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**ARTICLE:** UNREASONABLE SEIZURES OF UNREASONABLE PEOPLE: DEFINING THE TOTALITY OF CIRCUMSTANCES RELEVANT TO ASSESSING THE POLICE USE OF FORCE AGAINST EMOTIONALLY DISTURBED PEOPLE

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**SUMMARY:**

... Police officers frequently confront emotionally disturbed people in the course of their duties. ... In *St. Hilaire v. City of Laconia*, the First Circuit declared that the actions of a police officer leading up to a shooting should be taken into account in assessing the reasonableness of the seizure. ... There is no analysis in the opinion, however, as to whether the officers properly handled the decedent as an emotionally disturbed person. ... *Wagner* is different from *Gutierrez*, however, in that in *Wagner* the focus seems to be on whether the officers were entitled to qualified immunity based on the facts of previously reported cases, rather than on whether they followed their training or the police practices described in police literature. ... The lower federal courts are divided on the questions of whether "pre-seizure" conduct by the officers which enhances the risk of a violent outcome can affect the reasonableness of a later use of force, and whether training and accepted police practices regarding the handling of emotionally disturbed people is relevant to the reasonableness of the police use of force. ...

**HIGHLIGHT:** A woman in an urban neighborhood telephones "911" in the early evening and reports that there is a man shouting at bystanders on the street. She describes him as shirtless and disheveled, but carrying a briefcase in one hand. The "911" operator asks if he appears to have a weapon and the caller says that she does not know.

The "911" operator forwards the information to the police dispatcher, who puts out a radio call requesting nearby units to respond to "a possibly disturbed person engaged in disorderly conduct who may be armed." Officers Abel and Baker are only a few minutes from the scene and notify the dispatcher that they will respond. Abel activates the siren and lights and drives rapidly to the reported location. The officers have no conversation concerning the call during the ride.

When the officers arrive the subject is standing alone on the street corner, muttering to himself and scratching his bare chest. The officers leap from their vehicle with their guns drawn, held pointed down at their sides, and quickly begin walking toward the subject. He says something that is incoherent, then turns and runs. The officers give chase, both shouting, "Stop!" The subject trips and falls, dropping his briefcase and spilling the contents. He stuffs everything back inside, except for a small Swiss Army knife, which he opens. The officers stop and are now twenty feet from the subject. The subject is clutching the briefcase to his chest and he shouts, "Leave me alone!" He begins to run down the street.

Two more units arrive in response to the original dispatch, and now six officers chase the subject, most of them shouting for him to stop. All officers have their guns drawn. The subject falls again and the officers form a semicircle around him. Four of the officers are shouting, "Get down on the ground," "Drop the knife," and "Don't move!" The subject continues to scream, "Why are you doing this to me," "Leave me alone," and says, "You can't have my records."

At this point all of the officers are about fifteen feet from the subject. He begins edging his way sideways down the street. The officer who is closest to him, Baker, does not move, but yells at the subject, "Stay back!" Other officers continue to yell, "Drop the knife!" As the subject takes another step, Baker draws a canister of pepper spray and sprays it toward the subject from a distance of about eight feet. The subject lunges toward Baker who fires a single shot from his weapon, striking the subject in the chest. In later statements, the eyewitnesses, including the officers, give conflicting statements about whether the subject had the knife thrust toward the officer who shot him. Baker claims that the subject was attacking him with the knife and that he was in fear of his life at the moment he fired. The subject dies from the gunshot wound. n1

**TEXT:**

[\*262] Introduction

Police officers frequently confront emotionally disturbed n2 people in the course of their duties. n3 In one study, it was reported that in medium and large [\*263] cities nationwide, police departments estimate that an average of approximately seven percent of police calls involve mentally ill people. n4 In Los Angeles, for example, an estimated ten percent of police calls may involve mentally ill people. n5 In New York City, the police department responds to approximately 18,000 calls involving emotionally disturbed persons per year. n6

A large number of people who have serious emotional problems live freely in American society. This is in part due to efforts that began in the 1960s to deinstitutionalize people suffering from mental disabilities. n7 The concept was to transfer people from mental hospitals to less restrictive community-based settings. n8 At the same time, court decisions imposed stricter criteria for involuntary civil commitments and afforded greater protection to patients who wished to refuse treatment. n9 In 1955, with a population of 164 million people, the United States had 558,239 people in state and county mental hospitals. By 1996, with a population of 265 million, there were only 61,722 people so [\*264] hospitalized. n10 Those in need of mental health services often do not receive them, because adequate community-based housing and services were not developed to handle the massive numbers of people released from institutions. n11 As a result, it is not surprising that police officers often have to confront people whose mental disabilities lead them to create disturbances in their communities. n12

Most officers will encounter a subject somewhat like the person described in the scenario at the beginning of this Article many times in their careers. n13 These people may be committing crimes - occasionally serious but typically minor in degree - or may be engaged in innocent, although perhaps unsettling, behavior. The police may attempt to take such people into custody, either by arresting them on criminal charges or by seizing them for the purpose of taking them to a hospital or mental health facility.

The majority of these incidents are resolved without serious injuries. n14 Unfortunately, in some of these situations, police officers shoot and seriously [\*265] injure or kill the disturbed person. Many of these occurrences have resulted in claims under the federal civil rights statute, 42 U.S.C. 1983. n15 In the bulk of the cases, plaintiffs claim that the

shooting constituted an unreasonable seizure of the person shot, in violation of the Fourth Amendment to the United States Constitution. n16

In general, the law provides that the constitutional reasonableness of Fourth Amendment seizures of persons is determined against the backdrop of the "totality of the circumstances" attendant to the incident in question. n17 With regard to claims that forcible seizures of emotionally disturbed persons are constitutionally unreasonable, courts have wrestled with the issue of which facts and circumstances must be taken into account. Some courts have taken a narrow view and judged the reasonableness of an officer's action only in terms of the circumstances present at the moment the officer employed deadly force. Other courts have suggested that antecedent facts and circumstances that led up to a shooting should be considered in determining the reasonableness of an officer's use of force. Many of the decisions addressing these issues have been vague and imprecise as to which factors should be considered and at what point prior to a shooting an officer's conduct will be examined for reasonableness. Few courts have taken into serious account the training available to officers, or the training an officer has actually received, when describing the facts and circumstances that determine the reasonableness of an officer's use of force.

[\*266] As a result of this inconsistent doctrine, judges and juries, without giving adequate consideration to all relevant factors, have found police shootings of emotionally disturbed people to be reasonable. n18 Moreover, although a trier of fact might find a shooting to be unreasonable under Fourth Amendment standards, a court may still find that the officer was reasonably mistaken about the amount or type of force the law permitted under the circumstances and grant him qualified immunity from liability and from suit. n19

Sophisticated training on the issues involved in confronting and taking into custody emotionally disturbed people is available to police agencies. n20 It is possible to educate officers about the variety of emotional states that disturbed people may experience and to train them in strategies that make the safe apprehension of such persons more likely. Sound training minimizes the need for split-second decisions. Untrained officers, or those who forget or disregard their training, are far more likely to exacerbate the tensions inherent in confrontations with emotionally disturbed people and are thus more likely to escalate the risk of a violent outcome. At present, the case law provides no clear analytical framework specifying how police training regarding emotionally disturbed people should be taken into account in determining the constitutionality of the use of force against them.

Part I of this article provides an overview of the U.S. Supreme Court cases that have developed the "totality of the circumstances" test of reasonableness, which sets the constitutional standard for seizures of persons by police officers. The first section also discusses general applications of the "totality of the circumstances" standard by lower federal courts. It exposes the conflicts that have emerged among the federal circuits in decisions of the last decade. By identifying the factors that are overly emphasized and the factors that are relatively ignored in such cases, this section highlights the widespread failure of lower courts to consider the "pre-seizure" conduct of officers and the training provided to police officers as elements in their assessment of the "totality of the circumstances."

[\*267] Part II provides an account of the broad range of training programs and materials available for police officers who are likely to come into contact with disturbed individuals. Part III examines excessive force cases involving emotionally disturbed persons. It argues that courts that overlook the reality of police training have had the effect of tilting the "totality" standard in the direction of finding police actions to be reasonable, even when police conduct has contradicted the principles and tactics on which officers are trained. This Part also discusses how the abundance of training that can establish preparedness and mastery of techniques effective for meeting such situations belies the mythology of a need for "split-second" responses by police officers in emergency situations.

The Article concludes that the constitutional reasonableness of the use of force by police officers against emotionally disturbed people should be judged against the true "totality of the circumstances" that led to the use of force. As part of the "totality of the circumstances," courts should consider the emotional state of the subject, the training available to, and actually provided to, the officers involved, the norms of behavior established by accepted police practices, and the choices made by officers leading up to the use of force that may have influenced the necessity

of resolving an incident through force.

## I. The Development and Application of the "Totality of the Circumstances" Standard

### A. Setting the Stage: Supreme Court Cases

In 1983 cases decided since 1989, the Supreme Court has used constitutional standards to define when force employed by a police officer in taking a person into custody may be deemed excessive. n21 These Supreme Court decisions established a "totality of the circumstances" standard against which police use of force must be judged. The Supreme Court, [\*268] however, has provided an inexact definition of which circumstances must be taken into account under this standard, creating uncertainty in the lower federal courts. As a result, the "totality" test applied by lower federal courts has been inadequate in deterring police misconduct and in providing remedies for mentally and emotionally disturbed individuals injured during encounters with police.

The Supreme Court held in *Graham v. Connor* that the use of force during an arrest, an investigatory stop, or any other "seizure" of a person at liberty is to be judged by Fourth Amendment standards. n22 A victim of excessive force has a cause of action against local and state law enforcement officers under 42 U.S.C. 1983. n23 *Graham* broadened the application of the Court's earlier decision in *Tennessee v. Garner*, n24 where the Court held that the apprehension of a person by the use of deadly force constitutes a seizure of that person subject to the reasonableness requirement of the Fourth Amendment. n25

In *Garner*, the Court held that its prior cases compelled the conclusion that it was essential to examine the reasonableness of the manner in which a search or seizure was conducted. n26 The Court concluded that to determine the constitutionality of a seizure "we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the [\*269] importance of the governmental interests alleged to justify the intrusion." n27 The *Garner* Court explicitly concluded that in each of its prior cases, including those where seizures were upheld, "the question was whether the totality of the circumstances justified a particular sort of search or seizure." n28 The Supreme Court incorporated the "totality of the circumstances" test into its criteria for assessing the uses of non-deadly force in *Graham*. n29

The Fourth Amendment standard applies only to incidents in which a person is "seized." In *Brower v. County of Inyo*, the Supreme Court held that a "seizure" occurs only where a subject's freedom of movement is curtailed by means that police officers have employed intentionally for that purpose. n30 In *California v. Hodari D.*, n31 the Court further expounded on this principle, holding that a mere police pursuit is not a Fourth Amendment seizure, unless the police use physical force in effecting a stop, or the subject submits to a show of police authority. n32

In *Graham* the Court noted that there is no precise definition available for what constitutes "reasonable" force. The Court declared that determining whether the force used in a given instance was "reasonable" under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. This balancing requires "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the subject 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." n33 Reasonableness must be judged from the perspective of a reasonable police officer on the scene, not on the basis of [\*270] hindsight. The Court emphasized that the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." n34 Thus, the Court suggested that the "totality of the circumstances" would include the reality of a police officer under extreme stress and pressure.

The test for reasonableness in Fourth Amendment seizures is an objective one. In *Graham*, the Court explicitly rejected any relevance of the officer's underlying subjective attitude toward the individual against whom force is

employed: "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." n35

### 1. Qualified Immunity Defense

Recently, in *Saucier v. Katz*, the Court held that a qualified immunity defense is available to claims of excessive force. n36 Under this defense, a public official is entitled to qualified immunity from liability for a civil rights violation where a reasonable official would not have known that his specific conduct in the case in question violated a clearly established constitutional right of the plaintiff. n37 The Court rejected the argument that the qualified immunity inquiry was identical to the inquiry on the merits in an excessive force claim. n38 The decision reaffirmed that qualified immunity is an entitlement not to stand trial or to face the other burdens of litigation, and that the doctrine permits judges to [\*271] resolve excessive force claims on summary judgment where qualified immunity is appropriate.

*Saucier* makes qualified immunity appropriate where an officer mistakenly, but reasonably, concluded that the law permitted a particular amount of force in given circumstances. In *Saucier*, the Court employed the "totality of the circumstances" analysis to determine whether the force used by an officer in removing a demonstrator from a speech given by the Vice President was reasonable. n39 The Court reasoned, however, that *Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. n40 The Court rejected plaintiff's attempt to make a distinction between excessive force issues and more difficult probable cause search and arrest problems, holding that the rationale of *Anderson v. Creighton* was fully applicable to excessive force claims. The Court concluded that qualified immunity operates "to protect officers from the sometimes "hazy border between excessive and acceptable force." n41

While an extensive review of qualified immunity is beyond the scope of this Article, a brief discussion of some examples of its use is helpful to an understanding of the many cases cited herein that were resolved on qualified immunity grounds. A good illustration of how qualified immunity operates to protect police officers from liability in excessive force cases is provided by the pre-*Saucier* decision of the Court of Appeals for the First Circuit in *Roy v. City of Lewiston*. n42 Plaintiff had been shot by police while intoxicated and armed with knives. At trial, plaintiff called an expert to testify that the officers had mishandled the incident. The court concluded that although a jury might have found that the officer could have done a better job, the officer was entitled to qualified immunity:

Whether substantive liability or qualified immunity is at issue, the Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protections in close cases... . And in close cases, a jury does not automatically get to second-guess these life and death decisions, even though the plaintiff has an expert and a plausible claim that the situation could better have been handled differently. n43

[\*272] Qualified immunity makes it difficult for plaintiffs to recover damages even from officers who demonstrate extreme insensitivity to emotional disabilities. In *Kerman v. City of New York*, n44 officers came to plaintiff's apartment following an anonymous "911" call alleging that there was a mentally ill man off his medication at the apartment, that he was acting crazy, and that he possibly had a gun. n45 The officers forcefully entered plaintiff's apartment and handcuffed him while naked (plaintiff had just emerged from the shower). During the incident, the officers never allowed plaintiff to dress, verbally disparaged him, and treated him roughly. n46 At no point in the course of the arrest did the officers do anything in response to information that the plaintiff was emotionally disturbed, although they did take him to a psychiatric hospital after removing him from his apartment. n47

Although the court found that both the entry into the apartment and the handcuffing and detention of the plaintiff violated his Fourth Amendment rights, it held that the officers were entitled to qualified immunity on these claims because, at the time, the law was not clear as to whether they could rely on an anonymous "911" call alone to handcuff and detain the plaintiff. n48 With respect to plaintiff's claim that the officers used excessive force after he was

handcuffed, the Court of Appeals for the Second Circuit affirmed the decision of the district court granting summary judgment to all officers except the sergeant. The district judge had also granted summary judgment in favor of the sergeant, despite a jury verdict of \$ 75,000 in plaintiff's favor on this claim. n49 The court somewhat grudgingly reversed this decision, finding that disputes of fact between the parties precluded summary judgment in favor of the officer. n50 [\*273] The only discussion in the decision of the failure of the police to respond appropriately to a mental health call is in connection with the reversal of the district court's decision granting summary judgment in favor of the sergeant for taking plaintiff to a psychiatric hospital in a restraint bag. n51 The court ultimately remanded for trial the plaintiff's claims against the sergeant for excessive force, the psychiatric hospitalization, and retaliation against the plaintiff for criticizing the officers for violating his First Amendment rights. The other officers were granted qualified immunity on all claims. n52

Where an officer's conduct clearly violates established Fourth Amendment standards he is not entitled to qualified immunity. *Clem v. Corbeau* illustrated this principle. n53 In *Clem*, two officers had responded to a call for assistance from a man's wife. Despite evidence that the man at no time threatened the officers, both officers pepper-sprayed him and one shot him. n54 The court held that the latter officer was not entitled to qualified immunity for shooting three times "a mentally disabled, confused older man, obviously unarmed, who was stumbling toward the bathroom in his own house with pepper spray in his eyes, unable to threaten anyone." n55

The Supreme Court has not yet decided a case involving the reasonableness of a police seizure of an emotionally disturbed person. Developments in the lower federal courts, however, evidence the inadequacy of the current standard, particularly in cases involving vulnerable mentally disturbed individuals. n56

#### B. Development of the Doctrine in the Lower Federal Courts

The "totality of the circumstances" standard, articulated in *Garner v. Tennessee* and *Graham v. Connor*, has been variously interpreted and applied by the lower federal courts. The courts have generally evidenced a narrowness of perspective in applying the "totality of the circumstances," focusing on the emergency confronting the officer and the pressures he may have experienced. This is demonstrated in cases giving scant weight to the argument that officers [\*274] should have employed means less drastic than those which led to the plaintiff's injuries.

Although the availability of means other than deadly force is relevant to whether the decision to use deadly force was reasonable, the lower federal courts have generally held that the balancing test does not require that officers employ the least intrusive means to attempt a seizure of a person. As long as an officer's actions fall within a range of reasonable means, his use of force will be held constitutional. n57 Cases reaching this conclusion demonstrate that the courts are willing to afford officers an allowance to make choices among tactics, given their perception that the officers are acting in tense situations. This approach, however, overlooks the fact that a tense situation may be in part the officer's making.

There seems to be no controversy that the actions of a plaintiff leading up to a violent outcome are part of the "totality of the circumstances" that should be considered in assessing the police use of force against him. n58 The actions of the victim of a police shooting leading up to the shooting are presumably relevant because they set the stage for later decisions by an officer with respect to the use of force.

There is controversy, however, about whether the actions of police officers in approaching a person increase the risk that violence will erupt or that deadly force will be used. n59 The notion that an officer's behavior leading up to a [\*275] shooting may have set the stage for the use of force is frequently disregarded or minimized by courts. While some circuits have held that officers' actions leading up to a violent incident should be taken into account in assessing the reasonableness of the officers' use of force, others have taken a narrower view, holding that police actions prior to a shooting are not relevant in assessing the reasonableness of the force used. Two circuits have suggested that incidents should be "segmented," with the reviewing court separately determining the reasonableness of police officers' actions in each segment. In addition, there are decisions within circuits that conflict with respect to what actions should properly

be taken into account in assessing the reasonableness of the use of force.

#### 1. Circuits Recognizing that Officers' Actions Prior to the Instant a Seizure Is Accomplished Must Be Considered in Assessing its Reasonableness

In *Abraham v. Raso*, the Court of Appeals for the Third Circuit established its clear position that the "totality of the circumstances" standard requires consideration of events preceding the instant a seizure takes place. n60 An officer working off-duty as a security guard in a mall shot and killed plaintiff's decedent while he was trying to flee from a department store where he had stolen clothes. n61 The officer claimed that the decedent was a danger because of the way he was driving, and that he had attempted to run the officer over. n62 The court concluded that it was required to take into account events prior to the actual shooting in assessing the reasonableness of the seizure. It rejected cases from other circuits to the contrary:

We do not see how these cases can reconcile the Supreme Court's rule requiring examination of the "totality of the circumstances" with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished. "Totality" is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force. n63

The court reasoned that its conclusion was compelled because there is no principled way of drawing a line between circumstances that must be taken [\*276] into account and supposed pre-seizure events that would not be considered in assessing reasonableness. The court acknowledged that not all preceding events would be of equal importance and that some may not be of any importance. It would measure the consequence of these events, however, on "ordinary ideas of causation, not doctrine about when the seizure occurred." n64 This standard seems both doctrinally correct and workable. It has not, however, been adopted by most other lower federal courts.

