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## Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal

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2020]

DETERMINING THE PERSPECTIVE OF A REASONABLE POLICE  
OFFICER: AN EVIDENCE-BASED PROPOSAL

MITCH ZAMOFF\*

ABSTRACT

Excessive force jurisprudence in America is in disarray. Although the Supreme Court mandated over thirty years ago that courts determine the constitutionality of allegedly excessive force from the perspective of a reasonable officer on the scene, courts have never seemed more confused about how to make that determination. Without any definitive guidance on what evidence to consider in determining how a reasonable officer on the scene of an incident of allegedly excessive force would have behaved, courts are issuing haphazard, inconsistent decisions that are often difficult to reconcile with basic evidentiary principles. Unfortunately, the prevailing approach to determining the perspective of a reasonable police officer—which has been reinforced by the Supreme Court’s excessive force decisions over the past decade—is to blindly defer to police officers accused of using excessive force, ignore the distinctions between reasonable police officers and ordinary reasonable persons, engage in rank speculation about what a reasonable officer would (or would not) have done under the circumstances, and ignore evidence that is relevant to assessing the perspective of a reasonable officer on the scene. This approach, which has resulted in an incoherent hodgepodge of pro-police excessive force decisions, undermines public confidence in the ability of the justice system to address police behavior that is unconstitutional. That confidence is particularly fragile in the wake of the killing of George Floyd by Minneapolis police officer Derek Chauvin and the other incidents of lethal force by American law enforcement officers that sparked protests against police brutality throughout the United States during the summer of 2020.

Rather than advocate for an overhaul of the Supreme Court’s “reasonable officer on the scene” standard for determining whether force is excessive, this Article argues that the credibility of excessive force jurisprudence can be restored by injecting a consistent dose of evidentiary rigor into excessive force decisions. To that end, this Article proposes an evidentiary road map for courts to follow in determining the perspective of a reasonable officer on the scene of an incident of allegedly excessive force. By isolating and focusing on the characteristics of the law enforcement

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experience which meaningfully distinguish it from the experience of ordinary civilians, this Article contends that in order to meaningfully determine whether a police officer accused of excessive force acted reasonably under the circumstances, courts must consider (1) the officer's training and the extent to which he adhered to or deviated from that training during the incident in question, (2) the officer's experience in the law enforcement profession, and (3) the extent to which the officer complied with or violated department rules applicable to his use of force under the circumstances. While this evidence is not dispositive of the reasonable-officer determination, it defies logic and a reasonable construction of the rules of evidence and civil procedure for courts to deem such evidence irrelevant in making that determination.

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## INTRODUCTION

OVER thirty years ago, in *Graham v. Connor*,<sup>1</sup> the United States Supreme Court held that the reasonableness of police officer conduct at issue in an excessive force lawsuit should be evaluated from the perspective of a “reasonable officer on the scene”<sup>2</sup> rather than the “reasonable person” perspective typically used to determine liability in situations involving alleged tortious conduct.<sup>3</sup> This makes sense. On the one hand, law enforcement officers have an unusually stressful and dangerous job. As Justice Rehnquist observed, “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>4</sup> Thus, it seems fair to determine whether police force was excessive by trying to figure out what a reasonable officer on the scene would have done at the time without the benefit of “the 20/20 vision of hindsight.”<sup>5</sup> For example, if an armed man threatened to shoot police officers during a heated exchange, reached into his waistband, pulled out a gun, and pointed it at the officers, many of us would agree that it would not be excessive force for the officers to fire at the armed man to protect themselves.

On the other hand, law enforcement officers have training, expertise, and experience that prepare them to process civilian<sup>6</sup> encounters and make those split-second judgments in tense, uncertain, and rapidly evolving situations. Police officers are trained not only to be able to distinguish real from illusory threats but also to defuse dangerous situations without resort to violence.<sup>7</sup> When force is necessary, they are generally trained to

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1. 490 U.S. 386 (1989).

2. *Id.* at 396.

3. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 11 (AM. LAW. INST. 1965) (defining “reasonably believes” in the tort context as “the actor believes that a given fact or combination of facts exists, and that the circumstances which he knows, or should know, are such as to cause a *reasonable man* so to believe” (emphasis added)).

4. *Graham*, 490 U.S. at 397.

5. *Id.* at 396.

6. The term “civilian,” as used in this Article, is intended to refer to all people who are not law enforcement officers.

7. *See, e.g.*, Michael S. Rogers et al., *Effectiveness of Police Crisis Intervention Training Programs*, 47 J. AM. ACAD. PSYCHIATRY & L. 414, 415–18 (2019) (detailing crisis intervention models and outcomes); *Deescalation Training for Police Officers*, APEX OFFICER, <https://www.apexofficer.com/deescalation-training> [<https://perma.cc/C6CA-CN8K>] (last visited Mar. 11, 2020) (describing a deescalation training program); Adam Sacasa, *Shoot or Don't Shoot? Simulator Helps Cops Make Crucial Decision*, SOUTH FLA. SUN-SENTINEL (May 31, 2017, 5:10 PM), <https://www.sun-sentinel.com/local/palm-beach/fl-pn-boca-shoot-dont-shoot-20170531-story.html> [<https://perma.cc/W73X-F6BJ>] (describing a simulator that helps officers practice threatening scenarios); *see also* Matt Kenyon, *Police De-escalation Training Policy Shift*, POWERDMS (May 15, 2019), <https://www.powerdms.com/blog/police-de-escalation-training-policy-shift/> [<https://perma.cc/PB59-VWPN>] (describing the change in police department policies to encourage alternatives to force).

use the minimal force required under the circumstances to contain the threat.<sup>8</sup> Their daily experiences working on the streets should make police officers less likely to overreact to a tense or uncertain situation than an ordinary reasonable person with no law enforcement training and experience. And police officers are governed by policies and procedures that, if followed, should promote professional behavior during their encounters with civilians.<sup>9</sup> It is reasonable to assume that if we deputized a group of bartenders, auto mechanics, and accountants, gave them guns, dropped them into “tense, uncertain, and rapidly evolving” situations on the streets, and directed them to use the amount of force necessary to protect themselves and the public, they would be more likely to overreact and use an unreasonable amount of force than trained law enforcement officers, especially more experienced officers.<sup>10</sup>

But while it makes sense in concept to evaluate a particular use of force from the perspective of a reasonable officer on the scene, the courts have failed to do so in a consistent or meaningful way. Instead of considering evidence of the training and experience of law enforcers in determining the reasonableness of their allegedly excessive force, the majority of judges—most of whom have no law enforcement background of any kind<sup>11</sup>—have simply used their imaginations to try to decide whether a use of force was reasonable in light of the judges’ own assessment of the danger posed by the situation.<sup>12</sup> These judges also have ignored—or, in some cases, expressly excluded—evidence that the officers accused of excessive force either deviated from or complied with their agencies’ policies and procedures governing the use of force.<sup>13</sup> And juries deciding excessive force claims are routinely instructed to consider the uncertainties and

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8. See generally *The Use-of-Force Continuum*, NAT’L INST. JUST. (Aug. 3, 2009), <https://nij.ojp.gov/topics/articles/use-force-continuum> [https://perma.cc/3NNW-3STG] (describing an example of a use-of-force continuum from “officer presence” to “lethal force”).

9. See, e.g., L.A. POLICE DEP’T, DEPARTMENT MANUAL § 240 (2019), [http://www.lapdonline.org/lapd\\_manual/](http://www.lapdonline.org/lapd_manual/) [https://perma.cc/98TR-BCKZ] (describing guidelines for department employee-public contact).

10. *Graham*, 490 U.S. at 397. There is ample data to support this assumption. When placed in simulated exercises presenting potentially threatening situations, trained law enforcement officers are less likely to use deadly force than their civilian counterparts. See *infra* Part II.

11. Searches of an Article III directory of federal judges revealed only seventeen judges with a law enforcement background out of the 3,762 judges in the directory—less than half of one percent. See *Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> [permalink unavailable] (last visited Mar. 11, 2020) (identifying federal judges with police experience, found by searching “police officer,” “sheriff,” and “marshal” and excluding civilian positions within enforcement agencies).

12. See, e.g., *infra* Section III.C.1 (discussing the Supreme Court’s analysis of an officer’s use of force in *Plumhoff v. Rickard*).

13. See, e.g., *infra* Section III.B (discussing the failure of the Supreme Court to consider relevant police policies and procedures in *Scott v. Harris*).

stress of policing, as well as the conduct of the civilian who was harmed, but not the training and experience of the officers involved or their compliance with policies and procedures.<sup>14</sup> All of the emphasis is being placed on the difficult and dangerous nature of policing, while the other characteristics of a reasonable officer on the scene are being ignored. The result is not only that the *Graham* standard has been applied in an uneven, one-sided manner that usually favors the police, but there is sparse evidentiary support for many decisions purporting to determine the perspective of a reasonable officer on the scene.

A thorough survey of excessive force decisions since *Graham* reflects that many courts are myopically focusing on only one aspect of policing—its dangerousness—rather than the training, experience, and standards of professional conduct that make police officers better able than civilians to deal with that danger without using excessive force. There is little doubt that policing, at least in jurisdictions with high rates of violent crime, is more dangerous than many other professions.<sup>15</sup> But the dangerous nature of policing is only one aspect of the law enforcement profession. Understandably, judges and juries without law enforcement training and experience who are focused solely on this aspect will be deferential to a police officer's use of force—up to and including deadly force—because it can be scary to project oneself onto the streets and into the high-stress world of policing without the training, expertise, and experience of a professional officer.

The fundamental problem with the current application of the *Graham* standard is that the courts have twisted it from what should be an evidence-based, multidimensional “reasonable officer on the scene” standard into a one-dimensional, overly deferential “reasonable person in a high-stress situation” standard whose application is disproportionately based on the guesswork of the fact finder. The reasonable officer standard articulated in *Graham* should preclude judges and juries—who may be reasonable people, but typically are not reasonable police officers—from placing themselves in the shoes of a professional law enforcement officer and trying to assess the reasonableness of the officer's conduct through their own untrained eyes. A trained professional law enforcement officer presumably would process every aspect of a tense encounter with a civilian differently than a judge or a juror. The reasonable officer standard requires judges and juries not to ask what seems reasonable to them under the circumstances (while taking into account how difficult and stressful it is to be to be a police officer) but to consider the officer's training, experience, and adherence to department policies and procedures and determine whether a reasonable officer on the scene—as opposed to an ordinary reasonable person—would have exerted the same force as the defendant of-

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14. See *infra* note 57 and accompanying text (discussing model jury instructions applicable to excessive force claims).

15. See David M. Bierie, *Assault of Police*, 63 CRIME & DELINQUENCY 899, 899 (2017) (“[A]pproximately 10% of [police] officers are assaulted each year . . .”).

ficer. Unfortunately, in many excessive force cases, this is simply not happening.

This has given rise to two problems that this Article seeks to address. First, the failure to meaningfully implement the “reasonable officer on the scene” standard, especially when combined with the doctrine of qualified immunity,<sup>16</sup> has raised the bar for excessive force plaintiffs to almost insurmountable heights.<sup>17</sup> Second, the lack of evidentiary support for most excessive force decisions is contributing to a crisis of confidence regarding the use of force by the police.<sup>18</sup> Even if a significant majority of excessive

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16. The doctrine of qualified immunity provides government officials (including police defendants) with an extra layer of protection so as to “shield [them] from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). As discussed in Section I.B of this Article, in addition to proving that the police officer used an unreasonable amount of force amounting to a violation of the Fourth Amendment of the United States Constitution, an excessive force plaintiff also must prove that his Fourth Amendment rights were “clearly established” under the circumstances to overcome the qualified immunity defense. *Id.* at 232. Thus, while applying the “reasonable officer on the scene” standard in a more robust and evenhanded manner would meaningfully impact the first prong of the qualified immunity doctrine—which asks whether there was a constitutional violation—a police officer still would not be subject to liability for using excessive force unless the plaintiff could also show that prior judicial decisions had clearly established that the force was excessive under the particular set of circumstances confronting the officer. However, as discussed in Section I.B, if the doctrine of qualified immunity were to be abolished—either by Congress or the Supreme Court—the application of the “reasonable officer on the scene” standard would become dispositive of most excessive force claims.

17. *See, e.g.*, Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 218 (2017) (noting that the current approach to determining the reasonableness of allegedly excessive force “rarely result[s] in compensation to persons injured by police officers”); *see also* *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (describing the Supreme Court’s approach to qualified immunity in excessive force cases as “an absolute shield for law enforcement officers” that “gut[s] the deterrent effect of the Fourth Amendment” and under which the Court “routinely displays an unflinching willingness ‘to summarily reverse courts for wrongly denying officers the protection of qualified immunity’ but ‘rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases’” (second alteration in original) (quoting *Salazar-Limon v. Houston*, 137 S. Ct. 1277, 1282–83 (2017) (Sotomayor, J., dissenting))).

18. *See, e.g.*, Andrew Selsky, *Floyd Death Sparks Efforts to Hold More Officers Accountable*, STAR TRIB. (June 13, 2020, 9:15 AM) <https://www.startribune.com/floyd-death-sparks-efforts-to-hold-more-officers-accountable/571239022/> [<https://perma.cc/UWD8-2LTW>] (discussing proposals to increase police accountability); Vera Bergengruen & Tessa Berenson, *‘It Was a Tinderbox.’ How George Floyd’s Killing Highlighted America’s Police Reform Failures*, TIME (June 4, 2020, 1:22 PM), <https://time.com/5848368/george-floyd-police-reform-failures/> [<https://perma.cc/5GTU-4DQ3>] (“Floyd’s death under the knee of the white MPD officer on May 25 has reignited furor over the persistence of police brutality against people of color in the United States.”); Osagie K. Obasogie, *The Bad-Apple Myth of Policing*, ATLANTIC (Aug. 2, 2019), <https://www.theatlantic.com/politics/archive/2019/08/how-courts-judge-police-use-force/594832/> [<https://perma.cc/7RS8-PA7L>] (“Violence perpetrated by cops doesn’t simply boil down to individual bad actors—it’s also a



force decisions end up favoring the police, the legitimacy of those decisions will be enhanced if there is a demonstrable evidentiary basis for them. That basis is lacking in many of the decisions issued since *Graham*.

While many of the proposals for excessive force litigation reform depend upon a fundamental revision of Fourth Amendment doctrine or a reconstitution of the Supreme Court, this Article argues that excessive force jurisprudence can be meaningfully recalibrated and legitimized by injecting meaning into the “reasonable officer on the scene” standard that already governs the adjudication of excessive force claims. This will result in a more consistent, evenhanded, evidence-based approach that properly accounts for the training and experience of law enforcement officers, as well as their compliance or noncompliance with department policies and procedures, in evaluating the reasonableness of their use of force.

To provide context for my argument (and my proposal for reform), Part I of this Article lays out the legal framework for excessive force claims and reviews the Supreme Court’s establishment of the “reasonable officer on the scene” standard of care. Part II examines some of the ways in which a reasonable police officer is different from an ordinary reasonable person with respect to decisions about whether and how to use force. Part III surveys the universe of excessive force decisions purporting to apply the “reasonable officer on the scene” standard, finds tremendous inconsistencies in courts’ evidentiary approaches to doing so, and concludes that the standard is being misapplied by the many judges who are failing to consider (or failing to instruct juries to consider) three categories of evidence that are critical to determining the perspective of a reasonable officer on the scene of an incident of alleged excessive force: (1) evidence of the officers’ training, (2) evidence of the officers’ experience, and (3) evidence of the officers’ compliance with or deviation from their agency’s policies and procedures. Finally, Part IV argues that the courts should rectify the uneven and often incoherent application of the standard of care in excessive force cases by determining the perspective of a reasonable officer on the scene, wherever possible, based on evidence rather than speculation. This will result in a more objective, credible, faithful, and evenhanded application of the “reasonable officer on the scene” standard of care articulated in *Graham*.

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systemic, judicial failing.”); Nina Totenberg, *Police Shootings Stir Outrage Among Some, But Not the Supreme Court*, NAT’L PUB. RADIO (Apr. 3, 2018, 5:00 AM), <https://www.npr.org/2018/04/03/599009640/police-shootings-stir-outrage-among-some-but-not-the-supreme-court> [<https://perma.cc/748S-459M>].

I. THE ESTABLISHMENT OF THE “REASONABLE OFFICER ON THE SCENE”  
STANDARD OF CARE FOR EXCESSIVE FORCE CLAIMS

A. *Section 1983*

Individuals whose civil rights are violated by government agents may seek relief pursuant to 42 U.S.C. § 1983, which provides a federal cause of action for a violation of an individual’s civil rights.<sup>19</sup> It provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .<sup>20</sup>

Section 1983 “‘is not itself a source of substantive rights,’ but merely provides ‘a method for vindicating federal rights elsewhere conferred.’”<sup>21</sup> To establish a Section 1983 claim, a plaintiff must show (1) the depriva-

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19. *See, e.g.*, *Gomez v. Toledo*, 446 U.S. 635, 638–40 (1980) (finding that Section 1983 creates a cause of action for the deprivation of constitutional or statutory rights by any person acting under the color of state law). Originally known as Section 1 of the Ku Klux Klan Act of 1871, Section 1983 was enacted to provide a neutral forum for citizens, primarily freed slaves, to file grievances against state officials who failed to enforce the law or deprived citizens of their constitutionally guaranteed rights. H.R. REP. NO. 96-548, at 1 (1979). Nevertheless, in the fifty years following the passage of the Ku Klux Klan Act, only twenty-one cases were decided under what would become Section 1983. Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1781 (2016). The volume of Section 1983 litigation began to slowly increase around 1939 when the Justice Department established a civil rights section and started prosecuting both lynch mob and police brutality cases. *Id.* Then, in 1961, the Supreme Court decided *Monroe v. Pape*, which is widely viewed as the starting point for modern-day Section 1983 litigation. *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (finding that plaintiffs had a viable cause of action for money damages against state and local officers under Section 1983 for violations of the Fourth Amendment). The reach of Section 1983 was further enlarged and clarified in a series of landmark Supreme Court decisions in the ensuing decades. *See Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985) (modifying the common law rule that permitted the use of deadly force against a fleeing felon and holding that the felon must pose a significant threat to the officer or others for the use of deadly force to be constitutional); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (holding that municipalities and local government units are “persons” for purposes of Section 1983 claims); *see also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395–96 (1971) (holding that individuals can bring claims against federal actors for alleged constitutional violations).

20. 42 U.S.C. § 1983 (2018).

21. *Graham v. Connor*, 490 U.S. 386, 393–94 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979)).

tion of a right, privilege or immunity secured by the Constitution and laws (2) by any person acting under the color of state law.<sup>22</sup>

Excessive force claims by citizens in non-custodial settings, which are the focus of this Article, implicate the Fourth Amendment right to be free from unreasonable seizures.<sup>23</sup> As the Supreme Court made clear in *Graham*, “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.”<sup>24</sup> Under that standard, “whatever the circumstances prompting law enforcement officers to use force, whether it be self-defense, defense of another or resistance to arrest, where, as here, a [F]ourth [A]mendment violation is alleged, the inquiry remains whether the force applied was reasonable.”<sup>25</sup> While some Section 1983 plaintiffs also assert state tort claims,<sup>26</sup> Section 1983 is the primary vehicle for excessive force claims against the police.<sup>27</sup> Indeed, “[s]ince 1961, when contemporary § 1983 litigation began, the law of police vio-

22. *Gomez*, 446 U.S. at 638. It is typically not difficult for Section 1983 plaintiffs to demonstrate that law enforcement defendants acted under the color of state law with respect to their exercise of the allegedly excessive force at issue in the lawsuit.

23. The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. CONST. amend. IV. A “seizure,” for Fourth Amendment purposes, occurs whenever government actors have, “by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.” *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). Excessive force claims by prisoners are evaluated not under the Fourth Amendment but the Eighth Amendment, which prohibits the imposition of cruel and unusual punishment. *See Hudson v. McMillian*, 503 U.S. 1, 11–12 (1992); *Whitley v. Albers*, 475 U.S. 312, 318–26 (1986). The Fourteenth Amendment governs Section 1983 claims by pretrial detainees who allege that they were the victim of excessive force at the hands of state law enforcement officers. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015).

