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Comment

Cracking *Graham*: Police Department Policy and Excessive Force

Christopher Logel*

When a police officer uses force against a person, the Fourth Amendment requires that the force be “objectively reasonable” under the circumstances. Under this standard, is it relevant whether an officer complied—or did not comply—with his or her department’s use of force policy? The federal circuit courts of appeal are split. A slim plurality of circuits holds that an officer’s compliance or non-compliance with individual departmental use of force policy is relevant to excessive force claims. The minority of circuits disagree. To further complicate matters, within each side of the split, courts often have divergent reasons for reaching the same conclusion.

This Comment examines both sides of the circuit split before concluding that the minority position is correct: police department policy has no bearing on objective reasonableness under the Fourth Amendment. This conclusion is supported in by two independent arguments. First, this Comment demonstrates that—contrary to the plurality’s position—Supreme Court precedent precludes the consideration of police department policy. It advances this claim not only from Fourth Amendment law specifically, but also based on the application of broader separation of powers principles. Second, this Comment outlines powerful practical considerations that caution against allowing police department policy to creep into excessive force law. These practical concerns resolve any lingering ambiguity in the case law in favor of police department policy’s constitutional irrelevancy.

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INTRODUCTION

In *Graham v. Connor*,¹ the Supreme Court announced that the Fourth Amendment’s “objective reasonableness” requirement governs police use of force during the seizure of a person.² But what evidence is legally relevant to “objective reasonableness?” Consider the following hypothetical: two officers from two different departments respond to the same situation. At the exact same moment, during the exact same encounter, they both use identical force. And although their actions were the same, one officer violated his or her department’s use of force policy, while the other did not. Are these two uses of force constitutionally distinguishable? The federal circuit courts of appeal are split. A small plurality of circuits has held that police department policy is relevant to use of force analysis.³ For those courts, force used in accordance with an officer’s departmental policy will weigh in favor of its reasonableness—and therefore constitutionality—whereas a violation of policy will do the opposite.⁴

Whether police department policy is relevant to constitutional use of force analysis will have a wide-ranging effect. Excessive force cases are often won, lost, and settled based upon open-ended Fourth Amendment rules and nebulous factual predicates open to interpretation.⁵ Because Fourth Amendment jurisprudence is usually characterized by an examination of the “factbound

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

2. *Id.* at 396–99.

3. The five circuits (the First, Second, Third, Eighth, and Ninth) have held that police department policy is relevant. Four (the Fourth, Seventh, Tenth, and D.C.) circuits take the opposite view. The Fifth and Sixth circuits have intra-circuit splits. The Eleventh Circuit has not directly addressed the issue. *See* *infra* Figure 1.

4. *E.g.*, *Stamps v. Town of Framingham*, 813 F.3d 27, 32 & n.4 (1st Cir. 2016); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003).

5. *See, e.g.*, Rob Schultz, *Jury Awards \$7 Million in Damages After Finding 2 Madison Police Officers Used Unreasonable Force in 2014 Fatal Shooting*, WISCONSIN STATE JOURNAL (Jul. 14, 2017), http://host.madison.com/wsj/news/local/courts/jury-awards-million-in-damages-after-finding-madison-police-officers/article_7afa930b-feb3-50c2-aa75-be6b11580fff.html.

morass of ‘reasonableness’⁶ bright-line rules are the outlier, not the norm. By contrast, police department policies often contain specific prohibitions and regulations against which an officer’s actions can be easily judged.⁷ Courts’ incorporation of these policies into use of force analysis represents a break with the general philosophy of eschewing universal rules in the Fourth Amendment context. As such, the resolution of this issue implicates not only the particularized legal question itself, but also Fourth Amendment jurisprudence more broadly. And outside the court room, police departments and municipalities—or at least, most of them⁸—closely follow and adapt to developments in constitutional police law. Given how commonplace police use of force is in the United States⁹ even a minor change in the law could have significant street level effects.

Against this backdrop, this Comment argues that an officer’s compliance or non-compliance with police department policy is not relevant to constitutional use of force analysis. The Supreme Court’s decisions confirm that whether force is excessive is governed by the Fourth Amendment’s reasonableness requirement, and not any other law, practice, or policy. Part I describes the Fourth Amendment’s “objective reasonableness” requirement as interpreted by the Supreme Court, before detailing rationales from each side of the circuit split. “Objective reasonableness” is necessarily a context-specific, fact-intensive standard, but a close examination of the foundational case law will set the stage for the rest of the discussion. Part II presents the argument-in-chief against the relevancy of police department policy in constitutional use of force analysis.

6. *Scott v. Harris*, 550 U.S. 372, 383 (2007).

7. For example, a New York Police Department officer killed Eric Garner—who was unarmed—by using a choke hold that had been banned under departmental policy for more than twenty years. Joseph Goldstein & Marc Santora, *Staten Island Man Died from Chokehold During Arrest, Autopsy Finds*, N.Y. TIMES (Aug. 1, 2014), <https://www.nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html>; see also, Ian Fisher, *Kelly Bans Choke Holds by Officers*, N.Y. TIMES (Nov. 24, 1993), <http://www.nytimes.com/1993/11/24/nyregion/kelly-bans-choke-holds-by-officers.html>.

8. See, e.g., CIVIL RIGHTS DIVISION, U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 23–45 (Jan. 13, 2017) (finding that the Chicago Police Department use of force policies and practices systemically ran afoul of the Fourth Amendment).

9. The Department of Justice’s officer-citizen shooting statistics are notoriously incomplete. Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, WASH. POST (Sept. 8, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/>. The most reliable count of those killed by police in the United States puts the number at 1093 in 2016. See *The Counted*, THE GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database>. Other countries with similar governments, legal traditions, and economic development use force at tiny fraction of the rate of officers in the United States. For example, in England & Wales 55 people were fatally shot by police in 24 years. By contrast, in the first 24 days of 2015, 59 people were fatally shot by police in the United States. See James Lartey, *By the Numbers: US Police Kill More in Days Than Other Countries Do in Years*, THE GUARDIAN, (June 9, 2015), <https://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries>.

First, it argues that existing Supreme Court precedent forecloses the consideration of police department in use of force analysis, not only on Fourth Amendment grounds, but also based on broader separation of powers principles. The part continues by showing that significant pragmatic considerations militate against the consideration of police department policy in use of force analysis. Finally, this Comment concludes by suggesting that although ample case law already exists on the subject, further clarification on the *Graham* standard would be helpful to the lower courts.

I. USE OF FORCE UNDER THE FOURTH AMENDMENT

Prior to *Graham* there was confusion among the lower courts not only about which constitutional standard governed claims of allegedly excessive force used by police¹⁰ during a seizure¹¹ but also about how those standards ought to be applied.¹² And although all post-*Graham* courts agree that claims of excessive force are judged against the objective reasonableness standard, they disagree about the legal contours of that standard. This part begins by examining the foundational case: *Graham*, before exploring the details of the circuit split, which gave rise to this Comment.

A. *Graham v. Connor* and “Objectively Reasonable” Force

Graham was a diabetic in need of food to counteract an insulin reaction.¹³ *Graham*’s friend drove him to a convenience store to purchase some food, but the store was busy so *Graham* quickly exited and the pair drove off to find food elsewhere.¹⁴ *Connor*, a local police officer, observed *Graham* quickly enter and exit the store and—concluding that this was suspicious behavior—stopped *Graham* and his friend’s car about half a mile from the store.¹⁵ At the beginning

10. For the purposes of this Comment, a “police officer” is any executive official exercising the police power of the government. This includes for example, city police officers, county sheriff’s deputies, state game wardens, and FBI agents. Similarly, a “police department” encompasses any agency supervising police officers.