In *St. Hilaire v. City of Laconia*, the First Circuit declared that the actions of a police officer leading up to a shooting should be taken into account in assessing the reasonableness of the seizure. n65 The court rejected defendants' analysis that "the police officers' actions need be examined for 'reasonableness' under the Fourth Amendment only at the moment of the shooting." n66 At the same time, the *St. Hilaire* court did not consider the plaintiff to be making "the broad contention that the police have a duty to reduce the risk of violence." n67 It treated plaintiff's argument as the narrower claim that, in executing a search warrant, the police have a duty to identify themselves as police and state their purpose. n68 Given the manner in which the court interpreted the plaintiff's claim in *St. Hilaire*, the court limited its review of the police actions to those which occurred immediately before the shooting.

[\*277] In *Napier v. Town of Windham*, the First Circuit reviewed similar issues and reiterated *St. Hilaire*'s rejection of a broad proposition that officers have a duty to avoid creating situations that increase the risk of the use of deadly force. n69 The court rejected the argument that the officers' pre-confrontation actions should deprive their later conduct in response to the plaintiff's actions of its reasonableness. n70 The court did indicate, however, that "the pre-confrontation actions themselves could theoretically serve as the unreasonable conduct on which a 1983 claim is based," and that "the police officers' actions leading up to the shooting must be examined for their reasonableness." n71 Neither *St. Hilaire* nor *Napier* presented a series of officers' actions that, taken cumulatively, might have been held unreasonable. Nor did either case clearly delineate the scope of the actions leading up to a shooting that must be examined for reasonableness.

Ninth Circuit decisions concerning the relevance of events leading up to a shooting have evolved over the last several years. n72 In *Billington v. Smith*, n73 the court reviewed the course of its cases beginning in 1994 n74 and concluded [\*278] that "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." n75 At the same time, the court held that the negligent selection of bad tactics would not render excessive an otherwise

justifiable use of force. n76

Tenth Circuit cases have demonstrated considerable inconsistency over the past several years. n77 The circuit does recognize that in some circumstances an officer's conduct that creates a need to use deadly force may be relevant in assessing the reasonableness of the force. The court recognizes that this approach is simply a specific application of the "totality of the circumstances" standard of Garner. n78 By a recent relevant decision, however, the court has limited the extent to which an officer's actions leading up to a shooting may be considered to those which were "reckless" and "immediately connected" to a shooting:

[\*279]

We emphasize, however, that, in order to constitute excessive force, the conduct arguably creating the need for force must be immediately connected with the seizure and must rise to the level of recklessness, rather than negligence. The primary focus of our inquiry, therefore, remains on whether the officer was in danger at the exact moment of the threat of force. n79

As this review makes clear, even in the four circuits recognizing the relevance of "pre-seizure" conduct to the assessment of the reasonableness of police use of force, the recognition has been uncertain and less than completely clear.

## 2. Circuits Limiting the Factors Relevant to Reasonableness to Those Which Exist at the Moment a Seizure Is Made

The Second, Fourth, Fifth, Eighth, and Eleventh Circuits, in their assessment of the reasonableness of the police use of force, have generally declined to consider as relevant the pre-seizure conduct of officers. Their decisions, however, are not consistent in maintaining this position.

The Second Circuit, in *Salim v. Proulx*, decisively rejected the argument that an officer was liable for a shooting because he had created the situation in which the use of deadly force became necessary. n80 Plaintiff argued that a series of violations of proper police procedure by the officer had caused the need for violent action. The court rejected this argument, concluding:

[The officer's] actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force. The reasonableness inquiry depends only 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. n81

[\*280] The court cited decisions from other circuits as authority for this proposition, but did not discuss the "totality of the circumstances" standard. n82

In *Greenidge v. Ruffin*, n83 the Fourth Circuit read *Graham* to limit the circumstances that must be taken into account in determining reasonableness to those existing at the time of the seizure. The court reasoned that the Supreme Court's emphasis on the nature of the "split-second" judgments that officers must make compelled this conclusion. The court also quoted language from *Graham* indicating that it was the "reasonableness at the moment" of the seizure that was to be judged. n84 The Eighth Circuit in *Schulz v. Long* also relied on this language from *Graham* in holding that evidence that officers created a need to use force by their actions prior to the moment of a seizure was irrelevant. n85

The emphasis of the Fourth and Eighth Circuits on the "at the moment" language appears misplaced. It is obvious from the context that the Supreme Court's reference in *Graham* was intended to distinguish between judging an officer's

actions from his perspective at the time of the incident and judging them later on the basis of "20-20 hindsight." n86 At no point in *Graham* did the Court have occasion to discuss an officer's conduct leading up to a use of force.

In the later cases of *Elliott v. Leavitt* n87 and *Drewitt v. Pratt*, n88 the Fourth Circuit followed *Greenidge* in limiting the relevant facts to those [\*281] existing at the moment force was used. In *Rowland v. Perry*, n89 however, the Fourth Circuit took a more expansive view of what constitutes the "totality of the circumstances" in an excessive force case. In arguing that his use of force against plaintiff was justified, the officer attempted to segment the event into stages. While acknowledging that each distinct act of force was reasonable when viewed in this way, the court nonetheless rejected this approach:

This approach seems to us to miss the forest for the trees. The better way to assess the objective reasonableness of force is to view it in full context, with an eye toward the proportionality of the force in light of all the circumstances. Artificial divisions in the sequence of events do not aid a court's evaluation of objective reasonableness. n90

The court reasoned that this "full context" approach was required by the "totality of the circumstances" standard articulated in *Garner* and *Graham*.

On the one hand, the factors considered by the court in *Rowland* were merely those denominated as relevant in *Graham*: "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." n91 On the other hand, in rejecting the officer's segmented view of the sequence of events, the court refused to judge the force employed by the officer merely at the instant it was applied. The court declined to accept the officer's invitation to focus on the plaintiff's resistance, which would "separate this fact from the rest of the story." n92 Thus, although the Fourth [\*282] Circuit generally is a court that has found an officer's actions leading up to the use of force to be irrelevant to reasonableness, in this case it seems to have experienced the difficulty identified by the Third Circuit in *Abraham v. Raso*, that "courts are left without any principled way of explaining when 'pre-seizure' events start and, consequently, will not have any defensible justification for why conduct prior to that chosen moment should be excluded." n93

The Fifth Circuit rejected arguments that police officers could be held liable for manufacturing the circumstances that gave rise to a fatal shooting in *Freire v. City of Arlington* n94 and *Young v. City of Killeen*. n95 In both cases the court treated the failure to follow proper police procedures as negligent at most, and thus an insufficient basis for a constitutional violation. In neither case did the court discuss whether the officer's arguably unreasonable approach to the decedent should be considered as part of the "totality of the circumstances." n96

In *Menuel v. City of Atlanta*, n97 the Eleventh Circuit evaluated the reasonableness of the officers' behavior only from the point at which decedent began firing at them. The court relied on the Seventh Circuit decision in *Plakas v. Drinski*, n98 with respect to "the shortness of the legally relevant time period." n99

The decisions of the Second, Fourth, Fifth, Eighth, and Eleventh Circuits are thus in conflict with those of the First, Third, Ninth, and Tenth Circuits with respect to whether and to what extent pre-seizure conduct must be taken into account in assessing the reasonableness of police use of force. The [\*283] narrow view of which conduct is relevant results from an overemphasis on "split-second" decision-making, rather than on the broader "totality of the circumstances" standard.

### 3. Circuits Dividing a Seizure into Different "Segments"

In their analysis of the extent to which pre-seizure conduct is relevant in assessing the reasonableness of police use of force, the Sixth and Seventh Circuits have taken an approach somewhat distinct from those already discussed. These courts divide an incident into discrete "segments" and analyze whether the police conduct at each separate stage of an

incident was reasonable.

The Seventh Circuit in *Plakas v. Drinski* n100 looked at each separate stage of the event to determine if the police activity at each stage was reasonable. n101 The court determined that conduct by the police at an earlier stage, however, would not render their later conduct unreasonable if the later conduct was reasonable when looked at on its own. The court concluded: "We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct." n102 The court reasoned as follows:

Our historical emphasis on the shortness of the legally relevant time period is not accidental. The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases [\*284] begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.

So we carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage. n103

*Plakas* was not strictly followed, however, by the Seventh Circuit in *Deering v. Reich*. n104 The court in *Deering* analyzed the case in terms of the "totality of the circumstances" standard, which had never been referred to in *Plakas*. n105 The *Deering* court concluded that "the totality of the circumstances cannot be limited to the precise moment when [the officer] discharged his weapon." n106 After reviewing its prior cases, the court articulated a fairly expansive definition of what should be included in its analysis:

What [the officer] knew at the time - about [the subject], his crime, and the warrant, and his perception of the danger he and the other deputies were in - was relevant to the evaluation of the reasonableness of his conduct. In addition, the balancing required by *Garner* requires a look at the countervailing governmental interest in serving the warrant on [the subject], which would include the time and manner in which it was served. Finally, of course, all of the events that occurred around the time of the shooting are relevant. In other words, the totality of the circumstances is what must be evaluated. n107

[\*285] Other Seventh Circuit cases also have considered facts outside the narrow time frame of the moments just immediately prior to a shooting. n108

Sixth Circuit cases also have attempted to resolve issues under the "totality of the circumstances" test by segmenting incidents into various components and judging each segment separately. In *Dickerson v. McClellan*, n109 plaintiffs argued that officers should be held liable for creating the need to use excessive force by an unreasonable and unannounced entry. n110 The court rejected the argument, holding that the unannounced entry was a separate claim from the shooting, and that it would limit the scope of its review of the excessive force claim to the moments preceding the shooting. n111 The court thus concluded that "segmenting" the incident was appropriate. n112

It is worth examining the later Sixth Circuit case of *Claybrook v. Birchwell*, n113 however, to demonstrate that "segmenting" does not lead to a bright line analysis of what factors are relevant in assessing the reasonableness of the use of force. In *Claybrook*, the decedent was shot and killed by undercover officers who came upon him while he was standing guard with a shotgun as his daughter took deposits from a store where she worked to her car. n114 The officers

drove into the parking lot of the store and there was an exchange of gunfire. The decedent then went behind the building where he concealed himself behind a concrete structure. When he pointed his shotgun at [\*286] the officers and failed to drop it upon their command, the officers shot him. n115

There was a dispute between the parties about how many segments there were to the incident, and which facts were relevant to the reasonableness of the use of force by the officers. The court determined that there were three segments: first, the officers' approach and confrontation of the decedent; second, the initial firefight in the parking lot; and third, the shots fired after the decedent moved to a position behind the concrete steps. n116 The court agreed with plaintiffs' assertion that the decision of the officers to make the initial approach in the manner they did was in clear contravention of their department's procedures for undercover officers. The court held, however, that any unreasonableness of these actions would not be weighed in consideration of the use of excessive force, citing Dickerson. n117 Defendants also argued that the firefight in the parking lot, and the crucial question of who fired the first shot in that fight, were also not relevant to their use of force in the third segment. The court rejected this argument, however, concluding that plaintiffs had challenged all use of excessive force by the officers, and that the question of whether the force used in the second segment was reasonable could not be ignored. n118

The court concluded that defendants' argument, that Dickerson and other cases compelled the conclusion that the court need only look at what occurred in the moments immediately before the fatal shots were fired, construed the court's earlier precedent too narrowly. The opinion seems to recognize that some earlier events might be relevant, at least when the officers' actions at the earlier time also constituted the use of deadly force:

Regardless of whether the shots fired at Royal Claybrook were warranted after he had fled to a position behind the concrete steps and aimed his gun at the officers, this initial firefight also constitutes deadly force used against Claybrook by the officers. Therefore, we must analyze its reasonableness to determine whether this use of force was excessive under the circumstances. n119

The opinion does not resolve, however, the question of whether the officers' actions in the firefight in the parking lot - specifically the question of whether the officers fired first - would be relevant to whether the decedent's death (which resulted from shots fired in the third segment) was caused by excessive force.

[\*287] Claybrook demonstrates significant weaknesses in the segmenting approach. According to the court, "the entire incident transpired within only one or two minutes." n120 Drawing temporal or other lines in the middle of an ongoing gun battle seems entirely unprincipled and arbitrary. It ignores the fact that all participants were probably operating at a peak of adrenaline, frightened, and confused. Although the fact that the officers fired first in the parking lot, if proven, may not compel the conclusion that fatally shooting the subject several seconds later as he was threatening them with his weapon was unreasonable, it is hard to justify an argument that the officers' first shot has no relevance to the issue.

The cases discussed above show inconsistencies in the lower federal courts' interpretations of what constitutes the "totality of the circumstances." The Third Circuit's decision in *Abraham v. Raso* n121 provides the clearest rule, and the one giving the word "totality" in the "totality of the circumstances" standard its truest meaning. The Third Circuit would determine reasonableness based on all factors "bearing on the officer's use of force," n122 and would measure the significance of individual factors based on "ordinary ideas of causation, not doctrine about when the seizure occurred." n123 As the above discussion demonstrates, the efforts of other courts to draw fine lines around the moment of a seizure, and to exclude as irrelevant other factors, break down in the absence of any principled justification for where the lines ought to be drawn. Dividing a single incident into a series of "segments," or limiting relevant factors to those "immediately" connected with a seizure, lacks the doctrinal justification that the causation standard supplies. Although the courts routinely intone the standard of the "totality of the circumstances," few have attempted to develop a principled meaning for the concept. An important consequence of the lack of clarity about the content of the standard is

that it has led to courts paying inadequate attention to police officers' training in assessing claims of excessive force. This inadequacy is particularly significant in assessments of police contacts with emotionally disturbed persons.

### C. What's Missing from the Totality of the Circumstances: Overlooking Police Training and Accepted Police Practices

The imprecise definition of "totality of the circumstances" has left courts uncertain as to what role training or accepted police practices should play [\*288] in judging an officer's decision-making in the field. In determining the constitutionality of police actions, an officer's training is routinely taken into account as part of the "totality of the circumstances" test. As the Supreme Court wrote in *United States v. Arvizu*:

When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing... This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person." n124

In *Illinois v. Gates*, the Supreme Court held that whether a tip from an informant is reliable enough to establish probable cause must be judged under the "totality of the circumstances" and that "the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." n125 Likewise, circuit courts have held that it is appropriate for an officer to take into account his training to determine whether there was a relationship between a defendant and a bag of drugs found along the road; n126 that a "magistrate is entitled to rely upon the law enforcement officer's training and experience when evaluating the information related to him in the determination of probable cause;" n127 that the circumstances surrounding a stop "are to be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training;" n128 that an officer's training and experience may establish that "lighting a cigarette is usually done to mask an incriminating odor" and thus provide probable cause [\*289] for searching a vehicle for an open container; n129 and that generally "whether the police have probable cause for an arrest is determined by viewing the totality of the circumstances from the perspective of a prudent police officer and in light of the police officer's training and experience." n130

In civil cases, however, an officer's failure to follow procedures consistent with training is often passed off as mere negligence, an insufficient basis for a civil rights claim. n131 Frequently, plaintiffs present training materials through the vehicle of expert testimony. Courts may discount such evidence on the ground that the trier of fact is not obliged to accept an expert witness's opinion. n132 Yet there is no reason why the courts' reliance on officer training should be any different in civil and criminal cases.

Where officers have knowledge of information that is relevant to their use of force, such knowledge should be taken into account in assessing the reasonableness of their actions. That is, the officers' knowledge of relevant facts is part of the "totality of the circumstances" that must be taken into account in assessing the constitutional reasonableness of the use of force. An officer's training, then, would be manifestly relevant to the reasonableness of his use of force. What an officer is taught in training should be viewed as part of the equipment he takes with him into the field.

An understanding of the significance of omitting careful consideration of police training from the evaluation of reasonableness in excessive force cases requires some appreciation of exactly what police officers are and can be taught. It will be useful to examine training options before further considering what the impact of overlooking that training has been in cases involving destructive encounters between police and mentally disturbed individuals. Particular attention will be given to police training relating to encounters with emotionally disturbed people.

[\*290]

## II. Training Police Officers for Encounters with Emotionally Disturbed Persons

A substantial number of training materials on interacting with emotionally disturbed people have been available to police departments and officers for several decades. n133 These materials are produced and/or made available by government agencies, n134 police training agencies, n135 police professional associations and publications, n136 in-house police department training officers, n137 and others. n138

Training materials present officers with the knowledge necessary to recognize people suffering from serious emotional or mental problems. n139 Officers are encouraged to look for signs that an individual might be mentally ill. n140 A particularly detailed set of materials for training officers who are [\*291] responsible for instructing police officers is found in Gerard R. Murphy's curriculum guide. n141 This guide instructs police officers not only on the common types of mental illness, but also on current mental health treatment philosophies and practices, as well as the phenomenon of deinstitutionalization. n142 The same materials provide training for identifying officers' feelings and beliefs about mentally disabled persons and increasing officers' empathy for mentally disabled persons. n143

Modern training materials are remarkably consistent in the approach they recommend to officers who respond to calls involving emotionally disturbed persons. The training is designed to protect the safety of the public, minimize the risks to the safety of the responding officer, and deal with the disturbed person in a humane manner, recognizing that he is ill. n144 One such strategy, described in a manual created for police officers in Stamford, Connecticut, emphasizes the following: "(1) safety, (2) non-threatening approach, (3) control of the scene, (4) defusing the situation, and (5) problem solving." n145

A specific goal of training is to minimize the risk of violent outcomes when officers confront emotionally disturbed people. Officers are encouraged to approach subjects in a friendly and open manner. n146 Training materials specifically warn officers to arrive at a scene quietly, avoiding loud noise from sirens, as additional commotion may disturb a subject even more. n147 Excitement and confusion are to be avoided. n148

Training materials indicate that, whenever time permits, officers should communicate with one another and prepare a plan prior to engaging an [\*292] emotionally disturbed person. n149 Officers are encouraged not to proceed in haste, but to take the time to assess the overall situation and to proceed slowly as the event develops. n150 Officers can be trained in specific techniques to defuse a situation in which there is a threat of violence. n151

Training materials direct officers to employ the "contact and cover" method when approaching emotionally disturbed people, as well as in many other situations. n152 This method is so-named due to the fact that one officer is designated as the "contact" officer and has the primary contact with the subject. In the case of emotionally disturbed subjects, this officer would do all the speaking to the person. Other officers who are present should act as "cover" officers. They should stand at a distance and monitor the activity of the contact officer and the subject. They should not become directly involved with the subject unless the safety of the contact officer or others requires it. n153 Officers are advised not to "rush the person or crowd his personal space." n154

In many of the reported cases encounters became violent after a subject refused to comply with police directions. In fact, training materials advise officers to be aware that the response of a person of diminished capacity to their orders may be delayed or inappropriate because of his condition. n155 In response, officers should attempt to use a calm, quiet voice and a firm attitude. n156 Jim Ruiz, from the University of Southwestern Louisiana, concludes:

The prime catalyst that engenders confrontations between the uniformed law enforcement officers and the mentally disturbed is the reluctance of the mentally disturbed to comply with the lawful bidding of the officers, and the lack of

understanding and empathy [\*293] on the part of uniformed law enforcement officers... . [The fear or fright experienced by the mentally disturbed] can easily spawn aggressive behavior in the mentally disturbed, and should the uniformed officers activate additional tension, violent behavior can easily result. n157

Gary W. Corder makes the same point:

Because the behavior of persons with mental illness is sometimes unpredictable and threatening, it often stimulates forceful responses from officers. Furthermore, initial actions by officers, in the form of verbal commands, may be particularly ineffective with persons with mental illness, thus making escalated police responses even more likely. n158

It is important that police officers anticipate that emotionally disturbed people may verbally abuse them and that officers do not respond to such abuse in a confrontational manner. n159 Training materials continually stress that officers should remain calm, exercise restraint, reassure the subject, avoid excitement, and attempt to avoid gathering crowds. n160 If a crowd has gathered, the officer should try to disperse it. n161

Many of the deficiencies in police responses to mentally disturbed people result from officers treating such calls as criminal incidents rather than mental health emergencies. n162 Techniques of eliciting compliance on the part of subjects that may work with criminal suspects are not likely to work with emotionally disturbed persons. For this reason officers are trained not to abuse or threaten emotionally disturbed people:

Whatever the reason, it is hard for police officers to keep from using their usual methods of controlling violence. However, if an excited [\*294] person is already scared, tough methods usually make matters worse by making him still more frightened, so that he has an even greater need to figure out some way to defend himself... . To sum up this point: Never threaten a disturbed or violent person. Do not strike him, do not call him names. Never try to bully him. These things do not work. They only make your job harder, longer, and more dangerous. n163

In *Deorle v. Rutherford*, n164 the Ninth Circuit recognized that the methods for dealing with emotionally disturbed people must be different from those used in dealing with other criminal suspects:

The problems posed by, and thus the tactics to be employed against, an unarmed emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end. n165

Some of the failures of officers to respond with means specifically appropriate to emotionally disturbed people may be due to the information that officers receive from police dispatchers, which may not sufficiently inform the officer of the nature of the problem. Jim Ruiz has concluded:

Empirically, many jurisdictions include mental patient calls for service in their codes of violations of law, violence, and disturbances. Furthermore, the language equivalent of these codes displays a distinct lack of imparting the true nature of the call, which is that of a mentally ill person ... . A review of all of these signal codes indicate [sic] that these codes, because of the way in which the verbal equivalent is stated and their proximity and incorporation with codes involving

criminal behavior, are communicating the wrong message to the responding uniformed officers in the field. n166

There always is a possibility that emotionally disturbed persons may be armed. Substantial training materials are available to prepare officers for [\*295] encounters with people with knives, including emotionally disturbed people. n167 These materials consistently recommend that officers must maintain a distance of twenty-one feet from the armed person in order to have enough time to employ a firearm against an attack. n168 Regardless of the presence of knives, training materials encourage officers to avoid invading the personal space of the subject unless there are enough officers present to secure him if a struggle develops. n169

It is important to stress that these resources have been available for quite some time. The International Association of Chiefs of Police recommended the following response to emotionally disturbed persons as early as 1979:

At most times, mentally ill persons are not particularly dangerous; however, the police most frequently are in contact with disturbed persons when there is potential for violence. Certain specific measures for dealing with persons who act abnormally are therefore recommended.

