

FORESEEABLE POLICE SHOOTINGS

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INTRODUCTION

No matter how it begins, a police encounter may end in death, especially when the encounter involves people of color.¹ There is no safe haven. Police-involved shootings happen everywhere—on the street,² in a parked car,³ in a public park,⁴ or inside one’s own home.⁵ Police violence is a constant, its occurrence so predictable that cities purchase insurance policies to pay those injured by the police or set aside money for this purpose alone.⁶ This Piece considers how the foreseeability of police-involved shootings affects civil rights recovery for the shooting victims.

Though police-involved shootings are common, shooting victims rarely prevail in civil rights actions.⁷ The Supreme Court has ruled for

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1. See Todd Brewster, Foreword to Marc Lamont Hill, *Nobody: Casualties of America’s War on the Vulnerable, from Ferguson to Flint and Beyond*, at IX, X (2016) (stating that the victims “of both State and . . . ‘vigilante’ violence . . . form a list that recites, especially in the black communities that lost them, like a rosary: Michael Brown, Jordan Davis, Eric Garner, Sandra Bland, Walter Scott, Freddie Gray, Tamir Rice, Trayvon Martin”); Paul Butler, *Chokehold: Policing Black Men* 52–54 (2017).

2. Laquan McDonald was shot “while he lay cowering on a Chicago street.” Butler, *supra* note 1, at 1. McDonald was 17. *Id.*

3. Philando Castile was shot in his car by Officer Jeronimo Yanez. Julie Bosman & Mitch Smith, *Experts Weigh In on Video of Philando Castile Shooting*, *N.Y. Times* (June 21, 2017), <https://www.nytimes.com/2017/06/21/us/video-police-shooting-philando-castile-trial.html> [<https://perma.cc/S6MV-ED8V>].

4. Tamir Rice was shot “two seconds” after an officer spotted him in a public park. Butler, *supra* note 1, at 1. Rice was 12. *Id.*

5. Fernando Saucedo was shot on his porch by Officer Jefferey Pollard. *Estate of Saucedo v. City of North Las Vegas*, 380 F. Supp. 3d 1068, 1073–74 (D. Nev. 2019).

6. Butler, *supra* note 1, at 55 (citing John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 *U. Chi. Legal F.* 369, 369–70).

7. See David G. Savage, *Supreme Court Lets Stand \$4-Million Verdict Against L.A. County Deputies in Shooting*, *L.A. Times* (Mar. 4, 2019), <https://www.latimes.com/politics/la-na-pol-supreme-court-police-shooting-los-angeles-20190304-story.html> [<https://perma.cc/34YC-R9J7>] (calling the Supreme Court’s decision not to review a verdict in favor of a police shooting victim a “rare victory for victims of mistaken police shootings”); see also Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 *Fla. L. Rev.* 1773, 1777 (2016) (arguing that the Supreme Court has curtailed the right to be free from excessive force, because its application of qualified immunity renders it “exceedingly difficult for victims of police brutality to overcome defendants’ motions to dismiss or motions for summary judgment”).

officers who shoot in an ever-expanding set of circumstances,⁸ and qualified immunity protects officers even if they violate constitutional rights.⁹ Only violations of clearly established rights “of which a reasonable person would have known” may lead to liability.¹⁰ Qualified immunity applied in *Brosseau v. Haugen*, in which the defendant officer shot a fleeing suspect in the back.¹¹ No case “squarely” governed whether an officer could “shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.”¹² As Erwin Chemerinsky has noted, a right is “clearly established” only if there exists “an exact case on point.”¹³

As a result of officer-friendly qualified immunity precedent, the outcome in the civil rights action brought by shooting victims Jennifer and Angel Mendez seemed predictable. The Mendezes¹⁴ were asleep on a futon when Los Angeles County Sheriff’s deputies, searching for a wanted parolee, entered their home and fired fifteen rounds, causing severe injuries.¹⁵ But the Mendezes’ civil rights action did not result in an officer-friendly outcome. They obtained a \$4 million damages award.¹⁶ Following a Supreme Court remand, the Ninth Circuit held that when officers entered their home “armed and on alert,” without a warrant, consent, or other justification, the shooting that followed was foresee-

8. See, e.g., *Kisela v. Hughes*, 138 S. Ct. 1148, 1150, 1154–55 (2018) (holding that an officer who shot a woman holding a kitchen knife was entitled to qualified immunity); *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1769, 1778 (2015) (holding that officers who shot a woman who suffered from schizoaffective disorder in her residence, a group home for individuals suffering from mental illness, were entitled to qualified immunity); *Plumhoff v. Rickard*, 572 U.S. 765, 768 (2014) (holding that officers who “shot the driver of a fleeing vehicle to put an end to a dangerous car chase” were entitled to qualified immunity); *Brosseau v. Haugen*, 543 U.S. 194, 194–95, 198–99, 201 (2004) (holding that an officer who shot a fleeing suspect in the back may be entitled to qualified immunity because the officer’s actions fell in the “hazy border between excessive and acceptable force” (internal quotation marks omitted) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001))).

9. See Tyler Finn, Note, *Qualified Immunity Formalism: “Clearly Established Law” and the Right to Record Police Activity*, 119 Colum. L. Rev. 445, 447 (2019) (noting that the Supreme Court’s qualified immunity jurisprudence leads lower courts to “resort to a restrictive definition” of what constitutes a clearly established right).

10. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

11. 543 U.S. at 194–95.

12. *Id.* at 200–01.

13. Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 Touro L. Rev. 633, 656 (2013).

14. Jennifer Mendez was known as Jennifer Garcia at the time of the shooting. *County of Los Angeles v. Mendez (Mendez III)*, 137 S. Ct. 1539, 1544 (2017).

15. Katherine A. Macfarlane, *Los Angeles v. Mendez: Proximate Cause Promise for Police Shooting Victims*, 118 Colum. L. Rev. Online 48, 49 (2018), https://columbialawreview.org/wp-content/uploads/2018/02/Macfarlane_Los-Angeles-v-Mendez.pdf [<https://perma.cc/8YHX-27N7>].

16. Savage, *supra* note 7.

able.¹⁷ The Fourth Amendment's protection against unreasonable home entries is, under circumstances like the entry in *Mendez*, a clearly established right.

