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Policing, Masculinities, and Judicial Acknowledgment

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In the 1980s, the Supreme Court held that courts must consider the "totality of the circumstances" when deciding the reasonableness of a police officer's conduct in an excessive force suit. To this day, the precise meaning of "reasonableness" remains elusive. For years, courts around the country have struggled to articulate what police conduct should and—equally as saliently—should not *be considered during reasonableness determinations. Thus far, the Supreme Court has been unwilling to substantively clarify its reasonableness doctrine. This lack of clarity has led to an untenable patchwork of differing legal frameworks throughout the United States.*

This issue exists in a cultural milieu of exacerbated police tensions and intersects issues of race, class, and gender. This Note focuses on the latter, centering the discussion on how gender increases the potential for police violence. In doing so, it considers how the Supreme Court's Fourth Amendment jurisprudence has historically turned a blind eye to some of the predominant social forces that shape police culture in America, thereby insulating dangerous forms of police conduct from judicial scrutiny. This Note attempts to wed policy considerations with legal reasoning and argues that the Supreme Court should broaden its reasonableness inquiry for two key reasons: first, to resolve the current circuit split, and second, to acknowledge—and dismantle—the problematic policing culture that its own jurisprudence helped shape.

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INTRODUCTION

On May 25, 2020, a 46-year-old Black man is killed on the streets of Minneapolis, Minnesota.[1] His name is George Floyd, and he has been accused of purchasing a pack of cigarettes with a counterfeit twenty-dollar bill at a convenience store.[2] After confronting Floyd, a store employee phones the police.[3] A squad car arrives.[4] A responding officer draws his weapon and forcefully removes Floyd from the vehicle he is seated in.[5] The officers handcuff him.[6] They provide Floyd no explanation for his arrest.[7] They walk him across the street to a police cruiser and attempt to force Floyd into the back seat.[8] He resists—Floyd gets pinned between an officer and the vehicle.[9] He is claustrophobic.[10] When the officers finally thrust Floyd into the car, he manages to climb out the opposite side.[11] Now, Officer Derek Chauvin takes control.[12] He, along with two other officers, pin the panicked Floyd against the pavement.[13] Chauvin kneels on Floyd's neck; the others assume responsibility for his legs and wrists.[14] A fourth officer repels bystanders.[15] Floyd, visibly distressed, cannot breathe.[16] He tries to tell

1. *E.g.*, Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES, https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html (last updated Jan. 4, 2022) [https://perma.cc/DFS7-NRDC].
2. *Id.*
3. *Id.*
4. *Id.*
5. *How George Floyd Died, and What Happened Next*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/article/george-floyd.html [https://perma.cc/XXM8-ZH6X].
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

the officers.[17] Seventeen minutes after the first squad car arrives, Floyd is dead.[18]

The events in Minneapolis catalyzed a "national reckoning" over police misconduct.[19] Overnight, protests erupted across the country, demanding justice for Black Americans—predominantly, Black men—who had been killed at the hands of police officers for obscure (or unknown) legal wrongs.[20] The Minneapolis officers were fired from their positions.[21] Chauvin was charged with second-degree murder, third-degree murder, and second-degree manslaughter.[22] On April 20, 2021, a Minnesota jury found Chauvin guilty on all three counts.[23] The other officers involved in Floyd's death were later found guilty of civil rights violations.[24]

The justice system did not spare Derek Chauvin. For decades, however, police officers have relied on courts to absolve them of wrongdoing. *Graham v. Connor* is the landmark 1989 Supreme Court case that instructed courts to consider the "totality of the circumstances" in determining the reasonableness of an officer's Fourth

17. *Id.*; *see also* Antjuan Seawright & Jessica Tarlov, Opinion, *Remembering George Floyd: Too Many Still Can't Breathe*, HILL (May 25, 2021, 8:00 AM), https://thehill.com/opinion/civil-rights/555129-remembering-george-floyd-too-many-still-cant-breathe/ [https://perma.cc/T27F-RU2K].

18. Hill et al., *supra* note 1.

19. Floyd's case became "one of the most closely watched cases in recent memory, setting off a national reckoning on police violence and systemic racism." Laurel Wamsley, *Derek Chauvin Found Guilty of George Floyd's Murder*, NPR, https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/987777911/court-says-jury-has-reached-verdict-in-derek-chauvins-murder-trial (last updated Apr. 20, 2021, 5:37 PM) [https://perma.cc/G2GE-3GH4].

20. N.Y. TIMES, *supra* note 5; *see also* Alia Chughtai, *Know Their Names: Black People Killed by Police in the US*, AL JAZEERA, https://interactive.aljazeera.com/aje/2020/know-their-names/index.html (last visited Mar. 28, 2022) [https://perma.cc/MPB5-VKHB] (interactive website providing information about high-profile people of color killed by law enforcement in recent years).

21. N.Y. TIMES, *supra* note 5.

22. *Id.*

23. Wamsley, *supra* note 19. For a more robust account of post-verdict reactions, see Jelani Cobb, *Derek Chauvin's Trial and George Floyd's City*, NEW YORKER (July 5, 2021), https://www.newyorker.com/magazine/2021/07/12/derek-chauvins-trial-and-george-floyds-city [https://perma.cc/HJ3U-83FA]. Chauvin was sentenced to twenty-two and a half years in prison. *Id.* Cobb also discusses the police shootings of Jamar Clark (2015) and Philando Castile (2016), and the founding of the Minneapolis Police Department's activist group, MPD150. *Id.* "The group found that, of nearly twenty-eight hundred civilian complaints lodged during the eight years before Floyd's death, the department ruled that only thirteen were warranted." *Id.* Cobb writes: "This history helps explain why, [in Minneapolis], people tended to view Floyd's killing not as an anomaly but as part of an enduring narrative." *Id.*

24. Julia Jones & Christina Maxouris, *3 Former Minneapolis Police Officers Found Guilty of Violating George Floyd's Civil Rights*, CNN, https://www.cnn.com/2022/02/24/us/george-floyd-federal-civil-rights-trial-jury-thursday/index.html (last updated Feb. 24, 2022, 8:51 PM) [https://perma.cc/4KCK-HU6Y]. Sentencing for these officers is slated to begin just prior to the publication of this Note. *Id.* All officers involved were men.

Amendment seizure.[25] But today, some commentators refer to the case as an officer's "First Amendment"—a powerful shield against allegations of police misconduct.[26] Lower courts struggle to determine what conduct occurring *before* a seizure is effectuated may be included in the reasonableness inquiry, further muddling the issue.[27] Additionally, Fourth Amendment jurisprudence is complicated by the intersections of race[28] *and* gender—by the end of 2020, police had shot and killed 983 men, compared to thirty-eight women.[29] Nonetheless, the Fourth Amendment continues to safeguard police officers. Courts have failed to adequately address these issues—namely, how to hold officers sufficiently accountable for excessive force and "unreasonable" conduct, whatever that may be.

This Note will examine how Fourth Amendment jurisprudence turns a blind eye to the socio-cultural forces that exacerbate police misconduct in America. Specifically, this Note argues that the Supreme Court should resolve a current circuit split: whereas some circuits conduct an exceedingly narrow inquiry into the reasonableness of an officer's conduct, others consider a broader timeline in their determination of reasonableness. The Note urges courts to adopt the latter approach: a broadening of the Fourth Amendment reasonableness inquiry to include consideration of an officer's *pre*-seizure conduct. That is, courts should consider an officer's actions that

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25. 490 U.S. 386, 396 (1989) (quoting Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)).

26. Radiolab, *Graham*, WNYC STUDIOS (June 6, 2020), https://www.wnycstudios.org/podcasts/radiolab/articles/graham [https://perma.cc/YR6E-CTNU] (as described by Kelly McEvers, NPR reporter and host of *Embedded* podcast and *All Things Considered*).

27. *See* discussion *infra* Parts III.A, B. *Compare* Schulz v. Long, 44 F.3d 643, 648–49 (8th Cir. 1995) (applying an extremely narrow reasonableness inquiry that excludes most pre-seizure conduct from consideration), *with* Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir. 1997) (acknowledging a broader reasonableness analysis that considers officers' pre-seizure conduct).

28. *See, e.g.*, Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 116 PNAS 16793 (John Hagan ed., 2019) (finding that "people of color face a higher likelihood of being killed by police than do white men and women").

29. *Number of People Shot to Death by Police in the United States from 2017 to 2022, by Gender*, STATISTA, https://www.statista.com/statistics/585149/people-shot-to-death-by-us-police-by-gender/ (last visited Jan. 28, 2022) [https://perma.cc/JR2Z-BUFS]; *see also* Timothy Williams & Caitlin Dickerson, *Rarity of Tulsa Shooting: Female Officers Are Almost Never Involved*, N.Y. TIMES (Sept. 24, 2016), https://www.nytimes.com/2016/09/25/us/rarity-of-tulsa-shooting-female-officers-are-almost-never-involved.html [https://perma.cc/A2YU-KHXQ] (noting that female *officers* account for only a "handful" of police shootings). For further reading on the intersection between police violence, gender, race, and class, see Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000). In her piece, Harris discusses socio-cultural forces that shape gendered police interactions and ultimately argues that the American criminal justice system is complicit in perpetuating a pattern of gendered police violence, in part because "it blocks our society from exploring possibly more effective ways of pursuing a truly safe society." *Id.* at 780. This Note focuses on one possible judicial intervention to spur that pursuit.

occur *before* the precise moment a seizure is effectuated; the events *leading to* the seizure.[30] Critically, this Note unites the circuit split with the concept of "masculinities," contending that by failing to broaden the inquiry and denouncing prior Fourth Amendment doctrine, courts act as de facto guardians of toxic policing tactics.