Emergency lights, sirens, a gathering crowd and threatening manner by the responding officers may trigger a violent reaction from the disturbed person.

The officer should use a calm, quiet, non-threatening approach toward the individual. When first arriving on the scene, take time to assess the situation. If the disturbed person is not engaged in destructive behavior avoid physical contact.

Move slowly and do not excite the disturbed person. His excitement generally lasts only a short time and when given the time he will calm down. Reassure him that he will be taken care of and that the police are there to help.

Whenever possible, more than one officer should be assigned to calls involving the emotionally disturbed ... .

Talk to the disturbed person, if possible. Find out what is bothering him. Communicate that you care about him and let him ventilate his feelings to you ... .

Do not threaten a disturbed person. Most disturbed individuals are already badly frightened because they do not understand their own [\*296] feelings and are unsure how other people will treat them. Aggressive behavior by a mentally disturbed person is the outcome of this fear. If the officer's actions create any additional stress, it may trigger violent behavior. The officer's weapon is of no use as a threat against a disturbed person. The person may react by attacking the officer in an attempt to take it away. The officer's reaction should be a calm, understanding manner conveying that he is truly concerned and wants to help rather than punish the disturbed person.

Avoid topics that agitate the subject. Concrete questions concerning the subject's family or occupation may bring him back to reality to the extent that he can be reasoned with.

Do not lie to an emotionally unstable person ... n170

Police training materials provide a clear and simple approach to handling emotionally disturbed people that can be taught to officers in their initial academy experience and during in-service training opportunities. Yet, in many cases involving police encounters with emotionally disturbed people, the reality of police training outlined above is either entirely ignored or significantly undervalued in the assessment of the "totality of the circumstances" that measures the reasonableness of an officer's actions. This discussion now turns to a review of the cases, with an eye toward the consideration the courts give, or fail to give, to police training and generally accepted police practices.

### III. Courts Should Consider Police Training and Accepted Police Practices as Part of the "Totality of the Circumstances" in Cases Involving Emotionally Disturbed Persons

While the Supreme Court has not yet heard a case involving a claim of excessive force against an emotionally disturbed person, the lower federal courts have resolved many such cases. Many cases have involved a police response to emotionally disturbed persons that eventually resulted in the shooting and/or death of the person the police are dispatched to help. Plaintiffs have challenged the actions of police officers in these cases on a variety of grounds. A common theme of these complaints is that officers failed to respond to an emotionally disturbed person appropriately, with the result that the officers' actions exacerbated the dangers inherent in the situation and precipitated a violent outcome.

[\*297] Plaintiffs often argue that the officers failed to follow appropriate police procedures or their own training. Rather than approaching the event as a mental health emergency, officers may have responded as though they had been called to a strictly criminal incident. Instead of taking time to plan an appropriate approach and then handling the event in a measured manner, officers may have charged forward and tried to resolve the incident quickly. All or most of the officers present may have become involved in trying to make the subject respond to their commands, rather than relying on the "contact and cover" approach emphasized in police training. Plaintiffs may claim that officers overreacted to a perceived threat of violence by the emotionally disturbed person and used excessive force in subduing him.

Police officers ordinarily defend such cases by arguing that the emotionally disturbed person refused to follow police directions, that he became violent, that he physically resisted the officers, and that they used only such force as was reasonably necessary to overcome his resistance. In some cases, officers have claimed that the emotionally disturbed person deliberately precipitated a situation in which he would be killed - generally known as "suicide by cop." n171 There may be authentic instances where a mentally disturbed person engineers his own death at the hands of the police. n172 Some observers, however, are skeptical of such claims, which may amount to no more than post hoc rationalizations for police misconduct. n173

[\*298] In many cases in which emotionally disturbed people are injured by police officers, police training is raised as a relevant issue. In some cases plaintiffs base their arguments on training actually received by the defendant officers; in others, the plaintiffs' arguments are based on police practices that are recognized as appropriate by an expert or other authority. Sometimes it is claimed that police misconduct has occurred because individual officers have not followed appropriate police practices consistent with training; in other circumstances it is claimed that the failure by local governments to train police officers appropriately has caused the use of excessive force. Both types of cases are examined here.

#### A. Police Officers Often Fail to Follow Appropriate Police Practices with the Emotionally Disturbed

As noted above, plaintiffs may complain that officers have engaged in actions that provoke an emotionally disturbed person and aggravate the risk of a violent outcome. Phrased this broadly, courts are likely to reject the claim that the police have a duty to minimize the likelihood of a violent outcome. n174 Similarly, courts generally have not imposed liability based on the failure of the police to employ the least dangerous or intrusive means to control an emotionally disturbed person. Thus courts generally reject the argument that the use of deadly force was precipitated by an officer's failure to use less dangerous means to subdue the disturbed person. n175

#### 1. Failure to Take into Account the Emotional Status of the Subject

On the most basic level, the most significant criticism that may be [\*299] leveled against police officers in these cases is that they failed to take into account the emotional or mental status of the person with whom they were dealing. The most fundamental error that courts can make in these cases is to analyze the use of force against emotionally disturbed persons without factoring the person's mental state into the calculation of whether the officer's actions were reasonable. For example, in *Pena v. Leombruni*, n176 the trial judge excluded plaintiff's offer of testimony from a police expert on the proper handling of an emotionally disturbed person. n177 On appeal, the circuit court concluded that testimony regarding the mental state of the subject was irrelevant to the reasonableness of the officer's action in shooting him. n178 Moreover, the court concluded that the expert testimony would not assist the trier of fact in determining whether the officer acted reasonably because the subject's behavior was "unambiguously dangerous" and the question of whether the danger was sufficient to justify the use of deadly force was within lay competence. The opinion does not provide any detail regarding the proposed testimony of the expert. Nonetheless, it would appear that the court either rejected out of hand or simply failed to appreciate that the level of dangerousness posed by the subject might be influenced by how he was handled by the officer, and that the expert might be of assistance to the jury in evaluating those possibilities.

A striking example of the failure to give any consideration to the subject's mental state is the Eleventh Circuit's opinion in *Wood v. City of Lakeland*. n179 Police responded to a call for assistance with an emotionally disturbed teenager who had injured himself and was threatening suicide. n180 The officers entered the youth's bedroom where he was sitting on a dresser, with his [\*300] arms covered with blood, holding an object to the side of his neck. He ignored the officers' commands to drop his knife. When he slid off the dresser he was shot three times in the chest and killed by one of the officers from a distance of eight feet. n181 The court awarded the officers qualified immunity. The opinion focused on whether there was any evidence to support plaintiff's contention that the teenager posed no threat to the officers at the moment of the shooting. n182 At no point in the opinion is there any discussion of whether the officers might have handled the incident differently given the decedent's mental state.

Another example of officers shooting and killing a suicidal person is found in *Sova v. City of Mt. Pleasant*. n183 Officers responded to the home of a clinically depressed man who was drunk and in the midst of cutting himself with knives. The opinion of the court of appeals characterized the district court decision to grant summary judgment to the officers with cruel irony: "The court stated that the threat [the decedent] posed to himself justified, in part, the use of deadly force against him." n184

It would appear from the opinion that the responding officers did little that took into account the mental status of the subject, apart from asking him on one occasion what he wanted, to which he replied that he wanted the police to shoot him. n185 The officers screamed at the subject, approached him, and sprayed mace in his face. n186 There is no analysis in the opinion, however, as to whether the officers properly handled the decedent as an emotionally disturbed person. The court of appeals reversed the district court's summary judgment in favor of the officers on the ground that there was a material factual dispute about whether the decedent had threatened to get a gun and whether he had charged at the officers through the door with knives drawn, or whether he was shot before he stepped through the doorway. n187 The court analyzed the case on ordinary use of force principles without regard to the decedent's mental state.

In *Nelson v. County of Wright*, n188 plaintiff had been committed to a state institution as chemically dependent and mentally ill. Later in the month he left the center without permission and returned to his mother's house. After an

[\*301] argument with his mother, plaintiff became agitated, and she called "911". She reported that he was screaming at her and threatening suicide. While his mother was on the phone, plaintiff ingested approximately eighteen "white cross tablets" and half a bottle of aspirin. At the time plaintiff was eighteen-years-old, 6'3" tall, and weighed 140 pounds. When the responding officer arrived at the house, he spoke with plaintiff's mother and learned that her son had just taken the pills, that he was in his bedroom, and that he did not have any weapons. n189

The officer went into the room and attempted to arrest plaintiff, advising him that he would have to handcuff him. Plaintiff resisted and a violent struggle ensued. During the struggle, plaintiff attempted to take the officer's gun. The officer struck the plaintiff several times on the head with his weapon to try to control him. The officer then fell to the floor in plaintiff's closet, plaintiff went down after him and the officer fired two shots, one of which struck plaintiff in the chest. The wound was not fatal. n190

The opinion contains no description whatsoever of any efforts by the officer to deal with the plaintiff by taking his emotional condition into account. The case is analyzed as a straightforward excessive use of force claim, with the court concluding that the officer was entitled to qualified immunity with respect to the use of deadly force, given the plaintiff's violent resistance and attempt to seize the officer's gun. n191 Here, both the disturbed state of the subject and the standard police practices to be utilized in dealing with disturbed persons were ignored in assessing the reasonableness of the officer's conduct.

In *Caricofe v. Mayor and City Council of Ocean City*, n192 officers were attempting to take into custody a large naked man who was running around the halls of a hotel. n193 The officers yelled at the subject, attempted to handcuff him, used pepper spray against him, struck him with their batons, and eventually put him in a "violent prisoner restraining device," and then leaned and knelt on him on the ground. n194 He stopped moving and eventually stopped breathing. n195 Other than a brief attempt to ask him questions, the officers did not seem to follow any of the advice ordinarily given in training for handling emotionally disturbed people. Nor did the court engage in any analysis as to whether they [\*302] had responded appropriately to the subject's mental state - the court simply concluded: "The officers necessarily made a split-second judgment that the man needed to be restrained and then proceeded with this effort, escalating their force only when the previous level of force proved ineffective." n196

In contrast with the foregoing cases, the court in *Ludwig v. Andersen* explicitly found that the mental state of an emotionally disturbed person was relevant in assessing the police's use of deadly force. n197 The officers had responded to a complaint concerning a man camping behind a fast food restaurant who was "not in a right frame of mind ... talking about Vietnam and all." n198 After an encounter of five to ten minutes, the subject ran away through the woods, armed with a knife. At one point, an officer attempted to hit him with his squad car, which failed to stop him. n199 Subsequently, several officers surrounded the subject, ordering him to drop his knife. They employed mace on two occasions with no effect. When the subject began to run away again toward a street on which there were pedestrians, one officer shot him twice with his pistol and another officer shot him with a shotgun. n200

The court reversed the district court's summary judgment in favor of the officers, concluding:

Considering the totality of the circumstances, we can not escape the conclusion that [the officers] fatally shot [plaintiff's decedent] after St. Paul police suspected him initially of being homeless and emotionally disturbed, and, later, of misdemeanor criminal activity which arguably placed no one in immediate harm. n201

The court explicitly rejected the district court's conclusion that the emotional state of the subject was not relevant, for the reasons that the officers "had been trained in the detection and handling of emotionally disturbed persons" and "standard police procedure regarding emotionally disturbed persons differs greatly from that regarding emotionally stable persons." n202

[\*303] The court based its conclusion in part on the affidavit from plaintiff's expert concerning police practices, and in part on the instructions contained in the St. Paul police manual for dealing with emotionally disturbed persons:

If the person is agitated, but not yet violent, the manual recommends that the officer "reduce fear, anxiety and tension in the patient" by avoiding "any show of force," establishing "friendly or understanding relationship with patient," and, where possible, determining "whom he trusts or has faith in and summon[ing them] to the scene." The manual further instructs officers dealing with emotionally disturbed persons to "practice restraint and patience" because "haste sometimes aggravates the situation." n203

The court specifically held that the guidelines were "relevant to the analysis of constitutionally excessive force," citing *Tennessee v. Garner*, where the Supreme Court had taken into account the policies of police departments across the country in determining whether or not the fleeing felon rule for the use of deadly force was constitutional. n204

## 2. Failure to Proceed Cautiously and to Utilize Cover and Containment

The police training materials reviewed above uniformly caution officers to plan their approach to an emotionally disturbed person, to proceed cautiously and slowly, and to avoid lying to the subject. The failure to follow these prescriptions, however, will not necessarily result in a finding that officers behaved unreasonably in constitutional terms. For example, in *Hegarty v. Somerset County*, n205 officers were attempting to apprehend a woman who had fired several shots at campers in the woods. They eventually broke into her cabin where she confronted them armed with a rifle, at which point the officers shot and killed her. n206

Plaintiff offered the analysis of an expert who criticized the failure of the officers to define an exact chain of command before approaching the subject's cabin and their failure to use proper "containment" techniques by needlessly placing themselves in peril against the "paper thin" walls of the cabin. n207 The court concluded, however, that the officers were required to [\*304] approach the cabin to confirm that the subject was inside. The court further concluded that, having approached, the officers were unable to withdraw or to remain where they were without risk and thus were obliged to attempt an entry. Rather than submitting the question of the reasonableness of the officers' decisions to a jury under a "totality of the circumstances" standard, the court resolved the question against the plaintiff on a summary judgment motion claiming qualified immunity for the officers. n208

The officers, who were well aware of the subject's history of emotional instability, had decided not to inform her of their intention to arrest her "until after she had been restrained, for fear that she would become violent." n209 Hence the officers told her that they were investigating a report of campsite burglaries in the area and were concerned for her safety. n210 This led to laughing "like a witch" by the subject. n211 The court apparently found this tactic by the officers to be reasonable:

Furthermore, the officers' "differing" responses to [the subject's] inquiries were not so much confusingly inconsistent, as consistently misleading. But their responses were also deliberately designed to reduce the risk that she might react violently, as by their consistent expressions of concern for [the subject's] safety and their scrupulous avoidance of any mention of her impending arrest. n212

Given that the subject was aware of the fact that she had just fired several shots at campers and followed them off her property in her truck, this obvious lying by the officers could only have created fear and distrust. The court supplied no basis for its conclusion that such tactics might be reasonable, although, as discussed above, the training materials consistently warn officers against lying to emotionally disturbed people. The court did conclude that it would not inquire as to which strategies the officers might have employed that would have been more prudent or posed the least

risk, having concluded that the strategy the officers did employ was within the range of reasonable conduct. n213

In *Sorrells v. Dallas*, where police officers responded to a complaint of indecent exposure and found a nude male masturbating in his car, police could have proceeded more slowly. n214 They told him to get out of the car, but he [\*305] ignored the command and continued masturbating. They then shot pepper spray into the car through the air conditioning vents. The subject continued to masturbate and remained in the car. n215

Eventually, a sergeant broke out the passenger side window with a baton, injuring the subject with flying glass. The officers again pepper-sprayed the subject but he still refused to leave the car. Eventually, they pulled the subject from the car, bleeding profusely. Plaintiffs alleged that the officers then beat the subject with batons, striking him twenty-five to thirty times and put him in a chokehold for five to eight minutes on the ground. n216 After handcuffing the subject, one officer put his right foot on his shoulder to prevent him from standing up, while other officers held him down by his arms and legs. Eventually, he lost consciousness and stopped breathing. He was pronounced dead on arrival at the hospital. n217 The court's opinion, which merely addresses discovery matters, includes no explanation for why the officers had concluded they needed to precipitate a confrontation with decedent.

In *Medina v. Cram*, n218 plaintiff had been drinking, was suicidal, and told the officers that he wanted them to shoot him. n219 The officers used non-lethal beanbag rounds against plaintiff, released a police attack dog that bit him, and finally shot him. Plaintiff argued that the officers mishandled the incident, thus creating the need to use deadly force, and offered a police practices expert's affidavit in support of his claim. The court found the officers' actions objectively reasonable and granted summary judgment. The court rejected the argument that the expert's assertions created genuine issues of material fact, concluding that the affidavit was conclusory, that the officers were not required to use means less intrusive than those they employed, and that it was not appropriate to judge the officers on the basis of 20/20 hindsight. n220 The majority opinion of the court engaged in no serious analysis of whether the plaintiff's emotional state required a different approach by the officers.

In her dissent, Judge Seymour stressed the plaintiff's intoxicated and agitated state and concluded that the officers' actions could not be held to have been reasonable as a matter of law. n221 She set out in her opinion the expert's [\*306] affidavit, which criticized the officers for failing to remain behind cover and concealment until the plaintiff had surrendered.

The advisability of proceeding slowly was also recognized by the Ninth Circuit in *Deorle v. Rutherford*, where the court concluded: "A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." n222

### 3. Failure to Employ Proper Tactics Against People with Knives

As discussed above, there are extensive training materials available on confronting emotionally disturbed people armed with knives. n223 Where officers fail to follow accepted police practices, however, courts may nonetheless deem their actions reasonable under the Fourth Amendment. Plaintiffs may argue, for example, that when the disturbed person is armed with a knife, police officers who do not maintain sufficient distance from him unnecessarily increase the risk that they will be forced to use a firearm to protect them from harm. In *Warren v. Las Vegas Metropolitan Police Department*, n224 police department guidelines mandated that officers maintain a twenty-one foot distance from a person armed with a knife. n225 The court reasoned, however, that such guidelines [\*307] are not relevant to the reasonableness of the officers' behavior unless they are intended for the protection of the person harmed. n226 Here, the court concluded that the guideline was for the officers' protection. Moreover, the court noted that even if the twenty-one-foot distance had been intended to protect the decedent, it would be only one factor in determining the reasonableness of the officers' actions. The court noted that in this case the decedent was continually moving during the incident, making it difficult to maintain a given distance from him, and perhaps requiring the officers to be closer at times to protect other civilians present. n227

In *Reynolds v. County of San Diego*, n228 an emotionally disturbed person got on the ground as ordered by the police officer, but then, as the officer approached, he sat up and grabbed a knife. The officer then moved behind the subject and attempted to disarm him by kicking him, but missed. n229 The officer then put his knee in the subject's back and held his gun to his neck. When the subject turned toward the officer swinging the knife, the officer shot him in the [\*308] back of the neck. n230 Plaintiffs offered testimony from a police practices expert that the officer's tactics were "reckless," and that he should have called for back-up, talked to the subject in calm tones, and refrained from approaching him while he held a knife. n231 The court, affirming summary judgment in favor of the officer, rejected the argument that the expert's testimony created a jury issue: "[The expert's] findings, however, are insufficient to raise a genuine issue of material fact regarding the reasonability of [the officer's] use of force. The fact that an expert disagrees with an officer's actions does not render the officer's actions unreasonable." n232

In *Reynolds* the officer's failure to follow training, as evidenced in the expert's testimony about appropriate police procedures, is relegated to the status of a mere dispute between reasonable officers about tactics. With no apparent basis other than its own view of the matter, the court concluded: "Given that [the subject] was behaving in a strange manner and wielded a knife, it was reasonable for [the officer] to try to confine and attempt to disarm him." n233 Characterizing the matter as a reasonable dispute about tactics fails to appreciate the overwhelming weight of the available training materials and accepted police practices.