Jennifer and Angel Mendez were shot under incredulous circumstances. Following a tip that Ronnie O'Dell, a parolee on the lam, was in or near a home owned by Paula Hughes, a task force of Los Angeles County Sheriff's deputies devised a plan to capture him.¹⁸ The officers had information that O'Dell was recently at a home belonging to Roseanne Larsen.¹⁹ As a result, the plan provided that several officers would proceed to the Larsen home, while others, including deputies Conley and Pederson, would proceed to the Hughes residence.²⁰ Conley and Pederson were assigned to cover the back door of the Hughes residence in the event that O'Dell tried to escape through it.²¹ They were also tasked with ascertaining whether O'Dell was hiding behind the Hughes property.²² During the planning session, another deputy announced that "a male named Angel (Mendez) lived in the backyard of the Hughes residence with a pregnant lady (Mrs. Mendez)."²³

Jennifer and Angel Mendez lived in a shack in the Hughes' backyard.²⁴ The wood and plywood structure was approximately seven feet wide, seven feet long, and seven feet tall.²⁵ A blue blanket hung from the top of the shack's doorway, and both a hinged screen door and

17. *Mendez v. County of Los Angeles (Mendez IV)*, 897 F.3d 1067, 1078, 1082–84 (9th Cir. 2018), cert. denied, 139 S. Ct. 1292 (2019) (mem.).

18. *Mendez III*, 137 S. Ct. at 1544.

19. *Mendez v. County of Los Angeles (Mendez I)*, No. CV 11-04771-MWF (PJWx), 2013 WL 4202240, at *2 (C.D. Cal. Aug. 13, 2013), aff'd in part, rev'd in part, appeal dismissed, 815 F.3d 1178 (9th Cir. 2016), vacated and remanded, 137 S. Ct. 1539 (2017), aff'd in part, rev'd in part, 897 F.3d 1067 (9th Cir. 2018).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at *3.

25. *Id.* In its first *Mendez* opinion, the Ninth Circuit referred to the shack as part of the curtilage of the Hughes home. *Mendez v. County of Los Angeles (Mendez II)*, 815 F.3d 1178, 1187 (9th Cir. 2016). In its second opinion, the court referred to the shack as "the Mendezes' home." *Mendez IV*, 897 F.3d 1067, 1074 (9th Cir. 2018). The Fourth Amendment applies to both an individual's home and the home's curtilage. See, e.g., *Florida v. Jardines*, 569 U.S. 1, 6–7 (2013) (explaining that the curtilage, which is the area around a home, "is intimately linked to the home, both physically and psychologically," where, like the home, "privacy expectations are most heightened" (internal quotation marks omitted) (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986))). Moreover, extending Fourth Amendment coverage to curtilage protects residences "both lavish and humble alike." Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. Rev. 507, 535 (2011) (stating that "courts have suppressed evidence gathered in boarding houses and other shared residences").

wooden door separated the blanket from the outside.²⁶ An electrical cord and a water hose ran into the shack.²⁷ A blue tarp covered its roof.²⁸ An air conditioner was mounted on one of its sides.²⁹ At the time of the shooting, the Mendezes had lived in the shack for about ten months.³⁰

Deputies Conley and Pederson entered the Mendez home “without a warrant and without announcing their presence.”³¹ Awoken by the deputies, Angel Mendez “grabbed hold of a BB gun” that was on the futon.³² In response, the deputies fired fifteen rounds,³³ hitting the Mendezes multiple times.³⁴ Jennifer Mendez was pregnant.³⁵ Doctors eventually amputated Angel Mendez’s right leg.³⁶

In 2017, the Supreme Court held that the Mendezes could not recover damages on the theory that the shooting constituted excessive force.³⁷ When deputies shot them, the use of force was reasonable.³⁸ However, the Court suggested that the deputies’ warrantless entry might have caused the shooting.³⁹ On remand, the Ninth Circuit adopted this theory, and instructed the district court to amend its judgment “to award all damages arising from the shooting in the Mendezes’ favor as proximately caused by the unconstitutional entry, and proximately caused by the failure to get a warrant.”⁴⁰ The Supreme Court denied defendants’ most recent petition for writ of certiorari on March 4, 2019.⁴¹

This Piece updates *Los Angeles v. Mendez: Proximate Cause Promise for Police Shooting Victims*.⁴² That piece analyzed the Supreme Court’s 2017 opinion, explaining that it was more than a defendant-friendly rejection

26. *Mendez I*, 2013 WL 4202240, at *3.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Macfarlane, *supra* note 15, at 49.

32. *Mendez IV*, 897 F.3d 1067, 1072 (9th Cir. 2018); Macfarlane, *supra* note 15, at 49.

33. Macfarlane, *supra* note 15, at 49.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Mendez III*, 137 S. Ct. 1539, 1547 (2017).

38. *Id.* (noting that “[t]he District Court found (and the Ninth Circuit did not dispute) that the use of force by the deputies was reasonable”).

39. *Id.* at 1548–49 (“On remand, the court should revisit the question whether proximate cause permits respondents to recover damages for their shooting injuries based on the deputies’ failure to secure a warrant at the outset.”).

40. *Mendez IV*, 897 F.3d 1067, 1084 (9th Cir. 2018). The Ninth Circuit also held that “California negligence law provides an independent basis for recovery of all damages awarded by the district court,” a holding beyond the scope of this Piece. *Id.* at 1074.

41. *Los Angeles County v. Mendez (Mendez V)*, 139 S. Ct. 1292 (2019) (mem.).

