3B

Use of Physical Force and Deadly Physical Force

Division of Criminal Justice Services

Lesson Title:
Use of Physical Force and Deadly Physical Force

Section:
3B

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Approved by:
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Instructor:

Method of Presentation:
Lecture/Class Discussion

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Duration:
11 Hours

Instructional Objectives:
Upon completion of this section, the student will be able to:

1. **Describe the balance between police authority and responsibility pertaining to the use of force.**
2. **Define "physical force," "deadly physical force," "physical injury" and "serious physical injury.**
3. **Recognize circumstances that justify the use of physical force and the use of deadly physical force by police.**
4. **Recognize the considerations and consequences associated with use of physical force and deadly physical force.**
5. **Describe the relationship and differences between federal law, state law, and agency policy regarding police use of force.**
6. **Identify and apply relevant case law to developing police use of force policies and procedure in NYS and nationwide.**
7. **Describe the application of current case law that must be considered when judging the reasonableness of force.**
8. **Verbally articulate police use of force actions while utilizing in class scenarios and identify documentation requirements necessary to accurately record use of force situations.**

Instructor References
NYS Penal Law
Case Law

Training Aids/Supplies/Equipment:
Video Supplements

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I Introduction

A. No topic has created public discussion or garnered more media attention in recent years than the discussion regarding how police officers use force and how those officers are trained to use force.

It should be noted, however, that even though police use of force is widely discussed, it is relatively uncommon. Accurate tracking is not available for lower levels of force; however, we know that police killed 963 people in 2016.[1] That's out of more than 1,000,000 face to face contacts with police each week; equivalent to 0.0015% of all face-to-face contacts.[2]

B. Sir Robert Peel, known as the Father of Modern Policing, established the London Metropolitan Police in 1829. He addressed the use of force by police in what has become known as the nine Peelian Principles.

1. Number 6 of these Peelian Principles states, "Police use physical force to the extent necessary to secure observance of the law or to restore order only

☞ This course was designed for use with the included computer slide presentation. It is suggested that instructors print the slides for reference during their presentation.

🗁 Although statistics have been provided, it is incumbent on the instructor to ensure that they have conducted research to obtain recent information before presenting this lesson.

📣 **Class discussion:** How does the public view use of force? What drives these views?

2001 was known as the "Summer of the Shark" but there were less attacks and less deaths from shark attacks than in 2000. How does this relate to the public's view of police use of force?

Have the recruit's views been shaped in the same way?

[1] The Washington Post, https://www.washingtonpost.com/graphics/national/police-shootings-2016/
[2] Police Foundation, https://www.policefoundation.org/general-resources/use-of-force-infographic/, 2016

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when the exercise of persuasion, advice and warning is found to be insufficient to achieve police objectives; and police should use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective."[3]

2. The focus of these principles was to outline the fundamentals of a police force that serves the public by the public's own consent.

3. This is the way that policing functions in the modern-day United States.

II Overview

A. Police officers are unlike any other public employees in at least one significant way. They are the only class of governmental agents that, without prior judicial review, are permitted to use force – up to and including deadly force – against members of the communities they are sworn to protect.[4]

B. Why do police use force (generally)?

⚐ The police Foundation has prepared an infographic which may be helpful in initial conversations with recruits. The infographic is "intended to provide the reader with a broad, high-level understanding of when the police use of force is legally viewed as reasonable and justified and how these incidents are generally investigated."

Asking the class questions about their preconceptions may help to facilitate later discussion.

https://www.policefoundation.org/general-resources/use-of-force-infographic/

[3] "*Minimum force*," although an aspirational goal, is not a legal standard under United States or NYS law. The concept of minimum force will be explored more in a later section of this lesson.
[4] Jim Bueermann, https://www.policefoundation.org/general-resources/use-of-force-infographic/?_sm_au_=iVVPM5sLNTR6SFLR

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1. Establish control in a situation
2. Protect others or self
3. Make an arrest or effect a detention
4. Defend property
5. Prevent the destruction of evidence
6. Prevent escape of a prisoner

C. What about deadly force?

1. Defense of others
2. In self-defense

D. Where do police get the authority to use force?

1. The United States Constitution
2. NYS Penal Law

III Definitions

Before getting into a detailed discussion regarding police use of force, it is important to review some definitions.

A. Justification - is a "defense to an offense." An individual admits that an

Instructor Note: The instructor may choose to cover these now or return to them individually to cover them the first time that they are used within the section.

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offense has been committed, but at the same time asserts that it was committed under circumstances which legally justified the action taken (PL § 35.05).

B. Choice of Evils Doctrine - the actions of an individual legally constitute an offense. But in taking this action, the occurrence of a greater evil was prevented (PL § 35.05)

C. Necessity - the requirement that physical and/or deadly physical force should only be used where reasonably believed to be required to accomplish a lawful objective.

D. Reasonable Cause to Believe - exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in this chapter, such apparently reliable evidence may include or consist of hearsay. [PL § 70.10(2)].

E. Probable Cause - for the purposes of a warrantless arrest, all the facts taken

Instructor Note - terminology: See also, probable cause (below).

These terms are used interchangeably and are not substantively different. RCTB is provided because it is used in the Penal Law.

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together would lead a reasonable and prudent individual to believe that an offense has occurred and the person to be accused committed the offense.

F. Deadly Physical Force - physical force which under the circumstances in which it is used is readily capable of causing death or other serious physical injury [PL §10.00 (11)].

G. Physical Force - force which does not amount to deadly physical force.[5]

H. Serious Physical Injury - physical injury which creates a substantial risk of death or which causes death or protracted disfigurement, protracted impairment of health or protracted loss or impairment of the functioning of any bodily organ [PL §10.00(11)].

I. Physical Injury - impairment of physical condition or substantial pain [PL §10.00 (9)].

J. Police Officer - anyone appointed by a governmental entity pursuant to Section 1.20 (34) of the NYS Criminal Procedure Law. Expanded authority (e.g., arrest, search and seizure) is based upon this designation.

Defining Force: There is a difference between force definitions in the operational and legal sense.

Operationally, force will be defined by agency policy.

Legally, force is a seizure or attempt to seize a person under the 4th amendment.

[5] Physical force or "mere force" is not defined in the NYS Penal Law and may be defined in various ways by agency policy, specifically as it relates to the purposes of defining reportable force.

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K. Peace Officer - anyone appointed by an entity pursuant to CPL Section 2.10. Expanded authority (generally more limited than that associated with the designation of police officer) is based upon this designation.

L. Civilian - anyone who is not a police or peace officer.

M. Objectively Reasonable - an objective standard used to judge an officer's actions. Under this standard, a particular application of force must be judged through the perspective of a reasonable officer facing the same set of circumstances, without the benefit of 20/20 hindsight, and be based on the totality of the facts that are known to that officer at the time that the force was used.[6]

N. Seizure - a government termination of movement through a means, intentionally applied.[7]

O. Indemnification - is security against personal legal responsibility by an agency.

[6] Municipal Police Training Council, *Use of Force Model Policy*, 2015, citing *Graham v. Connor*, 490 U.S. 386 at 396 (1989).
[7] *Brower v. County of Inyo*, 489 U.S. 593 (1989)

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P. Qualified Immunity - To have liability under the Fourth Amendment, officers must (1) violate a constitutional right, and (2) that right must be clearly established in law.

IV Standards

As was discussed during the overview, police officers are empowered by the government to use force on a person prior to judicial review. This does not mean, of course, that there are not rules that govern when and how much force can be used. This section will briefly discuss these various standards and what they mean for officers in the field. We will go into more detail later in this section.

A. Criminal

1. New York

a. Article 35 of the NYS Penal Law provides for a defense of justification.

b. Conduct is excused where it would otherwise constitute an offense under state law.

(i) For example, forcing someone to the ground, cuffing their hands behind their back would

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otherwise constitute a whole host of offenses if committed by a private person not acting pursuant to any justification under the law.

(ii) Police officers, where acting properly in their official duties, are covered for such conduct.

2. Federal

a. Title 18, §242 of the United States Code makes it a crime for a person acting under color of any law to *willfully* deprive a person of a right or privilege protected by the Constitution or laws of the United States.

b. The right to be free from excessive force perpetrated by agents of the government is one such right.

(i) Police officers are rarely charged with this federal crime.

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(ii) Punishment can be severe (including life in prison and even death).

(iii) The burden that the prosecution must meet is very high.

c. These charges would be brought by the U.S. Department of Justice, Civil Rights Division, Criminal Section.

d. Authority extends to all law enforcement conduct, regardless of whether an officer is on or off duty, so long as he/she is acting, or claiming to act, in his/her official capacity.[8]

e. Examples of types of violations:[9]

(i) Physical Assault/Excessive force

(ii) Deliberate Indifference to a Serious Medical Condition

Reminder:
This includes a condition caused by the lawful conduct of the police. **Render aid as soon as is safe to do so!**

See also, New York State CVR §28 (full statute in appendix).

[8] U.S. Department of Justice, Civil Rights Division, *Law Enforcement Misconduct*, https://www.justice.gov/crt/law-enforcement-misconduct, Retrieved: January 26, 2017
[9] *Id.*

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(iii) Failure to Intervene

B. Civil

1. There are two potential forums for civil liability for the use of force: the state court system for a Tort violation, or the Federal Court system for a violation of a constitutional right. This lesson plan will focus on constitutional law.

2. Standard used: <u>objective reasonableness</u>

3. 42 U.S.C. § 1983 provides for relief for a plaintiff denied a constitutionally protected right under color of law. This includes claims of excessive force.

4. Claims of excessive force allege violations of Fourth Amendment protections while being arrested or stopped.

5. Political subdivision who employs officer(s) may be named as defendant by nature of policy, practice, or custom that contributed to the violation.

⚐ For more discussion regarding **torts**, see section 3E – Civil Liability.

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6. Officers can face personal liability too.

7. Qualified Immunity – an officer and/or municipality may be afforded qualified immunity as a shield against civil liability if the conduct was objectively reasonable or if it had not been clearly established that such conduct would violate a person's rights (i.e. could a reasonable officer have believed that the challenged conduct was lawful.)

   In other words, a court with jurisdiction over the geographic location of the incident must have previously ruled that the similar type of behavior violated the Fourth Amendment. This effectively requires objective notice to be given before liability can attach. This is not subjective and it matters not if the specific officer knew of this previous ruling.

   a. Police officers are often called upon to make difficult decisions under difficult circumstances so it is thought they should not be required to face the burden of litigation where they have not violated

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clearly established law. Qualified immunity allows for "reasonable mistakes" on the legal constraints of a particular police conduct.

b. "An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense."[10]

c. Could an objectively reasonable officer have believed, under the circumstances, that the conduct was lawful?

   (i) If the answer is "yes" then a summary judgement in favor of the officer(s) is appropriate.[11]

Discussion: What is a reasonable competent officer?

"[U]nder our system of government the police have a duty to fight crime without violating constitutional rights… we should expect police officers to have a basic understanding of the limits of their power and we must hold them liable when, negligently or intentionally, they overstep these bounds." *Briggs v. Malley*, 748 F.2d 715, 719-20 (1st Cir. 1984) aff'd, 475 U.S. 335 (1986)

⇨ This and other sections illustrate that competence implies that an officer is "reasonably well-trained."

[10] *Saucier v. Katz*, 533 U.S.194 (2001)

[11] "A police officer who has an objectively reasonable belief that his actions are lawful is entitled to qualified immunity." - *Okin v. Village of Cornwall-On-Hudson Police Dept.*, 577 F. 3d 415, 422 (2nd Cir. 2009)

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(ii) Does not mean, in all cases, that the conduct was correct – just that the right that was violated was not "clearly established."

🗁 See; e.g. *Armstrong v. Pinehurst*, 810 F.3d 892 (4th Cir 2016)

The officer's conduct was found to be in violation of the Fourth Amendment, but that right was not clearly established.

d. Clearly established law

(i) Was there a violation of constitutionally protected rights?

(ii) Was the right clearly established?

(iii) A court can determine that a right was not clearly established without determining on the facts whether the right was violated.[12]

(iv) "…we may nonetheless treat the law as clearly established if decisions from this or other circuits 'clearly foreshadow a particular ruling on the issue.'"[13]

🗁 **See also** *Burchett v. Kiefer*, 310 F. 3d 937 at 942 for discussion of what constitutes clearly established law.

[12] *Pearson v. Callahan*, 129 S.Ct. 808 (2009)
[13] *Terebesi v. Torreso*, 764 F. 3d 217, 231 (2nd Cir. 2014), quoting *Varrone v. Bilotti*, 123 F.3d 75, 79 (2d Cir.1997)

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e. *White v. Pauly*, 137 S.Ct. 548 (2017)

(i) Here plaintiffs alleged that *Graham* and *Garner* clearly established broad rights which could apply to virtually any fact pattern to second guess an officer's actions and deny qualified immunity.

(ii) The Court disagreed stating, "clearly established law should not be defined at a high level of generality. As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case. Otherwise, plaintiffs would be able to convert the rule of qualified immunity ... into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."[14]

(iii) While case law "do[es] not require a case

[14] *White v. Pauly*, 137 S.Ct. 548, 552 (2017) (citations & quotations omitted)

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directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate."[15]

C. Agency Policy

1. Will typically be more restrictive than the law allows.

2. Agency policy, standing alone, does not establish criminal or civil liability.

   a. For example, many agencies will prohibit shooting at or from moving vehicles.

   b. This policy prohibition does not affect the constitutionality of that act, or make that conduct criminal, but would allow for administrative departmental charges.

D. What's the Relationship Between These Standards?

1. The three standards are not in all circumstances interrelated. There

[15] *Id*. at 551

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are many possibilities, including but not limited to:

a. A use of force may not rise to the level of criminal conduct and be found to be objectively reasonable by a federal court, but be a violation of department policy. This can result in **administrative charges** against an officer.

b. A use of force may not rise to the level of criminal conduct, but be viewed as unreasonable by a federal court, and still be viewed as within compliance or not within agency policy after an internal investigation. This would result in **civil liability**.

c. The internal investigation would normally be completed before a civil trial commenced.

2. A use of force that results in criminal charges would be *likely* to result in civil liability, and would *likely* be determined to have violated agency policy. This could result in **liability under all three standards**.

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E. Burdens of Proof

1. Criminal – Beyond a Reasonable Doubt

2. Civil – Preponderance of the Evidence

3. Administrative – officers have a right to due process and will generally have a right to a hearing before a hearing officer or arbitrator.

F. Misuse of Force

1. Too much force

a. Caused by:

(i) Extending beyond your capabilities

(ii) Over-reaction to events

(iii) Rushing into dangerous situations

(iv) Acting on impulse

(v) Taking more action than necessary

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b. Can lead to:

(i) Injuries to suspects and officers

(ii) Criminal Liability

(iii) Civil liability

(iv) Departmental charges

(v) Negative community perception and relations

(vi) Damaged credibility to your agency and law enforcement in general

2. Too little force

a. Caused by:

(i) Underestimating a suspect's abilities

(ii) Failing to perceive the dangerousness of a situation

(iii) Giving into complacency

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(iv) Hesitation - refusing (or being unable) to make a decision

(v) Thinking "it can't happen here" (immunity zone)

b. Can lead to:

(i) Unnecessary injuries to officers, suspects, victims, and the public

(ii) Failing to maintain control of a situation

Video supplement
To witness firsthand the dangers of hesitation, watch the Kyle Dinkheller video.

V Types of Force

A. When we talk about police using force what do we mean?

B. Although no universal definition of police use of force exists, it typically means any physical contact or action intended to compel another person to do something.[16]

C. Often this force is divided into categories to be used for training or reporting purposes. These categories are useful for providing examples of

Instructor Note:
While not endorsing the practice of differentiating force into "levels" – or a continuum – it may be useful to discuss some examples of actions that would constitute a *use of force* by police.

The types of force and resistance offered by the subject are merely illustrative and are not intended to teach a progression or account for factors that may affect an officer's use of force. That discussion will come later.

[16] The MPTC ultimately chose not to define "force" when creating the model policy, however this definition is sufficient for discussing the issue in general terms.

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different types of force and what may or may not be reasonable under the circumstances reasonably apparent to the officer. These categories do not create a rigid hierarchy as every case is different. They are:

1. Verbalization – not physical

    a. Verbal commands

    b. Used for compliant subject(s)

2. Empty hand controls

    a. Includes grabbing, employing holds, and joint locks for passively resistant subjects.

    b. Punches, kicks, and strikes to gain control of someone offering active resistance.

3. Less-lethal

    a. Impact weapons, chemical sprays, and conducted energy devices (Tasers) are examples of these weapons.

    b. These are generally appropriate for actively resisting or assaultive behavior or when a person is

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demonstrating the apparent intent to do so.

4. Deadly physical force[17]

   a. Firearms or anything which creates a substantial risk of serious injury or death would be considered deadly force (e.g. running someone over with a car, striking them with a hard object in the head, etc.)

   b. DPF is used to defend against assaultive behavior likely to cause serious injury or death.

Instructor Note: EXC § 837-v requires a police or peace officer who discharges his or her weapon in the direction of a person to verbally report the incident within 6 hours. The officer must also file a written report within 48 hours of the weapons discharge.

It is likely that an agency's policy will require more prompt reporting than is required by the law.

VI Relevant Cases, Statutes, and Concepts

A. United States Constitution – Fourth Amendment

1. <u>What it says</u>: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the

[17] Deadly physical force may be defined in a variety of different ways, for example Black's Law Dictionary defines it as a "[v]iolent action known to create a substantial risk of causing death or serious bodily harm" while the Penal Law definition is provided in section III of this lesson. For our purposes, in this section, there exists no substantive difference between these definitions.

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place to be searched, and the persons or things to be seized."[18]

2. What it means: The law views use of force by police as a seizure which is governed by the Fourth Amendment. Use of force that is "reasonable" given the circumstances is not considered to be excessive.

3. How it affects the police: Force is examined using the same "reasonableness" requirement that other search and seizure jurisprudence relies upon, however instead of seizing evidence, where force is used, the seizure is of a person.

4. The following uses of force are examples of force and why they are (or are not) considered seizures.

   a. Deadly physical force is perhaps the ultimate seizure of a person. For example, the shooting of a fleeing felony suspect is a seizure of that person. The US Supreme Court has said that "[t]he intrusiveness of a seizure by

Instructor Note: Remember, that we're talking about the seizure of a person, rather than the seizure of evidence.

[18] U.S. Const. amend. IV

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means of deadly force is unmatched."[19]

b. A police officer attempted to stop a motorcycle for speeding. The operator flees with a passenger. The motorcycle crashed, resulting in the accidental death of the passenger who was struck by the police car. The Court ruled that this was not a seizure governed by the Fourth Amendment.[20]

c. Alternatively, consider another scenario involving a police chase. A car thief had been fleeing police for almost 20 miles where police had set up a roadblock – an 18-wheel tractor trailer – across the entire roadway and then concealed it behind a blind curve. Predictably, the driver was killed when he struck the roadblock. The Court held that this did constitute an intentional seizure of the driver.[21]

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[19] *Tennessee v. Garner*, 471 U.S. 1, 9 (1985)
[20] *County of Sacramento v. Lewis*, 523 U.S. 833, 834 (1998)
[21] *Brower v. County of Inyo*, 489 U.S. 593 (1989). This is where we get the definition of a "seizure." The Supreme Court ruled only that the conduct of the police constituted a seizure but did not rule on the reasonableness of such conduct. The case was remanded for the Circuit court to make that determination.

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(i) What's the difference?

(ii) From the definition: "…through means intentionally, applied"

B. NYS Constitution – Article I, Section 12

1. Identical wording to the U.S. Constitution's Fourth Amendment, however keep in mind that when we discuss constitutional protections against excessive force we are taking about protections that exist under federal law. New York courts that rule on issues of federal law, such as §1983 cases must follow federal court precedents under the Fourth Amendment; the "objective reasonableness" standard is a concept derived from Fourth Amendment case law.

2. As compared to the law of search and seizure and right to counsel, where the NY courts create stricter standards under the NY Constitution when applying NY law (such as in criminal cases, charging Penal Law offenses).

C. *Graham v. Connor* (1989)

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1. Establishes the "objectively reasonable" standard under the 4th Amendment to be used in evaluating the constitutionality of a police use of force in making an arrest, investigatory stop, or other seizure of a person.

2. Requires that a police officers' use of force is reasonable in light of the particular circumstances faced by that officer(s).

3. Case Summary:[22]

   On Nov 12, 1984 Dethorne Graham, who was diabetic, felt the onset of a diabetic reaction and asked a friend to drive him to get orange juice to offset the reaction. The friend drove him to a convenience store where Graham exited the car "hastily" and went inside. Once inside, he saw a line of people and was concerned about the delay so he hurried outside to be driven to another store.

   Outside, a Charlotte police officer (Connor), observed Graham quickly enter and leave the store

[22] In case law dealing with allegations of excessive force the facts provided are often one version of events that is most favorable to the plaintiff. The case summaries discussed are those which are provided by the courts.

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and became suspicious of the behavior. As they left the lot Connor followed Graham and his friend and after about a half mile he made an investigatory stop of the vehicle. The driver advised the police officer that Graham was suffering from a diabetic emergency and Connor ordered both men to remain in the vehicle while he further investigated the incident.

Connor returned to his vehicle to request another officer go to the store to find out what happened while Graham was inside. While this was taking place, Graham exited the car, ran around it twice, sat on the curb and then passed out. Connor's request for assistance resulted in a number of officers responding to the scene to assist. One of those officers placed Graham in handcuffs due to his erratic behavior and the officer's belief that Graham was drunk. Graham was then placed face down on the hood of a car where he regained consciousness and began to tell the officers to check his wallet for a diabetic ID card. They refused and instead placed

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him into the back of a car, head first.

During that time, an officer who responded to the convenience store reported that, in fact, Graham had done nothing wrong while inside. Graham was driven home and released. During the encounter, Graham suffered a broken foot, cuts and bruises, and a shoulder injury. Graham sued under 42 U.S.C. § 1983 alleging excessive force in making the stop.

4. The suit alleged violations of Fourteenth Amendment *due process* protections. Using that standard, the court denied the claim which was appealed to the US Supreme Court. The Court held that the Fourteenth Amendment protection was too broad and that a specific, Fourth Amendment standard applied.

5. Instead, the courts must use an inquiry as to the reasonableness of a particular use of force – balancing the legitimate interest of the government with the rights of the citizen.

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To be considered:[23]

a. The severity of the crime at issue.

b. Whether the suspect poses an immediate threat to the safety of officers or others.

c. Whether the suspect is actively resisting arrest or attempting to evade by flight.

Instructor Note: These are not the only factors to be considered but that will be discussed later, in section VII.

D. NYS Penal Law, Article 35.

1. Provides for justification for the commission of conduct that would otherwise constitute an offense when:

a. Conduct is required or authorized by law or performed by a public servant in the reasonable exercise of his official duties; or,

b. When the conduct is the lesser of two evils (see definition above). A reasonable belief standard applies here too.[24]

Instructor Note: Some of the conduct permitted by Article 35 would be constitutionally unreasonable.

[23] *Graham v. Connor*, 490 U.S. 386, 396 (1989)
[24] See *People v. Goetz* 68 N.Y. 2d 96 (1986), *People v. Gray* 150 Misc.2d 852 (1991)

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2. §35.15 Justification; use of physical force in defense of a person

    a. Can use to defend against unlawful use of force

    b. DPF authorized to terminate the following: kidnapping, forcible rape, forcible criminal sex act, robbery, burglary of a dwelling*

3. §35.20 Justification; use of physical force in defense of premises and in defense of a person in the course of a burglary

    a. To prevent/terminate what he/she reasonably believes to be a crime involving damage to premises or a criminal trespass upon such premises

    b. DPF can be used to terminate an arson*

    c. DPF can be used to prevent/terminate an arson or a burglary of a dwelling or occupied building*

4. §35.25 Justification; use of physical force to prevent or terminate larceny or criminal mischief

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a. Physical force may be used to prevent/terminate a larceny or criminal mischief or property.

5. §35.30 Justification; use of physical force in making an arrest or preventing an escape

   a. Physical force may be used to the extent reasonably believed necessary to effect the arrest/prevent the escape from custody of a person reasonably believed to have committed an offense.

   b. DPF can be used for the above purpose when:

      (i) The underlying offense was a felony involving the use or threatened use of physical force against a person*

      (ii) The underlying offense was a felony and the suspect is armed with a firearm or deadly weapon*

      (iii) In defense of self or another from imminent

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use of DPF (refer to §35.15)

(iv) Believed to be necessary to prevent the escape from custody from a detention facility (§205.00)

c. Conduct described in the above sections, are excused from criminal liability under NYS law. That does not mean that they are constitutionally permissible in all circumstances. Furthermore, they may violate applicable federal law.

d. A police officer's use of deadly physical force may be initially justified under the circumstances, but it cannot be used recklessly while attempting to make an arrest or prevent an escape from custody. [PL §35.30(2)]

E. *Tennessee v. Garner*

1. Contemplates a Tennessee State statute regarding fleeing felons (much like our Article 35 above).

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2. The ruling limits the use of DPF where used to prevent the escape of unarmed and non-dangerous fleeing suspects.

3. The Court later clarified that this ruling was simply an application of the test of reasonableness as later described in Graham.[25]

   a. Garner does not set rigid preconditions that must be met in other cases.

   b. No "magical on/off switch" for when deadly force is authorized – each case must be deliberated as to its reasonableness. [26]

4. Case Summary:

   On October 3, 1974, Memphis Police were dispatched to a call for a "prowler inside" of a residence. Upon arrival they were pointed toward a house by a neighbor who stated that she heard breaking glass and someone was breaking into the home. When an officer went behind the house, he heard a door slam and someone run across

Instructor Note: This clarification is important, because they do not create two separate and distinct standards. Giving a warning, if feasible under the circumstances, is only one factor of the objective reasonableness of a use of DPF.

[25] *Scott v. Harris*, 127 S.Ct. 1769, 1777 (2007)
[26] *Id.* at 1778

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the backyard where they encountered a 6 foot high chain link fence.

The suspect, Edward Garner began to climb the fence after the command, “police, halt!” was given. The officer, who testified that he was “reasonably sure” that the suspect was unarmed, shot the suspect to prevent his escape. The bullet struck the suspect in the back of the head and he later died. Proceeds from the burglary were found on his body.

5. At that time, DPF to prevent the escape of a fleeing felon involved in a burglary was permitted by both Tennessee statute and Memphis PD policy. The father of the suspect brought suit which found its way to the Supreme Court. The court found the Tennessee statute, which allowed for the use of deadly force to prevent the escape of all felony suspects, regardless of circumstances, to be unreasonable.

6. Like the Graham ruling, the court ruled that a reasonableness test must be applied to a 4th Amendment seizure. The court

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held that the statute [was] unreasonable insofar as it authorized the use of DPF against all fleeing felons. It was not, however, unreasonable in cases where the officer has probable cause to believe the suspect poses a "threat of serious physical harm" to the officer or others. Specifically, the court cited those cases where the suspect threatened the officer with a weapon or where the suspect's crime involved the "threat or use of serious physical harm." [27]

7. Inferred limits on applications that would be "permitted" by Article 35.

   a. §35.30 (1)(a)(i) – statute requires only physical force used in underlying felony

   b. §35.30 (1)(a)(ii) – enumerated crimes for which DPF can be used are restricted

   c. §35.30 (1)(b) – the statute requires merely being armed and fleeing

   d. §35.20 (1), (2), & (3) – unreasonable to prevent/terminate a burglary

[27] *Garner*, 471 U.S. at 12

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with no aggravating factors and arsons where there is no reason to believe that lives are in danger.

F. Duty to Intervene

1. Refers to the affirmative duty required of all law enforcement officers to intercede where force being used by another officer is clearly beyond that which is objectively reasonable under the circumstances.

2. Even where the accused is not directly involved in the rights violation, the officer can be held liable for the "preventable harm" where a realistic opportunity exists for the officer to do so.[28]

3. Compare examples:

   a. Qualified immunity granted

   b. Qualified immunity denied

VII The Decision-Making Process – Factors and More

A. Briefly discuss what is meant by "totality of the circumstances."

[28] *Anderson v. Branen*, 17 F.3d 552, 557 (2nd Cir. 1994).

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1. Relies on all the factors when taken together, rather than reliance on one or two specific factors.

2. This is the same test for probable cause – remember that an arrest and a use of force are both seizures.

B. Determining the reasonableness of force used

1. Requires a careful balancing act of the rights of the individual with the legitimate interest of the government.[29]

2. What was the force option and how was it applied?

3. Not subject to 20/20 hindsight analysis

4. "The test for reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." [30]

C. Facts reasonably known to the officer at the time – The Graham factors

[29] *Graham*, 490 U.S. at 396
[30] *Id.*

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1. The severity of the crime at issue.

2. Whether the suspect poses an immediate threat to the safety of officers or others.

3. Whether the suspect is actively resisting arrest or attempting to evade by flight.

D. Other articulable factors that address the necessity of force used:

1. The training and experience of the officer

🗁 **For review:** Recall that these factors are fundamental to the balancing test discussed in Graham.

🗐 **Case law:** "And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v. Ohio*, 392 US 1, 27 (1968). Read the full case in Appendix.

2. Availability of other techniques or tools

🗐 **Case law: "**There is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used. There are, however, cases which support the assertion that, where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first." *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994). Read the full case in Appendix.

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3. The potential for injury to citizens, officers, and suspects

🗐 **Case law: "**Among relevant considerations: Were the lives and wellbeing of others (motorists, pedestrians, police officers) at risk? Was there a safer way, given the time, place, and circumstances, to stop the fleeing vehicle? *Scott v. Harris*, 127 S.Ct. 1769, 1779. 550 U.S. 372 (2007) (Ginsburg concurring). Read the full case in Appendix.

🖵 **Video available:** https://www.supremecourt.gov/media/video/wmvfiles/scott_v_harris.wmv

4. Duration of the action

🗐 **Case law: "**Other relevant factors include the possibility that the persons subject to the police action are themselves violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time." *Sharrar v. Felsing*, 128 F. 3d 810, 822 (3rd Cir. 1997). Read the full case in Appendix.

5. Officer/subject considerations
   a. Size
   b. Age
   c. Physical condition
6. Influence of drugs or alcohol

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7. Subject's known history of violence

🗐 **Case law:** "The officers were presented with another serious complication: the arrest warrant was to be executed in the presence of innocent bystanders at a bus stop on a busy city street. Finally, in the circumstances known to the officers, particularly Burbo's threat to shoot any police officer who attempted to apprehend him, it was entirely reasonable to anticipate that Burbo, given an opportunity, would resist arrest with deadly force. In the circumstances known to the defendant officers, it would have been unreasonable not to effect the intended arrest with adequate alacrity and sufficient force to subdue Burbo as quickly and surely as practicable without unnecessary harm to him, or unnecessary risk to the officers or innocent bystanders." *Dean v. City of Worcester*, 924 F. 2d 364, 368 (1st Cir. 1991). Read the full case in Appendix.

8. Subject's mental or psychiatric history (known to the officer)

🗐 **Case law:** "More than that, San Francisco's new argument effectively concedes that the relevant provision of the ADA, 42 U.S.C. § 12132, may "requir[e] law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." This is so because there may be circumstances in which any "significant risk" presented by "an armed, violent, and mentally ill suspect" can be "eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services." *City and County of San Francisco v. Sheehan*,135 S.Ct. 1765, 1773 (2015) (Citation omitted). Read the full case in Appendix.

9. Pre-assault indicators[31]

A major factor in the utilization of force is the actions and threats presented and the subject's degree of compliance or non-compliance. Specific articulation of non-verbal suspect actions can lead to a reasonable determination in force utilization. The following list is not exhaustive, but provides officers

[31] Federal Law Enforcement Training Center, *Use of Force – Lesson Plan* 24 (U.S. Department of Homeland Security, 2010)

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with some examples that should be recognized.

a. Verbal aggression

b. Posture change – stands taller, sets head & shoulders, moves closer or steps back (depending on the situation), points, forms fists, shifts weight, blades body.

c. Face becomes flush, teeth show, respiration rate increases, perspiration appears on the skin.

d. Individual ignores you (1,000-yard stare)

e. Undirected over compliance (attempts to create a false sense of security by becoming over cooperative or feigning incapacitation)

f. Aggression directed at another person or inanimate objects

g. Bobbing or rocking while eyes shift to view possible targets

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h. The suspect may become rigid and stop all motion in defiance.

i. Head may drop, chin tucked, with eyebrows tightening and dropping.

10. Courts have repeatedly declined to provide an *exhaustive* listing of factors.[32]

E. Other potential considerations may include:

1. Can a resistant subject physically comply?

2. Does the subject understand the commands being given or what's expected of them?

a. Mental illness

b. Excited Delirium Syndrome (ExDS) - A medical disorder generally characterized by observable behaviors including extreme mental and physiological excitement, intense agitation, hyperthermia (elevated body

Instructor Note: These additional considerations should be illustrated using examples by an experienced instructor.

[32] See *Chew v. Gates*, 27 F.3d 1432, 1475 n.5 (9th Cir. 1994)

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temperature) often resulting in nudity, hostility, exceptional strength, endurance without apparent fatigue, and unusual calmness after restraint accompanied by a risk of sudden death.[33]

c. Language barriers

3. Does the officer(s) have the ability to disengage or engage a contact?

4. Will the officer's actions or tactics precipitate a higher use of force level?

5. Will the use of force that is presently appropriate have the desired result?

6. Is the officer's conduct (although lawful) tactically sound?

7. What are the environmental conditions (rain, snow, ice, terrain, heat, confinement, etc.)?

8. What weapons (including improvised weapons) are available to the suspect in the immediate vicinity?

[33] Law Enforcement Policy Center, *Excited Delirium Model Policy* (International Association of Chiefs of Police, April 2017)

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9. What is the distance between the officer and suspect?

10. What is the intended result from an escalation in force?

11. Is the action worth the potential for injury to yourself?

12. Are you injured? Exhausted? Able to continue?

F. Legally permitted does not necessarily mean "should."

1. The concept of "proportionality" considers whether a particular police use of force is proportional to the threat faced by the officers and is appropriate given the totality of the circumstances.

   Proportionality requires officers to consider if they are using only the level of force necessary to mitigate the threat, and whether there is another, less injurious option available that will safely and effectively achieve the same objective.[34]

[34] Police Executive Research Forum, *Guiding Principles on Use of Force* (What constitutes "necessary" force will be discussed later in the lesson.)

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2. De-escalation may be an option in some cases.

   a. In such instances, this may be referred to a "tactical repositioning."

   b. Can you use time, distance, and cover to give yourself "breathing room" to make a decision? a

   c. Is there discretionary time and how can that time be best used?

G. The "reasonable officer" standard

What do we mean when we discuss a "reasonable officer?" In *Graham v. Connor* the Court said that force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[35]

1. Similar training and experience

2. Facing similar circumstances

   a. In Scott, the Court said "[a]lthough respondent's

Terminology – The "reasonable officer" analysis:

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a **reasonable officer** that his conduct was unlawful in the situation he confronted.
-*Saucier v. Katz,* 533 U.S. 194 (2001)

"…the Supreme Court has emphasized that the inquiry is whether a **reasonable officer** could have believed that his or her conduct was lawful. In light of the clearly established law and the information in the officer's possession."
-*Sharrar v. Felsing,* 128 F.3d 810 (1997)

Discussion:
This standard is recurring in 4th Amendment case law. Why is that?

Hint: take a look at the wording of the 4th Amendment.

[35] *Graham*, 490 U.S. at 396

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attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of reasonableness."[36]

b. What they're saying is that almost no two circumstances are exactly alike, and each much be judged on its own merits and specific circumstances rather than the application of standard derived from a situation with different facts.

3. Based on totality of facts known to the officer at the time

4. Acting properly within confines of clearly established law

5. An officer's actions are "objectively <u>un</u>reasonable" when no officer of reasonable competence could have made the same choice in similar circumstances.[37]

H. What does "necessary force" mean?

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[36] *Scott*, 127 S.Ct. at 1777 (quotations omitted) (Discussion as to why the decision in *Tennessee v. Garner* did not reflect the similar circumstances to the case in Scott.)
[37] *Lennon v. Miller*, 66 F. 3d 416, 420 (1995) (emphasis added)

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1. The question of necessity is based on the reasonable perception and belief held by the officer.

    a. "This standard contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case."[38]

    b. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation."[39]

2. The options available to an officer affect the necessity of the force used.

    a. What are your options?

        (i) Are there less intrusive, safe means available?

[38] *Burchett v. Kiefer*, 310 F.3d 937, 944 (2002)
[39] *Graham,* 490 U.S. at 397 (1989)

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(ii) Did you rule them out or exhaust them?

(iii) Would they be effective? Why or why not?

b. In cases of DPF – "Did a reasonable non-deadly alternative exist for apprehending the suspect?"[40]

3. This is an <u>objective, fact based</u> inquiry.

4. Question of necessity has as much to do with the suspect as the officer.

VIII Deadly Physical Force

A. The preservation of human life is a solemn duty of the police. With that said, that responsibility may infrequently require the application of deadly physical force by officers in the course of their duty.

Of course, police officers, like anyone, can use deadly physical force to protect their life and the life of another from an imminent threat. The difference is that while civilians have a legal duty to

[40] *Forrett v. Richardson*, 112 F. 3d 416, 420 (9th Cir. 1997)

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retreat to avoid the use of deadly force, a police officer does not. In fact, in many instances an officers' duty will require that he or she address that threat to further another lawful objective.

Let's illustrate with a very simplistic example. Let's say that you are a civilian and you are walking down the street and observe what you believe to be a street robbery. You yell out, "Hey, stop that!" at which point the victim can safely get away. The suspect now turns toward you with the knife and says "Now, I'm going to get you!" You have a clear route of escape but you choose instead that you will stand your ground and attempt to arrest the perpetrator.

You pull out your knife and do your best Crocodile Dundee impression but instead of running away or giving up the suspect continues to advance on you. In this case, as a civilian, you would not be justified in using deadly physical force. You have a legal duty to retreat to avoid using DPF.

But wait, can't a private person use DPF to effect an arrest of a robbery suspect? Well yes, Article 35 permits that; however, you'd better hope this was in fact an actual robbery and not simply a

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menacing that you perceived to be a robbery.[41]

B. Now, let's take that same example, but as you approach the scene you are a uniformed police officer. As the suspect turns toward you and begins to advance you have already drawn your firearm and it is pointed at the suspect.

The suspect advances on you and you shoot the suspect who later dies. In this case, you would be justified in using deadly physical force to stop the threat and you have no duty to retreat to avoid using it. It also doesn't matter that if the incident later turned out to be a menacing and not a robbery. Either way, your use of DPF was in defense of your own life from a suspect who you reasonably believed was going to cause you great bodily harm while you were attempting to effect a lawful arrest.

C. Your duty in this case was not to kill the suspect, but you did have a duty to act to address the crime being committed and that action resulted in your life being in danger. Your response was appropriate in this case and would be considered justified under the law.

[41] PL §35.30(4) requires that the person has "in fact has committed such offense" for which a private person is attempting to effect an arrest.

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D. You'll recall that NY State's Justification Defense – Article 35 – permits police to use deadly physical force for a whole host of reasons, but once restricted in application by the Supreme Court's ruling in *Tennessee v. Garner*, it boils down to this: DPF should be used where reasonably believed to be necessary to protect you or someone else from an imminent threat of serious physical injury or death.[42]

E. *Tennessee v. Garner*

1. The decision limited the use of deadly force in some circumstances where the offenders are non-violent.

2. Requires that where feasible, some warning given before use of DPF to prevent fleeing.

3. When is a warning not feasible?[43]

   a. The suspect is aware that the police are trying to apprehend him, such that he has knowledge that he should stop, and;

[42] The application of the reasonableness requirement, established in *Tennessee v. Garner* demands that the governmental interest be very high when using DPF to prevent an escape. That same reasonableness requirement demands that some imminent (yet, not immediate) danger exist for the application of DPF.
[43] *Ridgeway v. City of Woolwich,* 924 F. Supp. 653 (1996)

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b. The officer reasonably believes that such a warning would not cause the suspect to surrender based on their prior conduct.

F. Threat Assessment

What constitutes an immediate threat?

1. An immediate threat is not always necessary to use deadly physical force, but it is certainly the most justified reason to use DPF.[44]

2. For a threat be considered immediate, three factors must be present.

   a. Ability – to have *ability* a subject must have the means to be physically capable of causing bodily harm. This could be accomplished through;

      (i) The presence of a weapon

      (ii) Overwhelming size, strength, or numbers

The deadly force triangle may be useful when discussing these elements that will be present when a threat is immediate. It is especially useful when discussing the concept of "officer created jeopardy."

For that discussion, officers should be warned against completing the triangle through their own actions and potentially necessitating the use of DPF.

See *San Francisco v. Sheehan* for a fact pattern that is useful to facilitate this discussion.

[44] *Imminent* is not synonymous with *immediate* when describing a threat. Where an immediate threat is happening at this moment, an imminent threat is perceived to be unfolding. An officer's reasonably held beliefs are used to support the assertion that a threat is imminent.

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(iii) Superior knowledge or fighting skills possessed by the offender

b. Opportunity – to have opportunity a subject must have the time, distance, and circumstances which allow for them to create a risk of bodily harm.

(i) Time – the offender must be in a relative positon which allows for them to use their ability.

(ii) Distance – similar to time, but specifically the offender must be close enough to cause bodily harm. This is circumstance specific and can vary greatly.

(a) Contact weapons

(b) Firearms

(iii) The circumstances must be present that provide the opportunity. For example, a cell door between an offender and the party they intend to

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harm denies them the opportunity.

c. Jeopardy (Intent) – to demonstrate intent to cause jeopardy a suspect must provide an officer with justifiable fear that he or she intends to cause bodily harm.

(i) Based on objective facts, not subjective “fears”

(ii) Words, actions, or observations of the subject

IX Misconceptions

Misconceptions regarding force may lead to unnecessary hesitation on the part of the officer. These misconceptions may arise from a variety of factors such as media presentation, poor training, and even movies and TV.

A. Exhaust lower levels of force prior to resorting to DPF.

1. Officers are often told that deadly physical force should be used only as a last resort. This may be communicated through agency

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policy or through less formal means.

2. This often ends up leaving officers to believe that they are required to exhaust lower levels of force or try alternative less intrusive means first. This is not a legal requirement.

3. "[w]here deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first."[45]

B. No duty to retreat to avoid using force.

1. NYS Penal Law Article 35

a. §35.15(2)(a)(ii)

b. Police or peace officers have no duty to retreat from using DPF in defense of a person.

c. The duty to retreat is found in NY State Law – not the Constitution – and it specifically exempts police officers acting pursuant to their official duties.

2. Case law

[45] *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994)

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a. No Constitutional duty to retreat for police.

b. "[S]uch a duty may be inconsistent with police officers' duty to the public to pursue investigations of criminal activity."[46]

3. That does not mean it may not be a good idea to retreat in some cases. Although, this would be a tactical rather than a legal consideration.

C. Minimal force

1. Agency policy will often dictate that officers much use the "minimal amount of force necessary" to gain control of a situation.

2. The concept of minimal force is inherently subjective and is not supported in case law.

3. Consistent with Sir Robert Peel's 6th principle, the use of less force is certainly an aspirational goal, but it is inconsistent with the Court's well-reasoned decision in *Graham v. Connor*. The force used must

[46] *Reed v. Hoy*, 891 F.2d 1421, 1428 (1989), as amended, 909 F. 2d 324, 331 (9th Cir 1990)

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only be **objectively reasonable** in light of the circumstances.

D. DPF against an unarmed person

1. It is said that every call a police officer goes on is a gun call because the officer is armed – introducing a gun into the situation.

2. Unarmed individuals can be capable of disarming police officers of their weapon and certainly capable of inflicting serious physical injury upon a police officer.

3. Any decision to use force, including deadly force, must be supported by factors discussed in section VIII.

4. There are situations where a mistake of fact is a factor. For example, where the officer believed the suspect was armed even where he or she was not.

🖵 **Video supplement**
Birmingham detective video or another more recent example which demonstrates this concept can be used.

X Case Studies

The following cases should be discussed in terms of the Graham (and other relevant) factors and priority of life concepts.

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A. *City and County of San Francisco v. Sheehan,* 135 S.Ct. 1765 (2015)

1. Teresa Sheehan lived in a group home for patients with mental illness. Police were called after she made threats to kill her social worker who was attempting to get her to take her medication, bathe herself, and eat. When officers entered her room, she threatened them with a knife and they retreated and closed the door.

   Shortly thereafter, believing that the situation "required their immediate attention," the officers reentered her room and were again confronted by Ms. Sheehan with a knife. The officers attempted to use OC spray which proved ineffective, and then she was shot multiple times by the officers.

   Ms. Sheehan sued alleging excessive force and that the city failed to provide reasonable accommodation for Ms. Sheehan's disability, as required by the Americans with Disabilities Act. She also alleges that the officers acted contrary to their training by failing to treat her as a barricaded subject and use a negotiator.

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The Court sidestepped the ADA question, leaving it to be answered another day. They ruled that the officers were entitled to qualified immunity because it was not clearly established at the time that their conduct violated any of Ms. Sheehan's rights. Even if it was proved the officers acted contrary to their training, the Court reasoned, that does not "negate qualified immunity that would otherwise be warranted."[47]

Additionally, the Court opined that Ms. Sheehan could not "establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided."[48]

2. Notwithstanding the decision by the U.S. Supreme Court in this case, this fact pattern is a good one to discuss concepts related to priority of life.

   a. Who is in danger?

   b. Who is causing the danger?

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[47] *City and County of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1777 (2015)
[48] *Id.* at 1777, citing *Billington v. Smith*, 292 F. 3d 1177, 1190 (9th Cir. 2002)

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c. What's the need to act now?

B. *Armstrong v. Pinehurst,* 810 F.3d 892 (4th Cir 2016)

1. Ronald Armstrong was a paranoid schizophrenic who had stopped taking his medication, checked into a hospital, and then subsequently left the hospital. A doctor there issued an involuntary commitment order deeming Armstrong "mentally ill and dangerous to self" but not dangerous to others, on the commitment form.

   Pinehurst police officers responded to Mr. Armstrong wandering in the street near the hospital. He was convinced to get to the side of the road and engaged in conversation with the officers and his sister until the commitment order had been signed. Mr. Armstrong wrapped himself tightly around a pole and refused to let go. He was tased in drive-stun mode (for pain compliance) five time over two minutes. He further resisted and was eventually wrestled from the pole and restrained. During the struggle he became unresponsive and died.

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Although the officers were entitled to qualified immunity, the force used was found to be unreasonable under the circumstances. The court reasoned that "[n]oncompliance with lawful orders justifies some use of force, but the level of justified force varies based on the risks posed by the resistance […] And, here, the factual circumstances demonstrate little risk – Armstrong was stationary, non-violent, and surrounded by people willing to help return him to the Hospital. That Armstrong was not allowing his arms to be pulled from the post and was refusing to comply with shouted orders to let go, while cause for some concern, do not import much danger or urgency into a situation that was, in effect, a static impasse."[49]

2. Remember that we've been discussing a balancing act throughout this section.

   a. What's the governmental interest here?

🗁 **From the Court:** "Where a seizure's sole justification is preventing harm to the subject of the seizure, the government has little interest in using force to effect that seizure." *Armstrong v. Pinehurst*, 810 F.3d 892, 901 (4th Cir. 2016)

[49] *Armstrong v. Pinehurst*, 810 F.3d 892, 901 (4th Circ. 2016)

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b. How does that affect the reasonableness of the force used?

c. What was the need to act now?

C. *People v. Haste*, 40 Misc.3d 596 (2013)

1. Police Officer Richard Haste, part of a plainclothes narcotics team in the Bronx, chased a person who they believed had a gun. Officers reporting seeing the subject with a gun in his waistband and that was communicated over the radio. The subject ran inside of a residential building. The officer and his partner accessed the building and then kicked in the apartment door.

   Officer Haste confronted the subject in the bathroom of the apartment and fired one shot, striking the subject in the chest.

2. The DA's Office presented the case to the Grand Jury instructing the jurors that their role was to rule on "the reasonableness of Police Officer Haste's conduct," and that they should not consider the effect of the communications from other officers that led to Haste's belief

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that the subject was armed. The prosecutor stated, "what controls on the issue of justification is the reasonableness of Police Officer Haste's conduct at the time of the shooting."[50]

3. Rather, the court ruled, in overturning the indictment, the focal point of the grand jury (and therefore the instruction) should have been the reasonableness of Officer Haste's belief at the time; specifically, whether he reasonably believed that the use of deadly physical force was necessary to defend himself.

4. "When the prosecutor told the grand jury, in essence, not to consider the communications of fellow officers overheard by Haste, it misled them on the issue that was at the very heart of the case. And, when the prosecutor failed to instruct affirmatively that the grand jury could and should consider these communications in connection with Haste's belief upon being presented with a final opportunity to do so, this omission was fatal."[51]

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[50] *People v. Haste*, 40 Misc.3d 596, 599 (2013)
[51] *Haste,* 40 Misc.3d at 600

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5. "On the question of whether the defendant did reasonably believe that deadly physical force was necessary to defend himself/herself [or someone else] from what he/she reasonably believed to be the use or imminent use of such force by (specify), it does not matter that the defendant was or may have been mistaken in his/her belief; provided that such belief was both honestly held and reasonable."[52]

D. *Scott v. Harris,* 550 U.S. 372 (2007)

1. Gives perspective to other case law.

2. Applies Graham factors in a way that may clear up misconceptions about the fluid nature of their application (not all or nothing).

3. Victor Harris was traveling home from work at a high rate of speed when a police officer attempted to pull him over. He fled due to a suspended driver's license and led the police on a very high speed chase. At one point, the chase entered a parking lot and Mr. Harris

🖵 **Video supplement**
Video of the car chase of Victor Scott.

https://www.supremecourt.gov/media/video/wmvfiles/scott_v_harris.wmv

"Why I Ran." video also provides context and features interviews with the suspect and officer. Pay attention to the officer's comments about the dangerousness of the chase.

[52] CJI2d[NY] Penal Law §35.15

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struck a police vehicle as the vehicle attempted to block his path. Once back on the road he continued his dangerous flight.

Deputy Scott obtained radio permission from a supervisor to use a P.I.T. maneuver to end the chase. The permission was granted and the maneuver led to a devastating crash which left Mr. Harris a quadriplegic.

Harris sued arguing unreasonable force, invoking the ruling in Garner. His initial offense was so minor, he reasoned, that the force used (which amounted to DPF) was excessive and prohibited. The Court ruled that although the ramming of his car could be viewed as an application of DPF, it was not the underlying offense that was significant; rather the fact that Harris' manner of flight posed an imminent threat to the lives of other motorists and pedestrians. The Court ruled that "[a]lthough respondent's attempt to craft an easy to apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the

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factbound morass of "reasonableness."[53]

4. What was the governmental interest when the police first attempted to stop Mr. Harris?

5. Did the governmental interest change throughout the event?

6. How did that change affect the reasonableness of Deputy Scott's actions?

E. *Terebesi v. Torreso*, 764 F.3d 217 (2nd Cir. 2014)

1. Police applied for a search warrant for a "small amount of drugs" – 2 glass pipes and a small tin box containing narcotics – at the home of a person known to police. He had previously been arrested for having a loaded handgun in his home which he said he kept for protection.

   The subject was reported to use crack daily and had previously been the victim of a shotgun attack on his home during which his windows had been broken.

[53] *Scott,* 127 S.Ct. at 1777

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2. A regional SWAT team (locally known as SWERT) was activated to serve the drug warrant. During the planning of the raid some team members believed the plan to be excessive and dangerous given the circumstances.

   Shortly after the team entered the home, using stun grenades, the point man shot and killed an unarmed occupant of the home.

3. The court ruled that the law governing the use of the tactics used was clearly established and denied qualified immunity to the involved officers. The court noted that none of the facts presented during the planning of the raid suggested that the suspect was prepared to engage in violence.

4. Here, the officers involved in the planning of the raid had a duty to intervene.

XI Practical Exercises

A. Recruits should be provided with an opportunity to apply the concepts learned.

   1. Videos and guided discussion

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2. Simulator or other active learning process

B. Documentation

C. Reality Based Training Exercises

Facts vs. Conclusions:
When discussing the proper articulation and documentation of force with recruits, instructors should be sure to have the recruits articulate objective facts that support their decisions to use (or not use) force. While conclusions may describe a subject's actions, they often lack clear articulation of the subject's behavior. For example, instead of describing a subject as "assaultive" the specific actions of the subject should be articulated (e.g. The subject assumed a fighting stance and stated "I'm going to kick your ass.")

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Appendix

JUSTIFICATION:
USE OF DEADLY PHYSICAL FORCE
IN DEFENSE OF A PERSON

PENAL LAW 35.15
(Effective Sept. 1, 1980)
(Revised Jan. 2013 and Feb. 2016) [1]

NOTE: This charge should precede the reading of the elements of the charged crime, and then, the final element of the crime charged should read as follows:

"and, #. That the defendant was not justified." [2]

[With respect to count(s) (*specify*),] [T]he defendant has raised the defense of justification, also known as self defense. The defendant, however, is not required to prove that he was justified. The People are required to prove beyond a reasonable doubt that the defendant was not justified.

I will now explain our law's definition of the defense of justification as it applies to this case.

Under our law, a person may use deadly physical force upon another individual when, and to the extent that, he/she reasonably believes it to be necessary to defend himself/herself [or someone else] from what he/she reasonably believes to be the use or imminent use of [unlawful[3]] deadly physical force by such individual.

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms: "deadly physical force" and "reasonably believes."

DEADLY PHYSICAL FORCE means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.[4] [Serious physical injury means impairment of a person's physical condition which

creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.[5]]

The determination of whether a person REASONABLY BELIEVES deadly physical force to be necessary to defend himself/herself [or someone else] from what he/she reasonably believes to be the use or imminent use of deadly physical force by another individual requires the application of a two-part test.[6] That test applies to this case in the following way:

First, the defendant must have actually believed that *(specify)* was using or was about to use deadly physical force against him/her [*or* someone else], and that the defendant's own use of deadly physical force was necessary to defend himself/herself [*or* someone else] from it; and

Second, a "reasonable person" in the defendant's position, knowing what the defendant knew and being in the same circumstances, would have had those same beliefs.

Thus, under our law of justification, it is not sufficient that the defendant honestly believed in his own mind that he was faced with defending himself/herself [or someone else] against the use or imminent use of deadly physical force. An honest belief, no matter how genuine or sincere, may yet be unreasonable.

To have been justified in the use of deadly physical force, the defendant must have honestly believed that it was necessary to defend himself/herself [or someone else] from what he/she honestly believed to be the use or imminent use of such force by (*specify*), and a "reasonable person" in the defendant's position, knowing what the defendant knew and being in the same circumstances, would have believed that too.

On the question of whether the defendant did reasonably believe that deadly physical force was necessary to defend himself/herself [or someone else] from what he/she reasonably believed to be the use or imminent use of such force by (*specify*), it does not matter that the defendant was or may have been mistaken in his/her belief; provided that such belief was both honestly held and reasonable.

[Add if there was evidence of a party's reputation for violence:

> Now, you have heard testimony that *(specify)* had a reputation for violence and engaged in violent acts. Normally, the law does not permit such testimony. The reason is that every person, regardless of that person's relative worth to the community, has the right to live undisturbed by an unlawful assault. The character of *(specify)* is thus not in issue.
>
> What is in issue, however, is whether the defendant did "reasonably believe" that the deadly physical force he/she used was necessary to defend himself/herself [or someone else] from what he/she "reasonably believed" to be the use or imminent use of such force by (*specify*).
>
> In assessing that issue, you may consider whether the defendant knew that (*specify*) had a reputation for violence or had engaged in violent acts. If so, you may then consider to what extent, if any, that knowledge contributed to a "reasonable belief" that the deadly physical force the defendant used was necessary to defend himself/herself [or someone else] from what he/she "reasonably believed" was the use or imminent use of such force by (*specify*).[7]
>
> Further, provided the defendant believed (*specify*) had such reputation or engaged in such acts, it does not matter whether that belief was correct.]

[*Add as applicable:*

Notwithstanding the rules I have just explained, the defendant would not be justified in using deadly physical force under the following circumstances:

Select appropriate alternative(s):

(1) The defendant would not be justified if he/she was the initial aggressor of deadly physical force;

[Add if applicable:
except, that the defendant's use of deadly physical force would nevertheless be justified if he/she had withdrawn from the encounter and effectively communicated such withdrawal to (*specify*) but (*specify*) persisted in continuing the incident by the use or threatened imminent use of (unlawful[8]) deadly physical force.]

[A person cannot be considered the initial aggressor simply because he/she has a reputation for violence or has previously engaged in violent acts.[9]]

[Arguing, using abusive language, calling a person names, or the like, unaccompanied by physical threats or acts, does not make a person an initial aggressor and does not justify physical force.]

"Initial aggressor" means the first person who uses, or threatens the imminent use of, deadly physical force. Thus, the actual striking of the first blow or inflicting of the first wound does not necessarily determine who was the initial aggressor.

A person who reasonably believes that another is about to use deadly physical force upon him/her need not wait until he/she is struck or wounded. He/she may, in such circumstances, be the first to use deadly physical force, so long as he/she reasonably believed it was about to be used against him/her. He/she is then not considered to be the

"initial aggressor," even though he/she strikes the first blow or inflicts the first wound.

[If a person initially uses or threatens the use of *non-deadly physical* force against another who, in response, uses or threatens the imminent use of *deadly* physical force, then that person who first used or threatened the imminent use of deadly physical force is the initial aggressor.[10]]

[If a person intervenes in a conflict in defense of another, that person is an initial aggressor only if he/she somehow initiated or participated in the initiation of the original use of [deadly] physical force or the threat to use it, or reasonably should have known that the person he/she was defending initiated it. On the other hand, if he/she neither initiated, nor participated in the initiation of [deadly] physical force, or the threat to use it, and had no reason to know who initiated it, then he/she is not the initial aggressor.[11]]

(2) The defendant would not be justified if he/she knew that he/she could with complete safety to himself/herself and others avoid the necessity of using deadly physical force by retreating.

