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Reasonable Approach to Excessive Force Cases under Section 1983

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NOTE

The "Reasonable" Approach to Excessive Force Cases Under Section 1983

In August 1988, hundreds of demonstrators, mostly young and homeless, protested New York City's curfew at Tompkins Square Park, where many of the homeless routinely gathered. When the police responded to the demonstration, fifty-two civilians and eighteen police officers were injured. Over one hundred charges of police brutality were filed. The New York Police Department (NYPD) severely criticized its own commanders and blamed the youth and inexperience of police at the scene for their violent and uncontrolled response to the protest. Videotape revealed police officers indiscriminately beating protestors, hiding badges, and hurling racial epithets. Many of the charges of brutality were made by those claiming to be innocent bystanders patronizing nearby restaurants and clubs.[1]

The NYPD's use of force at Tompkins Square Park was admittedly extreme.[2] Such conduct raises an important issue: what standard should courts use to determine whether police force is excessive? Today, two different standards are applied in federal proceedings: a "reasonableness" standard[3] and a "shock the conscience" standard.[4] The choice of the applicable standard affects a variety of practical public policy concerns.[5] As such, it ought to be carefully made.

Before deciding which standard should be used, one must examine the context of the problem facing the courts. Part I of this Note assesses the character and extent of crime and violence in our society and the conditions law enforcement officers face on the streets in the performance of their duties. Part II analyzes an exemplary excessive force in arrest case, *Lester v. City of Chicago*,[6] and then discusses the conflicting standards used by the courts. Part III evaluates these standards and their impact on victim compensation, judicial efficiency, and effective law enforcement. This Note concludes by recommending use of the fourth amendment "reasonableness" test to meet these policy concerns.

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1 *Command Breakdown Cited: NYPD Assesses Park Riot*, Law Enforcement News, Aug. 25, 1988, at 1, col. 3.

2 *Id.* The NYPD Advocate's Office brought charges against two of the NYPD's own officers for use of "unnecessary [and] excessive" force against the bystanders. *Id.*

3 *See infra* notes 45-60 and accompanying text for a discussion of the "reasonableness" standard.

4 *See infra* notes 61-74 and accompanying text for a discussion of the "shock the conscience" standard.

5 The United States Supreme Court will have the opportunity to consider these policy issues in Graham v. City of Charlotte, 827 F.2d 945 (4th Cir. 1987), *cert. granted*, 109 S. Ct. 54 (1988).

6 830 F.2d 706 (7th Cir. 1987).

I. Crime and Violence in Society

In 1960, 9,110 people were murdered in the United States, representing 5.1 homicides per 100,000 people.[7] By 1987, the figure had risen to 20,100, or 8.3 homicides per 100,000 people.[8] In other words, murders increased by almost 121%, while the general population grew by only about 36%.[9] The leading cause of death for black males between the ages of fifteen and thirty-four is homicide.[10] In 1980, homicides peaked at a rate of eleven per 100,000 people.[11] In introducing legislative recommendations growing out of the investigation of the House Select Committee on Assassinations, Ohio Congressman Louis Stokes commented in 1981 that an American male born that year was more likely to be murdered than an American soldier in World War II was to die in combat.[12]

The rate of violent crimes in the United States is several times higher than that in European countries.[13] Americans own more guns and use them against each other more often than in any other Western democracy.[14] Crime increased nearly 300% between 1960 and 1987, and vio-

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7 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1985, U.S. Dept. of Just., BJS, table 3.89 at 365, [hereinafter SOURCEBOOK].

8 *Crime in the United States*, UNIFORM CRIME REPORTS 1987, July 10, 1988, at 41 [hereinafter UNIFORM CRIME REPORTS].

9 *See supra* notes 7-8. The population in 1960 was 179,323,175. By 1987, it had increased 36% to 243,400,000. UNIFORM CRIME REPORTS, *supra* note 8, at 41; SOURCEBOOK, *supra* note 7, table 3.89 at 365.

10 U.S. DEPT. OF HEALTH AND HUMAN SERVICES, VITAL STATISTICS OF THE UNITED STATES 1985, VOL. II - MORTALITY Part A, tables 1-9. *See also* 127 CONG. REC. 28,217 (Nov. 19, 1981) (statement of Rep. Stokes) (from 1960 to 1980 the population in the violence-prone age bracket, 15-24 year olds, increased faster than the general population, but even this increase was only 72%). Also note that while the number of minorities shot by police is disproportionate to their representation in the population, this number is not disproportionate considering that the percentage of minorities involved in crimes is higher than for nonminorities. Geller, *Deadly Force*, NATIONAL INSTITUTE OF JUSTICE CRIMINAL FILE STUDY GUIDE 3 (n.d.).

Recently reported federal health statistics for 1986 (the latest year for which figures are available) show rising death rates from killings and accidents have cut the life expectancy of blacks in the United States for the second consecutive year. *Rise in Killings and Accidents Cuts Blacks' Life Expectancy*, N.Y. Times, Dec. 20, 1988, at A14, col. 2. For the first time in this century, the life expectancy for blacks dropped while figures for whites went up. Among the leading causes of death, homicides and killings in police confrontations increased 8%, the first increase in this category since 1980. *Id.* The death rate for such killings increased 5% for whites and 15% for blacks. *Id.*

11 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 15 (2d ed. Mar. 1988). Since 1900, three long-term trends in homicide have been present. From 1903 to 1933, the rate increased from 1.1 to 9.7 homicides per 100,000 people. From 1934 to 1958, it fell to 4.5 and then rose from 1961 to 1980 to 11 per 100,000. Experts say it is too early to tell whether the decline since 1980 is the start of a long-term trend or a short pause in the generally rising trend since 1961. *Id.* The increase in murder and non-negligent manslaughter from 1978 to 1987 was 2.8%, from 19,560 homicides in 1978 to 20,100 in 1987. The population grew from 218,059,000 in 1978 to an estimated 243,400,000 in 1987, almost a 12% increase. UNIFORM CRIME REPORTS, *supra* note 8, at 41.

12 127 CONG. REC., 28,217 (Nov. 19, 1981) (statement of Rep. Stokes).

13 Kalsik, *International Crime Rates*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, May 1988, at 1. Based on data from 41 countries' law enforcement authorities, collected by the United Nations and the International Police Organization (Interpol), as well as World Health Organization (WHO) data, the rate of violent crime in the United States was reported to be several times higher than in the 41 countries for which information was available. Violent crimes (homicide, rape, and robbery) are four to nine times more frequent in the United States than in Europe. *Id.*

14 Zimring, *Gun Control*, NATIONAL INSTITUTE OF JUSTICE, CRIME FILE STUDY GUIDE 1 (n.d.). There are 130 million firearms in this country. "Firearms continue to multiply, and deaths from

lent crimes (murder, forcible rape, robbery, and aggravated assault) were up over 410 percent for the same period.[15]

The nexus between drugs and the increase in violent crime is well documented.[16] Sixty to eighty percent of all crime and half of all

guns have increased since the early 1960's to roughly 30,000 per year." Over 20% of all robberies and roughly 60% of all homicides are committed with firearms. *Id.*

15 SOURCEBOOK, *supra* note 7, at 365; UNIFORM CRIME REPORTS, *supra* note 8, at 41, table 1. In 1960, 3,384,200 crimes were reported while 13,508,700 were reported in 1987. Violent crimes reported numbered 288,460 in 1960 and 1,484,000 in 1987. The rate of crimes in general rose 190% and violent crimes rose nearly 280%. During this same time the population rose by roughly 35%. *Id.* More recently, in 1978, 11,209,000 crimes were reported, while 13,508,700 were reported in 1987. In 1978, 1,085,550 violent crimes were reported and in 1987, 1,484,000 were reported. This represents an 8.1% increase in the rate of crimes per 100,000 people between 1978 and 1987 and a 22.5% increase in the rate of violent crimes per 100,000 people during the same time period. The population increased from 218,059,000 to approximately 243,400,000 during this time frame. *Id.* The volume of violent crime between 1986 and 1987 virtually did not change. "The rate for violent crime, 610 per 100,000 people, was down 1% from 1986. The number of murders in 1987 totaled 20,096, a decrease of 3% from 1986, for a rate of 8 per 100,000 people." *Crime in the United States*, FBI LAW ENFORCEMENT BULLETIN, Aug. 1988, at 6-7. Forty-nine percent of murder victims were 20-34 years old, 74% were male, and 53% white. Firearms were used for three out of every five murders. *Id.*

