

**SORRY, NOT SORRY: AN EMPIRICAL
REVIEW OF EXCESSIVE FORCE CLAIMS
FOCUSING ON INCONSISTENT
REASONABLENESS STANDARDS AND
EXPRESSIONS OF SYMPATHY**

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INTRODUCTION 128

I. THE FOUNDATION OF EXCESSIVE FORCE PRECEDENT
AND LOWER COURTS’ APPLICATION 130

 A. *The Fourth Amendment and 42 U.S.C. Section 1983*
 Claims..... 131

 1. Establishment of Excessive Force Claims and
 Objective Reasonableness..... 132

 B. *Interpretation of Precedent* 134

 1. Broad, Totality-of-the-Circumstances Approach. 136

 2. Narrow, Moment-of-Force Approach 137

 3. A Third Category of Differing Approaches 139

II. AN EMPIRICAL ANALYSIS OF EXCESSIVE FORCE
CLAIMS 140

 A. *Claimant Data and Process of Analysis* 140

 B. *Case Analysis Breakdown* 143

III. ADDITIONAL OBSTACLES CLAIMANTS MUST
OVERCOME ON EXCESSIVE FORCE CLAIMS..... 147

 A. *Genuine Disputes as to Material Fact*..... 148

 B. *Qualified Immunity* 149

IV. JUDICIAL EMPATHY AND THE USE OF SYMPATHETIC
EXPRESSIONS 151

 A. *Judicial Empathy* 151

 B. *Expressions of Sympathy* 153

V. MOVING FORWARD 159

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CONCLUSION	160
APPENDIX	162

INTRODUCTION

Inconsistent standards of objective reasonableness are not reasonable for those seeking to recover against law enforcement on excessive force claims. As tensions between private individuals and law enforcement officials have become increasingly apparent,¹ the courts have grappled with the treatment of these civil claims arising from law enforcement action.² The Supreme Court has prescribed that excessive force claims arising from a seizure require a Fourth Amendment “objective reasonableness” analysis;³ however, this instruction has created inconsistencies in the ways that courts approach these fact-based circumstances.⁴

The Circuit Courts of Appeals have read the Supreme Court guidance in different ways, creating a circuit split with some reviewing the reasonableness of the officer’s conduct in the exchange leading up to the use of force and others simply looking at the moment force was used.⁵ When the circuits employ

¹ See, e.g., Shaila Dewan & Mike Baker, *Facing Protests over Use of Force, Police Respond with More Force*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/05/31/us/police-tactics-floyd-protests.html> [<https://perma.cc/6HU8-JNBH>] (addressing the growing tensions across the country stemming from George Floyd’s death); Mark Berman et al., *Protests Spread over Police Shootings. Police Promised Reforms. Every Year, They Still Shoot and Kill Nearly 1,000 People.*, WASH. POST (June 8, 2020), https://www.washingtonpost.com/investigations/protests-spread-over-police-shootings-police-promised-reforms-every-year-they-still-shoot-nearly-1000-people/2020/06/08/5c204f0c-a67c-11ea-b473-04905b1af82b_story.html [<https://perma.cc/S3VL-UYDR>] (“Since 2015, police have shot and killed 5,400 people.”); Alicia Victoria Lozano, *Fatal Encounters: One Man Is Tracking Every Officer-Involved Killing in the U.S.*, NBC NEWS (July 11, 2020, 5:09 AM), <https://www.nbcnews.com/news/us-news/fatal-encounters-one-man-tracking-every-officer-involved-killing-u-n1233188> [<https://perma.cc/XTD6-9CMZ>].

² See Martin A. Schwartz, *How the Supreme Court Enables Police Excessive Force*, LAW: N.Y. L.J. (June 5, 2020, 12:30 PM), <https://www.law.com/newyorklawjournal/2020/06/05/how-the-supreme-court-enables-police-excessive-force/?slreturn=20201015211620> [<https://perma.cc/Q3C9-VZM7>].

³ *Graham v. Connor*, 490 U.S. 386, 388 (1989).

⁴ See Jack Zouhary, *A Jedi Approach to Excessive Force Claims: May the Reasonable Force Be with You*, 50 U. TOL. L. REV. 1, 4-10 (2018).

⁵ *Id.*

inconsistent standards for analyzing the scope of excessive force claims, this opens the door to questions regarding the equitable discrepancies for claimants across the country seeking justice on these types of claims. These claims and analyses, however, are additionally subject to qualified immunity. Qualified immunity shields law enforcement, but also creates obstacles for claimants that go beyond the scope of reasonableness and the time frame assessed.⁶ So, although non-uniform reasonableness standards do affect the probability of a claimant's successful outcome, reasonableness alone is not the sole determinative factor. Part I walks through Supreme Court precedent for excessive force claims under 42 U.S.C. Section 1983 and surveys the different ways that Courts of Appeals analyze the reasonableness of the use of force.

Further, this Comment reviews the varying standards, analyzes case law to show statistical comparisons in claimants' success, and addresses the other factors that play a role in a court's analysis. Part II introduces a research set that contains appellate cases from a twenty-six-year window to empirically analyze excessive force claims and details the findings from the review. Compiling cases from January 1, 1990 to December 31, 2015, this window identifies notable excessive force cases analyzing the reasonableness standards, while also collecting other excessive force cases in general. This data creates a sample of 251 cases that allows for comparison between circuits and the standards they employ.⁷

Initially, this Comment solely intended to review how the reasonableness standards affect claimants' success on excessive force claims. Although the data analysis provides some indication of the connection between the two, the data revealed that the problem of civilian protection in excessive force is not as simple as a reasonableness standard used in the courts' analyses. Part III addresses the additional challenges, outside of the reasonableness standards, that claimants must overcome in order to successfully

⁶ See *infra* Section III.B.

⁷ A total of 251 cases were compiled, but 239 cases were thoroughly analyzed. Twelve cases were excluded because the circuit court later vacated its decision, the Supreme Court reversed the circuit court's decision, or the opinion focused on issues not relevant to an excessive force analysis. For a full list of the cases compiled, see *infra* Appendix.

argue excessive force. Additionally, the data unexpectedly sheds light on the language the courts utilize in delivering decisions. As courts issue decisions upholding protection in favor of law enforcement, they seem to additionally offer expressions of sympathy towards the claimant or represented party for the unfortunate interaction with law enforcement. Essentially, through the use of this language, the court purports to say it is sorry, but then solidifies that it is not sorry through its holding in favor of law enforcement. Based on this startling finding, Part IV discusses judicial empathy and explores the moral obligations facing the court with regard to the use of sympathetic language to highlight the fact that judges are currently bound by socially expired precedent. Finally, Part V acknowledges all of these findings and attempts to synthesize the various factors addressed in this Comment to spark discussion on how this area of the law should continue to develop moving forward.

The relevance of this Comment is critical for both our nation and court system as we continue to grapple with the relationships between private citizens and law enforcement. News reports and statistics indicate a deeply rooted problem,⁸ but failing to take steps to address this problem suggests an even larger issue. This Comment takes a step towards breaking down excessive force claims by highlighting where the actual issues lie and calling on the Court and government to take action in order to rectify these misgivings in the future.

I. THE FOUNDATION OF EXCESSIVE FORCE PRECEDENT AND LOWER COURTS' APPLICATION

In 1961, the U.S. Supreme Court handed down its opinion in *Monroe v. Pape*⁹ with Justice Douglas writing for the court, emphasizing individual rights.¹⁰ In this seminal decision, the Court interpreted 42 U.S.C. Section 1983 for the second time and found in favor of the plaintiff against law enforcement.¹¹ As “the nation’s attention was increasingly focused on racial discrimination,” the

⁸ See sources cited *supra* note 1.

⁹ 365 U.S. 167 (1961).

¹⁰ Sheldon Nahmod, *Section 1983 Is Born: The Interlocking Supreme Court Stories of Tenney and Monroe*, 17 LEWIS & CLARK L. REV. 1019, 1022 (2013).

¹¹ *Id.*

Court simultaneously began to establish its Section 1983 jurisprudence.¹² Since *Monroe*, the Court has addressed many Section 1983 claims and has continued to develop its doctrine.¹³ Part I focuses on laying the foundation for Section 1983 claims, specifically with respect to excessive force claims, and additionally, addressing the Courts of Appeals' application of established law.

A. *The Fourth Amendment and 42 U.S.C. Section 1983 Claims*

The Fourth Amendment protects individuals' liberties "against unreasonable searches and seizures."¹⁴ In addition to the anticipated claims regarding the constitutionality of searches and seizures, additional claims, including excessive force claims, may be brought.¹⁵ 42 U.S.C. Section 1983 serves as a vehicle allowing claimants to assert that a state actor, acting under color of law, deprived them of a constitutional right.¹⁶ This civil remedy not only protects private individuals, but also serves to protect state actors through qualified immunity.¹⁷ Government officials are entitled to protection through qualified immunity unless the official violates "a federal statutory or constitutional right" and "the unlawfulness of their conduct was 'clearly established at the time'" of the officer's conduct.¹⁸ In order for a claimant to successfully make a

¹² *Id.*

¹³ *See infra* Section I.A.1.

¹⁴ U.S. CONST. amend. IV.

¹⁵ *See* Nathan R. Pittman, Note, *Unintentional Levels of Force in § 1983 Excessive Force Claims*, 53 WM. & MARY L. REV. 2107, 2109 (2012).

¹⁶ The entire text of 42 U.S.C. Section 1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought 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 violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

¹⁷ *See id.*

¹⁸ *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

constitutional violation claim, the claimant must argue sufficient facts and law to show that the burden of qualified immunity has been overcome.¹⁹

1. Establishment of Excessive Force Claims and Objective Reasonableness

Excessive force claims may arise under a wide variety of scenarios.²⁰ In some instances, excessive force claims arise when law enforcement attempts to make an arrest or stop a public citizen.²¹ Specifically, excessive force claims are frequently observed in interactions with suicidal or emotionally disturbed persons,²² with persons under the influence,²³ during the execution of search warrants,²⁴ and during high-speed chases.²⁵ The Fourth Amendment protects these individuals from being subjected to unreasonable uses of force by law enforcement officials during these interactions.²⁶ *Tennessee v. Garner* and *Graham v. Connor* serve as foundational law on excessive force claims.²⁷ Additionally, *Brower*

¹⁹ See *id.* See also *infra* Section III.B.

²⁰ See *Scott v. Harris*, 550 U.S. 372, 383 (2007) (acknowledging that excessive force claims can come in many varieties and that, therefore, the Court must “slosh [its] way through the factbound morass of ‘reasonableness’” in order to properly analyze these claims).

²¹ See *Graham v. Connor*, 490 U.S. 386, 394-97 (1989) (finding that an excessive force claim against an officer’s seizure of a citizen is analyzed properly under the Fourth Amendment and the “objective reasonableness” standard).

