

# A Primer on North Carolina and Federal Use of Force Law: Trends in Fourth Amendment Doctrine, Qualified Immunity, and State Law Issues\*

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*The Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm.*<sup>1</sup>

*An officer of the law has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties to effect an arrest. . . . [T]he officer is properly left with the discretion to determine the amount of force required under the circumstances as they appear to him at the time of the arrest.*<sup>2</sup>

*[W]e must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes “reasonable” action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.*<sup>3</sup>

## INTRODUCTION

Police use of force is a critically important component of effective criminal justice in North Carolina and throughout America. Using force to accomplish the primary objectives of criminal justice is one of

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\* This Article constitutes a revised, updated, and expanded version of a previous article published in Volume 24 of the *Campbell Law Review*. See J. Michael McGuinness, *Law Enforcement Use of Force: The Objective Reasonableness Standards Under North Carolina and Federal Law*, 24 *CAMPBELL L. REV.* 201 (2002).

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This Article is dedicated to the 417 North Carolina law enforcement officers that have been killed in the line of duty.

1. *Elliot v. Leavitt*, 99 F.3d 640, 641 (4th Cir. 1996).

2. *State v. Anderson*, 253 S.E.2d 48, 50 (N.C. Ct. App. 1979). See N.C. GEN. STAT. § 15A-401(d)(1) (2007).

3. *Smith v. Freeland*, 954 F.2d 343, 347 (6th Cir. 1992).

many appropriate tools of the law enforcement profession. Violence from suspects and others has increased as the disrespect for police officers has grown in recent years. Life for officers on the beat has never been more dangerous.<sup>4</sup>

The use of police force often generates litigation against law enforcement officers. However, courts throughout America, including the United States Supreme Court, the Fourth Circuit Court of Appeals, and North Carolina courts, have recently responded with enhanced legal protection to insulate police officers from constitutional and tort liability.<sup>5</sup> The central issue in most use of force litigation is typically *whether an objectively reasonable officer could have reasonably believed that the force employed was appropriate under the circumstances.*<sup>6</sup> Thus,

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4. See Nat'l Law Enforcement Officers Mem'l Fund, Law Enforcement Facts, <http://www.nleomf.com/TheMemorial/Facts/polfacts.htm> (last visited Feb. 10, 2009) [hereinafter Law Enforcement Facts]. The National Law Enforcement Officers Memorial Fund's website contains extensive data regarding the history of danger to the American law enforcement profession. For example, on average, there are 167 officers per year killed in the line of duty. *Id.* On average, there are more than 56,000 assaults on officers per year, resulting in more than 16,000 injuries per year. *Id.* Being shot is the most prevalent source of death. *Id.* There have been 18,274 officers killed in the line of duty in America. *Id.* America has over 900,000 sworn law enforcement officers. *Id.* An estimated 5.2 million "violent crimes" occurred in the United States in 2005. *Id.* North Carolina has lost 417 officers to death in the line of duty. Nat'l Law Enforcement Officers Mem'l Fund, State and Federal Breakdown of Law Officer's Deaths, <http://www.nleomf.com/TheMemorial/Facts/state.htm> (last visited Mar. 30, 2009). Many developments and studies demonstrate growing risks for police officers. See, e.g., Kris Mohandie et al., *Suicide by Cops Among Officer-Involved Shooting Cases*, 54 J. FORENSIC SCI. 456 (2009).

See N.C. DEP'T. OF JUSTICE, CRIME IN NORTH CAROLINA—2007: ANNUAL SUMMARY REPORT OF 2007 UNIFORM CRIME REPORTING DATA (2008), available at <http://sbi2.jus.state.nc.us/crp/public/2007/ASR/2007%20Annual%20Summary%20.pdf> (stating that "the murder rate increased 8.5%" in 2007 over 2006); Dep't of Justice, Law Enforcement Officers Killed and Assaulted, <http://www.fbi.gov/ucr/killed/2007/> (last visited Mar. 7, 2009) (confirming the continuing violence perpetrated against police officers—including assaults and murders); State Bureau of Investigation, Officers Assaulted by Situation and Weapon, <http://sbi2.jus.state.nc.us/crp/public/2007/LEOKillAsslt/LEOAssltSitWea07/LEOAssltSitWea07/leoassltsitwea04/leoassltsitwea04.htm> (last visited Feb. 10, 2009) (noting that, in 2007, there were 2567 assaults on officers.).

5. See, e.g., *Arizona v. Johnson*, 129 S. Ct. 781, 782 (2009) ("[T]he government's 'legitimate and weighty' interest in officer safety outweighs the 'de minimis' additional intrusion [of a Terry frisk.]" ). See the cases collected in notes 48 and 83-91.

6. A trilogy of decisions provide the parameters for the typical use of force case. See *Saucier v. Katz*, 533 U.S. 194, 210 (2001), modified by *Pearson v. Callahan*, 129 S. Ct. 808 (2009); *Graham v. Connor*, 490 U.S. 386, 397 (1989); *Tennessee v. Garner*, 471 U.S. 1, 3 (1985); see also *Bd. of County Comm'rs v. Brown*, 520 U.S. 397 (1997) (reviewing governmental liability issues).

the “first step is for the Court to determine whether the [d]efendant[’s] ‘actions were objectively reasonable.’”<sup>7</sup> This fundamental standard has generated scores of state and federal cases in a variety of use of force contexts.<sup>8</sup>

This Article analyzes recent trends and updates the status of use of force law under North Carolina and federal standards.<sup>9</sup> Use of force law has significantly changed in recent years, whereby most courts have further insulated officers from liability. The United States Supreme Court has recently issued major use of force decisions in *Scott v. Harris*<sup>10</sup> and *Brosseau v. Haugen*.<sup>11</sup> Furthermore, the United States Court of Appeals for the Fourth Circuit continues to be very active in producing leading use of force and qualified immunity decisions.<sup>12</sup> Thus, this Article focuses its analysis on Fourth Amendment use of force methodology in leading United States Supreme Court, Fourth Circuit, and North Carolina cases. Statutory and common law use of force standards under North Carolina law, including self-defense and apparent dangers, are also examined. Additionally, the prevailing liability standards employed in determining whether use of force is excessive, particularly in “mistaken belief” and vehicular cases, are explored. Finally, the nature of expert testimony is reviewed since those cases have similarly evolved with new standards.<sup>13</sup>

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7. *Marvin v. City of Taylor*, 509 F.3d 234, 245 (6th Cir. 2007) (citing *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

8. *See, e.g., Elliot v. Leavitt*, 99 F.3d 640, 641 (4th Cir. 1996) (“The Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm.”).

9. Since 2002, use of force law has substantially evolved, recognizing the increasingly dangerous world that police officers face every day. Both substantive use of force law determining whether a Fourth Amendment claim is presented and the doctrine of qualified immunity have further heightened the threshold for establishing an actionable case sufficient to survive summary judgment. The “could have believed” standard is now more rigorously enforced, especially by the Fourth Circuit. *See* J. Michael McGuinness, *Law Enforcement Use of Force: The Objective Reasonableness Standards Under North Carolina and Federal Law*, 24 CAMPBELL. L. REV. 201 (2002). *Cf.* UREY W. PATRICK & JOHN C. HALL, IN DEFENSE OF SELF & OTHERS: ISSUES, FACTS AND FALLACIES—THE REALITIES OF LAW ENFORCEMENT’S USE OF DEADLY FORCE (2005) (offering one of the first comprehensive practical analyses of use of force by providing extensive insight into a better understanding of the need for and scope of police deadly force).

10. 550 U.S. 372 (2007).

11. 543 U.S. 194 (2004). Both *Scott* and *Brosseau* are vehicular use of force cases.

12. *See* sources cited *infra* note 48.

13. The area of expert testimony is another area where courts have tightened admissibility standards to curtail the ability of plaintiffs to offer loose opinions of what they think is right or wrong. *See Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir.

## I. THE UNDERLYING POLICE ENVIRONMENT AND USE OF FORCE LIABILITY

The core mission of American policing requires law enforcement officers to physically encounter a broad range of suspects in the course of their ordinary duties. The daily work of police officers serving in patrol and related functions puts officers on the front line, often requiring instantaneous responses to all types of unpredictable human behaviors. The history of American policing demonstrates that a significant portion of individuals encountered by police officers engage in conduct that places the officer, bystanders, and other members of the public in danger.

The routine work of officers often puts them in harm's way, which frequently requires officers to use force to perform their duties and survive. Felony suspects appear to be the more likely to overreact to an officer's inquiry by direct attack, flight, or both. However, misdemeanants also respond with violence. Suspects create varying "fight or flight" scenarios which require officers to employ physical force to apprehend suspects and stop the threats to themselves and the public. Stopping the threat of violence is typically the foremost objective of the use of force. Both actual and apparent threats must be thwarted by reasonable force.

Typical police encounters often pit officers against dangerous suspects at traffic stops, domestic calls, and many other routine police operations. Police encounters often become confrontational and the physical risks to officers during such encounters can present deadly threats. Police officers are regularly confronted with some of the most deadly weapons, including: automobiles, shotguns, rifles, pistols, knives, fireplace poker, farm equipment, axes, self-made bombs, chemicals, and other devices. Being spit upon was traditionally considered a minimum risk; recently, however, it was recognized as being potentially deadly for officers.<sup>14</sup>

Law enforcement involves protecting citizens from harm, investigating alleged or suspected crimes, apprehending and taking suspects

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1992). The "could have believed" test is one for judicial determination on a motion for summary judgment. *See Hunter v. Bryant*, 502 U.S. 224, 227-28 (1991). Expert testimony was becoming a means for plaintiffs to get around the Supreme Court principle of avoiding hindsight in force analysis. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) ("The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (internal quotation marks omitted)); *Zuchel v. City of Denver*, 997 F.2d 730, 742-43 (10th Cir. 1993). However, more recent cases have limited expert testimony especially in individual liability claims. *See Hygh*, 961 F.2d at 364.

14. *See State v. Price*, 834 N.E.2d 847, 850 (Ohio Ct. App. 2005).

into custody, interviewing suspects, and countless other challenging duties. Law enforcement officers are *required* to respond to citizen requests for assistance.<sup>15</sup> As a recent North Carolina Supreme Court decision stated, “[p]olice officers have a duty to apprehend lawbreakers.”<sup>16</sup> The foremost mission of an investigating law enforcement officer is to protect all citizens from harm and to apprehend criminal suspects. For instance, “police must pursue crime and constrain violence, even if the undertaking itself causes violence from time to time.”<sup>17</sup> As Judge Fox has eloquently explained:

It is the duty of a law enforcement officer . . . to stand his ground, carry through on the performance of his duties, and meet force with force, so long as he acts in good faith and uses no more force than reasonably appears . . . necessary to effectuate his duties and save himself from harm.<sup>18</sup>

The streets of North Carolina and America are becoming increasingly full of criminals wielding sophisticated illegal weaponry, bullet proof vests, and special ammunition designed to kill officers on the front line.<sup>19</sup> In fact, our streets are so full of illegal guns that they have been described as a “domestic Vietnam.”<sup>20</sup> In many situations, law enforcement officers are the primary targets of these illegal guns. Additionally, suspects and criminals, in recent years, have frequently used their vehicles as weapons against police officers.<sup>21</sup> Therefore, the use of vehicles as weapons at traffic stops, and in flight from apprehension, is a legitimate threat to police officers.<sup>22</sup> As a result, “[a] police

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15. See N.C. GEN. STAT. § 14-230 (2007). Failure to properly act can result in malfeasance in office and other charges against law enforcement officers. *Id.*

16. *Parish v. Hill*, 513 S.E.2d 547, 550 (N.C. 1999) (citing *Mixon v. City of Warner Robins*, 434 S.E.2d 71, 73 (Ga. Ct. App. 1993), *rev'd on other grounds*, 444 S.E.2d 761 (Ga. 1994)).

17. *Menuel v. City of Atlanta*, 25 F.3d 990, 997 (11th Cir. 1994).

18. *Morrison v. Martin*, 755 F. Supp. 683, 692 (E.D.N.C. 1990) (citing *State v. Ellis*, 86 S.E.2d 272, 274 (N.C. 1955)).

19. See KENNETH J. PEAK, *POLICING AMERICA: METHODS, ISSUES AND CHALLENGES* 357-58 (5th ed. 1993).

20. See Gordon Witkin et al., *Cops Under Fire*, U.S. NEWS & WORLD REP., Dec. 3, 1990, at 32-44.

21. National statistics demonstrate how many police officers are killed by suspects wielding vehicles as weapons. One hundred and fifty-four officers were killed from being struck by a vehicle out of the 1640 officers killed from 1999 through 2008. Nat'l Law Enforcement Officers Mem'l Fund, *Causes of Law Enforcement Death*, <http://www.nleomf.com/TheMemorial/Facts/causes.htm> (last visited Apr. 3, 2009).

22. See *id.*

officer's life is always at risk, no matter how routine the assignment might seem."<sup>23</sup>

Law enforcement use of force is among the most controversial public interest topics throughout the country.<sup>24</sup> Hardly a day passes without an incident sparking a cry of alleged "police brutality."<sup>25</sup> However, many use of force judgment calls are incredibly difficult for a police officer to make because of a myriad of physical and environmental constraints and limitations. The United States Supreme Court has observed that there is often a "hazy border between excessive and acceptable force."<sup>26</sup> As such, use of force law is very misunderstood.<sup>27</sup>

Federal and North Carolina courts have addressed a broad variety of cases presenting police force issues.<sup>28</sup> Many of the headline grabbing cases invoke strong emotion, often pitting interest groups against officers even when there is no evidence of improper motivations.<sup>29</sup> Most police shootings, or other instances of significant use of force, prompt media commentary that is usually predicated upon specula-

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23. N.C. POLICE BENEVOLENT ASS'N, THE LAW ENFORCEMENT OFFICER DISCIPLINE ACT (HOUSE BILL 980/SENATE BILL 980): A CRITICAL NECESSITY FOR THE PROMOTION OF PUBLIC SAFETY IN NORTH CAROLINA 2 n.2, available at [http://www.ncpba.org/legislative/stories/THE\\_LAW\\_ENFORCEMENT\\_OFFICER\\_DISCIPLINE\\_ACT/discipline2.pdf](http://www.ncpba.org/legislative/stories/THE_LAW_ENFORCEMENT_OFFICER_DISCIPLINE_ACT/discipline2.pdf) (last visited Mar. 7, 2009) (citations omitted).

24. See, e.g., *United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002) (reversing convictions in the Louima case); *United States v. Volpe*, 224 F.3d 72 (2d Cir. 2000); *People v. Boss*, 701 N.Y.S.2d 342 (N.Y. App. Div. 1999) (known as the Amadou Diallo case); see also Jane Fritsch, *The Diallo Verdict: The Overview; Four Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000; U.S. Dep't of Justice, *Addressing Police Conduct*, <http://www.usdoj.gov/crt/split/documents/polmis.php> (last visited Apr. 3, 2009).

25. See Scott D. Maclatchie, *Defending Police Shootings Against Trigger-Happy Lawsuits*, 30 BRIEF 69 (2001), available at <http://www.wcsr.com/resources/pdfs/maclatchiepolice.pdf>.

26. *Saucier v. Katz*, 533 U.S. 194, 210 (2001), modified by *Pearson v. Callahan*, 129 S. Ct. 808 (2009) (citations omitted).

27. See Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. CRIM. L. & CRIMINOLOGY 481 (1994).

28. Force issues arise in both civil and criminal litigation. Force issues often arise in detention, arrest, suspect transportation, pre-trial confinement, and other contexts. See, e.g., *Muehler v. Mena*, 544 U.S. 93 (2005); *Brown v. Gilmore*, 278 F.3d 362 (4th Cir. 2002); *Caldwell v. Moore*, 968 F.2d 595 (6th Cir. 1992); *Baribeau v. City of Minneapolis*, 578 F. Supp. 2d 1201 (D. Minn. 2008).

29. See *Brown*, 278 F.3d at 370. The terms "police brutality" and "excessive force" have become such common parlance in the new millennium that suspects being arrested often begin to launch verbal threats of litigation before and during the encounter.

tion and emotion.<sup>30</sup> Moreover, the media regularly fuels accusations based upon substantially incomplete information.<sup>31</sup> It usually takes weeks or months before all witnesses can be interviewed and all evidence analyzed. However, the media often has officers convicted in the court of public opinion in the direct aftermath of the incident. High-profile police use of force cases in North Carolina have focused concern on the underlying legal standards.<sup>32</sup>

The most common form of alleged police misconduct is excessive force.<sup>33</sup> Alleged excessive force may arise where handcuffs are too tight; hands-on force is used in suspect processing and transportation; less-than-lethal devices are used, such as Tasers,<sup>34</sup> pepper spray, and

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30. See Maclatchie, *supra* note 25 (“The journalistic spin on the story often questions the wisdom of the decision of the police to use deadly force, and readily offers the editorial opinions of outsiders armed with Monday-morning-quarterback luxury of detached analysis.”).

31. Media commentary of police shootings is a major source impeding proper objective review of police conduct as well as unduly inflaming tensions in the local community. Typically, the media will show up at incident scenes trying to quickly get the “scoop” and frame an inflammatory headline. Police officers are typically forbidden from publicly commenting about their official police actions. Thus, officers are immediately handicapped in the media environment. However, purported witnesses who may have been present or not present often offer their own conclusory opinions. A serious injury often invokes tears and strong emotion, which the media often views as a ripe environment for a hot story. Meanwhile, the officer typically becomes the target for what usually becomes a series of media articles with conclusions long before the witnesses are properly interviewed, the scene is scientifically analyzed, or objective overall analysis is performed. Countless examples of misleading and false media assertions surround police shootings. See, e.g., Myron Pitts, *Perception, Law May Conflict in Shooting*, FAYETTEVILLE OBSERVER, Dec. 21, 2008, at 1B (“This looks bad. The news will further inflame some people in the community . . . . This troubling incident may be one of those cases where what is legally justified conflicts with public perception. . . . We can speculate all day but none of us knows.”).

32. One United States Supreme Court case on use of force arose from North Carolina. See *Graham v. Connor*, 490 U.S. 386 (1989). In North Carolina, even investigations into alleged excessive force have generated high profile litigation. See *In re Brooks*, 548 S.E.2d 748 (N.C. Ct. App. 2001) (involving an unprecedented *ex parte* procedure that was used by the State Bureau of Investigation, but ultimately declared improper, to obtain confidential personnel and internal affairs files of officers without a warrant and without notice to the officers and opportunity to be heard).

33. See, e.g., ALEXIS ARTWOHL & LOREN W. CHRISTENSEN, *DEADLY FORCE ENCOUNTERS* (1997); THOMAS GILLESPIE ET AL., *POLICE USE OF FORCE* (1998).

34. Tasers have resulted in a number of use of force cases. See, e.g., *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004); *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002); *Hinton v. City of Elwood*, 997 F.2d 774 (10th Cir. 1993); *Johnson v. City of Lincoln Park*, 434 F. Supp. 2d 467 (E.D. Mich. 2006); *Nicholson v. Kent County Sheriff's Dep't*, 839 F. Supp. 508 (W.D. Mich. 1993). These electronic control

asp batons; police canines are used;<sup>35</sup> or where other types of deadly police weapons are used.

In a split second, officers are required to evaluate the situation and employ force against criminal suspects to thwart apparent dangers to citizens and themselves.<sup>36</sup> The officer is often alone in this nightmare, like a “pedestrian in Hell.”<sup>37</sup> It should not be surprising then that the most common source of death for officers is murder committed by criminal suspects in the process of their arrest.<sup>38</sup> The officer’s environment in use of force decision-making is particularly unique due to the stress and time pressures to act immediately without “armchair reflection” and because the lives of officers and bystanders are often at risk.<sup>39</sup> This split-second decision-making environment often necessitates the exercise of judgment under severe environmental constraints, such as darkness and other limitations on vision, noise (including the sounds of gunshots), weather, and other environmental factors that enhance the difficulty of assessing the particular scene and circumstances. Police conduct undertaken in a second or two is often replayed by pundits with speculation for years thereafter.

In most serious police operations with rapidly-evolving developments, occasional mistakes will inevitably be made. These mistakes result from suspect behavior, environmental conditions, and all sorts of other causes. Officers must often quickly form beliefs regarding the totality of circumstances that they are confronting. Generally, if an

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devices appear to have substantial utility in controlling force and avoiding more likely deadly force to follow. See *Draper*, 369 F.3d at 1278.

35. The use of police dogs has generated numerous cases. See, e.g., *Priester v. City of Riviera Beach*, 208 F.3d 919 (11th Cir. 2000); *Vathekan v. Prince George’s County*, 154 F.3d 173 (4th Cir. 1998).

36. See, e.g., *Saucier v. Katz*, 533 U.S. 194, 210 (2001), modified by *Pearson v. Callahan*, 129 S. Ct. 808 (2009); *Park v. Shiflett*, 250 F.3d 843, 853 (4th Cir. 2001); *Anderson v. Russell*, 247 F.3d 125, 129 (4th Cir. 2001); *McLenagan v. Karnes*, 27 F.3d 1002, 1006-07 (4th Cir. 1994); *Ford v. Childers*, 855 F.2d 1271, 1276 (7th Cir. 1988) (“[A]n officer oftentimes has only a split second to make the critical judgment of whether to use his weapon.”).