11. A person is seized within the meaning of the Fourth Amendment “when, by means of physical force or a show of authority, his freedom of movement is restrained.” *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). Thus, the force used to “seize” a person within this Comment refers only to the pre-custodial force such as during a stop, arrest, or arrestee transport. In the custodial context, the Eighth Amendment’s “cruel and unusual punishment” clause governs excessive force claims. *Whitley v. Albers*, 475 U.S. 312, 318–19 (1986).

12. “In the years following *Johnson v. Glick*, the vast majority of lower federal courts have applied its four-part ‘substantive due process’ test indiscriminately to all excessive force claims lodged against law enforcement and prison officials under § 1983, without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard.” *Graham v. Connor*, 490 U.S. 386, 393 (1989); see *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir. 1973) cert. denied, 94 S. Ct. 462 (1973).

13. *Graham*, 490 U.S. at 388.

14. *Id.* at 389.

15. *Id.*

of the stop, Graham's friend told Connor that Graham was a diabetic having an insulin reaction.¹⁶ Connor ordered the pair to wait while he returned to his patrol car to call for backup and find out if anything illegal had happened at the store.¹⁷ At this point, Graham got out of the car, ran around it twice, and then passed out.¹⁸ When more officers arrived, multiple people again urged that Graham was just having a diabetic reaction, but officers handcuffed Graham and "threw him headfirst into the car."¹⁹ Eventually, the officers received a report that nothing illegal had happened at the convenience store, and released Graham.²⁰ During the stop, Graham suffered a broken foot, cuts, a bruised forehead, and chronic tinnitus.²¹

Graham brought a suit under 42 U.S.C. § 1983,²² arguing that officers used excessive force in violation of his Fourth Amendment rights.²³ The district court applied a four-factor test for excessive force claims brought under § 1983.²⁴ Under this test, the district court issued a directed verdict in favor of the city and its officers, which was later affirmed by the Fourth Circuit.²⁵

The Supreme Court overturned the Fourth Circuit's ruling, and—relying primarily on its decision in *Tennessee v. Garner*²⁶—held that the Fourth Amendment requires that the force used by police to seize a person must be "objectively reasonable" under the circumstances.²⁷ Determining whether the use of force is objectively reasonable requires balancing an individual's Fourth

16. *Id.* at 388-89.

17. *Id.* at 389.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 390.

22. This statute provides a cause of action for anyone whose federal constitutional rights have been violated by a state official: "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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. § 1983 (1982).

23. Brief for Petitioner at 6–8, *Graham v. Connor*, 490 U.S. 386 (1989) (No. 87-6571).

24. The four-factor test included the following parameters, and was based on "substantive due process," rather than the Fourth Amendment's reasonableness requirement:

(1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) "[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm."

Graham at 386, 390 (1989) (quoting *Graham v. City of Charlotte*, 644 F. Supp. 246, 248 (W.D.N.C. 1986)); see also *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir. 1973) cert. denied, 94 S. Ct. 462 (1973).

25. See *Graham v. City of Charlotte*, 644 F. Supp. 246, 249 (W.D.N.C. 1986); *Graham v. City of Charlotte*, 827 F.2d 945, 950 (4th Cir. 1987).

26. 471 U.S. 1 (1985).

27. *Graham*, 490 U.S. at 388, 396.

Amendment interests against the governmental interests in the use of force.²⁸ The Court vacated the lower court's decision in *Graham* and remanded it for further consideration under the proper constitutional standard.²⁹

Although *Graham*'s balancing test is context-specific and defies "precise definition or mechanical application,"³⁰ three important analytical features govern judicial inquiries applying it. First, the test for reasonableness is *objective*: the malicious intent and motivation of officers have no relevance.³¹ Put another way, the test for reasonableness under *Graham* asks what a reasonable officer would have done under the circumstances.³² Under this standard, an officer's knowledge of the circumstances is relevant; he or she is privileged to act in an objectively reasonable manner based upon his or her knowledge of the circumstances at the moment of action. By contrast, that officer's subjective beliefs about what constitutes a reasonable course given those circumstances is irrelevant. For example, if an officer receives a report that a suspect is carrying a gun, then his or her conduct will be measured against what a reasonable officer would have done based on such a report, rather than on what the officer subjectively thought was reasonable.

Second, the test for reasonableness must account for the fact that officers make judgments in the moment, and without the benefit of perfect hindsight.³³ This is part of judging the reasonableness of force under the totality of the circumstances—sometimes officers must make quick decisions and judicial inquiries must account for this fact. While conduct may seem unreasonable from the bench or jury box years later, it may have been perfectly reasonable in the split second that the officer had to decide on a course of action.

And finally, the Court announced an *illustrative* list of relevant considerations. This list, which has become known as "*Graham* factors" includes: (1) "the severity of the crime at issue; (2) "whether the suspect poses an immediate threat to the safety of the officers or others"; (3) "whether [the

28. *Id.*

29. *Id.* at 399.

30. *Id.* at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)); see also *Scott v. Harris*, 550 U.S. 372, 383 (2007). In response to a party's attempt to discretely categorize the use of force as either deadly or non-deadly, the Court stated "[a]lthough respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.'" *Scott* at 383 (2007). Notwithstanding *Scott* and *Graham*, some lower courts still consider force in discrete categories. *E.g.*, *Flores v. City of Palacios*, 381 F.3d 391, 398–99 (5th Cir. 2004) (applying separate legal standards to deadly and non-deadly force).

31. *Graham*, 490 U.S. at 397. A substantial reason that the Court took the *Graham* case was to send a message to lower courts who were grossly misreading *Garner*. See *infra* note 92. Prior to *Graham*, many federal circuits had considered whether force was used "in good faith" or "maliciously and sadistically for the purpose of causing harm." *Graham v. City of Charlotte*, 827 F.2d 945, 948 (4th Cir. 1987) (quoting *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980)); *Lewis v. Downs*, 774 F.2d 711, 714 (6th Cir. 1985); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir. 1973).

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

33. *Id.*

suspect] is actively resisting arrest or attempting to evade arrest by flight.”³⁴ Because the *Graham* factors are merely illustrative, courts consider them to varying degrees depending on the law of that circuit and the circumstances of the case.³⁵

In addition to the *Graham* factors, some circuits have fashioned their own, circuit-made factors that they often consider. For example, the Fourth Circuit has employed a factor that examines “the proportionality of the force in light of all the circumstances.”³⁶ For its part, the Third Circuit has a list of five factors—”*Sharrar* factors”—that it applies in addition to *Graham* factors.³⁷ These are but a few examples of how *Graham*’s relative paucity of explanatory force has led to its uneven application, which varies from circuit to circuit and case to case.