²² See, e.g., *Royal v. Spragins*, 575 F. App’x 300, 301, 304 (5th Cir. 2014) (finding that officers who were called to a home to assist the parents in helping a suicidal teen and fatally shot the teen were entitled to qualified immunity on the basis that “the use of deadly force was not clearly excessive or clearly unreasonable”).

²³ See, e.g., *Small ex rel. R.G. v. City of Alexandria*, 622 F. App’x 378, 379-80, 382 (5th Cir. 2015) (finding that officers did not use excessive force when fatally shooting a man while responding to a call regarding the intoxicated male).

²⁴ See, e.g., *St. Hilaire v. City of Laconia*, 71 F.3d 20, 22-23, 28 (1st Cir. 1995) (finding that officers who shot a suspect during the execution of a warrant did not violate any clearly established rights).

²⁵ See, e.g., *Cole v. Bone*, 993 F.2d 1328, 1330-31, 1333 (8th Cir. 1993) (finding that officers did not use unreasonable force when they fatally shot a man who was being chased in a high-speed pursuit).

²⁶ See *Graham*, 490 U.S. at 394.

²⁷ See *Tennessee v. Garner*, 471 U.S. 1 (1985); *Graham*, 490 U.S. 386.

v. County of Inyo and *California v. Hodari D.* have influenced the time frame at which courts analyze the use of force.²⁸

Garner stated that the use of deadly force that apprehends a suspect is a seizure and that the use of such force must be justified by a probable cause belief that the suspect poses a threat to the officer or another party.²⁹ *Graham* established that excessive force claims that originate from a seizure are properly analyzed under a Fourth Amendment “reasonableness” standard.³⁰ The Court specifically emphasized that the actions of the officer must be “objectively reasonable” based on the facts and circumstances from the perspective of a reasonable officer during the encounter, noting that officers are required to make “split-second” judgment calls.³¹ Whether or not force is excessive must be further analyzed to consider if the use of force was justified by the existing threat.³² The reasonableness of such action is viewed from the perspective of a reasonable officer in the same or similar situation.³³

The Court in *Brower* found that an individual was subject to a seizure as a result of a roadblock and that such seizure may have been unreasonable due to excessive force.³⁴ Building on this, the *Hodari D.* Court identified that a seizure occurs at the moment the suspect submits to an assertion of authority or at the moment the suspect is apprehended by the actual application of force.³⁵

²⁸ *St. Hilaire*, 71 F.3d at 26 (“We believe that view is inconsistent with Supreme Court decisions and with the law of this Circuit. The Supreme Court in [*Brower v. County of Inyo*, 489 U.S. 593 (1989)], held that once it has been established that a seizure has occurred, the court should examine the actions of the government officials leading up to the seizure.”); *Bone*, 993 F.2d at 1332-33 (using *California v. Hodari D.*, 499 U.S. 621 (1991), to justify only looking at the use of force in the moment the seizure occurred).

²⁹ *Garner*, 471 U.S. at 3, 7 (holding that deadly force “may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”).

³⁰ *Graham*, 490 U.S. at 386 (stating that excessive force claims that evolve from force used during “an arrest, investigatory stop, or other ‘seizure’ . . . are properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard, rather than under a substantive due process standard.”).

³¹ *Id.* at 396-97.

³² *See id.*

³³ *Id.* at 396.

³⁴ *Brower v. County of Inyo*, 489 U.S. 593, 599-600 (1989).

³⁵ *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

Garner and *Graham* attempted to offer lower courts guidance for how to handle excessive force and deadly force claims. However, courts have chosen to read the words of *Garner* and *Graham* in entirely different ways.³⁶ Whereas some circuits utilize a totality-of-the-circumstances test, other circuits opt to review the reasonableness solely at the moment the use of force was employed.³⁷ Further, some circuits claim to use a totality of the circumstances approach, but only focus on the moment of force.³⁸ *Brower* and *Hodari D.* introduced additional intricacies into the analysis by focusing on when seizures occur and the analyses that are employed. Circuits that adopt a broader standard tend to rely more heavily on *Brower*, determining that the Court in *Brower* intended for the analysis of a seizure to review the actions of government actors in the moments leading up to the seizure.³⁹ Conversely, the circuits that employ a more narrow test seem to rely on *Hodari D.*, finding that the constitutional considerations take place at the point a seizure occurs and that the moment of seizure is the sole moment of focus.⁴⁰

B. Interpretation of Precedent

The Supreme Court precedent purports to establish standard instructions for courts to utilize in any circumstance that may arise under an excessive force claim. However, courts have chosen to read the holdings of *Garner*, *Graham*, *Brower*, and *Hodari D.* together in very different ways. *Garner* and *Graham* acknowledged that facts play a role in the situation and that the correct analysis requires balancing the factors of the situation.⁴¹ Although the Court noted

³⁶ Zouhary, *supra* note 4, at 4-10.

³⁷ *Id.* at 4-8.

³⁸ *See, e.g.*, *Thomas v. Holly*, 533 F. App'x 208, 217 (4th Cir. 2013) (stating that the court's analysis "[f]ocus[es] on the moment that force was employed, in light of the totality of the circumstances").

³⁹ *See, e.g.*, *Abraham v. Raso*, 183 F.3d 279, 292 (3d Cir. 1999).

⁴⁰ *Id.* (explaining how courts have relied on the *Hodari D.* holding to review the conduct of officers at the exact moment of seizure and use of force apprehending the suspect).

⁴¹ *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)) ("[P]roper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. . . . ([T]he

that this is essentially the totality of the circumstances, that analysis fails to include the totality of the circumstances pertaining to the officer's conduct.⁴² Furthering the grounds for confusion, *Graham* went on to acknowledge that “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”⁴³

Each circuit has adopted a test pursuant to its interpretation of the murkiness established. The interpretations indicate the standards adopted and are identified through the court's language toward the situation. Whereas some circuits have read previous cases and determined that the totality of the circumstances as used in *Garner* should include the officer's actions leading up to the moment force is used, others rely on the determination that officers are forced to make split-second judgments and only need to make a reasonable decision the moment they decide to use force.⁴⁴

Although these differing approaches are relevant and should be considered, the utility and application of these approaches are still somewhat scarce.⁴⁵ Thus, although a circuit may use a specific approach, this does not automatically mean that the approach is applied, or even addressed by the court, on every excessive force or deadly force claim argued by a claimant. Whether or not the approach is explicitly stated as a rationale for the court's decision,

question is ‘whether the totality of the circumstances justifie[s] a particular sort of . . . seizure’.”) (alteration in original).

⁴² From this point on, the use of the phrase “totality of the circumstances” in this Comment generally refers to the circuits that consider the reasonableness of the officer's conduct in the time prior to the use of force, not the circuits that use the *Graham* factors.

⁴³ *Graham*, 490 U.S. at 396-97.

⁴⁴ Compare *Malbrough v. Stelly*, 814 F. App'x 798, 803 (5th Cir. 2020) (quoting *Harris v. Serpas*, 745 F.3d 767, 773 (5th Cir. 2014)) (“In the Fifth Circuit, the excessive force inquiry zeros in on whether officers or others were ‘in danger *at the moment of the threat* that resulted in the officer's use of deadly force.”), with *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) (“The excessive force inquiry includes not only the officers' actions at the moment that the threat was presented, but also may include their actions in the moments leading up to the suspect's threat of force.”).

⁴⁵ Notably, the Tenth Circuit takes one of the broadest approaches, yet it still consistently finds in favor of law enforcement. See, e.g., *Wilson v. City of Lafayette*, 510 F. App'x 775, 778-80 (10th Cir. 2013).

the court's stance with regard to the approach is likely still an underlying consideration for the court's decision.

1. Broad, Totality-of-the-Circumstances Approach

The First, Third, and Tenth Circuits have selected to employ this broader approach. The First Circuit examines all of the officers' actions to determine if the officer had probable cause to use force.⁴⁶ The court specifically noted that although it reads an analysis looking only at the moment of the shooting as inconsistent with the Supreme Court decisions, the court does not read that this consideration imports a duty on police officers "to reduce the risk of violence."⁴⁷ The claims asserted must be narrow and specific, as opposed to a broad, generalized duty.⁴⁸

Stating that the narrow rule is "rigid" and excludes the context of the situation, the Third Circuit stated that "reasonableness should be sensitive to all of the factors bearing on the officer's use of force" and, instead, selected to use a broader standard to look at the situation as a whole.⁴⁹ Specifically acknowledging the narrow approach's shortcomings, the Third Circuit in *Abraham v. Raso* discussed the concerns with using a narrower approach by questioning "what circumstances, if any, are left to be considered when events leading up to the shooting are excluded."⁵⁰ The *Abraham* court focused in on the concern that circuits using a narrow approach have no way to explain "when 'pre-seizure' events start" and, therefore, they "will not have any defensible justification for why conduct prior to that chosen moment should be excluded."⁵¹

The Tenth Circuit takes one of the broadest approaches and includes considerations as to whether the officers' conduct was reckless or deliberate during the seizure and, in turn, created the

⁴⁶ *Napier v. Town of Windham*, 187 F.3d 177, 188-89 (1st Cir. 1999) (citing *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26-27 (1st Cir. 1995)).

⁴⁷ *St. Hilaire*, 71 F.3d at 27 ("Such a contention itself creates a risk that the 'duty' is so broadly defined that it gives inadequate notice of what would violate the duty and thus would fall back on whether those specific facts have occurred in the case law before.").

⁴⁸ *Id.*

⁴⁹ *Abraham v. Raso*, 183 F.3d 279, 291-92 (3d Cir. 1999) ("'Totality' is an encompassing word.").

⁵⁰ *Id.* at 291.

⁵¹ *Id.* at 291-92.

need to use force against the suspect.⁵² Through looking at the officers' actions leading up to the moment force is used, the court is able to develop a fuller picture of the exchange in order to determine the degree of threat the suspect actually posed to law enforcement.⁵³

2. Narrow, Moment-of-Force Approach

Contrary to the stance taken by the First, Third, and Tenth Circuits, the Second, Fourth, Fifth, Eighth, and Eleventh Circuits have read the Supreme Court's instruction as focusing specifically on the moment force is used. Whereas there is some room for movement in these circuits to allow for the analysis to include the moments immediately prior to the use of force, the court's analysis generally concerns the precise moment that the officer pulls the trigger of a gun or strikes an individual with a baton.

The Second Circuit focuses in on "the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force."⁵⁴ This approach is a broader application of the traditional narrow standard, permitting analysis of the officer's knowledge and action immediately prior to the use of force.⁵⁵ Narrowing the scope, the Fourth Circuit reviews the reasonableness of an officer in the precise moment that force is used, specifically relying on the split-second decision-making that officers have to make.⁵⁶ Uniquely, the

⁵² See *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997); *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001).

⁵³ See *Thomson v. Salt Lake County*, 584 F.3d 1304, 1314-15 (10th Cir. 2009) (quoting *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008)) ("In assessing the degree of threat the suspect poses to the officers, we consider factors that include, but are not limited to: '(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect.'").

