Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim

Aaron Kimber
RIGHTIOUS SHOOTING, UNREASONABLE SEIZURE?
THE RELEVANCE OF AN OFFICER'S PRE-SEIZURE
CONDUCT IN AN EXCESSIVE FORCE CLAIM

Aaron Kimber*

One leading police scholar, Egon Bittner, has . . . proposed that it
makes sense to think of the police "as a mechanism for the distribution
of non-negotiably coercive force employed in accordance with the
dictates of an intuitive grasp of situational exigencies." The question
remains, however, as to how much force is justified and in what
situations.¹

INTRODUCTION

Because of the special relationship between the police and society at large,
law enforcement officers possess a unique right to impose upon those suspected
of violating the law burdens that would not be tolerated if imposed by private
citizens or other government actors.² Flowing from this privilege to interfere with
the freedom of some citizens is the right to use the force necessary to compel those
individuals to comply.³ However, this right to use force is limited by civil,⁴

* J.D. Candidate, 2005, College of William & Mary School of Law. The author would
like to thank his parents for their support and his wife, Mary Clare, for her encouragement.
¹ JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE
USE OF FORCE 10 (1993) (quoting Eigon Bittner, The Functions of the Police in
Modern Society 46 (1970)).
² See THE ROLE OF POLICE IN AMERICAN SOCIETY: A DOCUMENTARY HISTORY xxiv
(Bryan Vila & Cynthia Morris eds., 1999).
³ One study found that police officers used some form of force in 22% of arrests and that
2.1% involved the use of a weapon by the officer. U.S. DEPARTMENT OF JUSTICE, USE OF
FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 5-6 (1999). Although the use
of deadly force by police often catches headlines, its actual application is quite rare. For
instance, in 1998, police killed 367 people justifiably. JODI M. BROWN & PATRICK A.
LANGAN, PH.D., POLICING AND HOMICIDE, 1976-98: JUSTIFIABLE HOMICIDE BY POLICE,
POLICE OFFICERS MURDERED BY FELONS 3 (2001).
⁴ See DARRELL L. ROSS, CIVIL LIABILITY IN CRIMINAL JUSTICE (3d ed. 2003).
criminal, and constitutional provisions; among the constitutional restrictions is a prohibition against using excessive force.

The determination of whether a use of force is excessive cannot be made by looking at the application of physical force in a vacuum. Such uses of force do not occur spontaneously, but are the result of interactions between, at a minimum, an officer and the citizen. The actions the officer takes before the need to use force arises can be termed “pre-seizure” conduct, and have the potential to create the need for the subsequent application of physical force. For this reason, some argue that evidence of pre-seizure conduct is relevant in excessive force claims. Some U.S. circuit courts of appeals have determined that pre-seizure conduct is not part of the totality of the circumstances of the use of force and cannot be used to resolve the reasonableness of the use of force. Other circuits have looked at the same precedents and concluded that this conduct is relevant to that determination. In its decision in Billington v. Smith, the Ninth Circuit held that evidence of pre-seizure...
police conduct can be used in excessive force claims, but only where the alleged police conduct was not mere negligence and itself was a separate Fourth Amendment violation.

This Note will examine how evidence of pre-seizure police conduct has been, and should be, viewed by the courts in § 1983 civil rights actions for excessive force. Part I examines the Supreme Court precedents that shape the decisions of the lower courts. Although it has never decided the issue of the relevance of pre-seizure conduct, the Supreme Court has laid out several important principles for excessive force claims. The Court has held that the right to be free from such force is rooted in the Fourth Amendment and that the totality of the circumstances is to be examined. It has also noted that decisions by police officers occur under great pressure and without time for contemplation. Part II details the Ninth Circuit's decision in Billington and the prior Ninth Circuit cases that led to the adoption of the requirement of a separate, independent Fourth Amendment violation will be detailed. In Part III, attention will turn to the other circuits to see how they have dealt with this issue. The competing interests of the expansiveness of a totality of circumstances test and deference to decisions made by officers is apparent from the range of decisions, and most circuits seek to keep away from either extreme. Finally, in Part IV, this Note will argue that the Ninth Circuit should not use a requirement of a separate Fourth Amendment violation to limit the use of pre-seizure conduct; instead, it should rely on a narrowly applied totality of the circumstances test.

I. SUPREME COURT PRECEDENT

Plaintiffs who make use of pre-seizure police conduct are not arguing that the officer was not justified in using force at the moment he used it; they often agree that if only the circumstances immediately surrounding the need for and application of the force were looked at, then it would be judged constitutional. What they allege, instead, is that the officer's wrongful actions that occurred earlier in the incident created the need for the subsequent use of force, and, therefore, that use is unreasonable and excessive. Pre-seizure conduct can range from a violation of a department policy manual requiring the use of a flashlight at night or a claim that the officer should have used a less intrusive alternative, to the failure to obtain

12 See, e.g., Greenidge v. Ruffin, 927 F.2d 789 (4th Cir. 1991) (alleging that officer's violation of department policy manual by approaching car at night without a flashlight led to shooting).
13 For a look at possible liability issues associated with the use and non-use of so-called less-than-lethal weapons, see Neal Miller, Less-Than-Lethal Force Weaponry: Law
a proper warrant before entering a residence.\textsuperscript{14} What each of these actions has in common is that the plaintiff alleges that it caused, or greatly increased, the likelihood of the need for the officer to apply force against the individual.

In the context of arrests, the right not to have an officer use more force than is necessary to accomplish his/her task is grounded in the Fourth Amendment’s prohibition against unreasonable searches and seizures.\textsuperscript{15} As a result, each use of force must be evaluated for its reasonableness, and this evaluation must be made under the “totality of the circumstances.”\textsuperscript{16} The specific set of factors that fall within this test is not clear, and the circuits have split on whether pre-seizure police conduct leading up to the use of force is within its scope.

The most significant case in the area of use of deadly force by police officers is \textit{Tennessee v. Garner}.\textsuperscript{17} In this landmark case, the Supreme Court constitutionalized the prohibition against using deadly force to apprehend non-dangerous fleeing felons. The Court based its decision on the Fourth Amendment’s limitations on searches and seizures.\textsuperscript{18} The most important result of \textit{Garner} was not the rejection of the fleeing felon rule,\textsuperscript{19} but rather it was the declaration by the Court


\textsuperscript{14} See, e.g., Alexander, 29 F.3d at 1366.

\textsuperscript{15} U.S. CONST. amend. IV (“The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated ....”).


\textsuperscript{17} 471 U.S. 1 (1985). In \textit{Garner}, the father of a boy shot by police brought a federal civil rights suit against the police officer and the officer’s department. The officer shot the boy, who was fleeing the scene of a residential burglary, as he attempted to climb a fence in order to escape from the officer. The officer’s actions were clearly within department procedures and explicitly allowed under a Tennessee statute. \textit{Id.} at 5.

\textsuperscript{18} \textit{Id.} at 7.

\textsuperscript{19} Although the common law allowing the use of deadly force to apprehend fleeing felons was well settled, see WAYNE R. LAFAVE, \textit{SUBSTANTIVE CRIMINAL LAW} § 10.7(a) (2d ed. 2003), the Court’s decision was not as dramatic a shift in doctrine as it might sound. In its decision, the Court noted that a large number of states had prohibited or severely limited the use of deadly force in such circumstances through judicial opinions or statutory laws. \textit{Garner}, 471 U.S. at 15–18. Additionally, in deciding the case, the Court gave great weight to the fact that police departments across the country almost universally prohibited such a use of deadly force in their policy and procedure manuals, noting that:

\textit{Id.} at 19 (citations omitted).