16 New York Times articles over an eight day period, from November 22 through November 29, 1988, illustrate the strong connection between drugs and crime throughout the nation. For example, the murder rate in New York City surged during August of 1988 when 201 murders were committed. This represents a 74.8% increase over the 115 murders or criminal manslaughters suffered in the same month a year earlier. *New York City Nears Record for Slayings*, N.Y. Times, Nov. 22, 1988, at B1, col. 5. With this surge in the murder rate, the city will likely break the one-year record for murders set seven years ago when there were 1826 murders. "Officials and criminologists blamed the magnitude of the August increase on the continued effects of drugs and drug trafficking, exacerbated by brutal August heat." *Id.* "The huge increase in killings—which was accompanied by steep, but far less pronounced rises in robbery, aggravated assault and motor-vehicle theft—stunned officials." *Id.* Thomas Reppetto, head of the Citizens Crime Commission, a nonprofit organization monitoring crime in New York City, said that he had never seen that kind of a one-month jump in a large city in his 30 years of experience. " 'It's clear now that barring a miracle we will break the all-time record for murder that was set in 1981.' " *Id.* He added, " '*Everybody knows that drugs is the key problem.*' " *Id.* at B2, col. 2 (emphasis added). Assistant Police Chief Raymond W. Kelly stated that the 1988 statistics already broke the record for the percentage of killings linked directly to drugs. *Id.* Through November 1988, the percentage of killings related to drugs was 42.3%, compared to 38.5% in 1987 and 35.1% in 1986. *Id.* Mr. Reppetto identified the brutal tactics of drug gangs as a factor in the increase. He commented on the increase while attending Governor Cuomo's two-day conference on crime and drugs. Mr. Reppetto said, "[w]e're in a war . . . [t]hese are war tactics." *Id.* To put New York City's problem in perspective with the national problem, Chief Kelly pointed out that New York City is still ranked only tenth in the nation for murders per 100,000 in population. *Id.*

One week later, New York City's new strategy for arresting low-level drug dealers via police saturation in given neighborhoods was criticized by the Citizens Crime Commission of New York City. *Study Faults Strategy in New York Drug Crackdown*, N.Y. Times, Nov. 29, 1988, at B1, col. 2. The Commission urged dedicating more resources to concentrate on the drug-murder gangs. *Id.* at B1, col. 3. In his retort to the criticisms, the Mayor's Criminal Justice Coordinator, Peter J. Benitez, argued that "[t]he city does have a comprehensive strategy to address drug abuse and its resulting crimes." *Id.* at B1, col. 4.

New York City is not the only city plagued with the violent drug war. In our nation's capital the arrest of one man thought to be responsible for at least three drug-related murders was a victorious battle in Washington, D.C.'s escalating war on drugs. *End of a Manhunt Brings Respite in Capital's Violent Drug Wars*, N.Y. Times, Nov. 29, 1988, at A10, col. 1. "[T]he authorities warned that more drug violence was all but inevitable, given the fact that 200 people have already died this year as a result of disputes over drugs, especially crack, an extremely potent form of cocaine. They noted that the capital now has one of the most serious drug problems in the country." *Id.*

The conviction of crime boss Nicodemo Scarfo, head of La Cosa Nostra in Philadelphia and Atlantic City, was also celebrated as a victory in the drug war. *Mob Trial Results in 17 Convictions*, N.Y. Times, Nov. 21, 1988, at A16, col. 1. Scarfo and 16 others were convicted of murder and conspiracy. Charges included nine murders, four attempted murders, and conspiracy to commit racketeering, drug trafficking, and other crimes. *Id.* Government experts indicated that organized crime in Phila-

murders are drug-related.[17] Two years ago, Washington, D.C. initiated "Operation Clean Sweep" in an effort to crack down on drug trafficking. Despite the anti-drug drive, the mayor recently admitted, "[w]e're waging war—or trying to wage war—but, no, we haven't turned the corner yet."[18]

The President of the International Association of Chiefs of Police concluded that crime is more violent in recent years, that criminals are more readily killing officers on the street, and that criminals, and especially drug dealers, possess more firepower than the police.[19] During the first six months of 1987, thirty-four law enforcement officers were feloniously killed in the line of duty. Although this represents a decrease from the forty-three killed in the first half of 1986, all but two of the thirty-four officers were killed with firearms.[20] While empirical data in this area

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delphia has been more vicious since the surge of murders began in 1980 with the killing of Angelo Bruno, the former head of the mafia family, who was called the "docile don" because he refrained from using bloodshed and refused to involve the mob in drug-dealing. *Id.* Since Bruno's assassination, La Cosa Nostra has become more involved in drug trafficking and has retaliated against anyone standing in its way. *Id.*

The drug war, gangs, and organized crime are not restricted to the largest cities in our nation. Two California gangs, for example, have taken their lucrative and sophisticated drug trafficking enterprise across the country via the interstate highways. These gangs have expanded to Denver, St. Louis, Omaha, Oklahoma City, and Kansas City, as well as to cities as far east as Baltimore and Washington, D.C. *Armed, Sophisticated and Violent, Two Drug Gangs Blanket Nation*, N.Y. Times, Nov. 25, 1988, at A1, col. 5. "[L]aw-enforcement officials say, their [the gangs'] tactics mimic the entrepreneurial enterprises of newly minted M.B.A.'s: they quietly establish a distribution network in markets deemed favorable for cocaine and its derivative crack, whose prices have been depressed by a glut of drugs in California." *Id.* at A1, cols. 5-6. The gangs came into Middle America where the crack problem had not been very great (because of the high price of drugs) and drastically reduced the street prices and made drugs easier to obtain. Heavily armed, they intimidate neighborhoods with violence, making citizens afraid to call the police for fear of retaliation. *Id.* at B14, col.5.

> And though they [the Omaha police] note that drug sales and violence [in Omaha] did not originate with the Bloods and Crips [the two California gangs], others observe that levels of violence, the number of arms seized in arrests and the use of crack have all risen with their arrival and with the sharp drop in drug prices that followed.

Id. at B14, col. 4.

17 *LEN Interview: Police Chief Joe D. Casey of Nashville, Incumbent President of the International Association of Chiefs of Police*, Law Enforcement News, Mar. 29, 1988, at 10, col. 3 [hereinafter *Casey Interview*].

18 *Washington Finds Drug War Is Hardest at Home*, N.Y. Times, Dec. 9, 1988, at A13, col. 1.

19 He stated:

> Crimes have become more violent. . . . We're seeing more and more in this country that some of the criminal element, especially some of the people dealing drugs, has more firepower than the policeman on the street does. We're seeing more and more automatic weapons, and it's scary to know that the other side has got more firepower than you've got. In the past few years we are also seeing that people don't really think twice before they shoot a policeman. They'll shoot one now just as quick as they'll shoot anyone else. It used to be that that wasn't the case.

Casey Interview, supra note 17, at 10, col. 2.

20 *Line of Duty Deaths Decrease*, FBI LAW ENFORCEMENT BULLETIN, Dec. 1987, at 13.

> While the risk of job-related death is reportedly lower in police work than in such industries as mining, agriculture, construction and transportation, the hazards are substantial nevertheless, especially in the United States. An early study of British and American police fatalities revealed that, from 1946 through 1966, 1014 American law enforcement officers were killed on the job, compared to 10 of their British counterparts. By the 1970's American police deaths were up dramatically—1018 officers were slain from 1972 through 1980.
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> Without in any way denigrating the dangers of policing—although the annual figure has begun to decline in the 1980s. . . . research in a number of cities has revealed that large percentages of the police who are shot, particularly while off duty, are shot by themselves or by their coworkers. For example, in Chicago, police bullets accounted for 38 percent of the 187 officer victims during 1974-1978.

leaves room for improvement, researchers estimate that publicly employed American law enforcement personnel kill about 600 criminal suspects yearly, shoot and wound another 1,200, and fire at and miss an additional 1,800.[21]

While police are battling violent crime and waging a deadly drug war, citizens are initiating more civil rights cases against law enforcement officials.[22] Section 1983 of the Civil Rights Act[23] provides a cause of action against public officials for deprivation of constitutional rights.[24] The circuit courts have been inconsistent in deciding which constitutional standard to apply to excessive force cases under section 1983. Some circuits apply the "reasonableness" test of *Tennessee v. Garner*,[25] in which the Supreme Court treated excessive force during arrest as a violation of the arrestee's fourth amendment right to be secure against unreasonable searches and seizures.[26] Other courts treat excessive force by a police officer as a violation of the arrestee's fourteenth amendment right to substantive due process of the law,[27] subject to a "shock the conscience" test. While *Garner* seemed to dictate that the fourth amendment and its corresponding "reasonableness" test should be used in all of these cases, courts continue to employ both standards.