B. The Circuit Split: Police Department Policy Under Graham

Figure 1: The Circuit Split

Officer Compliance or Non-Compliance with Police Department Policy		
Relevant under <i>Graham</i>	Not relevant under <i>Graham</i>	Intra-circuit split
<i>Stamps v. Town of Framingham</i> , 813 F.3d 27, 32 & n.4 (1st Cir. 2016)	<i>Abney v. Coe</i> , 493 F.3d 412, 419–20 (4th Cir. 2007).	<i>Compare Gutierrez v. City of San Antonio</i> , 139 F.3d 441 (5th Cir. 1998), with <i>Pratt v. Harris Cnty.</i> , 822 F.3d 174 (5th Cir. 2016).
<i>Brown v. City of New York</i> , 798 F.3d 94, 101 & n.11 (2d Cir. 2015)	<i>Thompson v. City of Chicago</i> , 472 F.3d 444, 453–55 (7th Cir. 2006).	<i>Compare Roelle v. Hamilton Cnty.</i> , 870 F.3d 471, 486 (6th Cir. 2017), with <i>Cass v. City of Dayton</i> , 770 F.3d 368 (6th Cir. 2014).
<i>Estate of Smith v. Marasco</i> , 318 F.3d 497, 517 (3d Cir. 2003)	<i>Tanberg v. Sholtis</i> , 401 F.3d 1151, 1163–64 (10th Cir. 2005)	
<i>Ludwig v. Anderson</i> , 54 F.3d 465, 471–72 (8th Cir. 1995)	<i>English v. District of Columbia</i> , 651 F.3d 1, 9 (D.C. Cir. 2011).	

34. *Id.*

35. *Compare Scott*, 550 U.S. 381–86 (making no explicit reference to *Graham* factors when considering whether use of force was constitutionally unreasonable), with *Shafer v. Cnty. of Santa Barbara*, 868 F.3d 1110, 1115–16 (9th Cir. 2017) (analysis focused exclusively on *Graham* factors).

36. *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994); see also *Waterman v. Batton*, 393 F.3d 471, 480–82 (4th Cir. 2005) (discussing *Rowland*’s proportionality factor).

37. *Sharrar v. Felsing*, 128 F.3d 810, 822 (3d Cir. 1997) (“[o]ther relevant factors include the possibility that the persons subject to the police action are themselves violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time.”), abrogated on other grounds by *Curley v. Klem*, 499 F.3d 199 (3d Cir. 2007); see also *Estate of Smith v. Marasco*, 430 F.3d 140, 149–50 (3d Cir. 2005) (applying both *Graham* and *Sharrar* factors).

<i>Drummond ex rel. Drummond v. City of Anaheim</i> , 343 F.3d 1052, 1059 & n.6 (9th Cir. 2003); <i>see also Scott v. Henrich</i> , 39 F.3d 912, 915–16 (9th Cir. 1994).		
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The plurality of circuits that have found police department policy relevant under *Graham* have done so on varied grounds.³⁸ These circuits can be roughly divided into two categories: those that rely directly on the Supreme Court’s reasoning in *Tennessee v. Garner*,³⁹ and those espousing views that seem to be extrapolated from *Graham* itself. *Brown v. City of New York* is an example of the former approach.⁴⁰ In *Brown*, the Second Circuit held that a police officer’s violation of the department’s pepper spray policy was relevant to whether his use of force was constitutionally excessive.⁴¹ In so holding, the *Brown* court noted that in *Garner* the Supreme Court had “considered police regulations of several jurisdictions in making a constitutional rule in excessive force.”⁴² At least one other circuit has framed the issue by reference to the same passage from *Garner*.⁴³

By contrast, in *Stamps v. Town of Framingham*, the First Circuit relied on a *Graham*-centric approach.⁴⁴ In a footnote, the *Stamps* court reasoned that police department policy was relevant because it showed that “evidence regarding officer training ‘is relevant both to the . . . question of whether there was a violation at all and to the . . . question . . . of whether a reasonable officer in [the defendant’s] circumstances would have believed that his conduct violated the Constitution.”⁴⁵ The court’s emphasis on the “reasonable officer,” is an

38. *Stamps v. Town of Framingham*, 813 F.3d 27, 32 & n.4 (1st Cir. 2016) (holding police policy and procedure are probative of what a reasonable officer would have done under the circumstances); *Brown v. City of New York*, 798 F.3d 94, 101, n.11 (2d Cir. 2015) (noting that *Tennessee v. Garner*, 471 U.S. 1 (1985), “considered police regulations of several jurisdictions in making a constitutional ruling on excessive force.”); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003)

39. 471 U.S. 1 (1985).

40. 798 F.3d 94, 101 & n.11 (2d Cir. 2015).

41. *Id.*

42. *Id.*; *Garner*, 471 U.S. at 1.

43. *Scott v. Henrich*, 39 F.3d 912, 915–16 (9th Cir. 1994).

44. *Stamps*, 813 F.3d at 32 & n.4.

45. *Id.* (quoting *Jennings v. Jones*, 499 F.3d 2, 19–20 (1st Cir. 2007)). Attentive readers will likely note that this quote appears to bifurcate the “objective reasonableness” test in a way that—arguably—introduces subjectivity into the issue in contravention of *Graham*. *See Graham v. Connor*, 490 U.S. 386, 397 (1989) (“the ‘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 intention or motivation.”) (emphasis added).

incorporation of that standard used both in *Graham* and in other Fourth Amendment contexts.⁴⁶

Courts with the most convincing arguments on the minority side of the split—those holding that police department policy is irrelevant—tend to cite⁴⁷ the Supreme Court’s decision in *Whren v. United States*,⁴⁸ which held, *inter alia*, that “police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities.”⁴⁹ Lower courts have interpreted this language to mean that the protections of the Fourth Amendment should apply equally to citizens, regardless of the internal policies governing officers policing them.⁵⁰

*Tanberg v. Sholtis*⁵¹ is a particularly useful case for understanding the application of *Whren* to excessive force cases. In *Tanberg*, one of the issues on appeal was whether the district court properly excluded evidence that an officer had violated his department’s standard operating procedures (SOP).⁵² The *Tanberg* court upheld the district court’s exclusion of the evidence under Fed. R. Evid. 401, stating:

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. If [the officer] violated the SOP governing the use of force in effecting arrest, that fact might well be pertinent to [his department’s] future decisions to promote, retain, or discipline him; it is not relevant to determining if Plaintiffs’ arrest violated the reasonableness requirement of the Fourth Amendment.⁵³

46. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989); cf. *Terry v. Ohio*, 392 U.S. 1, 21–22 (“would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?”) (1968) (quoting *Carroll v. United States*, 267 U.S. 132, 162) (1925)).

47. Among those circuits holding that police department policy is not relevant under *Graham*, the Fourth is the only one to *not* cite *Whren*. See *Abney v. Coe*, 493 F.3d 412, 418–20 (4th Cir. 2007). Instead that court swiftly dismissed the relevancy of department policy stating, “[i]t is, in fact, settled law that a violation of departmental policy does not equate with constitutional unreasonableness.” *Id.* at 419 (citing *Davis v. Scherer*, 468 U.S. 183, 193–96 (1984)).

48. 517 U.S. 806 (1996).

49. *Id.* at 815 (1996) (citations omitted).

50. E.g., *Thompson v. City of Chicago*, 472 F.3d 444, 455 (7th Cir. 2006) (citing *Whren* in holding that police department policies are irrelevant to the question of whether force was constitutionally reasonable).

51. 401 F.3d 1151, 1161–68 (10th Cir. 2005).