42. Macfarlane, *supra* note 15, at 62 (assessing the potential for a shooting recovery following the Court’s opinion in *Mendez III*).

of a shooting victim's attempt at civil rights recovery.⁴³ It first described how the Supreme Court has repeatedly rejected civil rights plaintiffs' use of excessive force claims, finding that officers who used deadly force were protected by qualified immunity.⁴⁴ Second, it explained why the Court rejected the Ninth Circuit's provocation doctrine, through which an officer's otherwise reasonable use of force could nevertheless result in liability.⁴⁵ Third, it analyzed the impact of the Court's remand instructions, through which it invited civil rights plaintiffs to contend that unlawful entries may proximately cause shootings.⁴⁶

Finally, it outlined the kind of argument that, on remand, would allow the *Mendezes* to retain their damages award.⁴⁷ In particular, it argued that protecting innocents like the *Mendezes* was one of the interests the Fourth Amendment's warrant requirement protects.⁴⁸ It also argued that violence is a foreseeable consequence of a warrantless entry like the entry into the *Mendezes*' home, and that obtaining a warrant would have caused the deputies to pause and perhaps remind themselves of the individuals living in the *Hughes*' backyard.⁴⁹ It concluded that Angel *Mendez*'s act of holding his BB gun was not a superseding cause of the shooting—it was not free, deliberate, and informed.⁵⁰ Finally, that piece urged civil rights plaintiffs with similar claims to seize the opportunity *Mendez* offered.⁵¹

The *Mendez* remand resulted in a meaningful Ninth Circuit opinion. In addition to revisiting the foreseeable consequences of the unconstitutional entry into the *Mendez* home, the Ninth Circuit acknowledged that police-involved shootings of the innocent are themselves foreseeable. This Piece examines the Ninth Circuit's foreseeable shooting analysis and highlights the court's realistic approach to shootings that are both commonplace and avoidable.

Following this Introduction, Part I assesses the Ninth Circuit's opinion on remand, highlighting where it followed and departed from my original predictions. It also identifies a key aspect of the court's opinion: its description of the consequences that flow from surprise entries into an individual's home. Instead of reexamining split-second decisions regarding whether shots should be fired, *Mendez* turns to an earlier

43. *Id.*

44. *Id.* at 53–54.

45. *Id.* at 56.

46. *Id.* at 56–59.

47. *Id.* at 59–62.

48. *Id.*

49. *Id.* at 61.

50. *Id.*

51. *Id.* at 61–62.

moment—when officers could still turn back, obtain a warrant, and avoid needlessly violent encounters. This is a new perspective.

Part II describes how the Ninth Circuit’s awareness of the dangerous consequences of unlawful entries might impact the civil rights litigation brought by the family members of Stephon Clark, who was shot in his own backyard. That tragic shooting followed Sacramento police officers’ arguably unlawful entry into Clark’s driveway and backyard.⁵² It also examines how a district court has applied *Mendez* to a civil rights action arising out of a police-involved shooting in North Las Vegas.

This Piece concludes by considering how the *Mendez* focus on foreseeability impacts recent scholarship regarding qualified immunity and California’s attempt to legislate its way to more thoughtful use-of-force decisions. Perhaps *Mendez* presents the most pragmatic approach, taking any use-of-force decision out of the equation.

I. MENDEZ PART TWO: SHOOTINGS AS A FORESEEABLE RESULT OF UNCONSTITUTIONAL HOME ENTRIES

There are significant differences between the original Ninth Circuit opinion upholding the Mendezes’ damages award, and the second opinion, which reached the same result, but on different grounds. Following a brief review of the relevant facts and procedure, these differences are highlighted below.

The *Mendez* verdict followed a bench trial.⁵³ The district court found that the deputies’ use of force was reasonable, but awarded nominal damages for the plaintiffs’ warrantless entry and failure-to-knock-and-announce claims.⁵⁴ The court also found that the deputies’ unlawful entry and failure to knock and announce provoked the subsequent shooting.⁵⁵ Therefore, it awarded plaintiffs \$4 million for their provocation claim.⁵⁶

The Ninth Circuit affirmed the district court’s unlawful entry ruling.⁵⁷ Though it reversed the district court’s knock-and-announce holding, it affirmed the award of damages, agreeing with the district court that the deputies provoked the shooting.⁵⁸ The bulk of the Ninth Circuit’s

52. See Richard Winton, Sarah Parvini & Monte Morin, Stephon Clark Shooting: How Police Opened Fire on an Unarmed Black Man Holding a Cellphone, L.A. Times (Mar. 23, 2018), <https://www.latimes.com/local/lanow/la-me-stephon-clark-shooting-sacramento-explainer-20180323-story.html> [<https://perma.cc/A69D-FHWW>] (describing the circumstances of the police officers’ entry into Clark’s driveway and backyard).

53. *Mendez I*, No. CV 11-04771-MWF (PJWx), 2013 WL 4202240, at *1 (C.D. Cal. Aug. 13, 2013).

54. *Id.* at *24–25, *37.

55. *Id.* at *31.

56. *Id.* at *37. On the state law negligence claim, the court ruled for defendants. *Id.* at *38.

57. *Mendez II*, 815 F.3d 1178, 1191 (9th Cir. 2016).

58. *Id.* at 1191, 1195.

original opinion is devoted to a discussion of the qualified immunity doctrine and its application to the deputies' warrantless entry and failure to knock and announce.⁵⁹ In two short paragraphs, and without much analysis, the court alternatively upheld the damages award because "the situation in this case, where Mendez was holding a gun when the officers barged into the shack unannounced, was reasonably foreseeable" as a consequence of the deputies' unconstitutional entry.⁶⁰

The Supreme Court abrogated the provocation doctrine—followed by the district and appellate courts—concluding instead that excessive force claims rise and fall on an assessment of the force's reasonableness.⁶¹ However, the Court ordered the Ninth Circuit to "revisit the question whether proximate cause permits respondents to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset."⁶² The Ninth Circuit did just that.

The second Ninth Circuit *Mendez* opinion appears to revise some of the first opinion's key holdings. For example, in the second opinion, the court announced that it needed to address the proximate cause of the shooting arising from the warrantless entry as distinct from the mode of entry (the crux of the proximate cause analysis in the first opinion).⁶³ However, with respect to the preliminary question of whether there was an unlawful entry, it deferred to its first opinion. After all, it had already concluded:

[T]he officers engaged in a search by entering the Mendezes' home. The officers did not have a warrant or consent and did not satisfy any emergency or exigency conditions that could make an entry lawful. The law on all these points was clearly established at the time, so the officers could not obtain qualified immunity for their unlawful search. There is no reason to revisit those conclusions on remand: We again hold that the officers violated the Fourth Amendment by engaging in an unconstitutional entry into the Mendezes' home.⁶⁴

The court's second opinion also treats the shack slightly differently. In its first opinion, the Ninth Circuit referred to the shack as part of the curtilage of Hughes' property—and therefore entitled to the same

59. *Id.* at 1186–93.