#### 4. Inappropriate Use of Pepper Spray

A controversial technique in the handling of emotionally disturbed persons is the use of pepper spray. n234 Officers confronting emotionally disturbed subjects sometimes resort to pepper spray in an effort to attempt to subdue them. Indeed, in some cases, plaintiffs' experts have criticized the failure of officers to employ pepper spray, rather than more lethal force. n235 In a number of [\*309] reported cases, however, pepper spray appears to have been completely ineffectual when used against emotionally disturbed persons. n236

Whether the use of pepper spray or chemical agents against any person constitutes unreasonable force will depend upon the facts and circumstances present in individual cases. n237 Courts have largely rejected categorical challenges to the use of pepper spray on the ground that it is inherently too dangerous. n238

#### 5. Hog-Tying and Positional Asphyxia

Another technique sometimes used by police officers attempting to subdue emotionally disturbed persons is "hog-tying." This technique involves handcuffing or otherwise securing a person's hands behind his back, hobbling or otherwise securing his legs together, and then joining the hands and feet while the subject is placed face-down on the ground. There is substantial medical support for the claim that hog-tying can cause death. n239 Whether hog-tying [\*310] will amount to excessive force depends upon a fact specific inquiry in each case. n240

Even when police do not accomplish a full "hog-tying" maneuver, it is not uncommon for a physical struggle with a disturbed person to end with a prolonged period during which the officers are holding the person face-down in a prone position on the ground, frequently with officers exerting pressure on his back. n241 This may result in positional asphyxiation causing the death of the person. n242

[\*311] Hog-tying is the area of police use of force where courts have made the most serious effort to take into account police training and the relevant literature in assessing the reasonableness of the officers' actions. In *Cruz v. City of Laramie*, n243 the facts were typical of hog-tying cases. The decedent was running naked, yelling, and attempting to elude the officers, who struggled with him and wrestled him to the ground, where they handcuffed him face-down. The decedent continued to yell and flail about, at which point the officers applied a nylon restraint around his ankles to stop his kicking and then fastened the ankle restraint to the handcuffs with a metal clip. The subject "calmed markedly," and later the officers noticed that his face had "blanched." n244 The restraint was removed, and when the ambulance emergency team arrived they began CPR. The subject was pronounced dead on arrival at the hospital. The autopsy

revealed a large amount of cocaine in the decedent's system. n245 Medical experts disagreed on the cause of death - plaintiff's expert said that the decedent's position on the ground contributed to his death, the defense expert concluded that death resulted solely from cocaine abuse. n246

The court held that it would be a constitutional violation to apply the hog-tie technique "when an individual's diminished capacity is apparent." n247 In coming to this conclusion, the court reviewed other 1983 cases involving hog-tying allegations and, more importantly, the police and medical literature [\*312] referred to in those cases. n248 The court also reviewed "numerous articles and other materials discussing 'sudden custody death syndrome' and noting the relationship between improper restraints and positional asphyxia." n249 This included "police handbooks, Justice Department symposia, various journals and periodicals, and newspaper articles detailing deaths of individuals while in custody." n250 The court concluded that, "given the extent of the case law, and the 'legally-related' literature available to law enforcement personnel detailing the serious dangers involved in application of the hog-tie restraint, it is apparent that officers should use much caution in applying the hog-tie restraint." n251

In Cruz, the court did not discuss the "totality of the circumstances" standard as such, and did not explain why the literature on hog-tying and positional asphyxia was "legally-related" or relevant. Nonetheless, the conclusion is certainly consistent with the thesis of this Article that training and accepted police practices are part of the "totality of the circumstances" that courts must take into account in assessing the reasonableness of the use of force by police.

In Gutierrez v. City of San Antonio, n252 the court rejected the officers' motion for summary judgment on qualified immunity grounds. The court found material disputes of fact regarding the reasonableness of officers' actions - whether they knew the decedent had used drugs; what position he was placed in; what threat the decedent had posed; and whether the officers knew of the risks associated with hog-tying. n253 The court relied upon materials from the officers' own department and elsewhere to demonstrate that plaintiff had introduced sufficient evidence to warrant trial on the question of whether the officers were aware of the risks. n254

[\*313] Plaintiff introduced three pieces of evidence into the summary judgment record suggesting hog-tying to be unreasonable under these circumstances: (1) a 1991 San Diego Task Force study in the possession of the San Antonio Police Department (SAPD) in November 1994 indicating that the combination of hog-tying a drug-affected person in "cocaine psychosis" (excited delirium) and "positional asphyxia" (the result of placing persons in a face-down prone position) can lead to death (Sudden Custody Death Syndrome (SCDS)); (2) an article entitled Sudden Custody Death Syndrome: The Role of Hog-tying, that appeared in the Fall 1994 issue of Criminal Law Update; and (3) a memo issued by an SAPD captain ten days after the death of decedent "reminding" officers that hog-tying anyone was prohibited. n255

In reviewing the denial of qualified immunity to the defendants, the court noted that Anderson v. Creighton "requires that 'the contours of the right [] be sufficiently clear that a reasonable official would understand that what he is doing violates the right.'" n256 The court examined whether a reasonable police officer in November 1994 would have known whether hog-tying falls within the bounds of the Fourth Amendment's prohibition of the use of excessive force in light of pre-existing law.

The court defined "deadly force" as force "carrying with it a substantial risk of causing death or serious bodily harm." n257 It noted that both the Texas statute and San Antonio Police Department procedures in effect in November 1994 employed this definition. n258 Accordingly, the court found both this definition of "deadly force" and the holding of Tennessee v. Garner n259 to have been clearly established prior to November 1994.

[\*314] The court then looked to the question of whether hog-tying in the circumstances of the case created a substantial risk of death or serious bodily injury, and hence, was deadly force. Relying on the San Diego Task Force study, which found SCDS to be caused by the combination of (1) drug use, (2) positional asphyxia, (3) cocaine psychosis, and (4) hog-tying or carotid choke holds, the court concluded that plaintiff had presented sufficient evidence that hog-tying may create a substantial risk of death or serious bodily injury in these circumstances and thereby become

deadly force sufficient to deny the officer's motion for summary judgment. n260 The court noted that both the San Diego Task Force study and the Criminal Law Update article suggested hog-tying may present a substantial risk of death or serious bodily harm only in a limited set of circumstances - i.e., when a drug-affected person in a state of excited delirium is hog-tied and placed face down in a prone position. n261

Both sides in the case recognized the value and the relevance of training materials and published information concerning hog-tying. In arguing that their conduct was objectively reasonable, the defendants presented the affidavit of a local police official who stated that the official policies of the SAPD, the Texas Department of Public Safety, and the International Association of Chiefs of Police Use of Force Model Policy did not prohibit the use of hog-ties in November 1994. He claimed that SCDS was not known to reasonably well-trained police officers in Texas at that time, and that hog-tying was reasonable under the circumstances in this case. n262 Gutierrez, however, presented the affidavit of police practices expert Lou Reiter who analyzed the facts of the case and concluded that the officers' use of force and actions were unreasonable. n263 Claiming that a "battle of the experts" thus existed, defendants argued that they were entitled to qualified immunity because, "if officers of reasonable competence could disagree on this issue, immunity should be recognized." n264 The Fifth Circuit concluded that the Supreme Court did not intend, by the language on which defendants relied, to suggest that "summary judgment must be granted in favor of the police whenever they can find an expert to testify that their actions were reasonable." n265 The court reasoned that under such a rule, the police would virtually always win summary judgment. The court further noted that "an expert's opinion does not establish [\*315] reasonableness as a matter of law, especially when directly contradicted by another expert's well-supported opinion." n266

The court found that there were material disputes of fact regarding whether the San Antonio officers should have been aware of the risks of hog-tying. n267 Plaintiffs introduced evidence that San Diego had mailed copies of its study to police departments around the nation, including the SAPD, in 1992. n268 Deposition testimony indicated that the SAPD had this study in its possession at the time of Gutierrez's death. n269 The aforementioned Criminal Law Update article, published in the fall of 1994 by the Texas Office of the Attorney General, noted that, "Texas agencies that have banned the use of hog-tying include Dallas, San Antonio, Austin, Corsicana, and the [Department of Public Safety]." n270 Although SAPD representatives had claimed at their depositions that the SAPD had not banned hog-tying, plaintiffs' evidence showed that a SAPD captain had sent officers a memo ten days after Gutierrez's death "reminding" them that the use of a hog-tie on an arrestee was not allowed.

Although the Gutierrez court did not explicitly refer to the "totality of the circumstances" standard, nor explicitly discuss whether the training available to the officers should be viewed as part of the circumstances the court should take into account in assessing reasonableness, the court's analysis did precisely that. The court held that the training materials and published information were relevant, relying upon the analysis the Supreme Court employed in *Tennessee v. Garner* to conclude that the "fleeing felon" justification for the use of deadly force did not meet Fourth Amendment standards. n271 There, the Supreme Court had reviewed the practice in the several states to determine whether the "fleeing felon" rule was constitutionally reasonable. n272 Gutierrez relied upon the Supreme Court's rationale for doing so: "In *Garner*, the Supreme Court explained that in "evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions." n273 The Gutierrez court relied heavily on the distribution of the San Diego study around the country, and particularly in Texas.

[\*316] The discovery materials in Gutierrez created a factual dispute about the extent to which hog-tying was banned by the San Antonio Police Department as well as what specific information its officers had been given. The court found that this dispute about the training and information the defendant officers had received was crucial. The court concluded: "This dispute is important because it may be difficult to conclude that the officers acted reasonably if they performed an action that had been banned by their department or of whose dangers in these circumstances they had been warned." n274 Gutierrez represents a court's serious attempt to take into account the training that officers actually received in determining whether they acted in disregard of risks with which they were acquainted. The court considered this information in the process of determining whether the officers' behavior was objectively reasonable.

In the more recent case of *Wagner v. Bay City*,<sup>n275</sup> the Fifth Circuit's decision regarding positional asphyxia also confirms, to an extent, the proposition that what police have learned in training is relevant to the reasonableness of their use of force. In this case the court declined to impose liability, concluding that the situation that police officers had confronted had not included risks about which they had been trained. In this case, concerning a man who created a disturbance in a fast food restaurant, there was contradictory evidence about what transpired during a physical altercation that took place between the decedent and the officers who arrived on the scene.<sup>n276</sup> The officers used pepper spray against the decedent, and after a struggle, took him face-first to the pavement and handcuffed him behind his back. One witness stated that an officer had his knee on the decedent's back and kept pushing the decedent's neck and head to the ground with a stick. After more police arrived, the officers placed the decedent in a squad car. He was not walking and had to be carried and lifted into the car, on his stomach. One officer thought that he had passed out. At the station he was carried or dragged into the building and placed on the floor, face-down. The police were uncertain whether he was conscious. Officers noticed that he had stopped breathing and administered CPR. He resumed breathing and was taken to a hospital where he went into a coma and ultimately died.<sup>n277</sup> While the trial court denied a summary judgment motion based on qualified immunity because of factual disputes, the court of appeals reversed, granting qualified immunity to the officers.

[\*317] The opinion acknowledged that "a reasonable jury could conclude that the use of pepper spray, combined with the fact that the officers repeatedly pushed him face-first to the ground, could have resulted in [decedent's] stopping breathing."<sup>n278</sup> Nonetheless, after taking all disputed facts in the light most favorable to the plaintiff the court found that the officers were entitled to qualified immunity. Distinguishing *Gutierrez v. City of San Antonio*, the court here relied on the facts that decedent had not been hog-tied, and that there was no evidence that he was a drug user or that there was a risk of "cocaine psychosis." The court reasoned that although there was support in *Gutierrez* for the concept that in this case there was a substantial risk of harm from positional asphyxia, that theory could not serve as the basis for plaintiff's claim that the officers violated clearly established law and behaved unreasonably, because the other three factors discussed in the San Diego Task Force report on SCDS were not present.<sup>n279</sup>

*Wagner* is different from *Gutierrez*, however, in that in *Wagner* the focus seems to be on whether the officers were entitled to qualified immunity based on the facts of previously reported cases, rather than on whether they followed their training or the police practices described in police literature. It is unclear from the opinion how much evidence the plaintiff adduced, if any, concerning the training supplied by the officers' department or concerning appropriate police practices, other than what was already reported in *Gutierrez*.<sup>n280</sup>

The hog-tying and positional asphyxia cases do demonstrate that it is appropriate for courts to consider police training and accepted police practices in assessing the reasonableness of the police use of force. The cases discussed above, however, would rest on a stronger analytical footing had the courts explicitly held that training and police literature were among the circumstances that must be taken into account in considering the use of force in the "totality of the circumstances."

#### 6. Police Tactics that Pose Unreasonable Risks to Bystanders

The risk of injury to bystanders is an issue in any case involving police use of deadly force. Because encounters with emotionally disturbed people in public may draw crowds, the issue is of particular importance in such cases. As [\*318] noted above, training materials consistently encourage officers to disperse any people who may gather. Where this advice is not heeded, or it is not possible to follow it, there is a risk that bystanders may be injured during police efforts to take emotionally disturbed subjects into custody. This raises two questions: (1) under what constitutional principles are injuries to bystanders assessed; and (2) whether police actions that create unreasonable risks to bystanders are also unreasonable from the perspective of the subject of the police intervention.

Where there was no intention on the part of the police to attempt a seizure of the bystander, the bystander may be relegated to making a substantive due process claim, because the bystander has not been "seized" within the meaning of the Fourth Amendment and Fourth Amendment standards will not apply.<sup>n281</sup> Some courts have employed the standard

of *County of Sacramento v. Lewis*, n282 in which the Court required that the plaintiff prove an intent to harm the ultimate victim in order to meet the "shocks the conscience" test that determines whether a government's conduct violates substantive due process. n283 This is a standard that could rarely be met in this context.

For example, in *Schaefer v. Goch*, a bystander was killed (in addition to the subject) during a police standoff with an emotionally disturbed person. The bystander's parents filed a claim on her behalf. In this case, the police had been informed that a man had threatened people in a bar with a shotgun while talking in an erratic and irrational manner. The incident was subsequently managed by the Sheriff's Department's Special Response Team, which knew the suspect to be a violent and unpredictable "fighter," who the police had been required to resort to physical measures to subdue in the past. The officers also knew that the suspect was a military man who had previously been a suspect in a murder investigation, and that he was physically very strong. The officers got a [\*319] "no-knock" warrant to enter his parents' home, not far from the bar. They attempted a surreptitious entry through the rear, but the suspect heard them and fired a shotgun at the officers. Officers backed off and surrounded the house. n284

At some point the suspect's wife came out on the porch. Officers told her to get down. She did so, but then the man came out and picked her up by the hair or the shoulder. He had a rifle under one arm. Viewing the evidence in the light most favorable to plaintiff, the court determined he was not pointing it at the officers. The officers shouted at the suspect, "Sheriff's Department, let me see your hands," and "put down your gun," and he released his hold on his wife. Immediately after, a sergeant fired two shots at the man from his MP5 submachine gun, and two deputies also fired at him with their handguns at roughly the same moment. One bullet from the deputy's weapon struck the man, and he died soon after. One of the sergeant's two bullets struck the suspect's wife in the back of the head and she died some hours later from the wound. n285

The opinion does not reflect any other efforts by the officers to contact the suspect inside the house, or to resolve the incident through any communication. Strikingly, there is no discussion in the opinion of whether their failure to do so affected whether their conduct should "shock the conscience."

The court found that the suspect's wife was not seized when she was ordered down on the porch because she could have gotten up and was, in any event, able to be grabbed and moved by her husband. n286 It reviewed the case under the "shocks the conscience" due process standard established in *Sacramento v. Lewis* and found no constitutional violation. In part the court used the standard employed in *Sacramento* requiring proof of an intent to harm the victim, but it also examined the facts in light of the fact that officers were firing at a suspect standing very close to an innocent victim. Even from that perspective, though, the court determined that the officers' conduct did not "shock the conscience." n287

As to the second issue noted above, it would seem desirable to recognize that an unreasonable risk of injury to bystanders would render the use of force against the mentally disturbed person unreasonable under the Fourth Amendment. In *Graham v. Connor*, the Court held that in assessing the force used by an officer, the jury should consider "whether the suspect poses an immediate threat to the safety of the officers or others." n288 It would seem that if [\*320] the justification for using force may be the threat the suspect poses to others, it would be nonsensical not to be concerned about the threat to others that the officer's use of force would create. In *Tennessee v. Garner*, the Court concluded that in determining the need for deadly force the balance is between the intrusion on the individual's Fourth Amendment rights and "the importance of the governmental interests alleged to justify the intrusion." n289 Because public safety will frequently constitute the governmental interest used to justify a Fourth Amendment intrusion, it again would seem nonsensical not to weigh the threat to public safety posed by an officer's actions. n290

#### B. The Myth of Split-Second Decision-Making

Force used against emotionally disturbed persons, even when that force contradicts what is prescribed by standard police practice, is often justified, at least in part, on the ground that the officers were required to make split-second decisions. n291 The Supreme Court emphasized in *Graham* that when assessing the reasonableness of force used by the

police, "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." n292 Sympathy for the officers' perceived need to make rapid on-the-spot decisions has led to affording police a "fairly wide zone of protection in close cases." n293 Although as the Seventh Circuit has stated that the need to make a split-second decision "alone will never immunize an otherwise unreasonable use of deadly force," n294 the vast bulk of police shootings are justified in large measure on this basis.

