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The Fourth Amendment's Shortcomings for Police During School Shootings

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Notes

THE FOURTH AMENDMENT'S SHORTCOMINGS FOR POLICE DURING SCHOOL SHOOTINGS

I. INTRODUCTION

On a normal day inside Wilson High School's Room 110, three dozen students talk excitedly of the weekend's past events as they wait for geometry class to begin.[1] Suddenly, a frightening, reverberating sound comes from the hallway—gunshots. On this bright Monday morning, Billy decided to kill as many of his fellow students as possible for no apparent reason. As he walks through the halls, firing arbitrarily at any student in his path, the principal orders the school to initiate lockdown procedures and immediately calls the police. When the police arrive, they rush to quarantine the area by establishing a perimeter around the school and assist only those students that escaped. Following department procedure, they are forced to sit outside the school for the next hour and await the Special Weapons and Tactics ("SWAT") team's arrival. As the police wait, they hear the unremitting shots coming from inside the school. After the SWAT team arrives and nearly fifty innocent lives are lost, Billy puts the guns down to surrender. He is arrested and eventually sentenced to life in prison.

While the scenario above is merely fictional, the words "school shooting" often arouse strong emotions of fear and anxiety in many Americans.[2] These same emotions are evoked when mentioning Jonesboro, Arkansas; Columbine; Virginia Tech; or Northern Illinois University.[3] Although school shootings have plagued America for many

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1 This scenario is entirely fictional and is not based upon any known true facts. Any resemblance is merely coincidental.

2 Lesli A. Maxwell, *School Shootings in Policy Spotlight: Safety Experts Say Best Idea is Level Heads But Open Eyes*, EDUC. WK., Oct. 11, 2006, *available at* http://www.edweek.org/ew/articles/2006/10/11/07shoot.h26.html (noting the anxieties school shootings have created for students, their families, school officials, and police).

3 *See generally Timeline of School Shootings*, U.S. NEWS & WORLD REPORTS, Feb. 15, 2008, http://www.usnews.com/articles/news/national/2008/02/15/timeline-of-school-shootings.html?PageNr=1 (summarizing school shootings since 1966). Additional prominent school shootings are as follows: August 1, 1966, Charles Whitman killed sixteen people and wounded thirty-one during a ninety-six-minute shootout from atop the observation deck at the University of Texas-Austin; January 17, 1969, two students were shot and killed during a student meeting at the University of California-Los Angeles; December 30, 1974, Anthony Barbaro killed three adults and wounded eleven others at his high school; February 22, 1978, a fifteen-year-old self-proclaimed Nazi killed one student

years, they appear to be increasingly regular events in American society, or at least more frequently reported by the media.[4] To combat such shootings, police officers are currently trained to take aggressive steps to stop the shooter, including the use of deadly force.[5]

In today's society, police conduct is a controversial topic.[6] Although police departments encourage the use of less lethal alternatives when seizing or arresting suspects, courts often expect officers to refrain from using deadly force.[7] Consequently, there is a growing gap between officer training as it relates to school shootings and judicial expectations regarding officer conduct.[8]

This Note advocates that the current reasonableness test under the Fourth Amendment must be amended to give greater deference to police officers with regard to their use of deadly force when responding to school shootings, while reducing the frequency of school shootings. Part

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and wounded a second; August 12, 1986, five people are shot and one killed by a student at New York Technical College in Brooklyn; November 1, 1991, a graduate student killed five and wounded two at the University of Iowa; February 2, 1996, two students and one teacher are killed and another wounded when a fourteen-year-old opened fire on his algebra class; August 15, 1996, graduate student at San Diego State University killed three professors while defending his thesis; December 1, 1997, three students are killed and five wounded by a fourteen-year-old student at a high school in Paducah, Kentucky; December 15, 1997, two students are wounded by a fourteen-year-old who was hiding in the woods when he shot the students standing in the parking lot; May 21, 1998, two teenagers are killed and twenty wounded in a school shooting in Oregon; March 5, 2001, a fifteen-year-old student kills two and wounds thirteen in California; January 16, 2002, graduate student at Appalachian School of Law killed the dean, a professor, and a student, while wounding three; and October 2, 2006, gunman kills six at an Amish schoolhouse in Pennsylvania. *Id.*

4 *See Timeline of School Shootings*, *supra* note 3 (summarizing school shootings since 1966 and the increased frequency of school shootings annually).

5 *See infra* Part II.C (discussing changes in police policies and recent tactics police departments are training their officers to use).

6 *See* J. Michael McGuinness & Melvin L. Tucker, *Police Use of Force Standards Under Colorado and Federal Law*, 36 COLO. LAW. 47, 47 (2007) ("Police officer conduct is among the most controversial public interest topics in the country.").

7 *See* Neal Miller, *Less-Than-Lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Law Liability for the Use of Excessive Force*, 28 CREIGHTON L. REV. 733, 735 (1995) ("One of the more innovative reforms is to increase the use of the less-than-lethal force weapon ("LTL") among police officers in order to limit resource to either deadly force or injury-producing conventional force instruments."). *See also infra* Part II.B (discussing the reasonableness test set forth by the Supreme Court and the expectation that officers use deadly force in limited circumstances).

8 *See* Alissa C. Wetzel, Comment, Georgia v. Randolph*: A Jealously Guarded Exception – Consent and the Fourth Amendment*, 41 VAL. U. L. REV. 499, 499 (2006) ("The history of Fourth Amendment jurisprudence traces the struggle of successive courts to define 'reasonableness,' and balance the competing needs of personal privacy and police efficiency."). *See also infra* Part II.B.1 (discussing common law principles and judicial deference to police officers); Part III.B (noting the gap between the Fourth Amendment's reasonableness test and police officer training).

II of this Note discusses school violence, new and old police policies in response to school shootings, and the Supreme Court's interpretation of excessive force under the Fourth Amendment.[9] Part III analyzes three major problems with current attempts to remedy school violence, which include: the previous approaches to remedy school violence; interpreting and applying the current Fourth Amendment reasonableness test; and the recent, unclear police policies.[10] Part IV proposes establishing mandatory preventive measures and creating a bright-line rule for situations in which officers respond to a school shooting, thus eliminating the Fourth Amendment reasonableness test.[11]

II. BACKGROUND

Since the Columbine High School shootings, other highly publicized school shootings have continued to instill fear in communities around America.[12] In response, educators, law enforcement officials, mental health professionals, and parents have tried to prevent school violence.[13] Additionally, in efforts to prevent large-scale casualties, police departments have adopted aggressive tactics to neutralize perpetrators in violent school attacks.[14] Despite the apparent need for responsive

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9 *See infra* Part II (discussing the current status of violence in schools and previous legislative approaches to remedy the violence; the Court's definition, interpretation, and application of excessive force under the Fourth Amendment; and the divergence from the old, inactive police procedures of quarantining to the new, proactive trend of eliminating the shooter).

10 *See infra* Part III (analyzing problems with previous approaches to remedy school violence, problems with interpreting and applying the current reasonableness test, and problems with the recent, unclear police policies).

11 *See infra* Part IV (proposing the creation of mandatory preventive measures and a bright-line rule for school shootings, which would replace the Fourth Amendment reasonableness test in such situations).

12 *See* Maxwell, *supra* note 2 ("The spate of shootings has thrust school violence into a national spotlight not seen since the 1999 slayings at Columbine High School in Jefferson County, Colo."). Despite the fear, "school safety experts urged caution against overreacting to the horrific, but rare, incidents in rural schools in Colorado, Pennsylvania, and Wisconsin." *Id.* *See also* ROBERT A. FEIN ET AL., U.S. SECRET SERV. & U.S. DEP'T OF EDUC., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES 3 (2002), http://www.secretservice.gov/ntac/ssi_guide.pdf. "However, highly publicized school shootings have created uncertainty about the safety and security of this country s [sic] schools and generated fear that an attack might occur in any school, in any community." *Id.*

13 *See* FEIN ET AL., *supra* note 12, at 3. In searching for explanations, these individuals have tried to answer "two central questions: 'Could we have known that these attacks were being planned?' and, if so, 'What could we have done to prevent these attacks from occurring?'" *Id.*

14 *See* Jerome Burdi, Fla. Police Department Training for Active Shooter in Schools: "We Can't Afford to Wait for the SWAT Team When Innocent People Can Be Dying Inside"

police action, police departments must ensure the perpetrator's Fourth Amendment rights are protected.[15] If they do not, they may be civilly liable for their actions under 42 U.S.C. § 1983.[16]

Part II.A examines the prevalence of school violence in America and the need for additional security measures.[17] Part II.B defines excessive force by reviewing the federal courts' interpretation of Fourth Amendment jurisprudence.[18] Part II.C discusses the recent response taken by law enforcement officials towards school violence.[19]

(July 13, 2007), http://www.policeone.com/training/articles/1289217-Fla-police-department-training-for-active-shooter-in-schools/ (discussing new strategies and training Florida police officers are required to undergo); First Shot Hits . . . Anytime! (Sept. 11, 2001) [hereinafter *First Shot Hits*], http://www.policeone.com/training/articles/44362-First-shot-hits-Anytime/ (noting that traditional firearms training is inefficient in real-life scenarios, resulting in decreased accuracy of police officers and increased levels of stress); Maxwell, *supra* note 2 ("In many communities, local law-enforcement officers stepped up their presence near schools . . . ."); 20 Police from Four States and Volunteer Hostages Prepare for a Situation They Pray Won't (July 5, 2000), http://www.policeone.com/training/articles/44494-20-police-from-four-states-and-volunteer-hostages-prepare-for-a-situation-they-pray-wont/ (discussing new strategies and training techniques police officers are required to follow).

15 *See* U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

16 42 U.S.C. § 1983 (2006).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

17 *See infra* Part II.A (discussing the current trends in school violence and the attempts to remedy it).

18 *See infra* Part II.B (defining excessive force and the interpretation of the Fourth Amendment).

19 *See infra* Part II.C (discussing the traditional and contemporary police policies regarding active school shootings).

A. Violence in Schools

School-associated violent deaths rarely occur, but when they do, they tend to have far-reaching effects on the surrounding communities, as well as throughout the entire United States.[20] These events tend to be so rare that, on average, less than two percent of youth homicides occur at school.[21] Statistics remained under two percent from July 1, 1992 through June 30, 1999, indicating that there was no significant increase in the number of youth homicides at schools.[22] Since that time, however, the number of school deaths have fluctuated greatly.[23] A reasonable explanation for this fluctuation and overall decrease in violence could be

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[20] *See* INST. OF EDUC. SCIS., U.S. DEP'T OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY: 2007 (2007), http://nces.ed.gov/programs/crimeindicators/crimeindicators2007/ind_01.asp. A school-associated violent death is defined as "a homicide, suicide, legal intervention (involving a law enforcement officer), or unintentional firearm-related death in which the fatal injury occurred on the campus of a functioning elementary or secondary school in the United States." *Id.* (internal quotations omitted). The study further noted that "[v]iolent deaths at schools are rare but tragic events with far-reaching effects on the school population and surrounding community." *Id.* Often the targets of these crimes are students, staff members, and others who are not students. *Id.*

[21] *See* Maxwell, *supra* note 2 (noting that people should listen to officials and refrain from overreacting to horrific, but rare, school shootings). "Between the 1992–93 and 2001–02 school years, 116 were killed in 93 incidents by students in U.S. schools . . . .If you divide those incidents by 119,000 schools, it turns out that the average school can expect something like this once every 12,000 years . . . ." *Id.* (internal quotations omitted). *See also* INDICATORS OF SCHOOL CRIME AND SAFETY: 2007, *supra* note 20. "The percentage of youth homicides occurring at school remained at less than 2 percent of the total number of youth homicides over all available survey years even though the absolute number of homicides of school-age youth at school varied to some degree across the years." *Id.* It was further noted that, "[f]rom July 1, 2005, through June 30, 2006, there were 35 school-associated violent deaths in elementary and secondary schools in the United States," while the overall number of homicides for this age group in 2004–05 reached 1534. *Id.* Consequently, youth were over fifty times more likely to be murdered and over 150 times more likely to commit suicide off-campus, than on-campus. *Id.*

[22] *See* INDICATORS OF SCHOOL CRIME AND SAFETY: 2007, *supra* note 20. "During this period, between 28 and 34 homicides of school-age youth occurred at school in each school year." *Id.*

[23] *See id.* "The number of homicides of school-age youth at school declined between the 1998–99 and 1999–2000 school years from 33 to 13 homicides. The number of homicides of school-age youth at school increased from 11 to 21 between the 2000–01 and 2004–05 school years, but dropped to 14 in 2005–06." *Id. See also* INST. OF EDUC. SCIS., U.S. DEP'T OF EDUC., TABLE 1.1. NUMBER OF SCHOOL-ASSOCIATED VIOLENT DEATHS, HOMICIDES, AND SUICIDES OF YOUTH AGES 5–18, BY LOCATION AND YEAR: 1992–2006 (2007), http://nces.ed.gov/programs/crimeindicators/crimeindicators2007/tables/table_01_1.asp?referrer=report (noting that from 1992–93 there were fifty-seven deaths; 1993–94, forty-eight deaths; 1994–95, forty-eight deaths; 1995–96, fifty-three deaths; 1996–97, forty-eight deaths; 1997–98, fifty-seven deaths; 1998–99, forty-seven deaths; 1999–2000, thirty-six deaths; 2000–01, thirty deaths, 2001–02, thirty-seven deaths; 2002–03, thirty-five deaths; 2003–04, thirty-six deaths; 2004–05, fifty deaths; and 2005–06, thirty-five deaths).

attributed to the decreased presence of weapons on campus properties.[24] Despite the lower presence of weapons and violence, student absentee rates rose due to unsafe feelings at school or on their way to or from school.[25] As a result, schools, police, governments, and parents have made efforts to prevent school violence by altering school and police policies.[26]

Schools can be the first line of defense against violence, but it is often difficult to assess potential threats because characteristics and backgrounds of perpetrators vary.[27] Recognizing this, the Federal

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[24] *See* NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, TRENDS IN THE PREVALENCE OF SELECTED RISK BEHAVIORS FOR ALL STUDENTS NATIONAL YRBS: 1991–2007 (2007), http://www.cdc.gov/HealthyYouth/yrbs/pdf/yrbs07_us_summary_trend_all.pdf. The Youth Risk Behavior Survey (YRBS) is conducted every two years, representative of all high school students, both in private and public schools throughout the United States. *Id.* The students were surveyed regarding whether they had carried a weapon (knife, gun, or club, etc.) to school on at least one day during the thirty days before the survey. *Id.* The survey reported: in 1991, 26.1% of students had carried a weapon; 1993, 22.1%; 1995, 20.0%; 1997, 18.3%; 1999, 17.3%; 2001, 17.4%; 2003, 17.1%; 2005, 18.5%; and 2007, 18.0%. *Id.*

[25] *See id.* Students were surveyed on whether they had missed at least one day of school during the thirty days before the survey because they felt unsafe at school or on their way to or from school. *Id.* The survey reported: in 1993, 4.4% had not attended; 1995, 4.5%; 1997, 4.0%; 1999, 5.2%; 2001, 6.6%, 2003, 5.4%; 2005, 6.0%; and 2007, 5.5%. *Id.*

[26] *See* Maxwell, *supra* note 2. "The three school shootings that left a principal and six students dead in less than a week have sparked a barrage of pledges from national and state political leaders to tighten campus security." *Id.*

[27] *See id*.

> The string of attacks—two by intruders, one by a student—began on Sept. 27, when a 53-year-old gunman took six female students hostage, sexually assaulted them, and killed one before shooting himself in a classroom at Platte Canyon High School in Bailey, Colo.
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> Two days later, Eric Hainstock, 15, fatally shot his principal at Weston High School in Cazenovia, Wis., a farming community about 70 miles northwest of Madison.
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> And on Oct. 2, a 32-year-old milk truck driver laid siege to a one-room Amish schoolhouse in Lancaster County, Pa., shooting and killing five girls, ages 7 through 13, before killing himself. Five other girls were seriously wounded in the attack, and one of them, a 6-year-old, was reported to have been discharged from the hospital to die at home.

Id. See also Family of Gay Boy Says Dress Code Led to Killing, EDUC. WK., Aug. 15, 2008, *available at* http://www.edweek.org/ew/articles/2008/08/15/145667cgaystudentkilledlawsuit_ap.html (discussing that the family of the gay teenager blamed the school district for allowing their son to wear makeup and feminine clothing to school, which could have led to his death). Not only is difficult to assess potential threats, but determining threats based on profiling may not be an effective deterrent. *See* Melissa G. Cohen, Note & Comment, *They Appear To Be The Same, But They Are Not The Same . . . A Student Profiling Technique Will Not Effectively Deter Juvenile Violence in Our Schools*, 17 N.Y.L. SCH. J. HUM. RTS. 299 (2000) (arguing that student profiling is not an effective deterrent to crime in American schools).

Bureau of Investigation ("FBI"), Secret Service, and United States Department of Education ("Department of Education") joined together to aid schools by developing threat assessment programs.[28] Congress, with pressure from special interest groups, has also attempted to promote safe schools by passing numerous statutes and providing schools with additional funding to curb school violence.[29]

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[28] *See* MARY ELLEN O'TOOLE, FED. BUREAU OF INV., THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 7–8 (1999), http://www.fbi.gov/publications/school/school2.pdf (noting specific factors to be used in threat assessment such as specific, plausible details; emotional content of a threat; and any precipitating stressors).

> Specific, plausible details are a critical factor in evaluating a threat. Details can include the identity of the victim or victims; the reason for making the threat; the means, weapon, and method by which it is to be carried out; the date, time, and place where the threatened act will occur; and concrete information about plans or preparations that have already been made.

Id. at 7 (emphasis removed). Additionally, the amount of detail can be a factor because substantial planning and greater detail shows more preparation and therefore should be considered high risk, whereas less detailed threats should be considered low risk. *Id.* at 7–8. The next factor is the emotional content of a threat which can produce clues regarding the threat maker's mental state. *Id.* at 8. Although these threats may give clues to the mental state, they are not helpful for measuring danger; therefore, it is difficult to determine the amount of risk that should be assigned to them. *Id.* The last factor is precipitating stressors. *Id.* These are "incidents, circumstances, reactions, or situations that can trigger a threat. The precipitating event may seem insignificant and have no direct relevance to the threat, but nonetheless becomes a catalyst." *Id. See also* FEIN ET AL., *supra* note 12, at iii ("Since June 1999, the U.S. Department of Education and the U.S. Secret Service have been working as a team to try to better understand and ultimately help prevent school shootings in America."); WILLIAM S. POLLACK ET AL., U.S. SECRET SERV. & U.S. DEP'T OF EDUC., PRIOR KNOWLEDGE OF POTENTIAL SCHOOL-BASED VIOLENCE: INFORMATION STUDENTS LEARN MAY PREVENT A TARGETED ATTACK (2008), http://www.secretservice.gov/ntac/bystander_study.pdf; BRYAN VOSSEKUIL ET AL., U.S. SECRET SERV. & U.S. DEP'T OF EDUC., THE FINAL REPORT AND FINDINGS OF THE SAFE SCHOOL INITIATIVE: IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES (2002), http://www.secretservice.gov/ntac/ssi_final_report.pdf.

