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County of Los Angeles v. Mendez: Defending the Constitutionality of the "Provocation Rule"

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COUNTY OF LOS ANGELES V. MENDEZ: DEFENDING THE CONSTITUTIONALITY OF THE "PROVOCATION RULE"

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I. INTRODUCTION

The Fourth Amendment of the United States Constitution ensures the right of the people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[1] Additionally, it ensures that "no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[2] This amendment has been a cornerstone in the discussion on law enforcement and its use of force, abuse of power, and the interaction between the police and the public. Recently, the Supreme Court of the United States weighed in on this discussion in *County of Los Angeles v. Mendez*.[3] On May 30, 2017, the Court overruled in part and remanded in part the Ninth Circuit's ruling in *Mendez v. County of Los Angeles*.[4]

In *Mendez v. County of Los Angeles*, the Ninth Circuit held that police officers can be sued when they use reasonable force if they have unlawfully entered a premises in violation of the Fourth Amendment, thereby violating an individual's right to privacy; this is known as the "Provocation Rule."[5] The Provocation Rule provides that "if a police officer recklessly promotes a potentially violent confrontation with a Fourth Amendment violation, the officer is liable for any injury caused

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1. U.S. CONST. amend. IV.
2. *Id.*
3. 137 S. Ct. 1539 (2017).
4. 815 F.3d 1178 (9th Cir. 2016), *vacated*, 137 S. Ct. 1539 (2017).
5. Id. at 1193–94.

by a subsequent use of force that results from that confrontation, even if the use of force itself was reasonable."[6]

The Supreme Court overturned this "Rule," holding it unconstitutional.[7] This Comment analyzes the Supreme Court's decision regarding the constitutionality of the Provocation Rule, and the question of whether the officers' use of force and the resulting injury would have been prevented had the officers secured a search warrant.

II. STATEMENT OF THE CASE

In October 2010, an arrest warrant was issued for Ronnie O'Dell, "who was believed to be armed and dangerous."[8] Officers Conley and Pederson of the Los Angeles County Sheriff's Department were among the officers assigned to capture O'Dell.[9] They received a tip that O'Dell was residing at the home of Paula Hughes in Lancaster, California, and pursued the tip.[10] Officers were instructed to go to the front door and confront Hughes, and Officers Conley and Pederson were instructed to go and search the back of the residence.[11] The officers at the front door entered the residence without displaying a warrant, despite Hughes's request to see one.[12] However, they did not find O'Dell in the house.[13] Meanwhile, Officers Conley and Pederson were behind the house and found three sheds, one of which was occupied by Angel Mendez and a pregnant woman, Jennifer Garcia (now Jennifer Mendez).[14] Mendez and Garcia had been living in this shack in Hughes's backyard for about 10 months at that time, and Mendez had built the shed himself.[15] The officers were unaware of the presence of Mendez and Garcia, and entered the shed without a search warrant, knocking, or announcing themselves.[16]

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6. Radley Balko, *SCOTUS Eliminates the 'Provocation Rule'*, THE WASH. POST (May 30, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/05/30/scotus-eliminates-the-provocation-rule/?utm_term=.71cbf6dddfde.
7. *Mendez*, 137 S. Ct. at 1544.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

Mendez and Garcia were inside the shed, napping on a futon.[17] When the officers entered, Mendez woke up and picked up a BB gun he was holding so as to set it down on the floor, as he thought it was Hughes who had entered the shed.[18] Mendez kept this BB gun for fending off rats and other pests that lived outside.[19] The officers assert that Mendez pointed the gun "somewhat south towards Deputy Conley," so they opened fire and fired fifteen rounds, severely injuring both Mendez and Garcia.[20] Mendez's injuries resulted in the amputation of his leg.[21]

Mendez and Garcia filed suit in federal court against the County of Los Angeles and Officers Conley and Pederson, asserting three Fourth Amendment claims: (1) "the deputies executed an unreasonable search by entering the shack without a warrant"; (2) "the deputies performed an unreasonable search because they failed to announce their presence before entering the shack"; and (3) "the deputies effected an unreasonable seizure by deploying excessive force in opening fire after entering the shack."[22]

