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Unintentional Levels of Force in §1983 Excessive Force Claims

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NOTES

UNINTENTIONAL LEVELS OF FORCE IN § 1983 EXCESSIVE FORCE CLAIMS

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INTRODUCTION

In the early morning hours on New Year's Day 2009, Bay Area Rapid Transit (BART) Police in Oakland, California, responded to reports of a fight on one of the city's trains.[1] Twenty-two-year-old Oscar Grant was one of several men pulled off of the train.[2] Grant offered some initial resistance but was soon detained by police, who laid him flat on his stomach with his arms behind his back.[3] At this point, the routine police detention took a tragic and unexpected turn. One of the officers involved in detaining Grant, Johannes Mehserle, allegedly told another officer on the scene that he was going to stun Grant with his Taser.[4] When Mehserle stood up to Tase Grant, he instead drew his firearm and fatally shot Grant in the back.[5]

The State of California chose to bring criminal charges against Mehserle, and he was convicted of involuntary manslaughter.[6] It is possible, however, that Grant's family might have pursued a civil remedy for violation of Grant's Fourth Amendment rights. Under 42 U.S.C. § 1983, there is a private cause of action against

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

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1. Demian Bulwa et al., *Behind Murder Charge Against Ex-BART Officer*, S.F. CHRON., Jan. 15, 2009, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/15/MNJE15A6O2.DTL.

2. *Id.*

3. *Id.*

4. Demian Bulwa, *Skeptical Judge Grants Bail to Former BART Cop*, S.F. CHRON., Jan. 31, 2009, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/30/BABI15KCD5.DTL&type=adfree. The term "Taser" in this Note refers to any nonlethal weapon that is designed to deploy "electrical energy sufficient to cause uncontrolled muscle contractions and override an individual's voluntary motor responses." DEP'T OF JUSTICE, REVIEW OF THE DEPARTMENT OF JUSTICE'S USE OF LESS-LETHAL WEAPONS app. I (2009), *available at* http://www.justice.gov/oig/reports/plus/e0903/final.pdf.

5. *Id.*

6. Demian Bulwa, *Mehserle Convicted of Involuntary Manslaughter*, S.F. CHRON., July 9, 2010, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/07/08/BAM21EBDOD.DTL.

> to the deprivation of any rights, privileges, or immunities secured by the Constitution and [the] laws.[7]

Under the language of § 1983, an excessive force claim might have been brought against Mehserle for his fatal shooting of Grant. In that case, the question would be whether a police officer who shoots a suspect, although intending to Tase him, is subject to liability for excessive force under § 1983.

Although Grant's shooting is perhaps the most famous example of police officers confusing their handguns for Tasers, it hardly marked the first time that officers had employed such unintentional force. In *Henry v. Purnell*, the Fourth Circuit considered whether a police officer who unintentionally drew his firearm instead of his Taser and shot a fleeing suspect in the elbow was liable under § 1983 for using excessive force.[8] In *Torres v. City of Madera*, the Eastern District of California considered a case, on remand from the Ninth Circuit, in which a police officer mistakenly drew her firearm and killed a suspect in the back of her police car.[9] In both of these cases, the courts initially found that the defendant officers did not violate the Fourth Amendment, and even if they had, they were entitled to qualified immunity for their actions.[10] These cases were subsequently reviewed, and although the courts denied qualified immunity, both the Fourth and the Ninth Circuits found that an issue of fact remained as to whether the officers' actions were reasonably mistaken and therefore not a violation of the Fourth Amendment.[11]

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7. 42 U.S.C. § 1983 (2006).

8. Henry v. Purnell (*Henry I*), 501 F.3d 374, 376, 379 (4th Cir. 2007). The procedural history of this case is long and ongoing. This Note focuses on the 2007 opinion, because it most clearly lays out the reasonable mistakes analysis that the Fourth Circuit has chosen to adopt and because it has been cited in other circuits for the same proposition. *See, e.g.*, Torres v. City of Madera (*Torres I*), 655 F. Supp. 2d 1109, 1120-23 (E.D. Cal. 2009), *rev'd on other grounds*, 648 F.3d 1119 (9th Cir. 2011). The most recent opinion in the case is an en banc ruling of the Fourth Circuit, which reaffirmed that the proper scope of analysis for unintentional level of force claims is reasonable mistakes. Henry v. Purnell (*Henry III*), 652 F.3d 524, 531-33 (4th Cir. 2011).

9. *Torres I*, 655 F. Supp. 2d at 1116-17.

10. *Id.* at 1123; *Henry I*, 501 F.3d at 384.

11. *Henry III*, 652 F.3d at 527; Torres v. City of Madera (*Torres II*), 648 F.3d 1119, 1127-28 (9th Cir. 2011).

The purpose of this Note is to use these cases to explore the implications of § 1983 excessive force claims when police unambiguously intend to use a reasonable level of force and instead employ an unreasonable level of force. Critically, unintentional levels of force in excessive force claims are new. Although scholarship and jurisprudence exists on reasonable mistakes, existing literature tends to focus on mistakes officers made about whether the conduct that they intend to carry out was constitutional or about mistakes of fact.[12] This Note evaluates the outcomes of *Henry* and *Torres* to determine whether they are consistent with the history of § 1983, the policy ramifications of the excessive force doctrine, and the qualified immunity doctrine.

Finally, this Note also makes a recommendation as to how unintentional level of force cases should be resolved in the future. This Note argues that the "reasonable mistake" standard developed in *Henry* and *Torres* provides too much protection to police officers. The analysis in these cases undermines the objective reasonableness test that governs excessive force cases under the Fourth Amendment and creates the potential for unintentional uses of force to become a wider defense to excessive force claims. Therefore, this Note should not be understood to apply only to Taser/handgun scenarios but to any situation in which police officers unambiguously intend to use lawful force and instead use unlawful force. This Note recommends that unintentional level of force claims should be treated like any other excessive force claim: judged by the objective conduct, and not the subjective intent, of the officer.

This Note first traces the history of § 1983 and explores its aspirational nature. This Note then traces the framework of a § 1983 analysis, focusing on the substantive Fourth Amendment violation and the additional qualified immunity analysis. Finally, this Note concludes by laying out the model analysis.

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12. *See, e.g.*, Amber Carvalho, Comment, *The Sliding Scale Approach to Protecting Nonresident Immigrants Against the Use of Excessive Force in Violation of the Fourth Amendment*, 22 EMORY INT'L L. REV. 247, 254-55 (2008); Jeff Fabian, Note, *Don't Tase Me Bro!: A Comprehensive Analysis of the Laws Governing Taser Use by Law Enforcement*, 62 FLA. L. REV. 763, 765 (2010).

I. HISTORY OF § 1983

The awakening of § 1983 in the middle of the twentieth century represents a transformative moment in American law. Many of the signature advancements in civil rights that marked the middle of the century emerged from § 1983 litigation.[13] Section 1983 was awakened from its long, post-Civil War sleep via the Supreme Court's decision in *Monroe v. Pape*.[14] The original intent of the statute, as discussed by the *Monroe* Court, was to combat lawlessness in the Reconstruction South stemming from the violent actions of the Ku Klux Klan.[15] Section 1983—or § 1 as it was then known[16]—was one of the Reconstruction Congress's attempts to assert the supremacy of the national government, which had been recently entrenched by the Fourteenth Amendment.[17] Although this parochial intent does not readily lend itself to the expansive role that § 1983 has played,[18] the *Monroe* Court saw fit to expand § 1983 to encompass the principle that "Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."[19]

Today § 1983 occupies a central position in civil rights jurisprudence, in part because of the failure of its fellow civil rights statutes. Eugene Gressman, a legal scholar writing before *Monroe*, characterized this failure: strict judicial construction of the Civil War

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13. *See* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?,* 60 N.Y.U. L. REV. 1, 1-2 (1985) ("Many of the Supreme Court's most significant constitutional decisions of the past generation, such as *Brown v. Board of Education* and the legislative reapportionment cases, were the product of suits brought under § 1983." (footnote omitted)).

14. 365 U.S. 167, 184-85, 187 (1961) (construing "under color of law" broadly enough that it encompassed state actors, such as police officers, who acted with authority but without explicit lawful sanction for their actions). Accordingly, § 1983 claims can be maintained even when state laws also forbid the police conduct. *See id.* at 172, 187.

15. *Id.* at 174-75.

16. *Id.* at 171.

17. *Id.* ("[Section 1983] was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment.").

18. *See* Blackmun, *supra* note 13, at 1-2.

19. *Monroe*, 365 U.S. at 171-72.

Amendments and the civil rights statutes that implemented them had reduced "[t]he civil rights program of the Reconstruction era ... to a pitiful handful of statutory provisions, most of which are burdened by the dead weight of strict construction."[20] Gressman was concerned that civil rights, which "were conceived of as inherent ingredients of national citizenship and as such were entitled to federal protection,"[21] had given way to a stifling judicial interpretation that reflected antebellum fears about the federal government.[22] Although he lamented the state of civil rights legislation, Gressman did not view § 1983 as a means of rejuvenating protections for civil rights.[23] This was because, in contrast to other civil rights statutes, the lack of enforceable federal rights up until the mid-twentieth century made § 1983 essentially dormant.[24]

The story of the revival of § 1983, then, is inseparable from the broader story of the revival of federal protections for civil rights—what fifty years after Gressman's article could be called the "Second Reconstruction."[25] The genius of civil rights statutes such as § 1983 is that because they "provide mechanisms for enforcing constitutional rights, when the Court recognizes a new constitutional right, or broadens an existing one, the reach of civil rights statutes inevitably also expands."[26] Section 1983 is woven into the fabric of constitutional jurisprudence and "represents the primary vehicle used by parties to vindicate their constitutional rights against state and local government officials."[27] This symbiosis between § 1983 and the wider scheme of fundamental civil rights that developed during the twentieth century led Justice Blackmun to state that § 1983 stands

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20. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1357 (1952).

