

NOTES

WHO IS THE REASONABLE POLICE OFFICER? A LOCALIZED SOLUTION TO A NATIONWIDE PROBLEM

*Jesse Chang**

In Graham v. Connor, the Supreme Court held that a Fourth Amendment reasonableness standard governed the analysis of any allegation that a law enforcement officer used excessive force during an arrest or investigatory stop. In particular, courts were to evaluate the reasonableness of the need to use force from the perspective of a hypothetical reasonable police officer at the scene. While this test seems straightforward, the Supreme Court has provided little guidance on how exactly to apply the reasonable police officer analysis. As a result, it has been criticized as a vague standard, which is difficult for courts to apply, and unduly deferential to the police.

This Note proposes that courts adopt a localized conception of the reasonable police officer as a modest reform within the existing framework for excessive force analysis. Under the localized conception, courts would assign objective attributes, particular to the jurisdiction where the excessive force allegedly happened, to the hypothetical reasonable police officer. Accordingly, the reasonable police officer becomes less of an amorphous standard and more of a concrete vehicle for analysis that is responsive to local notions of acceptable police behavior.

INTRODUCTION	88
I. FOURTH AMENDMENT EXCESSIVE FORCE JURISPRUDENCE.....	91
A. Excessive Force Analysis Before <i>Graham</i>	91
1. <i>Johnson v. Glick</i> : Substantive Due Process and “Conduct That Shocks the Conscience”	92
2. <i>Tennessee v. Garner</i> and the Pivot to the Fourth Amendment .	93
B. Explicitly Adopting the Fourth Amendment: <i>Graham v. Connor</i>	93
C. The Factbound Morass Created by <i>Graham</i>	96
1. Post- <i>Graham</i> Supreme Court Decisions.....	96
2. The Current Fragmented State of Excessive Force Analysis ...	99
II. THE PROBLEMATIC AND MYSTERIOUS REASONABLE POLICE OFFICER...	100

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A.	Who Is the Reasonable Police Officer?	100
1.	Does the Reasonable Police Officer Follow Department Policies?	101
2.	Is the Reasonable Police Officer Well Trained?	103
B.	There Is a Lack of Consensus on Reasonable Police Behavior.	105
C.	The Reasonable Police Officer Accommodates Biases Police May Have	107
1.	Undue Police Perception of Threat	108
2.	Police Sensory Perception Under Pressure.....	110
III.	A LOCALIZED CONCEPTION OF THE REASONABLE POLICE OFFICER	111
A.	What Is Considered Under the Localized Conception of the Reasonable Police Officer?	112
1.	Relevant State and Local Law Notions of How Police Should Use Force	112
2.	Relevant Police Department Training and Policies	114
3.	Other Possible Considerations	115
B.	Why the Localized Conception Should Be Adopted.....	116
1.	The Assigned Attributes Are Consistent With Excessive Force Jurisprudence	116
2.	It Gives People a Say in How They Are Policed	118
C.	Addressing Fragmentation Counterarguments	121
	CONCLUSION	123

INTRODUCTION

A series of recent, high-profile police-involved killings has once again brought the issues of police brutality and excessive force to the forefront of the national consciousness and reinvigorated calls for police reform.¹ For those alleging that the police used excessive force against them, one possible means of recourse is to file a § 1983 lawsuit against the police officer who used the force.² The individual's claim in such a lawsuit is that

1. See, e.g., John Eligon & Will Wright, In Louisville, Looking to Protests of the Past to Move Forward, N.Y. Times (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/us/louisville-protests-civil-rights.html> (on file with the *Columbia Law Review*) (covering the development of protests following the death of Breonna Taylor, who was shot by police officers executing a “no knock” warrant); Dionne Searcey & David Zucchini, Protests Swell Across America as George Floyd Is Mourned Near His Birthplace, N.Y. Times (June 6, 2020), <https://www.nytimes.com/2020/06/06/us/george-floyd-memorial-protests.html> (on file with the *Columbia Law Review*) (last updated Sept. 7, 2021) (covering protests and reactions in the wake of the murder of George Floyd, who died while handcuffed because a police officer knelt on his neck).

2. 42 U.S.C. § 1983 (2018). Section 1983 provides individuals with the right to sue government officials and those acting “under the color of law” for the “deprivation of any

the police officer violated their Fourth Amendment right to be free from unreasonable seizure by using excessive force.³ Under current Fourth Amendment jurisprudence, courts assess whether the use of force—conceptualized as a “seizure”—was reasonable by evaluating the need to use force based “on the facts and circumstances” of the particular situation from the perspective of a hypothetical reasonable police officer.⁴ This basic framework for excessive force analysis appears to be straightforward, but the Supreme Court has provided little guidance on how to apply it, resulting in an opaque excessive force doctrine, which has been criticized as “a factbound morass.”⁵ Perplexingly, but in line with the general lack of clarity surrounding excessive force analysis, there is no guidance on what qualities characterize the hypothetical reasonable police officer.⁶ Commentators have written copious amounts of discourse about the need to clarify the excessive force analysis and have asked for courts to include additional considerations in the analysis. They have also called attention to other issues with the reasonable police officer standard.⁷ Yet, there is little scholarship on providing a cohesive framework to aid in understanding the attributes assigned to the reasonable police officer.⁸

rights, privileges, or immunities secured by the Constitution and laws.” *Id.* Individuals commonly use § 1983 litigation to impose liability on individual police officers for misconduct such as use of excessive force and as a means to vindicate their civil rights. See Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Detering Police Brutality*, 44 *Hastings L.J.* 753, 754 (1993) (“[C]ivil rights lawyers continue to bring section 1983 suits because they view such actions as an important tool to address police brutality . . .”).

3. U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

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

5. *Scott v. Harris*, 550 U.S. 372, 383 (2007); see also *infra* note 60 (citing legal scholars who note the unclarity regarding *Graham’s* excessive force test).

6. See *infra* section II.A.

7. See, e.g., Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 *J. Crim. L. & Criminology* 481, 482, 484–86 (1994) (criticizing the reasonable police officer standard as being unclear and difficult for courts to apply); David B. Goode, *Law Enforcement Policies and the Reasonable Use of Force*, 54 *Willamette L. Rev.* 371, 404 (2018) (arguing that courts should consider police department policies on use of force in determining how the reasonable police officer would have acted); Lindsey Webb, *Legal Consciousness as Race Consciousness: Expansion of the Fourth Amendment Seizure Analysis Through Objective Knowledge of Police Impunity*, 48 *Seton Hall L. Rev.* 403, 408–09 (2018) (arguing that the reasonable person standard used throughout Fourth Amendment analysis should incorporate the assumption that the reasonable person knows that people of color are disproportionately affected by police misconduct); Benjamin Buchwalter, Note, *Return to “Reasonable” in Section 1983 Police Pursuit Excessive Force Litigation*, 65 *Hastings L.J.* 1665, 1673 (2014) (arguing that the reasonable police officer standard, as applied in claims of excessive force during police pursuits, is overly deferential to the police and provides little guidance to courts).

8. The one piece of legal scholarship that alludes to something like a framework for understanding the attributes assigned to the reasonable police officer is Professor Mitch Zamoff’s recently published article. See Mitch Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 *Vill. L. Rev.* 585 (2020). Prof-

This Note argues that a localized conception of the reasonable police officer should be used as a framework to inform courts of the relevant characteristics of the reasonable police officer. The localized conception would have courts assign objective attributes, particular to the jurisdiction where the excessive force was alleged, to the hypothetical reasonable police officer used in excessive force analysis. Part I of this Note describes how the excessive force inquiry has developed and highlights some of the policy considerations informing its development. Additionally, Part I points out the confusion that the lack of Supreme Court guidance has created.

Part II then examines how the lack of clarity about the characteristics of the reasonable police officer creates problems for excessive force analysis. Section II.A argues that this lack of clarity adds to the confusion about what information courts should consider in evaluating whether a particular use of force was reasonable. Section II.B then describes how a lack of consensus regarding acceptable police behavior further compounds this confusion, as illustrated by jurisdictional variations in policing standards. Section II.C argues that this lack of clarity accommodates negative biases or sensory misperceptions that police may have, potentially leading to excessive use of force.

Finally, Part III suggests a novel framework for courts to use in the excessive force inquiry. This framework, the localized conception of the reasonable police officer, asks courts to hold that the reasonable police officer takes on objective attributes particular to the jurisdiction where the excessive force is alleged.⁹ The localized conception of the reasonable police officer is a unique contribution to the literature on excessive force in

essor Zamoff's primary argument is that the reasonable police officer standard does not account for the differences between the police and ordinary citizens and has been turned into a "reasonable person in a high-stress situation" standard. *Id.* at 590. In other words, the perspective of the hypothetical reasonable police officer used by courts is no different from the perspective of an ordinary reasonable person. As a solution, Professor Zamoff relies on evidence law to propose that courts consider evidence of the officer's training, experience, and compliance with their agency's policies and procedures. *Id.* at 592. While this Note also advocates for consideration of training along with departmental policies and procedures, this Note's primary argument is that courts must conceptualize the reasonable police officer as more than an abstract standard used to give deference to the police. Instead, it should be a model—based on objective attributes—of how police *should* act in a given situation. The underlying theme is that policing varies by jurisdiction, and officers in different jurisdictions are subject to different governing circumstances. Additionally, Professor Zamoff invites subjectivity into his proposed analysis by asking courts to consider the individual officer's actual training and experience. *Id.* This Note, however, limits attributes assigned to the reasonable police officer to objective ones that a court could fairly assume of a reasonable officer on the scene.

9. For example, the framework assumes that the reasonable police officer is aware of and in compliance with a state law that requires exhaustion of all reasonable alternatives before using deadly force. See *infra* section III.A.1.

that it offers courts a *method* to decide *what* attributes are given to the reasonable police officer and not just whether a specific consideration is relevant to the excessive force inquiry.¹⁰

I. FOURTH AMENDMENT EXCESSIVE FORCE JURISPRUDENCE

This Part examines how the Supreme Court developed the current “objective reasonableness” test¹¹ for analyzing excessive force claims and introduces the test’s central issue—a lack of clarity on how courts should apply it.¹² This lack of clarity is the key issue that the localized conception of the reasonable police officer seeks to address. Section I.A introduces the prior circuit split on whether courts should analyze claims of excessive force under the Fourth Amendment’s reasonableness test or the Fourteenth Amendment’s broader balancing test. Section I.B then examines the Court’s decision in *Graham v. Connor*,¹³ which established the current test for excessive force, with a focus on the Court’s underlying desire to create a framework that could be sensitive to the complex nature of use of force situations without inviting too much judicial second guessing of police decisionmaking. Finally, section I.C describes how *Graham* has not provided needed guidance for analyzing whether a police officer’s use of force was excessive and notes how courts have responded to the lack of clarity by creating their own principles for analysis.

A. *Excessive Force Analysis Before Graham*

Before the Supreme Court’s decision in *Graham*, there was no consensus among courts on how to analyze a § 1983 claim that a police officer used excessive force. Underlying this lack of consensus was disagreement on whether the constitutional source of protection against police use of excessive force was rooted in the Fourteenth Amendment’s protection of

10. See *supra* note 7 and accompanying text (highlighting excessive force literature that calls for particular considerations to be examined during excessive force analysis).

11. See *Graham v. Connor*, 490 U.S. 386, 388 (1989) (“This case requires us to decide what constitutional standard governs a free citizen’s claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other ‘seizure’ We hold that such claims are properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard”).

12. When this Note refers to excessive force, it does so in the context of excessive force used by police officers against nondetained “free” persons. The issue of excessive force also arises in other contexts, such as excessive force against people held in pretrial detention or people who are incarcerated, and is evaluated differently depending on the context. See, e.g., *Kingsley v. Hendrickson*, 576 U.S. 389, 391 (2015) (holding that courts must evaluate a pretrial detainee’s claim that jail officials used excessive force under an objective reasonableness standard grounded in the Fourth Amendment); *Hudson v. McMillian*, 503 U.S. 1, 4 (1992) (holding that courts must evaluate an incarcerated person’s claim that prison officials used excessive physical force under the Eighth Amendment’s prohibition of cruel and unusual punishment).

