

## WHEN IS POLICE VIOLENCE JUSTIFIED?

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### INTRODUCTION

The Supreme Court’s Fourth Amendment doctrine regulating the use of force by police officers is deeply impoverished. Although lower courts frequently rely on this doctrine in civil and criminal cases alleging excessive force by police officers, the Court’s standard is indeterminate and undertheorized, particularly as applied to nondeadly force.<sup>1</sup> After nearly twenty years of silence on the issue, the Supreme Court finally turned again to the constitutionality of police acts of violence last year in *Scott v. Har-*

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<sup>1</sup> The lower federal courts have little improved the situation. As Bill Stuntz put it, “One searches in vain for any body of case law that gives this standard some content.” William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1043–44 n.93 (1995) (discussing the lack of attention in federal case law to standards governing use of force, particularly nondeadly force).

*ris.*<sup>2</sup> Yet, rather than improve its confused doctrine, the Court made matters worse. Far from providing a principled account of when police uses of force are justified, it left the law more incomplete and indeterminate than ever.

Criminal law already provides a well-established conceptual structure for deciding when, how, and why one person may justifiably use force against another. It does so in the context of justification defenses—such as self-defense, defense of others, and the public authority defense—each of which differentiates instances of legitimate force from impermissible exercises of violent will. Justification law provides a mechanism for balancing individual interests with our moral obligations to each other: It limits the interests we may defend, measures our need to respond to attacks, balances the difficulty of responding quickly to threats with the costs of our errors, and incorporates deontic limits on our permissible responses to wrongdoing. Assessing the constitutionality of police uses of force requires balancing precisely the same kinds of considerations. As a result, the law of justification provides a natural and powerful framework for evaluating the force used by law enforcement officers.

In this Article, I argue that the concepts that structure justification defenses can and should be imported, subject to appropriate modifications, into the Fourth Amendment doctrine regulating police violence. Specifically, the law of justification defenses permits individuals to use force to serve particular well-defined interests, such as to protect themselves or others, under specific, carefully delineated conditions, i.e., when that force is necessary to protect against an imminent threat to one of those interests and is proportional to that threat.<sup>3</sup> Analogously, I contend that the Fourth Amendment permits police uses of force only to serve directly the state's distinct interests in (1) facilitating its institutions of criminal law, most commonly by enabling a lawful arrest; (2) protecting public order; and (3) protecting the officer from physical harm. Moreover, even if one of these interests is at stake, a use of force should be considered unreasonable—and therefore unconstitutional under the Fourth Amendment—unless it is a response to an imminent threat to one of these interests, the force reasonably appears necessary in both degree and kind to protect the interest, and the harm the force threatens is not substantially disproportionate to the interest it protects. In this way, the substructure of justification defenses can be used to analyze whether a police use of force is constitutional.

Of course, police officers and civilians are not similarly situated: Officers act with state authority, they are often not permitted to retreat, and they are trained and expected to use force. These differences affect how the concepts of imminence, necessity, and proportionality that comprise the jus-

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<sup>2</sup> 127 S. Ct. 1769 (2007).

<sup>3</sup> See 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* §§ 10.4–10.7 (2d ed. 2003); 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 131 (1984).

tification standard should be applied to police uses of force, and these differences are not incidental. Instead, they reveal the deep dual structure of policing. Police officers use force as an authorized form of state coercion, but they do so in tense and often emotionally charged interpersonal encounters. An officer using force to arrest a subject is neither entirely a neutral actor, detached and disinterested, charged with carrying out the will of the state, nor entirely an individual acting in the heat of the moment, vulnerable and in harm's way, perhaps vengeful and afraid. Strangely but inevitably, he<sup>4</sup> is both.

It is this combination of state authority and human agency that distinguishes police violence from other forms of state coercion and from other forms of justified force by individuals. Because police uses of force are both determined and imposed by persons who are under threat, these acts are unlike punishment, the paradigmatic form of state coercion, which is detached, impersonal, and institutionally enacted. Yet, because police officers are empowered and trained by the state, prepared for violence, and denied the choice of retreat, their uses of force are also unlike self-defense, the paradigmatic form of justified individual violence. Neither purely of the state nor of the individual, police violence has remained confusing and dangerously unclear to juries, judges, and the public precisely because of its dual character. Although the factual contexts in which police uses of force arise make incidents of force inevitably complex and difficult to assess, understanding the unique character of police violence clarifies its proper scope and limits.

Like jurists, scholars have overlooked the specific blend of state authority and individual agency inherent in police violence. Instead, disciplinary norms have led scholars either to explore justifications for state coercion entirely abstracted from policing or to focus exclusively on the cause and prevention of police misconduct without considering the normative grounds that justify and limit the state's use of force through police officers. Thus, when contemporary political philosophers consider state coercion, they usually do so in the context of punishment.<sup>5</sup> As a conse-

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<sup>4</sup> Throughout this Article, I use masculine pronouns to include both male and female suspects and police officers, both because it is convenient and because it reflects the empirical realities of criminal and police populations. See LAWRENCE A. GREENFELD & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, WOMEN OFFENDERS 1 (1999) ("Based on the self-reports of victims of violence, women account for about 14% of violent offenders . . ."); MATTHEW J. HICKMAN & BRIAN J. REAVES, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2003, at 7 (2003) ("Of the 451,737 full-time sworn personnel in local police departments as of June 2003, approximately 11% were women.").

<sup>5</sup> See, e.g., DAVID A. HOEKEMA, RIGHTS AND WRONGS: COERCION, PUNISHMENT AND THE STATE 126-46 (1986) (exploring theoretical justifications for state coercion and considering their application only in the context of punishment). There has long been extensive jurisprudential attention to the question of justifying punishment. See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); PUNISHMENT: A PHILOSOPHY AND PUBLIC AFFAIRS READER vii (A. John Simmons et al. eds., 1995) ("[J]ustifying legal punishment has remained at the heart of legal and social philosophy from the very

quence, they consider state-applied force without recognizing the significance of the actors who implement that force or the special conditions of policing as a form of state coercion. Social scientists, by contrast, have acknowledged the actors, emphasizing the psychological, sociological, and organizational factors that influence police violence.<sup>6</sup> Yet they have failed to recognize policing as a distinctive state enterprise arising out of the state's responsibility to protect freedom by creating order. They have therefore neglected to offer accounts of why and when police uses of force are legitimate.<sup>7</sup> Criminal procedure scholars have largely focused on a set of police activities—searches, seizures of property, interrogations, and techniques of community policing—other than the use of force.<sup>8</sup> Even when legal scholars have addressed excessive police violence, they have considered the topic from an entirely pragmatic perspective, focusing, for example, on why existing avenues of criminal and civil litigation are inadequate tools for redressing and curbing police misconduct,<sup>9</sup> or why existing case law on the constitutionality of excessive force is inadequate to address the problem of

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earliest recorded philosophical texts to the most recent.”). However, philosophers have devoted scant attention to justifying the equally coercive practices of policing.

<sup>6</sup> See, e.g., JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* (1993) (explaining excessive police violence as resulting from sociological and cultural aspects of police work); JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* (1978) (providing classic accounts of varying organizational styles of policing and suggesting that watchman-style departments may contribute to the excessive use of force); Hans Toch, *The Violence-Prone Officer*, in *POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE* 94 (William A. Geller & Hans Toch eds., 1996) [hereinafter *POLICE VIOLENCE*] (discussing individual variables that may contribute to excessive force by “problem” officers).

<sup>7</sup> See, e.g., Robert W. Worden, *The Causes of Police Brutality: Theory and Evidence on Police Use of Force*, in *POLICE VIOLENCE*, *supra* note 6; see also GEOFFREY P. ALPERT & ROGER G. DUNHAM, *UNDERSTANDING POLICE USE OF FORCE: OFFICERS, SUSPECTS, AND RECIPROCITY* 171 (2004) (describing research on use of force and arrests as “atheoretical”). Alpert and Dunham are exceptional in proposing a theoretical approach that at least indirectly considers the role of the state. They contend that force is explained by the interaction between the suspect and the officer who expects a suspect to defer and acts to ensure that deference when the citizen fails to fulfill the officer's expectation. This theory, while useful in explaining why officers may sometimes use too much force, assumes the existence of the officers' legal and social power, and therefore does not justify or explain the limits of police authority to use force. See *id.* at 171–85.

<sup>8</sup> See, e.g., Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998); Robert Weisberg, *Foreword: A New Agenda for Criminal Procedure*, 2 BUFF. CRIM. L. REV. 367 (1999).

<sup>9</sup> See, e.g., Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004); Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275 (1999); Mary M. Cheh, *Are Lawsuits the Answer to Police Brutality?*, in *POLICE VIOLENCE*, *supra* note 6, at 247; John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789; David Rudovsky, *Police Abuse: Can the Violence be Contained?*, 27 HARV. C.R.-C.L. REV. 465, 480–88 (1992).

police interaction with the mentally ill.<sup>10</sup> By contrast, this Article describes the limits of the state's use of force by police officers and the officers' role in carrying out state commands. Moreover, it demonstrates that that relationship can be captured doctrinally by the analogy to justification defenses: The state's legitimate but limited authority is reflected in the interests that justify the use of force, and the intersubjective and situational nature of individual police uses of force is captured by applying concepts of imminence, necessity, and proportionality to uses of force that serve legitimate state interests.

In Part I of this Article, I describe the constitutional landscape governing police uses of force, including the Court's recent foray into the substantive standard for the use of force in *Scott v. Harris*. I argue that the Supreme Court's few opinions fail to answer basic questions of why, when, and how much force officers can use, while at the same time permitting, if not encouraging, the use of irrelevant and prejudicial considerations in evaluating whether an officer acted reasonably. While the Court has declared some uses or degrees of force within bounds or beyond the pale, it has failed to provide a principled basis for determining when police uses of force are reasonable under the Fourth Amendment. This has had the effect of stunting the development of the law in the lower federal courts: While the intuition of federal judges usually leads to results that seem reasonable and are consistent with the Court's doctrine, the reasoning in these cases is ad hoc, often inconsistent, and sometimes ill-considered. Because the doctrine on police violence is underdeveloped, the outcomes of future cases are largely unpredictable, even by the Supreme Court's own measure.<sup>11</sup> This unpredictability turns out to be of enormous consequence to federal civil rights litigation. Under the doctrine of qualified immunity, officers are not civilly liable under federal civil rights law for using excessive force unless the unlawfulness of their conduct is apparent from prior case law.<sup>12</sup> Since current Fourth Amendment doctrine is often too indeterminate to permit officers to determine the lawfulness of a particular use of force ex ante from past Supreme Court and lower federal opinions, qualified immunity plays an overly expansive role in determining the outcome of excessive force litigation. Thus, the indeterminate nature of the Court's doctrine leads many unconstitutional uses of force to go uncompensated and undeterred.

Parts II and III provide an alternative to the Court's failed doctrine that is analogous to the law of justification defenses. In order to establish a justification defense, there must be an interest weighty enough to justify the

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<sup>10</sup> See, e.g., Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 267–89 (2003).

<sup>11</sup> See *Brosseau v. Haugen*, 543 U.S. 194, 198–200 (2004) (per curiam); *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001); see also *infra* notes 110–13 and accompanying text.

<sup>12</sup> See *infra* notes 101–09 and accompanying text.

risk of harm created by the use of police force. In Part II, I argue that while the interests protected by justification defenses are helpful to consider, they are insufficiently tailored to policing as a form of state coercion to provide an account of the limits of police uses of force. More importantly, I argue that the traditional retributive and utilitarian justifications for punishment—the paradigmatic form of state coercion—also fail to provide an adequate justification for state force exercised through the police. Instead, I argue that only two state interests justify police uses of force: the implementation of the adjudicative processes of criminal law and the preservation of public order.