[\*321] Reliance on the need for split-second decisions is highly questionable when the actions of the officers have created or enhanced the likelihood of a need for rapid action in dealing with an emotionally disturbed person. Virtually all of the police training available counsels officers to develop a plan prior to confronting a subject, to take their time and proceed cautiously and slowly in attempting to resolve a situation, to remain calm, to remain at a safe distance from a subject, and to avoid actions which might unnecessarily frighten or excite a subject. n295

In *Ewolski v. City of Brunswick*, n296 the court recognized that when officers proceed slowly in resolving an incident, split-second decision-making is not required. In *Ewolski*, the police had surrounded the home of an armed, paranoid schizophrenic man, who had his wife and son in the house. After a two-day standoff, police rammed through the living room wall with an armored vehicle. They found that the man had shot his son and killed himself. n297 In connection with the substantive due process claims on behalf of his wife and son, the plaintiff claimed that the police had unnecessarily escalated the confrontation with the subject, thus placing his family at greater risk. n298 The court was required to determine the level of culpability that would satisfy the "shocks the conscience" standard for substantive due process claims, n299 and determined that the opportunity for deliberation on the part of the officers in the case fell between the circumstances of custodial settings and high speed chases. n300 It concluded: "The facts viewed most favorably to the plaintiffs reveal that this was a situation where actual deliberation was practical. The police waited five hours to initiate the first 'tactical solution,' which strongly suggest that split-second decision-making was not required." n301

Similarly, in *Deorle v. Rutherford*, the court recognized that the officer who shot a "beanbag" round at a disturbed person walking toward him, which [\*322] seriously injured the person, was not acting in a circumstance requiring a split-second decision. n302 At the time of the shooting the subject, who was unarmed, was walking toward the officer at a steady gait and the officer, without giving a warning, decided that he would fire when the subject came within a given range. n303 The court distinguished the situation confronting the officer from the need for split-second judgments mentioned in *Graham v. Connor*. The court noted that the officer had been at the scene for over half an hour before he shot the man, that he had been able to observe the subject for a considerable period of time before firing at him, that he had an opportunity to consult with his superiors, that the police were awaiting the arrival of skilled negotiators, and that the officer who shot had a clear line of escape from the position he had assumed, with a police roadblock or buffer zone behind him. The court concluded that "with knowledge of all the relevant circumstances, [the officer] made a calculated and deliberate decision to shoot [plaintiff] when [plaintiff] reached a particular point in his peregrinations: and that is precisely what he did." n304

A police officer's insistence that he was forced to make a split-second decision would often seem to be a rationalization of his own actions that precipitated a crisis during an incident. The training given to police officers, when followed, minimizes the need for split-second decisions. Indeed, many of the decisions about how such incidents should be handled have already been addressed in the training materials. The officer should not be in the position of attempting to develop on the street, from scratch, a strategy for dealing with an emotionally disturbed person. Naturally, each situation has unique features, but the overall approach to the subject should be determined by training, not by split-second decisions.

Many of the lower federal courts have become mesmerized by the concept that police officers are forced to make decisions about the use of force in split seconds. Not only is this unrealistic when the preparation officers receive in training is taken into account, but it drastically distorts the "totality of the circumstances" standard. Rather than judging the use of force in the more appropriate matrix of the "totality of the circumstances," the urgent perceptions and fears of

the officer at the precise instant force is used become controlling [\*323] factors. Thus, in most of the cases little weight has been given by the courts to the failure of police officers to follow the training they have received.

### C. Local Governments' Failure to Provide Adequate Police Training

In a number of cases, plaintiffs have sought to impose liability against local government agencies for failing to properly train officers involved in incidents in which emotionally disturbed persons are injured or killed. The failure to train officers in appropriate techniques for handling emotionally disturbed people has predictably dire consequences, as described by James J. Fyfe:

Consider officers untrained for their work with [emotionally disturbed persons]. They have been trained to get rational offenders to submit to their authority by approaching them forcefully and making it plain that resistance is only likely to make things worse. This intimidating approach almost always succeeds in gaining criminal suspects' compliance ... . Not so with [emotionally disturbed persons]; the police are called to handle them precisely because, for reasons that might not affect more stable individuals, they have become frightened and potentially dangerous to themselves and others. In such cases, the forceful police approaches that work so well with rational offenders - threats, intimidation, closing in on personal space - are liable to force unnecessary confrontations and to put officers into perilous circumstances from which they can extricate themselves only by resorting to the most extreme types of force, that is, by shooting. n305

The Supreme Court has established that there is no respondeat superior liability under 1983. n306 Therefore, in order to establish liability against a local government agency for constitutional wrongs committed by government officials, a plaintiff must establish that the violation was the result of a "policy" or "custom" of the municipality. n307

[\*324] In *City of Canton v. Harris*, n308 the Supreme Court held that "there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under 1983." n309 In order to establish liability a plaintiff must prove that "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." n310 The Court observed that:

It may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. n311

The "deliberate indifference" standard has nothing to do with the level of culpability that may be required to make out the underlying constitutional wrong, but rather has to do with what is required to establish the municipal policy as the "moving force" behind the constitutional violation. n312

The Court in *City of Canton* made it clear that on remand the plaintiff would have to identify a particular deficiency in the training program and prove that the identified deficiency was the actual cause of plaintiff's constitutional injury. It would not be enough to establish that the particular officer was inadequately trained, nor that there was negligent administration of an otherwise adequate program, nor that the conduct resulting in the injury could have been avoided by more or better training. The Court cautioned that federal courts are not to become involved "in an endless exercise of second-guessing municipal employee-training programs." n313

Justice O'Connor elaborated on how a plaintiff could show that a municipality was deliberately indifferent under

City of Canton. First, where there is "a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face, ... failure to inform city personnel of that duty will create an extremely high risk that constitutional violations will ensue." n314 For example, all of the Justices agreed that there is an obvious need [\*325] to train police officers as to the constitutional limitations on the use of deadly force, and that a failure to so train would be so certain to result in constitutional violations as to reflect the deliberate indifference to constitutional rights required for the imposition of municipal liability. n315

The concurring opinion was also willing to recognize that municipal liability on a "failure to train" theory might be established "where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion ... [that] could put the municipality on notice that its officers confront the particular situations on a regular basis, and that they often react in a manner contrary to constitutional requirements." n316

Thus, City of Canton provides a plaintiff with two different approaches to a "failure to train" case. First, a plaintiff may establish deliberate indifference by demonstrating a failure to train officials in a specific area where there is an obvious need for training to avoid violations of citizens' constitutional rights. Second, plaintiff may rely on a pattern of unconstitutional conduct so pervasive as to imply actual or constructive knowledge on the part of policymakers, whose deliberate indifference, evidenced by a failure to correct once the need for training became obvious, would be attributable to the municipality.

The need for training with respect to encounters with emotionally disturbed people is as compelling as the need to train with respect to constitutional limits on the use of deadly force that the Court recognized in City of Canton. n317 As has been discussed above, the frequency with which officers encounter such persons is very high. The risks of mishandling such incidents are also very high, frequently involving the use of deadly force. n318

As also described above, there are substantial materials available to provide officers with the tools they need to handle emotionally disturbed people in a manner that minimizes the risk of violence and injury. James J. Fyfe is of the opinion that the necessary training can be described in a "few simple principles":

Officers should keep a safe distance away from [emotionally disturbed persons (EDPs)] and otherwise avoid putting themselves in [\*326] harm's way when handling .

Officers should avoid unnecessary and provocative displays or threats of force.

An officer should try to avoid confronting an EDP while alone and should always make sure that back-up assistance is called so that the EDP can be contained at the same time that bystanders are cleared away.

One officer (the talker) should be designated to talk to the EDP, and everybody else on the scene should "shut up and listen."

Officers should make sure that the talker is in charge of the scene and that nobody takes unplanned action unless life is in immediate danger.

Officers should make sure that the talker does not threaten the EDP, but instead makes it plain that the police want to help him or her and that the way to accomplish this is for the EDP to put down any weapons and to come with the police for help.

Officers should take as much time as necessary to talk EDPs into custody, even if this runs into hours or days. n319

In Fyfe's opinion, these principles "can be taught and absorbed in no more than a couple of days." n320 Because of the simplicity of the training, Fyfe believes "all police patrol officers, who are almost invariably the first police responders to such situations, should be trained in them and held accountable for following them." n321

Some courts have recognized the legitimacy of claims based on the failure to train officers on practices for dealing with emotionally disturbed persons. Thus in *Allen v. Muskogee*, the court held:

The case before us is within the "narrow range of circumstances" recognized by *Canton* and left intact by [*Board of County Commissioners v.*] *Brown*, under which a single violation of federal rights may be a highly predictable consequence of failure to train officers to handle recurring situations with an obvious potential for such a violation. The likelihood that officers will frequently have to deal with armed emotionally upset persons, and the predictability that officers trained to leave cover, approach, and attempt to disarm [\*327] such persons will provoke a violent response, could justify a finding that the City's failure to properly train its officers reflected deliberate indifference to the obvious consequence of the City's choice. The likelihood of a violent response to this type of police action also may support an inference of causation - that the City's indifference led directly to the very consequence that was so predictable. n322

The court found that there were sufficient facts "to support an inference that the need for different training was so obvious and the inadequacy so likely to result in violation of constitutional rights that the policymakers of the City could reasonably be said to have been deliberately indifferent to the need." n323

In *Johnson v. City of Cincinnati*, the court also found that plaintiff's evidence supported the inference "that dealing with highly agitated persons was a recurring situation for law enforcement officials nationwide and in Cincinnati, and that a violation of civil rights is a predictable result of being inadequately trained to handle such persons." n324 Plaintiff's claim was that city officials knew of the potential danger of the prone restraint before the incident, and the failure to train the officers led to the death of a person in the throes of agitated delirium from positional asphyxia. n325

In *Gibson v. County of Washoe*, n326 plaintiff's decedent died of a heart attack he suffered during efforts by sheriff's deputies to restrain him while in jail. The decedent suffered from manic-depressive disorder and was taken into custody while behaving bizarrely. County policy required all inmates, upon arrival at the facility, to go through medical screening procedures, including for mental illness. There was an exception to the policy, however, for inmates who were combative or uncooperative. n327 Upon his admission to the jail, plaintiff's decedent was not afforded medical screening procedures because he was uncooperative and combative. As a result, he was not referred to a hospital. n328

The court concluded that the policy "poses a substantial risk of serious harm to those with certain mental illnesses," noting that a common symptom of someone in a manic state is that he would be uncooperative and combative. n329 [\*328] The court also found that there was sufficient evidence in the record that the county was aware of that risk, based in part on the large number of people with mental difficulties housed at the jail. n330 As a consequence, the court concluded that plaintiff was entitled to a trial on the question of whether the county was deliberately indifferent to the

medical needs of persons in the position of plaintiff's decedent. The language of the opinion would be equally applicable to a failure to have appropriate policies and training in place for dealing with emotionally disturbed people on the street:

Instead of attending to [the decedent's] serious medical needs, the County reacted to [the decedent's] illness by locking him in a cell, pepper spraying him, shackling him for several hours by the hands, feet, and waist, dragging him through the corridor, and having two deputies climb on top of him... . In addition, these injuries were indisputably foreseeable. Uncontrollable behavior is a foreseeable consequence of not identifying a manic condition, and having to chain, pepper spray and drag someone, with attendant psychological and physiological harm, is a foreseeable consequence of dealing with someone who is out of control. n331

The availability of "failure to train" claims means little, of course, if the requirement can be satisfied with token efforts or substandard training. At least one court of appeals has rejected the notion "that a municipality may shield itself from liability for failure to train its police officers in a given area simply by offering a course nominally covering the subject, regardless of how substandard the content and quality of that training is." n332

Despite the foregoing cases, however, courts have rejected the argument that specialized training is required with respect to emotionally disturbed persons. In *Pena v. Leombruni*, n333 the court ruled that the sheriff's general training on the use of deadly force was sufficient to cover the problem:

Failing merely to instruct police on the handling of dangerous people who appear to be irrational cannot amount to deliberate indifference, at least on the facts presented in this case. The sheriff had announced a policy that ... the deputies were not to use deadly force unless they (or other persons) were threatened by death or great [\*329] bodily harm, and this policy covered the case of the crazy assailant, giving him all the protection to which constitutional law entitled him. Maybe despite what we have just said it would be desirable to take special measures to render such a person harmless without killing or wounding him, ... but if so the failure to adopt those measures would not be more than negligence, which is not actionable under section 1983. n334

Courts have rejected claims based on an asserted need for general training with respect to emotionally disturbed persons, n335 and with respect to [\*330] specific techniques or situations. n336 Contrary to *Allen v. Muskogee*, where the court held that liability could be found despite the fact that plaintiff had adduced evidence only of a single incident, other courts have required proof of additional incidents to establish a basis for municipal liability. n337 In other cases, courts have found the training given with respect to emotionally disturbed persons to be adequate. n338 Where courts have rejected the underlying claim that individual officers behaved unreasonably, it is generally difficult for plaintiffs to prove that a failure of training was a cause of any violation of the plaintiff's rights. n339

[\*331] As this review indicates, there is great division and inconsistency in present judicial consideration of the significance of a lack of police training in dealing with emotionally disturbed people. Plaintiffs carry an extremely heavy burden in persuading courts to base municipal liability on inadequate training in cases alleging excessive force against emotionally disturbed people.

#### IV. Conclusion

Police officers are frequently called to render assistance to emotionally disturbed people. There is substantial training available to assist officers in handling such calls in a humane manner, with the goal of rendering assistance to a person suffering a medical emergency and minimizing the risk of injury to all parties. Sometimes, however, such incidents become confrontational and escalate to a violent conclusion, ending with the serious injury or death of the disturbed

person. Sometimes this is because officers ignore their training and aggravate, rather than defuse, tension and emotion, with the result that they make ill-advised or unnecessary decisions in haste, with tragic consequences. The notion, however, that officers are always required to make "split-second" decisions regarding the use of force is a myth. The need for haste and on-the-spot decision-making is dramatically reduced where officers follow training and accepted police practices in dealing with emotionally disturbed people.

At present there is substantial doctrinal confusion concerning the legal standards by which civil rights claims on behalf of such injured or deceased persons should be judged. Although the Supreme Court has declared that the reasonableness of the police use of force must be judged under a "totality of the circumstances" standard, the Court has had no occasion to determine what "circumstances" are relevant with respect to the use of force against emotionally disturbed people. The lower federal courts are divided on the questions of whether "pre-seizure" conduct by the officers which enhances the risk of a violent outcome can affect the reasonableness of a later use of force, and whether training and accepted police practices regarding the handling of emotionally disturbed people is relevant to the reasonableness of the police use of force. Many of the courts place far too much emphasis on "split-second" decision-making and not nearly enough emphasis on police training.

[\*332] There is no principled basis for excluding from the calculus of constitutional reasonableness those actions of officers that contribute to an escalation of tensions that results in a violent outcome when they encounter an emotionally disturbed person. "Totality of the circumstances" ought to include viewing an incident in its entirety and taking into account all the behavior of officers that was causally related to the use of force in assessing the reasonableness of that force. In particular, the failure of officers to follow training and generally accepted police practices for encountering the emotionally disturbed should be taken into account as part of the "totality of the circumstances" under which the reasonableness of police actions is judged.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Constitutional Law  
 Bill of Rights  
 Fundamental Rights  
 Search & Seizure  
 Scope of Protection  
 Healthcare Law  
 Treatment  
 Patient Consent  
 Right to Refuse Treatment  
 Public Health & Welfare Law  
 Social Services  
 Institutionalized Individuals  
 Confinement Conditions

### **FOOTNOTES:**

n1. Although this specific incident is imagined, the hypothetical facts are typical of the scenarios presented in a large number of reported cases and will be familiar to practicing civil rights lawyers and police officers.

n2. By "emotionally disturbed" people, I mean to include those who are engaged in abnormal behavior as a result of mental illness. The training materials in this area provide officers with examples of the behaviors and symptoms that are typical of common forms of mental illness. See *infra* note 140 and accompanying text. Police officers may also encounter substantial numbers of people who are mentally retarded, but this subject is beyond the scope of this Article. These encounters present some similar and many different problems from those with mentally or emotionally disturbed people. For a discussion of the lack of police training with respect to mental retardation, see James K. McAfee & Stephanie L. Musso, *Police Training and Citizens with Mental Retardation*, 20 *Crim. Just. Rev.* 55 (1995).

n3. Peter C. Patch & Bruce A. Arrigo, *Police Officer Attitudes and Use of Discretion in Situations Involving the Mentally Ill*, 22 *Int'l. J.L. & Psychiatry* 23, 24 (1999) ("It is widely believed that the police are coming into contact with the mentally ill in record numbers."). The large number of interactions between law enforcement officers and emotionally disturbed people is also suggested by the number of mentally ill people who are eventually incarcerated in the nation's prisons and jails or placed on probation. A U.S. Department of Justice study concluded that at midyear 1998 there were 283,800 mentally ill offenders in prison or jail and another 547,800 on probation. Paula M. Ditton, Bureau of Justice Statistics, U.S. Dep't of Justice, *Mental Health and Treatment of Inmates and Probationers 1* (1999). Of the mentally ill in jails, 23.2% had been convicted of public order offenses, and 24.7% of the probationers had been convicted of public order offenses. *Id.* at 4.

n4. Randy Borum et al., *Police Perspectives on Responding to Mentally Ill People in Crisis: Perceptions of Program Effectiveness*, 16 *Behav. Sci. & L.* 393, 393-94 (1998) (citing Martha Williams Deane, *Emerging Partnerships Between Mental Health and Law Enforcement*, 50 *Psychiatric Services* 99 (1999)).

n5. Michael Jonathan Grinfield, *Dying for Treatment: Police Shootings Spur Calls for Change*, *Psychiatric Times*, Feb. 2000, at 283. Los Angeles Police Department Chief Bernard Parks reports that an estimated 672,000 people in Los Angeles County are severely and persistently mentally ill, based on 1998 population data. *Id.*

n6. James J. Fyfe, *Policing the Emotionally Disturbed*, 28 *J. Am. Acad. Psychiatry L.* 345, 345 (2000).

n7. See Dana M. Bessette, *Reinterpreting the ADA: Finding a Freedom from Unnecessary Segregation*, 24 *New Eng. J. on Crim. & Civ. Confinement* 131, 154 (1998); Jim Ruiz, *An Interactive Analysis Between Uniformed Law Enforcement Officers and The Mentally Ill*, *Am. J. Police*, No. 4, at 149 (1993); Sheldon Travin, *The Role of the Police with the Mentally Ill*, in *Criminal Court Consultation* 137 (Richard Rosner & Ronnie B. Harmon eds., 1989).

n8. Nancy K. Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 *Emory L.J.* 375, 387 (1982).

n9. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Rogers v. Okin* 738 F.2d 1 (1st Cir. 1984); *Rennie v. Klein*, 720 F.2d 266 (3d Cir. 1983); Laurence H. Tribe, *American Constitutional Law*, 15-8, at 1326 (2d ed. 1988).

n10. Robert L. Jamieson & Kimberly A.C. Wilson, *Mental Illness Frequently Deepens Tragedy of Police Shootings*, *Seattle Post-Intelligencer*, May 25, 2000, at A1.

n11. See Jonathan P. Bach, *Requiring Due Care in the Process of Patient Deinstitutionalization: Toward a Common Law Approach to Mental Health Care Reform*, 98 *Yale L.J.* 1153, 1156-57 (1989).

n12. A significant issue presented by these interactions is whether an emotionally disturbed person who is taken into custody by the police should be taken to jail or to a mental health facility. This question is beyond the scope of this Article. For some discussion of the problem, see Randolph Dupont & Sam Cochran, *Police Response to Mental Health Emergencies - Barriers to Change*, 28 *J. Am. Acad. Psychiatry L.* 338, 342-44 (2000); Henry J. Steadman et al., *Comparing Outcomes of Major Models of Police Responses to Mental Health Emergencies*, 51 *Psychiatric Services* 645 (2000); Linda A. Teplin, *Police Discretion and Mentally Ill Persons*, in *Forensic Mental Health*, Ch. 28 (Gerald Landsberg & Amy Smiley eds., 2001); Travin, *supra* note 7.

n13. In a survey of 452 officers in Birmingham, Alabama, Knoxville, Tennessee, and Memphis, Tennessee, officers estimated on average that they had been involved in six such encounters within the past month. Borum et al., *supra* note 4, at 401. This study was of departments that had specialized programs for encounters with mentally disturbed persons and included, but was not limited to, officers assigned to specific assignments in this regard. The frequency of the encounters may be inflated due to the inclusion of officers assigned to specialized units, but in any event, ninety-two percent of the officers reported at least one such encounter in the previous month, and eighty-four percent reported more than one. *Id.*

n14. Although the author is aware of no statistics on this point, it would appear from the reported and estimated frequency of such encounters and the number of reported court cases that most such encounters are resolved without injuries that lead to litigation. It is impossible to determine from the existence of injuries alone whether a given encounter was handled by officers using the methods provided in training to reduce the risk of a violent outcome. Sometimes officers proceed properly and injuries are unavoidable. In other cases, officers mishandle encounters with emotionally disturbed people, but despite their use of poor tactics no one is injured.

