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I. Article
HOLLOMAN V. MARKOWSKI
“An Opportunity for Further Reflection On Police Encounters with People in Mental Health Crisis”

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This past court term, the United States Court of Appeals for the Fourth Circuit decided the case of *Holloman v. Markowski*, No. 15-1878 (4th Cir. Oct. 7, 2016). Four years earlier, Marcella Holloman’s mentally ill son Maurice Johnson (“Johnson”) was shot to death by two officers of the Baltimore Police Department (“BPD”). Holloman sued the officers for violation of her son’s civil rights. The Fourth Circuit found that the officers were entitled to qualified immunity from being sued for shooting—and killing—Johnson.

As the old adage advises, “hard cases make bad law.” It is difficult to imagine a harder set of facts than those confronted by the Court in *Holloman*.\(^1\) Less than a minute after encountering two fully armed white Baltimore police officers, the unarmed, mentally ill, African-American Johnson was dead. While the extreme nature of these facts might help to explain the unsatisfying nature of the Court’s result, it also provides a ready vehicle for reexamining certain aspects of the way such encounters might be handled as well as the way failed encounters might be litigated. Clearer guideposts would be a good thing for everyone. Society, the members of society who live with mental illness, and the law enforcement community all deserve better.

**FACTS**

At the time of his death, then thirty-one year-old Johnson lived with Holloman in their shared residence located at 3531 Elmora Avenue in Baltimore City, Maryland. J.A. at 26.\(^2\) Johnson was a professional cook and was working toward obtaining his G.E.D. J.A. at 270-272. In 2009, the University of Maryland Hospital diagnosed Johnson with manic-depressive disorder and this diagnosis was entered in the Maryland State database, an official state record of persons known to suffer from mental disorders. J.A. at 25. Johnson received medical treatment for this disorder. *Id.*

**Johnson Comes Home Upset**

On May 19, 2012, at approximately 5:00 p.m., Johnson arrived home and walked into the backyard where Holloman was hosting her granddaughter’s sixth birthday party. J.A. at 26, 274. Holloman noticed that Johnson appeared “visibly upset.” J.A. at 26. However, she “did not...know the reason why.” J.A at 26.

**Johnson Goes Upstairs To His Room And Breaks Things**

Johnson then went upstairs into his room where he broke his large mirror and the television on his nightstand. J.A at 267. Holloman heard a “splash” sound coming from inside and went upstairs to check on Johnson. *Id.* Upon seeing Johnson’s broken

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\(^1\) The factual difficulties in the case were compounded by the fact that Holloman was proceeding *pro se* in the district court.

\(^2\) J.A. citations are to the “Joint Appendix” filed in the United States Court of Appeals for the Fourth Circuit.
possessions, Holloman knew that Johnson was experiencing a mental health episode and that he needed “some medicine.” *Id.* She told Johnson that she would take him to the hospital once the party was over. *Id.* Johnson responded by telling Holloman that she should call the police because he “ain’t going nowhere.” *Id.* Holloman told Johnson that police involvement was unnecessary. *Id.* She then returned downstairs while Johnson remained in his room. *Id.*

Holloman’s daughter, Barbara, subsequently went upstairs to speak with Johnson. *Id.* She asked him why he was “zapping out” and “busting up [his] stuff like that.” *J.A.* at 275. Barbara and Johnson “had some words,” and their verbal argument turned into “some tussling.” *Id.* Shortly after, Barbara returned downstairs completely uninjured. *J.A.* at 276.

**Johnson Comes Downstairs And Continues To Act Up**

After Holloman asked the party-attendees to leave, Johnson came downstairs and tried to dislodge the screen door from the back door. *J.A.* at 275. Next, he pushed his foam mattress onto the front lawn where he pulled it apart into tiny pieces. *J.A.* at 277-278. While Johnson was preoccupied on the front lawn, Barbara locked the front door of the house to keep him outside. *J.A.* at 278.