In addition to these primary interests, however, the state has a derivative interest in using force to protect police officers so that the officers may serve the state's interests in effectuating the adjudicative process and maintaining public order. Thus, rather than protect its citizens' freedom by demanding that officers contract away any legal right to defend themselves while acting in the line of duty, states should and do permit officers to use force to defend themselves as well as the state's interests. The state's derivative interest, however, is not without limits. Not only is the force used to protect officer safety subject to deontic constraints—which reflect the moral rights of officers and suspects alike—but the scope of the state's interest in protecting officers depends on social conditions, including the societal costs of police uses of force. In considering the justifications for state violence in light of the social and institutional constraints, the analysis in Part II is methodologically sympathetic to recent criminal procedure and constitutional law scholarship that has considered the effect of contextual interests and incentives on the legal regulation of government officials.<sup>13</sup> I conclude that the legitimate exercise of force by police officers must assist the institutions of criminal justice, preserve public order, or protect an officer. Any other use of force is simply illegitimate.

In Part III, I argue that the concepts of imminence, necessity, and proportionality that make up justification defenses in criminal law provide a coherent conceptual framework and a set of practical legal principles for assessing the constitutionality of police uses of force against citizens under the Fourth Amendment. While the law of justification defenses provides the starting point for such a standard, that law must be adjusted in crucial

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<sup>13</sup> See, for example, in constitutional law, Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005), and Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000), and in criminal procedure, William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006), and William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997). Such work can be viewed ultimately as applying to public law scholarship some of the insights that have grown out of the work of Ronald Coase, who differentiated a hypothetical, efficient world from the real one in order to demonstrate that transaction costs in the real world affect the appropriate choice of private law rules. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

ways to accommodate both the state's interests and the unique character of police power.

No legal standard can eliminate the difficulty of analyzing and making judgments about the complex interactions out of which excessive force claims arise. Nor can any legal framework make Fourth Amendment law fully determinate and predictable. Nevertheless, this Article supplies a more theoretically grounded and doctrinally rigorous framework for determining when police uses of force are justified, one that reflects the dual nature of policing and permits lower federal courts to develop the law in a principled fashion over time. It also provides a reasoned basis for explaining and evaluating the intuitions underlying both federal court decisions and general public opinions about excessive police violence. Only by taking seriously the role of the state *and* the limitations of human actors can we come to a sound constitutional assessment of police uses of force—an assessment which promises more reasoned, predictable, consistent, and just results in civil and criminal cases.

#### I. INADEQUACY AND INDETERMINACY IN POLICE USE OF FORCE LAW

Police violence never arises in a vacuum. During an arrest, an officer might give verbal commands to a suspect to stop, to keep his hands visible, to turn around and place his hands against the wall, to submit to a pat-down, to put his hands behind his back for handcuffing, to come along to the car, to get in, to get booked at the station. Most suspects are compliant and require no more than a guiding arm, but those who refuse or resist, and occasionally those who do not, may provoke a forcible response. Subjects of police uses of force<sup>14</sup> often respond with allegations of law enforcement brutality. Sometimes these allegations are baseless, a product of misunder-

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<sup>14</sup> One reasonable definition of police force is that it includes:

any physical strike or instrumental contact with a person; any intentional attempted physical strike or instrumental contact that does not take effect; or any significant physical contact that restricts the movement of a person. The term includes the discharge of firearms; the use of chemical spray, choke holds or hard hands; the taking of a subject to the ground; or the deployment of a canine. The term does not include escorting or handcuffing a person, with no or minimal resistance.

Consent Judgment: Conditions of Confinement at 1–2, *United States v. City of Detroit*, No. 03-72258 (E.D. Mich., July 18, 2003), *available at* [http://www.usdoj.gov/crt/split/documents/dpd/detroitpd\\_holdingcell\\_613.pdf](http://www.usdoj.gov/crt/split/documents/dpd/detroitpd_holdingcell_613.pdf) (cited with approval in INT'L ASS'N OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT 116 (2006) [hereinafter IACP, PROTECTING CIVIL RIGHTS]). Force is often distinguished by whether it is deadly or non-deadly, or "less-than-lethal." Deadly force includes force that is "likely to cause death or serious physical injury," including, for example, shooting someone with a gun or hitting someone in the head with something hard. Memorandum of Agreement Between the United States Department of Justice and the District of Columbia and District of Columbia Metropolitan Police Department (June 13, 2001), *available at* <http://www.usdoj.gov/crt/split/documents/dcmoa.htm> (cited in IACP, PROTECTING CIVIL RIGHTS, *supra*, at 116). Less-than-lethal weaponry includes (when not directed at the head) batons, flashlights, chemical agents like pepper spray, conducted energy devices such as tasers, and police dogs. IACP, PROTECTING CIVIL RIGHTS, *supra*, at 116.

standing what might justify lawful force or of false accusation. Other times they represent a just demand for recognition and redress for damaged bodies and spirits.

Courts typically confront allegations of excessive force during arrest in federal civil suits under 42 U.S.C. § 1983,<sup>15</sup> which makes individuals liable for depriving others of their constitutional rights while acting under color of law.<sup>16</sup> Using this statute, subjects of police uses of force claim that the force violated their constitutional right under the Fourth Amendment “to be secure in their persons . . . against unreasonable . . . seizures.”<sup>17</sup> Federal prosecutors also charge federal, state, and local law enforcement officers with violating the Fourth Amendment by using excessive force under the criminal equivalent to § 1983, 18 U.S.C. § 242, which makes it a crime to willfully deprive any person of his or her federal or constitutional rights while acting under color of law.<sup>18</sup> Since 1961, when contemporary § 1983 litigation began,<sup>19</sup> the law of police violence has been dominated by thousands of § 1983 suits alleging excessive force by police officers<sup>20</sup> and hundreds of federal criminal convictions of police officers for the same.<sup>21</sup>

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<sup>15</sup> See, e.g., *Scott v. Harris*, 127 S. Ct. 1769 (2007); *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Brower v. County of Inyo*, 489 U.S. 593 (1989).

<sup>16</sup> 42 U.S.C. § 1983 (2000). An action is taken “under color of law” if it involves the “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *United States v. Classic*, 313 U.S. 299, 326 (1941); see also *United States v. Price*, 383 U.S. 787, 794 n.7 (1966) (stating that “under color of law” has the same meaning under 18 U.S.C. § 242 and 42 U.S.C. § 1983).

<sup>17</sup> U.S. CONST. amend. IV; see *Graham v. Connor*, 490 U.S. 386, 395 (1989) (“[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard.”); *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (concluding that although not all police-citizen interactions constitute Fourth Amendment seizures, an officer has seized an individual within the meaning of the Fourth Amendment when “by means of physical force or show of authority, [the officer] has in some way restrained the liberty of [the] citizen”).

<sup>18</sup> See, e.g., *United States v. Brugman*, 364 F.2d 613 (5th Cir. 2004) (federal); *United States v. Dise*, 763 F.2d 586 (3d Cir. 1985) (state); *United States v. Christian*, 342 F.3d 744 (7th Cir. 2003) (local).

<sup>19</sup> See *Monroe v. Pape*, 365 U.S. 167 (1961) (permitting a damages action against police officers for a Fourth Amendment violation in a lawsuit brought under § 1983 and clearly indicating for the first time that § 1983 could be used as a federal remedy against unconstitutional local police action even when that action was not authorized by law or custom).

<sup>20</sup> Good statistics for the number of civil suits against police officers or departments for excessive force are not available. See Carol A. Archbold & Edward R. Maguire, *Studying Civil Suits Against the Police: A Serendipitous Finding of Sample Section Bias*, 5 POLICE Q. 222, 223–30 (2002); Cheh, *supra* note 9, at 261. Westlaw indicates that there are more than 2300 federal cases that cite *Graham v. Connor*, 490 U.S. 386 (1989), for some aspect of the constitutional standard governing excessive force, although most excessive force suits probably have not resulted in an opinion.

<sup>21</sup> Statistics on criminal excessive force cases are also quite limited. See U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2007, at 80 tbl.D-2 (2007), available at <http://www.uscourts.gov/caseload2007/tables/D02DMar07.pdf> (indicating that 548 defendants were charged with federal civil rights offenses in five year period between 2003 and 2007); Cheh, *supra* note 9, at 251. Although this number includes hate crimes and religious interference cases as well as official misconduct by law en-

Clearly, when the law confronts claims under these statutes that an officer used too much force during an arrest, the central question for federal liability is what constitutes constitutionally excessive force under the Fourth Amendment.<sup>22</sup> Despite the legal and social importance of this question, however, the federal courts have said relatively little about how to determine what constitutes an inappropriate use of force. The Supreme Court has addressed the question directly three times, in *Tennessee v. Garner*<sup>23</sup> in 1985, in *Graham v. Connor*<sup>24</sup> in 1989, and recently, in April 2007, in *Scott v. Harris*.<sup>25</sup> In this Part, I argue that the doctrine articulated in these cases is deeply problematic. It provides unprincipled, indeterminate, and sometimes simply misleading guidance to lower courts, police officers, jurors, and members of the public because it fails to articulate a systematic conceptual framework for assessing police uses of force. It does not delineate the legitimate interests that justify police uses of force, and it does not answer adequately the most basic questions about police uses of force: *when* a police officer may use force against a citizen, *how much* force he may use, and *what kinds* of force are permissible.

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forcement officers, the majority of federal criminal civil rights complaints allege misconduct by law enforcement officers and other public officials. See U.S. Dep't of Justice, Criminal Section, Civil Rights Division, Overview, <http://www.usdoj.gov/crt/crim/overview.htm> (last visited Dec. 14, 2007).

<sup>22</sup> Traditionally, state courts heard most excessive force litigation, and state courts continue to hear civil and criminal cases alleging excessive force. Although one might argue that states should lead the regulation of police violence with the Fourth Amendment a more distant constitutional backstop, such a view is difficult to accord with the constitutional language of "reasonableness," the significant historical role the federal government has played in protecting individuals against local official violence, and public concern about continuing local reluctance to hold police officers liable for excessive force. Thus, the centrality of the Fourth Amendment standard is neither ephemeral nor unwarranted. Nevertheless, a vigorous local role in regulating excessive force is foundational: State and local governments in the first instance authorize and limit police authority, including the authority to use force. Thus, states, localities, and law enforcement agencies may prohibit particular methods of using force—such as ramming cars—or prohibit force in certain situations—such as shooting at moving vehicles—regardless of whether such uses of force are constitutionally permissible. Moreover, these institutions shape the extralegal processes that influence police violence: they provide for the selection and training of officers; they select the leadership that shapes and regulates local police culture; and they specify the regulation of police violence through early intervention strategies, internal administrative review, external auditing, and civilian review. Fourth Amendment doctrine has significant power to influence officer training and decisionmaking, but it is only one of many factors that do so.

<sup>23</sup> 471 U.S. 1 (1985).

<sup>24</sup> 490 U.S. 386 (1989).

<sup>25</sup> 127 S. Ct. 1769 (2007). On other occasions, the Court has addressed aspects of the legal regulation of police use of force during arrest without discussing the Fourth Amendment standard governing such force. See, e.g., *Brosseau v. Haugen*, 543 U.S. 194 (2004) (discussing appropriate qualified immunity inquiry in police force cases under the Fourth Amendment); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that plaintiff did not demonstrate a substantial likelihood of imminent recurrence of his injury sufficient to seek an injunction against the police department's use of chokeholds).