n15. The statute provides:

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. For the purpose 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 (2000).

n16. "The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated ... ." U.S. Const. amend. IV. The Supreme Court held that the constitutionality of the intentional use of deadly force by police officers against persons must be determined under Fourth Amendment standards. *Tennessee v. Garner*, 471 U.S. 1 (1985).

n17. *Graham v. Connor*, 490 U.S. 386 (1989); see *infra* Parts I and II, for a discussion of the general standards for assessing the use of force by police.

n18. See, e.g., *Wood v. City of Lakeland*, 203 F.3d 1288, 1292 (11th Cir. 2000) (holding a police shooting of a suicidal teenager reasonable while giving no consideration to the police failure to employ techniques for dealing with suicidal subjects); *Pena v. Leombruni*, 200 F.3d 1031, 1034 (7th Cir. 1999) (finding the mental state of the subject irrelevant to the reasonableness of officer's action in shooting him); *Nelson v. County of Wright*, 162 F.3d 986 (8th Cir. 1998) (affording officer qualified immunity for shooting a suicidal man, while ignoring the disturbed mental state of subject).

n19. *Saucier v. Katz*, 533 U.S. 194 (2001) (discussing use of excessive force cases and qualified immunity); see generally Michael Avery et al., *Police Misconduct: Law and Litigation* 3:14 (3d ed. 1997) (discussing qualified immunity).

n20. See *infra* Part II (discussing available training).

n21. Although there is a potential remedy for excessive force claims under the Americans with Disabilities Act (ADA), plaintiffs have not been very successful in claiming that the ADA provides remedies for emotionally disturbed people injured by police misconduct. See, e.g., *Thompson v. Williamson County*, 219 F.3d 555, 558 (6th Cir. 2000) (stating that if the machete-wielding, emotionally disturbed decedent who was shot by an officer was denied access to medical services, "it was because of his violent, threatening behavior, not because he was mentally disabled"); *Hainze v. Richards*, 207 F.3d 795, 802 (5th Cir. 2000) (rejecting plaintiff's effort to litigate claim under the ADA against the police for shooting suicidal person); *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999) (discussing theories of applicability of the ADA to arrests and investigations by police). ADA claims are beyond the scope of this Article. See generally James C. Harrington, *The ADA and Section 1983: Walking Hand in Hand*, 19 Rev. Litig. 435 (2000) (discussing way in which the ADA "fills a

void" left by 1983 claims).

n22. *Graham*, 490 U.S. at 395. Prior to *Graham*, most lower federal courts analyzed the excessive use of force by police officers as a substantive due process violation. The leading case was *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973). There is no single generic standard for all excessive force claims brought under 1983. Where a convicted prisoner claims that excessive force has been used against him, the force is judged under Eighth Amendment standards. *Whitley v. Albers*, 475 U.S. 312, 327 (1986). The Supreme Court has yet to decide what constitutional provision applies to claims of excessive force by pretrial detainees. The lower federal courts are split on this issue, with some applying Eighth Amendment standards, others Fourth Amendment standards, and others a substantive due process analysis. See *Avery et al.*, *supra* note 19, 3:14.

n23. *Graham*, 490 U.S. at 386 (1989). Claims against federal officers may be litigated directly under the Fourth Amendment to the Constitution. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

n24. *Tennessee v. Garner*, 471 U.S. 1 (1985).

n25. *Id.* at 7.

n26. The Court cited cases in which seizures were unreasonable because governmental interests did not support them: *Hayes v. Florida*, 470 U.S. 811, 817 (1985) (detention for fingerprinting without probable cause); *Winston v. Lee*, 470 U.S. 753, 766 (1985) (surgery under general anesthesia to obtain evidence); *United States v. Place*, 462 U.S. 696, 703 (1983) (lengthy detention of luggage); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) (an airport seizure not "carefully tailored to its underlying justification"); *Davis v. Mississippi*, 394 U.S. 721, 727 (1969) (fingerprints were a product of an illegal detention).

n27. *Garner*, 471 U.S. at 8.

n28. *Id.* at 8-9 (emphasis added).

n29. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

n30. *Brower v. County of Inyo*, 489 U.S. 593, 598 (1989) (holding a roadblock struck by a driver fleeing from the police constitutes a seizure because it is "designed to produce a stop by physical impact if voluntary compliance does not occur"); see also *In re City of Phila. Litig.*, 158 F.3d 711 (3d Cir. 1998) (holding that dropping a bomb on a home occupied by barricaded suspects constituted a seizure).

n31. *California v. Hodari D.*, 499 U.S. 621 (1991).

n32. *Id.* at 626. For an application of this principle, see *United States v. Bradley*, 196 F.3d 762 (7th Cir. 1999), finding that driver who stopped after his vehicle was struck by a shot fired by police officer was seized. See also *Hawkins v. City of Farmington*, 189 F.3d 695 (8th Cir. 1999) (holding that question of whether officer intended collision between his vehicle and a motorcycle to stop the motorcycle was for the jury to determine).

n33. *Graham*, 490 U.S. at 396.

n34. *Id.* at 396-97; see *infra* Part III (discussing whether the Court's assumption that police officers are frequently required to make "split-second" decisions is always an appropriate factor for determining the reasonableness of force used in taking emotionally disturbed people into custody).

n35. *Graham*, 490 U.S. at 396. In this respect, the Court departed from the substantive due process analysis that had been employed by the lower courts, which typically had included, as one of the factors to be considered, whether force was applied in a good faith effort to gain physical control of a subject "or maliciously and sadistically for the very purpose of causing harm." *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973). The subjective test is still employed in Eighth Amendment cases, where intent to harm is an aspect of whether there has been "unnecessary and wanton infliction of pain" constituting cruel and unusual punishment. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986).

n36. *Saucier v. Katz*, 533 U.S. 194 (2001).

n37. See *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). For a general discussion of the qualified immunity defense to excessive force claims, see *Avery et al.*, *supra* note 19, 3.14.

n38. Saucier, 533 U.S. at 204.

n39. Id. at 208-09.

n40. Id.

n41. Id. at 206 (quoting *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000)).

n42. *Roy v. City of Lewiston*, 42 F.3d 691 (1st Cir. 1994).

n43. Id. at 695.

n44. *Kerman v. City of New York*, 261 F.3d 229 (2d Cir. 2001).

n45. Id. at 232.

n46. Plaintiff's evidence included the allegation that one officer held a gun to his head and said, "listen you fucking nut-job, just hold still or I'll blow your brains out." Because he was standing naked in his apartment, plaintiff asked the officers to close his door, to which the sergeant replied, "you shut your fucking mouth, I'll shut the door when I want to." Paramedics telephoned the plaintiff's doctor, but when plaintiff asked the doctor to "get these goons out of here," the police hung up the telephone, without asking the doctor about plaintiff's mental health. When plaintiff complained that the handcuffs were too tight, an officer yanked them tighter. Although plaintiff was not struggling and was calm, the officers insisted upon removing him from the apartment in a restraint bag. Plaintiff threatened to sue the officers for their conduct, to which the sergeant replied, "I'm going to teach you a lesson ... I'll give you something to sue for." Id. at 233.

n47. Id. at 234.

n48. Id. at 237.

n49. The verdict was set aside as inconsistent with other special verdicts. Id. at 234.

n50. Id. at 239.

n51. Id. at 240-41.

n52. Id. at 245.

n53. *Clem v. Corbeau*, 284 F.3d 543 (4th Cir. 2002).

n54. Id. at 546-48.

n55. Id. at 552.

n56. See Timothy P. Flynn & Robert J. Homant, "Suicide by Police' in Section 1983 Suits: Relevance of Police Tactics, 77 U. Det. Mercy L. Rev. 555, 577 (2000) (concluding that "it would seem that more thought must be given to setting a standard for scrutinizing tactics in police shooting cases in general and in "suicide by police' incidents in particular").

n57. See, e.g., *Forrett v. Richardson*, 112 F.3d 416, 420-21 (9th Cir. 1997) (holding that shooting a violent felony suspect was reasonable, even if his capture through other means was inevitable); *Hegarty v. Somerset County*, 53 F.3d 1367, 1377 (1st Cir. 1995) (finding that officers were entitled to qualified immunity for their

decision to opt for an immediate unannounced approach to an isolated cabin to apprehend an armed suspect, rather than pursuing a more conservative containment strategy); *Forrester v. City of San Diego*, 25 F.3d 804, 807-08 (9th Cir. 1994) (holding that police are not required to drag and carry protestors away from a scene, but may use nonchakus as a "pain compliance technique" to motivate the protestors to move themselves); *Plakas v. Drinski*, 19 F.3d 1143, 1148-49 (7th Cir. 1994) (finding that the shooting of a subject was reasonable, and that officers were not required to use available alternatives of maintaining distance from the subject with the protection of a barrier, or to use chemical spray or a canine).

n58. See, e.g., *Pace v. Capobianco*, 283 F.3d 1275 (11th Cir. 2002) (finding that conclusion of eyewitness that decedent posed no threat to officers with his vehicle at the time he was shot, after the car had come to a stop in a cul-de-sac, did not present a material issue of disputed fact on summary judgment because the eyewitness had not seen the behavior of the decedent during the high speed chase that had taken place before he entered the cul-de-sac).

n59. Police practices expert James J. Fyfe has testified in more than sixty trials involving shootings of mentally ill subjects and believes that the officer's first response to an emotionally disturbed person is critical. He maintains: "In all of the cases where I testified, the cops screwed up in the first 90 seconds." Kathy Bunch, *When Cops Confront Mental Illness*, *WebMD Med. News*, Apr. 23, 2001, at <http://my.webmd.com/content/article/1685.51225>.

n60. *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999).

n61. *Id.* at 283.

n62. *Id.*

n63. *Id.* at 291.

n64. *Id.* at 292.

n65. *St. Hilaire v. City of Laconia*, 71 F.3d 20 (1st Cir. 1995). Police officers were attempting to arrest

plaintiff's decedent, whom they believed to be armed. A plain-clothes officer ran toward decedent's car with his gun in his hand. Believing that decedent was reaching for his own weapon, the officer shot him. There was a dispute as to whether the officer had identified himself as a police officer. *Id.* at 23.

n66. *Id.* at 26. The court reasoned that such a rule would be inconsistent with the Supreme Court's decision in *Brower v. County of Inyo*, which it read as holding "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." *Id.* This argument was based on the fact that, having determined that a roadblock is a seizure, the Court in *Brower* remanded for the purpose of determining whether the roadblock was constructed and designed unreasonably. The Third Circuit agreed with this reading of *Brower* in *Abraham v. Raso*: "If preceding conduct could not be considered, remand in *Brower* would have been pointless, for the only basis for saying the seizure was unreasonable was the police's pre-seizure planning and conduct." *Abraham v. Raso*, 183 F.3d 279, 292 (3d Cir. 1999). *Brower* is certainly authority for the proposition that one does not judge the officers' actions simply at the instant a seizure takes place, but the decision provides little guidance as to how far back to go in reviewing their actions.

n67. *St. Hilaire*, 71 F.3d at 27.

n68. *Id.* at 27-28. On that claim, the court awarded the defendants qualified immunity, holding that the decedent's rights in that respect had not been clearly established at the time of the incident. The incident took place prior to the Supreme Court's decision in *Wilson v. Arkansas*, 514 U.S. 927 (1995), which held that the "knock and announce" rule is required by the Fourth Amendment.

n69. *Napier v. Town of Windham*, 187 F.3d 177 (1st Cir. 1999). Two police officers came to the home of a man, believed to be mentally disturbed, who had been firing a rifle from his porch. Prior to the civil claim, plaintiff had been convicted in criminal proceedings for threatening one of the officers with his weapon, and the court afforded qualified immunity to both officers based on the reasonableness of their actions given the plaintiff's threatening presence. *Id.* at 184-85.

n70. *Id.* at 188.

n71. *Id.* The court then inquired whether there had existed a clearly established right or obligation that the officers' pre-confrontation conduct might have breached. Evidently, the plaintiff's only argument in this regard was that the officers were "sneaking around the house with their guns drawn, rather than telephoning [plaintiff] or contacting him from a position of cover." *Id.* at 189. The court found that the officers had no clearly

established duty to take the latter course of action.

n72. In *Alexander v. San Francisco*, officers shot and killed a man in his home. 29 F.3d 1355, 1358 (9th Cir. 1994). At the time the fatal shots were fired, decedent was pointing his gun at the officers and had accidentally pulled the trigger. *Id.* The court agreed with plaintiff, however, that the reasonableness of the officers' use of force had to take into account their decision to storm the house of "a mentally ill, elderly, half-blind recluse who had threatened to shoot anyone who entered." *Id.* at 1366. The decision suggested that the court might develop a generous standard for taking into account circumstances that lead up to the moment when force is applied. The decision has been limited, however, by subsequent cases.

n73. *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002).

n74. Subsequent to *Alexander v. San Francisco*, described supra in note 72, the court in *Reynolds v. County of San Diego* put more weight on the split-second nature of decisions regarding the use of force and on the desirability of affirming an officer's tactical choices as long as they were reasonable. While recognizing the *Alexander* precedent, the court held that an officer's actions in shooting a subject were reasonable, despite expert testimony that the officer had mishandled the situation. *Reynolds v. County of San Diego*, 84 F.3d at 1162, 1169-70 (9th Cir. 1996). In *Duran v. City of Maywood*, plaintiffs had requested what the court termed an "Alexander instruction," that the officers could be held liable if they intentionally or unreasonably created a situation where the use of deadly force would become likely. *Duran v. City of Maywood*, 221 F.3d 1127 (9th Cir. 2000). While holding that the facts of the case did not justify such an instruction, the court recognized the legitimacy of one under proper circumstances. It held specifically that "in order to justify an Alexander instruction, there must be evidence to show that the officer's actions were excessive and unreasonable, and that these actions caused an escalation that led to the shooting." *Id.* at 1131.

n75. *Billington*, 292 F.3d at 1189.

n76. *Id.* at 1190. The court reasoned that, "an officer may fail to exercise 'reasonable care' as a matter of tort law yet still be a constitutionally 'reasonable' officer." *Id.* It did not discuss explicitly, however, the "totality of the circumstances" standard.

n77. See *Myers v. Oklahoma County Bd. of County Comm'rs*, 151 F.3d 1313, 1320 (10th Cir. 1998) (finding that court is obliged to consider whether decision to enter apartment unreasonably created need to use force inside apartment); *Allen v. Muskogee*, 119 F.3d 837, 841 (10th Cir. 1997) (finding that dispute as to how officers approached decedent's car was material, precluding summary judgment); *Wilson v. Meeks*, 52 F.3d

1547, 1554 (10th Cir. 1995) (finding that inquiry is confined to whether officer was in danger at the moment of the threat from decedent); *Romero v. Bd. of County Comm'rs*, 60 F.3d 702, 705 (10th Cir. 1995) (finding that failure to arrest and handcuff deceased before he threatened officer with knife was not relevant, but that officer's conduct might be relevant if it were "immediately connected" to the subject's threat of force); *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995) (holding that reasonableness of officers' actions depends in part on whether their own reckless or deliberate conduct during a seizure unreasonably created the need to use deadly force).

n78. See *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001); *Allen*, 119 F.3d at 840; *Sevier*, 60 F.3d at 699.

n79. *Medina*, 252 F.3d at 1132. In *Holland v. Harrington*, 268 F.3d 1179 (10th Cir. 2001), the court held that the decision to employ a SWAT team to execute an arrest warrant and to conduct a search was conduct "immediately connected" with the seizure that later took place).

n80. *Salim v. Proulx*, 93 F.3d 86 (2d Cir. 1996). The officer and a fourteen-year-old boy, an escapee from a detention center, were struggling on the ground as the officer attempted to take the boy into custody. A group of children physically intervened to try to free the boy. The officer's gun was taken from his pocket and when he saw the barrel of the gun in the boy's hand, the officer grabbed the handle and pulled the trigger. *Id.* at 88.

n81. *Id.* at 92.

n82. The court in *Salim* did state that even if the plaintiff had proved that the officer acted negligently, this would not establish a 1983 violation. *Id.* This may suggest that the court believed that the officer's conduct leading up to the shooting could only amount to negligence.

n83. *Greenidge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991) (holding that plaintiff's evidence that officers recklessly created a dangerous situation during prostitution arrest by approaching car at night without flashlights was properly excluded from trial).

n84. *Id.* at 792.

n85. *Schulz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995) ("The Court's use of the phrases 'at the moment' and 'split-second judgment' are strong indicia that the reasonableness inquiry extends only to those facts known to the officer at the precise moment the officers effectuate the seizure.").

n86. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). The "at the moment" language in *Graham* continues as follows: "With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers' ... violates the Fourth Amendment." *Id.* at 396 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

n87. *Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996). The facts in *Elliott* were extremely unsympathetic to the plaintiff. Plaintiff's decedent had been arrested, handcuffed behind his back, and placed in a police cruiser. Somehow he managed to get a gun he had secreted on his person into his hands and pointed it at the officers. They ordered him to drop it, he refused, and the officers shot him. Plaintiff's theory of liability was that the officers should have conducted a more thorough search and found the gun. *Id.* at 642-44.

n88. *Drewitt v. Pratt*, 999 F.2d 774 (4th Cir. 1993) (finding that officer's actions prior to shooting, such as whether he properly identified himself as a police officer or whether he was in a position to jump out of the way of plaintiff's rapidly accelerating vehicle, relate only to the issue of whether his arrest procedures were proper or improper, and were not material to officer's subsequent decision to shoot plaintiff in light of the severe threat of physical harm to himself after being thrown on the hood of plaintiff's vehicle).

n89. *Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994). The plaintiff was a mildly retarded man who had picked up a five-dollar bill that a woman had dropped in a bus station. The officer who witnessed the incident believed plaintiff was stealing the money, although plaintiff later testified he had not seen anyone drop it and did not know to whom it belonged. *Id.* at 171. The officer followed plaintiff out of the bus station and arrested him. In the process, there was a struggle during which the officer employed a wrestling maneuver in which he threw his weight against plaintiff's knee until it cracked, causing plaintiff to sustain a torn anterior cruciate ligament. *Id.* at 172.

n90. *Id.* at 173.

n91. *Id.* (citing *Graham*, 490 U.S. at 396).

n92. *Id.* at 173.

n93. *Abraham v. Raso*, 183 F.3d 279, 291-92 (3d Cir. 1999).

n94. *Freire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992) (holding that failure of officer to display his badge and identify himself as a police officer while in plain clothes would not create liability for fatal shooting where officer fired at decedent's vehicle to prevent decedent from running officer down).

n95. *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985) (finding no constitutional violation where officer shot decedent in self-defense, although the need for force might have been avoided if officer had followed proper police procedures in handling the incident).

n96. *Young* was decided prior to *Graham*, but after the Supreme Court's decision in *Garner*.

n97. *Menuel v. City of Atlanta*, 25 F.3d 990 (11th Cir. 1994). The court held that plaintiffs' decedent, who was emotionally disturbed and behaving violently and erratically, was not "seized" under the Fourth Amendment when officers entered her home and trapped her in a bedroom. The court reasoned that she still retained sufficient freedom of action to pose a danger to the officers. Eventually officers broke into the bedroom at which time the decedent opened fire on them and the officers returned fire.

n98. *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994).

n99. *Menuel*, 25 F.3d at 996-97.

n100. *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994). Plaintiff's decedent was arrested after an accident for drunk driving. He escaped, while handcuffed, from the police cruiser. After a lengthy series of events, he was shot and killed by an officer in a field, while charging at the officer with a fireplace poker. *Id.* at 1144-46. The court rejected plaintiff's claim that the reasonableness of the shooting should be judged in light of the police failure to use a chemical agent to subdue decedent, to employ a canine unit that was offered to them, and to put barriers between themselves and decedent and maintain distance from him. The court held that it should judge the incident from the point when the officer was standing in a field, gun in hand, several feet from the decedent,

who charged him with the poker raised. *Id.* at 1150.

n101. *Id.* at 1150. The court noted that:

Here it is beyond dispute that, under the Constitution, the police could reasonably (1) arrest Plakas for drunk driving after he exhibited familiar signs of intoxication; (2) track down an escaping arrestee; (3) draw and point weapons after Plakas armed himself and attacked an officer; (4) pursue Plakas into the clearing after he committed a violent offense and was a danger to himself; and (5) try to talk Plakas into disarming himself and surrendering.