This Note continues in four Parts. Part II provides a background on Fourth Amendment jurisprudence and § 1983 suits (the statute by which citizens can hold law enforcement officers accountable for excessive force). Part II also introduces masculinities theory—an offshoot of feminist scholarship—and the idea of "command presence." Part III examines the current circuit split regarding the reasonableness of pre-seizure law enforcement conduct and analyzes the inconsistent development of lower court precedent in this area of Fourth Amendment jurisprudence. Part III concludes by utilizing masculinities as a lens through which to view the circuit split. Part IV offers a solution: the Supreme Court should resolve the circuit split favoring a broadened pre-seizure reasonableness inquiry. This solution has complementary rationales: it would (1) comport with the Supreme Court's most recent developments in Fourth Amendment jurisprudence on related constitutional issues, and (2) provide a compelling policy precedent should the Court willingly acknowledge the sociological forces that currently shape policing in America.

I. BACKGROUND

A. The § 1983 Lawsuit and Fourth Amendment Jurisprudence

Before assessing what masculinities can reveal about the inadequacies of policing in America, it is essential to discuss the Supreme Court's foundational decisions on Fourth Amendment seizures and the statutory mechanism that everyday citizens can employ to vindicate their rights. This Section begins by introducing 42 U.S.C. § 1983—the provision under which civil suits may be brought against state officials, such as law enforcement officers, for violations of constitutional rights. Then, this Section briefly discusses the constitutional right most commonly invoked in § 1983 claims against law enforcement officers for excessive use of force: the Fourth Amendment's protection against "unreasonable searches and seizures."[31] The Section will outline how two landmark Supreme Court

30. *See infra* Part III.

31. U.S. CONST. amend. IV.

cases—*Tennessee v. Garner*[32] and *Graham v. Connor*[33]—shaped the contours of Fourth Amendment jurisprudence but have led to an inconsistent patchwork of legal considerations for lower courts to evaluate excessive force claims. As is discussed in the following Sections, this inconsistent scheme leads to judicial vindication of hypermasculine policing tactics.

1. The § 1983 Lawsuit

Municipal governments and their employees face liability for their actions under 42 U.S.C. § 1983.[34] The statute is the "primary vehicle for ensuring municipal governments obey the Constitution."[35] In relevant part, the statute reads:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .[36]

In an unfortunate contextual irony, § 1983 is a codification of § 1 of the Civil Rights Act of 1871,[37] which was a direct measure by Congress to protect against constitutional violations resulting from racism in the post–Civil War south.[38] It is within this framework that the medium for suing law enforcement officials for excessive force exists. In order to bring a suit under this statute, an aggrieved plaintiff must also allege *which* specific constitutional right of theirs has been infringed upon. In the context of police violence, the question may be: Which right is an officer violating when using excessive—sometimes deadly—force during arrests? Here, the right is found in the Fourth

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32. 471 U.S. 1 (1985).

33. 490 U.S. 386 (1989).

34. *See, e.g.*, Kalina v. Fletcher, 522 U.S. 118, 123 (1997) (noting that "[t]he text of the statute purports to create a damages remedy against every state official for the violation of any person's federal constitutional or statutory rights").

35. Mike Jilka, *Municipal Government Liability Under Section 1983*, J. KAN. BAR ASS'N, Dec. 1998, at 22, 23.

36. 42 U.S.C. § 1983; *see also* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978) (holding that municipalities are "persons" within the meaning of § 1983). Although it is not addressed in depth in this Note, the Court's holding in *Monell* is interesting because it states that municipalities are subject to suit, but they may not be held liable under the doctrine of respondeat superior. *See* 436 U.S. at 691. Therefore, liability attaches only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

37. *Kalina*, 522 U.S. at 123.

38. Shad E. Christman, Note, *Excessive Force Cases and Incidents of Deadly Force Ignite Possibilities for Change in Eight Circuit § 1983 Law*, 62 S.D. L. REV. 418, 428–29 (2017). Indeed, the colloquial name for the statute was the "Ku Klux Act." *Id.* at 428.

Amendment's protection against "unreasonable searches and seizures."[39]

2. The Fourth Amendment and Excessive Force Claims

What constitutes a "seizure" under the Fourth Amendment? In *Tennessee v. Garner*, the Supreme Court held that "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person."[40] In *Garner*, the Court considered whether the use of deadly force against an unarmed suspected felon was subject to the Fourth Amendment's "reasonableness" analysis.[41] In the case, Edward Garner, a teenage boy suspected of robbery, was shot in the head while fleeing from police.[42] Garner's father brought suit under § 1983 for violations of his son's Fourth Amendment constitutional rights.[43]

Holding that the use of deadly force by an officer is subject to the Fourth Amendment's "reasonableness" analysis, *Garner* became the first case in which the Court recognized a cause of action for the *unreasonable* use of deadly force.[44] On that threshold issue, the Court noted that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[45] Thus, the use of deadly force must be subject to a "totality of the circumstances" analysis that balances the government's interest in a "particular sort of . . . seizure" with the victim's "fundamental interest in his own life."[46]

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39. Tennessee v. Garner, 471 U.S. 1, 7 (1985). The Fourth Amendment reads, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. It is important to note that different constitutional rights apply depending on which stage of detainment is being assessed. For example, the Eighth Amendment's ban on cruel and unusual punishment is implicated when the claim of excessive force is made by a person already incarcerated. *See* U.S. CONST. amend. VIII; Whitley v. Albers, 475 U.S. 312, 327 (1986). The Fourteenth Amendment's guarantee of substantive due process provides the proper analysis for claims of force made by pretrial detainees. *See* U.S. CONST. amend. XIV; Bell v. Wolfish, 441 U.S. 520, 535–39 (1979). This Note focuses on excessive force at the *pre*-seizure stage.

40. 471 U.S. at 7.

41. *Id.*

42. *Id.* at 3–4. The opinion notes that "[t]en dollars and a purse . . . were found on his body." *Id.* at 4.

43. *Id.* at 5.

44. *Id.* at 11–12.

45. *Id.* at 7. The Court famously posited that "[i]t is not better that all felony suspects die than that they escape," before further elaborating: "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Id.* at 11.

46. *Id.* at 8–9.

Four years after *Garner*, in 1989, the Court decided *Graham v. Connor*.[47] In *Graham*, the Court explicitly held that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard."[48] The petitioner in this case, Dethorne Graham, was diabetic and on the verge of a negative insulin reaction.[49] Graham's friend brought him to a nearby convenience store to purchase some orange juice and raise his blood sugar enough to ward off the adverse effects of an insulin shortage.[50] Graham was deterred, however, by the length of the line in the store[51]—he ran out empty-handed and asked his friend to drive elsewhere.[52]

After witnessing Graham sprint from the convenience store, M.S. Connor, an officer with the Charlotte, North Carolina, Police Department, decided to conduct an investigatory stop.[53] Graham, now in the thralls of a full diabetic reaction, ran around his vehicle before briefly losing consciousness and passing out.[54] Despite informing the officer (prior to his unconsciousness) that he was suffering from a diabetic reaction, Connor handcuffed him, slammed his face against the hood of a car, and threw him headfirst into a police cruiser.[55] Shortly thereafter, Officer Connor received word that Graham had committed no wrongdoing at the convenience store, and he was released.[56] During the seizure, Graham suffered "a broken foot, cuts on his wrist, a bruised forehead, and an injured shoulder."[57]

In holding that an officer's conduct is subject to the Fourth Amendment's reasonableness standard, the *Graham* Court developed a three-pronged balancing test.[58] To determine whether an officer's conduct is reasonable, a court must consider (1) the severity of the crime, (2) the immediacy of the threat the suspect poses, and (3)

47. 490 U.S. 386 (1989).
48. *Id.* at 395.
49. *Id.* at 388.
50. *Id.*
51. *Id.* at 388–89.
52. *Id.* at 389.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 390.
58. *See id.* at 396.

whether the suspect is resisting arrest or attempting to evade arrest.[59] The reasonableness inquiry is "an objective one."[60]

In its articulation of what constitutes "objective" reasonableness, the Court drew on seemingly conflicting principles. On the one hand, the Court cited *Garner* to emphasize that any excessive force analysis should consider the totality of the circumstances, considering the unique facts and context of the case.[61] But the Court hedged its language, later writing that the analysis must be conducted from the officer's perspective at the *moment* force was used.[62] The analysis "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[63]

One commentator has noted that the *Graham* Court's ambiguous language created a set of "dual mandates."[64] Courts are instructed to consider the totality of the circumstances but "without engaging in impermissible retrospection."[65] The Court left many questions unanswered. For instance: What are the relevant facts that should be considered in a court's reasonableness analysis? Should an officer's pre-seizure conduct be considered as part of the "totality of the circumstances," or is reasonableness a narrower inquiry, exclusively focused on the precise moment that the seizure occurs? These queries continue to stymie courts.[66] The judiciary has failed to develop an effective, uniform solution to excessive-force jurisprudence and the Supreme Court has been unwilling to clarify its decisions.[67] This has created a circuit split, which will be discussed below.

B. A Brief Introduction to Masculinities Theory

This Note is not the first piece of academic literature to discuss the intersection between gender and policing in America. Central

59. *Id.*

60. *Id.* at 397.

61. *Id.* at 396–97.

62. *Id.*

63. *Id.*

64. Jack Zouhary, *A Jedi Approach to Excessive Force Claims: May the Reasonable Force Be with You*, 50 U. TOL. L. REV. 1, 19 (2018).

65. *Id.*

66. *Id.* at 20 (noting further that "[b]oth courts and critics have recognized the concern that, in practice, [the test] may be overly deferential to officers").

67. As will be discussed, the effects of this failure are paramount today, over thirty years after *Graham* was decided.

among prior works is Frank Rudy Cooper's *"Who's the Man?": Masculinities Studies,* Terry *Stops, and Police Training*.[68] Published in the *Columbia Journal of Gender and Law* in 2009, Cooper's themes and analyses, while enduring, are ripe for an update.