21. *Id.* at 1336.

22. *Id.* at 1323 ("Such limited guarantees reflected the early fears of a powerful central government and the early reliance on the states as the protectors of the individual's rights and liberties.").

23. *See id.* at 1357-58.

24. *See id.* at 1355 ("The sole problem here relates to the rights, privileges and immunities which may be said to be secured by the Constitution and federal laws."); *see also* Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1003, 1015, 1017-18 (2002) (discussing theories as to why § 1983 remained dormant until *Monroe*).

25. Beermann, *supra* note 24, at 981.

26. *Id.* at 982.

27. *Id.* at 1002.

"for the commitment of our society to be governed by law and to protect the rights of those without power against oppression at the hands of the powerful."[28] Justice Blackmun is not alone in considering § 1983 a "super statute."[29] This view of § 1983 treats it as an aspirational statute, one that has a central role to play not only in protecting civil rights but also, through its symbiosis with the concept of rights in general, in developing the very dialogue of rights.[30]

Justice Blackmun grew concerned, noting that "recent opinions of the Supreme Court appear to reflect a growing uneasiness with the heretofore pronounced breadth of the statute and ... a tendency to strain otherwise sound doctrines in order to ease the perceived federalism tensions generated by § 1983 actions."[31] Blackmun's concerns about federalism, and his plea for the Court to leave the balance of decision-making authority between unelected judges and elected officials to Congress,[32] echo Gressman's historical account of a Reconstruction-era civil rights program rendered all but meaningless by judicial construction.[33]

The two cases that will form the basis for this analysis must be viewed within the context of the direction of § 1983 jurisprudence. While reviewing the facts and legal issues that confronted the courts in *Henry* and *Torres*, it is important to remember the aspirational nature of § 1983 and to keep in mind the normative bases for its guarantee that civil rights violations will be vindicated.

II. *HENRY* AND *TORRES*

Excessive force determinations are necessarily factually driven. As such, the factual circumstances in the two model cases must be recited. In *Henry v. Purnell*, the plaintiff attempted to flee from the

28. Blackmun, *supra* note 13, at 28.

29. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215, 1226 (2001). Super-statutes "aspire toward changing the common law baseline, and they actually have that effect over time, which in turn means that they become the object of evolution and debate among judges as well as legislators." *Id.* at 1219.

30. *See id.*

31. Blackmun, *supra* note 13, at 2-3.

32. *Id.* at 23 ("If § 1983 as presently construed does shift political authority from elected officials to unelected judges ... the remedy, it seems to me, lies with the elected members of the Senate and House of Representatives and not with the unelected members of the Supreme Court.").

33. *See* Gressman, *supra* note 20, at 1357.

police.[34] The court recognized, and the plaintiff stipulated, that "the undisputed evidence in the record established that Purnell's specific intent was to stop Henry from fleeing by means of firing a weapon," in this case, a Taser.[35] This finding by the court was crucial, because it established that Purnell seized the plaintiff, and therefore, his claim could be analyzed under the Fourth Amendment's protection against unreasonable searches and seizures.[36] When Purnell reached for his Taser, he instead drew his firearm and shot the plaintiff in the elbow.[37]

In *Torres v. City of Madera*, the Eastern District of California considered a case that was factually similar to *Henry*. In *Torres*, the police had already apprehended the suspect and placed him in the back of a police car.[38] While in the back of the police car, the suspect became agitated, kicked at the back of the police car window, and was difficult to control.[39] In response to Torres' agitation, the defendant officer opened the door to the police car with the intent to Tase the suspect.[40] The door was kicked into her, and when she attempted to draw her Taser, she instead drew her handgun and fatally shot the suspect.[41] The plaintiff in *Torres* was more sympathetic in almost every way than his counterpart in *Henry*: the suspect was already seized and under police control, and instead of shooting his elbow, the defendant officer in *Torres* killed the suspect.

What makes *Henry* and *Torres* more interesting, however, is the way that the parties and the courts treated these facts. In *Henry,* the plaintiff stipulated to the fact that the defendant officer's use of his gun was unintentional.[42] The same was true in *Torres*.[43] Although this might seem like a minor wrinkle, it in fact had major

34. 501 F.3d 374, 379 (4th Cir. 2007).

35. *Id.* at 381-82.

36. *Id. See generally* Brower v. County of Inyo, 489 U.S. 593 (1989) (holding that the Fourth Amendment applied to a case in which police used a road block to stop a suspect).

37. *Henry I*, 501 F.3d at 379.

38. *Torres I*, 655 F. Supp. 2d 1109, 1117 (E.D. Cal. 2009). *Torres* presented a case in which the seizure was more obvious, making application of the Fourth Amendment even more certain. *See id.* at 1120.

39. *Id.* at 1117.

40. *Id.*

41. *Id.* at 1118.

42. *Henry I*, 501 F.3d at 379.

43. *Torres I*, 655 F. Supp. 2d at 1116.

implications, because the stipulations meant that there were no disputes as to what actually happened—the sole duty of the court and the jury was to determine the implications of those facts.

The Fourth Circuit in *Henry* expressly recognized that it was dealing with an atypical case.[44] Lacking any clear precedent on how to proceed, the court decided that the appropriate analysis would be to fall back on the reasonable mistake standard to determine whether a violation of the Fourth Amendment had occurred.[45] The court analogized the situation in *Henry* to situations in which reasonable mistakes were held not to represent violations of the Fourth Amendment. These included a case in which police officers held a reasonably mistaken belief about an apartment complex and searched the wrong premises,[46] in which police officers arrested the wrong person,[47] and in which a mistaken, fatal shooting of an innocent person occurred.[48] Based on these precedents, the *Henry* court decided that its central inquiry should be into whether the defendant officer's belief that he was using his Taser was objectively reasonable.[49] *Torres* adopted the same position.[50]

In order to assess whether the defendant officer's mistake was objectively reasonable, the *Henry* court adopted the district court's five-factor test that considered: (1) the nature of the officer's training to prevent such incidents; (2) whether the officer acted in accordance with that training; (3) whether the officer would have discovered that he or she was actually holding a gun if the officer attempted to flick the thumb safety; (4) whether the sense of danger that the officer was experiencing was heightened, leading to a

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44. *Henry I*, 501 F.3d at 382 ("[T]his case is atypical because Henry's claim is based on the fact that Purnell shot him with the Glock, which is *not* the level of force that Purnell intended.").

45. *Id.* ("[M]istakes made by officers during the course of their duties have been held to be reasonable for Fourth Amendment purposes under a variety of circumstances."). Both of the reviewing courts agreed. *Henry III*, 652 F.3d 524, 531 (4th Cir. 2011); *Torres II*, 648 F.3d 1119, 1124 (9th Cir. 2011) ("Where an officer's particular use of of force is based on a mistake of fact, we ask whether a reasonable officer would have or *should* have accurately perceived that fact.").

46. *Henry I*, 501 F.3d at 382 (citing Maryland v. Garrison, 480 U.S. 79, 80, 88-89 (1987)).

47. *Id.* (citing Hill v. California, 401 U.S. 797, 799, 805 (1971)).

48. *Id.* (citing Milstead v. Kibler, 243 F.3d 157, 160-61 (4th Cir. 2001)).

49. *Id.* at 384.

50. *Torres I*, 655 F. Supp. 2d 1109, 1120 (E.D. Cal. 2009).

hurried action; (5) whether earlier actions by the plaintiff led the officer to use undue haste.[51]

Before engaging in a critique of the *Henry* and *Torres* decisions, it is first necessary to discuss the basis of the standards that informed the courts' decisions in those cases. These sections evaluate the decisions in *Henry* and *Torres* and discuss how the doctrine produced these decisions. This Note argues that *Henry* and *Torres* are the product of trends within the excessive force and qualified immunity doctrine that undermine their purpose and the aspirational nature of § 1983.[52] Ultimately, this Note proposes a model analysis that seeks to resolve this criticism.[53]

III. EXCESSIVE FORCE CLAIMS UNDER § 1983

A. History

Section 1983 protects against "deprivation of any rights, privileges, or immunities secured by the Constitution and [the] laws."[54] The statute depends upon the existence of rights in order to operate. This is the symbiosis between § 1983 and the wider development of civil rights that Beermann recognized.[55] The recognition that rights sought to be vindicated under § 1983 must derive from the Constitution or federal law is not merely an academic observation; the source of rights influences and shapes how they are applied. For example, that a citizen has a right to be free from excessive force is obvious, but whether that right stems from the Fourteenth Amendment, the Fourth Amendment, or other sources is not as clear.[56] The origin of the right to be free from excessive force has had a major impact on how that right is vindicated through § 1983.

It is first important to distinguish what type of excessive force is at issue when a police officer is in the process of arresting a suspect.

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51. *Henry I*, 501 F.3d at 383. The Ninth Circuit explicitly adopted this test. *Torres II*, 648 F.3d 1119, 1125 (9th Cir. 2011).

52. *See infra* notes 102-12 and accompanying text.

