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## How the Fourth Amendment Frustrates the Regulation of Police Violence

Seth W. Stoughton

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# HOW THE FOURTH AMENDMENT FRUSTRATES THE REGULATION OF POLICE VIOLENCE

*Seth W. Stoughton\**

## ABSTRACT

*Within policing, few legal principles are more widely known or highly esteemed than the “objective reasonableness” standard that regulates police uses of force. The Fourth Amendment, it is argued, is not only the facet of constitutional law that governs police violence, it sets out the only standard that state lawmakers, police commanders, and officers should recognize. Any other regulation of police violence is inappropriate and unnecessary.*

*Ironically, though, the Constitution does not actually regulate the use of force. It regulates seizures. Some uses of force are seizures. This Article explains that a surprising number of others—including some police shootings—are not. Uses of force that do not amount to seizures fall entirely outside the ambit of Fourth Amendment regulation. And when a use of force does constitute a seizure, the Fourth Amendment is a distressingly inapt regulatory tool. There is, in short, a fundamental misalignment between what the Fourth Amendment is thought to regulate and what it actually regulates, and there are good reasons to doubt the efficacy of that regulation even when it applies. Put simply, the Fourth Amendment is a profoundly flawed framework for regulating police violence.*

*The Constitution is not the only option. Police reformers have offered state law and police agency policies as promising regulatory alternatives. What has largely evaded academic attention, however, is the extent to which state courts and police agencies simply adopt or incorporate the constitutional standards into state law or agency policies. In this way, the Fourth Amendment’s flaws have spilled over into the sub-constitutional regulation of police violence.*

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\* Associate Professor of Law, University of South Carolina School of Law. I am thankful to my University of South Carolina colleagues as well as the participants of the 2019 Law of the Police Conference (Geoff Alpert, Kami Chavis, Mary Fan, Barry Friedman, Rachel Harmon, David Harris, Ashley Heiberger, Richard Leo, Anna Lvovsky, Eric Miller, Maria Ponomarenko, John Rappaport, Joanna Schwartz, Jocelyn Simonson, David Sklansky, Chris Slobogin, and Jordan Woods), the participants of the 2019 Vanderbilt Criminal Law Roundtable, panel attendees at CrimFest! 2019, participants in a Duke Law Center for Science & Justice Works-in-Progress virtual workshop, and Jeff Noble for their helpful thoughts and suggestions. All errors are the result of my association with Geoff Alpert. I appreciate the research assistance of Katie Engels, and the editorial assistance of the Emory Law Journal. As always, I am grateful for the support of Alisa Stoughton.

*This Article details the substantial shortcomings in constitutional jurisprudence, describes the problem of Fourth Amendment spillage, and argues that the divergent interests underlying the various regulatory mechanisms should lead state lawmakers and administrative policymakers to divorce state law and administrative policies from constitutional law. In doing so, it advances both academic and public conversations about police violence.*

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## INTRODUCTION

Within policing, few legal principles are more widely known or highly esteemed than the “objective reasonableness” standard that regulates police uses of force. Over the last thirty years, *Graham v. Connor*<sup>1</sup> has not only been quoted and cited thousands of times in litigation and judicial opinions, it has also featured prominently in police training and police-oriented publications.<sup>2</sup>

Today, *Graham v. Connor* is a clear example of police orthodoxy. When the Police Executive Research Forum (PERF) suggested in 2016 that police “[a]gencies should continue to develop best policies, practices, and training . . . that go beyond the minimum requirements of *Graham v. Connor*,”<sup>3</sup> the backlash was swift and vehement. The International Association of Chiefs of Police (IACP) and the Fraternal Order of Police—organizations that are not typically bedfellows when it comes to positions on police policy—promptly released a joint statement “reject[ing] any call to require law enforcement agencies to unilaterally, and haphazardly, establish use-of-force guidelines that exceed the ‘objectively reasonable’ standard set forth by the U.S. Supreme Court . . . .”<sup>4</sup> Police-oriented publications printed articles criticizing PERF’s recommendations.<sup>5</sup> Officers and union officials denounced police chiefs who supported those recommendations, with at least one union going so far as to call a vote of no confidence because of a chief’s interest in implementing some of the PERF-backed reforms.<sup>6</sup>

There was a similar reaction in 2018 when California legislators proposed the Police Accountability and Community Protection Act, which would have authorized the use of deadly force only when it was “necessary to prevent

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<sup>1</sup> 490 U.S. 386 (1989). In *Graham*, the Court held that claims that officers who used excessive force were to be assessed under the Fourth Amendment’s prohibition on unreasonable searches and seizures, and thus that officers’ uses of force were constitutional so long as they were objectively reasonable. *Id.* at 397.

<sup>2</sup> Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 865 (2014).

<sup>3</sup> POLICE EXEC. RSCH. F., GUIDING PRINCIPLES ON USE OF FORCE 35 (2016), <https://www.policeforum.org/assets/30%20guiding%20principles.pdf>.

<sup>4</sup> Chuck Canterbury & Terrence Cunningham, *Statement of the Fraternal Order of Police and the International Association of Chiefs of Police on Use of Force Standards*, FRATERNAL ORD. POLICE, [https://fop.net/CmsDocument/Doc/FOP-IACP\\_UseofForceStatement.pdf](https://fop.net/CmsDocument/Doc/FOP-IACP_UseofForceStatement.pdf) (last visited Dec. 23, 2020).

<sup>5</sup> See, e.g., Kevin Davis, *Editorial: PERF and Its Questionable Principles*, OFFICER.COM (Feb. 25, 2016), <https://www.officer.com/investigations/article/12174475/perf-and-their-questionable-principles>; Richard Fairburn, *PERF’s UOF Report Illustrates Disconnect Between Street Cops, Administrators*, POLICE1 (Mar. 7, 2016), <https://www.police1.com/use-of-force/articles/perfs-uof-report-illustrates-disconnect-between-street-cops-administrators-k15J8s92bri5weQU/>.

<sup>6</sup> Jacob Beltran, *Police Union to Take Vote of ‘No Confidence’ on McManus*, MYSANANTONIO (Mar. 9, 2016), <https://www.mysanantonio.com/news/local/article/Police-union-to-take-vote-of-no-confidence-6878688.php>.

imminent death or serious bodily injury to the officer or to another person.”<sup>7</sup> The California Peace Officers Association criticized the proposal for “rais[ing] the legal use of force standard” above that laid out in *Graham v. Connor*.<sup>8</sup> As the president of the San Diego Police Officers Association wrote, “Abandoning the ‘reasonableness’ standard pertaining to a police officer’s use of force set by [*Graham*] would greatly hinder law enforcement officers and therefore endanger the communities they serve”; anything other than continued reliance on the constitutional standard established in *Graham* would be “unrealistic and unacceptable . . . .”<sup>9</sup>

The message was clear: the Fourth Amendment is not only the source of constitutional law that governs police violence;<sup>10</sup> it sets out the *only* standard that state lawmakers, police commanders, and officers themselves should recognize. Any additional regulation is unnecessary, if not dangerously counterproductive.

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<sup>7</sup> A.B. 931, 2017–18 Leg., Reg. Sess. (Cal. 2018). The proposal defined “necessary” as those situations in which “an objectively reasonable peace officer would conclude that there was no reasonable alternative to the use of deadly force that would prevent imminent death or serious bodily injury to the peace officer or to another person.” *Id.* “Reasonable alternatives,” in turn, were defined as “tactics and methods, other than the use of deadly force, of apprehending a subject or addressing a situation that do not unreasonably increase the threat posed to the peace officer or another person.” *Id.* For purposes of disclosure, I helped with drafting parts of the bill, ultimately testifying before a state senate committee and submitting two letters supporting the bill. I also assisted with the successor bill the following year, A.B. 392, 2018–19 Leg., Reg. Sess. (Cal. 2019), drafting some language and submitting two letters of support.

<sup>8</sup> Shaun Rundle, *Use of Force Legislation Negotiations Prove Nothing Has Changed*, CAL. PEACE OFFS. ASS’N (Jan. 15, 2019), <https://cpoa.org/use-of-force-legislation-negotiations-prove-nothing-has-changed/>.

<sup>9</sup> Jack Schaeffer, *Commentary: Why Lawmakers Shouldn’t Change the Standard for Police Use of Force*, SAN DIEGO UNION-TRIB. (June 13, 2018, 2:45 PM), <https://www.sandiegouniontribune.com/opinion/commentary/sd-utbg-california-police-force-20180613-story.html>.

<sup>10</sup> I use the terms “police use of force” and “police violence” synonymously. I acknowledge that “use of force” (or, more recently, “response to resistance”) are industry standard terms. As David Sklansky has persuasively argued, though, such terminology “has a euphemistic quality” that obscures the operational reality of officer actions in a way that meaningfully hinders public conversations. DAVID SKLANSKY, *THE JURISPRUDENCE OF BLOOD: HOW THE LAW THINKS ABOUT VIOLENCE* (forthcoming) (excerpt on file with author). As I have asserted elsewhere, “Treating police violence as a static, hygienic exercise of government authority insulates society from the consequences of its approval, unfairly shifting disapprobation for police actions onto individual officers instead of the society that condoned some abstract understanding of what they would be doing. It allows society to overlook or ignore the raw reality of police violence, and thus frees us from having to confront difficult regulatory questions about where and how to draw lines that separate permissible and impermissible behavior.” Seth W. Stoughton, *The Regulation of Police Violence*, in *CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS* 321, 323 (Roger G. Dunham, Geoffrey P. Alpert & Kyle D. McLean eds., 8th ed. 2020). In keeping with those concerns, I use “police violence” as a purely descriptive phrase that does not connote whether the actions so described were appropriate or inappropriate. I explicitly eschew more value-loaded terminology, such as “police brutality.”

Ironically, though, the Constitution does not actually regulate the use of force, at least not directly. The Fourth Amendment regulates *seizures*, and the relationship between seizures and uses of force is more complicated than it first appears. An officer seizes someone when the circumstances are such that a reasonable person would not feel free to terminate the encounter, either by leaving,<sup>11</sup> or, in situations where leaving is not feasible, by disregarding the officer and going about their business.<sup>12</sup> Such circumstances exist when officers intentionally acquire a degree of physical control over the subject through the subject's submission to a show of police authority or through the initiation of physical contact with the subject.<sup>13</sup> Uses of force are regulated as seizures because they involve intentional physical contact.

But not always. Some uses of force are, indeed, seizures. Others are not. This Article is the first to point out the extent to which police uses of force are *not* seizures. While Fourth Amendment search jurisprudence can be quite sophisticated—or painfully over-complicated, depending on how charitable one is feeling—the line between seizures and uses of force has been so badly drawn as to have passed the point of absurdity. An officer who shoots at someone, but misses, for example, has unquestionably used force, but has not seized the subject (unless the subject submits).<sup>14</sup> More problematically, appellate courts have held that even uses of force that physically connect with someone are not necessarily seizures. An officer who shoots someone other than their intended target has used force, but may not have seized anyone for Fourth Amendment purposes.<sup>15</sup> Even when an officer shoots the intended target, courts may conclude that there has been no seizure if the subject is able to flee after being shot.<sup>16</sup> Sometimes even a use of physical force that connects with and has the desired effect on the intended target does not constitute a seizure.<sup>17</sup> In each of these cases, and many more, officers are intentionally using physical force, but their actions are not subject to Fourth Amendment regulation.

When a use of force does constitute a seizure, the Fourth Amendment is a distressingly inapt regulatory tool. As Rachel Harmon has observed, constitutional jurisprudence “regulating the use of force by police officers is

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<sup>11</sup> United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion).

<sup>12</sup> United States v. Drayton, 536 U.S. 194, 202 (2002).

<sup>13</sup> See, e.g., Brower v. Cnty. of Inyo, 489 U.S. 593, 598–99 (1989); California v. Hodari D., 499 U.S. 621, 628–29 (1991).

<sup>14</sup> See *infra* Part II.A.1.

<sup>15</sup> See *infra* Part II.A.2.

<sup>16</sup> See *infra* Part II.A.4.

<sup>17</sup> See *infra* Part II.A.3.

deeply impoverished.”<sup>18</sup> The oft-cited “*Graham* factors”—the severity of the crime, whether the subject is actively resisting or attempting to flee, and whether the subject is threatening officers or others—were specifically offered by the Court as a guide to judicial evaluation of use-of-force incidents, but those factors have limited analytical value.<sup>19</sup> At best, they serve as weak and potentially misleading proxies for the governmental interests that can justify the use of force by police, offering no guidance on what type of force or how much force officers can legitimately use in any given situation.<sup>20</sup> Worse, although the *Graham* factors were never intended to be exhaustive, courts frequently apply them to the exclusion of other relevant considerations. Finally, although the “objective reasonableness” inquiry is often conceived of and described as a totality of the circumstances review, the Fourth Amendment standard has been applied in ways that limit the scope of the analysis. Those limitations consistently favor officers.

There is a fundamental misalignment between what the Fourth Amendment is thought to regulate and what it actually regulates, and there are good reasons to doubt the efficacy of that regulation even when it applies. The Fourth Amendment, in short, is a profoundly flawed framework for regulating police violence.

The distortive seizure framework of the Fourth Amendment is not the only option; sub-constitutional regulatory alternatives exist. State law governs tortious and criminal behavior, setting out offenses<sup>21</sup> and establishing appropriate exceptions,<sup>22</sup> including police-specific exceptions. State law, for example, could regulate officers’ uses of force *qua* violence based on its effect on public safety. Police agency policy, meanwhile, regulates officer-civilian encounters more directly, yet with an eye toward balancing competing police priorities, such as the interests in law enforcement, officer safety, and public perceptions. Agencies could, as a matter of policy, regulate the use of force as a facet of officer interactions. In short, constitutional law, state law, and agency policy are not only different sources of authority, they also have distinct regulatory goals. As a formal matter, then, there is nothing unusual about the assertion that state law or agency policy provide additional layers of regulation, such that an officer’s use of force could run afoul of state law or agency policy regardless of its constitutional dimensions.

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<sup>18</sup> Rachel Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1119 (2008).

<sup>19</sup> See *infra* Part II.B.

<sup>20</sup> Harmon, *supra* note 18, at 1128–47.

<sup>21</sup> See, e.g., FLA. STAT. § 784.03 (2019).

<sup>22</sup> Such exceptions include self-defense, defense of others, or defense of property.

Despite these divergent regulatory goals, the Fourth Amendment's flawed framework has spilled over into state law and agency policy. A number of state judicial decisions reference the constitutional standards when applying or interpreting state statutory or common law,<sup>23</sup> with some explicitly incorporating constitutional jurisprudence into state law.<sup>24</sup> And many police agency policies borrow heavily or quote directly from Fourth Amendment caselaw, "overly[ing] on reciting the basic constitutional standard for police engagements without providing key protections for citizens."<sup>25</sup>

Even when restricted to federal courts,<sup>26</sup> the Fourth Amendment's flaws are severe enough to merit reconsideration in light of social and political changes. Those flaws are even more serious than they first appear, though, because of the spillage of constitutional jurisprudence into state courts' interpretations of state law and police agencies' development of policy, procedure, and training. In this Article, I argue that the many shortcomings in the Fourth Amendment's regulation of police violence make it an inappropriate source of guidance for state law and agency policy. While it goes without saying that officers should act within the scope of their constitutional authority, state lawmakers and police commanders should reject the uncritical adoption of constitutional law as a matter of state law or agency policy.

My argument proceeds in four parts. Part I summarizes the constitutional framework for evaluating the constitutionality of police uses of force under the Fourth Amendment. Part II identifies a series of flaws in that framework, adding to other scholars' criticisms to demonstrate that the Fourth Amendment's seizure jurisprudence is ill-suited to regulate police uses of force. Part III illustrates the problem of constitutional spillage into state law and police agency policy. Part IV argues that state legislators, judges, and police commanders should detach state law and, to a lesser but appreciable extent, police agency policy from the faulty Fourth Amendment framework. By doing so, I hope to advance both academic and public conversations about police violence.

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<sup>23</sup> See, e.g., *City of Jackson v. Powell*, 917 So. 2d 59, 71–72 (Miss. 2005).

<sup>24</sup> *Richardson v. McGriff*, 762 A.2d 48, 56 (Md. 2000) ("The touchstone of the analysis [for state law excessive force claims] is *Graham v. Connor*.").

<sup>25</sup> Osagie K. Obasogie & Zachary Newman, *Police Violence, Use of Force Policies, and Public Health*, 43 AM. J.L. & MED. 279, 286–87 (2018).

<sup>26</sup> See 18 U.S.C. § 242; 42 U.S.C. § 1983.



## I. THE FOURTH AMENDMENT REGULATION OF POLICE VIOLENCE

Prior to 1989, there was no clearly defined constitutional basis for regulating police uses of force. Most excessive force claims brought against state and local officers were analyzed under the Due Process Clause of the Fourteenth Amendment.<sup>27</sup> Indeed, the “vast majority” of federal courts had adopted the four-part analytical framework articulated by the Second Circuit in *Johnson v. Glick*, under which courts would assess plaintiff’s claims that officers had used excessive force by considering:

[ (1) ] the need for the application of force, [ (2) ] the relationship between the need and the amount of force that was used, [ (3) ] the extent of injury inflicted, and [ (4) ] whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.<sup>28</sup>

In 1989, the Supreme Court discarded the substantive due process analysis of excessive force claims in the policing context, “reject[ing] the notion that all excessive force claims brought under § 1983 are governed by a single generic standard.”<sup>29</sup> Instead, the Court held, excessive force claims were to be governed by *different* generic standards: “in the context of an arrest or investigatory stop of a free [i.e., not incarcerated] citizen,” the use of force was to be regulated by the Fourth Amendment’s prohibition on unreasonable seizures.<sup>30</sup>

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<sup>27</sup> *Graham v. Connor*, 490 U.S. 386, 392–93 (1989).

<sup>28</sup> *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973).

<sup>29</sup> *Graham*, 490 U.S. at 392.

<sup>30</sup> *Id.* at 394. In contrast, the use of force against individuals who have not been seized is regulated by the Due Process Clause of the Fourteenth Amendment, which prohibits government actions that shock the conscience. *Id.* at 393 (citing *Rochin v. California*, 342 U.S. 165 (1952)). In most use-of-force situations, an officer’s use of force will only shock the conscience when it is malicious, motivated by “a purpose to cause harm unrelated to the legitimate object of arrest”; conduct that merely evinces deliberate or reckless indifference will not run afoul of the Constitution. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998). The use of force against pre-trial detainees, meanwhile, is also subject to review under the Fourteenth Amendment’s Due Process Clause. *Graham*, 490 U.S. at 395 n.10. In that context, however, the jail official’s subjective intention is irrelevant; “a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable,” taking into account “the ‘legitimate interests that stem from [the government’s] need to manage the facility in which the individual is detained,’ appropriately deferring to ‘policies and practices that in th[e] judgment’ of jail officials ‘are needed to preserve internal order and discipline and to maintain institutional security.’” *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015) (quoting *Bell v. Wolfish*, 441 U.S. 520, 540, 547 (1979)). The use of force against convicted prisoners, meanwhile, is regulated by the Eighth Amendment’s prohibition of cruel and unusual punishment, which incorporates a subjective analysis: the question is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hudson v. McMillian*, 503 U.S. 1, 7 (1992); see *Wilkins v. Gaddy*, 559 U.S. 34 (2010).

Critically, that decision means that, for constitutional purposes, police uses of force are not primarily regulated as *violence*. Instead, they are regulated as *seizures*. In analyzing claims that officers used excessive force in violation of Fourth Amendment rights, then, the first step is to determine whether the incident involved a seizure. Less than two months before deciding *Graham*, the Court had clarified the nature of government actions that constitute a seizure, holding that seizures “require[] an intentional acquisition of physical control.”<sup>31</sup>

In defining the requisite physical control, the Court drew on common law tort principles and held that officers can seize individuals in either of two ways. First, a seizure occurs when an individual submits to an officer’s “assertion of authority” under circumstances in which a reasonable person would not feel free to “disregard the police and go about his business.”<sup>32</sup> This occurs, for example, when an officer initiates a traffic stop by activating their overhead lights (the show of authority) and the subject pulls over (submission), because no reasonable person in that situation would feel empowered to lawfully disregard the officer and keep driving. Second, and more relevantly, “the mere grasping or application of physical force with lawful authority” constitutes a seizure “whether or not it succeeded in subduing the arrestee.”<sup>33</sup>

Despite the general rule that an officer’s subjective motivations are not a relevant consideration in Fourth Amendment analysis,<sup>34</sup> the Court emphasized in *Brower v. County of Inyo* that what matters in the seizure determination is an officer’s intention to restrict freedom of movement.<sup>35</sup> As the Court wrote, “a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual’s freedom of movement (the innocent passerby), . . . but only when there is a governmental termination of freedom of

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<sup>31</sup> *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596 (1989).

<sup>32</sup> *California v. Hodari D.*, 499 U.S. 621, 626–27, 628 (1991).

<sup>33</sup> *Id.* at 624.

<sup>34</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996) (stating, “we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers” and “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis”); *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (concluding, with regard to the constitutionality of searches, “[t]he officer’s subjective motivation is irrelevant”); *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000) (“The parties properly agree that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer’s actions violate the Fourth Amendment . . . ; the issue is not his state of mind, but the objective effect of his actions.”); *Graham*, 490 U.S. at 397 (“[O]ur prior cases make clear” that “the subjective motivations of the individual officers . . . ha[ve] no bearing on whether a particular seizure is ‘unreasonable’ under the Fourth Amendment.”); *United States v. Mendenhall*, 446 U.S. 544, 554 n.6 (1980) (opinion of Stewart, J.) (noting an officer’s subjective intent is not relevant to the question of whether an individual has been detained); *United States v. Robinson*, 414 U.S. 218, 236 n.7 (1973) (noting an officer’s subjective perceptions were irrelevant to the determination of the constitutionality of a search under the “search incident to arrest” doctrine).