[29] *See* MEMBERS OF THE NAT'L SAFE SCHS. P'SHIP, BRIDGING THE GAP IN FEDERAL LAW: PROMOTING SAFE SCHOOL AND IMPROVED STUDENT ACHIEVEMENT BY PREVENTING BULLYING AND HARASSMENT IN OUR SCHOOLS 2 (2007), http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/000/912-1.pdf (recommending Congress amend federal law to ensure that schools and districts have comprehensive and effective student conduct policies, schools and districts focus on prevention strategies and professional development to address bullying and harassment, and states and districts maintain bullying and harassment data); National Education Association, Partnership Calls on Congress to Help Prevent Bullying (July 2007), http://www.nea.org/tools/30446.htm (noting that over thirty leading groups have called on Congress to take action to prevent bullying and harassment in schools). *See also infra* notes 30–35 and accompanying text (discussing the numerous acts Congress passed in attempts to curb school violence).

Congress's first effort was the Gun-Free School Zones Act passed in 1990, but was later found unconstitutional by the Supreme Court.[30] In response, Congress created the Gun-Free Schools Act in 1994, noting that the presence of guns near schools affected interstate commerce.[31] This Act required state schools receiving federal funds to suspend individuals violating the law.[32] The Act also it mandated that possessing a firearm on school grounds was a felony offense and subjected violators to criminal prosecution.[33]

Since the Gun-Free School Act, senators have proposed additional legislation to deter school violence and upgrade school safety programs.[34] Specifically, these bills increased spending by providing

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[30] *See* James C. Hanks, *Weapons in Schools*, *in* SCHOOL VIOLENCE: FROM DISCIPLINE TO DUE PROCESS 15 (James C. Hanks ed., 2004) (citing 18 U.S.C. § 922(q)(2)(A) (2000)).

> In 1995, the Supreme Court held the Gun-Free School Zones Act unconstitutional, as exceeding Congress's power under the Commerce Clause. United States v. Lopez, 514 U.S. 549 (1995). As it read at the time, the statute "made it a federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'"

Id. at 15 n.1 (quoting United States v. Lopez, 514 U.S. 549, 551 (1995) (quoting 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V))).

[31] *See* Hanks, *supra* note 30, at 15 n.1 (citing 18 U.S.C. § 922(q)(1) (2000)).

> In addition, the statute now contains a jurisdictional requirement, which prohibits only knowing possession of "a firearm *that has moved in . . . interstate or foreign commerce*" in a school zone. *Id.* § 922(q)(2)(A) (emphasis added). The Amended Gun-Free Schools Act has been upheld as a constitutional exercise of Congress's commerce power. *See, e.g.,* United States v. Danks, 221 F.3d 1037, 1039 (8th Cir. 1999).

Id. Consequently, "[t]he Gun-Free Schools Act, as Spending Clause legislation, is not subject to the same constitutional vulnerability as the pre-*Lopez* Gun-Free School Zones Act." *Id.* at 15 n.2 (citing 20 U.S.C. § 7151 (Supp. 2003)).

[32] *See id.* at 16 (quoting 20 U.S.C. § 7151 (b)(1)).

> The Gun-Free Schools Act requires states receiving federal funds for education to enact state laws that require "local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to school, or to have possessed a firearm at school."

Id. See also Ann Majestic, Carolyn Waller & Julie Devine, *Disciplining the Violent Student with Disabilities*, *in* SCHOOL VIOLENCE: FROM DISCIPLINE TO DUE PROCESS 155 (James C. Hanks ed., 2004) (citing 20 U.S.C. § 8921 (1994)) ("At the federal level, Congress has passed legislation requiring schools that receive federal funds to institute a mandatory 365-day suspension for any student who brings a gun to school.").

[33] *See* Hanks, *supra* note 30, at 16–17 (citing 18 U.S.C. § 924(a)(4)) ("A violation is punishable by a fine and up to five years' imprisonment.").

[34] *See* School Safety and Law Enforcement Improvement Act of 2007, S. 2084, 110th Cong. 1 (2007) (noting its purpose was "[t]o promote school safety, improved law enforcement, and for other purposes."); School Safety Enhancements Act of 2007, S. 1217, 110th Cong. 1 (2007) (stating its purpose was "[t]o enhance the safety of elementary schools, secondary schools, and institutions of higher education."); School Safety

additional funds to schools that complied with various safety requirements.[35] As a result of these financial benefits, states and schools have implemented additional safety standards and programs.[36]

In many states, possessing a firearm on school grounds is illegal.[37] Despite general similarities regarding gun possession, punishments for

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Enhancements Act of 2007, S. 677, 110th Cong. 1 (2007) (indicating its purpose was "[t]o improve the grant program for secure schools under the Omnibus Crime Control and Safe Streets Act of 1968."). *See also* School Safety and Law Enforcement Improvement Act of 2007, S. REP. NO. 110-183 (2007) (report to S. 2084, explaining information regarding the proposed bill).

> The bill provides a responsible and effective congressional response to school incidents that have occurred in the recent past and, in particular, to the tragedy that took place on April 16, 2007 on the campus of Virginia Polytechnic Institute and State University (Virginia Tech) in Blacksburg, Virginia. The bill is intended in part to address the recurring problem of violence in our schools through additional support to law enforcement in both public and private educational settings, and to make needed improvements to the National Instant Criminal Background Check System.

Id. at 2.

[35] *See* S. 2084, at 3–5, 12 (proposed "striking $30,000,000 for each of fiscal years 2001 through 2009 and inserting $50,000,000 for each of the fiscal years 2008 and 2009" for those schools that use surveillance equipment, locks, lighting, metal detectors, other measures, establish hotlines or tiplines, use capital improvements to make schools more secure, conduct safety assessments, conduct security training, coordinate with federal, state, and local law enforcement, test emergency response, and develop and implement a campus emergency response plan) (internal quotations omitted); S. 1217, at 2, 4–5 (proposing "striking $30,000,000 for each of fiscal years 2001 through 2009 and inserting $50,000,000 for each of the fiscal years 2008 and 2009" for those schools that use surveillance equipment, establish hotlines or tiplines, use capital improvements to make schools more secure, conduct annual campus safety assessments, and develop and implement a campus emergency response plan) (internal quotations omitted); S. 677, at 2–4 (proposing "striking $30,000,000 for each of fiscal years 2001 through 2009 and inserting $50,000,000 for each of the fiscal years 2008 and 2009" for those schools that use surveillance equipment, establish hotlines or tiplines, and use capital improvements to make schools more secure) (internal quotations omitted).

[36] *See infra* notes 37–52 and accompanying text (discussing state and school programs implemented).

[37] *See* Hanks, *supra* note 30, at 16 & n.5. Sample statutes include:

> CAL. PENAL CODE § 626.9(b) (West 2003) (prohibiting the possession of a firearm in a school zone); FLA. STAT. ch. 790.115 (2002) (prohibiting the possession of any weapon "at a school-sponsored event or on the property of any school, school bus, or school bus stop," and prohibiting the exhibition of any weapon within 1,000 feet of a school during school hours or activities); GA. CODE ANN. § 16-11-127.1 (2002) (prohibiting the possession of specified weapons in "school safety zones"); IOWA CODE § 724.4B(1) (2003) (prohibiting the possession of a firearm on the grounds of a school); LA. REV. STAT. ANN. § 14:95.2 (West 2003) (prohibiting the possession of firearms and "dangerous weapons" on "a school campus, on school transportation, or at any

violating the state statutes vary greatly.[38] For example, in Iowa, the fine imposed for carrying a gun inside a school zone is double the fine imposed for carrying a gun outside a school zone.[39] California's statute is similar, but the punishment "ranges from a three-month sentence in county jail to a five year sentence in state prison" and applies to offenses that occur in institutions of higher learning.[40] Georgia's statute, however, is stricter than both of these because it applies to elementary or secondary schools, technical schools, vocational schools, colleges, universities, and other institutes of post-secondary education.[41] Under the Georgia statute, possessing a weapon is also a felony punishable "by a fine of not more than $10,000, by imprisonment for not less than two nor more than ten years, or both."[42] While states implemented different criminal sanctions, school policies focused primarily on prevention.[43]

For schools, zero-tolerance policies are the most common method of prevention.[44] Although these policies are credited with reducing school

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> school sponsored function . . . , or within one thousand feet of any school campus"); WIS. STAT. § 948.605(2) (2003) (making it a felony to possess a firearm in a school zone).

Id.

38 *See id.* at 17 (noting that the laws impacting weapons possession vary in terms of scope and punishments).

39 *See id.* (citing IOWA CODE § 724.4A(2) (2003)). The Iowa Code on Weapons Free Zones provides:

> 1. As used in this section, "weapons free zone" means the area in or on, or within one thousand feet of, the real property comprising a public or private elementary or secondary school, or in or on the real property comprising a public park. . . .
> 2. Notwithstanding sections 902.9 and 903.1, a person who commits a public offense involving a firearm or offensive weapon, within a weapons free zone, in violation of this or any other chapter shall be subject to a fine of twice the maximum amount which may otherwise be imposed for the public offense.

IOWA CODE § 724.4A (2008). It further provides:

> 1. A person who goes armed with, carries, or transports a firearm of any kind, whether concealed or not, on the grounds of a school commits a class "D" felony. For the purposes of this section, "school" means a public or nonpublic school as defined in section 280.2.

Id. § 724.4B(1).

40 Hanks, *supra* note 30, at 17 & nn.15–16 (citing CAL. PENAL CODE § 626.9(f) (West 2003)).

41 *See id.* at 17–18 & n.18 (citing GA. CODE ANN. § 16-11-127.1 (2002)).

42 GA. CODE ANN. § 16-11-127.1(b).

43 *See infra* notes 45–52 and accompanying text (discussing school's prevention policies).

44 A zero-tolerance policy "provides predetermined consequences for specific offenses." David M. Pedersen, *Zero-Tolerance Policies*, *in* SCHOOL VIOLENCE: FROM DISCIPLINE TO DUE PROCESS 47, 48 (James C. Hanks ed., 2004) (citing Alicia C. Insley, Comment, *Suspending and Expelling Children From Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1043 (2001)) (noting that in 1998, nine out of ten public schools had employed zero-tolerance policies for firearms and weapons). "A zero-tolerance program's

violence, they are criticized for inflexibility and over-inclusiveness.[45] They are also detrimental to learning environments because school administrators are not afforded discretion; rather, students are automatically punished even for unintentional policy violations, which can hinder student development.[46] As a result, experts advocating for additional safety plans in schools have warned against losing perspective and fortressing schools; however, many schools continue to use these policies and sometimes extend the policies to apply to other

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goal is to act as a deterrent and provide swift intervention for misconduct, sending a strong, 'one strike and you're out' message to students." Rhonda B. Armistead, *Zero Tolerance: The School Woodshed*, EDUC. WK., June 11, 2008, at 24, *available at* http://www.edweek.org/ew/articles/2008/06/11/41armistead_ep.h27.html. For a continued and detailed discussion of zero-tolerance policies, see Nora M. Findlay, *Should There Be Zero Tolerance For Zero Tolerance School Discipline Policies?*, 18 EDUC. & L.J. 103 (2008); Paul M. Bogos, Note, *"Expelled. No Excuses. No Exceptions." – Michigan's Zero-Tolerance Policy In Response To School Violence: M.C.L.A. Section 380.1311*, 74 U. DET. MERCY L. REV. 357 (1997); Alicia C. Insley, Comment, *Suspending and Expelling Children From Educational Opportunity: Time To Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039 (2001); Sheena Molsbee, Comment, *Zeroing Out Zero Tolerance: Eliminating Zero Tolerance Policies In Texas Schools*, 40 TEX. TECH L. REV. 325 (2008).

[45] *See* Pedersen, *supra* note 44, at 47 ("The decrease in violent crime may be attributed to the increasing application of 'Zero-Tolerance Policies' to serious student offenses."). However:

> Overtones of absolutism and inflexibility accompany zero-tolerance policies, leading education and legal scholars to sharply criticize such policies. Under zero-tolerance policies, educators are often unable to distinguish between threats to school safety and innocent mistakes by students. The following is an example of a rigid application of zero-tolerance policies to seemingly innocuous behavior:
>
> - A student at Blue Ridge Middle School in Loudon County, Virginia, was suspended for 16 weeks after he convinced a suicidal friend to give him the knife she intended to use to kill herself. The student put the knife in his locker and reported the incident to the principal. While the school praised the student for helping his friend, the school board determined that the student's actions violated the school's zero-tolerance policy with respect to possession of weapons and suspended the student.

Id. at 49. *See also* Armistead, *supra* note 44 ("Few policies in education have proven to be as universally ineffective—even counterproductive—as 'zero-tolerance.'").

[46] *See* Armistead, *supra* note 44 (discussing how zero-tolerance policies are solely punitive and are counterproductive to the school's primary goals of learning and development).

> Such a one-size-fits-all framework seriously limits administrators' use of their professional judgment in a given situation, and often forces them to impose punishments they otherwise feel are inappropriate to the facts. It also fails to take into account the intricacies of child development, individual characteristics, risk factors, and underlying causes, all of which shape behavior.

Id.

immature and illegal behaviors.[47] Despite the prevalence of zero-tolerance policies, schools have also used other alternative methods to ensure safety.[48]

The most radical alternative can be found in Texas, where one school district recently allowed teachers to carry concealed weapons.[49] This is

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[47] *See* Maxwell, *supra* note 2.

> But aside from carrying out existing safety plans, experts urged a measured response to the shootings. Any new safety policies and increased security measures should be done in a thoughtful way, without turning schools into fortresses, they said. "Understandably, there is a rush in these situations to do something and that gives the illusion that things will be safer," said Dewey G. Cornell, an education professor and the director of the Virginia Youth Violence Project at the University of Virginia in Charlottesville. "But the tragedy and distress of these events in our schools can make us lose perspective."

Id. "Despite the zero-tolerance concept's shortcomings, however, states and school districts have extended its reach beyond weapons and drugs, to include an array of behaviors, such as sexual harassment, bullying, and dress-code violations." Armistead, *supra* note 44.

[48] *See* Maxwell, *supra* note 2 (noting that some educators have enforced precautions by locking doors and forcing visitors to check in before being allowed to walk school hallways); *Texas Students Pack Bookbags; Teachers Pack Heat*, EDUC. WK., Aug. 25, 2008, *available at* http://www.edweek.org/ew/articles/2008/08/25/150810guntotingteachers_ap.html (noting that a high school in Texas locked doors and had security cameras). A better policy is to have "an awareness of your school environment." Maxwell, *supra* note 2. Other methods have created real and imagined barriers such as signs warning against guns, drugs, and trespassing, or the presence of more adults. *Id.* However, it has also been warned that "[t]hose features tend to become more a pacifier than a panacea . . . ." *Id.*

Meanwhile, some students are being instructed to fight back using whatever is available. *See* Alan Scher Zagier, Colleges Confront Shootings with Survival Training (Aug. 27, 2008), http://www.policeone.com/school-violence/articles/1729501-Colleges-confront-shootings-with-survival-training/. "The training discourages cowering in a corner or huddling together in fear . . . . Instead, Metropolitan Community College faculty members were taught to be aware of their surroundings and to think of common classroom objects—such as laptops and backpacks—as 'improvised weapons.'" *Id.*

[49] *See Texas School District OKs Pistols for Staff*, EDUC. WK., Aug. 15, 2008, *available at* http://www.edweek.org/ew/articles/2008/08/15/145829bctxguntotingteachers_ap.html (discussing a Texas school district's decision to allow teachers to carry pistols); *Texas Students Pack Bookbags; Teachers Pack Heat*, *supra* note 48 (discussing reactions to a Texas school district's decision to allow teachers to carry pistols). Before being permitted to carry a firearm. a teacher: must possess "a Texas license to carry a concealed handgun; must be authorized to carry by the district; must receive training in crisis management and hostile situations and have to use ammunition that is designed to minimize the risk of ricochet in school halls." *Texas School District OKs Pistols for Staff*, *supra*. The superintendent justified the decision because it is a small community which is thirty minutes from the sheriff's office and "'[w]hen you outlaw guns in a certain area, the only people who follow that are law-abiding citizens, and everybody else ignores it.'" *Id.* However, both students and parents have had mixed reactions to the new policy. *Id. See also* Jennifer Frederick, *Do As I Say, Not As I Do: Why Teachers Should Not Be Allowed To Carry Guns On School Property*, 28 J.L. & EDUC. 139 (1999) (arguing that teachers are role models for children so if we do not want children to bring guns to school, then teachers should not either); David B. Kopel,

the only school district in the country allowing such a policy.[50] More traditional alternatives, such as anti-violence programs or requiring police presence on school premises, are popular among high schools.[51] Despite pressures to change, some districts have not altered their methods of addressing violence, but instead have enhanced expulsion policies and threatened students with greater punishments.[52] Even with the apparent improvements and attempts to remedy school violence, surveys show that schools are still vulnerable to attack.[53]

Beginning in 2001, the National School Safety and Security Services conducted a survey for the National Association of School Resource Officers ("NASRO").[54] School Resource Officers ("SROs") reported that

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Pretend "Gun-Free" School Zones: A Deadly Legal Fiction, 42 CONN. L. REV. 515, 515 (2009) (analyzing the empirical evidence and policy arguments regarding licensed campus carry policies and advocating that "complete prohibition of armed defense on school campuses by all faculty and by all adult students is irrational and deadly"); Brian J. Siebel, *The Case Against Guns On Campus*, 18 GEO. MASON U. CIV. RTS. L.J. 319 (2008) (advocating that guns should not be allowed on college campuses).

50 *See Texas School District OKs Pistols for Staff*, *supra* note 49; *Texas Students Pack Bookbags*; *Teachers Pack Heat*, *supra* note 48.

51 *See* Leah M. Christensen, *Sticks, Stones, and Schoolyard Bullies: Restorative Justice, Mediation and a New Approach to Conflict Resolution in Our Schools*, 9 NEV. L.J. 545, 546 (2009) (discussing the effects of bullying, mediation, and other conflict resolution programs, and "consider[ing] the Social Inclusion Approach, a program based upon the work of Kim John Payne, M.Ed., an international educator and counselor who developed a restorative justice approach to deal with conflict in schools, as a mechanism to effectively prevent and handle bullying in schools."); Kathleen M. Cerrone, Comment, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 PACE L. REV. 131, 155 (1999) (citing Jean Rimbach & John Mooney, *Whitman Unveils Plan to Cut School Violence*, THE RECORD (N.J.), Sept. 4, 1998, at A3) (noting that the "district has instituted peer-mediation and leadership programs and it plans to create a new group to present anti-violence assemblies and that officials have seen beneficial effects from police presence by providing "training in school violence prevention, conflict mediation, counseling, sexual harassment, and how to handle secret tips from students."). *But see* Scott Buhrmaster, Should Campus Cops Carry Guns? One College President Says No (Nov. 19, 2003), http://www.policeone.com/writers/columnists/Scott-Buhrmaster/articles/72520-Should-campus-cops-carry-guns-One-college-president-says-no/ (discussing a president's opposition to armed officers on a community college's campus). "When asked to explain her anti-armed officer position she replied, 'Much of the research shows that having armed public safety officers on campus increases the chances for more violence.'" *Id.*

52 *See* Cerrone, Comment, *supra* note 51, at 154 (citing Kathleen Parrish & Christian D. Berg, *Pennsylvania Bill Seeks Millions to Fight School Violence: State Representative Julie Harhart will Introduce the Law With Attorney General's Backing*, ALLENTOWN MORNING CALL, Sept. 15, 1998, at A1).

53 *See infra* notes 54–63 and accompanying text (discussing annual surveys revealing security problems at schools).