The District Court found the officers responsible for the first two claims, failing to announce presence before entering and entering without a warrant, but found that the officers did not use unreasonable force since they were under the reasonable belief that a gun was pointed at them and threatening them.[23] However, the District Court invoked the Ninth Circuit's "Provocation Rule."[24] The Provocation Rule holds that "an officer's otherwise reasonable (and lawful) defensive use of force is unreasonable as a matter of law, if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation."[25] Consequently, "the District Court held the deputies liable for excessive force and awarded [Mendez] $4 million in damages."[26]

17. *Id.*
18. *Id.* at 1544–45.
19. *Id.* at 1544.
20. *Id.* at 1545.
21. *Id.*
22. *Id.*
23. *Id.*; *see also* Graham v. Connor, 490 U.S. 386, 397 (1989) (holding that use of force was reasonable if the officers were under a reasonable belief that a firearm was threatening their lives).
24. Mendez v. Cty. of Los Angeles, No. CV 11-04771-MWF (PJWx), 2013 U.S. Dist. LEXIS 115099, at *65–66 (C.D. Cal. Aug. 13, 2013).
25. *Mendez*, 137 S. Ct. at 1545.
26. *Id.*

The County and officers appealed to the Ninth Circuit Court of Appeals, which affirmed in part and reversed in part the District Court's ruling.[27] In pertinent part, the Ninth Circuit ultimately affirmed the District Court's interpretation of the Provocation Rule.[28] It affirmed that the Provocation Rule only requires "that the deputies' unconstitutional conduct 'created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable,'"[29] and that here, the officers "recklessly or intentionally" brought about the shooting by unlawfully entering the shack.[30] However, it used a different approach for its analysis, concluding that "'basic notions of proximate cause' would support liability even without the Provocation Rule because it was 'reasonably foreseeable' that the officers would meet an armed homeowner when they 'barged into the shack unannounced.'"[31]

The United States Supreme Court then granted certiorari, and on May 30, 2017, issued an opinion overturning in part and remanding in part the decision by the Ninth Circuit Court of Appeals.[32]

III. REASONING OF THE COURT

In its opinion, the Supreme Court focused on the constitutionality of the Ninth Circuit's Provocation Rule.[33] Under the Ninth Circuit's reasoning, the Provocation Rule may apply if police force has been deemed reasonable by the standards set out in *Graham v. Connor*, 490 U.S. 386 (1989).[34] The rule then "instructs the court to ask whether the law enforcement officer violated the Fourth Amendment in some other way in the course of events leading up to the seizure."[35] If there is a separate Fourth Amendment violation, it may "render the officer's otherwise *reasonable* defensive use of force *unreasonable* as a matter of law."[36] To start with, the Court asserted that the definitions of the

27. Mendez v. Cty. of Los Angeles, 815 F.3d 1178 (9th Cir. 2016), *vacated*, 137 S. Ct. 1539 (2017).

28. *Id.*

29. *Id.* at 1193 (quoting Espinosa v. City & Cty. of San Francisco, 598 F.3d 528, 539 (9th Cir. 2010)).

30. *Id.* at 1194.

31. *Id.* at 1194–95.

32. Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017).

33. *See id.* at 1546–49 (discussing the constitutionality of the Ninth Circuit's Provocation Rule).

34. *Id.* at 1546–47.

35. *Id.* at 1546.

36. *Id.* (quoting Billington v. Smith, 292 F.3d 1177, 1190–91 (9th Cir. 2002)).

two claims differ:

> an excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances. It is not a claim that an officer used reasonable force after committing a distinct Fourth Amendment violation such as an unreasonable entry.[37]

The Court went on to assert that conflating excessive force claims with other Fourth Amendment claims, as is done through the Provocation Rule, is incorrect.[38] If the elements of an excessive force claim set out in *Graham* are not met, then there is no excessive force claim, and the analysis should end there.[39] The analysis for any other Fourth Amendment claim should be conducted separately.[40] The Court noted that, although the Ninth Circuit attempted to limit the use of the Provocation Rule "to only those distinct Fourth Amendment violations that in some sense 'provoked' the need to use force," this limitation is riddled with problems.[41] The test for whether "provocation" has occurred is (1) "the separate constitutional violation '[created] a situation which led to' the use of force," and (2) "the separate constitutional violation must [have been] committed recklessly or intentionally."[42]