13. 490 U.S. 386.

substantive due process¹⁴ or the Fourth Amendment's protection against unreasonable search and seizure.¹⁵

1. *Johnson v. Glick: Substantive Due Process and "Conduct That Shocks the Conscience"*. — Before the Court's decisions in *Graham* and *Tennessee v. Garner*,¹⁶ the prevailing analysis used by a vast majority of federal courts in § 1983 claims of excessive force was based on the Fourteenth Amendment's protection of substantive due process.¹⁷ In *Johnson v. Glick*, a pretrial detainee filed a § 1983 claim alleging that a corrections officer had assaulted him without justification.¹⁸ The Second Circuit noted that the Supreme Court had previously used the Due Process Clause to invalidate a criminal conviction in which the conduct of the police officer toward the defendant "shock[ed] the conscience."¹⁹ Similarly, if the guard's use of force shocked the conscience, there could be grounds for invoking the Due Process Clause.²⁰ Accordingly, the Second Circuit ruled that an "application of undue force by law enforcement officers deprives a suspect of liberty without due process of law";²¹ it outlined four factors for courts to examine to determine if the force applied was unconstitutional: (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.²²

Underlying the Second Circuit's reasoning in *Glick* was the recognition that use of force situations are complex and cannot be analyzed without surveying a broad range of considerations.²³ The four given factors were open-ended and designed to help answer the difficult question of

14. U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .").

15. U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

16. 471 U.S. 1 (1985).

17. *Graham*, 490 U.S. at 393–94 ("In the years following *Johnson v. Glick*, the vast majority of lower federal courts have applied its four-part 'substantive due process' test indiscriminately to all excessive force claims . . .").

18. 481 F.2d 1028, 1029–30 (2d Cir. 1973), overruled by *Graham*, 490 U.S. 386.

19. *Rochin v. California*, 342 U.S. 165, 172 (1952). In *Rochin*, the Court ruled that the defendant's right to due process was violated when a police officer forcibly pumped the defendant's stomach to obtain evidence that defendant swallowed narcotics in an attempt to avoid drug possession charges. *Id.* at 166, 174.

20. See *Glick*, 481 F.2d at 1032–33 ("The same principle should extend to acts of brutality by correctional officers . . .").

21. *Id.* at 1032.

22. *Id.* at 1033.

23. See *id.* (noting that the court cannot mechanically apply the *Rochin* standard of "conduct that shocks the conscience").

whether the force used was unconstitutional. All but one other circuit adopted the *Glick* test, which validated the Second Circuit's reasoning.²⁴

2. *Tennessee v. Garner and the Pivot to the Fourth Amendment.* — The Supreme Court's decision in *Garner* began a shift in excessive force jurisprudence. In *Garner*, a police officer shot and killed an unarmed teenager allegedly fleeing the scene of a burglary.²⁵ The teenager's father brought a § 1983 claim alleging violations of the teenager's constitutional rights, while the police officer argued that he was protected by a Tennessee statute which permitted police to "use all the necessary means to effect the arrest" of fleeing or resisting felony suspects.²⁶ In response, the Court held that the statute was unconstitutional, ruling that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment" and that the statute's allowance of deadly force to apprehend all felony suspects, regardless of the circumstances, was unreasonable.²⁷

By grounding constitutional protection against the use of deadly force to apprehend a nonviolent fleeing suspect in the Fourth Amendment, the Court raised the question of whether a Fourth Amendment reasonableness inquiry applied to all excessive force claims. This created a circuit split, with some circuits still applying a Fourteenth Amendment substantive due process analysis to claims of excessive force,²⁸ as in *Glick*, while other circuits interpreted *Garner* as instructing courts to use a Fourth Amendment reasonableness analysis in all claims of excessive force.²⁹

B. *Explicitly Adopting the Fourth Amendment: Graham v. Connor*

The Supreme Court settled the circuit split in *Graham v. Connor* and sided with the circuits using a Fourth Amendment reasonableness test.³⁰ Dethorne Graham brought a § 1983 action alleging that police officers used excessive physical force during an investigatory stop and violated his

24. See *Graham v. Connor*, 490 U.S. 386, 393 (1989) (citing R. Wilson Freyermuth, Rethinking Excessive Force, 1987 Duke L.J. 692, 694–96 nn.16–23 (collecting cases)); Jill I. Brown, Comment, Defining "Reasonable" Police Conduct: *Graham v. Connor* and Excessive Force During Arrest, 38 UCLA L. Rev. 1257, 1262 n.32 (1991) (listing cases in which other circuits adopted the *Glick* analysis).

25. *Tennessee v. Garner*, 471 U.S. 1, 3–4 (1985).

26. *Id.* at 4–5 (internal quotation marks omitted) (quoting Tenn. Code Ann. § 40-7-108 (1982)).

27. *Id.* at 7, 11.

28. See, e.g., *Dale v. Janklow*, 828 F.2d 481, 484 (8th Cir. 1987) (applying the *Glick* substantive due process analysis to an excessive force claim); *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1446 (9th Cir. 1986) (same).

29. See, e.g., *Heath v. Henning*, 854 F.2d 6, 8 (2d Cir. 1988) (holding that Fourth Amendment analysis applies "to all excessive force claims brought under section 1983"); *Lester v. City of Chicago*, 830 F.2d 706, 713 (7th Cir. 1987) (holding that "Fourth Amendment standards govern all excessive force in arrest claims").

30. 490 U.S. 386, 395 (1989).

Fourteenth Amendment rights.³¹ The Supreme Court explicitly ruled, however, that “*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach.”³² This settled the circuit split on how to analyze claims of excessive force and set the stage for current excessive force jurisprudence: Although the Court issued a new method for analysis and outlined its reasoning behind it, the *Graham* decision still left lower courts confused.³³

To reach its decision in *Graham*, the Supreme Court noted that § 1983 did not create substantive rights and only created a means for individuals to vindicate existing rights.³⁴ Accordingly, the Court found that the Fourth Amendment’s protection against unreasonable search and seizure was the best explicit textual source of a free individual’s right against “physically intrusive governmental conduct.”³⁵ In particular, the Court held that the use of force during an arrest or investigatory stop constituted a Fourth Amendment “seizure.”³⁶ Thus, whether a use of force was excessive and violated an individual’s Fourth Amendment rights depended on whether the use of force was reasonable.³⁷ The Court then held that courts must balance the “‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake” to determine whether a use of force was reasonable.³⁸

Additionally, the Supreme Court announced several principles to guide lower courts in conducting the balancing test. Most importantly, courts were to evaluate the reasonableness of a particular use of force “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”³⁹ By announcing this, the Court explicitly rejected *Glick*’s subjective inquiry into the intentions of the police

31. *Id.* at 390.

32. *Id.* at 395.

33. See *infra* section I.C.

34. *Graham*, 490 U.S. at 393–94 (citing *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)).

35. *Id.* at 395. The Court reasoned that *Glick*’s substantive due process analysis was not sufficiently grounded in a specific constitutional standard and effectively created a “generic right” to be free from excessive force. *Id.* at 393–94.

36. *Id.* at 395. Protection against excessive force outside the context of an arrest or investigatory stop stems from other parts of the Constitution. See *Whitley v. Albers*, 475 U.S. 312, 318–26 (1986) (holding that an imprisoned person’s right to be free of excessive force from corrections officials comes from the Eighth Amendment’s protection against cruel and unusual punishment).

37. *Graham*, 490 U.S. at 396.

38. *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

39. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968)).

officer who used the force.⁴⁰ Instead, the Court emphasized that the reasonableness inquiry is purely objective and based on how a hypothetical reasonable police officer would respond to the facts and circumstances at the moment the officer used force.⁴¹ If the hypothetical police officer would have believed that using force was necessary, a court would deem the force reasonable.⁴² Despite *Graham*'s emphasis on the reasonable police officer, the Court gave little guidance on what exactly the reasonable police officer entailed.⁴³

Underlying the Court's decision to adopt the perspective of the reasonable police officer was a desire to limit judicial second-guessing of police officers.⁴⁴ Wary of setting a bright-line rule on when and how much force could be used, the Court noted that the balancing test "allow[ed] 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."⁴⁵ This deference to police officers' judgment was not novel, as *Glick* also noted that force could easily be seen as reasonable at the time but excessive in retrospect.⁴⁶ The *Graham* and *Glick* decisions both acknowledged the complexity of decisions to use force and held that it is not the role of courts to seriously question such decisions by police officers.⁴⁷

The other principles that the Supreme Court stated in *Graham* also acknowledge the difficulty of evaluating whether a use of force was excessive. Before listing broad factors that courts should consider, the Court was careful to note that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."⁴⁸

40. See *id.* at 397–99 (holding that the trial court's use of the *Glick* analysis, and its subjective considerations, was reversible error); see also *supra* note 22 and accompanying text.

41. See *Graham*, 490 U.S. at 396–97.

42. See *Ryburn v. Huff*, 565 U.S. 469, 477 (2012) (holding that a reasonable police officer could have come to the conclusion that "there was an objectively reasonable basis for fearing that violence was imminent" in declining to find that the force used by the police was excessive).

43. See *infra* section II.A.

44. On multiple occasions and in many contexts, courts have dismissed judicial second-guessing of police actions as unrealistic. See, e.g., *United States v. Sokolow*, 490 U.S. 1, 11 (1989) (holding that preventing courts from "indulg[ing] in unrealistic second guessing" of police justified limits on scrutiny of Fourth Amendment searches).

45. *Graham*, 490 U.S. at 396–97.

46. See *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.").

47. See *Graham*, 490 U.S. at 396–97; *Glick*, 481 F.2d at 1033; cf. *Ryburn*, 565 U.S. at 477 (citing *Graham* and noting that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation").

48. *Graham*, 490 U.S. at 396 (internal quotation marks omitted) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

The Court stated that “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight” were considerations.⁴⁹ While the Court held that Fourth Amendment excessive force analysis should be an objective inquiry into the facts, it qualified its holding by pointing out that it could not state a precise framework for this objective inquiry.⁵⁰ The Court’s recognition of the complexity facing courts in use of force analysis, and its attempt to provide guidance without being limiting, have created much confusion and many new problems. These problems include the relevant timeframe of police officer actions that courts should consider under the totality of the circumstances⁵¹ and whether police department training and policies are relevant to the excessive force inquiry.⁵²

C. *The Factbound Morass Created by Graham*

Although *Graham* settled that excessive force claims should be analyzed under a Fourth Amendment reasonableness standard and provided some guiding principles for courts to follow, much confusion remained. Fittingly, Justice Antonin Scalia, writing for the Court in *Scott v. Harris*, noted that the Fourth Amendment balancing test articulated in *Graham* was a “factbound morass of ‘reasonableness.’”⁵³ This section examines how courts, including the Supreme Court, have applied the *Graham* objective reasonableness test, with a focus on how the lack of clear guidance has created the opportunity for circuits to apply their own approaches.

1. *Post-Graham Supreme Court Decisions.* — There have been few Supreme Court decisions directly applying *Graham* and clarifying its objective reasonableness test. The Court’s decision in *Scott v. Harris* provides an illustration of the basic balancing test at the center of the *Graham* test. In *Scott*, a police officer used a Precision Intervention Technique (PIT) maneuver during a high-speed chase to ram the car of respondent Victor Harris, causing Harris to lose control and crash—and rendering Harris a quadriplegic.⁵⁴ Harris filed a § 1983 suit alleging that the police officer violated his Fourth Amendment rights because the PIT maneuver constituted excessive force.⁵⁵ In balancing the “nature and quality of the intrusion on the individual’s Fourth Amendment interests against the

49. *Id.*

50. See *id.* at 393 (“We reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard.”).

51. See *infra* note 69.

52. See *infra* sections II.A.1–2 (discussing the role of police department training and policies in the excessive force inquiry).

53. 550 U.S. 372, 383 (2007).

