University of Baltimore Law Forum

Volume 53 | Number 1 Article 5

10-1-2022

Time to Define the Objectively Reasonable Officer: How Maryland's Use of Force Statute Supplies Measureable Standards to Protect Fourth Amendment Rights

Chelsea Roberts

COMMENT

TIME TO DEFINE THE OBJECTIVELY REASONABLE OFFICER: HOW MARYLAND'S USE OF FORCE STATUTE SUPPLIES MEASURABLE STANDARDS TO PROTECT FOURTH AMENDMENT RIGHTS

By: **Chelsea Roberts***

I. INTRODUCTION

Law enforcement officers are entrusted with the authority to use force when arresting individuals suspected of illegal activity.[1] The use of such force, including the use of deadly force, is only privileged, however, to the extent the force is constitutional.[2] Unconstitutional use of force by an officer permits individuals to bring a civil cause of action[3] against the officer for excessive (or unreasonable) use of force.[4] Determining whether an officer's use of force is reasonable—and therefore, permissible—is a complicated and arduous analysis.[5]

The decision of whether force is reasonable largely yields to supposing what another officer in the accused's position would believe is

---

* Chelsea Roberts: J.D. Candidate, 2023, University of Baltimore School of Law. Special thanks to the entire 2021-2022 University of Baltimore *Law Forum* executive board and staff for their editorial assistance. For their continued support and mentorship throughout the writing process, I extend my deepest gratitude to my faculty advisor, Professor Michael Higginbotham and 2021-2022 Comments Editor, Robert Taylor. I wish to thank Professor David Jaros for his endless encouragement and advice. Lastly, many thanks to my family and friends for their support throughout my time serving as a *Law Forum* First Year Staff Editor.

[1] Richardson v. McGriff, 361 Md. 437, 484, 762 A.2d 48, 73 (2000) (citing Okwa v. Harper, 360 Md. 161, 199 (2000)).

[2] *Richardson*, 361 Md. at 484, 762 A.2d at 73 (citing Tennessee v. Garner, 471 U.S. 1, 7 (1985); *see* discussion *infra* Section II.A.

[3] While this comment often discusses excessive force analyses in civil causes of action (*see* discussion *infra* Section II.A.i.), determining whether force is reasonable is equally relevant to criminal causes of actions brought against officers. *See* Koushall v. State, 479 Md. 124, 150-51, 277 A.3d 403, 418 (2022) (explaining that in a claim where the officer was accused of assault and battery, the determination of the lawfulness of police use of force "is analyzed under the Fourth Amendment's objective reasonableness standard."); *see also* Wilson v. State, 87 Md. App. 512, 519-21, 590 A.2d 562, 565-66 (1991); *see also* Cagle v. State, 235 Md. App. 593, 604-05, 607, 178 A.3d 674, 680 (2018).

[4] *See* Widgeon v. E. Shore Hosp. Ctr., 300 Md. 520, 535, 479 A.2d 921, 928 (1984); *see also* Barnes v. Montgomery Cnty., 798 F. Supp. 2d 688, 700 (D. Md. 2011).

[5] *See* Graham v. Connor, 490 U.S. 386, 396 (1989).

reasonable.[6] As the public and legislatures become increasingly aware of many police officers' "warrior mindset,"[7] deference to a "reasonable" officer's discretion seems more and more intolerable.[8] This recent awareness demands legislators define use of force statutes in a way that guarantees individuals' constitutional rights are protected.[9]

In the 2021 legislative session, the Maryland General Assembly ("MGA") passed a bill to enact a new use of force statute ("Statute") for the State.[10] While the Statute stops short of defining controlling terms "necessary" and "proportional" force and explicitly omits the term "reasonable," the Statute, read as a whole, allows officers, the public, and courts to ascertain what is required of a reasonable officer.[11] This comment will discuss: (1) the history of police use of force standards federally and in the state of Maryland;[12] (2) the impact of police use of force and current instances of excessive force that necessitated change;[13] (3) changes made to use of force standards throughout the country;[14] (4) the creation of the Maryland Use of Force Statute;[15] (5) the issues surrounding the Statute;[16] and

---

[6] *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20-22 (1968)).

[7] *See* Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225, 228 (2015) [hereinafter *Law Enforcement's "Warrior" Problem*] ("Officers are trained to cultivate a "warrior mindset," the virtues of which are extolled in books, articles, interviews, and seminars intended for a law enforcement audience."); *see also* Kevin Cyr, *Police Use of Force: Assessing Necessity and Proportionality*, ALBERTA L. REV. 675 (2016) ("[T]he objectively reasonable standard can . . . be problematic [because] use of force is inextricably linked to officer safety, which introduces cognitive biases due to threat of interpersonal violence."); *see also* discussion *infra* Sections III.A., IV.

[8] *See* Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder; Jennifer Hassan & Rick Noack, *How George Floyd's Killing Sparked a Global Reckoning*, WASH. POST (May 25, 2021, 1:32 PM), https://www.washingtonpost.com/world/2021/05/25/george-floyd-anniversary-global-change/.

[9] *See* Subramanian & Arzy*, supra* note 8; *see also* Hassan & Noack, *supra* note 8.

[10] S. 71, 2021 Leg., 442nd Sess. (Md. 2021); MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2021).

[11] S. 71, 2021 Leg., 442nd Sess. (Md. 2021); MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2021); *see also* discussions *infra* Sections III. B., IV. Although the Statute is silent on "reasonableness" and an officer's civil liability for excessive force, in clarifying what force is permitted, the Statute is essential to an analysis concerning what force is reasonable in civil actions for constitutional violations.

[12] *See infra* Section II.A.

[13] *See infra* Section II.B.

[14] *See infra* Section II.C.

[15] *See infra* Section II.D.

[16] *See infra* Section III.B

lastly (6) a proposal on how to resolve the issues with the Statute consistent with legislative intent, and Fourth Amendment Jurisprudence.[17]

II. BACKGROUND

A. Police Use of Force Legal Standards Before Enactment of the Maryland Use of Force Statute

i. Federal Use of Force Standard as Prescribed by the Supreme Court

Under the Fourth Amendment of the United States Constitution, citizens of the U.S. have the right to be "secure in their persons. . . against unreasonable searches and seizures."[18] This Fourth Amendment protection prohibits officers from using excessive force to effectuate an arrest.[19] When an individual alleges an officer has used excessive force, the officer may be liable for the constitutional violation under 42. U.S.C. § 1983 ("§ 1983").[20]

In 1989, the Supreme Court in *Graham v. Connor* held that when a citizen brings a claim under § 1983, alleging an officer used excessive force (in either a stop, arrest, or "other 'seizure'"), the Fourth Amendment governs, and courts must apply a "reasonableness standard."[21] The *Graham* court further held: "[d]etermining whether the force . . . is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."[22]

This balancing test weighs the facts and circumstances of each case; "the test of reasonableness" is incapable of "precise definition or mechanical application."[23] Moreover, the "reasonableness" of force used is an objective standard, considered from the perspective of a "reasonable police officer."[24] The Court in *Graham* reasoned the "reasonableness" of police use of force

---

[17] *See infra* Section IV.
[18] U.S. CONST. amend. IV; *see Garner*, 471 U.S. at 7 ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person.").
[19] *See Graham*, 490 U.S. at 393-94.
[20] *See* Richardson v. McKnight, 521 U.S. 399, 403 (1997). While officer excessive force in criminal actions also implicates the Fourth Amendment, *Koushall*, 479 Md. at 150-51, 277 A.3d at 417-18, this comment discusses excessive force analyses generally to address when force is reasonable, and thus justified, in both civil and criminal actions.
[21] *Richardson*, 361 Md. at 484, 762 A.2d at 73 (citing *Garner*, 471 U.S. at 7); *see* discussion *infra* Section II.A.
[22] *McKnight*, 521 U.S. at 396 (quoting *Terry*, 392 U.S. at 24 (1968)).
[23] *Graham*, 490 U.S. at 396 (quoting Bell v. Wolfish*,* 441 U.S. 520, 559 (1979)).
[24] *Graham*, 490 U.S. at 396-97.