[The defendant, however, would not be required to retreat if the defendant was in his/her dwelling and was not the initial aggressor.[12]

The term, “dwelling,” encompasses a house, an apartment or a part of a structure where the defendant lives and where others are ordinarily excluded. (The determination of whether a particular location is part of a defendant's dwelling depends on the extent to which the defendant [and persons actually sharing living quarters with the defendant] exercise(s) exclusive possession and control over the area in question.)[13]]

(3) The defendant would not be justified if (*specify's*) conduct was provoked by the defendant himself/herself with intent to cause physical injury to (*specify*).

(4) The defendant would not be justified if the deadly physical force involved was the product of a combat by agreement not specifically authorized by law.]

The People are required to prove beyond a reasonable doubt that the defendant was not justified. It is thus an element of [each] count [*specify*] that the defendant was not justified. As a result, if you find that the People have failed to prove beyond a reasonable doubt that the defendant was not justified, then you must find the defendant not guilty of [all] count(s) [*specify*]. [14]

NOTE: The trial judge must take special note of the foregoing paragraph. As the cases in endnote fourteen dictate, any instructions, as well as the verdict sheet, as relate to the defense of justification, must convey to the jury that once the jury has determined that the People have failed to prove lack of justification, they must find the defendant not guilty of each and every count for which proof of lack of justification is an element. See CJI2d Model Verdict Sheet for Justification.

McKinney's Civil Rights Law § 28

§ 28. Medical attention for persons under arrest

Effective: June 15, 2020
Currentness

When a person is under arrest or otherwise in the custody of a police officer, peace officer or other law enforcement representative or entity, such officer, representative or entity shall have a duty to provide attention to the medical and mental health needs of such person, and obtain assistance and treatment of such needs for such person, which are reasonable and provided in good faith under the circumstances. Any person who has not received such reasonable and good faith attention, assistance or treatment and who, as a result, suffers serious physical injury or significant exacerbation of an injury or condition shall have a cause of action against such officer, representative, and/or entity. In any such civil action, the court, in addition to awarding actual damages and costs, may award reasonable attorneys' fees to a successful plaintiff. The provisions of this section are in addition to, but shall not supersede, any other rights or remedies available in law or equity.

Credits
(Added L.2020, c. 103, § 1, eff. June 15, 2020.)

McKinney's Civil Rights Law § 28, NY CIV RTS § 28
Current through L.2019, chapter 758 & L.2020, chapters 1 to 56, 58 to 127. Some statute sections may be more current, see credits for details.

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490 U.S. 386 (1989)

GRAHAM
v.
CONNOR ET AL.

No. 87-6571.

Supreme Court of United States.

Argued February 21, 1989
Decided May 15, 1989
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

388 *388 *H. Gerald Beaver* argued the cause for petitioner. On the briefs was *Richard B. Glazier.*

Mark I. Levy argued the cause for respondents. On the brief was *Frank B. Aycock III.*[*]

Lacy H. Thornburg, Attorney General of North Carolina, *Isaac T. Avery III,* Special Deputy Attorney General, and *Linda Anne Morris,* Assistant Attorney General, filed a brief for the State of North Carolina as *amicus curiae* urging affirmance.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires us to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other "seizure" of his person. We hold that such claims are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard.

In this action under 42 U. S. C. § 1983, petitioner Dethorne **Graham** seeks to recover damages for injuries allegedly sustained when law enforcement officers used physical force against him during the course of an investigatory stop. Because the case comes to us from a decision of the Court of Appeals affirming the entry of a directed verdict for respondents, we take the evidence hereafter noted in the light most favorable to petitioner. On November 12, 1984, **Graham**, a diabetic, felt the onset of an insulin reaction. He asked a friend, William Berry, to drive him to a nearby convenience store so he could purchase some orange juice to counteract the reaction. Berry agreed, but when **Graham**
389 entered the store, he saw a number of people ahead of him in the checkout *389 line. Concerned about the delay, he hurried out of the store and asked Berry to drive him to a friend's house instead.

Respondent Connor, an officer of the Charlotte, North Carolina, Police Department, saw **Graham** hastily enter and leave the store. The officer became suspicious that something was amiss and followed Berry's car. About one-half mile from the store, he made an investigative stop. Although Berry told Connor that **Graham** was simply suffering from a "sugar reaction," the officer ordered Berry and **Graham** to wait while he found out what, if anything, had happened at the convenience store. When Officer Connor returned to his patrol car to call for backup assistance, **Graham** got out of the car, ran around it twice, and finally sat down on the curb, where he passed out briefly.

In the ensuing confusion, a number of other Charlotte police officers arrived on the scene in response to Officer Connor's request for backup. One of the officers rolled **Graham** over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry's pleas to get him some sugar. Another officer said: "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M. F. but drunk. Lock the S. B. up." App. 42. Several officers then lifted **Graham** up from behind, carried him over to Berry's car, and placed him face down on its hood. Regaining consciousness, **Graham** asked the officers to check in his wallet for a diabetic decal that he carried. In response, one of the officers told him to "shut up" and shoved his face down against the hood of the car. Four officers grabbed **Graham** and threw him headfirst into the police car. A friend of **Graham's** brought some orange juice to the car, but the officers

refused to let him have it. Finally, Officer Connor received a report that **Graham** had done nothing wrong at the convenience store, and the officers drove him home and released him.

390 *390 At some point during his encounter with the police, **Graham** sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he also claims to have developed a loud ringing in his right ear that continues to this day. He commenced this action under 42 U. S. C. § 1983 against the individual officers involved in the incident, all of whom are respondents here,[1] alleging that they had used excessive force in making the investigatory stop, in violation of "rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U. S. C. § 1983." Complaint ¶ 10, App. 5.[2] The case was tried before a jury. At the close of petitioner's evidence, respondents moved for a directed verdict. In ruling on that motion, the District Court considered the following four factors, which it identified as " [t]he factors to be considered in determining when the excessive use of force gives rise to a cause of action under § 1983": (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) "[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm." 644 F. Supp. 246, 248 (WDNC 1986). Finding that the amount of force used by the officers was "appropriate under the circumstances," that "[t]here was no discernable injury inflicted," and that the force used "was not applied maliciously or sadistically for the very purpose of
391 causing harm," but in "a good faith effort to maintain or restore order in the face of a potentially explosive *391 situation." *id.,* at 248-249, the District Court granted respondents' motion for a directed verdict.

A divided panel of the Court of Appeals for the Fourth Circuit affirmed. 827 F. 2d 945 (1987). The majority ruled first that the District Court had applied the correct legal standard in assessing petitioner's excessive force claim. *Id.,* at 948-949. Without attempting to identify the specific constitutional provision under which that claim arose,[3] the majority endorsed the four-factor test applied by the District Court as generally applicable to all claims of "constitutionally excessive force" brought against governmental officials. *Id.,* at 948. The majority rejected petitioner's argument, based on Circuit precedent,[4] that it was error to require him to prove that the allegedly excessive force used against him was applied "maliciously and sadistically for the very purpose of causing harm."[5] *Ibid.* Finally, the majority held that a reasonable
392 jury applying the four-part test it had just endorsed *392 to petitioner's evidence "could not find that the force applied was constitutionally excessive." *Id.,* at 949-950. The dissenting judge argued that this Court's decisions in *Terry* v. *Ohio,* 392 U. S. 1 (1968), and *Tennessee* v. *Garner,* 471 U. S. 1 (1985), required that excessive force claims arising out of investigatory stops be analyzed under the Fourth Amendment's "objective reasonableness" standard. 827 F. 2d, at 950-952. We granted certiorari, 488 U. S. 816 (1988), and now reverse.

Fifteen years ago, in *Johnson* v. *Glick,* 481 F. 2d 1028, cert. denied, 414 U. S. 1033 (1973), the Court of Appeals for the Second Circuit addressed a § 1983 damages claim filed by a pretrial detainee who claimed that a guard had assaulted him without justification. In evaluating the detainee's claim, Judge Friendly applied neither the Fourth Amendment nor the Eighth, the two most textually obvious sources of constitutional protection against physically abusive governmental conduct.[6] Instead, he looked to "substantive due process," holding that "quite apart from any `specific' of the Bill of
393 Rights, application of undue force by *393 law enforcement officers deprives a suspect of liberty without due process of law." 481 F. 2d, at 1032. As support for this proposition, he relied upon our decision in *Rochin* v. *California,* 342 U. S. 165 (1952), which used the Due Process Clause to void a state criminal conviction based on evidence obtained by pumping the defendant's stomach. 481 F. 2d, at 1032-1033. If a police officer's use of force which "shocks the conscience" could justify setting aside a criminal conviction, Judge Friendly reasoned, a correctional officer's use of similarly excessive force must give rise to a due process violation actionable under § 1983. *Ibid.* Judge Friendly went on to set forth four factors to guide courts in determining "whether the constitutional line has been crossed" by a particular use of force — the same four factors relied upon by the courts below in this case. *Id.,* at 1033.

In the years following *Johnson* v. *Glick,* the vast majority of lower federal courts have applied its four-part "substantive due process" test indiscriminately to all excessive force claims lodged against law enforcement and prison officials under § 1983, without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard.[7] Indeed, many courts have seemed to assume, as did the courts below in this case, that there is a generic "right" to be free from excessive force, grounded not in any particular

constitutional provision but rather in "basic principles of § 1983 jurisprudence."[8]

We reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard. As
394 we have said many times, § 1983 "is not itself a *394 source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." *Baker* v. *McCollan*, 443 U. S. 137, 144, n. 3 (1979). In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. See *id.,* at 140 ("The first inquiry in any § 1983 suit" is "to isolate the precise constitutional violation with which [the defendant] is charged").[9] In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct. The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized "excessive force" standard. See *Tennessee* v. *Garner, supra,* at 7-22 (claim of excessive force to effect arrest analyzed under a Fourth Amendment standard); *Whitley* v. *Albers*, 475 U. S. 312, 318-326 (1986) (claim of excessive force to subdue convicted prisoner analyzed under an Eighth Amendment standard).

Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons . . . against unreasonable. . . seizures" of the person. This much is clear from our decision in *Tennessee* v. *Garner, supra*. In *Garner,* we addressed a claim that the use of deadly force to apprehend a fleeing suspect who did not appear to be armed or otherwise dangerous violated the suspect's constitutional rights,
395 notwithstanding the existence of probable cause to arrest. *395 Though the complaint alleged violations of both the Fourth Amendment and the Due Process Clause, see 471 U. S., at 5, we analyzed the constitutionality of the challenged application of force solely by reference to the Fourth Amendment's prohibition against unreasonable seizures of the person, holding that the "reasonableness" of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out. *Id.,* at 7-8. Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.[10]

396 *396 Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires 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. *Id.,* at 8, quoting *United States* v. *Place*, 462 U. S. 696, 703 (1983). Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. See *Terry* v. *Ohio,* 392 U. S., at 22-27. Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," *Bell* v. *Wolfish,* 441 U. S. 520, 559 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. See *Tennessee* v. *Garner,* 471 U. S., at 8-9 (the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure").

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. See *Terry* v. *Ohio, supra,* at 20-22. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, *Hill* v. *California,* 401 U. S. 797 (1971), nor by the mistaken execution of a valid search warrant on the wrong premises, *Maryland* v. *Garrison,* 480 U. S. 79 (1987). With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," *Johnson* v. *Glick,*
397 481 F. 2d, at 1033, violates the Fourth Amendment. The calculus of reasonableness must embody *397 allowance for

the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.

As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. See *Scott* v. *United States,* 436 U. S. 128, 137-139 (1978); see also *Terry* v. *Ohio, supra,* at 21 (in analyzing the reasonableness of a particular search or seizure, "it is imperative that the facts be judged against an objective standard"). An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional. See *Scott* v. *United States, supra,* at 138, citing *United States* v. *Robinson,* 414 U. S. 218 (1973).

Because petitioner's excessive force claim is one arising under the Fourth Amendment, the Court of Appeals erred in analyzing it under the four-part *Johnson* v. *Glick* test. That test, which requires consideration of whether the individual officers acted in "good faith" or "maliciously and sadistically for the very purpose of causing harm," is incompatible with a proper Fourth Amendment analysis. We do not agree with the Court of Appeals' suggestion, see 827 F. 2d, at 948, that the "malicious and sadistic" inquiry is merely another way of describing conduct that is objectively unreasonable under the circumstances. Whatever the empirical correlations between "malicious and sadistic" behavior and objective unreasonableness may be, the fact remains that the "malicious and sadistic" factor puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is
398 "unreasonable" under the Fourth Amendment. Nor do we agree with the *398 Court of Appeals' conclusion, see *id.,* at 948, n. 3, that because the subjective motivations of the individual officers are of central importance in deciding whether force used against a convicted prisoner violates the Eighth Amendment, see *Whitley* v. *Albers,* 475 U. S., at 320-321,[11] it cannot be reversible error to inquire into them in deciding whether force used against a suspect or arrestee violates the Fourth Amendment. Differing standards under the Fourth and Eighth Amendments are hardly surprising: the terms "cruel" and "punishments" clearly suggest some inquiry into subjective state of mind, whereas the term "unreasonable" does not. Moreover, the less protective Eighth Amendment standard applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Ingraham* v. *Wright,* 430 U. S. 651, 671,
399 *399 n. 40 (1977). The Fourth Amendment inquiry is one of "objective reasonableness" under the circumstances, and subjective concepts like "malice" and "sadism" have no proper place in that inquiry.[12]

Because the Court of Appeals reviewed the District Court's ruling on the motion for directed verdict under an erroneous view of the governing substantive law, its judgment must be vacated and the case remanded to that court for reconsideration of that issue under the proper Fourth Amendment standard.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and concurring in the judgment.

I join the Court's opinion insofar as it rules that the Fourth Amendment is the primary tool for analyzing claims of excessive force in the prearrest context, and I concur in the judgment remanding the case to the Court of Appeals for reconsideration of the evidence under a reasonableness standard. In light of respondents' concession, however, that the pleadings in this case properly may be construed as raising a Fourth Amendment claim, see Brief for Respondents 3, I see no reason for the Court to find it necessary further to reach out to decide that prearrest excessive force claims are to
400 be analyzed under the Fourth Amendment *rather than* under a *400 substantive due process standard. I also see no basis for the Court's suggestion, *ante,* at 395, that our decision in *Tennessee* v. *Garner,* 471 U. S. 1 (1985), implicitly so held. Nowhere in *Garner* is a substantive due process standard for evaluating the use of excessive force in a particular case discussed; there is no suggestion that such a standard was offered as an alternative and rejected.

In this case, petitioner apparently decided that it was in his best interest to disavow the continued applicability of substantive due process analysis as an alternative basis for recovery in prearrest excessive force cases. See Brief for

Petitioner 20. His choice was certainly wise as a matter of litigation strategy in his own case, but does not (indeed, cannot be expected to) serve other potential plaintiffs equally well. It is for that reason that the Court would have done better to leave that question for another day. I expect that the use of force that is not demonstrably unreasonable under the Fourth Amendment only rarely will raise substantive due process concerns. But until I am faced with a case in which that question is squarely raised, and its merits are subjected to adversary presentation, I do not join in foreclosing the use of substantive due process analysis in prearrest cases.

[*] Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Assistant Attorney General Clegg, David L. Shapiro, Brian J. Martin,* and *David K. Flynn;* and for the American Civil Liberties Union et al. by *Steven R. Shapiro.*

[1] Also named as a defendant was the city of Charlotte, which employed the individual respondents. The District Court granted a directed verdict for the city, and petitioner did not challenge that ruling before the Court of Appeals. Accordingly, the city is not a party to the proceedings before this Court.

[2] Petitioner also asserted pendent state-law claims of assault, false imprisonment, and intentional infliction of emotional distress. Those claims have been dismissed from the case and are not before this Court.

[3] The majority did note that because **Graham** was not an incarcerated prisoner, "his complaint of excessive force did not, therefore, arise under the eighth amendment." 827 F. 2d, at 948, n. 3. However, it made no further effort to identify the constitutional basis for his claim.

[4] Petitioner's argument was based primarily on *Kidd* v. *O'Neil,* 774 F. 2d 1252 (CA4 1985), which read this Court's decision in *Tennessee* v. *Garner,* 471 U. S. 1 (1985), as mandating application of a Fourth Amendment "objective reasonableness" standard to claims of excessive force during arrest. See 774 F. 2d, at 1254-1257. The reasoning of *Kidd* was subsequently rejected by the en banc Fourth Circuit in *Justice* v. *Dennis,* 834 F. 2d 380, 383 (1987), cert. pending, No. 87-1422.

[5] The majority noted that in *Whitley* v. *Albers,* 475 U. S. 312 (1986), we held that the question whether physical force used against convicted prisoners in the course of quelling a prison riot violates the Eighth Amendment "ultimately turns on `whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.' " 827 F. 2d, at 948, n. 3, quoting *Whitley* v. *Albers, supra,* at 320-321. Though the Court of Appeals acknowledged that petitioner was not a convicted prisoner, it thought it "unreasonable . . . to suggest that a conceptual factor could be central to one type of excessive force claim but reversible error when merely considered by the court in another context." 827 F. 2d, at 948, n. 3.

[6] Judge Friendly did not apply the Eighth Amendment's Cruel and Unusual Punishments Clause to the detainee's claim for two reasons. First, he thought that the Eighth Amendment's protections did not attach until after conviction and sentence. 481 F. 2d, at 1032. This view was confirmed by *Ingraham* v. *Wright,* 430 U. S. 651, 671, n. 40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions"). Second, he expressed doubt whether a "spontaneous attack" by a prison guard, done without the authorization of prison officials, fell within the traditional Eighth Amendment definition of "punishments." 481 F. 2d, at 1032. Although Judge Friendly gave no reason for not analyzing the detainee's claim under the Fourth Amendment's prohibition against "unreasonable . . . seizures" of the person, his refusal to do so was apparently based on a belief that the protections of the Fourth Amendment did not extend to pretrial detainees. See *id.,* at 1033 (noting that "most of the courts faced with challenges to the conditions of *pretrial* detention have primarily based their analysis directly on the due process clause"). See n. 10, *infra.*

[7] See Freyermuth, Rethinking Excessive Force, 1987 Duke L. J. 692, 694-696, and nn. 16-23 (1987) (collecting cases).

[8] See *Justice* v. *Dennis, supra,* at 382 ("There are . . . certain basic principles in section 1983 jurisprudence as it relates to claims of excessive force that are beyond question [,] [w]hether the factual circumstances involve an arrestee, a pretrial detainee or a prisoner").

[9] The same analysis applies to excessive force claims brought against federal law enforcement and correctional officials under *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971).

[10] A "seizure" triggering the Fourth Amendment's protections occurs only when government actors have, "by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen," *Terry* v. *Ohio,* 392 U. S. 1, 19, n. 16 (1968); see *Brower* v. *County of Inyo,* 489 U. S. 593, 596 (1989).

Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today. It is clear, however, that the Due Process Clause protects a pretrial detainee from the use of excessive force

that amounts to punishment. See *Bell* v. *Wolfish,* 441 U. S. 520, 535-539 (1979). After conviction, the Eighth Amendment "serves as the primary source of substantive protection . . . in cases . . . where the deliberate use of force is challenged as excessive and unjustified." *Whitley* v. *Albers,* 475 U. S., at 327. Any protection that "substantive due process" affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment. *Ibid.*

[11] In *Whitley,* we addressed a § 1983 claim brought by a convicted prisoner, who claimed that prison officials had violated his Eighth Amendment rights by shooting him in the knee during a prison riot. We began our Eighth Amendment analysis by reiterating the long-established maxim that an Eighth Amendment violation requires proof of the " ` "unnecessary and wanton infliction of pain." ' " 475 U. S., at 319, quoting *Ingraham* v. *Wright,* 430 U. S., at 670, in turn quoting *Estelle* v. *Gamble,* 429 U. S. 97, 103 (1976). We went on to say that when prison officials use physical force against an inmate "to restore order in the face of a prison disturbance, . . . the question whether the measure taken inflicted unnecessary and wanton pain . . . *ultimately turns* on `whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.' " 475 U. S., at 320-321 (emphasis added), quoting *Johnson* v. *Glick,* 481 F. 2d, at 1033. We also suggested that the other prongs of the *Johnson* v. *Glick* test might be useful in analyzing excessive force claims brought under the Eighth Amendment. 475 U. S., at 321. But we made clear that this was so *not* because Judge Friendly's four-part test is some talismanic formula generally applicable to all excessive force claims, but because its four factors help to focus the central inquiry in the Eighth Amendment context, which is whether the particular use of force amounts to the "unnecessary and wanton infliction of pain." See *id.,* at 320-321. Our endorsement of the *Johnson* v. *Glick* test in *Whitley* thus had no implications beyond the Eighth Amendment context.

[12] Of course, in assessing the credibility of an officer's account of the circumstances that prompted the use of force, a factfinder may consider, along with other factors, evidence that the officer may have harbored ill-will toward the citizen. See *Scott* v. *United States,* 436 U. S. 128, 139, n. 13 (1978). Similarly, the officer's *objective* "good faith" — that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment — may be relevant to the availability of the qualified immunity defense to monetary liability under § 1983. See *Anderson* v. *Creighton,* 483 U. S. 635 (1987). Since no claim of qualified immunity has been raised in this case, however, we express no view on its proper application in excessive force cases that arise under the Fourth Amendment.

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127 S.Ct. 1769 (2007)

550 U.S. 372 (2007)

Timothy SCOTT, Petitioner,

v.

Victor HARRIS.

No. 05-1631.

Supreme Court of United States.

Argued February 26, 2007.
Decided April 30, 2007.

1772 *1772 Philip W. Savrin, Atlanta, GA, for petitioner.

Gregory G. Garre, for the United States as amicus curiae, by special leave of the Court, supporting the petitioner.

Craig T. Jones, Atlanta, GA, for respondent.

Orin S. Kerr, Washington, D.C., Philip W. Savrin, Counsel of Record, Sun S. Choy, Freeman Mathis & Gary, LLP, Atlanta, GA, Counsel for Petitioner.

Craig T. Jones, Counsel of Record, Edmond & Jones, LLP, Atlanta, Georgia, Andrew C. Clarke, Borod & Kramer, Memphis, Tennessee, Counsel for Respondent.

Justice SCALIA delivered the opinion of the Court.

We consider whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind. Put another way: Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?

I

In March 2001, a Georgia county deputy clocked respondent's vehicle traveling at 73 miles per hour on a road with a 55-mile-per-hour speed limit. The deputy activated his blue flashing lights indicating that respondent should pull over. Instead, respondent sped away, initiating a chase down what is in most portions a two-lane road, at speeds exceeding
1773 85 miles per hour. The deputy radioed his dispatch to *1773 report that he was pursuing a fleeing vehicle, and broadcast its license plate number. Petitioner, Deputy Timothy **Scott**, heard the radio communication and joined the pursuit along with other officers. In the midst of the chase, respondent pulled into the parking lot of a shopping center and was nearly boxed in by the various police vehicles. Respondent evaded the trap by making a sharp turn, colliding with **Scott's** police car, exiting the parking lot, and speeding off once again down a two-lane highway.

Following respondent's shopping center maneuvering, which resulted in slight damage to **Scott's** police car, **Scott** took over as the lead pursuit vehicle. Six minutes and nearly 10 miles after the chase had begun, **Scott** decided to attempt to terminate the episode by employing a "Precision Intervention Technique (`PIT') maneuver, which causes the fleeing vehicle to spin to a stop." Brief for Petitioner 4. Having radioed his supervisor for permission, **Scott** was told to "`[g]o ahead and take him out.'" ***Harris** v. Coweta County*, 433 F.3d 807, 811 (C.A.11 2005). Instead, **Scott** applied his push bumper to the rear of respondent's vehicle.[1] As a result, respondent lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. Respondent was badly injured and was rendered a quadriplegic.

Respondent filed suit against Deputy **Scott** and others under Rev. Stat. § 1979, 42 U.S.C. § 1983, alleging, *inter alia,* a

violation of his federal constitutional rights, viz. use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. In response, **Scott** filed a motion for summary judgment based on an assertion of qualified immunity. The District Court denied the motion, finding that "there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury." ***Harris** v. Coweta County,* No. 3:01-CV-148-WBH, 2003 WL 25419527 (N.D.Ga. Sept. 23, 2003), App. to Pet. for Cert. 41a-42a. On interlocutory appeal,[2] the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision to allow respondent's Fourth Amendment claim against **Scott** to proceed to trial.[3] Taking respondent's view of the facts as given, the Court of Appeals concluded that **Scott's** actions could constitute "deadly force" under *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), and that the use of such force in this context "would violate [respondent's] constitutional right to be free from excessive force during a seizure. *1774 Accordingly, a reasonable jury could find that **Scott** violated [respondent's] Fourth Amendment rights." 433 F.3d, at 816. The Court of Appeals further concluded that "the law as it existed [at the time of the incident], was sufficiently clear to give reasonable law enforcement officers `fair notice' that ramming a vehicle under these circumstances was unlawful." *Id.,* at 817. The Court of Appeals thus concluded that **Scott** was not entitled to qualified immunity. We granted certiorari, 549 U.S. ___, 127 S.Ct. 468, 166 L.Ed.2d 333 (2006), and now reverse.

II

In resolving questions of qualified immunity, courts are required to resolve a "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If, and only if, the court finds a violation of a constitutional right, "the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case." *Ibid.* Although this ordering contradicts "[o]ur policy of avoiding unnecessary adjudication of constitutional issues," *United States v. Treasury Employees,* 513 U.S. 454, 478, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (citing *Ashwander v. TVA,* 297 U.S. 288, 346-347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring)), we have said that such a departure from practice is "necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established." *Saucier, supra,* at 201, 121 S.Ct. 2151.[4] We therefore turn to the threshold inquiry: whether Deputy **Scott's** actions violated the Fourth Amendment.

III

A

The first step in assessing the constitutionality of **Scott's** actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's version of events (unsurprisingly) differs substantially from **Scott's** version. When things are in such a posture, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." *United States v. Diebold, Inc.,* *1775 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) *(per curiam); Saucier, supra,* at 201, 121 S.Ct. 2151. In qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of the facts.

There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.[5] For example, the Court of Appeals adopted respondent's assertions that, during the chase, "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [respondent] remained in control of his vehicle." 433 F.3d, at 815. Indeed, reading the lower court's opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test:

> "[T]aking the facts from the non-movant's viewpoint, [respondent] remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and **Scott** rammed [respondent], the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections." *Id.,* at 815-816 (citations omitted).

The videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit.[6] We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car
1776 chase of the most frightening *1776 sort, placing police officers and innocent bystanders alike at great risk of serious injury.[7]

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Fed. Rule Civ. Proc. 56(c). As we have emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no `genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (footnote omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

B

Judging the matter on that basis, we think it is quite clear that Deputy **Scott** did not violate the Fourth Amendment. **Scott** does not contest that his decision to terminate the car chase by ramming his bumper into respondent's vehicle constituted a "seizure." "[A] Fourth Amendment seizure [occurs] . . . when there is a governmental termination of freedom of movement through means intentionally applied." *Brower v. County of Inyo,* 489 U.S. 593, 596-597, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) (emphasis deleted). See also *id.,* at 597, 109 S.Ct. 1378 ("If . . . the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure"). It is also conceded, by both sides, that a claim of "excessive force in the course of making [a] . . .'seizure' of [the] person . . . [is] properly analyzed under the Fourth Amendment's `objective reasonableness' standard." *Graham v. Connor,* 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The question we need to answer is whether **Scott's** actions were objectively reasonable.[8]

1777 *1777 **1**

Respondent urges us to analyze this case as we analyzed *Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1. See Brief

for Respondent 16-29. We must first decide, he says, whether the actions **Scott** took constituted "deadly force." (He defines "deadly force" as "any use of force which creates a substantial likelihood of causing death or serious bodily injury," *id.,* at 19, 105 S.Ct. 1694.) If so, respondent claims that *Garner* prescribes certain preconditions that must be met before **Scott's** actions can survive Fourth Amendment scrutiny: (1) The suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape;[9] and (3) where feasible, the officer must have given the suspect some warning. See Brief for Respondent 17-18 (citing *Garner, supra,* at 9-12, 105 S.Ct. 1694). Since these *Garner* preconditions for using deadly force were not met in this case, **Scott's** actions were *per se* unreasonable.

Respondent's argument falters at its first step; *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." *Garner* was simply an application of the Fourth Amendment's "reasonableness" test, *Graham, supra,* at 388, 109 S.Ct. 1865, to the use of a particular type of force in a particular situation. *Garner* held that it was unreasonable to kill a "young, slight, and unarmed" burglary suspect, 471 U.S., at 21, 105 S.Ct. 1694, by shooting him "in the back of the head" while he was running away on foot, *id.,* at 4, 105 S.Ct. 1694, and when the officer "could not reasonably have believed that [the suspect] ... posed any threat," and "never attempted to justify his actions on any basis other than the need to prevent an escape," *id.,* at 21, 105 S.Ct. 1694. Whatever *Garner* said about the factors that *might have* justified shooting the suspect in that case, such "preconditions" have scant applicability to this case, which has vastly different facts. "*Garner* had nothing to do with one car striking another or even with car chases in general .... A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." *Adams v. St. Lucie County Sheriff's Dept.,* 962 F.2d 1563, 1577 (C.A.11 1992) (Edmondson, J., dissenting), adopted by 998 F.2d 923 (C.A.11 1993) (en banc) *(per curiam).* Nor is the threat posed by the flight on foot of an unarmed suspect even remotely comparable to the extreme danger to human life posed by
1778 respondent in this case. Although respondent's attempt *1778 to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of "reasonableness." Whether or not **Scott's** actions constituted application of "deadly force," all that matters is whether **Scott's** actions were reasonable.

2

In determining the reasonableness of the manner in which a seizure is effected, "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place,* 462 U.S. 696, 703, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). **Scott** defends his actions by pointing to the paramount governmental interest in ensuring public safety, and respondent nowhere suggests this was not the purpose motivating **Scott's** behavior. Thus, in judging whether **Scott's** actions were reasonable, we must consider the risk of bodily harm that **Scott's** actions posed to respondent in light of the threat to the public that **Scott** was trying to eliminate. Although there is no obvious way to quantify the risks on either side, it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase. See Part III-A, *supra.* It is equally clear that **Scott's** actions posed a high likelihood of serious injury or death to respondent—though not the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head, see *Garner, supra,* at 4, 105 S.Ct. 1694, or pulling alongside a fleeing motorist's car and shooting the motorist, cf. *Vaughan v. Cox,* 343 F.3d 1323, 1326-1327 (C.A.11 2003). So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person? We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that **Scott** confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had **Scott** not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for **Scott** to take the action that he did.[10]

But wait, says respondent: Couldn't the innocent public equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit? We think the police need not have taken that chance and hoped
1779 for the best. Whereas **Scott's** action—ramming respondent off the road—was *certain* to *1779 eliminate the risk that respondent posed to the public, ceasing pursuit was not. First of all, there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go. Had respondent looked in his rear-view mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they were setting up a roadblock in his path. Cf. *Brower,* 489 U.S., at 594, 109 S.Ct. 1378. Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.[11]

Second, we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

*** * ***

The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. **Scott's** attempt to terminate the chase by forcing respondent off the road was reasonable, and **Scott** is entitled to summary judgment. The Court of Appeals' decision to the contrary is reversed.

It is so ordered.

Justice GINSBURG, concurring.

I join the Court's opinion and would underscore two points. First, I do not read today's decision as articulating a mechanical, *per se* rule. Cf. *post,* at 1781 (BREYER, J., concurring). The inquiry described by the Court, *ante,* at 1777-1779, is situation specific. Among relevant considerations: Were the lives and well-being of others (motorists, pedestrians, police officers) at risk? Was there a safer way, given the time, place, and circumstances, to stop the fleeing vehicle? "[A]dmirable" as "[an] attempt to craft an easy-to-apply legal test in the Fourth Amendment context [may be]," the Court explains, "in the end we must still slosh our way through the factbound morass of `reasonableness.'" *Ante,* at 1778.

Second, were this case suitable for resolution on qualified immunity grounds, without reaching the constitutional question, Justice BREYER's discussion would be engaging. See *post,* at 1780-1781 (urging the Court to overrule
1780 *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). In joining the Court's opinion, *1780 however, Justice BREYER apparently shares the view that, in the appeal before us, the constitutional question warrants an answer. The video footage of the car chase, he agrees, demonstrates that the officer's conduct did not transgress Fourth Amendment limitations. See *post,* at 1780. Confronting *Saucier,* therefore, is properly reserved for another day and case. See *ante,* at 1774, n. 4.

Justice BREYER, concurring.

I join the Court's opinion with one suggestion and two qualifications. Because watching the video footage of the car chase made a difference to my own view of the case, I suggest that the interested reader take advantage of the link in the Court's opinion, *ante,* at 1775, n. 5, and watch it. Having done so, I do not believe a reasonable jury could, in this instance, find that Officer Timothy **Scott** (who joined the chase late in the day and did not know the specific reason why the respondent was being pursued) acted in violation of the Constitution.

Second, the video makes clear the highly fact-dependent nature of this constitutional determination. And that fact-dependency supports the argument that we should overrule the requirement, announced in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), that lower courts must first decide the "constitutional question" before they turn to the "qualified immunity question." See *id.,* at 200, 121 S.Ct. 2151 ("[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged"). Instead, lower courts should be free to decide the two questions in whatever order makes sense in the context of a particular case. Although I do not object to our deciding the constitutional question in this particular case, I believe that in order to lift the burden from lower courts we can and should reconsider *Saucier's* requirement as well.

Sometimes (*e.g.,* where a defendant is clearly entitled to qualified immunity) *Saucier's* fixed order-of-battle rule wastes judicial resources in that it may require courts to answer a difficult constitutional question unnecessarily. Sometimes (*e.g.,* where the defendant loses the constitutional question but wins on qualified immunity) that order-of-battle rule may immunize an incorrect constitutional ruling from review. Sometimes, as here, the order-of-battle rule will spawn constitutional rulings in areas of law so fact dependent that the result will be confusion rather than clarity. And frequently the order-of-battle rule violates that older, wiser judicial counsel "not to pass on questions of constitutionality. . . unless such adjudication is unavoidable." *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944); see *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"). In a sharp departure from this counsel, *Saucier* requires courts to embrace unnecessary constitutional questions not to avoid them.

It is not surprising that commentators, judges, and, in this case, 28 States in an *amicus* brief, have invited us to reconsider *Saucier's* requirement. See Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. Rev. 1249, 1275 (2006) (calling the requirement "a puzzling misadventure in constitutional dictum"); *Dirrane v. Brookline Police Dept.*, 315 F.3d 65, 69-70 (C.A.1 2002) (referring to the requirement as "an uncomfortable exercise" when "the answer
1781 whether there was a violation may depend on a kaleidoscope *1781 of facts not yet fully developed"); *Lyons v. Xenia*, 417 F.3d 565, 580-584 (C.A.6 2005) (Sutton, J., concurring); Brief for State of Illinois et al. as *Amici Curiae.* I would accept that invitation.

While this Court should generally be reluctant to overturn precedents, *stare decisis* concerns are at their weakest here. See, *e.g., Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) ("Considerations in favor of *stare decisis*" are at their weakest in cases "involving procedural and evidentiary rules"). The order-of-battle rule is relatively novel, it primarily affects judges, and there has been little reliance upon it.

Third, I disagree with the Court insofar as it articulates a *per se* rule. The majority states: "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Ante,* at 1779. This statement is too absolute. As Justice GINSBURG points out, *ante,* at 1779-1780, whether a high-speed chase violates the Fourth Amendment may well depend upon more circumstances than the majority's rule reflects. With these qualifications, I join the Court's opinion.

Justice STEVENS, dissenting.

Today, the Court asks whether an officer may "take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders." *Ante,* at 1772. Depending on the circumstances, the answer may be an obvious "yes," an obvious "no," or sufficiently doubtful that the question of the reasonableness of the officer's actions should be decided by a jury, after a review of the degree of danger and the alternatives available to the officer. A high speed chase in a desert in Nevada is, after all, quite different from one that travels through the heart of Las Vegas.

Relying on a *de novo* review of a videotape of a portion of a nighttime chase on a lightly traveled road in Georgia where no pedestrians or other "bystanders" were present, buttressed by uninformed speculation about the possible consequences of discontinuing the chase, eight of the jurors on this Court reach a verdict that differs from the views of

the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are. The Court's justification for this unprecedented departure from our well-settled standard of review of factual determinations made by a district court and affirmed by a court of appeals is based on its mistaken view that the Court of Appeals' description of the facts was "blatantly contradicted by the record" and that respondent's version of the events was "so utterly discredited by the record that no reasonable jury could have believed him." *Ante,* at 1776.

Rather than supporting the conclusion that what we see on the video "resembles a Hollywood-style car chase of the most frightening sort," *ante,* at 1775-1776,[1] the tape actually confirms, rather than contradicts, the lower courts' 1782 appraisal of the factual questions at issue. More important, *1782 it surely does not provide a principled basis for depriving the respondent of his right to have a jury evaluate the question whether the police officers' decision to use deadly force to bring the chase to an end was reasonable.

Omitted from the Court's description of the initial speeding violation is the fact that respondent was on a four-lane portion of Highway 34 when the officer clocked his speed at 73 miles per hour and initiated the chase.[2] More significant—and contrary to the Court's assumption that respondent's vehicle "force[d] cars traveling in both directions to their respective shoulders to avoid being hit" *ante,* at 1775—a fact unmentioned in the text of the opinion explains why those cars pulled over prior to being passed by respondent. The sirens and flashing lights on the police cars following respondent gave the same warning that a speeding ambulance or fire engine would have provided.[3] The 13 cars that respondent passed on his side of the road before entering the shopping center, and both of the cars that he passed on the right after leaving the center, no doubt had already pulled to the side of the road or were driving along the shoulder because they heard the police sirens or saw the flashing lights before respondent or the police cruisers approached.[4] A jury could certainly conclude that those motorists were exposed to no greater risk than persons who take the same action in response to a speeding ambulance, and that their reactions were fully consistent with the evidence that respondent, though speeding, retained full control of his vehicle.

The police sirens also minimized any risk that may have arisen from running "multiple red lights," *ibid.* In fact, respondent and his pursuers went through only two intersections with stop lights and in both cases all other vehicles in sight were stationary, presumably because they had been warned of the approaching speeders. Incidentally, the videos do show that the lights were red when the police cars passed through them but, because the cameras were farther away when respondent did so and it is difficult to discern the color of the signal at that point, it is not entirely clear that he ran either or both of the red lights. In any event, the risk of harm to the stationary vehicles was minimized by the sirens, and there is no reason to believe that respondent would have disobeyed the signals if he were not being pursued.

My colleagues on the jury saw respondent "swerve around more than a dozen other cars," and "force cars traveling in both directions to their respective shoulders," *ante,* at 1775, but they apparently discounted the possibility that those cars 1783 were already out of the pursuit's path as a result of hearing the sirens. Even if that *1783 were not so, passing a slower vehicle on a two-lane road always involves some degree of swerving and is not especially dangerous if there are no cars coming from the opposite direction. At no point during the chase did respondent pull into the opposite lane other than to pass a car in front of him; he did the latter no more than five times and, on most of those occasions, used his turn signal. On none of these occasions was there a car traveling in the opposite direction. In fact, at one point, when respondent found himself behind a car in his own lane and there were cars traveling in the other direction, he slowed and waited for the cars traveling in the other direction to pass before overtaking the car in front of him while using his turn signal to do so. This is hardly the stuff of Hollywood. To the contrary, the video does not reveal any incidents that could even be remotely characterized as "close calls."

In sum, the factual statements by the Court of Appeals quoted by the Court, *ante,* at 1774-1775, were entirely accurate. That court did not describe respondent as a "cautious" driver as my colleagues imply, *ante,* at 1776, but it did correctly conclude that there is no evidence that he ever lost control of his vehicle. That court also correctly pointed out that the incident in the shopping center parking lot did not create any risk to pedestrians or other vehicles because the chase occurred just before 11 p.m. on a weekday night and the center was closed. It is apparent from the record (including the videotape) that local police had blocked off intersections to keep respondent from entering residential neighborhoods

and possibly endangering other motorists. I would add that the videos also show that no pedestrians, parked cars, sidewalks, or residences were visible at any time during the chase. The only "innocent bystanders" who were placed "at great risk of serious injury," *ante,* at 1776, were the drivers who either pulled off the road in response to the sirens or passed respondent in the opposite direction when he was driving on his side of the road.

I recognize, of course, that even though respondent's original speeding violation on a four-lane highway was rather ordinary, his refusal to stop and subsequent flight was a serious offense that merited severe punishment. It was not, however, a capital offense, or even an offense that justified the use of deadly force rather than an abandonment of the chase. The Court's concern about the "imminent threat to the lives of any pedestrians who might have been present," *ante,* at 1778, while surely valid in an appropriate case, should be discounted in a case involving a nighttime chase in an area where no pedestrians were present.

What would have happened if the police had decided to abandon the chase? We now know that they could have apprehended respondent later because they had his license plate number. Even if that were not true, and even if he would have escaped any punishment at all, the use of deadly force in this case was no more appropriate than the use of a deadly weapon against a fleeing felon in *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). In any event, any uncertainty about the result of abandoning the pursuit has not prevented the Court from basing its
1784 conclusions on its own factual assumptions.[5] The Court attempts *1784 to avoid the conclusion that deadly force was unnecessary by speculating that if the officers had let him go, respondent might have been "just as likely" to continue to drive recklessly as to slow down and wipe his brow. *Ante,* at 1779. That speculation is unconvincing as a matter of common sense and improper as a matter of law. Our duty to view the evidence in the light most favorable to the nonmoving party would foreclose such speculation if the Court had not used its observation of the video as an excuse for replacing the rule of law with its ad hoc judgment. There is no evidentiary basis for an assumption that dangers caused by flight from a police pursuit will continue after the pursuit ends. Indeed, rules adopted by countless police departments throughout the country are based on a judgment that differs from the Court's. See, *e.g.,* App. to Brief for Georgia Association of Chiefs of Police, Inc., as *Amicus Curiae* A-52 ("During a pursuit, the need to apprehend the suspect should always outweigh the level of danger created by the pursuit. When the immediate danger to the public created by the pursuit is greater than the immediate or potential danger to the public should the suspect remain at large, then the pursuit should be discontinued or terminated.... [P]ursuits should usually be discontinued when the violator's identity has been established to the point that later apprehension can be accomplished without danger to the public").

Although *Garner* may not, as the Court suggests, "establish a magical on/off switch that triggers rigid preconditions" for the use of deadly force, *ante,* at 1777, it did set a threshold under which the use of deadly force would be considered constitutionally unreasonable:

> "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." 471 U.S., at 11-12, 105 S.Ct. 1694.

Whether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury.[6] Here, the Court has usurped the jury's factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable. It chastises the Court of Appeals for failing to "vie[w] the facts in the light depicted by the
1785 videotape" and implies that no reasonable person could *1785 view the videotape and come to the conclusion that deadly force was unjustified. *Ante,* at 1776-1777. However, the three judges on the Court of Appeals panel apparently did view the videotapes entered into evidence[7] and described a very different version of events:

> "At the time of the ramming, apart from speeding and running two red lights, **Harris** was driving in a non-aggressive fashion (i.e., without trying to ram or run into the officers). Moreover, ... **Scott's** path on the open highway was largely clear. The videos introduced into evidence show little to no vehicular (or

pedestrian) traffic, allegedly because of the late hour and the police blockade of the nearby intersections. Finally, **Scott** issued absolutely no warning (e.g., over the loudspeaker or otherwise) prior to using deadly force." ***Harris** v. Coweta County*, 433 F.3d 807, 819, n. 14 (C.A.11 2005).

If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events. Moreover, under the standard set forth in *Garner,* it is certainly possible that "a jury could conclude that **Scott** unreasonably used deadly force to seize **Harris** by ramming him off the road under the instant circumstances." 433 F.3d, at 821.

The Court today sets forth a *per se* rule that presumes its own version of the facts: "A police officer's attempt to terminate a dangerous high-speed car chase *that threatens the lives of innocent bystanders* does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Ante,* at 1779 (emphasis added). Not only does that rule fly in the face of the flexible and case-by-case "reasonableness" approach applied in *Garner* and *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), but it is also arguably inapplicable to the case at hand, given that it is not clear that this chase threatened the life of any "innocent bystande[r]."[8] In my view, the risks inherent in justifying unwarranted police conduct on the basis of unfounded assumptions are unacceptable, particularly when less drastic measures— in this case, the use of stop sticks[9] or a simple warning issued from a loudspeaker—could have avoided such a tragic result. In my judgment, jurors in Georgia should be allowed to evaluate the reasonableness of the decision to ram respondent's speeding vehicle in a manner that created an obvious risk of death and has in fact made him a quadriplegic at the age of 19.

I respectfully dissent.

[1] **Scott** says he decided not to employ the PIT maneuver because he was "concerned that the vehicles were moving too quickly to safely execute the maneuver." Brief for Petitioner 4. Respondent agrees that the PIT maneuver could not have been safely employed. See Brief for Respondent 9. It is irrelevant to our analysis whether **Scott** had permission to take the precise actions he took.

[2] Qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Thus, we have held that an order denying qualified immunity is immediately appealable even though it is interlocutory; otherwise, it would be "effectively unreviewable." *Id.,* at 527, 105 S.Ct. 2806. Further, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) *(per curiam)*.

[3] None of the other claims respondent brought against **Scott** or any other party are before this Court.

[4] Prior to this Court's announcement of *Saucier's* "rigid `order of battle,'" *Brosseau v. Haugen,* 543 U.S. 194, 201-202, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (BREYER, J., concurring), we had described this order of inquiry as the "better approach," *County of Sacramento v. Lewis,* 523 U.S. 833, 841, n. 5, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), though not one that was required in all cases. See *id.,* at 858-859, 118 S.Ct. 1708 (BREYER, J., concurring); *id.,* at 859, 118 S.Ct. 1708 (STEVENS, J., concurring in judgment). There has been doubt expressed regarding the wisdom of *Saucier's* decision to make the threshold inquiry mandatory, especially in cases where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward. See, *e.g., Brosseau, supra,* at 201, 125 S.Ct. 596 (BREYER, J., joined by SCALIA and GINSBURG, JJ., concurring); *Bunting v. Mellen,* 541 U.S. 1019, 124 S.Ct. 1750, 158 L.Ed.2d 636 (2004) (STEVENS, J., joined by GINSBURG and BREYER, JJ., respecting denial of certiorari); *id.,* at 1025, 124 S.Ct. 1750 (SCALIA, J., joined by Rehnquist, C.J., dissenting). See also *Lyons v. Xenia,* 417 F.3d 565, 580-584 (C.A.6 2005) (Sutton, J., concurring). We need not address the wisdom of *Saucier* in this case, however, because the constitutional question with which we are presented is, as discussed in Part III-B, *infra,* easily decided. Deciding that question first is thus the "better approach," *Lewis, supra,* at 841, n. 5, 118 S.Ct. 1708, regardless of whether it is required.

[5] Justice STEVENS suggests that our reaction to the videotape is somehow idiosyncratic, and seems to believe we are misrepresenting its contents. See *post,* at 1783 (dissenting opinion) ("In sum, the factual statements by the Court of Appeals quoted by the Court ... were entirely accurate"). We are happy to allow the videotape to speak for itself. See Record 36, Exh. A, available at http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb and in Clerk of Court's case file.

[6] Justice STEVENS hypothesizes that these cars "had already pulled to the side of the road or were driving along the shoulder because they heard the police sirens or saw the flashing lights," so that "[a] jury could certainly conclude that those motorists were exposed to no

greater risk than persons who take the same action in response to a speeding ambulance." *Post,* at 1782. It is not our experience that ambulances and fire engines careen down two-lane roads at 85-plus miles per hour, with an unmarked scout car out in front of them. The risk they pose to the public is vastly less than what respondent created here. But even if that were not so, it would in no way lead to the conclusion that it was unreasonable to eliminate the threat to life that respondent posed. Society accepts the risk of speeding ambulances and fire engines in order to save life and property; it need not (and assuredly does not) accept a similar risk posed by a reckless motorist fleeing the police.

[7] This is not to say that each and every factual statement made by the Court of Appeals is inaccurate. For example, the videotape validates the court's statement that when **Scott** rammed respondent's vehicle it was not threatening any other vehicles or pedestrians. (Undoubtedly **Scott** *waited* for the road to be clear before executing his maneuver.)

[8] Justice STEVENS incorrectly declares this to be "a question of fact best reserved for a jury," and complains we are "usurp[ing] the jury's factfinding function." *Post,* at ___7. At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record,* see Part III-A, *supra,* the reasonableness of **Scott's** actions—or, in Justice STEVENS' parlance, "[w]hether [respondent's] actions have risen to a level warranting deadly force," *post,* at 1784—is a pure question of law.

[9] Respondent, like the Court of Appeals, defines this second precondition as "`necessary to prevent escape,'" Brief for Respondent 17; ***Harris** v. Coweta County,* 433 F.3d 807, 813 (C.A.11 2005), quoting *Garner,* 471 U.S., at 11, 105 S.Ct. 1694. But that quote from *Garner* is taken out of context. The necessity described in *Garner* was, in fact, the need to prevent "serious physical harm, either to the officer or to others." *Ibid.* By way of example only, *Garner* hypothesized that deadly force may be used "if necessary to prevent escape" when the suspect is known to have "committed a crime involving the infliction or threatened infliction of serious physical harm," *ibid.,* so that his mere being at large poses an inherent danger to society. Respondent did not pose that type of inherent threat to society, since (prior to the car chase) he had committed only a minor traffic offense and, as far as the police were aware, had no prior criminal record. But in this case, unlike in *Garner,* it was respondent's flight itself (by means of a speeding automobile) that posed the threat of "serious physical harm... to others." *Ibid.*

[10] The Court of Appeals cites *Brower v. County of Inyo,* 489 U.S. 593, 595, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989), for its refusal to "countenance the argument that by continuing to flee, a suspect absolves a pursuing police officer of any possible liability for all ensuing actions during the chase," 433 F.3d, at 816. The only question in *Brower* was whether a police roadblock constituted a *seizure* under the Fourth Amendment. In deciding that question, the relative culpability of the parties is, of course, irrelevant; a seizure occurs whenever the police are "responsib[le] for the termination of [a person's] movement," 433 F.3d, at 816, regardless of the reason for the termination. Culpability *is* relevant, however, to the *reasonableness* of the seizure—to whether preventing possible harm to the innocent justifies exposing to possible harm the person threatening them.

[11] Contrary to Justice STEVENS' assertions, we do not "assum[e] that dangers caused by flight from a police pursuit will continue after the pursuit ends," *post,* at 1784, nor do we make any "factual assumptions," *post,* at 1783, with respect to what would have happened if the police had gone home. We simply point out the *uncertainties* regarding what would have happened, in response to *respondent's* factual assumption that the high-speed flight would have ended.

[1] I can only conclude that my colleagues were unduly frightened by two or three images on the tape that looked like bursts of lightning or explosions, but were in fact merely the headlights of vehicles zooming by in the opposite lane. Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slow-poke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately.

[2] According to the District Court record, when respondent was clocked at 73 miles per hour, the deputy who recorded his speed was sitting in his patrol car on Highway 34 between Lora Smith Road and Sullivan Road in Coweta County, Georgia. At that point, as well as at the point at which Highway 34 intersects with Highway 154—where the deputy caught up with respondent and the videotape begins—Highway 34 is a four-lane road, consisting of two lanes in each direction with a wide grass divider separating the flow of traffic.

[3] While still on the four-lane portion of Highway 34, the deputy who had clocked respondent's speed turned on his blue light and siren in an attempt to get respondent to pull over. It was when the deputy turned on his blue light that the dash-mounted video camera was activated and began to record the pursuit.

[4] Although perhaps understandable, because their volume on the sound recording is low (possibly due to sound proofing in the officer's vehicle), the Court appears to minimize the significance of the sirens audible throughout the tape recording of the pursuit.

[5] In noting that **Scott's** action "was *certain* to eliminate the risk that respondent posed to the public" while "ceasing pursuit was not," the Court prioritizes total elimination of the risk of harm to the public over the risk that respondent may be seriously injured or even killed. *Ante,* at 1778-1779 (emphasis in original). The Court is only able to make such a statement by assuming, based on its interpretation of

events on the videotape, that the risk of harm posed in this case, and the type of harm involved, rose to a level warranting deadly force. These are the same types of questions that, when disputed, are typically resolved by a jury; this is why both the District Court and the Court of Appeals saw fit to have them be so decided. Although the Court claims only to have drawn factual inferences in respondent's favor *"to the extent supportable by the record," ante,* at 1776-1777, n. 8 (emphasis in original), its own view of the record has clearly precluded it from doing so to the same extent as the two courts through which this case has already traveled, see *ante,* at 1773-1774, 1774-1775.

[6] In its opinion, the Court of Appeals correctly noted: "We reject the defendants' argument that **Harris**' driving must, as a matter of law, be considered sufficiently reckless to give **Scott** probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians. This is a disputed issue to be resolved by a jury." ***Harris** v. Coweta County*, 433 F.3d 807, 815 (C.A.11 2005).

[7] In total, there are four police tapes which captured portions of the pursuit, all recorded from different officers' vehicles.

[8] It is unclear whether, in referring to "innocent bystanders," the Court is referring to the motorists driving unfazed in the opposite direction or to the drivers who pulled over to the side of the road, safely out of respondent's and petitioner's path.

[9] "Stop sticks" are a device which can be placed across the roadway and used to flatten a vehicle's tires slowly to safely terminate a pursuit.

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471 U.S. 1 (1985)

TENNESSEE
v.
GARNER ET AL.

No. 83-1035.

Supreme Court of United States.

Argued October 30, 1984

Decided March 27, 1985[*]

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2 *2 *Henry L. Klein* argued the cause for petitioners in No. 83-1070. With him on the briefs were *Clifford D. Pierce, Jr., Charles V. Holmes,* and *Paul F. Goodman. W. J. Michael Cody,* Attorney General of **Tennessee**, argued the cause for appellant in No. 83-1035. With him on the briefs were *William M. Leech, Jr.,* former Attorney General, and *Jerry L. Smith,* Assistant Attorney General.

3 *3 *Steven L. Winter* argued the cause for appellee-respondent **Garner**. With him on the brief was *Walter L. Bailey, Jr.*[†]

JUSTICE WHITE delivered the opinion of the Court.

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

I

At about 10:45 p. m. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to answer a "prowler inside call." Upon arriving at the scene they saw a woman standing on her porch and gesturing toward the adjacent house.[1] She told them she had heard glass breaking and that "they" or "someone" was breaking in next door. While Wright radioed the dispatcher to say that they were on the scene, Hymon went behind the house. He heard a door slam and saw someone run across the backyard. The fleeing suspect, who was appellee-respondent's decedent, Edward **Garner**, stopped at a 6-feet-high chain link fence at the edge of the yard. With the aid of a flashlight, Hymon was able to see **Garner's** face and hands. He saw no sign of a weapon, and, though not certain, was "reasonably sure" and "figured" that **Garner** was unarmed. App. 41, 56; Record 219. He thought **Garner** was 17 or 18
4 years old and *4 about 5' 5" or 5' 7" tall.[2] While **Garner** was crouched at the base of the fence, Hymon called out "police, halt" and took a few steps toward him. **Garner** then began to climb over the fence. Convinced that if **Garner** made it over the fence he would elude capture,[3] Hymon shot him. The bullet hit **Garner** in the back of the head. **Garner** was taken by ambulance to a hospital, where he died on the operating table. Ten dollars and a purse taken from the house were found on his body.[4]

In using deadly force to prevent the escape, Hymon was acting under the authority of a **Tennessee** statute and pursuant to Police Department policy. The statute provides that "[i]f, after notice of the intention to arrest the defendant, he either
5 flee or forcibly resist, the officer may use all the necessary means to effect the arrest." Tenn. Code Ann. *5 § 40-7-108 (1982).[5] The Department policy was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary. App. 140-144. The incident was reviewed by the Memphis Police Firearm's Review Board and presented to a grand jury. Neither took any action. *Id.,* at 57.

Garner's father then brought this action in the Federal District Court for the Western District of **Tennessee**, seeking damages under 42 U. S. C. § 1983 for asserted violations of **Garner's** constitutional rights. The complaint alleged that the shooting violated the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. It named as defendants Officer Hymon, the Police Department, its Director, and the Mayor and city of Memphis. After a 3-day bench trial, the District Court entered judgment for all defendants. It dismissed the claims against the Mayor and the Director for lack of evidence. It then concluded that Hymon's actions were authorized by the **Tennessee** statute, which in turn was constitutional. Hymon had employed the only reasonable and practicable means of preventing **Garner's** escape. **Garner** had "recklessly and heedlessly attempted to vault over the fence to escape, thereby assuming the risk of being fired upon." App. to Pet. for Cert. A10.

The Court of Appeals for the Sixth Circuit affirmed with regard to Hymon, finding that he had acted in good-faith reliance on the **Tennessee** statute and was therefore within the scope of his qualified immunity. 600 F. 2d 52 (1979). It remanded for reconsideration of the possible liability of the city, however, in light of *Monell* v. *New York City Dept. of Social*
6 *Services*, 436 U. S. 658 (1978), which had come down after the District Court's decision. The District Court was *6 directed to consider whether a city enjoyed a qualified immunity, whether the use of deadly force and hollow point bullets in these circumstances was constitutional, and whether any unconstitutional municipal conduct flowed from a "policy or custom" as required for liability under *Monell.* 600 F. 2d, at 54-55.

The District Court concluded that *Monell* did not affect its decision. While acknowledging some doubt as to the possible immunity of the city, it found that the statute, and Hymon's actions, were constitutional. Given this conclusion, it declined to consider the "policy or custom" question. App. to Pet. for Cert. A37-A39.

The Court of Appeals reversed and remanded. 710 F. 2d 240 (1983). It reasoned that the killing of a fleeing suspect is a "seizure" under the Fourth Amendment,[6] and is therefore constitutional only if "reasonable." The **Tennessee** statute failed as applied to this case because it did not adequately limit the use of deadly force by distinguishing between felonies of different magnitudes — "the facts, as found, did not justify the use of deadly force under the Fourth Amendment." *Id.,* at 246. Officers cannot resort to deadly force unless they "have probable cause . . . to believe that the suspect [has committed a felony and] poses a threat to the safety of the officers or a danger to the community if left at large." *Ibid.*[7]

7 *7 The State of **Tennessee**, which had intervened to defend the statute, see 28 U. S. C. § 2403(b), appealed to this Court. The city filed a petition for certiorari. We noted probable jurisdiction in the appeal and granted the petition. 465 U. S. 1098 (1984).