<sup>35</sup> *Brower*, 489 U.S. at 597.

movement *through means intentionally applied*.”<sup>36</sup> The Court went on to explain in dicta that it is the officer’s intention to restrict movement—not the identity of the individual whose freedom of movement is actually restricted—that matters, writing, “A seizure occurs even when an unintended person or thing is the object of the detention or taking, . . . but the detention or taking itself must be willful.”<sup>37</sup>

The Court expounded on this issue in *Brendlin v. California*, holding that a traffic stop involved not only the seizure of the driver—whom the police typically target for committing some infraction—but also the seizure of any vehicle passengers whom the officer did not specifically target.<sup>38</sup> Indeed, the *Brendlin* Court explicitly rejected the argument that “for a specific occupant of the car to be seized he must be the motivating target of an officer’s show of authority.”<sup>39</sup> Instead, the Court reiterated that a seizure is predicated on an officer’s intent to restrict some person’s movement, not on whether the person whose movement was restricted was the specific individual the officer intended to seize.<sup>40</sup> Read together, the opinions suggest that so long as officers intend to restrict *someone’s* freedom of movement, the actions that they take that *do* restrict freedom of movement are likely to be considered seizures even if the individual whose movement was restricted is not the intended target.<sup>41</sup>

If the government action in question amounts to a seizure, the next step is analyzing whether it was conducted in compliance with the constitutional limitations on government authority. In *Graham v. Connor*, the Court laid out a

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<sup>36</sup> *Id.* at 596–97.

<sup>37</sup> *Id.* at 596.

<sup>38</sup> 551 U.S. 249 (2007).

<sup>39</sup> *Id.* at 261.

<sup>40</sup> *Id.* (“[O]ur point was not that Brower alone was the target but that officers detained him ‘through means intentionally applied’; if the car had had another occupant, it would have made sense to hold that he too had been seized when the car collided with the roadblock.”).

<sup>41</sup> The “transferred intent” doctrine from criminal law provides a useful parallel. If an actor shoots at Person *A* intending to kill them but misses and fatally hits Person *B*, toward whom they have no ill will, the “transferred intent” doctrine holds that the actor acted with the purpose to kill even though an inadvertent target was struck. In essence, the actor’s *mens rea* is said to “transfer” from the intended target to the unintended target. The doctrine of transferred intent has been subject to a range of criticisms, from assertions that it is an unnecessary legal fiction, see JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 156–58 (6th ed. 2012); to assertions that it is misguided, see Douglas N. Husak, *Transferred Intent*, 10 NOTRE DAME J.L., ETHICS & PUB. POL’Y 65 (1996); to far stronger denunciations of the doctrine, see Peter Westen, *The Significance of Transferred Intent*, 7 CRIM. L. & PHIL. 321, 322 (2013). Criminal law theorists have disputed the propriety of transferred intent, variously arguing that it imposes liability on non-culpable (or less culpable) actors, see Anthony M. Dillof, *Transferred Intent: An Inquiry into the Nature of Criminal Culpability*, 1 BUFF. CRIM. L. REV. 501 (1998), and that it should be abandoned in favor of alternative means of reaching substantially similar outcomes. See Husak, *supra*.

framework for evaluating seizures involving or predicated on the application of physical force: because the applicable constitutional language prohibits unreasonable seizures, the ultimate question is whether the officer's actions were "objectively reasonable" under the circumstances.<sup>42</sup> Answering that question, the Court wrote, requires "a careful balancing of 'the nature and quality of the intrusion on the individual's . . . interests' against the countervailing governmental interests at stake."<sup>43</sup> But the balancing "test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."<sup>44</sup> Instead, determining whether any given use of force was constitutionally reasonable requires "careful attention to the facts and circumstances of each particular case."<sup>45</sup> The Court identified three specific, but not exclusive or exhaustive, considerations that are particularly relevant: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight."<sup>46</sup> These considerations are commonly known as the "*Graham* factors."

Of course, the underlying facts and circumstances are subject to dispute; there is always the potential for both factual and interpretive disagreements. As a factual matter, there may be a disagreement about whether the subject took a step toward an officer or whether the officer struck the subject with a closed fist. As an interpretive matter, there may be a disagreement about how undisputed facts should be interpreted; even when there is factual agreement that the subject took a step toward the officer, for example, there may be interpretive disagreement about whether the subject did so aggressively or in a way that threatened the officer. The determination that an officer's use of force was objectively reasonable *vel non* will depend on what one understands the operative facts and circumstances to be.<sup>47</sup> So how should the facts and circumstances be identified? Here, too, the Court has provided guidance, instructing reviewers to adopt the "perspective of a reasonable officer on the scene, rather than . . . the 20/20 vision of hindsight."<sup>48</sup>

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<sup>42</sup> 490 U.S. 386, 397 (1989).

<sup>43</sup> *Id.* at 396.

<sup>44</sup> *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Individual perceptions and conclusions may be influenced by the reviewer's prior beliefs, including their attitudes about police. Roseanna Sommers, *Will Putting Body Cameras on Police Reduce Polarization?*, 125 *YALE L.J.* 1304, 1318–22 (2016); Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection*, 8 *JUDGMENT & DECISION MAKING* 407, 408 (2013); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 *YALE L. & POL'Y REV.* 149, 150 (2006).

<sup>48</sup> *Graham*, 490 U.S. at 396.

Thus, the formula for determining the reasonableness of an officer's use of force is not fully subjective: courts should not blindly accept the facts or circumstances that the officer perceived or the conclusions that the officer drew. Nor is the test fully objective: courts will not eschew consideration of the officer's subjective perceptions. Instead, the constitutionality of police violence is determined under a more nuanced and complex standard, one that has been referred to as "subjective objectivity."<sup>49</sup> In assessing the constitutionality of force, the officer's subjective perspective, observations, and conclusions must be filtered through the lens of the legal construct known as the "reasonable officer on the scene."<sup>50</sup> The operative facts and circumstances are those that the "reasonable officer" would have perceived, and the operative conclusions are those that the "reasonable officer" would have come to if she had been in the position of the actual officer at the time.<sup>51</sup>

Once the operative facts and circumstances—that is, the facts as they would have appeared to a reasonable officer at the time—have been identified, the analysis turns to the ultimate question: under those facts and circumstances, was the use of force objectively reasonable? Unfortunately, while the Court has provided a multifaceted framework for determining what the operative "facts and circumstances" are, it has done little to provide meaningful guidance to courts assessing the reasonableness of police violence. In short, the Court has not explained how to distinguish reasonable force from unreasonable force. It did, however, caution that the analysis must be deferential to officers: "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."<sup>52</sup>

The Court has suggested that the question of reasonableness is essentially one of proportionality, at least in the context of deadly force. In 1985, four years before *Graham* was decided, the Court articulated the circumstances under which officers could constitutionally use deadly force, concluding that the Fourth Amendment permits it when officers have "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."<sup>53</sup> In so holding, the Court rejected a common law rule known

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<sup>49</sup> Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?*, 85 J. CRIM. L. & CRIMINOLOGY 481, 486 (1994).

<sup>50</sup> *Graham*, 490 U.S. at 396.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 396–97.

<sup>53</sup> *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

as the “fleeing felon rule,” which held that officers could use deadly force to prevent the escape of a fleeing felon.<sup>54</sup> The Court’s decision was explicitly predicated on the strength of the individual’s interest in *not* being killed, and on the relative weakness of the government’s interest in killing a fleeing felony suspect: doing so would undermine, rather than facilitate, the government’s interest in apprehending the offender, determining guilt, and imposing punishment, and it would not meaningfully advance the government’s interest in law enforcement by discouraging other suspects from fleeing.<sup>55</sup>

The rule governing deadly force in the aftermath of *Garner* appeared fairly straightforward: lower courts and police agencies themselves understood that deadly force was a proportional response to an immediate threat of death or great bodily harm, but was disproportionate to any lesser or more attenuated threat. That bright-line rule lasted for almost twenty years before being muddied by the Court’s 2007 decision in *Scott v. Harris*.<sup>56</sup> In that case, the Court reimagined the *Garner* holding, writing, “*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute ‘deadly force.’ *Garner* was simply an application of the Fourth Amendment’s ‘reasonableness’ test . . . to the use of a particular type of force in a particular situation.”<sup>57</sup> Instead of setting out the circumstances in which deadly force is constitutionally permissible, which is how *Garner* had been interpreted until that point, the *Harris* Court understood *Garner* to be an application of *Graham*’s reasonableness test.<sup>58</sup> *Harris*, in short, strongly suggests that there is no meaningful difference between deadly force and less-lethal force: “all that matters is whether [the officer’s] actions were reasonable.”<sup>59</sup>

Strong as that suggestion is, it is not entirely clear how seriously it should be taken in light of the fact that *Harris* appears to have followed the *Garner* rule. In *Harris*, an officer used his vehicle to ram a fleeing motorist, causing the

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<sup>54</sup> *Id.* at 12.

<sup>55</sup> *Id.* at 10–12. This portion of the Court’s holding was based, to a significant extent, on a review of contemporary police practices as reflected in the policies of forty-six police agencies, including the Federal Bureau of Investigation and the New York City Police Department; research by the Boston Police Department Planning and Research Division and by the International Association of Chiefs of Police; and the accreditation criteria set out by the Commission on Accreditation for Law Enforcement Agencies. See Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 224–28 (2017).

<sup>56</sup> 550 U.S. 372 (2007).

<sup>57</sup> *Id.* at 382.

<sup>58</sup> The *Harris* Court appears to have encountered a Star Trek-esque hole in the space-time continuum, given that it was, in 2007, interpreting *Garner*, written in 1985, to be an example of *Graham*, decided in 1989. *Id.*

<sup>59</sup> *Harris*, 550 U.S. at 383.

fleeing vehicle to go into an uncontrolled spin and crash.<sup>60</sup> The Court described the events leading up to the ram as “a dangerous high-speed car chase that threaten[ed] the lives of innocent bystanders . . . .”<sup>61</sup> Indeed, the Court held that it was so clear that the fleeing motorist “posed a substantial and immediate risk of serious physical injury to others” that “no reasonable jury could conclude otherwise.”<sup>62</sup> Given this interpretation of the facts, it would appear that the officer in *Harris* had probable cause to believe that the fleeing driver presented an imminent threat of death or great bodily harm to the officer or others, and therefore would have been justified in using deadly force under *Garner*. After *Harris*, it seems clear that it is objectively reasonable for officers to use deadly force when they are confronted with an imminent threat of death or serious bodily injury, but *Harris* appears to have left open the possibility that it may be objectively reasonable for officers to use deadly force in other circumstances as well.

*Harris* is not without its critics. A prominent criminologist with an extensive background in studying police pursuits argued, *inter alia*, that the *Harris* decision failed to acknowledge relevant research that would have contraindicated the Court’s conclusions.<sup>63</sup> At least one legal scholar has argued that outside of the relatively limited contexts of vehicle pursuits, *Harris* is something of a dead letter, largely ignored by lower courts and even, in its subsequent decisions, the Court itself.<sup>64</sup>

In sum, the Fourth Amendment regulates police violence (when it amounts to a seizure) by requiring, under a deferential view of the facts and circumstances and keeping certain especially relevant factors in mind, officers’ actions to be objectively reasonable.

## II. FOURTH AMENDMENT FLAWS

The preceding Part described the Fourth Amendment’s regulation of police violence as seizures. In this Part, I identify four structural shortcomings in that approach. First, there are significant interstices between “uses of force” and “seizures.” Because the terms are not coextensive, some acts of police violence

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<sup>60</sup> *Id.* at 375.

<sup>61</sup> *Id.* at 373.

<sup>62</sup> *Id.* at 386. For an empirical examination of this assertion, see Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

<sup>63</sup> Geoffrey P. Alpert & William C. Smith, *Police Pursuits After Scott v. Harris*, 10 POLICE FOUND. 1, 12 (2008).

<sup>64</sup> RACHEL A. HARMON, *THE LAW OF THE POLICE* (forthcoming 2021).

simply will not implicate the Fourth Amendment. Second, when the Fourth Amendment does apply, the framework articulated by the Court is deeply flawed. The factors the Court explicitly identified as particularly relevant to determining whether an officer's use of force was reasonable are at best unhelpful and at worst affirmatively misleading. Third, while the Court has articulated a "totality of the circumstances" approach in theory, the approach in practice has been sharply limited. Courts frequently rely on *some* circumstances while largely eschewing others, often in ways that systematically benefit officers. Fourth, the language used to describe when the Constitution permits the use of force has been sloppily inconsistent, frustrating efforts to carefully parse the Court's opinions to define meaning, as is common in other Fourth Amendment contexts. The cracks, inadequacies, and incompleteness inherent in the constitutional framework make the Fourth Amendment a flawed vehicle indeed for regulating police violence.

*A. Nothing to Seize Here: When Police Uses of Force ≠ Seizures*

The Fourth Amendment regulates seizures.<sup>65</sup> Uses of force that do not amount to seizures, for constitutional purposes, are outside the ambit of the Fourth Amendment. So much is obvious. What is less obvious, however, is the sheer number and width of the interstices between seizures and police violence. Various federal courts have held that the Fourth Amendment does not reach unsuccessful attempts to use of force, or uses of force that connect with an unintended target, or uses of force that connect with the intended target but are not intended to restrain freedom of movement, or uses of force that connect with the intended target and are intended to restrain but fail to do so. The following subsections examine each scenario, illustrating the discrepancies between police violence and seizures.

The various gaps discussed in this section should not be read as a condemnation of how courts are applying seizure jurisprudence. Instead, the inapplicability of the Fourth Amendment to many situations involving police violence is more properly understood as an indication that the rules developed to regulate seizures are not conceptually well aligned to regulate police violence. Some of these conclusions, for example, may make perfect sense in the context of investigative stops<sup>66</sup> or arrests but little sense when it comes to police uses of

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<sup>65</sup> The Fourth Amendment, of course, also regulates searches. A tremendous amount of ink has been spilled by judges and scholars applying or examining the constitutional regulation of searches. As interesting and important as that convoluted set of issues is, I am delighted that it is outside the scope of this Article and need not be discussed further.

<sup>66</sup> See *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (authorizing officers who have reasonable suspicion to believe



force. That conclusion advances my ultimate thesis: the Fourth Amendment is not well calibrated for regulating police violence.

*1. Attempts to Use Physical Force that Fail to Connect*

As described above, a seizure requires governmental action intended to restrain liberty and either physical contact or the subject's submission to an officer's assertion of authority. An officer may intend to restrain someone, but if their use of force is unsuccessful because the officer failed to make physical contact with a non-compliant subject, the officer has achieved neither physical contact nor the subject's submission. Under such circumstances, courts have held unsuccessful attempts to use force do not constitute Fourth Amendment seizures.

Consider the case of Christopher Reed, who was attacked by a group of heavily intoxicated assailants outside of an Orlando nightclub.<sup>67</sup> He managed to escape to a nearby parking lot and get into his car.<sup>68</sup> As Reed drove away, he struck several of the assailants who were surrounding the vehicle.<sup>69</sup> When Officer Phillip Clough saw what Reed had done, he fired two shots at Reed's vehicle.<sup>70</sup> "Reed neither heard nor saw the shots."<sup>71</sup> Reed was later stopped by the police, at which time he learned that officers had (previously) shot at him.<sup>72</sup> Reed filed a § 1983 claim alleging, *inter alia*, that Officer Clough's use of deadly force violated the Fourth Amendment.<sup>73</sup> The district court granted the defense motion for summary judgment and the Eleventh Circuit affirmed, concluding that there was no valid basis for a Fourth Amendment claim because Reed had not been seized.<sup>74</sup> There was no evidence that Officer Clough's gunshots had struck Reed's vehicle, so there was no physical contact.<sup>75</sup> Further, "the undisputed evidence that Reed did not learn about Clough's gunshots until he was later stopped by police demonstrated that Reed was not seized within the

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that crime is afoot to initiate brief detentions for the purposes of confirming or dispelling their suspicions, and authorizing officers who have reasonable suspicion that a detained subject is armed and dangerous to conduct a limited search for weapons by patting down the exterior of the subject's clothing).

<sup>67</sup> Reed v. Clough, 694 F. App'x 716, 717 (11th Cir. 2017).

<sup>68</sup> *Id.* at 718.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 717.

<sup>72</sup> *Id.* at 724.

<sup>73</sup> *Id.* at 717.

<sup>74</sup> *Id.* at 724.

<sup>75</sup> *Id.* The complaint alleged that Officer Clough's shots had broken Reed's windshield and that the broken glass had injured Reed, but there was no evidence in the record to support that contention. Instead, the evidence suggested that Reed's window was broken later (by an officer wielding a baton). *Id.*

meaning of the Fourth Amendment” because, from Reed’s perspective, there was no show of authority.<sup>76</sup> The Eleventh Circuit acknowledged that Officer Clough had shot at Reed in an attempt to effect what *would have* amounted to a Fourth Amendment seizure,<sup>77</sup> but—quoting a prior circuit case that, in turn, quoted *Hodari D.*—it reiterated, “Neither usage nor common-law tradition makes an *attempted* seizure a seizure.”<sup>78</sup>

It is not uncommon for officers to unsuccessfully attempt to use force. Officers get more hours of training on firearms than any other single tool, technique, or weapon that they might use in use-of-force situations, yet the best available data suggests that in most situations officers miss their target more often than they hit.<sup>79</sup> Officers also employ less-lethal<sup>80</sup> projectile weapons (e.g., beanbag and “baton” rounds, chemical sprays, PepperBalls, and TASERS),<sup>81</sup> handheld weapons (e.g., batons), and bodily weapons (e.g., fists), and, as with firearms, they fail to hit their targets on at least some occasions. When they miss, those uses of force will not constitute seizures and are likely to fall outside the ambit of the Fourth Amendment.<sup>82</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 726.

<sup>78</sup> *Id.* at 724 (internal quotation marks omitted). The Eighth Circuit came to a similar conclusion regarding a vehicle pursuit and multiple shots fired at a subject. In that case, the court held that the subject was not seized until actually struck by the officer’s bullets, concluding that previous shots “that were fired at [the subject’s vehicle] and that did not hit [the subject] were not seizures because they [like a vehicle pursuit itself] failed to produce a stop.” *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993).

<sup>79</sup> Christopher M. Donner & Nicole Popovich, *Hitting (or Missing) the Mark: An Examination of Police Shooting Accuracy in Officer-Involved Shooting Incidents*, 42 POLICING: AN INT’L J. 474, 474–75, 479 (2019) (concluding that Dallas Police Department officers hit their target, on average, 35% of the time); BERNARD D. ROSTKER, LAWRENCE M. HANSER, WILLIAM M. HIX, CARL JENSEN, ANDREW R. MORRAL, GREG RIDGEWAY & TERRY L. SCHELL, EVALUATION OF THE NEW YORK CITY POLICE DEPARTMENT FIREARM TRAINING AND FIREARM-DISCHARGE REVIEW PROCESS 14–15 (2008), [http://www.nyc.gov/html/nypd/downloads/pdf/public\\_information/RAND\\_FirearmEvaluation.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/public_information/RAND_FirearmEvaluation.pdf) (concluding that New York Police Department officers hit their target with between 18% and 37% of the bullets fired, depending on the nature of the shooting); CHARLIE BECK, USE OF FORCE YEAR-END REVIEW 29 (2016), <http://assets.lapdonline.org/assets/pdf/2016-use-of-force-year-end-review-small.pdf> (concluding that Los Angeles Police Department officers hit their target with between 20% and 48% of the bullets fired, depending on year); Michael D. White, *Hitting the Target (or Not): Comparing Characteristics of Fatal, Injurious, and Noninjurious Police Shootings*, 9 POLICE Q. 303, 304 (2006).

<sup>80</sup> I adopt here the industry standard terminology for a force option that can, but is not substantially likely to, cause serious bodily injury or death. See *infra* note 244 and accompanying text.

<sup>81</sup> In their standard deployment mode, a TASER weapon will propel two darts, called “probes.” The maximum range depends on the cartridge being used, but can extend to thirty-five feet. See ROSTKER ET AL., *supra* note 79.

<sup>82</sup> Unless, of course, the unsuccessful use of force convinces the subject to submit to the officer’s show of authority. See *California v. Hodari D.*, 499 U.S. 621, 626–27, 628 (1991).

## 2. *Physical Contact with an Unintended Person*

Sometimes an officer's use of force will physically connect with someone other than the intended target. It would be easy to assume that, under such circumstances, the unintended recipient of an officer's use of force has been seized for Fourth Amendment purposes, especially since the Court suggested as much in both *Brower* and *Brendlin*.

In the use of force context, however, several courts have adopted an approach that is in tension, if not entirely inconsistent, with the language of *Brower* and *Brendlin*. Multiple federal courts—including the Courts of Appeal for the First,<sup>83</sup> Second,<sup>84</sup> Fourth,<sup>85</sup> Sixth,<sup>86</sup> Seventh,<sup>87</sup> and Tenth Circuits<sup>88</sup>—have held that an individual is seized for Fourth Amendment purposes only when he is the *intended* target of the use of force. Under that approach, a use of force that inadvertently affects an innocent bystander does not constitute a Fourth Amendment seizure.

*Claybrook v. Birchwell* is representative; an officer intentionally fired his weapon at someone, but the bullet missed the intended target and struck Quintana Claybrook in the back, seriously injuring her.<sup>89</sup> Claybrook brought suit under 42 U.S.C. § 1983, alleging a Fourth Amendment violation.<sup>90</sup> The Sixth Circuit held that the Fourth Amendment was inapplicable when “physical injuries [were] inadvertently inflicted upon an innocent third party . . . because the authorities could not ‘seize’ any person other than one who was a deliberate object of their exertion of force.”<sup>91</sup>

Ironically, the Sixth Circuit cited as support for that proposition the same page of the *Brower* opinion that states, “A seizure occurs even when an unintended person or thing is the object of the detention or taking.”<sup>92</sup> Nevertheless, the court held the Fourth Amendment inapplicable, writing, “constitutional tort claims asserted by persons collaterally injured by police

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<sup>83</sup> *E.g.*, *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 795, 798 (1st Cir. 1990).