Once Johnson found himself locked out of the house, he started kicking the front door to get inside. *J.A.* at 279. Johnson then proceeded around the house, through the alley and up to the back door. *Id.* Holloman locked the back door from inside though just as Johnson was reaching for its handle. *J.A.* at 280. Finding the back door locked too, Johnson started kicking at it to get inside. *Id.* At this time, Johnson was completely locked out of the house. *Id.*

**Holloman Calls 911 To Take Johnson To The Hospital**

At 5:05 p.m., Holloman called 9-1-1 to ask the BPD and/or the Baltimore Fire Department to assist her in transporting Johnson to the hospital for medical care. *J.A.* at 26. They had successfully helped transport Johnson to the hospital before, and Holloman trusted that they would do so again. *J.A.* at 271. At the time, Officers Markowski and Bragg were separately on duty working as uniformed police officers for the BPD. *J.A.* at 26. Both officers were apprised of Ms. Holloman’s 9-1-1 call. *Id.*

**Two BPD Officers Respond To The 911 Call**

At 5:17 p.m., Markowski arrived at 3531 Elmora Avenue. *Id.* He was “well aware of [Johnson’s] disorder” from previous interactions and from “his knowledge of [Johnson’s] name being contained in the [Maryland State] database.” *J.A.* at 25. Holloman unlocked the front door to let him in. *J.A.* at 27. She then informed Markowski that Johnson was “o.k.” in the backyard, but she asked Markowski to wait for another responding officer to arrive before addressing Johnson’s situation. *Id.* Markowski paid “no mind” to Holloman’s suggestion however, and he instead marched
right through Holloman’s living room, dining room and kitchen to the back door. Id. Markowski then called out Johnson’s name, which prompted Johnson to stop kicking on the door and to start knocking instead. Id.

As Johnson was knocking on the back door, Holloman explained to Markowski that Johnson was suffering from a mental health episode, that Johnson had “psych issues,” that he had “zapped out” and that he “wasn’t going to stop.” J.A. at 280. That was why she wanted police help in transporting him to the hospital for treatment. A few seconds later, Bragg arrived at the scene and joined Markowski and Holloman at the rear of the house. J.A. at 27.

At this point in time, a locked, steel door stood between the two fully armed police officers inside the house and the unarmed Johnson outside. J.A. at 280.

**Holloman Tells The Officers To Use Their Tasers Not Their Guns**

While BPD Officers Markowski and Bragg calculated their next move, Holloman told both officers: “Don’t sho[o]t him but just taze him ‘cause I do know tazing make him stop.” Id. Nonetheless, Bragg then unbuckled the safety strap on his leather gun holster, causing Holloman to implore him “not to shoot [her] son.” Id. As Holloman’s last plea left her lips, Bragg opened the back door. Id.

Johnson then stepped inside the now-open door and everybody surrounded him, screaming at him to “calm down.” J.A. at 281. Both officers “could clearly see that [Johnson] was unarmed,” J.A. at 28, and Johnson did not make any aggressive gestures or sudden movements toward the officers. Id.

**Officer Markowski Initiates A Struggle With Johnson**

Markowski then quickly seized Johnson’s left arm with both hands while Bragg simultaneously grabbed Johnson’s right arm in a similar fashion. Id. Johnson resisted their seizure, and the tangled group of men bulldozed their way into the dining room. J.A. at 281. Johnson soon escaped the officer’s restraint and “punched” one of the officers. Id. Johnson and Markowski then fell to the ground in a struggle. Id. While on the ground, Johnson maneuvered his way on top of Markowski while “the other officer [got] on top of [Johnson],” trying to pull Johnson off. Id. Sandwiched between the two officers, Johnson tried to fend off Bragg by throwing his hands back. J.A. at 268.

**Both Officers Shoot Johnson At Close Range And Kill Him**

Markowski suddenly reached behind his back and pulled out his gun. J.A. at 28. He pressed its barrel against Johnson’s chest and squeezed its trigger twice. Id. Bragg then drew his gun and fired it into Johnson’s back. Johnson fell forward, gasping for his last breath. Id. At approximately 5:18 p.m., Johnson died from the multiple gun wounds to his chest and back. Id. The time interval between the beginning of the BPD Officers’ encounter with Johnson and Johnson’s death was approximately one minute. Id.
Holloman Files And Loses A Civil Rights Lawsuit Over Her Son’s Death


The district court began its analysis of the police officers’ summary judgment motion with the following recognition of the limitations on its review:

The record here is relatively sparse. The only substantive material Officers Markowski and Bragg provide to support their motion is a transcript of the recorded statement Holloman provided to detectives soon after the shooting. Because they wish to avoid a protracted discovery dispute, Officers Markowski and Bragg rely primarily on the facts in Holloman’s amended complaint and the recorded statement. Holloman submits no materials with her opposition. The court relies on her recorded statement when possible but otherwise cites to her amended complaint.

J.A. at 335, n.2. Indeed, Officers Markowski and Bragg never made a single factual averment of their own to explain and support their conduct in shooting Holloman’s son to death, both choosing instead to “answer” her amended complaint by simply generally denying its allegations. J.A. at 216-217 & 219-220. And contrary to the regular practice in qualified immunity cases nationwide, the officers strategically declined to submit affidavits in support of the objective reasonableness of their actions in the circumstances they confronted.