Cooper provides a working definition of "masculinities."[69] At its most basic level, "masculinities" are simply what it means to be male in any given cultural setting.[70] They are "the socially generated consensus of what it means to be a man, to be 'manly' or to display such behavior at any one time."[71] Nancy E. Dowd notes that "[m]asculinities work can be used to understand more clearly how male privilege and dominance are constructed."[72] Even beyond the policing context, Dowd implores that scholars, academics, and feminists "ask the man question."[73] There is no single form of masculinity.[74] But at the core of masculinities studies is an attempt to discern how "hegemonic" masculinity (that is, the single exhibition of masculinity that may be dominant over other forms "in a given cultural context") arises, shifts over time, and impacts social ordering.[75]

This Note will discuss the role that hegemonic masculinity plays in the context of policing and how Fourth Amendment jurisprudence (that is, jurisprudence focused on the reasonableness of law enforcement seizures) permits these harmful social tendencies. On the one hand, this Note is in agreement with Cooper that police officers

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68. Frank Rudy Cooper, "*Who's the Man?": Masculinities Studies,* Terry *Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009); *see also* Harris, *supra* note 29.

69. Cooper*, supra* note 68, at 671–73. The term is pluralized because there is no "singular, inherent masculinity that men exhibit." KATHARINE T. BARTLETT, DEBORAH L. RHODE & JOANNA L. GROSSMAN, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 30 (8th ed. 2020); *see also* Cooper, *supra* note 68, at 672 n.2. Angela Harris writes that "[v]iolence and masculinity converge in the sociological note of 'hypermasculinity': a masculinity in which the strictures against femininity and homosexuality are especially intense and in which physical strength and aggressiveness are paramount." Harris, *supra* note 29, at 793. She also notes that hypermasculinity characterizes the style of policing favored by most police departments. *Id.* at 794.

70. *See* Cooper, *supra* note 68, at 671–73.

71. Deborah Kerfoot & David Knights, *'The Best is Yet to Come?': The Quest for Embodiment in Managerial Work*, *in* MEN AS MANAGERS, MANAGERS AS MEN 86 (David L. Collinson & Jeff Hearn eds., 1996).

72. Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis and Feminist Theory*, 33 HARV. J.L. & GENDER 415, 416 (2010).

73. *Id.* at 417 ("Masculinities analysis needs to continually challenge itself to challenge the hegemony of men and male power. The project of imagining positive, affirming, egalitarian masculinities is ongoing, but it is absolutely essential. . . . The implications of these teachings . . . are that feminists should 'ask the man question.' ").

74. *See supra* note 69 and accompanying text.

75. BARTLETT ET AL., *supra* note 69, at 30; Cooper, *supra* note 68, at 672 n.5 (citing R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC'Y 829, 846 (2005)). The social ordering is then reflected in the legal system. This Note grapples with that reality.

exert hypermasculine tactics to intimidate, dominate, and subdue suspects and civilians on American streets.[76] He asks "[h]ow . . . masculinity affect[s] policing,"[77] and his argument can be distilled as follows: "Officers may get 'macho' with civilians."[78]

This Note differs from Cooper's work by focusing the lens of masculinities on a related but different legal framework. Cooper's work analyzes masculinities in the context of Fourth Amendment "*Terry* Stops."[79] In contrast, this Note will consider a circuit split in Fourth Amendment jurisprudence regarding the applicability of pre-seizure officer conduct in the reasonableness inquiry. Masculinities are used as a tool to understand the implication of that legal regime: in failing to accept the relevance of pre-seizure conduct, courts allow damaging policing patterns to proceed unchecked.

Cooper argues that the Supreme Court in *Terry v. Ohio*[80] tacitly supported hypermasculine policing tactics.[81] Buried in a footnote, the Court appears to justify stop and frisk by noting that even when "motivated by the officers' perceived need to maintain the power image of the beat officer," such as "by humiliating anyone who attempts to undermine police control of the streets," police harassment is permissible.[82] To Cooper, the Supreme Court in *Terry* "explicitly links stop and frisks to . . . harassment . . . without the purpose of furthering prosecution for crime."[83] But "[w]hile such bullying seems to be part of the activity that the Court identified as 'violative of the Fourth Amendment,' it also seems to be the activity that the Court" considers undeterrable.[84] A key takeaway is that "the hegemonic pattern of police officer masculinity may create an incentive for officers to use this free harassment zone to boost their masculine esteem, [and thus] we ought to be concerned about the fact that the *Terry* opinion reveals a

76. *See, e.g.*, Cooper, *supra* note 68, at 692 ("Men are generally on the lookout for signs of disrespect, so when a male police officer's masculinity is questioned, he may engage in police brutality. Thus, the policeman's culture of honor stance and hypermasculine brutality reflect the hegemonic pattern of U.S. masculinity."); Harris, *supra* note 29, at 796 ("The hypermasculinity of policing leads to a culture in which violence is always just below the surface.").

77. Cooper, *supra* note 68, at 674.

78. *Id.* Cooper identifies patterns of police officer masculinity that anchor his argument. *See id.* at 677. First, he notes the "predominance of command presence as a paradigm for police officer behavior," and second, he notes that there is an "unofficial rule that police officers must punish disrespect." *Id.*

79. *Id.* at 702.

80. 392 U.S. 1 (1968).

81. Cooper, *supra* note 68, at 708.

82. *Terry*, 392 U.S. at 14–15 n.11 (internal quotation marks omitted).

83. Cooper, *supra* note 68, at 708.

84. *Id.*

presumption that bullying is inevitable."[85] As Cooper notes, a police officer who desires to establish a "command presence" may do so by asserting dominance and getting "macho" with civilians in a way that perpetuates a stop and frisk culture.[86] These factors imply that the potential for masculine posturing often manifests before police intervention is necessary in a given situation.

Cooper offers a solution to the stop and frisk problem: improve officer training.[87] He notes that "[n]ot only do police academies fail to train officers on the appropriate use of command presence, they may actually provide counterproductive messages. This begins with the indoctrination into the present macho police culture."[88] To Cooper, training is a crucial element to reduce police harassment.[89] He writes that "the goal of training should be to get police officers to act with restraint when they face situations where their authority is questioned" and suggests that officers can achieve a learned reluctance towards using *Terry* stop and frisks to create a command presence.[90] Cooper argues for a systemic restructuring of police academy training,[91] field training,[92] and informal training.[93] More abstractly, Cooper posits that some training techniques untangle masculinities from the role of the law enforcement officer better than others.[94] Regardless, officers ought to be trained to separate their egos from their employment.[95]

Although Cooper's analysis centers on stop and frisks, it can provide a guide for understanding how hypermasculine policing tactics can manifest pre-seizure. As discussed in Part I.A above, there is a growing divide among circuits as to *what* conduct by a police officer (during a Fourth Amendment search) is subject to judicial scrutiny. As Cooper notes, the *Terry* decision "creates a huge category of police activity [e.g., stop and frisks] that takes place absent significant judicial oversight."[96] There exists a similar dilemma in the pre-seizure

85. *Id.* at 720.

86. *Id.* at 711–12. "Command presence" is the concept at the heart of Cooper's argument. To him, it is this sort of policing culture—i.e., the establishing of a "command presence"—that the *Terry* court vindicated in their decision to permit stop and frisks based on reasonable suspicion. *Id.* After discussing *Terry*, he writes that "the Court [in *Terry*] acknowledge[s] that stops and frisks are a tool that officers use to enact a command presence and punish disrespect." *Id.* at 712.

87. *Id.* at 729.

88. *Id.*

89. *Id.* at 732.

90. *Id.* at 733.

91. *Id.* at 734–38.

92. *Id.* at 738–39.

93. *Id.* at 739–40.

94. *See id.* at 734–740.

95. *Id.* at 737–38.

96. *Id.* at 719.

context—yet in their reasonableness analysis, some courts tend to ignore pre-seizure activities altogether. By doing so, the judiciary is turning a blind eye to the lessons of *Terry* and supporting a de facto regime that exacerbates a hypermasculine policing culture. In addition to enhanced training (as Cooper argues), an alternative method of dismantling the current regime is through courts acknowledging the sociological forces implicated in their decision while simultaneously holding officers accountable for their unreasonable conduct.[97] Simply put, training, while a necessity, has proven insufficient in combatting police misconduct. In 2020, incidents of police violence reached a fever pitch. Calls for action are deafening.[98] Courts are best equipped to take action and must take accountability for the growing divide in Fourth Amendment jurisprudence.

II. ANALYSIS

The Supreme Court's unwillingness to clarify its holding in *Graham* has left lower courts to answer an essential question: What is the proper timeframe to assess officer reasonableness in excessive force cases? The answer depends on jurisdiction. In developing overly permissive tests, many circuits have unwittingly (or perhaps indifferently) ignored the systemic, hypermasculine policing culture that permeates American law enforcement.[99] Fourth Amendment jurisprudence turns a blind eye to masculinities and perpetuates a culture of aggressive police conduct that therefore remains insulated from judicial scrutiny.

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97. Others have experimented with masculinities in more traditional scientific settings. For example, researchers have found "evidence [to] corroborate the stereotype that men (particularly young men), and not women, are susceptible to unwarranted levels of perceived invulnerability and confidence in their ability . . . and this increases the probability of confrontational behaviour which may lead to violence." Dominic D. P. Johnson, Rose McDermott, Emily S. Barrett, Jonathan Cowden, Richard Wrangham, Matthew H. McIntyre & Stephen Peter Rosen, *Overconfidence in Wargames: Experimental Evidence on Expectations, Aggression, Gender and Testosterone*, 273 PROC. ROYAL SOC'Y 2513, 2514 (2006) (citing sources). In the Johnson et al. study, researchers simulated virtual wargame scenarios with participants to see "whether, when, and which players made 'unprovoked attacks' . . . where unprovoked attacks were defined as launching a war without any prior violence carried out by the other side." *Id.* As their key finding, the researchers highlighted that "those who were more overconfident were more likely to make unprovoked attacks," and "overconfidence and unprovoked attacks were more pronounced among males than females." *Id.* at 2517. While this Note builds on Cooper's work from a legal perspective, other research supports the notion that masculinities, even if not defined in the broader sociological sense, are omnipresent in real-world scenarios.