52. *Id.*

53. *Id.* at 1162. In addition to the abovementioned quote, the *Tanberg* court also gave a well-articulated defense of its ruling on policy grounds:

Although plaintiffs frequently wish to use administrative standards, like the Albuquerque SOPs, to support constitutional damages claims, this could disserve the objective of protecting civil liberties. Modern police departments are able—and often willing—to use administrative measures such as reprimands, salary adjustments, and promotions to

This split illustrates that *Graham*'s lack of a detailed rationale leaves courts without clear guidance. The *Graham* standard is succinct, but so general that courts rarely solely rely on *Graham*. To further complicate matters, most of the Court's subsequent excessive force cases have been resolved on procedural grounds or qualified immunity.⁵⁴ Because *Graham*'s holding lacks explanatory force, lower courts must analytically extrapolate from its facially ambiguous language and look to other Fourth Amendment precedent to understand its holding. The next Part conducts that analysis.

II. REFOCUSING ON OBJECTIVE REASONABLENESS

This Part advances three arguments against the constitutional relevancy of police department policy in Fourth Amendment use of force analysis. First, it conducts a close examination of *Graham*'s test for "objective reasonableness." It argues that while the that test is facially opaque, the analytically salient features of the "*Graham* factors" demonstrate that police department policy falls well outside the ambit of constitutionally relevant considerations.⁵⁵ Second, it presents a novel argument against the relevancy of police department policy based on separation of powers concerns. Finally, it argues that there are significant practical considerations that militate against allowing the police to regulate themselves by interjecting their own policy into the Fourth Amendment's reasonableness requirement.

A. *Interpreting Graham & Other Constitutional Considerations*

As announced in *Graham*, the touchstone for whether a police officer's use of force was constitutionally excessive is the Fourth Amendment's test for

encourage a high standard of public service, in excess of the federal constitutional minima. If courts treated these administrative standards as evidence of constitutional violations in damages actions under § 1983, this would create a disincentive to adopt progressive standards. Thus, we decline Plaintiffs' invitation here to use the Albuquerque Police Department's operating procedures as evidence of the constitutional standard.

Id. at 64.

54. Thirty-Five Supreme Court cases cite *Graham*. Of those, arguably only one directly addresses the *substance* of "reasonable force." See *Scott v. Harris*, 550 U.S. 372 (2007). The rest are resolved on either procedural or qualified immunity grounds, which do little to nothing to clarify the contours of reasonableness under the Fourth Amendment. See, e.g., *Cnty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546, 1549 (2017) (overturning the Ninth Circuit's "provocation" rule, which allowed officers to be held liable for an otherwise reasonable use of force that was necessitated by another *independent* Fourth Amendment violation); *City and Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774–76 (2015) (holding that officers were entitled to qualified immunity and declining to resolve whether they violated the Fourth Amendment); *Mullenix v. Luna*, 136 S. Ct. 305, 308–12 (2015) (per curiam) (holding that an officer was entitled to qualified immunity for ending a high-speed chase by shooting at a suspect's vehicle rather than using spike strips).

55. See *Graham v. Connor*, 490 U.S. 386, 388, 396 (1989).

“objective reasonableness.”⁵⁶ But on its face, “reasonableness” lacks explanatory force and the *Graham* opinion itself is open-ended. To understand, analogize, and expand on *Graham*, requires understanding the *Graham* factors. This section begins by unpacking the “*Graham* factors” and their significance in ruling consistently with *Graham*. Although the *Graham* factors are merely illustrative, understanding their analytical characteristics is important for conducting parallel reasoning consistent with *Graham*’s mandate.

1. *Fourth Amendment Precedent Precludes the use of Police Department Policy*

Although the *Graham* factors⁵⁷ do not provide an exhaustive list of constitutionally relevant considerations, they are useful for resolving what sorts of facts are relevant to use of force analysis under the Fourth Amendment. Specifically, analytical features common to all the factors suggest how courts ought to reason about use of force issues. The *Graham* factors *differ* from police department policy in the following respects.

First, all the *Graham* factors are circumstance specific. That is to say, the factors themselves do not produce any categorical rules about the use of force independent of the facts surrounding a particular encounter.⁵⁸ And circuits interpreting *Graham* have—with the exception of police department policy—only considered *circumstance specific* factors, resisting the temptation to carve out universal norms independent of the facts of a particular encounter.⁵⁹ By contrast, police department policies are non-circumstance specific; policy varies from department to department, but not encounter to encounter within the same department. The *Graham* factors will apply in variable degrees—and sometimes not at all⁶⁰—to the circumstances of a particular encounter, but police department policy will always apply to every encounter. Moreover, unlike the *Graham* factors, police department policies often contain categorical rules⁶¹ that do not

56. *Graham*, 490 U.S. at 388.

57. The *Graham* factors are: “(1) the severity of the crime at issue”; (2) “whether the suspect poses an immediate threat to the safety of the officers or others”; (3) “whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.”⁵⁷ *Graham*, 490 U.S. at 396.

58. *Pleasant v. Zamieski*, 895 F.2d 272, (6th Cir. 1990) (under *Graham* “there can be no *a priori* judgments of categorical unreasonableness.”).

59. See, e.g., *Rowland v. Perry*, 41 F.3d 167, 173-74 (4th Cir. 1994) (considering “the proportionality of the force in light of all the circumstances.”); *Sharrar v. Felsing*, 128 F.3d 810 (3d Cir. 1997) (in addition to *Graham* factors, “[o]ther relevant factors include the possibility that the persons subject to the police action are themselves violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time.”), *abrogated on other grounds by Curley v. Klem*, 499 F.3d 199 (3d Cir. 2007).

60. See *supra* note 35 and accompanying text.

61. E.g., PHILADELPHIA POLICE DEPARTMENT, DIRECTIVE 10.6–4 (2016) (categorically regulating ammunition type), <https://www.phillypolice.com/assets/directives/D10.6-FirearmsPolicy.pdf>.

necessarily bend to the requirements of the Fourth Amendment's circumstance-specific inquiry.⁶²

Second, unlike police department policy, *Graham* factors mean the same thing in every part of the country and should be applied the same way in every court; *Graham* factors apply equally well to the use of force analysis in Alaska as they do in Atlanta.⁶³ Police department policy by contrast is highly variable, such that it is not uncommon for two officers in different departments to have different policies within the same jurisdiction. For example, the Los Angeles County Sheriff's department (LACS) and the Los Angeles Police Department (LAPD) have different use of force policies. The LACS mandate that officers issue a verbal warning before using a taser, "unless it would compromise officer safety or is impractical due to the circumstances."⁶⁴ The LAPD taser use of force policy does not mention verbal warnings in any respect.⁶⁵ And while it is inherently reasonable for different departments to have different use of force policies,⁶⁶ the meaning of objective reasonability—and by extension of the Fourth Amendment—is not so variable.⁶⁷

Finally, another clear feature of all the *Graham* factors is that they examine only objective facts.⁶⁸ *Graham* makes clear that the Fourth Amendment's

62. See, e.g., NEW YORK CITY POLICE DEPARTMENT, PROCEDURE 221-02 (2016) (requiring the use of de-escalation techniques, "when appropriate and consistent with personal safety."), https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg221-02-use-of-force.pdf. Although it would be more expeditious for everyone involved, the Court has strongly resisted attempts to carve out categorical rules at the expense of the circumstance-specific character of the Fourth Amendment. See, e.g., *Scott v. Harris*, 550 U.S. 372, 383 (2007) ("[a]lthough respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slough our way through the factbound morass of 'reasonableness.'").