24. *Graham*, 490 U.S. at 395.

25. *Wardlaw v. Pickett*, 1 F.3d 1297, 1303 (D.C. Cir. 1993).

26. KATHLEEN L. DAERR-BANNON, CAUSE OF ACTION UNDER 42 U.S.C. § 1983 FOR USE OF EXCESSIVE FORCE BY POLICE IN MAKING ARREST, 59 CAUSES OF ACTION 2D 173 § 3 (2013) (“The plaintiff may have alternative actions based on the same factual circumstances that give rise to the action under § 1983. For example, most commonly, plaintiff will be able to assert state law tort actions, whether or not the action rises to the level of a deprivation of federally guaranteed constitutional rights.”). Plaintiffs typically would prefer to prevail under Section 1983 rather than on state law theories because Section 1983 provides for the recovery of attorney’s fees by prevailing plaintiffs, 42 U.S.C. § 1988, and does not contain any cap on damages, unlike those imposed by many state tort claim acts. *See STATUTORY CAPS ON DAMAGES: GENERALLY*, 1 CIV. ACTIONS AGAINST STATE & LOC. GOV’T § 6:12 (“Most state tort claims acts contain provisions which limit the amount of damages for which a governmental entity may be liable in a tort action.”).

27. Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1002 (2002). *See generally* Mitch Zamoff, *Assessing the Impact of Police Body Camera Evidence on the Litigation of Excessive Force Cases*, 54 GA. L. REV. 1, 26–27 (2019) (discussing the landmark Section 1983 cases that laid the foundation for contemporary excessive force litigation).

lence has been dominated by thousands of § 1983 suits alleging excessive force by police officers.”<sup>28</sup>

### B. *Qualified Immunity*

Under Section 1983, law enforcement officers and other government officials who allegedly have violated rights conferred by federal statutes or the Constitution may be sued in their individual capacities.<sup>29</sup> Nevertheless, public officials, including police officers, are ordinarily shielded from personal liability for discretionary actions undertaken during their employment under the doctrine of qualified immunity.<sup>30</sup> This doctrine balances two interests: the need to hold accountable a public official who has irresponsibly exercised his power and the obligation to protect from liability an official who has reasonably performed his duties.<sup>31</sup>

The doctrine of qualified immunity protects police officers and other government officials “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.”<sup>32</sup> Qualified immunity is “an *immunity from suit* rather than a mere defense to liability.”<sup>33</sup> In resolving qualified immunity claims, “[a] court must decide . . . whether the facts [that a plaintiff has] alleged or shown . . . make out a violation of a constitutional right, and . . . whether the right at issue was ‘clearly established’ at the time of defendant’s alleged misconduct.”<sup>34</sup> A police officer

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28. Rachel A. Harmon, *When Is Police Violence Justified?*, 102 Nw. U. L. REV. 1119, 1126 (2008).

29. See Garrett & Stoughton, *supra* note 17, at 237. Professors Garrett and Stoughton explain why almost all of the legal developments in the excessive force context are now taking place in the context of suits against individual officers under Section 1983:

The entire structure of federal civil rights litigation redirects the focus from systemic issues of policy, practice, supervision, and training, to the individual conduct of an officer. Civil rights litigation does not directly target police policymakers. Most such lawsuits name only individual officers as defendants [as] any judgments will be covered by municipal insurance . . . . It is difficult to bring larger suits, whether individual suits raising questions of policy, or class actions seeking injunctive relief to change policy regarding the use of excessive force.

*Id.* (footnote omitted).

30. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

31. *Id.* Following the lead of Professor Rachel Harmon, I have used masculine pronouns to describe male and female civilians involved in encounters with the police as well as male and female police officers both for consistency’s sake and because “it reflects the empirical realities of criminal and police populations.” Harmon, *supra* note 28, at 1121 n.4 (citing studies reflecting that men account for more than eighty-five percent of violent criminal offenders and approximately eighty-nine percent of police officers).

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

33. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

34. *Pearson*, 555 U.S. at 232.

defendant is entitled to qualified immunity unless the conduct “violated a clearly established constitutional right.”<sup>35</sup>

Thus, in order to overcome the defense of qualified immunity, which is asserted by law enforcement defendants in virtually every excessive force case, the plaintiff has the burden of showing (1) a violation of a constitutional right—here, the Fourth Amendment right to be free from unreasonable seizures—that (2) was clearly established at the time of the violation.<sup>36</sup> “A [g]overnment official’s conduct violates clearly established law when, at the time of the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’”<sup>37</sup> While most courts first consider whether there was a constitutional violation in analyzing a Section 1983 excessive force claim, courts may “exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.”<sup>38</sup>

The doctrine of qualified immunity has become the subject of intense debate, as American policing has gone under the microscope.<sup>39</sup> Growing

35. *Id.*

36. *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *modified by Pearson*, 555 U.S. at 227.

37. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (second, third, and fourth alterations in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). “We do not require a case directly on point, but existing precedent must have placed the . . . constitutional question beyond debate.” *Id.*; *see also Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (explaining that the qualified immunity inquiry “must be undertaken in light of the specific context of the case, not as a broad general proposition” (quoting *Saucier*, 533 U.S. at 201)).

38. *Pearson*, 555 U.S. at 236. Prior to the Supreme Court’s 2009 decision in *Pearson*, courts were required to consider the first prong of the qualified immunity test—whether the plaintiff was “unreasonably seized” for Fourth Amendment purposes—before they reached the question of whether the right to be free from an unreasonable seizure was “clearly established” under the circumstances. *See Saucier*, 533 U.S. at 201. Even subsequent to *Pearson*, courts frequently base their qualified immunity decisions on the first prong of qualified immunity rather than the second. This is likely because the existence (or non-existence) of a constitutional violation is at the heart of every excessive force claim and because there are multiple ways for plaintiffs to show that their Fourth Amendment rights were clearly established. They can, for instance, produce a materially similar case decided by the Supreme Court, the court in which the Section 1983 action is pending, or the highest court of the relevant state. *See Hoyt v. Cooks*, 672 F.3d 972, 977 (11th Cir. 2012). A right can also be clearly established in the absence of precedent. A plaintiff can point to a “broader, clearly established principle [that] should control the novel facts in [his] situation.” *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005). Finally, a plaintiff may show that an “official’s conduct ‘was so far beyond the hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution even without caselaw on point.’” *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000) (alteration in original) (quoting *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997) (per curiam)).

39. Jess Bravin & Brent Kendall, *Immunity Doctrine Often Shields Police From Lawsuit*, WALL ST. J. (June 9, 2020, 1:03 PM), <https://www.wsj.com/articles/immunity->

dissatisfaction with a perceived lack of accountability on the part of police officers for their use of force, particularly against Black citizens, has generated momentum for abolishing the doctrine altogether—either by legislation or a Supreme Court decision.<sup>40</sup> The U.S. House of Representatives recently adopted the “George Floyd Justice in Policing Act of 2020” that would, among other things, eliminate qualified immunity as a defense in cases alleging excessive force by the police.<sup>41</sup> But Senate Republicans have characterized the eradication of qualified immunity as a “non-starter” or “poison pill” that will not be a feature of any police reform legislation endorsed by the Republican-controlled Senate.<sup>42</sup> Thus, while it is unclear at the time this Article is being drafted whether Senate and House leaders will ultimately be able to negotiate bipartisan police reform legislation in 2020, any such legislation is unlikely to include the abolition of qualified immunity.<sup>43</sup> And although Supreme Court Justices from both ends of the ideological spectrum have expressed skepticism about the judicially manufactured doctrine of qualified immunity,<sup>44</sup> the Court recently declined to

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doctrine-often-shields-police-from-lawsuits-11591720435 [https://perma.cc/N66V-6NEM] (“Mr. Floyd’s death has focused attention on qualified immunity, and whether it may have contributed to a culture of American policing that critics say gives officers too much leeway to use force against suspects and commit other constitutional violations.”); Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (June 23, 2020), https://nyti.ms/3esDevA [https://perma.cc/AFS2-88EA] (“Once a little-known rule, qualified immunity has emerged as a flash point in the protests spurred by Mr. Floyd’s killing and galvanized calls for police reform.”); Selsky, *supra* note 18 (describing qualified immunity as “a legal doctrine that makes successfully filing a lawsuit against an officer almost impossible”).

40. See, e.g., Alan Feuer, *Advocates From Left and Right Ask Supreme Court to Revisit Immunity Defense*, N.Y. TIMES (July 11, 2018), https://nyti.ms/2JebgDH [https://perma.cc/7MZG-9UNA] (“[Q]ualified immunity had time and again denied relief to the victims of abuse and had eroded trust in law enforcement officers.”); Fuchs, *supra* note 39 (“Qualified immunity is a focal point of the new debate on Capitol Hill over how to address systemic racism in policing and use of excessive force.”).

41. Felicia Sonmez, Paul Kane, & Rhonda Colvin, *House Passes Broad Police Reform Legislation in Wake of George Floyd’s Killing*, WASH. POST (June 25, 2020, 9:44 PM), https://www.washingtonpost.com/powerpost/house-poised-to-pass-broad-police-reform-legislation-in-wake-of-george-floyds-killing/2020/06/25/445307f8-b6ed-11ea-a8da-693df3d7674a\_story.html [https://perma.cc/32UM-KHWU].

42. *Senator Mike Braun Discusses Bill Reforming Police Qualified Immunity*, NAT’L PUB. RADIO (June 24, 2020, 8:08 AM), https://www.npr.org/2020/06/24/882678441/confederate-flag-ban-at-marine-corps-opens-up-wider-conversation-on-racism [https://perma.cc/6GEA-ZFT5] (“We spent time because eliminating qualified immunity is a poison pill or a non-starter.”).

43. See, e.g., Sonmez et al., *supra* note 41 (discussing the landscape of police reform legislation); Emily Cochran & Luke Broadwater, *Here Are the Differences Between the Senate and House Bills to Overhaul Policing*, N.Y. TIMES (June 17, 2020), https://nyti.ms/2UTDz30 [https://perma.cc/GL9F-29AL].

44. See, e.g., Robert Barnes, *Supreme Court Asked to Reconsider Immunity Available to Police Accused of Brutality*, WASH. POST (June 4, 2020, 5:25 PM), https://www.washingtonpost.com/politics/courts\_law/supreme-court-asked-to-reconsider-immunity-available-to-police-accused-of-brutality/2020/06/04/99266d2c-a5b0-

hear a case that would have provided it with an opportunity to revisit the validity of the doctrine.<sup>45</sup> Thus, absent additional developments in the political or judicial arenas, the qualified immunity defense will remain available to police defendants in excessive force litigation.<sup>46</sup>

### C. *Graham v. Connor*

The Supreme Court's decision in *Graham* represented a critical milestone in excessive force jurisprudence because it definitively established the standard for courts to use in determining whether Section 1983 plaintiffs had met their burden under the first part of the qualified immunity test—to show that the defendants violated the Fourth Amendment by using excessive force against them. The Court held that excessive force claims are to be analyzed pursuant to an objective reasonableness standard and that courts must balance “the nature and quality of the intrusion on the individual's Fourth Amendment interests’ against the countervailing governmental interests at stake.”<sup>47</sup> “[T]he ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”<sup>48</sup> The *Graham* decision, like others before it, recognized that it is often necessary for the police to use some degree of force when making an arrest or investigatory stop.<sup>49</sup> However, unlike in previous cases, the *Graham* Court explicitly directed lower courts to consider, among

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11ea-b473-04905b1af82b\_story.html [https://perma.cc/G55B-HRSG] (discussing recent dissenting opinions by Justices Sotomayor and Thomas expressing doubts about the doctrine of qualified immunity).

45. See, e.g., Robert Barnes & Ann E. Marimow, *Supreme Court Sidesteps Controversies Over Gun Control, ‘Sanctuary Cities’ and Immunity For Police Accused of Using Excessive Force*, WASH. POST (June 15, 2020, 5:40 PM), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-sidesteps-controversies-over-gun-control-sanctuary-cities-and-immunity-for-police-accused-of-using-excessive-force/2020/06/15/a262ed9e-af37-11ea-8758-bfd1d045525a\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-sidesteps-controversies-over-gun-control-sanctuary-cities-and-immunity-for-police-accused-of-using-excessive-force/2020/06/15/a262ed9e-af37-11ea-8758-bfd1d045525a_story.html) [https://perma.cc/T7GD-FURU] (“The justices also declined to take up a form of immunity that has shielded police officers from lawsuits alleging excessive force and other civil rights violations.”).

46. Of course, were the doctrine of qualified immunity to be eradicated, the proposal contained in the Article would take on even more importance because liability for excessive force under Section 1983 would then turn solely on the court's application of the “reasonable officer on the scene” standard.

47. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks omitted) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

48. *Id.* at 397.

49. *Id.* at 396 (citing *Terry v. Ohio*, 392 U.S. 1, 22–27 (1968)). An officer has the authority to use “some degree of physical coercion or threat thereof” during the course of an arrest, and “[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.” *Id.* at 395–97 (citation omitted) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), *rejected by Graham*, 490 U.S. at 399); see also *id.* at 396–97 (cautioning against evaluating police officer conduct “with the 20/20 vision of hindsight”).

other things, “the severity of the crime at issue, whether the [plaintiff] pose[d] an immediate threat to the . . . officer[']s or others['] safety, and whether [the plaintiff was] actively resisting arrest or attempting to evade arrest by flight.”<sup>50</sup>

The *Graham* Court’s guidance regarding how to decide whether there is an underlying constitutional violation that supports a claim under Section 1983 centers on its establishment of a reasonable officer standard of care. Rather than judging the officers’ conduct by an ordinary reasonable person standard, the *Graham* Court held that the reasonableness of use of force “must be judged from the perspective of a reasonable officer on the scene.”<sup>51</sup> This is the first time that the Court articulated the standard of care to be applied in excessive force cases. The *Graham* Court did not provide any guidance regarding what characteristics of reasonable police officers should be taken into account in assessing the reasonableness of their use of force under Section 1983 other than to caution the lower courts to allow for the fact that “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>52</sup>

Since *Graham* was decided, the Supreme Court consistently has reaffirmed that the “reasonable police officer on the scene” standard of care governs the adjudication of excessive force claims under Section 1983.<sup>53</sup> In fact, the Court has stated that this standard is a key component of the “settled and exclusive framework for analyzing whether the force used in making a seizure complies with the Fourth Amendment.”<sup>54</sup> While the Court has noted that “[a] court (judge or jury) cannot apply this standard

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50. *Id.* at 396. The severity of any injury sustained by the plaintiff may also be taken into account. *Wardlaw v. Pickett*, 1 F.3d 1297, 1304 n.7 (D.C. Cir. 1993) (holding that although the severity of injury “is not by itself the basis for deciding whether the force used was excessive, . . . it is a relevant factor”). Courts have recognized that while the *Graham* factors are “useful,” they should not be “mechanically” applied and do not obviate the need for courts to “slosh [their] way through the factbound morass of ‘reasonableness.’” *Scott v. Harris*, 550 U.S. 372, 383 (2007).

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

52. *Id.* at 397.

53. *See, e.g., Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene . . .” (internal quotation marks omitted)); *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (holding that courts must evaluate “[t]he ‘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” (alteration in original) (internal quotation marks omitted)); *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472–73 (2015) (“A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight.”); *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014) (“We analyze this question from the perspective ‘of a reasonable officer on the scene . . .’”).

54. *Mendez*, 137 S. Ct. at 1546.



mechanically,” and that its application turns on the “facts and circumstances of each particular case,”<sup>55</sup> the Court has yet to offer guidance on what makes a reasonable officer different from an ordinary reasonable person on the scene. Unfortunately, Supreme Court jurisprudence in this area to date has focused solely on one dimension of the law enforcement profession—its “tense[ness]” and “uncertain[ty]”<sup>56</sup>—while all but ignoring the training, experience, and professional standards that distinguish police officers from civilians. Thus, many of the lower court judges who have applied the “reasonable officer on the scene” standard of care—largely in the context of summary judgment motions by police defendants—have done so by trying to put themselves (and their lack of any law enforcement training and experience) into the shoes of trained law enforcement officers and imagining what they experienced. And the typical jury instructions in excessive force cases, while parroting the “reasonable officer on the scene” standard of care from *Graham*, focus—much like *Graham* and its progeny—only on the conduct of the Section 1983 plaintiff and the stress of law enforcement, rather than the distinctive characteristics of a law enforcement officer.<sup>57</sup> Absent consideration of an officer’s training, experience, and applicable department policies, determinations

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55. *Kingsley*, 135 S. Ct. at 2473 (internal quotation marks and citation omitted).

56. *See, e.g., Graham*, 490 U.S. at 396–97.

57. One such model jury instruction states:

The right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of official coercion or threat thereof to effect it. The amount of force used to effect a particular seizure must be reasonable. In determining whether the amount of force used in this case was reasonable, you may consider all of the facts and circumstances, including the severity of the crime at issue, whether the suspects posed an immediate threat to the officers or others, and whether the subjects were attempting to evade or resist arrest.

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than the 20/20 vision of hindsight. In determining whether the use of force was reasonable, you may consider that police officers are often forced to make split-second judgments—in circumstances that may be tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

JOHN W. WITT ET AL., POLICE CASE INSTRUCTIONS, FORM 5-20 INSTRUCTIONS: USE OF REASONABLE FORCE, SECTION 1983 LITIGATION FORMS § 5.04 (2d ed. 2019); *see also* MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION § 12:21 (2019) (“There is no precise definition or formula available for determining whether force is excessive in a particular case. You should take into account the severity of the crime the police were investigating, whether the plaintiff posed an immediate threat to the safety of the officers or others, and whether the plaintiff was actively resisting arrest or attempting to avoid arrest by fleeing. Whether the officer used reasonable force must be judged from the perspective of a reasonable police officer on the scene, the totality of circumstances confronting the officer and the time available to the officer to assess the need for force under the circumstances of this case.”).

of reasonableness by judges and juries will remain imbalanced and unfaithful to the *Graham* standard.

## II. POLICE OFFICERS HAVE TRAINING AND EXPERIENCE RELEVANT TO THE USE OF FORCE THAT ORDINARY PEOPLE DO NOT

Training and experience distinguish a reasonable police officer from an ordinary reasonable person.<sup>58</sup> Police officers are subject to a training period both in the academy and in the field prior to becoming sworn officers and receive continuing education and training after officially joining the force.<sup>59</sup> This training and education, which is intended to cover all aspects of police work, focuses to a large extent on whether, when, and how to use force.<sup>60</sup> Police officers also gain experience with respect to the use of force simply by working as a police officer and being exposed to all of the situations—some of which are dangerous and call for decisions about whether and how to use force—that officers encounter day after day, year after year. An ordinary reasonable person lacks training relevant to the use of force and typically has no meaningful experience in how to use or minimize the use of force. Thus, it is no surprise that police officers outperform civilians in making decisions about when and how to use force.<sup>61</sup>

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58. The applicability of standardized professional guidelines to the use of force by police officers also distinguishes a reasonable officer from an ordinary reasonable person. See David B. Goode, *Law Enforcement Policies and the Reasonable Use of Force*, 54 WILLAMETTE L. REV. 371, 374 (2018) (“Department policies guide police action and discretion and prepare police for tense situations in the field, providing some of the most important guidance to officers regarding when the use of force is necessary or appropriate.”). However, this Article does not contain a detailed background discussion of those policies not only because it is obvious that police officers are subject to policies governing the use of force that are not applicable to civilians, but because other works already contain detailed summaries and analyses of use-of-force policies. See, e.g., *id.* at 384–90; Garrett & Stoughton, *supra* note 17, at 249–90.

59. See BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2007 12 (2011), <https://www.bjs.gov/content/pub/pdf/lpd07.pdf> [<https://perma.cc/7ZEM-4GAZ>] [hereinafter REAVES, LOCAL POLICE DEPARTMENTS].

60. See BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2013 5 (2016), <https://www.bjs.gov/content/pub/pdf/slleta13.pdf> [<https://perma.cc/6T6W-4M3V>] [hereinafter REAVES, TRAINING ACADEMIES].