98. *See, e.g.*, Shawn Hubler & Julie Bosman, *A Crisis that Began with an Image of Police Violence Keeps Providing More*, N.Y. TIMES, https://www.nytimes.com/2020/06/05/us/police-violence-george-floyd.html (last updated March 11, 2021) [https://perma.cc/5PRS-AKAH].

99. *See infra* Section III.A.

This Part proceeds in three Sections. Section A examines the narrowest approach that circuit courts have taken in assessing reasonableness in excessive force cases. Section B examines a broader approach used by some courts and highlights the current split among the circuits. Sections A and B also consider the effectiveness of each approach in promoting justice. Section C will briefly call on Cooper's literature and apply masculinities theory to the doctrine, discussing how understanding masculinities helps color the pre-seizure excessive force issue. By combining and contrasting Fourth Amendment reasonableness jurisprudence and masculinities theory, Section C will examine how the legal frameworks under discussion fail to provide an adequate remedy to victims of excessive force. Ultimately, Section C argues that by ignoring masculinities theories, courts created and continue to permit an environment that subjects Americans to police misconduct.

A. The Narrowest Reasonableness Inquiry

The Second, Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits take the narrowest approach to the pre-seizure reasonableness inquiry. Generally, these courts have held that pre-seizure conduct (that is, an officer's conduct *before* the exact moment of the seizure) is not relevant under *Graham*'s reasonableness test.[100]

Consider, for example, the Second Circuit's holding in *Salim v. Proulx*.[101] The case involved an officer who shot and killed Eric Reyes, a fourteen-year-old escapee of a juvenile detention center.[102] Officer Proulx, armed with only his personal .22 caliber handgun and no other disabling devices or handcuffs, pursued Reyes near the boy's home.[103] After Reyes threw and hit Proulx with a rock, the officer caught up to the boy, and a struggle ensued.[104] Other children got involved.[105] At some point during the struggle, Office Proulx discharged his weapon, killing Reyes.[106]

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100. Cara McClellan, *Dismantling the Trap: Untangling the Chain of Events in Excessive Force Claims*, 8 COLUM. J. RACE & L. 1, 9–10, 13–14 (2017); William Heinke, Note, *Deadly Force: Differing Approaches to Arrestee Excessive Force Claims*, 26 S. CAL. REV. L. & SOC. JUST. 155, 162 (2017).

101. 93 F.3d 86 (2d Cir. 1996).

102. *Id.* at 88.

103. *Id.* (noting that Officer Proulx had also locked his police-issued service revolver and radio in the trunk of his car before pursuing Reyes).

104. *Id.*

105. *Id.* During the scrum, "a group of five or six children between the ages of eight and twelve, including Eric's siblings, arrived on the scene. [They] began to hit and kick Officer Proulx . . . ." *Id.*

106. *Id.*

Arguing that Officer Proulx "created a situation in which the use of deadly force became necessary," the plaintiffs contended that Reyes's constitutional protection against unreasonable searches and seizures had been violated.[107] Proulx could have carried his radio, called for backup, or chosen to disengage with Reyes once other children became involved in the skirmish.[108] According to the Second Circuit, however, these considerations are inapt.[109] The court held that "actions leading up to the shooting are irrelevant to the objective reasonableness of [Proulx's] conduct *at the moment he decided to employ deadly force*."[110] In assessing a seizure's reasonableness, courts need only consider the precise moment that an officer made the "split-second decision" to use deadly force—according to the Second Circuit.[111] The court ultimately held that Officer Proulx's actions were objectively reasonable.[112]

The Second Circuit in *Proulx* drew on the Eighth Circuit's decision in *Schulz v. Long*, decided one year prior.[113] Schulz, a paranoid schizophrenic, appeared to threaten a team of officers with an axe while refusing to be taken to the hospital for psychiatric treatment.[114] As Schulz approached an officer while holding the axe, he was shot.[115] On appeal, the Eighth Circuit refused to consider whether the officers inappropriately managed the events leading up to the deadly seizure.[116] Citing *Garner* and *Graham*, the court stated that "[t]he Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within a *range of conduct* which is objectively 'reasonable.' "[117] The court rejected the § 1983 claim that Schulz's Fourth Amendment rights had been violated.[118]

107. *Id.* at 92.
108. *Id.*
109. *Id.*
110. *Id.* (emphasis added).
111. *Id.*
112. *Id.*
113. 44 F.3d 643 (8th Cir. 1995).
114. *Id.* at 645–46.
115. *Id.* at 646.
116. *Id.* at 648–49.
117. *Id.* at 649 (emphasis added). The court goes on to explain that evidence that may weigh on what an officer *should* have done is "simply not relevant to the reasonableness inquiry." *Id.*
118. *Id.* at 650.

A more recent iteration in this line of reasoning is the Fifth Circuit's decision in *Malbrough v. Stelly*.[119] In *Malbrough*, officers attempted to execute a search warrant for the home of Anthony Campbell, a known drug dealer.[120] The plaintiffs claimed that officers arrived at the home in unmarked cars and without uniforms and surrounded Campbell's vehicle as he sat in the driver's seat.[121] Approaching without announcing themselves and with guns drawn, the officers ordered Campbell to exit.[122] Campbell, unaware that the encroaching party consisted of law enforcement officers, feared he was being robbed.[123] He attempted to accelerate away and struck a police cruiser and an officer.[124] The officers fired at Campbell's vehicle, shooting him in the head.[125] Campbell was left with a bullet lodged in his brain that disabled him for life.[126]

The Fifth Circuit rejected the plaintiff's argument that the officers unreasonably created the need for deadly force.[127] Holding that "we have rejected the idea that a police officer uses excessive force simply because he has 'manufactured the circumstances that give rise to the fatal shooting,' " the court explicitly limited the reasonable force inquiry to whether an officer was " 'in danger *at the moment of the threat* that resulted in the officer's use of deadly force.' "[128]

The Fifth Circuit suggested that even if the court had adopted the plaintiff's broadened reasonableness inquiry, the outcome in *Malbrough* would likely have been the same.[129] First, there were evidentiary issues. The court held that despite testimony to the

119. 814 F. App'x 798 (5th Cir. 2020). Other recent cases includes, for example, *Arnold v. Olathe*, 550 F. Supp. 3d 969, 985–86 (D. Kan. 2021), which held that "[t]o reconsider every action or decision taken by the officers in this case . . . would run counter to the objective standard used in evaluating excessive force claims, as well as the caution that courts should not view police encounters with the benefit of 20/20 hindsight," and *Kelly v. Stassi*, No. 18-263, 2022 WL 263565, at *1 (M.D. La. Jan. 27, 2022), which noted that "[o]perational errors by law enforcement cannot be used as evidence that the officers created the need to use excessive force," among many others.

120. *Id.* at 800.

121. *Id.* at 801.

122. *Id.* at 800–01.

123. *Id.* at 803.

124. *Id.* at 800. Campbell disputes that he struck an officer, arguing instead that the officer slipped and fell into nearby bushes. *Id.* at 801.

125. *Id.* at 799.

126. *Id.*

127. *Id.* at 802. Malbrough, on behalf of his son, put forth the argument that "the deliberate and reckless actions of law enforcement that took place immediately following [the officers'] arrival . . . directly contributed to [Campbell's] reaction, which [Defendants] then use[d] as the basis to justify the use of deadly force." *Id.* at 803. This argument hinges on the idea that an excessive force inquiry "must consider whether the officers 'created the need to use such force' through their own 'reckless or deliberate conduct.' " *Id.*

128. *Id.*

129. *See id.* at 803.

contrary, the officers who approached his vehicle were uniformed—Campbell, then, should have recognized their authority and complied with their demands.[130] And second, there was a doctrinal consideration. Even if Campbell's claims *were* true,[131] the court reaffirmed its holding that it would analyze the conduct only at the moment of the threat, not the conduct preceding that moment, such as the manner of arrival.[132] This reaffirmation means that "even if the officers negligently spooked Campbell," "the officers did not act unreasonably *if* they reasonably believed that Campbell posed an immediate threat to the officers and others" at the moment deadly force was used.[133] Here, according to the court, the police were justified in using deadly force, in that moment, to effect a seizure.[134]

The narrow inquiry utilized by the Second, Fifth, and Eighth Circuits has an immediately perceptible appeal: ease of administration. By reducing the Fourth Amendment inquiry to a single moment in time, courts effectively limit the number of considerations they may otherwise have to grapple with. The result, as evidenced above, is increased insulation of officer conduct. The problem, though, is that this approach may not remain faithful to the Supreme Court's command in *Graham*. Recall that the *Graham* Court, citing *Garner*, iterated that a proper test of reasonableness should assess the totality of the circumstances by "requir[ing] careful attention to the facts and circumstances of each particular case."[135]

Although the Supreme Court cited *Garner* in its *Graham* opinion, the *Graham* Court never expressly invoked the "*totality* of the circumstances" language.[136] Perhaps this is notable. It may lend

130. *Id.* at 804. The court notes that "[t]he photographs [from the night in question] show that all officers wore uniforms or clothing with clear police insignia," and "Trooper Katie Morel testified under oath that none of the officers were allowed to go home or change before being photographed at the . . . Police Department immediately following the incident." *Id.*

131. *Id.* at 803.

132. *Id.* at 804.

133. *Id.* (emphasis added).