⁵⁴ *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996). See also *Brothers v. Akshar*, 383 F. App'x 47, 49 (2d Cir. 2010) (quoting *Nimely v. City of New York*, 414 F.3d 381, 390-91 (2d Cir. 2005) ("The reasonableness of an officer's decision to use force 'depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force.'").

⁵⁵ See *Brothers*, 383 F. App'x at 49.

⁵⁶ See *Greenidge v. Ruffin*, 927 F.2d 789, 791-92 (4th Cir. 1991); *Anderson v. Russell*, 247 F.3d 125, 132 (4th Cir. 2001).

Fourth Circuit places additional emphasis on the fact that the totality of the circumstances should be used to consider the reasonableness of the seizure, but the reasonableness of the officer's actions is strictly analyzed at the moment force is exerted.⁵⁷

Focusing on temporal and proximate factors relating to the moment force is executed, the Fifth Circuit has declined to consider the officer's actions leading up to the use of force, noting excessive force does not occur simply because the officer's actions created the situation in which force had to be used.⁵⁸ The Fifth Circuit consistently rejects claimants' attempts to make the argument that officers played a negative role in the interaction.⁵⁹

The Eighth Circuit has placed emphasis on the *Hodari D.* holding, finding that the excessive force analysis should begin at the time that the seizure occurs and at the moment of the use of deadly force.⁶⁰ The court additionally notes that the analysis examines the information that the officer possessed at the time of the use of force, and it is not necessary for the officer's decision to use force to have been the most prudent action.⁶¹ Interestingly, and similar to the Fourth Circuit, the Eleventh Circuit states that the totality of the circumstances must be considered as to the use of force;⁶² however, the court also notes that the "precise circumstances immediately preceding" the use of force is where the focus should be placed.⁶³

⁵⁷ *Smith v. Ray*, 781 F.3d 95, 101 (4th Cir. 2015) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)) (citing *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011)) ("In considering the reasonableness of an officer's actions, we must consider the facts at the moment that the challenged force was employed. . . . Ultimately, the question to be decided is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure.'" (alterations in original).

⁵⁸ See *Malbrough v. Stelly*, 814 F. App'x 798, 804-05 (5th Cir. 2020) (citing *Hathaway v. Bazany*, 507 F.3d 312, 321-22 (5th Cir. 2007)); *Fraire v. City of Arlington*, 957 F.2d 1268, 1275-76 (5th Cir. 1992).

⁵⁹ *Thompson v. Mercer*, 762 F.3d 433, 439-40 (5th Cir. 2014) ("The Thompsons nevertheless contend that—to whatever extent law enforcement was in danger—the officers created that danger by trying to intercept Keith's vehicle. The argument is wholly without merit. This court has consistently rejected similar reasoning.").

⁶⁰ See *Cole v. Bone*, 993 F.2d 1328, 1332-33 (8th Cir. 1993).

⁶¹ *Id.* at 1333-34.

⁶² *Hammett v. Paulding County*, 875 F.3d 1036, 1050-51 (11th Cir. 2017) (citing *Perez v. Suszczynski*, 809 F.3d 1213, 1220 (11th Cir. 2016)).

⁶³ *Carr v. Tatangelo*, 338 F.3d 1259, 1270 (11th Cir. 2003).

3. A Third Category of Differing Approaches

Although there appears to be a divide between many of the circuits, there are three circuits that implement a more complex analysis. Whereas most of the circuits focus in on one particular approach, the Sixth, Seventh, and Ninth Circuits have offered differing approaches.

The Sixth Circuit elects to use a segmented approach by first analyzing the actions of the officers prior to the use of force and then separately analyzing the officers' actions at the moment force was used.⁶⁴ In doing so, the court assesses which segments are material to the excessive force analysis.⁶⁵ District courts outside of the Sixth Circuit have utilized this approach occasionally; however, the application of the segmented approach in these jurisdictions has been questioned on appeal.⁶⁶ The Seventh Circuit may consider information that the officer possessed prior to and at the moment of the use of force.⁶⁷ There has been some waiver on this stance by the court and indications that the Seventh Circuit somewhat follows the Sixth Circuit's approach of breaking the sequence of events up.⁶⁸ Until 2017, the Ninth Circuit utilized the "provocation theory," analyzing whether officers created a situation that caused the suspect to take the actions he did which, in turn, resulted in the officers using force.⁶⁹ The Supreme Court abrogated this analysis, determining that it "conflates distinct Fourth Amendment claims."⁷⁰ The Court did not provide guidance as to what a proper analysis entails.⁷¹

⁶⁴ *Claybrook v. Birchwell*, 274 F.3d 1098, 1104 (6th Cir. 2001).

⁶⁵ *See id.* at 1104-05. *See also* *Zouhary*, *supra* note 4, at 17-18.

⁶⁶ *See, e.g.*, *Fancher v. Barrientos*, 723 F.3d 1191, 1199-1200 (10th Cir. 2013) (summarizing the officer's argument that the district court erroneously applied a "segmented" analysis by looking at the first shot apart from the second through seventh shots, claiming that "segregating the shots as the district court did constitutes a 'misapplication of the totality of the circumstances standard' which is applied when analyzing excessive force claims").

⁶⁷ *See* *Deering v. Reich*, 183 F.3d 645, 650 (7th Cir. 1999).

⁶⁸ *See* *Zouhary*, *supra* note 4, at 8-9.

⁶⁹ *Id.* at 7. *See also* *Billington v. Smith*, 292 F.3d 1177, 1190-91 (9th Cir. 2002).

⁷⁰ *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1547 (2017).

⁷¹ *See id.* at 1546-48.

Emphasis has previously been placed on these stand-alone circuits,⁷² but for the purposes of this Comment, the focus will remain on the two, larger categories.⁷³

II. AN EMPIRICAL ANALYSIS OF EXCESSIVE FORCE CLAIMS

Seeing as how each circuit has adopted a different standard regarding the scope and objective reasonableness of the officer's actions, this presents the question: why is there inconsistency between the courts? And beyond that, how do the varying standards affect private citizens? Many have attempted to categorize the different standards and have suggested approaches that should be adopted to solve the circuit split.⁷⁴ However, these works have failed to look realistically at how these standards play out in cases across the board. Nor has anyone statistically addressed whether these standards are actually affecting claimants. After narrowing a data set and reviewing 251 cases, the results indicate that while the type of reasonableness standard used may have some bearing on the probability of a claimant's success in a certain circuit, a reasonableness standard alone is not determinative. Further, these results do not present the full picture regarding the total number of claims filed relative to the number reviewed on appeal.

A. Claimant Data and Process of Analysis

Despite the variety of fact challenges that this analysis faces, this information proves to be valuable in realistically considering

⁷² See, e.g., Cara McClellan, *Dismantling the Trap: Untangling the Chain of Events in Excessive Force Claims*, 8 COLUM. J. RACE & L. 1 (2017); Ryan Hartzell C. Balisacan, *Incorporating Police Provocation into the Fourth Amendment "Reasonableness" Calculus: A Proposed Post-Mendez Agenda*, 54 HARV. C.R.-C.L. L. REV. 327 (2019).

⁷³ Recognizing the discussion surrounding these approaches, this Comment narrows the focus in on the circuits that can be categorized as applying the narrow approach or the broad approach. In order to fully delve into the implications of these standards, the analysis in Part II excludes the Sixth, Seventh, and Ninth Circuits. Excluding these circuits does not pose critical concerns for the validity of this Comment, but an analysis of the excluded circuits may be used to build upon this Comment at a later date.

⁷⁴ See, e.g., Brianna Vollman, *The Use of Force: The Proper Timeframe to Assess Reasonableness in Excessive Force Cases*, U. CIN. L. REV. BLOG (July 28, 2020), <https://uclawreview.org/2020/07/28/the-use-of-force-the-proper-timeframe-to-assess-reasonableness-in-excessive-force-cases/> [<https://perma.cc/UY5J-S9TJ>] (suggesting that by "[e]valuating all pre-seizure actions of police when assessing reasonableness of force used enables courts to more accurately determine whether the force used was excessive").

the implications and effects of precedent on excessive force claims. While it is true that no two cases are alike, this analysis serves to identify how excessive force cases are being ruled on at the appellate level.

Over the last decade, tens of thousands of law enforcement officers in the United States have been investigated or disciplined for misconduct while on duty; specifically, more than 22,000 of those investigations have been based on the officer's use of excessive force.⁷⁵ While these numbers do not reflect the number of cases filed with claims of excessive force, these numbers do indicate the magnitude of this issue and the propensity at which these cases may enter the courtroom. Recognizing the expansiveness of this area of the law, this research has been limited in scope to create a reasonable sample size. The following outcomes are based on a twenty-six-year time frame.⁷⁶ The first half of the window reviews excessive force cases that occurred immediately following *Graham v. Connor*,⁷⁷ beginning in the year 1990. The later cases in the window review claims occurring through the end of 2015. The end date was identified so that this analysis could capture how the *Saucier v. Katz*⁷⁸ and *Pearson v. Callahan*⁷⁹ analyses for qualified immunity factor into excessive force claim outcomes, while additionally providing a more modern depiction of this area of case law. This rationale is ultimately recognizing the role that qualified immunity plays in these claims and using this period to see if the qualified immunity analysis has had a substantial role in claimants' successes.

⁷⁵ John Kelly & Mark Nichols, *We Found 85,000 Cops Who've Been Investigated for Misconduct. Now You Can Read Their Records.*, USA TODAY (June 11, 2020, 8:48 AM), <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/> [<https://perma.cc/9NB5-HV2A>].

⁷⁶ This length of time was specifically selected so that certain foundational cases from the 1990s, 2000s, and 2010s would be included.

⁷⁷ 490 U.S. 386, 388 (1989) (instructing that excessive force cases arising out of seizures are to be "analyzed under the Fourth Amendment's 'objective reasonableness' standard").

⁷⁸ 533 U.S. 194, 204 (2001) (establishing that the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is separate and distinct from the inquiry as to whether excessive force was used).

⁷⁹ 555 U.S. 223, 239 (2009) (receding from *Saucier* and not requiring the courts to address the prongs of qualified immunity in a specific order).

In order to identify cases during this time period, the same search terms were used to compile cases.⁸⁰ An individual search using these search terms was conducted for each circuit to identify the cases consistently throughout the time frame.⁸¹ After identifying all of the cases generated from the search terms, each case was reviewed and categorized based on the following factors: jurisdictional seating, outcome, presence of sympathetic expressions, and additional analysis considerations.