II. An Exemplary Case: *Lester v. City of Chicago*

Decided by the Seventh Circuit in late 1987, *Lester v. City of Chicago*[28] exemplifies the federal courts' search for a standard in excessive force in

Geller, *supra* note 10, at 2. *See also* STATISTICAL ABSTRACTS OF THE UNITED STATES 1988, Table No. 283, at 167 (from 1980-86, 1064 officers have been killed, but the report does not state how many were killed feloniously and how many died accidentally).

21 Geller, *supra* note 10, at 2.

22 *The Federal Civil Justice System*, BJS BULLETIN, July 1987, at 1. Filings for federal civil cases, including civil rights cases, almost doubled between 1976 and 1986 and almost tripled between 1970 and 1986. While the statistics do not provide a breakdown of excessive force cases under § 1983 of the Civil Rights Act, they do show that civil rights cases are on the rise as well. *Id.*

23 Section 1983 provides:

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

42 U.S.C. § 1983 (1982).

24 *See* CONG. GLOBE 42d Cong., 1st Sess. 236 (1871). Congress originally enacted § 1983 as Section 1 of the Ku Klux Klan Act of 1871. The Ku Klux Klan Act was a federal reaction to brutal attacks against the newly freed slaves in the southern states. Congress was reacting to the lawless bands who "by force, terror, and violence, defied civil authority" and "ha[d] rendered the courts powerless to punish the crimes they ha[d] committed, thus overthrowing the safety of person and property, and the rights which are the primary basis of civil government, and which are guarantied [sic] by the Constitution of the United States to all its citizens." *Id.*

25 471 U.S. 1 (1985).

26 "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

27 "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

28 830 F.2d 706 (7th Cir. 1987).

arrest claims.[29] *Lester* illustrates the courts' struggle to determine whether they should apply a fourth or a fourteenth amendment test in evaluating a police officer's use of force.

A. *Facts of* Lester

In May 1979, Alfred Harmon telephoned his daughter, Betty Lester.[30] Mr. Harmon told his daughter he had been arrested and asked her to come to the police station to get him out of jail.[31] When Mrs. Lester arrived at the station, a confrontation ensued. Evidence conflicts as to what happened at the station,[32] but all parties agreed that the police arrested Mrs. Lester, handcuffed her, and took her to a nearby office where they handcuffed her to a radiator.[33]

Mrs. Lester sued Chicago police officers Daniel Leahy and Earnest Cain under section 1983 for using excessive force in arresting her.[34] At trial, the judge charged the jury under the Seventh Circuit's fourteenth amendment "shock the conscience" test established in *Gumz v. Morrissette*.[35] The jury found for the officers and Mrs. Lester appealed, contending the jury instruction was improper.[36]

B. *Issue*

On appeal, the Seventh Circuit confronted the issue of what constitutional standard to apply to excessive force in arrest claims.[37] The court

29 The Seventh Circuit heard *Lester* less than two years after the oft-quoted case of Gumz v. Morrissette, 772 F.2d 1395 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986). The *Gumz* court ruled that a substantive due process "shock the conscience" standard should govern excessive force in arrest claims. *Id.* at 1400.

30 *Lester*, 830 F.2d at 708.

31 *Id.*

32 Mrs. Lester claimed the officers ridiculed her and, when she asserted her desire to see her father, placed her under arrest. She claimed Officer Daniel Leahy kneed her in the back, handcuffed her tightly, causing injury to her wrists, and dragged her down a hall to the tactical office where, after threatening her with violence, he immediately handcuffed her to a radiator.

The officers claimed Mrs. Lester was shouting at the desk officers and disrupting the activities of the station. After repeated warnings, the officers arrested her. The officers claimed Mrs. Lester ran from them and grabbed a pole near the front desk. After prying her away from the pole, the officers took Mrs. Lester to the tactical office; she refused to walk under her own power. In the tactical office, the officers claimed Mrs. Lester started kicking chairs and tables and was handcuffed to the radiator for her own protection as well as the protection of others. *Id.* at 708-09.

33 *Id.* at 708. The parties disagreed as to why the police handcuffed Mrs. Lester to the radiator. *Id.* at 708-09.

34 *Id.* at 707. Mrs. Lester also brought claims under 42 U.S.C. §§ 1981, 1985(3) (1982) against Leahy, Cain, the City of Chicago, and Sergeant John McNulty. The merits of these claims were not raised on appeal. *Id.* at 707 n.1.

35 "The district court took the language in that instruction almost verbatim from *Gumz v. Morrissette*." *Id.* at 709 (citing Gumz v. Morrissette, 772 F.2d 1395 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986)).

36 *Id.*

37 This comment addresses excessive force in arrest cases, that is, cases in which police allegedly used excessive force at the time of an arrest. If the force is applied after arrest or during incarceration, other constitutional rights may be implicated. For example, excessive force inflicted while a person is incarcerated is appropriately evaluated under an eighth amendment "cruel and unusual punishment" standard. "The Cruel and Unusual Punishments Clause 'was designed to protect those convicted of crimes' . . . and consequently the Clause applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.' " Whitley v. Albers, 475 U.S. 312, 318 (1986) (quoting Ingraham v. Wright, 430 U.S. 651, 664, 671 n.40 (1977)).

faced two alternatives: the fourth amendment "reasonableness" standard and the fourteenth amendment "shock the conscience" standard.[38] The Second Circuit,[39] the Fourth Circuit,[40] and the District of Columbia Circuit[41] follow a "reasonableness" test while the Fifth Circuit,[42] the Sixth Circuit,[43] and the Eleventh Circuit[44] follow a "shock the conscience" test. Although a conflict between the circuits is itself significant, the policy issues implicated by a court's choice of law go beyond merely reconciling a split between the circuits and relate to the underpinnings of an excessive force claim: victim compensation, judicial economy, and effective law enforcement.

See generally Comment, *Excessive Force Claims: Removing the Double Standard*, 53 U. CHI. L. REV. 1369 (1986) (distinguishing between the standard that should apply to arrest cases and the standard that should apply to pretrial detainment cases).

38 In addition to the courts that use either a fourth amendment or a fourteenth amendment standard, some courts combine (or confuse) the fourth and fourteenth amendment approaches and apply a "hybrid approach." This approach involves jury instructions similar to the district court's instructions in *Lester*. *See Lester*, 830 F.2d at 709.

In Jamieson v. Shaw, 772 F.2d 1205 (5th Cir. 1985), the Fifth Circuit began its analysis with the Supreme Court's approach in Tennessee v. Garner, 471 U.S. 1 (1985), but added the "shock the conscience" standard to its analysis. The plaintiff in *Jamieson*, a passenger who was injured when the car in which she was riding struck a roadblock placed on the state highway by the police, brought a § 1983 action. She based her claim on alleged violations of her fourth and eighth amendment rights. The court began its analysis with *Garner* and applied a reasonableness standard, stating "it is now settled that the Fourth Amendment limits the level of force that may be used to accomplish a seizure of the person: the level of force must be 'reasonable.' " *Jamieson*, 772 F.2d at 1209. The analysis, however, did not stop with the fourth amendment. Instead, the court reiterated the "shock the conscience" language set out in Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980), and Johnson v. Glick, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). *Jamieson*, 772 F.2d at 1210. *See infra* notes 66-69 and accompanying text.

In the same year, the Eleventh Circuit in Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115 (1986), looked at both the fourth amendment "reasonableness" standard and the fourteenth amendment "shock the conscience" standard. In *Gilmere*, the sister of the decedent brought a § 1983 action for the shooting death of her brother. The complaint alleged violations of the decedent's fourth, eighth, and fourteenth amendment rights and of state tort law. The court first addressed the fourteenth amendment claim and used the *Glick* standard to affirm the lower court's holding against the defendant. *Id.* at 1501. The court then examined the fourth amendment claim, cited *Garner*, and again affirmed the lower court's holding. *Id.* at 1502.