II

Whenever an officer restrains the freedom of a person to walk away, he has seized that person. *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975). While it is not always clear just when minimal police interference becomes a seizure, see *United States* v. *Mendenhall*, 446 U. S. 544 (1980), there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.

A

A police officer may arrest a person if he has probable cause to believe that person committed a crime. *E. g., United States* v. *Watson*, 423 U. S. 411 (1976). Petitioners and appellant argue that if this requirement is satisfied the Fourth Amendment has nothing to say about *how* that seizure is made. This submission ignores the many cases in which this
8 Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of *8 the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States* v. *Place*, 462 U. S. 696, 703 (1983); see *Delaware*

v. *Prouse*, 440 U. S. 648, 654 (1979); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 555 (1976). We have described "the balancing of competing interests" as "the key principle of the Fourth Amendment." *Michigan* v. *Summers*, 452 U. S. 692, 700, n. 12 (1981). See also *Camara* v. *Municipal Court*, 387 U. S. 523, 536-537 (1967). Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out. *United States* v. *Ortiz*, 422 U. S. 891, 895 (1975); *Terry* v. *Ohio*, 392 U. S. 1, 28-29 (1968).

Applying these principles to particular facts, the Court has held that governmental interests did not support a lengthy detention of luggage, *United States* v. *Place*, *supra*, an airport seizure not "carefully tailored to its underlying justification," *Florida* v. *Royer*, 460 U. S. 491, 500 (1983) (plurality opinion), surgery under general anesthesia to obtain evidence, *Winston* v. *Lee*, 470 U. S. 753 (1985), or detention for fingerprinting without probable cause, *Davis* v. *Mississippi*, 394 U. S. 721 (1969); *Hayes* v. *Florida*, 470 U. S. 811 (1985). On the other hand, under the same approach it has upheld the taking of fingernail scrapings from a suspect, *Cupp* v. *Murphy*, 412 U. S. 291 (1973), an unannounced entry into a home to prevent the destruction of evidence, *Ker* v. *California*, 374 U. S. 23 (1963), administrative housing inspections without probable cause to believe that a code violation will be found, *Camara* v. *Municipal Court*, *supra*, and a blood test of a drunken-driving suspect, *Schmerber* v. *California*, 384 U. S. 757 (1966). In each of these cases, the
9 question was whether *9 the totality of the circumstances justified a particular sort of search or seizure.

B

The same balancing process applied in the cases cited above demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement.[8] It is argued that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee. Effectiveness
10 in making arrests requires the resort to deadly *10 force, or at least the meaningful threat thereof. "Being able to arrest such individuals is a condition precedent to the state's entire system of law enforcement." Brief for Petitioners 14.

Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. Cf. *Delaware* v. *Prouse*, *supra*, at 659. The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion. And while the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts,[9] the presently available evidence does not support this thesis.[10] The fact is that a majority of police
11 departments *11 in this country have forbidden the use of deadly force against nonviolent suspects. See *infra,* at 18-19. If those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases. See *Schumann* v. *McGinn*, 307 Minn. 446, 472, 240 N. W. 2d 525, 540 (1976) (Rogosheske, J., dissenting in part). Petitioners and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life.

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The **Tennessee** statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape

by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be
12 used if necessary to prevent escape, and if, where *12 feasible, some warning has been given. As applied in such circumstances, the **Tennessee** statute would pass constitutional muster.

III

A

It is insisted that the Fourth Amendment must be construed in light of the common-law rule, which allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant. As stated in Hale's posthumously published Pleas of the Crown:

> "[I]f persons that are pursued by these officers for felony or the just suspicion thereof . . . shall not yield themselves to these officers, but shall either resist or fly before they are apprehended or being apprehended shall rescue themselves and resist or fly, so that they cannot be otherwise apprehended, and are upon necessity slain therein, because they cannot be otherwise taken, it is no felony." 2 M. Hale, Historia Placitorum Coronae 85 (1736).

See also 4 W. Blackstone, Commentaries *289. Most American jurisdictions also imposed a flat prohibition against the use of deadly force to stop a fleeing misdemeanant, coupled with a general privilege to use such force to stop a fleeing felon. *E. g., Holloway* v. *Moser,* 193 N. C. 185, 136 S. E. 375 (1927); *State* v. *Smith,* 127 Iowa 534, 535, 103 N. W. 944, 945 (1905); *Reneau* v. *State,* 70 Tenn. 720 (1879); *Brooks* v. *Commonwealth,* 61 Pa. 352 (1869); *Roberts* v. *State,* 14 Mo. 138 (1851); see generally R. Perkins & R. Boyce, Criminal Law 1098-1102 (3d ed. 1982); Day, Shooting the Fleeing Felon: State of the Law, 14 Crim. L. Bull. 285, 286-287 (1978); Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 807-816 (1924). But see *Storey* v. *State,* 71 Ala. 329 (1882); *State* v. *Bryant,* 65 N. C. 327, 328 (1871); *Caldwell* v. *State,* 41 Tex. 86 (1874).

13 *13 The State and city argue that because this was the prevailing rule at the time of the adoption of the Fourth Amendment and for some time thereafter, and is still in force in some States, use of deadly force against a fleeing felon must be "reasonable." It is true that this Court has often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity. See, *e. g., United States* v. *Watson,* 423 U. S. 411, 418-419 (1976); *Gerstein* v. *Pugh,* 420 U. S. 103, 111, 114 (1975); *Carroll* v. *United States,* 267 U. S. 132, 149-153 (1925). On the other hand, it "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton* v. *New York,* 445 U. S. 573, 591, n. 33 (1980). Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry.

B

It has been pointed out many times that the common-law rule is best understood in light of the fact that it arose at a time when virtually all felonies were punishable by death.[11] "Though effected without the protections and formalities of an
14 orderly trial and conviction, the killing of a resisting or *14 fleeing felon resulted in no greater consequences than those authorized for punishment of the felony of which the individual was charged or suspected." American Law Institute, Model Penal Code § 3.07, Comment 3, p. 56 (Tentative Draft No. 8, 1958) (hereinafter Model Penal Code Comment). Courts have also justified the common-law rule by emphasizing the relative dangerousness of felons. See, *e. g., Schumann* v. *McGinn,* 307 Minn., at 458, 240 N. W. 2d, at 533; *Holloway* v. *Moser, supra,* at 187, 136 S. E., at 376 (1927).

Neither of these justifications makes sense today. Almost all crimes formerly punishable by death no longer are or can

be. See, *e. g., Enmund* v. *Florida,* 458 U. S. 782 (1982); *Coker* v. *Georgia,* 433 U. S. 584 (1977). And while in earlier times "the gulf between the felonies and the minor offences was broad and deep," 2 Pollock & Maitland 467, n. 3; *Carroll* v. *United States, supra,* at 158, today the distinction is minor and often arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies. Wilgus, 22 Mich. L. Rev., at 572-573. These changes have undermined the concept, which was questionable to begin with, that use of deadly force against a fleeing felon is merely a speedier execution of someone who has already forfeited his life. They have also made the assumption that a "felon" is more dangerous than a misdemeanant untenable. Indeed, numerous misdemeanors involve conduct more dangerous than many felonies.[12]

There is an additional reason why the common-law rule cannot be directly translated to the present day. The common-law rule developed at a time when weapons were rudimentary. Deadly force could be inflicted almost solely in a hand-
15 to-hand struggle during which, necessarily, the safety *15 of the arresting officer was at risk. Handguns were not carried by police officers until the latter half of the last century. L. Kennett & J. Anderson, The Gun in America 150-151 (1975). Only then did it become possible to use deadly force from a distance as a means of apprehension. As a practical matter, the use of deadly force under the standard articulation of the common-law rule has an altogether different meaning — and harsher consequences — now than in past centuries. See Wechsler & Michael, A Rationale for the Law of Homicide: I, 37 Colum. L. Rev. 701, 741 (1937).[13]

One other aspect of the common-law rule bears emphasis. It forbids the use of deadly force to apprehend a misdemeanant, condemning such action as disproportionately severe. See *Holloway* v. *Moser,* 193 N. C., at 187, 136 S. E., at 376; *State* v. *Smith,* 127 Iowa, at 535, 103 N. W., at 945. See generally Annot., 83 A. L. R. 3d 238 (1978).

In short, though the common-law pedigree of **Tennessee's** rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied.

C

In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing
16 *16 rules in individual jurisdictions. See, *e. g., United States* v. *Watson,* 423 U. S., at 421-422. The rules in the States are varied. See generally Comment, 18 Ga. L. Rev. 137, 140-144 (1983). Some 19 States have codified the common-law rule,[14] though in two of these the courts have significantly limited the statute.[15] Four States, though without a relevant
17 statute, apparently retain the common-law rule.[16] Two States have adopted the Model Penal Code's *17 provision verbatim.[17] Eighteen others allow, in slightly varying language, the use of deadly force only if the suspect has committed a felony involving the use or threat of physical or deadly force, or is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not arrested.[18] Louisiana and Vermont, though without statutes or case law on point, do forbid the use of deadly force to prevent any but violent felonies.[19] The remaining States either have no relevant statute or case law, or have positions that are unclear.[20]

18 *18 It cannot be said that there is a constant or overwhelming trend away from the common-law rule. In recent years, some States have reviewed their laws and expressly rejected abandonment of the common-law rule.[21] Nonetheless, the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the States.

This trend is more evident and impressive when viewed in light of the policies adopted by the police departments themselves. Overwhelmingly, these are more restrictive than the common-law rule. C. Milton, J. Halleck, J. Lardner, & G. Abrecht, Police Use of Deadly Force 45-46 (1977). The Federal Bureau of Investigation and the New York City Police Department, for example, both forbid the use of firearms except when necessary to prevent death or grievous bodily harm. *Id.,* at 40-41; App. 83. For accreditation by the Commission on Accreditation for Law Enforcement Agencies, a department must restrict the use of deadly force to situations where "the officer reasonably believes that the action is in defense of human life . . . or in defense of any person in immediate danger of serious physical injury." Commission on

Accreditation for Law Enforcement Agencies, Inc., Standards for Law Enforcement Agencies 1-2 (1983) (italics deleted). A 1974 study reported that the police department regulations in a majority of the large cities of the United States allowed
19 the firing of a weapon only when a *19 felon presented a threat of death or serious bodily harm. Boston Police Department, Planning & Research Division, The Use of Deadly Force by Boston Police Personnel (1974), cited in *Mattis* v. *Schnarr,* 547 F. 2d 1007, 1016, n. 19 (CA8 1976), vacated as moot *sub nom. Ashcroft* v. *Mattis,* 431 U. S. 171 (1977). Overall, only 7.5% of departmental and municipal policies explicitly permit the use of deadly force against any felon; 86.8% explicitly do not. K. Matulia, A Balance of Forces: A Report of the International Association of Chiefs of Police 161 (1982) (table). See also Record 1108-1368 (written policies of 44 departments). See generally W. Geller & K. Karales, Split-Second Decisions 33-42 (1981); Brief for Police Foundation et al. as *Amici Curiae.* In light of the rules adopted by those who must actually administer them, the older and fading common-law view is a dubious indicium of the constitutionality of the **Tennessee** statute now before us.

D

Actual departmental policies are important for an additional reason. We would hesitate to declare a police practice of long standing "unreasonable" if doing so would severely hamper effective law enforcement. But the indications are to the contrary. There has been no suggestion that crime has worsened in any way in jurisdictions that have adopted, by legislation or departmental policy, rules similar to that announced today. *Amici* note that "[a]fter extensive research and consideration, [they] have concluded that laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime-fighting ability of law enforcement agencies." *Id.,* at 11. The submission is that the obvious state interests in apprehension are not sufficiently served to warrant the use of lethal weapons against all fleeing felons. See *supra,* at 10-11, and n. 10.

20 *20 Nor do we agree with petitioners and appellant that the rule we have adopted requires the police to make impossible, split-second evaluations of unknowable facts. See Brief for Petitioners 25; Brief for Appellant 11. We do not deny the practical difficulties of attempting to assess the suspect's dangerousness. However, similarly difficult judgments must be made by the police in equally uncertain circumstances. See, *e. g., Terry* v. *Ohio,* 392 U. S., at 20, 27. Nor is there any indication that in States that allow the use of deadly force only against dangerous suspects, see nn. 15, 17-19, *supra,* the standard has been difficult to apply or has led to a rash of litigation involving inappropriate second-guessing of police officers' split-second decisions. Moreover, the highly technical felony/misdemeanor distinction is equally, if not more, difficult to apply in the field. An officer is in no position to know, for example, the precise value of property stolen, or whether the crime was a first or second offense. Finally, as noted above, this claim must be viewed with suspicion in light of the similar self-imposed limitations of so many police departments.

IV

The District Court concluded that Hymon was justified in shooting **Garner** because state law allows, and the Federal Constitution does not forbid, the use of deadly force to prevent the escape of a fleeing felony suspect if no alternative means of apprehension is available. See App. to Pet. for Cert. A9-A11, A38. This conclusion made a determination of **Garner's** apparent dangerousness unnecessary. The court did find, however, that **Garner** appeared to be unarmed, though Hymon could not be certain that was the case. *Id.,* at A4, A23. See also App. 41, 56; Record 219. Restated in Fourth Amendment terms, this means Hymon had no articulable basis to think **Garner** was armed.

In reversing, the Court of Appeals accepted the District Court's factual conclusions and held that "the facts, as found, did
21 not justify the use of deadly force." 710 F. 2d, at 246. *21 We agree. Officer Hymon could not reasonably have believed that **Garner** — young, slight, and unarmed — posed any threat. Indeed, Hymon never attempted to justify his actions on any basis other than the need to prevent an escape. The District Court stated in passing that "[t]he facts of this case did not indicate to Officer Hymon that **Garner** was `nondangerous.' " App. to Pet. for Cert. A34. This conclusion is not explained, and seems to be based solely on the fact that **Garner** had broken into a house at night. However, the fact that

Garner was a suspected burglar could not, without regard to the other circumstances, automatically justify the use of deadly force. Hymon did not have probable cause to believe that **Garner**, whom he correctly believed to be unarmed, posed any physical danger to himself or others.

The dissent argues that the shooting was justified by the fact that Officer Hymon had probable cause to believe that **Garner** had committed a nighttime burglary. *Post,* at 29, 32. While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force. The FBI classifies burglary as a "property" rather than a "violent" crime. See Federal Bureau of Investigation, Uniform Crime Reports, Crime in the United States 1 (1984).[22] Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous. This case demonstrates as much. See also *Solem* v. *Helm,* 463 U. S. 277, 296-297, and nn. 22-23 (1983). In fact, the available statistics demonstrate that burglaries only rarely involve physical violence. During the 10-year period from 1973-1982, only 3.8% of all burglaries
22 involved violent crime. Bureau of Justice Statistics, Household *22 Burglary 4 (1985).[23] See also T. Reppetto, Residential Crime 17, 105 (1974); Conklin & Bittner, Burglary in a Suburb, 11 Criminology 208, 214 (1973).

V

We wish to make clear what our holding means in the context of this case. The complaint has been dismissed as to all the individual defendants. The State is a party only by virtue of 28 U. S. C. § 2403(b) and is not subject to liability. The possible liability of the remaining defendants — the Police Department and the city of Memphis — hinges on *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658 (1978), and is left for remand. We hold that the statute is invalid insofar as it purported to give Hymon the authority to act as he did. As for the policy of the Police Department, the absence of any discussion of this issue by the courts below, and the uncertain state of the record, preclude any consideration of its validity.

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

23 The Court today holds that the Fourth Amendment prohibits a police officer from using deadly force as a last resort to *23 apprehend a criminal suspect who refuses to halt when fleeing the scene of a nighttime burglary. This conclusion rests on the majority's balancing of the interests of the suspect and the public interest in effective law enforcement. *Ante,* at 8. Notwithstanding the venerable common-law rule authorizing the use of deadly force if necessary to apprehend a fleeing felon, and continued acceptance of this rule by nearly half the States, *ante,* at 14, 16-17, the majority concludes that **Tennessee's** statute is unconstitutional inasmuch as it allows the use of such force to apprehend a burglary suspect who is not obviously armed or otherwise dangerous. Although the circumstances of this case are unquestionably tragic and unfortunate, our constitutional holdings must be sensitive both to the history of the Fourth Amendment and to the general implications of the Court's reasoning. By disregarding the serious and dangerous nature of residential burglaries and the longstanding practice of many States, the Court effectively creates a Fourth Amendment right allowing a burglary suspect to flee unimpeded from a police officer who has probable cause to arrest, who has ordered the suspect to halt, and who has no means short of firing his weapon to prevent escape. I do not believe that the Fourth Amendment supports such a right, and I accordingly dissent.

I

The facts below warrant brief review because they highlight the difficult, split-second decisions police officers must make in these circumstances. Memphis Police Officers Elton Hymon and Leslie Wright responded to a late-night call that a burglary was in progress at a private residence. When the officers arrived at the scene, the caller said that "they" were

breaking into the house next door. App. in No. 81-5605 (CA6), p. 207. The officers found the residence had been forcibly
24 entered through a window and saw lights *24 on inside the house. Officer Hymon testified that when he saw the broken window he realized "that something was wrong inside," *id.,* at 656, but that he could not determine whether anyone — either a burglar or a member of the household — was within the residence. *Id.,* at 209. As Officer Hymon walked behind the house, he heard a door slam. He saw Edward Eugene **Garner** run away from the house through the dark and cluttered backyard. **Garner** crouched next to a 6-foot-high fence. Officer Hymon thought **Garner** was an adult and was unsure whether **Garner** was armed because Hymon "had no idea what was in the hand [that he could not see] or what he might have had on his person." *Id.,* at 658-659. In fact, **Garner** was 15 years old and unarmed. Hymon also did not know whether accomplices remained inside the house. *Id.,* at 657. The officer identified himself as a police officer and ordered **Garner** to halt. **Garner** paused briefly and then sprang to the top of the fence. Believing that **Garner** would escape if he climbed over the fence, Hymon fired his revolver and mortally wounded the suspected burglar.

Appellee-respondent, the deceased's father, filed a 42 U. S. C. § 1983 action in federal court against Hymon, the city of Memphis, and other defendants, for asserted violations of **Garner's** constitutional rights. The District Court for the Western District of **Tennessee** held that Officer Hymon's actions were justified by a **Tennessee** statute that authorizes a police officer to "use all the necessary means to effect the arrest," if "after notice of the intention to arrest the defendant, he either flee or forcibly resist." Tenn. Code Ann. § 40-7-108 (1982). As construed by the **Tennessee** courts, this statute allows the use of deadly force only if a police officer has probable cause to believe that a person has committed a felony, the officer warns the person that he intends to arrest him, and the officer reasonably believes that no means less than
25 such force will prevent the escape. See, *e. g., Johnson* v. *State,* 173 Tenn. 134, 114 S. W. 2d 819 *25 (1938). The District Court held that the **Tennessee** statute is constitutional and that Hymon's actions as authorized by that statute did not violate **Garner's** constitutional rights. The Court of Appeals for the Sixth Circuit reversed on the grounds that the **Tennessee** statute "authorizing the killing of an unarmed, nonviolent fleeing felon by police in order to prevent escape" violates the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. 710 F. 2d 240, 244 (1983).

The Court affirms on the ground that application of the **Tennessee** statute to authorize Officer Hymon's use of deadly force constituted an unreasonable seizure in violation of the Fourth Amendment. The precise issue before the Court deserves emphasis, because both the decision below and the majority obscure what must be decided in this case. The issue is not the constitutional validity of the **Tennessee** statute on its face or as applied to some hypothetical set of facts. Instead, the issue is whether the use of deadly force by Officer Hymon under the circumstances of this case violated **Garner's** constitutional rights. Thus, the majority's assertion that a police officer who has probable cause to seize a suspect "may not always do so by killing him," *ante,* at 9, is unexceptionable but also of little relevance to the question presented here. The same is true of the rhetorically stirring statement that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *ante,* at 11. The question we must address is whether the Constitution allows the use of such force to apprehend a suspect who resists arrest by attempting to flee the scene of a nighttime burglary of a residence.

II

For purposes of Fourth Amendment analysis, I agree with the Court that Officer Hymon "seized" **Garner** by shooting him. Whether that seizure was reasonable and therefore permitted by the Fourth Amendment requires a careful balancing
26 *26 of the important public interest in crime prevention and detection and the nature and quality of the intrusion upon legitimate interests of the individual. *United States* v. *Place,* 462 U. S. 696, 703 (1983). In striking this balance here, it is crucial to acknowledge that police use of deadly force to apprehend a fleeing criminal suspect falls within the "rubric of police conduct . . . necessarily [involving] swift action predicated upon the on-the-spot observations of the officer on the beat." *Terry* v. *Ohio,* 392 U. S. 1, 20 (1968). The clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances. Moreover, I am far more reluctant than is the Court to conclude that the Fourth Amendment proscribes a police practice that was accepted at the time of the adoption of the Bill of Rights and has continued to receive the support of many state legislatures. Although the Court has recognized that the requirements of the Fourth Amendment must respond to the reality of social and technological change, fidelity to the notion of *constitutional* — as opposed to purely judicial — limits on governmental

action requires us to impose a heavy burden on those who claim that practices accepted when the Fourth Amendment was adopted are now constitutionally impermissible. See, *e. g., United States* v. *Watson,* 423 U. S. 411, 416-421 (1976); *Carroll* v. *United States,* 267 U. S. 132, 149-153 (1925). Cf. *United States* v. *Villamonte-Marquez,* 462 U. S. 579, 585 (1983) (noting "impressive historical pedigree" of statute challenged under Fourth Amendment).

The public interest involved in the use of deadly force as a last resort to apprehend a fleeing burglary suspect relates primarily to the serious nature of the crime. Household burglaries not only represent the illegal entry into a person's home, but also "pos[e] real risk of serious harm to others." *Solem* v. *Helm,* 463 U. S. 277, 315-316 (1983) (BURGER, C.
27 J., dissenting). According to recent Department of Justice statistics, "[t]hree-fifths of all rapes in the home, *27 three-fifths of all home robberies, and about a third of home aggravated and simple assaults are committed by burglars." Bureau of Justice Statistics Bulletin, Household Burglary 1 (January 1985). During the period 1973-1982, 2.8 million such violent crimes were committed in the course of burglaries. *Ibid.* Victims of a forcible intrusion into their home by a nighttime prowler will find little consolation in the majority's confident assertion that "burglaries only rarely involve physical violence." *Ante,* at 21. Moreover, even if a particular burglary, when viewed in retrospect, does not involve physical harm to others, the "harsh potentialities for violence" inherent in the forced entry into a home preclude characterization of the crime as "innocuous, inconsequential, minor, or `nonviolent.' " *Solem* v. *Helm, supra,* at 316 (BURGER, C. J., dissenting). See also Restatement of Torts § 131, Comment *g* (1934) (burglary is among felonies that normally cause or threaten death or serious bodily harm); R. Perkins & R. Boyce, Criminal Law 1110 (3d ed. 1982) (burglary is dangerous felony that creates unreasonable risk of great personal harm).

Because burglary is a serious and dangerous felony, the public interest in the prevention and detection of the crime is of compelling importance. Where a police officer has probable cause to arrest a suspected burglar, the use of deadly force as a last resort might well be the only means of apprehending the suspect. With respect to a particular burglary, subsequent investigation simply cannot represent a substitute for immediate apprehension of the criminal suspect at the scene. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Challenge of Crime in a Free Society 97 (1967). Indeed, the Captain of the Memphis Police Department testified that in his city, if apprehension is not immediate, it is likely that the suspect will not be caught. App. in No. 81-5605 (CA6), p. 334. Although some law enforcement agencies may choose to assume the risk that a criminal will remain at large, the
28 *28 **Tennessee** statute reflects a legislative determination that the use of deadly force in prescribed circumstances will serve generally to protect the public. Such statutes assist the police in apprehending suspected perpetrators of serious crimes and provide notice that a lawful police order to stop and submit to arrest may not be ignored with impunity. See, *e. g., Wiley* v. *Memphis Police Department,* 548 F. 2d 1247, 1252-1253 (CA6), cert. denied, 434 U. S. 822 (1977); *Jones* v. *Marshall,* 528 F. 2d 132, 142 (CA2 1975).

The Court unconvincingly dismisses the general deterrence effects by stating that "the presently available evidence does not support [the] thesis" that the threat of force discourages escape and that "there is a substantial basis for doubting that the use of such force is an essential attribute to the arrest power in all felony cases." *Ante,* at 10, 11. There is no question that the effectiveness of police use of deadly force is arguable and that many States or individual police departments have decided not to authorize it in circumstances similar to those presented here. But it should go without saying that the effectiveness or popularity of a particular police practice does not determine its constitutionality. Cf. *Spaziano* v. *Florida,* 468 U. S. 447, 464 (1984) ("The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws"). Moreover, the fact that police conduct pursuant to a state statute is challenged on constitutional grounds does not impose a burden on the State to produce social science statistics or to dispel any possible doubts about the necessity of the conduct. This observation, I believe, has particular force where the challenged practice both predates enactment of the Bill of Rights and continues to be accepted by a substantial number of the States.

Against the strong public interests justifying the conduct at issue here must be weighed the individual interests
29 implicated in the use of deadly force by police officers. The *29 majority declares that "[t]he suspect's fundamental interest in his own life need not be elaborated upon." *Ante,* at 9. This blithe assertion hardly provides an adequate substitute for the majority's failure to acknowledge the distinctive manner in which the suspect's interest in his life is even exposed to risk. For purposes of this case, we must recall that the police officer, in the course of investigating a nighttime

burglary, had reasonable cause to arrest the suspect and ordered him to halt. The officer's use of force resulted because the suspected burglar refused to heed this command and the officer reasonably believed that there was no means short of firing his weapon to apprehend the suspect. Without questioning the importance of a person's interest in his life, I do not think this interest encompasses a right to flee unimpeded from the scene of a burglary. Cf. *Payton* v. *New York,* 445 U. S. 573, 617, n. 14 (1980) (WHITE, J., dissenting) ("[T]he policeman's hands should not be tied merely because of the possibility that the suspect will fail to cooperate with legitimate actions by law enforcement personnel"). The legitimate interests of the suspect in these circumstances are adequately accommodated by the **Tennessee** statute: to avoid the use of deadly force and the consequent risk to his life, the suspect need merely obey the valid order to halt.

A proper balancing of the interests involved suggests that use of deadly force as a last resort to apprehend a criminal suspect fleeing from the scene of a nighttime burglary is not unreasonable within the meaning of the Fourth Amendment. Admittedly, the events giving rise to this case are in retrospect deeply regrettable. No one can view the death of an unarmed and apparently nonviolent 15-year-old without sorrow, much less disapproval. Nonetheless, the reasonableness of Officer Hymon's conduct for purposes of the Fourth Amendment cannot be evaluated by what later appears to have been a preferable course of police action. The officer pursued a suspect in the darkened backyard of a
30 house that from all indications had just been burglarized. The *30 police officer was not certain whether the suspect was alone or unarmed; nor did he know what had transpired inside the house. He ordered the suspect to halt, and when the suspect refused to obey and attempted to flee into the night, the officer fired his weapon to prevent escape. The reasonableness of this action for purposes of the Fourth Amendment is not determined by the unfortunate nature of this particular case; instead, the question is whether it is constitutionally impermissible for police officers, as a last resort, to shoot a burglary suspect fleeing the scene of the crime.

Because I reject the Fourth Amendment reasoning of the majority and the Court of Appeals, I briefly note that no other constitutional provision supports the decision below. In addition to his Fourth Amendment claim, appellee-respondent also alleged violations of due process, the Sixth Amendment right to trial by jury, and the Eighth Amendment proscription of cruel and unusual punishment. These arguments were rejected by the District Court and, except for the due process claim, not addressed by the Court of Appeals. With respect to due process, the Court of Appeals reasoned that statutes affecting the fundamental interest in life must be "narrowly drawn to express only the legitimate state interests at stake." 710 F. 2d, at 245. The Court of Appeals concluded that a statute allowing police use of deadly force is narrowly drawn and therefore constitutional only if the use of such force is limited to situations in which the suspect poses an immediate threat to others. *Id.,* at 246-247. Whatever the validity of **Tennessee's** statute in other contexts, I cannot agree that its application in this case resulted in a deprivation "without due process of law." Cf. *Baker* v. *McCollan,* 443 U. S. 137, 144-145 (1979). Nor do I believe that a criminal suspect who is shot while trying to avoid apprehension has a cognizable claim of a deprivation of his Sixth Amendment right to trial by jury. See *Cunningham* v. *Ellington,* 323 F. Supp. 1072,
31 1075-1076 (WD Tenn. 1971) (three-judge court). Finally, because there is no indication that the use *31 of deadly force was intended to punish rather than to capture the suspect, there is no valid claim under the Eighth Amendment. See *Bell* v. *Wolfish,* 441 U. S. 520, 538-539 (1979). Accordingly, I conclude that the District Court properly entered judgment against appellee-respondent, and I would reverse the decision of the Court of Appeals.

III

Even if I agreed that the Fourth Amendment was violated under the circumstances of this case, I would be unable to join the Court's opinion. The Court holds that deadly force may be used only if the suspect "threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm." *Ante,* at 11. The Court ignores the more general implications of its reasoning. Relying on the Fourth Amendment, the majority asserts that it is constitutionally unreasonable to *use* deadly force against fleeing criminal suspects who do not appear to pose a threat of serious physical harm to others. *Ibid.* By declining to limit its holding to the use of firearms, the Court unnecessarily implies that the Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk. Cf. *Los Angeles* v. *Lyons,* 461 U. S. 95 (1983).

Although it is unclear from the language of the opinion, I assume that the majority intends the word "use" to include only

those circumstances in which the suspect is actually apprehended. Absent apprehension of the suspect, there is no "seizure" for Fourth Amendment purposes. I doubt that the Court intends to allow criminal suspects who successfully escape to return later with § 1983 claims against officers who used, albeit unsuccessfully, deadly force in their futile
32 attempt to capture the fleeing suspect. The Court's opinion, despite its broad language, actually decides only that the *32 shooting of a fleeing burglary suspect who was in fact neither armed nor dangerous can support a § 1983 action.

The Court's silence on critical factors in the decision to use deadly force simply invites second-guessing of difficult police decisions that must be made quickly in the most trying of circumstances. Cf. *Payton* v. *New York,* 445 U. S., at 619 (WHITE, J., dissenting). Police are given no guidance for determining which objects, among an array of potentially lethal weapons ranging from guns to knives to baseball bats to rope, will justify the use of deadly force. The Court also declines to outline the additional factors necessary to provide "probable cause" for believing that a suspect "poses a significant threat of death or serious physical injury," *ante,* at 3, when the officer has probable cause to arrest and the suspect refuses to obey an order to halt. But even if it were appropriate in this case to limit the use of deadly force to that ambiguous class of suspects, I believe the class should include nighttime residential burglars who resist arrest by attempting to flee the scene of the crime. We can expect an escalating volume of litigation as the lower courts struggle to determine if a police officer's split-second decision to shoot was justified by the danger posed by a particular object and other facts related to the crime. Thus, the majority opinion portends a burgeoning area of Fourth Amendment doctrine concerning the circumstances in which police officers can reasonably employ deadly force.

IV

The Court's opinion sweeps broadly to adopt an entirely new standard for the constitutionality of the use of deadly force to apprehend fleeing felons. Thus, the Court "lightly brushe[s] aside," *Payton* v. *New York, supra,* at 600, a longstanding police practice that predates the Fourth Amendment and continues to receive the approval of nearly half of the state
33 legislatures. I cannot accept the majority's creation of a constitutional right to flight for burglary suspects *33 seeking to avoid capture at the scene of the crime. Whatever the constitutional limits on police use of deadly force in order to apprehend a fleeing felon, I do not believe they are exceeded in a case in which a police officer has probable cause to arrest a suspect at the scene of a residential burglary, orders the suspect to halt, and then fires his weapon as a last resort to prevent the suspect's escape into the night. I respectfully dissent.

[*] Together with No. 83-1070, *Memphis Police Department et al.* v. ***Garner** et al.,* on certiorari to the same court.

[†] Briefs of *amici curiae* urging affirmance were filed for the Florida Chapter of the National Bar Association by *Deitra Micks;* and for the Police Foundation et al. by *William Josephson, Robert Kasanof, Philip Lacovara,* and *Margaret Bush Wilson.*

[1] The owner of the house testified that no lights were on in the house, but that a back door light was on. Record 160. Officer Hymon, though uncertain, stated in his deposition that there were lights on in the house. *Id.,* at 209.

[2] In fact, **Garner**, an eighth-grader, was 15. He was 5' 4" tall and weighed somewhere around 100 or 110 pounds. App. to Pet. for Cert. A5.

[3] When asked at trial why he fired, Hymon stated:

"Well, first of all it was apparent to me from the little bit that I knew about the area at the time that he was going to get away because, number 1, I couldn't get to him. My partner then couldn't find where he was because, you know, he was late coming around. He didn't know where I was talking about. I couldn't get to him because of the fence here, I couldn't have jumped this fence and come up, consequently jumped this fence and caught him before he got away because he was already up on the fence, just one leap and he was already over the fence, and so there is no way that I could have caught him." App. 52.

He also stated that the area beyond the fence was dark, that he could not have gotten over the fence easily because he was carrying a lot of equipment and wearing heavy boots, and that **Garner**, being younger and more energetic, could have outrun him. *Id.,* at 53-54.

[4] **Garner** had rummaged through one room in the house, in which, in the words of the owner, "[a]ll the stuff was out on the floors, all the drawers was pulled out, and stuff was scattered all over." *Id.,* at 34. The owner testified that his valuables were untouched but that, in addition to the purse and the 10 dollars, one of his wife's rings was missing. The ring was not recovered. *Id.,* at 34-35.

[5] Although the statute does not say so explicitly, **Tennessee** law forbids the use of deadly force in the arrest of a misdemeanant. See *Johnson* v. *State*, 173 Tenn. 134, 114 S. W. 2d 819 (1938).

[6] "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." U. S. Const., Amdt. 4.

[7] The Court of Appeals concluded that the rule set out in the Model Penal Code "accurately states Fourth Amendment limitations on the use of deadly force against fleeing felons." 710 F. 2d, at 247. The relevant portion of the Model Penal Code provides:

"The use of deadly force is not justifiable . . . unless (i) the arrest is for a felony; and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed." American Law Institute, Model Penal Code § 3.07(2)(b) (Proposed Official Draft 1962).

The court also found that "[a]n analysis of the facts of this case under the Due Process Clause" required the same result, because the statute was not narrowly drawn to further a compelling state interest. 710 F. 2d, at 246-247. The court considered the generalized interest in effective law enforcement sufficiently compelling only when the the suspect is dangerous. Finally, the court held, relying on *Owen* v. *City of Independence*, 445 U. S. 622 (1980), that the city was not immune.

[8] The dissent emphasizes that subsequent investigation cannot replace immediate apprehension. We recognize that this is so, see n. 13, *infra;* indeed, that is the reason why there is any dispute. If subsequent arrest were assured, no one would argue that use of deadly force was justified. Thus, we proceed on the assumption that subsequent arrest is not likely. Nonetheless, it should be remembered that failure to apprehend at the scene does not necessarily mean that the suspect will never be caught.

In lamenting the inadequacy of later investigation, the dissent relies on the report of the President's Commission on Law Enforcement and Administration of Justice. It is worth noting that, notwithstanding its awareness of this problem, the Commission itself proposed a policy for use of deadly force arguably even more stringent than the formulation we adopt today. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 189 (1967). The Commission proposed that deadly force be used only to apprehend "perpetrators who, in the course of their crime threatened the use of deadly force, or if the officer believes there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if his apprehension is delayed." In addition, the officer would have "to know, as a virtual certainty, that the suspect committed an offense for which the use of deadly force is permissible." *Ibid.*

[9] We note that the usual manner of deterring illegal conduct — through punishment — has been largely ignored in connection with flight from arrest. Arkansas, for example, specifically excepts flight from arrest from the offense of "obstruction of governmental operations." The commentary notes that this "reflects the basic policy judgment that, absent the use of force or violence, a mere attempt to avoid apprehension by a law enforcement officer does not give rise to an independent offense." Ark. Stat. Ann. § 41-2802(3)(a) (1977) and commentary. In the few States that do outlaw flight from an arresting officer, the crime is only a misdemeanor. See, *e. g.,* Ind. Code § 35-44-3-3 (1982). Even forceful resistance, though generally a separate offense, is classified as a misdemeanor. *E. g.,* Ill. Rev. Stat., ch. 38, ¶ 31-1 (1984); Mont. Code Ann. § 45-7-301 (1984); N. H. Rev. Stat. Ann. § 642:2 (Supp. 1983); Ore. Rev. Stat. § 162.315 (1983).

This lenient approach does avoid the anomaly of automatically transforming every fleeing misdemeanant into a fleeing felon — subject, under the common-law rule, to apprehension by deadly force — solely by virtue of his flight. However, it is in real tension with the harsh consequences of flight in cases where deadly force is employed. For example, **Tennessee** does not outlaw fleeing from arrest. The Memphis City Code does, § 22-34.1 (Supp. 17, 1971), subjecting the offender to a maximum fine of $50, § 1-8 (1967). Thus, **Garner's** attempted escape subjected him to (a) a $50 fine, and (b) being shot.

[10] See Sherman, Reducing Police Gun use, in Control in the Police Organization 98, 120-123 (M. Punch ed. 1983); Fyfe, Observations on Police Deadly Force, 27 Crime & Delinquency 376, 378-381 (1981); W. Geller & K. Karales, Split-Second Decisions 67 (1981); App. 84 (affidavit of William Bracey, Chief of Patrol, New York City Police Department). See generally Brief for Police Foundation et al. as *Amici Curiae.*

[11] The roots of the concept of a "felony" lie not in capital punishment but in forfeiture. 2 F. Pollock & F. Maitland, The History of English Law 465 (2d ed. 1909) (hereinafter Pollock & Maitland). Not all felonies were always punishable by death. See *id.,* at 466-467, n. 3. Nonetheless, the link was profound. Blackstone was able to write: "The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offence felony, the law implies that is shall be punished with death, *viz.* by hanging, as well as with forfeiture . . . ." 4 W. Blackstone, Commentaries *98. See also R. Perkins & R. Boyce, Criminal Law 14-15 (3d ed. 1982); 2 Pollock & Maitland 511.

[12] White-collar crime, for example, poses a less significant physical threat than, say, drunken driving. See *Welsh* v. *Wisconsin,* 466 U. S. 740 (1984); *id.,* at 755 (BLACKMUN, J., concurring). See Model Penal Code Comment, at 57.

[13] It has been argued that sophisticated techniques of apprehension and increased communication between the police in different jurisdictions have made it more likely that an escapee will be caught than was once the case, and that this change has also reduced the "reasonableness" of the use of deadly force to prevent escape. *E. g.,* Sherman, Execution Without Trial: Police Homicide and the Constitution, 33 Vand. L. Rev. 71, 76 (1980). We are unaware of any data that would permit sensible evaluation of this claim. Current arrest rates are sufficiently low, however, that we have some doubt whether in past centuries the failure to arrest at the scene meant that the police had missed their only chance in a way that is not presently the case. In 1983, 21% of the offenses in the Federal Bureau of Investigation crime index were cleared by arrest. Federal Bureau of Investigation, Uniform Crime Reports, Crime in the United States 159 (1984). The clearance rate for burglary was 15%. *Ibid.*

[14] Ala. Code § 13A-3-27 (1982); Ark. Stat. Ann. § 41-510 (1977); Cal. Penal Code Ann. § 196 (West 1970); Conn. Gen. Stat. § 53a-22 (1972); Fla. Stat. § 776.05 (1983); Idaho Code § 19-610 (1979); Ind. Code § 35-41-3-3 (1982); Kan. Stat. Ann. § 21-3215 (1981); Miss. Code Ann. § 97-3-15(d) (Supp. 1984); Mo. Rev. Stat. § 563.046 (1979); Nev. Rev. Stat. § 200.140 (1983); N. M. Stat. Ann. § 30-2-6 (1984); Okla. Stat., Tit. 21, § 732 (1981); R. I. Gen. Laws § 12-7-9 (1981); S. D. Codified Laws §§ 22-16-32, 22-16-33 (1979); Tenn. Code Ann. § 40-7-108 (1982); Wash. Rev. Code § 9A.16.040(3) (1977). Oregon limits use of deadly force to violent felons, but also allows its use against any felon if "necessary." Ore. Rev. Stat. § 161.239 (1983). Wisconsin's statute is ambiguous, but should probably be added to this list. Wis. Stat. § 939.45(4) (1981-1982) (officer may use force necessary for "a reasonable accomplishment of a lawful arrest"). But see *Clark* v. *Ziedonis,* 368 F. Supp. 544 (ED Wis. 1973), aff'd on other grounds, 513 F. 2d 79 (CA7 1975).

[15] In California, the police may use deadly force to arrest only if the crime for which the arrest is sought was "a forcible and atrocious one which threatens death or serious bodily harm," or there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if apprehension is delayed. *Kortum* v. *Alkire,* 69 Cal. App. 3d 325, 333, 138 Cal. Rptr. 26, 30-31 (1977). See also *People* v. *Ceballos,* 12 Cal. 3d 470, 476-484, 526 P. 2d 241, 245-250 (1974); *Long Beach Police Officers Assn.* v. *Long Beach,* 61 Cal. App. 3d 364, 373-374, 132 Cal. Rptr. 348, 353-354 (1976). In Indiana, deadly force may be used only to prevent injury, the imminent danger of injury or force, or the threat of force. It is not permitted simply to prevent escape. *Rose* v. *State,* 431 N. E. 2d 521 (Ind. App. 1982).

[16] These are Michigan, Ohio, Virginia, and West Virginia. *Werner* v. *Hartfelder,* 113 Mich. App. 747, 318 N. W. 2d 825 (1982); *State* v. *Foster,* 60 Ohio Misc. 46, 59-66, 396 N. E. 2d 246, 255-258 (Com. Pl. 1979) (citing cases); *Berry* v. *Hamman,* 203 Va. 596, 125 S. E. 2d 851 (1962); *Thompson* v. *Norfolk & W. R. Co.,* 116 W. Va. 705, 711-712, 182 S. E. 880, 883-884 (1935).

[17] Haw. Rev. Stat. § 703-307 (1976); Neb. Rev. Stat. § 28-1412 (1979). Massachusetts probably belongs in this category. Though it once rejected distinctions between felonies, *Uraneck* v. *Lima,* 359 Mass. 749, 750, 269 N. E. 2d 670, 671 (1971), it has since adopted the Model Penal Code limitations with regard to private citizens, *Commonwealth* v. *Klein,* 372 Mass. 823, 363 N. E. 2d 1313 (1977), and seems to have extended that decision to police officers, *Julian* v. *Randazzo,* 380 Mass. 391, 403 N. E. 2d 931 (1980).

[18] Alaska Stat. Ann. § 11.81.370(a) (1983); Ariz. Rev. Stat. Ann. § 13-410 (1978); Colo. Rev. Stat. § 18-1-707 (1978); Del. Code Ann., Tit. 11, § 467 (1979) (felony involving physical force *and* a substantial risk that the suspect will cause death or serious bodily injury *or* will never be recaptured); Ga. Code § 16-3-21(a) (1984); Ill. Rev. Stat., ch. 38, ¶ 7-5 (1984); Iowa Code § 804.8 (1983) (suspect has used or threatened deadly force in commission of a felony, or would use deadly force if not caught); Ky. Rev. Stat. § 503.090 (1984) (suspect committed felony involving use or threat of physical force likely to cause death or serious injury, *and* is likely to endanger life unless apprehended without delay); Me. Rev. Stat. Ann., Tit. 17-A, § 107 (1983) (commentary notes that deadly force may be used only "where the person to be arrested poses a threat to human life"); Minn. Stat. § 609.066 (1984); N. H. Rev. Stat. Ann. § 627:5(II) (Supp. 1983); N. J. Stat. Ann. § 2C-3-7 (West 1982); N. Y. Penal Law § 35.30 (McKinney Supp. 1984-1985); N. C. Gen. Stat. § 15A-401 (1983); N. D. Cent. Code § 12.1-05-07.2.d (1976); 18 Pa. Cons. Stat. § 508 (1982); Tex. Penal Code Ann. § 9.51(c) (1974); Utah Code Ann. § 76-2-404 (1978).

[19] See La. Rev. Stat. Ann. § 14:20(2) (West 1974); Vt. Stat. Ann., Tit. 13, § 2305 (1974 and Supp. 1984). A Federal District Court has interpreted the Louisiana statute to limit the use of deadly force against fleeing suspects to situations where "life itself is endangered or great bodily harm is threatened." *Sauls* v. *Hutto,* 304 F. Supp. 124, 132 (ED La. 1969).

[20] These are Maryland, Montana, South Carolina, and Wyoming. A Maryland appellate court has indicated, however, that deadly force may not be used against a felon who "was in the process of fleeing and, at the time, presented no immediate danger to . . . anyone . . . ." *Giant Food, Inc.* v. *Scherry,* 51 Md. App. 586, 589, 596, 444 A. 2d 483, 486, 489 (1982).

[21] In adopting its current statute in 1979, for example, Alabama expressly chose the common-law rule over more restrictive provisions. Ala. Code § 13A-3-27, Commentary, pp. 67-63 (1982). Missouri likewise considered but rejected a proposal akin to the Model Penal Code rule. See *Mattis* v. *Schnarr,* 547 F. 2d 1007, 1022 (CA8 1976) (Gibson, C. J., dissenting), vacated as moot *sub nom.* *Ashcroft* v.

Mattis, 431 U. S. 171 (1977). Idaho, whose current statute codifies the common-law rule, adopted the Model Penal Code in 1971, but abandoned it in 1972.

[22] In a recent report, the Department of Corrections of the District of Columbia also noted that "there is nothing inherently dangerous or violent about the offense," which is a crime against property. D. C. Department of Corrections, Prisoner Screening Project 2 (1985).

[23] The dissent points out that three-fifths of all rapes in the home, three-fifths of all home robberies, and about a third of home assaults are committed by burglars. *Post,* at 26-27. These figures mean only that if one knows that a suspect committed a rape in the home, there is a good chance that the suspect is also a burglar. That has nothing to do with the question here, which is whether the fact that someone has committed a burglary indicates that he has committed, or might commit, a violent crime.

The dissent also points out that this 3.8% adds up to 2.8 million violent crimes over a 10-year period, as if to imply that today's holding will let loose 2.8 million violent burglars. The relevant universe is, of course, far smaller. At issue is only that tiny fraction of cases where violence has taken place and an officer who has no other means of apprehending the suspect is unaware of its occurrence.

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489 U.S. 593 (1989)

BROWER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CALDWELL (BROWER), ET AL.
v.
COUNTY OF INYO ET AL.

No. 87-248.

Supreme Court of United States.

Argued January 11, 1989
Decided March 21, 1989
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

594 *594 *Robert G. Gilmore* argued the cause for petitioners. With him on the briefs was *Craig A. Diamond.*

Philip W. McDowell argued the cause for respondents. With him on the brief was *Gregory L. James.*

JUSTICE SCALIA delivered the opinion of the Court.

On the night of October 23, 1984, William James Caldwell (Brower) was killed when the stolen car that he had been driving at high speeds for approximately 20 miles in an effort to elude pursuing police crashed into a police roadblock. His heirs, petitioners here, brought this action in Federal District Court under 42 U. S. C. § 1983, claiming, *inter alia,* that respondents used "brutal, excessive, unreasonable and unnecessary physical force" in establishing the roadblock, and thus effected an unreasonable seizure of Brower, in violation of the Fourth Amendment. Petitioners alleged that "under color of statutes, regulations, customs and usages," respondents (1) caused an 18-wheel tractor-trailer to be placed across both lanes of a two-lane highway in the path of Brower's flight, (2) "effectively concealed" this roadblock by placing it behind a curve and leaving it unilluminated, and (3) positioned a police car, with its headlights on, between Brower's oncoming vehicle and the truck, so that Brower would be "blinded" on his approach. App. 8-9. Petitioners further alleged that Brower's fatal collision with the truck was "a proximate result" of this official conduct. *Id.,* at 9. The District Court granted respondents' motion to dismiss the complaint for failure to state a claim on the ground (insofar as the Fourth Amendment claim was concerned) that "establishing a roadblock [was] not unreasonable under the circumstances." App. to Pet. for Cert. A-21. A divided panel of the Court of Appeals for the Ninth Circuit affirmed the dismissal of the Fourth Amendment claim on the basis that no "seizure" had occurred. 817 F. 2d 540, 545-546 (1987). We
595 granted certiorari, 487 U. S. 1217 (1988), to resolve a conflict between that decision and the contrary holding *595 of the Court of Appeals for the Fifth Circuit in *Jamieson* v. *Shaw,* 772 F. 2d 1205 (1985).

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

In *Tennessee* v. *Garner,* 471 U. S. 1 (1985), all Members of the Court agreed that a police officer's fatal shooting of a fleeing suspect constituted a Fourth Amendment "seizure." See *id.,* at 7; *id.,* at 25 (O'CONNOR, J., dissenting). We reasoned that "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person." *Id.,* at 7. While acknowledging *Garner,* the Court of Appeals here concluded that no "seizure" occurred when Brower collided with the police roadblock because "[p]rior to his failure to stop voluntarily, his freedom of movement was never arrested or restrained" and because "[h]e had a number of opportunities to stop his automobile prior to the impact." 817 F. 2d, at 546. Essentially the same thing, however, could have been said in *Garner.* Brower's independent decision to continue the chase can no more eliminate respondents' responsibility for the termination of his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet.

The Court of Appeals was impelled to its result by consideration of what it described as the "analogous situation" of a police chase in which the suspect unexpectedly loses control of his car and crashes. See *Galas* v. *McKee,* 801 F. 2d 200, 202-203 (CA6 1986) (no seizure in such circumstances). We agree that no unconstitutional seizure occurs there, but not for a reason that has
596 any application to the present case. *596 Violation of the Fourth Amendment requires an intentional acquisition of physical

control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, see *Hill* v. *California*, 401 U. S. 797, 802-805 (1971); cf. *Maryland* v. *Garrison*, 480 U. S. 79, 85-89 (1987), but the detention or taking itself must be willful. This is implicit in the word "seizure," which can hardly be applied to an unknowing act. The writs of assistance that were the principal grievance against which the Fourth Amendment was directed, see *Boyd* v. *United States*, 116 U. S. 616, 624-625 (1886); T. Cooley, Constitutional Limitations *301-*302, did not involve unintended consequences of government action. Nor did the general warrants issued by Lord Halifax in the 1760's, which produced "the first and only major litigation in the English courts in the field of search and seizure," T. Taylor, Two Studies in Constitutional Interpretation 26 (1969), including the case we have described as a "monument of English freedom" "undoubtedly familiar" to "every American statesman" at the time the Constitution was adopted, and considered to be "the true and ultimate expression of constitutional law," *Boyd*, *supra*, at 626 (discussing *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765)). In sum, the Fourth Amendment addresses "misuse of power," *Byars* v. *United States*, 273 U. S. 28, 33 (1927), not the accidental effects of otherwise lawful government conduct.

Thus, if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. And the situation would not change if the passerby happened, by lucky chance, to be a serial murderer for whom there was an outstanding arrest warrant — even if, at the time he was thus pinned, he was in the process of running away from two pursuing constables. It is clear, in other words, that a Fourth Amendment seizure does not
597 occur whenever there is a governmentally caused termination of an *597 individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied.* That is the reason there was no seizure in the hypothetical situation that concerned the Court of Appeals. The pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit; and though he was in fact stopped, he was stopped by a different means — his loss of control of his vehicle and the subsequent crash. If, instead of that, the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure.

This analysis is reflected by our decision in *Hester* v. *United States*, 265 U. S. 57 (1924), where an armed revenue agent had pursued the defendant and his accomplice after seeing them obtain containers thought to be filled with "moonshine whisky." During their flight they dropped the containers, which the agent recovered. The defendant sought to suppress testimony concerning the containers' contents as the product of an unlawful seizure. Justice Holmes, speaking for a unanimous Court, concluded: "The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle — and there was no seizure in the sense of the law when the officers examined the contents of each after they had been abandoned." *Id.,* at 58. Thus, even though the incriminating containers were unquestionably taken into possession as a result (in the broad sense) of action by the police, the Court held that no seizure had taken place. It would have been quite different, of course, if the revenue agent had shouted, "Stop and give us those bottles, in the name of the law!" and the defendant and his accomplice had complied. Then the
598 taking of possession would have been *598 not merely the result of government action but the result of the very means (the show of authority) that the government selected, and a Fourth Amendment seizure would have occurred.

In applying these principles to the dismissal of petitioners' Fourth Amendment complaint for failure to state a claim, we can sustain the District Court's action only if, taking the allegations of the complaint in the light most favorable to petitioners, see *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974), we nonetheless conclude that they could prove no set of facts entitling them to relief for a "seizure." See *Conley* v. *Gibson*, 355 U. S. 41, 45-46 (1957). Petitioners have alleged the establishment of a roadblock crossing both lanes of the highway. In marked contrast to a police car pursuing with flashing lights, or to a policeman in the road signaling an oncoming car to halt, see *Kibbe* v. *Springfield*, 777 F. 2d 801, 802-803 (CA1 1985), cert. dism'd, 480 U. S. 257 (1987), a roadblock is not just a significant show of authority to induce a voluntary stop, but is designed to produce a stop by physical impact if voluntary compliance does not occur. It may well be that respondents here preferred, and indeed earnestly hoped, that Brower would stop on his own, without striking the barrier, but we do not think it practicable to conduct such an inquiry into subjective intent. See *United States* v. *Leon*, 468 U. S. 897, 922, n. 23 (1984); see also *Anderson* v. *Creighton*, 483 U. S. 635, 641 (1987); *Harlow* v. *Fitzgerald*, 457 U. S. 800, 815-819 (1982). Nor do we think it possible, in determining whether there has been a seizure in a case such as this, to distinguish between a roadblock that is designed to give the oncoming driver the option of a voluntary stop (*e. g.,* one at the end of a long straightaway), and a roadblock that is designed precisely to produce a collision (*e. g.,* one located just around a bend). In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized
599 who has been *599 stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. We think it enough for a seizure that a person be stopped by the very instrumentality

set in motion or put in place in order to achieve that result. It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock — and that he was so stopped.

This is not to say that the precise character of the roadblock is irrelevant to further issues in this case. "Seizure" alone is not enough for § 1983 liability; the seizure must be "unreasonable." Petitioners can claim the right to recover for Brower's death only because the unreasonableness they allege consists precisely of setting up the roadblock in such manner as to be likely to kill him. This should be contrasted with the situation that would obtain if the sole claim of unreasonableness were that there was no probable cause for the stop. In that case, if Brower had had the opportunity to stop voluntarily at the roadblock, but had negligently or intentionally driven into it, then, because of lack of proximate causality, respondents, though responsible for depriving him of his freedom of movement, would not be liable for his death. See *Martinez* v. *California*, 444 U. S. 277, 285 (1980); *Cameron* v. *Pontiac*, 813 F. 2d 782, 786 (CA6 1987). Thus, the circumstances of this roadblock, including the allegation that headlights were used to blind the oncoming driver, may yet determine the outcome of this case.

The complaint here sufficiently alleges that respondents, under color of law, sought to stop Brower by means of a roadblock and succeeded in doing so. That is enough to constitute a "seizure" within the meaning of the Fourth Amendment. Accordingly, we reverse the judgment of the Court of Appeals and remand for consideration of whether the District Court properly dismissed the
600 Fourth Amendment claim *600 on the basis that the alleged roadblock did not effect a seizure that was "unreasonable."

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in the judgment.

The Court is unquestionably correct in concluding that respondents' use of a roadblock to stop Brower's car constituted a seizure within the meaning of the Fourth Amendment. I therefore concur in its judgment. I do not, however, join its opinion because its dicta seem designed to decide a number of cases not before the Court and to establish the proposition that "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control." *Ante,* at 596.

The intentional acquisition of physical control of something is no doubt a characteristic of the typical seizure, but I am not entirely sure that it is an essential element of every seizure or that this formulation is particularly helpful in deciding close cases. The Court suggests that the test it articulates does not turn on the subjective intent of the officer. *Ante,* at 598. This, of course, not only comports with the recent trend in our cases, see, *e. g., Harlow* v. *Fitzgerald*, 457 U. S. 800, 815-819 (1982); *United States* v. *Mendenhall*, 446 U. S. 544, 554, n. 6 (1980) (opinion of Stewart, J.), but also makes perfect sense. No one would suggest that the Fourth Amendment provides no protection against a police officer who is too drunk to act intentionally, yet who appears in uniform brandishing a weapon in a threatening manner. Alternatively, however, the concept of objective intent, at least in the vast majority of cases, adds little to the well-established rule that "a person has been `seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that
601 he was not free to leave." *Id.,* at 554 *601 (opinion of Stewart, J.); see also *INS* v. *Delgado*, 466 U. S. 210, 215 (1984).

There may be a case that someday comes before this Court in which the concept of intent is useful in applying the Fourth Amendment. What is extraordinary about the Court's discussion of the intent requirement in this case is that there is no dispute that the roadblock was intended to stop the decedent. Decision in the case before us is thus not advanced by pursuing a hypothetical inquiry concerning whether an unintentional act might also violate the Fourth Amendment. Rather, as explained in Judge Pregerson's dissent in the Court of Appeals, this case is plainly controlled by our decision in *Tennessee* v. *Garner*, 471 U. S. 1 (1985). 817 F. 2d 540, 548 (CA9 1987) (opinion concurring in part and dissenting in part). In that case, we held that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." 471 U. S., at 7. Because it was undisputed that the police officer acted intentionally, we did not discuss the hypothetical case of an unintentional seizure. I would exercise the same restraint here.

I am in full accord with Judge Pregerson's dissenting opinion, and, for the reasons stated in his opinion, I join the Court's judgment.

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392 U.S. 1 (1968)

TERRY
v.
OHIO.

No. 67.

Supreme Court of United States.

Argued December 12, 1967.
Decided June 10, 1968.

CERTIORARI TO THE SUPREME COURT OF OHIO.