On the basis of the limited paper record before it, the district court then went on to find that the officers had not used excessive force in their encounter with Johnson. As a result of this finding, the district court never addressed the officers’ claim that even if they had used excessive force, they were entitled to qualified immunity from suit for doing so.

Holloman Appeals To The Fourth Circuit

Holloman appealed the district court’s decision in the BPD officers’ favor to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit subsequently appointed counsel to represent Holloman. In briefing the appeal for that Court, Holloman argued inter alia that: 1) the Graham v. Conner factors\(^3\) indicated that the officers use of

lethal force against Mr. Johnson was not objectively reasonable;\(^4\) 2) “[s]hooting Mr. Johnson was not a proportional use of force under the circumstances” because no “non-lethal weapons were employed or warnings given” before the fatal shots were fired;\(^5\) and 3) that “even if the first shot fired at Mr. Johnson might somehow have been justified, that justification does not automatically attach to the subsequent shots [and] the district court failed to account for this important effect of the different shots fired by the different officers.”\(^6\) Holloman also complained that “the most disturbing factor in the district court’s decision to grant summary judgment to the two BPD officers who shot Ms. Holloman’s son is the almost completely barren factual record which formed the backdrop for that ruling.”\(^7\)

**An Intervening Development**

After the briefing of Holloman’s appeal was completed, but before the oral argument of that appeal, the United States Department of Justice issued the long-awaited report on its fourteen-month investigation of the BPD in light of “the death of Freddie Gray and ensuing unrest” in the city. See https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department (“BPD Rpt.”). The report could not have been more scathing in its condemnation of the BPD’s “pattern or practice” of using “constitutionally excessive force” in its encounters with citizens. BPD Rpt. at 8. The first two “recurring issues” in this regard noted in the report were as follows:

First, BPD uses overly aggressive tactics that unnecessarily escalate encounters, increase tensions, and lead to unnecessary force, and fails to de-escalate encounters when it would be reasonable to do so. Officers frequently resort to physical force when a subject does not immediately respond to verbal commands, even where the subject poses no imminent threat to the officer or others. These tactics result from BPD’s training and guidance.

Second, BPD uses excessive force against individuals with mental health disabilities or in crisis. Due to a lack of training and improper tactics, BPD officers end up in unnecessarily violent confrontations with these vulnerable individuals. BPD provides less effective services to people with mental illness and intellectual disabilities by failing to account for these disabilities in officers’ law enforcement actions, leading to unnecessary and excessive force being used against them. BPD has failed to make reasonable modifications in its policies, practices and procedures to avoid discriminating against people with mental illness and intellectual disabilities. Id.

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\(^4\) Opening Brief of Appellant at 17-23.
\(^5\) Opening Brief of Appellant at 23-24.
\(^6\) Opening Brief of Appellant at 25.
\(^7\) Reply Brief of Appellant at 10.
Johnson’s shooting occurred right in the middle of the time period investigated by the DOJ. And one of the examples of questionable police conduct detailed in the DOJ Report chillingly echoed Johnson’s experience:

Tragically, some encounters with people with mental health disabilities or in crisis have resulted in uses of deadly force that may have been avoided had officers used tactics to account for the mental state of the individuals involved. For example, in a 2012 incident, a single officer was the first to arrive on the scene in response to a call by a man, Zachary, who informed the dispatcher that he had “a weapon” and was “about to do something crazy.” After the officer was dispatched, another officer and sergeant stated over the air that they would respond as backup. The officer did not wait for backup to arrive, however, or request the presence of a specially trained crisis intervention officer, despite the fact that he had prior information that Zachary had a weapon and was in crisis. The officer also made no attempt to contact Zachary inside the house before approaching the door, or consider less-lethal options for intervention. Instead, the officer went up to the door, alone, and with his gun already drawn. When Zachary opened the door with a lit cigarette in one hand, and a knife in the other, the officer reportedly ordered the man three times to drop the knife, and when he did not comply, the officer fired, killing him. After radioing dispatch to inform that he had arrived on the scene, less than two minutes passed before he announced that Zachary had been shot two to three times.

BPD Rpt. at 84. 8 The DOJ Report concluded that such incidents were the “result [of the fact] that BPD officers frequently fail to de-escalate encounters with unarmed individuals with mental health disabilities and those in crisis. Indeed, their tactics often escalate these encounters. Instead of requesting an officer trained in handling crisis events or a mobile crisis team made up of trained mental health professionals, officers handcuff and detain people with mental health disabilities and those in crisis and resort too quickly to force without understanding or accounting for the person’s disability or crisis.” Id. at 80.