54. See *id.* at 372, 374–75 (providing factual background on the suit).

55. *Id.* at 375–76.

importance of the governmental interests alleged to justify the intrusion,⁵⁶ the Court weighed the government's interest in promoting public safety against the risk of bodily harm posed by the PIT maneuver.⁵⁷ The Court quickly concluded that the police officer's actions did not constitute excessive force because, although there was a high risk of injury to Harris, there was a substantial and immediate risk of harm to others, making the officer's decision to use the PIT maneuver objectively reasonable.⁵⁸

More illuminating, however, was the Court's rejection of Harris's arguments. First, the Court rejected Harris's contention that *Garner* imposed additional conditions on the use of *deadly* force—as opposed to other types of force—and held that “*Garner* was simply an application of the Fourth Amendment's ‘reasonableness’ test.”⁵⁹ Besides reaffirming that all excessive force claims are to be evaluated under a single standard, the Court also signaled a general unwillingness to further clarify that standard.⁶⁰ The Court explained its balancing in a few sentences without substantially engaging with the facts and did not articulate any concrete principles for lower courts to follow.⁶¹ Secondly, the Court signaled its continued deference to police by rejecting Harris's argument that the force was unreasonable because the police could have ended the pursuit and apprehended Harris at another time.⁶² Reasoning that there was still much uncertainty about what Harris would have done if the police had stopped chasing him, the Court declined to engage with that uncertainty and issued a police-friendly rule: “A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders

56. *Id.* at 383 (internal quotation marks omitted) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

57. *Id.* at 383–84.

58. *Id.* at 384. But see *id.* at 389–91 (Stevens, J., dissenting) (arguing that the majority incorrectly assumed that Harris posed a substantial and immediate risk to others when, in truth, the chase occurred on a “lightly traveled road” and the other motorists who passed by Harris had pulled to the side because of the police lights and sirens).

59. *Id.* at 382 (majority opinion).

60. Others have widely criticized the “factbound morass” of excessive force analysis that Justice Scalia referred to. See, e.g., Rachel A. Harmon, *When Is Police Violence Justified?*, 102 *Nw. L. Rev.* 1119, 1130–33 (2008) (arguing that the *Graham* formulation of excessive force analysis was “brief and inadequate” and that little has been done since to clarify it); Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 *U. Ill. L. Rev.* 629, 645–48 (noting problems created by *Graham's* embrace of an unclear “reasonableness”).

61. See *Scott*, 550 U.S. at 384 (“We have little difficulty in concluding it was reasonable for [the police officer] to take the action that he did.”); see also Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 *Va. L. Rev.* 211, 216 (2017) (arguing that *Garner* was a “high-water mark” of excessive force analysis because of its detailed examination of underlying facts, such as police training and tactics, in order to determine that the force used was unreasonable).

62. *Scott*, 550 U.S. at 385–86.

does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”⁶³

Similarly, in other post-*Graham* decisions on the issue of excessive force, the Supreme Court has not significantly clarified or refined excessive force analysis. In *Plumhoff v. Rickard*, the Court affirmed its reasoning in *Scott* and ruled that the police firing fifteen shots in a ten-second span at the decedent’s vehicle during a high-speed chase did not constitute excessive force.⁶⁴ The Court also held that officers may continue to use deadly force until the threat to public safety is over and rejected the argument of Whitne Rickard, the deceased’s daughter, that the number of shots fired was unreasonable.⁶⁵

In other excessive force cases, the Court declined to explicitly rule on the reasonableness analysis and instead addressed tangential issues on qualified immunity.⁶⁶ For example, in *Mullenix v. Luna*, the Supreme Court did not address whether there was a Fourth Amendment violation when a police officer killed Israel Leija, Jr., the driver of a car involved in a high-speed chase, while attempting to shoot out the engine block in order to disable the car, even though the police officer was not trained to do so.⁶⁷ Instead, the Court confined its analysis to whether the police officer violated a “clearly established right” such that they would not be protected by qualified immunity and held that the appellate court erred by defining the right against unreasonable seizure at too high of a level of generality.⁶⁸

63. *Id.* at 386. But cf. *id.* at 393–95 (Stevens, J., dissenting) (arguing that the uncertainty should have been resolved by a jury given that, among other facts supporting Harris’s argument, the police had Harris’s license plate number and could have apprehended Harris at a later time). The Court’s reasoning in declining to accept Harris’s argument— “[W]e are loath to lay down a rule requiring the police to allow fleeing suspects to get away”— could be seen as continued acknowledgement of the complexity of use of force scenarios and the fact that categorical rules cannot effectively address use of force questions. *Id.* at 385 (majority opinion). The Court articulated a rule, however, that actually contradicts this notion given its broad applicability.

64. 572 U.S. 765, 777 (2014).

65. *Id.*

66. Qualified immunity waives liability for individual government actors if their actions did not “violate a clearly established right of which a reasonable person would have known” and if the actor’s actions were objectively reasonable. Diana Hassel, *Excessive Reasonableness*, 43 *Ind. L. Rev.* 117, 117–18 (2009); see also *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (finding that the defendant-police officers were entitled to qualified immunity—making it unnecessary to determine whether they violated Amy Hughes’s Fourth Amendment protection against excessive force); *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (ruling only on whether a police officer’s shooting of an armed suspect without warning violated “clearly established law” for the purpose of granting qualified immunity); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (“We express no view as to the correctness of the Court of Appeals’ decision on the [Fourth Amendment violation] question itself. We believe that, however that question is decided, the Court of Appeals was wrong on the issue of qualified immunity.”).

67. 577 U.S. 7, 9–10 (2015).

68. *Id.* at 11–12, 14–15. The appellate court defined the relevant right as, “[A] police officer may not ‘use deadly force against a fleeing felon who does not pose a sufficient threat

As a result of this lack of clarification, lower courts have had to create their own doctrines on how to analyze excessive force claims.

2. *The Current Fragmented State of Excessive Force Analysis.* — In the absence of clear guidance on how to carry out the Fourth Amendment balancing test against claims of excessive force, circuits have seized upon different bits and pieces from relevant Supreme Court cases. Unsurprisingly, this has resulted in the fragmented application of excessive force analysis.⁶⁹ Despite this apt opportunity to clarify the messy excessive force analysis framework, the Court has declined to provide much clarification.⁷⁰

The lack of clarity on how to carry out *Graham's* excessive force analysis has understandably created confusion among lower courts. Although *Graham* created an exclusive framework for analyzing claims of excessive force,⁷¹ the framework is open-ended and has left lower courts to their own devices to figure out what exactly is relevant to determining whether force used is reasonable. The complex nature of use of force situations further compounds this problem.⁷² Many factors are arguably relevant to determining what police actions constitute reasonable and unreasonable force.

of harm to the officer or others.” *Id.* at 12 (quoting *Luna v. Mullenix*, 773 F.3d 712, 725 (5th Cir. 2014)). The Supreme Court’s decision to focus on the qualified immunity analysis, and not on the underlying Fourth Amendment violation, may create an unnecessary additional barrier to holding police accountable for using excessive force. See Hassel, *supra* note 66, at 118 (arguing that the qualified immunity doctrine, as applied in Fourth Amendment excessive force cases, results in overprotection of defendants from liability because both qualified immunity and the *Graham* test absolve the defendant if the force used was “objectively reasonable”).

69. For example, the Third Circuit has issued a list of other factors for courts to consider when conducting excessive force analysis:

[T]he possibility that the persons subject to the police action are themselves violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time.

Sharrar v. Felsing, 128 F.3d 810, 822 (3d Cir. 1997), abrogated on other grounds by *Curley v. Klem*, 499 F.3d 199 (3d Cir. 2007). Another example is the circuit split on whether courts should examine “preseizure conduct” under the excessive force analysis. See Lee, *supra* note 60, at 671–72 (describing preseizure conduct and the associated circuit split); Cara McClellan, *Dismantling the Trap: Untangling the Chain of Events in Excessive Force Claims*, 8 Colum. J. Race & L. 1, 8–9 (2017) (same); Aaron Kimber, Note, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer’s Pre-Seizure Conduct in an Excessive Force Claim*, 13 Wm. & Mary Bill Rts. J. 651, 652 (2004) (same); see also Christopher Logel, Comment, *Cracking Graham: Police Department Policy and Excessive Force*, 20 Berkeley J. Afr.-Am. L. & Pol’y 27, 33–36 (2018) (surveying a circuit split on whether police department policy on use of force, and the police officer’s compliance with it, is relevant to the excessive force inquiry).

70. See, e.g., *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1547 n.2 (2017) (declining to grant certiorari on the question of whether the “totality of the circumstances” encompasses unreasonable police conduct prior to the use of force, reasoning that the appellate court did not address the question).

71. See *supra* notes 32–38 and accompanying text.

72. See *supra* notes 23–24, 48–50 and accompanying text.

Furthermore, case-by-case determinations of what is relevant may only add to the existing fragmentation.⁷³ These issues point to a need for more concrete guiding principles to determine what facts are relevant to conducting an excessive force analysis. The localized conception of the reasonable police officer seeks to offer a principle—that the reasonable police officer assumes objective attributes particular to the jurisdiction—to guide courts in considering what is relevant.

II. THE PROBLEMATIC AND MYSTERIOUS REASONABLE POLICE OFFICER

This Part argues that the *Graham* analysis for excessive force creates additional problems beyond its general lack of clarity when it asks courts to assume the viewpoint of a hypothetical reasonable police officer in evaluating the reasonableness of force. Section II.A demonstrates that the lack of guidance on what exactly constitutes the reasonable police officer only adds to the confusion on what courts should consider in excessive force analysis. Section II.B then shows that there is a problematic lack of consensus on how a reasonable police officer should act, as demonstrated by variations in policing standards across jurisdictions. Finally, section II.C argues that the reasonable police officer standard accommodates negative aspects of how police officers perceive and interact with the world around them.

A. *Who Is the Reasonable Police Officer?*

The Supreme Court's failure to explicate the characteristics of the reasonable police officer has added to the general confusion on how to analyze an excessive force claim. Under *Graham*, courts are to examine excessive force claims from "the perspective of a reasonable officer on the scene."⁷⁴ Thus, the reasonable police officer serves as the critical analytical tool for courts to use to guide their inquiry.⁷⁵ Logically, there remains an open question for the courts: What exactly is the perspective of the reasonable police officer? Knowing the answer would provide invaluable guidance to courts conducting excessive force analysis because they would know what evidence to consider, and it would provide insight in how to conduct an unclear test. Unfortunately, the Court has not directly

73. See Harmon, *supra* note 60, at 1123 ("While the intuition of federal judges usually leads to results that seem reasonable and are consistent with the Court's doctrine, the reasoning in these cases is ad hoc, often inconsistent, and sometimes ill-considered.")

74. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968)); see also *supra* notes 39–42 and accompanying text (explaining the Supreme Court's reasoning in adopting the perspective of the reasonable police officer).

75. See McClellan, *supra* note 69, at 17–18 (arguing that courts that exclude the police officer's pre-seizure conduct in excessive force analysis are effectively treating "the reasonable officer as if he or she has no memory that informs his or her perspective"); see also Alpert & Smith, *supra* note 7, at 485–86 (noting that fact-finders typically rely on expert witness testimony on relevant police department policies and training to determine how a reasonable police officer would have acted).

addressed this question or issued any explicit guidance.⁷⁶ This section examines two relevant considerations that could shape the reasonable police officer analysis and shows how lower courts have handled those considerations in varied ways across jurisdictions. By highlighting this uncertainty, this section seeks to demonstrate that there is a need for a cohesive framework on what the reasonable police officer analysis entails.

1. *Does the Reasonable Police Officer Follow Department Policies?* — One potentially relevant consideration in a court’s construction of the reasonable police officer is the role of applicable police department policies on use of force and whether the reasonable police officer would adhere to those policies. Currently, the circuits are split on whether to consider applicable police department policies as evidence during an excessive force inquiry.⁷⁷ Circuits that accept police department policies as relevant to the excessive force inquiry generally reason that these policies have probative value in helping the fact-finder understand how the reasonable police officer would have acted under the circumstances.⁷⁸ For example, in *Drummond ex rel. Drummond v. City of Anaheim*, at issue was whether two Anaheim Police Department officers used excessive force when they placed their body weight on the neck and torso of Brian Drummond, who was handcuffed and nonresisting, resulting in him entering into a permanent vegetative state.⁷⁹ The Ninth Circuit held that any reasonable police

76. The Supreme Court has used the term “reasonable police officer” in at least seventeen cases but has never stated what characteristics define the reasonable police officer. See, e.g., *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018); *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018); *Heien v. North Carolina*, 574 U.S. 54, 72 (2014) (Sotomayor, J., dissenting); *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014).