"must embody allowance for the fact that police officers are often forced to make split-second judgments."[25] The Court did not expound how "split-second judgments" should be analyzed in the calculus of reasonableness, but courts since *Graham* routinely cite this proposition when paying deference to an officer's judgment.[26]

Law enforcement officials accused of violating § 1983 are entitled to the complete defense of "qualified immunity" if the officer reasonably would not have known he or she violated a clearly established federal right.[27] While the Statute may fit within Maryland precedent as a clearly established law that protects a federal constitutional right (extinguishing the qualified immunity defense), this implication of qualified immunity on the Statute is outside the scope of this comment.[28]

ii. Use of Force Under Maryland Common Law

a. Maryland Courts' Interpretation and Application of Graham v. Connor Under the Maryland Declaration of Rights

In Maryland, when an individual is allegedly the victim of police use of excessive force, he or she may bring a federal § 1983 claim and a separate civil cause of action under the Maryland Declaration of Rights.[29] Article 26 of the Maryland Declaration of Rights is the analog to the Fourth Amendment and protects the same right "to be free from unreasonable search and seizure."[30] The provisions under the Maryland Declaration of Rights are

---

[25] *See id.*

[26] *See id.*; *see also* Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 864–65 (2014) [hereinafter *Policing Facts*].

[27] Shoemaker v. Smith, 353 Md. 143, 159, 725 A.2d 549, 558 (1999) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[28] *See* Branch v. McGeeney, 123 Md. App. 330, 354, 359, 718 A.2d 631, 643, 645 (1998) (explaining where a state law protects a federal right, and the law mandates an officer's compliance, violation of that state law may destroy an officer's immunity); *see also* S. 71, 2021 Leg., 442nd Sess. (Md. 2021); MD. CODE ANN., PUB. SAFETY § 3-524 (h)(2) (LexisNexis 2021) (requiring officer's sign a document affirming they understand and will comply with the Statute which arguably protects a federal right under the Fourth Amendment due to its mandate on officers to use only necessary force).

[29] *See e.g., Widgeon*, 300 Md. at 535, 479 A.2d at 928 (1984); *see also Barnes*, 798 F. Supp. 2d at 700.

[30] *Barnes*, 798 F. Supp. 2d at 700; MD. CONST. art. 26.

construed *in pari materia*[31] with related U.S. Constitutional Amendments, meaning Article 26 must be interpreted in the same way the Supreme Court of the United States interprets the Fourth Amendment.[32]

Consequently, the Court of Appeals of Maryland applies the same objective "reasonableness" standard to assessing Article 26 violations as the Supreme Court applies to § 1983 claims of Fourth Amendment violations.[33] In applying the reasonableness standard to excessive force claims, the Supreme Court held claims of excessive force are only proper under the Fourth Amendment (rejecting a Fourteenth Amendment substantive due process analysis).[34] The standard set out by the Supreme Court in *Graham*—that claims of excessive force are judged under an objective standard from the perspective of a reasonable officer—has been applied consistently throughout Maryland for the last twenty years.[35] In applying *Graham*, however, Maryland courts have needed to go beyond the nebulous Supreme Court standard to conduct analysis into the "totality of circumstances,"[36] and precisely what circumstances are included in the calculus of reasonableness.[37]

b. Maryland Precedent Surrounding Antecedent Events and Police Procedures in the Reasonable Force Analysis

Maryland jurisprudence on admissibility of antecedent events (events that occurred before an officer's use of force) lean strongly toward

---

[31] Latin term meaning "in the same matter," *in pari materia* is "a cannon of construction" that statutes are interpreted the same as another statute on a related subject matter. *In pari materia*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[32] *See* Park v. Miller, No. CIV. JFM-03-3257, 2004 WL 2415062, at *12 (D. Md. Oct. 28, 2004) (citing DiPino v. Davis, 354 Md. 18, 43, 729 A.2d 354, 367 (Md. 1999)); *see also Barnes*, 798 F. Supp. 2d at 700 (citing Hayes v. City of Seat Pleasant, No. DKC 08–2548, 2010 WL 3703291, at *4 (D. Md. Sept. 16, 2010)); *see also Richardson*, 361 Md. at 452-53, 762 A.2d at 56 (citation omitted).

[33] *See Richardson*, 361 Md. at 452-53, 762 A.2d at 56 (citations omitted).

[34] *Graham*, 490 U.S. at 395 (citing *Garner*, 471 U.S. at 5); *cf Barnes*, 798 F. Supp. 2d at 700 (holding Article 26 and not Article 24 of the Maryland Declaration of Rights is the cause of action for claims of excessive force since article 24 "protects the same rights as the *Fourteenth* Amendment") (emphasis added).

[35] *See* Estate of Blair v. Austin, 469 Md. 1, 22, 228 A.3d 1094, 1106 (2020); *see also* Randall v. Peaco, 175 Md. App. 320, 333, 927 A.2d 83, 91 (2007) (citing Schulz v. Long, 44 F.3d 649 (8th Cir. 1995)); *see also Richardson*, 361 Md. at 452–53, 762 A.2d at 56.

[36] *See Estate of Blair*, 469 Md. at 23, 228 A.3d at 1106-07 (quoting *Graham*, 490 U.S. at 396-97) ("totality of the circumstances[] includ[es] 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, whether he is actively resisting arrest or attempting to evade arrest by flight[.]'"); *see also Richardson*, 361 Md. at 464, 762 A.2d at 63 (explaining the totality of the circumstances includes facts known to the officer at the moment force was used and does not allow for "20/20 hindsight guessing.").

[37] *See supra* note 36 and accompanying text.

exclusion,[38] although cautiously.[39] Officer compliance with discretionary police policy, and whether an officer took unnecessary action which then led to necessary force are two separate but related categories of antecedent events.[40] Almost indisputably, however, admission of evidence showing a clear violation of *non-discretionary* police guidelines may be relevant to the reasonableness inquiry.[41] Definitively, analysis of the "totality of circumstances," encompasses what the officer *knew* at the moment force was used.[42]

In 2000, the Court of Appeals of Maryland in *Richardson v. McGriff* found no error in excluding evidence of "antecedent events" where an officer's pre-seizure conduct may have violated police guidelines.[43] The *Richardson* court reasoned that events and facts known to the officer leading up to the use of force are relevant only where the events are *contemporaneous* with the use of force.[44] The reasonableness of the officer's actions *before* the officer's use of force were irrelevant to assessing whether the use of force was reasonable.[45] Maryland courts since *Richardson* have held antecedent events are not relevant in determining reasonable force.[46]

---

[38] *See Richardson*, 361 Md. at 458-59, 762 A.2d at 59-60 (finding pre-seizure actions of the officer that were potentially violative of discretionary police policies were not relevant and thus not admissible); *see also* Greenidge v. Ruffin, 927 F.2d 789, 792 (4th Cir. 1991) (recognizing Supreme Court precedent and the necessity for officers to make "split-second judgments," the court held there was no abuse of discretion in the exclusion of evidence concerning the officer's actions leading up to use of force).

[39] *See Richardson*, 361 Md. at 501–03, 762 A.2d at 83–84 (Harrell, J., concurring) (contending pre-seizure conduct is relevant to reasonableness, "[w]ithout reference to and consideration of pre-seizure events, no context for reasonableness evaluation of the totality of the circumstances can be illustrated.").