A. *Garner, Graham, and Scott*

Edward Garner was an eighth grader in Memphis, Tennessee when police officer Elton Hymon saw him fleeing across the yard of a house that had been reported to have a prowler.<sup>26</sup> Hymon called out to Garner. When he then saw Garner start over a fence, Hymon shot him in the back of the head, killing Garner to prevent his escape.<sup>27</sup> Although Hymon believed Garner was unarmed, he also believed that Garner would easily outrun him if he made it over the fence.<sup>28</sup> Cleamtree Garner, Edward's father, sued the officer, the Memphis Police Department, its director, the mayor, and the city of Memphis in federal district court for monetary damages under 42 U.S.C. § 1983.<sup>29</sup>

Using an approach developed in the context of evaluating government searches and seizures conducted without probable cause,<sup>30</sup> the Supreme Court in *Garner* stated that determining the reasonableness of police uses of force requires balancing an individual's interests against those of the government by looking at the "totality of the circumstances."<sup>31</sup> The Court then considered the interests that arise in cases like Garner's. On the one hand, the average individual has an "unmatched" interest in his own life, and the individual and society have an interest in the "judicial determination of guilt and punishment." The Court took both of these interests to counsel against permitting deadly force.<sup>32</sup> On the other hand, the government's interest in effectively enforcing its criminal laws counsels in its favor.<sup>33</sup> On balance, the Court reasoned, where the suspect is "nonviolent," the government's interests in effecting the arrest are insufficient to justify killing a suspect.<sup>34</sup>

Lower court cases following *Garner* have taken the decision to establish a bright-line rule for the use of force against fleeing suspects that deadly force is justified—which is to say constitutionally reasonable—only against dangerous felons in flight<sup>35</sup>:

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he

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<sup>26</sup> *Garner*, 471 U.S. at 3, 4 n.2.

<sup>27</sup> *Id.* at 3–4.

<sup>28</sup> *Id.* at 4 & n.3.

<sup>29</sup> *Id.* at 5.

<sup>30</sup> See, e.g., *United States v. Place*, 462 U.S. 696, 703 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *Camara v. Municipal Court*, 387 U.S. 523, 536–537 (1967).

<sup>31</sup> *Garner*, 471 U.S. at 7–8.

<sup>32</sup> *Id.* at 9.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 11–12.

<sup>35</sup> See, e.g., *Martin v. Dishong*, 57 Fed. App'x 153, 155 (4th Cir. 2003); *Kuha v. City of Minnetonka*, 365 F.3d 590, 598 n.2 (8th Cir. 2003); *Abraham v. Raso*, 183 F.3d 279, 288 (3d Cir. 1999).

has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.<sup>36</sup>

Only four years later, in *Graham v. Connor*, the Court considered police uses of force more broadly. Whereas *Garner* addressed police uses of force against fleeing felons, *Graham* described a general standard for evaluating police uses of force, and treated *Garner* as a particular application.<sup>37</sup> Considering its importance, *Graham's* analysis of what “reasonable” force means in the context of police violence was quite short. *Graham* appeared to instruct courts to balance the intrusion on the individual’s interests with the government’s competing interests, and specified that courts must do so under “the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest . . . or [4] [whether he is] attempting to evade arrest by flight.”<sup>38</sup> The Court’s only additional counsel was that reasonableness is an objective inquiry and should be considered from the officer’s perspective at the time, taking into consideration the often “tense, uncertain, and rapidly evolving” nature of the circumstances in which police use force.<sup>39</sup>

Although the test articulated in *Graham* appears to come directly from *Garner*, the Court in *Garner* weighed the government’s interests against those of the suspect as a means to develop a rule to guide and govern police practices, just as the Court had done in prior seizure cases.<sup>40</sup> In *Graham*, the Court provided no rule, and instead recommended the weighing technique to lower courts—and presumably to officers—as a primary method for evaluating individual uses of force.<sup>41</sup> *Graham's* use of the balancing

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<sup>36</sup> *Garner*, 471 U.S. at 11–12.

<sup>37</sup> *Graham v. Connor*, 490 U.S. 386, 395–96 (1989).

<sup>38</sup> *Id.* at 396 (numbering added for clarity).

<sup>39</sup> *Id.* at 396–97.

<sup>40</sup> See, e.g., *United States v. Place*, 462 U.S. 696, 706 (1983); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976).

<sup>41</sup> This approach contrasts drastically with the Court’s approach in other cases that assess the constitutionality of seizures. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (“[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.” (citation omitted)). Moreover, this doctrinal move facilitates the difference between the Supreme Court’s notably infrequent consideration of police uses of force and its recurrent contemplation of police searches and arrests: Although courts in search and arrest cases use the weighing test to create rules of general application that may conflict with rules developed in other jurisdictions, in use of force cases the

test, list of relevant circumstances or factors, and description of the objective perspective from which uses of force should be evaluated have dominated federal cases involving the reasonableness of police uses of force since 1989.<sup>42</sup> And yet, as guidance regarding what constitutes reasonableness, *Graham*'s instruction is woefully inadequate: While *Graham* mentions at least one government interest that may weigh in favor of using force, the right to make an arrest, it does not further delimit the scope of relevant government interests that may justify force.<sup>43</sup> Nor has the Court done so since. Thus, the lower courts are without guidance about what purposes police uses of force may serve, which is to say which government interests may be placed on the scale. Instead, *Graham* permits courts to consider any circumstance in determining whether force is reasonable without providing a standard for measuring relevance, it gives little instruction on how to weigh relevant factors, and it apparently requires courts to consider the severity of the underlying crime in all cases, a circumstance that is sometimes irrelevant and misleading in determining whether force is reasonable. Thus, *Graham* has largely left judges and juries to their intuitions, and what direction it does give sometimes steers them off course.

Consider, for example, the last three factors cited by *Graham*. Whether the suspect poses a threat, actively resists, or flees are all questions of central importance in evaluating the reasonableness of the use of force against him. But these are questions with binary answers: either the suspect poses a threat or not; flees or not; resists or not. Moreover, these binaries are often incompatible: a fleeing suspect does not resist; a fighting suspect does not flee. By stating these factors in such terms, *Graham* provides a weak tool for evaluating the use of force, particularly in the common complex encounters that result in nondeadly uses of force by officers.

The use of force, and especially the use of nondeadly force, is often not a singular event but a series of choices made by an officer, sometimes in quick succession, over the course of an interaction.<sup>44</sup> Officers have their bodies and a few basic weapons that together provide a spectrum of options, ranging from verbal persuasion or a guiding hand to a baton blow to the

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*Graham* test makes lower court opinions factbound and incommensurable with the rulings of other courts, which is to say almost inevitably unworthy.

<sup>42</sup> Federal courts at all levels have acknowledged the centrality of *Graham*, including its factors, in analyzing police uses of force. See, e.g., *Saucier v. Katz*, 533 U.S. 194, 204–05 (2001); *Miller v. Cate*, 86 Fed. App'x 830, 833 (6th Cir. 2004); *United States v. Schatzle*, 901 F.2d 252, 254–55 (2d Cir. 1990); *Cruz v. Wilmington*, 814 F. Supp. 405, 412 (D. Del. 1993); *Courville v. Town of Barre*, 818 F. Supp. 23, 25–26 (D. Miss. 1993).

<sup>43</sup> See *Graham*, 490 U.S. at 396.

<sup>44</sup> See ALPERT & DUNHAM, *supra* note 7, at 178. The facts of *Graham* itself demonstrate this proposition. See *Graham*, 490 U.S. at 389–90 (summarizing the officers' actions during *Graham*'s arrest, in the light most favorable to the plaintiff, as having included rolling *Graham* on the sidewalk to handcuff him, lifting him and placing him face down on the hood of the police car, shoving his face down against the hood of the police car, and throwing him headfirst into the police car, all resulting in multiple injuries to *Graham*).

head or a shooting. Reasonable force is properly measured on a sliding scale, where more force is justified to counter an increased threat, taking into account the conditions of the interaction.<sup>45</sup> For example, a come-along hold or wristlock might induce compliance in a mildly resistant suspect. If circumstances allow, police officers should employ lesser uses of force rather than escalate to throwing, kicking, hitting, or stunning a suspect.<sup>46</sup> In simply listing circumstances under which force may be justified, the *Graham* factors fail to specify how to evaluate whether an officer's actions were justified in a particular situation, including whether they were reasonable given the spectrum of possible responses.<sup>47</sup> They do not tell us how much force is justified or what kind of force is reasonable.

The *Graham* factors also fail to answer the question of *when* the officer's force is appropriate. Timing is crucial to any meaningful account of what is reasonable force. If a threat to the officer or a state interest has not yet manifested itself, no force is justified. If force occurs after the threat terminates, it is excessive regardless of what took place before it. Although two of the four *Graham* factors imply that timing may be relevant—whether an “*immediate* threat to the safety of the officers”<sup>48</sup> existed and whether someone was “*actively* resisting”<sup>49</sup> at the time of a use of force—*Graham*'s vague “*totality of the circumstances*”<sup>50</sup> approach falls critically short in addressing this crucial matter because it suggests that timing is one factor to be considered among many, when it is often simply dispositive. As a consequence, *Graham* may misfire in cases in which force is mistimed.

Since *Graham*, juries have assessed police violence hundreds, if not thousands, of times. And yet the lower courts have failed to develop significantly the law of reasonable seizures. There has been no substantial advance over the Supreme Court's formulation, no further attempt at a test or a structure, almost nothing to help officers, victims, juries, or the public understand the nature of legitimate police force. This is not to say that courts have not made law. They have made lots of it. Nevertheless, in a country

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<sup>45</sup> See, e.g., IACP, PROTECTING CIVIL RIGHTS, *supra* note 14, at 117–223 (describing reasonable force as force that is responsive to the level of resistance presented by a suspect and providing several examples of use of force continua, which illustrate diagrammatically that appropriate force intensifies in proportion to the significance of the threat).

<sup>46</sup> *Id.* at 118–19.

<sup>47</sup> Among other failings, the *Graham* factors fail to mandate consideration of the effectiveness of an attempt to resist or flee. Less force is likely needed to counter a small, weak, elderly woman resisting arrest than to foil a linebacker who equally refuses to be handcuffed.

<sup>48</sup> *Graham*, 490 U.S. at 396 (emphasis added).

<sup>49</sup> *Id.* (emphasis added).

<sup>50</sup> *Id.*

that has since seen Rodney King,<sup>51</sup> Abner Louima,<sup>52</sup> Amadou Diallo,<sup>53</sup> and many other victims of police uses of force, the federal courts have added little analysis to the Supreme Court's brief and inadequate statement in *Graham* about what factors are relevant in determining the reasonableness of a seizure and why.<sup>54</sup> Instead, the lower federal courts have recited *Graham* as if it were a mantra and then gone on to try to make sense of the facts of individual cases using intuitions about what is reasonable for officers to do.<sup>55</sup> Nor has the academy filled the lacuna. Although some academics have

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<sup>51</sup> On March 2, 1991, Los Angeles Police Department officers attempted to subdue Rodney King, an African-American man, after a high speed chase. King initially resisted arrest, and officers fired a taser at him and struck him with batons in order to subdue him. As a videotape of the incident famously revealed, after King's leg was fractured and he lay prone on the ground, officers continued to stomp on King, kick him, and strike him with baton blows. See *Koon v. United States*, 518 U.S. 81, 86–87 (1996).