More recently, the Fourth Circuit used the "hybrid approach" in Justice v. Dennis, 834 F.2d 380 (4th Cir. 1987) (en banc), and Kidd v. O'Neil, 774 F.2d 1252 (4th Cir. 1985). In *Kidd*, the defendant alleged he was "brutally" and "severely" beaten, kicked, and maced while handcuffed. *Kidd*, 774 F.2d at 1253. *Justice* overturned *Kidd* only two years after *Kidd* was decided by the same circuit. *Justice*, 834 F.2d at 383. Justice brought a civil rights action against police officer Dennis under § 1983. Justice alleged the officer's "brutal and excessive force" had deprived him of liberty without due process of law. *Id* at 381. On appeal, the court upheld a jury instruction that essentially embodied the *Glick* "shock the conscience" standard. *Id.* at 383. The court began with the "reasonableness" standard but held that the inquiry must not "cease at that point." *Id.* Instead, the court stated that the force used also had to "shock the conscience." *Id.* The court did not even mention *Garner*, despite the fact that Judge Phillips, in his dissent, found *Garner* controlling. *Id.* at 384.

39 *See* Heath v. Henning, 854 F.2d 6, 8 (2d Cir. 1988).

40 *See* Martin v. Gentile, 849 F.2d 863, 867 (4th Cir. 1988).

41 *See* Martin v. Malhoyt, 830 F.2d 237, 261 (D.C. Cir. 1987).

42 *See* Stevens v. Corbell, 832 F.2d 884, 889 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 2018 (1988).

43 *See* Kuhar v. Hanton, 836 F.2d 1348 (6th Cir. 1988) (table opinion) (text in WESTLAW) (see WESTLAW p. 7 of 18).

44 *See* Samples v. City of Atlanta, 846 F.2d 1328, 1331 (11th Cir. 1988).

1. The Fourth Amendment "Reasonableness" Standard

The right protected by the fourth amendment in excessive force in arrest claims is "[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures."[45] "The operative word in the Fourth Amendment is 'unreasonable.' "[46] The "reasonableness" standard under the fourth amendment is wholly objective.[47] The officer must have acted in an " 'objectively reasonable' [manner] in light of the facts and circumstances confronting him, without regard to his own subjective intent or motivation."[48] More precisely, under a fourth amendment approach, conducting an inquiry into the officer's subjective beliefs is improper,[49] while judging the facts against an objective standard is imperative.[50] Under an objective "reasonableness" standard, a court must give due regard to the fact that police officers are forced to make split second judgments under tense and often dangerous circumstances.[51] The fourth amendment demands an analysis of police conduct under the circumstances existing at the time of the arrest and rejects hindsight reasoning.[52]

An analysis of the fourth amendment "reasonableness" standard requires consideration of the Supreme Court's decision in *Tennessee v. Garner*.[53] In that case, an officer shot and killed Edward Garner, a suspected prowler, in an effort to prevent an escape.[54] Garner's father brought a section 1983 action asserting violations of his son's fourth, fifth, sixth, eighth, and fourteenth amendment rights.[55] The Court decided *Garner* solely under the fourth amendment.[56] The Court balanced competing

45 U.S. CONST. amend. IV.

46 Llaguno v. Mingey, 763 F.2d 1560, 1564 (7th Cir. 1985) (en banc), *cert. dismissed*, 478 U.S. 1044 (1986).

47 Scott v. United States, 436 U.S. 128, 137 (1978) ("[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him.").

48 Martin v. Gentile, 849 F.2d 863, 869 (4th Cir. 1988) (citing *Scott*, 436 U.S. at 128, 137-38).

49 Anderson v. Creighton, 107 S. Ct. 3034, 3040 (1987) ("Anderson's subjective beliefs about the search are irrelevant.").

50 *Scott*, 436 U.S. at 137 (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).

51 Tennessee v. Garner, 471 U.S. 1, 26 (1985) (O'Connor, J., dissenting) (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)). *See also Martin*, 849 F.2d at 869; Lester v. City of Chicago, 830 F.2d 706, 712 (7th Cir. 1987). *See supra* notes 7-21 and accompanying text for information on the increasing violence facing police officers.

52 *Garner*, 471 U.S. at 26 (O'Connor, J., dissenting) ("The clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances."); Beck v. Ohio, 379 U.S. 89, 91 (1964) ("Whether that arrest was constitutionally valid depends in turn upon whether, *at the moment the arrest was made*, the officers had probable cause to make it—whether *at that moment* the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.") (emphasis added); United States v. Stevens, 509 F.2d 683, 688 (8th Cir.), *cert. denied*, 421 U.S. 989 (1975) ("Hindsight reasoning might convince one that the officers were being overly cautious or that they could have dealt with their concern by moving the suspects farther away from the vehicle, but we must view their conduct in terms of what could be considered reasonable under the circumstances then existing.").

53 471 U.S. 1 (1985). This is the only case in which the Court held that an officer used excessive force in making an arrest, and the Court evaluated the case under a fourth amendment test. *Lester*, 830 F.2d at 711.

54 *Garner*, 471 U.S. at 4.

55 *Id.* at 5.

56 *Id.* at 7.

policy interests: "To determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' "[57] The Court held that "reasonableness depends on not only when a seizure is made, but also how it is carried out"[58] in light of the "totality of the circumstances."[59] The "totality of the circumstances" approach dictates an objective standard, and in its analysis the Court did not consider motive or intent, which are subjective factors.[60]

2. The Fourteenth Amendment Due Process Standard

The fourteenth amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law."[61] In excessive force cases, the fourteenth amendment protects "the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court."[62]

The "shock the conscience" standard, a due process test, originated in a 1952 case, *Rochin v. California*.[63] In *Rochin*, the United States Supreme Court found that police officers violated Rochin's due process rights when they directed a doctor to force an emetic into Rochin's stomach in an effort to obtain evidence.[64] The Court concluded the police

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

58 *Id.*

59 *Id.* at 9.

60 *See id.* at 7-9. *See also* Gumz v. Morrissette, 772 F.2d 1395, 1407 (7th Cir. 1985) (Easterbrook, J., concurring) ("The most significant difference between substantive due process and reasonableness under the Fourth Amendment is that one requires scrutiny of motive and the other forbids it.").

61 U.S. CONST. amend. XIV, § 1.

62 Hall v. Tawney, 621 F.2d 607, 613 (1980). *See also* Rochin v. California, 342 U.S. 165, 172 (1952); Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).

63 342 U.S. 165 (1952).

64 *Id.* at 166. *Rochin* marked the beginning of the use of the fourteenth amendment to remedy excessive force harms properly arising under the fourth amendment. When *Rochin* was decided, the Court had already held that the concepts of personal security with respect to an unreasonable search and seizure were "implicit in the concept of ordered liberty." Wolf v. Colorado, 338 U.S. 25, 27 (1949) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Thus, the relevant standard, the fourth amendment, and the remedy, § 1983, were both available to Rochin.

The Court recognized the availability of these remedies in Irvine v. California, 347 U.S. 128 (1954). Like *Rochin*, the Court decided *Irvine* after *Wolf*, but prior to application of the exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643, 655 (1961). In *Irvine*, the police repeatedly entered the defendant's home without a search warrant, installed listening devices, and obtained evidence concerning the defendant's gambling operations. *Irvine*, 347 U.S. at 130-32. Although the Court concluded that the officers' actions "flagrantly, deliberately, and persistently" violated the defendant's fourth amendment rights, and the conviction was based on the tainted evidence, the Court upheld the defendant's conviction. *Id.* at 132. In affirming the conviction, the Court declared: "[A]dmission of the evidence does not exonerate the officers and their aides if they have violated defendant's constitutional rights. . . . [O]ther remedies are available for official lawlessness." *Id.* at 137. (The Court specifically referred to the criminal remedy under 18 U.S.C. § 242 (1982) and directed the Clerk of the Court to forward a copy of the case record and the Court's opinion to the Attorney General of the United States. *Id.* at 137-38.)