Notwithstanding this, the effect that \textit{Garner} had on actual police shootings was greater than expected. One study found that police shootings declined 16% overall following the decision, and even states that already prohibited killing fleeing felons had the numbers drop
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."\(^{20}\) This holding has been construed to mean that every intentional police shooting is a Fourth Amendment seizure, although one could logically distinguish between instances where the police used deadly force solely for the purpose of apprehending a suspect from situations where the officer acted in self-defense.\(^{21}\)

In determining whether a use of force is reasonable, a court must balance the interest of the state in the intrusion with the interest of the individual against suffering the intrusion.\(^{22}\) The standard this is to be judged by is that of reasonableness,\(^{23}\) and consists not only of when the seizure is made, but also how it is carried out.\(^{24}\) In \textit{Garner}, the Court state that "[i]n each of these cases, the question [is] whether the totality of the circumstances justifie[s] a particular sort of search or seizure.\(^{25}\)" The courts have struggled to interpret just where the "totality of the circumstances" ends. Using this same phrase, some courts have held that only the facts at the very moment of the shooting matter, while others have decided that all of the events that contributed to the use of force are relevant.

Two other Supreme Court decisions play an important part in how courts evaluate pre-seizure police conduct. In both cases, the Court did not determine whether the seizure was reasonable, but rather whether one had taken place. In \textit{California v. Hodari D.},\(^{26}\) the fleeing suspect, pursued by a police officer, dropped a small rock of crack cocaine. He was subsequently tackled by the officer, the rock was recovered, and he was charged with its possession.\(^{27}\) The only issue before the Supreme Court was whether Hodari D. had been "seized" at the time

\(^{20}\) \textit{Garner}, 471 U.S. at 7.

\(^{21}\) See, e.g., Abraham v. Raso, 183 F.3d 279, 288 (3d Cir. 1999) (police officer shot and killed driver of vehicle coming at her); Romero v. Bd. of County Comm’rs, 60 F.3d 702, 704 (10th Cir. 1995), \textit{cert. denied}, 516 U.S. 1073 (1996) (officer shot man as he swung knife at officer); Carter v. Buscher, 973 F.2d 1328, 1331 (7th Cir. 1992) (suspect was shot after he shot at officers); Fraire v. City of Arlington, 957 F.2d 1268, 1274 n.17 (5th Cir.), \textit{cert. denied}, 506 U.S. 973 (1992) ("Regardless of whether [the officer] was attempting to, or at the very least intended to arrest Fraire, the Fourth Amendment prohibition against unreasonable searches and seizures is implicated . . . ").


\(^{23}\) \textit{Garner}, 471 U.S. at 8; Terry v. Ohio, 392 U.S. 1, 20–21 (1968).

\(^{24}\) \textit{Garner}, 471 U.S. at 8.

\(^{25}\) \textit{Id.} at 8–9.


\(^{27}\) \textit{Id.}
he dropped the drugs. The Court held that "[a]n arrest requires either physical force . . . or, where that is absent, submission to the assertion of authority." Circuit courts that reject evidence of pre-seizure conduct often point to Hodari D. for justification, reasoning that because the suspect was not seized at the time the conduct in question occurred, it is not relevant to the subsequent seizure.

Whereas Hodari D. involved the point where police action turned an intentional contact into a seizure, the case did not provide the Court the opportunity to address whether an unintentional action by the police can result in a seizure. The Supreme Court examined this issue in Brower v. County of Inyo. In Brower, the eluding suspect crashed into a roadblock set up by police and was killed. In the resulting § 1983 litigation, the Ninth Circuit affirmed the dismissal of the Fourth Amendment claim, holding that there had been no seizure of the deceased. The Supreme Court reversed that decision and instead held that the roadblock was set up for the purpose of seizing the suspect and accomplished that feat, even if by a different means than intended. "[T]he Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful government conduct." In order for a seizure to have occurred, there must be a "termination of . . . movement through means intentionally applied." Although this language makes it clear

28 The only facts leading to the necessary cause to give chase to the suspect was that he had been part of a group of youths huddled around a vehicle late in the evening who ran when they saw the police officers' car approaching. Id. at 622–23. The State conceded that the officer did not have reasonable suspicion to seize the suspect at the time of the chase. Id. at 624 n.1.

29 Id. at 626.

30 See infra notes 99–102, 139, 156–57 and accompanying text.


32 Id. at 594. The plaintiffs alleged that the roadblock was located on a curve in the road and consisted of an eighteen-wheeled tractor-trailer placed across the road, completely blocking it. Additionally, a police car was placed so that its headlights would blind the fleeing suspect and cause him to crash into the roadblock.

33 Id.

34 Id.

35 Id. at 596 (quoting Byars v. United States, 273 U.S. 28, 33 (1927)).

36 Id. at 597. To illustrate how this doctrine works, Justice Scalia used the following: [I]f 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 occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally
that the Court decided how intentional or unintentional conduct relates to whether there was a seizure in the first place and not whether that seizure was reasonable, in the context of forming a rule on whether to allow the use of pre-seizure action by police, some courts have construed it to bear on the latter issue.

Some have urged that a claim for excessive use of force should not be based on the Fourth Amendment, but rather should fall under the Due Process Clause of the Fourteenth Amendment. These claims have been based on the doctrine set forth in *Rochin v. California*, in which the Court concluded that certain bad police conduct can rise to the level of a due process violation. The Court did not give any test to determine when there has been a violation of the Due Process Clause; however, subsequent cases have focused on the Court’s statement that the officers’ conduct “shocks the conscience.”

Even though there is no obvious reason why a particular excessive use of force incident might be a violation of both the Fourth and Fourteenth Amendments, the Supreme Court made it explicitly clear, in *Graham v. Conner*, that all use of force claims involving a seizure are to be examined under the Fourth Amendment.

The Court found that there had been a seizure and remanded the case for a determination of whether the seizure had been reasonable. *Id.* at 599–600.

See infra pp. 671–73.


*Rochin*, 342 U.S. 165 (1952). In *Rochin*, the police entered the defendant’s residence on a tip that drugs were being sold there. They forced their way into the bedroom where the defendant was, and spotted two capsules that the defendant subsequently put in his mouth. The police attempted to extract them forcefully from his mouth and, failing, took him to the hospital where they had his stomach pumped.

The Court explained that the determination “is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges.” *Id.* at 170.


*Rochin*, 342 U.S. at 172.


For arguments on why the Fourth Amendment is more appropriate than the Due Process Clause, see Mark S. Bruder, Comment, *When Police Use Excessive Force: Choosing a Constitutional Threshold of Liability* in *Justice v. Dennis*, 62 ST. JOHN’S L. REV. 735, 742 (1988) (“[T]he Fourth Amendment reasonableness test provides a clear standard for reviewing a state officer’s use of force that adequately protects the individual’s rights throughout the arrest process without impeding the state’s interest in effectuating arrests.”).
and not the Due Process Clause. In *Graham*, the Court stated that there is no single generic standard governing use of force claims under § 1983; instead, a specific constitutional guarantee must be identified.\(^\ast\)

In its opinion in *Graham*, the Court added two important aspects of Fourth Amendment use of force analysis. First, courts should acknowledge that officers' decisions are made on the spot and in the heat of the moment:\(^\dagger\)

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. . . . 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.\(^\ddagger\)

This deference to an officer's judgment is a theme running throughout many of the opinions involving claims of excessive use of force.

Secondly, the Court emphasized that the reasonableness inquiry is an objective one and is not based on the officer's intentions. "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."\(^\S\) Because of this objective standard, some plaintiffs argue

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R. Wilson Freyermuth, *Rethinking Excessive Force*, 1987 DUKE L.J. 692, 693 ("[F]or most citizens the Fourth Amendment provides the primary source of constitutional protection from excessive force.").

\(^\ast\) The Court stated:

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. 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.

490 U.S. at 394 (citation omitted).

\(^\dagger\) For a look at some of the physiological changes that take place during high-stress police incidents and how they affect what should be considered reasonable actions, see Seth D. DuCharme, *The Search for Reasonableness in Use-of-Force Cases: Understanding the Effects of Stress on Perception and Performance*, 70 FORDHAM L. REV. 2515 (2002).