60. *Id.* at 1195.

61. *Mendez III*, 137 S. Ct. 1539, 1546 (2017).

62. *Id.* at 1549.

63. *Mendez IV*, 897 F.3d at 1067, 1074 (9th Cir. 2018); see also *Mendez III*, 137 S. Ct. at 1549 (stating that the Ninth Circuit's original opinion focused solely on "risks foreseeably associated with the failure to knock and announce," and that the "proximate cause analysis . . . conflated distinct Fourth Amendment claims and required only a murky causal link between the warrantless entry and the injuries attributed to it").

64. *Mendez IV*, 897 F.3d at 1074 (citations omitted).

Fourth Amendment protection as her home.⁶⁵ In assessing whether the deputies had consent to enter the shack, the first opinion considered whether Hughes, and not the Mendezes, had given consent.⁶⁶ The district court had addressed this ambiguity, finding that in addition to its status as part of the Hughes' curtilage, the shack was also a separate dwelling: "Mr. and Mrs. Mendez—at the very least—were long-term, overnight guests staying within a protected structure" with "a subjective and objective expectation of privacy in the shack."⁶⁷ In its second opinion, the Ninth Circuit concludes that deputies unreasonably entered the Mendezes' home but the court does not explain exactly why the shed should be treated as a place in which they were entitled to an expectation of privacy.⁶⁸

Despite its desire to quickly establish that the predicate search was unlawful, the second Ninth Circuit opinion methodically explains why the unlawful entry constituted a breach of a duty owed to the Mendezes, and identifies the but-for and proximate causes of the breach.

First, the court held that the Fourth Amendment "imposes a duty on officers" to enter a home only under "reasonable" circumstances.⁶⁹ Without a warrant, consent, exigent circumstance, or an emergency, they cannot enter; if they do enter, their entry breaches the duty owed to a home's residents.⁷⁰ The Fourth Amendment, the court noted, protects "a person's interest in being shielded from physical governmental intrusion."⁷¹ Similarly, my original piece noted that future plaintiffs should argue that the scope of interests protected by the Fourth Amendment include "an innocent individual's safety."⁷²

Second, the court turned to cause in fact and proximate cause. With respect to the former, the plaintiffs "would not have been shot while lying in bed" but for the entry.⁷³ The entry was also the proximate cause of the injuries because they "followed in a normal course as a result of the unlawful acts of the officers."⁷⁴ In so holding, the court considered "historical evidence" surrounding the "point" of the Fourth Amendment's prohibition against trespass—preventing the damages trespassers would cause:

65. *Mendez II*, 815 F.3d at 1187.

66. *Id.* at 1190–91.

67. *Mendez I*, No. CV 11-04771-MWF (PJWx), 2013 WL 4202240, at *14 (C.D. Cal. Aug. 13, 2013).

68. *Mendez IV*, 897 F.3d at 1074–75.

69. *Id.* at 1075.

70. *Id.*

71. *Id.*

72. Macfarlane, *supra* note 15, at 60.

73. *Mendez IV*, 897 F.3d at 1076.

74. *Id.* at 1077.

[A]ttendees at the Boston Town Meeting of 1772 raised concerns about damage done to chattels after searches. And anti-federalists advocated for constitutional protections against searches because otherwise the government could be free to damage personal property when searching. These historical sources suggest that the Fourth Amendment was ratified not just to protect privacy interests, but also out of a concern that governmental trespass to property could lead to subsequent physical harms.⁷⁵

Therefore, interactions between “armed officers on high alert and innocent persons in their homes” should be limited, “precisely because such interactions can foreseeably lead to tragic incidents where people are injured or killed due to a split-second misunderstanding.”⁷⁶

In addition to the risks posed by agitated officers, “it can be expected that some individuals will keep firearms in their homes to defend themselves against intruders.”⁷⁷ The court also cited Justice Jackson’s concurrence in *McDonald v. United States*,⁷⁸ raising the concern that “unlawful entries can invite precisely the sort of violence that occurred [in *Mendez*], where ‘an officer seeing a gun being drawn on him might shoot first.’”⁷⁹

The Ninth Circuit’s concern for homeowners lawfully entitled to protect themselves in their own homes is particularly timely. It serves as a reminder that guns can be used for lawful purposes, and that depending on the circumstance, law enforcement officers should temper their response to the presence of guns. Most civil rights actions involving the police defer to officers’ decisions, especially with respect to decisions to shoot.⁸⁰ But the second *Mendez* opinion suggests that when it comes to unlawful home entries, there may be less deference.

The second Ninth Circuit opinion also addresses the deputies’ argument that the failure to knock-and-announce was the real proximate cause of the shooting, and that only knocking and announcing could have avoided the shooting that followed.⁸¹ But knocking and announcing might not alert every homeowner that an entry is about to occur—as the court highlighted, had Angel Mendez been deaf, he still would have grabbed for his BB gun following a knock-and-announce he could not

75. *Id.*

76. *Id.* at 1078.

77. *Id.* (citing *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008)).

78. 335 U.S. 451, 457–61 (1948) (Jackson, J., concurring) (concurring in reversal of the conviction of a petty gambler based on evidence obtained without a warrant or exigent circumstances justifying the police’s unlawful entry).

79. *Mendez IV*, 897 F.3d at 1077 (quoting *McDonald*, 335 U.S. at 460–61 (Jackson, J., concurring)).

