

University of Michigan Journal of Law Reform

Volume 55

2022

Officer-Created Jeopardy and Reasonableness Reform: Rebuttable Presumption of Unreasonableness Within 42 U.S.C. § 1983 Police Use of Force Claims

Bryan Borodkin
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Civil Law Commons](#), [Law Enforcement and Corrections Commons](#), and the [Litigation Commons](#)

Recommended Citation

Bryan Borodkin, *Officer-Created Jeopardy and Reasonableness Reform: Rebuttable Presumption of Unreasonableness Within 42 U.S.C. § 1983 Police Use of Force Claims*, 55 U. MICH. J. L. REFORM 919 (2022).

Available at: <https://repository.law.umich.edu/mjlr/vol55/iss4/6>

<https://doi.org/10.36646/mjlr.55.4.officer>

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

**OFFICER-CREATED JEOPARDY AND REASONABLENESS REFORM:
REBUTTABLE PRESUMPTION OF UNREASONABLENESS WITHIN
42 U.S.C. § 1983 POLICE USE OF FORCE CLAIMS**

Bryan Borodkin*

ABSTRACT

This Note analyzes the current state of civil law surrounding police use of excessive force, highlighting the evolution of the “objective reasonableness” test employed in civil police use of force lawsuits brought under 42 U.S.C. § 1983. This Note also discusses the role that social movements and surveillance technologies have played in furthering police accountability and shifting public opinion surrounding police use of force. After detailing this social and technological context, this Note addresses the numerous problems presented by the “objective reasonableness” test employed within civil police use of force cases, analyzing this problematic test from the perspective of both the public and the police. This Note coins the term “officer-created jeopardy liability loophole” and explains how, under the current test, officer-defendants can escape § 1983 liability when they deliberately or recklessly escalate a situation or create the need for force in the first place. To close this liability loophole and resolve other problems presented by the current “objective reasonableness” test, this Note proposes a rebuttable presumption of unreasonableness, in which a § 1983 plaintiff can present evidence to establish a prima facie case of officer-created jeopardy which, if not sufficiently rebutted by an officer-defendant, presumes the officer-defendant’s use of force unreasonable and in violation of § 1983.

TABLE OF CONTENTS

INTRODUCTION 920

I. THE CURRENT STATE OF POLICE USE OF FORCE CIVIL SUITS924

A. *The History of 42 U.S.C. § 1983 and Evolution of the
“Objective Reasonableness” Test*924

B. *Body Cameras and Black Lives Matter: The Rise in Police
Accountability through Social Movements and Technology* 930

* J.D. Candidate, May 2023, University of Michigan Law School. I would like to thank Professor JJ Prescott and the *University of Michigan Journal of Law Reform* team for their guidance and generous support of this note. Special thanks to my parents and friends for their unwavering encouragement and love.

II.	PROBLEMS WITH THE “OBJECTIVE REASONABLENESS” TEST EMPLOYED IN § 1983 POLICE USE OF FORCE CASES	933
A.	<i>From the Public’s Perspective</i>	933
B.	<i>From the Police Perspective</i>	940
C.	<i>City of Tahlequah v. Bond: The Story of Dominic Rollice</i>	943
III.	PROPOSING A REBUTTABLE PRESUMPTION OF UNREASONABLENESS WITHIN § 1983 ANALYSIS	946
A.	<i>Rebuttable Presumption of Unreasonableness</i>	946
B.	<i>Counterarguments and Considerations</i>	949
C.	<i>The Benefits of a Rebuttable Presumption of Unreasonableness in Situations of Officer-Created Jeopardy</i>	955
	CONCLUSION	956

INTRODUCTION

Amy Hughes was shot four times by a police officer without warning and without being suspected of any crime.¹ In May of 2010, officers responded to a call that a woman was “engaging in erratic behavior” and “hacking a tree with a kitchen knife.”² Three officers arrived on scene and drew their weapons soon after.³ Officers soon saw Amy, who matched the dispatch caller’s description, walking towards another woman in the yard with a knife at her side, stopping about six feet away from the woman.⁴ Amy was calm, composed, and content.⁵ Amy never engaged in any erratic behavior. Amy committed no crime. Amy never raised the knife in the direction of the other woman in the yard or the police.⁶ The police never warned Amy that force would be used against her.⁷ Despite this, Tucson Police Officer Andrew Kisela dropped to the ground to create a clear line of fire and shot at Amy four times.⁸

After this shooting, officers discovered that the woman in the yard with Amy was her roommate, Sharon Chadwick, and that Chadwick was walking to her car to retrieve \$20 that she owed to Amy.⁹ Officers

1. *Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., dissenting).

2. *Id.* at 1150–51 (majority opinion).

3. *See id.* at 1151.

4. *Id.* at 1151, 1155.

5. *Id.* at 1159 (Sotomayor, J., dissenting).

6. *Id.* at 1155.

7. *Id.*

8. *Id.* at 1151 (majority opinion).

9. *Id.*

also discovered that Amy had a significant history of mental illness. Although the officers claimed they opened fire because they believed Amy posed a threat to Chadwick, Chadwick admitted that she never felt she was in danger from the time Amy exited the house holding a knife to the time responding officers opened fire, an ordeal that lasted a mere minute.¹⁰

Once she recovered from her injuries, Amy sued officer Kisela under 42 U.S.C. § 1983, the primary statute cited in civil police use of force cases, which prohibits the “deprivation of rights under the color of law.”¹¹ In 2018, the Supreme Court held in favor of Officer Kisela, reversing the Ninth Circuit which had held Officer Kisela liable for violating Amy’s Fourth Amendment right to freedom from unreasonable searches and seizures.¹²

Unfortunately, the story of Amy Hughes is the rule and not the exception. Officers can be held accountable for their unreasonable or excessive use of force under both federal criminal and civil law. Most civil police use of force cases take the form of Amy Hughes’ case, as described above: plaintiffs file suit seeking to hold officers liable for depriving them of their Fourth Amendment right to freedom from unreasonable searches and seizures, in violation of 42 U.S.C. § 1983. These plaintiffs often fail.¹³ On the other hand, in criminal police use of force cases, the primary charge brought against police officers is also “deprivation of rights under [the] color of law,” in violation of 18 U.S.C. § 242.¹⁴ As their titles suggest, the civil and criminal statutes cited in police use of force lawsuits are incredibly similar. Both criminal and civil deprivation of rights statutes create liability for a person who, acting under the color of law, deprives another of any rights, privileges, or immunities secured by the Constitution or laws of the United States.¹⁵

While several problems hinder plaintiffs from holding officers accountable for their unreasonable use of force under both criminal and civil law, this Note focuses solely on reforming civil liability under 42

10. *Id.*

11. *See generally* 42 U.S.C. § 1983.

12. *Kisela*, 138 S. Ct. at 1151–52 (majority opinion).

13. *See Mawia Khogali, Redefining Standards of Excessive Force: Implications for Police and Practice*, 12 S.J. POL’Y & JUST. 105, 110 (2018).

14. This statute provides, “[w]hoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . on account of such person being an alien, or by reason of his color, or race . . . shall be fined under this title or imprisoned . . .” 18 U.S.C. § 242.

15. *Compare* 42 U.S.C. § 1983 *with* 18 U.S.C. § 242.

U.S.C. § 1983.¹⁶ In civil police brutality cases brought under § 1983, federal courts analyze officer-defendants' uses of force under an "objective reasonableness" standard, "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment right to freedom from unreasonable search and seizure against the important governmental interests in effecting such seizure."¹⁷ Throughout this balancing, courts determine whether the officer's use of force was reasonable from the perspective of another reasonable officer *on the scene*, rather than one with the "20/20 vision of hindsight."¹⁸ This "objective reasonableness" standard is far too deferential to police officers, placing emphasis on the fact that "officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."¹⁹ The "objective reasonableness" test also allows for the exclusion of evidence regarding the officer-defendant's pre-seizure conduct, the conduct of such officer before the "split-second" when they used force or effectuated an arrest.²⁰ This deferential standard results in frequent failures to hold officers accountable for their unreasonable and excessive use of force, especially in situations of officer-created jeopardy.

16. Attempting to hold officers civilly liable under 42 U.S.C. § 1983 avoids many problems associated with holding an officer criminally liable under 18 U.S.C. § 242. First, criminal charges are less likely to be brought in the first place. In theory, any victim of police brutality or use of unreasonable or excessive force can bring a civil claim under § 1983 against the officer who used such force. In contrast, criminal prosecutions of 18 U.S.C. § 242 must be brought by the Department of Justice. Several scholars have noted reluctance to bring criminal charges against officers as both the prosecutors and the prosecuted are members of law enforcement. Additionally, even if brought, criminal liability is more difficult to prove at trial than civil liability. Criminal prosecutions entail a higher burden of proof, requiring prosecutors prove their case "beyond a reasonable doubt." In civil § 1983 cases, on the other hand, a plaintiff merely has to prove their case by a "preponderance of the evidence." In addition to the higher burden for criminal liability, prosecutors charging 18 U.S.C. § 242 must show that the officer-defendant acted *willfully* and that the deprivation in question was *because of* some racial or ethnic animus on behalf of the officer. See Amelia Thomson-DeVeaux, Laura Bronner, & Damini Sharma, *Cities Spend Millions on Police Misconduct Every Year. Here's Why It's So Difficult to Hold Departments Accountable*, FIVETHIRTYEIGHT (Feb. 22, 2021) <https://fivethirtyeight.com/features/police-misconduct-costs-cities-millions-every-year-but-thats-where-the-accountability-ends/> [<https://perma.cc/QNP4-7LRY>] (explaining how it is extremely rare for police officers to face criminal prosecution and, when they do, it is even more rare that they end up convicted as a result).

17. *Scott v. Harris*, 550 U.S. 372, 381 (2007) (quoting *Graham v. Connor*, 490 U.S. 386, 388 (1989)); *id.* at 383 (quoting *United States v. Place*, 462 U.S. 696, 703).

18. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (emphasis added).

19. *Id.* at 396–97.

20. Cara McClellan, *Dismantling the Trap: Untangling the Chain of Events in Excessive Force Claims*, 8 COLUM. J. RACE & L. 1, 8 (2018) (Claiming that "[f]ollowing *Graham v. Connor*, lower courts were left to interpret the relevant timeframe for evaluating an officer's conduct under an excessive force claim" and describing the different approaches that lower courts take regarding pre-seizure conduct); see also Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629 (2018) (including the analysis of pre-seizure conduct in her proposed model statute).

Officer-created jeopardy is a term hallmarked by criminologists to describe situations in which officers create their own danger, often by deliberately or recklessly escalating a situation throughout the moments leading up to the effectuation of an arrest, increasing the likelihood that fatal or excessive force will be used.²¹ Under the current “objective reasonableness” standard within § 1983 analysis, officers can use this concept of officer-created jeopardy to their advantage, escaping liability.

This Note argues for reforming civil liability under 18 U.S.C. § 1983 by embedding a rebuttable presumption of unreasonableness within the “objective reasonableness” test utilized by federal courts to ensure that officer-created jeopardy generates, rather than inhibits, civil liability, leading to increased success for plaintiffs bringing civil police brutality suits. Under this proposed framework, an officer-defendant’s use of force would be presumed unreasonable and in violation of § 1983 if the officer deliberately or recklessly escalated the situation or otherwise increased the likelihood of force throughout their pre-seizure conduct. An officer-defendant could rebut this presumption by showing that they sufficiently de-escalated the situation before using force.