\(^\ddagger\) *Graham*, 490 U.S. at 396–97.

\(^\S\) *Id.* at 397.
that if the actions an officer took in responding to a situation created the need for the use of force, and were not an accepted way of dealing with the situation, the actions made the use of force objectively unreasonable.

The circuits only have these few decisions from the Supreme Court to guide them when confronted with the issue of pre-seizure conduct, and each has treated the issue differently. Some circuits rely on the expansive concept of the totality of the circumstances, reasoning that this conduct occurs close enough to the use of force to be included. Other circuits have focused on the deferential language of *Graham* to conclude that the choices an officer makes during the events leading up to the need to use force should not hinder the officer's ability to use such force. The Ninth Circuit has joined those circuits that allow the examination of an officer's pre-seizure conduct; however, it has placed several restraints that limit the in which the officer's pre-seizure conduct can be admitted. These limits ensure that only the most egregious instances of police misconduct are tied to the subsequent use of force.

II. *BILLINGTON v. SMITH* AND EARLIER NINTH CIRCUIT DECISIONS

Over a series of decisions, the Ninth Circuit created a doctrine that allows pre-seizure police conduct to be examined when determining the reasonableness of a subsequent use of force. In *Billington v. Smith*, however, it limited such inquiry to instances where that conduct intentionally or recklessly provokes a violent confrontation and itself arises to an independent Fourth Amendment violation. This decision recognizes that police officers should not have free reign to create situations that are highly likely to lead to violence, but it also limits the liability for such conduct to only the most outrageous instances. While this quest for balance is appropriate, the specific formulation the court created does not adequately reach it. The court was very conscientious in its examination of the proper mental state required before an officer's actions could be considered under the Fourth Amendment; however, the court seemed to apply blindly one of its early pre-seizure precedents when deciding that there also must be an independent Fourth Amendment violation.

50 *See infra* notes 141–66 and accompanying text (citing case law from the Tenth, First, and Third Circuits).
51 *See infra* notes 103–34 and accompanying text (discussing case law from the Eighth, Sixth, and Fourth Circuits).
52 *See discussion infra* Part II.
53 292 F.3d 1177 (9th Cir. 2002).
54 *Id.* at 1189.
56 *See infra* notes 94–97 and accompanying text.
The bedrock case in the Ninth Circuit authorizing the examination of pre-seizure police conduct to determine the reasonableness of subsequent use of force is *Alexander v. City and County of San Francisco.*⁵⁷ Like many of these cases, the events leading to the eventual use of deadly force against the suspect started unthreateningly. A citizen reported to the health department that there was sewage leaking from the suspect’s residence.⁵⁸ After numerous attempts to contact the resident,⁵⁹ the health department obtained an inspection warrant that authorized forcible entry.⁶⁰ Upon their attempt to serve the warrant, the resident threatened to “get my gun and use it.”⁶¹ The police officer accompanying the public health personnel called for more officers, and soon thereafter hostage negotiators and a tactical team arrived.⁶² After failed attempts to get the resident to surrender, the tactical team forced entry.⁶³ The resident confronted the officers with a handgun. Officers ordered him to put it down and then shot him after he refused.⁶⁴

The plaintiff (the executor of the deceased’s estate) brought suit alleging, inter alia, Fourth Amendment violations for both the entry by the tactical team based on the inspection warrant⁶⁵ and the use of deadly force. The excessive force claim was premised on the theory that the use of the tactical team was unreasonable under the circumstances and resulted in the seizure of the deceased.⁶⁶ Thus, the facts surrounding the “justifiableness” of the shooting itself were irrelevant to the

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⁵⁷ 29 F.3d 1355 (9th Cir. 1994).
⁵⁸ *Id.* at 1357.
⁵⁹ Including an attempted initial visit, four summons to an abatement hearing, two more letters requesting to have him schedule an inspection appointment, a letter following the issuance of a non-forcible entry inspection warrant, a visit to serve the warrant during which the resident did not respond, and a final letter advising that the forcible entry warrant had been issued and providing the date on which it would be served. *Id.* at 1357–58.
⁶⁰ The warrant was issued “for the purpose of discovering if the subject property complies with the Health, Building, Housing, Plumbing, Electrical, City Planning and Fire Codes, and any other applicable code regulations.” *Id.* at 1358 (quoting forcible entry warrant).
⁶¹ *Id.* (quoting the resident, Quade).
⁶² *Id.*
⁶³ *Id.* at 1358.
⁶⁴ *Id.* The resident responded to the order with, “I told you I was going to use it,” and then pulled the trigger; however, the gun misfired. *Id.*
⁶⁵ The court reversed summary judgment against the plaintiff for the claim resulting from the entry. It held that the entry was illegal if “the officers’ primary purpose in storming the house was to arrest [the deceased] rather than to assist the health officials in executing the inspection warrant.” *Id.* at 1360.
⁶⁶ *Id.* at 1366. The court noted that, “[t]he causal link between the alleged wrong-doing on which plaintiff’s case depends (entry for the purpose of making an arrest) and the injury suffered (not arrest but death) is somewhat more subtle here than in the typical case.” *Id.* at 1365. The plaintiff’s reasoning followed that used in *Brower,* 489 U.S. 593; see *supra* notes 31–37 and accompanying text, that the police intended to seize the resident when they made entry, even though they did not intend to do so through deadly force.
Because of these unique circumstances, the entry into the house (which was illegal) was not just some event that led to the use of force, but was an integral part of the seizure itself. Therefore, the pre-seizure conduct was not of the type that is typically sought by plaintiffs to be examined with the actual seizure itself. As a result, the uniqueness of this case would cloud future decisions.

Soon after Alexander, the Ninth Circuit again decided a case involving pre-seizure police conduct. In Scott v. Henrich, the issue was much more typical of pre-seizure conduct cases. The officers were accused of responding to a “shots fired” call improperly, leading to the shooting death of the suspect. However, the court side-stepped the issue of whether pre-seizure conduct was relevant to the reasonableness of the shooting by characterizing the plaintiff’s argument as a claim that reasonableness requires the use of the least intrusive alternative. The court was able to dismiss quickly the claim on this theory by relying on Supreme Court decisions holding that reasonableness does not require the use of the least intrusive means.

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67 Alexander, 29 F.3d at 1366 (“Plaintiff does not argue that once [the deceased] pointed his gun at the officers and pulled the trigger, the officers used unreasonable force in shooting to kill.”).
69 After arriving at the scene, the officers were told that the suspect had entered a two-story apartment building. With guns drawn, they banged and kicked the door, identified themselves, and demanded that the suspect open the door. Id. at 914. The plaintiff (the deceased’s wife) claimed that these actions were against both the department’s policies and contemporary police practices and unreasonably created a risk of an armed confrontation. Id. at 917 (Norris, J., dissenting).
70 The suspect opened the door holding a rifle and then pointed it at the officers who fired at him. One shot hit the suspect, killing him. Id. at 914.
71 Id. at 915. The dissent disagreed with this characterization, instead stating the plaintiff was specifically claiming that the actions unreasonably created the need for force:

... She does not argue, as the majority says, that “the officers should have used alternative measures,” but rather that the alternative they did choose was objectively unreasonable.