80. See *supra* notes 8–13 and accompanying text.

81. *Mendez IV*, 897 F.3d at 1078.

hear.⁸² And even if the officers had knocked and announced their presence in a manner that everyone could understand, a subsequent unlawful entry could still result in a shooting.⁸³ An agitated officer who unlawfully enters a home “substantially increase[s] the risk that a person, pet, or property inside might be harmed.”⁸⁴

Thus, the court concluded that warrant procedures would have protected the Mendezes by “encouraging considered reflection before officers take action,” reasoning that:

It is likely that if the officers had gone through the constitutionally required warrant procedures before entering, they would have remembered that the Mendezes’ lived in the building behind the Hughes’ house, and taken account of the risks of armed entry into an inhabited building. In such circumstances a responsible officer would likely have taken additional steps to prevent avoidable injuries to innocent third parties. The process of having to collect information, seek permission for entry from a magistrate, and justify that entry, most clearly serves important social interests where a warrant request is denied because it creates a barrier protecting persons from unnecessary harm at the hands of police.⁸⁵

In my original piece, I similarly argued that additional procedures would have rendered the shooting unlikely. Armed with a warrant indicating that the Mendezes lived in the shack, the deputies “would have presumably knocked and announced their presence.”⁸⁶ This would have likely caused Mendez to keep “his BB gun far away from his person,” and “[w]ithout the BB gun element, the deputies would not have felt the need to use deadly force, and no one would have opened fire on the shack’s occupants.”⁸⁷

The Ninth Circuit’s description of the duties created by the Fourth Amendment in and around the home, and its identification of the foreseeable consequences of breaching those duties, anchor its second

82. *Id.* at 1078–79.

83. *Id.* at 1079.

84. *Id.*

85. *Id.* at 1080–81. The court also rejected the defendants’ argument that because Mendez moved his BB gun in the deputies’ direction, his actions were the superseding cause of the injuries: “[I]f an officer has a duty not to enter in part because he or she might misperceive a victim’s innocent acts as a threat and respond with deadly force, then the victim’s innocent acts cannot be a superseding cause.” *Id.* at 1081. My original piece made similar points. Mendez did not expect someone who would be threatened by his BB gun to enter the shack. Macfarlane, *supra* note 15, at 61. “As a result, his actions, which occurred after he was awoken from a midday nap, are not the kind of ‘free, deliberate, and informed’ acts that break the chain of causation between a wrongdoer’s conduct and a foreseeable consequence. Macfarlane, *supra* note 15, at 61.

86. Macfarlane, *supra* note 14, at 61.

87. *Id.*

opinion in reality. Unlike excessive force precedent, which defers to officers' decision to shoot, the second *Mendez* opinion is less deferential, at least with respect to the use of force in an innocent person's home. In *Mendez*, the Ninth Circuit incorporated its understanding of how unexpected encounters with police can end in violence into its proximate cause analysis. The implications of this pragmatic approach are explored below.

II. FORESEEABLE CONSEQUENCES OF FOURTH AMENDMENT VIOLATIONS IN OR AROUND THE HOME

The *Mendez* foreseeability analysis reflects § 1983's common law tort underpinnings.⁸⁸ The common law of torts is the first place to look “[i]n defining the contours and prerequisites of a § 1983 claim.”⁸⁹ A court evaluating a § 1983 claim may adopt each rule that would apply in the context of an analogous tort.⁹⁰ Common law rules of recovery are frequently invoked in § 1983 actions to limit damages to those which compensate a plaintiff for a constitutional injury.⁹¹ However, with respect to duties of care, “Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.”⁹²

In *Mendez*, the deputies violated the duties owed to the Mendezes in their home—duties anchored in the Fourth Amendment. Officers have a duty to enter homes lawfully with a warrant or under circumstances in which a warrant is not required. This duty arises out of the Fourth Amendment's concern for an individual's privacy and interest “in being shielded from governmental physical intrusions.”⁹³

The concern for an individual's bodily integrity is also present in the *Mendez* assessment of which consequences will foreseeably flow from an

88. 42 U.S.C. § 1983 (2012); *Carey v. Phipus*, 435 U.S. 247, 257–58 (1978) (“[T]he common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules . . . provide the appropriate starting point for the inquiry under § 1983 as well.”).

89. *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017).

90. *Id.*; see also *Chavez v. County of Bernalillo*, 3 F. Supp. 3d 936, 980–81 (D.N.M. 2014) (explaining that a claim of imprisonment without process “is analogous to false arrest or false imprisonment,” and imprisonment “pursuant to legal but wrongful process,” is a due process claim “analogous to a tort claim for malicious prosecution” (quoting *Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008))).

91. See, e.g., *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307–09 (1986) (affirming *Carey v. Phipus*'s holding that “no compensatory damages could be awarded for violation of [due process] right[s] absent proof of actual injury” (citing *Carey*, 435 U.S. at 264)); *Wayne v. Village of Sebring*, 36 F.3d 517, 529 (6th Cir. 1994) (“[I]t is well settled that a prevailing § 1983 plaintiff, like a prevailing party in a common law tort action, can recover for any compensable injury caused by the defendant's breach of duty.”).

92. *Baker v. McCollan*, 443 U.S. 137, 146 (1979).

93. *Mendez IV*, 897 F.3d 1067, 1075 (9th Cir. 2018).

unlawful entry. *Mendez* quickly dismisses the suggestion that the shooting was fortuitous. Rather, it followed “in a normal course as a result of the unlawful acts of the officers.”⁹⁴ When an armed stranger enters a residence, there is a risk of injury, whether the stranger is an officer or an intruder.⁹⁵ Its review of “historical evidence” buttressed this conclusion.⁹⁶ The Fourth Amendment’s concern for unreasonable searches that would cause property damages also reflects a concern that unlawful governmental intrusions “could lead to subsequent physical harms.”⁹⁷ Just like burglary, *Mendez* notes, “unlawful entry invites violence.”⁹⁸

Unlawful entries are rendered even more dangerous by gun ownership. Some individuals will keep firearms in their home.⁹⁹ Armed officers who enter a home “present a substantial risk to anyone in the house they perceive as being armed.”¹⁰⁰ The Fourth Amendment’s “barrier to entry” exists precisely for this reason: “[A]n officer might, due to a mistaken assessment of a threat, harm a person inside the residence.”¹⁰¹ Compensation for resulting injuries simply provides a remedy for constitutional violations that the Fourth Amendment was intended to prevent.¹⁰²

The Ninth Circuit’s concern for “mistaken assessment[s]” reaches beyond the facts of *Mendez*: “Persons residing in a home may innocently hold kitchen knives, cell phones, toy guns, or even real ones that could be mistakenly believed by police to pose a threat.”¹⁰³ Indeed, the court might have been thinking of Stephon Clark when it wrote, just three months after his death, that “there is nothing extraordinary about the possibility that officers might mistake an innocent implement for a threat” because “[n]ationally prominent events in publicized police shootings show that such a possibility is sadly all too common.”¹⁰⁴

On March 18, 2018, Sacramento police officers shot and killed unarmed twenty-two-year-old Stephon Clark in his backyard.¹⁰⁵ Clark’s

94. *Id.* at 1078.