134. *Id.* at 804–07. The court began by discussing whether reasonable officers could have perceived Campbell's actions as dangerous and threatening. *Id.* It held that reasonable officers could. *Id.* The court briefly noted that despite conflicting testimony regarding whether an officer was struck by Campbell's fleeing vehicle, the reasonable officers could have concluded that the downed officer *was* hit by Campbell. *Id.* at 805. Indeed, shots were not fired until the officers saw their colleague go to the ground near the vehicle. *Id.* Under this iteration of the facts, the Fifth Circuit agreed with the District Court's holding that "[o]nce it was announced that an officer was down, it was objectively reasonable for the officers to respond with force in light of the circumstances." *Id.*

135. Graham v. Connor, 490 U.S. 386, 396 (1989).

136. *Id.* (emphasis added). Instead, the *Graham* Court made note of *Garner*'s "totality of the circumstances" language by including an in-text parenthetical to the reference in *Garner*. *Id.*

credence to courts that utilize the narrow inquiry—that is, *Graham* may be read as saying that the pertinent circumstantial considerations in the reasonableness inquiry are, in fact, those from the moment that actual force is used.[137] This reading of the case coupled with *Graham*'s dicta that ex-post judicial scrutiny of an officer's actions "must embody allowance for the fact that police officers are often forced to make split-second judgments" seems to funnel the inquiry towards one of narrow applicability—that the "totality of the circumstances" includes only those events that make up the moment that the split-second judgment to seize is made.[138] In that sense, courts that utilize the narrow inquiry are reading *Graham* not as an analog to *Garner* but as a case that clarifies prior ambiguous language. Nonetheless, the narrow test, whether technically correct or overly restrictive,[139] indisputably shields a wider range of police conduct from § 1983 liability.[140]

Along similar lines, courts that use the narrow reasonableness inquiry subject themselves to the types of sociological criticisms Cooper leveled against the *Terry* decision, discussed above.[141] Cooper points out that "[s]ome commentators might say that the *Terry* decision does not expand police officer discretion and therefore does not cause an increase in police harassment"[142] before flatly rejecting that position,[143] instead contending that the "*Terry* decision's expansion of police officer discretion increases opportunities for harassment."[144] This argument tracks in the pre-seizure context. By refusing to consider the conduct of police officers *before* the moment of a deadly seizure, courts that apply the narrow inquiry are fashioning a massive category of police conduct that is, without exception, exempt from judicial scrutiny. A notable distinction here, however, is that deadly force is used. This raises the stakes because, in the cases discussed in this Section, the insulated category of police conduct poses the greatest threat to civilians. By failing to broaden judicial oversight to include pre-seizure conduct, courts may thereby authorize (or at least ignore) an increasingly dangerous potential for police aggression.

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137. *Id.*

138. *Id.* at 396–97.

139. *See* discussion *infra* Part III.B.

140. "To hold otherwise would limit an officer's ability to defend himself during a rapidly evolving and increasingly dangerous encounter." McClellan, *supra* note 100, at 10.

141. *See supra* notes 80–96 and accompanying text.

142. *Id.* at 719.

143. *Id.* Cooper writes: "Before the *Terry* decision, police who stopped and frisked civilians without probable cause were taking a calculated risk that they might lose any evidence they found. After the *Terry* decision, officers knew for sure that they had the discretion to stop and frisk civilians upon mere reasonable suspicion." *Id.*

144. *Id.*

B. Broadening the Reasonableness Inquiry

The narrow inquiry implemented by the circuits discussed above is not the only method of analysis. Indeed, the First, Third, and Tenth Circuits have charted a path that makes an officer's pre-seizure conduct relevant for Fourth Amendment reasonableness determinations.[145]

The roots of what would become the "state-created-need" theory are found in the Tenth Circuit's 1995 case *Sevier v. City of Lawrence*.[146] In *Sevier*, the parents of Gregory Sevier brought a § 1983 action against City of Lawrence police officers for the death of their son.[147] On the evening of April 20, 1991, Gregory and his father went to a local saloon to drink beer and shoot pool.[148] While out, Gregory admitted to his father that he and his girlfriend had been having relationship problems.[149] Upon returning home, Gregory—who had consumed a "modest" amount of beer—locked himself in his bedroom and blasted his stereo.[150] After picking the lock on the bedroom door, Gregory's father found him sitting on the bed with a knife in his lap.[151]

Concerned for their son's wellbeing, the Seviers phoned the local police department and requested a wellness check.[152] Upon arriving at the Sevier household, the officers unlocked Gregory's door with a toothpick, ordered him to show his hands, and drew their weapons.[153] Within five minutes of the officers' arrival, they had shot and killed Gregory.[154] The Seviers brought a § 1983 action, arguing that the officers acted "recklessly and unreasonably in the events *surrounding* the seizure" and that their conduct caused the shooting.[155]

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145. *See, e.g.*, Young v. City of Providence ex rel. Napolitano, 404 F.3d 4, 22 (1st Cir. 2005); Abraham v. Raso, 183 F.3d 279, 291 (3d Cir. 1999); Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir. 1997).

146. 60 F.3d 695 (10th Cir. 1995).

147. *Id.* at 696–97.

148. *Id.* at 697.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* The court writes: "The Seviers were particularly concerned because Gregory had attempted suicide on two previous occasions . . . ." *Id.* During the call, Gregory's mother informed the dispatcher that Gregory had a "butcher knife" in his bedroom. *Id.*

153. *Id.* at 698.

154. *Id.* The parties dispute whether Gregory lunged at the officers with "the knife in a raised and striking position." *Id.* Gregory was shot six times; two of the shots were instantly fatal. *Id.*

155. *Id.* at 698–700 (emphasis added).

Without addressing the merits of the case,[156] the court iterated its understanding of the precedent set in *Graham*: "The reasonableness of Defendants' actions depends *both* on whether the officers were in danger at the precise moment that they used force *and* on whether Defendants' own reckless or deliberate conduct . . . unreasonably created the need to use such force."[157] This approach, which leaves room for courts to scrutinize events surrounding the actual seizure, is markedly broader than the alternative inquiry previously discussed.[158]

In *Allen v. Muskogee*, the Tenth Circuit formalized the "state-created-need" doctrine.[159] In *Allen*, Plaintiff Marilyn Allen challenged a district court ruling that absolved the police officers who shot and killed her husband.[160] The local police department was informed that Mr. Allen was threatening suicide.[161] He was armed with a firearm and threatening family members.[162] After officers arrived at the scene, they told Mr. Allen, who was sitting in his vehicle, to drop his weapon.[163] The Defendant officers contended that when they tried to enter the vehicle, Mr. Allen pointed the gun them and began firing.[164] In response, the officers fired twelve rounds into Mr. Allen's vehicle, striking him four times.[165] The entire altercation—from arrival to deadly seizure—took ninety seconds.[166]

Plaintiff disputed the factual characterizations of the district court, arguing that a genuine issue of material fact existed as to the officers' reasonableness.[167] The crux of the issue was whether the officers' own actions occasioned the need to use deadly force.[168] On

156. The Tenth Circuit "lack[ed] jurisdiction to consider [the] collateral appeal . . . [because] appellate courts lack interlocutory jurisdiction to review a district court ruling denying summary judgment for a defendant on a qualified immunity defense on the ground that there are disputed issues of material fact." *Id.* at 700.

157. *Id.* at 699 (emphasis added). The court cites *Bella v. Chamberlain*, 24 F.3d 1251, 1256 & n.7 (10th Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995), which held: "Obviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable." *Id.*

158. *See supra* Section III.A (discussing the narrow reasonableness inquiry).

159. 119 F.3d 837 (10th Cir. 1997).

160. *Id.* at 839.

161. *Id.*

162. *Id.*

163. *Id.* Allen was parked outside of his sister's home, with "one foot out of the vehicle . . . [and] a gun in his right hand." *Id.*

164. *Id.* ("Mr. Allen reacted by pointing the gun toward Officer Farmer, who ducked and moved behind the car. Mr. Allen then swung the gun toward Lt. Smith and Officer McDonald, and shots were exchanged.").

165. *Id.*

166. *Id.*

167. *See id.* at 841.

168. *Id.* at 840–41. Importantly, the distinction between the Tenth Circuit's test and the narrow inquiry discussed earlier is *what* pre-seizure conduct is relevant. Plaintiff here did not

review, the Tenth Circuit noted that "some deposition testimony indicates that [an officer] ran 'screaming' up to Mr. Allen's car and immediately began shouting at Mr. Allen to get out of his car."[169] To the Tenth Circuit, this context mattered.[170] "The excessive force inquiry includes not only the officers' actions at the moment that the threat was presented, but also may include their actions in the moments leading up to the suspect's threat of force."[171] A key consideration in the broadened reasonableness inquiry is "an officer's conduct *prior* to the suspect's threat of force *if* the conduct is 'immediately connected' to the suspect's threat of force."[172] The reasonableness of the officers' *approach* to Mr. Allen's vehicle ought to be considered in the reasonableness inquiry because the preceding actions were so " 'immediately connected' to Mr. Allen's threat of force."[173]

The Tenth Circuit[174] is not alone in its moderate expansion of the reasonableness inquiry. In 2005, the First Circuit reaffirmed its commitment to a broader reasonableness approach in *Young v. City of Providence ex rel. Napolitano*.[175] The case involved two Providence, Rhode Island, police officers who shot and killed one of their colleagues, Cornel Young.[176] Young, off duty at the time of the shooting and

dispute that at the moment the force was used, it was plausibly necessary. *Id.* at 840. Instead, Plaintiff argued that Allen's threat of force—leading to an objectively reasonable deadly seizure—was brought about only by *unreasonable* actions by the individual officers. *Id.* at 839. Whereas a narrow inquiry would not allow consideration of such conduct, the Tenth Circuit is far more willing to do so.

169. *Id.*

170. *See id.* at 840.

171. *Id.* The Court cites *Sevier* for this proposition before continuing to *Graham* to note that "[o]f course, the use of force must be judged from the perspective of a reasonable officer 'on the scene,' who is 'often forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation.' " *Id.*

172. *Id.* (emphasis added). The Tenth Circuit cites *Garner* here, noting the "totality of the circumstances" language that is interpreted differently in other circuits. *Id.*

173. *Id.* at 841.