**Oral Argument Of Holloman’s Appeal**

On September 20th, the Fourth Circuit heard oral argument of Holloman’s appeal. During the course of argument, Judge Harris asked counsel for Markowski and Bragg the completely understandable question why the officers had not submitted any affidavits describing their view of the circumstances surrounding their fatal encounter with Johnson? As Judge Harris put it, this “case is so much harder than it has to be because

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8 Unfortunately, Zachary’s heartbreaking story was not an isolated incident. The DOJ Report recounted many examples in support of its findings, including detailed stories about interactions with police by mentally ill citizens Christopher, James and David as well. Id. at 81-83. It was the DOJ’s belief that “[u]sing effective de-escalation techniques and calling for assistance from a mental health provider or officer trained in crisis intervention techniques would have likely prevented the use of force against all of these individuals.”
we don’t have affidavits.” Judge Motz later chimed in to similar effect saying: “it is strange they didn’t put affidavits in.” Counsel’s response to this question, and these concerns, was that trial counsel for Markowski and Bragg did not want to open “protracted discovery disputes” by submitting such affidavits. In rebuttal, Holloman’s counsel asked—as Holloman had also done in her briefs on appeal—for the case to be remanded to the district court for further development of the critical facts and circumstances missing from the record.

Shortly after argument, the Fourth Circuit ruled against Holloman. As relevant herein, that Court found that BPD Officers Markowski and Bragg were entitled to qualified immunity from being sued for shooting to death the unarmed and mentally disabled Johnson. The Fourth Circuit explained this qualified immunity ruling as follows:

“A government official sued under § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.” Carroll v. Carmon, 135 S. Ct. 348, 350 (2014). A plaintiff seeking to avoid an officer’s qualified immunity defense must demonstrate both that (1) “the facts, viewed in the light most favorable to the plaintiff, show that the officer’s conduct violated a federal right,” and (2) this “right was clearly established at the time the violation occurred such that a reasonable person would have known that his conduct was unconstitutional.” Smith v. Ray, 781 F.3d 95, 100 (4th Cir. 2015).

We exercise our discretion to begin with the second question—whether the asserted right was clearly established. See Pearson v. Callahan, 555 U.S. 223, 236 (2009). “The dispositive question is whether the violative nature of particular conduct is clearly established . . . in light of the specific context of the case...” Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (internal citations and quotations omitted). “We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

Thus, here we must determine whether, as of May 19, 2012, relevant precedent established that an officer’s use of lethal force is objectively unreasonable and therefore constitutionally excessive when used against an unarmed but physically resistant suspect, who has destroyed property, attacked an officer, and given no indication that he will yield. There is no such precedent. Holloman conceded at oral argument that no case “anywhere” addresses similar facts. The relevant precedent most helpful for her, Clem v. Corbeau, 284 F.3d 543 (4th Cir. 2002), contains too many material distinctions to clearly establish that the officers acted

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9 The audio recording of the oral argument below is maintained for review on the Fourth Circuit’s website.
unconstitutionally in the case at hand. In Clem, we denied summary judgment to an officer who allegedly “shot a mentally disabled, confused older man, obviously unarmed, who was stumbling toward the bathroom in his own house with pepper spray in his eyes, unable to threaten anyone.” Id. at 552. Officers Markowski and Bragg faced markedly different circumstances.

Unlike Clem, Johnson engaged in a physical altercation with the two officers. Moreover, Holloman, Johnson’s mother, had told the officers that Johnson had destroyed substantial property that evening and that he likely would not stop; no one told the officers similar facts about Clem. Furthermore, despite having no weapon, Johnson had already dragged Officer Markowski to the ground, held him down, fought with him, and fended off Officer Bragg’s effort to pull him away. Again, Clem engaged in no similar activity.

In sum, regrettable as Johnson’s death is, under these circumstances neither Clem nor any other precedent established that the officers employed constitutionally excessive force.

Slip op. at 7 - 10. In light of its ruling on the qualified immunity issue, the court of appeals had no need to decide the excessive force issue and it accordingly declined to do so.

The Supreme Court subsequently denied Holloman’s petition for a writ of certiorari.