95. *Id.* at 1077.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1078. (citing *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008)).

100. *Id.*

101. *Id.* at 1081.

102. John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 Va. L. Rev. 1461, 1475 (1989) (advocating for limiting constitutional tort liability “to constitutionally relevant risks” to avoid compensating individuals for “losses that should be attributed to . . . the claimant’s own misconduct”).

103. *Mendez IV*, 897 F.3d at 1081.

104. *Id.* at 1082.

105. Christine Hauser, *Sacramento Man Fatally Shot by the Police in His Backyard*, N.Y. Times (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/us/stephon-clark-police-shooting.html?module=inline> [<https://perma.cc/ZX2G-49UU>].

death “touched off waves of protests in Sacramento that shut down busy streets, disrupted sporting events and overtook City Council meetings.”¹⁰⁶ His death “took on national significance amid continuing tensions over discriminatory policing in black neighborhoods and excessive use of force by police officers.”¹⁰⁷

The events that led to Clark’s death began with a 911 call. The caller reported that a man in his neighborhood was breaking vehicle windows.¹⁰⁸ Two officers responded to the location around 9:13PM. Twelve minutes later, a “sheriff’s helicopter spotted a man in a backyard and told police that the suspect had picked up a ‘toolbar’ and broken a window to a home.”¹⁰⁹ The helicopter pilot told the officers that the same man “climbed a fence and entered another yard,” and directed them to the man’s location.¹¹⁰ Sacramento police released “shaky” body camera footage, which, according to the L.A. Times, showed officers “running up a dark driveway with flashlights.”¹¹¹ The newspaper transcribed the exchange and actions that followed:

“Hey! Show me your hands! Stop! Stop!” an officer yells. As the officers run into a backyard, they turn a corner and spot Clark in the glare of their flashlights. The officers take temporary cover behind the corner and then confront the suspect once more. This time, an officer yells at Clark to show his hands, then begins shouting, “Gun, gun, gun!” Gunfire then erupts.¹¹²

Clark had no gun.¹¹³ A cellphone was discovered near his corpse.¹¹⁴

The *New York Times* recreated the shooting, using footage shot by the helicopter camera and the officers’ body cameras, overlaid with reporters’ narration.¹¹⁵ Though the helicopter footage shows Clark climbing over a fence into his backyard, the officers’ body camera footage does not. Their body camera footage shows them running into Clark’s driveway, where they appear to see him for the first time after rounding a corner. They do not identify themselves as officers, and open fire less than twenty seconds after the first “show me your hands.”

106. Jose A. Del Real, No Charges in Sacramento Police Shooting of Stephon Clark, N.Y. Times (Mar. 2, 2019), <https://www.nytimes.com/2019/03/02/us/stephon-clark-police-shooting-sacramento.html> [<https://perma.cc/Q8RZ-6GBT>].

107. Id.

108. Winton et al., *supra* note 52.

109. Id.

110. Id.

111. Id.

112. Id.

113. Id.

114. Del Real, *supra* note 106.

115. Barbara Marcolini, Chris Cirillo & Christoph Koettl, How Stephon Clark Was Killed by Police in His Backyard, Police & Surveillance Footage, N.Y. Times, <https://nyti.ms/2G21qns> (on file with the *Columbia Law Review*) (last visited Oct. 9, 2019).

On January 28, 2019, Clark's surviving family members brought an action pursuant to 42 U.S.C. § 1983 in the Eastern District of California against the City of Sacramento and the officers who shot Clark, alleging, inter alia, excessive use of force.¹¹⁶ The complaint does not rely upon a *Mendez*-based warrantless entry theory.¹¹⁷ Instead, it seeks recovery on the grounds that the use of deadly force was "unreasonable under the circumstances."¹¹⁸ That is, it seeks to recover damages from the shooting under the same theory that the Supreme Court has repeatedly rejected. Officers' use of force has been found to be reasonable, no matter how innocent the victim.

A theory based on *Mendez*'s Fourth Amendment unlawful entry analysis might be more likely to succeed. The Mendezes were shot in their home, while Clark was shot in his home's backyard. Still, both a backyard and a driveway may be part of a home's curtilage,¹¹⁹ "an area intimately linked to the home, both physically and psychologically."¹²⁰ "[P]rivacy expectations are most heightened" in a home's curtilage, just as they are in the home itself.¹²¹ A search of Clark's curtilage presumptively required a warrant.¹²²

There are some key differences between the shooting that injured the Mendezes and the shooting that killed Clark. For example, a police helicopter directed officers to Clark, whereas the deputies who shot the Mendezes knew that individuals unconnected to O'Dell lived in Hughes' backyard. Still, the *Mendez* analysis treats any unlawful entry as a breach of the duty officers owe pursuant to the Fourth Amendment.

In *Mendez*, no exigent circumstance excused the deputies' warrantless entry. It is a closer call with respect to the entry into Clark's driveway.¹²³

116. Complaint for Damages at 9, *Clark v. City of Sacramento*, No. 2:19-cv-00171 (E.D. Cal. filed Jan. 28, 2019), 2019 WL 338988. In June 2019, there were reports that the case had settled. Sam Stanton & Theresa Clift, Tentative Settlement Reached in Stephon Clark Family Lawsuit Against Sacramento, Court Says, *Sacramento Bee* (June 18, 2019), <https://www.sacbee.com/news/local/article231705043.html> (on file with the *Columbia Law Review*). As of August 7, 2019, Stephon Clark's father Stephen Clark agreed to dismiss his state law claims. Stipulation of Dismissal, *Clark*, No. 2:19-cv-00171 (E.D. Cal. filed Aug. 7, 2019).

117. See Complaint for Damages, *supra* note 116, at 2.

118. *Id.* at 10.