174. *See also, e.g.*, Gonzales v. Adson, No. 12-CV-495, 2019 WL 1795937, at *7–8 (N.D. Okla. Apr. 24, 2019) (more recent Tenth Circuit case noting that "it is appropriate to consider whether officers acted recklessly during a seizure, unreasonably creating the need to use force" but holding that the argument was "not supported by the record").

175. 404 F.3d 4 (1st Cir. 2005).

176. *Id.* at 9.

responding to the same incident as the uniformed officers, was mistaken for a threat.[177] Young's mother brought suit.[178]

The court considered whether, by leaving a position of cover, the officers unreasonably put themselves in a position to effect a deadly seizure.[179] Ultimately, this was a question of whether the pre-seizure decision to leave a position of safety should be considered in the Fourth Amendment assessment. The court held that the decision should be considered.[180] "[P]olice officers' actions . . . need not be examined solely at the 'moment of the shooting,' " the court wrote before noting that "[t]his rule is most consistent with the Supreme Court's mandate that we consider these cases in the 'totality of the circumstances.' "[181]

In *Abraham v. Raso*, the Third Circuit joined the First and Tenth Circuits.[182] Addressing the deadly shooting of a thief who allegedly attempted to ram officers with his getaway car, the Third Circuit dedicated several paragraphs in its opinion to "express [its] disagreement with those courts which have held that analysis of 'reasonableness' under the Fourth Amendment requires excluding any evidence of events preceding the actual 'seizure.' "[183]

The value of expanding the reasonableness inquiry, in theory, is that it permits courts to more closely scrutinize how an officer's conduct contributed to their ultimate need to use deadly force. In practice, the expanded reasonableness inquiry does little to offer more robust

177. *Id.* The court makes a point to note that "[t]he two on-duty officers, who are white, apparently mistook Cornel, an African-American, for a threat." *Id.* The issue as framed by the Defendants is unique. Essentially, Plaintiff argued that excessive force was used by the on-duty officer-Defendants because by leaving a position of protected cover during an armed altercation, they precipitated the need for deadly force. *See id.* at 22–23. Defendants argued that even if leaving their position was unreasonable, that was "not enough to raise a jury question as to the objective unreasonableness of [the officers'] use of force." *Id.* After noting that pre-seizure conduct ought to be considered, the court concludes that this issue is best left to the judgment of a jury. *Id.* at 23.

178. *Id.* at 9.

179. *Id.* at 22–23.

180. *Id.* at 22.

181. *Id.* In *St. Hilaire v. City of Laconia*, 71 F.3d 20 (1st Cir. 1995), the First Circuit laid the groundwork that they would later follow in *Young*. There, the First Circuit interpreted *Brower v. Inyo*, 489 U.S. 593 (1989). *St. Hilaire*, 71 F.3d at 26. In *St. Hilaire*, the Court found *Brower* to stand for the proposition that "once it has been established that a seizure has occurred, the court should examine the actions of the government officials leading up to the seizure." *Id.* In tacit disagreement with the narrow approaches outlined above, the First Circuit in *St. Hilaire* wrote that "[t]he district court analysis [finding the pre-seizure conduct irrelevant] was reasoned and grounded on law from other Circuits" (such as the Fourth and Eighth), but not with the First Circuit's own precedent. *Id.*

182. 183 F.3d 279, 291 (3d Cir. 1999).

183. *Id.* The Third Circuit, too, turns to *Brower* to reinforce its position. *Id.* at 292. The Third Circuit emphasizes, however, "that [not] all preceding events are equally important, or even of any importance. Some events may have too attenuated a connection to the officer's use of force. But what makes these prior events of no consequence are ordinary ideas of causation, not doctrine about when the seizure occurred." *Id.*

protection to victims of Fourth Amendment seizures. Consider the Tenth Circuit's overall disinterest in the practical application of the doctrine that it itself pioneered—the court has never held, as a matter of law, that a police officer violated the Fourth Amendment under the state-created-need doctrine.[184] More recently, in 2017, the Supreme Court held that a prior "Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure."[185] The Court's decision nonetheless leaves open a preliminary question of whether pre-seizure officer conduct less than an independent Fourth Amendment violation can be incorporated into the reasonableness calculus.[186] The Supreme Court has yet to address this issue.

C. Applying Masculinities Theory to the Circuit Split

The circuit split highlights a disagreement about fidelity to precedent. Courts that apply the narrowest reasonableness inquiry do so in an honest belief that they are remaining faithful to the Court's commands in *Garner* and *Graham*. These courts contend that pre-seizure conduct ought to be excluded from the reasonableness inquiry because *Graham* never used *Garner*'s totality of the circumstances language.[187] As noted in Part II, the *Graham* Court seemed hesitant to impose liability on police officers, who are oftentimes required to make "split-second" decisions in the course of their duties.[188] Arguably, then, limiting scrutiny of pre-seizure conduct is a plausible reading of the Court's prior holdings.

Ironically, courts that implement the expanded reasonableness inquiry invoke a similar argument. These courts, too, rely on *Garner* and *Graham* but focus their attention elsewhere in the opinions. Instead of emphasizing the Court's sympathetic dicta, these courts accentuate the "totality of the circumstances" language.[189] Without a nuanced consideration of the activity that led to a seizure, a court would

184. Joshua M. Minner, *Deadly Force in the Tenth Circuit*, 43 OKLA. CITY U. L. REV. 171, 206 (2019). Note, however, that the Tenth Circuit has occasionally denied qualified immunity for officers on state-created-need grounds. *Id.* at 208.

185. Cnty. of L.A. v. Mendez, 137 S. Ct. 1539, 1544 (2017).

186. For a more complete discussion of the distinction that the Court draws in *Mendez*, see *infra* notes 205–206 and accompanying text.

187. For further discussion on this line of reasoning, see *supra* notes 136–140 and accompanying text.

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

189. *Id.* at 396; Tennessee v. Garner, 471 U.S. 1, 8–9 (1985); *see also, e.g.*, Allen v. Muskogee, 119 F.3d 837 (10th Cir. 1997).

fail its command to consider the "totality of the circumstances" in the Fourth Amendment inquiry.

The dichotomy above encapsulates only the traditional legal issues. Beyond those, much more is at play in these varied decisions. As in *Terry*, the complex issues that arise from the permeation of masculinities in policing exist at the root of the current circuit split. Take, for example, Cooper's discussion of "command presence" in policing. He explains that an officer "may enact a command presence in situations where it only serves to boost the officer's masculine esteem. To enact command presence is to take charge of a situation. It involves projecting an aura of confidence and decisiveness. It is justified by the need to control dangerous suspects."[190] Command presence is aggressive.[191] And most importantly, command presence is a policing norm: it is "hegemonic in the occupation of policing and reflective of the general hegemonic pattern of U.S. masculinity."[192]

Command presence and masculinities can teach courts a good deal about pre-seizure officer conduct and, subsequently, what is lacking in the current Fourth Amendment framework. As in *Terry*, courts that ignore pre-seizure conduct are permitting hypermasculine policing tactics to continue unchecked. The effects are tragic. Consider the court's decision in *Salim v. Proulx*.[193] In that case, an officer pursued an *unarmed* juvenile detention center detainee.[194] Still, the officer felt the need to arm himself with a handgun—and not any handgun, but his *personal* handgun.[195] He was armed with no other disabling or deterring devices; he carried no handcuffs.[196] His goal, by any reasonable estimation, was to apprehend by force—indeed, deadly force if need be. There is perhaps no greater exhibition of an officer prefacing a display of command presence than by gearing up with nothing but a deadly weapon. To Cooper's point, "[w]hen suspects are threatening physical violence, officers are justified in enacting a command presence."[197] Other situations, like the one in *Proulx*, may not require such force. But neither the officer's behavior, nor the courts analysis of such behavior, draw a distinction.

Might a more reasonable course of action have been for the officer in *Proulx* to call for backup or arm himself with alternate

190. Cooper, *supra* note 68, at 674.
191. *Id.* at 693.
192. *Id.* at 696.
193. 93 F.3d 86 (2d Cir. 1996).
194. *Id.* at 87–88.
195. *Id.* at 88.
196. *Id.*
197. Cooper, *supra* note 68, at 726.

deterrents? Arguably, yes—but the purpose of this Note is not to discuss such questions. Instead, it aims to shed light on the impact that masculinities and command presence have on pre-seizure decisionmaking. Per the discussion up to this point, command presence likely has quite a significant impact. It then seems incomprehensible that a court would not even *consider* the impact of such conduct when making a Fourth Amendment reasonableness determination. The refusal to scrutinize pre-seizure conduct creates a judicial blind spot, thereby insulating one of the most problematic forces in American policing: command presence itself. Command presence—the conduct that has the propensity to heighten tension and contribute to the need for increased force—is shielded from legal probing.

In *Malbrough*, the court specifically stated that the moment of the threat (and the decision to use deadly force at that precise moment) is subject to judicial scrutiny, while the manner of the officers' arrival at the scene is not.[198] There exists, however, an inexorable link between how an officer arrives at the scene and the subsequent use of deadly force. If the court prioritizes the impact that masculinities and command presence have on policing, analyzing that link would not be unreasonable at all. The plaintiffs in the case alleged that officers stealthily surrounded the victim's vehicle with their guns drawn, frightening him into a frenzy that ultimately led to him being shot.[199] This is the sort of behavior that command presence demands of officers. But it goes without scrutiny. As Cooper writes, "officers without . . . requisite communications skills are more likely to enact command presence in situations where it is not actually required. In contrast, well-trained officers can use communications skills to defuse potentially explosive situations without enacting command presence."[200] By failing to recognize pre-seizure conduct as eligible for judicial scrutiny, some Fourth Amendment jurisprudence implicitly permits the aggressive policing behavior that may ultimately *create* the need for "reasonable"[201] deadly seizures.