In summary, had the Court properly addressed *Rochin* under the fourth amendment, the defendant could have pursued recovery under § 1983 and the state could have prosecuted the officers under § 242. Despite these remedies, the Court chose to use the fourteenth amendment in order to exclude the tainted evidence from Rochin's trial.

conduct did "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically" and declared "[t]his is conduct that shocks the conscience."[65]

While *Rochin* centered around police use of excessive force in obtaining evidence, the Second Circuit in *Johnson v. Glick*[66] transformed the "shock the conscience" language into a broader test.[67] The court held that a guard's unprovoked attack on a suspect being held for trial deprived that suspect of liberty without due process of law.[68] The *Glick* court believed the *Rochin* test, "conduct that shocks the conscience," pointed the way for cases involving police use of excessive force.[69]

The Seventh Circuit applied the *Rochin* test in *Gumz v. Morrissette*.[70] In *Gumz*, a farmer brought a section 1983 action against state officials for use of excessive force in his arrest. Gumz alleged violations of the first, fourth, fifth, eighth, and fourteenth amendments.[71] The Seventh Circuit decided *Gumz* solely under the fourteenth amendment[72] and set forth the so-called *Gumz* instruction. The *Gumz* instruction required proof of three elements: the officer caused severe injuries, the officer's act was grossly disproportionate to the need for action under the circumstances, and the officer's act was inspired by malice rather than merely carelessness or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience.[73]

Thus, under the *Rochin* line of cases, the Seventh Circuit, among other courts, evaluated police use of excessive force under a "shock the conscience" standard. This standard, in contrast to the fourth amendment test, mandated evaluation of subjective factors (such as malice) and a finding that the officer inflicted "serious injury."[74]

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65 *Rochin*, 342 U.S. at 172.

66 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

67 *Id.* at 1033. The court set forth a four factor test:

> [A] court must look to such factors as 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.

68 *Id.*

69 *Id.* Although *Glick* did not use the "shock the conscience" language in its four factor analysis, the language became a part of the analysis used in later cases. Specifically, in Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980), *Glick* was modified as follows:

> As in the cognate police brutality cases, the substantive due process inquiry . . . must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.

Id. at 613. In subsequent due process cases, the *Tawney* language and variations thereof prevailed. *See, e.g.*, Davis v. Forrest, 768 F.2d 257, 258 (8th Cir. 1985).

70 772 F.2d 1395 (7th Cir. 1985).

71 *Id.* at 1398.

72 *Id.* at 1399.

73 *Id.* at 1400.

74 The "hybrid approach" to excessive force in arrest claims imposes a standard that combines the reasonableness requirements of the fourth amendment with malice or other subjective elements of the fourteenth amendment approach. This standard, like the use of a fourteenth amendment standard, conflicts with *Garner* and *Lester*. Additionally, this standard is suspect (in a logical sense)

C. *Decision*

Confronted with this maze of case law, the Seventh Circuit, in *Lester*, adopted *Garner*'s fourth amendment test and overruled the circuit's two-year old decision in *Gumz*.[75] Specifically, the court rejected the so-called *Gumz* instruction that employed a substantive due process test in excessive force in arrest claims.[76] In rejecting the three-element *Gumz* instruction, the *Lester* majority was predominately troubled by the third element, malice that shocks the conscience.[77] This element of the *Gumz* instruction demanded a subjective inquiry into a police officer's motives to determine whether he acted with "malice" such that his actions "shock the conscience."[78] The court found a subjective inquiry incompatible with a fourth amendment "reasonableness" standard.[79] The fourth amendment protects against unreasonable seizures, not seizures that "shock the conscience" or those that cause "severe injuries."[80]

The district court's use of the fourteenth amendment standard in combination with a fourth amendment standard forced the Seventh Circuit to remand *Lester* to the district court for a new trial. The Seventh Circuit concluded that if the jury believed all of Mrs. Lester's testimony, then they could have found that the officers used more force than was reasonable under the circumstances.[81] Under a fourth amendment "reasonableness" test, this would result in a verdict for Mrs. Lester. Under the *Gumz* instruction, even if the jury concluded the officers used unrea-

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because in nearly every case, the hybrid approach will yield the same result as the fourteenth amendment approach.

For example, courts have suggested the force used must be unreasonable before it can shock the conscience: "[S]ince the force used here was not sufficiently excessive to amount to a violation of Martin's [the plaintiff's] fourth amendment rights, it obviously did not violate his substantive due process rights." Martin v. Gentile, 849 F.2d 863, 870 n.9 (4th Cir. 1988).

Clearly, a fourteenth amendment test requires motive and severe injury in addition to some sort of unreasonable force. Lester v. City of Chicago, 830 F.2d 706, 709, 712 (7th Cir. 1987); Gumz v. Morrisette, 772 F.2d 1395, 1400 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986). If unreasonable force under the fourth amendment is equated with disproportionate force under the fourteenth amendment, then all fourteenth amendment excessive force in arrest cases would also violate the fourth amendment. A case has not been found where a court decided the force used was disproportionate yet reasonable. To the contrary, activity is " 'unreasonable' only because it is out of proportion to the end sought." Foster v. United States, 265 F.2d 183, 188 (2d Cir.) (quoting McMann v. S.E.C., 87 F.2d 377, 379 (2d Cir.), *cert denied*, 301 U.S. 684 (1937)), *cert. denied*, 360 U.S. 912 (1959).

75 *Lester*, 830 F.2d at 713.

76 *Id.*

77 *Id.* at 712.

78 *Id.*

79 *Id.*

80 *Id.* The *Gumz* majority distinguished between fourth and fourteenth amendment excessive force in arrest claims. Although the *Gumz* panel recognized that an excessive force in arrest claim was proper, the court only addressed the plaintiff's claim under the fourteenth amendment. The court interpreted the plaintiff's complaint as having only advanced a fourteenth amendment claim. The need for a court to "interpret" the complaint raises a danger that courts will not be consistent in the way they evaluate such claims. Presumably, if the court had interpreted the plaintiff's same complaint as a fourth amendment claim, the court would have applied a standard other than *Gumz*. *Lester* solves this interpretation problem by applying the same standard to all excessive force in arrest claims regardless of the standard that the plaintiff may or may not have set forth in the complaint.

81 *Id.* at 714.

sonable force, the jury could still determine the officers' actions fell short of the fourteenth amendment "shock the conscience" threshold.[82]

III. Public Policy Impact

The Seventh Circuit chose to apply a "reasonableness" test in *Lester* and concluded that the "reasonableness" test should govern all excessive force in arrest cases. To determine whether the "reasonableness" test is a proper standard, one must evaluate how the test will affect police brutality cases. A proper test ought to insure that victims of unlawful police force are adequately compensated for their injuries, facilitate the disposition of cases that lack merit, and afford police officers a reasonable range of authority to engage in legitimate procedures on increasingly violent streets.[83]

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82 By remanding the case, the Seventh Circuit indicated it considers the "shock the conscience" standard to be a higher standard than the "reasonableness" standard, at least on the facts of *Lester*.

83 In evaluating what standard courts should apply, consistency is another factor to be considered. Consistency demands use of an objective standard in all excessive force in arrest cases.

In recent years, the Court has mandated use of an objective standard in two other prominent areas of fourth amendment jurisprudence: suppression of evidence based on alleged violations of the defendant's fourth amendment rights in criminal prosecutions and criminal prosecutions for alleged violations of a victim's fourth amendment rights. Consistency mandates that an objective standard also be applied in civil prosecutions under § 1983 for violations of a victim's fourth amendment rights.

The Court recognized an objective good faith exception to the exclusionary rule in United States v. Leon, 468 U.S. 897, *reh'g denied*, 468 U.S. 1250 (1984). "[E]ven assuming that the [exclusionary] rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id.* at 918-19. In *Leon*, the Court emphasized that "the standard of reasonableness we adopt is an objective one." *Id.* at 919 n.20. In connection with *Leon*, the Court also found that the exclusionary rule did not extend to evidence obtained by officers who acted in objective good faith reliance on a "warrant subsequently invalidated because of a technical error on the part of the issuing judge." Massachusetts v. Sheppard, 468 U.S. 981, 983-84 (1984).

The Court also applied an objective standard in a criminal case when law enforcement agents allegedly violated the federal wiretap statutes. In Scott v. United States, 436 U.S. 128, *reh'g denied*, 438 U.S. 908 (1978), pursuant to a court wiretap authorization order, government agents intercepted virtually all conversations over a telephone which agents suspected drug dealers were using for narcotics trafficking. The court order required the officers to "minimize" the number of calls intercepted in light of the purpose of the wiretap and the information available to the officers at the time of the interception. Although the officers knew about the minimization requirement, they made no attempt to comply with it.

