Article

Constitutional Reasonableness

Brandon L. Garrett†

INTRODUCTION

The concept of reasonableness pervades constitutional doctrine. The concept has long served to structure common-law doctrines, from negligence to criminal law, but its rise in constitutional law is more recent.[1] This Article aims to unpack three dimensions of constitutional reasonableness: (1) what the term reasonable means in constitutional doctrine; (2) which actors it applies to; and (3) how it is used. First, the underlying concept of reasonableness that courts adopt varies, with judges using competing objective, subjective, utility-based, or custom-based standards. For some rights, courts incorporate more than one usage at the same time.[2] Second, the objects of the reasonableness standard vary, assessed from the perspective of judges, officials, legislators, or citizens, and from the perspective of individual decisionmakers, or general institutional or government perspectives.[3] Third, judges may variously apply a constitutional

---

† Justice Thurgood Marshall Distinguished Professor of Law and White Burkett Miller Professor of Law and Public Affairs, University of Virginia School of Law. Many thanks to Kerry Abrams, Anne Coughlin, Barry Friedman, Toby Heytens, Aziz Huq, Dotan Oliar, Chris Slobogin, Larry Solum, and David Zaring for their thoughtful comments; to participants at UVA Law incubator lunch for their comments; and to Elizabeth Hoffman for invaluable research assistance.

1. For an important early commentary on the growing usage of reasonableness in constitutional rights discourse, see George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985).

2. *See* David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210, 250 (1996) ("The dominant standards of liability in tort require an objective reasonableness calculus of social costs and benefits.").

3. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 20–22 (1988) (outlining significance of "implicit male norms" in the reasonable person standard); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 465–67 (1997) (discussing challenges of reasonable person evaluation in sexual harassment); Kit Kinports, *Criminal*

reasonableness standard to the assertion of defenses, waivers, or limitations on obtaining a remedy for the violation of a constitutional right. The use of the common term reasonableness to such different ends can blur distinctions between rights and remedies. Ultimately, I argue that the flexibility and malleability of reasonableness standards accounts for their ubiquity and utility. Constitutional standards can—and have—shifted their meaning entirely, as judges move from one concept or usage of reasonableness, while appearing not to depart from precedent. That ambiguity across multiple dimensions explains both the attraction and the danger of constitutional reasonableness. In this Article, I ultimately point to an opportunity in the spread of these doctrines. I argue that there is a better way to conduct constitutional reasonableness: a regulatory approach, in which reasonableness is informed by objective and empirically informed standards of care.

One could be forgiven for thinking that the concept of reasonableness *should* be largely irrelevant to constitutional law. Only one constitutional provision refers to reasonableness in its text. The Fourth Amendment provides a right to be free from an "unreasonable" search and seizure.[4] That Clause has engendered complex case law concerning topics as wide-ranging as use of deadly force, police surveillance, and automobile searches, all relying to varying degrees on different concepts of reasonableness. Some Supreme Court rulings consist of all-things-considered assessments of the costs and benefits of searches;[5] in other Fourth Amendment areas, the Court asks judges to examine citizens' reasonable expectations of privacy, sometimes admitting evidence of their subjective beliefs; while in others, the focus is the perspective of a reasonable police officer.[6]

Procedure in Perspective, 98 J. CRIM. L. & CRIMINOLOGY 71, 72–73 (2007) (explaining the evolution of the reasonable person standard); Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 391–92 (2012) (arguing for normative conception).

4. U.S. CONST. amend. IV.

5. *See infra* Part II.B.

6. U.S. CONST. amend. IV; Graham v. Connor, 490 U.S. 386, 397–99 (1989) ("[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . . ." (citing Scott v. United States, 436 U.S. 128, 137–39 (1978))); Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 301–02 (2017) ("A tactical Fourth Amendment analysis would focus on whether officers acted contrary to sound police tactics by unreasonably creating a deadly situation . . . ."); *see infra* Part II.B.

Yet that is just the beginning. Each of those breeds of reasonableness review can be found in a range of other constitutional doctrines lacking any textual reference to reasonableness. Over the past three decades, in a range of constitutional doctrines, the Supreme Court has tightened its embrace of reasonableness and replaced a series of substantive standards for constitutional review with objective reasonableness standards. How do we decide if a government official receives qualified immunity from civil liability? We ask whether the official acted reasonably. How do we decide if a police officer properly used deadly force? We ask whether the officer acted reasonably under the circumstances. How do we decide whether a constitutional criminal procedure violation deserves a remedy? We ask whether the error would have affected a reasonable decision by the jurors.[7] How do we decide if a state judge correctly interpreted the Constitution in a criminal appeal? We ask whether the judge interpreted the Constitution reasonably.[8] In *Williams v. Taylor*, Justice O'Connor noted that "[t]he term 'unreasonable' is no doubt difficult to define."[9] However, she said, "it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning."[10] The commonplace, but highly inconsistent, uses of the word reasonable may not, however, suggest any settled meaning—particularly where constitutional interpretation is concerned.

In Part I of this Article, I explore three dimensions to the usages of constitutional reasonableness. The first dimension raises the question of the referent: What is reasonableness? Commentators have long critiqued reasonable man and reasonable person standards in common law fields for assuming perspectives that, in fact, bring in non-objective assumptions about conduct. In constitutional law, those questions are equally important, and there are also questions about whether a reasonableness standard need be objective at all. The Supreme Court has expressed concerns with subjective tests, which can lead to "an expedition into the minds" of officials, and "produce a grave and fruitless misallocation of judicial resources."[11] Thus, the

7. *In re* Winship, 397 U.S. 358, 367–68 (1970) (establishing reasonable doubt rule for juvenile defendants); Davis v. United States, 160 U.S. 469, 488 (1895) (establishing reasonable doubt rule for the federal defense of insanity).

8. Teague v. Lane, 489 U.S. 288, 305–10 (1989).

9. Williams v. Taylor, 529 U.S. 362, 410 (2000).

10. *Id.*

11. United States v. Leon, 468 U.S. 897, 922 n.23 (1984) (quoting Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting)).

Court has said, in the Fourth Amendment context, that "objective standards of conduct" better produce "evenhanded law enforcement" than "standards that depend upon the subjective state of mind of the officer."[12]

Yet the temptation to adopt subjective tests remains. For example, under the Equal Protection Clause of the Fourteenth Amendment, rational basis review ostensibly asks judges to deferentially review reasonable government decisions—yet sometimes the Court asks whether a discriminatory purpose or animus renders the action irrational or unreasonable.[13] Nor is it always clear how an objective reasonableness test works. In contrast to negligence law, constitutional balancing is rarely utilitarian, explicitly balancing costs and benefits. Often it is not clearly defined what factors may be balanced or how. Judges may call the resulting balance reasonable, but it is not always clear why.[14] Moreover, sometimes judges do not want to balance, but rather declare certain types of actions per se unreasonable. The resulting uneven coverage of a reasonableness test can make the constitutional inquiry part objective and part something else.[15] Such rulings may have the flavor of negligence and contract doctrines that rely on custom or industry practice to inform what is reasonable—which I argue is a preferable approach—or they may consist of judicial declarations of per se reasonableness.

A second problem exists: constitutional rights both set expectations for citizens and regulate government actors. The second dimension asks: Who or what is the object of the reasonableness standard—which citizens, government officials, or entities are being held to a standard of reasonableness? Often it is not clear—or, it is clear, but the answer varies from right to right or claim to claim. In some areas, the Supreme Court varies its object, from the reasonable civilian, to the reasonable police officer, to the reasonable judge assessing the claim, to the reasonable defense attorney.[16] Should the Fourth Amendment respect reasonable individual expectations of privacy, or an officer's reason-

12. Horton v. California, 496 U.S. 128, 138 (1990).

13. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996) (finding that law's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests").

14. *See infra* Part I.

15. *See infra* Part I.

16. *See infra* Part II.A.

able belief that a search was necessary? The individual's subjective belief that they were seized, or the officer's subjective intent to seize an individual? The text and the doctrine provide no neutral basis for deciding these questions. Along this second dimension, the Court is wholly inconsistent, both within and across rights, as to whom the object is of the reasonableness standard. Sometimes we might think that the Constitution should protect reasonable expectations of citizens against government incursions. We may expect government officials to do more than just a reasonable job of not violating our constitutional rights—and we may sometimes find government action reasonable, based on some fault by the citizen. Sometimes, judges assess the reasonableness of group decisionmakers, asking whether legislation or administrative action is reasonable. Judges introduce still additional complications where reasonableness for the underlying constitutional standard of care blends with non-reasonableness-based constitutional standards, or where reasonableness is used in a different sense to regulate remedies or standards of review for possible constitutional violations.

A third problem exists: When a constitutional right is concededly violated, should a remedy depend on a further determination of reasonableness in the eyes of federal judges, as opposed to reasonableness based on standards of care or validated facts proven to a jury? Often it does, and not necessarily due to statutory rules, but rather because of court-made remedial limits importing notions of reasonableness. Across this third dimension, judges engage in extensive stacking of different types of reasonableness inquiries. Reasonableness limits remedies or provides standards of review for judges asking whether constitutional rights were violated. Reasonableness can be used to deflect questions whether a right was violated onto another actor; if an official or a judge acted reasonably, then no further inquiry need be conducted. For example, qualified immunity doctrine in constitutional tort cases uses a reasonableness standard.

Once all three dimensions are set out, one sees just how problematic constitutional reasonableness can be in operation. It provides no coherent direction to advise police officers that if they use deadly force, they must do so reasonably under the circumstances; but, if they do so unreasonably, the Fourth Amendment violation may be deemed by a judge reasonable for qualified immunity purposes. It provides no coherent direction to tell defense lawyers that unreasonable assistance may violate the

Sixth Amendment; but, so long as the state judge reasonably denies relief, then there will be no remedy.[17] In those examples and many others, constitutional reasonableness serves not just to permit constitutional balancing, but to blur lines between a rights deprivation and a defense or a remedial limitation on that right. Giving government actors discretion, if there is some boundary to it, is perfectly fine, but these stacked reasonableness tests obscure the very notion of a right. Professor George Fletcher has argued in the criminal context, though the concern applies generally, that: "[t]he reasonable person enables us to blur the line between justification and excuse, between wrongfulness and blameworthiness, and thus renders impossible any ordering of the dimensions of liability."[18]

In Part II, I detail examples of constitutional reasonableness in constitutional criminal procedure, the First Amendment, and the Fourteenth Amendment. In each of these three areas, I describe how judges can blur the three dimensions set out in Part I, including by defining the standard with reference to individual or institutional actors and using the term to define rights, remedies, and standards of review. That all of these varying inquiries can be labeled as reasonableness inquiries itself leads to highly confusing rulings. One can read cases discussing whether, for example, a state judge was reasonable when deciding whether the attorney at a criminal trial reasonably decided to forfeit a defense regarding the reasonable expectation of privacy the defendant had in a police station, and whether doing so reasonably affected the jurors—who were applying a beyond-a-reasonable-doubt standard when deciding the question of guilt. Even if the concept of reasonableness can bear inconsistent usages in the context of the same rights, far more clarity is needed to identify which are used and how.

In Part III, I discuss how a range of prominent commentators have argued that the concept of reasonableness should be *expanded* in its use in constitutional interpretation. Some scholars argue that originalist inquiry should begin by asking what reasonable persons at the time of the drafting of the Constitution would think; or what reasonable lawyers then would do; or, scholars argue, that reasonableness standards should be used in additional areas to conduct constitutional balancing. In contrast,

17. For discussion in the context of habeas corpus, see BRANDON L. GARRETT & LEE KOVARSKY, FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION 336 (2013).

18. Fletcher, *supra* note 1, at 962.

critics raise concerns that doctrines of reasonableness are a poor fit outside contexts like negligence, in which they refer to standards of care and permit jurors to reflect on what an ordinary person might do. I argue that reasonableness has become overused precisely because it is susceptible to changing concepts, objects, and remedies. Judges can turn constitutional standards into very different animals, without changing the term of the standard. Judges can create exceptions and remedial restrictions that alternate from objective and subjective reasonableness, or use both.

In Part IV, I argue that one unanticipated positive consequence of the ubiquity of constitutional reasonableness standards is that judges could improve constitutional reasonableness by making the standards more defined and informed by empirical evidence. Judges could adopt wholesale what Professor Anthony Amsterdam famously advanced, in the Fourth Amendment context, as a regulatory model in which police discretion would be confined by written police practices and legislation within Fourth Amendment limits.[19] Courts could interpret reasonableness to require government officials to regulate on their own and by deferring to reasonable policies. Taking such a view requires looking beyond the reasonableness of the individual actors in a case and asking how the system works in the aggregate.[20] There has been a recent revival of academic interest in such approaches more broadly. Professor Seth Stoughton and I have argued for an approach, informed and encouraging best practices, in the Fourth Amendment use of force context.[21] Professor Barry Friedman and Maria Ponomarenko, as well as Professor Christopher Slobogin, have recently argued that police should generally be incentivized to adopt regulations.[22] The Supreme Court has adopted this approach in the context of challenges to prison rules that burden constitutional rights. Judges

19. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 409 (1974).

20. For an evaluation of potential aggregation in the criminal law context, see Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383 (2007) [hereinafter Garrett, *Aggregation in Criminal Law*].

21. *See* Garrett & Stoughton, *supra* note 6.

22. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1865 (2015) (arguing existing judicial review is "completely inadequate" to regulate law enforcement); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 91 (2016) (arguing that when police agencies create "statute -like policies," they must use notice-and-comment rulemaking).

ask whether they are "reasonably related to legitimate penological interests," although, as I will describe, that doctrine suggests a cautionary tale about the willingness of judges to carefully review regulation.[23]

Now that constitutional reasonableness has become so pervasive, a model in which judges assess reasonableness, as informed by policy and practice, is more feasible across a broad range of constitutional doctrines.[24] Such an approach encourages the government to write informed regulations, curbing discretion.[25] To be sure, constitutional law can demand difficult interpretative choices in highly contested areas. Perhaps in some areas, regulation cannot be realistically agreed upon, and one would worry that self-interested actors would promote practices that suit their interests. The counter-argument is that, so long as reasonableness involves protections above a constitutional floor, those protections should be informed by more than judges' own views of reasonableness. The aspiration of the approach—while courts have not had much success in following it—is to do more than engage in blind judicial deference, and, rather, incentivize informed regulation.

At minimum, I hope to convince readers that existing reasonableness doctrines are inconsistent and multifarious, so that they are often not even a clear enough form of deference. Even if constitutional tests can generally be inconsistent or complex, reasonableness raises its own unique problems as a referent across the different dimensions discussed. I hope to add more precision to the use of the term reasonable, but I also hope to call the inconsistent use of the term into question. The use of reasonableness should be confined to clearly defined dimensions. Still better, I argue we can aspire to a regulatory vision of reasonable and informed regulation. The judicial attraction, unfortunately, to the word reasonable may be precisely due to the ambiguity and malleability of its use across so many dimensions of constitutional doctrine. It is no wonder a word so pervasively used in

23. Turner v. Safley, 482 U.S. 78, 89 (1987).

24. It is a larger question whether drawing on administrative law is a useful move in a range of areas. Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2051 (2016). To what degree courts should consider empirical research when developing rights is also a question beyond the scope of this piece. *See, e.g.*, Lee Epstein, Barry Friedman & Geoffrey R. Stone, *Foreword: Testing the Constitution*, 90 N.Y.U. L. REV. 1001, 1002 (2015).

25. One important criticism of this approach, discussed further in Part IV, *infra*, is whether doing so defers to administrators at the expense of legislators.

modern private law, but appearing in just one portion of the Fourth Amendment, has come to define so much of American constitutional law.