“FOOD FOR THOUGHT” FROM HOLLOMAN

The daily news regularly makes clear that there is an epidemic of fatal shootings by police in this country. In the face of this epidemic, commentators have noted a trend toward expansion in qualified immunity jurisprudence. This expansion has been a subject of intense national debate as the violence between police officers and individual citizens rages on the street. Holloman represents an expansion of the procedural aspects

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10 See, e.g., “Fatal shootings by police remain relatively unchanged over the past two years.” p. A1 The Washington Post (Dec. 31, 2016)(“Despite ongoing national scrutiny of police tactics, the number of fatal shootings by officers in 2016 remained virtually unchanged from last year when nearly 1,000 people were killed by police. Through Thursday, law enforcement officers fatally shot 957 people in 2016 - close to three each day .... As was the case in 2015, a disproportionate number of those killed this year were black, and about a quarter involved someone who had a mental illness.”)(emphases added).
of the qualified immunity defense, and it also frames some issues about substantive aspects of the doctrine in the excessive force context as well. Against this backdrop, a few modest proposals for reform come to mind.

Procedure: Through clever defense lawyering against a pro se plaintiff, BPD Officers Markowski and Bragg were able to assert a qualified immunity defense without submitting a single factual averment of their own to explain the ‘facts and circumstances’ surrounding Johnson’s shooting as they saw them. Instead, both officers chose to “answer” Holloman’s amended complaint by simply generally denying its allegations. J.A. 216-217 & 219-220. And contrary to the regular practice in qualified immunity cases nationwide, the officers strategically declined to submit affidavits in support of the objective reasonableness of their actions in the circumstances they confronted.

This was unusual in the experience of Circuit Judges Motz and Harris. It was unprecedented in the experience of Holloman’s counsel as well, who asked for a remand to develop those ‘facts and circumstances.’ See, e.g., Anderson v. Creighton, 483 U.S. 635, 640-641 (1987)(noting that the qualified immunity inquiry “will often require examination of the information possessed by the searching officials” and “the circumstances with which [the officer] was confronted.”). But the Fourth Circuit declined that invitation. As a result, the police officers received qualified immunity for their actions without ever having to explain why they did what they did.

In the midst of the current epidemic of police shootings in this country, there are many societal reasons why we should want to require police officers to have to explain the reasons for their actions in such circumstances. Seeing such police-citizen encounters through the eyes of the officers helps to provide a helpful transparency into the underlying events, much like dashboard camera videos have been doing recently.13 And such transparency can help to quell the doubters about what really happened, to inform the determination of why it happened and (hopefully) to help prevent it from happening again. As Justice Brandeis famously observed: “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants.”14

Here, after years of litigation, Holloman has no idea why Officers Markowski and Bragg decided to take the reckless course of action they did with Johnson. Admittedly, part of her difficulty in getting such an explanation was caused by the fact that she was representing herself pro se against skilled defense counsel. Presumably, effective plaintiff’s counsel will be able to secure such police officer explanations in most cases. See Anderson v. Creighton, 483 U.S. at 641 (“The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson’s warrantless search to be lawful, in light of clearly established

13 See “Officers, turn on your body cams,” The Washington Post, p. A20 (July 23, 2107)(“evidence suggests that body cameras can serve an important purpose, facilitating accountability and transparency . . . [t]hey can . . . help rebuild trust between law enforcement and communities”).
14 Other People’s Money - and How Bankers Use It (1914).
law and the information the searching officers possessed”)(emphasis added). But the courts should also provide additional protection in this regard for the rights of the many pro se litigants who will continue to appear before them in civil rights cases. Transparency should be its own societal end in this context, regardless of individual litigants’ skill or strategy.

Substance: In searching for “clearly established” law in Holloman, the Fourth Circuit cited “the relevant precedent most helpful . . . as Clem v. Corbeau, 284 F.3d 543 (4th Cir. 2002),” but then quickly recognized that it “contains too many material distinctions to clearly establish that the officers acted unconstitutionally in the case at hand.” Slip op. at 7. The fact patterns in these cases are always going to be one-off and sui generis, however. See Scott v. Harris, 550 U.S. 372, 380 (2007)(referring to “the factbound morass of reasonableness” in excessive force cases). Like snowflakes, no two of these cases are ever going to be exactly alike. As a result, some broader principles should be considered to guide the way forward.

Mental Illness: Before Holloman, one of the broader principles that seemed firmly enconced for consideration in the Fourth Circuit’s excessive force jurisprudence was whether the citizen in question was “mentally ill.” Estate of Armstrong, 810 F.3d at 900. As the court of appeals clearly delineated in that decision, less than two years ago:

Armstrong’s mental health was thus one of the ‘facts and circumstances’ that ‘a reasonable officer on the scene’ would ascertain. And it is a fact that officers must account for when deciding when and how to use force. ‘The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense.’ ‘The use of force that may be justified by’ the government’s interest in seizing a mentally ill person, therefore, ‘differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community.’