61. See, e.g., Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1015, 1017 (2007). In this study, researchers conducted a video simulation exercise that compared the performance of police officer and civilian groups in making shoot/don’t shoot decisions when presented with armed and unarmed subjects under a variety of situations and time constraints. The study found that police officers outperformed the civilians by having faster reaction times, making correct shoot/don’t shoot decisions more quickly, differentiating between armed and unarmed targets, showing less racial bias, and ultimately exercising more restraint in making the decision to shoot. In short, the officers “showed greater discriminability and a less trigger-happy orientation in general,” suggesting that “expertise improves the outcome of the decision process.” *Id.* at 1017.

A. *Training*

Police training can be divided into three categories: academy training, field training, and in-service training.<sup>62</sup> Police academies introduce recruits to the profession and provide them with opportunities in the classroom and simulated settings to practice and develop the skills necessary to become a police officer.<sup>63</sup> Field training typically follows academy graduation, where recruits put the techniques learned in the academy into practice under the guidance of one or more experienced training officers.<sup>64</sup> In-service training continues throughout an officer's time on the force to replenish perishable skills, remind officers of proper tactics and procedures, and introduce officers to new policing approaches, strategies, and policies as they become incorporated into an agency's training program.<sup>65</sup>

1. *Police Officer Training is Substantial*

While there are variations in police training programs, all law enforcement officers receive a substantial amount of training. This training is largely centered around the use of force and generally includes simulations and use-of-force continuums to educate officers not only on how to use force, but when it is proper (or not) to do so.<sup>66</sup>

The police academy is typically the first step a cadet takes on the path to becoming a sworn officer.<sup>67</sup> Police academies tend to employ classroom, lecture-based learning in conjunction with hands-on scenario training.<sup>68</sup> In 2013, the average police recruit received 806 hours, or about twenty weeks, of police academy training.<sup>69</sup> The major topics covered at police academies are almost all pertinent to the use of force, including

62. REAVES, LOCAL POLICE DEPARTMENTS, *supra* note 59.

63. Steven Hundersmarck, *Police Recruit Training: Facilitating Learning Between the Academy and Field Training*, FBI L. ENFORCEMENT BULL., Aug. 2009, at 26–27.

64. Cary A. Caro, *Predicting State Police Officer Performance in the Field Training Officer Program: What Can We Learn from the Cadet's Performance in the Training Academy?*, 36 AM. J. CRIM. JUST. 357, 358 (2011).

65. See REAVES, LOCAL POLICE DEPARTMENTS, *supra* note 59; Emma Covelli & William Breslin, 2018 ANNUAL TRAINING NEEDS ASSESSMENT, PORTLAND POLICE BUREAU, at 5 (2018), <https://www.portlandoregon.gov/Police/article/725855> [<https://perma.cc/ZWY2-4AJ2>].

66. REAVES, TRAINING ACADEMIES, *supra* note 60, at 5–6; William Terrill & Stephen D. Mastrofski, *Situational and Officer-Based Determinants of Police Coercion*, 19 JUST. Q. 215, 225 (2002).

67. Some departments impose educational requirements in lieu of or in addition to a state police academy training. For example, the Minnesota Board of Peace Officer Standards and Training requires either a college degree, an associate's degree or higher, or acceptable military experience in lieu of college. *Minnesota POST License*, MINNEAPOLISMN.GOV (last updated Mar. 28, 2019), [http://www.ci.minneapolis.mn.us/police/recruiting/reqs/police\\_recruiting\\_post](http://www.ci.minneapolis.mn.us/police/recruiting/reqs/police_recruiting_post) [<https://perma.cc/26SV-BWGA>].

68. Hundersmarck, *supra* note 63; REAVES, TRAINING ACADEMIES, *supra* note 60, at 5–6.

69. REAVES, TRAINING ACADEMIES, *supra* note 60, at 4.

firearms training (seventy-one hours on average), defensive tactics (sixty hours), patrol procedures (fifty-two hours), emergency vehicle operations (thirty-eight hours), non-lethal weapons (sixteen hours), and targeted training on the use of force itself (twenty-one hours).<sup>70</sup> Focused use-of-force training typically includes modules on departmental use-of-force policies and continuums, deescalation tactics, and crisis intervention.<sup>71</sup>

Field training is usually the next step in a cadet's professional development. Field training programs allow cadets to apply the skills and knowledge they acquired in classroom and simulation settings to real-life situations.<sup>72</sup> A defining feature of field training programs is the presence of one or more senior training officers who oversee the activities of the cadet.<sup>73</sup> One of the most widely used field training programs is the "San Jose Model," which rotates recruits so they are paired with multiple experienced training officers in various areas of the department while the cadets are given progressively more difficult assignments.<sup>74</sup> For police academies that administer their own field training programs,<sup>75</sup> the average program length in 2013 was approximately 500 hours, with larger municipal police departments averaging close to 630 hours.<sup>76</sup>

Thus, taking into account time spent at the academy and in field training, recruits receive a substantial amount of training prior to becoming sworn police officers. In 2007, the average police department recruit completed 1,370 hours of training before becoming a sworn officer, an increase of more than 100 hours compared to 2003.<sup>77</sup> Recruits in larger departments completed even more training, with recruits in jurisdictions of more than 500,000 residents averaging 1,700 hours of training prior to officially joining the force.<sup>78</sup>

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70. *Id.* Recently, police academies have started to incorporate elements of community policing into police academy curricula. Allison T. Chappell, *Police Academy Training: Comparing Across Curricula*, 31 POLICING 36, 37 (2008). These training modules focus on increasing recruits' understanding of the communities they will police to provide them with a greater capacity to solve recurring problems and effectively communicate and engage with those communities when they reach the field. *Id.* at 39. As of 2013, nearly all police academies provided some training in community policing, with an average forty-hour training requirement regarding community policing strategies. REAVES, TRAINING ACADEMIES, *supra* note 60, at 7.

71. REAVES, TRAINING ACADEMIES, *supra* note 60.

72. *Id.* at 4; Caro, *supra* note 64.

73. Caro, *supra* note 64.

74. *Id.*

75. Field training programs can be administered by a police academy, hiring agency, or police department prior to the cadet's enlistment as a full officer. REAVES, TRAINING ACADEMIES, *supra* note 60, at 4 (stating that while thirty-seven percent of academies had a mandatory field training segment after academy, an additional forty-four percent of academies reported there was a field training requirement that was overseen by hiring agencies).

76. *Id.*

77. REAVES, LOCAL POLICE DEPARTMENTS, *supra* note 59, at 6, 12.

78. *Id.* at 12.

Nearly all police officers are also required to perform in-service training.<sup>79</sup> On average, U.S. police officers perform thirty-five hours of in-service training per year.<sup>80</sup> The Portland, Oregon Police Bureau (PPB) provides a representative example of an in-service training program. The focus of the PPB's in-service training program is to help officers maintain skills the department considers "perishable" and to provide officers with updates on new trends, equipment, and policies that maximize their performance under "unpredictable and complicated circumstances."<sup>81</sup> Areas of emphasis in the PPB's in-service training program include handgun training, self-defense, takedowns, shoot/don't-shoot decision-making, electric weapon (Taser) decision-making, and vehicle tactics.<sup>82</sup>

2. *Several Areas of Officer Training Impact Decisions About Whether and How to Use Force*

Police training emphasizes use-of-force tactics and decision-making. Some sources estimate around ninety percent of police recruit training time is spent on topics pertinent to use of force.<sup>83</sup> Officer training emphasizes tactical thinking in approaching encounters with civilians and planning responses to potential resistance. These tactics translate into field application, where an officer's "tactical awareness" can allow the officer to control the scene of an encounter by choosing when and where to initiate contact.<sup>84</sup> With respect to firearms training, police recruits frequently train under nighttime or reduced-light conditions and simulated stressful conditions.<sup>85</sup> Defensive tactics training typically includes weapon retention, verbal command presence, ground fighting, pressure-point control, and speed cuffing.<sup>86</sup>

While the full range of use-of-force police training programs is beyond the scope of this Article, nearly all recruits receive use-of-force training involving mock scenarios that allow the recruits to "practice critical decision-making, execute standard operating procedures, and employ potentially life-preserving tactics under the duress of realistic conditions."<sup>87</sup> Among other things, this training consists of arrest control tactics, verbal tactics, self-defense, firearm simulations, use-of-force continuums, use of Tasers and other non-lethal weapons, and threat assessment.<sup>88</sup> Over

79. *Id.* (stating that ninety-two percent of U.S. police departments required such training in 2007).

80. *Id.*

81. Covelli & Breslin, *supra* note 65, at 5.

82. *Id.* at 6–7, 9, 11, 13, 15, 18.

83. *See* Chappell, *supra* note 70, at 38.

84. Seth Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 866 (2014).

85. REAVES, TRAINING ACADEMIES, *supra* note 60, at 5.

86. *Id.* Some academies also provide training on specific uses of force that is supposed to be non-lethal, such as neck and full-body restraints. *Id.*

87. *Id.* at 6.

88. *Id.*

eighty percent of police academies provide specific training on identifying and responding to uses of excessive force by other officers.<sup>89</sup> And the vast majority of police academies train cadets on issues such as domestic violence and mental illness that can be catalysts for the use of force.<sup>90</sup>

Thus, while there are legitimate grounds upon which to critique existing police officer training programs and to advocate for new and improved training, it is beyond dispute that police officers receive substantial amounts of training—including meaningful training on the use of force—that civilians do not. This training should make police officers better than civilians at avoiding the use of force and, when force is necessary, minimizing the use of that force.

### B. *Experience*

After their initial training is completed, police officers enter a work environment that presents numerous opportunities to deploy use-of-force tactics in complex, real-life situations. Repeated exposure to and experiences with highly charged and potentially volatile situations should further enhance a law enforcement officer's ability to address a situation without resorting to excessive force.

It is difficult to make generalizations about law enforcement "experience," as police officers perform their duties in widely varying environments. Factors such as rank on the force, geography, beat assignment, shift time, and department culture help shape a police officer's environment, which impacts the frequency and nature of his exposure to situations where the use of force might be required.<sup>91</sup> For example, a Special Weapons and Tactics (SWAT) officer will almost certainly have greater exposure to dangerous situations and more opportunities to make use-of-

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89. *Id.*

90. *Id.* at 7.

91. See, e.g., Kevin J. Barrett et al., *A Comparative Study of the Attitudes of Urban, Suburban, and Rural Police Officers in New Jersey Regarding the Use of Force*, 52 CRIME L. & SOC. CHANGE 159, 171–73 (2009) (finding that differences in attitudes of urban, suburban, and rural police officers toward arrests, and use of force may be attributable to differences in training, department culture, officer rank or education, geographical location, experiences in the field (such as the frequency of exposure to drugs, guns, gangs and criminal activity in general), or a combination of these factors); Thomas D. Bazley et al., *Police Use of Force: Detectives in an Urban Police Department*, 31 CRIM. JUST. REV. 213, 214, 221 (2006) (detectives, who are usually not first responders or intervenors, experienced different types of civilian resistance in arrests compared to patrol officers); Lois James et al., *The Impact of Work Shift and Fatigue on Police Officer Response in Simulated Interactions with Citizens*, 14 J. EXP. CRIMINOL. 111, 117 (2018) (finding that "substantive natures of day- versus night-shift police work may affect officers' responses in citizen interactions"); John Liederbach, *Addressing the "Elephant in the Living Room: An Observational Study of the Work of Suburban Police*, 28 POLICING 415, 430–31 (2005) (officers in suburban and rural areas have fewer encounters with civilians and spend less of their shift time interacting with civilians compared to urban "beat cops").

force decisions than most other types of officers.<sup>92</sup> Patrol officers, who are more likely to be first responders or intervenors thrust into uncertain and volatile situations, typically will have more of these opportunities than police detectives, who usually investigate crimes after they have been committed.<sup>93</sup> Officers who regularly work the night shift may view police work through a different lens than their day-shift counterparts, leading to experiential differences that might inform an officer's use-of-force decisions.<sup>94</sup> A deputy policing a small rural town of a few hundred people will have a vastly different experience than a patrol officer in Los Angeles with respect to civilian encounters and the use of force.<sup>95</sup> Nonetheless, despite these variables, there is evidence to suggest that more experienced law enforcement officers are less likely to use excessive force than less experienced officers.<sup>96</sup>

Regardless of the specific environment in which a police officer operates, the "presence [of] or potential for *danger*" are factors with which almost every officer who is placed in a position to interact with civilians needs to contend.<sup>97</sup> While no law enforcement officer is in constant danger—even patrol officers on the most crime-ridden and violent beats typically spend significant portions of their shifts in settings where they are unlikely to encounter violent civilians<sup>98</sup>—police officers operate in a work environment that is fraught with risk.<sup>99</sup> Indeed, each year a large number of U.S. law enforcement officers are the victims of assault.<sup>100</sup> In large ur-

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92. See, e.g., Joan N. Vickers & William Lewinski, *Performing under Pressure: Gaze Control, Decision Making and Shooting Performance of Elite and Rookie Police Officers*, 31 HUM. MOVEMENT SCI. 101, 115 (2012) (comparing superior performance of emergency response team officers to the performance of other officers in making use-of-force decisions).

93. See Bazley et al., *supra* note 91, at 221 ("During the course of their on-duty rotations, patrol officers have frequent encounters with members of the public, some of which evolve into use of force situations. Detectives' investigative (as opposed to patrol) responsibilities afford fewer such exposures.")

94. See James, *supra* note 91, at 117 ("For example, officers who work during the day may have more opportunities to interact with citizens in less threatening and more cooperative situations, and, therefore, have increased opportunities to hone these skills.")

95. See, e.g., Barrett et al., *supra* note 91, at 171 (finding that urban officers displayed a more street-smart, pragmatic, and no-nonsense attitude toward arrests and use of force, while rural officers displayed a more book-smart, legalistic, and technically precise attitude towards police work, and suburban officers fell somewhere in between); Liederbach, *supra* note 82, at 431.

96. See *infra* notes 102–05 and accompanying text.

97. Eugene A. Paoline III, *Taking Stock: Toward a Richer Understanding of Police Culture*, 31 J. CRIM. JUST. 199, 200 (2003).

98. Liederbach, *supra* note 91, at 417–18.

99. See CLAIRE MAYHEW, OCCUPATIONAL HEALTH AND SAFETY RISKS FACED BY POLICE OFFICERS, TRENDS & ISSUES IN CRIME & CRIM. JUST. 1–2 (Austl. Inst. of Criminology 2001), <http://www.aic.gov.au/publications/tandi/tandi196> [https://perma.cc/VRL4-KDTP].

100. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, 2018 1–2 (2019), <https://ucr.fbi.gov/leoka>

ban areas, many officers will have exposure (often repeated exposure) to dangerous situations involving a risk of death or serious bodily harm.<sup>101</sup> It seems incontestable that officers' experiences in dangerous situations teach them lessons about how to address these situations without using excessive force. An officer encountering a potentially dangerous civilian for the fifth, tenth, fiftieth, or one hundredth time is presumably better equipped to handle that interaction than someone who has never been in that situation before.

While this Article does not purport to contain anything approaching an exhaustive survey of police behavioral research, there is evidence to suggest that more experienced police officers tend to use less force than their less-experienced colleagues.<sup>102</sup> Rather than harden emotionally, as some might suspect, research suggests that experienced officers often exhibit higher levels of emotional intelligence than rookies.<sup>103</sup> Inexperienced officers show, on average, a higher propensity to take risks and enter dangerous situations, while officers with greater experience tend to be more risk-averse and likely to follow the rules.<sup>104</sup> And while higher education levels are often found to correlate with a higher (and safer) level of police officer performance, researchers have found that this effect does not materialize until officers have several years of on-the-job experience.<sup>105</sup> All of this strongly suggests that job experience impacts officers' levels of performance and meaningfully distinguishes them from ordinary people.

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/2018/topic-pages/officers-assaulted.pdf [https://perma.cc/FW9V-BR5Q] ("Law enforcement agencies reported that 58,866 officers were assaulted while performing their duties in 2018. The rate of officer assaults in 2018 was 10.8 per 100 sworn officers." (internal reference omitted)).

101. In one survey of officers from major metropolitan police forces, a significant number of respondents reported that they had been shot at, threatened with weapons, or trapped in life-threatening situations. At least fifty percent of surveyed officers from departments in New York City, San Jose, and Oakland, California, reported having one or more of those experiences. Daniel S. Wiess et al., *Frequency and Severity Approaches to Indexing Exposure to Trauma: The Critical Incident History Questionnaire for Police Officers*, 23 J. TRAUMATIC STRESS 734, 738 (2010).

102. Eugene A. Paoline, III & William Terrill, *Police Education, Experience, and the Use of Force*, 34 CRIM. JUST. & BEHAV. 179, 192–93 (2007).

103. See Louis Laguna et al., *An Examination of Authoritarian Personality Traits Among Police Officers: The Role of Experience*, 25 J. POLICE & CRIM. PSYCHOL. 99, 103 (2010).

104. *Id.*

105. Scott M. Smith & Michael G. Aamodt, *The Relationship Between Education, Experience, and Police Performance*, 12 J. POLICE & CRIM. PSYCHOL. 7, 12–13 (1997) ("This study shows that college educated police officers improve their performance as they acquire more experience. This effect is not found for the lesser-educated officers . . . [I]t takes several years of on-the-job police experience for the benefits of a college education to become apparent.").



III. THE INCONSISTENT, HAPHAZARD, OVERLY DEFERENTIAL, AND  
SPECULATIVE APPLICATION OF THE “REASONABLE OFFICER  
ON THE SCENE” STANDARD

In the absence of any guidance from the Supreme Court on how to determine the perspective of a reasonable officer on the scene, most courts have used the reasonable officer standard as a justification for exonerating police officers accused of excessive force.<sup>106</sup> Indeed, while paying lip service to the reasonable officer standard, the courts seem to be applying something akin to a more lenient “reasonable person” standard—or perhaps a standard even more lenient than that—in Section 1983 excessive force cases.<sup>107</sup> Their decisions (and jury instructions) are not taking into account training, experience, or any other characteristics of law enforcement officers that make them better able than ordinary reasonable people to handle stressful encounters on the street without using excessive force. The only thing about being a police officer that is factoring into many excessive force analyses is that it is stressful. Indeed, as applied to date, “reasonable officer” in the excessive force context often means little more than “reasonable person with a very stressful and dangerous job.” But that is a misapplication of the standard of care. Rather than considering all the evidence of how a professional law enforcer might view and react to the situation differently from them, judges and juries too often view the use of force from their own untrained perspectives with an extra layer of deference to the police because they have a dangerous job. That is inconsistent with the *Graham* Court’s direction to determine the perspective of a reasonable officer on the scene.

A. *Graham v. Connor*

*Graham* involved a Section 1983 claim by Dethorne Graham, a diabetic, against several Charlotte, North Carolina police officers for injuries he sustained during an investigative stop.<sup>108</sup> Graham and a friend, William Berry, went to a convenience store to get some orange juice for Graham to counteract an insulin reaction, but they left because the checkout line was too long.<sup>109</sup> They decided to drive to Graham’s friend’s house

106. See Garrett & Stoughton, *supra* note 17, at 218 (noting that the current approach to determining the reasonableness of allegedly excessive force “rarely result[s] in compensation to persons injured by police officers”).

107. See Stoughton, *supra* note 84, at 897 (“By concluding that most use-of-force situations require officers to make ‘split-second judgments,’ the Court has adopted a more deferential standard for reviewing police violence than the circumstances typically require.”).