54 *See generally* KENNETH S. TRUMP, NAT'L ASS'N OF SCH. RES. OFFICERS, 2001 NASRO SCHOOL RESOURCE OFFICER SURVEY 1 (2001), http://www.schoolsecurity.org/resources/2001NASROsurvey%20NSSSS.pdf [hereinafter 2001 NASRO SURVEY] ("[T]his survey information is drawn from the largest sampled population of SROs from the front-lines of

their programs improved school safety, prevented crime and violence, and fostered positive relationships between students and faculty.[55] Many SROs also reported preventing assaults against faculty and staff.[56] A majority of SROs reported that they believed an armed SRO did not put students at a greater risk of harm, but that an unarmed SRO did increase the risk of harm.[57] Overall, the 2001 SRO survey illustrated school safety improvements, but similar surveys conducted from 2002–2004 revealed a different trend.[58]

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school safety."). A sixty-one question survey was developed and distributed at a school-based police officer conference. *Id.* A total of 1000 surveys were distributed and 717 of them were returned, twenty-eight of which were completed by school administrators. *Id.* These twenty-eight surveys were voided and the findings were based upon the results of the other 689 surveys. *Id.*

[55] *Id.* at 2 (finding that 99% (683) respondents believed their SRO programs were successful). Furthermore, rating relationships on a scale of one to five (one being poor and five being excellent), respondents reported having an average relationship rate of 4.40 with school administrators, 4.39 with students, 4.36 with school support staff, and 4.27 with teachers. *Id.*

[56] *See id.* at 5 (finding that 67% (460) of respondents had prevented an assault by a student or other individual for an approximate total of 3200 cases in their combined careers, thus averaging seven per officer). Furthermore:

> A total of 92% of the respondents reported preventing from 1 to 25 violent acts in an average school year. 57% (394) of School Resource Officers report preventing 11 or more acts of violence in an average school year, with 28% (190) of them reporting that they prevent more than 25 violent acts in an average year. An additional 35% (240) of respondents report preventing between 1 and 10 violent acts in an average year. Only 2% report that they have not prevented a violent incident in an average school year.

Id. SROs have also reported that:

> approximately 24% (165) of the respondents have taken a loaded firearm from a student or other individual on campus . . . .Of the 24% officers who have taken a loaded firearm, an approximate total of 344 incidents have occurred during their SRO careers for an average of over 2 times per officer.

Id. at 6.

[57] *Id.* at 3 (finding that 98% (673) of respondents did not believe armed SROs put students in harm, and 91% (625) of respondents believed that unarmed SROs put students in harm).

[58] *See* KENNETH S. TRUMP, NAT'L ASS'N OF SCH. RES. OFFICERS, SCHOOL SAFETY LEFT BEHIND? SCHOOL SAFETY THREATS GROW AS PREPAREDNESS STALLS & FUNDING DECREASES 4–6 (2004), http://www.schoolsecurity.org/resources/2004%20NASRO%20Survey%20Final%20Report%20NSSSS.pdf [hereinafter 2004 NASRO SURVEY] (noting that threats continued to persist, school plans remained inadequate, and funding decreased); KENNETH S. TRUMP, NAT'L ASS'N OF SCH. RES. OFFICERS, SCHOOL SAFETY THREATS PERSIST, FUNDING DECREASING: NASRO 2003 NATIONAL SCHOOL-BASED LAW ENFORCEMENT SURVEY 6 (2003), http://www.schoolsecurity.org/resources/2003NASROSurvey%20NSSSS.pdf [hereinafter 2003 NASRO SURVEY] (asserting that threats and problems continued to persist due in part to lack of funding); KENNETH S. TRUMP, NAT'L ASS'N OF SCH. RES. OFFICERS, 2002 NASRO SCHOOL RESOURCE OFFICER SURVEY 4 (2002), http://www.schoolsecurity.org/resources/

The most significant findings of the 2002 survey revealed major security issues, such as terrorism, threat response, and SRO training.[59] In

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2002NASROSurvey%20NSSSS.pdf [hereinafter 2002 NASRO SURVEY] (stating schools were highly vulnerable to attack and would not be able to respond adequately); 2001 NASRO SURVEY, *supra* note 54, at 14 (noting in its conclusion that from the SROs perspective, the programs were successful in improving school safety, but further noting that the safety threats continue to remain clear and real, and officers need to be effectively trained and equipped).

[59] *See* 2002 NASRO SURVEY, *supra* note 58, at 4 (contending that 95% of SROs reported their schools were vulnerable to terrorist attacks, 79% reported their districts could not adequately respond to an attack, a majority reported their school crisis plans were inadequate and untested, and finally, that SROs reported having limited training and minimal support from outside agencies, which was attributable to a lack of funding). Regarding the easy ability to access schools, "96% of SROs described gaining access to outside school grounds during school hours as very easy (74%) or somewhat easy (22%). 83% of school officers described gaining access to inside of their school as very easy (37%) or somewhat easy (46%)." *Id.* at 7. In finding that most safety plans were inadequate due to insufficient implementation, review, and revision, the 2002 survey found:

- 39% of the officers reported that a formal security assessment by a qualified professional has not been conducted of their school in the past five years.
- 71% of the respondents were involved in developing and/or revising their school crisis plans, yet 55% felt that the plans for their schools are not adequate.
- 52% of the SROs reported that the crisis plans for their school have never been tested and exercised, and in those schools where plans have been tested, the amount and/or type of testing has not been adequate, according to 62% of the respondents.
- 74% of school officers responded that their schools do not educate parents and communicate effectively with parents on school safety, security, and crisis planning issues.

Id. In finding that several federal school safety initiatives and/or federal agencies were not helpful, the 2002 survey reported:

- While 36% of the respondents found reports by the U.S. Secret Service on assessing and managing school violence threats helpful, nearly half of the officers had never heard of the reports and 15% reported that the reports did not provide any new information.
- 72% of the officers surveyed said that the FBI was not helpful to them in their day-to-day work as a school-based officer.
- Only 25% of the SROs reported that the U.S. Department of Education's Safe and Drug Free Schools Program provided funding to directly support their work. 35% reported receiving no funding and 40% were uncertain as to whether the program provided any direct support.
- Only 28% of the SROs reported that the U.S. Department of Education's Safe and Drug Free Schools Program provided resource materials that have been helpful to them in their day-to-day work as school-based officers. 39% reported receiving no materials and 33% were uncertain as to whether the program provided any resource materials.

Id. at 9.

addition, the survey found that a large majority of SROs carried firearms believing it was beneficial to the safety of the school and students.[60] The survey also reported that over a quarter of SROs had confiscated a firearm, while nearly three times as many had confiscated knives.[61] Consequently, the 2002 survey illustrated major vulnerabilities in the nation's schools, many of which were repeated in the 2003 and 2004 surveys.[62] As a result, police officers are being charged with the

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[60] *See id.* at 10 (noting that 95% carried firearms and 99% did not believe armed SROs put students at additional risks of harm, while 90% believed not carrying a firearm did put students at additional risks of harm).

[61] *See* 2002 NASRO SURVEY, *supra* note 58, at 10 (noting that twenty-nine percent of SROs confiscated a loaded firearm, while eighty-eight percent of SROs had confiscated a knife from a student).

[62] *See* 2003 NASRO SURVEY, *supra* note 58, at 4 (noting that many threats continue to be made against U.S. schools); 2002 NASRO SURVEY, *supra* note 58, at 12 (reporting that the majority of school officers indicated significant gaps in school plans and policies).

The 2003 survey revealed that school safety threats persisted, large gaps continued to exist in threat response programs, and low funding caused greater inadequacies. *See* 2003 NASRO SURVEY, *supra* note 58, at 4–5. The survey found:

> Over 70% of the officers reported that aggressive behaviors in elementary school children has increased in their districts in the past five years. . . . Over 55% of the respondents said that their school crisis plans are not adequate. . . . Over 41% of school-based police officers report that funding for school safety in their schools is decreasing. Over 85% of the survey respondents believe that the U.S. Department of Education's 2004 proposed budget cut of 35% ($50 million) for state funding of the Safe and Drug Free Schools program will contribute to schools being less safe.

Id. As a result, the survey concluded that school violence and underpreparedness continued to persist, due in part to the lack of funding available to schools. *Id.* at 6 (revealing that the majority of SROs indicated that their crisis programs are inadequate, the preparedness of schools had not improved, and the funding is inadequate to support safe school environments).

Similarly, the 2004 survey exposed similar trends. *See* 2004 NASRO SURVEY, *supra* note 58, at 4–6 (substantiating claims that crime and violence continue to threaten U.S. schools, schools remain vulnerable to attack, gaps in policies remain prevalent, and funding either remained the same or decreased). The key findings of the 2004 survey revealed that violence and safety offenses continued to threaten schools, SROs believed that gaps continued to remain in school crisis policies, and funding continued to either remain the same or decline. *See id.* at 4 (noting that 78% of SROs had reported confiscating a weapon from a student in the past year, 51% of SROs said crisis plans were inadequate, 43% of SROs indicated that school officials do not formally meet with other emergency responders, more than 55% of SROs said that school faculty do not receive ongoing training for emergency situations, and over 70% of SROs reported that school safety funding either decreased or remained the same). Consequently, the 2004 NASRO survey found little to no positive change in school safety, thus evidencing that attempts to remedy school violence by Congress, states, and schools have had little effect and that school violence will remain as a prevalent concern amongst officials at all levels, students, and their families. *See id.* at 7 ("It would be expected that three years after 9/11 and five years after Columbine High School attack, the preparedness level of schools should have improved."). *See also*

responsibility of responding quickly to school violence in order to disable perpetrators, while at the same time remaining mindful of the perpetrator's constitutional rights by refraining from excessive force.[63]

B. Excessive Force Defined

"In accomplishing police objectives, officers are given great power and authority."[64] Police officers' ability to use force is the greatest display of authority to which they are entitled; however, the type and degree of force must be proportional to the threat in order to accomplish the officer's objective.[65] Before discussing the current trends in the law, one must understand why and how those principles were established.[66] Part II.B.1 focuses on the history of the use of force, beginning with ancient history and the common law principles of excessive force.[67] Part II.B.2 then discusses the applicability of the Fourth Amendment to excessive force claims, focusing only on the second prong of the reasonableness test.[68] Finally, Part II.B.3 reveals the inconsistency among the federal circuits in analyzing excessive force claims.[69]

O'TOOLE, *supra* note 28, at 33 (discussing the continuing concern of families, despite the overall decline of violence in schools).

> Overall, the level of violence in American schools is falling, not rising. But the shock and fear generated by the recent succession of school shootings and other violent acts in schools—and by violence in society at large—have led to intense public concern about the danger of school violence.

Id.

63 *See infra* Part II.B (defining excessive force and the Supreme Court's interpretation). *See also* UREY W. PATRICK & JOHN C. HALL, IN DEFENSE OF SELF AND OTHERS . . . ISSUES, FACTS & FALLACIES—THE REALITIES OF LAW ENFORCEMENT'S USE OF DEADLY FORCE 11–12 (2005) (noting the three amendments within the Constitution that protect against force, mainly the Fourth, Eighth, and Fourteenth Amendments, but further noting that the Eighth and Fourteenth Amendments fall outside the parameters of deadly force).

64 BRIAN A. KINNAIRD, USE OF FORCE: EXPERT GUIDANCE FOR DECISIVE FORCE RESPONSE 1 (2003).

65 *See id.* "The use of force is the most significant display of authority and control that all law enforcement officers possess. The type and amount of force that can be used, however, depends on exercising sound judgment and competence in accordance with legal guidelines and department policy." *Id.*

66 *See id.* (discussing the history of the use of force); PATRICK, *supra* note 63, at 3 (discussing the common law background of the use of force).

67 *See infra* Part II.B.1 (tracing the background of the use of force and its development through the common law).

68 *See infra* Part II.B.2 (discussing the current status of excessive force and the Court's interpretation).

69 *See infra* Part II.B.3 (examining the lower federal courts' application of the reasonableness test).

1. Historical Background and the Use of Force During the Common Law Era

It is undisputed that throughout history the use of force and punishment has taken various forms.[70] For example, during the biblical period (3000 B.C.–A.D. 500), stoning was considered to be an appropriate punishment and could be imposed by the public.[71] Then, during the Medieval Era (A.D. 500–1000), victims chose the appropriate punishment to be imposed upon the perpetrators.[72] This approach continued until the state took sole responsibility and control over formalized punishments and the use of force.[73] This new formalized period, known as the common law era, spanned from the mid-1600s to the early 1900s.[74]

Under the common law, police officers were given great deference and were authorized to use deadly force in many different situations.[75] This lasted for most of America's history because the Bill of Rights restrained only the powers of the Federal Government.[76] After the Fourteenth Amendment was passed and incorporated, however, states

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[70] KINNAIRD, *supra* note 64, at 1 (explaining the various ages throughout history and using a few illustrations).

[71] *See id.* (noting that prior to formal written codes of law and morality, the public was responsible for determining appropriate punishments).

[72] *See id.* (suggesting that "these were practiced as 'non-legal' initiatives long before the legal use of force was ever developed").

[73] *See id.* at 1–2 (asserting that from the Middle Ages to the late 1600s, procedures were developed to create less erratic punishments against offenders and that "the state governed the imposition of the use of force in an attempt to prevent individuals from using it in ways that violated others' natural rights").

[74] *See id.* at 2 (noting that from 1650–1830 policing and punishment remained public and corporal, but with Sir Robert Peel's uniformed patrol divisions and investigative units, the early police forces were created). Despite this early formation, it was not until the late 1800s that most of the cities in the United States had established police forces with formal operations. *Id.*

[75] *See* PATRICK, *supra* note 63, at 4 (discussing common law principles and noting the great deference given to officers); Forrest Plesko, Comment, *(Im)balance and (Un)reasonableness: High-Speed Police Pursuits, The Fourth Amendment, and* Scott v. Harris, 85 DENV. U. L. REV. 463, 463 (2007) (citing Tennessee v. Garner, 471 U.S. 1, 12 (1985)) (suggesting that a police officer could shoot a fleeing suspect). With respect to the authority of police officers to use deadly force, the 18th century English jurist William Blackstone explained that such authority would exist in the following circumstances:

> "*[1] Where an officer in the execution of his office . . . kills a person that assaults or resists him.*
> *[2] If an officer . . . attempts to take a man charged with felony, and is resisted; and in the endeavor to take him, kills him.*
> *[3] In all these cases, there must be an apparent necessity . . . otherwise, without such absolute necessity, it is not justifiable.*"

PATRICK, *supra* note 63, at 4 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *179–80, *203–04).

[76] *See* PATRICK, *supra* note 63, at 4.

had to abide by the Bill of Rights and could not deprive citizens of their Fourth Amendment rights.[77]

2. The Fourth Amendment and the Supreme Court's Interpretation

Under the Fourth Amendment, individuals have the right to be secure against unreasonable searches and seizures.[78] A seizure "occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'"[79] Proving only that a seizure occurred is not enough to violate the Fourth Amendment; the seizure must also be unreasonable.[80] Thus, the basic

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[77] *See* IAONNIS G. DIMITRAKOPOULOS, INDIVIDUAL RIGHTS AND LIBERTIES UNDER THE U.S. CONSTITUTION: THE CASE LAW OF THE U.S. SUPREME COURT 365 & n.1 (2007) (citing Arkansas v. Sullivan, 532 U.S. 769, 772 (2001); Ker v. California, 374 U.S. 23, 30–34 (1963); Mapp v. Ohio, 367 U.S. 643 (1961), *overruling* Wolf v. Colorado, 338 U.S. 25 (1949)); PATRICK, *supra* note 63, at 4. However, even after incorporation, courts used the substantive due process clause of the Fourteenth Amendment to evaluate excessive force claims. *See* Rochin v. California, 342 U.S. 165, 174 (1952) (holding that pumping a suspect's stomach to obtain evidence and ensure a conviction 'shocked the conscious' and offended the Due Process Clause); Johnson v. Glick, 481 F.2d 1028, 1031 (2d Cir. 1973). Under substantive due process, Judge Friendly set forth four factors to determine the liability. *Johnson*, 481 F.2d at 1033. They are as follows: the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. *Id*. This test, however, was short-lived because approximately ten years later, the Supreme Court determined that the reasonableness test under the Fourth Amendment provided the proper analysis for alleged unconstitutional seizures. United States v. Place, 462 U.S. 696, 702 (1983).

[78] *See* U.S. CONST. amend. IV.

[79] Graham v. Connor, 490 U.S. 386, 395 n.10 (1989) (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). *See* California v. Hodari D., 499 U.S. 621, 627–28 (1991) (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980)); *Brower*, 489 U.S. at 596–97 (noting that a seizure could only occur if it was intentional; desired termination or incidental termination was not enough). Furthermore, "[a]n arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority." *Hodari D.*, 499 U.S. at 626.

[80] *See Graham*, 490 U.S. at 395–96 (discussing seizure and reasonableness); *Brower*, 489 U.S. at 599–600 (holding that the police actions constituted a seizure, but remanded the case to determine whether the seizure was unreasonable); Bouggess v. Mattingly, 482 F.3d 886, 889 (6th Cir. 2007) (noting the reasonableness test set forth in *Tennessee v. Garner,* 471 U.S. 1, 7 (1985)); Thomas K. Clancy, *The Future of Fourth Amendment Seizure Analysis After* Hodari D. *and* Bostick, 28 AM. CRIM. L. REV. 799 (1991) (noting that before the reasonableness question is determined, there must be a determination of whether a seizure has occurred); Ken Wallentine, How To Ensure Use of Force is "Reasonable and Necessary" and Avoid Claims of Excessive Force (Sept. 5, 2007), http://www.policeone.com/training/articles/1271618-How-to-ensure-use-of-force-is-reasonable-and-necessary-and-avoid-claims-of-excessive-force/ (citing Payne v. Pauley, 337 F.3d 767 (7th Cir. 2003)) ("An officer may use only that force which is both *reasonable* and *necessary* to effect an arrest or detention."). To dispel any confusion, unreasonable use of force and excessive force are essentially the same

purpose of the Fourth Amendment is to safeguard individuals from "arbitrary invasions by governmental officials."[81] As a result, an individual's expectations of privacy are weighed against the government's interest of preventing crime.[82] In balancing these interests and fashioning reasonableness standards, the Court remains conscientious of three basic principles: workability, reasonability, and objectivity.[83]

The Supreme Court's first critical decision regarding a police officer's liability for the use of deadly force was *Tennessee v. Garner*.[84] In *Garner*, the Court considered the constitutionality of deadly force by a police officer to prevent the escape of an unarmed burglar.[85] Justice

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because excessive force has been defined as those actions "[o]utside of what is considered 'reasonably necessary' under statutory provisions . . . ." KINNAIRD, *supra* note 64, at 5. Despite this, the author gives his own definition of reasonable force as "that force the officer, by necessity, needs to use in order to gain control and maintain control of a subject, or defend a life, based on the common sense factors and any training the officer has received." *Id.* at ix (emphasis removed).

81 DIMITRAKOPOULOS, *supra* note 77, at 365 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)). "The evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or 'writs of assistance' to authorize searches for contraband by officers of the Crown." *Id.* at 365 (citing United States v. Chadwick, 433 U.S. 1, 7–8 (1977); Boyd v. United States, 116 U.S. 616, 624–29 (1886)).