Mental illness, of course, describes a broad spectrum of conditions and does not dictate the same police response in all situations. But ‘in some circumstances at least,’ it means that increasing the use of force may . . . exacerbate the situation.’ Accordingly, ‘the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis.’ And even when this ideal course is not feasible, officers who encounter an unarmed and minimally

15 This would not require the Court to enter an adverse final judgment on the merits against any officer who failed to so explain all of the circumstances surrounding his or her actions. Instead, a record lacking such an explanation would simply be found insufficient to support the officer’s affirmative defense of qualified immunity.
threatening individual who is ‘exhibit[ing] conspicuous signs that he [i]s mentally unstable’ must de-escalate the situation and adjust the application of force downward.’

Id. at 900 (internal citations omitted, emphasis added).

The fact pattern in Holloman presented a paradigmatic situation for application of the de-escalation approach with the aid of trained mental health counselors. The critical point was when Officers Markowski and Bragg had a locked steel door between them and Johnson, and the officers were in complete control of the situation. At that point, they could have chosen to do anything—and to ask for any assistance they wanted—in their approach to Johnson.

It is difficult to imagine how the police officers so completely and so quickly lost control of the situation thereafter. Indeed, these circumstances present a fact pattern of almost res ipsa loquitor implications. The facts speak for themselves that something went horribly wrong here from the point of complete police control, including Holloman’s advice that her son had been effectively tasered in the past, to the point of her unarmed, mentally ill son’s killing a moment later.

Why did these BPD officers choose the disastrous course of action they did to open the door and escalate the situation by trying to grab Johnson’s arms to restrain him, leading to the fatal melee? We have no idea from the record in the case because the officers never explained the basis for their actions. But we do have an extrajudicial source of information that helps to answer this question: the DOJ’s BPD Report.

The DOJ report reveals repeated concerns, premised on real world examples during the very time period Johnson was shot, that the BPD actually taught its officers to aggressively escalate situations like this. (None of this is recounted to damn Baltimore individually, but rather to learn from its history experientially. Right or wrong, “Baltimore is at the epicenter of the national debate over police violence,”16 which logically puts Holloman at the center of that debate as well.)

This is not, therefore, a question of 20/20 hindsight second-guessing a potentially mistaken judgment made by officers reacting to unanticipated events in the field.17 This was apparently a trained judgment to bypass the use of mental health counselors and de-escalation tactics. Yet as both the Armstrong Court and the DOJ recognize, the use of both is essential to reasonable—and accommodative—treatment of individuals with a mental illness in their encounters with police officers.

In light of the BPD settlement agreement with the DOJ referenced as part of the BPD Report, going forward, BPD police officers will be trained and required to use such mental health counselors and/or de-escalation techniques when possible in their interactions with individuals who have a mental illness. Going forward as well, in light of that settlement agreement and the Armstrong Court’s findings to the same effect, the obligation for police officers to use those counselors and techniques should be treated as “clearly established” as a matter of law. Thereafter, any officer who intentionally bypasses those obligations without adequate justification would be violating clearly established law in doing so.

Proportionality: In the Fourth Circuit, the author of this article argued strenuously that there was no case precedent anywhere supporting police officers’ use of lethal force against a citizen whom they knew to be unarmed. In response to a question by Judge Harris, opposing counsel agreed that his research had failed to identify any such precedent as well. One can easily understand the absence of such precedent. If the use of force by police officers is supposed to be “proportional” to the force confronted by those officers, then nonlethal force should never be allowed to be met with lethal force because the two forces are (by definition) non-proportional.

Put another way, safety from a punch is not the same thing as safety from a point-blank pistol shot. After Officers Markowski and Bragg tried to physically restrain him, the unarmed Johnson regretfully punched and struggled with Officer Markowski. Was that sufficient justification for two officers to fire three gunshots to his heart to stop the struggle? This not a question of bringing “a gun to a knife fight” where different applications of potentially lethal force might be viewed as proportional to one another. This is an instance of bringing “two guns to a fist fight,” which seems obviously non-proportional.

But what appears “obvious” to one may not appear the same to another. While Holloman’s counsel read the absence of case precedent as proof that the use of lethal force against a nonlethal threat had never been authorized, Judge Harris read the same precedent as proof that such use of force had never been proscribed. Flip sides of the same coin, leading to dramatically different results.