37. WILLIAM A. WESTLEY, *VIOLENCE AND THE POLICE* (1970) (“The policeman’s world is spawned of degradation, corruption and insecurity . . . [H]e walks alone, like a pedestrian in Hell.”); Law Enforcement Facts, *supra* note 4 (revealing “an average of one death every 53 hours” over the previous ten years for police officers in the line of duty).

38. See *PEAK*, *supra* note 19, at 359.

39. *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996) (“[O]fficers on the beat are not often afforded the luxury of armchair reflection.”). See Seth D. DuCharme, *The Search for Reasonableness in Use-Of-Force Cases: Understanding the Effects of Stress on Perception and Performance*, 70 *FORDHAM L. REV.* 2515 (2002).

officer's mistaken belief is objectively reasonable under the circumstances, then the officer is not subject to liability.<sup>40</sup> This is true under both North Carolina and federal law.<sup>41</sup> Moreover, the perceived danger must only be *apparent*, not actual, in order to justify the use of deadly force.<sup>42</sup>

Applying overlapping applicable doctrines is sometimes not so simple. Professor John Rubin of the Institute of Government at the University of North Carolina has observed that "despite its place in North Carolina jurisprudence, . . . the excessive force element has been difficult to apply. The principal difficulty has been with distinguishing the requirement that the Defendant's force not be excessive, or unreasonable, from the reasonable belief requirement embodied" in the law.<sup>43</sup>

Recent cases have clarified many use of force issues. In *Saucier v. Katz*, the United States Supreme Court reaffirmed that the *doctrine of mistaken beliefs* is applicable in use of force cases.<sup>44</sup> In *Brosseau v. Haugen*, the Court held that an officer, who shot a suspect that was fleeing by vehicle, was entitled to qualified immunity where the officer believed that the suspect, in flight, posed a danger to other officers and the public.<sup>45</sup> Additionally, *Scott v. Harris* is the Supreme Court's most recent venture into alleged excessive force.<sup>46</sup> In *Scott*, the Court reaffirmed the core use of force doctrine and applied it to insulate officers from liability in the context of a pursuit involving the use of intentional force to stop a fleeing suspect by ramming his vehicle from behind.<sup>47</sup>

North Carolina and federal law have recently evolved to better insulate officers from liability in general, and especially in cases where there are not bright line rules that can be applied. The United States Court of Appeals for the Fourth Circuit has emerged as perhaps the leading circuit court in curtailing alleged excessive force litigation by frequent summary judgment dispositions that are often premised upon qualified immunity for the officer.<sup>48</sup> It is clear that use of force cases are especially ripe for qualified immunity.

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40. See, e.g., *Graham v. Connor*, 490 U.S. 386, 387 (1989).

41. See *id.* at 396; *Perry v. Gibson*, 100 S.E.2d 341, 342 (N.C. 1957).

42. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985).

43. JOHN RUBIN, *THE LAW OF SELF-DEFENSE IN NORTH CAROLINA* 75 (1996).

44. *Saucier v. Katz*, 533 U.S. 194, 210 (2001), *modified by* *Pearson v. Callahan*, 129 S. Ct. 808 (2009). See *Brown v. Gilmore*, 278 F.3d 362, 370 (4th Cir. 2002).

45. 543 U.S. 194 (2004).

46. 550 U.S. 372 (2007).

47. *Id.*

48. The Fourth Circuit is a leader in qualified immunity cases, and these cases have granted qualified immunity to officers and reaffirmed the deferential standards

A number of factors have contributed to the environment that necessitates police use of force in response to apparent dangers. One of these factors is the increasing population of armed suspects. Drug dealers are often armed with the most sophisticated, high-tech weapons including Uzi-style assault weaponry.<sup>49</sup> Civil rights advocates have challenged police for the failure to protect citizens from these better-armed criminals. This phenomenon has been particularly prevalent in the alleged domestic violence context.<sup>50</sup> Law-abiding citizens rightfully demand instantaneous and decisive law enforcement responses to their legitimate needs. Citizens are quick to complain when criminal offenders are not apprehended. Courts have generally recognized that law enforcement officers are vulnerable to unfounded claims of abuse.<sup>51</sup>

Like most jurisdictions, North Carolina courts have become a common forum for various types of alleged excessive force cases against law enforcement officers.<sup>52</sup> North Carolina has even begun to

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applicable to officers. *See, e.g.,* *Abney v. Coe*, 493 F.3d 412, 415 (4th Cir. 2007) (“The requirement of reasonableness . . . accords police officers latitude . . . .” (internal quotation marks omitted)); *Alford v. Cumberland County*, No. 06-1569, 2007 WL 2985297 (4th Cir. Oct. 15, 2007); *Carr v. Deeds*, 453 F.3d 593, 600 (4th Cir. 2006); *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005); *Wilson v. Flynn*, 429 F.3d 465 (4th Cir. 2005); *Altman v. City of High Point*, 330 F.3d 194 (4th Cir. 2003); *Brown v. Gilmore*, 278 F.3d 362, 365 (4th Cir. 2002) (granting qualified immunity for an officer where the plaintiff refused to obey the officer’s command); *Gomez v. Atkins*, 296 F.3d 253, 266 (4th Cir. 2002) (Hamilton, J., concurring); *Milstead v. Kibler*, 243 F.3d 157, 165 (4th Cir. 2001) (concluding deadly force was objectively reasonable where the officer mistakenly believed a fleeing person was threatening other officers); *Anderson v. Russell*, 247 F.3d 125, 130 (4th Cir. 2001) (noting split-second decision-making principles require the court to accept what the officer “perceived immediately before” using force); *Cox v. County of Prince William*, 249 F.3d 295, 300 (4th Cir. 2001) (finding no Fourth Amendment violation); *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 788 (4th Cir. 1998) (involving reasonable perception of a weapon); *Pitman v. Nelms*, 87 F.3d 116, 120 (4th Cir. 1996); *Edmundson v. Keesler*, Nos. 95-3125, 95-3132, 1996 WL 683888 (4th Cir. Nov. 27, 1996); *Elliot v. Leavitt*, 99 F.3d 640, 641 (4th Cir. 1996).

49. *See, e.g.,* *United States v. Kirk*, 105 F.3d 997 (5th Cir. 1997).

50. Application of 42 U.S.C. § 1983 (2000) through case law has developed liability theories against law enforcement officers and agencies for failing to properly respond to domestic violence. *See* *Watson v. City of Kan. City*, 857 F.2d 690 (10th Cir. 1988).

51. *See, e.g.,* *Brooks v. Scheib*, 813 F.2d 1191, 1194 (11th Cir. 1987) (noting that officers working in high crime areas are subject to a higher numbers of complaints).

52. *See, e.g.,* *State v. Hicks*, No. 98 CRS 10492 (N.C. Super. Ct. Nov. 3, 1998). In *State v. Hicks*, the Honorable Jack Thompson, Superior Court Judge, issued an order dismissing an alleged voluntary manslaughter charge against Hoke County Deputy Hicks at the close of the State’s evidence. There, the criminal suspect led Deputy

indict officers for allegations of excessive force with greater frequency.<sup>53</sup> Although “[t]he amount of deadly force since the early 1970’s has dropped fifty percent in the major cities,”<sup>54</sup> alleged excessive force cases against law enforcement officers continue to explode.<sup>55</sup> Alleged police misconduct claims encompass a wide variety of potential tort-related claims.<sup>56</sup> Law enforcement officers may be subject to

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Hicks on a high speed chase and temporarily lost Deputy Hicks. Later, Deputy Hicks found the suspect near his van, whereby the suspect jumped in his van and attempted to drive off. Deputy Hicks observed the suspect reach down to the floor of the van as if he was retrieving a gun. The suspect was driving the van towards Deputy Hicks and four citizens. Deputy Hicks, consequently, shot at the suspect eleven times, striking and killing him. There was no weapon in the suspect’s van. However, the suspect’s gesture implied such a weapon. Judge Thompson’s announced decision appeared to rely heavily upon chapter 15A, section 401 of the North Carolina General Statutes. See N.C. GEN. STAT. § 15A-401 (2007).

53. See Mark Nichols, *Pursuit Leads To Felony Indictment*, AM. POLICE BEAT, Mar. 2002. In North Carolina, officers have been subjected to unlawful investigative tactics, including warrantless seizures of confidential records in attempts to indict officers. See *In re Brooks*, 548 S.E.2d 748 (N.C. Ct. App. 2000). The North Carolina criminal cases against officers for use of force have largely failed. North Carolina tried twice to indict Deputy Christopher Long for murder in connection with a shooting incident arising from a S.W.A.T. raid. In both instances, the grand jury failed to return a true bill of indictment. See *No Indictment in PlayStation Shooting*, REDORBIT, July, 11, 2007, [http://www.redorbit.com/news/scifi-gaming/996767/no\\_indictment\\_in\\_playstation\\_shooting/index.html](http://www.redorbit.com/news/scifi-gaming/996767/no_indictment_in_playstation_shooting/index.html). Many other North Carolina grand juries have declined to indict officers in use-of-force contexts. This trend appears consistent with the extraordinarily high criminal law standards under chapter 15A, section 401 of the North Carolina General Statutes and case law. See N.C. GEN. STAT. § 15A-401 (2007).

54. Paul G. Chevigny, *Police Violence: Causes and Cures*, 7 J.L. & POL’Y 85, 89 (1998).

55. See KENNETH ADAMS ET AL., U.S. DEP’T OF JUSTICE, *USE OF FORCE BY POLICE* (1999), available at <http://www.ncjrs.org/pdffiles1/nij/176330-1.pdf>; MICHAEL AVERY ET AL., *POLICE MISCONDUCT: LAW AND LITIGATION* § 2:19 (3d ed. 1999). See generally Bureau of Justice Statistics, *Citizen Complaints About Police Use of Force*, <http://www.ojp.usdoj.gov/bjs/pub/pdf/ccpuf.pdf> (last visited Feb. 22, 2009) (providing statistics on use of force complaints). The explosion of frivolous claims against police officers appears predicated upon a number of factors. The framing of a facially valid claim under bare notice pleading standards is quite easy. However, the overwhelming majority of excessive force claims do not survive summary judgment for a wide variety of deficiencies. See, e.g., *Sigman v. Town of Chapel Hill*, 161 F.3d 782 (4th Cir. 1998).

56. The broad range of prospective civil and civil rights claims against police officers include: negligence claims; claims based on arrest and detention involving warrantless arrests; arrests under unconstitutional statutes and ordinances; malicious prosecution; abuse of process; retaliatory prosecution; illegal searches and seizures; deprivations through improper use of informants and undercover agents; deprivation of First Amendment rights based on retaliatory actions; illegal interrogations; denial of medical attention; denial of counsel; defamation; verbal abuse and harassment; failure to provide police protection in various contexts, including domestic violence;

civil actions,<sup>57</sup> civil rights actions,<sup>58</sup> and criminal liability actions<sup>59</sup> for

conspiracies to violate civil rights; interference with family relationships; police pursuits; failure to disclose or act upon exculpatory evidence; negligence or deliberate indifference in the establishment or maintenance of road blocks; misuse of weapons; invasion of privacy; discrimination; and otherwise. See *AVERY ET AL.*, *supra* note 55. The everyday vehicle stop now invokes cutting-edge theories of ethnic profiling premised upon statistical analysis. See Sean P. Trende, Note, *Why Modest Proposals Offer the Best Solution for Combating Racial Profiling*, 50 *DUKE L.J.* 331 (2000).

57. Common law torts for assault and battery apply to law enforcement use of force. A battery consists of intentional infliction of harmful or offensive contact upon the claimant's person without the claimant's consent. See *Burwell v. Giant Genie Corp.*, 446 S.E.2d 126, 128 (N.C. Ct. App. 1994) (grabbing the plaintiff's arm held sufficient); *Wilson v. Bellamy*, 414 S.E.2d 347, 357-58 (N.C. Ct. App. 1992). However, North Carolina police officers are public officials and are therefore subject to the doctrine of public official immunity, which immunizes them from common law tort claims where the action is not corrupt, malicious, or beyond the scope of their authority. See, e.g., *Smith v. Hefner*, 68 S.E.2d 783, 787 (N.C. 1952); *Barnett v. Karpinos*, 460 S.E.2d 208, 213 (N.C. Ct. App. 1995); *Hare v. Butler*, 394 S.E.2d 231, 236 (N.C. Ct. App. 1990); *Wiggins v. City of Monroe*, 326 S.E.2d 39, 43 (N.C. Ct. App. 1985); *Pigott v. City of Wilmington*, 273 S.E.2d 752, 753-54 (N.C. Ct. App. 1981).

58. Among the most common civil rights actions for alleged excessive force are Fourth Amendment claims brought under 42 U.S.C. § 1983 (2000). See, e.g., *Graham v. Connor*, 490 U.S. 386, 386 (1989); *Tennessee v. Garner*, 471 U.S. 1, 1 (1985); *Spell v. McDaniel*, 824 F.2d 1380, 1383 (4th Cir. 1987).

59. Homicide and felonious assault charges under North Carolina law may apply to law enforcement use of force allegations. However, those substantive laws must also be applied together with the statutory use of force standard in chapter 15A, section 401 of the North Carolina General Statutes. N.C. GEN. STAT. § 15A-401 (2007). Despite the availability of potential criminal charges, prosecutions of North Carolina officers are very rare because of the stringent standards in section 401 and case law. See *id.*

Federal statutes also preclude excessive force. For example, 18 U.S.C. § 241 (2000) generally prohibits conspiracies to violate civil rights, and 18 U.S.C. § 242 generally prohibits excessive force and other conduct that deprives one of a federal constitutional or statutory right. Specifically, § 242 "imposes a criminal penalty on anyone who, under color of state law, willfully subjects any person to the deprivation of rights secured by the Constitution or laws of the United States." *Id.* See *United States v. Colbert*, 172 F.3d 594, 596 (8th Cir. 1999). The most recent interpretation of § 242 by the United States Supreme Court appears in *United States v. Lanier*, 520 U.S. 259 (1997). In *Lanier*, a Tennessee state judge was convicted for violating § 242 for having sexually assaulted judicial employees and litigants. *Id.* at 259. The Court held that § 242 makes it "criminal to act (1) willfully and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States." *Id.* at 264 (internal quotation marks omitted). Thus, excessive force is actionable under § 242 when the stringent statutory standards can be met. See, e.g., *United States v. Dean*, 722 F.2d 92, 94 (5th Cir. 1983) (concluding that "excessive force can be the basis of a conviction under 18 U.S.C. § 242"). Many other recent cases have confirmed the reach and breadth of § 242. See *United States v. Daniels*, 281 F.3d 168 (5th Cir. 2002); *United States v. Tines*, 70 F.3d 891 (6th Cir. 1995); *United States v.*

excessive force. However, a single legal standard applies to all of these alleged excessive force charges: the *objective reasonableness standard*.<sup>60</sup>

## II. OUTLINE OF FUNDAMENTAL PRINCIPLES APPLICABLE IN THE ANALYSIS OF POLICE USE OF FORCE

Use of force law involves an overlapping body of law including state and federal statutory, constitutional, and common law. Claims against police officers for excessive force can be grouped in three general areas: (1) federal constitutional claims under the Fourth, Eighth, or Fourteenth Amendments; (2) state statutory or common law use of force claims, including statutory wrongful death, and common law assault and battery—subject, of course, to North Carolina’s doctrine of public officer immunity; and (3) state constitutional claims for unreasonable seizure, which can potentially be brought under article 1, sections 19, 35, and 36 of the North Carolina constitution.

There are many available defenses to use of force claims that also arise from statutory and common law sources. Some defenses include: (a) self defense; (b) defense of others; (c) necessity; (d) justification; (e) state statutory defenses; (f) the force used was not unlawfully excessive; (g) the officer reasonably could have believed that the force used was appropriate; (h) law enforcement privilege; (i) crime prevention privilege; (j) authority and duty of law; (k) assumption of risk; (l) provocation; (m) doctrine of mistaken belief; (n) contributory negligence; (o) lack of causation; (p) qualified immunity, which immunizes officers from individual federal constitutional liability under various circumstances; and (q) public officer immunity, which immunizes officers from state law individual liability under various circumstances.<sup>61</sup>

The following are some general use of force principles offered as a preview of the more detailed analysis to follow.

1) Officer perception in light of the particular circumstances is often the key factor for reasonableness analysis in most use of force cases.

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Vaden, 912 F.2d 780 (5th Cir. 1990); *United States v. Golden*, 671 F.2d 369 (10th Cir. 1982).

60. See J. Michael McGuinness, *Shootings by Police Officers Are Analyzed Under Standards Based on Objective Reasonableness*, 72 N.Y. ST. B. ASS’N J. 17 (2000).

61. See for example the cases cited in notes 464-73; N.C. GEN. STAT. § 15A-401(d)(2) (providing that an officer may use deadly force when it “appears to be reasonably necessary” to protect “himself or a third person”); see also ISIDORE SILVER, *POLICE CIVIL LIABILITY* § 6.03[2] (1996); ESSICA SMITH, *NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME* 12 (6th ed. 2007).

2) The amount of force that was necessary is judged from the perspective of a reasonable officer on the particular scene confronted with the particular circumstances, without retrospective analysis. This split-second decision-making standard is extremely deferential to officer perception and discretion.

3) Reasonable mistakes by an officer based upon good faith beliefs will typically insulate officers from liability.

4) Analysis of the use of force is keyed to the facts at the precise moment that the force is used. Ten minutes of rational conduct by a suspect, followed by a quick, threatening movement typically justifies the use of force.

5) The *use of force continuum* theory is not the law and is not enforceable. This theory involves initial verbal persuasion, commands, and warnings. It then progresses to the use of a lesser means of force where feasible and safe, such as tasers, batons, pepper spray, or a canine. The continuum progressively evolves from a show of force to the use of force. As the risk gets progressively more severe and the magnitude and intensity of the threat to surrounding officers increases, officers resort to more efficient weapons to stop the threat and control the suspect. However, nothing in the continuum theory precludes the immediate use of deadly force where the officer could have reasonably believed that deadly force was appropriate.

6) Although the degree of force should theoretically be commensurate with the magnitude of the apparent threat, use of force law does not allow admission of evidence that there were less drastic means available. The test is determining whether the officer's actions were objectively reasonable and if the officer could have reasonably believed that the force used was appropriate.

7) The display of potentially deadly weapons, which includes edged weapons, heavy objects, broken bottles, vehicles, and other means of potential death, usually justifies deadly force where the officer could have reasonably believed that the weapon could have been used to kill the officer or others. The display of a gun virtually always justifies deadly force. Even with the barrel pointed down or away, a flick of movement can aim and fire it before an officer can initiate preemptive action. A real weapon need not be present; an officer is required to act to protect himself or herself and third persons from apparent threats and weapons.

8) Bullet trajectory and the number of shots fired do not determine the issues of reasonableness of force or justification. Back and side shot cases are often justifiable because of the lag time and reac-

tionary gap phenomenon. Suspects can turn quicker than an officer can fire a weapon.

9) Factors demonstrating justification are key points for analysis in most use of force cases. Justification involves a comprehensive analysis of both facts, perceptions by the officer as to the need for force, and the officer's belief as to the applicable law.

10) Agency use of force policies and other rules and regulations are irrelevant and inadmissible in civil actions adjudicating alleged excessive force. The legal standard is objective reasonableness, which cannot be determined by any agency policy or rules. Departmental use of force policy is not enforceable as a claim in a civil action. While departmental policies may be appropriate as general guidelines and training for officers, the enforceable law derives from constitutional, statutory, and common law sources. Thus, even a violation of a department use of force guideline is irrelevant and inadmissible in use of force litigation. Local policies are not the law.<sup>62</sup>

11) The determination of whether the force used is excessive under the Fourth Amendment involves application of a balancing test whereby the court considers "the nature and quality of the intrusion on the [suspect's] Fourth Amendment interests [balanced] against the countervailing governmental interests."<sup>63</sup> Many cases reflect the balancing of relevant factors.<sup>64</sup>

In *Graham v. Connor*, the Supreme Court defined the constitutional standard governing claims for excessive force during an arrest, investigatory stop, or other seizure as requiring objective reasonableness.<sup>65</sup> The Court explained that judging the reasonableness of force under the Fourth Amendment requires analysis of the facts and circumstances of each particular case, including: (1) the severity of the

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62. See, e.g., *Davis v. Scherer*, 468 U.S. 183, 196 & n.13 (1984) (holding that there is no loss of qualified immunity merely because the conduct violated a statutory or administrative provision); *Abney v. Coe*, 493 F.3d 412, 419 (4th Cir. 2007); *Thompson v. City of Chicago*, 472 F.3d 444, 454-55 (7th Cir. 2006); *Medina v. Cram*, 252 F.3d 1124, 1131-32 (10th Cir. 2001); *Mettler v. Whitley*, 165 F.3d 1197, 1203 (8th Cir. 1999); *Ensley v. Soper*, 142 F.3d 1402, 1407 n.4 (11th Cir. 1998); *Gravelly v. Madden*, 142 F.3d 345, 349 (6th Cir. 1998); *Wilson v. Meeks*, 52 F.3d 1547, 1554 (10th Cir. 1995); *Smith v. Freland*, 954 F.2d 343, 346-47 (6th Cir. 1992); *Carter v. Buscher*, 973 F.2d 1328 (7th Cir. 1992); *Edwards v. Baer*, 863 F.2d 606, 608 (8th Cir. 1988).

63. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks and citations omitted).

64. See, e.g., *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997); *Phillips v. City of Milwaukee*, 123 F.3d 586, 592 (7th Cir. 1997).

65. *Graham*, 490 U.S. at 388.

crime; (2) whether the suspect posed an immediate threat to the officers or others; (3) whether the suspect was actively resisting arrest; and (4) whether the suspect was attempting to evade arrest by flight.<sup>66</sup>

Although this Article focuses on use of force under Fourth Amendment analysis, there are, as indicated above, other constitutional bases for use of force claims. Where excessive force is used against a convicted prisoner, the claim is analyzed under the Eighth Amendment to determine whether cruel and unusual punishment has been applied.<sup>67</sup> The appropriate test to be applied is the standard of recklessness, deliberate indifference, or callous indifference, which most courts use interchangeably.<sup>68</sup> This test has been characterized as just “not giving a damn.”<sup>69</sup> In situations involving denial of medical care, a version of the “shocks the conscience” substantive due process test will apply.<sup>70</sup> The Supreme Court has not decided what specific constitutional test is implicated where a pretrial detainee is subjected to excessive force.<sup>71</sup> Several courts have held that *Graham* Fourth Amendment standards apply in the period between arrest and initial court appearances.<sup>72</sup> Other courts have employed a substantive due process approach or some hybrid test to such circumstances.<sup>73</sup>

### III. THE NORTH CAROLINA STATUTORY STANDARD: SECTION 15A-401

#### A. *Reasonable Necessity from the Officer's Perspective*

Section 15A-401(d)(2) of the North Carolina General Statutes provides the applicable standard governing the use of force in North Carolina in connection with the apprehension of criminal suspects.<sup>74</sup> This statute codifies the rights, duties, and privileges of officers to employ force in the defense of others and self defense.<sup>75</sup> Section 15A-401(d)(2) provides, in pertinent part, that:

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66. *Id.* at 396.

67. See *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

68. See *Bordanaro v. McLeod*, 871 F.2d 1151, 1164 (1st Cir. 1989).

69. *Id.*

70. See *Nerren v. Livingston Police Dep't*, 86 F.3d 469, 474 (5th Cir. 1996).

71. See *Wilson v. Spain*, 209 F.3d 713, 715 (8th Cir. 2000).

72. See *id.* at 715-16. *But see Orem v. Rephann*, 523 F.3d 442, 446 (4th Cir. 2008) (indicating that excessive force claims of a pretrial detainee or arrestee are governed by the Due Process Clause of the Fourteenth Amendment); *Sammons v. Barker*, No. 2:07-00132, 2008 WL 1968843, at \*7 (S.D.W. Va. May 2, 2008).

73. See *Leary v. Livingston County*, 528 F.3d 438, 443 (6th Cir. 2008); *Riley v. Dorton*, 115 F.3d 1159, 1166 (4th Cir. 1997).

74. See N.C. GEN. STAT. § 15A-401(d)(2) (2007).

75. See *SILVER*, *supra* note 61, at 6-12 (“A police officer making an otherwise valid arrest is legally privileged to use reasonably necessary force to effect a custody.”).

A law-enforcement officer is justified in using deadly physical force upon another person . . . when it is or appears to be reasonably necessary thereby . . . [t]o defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; . . . [or] [t]o effect an arrest or to prevent the escape from custody of a person who he reasonably believes is attempting to escape by means of a deadly weapon, or who by his conduct or any other means indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay . . . .<sup>76</sup>

This statutory provision recognizes three essential concepts: (1) how the situation “appears” to the officer can justify the force used; (2) the use of force requires “reasonable” necessity; and (3) the *officer’s perspective* is the basis for analysis.<sup>77</sup>

North Carolina common law recognizes that “an officer is presumed to be acting lawfully while in the exercise of his official duties.”<sup>78</sup> It also recognizes a “privilege to intervene in the context of a supposed felonious assault . . . .”<sup>79</sup> Section 15A-401 provides both a statutory standard and privilege<sup>80</sup> for law enforcement officers that is

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76. N.C. GEN. STAT. § 15A-401(d)(2).

77. *Id.*

78. *State v. Anderson*, 253 S.E.2d 48, 52 (N.C. Ct. App. 1979).

79. *Id.*

80. In *North Carolina v. Reuben Hassell*, the Honorable Richard Allsbrook, Superior Court Judge presiding, instructed the jury on use of force issues in the criminal case against Officer Hassell:

Since the Defendant, Reuben Hassell, Jr., was acting in his capacity as a police officer in the Washington Police Department at the time of this incident on March 24, 1998, and since he then was attempting to affect a lawful arrest, there are some special instructions that you need to consider as you deliberate upon your verdict in this case.

Police officers have a duty to apprehend lawbreakers, and society has a strong interest in allowing the police to carry out that duty without fear of being subjected to criminal liability just because someone is injured. North Carolina General Statute 15A-401 entitled “Arrest by law-enforcement officer” provides in part as follows: An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer’s presence. A law enforcement officer is justified in using force upon another person when and to the extent that he reasonably believes it necessary to effect an arrest of a person who he reasonably believes has committed a criminal offense. And a law enforcement officer is justified in using deadly physical force upon another person only when it is or appears to be reasonably necessary thereby to defend himself from what he reasonably believes to be the use or imminent use of deadly physical force. Nothing in this subdivision shall be construed to excuse or justify the use of an unreasonable or excessive force. An officer of the law has the right to use such force as he may reasonably believe

consistent with the common law as well as contemporary decisions by the United States Supreme Court regarding the use of force.<sup>81</sup> Several cases have demonstrated that section 15A-401(d)(2) “was designed solely to codify and clarify those situations in which a police officer may use deadly force without fear of incurring criminal or civil liability.”<sup>82</sup>

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necessary in the proper discharge of his duties to effect an arrest. But in reasonable limits, the officer is properly left with the discretion to determine the amount of force required under the circumstances as they appeared to him at the time of the arrest. An officer, in making an arrest or preventing an escape, either in case of felony or misdemeanor, may meet force with force, sufficient to overcome it, even to the taking of life if necessary, and he is not required under such circumstances to afford the accused equal opportunities with him in the struggle. He is not bound to put off the arrest until a more favorable time. His duty is to overcome all resistance and to bring the party to be arrested under physical restraint, and the means he may use must be coextensive with the duty, and so the law is written.

If the offender put the life of an officer in jeopardy, the latter in self-defense may slay him. But he must be careful not to use any greater force than is reasonable and apparently necessary under the circumstances, for necessity, real or apparent, is the ground upon which the law permits such action. However, where officers of the law engaged in making arrests or acting in good faith and forces required to be used, their conduct should not be weighed in golden scales. Stated somewhat differently, every arrest officers make involves either a threatened or active use of force. Essentially the officers themselves decide how much force is necessary under the circumstances to bring the arrestees within their custody and control. However, they are entitled to use only as much force as is reasonably necessary to secure the arrestee, overcome resistance, prevent escape, or protect themselves from bodily injury. They may never use more force than is necessary to accomplish this purpose. In determining the amount of force required, an officer may consider all of the circumstances surrounding the arrest, such as the type of offense, the arrestee’s reputation for violence, the arrestee’s words or actions, and whether the arrestee is armed or is apparently armed. The amount of force must not be excessive considering the circumstances.

McGuinness, *supra* note 9, at 210 n.39. Judge Allsbrook later gave specific instructions regarding self-defense and apparent danger.

81. See *Isquierdo v. Frederick*, 922 F. Supp. 1072, 1076 (M.D.N.C. 1996).

82. *State v. Irick*, 231 S.E.2d 833, 846 (N.C. 1977). See *Prior v. Pruett*, 550 S.E.2d 166, 172 (N.C. Ct. App. 2001). Cf. *Sossamon v. Cruse*, 45 S.E. 757, 759 (N.C. 1903) (discussing early common law use of force).

In his criminal procedure treatise, Professor Irving Joyner has outlined the principles regarding “Use of Deadly Force by Police Officers” as follows: “A police officer is justified in using deadly force when it is or appears to be reasonably necessary . . . [t]o defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force . . . .” IRVING JOYNER, *CRIMINAL PROCEDURE IN NORTH CAROLINA* § 3.4 (1st ed. 1989). Professor Joyner observed that

A number of North Carolina cases have construed section 15A-401. In *State v. Anderson*, the North Carolina Court of Appeals explained:

An officer of the law has the right to use such force as *he may reasonably believe necessary* in the proper discharge of his duties to effect an arrest. . . . [T]he officer is properly left with the discretion to determine the amount of force required under the circumstances as they appeared to him at the time of the arrest.<sup>83</sup>

In use of force cases, officers have considerable discretion and latitude in determining whether force is necessary and, if so, the extent of the force needed.<sup>84</sup> In *Todd v. Creech*, the court of appeals reaffirmed the principle that an officer “has discretion to determine the amount of force required under the circumstances as they appeared to him at the time he acted.”<sup>85</sup> The amount of force that an officer may utilize is that which appears “necessary from the viewpoint of the officer.”<sup>86</sup> This “officer viewpoint” standard is a critically important principle because it eliminates the possibility of after-the-fact second-guessing by judges and jurors not confronting the split-second and often life-threatening environment that surrounded the officer’s actual decision.

In *Hinton v. City of Raleigh*, the court of appeals held that the officer was entitled to shoot the suspect when the suspect failed to halt all movement when ordered to do so by the officer.<sup>87</sup> The court noted that the decedent was under a “duty . . . to submit when ordered to do so by the officers.”<sup>88</sup> The officer had a “right of self defense” provided by section 15A-401(d)(2)(a).<sup>89</sup> The court determined that the decedent’s “crouching” and movement “pointing toward the officers” was sufficient to justify the use of deadly force.<sup>90</sup> Moreover, in *State v. Burton*, the court of appeals held that if an officer is attempting a lawful

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even a fleeing misdemeanor may be subjected to deadly force, noting that “if the misdemeanor poses a threat of death or serious bodily injury to the officer or third persons, deadly force may be authorized.” *Id.* (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

83. 253 S.E.2d 48, 50 (N.C. Ct. App. 1979) (emphasis added) (citations omitted); accord *Isquierdo*, 922 F. Supp. at 1076-80.

84. See, e.g., *Morrison v. Martin*, 755 F. Supp. 683, 692 (E.D.N.C. 1990); *Anderson*, 253 S.E.2d at 50.

85. 209 S.E.2d 293, 295 (N.C. Ct. App. 1974). See *State v. McCaskill*, 154 S.E.2d 907, 908-09 (N.C. 1967).

86. *State v. Mensch*, 239 S.E.2d 297, 299 (N.C. Ct. App. 1977).

87. 264 S.E.2d 777 (N.C. Ct. App. 1980).

88. *Id.* at 779.

89. *Id.*

90. *Id.*

arrest, the officer has the right to employ commensurate force to subdue the arrestee and the arrestee has no right to resist.<sup>91</sup>

In *State v. Fain*, the North Carolina Supreme Court articulated an excellent summary of the basic principles of the use of force and self-defense in the law enforcement criminal context:

An officer, where he acts in self-defense may, if necessary, kill an offender who endangers his life or safety, while attempting an arrest. If the officer is assaulted, he is not bound to fly to the wall, but if necessary to save his own life, or to guard his person from great bodily harm, he may even kill the offender; this rule applies, although the arrest is being made for a misdemeanor . . . . It is a principle very generally accepted that an officer, having the right to arrest an offender, may use such force as is necessary to effect his purpose, and to a great extent he is made the judge of the degree of force that may be properly exerted. Called on to deal with violators of the law, and not infrequently to act in the presence of conditions importing serious menace, his conduct in such circumstances is not to be harshly judged . . . . [H]e may use the force necessary to overcome resistance and to the extent of taking life . . . .<sup>92</sup>

#### B. *Apparent Dangers Warrant the Use of Force*

If there is *apparent danger* to the officer or to any citizens, a law enforcement officer is required to stop the threat to the officer or citizen.<sup>93</sup> Police officers often have to make immediate split-second decisions based on *perception* and apparent danger. There need not be *actual danger* to the officer to justify the use of force.<sup>94</sup> Law enforcement officers are required to react to apparent dangers and apparent weapons because normal conditions and lag time do not often allow for an officer to ascertain, with certainty, whether a weapon is present.<sup>95</sup> Typical conditions in routine police encounters present the likelihood of mistakes. The North Carolina Supreme Court has long recognized the balance that law enforcement officers must employ:

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91. 423 S.E.2d 484, 488 (N.C. Ct. App. 1992).

92. 50 S.E.2d 904, 905 (N.C. 1948) (emphasis added) (internal quotation marks and citations omitted).

93. See *McLenagan v. Karns*, 27 F.3d 1002 (4th Cir. 2004).

94. See, e.g., *Saucier v. Katz*, 533 U.S. 194, 210 (2001), modified by *Pearson v. Callahan*, 129 S. Ct. 808 (2009); *Milstead v. Kibler*, 243 F.3d 157, 164 (4th Cir. 2001); *Davis v. Freels*, 583 F.2d 337, 341 (7th Cir. 1978). The Fourth Circuit has similarly construed the Fourth Amendment and has also provided qualified immunity where an officer could have reasonably believed that deadly force was necessary. For example, see *Carr v. Deeds*, 453 F.3d 593, 600 (4th Cir. 2006) and cases cited therein.

95. See *McLenagan*, 27 F.3d at 1007.

[T]he police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made in “haste, under pressure, and frequently without the luxury of a second chance.”<sup>96</sup>

In *State v. Marsh*, the North Carolina Supreme Court explained:

The right to act in self-defense rests upon necessity, real or apparent, and a person may use such force as is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense. A person may exercise such force if he believes it to be necessary and has reasonable grounds for such belief.<sup>97</sup>

Courts have recognized that a police officer is not required to await the “glint of steel” before he or she can act to preserve his or her own safety.<sup>98</sup> Generally, once the “‘glint of steel’ [appears,] . . . it is too late to take safety precautions.”<sup>99</sup>

In *Davis v. Freels*, a leading police shooting case, the Seventh Circuit explained:

It is not necessary that the danger which gave rise to the belief actually existed; it is sufficient that the person resorting to self-defense at the time involved reasonably believed in the existence of such a danger, and such reasonable belief is sufficient even where it is mistaken.<sup>100</sup>

Law enforcement officers are trained to evaluate human behavior as a part of their basic functions. Attempts to evade the officer, as well as furtive glances, sudden turns, and ignoring requests to bring one’s hands into view, are common indicia of behavior that demonstrates reasonable suspicion and prospective danger.<sup>101</sup> Police encounters often occur at night, which substantially limits vision and enhances risk to everyone. Criminals often flee and take cover in uncertain terrain, thus putting officers at a further disadvantage.

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96. *Parish v. Hill*, 513 S.E.2d 547, 556 (N.C. 1999) (quoting *Whitely v. Albers*, 475 U.S. 312, 320 (1986)).

97. 237 S.E.2d 745, 747 (N.C. 1977).

98. *See People v. Morales*, 603 N.Y.S.2d 319 (N.Y. App. Div. 1993).

99. *Id.* at 320.

100. 583 F.2d 337, 341 (7th Cir. 1978).

101. *See, e.g., People v. Warren*, 613 N.Y.S.2d 375, 376 (N.Y. App. Div. 1994); *People v. Alonzo*, 580 N.Y.S.2d 298, 299 (N.Y. App. Div. 1992); *People v. Rodriguez*, 575 N.Y.S.2d 911, 912 (N.Y. App. Div. 1991).

The most common gesture—which fuels the need for the use of force—is the reach towards a pocket or the waistband area.<sup>102</sup> In *People v. Benjamin*, the New York Court of Appeals explained:

It is quite apparent to an experienced police officer, and indeed it may almost be considered common knowledge, that a handgun is often carried in the waistband. It is equally apparent that law-abiding persons do not normally step back while reaching to the rear of the waistband, with both hands, to where such a weapon may be carried. Although such action may be consistent with innocuous behavior, it would be unrealistic to require [the police] . . . to assume the risk that the defendant's conduct was in fact innocuous or innocent. . . . It would, indeed, be absurd to suggest that a police officer has to await the glint of steel before he can act to preserve his safety.<sup>103</sup>

These cases recognize the fundamental tenet of law enforcement decision-making in split second environments: there is not time for armchair reflection and reflective analysis.<sup>104</sup>

It is essential to note that “[t]he Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists.”<sup>105</sup> An officer is not required to shoot to wound,<sup>106</sup> nor is an officer required to use a minimum of force to apprehend a suspect.<sup>107</sup> Rather, the officer is required to stop the threat. Where an officer is exposed to an imminent risk of death or serious bodily injury, less-than-lethal force is not required.<sup>108</sup>

#### IV. SPECIAL SELF-DEFENSE AND DEFENSE OF OTHERS PRINCIPLES IN LAW ENFORCEMENT CASES

##### A. *Self-Defense*

The principle of self-defense is one of the foremost principles in American jurisprudence.<sup>109</sup> The first published North Carolina case,

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102. *People v. Benjamin*, 414 N.E.2d 645 (N.Y. 1980). Recent cases show that resorting to a vehicle may similarly provide a reasonable grounds for a belief that the officer is in imminent danger of death or serious bodily injury. See *infra* Part VII.D.

103. *Benjamin*, 414 N.E.2d at 648. See *People v. Marquez*, 563 N.Y.S.2d 987, 990 (N.Y. Sup. Ct. 1990) (“Scarcely a day goes by in New York City during which an innocent life is not lost to firearms wielded by criminals.”).

104. See *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 787 (4th Cir. 1998).

105. *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996).

106. See *Clark v. Evans*, 840 F.2d 876, 883 (11th Cir. 1988).

107. See *Graham v. Connor*, 490 U.S. 386, 396 (1989).

108. See N.C. GEN. STAT. § 15A-401(d)(2)(a) (2007).

109. See *New Orleans & N.E.R.R. Co. v. Jopes*, 142 U.S. 18, 23 (1891) (illustrating that the right to self-defense developed very early in Anglo-American jurisprudence).

*State v. Davis*, recognizing self-defense dates back to 1859.<sup>110</sup> In a case from 1877, the North Carolina Supreme Court observed how the right to self-defense involves “the very instinct and constitution of [a man’s] being.”<sup>111</sup> In 1927, the court pronounced that “[t]he first law of nature is that of self-defense.”<sup>112</sup> The right to claim self-defense has been long recognized as a fundamental right, as it is “deeply rooted in our traditions.”<sup>113</sup> Therefore, this historic right of self-defense is not easily trumped in alleged excessive force litigation.

Leading North Carolina cases demonstrate the application of the doctrine of self-defense in the law enforcement use of force context. These cases provide for a standard that is very deferential to good faith judgment calls made by officers. In a leading case, the North Carolina Court of Appeals explained:

An officer of the law has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties to effect an arrest . . . . [T]he officer is properly left with the discretion to determine the amount of force required under the circumstances as they appeared to him at the time of the arrest.<sup>114</sup>

An officer “has discretion to determine the amount of force required under the circumstances as they appear[ ] to him at the time he act[s].”<sup>115</sup> Additionally, “[a]n officer, in making an arrest or preventing an escape, either in case of felony or misdemeanor, may meet force with force, sufficient to overcome it, even to the taking of life if necessary.”<sup>116</sup>

The danger necessary for self-defense must only be apparent danger, such that would cause a reasonable person to believe that he or she was in danger of death or great bodily harm.<sup>117</sup> Thus, actual dan-

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110. 52 N.C. 52 (1859) (referring to self-defense as a natural right).

111. *State v. Turpin*, 77 N.C. 473, 476 (1877).

112. *State v. Holland*, 138 S.E. 8, 10 (N.C. 1927).

113. *Taylor v. Withrow*, 288 F.3d 846, 851-52 (6th Cir. 2002) (“Blackstone referred to self-defense as ‘the primary law of nature,’ and claimed that ‘it is not, neither can it be in fact, taken away by the law of society.’” (citations omitted)). Many dated and modern cases have emphatically reaffirmed the constitutional right of self-defense. *See, e.g., State v. Hardy*, 397 N.E.2d 773, 776 (Ohio Ct. App. 1978) (holding that the constitutional right of self-defense is grounded in both the Federal and Ohio Constitutions).

114. *State v. Anderson*, 253 S.E.2d 48, 50 (N.C. Ct. App. 1979) (citations omitted).

115. *Todd v. Creech*, 209 S.E.2d 293, 295 (N.C. Ct. App. 1974). *See Myrick v. Cooley*, 371 S.E.2d 492, 496 (N.C. Ct. App. 1988).