108. *Graham v. Connor*, 490 U.S. 386, 388 (1989). The *Graham* Court, which was reviewing a decision of the United States Court of Appeals for the Fourth Circuit affirming the entry of judgment as a matter of law (then known as a directed verdict) in favor of the police officers, considered the evidence in the light most favorable to Graham. *Id.*

109. *Id.* at 388–89.

instead.<sup>110</sup> While en route, Graham and Berry were stopped by a Charlotte police officer who followed their car because he became suspicious when he saw Graham “hastily enter and leave the store.”<sup>111</sup> Berry told the officer that Graham was simply suffering from a sugar reaction, but the officer ordered both Graham and Berry to remain on the scene until he was able to find out what, if anything, happened at the convenience store.<sup>112</sup>

When the officer went to his patrol car to call for backup assistance, Graham exited the vehicle he was in, ran around it twice, and then sat down on the curb, where he briefly blacked out before regaining consciousness.<sup>113</sup> Other officers arrived on the scene, and the following took place:

One of the officers rolled Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry’s pleas to get him some sugar. Another officer said: “I’ve seen a lot of people with sugar diabetes that never acted like this. Ain’t nothing wrong with the M.F. but drunk. Lock the S.B. up.” Several officers then lifted Graham up from behind, carried him over to Berry’s car, and placed him face down on its hood.<sup>114</sup>

When Graham told the officers that he had a diabetic decal in his wallet, one of the officers told him to “shut up” and shoved his face against the hood of the car.<sup>115</sup> Four officers then grabbed Graham and threw him headfirst into a police squad car.<sup>116</sup> After Graham was secured in the police car, the officers refused to allow him to have some orange juice that a friend had brought to him.<sup>117</sup> The officers eventually released Graham after they confirmed he had not engaged in any misconduct at the convenience store.<sup>118</sup>

Graham’s injuries included a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder.<sup>119</sup> He filed suit against the officers under Section 1983 and the case proceeded to a jury trial.<sup>120</sup> After Graham rested his case but before the case was submitted to the jury, the district court granted the police defendants’ motion for a directed verdict

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110. *Id.* at 389.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 390.

120. *Id.*

and entered judgment on their behalf.<sup>121</sup> The Fourth Circuit affirmed the district court's decision.<sup>122</sup>

The *Graham* Court reversed the Fourth Circuit on the ground that its decision was based on “an erroneous view of the governing substantive law.”<sup>123</sup> Rather than evaluate the excessive force claim under the substantive due process rubric, like the courts below, which included consideration of the officers' subjective intent, the Supreme Court held that the excessive force claim was governed by the Fourth Amendment and its “objective reasonableness” inquiry.<sup>124</sup> The Supreme Court remanded the case to the district court for “reconsideration . . . under the proper Fourth Amendment standard.”<sup>125</sup> Although this was the first case in which the Supreme Court held that “the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene,”<sup>126</sup> the Court did not provide guidance as to how to determine that perspective.<sup>127</sup>

#### B. *Scott v. Harris*

*Scott v. Harris*,<sup>128</sup> decided in 2007, is one of the Supreme Court's most widely cited excessive force decisions. It appears to be the first excessive

121. *Id.* at 390–91. The motion for directed verdict was made pursuant to Federal Rule of Civil Procedure 50, which provides that the court may enter judgment against a party in lieu of submitting the case to the jury if that party “has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” FED. R. CIV. P. 50(a)(1). Motions for directed verdict are now called motions for judgment as a matter of law. *Id.* (advisory committee's note to 1991 amendment).

122. *Graham*, 490 U.S. at 391.

123. *Id.* at 399.

124. *See supra* Section I.C (discussing this aspect of the *Graham* decision in greater detail).

125. *Graham*, 490 U.S. at 399. There are no reported decisions in the *Graham* case after it was remanded by the Supreme Court to the district court for further proceedings.

126. *Id.* at 396.

127. For example, would a reasonable police officer on the scene have become suspicious simply because Graham “hastily” entered and left the convenience store? *Id.* at 389. Did the police officers receive training on the medical needs of diabetics and how to accommodate those needs during encounters with them? If so, did the officers act consistently with that training? Were the police officers familiar, by training or experience, with the diabetic decal that Graham wanted to show them? Was the harsh physical treatment of Graham—who was unarmed, sitting on the curb, and had just passed out—consistent with use-of-force training received by the officers? Did the officers comply with or deviate from any department policies or procedures that prescribed how they should have conducted themselves under the circumstances? The answers to these questions are important to a meaningful determination of “the perspective of a reasonable officer on the scene” with “careful attention to the facts and circumstances of each particular case.” *Id.* at 396.

128. 550 U.S. 372 (2007).

force case decided by the Court that involved a video record of the allegedly unconstitutional interaction between the Section 1983 plaintiff and the police.<sup>129</sup> The decision, which granted qualified immunity to a deputy sheriff who paralyzed a motorist by purposefully ramming his vehicle off the road during a high-speed chase, is notable because it altered the approach to the adjudication of summary judgment motions in excessive force cases (and, arguably all cases) involving video evidence. Instead of viewing the facts in the light most favorable to the party opposing summary judgment—typically the plaintiff in a Section 1983 case—the *Scott* Court instructed lower courts to “view[ ] the facts in the light depicted by the videotape.”<sup>130</sup> Based on its independent review of the dashboard camera video of the chase, including the maneuver that ended the pursuit and caused the plaintiff’s injuries, the Court in an 8–1 decision authored by Justice Scalia held “it is quite clear that Deputy Scott did not violate the Fourth Amendment.”<sup>131</sup> This holding was not based on a meaningful application of the “reasonable officer on the scene” standard of care, but the personal views of the Justices—uninformed by any evidence regarding the training, expertise, and experience of law enforcement professionals—about what was objectively reasonable in light of the video of the encounter.

The vehicle pursuit at issue in *Scott* began when police clocked Victor Harris’s vehicle at seventy-three miles per hour, which was above the appli-

129. See Jessica Silbey, *Cross-Examining Film*, 8 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 17, 17–18 (2008) (noting that *Scott v. Harris* may be “the first time that the Supreme Court disregarded all other evidence and declared the film version of the disputed events as the unassailable truth”).

130. *Scott*, 550 U.S. at 381.

131. *Id.* at 381. This holding, which reversed the decisions of both lower courts to deny Deputy Scott’s motion for summary judgment, has been the subject of considerable criticism on civil procedure grounds, as summary judgment is normally reserved only for those cases where no reasonable juror could find for the party opposing the summary judgment motion. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (holding that “summary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party”). While *Scott* reflects the Court’s judgment that the video record of the encounter was so unambiguous and one-sided that it would be unreasonable for a juror to find that the force used by Deputy Scott was unconstitutionally excessive, researchers have found a substantial difference of opinion regarding the officer’s conduct that undermines this conclusion. Professor Dan Kahan’s research team found that when it allowed the video to “speak for itself”—as the *Scott* Court encouraged readers of its opinion to do—“what it says depends on to whom it is speaking.” Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 903 (2009). As Kahan observed:

Whites and African Americans, high-wage earners and low-wage earners, Northeasterners and Southerners and Westerners, liberals and conservatives, Republicans and Democrats—all varied significantly in their perceptions of the risk that Harris posed, of the risk the police created by deciding to pursue him, and of the need to use deadly force against Harris in the interest of reducing public risk.

*Id.*

cable fifty-five-mile-per-hour speed limit.<sup>132</sup> Instead of pulling over when a Georgia county deputy activated the blue flashing lights on his police car, Harris sped away, “initiating a chase down what is in most portions a two-lane road, at speeds exceeding 85 miles per hour.”<sup>133</sup> The pursuit of Harris continued for about six minutes.<sup>134</sup> At that point, Deputy Scott brought an end to the chase:

Scott decided to attempt to terminate the episode by employing a “Precision Intervention Technique (‘PIT’) maneuver, which causes the fleeing vehicle to spin to a stop.” Having radioed his supervisor for permission, Scott was told to “[g]o ahead and take him out.” Instead, Scott applied his push bumper to the rear of respondent’s vehicle. As a result, respondent lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. Respondent was badly injured and was rendered a quadriplegic.<sup>135</sup>

Harris filed suit against Deputy Scott and others pursuant to Section 1983, alleging that he was the subject of an unreasonable seizure under the Fourth Amendment.<sup>136</sup> Deputy Scott moved for summary judgment on the ground that he was entitled to qualified immunity.<sup>137</sup> The district court denied the motion, finding that “there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury.”<sup>138</sup> On interlocutory appeal,<sup>139</sup> the United States Court of Appeals for the Eleventh Circuit affirmed the district court’s decision.<sup>140</sup>

The Supreme Court reversed.<sup>141</sup> Although it cited *Graham* as providing the governing objective reasonableness framework for analyzing a Fourth Amendment excessive force claim,<sup>142</sup> the Court curiously omitted

132. *Scott*, 550 U.S. at 374.

133. *Id.* at 374–75.

134. *Id.* at 375.

135. *Id.* (alteration in original) (internal quotation marks and citations omitted) (footnote omitted). Deputy Scott decided to use his bumper to push Harris off the road, rather than execute the PIT maneuver, because he was “concerned that the vehicles were moving too quickly to safely execute the [PIT] maneuver.” *Id.* at 375 n.1.

136. *Id.* at 375–76.

137. *Id.* at 376.

138. *Id.*

139. Since qualified immunity is treated as “an *immunity from suit* rather than a mere defense to liability,” an order denying qualified immunity, although interlocutory, is immediately appealable—otherwise, it would be “effectively unreviewable.” *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985).

140. *Scott*, 550 U.S. at 376.

141. *Id.*

142. *Id.* at 381.

any reference to the “reasonable officer on the scene” standard.<sup>143</sup> Indeed, rather than make an effort to analyze evidence in the record bearing upon whether a reasonable law enforcement officer would have used force to terminate the pursuit of Harris and, if so, whether the force used by Deputy Scott was excessive, the Court simply watched the video and supported its decision with the personal opinions of the Justices. The Court characterized Harris’s speed during the pursuit—which vacillated throughout the six-minute pursuit and topped out around eighty-five miles per hour<sup>144</sup>—as “shockingly fast” and the pursuit itself as “a Hollywood-style car chase of the most frightening sort.”<sup>145</sup> That may be how eight Justices perceived the events depicted on the video, but the Court made no effort to determine how the pursuit would look and feel to a trained law enforcement officer who had likely been involved in other vehicle pursuits.<sup>146</sup> Indeed, in response to a portion of Justice Stevens’s dissent analogizing the risk posed by the chase to the risk posed by a speeding ambulance, the Court stated: “It is not our experience that ambulances and fire engines careen down two-lane roads at 85-plus miles per hour, with an unmarked scout car out in front of them.”<sup>147</sup> Of course, what matters under *Graham* is not the experience and perspective of judges, but the experience and perspective of a reasonable police officer on the scene.

In “slosh[ing] [its] way through the factbound morass of ‘reasonable-ness,’”<sup>148</sup> the *Scott* Court never once considered the training and experience of the defendant officers or their compliance with applicable policies and procedures in addressing the risk posed by Harris’s vehicle and deciding whether it was reasonable to meet that risk with a potentially deadly use of force.<sup>149</sup> After taking into account its own view of the risks posed to

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143. See Harmon, *supra* note 28, at 1136 (noting that the *Scott* Court does “[not] . . . even cite *Graham* in its analysis of the reasonableness of Scott’s actions”).

144. Harris signaled before making several turns during the pursuit and, at one point, pulled into the parking lot of a shopping center before returning to the highway. *Scott*, 550 U.S. at 375.

145. *Id.* at 379–80.

146. See generally Stoughton, *supra* note 84, at 847–51 (observing that the majority of the Supreme Court’s factual assertions about police practices “are made entirely without support or citation, raising concerns about whether the Court is acting based on a complete and accurate perception,” criticizing the Court’s “casual approach to policing facts,” and further noting that “[w]hen it comes to policing facts, the Court too often gets it wrong”).

147. *Scott*, 550 U.S. at 379 n.6.

148. *Id.* at 383.

149. See Garrett & Stoughton, *supra* note 17, at 234 (“The *Harris* decision was notable in the way that it ignored the subject of police policy and practice. None of the Justices focused on the issue of police practices in the area—an issue on which experts provided opinions at trial and one that the parties briefed and developed through deposition testimony. . . . Although it is absent from both the Court’s opinion and the dissent, the record below focused not just on alternatives to a police chase, but also on the policy and training provided to the officers that chose to engage in this high-speed chase. Perhaps the most remarkable aspect of

innocent bystanders, the risk posed to Harris, and Harris's culpability relative to the innocent bystanders, the Court simply found that it was "reasonable for Scott to take the action that he did."<sup>150</sup> In attempting to determine the perspective of a reasonable officer on the scene, the Court failed to consider, among other things, police officer training with respect to vehicle pursuits (including when to abandon vehicle pursuits in the interest of public safety),<sup>151</sup> training on techniques to terminate car chases without the use of deadly force (such as the PIT maneuver that Deputy Scott received permission to, but did not, use to terminate the chase), other training and policies regarding use of force, experience with respect to vehicle pursuits involving drivers with the characteristics of Harris (who was unarmed and not suspected of any criminal violations other than speeding at the time he fled), knowledge of the area in which the pursuit took place, and training and policies with respect to using potentially dangerous techniques to end a vehicular chase that had not been the subject of supervisory approval. Instead, the Court oddly found that "[i]t is irrelevant to our analysis whether Scott had permission to take the precise actions he took."<sup>152</sup>

### C. *The Supreme Court's Most Recent Excessive Force Cases*

There has been no further evolution of the "reasonable officer on the scene" standard in recent Supreme Court jurisprudence. The reasonable officer remains one-dimensional—the equivalent of an ordinary reasonable person working in a highly stressful and dangerous environment. The Court is not considering the training and experience of defendant officers

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the record in the *Harris* case was Deputy Scott's deposition testimony admitting that he had *no* training on how to conduct the PIT maneuver that he used to stop Harris's vehicle, and that he received authorization to use the maneuver without discussing any relevant details with his supervisor.").

150. *Scott*, 550 U.S. at 384.

151. In response to Harris's argument that the dangerous situation would have been avoided if the "police had simply ceased their pursuit," the Court declined to "lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger" because of the "perverse incentives such a rule would create." *Id.* at 385–86. That is a different issue, however, than whether a reasonable officer on the scene of this particular vehicle pursuit—in view of the training, expertise, and experience of the defendant officers—would have decided to terminate the chase as opposed to knocking Harris off the highway and into an embankment.

152. *Id.* at 375 n.1. While it makes sense that the objective reasonableness of a police officer's use of force would not turn solely on whether he received permission from his supervisor to use that method and degree of force, the presence or absence of permission—including permission to use a method of force different than the one the officer later decided to use—certainly seems relevant to a determination of the perspective of a reasonable officer on the scene. One would expect most reasonable officers to seek and obtain such approval, where possible, before exerting potentially lethal force on a civilian.

or their level of compliance with applicable policies and procedures when it comes to evaluating their alleged use of excessive force.<sup>153</sup>

### 1. Plumhoff v. Rickard

In *Plumhoff v. Rickard*,<sup>154</sup> the Court overruled two lower court decisions that denied qualified immunity to police officers who shot and killed the driver of a fleeing vehicle to put an end to a car chase.<sup>155</sup> The Court held that the officers did not violate the Fourth Amendment and were therefore entitled to protection under the first prong of the qualified immunity test.<sup>156</sup>

The police shooting in *Plumhoff* traces back to a traffic stop where an officer pulled over a Honda Accord driven by Donald Rickard because the car had only one operating headlight.<sup>157</sup> The officer asked Rickard to step out of the car based on, among other things, Rickard's nervousness and failure to comply with the officer's request to produce his driver's license.<sup>158</sup> Instead of stepping out of the vehicle, Rickard sped away.<sup>159</sup>

The officer got in his police cruiser and pursued Rickard with five other police cars joining the chase.<sup>160</sup> While on Interstate I-40, with the police in hot pursuit, Rickard "swerv[ed] through traffic at high speeds," reaching more than 100 miles per hour, and passed more than two dozen vehicles.<sup>161</sup> The officers tried to stop Rickard on I-40 using a "rolling roadblock" but were unsuccessful.<sup>162</sup> After Rickard exited I-40, he made

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153. The Supreme Court's disregard for evidence of officer training and experience in determining the perspective of a reasonable officer on the scene is puzzling in view of the Court's statement in the criminal law context that the "experience and specialized training" that police officers receive allow them "to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

154. 572 U.S. 765 (2014).

155. *Id.* at 768.

156. *Id.* The Court also ruled, in the alternative, that the officers were entitled to qualified immunity under the second prong of the qualified immunity test because they "violated no clearly established law." *Id.* Because this Article focuses on the role of the standard of care in determining whether there was a constitutional violation in the excessive force context, rather than whether the law was "clearly established" under a specific set of factual circumstances, it does not address the Court's alternative prong-two ruling.

157. *Id.* The Court noted that it was viewing the facts "in the light most favorable to the . . . daughter of the driver who attempted to flee" because the case arose from the denial of the officers' motion for summary judgment. *Id.*

158. *Id.* at 768–69.

159. *Id.* at 769.

160. *Id.*

161. *Id.*

162. *Id.* (quoting *Estate of Allen v. City of West Memphis*, Nos. 05-2489, 05-2585, 2011 WL 197426, at \*2 (W.D. Tenn. Jan. 20, 2011), *aff'd in part*, 509 F. App'x 388 (6th Cir. 2012), *rev'd and remanded sub. nom.* *Plumhoff v. Rickard*, 572 U.S. 765 (2014)).



contact with one of the police cars and spun out into a parking lot, which caused him to collide with another police car.<sup>163</sup>

At that point, the following events took place, which culminated in the fatal shooting of Rickard:

Rickard put his car into reverse “in an attempt to escape.” As he did so, [two officers] got out of their cruisers and approached Rickard’s car, and [one officer], gun in hand, pounded on the passenger-side window.<sup>164</sup> At that point, Rickard’s car “made contact with” yet another police cruiser. Rickard’s tires started spinning, and his car “was rocking back and forth,” indicating that Rickard was using the accelerator even though his bumper was flush against a police cruiser.<sup>165</sup>

At that moment, one of the officers fired three shots into Rickard’s car.<sup>166</sup> Rickard then maneuvered the car out of the parking lot and onto the street, requiring one of the officers to sidestep the vehicle.<sup>167</sup> Two officers fired a total of twelve shots toward Rickard’s car as he tried to drive away down the street—“bringing the total number of shots fired during this incident to 15.”<sup>168</sup> At that point, Rickard “lost control of the car and crashed into a building.”<sup>169</sup> Rickard and his passenger both died from a combination of gunshot wounds and injuries suffered in the crash.<sup>170</sup> Rickard’s surviving daughter filed a Section 1983 action alleging that her father’s death was the result of an unconstitutional exercise of excessive force.<sup>171</sup>

The Court assessed whether the officers’ conduct violated the Fourth Amendment under the first prong of the qualified immunity analysis by reference to the “reasonable officer on the scene” standard articulated in *Graham*.<sup>172</sup> But rather than analyze how a reasonable officer would have handled the vehicle pursuit in view of his training, expertise, and experience, the Justices<sup>173</sup> simply pretended they were in the officers’ shoes and expressed their own views on whether the Fourth Amendment allowed the officers to use deadly force to terminate the chase:

Rickard’s outrageously reckless driving posed a grave public safety risk. And while it is true that Rickard’s car eventually col-

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163. *Id.*

164. A woman named Kelly Allen was in the passenger’s seat during the entire incident. *Id.* at 768.

165. *Id.* at 769–70 (quoting *Estate of Allen*, 2011 WL 197426, at \*3).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 774–75.

173. Justice Alito authored the opinion of the Court. *Id.* at 767.

lided with a police car and came temporarily to a near standstill, that did not end the chase. . . . Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road. . . . In light of the circumstances . . . the police acted reasonably in using deadly force to end that risk.<sup>174</sup>

But how could the Justices know “all that a reasonable officer could have concluded” without any examination of the training, expertise, and experience of the officers that would inform their conclusions?<sup>175</sup> Perhaps the Court would have landed in the same place after considering evidence of these characteristics which differentiate law enforcement officers from ordinary people. But skipping that step is inconsistent with *Graham*’s directive to determine the perspective of a reasonable officer on the scene.

With respect to Rickard’s contention that even if the use of deadly force was permissible, the officers acted unreasonably by firing a total of fifteen shots, the Court simply held: “It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.”<sup>176</sup> But the Court did not even attempt to view this part of its analysis through the lens of a reasonable officer on the scene. Indeed, it provided no basis for its conclusion that a reasonable police officer would have considered Rickard “a severe threat to public safety” after the events in the parking lot—other than the personal opinions of the Justices. And it did not mention use-of-force and other training or policies that would inform when a reasonable officer should “stop shooting”; rather, the Justices simply opined that “[i]t stands to reason” that the officers could keep shooting until the threat was over.<sup>177</sup>

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174. *Id.* at 776–77.