82 *See* Tennessee v. Garner, 471 U.S. 1, 8 (1985) (citing United States v. Place, 462 U.S. 696, 703 (1983); Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981); Delaware v. Prouse, 440 U.S. 648, 654 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976)). *See also* DIMITRAKOPOULOS, *supra* note 77, at 397 (noting that the balancing of these interests is the key principle to the Fourth Amendment); Clancy, *supra* note 80, at 799 (citing United States v. Leon, 468 U.S. 897 (1984); *Prouse*, 440 U.S. 648; Terry v. Ohio 392 U.S. 1 (1968)).

83 DIMITRAKOPOULOS, *supra* note 77, at 389, n.247–49 (citing Illinois v. Andreas, 463 U.S. 765, 772–73 (1983)).

84 471 U.S. 1 (1985). In *Garner*, Cleamtee Garner brought a wrongful death suit against the Memphis Police Department after their officers shot and killed his son, Edward Garner ("Garner"). *Id.* at 4. At approximately 10:45 p.m., Memphis police officers were dispatched to respond to a suspected burglary. *Id.* at 3. Upon arrival, Officer Hymon ("Hymon") went behind the house and saw an individual run across the backyard. *Id.* Using a flashlight, Hymon was able to see Garner's face and hands, but no sign of a weapon. *Id.* While Garner was crouched next to the fence, Hymon yelled, "police, halt" and walked towards Garner. *Id.* at 4. As Hymon advanced, Garner began to climb over the fence. *Id.* Convinced that Garner would escape, Hymon decided to shoot, and the bullet hit Garner in the back of the head. *Id.* Garner died from his injuries at the hospital. *Id.*

85 *Id.* at 3. The Federal District Court for the Western District of Tennessee entered judgment for the defendants, concluding that Hymon's actions were authorized by the Tennessee statute, which was also deemed constitutional. *Id.* at 5. The Court further found Hymon's actions to be "the only reasonable and practicable means of preventing Garner's escape. Garner had recklessly and heedlessly attempted to vault over the fence to escape, thereby assuming the risk of being fired upon." *Id.* (internal quotations omitted). The Sixth Circuit Court of Appeals affirmed with regard to Hymon, but remanded the issue of possible city liability because *Monell v. N.Y. City Dep't of Social Servs.*, 436 U.S. 658 (1978),

White, writing for the majority, concluded that "such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[86] The Court reasoned that it was better for all felony suspects to escape than to die, especially when the suspect posed no immediate threat to the officer or others.[87] As a result, the Tennessee statute was found unconstitutional as applied.[88] However, it was not unconstitutional on its face because

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had been handed down after the district court's decision. *Id.* The district court concluded that its prior decision was unaffected, but the court of appeals reversed and remanded the case. *Id.* at 6. The court of appeals concluded that the Tennessee statute was unconstitutional reasoning that the killing of a fleeing suspect constituted a seizure under the Fourth Amendment and therefore must be deemed reasonable. *Id.*

[86] *Garner*, 471 U.S. at 3. Finding the individual's rights outweighed the government's, the Court rejected the following arguments proposed by the government and the dissent: (1) overall violence will be reduced because suspects will not flee if they know they will be shot; (2) the Fourth Amendment must be construed in light of the commonlaw rule, thus police should be allowed to use whatever force is necessary against a felon; and (3) the shooting was justified because the officer had probable cause to believe that Garner had committed a burglary. *Id*. at 9, 12, 21. The Court concluded that these arguments were invalid because (1) shooting a nonviolent suspect is not a justifiable reason to use deadly force, (2) a large number of police departments and state statutes do not allow for deadly force when preventing the escape of a suspected felon, (3) the legal and technological advancements do not justify the reliance upon the common-law rule, (4) many of the crimes formerly punishable by death no longer exist, and (5) a suspected burglar, without regard to other circumstances, should not automatically justify deadly force. *Id.* at 10–11, 13–14, 21.

[87] *Id.* at 11. The Court noted:

> It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

Id. See also Andrew T. George, Comment, *Rediscovering Dangerousness: The Expanded Scope of Reasonable Deadly Force After* Scott v. Harris, 93 VA. L. REV. IN BRIEF 145, 146 (2007), *available at* http://virginialawreview.org/inbrief.php?s=inbrief&p=2007/07/09/george (discussing *Tennessee v. Garner*, suggesting that it was "a case of the right Constitutional rule wrongly applied").

[88] *Garner*, 471 U.S. at 11. The Tennessee Statute provides:

> (a) A law enforcement officer, after giving notice of the officer's identity as an officer, may use or threaten to use force that is reasonably necessary to accomplish the arrest of an individual suspected of a criminal act who resists or flees from the arrest.
> (b) Notwithstanding subsection (a), the officer may use deadly force to effect an arrest only if all other reasonable means of apprehension have been exhausted or are unavailable, and where feasible, the officer has given notice of the officer's identity as an officer and given a warning that deadly force may be used unless resistance or flight ceases, and:
> (1) The officer has probable cause to believe the individual to be arrested has committed a felony involving the infliction or threatened infliction of serious bodily injury; or

where an officer has probable cause to believe the suspect posed a threat of serious physical harm to officers or others, deadly force is reasonable to prevent escape.[89] Therefore, the Court noted that it must decide "whether the totality of the circumstances justified a particular sort of search or seizure."[90] Determining reasonableness and the appropriate analysis under this test posed problems for lower courts.[91] As a result, the test was clarified three years later in *Graham v. O'Connor*.[92]

In *Graham*, the Supreme Court determined "what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person."[93] Justice Rehnquist, writing for the

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> (2) The officer has probable cause to believe that the individual to be arrested poses a threat of serious bodily injury, either to the officer or to others unless immediately apprehended.
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> (c) All law enforcement officers, both state and local, shall be bound by the provisions in this section and shall receive instruction regarding implementation of this section in law enforcement training programs.

TENN. CODE ANN. § 40-7-108 (1982).

89 *Garner*, 471 U.S. at 11.

> Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Id. at 11–12.

90 *Id.* at 8–9.

91 *See* Brower v. County of Inyo, 489 U.S. 593, 594 (1989) (reporting that the district court granted the defendant's motion to dismiss because using a roadblock during a high-speed pursuit was reasonable under the circumstances; a divided panel for the Ninth Circuit affirmed); Plesko, Comment, *supra* note 75, at 466 (noting that because *Garner* is fact-specific and is determined upon the reasonableness of the officer's actions in light of the totality of the circumstances, confusion continued to plague the lower courts until *Graham v. Connor*, 490 U.S. 386 (1989)).

92 490 U.S. 386 (1989).

93 *Id.* at 388. In this case, Dethorne Graham ("Graham") sought damages for injuries sustained when an officer used force against him during an investigatory stop. *Id.* Graham, a diabetic, felt the onset of an insulin reaction and asked his friend, William Berry ("Berry"), to drive him to a convenience store to buy some orange juice. *Id.* Berry agreed, but upon arriving and entering the store, Graham saw numerous people in the check-out line and as a result, hurried out of the store, requesting Berry to drive him to a friend's house. *Id.* Seeing Graham leave the store in a hurry, Officer Connor ("Connor") became suspicious and decided to follow Berry's car. *Id.* at 389. A little distance down the road, Connor decided to perform an investigatory stop and Berry related to Connor that Graham was suffering from a "sugar reaction." *Id.* Hearing this, Connor ordered Berry and Graham to remain where they were, while he determined if anything had occurred at the store. *Id.* When Connor returned to his car to call for backup, Graham exited the car, ran around it twice, and sat down on the curb where he passed out briefly. *Id.* Once backup arrived, the officers rolled Graham over and handcuffed him, all the while ignoring Berry's pleas to get Graham some sugar. *Id.* The officers then lifted Graham up, carried him to

majority, held that such claims should be analyzed under the Fourth Amendment's objective reasonableness test, rather than the substantive due process standard of the Fourteenth Amendment.[94] The Court reasoned that the Fourth Amendment provided more guidance than substantive due process by offering an "explicit textual source of constitutional protection against this sort of physically intrusive

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Berry's car, and placed him face down on the hood. *Id.* Graham regained consciousness and pleaded for the police to check his wallet for his diabetes decal, but the officers continued to ignore him and shoved his face in the hood. *Id.* The officers then grabbed Graham and threw him headfirst into the back of the patrol car. *Id.* Meanwhile, Graham's friend brought some orange juice for him, but the officers refused to let Graham have it. *Id.* Finally, Connor discovered that Graham had done nothing wrong at the convenience store and the officers drove him home. *Id.* As a result of this encounter, Graham suffered a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and claims to have a loud ringing in his right ear. *Id.* at 390.

[94] *See id.* at 388 (vacating the Fourth Circuit's decision and remanding it for reconsideration under the proper Fourth Amendment standard). As the court explained:

> Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach.

Id. at 395. *See also* Terry v. Ohio, 392 U.S. 1, 21 (1968) (stating that when analyzing the reasonableness of a particular search or seizure, "it is imperative that the facts be judged against an objective standard"). *But see Graham*, 490 U.S. at 399–400 (Blackmun, Brennan, & Marshall, JJ., concurring in part and concurring in judgment) (determining that there appears to be no reason for deciding that "prearrest excessive force claims are to be analyzed under the Fourth Amendment *rather than* under a substantive due process standard" and deciding not to join "in foreclosing the use of substantive due process analysis in prearrest cases"). At the original jury trial, the district court granted the defendant's motion for a directed verdict after considering four factors. Graham v. City of Charlotte, 644 F. Supp. 246, 248 (W.D.N.C. 1986).

> The factors to be considered in determining when the excessive use of force gives rise to a cause of action under § 1983 are identified as
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> (1) The need for the application for the force.
>
> (2) The relationship between the need and the amount of the force that was used.
>
> (3) The extent of the injury inflicted.
>
> (4) Whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id. (citing King v. Blankenship, 636 F.2d 70 (4th Cir.1980)). In applying these factors, the district court found that the amount of force was appropriate under the circumstances, there was no discernable injury, and the force was not applied for the very purpose of causing harm, but instead was used to maintain order. *Id.* at 248–49. On appeal, the Fourth Circuit affirmed, finding that the district court had applied the correct legal standard, approving the four-factor test, and concluding that a jury could not find that force was unconstitutionally excessive. *Graham*, 490 U.S. at 391.

governmental conduct."[95] With the proper standard established, the Court shifted its focus to the question of reasonableness.[96]

In discussing reasonableness, the Court reaffirmed that the Fourth Amendment required a careful balancing between individual and governmental interests, noting that reasonableness cannot be precisely defined or mechanically applied.[97] As a result, courts must be attentive to the facts and the circumstances of each case, noting the crime's severity, the immediacy of the threat to others, and whether the individual is actively resisting arrest or attempting to evade arrest.[98] In applying the test, the Court further reaffirmed that courts are to refrain from judging in hindsight or considering underlying intent or motivation.[99] The Court reasoned that officers are often forced to make split-second decisions in tense, uncertain, and rapidly evolving situations.[100] Many of the principles in *Graham* were reaffirmed in the 2007 opinion *Scott v. Harris*.[101]

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95 *Graham*, 490 U.S. at 395.

96 *Id.* at 396.

97 *Id.* (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985); United States v. Place, 462 U.S. 696, 703 (1983); Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

98 *Id.* (quoting *Garner*, 471 U.S. at 8–9) (considering the totality of the circumstances against the justifiability of the officer's actions).

99 *Id.* at 396–97 (citing *Terry*, 392 U.S. at 20–22) (reasoning that courts must judge the actions from the perspective of the reasonable officer on the scene, "rather than with the 20/20 vision of hindsight"). The Court noted that since the proper test is an objectively reasonable test, "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.* at 397 (citing Scott v. United States, 436 U.S. 128, 138 (1978); United States v. Robinson, 414 U.S. 218 (1973)). Thus, "[t]hat test [*Johnson v. Glick* test], which requires consideration of whether the individual officers acted in 'good faith' or 'maliciously and sadistically for the very purpose of causing harm,' is incompatible with a proper Fourth Amendment analysis." *Id.* *See also Scott*, 436 U.S. at 137 ("[I]n evaluating alleged violations of the Fourth Amendment[,] the Court has first undertaken an objective assessment of an officer's actions . . . ."); Troupe v. Sarasota County, 419 F.3d 1160, 1166–67 (11th Cir. 2005) ("Force regardless of the form directed to a driver . . . does not give rise to a due process deprivation claim unless it was exercised with 'a purpose to cause harm' unrelated to the legitimate object of arrest.") (quoting Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 796 (1st Cir. 1990)).

100 *Graham*, 490 U.S. at 396. *See* Martin A. Swartz, *The High-Speed Police Pursuit Decision*, N.Y.L.J. 3, July 24, 2007 (recognizing that officers have to make difficult split-second decisions with no time for real deliberation); Travis N. Jensen, Note, *Cooling the Hot Pursuit: Toward a Categorical Approach*, 73 IND. L.J. 1277, 1280 (1998) ("[E]very police officer must perform what becomes a complex balancing test in the seconds before each decision to pursue.").

101 550 U.S. 372 (2007). However, it has also been suggested that *Scott v. Harris* is a departure from precedent and is an expansion of the reasonableness test because it was distinguished from *Garner* and considered without directly applying *Graham*. *See* George, *supra* note 87, at 147–49 & n.18.

In *Scott*, the Court focused its attention on the threshold question of whether Deputy Scott's actions violated the Fourth Amendment.[102] Specifically, the Court asked "whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind."[103] Justice Scalia, delivering the Court's

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[102] *Scott*, 550 U.S. at 376. The Court reasoned that qualified immunity was not the proper initial inquiry. *Id.* In *Saucier v. Katz*, the Court concluded that the initial inquiry must be whether a constitutional right was violated. 533 U.S. 194 (2001).

> In the course of determining whether a constitutional right was violated . . . a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry.

Id. at 201. Although relatively insignificant to the thesis of this Note, the Supreme Court recently receded from the two-prong test set forth in *Saucier*. *See* Pearson v. Callahan, 129 S. Ct. 808, 818 (2009) (holding that although *Saucier*'s two-step sequence for resolving qualified immunity claims is "often appropriate, it should no longer be regarded as mandatory"). *See also* Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117 (2009) (discussing *Pearson* and qualified immunity). Hassel proposes the following:

> Addressing the problem of police violence, providing balance to doctrine overly protective of defendants, and simplifying the procedural morass that qualified immunity has created in excessive force cases requires a radical modification of the doctrine. In excessive force cases, the doctrine should be modified to protect a defendant only when there has been a genuine change in the legal standard governing his actions—not merely an application of established doctrine to a somewhat new set of facts. Currently, qualified immunity prevents liability if the defendant's actions do not violate clearly established law "of which a reasonable person would have known." Instead, the standard should be that the defendant will be liable unless his actions violate a newly developed legal standard. In the excessive force context, the protection provided by the reasonableness standard of Fourth Amendment, in conjunction with this more limited defense based on a newly developed law, will provide ample protection for the reasonably mistaken officer and will make compensation for the victim possible.

Id. at 119–20.

[103] *Scott*, 550 U.S. at 376. "Put another way: Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?" *Id*. In this case, a Georgia county deputy decided to pull Victor Harris ("Harris") over for speeding, but upon the sight of flashing lights, Harris sped away. *Id.* During the chase, speeds exceeded eighty-five miles per hour. *Id*. at 374–75. After hearing about the chase over his radio, Deputy Timothy Scott ("Scott") joined the pursuit. *Id.* at 375. During the pursuit, Harris pulled into a large parking lot and the police attempted to box him in, but before they could, Harris was able to escape by making a sharp turn and ramming into Scott's car. *Id.* Scott then took over as the lead pursuit vehicle where he decided to terminate the chase by employing a Precision Intervention Technique ("PIT") maneuver. *Id.* This maneuver would cause the fleeing

opinion, held that such actions were reasonable and did not violate the Fourth Amendment because the car chase posed a "substantial and immediate risk of serious physical injury to others[.]"[104]

The Court began by distinguishing *Scott* from *Garner*.[105] The Court first noted that "*Garner* did not establish a magical on/off switch that

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vehicle to spin out of control and terminate the pursuit. *Id.* After permission was granted by Scott's supervisor, Scott decided not to perform the maneuver, but instead apply his push bumper to the back of Harris' vehicle, causing Harris to lose control, leave the highway, overturn, and crash. *Id.* As a result, Harris was rendered a quadriplegic. *Id.* After hearing the facts of the case, the Court determined that the best option was to view the dashboard video tape recording. *Id.* at 378–79. Although acknowledging that courts are required to view the facts and draw reasonable inferences in favor of the nonmoving party, the Court noted that there was "an added wrinkle in this case" and since there were no allegations or indications of tampering, the Court concluded that it was proper to rely solely upon the videotape as an eyewitness. *Id.* at 378–80 (recognizing that such an approach is appropriate when "opposing parties tell two different stories, one of which is blatantly contradicted by the record"). *See* Howard M. Wasserman, *Video Evidence and Summary Judgment: The Procedure of Scott v. Harris*, 91 JUDICATURE 180, 182 (2008) (suggesting that video can replace an eyewitness, making live testimony and corroboration unnecessary, allowing courts to disregard testimony altogether even when considering a motion for summary judgment). *But see* Erwin Chemerinsky, *A Troubling Take on Excessive-Force Claims*, 43 TRIAL 74, 74 (2007) (viewing the use of videotapes as a "novel twist" on judges' decision-making and a likely trend in the future).

[104] *Scott*, 550 U.S. at 386 (reversing the court of appeals' decision to deny qualified immunity). Harris brought a claim under 42 U.S.C. § 1983, claiming Scott's actions were excessive and constituted an unreasonable seizure, thereby violating his Fourth Amendment rights. *Id.* at 375. In response, Scott filed a motion for summary judgment, claiming he was protected under the theory of qualified immunity. *Id.* "The District Court denied the motion, finding 'there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury.'" *Id.* (quoting Harris v. Coweta County, No. 3:01-CV-148-WBH, 2003 WL 25419527, at *6 (N.D. Ga. Sept. 3, 2003)). The Court of Appeals for the Eleventh Circuit affirmed the district court's decision to allow the case to proceed to trial because a reasonable jury could find that Scott's actions violated Harris' Fourth Amendment rights. *Id.* at 376 (citing Harris v. Coweta County, 433 F.3d 807, 816 (11th Cir. 2005)). "The Court of Appeals further concluded that 'the law as it existed [at time of the incident], was sufficiently clear to give reasonable law enforcement officers 'fair notice' that ramming a vehicle under these circumstances was unlawful.'" *Id.* (citing Harris v. Coweta County, 433 F.3d 807, 817 (11th Cir. 2005)). *See also Saucier*, 533 U.S. at 202 (noting that in *Anderson* the Court emphasized that the right allegedly violated by an official must have been 'clearly established').

> It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Anderson v. Creighton, 483 U.S. 635, 640 (1987).

[105] *Scott*, 550 U.S. at 382–83. Harris urged the case be analyzed under the *Garner*, reasoning that Scott's actions constituted deadly force. *Id.* Citing *Garner*, Harris defined deadly as "any use of force which creates a substantial likelihood of causing death or serious bodily injury." *Id.* (quoting Tennessee v. Garner, 471 U.S. 1, 19 (1985)). Harris

triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"[106] As a result, judges must still "slosh [their] way through the factbound morass of 'reasonableness.'"[107]

"Sloshing" its way through, the Court could not quantify the significant individual and government interests, and was instead compelled to consider the number of lives and their relative culpability.[108] The Court concluded that Scott's actions were reasonable because Harris could have severely injured or killed multiple individuals through his unlawful, reckless, and intentional acts.[109] Using such

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urged that under *Garner*, certain preconditions must be met before justifying Scott's actions: "(1) The suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape; and (3) where feasible, the officer must have given the suspect some warning." *Id*. Harris concludes that since Scott cannot satisfy these requirements, his actions were "*per se* unreasonable." *Id*.