[40] *Compare Richardson*, 361 Md. at 458-59, 461, 762 A.2d at 59-61 (explaining that the officer's antecedent actions related to discretionary police guidelines which were irrelevant to whether the officer's use of force was reasonable), *with Richardson*, 361 Md. at 458–59, 762 A.2d at 59–60 (analyzing whether the officer's decision to search for a suspect in the dark and not turn on the lights, was an irrelevant antecedent event).

[41] *See id.* at 458-59, 461, 762 A.2d at 59-61 (noting an absence of evidence there was a clear violation of police guidelines in officer's decision to not turn lights on in a dark room when conducting a search); *see also id.* at 509-10, 762 A.2d at 87 (Harrell, J., concurring).

[42] *See id.* at 464-65, 762 A.2d at 62-63; *see also Koushall*, 249 Md. App. at 732-32, 246 A.3d at 733 (citing Wilson v. State, 87 Md. App. 512, 521, 590 A.2d 562, 566 (1991)).

[43] *See Richardson*, 361 Md. at 441, 762 A.2d at 50.

[44] *See id.* at 452, 456-57, 462, 464-65, 762 A.2d at 56, 58, 62-63.

[45] *See id.* at 458, 762 A.2d at 59.

[46] *E.g., Randall*, 175 Md. App. at 329, 927 A.2d at 89 ("The law in Maryland, and in a number of federal courts and our sister states, is that events that are antecedent to the conduct of the officer at issue do not bear on the objective reasonableness of that conduct.").

The concurring opinion in *Richardson* proposed, however, that the totality of circumstances considered in the reasonableness inquiry cannot be confined with such rigidity.[47] The concurrence observed an inconsistency in the federal circuits' interpretation of "totality of circumstances" under *Graham*.[48] To be sure, in some circuits (as the Majority reasoned), the totality of circumstances in the use of force is limited to only those circumstances "immediately prior to and at the moment" of the use of force.[49]

In the Seventh Circuit, however, the totality of circumstances encompasses all information an officer had at the moment force was used, excluding only "information uncovered later."[50] Relevant to the reasonableness of "the officer's perspective" and the time force was used are the "'knowledge, facts and circumstances known to the officer at the time he exercised his split-second judgment.'"[51] The concurrence in *Richardson* went on further to cite many federal and Maryland state cases where police procedures were admitted and considered in determining the reasonableness of the officer's use of force.[52] Despite extensive Maryland precedent excluding evidence of antecedent events (*supra*), admission of police guidelines has generally been relevant to excessive force analyses in Maryland and federal courts.[53]

---

[47] *See Richardson*, 361 Md. at 484-85, 762 A.2d at 73-74 (Harrell, J., concurring) ("In Graham, the Supreme Court expressly rejected a rigid formulation in defining the Fourth Amendment standard of reasonableness[.]").

[48] *Id.* at 486-87, 762 A.2d at 74-75 (Harrell, J., concurring).

[49] *Id.* at 486-87, 762 A.2d at 74-75 (Harrell, J., concurring) (quoting Salim v. Proulx, 93 F.3d 86, 92 (2d Cir. 1996)).

[50] *Richardson*, 361 Md. at 488-89, 762 A.2d at 75-76 (Harrell, J., concurring) (quoting Deering v. Reich, 183 F.3d 645, 649-50 (7th Cir. 1999)).

[51] *Id.* at 489, 762 A.2d at 76 (Harrell, J., concurring) (quoting *Deering*, 183 F.3d at 650).

[52] *See Richardson*, 361 Md. at 504-05, 762 A.2d at 84-85 (Harrell, J., concurring) (first citing Williams v. Mayor & City Council of Balt., 359 Md. 101, 139-40, 753 A.2d 41, 61-62 (2000); then citing State v. Albrecht, 336 Md. 475, 502-03, 649 A.2d 336, 349-50 (1994); then citing Boyer v. State, 323 Md. 558, 591, 594 A.2d 121, 137 (1991); then citing *Garner*, 471 U.S. at 18; then citing Ludwig v. Anderson, 54 F.3d 465, 472 (8th Cir. 1995); then citing Samples v. Atlanta, 916 F.2d 1548, 1551 (11th Cir. 1990); then citing Kladis v. Brezek, 823 F.2d 1014, 1019 (7th Cir. 1987); and then citing Peraza v. Delameter, 722 F.2d 1455, 1456 (9th Cir. 1984)).

[53] *Richardson*, 361 Md. at 504, 762 A.2d at 84 (2000) (Harrell, J., concurring).

B. The Tipping Point for U.S. Enduring Police Brutality Sparks Global Furor and Legislative Action.

i. Police Brutality and Use of Force in the U.S.

Use of excessive force by police officers has been a part of U.S. history since the first officers were deployed.[54] In recent history, with the evolving use of video cameras, documented instances of police excessive force have brought attention to how, when, and why police exert force.[55] This attention is particularly focused on police use of force against Black people,[56] as a recent report[57] has illustrated: Black people are three times more likely to be killed by police.[58] Ordinarily Black victims of excessive force (and their estates), have failed to find justice in the U.S. legal system.[59] From Rodney King[60] to George Floyd,[61] protests and riots have spurred calls for justice.[62]

In Maryland, the unexplained death of Freddie Gray[63] while in police custody prompted an eruption of protests, riots, and a federal investigation of the Baltimore Police Department ("BPD") by the Department of Justice ("DOJ") in 2015.[64] In 2016, the DOJ found that the BPD engaged in a

---

[54] ANGELA DAVIS, POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT, at xii (2017).
[55] *See id.* at xii-xiii.
[56] *E.g.,* Subramanian & Arzy, *supra* note 8.
[57] Harvard T.H. Chan School of Public Health Study examining 5,494 police involved deaths between 2013 and 2017.
[58] *See* HARVARD T.H. CHAN SCH. OF PUBLIC HEALTH, BLACK PEOPLE MORE THAN THREE TIMES AS LIKELY AS WHITE PEOPLE TO BE KILLED DURING A POLICE ENCOUNTER, https://www.hsph.harvard.edu/news/hsph-in-the-news/blacks-whites-police-deaths-disparity/ (last visited Oct. 24, 2022).
[59] *See* DAVIS, *supra* note 54, at xii-xiii; *see also* JIN HEE LEE & SHERRILYN IFILL, *Do Black Lives Matter to the Courts?*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 256-58 (Angela Davis ed., 2017).
[60] *See* HEE LEE & IFILL, *supra* note 59, at 257 ("The 1991 videotaped beating of Rodney King by Los Angeles Police Department officers unleashed a brewing outrage among communities of color across the country [and riots] ensued after the officers involved in the King beating were acquitted of all criminal charges.").
[61] George Floyd was a Black Minnesotan who died in police custody (discussed *infra* Section II.B.ii).
[62] *See* Subramanian & Arzy, *supra* note 8.
[63] Freddie Gray was a twenty-five-year-old Black man who ran upon seeing Baltimore Police officers. He was pursued and then arrested—sustaining fatal injuries while in police transport. *Timeline of the Events Following the Arrest of Freddie* Gray, ASSOCIATED PRESS (May 23, 2016), https://apnews.com/article/sports-baseball-freddie-gray-arrests-archive-1b229abb271a45a2ab2d03878c1e9dfb.
[64] *See* HEE LEE & IFILL, *supra* note 59, at 258-60.