116. *Holloway v. Moser*, 136 S.E. 375, 377 (N.C. 1927).

117. *See State v. Herbin*, 259 S.E.2d 263, 267 (N.C. 1979) (“The burden is upon the State to prove beyond a reasonable doubt that the defendant did not act in self-defense when there is some evidence in the case that he did.”); *State v. Goode*, 107 S.E.2d 70

ger is not the issue; rather, apparent danger as it reasonably appears to the officer is sufficient to establish self-defense.<sup>118</sup> The North Carolina Supreme Court explained this principle, stating:

The right to act in self-defense rests upon necessity, real or apparent, and a person may use such force as is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense. A person may exercise such force if he believes it to be necessary and has reasonable grounds for such belief.<sup>119</sup>

Moreover, an officer “acting in self-defense is presumed to have acted in good faith.”<sup>120</sup>

In *State v. Brannon*, the North Carolina Supreme Court addressed a homicide case involving an officer who was attacked with a pool cue.<sup>121</sup> The Court in *Brannon* explained that “if the offender put the life of the officer in jeopardy, the latter may *se defendendo* slay him.”<sup>122</sup> It added that “[a]s against those who defy its decrees and threaten violence to its officers, the law commands that its mandates be executed, peaceably, if they can, forcibly if they must.”<sup>123</sup>

#### B. *Defense of Others*

Numerous cases recognize the right to come to the defense of a third party.<sup>124</sup> This doctrine has special application for police officers because of their duty to defend and protect others. For example, in *State v. Foster*, an officer was acquitted of manslaughter charges after he shot several times at a suspect’s car—resulting in the suspect’s death—in response to another officer’s call for help.<sup>125</sup> The court, in *Foster*, reasoned that “a person can come to the defense of another

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(N.C. 1959); *State v. Hand*, 86 S.E. 1005 (N.C. 1915); *see also* *Tennon v. Ricketts*, 642 F.2d 161 (5th Cir. 1981); *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980).

118. *See* *State v. Jones*, 261 S.E.2d 1, 7 (N.C. 1980); *State v. Jackson*, 200 S.E.2d 596, 601 (N.C. 1973).

119. *State v. Marsh*, 237 S.E.2d 745, 747 (N.C. 1977).

120. *State v. Ellis*, 86 S.E.2d 272, 274 (N.C. 1955).

121. 67 S.E.2d 633 (N.C. 1951).

122. *Id.* at 638 (emphasis added) (quoting *State v. Miller*, 149 S.E. 590, 592 (N.C. 1929)).

123. *Id.* at 637 (quoting jury instructions from the trial court, and holding that they were not in error).

124. *See, e.g., State v. Church*, 51 S.E.2d 345, 347 (N.C. 1949) (holding that the defendant has a right to defend a family member against threat of death or great bodily harm); *State v. Anderson*, 253 S.E.2d 48, 52 (N.C. Ct. App. 1979) (holding that a bystander may come to the defense of an arrestee only when the arrestee would himself be justified in using force).

125. 396 N.E.2d 246 (Ohio Ct. C.P. 1979).

person and even kill an assailant in the necessary defense of the other person.”<sup>126</sup>

A person may intervene and use force against another when it appears reasonably necessary in order to protect a third person from harm.<sup>127</sup> Moreover, when an officer has a reasonable belief that a felonious assault is about to be committed, the officer has the right and the duty to intervene and prevent it.<sup>128</sup> In support of these statements, The North Carolina Supreme Court, in *State v. Robinson*, held that the jury may be instructed on both self-defense and crime prevention aspects of defense of others.<sup>129</sup>

#### V. STATE LAW USE OF FORCE STANDARDS IN OTHER JURISDICTIONS

Various state appellate courts have similarly recognized the appropriateness of deferential standards in alleged law enforcement use of force cases. Thus, North Carolina’s substantial deference to police officers is consistent with the national majority rule. The constant difficulties and inherent dangers in law enforcement must be considered in the use of force inquiry. For example, in *Johnson v. Ray*, the Supreme Court of Wisconsin affirmed that police officers, in the course of making an arrest, are privileged to use whatever force is reasonably necessary.<sup>130</sup> The court held that the test of reasonableness focused upon the particular belief of the officer involved.<sup>131</sup> Furthermore, in *State v. Thompson*, the Supreme Court of Nebraska held that the use of force is justifiable when an officer is making or assisting in the making of an arrest and the officer believes that such force is necessary.<sup>132</sup>

In *State v. Foster*, the defendant was a law enforcement officer charged with voluntary manslaughter arising out of a shooting.<sup>133</sup> In discussing the facts, the Court of Common Pleas of Ohio stated that:

Officer Foster, armed with a Smith and Wesson, Model 10, .38 caliber revolver, discharged five rounds of the six available rounds as the car proceeded toward and past him. Two of the rounds discharged, struck the front of . . . [the] automobile . . . . After the first two shots, [the criminal suspect] was observed bending down toward the passenger’s

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126. *Id.* at 257 (citing *Greger v. State*, 161 N.E. 37 (Ohio Ct. App. 1927)).

127. *See State v. Hornbuckle*, 144 S.E.2d 12, 14 (N.C. 1965).

128. *See id.* at 14; *State v. Moses*, 193 S.E.2d 288, 289 (N.C. Ct. App. 1972).

129. 195 S.E. 824, 829-30 (N.C. 1938).

130. 299 N.W.2d 849, 852 (Wis. 1981).

131. *Id.*

132. 505 N.W.2d 673, 680 (Neb. 1993).

133. 396 N.E.2d 246, 248 (Ohio Ct. C.P. 1979).

side. As the . . . vehicle continued toward Officer Foster, Officer Foster kept from being struck by the vehicle by moving to the east side of Dublin Road where he continued to fire three more shots.<sup>134</sup>

The court analyzed the law of Ohio regarding the use of force by police officers, and addressed the issue of whether the use of deadly force, in order to be privileged, must be “actually necessary” or “apparently necessary”.<sup>135</sup> The court held that “[t]he majority view today requires only ‘apparent necessity,’”<sup>136</sup> and that “the courts will ordinarily afford [police officers] the utmost protection.”<sup>137</sup>

VI. ANALYTICAL METHODOLOGY IN USE OF FORCE CASES: THE  
“REASONABLENESS OF THE MOMENT” TEST AND THE  
“COULD HAVE BELIEVED” STANDARD

A. *The “Reasonableness of the Moment” Test*

The United States Supreme Court and lower courts have structured a contextual test for the analysis of law enforcement use of force claims.<sup>138</sup> Most of these cases apply federal constitutional standards but the methodology is equally applicable to state-based claims. This use of force methodology is grounded upon the “reasonableness of the moment” test.<sup>139</sup> This standard requires an assessment of force at the precise moment of its use, rather than before- or after-the-fact considerations.<sup>140</sup> The Supreme Court has long recognized the “practical difficulties of attempting to assess the suspect’s dangerousness.”<sup>141</sup> The Fourth Circuit has also recognized this difficulty, indicating that “[t]o evaluate excessive force, we view the facts from the perspective of the officer.”<sup>142</sup> Thus, the precise moment of the use of force is the context within which the conduct is analyzed under the reasonableness test. The Fourth Circuit is particularly clear on this point.<sup>143</sup>

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134. *Id.* at 251.

135. *Id.* at 256.

136. *Id.*

137. *Id.* at 258 (quoting *In re Removal of Pickering*, 266 N.E.2d 248 (Ohio Ct. App. 1970)).

138. See e.g., *Graham v. Connor*, 490 U.S. 386, 395 (1989); *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 786-87 (4th Cir. 1998); *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994). Additional factors from *Graham* are addressed *infra* Part VII.A.

139. See *Graham*, 490 U.S. at 396-97.

140. *Id.*

141. *Tennessee v. Garner*, 471 U.S. 1, 20 (1985).

142. *Anderson v. Russell*, 247 F.3d 125, 130 (4th Cir. 2001) (citing *Graham*, 490 U.S. at 396-97).

143. See *id.*

Through a settled line of cases, courts have fleshed out this “reasonableness of the moment” concept. Police conduct that “may later seem unnecessary in the peace of a judge’s chambers” is not made illegal through “20/20 vision of hindsight.”<sup>144</sup> Cases make clear that only the situation present at the precise moment of the use of force is to be considered in the reasonableness inquiry.<sup>145</sup> One court noted that “we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness.”<sup>146</sup>

The Fourth Circuit has been clear that pre-seizure conduct will not be considered as a part of determining the reasonableness of the force.<sup>147</sup> This is important because it precludes plaintiffs from being able to point to some preliminary transgression by the officer to survive summary judgment.<sup>148</sup> The dispositive legal point for analysis occurs at the precise moment when the force is imposed. In other words, what did the officer then know and what could he or she have reasonably believed?

In *Greenidge v. Ruffin*, the Fourth Circuit held that the conduct “at the moment” of the use of force was the applicable test within the circuit.<sup>149</sup> The plaintiff attempted to introduce evidence that an officer violated departmental policy by not having a backup and by not using a flashlight at night.<sup>150</sup> The Fourth Circuit held that these pre-seizure events were not factors to be considered in the reasonableness inquiry.<sup>151</sup> More specifically, the court in *Greenidge* held that viola-

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

145. See *Schulz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995); *Carter v. Busher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (noting that pre-seizure conduct by the officer is not subject to use of force scrutiny); *Fraire v. City of Arlington*, 957 F.2d 1268, 1275-76 (5th Cir. 1992) (rejecting as irrelevant evidence that police officer manufactured the circumstances that gave rise to the force); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (stating the officer’s “liability [is to] be determined exclusively upon an examination and weighing of the information [the officer] possessed immediately prior to and at the very moment [he] fired the fatal shot” (emphasis omitted)). When examining the “reasonableness of the moment,” courts will observe the facts at the time that the force was used, and a violation of police policy or state law prior to that use of force is irrelevant. *Greenidge*, 927 F.2d at 791 (stating officer’s alleged misconduct in failing to comply with standard practices is not to be considered). The fact that injuries occur does not establish that the force employed was unreasonable. See *Lopez v. Robinson*, 914 F.2d 486, 489 (4th Cir. 1990).

146. *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993).

147. See *Greenidge*, 927 F.2d at 791.

148. See *id.*; *Fraire*, 957 F.2d at 1275-76.

149. *Greenidge*, 927 F.2d at 792.

150. *Id.* at 791.

151. *Id.* at 792.

tions of departmental policy are not to be considered in the reasonableness inquiry.<sup>152</sup>

Even where an officer has created the need for force, the pre-seizure conduct is not to be considered in the reasonableness inquiry:

[The officer's] actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force. The reasonableness inquiry depends only on the officer's knowledge of the circumstances immediately prior to and at the moment he made the split second decision to use deadly force.<sup>153</sup>

In *Elliot v. Leavitt*, the Fourth Circuit reaffirmed the "reasonableness of the moment" test, including the irrelevance of pre-use of force conduct.<sup>154</sup> According to the facts of the case, an officer allegedly failed to adequately search the suspect.<sup>155</sup> The Fourth Circuit concluded that such pre-seizure conduct was "irrelevant" to the excessive force inquiry.<sup>156</sup> In *Drewitt v. Pratt*, the Fourth Circuit similarly concluded that an officer's actions prior to shooting, including whether he could have jumped out of the way, were irrelevant to the excessive force inquiry.<sup>157</sup> Even if the officer had unreasonably provoked the shooting, the analysis does not change; reasonableness is determined at the moment of the use of force and earlier conduct of the officer is irrelevant. Despite common claims by plaintiffs' experts that a police shooting violated some ill defined "police practices standard" or departmental or other policy, such unauthorized conduct does not constitute a violation of the Fourth Amendment reasonableness standard.<sup>158</sup>

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152. *Id.* Scores of cases similarly prohibit use or admission of an officer's violations of agency policy or of "good police procedure." See, e.g., *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985) (involving claims that the officer violated "good police procedure" in six ways, including failing to use his radio, failure to use a back up, dangerous placement of his vehicle, ordering suspects to exit their car rather than issuing an immobilization command, and abandoning a covered position).

153. *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996). See *Schultz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) (stating that evidence that the officers "created the need for force by their actions prior to the moment of the seizure is irrelevant"); *Randall v. Peaco*, 927 A.2d 83, 91 (Md. Ct. Spec. App. 2007).

154. 99 F.3d 640, 645 (4th Cir. 1996).

155. *Id.*

156. *Id.* at 643.

157. 999 F.2d 774, 780 (4th Cir. 1993). See *Livermore ex. rel. Rohm v. Lubelan*, 476 F.3d 397, 406 (6th Cir. 2007).

158. See, e.g., *Davis v. Scherer*, 468 U.S. 183, 194 (1984); *Abney v. Coe*, 493 F.3d 412, 419 (4th Cir. 2007); *Ensley v. Soper*, 142 F.3d 1402, 1407 n.4 (11th Cir. 1998); *Gravelly v. Madden*, 142 F.3d 345, 349 (6th Cir. 1998); *Cottrell v. Caldwell*, 85 F.3d 1480, 1491 (11th Cir. 1996); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1170

Use of force law also does not allow admission of evidence that may suggest that the officer had less drastic or less intrusive alternatives available.<sup>159</sup> In *Plakas v. Drinski*, the Seventh Circuit held that police officers are not required “to use the least intrusive or even less intrusive alternatives.”<sup>160</sup> Rather, the court concluded that “[t]he only test is whether what the police officers actually did was reasonable.”<sup>161</sup> In *Scott v. Henrich*, the Ninth Circuit held that police officers are not required to use the “least intrusive alternative” before responding with deadly force.<sup>162</sup> Similarly, officers are not required to wait for backup to arrive before shooting at a suspect.<sup>163</sup> As the Eighth Circuit, in *Schulz v. Long*, explained: “Alternative measures which 20/20 hindsight reveal to be less intrusive (or more prudent), such as waiting for a supervisor or the SWAT team, are simply not relevant to the reasonableness inquiry.”<sup>164</sup>

#### B. The “Could Have Believed” Standard

Courts now routinely apply the “could have believed” standard in use of force litigation. In *Hunter v. Bryant*, the Supreme Court adopted the “could have believed” standard, which absolves the officer of liability “if a reasonable officer could have believed [the conduct in issue] to be lawful, in light of clearly established law and the information the [arresting] officers possessed.”<sup>165</sup> The Fourth Circuit has also consistently applied the “could have believed” standard.<sup>166</sup> Additionally, in *Prior v. Pruett*, the North Carolina Court of Appeals recognized the “could have believed” standard under federal law.<sup>167</sup>

In *Wyche v. City of Franklinton*, it was alleged that a police officer used excessive force in shooting the decedent after a confrontation.<sup>168</sup>

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(9th Cir. 1996); *Wilson v. Meeks*, 52 F.3d 1547, 1554 (10th Cir. 1995); *Edwards v. Baer*, 863 F.2d 606, 608 (8th Cir. 1988).

159. See *Illinois v. LaFayette*, 462 U.S. 640, 647-48 (1983) (stating reasonableness of governmental activity does not turn on existence of alternative “less intrusive” means); *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) (stating officers are not required to “pursue the most prudent course of conduct as judged by 20/20 hindsight”).

160. 19 F.3d 1143, 1149 (7th Cir. 1994).

161. *Id.*

162. 39 F.3d 912, 915 (9th Cir. 1994).

163. See *Mettler v. Whitledge*, 165 F.3d 1197, 1203 (8th Cir. 1999).

164. *Schulz*, 44 F.3d at 649.

165. 502 U.S. 224, 227 (1991) (internal quotation marks omitted).

166. See, e.g., *Park v. Shifflett*, 250 F.3d 843, 853 (4th Cir. 2001); *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994).

167. 550 S.E.2d 166, 168 (N.C. Ct. App. 2001).

168. 837 F. Supp. 137, 139 (E.D.N.C. 1993).

The decedent had been acting in a bizarre manner, thus causing a convenience store clerk to summon police to the scene.<sup>169</sup> Officer Caldwell responded and the decedent appeared unarmed; however, the officer observed the decedent reach behind him and, fearing a weapon, the officer shot the decedent in the leg.<sup>170</sup> As the decedent continued to advance, the officer shot him a second time, killing him.<sup>171</sup> The court, utilizing the “could have believed” standard, noted that “Caldwell is entitled to qualified immunity if he can establish that, in light of the clearly established principles governing the use of force to effect an arrest, he could, as a matter of law, reasonably have believed that his use of deadly force was lawful.”<sup>172</sup>

In *Pittman v. Nelms*, the Fourth Circuit held as a matter of law that a police officer did not use excessive force in shooting a fleeing suspect from the rear.<sup>173</sup> In *Pittman*, two officers, Banks and Nelms, pulled over a car belonging to a suspected drug dealer.<sup>174</sup> After approaching the car, Banks leaned inside to speak to the driver, Hudson, who drove off with Officer Banks’ arm still stuck inside the window.<sup>175</sup> After Banks was thrown clear of the car, Nelms fired his gun hitting a passenger, Pittman, in the back.<sup>176</sup> The court explained that “[i]n light of *Graham* . . . we cannot conclude that the force Nelms used was excessive under clearly established law.”<sup>177</sup> The court further reasoned that “an objectively reasonable officer certainly could have believed that his decision to fire was legally justified.”<sup>178</sup>

In *Klein v. Ryan*, the Seventh Circuit held that a reasonable officer in the position of the defendant-officers could have believed that the use of deadly force was justified.<sup>179</sup> The officers had been investigating the burglary of a laundromat.<sup>180</sup> Using surveillance photos, the officers identified a suspect, Klein.<sup>181</sup> One night while surveying the area around the laundromat, they spotted Klein in a car a few feet away

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169. *Id.*

170. *Id.* at 140.

171. *Id.*

172. *Id.* at 141-42.

173. 87 F.3d 116, 120 (4th Cir. 1996).

174. *Id.* at 118.

175. *Id.*

176. *Id.*

177. *Id.* at 120.

178. *Id.*

179. 847 F.2d 368, 375 (7th Cir. 1988).

180. *Id.* at 369.

181. *Id.*

from the laundromat.<sup>182</sup> Klein entered the laundromat and proceeded to open the machines and remove the money.<sup>183</sup> After obtaining backup, several officers took strategic positions outside the Laundromat and, as Klein exited, one of the officers commanded him to halt.<sup>184</sup> Klein did not heed the warning and ran for his car.<sup>185</sup> As he fled, Klein was positioned between the two officers, one to the east and one to the west.<sup>186</sup>

After he got to his car, Klein started the engine and began backing up.<sup>187</sup> An officer then jumped out of the way and, after regaining his position, fired two shots at Klein as he fled the scene.<sup>188</sup> Klein was later captured after checking into the hospital to be treated for gunshot wounds.<sup>189</sup> The court determined that the actions taken by the defendants in attempting to stop the fleeing suspect were reasonable as a matter of law.<sup>190</sup> In its analysis, the Seventh Circuit explained that,

Police officers tell a person, who they reasonably suspect of having committed a forcible felony, to halt. They reasonably believe that the suspect heard them, but the suspect continues to flee. The suspect gets in the car and begins to drive away, with no resistance from any other officer. In this situation, a police officer could reasonably believe that deadly force was “necessary to prevent the arrest from being defeated by resistance or escape.”<sup>191</sup>

## VII. GRAHAM, GARNER, SAUCIER, AND SCOTT PROVIDE THE FEDERAL USE OF FORCE TESTS

### A. *Graham v. Connor and Excessive Force*

The controlling federal use of force standards are virtually identical to the North Carolina standards. In *Graham v. Connor*, the Supreme Court clarified the parameters of use of force principles.<sup>192</sup> The Court explained that:

“[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,” however, its proper application requires careful attention to the facts and circum-

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182. *Id.*

183. *Id.* at 390.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 369-71.

190. *Id.* at 375.

191. *Id.* at 373 (citations omitted).

192. 490 U.S. 386, 395 (1989).

stances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight . . . .

The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.<sup>193</sup>

In *Graham*, the Court was confronted with the issue of what constitutional standard governs an excessive force claim against a law enforcement officer in the course of making an arrest, investigatory stop, or other “seizure” of the person.<sup>194</sup> There, the plaintiff sought damages for alleged injuries when officers used physical force against him in the course of an investigatory stop.<sup>195</sup>

Plaintiff Dethorne Graham, a diabetic, had a friend drive him to a convenience store to obtain orange juice in order to counteract an oncoming insulin reaction.<sup>196</sup> Graham entered the store but hurried out after becoming concerned about delay when he observed several people ahead of him in line.<sup>197</sup> A Charlotte police officer observed “Graham hastily enter and leave the store.”<sup>198</sup> The officer became suspicious, followed the car in which Graham was traveling, and made an investigatory stop.<sup>199</sup> Graham’s friend informed the officer that Graham was suffering from a “sugar reaction.”<sup>200</sup> The officer told Graham and the driver he would detain them until he had established what occurred at the store.<sup>201</sup> When the officer called for assistance, “Graham got out of the car, ran around it twice, and finally sat down on the curb, and passed out briefly.”<sup>202</sup>

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193. *Id.* at 396-97 (citations omitted). This “reasonableness” test was reaffirmed in *Saucier v. Katz*, 533 U.S. 194, 210 (2001).