<sup>84</sup> *E.g.*, *Medeiros v. O’Connell*, 150 F.3d 164, 169 (2d Cir. 1998).

<sup>85</sup> *E.g.*, *Rucker v. Harford Cnty.*, 946 F.2d 278, 281 (4th Cir. 1991); *see Lee v. Williams*, 138 F. Supp. 2d 748, 758 (E.D. Va. 2001).

<sup>86</sup> *E.g.*, *Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000).

<sup>87</sup> *E.g.*, *Bublitz v. Cottey*, 327 F.3d 485, 489 (7th Cir. 2003); *see Bean v. Ind. Univ.*, 855 F. Supp. 2d 857, 864–65 (S.D. Ind. 2012).

<sup>88</sup> *E.g.*, *Childress v. City of Arapaho*, 210 F.3d 1154, 1156–57 (10th Cir. 2000).

<sup>89</sup> *Claybrook*, 199 F.3d at 355.

<sup>90</sup> *Id.* at 353.

<sup>91</sup> *Id.* at 359 (quoting *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596 (1989)).

<sup>92</sup> *Brower*, 489 U.S. at 596.

conduct who were not intended targets of an attempted official ‘seizure’ are adjudged according to substantive due process norms.”<sup>93</sup> Other courts have come to similar conclusions in cases involving bystanders or unintended targets struck by stray bullets.<sup>94</sup>

Officer-involved shootings are not the only use of force that can affect an unintended target. In *Sebastian v. Douglas County*, the Supreme Court of Colorado ruled on a § 1983 claim predicated on an alleged Fourth Amendment violation.<sup>95</sup> In that case, two suspects fled from a traffic stop and climbed a fence.<sup>96</sup> Deputy Greg Black released a police canine that had been trained in what the court referred to as a “find-and-bite” tactic<sup>97</sup>—often referred to as “bite-and-hold”—in which the canine is trained to bite the target and maintain that bite until the handler gives the order to release the bite.<sup>98</sup> Instead of following the two suspects over the fence, however, the canine returned to the vehicle and bit Fabian Sebastian, a passenger in the back of the vehicle who was in his seat with his hands up, exactly what the officers had directed him to do.<sup>99</sup> The Colorado Supreme Court concluded that Sebastian’s allegation with regard to Deputy Black was that the deputy had directed the dog to bite the fleeing suspects, not Sebastian himself.<sup>100</sup> That allegation, the court held, “does not amount to an allegation that the seizure here was the product of ‘means intentionally applied’ under *Brower*.”<sup>101</sup>

There are also at least some situations where officers’ use of force impacts *both* the intended target and an unintended target. In *Bublitz v. Cottey*, for example, officers were engaged in a high-speed pursuit of a robbery suspect.<sup>102</sup> Sergeant David Durant deployed a spike strip to deflate the tires of the fleeing vehicle.<sup>103</sup> When the suspect drove over the spike strip, their car veered to the

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<sup>93</sup> *Id.* The substantive due process framework is discussed briefly above. *See supra* note 30.

<sup>94</sup> *Moore v. Weekly*, 159 F. Supp. 3d 784, 791 (E.D. Mich. 2016) (minor child accidentally shot during a police raid); *Childress v. City of Arapaho*, 210 F.3d 1154, 1157 (10th Cir. 2000) (hostages in a fleeing minivan shot by officers were not seized because officers “intended to restrain the minivan and the fugitives, not [the hostages]”); *Browell v. Davidson*, 595 F. Supp. 2d 907, 911–12 (N.D. Ind. 2009) (kidnapping victim accidentally shot by officers); *Green v. Freeman*, 434 F. Supp. 2d 1172, 1174 (M.D. Ala. 2005) (bank robbery victim accidentally shot by officers).

<sup>95</sup> *Sebastian v. Douglas Cnty.*, 366 P.3d 601, 605 (Colo. 2016).

<sup>96</sup> *Id.* at 603–04.

<sup>97</sup> *Id.* at 604.

<sup>98</sup> SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, *EVALUATING POLICE USES OF FORCE* 220–21 (2020).

<sup>99</sup> *Sebastian*, 355 P.3d at 604.

<sup>100</sup> *Id.* at 607.

<sup>101</sup> *Id.* (quoting *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596–97 (1989)).

<sup>102</sup> *Bublitz v. Cottey*, 327 F.3d 485, 487 (7th Cir. 2003).

<sup>103</sup> *Id.*

side and crashed into a vehicle that had not been involved in the pursuit, injuring Lester Bublitz and killing his wife, Rebekah, and son, Nathaniel.<sup>104</sup> The Seventh Circuit concluded that while the officers intentionally made physical contact with the fleeing suspect's vehicle in an attempt to apprehend the robbery suspect, "[t]he Bublitz family was simply not the intended object of the defendant officers' attempts to seize the fleeing [suspect], so the Fourth Amendment is not implicated and cannot provide the basis for a section 1983 claim."<sup>105</sup>

As those cases demonstrate, an intentional use of force that impacts someone other than the intended target—even if it *also* affects the intended target—may not constitute a Fourth Amendment seizure.

### 3. *Physical Contact without the Intent to Restrain*

In *Terry v. Ohio*, the Court stated that a seizure occurs “whenever a police officer accosts an individual and restrains his freedom to walk away.”<sup>106</sup> In use-of-force situations as they are typically conceived, officers use physical violence as a tool to restrain a subject's ability to move and act freely, either for the purposes of detaining or arresting someone, or to protect themselves, another person, or the subject. On some occasions, however, officers use force to get someone moving, rather than with the intention of *preventing* someone from moving.

In the context of crowd control, for example, officers can deploy a range of physical weapons—disruptive devices,<sup>107</sup> chemical munitions,<sup>108</sup> less-lethal projectiles,<sup>109</sup> electrical conductive weapons,<sup>110</sup> and so on—to enforce dispersal

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 489.

<sup>106</sup> 392 U.S. 1, 16 (1968).

<sup>107</sup> Officers responding to the unrest in Ferguson, Missouri, deployed noise-flash diversionary devices, better known by their colloquial name “flashbangs.” Abbie Nehring, “*Less Lethal*” Flash-Bangs Used in Ferguson Leave Some Feeling the Burn, PROPUBLICA (Aug. 22, 2014, 9:56 AM), <https://www.propublica.org/article/less-lethal-flash-bangs-used-in-ferguson-leave-some-feeling-the-burn>. The Seattle Police Department uses Blast Balls in crowd control situations. Paula Wissel, *Seattle Police Say “Blast Balls” Safer Than Other Methods of Crowd Control*, KNKX (Aug. 16, 2016), <https://www.knkx.org/post/seattle-police-say-blast-balls-safer-other-methods-crowd-control>.

<sup>108</sup> Officers may use conventional pepper spray, of course, but may also deploy smoke or chemical gas from launched or thrown grenades. Alyssa Fowers, Aaron Steckelberg & Bonnie Berkowitz, *A Guide to the Less-Lethal Weapons That Law Enforcement Uses Against Protesters*, WASH. POST (June 5, 2020), <https://www.washingtonpost.com/nation/2020/06/05/less-lethal-weapons-protests/?arc404=true>.

<sup>109</sup> This includes rubber bullets, beanbags fired from a shotgun, and pellets fired from a PepperBall rifle. *Id.*

<sup>110</sup> Agencies have deployed stun batons, stun shields, and handheld electrical conductive weapons that resemble a “bunny-ear” antenna that can be used against individual protestors in a crowd situation. Paul A.

orders. Such tools and weapons are used to clear people from the area—the violent police equivalent of “you don’t have to go home, but you can’t stay here.” It seems possible to argue that, under such circumstances, individual crowd members’ freedom of movement is being restrained not because they are restricted in their ability to leave, but because they are being denied the option to stay in place. As previous work in this area has described, however, “*Brower* and similar formulations of seizure can be read to indicate that where one avenue of movement is denied to a citizen, she is not seized, but where all avenues of movement are denied to her, she is.”<sup>111</sup> In short, even assuming that any particular member of the crowd would be considered an “intended” target, for the reasons discussed above,<sup>112</sup> it is not at all clear that the use of force to encourage movement, as opposed to limit the subject’s physical ability to move, would constitute a seizure.

Other contexts present the same conundrum more directly. When activist Martin O’Boyle was attempting to take air samples at the office of the town clerk in Gulf Stream, Florida, he refused to let Police Chief Garrett Ward make a copy of a document that purportedly allowed him to record video in public buildings.<sup>113</sup> “Chief Ward allegedly grabbed O’Boyle’s ‘right-hand wrist and forearm to prevent [him] from retrieving the document’” that he was making a copy of and “shoved [O’Boyle] with his whole body” before grabbing his “right wrist and elbow with both hands and forcibly eject[ing O’Boyle] from the copy machine area” and warning him to leave the building.<sup>114</sup> The Eleventh Circuit approached the Fourth Amendment issue by asserting that the “ultimate inquiry [was] whether the officer used force as a means of coercion that would make [the plaintiff] feel he was not free to leave.”<sup>115</sup> With that in mind, and “[c]onstruing the facts in a light most favorable to O’Boyle,” the Court wrote, “we simply do not see how a reasonable person in O’Boyle’s position would not have believed that he was free to leave at any time”<sup>116</sup> because, as the complaint itself admitted, “Chief Ward’s actions were done in an attempt to ‘eject’

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Haskins, *Conducted Energy Devices: Policies on Use Evolve to Reflect Research and Field Deployment Experience*, 281 NAT’L INST. JUST. 45, 51, 53 n.17 (2019).

<sup>111</sup> Renée Paradis, Note, *Carpe Demonstratores: Towards a Bright-Line Rule Governing Seizure in Excessive Force Claims Brought by Demonstrators*, 103 COLUM. L. REV. 316, 317 (2003); see Karen J. Pita Loor, *Tear Gas + Water Hoses + Dispersal Orders: The Fourth Amendment Endorses Brutality in Protest Policing*, 100 B.U. L. REV. 817, 838–41 (2020).

<sup>112</sup> See *supra* Part II.A.2.

<sup>113</sup> *O’Boyle v. Thrasher*, 638 F. App’x 873, 875 (11th Cir. 2016).

<sup>114</sup> *Id.* at 875–76.

<sup>115</sup> *Id.* at 877 (internal quotation marks and citations omitted).

<sup>116</sup> *Id.*

O'Boyle."<sup>117</sup> Because O'Boyle was "free to walk away or end the encounter and proceed about his business," he was not seized for purposes of the Fourth Amendment.<sup>118</sup>

Not every such case involves an individual being ejected from a particular area. In *Clark v. Edmunds*, a county sheriff, David Edmunds, was at Sheryl Clark's house to take Clark's adult daughter into custody for an involuntary mental health evaluation.<sup>119</sup> Sheriff Edmunds grabbed the daughter's arm and began escorting her out of the house when Clark, who was nearby, "turned to see what was happening."<sup>120</sup> Fearing an attack, the sheriff shoved Clark away, causing her to stumble backward and strike a chair and glass table.<sup>121</sup> Sheriff Edmunds clearly intended to make physical contact, and he made physical contact with the intended target, and his use of force had the desired effect of controlling, to some extent, Clark's movement, but the Tenth Circuit still concluded that the shove did not constitute a seizure for Fourth Amendment purposes.<sup>122</sup> It came to that decision because "[t]he sheriff only intended to remove Plaintiff from his path to the door; he did not intend to acquire physical control over her."<sup>123</sup> Although Sheriff Edmunds was intentionally exercising a degree of physical control over Clark's physical movements by removing her from his path, the fact that he was stopping her from moving in one particular way—coming closer—rather than trying to restrict her freedom of movement generally was sufficient for the court to hold that his use of force did not amount to a seizure.<sup>124</sup>

#### 4. *Physical Contact that Fails to Restrain*

There is a degree of tension about whether and for how long someone's movements must actually be restricted to constitute a seizure. On the one hand, dictum from *Hodari D.* suggests that "the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient" to constitute a seizure.<sup>125</sup> Elsewhere in that opinion, the Court wrote, "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is

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<sup>117</sup> *Id.* at 878.

<sup>118</sup> *Id.* (internal quotation marks and citation omitted).

<sup>119</sup> *Clark v. Edmunds*, 513 F.3d 1219, 1221 (10th Cir. 2008).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1221–22.

<sup>123</sup> *Id.* at 1222.

<sup>124</sup> *Id.* at 1221–22.

<sup>125</sup> *California v. Hodari D.*, 499 U.S. 621, 624 (1991).

ultimately unsuccessful.”<sup>126</sup> A subject who escapes despite an officer’s use of physical force may not *remain* seized, the Court acknowledged, but the subject would still have been seized at the time of the force itself.<sup>127</sup>

On the other hand, the Court seemed to suggest a more limited definition in other cases. In *Brower*, the Court referred to “governmentally caused termination of an individual’s freedom of movement.”<sup>128</sup> In *Terry v. Ohio*, the Court wrote that the Fourth Amendment applies when officers have “in some way restrained the liberty of a citizen.”<sup>129</sup> In *United States v. Mendenhall*, the Court wrote that “a person is ‘seized’ only when, by means of physical force or a show of authority, his freedom of movement is restrained.”<sup>130</sup> In *Brower*, *Terry*, and *Mendenhall*, of course, there was no question of whether the subject’s movement had been restrained; instead, the issue was whether the restraint was or needed to be intentional,<sup>131</sup> whether the restraint was constitutional in the absence of probable cause,<sup>132</sup> or whether the restraint was the result of the subject’s consent.<sup>133</sup> Nevertheless, some courts have read into Fourth Amendment jurisprudence a requirement that, to constitute a seizure, a governmental action must actually result in the restraint or termination of an individual’s movement.

This has obvious implications in the use-of-force context. On some number of occasions, officers will use physical force against an intended target with the goal of restricting the target’s freedom of movement, but the subject will still be able to evade apprehension. The Seventh Circuit,<sup>134</sup> Ninth Circuit,<sup>135</sup> and Tenth Circuit<sup>136</sup> have all held that there is no seizure under such circumstances.<sup>137</sup>

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<sup>126</sup> *Id.* at 626.

<sup>127</sup> *Id.* at 625 (citing *Thompson v. Whitman*, 85 U.S. 457, 471 (1874) (“A seizure is a single act, and not a continuous fact[.]”). Courts applying this approach have held that an officer’s use of physical force against a subject amounts to a seizure even if the subject is able to flee. *See, e.g., Carr v. Tatangelo*, 338 F.3d 1259, 1268 (11th Cir. 2003) (noting that an individual who fled after being shot by an officer was seized despite not being “stopped by the bullet”).

<sup>128</sup> *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596–97 (1989).

<sup>129</sup> 392 U.S. 1, 19 n.16 (1968).

<sup>130</sup> 446 U.S. 544, 553 (1980).

<sup>131</sup> *Brower*, 489 U.S. at 596.

<sup>132</sup> *Terry*, 392 U.S. at 15.

<sup>133</sup> *Mendenhall*, 446 U.S. at 557.

<sup>134</sup> *United States v. Bradley*, 196 F.3d 762, 768 (7th Cir. 1999) (stating, to constitute a seizure, “the show of authority or use of force must have caused the fleeing individual to stop attempting to escape”).

<sup>135</sup> *United States v. Hernandez*, 27 F.3d 1403, 1407 (9th Cir. 1994) (“A seizure does not occur if an officer applies physical force in an attempt to detain a suspect but such force is ineffective.”).

<sup>136</sup> *Brooks v. Gaenzle*, 614 F.3d 1213, 1224–25 (10th Cir. 2010).

<sup>137</sup> *But see United States v. Brown*, 448 F.3d 239, 245 (3d Cir. 2006) (“[A] seizure is effected by even the slightest application of physical force[.] it is immaterial whether the suspect yields to that force.” (internal



In *Brooks v. Gaenzle*, for example, deputies responding to a call about a residential burglary were fired upon by an unknown assailant.<sup>138</sup> As deputies withdrew and regrouped, Keith Brooks fled from the back of the house and began climbing a fence.<sup>139</sup> Deputy Gaenzle fired his weapon, striking Brooks.<sup>140</sup> Despite having been shot, Brooks was able to escape over the fence, made it to a nearby vehicle, and evaded apprehension for the next three days.<sup>141</sup> Brooks ultimately filed a lawsuit alleging that Deputy Gaenzle's use of force violated his Fourth Amendment right to be free from unreasonable seizures.<sup>142</sup> The Tenth Circuit concluded that there had been no seizure; while "Deputy Gaenzle's gunshot may have intentionally struck Mr. Brooks[,] it clearly did not terminate his movement or otherwise cause the government to have physical control over him."<sup>143</sup> In the absence of a governmentally imposed termination of movement, the court held, there could be no seizure.<sup>144</sup>

That logic has not been restricted to cases in which officers used deadly force. In *United States v. Hernandez*, officers approached James Hernandez to conduct a *Terry* stop after seeing him climb a fence.<sup>145</sup> Hernandez attempted to flee, Officer Gregory Sadar grabbed him, "and a brief struggle ensued" before Hernandez ultimately broke away and fled on foot.<sup>146</sup> While fleeing, Hernandez discarded a firearm that he was later charged with possessing unlawfully.<sup>147</sup> Hernandez sought to have the firearm suppressed, contending that the evidence was fruit of an unlawful seizure because the officers lacked reasonable suspicion to justify the initiation encounter.<sup>148</sup> The Ninth Circuit focused on Hernandez's escape, writing, "[Officer] Sadar did have physical contact with Hernandez during a brief struggle, but obviously, this force was insufficient to impede Hernandez because he fled."<sup>149</sup> Because Hernandez did not submit to the officer's verbal commands and, more relevantly, because he was not "physically subdued" by the officer's use of force, the court held that he was never seized

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quotation marks omitted)); *Ludwig v. Anderson*, 54 F.3d 465, 471 (8th Cir. 1995) ("[A] seizure occurs when either the citizen submits to an assertion of authority or physical force is applied, regardless of whether the citizen yields to that force.") (emphasis omitted).

<sup>138</sup> 614 F.3d at 1215.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1216.

<sup>143</sup> *Id.* at 1224–25.

<sup>144</sup> *Id.* at 1220, 1224.

<sup>145</sup> 27 F.3d 1403, 1404–05 (9th Cir. 1994).

<sup>146</sup> *Id.* at 1405.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1407.

for Fourth Amendment purposes.<sup>150</sup> The Court of Appeals for the D.C. Circuit came to substantially the same conclusion in a similar case.<sup>151</sup>

Physical force that has been employed to restrict the target's freedom of movement and that connects with, but does not restrain, the intended target may not be considered a seizure for Fourth Amendment purposes. This logic has not been universally adopted; the Eighth, Ninth, and Eleventh Circuits have all held that the use of physical force is a seizure without regard to the subject's evasion.<sup>152</sup> In December 2019, the Supreme Court granted certiorari in *Torres v. Madrid* to resolve the circuit split on exactly this issue.<sup>153</sup>

### B. *Crumbling Graham Factors*

The prior subsection illustrated the limited reach of the Fourth Amendment when it comes to police uses of force by exploring the ways in which officers can use physical force without effecting a seizure. This subsection makes a different point: even when the Fourth Amendment does apply, it can be a distressingly inapt regulatory mechanism. As Rachel Harmon has pointed out, the current constitutional framework for evaluating police violence is “deeply impoverished.”<sup>154</sup> The Fourth Amendment's regulatory shortcomings are, at least in part, the result of the emphasis that the Court put on—and that lower courts and others have read into—the so-called *Graham* factors.

According to *Graham*, determining whether an officer's use of force was objectively reasonable “requires careful attention to the facts and circumstances of each particular case.”<sup>155</sup> The Court specifically identified three factors, suggesting they are especially relevant to the analysis: “[ (1) ] the severity of the crime at issue, [ (2) ] whether the suspect poses an immediate threat to the safety of the officers or others, and [ (3) ] whether [ the suspect ] is actively resisting arrest or attempting to evade arrest by flight.”<sup>156</sup> Lower courts quote these considerations as a matter of course, but building on Harmon's work, this subsection illustrates why the *Graham* factors too often crumble under the

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<sup>150</sup> *Id.*

<sup>151</sup> *Henson v. United States*, 55 A.3d 859, 866–67 (D.C. Cir. 2012).

<sup>152</sup> *See, e.g., Ludwig v. Anderson*, 54 F.3d 465, 471 (8th Cir. 1995); *Nelson v. City of Davis*, 685 F.3d 867, 875–76 (9th Cir. 2012); *Carr v. Tatangelo*, 338 F.3d 1259, 1268 (11th Cir. 2003).

<sup>153</sup> For purposes of full disclosure, I am one of the signatories on an amicus curiae brief supporting the petition for certiorari and another arguing that the use of force against a subject should be considered a seizure for Fourth Amendment purposes even if the subject evades apprehension.

<sup>154</sup> *See Harmon, supra* note 18, at 1119.

<sup>155</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989).

<sup>156</sup> *Id.*

weight put on them. First, the *Graham* factors are often of limited analytical import and can affirmatively hinder accurate analysis when taken at face value. Second, the Court has failed to provide operational definitions that can be applied by officers or reviewers, introducing potential confusion about what exactly the various *Graham* factors mean and how they apply. Third, although not intended to be exhaustive, the special emphasis that is often placed on the *Graham* factors creates a risk that other relevant considerations will either be overlooked or undervalued.