<sup>52</sup> On August 9, 1997, after Abner Louima, an African-American man, was arrested following a verbal confrontation with a police officer, various New York Police Department officers beat him in the police car in which he was transported, and then punched and beat him and shoved a broken broomstick about six inches into his rectum in a stationhouse bathroom, causing Louima severe internal injuries. See *United States v. Volpe*, 78 F. Supp. 2d 76, 79–81 (E.D.N.Y. 1999).

<sup>53</sup> On February 4, 1999, officers of the New York Police Department's controversial street crime unit shot at an unarmed black, West African immigrant named Amadou Diallo forty-one times, hitting him nineteen times and killing him, while searching for a rape suspect. The officers stated that they believed Diallo drew a gun but that it turned out to be a wallet. The officers were indicted for second-degree murder and reckless endangerment in state court, but were acquitted of all charges. See *People v. Boss*, 701 N.Y.S.2d 342, 344–45 (N.Y. App. Div. 1999); Kevin Flynn, *Revisiting a Killing: Many Details, but a Mystery Remains*, N.Y. TIMES, Feb. 14, 1999, at 37; Robert D. McFadden, *Police Dept. Rejects Punishment for Officers in Diallo Shooting*, N.Y. TIMES, Apr. 27, 2001, at A1.

<sup>54</sup> Courts have occasionally expanded on *Graham*'s factors, but in a largely ad hoc manner. See, e.g., *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (noting as an additional possible factor “the availability of alternative methods of capturing or subduing a suspect”); *Sharrar v. Felsing*, 128 F.3d 810, 822 (3d Cir. 1997) (listing as possible additional factors injury, “the possibility that the persons subject to the police action are themselves violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time”).

<sup>55</sup> See, e.g., *Thacker v. Lawrence County Local Gov't*, No. 1:04-CV-00265, 2005 WL 1075019, at \*6–9 (S.D. Ohio 2005) (quoting the *Graham* factors but granting a motion for summary judgment without considering them); *Byrd v. Hopson*, 265 F. Supp. 2d 594, 611–13 (W.D.N.C. 2003) (quoting the *Graham* factors but granting a motion for summary judgment based on the minor nature of the intrusion without further considering the factors); *DeBellis v. Kulp*, 166 F.Supp.2d 255, 271–74 (E.D. Pa. 2001) (quoting the *Graham* factors and denying a summary judgment motion without further considering the factors).

noted that the *Graham* standard lacks content,<sup>56</sup> none have offered a meaningful alternative to fill the gap.<sup>57</sup>

After almost twenty years of silence on the subject, the Supreme Court again confronted directly the constitutionality of the use of force by a police officer in *Scott v. Harris*.<sup>58</sup> In this case, a deputy sheriff from the Coweta County Sheriff's Office was monitoring traffic on a highway in Georgia when Victor Harris passed him traveling seventy-three miles-per-hour in a fifty-five mile-per-hour zone.<sup>59</sup> When Harris did not respond to the police car's lights, the deputy pursued him, and a high speed chase ensued.<sup>60</sup> After hearing a radio call about the pursuit, a second deputy, Chuck Scott, joined the chase without knowing the nature of the underlying offense. Eventually, in order to stop Harris, Scott rammed Harris's car with his police cruiser. Harris lost control, left the roadway, ran his vehicle down an embankment, and crashed. Harris suffered serious injuries and is now a quadriplegic.<sup>61</sup>

Using § 1983 and state law, Harris sued Scott, other members of the sheriff's department, and the county. The defendants all sought summary judgment.<sup>62</sup> Using the Supreme Court's analysis in *Graham*, the district court granted some of those motions, but denied summary judgment on the Fourth Amendment claim against Scott, in which Harris alleged that Scott unreasonably seized him when Scott rammed Harris's car.<sup>63</sup> The court of appeals affirmed.<sup>64</sup> In an opinion joined by eight Justices, the Supreme Court reversed, concluding that Scott's actions did not violate the Fourth Amendment. Using a video of the pursuit, the Court notably rejected the version of the facts adopted by the lower courts and substituted its own assessment of Harris's conduct leading up to the collision.<sup>65</sup> In doing so, the Court discarded a central premise of the lower court opinions—that, in the light most favorable to the plaintiff, Harris posed little threat to pedestrians

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<sup>56</sup> See Stuntz, *supra* note 1, at 1043–44 n.93 (1995) (discussing the lack of attention in federal case law to the standard governing use of force, particularly nondeadly force, and noting that “[o]ne searches in vain for any body of case law that gives the standard some content”); Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. CRIM. L. & CRIMINOLOGY 481, 486–88 (1994) (discussing the law's failure to define sufficiently what reasonable force is).

<sup>57</sup> But see Alpert & Smith, *supra* note 56, at 487–501 (discussing reasonable force from the perspective of officers).

<sup>58</sup> 127 S. Ct. 1769 (2007).

<sup>59</sup> *Harris v. Coweta County*, No. CIVA 3:01CV148 WBH, 2003 WL 25419527, at \*1 (N.D. Ga. Sept. 25, 2003), *aff'd in part and rev'd in part*, 433 F.3d 807 (11th Cir. 2005), *rev'd sub nom. Scott v. Harris*, 127 S. Ct. 1769 (2007).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at \*2.

<sup>62</sup> *Id.* at \*3.

<sup>63</sup> *Id.* at \*6.

<sup>64</sup> See *Harris*, 433 F.3d 807, *rev'd sub nom. Scott*, 127 S. Ct. 1769.

<sup>65</sup> See *Scott*, 127 S. Ct. at 1774–76.

and other motorists—and found instead that Harris “plac[ed] police officers and innocent bystanders alike at great risk of serious injury.”<sup>66</sup> This factual premise became the basis for the Court’s conclusion that Scott’s seizure of Harris by ramming Harris’s car was not unreasonable.<sup>67</sup>

The Court reasoned that the government’s interest in protecting passing pedestrians, civilian motorists, and officers involved in the chase outweighed the risk of injury that Scott posed to Harris by ramming his car.<sup>68</sup> Although Scott eliminated the “lesser probability of injuring or killing numerous bystanders” by creating “the perhaps larger probability of injuring or killing a single person,” the Court found this outcome justified by the number of lives Harris put at risk and the fact that, while Harris was largely responsible for the risks he himself faced, the endangered civilians and officers “were entirely innocent.”<sup>69</sup>

Scott’s Fourth Amendment reasonableness analysis represents a significant departure from both *Garner* and *Graham*. Prior to *Scott*, most lower courts analyzed police uses of vehicles to exert force during high speed chases under *Garner*’s rule. Other courts used *Graham* because they did not take such collisions to constitute deadly force.<sup>70</sup> In *Scott* itself, the district court found that under the facts alleged by Harris, Scott’s use of force could be considered unreasonable under *Graham*.<sup>71</sup> The Eleventh Circuit reached the same result using *Garner*.<sup>72</sup> Scott argued in his brief to the Supreme Court that *Graham* rather than *Garner* governed Scott’s actions

<sup>66</sup> *See id.* at 1776.

<sup>67</sup> *Id.* at 1778–79.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Compare, e.g., *Ludwig v. Anderson*, 54 F.3d 465, 470–73 (8th Cir. 1995) (applying *Garner* to hitting an emotionally disturbed person with a squad car because “an attempt to hit an individual with a moving squad car is an attempt to apprehend by use of deadly force”), and *Donovan v. City of Milwaukee*, 17 F.3d 944, 949–51 (7th Cir. 1994) (applying *Garner* to a collision during a high speed chase because the use of a vehicle in the case was an application of deadly force), and *Abney v. Coe*, No. 1:04CV00652, 2005 U.S. Dist. LEXIS 41890, at \*24–26 (M.D.N.C. Dec. 15, 2005) (finding that a patrol car ramming a motorcycle constitutes the use of deadly force and applying *Garner* to determine whether the force was reasonable), with *Adams v. St. Lucie County Sheriff’s Dep’t*, 998 F.2d 923 (11th Cir. 1993) (en banc) (adopting the dissenting opinion of Judge Edmondson, reported at *Adams v. St. Lucie County Sheriff’s Dep’t*, 962 F.2d 1563, 1573–79 (1992), and holding that *Garner* did not apply to a case involving a high speed collision because an automobile is not designed to kill and may not cause death or serious injury), and *Williams v. City of Beverly Hills*, No. 4:04-CV-631 CAS, 2006 U.S. Dist. LEXIS 15129, at \*23–25 (E.D. Mo. Mar. 31, 2006) (indicating without reference to *Garner* that an excessive force claim involving a collision with a police vehicle should be analyzed under *Graham*’s objective reasonableness standard).

<sup>71</sup> *Harris v. Coweta County*, No. CIVA 3:01CV148 WBH, 2003 WL 25419527, at \*4–6 (N.D. Ga. Sept. 25, 2003), *aff’d in part and rev’d in part*, 433 F.3d 807 (11th Cir. 2005), *rev’d sub nom. Scott*, 127 S. Ct. 1769.

<sup>72</sup> *Harris*, 433 F.3d at 813–15 (finding that Scott’s use of force did not satisfy the *Garner* preconditions for deadly force because Harris did not pose an imminent threat of physical harm and was not suspected of a violent crime).

because it was not clear from Scott's perspective that he was using deadly force, and that even if the *Garner* rule did apply, he could satisfy it.<sup>73</sup> Harris contended that *Garner* prohibited Scott's use of force, but that even under *Graham*, ramming Harris's car was constitutionally unreasonable.<sup>74</sup> All considered *Graham* and *Garner* to be the relevant governing precedents.<sup>75</sup>

By contrast, the majority opinion expressly rejected Harris's attempt to frame the question whether Scott's use of force was excessive in terms of the *Garner* test for determining whether deadly force is permitted against a fleeing suspect. The Court stated that *Garner* could not be applied to the "vastly different facts" of Scott's use of force, noting in particular two distinctions between *Garner* and *Scott*.<sup>76</sup> First, *Garner* involved shooting a gun instead of striking one car with another; and second, the threat posed by the unarmed fleeing suspect in *Garner* was remote compared to the "extreme danger" posed by Harris's flight.<sup>77</sup> But *Scott* went beyond holding *Garner* inapplicable to *Scott*'s facts. Instead, the Court rejected the idea that *Garner* provided a rule at all.<sup>78</sup> It noted that *Garner* did not set "rigid preconditions" for the use of deadly force, and instead was simply a fact-based analysis of reasonableness in the circumstances of that case.<sup>79</sup> Moreover, it raised doubt about whether the distinction between deadly and non-deadly force on which *Garner* is premised has constitutional relevance.<sup>80</sup> Rather, the Court emphasized that in this case—and in future ones—"all that matters is whether [the officer's] actions were reasonable," a determination for which there is no test beyond a case-specific "slosh" through "the factbound morass of 'reasonableness.'"<sup>81</sup>

In a paragraph, then, the Supreme Court waved away what every federal court since *Garner*—including the Supreme Court itself—had taken to be clear criteria for determining the reasonableness of the use of deadly

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<sup>73</sup> Brief for Petitioner at 12–14, *Scott*, 127 S. Ct. 1769 (No. 05-1631), 2006 WL 3693418.

<sup>74</sup> Brief for Respondent at 18–29, *Scott*, 127 S. Ct. 1769 (No. 05-1631), 2007 WL 118977.