Id. at 917 (Norris, J., dissenting).
72 Id. at 915. See Illinois v. Lafayette, 462 U.S. 640, 647 (1983) (holding that the search of a bag incident to incarceration was valid even though sealing it in a container would have also served goal of protecting the contents from theft or loss); Cady v. Dombrowski, 413 U.S. 433, 447 (1973) (holding that removal of a handgun from the trunk of a car for purposes
The court again side-stepped the issue in *Reynolds v. County of San Diego*.\(^7\) In *Reynolds*, a law enforcement officer responded to a call of a man menacing people with a knife.\(^7\) After contacting the suspect and ordering him to drop the knife, the officer approached him from behind.\(^7\) The suspect grabbed the knife and began to turn toward the officer, swinging the knife around at him.\(^7\) The officer fired one shot into the suspect’s neck, killing him.\(^7\) The plaintiff alleged that the officer violated proper police procedures by approaching the suspect while the suspect had a knife\(^7\) and by causing the suspect to turn toward the officer by pushing his gun into the back of the suspect’s neck.\(^7\) The court held that the allegations did not raise a genuine issue of material fact because the mere testimony that another officer would have dealt with the situation differently does not make the actions taken unreasonable.\(^8\) Instead, the officer’s actions have to be looked at without regard to alternatives to determine reasonableness.

Besides rejecting both the use of the least intrusive means inquiry and testimony that other officers would have acted differently, the Ninth Circuit also limits the examination of pre-seizure conduct by including the requirement of provocation. In *Duran v. City of Maywood*,\(^8\) the officers were accused of improperly responding to a “loud music” and “shots fired” call, resulting in the shooting death of the suspect.\(^8\) The court held that a jury instruction based on of safekeeping was not a violation of the Fourth Amendment even though police could have posted an officer to guard the vehicle). See also Strossen, *supra* note 22, at 1221–32 (analyzing Supreme Court cases rejecting the least intrusive alternative test for Fourth Amendment reasonableness).

\(^7\) 84 F.3d 1162 (9th Cir. 1996).
\(^7\) Id. at 1164.
\(^7\) Id. at 1164–65.
\(^7\) Id.
\(^7\) Id.
\(^8\) Id. at 1170. An expert for the plaintiff testified that the officer “used ‘reckless’ tactics to restrain [the suspect]. [He] concluded that [the officer] should have called for back-up, talked to [the suspect] in calm tones, and refrained from approaching [the suspect] while he had the knife.”

\(^7\) Id. at 1168. As the suspect turned toward the officer, the officer attempted to fire his weapon, but it would not fire. He then pulled slightly back and fired one round into the back of the suspect’s neck. *Id.* at 1165. A criminologist testified for the plaintiff that the likely reason that the first attempt failed was that the gun was pressed too hard into the neck of the suspect at the time. He testified that his tests showed that eight pounds of force was required to make the gun inoperable in such a situation. He then theorized that the suspect’s sudden turn was a response to this pressure on his neck. *Id.* at 1169.

\(^8\) Id. at 1170.

\(^8\) 221 F.3d 1127 (9th Cir. 2000).

\(^8\) The officers arrived on the scene and, with guns drawn, approached the garage where the music was coming from. They heard someone “rack” a gun and saw the suspect emerge with a weapon. In response to commands to drop the gun, the suspect instead pointed it at the officers, one of whom shot the suspect. *Id.* at 1129–30.
Alexander was inappropriate because "nothing about [the officers'] actions should have provoked an armed response." The requirement of provocation sets a higher bar for plaintiffs and protects officers whose mistakes are tactical in nature.

The Ninth Circuit took the opportunity to survey both its own and other circuits' decisions regarding the use of pre-seizure police conduct and formulated a distinct doctrine on the subject in Billington v. Smith. Its resulting holding allows such conduct to be considered only where the officer "intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation." The officer in Billington shot the suspect during a violent hand-to-hand fight during which the suspect was attempting to gain control of the officer’s gun. Witnesses largely agreed to the details of the struggle and that the officer was losing the fight; however, the plaintiff claimed that the officer created the dangerous situation by disregarding proper tactics and procedures.

The court declined to follow either the course suggested by the plaintiff — adoption of the Tenth Circuit’s approach that allows the use of pre-seizure conduct that is reckless or deliberate — or that suggested by the defendant — prohibition of the use of pre-seizure conduct. Instead, the court looked at its previous decisions in Scott and Reynolds. The court noted that these decisions encompassed several

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83 The plaintiff alleged that the officers made a “stealth” approach with guns drawn and that this increased the likelihood that an armed confrontation would occur. Id. at 1131.
84 Id.
85 292 F.3d 1177 (9th Cir. 2002).
86 Id. at 1189.
87 Id. at 1181. The officer had been returning home with his wife and daughter after working off-duty as a security guard when the suspect, driving recklessly, passed him. The officer pursued the suspect until the suspect’s car crashed. The officer then approached the car intending to render first aid, but found the suspect unhurt and uncooperative. The suspect grabbed the officer and pulled himself out of the car through the window. A fight ensued during which the suspect kicked the officer in the groin, hit him in the head, and attempted to disarm the officer. The officer was dazed from a blow to the head and felt as though he was losing control of his weapon and shot the suspect once. Id. at 1180–81.
88 Id. at 1182.
89 The plaintiff claimed seven different errors:
1. He chose to initiate the traffic stop, even though he was in plainclothes with his family;
2. He didn’t tell his dispatcher where he was;
3. His hands were full, with his gun and flashlight;
4. He didn’t wear his duty belt, with spray, handcuffs, holster and baton;
5. He woke [the suspect] up before back-up arrived;
6. He told his daughter to bring the handcuffs to him; and
7. He didn’t make his gun incapable of shooting.
Id. at 1186.
90 Id. at 1188.
important considerations that must be kept in mind. First, Scott stood for the idea that police officers are not required to use the least intrusive alternative to deal with situations they face, but must only act "within that range of conduct we identify as reasonable." Second, officers are forced to make split-second decisions that might be made differently by different officers; however, that fact alone does not make that decision "imprudent, inappropriate, or even reckless." Finally, the court relied on Duran for the proposition that pre-seizure conduct is only admissible if the police provoked an armed response.

The court's holding that the pre-seizure conduct in question must rise to the level of an independent Fourth Amendment violation obviously derived from the court's view of the holding in Alexander, but the court gave little justification for why the unusual circumstances in Alexander should be controlling for all cases. None of the other Ninth Circuit decisions focused on the fact that there had been an independent Fourth Amendment violation, and the court in Billington spent the most time discussing the need for more than mere negligence on the part of the officer. Instead of discussing why the presence of an independent Fourth Amendment violation is necessary, the court simply noted that the court in Alexander found this to be important and adopted it as an indispensable pre-requisite. It did not give enough weight to the fact that the plaintiff's claim of excessive force in Alexander was founded on the entry, not on the shooting. In other words, the excessive force was the method of entry, not the shooting, though both led to the death of the resident. Firing the shots caused his death, but the entry violated his rights. In fact, the court did not hold that the claim for excessive force was premised on an illegal entry, but rather just the opposite, that the claim depended on the entry being legal:

The force which was applied must be balanced against the need for that force: it is the need for force which is at the heart of the consideration of the Graham factors. If the jury were to find that the officers entered in order to help the inspectors inspect — as defendants contend on appeal — then the jury may also conclude that the force used (deployment of a SWAT team) was excessive in relation to the purpose for which it was used (ensuring the immediate execution of a forcible entry inspection warrant). On the other hand, if the jury were to conclude that

91 Id. at 1188–89 (quoting Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994)).
92 Id. at 1189.
93 Id.
94 See id. at 1190–91.
95 Id. at 1189.
96 Alexander, 29 F.3d at 1366.
the officers entered for the purpose of arresting [the resident], they may conclude that storming the house was in fact commensurate with need (arresting a man who had threatened to shoot anyone who came into his house), and hence that the force was reasonable.97

In other words, if the entry was for the purpose of assisting the health department employees (valid under the inspection warrant), then the officers might have used excessive force; however, if it was for the purpose of arresting the resident (not a valid reason for entry under the inspection warrant), then the amount of force was probably reasonable.

This requirement severely limits the instances in which a plaintiff will be able to use pre-seizure police conduct. Although it might be good policy to limit such use, this method is arbitrary because it focuses on how one can categorize the pre-seizure encounter, rather than looking at how that conduct affects the eventual use of force.