I. THREE DIMENSIONS OF CONSTITUTIONAL REASONABLENESS

This Article discusses three dimensions of constitutional reasonableness standards. Each can characterize common law doctrine as well, but less frequently. Common law doctrines, say, of negligence, are often far less ornate than multi-part constitutional tests. First, conceptions of reasonableness can be objective, subjective, utility-based, or custom-based—and some rights include mixed concepts, or more than one usage, side by side with another, in a compound standard. Second, the objects of reasonableness standards may be institutional or individualized, and assessed from the perspective of judges, officials, legislators, or citizens—or again, with compound standards that look to multiple perspectives in order to resolve a single rights claim. Third, the standard may apply to a right, or to assertion of defenses, or waivers, or remedial limitations, or standards of review. Or it could apply to potentially more than one type of standard of proof, or for relief on review, potentially blurring the distinctions between each of these. Thus, each dimension itself raises complex questions and has its own complex doctrine. This Part discusses each of the three dimensions in turn.

A. CONCEPTIONS OF CONSTITUTIONAL REASONABLENESS

The term reasonable itself has a range of uses and meanings in everyday language. We speak of reasonable explanations, or prices, or persons. Something that is reasonable is "not extreme or excessive"; it is moderate and fair, or it is inexpensive.[26] A person who is reasonable has "sound judgment" or "the faculty of reason."[27] Quantities can be reasonable, people can be reasonable, and interpersonal agreements can be reasonable. In the law, the term reasonable has that same range of uses, which track everyday language, but also additional uses that are dis-

26. *Reasonable*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/reasonable (last visited Oct. 18, 2017).

27. *Id.*

tinctly legal. Reasonableness standards are pervasive in administrative law, civil procedure, contract law,[28] corporate law,[29] criminal law,[30] criminal procedure, employment discrimination law, tort law, and innumerable other fields.[31] In each, reasonableness can be used with conceptions that are, broadly speaking, objective, subjective, utility-based, or custom-based. As Professor Frédéric G. Sourgens has aptly put it in an in-depth examination, there are "competing utilitarian, pragmatic, or formalist reasonableness paradigms."[32]

The reasonable person standard is best known from negligence law, where courts have long used it to set an objective standard based on ordinary care in the relevant circumstances.[33] In tort law, the flexibility of the concept of reasonable care may be a weakness, but also its strength, giving courts the ability (in theory, at least) "to arrive at the correct judgment in a fact-dependent context," even if the concept is "frustratingly imprecise," as Professor James Gibson puts it.[34] The seemingly simple negligence standard can become quite complex in its different applications and permutations. The classic Judge Hand formula conception of that standard of care adopts a calculus focused on social utility, based on a balance of the cost of a precaution, as

28. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 162(2) (AM. LAW INST. 1981) ("A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent . . . .").

29. Leo Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 671 (2010).

30. Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611 *passim* (2011).

31. Judges developed reasonableness as "an objective, universally applicable standard by which everyone's actions could be measured." CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE 98, 316 (1989). *See also* Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 BYU J. PUB. L. 283, 316 (2014) ("Then, from the 1820s to the 1850s, as tort law gradually separated from contract law, the concept of the reasonable or prudent man slowly emerged as a generalized standard of care or liability that would govern interactions among strangers.").

32. Frédéric G. Sourgens, *Right and Reasonableness: The Necessary Diversity of the Common Law*, 67 ME. L. REV. 74, 77 (2014).

33. Martin v. Evans, 711 A.2d 458, 461 (Pa. 1998) (citing Lanni v. Pa. R.R. Co., 88 A.2d 887 (Pa. 1952)) ("Negligence is the absence of ordinary care that a reasonably prudent person would exercise in the same or similar circumstances."); Miller & Perry, *supra* note 3, at 325.

34. James Gibson, *Doctrinal Feedback and (Un)Reasonable Care*, 94 VA. L. REV. 1641, 1643 (2008).

compared to the risk of injury and the size of the harm.[35] However, courts do not always employ such a strictly economic cost-benefit analysis. Instead, they often focus on what a reasonably careful person would do.[36] Constitutional balancing does not explicitly adopt utilitarian formulas for assessing liability. Only in the procedural due process context, in the *Mathews v. Eldridge* test for assessing administrative procedures, has the Supreme Court adopted a utilitarian test for a constitutional right.[37] In addition, comparative negligence takes into account the reasonableness of not just the tortfeasor, but also the victim.[38] Negligence per se standards can import bright-line rules from other contexts, in deference to legislative judgment, to define per se unreasonable actions—regardless of whether the legislation adopts a rule that reflects what a reasonable person might have otherwise done.[39]

In the past, the negligence standard was a reasonable man standard. More recently, the reasonable man standard has been replaced by a reasonable person standard, which can reflect the perspective of those of "like age, intelligence, and experience under like circumstances," as the Restatement (Second) of Torts puts it.[40] Standards of care may be adjusted to reflect different expectations for minors or the disabled, for example, and not based on a general utilitarian calculus. Whether courts or fact

35. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (expressing the Hand formula as B < PL, where B is the burden, P is the probability, and L is the injury).

36. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 cmt. a (AM. LAW INST. 2009). Even better, RESTATEMENT (SECOND) OF TORTS § 291 cmt. a (AM. LAW INST. 1965), puts it this way: "The problem involved may be expressed in homely terms by asking whether 'the game is worth the candle.'" *See also* Michael D. Green, *Negligence = Economic Efficiency: Doubts* >, 75 TEX. L. REV. 1605, 1614 (1997) (comparing the Hand formula to the Golden Rule); Kenneth W. Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness as Well as Efficiency Values*, 54 VAND. L. REV. 901, 902–03 (2001) ("[T]he Reporter intended this definition to have the same meaning as a 'reasonably careful person' test. Moreover, the definition is meant to have some flexibility . . . .").

37. Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

38. Arthur Best, *Impediments to Reasonable Tort Reform: Lessons from the Adoption of Comparative Negligence*, 40 IND. L. REV. 1, 9–10 (2007).

39. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. c; *see, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 318–19 (2005).

40. RESTATEMENT (SECOND) OF TORTS § 283A; *accord* David E. Seidelson, *Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent*, 50 GEO. WASH. L. REV. 17, 20 (1981).

finders effectively take account of those perspectives is another question. Common criticisms remain that reasonableness tends to be interpreted to reflect standards of care that do not reflect diverse viewpoints, but rather those of reductionist, or majority, or male viewpoints; a non-emotional perspective; or a privileged judicial perspective.[41]

Moreover, in a range of areas, what is reasonable is defined based on industry standards of care, and not just by a cost-benefit analysis. Thus, in medical malpractice cases, liability may depend on norms in the relevant medical community: for example, the historical standard of care reflects "such reasonable care and skill . . . as is usually exercised by physicians or surgeons of good standing, of the same system or school of practice in the community in which he resides."[42] Those standards may not be sound ones; they may reflect consistent, but shoddy norms. The doctrine may even perversely disincentivize improvements upon standards of care.

A negligence-based standard requiring reasonable care is used in a range of constitutional contexts. Rather than look to a person of "ordinary prudence," perhaps informed by standards of care and accepted custom in a profession,[43] constitutional tests may look to something more uncertain—government standards of care.[44] In the Fourth Amendment context, for example, police

---

41. Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1404 (1992) ("The male bias inherent in a standard that explicitly excludes consideration of women as reasonable actors is obvious."); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1177–78 (1990) ("[J]udicial definitions of reasonableness often reflect the values and assumptions of a narrow elite . . . .").

42. Hansen v. Pock, 187 P. 282, 284 (Mont. 1920), *abrogated by* Chapel v. Allison, 785 P.2d 204, 207 (Mont. 1990). For the current standard of care for board-certified specialists, see *Chapel*, 785 P.2d at 207 ("[W]hen a defendant in a medical negligence action [is] a board-certified specialist, his skill and learning [will] be measured by 'the skill and learning possessed by other doctors in good standing, practicing in the same specialty and who hold the same national board certification.'" (quoting Aasheim v. Humberger, 695 P.2d 824, 826 (Mont. 1985))). For the current standard of care for non-board-certified specialists, see *Chapel*, 785 P.2d at 210 ("[A] non-board-certified general practitioner is held to the standard of care of a 'reasonably competent general practitioner acting in the same or similar community in the United States in the same or similar circumstances.'" (citing Shilkret v. Annapolis Emergency Hosp. Ass'n, 349 A.2d 245 (Md. 1975))).

43. *E.g.*, Schneider v. Revici, 817 F.2d 987, 990 (2d Cir. 1987) (discussing the standard focusing on "accepted medical practice" in malpractice suits).

44. WILLIAM LLOYD PROSSER ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, 173–74 (W. Page Keeton ed., 5th ed. 1984).

officers are judged on whether they used reasonable force, based on an objective analysis of the circumstances.[45] An officer is not treated as a reasonable civilian, but as a reasonable police officer in the circumstances—which raises the question whether one looks to police practices and norms in law enforcement to inform the reasonableness analysis.[46] Other standards look at reasonable representation by a criminal defense lawyer, or a reasonable legislator.[47] In other contexts, as I will describe, the Supreme Court has examined reasonableness from the perspective of a criminal suspect,[48] a juvenile,[49] or an intellectually disabled person.[50] Such approaches track negligence law, where the reasonable person may be replaced by the reasonable person of "like age, intelligence, and experience under like circumstances," as the Restatement (Second) of Torts puts it.[51]

A reasonable person inquiry may also include subjective considerations. In Equal Protection Clause doctrine under the Fourteenth Amendment, for example, while rational basis review typically defers to reasonable legislative goals, if a statute was motivated by a discriminatory purpose or animus, it may be found unconstitutional. Such a purpose-considering test is, at least in part, subjective, although the Court often frames it as unreasonable or irrational to be motivated by animus. Some Fourth Amendment decisions do not ask what a reasonable police officer would have done, but rather what a reasonable police officer would have done based specifically on the information the officer had under the circumstances, which some have termed a "subjective objectivity."[52]

Contract law does not adopt that utilitarian formulation of reasonableness; in contract law, a "rational basis ultimately is measured not by an absolute standard, but by reference to relevant community standards."[53] Concepts of reasonable reliance,

---

45. Graham v. Conner, 490 U.S. 386, 399 (1989).

46. For a larger discussion of that question, see Garrett & Stoughton, *supra* note 6, at 242–44.

47. *See infra* note 143 and accompanying text.

48. *See infra* note 145 and accompanying text.

49. *See infra* notes 189–91 and accompanying text.

50. *See infra* note 166 and accompanying text.

51. RESTATEMENT (SECOND) OF TORTS § 283A (AM. LAW INST. 1965); *see also* Seidelson, *supra* note 40.

52. Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. CRIM. L. & CRIMINOLOGY 481, 486 (1994).

53. Sourgens, *supra* note 32, at 86.

based on relevant business practices, are designed to assure predictability—a central goal in contract law—and reflect a different rationale than deference to medical practices used in a relevant specialty or community of doctors designed to protect local professional norms. To be sure, some criticize the use of reasonableness to refer to outside standards of care. Professor John Gardner argues that reasonableness standards can obscure legal reasons and that the reasonable person "exists to allow the law to pass the buck, to help itself *pro tempore* to standards of justification that are not themselves set by the law."[54] That may be a relevant criticism for individualized uses of reasonableness standards in the common law, but not necessarily to either utilitarian or formalistic uses of reasonableness to assess decisions by the government under constitutional standards that may assess reasonableness given policy and other considerations.

Reasonableness can also refer to an amount of some good, such as when reasonableness refers to a degree of certainty or of proof. In harmless-error-type review, a reasonable degree of certainty can refer to certainty that is not more probable than not, or meeting a preponderance of the evidence standard, but something more than just minimal certainty. The question asks whether it is reasonably probable that, absent the error, jurors would have had reasonable doubt concerning guilt.[55] A reasonable probability is perhaps twenty-five percent certainty, or something significant, but not reaching the level of more likely than not that jurors would have reached a different result at trial. Similarly, reasonableness can also refer to concepts of proportionality. For example, in the area of civil detention, the Supreme Court asks whether an ongoing civil detention serves a "reasonable relation to the purpose" justifying the initial commitment.[56] The idea expresses a notion that additional detention must be proportional to the continuing justification for the detention, and the use of reasonable reflects some modest, but not overly demanding degree of relation.

---

54. John Gardner, *The Many Faces of the Reasonable Person*, 131 LAW Q. REV. 563, 568 (2015).

55. *See* Kyles v. Whitley, 514 U.S. 419, 440 (1995); *see also* United States v. Bagley, 473 U.S. 667, 682 (1985) (adopting in the context of *Brady v. Maryland* claims a definition of materiality of "reasonable probability" as "a probability sufficient to undermine confidence in the outcome."); Strickland v. Washington, 466 U.S. 668, 694 (1984) (adopting that formulation in the context of ineffective-assistance-of-counsel claims).

56. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

Still more complex uses of reasonableness occur in the context of constitutional standards that involve multi-factor balancing tests, discussed further in the Sections that follow. For example, what does one make of the concept of reasonableness at work in a constitutional case like *Kyllo v. United States*, regarding government use of thermal imaging technology on a person's home?[57] Fourth Amendment scholars have intensely debated how to conceptualize what reasonableness means in such a case.[58] There, the Supreme Court discussed reasonable minimum expectations of privacy, emphasizing the sanctity of the home,[59] as balanced against government interests. The Court also considered other factors, such as whether technology is in "general public use" and available to the public,[60] as well as some common law baseline level of personal privacy, "that existed when the Fourth Amendment was adopted," and should be unaltered by new technology.[61] This Fourth Amendment test looks more like constitutional balancing of individual and government interests, taking into account a range of factors, and is perhaps less focused on an individual person's expectation of privacy than prior rulings. Calling this a reasonableness analysis makes sense, due to the Fourth Amendment text, but the analysis looks much like other constitutional balancing tests. In other Fourth Amendment rulings, the Court has long used, adopting Justice Harlan's formulation in *Katz*, a test focusing on both the individual and society; asking whether the personal interest in privacy is "one that society is prepared to recognize as 'reasonable.'"[62] Professor Sourgens terms this a formalist paradigm, in which judges decide what is reasonable given a balancing of relevant

57. 533 U.S. 27 (2001).

58. *See, e.g.*, Robert S. Litt, *The Fourth Amendment in the Information Age*, 126 YALE L.J. F. 8 (2016); Richard Seamon, Kyllo v. United States *and the Partial Ascendance of Justice Scalia's Fourth Amendment*, 79 WASH. U. L.Q. 1013 (2001); David A. Sklansky, *Back to the Future:* Kyllo, Katz, *and Common Law*, 72 MISS. L.J. 143, 148 n.13 (2002); Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through* Kyllo*'s Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393, 1425 n.146 (2002).

59. *Kyllo*, 533 U.S. at 40.

60. *Id.*

61. *Id.* at 34 (describing rule adopted as one that "assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted").

62. *Katz*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see, e.g.*, Smith v. Maryland, 442 U.S. 735, 740 (1979) (adopting Harlan's formulation from *Katz*). For a discussion of reasonable privacy interests, see also Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 516–17 (2011).

interests, such as balancing law enforcement and personal privacy interests, or even, as in *Kyllo*, taking into account some common law baseline level of protection.[63] It again is perhaps better thought of as reasonableness standing in for constitutional balancing of the type performed in a range of constitutional settings. Calling the balance between individual rights and social interests, as against law enforcement interests, a balance seeking a reasonable rule may be simply using the word reasonable to describe constitutional balancing.

B. OBJECTS OF CONSTITUTIONAL REASONABLENESS

A constitutional right can be violated by federal, state, and local actors, including (1) legislators enacting statutes; (2) executive officials enforcing them through actions and regulations; and (3) judges issuing judgments.[64] A standard of constitutional reasonableness may refer to different government actors—and one purpose of these doctrines can be to assign responsibility for implementing constitutional rights to different actors. In complex areas, like constitutional criminal procedure, where a wide range of different actors all work on investigations and trials, assigning such responsibility can be a challenging matter. Moreover, sometimes the constitutional standard views reasonableness not from the perspective of the government actor, but rather from the perspective of the citizen whose rights were allegedly violated.