Part I of this Note describes the evolution of the “objective reasonableness” test employed in § 1983 civil police use of force lawsuits and explains how surveillance technologies and social movements have increased societal focus on holding police accountable for their use of unreasonable force. Part II of this Note describes problems associated with the current “objective reasonableness” test employed within § 1983 civil suits, both from the perspective of the general public and the police. This Part concludes by discussing recent Supreme Court decisions that have opened the door to reforming this test and, generally, reforming civil liability for police uses of force. Lastly, Part III of this Note proposes a rebuttable presumption of unreasonableness within civil police use of force cases, responding to counterarguments and explaining how this reform would benefit both the public and the police.

21. See Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer's Use of Deadly Force*, 89 GEO. WASH. L. REV. 1362, 1388–89 (2021); Robin Stein, Haley Willis Brenna Smith, Natalie Reneau, Rumsey Taylor, David Kirkpatrick, Steve Eder, Kim Barker & Michael Beswetherick, *Before the Final Frame: When Police Missteps Create Danger*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/10/30/video/police-traffic-stops-danger-video.html> [<https://perma.cc/G7GT-4EUC>] (last visited Nov. 13, 2021).

I. THE CURRENT STATE OF POLICE USE OF FORCE CIVIL SUITS

A. *The History of 42 U.S.C. § 1983 and Evolution of the “Objective Reasonableness” Test*

On July 9th, 1868, the Fourteenth Amendment to the United States Constitution was ratified.²² This amendment provided for, among other protections, the “equal protection of the laws.”²³ In the proceeding years, however, this protection had far more bark than bite; states seemingly failed to provide equal protection to citizens while the Ku Klux Klan created a state of lawlessness and terror within the American South.²⁴ In response to widespread racial violence sparked by the Ku Klux Klan as well as states’ failure to effectuate the protections of the Fourteenth Amendment, Congress passed the Civil Rights Act of 1871.²⁵ This Act, also commonly referred to as the “Ku Klux Klan Act,” was the third in a series of Enforcement Acts created by Congress to provide for and protect previously enslaved persons who were newly freed by the Thirteenth Amendment, and was adopted in January of 1865.²⁶

Most relevant to this Note is the very first section of the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983 (“§ 1983”). Section 1983 provides that:

Every person who, under color of [law] . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and its laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress, except that in any action brought

22. LIBR. OF CONG., *14th Amendment to the U.S. Constitution: Primary Documents in American History*, <https://guides.loc.gov/14th-amendment> [<https://perma.cc/6V7K-9CXP>] (last visited Nov. 14, 2021).

23. U.S. CONST. amend. XIV, §1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

24. See *Monroe v. Pape*, 365 U.S. 167, 173–74 (1961); *The Enforcement Acts of 1870 and 1871*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm> [<https://perma.cc/2QXQ-K3WS>] (last visited Apr. 15, 2021).

25. *Monroe*, 365 U.S. at 174–75; Catherine E. Smith, *(Un)Masking Race-Based Intracorporate Conspiracies Under the Ku Klux Klan Act*, 11 VA. J. SOC. POLY & L. 129, 130 (2003).

26. Nicholas Mosvick, *Looking Back at the Ku Klux Klan Act*, INTERACTIVE CONST. (Apr. 20, 2021), <https://constitutioncenter.org/interactive-constitution/blog/looking-back-at-the-ku-klux-klan-act> [<https://perma.cc/VMT5-7FRG>].

against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated²⁷

Police use of force civil lawsuits are brought under § 1983 as there is no separate federal statute governing such claims.²⁸ Civil plaintiffs can bring § 1983 claims against law enforcement officers for using excessive force, thus depriving them of their constitutional rights while acting under the color of law. The Supreme Court employs an “objective reasonableness” test when assessing the use of force in question within a § 1983 claim. This test, much like § 1983 analysis as a whole, has evolved and varied throughout federal precedent. Three landmark Supreme Court cases—*Tennessee v. Garner*, *Graham v. Connor*, and *Scott v. Harris*—have created and shaped this “objective reasonableness” test.²⁹

The Supreme Court decided the first of these cases, *Tennessee v. Garner*, in 1985. Memphis police responded to a dispatch call from a woman claiming that she heard “glass breaking and that . . . ‘someone’ was breaking in[to]” her neighbor’s house.³⁰ Once on scene, a responding officer heard a door slam and saw someone run across the backyard of the house in question.³¹ The officer followed and, using a flashlight, saw that the fleeing suspect was unarmed.³² The officer identified himself as a police officer and told the suspect to “halt”, but the suspect began to climb over a fence that bordered the property.³³ Fearful that the suspect would evade capture if he made it over the fence, the responding officer fatally shot the suspect in the back of the head.³⁴

The decedent’s father brought suit under § 1983, arguing that the officer deprived his son of rights secured by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.³⁵ The defense argued that the responding officer properly acted in accordance with Tennessee law, which stated that “if, after notice of the intention to arrest the [suspect], he either flee[s] or forcibly resist[s], the officer may use all the necessary means to effect the arrest.”³⁶ The Supreme Court ruled in favor of the appellee father and held this Tennessee law unconstitutional insofar as

27. 42 U.S.C. § 1983.

28. See Lee, *supra* note 20, at 640.

29. See *id.* at 641.

30. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

31. *Id.*

32. *Id.*

33. *Id.* at 4.

34. *Id.*

35. *Id.* at 5.

36. *Id.* at 4.

it erroneously authorized the use of deadly force against an unarmed, non-dangerous, fleeing suspect.³⁷ The Court further held that deadly force cannot be used against a fleeing suspect unless the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to themselves or others.³⁸ Notably, in reaching this holding, the Supreme Court applied a Fourth Amendment balancing test, asking whether the force was justified under the totality of the circumstances and weighing the nature and quality of the intrusion on the citizen's interest in their Fourth Amendment rights against the government interest in the intrusion itself.³⁹

The Court "ma[d]e explicit what was implicit in [*Garner*]" just four years later in *Graham v. Connor*, the second of the police use of force tri-doctrine.⁴⁰ In *Graham*, the Court held that all § 1983 police use of force claims are to be analyzed under the "Fourth Amendment's 'objective reasonableness' standard"⁴¹ and delegated significant deference to police officers throughout the application of this standard.

Dethorne Graham, the plaintiff-appellant, was a diabetic who went to a convenience store to purchase orange juice at onset of an insulin reaction.⁴² When he realized the length of the line inside the store, Graham quickly left.⁴³ An observing officer grew suspicious of Graham's movements and followed Graham as he drove away from the store with his friend.⁴⁴ Soon after, the officer pulled Graham and his friend over and prevented the two from leaving until the officer "found out what . . . happened at the convenience store."⁴⁵ Graham's friend informed the officers that Graham was diabetic and Graham soon after lost consciousness.⁴⁶ While unconscious, officers rolled Graham over and handcuffed him tightly.⁴⁷ When Graham woke up, he told officers to check his diabetic medical alert card.⁴⁸ Officers refused and, instead, threw him headfirst into a squad car.⁴⁹ After determining Graham had done nothing wrong, officers released him.⁵⁰

37. *Id.* at 11.

38. *Id.*

39. *Id.* at 7–9.

40. *Graham v. Connor*, 490 U.S. 386, 395 (1989).

41. *Id.* at 388.

42. *Id.*

43. *Id.* at 388–89.

44. *Id.* at 389.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

Due to the officers' use of force, Graham suffered cut wrists, a bruised forehead, a broken foot, an injured shoulder, and permanent ringing in his ears.⁵¹ Graham filed suit against the responding officers under § 1983, arguing that their use of force deprived him of rights secured by the Fourteenth Amendment.⁵² The Supreme Court, finding that the Fourth Circuit applied the wrong legal standard in finding for the officers, remanded the case and instructed the Fourth Circuit (and, in effect, all federal courts) to apply the Fourth Amendment's "objective reasonableness" test when analyzing § 1983 police use of force claims.⁵³

The "objective reasonableness" test employed by the *Graham* Court is nuanced. In reaching its holding, the Court emphasized that "§ 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'"⁵⁴ Thus, in deciding § 1983 claims, federal courts must first identify the specific constitutional right allegedly deprived by the officer.⁵⁵ The Court claimed that § 1983 claims involving police use of force, specifically, are "most properly characterized . . . as invoking" the Fourth Amendment right to be free from unreasonable search and seizure.⁵⁶ Importantly, the Court declined to set rigid guidelines for police use of force and instead stated that, when determining whether an officer's force is "reasonable" under the Fourth Amendment, courts must carefully balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake."⁵⁷ The Court went on to note three relevant factors that federal courts can look to when employing such a balancing test: (1) "the severity of the crime at issue;" (2) "whether the suspect poses an immediate threat to the safety of the officers or others;" and (3) "whether the suspect is actively resisting or attempting to evade arrest by flight."⁵⁸

The Court went on to define the deferential contours of this test, claiming that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather

51. *Id.* at 390.

52. *Id.* at 386.

53. *Id.* at 395.

54. *Id.* at 393–94.

55. *Id.* at 394 (noting that "In most instances, [the right] will be either the Fourth Amendment's prohibition against unreasonable seizures . . . or the Eighth Amendment's ban on cruel and unusual punishments.").

56. *Id.*; see also U.S. CONST. amend. IV.

57. *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 7–9 (1985)); Lee, *supra* note 20, at 644, 647 (describing how the *Graham* Court's listed factors to be weighed in the Fourth Amendment "objective reasonableness" test provide little actual guidance to practitioners).

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

than after the fact with the “20/20 vision of hindsight.”⁵⁹ Further, the Court noted that this test must allow for the fact that “police officers are often forced to make split-second judgements—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”⁶⁰

However, the Court dismissed these factors in the most recent landmark § 1983 police use of force case, *Scott v. Harris*, decided in 2007. Victor Harris was traveling at seventy-three miles per hour on a road with a fifty-five miles per hour speed limit.⁶¹ When officers attempted to pull Harris over, he sped off and a high-speed chase ensued.⁶² About six minutes after the chase began, Officer Timothy Scott, in efforts to end the chase, engaged in a Precision Intervention Technique maneuver, designed to cause fleeing vehicles to spin to a stop.⁶³ As a result, Victor Harris was severely injured and rendered a quadriplegic.⁶⁴ Harris brought suit against Officer Scott, alleging a violation of § 1983.⁶⁵

While the district and appellate courts denied Officer Scott’s qualified immunity claims in favor of Harris, the Supreme Court reversed and held that Officer Scott did not deprive Harris of his Fourth Amendment rights and that his use of force, therefore, was not in violation of § 1983.⁶⁶ Notably, in reaching this holding, the Court declined to apply *Garner* to Harris’ claim, stating that *Garner* itself was actually an application of the *Graham* Fourth Amendment “objective reasonableness” test rather than a bright line rule for police officers deciding whether and how to use force against a fleeing suspect.⁶⁷ One may think that this part of the *Harris* opinion cements that *Graham*’s interpretation of the Fourth Amendment “objective reasonableness” standard applies to all § 1983 police use of force cases. However, further reasoning in *Harris* reaches the opposite conclusion. Although the Court in *Harris* balanced Harris’ interest against intrusion on his Fourth Amendment rights against the government’s interests in the intrusion itself, the Court never analyzed the other *Graham* factors, nor did the Court cite *Graham* in its application of the reasonableness balancing test.⁶⁸ There-

59. *Id.*

60. *Id.* at 396–97.

61. *Scott v. Harris*, 550 U.S. 372, 374 (2007).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 381.

67. *See id.* at 382; Lee, *supra* note 20, at 648.