The district court ordered the information obtained via the wiretap suppressed because the agents did not subjectively attempt to minimize the number of calls intercepted. Viewed objectively, the officers' conduct met the minimization requirement (40% of the calls turned out to be drug-related and many of the nonpertinent calls were wrong numbers, calls to hear a recorded weather message, or calls that were ambiguous because they used coded language). *Id.* at 140-42. The appellate court reversed the ruling and the Supreme Court affirmed. "[T]he existence *vel non* of such a violation [of constitutional rights] turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time. Subjective intent alone, the Government contends, does not make otherwise lawful conduct illegal or unconstitutional." *Id.* at 136. "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.* at 138.

The courts have also moved toward applying an objective standard for criminal violations of constitutional rights. The criminal counterpart to 42 U.S.C. § 1983, 18 U.S.C. § 242, provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined not more than

A. *Victim Compensation*

A proper standard for evaluating claims of excessive police force should ensure a victim of police brutality adequate compensation. Consideration of the adequacy of compensation necessarily involves determining whether the municipality or the officer was insured. Before addressing insurance coverage, this section will discuss three concerns facing a victim of police brutality: (1) who is legally responsible for the brutality (the individual police officer, the municipality, or both the officer and the municipality);[84] (2) governmental immunity which may protect both the individual officer and the municipality from tort liability; and (3) whether the victim can recover compensatory damages, punitive damages, or both.

> $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 242 (1982). 18 U.S.C. § 241, the criminal conspiracy counterpart to 42 U.S.C. § 1983, provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same. . . . They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 241 (1982).

In Screws v. United States, 325 U.S. 91 (1945), the Court found that the statute, 18 U.S.C. § 242, required scienter as to whether the defendant violated a right secured by the Constitution. The Court stated:

> To convict, it was necessary for them to find that petitioners had the purpose to deprive the prisoner of a constitutional right. . . . And in determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstances—the malice of petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like.

Id. at 107.

Since *Screws*, courts have backed away from requiring that the defendant subjectively intend to violate a victim's constitutional rights. In the Watergate trial of John D. Ehrlichman, the defendant contended that he could not have "intended" to violate the fourth amendment rights of Dr. Louis Fielding because Ehrlichman subjectively believed that the break-in was justified for national security reasons. Since he believed the break-in was authorized, Ehrlichman alleged that he did not intend to violate Fielding's constitutional rights. The court dispensed with the scienter requirement set forth in *Screws*: " 'specific intent' under section 241 does not require an actual awareness on the part of the conspirators that they are violating constitutional rights. It is enough that they engage in activity which interferes with rights which as a matter of law are clearly and specifically protected by the Constitution." United States v. Ehrlichman, 546 F.2d 910, 928 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977). The court stated: "[T]he same principles apply to prosecutions for conspiracy under section 241. Although the language of sections 241 and 242 is somewhat different . . . the Supreme Court has made clear since *Screws* that the 'specific intent' requirements of section 242 are equally applicable (or derivatively applicable) to section 241." *Id.* at 921.

Thus, *Ehrlichman* requires only that the defendant's conduct violate a right which as an objective matter of law was "clearly and specifically protected by the Constitution."

Compare Andresen v. Maryland, 427 U.S. 463, 483 (1976) (investigators did not violate the fourth amendment because they "reasonably could have believed" that their search was lawful).

Also consider that an objective test is imposed when defendants seek to withdraw guilty pleas in criminal cases. "[W]e do not think it is a sufficient reason . . . that appellants may in fact have labored under a subjective impression. . . . In our view, the proper question . . . is . . . whether this belief was, in an objective sense, reasonable in the circumstances." United States v. Barker, 514 F.2d 208, 224 (D.C. Cir.), *cert. denied*, 421 U.S. 1013 (1975).

84 Procedurally, "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond." Brandon v. Holt, 469 U.S. 464, 471-72 (1985).

1. Who is Legally Responsible

In deciding who is legally responsible in a section 1983 action, the victim must evaluate whether the municipality is liable for the actions of its police officers. Generally, the municipality is not liable for the actions of its officers under a respondeat superior theory.[85] Consequently, the mere fact that an officer works for a city or municipality is not enough to make the municipality liable. Nevertheless, in *Monell v. New York City Department of Social Services*,[86] the Supreme Court held that a municipality is accountable for the actions of its officers if the officer's conduct was the result of a municipal "custom or policy."[87] The Court defined municipal "custom or policy" in *Oklahoma City v. Tuttle*,[88] an excessive force case. The Court held that a finding of municipal liability required at least "an affirmative link between the policy and the particular constitutional violation alleged."[89] "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless [one can prove] . . . that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."[90]

Essentially, the plaintiff must satisfy two requirements to prove municipal liability. First, the plaintiff must show fault on the part of the municipality in its policy (e.g., a conscious choice by the municipality to use a particular police training program).[91] Such policies could include inaction by the municipality. For example, one court held that a municipality's persistent failure to discipline subordinates who violated civil rights gave rise to an inference of a municipal policy.[92]

Second, the plaintiff must establish a causal connection between the policy and the constitutional deprivation.[93] As in most evaluations of legal cause, causation in this context is a function of foreseeability. In examining causation, the reasonably foreseeable conduct of a municipality's employees and the citizens with whom the employees will interact must be taken into account.[94] If, in enacting a policy, policymakers could have reasonably foreseen that the policy would lead to police misconduct, the causation requirement is satisfied.

85 *See* Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 691 (1978) ("In particular, we conclude that a municipality cannot by held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.").

86 436 U.S. 658 (1978).

87 *Id.* at 691, 694. *Monell* overruled Monroe v. Pape, 365 U.S. 167 (1961), in which the Court had held that municipalities were not suable "persons" under § 1983. *Monell*, 436 U.S. at 700.

88 471 U.S. 808, *reh'g denied*, 473 U.S. 925 (1985). The facts in *Tuttle* involved the shooting death of the plaintiff's husband by an officer investigating an alleged robbery in progress. The plaintiff based her § 1983 action on alleged inadequate training or supervision which constituted "deliberate indifference" or "gross negligence" by officials in charge. *Id.* at 812-13.

89 *Id.* at 823.

90 *Id.* at 823-24. *But see* Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) (holding that a single decision of a municipal policymaker can create municipal liability under § 1983).

91 *Tuttle*, 471 U.S. at 824; Sarus v. Rotundo, 831 F.2d 397 (2d Cir. 1987).

92 *Sarus*, 831 F.2d at 400-01.

93 *Id.* at 400; *Tuttle*, 471 U.S. at 824. "The fact that a municipal 'policy' might lead to 'police misconduct' is hardly sufficient to satisfy *Monell*'s requirement that the particular policy be the 'moving force' behind a *constitutional* violation." *Tuttle*, 471 U.S. at 824 n.8.

94 Dodd v. City of Norwich, 827 F.2d 1, 6 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 701 (1988).

Thus, although each case of police brutality has unique facts affecting municipal liability, a single brutal act by an officer is almost never enough to establish a policy that would render the municipality liable.[95] Instead of focusing on a single act, the courts look closely at causation and at whether the officer's act was the product of a municipal policy.

2. Governmental Immunity

After a victim determines who is legally responsible, the victim must confront the issue of governmental immunity. In examining governmental immunity, the immunity of the municipality and the immunity of the officer raise separate considerations. With respect to immunity for the municipality, the Court announced in *Owen v. City of Independence*[96] that a municipality has no immunity from liability under section 1983.[97] The Court also held that the municipality may not assert the good faith of its officers as a defense to municipal liability.[98]

The same is not true for police officers. While a police officer cannot assert absolute immunity, the officer may be able to assert a qualified immunity defense.[99] In *Pierson v. Ray*,[100] the Supreme Court held that an officer may assert a defense of good faith in response to a section 1983 action.[101] The Court allowed the officer to raise the defense because the defense was available in the related common-law actions of false arrest and false imprisonment.[102]

Although an officer can invoke a qualified immunity, it took fifteen years for the courts to set out a clear standard for the qualified immunity defense. In *Harlow v. Fitzgerald*,[103] the Court declared: "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly*

95 *See* Chestnut v. City of Quincy, 513 F.2d 91, 92 (5th Cir. 1975) (the remote and unrecorded prior incident in which the officer was implicated, and the police chief's inaction, were insufficient to raise an inference regarding liability). *Cf.* Rookard v. Health & Hosps. Corp., 710 F.2d 41, 45 (2d Cir. 1983) ("A single unlawful discharge, if ordered by a person 'whose edicts or acts may fairly be said to represent official policy,' may support an action against the municipal corporation.") (citation omitted).