<sup>75</sup> See *supra* notes 71–74; Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent at 10–11, *Scott*, 127 S. Ct. 1769 (No. 05-1631), 2007 WL 128586; Brief of the ACLU and ACLU of Georgia as Amici Curiae Supporting Respondent at 17–18, *Scott*, 127 S. Ct. 1769 (No. 05-1631), 2007 WL 139201; Brief for the United States as Amicus Curiae Supporting Petitioner at 10–12, *Scott*, 127 S. Ct. 1769 (No. 05-1631), 2006 WL 3707883.

<sup>76</sup> *Scott*, 127 S. Ct. at 1778–79.

<sup>77</sup> *Id.* at 1777–78.

<sup>78</sup> *Id.* at 1777.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1778 (refusing to decide whether ramming Harris was a use of deadly force and concluding that "[w]hether or not Scott's actions constituted application of 'deadly force,' all that matters is whether Scott's actions were reasonable"); see *Acosta v. Hill*, 504 F.3d 1323, 1324 (9th Cir. 2007) ("*Scott* held that there is no special Fourth Amendment standard for unconstitutional deadly force."); *Blake v. City of New York*, No. 05 Cv. 6652(BSJ), 2007 WL 1975570, at \*3 (S.D.N.Y. July 6, 2007) (finding that after *Scott*, "[n]o separate legal standard applies to cases involving deadly force").

<sup>81</sup> *Scott*, 127 S. Ct. at 1778.

force against fleeing suspects during an arrest.<sup>82</sup> The *Graham* factors got even less respect. Although the *Scott* Court engaged in the weighing advocated by *Graham*, *Scott* simply does not acknowledge the sentence from *Graham* that has driven the analysis in thousands of cases since 1989: that the “proper application” of the reasonableness test involves consideration of “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”<sup>83</sup> Nor does it even cite *Graham* in its analysis of the reasonableness of *Scott*’s actions. Instead it ends where *Graham* starts, by stating that the Fourth Amendment analysis requires balancing “the nature or quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”<sup>84</sup> Thus, the Court not only emasculated *Garner*, but in the same paragraph—without comment or analysis—implicitly dismissed the factors articulated in *Graham* as central to analyzing reasonableness.<sup>85</sup> In doing so, the Court reduced the Fourth Amend-

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<sup>82</sup> See, e.g., *Brosseau v. Haugen*, 543 U.S. 194, 197–98 (2004) (“These cases establish that claims of excessive force are to be judged under the Fourth Amendment’s “objective reasonableness” standard. Specifically with regard to deadly force, we explained in *Garner* that it is unreasonable for an officer to ‘seize an unarmed, nondangerous suspect by shooting him dead.’” (citations omitted)); *Sample v. Bailey*, 409 F.3d 689, 699 (6th Cir. 2005) (“We have held that it has been clearly established in this circuit for the last twenty years that a criminal suspect has a right not to be shot unless he is perceived to pose a threat to the pursuing officers or to others during flight. This articulation of the *Garner* rule is clearly established even in situations with diverse factual distinctions.” (alterations omitted) (citations omitted) (internal quotation marks omitted)); see also cases cited *supra* note 70 (applying *Garner* to force used during vehicle pursuits).

<sup>83</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989); see *supra* note 42.

<sup>84</sup> Compare *Scott*, 127 S. Ct. at 1778 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983) as the full standard for evaluating use of force), with *Graham*, 490 U.S. at 396–97 (starting with the balancing required by *Place* and describing facts and circumstances relevant to the application of the reasonableness test). Extrapolating from the Court’s analytic process in *Terry v. Ohio*, 392 U.S. 1 (1968), *Place* states that where government agents engage in limited seizures in the absence of probable cause, the Court must “balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.” *Place*, 462 U.S. at 703. In *Garner*, *Graham*, and *Scott*, the Court applied this test to the use of force, a context in which probable cause is largely irrelevant to the question of Fourth Amendment reasonableness. See *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

<sup>85</sup> Though the *Scott* Court clearly considered in its analysis some of the *Graham* factors, including the immediate threat *Harris* posed and his attempt to evade by flight, the Court did not treat *Graham* as mandating this consideration. The Supreme Court had previously fully acknowledged the centrality of the *Graham* factors:

In *Graham*, we held that claims of excessive force in the context of arrests or investigatory stops should be analyzed under the Fourth Amendment’s “objective reasonableness standard,” not under substantive due process principles. . . . We set out a test that cautioned against the “20/20 vision of hindsight” in favor of deference to the judgment of reasonable officers on the scene. *Graham* sets forth a list of factors relevant to the merits of the constitutional excessive force claim, “requir[ing] careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”

ment regulation of reasonable force to its vaguest form: an ad hoc balancing of state and individual interests unconstrained by any specific criteria.

The Court easily could have reached the same outcome in *Scott* without undermining *Garner* and *Graham*. Given its rejection of the lower courts' factual basis, it could have concluded simply that Scott satisfied *Garner*'s clear charge that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."<sup>86</sup> This would have been inconsistent with the view of the Eleventh Circuit in *Scott* and some other federal courts that *Garner* specified other preconditions for deadly force, including that the force be necessary to prevent escape and that a warning be given if possible.<sup>87</sup> But it would have retained *Garner*'s primary command—untouched by *Graham*—that deadly force demands dangerousness.

Nor is *Scott*'s outcome necessarily inconsistent with *Graham*. At the time of Scott's use of force, Harris was—in the view of the Supreme Court if not the lower courts—criminally evading the officers by driving extremely recklessly, even feloniously so,<sup>88</sup> posing a threat to civilians and officers. Given this interpretation of Harris's conduct, the Court could have read *Graham* to mean that, whether or not Scott's use of force would have been justified when the chase began, from the "perspective of a reasonable officer" in Scott's position at the time he used force,<sup>89</sup> "the severity of the crime at issue" was the seriousness of Harris's criminal conduct during flight, rather than the original traffic violation.<sup>90</sup> Moreover, it could have found that it was the threat this conduct posed that demonstrated "an imme-

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Saucier v. Katz, 533 U.S. 194, 204–05 (2001) (alteration in quotation in original) (citations to *Garner* omitted). By ignoring the *Graham* factors, the Court might be taken to mean that *Graham*'s factors, like *Garner*'s "preconditions," *Scott*, 127 S. Ct. at 1777, are limited in their applicability. However, because the Court said nothing about what distinguishes *Scott* from *Graham*, it is perhaps unsurprising that, in the face of such minimal guidance, lower federal courts since *Scott* have often continued to use *Graham*'s factors, even in cases involving dangerous high speed chases. See, e.g., Miller v. Jensen, No. 06-CV-0328-CVE-SAJ, 2007 WL 1574761, at \*4–6 (N.D. Okla. May 29, 2007) (analyzing the use of force using *Graham*'s factors); Blake, 2007 WL 1975570, at \*4 (deciding to instruct the jury that it may consider the *Graham* factors).

<sup>86</sup> *Garner*, 471 U.S. at 11. As the *Scott* Court pointed out in a footnote, Harris's "flight itself (by means of a speeding automobile) . . . posed [a] threat of 'serious physical harm . . . to others.'" *Scott*, 127 S. Ct. at 1777 n.9 (alteration to quotation in original) (citing *Garner*, 471 U.S. at 11).

<sup>87</sup> See Harris v. Coweta County, 433 F.3d 807, 814 (11th Cir. 2005).

<sup>88</sup> See GA. CODE ANN. § 40-6-395(a) (2007), making it a crime to disobey a police signal to stop, and GA. CODE ANN. § 40-6-395(b)(5)(A) (2007), making it a felony to violate section (a) by speeding by more than thirty miles an hour, hitting another vehicle or pedestrian, or fleeing in traffic conditions that place others at risk of serious injury.

<sup>89</sup> *Graham*, 490 U.S. at 396.

<sup>90</sup> At least one post-*Scott* court has taken this approach to reconcile *Scott* and *Graham*. See Miller, 2007 WL 1574761, at \*5 (concluding that the high speed chase rather than the plaintiff's traffic offenses constituted the "crime at issue").

diate threat to the safety of the officers or others” that might have justified substantial force.<sup>91</sup>

Alternatively, the Court could have reached its result in *Scott* by refining rather than ignoring *Graham*. The Court’s language in *Graham* suggested that the *Graham* factors were mandatory, but not exclusive. In *Scott*, the Court could have ruled that—as the district court found<sup>92</sup>—the factors were intended to be exemplary rather than mandatory. And it could have explained, for example, why the underlying traffic offense crime was not relevant to a reasonableness analysis in this case, i.e., because Harris’s conduct posed a significant threat to pedestrians and officers that justified force, regardless of the nature of the crime at issue.

Why did the Court instead back away from *Graham* and *Garner*? *Scott* presented the Court with some of the inherent weaknesses of these two cases.<sup>93</sup> Both *Graham* and *Garner* appear to demand consideration of the underlying crime of which Harris was initially suspected in evaluating Scott’s use of force, and both lower courts emphasized that the force was unreasonable in large part because Harris was suspected only of speeding.<sup>94</sup>

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<sup>91</sup> *Id.* Such an interpretation of *Graham* would not have been inconsistent with that of the courts below. The district court emphasized Harris’s traffic offense in part because it—unlike the Supreme Court—found that Harris “did not endanger any particular motorist on the road,” “did not use his vehicle in an aggressive manner” during the chase, and did not “pose[] an immediate threat of harm to others” at the time of the ramming. See *Harris v. Coweta County*, No. CIVA 3:01CV148 WBH, 2003 WL 25419527, at \*5 (N.D. Ga. Sept. 25, 2003), *aff’d in part and rev’d in part*, 433 F.3d 807, *rev’d sub nom. Scott*, 127 S. Ct. 1769. And while the Court of Appeals focused on *Garner* rather than *Graham*, its analysis too depended on the fact that “there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and Harris remained in control of his vehicle.” See *Harris*, 433 F.3d at 815.

<sup>92</sup> See *Harris*, 2003 WL 25419527, at \*4 (“*Graham* instructs that the Court must examine the facts carefully and provides three examples of questions relevant to the inquiry . . .”).

<sup>93</sup> It might also be argued that Scalia’s retreat to a general form of balancing is consistent with his efforts in some other search and seizure contexts under the Fourth Amendment. See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995); *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring). Whatever else might have motivated the Court, it does not appear that its stance towards force in this case reflects deference to the idea that states should regulate police uses of force in all but the most egregious cases. Not only does the opinion lack the rhetoric of concern for state prerogative, but its reasoning does not inevitably decrease federal interference in local police enforcement. In fact, encouraging federal courts to engage in unconstrained case-by-case assessment of the circumstances surrounding local uses of force rather than rely on *Garner*’s relatively more predictable rule-based approach portends precisely the opposite. While leaving reasonableness underdetermined provides freedom to state courts to determine the constitutionality under federal law of law enforcement actions without much constraint, a vague standard is not necessarily a reliably permissive one, and thus the *Scott* approach cannot be said to carve out effectively space for state and local regulation of law enforcement without federal interference.

<sup>94</sup> The district court stated that “[t]he central fact” guiding its decision was that the underlying substantive crime was speeding. *Harris*, 2003 WL 25419527, at \*5; see also *Harris*, 433 F.3d at 813–15 (finding that a jury could find force unreasonable under *Garner* because the underlying crime—speeding—was not violent and because prior to the chase, Harris did not pose an imminent threat to others).