63. In Georgia, State Patrol (GSP) officers are instructed on and have a policy for using the "Precision Immobilization Technique" (often called the PIT maneuver)—a spin-out technique for ending high-speed car chases. GSP officers can use the PIT maneuver at any "reasonable speed as determined by the officer." Shaun Raviv, *Fast, Precise, and Deadly: How Police Use a Dangerous Anti-Terrorism Tactic to End Pursuits*, THE INTERCEPT (Feb. 11, 2016, 1:29 PM), <https://theintercept.com/2016/02/11/pit-maneuver-how-police-use-anti-terrorism-tactic-to-end-pursuits/>. By contrast, the Division of Alaska State Troopers has no official training or policy regarding the PIT maneuver. *Id.*

64. LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, USE OF FORCE POLICY, 5-06/04.95, <http://shq.lasdnews.net/content/uoa/EPC/force-policy.pdf>.

65. CITY OF LOS ANGELES POLICE DEPARTMENT, SPECIAL ORDER NO. 5, (Apr. 18, 2017), <http://assets.lapdonline.org/assets/pdf/17%20SO%205.pdf>.

66. Although the focus of this Comment is use of force policies with respect to the Fourth Amendment, it is important to remember that use of force policies are in place primarily for the police themselves. These policies offer guidance that may be appropriate for one agency depending on its mission and its officer training, but completely inapposite for another agency. For example, National Park Service Rangers stationed in Alaska may have extensive training and policies addressing the confrontation of poachers, but those same policies would be irrelevant to police officers in Atlanta.

67. See *supra* note 49 and accompanying text.

68. See *supra* notes 34–35 and accompanying text.

reasonableness requirement is an objective one.⁶⁹ While an officer's knowledge of the circumstances is relevant,⁷⁰ courts cannot consider the intentions or state of mind of an officer.⁷¹ Courts that consider an officer's training or the departmental policy run afoul of *Graham's* mandate by straying into the realm of subjective reasonableness. Police department policies are not *objective* facts that have independent bearing on a use of force encounter, they are normative—and therefore subjective—rules prescribing police behavior with respect to a department's own internal standards. Stated bluntly: policies are not *facts*, let alone *objective facts* and are therefore outside the scope of *Graham's* inquiry.

Furthermore, although courts and scholars have commented that departmental policy is very important for putting officers on notice of proper use of force techniques and standards,⁷² *Graham* is not concerned with notice. Whether an officer is on notice of the Fourth Amendment's requirements has no bearing on whether he or she actually ran afoul of it.⁷³ And that is the question under *Graham*, not whether an officer had a culpable state of mind, but rather, whether the officer acted in an objectively reasonable manner.⁷⁴

Because *Graham's* standard is anchored at such a high level of generality, many courts holding that police department policy is not relevant have supplemented their analysis by citing *Whren v. United States*.⁷⁵ In *Whren*, officers were patrolling a “high drug area” when they stopped a car for a minor traffic violation.⁷⁶ During the stop, an officer saw drugs in plain view, and the occupants were later charged with drug possession.⁷⁷ The defendants argued that the search was constitutionally unreasonable, in part, because the officers

69. *Graham v. Connor*, 490 U.S. 386, 397 (1989).

70. *Cf. Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474–75 (2015); *cf. Heien v. North Carolina*, 135 S. Ct. 530, 536–37 (2014) (investigatory stop was justified by “reasonable mistake of law”).

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

72. *See, e.g.*, POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 35–36 (2016); *see generally* Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211 (2017).

73. Similarly, when an officer violates a person's constitutional rights he or she will not necessarily be held legally liable. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (“[Q]ualified immunity protects 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.’”) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *but see* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 25–41 (2017) (arguing that qualified immunity is not strong as the Supreme Court generally asserts).

74. An officer's culpable state of mind might very well be relevant to other causes of action in a *custodial* context, but not so for allegations of excessive force during a *seizure*. *See Graham*, 490 U.S. at 398 (“Differing standards under the Fourth and Eighth Amendments are hardly surprising: the terms ‘cruel’ and ‘punishment’ clearly suggest some inquiry into subjective state of mind, whereas the term ‘unreasonable’ does not.”).

75. 517 U.S. 806 (1996); *e.g., Thompson v. City of Chicago*, 472 F.3d 444, 453–55 (7th Cir. 2006).

76. *Whren*, 517 U.S. at 808–10.

77. *Id.*

violated police department policy and practice.⁷⁸ The Court rejected this argument stating that although the defendants attempted to couch their argument as an empirical—and therefore, objective—violation of departmental policy, their reliance on police department policy and practice was “indisputably driven by subjective considerations.”⁷⁹ The Court went on to note that, “police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable.”⁸⁰

Although *Whren* took place in the context of an investigatory stop, many courts have held that it is directly on point in the excessive use of force context.⁸¹ Because both searches and seizures must conform to the Fourth Amendment’s objective reasonableness requirement, courts’ reasoning about the nature of that requirement⁸² is transferable from one context to the other.⁸³ From this premise, *Whren*’s application to the use of force context is straightforward: police department policy is irrelevant to the constitutional analysis of use of force, because it relies on the same sort of reasoning that the *Whren* court explicitly rejected as an impermissible interjection of “subjective considerations.”⁸⁴ In both instances, the Court was reasoning about objective nature of Fourth Amendment analysis. Given their common source of reasoning, it would be illogical for a court to hold that police department policy was relevant to searches, but not to seizures.

On the plurality side of the circuit split, courts tend not to cite *Whren* at all, choosing instead to find explanatory force from *Tennessee v. Garner*.⁸⁵ In *Garner*, a police officer shot an unarmed fleeing residential burglary suspect, who later died.⁸⁶ The police department defended a lawsuit filed by Garner’s father by noting that the officer’s actions were permissible under both Tennessee

78. *Id.* In addition to the argument stated here, the defendants focused on whether the stop was pretextual and motivated by impermissible considerations such as race. *Id.*

79. *Id.* at 813–14.

80. *Id.* at 815.

81. *E.g.*, *Thompson v. City of Chicago*, 472 F.3d 444 (7th Cir. 2006) (citing *Whren*).

82. Specifically, the “objective reasonableness” requirement of the Fourth Amendment is the common core concept around which the court reasons on issues of both search and seizure. *Cf. Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) (the Fourth Amendment’s search protections cover people where they have a “reasonable expectation of privacy”). But “objective reasonableness” lacks the necessary explanatory force to resolve particularized legal issues. Therefore, the Court necessarily has announced principles that—at least partially—flesh-out the meaning of “objective reasonableness.” These principles are common to both the search and seizure context.

83. *See, e.g.*, *Scott v. Harris*, 550 U.S. 372, 381–86 (2007); *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968).

84. *Whren*, 517 U.S. at 813–14 (1996).

85. 471 U.S. 1 (1985); *e.g.*, *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995). No case on the plurality side addresses *Whren*. *See supra* Figure 1.