77. The First Circuit, for example, has held that police department protocols and procedures are relevant to Fourth Amendment excessive force analysis. See *Stamps v. Town of Framingham*, 813 F.3d 27, 32 n.4 (1st Cir. 2016) (“Such standards do not, of course, establish the constitutional standard but may be relevant to the Fourth Amendment analysis. We have approved the taking of evidence about police training and procedures into consideration.”). Conversely, the Seventh Circuit has ruled that “the violation of police regulations . . . is completely immaterial as to the question of whether a violation of the federal constitution has been established.” *Thompson v. City of Chicago*, 472 F.3d 444, 454 (7th Cir. 2006).

78. See, e.g., *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003) (“[W]e may certainly consider a police department’s own guidelines when evaluating whether a particular use of force is constitutionally unreasonable.”); *Gutierrez v. City of San Antonio*, 139 F.3d 441, 449 (5th Cir. 1998) (“[I]t may be difficult to conclude that the officers acted reasonably if they performed an action that had been banned by their department or of whose dangers in these circumstances they had been warned.”).

79. *Drummond*, 343 F.3d at 1054–55. The facts in *Drummond* are shockingly similar to what happened in the police killing of George Floyd in May 2020. See Tim Arango, *Derek Chauvin Is Sentenced to 22 and a Half Years for Murder of George Floyd*, N.Y. Times (June 25, 2021), <https://www.nytimes.com/2021/06/25/us/derek-chauvin-22-and-a-half-years-george-floyd.html> (on file with the *Columbia Law Review*) (noting George Floyd was murdered by a police officer who pressed his knee into Floyd’s neck); Frances Robles & Audra D. S. Burch, *How Did George Floyd Die? Here’s What We Know*, N.Y. Times (June 2, 2020), <https://www.nytimes.com/article/george-floyd-autopsy-michael-baden.html> (on file with

officer, or even any ordinary person, should have known that the police officers' actions were unreasonable, especially given that the Anaheim Police Department had issued a bulletin warning of the asphyxiation dangers associated with kneeling on individuals to restrain them.⁸⁰ Underlying this reasoning is the presumption that a reasonable police officer is aware of and complies with the applicable police department use of force policies. As a result, circuits that permit consideration of police department policies and guidelines have formulated—at least partially—their own conception of what the reasonable police officer analysis entails.

Conversely, circuits holding that police department policies are not relevant to the excessive force inquiry have effectively reasoned that the reasonable police officer ignores applicable departmental policies and guidelines. It should be noted, however, that the circuits rejecting the relevance of police department policies do not ground their decisions in conceptions of the “reasonable police officer” and instead rely on evidence law.⁸¹ For example, in *Thompson v. City of Chicago*, the Seventh Circuit held that the Chicago Police Department's General Orders on the Use of Force were properly excluded from trial under the Federal Rules of Evidence.⁸² The Seventh Circuit cited *Whren v. United States*⁸³ for the proposition that police department policies and practices are irrelevant because they vary from department to department and are thus unreliable in determining police conduct reasonableness,⁸⁴ and held that the Chicago Police Department's General Orders were similarly irrelevant under Federal Rule of Evidence 401.⁸⁵ Nonetheless, declining to consider evidence of applicable police department policies is effectively stating that they have no bearing on how the hypothetical reasonable police officer operates. Instead, courts that hold police department policies to be irrelevant opt to keep the reasonable police officer as abstract as possible.⁸⁶

the *Columbia Law Review*) (reporting that George Floyd was handcuffed and prone on a sidewalk as the police officer pressed his knee into Floyd's neck).

80. *Drummond*, 343 F.3d at 1059.

81. See, e.g., *English v. District of Columbia*, 651 F.3d 1, 10 (D.C. Cir. 2011) (holding that a police department's internal investigation report, which noted an alleged police department policy violation, was properly excluded as evidence because it had no probative value for the excessive force analysis and risked misleading the jury that a policy violation was akin to a constitutional violation).

82. *Thompson*, 472 F.3d at 453. In *Thompson*, the claim was that a Chicago Police Department officer's use of a chokehold to subdue John Thompson constituted excessive force when Thompson died of asphyxia, and the police officer had violated Chicago Police Department policies by applying the chokehold. See *id.* at 446.

83. 517 U.S. 806 (1996).

84. *Thompson*, 472 F.3d at 455 (citing *Whren*, 517 U.S. at 815).

85. *Id.* Federal Rule of Evidence 401 states, “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401.

86. Perhaps having an abstract conception of the reasonable police officer is better for courts conducting an excessive force inquiry. See Logel, *supra* note 69, at 37–38 (arguing

Solving this circuit split would certainly add to *Graham's* excessive force analysis. Holding police department policies and guidelines to be relevant gives the reasonable police officer at the center of *Graham's* balancing test some inconsistent characteristics.⁸⁷ Asking how the reasonable police officer would think and act in a situation, however, necessarily invites a degree of inconsistency because the facts and circumstances of each use of force situation are never the same.⁸⁸ Under *Graham*, there must be *some* facts or externally verifiable phenomena that give substance to the hypothetical reasonable police officer and how they would have acted under the circumstances.⁸⁹ The localized conception of the reasonable police officer is mindful of this and allows for incorporation of some facts that may vary from jurisdiction to jurisdiction. Whether or not a specific piece of evidence is allowed to serve as that substance is subject to a broad range of considerations,⁹⁰ but there must be some police-specific information to ground the analysis. Otherwise, the reasonable police officer just becomes an ordinary person, which is contrary to what the Supreme Court announced in *Graham*.⁹¹

2. *Is the Reasonable Police Officer Well Trained?*— Another consideration that could factor into the hypothetical reasonable police officer analysis is training. Although training may be viewed in a similar light to police department policies as both have some bearing on how the police officer acts, it differs conceptually because training plays a more foundational role in determining police actions.⁹² At a broad level, training indoctrinates police officers and fundamentally sets how they interact with the world

that courts should not consider police department policies because they create categorical rules for use of force when the *Graham* inquiry is supposed to be circumstance-specific).

87. Of course, *Graham* explicitly instructed courts that the Fourth Amendment reasonableness test must be objective, without any inquiry into the subjective motivations of the police officer who acted, and reliant on the facts and circumstances of each case. *Graham v. Connor*, 490 U.S. 386, 397 (1989).

88. See Subjective, *Black's Law Dictionary* (11th ed. 2019) (defining subjective as “[b]ased on an individual’s perceptions, feelings, or intentions, as opposed to externally verifiable phenomena”).

89. The circuits that have accepted police department policy to be relevant are careful to qualify their acceptance by noting that the policies are probative of how the reasonable police officer would act but not dispositive in determining whether or not force was excessive. See, e.g., *Stamps v. Town of Framingham*, 813 F.3d 27, 32 n.4 (1st Cir. 2016) (“Such standards do not, of course, establish the constitutional standard . . .”); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1052 (9th Cir. 2003) (holding that a training bulletin could be considered in an excessive force claim even though it was not dispositive on the issue of whether the force was unreasonable).

90. See *supra* notes 81–84 and accompanying text (noting how courts have used evidentiary considerations to exclude police department policies from being admitted at trial).

91. See *Graham*, 490 U.S. at 396–97.

92. See *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (noting that police officers “draw on their own experience and specialized training” to evaluate information and determine how to proceed).

around them.⁹³ Unlike policies or guidelines, which may generally instruct police officers,⁹⁴ training more directly dictates exact actions taken by the police. For example, if a police officer is trained in specific police tactics prioritizing deescalation, such as deflecting verbal aggression, giving clear verbal warnings, or creating physical distance between them and a subject, it is less likely they will use physical force.⁹⁵

The case law on the relevance of police training is muddled in a similar manner to the case law on the relevance of police department policies. In *Mullenix*, the Supreme Court did not give weight to the fact that the police officer, who inadvertently shot and killed a suspect involved in a high-speed chase, was not trained to disable a moving vehicle by shooting the engine.⁹⁶ This does not, however, preclude consideration of training in excessive force analysis. At issue in *Mullenix*, for the purpose of establishing qualified immunity for the police officer, was whether the police officer violated a clearly established right.⁹⁷ Consequently, the Court framed its inquiry as whether it was reasonable to use deadly force against a potentially armed and intoxicated suspect during a high-speed chase and not whether it was reasonable, given a lack of training, to pick one method to terminate the chase over another.⁹⁸ Additional support for *Mullenix* not shutting the door on the consideration of training can be seen in how several district courts have framed the excessive force inquiry as whether a “reasonably well-trained officer” would have known the force was reasonable.⁹⁹

93. See Seth Stoughton, Law Enforcement’s “Warrior” Problem, 128 Harv. L. Rev. Forum 225, 226–30 (2015) [hereinafter Stoughton, Warrior Problem] (arguing that law enforcement training instills a mindset of survival at all costs in the face of unrelenting hostility from the public for new police officers, which permeates all aspects of how police interact with the public).

94. See N.Y.C. Police Dept., Patrol Guide, Procedure No. 221-02: Use of Force 2 (2016), https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg221-02-use-of-force.pdf [<https://perma.cc/5ZH6-W9RP>] (instructing police officers to “[a]pply no more than the reasonable force necessary to gain control”).

95. See Garrett & Stoughton, *supra* note 61, at 263–66 (describing how effective application of police tactics can reduce the need to use force).

96. See *Mullenix v. Luna*, 577 U.S. 7, 8–11 (2015). But see *id.* at 20–21 (Sotomayor, J., dissenting) (emphasizing the fact that the police officer had not been trained in shooting to disable moving vehicles).

97. See *id.* at 11 (majority opinion) (“We address only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place . . .”).

98. See *id.* at 18.

99. See, e.g., *Colbert v. County of Kern*, No. 1:13-cv-01589-JLT, 2015 WL 8214204, at *3 (E.D. Cal. Dec. 8, 2015). Supreme Court decisions in other Fourth Amendment contexts provide further support for the potential relevance of police training in the excessive force inquiry. See, e.g., *Malley v. Briggs*, 475 U.S. 335, 345 (1986) (holding that the objective reasonableness inquiry regarding the constitutionality of a warrant application centered on whether a “reasonably well-trained officer” would have known their affidavit failed to establish probable cause); *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984) (asking “whether a reasonably well trained officer would have known that the search was illegal” in a claim regarding the constitutionality of a Fourth Amendment search).

The goal of this Note is not to examine competing arguments on whether courts can consider police training.¹⁰⁰ Yet, like evidence on applicable police department policies and guidelines, police training is part of what influences a police officer to take the actions that they do. Consequently, courts need to be clear about the characteristics of the reasonable police officer so that they can consider relevant evidence and exclude irrelevant evidence. For example, a police officer's actions that are contrary to training would be viewed very differently if the reasonable police officer is held to be a well-trained officer.

B. *There Is a Lack of Consensus on Reasonable Police Behavior*

Disagreement on what exactly constitutes reasonable police behavior further complicates excessive force analysis. The wide range of responses, or lack thereof, to recent calls for police reform demonstrates this.¹⁰¹ Underlying these differences is a complex range of considerations.¹⁰² This section notes how state and local governments have responded differently to the issue of excessive force to show that there is no consensus on what exactly constitutes a reasonable use of force, and it examines the consequences of this confusion.

State and local government responses to the problem of excessive force have been varied, demonstrating that there are many notions of reasonable police behavior. Policing reforms may be thought of as direct statements on what is acceptable police conduct or how a reasonable police officer should act. To demonstrate, categorically banning the use of chokeholds¹⁰³ effectively states that their use is always unreasonable force. Not all jurisdictions, however, have adopted the same reforms. States and localities have passed police reform legislation with varying contents.¹⁰⁴ These all reflect different ideas on what qualifies as acceptable police conduct and how the reasonable police officer would act. For example, the

100. See generally Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 Colum. Hum. Rts. L. Rev. 261, 266 (2003) (arguing that courts should examine police training and policies during inquiries on excessive force involving emotionally disturbed individuals); Garrett & Stoughton, *supra* note 61 (arguing that police tactics and training should be central to excessive force analysis).

101. See *supra* note 1 and accompanying text.

102. See, e.g., April J. Anderson, Joanna R. Lampe & Whitney K. Novak, Cong. Rsch. Serv., R46530, *Police Reform and the 116th Congress: Selected Legal Issues 26–36* (2020) (surveying legal issues and considerations raised by popular police reform proposals).