*Id.*

n102. *Id.*

n103. *Id.*

n104. *Deering v. Reich*, 183 F.3d 645 (7th Cir. 1999). The police shot and killed an elderly mentally disturbed subject they had gone to arrest at 11 p.m. on a misdemeanor warrant for failing to appear in court in connection with a motor vehicle charge from a minor accident. The subject was killed while armed with a shotgun, after he had fired at one of the sheriff's deputies who had come to his house. *Id.* at 648.

n105. The court noted that the "totality of the circumstances" is a phrase that

In itself, ordinarily gives law enforcement officers a good deal of discretion. In fact, the phrase is most often used to provide justification for police action; usually the totality of the circumstances encompasses some fact or another which validates a search, a seizure, or such things as the reasonableness of force used to carry out an arrest.

*Deering*, 183 F.3d at 650.

n106. *Id.* at 649.

n107. *Id.* at 652. The court thus found it relevant to consider that the "deputies decided to serve the warrant in the middle of the night on an elderly man living alone in a rural farmhouse," despite the defendant's argument that such information was "pre-seizure" conduct. *Id.* at 650.

n108. See, e.g., *Sledd v. Lindsay*, 102 F.3d 282, 288 (7th Cir. 1996) (holding that an officer's failure to identify himself as a police officer will affect rules governing the use of deadly force and the right to resist); *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993) (holding that the court would consider whether an officer stepped in front of vehicle leaving decedent no time to brake, and hence unreasonably created the encounter which allegedly justified the use of deadly force).

n109. *Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996).

n110. The officers had responded to a "shots fired" call, having been told that a drunken male subject had fired nine shots inside a residence. The officers entered the home without knocking or announcing their presence, and without determining if anyone else was inside the residence. After some shouting by the subject, and after the officers heard what they believed was a cylinder closing on a revolver, the subject attempted to leave the house and was shot and killed by the officers. *Id.* at 1154.

n111. *Id.* at 1162.

n112. *Id.* at 1161-62.

n113. *Claybrook v. Birchwell*, 274 F.3d 1098 (6th Cir. 2001).

n114. *Id.* at 1100.

n115. *Id.* at 1101.

n116. *Id.* at 1105.

n117. *Id.*

n118. *Id.*

n119. *Id.*

n120. *Id.* at 1102.

n121. *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999).

n122. *Id.* at 291.

n123. *Id.* at 292.

n124. *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citing *United States v. Cortez*, 449 U.S. 411, 418-19 (1981)) (holding that training and experience of border patrol agents is properly taken into account); see also *Ornelas v. United States*, 517 U.S. 690, 699-700 (1996) (noting "a police officer views the facts through the lens of his police experience and expertise ... . Our cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists").

n125. *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

n126. *United States v. Sparks*, 291 F.3d 683, 688 (10th Cir. 2002).

n127. *United States v. Patterson*, 292 F.3d 615, 626 (9th Cir. 2002).

n128. *United States v. Price*, 599 F.2d 494, 501 (2d Cir. 1979). Price cites *United States v. Oates*, 560 F.2d 45, 61 (2d Cir. 1977), for the proposition that "some patterns of behavior which may seem innocuous enough to the untrained eye may not appear so innocent to the trained police officer." Price, 599 F. 2d at 501.

n129. *United States v. Neumann*, 183 F.3d 753, 756 (8th Cir. 1999).

n130. *United States v. Kayode*, 254 F.3d 204, 209 (D.C. Cir. 2001).

n131. See *Ewolski v. City of Brunswick*, 287 F.3d 492, 516 (6th Cir. 2002) (concluding that even though the police actions were "ill-advised and poorly executed" and "troubled as [the court was] by the conduct of the police in this standoff ... imprudence and poor execution do not rise to the level of constitutionally arbitrary abuses of power"); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) (stating that even if officer's failure to follow police procedure were negligent, it would not amount to a civil rights violation).

n132. *Roy v. City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994).

n133. Robert A. Matthews & Loyd W. Rowland, Nat'l Ass'n for Mental Health, *A Manual for the Police Officer: How to Recognize and Handle Abnormal People* (1954).

n134. See Herbert B. Fowler, *Police Handling of Emotionally Disturbed People*, FBI L. Enforcement Bull., Jan. 1971, at 16.

n135. See Mass. Municipal Police Inst., Inc., *Police Manual No. 435, Policies and Procedures: Handling the Mentally Ill* (1992); State of Ca. Comm'n on Peace Officer Standards and Training, *Basic Unit Course Guide*

No. 45, Mentally Ill (2001) [hereinafter Comm'n on Peace Officer Standards and Training].

n136. See Int'l Ass'n of Chiefs of Police, Training Key No. 274, Abnormal Behavior 1-2 (1979) [hereinafter IACP Training Key No. 274]; Int'l Ass'n of Chiefs of Police, Training Key No. 32, Mental Illness (1966) [hereinafter IACP Training Key No. 32]; Int'l Ass'n of Chiefs of Police, Training Key No. 50, Severe Mental Illness (1966); Int'l Ass'n of Chiefs of Police, Training Key No. 273, Suicide Intervention (1979); Gerard R. Murphy, *Managing Persons with Mental Disabilities: A Curriculum Guide for Police Trainers* (1989); Gerald D. Garner, *Safely Handling Diminished Capacity Persons*, *Police Marksman*, Jan./Feb. 1992; Ruiz, *supra* note 7.

n137. See Training Officer Reginald F. Allard, Jr., *Conn. Police Acad., Abnormal Behavior* (1988); John Jay Coll. of Criminal Justice, *Managing Situations Involving Mentally Disturbed Persons: A Training Manual for Stamford Police Officers*.

n138. See Jorge R. Garza, *Mental Illness/Patrol Procedures* (1985); Matthews & Rowland, *supra* note 133; Videotape: *Surviving Edged Weapons* (Calibre Press 1989); Videotape: *Contact and Cover* (Performance Dimensions 1994).

n139. See John Jay Coll. of Criminal Justice, *supra* note 137, at 4-8; Garner, *supra* note 136, at 19.

n140. See John Jay Coll. of Criminal Justice, *supra* note 137, at 8-12; Ruiz, *supra* note 7, at 151; IACP Training Key No. 274, *supra* note 136, at 1-2; IACP Training Key No. 32, *supra* note 136, at 46-47; see also Matthews & Rowland, *supra* note 133, at 8 (listing factors as telltale signs of mental illness in an individual: big changes in behavior; strange loss of memory; thinks people are plotting against him; has grand ideas about himself; talks to himself; hears voices; sees visions, smells strange odors, or has peculiar tastes; thinks people are watching or talking about him; has bodily ailments that are not possible; is extremely frightened; and engages in dangerous behavior); Garner, *supra* note 136, at 20 (listing indications that a person might be mentally ill: hallucinations, delusions, disorientation, wild and extreme mood swings or behavioral response, threats or actual attempts at self-destruction (including self-mutilation and suicide gestures), and extreme, deep depression and despair).

n141. Murphy, *supra* note 136.

n142. *Id.* at 1-1.

n143. *Id.* at 1-3.

n144. IACP Training Key No. 274, *supra* note 136, at 3-4; Matthews & Rowland, *supra* note 133, at 3.

n145. John Jay Coll. of Criminal Justice, *supra* note 137, at 30.

n146. See Fowler, *supra* note 134, at 4; Garza, *supra* note 138, at slide 54.

n147. See IACP Training Key No. 274, *supra* note 136, at 4; Fowler, *supra* note 134, at 4.

n148. Murphy, *supra* note 136, at 4-9.

n149. Officer Down "Insane Jane", *Police Marksman*, May/June 1992, at 9; IACP Training Key No. 32, *supra* note 136, at 7.

n150. Comm'n on Peace Officer Standards and Training, *supra* note 135, at 45-2-3; Garza, *supra* note 138, at slide 48; Mass. Municipal Police Inst., Inc., *supra* note 135, at 2; Matthews & Rowland, *supra* note 133, at 8-9.

n151. John Jay Coll. of Criminal Justice, *supra* note 137, at 32-33. In part, the manual suggests: "Defusion consists of trying to break into the disturbed persons' emotional turmoil and deflect the person's attention ... . In dealing with anger, direct anger away from a person, re-direct displaced anger, and put anger in the past." *Id.* at 32. Specific techniques are suggested for accomplishing these goals. *Id.* at 32-33.

n152. See Ruiz, *supra* note 7, at 165-66; Videotape: Contact and Cover, *supra* note 138.

n153. Ruiz, *supra* note 7, at 165-69; John Jay Coll. of Criminal Justice, *supra* note 137, at 31-32.

n154. Murphy, *supra* note 136, at 4-10.

n155. See Garner, *supra* note 136, at 20-21.

n156. *Id.* at 21.

n157. Ruiz, *supra* note 7, at 153.

n158. Gary W. Cordner, A Community Policing Approach to Persons with Mental Illness, 28 *J. Am. Acad. Psychiatry & L.* 326, 327 (2000).

n159. See Comm'n on Peace Officer Standards and Training, *supra* note 135, at 45-5; IACP Training Key No. 32, *supra* note 136, at 47; Mass. Municipal Police Inst., Inc., *supra* note 135, at 2; Matthews & Rowland, *supra* note 133, at 10; Garner, *supra* note 136, at 20.

n160. Allard, *supra* note 137, at 1; Garza, *supra* note 138, at slides 48-59; IACP Training Key No. 32, *supra* note 136, at 47; Mass. Municipal Police Inst., Inc., *supra* note 135, at 2; Murphy, *supra* note 136, at 4-8.

n161. Comm'n on Peace Officer Standards and Training, *supra* note 135, at 45-4; Matthews & Rowland, *supra* note 133, at 10; Murphy, *supra* note 136, at 4-8.

n162. "Most police officers, due primarily to the lack of training, will react in the same predictable fashion in situations involving resistance from the mentally ill as they would to any other situation involving resistance." Ruiz, *supra* note 7, at 159.

n163. Matthews & Rowland, *supra* note 133, at 10; see Allard, *supra* note 137, at 4; Garza, *supra* note 138, at slides 57-58; IACP Training Key No. 32, *supra* note 136, at 47.

n164. *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001).

n165. *Id.* at 1282-83.

n166. Ruiz, *supra* note 7, at 155-56.

n167. See Videotape: *Surviving Edged Weapons*, *supra* note 138.

n168. See *id.*

n169. See Garner, *supra* note 136, at 21.

n170. IACP Training Key No. 274, *supra* note 136. A strikingly similar list of behaviors to avoid is provided by Murphy, *supra* note 136, at 4-9.

n171. See Flynn & Homant, *supra* note 56, at 555.

n172. This does not mean, however, that officers are justified in using deadly force simply because a person is seeking to end his own life. As the Court of Appeals for the Ninth Circuit pointed out in *Deorle v. Rutherford*: "Even when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a criminal, but with a mentally ill individual." 272 F.3d 1272, 1283 (9th Cir. 2001). In *Deorle*, the plaintiff "repeatedly asked officers to shoot him"; pain, induced by a reaction to medication, had

driven him "out of control." *Id.* at 1281. The police heard him shout that "the pain was unbearable, and that he wanted to be done with the pain, and that there was no use in continuing." *Id.*

n173. James Fyfe discounts most claims of "suicide by cop." He writes:

After the fact, police have recently been prone to write off such tragedies as "suicide by cop," a classification that, in my experience, is far more often a post hoc justification for sloppy police work than a valid explanation of why and how somebody died. The term "suicide by cop" should describe only situations in which even officers who adhere closely to the industry standard for dealing with EDPs [emotionally disturbed persons] are given no choice but to kill them. Unfortunately, it has become a catchy descriptor for a far larger number of cases in which officers put themselves unnecessarily into harm's way and must then shoot their way out of it.

Fyfe, *supra* note 6, at 346.

n174. See *Napier v. Town of Windham*, 187 F.3d 177 (1st Cir. 1999); *Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996); *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992); *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985).

n175. See *Warren v. Las Vegas Metro. Police Dep't*, No. 96-15403, 1997 U.S. App. LEXIS 7620, at 7 (9th Cir. Apr. 15, 1997) (concluding that the failure to use "Capstun" (pepper spray) was irrelevant because officers are not required to use the least intrusive means of responding to an exigent situation, but need only act within a reasonable range of conduct); *Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691, 696 (1st Cir. 1994) (rejecting municipal and supervisory liability based on the argument that the failure to provide officers with mace constituted deliberate indifference); *McKinney v. DeKalb County, Ga.*, 997 F.2d 1440, 1443 (11th Cir. 1993) (reaching the same conclusion as the Roy court).

n176. *Pena v. Leombruni*, 200 F.3d 1031 (7th Cir. 1999).

n177. *Id.* at 1034. The appellate court begins by discussing the district court's rejection of the proposed expert on the ground that he was not qualified. *Id.* The court refers to the question of whether he was "incompetent to testify about the use of excessive force against a crazy person because he was not an expert on that rather esoteric issue." *Id.* As we have seen, however, this issue is not "esoteric," but one which arises frequently and on which there are substantial training materials.

n178. Plaintiffs' decedent was reported to have been "acting crazy," shoplifting, and fighting with store employees. *Id.* He fled upon the arrival of the officer, but later turned and confronted him with his dog. *Id.* The officer pepper-sprayed both the subject and the dog. *Id.* The subject then picked up a chunk of concrete and advanced toward the officer who backpedaled, but then shot and killed the subject from a distance of five to ten feet. *Id.* at 1033. The court treated the decedent's mental state as relevant only to any defense he might have raised had he survived and been prosecuted, not to whether there was a danger to the officer. "A rattlesnake is deadly but could not form the mental state required for conviction of murder." *Id.* at 1034.

n179. *Wood v. City of Lakeland*, 203 F.3d 1288 (11th Cir. 2000).

n180. *Id.* at 1290.

n181. *Id.*

n182. The court of appeals rejected the conclusion of the magistrate judge that the autopsy report supported the plaintiff's position. *Id.* at 1291.

n183. *Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998).

n184. *Id.* at 900.

n185. *Id.* at 901.

n186. *Id.*

n187. *Id.* at 902.

n188. *Nelson v. County of Wright*, 162 F.3d 986 (8th Cir. 1998).

n189. *Id.* at 988.

n190. *Id.* at 989.

n191. *Id.* at 990-91.

n192. *Caricofe v. Mayor and City Council of Ocean City*, No. 01-1809, 2002 WL 482563 (4th Cir. Apr. 1, 2002) (per curiam).

n193. *Id.* at 1.

n194. *Id.* at 2.

n195. *Id.* at 2-3.

n196. *Id.* at 4.

n197. *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995). In *Deorle v. Rutherford*, the court reached the same conclusion, holding, "we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed." 272 F.3d 1272, 1283 (9th Cir. 2001).

n198. *Ludwig*, 54 F.3d at 467.

n199. Id. at 468.

n200. Id. at 468-69.

n201. Id. at 474.

n202. Id. at 472.

n203. Id.

n204. Id. (citing *Tennessee v. Garner*, 471 U.S. 1, 18-19 (1985)).

n205. *Hegarty v. Somerset County*, 53 F.3d 1367 (1st Cir. 1995).

n206. Id. at 1371.

n207. Id. at 1375.

n208. Id. at 1376-77.

n209. Id. at 1371.

n210. Id.

n211. Id. at 1375.

n212. Id. at 1378.

n213. Id. at 1377.

n214. *Sorrells v. Dallas*, 192 F.R.D. 203 (N.D. Tex. 2000).

n215. Id. at 205.

n216. Id.

n217. Id. at 206.

n218. *Medina v. Cram*, 252 F.3d 1124 (10th Cir. 2001).

n219. Id. at 1138.

n220. Id. at 1133.

n221. Judge Seymour stated:

Notwithstanding plaintiff's agitated and suicidal state, the officers' knowledge that he wanted the police to shoot him, and their belief that he was holding a gun, one officer, instead of taking cover, attempted to sneak up behind plaintiff to knock him to the ground. The majority also holds reasonable as a matter of law the actions of another officer who released an attack dog on plaintiff while the first officer was attempting to sneak up on him. These facts, viewed most favorably to Mr. Medina, do not compel the conclusion that the actions of either officer, which in combination brought about the situation where deadly force was arguably necessary, were objectively reasonable as a matter of law.

Id. at 1138 (Seymour, J., dissenting).

n222. *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001).

n223. See *supra* Part II.

n224. *Warren v. Las Vegas Metro. Police Dep't*, No. 96-15403, 1997 U.S. App. LEXIS 7620 (9th Cir. Apr. 15, 1997).

n225. In this case, officers initially stopped plaintiffs' decedent in response to "911" calls reporting a man threatening people with a weapon. When the officers first attempted to stop him, the decedent had lunged at one officer with his knife. Id. at 1. The officers created a circle around the decedent, with their weapons raised. They allowed a police dog inside the six to eight foot perimeter they maintained around the decedent, despite the fact that, in one officer's words, the dog "was going crazy" and further agitating the subject. Id. at 3. Despite officers' repeated warnings to drop the weapon and to calm down, the subject continued to brandish the knife, and at one point ran at the officers with his knife raised, at which point two officers shot him. Id. at 3.

n226. Id. at 2. To support this argument, the court relied on its earlier decision in *Scott v. Heinrich*, 39 F.3d 912, 916 (9th Cir. 1994). The proposition is asserted in *Scott* without any supporting authority. Under the totality of the circumstances test, it is unclear why the relevance of the guidelines would depend upon the identity of the actor they were meant to protect.

n227. *Warren*, 1997 U.S. App. LEXIS 7620, at 2. In *Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691 (1st Cir. 1994), the court rejected plaintiff's argument that the officers should have maintained a twenty-foot distance from an intoxicated man armed with two knives on the grounds that the officers' failure to do so was

nonetheless reasonable, given the "fairly wide zone of protection [from liability] in close cases." *Id.* at 695. In addition, Judge Boudin opined:

Nor is it at all plain that the police could, or should, have kept their distance. Leaving aside the indications that [the subject] moved toward them, one might easily suppose that the best chance the police had to subdue him without shooting was to get close enough to push him over or wrest the weapons from him. The police may have done the wrong thing but they were not "plainly incompetent" nor were their actions "clearly proscribed."