4 *4 *Louis Stokes* argued the cause for petitioner. With him on the brief was *Jack G. Day.*

Reuben M. Payne argued the cause for respondent. With him on the brief was *John T. Corrigan.*

Briefs of *amici curiae,* urging reversal, were filed by *Jack Greenberg, James M. Nabrit III, Michael Meltsner, Melvyn Zarr,* and *Anthony G. Amsterdam* for the NAACP Legal Defense and Educational Fund, Inc., and by *Bernard A. Berkman, Melvin L. Wulf,* and *Alan H. Levine* for the American Civil Liberties Union et al.

Briefs of *amici curiae,* urging affirmance, were filed by *Solicitor General Griswold, Assistant Attorney General Vinson, Ralph S. Spritzer, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States; by *Louis J. Lefkowitz, pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Maria L. Marcus* and *Brenda Soloff,* Assistant Attorneys General, for the Attorney General of New York; by *Charles Moylan, Jr., Evelle J. Younger,* and *Harry Wood* for the National District Attorneys' Assn., and by *James R. Thompson* for Americans for Effective Law Enforcement.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.

Petitioner Terry was convicted of carrying a concealed weapon and sentenced to the statutorily prescribed term of one to three
5 years in the penitentiary.[1] Following *5 the denial of a pretrial motion to suppress, the prosecution introduced in evidence two revolvers and a number of bullets seized from Terry and a codefendant, Richard Chilton,[2] by Cleveland Police Detective Martin McFadden. At the hearing on the motion to suppress this evidence, Officer McFadden testified that while he was patrolling in plain clothes in downtown Cleveland at approximately 2:30 in the afternoon of October 31, 1963, his attention was attracted by two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue. He had never seen the two men before, and he was unable to say precisely what first drew his eye to them. However, he testified that he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years and that he would "stand and watch people or walk and watch people at many intervals of the day." He added: "Now, in this case when I looked over they didn't look right to me at the time."

6 His interest aroused, Officer McFadden took up a post of observation in the entrance to a store 300 to 400 feet *6 away from the two men. "I get more purpose to watch them when I seen their movements," he testified. He saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the corner. The two men repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips. At one point, while the two were standing together on the corner, a third man approached them and engaged them briefly in conversation. This man then left the two others and walked west on Euclid Avenue. Chilton and Terry resumed their measured pacing, peering, and conferring. After this had gone on for 10 to 12 minutes, the two men walked off together, heading west on Euclid Avenue, following the path taken earlier by the third man.

By this time Officer McFadden had become thoroughly suspicious. He testified that after observing their elaborately casual and oft-repeated reconnaissance of the store window on Huron Road, he suspected the two men of "casing a job, a stick-up," and that he considered it his duty as a police officer to investigate further. He added that he feared "they may have a gun." Thus, Officer McFadden followed Chilton and Terry and saw them stop in front of Zucker's store to talk to the same man who had conferred with them earlier on the street corner. Deciding that the situation was ripe for direct action. Officer McFadden approached the three
7 men, identified *7 himself as a police officer and asked for their names. At this point his knowledge was confined to what he had observed. He was not acquainted with any of the three men by name or by sight, and he had received no information concerning them from any other source. When the men "mumbled something" in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat Officer McFadden felt a pistol. He reached inside the overcoat pocket, but was unable to remove the gun. At this point, keeping Terry between himself and the others, the officer ordered all three men to enter Zucker's store. As they went in, he removed Terry's overcoat completely, removed a .38-caliber revolver from the pocket and ordered all three men to face the wall with their hands raised. Officer McFadden proceeded to pat down the outer clothing of Chilton and the third man, Katz. He discovered another revolver in the outer pocket of Chilton's overcoat, but no weapons were found on Katz. The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record, he never placed his hands beneath Katz' outer garments. Officer McFadden seized Chilton's gun, asked the proprietor of the store to call a police wagon, and took all three men to the station, where Chilton and Terry were formally charged with carrying concealed weapons.

On the motion to suppress the guns the prosecution took the position that they had been seized following a search incident to a lawful arrest. The trial court rejected this theory, stating that it "would be stretching the facts beyond reasonable comprehension"
8 to find that Officer *8 McFadden had had probable cause to arrest the men before he patted them down for weapons. However, the court denied the defendants' motion on the ground that Officer McFadden, on the basis of his experience, "had reasonable cause to believe . . . that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action." Purely for his own protection, the court held, the officer had the right to pat down the outer clothing of these men, who he had reasonable cause to believe might be armed. The court distinguished between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of crime. The frisk, it held, was essential to the proper performance of the officer's investigatory duties, for without it "the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible."

After the court denied their motion to suppress, Chilton and Terry waived jury trial and pleaded not guilty. The court adjudged them guilty, and the Court of Appeals for the Eighth Judicial District, Cuyahoga County, affirmed. *State* v. *Terry,* 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966). The Supreme Court of Ohio dismissed their appeal on the ground that no "substantial constitutional question" was involved. We granted certiorari, 387 U. S. 929 (1967), to determine whether the admission of the revolvers in evidence violated petitioner's rights under the Fourth Amendment, made applicable to the States by the Fourteenth. *Mapp* v. *Ohio,* 367 U. S. 643 (1961). We affirm the conviction.

I.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against
9 unreasonable searches and seizures, shall not be violated . . . ." This inestimable right of *9 personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized,

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co.* v. *Botsford,* 141 U. S. 250, 251 (1891).

We have recently held that "the Fourth Amendment protects people, not places," *Katz* v. *United States,* 389 U. S. 347, 351 (1967), and wherever an individual may harbor a reasonable "expectation of privacy," *id.,* at 361 (MR. JUSTICE HARLAN, concurring), he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Elkins* v. *United States,* 364 U. S. 206, 222 (1960). Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland. *Beck* v. *Ohio,* 379 U. S. 89 (1964); *Rios* v.

United States, 364 U. S. 253 (1960); *Henry* v. *United States*, 361 U. S. 98 (1959); *United States* v. *Di Re*, 332 U. S. 581 (1948); *Carroll* v. *United States*, 267 U. S. 132 (1925). The question is whether in all the circumstances of this on-the-street encounter, his right to personal security was violated by an unreasonable search and seizure.

We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues
10 regarding a sensitive area of police activity—issues which have never before been squarely *10 presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to "stop and frisk"— as it is sometimes euphemistically termed—suspicious persons.

On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. For this purpose it is urged that distinctions should be made between a "stop" and an "arrest" (or a "seizure" of a person), and between a "frisk" and a "search."[3] Thus, it is argued, the police should be allowed to "stop" a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion that the person may be armed, the police should have the power to "frisk" him for weapons. If the "stop" and the "frisk" give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal "arrest," and a full incident "search" of the person. This scheme is justified in part upon the notion that a "stop" and a "frisk" amount to a mere "minor inconvenience and
11 petty indignity,"[4] which can properly be imposed upon the *11 citizen in the interest of effective law enforcement on the basis of a police officer's suspicion.[5]

On the other side the argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment.[6] It is contended with some force that there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest. The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the
12 Constitution. Acquiescence by the courts in the compulsion inherent *12 in the field interrogation practices at issue here, it is urged, would constitute an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in "the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). This, it is argued, can only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities.[7]

In this context we approach the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street. The State has characterized the issue here as "the right of a police officer . . . to make an on-the-street stop, interrogate and pat down for weapons (known in street vernacular as `stop and frisk')."[8] But this is only partly accurate. For the issue is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure. Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. See *Weeks* v. *United States*, 232 U. S. 383, 391-393 (1914). Thus its major thrust is a deterrent one, see *Linkletter* v. *Walker*, 381 U. S. 618, 629-635 (1965), and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961). The rule also serves another vital function—"the imperative of judicial
13 integrity." *Elkins* *13 v. *United States*, 364 U. S. 206, 222 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts the rule is ineffective as a deterrent. Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different

turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide
14 variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.[9] Doubtless some *14 police "field interrogation" conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police,[10] it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.

Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently
15 complain,[11] will not be *15 stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime. No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us. Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials. And, of course, our approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.

Having thus roughly sketched the perimeters of the constitutional debate over the limits on police investigative conduct in general and the background against which this case presents itself, we turn our attention to the quite narrow question posed by the facts before us: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons
16 unless there is probable cause for an arrest. *16 Given the narrowness of this question, we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him.

II.

Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden "seized" Terry and whether and when he conducted a "search." There is some suggestion in the use of such terms as "stop" and "frisk" that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a "search" or "seizure" within the meaning of the Constitution.[12] We emphatically reject this notion. It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an
17 attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure *17 performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity."[13] It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.[14]

The danger in the logic which proceeds upon distinctions between a "stop" and an "arrest," or "seizure" of the person, and between a "frisk" and a "search" is two-fold. It seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of
18 constitutional regulation.[15] This Court has held in *18 the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. *Kremen* v. *United States*, 353 U. S. 346 (1957); *Go-Bart*
19 *Importing Co.* v. *18 *United States*, 282 U. S. 344, 356-358 (1931); see *United States* v. *Di Re*, 332 U. S. 581, 586-587 (1948). The scope of the search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible. *Warden* v. *Hayden*, 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring); see, *e. g., Preston* v. *United States*, 376 U. S.

364, 367-368 (1964); *Agnello* v. *United States,* 269 U. S. 20, 30-31 (1925).

The distinctions of classical "stop-and-frisk" theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. "Search" and "seizure" are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."

In this case there can be no question, then, that Officer McFadden "seized" petitioner and subjected him to a "search" when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did.[16] And in determining whether the seizure and
20 search were "unreasonable" our inquiry *20 is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

III.

If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, see, *e. g., Katz* v. *United States,* 389 U. S. 347 (1967); *Beck* v. *Ohio,* 379 U. S. 89, 96 (1964); *Chapman* v. *United States,* 365 U. S. 610 (1961), or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances, see, *e. g., Warden* v. *Hayden,* 387 U. S. 294 (1967) (hot pursuit); cf. *Preston* v. *United States,* 376 U. S. 364, 367-368 (1964). But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.[17]

Nonetheless, the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context. In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary "first
21 to focus upon *21 the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Camara* v. *Municipal Court,* 387 U. S. 523, 534-535, 536-537 (1967). And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.[18] The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.[19] And in making that assessment it is imperative that the facts be judged
22 against an objective standard: would the facts *22 available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Cf. *Carroll* v. *United States,* 267 U. S. 132 (1925); *Beck* v. *Ohio,* 379 U. S. 89, 96-97 (1964).[20] Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. See, *e. g., Beck* v. *Ohio, supra; Rios* v. *United States,* 364 U. S. 253 (1960); *Henry* v. *United States,* 361 U. S. 98 (1959). And simple " `good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be `secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Beck* v. *Ohio, supra,* at 97.

Applying these principles to this case, we consider first the nature and extent of the governmental interests involved. One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything
23 suspicious about people *23 in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover,

are made to be looked in. But the story in quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.

The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and
24 thousands more are wounded. *24 Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.[21]

In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

We must still consider, however, the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. Even
25 a limited search of the outer clothing for weapons constitutes a severe, *25 though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience. Petitioner contends that such an intrusion is permissible only incident to a lawful arrest, either for a crime involving the possession of weapons or for a crime the commission of which led the officer to investigate in the first place. However, this argument must be closely examined.

Petitioner does not argue that a police officer should refrain from making any investigation of suspicious circumstances until such time as he has probable cause to make an arrest; nor does he deny that police officers in properly discharging their investigative function may find themselves confronting persons who might well be armed and dangerous. Moreover, he does not say that an officer is always unjustified in searching a suspect to discover weapons. Rather, he says it is unreasonable for the policeman to take that step until such time as the situation evolves to a point where there is probable cause to make an arrest. When that point has been reached, petitioner would concede the officer's right to conduct a search of the suspect for weapons, fruits or instrumentalities of the crime, or "mere" evidence, incident to the arrest.

There are two weaknesses in this line of reasoning, however. First, it fails to take account of traditional limitations upon the scope of searches, and thus recognizes no distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, *Preston* v. *United States,* 376 U. S. 364, 367 (1964), is also justified on other grounds, *ibid.,* and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable
26 cause to *26 arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. *Warden* v. *Hayden,* 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring). Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion.

A second, and related, objection to petitioner's argument is that it assumes that the law of arrest has already worked out the balance between the particular interests involved here—the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual. But this is not so. An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.[22] The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion

upon the sanctity of the person. It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. Moreover, a perfectly reasonable apprehension of danger may
27 arise long before the officer is possessed of adequate information to justify taking a person into custody for *27 the purpose of prosecuting him for a crime. Petitioner's reliance on cases which have worked out standards of reasonableness with regard to "seizures" constituting arrests and searches incident thereto is thus misplaced. It assumes that the interests sought to be vindicated and the invasions of personal security may be equated in the two cases, and thereby ignores a vital aspect of the analysis of the reasonableness of particular types of conduct under the Fourth Amendment. See *Camara* v. *Municipal Court, supra*.

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Cf. *Beck* v. *Ohio*, 379 U. S. 89, 91 (1964); *Brinegar* v. *United States*, 338 U. S. 160, 174-176 (1949); *Stacey* v. *Emery*, 97 U. S. 642, 645 (1878).[23] And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. Cf. *Brinegar* v. *United States supra*.

IV.

We must now examine the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner
28 were reasonable, both at their inception *28 and as conducted. He had observed Terry, together with Chilton and another man, acting in a manner he took to be preface to a "stick-up." We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons—and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis. Although the trio had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery at some point. Thus, when Officer McFadden approached the three men gathered before the display window at Zucker's store he had observed enough to make it quite reasonable to fear that they were armed; and nothing in their response to his hailing them, identifying himself as a police officer, and asking their names served to dispel that reasonable belief. We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.

The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were
29 warranted at all. The Fourth Amendment proceeds as much by limitations upon the *29 scope of governmental action as by imposing preconditions upon its initiation. Compare *Katz* v. *United States*, 389 U. S. 347, 354-356 (1967). The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that "limitations upon the fruit to be gathered tend to limit the quest itself." *United States* v. *Poller*, 43 F. 2d 911, 914 (C. A. 2d Cir. 1930); see, *e. g., Linkletter* v. *Walker*, 381 U. S. 618, 629-635 (1965); *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Elkins* v. *United States*, 364 U. S. 206, 216-221 (1960). Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation. *Warden* v. *Hayden*, 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring).

We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases. See *Sibron* v. *New York, post,* p. 40, decided today. Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. See *Preston* v. *United States*, 376 U. S. 364, 367 (1964). The sole justification of the search in the present situation is the protection of

the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their
30 garments until he had *30 felt weapons, and then he merely reached for and removed the guns. He never did invade Katz' person beyond the outer surfaces of his clothes, since he discovered nothing in his pat-down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.

V.

We conclude that the revolver seized from Terry was properly admitted in evidence against him. At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to
31 discover weapons which might be used to assault him. *31 Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Affirmed.

MR. JUSTICE BLACK concurs in the judgment and the opinion except where the opinion quotes from and relies upon this Court's opinion in *Katz v. United States* and the concurring opinion in *Warden v. Hayden*.

MR. JUSTICE HARLAN, concurring.

While I unreservedly agree with the Court's ultimate holding in this case, I am constrained to fill in a few gaps, as I see them, in its opinion. I do this because what is said by this Court today will serve as initial guidelines for law enforcement authorities and courts throughout the land as this important new field of law develops.

A police officer's right to make an on-the-street "stop" and an accompanying "frisk" for weapons is of course bounded by the protections afforded by the Fourth and Fourteenth Amendments. The Court holds, and I agree, that while the right does not depend upon possession by the officer of a valid warrant, nor upon the existence of probable cause, such activities must be reasonable under the circumstances as the officer credibly relates them in court. Since the question in this and most cases is whether evidence produced by a frisk is admissible, the problem is to determine what makes a frisk reasonable.

If the State of Ohio were to provide that police officers could, on articulable suspicion less than probable cause, forcibly frisk and disarm persons thought to be carrying concealed weapons, I would have little doubt that action taken pursuant to such authority
32 could be constitutionally reasonable. Concealed weapons create an immediate *32 and severe danger to the public, and though that danger might not warrant routine general weapons checks, it could well warrant action on less than a "probability." I mention this line of analysis because I think it vital to point out that it cannot be applied in this case. On the record before us Ohio has not clothed its policemen with routine authority to frisk and disarm on suspicion; in the absence of state authority, policemen have no more right to "pat down" the outer clothing of passers-by, or of persons to whom they address casual questions, than does any other citizen. Consequently, the Ohio courts did not rest the constitutionality of this frisk upon any general authority in Officer McFadden to take reasonable steps to protect the citizenry, including himself, from dangerous weapons.

The state courts held, instead, that when an officer is lawfully confronting a possibly hostile person in the line of duty he has a right, springing only from the necessity of the situation and not from any broader right to disarm, to frisk for his own protection. This holding, with which I agree and with which I think the Court agrees, offers the only satisfactory basis I can think of for

affirming this conviction. The holding has, however, two logical corollaries that I do not think the Court has fully expressed.

In the first place, if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person *33 addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection. I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime.

Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.

The facts of this case are illustrative of a proper stop and an incident frisk. Officer McFadden had no probable cause to arrest Terry for anything, but he had observed circumstances that would reasonably lead an experienced, prudent policeman to suspect that Terry was about to engage in burglary or robbery. His justifiable suspicion afforded a proper constitutional basis for accosting Terry, restraining his liberty of movement briefly, and addressing questions to him, and Officer McFadden did so. When he did, he had no reason whatever to suppose that Terry might be armed, apart from the fact that he suspected him of planning a violent crime. McFadden asked Terry his name, to which Terry "mumbled something." Whereupon McFadden, without asking Terry to speak louder and without giving him any chance to explain his presence or his actions, forcibly frisked him.

I would affirm this conviction for what I believe to be the same reasons the Court relies on. I would, however, make explicit what I think is implicit in affirmance on *34 the present facts. Officer McFadden's right to interrupt Terry's freedom of movement and invade his privacy arose only because circumstances warranted forcing an encounter with Terry in an effort to prevent or investigate a crime. Once that forced encounter was justified, however, the officer's right to take suitable measures for his own safety followed automatically.

Upon the foregoing premises, I join the opinion of the Court.

MR. JUSTICE WHITE, concurring.

I join the opinion of the Court, reserving judgment, however, on some of the Court's general remarks about the scope and purpose of the exclusionary rule which the Court has fashioned in the process of enforcing the Fourth Amendment.

Also, although the Court puts the matter aside in the context of this case, I think an additional word is in order concerning the matter of interrogation during an investigative stop. There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. In my view, it is temporary detention, warranted by the circumstances, which chiefly justifies the protective frisk for weapons. Perhaps the frisk itself, where proper, will have beneficial results whether questions are asked or not. If weapons are found, an arrest will follow. *35 If none are found, the frisk may nevertheless serve preventive ends because of its unmistakable message that suspicion has been aroused. But if the investigative stop is sustainable at all, constitutional rights are not necessarily violated if pertinent questions are asked and the person is restrained briefly in the process.

MR. JUSTICE DOUGLAS, dissenting.

I agree that petitioner was "seized" within the meaning of the Fourth Amendment. I also agree that frisking petitioner and his companions for guns was a "search." But it is a mystery how that "search" and that "seizure" can be constitutional by Fourth Amendment standards, unless there was "probable cause"[1] to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed.

36 The opinion of the Court disclaims the existence of "probable cause." If loitering were in issue and that *36 was the offense charged, there would be "probable cause" shown. But the crime here is carrying concealed weapons;[2] and there is no basis for concluding that the officer had "probable cause" for believing that that crime was being committed. Had a warrant been sought, a magistrate would, therefore, have been unauthorized to issue one, for he can act only if there is a showing of "probable cause." We hold today that the police have greater authority to make a "seizure" and conduct a "search" than a judge has to authorize such action. We have said precisely the opposite over and over again.[3]

37 *37 In other words, police officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of *probable cause.* At the time of their "seizure" without a warrant they must possess facts concerning the person arrested that would have satisfied a magistrate that "probable cause" was indeed present. The term "probable cause" rings a bell of certainty that is not sounded by phrases such as "reasonable suspicion." Moreover, the meaning of "probable cause" is deeply imbedded in our constitutional history. As we stated in *Henry* v. *United States*, 361 U. S. 98, 100-102:

> "The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of `probable cause' before a magistrate was required.
>
> .....
>
> "That philosophy [rebelling against these practices] later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or
> 38 even `strong reason to suspect' was not adequate to support a warrant *38 for arrest. And that principle has survived to this day. . . .
>
> ". . . It is important, we think, that this requirement [of probable cause] be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent. . . . And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause. . . . This immunity of officers cannot fairly be enlarged without jeopardizing the privacy or security of the citizen."

The infringement on personal liberty of any "seizure" of a person can only be "reasonable" under the Fourth Amendment if we require the police to possess "probable cause" before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime. "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U. S. 160, 175.

To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a
39 constitutional amendment. *39 Until the Fourth Amendment, which is closely allied with the Fifth,[4] is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched.

There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.

Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

[1] Ohio Rev. Code § 2923.01 (1953) provides in part that "[n]o person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person." An exception is made for properly authorized law enforcement officers.

[2] Terry and Chilton were arrested, indicated, tried, and convicted together. They were represented by the same attorney, and they made a joint motion to suppress the guns. After the motion was denied, evidence was taken in the case against Chilton. This evidence consisted of the testimony

of the arresting officer and of Chilton. It was then stipulated that this testimony would be applied to the case against Terry, and no further evidence was introduced in that case. The trial judge considered the two cases together, rendered the decisions at the same time and sentenced the two men at the same time. They prosecuted their state court appeals together through the same attorney, and they petitioned this Court for certiorari together. Following the grant of the writ upon this joint petition, Chilton died. Thus, only Terry's conviction is here for review.

[3] Both the trial court and the Ohio Court of Appeals in this case relied upon such a distinction. *State* v. *Terry,* 5 Ohio App. 2d 122, 125-130, 214 N. E. 2d 114, 117-120 (1966). See also, *e. g., People* v. *Rivera,* 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. denied, 379 U. S. 978 (1965); Aspen, Arrest and Arrest Alternatives: Recent Trends, 1966 U. Ill. L. F. 241, 249-254; Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942); Note, Stop and Frisk in California, 18 Hastings L. J. 623, 629-632 (1967).

[4] *People* v. *Rivera, supra,* n. 3, at 447, 201 N. E. 2d, at 36, 252 N. Y. S. 2d, at 464.

[5] The theory is well laid out in the *Rivera* opinion:

"[T]he evidence needed to make the inquiry is not of the same degree of conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed. . . .

.....

"And as the right to stop and inquire is to be justified for a cause less conclusive than that which would sustain an arrest, so the right to frisk may be justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search. Ultimately the validity of the frisk narrows down to whether there is or is not a right by the police to touch the person questioned. The sense of exterior touch here involved is not very far different from the sense of sight or hearing—senses upon which police customarily act." *People* v. *Rivera,* 14 N. Y. 2d 441, 445, 447, 201 N. E. 2d 32, 34, 35, 252 N. Y. S. 2d 458, 461, 463 (1964), cert. denied, 379 U. S. 978 (1965).

[6] See, *e. g.,* Foote, The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?, 51 J. Crim. L. C. & P. S. 402 (1960).

[7] See n. 11, *infra.*

[8] Brief for Respondent 2.

[9] See L. Tiffany, D. McIntyre & D. Rotenberg, Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment 18-56 (1967). This sort of police conduct may, for example, be designed simply to help an intoxicated person find his way home, with no intention of arresting him unless he becomes obstreperous. Or the police may be seeking to mediate a domestic quarrel which threatens to erupt into violence. They may accost a woman in an area known for prostitution as part of a harassment campaign designed to drive prostitutes away without the considerable difficulty involved in prosecuting them. Or they may be conducting a dragnet search of all teenagers in a particular section of the city for weapons because they have heard rumors of an impending gang fight.

[10] See Tiffany, McIntyre & Rotenberg, *supra,* n. 9, at 100-101; Comment, 47 Nw. U. L. Rev. 493, 497-499 (1952).

[11] The President's Commission on Law Enforcement and Administration of Justice found that "[i]n many communities, field interrogations are a major source of friction between the police and minority groups." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183 (1967). It was reported that the friction caused by "[m]isuse of field interrogations" increases "as more police departments adopt `aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident." *Id.,* at 184. While the frequency with which "frisking" forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer, see Tiffany, McIntyre & Rotenberg, *supra,* n. 9, at 47-48, it cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the "stop and frisk" of youths or minority group members is "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets." *Ibid.*

[12] In this case, for example, the Ohio Court of Appeals stated that "we must be careful to distinguish that the `frisk' authorized herein includes only a `frisk' for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the Fourth Amendment, and probable cause is essential." *State* v. *Terry,* 5 Ohio App. 2d 122, 130, 214 N. E. 2d 114, 120 (1966). See also, *e. g., Ellis* v. *United States,* 105 U. S. App. D. C. 86, 88, 264 F. 2d 372, 374 (1959); Comment, 65 Col. L. Rev. 848, 860, and n. 81 (1965).

[13] Consider the following apt description:

"[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet." Priar & Martin, Searching and Disarming Criminals, 45 J. Crim. L. C. & P. S. 481 (1954).

[14] See n. 11, *supra,* and accompanying text.

We have noted that the abusive practices which play a major, though by no means exclusive, role in creating this friction are not susceptible of control by means of the exclusionary rule, and cannot properly dictate our decision with respect to the powers of the police in genuine investigative and preventive situations. However, the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.

[15] These dangers are illustrated in part by the course of adjudication in the Court of Appeals of New York. Although its first decision in this area, *People* v. *Rivera,* 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. denied, 379 U. S. 978 (1965), rested squarely on the notion that a "frisk" was not a "search," see nn. 3-5, *supra,* it was compelled to recognize in *People* v. *Taggart,* 20 N. Y. 2d 335, 342, 229 N. E. 2d 581, 586, 283 N. Y. S. 2d 1, 8 (1967), that what it had actually authorized in *Rivera* and subsequent decisions, see, *e. g., People* v. *Pugach,* 15 N. Y. 2d 65, 204 N. E. 2d 176, 255 N. Y. S. 2d 833 (1964), cert. denied, 380 U. S. 936 (1965), was a "search" upon less than probable cause. However, in acknowledging that no valid distinction could be maintained on the basis of its cases, the Court of Appeals continued to distinguish between the two in theory. It still defined "search" as it had in *Rivera*—as an essentially unlimited examination of the person for any and all seizable items—and merely noted that the cases had upheld police intrusions which went far beyond the original limited conception of a "frisk." Thus, principally because it failed to consider limitations upon the scope of searches in individual cases as a potential mode of regulation, the Court of Appeals in three short years arrived at the position that the Constitution must, in the name of necessity, be held to permit unrestrained rummaging about a person and his effects upon mere suspicion. It did apparently limit its holding to "cases involving serious personal injury or grave irreparable property damage," thus excluding those involving "the enforcement of sumptuary laws, such as gambling, and laws of limited public consequence, such as narcotics violations, prostitution, larcenies of the ordinary kind, and the like." *People* v. *Taggart, supra,* at 340, 214 N. E. 2d, at 584, 283 N. Y. S. 2d, at 6.

In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness. Cf. *Brinegar* v. *United States,* 338 U. S. 160, 183 (1949) (Mr. Justice Jackson, dissenting). Compare *Camara* v. *Municipal Court,* 387 U. S. 523, 537 (1967). This seems preferable to an approach which attributes too much significance to an overly technical definition of "search," and which turns in part upon a judge-made hierarchy of legislative enactments in the criminal sphere. Focusing the inquiry squarely on the dangers and demands of the particular situation also seems more likely to produce rules which are intelligible to the police and the public alike than requiring the officer in the heat of an unfolding encounter on the street to make a judgment as to which laws are "of limited public consequence."

[16] We thus decide nothing today concerning the constitutional propriety of an investigative "seizure" upon less than probable cause for purposes of "detention" and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.

[17] See generally Leagre, The Fourth Amendment and the Law of Arrest, 54 J. Crim. L. C. & P. S. 393, 396-403 (1963).

[18] This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence. See *Beck* v. *Ohio,* 379 U. S. 89, 96-97 (1964); *Ker* v. *California,* 374 U. S. 23, 34-37 (1963); *Wong Sun* v. *United States,* 371 U. S. 471, 479-484 (1963); *Rios* v. *United States,* 364 U. S. 253, 261-262 (1960); *Henry* v. *United States,* 361 U. S. 98, 100-102 (1959); *Draper* v. *United States,* 358 U. S. 307, 312-314 (1959); *Brinegar* v. *United States,* 338 U. S. 160, 175-178 (1949); *Johnson* v. *United States,* 333 U. S. 10, 15-17 (1948); *United States* v. *Di Re,* 332 U. S. 581, 593-595 (1948); *Husty* v. *United States,* 282 U. S. 694, 700-701 (1931); *Dumbra* v. *United States,* 268 U. S. 435, 441 (1925); *Carroll* v. *United States,* 267 U. S. 132, 159-162 (1925); *Stacey* v. *Emery,* 97 U. S. 642, 645 (1878).

[19] See, *e. g., Katz* v. *United States,* 389 U. S. 347, 354-357 (1967); *Berger* v. *New York,* 388 U. S. 41, 54-60 (1967); *Johnson* v. *United States,* 333 U. S. 10, 13-15 (1948); cf. *Wong Sun* v. *United States,* 371 U. S. 471, 479-480 (1963). See also *Aguilar* v. *Texas,* 378 U. S. 108, 110-115 (1964).

[20] See also cases cited in n. 18, *supra.*

[21] Fifty-seven law enforcement officers were killed in the line of duty in this country in 1966, bringing the total to 335 for the seven-year period beginning with 1960. Also in 1966, there were 23,851 assaults on police officers, 9,113 of which resulted in injuries to the policemen. Fifty-five of the 57 officers killed in 1966 died from gunshot wounds, 41 of them inflicted by handguns easily secreted about the person. The remaining two murders were perpetrated by knives. See Federal Bureau of Investigation, Uniform Crime Reports for the United States—1966, at 45-48, 152 and Table 51.

The easy availability of firearms to potential criminals in this country is well known and has provoked much debate. See, *e. g.,* President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 239-243 (1967). Whatever the merits of gun-control proposals, this fact is relevant to an assessment of the need for some form of self-protective search power.

[22] See generally W. LaFave, Arrest—The Decision to Take a Suspect into Custody 1-13 (1965).

[23] See also cases cited in n. 18, *supra.*

[1] The meaning of "probable cause" has been developed in cases where an officer has reasonable grounds to believe that a crime has been or is being committed. See, *e. g., The Thompson,* 3 Wall. 155; *Stacey* v. *Emery,* 97 U. S. 642; *Director General* v. *Kastenbaum,* 263 U. S. 25; *Carroll* v. *United States,* 267 U. S. 132; *United States* v. *Di Re,* 332 U. S. 581; *Brinegar* v. *United States,* 338 U. S. 160; *Draper* v. *United States,* 358 U. S. 307; *Henry* v. *United States,* 361 U. S. 98. In such cases, of course, the officer may make an "arrest" which results in charging the individual with commission of a crime. But while arresting persons who have already committed crimes is an important task of law enforcement, an equally if not more important function is crime prevention and deterrence of would-be criminals. "[T]here is no war between the Constitution and common sense," *Mapp* v. *Ohio,* 367 U. S. 643, 657. Police officers need not wait until they see a person actually commit a crime before they are able to "seize" that person. Respect for our constitutional system and personal liberty demands in return, however, that such a "seizure" be made only upon "probable cause."

[2] Ohio Rev. Code § 2923.01.

[3] This Court has always used the language of "probable cause" in determining the constitutionality of an arrest without a warrant. See, *e. g., Carroll* v. *United States,* 267 U. S. 132, 156, 161-162; *Johnson* v. *United States,* 333 U. S. 10, 13-15; *McDonald* v. *United States,* 335 U. S. 451, 455-456; *Henry* v. *United States,* 361 U. S. 98; *Wong Sun* v. *United States,* 371 U. S. 471, 479-484. To give power to the police to seize a person on some grounds different from or less than "probable cause" would be handing them *more* authority than could be exercised by a magistrate in issuing a warrant to seize a person. As we stated in *Wong Sun* v. *United States,* 371 U. S. 471, with respect to requirements for arrests without warrants: "Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained." *Id.,* at 479. And we said in *Brinegar* v. *United States,* 338 U. S. 160, 176:

"These long-prevailing standards [for probable cause] seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

And see *Johnson* v. *United States,* 333 U. S. 10, 14-15; *Wrightson* v. *United States,* 95 U. S. App. D. C. 390, 393-394, 222 F. 2d 556, 559-560 (1955).

[4] See *Boyd* v. *United States,* 116 U. S. 616, 633:

"For the `unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man `in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an `unreasonable search and seizure' within the meaning of the Fourth Amendment."

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128 F.3d 810 (1997)

Ronald E. SHARRAR; Gerard A. Sweeney; David L. Brigden; Kenneth J. Sharrar,
v.
Dennis FELSING, Sgt., Individually and as an officer of the Sea Isle City Police Department; William Kennedy, Detective Sgt., Individually and as an officer of Sea Isle City Police Department; Albert Wilson, Lt., Individually and as an officer of the Sea Isle City Police Department; Michael Larkin, Sgt., Individually and as an officer of the Sea Isle City Police Department; City Of Sea Isle
Ronald E. Sharrar, Gerard A. Sweeney, David L. Brigden and Kenneth L. Sharrar, Appellants.

No. 96-5375.

United States Court of Appeals, Third Circuit.

Argued May 23, 1997.
Decided October 24, 1997.

813 *811 *812 *813 Jane M. Shields (Argued), Sherilyn M. Arnold, Exton, PA, for Appellants.

Steve Drake (Argued), Savio, Reynolds & Drake, Absecon, NJ, for Appellees.

814 *814 Before: SLOVITER, Chief Judge, ROTH, Circuit Judge and POLLAK,[*] District Judge.

OPINION OF THE COURT

SLOVITER, Chief Judge.

Ronald Sharrar, Kenneth Sharrar, David Brigden and Gerard Sweeney brought this civil rights action pursuant to 42 U.S.C. § 1983 against police officers Lt. Albert Wilson, Sgt. Michael Larkin, Sgt. William Kennedy, Sgt. Dennis Felsing, and the City of Sea Isle, New Jersey, alleging unlawful arrest, arrest with excessive force, and two illegal searches. After the district court granted summary judgment to the defendants on all claims except for the second allegedly illegal search, a magistrate judge conducted a jury trial on the remaining claim against Sgts. Larkin and Kennedy. The jury found that the search was conducted without a warrant but that Sgt. Kennedy had not participated in the search and that Sgt. Larkin had a reasonable belief that he had a warrant so was entitled to qualified immunity.

The plaintiffs appeal the summary judgment order, the denial of their Motion for Judgment as a Matter of Law, and the submission of a special interrogatory to the jury with respect to Sgt. Kennedy's role in the illegal search. Plaintiffs do not appeal dismissal of their claims against the City.

On this appeal, we must consider plaintiffs' contentions that the court erred in disposing of certain claims by summary judgment and in its handling of the one claim that reached the jury. We must also reach the issue of qualified immunity, which had been sought by the defendants although not fully addressed by the district court.

I.

BACKGROUND

A.

Facts

As to those portions of this case that were decided by summary judgment, we set forth the undisputed facts as revealed by the record, which is comprised almost entirely of deposition testimony, and the plaintiffs' version of the facts when there are disparities. *See In re City of Philadelphia Litigation,* 49 F.3d 945, 949 (3d Cir.), *cert. denied,* ____U.S.____, 116 S.Ct. 176, 133 L.Ed.2d 116 (1995). We also refer to additional facts adduced at the trial which was held on the claim based on the second search.

On October 1, 1992 at approximately 12:10 p.m. Patricia Gannon-Brigden (referred to here as Patricia Gannon) called 911 and said "I had somebody come into my apartment and beat me up. I'm bleeding pretty bad." App. at 152. When the dispatcher asked who beat her up she replied "Robert Carroll." The dispatcher asked for clarification and Gannon repeated two more times that it was Robert Carroll who beat her up. *Id.* The dispatcher asked if he was still there and Gannon replied "No, he left. And three other people were here with him. I'm bleeding. I have blood all over me. There is blood everywhere." App. at 152-53. The dispatcher then told Sgt. Felsing, who was in the room with the dispatcher, that "There is a woman beat up by Robert Carroll." App. at 153. Sgt. Felsing's response was inaudible and in deposition he testified that he never heard the dispatcher mention the name Robert Carroll.

When Sgt. Felsing arrived at Gannon's apartment she told him that she had been hit, and he saw a two-inch laceration on her scalp, a pool of blood on the kitchen floor, blood on a pillow in the bedroom and blood in her hair. There were no signs of a forced entry or any broken objects in the apartment. She told Sgt. Felsing "that her [estranged] husband, David Brigden, and three others had come into the house, that they held her while David pulled a gun and hit her on the side of the head." App. at 250. She said that Brigden was being investigated by the FBI for bringing drugs into town, and that he told her that he was afraid
815 that she *815 had gone to the FBI, and that "she wouldn't be the first body he's thrown in the river and they haven't found. He hit her and that's the last she remembered." App. at 255. Gannon did not identify or describe the other three men to Sgt. Felsing.

An ambulance arrived soon after, as did Sgt. Larkin and Capt. Kevin McClory. Sgt. Larkin stated that "Officer Felsing indicated to me that [Gannon's] ex-husband entered the condominium while two of her [sic] friends held her down, he struck her with a handgun, and there was another person involved, that he was standing by the door, and he indicated that [Gannon] said that after they left, they jumped into the brown van and they went back to 49th Street." App. at 297. Neither Sgt. Larkin or Capt. McClory spoke with Gannon.

Gannon was taken to the hospital and was admitted at approximately 1:09 p.m. About the same time, Sgt. Larkin dispatched Sgt. Felsing to Brigden's home on 49th Street to see whether the van was there. Sgt. Felsing radioed Sgt. Larkin to tell him that the van was in front of Brigden's residence and then parked his car on another street and walked to the northwest corner of 49th Street and waited. Sometime thereafter, while Sgt. Felsing was at the property, Kim Candle, a resident of one of the units in the building, came out and Sgt. Felsing asked her if Brigden was in the house. She responded that she had heard noise downstairs "so she knew they were there." App. at 263.

Sgt. Larkin also proceeded to Brigden's residence and radioed the license number of the van to the dispatcher, who confirmed that it was Brigden's van. At approximately 1:30 p.m. Capt. McClory arrived and Sgt. Larkin suggested that they seek reinforcements. Capt. McClory agreed and Sgt. Larkin called the dispatcher and told him to call Lt. Wilson, "who was in charge of the tactical unit," and offduty officers. App. at 298. It took approximately a half hour to forty-five minutes for all the reinforcement officers to arrive.

A "temporary command post" was set up at the 49th Street corner where the officers assembled in a variety of police vehicles. App. at 345. City of Sea Isle Mayor Michael McHale arrived, as did Police Commissioner Libro. FBI agent Jack Reemer was called to the scene as a trained hostage negotiator. Two officers from the Sheriff's Department arrived. Additional officers from the Avalon and Ocean City Police Departments arrived, as did several officers with drug/explosives sniffing dogs. Lt. Wilson, the officer in charge of the SWAT team, arrived with the entire eight member SWAT team, who were dressed in black fatigue uniforms and armed with shotguns, rifles and submachine guns. App. at 405-06.

The police created an inner and outer perimeter around Brigden's residence. Capt. McClory ordered the evacuation of all residents in the inner perimeter. He dispatched someone to contact the schools in the area to divert their normal bus routes and keep at school all children who lived in the immediate vicinity of Brigden's residence. App. at 310. The fire station was ordered to accept evacuees, app. at 145; fire trucks and ambulances were told to come to the scene without lights and sirens; the City marina was closed so that no boats could leave the harbor; and the bridge which provided the sole vehicular access to the City was blocked.

Once the inner perimeter was cleared, Lt. Wilson assigned duties to members of the tactical team. Officer Rock, who was "the department sniper," and another officer were stationed at a nearby building. App. at 350. Sgt. Larkin, Lt. Wilson and at least three other officers were assigned to the rear of the residence. Sgt. Kennedy was sent to the front of the residence in order to watch the front door. Lt. Wilson then told Sgt. Felsing to go to a nearby house and call Brigden. Sgt. Felsing was accompanied by the FBI hostage negotiator.

Sometime between 2:30 and 3:20 in the afternoon, Gerard Sweeney, who along with Ronald and Kenneth Sharrar was staying with Brigden for a few days, looked out a sliding glass door and saw an armed man in black fatigues in the backyard. Frightened, he yelled "David, call the police." App. at 121. Brigden stated that "I looked out the back window and there was a fellow there
816 kneeling, dressed in black with a shotgun *816 pointed at the house. And I then went to the side window and looked out the side window and saw a man there with a machine gun...." App. at 129.

When Brigden picked up the phone to call the police, Sgt. Felsing was already on the line. Sgt. Felsing identified himself, told Brigden that the house was surrounded by police, that they had reason to believe he had committed an assault, and wanted him to "send his people out" one by one backwards out the back door and then for him to come out. App. at 262. Brigden stated that while he was on the phone he could hear men screaming for them to come out backward with their hands on their heads.

The four men complied and walked out backwards one at a time into the backyard and were ordered to lie face down in the dirt. They allege that the police yelled and "threatened to blow our brains out if we made one wrong move." App. at 114. Sweeney stated that the police yelled: "You move, I will blow your ... fucking heads off." App. at 122. Kenneth Sharrar stated that once on the ground the police "came up and were yelling, where's the fucking gun. Stuck a gun in the back of my head, put their knee in my back." App. at 115. Ronald Sharrar claimed the police yelled at him to "[k]eep your fucking head down or I'll blow it the fuck off," and repeated that threat three to five times. App. at 105.

By 3:20 p.m. the four men were handcuffed, frisked, and taken to the police station. According to Lt. Wilson, once the four were taken into custody "[t]he tactical unit immediately entered the building and cleared it to make sure there were no other suspects still hiding inside." App. at 429.

Brigden's residence consisted of a three story singlefamily house that had been converted into four separate locked and numbered apartment units. The first floor contained two apartments, one of which was occupied by Brigden. There were separate apartments on the second and third floors. The officers admitted that they knew that the other units were rented to other people.

Lt. Wilson testified that he and the SWAT team cleared the building by entering each room in the entire building to make sure there were no other suspects. The Mayor of the City of Sea Isle also entered the building during this sweep. Lt. Wilson then secured the residence so that no one would enter the premises again until a search warrant was procured. This sweep took somewhere between five and twenty minutes.

The precise sequence thereafter is unclear. At Sgt. Kennedy's deposition he stated that he and Sgt. Felsing then went to obtain a search warrant from Municipal Court Judge Kenneth Calloway, that he met with Judge Calloway and, before he had anything in writing, told him what had occurred and asked for a "no knock search warrant" for the premises and all vehicles on the premises. App. at 361-63. Sgt. Kennedy then claimed that Judge Calloway gave him oral permission to search the premises and told him to supply the necessary paperwork later. App. at 364. Sgt. Kennedy informed Lt. Wilson that Judge Calloway had authorized the search warrant and that the premises could be searched. Sgt. Kennedy went back to Brigden's residence and conducted a "walk-through of the scene" at the same time that Sgt. Larkin, pursuant to Lt. Wilson's direction, conducted the search. He was accompanied by several other police officers, county sheriffs, and dogs. Sgt. Kennedy then returned to the police station where he formally transcribed the information he previously had given to Judge Calloway and placed it in a search warrant application. Judge Calloway signed the search warrant at approximately 7:30 p.m., after both the sweep and the entire search had been completed. At Judge Calloway's deposition, taken shortly after Sgt. Kennedy's deposition, Judge Calloway testified that he did not remember "ever giving a verbal search warrant or authorization to do anything." App. at 530.

At the trial, Sgt. Kennedy acknowledged that he had testified at his deposition that he had received an oral warrant from Judge Calloway, and transmitted that information to the officers at the residence. However, he stated that his recollection had been
817 refreshed by review of the telephonic transmission. App. at 844-45. He testified, or at *817 least suggested, that the search was instituted following a telephone call during which Lt. Wilson, who was at the scene, was advised by Capt. Devlin that he had received a telephonic or oral warrant from Judge Calloway. App. at 832-34, 836, 839-41.

The next day the four plaintiffs were arraigned before Judge Calloway and were charged with burglary, assault, making terroristic threats and conspiracy. All of the charges were eventually dismissed.

B.

Procedural History

In their § 1983 complaint, the four plaintiffs sued Sgt. Felsing, Sgt. Kennedy, Sgt. Larkin and Lt. Wilson for violation of the Fourth and Fourteenth Amendments for arresting them without probable cause, unreasonable search and seizure, and use of excessive force. They also brought a § 1983 claim against the City of Sea Isle for fostering a policy which resulted in the constitutional violations by the police force.

After discovery, the plaintiffs filed a motion for summary judgment. The defendant officers and the City then filed their own motion for summary judgment. On March 7, 1996, the district court entered an order, accompanied by an opinion, denying the plaintiffs' motion and granting the defendants' motion in part.

The district court held that the police had probable cause to arrest, that the arrest occurred in a public place so no warrant was required, that the excessive force claim only involved an alleged injury to Ronald Sharrar's shoulder which could not be attributed to any of the defendants, and that the police's initial warrantless search of Bridgen's residence was an acceptable protective sweep. As for the second more extensive search, the court referred to it as a warrantless search, and did not find any exceptional circumstances present to justify conducting a warrantless search. Dist. Ct. Op. of March 7, 1996 at 14. It held, however, that the only named defendants who were implicated in this search were Sgts. Larkin and Kennedy and declined to grant summary judgment for plaintiffs as to these defendants because there was a genuine issue of material fact as to whether they were entitled to qualified immunity based on their belief that they had an oral search warrant. Finally, the district court granted summary judgment for the City, finding that the plaintiffs failed to present any evidence of a custom or policy of violating constitutional rights.

A magistrate judge presided over the jury trial which was held against Sgts. Larkin and Kennedy on the claim involving the second search. Following the presentation of evidence, plaintiffs filed a Motion for Judgment as a Matter of Law on the issue of qualified immunity, which the magistrate judge denied. The magistrate judge then submitted the illegal search claim to the jury along with special interrogatories. The jury found that the search of the premises was unlawful but returned a verdict in favor of the defendants, finding that Sgt. Larkin had a good faith belief that he was authorized to search the premises and that Sgt. Kennedy was not liable because he did not enter and search Brigden's residence.

II.

SUMMARY JUDGMENT

We exercise plenary review over a district court's order granting summary judgment, applying the same test as the district court should use in the first instance, to determine if there are any issues of material fact which would allow the issue to go to trial. *See* Fed.R.Civ.P. 56; *Hamilton v. Leavy,* 117 F.3d 742, 746 (3d Cir.1997). The plaintiffs, as the non-moving parties, are entitled to every favorable inference that can be drawn from the record. *Id.*

A.

The Arrests

1. *Probable Cause*

Plaintiffs first argue that there was no probable cause to arrest them or at least that it should have been a question for the jury. Probable cause is "defined in terms of facts and circumstances `sufficient to warrant a prudent man in believing that the [suspect]

818 *818 had committed or was committing an offense.'" *Gerstein v. Pugh,* 420 U.S. 103, 111, 95 S.Ct. 854, 862, 43 L.Ed.2d 54 (1975) (quoting *Beck v. Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 225-26, 13 L.Ed.2d 142 (1964)). This standard is meant to "`safeguard citizens from rash and unreasonable interferences with privacy'" and to provide "leeway for enforcing the law in the community's protection." *Id.* at 112, 95 S.Ct. at 862 (quoting *Brinegar v. United States,* 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949)).

We have stated that "[t]he determination that probable cause exists for a warrantless arrest is fundamentally a factual analysis that must be performed by the officers at the scene. It is the function of the court to determine whether the objective facts available to the officers at the time of arrest were sufficient to justify a reasonable belief that an offense [had been] committed." *United States v. Glasser,* 750 F.2d 1197, 1206 (3d Cir.1984), *cert. denied,* 471 U.S. 1018, 105 S.Ct. 2025, 85 L.Ed.2d 306 (1985). A court must look at the "totality of the circumstances" and use a "common sense" approach to the issue of probable cause. *Id.* at 1205 (citing *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

In a § 1983 action the issue of whether there was probable cause to make an arrest is usually a question for the jury, but "where no genuine issue as to any material fact exists and where credibility conflicts are absent, summary judgment may be appropriate." *Deary v. Three Un-Named Police Officers,* 746 F.2d 185, 192 (3d Cir.1984). The question is for the jury only if there is sufficient evidence whereby a jury could reasonably find that the police officers did not have probable cause to arrest. *Id.* at 190.

Sgt. Felsing responded almost immediately to Gannon's 911 call and found her injured and bleeding. She identified her husband David Brigden as her attacker, stated that he was assisted by three other men, and also stated that they all left in a brown van to return to Brigden's residence. Sgt. Felsing then drove to Brigden's residence and saw a brown van parked in the driveway that was positively identified by the license tag as belonging to Brigden. Because of the close proximity to the alleged attack, both in time and distance, the police had probable cause to arrest Brigden, whom the victim had identified, and the three men who were still with Brigden on the reasonable inference that they were the same three men who had participated in the assault.

The plaintiffs argue that Gannon's initial identification of "Robert Carroll" as her assailant was enough to undermine her credibility in the eyes of the police and creates a genuine issue whether the police had probable cause to arrest based on her subsequent identification of Brigden. They cite authority which they claim required the police to assess her reliability.

The cases on which plaintiffs rely involve informers, not victims. "[T]he skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from the criminal milieu, is appropriately relaxed if the informant is an identified victim...." *Easton v. City of Boulder,* 776 F.2d 1441, 1449 (10th Cir.1985), *cert. denied,* 479 U.S. 816, 107 S.Ct. 71, 93 L.Ed.2d 28 (1986). The district court explained, and we agree, that "[t]he cloistered nature of domestic violence is such that the testimony of the battered spouse and the injury itself may be the only evidence available to establish probable cause." Dist. Ct. Op. at 8.

Furthermore, there is no evidence that Sgt. Felsing heard Gannon's initial claim that Robert Carroll attacked her. Even if he had heard, it was reasonable for Sgt. Felsing to assess Gannon's demeanor, find her story credible, and rely on her subsequent identification of her husband as the attacker. When a police officer has received a reliable identification by a victim of his or her attacker, the police have probable cause to arrest. *See Torchinsky v. Siwinski,* 942 F.2d 257, 262 (4th Cir.1991) ("It is surely reasonable for a police officer to base his belief in probable cause on a victim's reliable identification of his attacker."); *Grimm v. Churchill,* 932 F.2d 674, 675 (7th Cir.1991) ("When an officer has received his information from some person — normally the
819 putative victim or an eye witness — who it seems reasonable to believe *819 is telling the truth, he has probable cause." (internal quotations omitted)).

Ronald Sharrar, Kenneth Sharrar and Gerard Sweeney argue that even if there was probable cause to arrest David Brigden based on Gannon's identification, there was not sufficient evidence to arrest them. They cite the Supreme Court decision in *Ybarra v. Illinois,* 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979), for the proposition that "mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause...." In *Ybarra,* a search warrant was issued to search a bar on the suspicion that a bartender was involved in drug sales. The police arrived and frisked all patrons based solely on their presence at the public tavern. Ybarra, a patron, sought to exclude evidence which was recovered from his person during this search. The Supreme Court held that the search violated the Fourth Amendment because the police had no facts which would support a suspicion that Ybarra had violated the law or that he was armed and presently dangerous. *See id.* at 91-93, 100 S.Ct. at 342-43.

Ybarra is inapposite. This is not a case where Ronald Sharrar, Kenneth Sharrar and Gerard Sweeney were arrested based on their "mere propinquity" to Brigden. Rather, they were arrested based upon an assault victim's description of her attack, which

included a clear identification of her husband and the statement that he was accompanied by three other men who all left in a brown van to go to Brigden's house. In less than an hour from the time of the 911 call, Sgt. Felsing observed that van outside of Brigden's house and learned from another resident of the building that Brigden may not be alone. These facts support a finding of probable cause to arrest all four plaintiffs.

2. Warrantless Arrest

Plaintiffs next contend that their arrests were illegal, even if probable cause existed, because the arrests occurred within their home unaccompanied by a warrant. Although police may make a warrantless arrest in a public place if they have probable cause to believe the suspect is a felon, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639 (1980).

The district court found that the arrests occurred in a public place so no warrant was required: "[T]he police telephoned the plaintiffs at home and asked them to come out. They consented to do so and were arrested outside, in a public place, at the moment the police took physical custody of them." Dist. Ct. Op. at 9. Thus, notwithstanding that the court recognized that "a substantial amount of coercion motivated plaintiffs' consent," *id.,* the court found there to be no jury issue.

The point at which an arrest occurs has been the subject of considerable judicial linedrawing. In *Terry v. Ohio,* 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 1879 n. 16, 20 L.Ed.2d 889 (1968), the Supreme Court defined a seizure as "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen...." Later, in *I.N.S. v. Delgado,* 466 U.S. 210, 215, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984), the Court explained that a person has been seized within the meaning of the Fourth Amendment "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (internal quotations omitted). In the most recent decision on the issue, the Supreme Court in *California v. Hodari D.*, 499 U.S. 621, 626, 111 S.Ct. 1547, 1551, 113 L.Ed.2d 690 (1991) explained that "[a]n arrest requires *either* physical force ... *or,* where that is absent, *submission* to the assertion of authority." (emphasis in original).

Under any of these tests, when a SWAT team surrounds a residence with machine guns pointed at the windows and the persons inside are ordered to leave the house backwards with their hands raised, an arrest has undoubtably occurred. There was a clear show of physical force and assertion of authority. No reasonable person would have believed that he was free to remain in the
820 house. We hold that under these circumstances the arrests occurred inside Brigden's *820 home. *See United States v. Al-Azzawy,* 784 F.2d 890, 893 (9th Cir.1985) (arrest occurred in the home when police surrounded the residence and ordered the person out with a bullhorn), *cert. denied,* 476 U.S. 1144, 106 S.Ct. 2255, 90 L.Ed.2d 700 (1986); *United States v. Maez*, 872 F.2d 1444, 1450 (10th Cir.1989) (where SWAT team surrounded trailer with rifles pointed and ordered suspect to exit, arrest occurred in home despite lack of physical entry). Therefore, the police were required to have secured an arrest warrant unless there were exigent circumstances. *See Payton,* 445 U.S. at 590, 100 S.Ct. at 1382.

The district court held that even if the arrests occurred indoors, exigent circumstances justified the warrantless arrests. The government bears the burden of proving that exigent circumstances existed: "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh v. Wisconsin,* 466 U.S. 740, 750, 104 S.Ct. 2091, 2098, 80 L.Ed.2d 732 (1984).

In explicating further on the type of exigent circumstances that would justify a warrantless entry into a person's home, the Court quoted the Minnesota Supreme Court with approval where it stated: "a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, ... or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling." *Minnesota v. Olson,* 495 U.S. 91, 100, 110 S.Ct. 1684, 1690, 109 L.Ed.2d 85 (1990) (internal quotations omitted); *see United States v. Velasquez*, 626 F.2d 314, 317 (3d Cir.1980).

There is an insufficient basis on this record to hold, as the district court did, that exigent circumstances existed as a matter of law. There is nothing in the record to support a theory of "hot pursuit," a fear that the suspects would flee, or a fear that evidence would be destroyed. It appears that, at most, the police believed that the suspects posed a danger because Gannon said she had been hit with a gun. The mere possession of a gun, which as far as the officers knew had been used only once and then against Brigden's wife, no matter how grievous a crime, does not necessarily show exigent circumstances. The police have not satisfactorily explained why, when the house was completely surrounded by an armed SWAT team, they could not secure the

premises while they went to procure an arrest warrant, especially in light of the fact that Municipal Court Judge Calloway was sitting on the bench at the police station during this entire episode.

The issue of exigent circumstances in these circumstances would be one for the jury. *See, e.g., Bodine v. Warwick,* 72 F.3d 393, 399 (3d Cir.1995) (issue of whether exigent circumstances existed should go to jury when there are disputed factual issues). However, there is, at most, evidence that only two of the defendants were involved in the arrest. Sgt. Felsing may be viewed by a fact finder as having effected the arrest by telephoning the order to exit to the plaintiffs, and he apparently did so under the direction of Lt. Wilson, the officer in charge of the operation. Thus, in summary, we cannot affirm the district court's disposition of the plaintiffs' claims based on that court's view that the arrests raised no constitutional issue.

B.

Excessive Force

We turn next to plaintiffs' contention that the district court erred in holding that there was insufficient evidence to present a jury issue on their claim that excessive force was used to arrest them. When an "excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right `to be secure in their persons ... against unreasonable ... seizures' of the person." *Graham v. Connor,* 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989). The proper test for evaluating an
821 excessive force claim is therefore one of objective reasonableness. *821 *See id.* at 397, 109 S.Ct. at 1872-73.

This objective reasonableness test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396, 109 S.Ct. at 1872. *See also Groman v. Township of Manalapan,* 47 F.3d 628, 634 (3d Cir.1995). Significantly, the Supreme Court has cautioned that in applying the objective reasonableness test, "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," is constitutionally unreasonable. 490 U.S. at 396, 109 S.Ct. at 1872 (internal quotations omitted). Rather, "[t]he calculus of reasonableness must embody allowance for the fact that `police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.'" *Id.* at 396-97, 109 S.Ct. at 1871-73.

In granting summary judgment, the district court held that only Ronald Sharrar alleged any physical injury and that that injury could not be attributed to any of the defendant officers. On appeal the plaintiffs argue that Lt. Wilson, as the on-scene commander and SWAT team leader, may be held liable for acquiescing in the unconstitutional conduct of his subordinate officers, even if he was not directly responsible for Ronald Sharrar's injuries. Plaintiffs also argue that their excessive force claim involves not just Sharrar's physical injury, but the entire level of force and verbal abuse used in the arresting process: deploying the SWAT team, forcing plaintiffs to lie face down in the dirt, and threatening that if they moved the police would "blow [their] ... fucking heads off." App. at 122.