Before moving to the research set as a whole, **Table A** shows the initial numerical results identified from the cases generated during the first six years and the last six years of the research set. These numbers standing alone will not be further analyzed, but they indicate a proliferation of excessive force cases in civil litigation when looking at two time periods separated by a fourteen-year span. Taking these cases together with the remaining cases to fill in the timeline, this study compiles 251 cases. This in-depth analysis looks more specifically at 239 of these cases.⁸²

Table A		
	1/1/1990 – 12/31/1995	1/1/2010 – 12/31/2015
First Circuit	3	4
Second Circuit	1	10
Third Circuit	2	6
Fourth Circuit	6	15
Fifth Circuit	7	24
Eighth Circuit	4	12
Tenth Circuit	9	12
Eleventh Circuit	3	16

⁸⁰ The search was conducted on Westlaw and consisted of the following search terms: (“excessive force” or “deadly force”) and “reasonableness.”

⁸¹ See *supra* note 80. This Comment acknowledges that while the search terms may not encapsulate every single excessive force claim for the jurisdictions during the time window, the search did generate foundational excessive force cases in the field as well as a broader pool. So, while the research set may not be perfect, it provides reliable insight to these claims. The Appendix lists all of the cases used in this study.

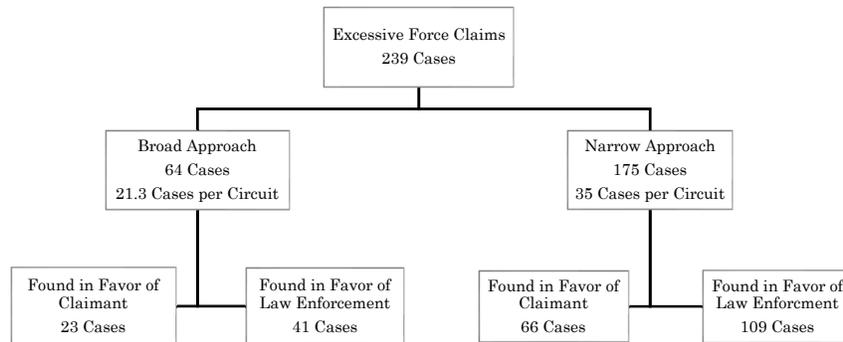
⁸² Twelve cases were dropped due to vacated decisions by the circuit, reversed decisions by the Supreme Court, or focus on issues not relevant to an excessive force analysis.

A key consideration prior to reviewing the results is that this research set includes all excessive force cases during the time frame, instead of simply those that turn on the reasonableness analysis. This Comment takes the position that whether or not the approach is explicitly stated as a rationale for the court's decision, the court's stance with regard to the approach is an underlying consideration for the court's decision. Acknowledging this, were another study to be conducted to solely look at the cases in which the court expressly analyzes and extensively discusses the reasonableness standard used, the total number of cases would be much smaller, and the outcome likely different.

B. Case Analysis Breakdown

Further breaking the analysis down, out of the 239 cases analyzed, 64 are from circuits using the broad approach, and 175 are from circuits using the narrow approach. **Chart 1** indicates the raw number of cases for each approach as well as the number of cases decided in favor of claimants versus those decided in favor of law enforcement within each approach. Three circuits make up the broad approach category, and this indicates that on average, each circuit had around twenty-one cases decided on the appellate level during the window assessed. This is in contrast to the five circuits that comprise the narrow approach category, which each had, on average, thirty-five cases decided at the appellate level over the twenty-six years. This suggests that there are more cases appealed in the narrow circuits in comparison to the broad circuits.

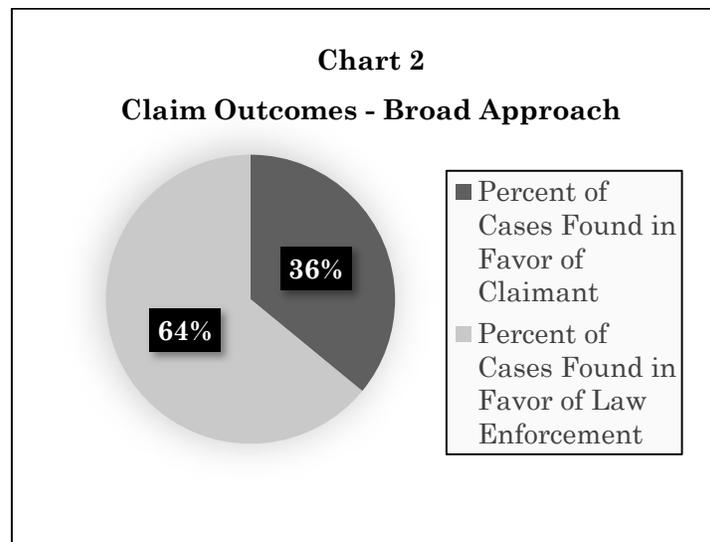
Chart 1



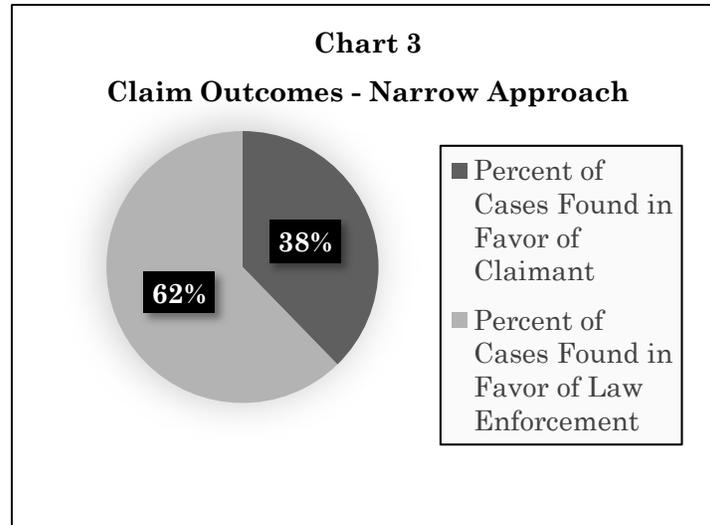
Interestingly, when the claim outcomes are compared relative to one another, the percentages suggest that the circuits using the narrow approach had more claimant-friendly results than the circuits using a broad approach over the span of the twenty-six years. **Table B** translates the numbers from **Chart 1** into percentages to show statistically how the outcomes compare. **Chart 2** and **Chart 3** further show the relationship between the cases found in favor of law enforcement versus those found in favor of claimants in regard to the broad approach and to the narrow approach respectively. The initial hypothesis for this study was that the circuits utilizing a broad approach would have outcomes that reflected more claimant-friendly results overall. Taking all of the cases from the time period together, the numbers suggest otherwise.⁸³

⁸³ Breaking down the twenty-six-year window into smaller time periods, the numbers suggest that the outcomes of circuits using the broad approach are consistently similar to the outcomes of circuits using the narrow approach. Comparing cases from the first six years and the last six years, there is some indication that both the circuits using the broad approach and the circuits using the narrow approach have moved from finding

Table B		
Claim Outcomes – Approaches Compared		
Approach	Percent of Cases Found in Favor of Claimant	Percent of Cases Found in Favor of Law Enforcement
Broad	35.94	64.06
Narrow	37.71	62.29



in favor of law enforcement overwhelmingly to still finding in favor of law enforcement, but at less stark rates.



Although this research set cannot definitively explain this unexpected phenomenon, perhaps the numbers still suggest that circuits employing the broad approach are ultimately more claimant-friendly. This study is narrowly tailored to look specifically at excessive force claims on appeal. This research does not look at the district court level—which is where further explanation of these numbers may lie. While this study does not attempt to fully delve into the outcomes of cases at the district court level, data from the district courts shed some light on the relationship between the district and the appellate courts. From the end of 2008 through 2013, approximately 80,000 civil rights cases were commenced.⁸⁴ The twenty-six-year window in this study

⁸⁴ Table C-2A: U.S. District Courts—Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 2008 Through 2013, U.S. CTS., https://www.uscourts.gov/sites/default/files/statistics_import_dir/C02ASep13.pdf [<https://perma.cc/7LWU-ER94>] (last visited Nov. 3, 2021) (specifically looking at the “Other Civil Rights” category). See also *Civil Nature of Suit Code Descriptions*, U.S. CTS., https://www.uscourts.gov/sites/default/files/js_044_code_descriptions.pdf [<https://perma.cc/6YSS-NJLS>] (last visited Nov. 3, 2021) (defining “Other Civil Rights” as “[actions] alleging a civil rights violation other than the specific civil rights categories [of voting, employment, housing/accommodations, Americans with Disabilities –

includes that time frame. This suggests that a large number of cases are being filed with few being heard on appeal.⁸⁵

As the numbers further suggested, in addition to a lower percentage of cases being found in favor of claimants in the broad circuits, a fewer number of cases were heard on appeal in the broad circuits overall. Recognizing that cases are being filed and commenced at the district court level at a high rate, perhaps the lower number of appeals in the broad circuits is a result of more cases being settled at the district court level in circuits utilizing the broad approach. Another potential explanation is that officers in the broad circuits are aware of the more plaintiff-friendly analysis in clearly established law and are more careful in their interactions as a result. This Comment acknowledges these considerations, but it does not attempt to further delve into this unexpected outcome.

III. ADDITIONAL OBSTACLES CLAIMANTS MUST OVERCOME ON EXCESSIVE FORCE CLAIMS

While the numbers give some indication as to what is going on in Section 1983 claims pertaining to excessive force, the courts analyzing the issue are consistently pointing to a number of other issues that cause the claimant's argument to fail. These additional issues indicate how many barriers a claimant must overcome to succeed against law enforcement. Because all of these cases are on appeal citing different errors in the district court's opinions, this Part reviews how the type of appeal factors into the type of analysis the court does. With regard to each of these, the reasonableness standard plays a role in shaping the obstacles that claimants must overcome when seeking to find success on a claim that goes up for appeal.

employment, Americans with Disabilities – other, and education] or a violation related to prison. Example: Action alleging excessive force by police incident to an arrest.”)

⁸⁵ See *supra* note 84. See also Andrea Januta et al., *Taking the Measure of Qualified Immunity: How Reuters Analyzed the Data*, REUTERS: INVESTIGATES, <https://www.reuters.com/investigates/special-report/usa-police-immunity-methodology/> [https://perma.cc/RH65-7L9X] (Dec. 23, 2020, 12:00 PM) (finding that an officer is “3.5 times more likely than a civilian to have a petition accepted” for review by the Supreme Court). Although this data from the *Reuters* article is not for the Courts of Appeals, it suggests the minuscule rate at which cases may be heard on appeal—especially in cases adverse to a plaintiff.