The objects of constitutional reasonableness may be aggregate and not individual. In some situations, the court looks at the question of reasonableness based on an institutional perspective, looking broadly to the interests of a government entity or actor. Or, the court may look systemically at what is reasonable regarding the effects of government action on citizens, in general, and not the individual person bringing the case. As a result, some constitutional rights lend themselves to an aggregate or systemic inquiry, while other constitutional rights are more narrowly individualized, or focused on case-specific circumstances.[65]

The differences among these choices may reflect important differences in views concerning the goals of constitutional rights.

---

63. 533 U.S. at 34.

64. For a lucid discussion of the various objections of constitutional provisions generally, see Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011).

65. Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593 (2012).

If the main goal is to protect individual rights, then the perspective of an individual would be more important. If the main goal is to protect aggregate rights in society, then an aggregate, but citizen-focused perspective, may be appropriate. If the main goal is to balance individual versus government priorities, then perhaps both perspectives are useful. If the main goal is to regulate or deter government, then perhaps the perspective of government actors is the best perspective to adopt. None of this analysis is to say that any one perspective is the best one for courts to adopt.

However, these are choices that must be made, and typically, the constitutional text does not specify to which objects the right applies. Sometimes, it is not clear what the right answer is to the question of which actor should be regulated by the constitutional right. The concept of reasonableness can then stand in for a set of decisions regarding who is regulated by the constitutional right, and yet the term reasonableness does not itself say which perspective should matter.

The Fourth Amendment, for example, states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[66] While it was understood to apply, before enactment of the Fourteenth Amendment and incorporation, only to federal officials, that does not resolve whether the reasonableness of the search should be assessed based on the perspective of the police officer, or the person being searched, or perhaps a judge deciding whether to authorize a search or to admit the evidence. As a result, some constitutional tests under the Fourth Amendment refer to the reasonableness of a seizure, judged from the perspective of an objective police officer. Other tests assess reasonableness from a broader social perspective. The courts sometimes act as if reasonableness logically tells one who should be regulated. Since courts adopt very different reasonableness tests in the Fourth Amendment context, there must be some external feature of the purpose the right is serving that provides the answer to the question.

Sometimes waivers of individual constitutional rights are assessed from the perspective of an individual. As the D.C. Circuit put it in the context of a criminal defendant's guilty plea:

> [W]e do not think it is a sufficient reason . . . that appellants may in fact have labored under a subjective impression. . . . In our view, the

66. U.S. CONST. amend. IV.

> proper question . . . is . . . whether this belief was, in an objective sense, reasonable in the circumstances.[67]

Yet what if the prosecutors withheld evidence or coerced the defendant in some way; should a court ask whether a reasonable prosecutor would have engaged in those actions? Instead, the focus is on a reasonable defendant (and not on this defendant, except to the extent that courts sometimes consider whether a vulnerable individual or juvenile would have been more likely to involuntarily plead guilty). Perhaps, for a question of waiver, the focus should be on the individual person, and not the government. Doing so is a choice, and the choice of an objective standard, with just the defendant as the object, may absolve the government from constitutional responsibility.

Perhaps one virtue of reasonableness is that it permits shifting choices concerning from whose perspective the right is to be assessed. Calling it a reasonableness standard, however, does not answer the question to whom the standard applies. Thus, courts should have to do more work to justify the choice of a particular object of constitutional reasonableness.

C. RIGHTS, REMEDIES, AND CONSTITUTIONAL REASONABLENESS

Reasonableness has migrated from standards for constitutional rights to standards for assessing whether a constitutional violation deserves a remedy. Now, just as there is a choice to be made regarding from which perspective a right should be assessed, there is nothing necessarily wrong with thinking separately about how to define a right and how to define the conditions under which a particular remedy may be appropriate. What has been surprising, however, has been the extent to which those distinctions have been blended. For example, the Supreme Court has said that the immunity of officials under § 1983 should be assessed under an objective reasonableness test.[68] Such a standard had its origins in the *Screws* decision—in a rule of lenity defense against criminal liability—but this standard then migrated to become a defense against civil liability, and a condition for obtaining relief for violations of constitutional rights more generally.[69] The Court had earlier adopted a partially subjective

---

67. United States v. Barker, 514 F.2d 208, 224 (D.C. Cir.), *cert. denied*, 421 U.S. 1013 (1975).

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

69. An intent requirement, not a reasonableness requirement, applies in criminal actions concerning constitutional violations. In *Screws v. United States*, 325 U.S. 91, 107 (1945), a plurality of the Court found 18 U.S.C. § 242, a statute making it a crime to "willfully" and "under color of any law" deprive a

test, but ultimately concluded that an objective test was preferable. That objective reasonableness test then became the default standard for not only civil rights litigation under § 1983, but criminal prosecutions for violations of constitutional rights, harmless error review of constitutional errors during appeals, and post-conviction review of constitutional error using federal habeas corpus. Reasonableness now limits constitutional remedies across the full spectrum of constitutional litigation.

The standard governing liability under § 1983—the statute under which much of modern constitutional litigation is brought—is a reasonableness standard.[70] Indeed, during the 1980s, when the Court was moving Fourth Amendment use-of-force law from a subjective to an objective standard, the Court made the same moves in its interpretation of § 1983. Initially, the Court adopted a mixed standard that was both subjective and objective, insulating officers from civil rights liability under a standard of qualified immunity.[71] Section 1983 does not have any reasonableness requirement in its text.[72] Yet the Court said that it would interpret the statute "in harmony with general principles of tort immunities and defenses rather than in derogation of them."[73] Where did it turn for a tort principle immunizing officials from constitutional tort liability? The doctrine of constitutional reasonableness, of course. The notion of reasonableness was attractive to the Court not merely because it imposes sound standards of care but also because it is a mixed question of law and fact, which judges can use at summary judgment to avoid a trial.[74]

In 1982, in *Harlow v. Fitzgerald*, the Court rejected a subjective approach in which officers would benefit from a subjective good-faith defense, in combination with an objective standard requiring respect for constitutional rights, and changed course, adopting a two-part reasonableness standard.[75] The Court held that officers are immune from suit so long as their conduct was

---

person of their constitutional rights, required that the defendant intend to violate a defendant's constitutional rights.

70. *Harlow*, 457 U.S. at 818.

71. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975); *see also* Gomez v. Toledo, 446 U.S. 635 (1980).

72. 42 U.S.C. § 1983 (1996).

73. Imbler v. Pachtman, 424 U.S. 409, 418 (1976).

74. Regarding judicial interest in rational remedies, see Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1 (2015).

75. 457 U.S. 800 (1982).

(1) "objective[ly] reasonable[]"; and (2) "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[76] No longer could plaintiffs allege official "malice" and proceed to trial. In *Harlow*, the Court emphasized that "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."[77] A subjective standard resulted in a factual inquiry, which many judges sensibly thought was inherently a jury question. An objective reasonableness standard permitted more judicial control over constitutional litigation, meaning fewer civil rights cases would go to trial. The Justices supplied additional reasons supporting the shift, including that a subjective inquiry permitted examination of the "subjective motivation" of officials, which may "entail broad-ranging discovery and the deposing of numerous persons," which itself would be "peculiarly disruptive of effective government."[78]

The second prong of the standard resembles more of a negligence-type duty of care, but focuses on standards of care that come from federal judges. The Court has explained the notice-related reasons for the shift to an objective standard concerning what constitutional law was clearly established by the federal courts at the time of the event: qualified immunity seeks to ensure that defendants "reasonably can anticipate when their conduct may give rise to liability."[79] Thus, the Court explained that for liability to accrue, "[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."[80] That places officers in the position of having to follow developments in the federal courts concerning constitutional law—these are not community standards of care or industry standards of care, but rather federal judicial standards, based on constitutional case law.

Later the Court adopted this same civil reasonableness standard in the context for criminal prosecution for civil rights violations—in which there is a subjective, intent standard—holding that whether the conduct violated clearly established constitutional law would be assessed under a reasonableness

76. *Harlow*, 457 U.S. at 818.
77. *Id.*
78. *Id.* at 817.
79. Davis v. Scherer, 468 U.S. 183, 195 (1984).
80. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

standard.[81] Reasonableness has spread farther into the law of constitutional remedies in criminal procedure. The concept of "objective reasonableness" was also adopted by the Supreme Court in additional Fourth Amendment decisions that limit access to the exclusionary remedy at trial, based on a concept of reasonableness, apart from whether the search or seizure was itself reasonable.[82]

The Supreme Court then adopted a reasonableness standard, modeled on the second part of the qualified immunity test, for all federal habeas litigation in *Teague v. Lane*, ruling that habeas litigants should not be able to assert new rights not in place at the time that the state judges denied them relief on their constitutional claims.[83] The Court interpreted that standard as requiring deference to "reasonable, good-faith interpretations" of the law by state courts.[84] Several Justices had argued that the standard should be that a federal court would ask whether "reasonable jurists" would agree with the result reached by the state judges, including not just which law was to be applied, but whether the state judges reasonably applied the law to the facts of the case.[85] Justice Clarence Thomas prominently, but unsuccessfully, advocated for a "patently unreasonable" standard.[86] Once again, the attractiveness of a reasonableness standard was to empower federal judges to deny relief on a broader range of legal, as well as factual, questions. The Supreme Court never reached that question because Congress then incorporated a version of such a standard, using language explicitly drawn from the qualified immunity context, when drafting the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996. AEDPA adopted a standard of review for all federal habeas corpus challenges that relief may only be awarded if the state judge denied

81. United States v. Lanier, 520 U.S. 259, 271 (1997).

82. Davis v. United States, 564 U.S. 229, 232 (2011) ("[S]earches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."); United States v. Leon, 468 U.S. 897, 913 (1983) ("[R]eliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate . . . should be admissible in the prosecution's case . . . .").

83. 489 U.S. 288, 289 (1989).

84. Butler v. McKellar, 494 U.S. 407, 414 (1990).

85. Wright v. West, 505 U.S. 277, 290–91 (1992).

86. *Id.* at 291 ("In other words, a federal habeas court 'must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable.'").

relief in a manner that was an "unreasonable" application of "clearly established" Supreme Court law.[87]

The use of reasonableness in that context raised novel questions because, while reasonableness has been used to describe a standard of care by persons, it was not an accepted standard of review. Justice John Paul Stevens noted in his opinion in *Williams v. Taylor*, the landmark decision interpreting the AEDPA standard, that this text "does not obviously prescribe a specific, recognizable standard of review," using familiar terms such as "de novo" or "plain error."[88] Instead, Congress used the term reasonableness. What does it mean to get the Constitution wrong, to erroneously deny relief to someone convicted due to a constitutional violation, and do so in a wrong-but-reasonable way? Courts have struggled with that question ever since Congress adopted the statute. In *Williams*, the Court, in an opinion written by Justice Sandra Day O'Connor, rejected a somewhat circular formulation by the Fourth Circuit that a state judge could only get it sufficiently wrong if rejecting the constitutional claim "in a manner that reasonable jurists would all agree is unreasonable."[89] This, Justice O'Connor noted, risked turning the inquiry into a "subjective inquiry rather than . . . an objective one." Indeed, some courts had said that since an appellate panel had split, then of course reasonable judges could disagree.[90] Justice O'Connor noted that "[t]he term 'unreasonable' is no doubt difficult to define."[91] However, "[t]hat said, it is a common term in the legal world, and accordingly, federal judges are familiar with its meaning."[92] It would mean that the state court must do more than decide federal law incorrectly, but rather unreasonably. The Court did not say more to explain what increment beyond being incorrect made a state court decision incorrect and also unreasonable.

---

87. Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, 28 U.S.C. § 2254(d). That provision states that a petition "shall not be granted," if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2012).

88. 529 U.S. 362, 385 (2000).

89. Green v. French, 143 F.3d 865, 870 (4th Cir. 1998), *rev'd*, 529 U.S. 362 (2000).

90. *Williams*, 529 U.S. at 410 (citing Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996)).

91. *Id.*

92. *Id.*

Going still farther, the Court held in *Fry v. Pliler* that a federal court must also examine whether a state court's determination that error was harmless was itself unreasonable.[93] Yet Justice Antonin Scalia, writing for the Court, noted that the result of adding that reasonableness deference was no different than the *Brecht* harmless error test asking whether error reasonably contributed to the outcome.[94] There was no need to further "stack" reasonableness deference on top of deference, and apply both tests (AEDPA deference and *Brecht*), when "the latter obviously subsumes the former."[95]

Constitutional reasonableness had come full circle. An objective reasonableness standard, designed perhaps initially with the Fourth Amendment and police use of force in mind, became the governing standard for all of § 1983 liability; it then migrated into substantive criminal law interpretation; it was incorporated into underlying criminal procedure rights; and it was adopted by the Court in the habeas context—but then, in turn, adopted in the text of the federal habeas statute by Congress.

Yet, the Supreme Court has kept hold of the reins. The Court has stealthily moved away in recent years from an objective reasonableness standard in federal habeas corpus, and increasingly cited to what reasonable jurists might do, raising the specter of the very sort of subjective analysis that the Court soundly rejected as unworkable in *Williams v. Taylor*.[96] In *Harrington v. Richter*, without having been briefed on the issue and without claiming to announce a new standard, the Court described the AEDPA unreasonableness standard as one that required deference to state rulings "beyond any possibility for fairminded disagreement," and asked whether "fairminded jurists could disagree."[97] The Court has added to the term "unreasonable" a gloss regarding "fairminded jurists."[98] Still more rulings suggest that a court must examine the actual reasons provided by a court, and not hypothetical reasons (as in rational basis review of legislation).[99] The implication of these recent statements

93. 551 U.S. 112, 120 (2007).
94. *Id.*
95. *Id.*
96. 529 U.S. 362 (2000).
97. 562 U.S. 86, 101–03 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)).
98. *Id.*
99. Bell v. Cone, 543 U.S. 447 (2005) (per curiam).

is that jurists need not just be reasonable, and certainly not correct in their constitutional rulings, but just fairminded.[100] The Justices encourage the lower federal judges to defer to their state court colleagues, with faint praise.[101]

Constitutional reasonableness in criminal procedure goes still deeper into standards that control whether an inmate can obtain a remedy. The Supreme Court has said that constitutional errors in criminal trials must be reviewed in federal habeas corpus based on a constitutionally required harmless-error standard that asks whether the error reasonably affected the outcome at trial (or, conversely, lacked a "substantial and injurious effect").[102] Of course, that review is layered over the underlying standard of proof at trial, at which a juror must apply a beyond-a-reasonable-doubt standard. The layers of reasonableness review run deep—it is reasonableness all the way down.

II. NAVIGATING CONSTITUTIONAL REASONABLENESS DOCTRINE

In this Part, I show in more detail how these three dimensions can operate across a few key areas that illustrate well the complexity of constitutional reasonableness doctrines. First, I discuss rational basis review under the Equal Protection Clause in particular. Second, I discuss constitutional criminal procedure rights, in which approaches differ sharply between certain Due Process Clause rights under the Fourteenth Amendment, as well as Fourth Amendment, Fifth Amendment, and Sixth Amendment rights.

---

100. For criticism, see Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 540 (2014) ("*Richter* not only made a striking change to habeas practice based on a statutory interpretation of a fifteen-year-old law that had been consistently interpreted otherwise by lower courts—it also did so sua sponte."); Amy Knight Burns, Note, *Counterfactual Contradictions: Interpretive Error in the Analysis of AEDPA*, 65 STAN. L. REV. 203, 220–21 (2013).

101. Huq, *supra* note 100, at 539 ("Habeas denial rates may be so high already that *Richter*'s impact will be inframarginal. Nevertheless, there are early signs that at least lower court judges are heeding *Richter*'s new verbal formulation.").

102. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)) (establishing separate federal habeas harmless-error standards limiting relief to where the constitutional error had a "substantial and injurious effect," or when no "actual prejudice" resulted). The Court had previously defined "prejudice" as a "reasonable probability" that an error affected the outcome. *See id.*

A. RATIONAL BASIS REVIEW

For a broad range of constitutional rights, the Supreme Court uses the rational basis test, which is deferential to legislative or executive action, absent some reason for heightened or strict scrutiny. The standard is not based on any particular constitutional text.[103] Instead, the test adopts a view of judicial review and restraint, designed to defer to the broad range of goals of government action, rather than a standard designed to promote adherence to reasonable standards of care. Early cases emphasized whether legislation was supported by "reasonable grounds" and assessed state laws for their reasonableness in legislating regarding the general welfare.[104] Most infamous of those cases was the Supreme Court's ruling in *Plessy v. Ferguson*, sustaining a Louisiana law requiring race segregation in railway passenger cars as a reasonable exercise of the police power.[105] The standard has evolved into one of rational basis review, in which a range of constitutional rights receive deferential review, unless there is evidence that triggers stricter scrutiny of government action. Such review is often considered to generally be toothless and "highly deferential."[106]

As Professor Richard Fallon explains: "As a doctrinal matter, the Court frequently treats reasonable disagreement as a ground for judicial deference to the political branches of government."[107] The Court has often stated, in explaining such standards, that considering government motives and subjective intent is fraught. In *United States v. O'Brien*, for example, the Court noted that: "[i]nquiries into congressional motives or purposes are a hazardous matter."[108]

Such rational basis review is commonly used to review equal protection challenges, but also challenges under the Due Process

---

103. Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1630 (2016) ("There is no textual basis in the Constitution to justify reviewing legislation for its rationality.").

104. Holden v. Hardy, 169 U.S. 366, 398 (1898) (stating that lawmakers had "reasonable grounds for believing that [their] determination is supported by the facts").

105. 163 U.S. 537 (1896).

106. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1713 (1984).

107. Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 58 (1997).

108. 391 U.S. 367, 383 (1968).

Clause[109] and other constitutional rights, such as First Amendment claims directed at unprotected speech or conduct,[110] and structural claims, such as Spending Clause claims examining the reasonable relationship between a condition and the expenditure in federal spending legislation.[111]

When conducting such review, "the theory of rational-basis review . . . does not require the State to place any evidence in the record."[112] Legislators need not "actually articulate at any time" the purpose of its classification.[113] Instead, hypothetical bases for the legislation may suffice and the legislation "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[114] This, as Professor Thomas Nachbar has recently critiqued, consists of a highly deferential and not particularly rigorous standard for rationality.[115] Such review consists of an objective reasonableness test for legislators, taken collectively, or for other government actors facing a discrimination

109. Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (applying rational basis review to anti-sodomy statute); Weinberger v. Salfi, 422 U.S. 749, 768 (1975) (quoting Flemming v. Nestor, 363 U.S. 603, 611 (1960)) ("Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.").

110. R.A.V. v. City of St. Paul, 505 U.S. 377, 406 (1992) (White, J., concurring); *e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60 (1973) ("It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself.").

111. South Dakota v. Dole, 483 U.S. 203, 209 (1987) ("Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended."); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958) ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof.").

112. Heller v. Doe, 509 U.S. 312, 319 (1993).

113. *Id.* at 320 (quoting Nordlinger v. Hahn, 505 U.S. 1, 15 (1992)).

114. F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993); *see also* McGowan v. Maryland, 366 U.S. 420, 425–26 (1960) ("[L]egislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

115. *See* Nachbar, *supra* note 103. For additional criticism of the test, see Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 490 (2004) (stating that rational basis review's "emphasis on deference at times leads courts to skip over the required step of evaluating the link between that permissible goal and the government's action"); *see also* Neelum J. Wadhwani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 802 (2006).

challenge, or other constitutional challenge where heightened scrutiny does not apply. Moreover, lawmakers may rely on "unprovable assumptions" that "underlie much lawful state regulation of commercial and business affairs."[116]

Like in other areas of reasonableness review, a seemingly "uncontroversial appeal of rationality" permits a broadly deferential doctrine that nevertheless may change over time and permit judicial intervention, without clear, binding rules.[117] Thus, although it is nominally an objective analysis, the Supreme Court has had a long tradition of considering subjective motives, even when rational basis review might otherwise apply. In equal protection cases, the Supreme Court has said that a purpose to discriminate must be shown when strict scrutiny applies—"the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[118] The Court has also sometimes put it differently, as in *Grutter*, explaining that "[w]e apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."[119] In that approach, the goal of strict scrutiny is to uncover whether the government used a discriminatory purpose. In contrast, while rational basis review is broadly deferential to the range of goals legislators may have sought, in some cases subjective motive matters. *USDA v. Moreno* emphasized that the "bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[120] In *Romer v. Evans*, the Court found government action impermissible even under rational basis review, if there is a showing of animus or discriminatory intent.[121] Such cases, called by commentators as examples of "rational basis

116. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973).

117. Nachbar, *supra* note 103, at 1631.

118. Washington v. Davis, 426 U.S. 229, 240 (1976). For criticism, see, for example, David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 952 (1989).

119. Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (quoting Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989)).

120. 413 U.S. 528, 534 (1973); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447 (1985) (holding that a bare desire to harm a politically unpopular group is not a legitimate state interest).

121. *E.g.*, 517 U.S. 620, 632, 634 (finding a Colorado Constitutional Amendment "inexplicable by anything but animus toward the class it affects").

with bite,"[122] may reflect a bar on legislators expressing "naked preferences" for one interest group over another, as Professor Cass Sunstein has put it.[123] In recent years, the Court has been tempted to engage in subjective analysis in another set of rational basis cases—cases that do not involve animus directed at any particular group, but rather single plaintiffs complaining of arbitrary treatment. In its "class of one" cases like *Willowbrook v. Olech*, the Court has held that the plaintiff may claim that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[124]

In *Lawrence v. Texas*,[125] *United States v. Windsor*,[126] and most recently, *Obergefell v. Hodges*,[127] the Court did not state whether its approach consisted of a rational basis review. Rather than using a reasonable legislator standard, the Court instead recognized a fundamental right and found that the Constitution "does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."[128] The central focus in *Lawrence* and *Windsor*, in particular, was animus and discriminatory purpose; in *Lawrence* the

122. Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 673 (3d ed. 2006) ("The claim is that in some cases where the Court says that it is using rational basis review, it is actually employing a test with more 'bite' than the customarily very deferential rational basis review."); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–19 (1972); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760 (2011) ("[A]pplications [of rational basis in *Moreno*, *Cleburne*, and *Romer*] depart from the usual deference associated with rational basis review. For this reason, commentators have correctly discerned a new rational basis with bite standard in such cases.").

123. Sunstein, *supra* note 106, at 1730.

124. 528 U.S. 562, 564 (2000); *see also* Engquist v. Or. Dep't of Agric., 553 U.S. 591, 591–92 (2008) (holding that while a class-of-one equal protection claim can sometimes be sustained, the class-of-one theory does not apply in the public employment context).

125. 539 U.S. 558 (2003) (concerning a Texas law prohibiting same-sex intimate conduct).

126. 133 S. Ct. 2675 (2013) (concerning federal estate-tax treatment of a same-sex spouse).

127. 135 S. Ct. 2584 (2015) (concerning the right of same-sex couples to marry); *see* Eric Berger, Lawrence*'s Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 782 (2013).

128. *Obergefell*, 135 S. Ct. at 2591, 2607. The Court added that there is "no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State." It was Justice O'Connor in a concurring opinion that invoked rational basis review: "When a law exhibits such a desire to harm a

Court emphasized that an anti-sodomy statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[129] As a result, perhaps, the dissenters in *Obergefell* did not argue that the appropriate standard of review should be rational basis review, nor that the motives of the legislators did not matter. Rather, they contested whether a right to same-sex marriage was appropriately deeply rooted, or deserved recognition as a fundamental right, or whether the traditional understanding of marriage should govern.[130]

Similarly, in the First Amendment area, despite the language in *O'Brien* counseling against inquiries into motive, the Court sometimes applies the *Lemon* test, asking whether a statute has a "secular legislative purpose," and whether it "neither advances nor inhibits religion" or fosters "excessive government entanglement with religion."[131] That well-known three-part test looks at the form and function of a statute, but also its purpose or intent.[132] The *Lemon* test has never been overruled, but it is far from consistently applied; as Justice Antonin Scalia put it: "[W]hen we wish to uphold a practice it forbids, we ignore it entirely . . . . Sometimes, we take a middle course, calling its three prongs 'no more than helpful signposts.'" He added that, like a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad," the test persists; "Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him."[133]

Justice William Rehnquist once wrote in an opinion that "[t]he most arrogant legal scholar would not claim that all . . . cases applied a uniform or consistent [rational basis] test under

---

politically unpopular group, [the Court has] applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring).

129. *Lawrence*, 539 U.S. at 578; *see* William D. Araiza, *After the Tiers:* Windsor, *Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constructionalism*, 94 B.U. L. REV. 367 (2014).

130. 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

131. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); United States v. O'Brien, 391 U.S. 367, 383 (1968) (calling inquiry into "congressional motives or purposes . . . a hazardous matter.").

132. For a case relying on the purpose prong, see, for example, Edwards v. Aguillard, 482 U.S. 578 (1987).

133. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring) (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)).

equal protection principles."[134] Is the inconsistent use of an objective, as opposed to a subjective, rational basis test a symptom? Or just something to be expected in areas in which such reasonableness standards apply? The same can be said of intent tests more broadly: objective reasonableness standards may be honored as much in the breach as not, but they are useful tools to retain alongside subjective intent or purpose tests. They are useful in the flexibility that they offer to judges, but they do not provide clear notice to government actors or the public. Perhaps more clarity would exist if the Court more clearly explained what types of actions are per se irrational, or adopted approaches demanding particular types of evidence of unreasonableness.[135] Just as tort law developed certain types of negligence per se, providing brighter-line examples of unreasonable behavior,[136] constitutional courts could provide further explanations of what types of conduct, or what types of information, support a conclusion that government action is per se unreasonable or irrational under rational basis review. The language in *Lawrence* regarding animus and identifying evidence concerning legislation that "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual" can be seen as at least a step in that direction.[137]

Another area in which reasonableness review is at least informed by community practice and tested standards is in First Amendment public forum doctrine, in which "time, place, or manner" restrictions on speech may be reasonable if narrowly tailored and with "ample alternative channels" provided.[138] The reasonableness of the time, place, or manner restrictions is assessed based on "the nature of a place" and "the pattern of its normal activities," and is therefore at least somewhat evidence-based.[139] What is practical, given prior practice; local government; the community; and what alternative avenues for speech

134. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 176 n.10 (1980).

135. Professor Nachbar describes early cases that adopted a view grounded in the police power, defining certain subjects for acceptable regulation. Nachbar, *supra* note 103, at Part I. Such substantive review is itself highly problematic, and Nachbar instead recommends requiring clear statement rules describing actual basis for legislation. *Id.* at 1689.

136. RESTATEMENT (THIRD) OF THE LAW OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 (AM. LAW INST. 2010).

137. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

138. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

139. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

remain open, can all be assessed.[140] Perhaps for those reasons, the doctrine has been very little criticized.[141] As I will develop more in Part III, concepts of reasonableness more closely anchored to industry practice, community norms, or empirical evidence of effectiveness may prove far more defensible than standards developed solely by judges to reflect what judges think is reasonable.

B. CRIMINAL PROCEDURE REASONABLENESS

In constitutional criminal procedure, whose perspective is adopted as that of the reasonable actor matters—that of a citizen; of a criminal suspect; of a police officer; or a juror; or a defense lawyer; or a judge? Each of these apply, and sometimes more than one of these perspectives matter. The differences typically relate to whether the focus is on individual rights or on deterrence of government actors. Sometimes both matter and both are kept in loose focus. Professor Kit Kinports points out how "the Court tends to shift opportunistically from case to case between subjective and objective standards and between whose point of view—the police officer's or the defendant's—it considers controlling."[142] The Due Process Clause regulates criminal trials, adopting the perspective of jurors when it demands that they be instructed to find guilt "beyond a reasonable doubt," but at other times reflecting the perspective of defense lawyers and prosecutors that are being regulated. In Fourth Amendment rulings, the focus is on police behavior and deterring overreaching searches and seizures, so the Supreme Court focuses on whether police action was reasonable, as well as on individual rights. In contrast, in some of its Fifth Amendment rulings, the Court focuses on the suspect as the relevant reasonable person—who may feel they are in police custody while being questioned, even

140. *Id.*

141. C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937, 937 (1984) (describing the test as "possibly the most universally accepted tenet of first amendment doctrine"); *see also* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1305 (2005).

142. For an important discussion of this general problem in criminal procedure, see Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 74 (2007).

if not formally under arrest.[143] Sixth Amendment (and due process) ineffective assistance of counsel rulings focus on two distinct forms of reasonableness: that of a reasonable lawyer, based on professional standards, and that of reasonable jurors and whether the outcome at trial might have been prejudiced.[144] That standard creates the possibility of "doubly deferential" review, with not just the two forms of reasonableness used to decide whether there was ineffective assistance of counsel, but also whether relief is warranted, based on the AEDPA standard of review limiting relief unless the state judge was unreasonable in dismissing the Sixth Amendment claim.[145] Reasonableness is piled on top of reasonableness like a layer cake—and this Section explores how constitutional criminal procedure has become shot through with varying and inconsistent reasonableness inquiries. They have a common purpose—to limit remedies for a wide range of constitutional rights—as well as to assign responsibility to a range of different criminal justice actors.

These differing tests can reflect difficult choices regarding the purpose of constitutional criminal procedure: Is the goal to protect individual rights, deter and regulate government actors, or both? Those shifting and sometimes inconsistent priorities in constitutional criminal procedure writ large then become instantiated through reasonableness tests.

1. Due Process Clause

In criminal procedure rulings concerning the due process clause, fair trial rights do not primarily take the perspective of the individual guaranteed the right to a fair trial, but rather a series of actors being regulated by the due process right in question. The Supreme Court has held that a jury must be instructed that it may only find guilt beyond a reasonable doubt. However, when the sufficiency of the evidence is reviewed, the evidence is assessed from the prosecutor's perspective, giving the prosecution the benefit of all inferences in favor of their evidence.[146] During federal habeas corpus, a miscarriage-of-justice standard that

143. Yarborough v. Alvarado, 541 U.S. 652, 662 (2004) (holding that "custody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances," but a suspect's age or experience is not relevant to the analysis).

144. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 687 (1984).

145. Burt v. Titlow, 134 S. Ct. 10, 13 (2013).

146. *See* Jackson v. Virginia, 443 U.S. 307, 319 (1979) ("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the

can excuse procedural bars applies, and it adopts a preponderance standard directed at federal judges, asking whether "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[147] The federal judge must make "a probabilistic determination about what reasonable, properly instructed jurors would do," looking at not just the evidence at the original criminal trial but also newly discovered evidence, all viewed "holistically" together.[148] In dissent in *House v. Bell*, Chief Justice John Roberts would have reformulated the standard and denied relief, so long as "at least one juror, acting reasonably, would vote to convict."[149] To be sure, some due process rules in criminal procedure do not take account of a government perspective. For example, when considering a denial of defendant's counsel of choice, or of a public trial, a court does not ask whether the violation was reasonable from either the government or defendant's perspective, but rather treats the violation as a per se structural error.[150] Most due process rules, though, use reasonableness designed to accomplish regulatory goals, with less focus on the individual.