68. *See Harris*, 550 U.S. at 384; Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1136 (2008).

fore, *Harris* “not only emasculated *Garner*, but in the same paragraph—without comment or analysis—implicitly dismissed the factors articulated in *Graham* as central to analyzing reasonableness.”⁶⁹

As a result, it is not entirely clear how one should assess whether an officer’s use of force is excessive or unreasonable in violation of § 1983. We know that, under the “objective reasonableness” test, courts must, in some form, balance the individual plaintiff’s Fourth Amendment interest against the government’s interest in exercising the force in question. However, after *Scott*, federal courts have few guideposts other than looking to the “totality of the circumstances”⁷⁰ when employing this balancing test. Thus, lower courts can decide *what* officer conduct should be analyzed. Importantly, lower courts can choose whether to analyze the officer’s pre-seizure conduct, actions taken before using force against the plaintiff, or disregard it entirely, and instead analyze merely the officer’s actions in the moment that force was used or the moments immediately prior.⁷¹ Lower courts can also largely decide *how* this conduct should be analyzed, so long as they still ground their analysis in *Graham* and *Harris*. Before turning to the problems that the murkiness of the current § 1983 “objective reasonableness” test creates for both the public and the police, it is important to pause and highlight how now, more than ever, clarity and balance are desperately needed in the federal test governing police use of force claims under § 1983.

69. Harmon, *supra* note 68.

70. *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985).

71. Many scholars have addressed the circuit split pertaining to pre-seizure conduct analysis in § 1983 claims. See, e.g., McClellan, *supra* note 20 (arguing that courts should consider pre-seizure conduct when the officer predictably causes the suspect to respond by employing an overly aggressive tactic); Timothy P. Flynn & Robert K. Homant, *Suicide by Police in Section 1983 Suits: Relevance of Police Tactics* 77 U. DET. MERCY L. REV. 555 (2000); Evelyn Michalos, *Time Over Matter: Measuring the Reasonableness of Officer Conduct in § 1983 Claims*, 89 FORDHAM L. REV. 1031 (2020) (concluding that the Third Circuit approach considering pre-seizure conduct is “truest to the notion of ‘totality’” and should be controlling); Lee, *supra* note 20 (proposing a model statute to govern police use of force and listing pre-seizure conduct as one of three relevant factors under this statute); Arthur H. Garrison, *Criminal Culpability, Civil Liability, and Police Created Danger: Why and How the Fourth Amendment Provides Very Limited Protection from Police Use of Deadly Force*, 28 GEO. MASON U. CIV. RTS. L.J. 241 (2018); Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 7 EMORY L.J. 521, 557 (2021).

B. *Body Cameras and Black Lives Matter: The Rise in Police Accountability through Social Movements and Technology*

Police accountability now occupies a sizable societal spotlight, due in large part to increases in surveillance and social technological capabilities, and the amplification of the Black Lives Matter movement.⁷²

Within the past four years, the use of surveillance technology by police has rapidly accelerated.⁷³ Due to an increased pool of federal funding and the fact that the increased acquisition of surveillance technology by municipalities is largely unilateral and secretive, local police departments and governments have exponentially expanded their surveillance capabilities.⁷⁴ Police surveillance technology can take many forms including, but not limited to, body cameras worn by officers, automated license plate readers, facial recognition software, cell phone trackers, and drones.⁷⁵ Although improvements to surveillance technology can bolster police accountability, the increased acquisition of these surveillance technologies by police has prompted an increase in public and scholarly scrutiny regarding potential privacy ramifications and the ability of police to abuse this increased surveillance technological capability.⁷⁶

This Note does not attempt to weigh in on this debate. However, it is important to highlight how increased surveillance technologies within police departments have led to an increase in police officers being held legally accountable for their uses of force and, within Part III, how surveillance technologies employed by police officers could serve as a source of evidence in situations of officer-created jeopardy when a §

72. See generally Thomson-DeVeaux et al., *supra* note 16.

73. Chad Marlow, *The People, Not the Police Should Decide If and How Surveillance Technologies Are Used in Their Communities*, ACLU (May 25, 2021) <https://www.aclu.org/news/criminal-law-reform/the-people-not-the-police-should-decide-if-and-how-surveillance-technologies-are-used-in-their-communities/> [https://perma.cc/HJM9-JP5P].

74. See *id.*; Candice Norwood, *Body Cameras Are Seen as Key to Police Reform. But Do They Increase Accountability?*, PBS (June 25, 2020) <https://www.pbs.org/newshour/politics/body-cameras-are-seen-as-key-to-police-reform-but-do-they-increase-accountability> [https://perma.cc/MC22-92XK].

75. See Dave Davies, *Surveillance and Local Police: How Technology is Evolving Faster than Regulation*, NPR (Jan. 27, 2021) <https://www.npr.org/2021/01/27/961103187/surveillance-and-local-police-how-technology-is-evolving-faster-than-regulation> [https://perma.cc/F5Z4-MTYD].

76. See, e.g., *id.* (noting the lack of regulation accompanying the increase in police surveillance technology); Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public* 66 EMORY L. J. 527, 530 (2017) (arguing that existing case law can be re-interpreted to reconcile Fourth Amendment privacy concerns associated with increased technologies); Rebecca Heilweil, *Why We Don't Know as Much as We Should About Police Surveillance Technology*, VOX (Feb. 5, 2020) <https://www.vox.com/recode/2020/2/5/21120404/police-departments-artificial-intelligence-public-records> [https://perma.cc/PK5H-B44T] (discussing how police surveillance technology exacerbates racial biases).

1983 plaintiff is attempting to establish a rebuttable presumption of unreasonableness.

First and most intuitively, the increased scrutiny of police use of surveillance technology has correspondingly increased discussions of police accountability among the general public and the media. Secondly, the expansion of police surveillance technology has led to increased success for police prosecutions and civil plaintiffs filing suit under § 1983.⁷⁷ Without actual evidence of the use of force, which body camera footage supplies, civil police use of force cases under § 1983 often turn on the word of the plaintiff—whose interaction with police was likely prompted by the plaintiff being suspected of a crime—against the word of a “trusted” member of a police department. Footage of force and, in jurisdictions that analyze it, footage of officer pre-seizure conduct, can bolster plaintiffs’ § 1983 claims, creating a larger incentive to litigate cases and bring suits in the first place.⁷⁸ In the criminal context, body camera footage has recently played a vital role in the successful prosecutions of numerous police officers for their excessive uses of force.⁷⁹ Similarly, this surveillance technology can provide critical proof of officers’ use of excessive force within § 1983 civil suits. It should be noted, however, that body cameras themselves will likely not lead to increased justice for police brutality victims. Research into the effectiveness of body camera footage in decreasing instances of deadly force inflicted by police and increasing the likelihood that officers are held legally accountable for their force has been “mixed at best.”⁸⁰ However, this Note’s proposed rebuttable presumption of unreasonableness in situations of officer-created jeopardy, coupled with increased surveillance technologies, may lead to increased justice for police brutality victims who file § 1983 suits.

Non-surveillance technology has also played a large role in increasing public pressure in favor of police accountability. Increased social and statistical technology has allowed civil rights and criminal justice

77. See Thomson-DeVeaux et al., *supra* note 16.

78. See Reha Kansara, *Black Lives Matter: Can Viral Videos Stop Police Brutality?* BBC NEWS (July 6, 2020) <https://www.bbc.com/news/blogs-trending-53239123> [<https://perma.cc/D4PK-9Q93>] (“There is a ‘huge increase’ in the number of clients [claiming excessive force] who are coming in with filmed evidence.”).

79. *Id.*

80. Norwood, *supra* note 74; Jennifer Lee, *Will Body Cameras Help End Police Violence?*, ACLU WASHINGTON, (June 7, 2021), <https://www.aclu-wa.org/story/%C2%Aowill-body-cameras-help-end-police-violence%C2%A0> [<https://perma.cc/XQ58-YGR5>] (describing how a comprehensive review of empirical studies found that body cameras “have not had statistically significant or consistent effects in decreasing police use of force” and noting another study which revealed that 92.6% of prosecutor’s offices in jurisdictions with body cameras have used footage to prosecute civilians while only 8.3% have used footage to prosecute police officers).

reform nonprofits to create open-source online databases that increase the visibility and transparency of police interactions involving officer use of force.⁸¹ These technologies can often serve as the “first step” in reform movements, giving the public and the police a clearer perspective when it comes to policing patterns.⁸² Improved social technology capabilities have also contributed to the increased societal spotlight on police accountability. Social media has played an increasingly large role in police accountability, allowing victims of police brutality to share their stories, connect with advocates, and put pressure on police departments through “viral” videos depicting police violence and legal injustice.⁸³ The significant impact of social and news media in sharpening societal focus on police accountability can be seen through an historical analysis of the Black Lives Matter movement.

The Black Lives Matter movement (“BLM”) has its roots in social media itself.⁸⁴ In 2013, Alicia Garza, Patrisse Cullors, and Opal Tometi created the hashtag #BlackLivesMatter to organize against police brutality after the acquittal of George Zimmerman in the shooting of Trayvon Martin.⁸⁵ Since its inception, BLM has amplified into the single largest social justice movement in American history.⁸⁶ This historic amplification cannot be discussed without reference to the murder of George Floyd at the knee of Officer Derek Chauvin. In the week following Floyd’s murder, “#BlackLivesMatter was used almost fifty million times on Twitter alone.”⁸⁷ This social media campaign put pressure on investigators and catalyzed criminal charges against Officer Chauvin, resulting in his eventual conviction.⁸⁸ Aside from the Chauvin trial, BLM’s social

81. See Josiah Bates, *Can a New, Open-Source Police Brutality Database Help to Hold Police Departments Accountable?*, TIME (Feb. 11, 2021), <https://time.com/5938038/accountable-now-police-force-database/> [https://perma.cc/TZ8G-N854]. The database that this article refers to, Accountable Now, can be accessed at <https://www.accountablenow.com/> [https://perma.cc/39FG-GDTD].

82. See *id.*

83. See Kansara, *supra* note 78 (noting that “[w]hen black people are picking up their cell phones, they’re not just recording in the wrong place at the wrong time. They’re attempting to connect, historically, dots between atrocities” and describing police brutality cases involving viral videos).

84. See generally Francesca Santoro, *More than Just a Hashtag: The Influence of Social Media on the Societal Change of the Black Lives Matter Movement*, SUFFOLK U. L. SCH. J. HIGH TECH. L. (Sep. 25, 2020), <https://sites.suffolk.edu/jhtl/2020/09/25/more-than-just-a-hashtag-the-influence-of-social-media-on-the-societal-change-of-the-black-lives-matter-movement/> [https://perma.cc/UF3T-QD3T].

85. Herstory, BLACK LIVES MATTER, https://blacklivesmatter.com/herstory/?__cf_chl_jschl_tk__=Kvac48.l4hKd6elolcWc6uU9ZGfg7e4i3.KwjAVjUKU-1636935791-o-gaNycGzNCLo [https://perma.cc/CHL8-G757] (last visited Nov. 14, 2021).

86. Larry Buchanan, Quoc Trung Bui, & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020) <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [https://perma.cc/A68C-75WE].

87. Santoro, *supra* note 84.

88. See *id.*

media presence has propelled protests in every state and secured funding for the legal representation of numerous victims of police use of excessive force.⁸⁹ The recent amplification of BLM has also prompted media outlets to shift their police use of force coverage, focusing on demonstrators and police violence victims rather than police accounts and concerns about property damage.⁹⁰ As a result of BLM and media technology, news outlets report more in-depth stories about police use of force victims, without fixating on victims' pasts to highlight criminality.⁹¹

Increased use of surveillance and social technology, coupled with and reinforcing the BLM movement, has increased the likelihood that § 1983 claims are litigated and has increased the public attention, and shifted the public perception, that these cases receive. The increased frequency of these socially salient lawsuits warrants timely reform of the § 1983 "objective reasonableness"⁹² standard to prevent problems faced by the public and the police under the current standard.