A. Genuine Disputes as to Material Fact

Adding to the legal complexities of excessive force claims, many circumstances that give rise to these cases involve tense moments with intricate details of the exchange. Further, these claims are being heard on appeal for varying reasons; some of which are appeals of a district court's ruling on a motion for summary judgment. Because Fourth Amendment claims are so fact dependent, it is not surprising that this is another issue the courts must consider. The courts have not shied away from these challenges; rather, they acknowledge that the factors of analysis cannot be applied "mechanically"⁸⁶ and that, in order to come to an answer, the court must "slosh [its] way through the factbound morass of 'reasonableness.'"⁸⁷

Generally, the cases appealed on the basis of summary judgment stem from law enforcement's motion for summary judgment. In these instances, either the claimant is appealing the district court's grant of summary judgment,⁸⁸ or the law enforcement officer is appealing the denial of summary judgment.⁸⁹ In these instances, the courts look to the facts of the case to determine if there is a genuine dispute as to material fact.⁹⁰ Where fact issues remain, summary judgment is improper, and the courts either remand the cases back to the district court for trial or dismiss the appeal.⁹¹ And because Fourth Amendment claims, especially excessive force claims, are fact-intensive, often with multiple accounts of the interaction, the court must sift through all of the details to determine if there is a material fact dispute with regard to the reasonableness of the law enforcement's actions.⁹²

⁸⁶ *Morton v. Kirkwood*, 707 F.3d 1276, 1281 (11th Cir. 2013).

⁸⁷ *Id.* (quoting *Scott v. Harris*, 550 U.S. 372, 383 (2007)).

⁸⁸ *See, e.g., Roy v. Inhabitants of Lewiston*, 42 F.3d 691, 694 (1st Cir. 1994); *Groman v. Township of Manalapan*, 47 F.3d 628, 631 (3d Cir. 1995); *Wilson v. City of Lafayette*, 510 F. App'x 775, 776 (10th Cir. 2013).

⁸⁹ *See, e.g., Krein v. Price*, 596 F. App'x 184, 186 (4th Cir. 2014); *Morris v. Noe*, 672 F.3d 1185, 1188 (10th Cir. 2012).

⁹⁰ *See Terebesi v. Torres*, 764 F.3d 217, 236 (2d Cir. 2014).

⁹¹ *See, e.g., id.*; *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 483 (5th Cir. 2001) ("[T]he threshold issue is whether the facts the district judge concluded are *genuinely disputed* are also *material*. If they are material, we lack jurisdiction.")

⁹² *See, e.g., Terebesi*, 764 F.3d at 239-41 (finding that there were fact issues as to whether officers' decisions to fire their weapons and to pin the claimant down with a shield was reasonable and whether the use of stun grenades was reasonable).

B. Qualified Immunity

Another challenge that claimants face is that of qualified immunity. Qualified immunity is tightly intertwined with Section 1983 claims.⁹³ The doctrine of qualified immunity has evolved to be hardly qualified at all. Rather, the doctrine has expanded since its inception to shield state actors in almost all situations. As courts have continued to push back against the protections of qualified immunity,⁹⁴ law enforcement remains sufficiently insulated from liability. Claimants must not only show that the officer violated a constitutional right, but they must also show that such right is clearly established so that a reasonable officer would know that his actions are unlawful.⁹⁵ In order to show that such right is clearly established, the claimant has the burden of showing that an analogous case found the conduct to be unlawful.⁹⁶ Section III.A reviewed how fact-intensive excessive force claims are. While facts play a role in motions for summary judgment, they also play a role in showing that a right is clearly established.

Because Fourth Amendment excessive force cases are so factually intricate, a claimant's burden is often an uphill battle. Justice Sotomayor has noted, “[The Supreme Court] routinely displays an unflinching willingness ‘to summarily reverse courts for wrongly denying officers the protection of qualified immunity’ but ‘rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.’”⁹⁷ Justice Sotomayor is not alone in her concerns for qualified immunity.⁹⁸ Although courts

⁹³ See 42 U.S.C. § 1983.

⁹⁴ See, e.g., *Jamison v. McClendon*, 476 F. Supp. 3d 386, 423 (S.D. Miss. 2020) (“Again, I do not envy the task before the Supreme Court. Overturning qualified immunity will undoubtedly impact our society. Yet, the status quo is extraordinary and unsustainable. Just as the Supreme Court swept away the mistaken doctrine of ‘separate but equal,’ so too should it eliminate the doctrine of qualified immunity.”).

⁹⁵ *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018).

⁹⁶ *Id.*

⁹⁷ *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (quoting *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1282-83 (2017) (Sotomayor, J., dissenting from the denial of certiorari)).

⁹⁸ See, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (noting his “growing concern with [the Court’s] qualified immunity jurisprudence”); *Jamison*, 476 F. Supp. 3d at 392 (“Immunity is not exoneration. And the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine.”).

have pushed back on the seemingly limitless nature of qualified immunity, no action has been taken to limit its power.

In Justice Sotomayor's *Kisela v. Hughes* dissent, she acknowledged that the Court is continuously using "a one-sided approach to qualified immunity" and, in doing so, the Court "transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment."⁹⁹ Ultimately, again, because these claims are so fact-specific, claimants face challenges in showing that based on the circumstances at hand, the officer should have known his actions were unlawful. For a law to be clearly established, the law must be defined with a "high 'degree of specificity'" rather than at a "high level of generality."¹⁰⁰ Because excessive force can occur in so many different forms, establishing that the officer should have known his actions were unlawful based on a law showing specificity can be challenging.

The pervasive nature of qualified immunity protection is likely the dominant problem with regard to claimants finding success on excessive force claims. Even if the varying reasonableness standards play a role in a handful of cases, the protections of qualified immunity shield law enforcement regardless of the officer's reasonableness. Because claimants must show that an officer used excessive force and that the unlawfulness of the officer's actions is clearly established, the law continues to not be clearly established when courts refuse to address excessive force and solely rely on qualified immunity to determine the outcome of the case, thus leading to further litigation in the future.¹⁰¹ Recognizing this fact undermines neither the discussions regarding the reasonableness standards, nor the findings of Part II. Rather, this fact highlights the problem—although settling the inconsistent reasonableness standards would be a step in the right direction (and a win for some claimants on the reasonableness prong), these

⁹⁹ *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting) ("[The majority's] decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.")

¹⁰⁰ *Wesby*, 138 S. Ct. at 590 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015)).

¹⁰¹ *Januta et al.*, *supra* note 85.

claims will consistently be inequitable until qualified immunity is properly limited.

IV. JUDICIAL EMPATHY AND THE USE OF SYMPATHETIC EXPRESSIONS

“Judges are human beings; human beings have emotions; ergo, judges have emotions.”¹⁰² While, traditionally, “judge’s humanity has long been either ignored or regarded as a necessary evil,” this notion is “misguided and destructive.”¹⁰³ This Comment does not dive into the considerations of emotion and humanity within a judge, but instead, it attempts to acknowledge the reality of the conversations surrounding judicial empathy and illustrate how a judge’s emotions and humanity shine through opinions issued by the courts.

Overall, this Part begins by briefly discussing judicial empathy and goes on to consider what the court’s expressions of sympathy really mean. Whereas the courts are faced with reconciling law and moral emotions, empathetic judges may be indicative of a call to reconsider the current legal framework in order to better protect the people who engage with law enforcement. Using the same data set used to analyze the reasonableness standards, this Part will review when the courts are using expressions of sympathy and how those cases are being decided.

A. *Judicial Empathy*

In 2009, President Barack Obama addressed some of the qualities he would consider in selecting his nominee for the Supreme Court.¹⁰⁴ Among the qualities, President Obama included that he sought someone who understood that justice is not solely about “abstract legal theory,” but also about how the law plays a role in the “daily realities of people’s lives.”¹⁰⁵ This “quality of empathy,” as President Obama understood it, is the ability to

¹⁰² Terry A. Maroney, *Judges and Their Emotions*, 64 N. IR. LEGAL Q. 11, 11 (2013).

¹⁰³ *Id.*

¹⁰⁴ See Jesse Lee, *The President’s Remarks on Justice Souter*, WHITE HOUSE: PRESIDENT BARACK OBAMA ARCHIVES (May 1, 2009, 4:23 PM), <https://obamawhitehouse.archives.gov/blog/2009/05/01/presidents-remarks-justice-souter> [<https://perma.cc/3724-QYHU>].

¹⁰⁵ *Id.*

understand and identify “with people’s hopes and struggles.”¹⁰⁶ Following these statements, President Obama faced skeptical critics, and the public support for an empathetic judge was “short-lived.”¹⁰⁷ Despite President Obama “stopp[ing] short” of identifying empathy as a key quality in a nominee,¹⁰⁸ the discussion surrounding the place for empathy within the judiciary did not stop in 2009.

Both Justice Sonia Sotomayor and Justice Stephen Breyer have since acknowledged the role of empathy in the job of the Court.¹⁰⁹ In her memoir, Justice Sotomayor discussed how she has used empathy in her life, and in an interview, Justice Breyer stated that empathy is a “crucial quality [to have] in a judge.”¹¹⁰ In recognizing that the conversation for empathy is taking place, some argue that “judges ought to develop their capacity for empathy in order to truly engage in evenhanded and thorough decisionmaking [sic]” and that empathy does not make judges biased or engage in favoritism, but rather, empathy is actually “required for judging to be impartial.”¹¹¹

Rationalizing the characteristic of empathy with actual case law, the question becomes: what effect, if any, does the presence of judicial empathy have on the law? As the following Section will discuss, in issuing its opinions, some courts employ the use of sympathetic language in discussing instances of excessive force. Although this Comment does not purport to have an answer to explain this occurrence, it raises the question of whether or not this language is a product of judicial empathy. When judges apologize to a claimant but rule in favor of law enforcement, are the judges using empathy in recognizing the shortcomings of the law, or are

¹⁰⁶ *Id.*

¹⁰⁷ Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145, 147 (2013).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (alteration in original) (first citing SONIA SOTOMAYOR, MY BELOVED WORLD (2013); and then quoting Ioanna Kohler, *On Reading Proust: Justice Stephen Breyer on Proust, Literature, and Interpretation*, N.Y. REV. BOOKS (Nov. 7, 2013), <https://www.nybooks.com/articles/2013/11/07/reading-proust/> [Perma.cc link unavailable]).

¹¹¹ *Id.* at 148.

they simply using lip service to justify the moral dilemmas in following court precedent?

B. *Expressions of Sympathy*

The final piece of this analysis hinges on the use of language in court opinions to express sympathy for events that gave rise to the suit. Although, in some instances, the courts use language to encourage change within the doctrine,¹¹² that is not the way sympathetic language is used across the board. Interestingly, there are many instances when a court finds in favor of law enforcement, but expresses sympathy to the claimant for the situation. Despite recognizing that the law is established and that courts are bound by precedent, the courts attempt to offer condolences to claimants who have suffered at the hands of police. Specifically considering that the use of these sympathetic expressions is often found when the court is finding in favor of law enforcement, these condolences often come across as lip service.

One instance of this can be seen in *Hammett v. Paulding County*.¹¹³ In *Hammett*, the court concludes its opinion by stating, “Hammett’s death is undoubtedly tragic.”¹¹⁴ The court states this shortly before following up with the statement that “[s]ummary judgment was appropriate, and [the law enforcement officers] are to be spared the burden of defending themselves at trial.”¹¹⁵ Sympathetic language in the context of *Hammett* is not uncommon. This Section walks through how rhetoric is utilized by the courts and the statistical use of sympathetic language in the research set analyzed here.