The Court held that the first prong of the test, whether the violation created a situation that led to the use of force, is a "vague causal standard" that deviates from the normal proximate cause test that courts are familiar with.[43] Additionally, the Court held that the second prong of the test is a subjective standard looking at the intent of the officers, while the "reasonableness of a search or seizure is almost always based on objective factors."[44]

The Court further asserted that the purpose of the Provocation Rule, holding law enforcement "liable for the foreseeable consequences of all of their constitutional torts," is one that can be

37. *Id.*
38. *See id*.
39. *Id.*
40. *Id.*
41. *Id.* at 1548.
42. *Id.* (quoting Mendez v. Cty. of Los Angeles, 815 F.3d 1178, 1193 (9th Cir. 2016)).
43. *Id*.
44. *Id.*

achieved through other means of the law.[45] Even if plaintiffs cannot seek relief through a claim of excessive force, if the officers entered unlawfully or without a warrant, they can seek damages on those claims alone.[46]

The Court further overturned the Ninth Circuit's proximate cause conclusion.[47] The Ninth Circuit held that the injury was "proximately caused" by the warrantless entry of Mendez's shack.[48] Instead of analyzing the foreseeability of the risk created by the warrantless entry, as would be proper since the warrantless entry was the applicable constitutional violation, the Ninth Circuit analyzed the causal proximity between the "unannounced" entry and the shooting. The Court held that this was an improper analysis because the officers were not liable for the "unannounced" entry due to qualified immunity.[49]

The Court did not, however, completely dismiss the Ninth Circuit's proximate cause theory.[50] In fact, it remanded the issue and ordered the court of appeals to apply a proximate cause analysis to the applicable violation, which was the warrantless entry.[51] The Court further ordered the Ninth Circuit to apply a traditional proximate cause analysis to this issue, rather than the "murky causal link" it applied in its decision.[52]

IV. HISTORICAL FRAMEWORK

The Provocation Rule was first addressed by the Ninth Circuit in *Alexander v. City & County of San Francisco*.[53] In *Alexander*, police officers and a hostage negotiation team were sent to a man's house with a forcible entry inspection warrant due to the resident's

45. *See id.*
46. *Id.*
47. *See id.* at 1549.
48. Mendez v. Cty. of Los Angeles, 815 F.3d 1178, 1193 (9th Cir. 2016), *vacated*, 137 S. Ct. 1539 (2017).
49. *Mendez*, 137 S. Ct. at 1549. "Qualified immunity is an immunity from civil suit extended to police officers, administrators, and other public officials who are alleged to have violated the rights of a person while the official was performing a discretionary function of office, if the official's conduct does not violate a clearly established statutory or constitutional right that would have been known to a reasonable person." *Qualified Immunity*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed. 2011).
50. *See Mendez*, 137 S. Ct. at 1549.
51. *Id.*
52. *See id.*
53. 29 F.3d 1355 (9th Cir. 1994).

unresponsiveness and failure to comply with housing inspection requests and orders.[54] When the officers and negotiators arrived, the resident, Quade, refused to let them in and threatened to use his gun.[55] The officers in turn entered with the intent of arresting him, but Quade fired his gun and shots were exchanged, resulting in Quade's death.[56] The Ninth Circuit found that if the officers entered Quade's house with the intention of arresting him, they violated his Fourth Amendment rights since they only had an inspection warrant rather than an arrest warrant.[57] The court further found that summary judgment was inappropriate in regard to whether excessive force was used:

> The force which was applied must be balanced against the *need* for that force: it is the need for force which is at the heart of the consideration of the *Graham* factors. If the jury were to find that the officers entered in order to help the inspectors inspect . . . then the jury may also conclude that the force used . . . was excessive in relation to the purpose for which it was used . . . . On the other hand, if the jury were to conclude that the officers entered for the purpose of arresting Quade, they may conclude that storming the house was in fact commensurate with need (arresting a man who had threatened to shoot anyone who came into his house), and hence that the force was reasonable.[58]