Ronald Sharrar, the only plaintiff who alleged any physical injury, stated in deposition that the injury to his shoulder occurred after he was placed in the police car: "My handcuffs were grabbed from behind and my arms were lifted up from behind.... My shoulder came partially out of the socket." App. at 105-06. The claims of the other plaintiffs are limited to "emotional distress, humiliation" and "public scorn and derision." Complaint, App. at 30.

Ronald Sharrar, who could recognize all of the defendant officers, was unable to identify which police officers were in the police car with him at the time of the alleged abuse. There was therefore no evidentiary basis on which to hold these defendants liable. Plaintiffs argue that Lt. Wilson may be liable under the cases holding that a police officer may be liable for violating an arrestee's rights not only if he personally participates in the violation, but also if he directs others to so violate, or had knowledge of and acquiesced in his subordinates' violations. *See Baker v. Monroe Township,* 50 F.3d 1186, 1190-91 (3d Cir.1995). However, there is no evidence in the record to suggest that Lt. Wilson, as the officer in charge, had any knowledge of the alleged incident in the police car. Therefore, we will not disturb the district court's determination that the conduct leading to Ronald Sharrar's injury could not be attributed to Wilson.

Turning next to the extent of force employed in effecting the four arrests, it is incontestable that the display of force used to apprehend the four men for an alleged domestic assault, albeit with a gun, appears extreme. It entailed calling over twenty

officers to the scene, including a SWAT team armed with machine guns and an FBI hostage negotiator. It does not follow, however, that the extreme methods used in effecting the arrests, such as requiring plaintiffs to lie face down in the dirt, with guns to their heads and vulgar threats, were constitutionally excessive, even though they caused plaintiffs' discomfort and humiliation. Although there are decisions of this court that have found the use of force excessive, notwithstanding the absence of extensive physical contact and permanent physical injury, the circumstances here are distinguishable.

In *Black v. Stephens*, 662 F.2d 181 (3d Cir.1981), *cert. denied,* 455 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1982), we
822 sustained a jury verdict in a case where a plainclothed *822 police officer brandished and pointed a revolver at plaintiff and his wife during what was at that time only an investigatory stop. However, in that case there had been no basis for plaintiff to know that the gunman was a police officer or that an arrest would eventually be effected. And in *Baker v. Monroe*, 50 F.3d at 1193, where police officers ordered those approaching a house that was the subject of an incipient drug raid to "get down," pushing them to the ground, while using handguns, we reversed the district court's grant of summary judgment and suggested that the officers' actions could constitute a constitutional violation. *See also* *McDonald v. Haskins*, 966 F.2d 292, 294 (7th Cir.1992) (finding a violation of the Fourth Amendment when a police officer aimed a gun at a passive nine-year-old boy and threatened to pull the trigger).

The Supreme Court made clear in *Graham* that each case alleging excessive force must be evaluated under the totality of the circumstances. The district court here focused only on the presence *vel non* of physical injury. We do not agree that the absence of physical injury necessarily signifies that the force has not been excessive, although the fact that the physical force applied was of such an extent as to lead to injury is indeed a relevant factor to be considered as part of the totality. *See* *Gumz v. Morrissette*, 772 F.2d 1395, 1400-01 (7th Cir. 1985) (holding that, under substantive due process standard, excessive force claim must be "so egregious as to be constitutionally excessive, and the presence of some physical injury is certainly relevant to that determination"), *cert. denied,* 475 U.S. 1123, 106 S.Ct. 1644, 90 L.Ed.2d 189 (1986), *overruled, Lester v. City of Chicago*, 830 F.2d 706, 712-14 (7th Cir.1987). Other relevant factors include the possibility that the persons subject to the police action are themselves violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time.

In this case, the officers were arresting four men, they had been advised that at least one of the men, with the assistance of others, had used a gun in a violent episode which was still unaccounted for, there had been some suggestion that they may have been involved with drugs, and there is no allegation that the requirement that the suspects lie down extended beyond the time necessary to handcuff them and secure them. While the language and method used to effect the arrests appear to be more akin to the Rambo-type behavior associated with police in overdramatized B movies or TV shows than the police conduct ordinarily expected in a quiet, family seaside town, we are reluctant to establish a precedent that would subject every police arrest of a group of possible violent offenders to compliance with Marquis of Queensberry Rules of fair play. Although these police officers came close to the line, these circumstances, in totality, do not rise to a Fourth Amendment violation. Therefore, we will not hold erroneous the district court's grant of summary judgment to the police officers on the plaintiffs' claim of excessive force.

C.

The Searches

1. *The "Protective Sweep"*

The plaintiffs also argue that the district court erred when it held constitutionally permissible the "protective sweep" of the premises conducted by the defendants after plaintiffs were arrested but before defendants procured a search warrant. The Supreme Court has defined a protective sweep as "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327, 110 S.Ct. 1093, 1094, 108 L.Ed.2d 276 (1990). The sweep must be limited to a search of "closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334, 110 S.Ct. at 1098. If the search goes beyond the immediately adjoining areas, there must be "articulable facts" which would warrant a reasonably prudent officer to believe that there are individuals who pose
823 a danger in *823 other areas of the house. *See id.* at 334, 110 S.Ct. at 1098.

In this case, the officers sought to justify their warrantless entry into Brigden's unit immediately following effecting the arrest by telephone on the ground that it was a quick protective sweep incident to the arrest and needed to protect the safety of the officers

involved. The officers contend they entered the residence seeking to determine that there were no other accomplices hiding in the building with access to the gun that remained unaccounted for. Although they swept more broadly than Brigden's unit, we need not decide whether the sweep of the remainder of the four-unit building was justified because these plaintiffs, who were overnight guests of Brigden, only had a privacy interest in Brigden's unit and lack standing to challenge a search of other persons' apartments. *Olson,* 495 U.S. at 95, 110 S.Ct. at 1687 (Fourth Amendment protects from unreasonable searches only those places where persons have a legitimate expectation of privacy).

We note as an initial matter that we are not dealing with a criminal case where the admissibility of evidence found during a protective sweep following an unconstitutional arrest would lead to suppression of the evidence as fruits of the unconstitutional arrests. Under the jurisprudence of this court, the validity of the search for purposes of a § 1983 suit must be examined independently of the lawfulness of the arrests. *See generally, Bodine,* 72 F.3d at 400 (in a § 1983 case, questions of reasonableness and constitutionality of officers' conduct once inside the home were not dependent on whether officers' entry into the home was lawful since officers are liable in tort only for injury proximately caused by their unreasonable conduct).

In *Maryland v. Buie,* the Supreme Court's seminal decision on this issue, the Court explained why a protective sweep "incident to [an] arrest" was permissible under the Fourth Amendment notwithstanding it was "without probable cause or reasonable suspicion." 494 U.S. at 334, 110 S.Ct. at 1098. The Court explained:

> In the instant case, there is an ... interest of the officers in taking steps to assure themselves that the house in which the suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. The risk of danger in the context of an arrest *in the home* is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter.... A protective sweep ... occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime. Moreover, unlike an encounter on the street or along a highway, *an in-home arrest puts the officer at the disadvantage of being on his adversary's "turf." An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surrounding.*

Id. at 333, 110 S.Ct. at 1097-98 (emphasis added). In addition, the Court noted that

> the arrest warrant gave the police every right to enter the home to search for Buie. *Once inside,* the potential for danger justified a standard of less than probable cause for conducting a limited protective sweep.

Id. at 334 n. 1, 110 S.Ct. at 1098 n. 1 (emphasis added). Finally, the Court cautioned that, unlike an evidentiary search, "a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found." *Id.* at 335, 110 S.Ct. at 1099.

Although this court has never ruled on the circumstances in which a protective sweep of a home, as defined in *Buie,* would be permissible as incident to an arrest occurring just outside the home, those circuits that have addressed the issue have uniformly held that the reasoning of *Buie* is also applicable and that under those circumstances, protective sweeps of the home in such situations are not *per se* unreasonable, *see, e.g., United States v. Colbert,* 76 F.3d 773, 776-77 (6th Cir.1996); *United States v. Henry,* 48 F.3d 1282, 1284 (D.C.Cir.1995); *United States v. Kimmons,* 965 F.2d 1001, 1009-10 (11th Cir.1992), *cert. denied,* 506 U.S. 1086, 113 S.Ct. 1065, 122 *824 L.Ed.2d 370 (1993), *cert. granted and judgment vacated on other grounds, Small v. United States,* 508 U.S. 902, 113 S.Ct. 2326, 124 L.Ed.2d 239 (1993), *judgment reinstated, United States v. Kimmons,* 1 F.3d 1144 (11th Cir.1993); *United States v. Oguns,* 921 F.2d 442, 446 (2d Cir.1990); *United States v. Tisdale,* 921 F.2d 1095, 1097 (10th Cir.1990), *cert. denied,* 502 U.S. 986, 112 S.Ct. 596, 116 L.Ed.2d 619 (1991). Those courts also agree that a sweep incident to an arrest occurring just outside the home must be analyzed under the second prong of the *Buie* analysis requiring "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Buie,* 494 U.S. at 334, 110 S.Ct. at 1098.

Like our sister circuits, we see no reason to impose a bright line rule limiting protective sweeps to in-home arrests, as we agree with the *Colbert* court that "in some circumstances, an arrest taking place just outside a home may pose an equally serious threat to the arresting officers." 76 F.3d at 776. Certainly, it would be imprudent to prohibit officers who are effecting an arrest or waiting until a warrant may be obtained from ensuring their safety and minimizing the risk of gunfire or other attack coming from inside the home if they have reason to believe that dangerous individuals are inside. Therefore, in order to determine whether the protective sweep in question met the standard enunciated by the Supreme Court in *Buie,* we must consider whether there was an articulable basis for a protective sweep, i.e., a warrantless search, under the circumstances at that time.

Predictably, where the courts have differed in permitting protective sweeps incident to arrests outside the home is on the quantity and quality of the articulable facts necessary to justify the sweep, rather than on the underlying standard. In *Oguns*, 921 F.2d at 446-47, for example, the Second Circuit upheld a protective sweep following an arrest outside the home where "[e]ven though the agents had been told that Oguns' brother was not in the apartment, they still could have reasonably believed that others were in the apartment." Similarly in *Tisdale*, 921 F.2d at 1097, the Tenth Circuit upheld a protective sweep following an arrest made outside the home, reasoning that "the fact that defendant fled [from the trailer before being arrested], along with the sounds of gunshots, was ample justification for a protective sweep." In *Colbert*, 76 F.3d at 777-78, however, the Sixth Circuit invalidated a protective sweep following an arrest made outside the home and after the arrestee's girlfriend frantically ran out of the house to the arrest site because the officers had no information as to whether anyone else was still in the house following the arrest. In so holding, the court reasoned that "`[n]o information' cannot be an articulable basis for a sweep that requires information to justify it in the first place". *Id.* at 778.

Although the parties before us have not focused on *Buie* and the standard enunciated there, the officers do contend that the protective sweep was justified in light of the "legitimate fear for their safety given the totality of the circumstances they faced." Appellee's Brief at 24. Admittedly, if the officers had an articulable basis to believe that a confederate of those apprehended was still at large or within the premises and that a weapon previously sighted and not yet recovered might be available within the premises, the protective sweep could have been justified, *see, e.g.,* *Kimmons*, 965 F.2d at 1009-10. The reasonable possibility that an associate of the arrestees remains at large to do mischief or cause danger to the officers is the salient, although not necessarily only, concern for which a warrantless protective sweep is justified. The evidence from these defendants themselves, however, negates reliance on these possibilities as the articulable basis for the protective sweep.

The transcript of the events as they were unfolding contains the following dialogue:

> MR. DEVLIN: Somebody from the Prosecutor's Office talked to the wife, there's only one gun involved, *it's a pistol in the brown van in front of the house.*
>
> MR. McCLORY: 10-4. Keep them coming out the back.
>
> 825 *825 MR. WILSON: Brigden is not out yet, he should be the fourth individual inside.
>
> MR. FELSING: Felsing to L-8.
>
> MR. McCLORY: If there's any movement to that brown van, let us know.
>
> MR. KENNEDY: I'm right on top of it, I am only 20 feet away from it.
>
> Let's go back to the back, *once they are out,* we'll get the gun.
>
> MR. FELSING: Felsing to L-8.
>
> MR. WILSON: You got this fourth guy on the phone, Dennis?
>
> MR. FELSING: Got him on the phone.
>
> MR. WILSON: Send him out.
>
> MR. FELSING: 10-4.
>
> Okay he's coming out.
>
> MR. McCLORY: C-2 to L-8, *I think everybody is clear.*
>
> MR. KENNEDY: The one in the front was covered.
>
> MR. WILSON: Tommy, you got the front door?
>
> MR. ROCK: Negative.
>
> MR. WILSON: Stand by.

Dennis, *is everybody out?*

MR. FELSING: *Confirmed.*

MR. WILSON: We're ready for transport whenever you are ready.

App. at 1075-76 (emphasis added).

Thus, under the circumstances, the fact that the officers believed that Brigden had brandished a pistol cannot, on its own, constitute sufficient "articulable facts" as required under *Buie* for two reasons. First, it implies nothing regarding the possible presence of anyone being in Brigden's home — the touchstone of the protective sweep analysis. *See* *Colbert,* 76 F.3d at 777 (arrestee's dangerousness is irrelevant to the protective sweep analysis once the arrestee is in custody); *United States v. Ford,* 56 F.3d 265, 269 (D.C.Cir.1995) (fact that homicide suspect was assumed to be armed and dangerous did not justify protective sweep beyond the immediate area of the arrest). Second and more importantly, at the time of the protective sweep, the officers at the scene had been informed, and believed, that the gun allegedly used in the assault was not in Brigden's residence, but in his van. App. at 1075-79.

Similarly unavailing to the officers is the fact that they had been told that Brigden was accompanied by three accomplices. Once all four men were out of the house and in custody, the arresting officers had no basis, let alone the "articulable facts" required under *Buie,* to conclude that others remained inside. Indeed, as the transcript reveals, Sgt. Felsing informed Lt. Wilson that everyone was out of the house *before* the sweep was initiated. App. at 1076.

Because we agree with the court in *Colbert* that "`[n]o information' cannot be an articulable basis for a sweep that requires information to justify it in the first place," 76 F.3d at 778, we conclude that the *Buie* "articulable facts" standard was not met in this case, and we cannot sustain the district court's grant of summary judgment for defendants as to the protective sweep.

2. *The Subsequent Search*

Plaintiffs next challenge the court's disposition of their claims that the subsequent full search of the building, also conducted before a written search warrant was issued, was unconstitutional. Plaintiffs argue that the district court erred when it found that only Sgts. Kennedy and Larkin were implicated in the search, and granted summary judgment to Sgt. Felsing and Lt. Wilson on the ground that "they played no part in the search." Dist. Ct. Op. at 17.

Sgt. Kennedy testified in his deposition that it was Lt. Wilson who ordered Sgt. Larkin to conduct the search. Lt. Wilson stated in his own deposition that he was in the house during the time the search was being conducted, although he claimed that he did not personally search the premises. *See* App. at 439. Lt. Wilson was the highest ranking officer at the scene and a reasonable jury could conclude that the search was conducted under his direction. It was therefore improper to grant summary judgment in favor of Lt. Wilson.

However, the only evidence linking Sgt. Felsing to the search was that he, along with Sgt. Kennedy, provided the initial
826 information orally to Municipal Court Judge Calloway *826 in order to procure a search warrant. Nothing suggests that Sgt. Felsing knew that a telephonic or "verbal" warrant, rather than a written warrant, was being procured and there is no evidence that he played any part in the decision to rely on that "verbal" warrant to conduct or authorize the search. Inasmuch as Sgt. Felsing did not participate in the search itself, it was not error to grant summary judgment as to him.

To summarize, we conclude that the district court erred in holding that there were exigent circumstances as a matter of law to justify the warrantless arrests, that the protective sweep was justified as a matter of law notwithstanding the absence of articulable facts and that there was no basis to hold Lt. Wilson responsible for the subsequent search.

III.

QUALIFIED IMMUNITY

A.

Applicable Principles

A claim under section 1983 for damages against police officers or other government officials will almost inevitably raise issues as to the availability of qualified immunity. Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). In addition, and particularly in § 1983 cases involving alleged violations of the Fourth Amendment, the Supreme Court has emphasized that the inquiry is whether a reasonable officer could have believed that his or her conduct was lawful, in light of the clearly established law and the information in the officer's possession. *See Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 536, 116 L.Ed.2d 589 (1991) (per curiam); *Anderson v. Creighton,* 483 U.S. 635, 641, 107 S.Ct. 3034, 3039-40, 97 L.Ed.2d 523 (1987). Our cases have followed that lead. *See Kornegay v. Cottingham,* 120 F.3d 392, 395-96 (3d Cir.1997); *Parkhurst v. Trapp,* 77 F.3d 707, 712 (3d Cir.1996); *Orsatti v. New Jersey State Police,* 71 F.3d 480, 483 (3d Cir.1995).

Thus, law enforcement officials who "reasonably but mistakenly" conclude that their conduct comports with the requirements of the Fourth Amendment are entitled to immunity. *Hunter,* 502 U.S. at 227, 112 S.Ct. at 536. *See also Anderson,* 483 U.S. at 641, 107 S.Ct. at 3039-40; *Kornegay,* 120 F.3d at 395-96; *Orsatti,* 71 F.3d at 483. In this way, "the qualified immunity standard `gives ample room for mistaken judgments' by protecting `all but the plainly incompetent or those who knowingly violate the law.'" *Hunter,* 502 U.S. at 229, 112 S.Ct. at 537 (quoting *Malley v. Briggs,* 475 U.S. 335, 341, 343, 106 S.Ct. 1092, 1096, 1097, 89 L.Ed.2d 271 (1986)); *Orsatti,* 71 F.3d at 484. It follows that the officer's subjective beliefs about the legality of his or her conduct generally "are irrelevant." *Anderson,* 483 U.S. at 641, 107 S.Ct. at 3040. *See also Grant v. City of Pittsburgh,* 98 F.3d 116, 123-24 (3d Cir.1996).

The first issue, whether the plaintiff alleges the violation of a clearly established constitutional right, is purely a question of law, and the Supreme Court has made clear that this is a threshold question that should be decided expeditiously to spare a defendant the "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley,* 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991).

The language in our cases is much less clear as to whether the second issue, the reasonableness of the official's mistaken belief in the lawfulness of his or her conduct, presents an issue of law for the court or an issue of fact for the jury. We have recently noted the "tension ... as to the proper role of the judge and jury where qualified immunity is asserted." *Sherwood v. Mulvihill,* 113 F.3d 396, 401 n. 4 (3d Cir.1997) (citing *Grant,* 98 F.3d at 122). To some extent that tension may be attributable to our effort to comply with the Supreme Court's instruction that qualified immunity defenses be resolved at the earliest possible point in the litigation *827 while recognizing the difficulty in applying that instruction in situations where there are disputes of relevant fact. *See Grant,* 98 F.3d at 122.

We are informed by the Supreme Court's discussion of this issue in *Hunter,* 502 U.S. 224, 112 S.Ct. 534, a case that surprisingly appears not to have been cited in any of this court's reported opinions. Bryant, who was arrested by Secret Service agents without a warrant for making threats against the President, sued them for damages after the criminal complaint against him was dismissed. The officers moved for summary judgment on qualified immunity grounds, alleging, inter alia, that they believed that they had probable cause to make the arrest based on Bryant's possession and delivery of a letter indicating that a "Mr. Image" would assassinate President Reagan on the President's upcoming trip to Germany, on tips that Bryant had earlier that day talked of assassination generally and told a co-worker that the President should have been assassinated in Bonn, and on Bryant's refusal to answer the agents' questions regarding his intent to harm the President. *Id.* at 224-26, 112 S.Ct. at 535-36. The denial of that motion by the district court was affirmed by the Court of Appeals, which stated that "[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment ... based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach." *Id.* at 228, 112 S.Ct. at 536-37.

The Supreme Court disagreed, stating:

> [t]his statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. Second, *the court* should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.

Id. (emphasis added) (internal citation omitted). The Court then remanded the case for further proceedings.

A review of our opinions in the last three or four years discloses that we have not always followed what appears to be the Supreme Court's instruction that the reasonableness of an official's belief that his or her conduct is lawful is a question of law for the court, although other courts have interpreted the opinion in that way. *See, e.g., Pierce v. Smith,* 117 F.3d 866, 871 (5th Cir.1997) (citing *Hunter* for the proposition that "whether under the circumstances a reasonable officer could believe probable cause for arrest existed, thus giving rise to qualified immunity, is a question of law").

Some of our cases have followed this approach, even without citation to *Hunter.* In *Parkhurst,* for example, police officers were sued in a § 1983 action based on the claim that the warrantless search of plaintiff's home violated the Fourth Amendment. 77 F.3d at 710. In reversing the district court's grant of summary judgment on qualified immunity grounds, we stated that "[t]o determine reasonableness [of the search], a reviewing court must ask `whether a reasonable person could have believed the defendant's actions to be lawful in light of clearly established law and the information he possessed.'" *Id.* at 712 (quoting *Anderson,* 483 U.S. at 641, 107 S.Ct. at 3039-40). We then applied this standard and held that as a matter of law the search violated the Fourth Amendment, and "the police officers reasonably should have known that their conduct was unlawful." *Id.* at 713.

We again applied this approach in our recent decision in *Rogers v. Powell,* 120 F.3d 446 (3d Cir.1997), where plaintiff filed suit under § 1983 alleging that he had been arrested with neither a warrant nor probable cause. The district court granted the defendant officers summary judgment on qualified immunity grounds. On appeal, we held that no probable cause existed and turned to the issue of qualified immunity, stating that "[w]hether a governmental official is entitled to protection under the doctrine of qualified immunity is a `purely legal question.'" *Id.* at 454 (citing *Acierno v. Cloutier,* 40 F.3d 597, 609 (3d Cir.1994) (en banc)).

828 The qualified immunity issue in *Rogers* raised the question whether defendant officers' *828 reliance on the statements of other officers was reasonable. On the issue relevant here, the respective roles of the judge and the jury, we stated that "where a police officer makes an arrest on the basis of oral statements by fellow officers, an officer will be entitled to qualified immunity from liability in a civil rights suit for unlawful arrest *provided it was objectively reasonable for him to believe, on the basis of the statements, that probable cause for the arrest existed." Id.* at 455 (emphasis added). This court then examined the information possessed by each defendant and determined whether his belief that a warrant or probable cause existed was reasonable. *Id.* at 455-57. Significantly, we made those reasonableness determinations as a matter of law. *Id. See also Capone v. Marinelli,* 868 F.2d 102, 104-06 (3d Cir.1989) (stating that official's objective good faith is purely legal question and holding it reasonable for officer to rely on a facially valid written bulletin indicating that a warrant existed).

We do not suggest that there may never be instances where resort to a jury is appropriate in deciding the qualified immunity issue. For example, in *Karnes v. Skrutski,* 62 F.3d 485 (3d Cir.1995), we reversed the district court's grant of judgment as a matter of law on the issue of qualified immunity. Plaintiff had alleged that defendant police officers unlawfully searched his vehicle following an investigatory stop. We held that because there was a genuine issue of material fact as to whether the officers in fact believed that certain "vegetable matter" seen on the floor of the car was or likely could have been marijuana, the issue of the officers' right to qualified immunity was an issue of fact for the jury. We did not reach the issue whether, had there been no factual dispute about the officers' *actual* belief, the jury rather than the court would have had to decide the question of the reasonableness of their belief. *Accord, Lampkin v. City of Nacogdoches,* 7 F.3d 430, 435 (5th Cir.1993) ("It must be recognized that even though [*Hunter v.] Bryant* diminished the jury's role in qualified immunity cases, it did not entirely abolish it. Rule 56 still has vitality in qualified immunity cases if [there are] underlying historical facts in dispute that are material to the resolution of the questions whether the defendants acted in an objectively reasonable manner in view of the existing law and facts available to them." (internal citations omitted)), *cert. denied,* 511 U.S. 1019, 114 S.Ct. 1400, 128 L.Ed.2d 73 (1994).

We thus hold, following the Supreme Court's decision in *Hunter,* that in deciding whether defendant officers are entitled to qualified immunity it is not only the evidence of "clearly established law" that is for the court but also whether the actions of the officers were objectively reasonable. Only if the historical facts material to the latter issue are in dispute, as in *Karnes,* will there be an issue for the jury. The reasonableness of the officers' beliefs or actions is not a jury question, as the Supreme Court explained in *Hunter.*

B.

Application of Qualified Immunity

1. *The Protective Sweep*

As discussed in part II.C.1. above, the protective sweep of Brigden's home was unlawful because the officers at the scene did not possess "articulable facts" justifying a reasonable belief that dangerous individuals remained inside the home after the arrests. To prevail on their qualified immunity claim, — a claim not reached by the district court — defendants must show that their conduct did not violate a clearly established constitutional right of which a reasonable officer would have been aware. Because the resolution of that issue is purely a question of law, there is no reason why this court should not address it now.

The Supreme Court has never had the opportunity to apply its holding in *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), to protective sweeps incident to arrests made just outside the home. And prior to today, we have never had occasion to apply the Court's reasoning in that case in a published opinion. Thus, on October 1, 1992, the date of the protective sweep, defendants had no express guidance as to the lawfulness of their conduct from any directly controlling authority. 829 Moreover, at that *829 time, two courts of appeals had upheld protective sweeps incident to arrests made outside the home under the *Buie* rationale by officers who had little more in the way of articulable facts than did the defendants in this case. *See United States v. Oguns*, 921 F.2d at 446-47; *United States v. Tisdale*, 921 F.2d at 1097.

Thus, we conclude that the law as to protective sweeps incident to arrests made outside the home was not clearly established, and even though the protective sweep conducted by the defendant officers exceeded constitutional boundaries, defendants were protected by qualified immunity.

2. *Exigent Circumstances*

In contrast to the issue of liability for the protective sweep, the defendants' claim that they should be afforded qualified immunity for the arrests, even if there were no exigent circumstances, cannot be disposed of by this court based on the absence of "clearly established law." The law on exigent circumstances was fully developed at the time of the incidents at issue, and a reasonable police officer should have known the applicable law. We note, however, that the *Hunter* Court framed the inquiry to be asked by the court as to "whether the agents acted reasonably under settled law *in the circumstances*." 502 U.S. at 228, 112 S.Ct. at 537. From our vantage point, we see no "circumstances" that would affect application of the clearly established law, but are cognizant that this issue was not addressed by the district court. We are unwilling to pretermit argument by the parties that may be relevant to the district court's determination which, as we previously stated, is essentially one of law. Nor is it clear that there are no disputes as to the historical facts. If there are and if they would be material to the determination, then the resolution of those disputes would be for the jury. In sum, we are not in a position to resolve the possibility of qualified immunity at this time and will remand that issue to the district court.

3. *The Second Search*

It is also clearly established law under the Fourth Amendment that "searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton,* 445 U.S. at 586, 100 S.Ct. at 1380. Such warrantless searches are prohibited "absent probable cause and exigent circumstances." *Welsh,* 466 U.S. at 749, 104 S.Ct. at 2097. In the case at bar, the district court held that no exigent circumstances justified a warrantless search, and that issue is not before us.

With respect to the existence of clearly established law, the parties have focused on whether defendants complied with New Jersey's law applicable to the issuance of warrants. Although the primary issue is whether the search was unconstitutional under the Fourth Amendment, that question cannot be answered without reference to state law. In *Acierno,* 40 F.3d at 620, this court looked to state law to determine whether certain rights were "clearly established." And in the Supreme Court's decision in *Davis v. Scherer,* 468 U.S. 183, 193 n. 11, 104 S.Ct. 3012, 3018-19 n. 11, 82 L.Ed.2d 139 (1984), the Court suggested that state law may be relevant to the immunity analysis where that law bears directly upon the federal claim, such as where a plaintiff's property rights are defined by state law for purposes of a due process challenge. Here, similar to claims for the deprivation of property without due process, the validity of the search under federal law depends in part on the validity of the warrant under state law. Thus, the officers' knowledge of the state warrant law bears directly upon the reasonableness, under the Fourth Amendment, of executing the search with an invalid warrant.

Under New Jersey Court Rule 3:5-3 (1992), search warrants may be issued either orally or in writing after complying with various procedural safeguards. Written warrants may be issued when an applicant appears in person before a judge providing his or her

affidavit or testimony and the judge finds that there are grounds for issuing the warrant. The judge shall then "date and issue the warrant identifying the property to be seized, naming or describing the person or place to be searched and specifying the hours when it may be executed." N.J. Ct. R. 3:5-3(a).

830 *830 A telephonic warrant, on the other hand, may be issued when the applicant is not physically present. The Rule, however, sets forth a variety of heightened procedural safeguards for the issuance of a telephonic warrant so that "the integrity and soundness [of the issuing judge's] determinations can be assured." *New Jersey v. Valencia*, 93 N.J. 126, 138, 459 A.2d 1149, 1155 (1983). Only a Superior Court Judge, not a Municipal Court Judge like Judge Calloway, is authorized to issue telephonic warrants. The Rule further provides, *inter alia,* that the Superior Court Judge must "contemporaneously record" the sworn oral testimony of the person(s) providing information to procure the warrant and satisfy him or herself that "exigent circumstances exist sufficient to excuse the failure to obtain a written warrant, and that sufficient grounds for granting the application have been shown." N.J. Ct. R. 3:5-3(b). Once the judge approves the warrant, the judge is required to "memorialize the specific terms of the authorization to search and shall direct the applicant to enter this authorization verbatim on a form, or other appropriate paper, designated the duplicate original search warrant. This warrant shall be deemed a search warrant for the purpose of [this Rule]." *Id.*

The judge must also "contemporaneously record factual determinations as to exigent circumstances," certify a transcription of the testimony, and "shall promptly issue a written confirmatory search warrant and shall enter thereon the exact time of issuance of the duplicate original warrant." *Id.* By requiring strict adherence to these exacting requirements, the Rule comports with the New Jersey Supreme Court's insistence on "a reliable underpinning to the judicial decision authorizing a search rendered over the telephone." *Valencia,* 93 N.J. at 139, 459 A.2d at 1155.

The defendants do not deny that Judge Calloway lacked any authority to issue a telephone warrant because he was not a Superior Court Judge, that the judge did not create a written document of the oral warrant, and that Sgt. Kennedy did not transcribe the judge's oral warrant onto a form "designated the duplicate original search warrant." Without the creation of such a written record, "the subsequent written warrant cannot be reliably compared to any prior recordation to determine its fidelity to the contents of the original application and oral authorization." *Valencia,* 93 N.J. at 135, 459 A.2d at 1154.

Thus, with respect to the second search of Brigden's residence, the district court, albeit granting summary judgment for Felsing and Wilson on the ground that they did not participate in the search, denied Larkin's and Kennedy's motion for summary judgment on qualified immunity grounds and directed that that issue be the subject of the jury trial. At the close of the evidence in that trial, presided over by the magistrate judge, plaintiffs filed a motion for judgment as a matter of law on the issue of qualified immunity, which the magistrate judge denied. He charged the jury to decide whether the defendants actually believed that the actions they took were lawful, whether the defendants were motivated by malice or acted in callous disregard or indifference to plaintiffs' rights, and whether their mistake was the sort that a reasonably prudent officer might make. The jury, answering special interrogatories, decided that the warrant was invalid but that Sgt. Larkin, the only defendant as to whom these interrogatories applied, had an objectively reasonable good faith belief that he was authorized to search Brigden's residence and vehicles.

As is evident from our prior discussion of the principles of qualified immunity, the first two questions given to the jury were either erroneous or irrelevant. However, we need not dwell on that error because the third question correctly framed the immunity issue. And although it would ordinarily have been a question of law for the court, in this case there were some historical facts at issue. Specifically, it appears to have been in dispute whether Sgt. Kennedy appeared before Municipal Court Judge Calloway for a telephonic warrant before the second search proceeded, and there was even a factual issue as to whether Judge Calloway issued a telephonic or oral warrant. Thus, this situation is not dissimilar to that in *Karnes* where we held that a factual dispute
831 relating to qualified *831 immunity must be sent to the jury, and suggested that, at the same time, the jury would decide the issue of objective reasonableness. We see no reversible error in the determination that Sgt. Larkin was entitled to qualified immunity.

The issue of qualified immunity as to Sgt. Kennedy was never resolved by the jury as that issue was foreclosed by the jury's response to the interrogatories dealing with the role played by each of the remaining defendants in the search, and thereafter with causation and damages. The first interrogatory as to defendant Sgt. Kennedy asked: "Do you find that Officer William Kennedy entered and searched the plaintiffs' residence and/or vehicles on the afternoon of October 1, 1992?" App. at 1194. The jury was told that if it answered "No" to this question, it should not further consider liability against Sgt. Kennedy. Plaintiffs objected to this interrogatory at trial on the ground that it unduly limited the basis on which Sgt. Kennedy could be held liable, and raise their objection again on appeal.

Plaintiffs argue that they presented ample evidence at trial that Sgt. Kennedy played a crucial role in the unlawful search, such as by conveying to the officers at the scene that he had obtained a valid search warrant and by failing to direct that the search be stopped as soon as he realized that there was no warrant.[1] Therefore, they contend that the jury should have been allowed to consider whether Kennedy should be held responsible for his role in the search, regardless of whether he physically entered Brigden's residence.

We have plenary review over the propriety of the challenged interrogatory as it involves a question of the correct legal standard. *Mosley v. Wilson*, 102 F.3d 85, 94 (3d Cir.1996). The limitation of the interrogatory to whether Sgt. Kennedy "entered and searched" the residence reflects an erroneous view of the law. Sgt. Kennedy may be held liable for his role in the illegal search if the jury found that he participated by procuring an invalid warrant or authorizing the search based on that warrant. *See, e.g., Malley*, 475 U.S. at 345, 106 S.Ct. at 1098 (holding that police officer can be held liable for applying for and relying upon a warrant that no reasonable officer would rely upon, despite the fact that a magistrate judge issued the warrant). Therefore, plaintiffs were entitled to have the jury decide Sgt. Kennedy's liability based on the totality of his conduct.

Similarly, we have held it was error to grant summary judgment for Lt. Wilson as to the second search. It follows that he too will be entitled to a determination on his qualified immunity claim. Moreover, we note from our decision in *Rogers* that the entitlement to qualified immunity may depend upon circumstances individual to the role played by each defendant, an issue that the district court will have to consider in the first instance.

IV.

CONCLUSION

We affirm the district court's grant of summary judgment to the defendants on the issues of probable cause to arrest and the alleged use of excessive force. We reverse the district court's grant of summary judgment to defendants Sgt. Felsing and Lt. Wilson on the issue of the warrantless arrest but affirm the judgment in favor of Sgts. Larkin and Kennedy.

With respect to the searches, we reverse the district court's holding that the protective sweep was lawful, but hold that defendants were entitled to qualified immunity on that claim. As to the second warrantless search, we affirm the grant of summary judgment for Sgt. Felsing, but hold that plaintiffs were entitled to a jury trial as to Lt. Wilson, in addition to Sgts. Kennedy and Larkin, and
832 that the interrogatory given to the jury regarding *832 Sgt. Kennedy's role in the second search was erroneous.

On remand, the jury will have to decide whether Lt. Wilson and Sgt. Felsing were justified by exigent circumstances for making a warrantless arrest inside Brigden's home and, if not, and assuming that relevant historical facts remain in dispute, whether they are entitled to qualified immunity. The jury will also have to decide whether the actions of Lt. Wilson and Sgt. Kennedy constituted participation in the second search and, if material historical facts remain in dispute, whether they are entitled to qualified immunity. Finally, if the jury finds for plaintiffs on the preceding issues, the jury must then determine causation and damages.

For the foregoing reasons, we will affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

POLLAK, District Judge, concurring in part and dissenting in part.

Except as to one issue, I find the court's opinion in this difficult case masterly: comprehensive, cogent, correct. The one issue on which I part company with the court is that canvassed in part II.B of the court's opinion. The court there sustains the district court's grant of summary judgment dismissing plaintiffs' claims that the police used excessive force in arresting them. Stating that it is "reluctant to establish a precedent that would subject every police arrest of a group of possible violent offenders to compliance with the Marquis of Queensberry Rules of fair play," the court, while acknowledging that "these police officers came close to the line," concludes that "these circumstances, in totality, do not rise to a Fourth Amendment violation." With great respect, I disagree. I believe that a fact-finder could, on the evidence before the district court, reasonably conclude that the police officers crossed the line. I think it error for this court to hold that arrest methods which the court characterizes as "more akin to ... Rambo-type behavior ... than the police conduct expected in a quiet, family seaside town," merit, as a matter of law, a constitutional seal of approval. In my judgment, the district court should have permitted the question whether excessive force was used to go to the jury.

I will not undertake to set forth at length the factual record which underlies my assessment, since the court's opinion fairly states the essential facts. I will, however, set the general scene and highlight certain details which seem particularly relevant to the

excessive-force issue. On October 1, 1992, the Sea Isle Police Department deployed all of its on-duty officers, and brought in reinforcements from neighboring towns as well as from its own off-duty roster, to arrest four men who were inside a building and suspected of an assault involving a pistol. At the time of the arrests, various officers stationed outside the building carried, aside from their standard sidearms, .30 caliber rifles, submachine guns, and shotguns. One member of the SWAT team was posted as a sniper. Although no witness recounted the exact number of officers on the scene, a conservative figure can be assembled from the record of some twenty officers on the scene. This means that at the point of arrest, which was effectuated by SWAT team members wearing body armor, the police outnumbered the suspects by a ratio of at least five to one. When the four plaintiffs, pursuant to police directive, emerged from the building, they were made to lie down in the dirt and menaced with loaded revolvers by officers who, allegedly, were threatening to "blow your ... fucking heads off."

I believe that, at the very least, the plaintiffs have raised a genuine issue of material fact concerning whether it was "objectively reasonable," under the standards the Supreme Court articulated in *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 1871-72, 104 L.Ed.2d 443 (1989), for the officers to use the force they did in arresting the plaintiffs. *Graham*'s fact-sensitive inquiry "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.* In light of the record before the court, a jury could reasonably find that the force the officers employed in making this arrest was excessive.

833 The record, viewed, as it must be, most favorably toward the plaintiffs, indicates that *833 four suspects — the very number the police expected to find — filed out of the building as directed by the officers. The police radio transcript cited in part II.C.1 of the opinion indicates that the officers were apprised, before all the suspects had come out of the building, that the gun allegedly involved was not on the person of any of the arrestees.[2] On this account, plaintiffs have certainly raised a triable issue of whether it was objectively reasonable under these circumstances to hold a loaded weapon to the head of a suspect and employ death threats punctuated by obscenity while the apparently unarmed and cooperative suspects were held to the ground and handcuffed. Considering the formidable array of officers and firepower stationed outside, and given that plaintiffs apparently did not resist arrest, it would be reasonable for a jury to conclude that the force deployed was excessive. Therefore, summary judgment in favor of the defendants was not appropriate. *See* *Groman v. Township of Manalapan,* 47 F.3d 628, 634 (3d Cir.1995) (reversing grant of summary judgment on excessive-force claim because jury could have found police behavior unreasonable).

[*] Hon. Louis H. Pollak, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

[1] At trial the plaintiffs presented transcripts of the radio transmissions which occurred during the course of the search, and Sgt. Kennedy read his own statement made during the search to Sgt. Larkin that "I'm finishing typing [the warrant] out. I had to retype everything because nobody knows what the F. they're doing.... [Wilson] got the telephonic search warrant ... now apparently that wasn't done. So we had to do the paperwork. I got the affidavit done, the search warrant is in the typewriter." App. at 846.

[2] The police radio transcript quotes Mr. Devlin as stating "there's only one gun involved, it's a pistol in the brown van in front of the house." The Devlin statement tends to undercut the court's statement in part II.B that the gun "was still unaccounted for." To the extent that the degree of force deployed by the police in making the arrests may be said to have depended on alleged uncertainty as to the whereabouts of the gun, there would appear to be dispute about a material fact.

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924 F.2d 364 (1991)

Gerard DEAN, Plaintiff, Appellant,
v.
CITY OF WORCESTER, et al., Defendants, Appellees.

No. 90-1093.

United States Court of Appeals, First Circuit.

Heard August 2, 1990.
Decided January 23, 1991.

365 *365 Terry Scott Nagel, Springfield, Mass., and John D. Egnal, Philadelphia, Pa., with whom Alan D. Sisitsky, Springfield, Mass., was on brief, for plaintiff, appellant.

Brian Rogal, Dedham, Mass., with whom Timothy M. Burke and Mark Newman, Needham, Mass., were on brief, for defendants, appellees Greaney and Murray.

Edward R. Joyal, Jr., Asst. Atty. Gen., for defendant, appellee Mattioli.

Elaine M. Lucas, Asst. City Sol., for defendants, appellees City of Worcester, Houlihan and Decelles.

Before TORRUELLA, Circuit Judge, BOWNES, Senior Circuit Judge, and CYR, Circuit Judge.

CYR, Circuit Judge.

366 Mistakenly identified and arrested as an escaped felon who had threatened to shoot *366 any officer who tried to return him to prison, plaintiff Gerard Dean brought the present civil action against the defendant police officers and the City of Worcester. Dean appeals from a grant of summary judgment in favor of all defendants. We affirm.

I

The facts leading up to Dean's arrest are uncontroverted. On September 3, 1985, Massachusetts State Police Officer Paul Greaney, assigned to the Violent Fugitive Arrest Squad, received information from a reliable informant that Richard Burbo, an escapee from the Massachusetts Correctional Institution at Shirley, was staying with an unknown female and her small child at a Worcester apartment. The informant advised Greaney that Burbo was armed with a .38 caliber revolver and that Burbo had expressed the intention to shoot any officer who attempted to return him to prison. Upon further investigation, Officer Greaney discovered that Burbo, at the time of the escape, was serving sentences for armed assault, armed robbery, and rape. An arrest warrant issued following Burbo's escape. Officer Greaney considered Burbo "armed and dangerous."

On September 4, Greaney and other members of the Violent Fugitive Arrest Squad, along with officers of the Worcester Police Department, located a male individual, resembling Burbo, seated on a rock at a city bus stop near the apartment at which Burbo reportedly was staying. After consultation, the officers decided to apprehend the subject at the bus stop, rather than at the nearby apartment, so as not to endanger the woman and child believed to be residing at the apartment. The officers decided that the subject would have to be apprehended and immobilized as quickly as possible in order to avoid endangering innocent bystanders and the arresting officers. Unbeknownst to the officers, the subject was not Burbo but Dean.

At about noon, a police car drove onto the sidewalk directly in front of Dean. Dean got to his feet as the police car approached. Two officers alighted from the car and pushed Dean down, causing his face to hit the sidewalk. One of the officers placed a gun to Dean's ear and threatened to blow his head off if he moved. Dean felt a knee in his back and a slight kicking to his feet. Dean was then lifted to his feet, tightly handcuffed, and pushed against a wall; in the process, he suffered a cut to his scalp. The police informed Dean that he was being placed under arrest. Dean gave his correct name and told the police that they had the wrong person.

After arresting Dean, the officers noticed that Dean appeared taller than Burbo was reported to be. The police decided to place

Dean in a cruiser while they executed the search warrant for the nearby apartment where Burbo was staying. Burbo was arrested inside the apartment. A loaded .38 caliber revolver was seized from under a cushion on the couch where Burbo had been sitting.

The police explained their mistake to Dean and released him from custody. Dean had been detained for about thirty minutes and suffered minor physical injuries: a cut nose and scalp, a scratch on the neck, and welts on his back. He alleges that he later suffered severe emotional trauma as well.

Two years later Dean filed suit in the United States District Court for the District of Massachusetts. The amended complaint contains six counts: one count charges *respondeat superior* liability against the City of Worcester under the Massachusetts Civil Rights Act (MCRA);[1] two counts charge the Worcester police officers and Massachusetts state troopers with civil rights violations under 42 U.S.C. § 1983 and MCRA; three counts allege common law claims against the defendant officers for assault and battery, intentional infliction of emotional distress, and false *367 imprisonment.[2] Dean appeals the summary judgment dismissing the common law claims for assault and battery and intentional infliction of emotional distress, and the section 1983 claims alleging official use of excessive force in effecting the arrest.

II

Summary judgment is appropriate only if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The record must be viewed and reviewed in the light most favorable to the nonmoving party. *See, e.g., Jensen v. Frank,* 912 F.2d 517, 520 (1st Cir.1990). When a motion for summary judgment is competently supported, however, the nonmoving party "may not rest upon the mere allegations or denials of [his] pleading, but ... must set forth specific facts showing there is a genuine issue for trial." Fed.R.Civ.P. 56(e). A genuine issue exists only if a material conflict in the evidence warrants trial. *See, e.g., Ortega-Rosario v. Alvarado-Ortiz,* 917 F.2d 71, 73 (1st Cir.1990).

III

Dean contends that the district court granted summary judgment on the section 1983 claims in mistaken reliance on an incorrect legal standard, and that there remains a genuine dispute as to the reasonableness of the force used in effecting Dean's arrest.

A civil rights claim alleging official use of excessive force in effecting an arrest must contend with the familiar fourth amendment "reasonableness" standard, which balances the public interest in effective law enforcement against the intrusiveness of the challenged police action in light of all the circumstances disclosed by the evidence. *See Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989). As with any judicial inquiry into the realm of the reasonable, we first identify our perspective. The inquiry is an objective one and the "question is whether the officers' actions are `objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* 109 S.Ct. at 1872. We examine with care the particular facts and circumstances of the case, *id.,* to determine whether the force used exceeded "the ... force ... necessary" to effect the arrest from the perspective of an objectively reasonable officer at the scene, with due "allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving...." *Id.*

Dean argues that the reasonableness standard annunciated in *Graham v. Connor* is less stringent than the "shock the conscience" test used by the district court. The district court indeed did refer to the "shock the conscience" and "good faith" standards superseded by *Graham v. Connor.* Although the court in the present case arrived at its determination in the course of an analysis of Dean's common law assault and battery claims, rather than the section 1983 claims, it considered the "facts and circumstances of the particular case" and determined that the force used by the officers "could not be viewed as ... unreasonable." Moreover, the section 1983 claims and the assault and battery claims arose out of the same facts and circumstances and Dean concedes that the rule of reasonableness relied on by the district court is "strikingly similar to the Fourth Amendment analysis commanded by *Graham v. Connor*." We conclude that Dean was occasioned no prejudice by virtue of the district court's reference to some other standard, since the record demonstrates that the force used to effect the intended arrest was reasonable as a matter of law.

The district court correctly concluded that the defendant officers reasonably believed that Dean was the escaped felon, Burbo, and that Dean's unsupported allegations *368 to the contrary were insufficient to raise a triable issue. The defendants submitted affidavits to the effect that Dean and Burbo were of similar physical appearance and that Dean was arrested near the apartment

house at which Burbo was believed to be staying and where he was later found.

Dean contends that the misidentification was unreasonable because he is taller than Burbo.[3] We disagree. Dean was seated on a rock near the bus stop when first observed by the officers and when the arrest decision was made. As the police cruiser, carrying two arresting officers in plain clothes, approached the scene of the arrest at high speed and drove onto the sidewalk, Dean stood up. According to Dean, the cruiser came so close that it almost ran over his feet. The two officers in plain clothes, with guns drawn, got out of the cruiser "very fast," according to Dean. Given all the circumstances that conspired in their hapless misidentification of Dean as the "armed and dangerous" prison escapee, Burbo, the failure of the officers to note, instantaneously, as they suddenly alighted from the cruiser, that Dean was somewhat taller than Burbo, cannot be considered objectively unreasonable, particularly amidst the tension and urgency prevailing at the moment of the arrest.

As the officers reasonably believed that Dean was the escaped felon Burbo,[4] they were "entitled to do what the law would have allowed them to do if [Dean] had in fact been [Burbo]." *Hill v. California*, 401 U.S. 797, 804, 91 S.Ct. 1106, 1111, 28 L.Ed.2d 484 (1971) (police had probable cause to arrest one person and reasonably mistook second person for first). The reasonableness of their use of force must be viewed from the perspective of the officers at the scene, the "circumstances of [the] particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of other officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham,* 109 S.Ct. at 1871; *see also United States v. McQueeney,* 674 F.2d 109 (1st Cir.1982) (officer may use "such force as is reasonably necessary to effect an arrest").

It is undisputed that the officers at the arrest scene possessed reliable information that Burbo was an escaped felon who posed a serious safety threat to the officers and others; Burbo reportedly was armed,[5] had threatened to shoot any officer attempting to apprehend him, and had an extensive record of violent crimes. The officers were presented with another serious complication: the arrest warrant was to be executed in the presence of innocent bystanders at a bus stop on a busy city street. Finally, in the circumstances known to the officers, particularly Burbo's threat to shoot any police officer who attempted to apprehend him, it was entirely reasonable to anticipate that Burbo, given an opportunity, would resist arrest with deadly force. In the circumstances known to the defendant officers, it would have been unreasonable not to effect the intended arrest with adequate alacrity and sufficient force to subdue Burbo as quickly and surely as practicable without unnecessary harm to him, or unnecessary risk to the officers or innocent bystanders.

Dean argues that *any* use of force in these circumstances must be considered excessive since he offered no resistance. Yet, "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.1973); *see also Furtado v. Bishop*, 604 F.2d 80, 95-96 (1st Cir.1979), amounts to a fourth amendment violation. It has long been recognized that "the right *369 to make an arrest or an investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham,* 109 S.Ct. at 1871.

The reasonableness of the force used is determined not only with reference to the need for the arrest and for reducing risk to the officers and the public but also with reference to the manner in which the arrest is effected. *See Tennessee v. Garner,* 471 U.S. 1, 8, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985) (constitutionality of seizure depends, *inter alia,* on "how it is carried out"). The reasonableness of the arresting force in the present case was further confirmed by compelling evidence that Dean's alleged injuries, though most unfortunate, were minor. Dean alleges a scratch on the neck, bruises on his back and a cut on the nose. The hospital record reports: "[n]o obvious signs of trauma." Dean did not seek out medical treatment until the following day, choosing first to consult with an attorney.

These minor physical injuries simply are insufficient to support an inference that the officers used inordinate force to effect the intended arrest in the "tense, uncertain, and rapidly evolving circumstances," *Graham,* 109 S.Ct. at 1872, surrounding the reasonably perceived need to subdue an armed felon on a busy city street.[6] Summary judgment on the section 1983 claims was proper in these circumstances, viewed in the light most favorable to Dean, as no trialworthy issue was raised concerning the objective reasonableness of the force used to effect the intended arrest.

IV

Dean contends that the district court erroneously entered summary judgment on his common law claims against the defendant officers and on his MCRA claim against the City of Worcester.

Dean alleged common law claims for assault and battery and for intentional infliction of extreme emotional distress against the

arresting officers. The district court found that Dean's assault and battery claims were deficient because the force used was neither "excessive, unwarranted, unreasonable, nor unjustifiable." *See Powers v. Sturtevant*, 199 Mass. 265, 266, 85 N.E. 84 (1908). The Massachusetts courts have held, in accord with section 3.07 of the Model Penal Code, that "an officer authorized to make an arrest may use `such force as is reasonably necessary to effect the arrest.'" *Julian v. Randazzo*, 380 Mass. 391, 396, 403 N.E.2d 931 (1980). As Dean points out, in the circumstances of the present case the *Randazzo* standard is essentially the same as the fourth amendment analysis required under *Graham v. Connor, supra*. Accordingly, the identical reasoning which constrained our determination that the officers' use of force was objectively reasonable in fourth amendment terms, under *Graham v. Connor*, controls the "reasonableness" determination required on Dean's common law claims for assault and battery as well.

Similarly, summary judgment was compelled on Dean's common law claims for intentional infliction of emotional distress under Massachusetts law, which requires that the plaintiff show, *inter alia,* "that the conduct was `extreme and outrageous,' was `beyond all possible bounds of decency' and was `utterly intolerable in a civilized community.'" *Agis v. Howard Johnson Co.*, 371 Mass. 140, 145, 355 N.E.2d 315 (1976) (quoting Restatement (Second) of Torts § 46, comment d (1965)). Since the officers' conduct in effecting the intended arrest was objectively reasonable in the circumstances, the claims for intentional infliction of emotional distress must fail.

Dean's remaining claims are predicated upon alleged violations of the MCRA, Mass.G.L. c. 12, § 11I, which establishes a right of
370 action for compensatory damages in favor of "[a]ny person whose exercise or *370 enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with...." The MCRA claims against the defendant officers are predicated on their alleged violations of Dean's rights under the fourth amendment and under Massachusetts common law.[7] Since Dean's federal constitutional claims and state law claims were deficient or were dismissed voluntarily, no predicate remains for the MCRA claims.

The judgment is affirmed. No costs to either party.

[1] The claim against the City of Worcester was dismissed on the ground that MCRA does not impose *respondeat superior* liability on municipalities.

[2] Dean voluntarily dismissed the common law claims and the section 1983 claims for unlawful restraint and false imprisonment.

[3] The record indicates that Dean, at 6'1", is taller than Burbo, but there is no other evidence as to Burbo's height.

[4] A reasonable mistake in identification which leads to an arrest does not violate the arrestee's constitutional rights. *See Hill v. California*, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971); *Gero v. Henault*, 740 F.2d 78, 85 (1st Cir.1984) ("[a]s a matter of law," mistaken arrest of suspect police reasonably believed to be person named in warrant does not violate constitutional rights).

[5] Indeed, a weapon was found in Burbo's constructive possession at the time of his arrest.

[6] Dean likewise alleges psychic injury as a consequence of the police threat to use a gun. Nevertheless, since the officers, after the warning, could have employed violent force to prevent the escape of a person with Burbo's record for violent assaults and threats against the police, *see Garner*, 471 U.S. at 11-12, 105 S.Ct. at 1701, their advance warning that violent force would be used was a reasonable precaution against the *need to use it.*

[7] The MCRA claim against the City of Worcester was predicated on a theory of *respondeat superior* liability. The district court dismissed the claim, citing *Hathaway v. Stone*, 687 F.Supp. 708, 711 (D.Mass.1988), for the proposition that a municipality is not vicariously liable for the actions of its employees under MCRA. *See also Batchelder v. Allied Stores Corp.*, 393 Mass. 819, 473 N.E.2d 1128 (1988) (MCRA coextensive with § 1983 except for "state action" requirement). We decline comment on the issue, as the MCRA claim against the municipality fails in any event on account of the dismissal of all claims against the defendant officers of the Worcester Police Department.

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19 F.3d 1143 (1994)

Jo Ann PLAKAS, Individually and as Administrator of the Estate of Konstantino N. Plakas, Deceased, Plaintiff-Appellant,

v.

Jeffrey DRINSKI, in both his individual and official capacity and Newton County, Indiana, a municipal unit of government, Defendants-Appellees.

No. 93-1431.

United States Court of Appeals, Seventh Circuit.

Argued November 1, 1993.
Decided March 21, 1994.

1144 *1144 Paul F. Michel (argued), Thomas McClure, Rosa A. Eliades, Elliott & McClure, Bourbonnais, IL, for Jo Ann PLAKAS.

Elizabeth A. Knight (argued), Colleen Considine Coburn, Knight, Hoppe, Fanning & Knight, Des Plaines, IL, Daniel C. Blaney, Blaney, Casey & Walton, Morocco, IN, Janella L. Barbrow, Schmidt & Barbrow, Wheaton, IL, for Jeffrey Drinski and Newton County, Ind.

Before CUMMINGS and COFFEY, Circuit Judges, and ZAGEL, District Judge.[*]

ZAGEL, District Judge.

Konstantino Plakas was shot once and killed by Jeffrey Drinski, a deputy sheriff. The only witnesses to the shooting were three police officers, Drinski and two others. All of the witnesses testified to an act of self-defense; that Plakas was moving toward Drinski and menacing him with a fireplace poker and that, moments before, Plakas had said to Drinski, "Either you're going to die here or I'm going to die here." Plakas's administrator claimed that the self-defense story was full of holes and that, even if it were not, Drinski and the county which employed him had a constitutional obligation to do more to preserve his life than they did. The district judge disagreed and granted summary judgment, 811 F.Supp. 1356. This appeal followed.

The details matter here, so we recite them.

When the police first saw Plakas, at about 9:30 p.m. on February 2, 1991, he was walking along State Road 10 in Newton County, Indiana, not far from the Illinois state line. His car had run off the road and wound up in a deep water-filled ditch. Sergeant Buddy R. King, of the Newton County Sheriff's Department thought the car had rolled over on its top and slid for 150 to 200 feet before rolling upright, striking a tree and coming to rest in the ditch. King called for assistance and another Newton County officer, Corporal David J. Koby, and two paramedics, Glen Cain and Steven Whitt, responded. On the way to the scene of the accident, Cain noticed Plakas walking along State Road 10. Cain approached Plakas and saw that Plakas's clothing was wet from the waist down. Cain stopped and spoke to Plakas who said he was fine except that he was cold. Cain examined Plakas's head and found nothing that required medical treatment. Plakas told Cain he had been the driver of the car in the ditch, and Plakas agreed to get into Cain's car in order to be driven back to the accident scene, now about a mile from where Plakas was found. Cain knew there was an ambulance at that site and that Plakas could be examined more carefully there. Cain smelled alcohol on Plakas's breath and Plakas dozed off as they rode to the place where the car had gone off the road.

When Cain and Plakas arrived, the ambulance driver examined Plakas. Cain told Corporal Koby to check Plakas for intoxication and he told Koby why. Plakas refused medical treatment and signed a written waiver of treatment. Koby spoke to Plakas who had some difficulty communicating the fact that he did not have his driver's license (which he had surrendered as bond for a traffic ticket he received in Illinois). Plakas did agree to go to the Sheriff's Department to be tested for intoxication. Koby frisked Plakas and then handcuffed him, with his hands behind his back.

Plakas complained about being cuffed behind his back. He told Koby that this hurt him because he had burn scars on his chest and thought that if he got in the car, his chest would start to bleed. Koby told Plakas that this manner of cuffing was department policy which he must follow. Koby also thought that he would have a problem with Plakas if he uncuffed him. Koby opened the rear door of his squad car, and Plakas entered the car voluntarily. In Koby's car, the rear door handles are not removed. After a

brief interval, Koby got in the car and drove away. As he drove he heard a noise that suggested the rear door was opened. He hit
1145 the brakes and heard Plakas hit the screen between the front and rear seats. Then the *1145 rear door flew open, and Plakas fled into snow-covered woods.