II. PROBLEMS WITH THE "OBJECTIVE REASONABLENESS" TEST EMPLOYED IN § 1983 POLICE USE OF FORCE CASES

This Part articulates several of the primary problems with the current "objective reasonableness" standard employed in § 1983 police use of force claims from the perspective of the public and police alike. This Part concludes by discussing a recent Supreme Court decision that highlighted some of these problems and opened the door for the reform proposed in Part III.

A. *From the Public's Perspective*

As discussed in Part II above, the public has grown increasingly concerned with police accountability and how police officers use force to effectuate an arrest. Police use of force claims brought by civil plaintiffs who have been victimized by this force are increasingly common. However, legal success for these victims remains incredibly rare due to three key problems under the current "objective reasonableness" test: (1) the inherent implicit bias against plaintiffs of color; (2) the inherent deference

89. *Id.*

90. Adeshina Emmanuel, *Spurred by Black Lives Matter, Coverage of Police Violence is Changing*, INJUSTICEWATCH (Feb. 1, 2021) <https://www.injusticewatch.org/longreads/2021/nieman-reports-police-violence-coverage-is-changing/> [<https://perma.cc/G5PM-VP87>].

91. *Id.*

92. *See supra* notes 54–60 and accompanying text.

in favor of police; and, most importantly, (3) the officer-created jeopardy liability loophole.

First, the Fourth Amendment “objective reasonableness” test employed throughout § 1983 police use of force civil suits is inherently biased against minority communities and plaintiffs of color.⁹³ When a court balances a civil plaintiff’s Fourth Amendment interest to be free from an unreasonable search and seizure against the officer’s “important” interest in using force to effectuate an arrest, this balance is often off-kilter due to implicit bias.

Implicit bias enters the analysis far before a civil plaintiff brings suit under § 1983. Indeed, implicit bias can be present at the onset of nearly all public interactions with police.⁹⁴ When confronted with a situation in which the use of force, lethal or otherwise, may be needed, police officers make a personal and *subjective* determination about the dangerousness of the individual before them.⁹⁵ However, dangerousness can be influenced by implicit biases.⁹⁶ Indeed, “these biases can influence more than just perceptions—they can directly influence behaviors as well.”⁹⁷ The tendency of implicit biases to influence perceptions of dangerousness coupled with the resulting police behavior causes problems throughout police-public interactions. This Note does not argue that all police perceptions or actions are problematic due to implicit bias, nor does this Note argue that police are more implicitly biased than members of the general public. On the contrary, this Note acknowledges that implicit bias is present on both sides of the aisle when the public and police interact.⁹⁸ It is important to highlight, however, that there is often a

93. Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1135–37 (2012) (“[B]iases could shape whether an officer decides to stop and individual for questioning in the first place, elects to interrogate briefly or at length, decides to frisk the individual, and concludes the encounter with an arrest versus a warning.”); see L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293 (2012) (demonstrating how reasonableness standards, in the context of self-defense and stop-and-frisk, are inherently biased against the Black community); see also Khogali, *supra* note 13, at 110.

94. See Megan Quattlebaum, *Let’s Get Real: Behavioral Realism, Implicit Bias, and the Reasonable Police Officer*, 14 STAN. J.C.R. & C.L. 1, 7–10 (2018); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2048–52 (discussing biased treatment resulting from implicit bias in a variety of scenarios).

95. See *Scott v. Harris*, 550 U.S. 372, 383–85 (2007) (explaining how the responding officer’s use of force was lawful because, in part, the officer was reasonable in concluding that Harris was dangerous, posing an imminent threat to the lives of pedestrians and officers alike).

96. Richardson & Goff, *supra* note 93, at 305.

97. *Id.*

98. Richardson, *supra* note 94, at 2039 (“The science of implicit social cognition demonstrates that individuals of all races have implicit biases in the form of stereotypes and prejudices that can negatively and nonconscious affect behavior. . . .”).

vast power imbalance that exists within these interactions,⁹⁹ as responding police officers have the means to readily deploy lethal force if they perceive that such force is justified or otherwise necessary due to their subjective perceptions of “dangerousness.”¹⁰⁰ Implicit bias can taint this perception.

Implicit bias and its ability to influence behavior is just as present within the courtroom and the current “objective reasonableness” test itself. Doctrines of reasonableness, generally, “are inherently biased against particular groups . . . because of biases that influence the way individuals perceive people as suspicious.”¹⁰¹ Essentially, reasonableness standards, like those employed for criminal and civil police use of force cases, do not recognize “the systematic errors caused by racial stereotypes that can effect judgements of criminality” and “[a]s a result, these [standards] often fail to protect those individuals who have the misfortune to be stereotyped”¹⁰² Unfortunately, the objectivity of the Fourth Amendment reasonableness standard employed in § 1983 police use of force cases compounds this misfortune. Due to its focus on objective rather than subjective officer intent, officers can escape liability despite subjective racially discriminatory motivations, so long as their use of force was objectively reasonable.¹⁰³ Some scholars have even gone as far to say that recent Supreme Court decisions employing this “objective reasonableness” test have essentially made racial discrimination constitutionally “reasonable.”¹⁰⁴

It is also important to note that implicit bias within courtrooms is not siloed to cases involving police use of force. Aside from § 1983 claims,

99. See Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L. J. 778 (2021) (discussing police reform which would balance, rather than exacerbate, current power imbalances that exist between the police and the public).

100. Recall the § 1983 use of force tri-doctrine of *Garner*, *Graham*, and *Harris*. The victims of police use of lethal or otherwise excessive force in each of these cases were young Black men. All three victims were unarmed. In *Garner*, the victim was fatally shot in the back of the head because he was fleeing, posing a potential danger to others after evasion. In *Graham*, the victim was subject to excessive force because he looked “suspicious” to an officer who saw him inside a convenience store. In *Harris*, the victim was rendered permanently disabled because he was perceived as dangerous throughout a high-speed chase.

101. Khogali, *supra* note 13, at 111.

102. Richardson & Goff, *supra* note 93, at 296.

103. See *Graham v. Connor*, 490 U.S. 386, 397 (1989) (“[T]he ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”).

104. See generally Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882 (2015) (discussing racial disparities within the Fourth amendment objective reasonableness standard within criminal law).

implicit bias and racial discrimination are “pervasive,” “large in magnitude,” and have substantial “real world effects” within the American legal system.¹⁰⁵ Factfinders within any courtroom bring with them implicit biases, some of which can target individuals of certain races or individuals with prior, unrelated criminal convictions.¹⁰⁶ Scholars, judges, and practitioners have begun to recognize how implicit biases within numerous facets of the legal system influence legal outcomes for persons of color.¹⁰⁷ Although implicit biases impact § 1983 police use of force claims in several unique ways, these impacts are a part of a far broader problem within the American legal system.

In addition to implicit bias, the second key problem of the current “objective reasonableness” test is its inherent deference to the police and officer-defendants. Despite the “balancing” that occurs within this test, the scales are set in favor of the police. The possibility of implicit bias tainting § 1983 claims against the plaintiff and in favor of the police compounds an already deferential standard in favor of the officer-defendant.¹⁰⁸ The deference police are afforded, however, is no accident. In creating the “objective reasonableness” test employed in § 1983 police use of force claims, the Supreme Court noted that this test “must” allow for “the fact that police officers are often forced to make split-second judgements-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation.”¹⁰⁹ This allowance is in accordance with the “arche-

105. Kang et al., *supra* note 93, at 1126.

106. See Richardson, *supra* note 94, at 2039.

107. Several scholars have noted the problem of implicit bias within the American legal system and have proposed solutions. See, e.g., Kang et al., *supra* note 93 (detailing several approaches to combat implicit bias in the courtroom, including jury instructions and pledges); Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 831 (2012) (arguing that jurors should complete implicit bias training throughout orientation); Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1071 (2019) (arguing that judges who have been discriminated against are more amenable to eradicating their own implicit biases and urging for further research); Justin D. Levinson, Mark W. Bennet & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 97–110 (2017) (highlighting the results of a study which found five implicit bias patterns held by different types of judges). Some judges and practitioners have noticed the problem of implicit bias within the American legal system and have made strides to combat this problem as well. For example, Circuit Judge Bennett of the Ninth Circuit spends approximately twenty-five minutes discussing implicit bias during jury selection, asking each potential juror to pledge that they will not decide the case based on biases. Kang et al., *supra* note 93, at 1181–82. Judge Bennet also gives a specific jury instruction on implicit biases prior to opening statements. *Id.*

108. Rachel Moran, *In Police We Trust*, 62 VILL. L. REV. 953, 955–57 (2017); Barry Freidman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1883 (2015) (noting that courts “all too readily defer” to the judgments of police officers).

109. *Graham v. Connor*, 490 U.S. 386, 296–97 (1989).

type of police officers as good-hearted heroes who do no wrong,” a commonly held view among “members of the American racial majority.”¹¹⁰

Deference to police decision-making and valorization of police officers may be based, in part, on the popular perception in American society that law enforcement is extremely dangerous work and that police officers are “under constant threat of attack.”¹¹¹ While policing can certainly be dangerous, many of the dangers associated with police work are drastically exaggerated.¹¹² Traffic stops provide a clear example of this exaggeration. Officers are told throughout their training, and society largely believes, that traffic stops are “highly dangerous” to officer safety.¹¹³ Even the Supreme Court has noted the “inordinate risk confronting an officer as he approaches a person seated in an automobile.”¹¹⁴ Reality does not reflect this risk, however. Out of over twenty-six million traffic stops made in 2011, eleven officers were killed.¹¹⁵ Statistically, officers have a “0.00004% chance of being killed during a traffic stop,” compared to a “0.00077% chance of being killed during an arrest.”¹¹⁶ Additionally, statistics indicate that police work has become increasingly safe. 2015 was one of the “safest years for American policing in history” as fatalities per officer, per resident, had fallen sharply.¹¹⁷ Additionally, statistics confirm that, since cases like *Garner* and *Graham* were decided, there has been “a seventy-five percent drop in police officer line-of-duty deaths.”¹¹⁸ Although police work can be dangerous, societal perceptions regarding these dangers are largely misplaced and do not reflect reality. These misperceptions, however, reinforce the deferential nature of the “objective reasonableness” test employed in § 1983 police use of force claims, in favor of officer-defendants.

110. Moran, *supra* note 108, at 954.

111. John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. C.L. & C.R. 155, 167–69 (2016).

112. *Id.*; Khogali, *supra* note 13 at 110–11.

113. The Daily, *Why Do So Many Traffic Stops Go Wrong?*, N.Y. TIMES, at 03:36, 04:15 (Nov. 1, 2021) <https://www.nytimes.com/2021/11/01/podcasts/the-daily/police-killings-traffic-stops.html>? [https://perma.cc/AK6D-NKHQ] (“In the most aggressive training manuals, they say point blank, every driver could be a killer. Watch out.”); Stein et al., *supra* note 21; Gross, *supra* note 111, at 168.

114. *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977).

115. Gross, *supra* note 111, at 169.

116. *Id.*

117. Daniel Bier, *It Has Never Been Safer to Be a Cop*, NEWSWEEK (Sept. 14, 2015, 3:27 PM), <http://www.newsweek.com/it-has-never-been-safer-be-cop-372025> [https://perma.cc/MS3E-GDX6].