The *Scott* Court may have believed that the initial traffic offense was irrelevant to the use of force but have been unable to articulate a principle for why this consideration was immaterial in this case but not in others. In addition, the relationship between *Garner's* test and *Graham's* factors in a case like *Scott* was at best unclear at the time of *Scott*, as is evidenced by the differing focuses of the lower court opinions and briefs.<sup>95</sup> Rather than fixing the problems by refining its framework for analyzing uses of force, however, the Court retreated from guiding lower courts, relying instead on a balancing test that depends on lower court judges' intuitions about what matters to reasonableness. Thus, the Court did not resolve the question of when the seriousness of the underlying crime matters. Moreover, even the little guidance *Scott* provides to lower courts about what to consider in implementing the weighing test is unhelpful. The Court announced, for example, that "culpability is relevant to the reasonableness of the seizure," but said little about how, when, or why.<sup>96</sup> In sum, in *Scott*, the Court rid itself of the clear rule of *Garner*,<sup>97</sup> establishing instead a much narrower rule for most high speed chase cases,<sup>98</sup> deemphasized, if not eliminated, any significant instruction to lower courts facing future cases about what to consider in evaluating police violence; and remained near silent about how to balance the interests of officers, suspects, and others.<sup>99</sup> After *Scott*, courts must

<sup>95</sup> See *supra* notes 70–75.

<sup>96</sup> *Scott*, 127 S. Ct. at 1778 n.10.

<sup>97</sup> See *Sharp v. Fisher*, No. 406CV020, 2007 U.S. Dist. LEXIS 60443, at \*4 (S.D. Ga. Aug. 17, 2007) (stating that, after *Scott*, "there is no *Garner* bright-line test").

<sup>98</sup> Despite the hopes of the concurring Justices to the contrary, see *Scott*, 127 S. Ct. at 1779 (Ginsburg, J., concurring); *id.* at 1781 (Breyer, J., concurring), the Court's conclusion that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death," *id.* at 1779 (majority opinion), likely represents something very close to a per se rule. Given the Court's factual conclusion that Harris's flight "endanger[ed] human life," *id.* at 1776, even though the chase occurred late at night on almost deserted roads with few officers and apparently no pedestrians, only the rare car chase will not satisfy the *Scott* test. See, e.g., *Beshers v. Harrison*, 495 F.3d 1260, 1268 (11th Cir. 2007) (stating that when an officer's vehicle collided with a suspect's, application of *Scott* created "no doubt that [the officer's] alleged use of deadly force to stop [the suspect] did not violate the Fourth Amendment"); *Abney v. Coe*, 493 F.3d 412, 418 (4th Cir. 2007) ("In accordance with *Scott v. Harris*, we hold that [the officer's] 'attempt to terminate a dangerous . . . car chase that threaten[ed] the lives of innocent bystanders d[id] not violate the Fourth Amendment . . .'" (some alterations in original) (citation omitted) (quoting *Scott*, 127 S. Ct. at 1779)). For an example of an exceptional chase during which force may not be justified under *Scott*, see Carmen R. Chandler & Jeanne Mariani, *Hypnotic Drama Unfolded on Freeway*, L.A. DAILY NEWS, June 18, 1994, at N1 (describing a car chase involving fleeing O.J. Simpson as "slow and methodical" and noting that the Bronco carrying Simpson "switched on its emergency flashers and slowed to speeds between 30 and 50 m.p.h." on the freeway).

<sup>99</sup> But see *Scott*, 127 S. Ct. at 1778–79 (discussing the relevance of a suspect's culpability). Even in the brief time since *Scott*, lower courts faced with this lack of guidance have turned back to *Graham*. See, e.g., *Marvin v. City of Taylor*, No. 06-2008, 2007 U.S. App. LEXIS 27950, at \*26–28 (6th Cir. Dec. 4, 2007) (noting that *Scott* requires courts to balance interests in order to determine reasonableness, but using the *Graham* factors, rather than *Scott*, to make the balance).

“slosh” their way through the “factbound morass” without galoshes or a compass, which is to say, with almost no direction at all about what constitutes reasonable force.

*B. The Consequences of an Impoverished Use of Force Doctrine*

The consequences of the Supreme Court’s problematic use of force doctrine are profound and significant. By eliminating what guidance *Garner* and *Graham* provided and by failing to articulate principles to shape lower court determinations, *Scott* increases the likelihood that lower courts will decide use of force cases inconsistently. For example, some courts may continue to apply *Garner* to situations involving nondangerous suspects fleeing on foot; others may take *Scott* to eliminate even this application of *Garner*. *Scott* also makes it more likely that lower courts will use inappropriate criteria in reaching results: some lower courts may take the Supreme Court’s declaration that a suspect’s culpability is relevant to the relative strength of the government’s interest to mean that wrongdoing by the suspect may be used to justify force against the suspect during the arrest, even if that force was more than was necessary under the circumstances immediately facing the officer.<sup>100</sup>

More importantly, however, *Scott* almost surely makes the outcome of lower court decisions about the reasonableness of police uses of force more difficult to predict. *Scott* does not confine its recommended analysis to high speed chases. Instead, it appears to encourage lower courts to dispense with mandatory consideration of *Graham*’s factors and to engage in ad hoc balancing in all cases of alleged unreasonable force, whether deadly or not. As a result, after *Scott*, it is difficult to imagine what specific circumstances federal courts will emphasize as relevant when they weigh individual and societal interests, and what balance they will strike. *Scott*, even more than *Graham* and *Garner*, makes almost all future cases indeterminate. In many areas of the law, indeterminacy is unfortunate; in the context of § 1983 litigation, because of qualified immunity law, it is devastating.

Qualified immunity is a judicial doctrine premised on the idea that an officer should not be held liable for unconstitutional actions absent “fair notice that [his or] her conduct was unlawful” based on the law at the time of the conduct.<sup>101</sup> Without a fair notice requirement for liability, government officials might undesirably shape their job decisions to avoid the substantial financial and social costs they might incur even for actions they reasonably believed were constitutional because the law did not prohibit those actions at the time they occurred.<sup>102</sup> As the Supreme Court has noted, the operation of qualified immunity “depends substantially upon the level of generality at

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<sup>100</sup> *Scott*, 127 S. Ct. at 1778.

<sup>101</sup> *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

<sup>102</sup> *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); see also *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (“[A] police officer is not charged with predicting the future course of constitutional law.”).

which the relevant ‘legal rule’ is to be identified.”<sup>103</sup> Although it could be said that any constitutional violation is clearly established law, based on the existence of the constitutional provision violated, interpreting the qualified immunity standard this way would “convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.”<sup>104</sup> On the other hand, if courts prohibited liability except where the officer’s actions previously had been declared unconstitutional under precisely the same circumstances, few officers could ever be held liable, even for actions that an officer should have known to be unconstitutional based on general principles from prior cases.<sup>105</sup>

Under current law, an officer cannot be tried for violating an individual’s federally protected rights unless, at the time of the incident, “it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”<sup>106</sup> This rule suggests the importance of the predictive power of any standard for the use of force: To rule on qualified immunity, courts must effectively determine whether an officer could have easily predicted from prior cases that his use of force would be held unreasonable. Currently, the question whether an officer is immune arises only when a court has already concluded that the facts alleged by the plaintiff would establish that the officer acted unconstitutionally.<sup>107</sup> In each such case, assuming the plaintiff can prove his allegations, a person has been injured by a police officer who acted illegally. If qualified immunity is granted, that victim will not be compensated for his injuries, no matter how severe.<sup>108</sup> Because no money will change hands, the suit will also be unlikely to deter future uses of excessive force.<sup>109</sup> In this way, then, the

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<sup>103</sup> *Anderson*, 483 U.S. at 639.

<sup>104</sup> *Id.*

<sup>105</sup> *See id.* at 640; *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985).

<sup>106</sup> *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (citation omitted).

<sup>107</sup> *Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007) (reiterating that “[i]f, and only if, the court finds a violation of a constitutional right” must the court consider whether the right was clearly established such that the officer may have qualified immunity); *Saucier*, 533 U.S. at 201 (“A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? This must be the initial inquiry.”).

<sup>108</sup> While it is legally possible to recover against a municipality, even when individual defendants have qualified immunity for their actions, *see Owen v. City of Independence*, 445 U.S. 622 (1980), in practice it is extremely “difficult for plaintiffs to prove the requisite deliberate indifference [required to establish liability for municipalities] when individual defendants prevail on the qualified immunity defense on the ground that the law was not clearly established at the time of the incident.” MICHAEL AVERY ET AL., *POLICE MISCONDUCT: LAW AND LITIGATION* 314 (3d ed. 2006). Moreover, supervisors are immune from suit if the subordinate who allegedly violated the plaintiff’s constitutional rights has qualified immunity. *See, e.g., Poe v. Leonard*, 282 F.3d 123, 126 (2d Cir. 2002); *Camilo-Robles v. Hoyos*, 151 F.3d 1 (1st Cir. 1998). Thus, in most cases, a qualified immunity ruling ensures that the plaintiff will not receive damages.

predictive value of the Supreme Court's doctrine on reasonableness is essential to making § 1983 effective.

According to the Court, *Graham* and *Garner* work at too high a level of generality to provide sufficient predictive power, except in the most obvious cases.<sup>110</sup> By the Court's own admission, they provide "some tests to guide us in determining the law in many different kinds of circumstances[,] but we do not see the kind of clear law (clear answers)" that would satisfy fair notice.<sup>111</sup> In practice, the Court has required quite specific prior case law describing the unconstitutionality of the conduct in closely analogous circumstances in order to overcome qualified immunity.<sup>112</sup> Although the Court has reasoned that it is their level of generality that makes *Garner* and *Graham* insufficient to provide fair notice, this is partially misguided. As

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<sup>109</sup> According to the Court, § 1983 is intended to deter as well as compensate constitutional violations. See, e.g., *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986); *Bd. of Regents v. Tomasi*, 446 U.S. 478, 488 (1980). Recently, however, there has been considerable debate over whether imposing financial liabilities on government agencies deters wrongful behavior. Compare, e.g., Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 965 (2005) (suggesting that there is "no reason to expect that . . . compensation payments will change [the government's] behavior in any predictable way"), and Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 367–68 (2000) [hereinafter Levinson, *Making Government Pay*] (arguing that because government agencies do not internalize costs, "awarding compensation to the victims of constitutional violations would not seem to have any deterrent effect on government"), with, e.g., Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 880 (2001) (claiming that, while "making governments pay may not prove optimal," it "does effectuate deterrence against future constitutional violations"). See also NAT'L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING 276–80 (2004) (concluding that although data is extremely limited, existing evidence suggests that civil and criminal liability influence police behavior little).

<sup>110</sup> See *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *Saucier*, 533 U.S. at 205–06.

<sup>111</sup> *Brosseau*, 543 U.S. at 198–99, 203 (quoting *Pace v. Capobianco*, 283 F.3d 1275, 1283 (11th Cir. 2002)); see *Saucier*, 533 U.S. at 201–02 ("[T]here is no doubt that *Graham v. Connor* . . . clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* 'that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'").