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18 The City of Baltimore’s settlement agreement with the DOJ included, among other things, that: “BPD will also ensure that its policies and training conform with legal and constitutional standards for law enforcement interactions with individuals with disabilities, individuals in behavioral health crisis, and juveniles. BPD will seek to partner with community organizations to explore practices to lower the number of incidents involving force, and the amount of force, used against persons with disabilities and in behavioral health crisis. BPD will expand its behavioral health crisis intervention program and seek to work with disability organizations and mental health care providers.” Agreement In Principle at 4.

19 And establishing “adequate justification,” of course, would require the officer’s explanation for why such a choice was made in light of the “facts and circumstances” being confronted at the time.

20 Estate of Armstrong ex rel Armstrong v. Village of Pinehurst, 810 F.3d 892, 899 (4th Cir. 2016)(requiring “proportionality of the force in light of all the circumstances”). Neither the district court nor the court of appeals ever mentioned the term “proportionality” in their rulings. Slip op. at 7-10; JA 339-343.
Because the Fourth Circuit did not rule upon the “excessive force” issue on appeal, the Court never addressed the “proportionality” of the force used in this context. The court of appeals had the clear discretion to bypass the issue in this regard, but addressing such a fundamental question head-on would have provided clearer future guidance for police officers on whether lethal force may be used in response to an attack—or threatened attack—with non-lethal force. It would also have eliminated the unsatisfying “absence of precedent” consideration, one way or the other, from future qualified immunity determinations on this issue. There is no need for more than one “free bite at the apple.”

There is, however, another potential way to look at this issue through the qualified immunity window. If the law definitively proscribes the non-proportional use of force by police officers in response to a citizen encounter, then perhaps that principle alone should be viewed as the “clearly established” law required to eliminate a qualified immunity defense for the officers involved. For example, suppose an unarmed government protester shouts a racial epithet at a police officer standing in a barricade line, then spits on the officer and raises his arm to punch the officer. Is the officer allowed to shoot that protester dead in response to such provocation? Of course not (although other physical and nonphysical responses would be permitted). The legal principle against such a non-proportional response could—and should—certainly be seen as “clearly established,” which would then allow a more fulsome examination of the police-citizen encounter in litigation unhampered by the qualified immunity defense.

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21 As a result, no binding precedent on the “proportionality” of lethal and non-lethal force results from the Holloman panel’s decision. Nonetheless, the district court’s decision remains outstanding with its sub silentio result to that effect. Because that aspect of the district court’s decision was not affirmed by the Fourth Circuit, however, its persuasiveness as authority is questionable. After all, if the Fourth Circuit believed that the “excessive force” decision by the district court was an “easy” affirmance, then the court of appeals would presumably have exercised its discretion to decide that “easy” issue first. But it did not do so. In addition, the truly persuasive precedents in this area of the law are “the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose.” Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998)(en banc).

22 “If the law’s lack of clarity would support an immunity defense, the court can readily dispose of the case after reaching that conclusion. But such a disposition leaves the law unsettled; it fails to give future officials and the individuals with whom they deal a clear idea about what the law permits and forbids. In other words, dispositions based on the law’s lack of clarity serve the interest in minimalist decision-making and constitutional avoidance, but do little to clarify the law.” Pfander, Resolving The Qualified Immunity Dilemma: Constitutional Tort Claims For Nominal Damages, Northwestern University School of Law Scholarly Commons, Faculty Working Papers, Paper 13 (2011). See John C. Jeffries, Jr., Reversing The Order of Battle in Constitutional Torts, 2009 Sup. Ct. Rev. 115

23 Of course, the courts have been cautioned against searching for “clearly established” law at too high a level of generality. But there is a difference between broad but fuzzy general platitudes and broad but specific proscriptions in this regard. The principle against a non-proportional response to force falls into the latter, enforceable category in this author’s view.

24 None of the positions argued for in the text of this article necessarily lead to final judgment on the merits of any excessive force claim against a law enforcement officer. Instead, they propose changes designed to lead to better reasoned and litigated claims, where all of the relevant facts and circumstances are explored and considered.
CONCLUSION

There is no denying that police officer-citizen encounters are fraught with potential danger, for both sides. Federal courts have endeavored to balance these competing concerns by developing the doctrine of qualified immunity to provide a buffer against suit for officers who act “reasonably” in the face of such danger. But that immunity was never meant to apply to “obviously” unreasonable conduct by such officers against citizens. See Hope v. Pelzer, 536 U.S. 730, 741 (2002); Wilson v. Layne, 526 U.S. 603, 615 (1999); Malley v. Briggs, 475 U.S. 335, 341 (1986).