175. Presumably, a reasonable police officer’s assessment of the risk posed by Rickard at the point he was shot and killed and whether it was appropriate to use deadly force to address that threat would be informed by, among other things, (1) training received with respect to vehicle pursuits (including when to abandon vehicle pursuits in the interest of public safety), (2) training on techniques to terminate car chases without the use of deadly force (such as the “rolling roadblock” technique that the officers unsuccessfully attempted prior to the events in the parking lot), (3) department policies and procedures regarding use of force, (4) experience with respect to vehicle pursuits involving drivers with the characteristics of Rickard (who apparently was unarmed and not suspected of any criminal violations at the time he fled), (5) knowledge of the neighborhood surrounding the parking lot, and (6) training and policies regarding where to aim when firing at a fleeing vehicle. The Court did not consider any of these factors in deciding what a reasonable police officer would have done under the circumstances.

176. *Plumhoff*, 572 U.S. at 777.

177. *Id.*

## 2. City &amp; County of San Francisco v. Sheehan

*City & County of San Francisco v. Sheehan*<sup>178</sup> is another recent Supreme Court decision that fails to meaningfully apply the reasonable officer standard of care. Teresa Sheehan was a resident of a group home for people with mental illnesses.<sup>179</sup> After Sheehan began acting erratically and threatened to kill a social worker who visited Sheehan's room to check on her, San Francisco police officers Kimberly Reynolds and Kathrine Holder were sent to the home to help escort Sheehan to a facility for temporary evaluation and treatment.<sup>180</sup> When the officers first entered Sheehan's room, she grabbed a kitchen knife and threatened to kill them.<sup>181</sup> The officers retreated out of the room and Sheehan closed the door, leaving Sheehan inside the room alone and the officers in the hallway.<sup>182</sup>

The officers were concerned that Sheehan might (1) "gather more weapons" because Reynolds "observed other knives in her room"; or (2) "try to flee through the back window," although Sheehan's room was on the second floor and "she likely would have needed a ladder to escape."<sup>183</sup> Based on these concerns, they made the decision to re-enter the room without waiting for backup.<sup>184</sup> With their guns drawn, the officers pushed open the door to Sheehan's room and went inside.<sup>185</sup> Then:

When Sheehan, knife in hand, saw them, she again yelled for them to leave. She may also have again said that she was going to kill them. Sheehan is "not sure" if she threatened death a second time, . . . but "concedes that it was her intent to resist arrest and use the knife." . . . In any event, Reynolds began pepper-spraying Sheehan in the face, but Sheehan would not drop the knife. When Sheehan was only a few feet away, Holder shot her twice, but she did not collapse. Reynolds then fired multiple shots.<sup>186</sup>

Sheehan survived her gunshot wounds and brought an action for excessive force against the officers under Section 1983.<sup>187</sup> While the district

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178. 135 S. Ct. 1765 (2015).

179. *Id.* at 1769.

180. *Id.* at 1769–70.

181. *Id.* at 1770.

182. *Id.*

183. *Id.* The Court noted that "[f]ire escapes . . . are common in San Francisco" but that the officers did not know whether Sheehan's room had a fire escape. *Id.*

184. *Id.* at 1770–71.

185. *Id.* at 1771.

186. *Id.* (citations omitted). The Court noted that "[t]here is a dispute regarding whether Sheehan was on the ground for the last shot," but decided that this dispute was "not material" because "[e]ven if Sheehan was on the ground, she was certainly not subdued." *Id.* at 1771 n.2 (third internal quotation marks omitted) (quoting *Sheehan v. City & County of San Francisco*, 743 F.3d 1211, 1230 (9th Cir. 2014), *rev'd in part, dismissed in part*, 135 S. Ct. 1765 (2015)).

187. *Id.* at 1771.

court entered summary judgment in favor of the officers, the Ninth Circuit reversed, holding that a reasonable jury “could find that the officers ‘provoked’ Sheehan” by entering her room a second time “when there was no objective need for immediate entry.”<sup>188</sup>

The Supreme Court did not mention the “reasonable officer on the scene” standard in deciding that the officers who shot Sheehan were entitled to qualified immunity. Without any discussion of evidence that would inform the decisions of a reasonable police officer confronted with the situation in Sheehan’s room, the Court found that, absent Sheehan’s mental disability, there was “no doubt” that the officers “could have opened her door the second time without violating any [constitutional] rights.”<sup>189</sup> Although Sheehan was alone in her room behind a closed door, the Court found that it was reasonable for the officers to re-enter her room because they knew that Sheehan had threatened to use the knife on them and “delay could make the situation more dangerous.”<sup>190</sup> Rather than making a meaningful attempt to ascertain the perspective of a reasonable officer on the scene, the Court simply noted that “police officers are often forced to make split-second judgments”<sup>191</sup> and that their conduct may be consistent with the Fourth Amendment even when it turns out, “with the benefit of hindsight,” that they “made ‘some mistakes.’”<sup>192</sup> Then, without any attempt to consider how reasonable law enforcers would have behaved once back inside Sheehan’s room, the Court found that shooting Sheehan multiple times did not constitute excessive force: “Nothing in the Fourth Amendment barred Reynolds and Holder from protecting themselves, even though it meant firing multiple rounds.”<sup>193</sup>

There was evidence in the record that Officers Reynolds and Holder did not follow their training by entering Sheehan’s room a second time—especially without waiting for additional resources to arrive on the scene—and shooting her. Sheehan offered expert testimony in the district court that “San Francisco trains its officers when dealing with the mentally ill to ‘ensure that sufficient resources are brought to the scene,’ ‘contain the subject’ and ‘respect the suspect’s comfort zone,’ ‘use time to their advantage,’ and ‘employ non-threatening verbal communication and open-ended questions to facilitate the subject’s participation in communica-

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188. *Id.* at 1771–72 (quoting *Sheehan*, 743 F.3d at 1216, 1229).

189. *Id.* at 1779.

190. *Id.*

191. *Id.* (quoting *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014)).

192. *Id.* (quoting *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014)). The Court ultimately decided not to reach the issue of whether it was a constitutional violation for the officers to re-enter the room in view of Sheehan’s disability because that issue had not been adequately briefed by the parties. *Id.* Instead, the Court held that the officers were entitled to qualified immunity with respect to their decision to re-enter the room because, under prong two of the qualified immunity test, that decision did not violate clearly established law. *Id.*

193. *Id.* (citing *Plumhoff*, 134 S. Ct. at 2022).

tion.”<sup>194</sup> The Court stated that evidence that the officers disregarded their training did not matter for qualified immunity purposes as the officers “had sufficient reason to believe that their conduct was justified,” “[c]onsidering the specific situation confronting [them].”<sup>195</sup> But the Court’s limited discussion of the topic merely suggests that an officer’s compliance—or lack of compliance—with her training, while perhaps relevant to the qualified immunity question, is not dispositive of the inquiry:

Even if an officer acts contrary to her training, however, (and here, given the generality of that training, it is not at all clear that Reynolds and Holder did so), that does not itself negate qualified immunity where it would otherwise be warranted. Rather, so long as “a reasonable officer could have believed that his conduct was justified,” a plaintiff cannot “avoi[d] summary judgment by simply producing an expert’s report that an officer’s conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.”<sup>196</sup>

If *Sheehan* simply stands for the proposition that an officer’s failure to comply with his training in a use-of-force situation does not amount to a per se violation of the reasonable officer standard, it seems consistent with *Graham*. After all, one can imagine situations where a reasonable officer on the scene of a stressful, rapidly evolving situation might deviate from his training to account for factors not fully anticipated in training exercises. One can also envision situations where a reasonable officer might make modest accidental departures from training protocols. But if the *Sheehan* Court truly meant that a police officer’s failure to comply with his training in a use-of-force situation is irrelevant to the qualified immunity inquiry,<sup>197</sup> that cannot be squared with *Graham*’s instruction to judge the reasonableness of force by reference to the perspective of a reasonable officer on the scene. How could the training received by police officers not be relevant to a determination of what a reasonable police officer would do in a particular situation? Presumably, most reasonable police officers would follow their training. While a deviation from training does not conclusively establish that an officer acted unreasonably, it is hard to see how it does not meaningfully impact the determination of a reasonable officer’s perspective. But, consistent with its other leading excessive force decisions since *Graham*, the *Sheehan* Court either ignored the “rea-

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194. *Id.* at 1777 (quoting Brief for Respondent at 7, *id.* (No. 13-1412)). The record also contained evidence of a San Francisco policy “to use hostage negotiators’ when dealing with ‘a suspect [who] resists arrest by barricading himself.’” *Id.* (quoting Brief for Respondent, *supra*, at 8).

195. *Id.* at 1777–78.

196. *Id.* at 1777 (alteration in original) (quoting *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002)).

197. The exact language used in the opinion authored by Justice Alito is: “Nor does it matter for purposes of qualified immunity that Sheehan’s expert, Reiter, testified that the officers did not follow their training.” *Id.*

sonable officer on the scene” standard of care or misapplied it by failing to take into account evidence that would shed light on whether a reasonable officer on the scene—in view of his training and experience, as well as the policies and procedures he was required to follow—would have done what Reynolds and Holder did.<sup>198</sup>

### 3. *The “Prong-Two” Qualified Immunity Decisions*

A recent trend in Supreme Court excessive force jurisprudence is that the Court is bypassing prong one of the qualified immunity analysis—the stage where the Court relies upon the “reasonable officer on the scene” standard of care to determine whether there was a violation of the Fourth Amendment—and deciding the case solely under prong two. As set forth in Section I.B of this Article, while the Supreme Court previously required courts to first decide whether a constitutional violation occurred before moving on to whether the right that was violated was clearly established,<sup>199</sup> it changed its approach in 2009 to allow courts to take up the qualified immunity inquiry in whatever order makes sense under the circumstances.<sup>200</sup> Of course, if a court grants qualified immunity to officers on the ground that the constitutional right at issue was not “clearly established” (prong two), there is no need for the court to decide whether that right was violated in the first place (prong one). These “prong-two” decisions represent another way to avoid meaningful application of the “reasonable officer on the scene” standard of care which the Court is embracing with increasing frequency. Although these cases do not purport to apply the reasonable officer standard, they merit at least brief consideration for two reasons. First, these cases involve troubling police conduct that likely falls short of the “reasonable officer on the scene” standard of care (which might explain why the Court skipped prong one in deciding them). Second, Justice Sotomayor’s dissenting opinions in these cases, which include her analysis under both prongs of the qualified immunity test, are noteworthy because they come closer than any Supreme

198. See Garrett & Stoughton, *supra* note 17, at 236–37 (“The Court’s 2015 ruling in *City & County of San Francisco v. Sheehan* similarly disregarded what a reasonable and trained officer would do in approaching a mentally ill person.”). In addition to training and policies on how to deal with heated situations involving mentally ill civilians, a reasonable police officer’s assessment of the risk posed by Sheehan when Reynolds and Holder re-entered her room and ultimately shot her presumably would be informed by, among other things, (1) their professional experiences with respect to mental illness, (2) training and policies regarding use of force, (3) training, policies, and experience regarding the identification of emergency situations (as there would have been no need to rush back into Sheehan’s room absent some type of emergency), (4) training, policies, and experience regarding whether to go in alone or await the arrival of backup officers, and (5) training (if any) regarding firing at a suspect when the suspect is lying on the ground. The Court did not consider evidence of any of these factors in deciding what a reasonable police officer would have done under the circumstances.

199. Saucier v. Katz, 533 U.S. 194, 201 (2001).

200. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

Court opinion since *Graham* to a faithful implementation of the “reasonable officer on the scene” standard of care.<sup>201</sup>

a. *Kisela v. Hughes*

*Kisela v. Hughes*<sup>202</sup> involved an excessive force claim by Amy Hughes.<sup>203</sup> Hughes was holding a kitchen knife and standing about six feet away from another woman, Sharon Chadwick, when Officer Andrew Kisela shot her four times through a fence even though “Hughes appeared calm,” Chadwick told the officers to “take it easy,” the officers had interacted with Hughes for less than one minute, and the two other officers with Kisela did not fire their weapons.<sup>204</sup> Relying on the “clearly established” language from prong two of the Court’s qualified immunity test, the Court held that “[t]his is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.”<sup>205</sup>

Justice Sotomayor, in an opinion joined by Justice Ginsburg, disagreed: “Viewing the facts in the light most favorable to Hughes, as the Court must at summary judgment, a jury could find that Kisela violated Hughes’ clearly established Fourth Amendment rights by needlessly

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201. Justice Sotomayor’s opinions also take issue with the Supreme Court’s “one-sided approach to qualified immunity” under which the Court “routinely displays an unflinching willingness ‘to summarily reverse courts for wrongly denying officers the protection of qualified immunity’ but ‘rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.’” *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (alteration in original) (quoting *Salazar-Limon v. Houston*, 137 S. Ct. 1277, 1282–83 (2017) (Sotomayor, J., dissenting from denial of certiorari)). The premise of this Article is that a more evidentially robust and evenhanded application of the “reasonable officer on the scene” standard of care during prong one of the qualified immunity analysis would help rectify the imbalance in the outcomes of excessive force cases.

202. 138 S. Ct. 1148 (2018).

203. *Id.* at 1150–51.

204. *Id.* Consistent with the summary judgment standard, the Court “[v]iew[ed] the record in the light most favorable to Hughes.” *Id.* at 1151. A 911 caller told the officers that Hughes “had been acting erratically” prior to their arrival on the scene. *Id.* The description of the relevant facts in Justice Sotomayor’s dissenting opinion included the following:

Hughes stood stationary about six feet away from Chadwick, appeared “composed and content,” . . . and held a kitchen knife down at her side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else. Faced with these facts, the two other responding officers held their fire, and one testified that he “wanted to continue trying verbal command[s] and see if that would work.” . . . But not Kisela. He thought it necessary to use deadly force, and so, without giving a warning that he would open fire, he shot Hughes four times, leaving her seriously injured.

*Id.* at 1155 (Sotomayor, J., dissenting) (alteration in original) (citations omitted).

205. *Id.* at 1153.

resorting to lethal force.”<sup>206</sup> Unlike the majority opinion, the dissent engaged in both parts of the qualified immunity analysis, beginning with the first step of determining whether Kisela violated Hughes’s Fourth Amendment rights by exerting excessive force against her. In making this first-step determination, Justice Sotomayor referenced the “reasonable officer on the scene” standard of care and engaged in what appears to be the most rigorous application of that standard in a Supreme Court opinion since *Graham*. Rather than just project herself into the encounter between Kisela and Hughes and try to decide whether it was reasonable for Kisela to shoot Hughes multiple times, Justice Sotomayor considered evidence bearing on whether a reasonable officer would have acted as Kisela did. For example, Hughes submitted expert testimony concluding that Kisela “should have used his Taser” instead of a gun and that “shooting his gun through the fence was dangerous because a bullet could have fragmented against the fence and hit Chadwick or his fellow officers.”<sup>207</sup> Justice Sotomayor also considered the experience of other officers in trying to determine the perspective of a reasonable officer on the scene:

[T]he other two officers on the scene declined to fire at Hughes, and one of them explained that he was inclined to use “some of the lesser means” than shooting, including verbal commands, because he believed there was time “[t]o try to talk [Hughes] down.” . . . That two officers on the scene, presented with the same circumstances as Kisela, did not use deadly force reveals just how unnecessary and unreasonable it was for Kisela to fire four shots at Hughes.<sup>208</sup>

This evidence compelled Justice Sotomayor to conclude that a reasonable jury—looking at the situation from the perspective of a reasonable officer on the scene—could find that Kisela “acted outside the bounds of the Fourth Amendment by shooting Hughes four times.”<sup>209</sup>

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206. *Id.* at 1155 (Sotomayor, J., dissenting). The dissent elaborated: At its core, then, the “clearly established” inquiry boils down to whether Kisela had “fair notice” that he acted unconstitutionally. . . . The answer to that question is yes. This Court’s precedents make clear that a police officer may only deploy deadly force against an individual if the officer “has probable cause to believe that the [person] poses a threat of serious physical harm, either to the officer or to others.” . . . Because Kisela plainly lacked any legitimate interest justifying the use of deadly force against a woman who posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police encounter, he was not entitled to qualified immunity.

*Id.* at 1158 (Sotomayor, J., dissenting) (alteration in original) (citations omitted).

207. *Id.* at 1157 (Sotomayor, J., dissenting) (citing *Hughes v. Kisela*, 862 F.3d 775, 781 (9th Cir. 2016), *rev’d*, 138 S. Ct. 1148 (2018)). This expert opinion was based on training officers receive with respect to use of force, in general, and firearms and ballistics, in particular.

208. *Id.* (Sotomayor, J., dissenting) (second and third alterations in original) (citation omitted).

209. *Id.* at 1157–58 (Sotomayor, J., dissenting).



b. *Mullenix v. Luna*

*Mullenix v. Luna*<sup>210</sup> is another case where a police officer shot and killed a motorist who was the subject of a vehicle pursuit. After a police sergeant approached Israel Leija's car with a warrant for his arrest, Leija sped away and was pursued by law enforcement officers.<sup>211</sup> The ensuing chase, which reached speeds between 85 and 110 miles per hour, lasted approximately eighteen minutes.<sup>212</sup> During the chase, the police developed a plan to disable Leija's vehicle by setting up tire spike strips at locations they expected the vehicle to reach based on police radio communications.<sup>213</sup> An officer who reported to one of these locations where the police hoped to intercept Leija, Chadrin Mullenix, came up with an alternative idea—"shooting at Leija's car in order to disable it"—although he had not received any training on this technique or previously attempted it.<sup>214</sup> Mullenix asked for input from his supervisor about this idea over police radio, but "exited his vehicle and, armed with his service rifle, took a shooting position on the overpass" before receiving a response.<sup>215</sup> Mullenix's supervisor advised him by radio to "'stand by' and 'see if the spikes work[ed] first,'" but there was a dispute about whether Mullenix could hear those instructions from his location outside his police car.<sup>216</sup> About three minutes after Mullenix assumed his shooting position, he spotted Leija's vehicle approaching his location with a police car in pursuit<sup>217</sup> and the following events ensued:

As Leija approached the overpass, Mullenix fired six shots. Leija's car continued forward beneath the overpass, where it engaged the spike strip, hit the median, and rolled two and a half

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210. 136 S. Ct. 305 (2015) (per curiam).

211. *Id.* at 306.

212. *Id.* Twice during the chase, Leija called the police dispatcher, threatening to shoot at the police officers if they did not let him go. *Id.* "The dispatcher relayed Leija's threats, together with a report that Leija might be intoxicated," to the officers involved in the pursuit. *Id.* However, the district court noted that subsequent examination of the crime scene revealed that Leija did not have a firearm inside his vehicle. *Luna v. Mullenix*, No. 2:12-CV-152-J, 2013 WL 4017124, at \*3 (N.D. Tex. Aug. 7, 2013), *aff'd*, 765 F.3d 531 (5th Cir. 2014), *withdrawn and superseded*, 773 F.3d 712 (5th Cir. 2014), *rev'd*, 136 S. Ct. 305 (2015).

213. *Mullenix*, 136 S. Ct. at 306. The opinion noted that the officers who were setting up the strips "had received training on the deployment of spike strips, including on how to take a defensive position so as to minimize the risk posed by the passing driver." *Id.* (citing *Luna v. Mullenix*, 773 F.3d 712, 716 (5th Cir. 2014), *rev'd*, 136 S. Ct. 305 (2015)).

214. *Id.*

215. *Id.* at 307.

216. *Id.* (quoting *Luna*, 773 F.3d at 716–17).