194. *Graham*, 490 U.S. at 387.

195. *Id.* at 388.

196. *Id.*

197. *Id.* at 388-89.

198. *Id.* at 389.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

Other officers arrived on the scene and handcuffed Graham.<sup>203</sup> One of the officers stated that he thought Graham was drunk.<sup>204</sup> Several officers then lifted Graham, carried him over to his friend's car, and placed him face down on the hood of the car.<sup>205</sup> Graham's friend brought him some orange juice in an effort to counter the diabetic reaction, but the officers on scene refused to allow Graham to drink it.<sup>206</sup> After the officers determined that "Graham had done nothing wrong at the convenience store . . . [they] drove him home and released him."<sup>207</sup> During the encounter, Graham suffered "a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder . . . [and] a loud ringing in his right ear."<sup>208</sup>

Graham's complaint alleged excessive force in making the investigatory stop.<sup>209</sup> The district court directed a verdict for the officers, finding that the use of force was appropriate under the circumstances.<sup>210</sup> The district court employed the four-factor *Glick* test.<sup>211</sup> A divided panel of the Fourth Circuit affirmed.<sup>212</sup> Over a vigorous dissent by Judge Butzner, the majority endorsed the four-factor test applied by the district court as generally applicable to all claims of constitutionally excessive force.<sup>213</sup>

In reviewing the Fourth Circuit's decision, the Supreme Court began its analysis with a treatment of *Johnson v. Glick*.<sup>214</sup> Speaking through Chief Justice Rehnquist, the Court observed that after *Glick*, the vast majority of lower federal courts have applied *Glick*'s four-prong substantive due process test indiscriminately to all excessive force claims.<sup>215</sup> The Court rejected the argument that all excessive force claims "are governed by a single generic standard."<sup>216</sup> Previous lower court cases had assumed that there was a generic right to be free

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203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 390.

209. *Id.*

210. *Graham v. City of Charlotte*, 644 F. Supp. 246, 248 (W.D.N.C. 1986).

211. *Id.* (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

212. *Graham v. City of Charlotte*, 827 F.2d 945, 950 (4th Cir. 1987).

213. *Id.* at 948-52.

214. *Graham*, 490 U.S. at 392-93.

215. *Id.* at 393.

216. *Id.*

of excessive force such that it was not grounded in any particular constitutional provision.<sup>217</sup>

In rejecting this generic type of excessive force analysis, the *Graham* Court instructed that the “analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force.”<sup>218</sup> The Court noted that, typically, the specific constitutional rights involved in excessive force claims will be the Fourth and Eighth Amendments.<sup>219</sup> Accordingly, the validity of such an excessive force claim must be “judged by reference to the specific constitutional standard which governs that right.”<sup>220</sup> The Court also observed that where the excessive force claim arose in the context of an arrest or investigatory stop, it is “most properly characterized as one invoking the protections of the Fourth Amendment . . . .”<sup>221</sup>

The holding of *Graham* was very specific: “[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach.”<sup>222</sup> The Court reasoned that the Fourth Amendment provides an “explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct.”<sup>223</sup>

The Court then enunciated a balancing test to be applied on a case-by-case basis to determine if a particular seizure is unreasonable because of constitutionally excessive force.<sup>224</sup> A court must balance “‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.”<sup>225</sup> The Court also determined that the standard to be applied was “reasonableness at the moment” of the seizure.<sup>226</sup>

The Court emphasized the objective nature of this reasonableness test, stating “the ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motiva-

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217. See, e.g., *Justice v. Dennis*, 834 F.2d 380, 382 (4th Cir. 1987) (en banc).

218. *Graham*, 490 U.S. at 394.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 395.

223. *Id.*

224. *Id.* at 396.

225. *Id.* (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

226. *Id.*

tion.”<sup>227</sup> Thus, under this test, considerations of concepts like malice have no formal place in the objective reasonableness inquiry.<sup>228</sup> The Court’s holding in *Graham* is quite narrow.

The concurring opinion of Justice Blackmun, joined by Justices Brennan and Marshall, provides helpful guidance and raises additional concerns.<sup>229</sup> Justice Blackmun’s concurrence primarily addressed the issue of whether substantive due process might serve as an *alternative* basis for recovery.<sup>230</sup> The majority’s narrow holding seems to eliminate the substantive due process framework in the specific law enforcement context, but it did not address whether this now precludes a plaintiff from proceeding under both theories independently.<sup>231</sup> However, any plaintiff with an excessive force claim that could establish liability under the more difficult substantive due process standard would almost necessarily be able to establish liability under the Fourth Amendment standard. As Justice Blackmun observed, “the use of force that is not demonstrably unreasonable under the Fourth Amendment only rarely will raise substantive due process concerns.”<sup>232</sup>

#### B. *Saucier v. Katz* and *Qualified Immunity*

In *Saucier v. Katz*, the Court decided the issue of whether the legal tests for qualified immunity and underlying substantive liability are identical in law enforcement use of force cases.<sup>233</sup> The Ninth Circuit

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227. *Id.* See *Martin v. Gentile*, 849 F.2d 863, 869 (4th Cir. 1988); *Scott v. United States*, 436 U.S. 128, 137-39 (1978) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). Just before the Court decided *Graham*, the Seventh Circuit, in *Wilkins v. May*, held that the use of excessive force in interrogating a suspect who has been arrested but not yet charged does not contravene the Fourth Amendment but may violate substantive due process. 872 F.2d 190 (7th Cir. 1989). Plaintiff-Wilkins alleged that the officers held a pistol pointed at his head while he was interrogated, thus causing mental distress. *Id.* at 191-92. Judge Posner’s opinion reasoned that since Wilkins was seized when he was arrested, there was no seizure through pointing the gun. *Id.* at 192-94. The “continuing seizure” theory was rejected. *Id.* at 194. Judge Posner went on to enunciate a “shock the conscience” test. *Id.* at 195.

228. See *Miller v. Lovett*, 879 F.2d 1066, 1070 (2d Cir. 1989).

229. *Graham*, 490 U.S. at 399 (Blackmun, J., concurring).

230. *Id.* at 399-400.

231. See *id.* at 386 (majority opinion).

232. *Id.* at 400 (Blackmun, J., concurring). See *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (enunciating a “shocks the conscience” test for vehicular police pursuits that is grounded in Fourteenth Amendment substantive due process); Michael Owens, Comment, *The Inherent Constitutionality of the Police Use of Deadly Force to Stop Dangerous Pursuits*, 52 MERCER L. REV. 1599 (2001).

233. 533 U.S. 194, 210 (2001), modified by *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

had earlier held that the two inquiries merged into a single question.<sup>234</sup>

In *Saucier*, an Army base in San Francisco was holding an event to celebrate its conversion to a national park.<sup>235</sup> Vice President Gore was a scheduled speaker.<sup>236</sup> Elliot Katz, concerned that the Army's hospital would be used for conducting experiments on animals, brought a cloth banner to the event to voice his opposition.<sup>237</sup>

While waiting for Gore to speak, Katz sat in the front row of the seating area.<sup>238</sup> When Gore began speaking, Katz removed the banner, started to unfold it, and walk toward the speaker's platform.<sup>239</sup> Saucier, a military police officer, was on duty that day.<sup>240</sup> Saucier "had been warned by his superiors of the possibility of demonstrations, and [Katz] had been identified as a potential protestor."<sup>241</sup> Saucier and a sergeant recognized Katz, and they moved to intercept him as he walked toward the speaker's platform.<sup>242</sup> As Katz began placing the banner, "the officers grabbed [Katz] from behind, took the banner, and rushed him out of the area."<sup>243</sup>

Katz alleged that the officers used excessive force in arresting him.<sup>244</sup> The trial court concluded that Saucier was not entitled to summary judgment.<sup>245</sup> Saucier initiated an interlocutory appeal from the denial of qualified immunity, and the Ninth Circuit affirmed.<sup>246</sup>

The Supreme Court granted certiorari and held that a qualified immunity decision requires an analysis that is separate from the substantive question of whether unreasonable force was used.<sup>247</sup> The Court concluded that the inquiries for qualified immunity and excessive force must remain distinct.<sup>248</sup> The Court explained that:

Because police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evol-

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234. *Id.* at 197.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 198.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 199.

245. *Id.*

246. *Id.*

247. *Id.* at 199-200.

248. *Id.*

ing—about the amount of force that is necessary in a particular situation, the reasonableness of the officer’s belief as to the appropriate level of force should be judged from that on-scene perspective. We set out a test that cautioned against the 20/20 vision of hindsight in favor of deference to the judgment of reasonable officers on the scene.<sup>249</sup>

The Court observed that the factors set forth in *Graham* determine the merits of an alleged excessive force claim, which require “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”<sup>250</sup>

Additionally, the Court, in *Saucier*, reaffirmed the *doctrine of mistaken beliefs*, which provides: “If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.”<sup>251</sup> The Court explained that the qualified immunity inquiry includes a further dimension:

The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer’s mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.<sup>252</sup>

The doctrine of qualified immunity protects law enforcement officers from individual liability “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>253</sup> If the law is not clearly established, the officer is entitled to qualified immunity from suit. However, even if the law is clearly established, the officer is still enti-

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249. *Id.* at 205 (internal quotation marks and citations omitted). See *Brown v. Gilmore*, 278 F.3d 362, 369 (4th Cir. 2002).

250. *Saucier*, 533 U.S. at 205 (internal quotation marks omitted). See *Graham v. Connor*, 490 U.S. 386, 395 (1989).

251. *Saucier*, 533 U.S. at 205. See *Roberts v. McSwain*, 487 S.E.2d 760 (N.C. Ct. App. 1999) (explaining that qualified immunity protects conduct that is reasonable although mistaken).

252. *Saucier*, 533 U.S. at 205.

253. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

bled to qualified immunity where a reasonable officer *could have believed* that his or her conduct was lawful.

*Saucier* held that qualified immunity and the underlying substantive standards for use of force claims are distinct issues even though they both involve determinations of reasonableness from the officer's perspective.<sup>254</sup> It also emphasized the application of qualified immunity for officers even where there has been a mistake which has resulted in injury. Moreover, *Saucier* provided that officers are entitled to qualified immunity from liability where their mistakes are reasonable.<sup>255</sup>

In *Brown v. Gilmore*, the Fourth Circuit interpreted *Saucier* and reversed a decision denying an officer's motion for summary judgment based on qualified immunity.<sup>256</sup> *Brown* arose out of a situation involving an alleged false arrest and use of excessive force during an arrest for violation of a city's disorderly conduct ordinance.<sup>257</sup> *Brown* had been in a minor traffic accident during a holiday weekend when there was an extremely large crowd of individuals who were visiting Myrtle Beach, South Carolina in connection with a biker festival.<sup>258</sup> Once officers arrived at the scene of the accident, Officer Gilmore asked Ms. Brown to move her car.<sup>259</sup> After the first two instructions to move the car were ignored, Officer Gilmore asked Brown again and she continued to ignore him.<sup>260</sup> Brown became verbally abusive and again refused to move her car.<sup>261</sup> Officer Gilmore then asked Officer Pina to arrest Brown for disorderly conduct.<sup>262</sup> Officer Pina escorted Brown to his patrol cruiser, handcuffed her, and asked her to get in the cruiser.<sup>263</sup> Brown refused and put up a scuffle.<sup>264</sup>

The Fourth Circuit observed that there was a factual dispute between the officers and Brown as to what occurred.<sup>265</sup> Brown claimed that she did not understand what the officer was saying and was not aware that he directed her to move her car.<sup>266</sup> The court posed

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254. *Saucier*, 533 U.S. at 197.

255. *Id.* at 205.

256. 278 F.3d 362, 365 (4th Cir. 2002).

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at 366.

265. *Id.*

266. *Id.*

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the issue as whether a reasonable officer would be justified in the belief that a citizen heard his request under those circumstances.<sup>267</sup>

The Fourth Circuit noted that Brown admitted that she was standing very close to Officer Gilmore, even to the extent that he was allegedly invading her personal space.<sup>268</sup> It was also undisputed that the other driver involved in the accident had no difficulty hearing the request and moved her car.<sup>269</sup> Furthermore, there was no allegation by Brown that Officer Gilmore never told her to move her car.<sup>270</sup> The court explained that:

Giving Brown the benefit of the doubt as to whether she heard the officer's request does not strip the officers of an objectively reasonable belief that she heard the request. In fact, a reasonable officer in this situation would have been warranted in the belief that Brown knew full well that she had been asked to move her automobile.<sup>271</sup>

The Fourth Circuit concluded that the circumstances encountered by Officer Pina justified the minimal level of force that he applied.<sup>272</sup> It also addressed the issue regarding the factual dispute as to whether Brown had resisted arrest. The court stated that the Supreme Court had made it clear that a "subjective clash of beliefs is not one that [the court] need[s] to resolve."<sup>273</sup> The Fourth Circuit explained that "[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed."<sup>274</sup>

*Brown* is a very instructive case to illustrate the critical point that alleged excessive force encounters will often develop some factual inconsistencies in the views of arrestees and the officers involved. However, factual discrepancies do not necessarily create genuine issues of material fact, especially where the facts demonstrate that officers had a reasonable belief that the action taken was necessary—even if their belief was mistaken.

### C. *Garner, Escapes, and the Fleeing Felon Rule*

In *Tennessee v. Garner*, the Supreme Court explained: "[I]f the suspect threatens the officer with a weapon or there is probable cause to

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267. *Id.* at 368

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 369.

273. *Id.*

274. *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 210 (2001)).

believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape . . . .”<sup>275</sup>

In *Garner*, the Court addressed the “constitutionality of the use of deadly force to prevent the escape of an apparently unarmed, suspected felon.”<sup>276</sup> According to the facts, officers were dispatched to answer a “proowler inside” call.<sup>277</sup> Upon arrival, the officers observed someone on her porch gesturing toward the adjacent house.<sup>278</sup> The neighbor informed the officers that she had heard glass breaking and that someone was breaking into the home.<sup>279</sup> The officers heard a door slam and observed someone run across the backyard.<sup>280</sup> These events occurred at approximately 10:45 at night.<sup>281</sup> With the aid of a flashlight, one of the officers was able to generally observe the fleeing suspect’s face and hands.<sup>282</sup> He did not appear to see a weapon.<sup>283</sup> The officer verbally commanded the suspect to halt as the suspect was fleeing.<sup>284</sup> The suspect attempted to climb over a fence.<sup>285</sup> The officer was concerned that the suspect would escape, and consequently the suspect was shot.<sup>286</sup> Justice White, writing for the majority, held that the use of force was unconstitutional.<sup>287</sup>

In making this holding, the *Garner* Court reaffirmed application of the constitutional balancing test for determining the constitutionality of a seizure.<sup>288</sup> It explained that, in order “[t]o determine the constitutionality of a seizure, ‘[w]e must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interest alleged to justify the intru-

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275. 471 U.S. 1, 11-12 (1985). See *Milstead v. Kibler*, 243 F.3d 157 (4th Cir. 2001); *Howerton v. Fletcher*, 213 F.3d 171 (4th Cir. 2000); *Lowery v. Stovall*, 92 F.3d 219 (4th Cir. 1996). *Garner* must be read in conjunction with *Hunter v. Bryant*, 502 U.S. 224, 228 (1991), where the Court explained that the “could have believed standard” is to be used in probable cause determinations for qualified immunity.

276. *Garner*, 471 U.S. at 3.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* at 4.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 7-8.

sion.’”<sup>289</sup> After reviewing a long line of seizure cases, the Court observed that the question “was whether the totality of the circumstances justified a particular sort of search or seizure.”<sup>290</sup>

The Court enunciated a number of fundamental rules in *Garner*. The Court concluded that “[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.”<sup>291</sup> However, “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.”<sup>292</sup> Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape.

The essential principle from *Garner* is that deadly “force may not be used unless it is necessary to prevent . . . escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”<sup>293</sup> Thus, in situations involving fleeing suspected felons, the Court recognized a “probable cause” standard.<sup>294</sup> *Garner* and its progeny make clear that, where officers have probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officers or others, officers may justifiably shoot a fleeing suspect.

*Garner* must be read with the more recent Supreme Court cases of *Hunter*, *Brosseau*, and *Scott*.<sup>295</sup> Read together, these and other cases authorize deadly force to prevent a fleeing suspect where the officer could have reasonably believed that the suspect posed a threat of death or serious bodily harm to the officer, other nearby officers, or the public. Escape on foot without an apparent weapon, as in *Garner*, will not justify deadly force. Escape by vehicle, on the other hand, will likely justify deadly force if the officer reasonably could have believed that

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289. *Id.* at 8 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

290. *Id.* at 8-9.

291. *Id.* at 11.

292. *Id.* The probable cause needed for qualified immunity is “only arguable probable cause.” See *Montoute v. Carr*, 114 F.3d 181, 184 (11th Cir. 1997) and cases cited therein. Cf. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (officers entitled to qualified immunity “if a reasonable officer could have believed that probable cause existed”).

293. *Garner*, 471 U.S. at 3.

294. *Id.* at 9.

295. See *Scott v. Harris*, 550 U.S. 372 (2007); *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Hunter v. Bryant*, 502 U.S. 224 (1991).

the suspect in the vehicle posed a threat of death or serious bodily injury to the officer or others. These and other cases demonstrate how preemptive police action is appropriate to stop violence at the threshold indication. Waiting for the course of violence to materially unfold before stopping the threat to officers or the public is clearly not required as long as the officer reasonably believes that there is imminent danger of death or serious bodily injury.

In *Garner*, the determinative facts that exposed the officers to constitutional tort liability appear to have been the lack of threat of harm to the officers or others from the fleeing suspect. Generally, mere flight alone without more is not sufficient to warrant deadly force unless there is something that triggers the officer to believe (or if a reasonable officer could have reasonably believed) that the suspect presents a threat of death or serious bodily harm to others.<sup>296</sup>

These principles were applied in *Montoute v. Carr*, where an officer responded to a call regarding a man with a gun.<sup>297</sup> Upon arrival of the officer, the suspect fled with the gun.<sup>298</sup> After warnings to stop were ignored, the officer shot and wounded the suspect.<sup>299</sup> The Eleventh Circuit concluded that even though the suspect was in flight, the weapon still posed an immediate threat to the officer.<sup>300</sup> Accordingly, as long as the suspect retains the weapon and may be within range of using the weapon against the officers or the public, then there is a legitimate basis that an officer could reasonably believe that the suspect poses an imminent threat of death or serious bodily injury. The recent vehicle flight cases provide further guidance on this point.<sup>301</sup>

When a suspect is operating, or about to operate, an automobile near an officer,<sup>302</sup> the risks to the officer may be much greater and potentially severe if the automobile can possibly be maneuvered or turned to strike the officer.<sup>303</sup> Preemptive police actions in this context are often crucial. A suspect fleeing in an automobile also poses a great risk of death or serious injury to the motoring public because, among other reasons, fleeing suspects are more apt to excessively

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296. *Garner*, 471 U.S. at 3.

297. 114 F.3d 181, 182 (11th Cir. 1997).

298. *Id.* at 183.

299. *Id.*

300. *Id.* at 185

301. *See, e.g., Scott v. Harris*, 127 S. Ct. 1769, 1778 (2007).

302. A car is unquestionably a deadly weapon. *See, e.g., Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992); *United States v. Sanchez*, 914 F.2d 1355 (9th Cir. 1990); *State v. Jackson*, 327 S.E.2d 270 (N.C. Ct. App. 1985).

303. *See, e.g., Brosseau v. Haugen*, 543 U.S. 194 (2004).

speed and violate other highway safety rules. If an officer reasonably could have believed that the suspect poses a danger of death or serious bodily harm to the officer or the public, then the officer may use deadly force to prevent an escape or flight from apprehension by vehicle. The constitutional balancing test applied by the Court in *Garner* allows consideration of the “totality of circumstances,” which warrants an officer to consider a vast array of facts, circumstances, and inferences—which may give rise to an officer’s reasonable belief that the suspect poses a risk to officers and citizens.<sup>304</sup>

In *Scott v. Harris*, the Supreme Court recognized that a fleeing criminal suspect in an automobile is a danger to others on the highway.<sup>305</sup> The officers in *Scott* were required to use force to defend others on the public highways.<sup>306</sup> The Court found that such force was appropriate and granted qualified immunity to the officers.<sup>307</sup> In powerful language, Justice Scalia’s majority opinion demonstrates how police officers, faced with the choice of whether to pursue a criminal suspect, cannot gamble with public safety when the suspect flees in an automobile: “We think that police need not have taken that chance and hoped for the best.”<sup>308</sup> Clearly, reckless driving or flight from police officers by vehicle represents a deadly hazard for the public.<sup>309</sup> Because officers have a duty to protect the public by stopping dangers on the public highways, vehicular flight by suspects, where an officer could reasonably believe that the fleeing suspect might kill or seriously injure others, will generally warrant deadly force to stop the fleeing vehicle.