118. See Gisele Galoustian, *It's Safer to be a Cop in the U.S. Today than 50 Years Ago*, FLA. ATL. UNIV. NEWS DESK (Apr. 10, 2019), <https://www.fau.edu/newsdesk/articles/police-deaths-study.php> [https://perma.cc/M8Z7-8L9F] (discussing results of “one of the most comprehensive assessments of the ‘dangerousness’ of policing to date,” conducted by researchers from FAU, Arizona State, and the University of Texas).

In addition to the deference afforded to police officers by the “objective reasonableness” test, the doctrine of qualified immunity further defers to officer-defendants in § 1983 police use of force cases. Qualified immunity is “a judicially created legal doctrine that shields government officials [such as police officers] performing discretionary duties from civil liability in cases involving the deprivation of statutory or constitutional rights.”¹¹⁹ Police officers are entitled to qualified immunity so long as their actions do not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.”¹²⁰ The Court has interpreted the qualified immunity doctrine to balance “the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distractions, and liability when they perform their duties reasonably.”¹²¹ The Court has also noted that qualified immunity is meant to give police officers “breathing room” to make reasonable mistakes of fact and law.¹²² Federal courts have historically applied a two-factor test when determining whether an officer-defendant is entitled to qualified immunity.¹²³ First, they ask “whether the facts alleged by the plaintiff amount to a constitutional violation.”¹²⁴ If so, they then determine whether the constitutional right was “clearly established” at the time of the officer-defendant’s misconduct.¹²⁵ Recently, the Supreme Court has afforded this two-pronged analysis more flexibility, allowing lower courts to decide in what order to apply these steps “in light of the circumstances of the factors of the case at hand.”¹²⁶

The qualified immunity doctrine has been subject to significant legal and practical criticism. Legally, opponents argue that the doctrine lacks roots in common law¹²⁷ and no longer achieves the policy goals it originally set out to achieve.¹²⁸ Practically, the qualified immunity doctrine is often a substantial impediment for civil § 1983 plaintiffs who have difficulty in proving that a police officer, despite potentially violating the plaintiff’s constitutional rights, acted in spite of a “clearly estab-

119. WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10492, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS 1 (2020).

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

121. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

122. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011); NOVAK, *supra* note 119, at 1.

123. NOVAK, *supra* note 119, at 2.

124. *Id.*

125. *Id.*; *Callahan*, 555 U.S. at 232 (citing *Saucier v. Katz*, 553 U.S. 194, 201 (2001)).

126. NOVAK, *supra* note 119, at 2.

127. See Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801–03 (2018).

128. *Id.* at 1803–04.

lished law.”¹²⁹ Scholars are not the only individuals who are concerned with qualified immunity’s deference in favor of the police: “Justice Sotomayor, in dissenting in several cases in which the Court found officers were entitled to qualified immunity, expressed her disfavor . . . fearing [qualified immunity’s] application essentially provides an absolute shield for law enforcement officers and ‘renders the protections of the Fourth Amendment hollow.’”¹³⁰ These qualified immunity concerns, unlike those of police traffic stop danger discussed above, accurately reflect reality. Recent studies confirm that federal appellate courts have been granting qualified immunity to officer-defendants at a significantly increasing rate, particularly in police use of excessive force cases.¹³¹ Due to the deference given to officer-defendants by both the “objective reasonableness” test and the doctrine of qualified immunity, civil § 1983 police use of force plaintiffs face a strenuous uphill battle in holding officers accountable for their unreasonable use of force.

Lastly, and most importantly, the current “objective reasonableness” standard allows officers to escape liability in situations of officer-created jeopardy. Officer-created jeopardy describes situations in which officers deliberately or recklessly create danger, escalating an interaction with a suspect or another individual and increasing the likelihood that fatal or excessive force will be used.¹³² Officer-created jeopardy largely arises during a police officer’s pre-seizure conduct, conduct that can span from the moment an officer receives a dispatch call to the moment that officer uses force.¹³³ However, under the current loosely defined “objective reasonableness” test, pre-seizure conduct is not necessarily relevant to assessing whether an officer-defendant’s use of force was unreasonable in violation of § 1983.¹³⁴ As noted in Part I, the Supreme Court did not define a timeline of relevant officer conduct for lower courts

129. *Id.* at 1814; Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015) (noting that the Court has used qualified immunity “to severely restrict the ability of individuals to recover for constitutional violations that they suffer at the hands of law enforcement.”).

130. NOVAK, *supra* note 119, at 4.

131. See Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta & Guillermo Gomez, *Shielded*, REUTERS INVESTIGATES (May 8, 2020), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> [<https://perma.cc/YQ98-C3MR>].

132. Lee, *supra* note 20, at 671; Lee, *supra* note 21, at 1388–89; Stein et al., *supra* note 21.

133. See Lee, *supra* note 20, at 671.

134. See Aaron Kimber, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer’s Pre-Seizure Conduct in an Excessive Force Claim*, 13 WM. & MARY BILL RTS. J. 651, 654 (2004) (“The specific set of factors that fall within [the totality of the circumstances test] is not clear, and the circuits have split on whether pre-seizure police conduct leading up to the use of force is within its scope.”).

to analyze when employing the “objective reasonableness” test.¹³⁵ Lower courts are therefore free to decide what officer conduct to analyze and may ignore pre-seizure conduct altogether.¹³⁶ If pre-seizure conduct is ignored by federal courts when deciding whether an officer’s conduct was reasonable within a § 1983 claim, the officer’s deliberate or reckless creation of the need for force, simply stated, is irrelevant. This Note refers to this problem as the “officer-created jeopardy liability loophole” because, in jurisdictions that do not deem pre-seizure conduct relevant for § 1983 reasonableness analysis, officers can use situations of officer-created jeopardy to escape liability, despite the fact that their deliberate or reckless actions escalated the situation and increased the likelihood that excessive force would be used. Due to inherent bias against plaintiffs of color,¹³⁷ extreme deference in favor of officer-defendants,¹³⁸ and the officer-created jeopardy liability loophole,¹³⁹ the current “objective reasonableness” test is incredibly problematic from the perspective of plaintiffs and the general public.

B. From the Police Perspective

The “objective reasonableness” test employed in § 1983 police use of force cases also presents three problems from the perspective of the police. First, due to the vagueness of the “objective reasonableness” test, officers have little practical guidance as to what, on the ground level, constitutes a reasonable use of force in accordance with § 1983. Second, police use of force protocols vary significantly across departments. Third, because the factfinders in § 1983 cases are not officers themselves, there is a problematic discrepancy between what non-officer factfinders perceive as “objectively reasonable” force and what officer-defendants perceive as “objectively reasonable” force.

First, the vagueness of the “objective reasonableness” test allows for wide variation in department use of force procedures while also preventing officers on the ground from being confident that their force is “reasonable” so as not to violate § 1983. Recall that when the *Graham* Court

135. See *id.*

136. See McClellan, *supra* note 20, at 8 (claiming that “[f]ollowing *Graham v. Connor*, lower courts were left to interpret the relevant timeframe for evaluating an officer’s conduct under an excessive force claim” and describing the different approaches that lower courts take regarding pre-seizure conduct).

137. See *supra* notes 93–107 and accompanying text.

138. See *supra* notes 108–131 and accompanying text.

139. See *supra* notes 132–136 and accompanying text.

created this test, “objective reasonableness” was not defined.¹⁴⁰ The Court merely stated that an officer-defendant’s use of force should be “objectively reasonable” in light of the “totality of the circumstances.”¹⁴¹ Recall further that, although the *Graham* court listed a few relevant factors for this inquiry, these factors were essentially erased by the Court in *Harris*.¹⁴² This vagueness has “forced police departments to create policies on the use of force that are unworkable.”¹⁴³ For example, the International Association of Chiefs of Police (“IACP”) developed a “National Consensus Policy and Discussion Paper on the Use of Force” intended to provide police officers with guidelines for the use of deadly and less-lethal force.¹⁴⁴ This Consensus Paper articulates the IACP policy that,

[Police] officers shall use only the force that is *objectively reasonable* to effectively bring an incident under control, while protecting the safety of the officers and others. Officers shall use force only when no reasonably effective alternative appears to exist and shall use only the level of force which a reasonably prudent officer would use under the same or similar circumstances.¹⁴⁵

The IACP goes on to define “objectively reasonable” as “the necessity for using force . . . based upon the officer’s evaluation of the situation in light of the totality of the circumstances known to the officer at the time the force is used and upon what a reasonably prudent officer would use under the same or similar situations.”¹⁴⁶ This definition, however, provides little concrete direction for officers to follow and merely restates the vague language from the *Graham* articulation of the “objective reasonableness” test.¹⁴⁷ Further, the IACP model policy follows the general trend of police department use of force standards: although departments do give general instructions that officers are to use no more force than

140. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (announcing the test’s application to the case and describing the contours of the test itself, failing to define “objective reasonableness”).

141. *Id.* at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)).

142. *Compare id.* (stating that the reasonableness test “requires careful attention to . . . 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 . . .”) with *Scott v. Harris*, 550 U.S. 372, 383–85 (2007) (applying a new version of the objective reasonableness test without looking to any factors announced in *Graham*).

143. Geoffrey P. Alpert & William C. Smith, *How Reasonable is the Reasonable Man?: Police and Excessive Force*, 85 J. CRIM. L. & CRIMINOLOGY 481, 486 (1994).

144. INT’L ASS’N OF CHIEFS OF POLICE, NATIONAL CONSENSUS POLICY AND DISCUSSION PAPER ON USE OF FORCE 2 (2020).

145. *Id.* (emphasis added).

146. *Id.*

147. *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)).

necessary, “when it comes to specifics . . . departments don’t give clear instructions for what officers ought to do” when using force in the field.¹⁴⁸ Although departments are able to set more precise, higher standards for officer use of force, doing so often creates, rather than reduces, department liability.¹⁴⁹

The “objective reasonableness” test’s vagueness also produces a problematic lack of uniformity among police department use of force policies. In 2012, a survey of hundreds of American police departments concluded that there is no commonly used force continuum policy and, among the 336 departments that taught police officers which types of force to use for different scenarios, there were 203 different variations.¹⁵⁰ The consistency among departmental approaches to use of force also varies based on scenario. For example, while police departments are more consistent in training officers on what type of force to use in self-defense, departments are incredibly varied in how they instruct officer use of force in response to other scenarios, such as when individuals are resisting arrest.¹⁵¹

In addition to these problems stemming from the vagueness of the “objective reasonableness” test, its methodology provides police with further cause for concern. While on the ground, officers must decide if force is reasonable prior to using it. However, officers are not the ones tasked with analyzing whether such force was “objectively reasonable” after the fact when a court is deciding a § 1983 excessive force claim.¹⁵² On the contrary, factfinders in such cases are ordinary citizens lacking both general law enforcement training and experience as well as knowledge of how the officer-defendant perceived the circumstances surrounding their use of force.¹⁵³ Therefore, it is the public perception of reasonableness, rather than the officer’s training-based perception that matters for § 1983 liability.¹⁵⁴ However, there is a vast difference in bases for these perceptions. Lessons learned throughout extensive training, at least in theory, influence how officers perceive dangerousness

148. Dara Lind, *How Do Police Departments Train Cops How to Use Force?*, VOX (May 6, 2015) <https://www.vox.com/2014/9/5/6105373/police-allowed-to-force-shoot-taser-training-policy> [<https://perma.cc/Z4GA-9PM2>].