### 1. *Analytical Red Herrings*

In a seminal article, Harmon persuasively argued that *Graham* failed to provide an appropriately rigorous analytical framework in use-of-force cases, providing little, if any, guidance as to a series of critical questions:<sup>157</sup> what government interests justify the use of force? How should courts determine whether one (or more) of those government interests existed, or the strength of the interest(s) in any given case? How should courts weigh those interests against the individual interest in liberty and bodily integrity to determine whether force was reasonable? As Harmon observed, “*Graham* has largely left judges and juries to their intuitions, and what direction it does give sometimes steers them off course.”<sup>158</sup> If anything, her assessment was too forgiving. Perhaps the Court knowingly left the governing standards vague, trusting lower courts and individual police agencies to interpret and further refine them.<sup>159</sup> If so, that has proven to be a failed experiment in analytical delegation.

Officers cannot use force for no reason or any reason. Harmon identified three prospective government interests, a threat to any of which can, under appropriate circumstances, justify the use of force: law enforcement (e.g., apprehending suspected criminal offenders), public order (e.g., protecting public safety), and officer safety (i.e., protecting officers).<sup>160</sup> At best, the *Graham* factors can help answer the relatively straightforward question of whether there is a legitimate threat to a government interest. A subject’s suspected commission of a crime can implicate the government’s interest in law enforcement, for example, which can justify an officer’s use of force.

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<sup>157</sup> Harmon, *supra* note 18, at 1129–30.

<sup>158</sup> *Id.* at 1130.

<sup>159</sup> See, e.g., John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 256 (2015).

<sup>160</sup> *Id.* at 1151–56; see STOUGHTON ET AL., *supra* note 98.

Except that is not quite right. The fact that a crime was committed—or, more accurately, that there is at least probable cause to believe a particular person committed a crime—establishes that the government has a legitimate interest in apprehending the suspected offender.<sup>161</sup> But it is not the government interest in law enforcement that justifies the use of force; instead, as Harmon points out, only a *threat* to a government interest can justify the use of force.<sup>162</sup> Even when the government has a legitimate interest in apprehension, for example, the use of force is generally inappropriate when an arrestee compliantly submits to arrest, as most do.<sup>163</sup> The same logic applies when the government has an interest in public order and officer safety, but those interests are not threatened by the subject's actions.

The first *Graham* factor—the severity of the crime—does not establish the existence of a threat to the government interest's in law enforcement, nor does it help assess the severity of such a threat.<sup>164</sup> Although it refers to the severity of the crime, the first *Graham* factor is more related to the government's interests in public and officer safety than it is to the government's interest in apprehending suspected offenders. In the absence of more detailed information, it seems entirely reasonable to conclude that a bank robbery suspect is more

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<sup>161</sup> Some scholars have argued that the severity of the crime may affect the first-order question of whether there is a government interest in effecting an arrest. Ian Ayres and Daniel Markovits, for example, have argued that the government's interest in seizing individuals suspected of committing minor crimes is too weak to justify a use of force. Ian Ayres & Daniel Markovits, *Ending Excessive Police Force Starts with New Rules of Engagement*, WASH. POST (Dec. 25, 2014), [https://www.washingtonpost.com/opinions/ending-excessive-police-force-starts-with-new-rules-of-engagement/2014/12/25/7fa379c0-8a1e-11e4-a085-34e9b9f09a58\\_story.html](https://www.washingtonpost.com/opinions/ending-excessive-police-force-starts-with-new-rules-of-engagement/2014/12/25/7fa379c0-8a1e-11e4-a085-34e9b9f09a58_story.html). Rachel Harmon has also called into question the strength of the government's interest in making custodial arrests for low-level offenses. Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV., 307, 360 (2016). That question, though, is distinct from the issue I examine here: Whether the severity of a crime is probative of the existence of a *threat* to a government interest.

<sup>162</sup> See Harmon, *supra* note 18, at 1151–60; STOUGHTON ET AL., *supra* note 98, at 33–38, 229–31.

<sup>163</sup> At least, it would be inappropriate for officers to use more force than is required to handcuff the fully compliant arrestee. For a thought-provoking challenge to the idea that custodial arrests are generally appropriate, see Harmon, *supra* note 161, at 307, 360.

<sup>164</sup> Some have argued that the relative severity of a crime is proportional to the strength of the government's interest in apprehension—essentially, that the government has a stronger interest in apprehending offenders who commit more serious crimes and a reduced interest in apprehending offenders who commit less serious crimes. See, e.g., Ayres & Markovits, *supra* note 161; see also Bryan v. MacPherson, 630 F.3d 805, 828 (9th Cir. 2010) (“Traffic violations generally will not support the use of a significant level of force.”). In other work, I have argued that, for *legal* purposes, a governmental interest in apprehension exists regardless of the relative severity of the crime, although the government would often be wise to consider severity in determining how it allocates its limited resources. STOUGHTON ET AL., *supra* note 98 (discussing force options in depth in Chapter 6). The fact that crime severity is a creature of statute and that legislators can and do take very different approaches to the gradation of crime severity suggests that debates about the strength of the government's interest in apprehension for different crimes may be more suited as a topic for academic debate than as a predicate for constitutional jurisprudence.

likely to be a threat to officers and others than a suspected jaywalker. Indeed, the Fourth Circuit has made that point explicitly, concluding, “this first *Graham* factor is intended as a proxy for determining whether ‘an officer [had] any reason to believe that [the subject of a seizure] was a potentially dangerous individual.’”<sup>165</sup>

Unfortunately, the Court has never clearly adopted that rationale, and lower courts have often failed to appreciate it. As a result, courts often mechanically recite the “severity of the crime” without much, if any, discussion of why it matters.<sup>166</sup> In a § 1983 case arising from an officer’s use of force against the driver of a stolen vehicle, for example, the Ninth Circuit’s entire application of the first *Graham* factor consisted of three sentences: “The facts relevant to the ‘severity of the crime’ prong are not genuinely at issue. The officers had reason to believe that Coles had stolen a car, a felony-grade offense. We agree with the district court that this factor weighs in favor of defendants.”<sup>167</sup> The district court, for its part, had discussed at length why officers could have believed that the vehicle was stolen, then asserted without further analysis that the government’s interest in apprehending a felony suspect “‘strongly favors the government.’”<sup>168</sup> Other courts have similarly identified particular crimes as serious or not serious without distinguishing between the severity of criminal (or, perhaps, moral) culpability and the potential for physical harm to officers or others.<sup>169</sup>

The other *Graham* factors—“whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight”<sup>170</sup>—can be similarly unhelpful. As Harmon observed,

[T]hese are questions with binary answers: either the suspect poses a threat or not; flees or not; resists or not. . . . By stating these factors

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<sup>165</sup> *Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892, 900 (4th Cir. 2016) (quoting *Smith v. Ray*, 781 F.3d 95, 101 (4th Cir. 2015)).

<sup>166</sup> *See, e.g., Williams v. Ind. State Police Dep’t*, 797 F.3d 468, 472–73 (7th Cir. 2015), *cert. denied sub nom.*, *Rogoz v. City of Hartford*, 796 F.3d 236, 246 (2d Cir. 2015).

<sup>167</sup> *Coles v. Eagle*, 704 F.3d 624, 628–29 (9th Cir. 2012).

<sup>168</sup> *Id.* at 1099 (quoting *Miller v. Clark Cnty.*, 340 F.3d 959, 964 (9th Cir. 2003) (internal citations omitted)). In a similar case, the Seventh Circuit discussed at length whether officers who used a baton launcher against a woman who refused to get out of a stationary vehicle could reasonably have thought that the vehicle was stolen without any discussion about why that mattered under the circumstances. *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 522 (7th Cir. 2012).

<sup>169</sup> *See, e.g., Griggs v. Brewer*, 841 F.3d 308, 316 (5th Cir. 2016) (describing driving under the influence as “a serious crime”); *Sanchez v. Obando-Echeverry*, 716 F. Supp. 2d 1195, 1203 (S.D. Fla. 2010) (describing residential burglary as a “serious felony”) (internal citations omitted).

<sup>170</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989).

in such terms, *Graham* provides a weak tool for evaluating the use of force, particularly in the common complex encounters that result in nondeadly uses of force by officers.<sup>171</sup>

In short, even when the binary answers are useful for determining whether the situation justified *some* amount of force, they are patently unhelpful in assessing the more complex issues of *what type* of force and *how much* force is reasonable to use under the circumstances.<sup>172</sup>

The *Graham* factors are not just a weak tool, though; they can be affirmatively misleading, overemphasizing considerations that are of little relevance and overlooking what can be critical information. Focusing on the nature of the subject's actions in the abstract distracts from more pertinent considerations: did the subject's actions, whatever they were, threaten to frustrate a legitimate government interest and, if so, to what extent? *Womack v. Bradshaw* is representative of this approach; two deputies arrested Marie Womack for driving under the influence after a roadside breathalyzer test indicated a 0.26% breath alcohol content.<sup>173</sup> When Womack, who was handcuffed at the time, resisted the deputies' attempt to "pull her towards the back door" of a squad car by kicking the door shut (incidentally striking a deputy in the shin), one of the deputies "quickly turned to his left, taking [Womack] to the ground. In the process, [Womack's] face struck the road," fracturing her jaw.<sup>174</sup> One of the deputies lifted "her up by the arms" and, although she continued to resist, deputies were able to push her into the rear seat of the car.<sup>175</sup> The district court concluded that the takedown was objectively reasonable.<sup>176</sup> It predicated its decision entirely upon the observation that Womack "actively resisted arrest," describing her as "somewhat violent" but acknowledging both

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<sup>171</sup> Harmon, *supra* note 18, at 1130.

<sup>172</sup> *Id.* at 1131. Force can be categorized in at least two ways that are relevant here. Perhaps most obviously, force can be assessed based on the foreseeable effect on the subject. The foreseeable results of a police officer using a firearm (e.g., serious bodily injury or death) are very different than the foreseeable results of an officer striking someone in the thigh with a baton (e.g., bruising). Separately, the *mechanism* by which force is intended to overcome the subject's noncompliance or resistance is a relevant distinction. Pain compliance techniques, which work by using pain to induce the subject to abandon their resistance and comply with an officer's commands, are meaningfully different from mechanical disruption techniques, which work by physically preventing the subject from resisting. As underlying mechanisms, pain compliance or mechanical disruption are not fungible; either one can be more or less appropriate to use depending on the situation. See STOUGHTON ET AL., *supra* note 98 (discussing force options in depth in Chapter 6).

<sup>173</sup> *Womack v. Bradshaw*, 49 F. Supp. 3d 624, 628 (W.D. Mo. 2014), *aff'd*, 610 F. App'x 582 (8th Cir. 2015).

<sup>174</sup> *Id.* at 629–30.

<sup>175</sup> *Id.* at 629.

<sup>176</sup> *Id.* at 635.

that the relevant crimes (driving under the influence and resisting arrest) were not very serious and that there was “no indication that [Womack] posed an immediate threat to the officers.”<sup>177</sup> There was no discussion of whether Womack’s actions actually threatened to frustrate the government’s interests in apprehending her or in the safety of the officers. In short, *Womack* is an example of how courts can focus myopically on the nature of the subject’s actions at the expense of analyzing the existence and severity of the threat that those actions pose to a government interest.

It is entirely possible for courts to reach sound conclusions about whether an officer’s use of force was reasonable, of course, but there is a troubling potential for those decisions to be reached *despite* the *Graham* factors rather than *because* of them. Consider a hypothetical: a stark naked, physically frail octogenarian murder suspect weakly slaps at and pulls away from officers as they attempt to arrest him. The subject’s actions simply do not present any appreciable likelihood that the subject will escape or injure the officers.<sup>178</sup> Most courts, I hope, would conclude that the use of more than a modicum of force, if even that much, is objectively unreasonable *even though* the crime is severe, the subject presents some (slight) physical threat to the officers, and the subject is both actively resisting and attempting to evade arrest. This conclusion demonstrates the conceptual inadequacies of the much-lauded *Graham* factors. The potential for courts to appreciate that the *Graham* factors are misleading in any given case may alleviate some concerns about poorly decided cases, but it does nothing to improve the *Graham* factors themselves.

## 2. *Lack of Operational Definition*

The *Graham* factors reflect three considerations that the Court viewed as especially important—at least, important enough to explicitly articulate—to the determination of whether a seizure was objectively reasonable.<sup>179</sup> Frustratingly, though, the Court has not provided operational definitions of them.<sup>180</sup> With regard to the severity of the crime, for example, the Court has clarified neither

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<sup>177</sup> *Id.* at 631, 633.

<sup>178</sup> In other work, I have argued that a threat to a government interest exists only when the subject has the physical ability, the opportunity, and the apparent intention to engage in an identifiable action that would frustrate the relevant interest. *STOUGHTON ET AL.*, *supra* note 98, at 33–38, 229–31.

<sup>179</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989).

<sup>180</sup> See Harry Alpert, *Operational Definitions in Sociology*, 3 *AM. SOCIO. REV.* 855, 856 (1938) (describing operational definitions as those that take into account the methods of execution, and are grounded in verifiable observation rather than “metaphysically conceived ‘properties’”).

how reviewers (looking at the situation through the lens of a reasonable officer) should determine severity nor how they should identify the relevant crime.

With regard to severity, it is unclear whether reviewers' attention should be directed to whether the crime is a "minor" crime, as in some Fourth Amendment contexts,<sup>181</sup> or to how the crime is categorized as a matter of state law,<sup>182</sup> or to the maximum punishment imposed (potentially including various sentencing enhancements); or to how the crime is classified in the Federal Bureau of Investigation's Uniform Crime Reporting program; or to whether the crime is considered a "property" crime or a "persons" crime; or to some other characteristic or set of characteristics. Any of those approaches seem plausible, but they do not lead to consistent results.

The theft of \$250 of merchandise from a retail store in New Jersey, for example, is a fourth-degree "crime,"<sup>183</sup> a term that the state uses instead of the more traditional word "felony."<sup>184</sup> But in neighboring Pennsylvania, the same theft is considered a first-degree misdemeanor (assuming the offender is not a recidivist).<sup>185</sup> Felonies, as first-year law students learn, are generally more severe than misdemeanors, suggesting that the crime would be more serious in New Jersey than in Pennsylvania. But a fourth-degree crime in New Jersey is punishable by up to eighteen months of incarceration and a \$10,000 fine,<sup>186</sup> while a first degree misdemeanor in Pennsylvania is punishable by incarceration for up to five *years* in prison and a \$10,000 fine.<sup>187</sup> To the extent that the severity of the crime is measured by the potential punishment, the crime would be considered more serious in Pennsylvania than in New Jersey. The Court has

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<sup>181</sup> *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (holding that the "hot pursuit" doctrine did not allow officers to force entry into private homes without a warrant when the underlying crime is "only a minor offense").

<sup>182</sup> States follow different approaches to the classification of criminal offenses. Florida, for example, has five classes of felony (capital felonies, life felonies, and first-, second-, and third-degree felonies) and two classes of misdemeanor (first- and second-degree misdemeanors). FLA. STAT. § 775.081 (2020). Washington state, in contrast, has three classes of felony (Class A, B, and C) in addition to gross misdemeanors and misdemeanors. WASH. REV. CODE § 9A.20.021 (2020). New Jersey, meanwhile, has four numbered classes of "crimes" that are punishable by imprisonment of more than six months and two classes of "offenses" ("disorderly persons offenses" and "petty disorderly persons offenses"). N.J. STAT. ANN. § 2C:1-4 (West 2020). In fact, the state statute provides that the term "misdemeanor" refers to "all crimes" (but not "offenses") including those that would traditionally be considered felonies because violations are subject to punishment of more than a year in prison. § 2C:1-4(d).

<sup>183</sup> § 2C:20-11(c)(3). Instead of the more common felony/misdemeanor distinction, New Jersey has "crimes" (or "indictable crimes") and "disorderly persons offense[s]." § 2C:20-11(c)(4).

<sup>184</sup> § 2C:1-4.

<sup>185</sup> 18 PA. CONS. STAT. § 3903 (2020).

<sup>186</sup> N.J. STAT. ANN. §§ 2C:20-11(c)(3), 2C:43-6 (West 2020) (substantive crime and penalties, respectively).

<sup>187</sup> 18 PA. CONS. STAT. § 3903 (2020); 30 PA. CONS. STAT. § 923(7) (2020).



provided no guidance about whether courts assessing the severity of a crime should look to its classification (e.g., as a felony or misdemeanor), or to how it is potentially punished, or whether severity should be gauged by other means.

Meanwhile, a simple assault (causing or attempting to cause bodily injury) is considered a “disorderly persons” offense (the equivalent of a misdemeanor elsewhere) in New Jersey (punishable by up to six months in jail and a \$1,000 fine)<sup>188</sup> and a second-degree misdemeanor in Pennsylvania<sup>189</sup> (punishable by up to two years in prison and a \$5,000 fine<sup>190</sup>). In both states, simple assault, a violent crime, is categorized as a less severe crime than a \$250 theft, a property crime. The Court’s failure to robustly define this *Graham* factor leaves open the question of whether shoplifting or assault is the more severe crime, and thus potentially justifies a more invasive use of force under the Fourth Amendment, *ceteris paribus*.

There is the potential for similar confusion with regard to identifying the crime (or crimes) considered relevant for purposes of Fourth Amendment analysis. Consider, for example, a shoplifter who runs away from officers shouting for them to stop, assaulting a bystander as they do so. It is unclear whether reviewers should consider the severity of the initial crime (shoplifting), or the intermediary crime (fleeing or failing to obey an officer’s lawful command), or the final crime (assault), or some combination of all three.<sup>191</sup>

Similar criticisms can be fairly leveled against the other *Graham* factors. The Court has not, for example, provided any guidance as to how the reasonable officer on the scene would go about assessing the severity, likelihood, or immediacy of potential threats, nor has it identified what exactly constitutes “actively resisting” and what, if anything, distinguishes it from attempts to “evade arrest by flight.”<sup>192</sup> The problem is not that these questions are unanswerable; the problem is the range of possible answers that present themselves can be inconsistent or incompatible with each other. The Court’s failure to provide operational definitions creates the potential for substantial confusion and inconsistencies in how the *Graham* factors are applied from case to case.

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<sup>188</sup> N.J. STAT. §§ 2C:33-2, 2C:1-4(a) (West 2020).

<sup>189</sup> 18 PA. CONS. STAT. § 2701 (2020).

<sup>190</sup> § 1104.

<sup>191</sup> I have argued in other work that, in situations involving multiple crimes, constitutional analysis should generally be predicated on the *most* severe crime, but that argument is grounded in policy rather than any clear expression of constitutional law. See STOUGHTON ET AL., *supra* note 98.

<sup>192</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989).

### 3. *Incompleteness*

In her work, Harmon identified how a threat to three distinct government interests—law enforcement, order maintenance, and officer safety—can, under appropriate circumstances, justify officers in using physical force.<sup>193</sup> The three *Graham* factors—crime severity, physical threat, and resistance/flight—implicate some, but not all, of those government interests. Specifically, they implicate the government’s interest in law enforcement and officer safety, but they are less useful when it comes to addressing the government’s interest in public order (including the safety of community members). That interest has been recognized in the Fourth Amendment context in the form of community caretaking. Community caretaking is “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”<sup>194</sup> As Debra Livingston has written:

“Community caretaking” denotes a wide range of everyday police activities undertaken to aid those in danger of physical harm, to preserve property, or to create and maintain a feeling of security in the community. It includes things like the mediation of noise disputes, the response to complaints about stray and injured animals, and the provision of assistance to the ill or injured. Police must frequently care for those who cannot care for themselves: the destitute, the inebriated, the addicted . . . and the very young. They are often charged with taking lost property into their possession; they not infrequently see to the removal of abandoned property. . . . Community caretaking, then, is an essential part of the functioning of local police.<sup>195</sup>

Not all aspects of community caretaking will justify police violence, but some could.<sup>196</sup> In *Ames v. King County*, for example, paramedics were attempting to aid an unconscious man who was overdosing as part of a suicide attempt, but their efforts were being hindered by Tonja Ames, the man’s mother.<sup>197</sup> Ames was refusing to allow the paramedics to treat her son and was

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<sup>193</sup> Harmon, *supra* note 18, at 1151–60.

<sup>194</sup> *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

<sup>195</sup> Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1 U. CHI. LEGAL F. 261, 272 (1998).

<sup>196</sup> This is not to suggest that the community caretaking function should be simplistically embraced. Academics have criticized community caretaking as a justification for infringement on otherwise applicable Fourth Amendment protections abound. *See, e.g.*, Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV 1485, 1489 (2009); *see also* Alyssa L. Lazar, Note, *Protecting Individual’s Fourth Amendment Rights Against Government Usurpation: Resolutions to the Problematic and Redundant Community Caretaking Doctrine*, 57 DUQ. L. REV. 198, 213–14 (2019).

<sup>197</sup> *Ames v. King Cnty.*, 846 F.3d 340, 349 (9th Cir. 2017).

attempting to drive him to the hospital herself when Deputy Heather Volpe dragged Ames out of a vehicle, slammed her head into the ground, and restrained her in handcuffs.<sup>198</sup> Ames later sued, alleging excessive force.<sup>199</sup> The *Graham* factors were inapplicable or, at best, of limited use in determining the constitutionality of Deputy Volpe's use of force. Ames did not present any threat to the officers, nor was she trying to evade arrest. She was arguably violating Washington Criminal Code § 9.08.040, which criminalizes impeding medics from attempting to discharge their legal duties, but the trial court concluded that the government had, at best, a weak interest in law enforcement because of low level of the offense (the offense is considered a "gross misdemeanor" in Washington).<sup>200</sup> The lack of threat to a government interest, the trial court concluded, meant that Deputy Volpe's use of force was unreasonable.