"pattern or practice" of conducting unlawful "stops, searches, and arrests" and used excessive force unlawfully against Black people at disproportionate rates.[65] In 2017, Baltimore City and the DOJ entered into a consent decree, implementing "comprehensive reforms."[66] Such reforms included the development of "policies and training" to ensure officers abide by constitutional requirements when conducting searches and seizures.[67]

ii. George Floyd, Global Protests, and the Legislative Response

In May 2020, a bystander video captured Minnesota police officer Derek Chauvin kneeling on the neck of George Floyd for over nine minutes, while Floyd (a Black man), repeated the words "I can't breathe."[68] While pinned in prone position by four male officers, Floyd's calls for help ultimately ceased, as he visibly lost consciousness.[69] Bystanders pleaded for Chauvin to remove his knee or to check Floyd's pulse, but Chauvin's demeanor remained apathetic as he continued to kneel on Floyd's neck.[70] An Emergency Medical Technician arrived, directed Chauvin to remove his knee from Floyd's limp body, and transported Floyd to a hospital where he was pronounced dead.[71] Later, the judge presiding over Chauvin's trial deemed his actions an abuse of power in which Chauvin "treated Floyd with particular cruelty."[72]

---

[65] THE U.S. DEP'T OF JUST., OFF. OF PUB. AFF., *Justice Department Reaches Agreement with City of Baltimore to Reform Police Department's Unconstitutional Practices* (Jan. 12, 2017), https://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-baltimore-reform-police-department-s.

[66] *Id.*

[67] Consent Decree Appendix A at 24-28, United States v. Police Department of Baltimore City, No. 17-cv-00099-JKB (D. Md. Jan. 12, 2017), ECF No. 39.

[68] *See* Subramanian & Arzy, *supra* note 8; *see also* Hassan & Noack, *supra* note 8.

[69] *See* Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

[70] *Id.*

[71] *See Derek Chauvin Trial: Paramedics Say Floyd Had No Pulse When They Arrived*, BBC NEWS, (Apr. 2, 2021), https://www.bbc.com/news/world-us-canada-56606418; *see also* Nicholas Bogel-Burroughs, *George Floyd Was Dead by the Time Medical Help Arrived, a Paramedic Testified*, N.Y. TIMES (Apr. 1, 2021), https://www.nytimes.com/2021/04/01/us/george-floyd-emt-paramedics.html.

[72] Laurel Wamsley, *Judge Finds Aggravating Factors in Chauvin Case, Paving Way For Longer Sentence*, NPR (May 12, 2021, 11:12 AM), https://www.npr.org/2021/05/12/996158514/judge-finds-aggravating-factors-in-chauvin-case-opening-path-for-longer-sentence.

With the public witnessing yet another Black person die in police custody, a visceral response boomed throughout the nation and the world.[73] "I can't breathe," reverberated throughout the protests; the chant repeated the last words of Floyd, and many other Black people in police custody who died before him.[74] Activists and public figures demanded legislators act.[75] Between May 2020 and May 2021, twenty states enacted legislation restricting or clarifying statewide police use of force standards.[76] Among these, Maryland legislators enacted the Maryland Police Accountability Act of 2021, establishing a statewide use of force standard.[77]

C. Recent Use of Force Legislation Throughout the U.S.

Of the twenty states to enact new use of force legislation, more than ten states (including Maryland), clarified or redefined the state use of force

---

[73] *See* Subramanian & Arzy, *supra* note 8; *see also* Hassan & Noack, *supra* note 8 (following countless other deaths of Black people in police custody, "George Floyd's death served as a catalyst for one of the largest social movements in U.S. history.").

[74] Katie Wedell, Cara Kelly, Camille McManus & Christine Fernando, *George Floyd is Not Alone. 'I Can't Breathe' Uttered By Dozens in Fatal Police Holds Across U.S.*, USA TODAY (June 13, 2020, 6:00 AM), https://www.usatoday.com/in-depth/news/investigations/2020/06/13/george-floyd-not-alone-dozens-said-cant-breathe-police-holds/3137373001/ (last updated June 25, 2020, 9:58 AM) (stating dozens have died in police custody uttering "I can't breathe" and the majority listed in the article are Black men); Mike Baker, Jennifer Valentino-DeVries, Manny Fernandez & Michael LaForgia, *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'* N.Y. TIMES (June 29, 2020), https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html (in seventy instances the phrase was said, and in more than half of the instances Black people uttered the phrase).

[75] *See* Jacqueline Alemany & Tobi Rali, *Power Up: Celebrities Descend on the Hill to Push Police Reform*, WASH. POST (May 13, 2021, 6:52 AM), https://www.washingtonpost.com/politics/2021/05/13/power-up-celebrities-descend-hill-push-police-reform/; *see also* Hassan & Noack, *supra* note 8.

[76] Subramanian & Arzy, *supra* note 8.

[77] *See* Brian Witte, *Racial Protests Reckoning: Maryland Police Reform Laws Begin*, ASSOCIATED PRESS NEWS (Sept. 30, 2021), https://apnews.com/article/police-laws-larry-hogan-maryland-police-reform-6829b0cf32106008566bae49049400a3 (describing the series of laws collectively called "The Maryland Police Accountability Act"); *see also State Legislature Passes Maryland Police Accountability Act of 2021*, OFF. OF THE STATE'S ATT'Y FOR BALT. CITY (Apr. 15, 2021), https://www.stattorney.org/media-center/press-releases/2249-state-legislature-passes-maryland-police-accountability-act-of-2021.

standard.[78] Nearly all the legislation explicitly specified that the reasonability of the use of force is measured by an objectively reasonable *police officer*.[79]

In 2021, Congress made efforts to enact a use of force standard for federal officers under the George Floyd Justice in Policing Act of 2021 ("Act").[80] While the legislation did not pass, the Act sought to prohibit police use of force, unless the force was "necessary and proportional."[81] Additionally, Congress included a number of instructive definitions.[82] For example, "necessary" was defined as what another reasonable federal officer would objectively believe was necessary, under the totality of circumstances and where there were no reasonable alternatives to the use of force; and "totality of circumstances" was further defined to include all the facts known to the officer "leading up to and at the time" the force is used.[83] These terms are identical to terms in the Maryland Statute, where they are undefined.[84]

D. Maryland General Assembly Redefines Police Use of Force: Language and Legislative History

The MGA clarified the state police use of force standard in Senate Bill 71 ("S.B. 71"), codified in section 3-524 of the Maryland Public Safety Code.[85] The section of the code titled, "Maryland Use of Force Statute," (referenced in this comment as "the Statute") provides: "(d)(1) A police officer may not use force against a person unless, under the totality of the circumstances, the force is necessary and proportional to: (i) prevent an imminent threat of physical injury to a person; or (ii) effectuate a legitimate law enforcement objective."[86] While the Statute itself does not define the terms found in section 3-524(d)(1), some notable points of legislative history provide greater insight.[87]

---

[78] Subramanian & Arzy, *supra* note 8 (Colorado, Connecticut, Illinois, Minnesota, Utah, Virginia, DC, Massachusetts, Nevada, Oregon, Vermont, Washington, and Maryland revised or clarified use of force standards).

[79] COLO. REV. STAT. § 18-1-707 (Lexis Advance through all 2021 Regular Session legislation, as compiled and edited by the Colorado Office of Legislative Legal Services); 2020 Ct. ALS 1, 2020 Ct. P.A. 1, 2020 Ct. HB 6004; 2019 ILL. ALS 652, 2019 Ill. Laws 652, 2019 ILL. P.A. 652, 2019 Ill. HB 3653; 2019 Bill Text MN H.B. 1C; 2021 Ut. HB 237, 2021 Utah Laws 150, 2021 Ut. Ch. 150, 2021 Ut. ALS 150; 2020 Va. ALS 37, 2020 Va. Acts 37, 2020 Va. Ch. 37, 2020 Va. SB 5030; 2019 Bill Text DC B. 907.

[80] George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021).

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Compare id.*, *with* MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2022).

[85] *See* S. 71, 2021 Leg., 442nd Sess. (Md. 2021); *see also* MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2022).