149. *Id.* (noting how departments with higher use-of-force standards are more susceptible to lawsuits for failing to properly train officers and failing to protect the safety of officer employees).

150. *Id.* (discussing the results of the Terrill & Paoline study); William Terrill & Eugene A. Paoline II., *Examining Less Lethal Force Police and the Force Continuum: Results from a National Use-of-Force Study*, 16 POLICE Q., July 2012, at 1, 9–15.

151. Lind, *supra* note 148.

152. Alpert & Smith, *supra* note 143, at 483–484.

153. See Mark Curtis White, *Essay, Police Use of Force*, 2 W. TEX. A&M U. POL. BUREAUCRACY, & JUST. J., 2011, at 17, 17–18.

154. See *id.* at 18; see also Alpert & Smith, *supra* note 143, at 484.

and their environments when in the line of duty, including prior to using force against an individual.¹⁵⁵ In contrast, citizen factfinders base their perception of reasonableness on evidence and testimony presented in the confines of a courtroom, long after the force was used, without comparable training. The problem with this distinction is easily evident. A “well-trained officer may come to a different conclusion than [a citizen factfinder] about what is necessary and reasonable to resolve [an] encounter.”¹⁵⁶ It is entirely possible for § 1983 citizen factfinders, unaware of the considerations influencing officer actions, to condemn a particular use of force that is otherwise in accordance with police protocol.¹⁵⁷

The problems presented by the “objective reasonableness” standard affect both the public and the police alike. Fortunately, the time for reforming this standard is ripe. Before explaining this Note’s proposal to include a rebuttable presumption of unreasonableness in § 1983 police use of force analysis, it is important to analyze a recent decision of the Supreme Court that created space for this reform.

C. *City of Tahlequah v. Bond: The Story of Dominic Rollice*

On August 12, 2016, Dominic Rollice was fatally shot by officers Girdner and Vick of the Tahlequah Police Department in Oklahoma.¹⁵⁸ Officers responded to a 911 call from Dominic’s ex-wife, who informed the dispatcher that Dominic was intoxicated and would not leave her garage.¹⁵⁹ Shortly after officers arrived on scene and were standing near the garage entrance, they saw Dominic “fidgeting with something in his hands” and claimed that Dominic “appeared nervous.”¹⁶⁰ Officer Girdner then began gesturing with his hands and took a step toward the garage doorway.¹⁶¹ Dominic began to walk towards the back of the gar-

155. The median timeframe for basic police officer recruit training in America is eighteen weeks, plus additional fieldwork experience. David Gutierrez, *Why Police Training Must be Reformed*, HARV. POL. REV., <https://iop.harvard.edu/get-involved/harvard-political-review/why-police-training-must-be-reformed> [https://perma.cc/B3JB-SSV2] (last visited Nov. 11, 2021).

156. Alpert & Smith, *supra* note 143, at 487; *see also* Lind, *supra* note 148 (“Often, what the public sees as appropriate force greatly differs from what police actually do in these situations.”).

157. *See* Alpert & Smith, *supra* note 143, at 485–86. It is also worth noting that, perhaps, in light of the increased societal focus on police accountability noted in Part I these citizen factfinders may be more likely to find a use of force that they do not understand to be “objectively unreasonable” within a § 1983 police excessive force claim.

158. *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021) (per curiam).

159. *Id.* at 10.

160. *Id.*

161. *Id.*

age and officers followed him, blocking his exit.¹⁶² Once at the back of the garage, Dominic grabbed a hammer from the nearby workbench.¹⁶³ Officers stepped back and drew their weapons in response.¹⁶⁴ Dominic held the hammer in one hand, slightly above his head.¹⁶⁵ Officers yelled at Dominic to drop the hammer and Dominic replied by saying “[n]o.”¹⁶⁶ At this point, the third responding officer decided to holster his gun and draw his taser instead.¹⁶⁷ Dominic claimed, “I have done nothing wrong here, man. I’m in my house. I’m doing nothing wrong. . . I see your taser.”¹⁶⁸ While still talking “relatively calmly” to the officers, Dominic pulled the hammer back behind his head.¹⁶⁹ Officers Girdner and Vick opened fire.¹⁷⁰ As Dominic “double[d] over,” Officer Girdner fired again because the hammer was still raised.¹⁷¹ Dominic was pronounced dead soon after.¹⁷²

After Dominic’s death, his estate filed a § 1983 claim against officers Vick and Girdner.¹⁷³ The district court granted summary judgment for each officer-defendant on the basis of qualified immunity.¹⁷⁴ On appeal, the Tenth Circuit reversed in favor of Dominic’s estate, holding that “the reasonableness of [the officers’] actions depends both on whether the officers were in danger at the precise moment that they used force and on whether [their] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.”¹⁷⁵ The Tenth Circuit began by discussing the relevancy of officer pre-seizure conduct, claiming that,

Taken together, the *Graham* factors as applied to the few seconds in which Dominic was wielding a hammer would present a close call on whether summary judgment was proper. But we need not

162. *See id.*

163. *Id.*

164. *Id.* at 11.

165. *Id.*

166. *Bond v. City of Tahlequah*, 981 F.3d 808, 814 (10th Cir. 2020), *cert. granted, rev’d*, 142 S. Ct. 9 (2021) (per curiam).

167. *Id.*

168. *Id.*

169. *Id.*

170. *See id.*

171. *Id.*

172. *See id.*

173. *Id.*

174. *Id.* (noting “procedural history”).

175. *Id.* at 816 (second alteration in original) (quoting *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995)).

and do not reach any conclusion on that issue because our review is *not* limited to that narrow timeframe.¹⁷⁶

The Tenth Circuit further reasoned that situations of officer-created jeopardy should *not* absolve officers of § 1983 liability, stating that the Circuit “consider[s] whether the *Graham* factors were met under the totality of the circumstances, including whether the officers approached the situation in a manner they knew or should have known would result in the escalation of danger.”¹⁷⁷ According to the Tenth Circuit, the responding officers, despite knowing that Dominic was intoxicated, cornered him in the garage, blocked his exit, and used fatal force against him all within the course of less than one minute.¹⁷⁸ Although Dominic did pull a hammer behind his head, he did so in response to the officer’s advancement with the taser.¹⁷⁹

On further appeal, however, the Supreme Court reversed the Court of Appeals, reinstating the district court’s grant of summary judgment in favor of officer-defendants Vick and Girdner on the basis of qualified immunity in a *per curiam* opinion.¹⁸⁰ Notably, the Court opened the door regarding § 1983 “objective reasonableness” reform or, at least, declined to close it. In granting qualified immunity to the officer-defendants, the Court wrote “[w]e need not, and do not, decide whether the officers violated the Fourth Amendment [or § 1983] in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment [or § 1983].”¹⁸¹

As both the Tenth Circuit’s holding and this Note’s proposed reform suggest, pre-seizure conduct should be analyzed by federal courts throughout § 1983 police use of force inquiries and the officer-created jeopardy liability loophole should be closed. The reform discussed below, creating a rebuttable presumption of unreasonableness, would, among other benefits, enable officers to be held liable under § 1983 for recklessly creating situations that require deadly force.

176. *Id.* at 822 (emphasis added).

177. *Id.* at 816.

178. *Id.* at 823.

179. *Id.*

180. *City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021) (*per curiam*).

181. *Id.* at 11.

III. PROPOSING A REBUTTABLE PRESUMPTION OF UNREASONABLENESS WITHIN § 1983 ANALYSIS

To alleviate the problems faced by the public and police alike, the “objective reasonableness” test utilized in § 1983 police use of force claims should include a rebuttable presumption of unreasonableness. This presumption would apply solely and specifically to cases involving the use of force in situations of officer-created jeopardy. Among other benefits, this presumption would allow civil plaintiffs—like Dominic Rollice’s estate—the chance to assert that an officer-defendant’s use of force was the result of the officer’s own reckless or deliberate conduct, which would increase civil plaintiffs’ likelihood of success in § 1983 claims and close the officer-created jeopardy liability loophole. This Part begins by explaining how this rebuttable presumption of unreasonableness will work in practice. Next, this Part will address potential counterarguments that may be raised against this reform. In conclusion, this Part will explore some of the benefits that this proposed rebuttable presumption of unreasonableness will bring to civil plaintiffs, officer-defendants, and society at large.

A. *Rebuttable Presumption of Unreasonableness*

Generally, a legal presumption is a “rule of law which requires the assumption of a fact from another fact or set of facts” and “has the effect of shifting either the burden of proof or the burden of [production].”¹⁸² Specifically, a rebuttable presumption is a presumption “which must . . . be made once certain facts have been proved, and which is thus said to establish a *prima facie* conclusion; it may be rebutted . . . through the introduction of contrary evidence, but if it is not, it becomes conclusive.”¹⁸³ The proposed rebuttable presumption of unreasonableness begins, therefore, with the § 1983 plaintiff establishing “certain facts” that show the officer-defendant deliberately or recklessly escalated a situation in the moments leading up to an arrest or otherwise increased the likelihood that fatal or excessive force would be used.¹⁸⁴

A § 1983 police use of force plaintiff can point to various sources and circumstances in establishing the existence of officer-created jeopardy,

182. *Presumption*, BARRON’S LAW DICTIONARY (7th ed. 2016).

183. *Rebuttable Presumption*, BARRON’S LAW DICTIONARY (7th ed. 2016).

184. The purpose of this note is not to decide specifically how this proposed rebuttable presumption of unreasonableness should be created. However, it should be noted that Congress could embed this proposal within an amendment to 42 U.S.C. § 1983 itself or this presumption could be created within federal § 1983 use of force precedent.

triggering the rebuttable presumption of unreasonableness. For example, a § 1983 plaintiff could argue through the presentation of direct or circumstantial evidence that the officer-defendant knew or should have known that their conduct would result in the escalation of danger, replicating the reasoning of the Tenth Circuit in *Bond*.¹⁸⁵ A § 1983 plaintiff could also point to police use of force policies that prohibit or contradict the officer-defendant's conduct in question. Additionally, a § 1983 plaintiff could show that the officer-defendant took an "unnecessary tactical risk," highlighting that the officer's actions, although technically justifying the officer's use of fatal or excessive force, were wholly unnecessary or reckless.¹⁸⁶ Though there would be various ways to trigger this rebuttable presumption of unreasonableness, each would allow § 1983 police use of force plaintiffs the opportunity to present evidence of the officer-defendant's pre-seizure conduct, making such evidence relevant within the numerous federal courts that have historically ignored it.¹⁸⁷

Once a § 1983 police use of force plaintiff presents evidence that the case involved officer-created jeopardy, the trier of fact would determine whether this evidence is sufficient to trigger the proposed rebuttable presumption of unreasonableness. This determination should not be subject to a rigid definition or test. Instead, this determination should be a common-sense inquiry, giving the trier of fact flexibility to find sufficient escalation in numerous cases involving various police tactics and types of force. If the trier of fact determines that the plaintiff's evidence constitutes a *prima facie* case of officer-created jeopardy, the court would presume that the officer-defendant's use of force was objectively unreasonable, in violation of § 1983.

Before discussing how this presumption could be rebutted by the officer-defendant, it is worth pausing to note the burden of proof that plaintiffs bear in § 1983 trials. In § 1983 claims, like most civil claims, plaintiffs bear the burden of proving their case by a preponderance of the evidence.¹⁸⁸ This burden "allows both parties to 'share the risk of er-

185. See *Bond v. City of Tahlequah*, 981 F.3d 808, 816, 822–24 (10th Cir. 2020), *cert. granted, judgement rev'd*, 142 S. Ct. 9 (2021) (per curiam).