The Ninth Circuit disagreed. "Deputy Volpe was acting in her community caretaking capacity," the court wrote, so the inquiry had to "focus . . . not on Ames's misdemeanor crime of obstruction but instead on the serious—indeed, life-threatening—situation that was unfolding at the time."<sup>201</sup> The gravity of the situation, the court held, and the risk that Ames's actions would seriously endanger her adult son's life established that the government interests "outweighed any intrusion onto Ames's Fourth Amendment rights."<sup>202</sup> The Ninth Circuit couched its analysis in terms of the *Graham* factors, but it had to stretch the scope of those factors almost beyond recognition in order to do so.

Other courts have more bluntly acknowledged the limitations of the *Graham* factors. The Sixth Circuit, for example, adopted what it described as "a more tailored set of factors to be considered in the medical-emergency context . . . [w]here a situation does not fit within the *Graham* test because the person in question has not committed a crime, is not resisting arrest, and is not directly threatening the officer."<sup>203</sup> Specifically, that analysis requires asking the following questions:

- (1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?

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<sup>198</sup> *Id.* at 345.

<sup>199</sup> *Id.* at 346.

<sup>200</sup> *Id.* at 348.

<sup>201</sup> *Id.* at 348–49.

<sup>202</sup> *Id.* at 349.

<sup>203</sup> *Hill v. Miracle*, 853 F.3d 306, 314 (6th Cir. 2017).

(2) Was some degree of force reasonably necessary to ameliorate the immediate threat?

(3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?<sup>204</sup>

The need to go beyond the *Graham* factors is particularly obvious in the context of involuntary detentions (or “holds”) for psychiatric evaluations. “Police in all jurisdictions have the authority to detain a person who appears to pose an imminent danger, . . . 38 states explicitly authorize police and peace or parole officers to initiate the emergency hold process,” and the remaining states allow officers to effect a hold initiated by a judge, medical professional, social worker, or other authorized entity.<sup>205</sup> Courts have recognized “[t]he government has an important interest in providing assistance to a person in need of psychiatric care.”<sup>206</sup> In some circumstances, though, the subject will refuse to comply, threatening to frustrate that interest. In such cases, the *Graham* factors will be of little, if any, use in determining whether the government had a valid interest or assessing the strength of that interest. Nor do the *Graham* factors help assess the constitutional limits of force.

Even in cases where the government has a clear interest, the *Graham* factors are not sufficient to identify the full range of subject behaviors that may threaten to frustrate those interests. Consider, for example, the classic “passive protestor” lying across the driveway of an abortion clinic or immigration facility, refusing officers’ orders to move but remaining limp when officers attempt to pick them up or drag them off. The subject’s actions are often relatively minor crimes (disorderly conduct, refusing to obey lawful commands, or the like), the subject’s non-compliance does not *itself* present a threat to the officer or others, and the subject is not engaged in “active resistance” or making any attempt to flee. Nevertheless, they can present a threat to public order (e.g., ensuring traffic safety and access to the relevant facility) or safety (e.g., ensuring that injured persons have access to emergency medical aid) and potentially in law enforcement (e.g., effecting the arrest of protestors whose noncompliance amounts to a criminal violation).

The *Graham* factors were not intended to be exhaustive. It is entirely possible to add to them or identify additional factors relevant to the

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<sup>204</sup> *Id.*

<sup>205</sup> Leslie C. Hedman, *State Laws on Emergency Holds for Mental Health Stabilization*, 67 PSYCHIATRIC SERVS. 529, 530–31 (2016).

<sup>206</sup> Bryan v. MacPherson, 620 F.3d 805, 829 (9th Cir. 2010); see also *Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892, 900 (4th Cir. 2016) (citation omitted).

constitutional analysis, as the Sixth Circuit has done. However, they have become touchstones that are too often cited despite their lack of relevance,<sup>207</sup> or, as in *Ames*, applied in untenable ways.<sup>208</sup>

### C. *Getting Bogged down in the “Factbound Morass”*

As discussed in the preceding sections, use of force does not always constitute a seizure,<sup>209</sup> and when it does, the *Graham* factors can be unhelpful or affirmatively detrimental to the analysis.<sup>210</sup> But there is yet another flaw in the Fourth Amendment’s regulation of police violence: courts applying the *Graham* framework often fail to include relevant information in the constitutional analysis. This can be intentional, as when courts consider and consciously decide that certain pieces of information are irrelevant to their analysis. More problematically, though, the privileging of certain facts and circumstances over others can be unintentional, as when courts fail to consider that certain information might be salient.

There is a degree of tension in the Fourth Amendment framework. On the one hand, the Court has emphasized that constitutional analysis requires “careful attention to the facts and circumstances of each particular case,”<sup>211</sup> which means “slosh[ing] . . . through the factbound morass of ‘reasonableness’” in any given case.<sup>212</sup> On the other hand, the Court has adopted a deferential approach to review. In *Tennessee v. Garner*, Justice O’Connor emphasized at the beginning of her dissent the “difficult, split-second decisions police officers must make in” use-of-force cases.<sup>213</sup> The Court picked up on that language in *Graham*, reminding lower courts that “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>214</sup> In many

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<sup>207</sup> *Lawrence v. City & Cnty. of San Francisco*, 258 F. Supp. 3d 977, 989–90 (N.D. Cal. 2017) (listing the *Graham* factors, but never explaining how they applied or affected the analysis).

<sup>208</sup> *Ames v. King Cnty.*, 846 F.3d 340, 349 (9th Cir. 2017).

<sup>209</sup> *See supra* Part II.A.

<sup>210</sup> *See supra* Part II.B.

<sup>211</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989).

<sup>212</sup> *Scott v. Harris*, 550 U.S. 372, 383 (2007).

<sup>213</sup> *Tennessee v. Garner*, 471 U.S. 1, 23 (1985) (O’Connor, J., dissenting).

<sup>214</sup> *Graham*, 490 U.S. at 396–97. I have previously argued that most uses of force do not involve the chaotic scene that the Court imagined in *Graham*. Stoughton, *supra* note 2, at 864. Indeed, *Graham* itself did not involve such chaos. *Graham*’s injuries were inflicted after he had been placed in handcuffs, which officers applied while he was unconscious. *Graham*, 490 U.S. at 396. The officers who arrested *Graham* were not forced by the situation to make any “split-second judgments” about using force, nor did their use of force occur in a “tense, uncertain, and rapidly evolving” situation. *Id.* at 397. As Brandon Garrett and I have observed, “This

cases, that tension has led courts to get bogged down in the “factbound morass” by paying careful attention to *some* of the facts and circumstances while overlooking *other* facts and circumstances, often without acknowledging that they are doing so and typically in a way that favors officers.

Some courts, for example, have held that the constitutionality of an officer’s use of force must be determined by looking exclusively at what the officer did at the moment the officer used force (or a few seconds before), omitting any review of the officer’s conduct prior to the constitutional seizure. In *Greenridge v. Ruffin*, officers observed a suspected prostitute getting into Leonard Greenridge’s vehicle.<sup>215</sup> Officer Ernestine Ruffin followed the vehicle until it parked, then approached without using her emergency lights or flashlights and without waiting for other officers.<sup>216</sup> Officer Ruffin opened the car door, identified herself as an officer, then shot Greenridge as he reached for what she thought was a shotgun, but was in fact a wooden nightstick.<sup>217</sup> Greenridge sued, arguing that Officer Ruffin’s decision not to wait for other officers and her failure to use her flashlight were improper and contributed to the shooting.<sup>218</sup> The Fourth Circuit concluded that those factors were irrelevant, writing, “events which occurred before Officer Ruffin opened the car door and identified herself to the passengers are not probative of the reasonableness of Ruffin’s decision to fire the shot.”<sup>219</sup> The Seventh Circuit has come to substantially the same conclusion, holding, “The Fourth Amendment prohibits unreasonable *seizures*, not unreasonable, unjustified or outrageous conduct in general. . . . Therefore, pre-seizure conduct is not subject to Fourth Amendment scrutiny.”<sup>220</sup>

This approach fails to recognize what legal scholars, criminologists, and police practitioners have concluded without exception: an officer’s approach, actions, and decisions can affect the probability and severity of an ultimate use of force.<sup>221</sup> The way an officer interacts with someone, for example, can

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case was not the ideal vehicle to develop the notion that police officers must sometimes make quick-fire decisions and that an objective standard might best be used to analyze excessive-force claims under the Fourth Amendment.” Garrett & Stoughton, *supra* note 55, at 231.

<sup>215</sup> *Greenridge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Greenridge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991).

<sup>220</sup> See *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992).

<sup>221</sup> See *STOUGHTON ET AL.*, *supra* note 98, at 155; *Zuchel v. City & Cnty. of Denver*, 997 F.2d 730, 739 (10th Cir. 1993) (reflecting the testimony of James Fyfe); James J. Fyfe, *The Split-Second Syndrome and Other Determinants of Police Violence*, in *CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS* 466, 475–77 (Roger G. Dunham & Geoffrey P. Alpert eds., 6th ed. 2010); Jeffrey J. Noble & Geoffrey P. Alpert, *State-Created Danger: Should Police Officers Be Accountable for Reckless Tactical Decision Making?*, in *CRITICAL*

potentially provoke or prevent resistance.<sup>222</sup> In the same vein, poor tactics can expose the officer to physical danger that a different approach is likely to avoid, increasing the likelihood that the officer will use force to address that danger.<sup>223</sup> These observations are well known in policing: over at least the last fifty years, the industry has developed a range of tactics—that is, procedures and techniques intended to help “limit the suspect’s ability to inflict harm and advance the ability of the officer to conclude the situation in the safest and least intrusive way”<sup>224</sup>—that apply in specific situations (e.g., traffic stops, domestic disputes, and active shooter scenarios), as well as tactical principles that can be applied whenever the situation permits.<sup>225</sup> As a purely descriptive matter, almost every incident of police violence is the ultimate result of “a contingent sequence of decisions and resulting behaviors—each increasing or decreasing the probability of an eventual use of . . . force,” including officers’ decisions and behaviors.<sup>226</sup>

The constitutional relevance of an officer’s “pre-seizure” conduct is suggested by its practical import, and several courts have held that officer’s actions prior to a seizure can affect whether the seizure—here, the use of force—was reasonable.<sup>227</sup> Other courts, however, have disagreed.<sup>228</sup> When courts hold that events—particularly an officer’s actions—that precede the seizure are not probative of the reasonableness of the use of force, they are effectively reviewing two separate timelines. With regard to the officer, the courts look only at the use of force itself or, perhaps, a few seconds prior to the use of force. With regard to the subject, however, the courts are willing to adopt a much more expansive perspective. *Graham* itself suggests as much, directing courts to consider the severity of the crime even when the subject is suspected of having committed it minutes, hours, days, or weeks earlier. Courts routinely include in the analysis actions that the subject engaged in previously but had stopped doing

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ISSUES IN POLICING: CONTEMPORARY READINGS, *supra*, at 481, 493; Off. of Cmty. Oriented Policing Servs., *Final Report of the President’s Task Force on 21st Century Policing*, U.S. DEP’T JUST. 1 (2015), [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf); *Community Oriented Policing Service Home Page*, U.S. DEP’T JUST., <https://cops.usdoj.gov> (last visited Dec. 23, 2020).

<sup>222</sup> Seth W. Stoughton, *Principled Policing: Warrior Cops & Guardian Officers*, 51 WAKE FOREST L. REV. 611, 652–58 (2016).

<sup>223</sup> STOUGHTON ET AL., *supra* note 98, at 154–58; Noble & Alpert, *supra* note 221, at 481, 493.

<sup>224</sup> Noble & Alpert, *supra* note 221, at 567, 568.

<sup>225</sup> STOUGHTON ET AL., *supra* note 98.

<sup>226</sup> Arnold Binder & Peter Scharf, *The Violent Police-Citizen Encounter*, 452 ANNALS AM. ACAD. POL. & SOC. SCI. 111, 116 (1980).

<sup>227</sup> See, e.g., *Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005); *Abraham v. Raso*, 183 F.3d 279, 291–92 (3d Cir. 1999); *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996); *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997).

<sup>228</sup> See *Greenridge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992).

by the time officers used force.<sup>229</sup> In application, then, “final frame” perspective becomes one-sided, determining the reasonableness of a use of force by looking to the subject’s precipitating behaviors but ignoring the officer’s.

In summary, regardless of how well the Fourth Amendment regulates seizures—an issue that is beyond the scope of this Article—the constitutional regulation of police violence is troublingly deficient. The Fourth Amendment simply will not apply to a number of use-of-force incidents, and when it does apply, the constitutional framework itself can contribute to analytical oversights.

#### *D. Inconsistent and Undefined: The Reasonableness of Deadly Force*

In most Fourth Amendment contexts, the Court, it is assumed, picks its words with care, allowing lower courts and commentators to carefully parse consistent language in various opinions so as to synthesize a definition. Indeed, the Court often does this itself. The Court has, for example, consistently defined the concept of “probable cause” by referring to the “man of reasonable caution” since 1925,<sup>230</sup> and *that* verbiage built on the “man of prudence and caution” language that the Court used in 1878.<sup>231</sup> There is, in short, a textual thread that lower courts can follow to find their way through the admittedly tangled path of Fourth Amendment jurisprudence.

Not so in the context of police violence, where chronological scrutiny of the Court’s language reveals frustrating inconsistencies and failures to define apparently salient terms. In *Tennessee v. Garner*, decided in 1985, the Court held that for officers to use deadly force, the subject must pose “a *significant* threat of death or serious physical injury,” but did not define “significant.”<sup>232</sup> Elsewhere in the opinion, the Court wrote that officers may use deadly force when “the suspect poses a threat of serious physical harm,” without including any discussion of the significance of that threat.<sup>233</sup> Further, the Court stated that “[w]here the suspect poses no *immediate* threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use

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<sup>229</sup> See, e.g., *Martin v. Gentile*, 849 F. 2d 863, 870 (4th Cir. 1988) (“These officers were charged with the task of arresting a serial rapist who was known to carry knives and to use them on people, had prior arrests for violent crimes, and was actively resisting arrest.”).

<sup>230</sup> *Carroll v. United States*, 267 U.S. 132, 162 (1925).

<sup>231</sup> *Stacey v. Emery*, 97 U.S. 642, 645 (1878).

<sup>232</sup> *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (emphasis added). The Court also did not define “serious physical injury,” although it may be assumed that the Court was incorporating the legal understanding of that term or its synonyms. See, e.g., 18 U.S.C. § 1365(h)(3) (1983) (defining serious bodily injury in the consumer protection context).

<sup>233</sup> *Garner*, 471 U.S. at 11.



of deadly force to do so,”<sup>234</sup> suggesting that a degree of temporal proximity was required, at least with regard to the threat to officers. In the next paragraph, however, the Court indicated that officers could use deadly force to prevent a subject from escaping when “there is probable cause to believe that [the subject] has committed a crime involving the infliction or threatened infliction of serious physical harm,” at least if the officer provided a warning, when feasible, before doing so.<sup>235</sup> In the latter language, there appears to be no temporal proximity requirement.

In *Scott v. Harris*, decided in 2007, the Court held that the ramming of a fleeing driver’s vehicle was reasonable because the subject “posed a *substantial* and *immediate* risk of serious physical injury.”<sup>236</sup> Although *Harris* may have less effect than a plain reading would suggest,<sup>237</sup> the Court’s use of “immediate” appears to reflect the temporal proximity requirement suggested in *Garner*. As with *Garner*, however, the Court did not define that term. Further, it is unclear whether the Court’s reference to a “substantial” threat is intended to be synonymous with the earlier opinion’s description of a “significant” threat. This is especially confusing because neither the use of “significant” (*Garner*) or “substantial” (*Harris*) refers to the type or severity of the threat itself. In both cases, the nature of the threat is explicitly identified: “death or serious physical injury.” But neither can “significant” and “substantial” be easily read to refer to the degree of *certainty* that such harm will result—essentially precluding speculative threats from justifying the use of deadly force—since that would suggest that they were standards of proof. The problem, of course, is that the Court has already identified the relevant standard of proof: “probable cause.”<sup>238</sup> Perhaps “significant” and “substantial” should be, like “immediate,” read as a temporal requirement.

This is not merely semantics, or at least it is not an empty semantic exercise. Small changes in wording can lead lower courts to apply very difficult decision rules. Consider, for example, a known murderer who, having been surprised by the police while bathing, is currently fleeing on foot, stark naked and unarmed. Assuming that officers’ only option to prevent his escape is deadly force, would shooting the fleeing subject in the back under such circumstances be constitutional? Applying the language from *Garner*, the officers have “probable cause to believe that [the subject] has committed a crime involving the infliction

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<sup>234</sup> *Id.* (emphasis added).

<sup>235</sup> *Id.* at 11–12.

<sup>236</sup> *Scott v. Harris*, 550 U.S. 372, 386 (2007) (emphasis added).

<sup>237</sup> See *supra* notes 55–63 and accompanying text.

<sup>238</sup> *Garner*, 471 U.S. at 3.

or threatened infliction of serious physical harm.”<sup>239</sup> The subject “poses no immediate threat to the officer[s]” but does present a “threat to others.”<sup>240</sup> Perhaps that threat is “significant,” perhaps it is not, and perhaps it does not have to be. The language from *Scott* is no better. The murder suspect does not present “a *substantial* and *immediate* risk of serious physical injury” at the time, but *Harris* suggested that he may not have to for the use of deadly force to be a reasonable response.<sup>241</sup>

In short, even in the context where the rules seem most straightforward, it is difficult to plumb the cases for textual cues about the contours of police authority to use deadly force.

### III. FOURTH AMENDMENT SPILLAGE INTO THE SUB-CONSTITUTIONAL REGULATION OF POLICE VIOLENCE

The prior Part offered an in-depth doctrinal analysis of the Fourth Amendment’s regulation of police violence, concluding that it is under-inclusive, imprecise, and woefully deficient. Fortunately, there are additional regulatory mechanisms in the form of state law and police agency policy. Unfortunately, the Fourth Amendment framework has been incorporated into state law, agency policy, and police culture, bringing its limitations with it. When state courts interpret state law, many have referred explicitly to the Fourth Amendment standards. Both police agency policies and the institutional culture of policing have hewed tightly to the constitutional framework for evaluating police uses of force. In that way, the Fourth Amendment has spilled over the constitutional banks, seeping—or pouring—into the sub-constitutional regulation of police violence. This Part explores that spillage and its implications.<sup>242</sup>

#### A. *State Law*

The provisions of state law that authorize or regulate police violence fall into three categories.<sup>243</sup> Most common are the statutory provisions or state judicial

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<sup>239</sup> *Id.* at 11.

<sup>240</sup> *Id.*

<sup>241</sup> *Harris*, 550 U.S. at 372 (emphasis added).

<sup>242</sup> This Article is not the first to observe that Fourth Amendment doctrines have over-spilled their doctrinal banks. As Wadie Said has persuasively argued, there is a “symbiotic relationship” between the constitutional rules that govern domestic policing and both arguments with regard to and the rules that develop in the contexts of immigration enforcement and national security. Wadie E. Said, *Law Enforcement in the American Security State*, 2019 WISC. L. REV. 819, 820 (2019).

<sup>243</sup> Officers are subject to regulation not only by laws that specifically target policing, but also by more

decisions that govern those uses of force that are likely to result in death or great bodily harm<sup>244</sup> (often referred to in state law as “force,” and for which I will adopt the industry standard term of “less-lethal force”), and those that are likely to (invariably referred to in state statutes as “deadly force”). Less commonly, a few states explicitly regulate *threats* of force, as distinct from the actual application of force.<sup>245</sup>

Thirty-seven states have statutes that regulate less-lethal force by identifying when<sup>246</sup> and how much<sup>247</sup> force officers can use. Forty-two states have statutes

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generally applicable laws. *See* Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2181 (2014). As is relevant to the context of this Article, officers may be regulated both by state laws that authorize (or establish civil or criminal defenses for) police violence and by state laws that apply more generally, such as the laws governing self-defense, defense of others, and defense of property. The Florida Supreme Court, for example, held that even if officer’s use of deadly force was not authorized by the state laws regulating *police* violence, it could be authorized under the state’s “Stand Your Ground” self-defense laws. *State v. Peraza*, 259 So. 3d 728 (Fla. 2018).

<sup>244</sup> Different jurisdictions may adopt inconsistent definitions of “great bodily harm” or its synonyms, “serious bodily injury,” “grievous bodily harm,” *et cetera*. In California, for example, the loss of consciousness constitutes “serious bodily injury” for purposes of the state’s battery statute. CAL. PENAL CODE § 243(f)(4) (West 2020). In Tennessee, that bar is only met by “protracted unconsciousness.” TENN. CODE ANN. § 39-11-106(b)(36)(B) (2020). Often, the discrepancies come down to the role of the fact finder establishing great bodily harm. In California, for example, a robbery victim’s suffering a possibly broken nose, a black eye, some loose teeth, and “bleeding about the face” was sufficient evidence for a jury to conclude that he had suffered “great bodily injury,” although the jury was not required to so find. *People v. James*, 284 P.2d 527, 528 (Cal. Ct. App. 1955).

<sup>245</sup> This is not to suggest that an officer’s threat to use force will be entirely unregulated. Most states, after all, criminalize assault. *See, e.g.*, ARIZ. REV. STAT. § 13-1203(A)(2) (2020) (criminalizing “intentionally placing another person in reasonable apprehension of imminent physical injury”). In states without explicit regulation, officers’ threats to use force may be subject to regulation under statutes that authorize officers to make arrests, for example. *See* IDAHO CODE § 19-610 (2020) (authorizing “all reasonable and necessary means to effect the arrest”).