53. *See infra* Part VI.

54. 42 U.S.C. § 1983 (2006).

55. *See* Beermann, *supra* note 24, at 1002-04.

56. *See* Graham v. Connor, 490 U.S. 386, 393-94 (1989) (noting the widespread belief in a "generic 'right' to be free from excessive force" before establishing that such a right must be founded in an explicit constitutional provision).

Excessive force can occur while suspects are being arrested, while they are awaiting trial, or while they are otherwise being detained or serving a sentence, with different constitutional standards applicable in each case.[57] In an arrest situation, there are two possible standards: the Fourteenth Amendment substantive due process standard and the Fourth Amendment reasonableness standard.[58]

The Fourteenth Amendment standard was articulated in the Supreme Court's 1952 decision *Rochin v. California*.[59] In that case, police inserted a tube into the suspect's stomach in order to induce vomiting so that he would be forced to surrender the illegal drugs that he had swallowed.[60] In an effort to remedy what it perceived as an egregious violation of civil rights, the Court turned to the vague language of the Due Process Clause of the Fourteenth Amendment to garner the tools necessary to correct the constitutional violation.[61] To that end, the Court held that "the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience."[62]

The Second Circuit developed the "shocks the conscience" test under the Fourteenth Amendment into a broader excessive force doctrine in *Johnson v. Glick*.[63] In that case, the court articulated a test for evaluating excessive force under a Fourteenth Amendment

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57. 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, 742-43 (1988) ("Determining the proper threshold of liability in excessive force claims under section 1983 has been complicated by the assumption that an individual's constitutional rights change at different stages of the arrest process.").

58. *See id.* at 742 (noting that the Fourth Amendment, as well as the paired Fifth and Fourteenth Amendments, are implicated during an arrest).

59. Rochin v. California, 342 U.S. 165 (1952).

60. *Id.* at 166.

61. *See id.* at 168-69. Justice Frankfurter devoted much of his decision in *Rochin* to justifying the Court's reliance on an amorphous standard to correct such an obvious wrong. *See id.* at 169-72. Justice Frankfurter even argued that "[i]n dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions." *Id.* at 169.

62. *Id.* at 172.

63. *See* Irene Prior Loftus et al., Note, *The "Reasonable" Approach to Excessive Force Cases Under Section 1983*, 64 NOTRE DAME L. REV. 136, 145 (1989) (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

substantive due process theory.[64] The test directed the trial court to consider (1) the need for force, (2) the relationship between the need and the amount of force that was used, (3) the extent of the injury inflicted, and (4) whether force was applied in a good faith effort to maintain order or maliciously and sadistically for the very purpose of causing harm.[65] This final step injected a degree of subjectivity into the analysis that, it has been argued, significantly restricts the ability of plaintiffs to vindicate their civil rights under § 1983, because an officer can escape liability by claiming "to have acted in good faith."[66] Much of Justice Frankfurter's decision in *Rochin* laid out a framework through which judges theoretically would have the flexibility necessary to punish police lawlessness, tempered by judicial self-discipline.[67] Instead, the apex of the "shocks the conscience" doctrine appears to have afforded greater protection for lawless officers.[68]

Prior to the Supreme Court's clarification of the doctrine on excessive force, a parallel track for evaluating arrest-level excessive force claims developed under the Fourth Amendment's protection against unreasonable searches and seizures.[69] The Seventh Circuit contrasted the Fourth Amendment approach to excessive force against the Fourteenth Amendment substantive due process approach in *Lester v. City of Chicago*.[70] At issue in that case was a jury instruction to evaluate the defendant officer's "abuse of official power that 'shocks the conscience.'"[71]

The Seventh Circuit in *Lester* characterized force used incident to arrest as a quintessential Fourth Amendment question.[72] At its most basic, an excessive force action under § 1983 claims that the "right ... to be secure in [the plaintiff's] person[ ] ... against unrea-

64. *Glick*, 481 F.2d at 1032-33.

65. *Id.* at 1033.

66. Bruder, *supra* note 57, at 748-49.

67. *See Rochin*, 342 U.S. at 170-71.

68. *See* Bruder, *supra* note 57, at 748-49.

69. *See* Lester v. City of Chicago, 830 F.2d 706, 711 (7th Cir. 1987) (detailing the Court's reliance on Fourth Amendment standards, and not a Fourteenth Amendment analysis, to evaluate excessive force claims).

70. *Id.* at 710.

71. *Id.* at 709.

72. *Id.* at 710.

sonable ... seizure[ ]"[73] has been violated.[74] The Seventh Circuit dismissed the Supreme Court's decision in *Rochin* as essentially a preincorporation relic, having been decided when the exclusionary rule did not apply to the states.[75] The *Lester* court also noted that the Supreme Court had discontinued its development of the Fourteenth Amendment analysis after *Rochin*, which left that line of reasoning to be developed by the circuit courts.[76] When the Supreme Court faced the issue in excessive force cases, it had turned toward the Fourth Amendment.[77]

The *Lester* court's excessive force standard relied on the broad statement that "the Fourth Amendment test measures a seizure's objective reasonableness under the circumstances."[78] This standard, which sought to balance the interests of the individual in remaining free of unreasonable searches and the government's important interests in the intrusion,[79] incorporates the first two prongs of the test developed in *Johnson v. Glick*.[80] The critical difference that the Seventh Circuit noted in *Lester* was that the Fourteenth Amendment substantive due process "inquiry into motive is incompatible with a Fourth Amendment standard that calls for objective analysis without regard to [an] officer's underlying intent or motivation."[81] The *Lester* court went so far as to craft a formulation of the Fourth Amendment's approach that would come to characterize the modern position: "An objectively unreasonable seizure violates the Constitution regardless of an officer's good intent; likewise, an objectively reasonable seizure does not violate the Constitution despite the officer's bad intent."[82]

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73. U.S. CONST. amend. IV.

74. This is the characterization of the Fourth Amendment test developed in *Lester*. 830 F.2d at 710.

75. *Id.* at 710-11.

76. *See id.* at 711.

77. *Id.* ("Consequently, the Court has not relied on the *Rochin* 'shocks the conscience' standard but has instead applied a Fourth Amendment reasonableness analysis in cases that, like *Rochin*, involved highly intrusive searches or seizures.").

78. *Id.*

79. *Id.* (citing Tennessee v. Garner, 471 U.S. 1, 8 (1985)).

80. *See* 481 F.2d 1028, 1033 (2d Cir. 1973).

81. *Lester*, 830 F.2d at 712.

82. *Id. See also* Whren v. United States, 517 U.S. 806, 812-13 (1996) ("We think [previous] cases foreclose any argument that ... constitutional reasonableness ... depends on the *actual* motivations of the individual officers involved." (emphasis added)).

When the Supreme Court visited the question of what standard should govern excessive force cases, the Justices had a choice between the Fourteenth Amendment substantive due process standard or the Fourth Amendment's objective reasonableness standard.[83] The main difference between the standards centered on the role played by subjective intent.

B. Graham v. Connor

The Supreme Court settled the question of which standard to apply to arrest-level excessive force claims in its *Graham v. Connor* decision in 1989.[84] Although *Graham* remains the touchstone for modern excessive force claims, the degree to which it offers meaningful guidance to courts is unclear.[85]

Shortly after *Lester*, the Supreme Court took up the case of Graham, a diabetic who sustained injuries during an investigatory stop and later arrest.[86] The Court used the case as an opportunity to declare that "[w]here, 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."[87] The Court in *Graham* relied on the familiar Fourth Amendment notion, also discussed in *Lester*,[88] that the courts' essential task was to balance the individual's interest in remaining free from excessive force against the government's interests in intruding upon the individual's right to be secure in his or her person.[89]

The Supreme Court went further than *Lester* in formulating a standard to evaluate the balance that the Fourth Amendment attempted to strike. In general, the test was designed to determine "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to

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83. *See* Graham v. Connor, 490 U.S. 386, 392-93 (1989).

84. *Id.* at 394.

85. *See* Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1129-31 (2008) (describing the *Graham* roadmap as "woefully inadequate").

86. *Graham*, 490 U.S. at 389.

87. *Id.* at 394.

88. Lester v. City of Chicago, 830 F.2d 706, 711 (7th Cir. 1987).

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

their underlying intent or motivation."[90] To assist courts, the Supreme Court identified three broad factors that would help determine whether under the totality of the circumstances the force used was objectively reasonable: (1) the severity of the crime; (2) the immediate threat that the suspect posed to themselves, others, or the officers; and (3) whether the suspect was actively resisting or evading arrest.[91] Taken together, the fact-intensive *Graham* factors recalled what Justice Frankfurter was attempting to achieve in *Rochin*. Justice Frankfurter trusted that judges would, in essence, know excessive force when they saw it and, using their judicial temperament, would be able to determine the lawfulness of police actions.[92] This is not altogether different from the task that the Supreme Court laid out in *Graham*. However, the Court did not go so far as to tell judges how the *Graham* factors should be weighed,[93] a limitation that "has largely left judges and juries to their intuitions."[94]

The critical difference, then, between how the Supreme Court in *Graham* treated arrest-level excessive force claims and how those claims had been treated under a Fourteenth Amendment substantive due process framework is the role of subjective intent.[95] To ensure that subjective analysis would remain out of substantive excessive force claims, the Supreme Court instructed the lower courts that "[a]n 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."[96] The Court was emphatic that, after *Graham*, the specter of subjective intent should be expunged from excessive force analysis.