[106] *Id*. Rather, "*Garner* was simply an application of the Fourth Amendment's 'reasonableness' test, . . . to the use of a particular type of force in a particular situation." *Id*. Differentiating between the facts, the Court noted that the "threat posed by the flight on foot of an unarmed suspect" was not "even remotely comparable to the extreme danger to human life posed by respondent in this case." *Id*. Therefore, since the facts of this case differ from those in *Garner*, such preconditions are inapplicable. *Id.*

[107] *Id*. at 384. Consequently, "all that matters is whether Scott's actions were reasonable." *Id*. The appropriate "inquiry should be viewed from the perspective of a reasonable officer on the scene, rather than with hindsight, and must allow for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving." *No Constitutional Violation in Car Chase Fatality*, 25 NO. 9 MCQUILLIN MUN. L. REP. 4 (Sept. 2007). *See* J. Michael McGuinness, *Law Enforcement Use of Force: The Objective Reasonableness Standards Under North Carolina and Federal Law*, 24 CAMPBELL L. REV. 201, 201 (2002) (stating that courts consider the facts of a particular case under the circumstances as they appear to the officer at the time of the arrest); Plesko, *supra* note 75, at 466 (determining reasonableness from the "perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"). Applying any other test would prove problematic. *See Saucier*, 533 U.S. at 205–06 (finding the *Graham* test problematic to officers because it does not always give a clear answer whether courts will deem officers' actions to be excessive); Jensen, *supra* note 100, at 1291–92 (recognizing that individual officers must perform a complex balancing test in the seconds before each decision to act, often under the influence of potentially prejudicial factors).

[108] *Scott*, 550 U.S. at 383 (quoting United States v. Place, 462 U.S. 696, 703 (1983)). In balancing the two, the Court determined that it must "consider the risk of bodily harm that Scott's actions posed to respondent [Harris] in light of the threat to the public that Scott was trying to eliminate." *Id*. In doing so, the Court noted it was clear from the videotape that Harris' actions imminently threatened the lives of pedestrians, civilian motorists, and officers involved in the pursuit, while Scott's actions only posed a high threat of serious harm to Harris. *See id*.

[109] *Id*. at 384.

> It was respondent [Harris], after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. . . . By contrast, those who might have been harmed

reasons, the Court impliedly resorted to the self-defense of others doctrine.[110] Meanwhile, Harris continued to argue that alternative methods would have sufficed.[111]

The Court rejected Harris's arguments reasoning that officers need not hope for the best, nor create perverse incentives for suspects to accelerate their speed and recklessness.[112] Instead, the Court noted a

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> had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did.

Id. It has also been noted that those who create the risk and jeopardize the lives of others should bear the risk of loss. *See* Michael Douglas Owens, Comment, *The Inherent Constitutionality of the Police Use of Deadly Force to Stop Dangerous Pursuits*, 52 MERCER L. REV. 1599, 1600 (2001). Owens argues that anytime a suspect flees from police, deadly force is justified because it warrants both tactical operations and an interest to society perspective. *Id.* "In short, the risks of injury or death from police pursuits should be upon the violators who, by their flight, create the risks, rather than upon the citizenry in general." *Id. But see* Jensen, *supra* note 100, at 1278 (arguing that because of the inherent risk of death or bodily injury, high-speed pursuits over minor crimes and traffic violations are unacceptable).

110 *See* Richard P. Shafer, Annotation, *When Does Police Officer's Use of Force During Arrest Become so Excessive as to Constitute Violation of Constitutional Rights, Imposing Liability Under Federal Civil Rights Act of 1871 (42 U.S.C.A. § 1983)*, 60 A.L.R. FED. 204 (1982) (discussing the standard for self-defense of others and citing cases to support the definition). "[A] person is justified in using force likely to cause death or great bodily harm if one reasonably believed that such force was necessary to prevent imminent death or great bodily harm to oneself or another." 41 C.J.S. *Homicide* § 499 (2008). *See also* CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 124 (15th ed. 1993) ("[T]he officer or private person, in attempting to make an arrest, is performing a significant public function . . . and, if the resistance escalates to such a degree as to threaten his life, he may resort to deadly force as a matter or self-defense."); 5 AM. JUR. 2D *Arrest* § 83 (2008) ("An officer's use of deadly force is reasonable under the Fourth Amendment if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."); Chemerinsky, *supra* note 103, at 75 ("In other words, the Court had to balance the officers' need to protect pedestrians and other drivers by stopping Harris's car against the risk of injuring Harris."); McGuinness, *supra* note 107, at 216–17 ("A person may intervene and use force against another when it appears reasonably necessary in order to protect a third person from harm."); Jensen, *supra* note 100, at 1294 ("Considering the risk to innocent third parties of death or serious bodily injury that accompanies each decision, police pursuit is a major public concern.").

111 *See Scott*, 550 U.S. at 385 (asking the rhetorical question: "Couldn't the innocent public equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit?"); Plesko, *supra* note 75, at 478 (indicating that seventy percent of jailed suspects involved in a car pursuit would have slowed down if police had terminated the pursuit).

112 The Court rejected the, reasoning that "police need not have taken that chance and hoped for the best." *Scott*, 550 U.S. at 385. Consequently, the Court found it was certain that ramming Harris' car would have ended the pursuit and immediately eliminated the risk, while ceasing pursuit would not certainly produce the same result. *Id.* at 385–86. "Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow." *Id.* at 385.

more sensible rule: "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."[113] Although the Court has defined and established reasonableness as the proper standard for Fourth Amendment excessive force claims, circuit courts have inconsistently followed this standard.[114]

3. Circuit Court Inconsistency When Analyzing Excessive Force Claims

"The time-frame is a crucial aspect of excessive force cases."[115] Even after *Garner* and *Graham*, appellate courts disagree about the time-frame of reasonableness.[116] For instance, the First, Third, Sixth, and Ninth

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Furthermore, the Court reasoned, "[i]t is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights." *Id*. *See also* Owens, *supra* note 109, at 1637 (commenting that cessation would only cause lawlessness and give criminals an incentive to push the limits).

113 *Scott*, 550 U.S. at 386. Justice Breyer, however, noted:

> I disagree with the Court insofar as it articulates a *per se* rule. The majority states: "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Ante*, at 1779. This statement is too absolute. As Justice GINSBURG points out, *ante*, at 1779–1780, whether a high-speed chase violates the Fourth Amendment may well depend upon more circumstances than the majority's rule reflects.

Id. at 389 (Breyer, J., concurring).

114 *See* Eric S. Connuck, *Constitutional Law: The Viability of Section 1983 Actions in Response to Police Misconduct*, 1990 ANN. SURV. AM. L. 747 (discussing the different standards applicable depending upon the status of the individual as either a pre-arrest detainee or pre-trial detainee); Mitchell J. Edlund, Note, *In the Heat of the Chase: Determining Substantive Due Process Violations Within the Framework of Police Pursuits When an Innocent Bystander is Injured*, 30 VAL. U. L. REV. 161, 161–68 (1995) (discussing the level of culpability necessary to invoke the protections of the Due Process Clause in police pursuit cases while discussing the varying approaches taken by lower federal courts); R. Wilson Freyermuth, Comment, *Rethinking Excessive Force*, 1987 DUKE L.J. 692, 694–95 (listing cases discussing the four factors set forth in *Johnson v. Glick*); Aaron Kimber, Note, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim*, 13 WM. & MARY BILL RTS. J. 651, 665–75 (2004) (noting and discussing various federal circuit court decisions to alter the reasonableness test after *Graham*); Daniel O'Connell, Note, *Excessive Force Claims: Is Significant Bodily Injury the Sine Qua Non to Proving a Fourth Amendment Violation?*, 58 FORDHAM L. REV. 739, 751 (1990) (demonstrating that courts have not uniformly applied *Graham*'s Fourth Amendment test); Shafer, *supra* note 110, at 204 (discussing numerous cases regarding the reasonableness test).

115 Plakas v. Drinski, 19 F.3d 1143, 1150 (7th Cir. 1994).

116 *See* Grazier *ex rel.* White v. City of Philadelphia, 328 F.3d 120, 127 (3d Cir. 2003) (noting the circuit court's split discussion in *Abraham*); Billington v. Smith, 292 F.3d 1177,

Circuits assess officer actions under a "totality of the circumstances" standard, while the Fourth, Seventh, Eighth, and Tenth Circuits review officer actions exactly when the seizure occurs.[117] As a result of this

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1186–88 (9th Cir. 2002) (addressing the split between the First, Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits); Abraham v. Raso, 183 F.3d 279, 291–92 (3d Cir. 1999) (discussing the court's agreement with the First Circuit and its disagreement with the Seventh, Eighth, and Tenth Circuits); Dickerson v. McClellan, 101 F.3d 1151, 1160–62 (6th Cir. 1996); St. Hilaire v. City of Laconia, 71 F.3d 20, 26 (1st Cir. 1995) (explaining the court's disagreement with the Fourth, Seventh, and Eighth Circuits); Schulz v. Long, 44 F.3d 643, 649 (8th Cir. 1995) (discussing the court's agreement with the Fourth, Fifth, Seventh, and Tenth Circuits to disregard the events leading up to the seizure).

[117] Tennessee v. Garner, 471 U.S. 1, 9 (1985). The Third Circuit has determined that the totality of the circumstances standard set forth in *Garner*, was again appropriately applied in *Brower*. *See Abraham*, 183 F.3d at 291 (noting that the Court in *Brower* used the totality of the circumstances to determine the officer's reasonableness and concluded that doing so was appropriate). This standard has been reaffirmed in the Third Circuit through numerous subsequent cases. *See, e.g.,* Hill v. Nigro, 266 F. App'x 219, 221 (3d Cir. 2008); Curley v. Klem, 499 F.3d 199, 207 (3d Cir. 2007); Kopec v. Tate, 361 F.3d 772, 776–77 (3d Cir. 2004); *Grazier ex rel. White*, 328 F.3d at 127; Estate of Smith v. Marasco, 318 F.3d 497, 515 (3d Cir. 2003). The First Circuit has also determined that the totality of the circumstances standard set forth by the Supreme Court is the proper analysis. *See* Young v. City of Providence, 404 F.3d 4, 22 (1st Cir. 2005); *St. Hilaire*, 71 F.3d at 26 n.4 ("We do not read this case as forbidding courts from examining circumstances leading up to a seizure, *once it is established that there has been a seizure*."). The First Circuit also noted that it had previously made similar decisions in earlier cases. *St. Hilaire*, 71 F.3d at 26.

> Instead of focusing solely on whether the officer who shot Hegarty was acting in self-defense at the moment of the shooting (Hegarty had picked up a rifle and raised it in the direction of the officers and ignored their demands to drop it), the court examined all of the actions of the officers to determine whether there was probable cause to arrest Hegarty and whether there were exigent circumstances to allow a forcible, warrantless, nighttime entry into her dwelling. *Id.* at 1374–79. Similarly, in *Roy v. Lewiston,* this court examined all of the surrounding circumstances in determining whether the police acted reasonably: "Roy was armed; he apparently tried to kick and strike at the officers; he disobeyed repeated instructions to put down the weapons; and the officers had other reasons . . . for thinking him capable of assault." 42 F.3d at 695.

Id. 26–27. Similarly, the Sixth Circuit has also determined that considering the totality of the circumstances, not just the moments before the seizure, was appropriate when considering reasonableness. *See* Claybrook v. Birchwell, 274 F.3d 1098, 1104–05 (6th Cir. 2001). *But see Dickerson*, 101 F.3d at 1162 (noting that in "reviewing the plaintiffs' excessive force claim, we limit the scope of our inquiry to the moments preceding the shooting."). The Ninth Circuit has taken a slightly different approach, but nonetheless has concluded that courts should consider the totality of the circumstances. *See Billington*, 292 F.3d at 1190 (citing Duran v. City of Maywood, 221 F.3d 1127 (9th Cir. 2000); Alexander v. City & County of San Francisco, 29 F.3d 1355 (9th Cir. 1994)) (finding that the initial inquiry should be whether the officer's conduct would provoke a violent response, followed by a determination if such force was objectively reasonable).

In contrast, other courts only consider an officer's actions at the moment the seizure occurs. *See, e.g.,* Bella v. Chamberlain, 24 F.3d 1251, 1256 (10th Cir. 1994); Cole v. Bone, 993

inconsistent standard, many law enforcement departments revised and altered their active shooter policies.[118]

C. Law Enforcement's Response to School Violence

Within days after the Columbine shooting, law enforcement agencies across the country began scrutinizing and changing their rapid-response programs.[119] These speedy changes were designed to prevent high

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F.2d 1328, 1333 (8th Cir. 1993); Carter v. Buscher, 973 F.2d 1328, 1332 (7th Cir. 1992); Greenidge v. Ruffin, 927 F.2d 789, 792 (4th Cir. 1991). The Fourth Circuit noted that the focus of reasonableness must be on the conduct "at the moment when the decision to use certain force was made" and therefore, "excluding evidence of the officer's actions leading up to the time immediately prior to the shooting" was appropriate. *Greenidge*, 927 F.2d at 792 (internal quotations omitted). The Seventh Circuit noted that "pre-seizure conduct is not subject to Fourth Amendment scrutiny." *Carter*, 973 F.2d at 1332. Similarly, the Eighth Circuit affirmed this principle when it noted, "we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment." *Cole*, 993 F.3d at 1333 (citing *Carter*, 973 F.2d at 1332). Two years later the Eighth Circuit reaffirmed that events leading up to the seizure should not be considered. *Schulz*, 44 F.3d at 649. Finally, the Tenth Circuit again adopted this principle when it rejected an appellant's claim that the court should examine all of the actions of the police officer up to the seizure. *Bella*, 24 F.3d at 1256. *See also* Holland *ex rel*. Overdorff v. Harrington, 268 F.3d 1179, 1191 (10th Cir. 2001) ("The decision to use a SWAT team to make a 'dynamic entry' into a residence constitutes conduct 'immediately connected with the seizure' because it determines the degree of force initially to be applied in effecting the seizure itself."); Medina v. Cram, 252 F.3d 1124, 1132 (10th Cir. 2001) ("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 . . . ."); Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir. 1995) ("The reasonableness of Defendants' actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force."). *But see* Allen v. Muskogee, Okla., 119 F.3d 837, 841 (10th Cir. 1997) (noting that that the officers' conduct prior to the use of force could be included in the reasonableness inquiry).

[118] *See infra* Part II.C (discussing law enforcement's response to school violence).

[119] *See* Timothy Harper, *Shoot to Kill*, THE ATLANTIC MONTHLY, Oct. 2000, at 28, *available at* http://www.theatlantic.com/issues/2000/10/harper.htm (discussing the Peoria, Illinois Police Department's new tactics and noting that most of the nation's 17000 police agencies, especially the 2000 agencies with fifty or more officers, have instituted new training programs in the last year).

> The day after Columbine, municipal officials and police chiefs across the nation asked their SWAT team leaders, "If it had happened here, what would have been the result?" They received answers similar to the one that Sergeant Jeff Adams, a longtime SWAT team leader and trainer in Peoria, gave: "The same thing would have happened here."

Id. *See also* Lisa Backus, Shooter Exercises Help Police Sharpen Response (May 25, 2008), http://www.policeone.com/training/articles/1698404-Shooter-exercises-help-police-sharpen-response/ (noting that after the shootings at Columbine, officers cannot wait for the SWAT team); Shelby County Officers Drill for Potential School Shootings (Apr. 4, 2002), http://www.policeone.com/training/articles/50373-Shelby-County-Officers-Drill-for-

casualties in school shootings and to avoid potential wrongful death lawsuits filed by victims' families due to officer inaction.[120] Consequently, "Columbine almost immediately became a seminal event in the history of police training and tactics."[121]

Part II.C.1 reviews traditional police active shooter policies, revealing the passivity of traditional policies.[122] Conversely, Part II.C.2 discusses the current trend in active-shooter policies and the aggressive techniques being used to counter school violence.[123]

1. Traditional Police Policies

Traditionally, the first officers to respond to an active shooter never rush into a confrontation.[124] Instead, they were trained to secure the area

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Potential-School-Shootings/ [hereinafter *Shelby County Officers Train*] (noting more than fifty officers in central Indiana, including the Indiana State Police troopers, received this training).

120 *See, e.g.*, Shoels v. Klebold, 375 F.3d 1054 (10th Cir. 2004); Ireland v. Jefferson County Sheriff's Dep't, 193 F. Supp. 2d 1201 (D. Colo. 2002); Rohrbough v. Stone, 189 F. Supp. 2d 1144 (D. Colo. 2002); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264 (D. Colo. 2002); Castaldo v. Stone, 192 F. Supp. 2d 1124 (D. Colo. 2001); Rohrbough v. Stone, 189 F. Supp. 2d 1088 (D. Colo. 2001); Ruegsegger v. Jefferson County Bd. of County Comm'rs, 197 F. Supp. 2d 1247 (D. Colo. 2001); Ruegsegger v. Jefferson County School Dist. R-1, 187 F. Supp. 2d 1284 (D. Colo. 2001); Sanders v. Bd. of County Comm'rs of County of Jefferson, 192 F. Supp. 2d 1094 (D. Colo. 2001); Schnurr v. Bd. of County Comm'rs of Jefferson County, 189 F. Supp. 2d 1105 (D. Colo. 2001); Harris v. Denver Post Corp., 123 P.3d 1166 (Colo. 2005); Blesch v. Denver Pub. Co., 62 P.3d 1060 (Colo. Ct. App. 2002); Bodelson v. Denver Pub. Co., 5 P.3d 373 (Colo. Ct. App. 2000). *See also* Harper, *supra* note 119 ("Glick acknowledges that the fear of lawsuits is one factor behind the new tactics."); Wallentine, *supra* note 80 (noting tremendous potential liability comes with each use of force); Ron Avery, Tactical Decision Making: An Equation for Critical Thinking in Moments of Crisis (May 9, 2007), http://www.policeone.com/training/articles/1243796-Tactical-decision-making-An-equation-for-critical-thinking-in-moments-of-crisis/ (posing the question "How often is legal liability the overwhelming factor in decision making, to the exclusion of situational needs or overall mission?"). Schools may also be subject to liability for student deaths. *See* Brett A. Sokolow et al., *College and University Liability for Violent Campus Attacks*, 34 J.C. & U.L. 319 (2008); Ben "Ziggy" Williamson, Note, *The Gunslinger to the Ivory Tower Came: Should Universities Have a Duty to Prevent Rampage Killings?*, 60 FLA. L. REV. 895, 898 (2008) (discussing "whether universities should have a duty to identify and thwart students that pose a threat to the lives of other students" and "ultimately reject[ing] the application of a Tarasoff-like duty to protect in the context of university rampage killings").

121 Harper, *supra* note 119.

122 *See infra* Part II.C.1 (discussing traditional police policies regarding school shootings).

123 *See infra* Part II.C.2 (discussing contemporary police policies regarding school shootings).