The lack of an arrest warrant caused reasonable force to become unreasonable, even if the force used was reasonable in the moment of the shooting itself.[59] By connecting the use of force to the purpose of entry, the court essentially held that a jury could have found that a lack of a warrant would have made the force unreasonable since the officers "used excessive force in creating the situation which caused Quade to take the actions he did."[60] In finding that a jury could have found that an unlawful entry led to a situation in which force was provoked, the court laid the foundation for the Provocation Rule.[61]

54. *Id.* at 1358.
55. *Id.*
56. *Id.*
57. *Id.* at 1360.
58. *Id.* at 1367.
59. *See id.* at 1366 n.12.
60. *Id.* at 1366.
61. *See id.* at 1367.

In another excessive force case, *Billington v. Smith*,[62] the Ninth Circuit succinctly interpreted the standard set out in *Alexander*:

> [W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force. In *Alexander*, the officers allegedly used excessive force because they committed an independent Fourth Amendment violation by entering the man's house to arrest him without an arrest warrant, for a relatively trivial and non-violent offense, and this violation provoked the man to shoot at the officers. Thus, even though the officers reasonably fired back in self-defense, they could still be held liable for using excessive force because their reckless and unconstitutional provocation created the need to use force.[63]

In *Espinosa v. City & County of San Francisco*,[64] an excessive force case with facts similar to those in *Mendez*, the Ninth Circuit further applied the Provocation Rule.[65] Officers entered an attic and shot a man because one of the officers "believed that he saw something black in [the man's] hand that looked like a gun," even though the man did not have a weapon or make any threats.[66] The court denied the defendants' motion for summary judgment because there was "evidence that the illegal entry created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable."[67] This established that provocation does not require the act to elicit a violent response from a plaintiff; the officers simply must act unconstitutionally, and the unconstitutional act must lead to a shooting or use of deadly force.[68]

V. ANALYSIS

The Ninth Circuit's Provocation Rule asserts that "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he

62. 292 F.3d 1177 (9th Cir. 2002).
63. *Id.* at 1189.
64. 598 F.3d 528 (9th Cir. 2010).
65. *See id.*
66. *Id.* at 533.
67. *Id.* at 539.
68. *See id.*; *see also* Mendez v. Cty. of Los Angeles, 815 F.3d 1178, 1193 (9th Cir. 2016).

may be held liable for his otherwise defensive use of deadly force."[69] Liability can attach to officers if their unconstitutional conduct—unlawful entry, for example—"created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable."[70]

In *Mendez*, the Supreme Court rejected the Ninth Circuit's Provocation Rule for several reasons: (1) the rule conflates two different Fourth Amendment violations that require two different analyses; (2) the test used to enforce the "provocation" limitation is incorrect; and (3) the purpose of the rule, to hold law enforcement officials liable for their actions, can be achieved through other means.[71] The Court further asserted that the causation analysis conducted by the Ninth Circuit was incomplete and vague.[72] This Comment analyzes the constitutionality of the Provocation Rule, namely whether an excessive force claim and an unlawful entry claim can be analyzed together, and the causal connection between the unlawful entry and resulting harm in *Mendez*.

A. Excessive Force Claim Analysis

The analysis for determining whether excessive force has been used was set out in *Graham v. Connor*.[73] The Court in *Graham* established that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[74] The Court held that because "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation," the analysis must consider the position and specific circumstances that the officers may be in.[75] As with other analyses that use the reasonableness standard, in an excessive force analysis, "the 'reasonableness' inquiry . . . is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their

69. Billington v. Smith, 292 F.3d 1177 (9th Cir. 2002).
70. *Espinosa*, 598 F.3d at 539.
71. *See* Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1546–48 (2017).
72. *Id.* at 1548–49.
73. 490 U.S. 386 (1989).
74. *Id.* at 396.
75. *Id.* at 396–97.

underlying intent or motivation."[76]