Koby reported the escape and called for help. King, Koby, Cain and Trooper Lucien Mark Perras of the Indiana State Police responded, as did Deputy Sheriff Jeffrey Drinski.

Plakas ran to the Ailes home located on a private road north of State Road 10. He knew the Aileses, Roy and Joyce; he was engaged to marry their daughter, Rachel. They called Plakas "Dino." Joyce Ailes heard Dino banging against the house; she saw him and opened the door. He fell on his face inside the doorway, his hands still cuffed behind his back. Joyce and Rachel helped him. They noticed that his clothes were wet. Plakas told them that he had wrecked his car and that his head hurt. Joyce saw no blood, but saw bumps on his head and bruises. He appeared to be blacking out.

Roy Ailes spoke to Plakas, smelled alcohol on his breath, and found him to be upset and insistent that he did nothing wrong. Roy told him that he should not run from the police. Plakas agreed that Roy should talk to the police. Roy went out and found Cain, whom he knew, and reported that Plakas was at the Ailes home and willing to come out. Cain and some officers went to the house. Roy stayed outside to direct other police to his house.

Cain and Koby were the first to enter. Cain saw Plakas push his legs through the circle of his arms, bringing his cuffed hands to the front of his body. Plakas was calm until he saw Cain and Koby. While Cain and the others tried to explain that Cain was from the fire department and wanted only to give medical aid, Plakas was loud and combative; (Joyce Ailes said he was "hysterical"). Plakas accused Koby of hurting him, and yelled about the handcuffing behind his back and about his scar tissue. He swore Koby would not touch him. Koby sought to reassure Plakas that he was not there to hurt him. Koby gestured for Cain to back up.

Plakas backed into a corner and neared a set of fireplace tools. He picked one of them up, a 2-3 foot poker with a hook on its end. Then gripping it with both hands, he continued screaming, louder and louder at Cain and Koby. Finally he rushed at Koby and swung quite hard at Koby, striking Koby's wrist with the poker. Koby moved away and tried to come in the room from another door, but Plakas chased him away, swinging the poker. Deputy Drinski passed by the injured Koby and asked him with what he was hit; Koby told him that Plakas had a poker. Inside the house, Plakas took the poker, slammed it into the wall[1] and then beat his head against the wall. Cain left.

Having driven Koby and Cain from the house, Plakas walked out of the front door. Drinski and Perras had entered the house from the garage and saw Plakas leave. They followed him out, now with guns drawn. Roy Ailes, who had just returned to his house, saw the officers with guns drawn and ran forward saying, "Don't shoot, I'll talk to him." Roy tried to talk Plakas into surrendering. As he did so, Plakas slowly backed down a hill in the yard. The officers told Plakas to drop the poker. At one point, Plakas lowered the poker but did not lay it down. He raised or cocked the poker but did not swing it. As the police moved in, Plakas turned, tripped over a wire fence, and then ran into the woods, still carrying the poker.

The police gave chase, shouting, "Stop, Police." The moon was bright, light was reflecting off the snow and it was easy to track Plakas who slowed as he entered a row of thick brush hedges. Through an opening in the brush was a clearing. Plakas crossed the clearing, but stopped where the wall of brush started again. Perras and Drinski entered the clearing. Sergeant King stood just outside it. Plakas turned and faced them. The clearing was small, but Plakas and the officers were ten feet apart. Drinski blocked the opening in the brush where all had entered the clearing.

1146 *1146 For the next quarter-hour or half-hour, Drinski and Perras tried to talk Plakas into surrendering. At times Plakas moved the poker about; at times it rested against the ground. Drinski did most of the talking. His theme was that there were people, including his girlfriend at the house, who cared about Plakas and that nobody needs to get hurt. He also told Plakas to drop the weapon and get down on the ground. They talked about the handcuffs and the chest scars. Plakas opened his shirt to show the scars to Drinski. King, listening from outside the clearing, thought Drinski might persuade Plakas to drop the weapon, but he did not. Drinski did not believe that Plakas was ever ready to surrender, although he was calmer for a time.

At one point Plakas pointed the poker at Drinski and said, "Either you're going to die here or I'm going to die here." He also said, in substance, "Go ahead and shoot. My life isn't worth anything." Plakas often repeated these thoughts. Then Plakas tried to break through the brush. He turned back to Drinski who was 12 to 15 feet away and, with the poker raised, charged at Drinski who backed away. Drinski's retreat was involuntarily stopped, either by his backing into a tree or by a near stumble of some sort. Drinski believed he couldn't retreat because there was something behind him. He saw Plakas cock the poker over his head for a swing and, when Plakas was two arms lengths away, he fired once at Plakas' chest. The shot hit Plakas in the chest inflicting a

mortal wound. After he was shot, Plakas fell to Drinski's right and lay face down semiconscious on the ground. Perras took the poker. Plakas was turned on his back. The handcuffs were removed. Plakas remained semiconscious until medical assistance arrived. He moaned and said, "I'm dying." Since medical assistance previously had been requested for Koby, it was not long in coming. When paramedic Whitt arrived at the clearing, he found Plakas laying about a foot from the brush at one corner of the clearing. Plakas died sometime after he arrived at the hospital.

Drinski was in fear of his life, and Plakas's action was sudden and unexpected. Perras would have shot Plakas if Drinski had not. During the entire time in the clearing, Perras had a canister of CS repellant on his belt.[2] It could have been used to disable Plakas. Moreover, about ten minutes before the shooting, the services of a canine unit (from Lake County) were offered. The police could have tried to put barriers between themselves and Plakas and maintain distance from him.

This is not a case where an officer claims to have used deadly force to prevent an escape. It is a self-defense case where the officer has "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer" and, therefore, the officer may use deadly force. *Tennessee v. Garner*, 471 U.S. 1, 3, 105 S.Ct. 1694, 1697, 85 L.Ed.2d 1 (1985). *See also* *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989). Indeed, had Drinski been a private citizen, he would have been entitled to claim self-defense under Indiana law (which does not have a rule of retreat). *French v. State*, 273 Ind. 251, 403 N.E.2d 821, 823, 825 (1980); *Montague v. State*, 266 Ind. 51, 360 N.E.2d 181, 188-89 (1977).

Drinski was faced with a man who had, minutes before, attacked a police officer with a dangerous weapon, had refused several entreaties to disarm, had told the officer that one of the two would die that night, and then had moved toward the officer while raising his weapon to strike. Shooting a man who has told you, in effect, that he is going to use deadly force against you and then moves toward you as if to do so is unquestionably an act of self-defense even if, as Plakas's expert maintains, the man is attempting "suicide by police."

Plakas argues there is enough evidence to cast doubt on the defendants' self-defense claim, given the low threshold that courts
1147 *1147 have set for refuting self-defense in deadly force cases both civil and criminal. The award of summary judgment to the defense in deadly force cases may be made only with particular care where the officer defendant is the only witness left alive to testify. In any self-defense case, a defendant knows that the only person likely to contradict him or her is beyond reach. So a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements and the opinions of experts to decide whether the officer's testimony could reasonably be rejected at a trial.

This guiding principle does not fit well here. There is a witness who corroborates the defendant officer's version. And there is no reason to discount the testimony of Trooper Perras; he is neither a defendant himself nor employed by the defendant Newton County. Even if there were no other witness, there is virtually nothing in this record to impeach Drinski. Plakas brings up a few bits of evidence to do so. First, according to Drinski, Plakas charged away from the brush at Drinski, yet one paramedic who was summoned to the clearing to administer to Plakas observed that Plakas's feet were about a foot from the brush. This does not help Plakas's case because, by the time the paramedic arrived, Plakas's body had been moved, rolled over by Drinski and Perras.[3] Plakas himself may have also moved; the dying man kicked over the paramedic's medical case.

Second, Drinski said he was stopped in his retreat by a tree. Perras only saw that Drinski stumbled in his retreat either because he backed into something or simply tripped. The fact remains that both officers say that Drinski's retreat occurred and that it ended by virtue of some circumstance other than Drinski's volition. Further, says Plakas, a photograph of the clearing shows there was no tree there to stop Drinski, just a sapling, and there are no footprints corroborating Drinski's story of retreat. Actually, the photograph is not included in the record here. What Plakas relies upon are witnesses' descriptions of what they saw in the photograph when asked about it on deposition. There is no showing that any footprints could be clearly discerned in the photograph. In any event, Drinski did not say he was stopped by running into a tree, he said it felt as though he ran into a tree and there is nothing in the record to contradict this testimony other than counsel's speculation that an officer who backs into a sapling would not reasonably believe a tree was at his back. The tree-sapling discrepancy is of the sort on which popular conspiracy theories are built, but it is not enough to allow a rational trier of fact to decide against Drinski. *See* *Perfetti v. First Nat'l Bank of Chicago*, 950 F.2d 449, 456 (7th Cir.1991); *Tom v. Voida*, 963 F.2d 952, 961 (7th Cir. 1992).

Perhaps in recognition of this weakness in the case, Plakas offers two other theories, one of which is a minor theme of his brief, that shooting in self-defense is unjustified where the aggressor acted out of reasonable fear of police brutality. *See* *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Cir.1985) (*en banc*). Perhaps we ought not to consider this theory since it was not pled, but it is of no use to Plakas in any event.

This theory is founded on the fact that Plakas told Koby, "You hurt me," and on Joyce Ailes's observation that Plakas had facial injuries. From this, Plakas argues a jury could infer that Officer Koby had beaten Plakas. This inference, however, cannot reasonably be made. Leaving aside the absence of evidence of facial injuries from medical records or post-mortem observation, 1148 we accept that Mrs. Ailes saw these injuries. But when she did so, Plakas had already been in *1148 one car accident, had cracked his head against the front seat shield in Koby's car, had run a considerable distance through forest and open terrain with his hands cuffed behind his back and, finally, when he entered the Ailes home, he did so by falling face down on the floor. Moreover, when Plakas did say anything at all about Koby, it was a complaint about cuffing him behind his back, which he said (without medical corroboration even now) caused pain because of his scar tissue. Plakas yelled a lot at Koby. It is significant he never yelled about a beating.

Even if Koby did beat Plakas, Koby was not at the scene of Plakas's demise. The officers who confronted Plakas were not the officers who injured him and should be able to claim self-defense. The proposition that an officer who beats John Doe may not use self-defense to justify killing Doe, who later attacks him, rests on the idea that because the officer's wrongful acts caused the attack, he cannot take advantage of his fear of retaliation to defend against liability. *See Gilmere*, 774 F.2d at 1501 ("any fear on the officer's part was the fear of retaliation against his own unjustified physical abuse").[4] Drinski did not cause Plakas to attack him. He can claim self-defense to shooting Plakas.

Finally, there is the argument most strongly urged by Plakas. Even if Plakas attacked Drinski and Drinski acted in self-defense, Plakas was still wronged because Drinski had a duty to use alternative methods short of deadly force to resolve the situation before him. Taken literally the argument fails because Drinski did use alternative methods. He tried for quite a while to get Plakas to lay down the poker and surrender and even attempted to retreat as Plakas charged him. Plakas means to argue that Drinski should have used *all* available alternatives before deadly force was exercised and that Newton County, Drinski's employer, is liable because it failed to equip and train Drinski to use such methods.

The alternatives here were three. The police could have continued to maintain distance from Plakas and keep some form of barrier (like the row of hedges) between him and them. They could have used disabling chemical spray, or they could have used a dog to disarm Plakas. It is unusual to hear a lawyer argue that the police ought to have caused a dog to attack his client, but he is right that such an attack *might* have led to a better result for his client (and would, in our view, have led to a different sort of lawsuit). Plakas also correctly refrains from arguing that the police should have simply walked away and arrested Plakas on another day.

There is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used.[5] There are, however, cases which support the assertion that, where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first. In *Ford v. Childers*, 855 F.2d 1271 (7th Cir.1988) (*en banc*), police officers shot and wounded a masked bank robber fleeing from the scene of his crime. Twice the police called out, "Halt, police," but the plaintiff may not have heard. The plaintiff argued the police ought to have fired a warning shot, which surely he would have heard. We said, "[T]he officers' split second decision to use their weapons, after twice warning the suspect, was objectively reasonable under the circumstances. We refuse to impose as an additional constitutional requirement the firing of a warning shot before deadly force may be used." *Id.* at 1276, n. 8. Also, in *Carter v. Buscher*, 973 F.2d 1328 (7th Cir.1992), it was claimed that the police had so poorly planned an arrest that the chance of a deadly gunfight was increased rather than minimized. An alternative plan could have reduced or eliminated the possibility of the arrestee's use of a gun. In *Carter,* such an alternative was not merely speculative; the arrestee was 1149 employed inside a prison where he would not have had a gun on his person. Yet we rejected the proposition *1149 "that the Fourth Amendment prohibits creating unreasonably dangerous circumstances in which to effect a legal arrest of a suspect." *Id.* at 1332. These cases make it clear that liability cannot be founded on the failure of Drinski to keep some sort of distance or natural barrier between himself and Plakas.

The Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in search and seizure cases. The only test is whether what the police officers actually did was reasonable. *Illinois v. Lafayette*, 462 U.S. 640, 647, 103 S.Ct. 2605, 2610, 77 L.Ed.2d 65 (1983); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n. 12, 96 S.Ct. 3074, 3082 n. 12, 49 L.Ed.2d 1116 (1976). We do not believe the Fourth Amendment requires the use of the least or even a less deadly alternative so long as the use of deadly force is reasonable under *Garner v. Tennessee* and *Graham v. Connor, supra*.

But Plakas does have at least one opinion on which he may build his argument, that is, *Tom v. Voida*, 963 F.2d 952 (7th Cir.1992), a case of tragic dimension where an officer stopped to help a fallen man and eventually, as two courts held, had to kill that man in defense of her own life. In brief, after the officer stopped to help the man, his actions and his flight showed he was unhurt and

may well have stolen the bike from which he fell. She chased him and, when she caught him, he attacked her, banging her head into a concrete surface. He fled but she caught him. Again, he struck her. It became clear she could not physically subdue him. She did not have her night stick. She had no idea if other officers would arrive. She decided she would have to pull her weapon so that he would not get it. After the weapon was out, she told him three times, "Please don't make me shoot you." He moved toward her. She fired and missed. He stopped, then lunged again; she fired into his chest. In affirming summary judgment for the officer, we said,

> Voida could not have subdued Tom through lesser means, as she did not have her nightstick with her and she feared that reaching for her chemical repellant would expose her weapon to Tom's grasp. Voida fired one shot at Tom which did not hit him, but he insisted on lunging at her again. Voida was justified in concluding that Tom could not have been subdued except through gunfire.

Id. at 962.

It is obvious that we said Voida thought she had no alternatives. But did we hold that this imposes a constitutional duty to use (or at least consider) the use of all alternatives?

The answer is no. *Tom v. Voida* did not, and did not mean to, announce a new doctrine. Nearly every court has commented on that fact that all decisions about deadly force (or any force) "must embody allowance for the fact that police officers are often forced to make split second judgments—in circumstances that are tense, uncertain and rapidly evolving." *Graham,* 490 U.S. at 396-97, 109 S.Ct. at 1872; *see also* *Sherrod v. Berry,* 856 F.2d 802, 806-07 (7th Cir.1988) (*en banc*). We always judge a decision made, as Drinski's was, in an instant or two. It is true we consider the whole of the event as it appears to the officer involved, but we recognize that the decision to shoot can only be made after the briefest reflection, so brief that "reflection" is the wrong word. As Plakas moved toward Drinski, was he supposed to think of an attack dog, of Perras's CS gas, of how fast he could run backwards? Our answer is, and has been no, because there is too little time for the officer to do so and too much opportunity to second-guess that officer.

In *Tom v. Voida* we were not addressing Officer Voida's decision to shoot; we were addressing her decision to draw her firearm and, even there, we spoke of a decision process that was quick and simple. Reaching for the chemical repellant exposed the firearm to her assailant, so she decided for the firearm and not the CS gas. This is not the kind of weighing of least deadly alternatives that Plakas would have us require of Drinski. What Drinski did here is no different than what Voida did. He tried to avoid violence. Then, when he thought his retreat would not be successful, he was justified in concluding that Plakas could not be subdued at that moment except through gunfire.

1150 *1150 Our historical emphasis on the shortness of the legally relevant time period is not accidental. The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.

So we carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage. *Tom v. Voida* is a classic example of this analysis. Here it is beyond dispute that, under the Constitution, the police could reasonably (1) arrest Plakas for drunk driving after he exhibited familiar signs of intoxication; (2) track down an escaping arrestee; (3) draw and point weapons after Plakas armed himself and attacked an officer; (4) pursue Plakas into the clearing after he committed a violent offense and was a danger to himself; and (5) try to talk Plakas into disarming himself and surrendering. All of this means Drinski was properly standing in the clearing, gun in hand, several feet away from Plakas, who charged him with the poker raised. It is from that point on that we judge the reasonableness of the use of deadly force in light of all that the officer knew. We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct. Reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred. This is what we mean when we say we refuse to second-guess the officer. Here we agree that the undisputed facts can lead to but one conclusion, that Drinski's use of deadly force was reasonable given Plakas's act of aggression and Drinski's knowledge of what had gone on before.

Since Drinski did not violate Plakas's rights, there usually is no basis for holding his employer, Newton County, liable. *Tom,* 963 F.2d at 962. Yet there exists a possibility that although Drinski's acts were justified given his circumstances, Newton County may be held liable for creating those circumstances. Plakas implicitly argues that although Drinski's choice among available

alternatives was reasonable, he should have had more choices, *i.e.,* a trained canine, a canister of gas.[6] Plakas implicitly seeks to hold Newton County liable for not providing those choices.

There is, however, not a single precedent which holds that a governmental unit has a constitutional duty to supply particular forms of equipment to police officers. And, in fact, the Fifth Circuit has held that the Constitution "does not mandate that law enforcement agencies maintain equipment useful in all foreseeable situations." *Salas v. Carpenter,* 980 F.2d 299, 310 (5th Cir.1992). Indeed, Plakas merely states this theory, he does not argue it. Nor does he show how such a rule of liability could be applied with reasonable limits. We do not think it is wise policy to permit every jury in these cases to hear expert testimony that an arrestee would have been uninjured if only the police had been able to use disabling gas or a capture net or a taser (or even a larger number of police officers) and then decide that a municipality is liable because it failed to buy this equipment (or increase its police force). There can be reasonable debates about whether the Constitution also enacts a code of criminal procedure, but
1151 we think it is clear that the Constitution does not enact a police administrator's equipment list.[7] We decline to use *1151 this case to impose constitutional equipment requirements on the police.[8]

The district court's grant of summary judgment is AFFIRMED.

[*] The Honorable James B. Zagel, District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

[1] We adopt the version most favorable to plaintiff. Cain said that Plakas was not slamming the poker into the wall, rather, he was starting toward Cain and perhaps swinging it at Cain and missing. Cain thought Plakas was out to kill him.

[2] Perras said that he did not use the CS repellant because he was too far from Plakas and because it might have landed on his fellow officers. Whatever the facts may be, it is hard to attribute to either Drinski or Newton County the inaction of Perras, who is neither a defendant here nor under the command of Newton County.

[3] The record before us leaves only room for speculation about some circumstances. We do not know whether there was any forensic investigation made at the scene. We know the caliber of the bullet, but not its type or weight or the power of the charge in the cartridge, nor do we know where it struck Plakas and what effect it might have on the position of the body. *See* Martin L. Fackler, M.D., *Police Handgun Ammunition Selection,* WOUND BALLISTICS REVIEW, Fall 1992, at 32-37 (suggesting little effect beyond stopping movement). Because these facts are not in the record, we cannot consider them on appeal and assume that had they any significance, they would have been made part of the record. Circuit Rule 28(d); *Branion v. Gramly,* 855 F.2d 1256, 1260-61 (7th Cir.1988).

[4] Here we distinguish *Gilmere,* but by doing so we neither approve nor disapprove of its holding.

[5] There may be state law rules which require retreat, but these do not impose constitutional duties. *See Reed v. Hoy,* 909 F.2d 324, 330-31 (9th Cir.1989).

[6] There are a wide variety of devices available for non-lethal control of those who refuse to surrender, including tasers, capture nets, sticky foam, rubber bullets, and beanbag projectiles. *See, e.g.,* John Barry & Tom Morganthau, *Soon, `Phasers on Stun',* NEWSWEEK, Feb. 7, 1994, at 24-26. None of these devices is unfailingly effective and safe, and courts and juries are unlikely to be capable of judging when they ought to be used.

[7] The closest thing we have to such a list is the rule which requires prison administrators to provide a law library to inmates, but even here we only require this as an alternative to providing other forms of legal assistance. And, of course, judges are far more competent to say what equipment is needed to prepare a lawsuit than they are to say what equipment is best to defend one's self against an attack by a man with a poker.

[8] Likewise, we decline to impose a constitutional requirement to train the police to use all available equipment beyond the acceptable training program already mandated. In this record, there is expert opinion that Drinski might have been better trained to negotiate with Plakas and that he may have said one thing to Plakas that he ought not to have said, *i.e.,* that Plakas could hit Drinski with the poker as long as it was not in the head. Plakas, however, merely mentions this testimony to show that Drinski was badly trained. There is no contention that this "invitation" immediately preceded the shooting or caused Plakas to charge Drinski. The only argument in this case is that Plakas did not charge at all.

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135 S.Ct. 1765 (2015)

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

No. 13-1412.

Supreme Court of United States.

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

1769 *1769 ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, GINSBURG, and SOTOMAYOR, JJ., joined. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which KAGAN, J., joined. BREYER, J., took no part in the consideration or decision of the case.

Christine Van Aken, San Francisco, CA, for petitioners.

Ian H. Gershengorn for the United States as amicus curiae, by special leave of the Court, supporting vacatur in part and reversal in part.

Leonard Feldman, Seattle, WA, for respondent.

Dennis J. Herrera, City Attorney, Christine Van Aken, Chief of Appellate Litigation, Peter J. Keith, Counsel of Record, Deputy City Attorney, San Francisco, CA, for Petitioners.

Ben Nisenbaum, Law Offices of John Burris, Oakland, CA, Jill D. Bowman, Hunter O. Ferguson, Stoel Rives LLP, Seattle, WA, Leonard J. Feldman, Counsel of Record, Peterson Wampold, Rosato Luna Knopp, Seattle, WA, for Respondent.

Justice ALITO delivered the opinion of the Court.

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

I

Petitioners are the City and County of San Francisco, California (San Francisco), and two police officers, Sergeant Kimberly Reynolds and Officer Kathrine Holder. Respondent is Teresa Sheehan, a woman who suffers from a schizoaffective disorder. Because this case arises in a summary judgment posture, we view the facts in the light most favorable to Sheehan, the nonmoving party. See, *e.g., Plumhoff v. Rickard,* 572 U.S. ___, ___ - ___, 134 S.Ct. 2012, 2017, 188 L.Ed.2d 1056 (2014).

In August 2008, Sheehan lived in a group home for people dealing with mental illness. Although she shared common areas of the building with others, she had a private room. On August 7, Heath Hodge, a social worker who supervised the counseling staff in the building, attempted to visit Sheehan to conduct a welfare check. Hodge was concerned because Sheehan had stopped taking her medication, no longer spoke with her psychiatrist, and reportedly was no longer changing her clothes or eating. See 743 F.3d 1211, 1218 (C.A.9 2014); App. 23-24.

Hodge knocked on Sheehan's door but received no answer. He then used a key to enter her room and found Sheehan on her
1770 bed. Initially, she would not respond *1770 to questions. But she then sprang up, reportedly yelling, "Get out of here! You don't have a warrant! I have a knife, and I'll kill you if I have to." Hodge left without seeing whether she actually had a knife, and Sheehan slammed the door shut behind him. See 743 F.3d, at 1218.

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

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

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

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

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

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

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

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

The District Court granted summary judgment for petitioners. Relying on *Hainze v. Richards*, 207 F.3d 795 (C.A.5 2000), the court held that officers making an arrest are not required "to first determine whether their actions would comply with the ADA before

protecting themselves and others." App. to Pet. for Cert. 80. The court also held that the officers did not violate the Fourth Amendment. The court wrote that the officers "had no way of knowing whether [Sheehan] might escape through a back window or fire escape, whether she might hurt herself, or whether there was anyone else in her room whom she might hurt." *Id.,* at 71. In 1772 addition, the court observed that Holder *1772 did not begin shooting until it was necessary for her to do so in order "to protect herself" and that "Reynolds used deadly force only after she found that pepper spray was not enough force to contain the situation." *Id.,* at 75, 76-77.

On appeal, the Ninth Circuit vacated in part. Relevant here, the panel held that because the ADA covers public "services, programs, or activities," § 12132, the ADA's accommodation requirement should be read to "to encompass `anything a public entity does,'" 743 F.3d, at 1232. The Ninth Circuit agreed "that exigent circumstances inform the reasonableness analysis under the ADA," *ibid.,* but concluded that it was for a jury to decide whether San Francisco should have accommodated Sheehan by, for instance, "respect[ing] her comfort zone, engag[ing] in non-threatening communications and us[ing] the passage of time to defuse the situation rather than precipitating a deadly confrontation." *Id.,* at 1233.

As to Reynolds and Holder, the panel held that their initial entry into Sheehan's room was lawful and that, after the officers opened the door for the second time, they reasonably used their firearms when the pepper spray failed to stop Sheehan's advance. Nonetheless, the panel also held that a jury could find that the officers "provoked" Sheehan by needlessly forcing that second confrontation. *Id.,* at 1216, 1229. The panel further found that it was clearly established that an officer cannot "forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry." *Id.,* at 1229. Dissenting in part, Judge Graber would have held that the officers were entitled to qualified immunity.

San Francisco and the officers petitioned for a writ of certiorari and asked us to review two questions. We granted the petition. 574 U.S. , 135 S.Ct. 702, 190 L.Ed.2d 434 (2014).

II

Title II of the ADA commands that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The first question on which we granted review asks whether this provision "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." Pet. for Cert. i. When we granted review, we understood this question to embody what appears to be the thrust of the argument that San Francisco made in the Ninth Circuit, namely that "`Title II *does not apply* to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life.'" Brief for Appellees in No. 11-16401(CA9), p. 36 (quoting *Hainze, supra,* at 801; emphasis added); see also Brief for Appellees in No. 11-16401, at 37 (similar).

As San Francisco explained in its reply brief at the certiorari stage, resolving its "question presented" "does not require a fact-intensive `reasonable accommodation' inquiry," since "the only question for this Court to resolve is whether any accommodation of an armed and violent individual is reasonable or required under Title II of the ADA." Reply to Brief in Opposition 3.

1773 Having persuaded us to grant certiorari, San Francisco chose to rely on a different argument than what it pressed below. In *1773 its brief in this Court, San Francisco focuses on the statutory phrase "qualified individual," § 12132, and a regulation declaring that Title II "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others." 28 CFR § 35.139(a) (2014). Another regulation defines a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services." § 35.104. Putting these authorities together, San Francisco argues that "a person who poses a direct threat or significant risk to the safety of others is not qualified for accommodations under the ADA," Brief for Petitioners 17. Contending that Sheehan clearly posed a "direct threat," San Francisco concludes that she was therefore not "qualified" for an accommodation.

Though, to be sure, this "qualified" argument does appear in San Francisco's certiorari petition, San Francisco never hinted at it in the Ninth Circuit. The Court does not ordinarily decide questions that were not passed on below. More than that, San Francisco's new argument effectively concedes that the relevant provision of the ADA, 42 U.S.C. § 12132, *may* "requir[e] law

enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." Pet. for Cert. i. This is so because there may be circumstances in which any "significant risk" presented by "an armed, violent, and mentally ill suspect" can be "eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services."

The argument that San Francisco now advances is predicated on the proposition that the ADA governs the manner in which a qualified individual with a disability is arrested. The relevant provision provides that a public entity may not "exclud[e]" a qualified individual with a disability from "participat[ing] in," and may not "den[y]" that individual the "benefits of[,] the services, programs, or activities of a public entity." § 12132. This language would apply to an arrest if an arrest is an "activity" in which the arrestee "participat[es]" or from which the arrestee may "benefi[t]."

This same provision also commands that "no qualified individual with a disability shall be . . . subjected to discrimination by any [public] entity." *Ibid.* This part of the statute would apply to an arrest if the failure to arrest an individual with a mental disability in a manner that reasonably accommodates that disability constitutes "discrimination." *Ibid.*

Whether the statutory language quoted above applies to arrests is an important question that would benefit from briefing and an adversary presentation. But San Francisco, the United States as *amicus curiae,* and Sheehan all argue (or at least accept) that § 12132 applies to arrests. No one argues the contrary view. As a result, we do not think that it would be prudent to decide the question in this case.

Our decision not to decide whether the ADA applies to arrests is reinforced by the parties' failure to address a related question: whether a public entity can be liable for damages under Title II for an arrest made by its police officers. Only public entities are subject to Title II, see, *e.g., Pennsylvania Dept. of Corrections v. Yeskey,* 524 U.S. 206, 208, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998), and the parties agree that such an entity can be held vicariously liable for money damages for the purposeful or
1774 deliberately indifferent *1774 conduct of its employees. See Tr. of Oral Arg. 10-12, 22. But we have never decided whether that is correct, and we decline to do so here, in the absence of adversarial briefing.

Because certiorari jurisdiction exists to clarify the law, its exercise "is not a matter of right, but of judicial discretion." Supreme Court Rule 10. Exercising that discretion, we dismiss the first question presented as improvidently granted. See, *e.g., Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 360, n. 1, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (partial dismissal); *Parker v. Dugger,* 498 U.S. 308, 323, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991) (same).

III

The second question presented is whether Reynolds and Holder can be held personally liable for the injuries that Sheehan suffered. We conclude they are entitled to qualified immunity.[3]

Public officials are immune from suit under 42 U.S.C. § 1983 unless they have "violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Plumhoff,* 572 U.S., at ___, 134 S.Ct., at 2023 (internal quotation marks omitted). An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it," *ibid.,* meaning that "existing precedent . . . placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd,* 563 U.S. ___, ___, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011). This exacting standard "gives government officials breathing room to make reasonable but mistaken judgments" by "protect[ing] all but the plainly incompetent or those who knowingly violate the law." *Id.,* at ___, 131 S.Ct., at 2085.

In this case, although we disagree with the Ninth Circuit's ultimate conclusion on the question of qualified immunity, we agree with its analysis in many respects. For instance, there is no doubt that the officers did not violate any federal right when they opened Sheehan's door the first time. See 743 F.3d, at 1216, 1223. Reynolds and Holder knocked on the door, announced that they were police officers, and informed Sheehan that they wanted to help her. When Sheehan did not come to the door, they
1775 entered her room. This was not unconstitutional. "[L]aw enforcement *1775 officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City v. Stuart,* 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). See also *Kentucky v. King,* 563 U.S. ___, ___, 131 S.Ct. 1849, 1856-1857, 179 L.Ed.2d 865 (2011).

Nor is there any doubt that had Sheehan not been disabled, the officers could have opened her door the second time without violating any constitutional rights. For one thing, "because the two entries were part of a single, continuous search or seizure, the

officers [were] not required to justify the continuing emergency with respect to the second entry." 743 F.3d, at 1224 (following *Michigan v. Tyler,* 436 U.S. 499, 511, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978)). In addition, Reynolds and Holder knew that Sheehan had a weapon and had threatened to use it to kill three people. They also knew that delay could make the situation more dangerous. The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay "would gravely endanger their lives or the lives of others." *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-299, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). This is true even when, judged with the benefit of hindsight, the officers may have made "some mistakes." *Heien v. North Carolina*, 574 U.S. ___, ___, 135 S.Ct. 530, 536, 190 L.Ed.2d 475 (2014). The Constitution is not blind to "the fact that police officers are often forced to make split-second judgments." *Plumhoff, supra*, at ___, 134 S.Ct., at 2020.

We also agree with the Ninth Circuit that after the officers opened Sheehan's door the second time, their use of force was reasonable. Reynolds tried to subdue Sheehan with pepper spray, but Sheehan kept coming at the officers until she was "only a few feet from a cornered Officer Holder." 743 F.3d, at 1229. At this point, the use of potentially deadly force was justified. See *Scott v. Harris*, 550 U.S. 372, 384, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). Nothing in the Fourth Amendment barred Reynolds and Holder from protecting themselves, even though it meant firing multiple rounds. See *Plumhoff, supra*, at ___, 134 S.Ct., at 2022.

The real question, then, is whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempting to accommodate her disability. Here we come to another problem. San Francisco, whose attorneys represent Reynolds and Holder, devotes scant briefing to this question. Instead, San Francisco argues almost exclusively that even if it is assumed that there was a Fourth Amendment violation, the right was not clearly established. This Court, of course, could decide the constitutional question anyway. See *Pearson v. Callahan*, 555 U.S. 223, 242, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (recognizing discretion). But because this question has not been adequately briefed, we decline to do so. See *id.,* at 239, 129 S.Ct. 808. Rather, we simply decide whether the officers' failure to accommodate Sheehan's illness violated clearly established law. It did not.

To begin, nothing in our cases suggests the constitutional rule applied by the Ninth Circuit. The Ninth Circuit focused on *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), but *Graham* holds only that the "`objective reasonableness'" test applies to excessive-force claims under the Fourth Amendment. See *id.,* at 388, 109 S.Ct. 1865. That is far too general a
1776 proposition to control this case. "We have repeatedly *1776 told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *al-Kidd, supra*, at ___, 131 S.Ct., at 2084 (citation omitted); cf. *Lopez v. Smith*, 574 U.S. ___, ___, 135 S.Ct. 1, 3-4, 190 L.Ed.2d 1 (2014) (*per curiam*). Qualified immunity is no immunity at all if "clearly established" law can simply be defined as the right to be free from unreasonable searches and seizures.

Even a cursory glance at the facts of *Graham* confirms just how different that case is from this one. That case did not involve a dangerous, obviously unstable person making threats, much less was there a weapon involved. There is a world of difference between needlessly withholding sugar from an innocent person who is suffering from an insulin reaction, see *Graham, supra*, at 388-389, 109 S.Ct. 1865, and responding to the perilous situation Reynolds and Holder confronted. *Graham* is a nonstarter.

Moving beyond *Graham,* the Ninth Circuit also turned to two of its own cases. But even if "a controlling circuit precedent could constitute clearly established federal law in these circumstances," *Carroll v. Carman*, 574 U.S. ___, ___, 135 S.Ct. 348, 350, 190 L.Ed.2d 311 (2014) (*per curiam*), it does not do so here.

The Ninth Circuit first pointed to *Deorle v. Rutherford*, 272 F.3d 1272 (C.A.9 2001), but from the very first paragraph of that opinion we learn that *Deorle* involved an officer's use of a beanbag gun to subdue "an emotionally disturbed" person who "was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense." *Id.,* at 1275. The officer there, moreover, "observed Deorle at close proximity for about five to ten minutes before shooting him" in the face. See *id.,* at 1281. Whatever the merits of the decision in *Deorle,* the differences between that case and the case before us leap from the page. Unlike Deorle, Sheehan was dangerous, recalcitrant, law-breaking, and out of sight.

The Ninth Circuit also leaned on *Alexander v. City and County of San Francisco*, 29 F.3d 1355 (C.A.9 1994), another case involving mental illness. There, officials from San Francisco attempted to enter Henry Quade's home "for the primary purpose of arresting him" even though they lacked an arrest warrant. *Id.,* at 1361. Quade, in response, fired a handgun; police officers "shot back, and Quade died from gunshot wounds shortly thereafter." *Id.,* at 1358. The panel concluded that a jury should decide whether the officers used excessive force. The court reasoned that the officers provoked the confrontation because there were no "exigent circumstances" excusing their entrance. *Id.,* at 1361.

Alexander too is a poor fit. As Judge Graber observed below in her dissent, the Ninth Circuit has long read *Alexander* narrowly. See 743 F.3d, at 1235 (Graber, J., concurring in part and dissenting in part) (citing *Billington v. Smith,* 292 F.3d 1177 (C.A.9 2002)). Under Ninth Circuit law,[4] an entry that otherwise complies *1777 with the Fourth Amendment is not rendered unreasonable because it provokes a violent reaction. See *id.,* at 1189-1190. Under this rule, qualified immunity necessarily applies here because, as explained above, competent officers could have believed that the second entry was justified under both continuous search and exigent circumstance rationales. Indeed, even if Reynolds and Holder misjudged the situation, Sheehan cannot "establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." *Id.,* at 1190. Courts must not judge officers with "the 20/20 vision of hindsight.'" *Ibid.* (quoting *Graham,* 490 U.S., at 396, 109 S.Ct. 1865).

When *Graham, Deorle,* and *Alexander* are viewed together, the central error in the Ninth Circuit's reasoning is apparent. The panel majority concluded that these three cases "would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry." 743 F.3d, at 1229. But even assuming that is true, *no precedent clearly established that there was not "an objective need for immediate entry" here.* No matter how carefully a reasonable officer read *Graham, Deorle,* and *Alexander* beforehand, that officer could not know that reopening Sheehan's door to prevent her from escaping or gathering more weapons would violate the Ninth Circuit's test, even if all the disputed facts are viewed in respondent's favor. Without that "fair notice," an officer is entitled to qualified immunity. See, *e.g., Plumhoff,* 572 U.S., at ___, 134 S.Ct., at 2023.

Nor does it matter for purposes of qualified immunity that Sheehan's expert, Reiter, testified that the officers did not follow their training. According to Reiter, San Francisco trains its officers when dealing with the mentally ill to "ensure that sufficient resources are brought to the scene," "contain the subject" and "respect the suspect's "comfort zone," "use time to their advantage," and "employ non-threatening verbal communication and open-ended questions to facilitate the subject's participation in communication." Brief for Respondent 7. Likewise, San Francisco's policy is "`to use hostage negotiators'" when dealing with "`a suspect [who] resists arrest by barricading himself.'" *Id.,* at 8 (quoting San Francisco Police Department General Order 8.02, § II(B) (Aug. 3, 1994), online at http://www.sf-police.org (as visited May 14, 2015, and available in Clerk of Court's case file)).

Even if an officer acts contrary to her training, however, (and here, given the generality of that training, it is not at all clear that Reynolds and Holder did so), that does not itself negate qualified immunity where it would otherwise be warranted. Rather, so long as "a reasonable officer could have believed that his conduct was justified," a plaintiff cannot "avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless." *Billington, supra,* at 1189. Cf. *Saucier v. Katz,* 533 U.S. 194, 216, n. 6, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (GINSBURG, J., concurring in judgment) ("`[I]n close cases, a jury does not automatically get to second-guess these life and death decisions, even though a plaintiff has an expert and a plausible claim that the situation could better have been handled differently'" (quoting *Roy v. Inhabitants* *1778 *of Lewiston,* 42 F.3d 691, 695 (C.A.1 1994)). Considering the specific situation confronting Reynolds and Holder, they had sufficient reason to believe that their conduct was justified.

Finally, to the extent that a "robust consensus of cases of persuasive authority" could itself clearly establish the federal right respondent alleges, *al-Kidd,* 563 U.S., at ___, 131 S.Ct., at 2084, no such consensus exists here. If anything, the opposite may be true. See, *e.g., Bates v. Chesterfield County,* 216 F.3d 367, 372 (C.A.4 2000) ("Knowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person, and the general public"); *Sanders v. Minneapolis,* 474 F.3d 523, 527 (C.A.8 2007) (following *Bates, supra*); *Menuel v. Atlanta,* 25 F.3d 990 (C.A.11 1994) (upholding use of deadly force to try to apprehend a mentally ill man who had a knife and was hiding behind a door).

In sum, we hold that qualified immunity applies because these officers had no "fair and clear warning of what the Constitution requires." *al-Kidd, supra,* at ___, 131 S.Ct., at 2086-2087 (KENNEDY, J., concurring). Because the qualified immunity analysis is straightforward, we need not decide whether the Constitution was violated by the officers' failure to accommodate Sheehan's illness.

*** * ***

For these reasons, the first question presented is dismissed as improvidently granted. On the second question, we reverse the judgment of the Ninth Circuit. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BREYER took no part in the consideration or decision of this case.

Justice SCALIA, with whom Justice KAGAN joins, concurring in part and dissenting in part.

The first question presented (QP) in the petition for certiorari was "Whether Title II of the Americans with Disabilities Act [(ADA)] requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." Pet. for Cert. i. The petition assured us (quite accurately), and devoted a section of its argument to the point, that "The Circuits Are In Conflict On This Question." *Id.,* at 18. And petitioners faulted the Ninth Circuit for "holding that the ADA's reasonable accommodation requirement applies to officers facing violent circumstances," a conclusion that was "in direct conflict with the categorical prohibition on such claims adopted by the Fifth and Sixth Circuits." *Ibid.* Petitioners had expressly advocated for the Fifth and Sixth Circuits' position in the Court of Appeals. See Appellees' Answering Brief in No. 11-16401 (CA9), pp. 35-37 ("[T]he ADA does not apply to police officers' responses to violent individuals who happen to be mentally ill, where officers have not yet brought the violent situation under control").

Imagine our surprise, then, when the petitioners' principal brief, reply brief, and oral argument had nary a word to say about that subject. Instead, petitioners bluntly announced in their principal brief that they "do not assert that the actions of individual police officers [in arresting violent and armed disabled persons] are never subject to scrutiny under Title II," and proclaimed that "[t]he only ADA issue here is *what* Title II requires of individual officers who are facing an armed and dangerous suspect." Brief for
1779 Petitioners 34 (emphasis added). In other words, the issue is not (as the petition had asserted) *1779 *whether* Title II applies to arrests of violent, mentally ill individuals, but rather *how* it applies under the circumstances of this case, where the plaintiff threatened officers with a weapon. We were thus deprived of the opportunity to consider, and settle, a controverted question of law that has divided the Circuits, and were invited instead to decide an ADA question that has relevance only if we assume the Ninth Circuit correctly resolved the antecedent, unargued question on which we granted certiorari. The Court is correct to dismiss the first QP as improvidently granted.

Why, one might ask, would a petitioner take a position on a Circuit split that it had no intention of arguing, or at least was so little keen to argue that it cast the argument aside uninvited? The answer is simple. Petitioners included that issue to induce us to grant certiorari. As the Court rightly observes, there are numerous reasons why we would not have agreed to hear petitioners' first QP if their petition for certiorari presented it in the same form that it was argued on the merits. See *ante,* at 1772-1774. But it is also true that there was little chance that we would have taken this case to decide only the second, fact-bound QP—that is, whether the individual petitioners are entitled to qualified immunity on respondent's Fourth Amendment claim.

This Court's Rule 10, entitled "Considerations Governing Review on Certiorari," says that certiorari will be granted "only for compelling reasons," which include the existence of conflicting decisions on issues of law among federal courts of appeals, among state courts of last resort, or between federal courts of appeals and state courts of last resort. The Rule concludes: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The second QP implicates, at most, the latter. It is unlikely that we would have granted certiorari on that question alone.

But (and here is what lies beneath the present case) when we do grant certiorari on a question for which there is a "compelling reason" for our review, we often also grant certiorari on attendant questions that are not independently "certworthy," but that are sufficiently connected to the ultimate disposition of the case that the efficient administration of justice supports their consideration. In other words, by promising argument on the Circuit conflict that their first question presented, petitioners got us to grant certiorari not only on the first question but also on the second.

I would not reward such bait-and-switch tactics by proceeding to decide the independently "uncertworthy" second question. And make no mistake about it: Today's judgment is a reward. It gives the individual petitioners all that they seek, and spares San Francisco the significant expense of defending the suit, and satisfying any judgment, against the individual petitioners.[*] I would not encourage future litigants to seek review premised on arguments they never plan to press, secure in the knowledge that once they find a toehold on this Court's docket, we will consider whatever workaday arguments they choose to present in their merits briefs.

1780 There is no injustice in my vote to dismiss both questions as improvidently granted. To be sure, *ex post*—after the *1780 Court has improvidently decided the uncertworthy question—it appears that refusal to reverse the judgment below would have left a wrong unrighted. *Ex ante,* however—before we considered and deliberated upon the second QP but after petitioners' principal

brief made clear that they would not address the Circuit conflict presented by the first QP—we had no more assurance that this question was decided incorrectly than we do for the thousands of other uncertworthy questions we refuse to hear each Term. *Many* of them have undoubtedly been decided wrongly, but we are not, and for well over a century have not been, a court of error correction. The fair course—the just course—is to treat this now-nakedly uncertworthy question the way we treat all others: by declining to decide it. In fact, there is in this case an even greater reason to decline: to avoid being snookered, and to deter future snookering.

Because I agree with the Court that "certiorari jurisdiction exists to clarify the *law," ante,* at 1774 (emphasis added), I would dismiss both questions presented as improvidently granted.

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

[2] There is a dispute regarding whether Sheehan was on the ground for the last shot. This dispute is not material: "Even if Sheehan was on the ground, she was certainly not subdued." 743 F.3d 1211, 1230 (C.A.9 2014).

[3] Not satisfied with dismissing question one, which concerns *San Francisco's* liability, our dissenting colleagues would further punish San Francisco by dismissing question two as well. See *post,* at 1779 (opinion of SCALIA, J.) (arguing that deciding the second question would "reward" San Francisco and "spar[e it] the significant expense of defending the suit, and satisfying any judgment, against the individual petitioners"). But question two concerns the *liability of the individual officers.* Whatever contractual obligations San Francisco may (or may not) have to represent and indemnify the officers are not our concern. At a minimum, these officers have a personal interest in the correctness of the judgment below, which holds that they may have violated the Constitution. Moreover, when we granted the petition, we determined that both questions independently merited review. Because of the importance of qualified immunity "to society as a whole," *Harlow v. Fitzgerald,* 457 U.S. 800, 814, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Court often corrects lower courts when they wrongly subject individual officers to liability. See, *e.g., Carroll v. Carman,* 574 U.S. ___, 135 S.Ct. 348, 190 L.Ed.2d 311 (2014) (*per curiam*); *Wood v. Moss,* 572 U.S. ___, 134 S.Ct. 2056, 188 L.Ed.2d 1039 (2014); *Plumhoff v. Rickard,* 572 U.S. ___, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014); *Stanton v. Sims,* 571 U.S. ___, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (*per curiam*); *Reichle v. Howards,* 566 U.S. ___, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012).

[4] Our citation to Ninth Circuit cases should not be read to suggest our agreement (or, for that matter, disagreement) with them. The Ninth Circuit's "provocation" rule, for instance, has been sharply questioned elsewhere. See *Livermore v. Lubelan,* 476 F.3d 397, 406-407 (C.A.6 2007); see also, *e.g., Hector v. Watt,* 235 F.3d 154, 160 (C.A.3 2001) ("[I]f the officers' use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be an intervening cause"). Whatever their merits, all that matters for our qualified immunity analysis is that they do not clearly establish any right that the officers violated.

[*] San Francisco will still be subject to liability under the ADA if the trial court determines that the facts demanded accommodation. The Court of Appeals vacated the District Court's judgment that the ADA was inapplicable to police arrests of violent and armed disabled persons, and remanded for the accommodation determination.

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810 F.3d 892 (2016)

The ESTATE OF Ronald H. ARMSTRONG, by and through his Administratrix, Jinia ARMSTRONG Lopez, Plaintiff-Appellant,

v.

The VILLAGE OF PINEHURST; Officer Jerry McDonald, in his official and individual capacity; OFFICER TINA S. SHEPPARD, in her official and individual capacity; Officer Arthur Lee Gatling, Jr., in his official and individual capacity, Defendants-Appellees, and Taser International, Inc., Defendant.

No. 15-1191.

United States Court of Appeals, Fourth Circuit.

Argued: October 28, 2015.
Decided: January 11, 2016.

895 *895 Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro, Catherine C. Eagles, District Judge, (1:13-cv-00407-CCE-JLW).

ARGUED: Karonnie R. Truzy, CRUMLEY ROBERTS, LLP, Greensboro, North Carolina, for Appellant. Dan McCord Hartzog, CRANFILL SUMNER & HARTZOG LLP, Raleigh, North Carolina, for Appellees. ON BRIEF: David J. Ventura, CRUMLEY ROBERTS, LLP, Charlotte, North Carolina, for Appellant. Dan M. Hartzog, Jr., CRANFILL SUMNER & HARTZOG LLP, Raleigh, North Carolina; Michael J. Newman, VAN CAMP, MEACHAM & NEWMAN PLLC, Pinehurst, North Carolina, for Appellees.

Before WILKINSON, KEENAN, and THACKER, Circuit Judges.

Affirmed by published opinion. Judge THACKER wrote the opinion, in which Judge KEENAN joined. Judge WILKINSON wrote a separate opinion concurring in part.

THACKER, Circuit Judge:

The Estate of Ronald H. Armstrong ("Appellant" when referring to the estate, or "Armstrong" when referring to the decedent) appeals an order granting summary judgment to the Village of Pinehurst, North Carolina, and Lieutenant Jerry McDonald, Sergeant Tina Sheppard, and Officer Arthur Gatling, Jr., of the Pinehurst Police Department ("Appellees"). The district court determined that qualified immunity bars Appellant's claim that Appellees used excessive force when executing an involuntary commitment order, which required Armstrong's immediate hospitalization.

On review, we hold that Appellees used unconstitutionally excessive force when seizing Armstrong, but we, nevertheless, agree with the district court that Appellees are entitled to qualified immunity. We, therefore, affirm the grant of summary judgment in Appellees' favor on the grounds explained below.

I.

We review the district court's grant of summary judgment de novo. *See Henry v. Purnell,* 652 F.3d 524, 531 (4th Cir.2011) (en banc). We "determine de novo whether the facts ... establish the deprivation of an actual constitutional right," *Leverette v. Bell,* 247 F.3d 160, 166 (4th Cir.2001), and "[w]e review de novo an award of summary judgment on the basis of qualified immunity," *Durham v. Horner,* 690 F.3d 183, 188 (4th Cir.2012). "Summary judgment is appropriate only if taking the
896 evidence and all reasonable inferences *896 drawn therefrom in the light most favorable to the nonmoving party, `no material facts are disputed and the moving party is entitled to judgment as a matter of law.'" *Henry,* 652 F.3d at 531 (quoting *Ausherman v. Bank of Am. Corp.,* 352 F.3d 896, 899 (4th Cir.2003)).

II.

A.

Ronald Armstrong suffered from bipolar disorder and paranoid schizophrenia. On April 23, 2011, he had been off his prescribed medication for five days and was poking holes through the skin on his leg "to let the air out." J.A. 675.[1] His sister, Jinia Armstrong Lopez ("Lopez"), worried by his behavior, convinced Armstrong to accompany her to Moore Regional Hospital ("Hospital") in Pinehurst, North Carolina. He willingly went to the Hospital and checked in, but "[d]uring the course of the evaluation he apparently became frightened and eloped from the [emergency department]." *Id.* Based on that flight and Lopez's report about his odd behavior over the previous week, the examining doctor judged Armstrong a danger to himself and issued involuntary commitment papers to compel his return. Armstrong's doctor could have, but did not, designate him a danger to others, checking only the box that reads "[m]entally ill and dangerous to self" on the commitment form. *Id.*

The Pinehurst police were called as soon as Armstrong left the Hospital, and three members of the department — all Appellees in this case — responded in short order. Officer Gatling appeared on the scene first, followed a minute or two later by Sergeant Sheppard. Lieutenant McDonald arrived about ten minutes after Sheppard. Armstrong had not traveled far when Gatling arrived. He was located near an intersection near the Hospital's main entrance.

When the police arrived, Armstrong's commitment order had not yet been finalized.[2] Therefore, Gatling and Sheppard engaged Armstrong in conversation. By all accounts, the parties were calm and cooperative at this point in time.

Armstrong was acting strangely, however. When Officer Gatling first initiated conversation, Armstrong was wandering across an active roadway that intersects with the Hospital's driveway. Gatling successfully convinced him to withdraw to the relative safety of the roadside, but Armstrong then proceeded to eat grass and dandelions, chew on a gauze-like substance, and put cigarettes out on his tongue while the police officers waited for the commitment order.

As soon as they learned that the commitment papers were complete, the three police officers surrounded and advanced toward Armstrong — who reacted by sitting down and wrapping himself around a four-by-four post that was supporting a nearby stop sign. The officers tried to pry Armstrong's arms and legs off of the post, but he was wrapped too tightly and would not budge.

897 Immediately following finalization of the involuntary commitment order, in other words, Armstrong was seated on the *897 ground, anchored to the base of a stop sign post, in defiance of the order. The three police officers at the scene were surrounding him, struggling to remove him from the post. Lopez was in the immediate vicinity as well, along with Jack Blankenship and Johnny Verbal, two Hospital security officers. So Armstrong was encircled by six people — three Pinehurst police officers tasked with returning him to the Hospital, two Hospital security guards tasked with returning him to the Hospital, and his sister, who was pleading with him to return to the Hospital.

Appellees did not prolong this stalemate. Nor did they attempt to engage in further conversation with Armstrong. Instead, just thirty seconds or so after the officers told Armstrong his commitment order was final, Lieutenant McDonald instructed Officer Gatling to prepare to tase Armstrong. Officer Gatling drew his taser, set it to "drive stun mode,"[3] and announced that, if Armstrong did not let go of the post, he would be tased. That warning had no effect, so Gatling deployed the taser — five separate times over a period of approximately two minutes.[4] Rather than have its desired effect, the tasing actually increased Armstrong's resistance.

But shortly after the tasing ceased, Blankenship and Verbal jumped in to assist the three police officers trying to pull Armstrong off of his post. That group of five successfully removed Armstrong and laid him facedown on the ground.

During the struggle, Armstrong complained that he was being choked. While no witness saw the police apply any chokeholds, Lopez did see officers "pull[] his collar like they were choking him" during the struggle. J.A. 192.

With Armstrong separated from the post, Appellees restrained him. Lieutenant McDonald and Sergeant Sheppard pinned Armstrong down by placing a knee on his back and standing on his back, respectively, while handcuffs were applied. But even after being cuffed, Armstrong continued to kick at Sergeant Sheppard, so the police shackled his legs too.

The officers then stood up to collect themselves. They left Armstrong facedown in the grass with his hands cuffed behind his back and his legs shackled. At this point, he was no longer moving — at all. Lopez was the first to notice that her brother

was unresponsive, so she asked the officers to check on him. Appellees did so immediately,[5] but Armstrong's condition had already become dire. When the officers flipped him over, his skin had *898 turned a bluish color and he did not appear to be breathing.

Sergeant Sheppard and Lieutenant McDonald administered CPR, and Lieutenant McDonald radioed dispatch to send Emergency Medical Services ("EMS"). EMS responders transported Armstrong to the Hospital's emergency department where resuscitation attempts continued but were unsuccessful. He was pronounced dead shortly after admission. According to the Pinehurst Police Department's summary of communications during the incident, just six and one-half minutes elapsed between dispatch advising Appellees that Armstrong's commitment papers were final and Appellees radioing for EMS.

B.

Based on the foregoing, Appellant filed a complaint in the Superior Court of Moore County, North Carolina, on April 16, 2013. Appellant sued each police officer involved in Armstrong's seizure, pursuant to 42 U.S.C. § 1983, alleging that the officers used excessive force, in violation of Armstrong's Fourth and Fourteenth Amendment rights, when seizing him.[6] Appellees removed the case to the United States District Court for the Middle District of North Carolina on May 20, 2013.

The district court granted summary judgment to Appellees on January 27, 2015, reasoning, "[i]t is highly doubtful that the evidence establishes a constitutional violation at all, but assuming it does, the defendants are entitled to qualified immunity." *Estate of Ronald H. Armstrong v. Village of Pinehurst,* No. 1:13-cv-407, slip op. at 4 (M.D.N.C. Jan. 27, 2015) (citation omitted). Appellant filed a timely notice of appeal on February 24, 2015.

III.

A.

"Qualified immunity protects officers who commit constitutional violations but who, in light of clearly established law, could reasonably believe that their actions were lawful." *Henry v. Purnell,* 652 F.3d 524, 531 (4th Cir.2011) (en banc). A "qualified immunity analysis," therefore, "typically involves two inquiries: (1) whether the plaintiff has established the violation of a constitutional right, and (2) whether that right was clearly established at the time of the alleged violation." *Raub v. Campbell,* 785 F.3d 876, 881 (4th Cir.2015). The court "may address these two questions in `the order ... that will best facilitate the fair and efficient disposition of each case.'" *Id.* (alteration in original) (quoting *Pearson v. Callahan,* 555 U.S. 223, 242, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)). Appellant's case survives summary judgment, however, only if we answer both questions in the affirmative. *See Pearson,* 555 U.S. at 232, 129 S.Ct. 808.

In this case, we adhere to "the better approach to resolving cases in which the defense of qualified immunity is raised," that is, we "determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *Pearson,* 555 U.S. at 232, 129 S.Ct. 808 (quoting *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 841 n. 5, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). *899 Though this sequence is "no longer ... regarded as mandatory," it is "often beneficial," and "is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.* at 236, 129 S.Ct. 808. Because excessive force claims raise such questions, *see* Nancy Leong, *Improving Rights,* 100 Va. L.Rev. 377, 393 (2014) ("[E]xcessive force claims are litigated over 98% of the time in the civil context...."), we exercise our discretion to address the constitutional question presented by this appeal first.

B.

Our initial inquiry, then, is this: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Brosseau v. Haugen,* 543 U.S. 194, 197, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam) (quoting *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). In this case, the answer is yes. Viewed in the light most favorable to Appellant, the record before us establishes that, when seizing Armstrong, Appellees used unreasonably excessive force in violation of the Fourth Amendment.

A "claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other `seizure' of [a] person" is "properly analyzed under the Fourth Amendment's `objective reasonableness' standard." *Graham v. Connor,* 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *see also* *Scott v. Harris,* 550 U.S. 372, 381, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *Bell v. Wolfish,* 441 U.S. 520, 559, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). But the Court has counseled that the test "requires 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." *Smith v. Ray,* 781 F.3d 95, 101 (4th Cir. 2015) (quoting *Graham,* 490 U.S. at 396, 109 S.Ct. 1865). There are, moreover, three factors the Court enumerated to guide this balancing. First, we look to "the severity of the crime at issue"; second, we examine the extent to which "the suspect poses an immediate threat to the safety of the officers or others"; and third, we consider "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.* (alteration supplied) (quoting *Graham,* 490 U.S. at 396, 109 S.Ct. 1865). "To properly consider the reasonableness of the force employed we must `view it in full context, with an eye toward the proportionality of the force in light of all the circumstances.'" *Id.* (quoting *Waterman v. Batton,* 393 F.3d 471, 481 (4th Cir.2005)).