[86] PUB. SAFETY § 3-524(d)(1).

[87] *Id.*

i. Report from the Maryland General Assembly Workgroup on Police Reform

The month after the killing of George Floyd, the House Speaker of the MGA assembled a bipartisan group of Maryland legislators, forming the "Workgroup to Address Police Reform and Accountability in Maryland" ("Workgroup").[88] The goal of the Workgroup was to provide the Speaker with a police reform bill for the 2021 legislative session.[89] Over five months, the Workgroup held eight public meetings and listened to testimony from approximately ninety citizens, and twenty-seven expert witnesses.[90]

The Workgroup then provided its recommendations for a police reform bill to include establishing a statewide use of force standard.[91] The Workgroup recommended police only use force when "objectively reasonable and appears to be necessary under the circumstances," in tandem with several police training provisions.[92] The House Speaker then introduced House Bill 670 ("H.B. 670"), which incorporated the Workgroup's use of force recommendations, stating the bill was "the product of the Workgroup."[93]

ii. The Origin and Evolution of The Statute Under H.B. 670

a. H.B. 670 Introduction

The Statute first appeared in H.B. 670 in section 3-524.[94] Like the Workgroup's recommendations, the bill required Maryland officers undergo training (to include training on de-escalation, and alternatives to lethal force), as well as sign a document certifying he or she underwent the training and

---

[88] *See Final Report of the Workgroup to Address Police Reform and Accountability in Maryland*, DEP'T. OF LEGIS. SERVS. 1 (Dec. 1, 2020), https://mgaleg.maryland.gov/pubs-current/Final-Report-Police-Reform-Workgroup.pdf.
[89] *See id.* at iii, 1.
[90] *See id.* at iii, 1, 7 (expert testimony was heard from Maryland State's Attorneys, Public Defenders, professors, a policy and data analyst, law enforcement officers in Maryland police and sheriff's offices, the Executive Director of the Maryland Police Training and Standards Commission, and the President of the Maryland Fraternal Order of Police).
[91] *See id.* at iii, 1-7.
[92] *See id.* at 3-5.
[93] *Police Reform and Accountability Act of 2021: Hearing on H.D. 670 Before the Judiciary Comm.*, 2021 Leg., 442nd Sess. (Md. 2021) (statement of Speaker Adrienne Jones).
[94] H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021).

will comply with the Statute.[95] While "proportionality" and "totality of circumstances" were not included in the first version of the bill, the original section 3-524 of the legislation contained substantially the same provisions that were later enacted into law under S.B. 71.[96] Like the Workgroup recommendation, however, H.B. 670 section 3-524 (c)(2) stated: "a police officer may only use the force that is objectively reasonable and appears to be necessary under the circumstances in response to the threat or resistance by another person."[97] This provision was the subject of a later amendment[98] and extensive discussion in the House.[99]

b. H.B. 670 Amendment 992612 and Subsequent House Floor Discussion

Amendment 992612 was the first amendment to H.B. 670 and struck section 3-524 (c)(2) in its entirety.[100] In its place the following was added: "a police officer may not use force against a person unless the force is necessary and proportional to [prevent a threat or effectuate an arrest]."[101] The amendment still did not define "necessary" but did define "totality of the circumstances" to include "all facts known to the officer. . . leading up to and at the time of the use of force. . ." and "proportional" as "not excessive in relation to a . . . legitimate law enforcement objective."[102]

After the amendment was adopted, an extensive debate occurred on the House floor regarding many conservative delegates' proposed amendments to section 3-524.[103] Conservatives criticized the proposed statute as a threat to officer safety; where officers are faced with dangerous split-second decisions, second-guessing their use of force could cost the officer their life.[104] Democratic Delegate, C.T. Wilson responded to many of

---

[95] *Compare*, *Final Report of the Workgroup to Address Police Reform and Accountability in Maryland*, DEP'T. OF LEGIS. SERVS., 1, 3-5 (Dec. 1, 2020), https://mgaleg.maryland.gov/pubs-current/Final-Report-Police-Reform-Workgroup.pdf, *with* H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021).
[96] *Compare* H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021), *with* S. 71, 2021 Leg., 442nd Sess. (Md. 2021).
[97] H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021) (terms including "necessary" not defined).
[98] *See infra* p.18-19 and notes 100-08.
[99] *See* House Floor Proceedings No. 21 A, 2021 Leg., Reg. Sess., at 3:12:00-4:13:00 (Mar. 10, 2021).
[100] H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021) (amendment 992612) (significantly, "force that is *objectively reasonable*" was stricken) (emphasis added).
[101] *Id.*
[102] *Id.*
[103] *See* House Floor Proceedings No. 21 A, 2021 Leg., Reg. Sess., at 2:20:00-4:13:00 (Mar. 10, 2021).
[104] *Id.*

the conservative amendments with one central theme: the use of force standard pays deference to officers' split-second decisions but requires officers act as the "well-trained professionals they are."[105]

Delegate Wilson criticized the conservative amendments as treating officers as ordinary citizens that decided to wake up that morning and "put on a badge and a gun."[106] The new standard, Delegate Wilson argued, shouldn't regard officers as ordinary citizens.[107] In endowing in officers "every right imaginable," society and the law must raise them to a higher standard, a standard that requires officers defer to their police training when making split-second decisions.[108] None of the conservative amendments passed, and section 3-524 remained unchanged.[109]

The entire use of force provision was then removed from H.B. 670[110] and added under the Senate's police reform bill, S.B. 71.[111] While the exact language from Amendment 992612 was not carried over to S.B. 71,[112] the Senate later adopted its own amendment similar to Amendment 992612,[113] and this original deviation from Amendment 992612 is believed to be unintentional.[114]

---

[105] *See* House Floor Proceedings No. 21 A, 2021 Leg., Reg. Sess., at 2:36:00-3:11:00 (Mar. 10, 2021) (statement of Del. C. T. Wilson), https://mgaleg.maryland.gov/mgawebsite/FloorActions/Media/house-21-A?year=2021RS.
[106] *See id.* at 3:07:00-3:11:00 (Mar. 10, 2021) (statement of Del. C. T. Wilson).
[107] *See id.* at 2:36:00-3:11:00 (Mar. 10, 2021) (statement of Del. C. T. Wilson).
[108] *See id.* at 3:00:00-3:11:00 (Mar. 10, 2021) (statement of Del. C. T. Wilson) ("I don't want [officers] to react how I would react, I want [officers] to react as a trained police officer would act . . . this bill asks [officers] to be a well-trained professional in dealing with [their] law enforcement responsibilities. . . this bill gives [officers] the latitude to be police officers; its what's *reasonable*, it's what's *proportional*. I hope that they're trained enough to make that decision . . . this bill asks us to treat [officers] like the professionals they are and raise them to a standard I know that they can meet.").
[109] *Compare* H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021) (first reader), *with* H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021) (third reader).
[110] *Compare* H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021) (third reader), *with* H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021) (enacted).
[111] *Compare* S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (third reader), *with* S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (enacted); *see* S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (amendment 952415).
[112] *Compare* S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (amendment 952415), *with* H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021) (amendment 992612).
[113] S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (amendment 213228).
[114] *See Hearing on S. 71 Amendment 213228 Before the Judiciary Comm.*, 2021 Leg., 442nd Sess. (Md. 2021) https://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=jud&clip=JUD_4_2_2021_meeting_2&ys=2021rs, (statement of Del. Luke Clippinger) (suggesting there

iii. Transfer of the Statute from H.B. 670 to S.B. 71 and the Senate's Revisions

When adopted in the Senate by way of Amendment 952415, the use of force statute read: "a police officer may not use force against a person *unless a police officer under similar circumstances would believe* that the force is necessary and proportional to [prevent a threat or effectuate an arrest]."[115] Several days later Amendment 213228 was adopted, striking "a police officer under similar circumstances would believe that," and replacing it with "under the totality of the circumstances."[116] Read in full with the proposed Amendment, the Statute read: "[a] police officer may not use force against a person unless, under the totality of circumstances, the force is necessary and proportional. . . .").[117]

Then, Amendment 213228 went to the House Judiciary Committee, where it was discussed.[118] A committee member questioned the interpretation of "totality of the circumstances," and expressed concern that an officer's actions would be judged in hindsight rather than what the officer knew at the time force was used.[119] Committee Chair, Delegate Clippinger, responded it was his belief the phrase simply required an officer on the scene to consider the circumstances known to the officer *in light of his or her training*.[120] After its adoption, Amendment 213228 produced the language contained in the final version of the use of force statute, later enacted into law.[121] None of these terms were defined in either the enacted statute, nor any version of S.B. 71.[122]

---

may have been an administrative error in the Senate's original incorporation of the House bill's use of force standard into S. 71; House amendment 992612 was possibly overlooked).