103. Banning the use of chokeholds, or other police tactics that restrict oxygen and blood flow to the brain, has been a common response to calls for police reform after a police officer killed George Floyd by holding his knee to Floyd's neck. See Kimberly Kindy, Kevin Schaul & Ted Mellnik, *Half of the Nation's Largest Police Departments Have Banned or Limited Neck Restraints Since June*, Wash. Post, <https://www.washingtonpost.com/graphics/2020/national/police-use-of-force-chokehold-carotid-ban/> (on file with the *Columbia Law Review*) (last updated Sept. 6, 2020); *infra* note 142 and accompanying text.

104. See *infra* notes 149–153 and accompanying text.

D.C. City Council recently passed police reform legislation that prohibited the use of tear gas, pepper spray, rubber bullets, and stun grenades in response to “First Amendment protests.”¹⁰⁵ In contrast, the City of Berkeley passed an ordinance that categorically banned any use of tear gas by its police department.¹⁰⁶ These local responses—a context-specific ban versus a categorical ban—show diverging views on when tear gas use is reasonable.

The vast number of police departments, each with different training policies and procedures, adds to this lack of uniformity on what constitutes reasonable police behavior.¹⁰⁷ These training policies are perhaps only partially unified by their occasional incorporation of generally accepted “best practices” and principles.¹⁰⁸ Thus, police officers across the country have varying fundamental notions of what constitutes acceptable conduct based on the training they receive. Variations in use of force policies mirror the differences in training in guiding police officers on what is excessive force.¹⁰⁹

All of this goes to show that, in many instances, there is not a single view on what exactly is reasonable use of force. Although some jurisdictions have passed varying police reform measures, many other jurisdictions have taken no action at all.¹¹⁰ Accordingly, police officers may have different ideas about what is reasonable force depending on the jurisdictions in which they are employed. What may be acceptable in one locality may very well be illegal in another.

105. Council Unanimously Passes Emergency Police and Justice Reform Measure, D.C. Council (June 10, 2020), <https://dccouncil.us/council-unanimously-passes-emergency-police-and-justice-reform-measure/> [<https://perma.cc/AUF4-8AKU>].

106. See Alexandra Kelley, Berkeley Votes to Ban Tear Gas and Other Northern California Cities May Follow, Hill: Changing Am. (June 10, 2020), <https://thehill.com/changing-america/well-being/prevention-cures/502088-berkeley-votes-to-ban-tear-gas-with-other-norcal> [<https://perma.cc/AA3L-DV7C>].

107. See Seth W. Stoughton, Jeffrey J. Noble & Geoffrey P. Alpert, Opinion, 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/> (on file with the *Columbia Law Review*) (noting the “hyperlocalized” nature of policing in the United States, which has more than 18,000 police agencies, and that many of those agencies create “their own policies and training from scratch, often without the benefit of research or broad experience, or simply purchas[e] them from private vendors”).

108. See *id.* (noting the existence of industry best practices and generally accepted principles).

109. See *id.* (noting policies that range from merely repeating or interpreting the Supreme Court’s constitutional standard with an added aspiration to “safeguard the sanctity of life” to policies that provide specific tactical guidance or an explicit directive to use the least amount of force safely possible).

110. See Will Schrepferman, Will Policy Follow Protests? How State Governments Are Responding to the Black Lives Matter Movement, GovPredict (Sept. 18, 2020), <https://www.govpredict.com/blog/will-policy-follow-protests-how-state-governments-are-responding-to-the-black-lives-matter-movement> [<https://perma.cc/T3G9-S72W>] (noting that, as of September 2020, only ten of the seventy-three use of force bills introduced to state legislatures since May 2020 have been signed into law).

C. *The Reasonable Police Officer Accommodates Biases Police May Have*

Uncertainty about the characteristics of the reasonable police officer not only creates confusion about what is relevant to the excessive force inquiry but also invites courts to gloss over systemic issues in policing. Presumably, the reasonable police officer stands in as a paradigm of how a police officer should act in a given situation.¹¹¹ This, of course, is qualified by the Supreme Court's emphasis that the benefit of clarity in hindsight should not lead to excessive judicial second-guessing of police actions.¹¹² Thus, the reasonable police officer is a construct for a range of acceptable police responses to the facts and circumstances of each use of force situation.¹¹³ But because this evaluation is from the perspective of a police officer, it necessarily incorporates how police officers process the facts and circumstances around them.¹¹⁴ This raises the question of whether the hypothetical reasonable police officer processes information and makes decisions in unacceptable ways.¹¹⁵ This section examines how police officers perceive and process information about the world around them and may have undue perceptions of threat or sensory misperceptions, especially in high-stress scenarios. This section then argues that an uncertain

111. See Alpert & Smith, *supra* note 7, at 486–95 (arguing that jurors in an excessive force case analyze the actions of the police officer under a “hybrid” concept of “subjective objectivity,” which encompasses notions of how citizens believe the police should act).

112. See *Graham v. Connor*, 490 U.S. 386, 396 (1989) (emphasizing that courts must judge the reasonableness of force without the “20/20 vision of hindsight” and that “[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,” violates the Fourth Amendment (quoting *Johnson v. Glick*, 481 F.2d 1027, 1033 (2d Cir. 1973))).

113. For example, the decision to use the PIT maneuver to terminate a high-speed car chase could be seen as an acceptable response by the police given the threat to the public and the risk of harm to the subject. For the Supreme Court’s decision on this fact pattern, see *Scott v. Harris*, 550 U.S. 372, 375 (2007). There could have been other acceptable responses, such as letting the suspect go, using tire spikes, etc., but as long as the police officer’s actual actions were in the range of acceptable responses, the use of force is not excessive.

114. If the evaluation did not incorporate how the police process information, it is hard to see why the *Graham* Court made the perspective of the reasonable police officer a key part of the excessive force analysis. See *supra* notes 40–45 and accompanying text. Otherwise, it seems like the perspective of an ordinary person would be sufficient. One possible counterargument is that the Court intended for the perspective of the reasonable police officer to serve solely as a reminder for lower courts to focus on the facts and circumstances known to the police at the moment force was used and not any facts that became apparent later. For example, knowing that a person only had a wallet in their pocket, and not a gun, could influence how the fact-finder viewed a police officer’s decision to shoot the person when they reached into their pocket.

115. The Court’s decision in *Graham* made it clear that the subjective mindset of the police officer who actually used the force has no place in the excessive force inquiry. See *supra* notes 38–44 and accompanying text. This does not preclude, however, an examination into how the reasonable police officer would have thought and reacted to the same facts and circumstances because how the reasonable police officer reacted is the central focus of the excessive force inquiry. See *supra* note 42 and accompanying text.

reasonable police officer standard may implicitly accommodate those negative aspects because it does not explicitly provide for how a reasonable police officer thinks.

1. *Undue Police Perception of Threat.* — The uncertain reasonable police officer standard risks indirectly legitimizing any undue police perceptions of threats and associated beliefs in the need to use force. Although research indicates that police officers have a generally positive perception of the public as a whole,¹¹⁶ there is solid evidence that police officers generally perceive a high level of threat from their interactions with the public, especially when interacting with minorities¹¹⁷ or in certain areas of their jurisdiction.¹¹⁸ A high baseline level of perceived threat is correlated with an increased perceived need to use force.¹¹⁹ This is confirmed by the significantly higher probability that the police will kill a Black person as compared to a white person in similar circumstances.¹²⁰ Thus, when adopting the viewpoint of the reasonable police officer, courts implicitly must determine whether to accept a perspective that may see a need to use force at an unwarranted rate because of racial biases.¹²¹

116. See Rich Morin, Kim Parker, Renee Stepler & Andrew Mercer, Pew Rsch. Ctr., *Behind the Badge: Amid Protests and Calls For Reform, How Police View Their Jobs, Key Issues and Recent Fatal Encounters Between Blacks and Police* 48 (2017), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2017/01/Police-Report_FINAL_web.pdf [<https://perma.cc/484C-GZSS>] (reporting the results of a survey of law enforcement officers, which indicated that 68% of officers surveyed either agree or strongly agree that “[m]ost people respect the police,” and only 28% of officers agree or strongly agree that “[o]fficers have reason to be distrustful of most citizens”).

117. A 2017 survey of police officers showed that 91% of police officers believed that they had positive relationships with white people in their communities, but only 56% shared the same feelings about Black people in their community. *Id.* at 52. For an in-depth discussion of the interaction between race and the assessed reasonableness of police shootings, see generally Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. Rev. 951 (2020).

118. Just as worrying are results showing that 56% of officers surveyed agreed with the statement that “[i]n certain areas of the city it is more useful for an officer to be aggressive than to be courteous.” Morin et al., *supra* note 116, at 54.

119. See Stephen T. Holmes, K. Michael Reynolds, Ronald M. Holmes & Samuel Faulkner, *Individual and Situational Determinants of Police Force: An Examination of Threat Presentation*, 23 Am. J. Crim. Just. 83, 83–85 (1998) (suggesting that “[t]he threat presented to officers is important and related to the level of force that is deemed appropriate by the police profession”). Professor Itiel E. Dror argues that “[t]he decision to use force is strongly based on the perception of risks” but is careful to qualify this assertion by also noting that a variety of other “decision factors” influence a police officer’s decision whether or not to use force. See Itiel E. Dror, *Perception of Risk and the Decision to Use Force*, 1 Policing 265, 266 (2007) (examining the factors that go into and the systems that underlie a police officer’s decision to use force).

120. See Fagan & Campbell, *supra* note 117, at 992 (conducting a statistical analysis to determine that there are 1.29 times as many killings of unarmed Black persons not in mental health crises compared to similarly situated white persons).

121. The hypothetical situation outlined of a person reaching into their pocket, see *supra* note 114, may provide an illustrative example. A police officer who perceives a high level of threat is more likely to see the person’s actions as posing a danger, which could warrant

Statistical evidence indicates that police work may predispose police officers to feel less positively about the communities in which they work. A recent survey of police officers indicated that 56% of police officers believed that their work made them more callous toward people.¹²² The same survey found that this callousness was associated with support for aggressive or physical tactics.¹²³ This is not to suggest that increased callousness amongst police officers directly indicates higher perceived level of threat. Instead, the suggestion is that the high level of stress borne by police officers primes them to feel more negatively about the public they work with, which in turn provides the grounds for a higher level of perceived threat.¹²⁴

The root of a high level of perceived threat by police officers may come from an indoctrinated “warrior mentality.”¹²⁵ Professor Seth Stoughton argues that police officers are taught from the first day of training that the world they work in is inherently hostile, dangerous, and unpredictable.¹²⁶ This in turn demands that police officers are constantly vigilant and on edge so that fears of not making it home are not realized.¹²⁷ Professor Stoughton then argues that police interaction with the public illustrates the consequences of the warrior mentality—with the police perceiving everyone as a potential threat to their survival.¹²⁸ It is not difficult to see how police may be primed to believe that threats are always around the corner and, consequently, may be more likely to assess a situation as requiring the use of force. While courts would not want to legitimize this “warrior” mindset, an awareness of it should inform courts in deciding how the reasonable police officer would act in a situation. Accepting an overly deferential conception of the reasonable police officer may inadvertently accommodate undue perception of threat.

using force. Accordingly, the evaluating court would have to determine how much threat the reasonable police officer perceives and how they act upon it.

122. Morin et al., *supra* note 116, at 56.

123. *Id.* at 57.

124. See John M. Violanti, Cecil M. Burchfiel, Diane B. Miller, Michael E. Andrew, Joan Dorn, Jean Wactawski-Wende, Christopher M. Beighley, Kathleen Pierino, Parveen Nedra Joseph, John E. Vena, Dan S. Sharp & Maurizio Trevisan, *The Buffalo Cardio-Metabolic Occupational Police Stress (BCOPS) Pilot Study: Methods and Participant Characteristics*, 16 *Annals Epidemiology* 148, 151–54 (2006) (showing that police officers had higher levels of chemicals stress indicators present in their bodies along with higher reported rates of depression and posttraumatic stress disorder when compared to the population as a whole); see also Modupe Akinola & Wendy Berry Mendes, *Stress-Induced Cortisol Facilitates Threat-Related Decision Making Among Police Officers*, 126 *Behav. Neurosci.* 167, 172–73 (2012) (evaluating how stress influences decisionmaking by police officers).