124 *See* Harper, *supra* note 119 ("The traditional police response was designed for dealing with trapped bank robbers, angry husbands, or disgruntled employees—not with disaffected teenagers running through a school killing as many people as possible."); Todd Johnson, Milwaukee Police Department Tactical Enforcement Team: Patrol Response to the Active Shooter Instructor Manual 2 (unpublished manual, on file with The Valparaiso

by establishing a perimeter around the scene to contain the suspect.[125] Meanwhile, SWAT teams were notified.[126] Upon arrival, the SWAT teams were given command over the situation, and all tactical operations were under their authority.[127] Even if an officer did enter the building and came upon the suspect holding a gun to a hostage's head, they were taught to comply with the suspect's demands.[128] Now, however, with the pressures of litigation and continuing violence in schools, many officers are being trained to use tactics, typically reserved for specialists, in an attempt to neutralize the risk quickly.[129]

University Law Review) [hereinafter MPD Training Manual] (stating that traditional methods were focused on isolating and containing the suspect).

125 *See* Backus, *supra* note 119 (revealing that traditional methods consisted of setting up a perimeter and waiting for the SWAT team to arrive); Harper, *supra* note 119.

126 *See* Harper, *supra* note 119.

127 *See id.* "The SWAT team arrived, assumed positions to keep the suspects pinned down, and negotiated with them until they surrendered. SWAT teams stormed buildings only when necessary to save lives, such as when hostages were being executed one by one." *Id.*

128 *See* Harper, *supra* note 119. "When he came upon the suspect holding the gun to the hostage's head, Layman's initial impulse was to drop his gun. 'That's what you were always taught—drop the gun, just like on the TV shows[.]'" *Id.*

129 *See infra* Part II.C.2 (discussing new police policies to neutralize the risk). *But see* Mike Baird, *Texas Police are Taught When to Use Deadly Force: Officers Learn to Use Guns at Last Resort*, Nov. 24, 2003, http://www.policeone.com/training/articles/72870-Texas-Police-Are-Taught-When-to-Use-Deadly-Force/ (discussing training requirements for Corpus Christi police officers and noting that officer training should focus on decision-making and teaching officers that deciding when to use deadly force is just as important as teaching them when not to use it). However, this decision-making skill is difficult to attain when officers have minimal training requirements and do not comply with national standards. *See* Backus, *supra* note 119 (noting that officers only spent four hours participating in active shooter situations and all the police departments will have to participate in the four hour training); Lise Olsen & Cindy George, *Houston Police Training Faces More Changes*, June 2, 2008, http://www.policeone.com/training/articles/1700712-Houston-police-training-faces-more-changes/ (stating that the Houston Police Department requires officers to use the firing range once a year, the state's minimum requirement, other larger cities require two attendances per year, and the national guidelines mandate four times per year; therefore, if officers would like additional training they must purchase their own ammunition and "compete for range time").

Interestingly, one of the side effects of these new tactics is increased levels of stress. *See First Shot Hits*, *supra* note 14 (discussing the effects of stress on a police officer's competency to react to his surroundings); *New Findings About Simulation Training and Post-Shooting Interview Stress*, Jan. 2, 2007, http://www.policeone.com/writers/columnists/force-science/articles/1197958/ [hereinafter *New Findings about Stress*] (noting the effects stressful situations have upon memory).

> We all know that excessive stress affects the awareness sections of the brain negatively, and the expected performance deteriorates rapidly in relation to the stress level experienced. The subconscious mind on the other hand will instantly increase its perceptive ability under stress, like when under live fire, and work hundreds of times faster than the

2. Contemporary Police Policies

Although SWAT teams may still be used, the current objective of thousands of police departments across the country is to neutralize the shooter.[130] Rather than establish a perimeter and secure the area, the first four to five officers on the scene form a "contact team."[131] Once

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> awareness sections of the brain. The subconscious mind will also, whether we want so or not, override any previous behavior pattern or training stored in the awareness section of the brain when under extreme stress. This means that any training of the awareness sections of the brain will more or less be non-existent when the subconscious mind takes over in a live shoot-out.

First Shot Hits, *supra* note 14.

[130] *See* Harper, *supra* note 119 ("Their sole purpose is to move right to the shooter and stop him, using whatever force is necessary," and are instructed to "take the shot if you have it.") (internal quotations omitted); *Shelby County Officers Train*, *supra* note 119 ("The quicker you can get in there and neutralize the situation, the better.") (internal quotations omitted); City of Racine Police Department Policy and Procedure, Rapid Deployment Policy 1 (June 8, 2007) (unpublished manuscript, on file with The Valparaiso University Law Review) [hereinafter RPD Policy] (noting the purpose is "to safe guard innocent individuals who otherwise may suffer great bodily injury or death without immediate police intervention."); MPD Training Manual, *supra* note 124, at 1 (stating that the objective is to "[s]uccessfully perform proper team movement and room clearing techniques while moving rapidly through the facility in an effort to locate, isolate, or engage the 'Active Shooter.'"). Whereas in the past SWAT experts were trained to neutralize the shooter, now police officers "are being taught to enter a building if they are the first to arrive at the scene, to chase the gunman, and to kill or disable him as quickly as possible." Harper, *supra* note 119.

[131] *See* RPD Policy, *supra* note 130, at 1 (discussing the proper procedure upon receiving a complaint). The officer involved should perform the following duties:

> 1. Advise the Communications of the current status of the situation until relieved by a Supervisor. Attempt to confirm the situation as an Active Shooter situation.
> 2. Attempt to confine and/or contain the situation until additional support arrives.
> 3. As directed by the on-scene Supervisor become a member of the following;
>   a. Contact Team.
>   b. Search and Rescue Team.
>   c. Security Team.
> 4. Attempt to effect the arrest(s) necessary as part of your duties as assigned by the on-scene Supervisor.

Id. *See also* Burdi, *supra* note 14 (discussing traditional methods, including establishing a perimeter, and the modern trend of officers being trained to actually "confront or diffuse a violent situation"); Harper, *supra* note 119; *Ohio Trainer Makes the Case for Single-Officer Entry Against Active Killers*, May 14, 2008, http://www.policeone.com/writers/columnists/Force-Science/articles/1695125-Ohio-trainer-makes-the-case-for-single-officer-entry-against-active-killers/ [hereinafter *Single-Officer Entry Against Active Killer*] (noting that an assembly of three or more officers is recommended, but also advocating for single-

assembled, they enter into a diamond formation and move through the school quickly, searching for the shooter and ignoring wounded individuals.[132] When contact is made with the shooter, officers are to disable the shooter by any means necessary, regardless of hostages.[133]

The main concern in these situations is time.[134] The theory is that by having the contact team pursue the gunman, he will be under pressure to keep moving, thus preventing him from controlling a particular populated area and killing many people.[135] Moreover, the gunman's attention will be diverted to the officers, and innocent bystanders will be protected.[136]

In conclusion, school violence plagues American schools, despite numerous attempts by Congress, schools, and states to reduce it.[137]

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officer entries); *Shelby County Officers Train*, *supra* note 119 (stating that this training will teach officers arriving on the scene how to react).

In addition to aggressive techniques, the Indianapolis Police Department has issued twenty of their officers M-16 Rifles. *See Indy Police Train to Use M-16 Rifles*, Dec. 1, 2004, http://www.policeone.com/training/articles/94089-Indy-Police-Train-to-Use-M-16-Rifles/ [hereinafter *Indy Police Use M-16 Rifles*]. The police department reasons that doing so will give officers more options when faced with specific situations in which such weaponry could be used. *Id.*

[132] *See* Harper, *supra* note 119 (noting that a second diamond formation may be used in larger buildings; one team pursuing the shooter and the other rescuing bystanders and wounded); MPD Training Manual, *supra* note 124, at 4, 12–16 (noting the first priority is to "locate, isolate, capture and/or neutralization of the suspect, as soon as possible" and discussing the proper formations). However, at least one other police department uses a T-formation, which consists of three officers across the front and one in the rear. *See* Backus, *supra* note 119.

[133] Harper, *supra* note 119 (noting that police departments are training officers to shoot because if they do not, the hostage is likely to die regardless). "Most of the gunman's body was shielded by the hostage, but Layman did not hesitate. He took the shot. Blue paint exploded against the gunman's helmet. . . . His clean head shot ended the exercise." *Id*. However, before shooting, experts suggest officers consider lighting conditions, whether the subject is moving or standing still, distance, whether the sights on the firearm have been sighted in recently, how "fat" the front sight is, the type of position the officer is in, time pressures, what is behind the target in case of a miss, and whether the officer is stationary or moving. Avery, *supra* note 120.

[134] *See* Harper, *supra* note 119 (noting it typically takes three to four minutes for officers to arrive on the scene, while it takes on average thirty to sixty minutes for a SWAT team to organize and arrive); Paul Howe, *Officer Survival: Use-of-Force* (Dec. 1, 2007), http://www.policeone.com/policemarksman/32-6/1667745-Officer-Survival-Use-of-Force/ (noting that in large cities, SWAT teams may take thirty to forty minutes to respond to an emergency; thus police officers "need to be authorized and empowered to act, and their training levels need to be elevated to meet the threats that they face").

[135] Harper, *supra* note 119 (noting that the Columbine shooters seized the school library and were able to kill and wound most of their victims).

[136] *See id.* ("[G]unmen are less likely to fire at innocent bystanders if they are shooting at pursuing police officers.").

[137] *See supra* Part II.A (discussing the current trends in school violence).

Although most remedies promote safety by providing additional funding to participating schools that comply with safety standards, many of these remedies have failed.[138] Coupled with the threat of litigation for inaction, police departments have been forced to change their active shooter policies.[139] While the public has generally been receptive of these new policies, these policies have not yet been challenged and could lead to excessive force claims if an officer acts unreasonably.[140] Because of the inconsistencies among appellate courts and the imprecise nature of reasonableness, police officers could act unreasonably.[141]

III. ANALYSIS

While congressional acts, state statutes, schools, and police departments have tried to remedy school shootings or provide police officers guidance, courts have rarely assisted.[142] Instead, police departments have been left with an ambiguous reasonableness test and little direction on how to apply it in school environments.[143] As a result, they have created unclear policies that may infringe upon the shooter's rights.[144] In order to protect these police departments from liability and deter school violence, courts need to create a bright-line rule that gives greater deference to police departments responding to school shootings.[145] This is particularly important because previously proposed alternatives have proven inadequate.[146]

Part III.A analyzes the problems with previous approaches taken to remedy school violence.[147] Part III.B examines the problems with

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138 *See supra* notes 54–63 and accompanying text (discussing surveys revealing security continued problems at schools).

139 *See supra* note 120 and accompanying text (noting cases where police departments were sued).

140 *See* Harper, *supra* note 119. "So far rapid-response training has encountered little public opposition, but Klinger expects that will change the first time the police kill a suspect instead of capturing him, or the first time an officer firing at a suspect hits an innocent person instead." *Id.*

141 *See supra* Part II.B.3 (discussing the inconsistent application of the reasonableness test among lower courts).

142 *See supra* Part II.A (discussing actions taken by these entities).

143 *See supra* Part III.B (setting forth the background of the reasonableness test).

144 *See supra* Part II.C.2 (discussing contemporary police policies).

145 *See infra* Parts III.A–C (discussing problems with previous remedies and the inherent problems with the current reasonableness test).

146 *See supra* Part II.A (discussing congressional acts, state statutes, and school remedies).

147 *See infra* Part III.A (discussing the problems with previous attempts to remedy school violence).

applying a reasonableness test.[148] Finally, Part III.C considers the problems posed by new nationwide police policies.[149]

A. Problem 1: Previous Approaches to Remedy School Violence Are Too Preventative

At least four authoritative entities have attempted to remedy school violence by proposing and implementing legislation or strict policies.[150] These bodies include: Congress, state legislatures, schools, and other governmental agencies, such as the FBI, Secret Service, and Department of Education.[151] The remedies posed by these organizations are individually flawed, but the common underlying defect is the preventative nature of the remedies.[152]

Congress has attempted to address school violence through multiple congressional bills and statutes, many of which provide additional financial aid to schools implementing security measures.[153] Because many of Congress's attempts were proposed by leading national organizations and were preventative, they lack a substantial deterrent mechanism.[154] Strong deterrents are essential because preventative measures may deter small risks, but they will not discourage individuals determined to evade those measures.[155] In fact, without strong

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[148] *See infra* Part III.B (discussing the problems the reasonableness test creates innately, for officers, and for courts).

[149] *See infra* Part III.C (discussing the problems the contemporary police policies create).

[150] *See supra* Part II.A (discussing previous proposals to remedy school violence and their ineffectiveness).

[151] *See supra* Part II.A (discussing previously proposed remedies).

[152] *See supra* notes 29–49, 54–63 and accompanying text; *infra* notes 153–73 and accompanying text (discussing the faults of previous remedies).

[153] *See supra* notes 30–36 and accompanying text (discussing the statutes Congress has passed and the bills proposed by congressmen).

[154] *See supra* note 29 (noting two national organizations lobbying and petitioning in Congress).

[155] *See* Maxwell, *supra* note 2. "Mr. Thomas acknowledged that keeping a determined, armed intruder out of schools may be impossible . . . ." *Id.* However,

> Mr. Cornell of the University of Virginia, who advises school administrators on security issues, cautioned policymakers and educators against measures to "fortify" schools, such as installing metal detectors and hiring police or armed security officers to patrol them. Those features tend to become more a pacifier than a panacea, he said. "That should be the last resort," he said. "Remember, in the school shooting at [Red Lake Indian Reservation in Minnesota], the first person to get shot was the school security officer."

Id. Moreover, the Luke Woodham, a sixteen-year-old student gunman told a federal education official "in an interview that a metal detector or police officer on duty would not have stopped his rampage." *Id. See also* 2002 NASRO SURVEY, *supra* note 58, at 7 (noting the ability to gain access to schools is easy).

deterrents the likelihood of school shootings might increase because schools become easy targets.[156] Similar to congressional statutes, state legislation has been too preventative in nature.[157]

Preventative measures created by state legislation are faulty because increasing penalties for weapons on school grounds reduces only the occurrence of firearms on school grounds, not violence on school grounds.[158] Similar to congressional statutes, state zoning laws make schools more vulnerable because perpetrators, believing the school is unarmed, become more inclined to attack.[159] While arming teachers with concealed weapons has received mixed reviews by parents and school officials, it provides a defense and deterrent against perpetrators.[160] This leads to the implementation of prevention-oriented strategies by the third entity—schools.[161]

Schools typically use zero-tolerance policies to threaten and prevent school violence.[162] While reactionary, these policies resemble preventative measures created by congressional and state zoning laws.[163]

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156 *See Texas School District OKs Pistols for Staff*, *supra* note 49 (noting it was not until the federal government starting making schools gun-free zones that these types of school shootings have started to occur). In order to prevent the school from being an easy target, one school district has approved teachers to carry firearms. *Id*.

157 *See infra* notes 158–61 and accompanying text (discussing the problems with state legislation).

158 *See supra* notes 38–43 and accompanying text (discussing examples of state statutes implemented to deter weapon possession on school grounds). *See also* Maxwell, *supra* note 2 (noting that fortifying schools with metal detectors and enhanced security will only act as a "pacifier [rather] than a panacea").

159 This was the logic of one school district in Texas that allowed teachers to carry concealed weapons if they were certified and passed all the requirements established by the school district. *See Texas School District OKs Pistols for Staff*, *supra* note 49; *Texas Students Pack Bookbags; Teachers Pack Heat*, *supra* note 48. "When you outlaw guns in a certain area, the only people who follow that are law-abiding citizens, and everybody else ignores it[.]" *Texas Students Pack Bookbags; Teachers Pack Heat*, *supra* note 48. A similar logic was behind the 500 colleges and universities across the country that have purchased training programs teaching professors and students to fight back with improvised weapons, such as a backpack or laptop computer. *See* Zagier, *supra* note 48 (noting that the training teaches students to be aware of surroundings and to use laptops or backpacks as weapons).

160 *See Texas Students Pack Bookbags; Teachers Pack Heat*, *supra* note 48 (parent commenting that with the length of time it takes for police to arrive, arming teachers at least provides some sort of defense).

161 *See infra* notes 162–67 and accompanying text (discussing the problems school programs create).

162 *See supra* notes 45–49 and accompanying text (discussing prevalence of zero-tolerance policies).

163 *Compare supra* notes 45–49 and accompanying text (discussing zero-tolerance policies and the preventative nature to deter weapon possession), *with supra* notes 30–36 and accompanying text (discussing Congress's school zoning laws, punishments imposed upon students, and safety requirements imposed upon schools receiving federal financial aid, all of which are intended to deter and prevent school violence), *and supra* notes 37–43 and

School policies are impractical because they impose small punishments on students and do not deter students who intend to commit violent acts.[164] In other words, they only deter gun possession and not the active use of that gun.[165] In addition, they also share the same over-inclusive, inflexible, and ineffective characteristics exhibited in threat assessment programs.[166] With regard to deterrence, zero-tolerance policies fall between proposed legislation and the threat assessment programs created by the FBI, Secret Service, and Department of Education.[167]

The FBI, Secret Service, and Department of Education threat assessment programs provide weak deterrents because they attack school violence only indirectly and have a high risk of error.[168] Their over-inclusiveness and high-risk tendencies stem from misidentifying the risky behaviors, the rarity of such events, and the low predictability of similar future events.[169] While assessing threats are important in determining initial security measures, the costs and risks of wrongly accusing someone are great, particularly when numerous factors and multiple types of threats are taken into consideration.[170] As a result,

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accompanying text (discussing state school zoning laws and varying punishments imposed upon violators, which are intended to deter and prevent school violence).

164 *See supra* notes 30–43, 54–63 and accompanying text (noting the punishments imposed upon violators and the survey results indicating the ineffectiveness of such measures).

165 *See supra* note 155 and accompanying text (noting at least one student who admitted a metal detector or police officers would not have deterred his actions).

166 *Compare* Armistead, *supra* note 44 (noting that non-negotiable punishment can be inappropriate and ineffective because "[p]ossession of a butter knife and possession of a switchblade . . . automatically receive the same punishment"), *and supra* notes 45–49 and accompanying text (discussing problems with zero-tolerance in schools and the tendency to be over-inclusive and speculative), *with infra* notes 168, 170 and accompanying text (discussing the FBI, Secret Service, and Department of Education's threat assessment factors and the speculative nature of checklists).

167 *Compare supra* notes 30–43 and accompanying text (discussing proposed legislation by Congress and states and the strong preventative nature of these measures), *with infra* notes 168–71 and accompanying text (discussing the unreliable and high risk characteristics).

168 *See generally* FEIN ET AL., *supra* note 12; O'TOOLE, *supra* note 28, at 2; POLLACK ET AL., *supra* note 28; VOSSEKUIL ET AL., *supra* note 28.

> One response to the pressure for action may be an effort to identify the next shooter by developing a "profile" of the typical school shooter. This may sound like a reasonable preventative measure, but in practice, trying to draw up a catalogue or "checklist" of warning signs to detect a potential school shooter can be shortsighted, even dangerous. Such lists, publicized by the media, can end up unfairly labeling many nonviolent students as potentially dangerous or even lethal.

O'TOOLE, *supra* note 28, at 2.

169 *See* O'TOOLE, *supra* note 28, at 2–3.