[115] S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (amendment 952415) (emphasis added).

[116] S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (amendment 213228) (potential administrative error in transferring the use of force statute by reverting the provision language to that which was used in H.D. 670 before the successful passage of Amendment 99612. Thus, Amendment 213228 to S. 71 likely reflects an intention to correct this error).

[117] S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (enrolled).

[118] *Hearing on S. 71 Amendment 213228 Before the Judiciary Comm.*, 2021 Leg., 442nd Sess. (Md. 2021).

[119] *Id.* (statement of Del. Michael Griffith).

[120] *Id.* (statement of Del. Luke Clippinger).

[121] MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2022).

[122] *See id.*; *see also* S. 71, 2021 Leg., 442nd Sess. (Md. 2021).

E. BPD Use of Force Policy

The 2019 BPD Use of Force Policy ("BPD Policy") largely resembles the Statute,[123] and legislative history suggests this was intentional.[124] The BPD Policy contains the following instruction:

> Reasonable, Necessary, and Proportional — The review of every Use of Force shall be to determine whether it was reasonable, necessary, and proportional *in light of the Totality of the Circumstances that were known, or should have been known, to the member, and in light of the mandates of BPD Policies*.[125]

In a floor proceeding, S.B. 71 sponsor, Senator Jill Carter, cited the absence of definitional guidance on use of force provided by the Supreme Court and went on to discuss how the BPD Policy provides guidance for the same controlling terms for use of force found in both the BPD Policy and the Statute.[126]

III. ISSUE

A. Existing Federal Issues with Use of Force Standards

Under federal precedent, a police officer's use of force is not excessive if an objectively reasonable police officer "on the scene" would have acted in the same way as the officer charged.[127] Governing terms "necessary" and "proportional" are vaguely defined (if at all).[128] These terms

---

[123] *Compare* BALT. POLICE DEP'T, POLICY 1115: USE OF FORCE (2019) (requiring de-escalation, use of reasonable alternatives to force, and containing the "core principle" that "[m]embers shall use only the force Reasonable, Necessary, and Proportional to respond to the threat or resistance to effectively and safely resolve an incident, and will immediately reduce the level of force as the threat or resistance diminishes."), *with* MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2021).

[124] *See* Senate Floor Proceedings No. 42, 2021 Leg., Reg. Sess., at 5:39:14-5:41:00 (Apr. 7, 2021) (statement of Sen. Jill Carter).

[125] BALT. POLICE DEP'T, POLICY 1115: USE OF FORCE (2019) (emphasis added).

[126] *See* Senate Floor Proceedings No. 42, 2021 Leg., Reg. Sess., at 5:39:14-5:41:00 (Apr. 7, 2021) (statement of Sen. Jill Carter).

[127] *Graham*, 490 U.S. at 396 (citing *Terry*, 392 U.S. at 20-22).

[128] *See, e.g., Graham*, 490 U.S. at 397; *see also* Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 644 (2018).

are typically construed in light of what an objectively reasonable officer would do.[129] This construction poses two distinct but related concerns under the Fourth Amendment.

First, because of an officer's profession, and training emphasizing hostile encounters, an objectively reasonable police officer is conditioned to see possible threats and risks in every situation.[130] Legal scholar and former Canadian officer, Kevin Cyr suggests (and U.S. statistics support[131]), officers' actions are often dictated by *possibility* rather than *probability*.[132] To illustrate: many officers believe the threat of ambush while in their vehicle is greater than the risk of dying by vehicle accident.[133] The data, however, demonstrates officers are six times more likely to die by vehicle accident than by ambush.[134] This flawed focus on the possibility of harm versus probability of harm, undermines unqualified reliance on an objectionably reasonable officer's belief. For this reason, the meaning of terms "necessary," and "proportional" to a reasonable officer may prove inadequate to, or incompatible with, the standard which the public believes the Fourth Amendment requires.[135]

Second, where "reasonable," "necessary," and "proportional," lack tangible explanation, courts routinely pay great, arguably absolute, deference

---

[129] *See*, *e.g., Terry*, 392 U.S. at 30; *e.g.,* Sigman v. Town of Chapel Hill, 161 F.3d 782, 787 (4th Cir. 1998) (citing *Graham*, 490 U.S. at 396).

[130] *See Law Enforcement's "Warrior" Problem*, *supra* note 7, at 228; *see also* Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATL. (Dec. 12, 2014), https://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/ [hereinafter *How Police Training Contributes to Avoidable Deaths*].

[131] *Compare* NAT'L INST. OF JUST., *Survey of Officers on the Use and Care of Body Armor* (2012), https://nij.ojp.gov/topics/articles/survey-officers-use-and-care-body-armor (ninety percent of 1,378 officers surveyed reported wearing body armor), *with* Ashley Halsey III, *For Police, Not Wearing Seat Belts Can be Fatal Mistake*, WASH. POST (Oct. 14, 2012), https://www.washingtonpost.com/local/trafficandcommuting/for-police-not-wearing-seat-belts-can-be-fatal-mistake/2012/10/14/78a8dd10-f207-11e1-892d-bc92fee603a7_story.html (National Highway Traffic Administration reports finding of 733 officer fatalities by vehicle accident, forty-five percent of officers were wearing seatbelts).

[132] *See* Cyr, *supra* note 7, at 675-76 (explaining certain officer safety practices are motivated by possible threats of interpersonal violence (i.e., ambush) rather than being motived by probable threats).

[133] *Compare* NAT'L INST. OF JUST., *supra* note 130, *with* Halsey, *supra* note 130 (statistics suggest officers are more likely to wear body armor than seatbelts); *see also* Cyr, *supra* note 7, at 675 n.63.

[134] *See* FEDERAL BUREAU OF INVESTIGATION, *Crime Data Explorer* (2021), https://crime-data-explorer.app.cloud.gov/pages/le/leoka (listing FBI Crime Data monthly reports from 2021 show officers in the United States are on average six times more likely to die from a vehicle accident than by ambush).

[135] *See How Police Training Contributes to Avoidable Deaths*, *supra* note 129; *see also* Cyr, *supra* note 7, at 674-75.

to the accused officer's "split-second judgment."[136] As in the first concern above, this deference provides a hurdle many plaintiffs cannot overcome.[137]

B. Issues Pertaining to the Maryland Use of Force Statute

i. Lack of Definitional Guidance from the Statute on Terms "Necessary," "Proportional," and the "Totality of Circumstances" May Subjugate Reform Efforts, Allowing for Continued Deference to an Officer's Judgment.