96 445 U.S. 622, *reh'g denied*, 446 U.S. 993 (1980).

97 *Id.* at 635-38.

98 *Id.* at 638. The court stated:

> Where the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded the City of Independence by the Court of Appeals. We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to a liability under § 1983.

Id.

99 Pierson v. Ray, 386 U.S. 547, 555-57 (1967). *See also* Annotation, *Defense of Good Faith in Action for Damages Against Law Enforcement Official Under 42 USCS § 1983, Providing for Liability of Person Who, Under Color of Law, Subjects Another to Deprivation of Rights*, 61 A.L.R. FED. 7 (1983).

100 386 U.S. 547 (1967).

101 *Id.* at 557.

102 *Id. See also supra* note 98 for the Court's disposition of a municipality's ability to assert a defense of good faith of its officers.

103 457 U.S. 800 (1982).

established statutory or constitutional rights of which a reasonable person would have known."[104]

In *Harlow*, the Court adopted a purely objective standard for determining whether an officer was immune from liability under a section 1983 action. In deciding the immunity question, a court must determine whether the officer knows his conduct is unlawful and therefore objectively unreasonable.[105] Reliance on an objective standard allows the court to evaluate officer immunity without assessing the officer's state of mind. Since a police officer is expected to know the law, the judicial inquiry is simply whether the officer violated "clearly established constitutional rights."[106]

3. Damages

After the victim determines who is legally responsible and faces governmental immunity, the victim must consider what type of damages are recoverable. The legislative history of section 1983 contains very little information concerning damages.[107] Consequently, courts have looked to the common law of torts for guidance.[108]

The common law provides for the award of both punitive and compensatory damages in section 1983 actions.[109] More specifically, in excessive force actions, the jury may award both compensatory and punitive damages against the individual police officer.[110] However, the municipality is only liable for compensatory damages.[111] The courts' refusal to award punitive damages against a municipality has persisted in a vast majority of jurisdictions.[112] The reasons behind this common-law tradition are simple. First, courts view punitive damages as contrary to sound public policy because "such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised."[113] Second, "compensation is an obligation properly shared by the munici-

104 *Id.* at 818 (emphasis added).

105 *Id.*

106 Hall v. Ochs, 817 F.2d 920, 924 (1st Cir. 1987) (holding that it was unreasonable for an officer to hold the plaintiff in custody solely because he refused to promise not to sue his captors).

107 Carey v. Piphus, 435 U.S. 247, 255 (1978).

108 *Id.* at 258-59.

109 City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267-68 (1981).

110 *Id.* at 267, 269.

111 *Id.* at 259. The court stated:

> [A]n award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. . . . Punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

Id. at 267.

112 *See, e.g.*, Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965); Lauer v. Young Men's Christian Assn. of Honolulu, 57 Haw. 390, 557 P.2d 1334 (1976); Town of Newton v. Wilson, 128 Miss. 726, 91 So. 419 (1922); Brown v. Village of Deming, 56 N.M. 302, 243 P.2d 609 (1952); Ranells v. City of Cleveland, 41 Ohio St. 2d 1, 321 N.E.2d 885 (1975); Smith v. District of Columbia, 336 A.2d 831 (D.C. App. 1975).

113 *Newport*, 453 U.S. at 263.

pality itself, whereas punishment properly applies only to the actual wrongdoers."[114]

With respect to compensatory damages, the plaintiff can recover for physical and emotional pain,[115] and for lost wages suffered as a result of the incident.[116] The law permits the jury to award punitive damages under section 1983 "when the defendant's conduct is shown to be motivated by evil intent or when it involves reckless or callous indifference to the federally protected rights of others."[117]

4. Insurance Considerations

After determining who is legally responsible, evaluating whether immunity applies, and assessing what type of damages are recoverable, the victim of police brutality will usually sue both the municipality and the individual police officer for compensatory and punitive damages.[118] Despite the allure of recovering compensatory and punitive damages from the officer, the average police patrol officer earns some $21,700 per year and hardly provides a "deep pocket" to satisfy a judgment.[119] Realistically, victim recovery turns on indemnity under liability insurance.

Almost all municipalities have comprehensive general liability policies[120] to cover judgments for compensatory damages.[121] In fact, some state legislatures have passed laws requiring cities to insure their police officers.[122] Even though the municipality and the officer may be covered by insurance, insurance will not indemnify the insured for intentional in-

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114 *Id.*

115 O'Neill v. Krzeminski, 839 F.2d 9, 13 (2d Cir. 1988).

116 *Id. See also* Henry v. Gross, 803 F.2d 757, 768 (2d Cir. 1986).

117 Smith v. Wade, 461 U.S. 30, 56 (1983).

118 The victim may choose not to sue both parties and instead proceed against either the officer or the municipality for strategic purposes. In evaluating strategies, the victim must be aware of the requirements of FED. R. CIV. P. 11. *See* Ripple & Saalman, *Rule 11 in the Constitutional Case*, 63 NOTRE DAME L. REV. 788 (1988). If the victim sues only the municipality, damages are limited to compensatory damages. If the victim sues only the individual officer, recovery can include both compensatory and punitive damages.

119 U.S. Dept. of Labor, Bureau of Labor Statistics, 1988-89 OCCUPATIONAL OUTLOOK HANDBOOK 262, 264 (Apr. 1988).

120 Other types of insurance are available. For example, municipalities often purchase personal injury liability coverage. *See generally* Farley, *Insurance Coverage in Civil Rights Cases*, 20 IDAHO L. REV. 615 (1984). In addition, although the comprehensive general liability policy purchased by most municipalities covers only accidents and not intentional acts, it is possible to obtain special insurance coverage. For example, Lloyds of London offers a false arrest liability policy which covers liability imposed by reason of false arrest, assault and battery, false imprisonment, or malicious prosecution. This type of policy covers judgments against insureds for deprivation of civil rights under 42 U.S.C. § 1983. *See* Caplan v. Johnson, 414 F.2d 615, 616-17 (5th Cir.), *reh'g denied*, 417 F.2d 781 (5th Cir. 1969).

121 With respect to punitive damages, a narrow majority of states prohibit insurance coverage of punitive damages because such coverage is against public policy. *See, e.g.*, Hartford Accident & Indem. Co. v. Village of Hempstead, 48 N.Y.2d 218, 228, 397 N.E.2d 737, 744, 422 N.Y.S.2d 47, 54 (1979); Beaver v. Country Mut. Ins. Co., 95 Ill. App. 3d 1122, 1124, 420 N.E.2d 1058, 1060 (1981). *See* Chen, *Insurance of Section 1983 Punitive Damages: Wrong Law, Wrong Result*, 51 INS. COUNS. J. 533 (1984). *See generally* Annotation, *Liability Insurance Coverage as Extending to Liability for Punitive or Exemplary Damages*, 20 A.L.R.3d 343 (1968). *Cf.* Fagot v. Ciravola, 445 F. Supp. 342, 345 (E.D. La. 1978).

122 *See* Annotation, *Validity and Construction of Statute Authorizing or Requiring Governmental Unit to Procure Liability Insurance Covering Public Officers or Employees for Liability Arising Out of Performance of Public Duties*, 71 A.L.R.3d 6 (1976).

juries[123] because of public policy interests.[124] In the interest of deterring tortious conduct, courts make an insured liable for his intentional actions.

A fourth amendment "reasonableness" test would further victim recoveries under general liability policies. Police conduct found to be "unreasonable" would fall within a tort negligence standard. Municipal insurance covers negligent police conduct, and unless the objectively unreasonable conduct is aggravated by other factors, the insurance would compensate victims of unreasonable police conduct. Thus, a victim who receives a judgment under a "reasonableness" test is positioned to recover from the insurer.

On the other hand, when an officer acts with a retaliatory motive or with malice, the conduct exceeds a standard of mere negligence and rises to the level of intentional conduct. Consequently, when the victim receives a judgment under a "shock the conscience" test, the victim will likely be precluded from recovery under a municipal insurance policy covering the officer.