*Id.* at 696. Judge Boudin does not set forth the nature of his own expertise in disarming men with knives, but his advice to attempt to push over a man with a knife would appear to contradict the available training. See *supra* Part II.

n228. *Reynolds v. County of San Diego*, 84 F.3d 1162 (9th Cir. 1996).

n229. *Id.* at 1164-65.

n230. *Id.* at 1165.

n231. *Id.* at 1170.

n232. *Id.*

n233. *Id.*

n234. Pepper spray is a compound known as oleoresin capsicum, which "is designed to cause intense pain, a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx," and which has the known psychological effects of "disorientation, anxiety, and panic." *Headwaters Forest Def. v. County of Humboldt*, 240 F.3d 1185, 1199-1200 (9th Cir. 2000), vacated on other grounds by 54 U.S. 801 (2001).

n235. See, e.g., *Medina v. Cram*, 252 F.3d 1124, 1139-40 (10th Cir. 2001) (recounting expert's opinion that pepper spray should have been used prior to shooting the plaintiff).

n236. See *Gibson v. Co. of Washoe*, 290 F.3d 1175, 1182-83 (9th Cir. 2002); *Caricofe v. Mayor and City Council of Ocean City*, No. 01-1809, 2002 WL 482563 (4th Cir. Apr. 1, 2002); *Sorrells v. Dallas*, 192 F.R.D. 203, 205 (N.D. Tex. 2000); *Tofano v. Reidel*, 61 F. Supp. 2d 289, 293 (D.N.J. 1999); see also *Howerton v. Fletcher*, 213 F.3d 171, 172 (4th Cir. 2000) (noting that mace was ineffective against mentally disturbed man); *Ludwig v. Anderson*, 54 F.3d 465, 468-69 (8th Cir. 1995) (same).

n237. See, e.g., *Park v. Shiflett*, 250 F.3d 843, 852-53 (4th Cir. 2001) (finding the use of pepper spray twice at close range against unarmed woman was excessive); *Monday v. Oulette*, 118 F.3d 1099, 1104 (3d Cir. 1997) (finding the use of single burst of pepper spray against 300-pound suicidal man resisting police, resulting in plaintiff's hospitalization for five days, reasonable under circumstances); *Tofano v. Reidel*, 61 F. Supp. 2d 289, 301 (D.N.J. 1999) (finding the use of pepper spray was reasonable where decedent was resisting arrest and had slashed the neck of one officer with his handcuffs); *Lamb v. City of Decatur*, 947 F. Supp. 1261, 1264 (C.D. Ill. 1996) (holding that officers who sprayed pepper spray against crowd of labor demonstrators should not receive qualified immunity on Fourth Amendment claim); cf. *Young v. City of Mt. Ranier*, 238 F.3d 567, 574-75 (4th Cir. 2001) (dismissing a case alleging deliberate indifference to effects of pepper spray on individual on PCP where emotionally disturbed person created a disturbance, resisted arrest, was pepper-sprayed, handcuffed, and shackled, then placed prone face-down in back seat of cruiser, where he died from sudden cardiac arrhythmia, and autopsy noted PCP in his system, because officers did not know he was on PCP).

n238. See *Young v. City of Mt. Ranier*, 238 F.3d 567 (4th Cir. 2001); *Vaughn v. City of Lebanon*, Nos. 99-6670, 99-6672, 99-6673, 99-6675, 99-6676, 2001 WL 966279 (6th Cir. Aug. 16, 2001).

n239. See Donald T. Reay, *Death In Custody*, *Clinics in Laboratory Med., Forensic Pathology*, Mar. 1998 at 14-15; Donald T. Reay et al., *Effects of Positional Restraint on Oxygen Saturation and Heart Rate Following Exercise*, 9 *Am. J. Forensic Med. Pathology* 16 (1988); Donald T. Reay et al., *Positional Asphyxia During Law Enforcement Transport*, 13 *Am. J. Forensic Med. Pathology* 90 (1992). In *Gutierrez v. City of San Antonio*, the medical examiner Vincent DiMaio concluded in a supplemental autopsy report:

Subsequent to completion of the autopsy report on Rene Gutierrez, this office discovered that when the deceased was transported in the San Antonio Police Department unit, that he was placed on the back seat, face down, his hands secured behind his back with handcuffs and his feet tied with a rope which was then tied to his hands or the handcuffs. In other words, the deceased was "hog tied." It is known that "hog-tying" of an individual and placing them in the position that Rene Gutierrez was placed, can produce a relative hypoxia and in some instances death. Based on the new information supplied, it is our opinion that the "hog-tying" was a contributory cause to Rene Gutierrez's death.

139 F.3d 441, 444 (5th Cir. 1998). But see Tom Neuman et al., *Restraint Position and Positional Asphyxia*, 30 *Annals of Emergency Med.* 578 (1997) (concluding that hog-tying does not cause death).

n240. See, e.g., *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 592-93 (7th Cir. 1997) (restraining a person in a prone position is not, in and of itself, excessive force when person restrained is resisting arrest; where officers handcuffed decedent behind his back and placed him face down on the floor with one officer's knee in his back, and his feet shackled, it was held an objectively reasonable response to an escalating situation); *Cottrell v. Caldwell*, 85 F.3d 1480, 1491 (11th Cir. 1996) (finding no genuine issue of material fact presenting claim of excessive force where defendants placed decedent in police car with his feet on rear seat and head in space between the front and rear seats, such that he was unable to adequately inhale oxygen, and because of handcuffs and leg restraints could not reposition himself); *Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir. 1990) (holding that officers should have known they maliciously used force that was grossly disproportionate to the need where they forced decedent to floor, and one officer (nicknamed "Beef" due to his large size) sat on the decedent's chest, after which they rolled the decedent onto his stomach, cuffed his hands behind his back, and cuffed his legs).

n241. See *Caricofe v. Mayor and City Council of Ocean City*, No. 01-1809, 2002 WL 482563 (4th Cir. Apr. 1, 2002); *Tofano v. Reidel*, 61 F. Supp. 2d 289, 293-94 (D.N.J. 1999).

n242. In *Tofano v. Reidel*, 61 F. Supp. 2d 289 (D.N.J. 1999), the medical examiner concluded that the plaintiff's death was due to a deprivation of oxygen that made him susceptible to fatal cardiac arrhythmia. The examiner said three events created this susceptibility:

1. an increase in oxygen demands caused by catecholamine stress on the heart due to cocaine toxicity,
2. an increase in oxygen demands caused by hyperactivity during police attempts at restraint and
3. a compromise of respiratory movements during restraint while holding him down in a prone position.

This scenario may have been further aggravated by a congenital heart defect (hypoplastic coronary artery disease) detected at autopsy which can render such a person susceptible to a fatal arrhythmia during increased states of physical activity.

*Id.* at 294.

n243. *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001).

n244. *Id.* at 1186.

n245. Id.

n246. Id.

n247. Id. at 1188. The court defined a "hog-tie" as "the binding of the ankles to the wrists, behind the back, with 12 inches or less of separation." Id. The court defined "diminished capacity" as something that might result from "severe intoxication, the influence of controlled substances, a discernible mental condition, or any other condition, apparent to the officers at the time, which would make the application of a hog-tie restraint likely to result in any significant risk to the individual's health or well-being." Id. The court eventually ruled that the defendant officers were entitled to qualified immunity because the asserted constitutional right was not clearly established at the time of the incident. Id.

n248. Id. at 1188-89.

n249. Id. at 1189.

n250. Id.

n251. Id.

n252. *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998).

n253. Id. at 445.

n254. Police officers had attempted to take plaintiffs' decedent into custody because he was behaving bizarrely. EMS personnel refused to transport him because of his behavior, and the police then decided to

transport him in their cruiser. The officers employed a personal leg-restraint device, a nylon rope with a loop on one end and a clasp on the other. They placed the loop around the decedent's feet, and linked the clasp around the handcuffs, drawing the decedent's legs backward at a ninety-degree angle in an "L" shape, thereby "hog-tying" him. While they drove to the hospital, one officer occasionally checked to see if the decedent's restraints were secure, but did not check to see if he was still breathing or otherwise monitor him. Approximately ten minutes into the journey, all sounds of the decedent's struggling stopped. Upon arriving at the hospital, decedent was face-down on the seat, a position that allegedly restricted the amount of oxygen that could reach his heart and his heart's ability to pump oxygen-enriched blood throughout his body. In the emergency room doctors pronounced him dead. *Id.* at 443. An autopsy concluded that the hog-tying was a contributory cause of death. *Id.* at 444.

n255. *Id.* at 444.

n256. *Id.* at 446 (alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

n257. *Id.* (alteration in original) (quoting *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988)).

n258. *Id.* (citing Tex. Penal Stat. Ann. 1.07(17) and quoting a San Antonio Police Department Procedure as stating that "'Deadly Force' means force that is intended or known by the actor to cause, or in the manner of its use or intended use, is capable of causing, death or serious bodily injury").

n259. "An officer can use 'deadly force' only against a suspect who poses a threat of death or serious physical harm to the officer or others." *Gutierrez*, 139 F.3d at 446 (construing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

n260. *Id.* at 451.

n261. *Id.* (citing a study by the San Diego Task Force); Garth D. Savage et al., Sudden Custody Death Syndrome: The Role of Hogtying, *Crim. L. Update*, Fall 1994 at 7.

n262. *Gutierrez*, 139 F.3d at 447.

n263. Id.

n264. Id. (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

n265. Id.

n266. Id.

n267. Id.

n268. Id. at 447.

n269. Id.

n270. Id. (quoting *Savage et al.*, *supra* note 261, at 11).

n271. *Gutierrez*, 139 F.3d at 447.

n272. *Tennessee v. Garner*, 471 U.S. 1 (1985).

n273. *Gutierrez*, 139 F.3d at 450, n.7 (quoting *Garner*, 471 U.S. at 15-16).

n274. *Id.* at 449.

n275. *Wagner v. Bay City*, 227 F.3d 316 (5th Cir. 2000).

n276. It is unclear from the opinion whether plaintiff's decedent was emotionally disturbed. He had, in any event, behaved strangely.

n277. *Id.* at 319.

n278. *Id.* at 320 n.3.

n279. *Id.* at 324.

n280. It would, of course, be the plaintiff's burden to produce such evidence if he sought to persuade the court that the methods employed in any given case by the police contradicted their training or accepted police practices.

n281. See *Milstead v. Kibler*, 243 F.3d 157 (4th Cir. 2001) (holding where force is directed at one person, but inadvertently injures another, the innocent victim does not suffer a seizure under the Fourth Amendment); *Childress v. City of Arapaho*, 210 F.3d 1154 (10th Cir. 2000) (finding that officers did not seize hostages who were shot when officers were firing at the van containing hostages and their captors); *Schaefer v. Goch*, 153 F.3d 793 (7th Cir. 1998) (telling hostage to "get down" when she exited home followed by subject did not constitute a seizure); *Medeiros v. O'Connell*, 150 F.3d 164 (2d Cir. 1998) (shooting of hostage rather than suspect was not a seizure). But see *Scott v. Clay County, Tenn.*, 205 F.3d 867 (6th Cir. 2000) (finding that a passenger in a fleeing vehicle, a voluntary cohort of the driver, was an intended target of a seizure for the purposes of the Fourth Amendment).

n282. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (recognizing theoretical availability of a substantive due process claim for police misconduct during a high speed pursuit, but requiring proof of an intent to harm on the part of the officer in order to meet the "shocks the conscience" test to establish the claim).

n283. See *Schaefer v. Goch*, 153 F.3d 793, 798 (7th Cir. 1998).

n284. *Id.* at 793-94.

n285. *Id.* at 795.

n286. *Id.* at 796-97.

n287. *Id.* at 798.

n288. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

n289. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

n290. In *Howerton v. Fletcher*, 213 F.3d 171 (4th Cir. 2000), however, the court held that the jury could not consider the risk that the use of deadly force posed to third parties in assessing whether it was reasonable for the police to shoot a naked, mentally disturbed man who assaulted another man in a barber shop with a knife. The court reasoned that "the question is not whether the officer acted reasonably vis-a-vis the world at large," but rather whether he acted reasonably toward the plaintiff. *Id.* at 173.

n291. See *Caricofe v. Mayor and City Council of Ocean City*, No. 01-1809, 2002 WL 482563, at 4 (4th Cir. Apr. 1, 2002); *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 787 (4th Cir. 1998); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1167 (9th Cir. 1996); *Tofano v. Reidel*, 61 F. Supp. 2d 289, 301 (D.N.J. 1999).

n292. *Graham*, 490 U.S. at 396-97.

n293. *Roy v. Inhabitants of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994).

n294. *Ford v. Childers*, 855 F.2d 1271, 1276 (7th Cir. 1988) (en banc).

n295. See *supra* Part II for a review of training materials.

n296. *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002).

n297. *Id.* at 499.

n298. *Id.* at 509.

n299. *Id.* at 510. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Court decided that the "shocks the conscience" standard was required in substantive due process claims, and that in a high speed police chase case, that standard required proof of an intent to harm the plaintiff on the part of the officers. The Court rejected the argument that deliberate indifference was sufficient to shock the conscience because in a high speed chase the requirement of split-second decision-making left no time for deliberation. *Id.* at 853.

n300. *Ewolski*, 287 F.3d at 511. The Supreme Court decided that deliberate indifference was the appropriate standard for meeting the shocks the conscience test in custodial settings in *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239 (1983).

n301. *Ewolski*, 287 F.3d at 511.

n302. *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001). The projectile removed plaintiff's eye and left lead shot implanted in his skull. *Id.* at 1275.

n303. *Id.* at 1283.

n304. *Id.* The opinion was revised after its first publication. In the initial version, the court had pointedly noted that "[the officer] did not make a split-second choice." 242 F.3d 1119, 1126 (2001). The reason for the change in language is not clear, but it is clear that the officer was not required to make any "split-second" judgments.

n305. *Fyfe*, *supra* note 6, at 345-46.

n306. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). States and agencies that are arms of the state are not deemed to be "persons" amenable to suit under 1983, and cities and states cannot be sued for damages in federal courts in any event under the Eleventh Amendment. *Will v. Mich. Dep't of State Police*, 491 U.S. 581 (1989); *Quern v. Jordan*, 440 U.S. 332 (1979). See generally, *Avery et al.*, *supra* note 19, 4:15 (discussing standards for imposing municipal liability under 1983).

n307. *Monell*, 436 U.S. at 690-91. See generally, *Avery et al.*, *supra* note 19, 4:15-:25 (discussing the substantial body of case law wrestling with the issue of what constitutes a policy or custom).

n308. *City of Canton v. Harris*, 489 U.S. 378 (1989).

n309. *Id.* at 387.

n310. *Id.* at 388.

n311. *Id.* at 390 (footnotes omitted).

n312. *Id.* at 389 n.8.

n313. *Id.* at 392.

n314. *Id.* at 396 (O'Connor, J., concurring).

n315. *Id.* at 390 n.10.

n316. *Id.* at 397 (O'Connor, J., concurring).

n317. Jim Ruiz has concluded that "knowledge of how to interact with the mentally ill during a crisis situation should be basics to all uniformed officers." Ruiz, *supra* note 7, at 158.

n318. The Seattle Police Department reports that one-third of the people killed by police in recent years showed signs of being emotionally disturbed or mentally ill at the time of the incident. Jamieson & Wilson, *supra* note 10.

n319. Fyfe, *supra* note 6, at 347.

n320. *Id.*

n321. *Id.*

n322. *Allen v. Muskogee*, 119 F.3d 837, 845 (10th Cir. 1997) (rejecting summary judgment in favor of the city).

n323. *Id.* at 844.

n324. *Johnson v. City of Cincinnati*, 39 F. Supp. 2d 1013, 1019 (S.D. Ohio 1999).

n325. *Id.* at 1019-20.

n326. *Gibson v. County of Washoe*, 290 F.3d 1175 (9th Cir. 2002).

n327. *Id.* at 1183.

n328. *Id.* at 1189.

n329. *Id.*

n330. *Id.* at 1190.

n331. *Id.* at 1192.

n332. *Russo v. City of Cincinnati*, 953 F.2d 1036, 1047 (6th Cir. 1992) (finding that the simple fact that officers received some training in a course entitled "Disturbed-Distressed Persons," and that the Department had policy of handling barricaded persons, did not necessitate finding that training was adequate as matter of law).

n333. *Pena v. Leombruni*, 200 F.3d 1031 (7th Cir. 1999).

n334. *Id.* at 1033. The Pena court, however, might have reached a different result had plaintiff been able to offer more evidence on the need for training. The court did say the following:

If Winnebago County had seen a rash of police killings of crazy people and it was well understood that these killings could have been avoided by the adoption of measures that would adequately protect the endangered police, then the failure to take these measures might, we may assume without having to decide, be found to manifest deliberate indifference to the rights of such people ... but the plaintiffs made no effort to establish the premises of such an argument.

*Id.* at 1033-34.

n335. See *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 93 n.6 (1st Cir. 1994) ("We do not find that the need to extensively train officers about how to identify and deal with mentally handicapped persons is so obvious, that failure to give this training supports a finding of reckless or callous indifference to constitutional rights."); *Tofano v. Reidel*, 61 F. Supp. 2d 289, 306 (D.N.J. 1999) (noting that "the record is devoid of any evidence of interactions in the past between Ramsey police officers and mentally unstable individuals which would have placed the municipality on notice that its training was inadequate," and further noting that "in addition, nothing in the record establishes that it would have been known or 'obvious' to a reasonable policymaker that the training provided to Ramsey police officers concerning interaction with mentally unstable individuals would likely result in the deprivation of constitutional rights"); *Wyche v. City of Franklinton*, 837 F. Supp. 137, 144-45 (E.D.N.C. 1993). The court in *Wyche* stated the following:

The plaintiff relies on the fact that the Town of Franklinton had no written policy on training, responding to "abnormal mental behavior" calls, hiring, supervision, or equipping officers. In further support of her contention, the plaintiff submitted documents showing that the Town of Franklinton spent less than 1% of its annual budget on police training ... [and] that alternative forms of restraint, such as chemical sprays or stun guns, were not available to [defendant] ... . The plaintiff has not shown that Franklinton police officers needed additional training in the use of force or had a history of using excessive force.

*Id.*

n336. *Bullard v. City of Mobile*, 2000 WL 33156407, at 8 n.6 (S.D. Ala. Dec. 14, 2000) (rejecting firmly the claim that the "failure to train every police officer in negotiating tactics or in the use of a beanbag gun or to pick up a knife within thirty seconds would so obviously lead to the violation of a constitutional right that the City could be considered deliberately indifferent."); *Guseman v. Martinez*, 1 F. Supp. 2d 1240, 1261 (D. Kan. 1998) (finding that "it would not have been 'known or obvious' to a reasonable policymaker that a failure to provide immediate further training would likely result in a deprivation of constitutional rights," that "there were no known court decisions finding that the use of prone restraint techniques on a person who had resisted arrest was a violation of the person's constitutional rights," and that the plaintiff cited no evidence that "the dangers of

positional asphyxiation were widely understood prior to this incident or that police departments in general considered such information to be an essential part of their training regimens").

n337. See *Conner v. Travis County*, 209 F.3d 794, 797 (5th Cir. 2000) (discussing the plaintiffs' reliance on a "single episode with Mr. Conner and on their experts' statements about the need for more training" and finding that it could "reasonably expect - if the need for training in this area was 'so obvious' and the failure to train was 'so likely to result in the violation of constitutional rights' - that the Connors would be able to identify other instances of harm arising from the failure to train"); *Guseman*, 1 F. Supp. 2d at 1260. In *Guseman*, the court stated that "there is no evidence here of any similar prior incident in which an individual in custody of Wichita police officers suddenly suffered serious injury or death as a result of positional asphyxia." It noted that, as a result, "the City cannot be said to have been on notice of an inadequate training program by virtue of a history of constitutional violations by its officers." *Id.*

n338. See *Myers v. Okla. County Bd. of County Comm'rs*, 151 F.3d 1313 (10th Cir. 1998). In this case, the plaintiffs' decedent was shot by officers when they entered his home to take him into protective custody. The entry followed the officers' attempt to negotiate with decedent by telephone over the course of an afternoon and into the evening. They obtained a court order to enter the apartment and take him into protective custody. When they entered, decedent was pointing a rifle at the officers and they fired, killing him. Plaintiffs' claim against the county was based on an alleged failure to train officers in the use of deadly force and in dealing with mentally ill or suicidal persons. The court found the department's deadly force policy to be in accord with constitutional requirements. With respect to the county's "failure to train" on dealing with mentally ill persons, the court noted that the record contained voluminous training materials dealing with mentally ill persons, that the individual defendants had received training in the area, and that plaintiffs had failed to adduce evidence demonstrating deliberate indifference. *Id.*

n339. See *Young v. City of Mount Ranier*, 238 F.3d 567, 579 (4th Cir. 2001) (finding no constitutional violation by the individual officers, the court would not entertain a "failure to train" claim against the government employer); *Hegarty v. Somerset County*, 53 F.3d 1367, 1380-81 (1st Cir. 1995) (holding that failure to give training to officers with respect to "barricaded felons" was not the cause of subject's death where court found tactics of the officers to be reasonable).