In assessing reasonableness, the court must also balance the "extent of the intrusion on the individual's Fourth Amendment rights against the government's interest," i.e., the court must balance the "force that was used by the officers against the need for such force."[77] In evaluating the government's interest, courts consider "(1) the severity of the crime; (2) whether the suspect posed an immediate threat to the officers' or public's safety; and (3) whether the suspect was resisting arrest or attempting to escape."[78] In assessing the extent of intrusion upon the individual's Fourth Amendment rights, courts must evaluate "the type and amount of force inflicted."[79] Lastly, courts "balance the gravity of the intrusion on the individual against the government's need for that intrusion."[80] Additionally, "the parties 'relative culpability' *i.e.*, which party created the dangerous situation and which party is more innocent, may also be considered."[81]

B. Unlawful Entry Claim Analysis

Although assessing an unlawful entry claim also analyzes whether the entry was reasonable or unreasonable, "[u]nder the Fourth Amendment, warrantless searches inside a home are 'presumptively unreasonable.'"[82] A violation of the knock-and-announce rule will also constitute an unlawful search or seizure under the Fourth Amendment.[83] "The most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established

76. *Id.* at 397; *see also* Terry v. Ohio, 392 U.S. 1, 21 (1968) (holding that in analyzing the reasonableness of a particular search or seizure, "it is imperative that the facts be judged against an objective standard . . . .").

77. Espinosa v. City & Cty. of San Francisco, 598 F.3d 528, 537 (9th Cir. 2010).

78. *Id.*; *Graham*, 490 U.S. at 396.

79. *Espinosa*, 598 F.3d at 537 (quoting Miller v. Clark Cty., 340 F.3d 959, 964 (9th Cir. 2003)).

80. *Id.* (quoting *Miller*, 340 F.3d at 964).

81. *Id.*

82. Walters v. Freeman, 572 F.App'x 723, 727 (11th Cir. 2014) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

83. Lusine Ajdaharian, *Knocking Down the "Knock-and-Announce" Rule: A Casenote on* Hudson v. Michigan, 29 WHITTIER L. REV. 183, 183 (2007); *see* 18 U.S.C. § 3109 (2012) ("The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.").

and well delineated exceptions."[84] Such exceptions include exigent circumstances under which a warrant could not be obtained.[85] The burden of showing exigency rests on the government to "demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries."[86] In order to show this, the government must prove that "the exigencies of the situation made that course imperative."[87]

Courts have found exigent circumstances that allow a warrantless entry in situations "where there is danger to human life, [and] protection of the public becomes paramount and can justify a limited, warrantless intrusion into the home."[88] Such circumstances also depend "somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it."[89]

C. Similarities Between the Two Analyses

While the analyses for an unlawful entry claim and an excessive force claim look to different factors and begin with different presumptions, they share many similarities. The standard in analyzing both claims is one of reasonableness, i.e., whether the force used was reasonable or whether the entry without a warrant was reasonable.[90] Additionally, both look to the specific circumstances and facts of the use of force/entry in assessing reasonableness.[91] Furthermore, they are almost always brought within the same action; generally, if a plaintiff

84. Watson v. City of Bonney Lake, 506 F.App'x 555, 557 (9th Cir. 2013) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971)); *see* Erwin Chemerinsky, *Fourth Amendment Stops, Arrests, and Seizures in the Context of Qualified Immunity*, 25 TOURO L. REV. 781, 791 n.62 (2009) ("[Y]ou are going to have cases where it is obvious that you do not need a case on point because the language of the statute or the language of the constitutional provision is so clear, and the conduct is so wrong that anybody would know that this is unlawful.").

85. *See* Alexander v. City & Cty. of San Francisco, 29 F.3d 1355, 1360 (9th Cir. 1994) (noting that the plaintiff relied on "Payton v. New York, 445 U.S. 573, 590 (1980), in which the Supreme Court held that absent exigent circumstances, police may not enter a suspect's home to make a felony arrest without a warrant."); *see also* Callahan v. Millard Cty., 494 F.3d 891, 899 (10th Cir. 2007) (finding that the law was clearly established that without consent or exigent circumstances, a warrantless entry of the home was unlawful), *rev'd on other grounds*, 555 U.S. 223.

86. *Watson*, 506 F.App'x at 558 (quoting Welsh v. Wisconsin, 466 U.S. 740, 750 (1984)).

87. *Id.* at 557 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971)).