The few states that explicitly regulate threats of less-lethal force do so in the same way that they regulate the actual application of less-lethal force. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-409(a) (2020) (imposing the same statutory requirements when officers are “threatening or using physical force against another”)

A handful of states explicitly regulate police threats of lethal force. Four states equate threats to use lethal force and the actual application of less-lethal force. ALASKA STAT. § 11.81.370(A) (2020); ARK. CODE ANN. § 5-2-610(a) (2020); S.D. CODIFIED LAWS §§ 22-18-2, 22-18-3 (2020); TENN. CODE ANN. §§ 39-11-620(a), 40-7-108(a) (2020). Arizona takes a different approach, authorizing officers to threaten to use less-lethal force, but not lethal force, to stop a fleeing misdemeanant, but without limiting threats of lethal force to those situations in which lethal force could be justified. ARIZ. REV. STAT. §§ 13-409, 13-410 (2020).

<sup>246</sup> All thirty-seven states with statutes authorizing police to use less-lethal force authorize them to do so to effect an arrest, although they have different requirements (e.g., ten states authorize force only when officers reasonably believe that the arrest is lawful, while nine authorize force so long as the officer subjectively believes the arrest is lawful). Twenty-four states have statutes permit the use of force to prevent an arrestee from escaping. Eighteen states have statutes permitting officers to use force to defend themselves or others. STOUGHTON ET AL., *supra* note 98, at 73–77.

<sup>247</sup> Twenty-seven states authorize officers to use “reasonably necessary” force, four states authorize “reasonable” force, and two states authorize “necessary” force. *Id.* at 77–79.

that regulate deadly force, falling into one or more of three categories:<sup>248</sup> the fleeing felon rule, under which officers can use deadly force to prevent the escape of a fleeing felon;<sup>249</sup> the *Garner* rule, under which officers can use deadly force when there is an imminent threat of death or great bodily harm;<sup>250</sup> and an intermediate category that requires more than the fleeing felon rule but less than an imminent threat of death or great bodily harm.<sup>251</sup> Some states have also adopted additional limitations,<sup>252</sup> restrictions, or requirements on the use of

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<sup>248</sup> Previous work has divided states into two exclusive categories: “fleeing felon” rule states and “*Garner* rule” states. Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After Garner*, 35 ST. LOUIS U. PUB. L. REV. 109, 120–21 (2016). My review of state laws concludes that they are not so easily catalogued.

<sup>249</sup> ALA. CODE § 13A-3-27 (2020); FLA. STAT. ANN. § 776.05 (2020); MISS. CODE ANN. § 97-3-15(1)(d) (2020); S.D. CODIFIED LAWS § 22-16-33 (2020).

<sup>250</sup> ALA. CODE § 13A-3-27(b)(2) (2020); ARIZ. REV. STAT. § 13-410(C)(1) (2020); ARK. CODE ANN. § 5-2-610(b)(2) (2020); COLO. REV. STAT. § 18-1-707(2)(a) (2020); CONN. GEN. STAT. § 53a-22(c)(1) (2020); GA. CODE ANN. § 17-4-20(b) (2020); IDAHO CODE § 18-4011(2) (2020); 720 ILL. COMP. STAT. 5/7-5(2) (2019–2020); IND. CODE § 35-41-3-3(b)(1)(B) (2020); KAN. STAT. ANN. § 21-5227(a) (2020); ME. STAT. tit. 17-A, § 107(2)(A) (2019); MINN. STAT. § 609.066 (Subd. 2(1)) (2020); NEV. REV. STAT. § 171.1455(2) (2020); N.H. REV. STAT. ANN. § 627:5(II)(a) (2020); N.J. STAT. ANN. § 2C:3-7(b)(2)(d)(i) (West 2020); N.M. STAT. ANN. § 30-2-6(B) (West 2020); N.Y. PENAL LAW § 35.30(1)(c) (McKinney 2020); N.C. GEN. STAT. § 15A-401(d)(2)(a) (2020); N.D. CENT. CODE § 12.1-05-07(2)(b) (2019); OKLA. STAT. tit. 21, § 732(3) (2020); 2020 Oregon Laws 2d Sp. Sess. H.B. 4301; 18 PA. CONS. STAT. § 508(a)(1) (2020); UTAH CODE ANN. § 76-2-404(1)(c) (West 2020); WASH. REV. CODE § 9A.16.040(5)(b) (2020). Seven states authorize the use of deadly force when a subject is escaping or attempting to escape “by use of” or “by means of” a deadly weapon, a particularized circumstance in which there is a threat of death or great bodily harm. ARIZ. REV. STAT. § 13-410(C)(2)(b) (2020); 720 ILL. COMP. STAT. 5/7-5(2) (2019–2020); KAN. STAT. ANN. § 21-5227(a) (2020); MO. REV. STAT. § 563.046(3)(b) (2020); N.H. REV. STAT. ANN. § 627:5(II)(b)(1) (2020); N.C. GEN. STAT. § 15A-401(d)(2)(b) (2020); OKLA. STAT. tit. 21, § 732(2)(b) (2020).

<sup>251</sup> In other work, I have identified seven different intermediate approaches. First, twenty-four states authorize the use of deadly force to prevent the escape of subjects suspected of committing violent felonies or crimes involving the use or threatened use of deadly force. Second, three states identify the predicate crimes more specifically, providing a list of offenses for which flight can justify deadly force. N.J. STAT. ANN. § 2C:3-7(b)(2)(c) (West 2020); N.Y. PENAL LAW § 35.30(1)(a)(ii) (McKinney 2020); 2020 Oregon Laws 2d Sp. Sess. H.B. 4301. Third, nineteen states permit the use of deadly force to prevent the escape of a subject who may present a future threat of death or great bodily harm, even if they do not currently do so. Fourth, six states authorize it to prevent the escape of armed subjects, but without requiring that the subject be using the weapon to effect their escape. Fifth, Rhode Island has a unique information-forcing requirement; officers can use deadly force to prevent the escape of a fleeing felon, but only when officers reasonably believe that “the person to be arrested is aware that a peace officer is attempting to arrest him or her.” 12 R.I. GEN. LAWS § 7-9 (2020). Sixth, North Carolina permits the use of deadly force to prevent the escape of a *convicted* felon. N.C. GEN. STAT. § 15A-401(d)(2)(c) (2020). Seventh, some states have adopted combinations of those intermediate requirements. See STOUGHTON ET AL., *supra* note 98, at 82–84.

<sup>252</sup> It is worth observing that a few states have statutes that, under certain circumstances, may be even more permissive with regard to the use of deadly force than the common law “fleeing felon” rule. Nine states permit it to suppress a riot or mutiny, although the specific requirements vary. ARIZ. REV. STAT. § 13-410(c)(2)(d) (LexisNexis 2020); DEL. CODE ANN. tit. 11, § 467(e)(2) (2020); IDAHO CODE ANN. § 18-4011(2) (2020); MISS. CODE ANN. § 97-3-15(1)(h) (2020); NEB. REV. STAT. § 28-1412(7)(b)(ii) (2020); 18 PA. CONS. STAT. § 508(d)(1)(ii)(B) (2020); S.D. CODIFIED LAWS § 22-16-33 (2020); VT. STAT. ANN. tit. 13, § 2305(3) (2019); WASH. REV. CODE § 9A.16.040(1)(c)(4) (2020).

deadly force, such as precluding the use of deadly force when there is a substantial risk to innocent persons,<sup>253</sup> prohibiting the use of deadly force against suicidal subjects who threaten only themselves,<sup>254</sup> requiring “actual resistance,”<sup>255</sup> permitting deadly force only when all other reasonable means have been exhausted,<sup>256</sup> information-forcing requirements,<sup>257</sup> and limitations on the predicate crime.<sup>258</sup> There is nothing particularly unusual about the state-level regulation of violence. In addition to police violence and crimes of violence, for example, states have statutes that govern boxing,<sup>259</sup> that define what constitutes a weapon,<sup>260</sup> that establish the scope of self-defense as an immunity to liability,<sup>261</sup> and so on. What is unusual is the extent to which state courts have referenced or incorporated constitutional law into their interpretation of the state laws that specifically regulate police uses of force.

Courts in thirty-one states have, while applying or discussing state law, referenced the constitutional framework articulated in *Graham*.<sup>262</sup> Nineteen

<sup>253</sup> DEL. CODE ANN. tit. 11, §§ 467(c)(2), (e)(1), (f)(2) (2020); HAW. REV. STAT. § 703-307(3)(c) (2020); NEB. REV. STAT. §§ 28-1412(3)(c), (7)(b)(1) (2020); N.J. REV. STAT. §§ 2C:3-7(b)(2)(b), (c), (e)(2) (West 2020); *Julian v. Randazzo*, 403 N.E.2d 931, 934 n.1 (Mass. 1980); *see also* 18 PA. CONS. STAT. § 508(d)(1)(ii)(A) (2020) (applying this restriction only when deadly force is used to prevent suicide or the commission of a crime).

<sup>254</sup> DEL. CODE ANN. tit. 11, § 467(e) (2020); CAL. CRIM. PROC. CODE § 835a(c)(2) (West 2020); NEB. REV. STAT. § 28-1412 (7)(b) (2020), N.J. REV. STAT. § 2C:3-7(e) (2020); 18 PA. CONS. STAT. § 508(d) (2020); TENN. CODE ANN. § 39-11-620(b)(2) (2020).

<sup>255</sup> IDAHO CODE ANN. § 18-4011(2) (2020); MISS. CODE § 97-3-15(1)(b) (2020); WASH. REV. CODE § 9A.16.040(1)(b) (2020).

<sup>256</sup> DEL. CODE ANN. tit. 11, § 467(c) (2020); IOWA CODE § 804.8(1) (2020); N.H. REV. STAT. ANN. § 627:5(VIII) (2020); TENN. CODE ANN. §§ 39-11-620(b), 40-7-108(b) (2020); *see also* CAL. PENAL CODE § 835a(a)(2) (West 2020) (including in the legislative directives that officers “shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer”).

<sup>257</sup> ME. REV. STAT. tit. 17-A, § 107(2)(B)(1)–(2) (2020); N.H. REV. STAT. ANN. § 627:5(II)(b)(2) (2020); TENN. CODE ANN. § 39-11-620(b) (2020).

<sup>258</sup> Colorado, which otherwise follows the *Garner* rule, does not permit officers to use lethal force when the only indication that the subject presents a threat of death or serious bodily harm is the subject’s commission of “a motor vehicle violation.” COLO. REV. STAT. § 18-1-707(2)(b)(III) (2020).

<sup>259</sup> *See, e.g.*, S.C. CODE ANN. § 40-81-10 (2020).

<sup>260</sup> *See, e.g.*, WIS. STAT. § 939.22(10) (2020) (defining “dangerous weapon” to mean “any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede, partially or completely, breathing or circulation of blood; any electric weapon . . . ; or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm”).

<sup>261</sup> There are, of course, a variety of approaches, including states that provide a defense to criminal liability, but not to civil liability. *See Self-Defense and “Stand Your Ground”*, NAT’L CONF. OF STATE LEGISLATURES (May 26, 2020), <http://www.ncsl.org/research/civil-and-criminal-justice/self-defense-and-stand-your-ground.aspx>.

<sup>262</sup> Alaska: *Russell ex rel. J.N. v. Virg-In*, 258 P.3d 795, 802 (Alaska 2011).

Arizona: *Caudillo v. City of Phoenix*, No. 1 CA-CV 09-0467, 2010 WL 2146408, at \*2 n.6 (Ariz. Ct. App. May 27, 2010).

have done so with *Tennessee v. Garner* or, less often, *Scott v. Harris*.<sup>263</sup> A few have done so for reasons that are only tangentially related to the use of force. In

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- Arkansas: *Ewells v. Constant*, 2012 Ark. 148, at \*4 (2012).
- California: *Hernandez v. City of Pomona*, 207 P.3d 506, 513–16 (Cal. 2009) (applying an earlier version of California law).
- Colorado: *Martinez v. Harper*, 802 P.2d 1185, 1187 (Colo. App. 1990).
- Connecticut: *State v. Saturno*, 139 A.3d 629, 652 (Conn. 2016); *State v. Smith*, 807 A.2d 500, 515–516 n.12, 518–19 (Conn. App. Ct. 2002).
- Delaware: *Elliott v. Dunn*, Civ. A. No. 94C-04-026, 1995 WL 411406, at \*3 (Del. Super. Ct. July 6, 1995); *Cornish v. Del. State Police*, No. CIV. A. 94C-12-019, 1996 WL 453304, at \*5 (Del. Super. Ct. June 19, 1996).
- Florida: *Brown ex rel. Brown v. Jenne*, 122 So. 3d 881, 885 (Fla. Dist. Ct. App. 2012).
- Georgia: *Kline v. KDB, Inc.*, 673 S.E.2d 516, 521 (Ga. Ct. App. 2009).
- Idaho: *James v. City of Boise*, 376 P.3d 33, 45–46 (Idaho 2016).
- Illinois: *People v. Mandarino*, 994 N.E.2d 138, 170 (Ill. App. Ct. 2013).
- Indiana: *Love v. State*, 73 N.E.3d 693, 698 (Ind. 2017).
- Iowa: *State v. Dewitt*, 811 N.W.2d 460, 470 (Iowa 2012).
- Kentucky: *Brown v. Fournier*, No. 2015-CA-001429-MR, 2017 WL 2391709, at \*4–5 (Ky. June 2, 2017).
- Louisiana: *State v. Palmer*, 14 So. 3d 304, 310 (La. 2009).
- Maine: *Richards v. Town of Eliot*, 780 A.2d 281, 287 (Me. 2001).
- Maryland: *Richardson v. McGriff*, 762 A.2d 48, 57 (Md. 2000).
- Michigan: *Webb v. City of Taylor*, No. 236153, 2002 WL 31947931, at \*4 (Mich. Ct. App. Dec. 3, 2002).
- Mississippi: *Williams v. Lee Cnty. Sheriff's Dep't*, 744 So. 2d 286, 297 (Miss. 1999).
- Nebraska: *Phillips v. Liberty Mutual Ins. Co.*, 876 N.W.2d 361, 369 (Neb. 2016).
- Nevada: *Lane v. State*, No. 66733, 131 Nev. 1309, at \*1 (Nov. 13, 2015).
- New Mexico: *State v. Mantelli*, 42 P.3d 272, 277 (N.M. Ct. App. 2002).
- New York: *McCummings v. N.Y.C. Transit Auth.*, 613 N.E.2d 559, 561 (N.Y. 1993).
- Ohio: *State v. White*, 29 N.E.3d 939, 944–50, 952–53 (Ohio 2015).
- Oklahoma: *Morales v. City of Oklahoma City ex rel. Oklahoma City Police Dep't*, 230 P.3d 869, 880 n.48 (Okla. 2010).
- Rhode Island: *Albanese v. Town of Narragansett*, 135 A.3d 1179, 1188 (R.I. 2016).
- South Carolina: *Heyward v. Christmas*, 593 S.E.2d 141, 144 (S.C. 2004).
- Vermont: *Coll v. Johnson*, 636 A.2d 336, 338 (Vt. 1993).
- Virginia: *Bufford v. Commonwealth*, Record No. 0630-08-4, 2009 WL 2222970, at \*8 (Va. Ct. App. July 28, 2009).
- West Virginia: *Maston v. Wagner*, 781 S.E.2d 936, 949–50 (W. Va. 2015).
- Wyoming: *Wilson v. State*, 199 P.3d 517, 520 n.3 (Wyo. 2009).
- <sup>263</sup> Arizona: *Caudillo v. City of Phoenix*, No. 1 CA-CV 09-0467, 2010 WL 2146408, at \*2 (Ariz. Ct. App. May 27, 2010).
- California: *Hernandez v. City of Pomona*, 207 P.3d 506, 515 (Cal. 2009).
- Colorado: *Martinez v. Harper*, 802 P.2d 1185, 1187 (Colo. App. 1990).
- Delaware: *Williams v. State*, 539 A.2d 164, 174 (Del. 1988).
- Florida: *Holland v. State*, 696 So. 2d 757, 760 n.2 (Fla. 1997).
- Georgia: *Mullis v. State*, 27 S.E.2d 91, 98 (Ga. 1943); *State v. Bunn*, 701 S.E.2d 138, 139 n.2 (Ga. 2010).
- Iowa: *State v. Dewitt*, 811 N.W.2d 460, 469 (Iowa 2012).
- Kentucky: *Bell v. Commonwealth*, 122 S.W.3d 490, 499 (Ky. 2003).
- Maryland: *Richardson v. McGriff*, 762 A.2d 48, 73 (Md. 2000).
- Michigan: *Washington v. Starke*, 433 N.W.2d 834, 836–37 (Mich. Ct. App. 1988).
- Minnesota: *Baker v. Chaplin*, 517 N.W.2d 911, 915 (Minn. 1994).
- Nevada: *Newell v. State*, 364 P.3d 602, 604 (Nev. 2015).
- New Mexico: *State v. Mantelli*, 42 P.3d 272, 278 (N.M. Ct. App. 2002).
- New York: *McCummings v. N.Y.C. Transit Auth.*, 613 N.E.2d 559, 561 (N.Y. 1993).

Delaware, for example, the state supreme court discussed and ultimately disagreed with the majority's conclusion in *Garner* that burglary was not a serious crime.<sup>264</sup>

Other states, however, are far less discriminating, explicitly adopting part or all of the constitutional framework as a matter of state law. In Arizona, a plaintiff argued that an officer who had shot him could not claim that his actions were justified under a state statute authorizing the use of force "in making or assisting in making an arrest or detention" because the use of deadly force is inconsistent with effecting an arrest. Citing *Garner*, the state appellate court concluded that because a police shooting is a Fourth Amendment seizure, it counts as an arrest for purposes of state law.<sup>265</sup> In short, the court looked to constitutional law to answer a question about the reach of the state's regulatory regime for police uses of force.<sup>266</sup> Iowa courts have taken a similar approach, using constitutional jurisprudence to determine that the state law regulating police violence is objective—such that an officer's malice is irrelevant to the analysis—instead of subjective.<sup>267</sup> In both examples, the scope and contours of state law were defined, in relevant part, by constitutional law.

Other states have gone even further by weaving constitutional law into state law. Oklahoma, for example, has adopted *Graham*'s objective reasonableness framework, including the *Graham* factors, but has supplemented them with some additional factors:

We . . . hold that a police officer has a special dispensation from the duty of ordinary care not to endanger others. A police officer's duty is very specific: it is to use only such force in making an arrest as a reasonably prudent police officer would use in light of the objective circumstances confronting the officer at the time of the arrest. In applying this standard, an officer's subjective mistake of fact or law is irrelevant, including whether he (she) is acting in good faith or bad. The question is whether the objective facts support the degree of force employed.

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Ohio: *State v. White*, 29 N.E.3d 939, 944–45, 947, 950, 952 (Ohio 2015).

Rhode Island: *Albanese v. Town of Narragansett*, 135 A.3d 1179, 1189 (R.I. 2016).

South Carolina: *Sheppard v. State*, 594 S.E.2d 462, 473 (S.C. 2004).

West Virginia: *Maston v. Wagner*, 781 S.E.2d 936, 952 (W. Va. 2015).

Wyoming: *Roose v. State*, 759 P.2d 478, 484 (Wyo. 1988).

<sup>264</sup> *Williams v. State*, 539 A.2d 164, 174 (Del. 1988).

<sup>265</sup> *Caudillo*, 2010 WL 2146408, at \*2.

<sup>266</sup> *Id.* at 2 n.6 ("It appears . . . that [the officer] was 'effectuating an arrest' because his use of deadly force against Celaya constituted a seizure for Fourth Amendment purposes.")

<sup>267</sup> *Chelf v. Civ. Serv. Comm'n of City of Davenport*, 515 N.W.2d 353, 356 (Iowa Ct. App. 1994).

Among the factors that may be considered in evaluating the objective reasonableness of an officer's use of force in making an arrest are: (1) the severity of the crime of which the arrestee is suspected; (2) whether the suspect poses an immediate threat to the safety of the officers or others, [sic] (3) whether the suspect is actively resisting arrest or attempting to evade arrest; (4) the known character of the arrestee; (5) the existence of alternative methods of accomplishing the arrest; (6) the physical size, strength and weaponry of the officers compared to those of the suspect; and (7) the exigency of the moment.<sup>268</sup>

Some states have effectively incorporated Fourth Amendment standards as a matter of state law. In Maryland, for example, the Court of Appeals held that the objective reasonableness standard "announced in the context of a § 1983 claim for the violation of Federal Constitutional rights[] is the appropriate one to apply as well to petitioner's claim under Article 26 of the Maryland Declaration of Rights and for the common law claims of battery and gross negligence."<sup>269</sup> The Supreme Court of Vermont has done effectively the same thing.<sup>270</sup> The Supreme Court of Ohio came to a similar decision in the prosecution of an officer for violating a state homicide statute, writing:

Ohio courts [have] also recognized that a police officer is justified at common law to use reasonable force in the course and scope of his law enforcement duties. . . .

. . .

Courts therefore apply *Garner* and *Graham* in reviewing criminal convictions arising from a police officer's use of deadly force. . . . Because a police officer's justification to use deadly force is limited by the Fourth Amendment, the appropriate instruction on deadly force is taken from *Tennessee v. Garner*. *Garner* establishes that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others," the officer does not act unreasonably by using deadly force.

. . . *Garner* defines the very circumstances to be considered in a deadly force case such as this; that is, when there is probable cause for a police

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<sup>268</sup> *Morales v. City of Oklahoma City ex rel. Oklahoma City Police Dep't*, 230 P.3d 869, 879–80 (Okla. 2010).

<sup>269</sup> *Richardson v. McGriff*, 762 A.2d 48, 56 (Md. 2000).