¹¹² See, e.g., *Elizondo v. Green*, 671 F.3d 506, 511 (5th Cir. 2012) (DeMoss, J., specially concurring) (“However, I once again feel compelled to write separately to express my disapproval of and disappointment with the actions of the City of Garland police department. . . . Either law enforcement procedures or our law must evolve if we are to ensure that more avoidable deaths do not occur at the hands of those called to ‘protect and serve.’”). See also *Estate of Jones v. City of Martinsburg*, 961 F.3d 661, 673 (4th Cir. 2020) (“Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives.”).

¹¹³ 875 F.3d 1036 (11th Cir. 2017).

¹¹⁴ *Id.* at 1053.

¹¹⁵ *Id.* at 1054.

Of the sixty-four cases representing circuits using the broad approach, a total of fourteen cases make expressions of sympathy.¹¹⁶ Twelve of these expressions—found in the First,¹¹⁷ Third,¹¹⁸ and Tenth¹¹⁹ Circuits—are in opinions where the court

¹¹⁶ This indicates that approximately 21.9% of cases using the broad approach employ sympathetic expressions in the courts' decisions.

¹¹⁷ See *Roy v. Inhabitants of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994) ("Perhaps a jury could rationally have found that [the officer] could have done a better job . . ."); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 794 (1st Cir. 1990) ("The plaintiff's shooting was an unfortunate accident, the officers contend, not a Fourth Amendment violation."); *Estate of Bennett v. Wainwright*, 548 F.3d 155, 158, 175-76 (1st Cir. 2008) ("This appeal involves the tragic death of Daniel Bennett II ('Bennett'), a mentally ill young man, when he opened fire against Maine law enforcement officers who had been called to his home. . . . While the result is tragic, we cannot conclude that the officers' actions were so deficient that no reasonable officer in their position would have made the same choices under these circumstances. . . . Since a reasonable factfinder must conclude that Bennett's shooting, while unfortunate, was not the result of plain incompetence or knowing violation of law on the part of the officers, the officers are entitled to qualified immunity . . ."); *McGrath v. Tavares*, 757 F.3d 20, 21, 31 (1st Cir. 2014) ("This appeal stems from the tragic deadly shooting of a sixteen-year-old boy . . . by a Plymouth police officer. Following the untimely death of her son, [his mother] filed [this] action . . . It is never easy for a parent to bury a child. And the particularly tragic circumstances surrounding sixteen-year-old Anthony's death make this loss even more devastating for his mother. However, we are duty-bound to apply the law to the record facts, which in this case do not support . . . recovery."); *Mitchell v. Miller*, 790 F.3d 73, 74 (1st Cir. 2015) ("We seldom do our best thinking in the murky hours when late night seeps into early morning.") (referencing concerns about police conduct).

¹¹⁸ See *In re City of Philadelphia Litigation*, 49 F.3d 945, 973 (3d Cir. 1995) ("[T]here can be no doubt that the defendants' actions had tragic consequences."); *Carswell v. Borough of Homestead*, 381 F.3d 235, 237 (3d Cir. 2004) ("The tragic death of Gilbert Carswell was the culmination of months of domestic discord."); *Neuburger v. Thompson*, 124 F. App'x 703, 707 (3d Cir. 2005) ("As the District Court stated, the shooting of Ms. Neuburger was 'undeniably tragic.' But no federal claim is based on a clearly established constitutional right."); *Curley v. Klem*, 499 F.3d 199, 216 (3d Cir. 2007) ("The mistake [the officer] made has undoubtedly been terrible in its long-term consequences for Officer Curley and his family, and we do not for a moment discount the pain, sorrow, expense, and frustration that it has visited on them in their innocence. But a mistake, though it may be terrible in its effects, is not always the equivalent of a constitutional violation.") (referencing the shooting of a port authority officer by a state trooper while each was responding to the same call).

¹¹⁹ See *Blossom v. Yarbrough*, 429 F.3d 963, 968 (10th Cir. 2005) ("Mr. Pickup posed an immediate threat to the safety of the officer, and the use of deadly force, while tragic, was reasonable."); *Estate of Turnbow v. Ogden City*, 386 F. App'x 749, 750, 753 (10th Cir. 2010) ("The facts of this case are tragic. . . . While it is regrettable and tragic that Mr. Turnbow was shot so many times, the facts are not to be viewed with the benefit of the '20/20 vision of hindsight' but from the perspective of a reasonable officer knowing the available facts at the time of the incident."); *Wilson v. City of Lafayette*, 510 F. App'x 775, 776, 780 (10th Cir. 2013) ("After Mr. Wilson's tragic death, his parents brought suit.

found in favor of law enforcement. The other two are in cases where the court found in favor of claimants, both issued by the Tenth Circuit.¹²⁰ In contrast to the circuits using the broad approach, thirty-four of the one hundred seventy-five cases from circuits using the narrow approach use expressions of sympathy.¹²¹ Of the thirty-four cases making sympathetic expressions, twenty-eight of them are in cases found in favor of law enforcement, and six are in cases found in favor of claimants. The twenty-eight cases that found in favor of law enforcement consist of opinions issued by the Second,¹²²

. . . We sympathize with the Wilsons over their terrible loss. But the Supreme Court has directed the lower federal courts to apply qualified immunity broadly . . .”).

¹²⁰ See *Zuchel v. City & County of Denver*, 997 F.2d 730, 735 (10th Cir. 1993) (“The following undisputed facts provide a general description of the tragic events giving rise to this litigation.”); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1197 (10th Cir. 2001) (Henry, J., concurring in part and dissenting in part) (“The facts of this case as we must construe them on summary judgment are, to understate, disquieting.”).

¹²¹ This indicates that approximately 19.4% of cases from circuits using the narrow approach employ expressions of sympathy in the opinions issued. This is slightly lower than that of the cases in the circuits using the broad approach.

¹²² See *Salim v. Proulx*, 93 F.3d 86, 87 (2d Cir. 1996) (“However regrettable the death of Eric Reyes, we conclude that Officer Proulx is entitled, as a matter of law, to the defense of qualified immunity. . . . Our account of the unfortunate episode that took the life of Eric Reyes is taken from plaintiff’s version of the facts . . .”); *Fortunati v. Vermont*, 503 F. App’x 78, 82 (2d Cir. 2012) (“While we are fully cognizant of the tragic circumstances giving rise to this case, we find no error in the district court’s rulings on the issues before us.”).

Fourth,¹²³ Fifth,¹²⁴ Eighth,¹²⁵ and Eleventh¹²⁶ Circuits. The other six cases where expressions of sympathy are made when the

¹²³ See *McLenagan v. Karnes*, 27 F.3d 1002, 1008 (4th Cir. 1994) (“Although it is extremely unfortunate that McLenagan was seriously injured, [Section] 1983 does not purport to redress injuries resulting from reasonable mistakes. . . . We are nonetheless troubled by [the officer’s] actions following the critical moment.”); *Greenidge v. Ruffin*, 927 F.2d 789, 793 (4th Cir. 1991) (“The present case unquestionably involves an unfortunate permanent injury to appellant caused by the arresting police officer”); *Anderson v. Russell*, 247 F.3d 125, 132 (4th Cir. 2001) (quoting *Elliott v. Leavitt*, 99 F.3d 640, 644 (4th Cir. 1996)) (“Russell ultimately was mistaken as to the nature and extent of the threat posed by Anderson, which resulted in a tragic consequence to Anderson. Nevertheless, as we stated in *Elliott*, ‘the Fourth Amendment does not require omniscience. . . . Officers need not be absolutely sure’”); *Milstead v. Kibler*, 243 F.3d 157, 165 (4th Cir. 2001) (“We acknowledge that the facts of this case—triggered by the criminal conduct of Ramey—sound a tragic knell of classical proportions. Ramey murdered Milstead’s fiancée [sic], who was pregnant. Officer Kibler attempted to perform his duty to assist Milstead, but instead killed him by mistake. And Ramey in the end committed suicide. Officer Kibler and the families of the innocent, as well as the family of the suspect, must live with these painful memories.”); *Huggins v. Weider*, 105 F. App’x 503, 504 (4th Cir. 2004) (“This case arises from unfortunate events that occurred on July 19, 2000.”); *Waller v. City of Danville*, 212 F. App’x 162, 175 (4th Cir. 2006) (Wilkinson, J., concurring in part and dissenting in part) (“Under these circumstances, as the majority notes, the officers’ use of deadly force, though tragic, was reasonable and proportional, because ‘a reasonable officer would have believed that Hunt had a weapon (including a gun and probably a knife), that he was holding Evans against her will and refusing to allow her free movement, and that he was an immediate threat to the officers and to Evans.’”); *Njang v. Montgomery County*, 279 F. App’x 209, 217 (4th Cir. 2008) (“We are not unsympathetic to the plight of the survivors of Peter Njang, whose dream of building a life in the United States was cut short by the unfortunate events of August 12, 2004. Nevertheless, the law simply provides no remedy when a police officer is driven to use deadly force in the face of a reasonably perceived serious threat. The decision of the district court is therefore *AFFIRMED*.”); *Noel v. Artson*, 641 F.3d 580, 584, 593 (4th Cir. 2011) (“The unfortunate events that led to this lawsuit began when a Baltimore County police officer noticed a plastic bag with white dust in the car of Matthew Noel during an October 2004 traffic stop. . . . Events at the Noel home on the evening in question took a deeply regrettable turn. But the jury tasked with weighing these sad happenings was not left in the dark.”).

¹²⁴ See *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991) (“A case of this gravity demands the utmost care.”); *Castillo v. City of Round Rock*, No. 98-50163, 1999 WL 195292, at *2 (5th Cir. Mar. 15, 1999) (“Castillo’s tragic death was caused by anoxic encephalopathy that produced cardiorespiratory arrest during the positional asphyxia that resulted from his being laid on the ground, handcuffed and in the prone position, for four to six minutes with the weight of two adults on his back.”); *Aujla v. Hinds County*, No. 01-60699, 2003 WL 1098839, at *5 (5th Cir. Feb. 11, 2003) (Jones, J., dissenting) (“A jury might well conclude that in this tragic case of apparent mistaken identity, four overbearing, heavily-armed and essentially disguised sheriff’s deputies gave Aujla no real opportunity to understand what was happening when they entered his store.”); *Rockwell v. Brown*, 664 F.3d 985, 996-97 (5th Cir. 2011) (DeMoss, J., specially concurring) (“I write separately to express disapproval of and disappointment

with the officers' actions during the course of this sad incident. . . . Scott's mental illness certainly added a tragic dynamic to his life, but it did not need to cause his death. In my opinion, the officers should have been trained to use better judgment in their approach to volatile and unfortunate situations such as this one. This entire case should have been avoided. Scott should be alive today—perhaps in a medical facility or under court supervision, but alive nonetheless.”); *Thompson v. Mercer*, 762 F.3d 433, 442 (5th Cir. 2014) (“Accordingly, while we are not unsympathetic to the Thompsons’ loss of their son, we AFFIRM summary judgment in favor of the defendants.”); *Elizondo v. Green*, 671 F.3d 506, 512 (5th Cir. 2012) (DeMoss, J., specially concurring) (“I firmly believe that the light of public concern must be shined on tragic cases such as Scott Rockwell’s and Ruddy Elizondo’s if more deaths are to be prevented.”); *Small ex rel. R.G. v. City of Alexandria*, 622 F. App’x 378, 379 (5th Cir. 2015) (“This case presents tragic facts.”).