B. *Judicial Efficiency*

Another of the overriding policy concerns relevant in evaluating the proper standard in excessive force claims is the burden such a standard will place on the court system.[125] A proper test should facilitate summary disposition of cases that lack merit.[126] Well-documented evidence reveals that courts are bogged down with the ever-increasing litigation of today's society.[127] Moreover, the court system is always seeking to keep needless litigation from proceeding to trial.[128] Summary judgment is an

123 *See* Ritter v. Mutual Life Ins. Co., 169 U.S. 139, 153 (1898) ("[I]t is well settled that although a policy . . . may cover a loss attributable merely to the negligence or carelessness of the insured . . . it will not cover a destruction of the property by the wilful act of the assured himself."); R. KEETON, INSURANCE LAW § 5.3(f) (1988).

124 Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793, 795 (4th Cir. 1949), *cert. denied*, 339 U.S. 914 (1950) (it is contrary to public policy to permit an insured to profit by his own wrongdoing); Isenhart v. General Casualty Co. of Am., 233 Or. 49, 50, 377 P.2d 26, 27 (1962) ("It is generally held that it is contrary to public policy to indemnify the insured for losses arising out of his commission of an intentional act which causes damage to another.").

125 Courts consider weeding out insubstantial civil rights claims to be an important public policy:

> In recent years there has been an increasingly large volume of cases brought under the Civil Rights Act. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants—public officials, policemen and citizens alike, considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.

Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976).

126 The Supreme Court has noted that litigation itself is not "an evil." Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 643 (1985). "Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. . . . That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride." *Id.*

127 *See supra* note 22 for statistics on the increasing number of federal civil cases filed.

128 *See* Butz v. Economou, 438 U.S. 478, 507 (1978) ("Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading."); Hansen v. Meese, 675 F. Supp. 1482, 1485 (E.D. Va. 1987) ("The Court has consistently urged the lower courts to dispose of meritless allegations of constitutional violations at early stages of litigation.").

exemplary touchstone to determine whether a standard can be effectively and efficiently applied by courts.[129]

As stated above, the fourteenth amendment "shock the conscience" standard is rooted in a subjective analysis of a police officer's motivation surrounding the use of force.[130] Consideration of malice, the subjective state of mind of an officer, makes a summary judgment determination difficult. In fact, courts deem summary judgment inappropriate in situations where state of mind is being addressed.[131] This inappropriateness is based on the underlying policy of summary judgment. Proof of malice does not lend itself to a finding that no genuine issue of material fact exists or that judgment should be rendered as a matter of law.[132] As a result, subjective inquiry will permit more, not less, litigation for government officials and should therefore not be used. The Supreme Court itself declared, "it is now clear that substantial costs attend the litigation of the subjective good faith of government officials."[133]

Conversely, the objective "reasonableness" standard of the fourth amendment does allow for summary disposition of cases under section 1983. An objective test allows a court to evaluate the factual statements in the affidavits and make a determination of "reasonableness." Under an objective test, a court need not delve into the minds of police officers to establish intent. Judges, under a fourth amendment standard, can take even conflicting affidavits,[134] make inferences in the non-moving party's favor, and possibly render a summary disposition of the case. Certainly no effort is being made to obviate trials for offenses under section 1983 or other theories.[135] However, only through the objective

129 "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (citations omitted). Further, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) (quoting advisory committee note to 1963 Amendment of FED. R. CIV. P. 56(e), 28 U.S.C. app., p. 7823 (1970)). *See also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

130 *See supra* notes 61-74 and accompanying text for a discussion of the "shock the conscience" standard.

131 *See generally* Harlow v. Fitzgerald, 457 U.S. 800 (1982). *See also* Foster v. Swift & Co., 615 F.2d 701 (5th Cir. 1980) (holding that summary judgment is especially questionable when intent as to employment discrimination is in question); Hayden v. First Nat'l, 595 F.2d 994 (5th Cir. 1979) (same); Teledyne Indus. v. Eon Corp., 373 F. Supp. 191 (S.D.N.Y. 1974) (holding that summary judgment is inappropriate when intent in fraud claims is in question).

132 *See* FED. R. CIV. P. 56.

133 *Harlow*, 457 U.S. at 816. *Harlow* goes on to discuss the impediment that litigation of subjective good faith would create. The Court concluded that "[i]nquiries of this kind can be particularly disruptive of effective government." *Id.* at 817. *See also id.* at 817 n.29.

134 The affidavit requirements in a summary judgment motion are detailed in FED. R. CIV. P. 56.

135 Section 1983 is not the only avenue of redress open to plaintiffs. State statutory and tort law provide remedies as well. The same act may constitute a state tort (wrongful death, negligent hiring, assault, or battery), deprivation of a constitutional right, and a § 1983 violation, according to Monroe v. Pape, 365 U.S. 167 (1961). *See generally* Bandes, *Monell, Parratt, Daniels, and Davidson: Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101 (1986); Bacharach, *Section 1983 and the Availability of a Federal Forum: A Reappraisal of the Police Brutality Cases*, 16 MEM. ST. U.L. REV. 353 (1986). Some states have also enacted provisions analogous to § 1983. *See, e.g.*, N.Y. EXEC. LAW §§ 290-301 (McKinney 1982); MASS. ANN. LAWS ch. 12, §§ 11h-11j (Law. Co-op. 1988). The question of exhaustion of state administrative remedies can be relevant to whether a federal remedy is even available. *See* Annotation, *Exhaustion of State Administrative Remedies*

"reasonableness" standard, which inherently lends itself to summary disposition, is it possible to accomplish the policy goal of freeing up the federal courts.

C. *Consequences for Law Enforcement*

The practical consequences of using a fourth amendment benchmark are significant. While deterring abuse of state power, such as that exercised by police in excessive force cases, is an important purpose of section 1983,[136] the proper standard for police conduct must also provide officers with a reasonable amount of authority to combat violent crime. At first blush, the fourth amendment standard seems anti-law enforcement because it appears to constrain officers more than a fourteenth amendment test. However, a lower standard that can be applied fairly, consistently, and efficiently is more effective than a higher standard that courts apply unpredictably.[137]

On closer examination, the fourth amendment provides adequate protection for officers. The fourth amendment does not guarantee a "flawless"[138] arrest and "the Fourth Amendment does not require the police to use the minimum number of officers to make an arrest."[139] Rather, the thrust of the fourth amendment standard is "reasonableness." This creates a standard that officers can follow. Not every "push and shove an officer makes during an arrest"[140] will render the officer liable under section 1983. The fact that an officer acted with a "retaliatory motive,"[141] or with "maliciousness,"[142] is irrelevant.[143] These factors do not affect the amount of force used by the officer. Consequently, the arrestee is only protected against force which is "objectively unreasonable in light of the rapidly unfolding sequence of events."[144] The fourth amendment grants the police officer foreknowledge of the standard under which the officer will be judged,[145] and through its objective nature, that force will be judged alone with no consideration of irrelevant, subjective factors.

IV. Conclusion

Subjective factors have no place in evaluating the liability of police officers in excessive force in arrest claims under section 1983. Requiring

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as Prerequisite to Federal Civil Rights Action Based on 42 USCS § 1983, 47 A.L.R. FED. 15 (1980). *See supra* notes 96-106 and accompanying text for a discussion of governmental immunity.

136 Newport v. Fact Concerts, Inc., 453 U.S. 247, 268 (1981) ("deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983").

137 Anderson v. Creighton, 107 S. Ct. 3034, 3042 (1987) (citing Davis v. Scherer, 468 U.S. 183, *reh'g denied*, 468 U.S. 1226 (1984)).

138 Martin v. Gentile, 849 F.2d 863, 870 (4th Cir. 1988).

139 Gumz v. Morrissette, 772 F.2d 1395, 1408 (7th Cir. 1985) (Easterbrook, J., concurring).

140 Lester v. City of Chicago, 830 F.2d 706, 712 (7th Cir. 1987).

141 Hansen v. Meese, 675 F. Supp. 1482, 1487 (E.D. Va. 1987).

142 *Lester*, 830 F.2d at 712.

143 Although these factors are irrelevant in a fourth amendment analysis, malice and motive are indispensable elements of a due process cause of action. *See supra* notes 61-74 and accompanying text.

144 Martin v. Malhoyt, 830 F.2d 237, 262 (D.C. Cir. 1987).

145 *See supra* note 137 and accompanying text.

malice and severe injury in excessive force cases fails to adequately guarantee that victims will be compensated, results in inefficient use of judicial resources, and hampers law enforcement efforts. The status quo, with its hodge-podge of standards and theories, is endangering these goals. Consequently, courts need to adopt a *single* standard, the *Lester* "reasonableness" test, to bring congruence to a disjointed area of the law.

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