125. See Stoughton, *Warrior Problem*, *supra* note 93, at 225–26 (arguing that the police’s adoption of a “warrior mentality” impedes positive community relationships and effective policing).

126. *Id.* at 227.

127. *Id.* at 228.

128. *Id.* at 229.

2. *Police Sensory Perception Under Pressure.* — Uncertainty about the characteristics of the reasonable police officer also raises the issue of how the reasonable police officer would respond to the facts and circumstances of a use of force situation when high-pressure situations may cause inaccurate sensory perceptions. Put another way, does the hypothetical reasonable police officer perceive things with absolute clarity, or does the reasonable police officer standard accommodate any potential misperceptions? Professors David A. Klinger and Rod K. Brunson have posed an apt hypothetical that demonstrates the challenges a court would face in deciding how to handle sensory misperceptions.¹²⁹ In the hypothetical, a shooting police officer subjectively perceives that a toy gun held by a person is a real one but, because of sensory distortion, does not hear their partner telling them that it is a toy.¹³⁰ Objectively, the evidence does not support finding that the shooting was justified, but the shooting police officer's subjective perception does. In such a situation, it is unclear if, and how, courts should acknowledge and accommodate this reality.

A police officer misperceiving their surroundings in a high-stress situation is not just the stuff of hypotheticals. Professors Klinger and Brunson examined detailed accounts of eighty police officers involved in police shootings of citizens.¹³¹ They found that sensory and perceptual distortions amongst the police officers were common, and they concluded that officers most frequently experience “at least two types of perceptual distortions during shooting incidents [O]fficers’ perceptions (and distortions thereof) often change substantially over the course of shooting incidents.”¹³²

The case law is uninformative on how courts should proceed. In *Graham*, the Supreme Court acknowledged that the circumstances surrounding police use of force are “tense, uncertain, and rapidly evolving” in holding that the reasonableness balancing test should allow for the split-second nature of use of force decisions.¹³³ Combining this with the Court’s

129. For additional context, the hypothetical takes place in a dark alleyway at night, and a nearby person uses a cellphone to record a video of the events. David A. Klinger & Rod K. Brunson, *Police Officers’ Perceptual Distortions During Lethal Force Situations: Informing the Reasonableness Standard*, 8 *Criminology & Pub. Pol’y* 117, 134–35 (2009).

130. *Id.* at 134.

131. *Id.* at 124–25.

132. *Id.* at 134. In particular, Professors Klinger and Brunson found that 31% of police officers reported tunnel vision, 42% reported auditory blunting, and 55% reported time distortions prior to firing their guns. See *id.* at 127 tbl.1.

133. *Graham v. Connor*, 490 U.S. 386, 397 (1989). But see Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 *Fla. L. Rev.* 1773, 1803–06 (2016) (arguing that the Court’s misguided conception of use of force decisions as “split-second judgments” unduly accommodates police aggression and racial biases); Seth W. Stoughton, *Policing Facts*, 88 *Tul. L. Rev.* 847, 868–69 (2014) (arguing that “the Court’s description of ‘split-second judgments’ is simply wrong almost all the time”).

reluctance to second-guess police actions,¹³⁴ the *Graham* decision seems to invite an accommodation of police sensory misperception. Doing so would be in line with *Graham*'s general deference to police.¹³⁵ Yet, it is unclear how exactly a court would accommodate police sensory misperception. One possible idea is to conceptualize the sensory misperception as a fact or circumstance for courts to evaluate. But giving the hypothetical reasonable police officer the same subjective sensory misperception as the police officer who used the force would seem to enter into the realm of subjective analysis that the Court clearly rejected in *Graham*.¹³⁶ Furthermore, there would be no possible way to verify the sensory misperception as a "fact." Again, a lack of clarity on the reasonable police officer standard raises issues in conducting the excessive force inquiry.

III. A LOCALIZED CONCEPTION OF THE REASONABLE POLICE OFFICER

This Part proposes that courts adopt a localized conception of the reasonable police officer to guide excessive force analysis. The localized conception asks courts to hold that the reasonable police officer takes on objective attributes particular to the jurisdiction where the excessive force is alleged. As a result, courts will have a better understanding of how exactly a reasonable police officer would act given the facts and circumstances of a particular use of force incident. Section III.A considers how the localized conception would work and examines attributes it assigns to the reasonable police officer. Next, section III.B argues that courts should adopt the localized conception because it is in line with the excessive force jurisprudence and gives communities a greater say in how they are policed. Finally, section III.C addresses concerns that adopting the localized conception would create inconsistent constitutional rights and undue fragmentation of the excessive force doctrine.

134. See *Graham*, 490 U.S. at 396 (holding that "the 'reasonableness' of a particular use of force" cannot be judged with the "20/20 vision of hindsight").

135. See *Saucier v. Katz*, 533 U.S. 194, 205 (2001) (reasoning that *Graham* "cautioned against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene" (quoting *Graham*, 490 U.S. at 396)); Osagie K. Obasogie & Zachary Newman, *Constitutional Interpretation Without Judges: Police Violence, Excessive Force, and Remaking the Fourth Amendment*, 105 Va. L. Rev. 425, 429–30 (2019) (arguing that the Supreme Court's decision in *Graham* is deferential to the police); see also John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 Tex. J. on C.L. & C.R. 155, 160–61 (2016) (arguing that *Graham* and the line of Supreme Court cases that follow it are deferential to the police).

136. See *supra* notes 40–42 and accompanying text.

A. *What Is Considered Under the Localized Conception of the Reasonable Police Officer?*

The localized conception of the reasonable police officer is a framework that gives courts guidance on what attributes to assign to the reasonable police officer at the center of *Graham's* excessive force inquiry.¹³⁷ Under this Note's proposed framework, the reasonable police officer assumes objective characteristics particular to the jurisdiction where the alleged excessive force took place. This is in line with *Graham's* requirement that excessive force analysis must be an objective inquiry that stays away from subjective considerations.¹³⁸ These objective characteristics are ones that a court can fairly assume of any police officer "on the scene" of the alleged excessive force.¹³⁹ For example, it is not a stretch to think that a reasonable police officer would be aware of and in compliance with a local ordinance banning the use of chokeholds.¹⁴⁰ Assigning these attributes to the reasonable police officer helps address the uncertainties that section II.A discusses and gives courts a better idea of how exactly a reasonable police officer would have acted. This section examines two of the most prominent considerations—relevant state and local law notions on use of force, along with relevant police department policies and trainings—under the localized conception, and it also assesses how they would function in excessive force analysis. Additionally, this section suggests several novel factors that courts may consider, as the localized conception is a framework and does not preclude courts from considering other objective characteristics that they find relevant to excessive force analysis.

1. *Relevant State and Local Law Notions of How Police Should Use Force.* — The localized conception of the reasonable police officer would assume awareness of and compliance with any relevant state and local law notions of how police should use force. To illustrate, assume that a hypothetical plaintiff files a § 1983 action against a police officer alleging excessive force when the police officer used a chokehold while detaining the plaintiff.¹⁴¹ Additionally, prior to the events giving rise to the suit, the state leg-

137. *Graham*, 490 U.S. at 396.

138. See *id.* at 399 ("The Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry.").

139. *Id.* at 396.

140. See *infra* section III.A.1.

141. Whether the force was excessive is the only issue in this hypothetical, but plaintiffs in § 1983 excessive force litigation typically face significant barriers. See, e.g., Cover, *supra* note 133, at 1777 (arguing that the Supreme Court's adoption of the reasonable police officer perspective and development of qualified immunity doctrine has limited the effectiveness of § 1983 as a means of relief for claims of excessive force); Hassel, *supra* note 66, at 118 ("An apparent duplication of the objective reasonableness standard of the Fourth Amendment in excessive force cases and the same objective reasonableness standard in the qualified immunity doctrine has created a nearly impenetrable defense to excessive force claims.").

islature passed a statute forbidding police officers from using chokeholds.¹⁴² Consequently, the police officer's use of the chokehold would be deemed excessive force in violation of the plaintiff's Fourth Amendment right against unreasonable search and seizure.¹⁴³ A reasonable police officer responding to the facts and circumstances of the incident could not find the chokehold to be necessary¹⁴⁴: A prohibited tactic would not even be an option that the reasonable police officer could consider.

The localized conception of the reasonable police officer would still provide valuable guidance to the court even when the relevant state or local law notion is not as explicit as an express prohibition of a police tactic. For example, in July 2020, Connecticut enacted a wide-ranging police reform statute that included clarification on when police officers were justified in using deadly force.¹⁴⁵ The statute stated that deadly force was only justified when the police officer's actions were objectively reasonable under the circumstances.¹⁴⁶ More importantly, however, the statute added that factors such as whether the officer "engaged in reasonable deescalation measures prior to using deadly physical force" or whether the officer's conduct "led to an increased risk of an occurrence of the situation that precipitated the use of such force" were relevant to determining objective reasonableness.¹⁴⁷ Consequently, a court would deem the police officer's use of the chokehold to be excessive force in violation of the plaintiff's Fourth Amendment right against unreasonable search and seizure.¹⁴⁸

142. State statutes and local ordinances that categorically forbid the use of chokeholds have been a common legislative response to calls for police reform. See, e.g., Enhance Law Enforcement Integrity Act, ch. 110, § 5(2.5)(a), 2020 Colo. Sess. Laws 445, 454 ("A peace officer is prohibited from using a chokehold upon another person."); Luis Ferré-Sadurni, Jeffery C. Mays & Ashley Southall, Defying Police Unions, New York Lawmakers Ban Chokeholds, N.Y. Times (June 8, 2020), <https://www.nytimes.com/2020/06/08/nyregion/floyd-protests-police-reform.html> (on file with the *Columbia Law Review*) (noting New York State's passage of the Eric Garner Anti-Chokehold Act, which criminalized the police use of chokeholds); Louisville Metro Council Passes Ordinance to Impose Use of Force Limits on LMPD, WLKY (Oct. 22, 2020), <https://www.wlky.com/article/louisville-metro-council-passes-ordinance-to-impose-use-of-force-limits-on-lmpd/34456014> [<https://perma.cc/DC4R-KX7T>] (noting Louisville's passage of an ordinance that prohibits the police department from using chokeholds).

143. See *supra* notes 3–4 and accompanying text.

144. See *supra* section I.B (describing the *Graham* test for excessive force analysis).

145. Governor Lamont Signs Policing Reform Legislation, Off. of Gov. Ned Lamont (July 31, 2020), <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2020/07-2020/Governor-Lamont-Signs-Policing-Reform-Legislation> [<https://perma.cc/UG8X-KRL8>].

146. An Act Concerning Police Accountability, Pub. Act No. 20-1, sec. 29, § 53a-22(c)[A](1), 2020 Conn. Acts 43.

147. See *id.* § 53a-22(c)[A](2).

148. See *supra* note 70 (describing the circuit split on pre-seizure conduct). The reasoning in this example is that the reasonable police officer would know that their pre-seizure conduct would be evaluated during excessive force analysis.

Incorporating relevant state or local law notions into excessive force analysis is particularly important given the substantial increase of recently enacted or proposed police reform legislation.¹⁴⁹ The legislative response to concerns about policing has varied, ranging from targeting specific police tactics such as chokeholds¹⁵⁰ or the use of tear gas¹⁵¹ to changing what qualifies as justified use of deadly force¹⁵² or removing the defense of qualified immunity.¹⁵³ By assuming that the reasonable police officer is aware of and acts in accordance with any relevant state or local law governing the use of force, courts will be able to give effect to how the people, through their legislatures, want their police to act.¹⁵⁴ After all, the police exist for the benefit of the people.

2. *Relevant Police Department Training and Policies.* — As with relevant state and local law use of force notions, the reasonable police officer would also be assumed to be aware of and in compliance with relevant police department trainings and policies. Given the lack of guidance on what exactly the reasonable police officer entails, a localized conception would give courts more substantive information to work with in excessive force analysis. Furthermore, adopting a localized conception would clear up the uncertainty over whether courts should consider police department trainings and policies in excessive force analysis.¹⁵⁵

Examples of how the excessive force analysis can consider local police department trainings and policies already exist in some jurisdictions. In these jurisdictions, the probative value of trainings and policies is in helping the fact-finder understand how the reasonable police officer would have acted under the circumstances.¹⁵⁶ For example, in *Stamps v. Town of Framingham*,¹⁵⁷ the First Circuit found relevance in expert testimony establishing that a police officer who pointed a loaded rifle, with his finger on the trigger and the safety off, at the head of Eurie A. Stamps, who was compliant,¹⁵⁸ was in violation of local police department rules and training.¹⁵⁹ In determining whether the officer's subsequent accidental discharge of the weapon, which killed Stamps, constituted excessive force,

149. See Legislative Responses for Policing—State Bill Tracking Database, Nat'l Conf. of State Legislatures (June 16, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/legislative-responses-for-policing.aspx> [<https://perma.cc/F7AX-NZ3Z>] [hereinafter Legislative Responses] (finding that 743 police reform bills were introduced in 41 states in 2020).