186. See Stein et al., *supra* note 21 (discussing "tactical risks" taken by officers in the cases of Coltin LeBlanc and Anthony Vega Cruz (jumping onto the door of a moving car and running around a fleeing car, respectively) which, although technically justified the responding officers' use of fatal force, were "unnecessary.")

187. See Kimber, *supra* note 134, at 653–54; McClellan, *supra* note 20, at 8–9 (stating that "[f]ollowing *Graham v. Connor*, lower courts were left to interpret the relevant timeframe for evaluating an officer's conduct under an excessive force claim" and describing the different approaches that lower courts take regarding pre-seizure conduct).

188. See *United States v. Balistrieri*, 981 F.2d 916, 930 (7th Cir. 1992) ("The preponderance standard of evidence is...the normal standard in civil cases.").

ror in roughly equal fashion.”¹⁸⁹ In the context of police use of force civil claims, the plaintiff is required to prove that it is “more likely than not” that the officer-defendant deprived them of their Fourth Amendment right to be free from unreasonable searches and seizures, in violation of § 1983.¹⁹⁰ The proposed rebuttable presumption of unreasonableness would not alter this burden in any fashion, nor displace this burden of proof from the plaintiff to the officer-defendant. If, however, the trier of fact found a *prima facie* case of officer-created jeopardy based on evidence presented by a plaintiff, the officer-defendant would have the burden of production to rebut the presumption that their use of force was unreasonable in violation of § 1983, in accordance with Federal Rule of Evidence 301.¹⁹¹

At this stage, the officer-defendant could rebut the presumption of unreasonableness in a number of ways. The officer-defendant could present evidence that their conduct was in accordance with department protocol, or demonstrate that the circumstances justified tactical risks taken or that their tactical risks were not otherwise “unnecessary.” Additionally and importantly, officer-defendants could rebut this presumption of unreasonableness by showing that, although they may have deliberately or recklessly escalated the situation involving the § 1983 plaintiff, they took sufficient subsequent steps to de-escalate the situation prior to using force.

In the International Association of Chiefs of Police National Consensus Paper, discussed above, the IACP defined “de-escalation” as

Taking action or communicating . . . during a potential force encounter in an attempt to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation without the use of force or with a reduction in the [degree of] force necessary.¹⁹²

Officer de-escalation can take numerous forms, including increasing distance between the officer and citizen-subject, attempting to calm the citizen-subject, waiting for backup, avoiding deadly force when the

189. *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983).

190. *See id.*

191. FED. R. EVID. 301 (“[T]he party against whom a presumption is directed has the burden of producing evidence to rebut the presumption.”).

192. INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 144, at 2.

citizen-subject is not armed, and being compassionate.¹⁹³ The trier of fact's determination of whether the officer-defendant has sufficiently rebutted the presumption, with attention to proof of de-escalation, is a common sense inquiry—much like the inquiry that triggers the presumption in the first place. This affords officer-defendants the same flexibility in rebutting the presumption of unreasonableness as plaintiffs receive in triggering it.

B. *Counterarguments and Considerations*

Potentially meritorious counterarguments to a § 1983 rebuttable presumption of unreasonableness can be largely categorized as critiquing either its legal implications or its practicality. This Note address both categories of counterarguments in turn.

First, some may criticize the presumption on “legal” grounds, arguing that it is unnecessary or duplicitous in light of the doctrine of state-created danger. The state-created danger doctrine developed throughout lower court decisions following the Supreme Court's holding in *DeShaney v. Winnebago County Dept. of Social Services* that, while the Fourteenth Amendment Due Process Clause does not guarantee minimal levels of safety and security for citizens,¹⁹⁴ there may be an exception to this rule for situations of “state-created danger,” in which the government actor in question could be in violation of § 1983.¹⁹⁵ While it is true that the state-created danger doctrine often arises in the context of § 1983 civil suits¹⁹⁶ and creates liability for a state actor, such as a police officer who exacerbates or creates danger faced by a private citizen,¹⁹⁷ this doctrine is problematic in itself and, regardless, is conceptually distinct from the rebuttable presumption proposed.

Although the state-created danger doctrine developed from lower court interpretations of Supreme Court dicta, the Supreme Court has yet to recognize it.¹⁹⁸ Additionally, although the doctrine has been rec-

193. Lee, *supra* note 20, at 662; Christopher L. McFarlin, *Integrating De-Escalation Techniques Into Policing*, POLICE1 (Oct. 17, 2017), <https://www.police1.com/american-military-university/articles/integrating-de-escalation-techniques-into-policing-YumZSki33Ak5qSjz/> [https://perma.cc/YBM8-TYPR].

194. 489 U.S. 189, 195 (1989).

195. Joseph M. Pellicciotti, Annotation, “State-Created Danger”, or Similar Theory, as Basis for Civil Rights Action Under 42 U.S.C.A. § 1983, 159 A.L.R. Fed. 37 (2000).

196. Christopher M. Eisenhauer, *Police Action and the State-Created Danger Doctrine: A Proposed Uniform Test*, 120 PA. ST. L. REV. 893, 894 (2016).

197. *Recent Case: Cook v. Hopkins*, HARV. L. REV. BLOG (Jan. 6, 2020), <https://blog.harvardlawreview.org/recent-case-cook-v-hopkins/> [https://perma.cc/V6MQ-REAF].

198. See Eisenhauer, *supra* note 196, at 893–94, 897, 916.

ognized by all federal circuit courts, these courts apply the doctrine in a variety of ways to numerous distinct factual circumstances, leading to inconsistency and unfairness for civil litigants.¹⁹⁹ Indeed, many critics have called to make uniform or otherwise reform the state-created danger doctrine.²⁰⁰ Due to this lack of uniformity in both application and recognition, the state-created danger doctrine does not provide any additional likelihood of success for victims of police use of excessive force.

Aside from its problems, the state-created danger doctrine is dissimilar from this Note's proposed rebuttable presumption of unreasonableness in numerous ways. First, the state-created danger doctrine implicates the Fourteenth Amendment Due Process Clause²⁰¹ rather than the Fourth Amendment right to freedom from unreasonable searches and seizures, which is the right implicated in § 1983 cases involving police use of force.²⁰² If a plaintiff victimized by police use of excessive force wanted to invoke the state-created danger doctrine to hold an officer liable for their creation or escalation of such force, the plaintiff would have to allege a separate deprivation of their Fourteenth Amendment due process rights within a § 1983 claim. This Note's proposed rebuttable presumption of unreasonableness requires no separate allegation. Instead, the proposed rebuttable presumption applies the conceptual benefits of an ideal, uniform, state-created danger doctrine to all cases of police use of excessive force brought under §1983. The proposed presumption in cases of officer-created jeopardy couches an ideal state-created danger doctrine within the existing Fourth Amendment "objective reasonableness" test utilized in § 1983 police use of force claims.

Secondly, critics of the proposed rebuttable presumption of unreasonableness may raise an additional "legal" counterargument that the presumption is too vague and does not provide the trier of fact with significant guideposts to determine when an officer-defendant has sufficiently escalated the altercation to trigger the presumption of unreason-

199. *Id.* at 893.

200. See generally *id.* (noting the various applications of the state-created danger doctrine and proposing a uniform rule); Milena Shtelmakher, *Police Misconduct and Liability: Applying the State-Created Danger Doctrine to Hold Police Officers Accountable for Responding Inadequately to Domestic Violence Situations*, 43 *LOY. L.A. L. REV.* 1533, 1538 (2010) (calling for a Congressionally-created national standard to make uniform the state-created danger doctrine to benefit victims of domestic violence); Matthew D. Barrett, *Failing to Provide Police Protection: Breeding a Viable and Consistent "State-Created Danger" Analysis for Establishing Constitutional Violations Under Section 1983*, 37 *VAL. U. L. REV.* 177, 179 (2002) (proposing a model judicial test to resolve the "varying degrees of inconsistencies among the federal circuits[]" application of the state-created danger doctrine).

201. See Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 *WM. & MARY BILL RTS. J.* 1165, 1168 (2005).

202. *Graham v. Connor*, 490 U.S. 386, 395 (1989).

ableness, or when an officer-defendant has sufficiently de-escalated the altercation to rebut this presumption. While the proposed rebuttable presumption provides no rigid definitions or tests for “escalation” or “de-escalation,” it does so intentionally to further federal court flexibility in applying this presumption to various factual circumstances. Although officers are largely aware of the terms “escalation” and “de-escalation,” “escalation” is not subject to the same technical treatment as “de-escalation,” as is made evident throughout various police protocols and policies such as the IACP National Consensus Policy.²⁰³ Indeed, “de-escalation,” in a sense, is *responsive* to “escalation.”

While this Note could propose that federal courts adopt a more rigid definition of “de-escalation” such as the definition provided by the IACP, doing so presents complications. A rigid “de-escalation” definition would limit the ability of the officer-defendants to: (1) provide evidence of techniques the officer felt would sufficiently de-escalate the specific situation; (2) point to local policies and protocols in support of their use of force; and (3) rebut a presumption of unreasonableness. Rigidly defining “de-escalation” without similarly defining “escalation” would not only shift the burden of production toward the officer-defendant but would also make this burden harder to meet, contradicting the purpose of the preponderance of the evidence burden that both parties equally “share the risk of error.”²⁰⁴

Additionally, potential arguments that this proposed presumption of unreasonableness fails to adequately guide the trier of fact ignore the fact that the current “objective reasonableness” test employed in § 1983 police use of force claims, as discussed in Part II (B), is equally vague, providing no guideposts for the trier of fact to follow other than that the “totality of the circumstances” should be considered and that officers “often make split-second decisions” and are impliedly entitled to deference.²⁰⁵ In other words, the proposed rebuttable presumption does not change the status quo. The trier of fact still must make a common-sense inquiry but, if the presumption is applied, the focus of this inquiry shifts from whether the officer’s use of force was “objectively reasonable” in light of the “totality of the circumstances”²⁰⁶ to whether the officer-defendant unnecessarily escalated and, if so, de-escalated the situation. At its minimum, the proposed rebuttable presumption does not take anything away from the current “objective reasonableness” test. Indeed, this standard is still applied if a § 1983 plaintiff chooses not to

203. See INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 144.

204. *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983).

205. *Graham*, 490 U.S. at 396–97.

206. *Id.*

pursue the presumption, fails to establish a *prima facie* case of officer-created jeopardy, or the case is rebutted by the officer-defendant. If invoked, however, the proposed rebuttable presumption gives the trier of fact an additional guidepost, allowing them to assess the officer's pre-seizure conduct if the § 1983 plaintiff presents it in support of a *prima facie* finding of officer-created jeopardy.²⁰⁷

Critics of this proposed presumption may raise two additional counterarguments, asserting that a rebuttable presumption of unreasonableness is impractical because: (1) § 1983 plaintiffs will not have access to evidence necessary to establish a *prima facie* case of officer-created jeopardy; and (2) the presumption problematically strips officers of legal protections, decreasing their use of force generally and, therefore, increasing the hazards that officers face in the line of duty.