2. Fourth Amendment

As noted, in a range of rulings, the Court has long used a broad test, focusing on balancing both the individual privacy interest and the larger interest of society against law enforcement interests, asking whether the personal interest in privacy is "one that society is prepared to recognize as 'reasonable.'"[151] Such a test is objective, but focused on the individual, law enforcement, and society. Other Fourth Amendment rules select different concepts of reasonableness and different objects. In the use of force context, the Court held in *Graham v. Connor* that the inquiry is an objective-reasonableness standard, focused on the perspective of the police officer, not that of the citizen.[152] While the

prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.").

147. Schlup v. Delo, 513 U.S. 298, 327 (1995).

148. House v. Bell, 547 U.S. 518, 538 (2006) (quoting *Schlup*, 513 U.S. at 329).

149. *Id.* at 572 (Roberts, C.J., dissenting).

150. United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006).

151. United States v. Katz, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see, e.g.*, Smith v. Maryland, 442 U.S. 735, 740 (1979) (adopting Harlan's formulation from *Katz*); for discussion, see Kerr, *supra* note 62, at 516–17.

152. Graham v. Connor, 490 U.S. 386, 397 (1989) ("[S]ubjective motivations of the individual officers . . . [have] no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment.").

standard is ostensibly objective, it is limited to some degree to the time period when force was used, and based on the information available to the officer, with the Court emphasizing that the "calculus of reasonableness" should "embody allowance for the fact that police officers are often forced to make split-second judgments[] in circumstances that are tense, uncertain, and rapidly evolving."[153]

In other respects, the Court has highlighted that an officer must, for example, face an "immediate threat" to their safety, but that much-quoted formulation does not reflect what a reasonable officer would do, based on training and best practices. More recent rulings, such as *Scott v. Harris*,[154] *Brosseau v. Haugen*,[155] and *Mullenix v. Luna*,[156] fail to discuss or reject the relevance of sound police policy and training, instead highlighting how the result "depends very much on the facts of each case."[157] As Seth Stoughton and I have described elsewhere, the Court's interpretation of the Fourth Amendment incorrectly constrains the use of police tactics to inform the reasonableness inquiry.[158] Instead, the focus should be taken from the individual officer, and placed, at the department level, on sound policy and training.[159] State tort law takes a different approach, focusing on general standards of care. Rules limiting liability for assault do not define reasonableness based on any particular moment in time; the Restatement (Second) of Torts adopts a rule of necessity, such that deadly force can only be used "when it reasonably appears" to the officer "that there is no other alternative" means available, short of abandoning the arrest.[160]

Indeed, in other Fourth Amendment contexts, the Court adopts a standard of care attempting to reflect sound policy and

---

153. *Id.* at 396–97.

154. 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 slosh our way through the factbound morass of 'reasonableness.'").

155. 543 U.S. 194 (2004).

156. 136 S. Ct. 305 (2015) (quoting *Brosseau*, 543 U.S. at 198) (holding a reasonableness inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition").

157. *Brosseau*, 543 U.S. at 201.

158. Garrett & Stoughton, *supra* note 6.

159. The structure of § 1983 doctrine, as well as the interpretation of the reasonableness of force, results in the focus on individual officers and not policy and training, as described in Garrett & Stroughton, *supra* note 6, Part I.A.

160. RESTATEMENT (SECOND) OF TORTS § 131 cmt. F (AM. LAW INST. 1965) (noting that deadly force "is privileged only as a last resort").

training. In *United States v. Leon*, the Court posed the question whether a "reasonably well trained police officer could have believed that there existed probable cause to search [defendant's] house."[161] To provide impetus, the Court cited to Professor Jerold Israel's discussion of the goals of such constitutional standards of care: to "make officers aware of the limits imposed by the [F]ourth [A]mendment and emphasize the need to operate within those limits."[162]

In still other contexts, it is the objective perspective of the individual defendant that is important. A person is seized if a reasonable person would not feel "free to leave."[163] A person's reasonable "expectation of privacy" matters.[164] Yet, according to the Court, whether a person is seized also depends on the subjective intent of the officer, since an accidental police action is not a seizure.[165] The Court also adopts a (partially) subjective test for consent and waiver of rights, where the voluntariness of a waiver is assessed based on factors including the "possibly vulnerable subjective state of the person who consents," such as whether the person is disabled.[166] If the officer misperceives whether the person consented to a search, however, then the test is objective, from the perspective of the officer, making both objective and subjective consent of the citizen largely irrelevant.[167]

---

161. United States v. Leon, 468 U.S. 897, 926 (1984).

162. *Id.* at 919 n.20 (quoting Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1412–13 (1977)).

163. Florida v. Bostick, 501 U.S. 429, 435 (1991); Florida v. Royer, 460 U.S. 491, 502 (1983); *see also* Florida v. Jimeno, 500 U.S. 248, 251 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?").

164. Terry v. Ohio, 392 U.S. 1, 1 (1968) (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

165. Brower v. County of Inyo, 489 U.S. 593, 596–97 (1989) ("[A] Fourth Amendment seizure . . . [occurs] only when there is a governmental termination of freedom of movement *through means intentionally applied*.").

166. Schneckloth v. Bustamonte, 412 U.S. 218, 229, 248 (1973); *see also* United States v. Mendenhall, 446 U.S. 544, 558 (1980) (holding that the respondent's age, educational attainment, gender, and ethnicity were relevant but not decisive in finding that she voluntarily consented to accompany officers to the DEA office).

167. Illinois v. Rodriguez, 497 U.S. 177, 186 (1990) (holding a warrantless entry is valid based upon consent from someone whom the police reasonably, though mistakenly, believe possesses common authority over the premises); Bruce A. Green, *"Power, Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term*, 70 N.C. L. REV. 373, 383 (1992) (discussing how *Jimeno* equated "reasonableness" of a consensual search

The objective perspective of the officer trumps all other considerations.

One gets the impression that the Court picks and chooses concepts of reasonableness—subjective or objective (dimension one) and the individual or systematic perspective from which it is assessed (dimension two)—in order to micro-calibrate Fourth Amendment coverage, to make it very difficult for individuals to know whether a search or seizure is unreasonable or to litigate the question, and to maximize the discretion of police officers.

Still other Fourth Amendment tests steer back and forth from the objective and the subjective. The standard for police use of force is defined as an objective test, focusing on the perspective of a reasonable police officer. Yet the Court also asks what a reasonable officer would have done based on the information that this particular officer had under the circumstances, a somewhat subjective objectivity, since a reasonable professional may have acted quite differently under the circumstances.[168]

While the main thrust of its rulings in the past two decades has been to move towards more objective reasonableness tests, recently the Supreme Court has uncharacteristically slipped back into partially subjective Fourth Amendment tests; recognizing, for example, a good-faith exception for a police officer's reasonable reliance on a warrant (even if issued erroneously).[169] That standard takes into account individual decisions of the police officer, even if they would not be reasonable, absent the good-faith errors.[170] Whether a police officer has probable cause or reasonable suspicion is similarly viewed from the perspective of a reasonable police officer.[171] In that context, however, the Court has slid towards the subjective, stating that the experience of

---

to the "reasonableness" of the police officer's perspective in believing that the suspect consented).

168. Alpert & Smith, *supra* note 52.

169. United States v. Leon, 468 U.S. 897, 922 (1984).

170. *See id.* at 923.

171. United States v. Arvizu, 534 U.S. 266, 276 (2002) (stating that an officer is "entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants"); United States v. Cortez, 449 U.S. 411, 418 (1981) ("[A] trained officer draws inferences and makes deductions . . . that might well elude an untrained person, . . . [and] . . . the evidence . . . must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."). *But see* Devenpeck v. Alford, 543 U.S. 146, 154 (2004) (rejecting as "arbitrar[]y" the argument that "[a]n arrest made by a knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie *in precisely the same circumstances* would not").

officers may be relevant in some cases.[172] Whether evidence seized by police has an independent source, such that the fruits-of-the-poisonous-tree doctrine does not apply, may depend on the subjective motivations of the officers, based on intent and the "purpose and flagrancy" of the conduct.[173] In contrast to such uses of subjective reasonableness, where the subjective intent of the officer might show pretext or malicious action, the Court has rejected any rule that would "attempt to root out subjective vices through objective means."[174] As the Court put it in *Whren*, encapsulating the complex view of reasonableness at work in the area, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."[175] What does that even mean? It means that subjectively disturbing police action, such as intentionally unconstitutional actions, are excused so long as the hypothetical reasonable officer would have acted similarly. Objective reasonableness preserves deference.

The second dimension comes into play in other Fourth Amendment rulings. Shifting the objects for administrative searches from officers to entire police departments, in an effort to defer to police department policies, the Court asks whether "programmatic purpose" and "special needs" justify a search, even if it was not justified based on reasonable and individualized suspicion.[176] In contrast, a stop and frisk under *Terry v. Ohio* may be made without probable cause, based on an individual officer's "reasonable suspicion."[177] And, as discussed, that an officer uses deadly force in a manner that violates department policy or a "programmatic purpose" may not matter at all, so far as the officer's actions under the specific circumstances were reasonable.

For a wonderful send-up of the contradictions in what I have called the first and second dimensions of the reasonableness

172. Peter B. Rutledge, Miranda *and Reasonableness*, 42 AM. CRIM. L. REV. 1011, 1017 (2005) (arguing that the Court engages in "subjective inquiry" when examining "a particular officer's experiences" while using an "objective inquiry" when examining a suspect's actions during Fourth Amendment seizures).

173. Brown v. Illinois, 422 U.S. 590, 604 (1975).

174. Whren v. United States, 517 U.S. 806, 814 (1996).

175. *Id.* at 813 (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

176. Brigham City v. Stuart, 547 U.S. 398, 405 (2006).

177. 392 U.S. 1, 37 (1968) (Douglas, J., dissenting).

problem, Professor Ronald J. Bacigal provides this list of contrary conceptions and viewpoints in conducting a Fourth Amendment analysis of an encounter during which a police officer stops a person and proceeds to question them; in that situation, the Fourth (and Fifth) Amendment doctrine takes into consideration:

> 1. A reasonable person's perception of the officer's initial approach.
> 2. The suspect's actual response to the officer's approach.
> 3. The officer's intent to seize the person through means intentionally applied.
> 4. The suspect's subjective intent to consent to a search of his wallet.
> 5. A reasonable officer's perception of the scope of the consensual search.
> 6. A reasonable person's perception of whether he was in police custody.
> 7. The suspect's subjective knowledge that he was addressing a police officer.
> 8. A reasonable officer's perception of whether his comment was likely to elicit an incriminating response from the suspect.
> 9. Any unusual susceptibility of the particular defendant to covert persuasion.
> 10. The officer's actual knowledge of the suspect's unusual susceptibility.
> 11. The suspect's subjective ability to make a free and voluntary statement.
> 12. An objective assessment of whether the suspect waived his *Miranda* rights.[178]

Professor Bacigal deplores these inconsistencies and summarizes: "At Center Court Wimbledon it is entertaining to watch the ball shift back and forth between the opponents."[179] Constitutional criminal procedure is complex in part because it attempts to regulate very difficult subject matter. But,

> [i]t is less captivating to observe constitutional analysis in which the United States Supreme Court appears to hide the ball, or at least makes it difficult to appreciate the nature of the game being played, as it shifts between objective and subjective perspectives of citizens, police officers, and hypothesized reasonable people.[180]

Unfortunately, the problem of the Fourth Amendment is still more complex when one introduces the third dimension, regarding remedies: that of exclusion at a criminal trial and qualified immunity as applied to civil damages remedies. Still other Fourth Amendment decisions limit access to the exclusionary

178. Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. J. 677, 681–82 (1998).

179. *Id.* at 677.

180. *Id.*

remedy at trial, based on a concept of reasonableness different from a question whether the search or seizure itself was reasonable, focusing instead on whether an officer reasonably relied on overruled-but-then-established prior precedent or on an erroneous warrant.[181] Here again we see elaborate stacking of different reasonableness inquiries. Thus, due to the doctrine of qualified immunity, a court may ask at the summary judgment stage whether a (1) reasonable jury could conclude that the police officer conducted an (2) unreasonable search or seizure or even, if so, whether the officer acted objectively (3) reasonably given the circumstances, and in (4) reasonable reliance on clearly established law. Reasonableness on top of reasonableness characterizes the entire project of litigating constitutional torts, but each usage refers to different forms of reasonableness, including the perspectives of jurors, officers, and those based on case law by federal judges.

As Professors Sam Kamin and Justin Marceau put it, "It is now possible to speak of that famous conundrum of reasonable unreasonable searches—those searches that are sufficiently unreasonable that they deprive the defendant of his Fourth Amendment right, but not so unreasonable that any remedy will be forthcoming."[182] Moreover, substantive Fourth Amendment law itself reflects interpretations of reasonableness designed to prevent undue exclusionary or damages remedies, and yet now separate doctrines accomplish that goal along the remedial dimension. Thus, "current Fourth Amendment law is the worst of both worlds—it produces a substantive Fourth Amendment corrupted by the fear of a mandatory exclusionary rule that no longer exists."[183]

The much-lamented confusion in Fourth Amendment doctrine can be seen as a product of shifting choices made across each of the three dimensions of constitutional reasonableness doctrines: (1) concepts of reasonableness that are objective, subjective, or all-things-considered balancing; (2) objects of reason-

181. *See* Davis v. United States, 131 S. Ct. 2419, 2423–24 (2011) (holding that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule"); United States v. Leon, 468 U.S. 897, 913 (1984) (holding that "reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate . . . should be admissible in the prosecution's case").

182. Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U. MIAMI L. REV. 589, 591 (2014).

183. *Id.* at 592.

ableness that vary between a police officer's perspective, the citizen's perspective, a combination of both, as well as that of society, and a police department; and (3) use of reasonableness to craft exceptions and limits to exclusionary and damages remedies.

Scholars have made Herculean efforts to try to synthesize Fourth Amendment doctrine. Yet still additional portions of the Fourth Amendment, such as the separate-warrant requirement, do not relate to the unreasonable-search-and-seizure requirement. Reconciling the use of reasonableness in the search and seizure context, with tests that do not pertain to reasonableness, raises still more complications. Some, like Professor Akhil Amar, have hoped that the concept of reasonableness can do heavy lifting in that work, extending to govern and unify Fourth Amendment doctrine generally.[184] However, these shifting dimensions suggest that unity cannot be found unless the concepts, objects, and usages of reasonableness are all worked out through the doctrine, which would require still more Herculean efforts by scholars and agreement by judges and Justices. If reasonableness is going to do such heavy lifting across so many aspects of Fourth Amendment doctrine, then the careful parsing of concepts, objects, and usages of reasonableness must be carefully set out and justified. Whether all of the current arrangements can be justified is equivocal.

3. Fifth Amendment

The Fifth Amendment reflects similar variety in the usages of reasonableness. The famous *Miranda* warnings need only be provided to a person in custody, but whether a person is deemed to be in custody depends on whether a person would reasonably feel free to leave.[185] The Court has suggested this is a purely objective determination: "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers

184. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (arguing that the Fourth Amendment generally "require[s] that all searches and seizures be reasonable").