Because the MGA did not define the above controlling terms, a court, applying the new standard under the Statute, must determine how to define the terms.[138] With an absence of definitional guidance in the Statute (and an absence of definitional precedent as discussed *supra*), applying the Statute consistent with legislative intent to reform policing is uncertain.[139]

While a recent opinion issued by the Attorney General of Maryland suggests the legislature did not intend for the Statute to affect civil actions

---

[136] *See Policing Facts*, *supra* note 26, at 865 (discussing *Graham's* reasonableness analysis and consideration of "split-second judgments" has been cited by federal courts on more than 2,300 occasions); *see also* Saucier v. Katz, 533 U.S. 194, 205–08 (2001) (describing the test laid out in *Graham* favors "deference to the judgment of reasonable officers on the scene."); *see also* Jones v. City of Cincinnati, 736 F.3d 688, 694–95 (6th Cir. 2012) (quoting Burchett v. Kiefer, 310 F.3d 937, 944 (6th Cir. 2002)) ("This [reasonableness] standard encompasses 'a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case.'"); *see also* Hinds v. Mohr, 56 F. App'x 591, 593 (4th Cir. 2003) (first quoting *Saucier*, 533 U.S. at 205; and then quoting *Graham*, 490 U.S. at 386) (because police are forced to make split-second decisions, "courts must afford them a measure of deference in their on-the-scene assessments about the application of force to subdue a fleeing or resisting suspect.").

[137] *Cf.* Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 234–36 (2017) (discussing the Supreme Court's failure to consider evidence an officer used a form of deadly force he was not trained on, despite policy that such force was only authorized "after receiving forty-five hours of training."); *cf.* Eliana Machefsky, *The California Act to Save [Black] Lives? Race, Policing, and the Interest-Convergence Dilemma in the State of California*, 109 CALIF. L. REV. 1959, 1972 (2021) (various legal scholars regard courts' reliance on police officers' determination of what is reasonable as flawed, rendering "reasonableness" to a "mere symbolic regulation of police use of force.").

[138] MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2021).

[139] *Id.*

(i.e., § 1983 claims),[140] the Statute inarguably redefines when use of force is necessary.[141] Issues of police use of necessary force in criminal and civil cases both encompass inquiries of reasonableness under the Fourth Amendment.[142] Thus, the Statute's application to civil actions is likely inevitable but unclear due to an absence of explicit intent for the Statute to impact civil actions.

Also unclear from explicit statutory language is whether the MGA intended to provide clarification on *Graham's* definition of "reasonableness."[143] The Statute, in defining what is "necessary and proportional" "under the totality of circumstances," unavoidably implicates "reasonableness."[144] Without direct instruction in the Statute on what is reasonable, the interpretation of "necessary and proportional" under the Statute is uncertain and unpredictable.

Lastly, because the Statute includes several training provisions,[145] it follows the MGA may have intended for inclusion of officer training as a significant factor in use of force analyses.[146] If the MGA intended the Statute to consider an officer's training (in what is necessary under the totality of circumstances), this intention may not materialize due to varied Maryland precedent concerning antecedent events[147] and the Statute's silence on antecedent events.[148]

ii. If the Statute Rejects the Reasonable Officer Standard, Courts Must Apply a Novel Reasonableness Standard Without Definitional Guidance from the Statute or Supreme Court and Maryland Precedent.

Because the MGA amended S.B. 71 (which later became the Statute), striking the language "a police officer under similar circumstances would

---

[140] *See* Att'y General of Md., Police officers – Use of Force Statute – Meaning of the Requirement that Force Used by Officers Must Be "Necessary" and "Proportional," Opinion Letter (Feb. 25, 2022).
[141] PUB. SAFETY § 3-524.
[142] *See supra* note 3.
[143] PUB. SAFETY § 3-524 (term "reasonableness" absent from statute).
[144] *See* RESTATEMENT (SECOND) OF TORTS, § 132 (AM. L. INST. 1965) (police use of force "is not privileged if the means employed are in excess of those which the actor reasonably believes is *necessary*.") (emphasis added).
[145] PUB. SAFETY § 3-524.
[146] *See, e.g.,* Maguire v. State, 192 Md. 615, 623, 65 A.2d 299, 302 (1949) ("[I]t is the most natural and general exposition of a statute to construe one part of the statute by another part of the same statute.").
[147] *See supra* Section II.A.ii.
[148] PUB. SAFETY § 3-524.

believe,"[149] a logical interpretation could provide that the legislature intended to eliminate an objectively reasonable officer's belief from the calculus of reasonableness in cases of excessive force. Such an interpretation would mean the Statute intends to apply a reasonable person (or civilian) standard. This standard would abandon Supreme Court and Court of Appeals of Maryland precedent,[150] further complicating the already multifaceted field of excessive force and Fourth Amendment violations.

Alternatively, the MGA could have intended to table providing a definition for "reasonable." But, because reasonableness is inextricably linked with what is a necessary use of force,[151] courts must still engage in a reasonableness analysis in excessive force claims. Courts then must construe possibly the most central mechanism of use of force (i.e., reasonableness) without any guidance from the Statute.

IV. SOLUTION

A. Under The Statute, Reasonableness is Still Judged from the Perspective of the Objectively Reasonable Police Officer.

Despite Maryland lawmakers removing "a police officer under similar circumstances" from S.B. 71, legislative history[152] and plain language interpretation does not provide that use of force be judged by any person *other than* a reasonable officer.[153] Thus, the Statute does not require or propose a deviation from decades long federal and state precedent, and Maryland courts will not be tasked with application of a novel reasonableness standard.[154]

---

[149] *See supra* note 116 and accompanying text.
[150] *See, e.g., Graham*, 490 U.S. at 396-97; *see, e.g., McGriff*, 361 Md. at 452, 456, 462, 464-65, 762 A.2d at 56, 58, 62-63.
[151] *See* RESTATEMENT (SECOND) OF TORTS, § 132 (AM. L. INST. 1965) (police use of force "is not privileged if the means employed are in excess of those which the actor reasonably believes is necessary."); *see also* Cyr, *supra* note 7, at 665.
[152] Legislative history evinces an intent to demand that an objectively reasonable police officer is an officer who applied their training in deciding to use force. *See* discussion *supra* Sections II.D.i., II.D.ii.
[153] H. Judiciary Comm., 442nd Sess., Third Reading SB0071/952415/1 at 6 (Md. 2021); MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2021).
[154] PUB. SAFETY § 3-524; *see Graham*, 490 U.S. at 396-97; *see also Richardson*, 361 Md. at 452, 762 A.2d at 56 (citing *Graham*, 490 U.S. at 396-97).

B. The Statute Provides Greater Definitions for Use of Force, Consistent with Supreme Court Precedent.

i. The "Totality of Circumstances" Should Include an Officer's Knowledge of Their Training.

Furthermore, while the Statute does not supplant the "objectively reasonable" police officer standard, the Statute does require an officer meet a higher threshold of reasonableness than previously required.[155] Officers under the Statute, must undergo de-escalation training and be trained in the use of reasonable alternatives (force less likely to cause death or serious injury).[156] These training requirements are contained *within* the Statute that provides officers "may not use force against a person unless, under the totality of the circumstances, the force is necessary and proportional to [prevent threat of harm or effectuate a law enforcement objective]."[157] Now, the use of force standard makes clear, the objectively reasonable officer considered their training the moment he or she decided what force was *necessary*.[158] While inarguably, these use of force trainings have always been conducted with the expectation officers will apply their training, now, with the weight of the Statute behind it, officers must be able to demonstrate their training was used in making the decision to use force.