In *Ford v. Childers*, for example, the Seventh Circuit held that an officer’s actions “were objectively reasonable under the circumstances leading to his decision to fire his revolver at [the suspect,] Ford.”<sup>310</sup> The officer was held to have acted reasonably in shooting at the fleeing suspect even though the officer could not be certain as to whether the suspect was armed.<sup>311</sup> Officer Childers was called to the scene of a bank robbery in progress.<sup>312</sup> He could see the hands of the bank patrons in the air from outside; however, he could not see the suspect

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304. *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)

305. *Scott*, 127 S. Ct. at 1778.

306. *Id.* at 1773.

307. *Id.* at 1775.

308. *Id.* at 1778.

309. *Id.* at 1779.

310. 855 F.2d 1271, 1275 (7th Cir. 1988) (en banc).

311. *Id.*

312. *Id.* at 1272.

or any weapon that the suspect may have been wielding.<sup>313</sup> Ford exited the bank carrying only a bag.<sup>314</sup> Officer Childers and his partner pursued Ford and warned him to stop.<sup>315</sup> When he did not stop running, both officers fired shots, shooting Ford in the back.<sup>316</sup> The Seventh Circuit explained that “[a]s we recognized in another . . . police shooting [case], a reasonable belief that danger exists may be formed by reliance on appearances.”<sup>317</sup> The court reasoned:

In view of the totality of the information Officer Childers possessed when he fired at Ford, we hold that a reasonable jury could only conclude that Officer Childers had probable cause to believe that Ford posed a threat of serious physical harm to himself and/or to others. Thus, Childers’ actions under the circumstances were objectively reasonable as a matter of law.<sup>318</sup>

Similarly, in *Forrett v. Richardson*, a suspect who supposedly tied up three people—shooting one victim in the neck and assaulting another—was shot by officers while trying to escape.<sup>319</sup> The Ninth Circuit held that “the only reasonable conclusion that could be drawn from the evidence when construed most favorable to the plaintiff was that the officers did not violate plaintiff’s Fourth Amendment rights.”<sup>320</sup>

According to the facts, Forrett broke into a home, tied up those inside, and fled in a stolen truck.<sup>321</sup> After Forrett had left the house, one of the victims was able to free himself and give police a description of Forrett and the truck.<sup>322</sup> Police located the truck within an hour, but there was no sign of the suspect or the firearm.<sup>323</sup> Police canvassed the area and located Forrett in a residential neighborhood.<sup>324</sup> He ran and the police gave chase.<sup>325</sup> The chase continued for about an hour with Forrett scaling fences, ducking into a shed, and taking off a layer of clothing to alter his appearance.<sup>326</sup> Finally, officers trapped

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313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 1275 (citing *Davis v. Freels*, 583 F.2d 337, 341 (7th Cir. 1978)).

318. *Id.* at 1276.

319. 112 F.3d 416, 418 (9th Cir. 1997).

320. *Id.* at 421.

321. *Id.* at 418.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

him in a yard that had a six-foot fence.<sup>327</sup> The officers warned Forrett to quit running, but as Forrett paused, the officers fired at him.<sup>328</sup> Forrett jumped the fence and officers fired through it shooting him in the back and hip.<sup>329</sup>

The Ninth Circuit reasoned that “[t]he only objectively reasonable conclusion to be drawn from this evidence is that if the defendants had not shot him, he would have continued taking whatever measures were necessary to avoid capture.”<sup>330</sup> The court observed that “[t]he use of deadly force was objectively reasonable under these circumstances,” and held that the plaintiff’s rights were not violated as a matter of law.<sup>331</sup>

*D. Brosseau, Scott, and Vehicle Related Cases Afford Even Greater Latitude to Officers to Protect Themselves and the Public*

Two recent Supreme Court cases, and many other cases, demonstrate how suspect flight by automobile poses especially dangerous circumstances for officers and the public thereby often justifying deadly force.<sup>332</sup> Fleeing suspects hardly exercise due care regarding public safety on highways.<sup>333</sup> Officers are often put in situations where they must theoretically balance numerous factors while staying focused on accomplishing the core mission of apprehending the suspect. Using force to stop a suspect fleeing by automobile is often crucial because of the prospect of death or injury to many members of the public.

Before, or at the beginning of, vehicular flight, officers are often out of their vehicles on foot dealing with stopped suspects. When a stopped suspect attempts to flee with an officer that is on foot, the dangers to the officer are greatly enhanced. Specifically, a vehicle might quickly turn or spin to put the officer at risk of death—even when the vehicle is not aimed directly at the officer.

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327. *Id.*

328. *Id.*

329. *Id.* at 418-19.

330. *Id.* at 421.

331. *Id.*

332. See *Scott v. Harris*, 127 S. Ct. 1769 (2007); *Brosseau v. Haugen*, 543 U.S. 194 (2004).

333. See *Abney v. Coe*, 439 F.3d 412, 418 (4th Cir. 2007) (describing a fleeing suspect’s tactics, which endangered innocent motorists on the road); Jennifer Golson, *3 Charged After Car Pins Officer During Arrest*, STAR-LEDGER, Feb. 27, 2009, available at <http://www.nj.com/news/ledger/jersey/index.ssf?/base/news-12/123571238385901.xml&coll=1>; Carol J. Williams, *Rash of Televised Police Chases Highlights Cost, Risks*, L.A. TIMES, Feb. 19, 2009, available at <http://www.latimes.com/news/local/crime/lame-freeway-chases19-2009feb19,0,23098.story>.

In *Smith v. Freeland*, the Sixth Circuit addressed a vehicular flight case and explained:

[U]nder *Graham*, we must avoid our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes “reasonable” action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.<sup>334</sup>

In *Smith*, Officer Schulcz tried to pull over a driver he saw run a stop sign.<sup>335</sup> Instead of stopping, Smith led Officer Schulcz on a high-speed chase for about three miles before turning down a dead-end residential street.<sup>336</sup> As Smith tried to turn his car around, Officer Schulcz moved his car closer, bringing the two vehicles hood to hood.<sup>337</sup> Once the cars were sufficiently close, Officer Schulcz got out of his car and began to approach Smith.<sup>338</sup>

As Officer Schulcz approached on foot, Smith backed up, drove forward, rammed Schulcz’s car, and then backed up again to go around it.<sup>339</sup> When Smith drove by, Officer Schulcz shot and killed him.<sup>340</sup> The court held that the seizure was not unreasonable.<sup>341</sup> The court reasoned that:

After a dramatic chase, Officer Schulcz appeared to have trapped his man at the end of a dark street. Suddenly Mr. Smith freed his car and began speeding down the street. In an instant Officer Schulcz had to decide whether to allow his suspect to escape. He decided to stop him, and no rational jury could say he acted unreasonably.<sup>342</sup>

The court further explained that:

Had [Smith] proceeded unmolested down Woodbine Avenue; he posed a major threat to the officers manning the roadblock. Even unarmed, he was not harmless; a car can be a deadly weapon. Finally, rather than confronting the roadblock, [Smith] could have stopped his car and entered one of the neighboring houses, hoping to take hostages. Mr. Smith had proven he would do almost anything to avoid capture;

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334. 954 F.2d 343, 347 (6th Cir. 1992).

335. *Id.* at 344.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at 348.

342. *Id.* at 347.

Officer Schulcz could certainly assume he would not stop at threatening others.<sup>343</sup>

As indicated, the Sixth Circuit noted that “a car can be a deadly weapon” and since Smith had already assaulted an officer, it was reasonable to assume that he was willing to go to extremes.<sup>344</sup> A “reasonable officer in those circumstances would certainly believe that if Mr. Smith continued this escape attempt, he posed a significant threat of physical injury to numerous others.”<sup>345</sup>

In *Brosseau v. Haugen*, the Supreme Court addressed a case involving a suspect who was shot in the back while attempting to flee in an automobile.<sup>346</sup> After a foot chase, the suspect jumped into an automobile and appeared ready to drive.<sup>347</sup> Officer Brosseau approached the driver’s side window and verbally ordered the suspect to stop and get out.<sup>348</sup> As the suspect began to drive away, Officer Brosseau fired, striking the suspect in the back.<sup>349</sup> Officer Brosseau stated that she fired her weapon because she feared that the suspect might run over other officers or citizens in the area.<sup>350</sup> The Supreme Court explained that “[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.”<sup>351</sup> Noting *Smith v. Freeland*’s conclusion that “a car can be a deadly weapon, and holding [an] officer’s decision to stop the car from possibly injuring others was reasonable,” the Court implied that Officer Brosseau was entitled to qualified immunity.<sup>352</sup>

In *Scott v. Harris*, the Supreme Court applied its traditional force doctrine in the context of a vehicular chase.<sup>353</sup> *Scott* represents a logical extension of the Court’s developing body of use of force law. The *Graham* objective reasonableness standard was reaffirmed and applied in the context of a traditional police pursuit.<sup>354</sup>

The Court in *Scott* framed the narrow issue as “whether a law enforcement officer can, consistent with the Fourth Amendment,

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343. *Id.* (citations omitted).

344. *Id.*

345. *Id.* at 346.

346. 543 U.S. 194 (2004).

347. *Id.* at 196.

348. *Id.*

349. *Id.* at 196-97.

350. *Id.* at 197.

351. *Id.* at 198.

352. *Id.* at 200.

353. 127 S. Ct. 1769 (2007).

354. *Id.* at 1776.

attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind."<sup>355</sup>

In that case, a Georgia deputy attempted to stop the plaintiff's vehicle after clocking it at nearly twenty miles per hour over the speed limit.<sup>356</sup> A chase down mostly two lane roads followed with speeds topping eighty-five miles per hour.<sup>357</sup> The deputy radioed information regarding the pursuit to his dispatcher.<sup>358</sup> Defendant, Deputy Timothy Scott, overheard this radio communication and joined the pursuit.<sup>359</sup> At one point, the plaintiff was nearly surrounded in a parking lot but managed to get away, damaging Deputy Scott's car in the process.<sup>360</sup> Deputy Scott then took the front position in the pursuit.<sup>361</sup> The chase had covered about ten miles when Deputy Scott requested and received permission to perform a "precision intervention technique" (PIT) maneuver, which causes the "fleeing vehicle to spin to a stop."<sup>362</sup> Deputy Scott claimed he abandoned his attempt at the PIT maneuver when he determined it would be unsafe, but had already applied his "push bumper to the rear of [plaintiff's] vehicle."<sup>363</sup> As a result, the plaintiff lost control of his car and careened down an embankment.<sup>364</sup> Plaintiff was rendered a quadriplegic.<sup>365</sup>

Plaintiff filed suit alleging excessive force under the Fourth Amendment.<sup>366</sup> Scott moved for summary judgment based on qualified immunity.<sup>367</sup> The district court denied the motion.<sup>368</sup> On interlocutory appeal, the Eleventh Circuit Court of Appeals affirmed the denial.<sup>369</sup> The Supreme Court granted certiorari and reversed.<sup>370</sup>

In examining the facts, the Court observed that evidence in the record included a video tape which captured the chase in question.<sup>371</sup> This video tape, according to the Court, clearly contradicted the ver-

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355. *Id.* at 1772.

356. *Id.*

357. *Id.*

358. *Id.* at 1772-73.

359. *Id.* at 1773.

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.* at 1774.

371. *Id.* at 1775.

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sion of facts presented by plaintiff and adopted by the court of appeals.<sup>372</sup>

In its analysis, the Court determined that the question to be decided under the Fourth Amendment was whether Deputy Scott's actions were objectively reasonable, explaining: "Whether or not Scott's actions constituted application of 'deadly force,' all that matters is whether Scott's actions were reasonable."<sup>373</sup>

In *Scott*, the Court reaffirmed use of the objective reasonableness balancing test.<sup>374</sup> In determining the reasonableness of a seizure, courts "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion."<sup>375</sup> The Court observed that Deputy Scott successfully defended his actions by asserting the "paramount governmental interest in ensuring public safety."<sup>376</sup> Elaborating on the issue, the Court stated: "[W]e must consider the risk of bodily harm that Scott's actions posed to respondent in light of the threat to the public that Scott was trying to eliminate."<sup>377</sup>

In weighing the likelihood of injuring or killing bystanders against the probability of injuring or killing a single person who is fleeing, the Court observed that "it [is] appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability."<sup>378</sup> In essence, the Court balanced the risk of harm to bystanders as compared with the assumed risk of harm by the fleeing plaintiff. The Court explained that it was the Plaintiff "who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted."<sup>379</sup> Accordingly, the Court concluded that the officer's actions were reasonable.<sup>380</sup>

The plaintiff argued that the "innocent public equally [could] have been protected and the . . . accident entirely avoided if the police had ceased their pursuit."<sup>381</sup> Not persuaded by that argument, the Court

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372. *Id.*

373. *Id.* at 1778.

374. *Id.*

375. *Id.* (internal quotation marks omitted).

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

stated that “police need not have taken that chance and hoped for the best.”<sup>382</sup> Elaborating on this issue, the Court reasoned,

[W]e are loath to lay down a rule requiring the police to allow a fleeing suspect to get away whenever they drive *so recklessly* that they put other people’s lives in danger. It is obvious . . . the perverse incentives such a rule would create . . . . The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: a police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.<sup>383</sup>

The Court recognized and respected the grave risk of harm presented to officers, bystanders, and other innocent motorists on the highway.<sup>384</sup> The fleeing plaintiff’s conduct necessarily assumed a risk of harm to himself. Those factors and the traditional balancing inquiry appear to have made the decision an easy one for the Court, resulting in an 8-1 decision with a sole dissent by Justice Stevens.<sup>385</sup>

Lower courts have begun to apply the rule and reasoning of *Scott*. In *Abney v. Coe*, the Fourth Circuit addressed a case arising out of a collision between a fleeing motorcyclist and a pursuing sheriff’s deputy.<sup>386</sup> The motorcyclist refused to pull over for the sheriff’s deputy, Deputy Coe, who had spotted him driving erratically.<sup>387</sup> A chase spanning roughly eight miles followed, ending when the deputy’s car and motorcycle crashed.<sup>388</sup> The motorcyclist was killed.<sup>389</sup> The plaintiff alleged that Deputy Coe used excessive force in violation of the Fourth Amendment by intentionally ramming the rear of the motorcycle.<sup>390</sup>

The plaintiff argued that Deputy Coe’s actions were unreasonable and unconstitutional because the motorcyclist “did not pose any risk to the public that justified using force that placed him at risk of serious injury or death.”<sup>391</sup> Additionally, the plaintiff claimed that a “high-speed chase of a suspect fleeing after a traffic infraction does not amount to the ‘substantial threat’ of imminent physical harm . . .

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382. *Id.*

383. *Id.* at 1779.

384. *See id.* at 1778.

385. *See id.* at 1781 (Stevens, J., dissenting).

386. 493 F.3d 412 (4th Cir. 2007).

387. *Id.* at 414.

388. *Id.*

389. *Id.* at 415.

390. *Id.*

391. *Id.*

require[d] before deadly force can be used.”<sup>392</sup> The Fourth Circuit began its qualified immunity analysis by reciting the essential principles from *Saucier v. Katz*.<sup>393</sup> The court explained that “reasonableness is evaluated from the perspective of the officer on the scene, not through the more leisurely lens of hindsight.”<sup>394</sup> Rejecting the plaintiff’s positions, the court found Deputy Coe’s conduct reasonable.<sup>395</sup>

When public safety is the interest supporting a seizure, the Fourth Circuit explained that courts should “consider 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.”<sup>396</sup> The court concluded that there “was a danger to the life of others” during the pursuit and it was therefore “eminently reasonable to terminate the chase in order to avoid further risks to the lives of innocent motorists.”<sup>397</sup> Thus, it held that the deputy’s “attempt to terminate a dangerous . . . car chase [that] threatened the lives of innocent bystanders did not violate the Fourth Amendment, even though it placed the fleeing motorist at risk of serious injury or death.”<sup>398</sup> Because the Fourth Circuit found the deputy’s conduct to be reasonable, it was unnecessary to address qualified immunity.<sup>399</sup>

Addressing other issues, the Fourth Circuit reaffirmed that the Department’s policy forbidding PITs does not determine “whether those tactics are constitutional.”<sup>400</sup> The court observed that it is “settled law that a violation of departmental policy does not equate with constitutional unreasonableness.”<sup>401</sup> Therefore, the county’s policy frowning upon the use of such intervention techniques was found to be of no consideration in determining “whether [the deputy’s] conduct was consistent with the Fourth Amendment.”<sup>402</sup>

The Fourth Circuit further explained that “[t]he subjective beliefs as to the reasonableness of an intervention technique are [equally] irrelevant to the constitutional inquiry.”<sup>403</sup> The Court concluded that “an officer’s subjective belief that a particular use of force was unrea-

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392. *Id.*

393. *Id.*

394. *Id.* at 416 (citation omitted).

395. *Id.* at 421.

396. *Id.* at 416 (internal quotation marks omitted).

397. *Id.* at 417.

398. *Id.* at 418 (internal quotation marks omitted).

399. *Id.*

400. *Id.* at 419.

401. *Id.*

402. *Id.*

403. *Id.* at 420.

sonable is [not] proof of any constitutional violation.”<sup>404</sup> The court, therefore, reversed and granted summary judgment as a matter of law for the deputy because his conduct was reasonable under the Fourth Amendment.<sup>405</sup>

Many other cases involving suspects either fleeing in vehicles or preparing to flee have resulted in qualified immunity for the officer. Moving vehicles or vehicles capable of moving near a police officer often present grave risks of death. A vehicle can lunge in a split second. In *Pittman v. Nelms*, the Fourth Circuit held as a matter of law that a police officer did not use excessive force in shooting a fleeing suspect from the rear.<sup>406</sup> In *Pittman*, two officers, Banks and Nelms, stopped a car belonging to a suspected drug dealer.<sup>407</sup> After approaching the car, Banks leaned inside to speak to the driver, Hudson, and Hudson took off.<sup>408</sup> After Banks was thrown back from the car, Nelms fired his gun hitting a passenger in the back.<sup>409</sup> The Court reasoned that under these facts, “an objectively reasonable officer certainly could have believed that his decision to fire was legally justified.”<sup>410</sup>

In *Long v. Slaton*, the Eleventh Circuit illustrates the point that whether a suspect appears likely to engage in a dangerous vehicular flight is highly relevant to the question of whether deadly force is reasonable.<sup>411</sup> In *Long*, the court held that an officer was justified in shooting a suspect who was attempting to steal a police vehicle, primarily because the suspect’s behavior suggested that he would continue to flee and was likely to cause a dangerous chase.<sup>412</sup> The court held that the officer’s decision to shoot the suspect was objectively reasonable even though the suspect had put the vehicle in reverse and was backing away from the officer at the time the officer fired the fatal shot.<sup>413</sup>

In *Scott v. Edinburg*, an off-duty police officer, Edinburg, had stopped at a local restaurant and left the keys in the ignition of his personal vehicle.<sup>414</sup> While Officer Edinburg was attempting to buy something to eat, Scott climbed into Edinburg’s car and attempted to

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404. *Id.*

405. *Id.* at 421.

406. 87 F.3d 116, 118 (4th Cir. 1996).

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.* at 120.

411. 508 F.3d 576, 580 (11th Cir. 2007).

412. *Id.* at 580-83.

413. *Id.* at 580-81.

414. 346 F.3d 752, 754 (7th Cir. 2003).

steal it.<sup>415</sup> Edinburg ran to the back of the car and started yelling “stop” and “that’s my car” to Scott as Scott started to back up.<sup>416</sup> Scott then put the car in forward and drove away.<sup>417</sup> As Scott was driving away, Edinburg drew his service revolver and fired several shots, one of which struck and killed Scott.<sup>418</sup> Both parties agreed that Edinburg did not start firing until the vehicle was in forward and was driving away.<sup>419</sup> Additionally, the parties agreed that there were approximately twelve to fourteen people in the parking lot at the time of the incident, but disagreed on whether any of these patrons were in the direct path of the vehicle as it fled the scene or whether Scott’s driving caused any of the patrons in the parking lot to flee in order to avoid being struck.<sup>420</sup> In fact, the plaintiff offered affidavit testimony from two eyewitnesses who stated that none of the patrons were “in the direct path of the vehicle’s travel” and that “no people ran or were forced to flee from the vehicle’s path to avoid being struck.”<sup>421</sup>

Despite the plaintiff’s affidavits, the Seventh Circuit held that Officer Edinburg was still entitled to summary judgment because Edinburg could have reasonably believed that Scott’s actions posed a threat to the bystanders or others.<sup>422</sup> The court held that Officer Edinburg was *not* required to show that bystanders were in the direct path of the vehicle, only that people “in the *immediate vicinity*” might have been placed in danger due to Scott’s actions.<sup>423</sup> The court noted that it was also highly relevant that Scott had “committed a forcible felony” and had almost run over Officer Edinburg in the process.<sup>424</sup>

*Scott, Brousseau, Abney, Slaton, and Edinburg* represent a reaffirmation of traditional use of force principles from older vehicular cases, such as *Pittman*, and clarified application to cases involving vehicles. *Abney* interpreting *Scott v. Harris* suggests that courts will enforce the letter and spirit of *Scott*: criminal suspects who assume risks of death in vehicular pursuits will not recover where the pursuing officers act to eliminate risks to public safety by stopping the risky conduct by the fleeing suspect.<sup>425</sup> It seems extremely unlikely that any court will

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415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.* at 758-59.