150. See *supra* note 142.

151. See Kelley, *supra* note 106.

152. See *supra* notes 145–148 and accompanying text.

153. Enhance Law Enforcement Integrity Act, ch. 110, § 3(2)(b), 2020 Colo. Sess. Laws 445, 453 (“Qualified immunity is not a defense to liability . . .”).

154. See *infra* section III.B.1.

155. See *supra* section II.A.

156. See *supra* note 78 and accompanying text.

157. 813 F.3d 27 (1st Cir. 2016).

158. *Id.* at 31.

159. See *id.* at 42.

the court noted that the evidence of the violations “reinforces the conclusion that the unreasonableness of [the police officer’s] conduct, as a jury could find it, was well established . . . in a manner that is actually useful to police officers, eliminating the risk that judicial declarations of reasonable firearm use in such situations may miss the mark.”¹⁶⁰ Stated differently, evidence of police department training and policies is relevant because it reflects what the police themselves have deemed how a reasonable officer should act. This is consistent with *Graham*’s command to evaluate the reasonableness of a use of force from the perspective of the police.¹⁶¹

The localized conception of the reasonable police officer offers a framework that incorporates a court’s finding that evidence of police department training and policies is relevant. Under the localized conception, the objective reasonable police officer assumes objective characteristics similar to those of the officers who were actually present at the moment of force. This allows for the understanding that policing differs from jurisdiction to jurisdiction, and consequently, the departmental policies and training that officers are subject to also varies.¹⁶² A police officer in an urban police department in one state is not subject to the same policies and trainings as an officer in a rural department across the country.¹⁶³ This is not to say that violation of or compliance with policies and training should be considered dispositive in excessive force claims. Given that policies and training influence how a police officer takes in information and acts,¹⁶⁴ it follows that this information has probative value to courts in determining how an objective police officer would have acted in a situation.

3. *Other Possible Considerations.* — Case law best supports the consideration of relevant state and local law notions along with departmental training and policies, but courts may also find other factors relevant under the localized conception. For example, a court might look at statistical evidence from the jurisdiction showing significant differences in police use

160. *Id.*

161. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989); see also *Stamps*, 813 F.3d at 42 (“[T]he reasonableness demanded by the Fourth Amendment is no more than the reasonableness that law enforcement officers regularly demand of themselves.”).

162. See Tatiana Follett, Suzanne Hultin, Amber Widgery & Lesley Kennedy, *Law Enforcement Certification and Discipline*, Nat’l Conf. of State Legislatures (Aug. 17, 2020), <https://www.ncsl.org/research/labor-and-employment/policing-oversight-and-new-legislation.aspx> [<https://perma.cc/7SZ4-SH4W>] (“[R]equirements for [police] officer training and certification vary greatly from state to state and lack a cohesive regulatory approach.”).

163. See Garrett & Stoughton, *supra* note 61, app. at 304 (cataloging variations in use of force policies across the fifty largest police departments by number of officers).

164. See generally George Wood, Tom R. Tyler & Andrew V. Papachristos, *Procedural Justice Training Reduces Police Use of Force and Complaints Against Officers*, 117 *Proc. Nat’l Acad. Scis.* 9815 (2020) (finding that the Chicago Police Department’s implementation of a training program emphasizing respect, neutrality, and transparency reduced complaints against the police by 10% and incidents involving the use of force by over 6%).

of force based on the subject's race.¹⁶⁵ This evidence could be relevant in that it suggests the use of force was a function of undue racial bias, and therefore unreasonable, especially if the court holds that the reasonable police officer is free from any undue biases.¹⁶⁶ Similarly, courts may elect to consider the nature and number of complaints along with lawsuits filed against a local police department. Repeated complaints and lawsuits about a particular police practice may indicate that people find it to be unreasonable. Additionally, there are indications that police officers pay attention to lawsuits, especially ones with significant repercussions.¹⁶⁷ It should be noted that these types of considerations are not held to be dispositive of reasonableness under the localized conception. Instead, they are important because they shape how a police officer acts and should therefore be treated by courts as additional points to consider in characterizing the reasonable police officer.

More importantly, the localized conception can help guide courts by making the reasonable police officer less of an abstract concept. Purposefully giving the reasonable police officer localized attributes invites courts to assign other attributes to it as well. For example, a court may hold that the reasonable police officer is free from undue bias.¹⁶⁸ This reflects how the reasonable police officer should be a stand-in for how the police are supposed to act.¹⁶⁹ Courts adopting a localized conception would be forced to think about what attributes the reasonable police officer possesses and clarify their own excessive force analysis.

B. *Why the Localized Conception Should Be Adopted*

1. *The Assigned Attributes Are Consistent With Excessive Force Jurisprudence.* — The localized conception of the reasonable police officer is consistent with excessive force jurisprudence. Although the idea of a framework for assigning attributes to the reasonable police officer in excessive force analysis is novel, some courts already accept the attributes assigned

165. See Fagan & Campbell, *supra* note 117 (conducting a statistical analysis to conclude that the police were significantly more likely to kill Black people than white people in similar circumstances).

166. See Fed. R. Evid. 401 (“Evidence is relevant if it (a) has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”); see also *supra* section II.C.1 (discussing undue police perception of threat).

167. See Joanna C. Schwartz, *What Police Learn From Lawsuits*, 33 *Cardozo L. Rev.* 841, 844 (2012).

168. See *supra* section II.C.

169. See *infra* section III.B.1. Or the court may decide that the reasonable police officer perceives the facts and circumstances of the situation with perfect clarity. See *infra* section III.B.2.

under the localized conception framework when conducting excessive force analyses.¹⁷⁰

Furthermore, doctrines adjacent to excessive force analysis provide support for the localized conception of the reasonable police officer. The doctrine of qualified immunity supports the localized conception of the reasonable police officer as being aware of and in compliance with relevant state and local law notions regarding use of force. Under qualified immunity, government officials are protected “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁷¹ Whether a police officer can assert qualified immunity as a defense is often a key issue in civil suits alleging excessive force.¹⁷² In excessive force litigation, asserting a general right to be free from unreasonable force is insufficient to show a clearly established right.¹⁷³ Consequently, courts must often engage in fact-specific analyses, comparing the facts and circumstances of the instant complaint to “[p]recedent involving similar facts” that would “provide an officer notice that a specific use of force is unlawful.”¹⁷⁴ This approach presupposes that police officers are aware of the nuances of excessive force case law. Assuming that a reasonable police officer is aware of relevant state and local law notions regarding use of force does not require as much of a stretch. If courts are willing to hold that their opinions provide sufficient notice to police officers, a statute in the police officer’s jurisdiction certainly provides sufficient notice as well.¹⁷⁵ Thus, it is a fair assumption that reasonable police officers are

170. See *Stamps v. Town of Framingham*, 813 F.3d 27, 32 n.4 (1st Cir. 2016) (“We have approved the taking of evidence about police training and procedures into consideration.”); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003) (“[W]e may certainly consider a police department’s own guidelines when evaluating whether a particular use of force is constitutionally unreasonable.”); *Gutierrez v. City of San Antonio*, 139 F.3d 441, 449 (5th Cir. 1998) (“[I]t may be difficult to conclude that the officers acted reasonably if they performed an action that had been banned by their department or of whose dangers in these circumstances they had been warned.”). But see *Thompson v. City of Chicago*, 472 F.3d 444, 454 (7th Cir. 2006) (“[T]he violation of police regulations . . . is completely immaterial as to the question of whether a violation of the federal constitution has been established.”).

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

172. The complaint is dismissed if the government official can assert qualified immunity, and the Supreme Court has emphasized that courts should resolve qualified immunity issues as early as possible. See *Pearson v. Callahan*, 555 U.S. 223, 231–32 (2009).

173. *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (“[I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force [and] deny qualified immunity . . .”).

174. *Id.*

175. See *Harlow*, 457 U.S. at 818 n.32 (“[W]e need not define here the circumstances under which ‘the state of the law’ should be ‘evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.’” (quoting *Procunier v. Navarette*, 434 U.S. 555, 565 (1978))).

aware of and in compliance with relevant state and local laws on use of force.

Fourth Amendment doctrine on the reasonableness of searches also supports holding that the reasonable police officer is aware of and follows departmental training and policies. Under the Fourth Amendment, a police officer may “conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.”¹⁷⁶ Additionally, officers may “draw on their own experiences and specialized training to make inferences from and deductions about the cumulative information available” to reach a basis to suspect wrongdoing.¹⁷⁷ Underlying this reasoning is the idea that police officers differ from ordinary citizens in how they respond to the circumstances around them, in part because of the training they receive.¹⁷⁸ This idea should extend to how courts understand the reasonable police officer. The *Graham* test for excessive force explicitly articulates that courts should evaluate the reasonableness of a use of force from the perspective of the reasonable police officer.¹⁷⁹ It makes sense that courts should consider departmental training and policies to understand how a reasonable police officer would have responded to the facts and circumstances in an excessive force complaint. After all, they represent how each police department thinks its officers should act—in other words, what is reasonable.¹⁸⁰

2. *It Gives People a Say in How They Are Policed.* — Allowing communities to have a greater say in how they are policed is another benefit of adopting the localized conception of the reasonable police officer. There were wide-scale protests in response to a series of highly publicized police-involved killings during the first half of 2020.¹⁸¹ These protests against police brutality, especially against Black Americans, called for systemic changes and

176. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

177. *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

178. See Zamoff, *supra* note 8, at 588–89 (arguing that training is part of what distinguishes police officers from ordinary citizens).

179. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Terry*, 392 U.S. at 20–22) (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”).

180. See *Stamps v. Town of Framingham*, 813 F.3d 27, 42 (1st Cir. 2016) (noting that “the reasonableness demanded by the Fourth Amendment is no more than the reasonableness that law enforcement officers regularly demand of themselves” in upholding the relevance of expert testimony that found that police officer violated departmental training and policies on firearm usage).

181. See Nicole Dungca, Jenn Abelson, Mark Berman & John Sullivan, A Dozen High-Profile Fatal Encounters That Have Galvanized Protests Nationwide, *Wash. Post* (June 8, 2020), https://www.washingtonpost.com/investigations/a-dozen-high-profile-fatal-encounters-that-have-galvanized-protests-nationwide/2020/06/08/4fdbfc9c-a72f-11ea-b473-04905b1af82b_story.html (on file with the *Columbia Law Review*); see also *supra* note 1 and accompanying text.

reforms to policing.¹⁸² In response, state and local legislatures passed police reform statutes and ordinances.¹⁸³ Although the legislative response is wide ranging, much of it concerns the use of force.¹⁸⁴ In particular, prohibitions on particular police tactics, such as chokeholds,¹⁸⁵ or changes to legal standards governing use of force,¹⁸⁶ constitute direct statements on what is reasonable force. For example, a ban on chokeholds is effectively stating that chokeholds constitute excessive force. Alternatively, a requirement that a police officer must exhaust all reasonable alternatives before using deadly force in certain scenarios is akin to saying that the reasonableness of force depends in part on the officer's pre-seizure conduct. A similar analogy can be made with changes to police policies or training, except that in that scenario it is the police who are dictating what is and is not reasonable.¹⁸⁷

By treating these notions on what constitutes reasonable force as having probative value in excessive force analysis, courts help give weight to policing reforms and allow for communities to have a more direct say in how they are policed. Determining what exactly is reasonable and unreasonable force through case law is a slow and uncertain process, ham-

182. See Elaine Godfrey, *The Enormous Scale of This Movement*, Atlantic (June 7, 2020), <https://www.theatlantic.com/politics/archive/2020/06/protest-dc-george-floyd-police-reform/612748/> (on file with the *Columbia Law Review*) (detailing the nationwide protests demanding justice, police reform, and equality for Black people following the murder of George Floyd in the summer of 2020).