170 *See id*. *See also supra* notes 29, 168 and accompanying text (discussing factors to consider and the risk of over-inclusiveness). Moreover,

threat assessments are the weakest deterrent because they are disconnected from school violence and provide a complex, fact-sensitive calculation.[171]

Despite problems with preventative measures, they are useful because school violence is often a conglomeration of factors for which a single solution does not exist.[172] Imprisonment, police action, and police presence may still be the greatest deterrents available, but imposing a reasonableness test in school shootings is problematic.[173]

B. Problem 2: Interpreting and Applying the Reasonableness Test

Police officers are charged with enforcing the law, and traditionally courts give them deference.[174] However, § 1983 limits police officers' use of force and holds them accountable to a reasonableness standard.[175] Under the current test, an individual must establish the two-prongs set

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> [t]hreats can be classed in four categories: *direct, indirect, veiled,* or *conditional*. *A direct threat* identifies a specific act against a specific target and is delivered in a straightforward, clear, and explicit manner: "I am going to place a bomb in the school's gym." *An indirect threat* tends to be vague, unclear, and ambiguous. The plan, the intended victim, the motivation, and other aspects of the threat are masked or equivocal: "If I wanted to, I could kill everyone at this school!" While violence is implied, the threat is phrased tentatively—"If I wanted to"—and suggests that a violent act COULD occur, not that it WILL occur. *A veiled threat* is one that strongly implies but does not explicitly threaten violence. "We would be better off without you around anymore" clearly hints at a possible violent act, but leaves it to the potential victim to interpret the message and give a definite meaning to the threat. *A conditional threat* is the type of threat often seen in extortion cases. It warns that a violent act will happen unless certain demands or terms are met: "If you don't pay me one million dollars, I will place a bomb in the school."

O'TOOLE, *supra* note 28, at 7.

171 *See supra* notes 168–70 and accompanying text (discussing the weaknesses of threat assessment).

172 Just as threats cannot be resolved by a single solution, governing bodies are correct in not applying a single solution to resolve school violence. If this did happen, then they would blindly follow the fallacy created by "Abraham Maslow: 'If the only tool you have is a hammer, you tend to see every problem as a nail.' Every problem is not a nail, of course, and schools must recognize that every threat does not represent the same danger or require the same level of response." O'TOOLE, *supra* note 28, at 5.

173 *See generally* 2004 NASRO SURVEY, *supra* note 58; 2003 NASRO SURVEY, *supra* note 58; 2002 NASRO SURVEY, *supra* note 58; 2001 NASRO SURVEY, *supra* note 54 (discussing how threats have continued to persist). *See also infra* Part III.B.2 (discussing problems for officers in applying reasonableness).

174 *See supra* Parts II.B.1–2 (discussing the evolution of police action from the common law to the reasonableness test).

175 See *supra* note 16 for text of 42 U.S.C. § 1983. *See also supra* Part II.B (defining excessive force).

forth in *Graham*.[176] Despite the test's apparent clarity, it is actually convoluted and poses problems for lower courts and police officers.[177]

Part III.B.1 analyzes the problems with the imprecise reasonableness test set forth by the Supreme Court.[178] Part III.B.2 discusses the problems this creates for police officers.[179] Part III.B.3 considers the problems facing lower courts.[180]

1. The Reasonableness Test

First defined in *Tennessee v. Garner*,[181] the reasonableness test provided that if an officer had probable cause to believe the suspect posed a threat of serious physical harm to officers or others, deadly force was reasonable to prevent escape.[182] This test was expanded in *Graham v. Connor*.[183] Whereas *Garner* was a narrow holding, only applying to cases where individuals posed danger while fleeing, *Graham* expanded the standard to all excessive force claims.[184] *Graham* impliedly became the standard, with *Garner* as an illustration of that standard, but not until *Scott v. Harris*[185] did such notions come to fruition.[186]

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176 *See supra* notes 80–81 and accompanying text (discussing the two-prong test established in *Graham*, which asks whether a seizure occurred, and if so, whether the acts were reasonable). This Note does not discuss the first prong of the test; whether a seizure has occurred. *See supra* notes 94–101 (discussing the second prong and the Court's decision in greater detail).

177 *See infra* Parts III.B.1–3 (discussing the innate problems with the reasonableness test, the problems this creates for police officers during school shootings, and the problems this creates for lower courts).

178 *See infra* Part III.B.1 (discussing the innate problems with the reasonableness test).

179 *See infra* Part III.B.2 (discussing the problems a reasonableness test creates for police officers during school shootings).

180 *See infra* Part III.B.3 (discussing the problems this creates for lower courts).

181 471 U.S. 1, 7 (1985).

182 *See supra* note 89 and accompanying text (quoting the language used by the Court).

183 490 U.S. 386 (1989). *See supra* notes 94–101 and accompanying text (discussing the reasonableness standard).

184 *Compare Garner*, 471 U.S. at 22 (noting that the statute was not invalid on its face, and was only invalid with the acts purportedly authorized in this case), *with Graham*, 490 U.S. at 388 (holding that any claim brought against a law enforcement official in the "course of making an arrest, investigatory stop, or other 'seizure' of his person[,]" had to be analyzed under the Fourth Amendment objective reasonableness test). *See also* George, *supra* note 87, at 146 (noting the Court took a narrow view and approach in *Tennessee v. Garner*).

185 550 U.S. 372 (2007).

186 *See infra* notes 187–208 and accompanying text (discussing the distinguishing of *Scott* and *Garner*).

Scott dramatically changed the relatively clear reasonableness definition.[187] In *Scott*, Justice Scalia's majority opinion attacked the notion that *Garner* was "*the* test" for reasonable deadly force with regard to a fleeing suspect.[188] Justice Scalia explained "that several of *Garner's* preconditions for deadly force [were] merely an application of the Fourth Amendment's reasonableness inquiry and *not* a 'magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute deadly force.'"[189] As a result, *Garner* is not the test, but rather an example of the reasonableness test.[190] The Court distinguished *Scott* from *Garner* and distanced it from *Graham*.[191]

Graham has been thrust to the forefront in determining the reasonableness of a police officer's actions.[192] As such, it would have been logical for the Court in *Scott* to discuss *Graham*.[193] However, the Court did not apply *Graham*, signaling a distancing from that precedent.[194] Instead, the Court focused primarily upon the cost-benefit analysis of the officer's actions, coupled with the perpetrator's culpability and danger posed to bystanders.[195] This further indicates distancing because it implies that police officers and courts must consider a fourth factor, dangerousness, whereas *Graham* only discussed three.[196] This cost-benefit analysis is relatively new to Fourth

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187 *See generally* George, *supra* note 87, at 148 (arguing Justice Scalia's majority opinion in *Scott* was a direct attack on the standard set forth in *Garner*, while ignoring the standards set forth in *Graham*).

188 *Id.* Justice Scalia factually distinguished *Garner* and *Scott* primarily on the danger posed to bystanders. *See id.*

189 *Id.* (quoting Scott v. Harris, 550 U.S. 372, 380 (2007)) (internal quotations omitted).

190 *See Scott,* 550 U.S. at 380 (citing Graham v. Connor, 490 U.S. 386 (1989) ("*Garner* was simply an application of the *Fourth Amendment's* 'reasonableness' test")); George, *supra* note 87, at 148 (noting that *Scott* reduced *Garner* to little more than an example).

191 *See supra* notes 75–77, 94; *infra* notes 192–208 and accompanying text (discussing the distinguishing between *Scott* and *Graham*).

192 *See supra* note 94 and accompanying text (noting *Graham*'s applicability to all excessive force cases). *See also* George, *supra* note 87, at 149 n.18 (noting that "*Graham* purported to apply to all use-of-force cases, with which *Garner* specifically did not deal").

193 *See* George, *supra* note 87, at 145, 149 n.18 (noting that it was surprising that the Court did not discuss, let alone not apply *Graham v. Connor*).

194 *See generally Scott*, 550 U.S. 372 (only noting that *Graham* stood for the proposition that a violation of the Fourth Amendment must be based upon objective reasonableness). *See also* George, *supra* note 87, at 149 n.18 (suggesting the avoidance of applying *Graham* equates to a distancing of *Scott* and *Graham*).

195 *See Scott*, 550 U.S. at 384–85.

196 *Compare* George, *supra* note 87, at 149 (proposing and noting that "for all future cases the door is now open to a new conception of dangerousness, under which a court may no longer ignore dangerousness from flight as a Fourth Amendment reasonableness factor"), *with* Graham v. Conner, 490 U.S. 386, 396 (1989) (noting that reasonableness "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety

Amendment analysis.[197] Because *Scott* did not discuss *Garner* or *Graham*, and instead carved out its own independent rule granting greater deference to police officers, it appears that the Court has started to revert back to common law notions.[198]

As previously noted, under common law, officers were allowed to commit any and all necessary actions to prevent a felon from escaping.[199] *Garner* contradicted this by carving out an exception, which provided that officers could not use deadly force to merely detain a felon, but *Scott* reverts by adopting that any police actions are justified if the suspected felon is dangerous.[200] In adopting this position, there are very few situations where a suspected felon could be seen as non-dangerous, especially when the Court agreed the "paramount governmental interest" was ensuring public safety.[201] The Court also used dangerousness to justify no requirement for alternative methods.[202]

By rejecting the alternative means argument, police officers were given greater deference because they can use all the force that is

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of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight").

197 *Compare Scott*, 550 U.S. at 384–85, *and* George, *supra* note 87, at 151 (noting that "the question of when deadly force *should* be used is a matter of policy, beyond the question of what is permissible under the Fourth Amendment"), *with Graham*, 490 U.S. at 396 (noting the three factors to be used in determining reasonableness without noting culpability or the benefits to society), *and* Tennessee v. Garner, 471 U.S. 1, 11 (1985) (focusing only on the costs and threats to police officers and innocent bystanders without considering culpability or the benefits afforded to society).

198 *See supra* notes 75–77 and accompanying text (discussing the common law standard for the use of force). *See also infra* notes 199–208 and accompanying text (discussing the implicit reversion back to the common law standard).

199 *See supra* notes 75–77 and accompanying text (discussing the common law standard for the use of force).

200 *Compare Garner*, 471 U.S. at 12–14 (rejecting the government's contention that officer's should be judged under the common law officers and use "whatever force was necessary to effect the arrest of a fleeing felon," while also rejecting the old policy that fleeing felons were dangerous), *with Scott*, 550 U.S. at 384 (noting that Harris posed "an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase").

201 *Scott*, 550 U.S. at 384. *See* George, *supra* note 87, at 146 ("[T]here is no such thing as a completely nondangerous [sic] fleeing suspect, because even nondangerous [sic] people are capable of becoming quite dangerous when desperately trying to escape."). Moreover, "[s]ociologists have noted that flight-induced panic can cause seemingly harmless people to set aside social norms in order to escape harm, including, for example, parents who abandon young children to escape a life threatening crisis." *Id.* at 147 (citing E. L. Quarentelli, *The Sociology of Panic*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 11021 (Neil J. Smelser & Paul B. Baltes eds., 2002).

202 *See Scott*, 550 U.S. at 384–85 (noting that officers did not have to justify not using alternative means because of the dangerous actions occurring); *infra* notes 203–07 and accompanying text (discussing the use of alternative methods and hoping for the best).

necessary and "*certain* to eliminate the risk[.]"[203] By using this language, the Court again reverted to common law because many types of force may be certain to eliminate the risk, including less intrusive means, but those are not required under the analysis.[204] This contradicts *Garner* because *Garner* impliedly required the use of less restrictive means and rejected common law arguments offered by the government.[205] Consequently, the Court claims reasonableness was used, but in reality, common law principles were applied.[206] As a result, police officers may have difficulty assessing their actions during school shootings.[207]

2. Problems for Police Officers in Applying Reasonableness

Police officers applying the aforementioned reasonableness test may encounter problems because of time constraints; a constant, rapidly changing environment; and differing individual reasonableness standards—that is, each officer has his own perception of reasonableness, thus creating a lack of uniformity.[208]

Although the Court recognized that officers are under time constraints, the reasonableness test's numerous factors are problematic

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[203] *Scott*, 550 U.S. at 384–85 (emphasis added in original).

[204] *Compare Garner*, 471 U.S. at 12 (noting that under the common law rule, officers were "allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant"), *and id.* at 12 ("As stated in Hale's posthumously published Pleas of the Crown: '[I]f persons that are pursued by these officers for felony or the just suspicion thereof . . . shall not yield themselves to these officers, but shall either resist or fly before they are apprehended or being apprehended shall rescue themselves and resist or fly, so that they cannot be otherwise apprehended, and are upon necessity slain therein, because they cannot be otherwise taken, it is no felony.' 2 M. Hale, Historia Placitorum Coronae 85 (1736).") (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *289)), *with Scott*, 550 U.S. at 383–85 (finding the officer's actions justified and "*certain* to eliminate the risk").

[205] *See Garner*, 471 U.S. at 12–16. The Court noted that when the common law rule was created, all felonies were punishable by death, whereas today many felonies are not. *Id.* at 13. Moreover, the common law developed when the weapons were rudimentary, and therefore deadly force was safer than hand-to-hand combat. *Id.* at 14. As a result of these policies, the Court rejected the government's contentions, and instead, impliedly adopted the position that alternatives should have been used or even the perpetrator's escape would have been better. *Id.* at 11.

[206] *Compare* Graham v. Connor, 490 U.S. 386, 395 (1989) (noting the reasonableness test should be applied to all excessive force claims), *and Garner*, 471 U.S. at 3 (applying the reasonableness test and impliedly requiring the use of alternative methods before deadly force), *with Scott*, 550 U.S. at 383–85 (finding the officer's actions reasonable, although deferring to his actions and allowing him to use any force "*certain* to eliminate the risk," without the requirement of alternatives).

[207] *See infra* Part III.B.2 (discussing problems officers encounter when a convoluted reasonableness test is used).

[208] *See infra* notes 209–30 and accompanying text (discussing problems for officers).

in these situations.[209] Rather than creating a bright-line rule like the rule in *Scott*, officers must weigh the three factors set forth in *Graham* and the fourth factor added by *Scott*.[210] While many officers may reach the same conclusions about the proper amount of force, any time a balancing test exists, there is a chance of error or worse yet, indecision and hesitation, which can lead to death.[211]

To remedy these time pressures, the Court previously noted that police actions must be judged from the officer's viewpoint when the seizure occurs; not with 20/20 hindsight.[212] While helpful in determining reasonableness and giving greater deference to police

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[209] *See Scott*, 550 U.S. at 384–85 (noting that officers must make split-second decisions, therefore they need a sensible and easy to apply rule); *Graham*, 490 U.S. at 396 (recognizing that officers must make split-second decisions); Jensen, *supra* note 99, at 1280 ("[E]very police officer must perform what becomes a complex balancing test in the seconds before each decision to pursue."); Swartz, *supra* note 99 (officers have to make difficult split-second decisions with no time for real deliberation).

[210] *See generally* S*cott,* 550 U.S. at 382–83, (noting that dangerousness was an important factor); *Graham*, 490 U.S. at 396 (discussing three factors the Court must consider in determining all reasonableness inquiries under Fourth Amendment excessive force claims). *See also* George, *supra* note 87, at 151 (proposing that the Court has adopted a dangerousness factor that must be included in determinations of reasonableness, and noting that "*Scott v. Harris* is an important step towards recognizing that this danger from flight can be equally relevant to a reasonableness calculation as the danger from continued freedom.").

[211] *See* Baird, *supra* note 129 ("[E]ach deadly force incident is different and the force continuum is only a guide that combines with an officer's level of training, education[,] and experience on the streets. . . . At some point there's a realization of risk, and hesitancy on the part of some officers has cost them their lives.").

[212] *See Graham*, 490 U.S. at 396–97 (citing Terry v. Ohio, 392 U.S. 1, 20–22 (1968)) (noting that courts must judge the actions from the perspective of the reasonable officer on the scene, "rather than with the 20/20 vision of hindsight"). The Court noted that since the proper test is an objectively reasonable test, "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.* at 397 (citing Scott v. United States, 436 U.S. 128, 138 (1978); United States v. Robinson, 414 U.S. 218 (1973)). Thus, "[t]hat test [*Johnson v. Glick* test], which requires consideration of whether the individual officers acted in 'good faith' or 'maliciously and sadistically for the very purpose of causing harm,' is incompatible with a proper Fourth Amendment analysis." *Id.* at 397. *See also* Scott v. United States, 436 U.S. 128, 137 (1978) ("[I]n evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions"); Troupe v. Sarasota County, 419 F.3d 1160, 1166–67 (11th Cir. 2005) ("Force regardless of the form directed to a driver . . . does not give rise to a due process deprivation claim unless it was exercised with 'a purpose to cause harm' unrelated to the legitimate object of arrest.").

officers, it will not remedy indecision or hesitation.[213] A constant, rapidly changing environment can also lead to similar problems.[214]

Balancing tests are detrimental to officers in constant, rapidly changing environments because each time the situation changes, the officer must reassess his actions.[215] This is dangerous in quickly evolving situations where officers cannot keep up with reassessments because hesitation can lead to unreasonable actions and even death.[216] Stress can also hinder a police officer's reassessment abilities.[217]

Stress can cause officers to become unresponsive and forget their surroundings.[218] If an officer becomes unresponsive and has a single-track mind in an evolving situation, he may act unreasonably because

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[213] *See supra* note 211 and accompanying text (discussing the effects of indecision or hesitation and noting the deadly consequences, which, of course, cannot be reversed because once somebody is dead, nothing can bring them back to life).

[214] *See infra* notes 215–17 and accompanying text (discussing the effects of rapidly changing events).

[215] Although the following is only an example of a training exercise, it is representative of how quickly a school shooting can evolve and change.

> His ears ringing from gunfire, his uniform damp with sweat, his breath labored and acrid-tasting from the gunpowder in the air, Officer Larry Layman ran heavily down a hallway toward an insistent *pop-pop-pop*. A gunman was running through a school shooting children, and Layman was chasing him. Layman rounded a corner, holding his gun in front of him with two stiff arms, and stopped dead. The gunman stood facing him, with an arm around a hostage's neck and a gun held to the hostage's head. "Drop your gun or I'll blow his head off!" the gunman screamed. Layman, a police officer for more than half his fifty years, had been trained always to drop his gun at a moment like this. Now he fired.

Harper, *supra* note 119. Although courts grant deference to police officers in these situations, they must still attempt to reassess the reasonableness of their actions. *See Graham*, 490 U.S. at 395–99. If this was not expected of officers, then the Court would not have adopted a balancing test that is subject to change if the facts change, but rather could have adopted a mechanical rule. *Id.* *See also* PATRICK, *supra* note 63, at 97 (noting that officers "must continuously assess the actions of the subject and the effects of the force being used to decide whether the next step on the ladder can be taken. The officers must also continuously consider lesser alternatives of force to know when to de-escalate.").

[216] *See* KINNAIRD, *supra* note 64, at ix (proposing for the implementation of simple tests in deadly force situations); Baird, *supra* note 129 (suggesting that as a situation evolves or changes the amount of appropriate force also changes, noting that "each deadly force incident is different and the force continuum is only a guide that combines with an officer's level of training, education[,] and experience"). *But see* Avery, *supra* note 120 (noting good officers can use balancing tests almost subconsciously and will have refined critical thinking skills, but suggesting that those without practice or experience may be slower in assessing situations). *See also supra* note 211 and accompanying text (noting the effects of indecision, hesitation, and error).

[217] *See infra* notes 218–21 and accompanying text (discussing the physiological effects of stress and unreasonable actions that can occur).