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90. *Id.* at 397.

91. *Id.* at 396.

92. Rochin v. California, 342 U.S. 165, 170-71 (1952).

93. *See Graham*, 490 U.S. at 396. The Court provided the factors that it believed were relevant but did not suggest which might be the most important or to what degree each must be established. *See id.*

94. Harmon, *supra* note 85, at 1130.

95. *Graham*, 490 U.S. at 397 ("[T]he 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 'unreasonable' under the Fourth Amendment.").

96. *Id.*

For the most part, the Supreme Court's framework in *Graham* has remained undisturbed, though the specifics of the analysis may have shifted. The Supreme Court's most recent excessive force case, *Scott v. Harris*, reiterates the Court's commitment to *Graham*'s objective reasonableness standard.[97] In that case, police were led on a high-speed chase that ended when a police vehicle rammed the suspect's car, driving him off the road and causing significant injuries.[98] The Court ruled that the Fourth Amendment was the appropriate standard, thereby broadening the concept of "seizure" to include almost any termination of the freedom of movement,[99] and in so doing expanded the types of cases to which a § 1983 excessive force analysis might be applied. Most importantly, however, the *Scott* Court rejected the premise that certain types of force, including deadly force, require a different kind of analysis under *Graham*.[100] The Court held that a deadly force analysis "was simply an application of the Fourth Amendment's 'reasonableness' test ... to the use of a particular type of force in a particular situation."[101] Just as *Graham* had held that all excessive force claims at the time of the arrest are to be decided under the Fourth Amendment's framework, *Scott* extended *Graham* to cover all excessive force claims.

The effect of *Scott* on excessive force jurisprudence, however, may have undermined the ability of § 1983 plaintiffs to achieve redress for constitutional violations. Even twenty years after *Graham*, there is still no "systematic conceptual framework" for what constitutes excessive force.[102] Echoing Justice Frankfurter's concerns about unreasonable seizures, legal scholars critical of *Scott*, such as Rachel Harmon, argue that lower courts have paid lip service to Supreme Court precedent and then relied on their intuitions about each case.[103] Harmon further argues that what little structure the *Graham* factors provided to excessive force claims was wiped out by

97. 550 U.S. 372, 381 (2007).
98. *Id.* at 374-75.
99. *Id.* at 381.
100. *Id.* at 382-83.
101. *Id.* at 382.
102. Harmon, *supra* note 85, at 1127.
103. *Id.* at 1132 ("[T]he lower federal courts have recited *Graham* as if it were a mantra and then gone on to try to make sense of the facts of individual cases using intuitions about what is reasonable for officers to do.").

Scott's reliance on only nebulous concepts of reasonableness.[104] She concludes that the ultimate consequence of the Court's failure to provide structure, and its removal of what structure existed from the "objective reasonableness" test, is to render "§ 1983 an even more impotent weapon in the battle against excessive force by police officers."[105]

Henry and *Torres* reflect the worst of the excessive force trends. The five factors that the *Henry* court identified[106] reflect a reworking of the *Graham* standard such that it begins to reflect just the sort of ad hoc reasoning that the Court had intended to abandon. This focus threatens to reintroduce elements of subjective intent that the Court attempted to banish by rejecting the Fourteenth Amendment's "shocks the conscience" framework.[107] Although the courts in *Henry* and *Torres* frame their language in terms of the Fourth Amendment test,[108] they actually inquire directly into the subjective intent of the officers by considering the force that they *intended* to use as opposed to the force that they *actually* used.

Harmon explains that the unpredictability and ad hoc nature of adjudicating excessive force claims was detrimental to plaintiffs seeking to vindicate their rights under § 1983 because that unpredictability impacts the next step in the analysis of a § 1983 claim.[109] Harmon points out that "[u]nder the doctrine of qualified immunity, officers are not civilly liable under federal civil rights law for using excessive force unless the unlawfulness of their conduct is apparent from prior case law."[110] The outcome of the *Scott* decision makes § 1983 even less predictable and therefore more susceptible to qualified immunity defenses.[111] The interaction between the excessive force doctrine and the qualified immunity defense has become toxic,

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104. *Id.* at 1136 ("[T]he Court not only emasculated *Garner*, but in the same paragraph—without comment or analysis—implicitly dismissed the factors articulated in *Graham* as central to analyzing reasonableness.").

105. *Id.* at 1143.

106. *Henry I*, 501 F.3d 374, 383 (4th Cir. 2007).

107. Graham v. Connor, 490 U.S. 386, 394 (1989).

108. *See Henry I*, 501 F.3d at 379; *Torres I*, 655 F. Supp. 2d 1109, 1119 (E.D. Cal. 2009).

109. Harmon, *supra* note 85, at 1123.

110. *Id.*

111. *Id.* at 1140 ("*Scott* almost surely makes the outcome of lower court decisions about the reasonableness of police uses of force more difficult to predict.").

to the point that Justice Blackmun's concern that immunities would restrict the vindication of rights has come to pass.[112]

IV. QUALIFIED IMMUNITY

A. Doctrine

After the expansion of potential government liability for unconstitutional actions in *Monroe v. Pape*,[113] the Supreme Court articulated a doctrine that would limit the potential scope of that liability in circumstances in which its imposition would be injurious to public policy.[114] To this end the qualified immunity doctrine was born.

The Supreme Court first recognized qualified immunity as its own unique defense in *Harlow v. Fitzgerald*.[115] In that case, the defendants, former members of the Nixon administration, asserted that they were entitled to the same absolute executive immunity that the President enjoyed.[116] The Court recognized that, under the common law, certain immunities were necessary to ensure that public officials could carry out their vital duties.[117] The Court concluded that the need for this immunity did not stem from any constitutional principle but was instead a product of public policy that required that strict enforcement of constitutional principles, under certain circumstances, should give way to the need of a modern society to function smoothly.[118] *Harlow* was also motivated in part by the sentiment, which Justice Blackmun identified,[119] that many constitutional claims under § 1983 are frivolous.[120]

The Court intended the immunity that it crafted in *Harlow* to be a departure from the "'good faith' immunity" that had characterized

112. *See* Beermann, *supra* note 24, at 1014, 1016; Blackmun, *supra* note 13, at 23-24.

113. 365 U.S. 167, 171-72 (1961).

114. Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982).

115. *Id.* at 815.

116. *Id.* at 802, 808.

117. *Id.* at 806 ("As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.").

118. *See id.* at 813-14.

119. *See* Blackmun, *supra* note 13, at 2.

120. *Harlow*, 457 U.S. at 814 ("[I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole.").

the common law and prior decisions.[121] That test had both objective and subjective elements that an official would have to plead in order to mount a proper defense.[122] In crafting its modern qualified immunity defense, the *Harlow* Court rejected the subjective element, which required a finding of malicious intent.[123] The Court did so because the element would prove unduly burdensome on courts that had to consider intent, a question of fact, in summary judgment motions.[124]

In fact, the Court's project in *Harlow* was to provide greater immunity for officials.[125] One factor in the Court's decision, which would later come to the fore in the Court's most recent qualified immunity case, *Pearson v. Callahan*, was that qualified immunity is an immunity rather than an affirmative defense, and thus even going to trial essentially represents a forfeiture of the immunity.[126] In order to effectuate its goal, the Court turned toward a standard that became familiar in the later *Graham* case: objective reasonableness.[127]

The objective reasonableness test that the Court formulated in *Harlow* stated that "government officials performing discretionary functions, generally 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 should have known."[128] The Court ultimately clarified that this objective reasonableness test includes two prongs. In order to determine whether a defendant officer met the standard for qualified immunity the Court first asked (1) whether the facts alleged by the plaintiff make out a constitutional violation and, if so, (2) whether the right at issue was clearly established at the time of the violation.[129] The Court had required in *Saucier v. Katz* that courts strictly

121. *Id.* at 814-15.
122. *Id.* at 815.
123. *Id.* at 815-18.
124. *Id.* at 816.
125. *Id.* at 818-19.
126. *See* Pearson v. Callahan, 555 U.S. 223, 237 (2009) (citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).
127. *Harlow*, 457 U.S. at 818.
128. *Id.*
129. *Pearson*, 555 U.S. at 232 (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)).

follow this sequence,[130] but the central holding of *Pearson* was that courts could use their discretion to determine which step to resolve first.[131]

In addition to these two prongs, many courts have applied a third requirement, in the event that the right in question is considered clearly established.[132] This final step requires the court to determine whether "a reasonable officer would have known that he was violating this clearly established right."[133] This step, although not mentioned by the Court in *Pearson*, is consistent with the Supreme Court's reasoning in *Harlow*: "Reliance on the objective reasonableness of an official's conduct ... by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."[134] It could further be argued that, in addition to these policy reasons, the additional step is consistent with the Court's reasoning in *Harlow* that the right in question is not judged by whether it is clearly established to a judge or a legal practitioner but that it is a statutory or constitutional right "of which a reasonable person should have known."[135] It follows that, implicit in the "clearly established" line of analysis, is a requirement that a reasonable officer could be mistaken about the state of the law and, for public policy reasons, still be entitled to qualified immunity.[136]

If the defendant officer can show that the right that the plaintiff is seeking to vindicate is not clearly established, or that a reasonable officer in his or her position would not have known that the right was clearly established, then he or she may invoke qualified immunity and be free from suit.[137]

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130. *Id.* (citing *Saucier*, 533 U.S. at 201).

131. *Id.* at 236.

132. Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 141 (1999).

133. *Id.*

134. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (footnote omitted).

135. *Id.*

136. *See id.* at 818-19.

137. *See id.*

B. Qualified Immunity Critiques

The qualified immunity doctrine has drawn substantial scholarly criticism. Though some scholars have defended some aspects of the immunity, it has been broadly criticized, particularly with regard to those claims that rest on the Fourth Amendment and its reasonableness standard.

1. Criticisms

Qualified immunity has distorted other values in the legal system and provided perverse incentives to law enforcement officers. First, as Evan Mandery argues, qualified immunity "departs from the commonly accepted maxim that all citizens are to be held strictly liable for knowledge of the law."[138] That is, law enforcement officers can escape liability by being ignorant of the law. Of course, one might respond to Mandery's criticism by pointing to *Harlow*'s requirement that ignorance is excused only when a reasonable person would not have known.[139]

Mandery's stronger criticism is that because qualified immunity holds officers to a low standard for their knowledge of the law,[140] they have no incentive to learn it and thus provide enforcement more consistent with the Constitution.[141] Mandery argues that this creates particular problems in the context of excessive force cases, in which victims of police misconduct are often powerless to mitigate that conduct because the level of care that victims take to comply with the law is often irrelevant.[142] In response, Mandery suggests that strict liability might be applied to § 1983 cases, a beneficial move that would remove uncertainty about which rights the statute will vindicate and would fully expunge subjective criteria from

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138. Evan J. Mandery, *Qualified Immunity or Absolute Impunity? The Moral Hazards of Extending Qualified Immunity to Lower-Level Public Officials*, 17 HARV. J.L. & PUB. POL'Y 479, 481 (1994).

139. *Harlow*, 457 U.S. at 818.

140. Mandery, *supra* note 138, at 481.

141. *Id.* at 481, 513 (noting that by holding officials to an "extremely low standard of care for knowledge of the law," qualified immunity creates a "moral hazard [that] leaves public officials with virtually no incentive to ascertain or comply with the law governing their conduct").

142. *Id.* at 497.

liability.[143] The public policy justifications of qualified immunity[144] would, of course, require that strict liability be packaged with a mandatory indemnification scheme or a respondeat superior theory of liability for municipalities,[145] and Mandery admits that such packaging has been explicitly rejected by the Court.[146]

Another criticism leveled at qualified immunity is that, in general, it widens the gap between rights and their remedies. This is the argument taken up by John Jeffries, who argues that "[d]octrines that curtail individual redress thus not only deny full remediation to some victims; they also call into question the adequacy of the overall structure of constitutional enforcement."[147] Jeffries explains that this gap is particularly wide in § 1983 claims.[148] This is not to say that Jeffries disregards the policy arguments for qualified immunity; his argument is that although society must tolerate some gaps, it should not come to believe that such gaps are anything more than a necessary evil whose social value should be carefully evaluated.[149] The chief benefit that Jeffries identifies in such a gap is that it "facilitates constitutional change by reducing the costs of innovation."[150] Jeffries is concerned that, if government had to bear the true cost of constitutional violations, then courts would be reluctant to develop new rights.[151] Jeffries is careful to point out that his framework views the proper role of qualified immunity as shielding government actors from liability, not as an endorsement of current law.[152]

Diana Hassel is one of the most strident critics of qualified immunity. She argues that qualified immunity is essentially a smoke-

143. *Id.* at 495.

144. A primary justification is the necessity of policy officers and other officials to be able to perform their duties without excessive fear of litigation. *See supra* text accompanying note 118.

145. Mandery, *supra* note 138, at 515.

146. *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 692 (1978).

147. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89 (1999). Jeffries' position here could be considered analogous to the concerns voiced by Justice Blackmun. *See supra* text accompanying note 28.

148. Jeffries, *supra* note 147, at 89.

149. *Id.* ("Unredressed constitutional violations may have to be tolerated, but they should not be embraced, approved, or allowed to proliferate.").

150. *Id.* at 90.

151. *Id.* at 105.

152. *Id.* at 91.

screen that "obscures the choices that are being made on the fundamental and divisive issues of what constitutional wrongs should be compensated."[153] In practice, the veil of qualified immunity allows judges to exercise their policy preferences on a case-by-case basis.[154] This system, Hassel argues, leads toward a qualified immunity doctrine that is both highly uncertain[155] and inappropriately focused on government interests[156] rather than the violation of constitutional rights.[157]

Hassel's critique suggests that qualified immunity returns civil rights analysis to the sort of methodology that Justice Frankfurter advocated in *Rochin*.[158] Judges, using their own sound discretion, determine what "shocks the conscience" to the point that judicial intervention is warranted.[159] A return to this jurisprudence vests judges with the power to decide which rights will be vindicated.[160] Although judges may already exercise this power, Hassel's argument is that this method hides the policy choices behind which rights will be enforced, contributing to an impoverished doctrine.[161]

2. Excessive Force and the Fourth Amendment

The Court's decision to employ an "objective reasonableness" standard in qualified immunity and substantive Fourth Amendment analyses has created a system that many scholars argue has distorted the application of laws designed to vindicate violations of constitutional rights. One of the first commentators to notice this

153. Hassel, *supra* note 132, at 123.

154. *Id.* at 124 ("The broad qualified immunity standard allows for a determination concerning liability of the defendant that is very flexible and almost completely subject to the policy beliefs of the judge making the decision.").

155. *Id.* at 134 ("The problem with this method of resolving civil rights disputes is the high cost in clarity and coherence we pay for using it.").

156. *Id.* at 156 ("Qualified immunity makes the essential issue of a civil rights claim the question of whether it would be too much of an inhibitor of government action to require a particular defendant to pay damages to the plaintiff.").

157. *Id.* at 134 ("Qualified immunity makes the result of each civil rights claim appear to be based on the particular facts of each case, rather than based on the appropriateness of providing relief for a violation of the constitutional right in question.").

158. *See* Rochin v. California, 342 U.S. 165, 170-71 (1952).

159. *Id.* at 172.

160. Hassel, *supra* note 132, at 146 ("Whether qualified immunity is granted or denied appears to be linked to the type of underlying civil right that is claimed to be violated.").

161. *Id.* at 147.

trend was Michael Fayz, who argued after *Graham* that "[w]hen the use of force is unreasonable-in-fact, yet deemed legally reasonable and immune, substantive constitutional protections have been sacrificed to the purposes and powers of the Court."[162] This doubling up of reasonableness standards—the potential for reasonable unreasonableness—undermines the ability of a plaintiff to vindicate his or her rights under the Fourth Amendment.

Under the modern doctrine of qualified immunity, the full analysis of an excessive force claim would proceed as follows. First, the court would determine whether, under the Fourth Amendment, the defendant's actions were objectively reasonable under the circumstances.[163] If the defendant's actions were not objectively reasonable, the court would then determine whether the defendant's belief that his or her objectively unreasonable action was reasonable under the circumstances was itself objectively reasonable.[164] For good reason, this scheme has been termed "nonsensical."[165] In effect, defendants would have two opportunities to prove that their conduct was objectively reasonable, with the standard of reasonableness becoming less stringent the second time around.

Understandably, the duplication of "objective reasonableness" standards has led some courts to consider qualified immunity and substantive excessive force violations at the same time. In *Katz v. United States*, the Ninth Circuit held that because the standards for determining whether an officer employed excessive force and whether that officer was entitled to qualified immunity were the same, it would not make sense to consider them separately.[166] Other

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162. Michael C. Fayz, Comment, Graham v. Connor*: The Supreme Court Clears the Way for Summary Dismissal of Section 1983 Excessive Force Claims*, 36 WAYNE L. REV. 1507, 1532-33 (1990) (footnote omitted).

163. *See* Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 125 (2009).

164. *Id.* ("[A] court must first determine whether a defendant's actions are objectively reasonable. Then, assuming that the actions were not objectively reasonable, the court must determine whether it was nonetheless objectively reasonable for the defendant to have believed his actions were objectively reasonable.").

165. *Id.*

166. Katz v. United States, 194 F.3d 962, 968 (9th Cir. 1999) ("Because of this parity, we have repeatedly held that 'the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim.'" (quoting Alexander v. County of Los Angeles, 64 F.3d 1315, 1322 (9th Cir. 1995))).

circuits have taken a similar position.[167] This approach boasts significant advantages because it considers whether the conduct itself was reasonable, and does not ask whether unreasonable conduct was itself reasonable. The Supreme Court, however, overturned the Ninth Circuit's approach in *Pearson v. Callahan* and determined that the two inquiries must be considered separately.[168] Keeping the two inquiries separate would protect defendants and preserve the blanket "objective reasonableness" standard announced in *Harlow*.[169] The practical effect of the Court's decision was to metastasize qualified immunity "into an almost absolute defense to all but the most outrageous conduct."[170]

Some scholars, however, have pointed to legitimate reasons for keeping the two "objective reasonableness" standards separate. They argue that the "paradox" of reasonably unreasonable conduct is deliberately designed into the system for the purpose of protecting officers.[171] Although even scholars critical of the bifurcated analysis would agree that this is the purpose of the doctrine, their supportive counterparts would respond that there are some situations in which it makes sense to excuse objectively unreasonable conduct. For the most part, such situations revolve around reasonably mistaken beliefs.[172] Lisa Eskow and Kevin Cole argue that *Graham* should be read with the possibility of reasonable mistakes in mind, because it consciously adopted a standard that was "closely aligned, but not necessarily coextensive," with the *Harlow* objective reasonableness standard for qualified immunity.[173]

It is not clear which standard is best suited for the excessive force context. Hassel argues that the problems that the double "objective reasonableness" standard created are "most acute in excessive force

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167. *See* Hassel, *supra* note 163, at 125-26.