86. *Garner*, 471 U.S. at 3–4.

statute and police department policy.⁸⁷ The Court held that the use of deadly force by police officers was governed by the Fourth Amendment's reasonableness requirement, and remanded the case for further consideration.⁸⁸

Crucially for those circuits citing *Garner* in the use of force context, the Court surveyed police department procedures and state rules in analyzing the use of deadly force.⁸⁹ The purpose of this survey was to compare modern use of force statutes, policies, and case law to the common-law use of force rule, which—like the Tennessee statute⁹⁰ in *Garner*—allowed police to shoot any fleeing felon, regardless of other circumstances.⁹¹ The Court concluded, “the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the States” and held that the Tennessee statute was invalid.⁹² Due to an insufficient factual record, the Court did not address whether the department's use of force of policy was constitutionally valid.⁹³

Although the *Garner* court did not explicitly endorse the relevancy of police department policy in use of force analysis—and in fact did not address the individual officer's departmental policy at all⁹⁴—some courts have read the decision as implicitly doing so.⁹⁵ And while intuitively it makes sense to look at *Garner* for clarification⁹⁶ some courts' reading of *Garner* has been problematic. Most importantly, the *Garner* court did not survey statutes and policies in other

87. *Id.* at 4–5.

88. *Id.* at 7, 21–22. Thereafter, some courts still applied the Fourteenth Amendment's substantive due process requirement to *non-deadly* use of force claims, until the Supreme Court clarified *Garner*'s reasoning via the *Graham* decision: “[t]oday we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach.” *Graham v. Connor*, 490 U.S. 386, 395 (1989).

89. *Garner*, 471 U.S. at 16–18.

90. *See* Tenn. Code. Ann. § 40-7-108 (1982). The Court declined to consider the constitutionality of the officer's departmental policy, for lack of sufficient record. *Garner*, 471 U.S. at 22. However, it did note that “[t]he Department policy was slightly more restrictive than the [Tennessee] statute, but still allowed the use of deadly force in cases of burglary.” *Id.* at 5.

91. *Garner*, 471 U.S. at 16–19. Under the statute officers were not allowed to shoot fleeing misdemeanants. *Id.* at 5 n.5.

92. *Garner*, 471 U.S. at 18, 22.

93. *Id.* at 22.

94. *Id.*

95. *See, e.g., Brown v. City of New York*, 798 F.3d 94, 101 & n.11 (2d Cir. 2015) (“the Supreme Court in *Tennessee v. Garner*, considered police regulations of several jurisdictions in making a constitutional ruling on excessive force.”) (citations omitted); *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)).

96. Unlike *Whren*, *Garner* is a case that is about the excessive use of force, while *Whren* is about searches. *But see* notes 85–88 and accompanying text. Additionally, *Graham* is explicitly an extension or clarification of what the Supreme Court viewed as its announcement in *Garner*. *See supra* note 92.

jurisdictions as evidence of the constitutional baseline, but rather as a response to concerns raised by Justice O'Connor's dissent in that case:

The Court's silence on critical factors in the decision to use deadly force simply invites second-guessing of difficult police decisions that must be made quickly in the most trying of circumstances. Police are given no guidance for determining which objects, among an array of potentially lethal weapons ranging from guns to knives to baseball bats to rope, will justify the use of deadly force.⁹⁷

Understood in this context, the majority was doing the equivalent of "collecting cases" as a rhetorical flourish to show that their decision was not unworkable as the dissent argued. The cited sections from *Garner* surveying state laws and use of force policies are *descriptive*, not *proscriptive*. Neither the majority—nor the dissent⁹⁸—meant to imply that the police department policy had any bearing on the contours of the Fourth Amendment. Rather, the Court meant to empirically illustrate that its approach was not out of touch with the realities of contemporary policing.⁹⁹ So, while superficially, *Garner* may appear more on point than *Whren*, when interpreted properly, *Garner* contains no binding authority on the propriety of using police policy in Fourth Amendment analysis.¹⁰⁰

But even if one chooses not to adopt the aforementioned reading of *Garner*, it is still not on point. If the *Garner* Court had considered police department policy relevant in the Fourth Amendment context, it did so, at most, in the aggregate.¹⁰¹ Notably, the Court explicitly declined to consider the officer's

97. *Garner*, 471 U.S. at 31–33 (O'Connor, J., dissenting) (citations omitted). The majority's survey of police department policies and state statutes was not the only area where the *Garner* majority explicitly addressed Justice O'Connor's pragmatic concerns. See *id.* at 22 n.23 (majority opinion).

98. *Id.* at 28 (1985) (O'Connor, J., dissenting) ("it should go without saying that the effectiveness or popularity of a particular police practice does not determine its constitutionality.").

99. But why should the Supreme Court go out of its way to reassure pragmatic objectors? Beyond O'Connor's dissent, there may be two other compelling reasons. First, in its brief and at oral argument, Tennessee tried to cast *Garner*'s case as resulting in an "unworkable" doctrine. See Transcript of Oral Argument at 19–21, *Tennessee v. Garner*, 471 U.S. 1 (1985) (No. 83-1035); see also Brief of Petitioners at 25–26, *Tennessee v. Garner*, 471 U.S. 1 (1985) (No. 83-1070). The Court often responds to a losing party's argument, particularly when that argument is pressed into service by the dissent. Second, there is evidence suggesting that—far from being a fully detached body of political adjudication—the Supreme Court flows with the tide of politics and popular opinion. See Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 264–267, 271–281.

100. Furthermore, courts' reliance on *Garner* fails to see the forest for the trees: in *Garner*, the police department policy specifically allowed police officers to shoot burglary suspects. *Garner*, 471 U.S. at 5. If the Court had found the substance of the policy constitutionally significant, surely it would have upheld the officer's actions or—at the very least—explicitly weighed the departmental policy against other factors.

101. Under this reading, the Court considered aggregate police department policy relevant as a watermark for reasonableness. The author of this Comment does not think that this is the correct reading. See *supra* notes 97–103 and accompanying text. But assuming *arguendo* that it is correct, such a consideration is inapposite to the subject of this Comment because the issue is the relevancy of *individual* police department policy, not policies in the *aggregate*.

specific departmental policy.¹⁰² Rather, the majority considered *multiple* police department policies, state statutes, and practices in the *aggregate*.¹⁰³ Thus, courts that have read this language as supporting *individual* police department relevancy have at best misconstrued the scope of the passages to which they cite and have at worst mistaken rhetorical dicta for binding precedent.¹⁰⁴

2. Separation of Powers Concerns

A basic principle of American jurisprudence is that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹⁰⁵ And as part of the executive branch, police departments cannot determine what the Constitution means.¹⁰⁶ Incorporation of police department policy into use of force jurisprudence runs afoul of this principle. Although courts finding relevance in police department policy have been careful to stipulate that police policy does not in itself create a constitutional right,¹⁰⁷ their reliance on police department policies allows the executive to creep into the realm of binding constitutional interpretation. Currently, although police department use of force policy varies widely across the country,¹⁰⁸ most standards either directly state the *Graham* standard or implicitly incorporate it into their policies.¹⁰⁹ But if courts begin to regularly view police department policy as relevant to use of force analysis, then the current paradigm will be reversed: the judicial branch will be looking to the executive for the meaning of the Constitution, rather than the executive following the judiciary’s interpretation.

102. *Id.* at 22 (“[w]e hold that the statute is invalid insofar as it purported to give [the officer] the authority to act as he did. As for the policy of the Police Department, the absence of any discussion of this issue by the courts below, and the uncertain state of the record, preclude any consideration of its validity.”).

103. *Id.* at 17–19.

104. As previously argued, any ambiguity on this issue was resolved by *Whren v. United States*, which is both more directly on point and more recent than *Garner*. 517 U.S. 806 (1996); *see supra* notes 78–87 and accompanying text.

105. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803).

106. Although oath binds the executive to uphold the Constitution, it does not follow that they can determine what the Constitution means. *See* U.S. Const. art. II, § 1, cl. 8. That is the job of the judiciary. *See Marbury*, 5 U.S. at 177. In fact, a key pillar of the separation of powers is that no one branch can both announce the meaning of *and* execute the powers awarded to it by the Constitution.

107. *E.g., Ludwig v. Anderson*, 54 F.3d 465 (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)).

108. Some of these variances arise as a result of local incidents. For example, the Los Angeles Police Department incorporated a prohibition against shooting at moving vehicles after an officer fatally shot a child in a moving car. Richard Winton & Megan Garvey, *LAPD Panel Restricts the Use of Force*, LOS ANGELES TIMES (Feb. 17, 2005), <http://articles.latimes.com/2005/feb/17/local/me-policy17>.

109. William Terrill et al., Final Technical Report Draft: Assessing Police Use of Force Policy and Outcomes 1, 42–55 (2012).

Another problem with allowing the executive to determine the meaning of the Fourth Amendment is that an underlying purpose of the Fourth Amendment is limiting the executive's power.¹¹⁰ Explicitly, Fourth Amendment jurisprudence is often couched in terms of a right to privacy,¹¹¹ or a right to be free from government interference.¹¹² But these positive rights of the citizens can just as easily be framed as negative rights operating against the executive's police power.¹¹³ A strong check against the executive overrunning these rights is the separation of powers whereby an independent judiciary polices the police. Allowing the executive to determine the scope and character of limitations that are designed to operate against the executive itself could undermine the prophylactic protections¹¹⁴ that the separation of powers provide.

The best counterargument against the abovementioned separation of powers position is that the courts lack the requisite expertise to determine what is "objectively reasonable" because most judges have never been police officers and have no special knowledge of police tactics. Put another way, this counterargument asserts that irrespective of separation of powers problems, the judiciary must by necessity defer to the executive's expertise. Some courts seem to agree—at least implicitly—with this idea. For example, in *Stamps v. Town of Framingham*,¹¹⁵ the First Circuit noted that "[p]olice training and procedures] do not, of course, establish the constitutional standard but may be relevant to the Fourth Amendment analysis. We have approved the taking of evidence about police training and procedures into consideration."¹¹⁶ On its face, this rule seems perfectly reasonable—after all, the court system relies on expert testimony when assessing medical malpractice claims, why not for excessive force?

There are several problems with this argument. First, the analogy to expert testimony is inappropriate. Experts do not necessarily craft police policies. Second, arguing that police policy and practice is necessarily reasonable is

110. Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 *Minn. L. Rev.* 1325, 1342–43 (2002); see generally Aziz Z. Huq, *How the Fourth Amendment and the Separation of Powers Rise (and Fall) Together*, 83 *U. Chi. L. Rev.* 139 (2016).

111. *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).

112. *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968).

113. The Fourth Amendment's relevant language could just as easily have been written as, "The Government shall not conduct unreasonable searches and seizures against the people." See U.S. Const. amend. IV.

114. "[I]t is unclear, in advance, whether a structure that violates the constitutional blueprint is a benign innovation or a malignant threat to liberty. Consequently, as Martin Redish and Elizabeth Cisar have pointed out, the constitutional principle of separation of powers is 'inherently prophylactic.'" Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of Second Best*, 80 *CORNELL L. REV.* 1, 10–11 (1994) (quoting Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Cases*, 41 *DUKE L.J.* 449, 477 (1991)).

115. 813 F.3d 27 (1st Cir. 2016).

116. *Id.* at 32, n.4 (1st Cir. 2016) (emphasis added).

analytically untenable. Not only is this assertion open to empirical attack,¹¹⁷ but it is also logically circular. A court ought to be wary of declaring that a practice is reasonable because the police say it is reasonable.¹¹⁸ Third, making a judgment of reasonableness requires no special extrajudicial knowledge. A police tactics expert can certainly testify as to the probable outcomes of using certain tactics, or what the likely effect on police and citizens of a policy or practice might have. But those are questions of empirical fact, not normative questions of reasonableness and policy. For example, it might very well be that a particular use of force policy is effective at apprehending suspects or protecting the lives of officers, but that alone does not answer the question of whether it is a normatively reasonable tactic.

B. “Practical”¹¹⁹ Considerations

Government entities have a large monetary incentive to avoid excessive force lawsuits. Although there are no official published records collating the total that government bodies pay out for excessive use of force, it is clear that the government pay staggering amounts for tortious police misconduct.¹²⁰ Chicago alone paid out \$662 million as a result of police misconduct between 2004 and

117. A—relatively tame—example of this is the Los Angeles Police Department’s policy of using hogtying during arrestee transport through the end of the late 1990s. See Abby Sewell, *Suit Focuses on Police Practice of Hogtying*, L.A. Times (Jan. 22, 2012), <http://articles.latimes.com/2012/jan/22/local/la-me-hogtie-20120122>.

118. This notion also operates against the “objective” prong of “objective reasonableness.” See *Graham v. Connor*, 490 U.S. 386, 388, 396–99 (1989).

119. The author of this Comment thinks that “practical” considerations ought to be outside the scope of constitutional analysis. The Constitution demands what it does, and it is the job of the government to adapt to those requirements, not the other way around. See *INS v. Chadha*, 462 U.S. 919, 944 (1983) (“the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government”); see also *supra* note 101. For example, it would be more expeditious and cheaper for the government to leave indigent defendants counsel-less in criminal cases. But the Constitution contains a right to counsel, so irrespective of its cost and practicality the government must appoint counsel to indigent criminal defendants. See *Gideon v. Wainwright*, 372 U.S. 335 (1963). Similarly, practical considerations should—in theory—be irrelevant to the subject of this Comment. However, not everyone shares this view. See, e.g., Sophie J. Hart & Dennis M. Martin, Essay, *Judge Gorsuch and the Fourth Amendment*, 69 Stan. L. Rev. Online 132, 136–38 (2017) (arguing that Justice Gorsuch’s judicial history suggests that he will take a pragmatic approach to certain Fourth Amendment questions). Therefore, for the sake of completeness, this section is included for those readers who take the view that “practical” considerations have constitutional relevancy.

120. “The 10 cities with the largest police departments paid out \$248.7 million [in 2014] in settlements and court judgments in police-misconduct cases, up 48% from \$168.3 million in 2010.” Zusha Elinson & David Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities*, THE WALL STREET JOURNAL (July 15, 2015, 10:30 PM), <https://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834>. It is worth noting that—like in many other areas of policing policy—more data would be helpful. See generally Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 Marq. L. Rev. 1119 (2013).