<sup>270</sup> *Coll v. Johnson*, 636 A.2d 336, 338–39 (Vt. 1993) ("In cases where plaintiffs allege excessive force, that standard will be whether the force used was objectively reasonable under the circumstances.")



officer to believe that the suspect poses a threat of serious physical harm to the officer or others.<sup>271</sup>

Florida offers an even more extreme example of the incorporation of constitutional law into state law. The first few sentences of Article I, Section 12 of the Florida Constitution is closely analogous to the Fourth Amendment, reading:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained.<sup>272</sup>

The Florida Constitution goes on to direct courts to interpret the state's constitutional limitations "in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."<sup>273</sup> Thus, to the extent that an individual alleges that an officer's use of force violated his or her state constitutional rights, the individual must expect the resulting analysis to follow the Fourth Amendment framework.

As these examples illustrate, the Fourth Amendment's regulation of police uses of force has spilled, often heavily, into state law.

### *B. Agency Policy*

Like state law, the police agency policies that regulate the use of force have been heavily influenced by constitutional law. In an empirical analysis of use-of-force policies at the fifty largest police agencies in the country (by the number of officers employed), Brandon Garrett and I found that more than half of the policies paraphrased or quoted directly, often without attribution, from *Graham* or *Garner*.<sup>274</sup> This is not inherently problematic; constitutional law *is* the relevant legal standard governing seizures, after all, and agencies can reasonably conclude that officers should be informed of the standards under which constitutional tort claims may be adjudicated. It is unsurprising, then, that agencies would acknowledge in policy the relevant Fourth Amendment rules.

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<sup>271</sup> State v. White, 29 N.E.3d 939, 944–50, 952–53 (Ohio 2015).

<sup>272</sup> FLA. CONST. art. I, § 12, cls. 1–2.

<sup>273</sup> FLA. CONST. art. I, § 12, cl. 3.

<sup>274</sup> Garrett & Stoughton, *supra* note 55, at 284–85.

The Washington, D.C. Metropolitan Police Department policy, for example, includes the following:

The Supreme Court has stated that the Fourth Amendment “reasonableness” inquiry is whether the officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation. (*Graham v. Connor*, 490 U.S. 386, 396–397 [1989]).<sup>275</sup>

But many agencies do not just acknowledge the constitutional standard; they hew closely to it. A public health analysis of police agency use-of-force policies at the twenty largest cities in the country concluded:

[T]here is generally a lack of substance and depth in conferring guidance, restriction, or description beyond the constitutional bare minimum articulated by the U.S. Supreme Court in *Graham v. Connor* that police use of force must be reasonable. Policies over-rely on reciting the basic constitutional standard for police engagements without providing key protections for citizens.<sup>276</sup>

This is not unintentional, nor is it necessarily the result of sloppy draftsmanship or a lack of imagination. As criminologist Lorie Fridell and police executives Steve Ijames and Michael Berkow have pointed out, perspectives on agency use-of-force policies can be divided into two categories: the “continuum” approach advocates for detailed policies that often include a graphical guide (a “use of force matrix” or “use of force continuum”), and the “just be reasonable” approach advocates against providing any more detail than the titular instruction.<sup>277</sup> One senior instructor at the Federal Law Enforcement Training Center, for example, argued that “models and continuums” that provide more explicit guidance to officers about which force options to use in different circumstances are inconsistent with Fourth Amendment jurisprudence.<sup>278</sup> As a

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<sup>275</sup> D.C. METRO. POLICE, GENERAL ORDER: USE OF FORCE 1–2 (2002), <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569bf3c740667a727ee7ef39/1453061069584/DC+Metropolitan+police+use+of+force+policy.pdf>.

<sup>276</sup> Obasogie & Newman, *supra* note 25, at 286–87.

<sup>277</sup> Lorie A. Fridell, Steve Ijames & Michael Berkow, *Taking the Strawman to the Ground: Arguments in Support of the Linear Use-of-Force Continuum*, POLICE CHIEF, Dec. 2011, at 20.

<sup>278</sup> See John Bostain, *Use of Force: Are Continuums Still Necessary?*, 4 FED. L. ENF'T TRAINING CTR. J. 33, 33 (2006).

result, as Brandon Garrett and I have written, “some policies simply ape the Fourth Amendment standard.”<sup>279</sup> And as it turns out, they do so in a number of different ways.

Some agencies incorporate the constitutional standard, in whole or in part, into the administrative standard governing the degree to which force is permitted. The Los Angeles Police Department, for example, states that officers “may use only that force which is ‘objectively reasonable,’” and then explicitly adopts the *Graham* Court’s articulation of reasonableness.<sup>280</sup> The Portland (Oregon) Police Department has promulgated a similar policy:

This Directive adopts the constitutional standard for the use of force established by the United States Supreme Court in *Graham v. Connor*, and subsequent case law as an outside limit on the amount of force that members may use. In this Directive, the Portland Police Bureau prohibits force that is not objectively reasonable under the constitutional standard.<sup>281</sup>

The Los Angeles County Sheriff’s Office has adopted a comparable approach with a policy that prohibits unreasonable force, then states explicitly that “the basis in determining whether force is ‘unreasonable’ shall be consistent with the Supreme Court decision of *Graham v. Connor*, 490 U.S. 386 (1989).”<sup>282</sup>

Further, many policies provide a framework for determining whether the constitutional requirement has been met in any given situation. Many of those policies state that the relevant facts and circumstances are those known to officer at the time,<sup>283</sup> or those that a reasonable officer would have perceived at the time.<sup>284</sup> Additionally, some policies specify how the relevant facts are to be determined. The Las Vegas Police Department policy, for example, authorizes officers to use the amount of force that is “necessary” and “within the range of ‘objectively reasonable’ options,” further stating:

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight. The reasonableness [sic] must account for

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<sup>279</sup> Garrett & Stoughton, *supra* note 55, at 284.

<sup>280</sup> L.A. POLICE DEP’T, POLICY ON THE USE OF FORCE 556.10, lapdonline.org/lapd\_manual/volume\_1.htm.

<sup>281</sup> PORTLAND POLICE DEP’T, USE OF FORCE 1010.00, at 4.1.

<sup>282</sup> L.A. CNTY. SHERIFF’S OFF., USE OF FORCE POLICY 3-10/030.00.

<sup>283</sup> *See, e.g.*, FORT WORTH POLICE DEP’T, GENERAL ORDER 306.04(A).

<sup>284</sup> *See, e.g.*, OKLA. CITY POLICE DEP’T, OPERATIONS MANUAL 554.0 (5th ed. 2014).

the fact that officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving.<sup>285</sup>

The Los Angeles County Sheriff's Office takes a similar approach:

Department members are authorized to use only that amount of force that is objectively reasonable to perform their duties. "Objectively reasonable" means that Department members shall evaluate each situation requiring the use of force in light of the known circumstances, including, but not limited to, the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the member or others, and whether the suspect is actively resisting, in determining the necessity for force and the appropriate level of force. Department members maintain the right to self-defense and have a duty to protect the lives of others.<sup>286</sup>

Many agencies' policies state that the propriety of an officer's use of force must be evaluated by reviewing the totality of the facts and circumstances.<sup>287</sup> Agencies often include the *Graham* factors among the totality of circumstances that can affect the permissibility of an officer's use of force.<sup>288</sup> At some agencies, the *Graham* factors are included in a more comprehensive list. The Cook County, Illinois, Sheriff's Office, for example, includes some of the *Graham* factors (e.g., "seriousness of the crime committed") among an enumerated, non-exhaustive list of fourteen "facts and circumstances" that comprise the "totality of the circumstances."<sup>289</sup> Many other agencies, however, incorporate the *Graham* factors into their policies almost verbatim<sup>290</sup> or with only a modicum of modification.<sup>291</sup> The Las Vegas Metropolitan Police Department goes even

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<sup>285</sup> LAS VEGAS METRO. POLICE DEP'T, USE OF FORCE POLICY 6/002.00(III).

<sup>286</sup> L.A. CNTY. SHERIFF'S OFF., USE OF FORCE POLICY 3-10/020.00.

<sup>287</sup> See, e.g., L.A. CNTY. SHERIFF'S OFF., *supra* note 282.

<sup>288</sup> See, e.g., L.A. POLICE DEP'T, *supra* note 280.

<sup>289</sup> COOK CNTY. SHERIFF'S ORDER, RESPONSE TO RESISTANCE/USE OF FORCE POLICY 11.2.1.0(V)(Q) (2011) (including, "1. Seriousness of crime committed[;] 2. Relative size/stature of the officer[;] 3. Number of subjects/officers[;] 4. Subject(s) access to weapons[;] 5. Gender, age, physical attributes of subject[;] 6. Immediacy of danger[;] 7. Distance from the subject[;] 8. Known history of violence by subject[;] 9. Presence of victims or potential victims in the area[;] 10. Whether evidence is likely to be destroyed[;] 11. Mental status of subject[;] 12. Reasonable belief of harm to another or self[;] 13. Nature and stability of the event environment or location[;] 14. Amount of time available to reasonably establish control").

<sup>290</sup> See, e.g., PHX. POLICE DEP'T, OPERATIONS ORDER: USE OF FORCE 1.5(3)(B)(2) (2013) ("Circumstances that may govern the reasonableness of using a particular force option include, but are not limited to: [t]he severity of the crime[;] [w]hether the suspect poses an immediate threat to the safety of officers or others[;] and [w]hether the suspect is actively resisting arrest or attempting to evade arrest by flight.").

<sup>291</sup> See, e.g., CONSOLIDATED CITY OF JACKSONVILLE, OFF. OF THE SHERIFF, GENERAL ORDER LXXII.6(72)(IV)(D) (authorizing the use of "non-deadly force" when it is "absolutely necessary and only to the degree needed," while instructing officers to consider "1. [s]everity of the crime/situation at issue; 2. [w]hether the person is resisting the officer's attempt to place him in custody, or attempting to evade an officer by flight;

further, directing officers who are completing use of force reports to “[e]nsure each of the prongs of *Graham v. Connor* and the Objectively Reasonable Force factors are addressed.”<sup>292</sup>

The preceding paragraphs illustrate how police agencies often rely on or incorporate constitutional standards into their administrative regulation of police violence. I do not mean to suggest that the constitutional standards are necessarily incompatible with the goals of an administrative policy; there may be strong arguments, for example, for incorporating the perspective of a reasonable officer on the scene into the administrative standard. It appears, however, that agencies are not carefully excising and adopting particularly appropriate aspects of Fourth Amendment analysis that happen to align with their administrative goals. Indeed, the prevalence with which police agencies purchase pre-generated policies from third-party vendors like Lexipol<sup>293</sup> suggests that agencies may be adopting generic standards in lieu of engaging in collaborative, stakeholder-informed policymaking that is responsive to local circumstances and concerns.

### C. *Police Culture*

The constitutional standards that govern police uses of force do not just inform police agencies’ written policies, they also shape industry norms. Police organizations have, *inter alia*, turned to Fourth Amendment jurisprudence when advocating on issues of public policy, asserting that maintaining the standard adopted in *Graham v. Connor* is essential to crime-fighting efforts and officer safety. The Court’s admonition that the constitutionality of an officer’s use of force is to be assessed by looking to the facts and circumstances as they would have been perceived by a reasonable officer on the scene, meanwhile, is frequently used to bolster arguments against meaningful review.

In 2016, the Police Executive Research Forum (“PERF”) convened a summit of almost 200 high-level police officials, academics, and others to discuss the use of force.<sup>294</sup> The self-stated goal was to identify “changes in policies, training, tactics, and equipment that provide officers with better tools for handling

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3. [w]hether the person poses an imminent threat to the safety of the officer(s) or others; or 4. [a]n inmate is attempting to disrupt the care, custody, and control of a correctional facility”).

<sup>292</sup> LAS VEGAS METRO. POLICE DEP’T, POST USE OF FORCE PROCEDURES, 6/002.04(V)(B)(2)(b).

<sup>293</sup> See Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891 (2018).

<sup>294</sup> POLICE EXEC. RSCH. F., GUIDING PRINCIPLES ON USE OF FORCE 13 (2016), <https://www.policeforum.org/assets/30%20guiding%20principles.pdf>.

difficult situations.”<sup>295</sup> The resulting report—the culmination of not just that summit, but also a year and a half of focus groups, a national survey, prior conferences on training and community trust, and site visits in New York and Scotland—identified thirty “guiding principles” for police agencies and the industry as a whole to consider as they develop use-of-force policies and training.<sup>296</sup> Among the “key insights”<sup>297</sup> of the report were the following observations:

The U.S. Supreme Court’s landmark 1989 decision in *Graham v. Connor* outlines broad principles regarding what police officers can legally do in possible use-of-force situations, but it does not provide specific guidance on what officers should do. . . .

. . .

The *Graham* decision offers little guidance . . . on how police agencies should devise their policies, strategies, tactics, and training regarding the wide range of use-of-force issues. The entire *Graham* decision is [fewer] than 10 pages, and nearly all of the opinion is devoted to detailing the facts of what happened in the case, the alternative legal arguments and approaches to considering use-of-force issues that the Supreme Court considered but rejected, and a concurring opinion by three justices.

Thus, the Supreme Court provides broad principles, but leaves it to individual police agencies to determine how to incorporate those principles into their policies and training, in order to teach officers how to perform their duties on a daily basis.<sup>298</sup>

Those observations led PERF to recommend, as its second guiding principle, that “[a]gencies should continue to develop best policies, practices, and training on use-of-force issues that go beyond the minimum requirements of *Graham v. Connor*.”<sup>299</sup>

The backlash was swift and vehement. The International Association of Chiefs of Police and the Fraternal Order of Police—organizations that are not typically bedfellows when it comes to positions on police policy—promptly

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<sup>295</sup> *Id.* at 5.

<sup>296</sup> *Id.* at 8–13, 25.

<sup>297</sup> *Id.* at 13.

<sup>298</sup> *Id.* at 15–16.

<sup>299</sup> *Id.* at 35. An earlier version of the report adopted a different phrasing, suggesting that “[d]epartments should adopt policies that hold themselves to a higher standard than the legal requirements of *Graham v. Connor*.” CRITICAL ISSUES IN POLICING SERIES, USE OF FORCE: TAKING POLICING TO A HIGHER STANDARD: 30 GUIDING PRINCIPLES 2 (2016), <https://www.policeforum.org/assets/30guidingprinciples.pdf>.

released a joint statement “reject[ing] any call to require law enforcement agencies to unilaterally, and haphazardly, establish use-of-force guidelines that exceed the ‘objectively reasonable’ standard set forth by the U.S. Supreme Court.”<sup>300</sup> The New York State Association of Chiefs of Police published a lengthy article in its quarterly magazine that assessed PERF’s Guiding Principles, explicitly taking issue with how the advice to go beyond *Graham* could be interpreted.<sup>301</sup> Articles criticizing PERF’s process and perspective, in addition to the actual substance of its recommendations, were printed in popular police-oriented sites, including Police1,<sup>302</sup> Officer.com,<sup>303</sup> and Law Officer.<sup>304</sup> Officers and union officials denounced police chiefs who supported PERF’s recommendations, with at least one union going so far as to call a vote of no confidence after learning that the chief intended to implement some of the PERF-backed reforms.<sup>305</sup>

Two years later, in 2018, California Assemblymember Shirley Weber proposed amending what was, at the time, the single oldest, unamended police use-of-force statute in the country.<sup>306</sup> Her Police Accountability and Community Protection Act would have replaced a codification of the “fleeing felon” rule with more a restrictive statute that authorized the use of deadly force only in those situations where it was “necessary to defend against a threat of imminent death or serious bodily injury to the officer or to another person.”<sup>307</sup> The

<sup>300</sup> Canterbury & Cunningham, *supra* note 4, at 1.

<sup>301</sup> Michael D. Ranalli, *Counsel’s Corner*, N.Y. STATE CHIEF’S CHRON., June 2016, at 7, 9–10, [https://www.nychiefs.org/assets/docs/June\\_16.pdf](https://www.nychiefs.org/assets/docs/June_16.pdf) (“The manner in which [PERF’s] principle is written may allow for inappropriate changes to policy pertaining to the legal standards for use of force, when the focus really needs to be on the tactics and decision making leading up to the need and/or decision to use force.”).

<sup>302</sup> See Fairburn, *supra* note 5.

<sup>303</sup> See Davis, *supra* note 5.

<sup>304</sup> *Response to PERF’s “30 Guiding Principles” Document*, LAW OFFICER (Feb. 14, 2016), <https://lawofficer.com/exclusive/perfresponse/>.

<sup>305</sup> Beltran, *supra* note 6.

<sup>306</sup> As I wrote in a letter to Assemblymember Weber: “The statute governing justifiable homicide by public officials, Penal Code § 196, was enacted in 1872 and has not been amended since, making it single oldest unamended use-of-force statute in the country. . . . The only states that enacted similar laws prior to California are Vermont (1787), Tennessee (1858) and Georgia (1863). Idaho followed suit shortly thereafter (1887). All four of those states have re-codified or amended their laws multiple times since, with Vermont doing so 11 times (mostly recently in 1983), Tennessee doing so twice (most recently in 1990), Georgia doing so 14 times (most recently in 2013), and Idaho doing so four times (most recently in 1987).” Letter from Seth W. Stoughton to Shirley Weber, Assemblymember, California State Assembly (May 31, 2019) (on file with author).

<sup>307</sup> Assembly Bill 931 defined “necessary” as those situations in which “an objectively reasonable peace officer in the same situation would conclude that there was no reasonable alternative to the use of deadly force that would prevent imminent death or serious bodily injury to the peace officer or to another person.” *Id.* “Reasonable alternatives,” in turn, were defined as “tactics and methods, other than the use of deadly force, of apprehending a subject or addressing a situation that do not unreasonably increase the threat posed to the peace officer or another person.” A.B. 931, 2017–2018 Cal. Leg., Reg. Sess. (Cal. 2018), [https://leginfo.ca.gov/pub/17\\_01\\_01\\_bill\\_0931\\_01.html](https://leginfo.ca.gov/pub/17_01_01_bill_0931_01.html).

California Peace Officers Association criticized the proposal for “rais[ing] the legal use of force standard” above that laid out in *Graham v. Connor*.<sup>308</sup> As the president of the San Diego Police Officers Association wrote, “[a]bandoning the ‘reasonableness’ standard pertaining to a police officer’s use of force set by *Graham* . . . would greatly hinder law enforcement officers and therefore endanger the communities they serve.”<sup>309</sup> The International Association of Chiefs of Police again spoke out, releasing a *Use of Force Position Paper* that expressed “significant concerns with any legislation or proposed bills in the United States that create an unachievable standard for use of deadly force that is in direct conflict with the established standard of ‘objectively reasonable under the totality of the circumstances,’ set forth by Supreme Court, *Graham v. Connor* [sic].”<sup>310</sup>

In both contexts—a police organization’s attempt to identify best practices and a legislative attempt to amend a statutory “fleeing felon” rule—*Graham* and its objective reasonableness standard provided the foundation for criticism and resistance. As the San Diego Police Officers Association president put it, anything other than continued reliance on the constitutional standard established in *Graham* would be “unrealistic and unacceptable.”<sup>311</sup>

On a more granular level, policing has taken too far the Court’s caution that constitutional analysis must not be based on the “perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>312</sup> In its *Use of Force Position Paper*, for example, the IACP expressed its concern that any standard other than the “objective reasonableness” framework would result in “endless scrutiny and second-guessing by investigators, prosecutors, and civil courts.”<sup>313</sup> Within policing, the cultural norm against second guessing or, as it is derisively called, “Monday-morning quarterbacking” is justified by both fairness and instrumental concerns.<sup>314</sup> With regard to fairness, there is the belief

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gov/faces/billTextClient.xhtml?bill\_id=201720180AB931.

For purposes of full disclosure: I provided some assistance in drafting certain aspects of the bill, ultimately testifying before a state senate committee and submitting two written letters supporting the bill. I also provided drafting assistance and two additional letters of support for the successor bill, Assembly Bill 392, which passed and was signed into law during the 2019 legislative session.

<sup>308</sup> Rundle, *supra* note 8.

<sup>309</sup> Schaeffer, *supra* note 9.

<sup>310</sup> INT’L ASS’N OF CHIEFS OF POLICE, USE OF FORCE POSITION PAPER: LEGISLATIVE CONSIDERATIONS AND RECOMMENDATIONS 4 (2019), [https://www.theiacp.org/sites/default/files/2019-05/Use%20of%20Force%20Task%20Force%20Recommendations\\_Final%20Draft.pdf](https://www.theiacp.org/sites/default/files/2019-05/Use%20of%20Force%20Task%20Force%20Recommendations_Final%20Draft.pdf).

<sup>311</sup> Schaeffer, *supra* note 9.

<sup>312</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989).

<sup>313</sup> INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 310, at 4.

<sup>314</sup> See, e.g., *The Right Kind of Monday Morning Quarterback*, HUMANIZING THE BADGE (Nov. 23, 2015),



that any *ex post* review of an officer's use of force is fundamentally unfair because the pressures inherent in the situation simply cannot be appreciated by anyone who did not experience that exact situation. As I have written elsewhere, "Comments like 'You weren't there' or 'You don't know what you would have done in that situation' are a common refrain" within policing.<sup>315</sup> While a strong version of this approach would effectively insulate an officer from review, a weaker version works to discredit any review by individuals who have not been in use-of-force situations (that is, by anyone other than other officers). Either way, the ultimate result is to discourage democratic accountability.