III. DECISIONS BY OTHER U.S. CIRCUIT COURTS OF APPEALS

Most of the circuits have also considered whether pre-seizure conduct by police officers should be used to determine the reasonableness of a use of force. The Fourth, Sixth, and Eighth Circuits have held that pre-seizure conduct is irrelevant to the Fourth Amendment analysis.98 These circuits focus on the language in Graham calling for acknowledgment that officers make decisions under great pressure and time constraints, and, as a result, they interpret the “totality of circumstances” narrowly.99 The First, Third, and Tenth Circuits have focused on the “totality” part of the “totality of the circumstances,” and each has held that this evidence is relevant and should be admitted.100 The Fifth Circuit has held that conduct that is negligent in nature should be excluded, but has not decided the issue of whether police actions that rise above mere negligence are relevant.101 Finally, the Seventh Circuit has declared that pre-seizure evidence is irrelevant, but subsequent decisions have shown that the court is willing to use several devices to lessen the impact of this ruling on plaintiffs.102 The next part of this Note will examine in more detail how these factors have affected the circuits’ decisions in pre-seizure cases.

97 Id. at 1367.
98 See infra notes 103–35 and accompanying text.
99 See infra notes 103–35 and accompanying text.
100 See infra notes 141–66 and accompanying text.
101 See infra notes 135–40 and accompanying text.
102 See infra notes 167–83 and accompanying text.
Among the circuits that do not allow pre-seizure police conduct to be used in the determination of reasonableness, the Eighth Circuit has addressed the issue the most. In *Cole v. Bone*, the court based its reasoning on *Hodari D.* and *Brower*. Because the actions of some of the police in question were not directly part of the actual shooting, the court stated that their actions were irrelevant to the determination of reasonableness. Only the actions of the officer who shot the suspect were examined, and these were analyzed with *Graham*’s sensitivity to the pressures faced by an officer in a stressful situation. Even though this officer also took part in some of the questionable activities preceding the actual shooting, the court ignored this fact in determining that the use of deadly force was reasonable.

The Eighth Circuit confirmed *Cole*’s position on the use of pre-seizure evidence in *Schulz v. Long*. In *Schulz*, the trial court prohibited the plaintiff from offering “evidence that: (a) the officers . . . created the need to use force; (b) they should have responded to the situation” differently, “and (c) they should have used a lesser degree of force.” The court of appeals affirmed the trial court’s ruling, holding

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103 993 F.2d 1328 (8th Cir. 1993).
104 The incident involved a high speed pursuit of the suspect, who was driving an eighteen-wheel tractor-trailer. After the suspect refused to pull over, the police attempted a “rolling roadblock.” When that failed, they shot out the tires with a shotgun, which also failed to stop the truck. Finally, after the truck had run numerous vehicles off the road, an officer shot at the front of the truck and killed the suspect. *Id.* at 1330–31.
105 In addition to the officer who fired the fatal shot, other officers involved in the pursuit were defendants. The court held that because they were not part of the actual seizure, they were entitled to summary judgment. *Id.* at 1333.
106 “The Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general. Consequently, we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment.” *Id.* (citations omitted).
107 *Id.*
108 The officer who fired the fatal shot also took part in the rolling roadblock and was directly in front of the truck throughout the entire chase. *Id.* at 1330–31.
109 *Id.* at 1333–34.
110 44 F.3d 643 (8th Cir. 1995).
111 Two officers responded to a report of the suspect destroying things in his basement bedroom. He had erected a barrier at the foot of the stairway leading into his bedroom. Officers engaged him in a conversation for some time. During this conversation the suspect had a hatchet that he picked up and put down several times. When one of the officers removed the hatchet while the suspect was out of sight, the suspect became upset and began throwing items at the officers. They then attempted to arrest him by scaling the barricade, but one officer became entangled. The suspect then returned with an ax and advanced on the entangled officer. The second officer fired his weapon, injuring the suspect. *Id.* at 645–46.
that this evidence was irrelevant to whether the officers seized the suspect and whether that seizure was reasonable.\(^\text{113}\)

Citing decisions from the Tenth, Seventh, Fifth, and Fourth Circuits, the court explicitly extended *Cole* to situations in which the officers themselves created the need for the use of force.\(^\text{114}\) In these decisions, the court drew a narrow picture of the totality of the circumstances. That picture is so narrow, in fact, that in *Cole*, evidence of police conduct intended to lead to a seizure of the suspect (the rolling roadblock, shooting out the tires, etc.) was inadmissible because the actual action that seized the suspect was the shot that killed him. These decisions also illustrate the deference that numerous courts are willing to give to officers' actions. Although in *Graham* the Supreme Court admonished the lower courts that there should be such deference,\(^\text{115}\) it is clear that some courts need no such directive from the high Court.

Although *Cole* and *Schulz* would seem to stand as strong barriers to plaintiffs who attempt to introduce evidence of pre-seizure police misconduct, the Eighth Circuit opened the door for plaintiffs in *Ludwig v. Anderson*.\(^\text{116}\) In this case, the police officers responded to a report of a mentally disturbed person. During the course of the melee that followed, officers hit the man with a patrol car, maced him, an officer shot him with his sidearm, and finally another officer shot him with a shotgun.\(^\text{117}\) The court cited *Cole* and *Schulz* for their holdings that “in determining the issue of Fourth Amendment reasonableness, the district court should scrutinize only the seizure or seizures themselves, not the events leading to them.”\(^\text{118}\) However, the court went on to find that the section of the department policy manual outlining the proper procedures for dealing with “mental cases” was relevant to the substantive determination of reasonableness.\(^\text{119}\)

The Fourth Circuit has addressed the issue of pre-seizure police conduct only briefly, but determined that it should not be allowed to influence the determination of reasonableness. In *Greenidge v. Ruffin*,\(^\text{120}\) the focus again was on *Graham*'s

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\(^{113}\) *Id.* at 648–49.

\(^{114}\) *Id.* at 649 (“[E]vidence that [the officers] created the need to use force by their actions prior to the moment of seizure is irrelevant . . . .”).

\(^{115}\) *See supra* pp. 665–66.

\(^{116}\) 54 F.3d 465 (8th Cir. 1995).

\(^{117}\) *Id.* at 467–69. The initial dispatch was to investigate “an emotionally disturbed person [who has been] sleeping behind Wendy’s for the past several days. The person talks crazy stuff about Vietnam. Comp[laining] is concerned about the kids in the area.” *Id.* at 467. The man was initially cooperative, but became agitated as more officers arrived. After pulling a knife he fled the scene and one officer attempted to stop him by using a squad car. He was confronted again and maced; he then fled and was shot by two officers as he ran away. *Id.* at 467–69.

\(^{118}\) *Id.* at 471.

\(^{119}\) *Id.* at 472 (“Although these ‘police department guidelines do not create a constitutional right,’ they are relevant to the analysis of constitutionally excessive force.”).

\(^{120}\) 927 F.2d 789 (4th Cir. 1991). The incident leading to this case involved an attempt to
warning about second-guessing the decisions made by police officers from the safety of an office.\textsuperscript{121} The court defined the conduct in question as occurring "at the moment" of the use of force.\textsuperscript{122} \textit{Greenidge} was affirmed in \textit{Elliott v. Leavitt},\textsuperscript{123} in which the court found the officer's failure to search the suspect adequately\textsuperscript{124} "irrelevant to the excessive force inquiry."\textsuperscript{125} Here again, the warning of \textit{Graham} was given effect by narrowing the definition of the totality of circumstances, which resulted in the exclusion of pre-seizure conduct evidence.