168. *See* 555 U.S. 223, 236 (2009).

169. Hassel, *supra* note 163, at 132.

170. *Id.* at 118.

171. *See* Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent that Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869, 879 (1998).

172. *Id.* at 870 ("*Harlow*'s objective formulation of qualified immunity shielded officials who in fact committed constitutional violations, provided that an official reasonably, albeit mistakenly, could have believed the conduct in question was lawful.").

173. *Id.* at 887.

claims."[174] *Graham* counseled, however, that excessive force is different than other Fourth Amendment contexts like searches, because "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."[175] In such situations—such as when a police officer mistakenly believes that the suspect has a gun[176]—reasonable mistakes may be more likely, and officers should not be punished for acting reasonably in accordance with facts that they reasonably believe to be true. These situations, in which the police have a mistaken view of the facts and act accordingly, may be the quintessential type of case in which the police are entitled to qualified immunity.[177]

In sum, the existence of legitimate reasonable mistakes and valid policy arguments for protecting police officers who act reasonably based on them support the bifurcated analysis. However, the criticism that such an analysis may lead to a level of protection for police officers which is higher than is necessary must also be considered. Although there are good reasons for the protections of the statute to give way when a reasonable mistake is found, the inherent paradox concerning "reasonable unreasonableness" should caution a broad application of this exception.

V. UNINTENTIONAL LEVELS OF FORCE

The development of the excessive force doctrine has reached a new stage, in part due to the progress of technology. The excessive force cases discussed above considered uses of force that could be assessed under the "objective reasonableness" standard.[178] That is, a court would primarily have to consider the force used and whether that force was appropriate to the situation given the totality of the circumstances.[179] The court would also have to determine questions

174. Hassel, *supra* note 163, at 118.

175. Graham v. Connor, 490 U.S. 386, 396-97 (1989).

176. *See* Snyder v. Trepagnier, 142 F.3d 791, 794 (1998).

177. *See* Eskow & Cole, *supra* note 171, at 888 ("[T]here may be circumstances under which an officer mistakenly, but reasonably, could have believed the use of force was reasonable. To be faithful to *Harlow*, it is essential to ask the question, and not just assume that a per se correlation exists in every excessive force case.").

178. *See* Scott v. Harris, 550 U.S. 372, 381 (2007).

179. *Graham*, 490 U.S. at 397.

of qualified immunity.[180] The courts have not had to consider, however, cases in which the force that the officer intended to use was not the same as the force that was actually used. This Part considers such uses of force and how they should be analyzed, guided by the factual scenario of police officers drawing their handguns instead of their Tasers.

A. Reasonable Mistakes

In order to assess whether the defendant officer's mistake was objectively reasonable,[181] the *Henry* court adopted the district court's five-factor test that examined (1) the nature of the officer's training to prevent such incidents; (2) whether the officer acted in accordance with that training; (3) whether the officer would have discovered that he or she was actually holding a gun if the officer attempted to flick the thumb safety; (4) whether the officer was experiencing a heightened sense of danger, leading to a hurried action; and (5) whether earlier actions by the plaintiff led the officer to use undue haste.[182] The test conflated the excessive force and qualified immunity analyses.[183]

An examination of the precedent that *Henry* cites for reasonable mistakes, however, shows that this analysis is not appropriate for unintentional level of force claims. Those cited cases overwhelmingly relied on what the defendant officer believed about the situation at hand. In *Maryland v. Garrison*, for instance, the Court held that, when considering a defendant officer accused of violating the Fourth Amendment, "we must judge the constitutionality of their conduct in light of the information available to them at the time they acted."[184] In assessing a case concerning the fatal shooting of an innocent man, the Fourth Circuit in *Milstead v. Kibler* focused on the information that was available to the defendant officer at the time and the degree to which that information suggested that his

180. *See* Pearson v. Callahan, 555 U.S. 223, 231-32 (2009).

181. The entire question presented here is mistake of fact; the mistake of law issue identified by Eskow and Cole is not applicable in unintentional level of force cases because the force actually used is clearly unreasonable. *See* Eskow & Cole, *supra* note 171, at 875-78.

182. *Henry I*, 501 F.3d 374, 383 (4th Cir. 2007).

183. *See id.*

184. 480 U.S. 79, 85 (1987).

mistaken identification was reasonable.[185] The *Henry* test is poorly designed to capture what the officer knew at the time. Of all the factors, only the third, which concerns whether the officer would have known that he was holding his firearm instead of his Taser, seems directed toward assessing what the officer knew.[186] The rest of the factors, which focus on training and state of mind, speak more to a general reasonableness standard, not to *Garrison*'s and *Milstead*'s focus on whether the officer was reasonable in misapprehending the facts of the situation.[187]

Torres II, which admirably attempts to dispel subjective intent in its analysis,[188] also explicitly adopts the *Henry* factors.[189] The *Torres II* analysis of reasonable mistakes raises some questions as to the appropriateness of the *Henry* test. In assessing the fifth prong, the court concluded that "a reasonable jury could conclude that [Officer Noriega's] own poor judgment and lack of preparedness caused her to act with undue haste."[190] It is not clear how this analysis helps determine whether the officer's mistake was unreasonable. The cases cited by the *Henry* and *Torres II* courts assessed external factors that would create a mistaken belief in the officer.[191] The plaintiff in *Torres II* would have been able to challenge a lawful use of force provided that the officer used poor judgment and was unprepared. The court's analysis therefore undermines the "reasonable person" standard by making the subjective qualities and intent of the officer a relevant factor in determining whether his or her actions were reasonable.

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185. 243 F.3d 157, 164-65 (4th Cir. 2001).

186. *See Henry I*, 501 F.3d at 383.

187. *See Garrison*, 480 U.S. at 85; *Milstead*, 243 F.3d at 164-65.

188. *Torres II*, 648 F.3d 1119, 1124 (9th Cir. 2011) ("That she intended to apply lesser force is of no consequence to our inquiry, for objective reasonableness must be determined 'without regard to [the officer's] underlying intent or motivation.'" (citing Graham v. Connor, 490 U.S. 386, 397 (1989))).

189. *Id.* at 1125.

190. *Id.* at 1126.

191. *See Garrison*, 480 U.S. at 88 (in which officers mistakenly entered the wrong apartment) ("The objective facts available to the officers at the time suggested no distinction between McWebb's apartment and the third-floor premises."); *Milstead*, 243 F.3d at 165 (in which the officer mistakenly shot the wrong suspect) ("The information that Kibler had at the time he shot Milstead was that (1) a female had been stabbed, (2) Milstead had been shot in the neck, (3) the intruder, Ramey, was armed with a gun, (4) Ramey had apparently shot at Officer Proctor, and (5) Ramey had threatened to kill all of the officers.").

The *Henry* test may find some support in the case of *Hill v. California*, in which the defendant officer arrested the wrong person.[192] The Court found that "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time."[193] The Fourth Circuit adopted that same rationale in *Milstead*.[194] Taken in the most favorable light, the *Henry* test could be designed to determine whether the training of the officer created a sufficient probability that he or she would act reasonably, and this baseline probability should be adjusted based on the circumstances that confronted the officer at the time. This interpretation, however, seems stretched. The *Hill* analysis focused on whether a reasonable officer in the defendant officer's position could have arrived at the same conclusion.[195] Again, the *Henry* factors do not assist a court in determining whether the totality of the circumstances were such that a reasonable officer could have acted in the same manner as the defendant officer.[196] Rather, they contribute more toward an analysis of the officer's training and, ultimately, his or her state of mind.

Using reasonable mistakes analysis to assess unintentional level of force claims leads to significant problems. Reasonable mistake analysis can be analogized to setting a stage. The court's task is to take the totality of the circumstances and reconstruct the situation facing the defendant officer. Then, once the stage is constructed, the defendant officer is removed and replaced with a reasonable officer. If the stage is such that the reasonable officer would act in the same way as the defendant, then the defendant officer's mistake was reasonable. This is what the Supreme Court meant in *Hill* when it couched its analysis in probability:[197] if there is a good chance that a reasonable officer would have acted the same way, then the defendant officer's mistake was reasonable, and the Fourth Amendment, of course, permits reasonable actions. The analysis used in *Henry*

192. 401 U.S. 797, 799 (1971).
193. *Id.* at 804.
194. *See Milstead*, 243 F.3d at 164.
195. *See Hill*, 401 U.S. at 804.
196. *See Henry I*, 501 F.3d 374, 383 (4th Cir. 2007).
197. *Hill*, 401 U.S. at 804.

and *Torres II* turns this process on its head by building an additional piece: the defendant officer's training and personal preparation for the moment.[198] A reasonable officer should not be imbued with these qualities, as they do not determine, under the totality of the circumstances, whether his or her action was reasonable. Rather, they pertain to the officer's subjective state of mind, and, though the *Torres II* court disavowed it, they ultimately look at the honesty of the action.[199]

B. Qualified Immunity

The Supreme Court in *Pearson v. Callahan* mandated that the substantive prong of a § 1983 violation be considered separately from the qualified immunity analysis, even if the analyses had overlapping objective reasonableness standards.[200] The *Henry* factors couch what is essentially a qualified immunity analysis into the substantive Fourth Amendment claim. The purpose of the *Henry* test, consistent with qualified immunity analysis, is to determine whether a reasonable officer in the defendant officer's position could have believed that the action he or she was undertaking was constitutional.[201] By assessing the officer's training, the *Henry* factors place the analysis squarely on the police officer's preparation, setting the baseline for what a "reasonable officer" should have known.[202] The factors also echo *Graham* by cautioning that when assessing reasonableness courts should keep in mind that police

198. *Torres II*, 648 F.3d 1119, 1125-26 (9th Cir. 2011).