88. Hall v. Smith, 170 F.App'x 105, 106 (11th Cir. 2006) (quoting United States v. Holloway, 290 F.3d 1331, 1334 (11th Cir. 2002)).

89. McDonald v. United States, 335 U.S. 451, 459 (1948).

90. *See* Graham v. Connor, 490 U.S. 386, 397 (1989); Walters v. Freeman, 572 F.App'x 723, 727 (11th Cir. 2014).

91. *See McDonald*, 335 U.S. at 459; *Graham*, 490 U.S. at 398.

brings an unlawful entry claim, they also bring an excessive force claim.[92] The court in *Walters* went as far as to assert that "[b]ecause the facts viewed in the light most favorable to Walters demonstrate that [the officer's] entry into her apartment was unlawful, we must also conclude that they support finding a constitutional excessive-force violation . . . 'if an arresting officer does not have the right to make an arrest, he does not have the right to use any degree of force in making the arrest.'"[93] The same can apply to an unlawful entry claim, since an unlawful arrest and unlawful entry claim are essentially the same violation.[94]

Although seemingly different on their face due to the specific factors and balancing test for an excessive force claim set out in *Graham*, in practice, the analyses of both claims will often lead to the same outcome, particularly through a proximate cause analysis as examined below.[95] Additionally, the *Graham* factors require considering "(1) the severity of the crime; (2) whether the suspect posed an immediate threat to the officers' or public's safety; and (3) whether the suspect was resisting arrest or attempting to escape."[96] All of these factors parallel those the court must look at in determining whether exigent circumstances were present and justified a warrantless entry.[97] If these factors are met, both exigency and reasonable force would be found, and vice versa.

In *Mendez*, the Supreme Court was concerned about finding liability for excessive force based on a successful unlawful entry claim when an excessive force claim would not have survived on its own.[98] Imposing liability on an officer could be a violation of the officer's due process rights because the officer would be held liable based on a

92. *See, e.g.*, Walters, 572 F.App'x at 723.; Watson v. City of Bonney Lake, 506 F.App'x 555 (9th Cir. 2013); Bashir v. Rockdale Cty., 445 F.3d 1323 (11th Cir. 2006); Alexander v. City & Cty. of San Francisco, 29 F.3d 1355 (9th Cir. 1994).

93. *Walters*, 572 F.App'x at 729 (quoting Bashir v. Rockdale Cty., 445 F.3d 1323, 1332 (11th Cir. 2006)).

94. *See* Barragan v. City of Eureka, No. 15-cv-02070-WHO, 2016 U.S. Dist. LEXIS 118603, at *9 (N.D. Cal. Sept. 1, 2016) (holding that an unlawful arrest analysis requires looking to whether it was "objectively reasonable" to carry out such an arrest by assessing the "totality of the circumstances").

95. *See infra* Section E.

96. *Graham*, 490 U.S. at 396; Espinosa v. City & Cty. of San Francisco, 598 F.3d 528, 537 (9th Cir. 2010).

97. *See* McDonald v. United States, 335 U.S. 451, 459 (1948); Hall v. Smith, 170 F.App'x 105, 106 (11th Cir. 2006).

98. Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1547 (2017).

violation that upon immediate examination, did not occur. However, as asserted above and as will be discussed in the proximate cause analysis of the unlawful entry and resulting force, even if the force was not excessive in the isolated circumstance of the shooting itself, both the unlawful entry analysis and the excessive force analysis call for an assessment of all of the surrounding circumstances.[99] Such circumstances must include the means by which the officer entered the premises where he used the force in controversy.[100]

D. Purpose of the Provocation Rule

The principles of the Provocation Rule are familiar with and similar to basic tort law causation principles. In *Monroe v. Pape*,[101] the Supreme Court held that 42 U.S.C. § 1983, which provides a civil remedy for victims of unconstitutional searches and seizures, should be "read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[102] Similarly, the Provocation Rule holds police officers liable for the harm caused by their unlawful entry.[103]

While excessive force and unlawful entry are two different Fourth Amendment violations, there are situations in which an unlawful entry leads to the use of force and resulting injury.[104] If constitutional torts follow the same reasoning as regular tort liability, not only should the force itself be analyzed, but the events leading up to the use of force should also be considered.[105] Indeed, "[p]olice officers should not be allowed to create dangerous situations that leave them with no choice but to use deadly force . . . officers cannot escape liability when their

99. *See Graham*, 490 U.S. at 396–97.