The Sixth Circuit's leading case on the use of pre-seizure evidence is \textit{Dickerson v. McClellan}.\textsuperscript{126} In this case, the plaintiff alleged that officers violated the suspect's Fourth Amendment rights twice, first by entering the house unannounced and without a warrant, and second by using excessive force.\textsuperscript{127} The court adopted a "segmented" analysis and looked at the two possible violations separately to determine the reasonableness of each action even though they both were premised on the Fourth Amendment.\textsuperscript{128} Any violation by the officers in entering the residence without announcing their presence was to have no bearing on the subsequent use of deadly force.\textsuperscript{129}

The issue before the court concerned whether the officers had qualified immunity for the two claims. The court held that they did for the claim arising out of entering the residence, but that the court did not have jurisdiction to decide the issue for the use of force claim because there were material facts in dispute. \textit{Id.} at 1165.

\textit{Id.} at 791-92.

\textit{Id.} at 792 ("Applying this reading to the present case, the \textit{Graham} decision contradicts appellants' argument that, in determining reasonableness, the chain of events ought to be traced backward to the officer's misconduct of failing to comply with the standard police procedures for nighttime prostitution arrests.").


The suspect was arrested for driving while intoxicated, was handcuffed, searched, and placed in the front passenger seat of the patrol car. He subsequently was able to obtain a handgun that had not been found on him and maneuver into a position to aim the weapon at two officers standing outside the car. The officers ordered him to drop the weapon and shot him when he failed to comply. \textit{Id.} at 641-42.

\textit{Id.} at 643.

101 F.3d 1151 (6th Cir. 1996).

\textit{Id.} at 1154. The officers responded to a "shots fired" call, arrived on scene, found the front door to the house open, and heard a male yelling incoherently inside. They entered the house and heard the male threaten to harm someone. The suspect then came to the front of the house holding a handgun. The officers believed that he was about to use it on them so they both fired, killing him. \textit{Id.} at 1154-55.

\textit{Id.} at 1162.

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The court refined the holding of *Dickerson* in *Claybrook v. Birchwell*. In this case, officers were involved in a gun battle that consisted of two distinct volleys. The court noted that, as compared to *Dickerson*, "the evening's events are not so easily divided." Nevertheless, it then divided the events into three segments and concluded that the latter two were relevant to the reasonableness of the use of force. The court allowed the separate uses of force to be used to determine if the seizure ultimately was reasonable, even though the suspect was not seized until the second volley; however, the court would not allow the officers' actions leading up to the beginning of the shooting to be examined. For the court, although the totality of the circumstances was not so narrow as to include only the shots that actually struck the suspect, it was still not expansive enough to include the actions that occurred only moments before the shooting began.

Like the Fourth Circuit, the Fifth Circuit has addressed this issue only briefly. In *Young v. City of Killeen* the court held that an officer's failure to adhere to proper police procedures could not be considered. However, the court consistently referred to the fact that the alleged improper conduct by the officer was

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130 274 F.3d 1098 (6th Cir. 2001).
131 The events began with the suspect standing guard with a shotgun outside a business (that was also a front for a gambling operation) while his daughter closed up. Undercover officers saw the suspect and attempted to surveil him discreetly; however, the suspect noticed the officers and approached menacingly. A gunfight resulted and the suspect retreated around the building in order to ambush the officers. The officers noticed the suspect and fired, killing him. *Id.* at 1100–01.
132 *Id.* at 1104.
133 The segments were: “first, the officers’ approach and confrontation of [the suspect]; second, the initial firefight . . . ; and third, the shots fired after [the suspect’s] move to a position behind the concrete steps.” *Id.* at 1105.
134 *Id.* The plaintiff claimed that the officers’ approach of the suspect was a violation of department policy regarding undercover officers and contributed to the need to use force. The court stated that “any unreasonableness of their actions at that point may not weigh in consideration of the use of excessive force.” *Id.*
135 775 F.2d 1349 (5th Cir. 1985).
136 The officer blocked the suspect from fleeing in his vehicle by blocking it with his own vehicle; he then approached the suspect’s vehicle and ordered both its occupants out. The suspect reached for something under the dash and was shot. The plaintiff claimed that the officer violated “good police procedure” in six ways:

1. failure to use his radio;
2. failure to utilize a back-up unit;
3. dangerous placement of his patrol car in a “cut off” maneuver;
4. ordering the two men to exit their car rather than issuing an immobilization command to remain in the car with their hands in plain view;
5. increasing the risk of an incident by having two suspects getting out of a car;
6. abandoning a covered position and advancing into the open, where the odds of overreacting would be greater.

*Id.* at 1351.
mere negligence. 137 The court affirmed that negligent acts by an officer 138 prior to the use of force are not relevant in Fraire v. City of Arlington. 139 Citing Young, the court stated that "even a negligent departure from established police procedure does not necessarily signal violation of constitutional protections." 140 Whether the Fourth Circuit would still exclude evidence of an officer's pre-seizure conduct if it rose to a level higher than negligence is not known.

Unlike the circuits that limit the scope of the totality of the circumstances inquiry to exclude pre-seizure conduct, those that allow evidence of such conduct heed the call in Garner to look at the totality of the circumstances with an emphasis on totality. To these courts, this means that actions of officers that contribute to the need to use force cannot be ignored even though they took place early in the incident, perhaps even before contact occurred between the police and the suspect.

The Tenth Circuit has a fairly well-developed line of cases in which it allows pre-seizure conduct to be used if it is "immediately connected to" the use of force. This doctrine was first announced in Bella v. Chamberlain, 141 a case involving a movie-plot-ready hijacking, prison escape, and helicopter chase. 142 The court focused on the Supreme Court's decision in Hodari D. and concluded that the shots fired at the helicopter did not result in a seizure; 143 furthermore, their occurrence was too remote from when the actual seizure took place. 144 The court, citing Graham, stated that "[o]bviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is

137 Id. at 1353 ("The only fault found against [the officer] was his negligence in creating a situation where the danger of such a mistake would exist.").
138 The Supreme Court held that the Due Process Clause is not violated by merely negligent acts in Daniels v. Williams, 474 U.S. 327 (1986). The Court held that "[n]ot only does the word 'deprive' in the Due Process Clause connote more than a negligent act, but we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.'" Id. at 330. The Court further noted that the Constitution "deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." Id. at 332.
140 Id. at 1276.
142 The plaintiff was the owner and pilot for a charter helicopter company. He picked up a customer who said she wanted to view some real estate; after takeoff, however, she pulled a gun and forced him to fly to a prison, land, and take three inmates away. A United States Customs Service Blackhawk helicopter pursued the fleeing helicopter. During the chase, shots were fired by a Customs Service officer at the other helicopter and the Blackhawk attempted to control the movement of the fleeing helicopter by hovering above it several times. Id. at 1253.
143 Id. at 1256.
144 Id. The officer shot at the helicopter an hour before the plaintiff and his captor were apprehended.
Because in *Bella* the alleged conduct was so attenuated from the actual seizure, the court's holding that only those actions immediately connected to the seizure could be used gave little guidance as to just what would be deemed relevant.