<sup>112</sup> In *Brosseau*, for example, the Court considered whether any case in the circuit "squarely govern[ed]" the case at issue, after concluding that *Garner* did not establish clearly that it was unconstitutional for an officer "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Brosseau*, 543 U.S. at 199–201. Lower courts will generally find the law to be clearly established only if there is a Supreme Court case on point, controlling authority from the relevant court of appeals, or a clear consensus of authority from other jurisdictions on the unlawfulness of the officer's conduct. See *Wilson v. Layne*, 526 U.S. 603 (1999); *Charles W. v. Maul*, 214 F.3d 350, 353 (2d Cir. 2000). Some circuits require even more. See, e.g., *Marsh v. Butler County*, 268 F.3d 1014, 1033 n.10 (11th Cir. 2001) (en banc) (rejecting the idea that decisions from other circuits could establish the law clearly); *Burgess v. Lowery*, 201 F.3d 942, 944 (7th Cir. 2000) (suggesting that even a court of appeals decision on point in the relevant circuit might be insufficient to establish the law clearly in some circumstances). As a result, actions that have been held unconstitutional by some courts may still be viewed as within bounds by officers, even if it is likely that their jurisdiction will eventually rule similarly on the question.

the Court has acknowledged, a general test might provide adequate fair notice if it produces sufficiently determinate outcomes—that is, if it were sufficiently clear to a reasonable officer how it would apply.<sup>113</sup> So understood, the problem with *Garner* and *Graham* is not that they are too general, but rather that they are insufficiently principled. These cases suggest some circumstances that are relevant in the determination of the lawfulness of police uses of force, but do not explain why those circumstances are relevant, or when or how they should be considered.

The approach articulated in *Scott* operates at a much higher level of generality than *Garner* and *Graham*, and it is no more principled. It sets no parameters on what circumstances meaningfully distinguish one case from another. It will therefore certainly result in cases that provide less notice to future defendants, and consequently, more qualified immunity, less relief to victims, and less deterrence against future violations. For this reason, even if one believes that courts know unreasonable force when they see it and will rule justly in most excessive force cases, the consequences of indeterminacy in the Court's use of force standard go well beyond a lack of theoretical refinement or good legal hygiene: To the degree that *Scott*'s approach replaces *Graham*'s factors and the rule of *Garner*, it renders § 1983 an even more impotent weapon in the battle against excessive force by police officers.<sup>114</sup>

A better constitutional framework for evaluating uses of force would put the police on notice of whether a particular use of force is constitutional before the federal courts have addressed the constitutionality of that precise use of force. Such a standard would not only compensate for and indirectly deter unconstitutional uses of force by holding officers accountable *ex post*, it also could reduce such uses of force *ex ante* by providing legal guidelines for training officers to use force constitutionally. Currently, nearly all officers receive training about the legal standards governing the use of force.<sup>115</sup> But while officers receive elaborate training about how to use force,<sup>116</sup> and detailed legal instruction about when they may search or seize persons, cars,

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<sup>113</sup> See *Brousseau*, 543 U.S. at 199; *United States v. Lanier*, 520 U.S. 259, 271 (1997) (“[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.” (alteration omitted) (internal quotation marks omitted)).

<sup>114</sup> That said, there are many practical, doctrinal, and organizational problems with using civil suits to combat police misconduct, see *Armacost*, *supra* note 9, at 465–78; *Chen*, *supra* note 9, at 263–69, problems that would remain even if qualified immunity were more limited.

<sup>115</sup> MATTHEW J. HICKMAN, U.S. DEP'T OF JUSTICE, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2002, at 14 (2005), available at <http://www.ojp.gov/bjs/pub/pdf/slleta02.pdf>.

<sup>116</sup> See *id.* at 9 (describing basic recruit training programs as including a median of sixty hours of instruction on firearms skills, twelve hours of instruction on the use of nonlethal weapons, and forty-four hours on self-defense).

and things,<sup>117</sup> the legal training they receive about when to use force mirrors current law: it often constitutes little more than an exhortation to act reasonably.<sup>118</sup> Even if officers are told the outcomes of specific cases, the law provides them little basis for extrapolating from those cases guidance for the new circumstances they continually face. If courts could articulate the reasoning that informs judicial intuition about excessive force, officers might be influenced by that reasoning in regulating their own actions or—often just as importantly—in discouraging the excessive use of force by a peer.

The imprecise current legal framework shapes the decisions not only of judges and officers but also of jurors. Jurors are routinely asked to make legal decisions about excessive force. And juries often get the closest cases: on the civil side, those not suitable for qualified immunity and not clear enough to motivate settlement; and in the criminal context, those in which evidence of guilt is not strong enough to induce a plea. Moreover, they are asked to determine whether the defendant's actions were unreasonable under the Constitution without any access to precedent. Instead, courts provide jury instructions distilling principles from the existing case law, jury instructions that sometimes provide exceptionally little help in shaping a determination about excessiveness.<sup>119</sup> Because many of those instructions

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<sup>117</sup> Idaho police officers, for example, receive eighteen hours on the laws of arrest, search, and seizure during basic training, and two hours on the law of use of force. See Idaho POST Academy, Basic Academy Coursework, [http://www.idaho-post.org/PatrAcad/Patrol\\_Coursework2.html](http://www.idaho-post.org/PatrAcad/Patrol_Coursework2.html) (last visited Feb. 1, 2008).

<sup>118</sup> See, e.g., CAL. COMM'N ON PEACE OFFICER STANDARDS AND TRAINING, BASIC COURSE WORKBOOK SERIES: STUDENT MATERIALS, USE OF FORCE, 1-3 to 1-8 (2006) (training officers that they may use reasonable force and using language from *Graham* to explain what is reasonable).

<sup>119</sup> See, e.g., SEVENTH CIRCUIT CIVIL JURY INSTRUCTIONS § 7.09 (2005) (section titled "Fourth Amendment/Fourteenth Amendment: Excessive Force—Definition of 'Unreasonable'") ("You must decide whether Defendant's use of force was unreasonable from the perspective of a reasonable officer facing the same circumstances that Defendant faced. You must make this decision based on what the officer knew at the time of the arrest, not based on what you know now. In deciding whether Defendant's use of force was unreasonable, you must not consider whether Defendant's intentions were good or bad. In performing his job, an officer can use force that is reasonably necessary under the circumstances."); EIGHTH CIRCUIT CIVIL JURY INSTRUCTIONS § 4.10 (2005) (section titled "Excessive Use of Force—Arrest or Other Seizure of Person—Before Confinement—Fourth Amendment") ("In determining whether such force, if any was 'not reasonably necessary,' you must consider such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether a reasonable officer on the scene, without the benefit of 20/20 hindsight, would have used such force under similar circumstances. The jury must consider that police officers are often forced to make judgments about the amount of force that is necessary in circumstances that are tense, uncertain and rapidly evolving. The jury must consider whether the officer's actions are reasonable in the light of the facts and circumstances confronting the officer, without regard to the officer's own state of mind, intention or motivation." (internal brackets omitted) (footnotes omitted)); ELEVENTH CIRCUIT CIVIL JURY INSTRUCTIONS § 2.2 (2005) (section titled "Civil Rights, 42 USC § 1983 Claims, Fourth Amendment Claim, Citizen Alleging Unlawful Arrest—Unlawful Search—Excessive Force") ("[E]very person has the constitutional right not to be subjected to excessive or unreasonable force while being arrested by a law enforcement officer, even though such arrest is otherwise

have in recent years referred to the *Graham* factors,<sup>120</sup> factors not even recognized in *Scott*, or to the *Garner* rule,<sup>121</sup> weakened in *Scott*, after *Scott*, those instructions inevitably will become even vaguer.<sup>122</sup>

The weakness of Supreme Court doctrine will affect the general public as well. The public cares deeply about police violence, and there has long been an active public conversation about the use of force by police officers,<sup>123</sup> a conversation that often becomes heated—even violent—in the wake of a controversial use of force.<sup>124</sup> The law often provides grist for this mill in the form of a prosecutor who refuses to bring criminal charges or a court that grants summary judgment to the defendant, or more rarely in the form of a jury verdict.<sup>125</sup> Because there is no clear legal framework that regulates the use of force, these legal decisions have little communicative

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made in accordance with the law. On the other hand, in making a lawful arrest, an officer has the right to use such force as is reasonably necessary under the circumstances to complete the arrest. Whether a specific use of force is excessive or unreasonable turns on factors such as the severity of the crime, whether the suspect poses an immediate violent threat to others, and whether the suspect is resisting or fleeing. You must decide whether the force used in making an arrest was excessive or unreasonable on the basis of that degree of force that a reasonable and prudent law enforcement officer would have applied in making the arrest under the same circumstances disclosed in this case.”)

<sup>120</sup> See, e.g., ELEVENTH CIRCUIT CIVIL JURY INSTRUCTIONS, *supra* note 119, at § 2.2.

<sup>121</sup> See, e.g., THIRD CIRCUIT CIVIL JURY INSTRUCTIONS § 4.9.1 (2007); SEVENTH CIRCUIT CIVIL JURY INSTRUCTIONS, *supra* note 119, at § 7.09; NINTH CIRCUIT CIVIL JURY INSTRUCTIONS § 9.23 (2007).

<sup>122</sup> See *Acosta v. Hill*, 504 F.3d 1323, 1324 (9th Cir. 2007) (upholding the district court’s refusal to give a deadly force instruction based on *Garner* in a § 1983 case not involving a high speed chase in light of *Scott* and overruling a prior Ninth Circuit decision requiring a deadly force instruction); *Blake v. City of New York*, No. 05 Cv. 6652(BSJ), 2007 WL 1975570, at \*3 (S.D.N.Y. July 6, 2007) (refusing to instruct the jury in a § 1983 case “as to the definition of deadly force or the specific circumstances under which deadly force is or is not reasonable” in light of *Scott* and deciding to give instruction that the jury “may consider the *Graham* factors” in determining reasonableness).

<sup>123</sup> See, e.g., MARILYNN S. JOHNSON, *STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY* 12–56 (2003) (discussing nineteenth century public outrage about police violence); Editorial, *The Fatal Facility of Clubs*, N.Y. TIMES, Aug. 21, 1866, at 4 (criticizing police officers’ overly “free use of their clubs which officers indulge in, often with very slight provocation, and sometimes with none at all”); Editorial, N.Y. TIMES, Aug. 20, 1882, at 6 (describing a “deep-seated dissatisfaction with the Police” and commenting that “[i]t is literally the truth that a great many of the most law-abiding citizens of New York are far more afraid of the Police than of the criminals whom the Police are supposed to catch”).

<sup>124</sup> See, e.g., Seth Mydans, *Verdicts Set Off a Wave of Shock and Anger*, N.Y. TIMES, Apr. 30, 1992, at D22 (describing the beginning of the riots in Los Angeles following the Rodney King verdict); President George Bush, Address to the Nation on the Civil Disturbances in Los Angeles, California (May 1, 1992), available at [http://bushlibrary.tamu.edu/research/public\\_papers.php?id=4252&year=1992&month=5](http://bushlibrary.tamu.edu/research/public_papers.php?id=4252&year=1992&month=5) (describing riots in Los Angeles and speaking of the outrage about the Rodney King beating).

<sup>125</sup> See, e.g., U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, 2007, at 51 tbl.C-4 (2007), available at <http://www.uscourts.gov/caseload2007/tables/C04Mar07.pdf> (indicating that 2.5% of non-employment federal civil rights cases go to trial); U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION ACTIVITIES AND PROGRAMS, CRIMINAL SECTION (2006), available at <http://www.usdoj.gov/crt/activity.html#crm> (noting that the Criminal Section receives thousands of civil rights complaints, most of which allege official misconduct, but only prosecutes approximately eighty federal civil rights cases of all types annually).

value. The government cannot cite any well-reasoned, concrete, and accessible standard to justify to the public its prosecutorial and political decisions in salient cases of police violence. Nothing in *Graham*, *Garner*, or *Scott* explains how uses of force, and the politicians, police officials, and police officers who are politically accountable for them, should be judged. One might argue that the public rarely understands the intricacies of the law, and that the outcome of litigation rarely provides a useful basis for holding political actors accountable. But, even for the lawyers who transform public concern about violent policing into litigation or legislative efforts, the Supreme Court has provided a barren legal scheme, filled with judicial intuitions about what matters in police uses of force, but devoid of a satisfactory structure with which others can engage.