There is also no denying that police officer encounters with individuals who have a mental illness present special circumstances. The Congress has endeavored to accommodate these circumstances by requiring police departments to comply with the Americans with Disabilities Act in their encounters with such individuals. As the DOJ put it, “[t]raining BPD officers on how to interact with individuals with mental health disabilities is a reasonable modification to policies, practices, and procedures to afford people with mental health disabilities the equal opportunity for a police intervention that is free from unreasonable force. Among other things, such training should result in officers employing appropriate de-escalation techniques or involving mental health professionals or specially trained crisis intervention officers.”

Holloman v. Markowski perfectly frames the escalation/de-escalation counterpoints. With a locked steel door between them and the unarmed Johnson, BPD Officers Markowski and Bragg had complete control of this citizen encounter as they decided how to handle it. For unknown reasons, they bypassed de-escalation techniques with a mental health specialist and chose an aggressive escalation tactic of attempting to physically restrain Johnson instead. When the physical restraint failed and angered Johnson, the resulting struggle turned fatal. In a single minute, Johnson was dead, amply illustrating the horrific consequences that can attend the wrong choice about how to handle such police encounters with individuals who have a mental illness.

When all is said and done, the heartbreaking facts of Holloman make the case more eloquently than any words can that more consequence should be attached to the initial police decision on whether to proceed with an escalation or a de-escalation approach to a citizen encounter. When the person being encountered has a mental illness, and in particular when it is clear that the person is experiencing a mental health crisis, the choice of de-escalation—preferably with the aid of a mental health counselor—is plainly the preferred alternative. Johnson would likely still be alive today if the BPD officers in his case had exercised that preferred choice. Governments and courts should now set about

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25 In support of this conclusion, the DOJ Report cited Estate of Saylor v. Regal Cinemas, Inc., 54 F. Supp. 3d 409, 424 (D. Md. 2014) (holding that the failure to provide appropriate training for officers to interact with individuals with developmental disabilities, which resulted in the death of a 26-year-old man with Down Syndrome after officers attempted to force him to leave a movie theater, properly stated a claim under Title II of the ADA).
enforcing, and reinforcing, the critical importance of that choice with the loss of qualified immunity if it is ignored.

The first opportunity to avoid conflict is always the best one.

II. Editor’s Comment
Excessive Force Jurisprudence and Police Encounters with People in Mental Health Crisis

As Prof. Braga notes in his article, during the appeal of the Holloman case to the Fourth Circuit, the U.S. Department of Justice (DOJ) released its findings from its months-long investigation (prompted by the death of Freddie Gray while in the custody of Baltimore police) into the use-of-force policies, training and incidents in the Baltimore Police Department (BPD). The DOJ found a “pattern or practice” in the BPD of using “constitutionally excessive force,” including the inappropriate escalation of encounters with persons with mental disabilities or in mental health crisis that resulted in officers shooting several of those individuals. The DOJ recommended a number of reforms in BPD policies, training and practices on the use of force, which were accepted by the City. The DOJ action, and the potential for wider reform that it represented, were significant. However, the future of such reform appears complicated, due in part to recent changes in DOJ policy, and in part to a reluctance by much of the federal judiciary to provide more definitive standards for police conduct.

The DOJ and Developments in Law Enforcement Agencies

As reported in a recent article in the New York Times (Eder, Protess, & Dewan, Nov. 21, 2017; available here) DOJ investigations and actions like the one in Baltimore were combined with a larger DOJ collaborative effort carried out over the last several years with law enforcement agencies around the country to reform police practices in a way that reduced harm, built trust between the police and the community, and better enabled the police to carry out their public safety mission. We, too, noted the potentially significant role the DOJ was taking in advancing the jurisprudence on the use of force in police encounters with persons with mental disabilities (July 2015 article reviewing the U.S. Supreme Court’s opinion in Sheehan v. City and County of San Francisco, 135 S.Ct 1765 (2015); available here). The hope was expressed in that 2015 article that the growing impact of these practices would change the norms for police conduct, and set a new standard for assessing and determining what conduct constitutes excessive use of force in these encounters.

The DOJ is now dramatically changing its approach to its work with local law enforcement, however, to the disappointment of many of the local governments and departments that had sought DOJ assistance (Eder, Protess, & Dewan). That change is likely to delay the evolution of the jurisprudence of excessive force. Nonetheless, many localities see the value of training officers to engage individuals who are in mental health crisis in a manner that de-escalates the crisis and enhances safe resolutions. In particular,