The Tenth Circuit, however, further refined its "immediately connected to" doctrine in several cases. In *Romero v. Board of County Commissioners*, the court held that an officer's failure to handcuff a suspected intoxicated driver was not relevant to the reasonableness of the officer's subsequent use of deadly force because it was not immediately connected to the use of force. In a case decided the same day as *Romero*, the court allowed a claim to go forward that was based on an allegation that officers "precipitated the use of deadly force by their own actions during the course of the encounter immediately prior to the shooting." The court construed *Bella* to allow such claims because the "[d]efendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." By characterizing the officers' conduct prior to the shooting as occurring "during" the seizure, this case was easy to decide. The Tenth Circuit has limited the reach of these prior decisions through a critical examination of the specific facts of each case. In *Medina v. Cram*, the officers were again accused of "creating the need to use deadly force"; however, the court still granted them qualified immunity. The court acknowledged its previous decisions and the necessity to examine acts that were immediately connected to the use of force, but concluded that the proper state of mind was not present in the officers. Specifically, the officers' actions did not rise to the level of reckless or deliberate

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145 Id. at 1256 n.7.
146 60 F.3d 702 (10th Cir. 1995), cert. denied, 516 U.S. 1073 (1996).
147 Id. at 705. The officer, a deputy from an adjoining county where the incident occurred, did not handcuff the suspect because he was waiting on one of that county's deputies to respond to make the arrest and the suspect did not appear threatening or dangerous.
148 Sevier v. City of Lawrence, 60 F.3d 695 (10th Cir. 1995).
149 Id. at 701. The allegation was that the officers responded knowing that the deceased was "distraught over problems he was having with his girlfriend" and was armed with a knife and that they did not gather more information before confronting him in his bedroom with guns drawn. Id. at 701 n.10.
150 Id. at 699.
151 252 F.3d 1124 (10th Cir. 2001).
152 Id. at 1132. During a standoff with the police during which the defendant claimed to possess a gun, the defendant left his house with one hand in a cup and one carrying a staple gun wrapped with a towel. A police dog was released twice, and during the second attack the defendant fell to the ground revealing the staple gun. The officers believed that it was a handgun and shot him when he turned toward several officers. At the time of the second dog release, one of the officers had approached the defendant from behind in order to attempt to knock him down. Id. at 1127.
153 Id. at 1133.
154 Id. at 1132.
conduct. Additionally, the court was reluctant to say that the fact that an officer left "cover" was relevant to anything other than whether his life was truly in danger, and was unwilling to allow reasonableness to include the requirement that officers use the least intrusive means of dealing with the situation.

The Tenth Circuit demonstrates that there are several ways for a court to limit the reach of a doctrine allowing the use of pre-seizure conduct. The first is for the court to find that the alleged misconduct either occurred too far in advance of the use of force, or that its connection to the use was too tenuous. This is the method the court used in Bella, and the basis for its "immediately connected to" test. Second, the court can focus on the actions of the police officer and determine whether they rise above the level of recklessness. By characterizing the officer's actions as merely negligent, the court is able to ensure that the actions will not be scrutinized even though they took place in conjunction with the use of force or directly led to the need for its application.

The First Circuit also allows for the use of pre-seizure evidence to determine if the use of force was reasonable. The leading case for this circuit is St. Hilaire v. City of Laconia. In this case, the court examined Brower v. Inyo and California v. Hodari D. and concluded that these decisions implied that pre-seizure conduct is relevant to a determination of reasonableness. The Supreme Court's statement in Brower that it is "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" caused

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155 Id.
156 Id.
157 Id. at 1133. The court based this conclusion on Graham's admonition not to evaluate the officer's conduct from the perspective of 20/20 hindsight and to remember that officers are required to make split-second decisions.
158 Bella, 24 F.3d at 1256.
159 Medina, 252 F.3d at 1124.
160 71 F.3d 20 (1st Cir. 1995), cert. denied, 518 U.S. 1017 (1996). Officers set up an arrest raid on the suspect's business, but had to change their plan when the suspect emerged and got into his car before the raid could start. One of the officers, dressed in plain clothes, rushed the car. The suspect appeared to reach for a gun and the officer shot him. The plaintiff alleged that the officer never identified himself as a police officer, though the defendant disputed this. Id. at 22–23.
161 Id. at 26. The court's discussion of Hodari D. is particularly compelling. It noted that the issue in that case was whether the defendant had been seized and not whether the seizure was reasonable:

We do not read this case as forbidding courts from examining circumstances leading up to a seizure, once it is established that there has been a seizure. We understand Hodari to hold that the Fourth Amendment does not come into play unless there has been a seizure, not that it does not come into play until there has been a seizure.

the court to conclude that the actions of the officers were relevant to the reasonableness of the arrest because the officers took the actions with the intent of seizing the suspect. 163

The Third Circuit reached a similar result, although based on slightly different reasoning. In Abraham v. Raso, 164 the court dismissed the idea that Hodari D. stands for the proposition that events prior to the actual seizure cannot be used in the reasonableness inquiry, and noted the absurdity that would result if this was taken to the logical extreme that no events prior to the bullet actually hitting the plaintiff (not even the pull of the trigger) could be used. 165 As an added justification, the court focused on the “totality of the circumstances” language in Garner and Graham, which it interpreted broadly. 166

The Seventh Circuit has been inconsistent in how it allows pre-seizure conduct to be utilized by a plaintiff. In Tom v. Voida, 167 the court was faced with a series of possible Fourth Amendment violations that ultimately resulted in the shooting death of the suspect by an officer. 168 Each event giving rise to a possible Fourth Amendment issue was analyzed separately; the court determined that, because the initial contact did not constitute a seizure, its reasonableness did not affect the reasonableness of the seizure that subsequently occurred. 169 The court reaffirmed this focus on the specific facts surrounding the actions taken only during the seizure itself in Carter v. Buscher. 170 However, the court noted that the possibility existed that such conduct might become relevant if it rose to the level of a separate constitutional violation. 171

163 St. Hilaire, 71 F.3d at 26.
164 183 F.3d 279 (3d Cir. 1999).
165 Id. at 291.
166 “'Totality' is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force.” Id.
167 963 F.2d 952 (7th Cir. 1992).
168 The court succinctly described the chain of events as follows:
This case began when a police officer benevolently approached an eighteen-year-old whom she did not suspect of any wrongdoing. For various reasons, this innocent encounter progressively escalated into a leisurely pursuit on foot, a rough-and-tumble chase, an attempted handcuffing, a violent physical struggle, another chase, another violent struggle, and ultimately a fatal shooting of the citizen. Id. at 954.
169 See id. at 956–59 (analyzing separately each of three separate decisions to contact the suspect).
170 973 F.2d 1328, 1332 (7th Cir. 1992) ("[P]re-seizure conduct is not subject to Fourth Amendment scrutiny.").
171 Id. at 1333 n.3. The court did not answer “whether a series of constitutional violations could render ‘unreasonable’ the eventual use of deadly force even if that use of force in and of itself was justified.” Id.
In *Starks v. Enyart*, the court did not refer to the holdings in *Tom* or *Carter* that pre-seizure conduct should not be considered. Instead, the court simply characterized the action of the officer as occurring during the seizure. The court analogized the situation to that in *Brower*, where the police set up a roadblock that was designed to stop the fleeing suspect. It stated that if the officer intentionally stepped in front of the car so that it would hit him before the suspect had time to brake, then he "would have unreasonably created the encounter that ostensibly permitted the use of deadly force to protect him, because the decedent would have been unable to react in order to avoid presenting a deadly threat." Because the purpose of stepping in front of the car was to stop the suspect from escaping, and shooting him accomplished that seizure, that action was not pre-seizure.

The court further called into question the holdings of *Tom* and *Carter* in *Deering v. Reich*. In this case, the plaintiff claimed that several facts were relevant to the reasonableness determination, including the fact that the arrest warrant the officers attempted to serve was for a misdemeanor charge. The court read *Carter* as merely "reinforc[ing] the concept . . . that the deputies did not need to consider all feasible alternatives in serving the warrant." However, the issues involved in *Deering* have less to do with actual pre-seizure police conduct, and more to do with what the deputies knew at the time, thus encompassing the totality of the circumstances as required by *Garner*. Although the plaintiff claimed that the reason for issuing the warrant was pre-seizure activity, the court recognized that it was the knowledge of the deputies that was at issue.