¹²⁵ See *Thompson v. Hubbard*, 257 F.3d 896, 900 (8th Cir. 2001) (“However tragic Thompson’s death, plaintiffs have failed to come forward with sufficient evidence to justify submitting their case to a jury.”); *Parks v. Pomeroy*, 387 F.3d 949, 959 (8th Cir. 2004) (Colloton, J., concurring in the judgment) (“For essentially the reasons discussed by the court in its immunity analysis, I conclude that the evidence, taken in the light most favorable to Mr. Parks, does not establish that this tragic situation involved a violation of the Fourth Amendment.”) (citation omitted); *Aipperspach v. McInerney*, 766 F.3d 803, 805 (8th Cir. 2014) (“This tragic incident began when William Hart called the Riverside Police Department on March 18, 2010”); *Ransom v. Grisafe*, 790 F.3d 804, 811 (8th Cir. 2015) (“It is very fortunate that the officers missed with their shots. This would be a tragic case if Ransom, who by all means was abiding by the law, had been injured or killed.”); *Molina-Gomes v. Welinski*, 676 F.3d 1149, 1151 (8th Cir. 2012) (“The transaction did not go as planned”).

¹²⁶ See *Wright v. Whiddon*, 951 F.2d 297, 301 (11th Cir. 1992) (“Our decision today does not mean that the police can shoot fleeing pretrial detainees with impunity.”); *McCullough v. Antolini*, 559 F.3d 1201, 1202 (11th Cir. 2009) (“This tragic story begins at approximately 1:00 a.m. on May 2, 2004, when Pinellas County sheriff’s deputy John Syers, Jr. received a report about individuals dealing narcotics at the La Quinta Inn located on 34th Street North in Pinellas County.”); *Garczynski v. Bradshaw*, 573 F.3d 1158, 1170 (11th Cir. 2009) (“The outcome of this situation was undeniably a tragedy. In their efforts to prevent a suicide, the officers took a life. Yet the record reveals that their use of force was objectively reasonable considering all the circumstances from a reasonable officer’s viewpoint. No constitutional violation occurred.”); *Terrell v. Smith*, 668 F.3d 1244, 1255 (11th Cir. 2012) (“We [address whether the law is clearly established] in order to make a complete record in the face of this tragic shooting, and we hold that the plaintiffs have failed to carry their burden on this prong as well.”); *Penley v. Eslinger*, 605 F.3d 843, 854, 856 (11th Cir. 2010) (“Under the tragic circumstances of this case and in light of this Court’s binding precedent, we must answer this question in the affirmative. . . . [W]e do not mean to minimize the tragic nature of this case.”); *Clark v. City of Atlanta*, 544 F. App’x 848, 850-51 (11th Cir. 2013) (“This case arises from a tragic series of events. . . . [A]lthough not known to the officers at the time, and possibly the reason this regrettable encounter escalated as it did, Montellis Clark suffered from paranoid schizophrenia”).

outcome is in favor of the claimant occur in the Fourth,¹²⁷ Fifth,¹²⁸ Eighth,¹²⁹ and Eleventh¹³⁰ Circuits.

Overall, with respect to the instances in which courts use expressions of sympathy, judges appear to be acknowledging a shortcoming of the law, but are committed to following precedent. The choice of words that judges utilize in their opinions speaks volumes. Although judicial opinions do not shed light on the exact thoughts of the bench, the language identified in this study seems to suggest that at least some judges feel a certain way about the current law governing excessive force claims. However, they ultimately appear to feel as though they do not have the ability to change it. Recognizing that culture changes over time and that law continually develops as the courts establish precedent, expressions of sympathy from the court do little more than offer lip service to victims who have suffered at the hands of police. Instead of simply issuing empty promises, it is time to examine why judges are consistently using sympathetic expressions in their opinions.

¹²⁷ See *Culosi v. Bullock*, 596 F.3d 195, 200 (4th Cir. 2010) (“[W]as the shooting death of Dr. Culosi the result, on the one hand, of an intentional act by Officer Bullock, or, on the other hand, was it the result of a tragic and deeply regrettable, unintentional, accidental, discharge of Officer Bullock’s firearm?”); *Bellotte v. Edwards*, 629 F.3d 415, 418, 426 (4th Cir. 2011) (quoting Brief of Appellees/Cross Appellants at 39, *Bellotte*, 629 F.3d 415 (No. 10-1115), 2010 WL 1654077, at *39) (“[T]he remarkably scanty rationale offered for the no-knock invasion makes an award of qualified immunity inappropriate. . . . That Mrs. Bellotte had to face such an experience was most unfortunate, but we cannot say that the officers used excessive force. . . . We have the deepest sympathy for a twelve-year-old ‘awakened to the sight of four or five men standing at the foot of her bed with flashing lights and guns pointed at her.’”); *Henry v. Purnell*, 652 F.3d 524, 549 (4th Cir. 2011) (“Deputy Purnell’s mistake is indeed unfortunate, but it was nonetheless one that was made in the tense and potentially dangerous circumstances arising from Henry’s flight from arrest.”).

¹²⁸ See *Lytle v. Bexar County*, 560 F.3d 404, 419 (5th Cir. 2009) (Smith, J., dissenting) (“His actions, despite their unfortunate and unintended consequences, were not unreasonable.”).

¹²⁹ See *Ludwig v. Anderson*, 54 F.3d 465, 471 (8th Cir. 1995) (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)) (“It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect.”).

¹³⁰ See *Morton v. Kirkwood*, 707 F.3d 1276, 1279 (11th Cir. 2013) (“Similarly, accepting Morton’s account of the tragic events that led to his grievous injury, state agent immunity does not apply to the assault and battery claim.”).

V. MOVING FORWARD

As courts have evolved their considerations, excessive force claims have become murky and undecipherable at times. By breaking down these claims to look at the outcomes, case law indicates that although reasonableness standards may produce different outcomes in a handful of cases, reasonableness standards alone are not the determining factors on the likelihood of a claimant's success. Although arguing that all circuits should adopt the broader reasonableness standard is admirable, the numbers show that this country faces a bigger problem.

Even if the circuits elected to consider a broader scope in analyses of reasonableness, the problem still circles back to the additional challenges that claimants must overcome—specifically, with regard to qualified immunity. As many courts, and even Supreme Court Justices, have pushed against the application of qualified immunity, the Court consistently refuses to address the pervasive concern.¹³¹ In June of 2020, the Supreme Court declined to hear eight cases involving qualified immunity—in six of those, claimants were challenging the lower courts' protection of law enforcement.¹³² Members of the House of Representatives Judiciary Committee “denounced the [C]ourt's rejection of the cases” stating, “The Supreme Court's failure to reconsider this flawed legal rule makes it all the more important for Congress to act.”¹³³ In 2020, the House drafted different versions of legislation to limit, or end entirely, the doctrine of qualified immunity.¹³⁴ This legislation faced pushback with several lawmakers and the Trump Administration opposing the abolition of qualified immunity.¹³⁵

¹³¹ Schwartz, *supra* note 2.

¹³² Lawrence Hurley & Andrew Chung, *Supreme Court Rejects Cases over 'Qualified Immunity' for Police*, REUTERS (June 15, 2020, 9:00 AM), <https://www.reuters.com/article/us-usa-court-qualified-immunity/supreme-court-rejects-cases-over-qualified-immunity-for-police-idUSKBN23M1YH> [<https://perma.cc/2UFV-QUS7>].

¹³³ *Id.* (quoting Press Release, Jerry Nadler, Judiciary Comm. Chair, House of Representatives, Nadler, Bass & Cohen Statement on SCOTUS Refusal to Re-examine Qualified Immunity (June 15, 2020), <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=394327#> [<https://perma.cc/YL22-9K5Q>]).

¹³⁴ See, e.g., Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020).

¹³⁵ Hurley & Chung, *supra* note 132.

One consideration that makes this discussion even trickier to settle is the fact that “[q]ualified immunity is a judicially created doctrine.”¹³⁶ As case law has created Section 1983 and qualified immunity jurisprudence, the Court now declines to further explain the doctrine’s place and application in the twenty-first century. When the Court fails to expound on its doctrine, to whose hands does it fall? This Comment does not attempt to prescribe the perfect solution, but rather calls on the courts and lawmakers to determine the best course of action in order to face the challenges plaguing the American people today.

Instead of simply using lip service to offer condolences to injured parties, it is time for the courts or lawmakers to step up and act. This topic is one that is relevant to our society today due to the tense relationships erupting across the country between law enforcement and private citizens, and continuing to ignore these considerations is an injustice to the American people.

CONCLUSION

Inconsistent standards of objective reasonableness are not reasonable for those seeking to recover against law enforcement, yet as this Comment’s empirical analysis has shown, there are multiple factors causing discrepancies on excessive force claims in favor of law enforcement over private citizens. Overall, the Supreme Court has laid the foundation for excessive force claims, but the Courts of Appeals fail to apply this precedent consistently, which results in various reasonableness standards. Empirically analyzing excessive force claims sheds light on the fact that despite using differing reasonableness standards, excessive force claims are generally being found in favor of law enforcement versus claimants at the same rates among the circuits that use different approaches. While the research set could not fully explain whether more excessive force cases are being settled or properly handled at or prior to the litigation stage, the research set was able to emphasize the fact that regardless of reasonableness standards

¹³⁶ Nathaniel Sobel, *What Is Qualified Immunity, and What Does It Have to Do with Police Reform?*, LAWFARE (June 6, 2020, 12:16 PM), <https://www.lawfareblog.com/what-qualified-immunity-and-what-does-it-have-to-do-police-reform> [https://perma.cc/PW2B-NKZZ].

used, the uphill battle that claimants have in seeking success is large.

Moreover, the research set surprisingly revealed the use of sympathetic language employed by courts when issuing decisions in favor of law enforcement. This sympathy is not enough, however, to rectify the damages that have been caused by law enforcement's use of force. Instead of simply apologizing, it is time to collectively call on the courts to address the varying reasonableness standards. Yet, the reasonableness standards are not enough. The Fourth Amendment protects individuals' liberties "against unreasonable searches and seizures,"¹³⁷ yet as the Court has developed its Section 1983 jurisprudence, the doctrine of qualified immunity has practically swallowed claimants' rights and created an absolute shield for law enforcement against liability.