185. Thompson v. Keohane, 516 U.S. 99, 112 (1995) ("[W]ould a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave."); *cf.* Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (requiring procedural safeguards when "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way").

or the person being questioned."[186] The Court noted that the reasonable person standard was imported from the negligence standard in torts, where it would be a jury determination, while, in the Fifth Amendment context, it is considered a question of law for a judge to decide.[187]

However, in its voluntariness case law concerning due process and Fifth Amendment protections against coercive police interrogations, the Supreme Court has examined subjective, as well as objective, circumstances, sometimes focusing on the defendant as the proper object of inquiry and sometimes on the police officer. In decisions such as *J.D.B. v. North Carolina*, the Court noted that the circumstances can include individual characteristics of the person, such as juvenile status, and thus one should consider whether a reasonable juvenile—rather than a reasonable adult—would feel free to leave.[188] The Court explained: "[S]o long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test."[189] The Court insisted it was adhering to an objective test, but it considered both the perspective of the officer and what the officer knew (or reasonably should have known) about the vulnerability of the individual defendant.[190] How to reconcile that ruling with the Court's ruling that age and experience with law enforcement were not relevant circumstances to the custody inquiry in *Yarborough v. Alvarado* is hard to say.[191] A reasonable person standard can admit consideration of relevant personal characteristics, and for juveniles, the Court considers those that might make the defendant perceive custody differently.[192] In *Colorado v. Connelly*, the Court rejected a claim by a grossly mentally ill person who was easily coerced and led by the police.[193] The Court held that, even if unreliable, a confession is not involuntary if it is not

186. Stansbury v. California, 511 U.S. 318, 323–25 (1994) (per curiam) (stating that custody depends on "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action'" (quoting Berkemer v. McCarty, 468 U.S. 420, 440 (1984))).

187. *Keohane*, 516 U.S. at 113 n.13.

188. 564 U.S. 261, 275–76 (2011).

189. *Id.* at 277.

190. *Id.* at 272.

191. *See* Yarborough v. Alvarado, 541 U.S. 652, 666–69 (2004) (explaining why age and experience with law enforcement are not objective circumstances).

192. *J.D.B.*, 564 U.S. at 275.

193. 479 U.S. 157, 159 (1986).

the result of "coercive police conduct" and if the officer did not engage in "wrongful acts" to affirmatively take advantage of the defendant's mental state.[194] In contrast, in *Arizona v. Fulminante*, the Court emphasized the defendant's subjective "fear of physical violence" from a prisoner who was a government cooperator.[195] As Professor Kit Kinports has detailed, the Court has not clearly explained how to resolve these cases and whether it is solely the officer's perspective that matters.[196]

In *Yarborough*, a different reasonableness inquiry limited the remedy: the Justices concluded that, under AEDPA, reasonable jurists could disagree about the state of the law such that the state judge did not make an "unreasonable determination" of constitutional law in rejecting the Fifth Amendment claim, and therefore, habeas relief was not warranted.[197] Separately, in cases not about custody but about the voluntariness of a suspect during police interrogations, the Court has stated that age and the characteristics of a person are relevant to voluntariness but that it is explicitly a totality-of-the-circumstances test, asking whether a person's will was overborne by police questioning and not a test that focuses on a concept of reasonableness.[198]

In still other rulings, the Supreme Court has created subjective good-faith exceptions to its ostensibly objective test asking whether the officers "reasonably conveyed" the *Miranda* warnings, stating that even if a "reasonable person in the suspect's shoes" would not have understood that they had a choice whether to continue to talk to the police or not, "a good-faith *Miranda* mistake" can excuse the failure to provide the warnings.[199] The Court shifted from an objective-officer perspective to an objective-suspect perspective and ultimately recognized a subjective-officer exception. No wonder Professor Kinports has carefully criticized the utter "confusion surrounding the controlling viewpoint in *Miranda* cases," as well as whether "reasonableness" is objective or subjective.[200]

---

194. *Id.* at 163–65.

195. 499 U.S. 279, 279, 287–88 (1991).

196. Kinports, *supra* note 3, at 121–22 ("In the end, the cases, and the divergent perspectives on which they turn, cannot be reconciled.").

197. Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

198. *See* J.D.B. v. North Carolina, 564 U.S. 261, 284 (2011) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)).

199. Missouri v. Seibert, 542 U.S. 600, 615 (2004) (plurality opinion).

200. Kinports, *supra* note 3, at 103.

4. Sixth Amendment

A jury must find guilt in a criminal case using a beyond-a-reasonable-doubt standard. That standard is objective when assessed on appeal or post-conviction. One might expect Sixth Amendment right-to-a-jury-trial rulings to chiefly focus on the perspective of jurors, but that is not the case. In striking down the United States Sentencing Guidelines in *United States v. Booker*, the Supreme Court found that the Guidelines took fact-finding away from jurors.[201] The remedy, though, included the ability of appellate judges to approve a sentence as reasonable, given a guideline's range and statutory factors, among other considerations.[202] The standard is one of judicial reasonableness, not juror reasonableness.[203] In other contexts, the standard is not a reasonableness standard at all: if a suspect requests counsel during an interrogation, for example, then that choice must be strictly respected, whether it was reasonable or not.[204] Then again, if the person waives the right to request counsel, the standard is subjective, asking whether the defendant "intentionally" abandoned or relinquished the "known right."[205]

The use of reasonableness becomes still more ornate in the context of ineffective-assistance-of-counsel claims. Sixth Amendment ineffective-assistance-of-counsel rulings focus on two distinct forms of reasonableness. First, a court asks whether a reasonable lawyer, based on professional standards, provided objectively unreasonable representation to the client.[206] Second, the court asks whether that deficient representation prejudiced the outcome, based on what reasonable jurors would have otherwise done.[207]

That standard creates the possibility of stacked reasonableness review with not just the two forms of reasonableness used to decide whether there was ineffective assistance of counsel but also whether relief is warranted, based on the AEDPA standard of review limiting relief unless the state judge was unreasonable in dismissing the Sixth Amendment claim.[208] The Supreme

201. 125 S. Ct. 738, 751–52 (2005).
202. *Id.* at 766.
203. *See id.*
204. *See* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).
205. Brewer v. Williams, 430 U.S. 387, 404 (1977).
206. Strickland v. Washington, 466 U.S. 668, 690 (1984).
207. *Id.* at 691–92.
208. Burt v. Titlow, 134 S. Ct. 10, 15 (2013) (citing 28 U.S.C. § 2254(d)(2) (2012)).

Court has repeatedly called this review "doubly deferential."[209] But, in fact, that is an understatement. There can be so many different types of reasonableness elements to the consideration of such a claim during federal habeas corpus review that the stacking of these reasonableness inquiries becomes so ornate and duplicative that judges may simply not bother to conduct much of the inquiry. So, a federal judge might ask if the state court actually went through all of the Supreme-Court-prescribed motions: whether the state judge was (1) unreasonable when deciding whether the trial lawyer was (2) unreasonable in providing representation, and whether (3) reasonable jurors would have found guilt beyond a (4) reasonable doubt, affecting the outcome at trial to a (5) reasonable degree such that there was prejudice. Added to that, a federal judge may consider whether the state judge's determination that any deficient performance by counsel lacked prejudice was itself (6) unreasonable. While this may sound byzantine, it is not unusual; ineffective assistance of counsel is the most commonly litigated federal habeas corpus claim.[210] The Supreme Court has often said that a judge need only discuss the portions of the analysis necessary to resolve the issue.[211] In effect, a judge can pick and choose which reasonableness doctrine can most readily dismiss a constitutional claim.

III. CONSTITUTIONAL REASONABLENESS WRIT LARGE

Some scholars have argued that reasonableness should do even more work in animating constitutional interpretation, while others criticize particular usages of constitutional reasonableness. Still others view reasonableness as imprecise, but a second-best solution where it is difficult to define constitutional standards that must apply in a broad range of circumstances. The thrust of the prior Parts, of course, has been that reasonableness is an overworked concept that stands for too many ideas and functions. To be sure, the challenges that courts face in adopting constitutional standards cannot be underestimated. This Part and the next will turn to those challenges. Most recently, scholars have advanced greater use of reasonableness standards to explain originalist interpretation and constitutional balancing more generally. It should be no surprise that a

209. *Id.* at 13; Cullen v. Pinholster, 563 U.S. 170, 190 (2011).

210. *See Burt*, 134 S. Ct. at 15 (describing ineffective assistance of counsel as a "common claim").

211. *See, e.g.*, *id.* at 18 n.3 (declining to discuss prejudice after finding that trial representation was not ineffective).

jack-of-all-trades concept would be invoked to support new theories of constitutional interpretation. I, however, argue that based on the evidence discussed in this Article, the critics of the overuse of constitutional reasonableness are correct that reasonableness doctrines risk manipulation—and in more ways than had been understood and along entirely separate dimensions of constitutional interpretation. The burden should be on an advocate of the use of a reasonableness test to show why it improves on alternatives, and in Part IV, I will describe what is, in my view, a preferable approach towards constitutional reasonableness.

A. REASONABLE PERSON ORIGINALISM

Originalism has an indeterminacy problem—assessing what the Framers and ratifiers would have thought about a given constitutional problem—and it should be no surprise that the reasonable person should be asked to assist. As Professors Gary Lawson and Guy Seidman describe, a range of originalist scholars have in their writing "endorsed reliance upon the reasonable person in constitutional interpretation."[212] In the view of scholars advancing this notion of originalism, the perspective of an ordinary speaker—a reasonable perspective—determines the meaning of the Constitution. Professors John O. McGinnis and Michael B. Rappaport argue, "the focus of originalism," in constitutional interpretation, "should be on how a reasonable person at the time of the Constitution's adoption would have underst[ood] its words and thought they should be interpreted."[213] This is a reasonable person as of 1788, presumably among that limited group of males that had the franchise (or perhaps it should be limited to those who participated in framing or ratification decisions). Such details are irrelevant to the theory, which focuses not on the subjective intent of the Framers, even taken collectively, but rather on the reasonable meaning of the text based on ordinary usage at the time.[214] Thus, Professor Lawrence Solum asks: "How would an ordinary American citizen flu-

212. Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 n.11 (2006).

213. John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 374 (2007).

214. *See* Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism*, 28 BYU J. PUB. L. 283, 285 (2014); Lawrence B. Solum, *We Are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 2–3 (2011).

ent in English as spoken in the late eighteenth century have understood the words and phrases that make up its clauses?"[215] The perspective of an ordinary, or reasonable, speaker addresses the problem of trying to assess subjective motivations or intent. Whether it is possible to compile sufficient evidence to ascertain what an ordinary speaker would have thought, or whether constitutional text was designed to reflect a reasonable person's speech rather than legal terminology, raises a different set of challenges. In addition, others argue that the concept of looking to a reasonable speaker at the time is itself anachronistic. For example, Professor Stephen Feldman has argued that there was no pervasive usage in the common law at that time of the concept of a reasonable person.[216] The adoption of such a standard in tort law came decades later. Thus, Professor Feldman argues: "Whereas today, lawyers and judges often invoke the reasonable person as a generalized legal standard establishing an individual's duty of care in a wide variety of circumstances, jurists during the early decades of nationhood discerned duties of care as established in the status-relationships of the disputants."[217]

The usage in constitutional interpretation, however, is different than usage for a tort standard of care. It is a gloss on a modern interpretive task. It seeks to impose a sort of standard on the interpretation of constitutional text. Perhaps reasonable care to assess what an ordinary citizen might have thought about constitutional text is the best that can be expected of judges. A different criticism, though, is that to interpret text based on a concept of reasonableness could add a veneer of objectivity to an enterprise that is anything but. After all, a reasonable person, or the Framers themselves, may have understood phrases in a document like the Constitution to express familiar concepts from pre-existing sources, like the English Bill of Rights, and not based on commonplace meaning of the words and phrases in everyday vernacular. What a reasonable person thought about suspension of habeas corpus may not be as informative as the desire to prevent suspensions of certain types that had occurred for centuries in England. Another reason to overlay reasonableness to describe the undertaking may be to obscure the uncertainty of the task, and the relative lack of historical information or expertise that lawyers and judges have to undertake it. Reasonableness provides a very low bar for any

215. Solum, *supra* note 214, at 3.
216. Feldman, *supra* note 214, at 305.
217. *Id.*

seeking to justify an argument about the original meaning of the Constitution. All that must be invoked is a reasonable approximation for what a person might have thought of the language at the time, without strong evidence for what drafters or other relevant individuals actually thought about legal concepts or constitutional rights. Similarly, judges would have a low bar by which their rulings would have to be justified, perhaps far lower than the bar if they had to articulate support in precedent, policy, or other constitutional norms. Without criticizing or endorsing reasonable-ordinary-speaker approaches, if it does adopt a reasonableness bar, it resembles the low reasonableness bar adopted in many other modern constitutional contexts.

B. HARMONIZING OR OBSCURING CONSTITUTIONAL DOCTRINE

In some contexts, a move to reasonableness review has been a move away from examining the subjective motivations of government actors, whether they be executive actors, legislators, or judges. In general, one might expect such a move to be a useful and more objective mode of constitutional review. Justice Oliver Wendell Holmes might applaud this as a form of tracking the development of the common law from standards focused on retribution and blameworthiness towards objective standards of care.[218] Thus, negligence standards are not adopted "for the purpose of improving men's hearts, but . . . to give a man a fair chance to avoid doing the harm before he is held responsible for it," in order to "reconcile the reasonable freedom of others with the protection of the individual from injury."[219] That, in constitutional law, judges would follow the same path might suggest more objective guides have been located to better provide notice to government officials and members of the public. Yet constitutional law is not private law—constitutional reasonableness standards rarely look like negligence or criminal law mens rea standards. The use of the word reasonable in standards for decision and for review can disguise the lack of objective criteria used, or the maintenance of quite subjective standards masquerading as reasonable. Constitutional reasonableness often stands in for a range of considerations that vary from one to another. While a move towards objective standards of care might be beneficial in some areas, that is not typically so, and the result

218. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 115 (Transaction Publishers 2005) (1881).

219. *Id.*

makes for confused constitutional law and still more troubling decisions as lower courts apply this doctrine.

One response by some scholars is that even if many reasonableness standards are largely a fig leaf, they are a useful second-best in an imprecise and imperfect world. They have argued that reasonableness standards can beneficially harmonize disparate standards, whether they are standards of care or standards of review, by at least giving them a common label.[220] Thus, a defender of the reasonable person standard in tort law would point to its unifying power, even if, in practice, what is reasonable is highly fact-dependent and will require fact-sensitive and industry-sensitive judgments.[221] An additional feature of such a defense may be an argument that no further precision in the doctrine can fairly be demanded. Those arguments have some real merit.

Thus, Professor David Zaring has argued that, in administrative law, a multiplicity of standards of review can apply to agency action, but that in practice, they are inconsistently applied, whether it is *Chevron* review or rationality review or hard-look review, and that the doctrine "at least as it actually exists," is really "something more like a 'reasonable agency' standard."[222] Calling disparate standards a single reasonableness standard may be more intellectually honest, in such a view—it simplifies the law and better describes the actual practice. It results in fewer ornate or even "impossible" sets of standards of review, and prevents judges from drawing "obscure curtains" across the doctrine.[223] A counter-argument, however, is that reasonableness would then serve as a fig leaf, or a way to sweep under the rug, a great deal of uncertainty in how to review agency action. Naming the standards of review reasonableness review may eliminate complex legal fictions, but it would not necessarily focus judges on the appropriate criteria for review. It would simply acknowledge, perhaps, a failed project.

The problem is different and far greater in constitutional law than in administrative law, where across three dimensions, reasonableness does not simplify doctrine but instead engenders an array of complexities much-criticized rather than appreciated

220. David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525, 525–26 (2011).

221. *Id.* at 538–39.

222. *Id.* at 535.

223. *Id.* at 559; *see also* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 186–87 (2010).

across doctrines and dimensions. That said, some have also argued that constitutional reasonableness would simplify, rather than obscure, the challenges of constitutional interpretation. Perhaps most prominently, Professor Akhil Amar has argued that the Fourth Amendment should not only be read as a whole to embrace a concept of reasonableness, and not just as to the "unreasonable search and seizure" portion of it.[224] He has argued that we can use "constitutional reasonableness" to evaluate "procedural regularity as well as substantive fairness" and rule-of-law values as well as "race and class" and "sex" discrimination.[225]

Descriptively, it has become correct that much of constitutional law does reflect reasonableness review—I have described just how pervasive constitutional reasonableness has become. Perhaps no greater precision can be demanded of complex constitutional balancing. But using the word reasonableness obscures the bewildering array of concepts and legal roles in which the review consists. Judges can act as if they are not conducting constitutional balancing by using the label of reasonableness. Standards can be shifted entirely using the same label of reasonableness. Whether using the same word to refer to very different standards of care, liability, and review is the best model for constitutional interpretation—and, more specifically, whether Fourth Amendment case law provides anything approaching a good model for constitutional interpretation—is a highly equivocal question. If it is the system that we have and that will not change, far more care must be used to define each type of reasonableness being applied across each dimension.