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172 5 F.3d 230 (7th Cir. 1993).
173 The suspect was in a stolen car and surrounded by police officers. In his attempt to escape, he accelerated towards one of the officers who, along with several others, fired at the suspect. Testimony conflicted as to whether the officer stepped in front of the car after it began to move or if the officer was there when the suspect floored the accelerator. *Id.* at 232.
174 "Police officers who unreasonably create a physically threatening situation in the midst of a Fourth Amendment seizure cannot be immunized for the use of deadly force." *Id.* at 234 (emphasis added).
175 489 U.S. 593.
176 *Starks*, 5 F.3d at 234.
177 *Id.* at 235.
178 183 F.3d 645 (7th Cir.), *cert. denied*, 528 U.S. 1021 (1999).
179 *Id.* at 649. In this case, the deputies attempted to serve a misdemeanor arrest warrant on the suspect late at night. After knocking on the door and announcing who they were, the suspect obtained a single-shot shotgun, came outside, and fired it. One of the deputies believed another had been hit and shot and killed the suspect. *Id.* at 648.
180 *Id.* at 650.
181 *Id.*
182 *Id.* at 649.
183 "Reasonableness depends on the information the officer possesses prior to and at the immediate time of the shooting . . . . What [the deputy] knew about [the suspect] and the basis for the warrant would seem to fall within these parameters." *Id.* at 650.
These decisions by other circuits show the struggle that courts face in applying the conflicting principles involved in pre-seizure cases. A few courts, having looked to only one of these principles for guidance, have created a strict doctrine that simply allows or does not allow evidence of such conduct to be used. Most circuits, however, have attempted to accommodate both the deference appropriate to officers' decisions and the need to look at all the factors involved in the use of force. Those that explicitly disallow evidence of pre-seizure police conduct can limit this rule by describing such conduct as occurring during the seizure, thereby allowing it to be considered. Circuits that hold that such conduct falls within the totality of circumstances can limit the effect this has by requiring that the officer's conduct be more than mere negligence, requiring that there be a close connection between the act and use of force, or by requiring that the alleged conduct be itself a separate constitutional violation.

IV. RECOMMENDATIONS

The Ninth Circuit chose to allow evidence of pre-seizure police conduct with two limitations: that the act be reckless or deliberate, rather than negligent, and that it rise to the level of an independent Fourth Amendment violation. The court was correct not to prohibit completely the use of such evidence; however, it should not have limited it by requiring a separate Fourth Amendment violation.

The circuits that prohibit the use of all pre-seizure evidence confuse what was at issue in Hodari D. By focusing on the fact that the alleged bad conduct did not constitute a seizure under Hodari D., these courts confuse the separate inquiries of whether a seizure occurred and, if so, whether it was reasonable. The Court in Hodari D. only spoke to the first issue. The effect of this issue bore on whether

185 See, e.g., discussion of Starks v. Enyart, 5 F.3d 230 (7th Cir. 1993), supra notes 172–77 and accompanying text (discussing court's finding that the action of the officer in question took place during the seizure).
186 See supra note 155 and accompanying text (discussing Tenth Circuit case holding that officers' action that were not reckless or deliberate could not be considered).
187 See supra notes 141–45 and accompanying text (discussing Tenth Circuit's use of the "immediately connected to" test).
188 See supra note 171 and accompanying text (noting that the Seventh Circuit held open the question of whether conduct that was itself a separate constitutional violation would be admissible).
189 Billington v. Smith, 292 F.3d 1177, 1189–90 (9th Cir. 2002).
190 California v. Hodari D., 499 U.S. 621, 623 (1991) (noting that "the only issue
there was probable cause for the seizure, not whether the seizure had been reasonable. 191

The events that occurred in Hodari D. illustrate the flaw in the application of the Fourth, Sixth and Eighth Circuits’ exclusion of pre-seizure evidence. Hodari D. fled from police when they attempted to approach him and other youths while they were on a street corner; during the pursuit, Hodari D. jettisoned a rock of cocaine and was subsequently tackled by the officer. 192 The Court held that Hodari D. was not seized until the officer tackled him because a mere show of authority, absent submission to that authority, does not constitute a seizure. 193 What if, however, instead of challenging the admissibility of the cocaine seized, Hodari D. had filed an action against the officer for excessive use of force by tackling him? Under the logic of the anti pre-seizure circuits, the court’s examination of the reasonableness could not include any action by the officer that occurred during the foot pursuit. Surely this would be an absurd result; not only is it illogical, it thwarts the purpose of requiring that seizures be reasonable.

The Supreme Court in Garner made it clear that no single factor renders a use of force unreasonable. 194 The Third Circuit’s holding that “‘totality’ is an encompassing word” is right on point. There is no reason that pertinent information should be kept out of this test. The actions of the suspect will be scrutinized by the defense and certainly make up part of the totality of the circumstances. Often those actions will not make sense unless they are put into context by the actions taken by the officer. The incident is the combination of all the interactions between the actors involved, so there is no reason why the actions of one of those actors should always be excluded. However, placing limitations on the use of such evidence is necessary to protect the interests of society.

A proper way to protect those interests is to require that merely negligent actions by police officers not be admitted as relevant pre-seizure conduct. The Supreme Court has held that the Constitution is not to be used as a federal tort statute, 196 and violations of the Due Process Clause of the Fourteenth Amendment should require something more than just a lack of ordinary care. 197 Additionally, the Supreme Court has warned against judging actions of the police which take place under stress and within time constraints from the comfort and safety of an office. The ability of an officer to function daily depends on being able to make judgments presented is whether, at the time he dropped the drugs, Hodari had been ‘seized’ within the meaning of the Fourth Amendment”).

191 Id. at 623–24.
192 Id. at 622–23.
193 Id. at 625–26.
197 Id. at 334.
on the spot.\textsuperscript{198} The officer’s, his or her fellow officers’, and the public’s safety often depend on these decisions, and, because of this, allowance needs to be made for the possibility of mistakes. Otherwise, the risk of binding the police into ineffectiveness becomes too great. The liberty and safety of the suspect is also dependant on the officer’s decisions, and because the harm that may result is so severe, there must be some form of oversight placed on an officer’s decision making. Allowing plaintiffs to bring in reckless or deliberate decisions made by officers that lead to the need to use force accomplishes this oversight.

The Ninth Circuit also protects officers by requiring there to be an independent Fourth Amendment violation. As noted earlier, this requirement is based on an incorrect reading of prior precedent.\textsuperscript{199} This also puts an artificial limit on the plaintiff. By definition, the conduct in question took place before the seizure occurred. In order for there to be an independent Fourth Amendment violation, the bad conduct would have had to occur during a previous search or seizure that violated the suspect’s rights. There would be very few cases where such an event would happen. Only in rare cases, such as \textit{Alexander v. City of San Francisco}, does police misconduct occur during a separate search or seizure, and whether it did or not has no bearing on whether that conduct created the need to use force.

A better approach to limit the use of pre-seizure conduct is to require a close fit between the conduct and the need to use force. This appears to be what the Tenth Circuit attempted to do in creating the “immediately connected to” test.\textsuperscript{200} The purpose of this test is similar to the requirement of proximate cause in tort actions: to determine whether the risk created by the officer justifies his liability.\textsuperscript{201} Courts are familiar with this concept and would have little trouble making such determinations in each case.

\textbf{CONCLUSION}

Courts have had trouble coming to grips with the relevance of pre-seizure police conduct in excessive force cases. Some circuits have completely excluded its use, but a majority have allowed it to be used in certain circumstances. The best compromise is a doctrine that allows it to be used where the actions by the officer are reckless or deliberate and are closely connected to the use of force. This will allow officers the freedom to make decisions that need to be made while still

\textsuperscript{198} See supra notes 47–48 and accompanying text.

\textsuperscript{199} See supra notes 91–93 and accompanying text (noting that the court in \textit{Alexander v. City of San Francisco}, 29 F.3d 1355, 1366 (9th Cir. 1994), actually held that the pre-seizure conduct was relevant only if there had been \textit{no} Fourth Amendment violation).

\textsuperscript{200} See supra notes 141–45 and accompanying text.

\textsuperscript{201} See \textsc{DAN B. DOBBS, THE LAW OF TORTS} 443 (2000) (discussing purpose of proximate cause requirement).
protecting the suspects that they encounter. There is no need for a rigid and fabricated framework that requires a separate constitutional violation (whether of the Fourth Amendment or otherwise). The principles involved in the concept of proximate causation would better limit the application of pre-seizure conduct and provide flexibility for the courts.