119. Vanessa Rownaghi, Driving into Unreasonableness: The Driveway, the Curtilage, and Reasonable Expectations of Privacy, 11 *Am. U. J. Gender Soc. Pol'y & L.* 1165, 1165–66 (2003) (explaining that "the American legal system has traditionally reserved Fourth Amendment privacy rights to individuals in their homes . . . [and] areas beyond the home as well," including the home's curtilage, which may include driveways and backyards).

120. *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (internal quotation marks omitted) (quoting *California v. Ciraolo*, 476 U.S. 207, 212–13 (1986)).

121. *Id.*

122. *Id.*

123. See *Hopkins v. Bonvicino*, 573 F.3d 752, 763 (9th Cir. 2009) (allowing entry where "both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is 'necessary to prevent . . . the destruction of relevant

The exigency exception renders a warrantless entry lawful if officers have “both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is ‘necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.’”¹²⁴ Based on the information received from the police helicopter, the officers arguably did have probable cause to believe that the crime of vandalism had been committed.¹²⁵ Still, there was no need to prevent the imminent destruction of evidence. Clark was on foot—he was not behind the wheel of the vehicle whose windows he had purportedly broken.¹²⁶

A court might apply the hot pursuit exception, which permits a warrantless entry “when officers are in ‘immediate’ and ‘continuous’ pursuit of a suspect” fleeing the scene of a crime.¹²⁷ The officers who shot Clark did not enter Clark’s driveway while pursuing him from the scene of an alleged crime.¹²⁸ But the police helicopter arguably did lead them in a hot pursuit.¹²⁹

If the hot pursuit exception can be overcome, then a court might consider whether an emergency exception to the warrant requirement justified the officers’ entry. The exception is narrow and derives from the “immediate” need for officers “to protect others or themselves from serious harm.”¹³⁰ At the time they entered Clark’s driveway, the officers were pursuing a vandalism suspect.¹³¹ Those facts do not trigger the need to protect officers or others from serious harm in a way that excuses the warrantless entry. Clark’s death was the result of a 911 call regarding a broken car window.¹³² There was nothing urgent about the officers’ pursuit.

The *Mendez* acknowledgment that violence is likely when officers are on high alert and yet proceed to unlawfully enter a home applies equally

evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts” exists (quoting *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir. 1984), overruled on other grounds, *Estate of Merch. v. Comm’r*, 947 F.2d 1390, 1392–93 (9th Cir. 1991) (en banc)).

124. *Id.*

125. See Marcolini et al., *supra* note 115.

126. *Id.*

127. *United States v. Johnson*, 256 F.3d 895, 907 (9th Cir. 2001) (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984); then quoting *United States v. Salvador*, 740 F.2d 752, 758 n.5 (9th Cir. 1984)).

128. Marcolini et al., *supra* note 115.

129. *Id.*

130. *Estate of Saucedo v. City of North Las Vegas*, 380 F. Supp. 3d 1068, 1079 (D. Nev. 2019) (internal quotation marks omitted) (quoting *United States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008)).

131. Marcolini et al., *supra* note 115.

132. See *id.*

to the curtilage of Clark's home.¹³³ Violence that is a known risk is violence that can be avoided.

The most obvious overlap between the shootings in *Mendez* and the shooting that killed Clark is that both should not and need not have occurred. Officers pursuing Clark did not need to chase him—he was no dangerous parolee on the lam. At most, he was believed to have vandalized a car.¹³⁴ If it was necessary to investigate further, the officers could have waited until daylight. Obtaining a warrant would have allowed them to gather more information and specify the places and people they needed to search. Had they knocked on Clark's door, his grandmother might have informed them that Stephon often climbed over the backyard fence on his way home. Thoughtful police practices might have saved Stephon Clark.

The Clark family's civil rights action would not be the first to rely upon the second *Mendez* opinion's foreseeability analysis. To date, at least one district court has applied it to a prayer for shooting-related damages.

Fernando Saucedo was killed by officers who entered his home shortly after midnight on New Year's Day.¹³⁵ Officers Harris and Pollard were assigned to patrol Saucedo's neighborhood, on the lookout for "celebratory gunfire."¹³⁶ As part of a special operations team, they wore "an olive green, fatigue-style shirt with subdued-colored [North Las Vegas Police Department] insignia patches on each arm, and a duty belt."¹³⁷

The officers drove past Saucedo's home while patrolling in their unmarked pickup truck.¹³⁸ After circling the block, Pollard thought he saw an individual in the Saucedo backyard holding a shiny object that looked like the barrel of a rifle.¹³⁹ The officers parked their truck a few houses away from Saucedo's.¹⁴⁰ They heard gunshots in the distance, but could not determine which backyard they were coming from.¹⁴¹ The officers exited their truck, and walked toward the Saucedo residence.¹⁴² An individual standing in the driveway asked them who they were.¹⁴³ The officers then turned on their flashlights and "rushed onto the property."¹⁴⁴ They claimed they identified themselves as police officers,

133. See *supra* text accompanying notes 76–79.

134. Marcolini et al., *supra* note 115.

135. *Saucedo*, 380 F. Supp. 3d at 1073–74.

136. *Id.* at 1073.

137. *Id.*

138. *Id.*

139. *Id.* at 1074.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

but witnesses disagreed.¹⁴⁵ Their attire did not obviously identify them as law enforcement.¹⁴⁶

After *Mendez*, it is difficult to read this account of the officers' patrol without pausing to consider if the officers' disguise and unmarked truck are cause for concern. These details may render their later entry into a home or its curtilage the kind of anxiety-filled situation that *Mendez* urges officers to avoid.¹⁴⁷ Out of uniform, the officers may look like intruders.