217. There was no evidence that any of the officers with whom Mullenix was in communication—including an officer stationed below him under the overpass—had expressed any concern for their safety. *Id.* at 313 (Sotomayor, J., dissenting).

times. It was later determined that Leija had been killed by Mullenix's shots, four of which struck his upper body.<sup>218</sup>

Leija's family filed an excessive force claim against Mullenix under Section 1983.<sup>219</sup> Mullenix filed a motion for summary judgment based on the doctrine of qualified immunity, but the district court denied his motion, finding that "[t]here are genuine issues of fact as to whether Trooper Mullenix acted recklessly, or acted as a reasonable, trained peace officer would have acted in the same or similar circumstances."<sup>220</sup> The Court of Appeals for the Fifth Circuit agreed with the district court and held in favor of Leija's family.<sup>221</sup>

The Supreme Court reversed solely on the ground that the Fourth Amendment right allegedly violated by Mullenix was not clearly established under the circumstances.<sup>222</sup> The Court noted that it has "never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity" and that "[c]ases decided by the lower courts . . . likewise have not clearly established that deadly force is inappropriate in response to conduct like Leija's."<sup>223</sup> Moreover, the Court found that "none of [its] precedents 'squarely govern[ed]' the facts" confronted by Mullenix.<sup>224</sup> Thus, the Court held, even had Mullenix violated the Fourth Amendment, it would not have been a clearly established violation based on the specific circumstances faced by Mullenix and the state of the case law at that point in time.<sup>225</sup> The Court passed on the question of "whether there was a Fourth Amendment violation in the first place."<sup>226</sup>

Again, Justice Sotomayor dissented and, again, unlike the majority who focused solely on the "clearly established" standard in prong two of the qualified immunity test, she considered Mullenix's conduct under the "reasonable officer on the scene" standard.<sup>227</sup> And again, Justice Sotomayor's dissent provides one of the few examples of a Supreme Court opinion that meaningfully follows the *Graham* Court's guidance to adjudicate excessive force claims from the perspective of a reasonable officer. Justice Sotomayor considered three types of evidence to try to ascertain

218. *Id.* at 307.

219. *Luna v. Mullenix*, 773 F.3d 712, 717 (5th Cir. 2014), *rev'd*, 136 S. Ct. 305 (2015).

220. *Id.* at 307 (alteration in original) (internal quotation marks omitted) (quoting *Luna v. Mullenix*, No. 2:12-CV-152, 2013 WL 4017124, at \*6 (N.D. Tex. Aug. 7, 2013), *aff'd*, 765 F.3d 531 (5th Cir. 2014), *withdrawn and superseded*, 773 F.3d 712 (5th Cir. 2014), *rev'd*, 136 S. Ct. 305 (2015).

221. *Id.* at 307.

222. *Id.* at 308, 312.

223. *Id.* at 310–11.

224. *Id.* at 310.

225. *Id.* at 310–12.

226. *Id.* at 308.

227. *Id.* at 313–14 (Sotomayor, J., dissenting).

that perspective. First, Justice Sotomayor considered Mullenix's lack of training in the technique he attempted to execute: "Mullenix had no training in shooting to disable a moving vehicle and had never seen the tactic done before."<sup>228</sup> Second, Justice Sotomayor examined whether Mullenix had supervisory approval to try this new technique, concluding that he did not.<sup>229</sup> And third, Justice Sotomayor inquired into whether the officer had experience with the efficacy of the new technique that might cause a reasonable officer to deploy it despite having never been trained on it or seen it used or authorized to use it. She concluded that the answer was no:

Nor was there any evidence that shooting at the car was more reliable than the spike strips. The majority notes that spike strips are fallible. . . . But Mullenix had no information to suggest that shooting to disable a car had a higher success rate, much less that doing so with no training and at night was more likely to succeed. Moreover, not only did officers have training in setting up the spike strips, but they had also placed two backup strips further north along the highway in case the first set failed. A reasonable officer could not have thought that shooting would stop the car with less danger or greater certainty than waiting.<sup>230</sup>

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228. *Id.* at 313 (Sotomayor, J., dissenting).

229. *Id.* (Sotomayor, J., dissenting) ("He also lacked permission to take the shots: When Mullenix relayed his plan to his superior officer, Robert Byrd, Byrd responded 'stand by' and 'see if the spikes work first.'" (quoting *Luna v. Mullenix*, 773 F.3d 712, 716–17 (5th Cir. 2014), *rev'd*, 136 S. Ct. 305 (2015))).

230. *Id.* at 314–15 (Sotomayor, J., dissenting) (citation omitted). Other evidence would also be relevant to the determination of the perspective of a reasonable officer on the scene, such as (1) training and policies with respect to vehicle pursuits (including when to abandon vehicle pursuits in the interest of public safety), (2) training, policies, and experience with respect to the need for supervisory approval before using deadly force, (3) training and policies with respect to techniques to terminate car chases without the use of deadly force (such as the "spike strip" technique that the officers had decided to implement before Mullenix opened fire), (4) knowledge of the area of the pursuit, (5) other training and policies regarding use of force, and (6) training (if any) regarding where to aim when firing at a fleeing vehicle—assuming it was in the record that the Supreme Court reviewed. Indeed, the district court opinion in *Mullenix* stated that an internal police review of the shooting concluded that the shooting "was not justified given the high speed of the fleeing vehicle, the elevated position Mullenix chose to deploy, the amount of time Mullenix took to discuss using his firearm with Trooper Rodriguez and Deputy Shipman, and Mullenix's conversation with the DPS communications operator to request permission to shoot at Leija's vehicle." *Luna v. Mullenix*, No. 2:12-CV-152, 2013 WL 4017124, at \*3 (N.D. Tex. Aug. 7, 2013), *aff'd*, 765 F.3d 531 (5th Cir. 2014), *withdrawn and superseded*, 773 F.3d 712 (5th Cir. 2014), *rev'd*, 136 S. Ct. 305 (2015). The police inspector general found that "the firearm discharge was reckless and without due regard for the safety of Canyon PD Officer Ducheneaux or Leija." *Id.* While this report is not dispositive of whether Mullenix is entitled to qualified immunity, it certainly bears on the question of whether the force used to terminate the car chase was excessive from the perspective of a reasonable officer. However, the majority opinion in *Mullenix* did not consider it.

Thus, Justice Sotomayor concluded that “it was clearly established under the Fourth Amendment that an officer in Mullenix’s position should not have fired the shots.”<sup>231</sup>

c. Lower Federal Court Decisions After *Graham*

The lower federal courts<sup>232</sup> generally have followed the Supreme Court’s lead in failing to meaningfully implement the “reasonable officer on the scene” standard of care in excessive force lawsuits decided since *Graham*.<sup>233</sup> In case after case, rather than making a genuine effort to ascertain the perspective of a reasonable law enforcement officer by examining evidence of the defendant officers’ training, experience, and level of compliance with applicable policies and procedures, judges adjudicating summary judgment motions by police defendants are typically using their imaginations to try to divine whether a police use of force was reasonable under the circumstances.<sup>234</sup> And because these judges do not have law enforcement training or the perspective and experience of police officers who patrol their beats on a daily basis, it stands to reason that they are more likely than a reasonable law enforcement professional to overreact to a stressful situation on the street and countenance the use of force against civilians who appear to pose a threat to the officers or the public at large. This leads courts to defer to law enforcement defendants—sometimes in situations involving highly questionable uses of force—without any evidentiary rationale for their findings that the officers acted as a reasonable officer on the scene would have acted under the same circumstances. There are some cases, however, where district and appellate courts have relied on record evidence to determine the perspective of a reasonable officer on the scene. While those cases do not provide any kind of consistent evidentiary framework, they provide at least a small window into what more meaningful excessive force adjudication should look like.

Some of the lower court judges to issue pro-police decisions have described their obligation under *Graham* in terms of a duty to “avoid substi-

231. *Mullenix*, 136 S. Ct. at 313 (Sotomayor, J., dissenting). It is not clear whether the dissent in *Mullenix* analyzed Mullenix’s conduct under both prongs of the qualified immunity test or just the second prong, as did the majority. As set forth above, the reasonable officer standard of care is most pertinent to the first prong, which asks the threshold question of whether a law enforcement defendant violated the plaintiff’s constitutional rights.

232. While state courts also may exercise jurisdiction over Section 1983 actions, most of these cases are litigated in federal court, either because the plaintiff filed suit there or because a defendant removed the case from state to federal court. Zamoff, *supra* note 27, at 27–28.

233. According to searches conducted in Westlaw, as of December 31, 2019, almost 10,000 federal cases have cited *Graham* for some aspect of the constitutional standard governing excessive force claims.

234. See Harmon, *supra* note 28, at 1123 (“While the intuition of federal judges usually leads to results that seem reasonable and are consistent with the [Supreme] Court’s doctrine, the reasoning in these cases is ad hoc, often inconsistent, and sometimes ill-considered.”).

tuting [their] personal notions of proper police procedure for the instantaneous decision of the officer at the scene” and a responsibility to “never allow the theoretical, sanitized world of [their] imagination[s] to replace the dangerous and complex world that policemen face every day.”<sup>235</sup> The problem with these articulations of the standard is not that they are incorrect, but that they are too one-sided. The reasonable officer standard should require judges to do more than merely imagine what a reasonable police officer would have done to determine if a particular use of force was excessive. Just as courts must not use their imaginations to characterize reasonable uses of force as excessive, they also must not use their imaginations to justify excessive force that a reasonable officer on the scene would not have used under the circumstances. But courts do so all the time. In language that could hardly be more conclusory, without reliance on a shred of evidentiary support for their determinations, courts routinely purport to decide what reasonable officers on the scene of an alleged incident of excessive force would have done by guessing rather than by evaluating evidence of the officers’ training, experience, and level of compliance with applicable policies and procedures.<sup>236</sup> It is con-

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235. *Stroik v. Ponseti*, 35 F.3d 155, 158 (5th Cir. 1994) (quoting *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992)); *see also Johnson v. District of Columbia*, 528 F.3d 969, 977 (D.C. Cir. 2008) (“This is not to say that the judicial role in determining what is ‘unreasonable’ under the Fourth Amendment transforms every judge into a police chief.”).

236. *See, e.g., Bernini v. City of St. Paul*, 665 F.3d 997, 1006 (8th Cir. 2012) (“In our view, the use of force [firing rubber pellets, smoke, blast balls, and chemical irritants to keep political convention protesters from going downtown] was reasonable under the Fourth Amendment. . . . It was reasonable for the officers to deploy non-lethal munitions to keep all members of the crowd moving west.”); *Oakes v. Anderson*, No. 1:08-CV-01778, 2011 WL 13186158, at \*3 (N.D. Ga. Jan. 31, 2011) (“Under the facts outlined above, the Court finds . . . it was reasonable for [the defendant] to fire his weapon at Mr. Oakes in defense of himself and his fellow officers.”), *aff’d*, 494 F. App’x 35 (11th Cir. 2012); *Omokaro v. Whitemyer*, No. 98-10903, 1999 WL 1338438, at \*2–3 (5th Cir. Dec. 30, 1999) (awarding summary judgment to police officers who allegedly struck the plaintiff with their fists and a baton while he was on the ground because a “reasonable officer could have perceived” the plaintiff’s reaction to getting maced by the officers “in such a way as to demand physical force to handcuff him”); *Tauke v. Stine*, No. C95-1010, 1996 WL 33423375, at \*3 (N.D. Iowa Oct. 4, 1996) (“This court finds that, even when viewed in [the light most favorable to the non-moving party], the facts of this case reveal that a reasonable police officer in the defendants’ position would have been justified in ordering the use of and in using deadly force . . .”), *aff’d*, 120 F.3d 1363 (9th Cir. 1997). Courts also occasionally use their imaginations to opine on the perspective of a reasonable police officer in a way that favors a Section 1983 plaintiff. *See, e.g., Johnson*, 528 F.3d at 974–75 (finding that “[i]n this scenario, we are convinced that a reasonable officer would not have repeatedly kicked the sur-rendering suspect in the groin” because, *inter alia*, “[s]triking the groin is the classic example of fighting dirty” and “[f]rom the schoolyard scrapper to the champion prizefighter, no pugilist takes lightly the threat of a hit below the belt”). These few pro-plaintiff decisions are no more faithful to the *Graham* standard of care than those that favor the police. For example, with respect to *Johnson*, it seems obvious that there are situations where a reasonable officer might strike a violent criminal “below the belt” to avert an imminent threat to an innocent civil-

founding that these judges believe they can somehow divine the perspective of a reasonable officer on the scene without considering such evidence.<sup>237</sup>

This is especially so where the facts of a case call out for consideration of specific evidence germane to the perspective of a reasonable police officer on the scene. For example, in a case where police officers fatally shot a civilian based on the mistaken belief that he was armed with an AR-15 rifle or similarly lethal firearm—when he was, in fact, holding a pellet gun—the court awarded the police officers summary judgment without any consideration of their training and experience with respect to the identification and characteristics of firearms.<sup>238</sup> In another case, the court found that it was “irrelevant” to its excessive force determination that a police department internal investigation found that the defendant police officer “violated the department’s policy of using unnecessary force” in the very incident underlying the Section 1983 action.<sup>239</sup> While the police department’s own finding that the officer used unnecessary force may not be dispositive of how a reasonable officer on the scene would have acted, it is difficult to see how the police department’s internal assessment of the rea-

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ian or the officer himself. But by eschewing evidence of police training, experience, and policy that would help identify these situations, the *Johnson* court, too, failed to credibly ascertain the perspective of a reasonable officer on the scene.

237. See Goode, *supra* note 58, at 379 (“Law enforcement policies are usually present, argued, or even discussed in § 1983 cases, but courts frequently disclaim reliance on them.”). Of course, this assumes that the parties have adduced this type of evidence and made it part of the record. As set forth in Part IV of this Article, it is incumbent upon the parties and their counsel in Section 1983 litigation to provide courts with the evidence necessary to meaningfully apply the “reasonable officer on the scene” standard of care to the facts of their case.

238. *Estrada v. Cook*, 166 F. Supp. 3d 1230, 1240–43 (D.N.M. 2015) (finding that “no reasonable officer would be able to distinguish between Estrada’s pellet rifle and an authentic AR-15 at a distance of thirty-five yards”). But since professional law enforcement officers have considerably more training and experience than judges and other civilians regarding the identification and characteristics of firearms, *see supra* Part II, it is not clear why the judge in *Estrada* thought he was qualified to determine what a “reasonable officer would be able to distinguish” without considering that training and experience. *Id.* at 1243; *see also* *Villegas v. City of Anaheim*, 998 F. Supp. 2d 903, 905–08 (C.D. Cal. 2014) (granting summary judgment to police officers who shot and killed a civilian based on their mistaken belief he was armed with a shotgun—which was actually a BB gun—without any consideration of the officers’ training, expertise, and experience regarding the identification and characteristics of firearms), *aff’d in part, rev’d in part, and remanded*, 823 F.3d 1252 (9th Cir. 2016).

239. *Vasquez v. City of Grand Prairie*, No. 3:07-CV-00059-D, 2008 WL 3895396, at \*2, 6–7 (N.D. Tex. Aug. 21, 2008) (finding, among other things, that the defendant police officer “exhibited poor weapons discipline by continuing to fire after the suspect had already passed him” in an incident where the Section 1983 plaintiff was “struck in the back by seven rounds of ammunition”); *see also* *English v. District of Columbia*, 651 F.3d 1, 9–10 (D.C. Cir. 2011) (affirming district court decision excluding evidence of a police internal investigation finding that an officer’s use of deadly force violated department policy on the grounds that it was irrelevant and confusing).

sonableness of the officer's conduct is not relevant to that determination. In *Thompson v. City of Chicago*,<sup>240</sup> the Seventh Circuit found that an officer's violation of a police department directive prohibiting the use of chokeholds on assailants like the plaintiff was properly excluded from evidence on relevance grounds as it "shed[ ] no light on what may or may not be considered 'objectively reasonable.'"<sup>241</sup> Based on the rationale that police department policies are not coterminous with the parameters of constitutional police behavior, several courts have reached the same conclusion, excluding evidence of police guidelines and regulations as irrelevant to the *Graham* inquiry.<sup>242</sup> And, in a similar vein, courts often decline to consider seemingly probative testimony from law enforcement experts about the perspective of a reasonable officer on the ground that they are not supposed to "second-guess the officer" or "evaluate what the officers could or should have done in hindsight."<sup>243</sup> These decisions miss the point of *Graham*'s reasonable officer standard. That standard is not intended to preclude a retrospective evaluation of the reasonableness of an officer's exertion of allegedly excessive force; indeed, that is the very point of Section 1983 litigation. The point of *Graham* is to preclude the imposition of liability on officers as long as that retrospective evaluation reveals that their conduct was reasonable—even if imperfect or erroneous. One of the problems with the current application of the *Graham* standard is that the courts' efforts to retrospectively ascertain the perspective of a reasonable officer on the scene are often hollow and unreliable because they are based on judicial opinion and guesswork rather than evidence.<sup>244</sup>

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240. 472 F.3d 444 (7th Cir. 2006).

241. *Id.* 454–55.

242. *See, e.g.*, *Abney v. Coe*, 493 F.3d 412, 419 (4th Cir. 2007) (holding that "the fact that Randolph County deputies are discouraged from using intervention techniques is irrelevant to the question of whether [the officer's] conduct was consistent with the Fourth Amendment"); *Tanberg v. Sholtis*, 401 F.3d 1151, 1163–64 (10th Cir. 2005) ("That an arrest violated police department procedures does not make it more or less likely that the arrest implicates the Fourth Amendment, and evidence of the violation is therefore irrelevant."); *Goode, supra* note 58, at 384 (noting that several courts have excluded department policies "as irrelevant to an analysis of whether a particular use of force violated the Fourth Amendment").

243. *Oakes v. Anderson*, 494 F. App'x 35, 39–40 (11th Cir. 2012) (first quoting *Menuel v. City of Atlanta*, 25 F.3d 990, 997 (11th Cir. 1994); then quoting *Garczynski v. Bradshaw*, 573 F.3d 1158, 1167 (11th Cir. 2009)); *see also Omokaro v. Whitemyer*, No. 98-10903, 1999 WL 1338438, at \*3 (5th Cir. Dec. 30, 1999) ("Experts on police techniques can always second-guess the officer in the field, opining that his judgment could have been better and his tactics could have been more lenient. But allowing such evidence to create jury issues in any but the most egregious cases would disregard the Supreme Court's point in *Graham* . . ."). *But see Kopf v. Skyrn*, 993 F.2d 374, 378–79 (4th Cir. 1993) (allowing expert testimony on police practices, and noting that a trier of fact is more likely to need expert testimony to determine the perspective of a reasonable officer than an ordinary reasonable person).