C. REASONABLENESS AND JUDICIAL SUPREMACY

Others have criticized the incorporation of reasonableness standards into constitutional law for some of the same reasons that they have been criticized in common law fields: they invite judicial adoption of perspectives that reflect those of the majority viewpoint and not the diversity of perspectives and persons being regulated. One can think of these as dimension-two critiques of constitutional reasonableness. Reasonableness standards can be an invitation to cognitive bias in resolving the most serious problems in our democracy. Professors Dan Kahan, David Hoff-

224. Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 37–39 (1997).

225. *Id.*

man and Donald Braman have written about how jurors responded to the use of force in the vehicle chase at issue in the Supreme Court's *Scott v. Harris* decision in a range of ways that was, for some sets of values, quite consistent with how the Justices viewed the car chase.[226] One response is that their criticism misses a different point: that reasonableness may, as a matter of substantive Fourth Amendment law, reflect an objective standard of care but that it is not one for jurors to freely opine upon. In fact, the Supreme Court moved towards reasonableness in both Fourth Amendment law, and more importantly, along dimension three, in qualified immunity law precisely to empower judges to take such questions away from juries.[227]

Reasonableness, in that view, is a tool for judicial control—a way to make more questions of law that can be resolved by a judge on summary judgment or before a criminal trial. It is a tool for judicial control that has the appearance of deferring to community norms without actually doing so. Jury reasonableness standards are, ideally, at least based on a theory of lay decision-making. But, for the most part, constitutional reasonableness standards do not reflect objective standards of care. They instead reflect the rulings of reasonable judges. Some applaud this. Professors Lawson and Seidman argue:

> If, however, constitutional meaning depends upon a distinctively legal construct such as the reasonable person, as we maintain, then determining constitutional meaning is more properly the province of legal experts. The people best able to glean the legally-constructed thoughts of a legally-constructed person are likely to be lawyers and legal scholars. Historians, psychologists, and linguists may have something, and even much, to contribute to this legal enterprise, but constitutional interpretation remains a distinctively legal, rather than a distinctively historical, linguistic, or psychological, task.[228]

Perhaps the federal courts are at their most candid, if least helpful, towards development of the law when they say that constitutional rights and remedies are available only when reasonable jurists would provide them. That move is less a slide into subjectivity than into judicial solipsism. The goal is to give judges discretion and insulate their rulings from review, under the guise of objectivity. To question such a ruling would be to question the reasonableness of a judge.

---

226. 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 (2009); *see also* Scott v. Harris, 550 U.S. 372 (2007).

227. *See Scott*, 550 U.S. at 381 ("The question we need to answer is whether Scott's actions were objectively reasonable.").

228. Lawson & Seidman, *supra* note 212, at 50.

A seemingly simple concept of deference, however, can produce highly complex doctrine. At the Supreme Court level, shifting membership and judicial approaches among the Justices can result in ever more complex rulings interpreting reasonableness, with varying rules and exceptions across each of the dimensions explored. More broadly, even if the Justices appreciate the clarity that reasonableness standards can provide, if seemingly bright-line standards of care become eroded through inconsistencies, such as subjective exceptions, shifting objects, or remedial rules, then the clarity supplied may only be superficial. While this can be a challenge in any area in which legal standards must be interpreted, the concept of reasonableness can disguise especially deep disagreements between the Justices concerning the constitutional balancing tests adopted, including questions as fundamental as whose interests are to be taken into account. As Professor Kit Kinports argues, the Court has used concepts of reasonableness that have "shifted opportunistically among different perspectives, based on neither the principles underlying the constitutional provisions at issue nor the attributes of the tests themselves."[229] Unfortunately, that tradition is endemic across a wide range of constitutional doctrines. The problems become magnified in the lower courts, as judges struggle to apply these rules to complex fact situations, in which it really matters whether the test is objective or subjective or reflects standards of care or not. Reasonableness begets highly unreasonable doctrine and results.

IV. TOWARDS A REGULATORY REASONABLENESS

Across a large body of constitutional law, reasonableness doctrines look patently unreasonable in their application and even in their definition. This need not be so. As Professor Anthony Amsterdam famously wrote about the Fourth Amendment reasonableness test adopted by the Supreme Court in *Katz v. United States*, "In the end, the basis of the *Katz* decision seems to be that the [F]ourth [A]mendment protects those interests that may justifiably claim [F]ourth [A]mendment protection."[230] That statement leaves us where we left off in Part III of this Article, with a defense of constitutional reasonableness as perhaps the best the courts can be expected to do, but still a self-referential standard with very little content. Professor Amsterdam,

229. Kinports, *supra* note 3, at 133.

230. Amsterdam, *supra* note 19, at 385.

however, moved from the Court's approach to a new one and advocated a positive change in focus in Fourth Amendment law. He argued for a regulatory model, in which police discretion would be informed and confined by written police practices and legislation, within Fourth Amendment limits.[231] Specifically, the goal of the constitutional right would be not just to protect "specific interests of specific individuals" whose rights were abused, but also to "regulat[e] police practices broadly, generally[,] and directly."[232] The goal is for a constitutional standard to inform and supplement regulatory policies, but for the Constitution to not be the sole protection.

Such an approach permits constitutional reasonableness to be informed by industry practices, policy, and regulation, and to in turn credit sound practices, policy, and regulation. That regulatory approach better resembles the administrative review doctrines that Professor David Zaring endorses, where deference is due to empirically informed administrative fact-finding.[233] I strongly agree with such a use of reasonableness standards and have argued that, in general, constitutional reasonableness can and should actually refer to objective and informed standards of care, as it can sometimes do in the tort context. Reasonableness should refer to objective standards, not actions by individuals under particularized circumstances. In short, many of the endemic problems identified in Parts I, II, and III of this Article can be addressed through a regulatory concept of constitutional reasonableness. In this Part, I hope to show why that concept improves on existing doctrine, why it is compatible with existing doctrine, and why it can solve still additional puzzles and difficulties in existing constitutional law. I will also discuss important and quite serious objections to such a concept of constitutional review, including that there may not be agreed upon best practices, empirical evidence may conflict, practices may be changing and improving over time, and such questions may be better suited to legislators making policy decisions rather than administrative agencies or local government.

231. *Id.* at 409 (proposing "a requirement that police discretion to conduct search and seizure activity be tolerably confined by either legislation or police-made rules and regulations, subject to judicial review for reasonableness").

232. *Id.* at 372.

233. *See* Zaring, *supra* note 220, at 525–26.

A. A REGULATORY CONCEPT OF REASONABLENESS

What would a regulatory or empirically informed reasonableness look like in the areas of constitutional law discussed in this Article? Professor Anthony Amsterdam argued that we should not have a system in which "the Constitution is our one instrument for keeping the police within the rule of law."[234] Instead, constitutional rulings should set "minimum standards" and areas of concern as well as "inform and monitor" enforcement, but police should have primary responsibility for regulating themselves.[235] Amsterdam urged a rule of constitutional law wherein the Fourth Amendment would (1) presumptively find a search or seizure constitutional if it was conducted pursuant either to legislation or to police department rules and regulations; (2) require that the statutes or police rules be "reasonably particular" in setting out the permissible bounds of police searches and seizures; and (3) require that those statutes or rules be consistent with existing Fourth Amendment requirements.[236]

Such an approach resembles an administrative law regime where there is deference to an administrative agency (here, local police agencies or state legislatures) if they make policy decisions within reasonable bounds. The approach rewards sound self-regulation and defers to best practices, but the federal courts would be tasked with reviewing those regulations and may find outlier approaches violative. The approach reduces arbitrariness without imposing a detailed code of procedure. Scholars who recommend administrative law approaches to criminal procedure generally now favor such approaches, which take some of the weight from constitutional interpretation. The courts, Amsterdam recommended, could instead incline more towards a "requirement of police-made rules judicially reviewable for reasonableness."[237] Rather than defer to individual officer action as reasonable or not, the starting place would be on regulation. More constitutional review would look like review of regulations or of legislation, based on empirically-informed assessments of policy—not just of individual action.

A generation of new-administrativist scholars has advanced such an approach more broadly in a range of areas in which expert administrative agencies do not currently exist to sufficiently

234. *Id.* at 380.
235. *Id.* at 380, 409.
236. *Id.* at 416–17.
237. *Id.* at 405.

protect constitutional rights.[238] To be sure, some of that scholarship neglects to consider that, in some areas, there are already agencies tasked with protection of constitutional rights. Take the Equal Employment Opportunity Commission, for example, or the Civil Rights Division of the Department of Justice. Some scholarship, then, critically assesses the role of such agencies in developing regulations to define and protect constitutional rights, or imagines a more robust role for those agencies at the federal, state, and local levels to protect constitutional rights.[239]

Another strain of this area of legal scholarship has advocated that administrative law norms be extended to areas in which regulation is largely lacking, such as within prosecutors' offices, an area explored by Professors Rachel Barkow, Stephanos Bibas, Gerard Lynch, Daniel Richman, and others.[240] That scholarship, while diverse, in part assesses existing government institutions and asks whether additional procedures and norms could better regulate those institutions. In addition, a wide range of new-governance scholarship has asked, for more than two decades, whether rulemaking and regulation could be better informed by democratic participation combined with rigorous assessment of best practices.[241]

Yet another strain of scholarship emphasizes that individual case-specific adjudication is inadequate to address systemic

---

238. *See* Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1043–44 (2016) (proposing that courts apply an administrative law framework to cases involving surveillance). *See generally* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 406, 439 (2007) (tracing the evolution of judicial deference to administrative expertise in the 1930s and 1940s).

239. *See* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2009) (discussing Department of Justice suits under § 14141 seeking institutional reform of police departments); Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 702–08 (2005) (explaining why the EEOC still plays an essential role in eradicating discrimination).

240. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2150 (1998); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 752 (2003).

241. *See, e.g.*, IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

problems that arise in government programs. Professor Tracey L. Meares has described how "individual-level analysis" is not suitable for addressing systemic law enforcement programs like stop-and-frisk.[242] I have argued that individual review using appellate or post-conviction review is not suitable for addressing systemic errors in criminal adjudication, as has Professor Eve Brensike Primus.[243] A range of solutions have been proposed to these problems. I have suggested that aggregate or class action-style regulation might better address systemic issues, or that administrative agencies outside the courts might better regulate such questions.[244] Professor Andrew Crespo has argued that systemic data might better be harnessed by courts.[245] Others have focused on incentivizing democratic rulemaking by government actors themselves.[246] In addition, scholars have argued social science and empirical research should more generally inform constitutional rights or constitutional criminal procedure, including in more complex hybrid models, in which courts serve a role in overseeing experimentation by government actors.[247]

One objection to such deference is that not all agencies deserve the deference that they might receive; for example, some questions may not be well informed by policy or research. Local law enforcement agencies do not have the resources to conduct research, or even spend much time assessing existing research in the way that a federal agency can do. Nor are there industry groups that typically conduct major research projects on topics related to a range of civil rights. Professor Ronald Allen has argued that police rules do not deserve deference, since they do not have expertise, they may not be agencies that are very account-

242. Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 164 (2015).

243. Garrett, *Aggregation in Criminal Law*, *supra* note 20; Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1 (2010).

244. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011); Garrett, *Aggregation in Criminal Law*, *supra* note 20.

245. Crespo, *supra* note 24.

246. Friedman & Ponomarenko, *supra* note 22, at 1833.

247. *See generally* Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 743–44 (2000); Dorf & Sabel, *supra* note 241.

able to the public, and, ultimately, such questions would be better settled through legislation.[248] There is also the danger that courts are not well situated to evaluate scientific research even when good research has been conducted. The story of the development of constitutional rights in a range of contexts has been the story of the courts disregarding scientific research that counseled very different protections for constitutional rights.

One advantage of regulatory reasonableness review is that it can, in theory, generate more detailed and informed regulation. That is why scholars since the 1970s have argued that a regulatory model can empower judicial review, but also limit it and inform judicial deference to agencies. Professors Barry Friedman and Maria Ponomarenko have argued that policing is poorly regulated by courts and that courts should instead incentivize review by agencies, in similar ways to those proposed by Professor Anthony Amsterdam, in the Fourth Amendment context, and Professor Kenneth Culp Davis, in the policing context more generally.[249]

For an example, take Fourth Amendment use-of-force standards. The Fourth Amendment provides a general right to be free from "unreasonable searches and seizures."[250] Professor Seth Stoughton and I, along with many others, have criticized the Supreme Court for focusing the reasonableness inquiry in that context on the split-second in which the officer decides to use force.[251] The Court has emphasized that there are no bright line rules or even clear standards, so that officers may use deadly force so long as it is objectively reasonable to do so in the circumstances of each case.[252] Such an approach certainly limits civil liability of officers. But it does not provide any guidance for officers or police supervisors, who instead adopt detailed policies

248. Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 80–81 (1976).

249. Friedman & Ponomarenko, *supra* note 22, at 1833 n.28 ("This drum has been beat, periodically, for at least the last fifty years. . . . [W]e stand on the shoulders of giants . . . ." (citing KENNETH CULP DAVIS, POLICE DISCRETION (1975)); Amsterdam, *supra* note 19.

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

251. POLICE EXECUTIVE RESEARCH FORUM, USE OF FORCE: TAKING POLICING TO A HIGHER STANDARD, at nos. 2, 5 & 15 (Jan. 29, 2016), http://www.policeforum.org/assets/30guidingprinciples.pdf; Garrett & Stoughton, *supra* note 6.

252. Scott v. Harris, 550 U.S. 372, 381 (2007).

designed to minimize the need to use force generally, and to prevent the need to use deadly force. Such police tactics are part of the training of any reasonable police officer. Officers should be held to the standards of their profession, and not to a rock-bottom constitutional floor where any split-second reaction is deemed reasonable, no matter how rash or preventable through prior actions. We call for an empirically grounded constitutional reasonableness in the use of force context, asking whether police officers followed sound policy and training to minimize the need to use force and deescalate. If deadly force was not avoidable, then officers should not be liable, but officers should be liable (really, the agencies that indemnify the individual officers) for unnecessary use of deadly force. The reasonable officer reacting in the moment is replaced by the reasonably trained officer, and the focus is on systemic questions of police training, rather than on the individual circumstances at the moment deadly force was used.

Other constitutional rights can benefit from an empirically informed focus on the general, not the specific, circumstances and on industry norms rather than individual preferences. In criminal procedure, other objective reasonableness standards can and should be informed by research on what a reasonably trained officer would do. Whether an individual can consent to a search or voluntarily agree to be interrogated should be informed by research on the vulnerability of, for example, the mentally ill and juveniles. Officers should not be off the hook if they subjectively had no idea that the suspect was mentally ill or disabled or a juvenile. Sound training on such questions should be expected—and it will be if the constitutional reasonableness standard creates that expectation.

Turning to civil rights, rational basis review could be better informed by a regulatory reasonableness standard. That is, although deference will be due to any potentially reasonable legislative determination, if there is factual evidence of bias or animus, then the Supreme Court has been correct to tighten the inquiry into the goals served by the legislation. Thus, scholars have argued that in *Lawrence*, the Court correctly emphasized that an anti-sodomy statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[253] While the Court has sometimes stated that "the theory of rational-basis review . . . does not require the

253. Lawrence v. Texas, 539 U.S. 558, 560 (2003); Araiza, *supra* note 129.

State to place any evidence in the record," such evidence should be put in the record if the plaintiff has some evidence or arbitrary or discriminatory motive.[254] There should be a burden-shifting analysis, even in the context of rational basis review; such a shift in the burden may explain why the Court sometimes appears to add teeth to rational basis review. Considering the factual record should be more routine when constitutional rights are at stake, and burden shifting can help to sort out cases deserving more careful inquiry.