421. *Id.*

422. *Id.* at 759.

423. *Id.*

424. *Id.*

425. See *Abney v. Coe*, 493 F.3d 412, 413-14 (4th Cir. 2007)

determine a pursuit to be constitutionally unreasonable where the pursuing officers could have reasonably believed that their action in stopping the suspect was appropriate. As in the traditional use of force context, the “could have believed” standard should insulate the officers.

VIII. A SUMMARY OF QUALIFIED IMMUNITY PRINCIPLES  
IN USE OF FORCE CASES

Individual capacity actions against officers are subject to the doctrine of qualified immunity. The Supreme Court has held 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 would have known.”<sup>426</sup> Moreover, the Court has stated that the qualified immunity defense “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”<sup>427</sup>

In deciding whether a defendant is entitled to qualified immunity, there are two relevant inquiries. Generally, a court will begin by examining whether the plaintiff has properly alleged a violation of a clearly established constitutional right.<sup>428</sup> If so, the court must decide whether the defendant’s actions were objectively reasonable.<sup>429</sup> While this order of analysis is generally appropriate, courts may depart from this sequence in appropriate cases.<sup>430</sup> The Court has interpreted “clearly established” to mean that “the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”<sup>431</sup>

The Fourth Circuit has been especially insightful and progressive in affording qualified immunity to police officers in most use of force litigation. The court has explained that law enforcement officers “are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.”<sup>432</sup> Where there is a legitimate question as to whether the

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426. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

427. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

428. *See Siegert v. Gilley*, 500 U.S. 226, 231-35 (1991).

429. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

430. *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

431. *Anderson*, 483 U.S. at 640. *See Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004); *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 787 (4th Cir. 1998) (affirming the lower court’s grant of summary judgment to police officers who shot and killed a suspect whom the officers perceived was holding a knife and began walking towards the officers).

432. *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

officer's conduct would objectively violate the plaintiff's rights, qualified immunity "gives police officers the necessary latitude to pursue their investigations without having to anticipate, on the pain of civil liability, future refinements or clarifications of constitutional law."<sup>433</sup>

In *Slattery v. Rizzon*, the Fourth Circuit noted that "the purpose of qualified immunity is to remove most civil liability actions, except those where the official clearly broke the law, from the legal process well in advance of the submission of facts to a jury."<sup>434</sup> Furthermore, granting qualified immunity to law enforcement officers "ensures that these officers can perform their duties free from the specter of endless and debilitating lawsuits."<sup>435</sup> Finally, "permitting damages suits against governmental officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."<sup>436</sup>

The Fourth Circuit has clearly explained qualified immunity in the use of force context: "The Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm."<sup>437</sup> In *Elliot v. Leavitt*, the court declared that "[t]he Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists."<sup>438</sup> It explained that:

Claims that law enforcement officers used excessive force when making an arrest "should be analyzed under the Fourth Amendment and its 'reasonableness' standard." The standard of review is an objective one. The intent or motivation of the officer is irrelevant; the question is whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force. A police officer may use deadly force when the officer has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others.<sup>439</sup>

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433. *Tarantino v. Baker*, 825 F.2d 772, 775 (4th Cir. 1987).

434. 939 F.2d 213, 216 (4th Cir. 1991).

435. *Torchinsky v. Siwinski*, 942 F.2d 257, 260 (4th Cir. 1991). See *Tarantino*, 825 F.2d at 775 ("[C]ertainly we cannot expect police officers to carry . . . a Decimal Digest on patrol; they cannot be held to . . . a legal scholar's expertise in constitutional law.").

436. *Anderson*, 483 U.S. at 638.

437. *Elliot v. Leavitt*, 99 F.3d 640, 641 (4th Cir. 1996).

438. *Id.* at 643.

439. *Id.* at 642 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)) (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)) (citations omitted).

The Fourth Circuit has also recognized that the doctrine of qualified immunity in excessive force cases and the inquiry under *Graham v. Connor* must reflect the considerations underlying the analysis of an immunity defense.<sup>440</sup> A reviewing court may not employ “the 20/20 vision of hindsight” and must make “allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”<sup>441</sup> The court’s focus should be on the circumstances at the moment force was used and on the fact that officers on the beat are not often afforded the luxury of armchair reflection.<sup>442</sup>

In *Saucier v. Katz*, the Supreme Court addressed qualified immunity in a law enforcement use of force case:

[P]olice officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation, the reasonableness of the officer’s belief as to the appropriate level of force should be judged from that *on-scene perspective*. We set out a test that cautioned against the “20/20 vision of hindsight” in favor of deference to the judgment of reasonable officers on the scene.<sup>443</sup>

In *Pittman v. Nelms*, the Fourth Circuit held as a matter of law that a police officer did not use excessive force in shooting a fleeing suspect from the rear.<sup>444</sup> In *Pittman*, two officers, Banks and Nelms, stopped a car belonging to a suspected drug dealer.<sup>445</sup> After approaching the car, Banks leaned inside to speak to the driver, Hudson, and Hudson attempted to flee.<sup>446</sup> After Banks was thrown back from the car, Nelms fired his gun hitting a passenger in the back.<sup>447</sup> The Court reasoned that under these facts, “an objectively reasonable officer certainly could have believed that his decision to fire was legally justified.”<sup>448</sup>

In *Carr v. Deeds*, state troopers were sued under an excessive force theory for a shooting death.<sup>449</sup> The Fourth Circuit affirmed qualified immunity for the troopers, explaining that “[b]ecause ‘police officers are often forced to make split-second judgments—in circumstances

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440. See *Slattery v. Rizzo*, 939 F.2d 213, 215-16 (4th Cir. 1991).

441. *Graham*, 490 U.S. at 396-97.

442. See *Greenidge v. Ruffin*, 927 F.2d 789, 791-92 (4th Cir.1991) (citing *Graham*, 490 U.S. at 395-96).

443. 533 U.S. 194, 205 (2001) (emphasis added) (citations omitted).

444. 87 F.3d 116, 118 (4th Cir. 1996).

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.* at 120.

449. 453 F.3d 593, 596 (4th Cir. 2006).

that are tense, uncertain and rapidly evolving,' the facts must be evaluated from the perspective of a reasonable officer on the scene, and the use of hindsight must be avoided."<sup>450</sup>

In *Wilson v. Flynn*, the Fourth Circuit affirmed qualified immunity for police officers.<sup>451</sup> Officer Flynn was sent to arrest Wilson for a domestic violence dispute.<sup>452</sup> Flynn tried to put Wilson in handcuffs but Wilson resisted.<sup>453</sup> Flynn and Wilson began fighting and Wilson was struck in the face and sprayed with mace.<sup>454</sup> Wilson later asserted in a deposition that he was shoved, stomped, punched repeatedly, kicked, and sprayed with mace by the officers.<sup>455</sup> Wilson also asserted that his face was slammed into a fireplace screen.<sup>456</sup>

The Fourth Circuit explained that it must first address "whether a constitutional right would have been violated on the facts alleged."<sup>457</sup> The first step in an excessive force case "requires analysis 'under the Fourth Amendment's 'objective reasonableness' standard.'"<sup>458</sup> The Fourth Circuit concluded that the use of force was not objectively unreasonable.<sup>459</sup> Therefore, qualified immunity for the officer was affirmed.<sup>460</sup>

This emphasizes that the "officer's perceptions at the time of the incident in question" is the dispositive point and "limits second-guessing the reasonableness of actions with the benefit of 20/20 hindsight."<sup>461</sup> The Fourth Circuit has stressed that, "[i]n evaluating excessive force claims, 'the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective.'"<sup>462</sup> Even law enforcement activities deemed as "disturbing" are subject to qualified immunity.<sup>463</sup>

The doctrine of qualified immunity has a broad scope that is consistently interpreted to insulate police officers from individual liability

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450. *Id.* at 600 (citations omitted).

451. 429 F.3d 465, 467 (4th Cir. 2005).

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 200 (2001)).

458. *Id.* at 467-68 (quoting *Graham v. Conner*, 490 U.S. 386, 388 (1989)).

459. *Id.* at 469.

460. *Id.*

461. *Milstead v. Kibler*, 243 F.3d 157, 163 (4th Cir. 2001) (citations omitted).

462. *Brown v. Gilmore*, 278 F.3d 362, 369 (4th Cir. 2002) (quoting *Saucier*, 533 U.S. at 204).

463. *Gomez v. Atkins*, 296 F.3d 253, 266 (4th Cir. 2002) (Hamilton, J., concurring).

in virtually all use of force cases where a reasonable officer could have reasonably believed that the force was necessary. The trends in these use of force cases should deter some of the continuing frivolous use of force claims.

IX. THE DOCTRINE OF PUBLIC OFFICER IMMUNITY AS A DEFENSE TO STATE LAW BASED USE OF FORCE CLAIMS

Plaintiffs may initiate alleged wrongful death claims and tort claims for assault and battery, and possibly other torts, where officers have used force. However, ordinary tort principles are generally inapplicable against police officers. Rather, through the doctrine of public officer immunity, officers are typically immunized except where there is malice, corruption or clear abuse of authority or action exceeding the scope of authority. Public officers performing official functions such as using force are protected from civil tort liability by immunity.<sup>464</sup> The policy underlying this grant of immunity has been explained by North Carolina's appellate courts as follows:

The complex process of legal administration requires that officers shall be charged with the duty of making decisions, either of law or of fact, and acting in accordance with their determinations. Public servants would be unduly hampered and intimidated in the discharge of their duties, and an impossible burden would fall upon all our agencies of government if the immunity to private liability were not extended, in some reasonable degree, to those who act improperly, or exceed the authority given.<sup>465</sup>

Law enforcement officers are public officers, and are entitled to immunity from liability for acts within their official duty.<sup>466</sup> In *Grad v. Kassa*, the North Carolina Supreme Court explained that “[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability.”<sup>467</sup>

It is only when a public officer exceeds or abuses his authority that immunity does not apply.<sup>468</sup> In *Mazzucco v. Board of Medical*

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464. See *State ex rel. Jacobs v. Sherard*, 243 S.E.2d 184, 187 (N.C. Ct. App. 1978); *Mazzucco v. N.C. Bd. of Med. Exam'rs*, 228 S.E.2d 529, 531 (N.C. Ct. App. 1976).

465. *Sherard*, 243 S.E.2d at 187-88 (quoting WILLIAM PROSSER, *THE HANDBOOK OF THE LAW OF TORTS* § 132 (4th ed. 1971)).

466. See *id.* at 188.

467. 321 S.E.2d 888, 890 (N.C. 1984) (quoting *Smith v. State*, 222 S.E.2d 412, 430 (N.C. 1976)).

468. See *Mazzucco*, 228 S.E.2d at 531.

*Examiners*, the North Carolina Court of Appeals declared that “[n]o action lies against a public officer for an honest exercise of his discretion, though erroneous, but for a corrupt or malicious exercise of discretion such officer may be made to respond in damages to an individual injured thereby.”<sup>469</sup> A claimant must allege and prove corruption or malice when the alleged wrongdoer performs official duties involving the exercise of discretion.<sup>470</sup> Where there is no allegation that the defendant-officer exceeded his authority or acted outside the scope of his duty, the officer is entitled to summary judgment.<sup>471</sup>

It is well settled in North Carolina that a public officer engaged in the performance of a governmental function involving the exercise of judgment and discretion may not be held liable for actions in the course and scope of employment.<sup>472</sup> A synthesis of these public officer immunity cases suggests a compelling analogy to the application of qualified immunity to federal constitutional claims. Both qualified immunity and public officer immunity are predicated upon the same policy concerns of not requiring officers to defend civil claims when officers act reasonably even when mistaken. The public officer immunity cases also use an objective standard of analysis similar to qualified immunity.<sup>473</sup> Therefore, many state law based use of force claims against police officers are subject to summary judgement disposition.

#### X. LEADING FEDERAL CIRCUIT COURT CASES DEMONSTRATE APPLICATION OF USE OF FORCE TESTS

##### A. *Objective Reasonableness in General*

In *Milstead v. Kibler*, the Fourth Circuit addressed Fourth Amendment constitutional tort claims arising out of a clearly mistaken shooting death.<sup>474</sup> An emergency call by Mark Milstead shortly after

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469. *Id.* at 531-32.

470. See *Jones v. Kearns*, 462 S.E.2d 245, 248 (N.C. Ct. App. 1995).

471. See *Sherard*, 243 S.E.2d at 189 (granting a 12(b)(6) motion for failure to state a claim in favor of defendant-officers where plaintiff did not allege that defendants acted outside the scope of duty).

472. See, e.g., *Smith v. Hefner*, 68 S.E.2d 783, 787 (N.C. 1952); *Hare v. Butler*, 394 S.E.2d 231 (N.C. Ct. App. 1990); *Piggot v. City of Wilmington*, 273 S.E.2d 752, 755 (N.C. Ct. App. 1981).

473. See *Bailey v. Kennedy*, 349 F.3d 731, 742 (4th Cir. 2003); *Massasoit v. Carter*, 439 F. Supp. 2d 463 (M.D.N.C. 2006); *Lea v. Kirby*, 171 F. Supp. 2d 579 (M.D.N.C. 2001) (noting its use of “essentially the same analysis as the Section 1983 claim,” and applying the reasonable person standard to public officer immunity); *Grad v. Kaasa*, 321 S.E.2d 888 (N.C. 1984) (utilizing standard of “man of reasonable intelligence”).

474. 243 F.3d 157 (4th Cir. 2001).

midnight to a 911 operator sought police help as a result of an alleged physical attack by an intruder, Ramey.<sup>475</sup> The operator reported Milstead's call to the Officers Kibler and Proctor, indicating that a man had been shot in the neck and a woman stabbed.<sup>476</sup> The officers responded immediately after receiving the call.<sup>477</sup>

When the officers arrived they observed "a van parked in front of the house, with the door open, and fresh blood on the van and on the steps leading to the house."<sup>478</sup> They also heard calls for help coming from inside the house.<sup>479</sup> Proctor kicked open the door and yelled "police."<sup>480</sup> The officers observed two men wrestling on the floor and one of them yelled that the other man had a gun.<sup>481</sup> Then the person with the gun pointed it at Proctor, who reacted by backing up and firing four shots from his pistol.<sup>482</sup> While Proctor was backing up, he stumbled and fell backwards outside the door.<sup>483</sup> Officer Kibler then, "believing that Proctor had been shot, retreated to the outside corner of the house . . . [and assumed] a defensive position."<sup>484</sup> Kibler then heard someone from inside say "that he was going to 'kill all of you.'"<sup>485</sup> Shortly after Kibler's retreat, someone ran through the door and turned towards him.<sup>486</sup> The officer "fired two shots, bringing the person down."<sup>487</sup> Unfortunately, Kibler had mistakenly shot Milstead instead of the assailant Ramey.<sup>488</sup> Milstead was transported to the hospital, where he subsequently died.<sup>489</sup>

The Fourth Circuit stated that the Fourth Amendment's reasonableness standard is the appropriate method by which to analyze all instances in which law enforcement officers have allegedly used excessive force, whether deadly or not, in the course of any arrest, investigatory stop or other seizure.<sup>490</sup> After recounting all of the pertinent circumstances, the Fourth Circuit concluded that the mistaken impres-

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475. *Id.* at 160.

476. *Id.*

477. *Id.*

478. *Id.*

479. *Id.*

480. *Id.*

481. *Id.*

482. *Id.*

483. *Id.*

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.* at 162.

sions by the officer were completely reasonable and justifiable under the circumstances.<sup>491</sup>

Mistakes of this nature usually involve one of two scenarios. The first involves an officer justifiably shooting at a suspect, but accidentally missing and hitting a bystander.<sup>492</sup> The second involves an officer justifiably shooting and hitting a person he mistakenly believes to be the suspect, but who is actually an innocent person.<sup>493</sup> No Fourth Amendment seizure occurs under the first type of mistake.<sup>494</sup> The second form of mistake, the one applicable in *Milstead*, implicates the Fourth Amendment, but is not a violation of the Fourth Amendment because the mistake is not necessarily unreasonable.<sup>495</sup>

Officer Kibler's mistaken understanding was not enough to render his use of force unreasonable.<sup>496</sup> According to the Fourth Circuit, because Officer Kibler had an objectively reasonable belief that Milstead was Ramsey, his "mistake [did] not negate the justification for the use of deadly force."<sup>497</sup> In support of its reasoning, the court noted that "[t]he Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful conduct."<sup>498</sup> Further, the court indicated that "courts cannot second guess the split-second judgments of a police officer to use deadly force in a context of rapidly evolving circumstances, when inaction could threaten the safety of the officers or others."<sup>499</sup>

In *Anderson v. Russell*, the Fourth Circuit addressed an alleged excessive force complaint following a jury verdict in the plaintiff's favor.<sup>500</sup> With respect to the officer's qualified immunity defense, the trial court granted the officer's motion for judgment as a matter of law, but the court denied the same motion as to the jury's finding of use of excessive force.<sup>501</sup> The court concluded that even though Officer Russell used deadly force, he did so reasonably in order to protect himself against the threat posed by Anderson, which Officer Russell perceived

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491. *Id.* at 165.

492. *Id.* at 163.

493. *Id.*

494. *Id.* at 164.

495. *Id.*

496. *Id.* at 165.

497. *Id.*

498. *Id.* (quoting *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (citation omitted)).

499. *Id.*

500. 247 F.3d 125 (4th Cir. 2001).

501. *Id.* at 128.

to be immediate and deadly.<sup>502</sup> Thus, the verdict was set aside in its entirety.<sup>503</sup>

Russell, a law enforcement officer, was providing part-time security services at a mall.<sup>504</sup> Anderson had been drinking wine all day and, after buying another bottle at the mall, drank that bottle while he walked around the mall.<sup>505</sup> Anderson was wearing three shirts, a sweater, and a jacket, and, inside one of these shirts, Anderson had tucked a shoe polish container inside an eye-glasses case.<sup>506</sup> In addition, Anderson carried a portable walkman radio in his back pocket and listened to the radio with earphones covered by his hat.<sup>507</sup>

While pointing to Anderson, a mall patron informed Officer Russell that a man appeared to have a gun under his sweater.<sup>508</sup> After observing Anderson for twenty minutes, Officer Russell spotted a bulge under Anderson's clothing near the waistband that he believed to be consistent with a handgun.<sup>509</sup> Concerned, Russell decided to confront Anderson in order to determine whether Anderson was armed and what his intentions were.<sup>510</sup> Officer Russell and one other officer followed Anderson as he exited the mall, approached him with their guns drawn, and gave him instructions to raise his hands and kneel on the ground.<sup>511</sup> Anderson raised his hands initially, but, without explanation, later lowered them, supposedly in order to turn off the portable walkman radio that was in his back pocket.<sup>512</sup> With this movement, Officer Russell believed Anderson was reaching for a weapon, and, for safety reasons, Russell shot Anderson three times, which later caused Anderson permanent injuries.<sup>513</sup> A subsequent search of Anderson revealed he was unarmed and in possession of a radio, not a weapon.<sup>514</sup>

The Fourth Circuit held that Anderson's excessive force claim should not have been submitted to the jury because Officer Russell did not violate the Fourth Amendment with the amount of force he

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502. *Id.* at 127.

503. *Id.*

504. *Id.*

505. *Id.*

506. *Id.* at 127-28.

507. *Id.* at 128.

508. *Id.*

509. *Id.*

510. *Id.*

511. *Id.*

512. *Id.*

513. *Id.*

514. *Id.*

used.<sup>515</sup> The evidence established that Officer Russell was reasonable in thinking that Anderson was armed with a gun.<sup>516</sup> The court noted that “[t]his Circuit has consistently held that an officer does not have to wait until a gun is pointed at [him] before the officer is entitled to take action.”<sup>517</sup> Despite the mistake and Anderson’s injuries, the court determined that, since the officer’s conduct was reasonable, the excessive force claim should have been dismissed.<sup>518</sup> In other words, the law does not and is not prepared to “redress injuries resulting from reasonable mistakes.”<sup>519</sup>

In *Elliott v. Leavitt*, the Fourth Circuit reversed the district court’s denial of qualified immunity in an alleged excessive force case.<sup>520</sup> According the facts, Officer Leavitt pulled over a motorist, Elliot, who had clearly been drinking.<sup>521</sup> Elliott failed several of the sobriety tests given by Leavitt and the officer called for backup.<sup>522</sup> After arresting Elliot, Leavitt conducted a brief search of the backside of Elliott’s body, but was unsure of whether he searched the front.<sup>523</sup> Officer Leavitt and the backup officer put Elliott in the front passenger seat of the police car, fastened Elliot’s seatbelt, and closed the door and window.<sup>524</sup> While standing near the passenger side of the car with the backup officer, Leavitt noticed a movement and saw Elliott pointing a small handgun at the officers with his finger on the trigger.<sup>525</sup> The officers ordered Elliott to drop the gun but when Elliott failed to respond he was shot and killed.<sup>526</sup>

The plaintiff argued a number of considerations not relevant to the objective reasonableness inquiry. For example, the plaintiff argued that the officers could have responded differently by moving further away from the car rather than shooting.<sup>527</sup> Agreeing with this suggestion, the district court concluded that the number of shots fired by the officers was excessive.<sup>528</sup> In response, however, the Fourth Circuit

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515. *Id.* at 129.