Contrast the above examples with *Allen v. Muskogee* and the Tenth Circuit's broadened reasonableness approach. Aligning with Cooper's suggestion that a "well-trained" officer may be able to effectively diffuse a situation using communication (as opposed to

198. Malbrough v. Stelly, 814 F. App'x 798, 803–04 (5th Cir. 2020).

199. *Id.* at 803.

200. Cooper, *supra* note 68, at 734.

201. That is, "reasonable" at a specific moment in time.

deadly force),[202] the Tenth Circuit acknowledged that an officer's pre-seizure conduct (namely, his erratic approach to a potentially volatile suspect) should be considered in the Fourth Amendment reasonableness analysis.[203] Notwithstanding the outcome of the case, it is the broadening of the inquiry that brings a potentially problematic category of police conduct—and thereby masculinities—within the ambit of the judiciary.

III. SOLUTION: FORMAL ADOPTION OF THE TENTH CIRCUIT'S APPROACH

The Supreme Court should address the circuit split directly. It should formally adopt the Tenth Circuit's approach and direct courts to consider the pre-seizure conduct in all Fourth Amendment reasonableness analyses. This interpretation maintains the most fidelity to Supreme Court precedent and may serve to dismantle the *Terry* pre-seizure loophole that is bourgeoning in Fourth Amendment reasonableness determinations. Unlike the approach taken in *Terry*, the Court should condemn the sort of aggressive pre-seizure conduct that leads to deadly seizures—definitively clarifying what "totality of the circumstances" means.[204] At this particular moment, with police culture positioned so visibly in the cultural fore, it is a crucial time to do so.

Despite its benefits, this solution is unlikely to manifest. The Supreme Court has already expressed a hesitancy to address the issue. In *County of Los Angeles v. Mendez*, the Court held that a prior "Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure."[205] In other words, once a Fourth Amendment seizure has been deemed reasonable under the current legal framework, it is not permissible to use a prior Fourth Amendment violation as grounds to invalidate the reasonableness determination per se.[206] This holding does not resolve the split outlined in this Note—

202. *See id.*

203. Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir. 1997).

204. Graham v. Connor, 490 U.S. 386, 396 (1989); Tennessee v. Garner, 471 U.S. 1, 8–9 (1985).

205. 137 S. Ct. 1539, 1544 (2017).

206. To clarify, the Court in *Mendez* is holding that *once an officer's use of force has been deemed reasonable* (under whichever doctrinal analysis), it is impermissible to then alter that finding ex post by combining the decision with another, non-excessive-force Fourth Amendment violation. *See id.* The Ninth Circuit's "rule comes into play *after* a forceful seizure has been judged reasonable under *Graham*." *Id.* at 1546 (emphasis added). It is this "instruct[ion] to look back in time to see if there was a *different* Fourth Amendment violation" that, according to the Court, "provides a novel and unsupported path to liability in which the use of force was reasonable." *Id.* at 1547. Although the Court cites *Graham* in the *Mendez* decision, *id.* at 1545–48, it is primarily concerned with "conflating . . . Fourth Amendment claims" and using prior violations to "permit[ ] excessive force claims that cannot succeed on their own terms." *Id.* at 1547. This Note addresses

courts remain without guidance as to what specific types of officer conduct, less than an independent Fourth Amendment violation (or otherwise), may be considered in the reasonableness calculus. It is this front-end, initial analysis that remains unclear and is subject to differing interpretations.

A. Related Fourth Amendment Doctrine Supports Clarification

The Supreme Court's reluctance to address this particular Fourth Amendment circuit split becomes even less justifiable when considering its other, related jurisprudence. Simply put, clarifying the reasonableness inquiry would comport with the Court's Fourth Amendment judgments on other recent issues. The Court has made concerted efforts to lessen ambiguity by broadening Fourth Amendment inquiries in other contexts. As recently as March 2021, the Court expressed a willingness to resolve a debate around when a police shooting effectively transforms into a "seizure" under the Fourth Amendment.[207] In *Torres v. Madrid*, the Court considered whether a person has been "seized" by law enforcement if after being struck with a bullet, a suspect temporarily eludes capture.[208] In *Torres*, two officers approached the suspect, Roxanne Torres, as she sat in her vehicle.[209] The officers wore identification and tactical vests, but Torres, suffering from a methamphetamine withdrawal, saw only their guns.[210] Torres took off in her vehicle in an attempt to escape from what she thought were car thieves.[211] Although neither of the officers stood in the vehicle's path, both discharged their weapons at Torres.[212] In total, they fired thirteen shots.[213] Torres was struck twice and temporarily paralyzed.[214] She managed to continue driving and was not arrested until she arrived at a hospital the following day.[215]

The trial court and Tenth Circuit dismissed Torres's excessive force suit, reasoning that if a suspect continues to flee after being struck

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the varying analyses used to determine, ab initio, the *terms* of the excessive force claim. In *Mendez*, the Court simply struck down the Ninth Circuit's rigid *post hoc ergo propter hoc* doctrine.

207. Torres v. Madrid, 141 S. Ct. 989, 993–94 (2021).

208. *Id.*

209. *Id.* at 994.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

by a police officer's bullet, a Fourth Amendment claim is negated.[216] In other words, if the bullet fails to stop the suspect, the suspect has not been "seized" under the Fourth Amendment.[217] Chief Justice Roberts, writing for the majority, disagreed.[218] The Court held that "[a] seizure requires the use of force *with intent to restrain*";[219] "[t]he slightest application of force could satisfy this rule."[220] A rule that necessitates actual control would be too ambiguous and impossible to administer—"[c]ourts will puzzle over whether an officer exercises control when he grabs a suspect, when he tackles him, or only when he slaps on the cuffs."[221] In *Torres*, six Justices were determined to "clearly fix[ ] the moment of the seizure" to the time when a bullet strikes a suspect, regardless of whether the person is actually subdued.[222]

While the Court recognizes the value in resolving ambiguity as to *when* a seizure occurs, its far-sightedness ends there. Before concluding its discussion, the Court added: "All we decide today is that the officers seized Torres by shooting her with intent to restrain her movement. We leave open . . . any questions regarding the reasonableness of the seizure . . . ."[223] Despite their concluding remarks, it appears that a *clarification* of the reasonableness inquiry (by either broadening or narrowing it) would fit within the general Fourth Amendment scheme the Court cultivated in *Torres*.

B. Judicial Acknowledgment: A Policy Rationale

Beyond clarification, broadening the reasonableness inquiry also has a compelling policy justification. By doing so, the Court could tactfully address the way its Fourth Amendment precedent insulates harmful policing tactics. Using the bench to address wide-ranging

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216. *Id.*

217. *Id.*

218. *Id.* at 993–96.

219. *Id.* at 998 (emphasis added).

220. *Id.* at 996.

221. *Id.* at 1001–02.

222. *Id.* at 1002–03. The dissent laments the holding, writing that a seizure necessarily indicates taking possession. *Id.* at 1005 (Gorsuch, J., dissenting).

223. *Id.* at 1003 (majority opinion). One could make the argument that the holding in *Torres* endorses the narrow reasonableness inquiry for excessive force claims. That logic is as follows: if we can fix the precise moment of the seizure, then we should arguably consider reasonableness only in that exact moment. A counterargument may be that *Torres* is a *broader* doctrine, the alternative being a requirement that the suspect is actually subdued before a "seizure" is effectuated—and the often amorphous intent is ignored. *See id.* at 1005 (Gorsuch, J., dissenting). This disagreement is of no matter. The important takeaway from this discussion is that the Court eagerly reduces (and sees value in reducing) ambiguity for some Fourth Amendment inquiries yet remains reluctant to do so for other crucial questions (reasonableness being paramount).

sociological issues, however, is unpopular.[224] Many judges oppose such judicial maneuvering. The late "Justice Scalia insisted that [judges] ground decisions in some form of constraint external to the judges' own preferences" unless there was a clear constitutional mandate or "a statute clearly authoriz[ing] judges to act on their own sense of the good."[225]

Today's issues with Fourth Amendment jurisprudence call for something less than blunt judicial activism. Instead, society may be best served if judges address the reasonableness inquiry more subtly—using what this Note terms "judicial acknowledgment." Judicial acknowledgment refers to a judge's willingness to acknowledge the sociological implications of their decisions. In other words, courts should address how language in *Terry* permits policing that, nearly sixty years later, continues to result in discriminatory overprotection for law enforcement. At the very least, a philosophy of judicial acknowledgment would task the courts with renouncing the historical jurisprudence that suggests harassment is somehow inextricably intertwined with successful enforcement of the law. Judicial acknowledgment asks judges to openly and explicitly address the socio-cultural climate that their decisions exist within.

Justice Sonia Sotomayor has expressed a willingness to invoke a theory of judicial acknowledgement in her decisions. In an impassioned dissent in *Schuette v. Coalition to Defend Affirmative Action*, she laid the paradigmatic foundations for the philosophy.[226] The case regarded a challenge to a Michigan ballot initiative that eliminated affirmative action by amending the state constitution.[227] While the specific facts of the case need not be recounted, Justice Sotomayor ultimately disagreed with the majority's holding that the Michigan initiative was permissible under the Equal Protection Clause.[228] Arguing that the ban on affirmative action "establish[ed] a distinct and more burdensome political process for the enactment of admissions plans that consider racial diversity," Justice Sotomayor advocated for judicial acknowledgment, writing

224. Black's Law Dictionary defines "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, [usually] with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." *Judicial Activism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

225. John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 750 (2017).

226. 572 U.S. 291, 337 (2014) (Sotomayor, J., dissenting).

227. *Id.* at 298 (majority opinion).

228. *Id.* at 311–14.