100. *See* Elie Mystal, *The Supreme Court Makes It Even Easier For Cops To Shoot You*, ABOVE THE LAW (May 30, 2017, 1:15 p.m.), https://abovethelaw.com/2017/05/the-supreme-court-makes-it-even-easier-for-cops-to-shoot-you/?rf=1.

101. 365 U.S. 167 (1961).

102. *Id.* at 187.

103. *See Mendez*, 137 S. Ct. at 1545 (District Court found an officer liable on a warrantless entry claim, and two deputies liable on a knock-and-announce claim).

104. James Byrd, *As a Matter of Law and Policy, the Ninth Circuit's "Provocation Rule" Must Stand*, HARV. C.R.-C.L. L. REV. (Feb. 9, 2017), http://harvardcrcl.org/as-a-matter-of-law-and-policy-the-ninth-circuits-provocation-rule-must-stand-2/.

105. *Id.* (stating that the provocation rule is partly motivated by the notion that it is important to hold law enforcement officers liable for the foreseeable consequences of all of their constitutional torts); *see* Billington v. Smith, 292 F.3d 1177, 1190 (9th Cir. 2002) ("[I]f an officer's provocative actions are objectively unreasonable under the Fourth Amendment, . . . liability is established, and the question becomes . . . what harms the constitutional violation proximately caused.").

own unreasonable conduct leads them to use avoidable force."[106] The Provocation Rule merely highlights and applies the belief that "the warrant requirement is preventive rather than remedial."[107] "The warrant process benefits the innocent, law-abiding citizen because it provides a check on the government agent's actions before the agent conducts an unconstitutional search and seizure," which almost undeniably leads to a forceful confrontation at the expense of the victim of the unconstitutional search or seizure.[108]

It is only logical that if an entry into a premises is illegal, the illegality of the entry should have a bearing upon the reasonableness inquiry of the excessive force claim.[109] If the entry is unlawful, officers are "essentially bait[ing] you into a confrontation."[110] The Provocation Rule exists as a mechanism for ensuring that the reasonableness of the entry is factored into the reasonableness of the use of force itself; since the reasonableness of the excessive force calls for assessing the circumstances the officers were in at the time,[111] the reasonableness of how they got into the premises where force was used in the first place is a logical and necessary factor.[112]

Additionally, the Provocation Rule is a mechanism by which plaintiffs can seek relief for injuries caused by police force, even if the force was reasonable at the time of exertion. "[T]hat the Mendezes failed to establish liability for unreasonable force is inapposite to the conclusion that the deputies unlawfully entered the Mendezes' dwelling and thereby caused their injuries."[113] Without the provocation rule, there is no remedy for the injuries caused by the illegal entrance. The rule also gives officers an incentive to obtain warrants, knock, and announce themselves before entering a premises, thereby avoiding inevitable resulting harm.[114]

106. Chiraag Bains, *After Creating Danger, Can Cops Use Force with Impunity?*, THE MARSHALL PROJECT (June 15, 2017), http://www.themarshallproject.org/2017/06/15/after-creating-danger-can-cops-use-force-with-impunity#.2FCCjAIMw[http://perma.cc/7MPK-BSKQ] (last visited Aug. 24, 2018).

107. Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence*, 73 DENV. U. L. REV. 293, 310 (1996).

108. *Id.*

109. Mystal, *supra* note 100.

110. *Id.*

111. *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989).

112. *See* Mystal, *supra* note 100.