516. *Id.* at 130.

517. *Id.* at 131.

518. *Id.* at 132.

519. *Id.* (quoting *McLenagan v. Karnes*, 27 F.3d 1002, 1008 (4th Cir. 1994)).

520. 99 F.3d 640 (4th Cir. 1996).

521. *Id.* at 641.

522. *Id.*

523. *Id.*

524. *Id.*

525. *Id.* at 642.

526. *Id.*

527. *Id.* at 643.

528. *Id.*

explained that “[t]he number of shots by itself cannot be determinative as to whether the force used was reasonable.”<sup>529</sup>

The evidence in *Leavitt* demonstrated that the officers fired simultaneously, that neither officer fired all of the available shots from his weapon, and that the shooting occurred within seconds.<sup>530</sup> As to the plaintiff’s argument and the district court’s suggestion that the officers could have moved further away, the Fourth Circuit explained that such a suggestion reflected an observation made from the “‘peace of a judge’s chambers’ [rather] than [from] . . . a dangerous and threatening situation on the street.”<sup>531</sup>

The Fourth Circuit clearly emphasized that, in order to comply with the requirements of the Fourth Amendment, one need not be omniscient.<sup>532</sup> Additionally, it is not required that officers be absolutely sure of the suspect’s intent to cause harm or of the nature of the threat made because “the Constitution does not require that certitude precede the act of self protection.”<sup>533</sup> Emphasizing this point, the court indicated that “[t]he Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm.”<sup>534</sup>

Applying the above-stated principles, the Fourth Circuit, in *Slatery v. Rizzo*, determined that an officer, who shot a criminal suspect, was not liable because the court found it objectively reasonable for the officer to have believed that the suspect was reaching for a gun, when in fact the object in the suspect’s hands was a beer bottle.<sup>535</sup> Similarly, the defendant-officer in *McLenagan v. Karnes* was found not liable when the officer shot an unarmed suspect who appeared to be chasing another officer.<sup>536</sup> Due to the fact that the suspect was handcuffed in front of his body, the officer could not determine whether the suspect was unarmed.<sup>537</sup> The Fourth Circuit explained that:

[A] suspect’s failure to raise his hands in compliance with a police officer’s command to do so may support the existence of probable cause to believe that the suspect is armed. . . .

. . . [W]e do not think it wise to require a police officer, in all instances, to actually detect the presence of an object in a suspect’s hands before firing on him. . . . We will not second-guess the split-

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529. *Id.*

530. *Id.*

531. *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

532. *Id.* at 644.

533. *Id.*

534. *Id.* at 641.

535. 939 F.2d 213, 216-17 (4th Cir. 1991).

536. 27 F.3d 1002, 1005, 1009 (4th Cir. 1994).

537. *Id.* at 1005.

second judgment of a trained police officer merely because that judgment turns out to be mistaken, particularly where inaction could have resulted in death or serious injury to the officer and others. . . . [Section] 1983 does not purport to redress injuries resulting from reasonable mistakes.<sup>538</sup>

The Fourth Circuit, in *Sigman v. Town of Chapel Hill*, affirmed the trial court's grant of summary judgment to defendant-police officers who fatally shot a suspect, believed to possess a knife, when he began advancing toward the officers.<sup>539</sup> The court rejected the plaintiff's argument that a factual dispute existed as to whether the suspect had a knife, deciding that it was immaterial in determining whether the officer was protected by qualified immunity.<sup>540</sup> Thus, an officer may justifiably fire if he or she reasonably perceives that a suspect may have a weapon.

In *Krueger v. Fuhr*, the Eighth Circuit decided that an officer's shooting of a fleeing suspect was objectively reasonable.<sup>541</sup> Officer Fuhr responded to a call identifying the area in which a suspect was allegedly spotted.<sup>542</sup> Fuhr believed that the suspect had just committed an assault at a laundry and was possibly an escapee from a halfway house.<sup>543</sup> While canvassing the area, Officer Fuhr spotted the suspect, Krueger, and approached him with his service revolver drawn.<sup>544</sup> He then told Krueger to freeze.<sup>545</sup> Instead, Krueger ran and Fuhr pursued him. Fuhr continued to yell for Krueger to stop, but Krueger continued to flee and, as he ran, tried to pull something from his waistband.<sup>546</sup> Fuhr witnessed Krueger's attempt to grab something from his waistband, slowed his pursuit, and fired four shots at the suspect.<sup>547</sup> Two of the shots hit Krueger in the back and one hit him in the base of the skull, killing him.<sup>548</sup>

In assessing the case, the Eighth Circuit indicated that any issues regarding the shot to Krueger's back were not sufficient to establish a material issue of fact as to whether Officer Fuhr acted reasonably.<sup>549</sup>

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538. *Id.* at 1007-08.

539. 161 F.3d 782, 787 (4th Cir. 1998).

540. *Id.*

541. 991 F.2d 435, 440 (8th Cir. 1993).

542. *Id.* at 437.

543. *Id.*

544. *Id.*

545. *Id.*

546. *Id.*

547. *Id.*

548. *Id.*

549. *Id.* at 439.

The court determined that Officer Fuhr was reasonable in his belief that “he faced a serious and immediate danger of physical harm when Leroy Krueger pulled, or seemed to pull, a knife from his waistband.”<sup>550</sup> The court concluded that police officers are not required to “forgo the use of deadly force to prevent their own death or serious physical injury whenever there is a possibility that another officer might later apprehend the fleeing suspect.”<sup>551</sup>

### B. *Bullet Trajectory Does Not Determine Justification*

At first glance, cases involving “back shots,” or shootings from a rear position, may suggest that the shooting was unnecessary because the danger was leaving the scene. However, ballistics studies reveal “that a person can turn around in less time than it takes to fire a drawn and pointed weapon.”<sup>552</sup> This recognized “lag time” or “reactionary gap” phenomenon justifies many cases with shootings from the rear as being objectively reasonable.

The number of shots fired, by itself, is not determinative in the use of force inquiry.<sup>553</sup> An officer is required to shoot until the threat is stopped, whether it takes one shot or forty-one shots. Modern police firearms will typically fire up to fifteen rounds in a matter of three or four seconds. Thus, it is common to have a large number of shots in a given encounter. Because of the lag time phenomenon, it is not unusual for shots to enter a suspect in the side or in the back. In the time it takes to unholster, prepare, and fire a weapon, the position of the suspect has often materially changed. After the first shot or warning, it is not unusual for a suspect to turn his or her back to the officer out of fear. These scenarios often justify back shootings, which on the surface may appear suspicious.

Many of the foregoing cases demonstrate challenging fact patterns but no liability. However, it must be remembered that the objective reasonableness standard considers the totality of the circumstances, including the fact that dangers are not necessarily reduced because a suspect is in flight.

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550. *Id.*

551. *Id.* at 440.

552. Ernest J. Tobin & Martin L. Fackler, *Officer Reaction—Response Times in Firing a Handgun*, 3 WOUND BALLISTICS REV. 3, 6 (1997). See Mark Hansen, *Faster Than a Speeding Bullet: Study Says Quick Turns by Suspects Can Account for Gunshot Wounds in Back*, ABA J., Sept. 1997, at 38.

553. *Elliot v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996).

## XI. THE USE OF EXPERT TESTIMONY IN USE OF FORCE LITIGATION

Expert testimony may be appropriate in some use of force cases regarding certain narrow and specific issues. Some law enforcement disputes require specialized or technical knowledge beyond that usually understood by lay jurors.<sup>554</sup> A number of older cases demonstrate the admission of expert testimony in civil, criminal,<sup>555</sup> and administra-

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554. Under the Federal Rules of Evidence, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.” FED. R. EVID. 702. Expert testimony is properly admissible when such testimony may assist the jury to draw inferences from facts because the expert is better qualified on the issues than are lay persons. See *State v. Bullard*, 322 S.E.2d 370 (N.C. 1984). When assessing the admissibility of expert testimony, the test is whether the jury will receive help from the expert witness. See JAMES H. CHADBOURN, WIGMORE ON EVIDENCE § 1923 (1978).

555. See *United States v. Alonso*, 48 F.3d 1536, 1541 (9th Cir. 1995) (holding that there was no error in permitting undercover agents conducting a sting to characterize a defendant’s counter-surveillance behavior as consistent with someone being involved in criminal activity and that a law enforcement expert may testify as to “techniques and methods” used); *United States v. Gastiaburo*, 16 F.3d 582, 587-89 (4th Cir. 1994) (holding that there was no error in admitting testimony about methods of drug dealers and explaining how expert testimony as to the “modus operandi” is “commonly admitted”); *United States v. Williams*, 980 F.2d 1463, 1465-66 (D.C. Cir. 1992) (allowing an expert in a drug case to testify that more than 100 zip lock bags concerning small amounts of drugs “were meant to be distributed at street level”); *United States v. Roldan-Zapata*, 916 F.2d 795, 805 (2d Cir. 1990) (holding that it was proper to admit testimony from an expert witness testifying as to police surveillance and record keeping procedures); *United States v. Lawson*, 780 F.2d 535, 542 (6th Cir. 1985) (upholding the admission of police officer’s testimony concerning the meaning of certain terms used in drug trafficking); *United States v. Young*, 745 F.2d 733, 760-61 (2d Cir. 1984) (allowing government agents to testify that in their opinion an incident involving a defendant was a narcotics transaction because the agents were experts whose testimony might have aided the jury in understanding the events); *United States v. Scavo*, 593 F.2d 837, 844 (8th Cir. 1979) (affirming the admission of expert testimony about the nature of gambling operations, gambling terminology, and his opinion of the defendant’s role in a bookmaking scheme); *United States v. Phillips*, 593 F.2d 553, 558 (4th Cir. 1978) (holding that there was no error in admitting testimony in a narcotics case interpreting code language in intercepted telephone conversations).

See also *United States v. Hankey*, 203 F.3d 1160, 1169-70 (9th Cir. 2000) (allowing expert testimony about gang behavior); *United States v. Hall*, 93 F.3d 1337, 1345 (7th Cir. 1996) (testimony admissible showing that a particular defendant was susceptible to interrogation techniques that would lead him to make unreliable statements); *United States v. McCollum*, 802 F.2d 344, 346 (9th Cir. 1986) (upholding admission of expert testimony regarding the typical structure of mail fraud schemes).

tive litigation involving use of force and related law enforcement issues.<sup>556</sup>

In the last several years, a number of courts have issued decisions which have shifted the trends and have tightened the parameters of admissibility of expert testimony, particularly in the area of use of force. Recent cases demonstrate how courts have rejected testimony from purported police procedures experts attempting to broadly opine that an officer's use of force is "unreasonable," "not justified," or "inappropriate."<sup>557</sup> These cases demonstrate that broad conclusory use of force opinions are generally inadmissible. Many purported experts

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556. North Carolina courts admit expert testimony in many fields where juries can benefit from such specialized knowledge. Among those areas are law enforcement and related matters. See, e.g., *Yassoo Enters., Inc. v. N.C. Joint Underwriting Ass'n*, 325 S.E.2d 677, 680-81 (N.C. Ct. App. 1985). Expert testimony has also been allowed on the standard of skill required in particular employment. *Alva v. Cloninger*, 277 S.E.2d 535, 541-42 (1981) (expert testimony addressing "duties" in a given field). See *Alley v. Charlotte Pipe & Foundry Co.*, 74 S.E. 885, 886-87 (1912).

557. Alan H. Scheiner, *Excluding "Police Practices" Experts in Federal Court: The Rule Against "Telling the Jury What Result to Reach,"* MUNICIPAL LAWYER, July-Aug. 2008, at 7, 8. See, e.g., *Thompson v. City of Chicago*, 472 F.3d 444, 453-54 (7th Cir. 2006); *Clem v. Corbeau*, 98 Fed. Appx. 197, 201 (4th Cir. 2004); *Pena v. Leombruni*, 200 F.3d 1031, 1034 (7th Cir. 1999) ("[T]he jury needed no help in deciding whether [the officer acted] reasonably"); *Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir. 1992) (holding that expert's testimony that the force used was "not justified" was inadmissible); *Berardi v. Village of Sauget*, No. 05-898 (S.D. Ill. July 21, 2008).

A number of older cases had more freely allowed experts to opine in loose general terms. For example, in *Zuchel v. City of Denver*, a law enforcement expert was properly permitted to testify that the officer's use of deadly force was inappropriate. 997 F.2d 730, 743 (10th Cir. 1993). In *Zuchel*, the criminal justice professor was permitted to give expert opinion testimony of "police tactics, the use of force, administration, supervision, and training." *Id.* at 738. The expert also testified about police training, tactics, and options available to police in situations where bodily injury is threatened. *Id.* at 739. The court held that expert testimony is admissible on whether the practices followed fell below acceptable standards. *Id.* at 742. The area of admitted expert testimony involved "generally accepted police custom and practice at the time." *Id.* at 739. The court noted that the professor was an expert in "police training, tactics, and the use of deadly force. Courts generally allow experts in this area to state an opinion on whether the conduct in issue fell below accepted standards in the field of law enforcement." *Id.* at 742. In *McEwen v. City of Norman*, expert law enforcement testimony was permitted on the issue of reasonableness of force. 926 F.2d 1539, 1546 (10th Cir. 1991). There, a professor testified as to the propriety of the police pursuit, the review procedures of the police chief, roadblocks, the method of arrest, and the overall handling of the incident. *Id.* However, in more modern cases, a number of courts have begun to disallow the often loose and conclusory opinions of purported plaintiff's experts who seek to opine that an officer did something wrong. See, e.g., *Berry v. City of Detroit*, 25 F.3d 1342, 1348-50 (6th Cir. 1994) (observing "junk science" concerns). Thus, *McEwen* is inconsistent with the more modern cases.

claim to base their opinions on “good police practices” or agency policy violations, which are categorically irrelevant in determining reasonableness. Thus, the more contemporary cases are excluding these general use of force opinions. Despite the substantial tightening of the parameters of expert testimony in use of force cases, there appears to remain some specific areas within law enforcement where appropriate expert testimony may be permitted.

Law enforcement experts have testified in state and federal courts in North Carolina in law enforcement related cases.<sup>558</sup> In older cases, the conduct of law enforcement officers was the subject of expert testimony in various scenarios, including employment cases where the appropriateness of the officer’s behavior was at issue.<sup>559</sup>

In *Kopf v. Skyrn*, for example, the Fourth Circuit addressed expert evidentiary standards in a law enforcement use of force case.<sup>560</sup> The court held that the specialized training of a police dog is a proper

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558. The following outlines the general parameters of admissibility of expert testimony in North Carolina courts. Rule 702 of the North Carolina Rules of Evidence provides: “If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.” N.C. R. EVID. 702. Expert testimony is properly admissible when such testimony may help the jury to draw inferences from facts because the expert is better qualified on the issues than are lay persons. See *State v. Bullard*, 322 S.E.2d 370 (N.C. 1984). Under North Carolina law, “[t]he test for admissibility of expert testimony is whether the jury can receive ‘appreciable help’ from the expert witness.” *State v. Knox*, 337 S.E.2d 154, 156 (N.C. Ct. App. 1985) (citations omitted). The leading North Carolina evidence treatise states that “[u]nder Rule 702, once expertise is demonstrated, the test of admissibility is helpfulness. A witness who is better qualified than the jury to form a particular opinion may satisfy the Rule.” KENNETH S. BROUN, BRANDIS AND BROUN ON NORTH CAROLINA EVIDENCE § 184 (6th ed. 2004) (footnotes omitted). In order to qualify, the expert need not be a specialist, have a particular license, or have had any experience with the exact type of subject matter involved. *Id.* (citing dozens of cases). The minimum prerequisite is that “through knowledge . . . the testimony can assist the trier of fact.” *Id.* See *State v. Howard*, 337 S.E.2d 598, 603-04 (N.C. Ct. App. 1985) (“To qualify, the expert need not have had experience in the very subject at issue. . . . It is [sufficient] that through study or experience the expert is better qualified than the jury to render the opinion regarding the particular subject.” (citations omitted)); see also *State v. Saunders*, 345 S.E.2d 212, 216-17 (N.C. 1986) (allowing a pathologist to offer expert testimony to assist the jury in understanding the nature of the decedent’s wound and whether the defendant acted in self-defense, even though self-defense was an ultimate issue in the case).

559. See *Webb v. City of Chester*, 813 F.2d 824, 832-33 (7th Cir. 1987) (allowing a law enforcement professor to testify “as to the appropriateness of plaintiff’s actions” in each of the six incidents).

560. 993 F.2d 374, 378-79 (4th Cir. 1993).

subject of expert testimony.<sup>561</sup> The court also held that a law enforcement expert should be permitted to testify as to the general standard of conduct with respect to use of a police slapjack.<sup>562</sup> *Kopf's* emphasis on admitting testimony regarding *specialized skills* might survive the more current trends.

In *Lawson v. Trowbridge*, the Seventh Circuit held that admission of expert testimony regarding the dangerousness of carrying knives and how to arrest individuals carrying concealed weapons was proper.<sup>563</sup> Furthermore, in *Samples v. City of Atlanta*, the Eleventh Circuit held that there was no error in permitting an expert to testify as to whether it was reasonable for an officer to discharge his firearm when the victim charged the officer with a knife.<sup>564</sup> The expert was allowed to testify as to whether the shooting “was justified.”<sup>565</sup> However, this would not be admitted under many of the contemporary cases.

In *Slakan v. Porter*, the Fourth Circuit upheld a decision involving an inmate’s excessive force claim against prison guards.<sup>566</sup> In this older case, the court found no error in the admission of expert testimony as to the punitive nature of using water hoses on inmates in North Carolina.<sup>567</sup> *Slakan*, therefore, involved a narrow matter of expertise as opposed to the more general use of force issues.

The Eleventh Circuit, in *Parker v. Williams*, held that it was permissible for the plaintiff’s law enforcement expert to testify that the law enforcement agency was grossly negligent in hiring a jailer.<sup>568</sup> Additionally, in *Vineyard v. County of Murray*, the Eleventh Circuit held that expert testimony relating to the inadequacy of law enforcement training was admissible.<sup>569</sup> A professor of criminal justice, qualified as an expert in “police operations,” was permitted to testify that the practice of not logging complaints—which can alert a law enforcement agency that an officer may have a history of using excessive force—as well as the lack of follow-up on such complaints, constituted a ratification of the wrongs that the agency knew had been committed.<sup>570</sup>

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561. *Id.* at 379.

562. *Id.*

563. 153 F.3d 368, 375-76 (7th Cir. 1998).

564. 916 F.2d 1548, 1552 (11th Cir. 1990).

565. *Id.*

566. 737 F.2d 368, 378 (4th Cir. 1984).

567. *Id.*

568. 855 F.2d 763, 777-78 (11th Cir. 1988), *vacated on other grounds*, 862 F.2d 1471 (11th Cir. 1989).

569. 990 F.2d 1207, 1210, 1212-13 (11th Cir. 1993).

570. *Id.*

The standards for admitting expert testimony in use of force cases have been restricted by many courts in the last several years. Highly technical aspects of the use of force may still be subject to expert testimony. However, courts appear much less willing to throw open the door for plaintiffs to offer academic opinions relating to particular instances of force in general terms or addressing the ultimate issues.

#### CONCLUSION

Alleged excessive force cases typically arise from instantaneous judgment calls made by law enforcement officers under the most difficult circumstances. Because of the proliferation of extensive use of illegal guns by criminals and the necessity of quick police action, some innocent citizens will inevitably be injured or killed by law enforcement officers, especially where such innocent citizens make gestures inferring that weapons are being retrieved. Vehicular flight has emerged as another increasing threat to officers and public safety. Most everyone has an after-the-fact opinion about how they may have responded somewhat differently. However, use of force law expressly prohibits such Monday morning quarterbacking.

The trends from the recent cases recognize the growing threats against the American law enforcement profession. The doctrine of qualified immunity has been enhanced to provide greater insulation against use of force claims. The body of use of force law has evolved consistent with the growing dangers from criminal conduct to police officers and public safety.

The *Graham*, *Garner*, *Saucier*, *Brousseau*, and *Scott* Supreme Court cases strike an appropriate balance between affording potential remedies for objectively unreasonable conduct and protecting officers who act consistent with reasonable beliefs, even when mistaken. The Fourth Circuit and North Carolina cases strictly adhere to the Supreme Court's continuing mandate that officers are not liable for reasonable mistaken beliefs or reasonable mistakes. A synthesis of federal and North Carolina law has enunciated workable standards which afford considerable discretion and latitude to officers whose lives are often at immediate risk in encounters where force becomes apparently necessary.