> [r]ace matters. Race matters in part because of the long history of racial minorities' being denied access to the political process. . . . And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. . . . Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here." . . .
>
> This refusal to accept the stark reality that race matters is regrettable. *The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.* . . . [Members] of the judiciary . . . ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter.[229]

Justice Sotomayor's knack for historical cognizance should be extended to the issues discussed in this Note. In the Fourth Amendment sphere, a philosophy of judicial acknowledgment that highlights law enforcement's continued reliance on command presence (or, for example, race-based policing tactics and similar issues) would be encouraging for citizens and lower courts alike. To recontextualize, Justice Sotomayor's remarks could be augmented to read:

> The way to stop [the persistent harm inflicted by hypermasculine policing tactics] is to speak openly and candidly on the subject of [gender in policing], and to apply the Constitution with eyes open to the unfortunate effects of [decades] of [Fourth Amendment jurisprudence that has willingly turned a blind eye to masculinities and its impact on deadly seizures by law enforcement].[230]

Justice Sotomayor offers a pragmatic way forward.[231] Judicial acknowledgment goes hand-in-hand with the legal framework, and the

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229. *Id.* at 380–81 (Sotomayor, J., dissenting) (emphasis added).

230. *Id.* at 381. There are, of course, a number of ways that this quote could be altered and have the same effect. For example, another way to stop harmful policing is undoubtedly to recognize the role that *race* plays in law enforcement. This Note does not intend to diminish such salient considerations and merely offers another theoretical lens from which to assess this systemic issue.

231. The premise of this Note may be compared to the concept of "abolition constitutionalism." *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019). Abolition constitutionalism endorses a view of the Constitution that "finds *utility* in applying the abolitionist history and logic of the Reconstruction Amendments to today's political conditions" in an effort to abolish the American prison system. *Id.* at 9.

Roberts, *supra*, discusses the concept of "colorblindness" as a "conservative strategy that shields white privilege through a rationalization that appears race neutral on its face. . . . Colorblind theory argues that because society has conquered racism and people of color and white people have full equality, social policies should not take account of race." *Id.* at 77. The problem with this theory, Roberts contends, is that court rulings that invoke it tend to "ignore the material harms inflicted by systems that are structured by white supremacy, but also shield those systems from efforts to dismantle them," thus perpetuating the system. *Id.* at 79. In doing so, the Supreme Court "continues to issue decisions that are completely oblivious to . . . reality." *Id.* at 80; *see also* Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1550 (2019) ("The Court's studied indifference has led to one of the more bizarre tensions in modern American political life: we are all aware of how deeply race infuses our

need for something beyond a doctrinal solution is clear. Even the Tenth Circuit is reticent to hold officers accountable under its state-created-need doctrine, despite its willingness to assess the reasonableness of pre-seizure conduct that leads to deadly force.[232] Judicial acknowledgment is compelling because it asks jurists to appreciate sociological trends while grounding their decisions in formal legal doctrine, such as the state-created-need theory (which, as the Tenth Circuit has argued, flows directly from *Graham*).[233] Circuit courts would benefit from assurance that they can move forward on stable ground. The topic is primed for Supreme Court intervention, and the reckoning is long overdue. For years, police departments have attempted to address harmful policing tactics.[234] Success has been limited.[235] Efforts by departments must be met with a corresponding judicial willingness to recognize the jurisprudential and sociological underpinnings that have allowed the very issues to manifest. Additional scrutiny of pre-seizure conduct, then, calls for a solution that itself remains cognizant of broader social forces. Without discussing these elements openly in a legal forum, police culture will remain resistant to change.

At this moment, the solution offered here is purely aspirational. With the current makeup of the Supreme Court, it seems highly unlikely that the circuit split will be addressed. And, even if reviewed by the Court, a majority of the justices would almost certainly avoid reliance on feminist theory to assess a fundamentally constitutional problem. Nonetheless, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[236] It is time that the Court does so.

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criminal justice system, and yet, the law gives us few ways to properly recognize and contextualize its impact."). Justice Sotomayor has repeatedly attacked the Court's colorblind jurisprudence. *See, e.g.*, *Schuette*, 572 U.S. at 337 (Sotomayor, J., dissenting); *see also* Roberts, *supra*, at 83–84. In a similar vein, this Note calls for a rejection of *genderblind* decisionmaking. Justice Sotomayor's anti-colorblind regime is tethered to "the constitutional objective of advancing freedom and democracy." *Id.* at 84. Without encroaching on that territory, an anti-genderblind jurisprudential approach may feasibly do the same.

232. *See supra* note 184 and accompanying text.

233. *See, e.g.*, Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir. 1997); Graham v. Connor, 490 U.S. 386 (1989).

234. *See* Caroline Preston, *Police Education Is Broken. Can It Be Fixed?*, HECHINGER REP. (June 28, 2020), https://hechingerreport.org/police-education-is-broken-can-it-be-fixed/ [https://perma.cc/WZQ8-R4G5].

235. *Id.*

236. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

CONCLUSION: *GRAHAM* ONWARD

The state of today's Fourth Amendment jurisprudence is not unlike that of 1989. Over thirty years ago, the Supreme Court was tasked with deciding which standard to use to assess the reasonableness of officer conduct.[237] In hindsight, how far courts have strayed from the thrust of *Graham v. Connor* is perplexing.[238] During the oral arguments for that case, Justice Thurgood Marshall pressed the officer's lawyer.[239] An excerpt from the exchange is as follows:

> Justice Marshall: What reason was there for handcuffing a diabetic in a coma?
>
> Lawyer: At the time the officers didn't know that he was a diabetic in a coma.
>
> Justice Marshall: What was he doing that was so violent that he had to be handcuffed?
>
> Lawyer: *You have to go back one step even before that*. Officer Connor saw a petitioner act a very suspicious and unusual manner . . . .[240]

The exchange later continues:

> Justice Marshall: But what was he doing, I'm talking about *before they put the handcuffs on him*. What was he doing before they tried to put the handcuffs on him?
>
> Lawyer: He was acting in a very bizarre manner. He ran out of the car, circled around it twice and then sat down. . . . Petitioner was throwing his hands around. . . .
>
> Justice Marshall: Was that threatening anybody? Did he strike anybody? . . . Did he have a weapon of any kind? . . . [W]hy was he handcuffed? . . .
>
> Lawyer: He was handcuffed because the officers were concerned that he was a criminal suspect. He was acting in a very unusual and erratic way. He was throwing his hands around. Indeed, the District Court stated from the record that he was handcuffed in part to protect himself, as well as the officers.
>
> Justice Marshall: In order to protect himself?
>
> Lawyer: The District Court summarized the record as indicating that. That's correct.
>
> Justice Marshall: May I differ from that conclusion?[241]

This oral argument took place on February 21, 1989.[242] Weeks later, the Supreme Court handed down the unanimous *Graham* decision, fundamentally reshaping Fourth Amendment jurisprudence.[243] It seems unlikely that a unanimous bench would, during the oral argument, concern itself so intently with the *victim*'s

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237. *Graham*, 490 U.S. at 386.

238. *Id.*

239. Oral Argument at 28:03, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571), https://www.oyez.org/cases/1988/87-6571 [https://perma.cc/G8MR-2RR4].

240. *Id.* (emphasis added).

241. *Id.* (emphasis added).

242. *Id.*

243. *Id.*

pre-seizure conduct yet simultaneously desire to completely disregard the *officer*'s pre-seizure conduct in the same altercation. Not even the lawyer for the officers subscribed to such an illogical view—in assessing reasonableness, he himself encouraged the Court to "go back one step even *before*" the seizure occurred.[244]

Today, police officers view *Graham* as a liberating security—their "First Amendment."[245] This conception is unfortunate but unsurprising—since the case was decided, it has consistently served to protect law enforcement.[246] Many courts have steadily constricted the reasonableness inquiry to a single moment: the perceived threat—a sliver in time that overwhelmingly favors the officer wielding the weapon.[247] When courts have opted to broaden the inquiry, they do so without affecting a substantive change from the status quo.[248]

And to boot, all of this is taking place in a cultural milieu that perpetuates overly aggressive policing methods. Less than two years after *Graham* was decided, the Independent Commission on the Los Angeles Police Department ("LAPD") released its report (known as the *Christopher Commission Report*) on police brutality in the wake of Rodney King's beating.[249] In the report, the Commission found that "female LAPD officers are involved in excessive use of force at rates substantially below those of male officers. . . . The statistics indicate that female officers are not reluctant to use force, but they are not nearly as likely to be involved in use of excessive force."[250] Nonetheless, systemic discrimination against women in the profession made it difficult to shift the culture of the LAPD.[251] This discrimination and the resulting "underutilization" of female officers contributed to a culture that emphasized "use of force to control a situation, and a disdain for a more patient, less aggressive approach."[252]

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244. *Id.* (emphasis added).

245. *See* Radiolab, *supra* note 26.

246. For cases and further discussion, see *supra* Part III.A, B.

247. *See supra* Part III.A.

248. *See supra* Part III.B.

249. INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991) [hereinafter CHRISTOPHER COMM'N REP.].

250. *Id.* at 83–84; *see also* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 85–94 (1995) (discussing gender and policing); Mary Anne Case, *Police Mistakes in Ferguson Involve Gender as Well as Race: The Forgotten Lessons of Los Angeles' Christopher Commission*, HUFFPOST, https://www.huffpost.com/entry/police-mistakes-in-fergus_b_5793494 (last updated Nov. 11, 2014) [https://perma.cc/AGE6-E48E] (same).

251. CHRISTOPHER COMM'N REP., *supra* note 249, at 88.

252. *Id.* at 83, 88.

The *Christopher Commission Report* is nearly thirty years old. Unfortunately, there is much work to be done to remedy the issues that still pervade the intersections of race, gender, and policing in America. Until the Supreme Court is willing to acknowledge how its own Fourth Amendment jurisprudence blindly overlooks and insulates these social forces, the United States may well continue the futile search for answers in our collective thoughts and prayers.[253]

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253. *See* Jeffrey Robinson, *The Time for Thoughts and Prayers is Over*, ACLU (June 3, 2020), https://www.aclu.org/news/criminal-law-reform/the-time-for-thoughts-and-prayers-is-over/ [https://perma.cc/5SGE-FQA7].

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