1.

Here, the first *Graham* factor favors Appellant. Appellees have never suggested that Armstrong committed a crime or that they had probable cause to effect a criminal arrest. When the subject of a seizure "ha[s] not committed any crime, this factor weighs heavily in [the subject's] favor." *Bailey v. Kennedy,* 349 F.3d 731, 743-44 (4th Cir.2003); *see also* *Turmon v. Jordan,* 405 F.3d 202, 207 (4th Cir.2005) ("[T]he severity of the crime cannot be taken into account because there was no crime." (internal quotation marks omitted)). And this factor would still favor Appellant if Appellees had argued that their seizure was converted to a criminal arrest when Armstrong failed to obey the officers' lawful orders. "Even in a case in which the plaintiff ha[s] committed a *900 crime, when the offense [i]s a minor one, we have found that the first *Graham* factor weigh[s] in plaintiff's favor...." *Jones v. Buchanan,* 325 F.3d 520, 528 (4th Cir. 2003) (internal quotation marks omitted).

But we have also recognized that this first *Graham* factor is intended as a proxy for determining whether "an officer [had] any reason to believe that [the subject of a seizure] was a potentially dangerous individual." *Smith,* 781 F.3d at 102. And while Armstrong committed no crime, the legal basis of his seizure did put Appellees on notice of two facts that bear on the question of whether Appellees had reason to believe Armstrong was dangerous.

First, as the subject of an involuntary commitment order, executed pursuant to N.C. Gen.Stat. § 122C-262, Armstrong was necessarily considered "mentally ill." *See also* N.C. Gen.Stat. § 122C-261(a). Armstrong's mental health was thus one of the "facts and circumstances" that "a reasonable officer on the scene" would ascertain. *Graham,* 490 U.S. at 396, 109 S.Ct. 1865. And it is a fact that officers must account for when deciding when and how to use force. *See* *Champion v. Outlook Nashville, Inc.,* 380 F.3d 893, 904 (6th Cir.2004) ("It cannot be forgotten that the police were confronting an individual whom they knew to be mentally ill.... The diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted."). "The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense." *Bryan v. MacPherson,* 630 F.3d 805, 829 (9th Cir. 2010) (alteration omitted) (quoting *Deorle v. Rutherford,* 272 F.3d 1272, 1282-83 (9th Cir.2001)). "[T]he use of force that may be justified by" the government's interest in seizing a mentally ill person, therefore, "differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community." *Id.*

Mental illness, of course, describes a broad spectrum of conditions and does not dictate the same police response in all situations. But "in some circumstances at least," it means that "increasing the use of force may ... exacerbate the situation." *Deorle,* 272 F.3d at 1283. Accordingly, "the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis." *Id.* And even when this ideal course is not feasible, officers who encounter an unarmed and minimally threatening individual who is "exhibit[ing] conspicuous signs that he [i]s mentally unstable" must "de-escalate the situation and adjust the application of force downward." *Martin v. City of Broadview Heights,* 712 F.3d 951, 962 (6th Cir.2013).

The second relevant fact that Appellees could glean from Armstrong's commitment order is that a doctor determined him to be a danger to himself.[7] *901 Where a seizure's sole justification is preventing harm to the subject of the seizure, the

government has little interest in using force to effect that seizure. Rather, using force likely to harm the subject is manifestly *contrary* to the government's interest in initiating that seizure. *See* Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1059 (9th Cir. 2003) (When "a mentally disturbed individual not wanted for any crime ... [i]s being taken into custody to prevent injury to himself[,] [d]irectly causing [that individual] grievous injury does not serve th[e officers'] objective in any respect.").

The first *Graham* factor thus weighs against imposition of force. The government's interest in seizing Armstrong was to prevent a mentally ill man from harming himself. The justification for the seizure, therefore, does not vindicate any degree of force that risks substantial harm to the subject.

2.

The second and third *Graham* factors, whether Armstrong threatened the safety of others and resisted seizure, do justify some — limited — use of force, though. Appellees had observed Armstrong wandering into traffic with little regard for avoiding the passing cars, and the seizure took place only a few feet from an active roadway. Armstrong, moreover, fled from the Hospital earlier that day, although he did not go far. Under such circumstances, Appellees concerns that Armstrong may try to flee into the street to avoid being returned to the Hospital, thereby endangering himself and individuals in passing cars, were objectively reasonable. A degree of force was, consequently, justified.

But that justified degree of force is the degree reasonably calculated to prevent Armstrong's flight. When Appellees decided to begin using force, Armstrong, who stood 5'11" tall and weighed 262 pounds, was stationary, seated, clinging to a post, and refusing to move. He was also out-numbered and surrounded by police officers and security guards. The degree of force necessary to prevent an individual who is affirmatively refusing to move from fleeing is obviously quite limited.

Armstrong was also resisting the seizure. There is no question that, prior to being tased, Armstrong was refusing to let go of the post he had wrapped himself around despite verbal instruction to desist and a brief — 30-second — attempt to physically pull him off. Noncompliance with lawful orders justifies some use of force, but the level of justified force varies based on the risks posed by the resistance. *See* Bryan, 630 F.3d at 830 ("`Resistance,' however, should not be understood as a binary state, with resistance being either completely passive or active.... Even purely passive resistance can support the use of some force, but the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance.") And, here, the factual circumstances demonstrate little risk — Armstrong was stationary, non-violent, and surrounded by people willing to help return him to the Hospital. That Armstrong was not allowing his arms to be pulled from the post and was refusing to comply with shouted orders to let go, while cause for some concern, do not import
902 *902 much danger or urgency into a situation that was, in effect, a static impasse.

3.

When we turn "an eye toward *the proportionality* of the force in light of all the[se] circumstances,'" *Smith,* 781 F.3d at 101 (alteration and emphasis supplied) (quoting *Waterman,* 393 F.3d at 481), it becomes evident that the level of force Appellees chose to use was not objectively reasonable. Appellees were confronted with a situation involving few exigencies where the *Graham* factors justify only a limited degree of force. Immediately tasing a non-criminal, mentally ill individual, who seconds before had been conversational, was not a proportional response.

Deploying a taser is a serious use of force. The weapon is designed to "caus[e] ... excruciating pain," *Cavanaugh v. Woods Cross City,* 625 F.3d 661, 665 (10th Cir.2010), and application can burn a subject's flesh, *see* Orem v. Rephann, 523 F.3d 442, 447-48 (4th Cir.2008) *abrogated on other grounds by* Wilkins v. Gaddy, 559 U.S. 34, 37, 130 S.Ct. 1175, 175 L.Ed.2d 995 (2010); *cf.* Commonwealth v. Caetano, 470 Mass. 774, 26 N.E.3d 688, 692 (2015) ("[W]e consider the stun gun a per se dangerous weapon at common law."). We have observed that a taser "inflicts a painful and frightening blow." *Orem,* 523 F.3d at 448 (quoting *Hickey v. Reeder,* 12 F.3d 754, 757 (8th Cir.1993)). Other circuits have made similar observations.[8] *See, e.g.,* Estate of Booker v. Gomez, 745 F.3d 405, 414 n. 9 (10th Cir.2014) ("A taser delivers electricity into a person's body, causing severe pain."); *Abbott v. Sangamon Cnty.,* 705 F.3d 706, 726 (7th Cir.2013) ("This court has acknowledged that one need not have personally endured a taser jolt to know the pain that must accompany it, and several of our sister circuits have likewise recognized the intense pain inflicted by a taser." (internal citations and quotation marks omitted)); *Bryan,* 630 F.3d at 825 ("The physiological effects, the high levels of pain, and foreseeable risk of physical injury lead us to

conclude that the X26 and similar devices are a greater intrusion than other non-lethal methods of force we have confronted.").

These observations about the severe pain inflicted by tasers apply when police officers utilize best practices. The taser use at issue in this case, however, contravenes current industry and manufacturer recommendations. Since at least 2011, the Police Executive Research Forum ("PERF") and the Department of Justice's Office of Community Oriented Policing Services ("COPS") have cautioned that using drive stun mode "to achieve pain compliance may have limited effectiveness and, when used repeatedly, may even exacerbate the situation." PERF & COPS, *2011 Electronic Control Weapon Guidelines,* at 14 (March 2011) (emphasis omitted). The organizations, therefore, recommend that police departments
903 "carefully consider policy *903 and training regarding when and how personnel use the drive stun mode[] and... discourage its use as a pain compliance tactic." *Id.* In 2013, moreover, Taser International, the manufacturer of the taser Appellees used in this case, warned, "Drive-stun use may not be effective on emotionally disturbed persons or others who may not respond to pain due to a mind-body disconnect." Cheryl W. Thompson & Mark Berman, *Stun guns: `There was just too much use,'* Wash. Post, Nov. 27, 2015, at A1. Taser users, the warning goes on, should "[a]void using repeated drive-stuns on such individuals if compliance is not achieved." *Id.* Even the company that manufactures tasers, in other words, now warns against the precise type of taser use inflicted on Armstrong.

Force that imposes serious consequences requires significant circumscription. Our precedent, consequently, makes clear that tasers are proportional force *only* when deployed in response to a situation in which a reasonable officer would perceive some immediate danger that could be mitigated by using the taser. In *Meyers v. Baltimore County,* we parsed a defendant-officer's taser deployments based on the level of resistance the arrestee was offering — and the danger that resistance posed to the officers — when each shock was administered. *See* 713 F.3d 723, 733-34 (4th Cir.2013). The "first three deployments of [the] taser did not amount to an unreasonable or excessive use of force[] [because the arrestee] was acting erratically, was holding a baseball bat that he did not relinquish until after he received the second shock, and was advancing toward the officers...." *Id.* at 733. But seven later deployments of the taser did amount to excessive force:

> It is an excessive and unreasonable use of force for a police officer repeatedly to administer electrical shocks with a taser on an individual who no longer is armed, has been brought to the ground, has been restrained physically by several other officers, and no longer is actively resisting arrest.

Id. at 734. Immediate danger was thus key to our distinction — tasing the arrestee ceased being proportional force when the officer "continued to use his taser" after the arrestee "did not pose a continuing threat to the officers' safety." *Id.* at 733.

In *Orem v. Rephann,* though we were applying a Fourteenth Amendment test rather than the Fourth Amendment's objective reasonableness test, we rejected an officer's argument that the taser deployment in question was intended to prevent an arrestee from endangering herself because the facts belied any immediate danger. *See* 523 F.3d at 447-49. Rather, those facts — that "Orem was handcuffed, weighed about 100 pounds, had her ankles loosened in the hobbling device which Deputy Boyles was tightening, and was locked in the back seat cage of Deputy Boyles's car until Deputy Rephann opened the door" — indicated that "the taser gun was not used for a legitimate purpose[,] such as protecting the officers, protecting Orem, or preventing Orem's escape." *Id.* As in *Meyers,* then, we tied permissible taser use to situations that present some exigency that is sufficiently dangerous to justify the force.

Appellees understand these cases to proscribe tasing when a subject has already been restrained but to sanction the practice when deployed against active resistance. Since Armstrong was unrestrained and actively resisting, they contend, their taser use must be permissible.

We disagree. While the questions whether an arrestee has been restrained and is complying with police directives are, of
904 course, relevant to any inquiry into the extent to which the arrestee "pose[s] a *904 continuing threat to the officers' safety," *Meyers,* 713 F.3d at 733, they are not dispositive. A rule limiting taser use to situations involving a proportional safety threat does not countenance use in situations where an unrestrained arrestee, though resistant, presents no serious safety threat.

Indeed, application of physical restraints cannot be the only way to ensure that an arrestee does not pose a sufficient safety threat to justify a tasing. If it were, use of a taser would be justified at the outset of *every* lawful seizure, before an arrestee has been restrained. This, of course, is not the law. Courts recognize that different seizures present different risks of danger. *See, e.g., Parker v. Gerrish,* 547 F.3d 1, 9 (1st Cir.2008) ("Though driving while intoxicated is a serious offense, it does not present a risk of danger to the arresting officer that is presented when an officer confronts a suspect engaged in an offense like robbery or assault."). Firing a taser "almost immediately upon arrival" at the scene of an altercation, before an officer

"could ... have known what was going on," is, consequently, constitutionally proscribed. *Casey v. City of Fed. Heights,* 509 F.3d 1278, 1285 (10th Cir.2007); *see also id.* at 1286 ("[I]t is excessive to use a Taser to control a target without having any reason to believe that a lesser amount of force — or a verbal command — could not exact compliance."). Painful, injurious, serious inflictions of force, like the use of a taser, do not become reasonable simply because officers have authorization to arrest a subject who is unrestrained.

Even noncompliance with police directives and nonviolent physical resistance do not necessarily create "a continuing threat to the officers' safety." *Meyers,* 713 F.3d at 733. Examples of minimally risky physical resistance are prevalent. Refusing to enter an out-of-state officer's police car until a local officer is summoned is not a sufficient threat to the arresting officer to justify physically striking the arrestee. *See Rambo v. Daley,* 68 F.3d 203, 207 (7th Cir.1995). Nor is an arrestee pulling her arm away when a police officer attempts to grab her without explanation. *See Smith,* 781 F.3d at 103. An arrestee "yank[ing] his arm away" from a police officer, similarly, does not justify "being tackled." *Goodson v. City of Corpus Christi,* 202 F.3d 730, 733, 740 (5th Cir. 2000).

Unsurprisingly, then, other circuits have held that taser use can constitute excessive force when used in response to non-violent resistance. The subject of a seizure "refus[ing] to release his arms for handcuffing," for example, "is no[t] evidence suggesting that [he] *violently* resisted the officers' attempts to handcuff him." *Cyrus v. Town of Mukwonago,* 624 F.3d 856, 863 (7th Cir.2010) (emphasis supplied). Such a refusal, therefore, does not justify deploying a taser when the subject "[i]s unarmed and there [i]s little risk [he] could access a weapon," according to the Seventh Circuit. *Id.* The en banc Ninth Circuit has drawn a similar conclusion: A suspect "actively resist[s] arrest [when] she refuse[s] to get out of her car when instructed to do so and stiffen[s] her body and clutche[s] her steering wheel to frustrate the officers' efforts to remove her from her car," but when she also "d[oes] not evade arrest by flight, and no other exigent circumstances exist[] at the time[,]... [a] reasonable fact-finder could conclude... that the officers' use of [a taser] was unreasonable and therefore constitutionally excessive." *Mattos v. Agarano,* 661 F.3d 433, 446 (9th Cir.2011) (en banc). The Eighth Circuit agrees as well. *See Brown v. City of Golden Valley,* 574 F.3d 491, 497 (8th Cir.2009) (refusal to terminate *905 a telephone call after police ordered an arrestee to do so does not justify tasing even though the police officer was concerned that the arrestee could use glass tumblers near her feet as weapons or could kick the officer).

And this conclusion, that taser use is unreasonable force in response to resistance that does not raise a risk of immediate danger, is consistent with our treatment of police officers' more traditional tools of compliance. We have denied summary judgment on excessive force claims to an officer, who "punched [an arrestee] [,] threw him to the ground," and, subsequently, "used a wrestling maneuver" on him, because there was no "real evidence that [a] relatively passive, [mentally delayed] man was a danger to the larger, trained police officer." *Rowland v. Perry,* 41 F.3d 167, 172, 174 (4th Cir.1994). In doing so, we rejected the argument that such force was a reasonable response to "the resistance offered by [the arrestee] during the struggle," reasoning that, despite this resistance, the arrestee "posed no threat to the officer or anyone else." *Id.* at 173-74.

We have similarly held that punching and throwing an arrestee to the ground because she "took only a single step back off of the small stoop in front of the door" and "pulled her arm away" during an attempted handcuffing was excessive force. *Smith,* 781 F.3d at 102-03. This nominal resistance did not justify the officer's use of force where a reasonable officer at the scene would not have "any reason to believe that [the arrestee] was a potentially dangerous individual" or "was at all inclined to cause [the officer] any harm." *Id.* at 102.

And we have treated pepper spray, a use of force that causes "closing of the eyes through swelling of the eyelids, ... immediate respiratory inflammation, ... and ... immediate burning sensations," similarly, having held it excessive when used on an arrestee's wife, who was sprinting toward police officers to assist her husband upon seeing him placed in handcuffs. *Park v. Shiflett,* 250 F.3d 843, 848-49, 852 (4th Cir.2001). Though the officers at the scene thought running full-bore toward their detainee was basis to arrest the wife for "disorderly conduct[] [and] obstruction of a law enforcement officer in the performance of his duties," *id.* at 854 n. * (Traxler, J., concurring in part and dissenting in part), we rejected any notion that such behavior justified the application of pepper spray, *see id.* at 852-83 (maj.op.). Rather, because "[i]t [wa]s difficult to imagine the unarmed [wife] as a threat to the officers or the public," the officers' "irresponsible use of pepper spray twice from close range ... was indeed excessive." *Id.*

In all of these cases, we declined to equate conduct that a police officer characterized as resistance with an objective threat to safety entitling the officer to escalate force. Our precedent, then, leads to the conclusion that a police officer may *only* use serious injurious force, like a taser, when an objectively reasonable officer would conclude that the circumstances present a

risk of immediate danger that could be mitigated by the use of force. At bottom, "physical resistance" is not synonymous with "risk of immediate danger."[9]

906 *906 Therefore, in the case before us, Appellees' use of force is only "proportional[]... in light of all the circumstances," *Smith,* 781 F.3d at 101 (quoting *Waterman,* 393 F.3d at 481), if Armstrong's resistance raised a risk of immediate danger that outweighs the *Graham* factors militating against harming Armstrong. But when the facts are viewed in the light most favorable to Appellant, they simply do not support that conclusion.

Under these facts, when Officer Gatling deployed his taser, Armstrong was a mentally ill man being seized for his own protection, was seated on the ground, was hugging a post to ensure his immobility, was surrounded by three police officers and two Hospital security guards,[10] and had failed to submit to a lawful seizure for only 30 seconds. A reasonable officer would have perceived a static stalemate with few, if any, exigencies — not an immediate danger so severe that the officer must beget the exact harm the seizure was intended to avoid.

That Armstrong had already left the Hospital and was acting strangely while the officers waited for the commitment order to be finalized do not change this calculus. If merely acting strangely in such a circumstance served as a green light to taser deployment, it would then be the rule rather than the exception when law enforcement officials encounter the mentally ill. That cannot be. By the time Appellees chose to inflict force, any threat had sunk to its nadir — Armstrong had immobilized himself, ceased chewing on inedible substances, and ceased burning himself. Use of force designed to "caus[e] ... excruciating pain," *Cavanaugh,* 625 F.3d at 665, in these circumstances is an unreasonably disproportionate response.

We are cognizant that courts ought not "undercut the necessary element of judgment inherent in a constable's attempts to control a volatile chain of events." *Brown v. Gilmore,* 278 F.3d 362, 369 (4th Cir. 2002). And we certainly do not suggest that Appellees had a constitutional duty to stand idly by and hope that Armstrong would change his mind and return to the Hospital on his own accord. But the facts of this case make clear that our ruling does not hamper police officers' ability to do their jobs: Tasing Armstrong did not force him to succumb to Appellees' seizure-he actually increased his resistance in response. When Appellees stopped tasing and enlisted the Hospital's security guards to help pull Armstrong off of the post, however, the group removed Armstrong and placed him in restraints. Had Appellees limited themselves to permissible uses of force when seizing Armstrong, they would have had every tool needed to control and resolve the situation at their disposal.

Appellees, therefore, are not entitled to summary judgment on the question whether they violated the Constitution. Viewing the record in the light most favorable to Appellant, Appellees used excessive force, in violation of the Fourth Amendment.[11]

907 *907 **C.**

We, nevertheless, affirm the district court's grant of summary judgment in Appellees' favor because we conclude that Appellees are entitled to qualified immunity.

Qualified immunity "shields government officials from liability for civil damages, provided that their conduct does not violate clearly established statutory or constitutional rights within the knowledge of a reasonable person." *Meyers,* 713 F.3d at 731. Not all constitutional violations are "violat[ions of] clearly established ... constitutional rights," *id.,* so "a plaintiff may prove that an official has violated his rights, but an official [may still be] entitled to qualified immunity." *Torchinsky v. Siwinski,* 942 F.2d 257, 261 (4th Cir.1991).

The inquiry into whether a constitutional right is clearly established requires first that we define the precise right into which we are inquiring. Because "[t]he dispositive question is `whether the violative nature of *particular* conduct is clearly established,'" *Mullenix v. Luna,* ___ U.S. ___, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015) (per curiam) (emphasis in original) (quoting *Ashcroft v. al-Kidd,* 563 U.S. 731, 742, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)), courts must "not... define clearly established law at a high level of generality," *al-Kidd,* 563 U.S. at 742, 131 S.Ct. 2074.

After defining the right, we ask whether it was clearly established at the time Appellees acted. A right satisfies this standard when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix,* 136 S.Ct. at 308 (quoting *Reichle v. Howards,* ___ U.S. ___, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012)).

"This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Wilson v. Layne*, 526 U.S. 603, 615, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (quoting *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). "[O]fficials can ... be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer,* 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). But they must, in fact, have notice in order to be held liable.

The constitutional right in question in the present case, defined with regard for Appellees' particular violative conduct, is Armstrong's right not to be subjected to tasing while offering stationary and non-violent resistance to a lawful seizure. *Cf.*
908 *Hagans v. Franklin Cnty.* *908 *Sheriff's Office,* 695 F.3d 505, 509 (6th Cir.2012) ("Defined at the appropriate level of generality — a reasonably particularized one — the question at hand is whether it was clearly established in May 2007 that using a taser repeatedly on a suspect actively resisting arrest and refusing to be handcuffed amounted to excessive force."). While our precedent supports our conclusion that Appellees violated that right when seizing Armstrong, we acknowledge that this conclusion was not so settled at the time they acted such that "every reasonable official would have understood that" tasing Armstrong was unconstitutional. *Mullenix,* 136 S.Ct. at 308 (quoting *Reichle,* 132 S.Ct. at 2093).

To be sure, substantial case law indicated that Appellees were treading close to the constitutional line. As discussed, we have previously held that tasing suspects after they have been secured, *see Meyers,* 713 F.3d at 734;[12] *Bailey,* 349 F.3d at 744-45, and that punching or pepper spraying suspects in response to minimal, non-violent resistance, *see Park,* 250 F.3d at 849-53; *Rowland,* 41 F.3d at 172-74, constitute excessive force.

These cases, however, are susceptible to readings which would not extend to the situation Appellees faced when seizing Armstrong. Unlike in *Meyers* and *Bailey,* Appellees did not continue using force after Armstrong was secured. See *Meyers,* 713 F.3d at 734; *Bailey,* 349 F.3d at 744. And unlike in *Park* and *Rowland,* Appellant does not contend the officers in question initiated the excessive force without warning or opportunity to cease any non-compliance. *See Park,* 250 F.3d at 848; *Rowland,* 41 F.3d at 171-72. It would not necessarily have been clear to every reasonable officer that those cases applied to force inflicted after warning an individual exhibiting nonviolent resistance to desist and discontinued before that individual was secured.

A survey of other circuits' case law confirms that Appellees did not have sufficiently clear guidance to forfeit qualified immunity. Again, there were many decisions that ought to have given Appellees pause. *See Bryan,* 630 F.3d at 826-27 (taser use against individual exhibiting "unusual behavior" and "shouting gibberish[] and ... expletives" who was "unarmed, stationary ..., [and] facing away from an officer at a distance of fifteen to twenty-five feet" constitutes excessive force); *Cyrus,* 624 F.3d at 863 (taser use when misdemeanant was not violent and did not try to flee but resisted being handcuffed constitutes excessive force); *Brown,* 574 F.3d at 499 ("[I]t was unlawful to Taser a nonviolent, suspected misdemeanant who was not fleeing or resisting arrest, who posed little to no threat to anyone's safety, and whose only noncompliance with the officer's commands was to disobey two orders to end her phone call to a 911 operator.")

But other cases could be construed to sanction Appellees' decision to use a taser. In 2004, the Eleventh Circuit held, "use of [a] taser gun to effectuate [an] arrest ... was reasonably proportionate to the difficult, tense and uncertain situation" faced by
909 a police officer when an arrestee "used profanity, moved around and paced in agitation, *909... yelled at [the officer]," and "repeatedly refused to comply with ... verbal commands." *Draper v. Reynolds,* 369 F.3d 1270, 1278 (11th Cir.2004). When reviewing the law as of 2007, moreover, the Sixth Circuit found, "[c]ases from this circuit and others, before and after May 2007, adhere to this line: If a suspect actively resists arrest and refuses to be handcuffed, officers do not violate the Fourth Amendment by using a taser to subdue him." *Hagans,* 695 F.3d at 509. The *Hagans* court proceeded to provide examples in which the Sixth Circuit had held tasing reasonable simply because "[t]he suspect refused to be handcuffed" or "the suspect ... refused to move his arms from under his body." *Id.* Other circuits, in short, have sometimes distinguished permissible and impermissible tasing based on facts establishing bare noncompliance rather than facts establishing a risk of danger. Because Armstrong was not complying with Appellees' commands, these cases negate the existence of any "consensus of cases of persuasive authority" across our sister circuits "such that a reasonable officer could not have believed that his actions were lawful." *Wilson,* 526 U.S. at 617, 119 S.Ct. 1692.

We conclude, therefore, that Armstrong's right not to be tased while offering stationary and non-violent resistance to a lawful seizure was not clearly established on April 23, 2011. Indeed, two months *after* Appellees' conduct in this case, one of our colleagues wrote, "the objective reasonableness of the use of Tasers continues to pose difficult challenges to law enforcement agencies and courts alike.... `That the law is still evolving is illustrated in cases granting qualified immunity for

that very reason.'" *Henry,* 652 F.3d at 539-40 (Davis, J., concurring) (quoting *McKenney v. Harrison,* 635 F.3d 354, 362 (8th Cir. 2011) (Murphy, J., concurring)).

D.

This ought not remain an evolving field of law indefinitely though. "Without merits adjudication, the legal rule[s]" governing evolving fields of constitutional law "remain unclear." John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts,* 2009 Sup.Ct. Rev. 115, 120. "What may not be quite so obvious, but is in fact far more important, is the degradation of constitutional rights that may result when ... constitutional tort claims are resolved solely on grounds of qualified immunity." *Id.* This degradation is most pernicious to rights that are rarely litigated outside the context of § 1983 actions subject to qualified immunity — rights like the Fourth Amendment protection against excessive force at issue here. *See id.* at 135-36. "For [such rights], the repeated invocation of qualified immunity will reduce the meaning of the Constitution to the lowest plausible conception of its content." *Id.* at 120.

Rather than accept this deteriorative creep, we intend this opinion to clarify when taser use amounts to excessive force in, at least, some circumstances. A taser, like "a gun, a baton, ... or other weapon," *Meyers,* 713 F.3d at 735, is expected to inflict pain or injury when deployed. It, therefore, may only be deployed when a police officer is confronted with an exigency that creates an immediate safety risk and that is reasonably likely to be cured by using the taser. The subject of a seizure does not create such a risk simply because he is doing something that can be characterized as resistance-even when that resistance includes physically preventing an officer's manipulations of his body. Erratic behavior and mental illness do not
910 necessarily create a safety risk either. To the contrary, when a seizure is intended solely to prevent a mentally ill *910 individual from harming himself, the officer effecting the seizure has a lessened interest in deploying potentially harmful force.

Where, during the course of seizing an out-numbered mentally ill individual who is a danger only to himself, police officers choose to deploy a taser in the face of stationary and non-violent resistance to being handcuffed, those officers use unreasonably excessive force. While qualified immunity shields the officers in this case from liability, law enforcement officers should now be on notice that such taser use violates the Fourth Amendment.

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

WILKINSON, Circuit Judge, concurring in part:

I am happy to concur in the judgment of affirmance and in Part III.C of the majority opinion. Having resolved the case by properly awarding judgment to defendants on qualified immunity grounds, the majority had no need to opine on the merits of the excessive force claim. In fact, it runs serious risks in doing so.

This was a close case, the very kind of dispute in which judicial hindsight should not displace the officers' judgmental calls. I do not contend that the officers' behavior was impeccable here, but I do believe, with the district court, that it was not the kind of action that merited an award of monetary damages.

I.

These are difficult situations. It is undisputed that on April 23, 2011, Armstrong had been off his medications for days and was in an unpredictable and erratic state. J.A. 210-19. It is undisputed that by the time Officer Sheppard arrived at the scene, Armstrong was engaged in self-destructive behavior — eating grass, dandelions, and gauze, and burning his arms and tongue with cigarettes. *Id.* at 507-08. It is undisputed that the police obtained an involuntary commitment order to bring Armstrong back to the hospital. *Id.* at 534. It is undisputed that Armstrong did not want to return to the hospital despite his sister's pleas to stop resisting authorities. *Id.* at 231. It is undisputed that Armstrong was a strong man, and weighed about 260 pounds. *Id.* at 297-98, 411. It is undisputed that before the officers ultimately detained Armstrong they did not have an

opportunity to frisk him for weapons. *Id.* at 464. It is undisputed that the sign post Armstrong gripped was near a trafficked intersection. *Id.* at 461. It is undisputed that the officers "had observed Armstrong wandering into traffic with little regard for avoiding the passing cars and the seizure took place only a few feet from an active roadway." Maj. Op. at 901. It is undisputed that the officers applied graduated levels of force — first verbal commands and then a "soft hands" approach — prior to Officer Gatling's use of his Taser. J.A. 514. It is undisputed that Armstrong tried to kick the officers as they put handcuffs on his legs. *Id.* at 573. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation" *Graham v. Connor,* 490 U.S. 386, 396-97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). That pretty much describes the situation here.

II.

911 Having thoughtfully resolved the appeal on qualified immunity grounds,[*] the majority *911 launches into an extended discussion on the merits of the excessive force claim. This is so unnecessary. Sometimes it is best for courts not to write large upon the world but to discharge our simple rustic duty to decide the case.

The Supreme Court in *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009), gave us the discretion to do just that. *Pearson* is admittedly a decision with a bit of back and forth, but its salient contribution was to liberate the lower federal courts from the onerous shackles of the *Saucier v. Katz* regime and allow them to proceed directly to a qualified immunity analysis without addressing the merits first. In this regard, *Pearson* recognized the foremost duty of courts to resolve cases and controversies. *Id.* at 242, 129 S.Ct. 808. That, at least, is what Article III established us to do.

In fact, proceeding in such a manner is often the preferable course. The majority says it must go further in order to provide clarity in future cases, Maj. Op. at 909-10, but that clarity is often illusory. Today's prescription may not fit tomorrow's facts and circumstances. Our rather abstract pronouncements in one case may be of little assistance with the realities and particulars of another.

As the Supreme Court noted, "the rigid *Saucier* procedure comes with a price. The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." *Pearson,* 555 U.S. at 236-37, 129 S.Ct. 808. So I would respectfully prefer not to get into the first prong of the *Saucier* analysis here. It is "far from obvious," to use the Court's term, that the trial court's conclusion that "[a]dditional reasonable force was appropriate under these circumstances" was unsound. J.A. 767.

Clarity is arguably most difficult to achieve in Fourth Amendment cases because bright-line rules at most imperfectly take account of the slight shifts in real-life situations that can alter what are inescapably close judgment calls. As the Supreme Court noted,

> Although the first prong of the *Saucier* procedure is intended to further the development of constitutional precedent, opinions following that procedure often fail to make a meaningful contribution to such development. For one thing, there are cases in which the constitutional question is so factbound that the decision provides little guidance for future cases. See *Scott v. Harris,* 550 U.S. 372, 388, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (BREYER, J., concurring) (counseling against the *Saucier* two-step protocol where the question is "so fact dependent that the result will be confusion rather than clarity"); *Buchanan v. Maine,* 469 F.3d 158, 168 (C.A.1 2006) ("We do not think the law elaboration purpose will be well served here, where the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts").

Pearson, 555 U.S. at 237, 129 S.Ct. 808.

912 My fine colleagues in the majority have done as good a job as can be expected *912 given the circumstances. But the very exemplary quality of the effort serves to illustrate the perils of the enterprise. The majority notes "that different seizures present different risks of danger," Maj. Op. at 904, but fails to recognize that the spectrum of risk presented cannot be easily sketched by an appellate court. It is hard to disagree with the majority's highly generalized assertion that Taser use is unwarranted "where an unrestrained arrestee, though resistant, presents no serious safety threat." *Id.* But of course, what

conduct qualifies as "resistant," and what rises to the level of a "serious safety threat" is once again dependent on the actual and infinitely variable facts and circumstances that confront officers on their beat.

Tasers came into widespread use for a reason. They were thought preferable to far cruder forms of force such as canines, sprays, batons, and choke-holds, and it was hoped that their use would make the deployment of lethal force unnecessary or at least a very last resort. None of this of course justifies their promiscuous use. The majority "tie[s] permissible taser use to situations that present some exigency that is sufficiently dangerous to justify the force." Maj. Op. at 903. But with all due respect, that abstract formulation will be of less than limited help to officers wondering what exactly they may and may not do.

We are told further that the officers, though armed with a civil commitment order, do not possess the same degree of latitude with regard to a mentally ill person as with someone whom there is reason to believe has committed a crime. *Id.* at 899-900. All well and good, but the majority then notes that "[m]ental illness, of course, describes a broad spectrum of conditions and does not dictate the same police response in all situations." *Id.* at 900. Again, what may seem a comforting appellate nostrum is of limited utility to those faced with volatile situations far removed from the peaceful confines of appellate chambers. The majority goes on to note that "in some circumstances ... increasing the use of force may ... exacerbate the situation." *Id.* (internal quotation marks omitted). But what those circumstances are neither my colleagues nor I can really say.

I finally cannot agree that the plaintiff here posed no real danger. He certainly posed a danger to himself having been off medication and engaging in self-destructive behaviors to the point that his sister was pleading for her brother's prompt return to the hospital where he might receive some help. As for the danger to others, it was hardly unlikely that the plaintiff, a sizeable and unrestrained individual, would bolt into the street and cause a traumatic accident for motorists who, if not themselves injured, would regret the harm inflicted on this pedestrian for years to come. I say this not to contend that the case was easy, but that it was hard. The district court rightly recognized that its intrinsic difficulty afforded no reason to deliver these officers an unnecessary rebuke.

III.

The majority has left it all up in the air. And its approach to this case is not without consequence. The great majority of mentally ill persons pose no serious danger to themselves or others and the challenge of society is to help these good people lead more satisfying lives. A smaller subset of the mentally ill do pose the greatest sort of danger, not only to themselves but to large numbers of people as the string of mass shootings in this country will attest.

913 It is difficult sometimes for even seasoned professionals to predict which is *913 which, not to mention officers and others with more limited training. And yet it is important in this area that law not lose its preventive aspect. It can be heartbreaking to wait until the damage is done. Delivering vague proclamations about do's and don'ts runs the risk of incentivizing officers to take no action, and in doing so to leave individuals and their prospective victims to their unhappy fates. Law enforcement will learn soon enough that sins of omission are generally not actionable. *See* *DeShaney v. Winnebago Cty. Dep't of Social Services,* 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). And in the face of nebulae from the courts, the natural human reaction will be to desist. Perhaps this is what we mean to achieve, but over-deterrence carries its own risks, namely that those who badly need help will receive no help, and we shall be the poorer for it.

[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

[2] North Carolina law required that Armstrong's involuntary commitment order be certified in writing and notarized before it took effect. *See* N.C. Gen.Stat. § 122C-262(b). Police officers are sometimes authorized to seize individuals to prevent them from harming themselves without a commitment order in place, *see id.* § 122C-262(a), but Appellees did not go that route. Rather, they rely solely on the involuntary commitment order as authorization for their seizure of Armstrong.

[3] Tasers generally have two modes. "In dart mode, a taser shoots probes into a subject and overrides the central nervous system." *Estate of Booker v. Gomez,* 745 F.3d 405, 414 n. 10 (10th Cir.2014). Drive stun mode, on the other hand, "does not cause an override of the victim's central nervous system"; that mode "is used as a pain compliance tool with limited threat reduction." *Id.* (internal quotation marks omitted). Appellees' expert confirmed that the drive stun mode on the TASER X26 ECD that Officer Gatling was carrying is intended to be used for pain compliance rather than incapacitation.

[4] The number of times Armstrong was tased is a disputed fact. But Lopez testified that she saw it happen five times, and because summary judgment was granted in favor of Appellees, this court must accept her version of the facts. *See* *Henry v. Purnell,* 652 F.3d 524, 527 (4th Cir.2011) (en banc).

[5] It is not clear exactly how long Armstrong was left facedown on the ground after he had been secured. But Lopez conceded that it "happen[ed] pretty quickly really" and that the officers responded "immediately" when asked to check on Armstrong. J.A. 241. Other witnesses estimated the time as "a couple of seconds" and "15 to 20 seconds." *Id.* at 346, 446.

[6] Appellant's complaint alleges additional causes of action and names additional defendants. But Appellant's brief on appeal presses only one claim: The officers attempting to execute the involuntary commitment order used unconstitutionally excessive force. "Failure to present or argue assignments of error in opening appellate briefs constitutes a waiver of those issues," *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 308 (4th Cir.2003), so the excessive force claim is the only matter that remains pending in this appeal. *See* Fed. R.App. P. 28(a)(8)(A).

[7] Armstrong's involuntary commitment order could have issued in order "to prevent harm to self *or others,*" N.C. Gen.Stat. § 122C-262(a) (emphasis supplied), and it is not entirely clear from the record whether reasonable officers at the scene would have known that Armstrong had only been judged a danger to himself or would have thought that a doctor may consider him a danger to others. The officers did, however, speak to Wayne Morton, the behavioral assessment nurse who assisted with preparation of Armstrong's commitment papers, prior to seizing Armstrong. In addition, the officers observed Armstrong for over 20 minutes before the involuntary commitment order was issued. During this period, Armstrong engaged in behavior mildly harmful to himself, but he exhibited no risk of flight or risk of harm to others. Taking these facts in the light most favorable to Appellant, objectively reasonable officers would be aware of the basis underlying Armstrong's commitment order.

[8] Officer Gatling deployed his taser in drive stun mode, which is intended to cause pain but is not intended to cause paralysis. *See supra* n. 3. Our conclusions about the severity of taser use, however, would be the same had he used dart mode. Dart mode, no less than drive stun mode, inflicts extreme pain. *See* David A. Harris, *Taser Use by Law Enforcement: Report of the Use of Force Working Group of Allegheny County, Pennsylvania,* 71 U. Pitt. L.Rev. 719, 726-27 (2010) ("I remember only one coherent thought in my head while this was occurring: *STOP! STOP! GET THIS OFF ME!* Despite my strong desire to do something, all through the Taser exposure I was completely paralyzed. I could not move at all." (emphasis in original)). And the risk of injury is increased because a paralyzed subject may be injured by the impact from falling to the ground. *See Bryan,* 630 F.3d at 824. Taser use is severe and injurious regardless of the mode to which the taser is set.

[9] *Graham's* test "requires careful attention to the facts and circumstances of each particular case." *Graham,* 490 U.S. at 396, 109 S.Ct. 1865. Our holding, therefore, does not rule out the possibility that taser use could be justified in some cases where an arrestee's non-compliance could be described as non-violent. Such a situation would require the existence of facts from which an officer could reasonably conclude that the resistance presents some immediate danger despite its non-violent character. *See Casey v. City of Fed. Heights,* 509 F.3d 1278, 1285 (10th Cir.2007) ("While we do not rule out the possibility that there might be circumstances in which the use of a Taser against a nonviolent offender is appropriate, we think a reasonable jury could decide that [a police officer] was not entitled under these circumstances to shoot first and ask questions later.").

[10] Indeed, it was not the deployment of the taser that ultimately resulted in Armstrong's removal from the post, but rather, the additional aid of the two security guards, who jumped in to assist the three police officers prying him off the post.

[11] We have reviewed Appellant's additional theories of excessive force but have determined that they lack merit. Those theories are based on Appellees' conduct while handcuffing and shackling Armstrong. Applying "just enough weight" to immobilize an individual "continu[ing] to struggle" during handcuffing is not excessive force. *Estate of Phillips v. City of Milwaukee,* 123 F.3d 586, 593 (7th Cir.1997). Appellant concedes that Armstrong was resisting Appellees' efforts to restrain him, that Appellees stopped applying force to Armstrong's back when their restraints were secure, and that Armstrong was left in the prone position for a very short period of time after being restrained. Lopez, herself, even placed her foot on Armstrong's leg to assist Appellees' efforts to immobilize Armstrong and apply restraints. In those circumstances, an officer at the scene could conclude that the force used to hold Armstrong down and the length of time Armstrong was left on the ground were objectively reasonable.

[12] *Meyers v. Baltimore County* was decided after Appellees' conduct in the instant case, but *Meyers* did not clearly establish any right for the first time. Rather in *Meyers,* we found that the officer in question violated a right that had been clearly established since, at least, *Bailey v. Kennedy,* which was decided in 2003. *See Meyers,* 713 F.3d at 734-35 (citing *Bailey,* 349 F.3d at 744-45). Appellees in the instant case, therefore, were on notice that tasing an individual who "was unarmed and effectively was secured" is clearly unconstitutional. *Id.* at 735.

[*] Normally, "clearly established" law is found by looking to Supreme Court cases and the cases in the circuit in which the officers are located. *See Marshall v. Rodgers,* ____ U.S. ___, 133 S.Ct. 1446, 1450, 185 L.Ed.2d 540 (2013). My good colleagues range somewhat further afield here, but I think doing so in this case in no way affected the outcome.

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764 F.3d 217 (2014)

Ronald TEREBESI, Plaintiff-Appellee,

v.

Sergeant Jay TORRESO, Sergeant Stephen Brennan, Officer Gregg Phillipson, Chief John F. Solomon, Lieutenant Ronald Kirby, Sergeant Kenneth Jones, Officer William Ruscoe, Officer Brian Weir, Officer Todd Edwards, Officer Gregg Lee, Sergeant Mark Cirillo, Officer Michael Sweeney, all individually and in their official capacities as police officers, Defendants-Appellants.[*]

Docket Nos. 12-3867, 12-3868, 12-3870, 12-3898, 12-3903, 12-3990.

United States Court of Appeals, Second Circuit.

Argued: October 10, 2013.
Decided: August 21, 2014.

221 *221 Richard J. Burturla, Berchem Moses & Devlin, P.C., Milford, CT, for Defendant-Appellant Michael Sweeney.

Arthur C. Laske, III, Laske Law Firm, LLC, Fairfield, CT, for Defendants-Appellants Ronald Kirby, Kenneth Jones, William Ruscoe, Brian Weir, Todd Edwards, and Gregg Lee.

Catherine S. Nietzel, Ryan Ryan Deluca LLP, Stamford, CT, for Defendant-Appellant John Solomon.

Elliot B. Spector, Noble, Spector & O'Connor, P.C., Hartford, CT, for Defendant-Appellant Mark Cirillo.

Thomas R. Gerarde, Beatrice S. Jordan, Howd & Ludorf, LLC, Hartford, CT, for Defendants-Appellants Stephen Brennan and Gregg Phillipson.

Scott M. Karsten, Karsten & Tallberg, LLC, West Hartford, CT, for Defendant-Appellant Jay Torreso.

Gary A. Mastronardi, Law Firm of Gary A. Mastronardi (John R. Gulash, Gulash & Riccio, on the brief), Bridgeport, CT, for Plaintiff-Appellee Ronald Terebesi.

Before: SACK, CHIN, and DRONEY, Circuit Judges.

SACK, Circuit Judge:

This case arises out of a botched SWAT[1]-style raid in Easton, Connecticut, in 2008. The police obtained a warrant to
222 search the home of the plaintiff, Ronald Terebesi, for a small amount of crack cocaine *222 and drug paraphernalia. To execute the search, police planned to smash Terebesi's windows, detonate at least three stun grenades (or "flashbangs") inside the home, break down the front door with a battering ram, and storm the house with weapons drawn. In the chaos that accompanied the implementation of this plan, the officers fatally shot Gonzalo Guizan, Terebesi's houseguest, and allegedly injured Terebesi. Both of the occupants were unarmed, and no weapons were found in the house.

In 2009, Terebesi and Guizan's estate brought suit against the officers involved in planning and executing the raid, against the police chiefs of several municipalities whose officers were involved, and against the municipalities themselves, alleging, *inter alia,* civil rights violations under 42 U.S.C. § 1983 and associated state tort claims. On December 29, 2011, the defendants moved for summary judgment, asserting that the facts of the case and the doctrine of qualified immunity rendered all of the plaintiffs' claims unsustainable. The District of Connecticut (Janet Bond Arterton, *Judge*) granted the motions in part and denied them in part. The defendants appeal from the denial of summary judgment. On April 11, 2013, Guizan's estate notified this Court of a settlement with all defendants, and the estate is no longer a party to this appeal.

For the reasons set forth below, we AFFIRM in part the order of the district court, REVERSE in part, and DISMISS the remainder of the claims for lack of appellate jurisdiction.

BACKGROUND

On interlocutory appeal, after the denial of the defendants' motions for summary judgment, "we have jurisdiction to review a denial of qualified immunity to the extent it can be resolved `on stipulated facts, or on the facts that the plaintiff alleges are true, or on the facts favorable to the plaintiff that the trial judge concluded the jury might find.'" *Escalera v. Lunn,* 361 F.3d 737, 743 (2d Cir.2004) (quoting *Salim v. Proulx,* 93 F.3d 86, 89 (2d Cir.1996)). We proceed to recite the factual basis of our decision in light of this limitation.

Police Interactions with Terebesi Prior to the Raid

In the weeks leading up to the raid on Ronald Terebesi's house in Easton, Connecticut, local police interacted with him on at least four occasions. Because the defendants assert that these interactions justify the tactics they employed in the raid, we recount them in some detail.

On March 31, 2008, at about 2:00 a.m., Officer Christopher Barton of the Easton Police Department was dispatched to Terebesi's home in response to a 911 call reporting that a man was having a seizure. Incident Report, Ex. C to Defs.' Local Rule 56(a)(1) Stmt., No. 3:09-cv-01436, ECF No. 199 ("Incident Report"). After knocking on the door several times with no response, Barton and his partner entered the residence, found Terebesi sleeping, and shook him awake. Dep. of Christopher Barton at 18, Ex. B to Defs.' Local Rule 56(a)(1) Stmt., No. 3:09-cv-01436, ECF No. 199 ("Barton Dep. I"). Easton Emergency Medical Services personnel were also on the scene. Incident Report, at 1. Although Terebesi was surprised and asserted that he had not called 911, he was not confrontational and offered no resistance as the officers and medical personnel lifted him up from his sofa to reveal three glass-stem pipes and a loaded .357 caliber Smith & Wesson
223 pistol. Dep. of Officer Christopher Barton at 21, 26-27, Ex. 1 to Guizan's Local Rule 56(a)(2) Stmt., No. *223 3:09-cv-01436, ECF No. 212, ("Barton Dep. II"); Incident Report, at 1.

Terebesi told the officers that he kept the handgun for his personal safety and protection, and that he had been receiving threatening messages from "a pimp." Guizan's Local Rule 56(a)(2) Stmt., Part I, ¶ 19, J.A. 305 (citing Terebesi's deposition). Barton "seized the gun for safekeeping," and told Terebesi he would have to go to the police station to pick it up. Barton Dep. II, at 30. Nothing of which we are aware in the record suggests that Terebesi retrieved the gun from the police station any time thereafter or, in any event, before the events of May 18, 2008.

As a result of the incident of March 31, Easton Police obtained a warrant for Terebesi's arrest, and Barton and a colleague served the warrant at Terebesi's home. Guizan's Local Rule 56(a)(2) Stmt., Part I, ¶ 22, J.A. 306. Terebesi went with the officers to the Easton police station without incident. *See id.,* ¶¶ 22-28, J.A. 306-07. While he was preparing to leave his home, Terebesi asked the officers how long he would be gone, expressing concern about leaving his pet macaw unattended. Aff. of Ronald Terebesi, ¶ 16, J.A. 284-85. Later, in a conversation during the ride to the police station, Terebesi told Barton that he owned a nine-millimeter Beretta pistol, which he considered to be a collector's item and which he kept in a display case at his parents' house in nearby Trumbull, Connecticut. *Id.* ¶ 19(b), J.A. 286. A subsequent records check revealed that Terebesi had registered such a pistol in 1990. Guizan's Local Rule 56(a)(2) Stmt., Part II, ¶ 4, J.A. 370. After being booked, Terebesi was released without bond on a promise to appear. *Id.* ¶ 6, J.A. 370. Officers drove him home, unrestrained, in the back of a police car. *Id.,* J.A. 370-71 (citing Barton Dep. II).

On May 7, 2008, at about 4:00 a.m., an unidentified person or persons attacked Terebesi's residence, firing seven blasts from a shotgun through the windows of the house. Guizan's Local Rule 56(a)(2) Stmt., Part I, ¶ 29, J.A. 307. Terebesi, who had been on the couch watching television, crouched down and ran into the bedroom, where he stayed until police arrived. Aff. of Officer David Simpson ¶¶ 6-11, J.A. 168. After the shooting, Barton and John Solomon, the Chief of the Easton Police, spoke with Terebesi regarding the incident. Although Terebesi agreed to answer their questions, they found his responses to be unhelpful or, in their view, untruthful. *See* Dep. of John Solomon at 166-69, Ex. G to Defs.' Local Rule 56(a)(1) Stmt., No. 3:09-cv-01436, ECF No. 199 ("Solomon Dep."); Barton Dep. I at 178-79, 190. *Id.* Later that day, Barton convinced Terebesi to return to the police station to give a statement. Barton Dep. II, at 51.

The following day, as police investigated the shotgun attack, an acquaintance of Terebesi told police that Terebesi used crack cocaine daily. Written Stmt., of Tina T. Lamica at 3, May 8, 2008, J.A. 181-83. Then, on May 17, 2008, a neighbor complained to police that she had discovered a bag containing hypodermic needles in the neighborhood, and that she had observed "a steady flow" of traffic in and around Terebesi's house at odd hours. Barton Dep. II at 65-66; Dep. of James Candee at 173-74, J.A. 188.

Barton responded to the neighbor's complaint and proceeded to Terebesi's residence to speak with him. *Id.* at 66. He found the house "barricaded," with the windows covered. *Id.* at 72-73; *see also* Witness Stmt. of Sergeant Mark Cirillo, J.A. 208 (describing the windows as covered with plywood and blankets). After knocking on the door and receiving no *224 answer, Barton returned to the police station and telephoned Terebesi instead. *Id.* at 67. Terebesi denied knowing about the bag of needles. *Id.* at 68. Chief Solomon later testified that the Easton Police had had no other reports of drug-related activity in the neighborhood. Solomon Dep. 520, J.A. 175.

Planning of the May 18 Raid

The Warrant and Tactical Team Activation

At about 9:00 a.m. on the morning of May 18, a woman named Chandra Pankov told police that she had been at Terebesi's house, and that she had personally witnessed the use of a small quantity of drugs there. Barton Dep. II at 117; Search and Seizure Warrant, in J.A. 417-23. Chief Solomon ordered that a search warrant be prepared and served that day. Solomon Dep. 279. And he requested that the Southwest [Connecticut] Regional Emergency Response Team ("SWERT")[2] be activated in order to assist in serving the warrant. *Id.* at 284. At 11:34 a.m., the Superior Court granted a search warrant for two "small clear glass smoking pipes" and "[c]rack cocaine in a tin box." Search and Seizure Warrant, in J.A. 417-23. Witnesses could not remember another time that SWERT had been activated to seize a personal-use quantity of drugs. *See* Dep. of Michael Sweeney at 61-63, Ex. 26 to Guizan's Local Rule 56(a)(2) Stmt., No. 3:09-cv-01436, ECF No. 212 ("Sweeney Dep."); Dep. of Thomas Kiely at 23, Ex. 34 to Guizan's Local Rule 56(a)(2) Stmt., No. 3:09-cv-01436, ECF No. 212.

The Briefing

The SWERT team was fully assembled for a briefing on the operation at about 1:00 p.m. *See* Sweeney Dep. at 224. The officers were informed that the items to be seized were two glass pipes and a tin box containing narcotics. Dep. of Captain James Candee at 140, Ex. 2 to Pl. Rule 56(a)(2) Stmt., No. 3:09-cv-01436, ECF No. 212. Solomon told the team that Terebesi was a habitual user of crack cocaine, and that he had been the target of a shotgun attack on May 7. Guizan's Rule 56(a)(2) Stmt., Part I, ¶¶ 106-07, J.A. 325. Barton, who signed the search warrant application but did not participate in the raid, also spoke to the SWERT team about his previous interactions with Terebesi. *Id.* ¶¶ 113-15, J.A. 327.

Throughout the course of this litigation, the SWERT team defendants have emphasized in their defense three statements made in the course of the briefing. First, Terebesi's house was described as having been "fortified" since the May 7 shotgun attack, although these fortifications amounted only to plywood affixed to the shot-out windows and hanging blankets to "catch" any shotgun pellets. Witness Stmt. of Sergeant Mark Cirillo, J.A. 208. Second, Barton told the team about "the unaccounted for Beretta that was out there," referring to the pistol that Terebesi said he kept at his parents' house. Barton Dep. II, at 141-42. The other officers may not have known that the pistol was not kept in Terebesi's home. Finally, several defendants report being told that Terebesi would "use force to protect his pet *225 bird," Br. of Ronald Kirby *et al.,* at 10, or that "he would defend this bird to the death," Br. of Mark Cirillo, at 13. Barton testified that he told the assembled SWERT team that Terebesi had expressed an unusual devotion to his bird, but denied saying that Terebesi "would fight to the death or he would attack an intruder over the well-being of his bird."[3] Barton Dep. II, at 141-144.

The Raid Plan

The plan for serving the warrant was developed by Officer William Ruscoe and Sergeant Kenneth Jones of the Trumbull Police Department and by Sergeant Mark Cirillo of the Darien Police Department. Pl. Rule 56(a)(2) Stmt., Part I, ¶ 124, J.A. 329-30. Lieutenant Ronald Kirby, of the Trumbull Police, acted as the commander of the SWERT team and reviewed and approved the plan. *Id.* The plan also was subject to the ultimate approval of John Solomon, who, as the Easton Chief of Police, was the highest-ranking local law enforcement official involved in the Terebesi matter. *Id.*; *see also* SWERT Mutual Aid Compact Addendum, J.A. at 143 ("The Team shall not commence any operation without the authorization of the ranking local law enforcement official at the scene.").

The plan called for a team of three officers to approach the rear of the house and toss two stun grenades[4] through a rear window. Witness Stmt. of Officer William Ruscoe, J.A. 197-202. This would be the first time SWERT had ever used stun grenades in an operation. Guizan's Rule 56(a)(2) Stmt., Part II, ¶ 88, J.A. 395. Another group of officers would knock loudly at the front door, announce their presence, and then, if necessary, break the door down with a battering ram. Witness Stmt. of Officer William Ruscoe, J.A. 197-202. After the door was breached, one team member would toss in another stun grenade, and a group of officers would rush in and restrain anyone in the house. *Id.* Police refer to this kind of raid (euphemistically) as a "dynamic entry." *See generally* Karan R. Singh, Note, *Treading the Thin Blue Line: Military Special-Operations Trained Police SWAT Teams and the Constitution,* 9 Wm. & Mary Bill of Rts. J. 673, 682-83 (2001).

Not all the team members were satisfied with this plan. Sergeant John Lawlor and Officer Michael Redgate told Mark Cirillo that a dynamic entry was too dangerous for a drug warrant. Dep. of John Lawlor at 32-34, Ex. 9 to Guizan's Local Rule 56(a)(2) Stmt., No. 3:09-cv-01436, ECF Doc. No. 212 ("Lawlor Dep."); Dep. of Michael Redgate at 33-35, Ex. 8 to Guizan's Local Rule 56(a)(2) Stmt., 3:09-cv-01436, ECF Doc. No. 212; Dep. of Mark Cirillo at 146, Ex. 17 to Guizan's Local Rule 56(a)(2) Stmt., No. 3:09-cv-01436, ECF Doc. No. 212; Witness Stmt. of Sergeant Mark Cirillo, J.A. 209. Lawlor testified that Cirillo attempted to have the plan changed, but did not succeed. Lawlor Dep. at 34, 47; *see also* Witness Stmt. of Sergeant Mark Cirillo, J.A. 209.

226 *226 **The Raid**

The operation began at about 2:00 p.m. on May 18, 2008. Throughout the short raid and its aftermath, Lieutenant Ronald Kirby recorded a video of the event from the exterior of the home. Although little can be seen of the raid from that viewpoint, the recording purportedly contains a complete audio record of the raid, including the successive stun grenade detonations and a series of gunshots.

At the beginning of the operation, Sergeant Jay Torreso, of the Monroe Police, and Officer Gregg Phillipson and Lieutenant Stephen Brennan, of the Wilton Police, moved to the rear of the house. *See* Guizan's Local Rule 56(a)(2) Stmt., Part II, ¶¶ 116-119, J.A. 403. Phillipson broke a window and separated the curtains inside, allowing the other officers to toss their stun grenades into the house. *Id.* ¶ 117, J.A. 403. Either immediately before or at the same time as the first stun grenade detonated, Brennan began shouting, "Police! Police with warrant! Hands up!" *Id.,* ¶¶ 113, 119, J.A. 402-03.

Meanwhile, the other team members moved to the front door and announced their presence. *Id.* ¶ 123, J.A. 404. The parties dispute what happened next. The defendants assert that Officer Gregg Lee checked to see whether the door was locked, knocked on the door and announced the officers' presence, and then waited several seconds for the occupants to respond before Officer Todd Edwards breached the door. Defs.' Local Rule 56(a)(1) Stmt., ¶ 148, J.A. 133. But the plaintiffs pointed out that only 7. 194 seconds[5] elapsed between the detonation of the second stun grenade, which was thrown from the rear of the house, and the detonation of the third stun grenade, which would have been thrown by the front-entry team after breaching the door. Guizan's Local Rule 56(a)(2) Stmt., Part II, ¶ 124, J.A. 404. Because a stun grenade takes 1.5 seconds to detonate, the plaintiffs argued, the front entry team had only 5.694 seconds to open the screen door, check to see whether Terebesi's door was locked, knock, announce, wait for a response, breach the door, look inside the room, and then throw a stun grenade. *Id.* ¶¶ 124-25, J.A. 404.