[218] *See supra* note 129 (discussing the unresponsiveness of officers in stressful situations).

the situation has changed, while his mindset and the force he thinks is reasonable has not.[219] This is also problematic because if stress slows reactions, the officer cannot perform the multi-factored reasonableness test quickly.[220] Finally, varying standards of reasonableness between individual police officers can be problematic.[221]

Often an officer's reasonableness standards will be similar to that of other officers, but not always.[222] For example, what is reasonable to a 6′ 5″ police officer weighing 240 pounds will not necessarily be reasonable to a 5′ 10″ police officer weighing 150 pounds because what intimidates one officer might not threaten another.[223] This is especially important when considering the mental distress associated with school shootings because if officers have differing individual reasonableness standards when placed in non-stressful situations, they will likely have differing reasonableness standards when placed in stressful situations.[224] This may also lead to predictability problems and the inability to gauge a co-officer's actions, which are necessary in situations requiring teamwork.[225] Confusion, hesitation, and errors, all of which can endanger innocent bystanders and fellow officers, may occur without teamwork.[226] For the aforementioned reasons, officers must have a bright-line rule similar to

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[219] *See supra* note 129 (discussing the unresponsiveness of officers in stressful situations).

[220] *See supra* note 215–16 and accompanying text (discussing the need for officers to continuously reassess deadly force situations).

[221] *See infra* notes 222–28 and accompanying text (discussing differing standards of reasonableness for individuals).

[222] *See* Wallentine, *supra* note 80.

> Ask a dozen people when "reasonable and necessary force" to effect an arrest or detention becomes "excessive force" and you will likely get a dozen different answers, none of them particularly helpful in measuring the proper amount of force. Several people may ultimately question an officer's use of force and each one may have a different idea of how to decide whether the force was excessive.

Id.

[223] *See* KINNAIRD, *supra* note 64, at viii (noting the flexibility needed in police policies, rather than generic standards, and illustrating this point with a similar example between a 5′2″ officer and a 6′2″ officer). *See also supra* note 222 (noting differing answers to reasonableness).

[224] *See supra* note 218 and accompanying text (discussing the effects of stress on a police officer's competency to surroundings).

[225] *See supra* notes 131–33 and accompanying text (discussing the methods and teamwork skills needed to execute the new tactics implemented by police departments).

[226] *See also supra* note 211 and accompanying text (noting the effects of indecision, hesitation, and error).

the rule carved out in *Scott*.[227] An easy-to-apply rule will also assist lower courts.[228]

3. Problems for Lower Courts in Applying Reasonableness

The greatest problem facing lower courts is when to begin applying the reasonableness test.[229] This inconsistency is problematic because if lower courts do not know when to begin their inquiries, then an officer's actions may be decided incorrectly.[230] This poses greater problems for police officers than courts because court decisions can be reversed, whereas an officer's decision to use deadly force, and the consequences of that action, cannot.[231]

When lower courts apply an inconsistent standard, police departments can be misled or confused as to the proper standard.[232] This can cause police officers to act incorrectly and endanger themselves or others.[233] Realizing this, new policies instruct officers to use deadly force almost immediately, but this too can be problematic.[234]

C. Problem 3: New, Unclear Police Policies

New police policies implemented around the country force police officers to act more aggressively than they are accustomed.[235] Although police departments are trained to fire upon active shooters in crowded and chaotic areas, this is problematic because they are not specialists.[236] In fact, they often receive limited training and if they want additional

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227 *See generally* Scott v. Harris, 550 U.S. 372 (2007) (discussing the Supreme Court's easy to apply rule). *See also infra* Part IV (discussing an easy to apply rule that may be beneficial to police officers).

228 *See infra* Part III.B.3 (discussing the problems lower courts have with the application of the reasonableness test).

229 *See supra* Part II.B.3 (discussing the inconsistency among lower courts).

230 *See supra* notes 116–19 and accompanying text (discussing the different time frames courts have applied when determining the reasonableness of an officer's actions).

231 *See supra* note 213 and accompanying text (discussing the reversibility of court decisions, but not police actions).

232 This is why many police departments hire attorneys or professional organizations in attempts to determine whether a department's protocols are legally sound. *See* Wallentine, *supra* note 80.

233 *See supra* note 211 and accompanying text (noting the effects of indecision, hesitation, and error).

234 *See infra* Part III.C (discussing the problems with contemporary police policies).

235 *Compare* Part II.C.2 (discussing new aggressive police tactics), *with* Part II.C.1 (discussing traditional passive police tactics).

236 *See supra* notes 126–27 (discussing SWAT tactics and their specialized training).

practice, they must do it on their own.[237] This means that strategies traditionally reserved for specialists, must now be implemented by amateurs.[238] While risky, these policies are momentarily socially acceptable and justified upon principles of utilitarianism.[239] Despite societal support, the policies' broad, vague language is problematic.[240]

Broad, vague language can easily be misinterpreted or misapplied, especially in rapidly changing environments.[241] Although the language itself can be deceiving, it poses greater problems for officers because the language appearing in new policies, which gives police officers deference, is the same language courts used under common law.[242] Recalling that the Court expressly rejected this language in earlier cases, there now appears to be a gap between the reasonableness test courts are instructed to apply and the protocols officers are trained to use.[243] This

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[237] *See supra* note 129 (discussing the limiting training many officers receive). *But see* Harper, *supra* note 119.

> At the same time, he says, he's glad he had the training. "Even the thought of it is terrifying, but as long as the nuts are out there, we have to prepare for them," he says. He would welcome more training, but doubts that his department, or any other, can adequately train every single police officer for a Columbine-style shooting. "The new training doesn't come close to what would be needed," he says. "To be really prepared for something like that, we would need to be trained almost weekly."

Id.

[238] *See supra* Part II.C.2 (noting that officers must use deadly force, regardless of whether they are comfortable or agree with doing so).

[239] *See supra* note 140 and accompanying text (noting the public's current acceptance of the new police tactics).

[240] *See infra* notes 241–44 and accompanying text (discussing the language contained in these new police policies).

[241] *See* Harper, *supra* note 119 (noting that the Peoria Police Department's "sole purpose is to move right to the shooter and stop him, using whatever force is necessary"); MPD Training Manual, *supra* note 124, at 4, 7, 15 (noting the contact team's goal is to neutralize the situation); RPD Policy, *supra* note 130, at 2 (noting the contact team should "[i]nitiate entry to the building or location to eliminate the threat, i.e. arrest, deadly force, response, etc.").

[242] *Compare supra* notes 132–33 and accompanying text (discussing the new police tactics), *and* Tennessee v. Garner, 471 U.S. 1, 11 (1985) (citing TENN. CODE ANN. § 40-7-108(a) (1982)) (the Court rejected language in the Tennessee Statute that provided a police officer may use or threaten to use force that is reasonably necessary to accomplish the arrest of an individual suspected of a criminal act who resists for flees from the arrest), *with* Tennessee v. Garner, 471 U.S. 1, 12 (1985) (noting the common law allowed police to use whatever force was necessary).

[243] For a discussion of the language the Court has adopted and rejected, *see generally* Graham v. Connor, 490 U.S. 386 (1989) (adopting the objective reasonableness test for all excessive force claims); *Garner*, 471 U.S. 1 (rejecting the common law language of whatever force was necessary).

For a discussion of the apparent gap between the language adopted by police departments and the language adopted by courts, *compare* Harper, *supra* note 119 (noting

means police, though believing their actions are justified, may be held liable because they relied upon their policies.[244]

As a result of the aforementioned problems, a bright-line test must be articulated to grant police departments greater deference during school shootings and protect them from liability.[245] In turn, such a rule will reduce school violence because: it is not preventative in nature; restricts the use of a multi-factored reasonableness test, thus allowing consistent applications by courts and police officers; and allows police officers to comply with the new policies without fearing liability.

IV. CONTRIBUTION

This Note suggests two proposals for reducing school violence. First, while optional financial assistance helps prevent school violence, it does not do so substantially, thus mere reliance upon it should be avoided. Second, the reasonableness test adopted by the Supreme Court should include an exception for school shootings, which would create a bright-line test for police officers' use of force and bridge the gap between officer training and Fourth Amendment jurisprudence. Both of these proposals create strong deterrents against individuals considering committing school shootings by preventing weaker-willed individuals from executing their plans and ending the plans of stronger-willed individuals early.

Part IV.A discusses reducing the reliance upon optional preventative measures and proposes that such measures be mandated.[246] Part IV.B proposes that a bright-line test be created for school shootings, thus replacing the reasonableness test in these situations.[247]

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that the Peoria Police Department's "sole purpose is to move right to the shooter and stop him, using whatever force is necessary"); MPD Training Manual, *supra* note 124, at 4, 7, 15 (noting the contact team's goal is to neutralize the situation); RPD Policy, *supra* note 130, at 2 (noting the contact team should "[i]nitiate entry to the building or location to eliminate the threat, i.e. arrest, deadly force, response, etc."), *with Graham*, 490 U.S. at 388 (adopting the objective reasonableness test for all excessive force claims); *Garner*, 471 U.S. at 13 (rejecting the common law language of whatever force was necessary).

244 *See* KINNAIRD, *supra* note 64, at vii (noting that some officers' actions were justified under the law, but those officers did not understand the ramifications of their department's policies or that the policy did not protect them from liability).

245 *See infra* Part IV (suggesting a proposed rule that will reduce school violence, while affording police departments greater protection from liability).

246 *See infra* Part IV.A (proposing mandatory preventative measures replace optional preventative measures).

247 *See infra* Part IV.B (proposing a bright-line test replace the reasonableness test only in school shootings).

A. Reducing Reliance Upon Optional Preventive Measures and Financial Assistance to Cure School Violence

In general, preventative measures help reduce school violence by deterring less-determined individuals.[248] To make them more effective, however, legislatures must reduce reliance solely on optional preventative measures and financial assistance to cure school violence.[249] Instead, governing bodies must mandate preventative measures because optional preventative measures implemented by Congress, state legislatures, schools, and other entities are insufficient.[250] The problem with optional preventative measures is they allow school officials discretion to conduct a cost-benefit analysis and determine the need for such measures. This means that if the costs of improvements exceed the amount of financial aid received from such improvements, officials would likely forego improvements altogether because the meager budget would not allow it. Mandatory preventive measures would turn out different.

Mandatory school security improvements force school officials to comply with safety requirements without any discretion, thus allowing legislatures to fine school districts that fail to comply. While additional financial assistance can persuade compliance for some school districts, as shown above, the incentives are not always greater than the cost. Therefore, the best remedy is imposing punishments on schools not in compliance. This creates a strong deterrent, while also maximizing the use of preventive measures in schools and curbing school violence. In essence, just as strong deterrents prevent students from committing violent acts, so too will strong deterrents encourage schools to enhance their security.

In addition to creating a deterrent, the benefits of mandating preventive measures are three-fold. First, violence by less-determined shooters will be reduced. Second, officials could not use the budget or other financial issues as an excuse for not implementing preventative measures. Finally, mandating school compliance allows exposure to liability under the tort of negligence.[251]

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248 *See supra* Part III.A (discussing the positives and negatives of preventative measures).

249 *See supra* notes 153–59 and accompanying text (discussing problems with optional preventative measures and financial assistance provided by legislatures).

250 *See supra* note 155 and accompanying text (discussing perpetrator's claim that medical detectors would not have been enough).

251 This Note recognizes legislatures are unlikely to adopt such a statute, but theoretically it is possible. *See generally* Hanks, *supra* note 30, at 1–6 (noting student violence in schools, tort law liability, and immunity granted by states).

In conclusion, while preventative measures might not deter stronger-willed shooters, they will reduce some violence. For those shooters not deterred by preventative measures, officers must resort to deadly force as the only remaining deterrent.[252] The problem is that current Fourth Amendment jurisprudence does not always allow police officers the unfettered discretion needed to achieve their goals, thus an exception must be created.[253]

B. Creating a Bright-Line Rule for School Shootings

The second proposal creates a bright-line rule for police officers by eliminating the Fourth Amendment's reasonableness test. Under the current test, courts and officers must consider the severity of the crime, the immediacy of the threat posed by the suspect to officers and others, whether the individual is actively resisting arrest or attempting to evade arrest, the dangerousness of the suspect's actions, and the culpability of the individuals involved.[254] Under this proposal, if an apparent necessity to use deadly force existed, police officers would automatically be justified in using it and would be immune from liability.[255] As a result, the sole inquiry would be to determine whether a school shooting was in progress. If the shooting ended, the need for deadly force would not exist; however, if the shooter was still active, the officers would be allowed to take all necessary actions to stop him.

Even though such a rule may lead to abuse of power and excessive force, the utilitarian ideal would outweigh any shooter's rights. This reasoning is similar to Justice Scalia's reasoning in *Scott*, where the Court took into account not only the dangerousness posed by the suspect, but also the culpability of the suspect in relation to the innocence of potential victims.[256] Consequently, *Scott* suggests that the Court will eliminate the reasonableness test and create bright-line rules in certain situations.[257] A school shooting is an example of such a situation where a bright-line

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[252] *See supra* note 14 and accompanying text (discussing police department's commitment to deter and prevent school shootings through new police tactics).

[253] *See infra* Part IV.B (discussing the creation of an exception for school shootings).

[254] *See supra* Part II.B.2 (discussing the background and standards of the reasonableness test); *supra* note 210 and accompanying text (discussing four factors officers should consider when determining reasonableness).

[255] *See infra* notes 256–71 and accompanying text (discussing proposal).

[256] *See supra* notes 102–13 and accompanying text (discussing Justice Scalia's majority opinion in *Scott v. Harris* and the addition of a dangerousness requirement which also considers culpability); *supra* Part III.B.1 (analyzing *Scott v. Harris* with the reasonableness test created in *Tennessee v. Garner* and *Graham v. Connor*).

[257] *See supra* notes 199–206 and accompanying text (analyzing *Scott v. Harris* and creating bright-line rules in some instances).

standard should be created. Doing so, will reduce school violence, bridge the gap between the Court's Fourth Amendment jurisprudence and officer training, and provide benefits to officers and courts.

Establishing a bright-line rule will reduce school violence by creating a strong deterrent. If shooters know they will be killed in the course of their shooting, some shooters may decide to abandon their plan. Naturally, not all shooters will be deterred, but if one shooter is deterred and even one innocent life protected, then the rule will have achieved its objective.[258] Even if no shooters are deterred, adopting this standard will re-align officer training and Supreme Court jurisprudence, which is better than the current status.[259]

As noted earlier, a gap exists between officer training and Fourth Amendment jurisprudence.[260] By adopting this bright-line rule, the Court will accommodate its reasonableness test and officers will be allowed to use whatever force is necessary to stop the suspect from committing the crime, which is the same standard police officers are currently using to stop school shootings.[261] As a result, the gap will be bridged and the chance of officer liability reduced substantially. Though immunity is important, there are many other benefits to officers as well.

Perhaps the most important benefit is allowing officers to react instinctively and quickly to the constantly changing environment, rather than forcing them to justify their actions prior to acting and risk indecision or hesitation.[262] In a chaotic deadly situation such as a school shooting, the worst action an officer can take is to hesitate or decide not to act. This jeopardizes their lives and also the lives of innocent people caught in the crossfire.

Additionally, adopting a bright-line rule eliminates the requirement that officers constantly reassess the situation. Instead, officers only need to know whether the shooter is still active. If he is, officers know deadly force is justifiable and can neutralize him; if not, officers know deadly force is inappropriate. It is an easy "on/off switch," which differs from *Garner*.[263] Moreover, it allows officers to make reasonable and rational

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[258] *See supra* note 155 and accompanying text (discussing perpetrator's claim that medical detectors would not have been enough).

[259] *See supra* notes 242–44 and accompanying text (discussing the gap between the Fourth Amendment's reasonableness test and officer tactics).

[260] *See supra* notes 242–44 and accompanying text (discussing the gap and extent to which it has reached).

[261] *See supra* Part II.C.2 (discussing the current police policies and tactics to reduce school shootings).

[262] *See supra* note 211 and accompanying text (discussing the risk of indecision and hesitation).

[263] *See supra* note 189 and accompanying text (discussing the on/off switch avoided in *Tennessee v. Garner*).

decisions because they can focus on eliminating the risk, rather than reassessing the situation.[264]

Finally, establishing this standard will create uniform police action by reducing differing individual standards of reasonableness.[265] This cures potential differences between the 6'5" officer and the 5'10" officer in the above illustration.[266] As a result co-officers can better predict each other's actions and provide safer conditions for themselves and innocent bystanders.[267] Although officers reap many benefits, courts also benefit from an easier standard.

For courts, adopting the common law standard allows application of more uniform and consistent standards.[268] This also eliminates confusion for officers because the standards applied by the courts would be consistent.[269] As a result, officers will act reasonably and reduce the chance of accidental injuries because, rather than reassessing reasonableness, officers can think and act quickly and clearly.[270] Consequently, both courts and officers benefit from adopting the common law standard.

If both proposals are implemented, students like Billy would either abandon their plans or be prematurely stopped by police. Either way, lives are saved.

With mandatory preventive measures, Billy may have decided to forego his plans because he would have seen the difficulty of entering school while possessing a firearm. Moreover, if he still attempted to enter, officers could immediately stop him. Consequently, the lives of nearly fifty individuals would have been saved, including his own, which now will be spent in prison.

Alternatively, if Billy was able to evade the preventative measures and begin shooting, the lives lost would be substantially reduced because rather than establish a perimeter and wait for the S.WA.T. team, officers could have entered the school and stopped Billy with any force

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264 *See supra* notes 209–20 and accompanying text (discussing problems reassessments cause police officers).

265 *See supra* notes 222–26 and accompanying text (discussing problems posed by individual reasonableness standards).

266 *See supra* notes 222–24 and accompanying text (comparing one police officer's reasonableness standards to another).

267 *See supra* notes 211, 225 and accompanying text (discussing police officer safety and the teamwork required to execute new police tactics).

268 *See supra* Parts II.B.3, III.B.3 (discussing problems lower courts have encountered when applying the reasonableness test).

269 *See supra* notes 230–33 and accompanying text (discussing how inconsistent court standards could mislead police departments).

270 *See supra* 233 and accompanying text (discussing how consistent standards will reduce accidental injury and death).

necessary. While officers could have done this volitionally, they would have been exposed to liability and would have to comply with the Fourth Amendment reasonableness test. This could lead to the potential problems illustrated above.[271] By adopting this second proposal, police officers are saved from the problems posed by the reasonableness test, are protected from liability, and numerous lives are saved because Billy would have only had minutes to execute his plan, rather than an hour. Therefore, it would not have been impossible for Billy to kill some students, but by implementing the proposals, the number of lives lost and the chance of liability for officers would have been substantially reduced.

V. CONCLUSION

Despite numerous attempts by schools and legislatures to curb school violence, the plague continues. The central problem with these previous attempts is the discretion given to officials. Preventative measures and financial assistance can help, but solely relying upon optional programs has been inadequate. As a result, police departments have revamped their active shooter procedures.

It was not until recently that police departments recognized the need to change active shooter policies and take a proactive stance by granting officers greater latitude regarding the use of force. While police departments altered procedures, legislatures and courts have not changed the reasonableness test to protect officers from liability. As a result, a growing gap exists between officers training and how courts expect officers to react. To bridge the gap, a bright-line rule must be adopted.

Taken together, both proposals will reduce school violence by deterring weak and strong-willed shooters. It is not a fool-proof solution, but absolute security does not exist. The best thing to hope for is that the next time Billy visits Wilson High School; he will abandon his plans because police officers will be stalking the halls.

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271 *See supra* Part III.B (discussing the problems associated with reasonableness tests and school shootings).

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