Synthesizing the pervasive problem of the relationship between law enforcement and private citizens with the findings from this Comment, it is time for the American people to call on the courts and lawmakers to decide how we, as a nation, move forward. Judicial empathy indicates the value of recognizing the "hopes and struggles" of all people,¹³⁸ but until the problem at hand is truly recognized, this obstacle will continue to be a prevalent issue in our courts and society.

¹³⁷ U.S. CONST. amend. IV.

¹³⁸ Lee, *supra* note 104.

APPENDIX¹³⁹

Landol-Rivera v. Cruz Cosme, 906 F.2d 791 (1st Cir. 1990).
Roy v. Inhabitants of Lewiston, 42 F.3d 691 (1st Cir. 1994).
St. Hilaire v. City of Laconia, 71 F.3d 20 (1st Cir. 1995).
Jarrett v. Town of Yarmouth, 309 F.3d 54 (1st Cir. 2002).*
Epsom v. Hall, 330 F.3d 49 (1st Cir. 2003).*
Jarrett v. Town of Yarmouth, 331 F.3d 140 (1st Cir. 2003).
Berube v. Conley, 506 F.3d 79 (1st Cir. 2007).
Estate of Bennett v. Wainwright, 548 F.3d 155 (1st Cir. 2008).
Parker v. Gerrish, 547 F.3d 1 (1st Cir. 2008).
Raiche v. Pietroski, 623 F.3d 30 (1st Cir. 2010).
Mlodzinski v. Lewis, 648 F.3d 24 (1st Cir. 2011).
McGrath v. Tavares, 757 F.3d 20 (1st Cir. 2014).
Mitchell v. Miller, 790 F.3d 73 (1st Cir. 2015).
Lennon v. Miller, 66 F.3d 416 (2d Cir. 1995).
Salim v. Proulx, 93 F.3d 86 (2d Cir. 1996).
Green v. Montgomery, 219 F.3d 52 (2d Cir. 2000).
O'Bert *ex rel.* Estate of O'Bert v. Vargo, 331 F.3d 29 (2d Cir. 2003).
Stephenson v. Doe, 332 F.3d 68 (2d Cir. 2003).
Cowan *ex rel.* Estate of Cooper v. Breen, 352 F.3d 756 (2d Cir. 2003).
Nimely v. City of New York, 414 F.3d 381 (2d Cir. 2005).
Mills v. Fenger, 216 F. App'x 7 (2d Cir. 2006).
Costello v. Town of Warwick, 273 F. App'x 118 (2d Cir. 2008).
Jennis v. Rood, 310 F. App'x 439 (2d Cir. 2009).
Brothers v. Akshar, 383 F. App'x 47 (2d Cir. 2010).
Tracy v. Freshwater, 623 F.3d 90 (2d Cir. 2010).
Crowell v. Kirkpatrick, 400 F. App'x 592 (2d Cir. 2010).
Terranova v. New York, 676 F.3d 305 (2d Cir. 2012).
Fortunati v. Vermont, 503 F. App'x 78 (2d Cir. 2012).
MacLeod v. Town of Brattleboro, 548 F. App'x 6 (2d Cir. 2013).

¹³⁹ Of the 251 cases compiled, twelve were dropped from this Comment's analysis due to vacated decisions by the circuit, reversed decisions by the Supreme Court, or the opinion's focus on issues not relevant to an excessive force analysis. In this Appendix, the twelve omitted cases are denoted by an asterisk.

Jamison v. Metz, 541 F. App'x 15 (2d Cir. 2013).
Rasanen v. Doe, 723 F.3d 325 (2d Cir. 2013).
O'Brien v. Barrows, 556 F. App'x 2 (2d Cir. 2014).
Terebesi v. Torres, 764 F.3d 217 (2d Cir. 2014).
Groman v. Township of Manalapan, 47 F.3d 628 (3d Cir. 1995).
In re City of Philadelphia Litigation, 49 F.3d 945 (3d Cir. 1995).
Abraham v. Raso, 183 F.3d 279 (3d Cir. 1999).
Bennett v. Murphy, 274 F.3d 133 (3d Cir. 2002).
Bloxson v. Borough of Wilkinsburg, 110 F. App'x 279 (3d Cir. 2004).
Carswell v. Borough of Homestead, 381 F.3d 235 (3d Cir. 2004).
Neuburger v. Thompson, 124 F. App'x 703 (3d Cir. 2005).
Curley v. Klem, 499 F.3d 199 (3d Cir. 2007).
Hill v. Nigro, 266 F. App'x 219 (3d Cir. 2008).
Lamont v. New Jersey, 637 F.3d 177 (3d Cir. 2011).
Brown v. Cwynar, 484 F. App'x 676 (3d Cir. 2012).
Patrick v. Moorman, 536 F. App'x 255 (3d Cir. 2013).
Zion v. Nassan, 556 F. App'x 103 (3d Cir. 2014).
Williams v. City of Scranton, 566 F. App'x 129 (3d Cir. 2014).
Santini v. Fuentes, 795 F.3d 410 (3d Cir. 2015).
Greenidge v. Ruffin, 927 F.2d 789 (4th Cir. 1991).
Slattery v. Rizzo, 939 F.2d 213 (4th Cir. 1991).
Drewitt v. Pratt, 999 F.2d 774 (4th Cir. 1993).
McLenagan v. Karnes, 27 F.3d 1002 (4th Cir. 1994).
Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994).
Mack v. Reddick, No. 94-6677, 1995 WL 81857 (4th Cir. Feb. 17, 1995).
Elliott v. Leavitt, 99 F.3d 640 (4th Cir. 1996).
Edmundson v. Keesler, No. 95-3125, 1996 WL 683888 (4th Cir. Nov. 27, 1996).
Isquierdo v. Frederick v. City of Sanford, No. 96-1713, 1997 WL 436933 (4th Cir. Aug. 5, 1997).
Estate of Williams v. Clemens, No. 96-2425, 1997 WL 697197 (4th Cir. Nov. 7, 1997).
Reed *ex rel.* Suthard v. Cheney, No. 97-1335, 1998 WL 25032 (4th Cir. Jan. 22, 1998).

Stout v. Bingeman, No. 99-1526, 2000 WL 345400 (4th Cir. Apr. 4, 2000).
Loney v. Miles, No. 98-2826, 2000 WL 530319 (4th Cir. May 3, 2000).
Milstead v. Kibler, 243 F.3d 157 (4th Cir. 2001).
Anderson v. Russell, 247 F.3d 125 (4th Cir. 2001).
Cox v. County of Prince William, 249 F.3d 295 (4th Cir. 2001).
Clem v. Corbeau, 284 F.3d 543 (4th Cir. 2002).
Gray-Hopkins v. Prince George's County, 309 F.3d 224 (4th Cir. 2002).
Lewis v. Boucher, 35 F. App'x 64 (4th Cir. 2002).
Clem v. Corbeau, 98 F. App'x 197 (4th Cir. 2004).*
Huggins v. Weider, 105 F. App'x 503 (4th Cir. 2004).
Waterman v. Batton, 393 F.3d 471 (4th Cir. 2005).
Waller v. City of Danville, 212 F. App'x 162 (4th Cir. 2006).
Carr v. Deeds, 453 F.3d 593 (4th Cir. 2006).
Alford v. Cumberland County, No. 06-1569, 2007 WL 2985297 (4th Cir. Oct. 15, 2007).
Abney v. Coe, 493 F.3d 412 (4th Cir. 2007).
Ingle v. Yelton, 264 F. App'x 336 (4th Cir. 2008).
Njang v. Montgomery County, 279 F. App'x 209 (4th Cir. 2008).
Pena v. Porter, 316 F. App'x 303 (4th Cir. 2009).
Culosi v. Bullock, 596 F.3d 195 (4th Cir. 2010).
Henry v. Purnell, 619 F.3d 323 (4th Cir. 2010).*
Smith v. Kendall, 369 F. App'x 437 (4th Cir. 2010).
Bellotte v. Edwards, 629 F.3d 415 (4th Cir. 2011).
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Noel v. Artson, 641 F.3d 580 (4th Cir. 2011).
Henry v. Purnell, 652 F.3d 524 (4th Cir. 2011).
Littleton v. Swonger, 502 F. App'x 271 (4th Cir. 2012).
Cooper v. Sheehan, 735 F.3d 153 (4th Cir. 2013).
Gandy v. Robey, 520 F. App'x 134 (4th Cir. 2013).
Thomas v. Holly, 533 F. App'x 208 (4th Cir. 2013).
Ayala v. Wolfe, 546 F. App'x 197 (4th Cir. 2013).
Streater v. Wilson, 565 F. App'x 208 (4th Cir. 2014).
Krein v. Price, 596 F. App'x 184 (4th Cir. 2014).
Smith v. Ray, 781 F.3d 95 (4th Cir. 2015).
Reese v. Anderson, 926 F.2d 494 (5th Cir. 1991).
Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir. 1992).

Brothers v. Klevenhagen, 28 F.3d 452 (5th Cir. 1994).
Stroik v. Ponseti, 35 F.3d 155 (5th Cir. 1994).
Bell v. Mahan, No. 94-40367, 1995 WL 71008 (5th Cir. Jan. 24, 1995).
Denstel v. City of McComb, No. 94-60445, 1995 WL 136133 (5th Cir. Mar. 8, 1995).
McCoy v. Brazoria Cnty. Sheriff's Dep't, No. 94-60791, 1995 WL 534761 (5th Cir. July 26, 1995).
Colston v. Barnhart, 130 F.3d 96 (5th Cir. 1997).
Gutierrez v. City of San Antonio, 139 F.3d 441 (5th Cir. 1998).
Colston v. Barnhart, 146 F.3d 282 (5th Cir. 1998).
Castillo v. City of Round Rock, No. 98-50163, 1999 WL 195292 (5th Cir. Mar. 15, 1999).
Bazan *ex rel.* Bazan v. Hidalgo County, 246 F.3d 481 (5th Cir. 2001).
Mace v. City of Palestine, 333 F.3d 621 (5th Cir. 2003).
Aujla v. Hinds County, No. 01-60699, 2003 WL 1098839 (5th Cir. Feb. 11, 2003).
Flores v. City of Palacios, 381 F.3d 391 (5th Cir. 2004).
Estate of Davis *ex rel.* McCully v. City of North Richland Hills, 406 F.3d 375 (5th Cir. 2005).
Bacque v. Leger, 207 F. App'x 374 (5th Cir. 2006).
Ballard v. Burton, 444 F.3d 391 (5th Cir. 2006).
Goodman v. Harris County, 239 F. App'x 869 (5th Cir. 2007).
Hathaway v. Bazany, 507 F.3d 312 (5th Cir. 2007).
Connors v. Graves, 538 F.3d 373 (5th Cir. 2008).
Hudspeth v. City of Shreveport, 270 F. App'x 332 (5th Cir. 2008).
Ramirez v. Knoulton, 542 F.3d 124 (5th Cir. 2008).
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