In response to the first concern, the current state of law enforcement surveillance technology employed by both the police and the public can aid § 1983 plaintiffs in establishing a *prima facie* case of officer-created jeopardy by highlighting an officer-defendant's reckless or deliberate escalation. As discussed in Part I, body cameras and social media "viral videos" are increasingly used in criminal and civil police use of force cases.²⁰⁸ The most recent Department of Justice Bureau of Justice Statistics study on police use of body cameras revealed that forty-seven percent of general-purpose law enforcement agencies nationwide had acquired body cameras.²⁰⁹ Roughly eighty percent of these agencies stated that one of the primary reasons for their body camera acquisition was increased evidence quality.²¹⁰ There is no indication that this increased acquisition and use of surveillance technology by the police will falter in the near future as calls for increased surveillance technology and body camera use now dominate conversations regarding policing reform.²¹¹ Currently, seven states mandate the use of body-worn cam-

207. Indeed, some scholars have noted that courts should analyze officer pre-seizure conduct in accordance with the "totality of the circumstances" in which the current § 1983 "objective reasonableness" test analyzes officer conduct. See, e.g., Michalos, *supra* note 71, 1062–66; Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of the Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 275–79 (2003).

208. See Kansara, *supra* note 78 ("There is a 'huge increase' in the number of clients [claiming excessive force] who are coming in with filmed evidence."); Dakin Andone, *In One Week There Were at Least 9 Instances of Police Using Excessive Force Caught on Camera*, CNN, (June 8, 2020, 5:05 PM), <https://www.cnn.com/2020/06/06/us/police-excessive-force-us-protests/index.html> [<https://perma.cc/VWP9-6FAW>].

209. SHELLEY S. HYLAND, U.S. DEP'T JUST., BUREAU JUST. STAT., NCJ 251775, BODY-WORN CAMERAS IN LAW ENFORCEMENT AGENCIES 1 (2016).

210. *Id.*

211. See Norwood, *supra* note 74.

eras by all law enforcement officers within the state.²¹² Only one of these states had enacted this body-camera mandate prior to May 2020.²¹³

Additionally, while direct surveillance footage of an officer-defendant's use of force and pre-seizure conduct would undoubtedly be beneficial in a § 1983 claim, the lack of such evidence is not dispositive for the claim or for the proposed rebuttable presumption of unreasonableness. If wearing a body camera or having it turned on were required under a given officer-defendant's departmental policies, a § 1983 plaintiff could cite this failure while establishing that the officer deliberately or recklessly escalated the situation. This rebuttable presumption would, therefore, further incentivize officer use of body cameras if they were under a duty to do so, subjecting them to potential legal liability rather than merely internal, departmental repercussions. In the alternative, if the officer-defendant was under no obligation to wear or operate a body camera and no footage was available, the lack of digital evidence would not necessarily prevent a § 1983 plaintiff from establishing a presumption of unreasonableness. The plaintiff could still present other forms of evidence such as non-body camera footage and eyewitness statements. If the trier of fact determines that this evidence establishes a *prima facie* case of officer-created jeopardy, the officer-defendant can rebut this triggered presumption of unreasonableness through non-surveillance evidence of their own.

The second concern, that such a presumption would problematically strip officers of legal protections and increase safety hazards, is similarly unsupported. A rebuttable presumption of unreasonableness in situations of officer-created jeopardy would not strip officers of legal protection. Although officers may be held liable at an increased rate for situations of officer-created jeopardy, the proposed presumption does not displace the "objective reasonableness" test as it currently exists, nor does it displace the deferential doctrine of qualified immunity. As stated, the "objective reasonableness" test would still apply in three situations: (1) the § 1983 plaintiff *chose* not to attempt to trigger the rebuttable presumption of unreasonableness by not presenting evidence establishing that the officer-defendant's deliberate or reckless conduct escalated the situation; (2) the § 1983 plaintiff attempted to trigger the presumption but did not sufficiently establish a *prima facie* case of officer-created jeopardy; or (3) the § 1983 plaintiff's *prima facie* case was rebutted by the officer-defendant. The only situation in which the officer-

212. *Body-Worn Camera Laws Database*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 30, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx> [<https://perma.cc/X9NE-LECY>].

213. *See id.*

defendant would be held liable is where the § 1983 plaintiff chose to pursue the rebuttable presumption of unreasonableness, if the trier of fact found that the plaintiff established a *prima facie* case of officer-created jeopardy, and if the officer-defendant failed to adequately rebut the *prima facie* case.

Additionally, officer-defendants would still receive the legal shield of the deferential doctrine of qualified immunity. An officer-defendant is still free to assert that their actions, even if violating the plaintiff's constitutional rights, were not in violation of "clearly established" law.²¹⁴ But, under this proposed rebuttable presumption of unreasonableness, the § 1983 plaintiff has the opportunity to simultaneously present evidence in support of a *prima facie* case of officer-created jeopardy. If un rebutted, this presumes that the officer-defendant's conduct was in violation of § 1983 or, in other words, in violation of "clearly established law."²¹⁵ The proposed rebuttable presumption of unreasonableness, therefore, does not strip police officers of legal "shields." Instead, it gives § 1983 plaintiffs an additional "sword" to present evidence of officer pre-seizure conduct and close the officer-created jeopardy liability loophole.

Still, one may argue that this additional "sword" tips the scales too far in favor of § 1983 plaintiffs, and that officers would be fearful of liability and, as a result, less likely to use force when truly necessary. The argument that police officers will use less force when fearful of liability seems weak when looking to studies, discussed in Part I, that found no significant statistical decline in officer use of force when officers were mandated to wear body cameras.²¹⁶ Further, perhaps a net decrease in the use of fatal and other forms of force by police is normatively good for society.²¹⁷ Lastly, one of the many benefits of this proposed rebuttable presumption of unreasonableness, discussed below, is an increased incentive for de-escalation. Theoretically, if de-escalation tactics are pri-

214. Pearson v. Callahan, 555 U.S. 223, 230–232 (noting the current two-part qualified immunity test employed by federal courts).

215. *Id.* at 232 (citing *Saucier v. Katz*, 553 U.S. 194, 201 (2001)).

216. See Norwood, *supra* note 74.

217. See Harmon, *supra* note 68, at 1120 (proposing a reform limiting officer use of force to (1) facilitate institutions of criminal law; (2) protect public order; and (3) protect the officer from physical harm; noting that, even if an officer's use of force is *justified* within one of these factors, it still may be excessive or unreasonable); Roge Karma, *We Train Police to Be Warriors—and Then Send Them Out to Be Social Workers*, VOX (July 31, 2020, 7:30 AM), <https://www.vox.com/2020/7/31/21334190/what-police-do-defund-abolish-police-reform-training> [<https://perma.cc/WQM8-4WEP>] (discussing the "mismatch" between officer training which largely emphasizes force and the job of policing in which force is not needed to a large extent, and the "devastating consequences" that this mismatch produces).

oritized and incentivized, officers *would not need* to use force to the extent they currently do, and the use that remains will be smaller in degree.

C. *The Benefits of a Rebuttable Presumption of Unreasonableness in Situations of Officer-Created Jeopardy*

Implementing the proposed rebuttable presumption of unreasonableness would solve many problems associated with the current “objective reasonableness” test employed in § 1983 police use of force claims and would create numerous benefits for both plaintiffs and officer-defendants.

First, the proposed rebuttable presumption of unreasonableness would provide clearer guidance to officers in the field, resolving some of the vagueness concerns of the current “objective reasonableness” test.²¹⁸ The triggering of the proposed presumption and the officer-defendant’s ability to rebut it turn on the sufficiency of the officer-defendant’s “escalation” or “de-escalation,” rather than the “objective reasonableness” of their use of force. Although the proposed presumption does not rigidly define these terms, they are often defined within policing policies and are the frequent subject matter of police training. Officers are far more familiar, therefore, with what escalation and de-escalation look like at the ground level than an “objectively reasonable” use of force.

Second, the proposed rebuttable presumption of unreasonableness incentivizes the use of surveillance and recording technology, such as body cameras, and de-escalation tactics. If an officer-defendant is under internal or departmental mandate to wear body cameras or have them turned on at a given time, § 1983 plaintiffs can cite the officer-defendant’s failure to do so in proving a *prima facie* case of officer-created jeopardy which, if established and unrebutted, would create external legal liability for an officer-defendant. Further, the proposed rebuttable presumption of unreasonableness places strong emphasis on officer de-escalation. While officer-defendants can rebut a *prima facie* case of officer-created jeopardy simply by producing evidence that they did not *escalate* the altercation, evidence that they *de-escalated* the altercation, even after escalating it, can protect them from § 1983 liability. This de-escalation emphasis parallels an increase in de-escalation buy-in and training from police departments throughout the nation.²¹⁹

218. See *supra* notes 140–157 and accompanying text.

219. Tom Jackman & Dan Morse, *Police De-Escalation Training Gaining Renewed Clout as Law Enforcement Seeks to Reduce Killings*, WASH. POST (Oct. 27, 2020) <https://www.washingtonpost.com>

Third, the proposed rebuttable presumption of unreasonableness diminishes some of the inherent bias against § 1983 plaintiffs of color.²²⁰ The current “objective reasonableness” standard fails to recognize systematic errors caused by racial biases that affect police judgments of culpability and fails to protect individuals who have the misfortune to be stereotyped.²²¹ Although the proposed rebuttable presumption does not displace the “objective reasonableness” test, it provides § 1983 plaintiffs, including plaintiffs of color, with another avenue to establish officer-defendant liability. If the § 1983 plaintiff can sufficiently establish a *prima facie* case of officer-created jeopardy, unless sufficiently rebutted, the officer-defendant is presumptively liable under § 1983 for depriving the plaintiff of their Fourth Amendment right to be free from unreasonable searches and seizures. In such a case, the inherently biased “objective reasonableness” test need not occur.

Lastly, and most importantly, the proposed rebuttable presumption of unreasonableness decreases the deference historically enjoyed by officer-defendants by incorporating officer pre-seizure conduct and closing the officer-created jeopardy liability loophole.²²² This Note’s reform offers § 1983 plaintiffs the opportunity to present evidence of the actions that officer-defendants took leading up to their use of force to establish a *prima facie* case of officer-created jeopardy. If un rebutted, § 1983 plaintiffs can hold officer-defendants liable for uses of force that they recklessly or deliberately created. This proposed rebuttable presumption of unreasonableness will result in greater access to justice for § 1983 police use of force plaintiffs and could result in more equitable and just interactions between members of the general public and the police.

CONCLUSION

The “objective reasonableness” test employed within § 1983 police use of force claims presents numerous problems from the perspective of both the public and police. These problems, including vagueness, inherent bias, and imbalanced deference, are especially relevant given the renewed societal focus on police accountability due in large part to social movements and surveillance technologies. Incorporating a rebuttable presumption of unreasonableness within the current “objective rea-

/local/deescalation-training-police/2020/10/27/3a345830-14a8-11eb-ad6f-36c93e6e94fb_story.html [https://perma.cc/J4Q8-ZU22]; see also INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 144, at 3.

220. See *supra* notes 93–107 and accompanying text.

221. See Richardson & Goff, *supra* note 93, at 296.

222. See *supra* notes 108–136 and accompanying text.

sonableness” test would allow § 1983 plaintiffs to present evidence establishing a *prima facie* case of officer-created jeopardy. If sufficiently established, an officer-defendant would have the opportunity to rebut this presumption by highlighting how their actions either did not escalate the altercation with the plaintiff, were in accordance with policy, or constituted sufficient de-escalation. This presumption would reduce inherent bias, balance deference, and provide clearer direction for police officers within § 1983 use of force claims. This presumption would also incentivize officer de-escalation, promote the use of surveillance technologies like body cameras, incorporate officer pre-seizure conduct into the legal analysis, and close the officer-created liability loophole. Under the proposed rebuttable presumption of unreasonableness, situations of officer-created jeopardy can be used as a “sword” for the § 1983 police use of force plaintiff rather than as a “shield” for officer-defendants.