The scene quickly turned chaotic. Pollard chased after individuals running toward the Saucedo residence.¹⁴⁸ He ran toward the home's porch, which was "enclosed with a tarp."¹⁴⁹ He pulled back the tarp and "noticed movement to his left."¹⁵⁰ He turned to find Fernando Saucedo "pointing a gun at his face Pollard held down Saucedo's right arm."¹⁵¹ The two tussled, Saucedo tried to flee, and Pollard fired twelve shots.¹⁵² Saucedo was hit nine times and died.¹⁵³

In the civil rights action that followed, *Estate of Saucedo v. North Las Vegas*, plaintiffs alleged, inter alia, that the officer's use of deadly force violated Saucedo's Fourth Amendment rights.¹⁵⁴ Before the second *Mendez* opinion, the use of force that caused Saucedo's death would likely have been deemed reasonable. After all, Saucedo pointed a gun at the officer who shot him.¹⁵⁵

But following the Supreme Court's *Mendez* decision, the *Saucedo* court ordered the parties to recommence their summary judgment briefing and address *Mendez*.¹⁵⁶ In the opinion that followed, the court first rejected defendants' summary judgment argument that their entry into the Saucedo home was justified by an exception to the warrant requirement.¹⁵⁷ Defendants entered Saucedo's curtilage (the porch) even though there was no clear emergency or exigent circumstance.¹⁵⁸

The court next considered whether Saucedo's right to be free from the officers' unreasonable entry was clearly established, that is, whether

145. *Id.*

146. *Id.*

147. See *supra* text accompanying notes 83–85.

148. *Saucedo*, 380 F. Supp. 3d at 1074.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 1075.

157. See *id.* at 1081.

158. *Id.* at 1074. The opinion does not discuss whether Saucedo consented to the entry. He likely did not, given his decision to point a gun at Pollard. See *id.*

Pollard had fair notice that his conduct was unlawful.¹⁵⁹ The court rejected the argument that Pollard could rely on his belief that evidence was on the verge of destruction after he heard gunshots somewhere near the Saucedo home.¹⁶⁰ The court also rejected the argument that Pollard reasonably believed he could lawfully enter the porch because he was in hot pursuit of the individuals he was chasing.¹⁶¹ There was a genuine issue of material fact regarding whether the individuals he chased knew he was a police officer whose commands were to be obeyed, thus precluding summary judgment.¹⁶² Officers who enter a home on New Year's Eve in plain clothes, after exiting an unmarked car, are not obviously police officers.

Having concluded that the officers violated Saucedo's clearly established right to be free of unlawful entries, the court examined whether, viewed in a light most favorable to the plaintiffs, the unlawful entry proximately caused Pollard to shoot Saucedo.¹⁶³ The court found a genuine issue of material fact as to whether the circumstances of the unlawful entry created the risk that a fire would occur.¹⁶⁴ According to some witnesses, the officers did not announce themselves as police officers.¹⁶⁵ They were at the Saucedo residence because of potential firearm use—that is, they knew that weapons might be in or near the residence.¹⁶⁶ A reasonable jury could determine that the entry “created a foreseeable risk of an ensuing fire resulting in death or serious bodily injury to the homeowner.”¹⁶⁷

Saucedo demonstrates that at least one district court is willing to push the second *Mendez* opinion into new territory. Whereas *Mendez* involved a shooting in what the Ninth Circuit considered to be the *Mendez* home,¹⁶⁸ the *Saucedo* shooting happened in the home's curtilage.¹⁶⁹ Unlike *Mendez*, the officer in *Saucedo* fired shots after a gun was intentionally pointed in his direction.¹⁷⁰ If *Mendez* can reach the more difficult scenario presented in *Saucedo*, then perhaps it will also reach the Clark facts.

159. See *id.* at 1081–82.

160. See *id.* at 1082.

161. See *id.* at 1083. The reasonableness of how an officer reacts to a suspect who disobeys the officer's commands is dependent on whether the suspect knew that the person issuing commands is “an officer of the law.” *Id.*

162. See *id.*

163. See *id.* at 1084–85.

164. See *id.* at 1085.

165. *Id.* at 1075.

166. *Id.* at 1073–74.

167. *Id.* at 1085.

168. *Mendez IV*, 897 F.3d 1067, 1072 (9th Cir. 2018) (“On the afternoon of the shooting, both were sleeping in their modest home.”).

169. *Saucedo*, 380 F. Supp. 3d at 1074.

170. *Id.*

CONCLUSION

The second *Mendez* opinion reflects an awareness of our reality. It acknowledges the ever-growing list of victims who have been killed by police-involved shootings. But instead of treating the repeated loss of life as tragic yet unavoidable, it instead imputes our collective knowledge about how frequent police-involved shootings are into its foreseeability analysis. We know what might happen, *Mendez* tells us. And when the risk of violence is known, officers should pause. An unlawful entry is not worth its risk.

The civil rights action brought by Stephon Clark's survivors could use *Mendez* to highlight how the death of an innocent person was a very real risk of rushing into a home, or its curtilage, without justification. The *Sauceda* summary judgment order suggests that *Mendez* will be used to evaluate the decision to unlawfully enter, as opposed to the decision to shoot.

Focusing on use of force has proven pointless, due to the ever-expanding qualified immunity defense and courts' deference to police instincts when officers believe they face imminent harm. Though much has been made of California's Assembly Bill 392, passed in August 2019, which purports to limit the circumstances in which officers may justifiably use deadly force, its changes are superficial. It requires that the decision to shoot be "necessary" and that the force used be "objectively reasonable" as opposed to simply "reasonable."¹⁷¹ The bill was motivated in part by Clark's death, but it is unclear what kind of change it will bring about.¹⁷²

But the \$4 million *Mendez* verdict may serve § 1983's deterrent purpose. It represents a rare victory for the victims of police-involved shootings. It invites challenges to officer-friendly outcomes less lofty than those that attack qualified immunity's shaky foundation.¹⁷³ And it may actually force police officers to pause before rushing in to a home, a porch, a driveway, or a backyard. *Mendez* may defeat the urge to unlawfully enter.

171. 2019 Cal. Legis. Serv. ch. 170 (AB 392) (West) (amending Cal. Penal Code §§ 196, 835a) (providing that "[i]n determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer"); *id.* (amending § 835a(d) of the Penal Code to replace "reasonable force" with "objectively reasonable force").

172. Anita Chabria, Newsom Signs 'Stephon Clark's Law,' Setting New Rules on Police Use of Force, L.A. Times (Aug. 19, 2019), <https://www.latimes.com/politics/la-pol-ca-california-police-use-of-force-law-signed-20190711-story.html> [<https://perma.cc/6KWX-KWCA>].

173. See generally William Baude, Is Qualified Immunity Unlawful?, 106 Calif. L. Rev. 45, 48 (2018) (stating that "[r]ecently publicized episodes of police misconduct vividly illustrate the costs of unaccountability").