The instrumental concern, on the other hand, is analogous to the so-called "Ferguson Effect," a prediction that public scrutiny and criticism of officers will lead "police officers to withdraw from their duties in order to avoid being accused of excessive force or racial profiling" (the "de-policing" hypothesis).<sup>316</sup> De-policing, or so it is argued, will lead to an increase in crime.<sup>317</sup> In the use-of-force context, the instrumental concern is reflected in the prediction that aggressive review and criticism may lead officers to improperly hesitate or refrain from using force when the situation legitimately requires it, thus exposing themselves and others to unnecessary danger. Advocates of the instrumental concern find support in officers' anecdotes, such as the statement of an officer who had previously been disarmed and knocked unconscious by a suspect: "A lot of officers are being too cautious because of what's going on in the media. . . . I hesitated because I didn't want to be in the media like I am right now."<sup>318</sup>

To be clear, *Graham's* admonition that the operative facts and circumstances of a use of force are those that would have been known to a reasonable officer on the scene is not properly understood as precluding critical review; it merely provides the framework under which constitutional review should be conducted. Nevertheless, it has contributed to the development of cultural norms against critical review, especially by perceived "outsiders."

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<https://www.humanizingthebadge.com/blogs/htb-blog/77978371-the-right-kind-of-monday-morning-quarterbacking>.

<sup>315</sup> Seth Stoughton, Geoffrey Alpert & Jeff Noble, *Why the Police Need Constructive Criticism*, ATLANTIC (Dec. 23, 2015), <https://www.theatlantic.com/politics/archive/2015/12/officer-porter-mistrial-police-culture/421656/>.

<sup>316</sup> Scott E. Wolfe & Justin Nix, *The Alleged "Ferguson Effect" and Police Willingness to Engage in Community Partnership*, 40 LAW & HUM. BEHAV. 1, 2 (2016).

<sup>317</sup> *Id.* at 3 (explaining the theory without adopting it).

<sup>318</sup> Nick Valencia, *Pistol-Whipped Detective Says He Didn't Shoot Attacker Because of Headlines*, CNN (Aug. 14, 2015, 10:57 PM), <https://edition.cnn.com/2015/08/13/us/alabama-birmingham-police-detective-pistol-whipped/>.

## IV. CLEANING UP THE SPILLAGE

Thus far, I have argued that the Fourth Amendment is a deeply flawed mechanism for regulating police violence and that the problematic constitutional standard has spilled over into state law, agency policy, and police culture. The problems could be alleviated, at least in part, by either shifting the constitutional regulation of police uses-of-force away from the Fourth Amendment—perhaps by returning to the due process standard rejected in *Graham*—or by improving the extant Fourth Amendment framework. In other work, I have explored ways to improve the constitutional framework, such as by including officer tactics, which can often create issues of path dependence, in the analysis;<sup>319</sup> by evaluating officers' actions against the backdrop of industry norms and evidence-based best practices;<sup>320</sup> and by shifting the analysis from the nature of the subject's actions to the extent to which those actions threaten a government interest.<sup>321</sup> Other scholars, similarly, have argued for a range of modifications to Fourth Amendment jurisprudence,<sup>322</sup> for an increase in the constitutionalization of police agency policies or training,<sup>323</sup> and for regulating the use of force through other constitutional provisions.<sup>324</sup>

In this discussion, I am focused explicitly—and narrowly—on the use of force by police. I acknowledge and generally support the many scholars and other commentators who have made the broader point that the use of force could be addressed in part by shifting the role of police agencies and the duties of police officers.<sup>325</sup> Indeed, I have made that point myself, albeit less eloquently and with less emphasis than many others.<sup>326</sup> Further, like others, I have argued that the first principles and culture of policing requires what can be radical

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<sup>319</sup> Garrett & Stoughton, *supra* note 55, at 291–93; STOUGHTON ET AL., *supra* note 98.

<sup>320</sup> See Garrett & Stoughton, *supra* note 55, at 293–99.

<sup>321</sup> STOUGHTON ET AL., *supra* note 98.

<sup>322</sup> Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 125–29 (2017) (observing that the body of Fourth Amendment doctrines that “legalize racial profiling” have contributed to “ordinary” police encounters that can become fatal); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182 (2017); Harmon, *supra* note 18 (arguing for the adoption of a proportionality analysis that draws on common law self-defense principles).

<sup>323</sup> See Nancy C. Marcus, *Out of Breath and Down to the Wire: A Call for Constitution-Focused Police Reform*, 59 HOW. L.J. 5 (2015).

<sup>324</sup> See Michael Banarjee, *No Trial Executions* (work in progress).

<sup>325</sup> See, e.g., PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); ALEX S. VITALE, *THE END OF POLICING* (2019).

<sup>326</sup> TEDx Talks, *Guardians of Our Galaxy – What Is Good Policing?* | Seth Stoughton | TEDxUofSC, YOUTUBE (Jan. 10, 2019), <https://www.youtube.com/watch?v=uJrBuo3lo5s>; Seth W. Stoughton, Jeffrey J. Noble & Geoffrey P. Alpert, *How to Actually Fix America's Police*, ATLANTIC (June 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/how-actually-fix-americas-police/612520/>.

readjustment.<sup>327</sup> It seems likely that any form of regulation will prove faulty when the very purposes for which society uses the police or the cultural values of policing itself are flawed. Those conversations are important, but are outside the scope of this Article, which is focused on the spillover effects of a flawed constitutional framework.

In the same vein, the deep problems of the Fourth Amendment must themselves be corrected. This will require litigants to educate and persuade the courts that, often, the judicial understanding of “reasonable” force is not, in fact, reasonable. As I have argued elsewhere, judicial understandings should be more heavily based on observational information about policing than it currently is;<sup>328</sup> this too is outside the scope of this Article.

Changing the contours of constitutional regulation—those that govern seizures generally and police violence specifically—are important, but there are other parts to the solution. To prevent or reduce Fourth Amendment spillage, state lawmakers and administrative policymakers should divorce statutory and administrative regulatory mechanisms from constitutional law. In this Part, I begin to explore that possibility. By necessity, this exploration will be brief; I do not here offer a model state constitutional amendment, for example, or to promulgate a model statute or model policy. Instead, my goal is to articulate the need for a robust public discussion about the regulation of police violence and to provide some preliminary topics of conversation, reserving for future work a complete examination of those topics. Specifically, I offer a simple, but powerful observation: the underlying interests protected by constitutional law are often distinct from the interests that underlie state law—constitutional or statutory—or agency policy. The adoption of constitutional law as a sub-constitutional standard, then, may substantially under-protect divergent state or administrative interests.

Whether wholesale or in part, the incorporation of constitutional standards into other regulatory frameworks is not entirely surprising. As Bill Stuntz pointed out more than a decade ago, Fourth Amendment doctrines can occupy the regulatory field, disincentivizing legislators from adding statutory supplements to extant constitutional standards.<sup>329</sup> Experience suggests that

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<sup>327</sup> Stoughton, *supra* note 222.

<sup>328</sup> Garrett & Stoughton, *supra* note 55.

<sup>329</sup> William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 793 (2006) (“The existence of any given constitutional rule tends to reduce support for friendly legislation. *Like the marginal benefit of most things, the marginal benefit of regulation declines; each new increment is worth less than the one before.*”) (emphasis added).

similar disincentives for police executives create obstacles to supplementing the *Graham* analysis. To a significant degree, this may be attributed to protectionism; the combination of the Fourth Amendment's often highly deferential "objective reasonableness" standard and the doctrine of qualified immunity provide a significant barrier to legal liability<sup>330</sup> or, in many cases, to determining whether an officer's actions violated the Fourth Amendment in the first place.<sup>331</sup>

The interests safeguarded by the Fourth Amendment, however, are both distinct and, in many cases, readily distinguishable from the interests that underlie state law and agency policy. It is widely accepted that the Fourth Amendment's prohibition of unreasonable searches and seizures was intended to limit the exercise of government power to those circumstances when the public interest in order outweighs the individual interest in liberty, bodily autonomy, or privacy.<sup>332</sup> This interest is in service to the Constitution's ultimate object: codifying a political philosophy superior to the Articles of Confederation or the monarchy that preceded them by laying out a series of "negative rights."<sup>333</sup> This structure provides plausible, though not inarguable, bases for concluding that the Fourth Amendment should not extend to certain aspects of police violence, such as attempts that do not physically connect with any target or those that do not actually restrict an individual's freedom of movement. Even when an officer's use of force should not be subject to Fourth Amendment regulation (because it does not amount to a seizure), though, it may properly be the subject of regulation by state law or agency policy.

States, of course, have an interest in appropriately limiting the authority of government agents to enforce state and local laws that is conceptually identical to the constitutional interest, although states are free to put a thumb on the scales by imposing more stringent limits on government authority than the Constitution demands. The Iowa Supreme Court, for example, ruled that a provision of the state's constitution that is worded almost identically to the Fourth Amendment prohibits vehicle inventory searches that lack probable cause, even though such

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<sup>330</sup> See, e.g., William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 60–61 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 70 (2017); Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 231–32 (2005).

<sup>331</sup> See John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010).

<sup>332</sup> See, e.g., Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011) (contending that the development of Fourth Amendment jurisprudence is marked by a series of expansions and contractions of government agents' constitutional authority that compensate for "changing technology and social practice").

<sup>333</sup> *Jackson v. Joilet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

searches would comply with constitutional precedent.<sup>334</sup> In the same vein, the New Jersey Supreme Court held that consent-based searches of vehicles were prohibited by the state's constitution even though they are permitted by the Fourth Amendment,<sup>335</sup> and the South Carolina Supreme Court held that officers must have reasonable suspicion before conducting a "knock-and-talk" even though the Fourth Amendment has no such requirement.<sup>336</sup> In each case, the Fourth Amendment and respective state's constitutional law both balance the same public and private interests. The difference is that the states have come to different conclusions about how those interests should be balanced. The states could take a similar tack in the context of police violence. A California court, for example, has held that the concept of "reasonableness" is narrower in the context of state negligence law than it is in the constitutional context, such that an officer's action that is considered "reasonable" for Fourth Amendment purposes may be unreasonable as a matter of state law.<sup>337</sup>

States also have a distinct interest from that which undergirds the Fourth Amendment: protecting public safety and welfare. Where the Fourth Amendment and state law analogs may regulate police uses of force as exercises of government authority, states can also regulate them as *violence* (or, relatedly, as *threats of violence*). "The state claims of assault and battery allege *physical* harm as a result of the police conduct,"<sup>338</sup> which courts have recognized as distinct from the deprivation of a constitutional right.<sup>339</sup> Thus, an officer's use of force can constitute a potential infringement on interests protected by state law regardless of whether it also implicates constitutional concerns.<sup>340</sup> This is not to suggest police uses of force always or typically constitute crimes, of course; it is merely to advance the observation that the state has an interest in regulating the use of force that is distinct from the constitutional interest in balancing the power dynamic between the government and the governed. Although it seems plausible that Congress could enact use-of-force legislation

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<sup>334</sup> Compare *State v. Ingram*, 914 N.W.2d 794, 797–98 (Iowa 2018), with *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976).

<sup>335</sup> Compare *State v. Carty*, 790 A.2d 903, 911–12 (N.J. 2002), with *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 223 (1973).

<sup>336</sup> Compare *State v. Counts*, 776 S.E.2d 59, 65 (S.C. 2015), with *Florida v. Jardines*, 569 U.S. 1, 10 (2013).

<sup>337</sup> *Hayes v. San Diego*, 305 P.3d 252, 263 (Cal. 2013).

<sup>338</sup> *Sudul v. Hamtramck* 562 N.W.2d 478, 487 (Mich. App. 1997) (Murphy, P.J., concurring) (citing PROSSER AND KEETON ON TORTS §§ 9, 10 (W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen eds., 5th ed. 1984)).

<sup>339</sup> See *Garner v. Mich. State Univ.*, 462 N.W.2d 832, 838 (Mich. App. 1990).

<sup>340</sup> See *Sudul*, 562 N.W.2d at 493 (Murphy, P.J., concurring).

under its authority to safeguard due process,<sup>341</sup> it is worth pointing out that Congress has a rather limited ability to enact criminal laws, as least as compared to the states. The Constitution generally prohibits the federal government from exercising the “police power,” reserving such authority for the states. As the Court wrote, “[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”<sup>342</sup> The state interest is both clear and straightforward in a way that the federal interest may not be.

Unfortunately, merely having state laws that build on the constitutional standard is not guaranteed to clean up the Fourth Amendment spillage. Several states, for example, have adopted statutory exhaustion requirements that permit officers to use deadly force only when “all other reasonable means of apprehension have been exhausted,”<sup>343</sup> when “a person cannot be captured any other way,”<sup>344</sup> or when “there is apparently no other possible means of effecting the arrest.”<sup>345</sup> Despite this statutory language, I have been unable to find a single case in which the exhaustion requirements in Iowa, Delaware, New Hampshire, or Tennessee played any significant role in the judicial analysis of a use of force incident.

This may be because the constitutional framework has so colored interpretations of state law. This stands in sharp contrast to the way courts have understood the Fourth Amendment. The Eighth Circuit, in which Iowa sits, has rejected the idea that the Fourth Amendment incorporates any type of force minimization or exhaustion requirement, holding:

The Fourth Amendment inquiry focuses not on . . . whether there were other alternatives available, but instead whether the seizure actually effectuated falls within a range of conduct which is objectively “reasonable” under the Fourth Amendment. Alternative measures which 20/20 hindsight reveal to be less intrusive (or more prudent) . . . are simply not relevant to the reasonableness inquiry.<sup>346</sup>

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<sup>341</sup> U.S. CONST. amend. XIV, § 5.

<sup>342</sup> *United States v. Morrison*, 529 U.S. 598, 618 (2000).

<sup>343</sup> TENN. CODE ANN. §§ 39-11-620(b), 40-7-108(b) (2020); DEL. CODE ANN. tit. 11, § 467(c) (2020).

<sup>344</sup> IOWA CODE § 804.8(1) (2020).

<sup>345</sup> N.H. REV. STAT. ANN. § 627:5(VIII) (2020).

<sup>346</sup> *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995).

The Tenth Circuit put it more succinctly: the Fourth Amendment “do[es] not require [police] to use the least intrusive means in the course of a detention, only reasonable ones.”<sup>347</sup>

Were state law more cleanly divorced from constitutional law, the various types of state statutory provisions that go beyond the Fourth Amendment’s minimum requirements may be given more effect by the courts that interpret them.<sup>348</sup>

A few states have recognized that the interests protected by state law support rejecting the constitutional framework for police violence. In New York, for example, the state court discussed *Graham*, ultimately concluding that the constitutional framework did not provide an appropriate model for state law.<sup>349</sup> In California, the state supreme court held that “state negligence law . . . is broader than federal Fourth Amendment law,” such that a use of force that was “reasonable” for constitutional purposes could be considered negligent for purposes of state law.<sup>350</sup> A Mississippi court made a similar point:

[A]s a general rule, remedies under civil rights law are not nearly as broad as those available under state law. While a state law plaintiff is allowed to recover damages for any unwanted touching under the common law of battery, federal remedies under § 1983 are only available for more egregious conduct.<sup>351</sup>

Given the various infirmities of Fourth Amendment jurisprudence, other states should adopt a clear distinction between constitutional law and state law.

Like states, individual police agencies have an interest in regulating police uses of force that is quite distinct from constitutional concerns; officer training and administrative policies must take into account limited resources, officers’ effectiveness in advancing law enforcement and public safety goals, officer safety, public trust and perceptions of legitimacy, and a number of other considerations. While certainly *relevant* to those broader considerations, the constitutional rules governing police violence are not necessarily *salient*; agencies might be expected to prioritize a range of non-constitutional issues, reducing the relative importance of the Court’s Fourth Amendment jurisprudence.

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<sup>347</sup> United States v. Melendez-Garcia, 28 F.3d 1046, 1052 (10th Cir. 1994).

<sup>348</sup> See *supra* notes 246–52 and accompanying text.

<sup>349</sup> See *McCummings v. N.Y.C. Transit Auth.*, 613 N.E.2d 559, 561 (N.Y. 1993).

<sup>350</sup> *Hayes v. San Diego*, 305 P.3d 252, 262 (Cal. 2013).

<sup>351</sup> *Williams v. Lee Cnty. Sheriff’s Dep’t*, 744 So. 2d 286, 297 (Miss. 1999).

There are a number of different ways in which agencies—preferably working collaboratively with the communities they serve—could develop policies that balance these different competing priorities. The Washington, D.C., Metropolitan Police Department policy serves again as an example: it makes clear that the agency has adopted a restrictive approach, stating on the first page of its policy that an officer “shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others.”<sup>352</sup> Other agencies have adopted similar “force minimization” policies.<sup>353</sup> As those examples demonstrate, there is ample room for localization, and not just in a sense of the “use of force policy” or “response to resistance policy” adopted by the particular agency. An agency’s decision not to equip officers with TASERs, for example, will have implications on whether and how officers use force even though that decision will likely not be reflected in written policy.

Of course, it will take more than the adoption of some new policy language or other administrative action to effectively disentangle the constitutional framework from how an agency regulates the use of force. Agencies must be alert to the possibility that their policies will purport to limit the use of force more stringently than the Fourth Amendment, but officer actions will continue to be evaluated under the Fourth Amendment framework. Both the Los Angeles Police Department and Los Angeles County Sheriff’s Office, for example, restrict when officers can shoot at moving vehicles in a way that the Supreme Court has not.<sup>354</sup> As described above, however, both have also explicitly adopted the *Graham v. Connor* framework for determining whether officers acted reasonably.<sup>355</sup> The effective extrication of constitutional law from agency policy would require those agencies to recognize that there may be circumstances when shooting at a moving vehicle is objectively reasonable even though the policy justifications that would permit such action are not met. Concluding that a

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<sup>352</sup> D.C. METRO. POLICE, GENERAL ORDER GO-RAR-901.07 (2010).

<sup>353</sup> See, e.g., MIA. POLICE DEP’T, DEPARTMENTAL ORDER 6, Chapter 21, 21.1.1 (“It is the policy of the Miami Police Department that officers shall use only the minimum amount of force that is *necessary* to effect an arrest, apprehension, or physically control a violent or resisting person.”); FORT WORTH POLICE DEP’T, GENERAL ORDER 306.03(D) (authorizing officers to use “necessary” force and defining it as “the minimum amount of lawful force necessary to achieve a legitimate police objective”).

<sup>354</sup> L.A. POLICE DEP’T, POLICY ON THE USE OF FORCE, 556.10 (“Firearms shall not be discharged at a moving vehicle unless a person in the vehicle is immediately threatening the officer or another person with deadly force by means other than the vehicle.”); L.A. CNTY. SHERIFF’S OFF., USE OF FORCE, 3-10/220.00 (prohibiting officers from shooting at moving vehicles except in “extraordinary” situations).

<sup>355</sup> L.A. POLICE DEP’T, POLICY ON THE USE OF FORCE, 556.10; L.A. CNTY. SHERIFF’S OFF., USE OF FORCE, 3-10/030.00.



shooting was authorized under the Los Angeles Sheriff's Office's policies that permit such behavior in "extraordinary" circumstances, for example, because the shooting was objectively reasonable would collapse putatively separate standards.

Recognizing that state and agency interests are distinct from the constitutional interest in regulating police uses of force should serve as an incentive to develop state or agency regulation independently of Fourth Amendment jurisprudence.

#### CONCLUSION

What rules regulate police violence? The most obvious answer, for legal scholars and police officers alike, is the Fourth Amendment's "objective reasonableness" standard, adopted by the Supreme Court in *Graham v. Connor*.<sup>356</sup> Within policing, it has been fervently argued that the constitutional standard is the *only* relevant or appropriate form of regulation.<sup>357</sup> That argument, however, misses the fact that the Fourth Amendment does not regulate police uses of force. It applies only to the extent that officers' actions amount to *seizures*, a doctrinal limitation that simply excludes some uses of force, including fatal police shootings. When the Fourth Amendment does apply, it provides little to no guidance to officers about whether and how to use force. The framework it establishes for evaluating officer actions is equally vacuous; the well-known *Graham* factors are of limited analytical value, are not well defined, and are woefully incomplete. In sum, the Fourth Amendment is a profoundly flawed framework for regulating police violence.

The Fourth Amendment's flaws would be troubling enough in the constitutional context, but the *Graham* framework has spilled over into the sub-constitutional regulation of police violence. Courts in more than half the states have turned to constitutional law when interpreting state statutes or constitutional provisions, referencing, relying on, or, most problematically, explicitly incorporating Fourth Amendment jurisprudence into state law. Although empirical evidence is scarce, there is reason to believe that state statutes that explicitly limit officers beyond the Constitution's minimum level protection for individual rights—such as statutory exhaustion that permits officers to use deadly force only when all other reasonable alternatives have been attempted—have been given short shrift because of the spillover effect of

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<sup>356</sup> 490 U.S. 386 (1989).

<sup>357</sup> See *supra* Part III.C.

constitutional law. Individual police agencies, similarly, incorporate Fourth Amendment jurisprudence into their administrative use-of-force policies, not just by describing it as a relevant legal standard but by adopting the *Graham v. Connor* framework whole cloth or with minimal alterations. More broadly, police culture as a whole has taken the position that the Fourth Amendment is the only relevant and appropriate standard under which officer actions can be reviewed.

The spillage of Fourth Amendment jurisprudence into sub-constitutional regulation should be cleaned up, and not just because of the many weaknesses of constitutional law. The Constitution, state law, and police agency policies have distinct regulatory goals. While the Constitution is concerned primarily with balancing government authority against individual liberty, state law seeks to do that while *also* appropriately protecting community members from physical threats and violence. Police agencies, meanwhile, must balance a host of competing priorities, including the immediate and long-term effectiveness of enforcement activities, officer safety, and public trust. The state and agency goals are not just distinct from the goals of the Fourth Amendment, they are divergent; rules that might serve to advance the constitutional interest will fall short, often substantially short, of adequately advancing state or agency interests.

The problem of police violence is multifaceted, as is the solution. This Article has gone beyond existing scholarship by arguing that the Fourth Amendment itself frustrates the effective regulation of police violence. It would behoove scholars, elected officials, policymakers, and community members who contemplate how to better manage the use of force to be attuned to the value of divorcing the Fourth Amendment framework from state law and agency policy.