113. Byrd, *supra* note 104.

114. *Id.*

E. The Ninth Circuit's Causation Analysis

The Supreme Court found that the Ninth Circuit's causation analysis was insufficient to warrant a finding of a causal connection between the entry and resulting force.[115] It held that "[p]roper analysis of this proximate cause question required consideration of the foreseeability or the scope of the risk created by the predicate conduct, and required the court to conclude that there was some direct relation between the injury asserted and the injurious conduct alleged."[116] It has been established that in analyzing causation of tort claims, an "actor's liability [is] limited to those harms that result[] from the risks that made the actor's conduct tortious."[117] The Provocation Rule brings this causation principle into practice in the context of enforcing Fourth Amendment rights. Additionally, other courts have assessed and found proximate causation between an unlawful entry and the resulting harm.[118]

In applying the Supreme Court's proper proximate cause analysis to the facts in *Mendez*, it is evident that there is a proximate causal connection between the unlawful entry and the force used, which ultimately led to the Mendezes' injuries. The "foreseeability . . . of the risk created"[119] by the unlawful entry was high, considering that the officers did not know who they would find inside the shack; consequently, the possibility of surprise to the individual(s) inside was high due to the officers' failure to announce themselves. This surprise is what led Mendez to quickly pick up the BB gun that was beside his bed when the officers abruptly entered.[120] Had the officers announced themselves, it is highly probably that Mendez's "natural impulse" would not have been to pick up his BB gun, but instead would have

115. Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1549 (2017). In its causation analysis, the Ninth Circuit simply asserted that "an announcement that police were entering the shack would almost certainly have ensured that Mendez was not holding his BB gun when the officers opened the door. Had this procedure been followed, the Mendezes would not have been shot." Mendez v. Cty. of Los Angeles, 815 F.3d 1178, 1193 (9th Cir. 2016).

116. *Mendez*, 137 S. Ct. at 1548–49.

117. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 (AM. LAW INST. 2015).

118. *See, e.g.*, Attocknie v. Smith, 798 F.3d 1252, 1258 (10th Cir. 2015) ("Cherry's entry of Aaron's home was clearly contrary to well-established law. He is not entitled to qualified immunity on the claim of unlawful entry. And because a reasonable jury could determine that the unlawful entry was the proximate cause of the fatal shooting of Aaron . . . we need not decide whether Cherry used excessive force when he confronted Aaron.").

119. *Mendez*, 137 S. Ct. at 1548–49.

120. Mendez v. Cty. of Los Angeles, 815 F.3d 1178, 1193 (9th Cir. 2016).

been to place it on the ground before allowing the officers to enter.[121] "Realizing that officers were nearby, he would have likely kept his BB gun far away from his person."[122] "Without the BB gun element,"[123] the officers would not have thought Mendez was aiming a gun at them, and would have not fired their weapons; consequently, the Mendezes would not have been injured.[124] This "direct relation between the injury asserted and the injurious conduct alleged" would satisfy the Supreme Court's proximate cause analysis.[125]

Furthermore, courts have found that knocking and announcing one's presence can help prevent "violent confrontations that may occur if occupants of the home mistake law enforcement for intruders."[126] In analyzing the causal connection between an unconstitutional entry "which arises from intentional or reckless conduct," courts have also found that such entry would "proximately cause the subsequent application of deadly force."[127]

VI. CONCLUSION

Because the analysis of an unlawful entry claim and an excessive force claim lead to the same conclusion in practice, the effect of the Provocation Rule is not at odds with the Fourth Amendment. Additionally, an independent causation analysis of an unlawful entry and the resulting force shows that an unlawful entry will almost always lead to provoked force and resulting harm; this close causal relationship is at the heart of the Provocation Rule, and supports its constitutionality.

121. *See* McDonald v. United States, 335 U.S. 451, 460–461 (1948).

122. Katherine A. Macfarlane, Los Angeles v. Mendez*: Proximate Cause Promise for Police Shooting Victims*, 118 COLUM. L. REV. ONLINE 48, 61 (2018).

123. *Id.*

124. Byrd, *supra* note 104 ("Each link in the causal chain was the foreseeable consequence of its preceding link. Indeed, in *McDonald v. United States*, Justice Jackson discussed the 'grave troubles' police may encounter after unlawfully entering a suspect's home, including the resident's "natural impulse" to shoot." (quoting *McDonald*, 335 U.S. at 460–461 (Jackson, J., concurring)).

125. *Id.*; Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1548–49 (2017).

126. United States v. Combs, 349 F.3d 739, 744 (9th Cir. 2005).

127. Billington v. Smith, 292 F.3d 1177, 1191 (9th Cir. 2002).