The plan called for six officers to enter sequentially, most brandishing weapons and wearing body armor. Defs.' Local Rule 56(a)(1) Stmt., ¶¶ 152-56, 162, J.A. 134-35, 137. Michael Sweeney of the Monroe Police was to enter the apartment first, wearing full ballistic body armor and a Kevlar helmet and carrying a ballistic shield and a Glock semiautomatic pistol. *Id.,* ¶¶ 152, 162, J.A. 134, 137. Officer Brian Weir of the Trumbull Police would follow, carrying a rifle. *Id.* ¶ 153, J.A. 134. Officer Donald Allen would be third, followed by Officer Kenneth Jones, who would carry a Taser—a "less [than] lethal option." *Id.* ¶¶ 154-55, J.A. 134-35. Ruscoe and Cirillo, designated "team field leaders," would be the fifth and sixth officers to enter the house. *Id.* ¶ 156, J.A. 135.

The police officers' testimony was not entirely consistent with respect to what the plan required once the team had breached the door. Ruscoe, one of the planners, stated that none of the team members was to enter the house until after the third stun grenade was deployed. Written Stmt. of Officer William Ruscoe, J.A. 198. Officer Michael Sweeney, the first in the entry team, said that the plan required him to enter the room before the third stun grenade detonated. Sweeney Dep. 246-
227 47, J.A. 227. If Sweeney encountered *227 any occupants once inside the house, his orders were to "pin" them with his shield. *Id.* at 316, J.A. 238.

Irrespective of the plan, the parties now agree that Sweeney entered the house before the third stun grenade detonated. *E.g.,* Guizan's Local Rule 56(a)(2) Stmt., Part I, ¶ 162, J.A. 353. Upon entering, Sweeney saw two men in the far right corner of the room, crouching, extending their arms, and screaming. Sweeney Dep. 271-74, J.A. 233-34. Sweeney testified at his deposition that when the third stun grenade went off, he felt projectiles striking his boot and his shield, and he "thought [he] was taking fire." *Id.* at 249-50, J.A. 228. He further testified that he felt Terebesi push and pull on his shield, and his pistol being pulled downward and away. *Id.* at 322-23, 329-30, J.A. 240-42. Sweeney fired his pistol for the first time as the third stun grenade detonated. Guizan's Local Rule 56(a)(2) Stmt., Part II, ¶ 113, J.A. 402. He then fired repeatedly until he regained control of his weapon. Sweeney Dep. 331, J.A. 242. These shots hit Guizan several times, killing him. Defs.' Local Rule 56(a)(1) Stmt., ¶ 179, J.A. 139. During the commotion, Weir fired one shot into the floor. Guizan's Local Rule 56(a)(2) Stmt., Part II, ¶ 142, J.A. 409.

The plaintiffs disputed Sweeney's testimony, arguing that no struggle took place, that there was no time for any struggle, and that the forensic evidence does not support Sweeney's description of events. The defendants' forensic expert stated that, at the time at least some of the shots were fired, Guizan's left hand was within a distance of Sweeney's weapon that was "greater than actual contact but less than twelve inches." *Id.* ¶ 180, J.A. 139. The plaintiffs did not dispute the distance, but argue that the forensic evidence suggests that at the time of the shooting, Guizan was on the floor, sitting or lying on his back, with his hands turned away from Sweeney. Guizan's Local Rule 56(a)(2) Stmt., Part II, ¶ 131, J.A. 405-06.

After he stopped shooting, Sweeney fell on top of Terebesi, pinning him with his shield. Defs.' Local Rule 56(a)(1) Stmt., ¶ 176, J.A. 139. Terebesi alleges that, while he was pinned to the floor, someone, who he now thinks was Sweeney, struck him with a firearm. Terebesi's Rule 56(a)(2) Stmt., ¶ 204, J.A. 276. Terebesi claims that the entire incident exacerbated his pre-existing post-traumatic stress disorder and caused injuries to his head, neck, and extremities. *Id.* ¶ 205, J.A. 278-79. The detonation of the stun grenades also started a fire in Terebesi's home, although the resulting damage was apparently not extensive. *See id.*

After the raid, the police searched the residence, recovering some drug paraphernalia with powder residue and "pieces of brown rock[-]like substance" totaling 0.020 ounces.[6] Search and Seizure Warrant, J.A. 417-423. No firearms were found.

Procedural History

228 In 2009, Terebesi and Guizan's estate filed separate complaints in the District of *228 Connecticut against the police officers involved in the raid and in obtaining the search warrant, against the police chiefs of the departments participating in SWERT, and against the municipalities in which the departments were located. The two cases eventually were consolidated. The complaints included: (i) section 1983 claims for violations of the plaintiffs' rights under the Fourth and Fourteenth Amendments based on the defendants obtaining the search warrant and their planning and execution of the raid; (ii) section 1983 claims against the towns and police chiefs for failure to train and for unconstitutional policies and procedures; and (iii) state law claims for negligence. The plaintiffs sought compensatory and punitive damages, costs, and attorney's fees.

In December 2011, the defendants moved for summary judgment, alleging, among other things, that the claims were barred by federal and state doctrines of qualified immunity. On August 29, 2012, the district court partly granted and partly denied these motions. *Guizan v. Town of Easton,* No. 3:09-cv-1436(JBA), 2012 WL 3775876, 2012 U.S. Dist. LEXIS 123727 (D.Conn. Aug. 29, 2012). The court concluded that the department lawfully procured the search warrant and granted summary judgment to the defendants on that claim. But it denied summary judgment with respect to the plaintiffs' other section 1983 and state tort claims against the raid participants and planners. The district court also granted summary judgment in favor of the police chiefs on the failure-to-train claims, but allowed the municipal liability claims to proceed.

The individual officers then filed this interlocutory appeal challenging the district court's denial of summary judgment concerning their assertions of qualified immunity.[7] On April 11, 2013, the estate of Gonzalo Guizan notified this Court of an impending settlement with all appealing defendants. In July, we ordered that the appeal be withdrawn as to the estate, and that the appeal proceed only with respect to Terebesi. We heard argument on October 10, 2013.

DISCUSSION

On appeal, the defendants make three arguments: first, that Terebesi's claims for excessive force arising out of the activation of SWERT, the raid plan, the so-called "dynamic entry," the use of stun grenades, and Terebesi's encounter with Officer Michael Sweeney are all barred by the doctrine of qualified immunity, and that their actions were objectively reasonable; second, that they complied with any requirements of the Fourth Amendment "knock-and-announce" rule, and that they were in any case entitled to qualified immunity on this claim; and, third, that they were entitled to governmental immunity under Connecticut law for Terebesi's negligence claims.[8]

I. Appellate Jurisdiction[9] and Standard of Review

229 This appeal comes to us from the denial of a motion for summary judgment, which *229 ordinarily is not an appealable final order. *See* 28 U.S.C. § 1291 (limiting jurisdiction to "appeals from ... final decisions" of a district court); *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (same). We may nevertheless entertain appeals from interlocutory orders in the narrow class of cases in which rights "will be irretrievably lost in the absence of an immediate appeal." *Wabtec Corp. v. Faiveley Transport Malmo AB,* 525 F.3d 135, 138 (2d Cir.2008) (internal quotation marks omitted). Because federal qualified immunity supplies not only a bar to liability but also an "entitlement not to stand trial or face the other burdens of litigation," *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), the Supreme Court and the federal courts of appeals allow some interlocutory appeals from district court decisions rejecting defenses of qualified immunity as a "limited exception" to the final judgment rule, *Grune v. Rodriguez,* 176 F.3d 27, 32 (2d Cir.1999) (internal quotation marks omitted).

A district court's denial of qualified immunity on a summary judgment motion is an appealable final decision only "to the extent the denial turns on an issue of law." *McCullough v. Wyandanch Union Free Sch. Dist.,* 187 F.3d 272, 277 (2d Cir.1999); *accord Mitchell,* 472 U.S. at 530, 105 S.Ct. 2806. Appealable matters involve "disputes about the substance and clarity of pre-existing law," not about "what occurred, or why an action was taken or omitted." *Ortiz v. Jordan,* 562 U.S. 180, 131 S.Ct. 884, 892, 178 L.Ed.2d 703 (2011) (citing *Behrens v. Pelletier,* 516 U.S. 299, 313, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), and *Johnson v. Jones,* 515 U.S. 304, 317, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995)).

Where factual disputes persist, we may exercise appellate jurisdiction only for the limited purpose of deciding whether, on the basis of "stipulated facts, or on the facts that the plaintiff alleges are true, or on the facts favorable to the plaintiff that the trial judge concluded the jury might find, the immunity defense is established as a matter of law." *Salim v. Proulx,* 93 F.3d 86, 90 (2d Cir.1996). Our review is thus limited to the defendant's arguments that these "facts show either that he `didn't do it' or that it was objectively reasonable for him to believe that his action did not violate clearly established law." *Id.* at 90-91. In considering these questions, "we will disregard any disputed facts or facts that contradict [the plaintiff's] version of events." *Cowan ex rel. Estate of Cooper v. Breen,* 352 F.3d 756, 761 (2d Cir.2003). And while "we have jurisdiction to determine whether the issue is *material*" to the legal issues properly before us, we may not review "whether it is *genuine." Bolmer v. Oliveira,* 594 F.3d 134, 140-41 (2d Cir.2010) (emphasis in original); *see also Droz v. McCadden,* 580 F.3d 106, 108 (2d Cir.2009) (*per curiam*) ("`[W]e may not review whether a dispute of fact identified by the district court is truly genuine.'" (quoting *Escalera,* 361 F.3d at 743)), *cert. denied,* 559 U.S. 1031, 130 S.Ct. 1914, 176 L.Ed.2d 403 (2010). Within these constraints, "our review is *de novo." Bolmer,* 594 F.3d at 141.

The defendants here allege at least some qualified immunity defenses over which we may properly exercise appellate jurisdiction: *inter alia,* that the relevant law was not clearly established, that the application of the Fourth Amendment to certain conduct has not been established, and that the facts as alleged by the plaintiff demonstrate the objective
230 reasonableness of the defendants' actions. Some of the defendants' arguments depend, however, on *230 their versions of contested facts, or on the district court's determinations of evidentiary sufficiency—questions over which we have no jurisdiction. We will therefore continue our jurisdictional inquiry in the course of reviewing the merits of the defendants' appeals.

II. Principles of Qualified Immunity

Federal law provides a private right of action for money damages against state officials, acting "under color" of law, who violate a constitutional or statutory right. 42 U.S.C. § 1983; *see also Camreta v. Greene,* ____ U.S. ___, 131 S.Ct. 2020, 2030, 179 L.Ed.2d 1118 (2011). But the doctrine of qualified immunity shields both state and federal officials from suit "unless [1] the official violated a statutory or constitutional right that [2] was clearly established at the time of the challenged

conduct."[10] *Reichle v. Howards,* ___ U.S. ___, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012); *see also* *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (setting out the standards for qualified immunity); *Matusick v. Erie Cnty. Water Auth.,* 757 F.3d 31, 54-56 & n. 15, 2014 WL 700718, at *18 & n. 15 (2d Cir. Jan. 3, 2014) (discussing the scope of the two-prong inquiry). This doctrine balances "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan,* 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

Official conduct violates clearly established law "when, at the time of the challenged conduct, `the contours of a right are sufficiently clear' that every `reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd,* ___ U.S. ___, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011) (quoting *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (brackets omitted)). The purpose of the doctrine is to ensure that the official being sued had "fair warning" that his or her actions were unlawful. *Hope v. Pelzer,* 536 U.S. 730, 739-40 & n. 10, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). To this end, a plaintiff need not show a case "directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."[11] *al-Kidd,* 131 S.Ct. at 2083; *accord* *Stanton v. Sims,* ___ U.S. ___, 134 S.Ct. 3, 5, 187 L.Ed.2d 341 (2013) *231 (*per curiam*); *Fabrikant v. French,* 691 F.3d 193, 213 (2d Cir.2012).

To determine whether the relevant law was clearly established, we consider the specificity with which a right is defined, the existence of Supreme Court or Court of Appeals case law on the subject, and the understanding of a reasonable officer in light of preexisting law. *See* *Scott v. Fischer,* 616 F.3d 100, 105 (2d Cir.2010). Even if this Court has not explicitly held a course of conduct to be unconstitutional, we may nonetheless treat the law as clearly established if decisions from this or other circuits "`clearly foreshadow a particular ruling on the issue.'"[12] *Id.* (quoting *Varrone v. Bilotti,* 123 F.3d 75, 79 (2d Cir.1997)); *see also* *Weber v. Dell,* 804 F.2d 796, 801 n. 6, 803-04 (2d Cir.1986) (looking to decisions of other circuits for clearly established law), *cert. denied,* 483 U.S. 1020, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987).

III. Excessive Force Claims

The Fourth Amendment governs "the reasonableness of the manner in which a search or seizure is conducted." *Tennessee v. Garner,* 471 U.S. 1, 7-8, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985); *see also* U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."). Determining whether a use of force was "reasonable" under the Fourth Amendment "requires 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." *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (internal quotation marks omitted). We ask "whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397, 109 S.Ct. 1865 (internal quotation marks omitted). In doing so, we consider "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396, 109 S.Ct. 1865.

This appeal concerns the reasonableness of the raid plan, the decision to use SWERT to effect the search, the use of stun grenades in the raid, and the actions of defendants Sweeney and Weir upon entering Terebesi's residence. We reverse the district court on one point: insofar as it denied summary judgment to Chief Solomon on the issue of his decision to activate SWERT in connection with the search, we conclude that the relevant law was not clearly established. But for the reasons stated below and to the extent that the defendants' appeals are properly before *232 this Court, we affirm the district court's denial of summary judgment as to all defendants on all other excessive force claims.

A. SWERT Activation

The plaintiff's theory of excessive force includes two claims relating to decisions that took place prior to the raid. In one claim, the plaintiff argues that the defendants who developed and approved the raid plan are liable for authorizing an excessive use of force in effecting a search and seizure. This claim concerns the details of the raid plan, and we address it below, in part III.B. Separately, the plaintiff argues that Solomon is liable for authorizing a use of excessive force because he decided to serve the search warrant using a SWAT team rather than ordinary uniformed officers. This claim asserts that the

decision to deploy a tactical team can, under certain circumstances, constitute an unconstitutional use of force, regardless of the details of the planned operation. We find that Solomon is entitled to qualified immunity with respect to this decision.

At least two circuits and one decision from the District of Connecticut have suggested that the decision to employ a tactical team may violate the Fourth Amendment's prohibition on excessive force.[13] *See Estate of Smith v. Marasco,* 430 F.3d 140, 149-50 (3d Cir.2005); *Holland ex rel. Overdorff v. Harrington,* 268 F.3d 1179, 1189-90 (10th Cir.2001), *cert. denied,* 535 U.S. 1056, 122 S.Ct. 1914, 152 L.Ed.2d 824 (2002); *Warren v. Williams,* No. Civ. 03:40CV537 (JCH), 2006 WL 860998, at *27, 2006 U.S. Dist. LEXIS 18900, at *82-*84 (D.Conn. Mar. 31, 2006). The district court referred to these decisions in denying summary judgment on this issue. *Guizan,* 2012 WL 3775876, at *11, 2012 U.S. Dist. LEXIS 123727, at *31-*32.

In November 2012—after the district court's decision in this case, but before the appeal was briefed—a panel of this Court determined that "there was no `clearly established' right in this Circuit to be free from the deployment of a police SWAT team." *Fortunati v. Vermont,* 503 Fed. Appx. 78, 81 (2d Cir.2012) (non-precedential summary order). In that case, members of a police tactical team fatally shot a man who was known to be "armed and unstable," who was at large in the woods, and who had threatened family members at gunpoint hours before the shooting. *Fortunati v. Campagne,* 681 F.Supp.2d 528, 532-34, 544 (D.Vt.2009), *aff'd,* 503 Fed.Appx. 78 (2d Cir.2012). Unlike in the case at bar, the challenged decision to deploy a tactical team to take the decedent into custody was made in response to an ongoing and evolving situation, not in the context of the planned execution of a search warrant. Although the district court found a triable issue of fact as to whether it was reasonable to deploy the tactical team, *id.* at 544, both the district court and this Court agreed that the law on SWAT team deployment was not clearly established in this Circuit. *Id.; Fortunati,* 503 Fed.Appx. at 81.

233 *233 We agree that there is no clearly established right in this Circuit to be free from the deployment of a tactical team in general.[14] *Fortunati,* 503 Fed.Appx. at 81. We of course recognize that this Circuit's order in *Fortunati* is not binding precedent. *See United States v. Cassesse,* 685 F.3d 186, 191 n. 4 (2d Cir.2012). But in the context of qualified immunity determinations, police officers are not "expected to predict the future course of constitutional law," and "it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne,* 526 U.S. 603, 617-18, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (internal quotation marks omitted). It is difficult to ask that a police officer identify clearly established law that three judges of this Court could not find. We therefore reverse the decision of the district court insofar as it denied qualified immunity to Chief Solomon for his decision to call out a tactical team in connection with the search of Terebesi's home.

We stress that our reversal relates only to the decision to deploy SWERT to execute the search warrant. Neither Solomon nor any other defendant is qualifiedly immune at the summary judgment stage from any Fourth Amendment liability he may otherwise have in connection with the planning of the raid, including any liability for authorizing or directing the team members to carry out the search in an unlawful manner or for failing to intervene in constitutional violations committed by others. *See infra,* Parts III.B., V.

B. Raid Plan

The defendants[15] argue that, because a seizure has yet to take place at the time a raid plan is formulated, planning activity is governed solely by the Fourteenth Amendment's Due Process Clause, which is "violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 847, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). This argument relies on a selective—and incorrect—reading of the case law. We agree instead with the district court that officers who authorize or direct the use of force in effecting a search or seizure must comply with the Fourth Amendment in doing so. And, viewing the facts in the light most favorable to Terebesi, we conclude that his claims in this respect were sufficient to withstand the defendants' claims of qualified immunity at the summary judgment stage.

A plaintiff is permitted to bring suit under section 1983 against "[e]very person who ... causes [him] to be subjected" to a deprivation of constitutional rights. 42 U.S.C. § 1983; *Rizzo v. Goode,* 423 U.S. 362, 370, 96 S.Ct. 598, 46 L.Ed.2d 561
234 (1976). Section 1983 does not give rise *234 to *respondeat superior* liability against the employer of a person who infringes upon another's constitutional rights. *Ashcroft v. Iqbal,* 556 U.S. 662, 676, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). But a supervisor may be held liable if he or she was personally a "direct participant" in the constitutional violation. *Richardson v. Goord,* 347 F.3d 431, 435 (2d Cir.2003) (*per curiam*). In this Circuit, a "direct participant" includes a person who authorizes, orders, or helps others to do the unlawful acts, even if he or she does not commit the acts personally. *Provost v. City of*

Newburgh, 262 F.3d 146, 155 (2d Cir.2001); *see also* *Gronowski v. Spencer,* 424 F.3d 285, 293-94 (2d Cir.2005) (addressing a city mayor's role in allegedly unconstitutional retaliation against the plaintiff, a former city employee).

This principle is often reflected in our cases concluding that a defendant in a section 1983 suit "did not engage in *or authorize* any of the brutalities alleged." *Al-Jundi v. Estate of Rockefeller,* 885 F.2d 1060, 1065-66 (2d Cir.1989) (emphasis added) (concerning a plan to retake the Attica prison from rioting inmates); *see also* *Rizzo,* 423 U.S. at 371, 96 S.Ct. 598 (stressing that there was no evidence showing the defendants' "authorization or approval" of misconduct); *Williams v. Vincent,* 508 F.2d 541, 546 (2d Cir.1974) (rejecting claim because it did not allege authorization of specific conduct). Other circuits that have addressed excessive force claims like Terebesi's have reached similar conclusions. *See, e.g.,* *Backes v. Village of Peoria Heights,* 662 F.3d 866, 869-71 (7th Cir. 2011) (concluding that, while police chief might have been liable if he had approved a raid plan that involved excessive force, he had instead deferred to an outside tactical team over which he had no authority); *Santiago v. Warminster Township,* 629 F.3d 121, 129 (3d Cir.2010) (claim that defendants "creat[ed] and authorize[ed]" a raid plan that directed other officers to use excessive force was distinct from a theory of *respondeat superior* and was permissible under § 1983); *Watkins v. City of Oakland,* 145 F.3d 1087, 1093 (9th Cir. 1998) (stating that, supervisor's liability for an officer's use of excessive force "hinges on whether he set in motion a series of acts by others ... which he knew or reasonably should have known[] would cause others to inflict the constitutional injury" (internal quotation marks omitted)).

Our case law thus clearly establishes that planners may be liable under section 1983 to the extent that a plan for a search or seizure, as formulated and approved by those defendants, provides for and results in an unconstitutionally excessive use of force. *See, e.g.,* *Provost,* 262 F.3d at 155. We therefore reject the defendants' assertions that the law in this respect is not
235 clearly established.[16] A defendant *235 who plans or directs an unreasonable use of force is liable for the resulting constitutional violation as a "direct participa[nt]." *Id.*

Terebesi alleges that the raid plan here contemplated a seizure of his person,[17] and that, as formulated (and ultimately executed), the planned use of force was excessive. By formulating and approving the plan, Terebesi contends, defendants Cirillo, Jones, Kirby, Ruscoe, and Solomon authorized or assisted in effecting a seizure involving excessive force.

Even if the plan expressly contemplated only a search, the same Fourth Amendment protections would apply. *See* *United States v. Ramirez,* 523 U.S. 65, 71, 118 S.Ct. 992, 140 L.Ed.2d 191 (1998) ("The general touchstone of reasonableness which governs Fourth Amendment analysis governs the method of execution of [a search] warrant." (citation omitted)). As with a seizure, the use of excessive force in the conduct of the search may render the police's actions unreasonable. *See, e.g.,* *Los Angeles Cnty. v. Rettele,* 550 U.S. 609, 614, 127 S.Ct. 1989, 167 L.Ed.2d 974 (2007) (*per curiam*) (applying Fourth Amendment test of reasonableness to police conduct in executing a search warrant); *Boyd v. Benton Cnty.,* 374 F.3d 773, 779-80 (9th Cir.2004) (same); *cf.* *Winston v. Lee,* 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985) ("[T]he [Fourth] Amendment's `proper function is to constrain ... against intrusions which are not justified in the circumstances, or which are made in an improper manner.'") (quoting *Schmerber v. California,* 384 U.S. 757, 768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). Because the raid plan concerned the method used to execute a search warrant, it was, as a matter of clearly established constitutional law, subject to Fourth Amendment protections, irrespective of whether a seizure was contemplated.[18]

236 *236 The foregoing analysis provides a sufficient basis on which to affirm the district court's denial of qualified immunity at the summary judgment stage. But we cannot determine as a matter of law at this stage whether the plan was reasonable or whether, in light of all the facts, the constitutional principles just elaborated apply with obvious clarity to the planners' actions. The answers to these questions depend on the resolution of several questions of material fact, including whether the plan provided an appropriate period of time for one of the occupants to answer the door before the forced entry, whether the defendants who decided to employ these tactics understood that only a small quantity of drugs was sought, and what the defendants understood or should have understood to be the risks posed in the service of this warrant. The district court determined that genuine disputes exist on these points. At this stage of this litigation, we are bound by the court's conclusions. *Bolmer,* 594 F.3d at 140-41. The defendants' appeals are therefore dismissed to the extent that they allege that the plan was objectively reasonable in light of the facts and circumstances known to each individual defendant at the time.

C. Use of Stun Grenades

The district court also denied summary judgment on the plaintiffs' claims with respect to the use of stun grenades in the raid. The defendants argue that the application of the Fourth Amendment to the use of such explosive devices is not clearly established, and that their use in this case was objectively reasonable. These arguments relate to defendants Brennan, Phillipson, and Torresso,[19] who deployed the devices at the rear of the house, and to defendant Lee, who tossed one through the front doorway. As explained in the foregoing section, they also relate to the liability of the planning defendants.

Stun grenades "detonate with a blinding flash of light and a deafening explosion. Their function is to temporarily stun people in a targeted building until police or military personnel can get inside." Radley Balko, *Flashbangs under Fire,* Reason, Feb. 17, 2010, *available at* http://reason.com/archives/2010/02/17/flashbangs-under-fire (last visited June 23, 2014); *see also* Steve Ijames, *I Learned About Policing from That: Flash Bang Boom,* LawOfficer, Nov./Dec.2006, *available at* http://www.lawofficer.com/article/magazine-feature/flash-bang-boom (last visited July 1, 2014). A stun grenade detonation is, indeed its purpose is to be, extremely loud. The explosion produces high temperatures and has been known to cause fires, burns, and other injuries. *See United States v. Ankeny,* 502 F.3d 829, 837 (9th Cir.2007), *cert. denied,* 553 U.S. 1034, 128 S.Ct. 2423, 171 L.Ed.2d 233 (2008); *United States v. Folks,* 236 F.3d 384, 387-88 (7th Cir.), *cert. denied,* 534 U.S. 830, 122 S.Ct. 74, 151 L.Ed.2d 39 (2001); *see also* Alexis Stevens, *Toddler Critically Injured by `Flash Bang' During Police Search, Atl. J. Const.,* May 30, 2014, http://www.ajc.com/news/news/breakingnews/toddler-critically-injured-by-flash-bang-
237 during-po/nf9XM/ (last visited *237 June 23, 2014); William K. Rashbaum, *Woman Dies after Police Mistakenly Raid Her Apartment,* N.Y. Times, May 17, 2003, at B3 (reporting the death of a woman who suffered a heart attack after police threw a stun grenade into her apartment).

As a threshold matter, we conclude that the Fourth Amendment principles governing police use of force apply with "obvious clarity," *United States v. Lanier,* 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997), to the unreasonable deployment of an explosive device in the home. *Cf. United States v. Jones,* 214 F.3d 836, 837 (7th Cir.2000) ("[P]olice cannot automatically throw bombs into drug dealers' houses, even if the bomb goes by the euphemism `flash-bang device.'").

"An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury."[20] *Mendoza v. Block,* 27 F.3d 1357, 1362 (9th Cir.1994); *see also Hope,* 536 U.S. at 741, 122 S.Ct. 2508 ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."). The prohibition on unreasonable force has been applied to, *inter alia,* the use of firearms, tear gas, pepper spray, "hog-tying," tight handcuffs, police dogs, batons, and Tasers. *See generally* 1 Ivan E. Bodensteiner & Rosalie Berger Levinson, *State and Local Government Civil Rights Liability* § 1:11 n. 66 (2013) (collecting cases). In light of these varied applications, we conclude that no reasonable officer would think that his or her use of a stun grenade in the course of executing a search warrant was beyond the purview of the Fourth Amendment. *See Rettele,* 550 U.S. at 614, 127 S.Ct. 1989 (excessive force may render a search unreasonable). We therefore agree with the District of Connecticut's view that the principles governing police use of force set out in *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, must be applied "to claims challenging the use of the distraction device when executing a search warrant." *Taylor v. City of Middletown,* 436 F.Supp.2d 377, 386 (D.Conn.2006).

The question, then, is whether the use of stun grenades was reasonable under the particular circumstances alleged in this case. *See Estate of Escobedo v. Bender,* 600 F.3d 770, 784-86 (7th Cir.) (finding law on stun grenades clearly established before 2005 incident), *cert. denied,* ___ U.S. ___, 131 S.Ct. 463, 178 L.Ed.2d 288 (2010); *Bing v. City of Whitehall,* 456 F.3d
238 555, 569-71 (6th Cir.2006) (analyzing use of stun grenades under *Graham,* but finding *238 that the officers had qualified immunity in light of the unusual circumstances surrounding the incident); *Boyd,* 374 F.3d at 778-84 (applying Fourth Amendment reasonableness test to find use of stun grenades unreasonable, but finding qualified immunity in light of, *inter alia,* the dangerousness of the suspect involved); *United States v. Myers,* 106 F.3d 936, 940 (10th Cir.) (finding that a "military-style assault," involving stun grenades, "c[a]me dangerously close to a Fourth Amendment violation," but was not objectively unreasonable in light of the suspect's sometimes violent criminal history), *cert. denied,* 520 U.S. 1270, 117 S.Ct. 2446, 138 L.Ed.2d 205 (1997).

The factors that other courts have considered in assessing whether a particular use of stun grenades was reasonable are no different from those that apply to other forms of force, lethal or non-lethal. In this case, we think it important to determine whether the officers first confirmed that they were tossing the stun grenade into an empty room or open space. *See United States v. Morris,* 349 F.3d 1009, 1012 (7th Cir.2003) (warning that the use of stun grenades in "close proximity to persons" may not be reasonable); *Boyd,* 374 F.3d at 779 ("[I]t cannot be a reasonable use of force under the Fourth Amendment to

throw [a stun grenade] `blind' into a room occupied by innocent bystanders absent a strong governmental interest, careful consideration of alternatives and appropriate measures to reduce the risk of injury."); *Taylor,* 436 F.Supp.2d at 386-87 ("The court cannot conceive of a set of circumstances that would permit an officer ... to throw a flash-bang device directly at a person.").

It also is more likely that using a stun grenade will be considered reasonable if the subject of the search or arrest is known to pose a high risk of violent confrontation.[21] *See, e.g., United States v. Boulanger,* 444 F.3d 76, 85 (1st Cir.2006), *cert. denied,* 549 U.S. 906, 127 S.Ct. 235, 166 L.Ed.2d 186 (suspect had a history of violent crimes); *Boyd,* 374 F.3d at 783 (constitutional violation not clearly established where officers had reason to believe suspect was armed and layout of dwelling made entry particularly dangerous); *Molina ex rel. Molina v. Cooper,* 325 F.3d 963, 973 (7th Cir.2003) (suspect had record of aggravated assault and access to weapons); *cf. Graham,* 490 U.S. at 396, 109 S.Ct. 1865 (considering, among other factors, "whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight").

By contrast, we do not think a reasonable officer would think that it was constitutional to use these devices in routine searches. Indeed, to the best of our knowledge, every appellate court to address the issue has found questionable the use of stun grenades in routine searches and seizures that do not pose high levels of risk to the officers or third parties. *See, e.g., Myers,* 106 F.3d at 940 ("Certainly, we could not countenance the use of [stun grenades] as a routine matter."); *Boyd,* 374 F.3d at 782 (quoting *Myers*); *Escobedo,* 600 F.3d at 785-86 (stressing that, on the facts presented at summary judgment, the plaintiff "was not considered to be a violent, dangerous individual, he was not the subject of an arrest and he
239 did not pose an immediate threat to the police or *239 others"); *Molina,* 325 F.3d at 973 (observing that the use of stun grenades is not appropriate in "most cases"). These cases, although not binding on us, confirm the obvious: People do not automatically lose their right to be free from explosive devices being thrown into their houses simply because there is a valid and outstanding search warrant with respect to the property. The use of a stun grenade must be justified by the particular risk posed in the execution of the warrant.

The facts alleged by Terebesi plainly differ from the kinds of high-risk scenarios, like those cited above, where courts have found the use of stun grenades to be objectively reasonable or within the zone protected by qualified immunity. *See, e.g., Bing,* 456 F.3d at 559 (suspect was reportedly intoxicated and had fired shots at neighborhood youths); *United States v. Baker,* 16 F.3d 854, 855-56 (8th Cir.1994) (suspected drug dealer was engaged in gang activity, owned two Doberman Pinschers, and had recently barricaded his door in a manner that made entry difficult).

On the facts presented at the summary judgment stage of this case, construed in the light most favorable to Terebesi, all of the stun grenade defendants knew or should have understood that the search warrant was for a personal-use quantity of drugs and that there was no reason to believe that Terebesi posed a risk of violence or resistance. It is true that, at the SWERT briefing, all of the officers were told that Terebesi habitually used crack cocaine, that he had recently been the victim of a shotgun attack, that he owned a handgun that was "unaccounted for," and that he held what might have been an unusually strong affection for his pet bird. But none of these facts suggested that Terebesi was ready to engage in violence, that he had any record of or propensity towards violence, that he had immediate access to weapons, or indeed that he was likely to offer any resistance at all. We therefore conclude that the record, as presented at summary judgment, presents material questions as to whether each defendant's decision to deploy stun grenades was reasonable under clearly established law, in light of his personal knowledge of the facts and circumstances surrounding the search.[22] We therefore conclude that the district court properly denied the defendants qualified immunity at this stage of the proceedings.

D. Actions of Officers Sweeney and Weir

The district court also determined that defendants Sweeney and Weir were not entitled to qualified immunity for their role in
240 executing the raid.[23] Sweeney entered *240 the home first and fired the shots that killed Gonzalo Guizan. He also pinned Terebesi to the floor with his shield and, according to Terebesi's account, struck him in the head with a pistol. Weir entered the home immediately after Sweeney and fired one shot into the floor. Terebesi alleges that he suffered physical injuries from his encounter with Sweeney, and that, by fatally shooting Guizan in Terebesi's presence, Sweeney caused emotional and psychological injury to Terebesi, aggravating a pre-existing condition of post-traumatic stress disorder. Terebesi also alleges that Weir's actions contributed to these injuries.

As we have explained, the Fourth Amendment protection against unreasonable uses of force extends to the manner in which a search is conducted. *See Rettele,* 550 U.S. at 614, 127 S.Ct. 1989. Depending on the circumstances, a search may be unreasonable under the Fourth Amendment even if officers do no more than threaten the occupants with firearms. *See Holland,* 268 F.3d at 1192 ("The display of weapons, and the pointing of firearms directly at persons inescapably involves the immediate threat of deadly force. Such a show of force should be predicated on at least a perceived risk of injury or danger to the officers or others, based upon what the officers know at that time."); 2 Wayne R. LaFave, *Search & Seizure* § 4.8(h) (5th ed.2013) ("Even a show of force in executing a search warrant, without actual harm to property or person, may be questioned on Fourth Amendment grounds."). These principles apply *a fortiori* to the discharge of weapons during a search, such that any reasonable officer must understand that his decision to fire a gun during the execution of a search warrant is subject to Fourth Amendment scrutiny, regardless of whether he hits anyone.

Whether in this case the officers' actions were reasonable in light of clearly established law is not a question we may answer conclusively at this stage of the proceedings. As the district court recognized, the reasonableness of Sweeney's decision to fire his weapon depends in large part on whether Guizan did in fact attempt to wrest the weapon away from him, whether Sweeney was blinded by debris from the stun grenade explosion, and whether Sweeney reasonably believed he was taking fire once inside the house. The district court noted, moreover, that the credibility of Sweeney's recollection of these events was subject to genuine dispute.[24] For the same reasons, we are unable to conclude at this juncture that Sweeney is entitled to qualified immunity for his decision to "pin" Terebesi with his shield. Because Sweeney's claims to qualified immunity rely on these disputed facts, we have no jurisdiction to entertain them at this time.

Weir, for his part, testified that he fired his weapon because he thought that Guizan was firing at Sweeney. The credibility of his recollection and the sufficiency of the asserted basis for his mistaken impression that Guizan was firing at the officers are— like the factual arguments made by Sweeney—matters to be determined by the factfinder.

241 *241 We therefore affirm the decision of the district court insofar as it determined that defendants Sweeney and Weir were not entitled to qualified immunity at the summary judgment stage in connection with their roles in the raid of Terebesi's home.

IV. Knock-and-Announce Violations

It is clearly established that, absent exigent circumstances, the Fourth Amendment requires officers executing a search warrant to knock at the entrance of the premises to be searched and to announce their presence. *Hudson v. Michigan,* 547 U.S. 586, 589, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006) (noting that the rule has "ancient" roots in the common law, was codified as a federal statute in 1917, and has been treated by the Supreme Court as a "command of the Fourth Amendment" since 1995). Absent exigency, the police must give an occupant a reasonable time to reach the door, "a time that will vary with the size of the establishment, perhaps five seconds to open a motel room door, or several minutes to move through a townhouse." *United States v. Banks,* 540 U.S. 31, 39-40, 124 S.Ct. 521, 157 L.Ed.2d 343 (2003).

The district court determined that the plaintiffs' knock-and-announce claims could proceed against Brennan, Edwards, Lee, Phillipson, Sweeney, Torresso, and Weir.[25] The defendants argue that exigent circumstances justified any violation of the knock-and-announce requirement.[26] Defendants Brennan, Phillipson, and Torresso argue separately that their part in the plan, which was limited to breaking a rear window and throwing two stun grenades into an empty room, was not subject to the knock-and-announce requirement, and that it was objectively reasonable for them to believe that the plaintiff would receive adequate announcement.

A. Front-Entry Team

The ordinary knock-and-announce requirement may not apply where officers reasonably suspect that announcing their presence, "under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin,* 520 U.S. 385, 394, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997). We consider the following factors as "guideposts for determining the existence of exigent circumstances":

(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry.

242 *United States v. Moreno,* 701 F.3d 64, 73 (2d Cir.2012) (quoting *United States v.* *242 *MacDonald,* 916 F.2d 766, 769-70 (2d Cir. 1990) (*en banc*) (ellipsis omitted)), *cert. denied,* ___U.S. ___, 133 S.Ct. 2797, 186 L.Ed.2d 864 (2013). In addition, we take into account whether "quick action is necessary to prevent the destruction of evidence." *United States v. Brown,* 52 F.3d 415, 421 (2d Cir.1995), *cert. denied,* 516 U.S. 1068, 116 S.Ct. 754, 133 L.Ed.2d 701 (1996). No one factor is dispositive, and the list here is "merely illustrative, not exhaustive." *Moreno,* 701 F.3d at 73 (quoting *United States v. Gordils,* 982 F.2d 64, 69 (2d Cir.1992)).

The district court correctly concluded that qualified immunity was not warranted at the summary judgment stage. The plaintiffs presented evidence indicating that all of the defendants understood that the warrant was for a small amount of drugs meant only for personal use. The basis for the officers' entry, in other words, was related to an offense that was neither grave nor violent. *See Moreno,* 701 F.3d at 73. As the Supreme Court stated in a related context, the "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense... has been committed." *Welsh v. Wisconsin,* 466 U.S. 740, 753, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) (rejecting exigency as a justification for warrantless nighttime entry into home to arrest drunk-driving suspect).

On the version of the facts most favorable to Terebesi, then, there was not enough evidence for a reasonable officer to conclude that the occupants of the house were so dangerous as to create exigent circumstances despite the nature of the offense at issue. Apart from Terebesi's perhaps unusually intense ardor for his pet bird, the defendants point to no evidence in the record suggesting that Terebesi would actually use force against the police.[27] Maybe most tellingly, the officers did not seek or even discuss acquiring a warrant that would expressly have permitted a "no-knock" entry, while several officers testified to understanding that the knock-and-announce rule applied to this operation. And there is no allegation that any exigency arose after the operation began. *See, e.g., Banks,* 540 U.S. at 37-38, 124 S.Ct. 521 (exigency may arise after the officers knock the first time). Taken together, these facts suggest that the officers, under the circumstances prevailing at the time of entry, understood there to be no exigent circumstances that would permit dispensing with the knock-and-announce requirement.

For the foregoing reasons, we cannot decide at this stage of the proceedings whether some or all of the front-entry defendants will ultimately be entitled to immunity for the alleged knock-and-announce violations. The reasonableness of their belief that Terebesi was dangerous turns on precisely what Barton said at the SWERT briefing about Terebesi's gun ownership and his propensity for violence, what reasonable conclusions could be drawn from this information, and whether any of the officers were told that Terebesi would likely shoot at intruders. We therefore agree with the district court that the issue of exigency is not appropriately decided on summary judgment.

B. The "Rake and Break" Team

243 The defendants comprising the team at the rear of the house—Brennan, Phillipson, *243 and Torresso—argue that the knock-and-announce rule did not clearly apply to their conduct, which was limited to breaking a window and deploying two stun grenades. Although Supreme Court case law supports the proposition that breaking a window for the purposes of deploying a weapon triggers the knock-and-announce rule,[28] we need not address that issue here. On what is contained in the record on summary judgment, we agree with the district court that the actions of Brennan, Phillipson, and Torresso may have frustrated any attempt by the entering officers to comply with the knock-and-announce rule at the front door.

"The knock-and-announce rule gives individuals `the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry,'" and supplies them with "the `opportunity to prepare themselves for' the entry of the police." *Hudson,* 547 U.S. at 594, 126 S.Ct. 2159 (quoting *Richards,* 520 U.S. at 393 n. 5, 117 S.Ct. 1416). For this reason, the "knock and announcement must be loud enough to be heard, and it must be followed by a pause long enough for someone to answer or come to the door." *United States v. Leichtnam,* 948 F.2d 370, 374 (7th Cir.1991); *see also Miller v. United States,* 357 U.S. 301, 311, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958) (suggesting that officers announced their presence

too quietly to satisfy the purposes of the rule). As the district court recognized, a series of loud and confusing announcements from all sides of the house may frustrate the dignitary and protective purposes of the rule. *Cf. Hudson,* 547 U.S. at 594, 126 S.Ct. 2159 (setting out the purposes for the rule).

The district court correctly found that, on the facts most favorable to the plaintiffs, Brennan, Torresso, and Phillipson might unreasonably have frustrated the purpose of knocking and announcing. After Phillipson broke the window, Brennan and Torresso deployed two stun grenades shortly before the officers at the front door announced their presence. Even after they detonated, the grenades caused glass to continue to fall and break while the officers at the front door were announcing their presence. At the same time, Brennan began shouting, from the rear of the house, "Police. Police with a warrant. Hands up." At this stage of the case, the district court properly concluded that the defendants' actions could have disoriented and confused the occupants of the house, depriving them of a meaningful opportunity to answer the door.

V. Failure to Intervene

"It is widely recognized that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence." *Anderson v. Branen,* 17 F.3d 552, 557 (2d Cir.1994). An officer who fails to intercede in the use of excessive force or another constitutional violation is liable
244 for the preventable harm caused by the actions of other officers. *Id.* *244 Whether the officer had a "realistic opportunity" to intervene is normally a question for the jury, unless, "considering all the evidence, a reasonable jury could not possibly conclude otherwise." *Id.*

We agree with the district court that, insofar as the raid plan included the use of substantial and violent force, the plaintiff alleged facts suggesting that every defendant had the opportunity to intervene. Whether some of the defendants were in fact unable to intercede in particular uses of force, either because they were not involved in the planning process, or because of the manner, place, and timing of their deployment in the raid itself, is properly a question for a jury. *Id.*

VI. Immunity from State Negligence Claims

Connecticut law entitles municipal officers to a form of "qualified immunity" for the negligent performance of discretionary acts. *Evon v. Andrews,* 211 Conn. 501, 505, 559 A.2d 1131, 1133-34 (1989). The law provides "three exceptions" to this general rule: (i) where it was apparent that the act would subject a person to imminent harm; (ii) where a statute provides a cause of action against a municipal officer; and (iii) where the act involves "malice, wantonness or intent to injure." *Id.* The district court declined to grant summary judgment on the plaintiffs' negligence claims on state-law immunity grounds, finding that there were genuine disputes of material fact as to the first and third prongs of the inquiry. This finding is not subject to interlocutory appeal. *See In re State Police Litig.,* 88 F.3d 111, 127 (2d Cir.1996).

CONCLUSION

We have considered the parties' remaining arguments and find them to be without merit. In light of the foregoing, we REVERSE the judgment of the district court insofar it determined that Chief Solomon was not entitled to qualified immunity from liability for the decision—standing alone—to activate the SWERT tactical team. We AFFIRM the judgment insofar as it held that Terebesi's claims implicated clearly established constitutional law with respect to the planning and approval of the raid, the use of stun grenades, the actions of Officers Michael Sweeney and Brian Weir, the alleged knock-and-announce violations, and the duty of police to intervene in constitutional violations by fellow officers. In all other respects, the defendants' arguments on appeal rely on disputed issues of fact and the appeal is therefore DISMISSED for lack of jurisdiction. The case is REMANDED for further proceedings.

[*] The Clerk of the Court is respectfully directed to amend the official caption to appear as set forth above.

[1] SWAT is the acronym for "Special Weapons and Tactics." *See, e.g.,* Alan D. Cohn, *Mutual Aid: Intergovernmental Agreements for Emergency Preparedness and Response,* 37 Urb. Law. 1, 45 (2005).

[2] SWERT is a specialized tactical police unit formed pursuant to a Mutual Aid Compact among the Connecticut towns of Easton, Trumbull, Monroe, Darien, Wilton, and Westport. J.A. 142-45; *see also* Conn. Gen.Stat. § 7-277a (setting out a framework for these mutual agreements). SWERT is intended to deploy specially trained police officers "to any incident involving tactical operations, manmade or

natural disaster, search and rescue, dignitary protection, civil unrest, or any situation requiring immediate augmentation of local law enforcement personnel to preserve life and protect property." SWERT Mutual Aid Compact Addendum, J.A. 142.

[3] Barton recalls Terebesi saying, during his arrest for the March 31 incident: "[T]hat bird's my life. I would do anything that I needed to protect that bird." Barton Dep. II, at 143.

[4] The grenades used by the defendants go by a variety of names, including "flash grenade," "stun grenade," "concussion grenade," "distraction device," and the colloquial "flashbang." *See, e.g.,* Al Baker, *The `Flash Bangs' Are Stilled,* N.Y. Times, Feb. 4, 2010, http://cityroom.blogs.nytimes.com/2010/02/04/the-flash-bangs-are-stilled/. They "produce[] a brilliant flash and a loud noise designed to stun and disorient persons nearby, making resistance less likely." *United States v. Jones,* 214 F.3d 836, 837 (7th Cir.2000).

[5] The timing is taken from time stamps on the video recording, which was prepared by the plaintiff's expert and which purports to provide times with that level of precision.

[6] To provide context, we note that although doses—"rocks"—of crack cocaine are sold by size, rather than by weight, *see United States v. Wright,* 131 F.3d 1111, 1113 (4th Cir.1997), the weight of a typical dose appears to vary from 0.1 to 0.25 grams (0.0035-0.0088 ounces), *see, e.g., United States v. Ramirez-Negron,* 751 F.3d 42, 46 (1st Cir.2014); *United States v. Barrow,* 287 F.3d 733, 737 (8th Cir.2002); *United States v. Steward,* 252 F.3d 908, 909 (7th Cir.2001); Caleb Mason, *Jay Z's 99 Problems, Verse 2: A Close Reading with Fourth Amendment Guidance for Cops and Perps,* 56 St. Louis U. L.J. 567, 570 n. 14 (2012) (noting that "rocks" vary "somewhat in weight, but a tenth of a gram is a good rule of thumb"). Assuming that the substance recovered was crack cocaine, the reported amount recovered was therefore roughly equivalent to two to six doses.

[7] The Town of Darien initially joined this appeal, but withdrew on March 21, 2013.

[8] Defendant Solomon also argued in his brief that the plaintiffs failed to establish the necessary elements for intentional infliction of emotional distress. At oral argument, Solomon's counsel indicated that the defendant was no longer pursuing this argument on appeal.

[9] We have the "independent obligation to consider the presence or absence" of appellate jurisdiction, even if the appellee has not raised the issue. *Joseph v. Leavitt,* 465 F.3d 87, 89 (2d Cir.2006), *cert. denied,* 549 U.S. 1282, 127 S.Ct. 1855, 167 L.Ed.2d 325 (2007).

[10] We may exercise our "sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan,* 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (modifying *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)).

[11] The precedent establishing a constitutional right must be more precise than, for example, the "broad history and purposes of the Fourth Amendment." *al-Kidd,* 131 S.Ct. at 2084 (warning courts "not to define clearly established law at a high level of generality") (internal quotation marks omitted). But, in some cases, a generally phrased statement of the law may provide sufficient warning that the defendant's conduct is unconstitutional. *See Hope,* 536 U.S. at 741, 122 S.Ct. 2508 ("[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." (quoting *United States v. Lanier,* 520 U.S. 259, 270-71, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997)) (internal quotation marks and brackets omitted)). The "salient question ... is whether the state of the law [at the time of the act] gave [the defendants] fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Id.*

[12] We do not think that, as some decisions in this Circuit have suggested, "*[o]nly* Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established." *Moore v. Vega,* 371 F.3d 110, 114 (2d Cir.2004) (emphasis added) (citing *Townes v. City of New York,* 176 F.3d 138, 144 (2d Cir.1999), *cert. denied,* 528 U.S. 964, 120 S.Ct. 398, 145 L.Ed.2d 311 (1999)). (The author of this opinion was a member of the panel in *Moore.*) *Townes* correctly stated that we consider "whether the Supreme Court or the Second Circuit had affirmed the existence of the right," *Townes,* 176 F.3d at 144, but the opinion also made clear that, "[e]ven in the absence of binding precedent, a right is clearly established if the contours ... are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (citing *Anderson,* 483 U.S. at 640, 107 S.Ct. 3034) (internal quotation marks and brackets omitted). Though not directly binding on this Court, the decisions of other circuits may reflect that the contours of the right in question are clearly established.

[13] These decisions do not necessarily distinguish between claims arising out the decision to *deploy* a SWAT team and claims arising out a particular *plan* for executing a search warrant. *See Holland,* 268 F.3d at 1189 (whether raid planning, which included the use of a SWAT team, violated the Fourth Amendment); *Warren,* 2006 WL 860998, at *27, U.S. Dist. LEXIS 18900, at *82 (assessing "the decision itself by law enforcement to use `dynamic entry' (i.e., a `SWAT team')"). Insofar as these decisions are premised on the substance of the planned operation, rather than on the mere decision to use a tactical team, we think that they provide further support for our decision in part III.B. to affirm the denial of qualified immunity for the plaintiff's planning claim.

[14] We would, in any event, be hesitant to craft a rule that would attach to any decision to deploy a tactical team, regardless of the context and substance of the planned operation. A SWAT team might be properly activated for any number of reasons, some of which we could not anticipate in any single case. *E.g., Fortunati,* 681 F.Supp.2d at 532-34; *Phillips v. James,* 422 F.3d 1075, 1082 (10th Cir.2005) (concluding that it was not unreasonable for a police officer to activate a SWAT team to secure the perimeter of a possible crime scene in support of other police operations).

[15] The plaintiff's claims relating to the raid plan apply to Cirillo, Jones, and Ruscoe, who formulated the plan; to Kirby, who reviewed and approved the plan; and to Solomon, who exercised the ultimate authority to approve and direct the plan. The plaintiff also claims that all

defendants are liable for failing to intervene with respect to the raid plan; this aspect of the claim is addressed below.

[16] The defendants' reliance on this Court's opinion in *Salim,* 93 F.3d 86, is misplaced. That case arose from an officer's pursuit and eventual fatal shooting of a 14-year-old boy who had recently escaped from juvenile detention. *Id.* at 88. The plaintiff (the boy's mother) alleged that the officer had himself "created the situation in which the use of deadly force became necessary" by violating police procedure in several respects in advance of the shooting. *Id.* at 92. We determined that these alleged failings were irrelevant because the Fourth Amendment reasonableness inquiry "depends only on the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force." *Id.*

Salim is consistent with a group of "preseizure conduct" cases from other circuits. *See generally* Aaron Kimber, Note, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim,* 13 Wm. & Mary Bill Rts. J. 651 (2004) (collecting cases). The common thread in these cases is the plaintiffs' attempt to argue that a use of force that might appear reasonable if considered in isolation was in fact unreasonable because the officers' prior conduct created the danger of escalation. *See Schulz v. Long,* 44 F.3d 643, 647 (8th Cir. 1995) (officers' interactions with mentally ill suspect allegedly "set in motion a chain of events which culminated in [plaintiff] being shot"); *Carter v. Buscher,* 973 F.2d 1328 (7th Cir.1992) (ill-conceived ruse, which did not contemplate excessive force, provoked deadly confrontation); *Fraire v. City of Arlington,* 957 F.2d 1268 (5th Cir.) (failure to follow police procedure in pursuit of suspect not relevant to deadly force claim), *cert. denied,* 506 U.S. 973, 113 S.Ct. 462, 121 L.Ed.2d 371 (1992); *Greenidge v. Ruffin,* 927 F.2d 789 (4th Cir. 1991) (violations of procedure for nighttime prostitution arrests created more dangerous situation). In cases like these, courts in this Circuit and others have discarded evidence of prior negligence or procedural violations, focusing instead on "the split-second decision to employ deadly force." *Salim,* 93 F.3d at 92.

This is not such a case. The plaintiff does not allege that the defendants improperly contributed to the likelihood of a deadly confrontation between the officers and the occupants of the Terebesi home. Rather, he alleges that the raid *as planned,* even if it had gone perfectly and not ended in Guizan's death, constituted an unreasonable use of force against his person and his home.

[17] The plan expressly provided that the officers would seize occupants of the Terebesi home, and it largely "determine[d] the degree of force initially to be applied in effecting the seizure itself," *Holland,* 268 F.3d at 1190. It called for six officers to charge into Terebesi's home, amid or just after a series of stun grenade detonations, with weapons drawn, and for one officer to "pin" any occupants encountered to the ground with his ballistic shield. J.A. at 353. When the raid was executed, Terebesi was pinned just as the plan described. In other words, the plaintiff alleges that by devising an unreasonable operation, the planners ordered, authorized, or assisted others in subjecting him to excessive force—allegations that fall squarely within clearly established Fourth Amendment prohibitions.

[18] Of course, as the district court implicitly recognized, Terebesi's planning claim must be limited to those aspects of the raid actually reflected in the operational plan, such as the "dynamic entry" and the use of the shield to "pin" him. *See Guizan,* 2012 WL 3775876, at *12-*13, 2012 U.S. Dist. LEXIS 123727, at *34-*37. Terebesi does not argue, for example, that the raid plan contemplated fatally shooting Guizan.

[19] Phillipson did not throw a stun grenade himself, but broke a window at the rear of the house and separated the curtains in order to allow the other officers to toss in their grenades. To the extent that the deployment of the stun grenades could constitute a constitutional violation, Phillipson may be held liable as a direct participant for assisting in an unlawful act. *See Provost,* 262 F.3d at 155.

[20] It has become commonplace for defendants in excessive force cases to support their claims to qualified immunity by pointing to the absence of prior case law concerning the precise weapon, method, or technology employed by the police. *See, e.g., Nelson v. City of Davis,* 685 F.3d 867, 884 (9th Cir.2012) (considering the use of "pepperball projectiles"). As the Supreme Court has made clear, however, it is not necessary to find a "case directly on point" in order to show that the law governing a plaintiff's claim is clearly established. *al-Kidd,* 131 S.Ct. at 2083. Some measure of abstraction and common sense is required with respect to police methods and weapons in light of rapid innovation in hardware and tactics. *See generally* Douglas B. McKechnie, *Don't Daze, Phase, or Lase Me Bro!: Fourth Amendment Excessive Force Claims, Future Nonlethal Weapons, and Why Requiring an Injury Cannot Withstand a Constitutional or Practical Challenge,* 60 Kan. L.Rev. 139, 179-87 (2011) (describing innovations in blinding lasers, "directed energy" weapons, Tasers, and sound guns); James Byrne & Gary Marx, *Technological Innovations in Crime Prevention and Policing,* J. Police Studs., No. 2011-3, at 17, 25 (noting widespread adoption of innovative non-lethal weapons, including "chemical irritants, electric shock immobilizing technology, rubber, plastic, wooden bullet guns, beanbag shotguns, [and] strobe and acoustical weaponry").

[21] This is not to say that using a stun grenade in such circumstances is always a sound strategy; a stun grenade may have little effect on a dangerous subject. *See* Bob Parker, *The High Cost of a Dynamic Entry,* Police Magazine, Sept. 30, 2011, http://www.policemag.com/blog/swat/story/2011/09/how-a-dynamic-entry-went-sideways.aspx (last visited July 1, 2014).

[22] Apart from the question of whether it was reasonable for police to deploy stun grenades in executing the warrant to search Terebesi's home at all, there are material disputes with respect to the manner in which the grenades were actually deployed into the residence. To the extent that the defendants argue that they exercised all appropriate caution in the deployment of the grenades, these assertions are based on disputed facts and must therefore and to that extent be dismissed for lack of appellate jurisdiction. We note only that, insofar as the use of stun grenades itself was excessive in light of clearly established law, this will be sufficient to establish liability regardless of whether the officers exercised appropriate care in handling their weapons.

[23] The district court based its decision to deny qualified immunity on this issue entirely on the facts surrounding the officers' encounters with Guizan. As noted above, the estate of Gonzalo Guizan is no longer a party to this litigation. Nevertheless, "we may affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied." *Sudler v. City of N.Y.,* 689 F.3d 159, 178 (2d Cir.2012) (internal quotation marks omitted), *cert. denied,* ____ U.S. ____, 133 S.Ct. 2777, 186 L.Ed.2d 219 (2013).

[24] Sweeney has, in turn, raised questions about Terebesi's credibility—a matter that is also for the jury to decide and thus beyond our jurisdiction in this interlocutory appeal. *See, e.g., McClellan v. Smith,* 439 F.3d 137, 148 (2d Cir.2006); *Cowan,* 352 F.3d at 761 ("[W]e will disregard any disputed facts or facts that contradict [the plaintiff's] version of events.").

[25] Brennan, Phillipson, and Torresso deployed the stun grenades at the rear of the house. Lee was responsible for "knocking and announcing" the police presence, while Edwards breached the door. J.A. 342-43. Sweeney and Weir were the first two officers inside the house; both fired shots.

[26] The defendants, relying on the testimony of Lee and Edwards, also assert that the officers in the front-entry team complied with the knock-and-announce requirement. The plaintiffs disputed this testimony, pointing to video and audio evidence suggesting that the officers waited only approximately five seconds after announcing their presence to breach the door. Because this argument depends on disputed issues of material fact, we lack jurisdiction to assess it.

[27] Although some officers testified to being told that Terebesi would shoot at them, Terebesi disputes their credibility.

[28] *United States v. Ramirez,* 523 U.S. 65, 69-71, 118 S.Ct. 992, 140 L.Ed.2d 191 (1998) (concluding that breaking a garage window for the purposes of pointing a gun inside constitutes an "entry", but finding that exigent circumstances justified dispensing with the knock-and-announce requirement); *see also Rush v. City of Mansfield,* 771 F.Supp.2d 827, 870 (N.D.Ohio 2011) (stating that the detonation of a stun grenade is itself an "unexpected and threatening intrusion" subject to the "knock-and-announce" requirement); *cf.* 18 U.S.C. § 3109 (setting out circumstances under which a federal officer "may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant").

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