2016. And among tortious misconduct, excessive use of force is likely to be the costliest because the harm caused is often severe. Given this economic backdrop, it stands to reason that if police departments can implement use of force policies that minimize their exposure to civil liability, they will do so.¹²¹ To that end, if compliance or non-compliance with their own policies becomes a widely accepted factor in excessive force claims, then it will be within the pecuniary interests of police departments to craft increasingly permissive use of force policies so that they can later cite an officer's compliance with that policy as a defense to civil liability.¹²²

But more permissive use of force policies are potentially problematic because the empirical data shows that those policies lead to higher rates of force usage.¹²³ As a strictly legal matter, the Constitution demands only that force be reasonable, but as a matter of policy, we want the police to use less force when possible, not more.¹²⁴ Therefore, we ought to encourage more restrictive, rather than less restrictive use of force policies.¹²⁵ Letting the police decide what counts cuts against this goal.¹²⁶

Permissive use of force policies are also harmful to police because they are less action-guiding than more specific and restrictive policies. Policies need to strike a balance between flexibility and guidance, all while conforming to the law. It is precisely because these policies need to account for so many different

121. It is worth noting, that municipalities can be held liable for use implementing use of force policies in violation of the Constitution. See *Monell v. Dep't of Soc. Services*, 436 U.S. 658 (1978); see generally VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY 55–63 (4th ed. 2006). The fact that we do hold municipalities liable for use of force policies in violation of the Constitution suggests that using such policies to define the contours of the Fourth Amendment is inappropriate.

122. See *supra* note 53.

123. See William Terrill & Eugene A. Paoline III, *Police Use of Less Lethal Force: Does Administrative Policy Matter?*, 34 Just. Q. 193, 206–09 (2017).

124. This policy view follows directly from prevailing norm that—*ceteris paribus*—we generally want to decrease the amount of physical harm inflicted on people. Of course, not everyone necessarily agrees with this idea. See Mark Berman, *Trump Tells Police Not to Worry About Injuring Suspects During Arrests*, WASH. POST (July 28, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/07/28/trump-tells-police-not-to-worry-about-injuring-suspects-during-arrests/>.

125. In addition to the benefits of preventing physical harm, restrictive use of force policies probably also encourages better policing practices. See Terrill & Paoline III, *supra* note 126, at 210 (“Foundational police scholars . . . have emphasized the inherent benefits of a less coercive policing environment, arguing that the best officers are those who use less, not more force. In effect, a good officer is one who can handle a conflictual encounter with a citizen in the least coercive manner possible.”) (citations omitted).

126. See *supra* note 125 and accompanying text. Furthermore, notwithstanding contemporary political rhetoric to the contrary, police officers are much less likely to be killed in the line of duty than in years past. Martin Kaste, *Is There A 'War on Police'? The Statistics Say No*, NPR (Sept. 17, 2015), <https://www.npr.org/2015/09/17/441196546/is-there-a-war-on-police-the-statistics-say-no>.

concerns that they are so difficult to craft.¹²⁷ On the one hand, an effective use of force policy needs to provide useful guidance to officers so that they use force safely and responsibly, not only in a constitutional sense, but also in a tactical sense.¹²⁸ On the other hand, use of force policies need to comply with an evolving tangle of legal rules. These competing goals create tension between two basic forms of police department use of force policy: general policies that clearly comply with the law, but provide little concrete direction to officers,¹²⁹ and highly particularized policies that provide clear guidance to officers in the form of concrete rules,¹³⁰ but that may run afoul of the legal standards.

CONCLUSION

This Comment has argued that an officer's compliance or non-compliance with police department policy is not relevant to claims alleging the use of constitutionally excessive force. Notwithstanding this contention, it is important to note that *Graham* is—probably by design—an open-ended decision. Although flexibility is necessary in the Fourth Amendment context,¹³¹ *Graham*'s application has led to confusion both among the lower courts¹³² and among police officers,¹³³ not only with respect to the subject of this Comment, but in

127. Although the task is difficult, clearly it is better for police to have adequate guidance before they need to use force, rather than expecting them to conduct complex legal, ethical, and tactical analysis in real time. See generally POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 25–71 (2016); Vladimir A. Sergevin & Darrell L. Ross, *Prevention and Training, in POLICE USE OF FORCE: IMPORTANT ISSUES FACING THE POLICE AND THE COMMUNITIES THEY SERVE*, 169, 170–71, 176–180 (Michael J. Palmiotto ed., 2017).

128. See Sergevin & Ross, *supra* note 130, at 178–180.

129. The substantive portion of the Los Angeles County Sheriff's Department use of force policy is a restatement of the *Graham* standard, summarized in a short paragraph. Los Angeles County Sheriff's Department Use of Force Policy, § 3-10/0.20.00 (2016), available at <http://shq.lasdnews.net/shq/mpp/mpp.html>.

130. The substantive portion of the Boston Police Department use of force policies is divided into three sections: “deadly force,” “less lethal force,” and “non-lethal force.” These policies span over a total of seventeen pages and contain explanations of both the applicable legal standards and the municipal policy. See Boston Police Department Rules and Procedures, §§ 303, 303a, 304 (2017), available at <http://bpdnews.com/rules-and-procedures/>. Interestingly, even though this approach is more action-guiding than a more generalized approach, the Supreme Court has said that the touchstone for excessive force analysis is reasonableness and has continually declined to apply different standards to distinct types of force. See *infra* note 136.

131. See *Scott v. Harris*, 550 U.S. 372, 383 (2007) (“Although respondent’s attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slough our way through the factbound morass of ‘reasonableness.’”).

132. For example, although *Graham*'s test is for objective reasonableness some courts still attempt to discretely classify force into distinct categories. *E.g.*, *Flores v. City of Palacios*, 381 F.3d 391, 398–99 (5th Cir. 2004) (differentiating between deadly and non-deadly force). Discrete classifications run counter to the Court's precedent. See *Scott v. Harris*, 550 U.S. 372, 383 (“Whether or not [an officer's] actions constituted application of ‘deadly force,’ all that matters is whether [the officer's] actions were reasonable.”); see *supra* note 30 and accompanying text.

133. This can be particularly frustrating for police officers because—unlike in certain Fourth Amendment search situations—there is no “good faith” exception for excessive force. See

other areas as well.¹³⁴ This indeterminacy has created different Fourth Amendment protections for people in different jurisdictions.¹³⁵ Not only is this patchwork of law unfair to citizens, but it also creates uncertainty for police officers who have to make split-second decisions in the field. In short, all parties involved deserve more clarification from the Supreme Court.¹³⁶ This is not to say that the Supreme Court ought to change to *Graham*'s test for objective reasonableness. Rather, it is a call for more clarity on what sorts of considerations are relevant to objective reasonableness.¹³⁷ And given the atypical rate at which police use force in the United States,¹³⁸ this is an issue that should be resolved sooner, rather than later.

United States v. Leon, 468 U.S. 897, 906–25 (1984) (establishing “good faith” exception to the exclusionary rule).

134. See *supra* note 30 and accompanying text.

135. Or even different protections based on the agency whose officers respond to an incident. Consider the varied use of force policies of the LACS and LAPD. See *supra* notes 67–68 and accompanying text.

136. This Comment is not the first article to make this point. For an in-depth discussion of some of the problems created by the vagaries of contemporary excessive force jurisprudence, see Rachel Harmon, *When is Police Violence Justified?*, 102 N.W. U. L. Rev. 1119, 1140–46 (2008) (arguing that the highly generalized nature of contemporary excessive force jurisprudence creates uncertainty that is problematic for police officers, judges, jurors, and victims of excessive force).

137. Recall that, not only with respect to the subject of this Comment, but also in other areas, the lower courts' application of *Graham* has been highly varied, to the point where circuits have created their own factors that are relevant under *Graham*. See, e.g., *supra* note 36–37 and accompanying text. While *Graham*'s open-ended standard will inevitably lead to opposite results based on similar factual predicates, we should at least be able to agree on a universal set of standards by which situations should be judged.

138. See *supra* note 9.