244. *See, e.g.*, *Bernini v. City of St. Paul*, 665 F.3d 997, 1003–06 (8th Cir. 2012) (no consideration of officer training, experience, or compliance with applicable policies); *Johnson v. District of Columbia*, 528 F.3d 969, 974–76 (D.C. Cir. 2008)

There are, however, some Section 1983 decisions that have relied on more than conjecture to determine the perspective of a reasonable officer

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(no consideration of officer training, experience, or compliance with applicable policies); *Lewis v. Adams County*, 244 F. App'x 1, 13–14 (6th Cir. 2007) (officers fatally shot civilian on his front porch; no consideration of officer training, experience, or compliance with applicable policies); *Chastang v. Levy*, 319 F. Supp. 3d 1244, 1253–56 (M.D. Fla. 2018) (officer shot two pet dogs while responding to burglar alarm at private residence; no consideration of officer training, experience, or compliance with applicable policies); *Orr v. Waterbury Police Dep't*, No. 3:17-CV-00788, 2018 WL 780218, at \*5–6 (D. Conn. Feb. 8, 2018) (civilian allegedly shoved to the floor by police during drug raid at an apartment he was visiting; no consideration of officer training, experience, or compliance with applicable policies); *Smith v. Aubuchon*, No. 2:14-CV-00775, 2017 WL 3839965, at \*3 (E.D. Cal. Sept. 1, 2017) (officers used “PIT” maneuver to knock civilian off of his bicycle and then tasered him; no consideration of officer training, experience, or compliance with applicable policies), *adopted in part*, No. 2:14-cv-0775-KJM-CMK-P, 2018 WL 1784287 (E.D. Cal. Apr. 13, 2018); *Estrada v. Cook*, 166 F. Supp. 3d 1230, 1240–43 (D.N.M. 2015) (no consideration of officer training, experience, or compliance with applicable policies); *Villegas v. City of Anaheim*, 998 F. Supp. 2d 903, 906–08 (C.D. Cal. 2014) (no consideration of officer training, experience or compliance with applicable policies), *aff'd in part, rev'd in part, and remanded*, 823 F.3d 1252 (9th Cir. 2016); *Ronkin v. Vihn*, 71 F. Supp. 3d 124, 135–36 (D.D.C. 2014) (officers injured civilian in takedown maneuver at Metro station; no consideration of officer training, experience, or compliance with applicable policies); *Mondragon v. New Mexico*, No. 2:11-CV-00050, 2011 WL 13289698, at \*4–5 (D.N.M. Aug. 9, 2011) (motorist injured during takedown by police officers; no consideration of officer training, experience, or compliance with applicable policies); *Knox v. City of Hartford*, No. 3:06-CV-01476, 2011 WL 781085, at \*2–3 (D. Conn. Feb. 28, 2011) (alleged excessive force used in handcuffing civilian at concert; no consideration of officer training, experience, or compliance with applicable policies); *Oakes v. Anderson*, No. 1:08-CV-01778, 2011 WL 13186158, at \*2–6 (N.D. Ga. Jan. 31, 2011) (no consideration of officer training, experience, or compliance with applicable policies), *aff'd*, 494 F. App'x 35 (11th Cir. 2012); *Lang v. City of Posen*, 1:07-CV-07274, 2008 WL 4089313, at \*4 (N.D. Ill. Aug. 21, 2008) (handcuffs allegedly applied too tightly during transport to police station; no consideration of officer training, experience, or compliance with applicable policies); *Browne v. Gossett*, No. CV-03-05072, 2006 WL 213732, at \*4–8 (N.D. Cal. Jan. 27, 2006) (civilians handcuffed and questioned for several hours during search; no consideration of officer training, experience, or compliance with applicable policies), *aff'd*, 259 F. App'x 928 (9th Cir. 2007); *Hoener v. County of Sonoma*, No. 3:03-CV-00566, 2004 WL 1811156, at \*4–6 (N.D. Cal. Aug. 5, 2004) (officers allegedly injured plaintiff by pinning her against a vehicle and handcuffing her too tightly; no consideration of officer training, experience, or compliance with applicable policies); *Smith v. Darlin*, No. 1:97-CV-00763, 1999 WL 498586, at \*3–6 (N.D. Ill. July 8, 1999) (officers allegedly manhandled plaintiff after accusing him of running a red light; no consideration of officer training, experience, or compliance with applicable policies), *aff'd*, 242 F.3d 737 (7th Cir. 2001); *Dahm v. City of Miamisburg*, No. C-3-95-207, 1997 WL 1764770, at \*6–9 (S.D. Ohio Mar. 31, 1997) (during execution of search warrant, police officer trying to shoot an aggressive dog shot the dog's owner instead; no consideration of officer training, experience, or compliance with applicable policies); *Tauke v. Stine*, No. C95-1010, 1996 WL 33423375, at \*2–7 (N.D. Iowa Oct. 4, 1996) (no consideration of officer training, experience, or compliance with applicable policies), *aff'd*, 120 F.3d 1363 (8th Cir. 1997); *Cole v. United States*, 874 F. Supp. 1011, 1033–40 (D. Neb. 1995) (alleged unlawful seizure and restraint during execution of search warrant; no consideration of officer training, experience, or compliance with applicable policies).



on the scene of an alleged incident of excessive force. While these opinions do not uniformly favor either Section 1983 plaintiffs or defendants, they all contain at least some type of evidentiary basis for the court's application of the "reasonable officer on the scene" standard. Those courts that have denied summary judgment motions by police defendants typically have relied on evidence that the defendants acted contrary either to police training or policies—or both—which created a genuine issue of material fact<sup>245</sup> as to whether a reasonable officer on the scene would have used the force used by the defendants.<sup>246</sup> One recent decision partially denying a defense summary judgment motion under the reasonable officer standard provides a clear rationale for why it is essential to consider actual evidence in determining the perspective of a reasonable officer on the scene:

Bassett [a defendant police officer] saw a figure under the covers on the bed, but despite Bassett's calling plaintiff's name, there was no response or movement. Bassett told Hill [another police defendant] that he believed plaintiff was "deceased or having some medical problems." While Bassett and Hill were conversing, plaintiff slammed the door, began cursing, and stated they were "Nazi murder's, [sic]" and to "Fuck off." Plaintiff talked to

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245. Courts rarely, if ever, grant plaintiffs summary judgment in excessive force litigation. The decisions favoring plaintiffs in excessive force litigation typically deny defense summary judgment motions on the ground that a reasonable jury could find for the plaintiff in view of genuine disputes of material fact. Federal Rule of Civil Procedure 56(a) provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

246. See, e.g., *Darden v. City of Fort Worth*, 880 F.3d 722, 732 n.8 (5th Cir. 2018) (finding "relevant, but not dispositive the fact that [the officer's] alleged conduct appears to have violated . . . [p]olice [d]epartment policies"); *Martin v. City of Broadview Heights*, 712 F.3d 951, 960–61, 963 (6th Cir. 2013) (relying in part on defendant officers' deviation from department policy in finding use of force was unreasonable); *Weigel v. Broad*, 544 F.3d 1143, 1150 (10th Cir. 2008) (considering training materials in determining reasonableness of force); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059–62 (9th Cir. 2003) ("Although such training materials are not dispositive, we may certainly consider a police department's own guidelines when evaluating whether a particular use of force is constitutionally unreasonable."); *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995) ("Although these 'police department guidelines do not create a constitutional right,' they are relevant to the analysis of constitutionally excessive force." (quoting *Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993))); *Lee v. Metro. Gov't of Nashville & Davidson City.*, 596 F. Supp. 2d 1101, 1116, 1119–21 (M.D. Tenn. 2009) (considering evidence offered by plaintiff's police practices expert witness that officers acted inconsistently with their training by putting plaintiff at risk of "positional asphyxia" in partially denying defense summary judgment motion), *aff'd in part*, 432 F. App'x 435 (6th Cir. 2011); see also *Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 902–03 (4th Cir. 2016) (granting summary judgment on "prong two" qualified-immunity grounds, but citing best practices developed by the Police Executive Research Forum in assessing the reasonableness of an officer's use of a Taser).

Bassett for a short time, again stating they were not real cops, only dressed as cops, and continued to tell them to “Fuck off you Nazi’s.” . . . *Such exchange, if heard by a reasonable law enforcement officer at the scene, might suggest that plaintiff was emotionally disturbed or suffering from a mental illness, and require a reasonable officer to handle the situation differently.*<sup>247</sup>

The point, simply put, is that reasonable officers likely will handle situations differently from ordinary civilians because of their training, experience, and compliance with professional standards of conduct (embodied in department policies and procedures). A handful of other courts have relied on evidence that officers acted in accordance with their training and applicable policies to support a finding that a reasonable officer would have used the same force as defendants.<sup>248</sup> While one could disagree with the outcomes of any of these decisions, they are all more faithful to *Graham’s* “reasonable officer on the scene” standard of care than the many opinions that ignore evidence distinguishing reasonable police officers from reasonable ordinary civilians.

#### IV. THE EVIDENTIARY ROAD MAP TO A MORE MEANINGFUL AND CREDIBLE DETERMINATION OF THE PERSPECTIVE OF A REASONABLE OFFICER ON THE SCENE

It is critical that the courts move promptly toward a more robust, evenhanded, and evidence-based determination of the perspective of a reasonable officer on the scene. When the Supreme Court instructed

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247. *Hoffman v. Jourdan*, No. 2:14-CV-02736, 2017 WL 4547066, at \*16 (E.D. Cal. Oct. 12, 2017) (alteration in original) (emphasis added) (citations omitted). The plaintiff in *Hoffman* argued that the defendants “acted contrary to training on how to handle mentally ill persons,” citing specific California Peace Officer Standards and Training provisions that, according to the plaintiff, “require officers dealing with mentally impaired persons to calm the situation by moving slowly, avoid physical contact, explain actions before acting, provide reassurance, and give the person time to calm down; communicate truthfully with the person and not make threats.” *Id.* at \*12.

248. *Thompson v. City of Danville*, No. 4:10-CV-00012, 2011 WL 2174536, at \*7–8 (W.D. Va. June 3, 2011) (relying in part on expert report from the chief instructor at the North Carolina Justice Academy in awarding summary judgment to defendant who twice deployed his Taser on a woman who objected to a search of her nephew’s vehicle), *aff’d*, 457 F. App’x. 221 (4th Cir. 2011); *Vasquez v. City of Grand Prairie*, No. 3:07-CV-00059, 2008 WL 3895396, at \*6–7 (N.D. Tex. Aug. 21, 2008) (relying in part on police commander’s expert testimony that “any reasonable and prudent law enforcement officer could have believed that Vasquez presented a substantial risk of serious bodily injury and/or death, if the arrest was delayed” in granting a defense summary judgment motion (quoting Defendant’s Brief Supporting Motion for Summary Judgment at Appeal at 196, *Vasquez*, 2008 WL 3895396, at \*5)); *Griffith v. Coburn*, 408 F. Supp. 2d 491, 498–501 (W.D. Mich. 2005) (relying in part on evidence regarding police officer training and experience in awarding summary judgment to defendants whose use of a vascular neck restraint technique to control a civilian in a violent altercation resulted in the civilian’s death), *rev’d*, 473 F.3d 650 (6th Cir. 2007).

courts over thirty years ago in *Graham* to ascertain the reasonableness of allegedly excessive force from that perspective, it could not have intended that judges ignore evidence of the defendant officers' training, experience, and degree of compliance with applicable policies and procedures, and simply defer to the police whenever stressful situations arise on the street. A fundamental recalibration of excessive force jurisprudence is necessary to ensure that decisions about the reasonableness of police force are based on evidence rather than guesswork. *Graham* already suggests that at least some level of deference to the police is inherent in the reasonable officer standard; it makes clear that an erroneous or otherwise suboptimal reaction by a police officer to "circumstances that are tense, uncertain, and rapidly evolving" does not amount to a constitutional violation as long as a reasonable officer would have reacted the same way.<sup>249</sup> But that does not obviate the need for the courts to objectively and rigorously determine the perspective of a reasonable officer in each Section 1983 case they decide.

How to do so? Not by reflexively deferring to the police because of the dangers of policing.<sup>250</sup> And not by speculating about what a reasonable officer would have done based on the common sense or gut instinct of a judge or juror. Although these are the prevailing approaches to determining the perspective of a reasonable officer, they are inadequate to discharge the duty imposed by *Graham*. Determining that perspective requires more than deference and guesswork; it calls for an evidence-based approach that probes the record for information about how the officers performed relative to their training, experience, and the policies and procedures they are required to follow. One can fairly assume that a reasonable officer typically would act in accordance with his training and experience, as well as applicable department policies and procedures, unless exigent circumstances call for a deviation therefrom.<sup>251</sup>

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

250. In fact, the fundamental rationale for deferring to the police in use-of-force situations—that the use of force is the product of split-second judgments on the street that should not be second-guessed with the benefit of hindsight—does not apply in many cases. Stoughton, *supra* note 84, at 869 (“[I]n responding to the resistance *actually* presented, the realities of police violence are such that the circumstances in which officers must make a truly split-second decision are highly unusual, which militates against the Supreme Court’s generalization.”). Thus, it is important for the courts to engage in a disciplined review of the evidentiary record in each case before deciding what degree of deference is due to the police. See *infra* notes 253–67 and accompanying text.

251. Some scholars have argued that the courts should interpret the term “reasonable officer” in this context to mean a “reasonably well-trained officer” and find that police force was excessive if it was contrary to sound law enforcement training practices, regardless of the training the defendant officers actually received. See, e.g., Garrett & Stoughton, *supra* note 17, at 299. While there are benefits to that approach, most notably the potential elevation of police training standards, there is a fairness issue with holding individual police defendants who fully complied with their training liable under Section 1983 because their training wasn’t good enough. Even assuming municipal insurance covered any damages

The remainder of this Article offers an evidence-based proposal to help ensure that courts make a meaningful effort to ascertain the perspective of a reasonable officer on the scene in excessive force litigation. Courts should base their decisions (and their jury instructions) about the perspective of a reasonable officer on the scene, wherever possible,<sup>252</sup> on evidence reflecting the defendant officers' experience and compliance with or deviation from their training and applicable departmental rules and regulations.<sup>253</sup> This evidence provides a critical objective reference point for measuring the reasonableness of police officer conduct. Police officers do not act in a vacuum. They are not just dropped on the street and told to do the right thing. As Part II of this Article reflects, they are the recipients of a substantial amount of training—focused largely on the appropriate use of force—both before and after they join the force. Veteran officers benefit from years of experience in making decisions about whether and, if so, how to use force to address situations that arise on the street. And law enforcement agencies promulgate policies and procedures in an effort to strike an appropriate balance between protecting the safety of officers and the public while promoting police professionalism

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award, a decision adverse to a police officer under Section 1983 likely would have negative career and other personal ramifications for the officer. While there are hurdles to imposing liability against municipalities under Section 1983, the most obvious defendant in a Section 1983 action alleging inadequate training should be the trainer, not the trainee. Without expressing an opinion on a “reasonably well-trained officer” approach, my proposal assumes that a reasonable officer on the scene had the same training and experience—and is subject to the same agency policies and procedures—as the defendant officers themselves. After all, it is unlikely that another officer from another jurisdiction with better training and more enlightened department policies and procedures would have been “on the scene” of the incident of alleged excessive force with the defendants. At a minimum, the use of force by an individual officer defendant should be consistent with what a reasonable officer with his training and experience—and subject to the same rules of engagement—would have done.

252. While several of the excessive force decisions surveyed in this Article explicitly declined to consider this type of evidence in making a determination about the reasonableness of an allegedly excessive use of force, other decisions simply make no mention of this type of evidence. It is not possible to discern from some of these opinions whether the evidence was presented—and ignored by the court—or not. Obviously, it is not fair to blame a court for failing to consider evidence that was not placed before it. It is incumbent on the parties to adduce this type of evidence, present it to the trial court, and make it part of the record on appeal. Of course, there would be a greater incentive for parties in Section 1983 litigation to do so if they knew the court would find it relevant to its determination of the perspective of a reasonable officer on the scene.

253. If the courts were to adopt the more rigorous, evidence-based approach to determining the perspective of a reasonable officer suggested here, one could foresee other benefits rippling through the policing community. Police officers would be even more incentivized to participate meaningfully in training programs, follow their training protocols, and adhere to the policies and procedures that govern their use of force. And police departments would be incentivized to train their officers well and follow best practices as increasing light would be shed on their training programs and rules of engagement.

and protecting civilians against excessive force.<sup>254</sup> If we accept the premise that police conduct is guided primarily by training, experience, and agency rules, then evidence of compliance with or deviation from these behavioral guideposts is an appropriate reference point for determining the perspective of a reasonable officer on the scene of an incident of alleged excessive force. While not every use of force will be governed by a training protocol or agency policy,<sup>255</sup> the survey of excessive force cases in Part III reflects that many are. Even where there is no clearly applicable training protocol or agency rule, excessive force determinations will be more credible and sustainable where the record is clear that the court searched for this type of evidence before engaging in the more speculative assessment of police reasonableness that has become commonplace in Section 1983 jurisprudence.

Now I turn to how this evidence-based proposal should be implemented in the three contexts where judges and juries most commonly are asked to determine the perspective of a reasonable officer. The first context is the actual determination of Section 1983 liability for excessive force. While this determination is usually made by a jury (unless a plaintiff, for some reason, waives his right to a jury trial), it is still heavily influenced by judicial decision-making concerning, among other things, what evidence the jury is allowed to consider and what instructions will guide the jury's deliberations. In this context, the relevance of evidence is governed by the Federal Rules of Evidence.<sup>256</sup> The second context is the ad-

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254. This is not to suggest that many of these policies and procedures are not vulnerable to legitimate criticism. The question is whether an individual officer should be found liable for a Section 1983 violation—and, hence, found to have acted unreasonably under the *Graham* standard—for exercising force in a manner consistent with the policies and procedures he was trained to follow. It seems to make more sense to challenge misguided or inadequate police policies and procedures in the policy-making arena and, potentially, in Section 1983 actions against the municipalities that promulgated them, rather than in lawsuits against officers who followed them.

255. Some police policies and procedures may be too general to provide meaningful guidance about the reasonableness of the use of force in certain situations. See Stoughton, *supra* note 84, at 884–85 (describing some “policy and procedure manuals that, for example, instruct officers to ‘use only that degree of force necessary and reasonable under the circumstances’ and to ‘either escalate or de-escalate the use of force as the situation progresses or circumstances change’” (quoting *Denver Police Department Operations Manual*, DENVER POLICE DEP’T § 105.01(1)a (Mar. 2010), <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569ad5c20e4c1148e6b1089e/1452987846106/Denver+Use+of+Force+Policy.pdf> [<https://perma.cc/G482-FGGV>])). And even where police departments have adopted policies and procedures that are more concrete about required or forbidden conduct in certain situations, they will not be able to anticipate every fact pattern that arises on the street.

256. Since the vast majority of Section 1983 lawsuits are litigated in federal court, see *supra* Section I.A, this Article will focus on the Federal Rules of Evidence. But this discussion applies with equal force to state court cases since the definition of relevance in state evidence codes and state common law evidence decisions is substantially the same as that set forth in the federal rules. See, e.g., CAL. EVID. CODE § 210 (defining “relevant evidence” as “having any tendency in reason to

judication of defense summary judgment motions. The vast majority of the district court decisions summarized in Part III were rendered in this context under the Federal Rules of Civil Procedure. And the third context is appellate review of the decisions of lower courts in excessive force cases. These cases typically involve discretionary decisions about what evidence in the record supports an appellate court's decision to affirm or reverse the court below. In all three contexts, the courts should follow a default rule that evidence reflecting the defendant officers' experience and compliance with or deviation from their training and applicable departmental rules and regulations (referred to below, for ease of reference, as the "Evidence") is relevant to the determination of the perspective of a reasonable officer on the scene of an incident of alleged excessive force.<sup>257</sup>

A. *The Evidence is Relevant Under the Federal Rules of Evidence*

Trial courts determine the relevance and admissibility of evidence as part of their gatekeeper function under the rules of evidence. Juries (or judges in bench trials) consider only admissible evidence; evidence must be relevant to be admissible. One of the problems with Section 1983 jurisprudence is that the concept of relevance has become hopelessly muddled. Many courts do not even cite, much less rely upon, record evidence in purporting to determine the perspective of a reasonable officer on the scene.<sup>258</sup> We cannot tell what Evidence, if any, these courts had available to them when they purported to determine the perspective of a reasonable officer. And where the record does contain Evidence (which presumably is the case in most excessive force cases), we typically cannot tell

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prove or disprove any disputed fact that is of consequence to the determination of the action"); MINN. CT. R. 401 (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); N.Y. R. EVID. 4.01 (defining "relevant evidence" as that "having any tendency to make the existence of any fact that is of consequence to the determination of the proceeding more probable or less probable than it would be without the evidence"); TEX. R. EVID. 401 (stating that 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").

257. This is proposed as a default rule rather than a bright-line rule because one can imagine situations where parties attempt to rely on Evidence that lacks a sufficient substantive connection to the incident of allegedly excessive force to be relevant. For example, evidence that a police officer violated his training by not wearing a bulletproof vest during an encounter where the officer punched the plaintiff is likely not relevant to the excessive force claim. So, too, evidence of an officer's training and experience as a community mediator in a case where he was accused of using excessive force in a vehicle pursuit that involved no prior interaction with the driver is likely not relevant. For the default rule to apply, there must be a substantive nexus between the evidence that is offered and the nature of the allegedly excessive force. As long as that substantive nexus exists, the Evidence should be considered by the judge or jury in connection with its determination of the perspective of a reasonable officer on the scene.