Areas in which reasonableness informs a standard of review and refers to a probability, could also be informed by a regulatory concept. Research could inform the question whether an event is reasonably probable or not. If the question is whether a jury reasonably was affected by the lawyer's failure to challenge a confession, a court could take notice of studies examining the question, and it could be expected to adopt general rules regulating lawyers and insisting that they litigate questions of real importance to jurors. Or, take the reasonably probable standard for determining whether a violation of *Brady v. Maryland* by prosecutors deserves reversal of a conviction. If a prosecutor's office does not have clear policy or training on the *Brady* obligation to provide exculpatory evidence to the defense, or if that policy was violated, perhaps that should inform the constitutional analysis. The Supreme Court itself has stated that its rule "requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate."[255] Many commentators have similarly criticized the *Brady* rule as toothless, where prosecutors can make their own judgments whether evidence is sufficiently material to turn over to the defense. Rather than defer to those judgments using after-the-fact reasonableness review, a court could first ask what the prosecutor's policy is on disclosure of exculpatory or impeachment evidence. If that policy was itself reasonable and followed, prosecutors would benefit from deference. If not, though, the Court would conduct further review.

Similarly, reasonableness rules that relate to questions of proportionality could also adopt a more regulatory posture. It might not be enough to defer to a reasonable decision to keep a person in indefinite civil commitment; the Court might instead expect an empirically informed policy and set of regulations for assessing whether individuals in general pose a risk and should

254. Heller v. Doe, 509 U.S. 312, 319 (1993).

255. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

be kept in ongoing civil confinement. Absent such a validated policy and regulations, even a seemingly sensible individual decision should not be approved, given the lack of a sound framework for making such decisions.

One area in which the Court has adopted such an approach deferring to regulatory expertise provides a set of quite cautionary lessons. The Supreme Court held in the context of constitutional challenges to prison regulations, including burdens on First Amendment rights, to the right to marry, and other rights, that such regulations are valid if "reasonably related to legitimate penological interests."[256] The Court explicitly adopted a regulatory model in that context, or at least seemed to do so initially, when the standard was first developed in the 1970s. The Court explained that such a standard is necessary if "prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations."[257] The Court saw the need for such an approach where the challenge is made directly to regulations that burden constitutional rights (or to statutes that benefit from rational-basis deference).

However, the development of the law and remedies in the area of prison-conditions litigation resulted in rulings that better resemble blanket deference to prison administrators than any model of regulatory reasonableness.[258] In the lower courts, often any reason given by prison officials is seen as an objective and legitimate, or reasonable, basis for a prison policy.[259] The doctrine was developed during a time when federal courts and the Supreme Court had begun to turn away from structural reform litigation and oversight of public institutions, and so the Supreme Court highlighted the need to "maintain institutional security"[260] and the "complex and intractable" problems of prison

256. Turner v. Safley, 482 U.S. 78, 89 (1987).

257. *Id.* (quoting Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 127 (1977)).

258. Mikel-Meredith Weidman, Comment, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1506–46 (2004). For empirical analysis, see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

259. *See* Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1822–33 (2012).

260. Bell v. Wolfish, 441 U.S. 520, 547 (1979).

administration "not readily susceptible of resolution by decree."[261] Making the law still more restrictive, Congress later stepped in with legislation to narrow remedies in prison conditions cases in the Prison Litigation Reform Act of 1995.[262]

Thus, in the Eighth Amendment area, the federal courts do not ask careful questions about whether the prison administrators adopt policies that are the least restrictive, or most justified, or supported by evidence.[263] They could be required to do so, but the Supreme Court had increasingly emphasized deference in the area, and then Congress has stepped in. While the area could have been one in which regulatory reasonableness would result in a body of informed regulation, the area instead resulted in largely rote deference to prison administrators. The experience in that area suggests that regulatory reasonableness has to be taken seriously by judges, the relevant regulators, and legislators. Judges must actually inquire into whether the regulation or rule is supported by evidence. Clear rules requiring objective support to be offered by regulators for their regulations must be set out. Otherwise, the entire effort may degenerate into blanket deference.

B. REGULATORY OBJECTS OF REASONABLENESS

Significant confusion in constitutional law flows from uncertainty about which actor's conduct should be assessed for its reasonableness. There should be a preference (if not a rule) on this question for a given constitutional right and it should not simply be up to whichever court happens to be reviewing a claim to decide on whom to place the burden upon. The problem disappears, however, if reasonableness is assessed on a general level, and based on standards of care instead of individual preferences or circumstances. I have argued that a regulatory or systemic focus is typically preferable for questions of constitutional importance. If a police officer must be trained on how to identify a mentally ill person, then it does not matter whether the officer was confused, even reasonably so, by the actions of a particular mentally

261. Rhodes v. Chapman, 452 U.S. 337, 351 n.16 (1981) (quoting Procunier v. Martinez, 416 U.S. 396, 404–05 (1974)).

262. Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626 (2012).

263. *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV.881 (2009); Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53 (2009).

ill person. If the officer did not follow the steps that sound training would recommend to identify such a person, then the perspectives of that officer and that suspect do not matter. The standard would focus on general standards of care—obviating the need for byzantine and case-specific rules about who should reasonably have said and done what during a multi-step encounter.

C. REGULATORY REASONABLENESS REVIEW

When courts use reasonableness standards to inform review of constitutional rights or to determine whether a remedy is appropriate, that review should be informed by objective and empirical sources, and not just whatever the reviewing judge calls reasonable. Take the Sixth Amendment right to counsel. Courts typically defer to performance of counsel based on some notion that it fell within the range of acceptable strategic decisions, or it likely did not prejudice the outcome at trial.[264] That analysis could be actually objective, and not just based on judges' hunches as to what might have happened, had the lawyer done the job differently. That is, empirical evidence could inform the analysis, based on studies of jury behavior and assessment of trial evidence. I have argued that the Sixth Amendment can and should be validated through such an evidence-based approach.[265]

More generally, the analogous reasonableness standards built into harmless error review of constitutional rights asserted in criminal cases on appeal and post-conviction are susceptible to better-informed empirical research. Scholars have proposed empirical methods for harmless-error analysis, for example, to use jury research to inform harmless-error determinations.[266] A large body of research has described how difficult it is to expect judges to engage in counterfactual reasoning, asking how a trial would have come out differently absent a constitutional error, and putting to one side evidence of guilt that may bias a judge to

264. *See, e.g.*, Strickland v. Washington, 446 U.S. 668 (1984) (finding that the proper standard was reasonably effective assistance and that even if counsel's assistance was unreasonable, the defendant suffered insufficient prejudice).

265. Brandon L. Garrett, *Validating the Right to Counsel*, 70 WASH. & LEE L. REV. 927 (2013).

266. D. Alex Winkelman et al., *An Empirical Method for Harmless Error*, 46 ARIZ. ST. L.J. 1405 (2014).

confirm the prior outcome.[267] Whether judges will take evidence-based analysis seriously is more equivocal, but it would improve upon reasonableness rubber-stamping.

The appropriate level of deference to regulations also raises important issues. Controversies over when and whether federal judges should defer to agency interpretations of ambiguous statutes under the *Chevron* doctrine have engendered a vast scholarship and complex case law.[268] Moreover, agencies can be presumed to have expertise, as well as delegated authority, regarding statutes concerning their own regulatory authority, but perhaps not constitutional rights, which raise very different separation of powers concerns regarding the judicial obligation to ensure that the Constitution is followed.

Several guideposts can nevertheless be set out here. One response to the criticism that judges would abdicate their role to defer to administrative regulations regarding constitutional rights is that judges already engage in broad deference, but are not informed by adequate information. Offering no reasonableness deference when an agency has no regulation at all on a subject touching on constitutional rights seems like a logical place to start. Taking away the benefit of reasonableness deference, whether regarding the definition of the violation or whether a remedy should result, when the agency does not provide evidentiary support for its regulation, would also be a fairly easy principle for judges to administer. Whether a constitutional violation can be insulated by a regulation that appears reasonable but was not followed will raise important questions regarding the reach of constitutional remedies. Perhaps no defense should be availing in such circumstances.

The more difficult situations will arise where government officials say they were following a regulation. They might even have a regulation parroting the constitutional floor: "Police officers shall use deadly force when reasonable to do so under the totality of the circumstances."[269] That policy is close to none at

267. *Id.* at 1411; D. Brian Wallace & Saul M. Kassin, *Harmless Error Analysis: How Do Judges Respond to Confession Errors*, 36 L. & HUM. BEHAV. 151 (2012).

268. Chevron v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984); *see, e.g.*, William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 190–91 (2006).

269. *See generally* Graham v. Connor, 490 U.S. 386 (1989).

all, but they might then add: "[w]e believe that this policy is highly effective and better than the alternatives." A judge should ask what evidence supports that conclusion. If lawmakers or regulators do adopt rules designed to prevent constitutional violations, but there is a lack of empirical evidence concerning their effectiveness, then perhaps the reasonableness issue should be litigated just as in a tort suit. The fact finder can decide whether a minimalistic policy truly is a reasonable policy that can protect individual constitutional rights. In constitutional tort cases, detailed questions are already asked whether an official acted reasonably, but without much content concerning what that means.[270] Adding the fact that a rule or regulation was addressed to the situation in which the constitutional right was allegedly violated could at least add more content to the litigation. In many areas, such practices do inform the fact finding concerning whether a constitutional violation occurred and deserves a remedy.[271]

Whether a regulatory vision of reasonableness could supplement, or even supplant, rational basis review raises more difficult questions. If the government has no regulation at all in place, perhaps that should be presumptively irrational, but typically (outside of the criminal justice setting in which agencies so often lack detailed regulations) there is a policy or a statute being challenged as unconstitutional. Whether a more evidence-based approach, focusing on best practices and effectiveness, could inform review is a broader question. If the purpose of rational basis review is to, apart from explicit animus, broadly defer to legislative and administrative policy expertise, then a regulatory model of reasonableness would serve no useful role. If the goal is to test government justifications factually, to at least some degree, then a more evidence-based approach would be warranted.

CONCLUSION

In this Article, I have developed three dimensions of constitutional reasonableness. Within each there are, in turn, a range of alternative approaches and usages of a reasonableness test.

---

270. *See, e.g.*, Freeman v. United States, 509 F.2d 626, 629 (6th Cir. 1975); Ingham v. Eastern Air Lines, 373 F.2d 227, 238 (2d Cir. 1967); Wiseman v. United States, 327 F.2d 701, 707 (3d Cir. 1964).

271. *See, e.g.*, Garrett & Stoughton, *supra* note 6 (describing the role that police practices already play in use-of-force litigation).

First, reasonableness can be used with conceptions that are objective, subjective, utility-based, or custom-based, sometimes with more than one usage in the context of a particular right. Second, as to the objects of reasonableness standards, they may be institutional or individualized and assessed from the perspective of judges, officials, legislators, or citizens. Third, the standard may apply to a right or to an assertion of defenses, or waivers, or remedial limitations, or standards of review, or potentially blurring the distinctions between each of these.

For a wonderfully candid assessment of the uncertainties that can result from such reasonableness doctrine, read this description from a treatise on municipal ordinances:

> It is impossible to be didactic, or even precise, in discussing the rule that an ordinance must be reasonable to be valid. The decision as to the reasonableness of any type of regulation depends a great deal on subjective factors—the temperament and experience of the judges, their attitude toward society and particularly toward the activity concerned, their training, education and other personal traits.[272]

One pities the municipal lawyer that must explain the standard to the city officials concerned about passing valid ordinances. Or, as Chief Judge Roger Traynor put it in his classic treatment of harmless-error doctrine: "The nebulous test of reasonableness is unlikely to foster uniformity either in the application of standards, should there be any, or in the pragmatic exercise of discretion."[273]

Yet constitutional reasonableness is here to stay. It is the glue that holds together vastly disparate constitutional provisions and standards. As Professors Sam Kamin and Justin Marceau put it, "it is unlikely that any area of law lacks a reasonableness test at the center of a core doctrine."[274] Pervasive constitutional borrowing has led the Court to pull reasonableness standards from civil to criminal settings, from discrimination law to free speech law, from standards of care to standards for relief on appeal or in habeas corpus petitions. In many of those areas, the indeterminate and even circular nature of the constitutional reasonableness standard can be a source of its strength. If a reasonable official must actually adhere to objectively sound practices, then officials have standards to follow and the public knows what to expect. If it is judges, though, calling conduct reasonable post hoc, without setting any standards

---

272. THOMAS A. MATTHEWS & BYRON S. MATTHEWS, MUNICIPAL ORDINANCES § 2.07 (2d ed. 1983).

273. ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 34–35 (1970).

274. Kamin & Marceau, *supra* note 182, at 590.

of care, then reasonableness turns into a form of blanket deference that does not inform officials or give the public clear guidance on what their rights actually are.

If only judges kept the three dimensions of constitutional reasonableness distinct, we might not see varying stacked concepts of reasonableness doing double or triple duty, for the adjudication of even a single federal constitutional claim. That the proliferation of these reasonableness standards has become accepted suggests to what a degree we have become accustomed to these usages. They disguise entirely separate dimensions of interpretive and remedial choices, however. Decisions that adopt entirely irreconcilable approaches can claim to be applying the same reasonableness doctrine. These doctrines should be unpacked and distinguished, even if in practice they can overlap and confuse. Better yet, federal judges should avoid using reasonableness as a fig leaf to disguise the rights and values they interpret and balance. Using different terms for different concepts would be a welcome change, even if the umbrella term reasonableness remains so attractive that it is retained.

Still better, under the model that I advance, and that others have developed in contexts such as the Fourth Amendment, and which the Supreme Court uses in certain contexts already, constitutional interpretation could incentivize evidence-informed practices. That is, the salutary role reasonableness is supposed to serve in the negligence context: incentivizing reasonable standards of care. A range of scholars have advanced a new focus on regulatory models to better adopt systemic and empirically informed regulation to protect constitutional rights. There have been concerns, though, whether courts have the right cases, or access to sufficient data, or institutional ability to incentivize such review.[275] The experience in the Eighth Amendment prison conditions area suggests those concerns can be warranted if judges do not carefully adopt a regulatory concept of reasonableness, but rather slide back into an approach that is broadly deferential to regulators. Reasonableness review, even if better informed, may be simply too "nebulous," as Judge Traynor put it, to carefully inform doctrine.[276]

While taking those concerns seriously, this Article does point out just how many doctrines are amenable to a more rigor-

275. For a discussion of those concerns, see also Crespo, *supra* note 24, at 2060–61 (collecting sources and offering a critique).

276. TRAYNOR, *supra* note 273.

ous regulatory reasonableness approach. There are many attractive places in the doctrine in which such an empirically informed view of reasonableness could be adopted, now that the doctrine is shot through with constitutional reasonableness review. Without such a shift, there will be little that is reasonable about constitutional reasonableness. Even if this positive proposal for a shift in approach towards an empirically informed model does not take hold, I hope the negative and critical aspects of this discussion may not only illuminate the multiple dimensions that reasonableness can operate under, but also how duplication and confusion across different aspects of constitutional law can make the job of a judge nearly impossible. The doctrine certainly defies the expectations of litigants and the public. I have also argued that the spread of constitutional reasonableness is understandable—if deplorable. The vagueness, flexibility, and malleability of reasonableness explains its ubiquity and utility. Today, however, without committing to any one usage, a judge or court can shift the meaning of entire constitutional standards, without seeming to change its reasonableness label. That shape-shifting ambiguity across multiple dimensions is the source of the power, the attraction, and the danger of constitutional reasonableness.