Precedent in Maryland requires the "totality of circumstances" include what the officer *knew* at the moment force was used.[159] Judge Harrell's concurrence in *Richardson* provides a workable solution for reconciling the Statue and contrary Maryland precedent.[160] First, like Judge Harrell, I propose the training requirements contained within the Statute should be relevant under the totality of circumstances, although not dispositive, to the reasonableness inquiry.[161]

By making the officer's training relevant to considering the "objectively reasonable officer," a jury may consider the fact the officer was trained in (or knew of) de-escalation tactics and reasonable alternatives to force at the moment force was used. Such a proposal is consistent with the

---

[155] PUB. SAFETY § 3-524; *see Richardson*, 361 Md. at 437, 451-52, 762 A.2d at 56.
[156] PUB. SAFETY § 3-524(h).
[157] PUB. SAFETY § 3-524(d)(1).
[158] *See id.*; *see also infra* note 160.
[159] *See Richardson*, 361 Md. at 464-65, 762 A.2d at 62-63 (emphasis added).
[160] *See supra* text accompanying notes 47-53.
[161] *Richardson*, 361 Md. at 510, 762 A.2d at 87 ("[C]onsideration of police guidelines and procedures is . . . some of the many factors to be considered and should not alone be deemed dispositive of the question of reasonableness.").

2022 Court of Appeals of Maryland decision in *Koushall v. State*.[162] There, the reasonableness of an officer's use of force encompassed what a reasonable officer *with the same training as the accused*, would have done under the same circumstances.[163] Support for this proposal is further found in the analogous use of force standard set by the BPD Policy.[164] The BPD Policy explicitly provides that use of force must be determined "in light of the [t]otality of [c]ircumstances . . . known [or should be known to the officer], *and in light of the mandates of BPD Policies*."[165]

Second, I suggest, (and discuss *infra*), the *Richardson* concurrence is the better approach to consideration of an officer's pre-seizure actions and antecedent events.[166] Relating to a circumstance under the totality of circumstances, the officer's *pre-seizure conduct* must be reasonable for the resulting force to truly be necessary. Such an approach is already followed by many federal courts throughout the country[167] and resolves the issue of "officer-created jeopardy."[168]

ii. Unnecessary Actions by an Officer and the Officer's Training Should be Included in Determining Whether Use of Force was "Necessary."

Construction of the controlling term "necessary" should be informed by the realities of the law enforcement profession, but the term must be construed and defined to allow for more universal and predictable application. Kevin Cyr's recommendations[169] for defining controlling terms is consistent with legislative intent for a higher use of force standard[170] and is compatible with Supreme Court precedent.[171] As an officer, Cyr's definitional recommendations pay deference to the objectively reasonable officer but provides for an ascertainable and measurable application.[172]

---

[162] *See Koushall*, 479 Md. at 150, 277 A.3d at 418 (citing *Graham*, 490 U.S. at 388) (where officer charged criminally for use of excessive force, the court conducted a Fourth Amendment reasonableness analysis).
[163] *Id.*
[164] *See supra* text accompanying notes 122-25.
[165] *See supra* text accompanying note 124 (emphasis added).
[166] *See Richardson*, 361 Md. at 501–03, 762 A.2d at 83–84 (Harrell, J., concurring).
[167] *See id.* at 486–87, 762 A.2d at 74–75 (Harrell, J., concurring).
[168] *See* Cyr, *supra* note 7, at 668 ("Officer-created jeopardy [occurs] where an officer takes unnecessary action which then creates a situation that requires force to resolve.").
[169] *See* Cyr, *supra* note 7, at 663-64.
[170] *See supra* Section II.D.
[171] *See supra* Section II.A.i.
[172] *See* Cyr, *supra* note 7, at 665-66, 673-74.

In recognition of his own experiences as an officer, Cyr embraces the need (and allowance) for officers to make split-second decisions while challenging vague definitions.[173] "Necessary," Cyr proposes should begin with a broad inquiry into whether an arrest was reasonable in the first place, and if the force used became necessary only after the officer's unnecessary action.[174]

Additionally, while the training provisions in the Statute are largely already required of officers, under the Statute, a reasonable officer *implements* their training in deciding what force—if any—is necessary. Citing a University of Alberta study of a particular Canadian police agency, Cyr reveals an intersection between training and necessity.[175] Researchers studying the agency found, where officers underwent training to deal with individuals with mental health issues (to include training on communication, de-escalation, and mental health awareness), the agency experienced a forty percent decrease in instances of force when engaging with those who were mentally ill.[176] Seemingly, mental health training (knowledge thereof), makes force "necessary" less often.[177] In construing "necessary" within the Statute, I propose what is "necessary" requires a reasonable officer: (1) acted reasonably leading up to the moment force was used; and (2) implemented their training when making the judgment to use force.[178] This proposal, again, is consistent with the analogous BPD policy.[179]

iii. "Proportional" Force Should Require the Officer Made an Assessment of a Suspect's Resistance and Implemented the Minimum Level of Force Required to Overcome the Suspect.

I propose the term "proportional" in the Statute be defined separately, and consistent with Cyr's recommendations. Further grounded in his experience as an officer, Cyr proposes that the proportionality of an officer's force relates to the level of force an officer needs to *overcome* resistance.[180]

---

[173] *See id.* at 666.
[174] *See id.* (necessary force may be unreasonable where officer unnecessarily places his or herself in front of a fleeing vehicle).
[175] *See id.* at 667-68.
[176] *See id.* (other internal police initiatives were launched in tandem with the training and may have also contributed to this reduction in use of force).
[177] *See id.*
[178] *See supra* discussion IV.B.i. (under the totality of circumstances, an officer's knowledge of their training is a relevant circumstance. I further propose, a reasonable officer must *make a determination* about what force is "necessary" informed by their knowledge of training).
[179] *See supra* note 163 and accompanying text.
[180] *See* Cyr, *supra* note 7, at 670.

Resistance "exist[s] on a spectrum of severity, from merely refusing to cooperate, to pushing the officer away, assaulting. . . to facilitate escape, assaulting. . .with the goal of injuring the officer, or. . . trying to kill the officer."[181] Cyr elucidates the force which an officer must meet a suspect's resistance must be that which "overwhelms the suspect's will to fight, or their ability to fight."[182]

Cyr argues that overwhelming a suspect's ability to fight is a dangerous and unpredictable endeavor.[183] Assessing the appropriate level of force to overcome a suspect's ability to resist can lead to an officer using less force, failing to overcome the suspect's resistance, and possibly fuel the suspect's will to fight in the window of time the officer failed to gain control.[184]

In interpreting the term "proportional," I propose Cyr's recommendations on application of proportionality be adopted. The two considerations by an officer regarding proportionality can be condensed into: (1) "determining the difficulty of defeating an adversary's ability or will to fight" (officer considered factors like relative size of suspect and officer, and whether the suspect is under the influence); and (2) "assessing the severity of repercussions" if the officer attempts to use the "least amount of force which might" overcome resistance (if doing so would result in "unnecessary danger to themselves or others").[185]

V. CONCLUSION

While the Statute provides little guidance on its application to cases of police officer use of force, a straightforward interpretation, and review of legislative history, provides the Statute elevates, but does not deviate from, the *Graham* standard. Under the Statute, use of force is still judged through the lens of an objectively reasonable officer, but a reasonable officer is expected to apply their training when deciding what force is necessary. Statutory construction and legislative history evidence an intent to create this higher standard. Moreover, given an absence of definitional precedent federally and within Maryland, "necessary" and "proportional" can and

---

[181] *See id.*
[182] *See id.* (explaining a suspect's *ability to fight* is overcome when they are placed in handcuffs, and their *will to fight* is overcome when they are convinced to voluntarily surrender).
[183] *See id.* at 670-72.
[184] *See id.* at 670-73.
[185] *See* Cyr, *supra* note 7, at 673.

should finally be tangibly defined as consistent with this comment's proposals.