258. See *supra* Section III.C.3.c.

whether the court failed to mention the Evidence in its decision because (1) it found the Evidence to be irrelevant or otherwise inadmissible under a rule of evidence, (2) it considered the Evidence, but found it of insufficient weight to impact its decision, or (3) it purposefully ignored the Evidence because it interpreted *Graham* to require the court to eschew consideration of the Evidence in favor of the court's own deferential view of a reasonable officer's perspective. Courts can defog these murky decisions and enhance their credibility simply by getting back to the basics of evidence law. The analysis of whether the Evidence is relevant turns on Federal Rule of Evidence 401, which provides that evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action."<sup>259</sup> A straightforward application of Rule 401 dictates that the Evidence, so long as it is substantively related to the alleged incident of excessive force, is relevant and should always be considered in determining the perspective of a reasonable police officer.<sup>260</sup>

The decisions which hold (or suggest through omission) that the Evidence is irrelevant to the reasonableness of allegedly excessive force are wrong as a matter of evidence law. *Graham* holds that the reasonableness of force turns on what a reasonable officer on the scene would have done. Reasonable officers typically act in certain ways. They typically follow their training. They typically comply with their agency's policies and procedures. They typically obey orders from commanding officers. When police officers deviate from these typical behaviors, it is an indication—though not dispositive proof—that they have acted unreasonably. Additional evidence might support a finding that a deviation was reasonable under the totality of the facts and circumstances, but that does not render irrelevant evidence reflecting a departure from a professional norm. On the other hand, evidence of police officer compliance with training protocols, department policies, and orders from superior officers suggests that police officers acted reasonably. Again, additional evidence could lead a fact finder to a different ultimate conclusion, but that does not diminish the relevance of the evidence reflecting compliance with professional norms. Rejecting or ignoring such evidence on the ground that it is irrelevant is inconsistent with a faithful application of the reasonable officer standard as well as the Federal Rules of Evidence.

It is well settled that the evidentiary standard for relevance is a lenient one that favors the admissibility of evidence.<sup>261</sup> For the reasons set forth

259. FED. R. EVID. 401.

260. Under this approach, the only reason not to admit the Evidence (assuming it is substantively related to the incident at issue) is if its probative value is "substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

261. See, e.g., *R.D. v. Shohola, Inc.*, No. 3:16-CV-01056, 2019 WL 6066146, at \*2 (M.D. Pa. Nov. 15, 2019) (characterizing Rule 401 as a "rule[ ] of inclusion"); *Mafua v. McKenzie*, 1:18-CV-00064, 2019 WL 5310244, at \*4 n.3 (D. Utah Oct. 21,

above, in an excessive force action, the Evidence is plainly relevant to whether the defendant accused of exerting excessive force acted like a reasonable officer on the scene.<sup>262</sup> And this issue is most certainly “of consequence to determining the action”<sup>263</sup> as it is essentially dispositive of prong one of the qualified immunity analysis. Thus, courts should follow a default rule of treating the Evidence as relevant under Rule 401. While the Evidence may not be dispositive of Section 1983 liability, there is no reasonable interpretation of Rule 401 that would result in its exclusion from evidence. No court should hold that a police department investigation finding that a defendant officer “violated the department’s policy of using unnecessary force” is irrelevant to its excessive force determination.<sup>264</sup> No court should hold that an officer’s violation of an applicable police department policy “sheds no light” on what a reasonable officer would have done under the circumstances.<sup>265</sup> No court should exclude expert testimony on the perspective of a reasonable officer on the scene on the ground that it “second-guess[es] the officer” or “evaluate[s] what the officers could or should have done in hindsight.”<sup>266</sup> While *Graham* admonishes courts not to use hindsight to subject police officers to Section 1983 liability for conduct that was objectively reasonable at the time, expert testimony about how a reasonable officer on the scene would have acted differently from the defendant is relevant under Rule 401 to a fact finder’s determination of the perspective of a reasonable officer on the

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2019) (discussing the “lenient standard of Federal Rule of Evidence 401”); *Surface v. City of Flint*, No. 2:12-CV-15513, 2017 WL 3613967, at \*4 (E.D. Mich. Aug. 23, 2017) (discussing “Fed. R. Evid. 401’s permissive definition” of relevance); *Yakima Valley Mem. Hosp. v. Wash. State Dep’t of Health*, No. 2:09-CV-03032, 2012 WL 12951706, at \*5 (E.D. Wash. June 27, 2012) (discussing “Federal Rule of Evidence 401’s permissive ‘any tendency’ standard”); *United States v. Miller*, No. 2:04-CR-00382, 2004 WL 2612420, at \*3 (E.D. Pa. Nov. 16, 2004) (discussing “the lenient relevance standard of Rule 401”).

262. While not looking at the issue through the lens of the rules of evidence, Professors Garrett and Stoughton essentially concurred with this approach in their thoughtful piece advocating for a Fourth Amendment tactical analysis in excessive force cases: “[T]he qualified immunity analysis should . . . take account of police policy and training when deciding whether an officer’s conduct should be actionable. . . . When an officer’s action is contrary to her training . . . the infringement of individual rights may, although not invariably, fail to meet the Fourth Amendment reasonableness standard.” Garrett & Stoughton, *supra* note 17, at 299.

263. *See* FED. R. EVID. 401(b).

264. *See* *Vasquez v. City of Grand Prairie*, No. 3:07-CV-00059, 2008 WL 3895396, at \*6–7 (N.D. Tex. Aug. 21, 2008) (holding violation of department policy was irrelevant); cases cited *supra* note 239 (finding violations of department policies irrelevant).

265. *See* *Thompson v. City of Chicago*, 472 F.3d 444, 454–55 (7th Cir. 2006) (finding violation of department policy irrelevant); cases cited *supra* note 242 (finding violations of department policies irrelevant).

266. *See* *Oakes v. Anderson*, 494 F. App’x 35, 39–40 (11th Cir. 2012) (excluding expert testimony); *Omokaro v. Whitmyer*, No. 3:97-CV-01608, 1999 WL 1338438, at \*3 (5th Cir. Dec. 30, 1999) (excluding expert testimony).



scene.<sup>267</sup> And if the courts want the public to have confidence in their excessive force determinations, they need to be more explicit about their relevance determinations. No one should have to guess whether the *Sheehan* Court was talking about relevance or evidentiary weight when it said: “Nor does it matter for purposes of qualified immunity that Sheehan’s expert, Reiter, testified that the officers did not follow their training.”<sup>268</sup> That evidence plainly does matter for purposes of Rule 401; the weight it deserves is open to discussion.

Jury instructions are the other part of this evidentiary equation. Not only should the Evidence presumptively be treated as relevant, but judges should expressly instruct juries that they should consider the Evidence in determining the perspective of a reasonable officer on the scene. The following language, or words to the same effect, should be added to jury instructions regarding the reasonable officer standard of care: “In determining whether the use of force was reasonable, you also may consider the training and experience of the defendants as well as their compliance or departure from any applicable standards of conduct.”<sup>269</sup> Without language to this effect, jury instructions on the *Graham* standard will remain too one-dimensional—focusing solely on the dangers of police work—and unfairly skewed toward a defense verdict.<sup>270</sup>

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267. There may, of course, be other reasons to exclude such expert testimony besides lack of relevance. See FED. R. EVID. 702 (requiring, among other things, that the expert is qualified “by knowledge, skill, experience, training, or education,” that the expert’s testimony is “the product of reliable principles and methods,” and that the expert “has reliably applied the principles and methods to the facts of the case”).

268. *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 (2015).

269. If a court were to amend the pattern jury instruction cited in Section I.C as suggested, it would read as follows (with the new language in italics):

The right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of official coercion or threat thereof to effect it. The amount of force used to effect a particular seizure must be reasonable. In determining whether the amount of force used in this case was reasonable, you may consider all of the facts and circumstances, including the severity of the crime at issue, whether the suspects posed an immediate threat to the officers or others, and whether the subjects were attempting to evade or resist arrest.

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than the 20/20 vision of hindsight. In determining whether the use of force was reasonable, you may consider that police officers are often forced to make split-second judgments—in circumstances that may be tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. *In determining whether the use of force was reasonable, you also may consider the training and experience of the defendants as well as their compliance or departure from any applicable standards of conduct.*

See *supra* note 57 (emphasis added).

270. As discussed in Part I, current pattern jury instructions for Section 1983 litigation do not so much as suggest that jurors may consider the Evidence—or any part of the Evidence—in determining the perspective of a reasonable police of-

B. *The Evidence is Relevant to Disposition of a Summary Judgment Motion Under the Federal Rules of Civil Procedure*

Almost all police defendants in excessive force cases move for summary judgment.<sup>271</sup> Indeed, given the availability of the doctrine of qualified immunity, it is difficult to understand why any defendant in an excessive force case would forego the chance to prevail on summary judgment and proceed straight to trial.<sup>272</sup> Thus, the first opportunity for most district courts to determine the perspective of a reasonable officer typically occurs at the summary judgment phase of the case. In fact, the adjudication of a defense summary judgment motion is the only time that determination is made in a majority of excessive force cases as many of these cases end either in the entry of summary judgment for the defense or a settlement in the event the court denies the defense's motion.<sup>273</sup>

Federal Rule of Civil Procedure 56 governs the adjudication of summary judgment motions in federal court. Under Rule 56, a movant is entitled to summary judgment if it shows that "there is no genuine dispute as to any material fact" and it is "entitled to judgment as a matter of law."<sup>274</sup> To do so, a police officer defendant must either "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials" or "show[ ] that the materials cited [by the plaintiff] do not establish the . . . presence of a genuine dispute, or that [the plaintiff] cannot produce admissible evidence" to create a genuine dispute of material fact.<sup>275</sup> Thus, under a

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ficer. See KEVIN O'MALLEY ET AL., 3B FEDERAL JURY PRACTICE AND INSTRUCTIONS § 165:23 (6th ed. 2017).

271. See *supra* Part III and cases discussed therein.

272. While some defendants in civil cases might opt not to file a summary judgment motion in a close case to conserve resources, most of the municipalities that employ police officer defendants in Section 1983 actions have the resources and/or access to insurance proceeds to fund the filing of a summary judgment motion, particularly when foregoing a summary judgment motion all but ensures that the case will be decided by a jury. See generally John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1542 (2017) ("Municipalities nationwide purchase insurance to indemnify themselves against liability for the acts of their law enforcement officers. These insurance policies shield the government from financial responsibility, often including punitive damages, for common law and constitutional torts such as assault and battery, excessive force, discrimination, false arrest, and false imprisonment."). Moreover, defendants who unsuccessfully assert a qualified immunity defense in district court are entitled to an interlocutory appeal, which adds to the rationale for asserting the defense in a pre-trial motion in almost every case. See *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

273. See Zamoff, *supra* note 27, at 39–48 (finding that excessive force defendants in cases with complete body camera videos prevailed on summary judgment motions at a rate of approximately sixty-three percent, while defendants in cases with no body camera evidence received summary judgment about fifty-three percent of the time).

274. FED. R. CIV. P. 56(a).

275. FED. R. CIV. P. 56(c)(1).

straightforward application of Rule 56, evidence is relevant to the disposition of a summary judgment motion if it bears on “any material fact” or whether the movant is “entitled to judgment as a matter of law.” While there is little question that the Evidence meets this standard, courts are far too often failing to reference the Evidence when they “state on the record the reasons for granting or denying” a summary judgment motion, as they are required to do.<sup>276</sup> That needs to change. The Evidence should be considered in connection with every summary judgment motion in an excessive force case where disputes of material fact do not preclude the imposition of summary judgment.

The Evidence typically will have no role to play in the resolution of factual disputes about the events that resulted in the plaintiff’s alleged injuries. For example, it will not help the fact finder resolve how many times an officer deployed his Taser or how fast a car was going or whether a civilian made a threatening gesture. If the evidence presented to the court during the litigation of a summary judgment motion gives rise to a genuine dispute of material fact about the underlying events at issue in the case, the motion must be denied, regardless of the perspective of a reasonable officer on the scene. In this scenario, there is no undisputed set of facts to which the “reasonable officer on the scene” standard can be applied. In other words, if there are genuine factual disputes about what happened on the scene, there is no way for the court to meaningfully determine what a reasonable officer would have done there. In these situations, the court should allow the jury (assuming there is no jury trial waiver)<sup>277</sup> to resolve the factual disputes and, based on its resolution of the facts, determine the perspective of a reasonable officer on the scene—hopefully with the benefit of the more balanced jury instructions proposed in this Article.

But in cases where there is no genuine factual dispute about what happened on the scene,<sup>278</sup> the Evidence takes on significance under Rule

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276. FED. R. CIV. P. 56(a).

277. While a plaintiff has a right to a jury trial in a Section 1983 action, he may waive that right. *See* FED. R. CIV. P. 38(d).

278. The increasing availability of body camera and cell phone video evidence should reduce (perhaps significantly) the number of cases where there are genuine factual disputes about what happened on the scene of an incident of allegedly excessive force. Indeed, one of the primary purposes of body cameras is to provide an objective video record of disputed encounters between the police and civilians. *See, e.g.,* Kami N. Chavis, *Body-Worn Cameras: Exploring the Unintentional Consequences of Technological Advances and Ensuring a Role for Community Consultation*, 51 WAKE FOREST L. REV. 985, 992 (2016) (predicting that body camera video evidence will help “eliminate issues of credibility or at least show one objective view of the event that reasonable jurors could interpret”); Howard M. Wasserman, *Recording of and by Police: The Good, the Bad, and the Ugly*, 20 J. GENDER RACE & JUST. 543, 551 (2017) (discussing how body camera video evidence offers an objective “check[ ] [on] the fallibility of human perception, providing a means for the factfinder to replay, perceive, and decide on events, free of the adverseness, passion, and partisanship attached to witness testimony, especially from parties”).

56. Because *Graham* requires district courts to determine the perspective of a reasonable officer on the scene in order to decide as a matter of law whether allegedly excessive force is actionable, the Evidence (assuming it has a substantive nexus to the acts of force) will always be relevant to whether a police officer moving for summary judgment in a Section 1983 action is “entitled to judgment as a matter of law.” Under *Graham*, the officer’s entitlement to judgment as a matter of law turns on the determination of the perspective of a reasonable officer on the scene and, as set forth above, the Evidence is critical to that determination.<sup>279</sup> The fundamental problem with many of the summary judgment decisions in this area is that the courts are failing to recognize that they cannot meaningfully determine a reasonable officer’s perspective in an evidentiary vacuum. They are incorrectly approaching their determination of the perspective of a reasonable officer on the scene the same way they determine the perspective of an ordinary reasonable person in most of the other tort cases they are asked to decide.

Judges ordinarily do not consider—or need to consider—evidence to determine the perspective of an ordinary reasonable person. If there are no genuine disputes of material fact, they simply use their judgment to decide what a reasonable person would or would not have done under the circumstances and whether the movant is entitled to judgment as a matter of law. But a reasonable police officer is not just an ordinary reasonable person with a uniform and a badge whose perspective the court can somehow divine without reference to the Evidence. The “reasonable officer on the scene” standard is a standard which, unlike the ordinary reasonable person standard, must be informed by record evidence. Thus, in cases where the court needs to apply that standard to adjudicate a summary judgment motion—which, as set forth above, are all lawsuits where there are no genuine disputes of material fact about what happened on the scene—the court should consider the Evidence and explain under Rule 56(a) how the Evidence informed its decision on the motion.

### C. *Failure to Consider the Evidence Should be Grounds for Reversal on Appeal*

While the task of applying the rules of evidence and civil procedure to the Evidence falls to the district courts in the first instance, appellate courts have an equally important role to play in ensuring that determinations of the perspective of a reasonable officer are evidence-based and

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<sup>279</sup>. While the Evidence should be admissible in excessive force lawsuits, *see supra* Section IV.A, the concept of admissibility is even more lenient at the summary judgment phase of a lawsuit than it is at trial. *See* FED. R. CIV. P. 56(c)(2) (stating that the court may consider material presented to the court in connection with a summary judgment motion as long as it can later be converted into “a form that would be admissible in evidence”); *see also* *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (“We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment.”).

meaningful. When trial court rulings in excessive force lawsuits are appealed, appellate courts should scrutinize the record to determine whether it contains Evidence. If so, and the district court failed to consider that Evidence in determining the perspective of a reasonable officer—either by erroneously excluding it or ignoring it altogether—the appellate court should reverse the lower court’s decision for misapplying the applicable legal standard.<sup>280</sup> The legal standard for determining whether police force is unconstitutionally excessive, as established in *Graham*, is whether that force was objectively reasonable when viewed from the perspective of a reasonable officer on the scene. Courts that simply decide (or instruct the jury to decide) based on conjecture how a reasonable police officer would view an act of police force without using the Evidence to inform their decisions are essentially applying an “ordinary reasonable person” instead of a “reasonable officer on the scene” standard to determine liability. This is reversible error. Whether one views the error as using the wrong legal standard—an ordinary reasonable person standard instead of the reasonable officer standard established in *Graham*—or misapplying the *Graham* standard by disregarding evidence relevant to determining the perspective of a reasonable officer, the result is the same. The decision should not stand.

The survey of excessive force caselaw in Part III reflects that most excessive force appeals arise out of district court summary judgment decisions.<sup>281</sup> Appellate courts typically review such decisions *de novo*, without any deference to the lower court’s ruling.<sup>282</sup> The misapplication of the applicable legal standard is one of the more common grounds for reversing a district court’s ruling under Federal Rule of Civil Procedure 56.<sup>283</sup> Similarly, appellate courts generally do not defer to district courts in adjudicating challenges to their orders granting motions for judgment as a matter of law or their allegedly erroneous jury instructions, which are two of the other contexts for excessive force appeals.<sup>284</sup> Thus, appeals courts have wide latitude to intervene when district courts fail to fulfill their duty

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280. Presumably, most appellate courts would then remand the case back to the trial court with instructions to consider the Evidence and redetermine the perspective of a reasonable officer on the scene.

281. See *supra* Part III and cases cited and discussed therein.

282. See, e.g., *McClendon v. United States*, 892 F.3d 775, 780–81 (5th Cir. 2018) (“This court reviews a grant of summary judgment *de novo*, applying the same standard as the district court.” (emphasis added)); *Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886, 891 (6th Cir. 2016) (“A district court’s grant of summary judgment is also reviewed *de novo*.” (emphasis added)); Judith A. Livingston & Thomas A. Moore, *Standards of Appellate Review*, in 4 LITIGATING TORT CASES § 47:3 (Roxanne Conlin & Gregory Cusimano eds., 2018) (citing cases ruling on the standard of appellate review).

283. See, e.g., *York Risk Servs. Grp., Inc. v. Couture*, 787 F. App’x 301, 305 (6th Cir. 2019); *ML Healthcare Servs., LLC v. Publix Super Mkts., Inc.*, 881 F.3d 1293, 1297–98 (11th Cir. 2018); *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1049–50 (9th Cir. 2012).

284. See *Livingston & Moore, supra* note 282, and cases cited therein.

to determine the perspective of a reasonable officer on the scene.<sup>285</sup> By insisting that district courts account for the Evidence in their summary judgment decisions, jury instructions, and other rulings, the appellate courts will not only act as a safeguard against uninformed reasonable officer determinations, but also will incentivize the lower courts to produce excessive force decisions that will be better reasoned and more credible to all audiences. They will also stimulate the parties in Section 1983 litigation to develop the Evidence wherever possible and ensure that it is made part of the record on summary judgment and appeal. This too will materially increase the accuracy and credibility of determinations about the perspective of a reasonable officer on the scene and meaningfully reduce the number of those determinations that are based on speculation rather than evidence.

#### CONCLUSION

The fundamental flaw in American excessive force jurisprudence is neither the standard that courts are applying to determine whether police force is excessive nor the outcomes of Section 1983 cases. As set forth above, the Supreme Court's focus on the perspective of a reasonable officer on the scene in *Graham* seems justified in view of the meaningful differences between the perspectives of law enforcement officers and ordinary reasonable persons. And complaints about outcomes—which are usually centered on the contention that the police win a disproportionate share of Section 1983 cases—too often gloss over the facts of each case, the governing law (which includes the defense-friendly doctrine of sovereign immunity), and, most importantly, the actual evidence that the court considered (or ignored) in reaching its decision. Instead, the crucial deficiency in the adjudication of excessive force claims is the incoherent and flawed process that too many courts are using to get from the standard to the outcome. Decisions based on blind deference and judicial speculation are vulnerable to criticism because they are the product of a process that is not reasonably calculated to meaningfully determine the perspective of a reasonable police officer. If a consistent, rigorous, evidentiary approach—like the approach proposed herein—focused on officer training, experience, and behavioral guidelines were adopted across the board, the reasonable officer standard would be more meaningful, outcomes would be more just, and public confidence in those outcomes would increase.

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285. This is not intended to suggest that reasonable officer determinations that disregard the Evidence would pass muster under more deferential standards of appellate review. They would not. But, as set forth above, they are certainly erroneous under the *de novo* standard that typically would apply.