199. *Id.* at 1127 ("[U]nder *Graham*, whether the mistake was an *honest* one is not the concern, only whether it was a *reasonable* one."). The *Torres II* court may be attempting to assess a form of gross negligence through its analysis. This is certainly consistent with the reasonable mistakes doctrine because the analysis does not concern itself with whether the officer acted with evil intent. At the same time, including as independent factors the particular qualities of the officer's mental state—his or her training, preparation, and judgment—undermines the reasonable officer standard. It also forces jury members to find the officer's state of mind as a factual issue, as opposed to assessing whether his or her conduct was "reasonable" for the situation. This is a grievous wound to the doctrine and threatens to undermine objective reasonableness in excessive force claims.

200. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

201. *See* Hassel, *supra* note 132, at 141.

202. *Henry I*, 501 F.3d 374, 383 (4th Cir. 2007).

officers do dangerous work and undertake actions that might, if viewed with the crystal clarity of hindsight, appear unnecessary.[203]

Though both the *Henry III* and *Torres II* courts ultimately rejected qualified immunity,[204] their reliance on reasonable mistakes analysis allowed them to shift qualified immunity concepts into the substantive analysis, further eroding the barriers between the doctrines. The *Torres II* court implicitly acknowledged the collapse of the qualified immunity doctrine when it inquired only whether the law was clearly established at the time of the violation.[205] The *Torres II* court thus mixed the substantive and "clearly established" prongs so that the dispositive determination became whether the defendant officer committed a reasonable mistake.

To illustrate this point, it is useful to consider Judge Siler's concurrence in *Torres II*. Judge Siler served on both the Fourth Circuit panel that found qualified immunity for the defendant officer in *Henry II*, which was reversed en banc, as well as the *Torres II* panel that reversed a finding of qualified immunity.[206] Judge Siler voted one way in the *Henry* case and another in *Torres* because he believed that the law was sufficiently developed in the Ninth Circuit to "clearly establish" the right in question.[207] The majority characterized the law in the Ninth Circuit as having clearly established that "an allegedly unreasonable mistake of identity resulting in the use of deadly force against a fellow police officer violated that officer's Fourth Amendment right."[208] In both *Wilkins v. City of Oakland* and *Jensen v. City of Oxnard*, the Ninth Circuit held that a reasonable officer would not have believed that using deadly force against another officer was reasonable.[209] Judge Siler believed that these cases moved beyond the Supreme Court's analysis of deadly force in *Garner* and established a bright line against the conduct at issue in *Torres II*.[210]

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203. Graham v. Connor, 490 U.S. 386, 396-97 (1989).

204. *Henry III*, 652 F.3d 524, 534-35 (4th Cir. 2011); *Torres II*, 648 F.3d at 1129-30.

205. *Torres II*, 648 F.3d at 1127.

206. *Id.* at 1130 (Siler, J., concurring).

207. *Id.*

208. *Id.* at 1128.

209. Wilkins v. City of Oakland, 350 F.3d 949, 955 (9th Cir. 2003); Jensen v. City of Oxnard, 145 F.3d 1078, 1086 (9th Cir. 1998).

210. *Torres II*, 648 F.3d at 1130 (Siler, J., concurring). It is not clear why Judge Siler focused so much on *Garner* because, as discussed above, *Scott* has largely displaced that case.

It is not clear, however, that for qualified immunity purposes *Wilkins* and *Jensen* stand for anything more than *Scott*'s eventual holding that the use of deadly force is governed by the totality of the circumstances test.[211] The Ninth Circuit cases fit within the classic reasonable mistakes analysis, through which a court would assess whether the mistake of identity was reasonable. The court in *Torres II* concluded that a mistake of identity is the same as mistaking a weapon.[212] The *Torres II* decision, then, collapsed the qualified immunity and substantive analysis together so that the only question remaining for a court to address is whether the mistake was reasonable.

Torres II realized the extent of the doctrine, as identified by Kathryn Urbonya. Urbonya argued that, in excessive force cases, the overlap in standards between the substantive analysis and qualified immunity was ultimately unworkable.[213] At the heart of Urbonya's argument is the recognition that excessive force claims are unique by virtue of being the only Fourth Amendment claims in which objective reasonableness is the sole standard.[214] Unintentional levels of force claims go a step further, because they necessarily implicate a reasonable mistakes analysis, which itself relies on objective reasonableness. However, unintentional levels of force are distinct from other mistakes because the reasonableness being assessed under *Henry* ultimately refers back to a state of mind. Thus, collapsing the entire analysis turns the court toward a forbidden arena: subjective intent.

The *Torres II* court's analysis ultimately brings the flaws identified in a qualified immunity analysis into the substantive doctrine.[215] When directed to consider the *Henry* factors, the jury

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See supra note 104 and accompanying text.

211. Scott v. Harris, 550 U.S. 372, 383-84 (2007).

212. *Torres II*, 648 F.3d at 1128.

213. Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force,* 62 TEMP. L. REV. 61, 107 (1989) ("The standards overlap completely and are not distinct because an officer has qualified immunity and complies with the fourth amendment if a reasonable officer would have believed that the officer's use of force was necessary.").

214. *Id.* at 108 ("In contrast to these fourth amendment claims, a single standard of reasonableness applies in excessive force claims asserted under the fourth amendment.").

215. In something of an ironic twist, the analysis announced by the *Torres II* court preserved the "reasonable unreasonableness" problem identified above. *See supra* Part IV.B.2. However, the court shifted the timing of the determination: the analysis allowed an officer's

will engage in an analysis that runs afoul of the aspirational nature of § 1983.[216] First and foremost, the *Henry* approach is a backdoor for the analysis of the subjective intent of the officer. *Graham* thoroughly rejected this approach.[217] Although the *Henry* court did not state that its standard rose to the level of requiring some sort of malicious intent, by considering the defendant officer's intended force as opposed to the force that he or she actually employed, the *Henry* court allowed the subjective intent of the officer to control the analysis. In doing so, the *Henry* court ignored *Graham*'s command that "[a]n 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 unreasonable use of force constitutional."[218] The *Henry* opinion allowed the officer to get a different, far more lenient standard for evaluating his or her actions, assuming the officer can allege a good subjective intent in carrying out his or her actions.

It is important to remember that, in the sorts of unintentional levels of force cases contemplated by this Note, all of the material facts have been decided. No factual controversies remain, only the legal significance to be given to the totality of the circumstances.[219]

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conduct to be found unreasonable at the qualified immunity stage and then reasonable again by operation of reasonable mistakes.

216. Not only does the analysis contravene the aspirational nature of § 1983, it halts the development of the doctrine. The ultimate question to be resolved in these cases is transformed by the reasonable mistakes analysis from a question of law into a question of fact to be decided by a jury. Juries issue no opinions and leave no law for a future plaintiff to cite and develop. The analysis, therefore, may retain qualified immunity's problem of widening the rights/remedies gap, while at the same time eliminating the value that Jeffries identified: reducing the costs of developing new constitutional rights. *See supra* text accompanying notes 147-52.

217. Graham v. Connor, 490 U.S. 386, 397 (1989).

218. *Id.*

219. *See* FRIEDENTHAL ET AL., CIVIL PROCEDURE 477-79 (4th ed. 2005) (discussing the circumstances by which the party moving for summary judgment, who also bears the burden of proof, may prevail on the motion). Karen Blum provides an interesting overview of the jury's role in a § 1983 case and how the mistake of fact/law analysis played out in the jury room. When no material facts about the officer's conduct remain, juries do not evaluate mistakes of fact but rather focus on mistakes of law by determining the legal standard that applies to the defendant officer's conduct. This is the role of the judge in making the qualified immunity determination. Karen Blum, *Qualified Immunity in the Fourth Amendment: A Practical Application of § 1983 as It Applies to Fourth Amendment Excessive Force Cases*, 21 TOURO L. REV. 571, 591-92 (2005) ("[I]f the jury found that there was, in fact, no knife, that Stephenson was fleeing, that he was unarmed, and that he didn't present a danger to the

By sending the case to the jury, as opposed to resolving it in favor of the plaintiff, courts abdicate their duty to protect constitutional rights.[220] Courts have not shied away from defining the boundaries of reasonableness in other Fourth Amendment contexts,[221] and although it would be inappropriate to remove the jury from Fourth Amendment considerations entirely, sending unintentional level of force cases to the jury when all relevant facts are known only serves to impose a faulty standard that protects officers.

VI. MODEL ANALYSIS

As an initial matter, sorting out how courts should deal with unintentional level of force claims is important because the analysis is not limited to Tasers. Although this technological innovation may have accelerated the development of the doctrine, the logic behind unintentional level of force claims can apply to any use of force the police employ, so long as the police allege an accident.[222] The situation at issue in *Torres II* reflects an unusual level of incompetence by the officer.[223] Qualified immunity might not have been denied in cases that did not involve Tasers but rather involved mistaken uses

officer, then there was no reasonable mistake of law because the law clearly states that you cannot use excessive force when a suspect is unarmed.").