183. See *supra* notes 142, 146; see also Paresh Dave, *Factbox: What Changes Are Governments Making in Response to George Floyd Protests?*, Reuters (June 10, 2020), <https://www.reuters.com/article/us-minneapolis-police-protests-response/factbox-what-changes-are-governments-making-in-response-to-george-floyd-protests-idUSKBN23I01D> [<https://perma.cc/P8P9-7GMJ>] (surveying the range of government responses to protests against police brutality). Congress had also considered police reform legislation at the time, but split-party control of the chambers meant that passage by both the House of Representatives and the Senate was unlikely. See *Catie Edmondson, House Passes Sweeping Policing Bill Targeting Racial Bias and Use of Force*, N.Y. Times (June 25, 2020), <https://www.nytimes.com/2020/06/25/us/politics/house-police-overhaul-bill.html> (on file with the *Columbia Law Review*).

184. See *Legislative Responses*, *supra* note 149 (cataloging 2020 police reform legislation).

185. See *supra* note 142 and accompanying text.

186. See *An Act Concerning Police Accountability*, Pub. Act No. 20.1, sec. 29, § 53a-22(c), 2020 Conn. Acts. 43 (providing that an officer is only justified in using deadly force in specifically outlined situations—such as preventing the use or imminent use of deadly force against the officer or a third party—when doing so is objectively reasonable and necessary).

187. See *supra* note 180 and accompanying text.

pered by *Graham*'s call for fact-specific inquiries¹⁸⁸ in addition to other barriers to bringing excessive force litigation.¹⁸⁹ Furthermore, developing standards for reasonable force through case law also requires an underlying complaint.¹⁹⁰ In contrast, letting communities, through the political process, decide what constitutes reasonable force and what is relevant to the excessive force inquiry offers a more direct path. It is easier for a community to effectively declare that a police tactic, such as the use of chemical agents against nonviolent protestors, constitutes excessive force by passing an ordinance or lobbying for police department changes than it is for the community to reach the same outcome through litigation.¹⁹¹

Additionally, the localized conception of the reasonable police officer accounts for the fact that these reforms to policing are not uniform. A police officer in a jurisdiction that has not passed reform legislation prohibiting a particular tactic is not on the same notice as a police officer in a jurisdiction that has banned the tactic. Thus, how the reasonable police officer acts may differ from jurisdiction to jurisdiction.¹⁹² The localized conception of the reasonable police officer accounts for this by serving as a limit on which state or local law notions on use of force, or relevant police departmental policies and trainings, apply—ones that would have been applicable to the police officers on the scene. This accounts for the fact that policing varies from jurisdiction to jurisdiction, and there is no one-size-fits-all reasonable police officer.¹⁹³

188. See Alice Ristroph, *The Constitution of Police Violence*, 64 *UCLA L. Rev.* 1182, 1208 n.106 (2017) (collecting cases where the court characterized the excessive force inquiry as a “fact-specific, totality-of-the-circumstances inquiry”).

189. See Kami N. Chavis & Conor Degnan, *Am. Const. Soc’y for L. & Pol’y, Curbing Excessive Force: A Primer on Barriers to Police Accountability 3–9* (2017), https://www.acslaw.org/wp-content/uploads/2017/04/Curbing_Excessive_Force.pdf [<https://perma.cc/K2MC-8J4C>] (surveying barriers to holding the police accountable for excessive force through litigation).

190. As an example, in order to develop the standard for when use of a particular police tactic is reasonable, there needs to be a complaint where the tactic in question was used. Even then, the court might not issue an opinion that explicitly sets a standard for when use of that tactic is reasonable. See *Mullenix v. Luna*, 577 U.S. 7, 18–19 (2015) (declining to rule on whether a police officer attempting to disable a car involved in a high-speed chase by shooting the engine block constituted reasonable force and instead resolving the case on qualified immunity grounds).

191. See Adrian Vermeule, *Law and the Limits of Reason 2–4* (2009) (arguing that legislatures are better able to use lawmaking to reach socially desirable results as opposed to courts, which make law through a case-by-case basis).

192. The underlying fundamental assumptions about the reasonable police officer—that they are aware of and in compliance with relevant laws, trainings, and policies—do not change. But, because these laws, trainings, and policies do change from jurisdiction to jurisdiction, the reasonable police officer may act differently.

193. See *supra* section II.B.

C. *Addressing Fragmentation Counterarguments*

Adopting the localized conception of the reasonable police officer will not lead to undue fragmentation of excessive force jurisprudence or inconsistent constitutional rights. Because the localized conception requires courts to consider different evidence in different jurisdictions, a natural counterargument is that adopting it will lead to inconsistency.¹⁹⁴ For example, it might be argued that considering a police department policy that requires verbal warning before using force¹⁹⁵ would result in an inconsistent right against excessive force, as the outcome of a case might be different in a locale where there was no such policy. The localized conception, however, does not necessarily add to the fragmentation of excessive force jurisprudence or create inconsistent constitutional rights.

The localized conception is only a framework that helps courts analyze excessive force claims and does not add to existing fragmentation in excessive force jurisprudence. Under *Graham*, excessive force analysis is already muddled, with the Supreme Court declining to provide clarification on several key issues.¹⁹⁶ Courts disagree on whether to consider the police officer's preseizure conduct¹⁹⁷ and/or police department training and policies.¹⁹⁸ These disagreements are the source of some of the differences in how courts conduct excessive force analysis and stem from the lack of clarity provided by the Supreme Court. Even though the localized conception explicitly calls for courts to consider police department training and policies, doing so is not adding to the existing lack of uniformity in excessive force analysis.

The fact that relevant laws or police department training or policies will differ between jurisdictions does not mean that there will be inconsistent constitutional rights if courts adopt the localized conception of the reasonable police officer. Under the localized conception, *Graham's* test, focusing on how a reasonable police officer would have acted under the facts and circumstances,¹⁹⁹ is not changed. Instead, the localized conception is a framework that helps courts assign attributes to the reasonable police officer so that the court can get a better understanding of how a

194. See *Whren v. United States*, 517 U.S. 806, 815 (1996) (noting that police rules, practices, and regulations “vary from place to place and from time to time”).

195. See *Require Warning Before Shooting*, City of Renton, https://rentonwa.gov/city_hall/police/8_can_t_wait/require_warning_before_shooting [https://perma.cc/2KEM-QMB8] (last visited Nov. 24, 2020) (outlining the City of Renton's policy on use of force, which states “a verbal warning should precede the use of deadly force, where feasible” (emphasis omitted)).

196. See *supra* section I.C.

197. See *supra* notes 69–70 and accompanying text.

198. See *supra* note 99 and accompanying text.

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

reasonable police officer would have acted.²⁰⁰ Merely adding to the facts and circumstances that a court considers in determining how a reasonable police officer would act does not change the underlying constitutional right.²⁰¹ In adopting this reasoning, circuit courts that do consider police department training or policies are careful to note that compliance with or violation of training or policies does not prove or disprove a constitutional violation.²⁰²

Furthermore, even assuming that the localized conception leads to inconsistent constitutional rights, it should be noted that inconsistency is accepted in other contexts.²⁰³ For instance, First Amendment protection of free speech does not extend to obscene materials, which are defined in part by local “community standards” as determined by jurors.²⁰⁴ Because policing and community norms on how policing should be vary across jurisdictions,²⁰⁵ the localized conception is well suited to capturing a necessary degree of localization.

Perhaps another way to consider the inconsistencies in the laws, police department trainings, and policies across jurisdictions is to see them as differences in the facts of the case. *Graham’s* test for excessive force is supposed to be a fact-specific inquiry into the totality of the circumstances.²⁰⁶ The specific facts and circumstance of a particular use of force situation are important because they change how the reasonable police officer would have acted. Accordingly, a police officer trained not to use chokeholds because of a state law banning their use may very well act differently when restraining a physically combative suspect, compared to a police officer who is not subject to the same training or state law. Rele-

200. See *id.*; see also *supra* section II.A (arguing that not knowing about the characteristics of the reasonable police officer makes it difficult for courts to determine how the reasonable police officer would have acted).

201. The right is always the right to be free from unreasonable seizure. See U.S. Const. amend. IV.

202. See, e.g., *Stamps v. Town of Framingham*, 813 F.3d 27, 32 n.4 (1st Cir. 2016) (“Such standards do not, of course, establish the constitutional standard . . .”); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059–60 (9th Cir. 2003) (holding that a training bulletin could be considered in an excessive force claim even though it was not dispositive on the issue of whether the force was unreasonable).

203. See Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 *Tex. L. Rev.* 1129, 1169 (1999) (arguing that “constitutional rights are defined in part on the basis of community expectations and considerations”).

204. See Joseph Blocher, *Firearm Localism*, 123 *Yale L.J.* 82, 125–26 (2013) (citing *Miller v. California*, 413 U.S. 15, 32–33 (1973)). Professor Joseph Blocher also notes that what “‘property’ [is] protected by the Due Process and Takings Clauses . . . ‘stem[s] from an independent source[] such as state law,’” which varies. *Id.* at 126 (quoting *Paul v. Davis*, 424 U.S. 693, 709 (1976)).

205. See *supra* section III.A.1.

206. See *Graham v. Connor*, 490 U.S. 386, 396 (“[The Fourth Amendment’s] proper application requires careful attention to the facts and circumstances of each particular case . . .” (citing *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985))).

vant laws, policies, and trainings are part of what sets the circumstances around the decision to use force, and differences in the facts and circumstances surrounding use of force incidents are inevitable and recognized as being key to determining whether the force used was excessive.²⁰⁷

Finally, it may not necessarily be a bad thing that the localized conception of the reasonable police officer invites differences. Police brutality, especially against minorities,²⁰⁸ is a clear problem in the United States. States and localities have responded in different ways to the problem, and the localized conception of the reasonable police officer allows courts to give weight to those responses by considering them in excessive force analyses.²⁰⁹ These differences can be seen as the products of a federal system striving to find the right response. Writing for the Supreme Court in *Bond v. United States*, Justice Anthony Kennedy extolled the virtues of a federal system, noting that “[t]he federal structure allows local policies ‘more sensitive to the diverse needs of a heterogeneous society,’ permits ‘innovation and experimentation,’ enables greater citizen ‘involvement in democratic processes,’ and makes government ‘more responsive.’”²¹⁰ These benefits are promoted when courts incentivize local- and state-level police reform by considering relevant notions contained in reform legislation on excessive force. There is no easy solution for police brutality, but by adopting the localized conception of the reasonable police officer and embracing the differences that it invites, courts can utilize the federal system to work toward a solution.²¹¹

CONCLUSION

The call for police reform and changes to the muddled Fourth Amendment doctrine surrounding excessive force is certainly not novel. This Note proposes a change that exists within the current framework for analyzing excessive force under *Graham*'s objective reasonableness test. By calling for courts to examine what exactly are the characteristics of the hypothetical reasonable police officer at the center of *Graham*'s test and

207. *Id.*

208. See Frank Edwards, Hedwig Lee & Michael Esposito, Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex, 116 *Proc. Nat'l Acad. Scis.* 16,793, 16,793 (2019) (“Black women and men and American Indian and Alaska Native women and men are significantly more likely than white women and men to be killed by police. Latino men are also more likely to be killed by police than are white men.”).

209. See Weihua Li & Humera Lodhi, Which States Are Taking on Police Reform After George Floyd?, Marshall Project (June 18, 2020), <https://www.themarshallproject.org/2020/06/18/which-states-are-taking-on-police-reform-after-george-floyd> [https://perma.cc/DG86-N2TR]; Legislative Responses, *supra* note 149.

210. *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

211. Of course, the converse is true in that a jurisdiction may pass legislation further immunizing the police from liability. But this reflects how the localized conception allows citizens, through the legislative process, to have a more direct say in how the police should act.

proposing that courts adopt a localized conception to determine those characteristics, this Note seeks to prompt courts to clarify one of many uncertainties surrounding the excessive force analysis. More importantly, however, inquiring about the reasonable police officer also asks courts to confront negative aspects of policing that are very real and have an impact on a police officer's decision to use force. Perhaps this can push courts toward a more realistic and less deferential reasonable force analysis that will ultimately reduce police misconduct.