220. *See supra* text accompanying notes 163-65. Hassel's argument is based on the premise that judges, exercising their own discretion, will vindicate some rights over others and that they do so in a way that shields policy concerns from public scrutiny. Juries, similarly, do not issue opinions. Entrusting what is essentially a question of law to the jury—when all the facts are known and not in dispute by the parties—completely buries these choices.

221. *See, e.g.*, Arizona v. Gant, 556 U.S. 332 (2009) (defining the bounds of reasonableness in the context of an automobile search); Delaware v. Prouse, 440 U.S. 648 (1979) (holding that spot checks were not sufficiently productive to be considered reasonable); Chimel v. California, 395 U.S. 752 (1969) (holding that searches incident to a lawful arrest are reasonable). The qualified immunity analysis itself calls on the court to determine whether the officer's conduct was reasonable, a determination that is sufficient to keep the case from going to trial. *See supra* Part IV.A.

222. *See* Kanda v. Longo, No. 2:09-cv-00404-EJL, 2010 WL 3000678, at *9 (D. Idaho July 27, 2010).

223. *Torres II*, 648 F.3d 1119, 1121 (9th Cir. 2011) (finding that Officer Noriega's Glock had a laser sight on it, her certification training for the weapon had lasted only three hours, the Taser was holstered on the same side as her firearm, the Taser looked the same as her firearm, and she had made the mistake drawing her Taser instead of her firearm numerous times before). Indeed, it is difficult to imagine a more egregious case.

in the degree of force or unintended consequences stemming from a use of force that would otherwise be lawful.[224]

For the purpose of this model analysis, the substantive violation of the Fourth Amendment and the first prong of the qualified immunity analysis—whether a constitutional violation has been alleged[225]—will be conflated. This is permissible because a finding that the substantive right has been violated does not end the qualified immunity analysis.[226] In *Graham*, the Supreme Court instructed that courts must determine "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[227] In a case like *Henry* or *Torres*, the officer's actions should be assessed without regard to what he or she intended to do but with regard to what he or she actually did. In these cases, the officers used their firearms.[228] The Supreme Court in *Scott v. Harris* rejected the existence of a separate excessive force analysis when deadly force was used.[229] Rather, deadly force was to be considered, along with every other use of force, on an objective reasonableness standard.[230] Nevertheless, the Court adhered to the holding in *Tennessee v. Garner*, which involved an officer shooting a fleeing suspect in the back of the head.[231] The *Scott* Court concluded that one possible reasonableness analysis for potentially lethal force could involve considering "the risk of bodily harm that [the officer's] actions posed to [the suspect] in light of the threat to the public that [the officer] was trying to eliminate."[232]

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224. A creative defense lawyer could certainly argue that her defendant officer client, when using a nightstick, intended to hit the plaintiff more lightly than he actually did. This would be a somewhat extraordinary case, as there would have to be some extenuating circumstances that would cause the plaintiff to agree. But in such a case, it would be difficult to draw a line between mistaken choice of weapon and mistaken choice of speed. Though it seems clear that such a case should be resolved by the force the defendant actually used, a defendant could argue, based on *Torres II* and *Henry III*, that the question of his or her subjective intent in the level of force he or she intended to use should have a chance to go to the jury.

225. *See* Pearson v. Callahan, 555 U.S. 223, 232 (2009).

226. *See id.*

227. Graham v. Connor, 490 U.S. 386, 397 (1989).

228. *See supra* Part II.

229. Scott v. Harris, 550 U.S. 372, 377 (2007).

230. *Id.*

231. 471 U.S. 1, 21 (1985).

232. *Scott*, 550 U.S. at 383.

It is difficult to imagine how potentially lethal force, like discharging a firearm, could be reasonable in either *Henry* or *Torres*. In neither situation did the defendant officer believe that the suspect was armed.[233] In *Torres*, the defendant officer even admitted that she did not fear for her safety.[234] Perhaps the most damning consideration of all is that both officers believed that discharging a Taser, not a firearm, was the appropriate response to the situation that they faced.[235] Because the force that was actually used, not the force that was intended, is the proper frame of analysis for the substantive element of an excessive force claim, the defendant officers violated the Fourth Amendment when they discharged their firearms at the suspects.

Once a constitutional violation has been found, the inquiry shifts to the question of qualified immunity, first examining whether the law in question was "clearly established" at the time of its violation.[236] The court may reference *Garner* and *Scott* to show that the use of potentially lethal force can only be justified when the suspect poses a threat to the public that warrants such force.[237] The officers in both *Henry* and *Torres* should have been on notice that their uses of force were constitutionally impermissible.

The second qualified immunity analysis—whether a reasonable officer in the defendant officer's position could have reasonably believed that his or her conduct was constitutional[238]—may provide relief to some defendants. The analysis must be confined to the actual force that was used in order to be loyal to the *Graham* standard. It is difficult to imagine that a reasonable officer could have believed that discharging a firearm at the suspects in *Henry* or *Torres* was constitutionally permissible. Remaining faithful to the actual force that was used, rather than relying on an analysis of mistakes, eliminates the double objective reasonableness problem

233. *See Henry I*, 501 F.3d 374, 379 (4th Cir. 2007); *Torres I*, 655 F. Supp. 2d 1109, 1116-18 (E.D. Cal. 2009).

234. *See Henry I*, 501 F.3d at 379; *Torres I*, 655 F. Supp. 2d at 1116-18.

235. *Torres I*, 655 F. Supp. 2d at 1117.

236. Pearson v. Callahan, 555 U.S. 223, 232 (2009).

237. *Scott*, 550 U.S. at 383.

238. *See* Hassel, *supra* note 132, at 141.

identified above.[239] In the end, the defendant officers in *Henry* and *Torres* should have been held liable for their conduct.

Some may argue that this approach runs afoul of the public policy rationale embodied in the qualified immunity doctrine. Mandery argues that the qualified immunity doctrine aims to calibrate the optimal level of care that public servants, such as police officers, take so as to minimize violations of constitutional rights without compromising the social benefit of a police force.[240] One could argue that the approach articulated here is a form of strict liability for police officers who make mistakes and that such strict liability essentially destroys the qualified immunity doctrine. Unintentional levels of force, however, are distinct from other mistakes. It would be difficult, in *Henry* or in *Torres*, to conceive of how a higher standard of care could have prevented the officers' actions. The *Henry* factors, two of which focus on training,[241] may attempt to reach the optimal level of care. In doing so, however, the court shifted strict liability to strict immunity. The aspirational nature of § 1983 requires that, if the courts must choose between either pole, strict liability best protects the constitutional values that underscore the legal system.

Of course, not every application of this model will result in liability. Reasonable mistake analysis may be reintroduced to shield an officer from liability when the unintentional level of force used is incident to a lawful use of force. That is, a police officer who assesses the situation, and reasonably believes that a procedure to take down a suspect is warranted, may not be liable if, for instance, the suspect strikes his or her head on an iron railing during the takedown.[242] Presented with such a scenario, the court may engage in an analysis of reasonable mistakes to determine whether a reasonable officer in the defendant's position could have believed that there was a very low probability that the lawful procedure would result in an unlawful application of force. This approach

239. *See supra* Part IV.B.2.

240. *See* Mandery, *supra* note 138, at 492 ("The socially optimal level of care for the official to exercise is that amount for which the marginal social benefit of acting more cautiously is equal to the marginal social cost incurred in so adjusting her behavior.").

241. *See Henry I*, 501 F.3d 374, 383 (4th Cir. 2007).

242. *See, e.g.*, Kanda v. Longo, No. 2:09-cv-00404-EJL, 2010 WL 3000678, at *1-2 (D. Idaho July 27, 2010).

would align unintentional level of force analysis with the "sufficient probability, not certainty" reasoning in *Hill v. California*.[243] In the iron railing case described above, the force applied was straightforward and unambiguous, raising no questions of force incident to a lawful procedure.

CONCLUSION

The recent technological advent of Tasers has created a new wrinkle in the application of a civil rights statute, § 1983. It has led to situations in which officers have mistakenly drawn their handguns instead of their Tasers, sometimes with fatal results. These unintentional levels of force present a new question for § 1983 jurisprudence.

The evolution of § 1983 has transformed the statute that was once almost a dead letter into the preeminent vehicle for the vindication of constitutional rights. Section 1983 has become more than just a tort statute, and the normative values that underlie it speak to society's promise to protect constitutional rights and uphold the rule of law. To facilitate this end, the Supreme Court has expunged subjective intent from the excessive force analysis, instead relying on objective reasonableness to assess a plaintiff's claims. The vindication of the right to be free from excessive force, however, is constrained by vagueness in the excessive force doctrine and the development of the qualified immunity standard, which stretches toward absolute immunity. This concern is heightened in unintentional level of force cases, because the misuse of the reasonable mistake standard, even in egregious cases in which qualified immunity has been denied, invites the same errors that qualified immunity can create. By relying on reasonable mistake analysis, courts abdicate their role under § 1983 to protect constitutional rights.

The model approach this Note proposes vindicates the normative values behind § 1983, keeps subjective intent out of the excessive force context, and minimally burdens police officers. If courts are serious about the *Graham* objective reasonableness standard, they

243. 401 U.S. 797, 804 (1971).

must evaluate the force that was actually used and not rely on the subjective intent of the officer who used it.

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