## II. JUSTIFICATION DEFENSES AND THE PURPOSES OF POLICE COERCION

### A. *Police Use of Force and Justification Defenses*

Part I shows that current constitutional law governing the use of force is inadequate and consequential, and argues that a more principled basis for evaluating police uses of force is needed. In this Part and the next, I propose an alternative. The common law has confronted many assertions that some interpersonal violence is legitimate, and it has developed answers to questions about when, how, and why one person may justifiably use force against another. Self-defense, the defense of others, and the public authority defense, among other defenses—known to the criminal law as “justification defenses”—are precisely the law’s means of differentiating between cases in which the use of force is acceptable and those in which it is simply an exercise of violent will.<sup>126</sup> If someone is justified and therefore not guilty under the law, it means that although that person’s actions fit the elements of a crime, the law recognizes that under the circumstances, the person’s conduct was not blameworthy or wrongful, and that it took adequate account of the rights of others.<sup>127</sup>

Regulating interpersonal violence—including both defensive force and police uses of force—presents distinctive challenges, challenges to which the law of justification has responded over time. Thus, the law of justification applied to defensive uses of force measures our reasons for attacking another and evaluates whether they are sufficient to justify violence. It recognizes our limitations, such as the difficulty of assessing threats and responding commensurately. And it provides a mechanism for balancing

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<sup>126</sup> Justification defenses apply to tort liability as well as to criminal cases “without much variation,” though in most states justification defenses are now authorized in criminal cases by statute. 1 DAN B. DOBBS, *THE LAW OF TORTS* 159–70 (2001); VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE AND SCHWARTZ’S TORTS* 101–05 (2000).

<sup>127</sup> See generally 2 LAFAVE, *supra* note 3, §§ 9.1(a)(3), 10; 1 ROBINSON, *supra* note 3, § 24; 2 *id.* §§ 121–49.

individual interests with our moral obligations to each other: it permits us to respond to harmful wrongdoing, but demands that we limit the timing and degree of such responses to recognize the rights of others, even those who do wrong.<sup>128</sup> Because effectively regulating police uses of force necessitates meeting these same challenges, the law of justification provides a useful framework for evaluating the legitimacy of police violence. Over time, such a framework would enable courts to create a principled and coherent body of case law that responds to the issues raised in cases like *Garner*, *Graham*, and *Scott* and thereby provide an effective basis for deciding and predicting the outcomes of future cases.

Defensive force justification defenses arise when individuals threaten interests that are weighty enough to justify protection. Someone responds forcibly to protect the interest, and justification defenses measure the response, asking, for example, were alternative means of responding available? Was the response too extreme given the nature of the threat? These considerations are usually translated into particular defensive force justification doctrines that are each based on different interests that can be legitimately protected by force. Thus, self-defense permits one to fight back when an aggressor threatens physical harm.<sup>129</sup> The defense of others permits one to respond forcibly when an aggressor threatens to hurt someone else.<sup>130</sup> The defense of property permits one to respond to some threats to property.<sup>131</sup> With respect to each interest, the doctrines set out three basic requirements to justify the use of force: the force is *necessary* to defend

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<sup>128</sup> See Arthur Ripstein, *Self-Defense and Equal Protection*, 57 U. PITT. L. REV. 685, 688–92 (1996), for a thoughtful account of the ways in which self-defense limits are a means of taking seriously the interests of others.

<sup>129</sup> See 2 LAFAVE, *supra* note 3, § 10.4; 2 ROBINSON, *supra* note 3, § 132.

<sup>130</sup> See 2 LAFAVE, *supra* note 3, § 10.5; 2 ROBINSON, *supra* note 3, § 133.

<sup>131</sup> See 2 LAFAVE, *supra* note 3, § 10.6; 2 ROBINSON, *supra* note 3, § 134–35. Although these are the primary defensive force justification defenses, there are other relevant justification defenses, including the public authority defense and the law enforcement authority defense. The public authority defense permits public officials to engage in authorized official conduct even when their actions might otherwise constitute a crime. Thus, a public executioner is not guilty of murder, and a sheriff may execute a writ of attachment. See 2 LAFAVE, *supra* note 3, § 10.2(a); 2 ROBINSON, *supra* note 3, § 141. The law enforcement authority defense permits police officers, under some conditions, to use force to arrest a suspect or prevent a suspect's escape from custody. It and the public authority defense are different from defensive force justification defenses because they permit affirmative uses of force. Thus, the law enforcement defense provides the source of authority under state law for police officers to conduct coercive arrests and gives officers a defense against unlawful restraint, assault, and battery charges for forcibly restraining a suspect for the purpose of a lawful arrest, even absent a threat to the officer or anyone else. This defense is not used to justify police officers who defend themselves or others from attack. It therefore does not function as a global justification for police uses of force. See 2 LAFAVE, *supra* note 3, § 10.7; 2 ROBINSON, *supra* note 3, § 142. My discussion of the requirements of justification defenses draws heavily from self-defense because, while the structure of all of the justification defenses is quite similar, compare, e.g., 2 ROBINSON, *supra* note 3, §§ 131–32, with *id.* § 142, self-defense is the most commonly used justification defense, and thus the one with the most well-developed case law. However, I do not limit the application of my analysis to circumstances in which officers are defending threats to themselves.

against a threat to that interest, the force is in response to an *imminent* threat to that interest, and the harm the force is likely to cause is reasonable in *proportion* to the harm that is threatened.<sup>132</sup> These requirements, properly interpreted, also provide a practical legal doctrine for analyzing police violence.

Applying the elements of justification defenses to evaluations of police violence under the Fourth Amendment would not be a radical departure from existing law, either substantively or methodologically. Although the federal courts lack a systematic approach to evaluating the reasonableness of police uses of force, the cases are rife with concern about the purposes,<sup>133</sup> timing,<sup>134</sup> necessity,<sup>135</sup> and proportionality<sup>136</sup> of uses of force by police officers—these considerations simply make sense as ways of evaluating what reasonableness means. The law of justification forms these concerns into a relatively well-ordered, principled, and coherent analytic framework that explains not only the relevance of each consideration to the justification of the use of force, but their relationships to each other. In current use of force doctrine, however, these considerations appear only as intermittent, adventitious, and free-floating ideas, undisciplined by any systematic or unifying account. As a result, federal courts have lacked a principled basis for including or excluding relevant considerations in determining reasonableness, and thus in practice they have sometimes given inadequate weight to these factors or incorporated other improper ones.

Although there is no significant case law or academic scholarship that explicitly considers the constitutionality of police uses of force in connection with the justification defenses of criminal law, a relationship between

<sup>132</sup> See, e.g., 2 LAFAYETTE, *supra* note 3, § 10.4; 2 ROBINSON, *supra* note 3, § 131.

<sup>133</sup> See, e.g., *Atwell v. Hart County*, 122 Fed. App'x 215, 218 (6th Cir. 2005) (holding that force was reasonable because it was to “accomplish the legitimate purpose of moving [the suspect] in order to ensure that he received the appropriate medical care” and “was not punitive”); *Buxton v. Nolte*, 473 F. Supp. 2d 802, 813 (S.D. Ohio 2007) (holding that the officer’s limited use of force was reasonable because it was “for the legitimate purpose of guiding [the suspect], rather than malicious”).

<sup>134</sup> See, e.g., *Morrison v. Bd. of Trs. of Green Twp.*, 529 F. Supp. 2d 807, 831 (S.D. Ohio 2007) (“It was not objectively reasonable for the officer to tackle a woman . . . [who] was not posing an imminent threat . . .”); *Estate of Hojna v. City of Roseville*, No. 04-75081, 2007 U.S. Dist. LEXIS 60035, at \*13 (E.D. Mich. Aug. 16, 2007) (finding officer’s use of force reasonable because it was in “response to an apparent imminent threat”).

<sup>135</sup> See, e.g., *Cliatt v. Phenix City*, No. 3:06-cv-471-MEF, 2007 U.S. Dist. LEXIS 92256, at \*12 (M.D. Ala. Dec. 12, 2007) (denying a motion to dismiss because defendants had not established “that the use of deadly force was necessary”); *Ortiz v. Santora*, 223 F. Supp. 2d 387, 394 (D. Conn. 2002) (granting summary judgment for an officer because dangerous circumstances made his use of force necessary).

<sup>136</sup> See, e.g., *Giles v. Kearney*, 516 F. Supp. 2d 362, at 368–69 (D. Del. 2007) (finding that the “amount of force” the officer used was reasonable because the officer’s use of pepper spray instead of physical handling was “proportionate” to the limited threat posed by the suspect); *Valladares v. Cordero*, No. 1:06cv1378, 2007 U.S. Dist. LEXIS 8069, at \*7–8 (E.D. Va. Feb. 5, 2007) (denying motion for summary judgment because, although “application of force may have been appropriate” the circumstances did not justify the “disproportionate response by [the officer]”).

justification defenses and police officers is in fact firmly embedded in existing law. At common law, excessive force allegations were commonly litigated in two traditional forms. Most often, private citizens brought civil assault actions in state courts for damages against police officers, alleging that the police used too much force in arresting the alleged victim.<sup>137</sup> In addition, states sometimes prosecuted police officers for murder or other violent crimes.<sup>138</sup> In both types of cases, especially where nondeadly force was at issue, officers often defended themselves by appealing to self-defense and public authority defenses,<sup>139</sup> or to the common law rule permitting police officers to use reasonable force to effect a lawful arrest.<sup>140</sup> Some of these cases even found their way to federal courts, which treated them similarly.<sup>141</sup>

The common law connection between justification defenses and police uses of force may not be surprising in light of the development of law enforcement in this country. In colonial America, private citizens played a much more important role in identifying and reporting suspects, and in arresting them, than they do today.<sup>142</sup> In a world without professional police forces or frequent interactions between the police and suspects, there would have been much less opportunity and motive for police violence. By contrast, private citizens—victims of crimes or neighbors, sometimes playing law enforcement roles—would have had much more opportunity for friction with other citizens, which would sometimes result in violence. Justification defenses were refined in this context.<sup>143</sup> This may explain why we see highly developed common law rules for self-defense, including rules about when those who start confrontations may invoke self-defense and when defenders may stand their ground rather than retreat.<sup>144</sup> Because citizens routinely confronted each other not only in anger, but as enforcers of legal norms, the legal confrontations between them were heavily contested in the courts. It also may account for the relatively scant attention paid to the question of state force in early American cases. The oddity is that with the rise of professional police forces and the constitutionalization of excessive force regulation, the federal law governing police uses of force has remained poorly developed.

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<sup>137</sup> See, e.g., *Karney v. Boyd*, 203 N.W. 371 (Wis. 1925); John B. Waite, *The Law of Arrest*, 24 TEX. L. REV. 279, 283 (1945).

<sup>138</sup> See, e.g., *State v. Fador*, 268 N.W. 625 (Iowa 1936); Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 263–64 (1940); Waite, *supra* note 137, at 283.

<sup>139</sup> See 2 LAFAVE, *supra* note 3, § 10.7(a); Waite, *supra* note 137, at 301–03.

<sup>140</sup> See 2 LAFAVE, *supra* note 3, § 10.7(a); Perkins, *supra* note 138, at 265–67.

<sup>141</sup> See, e.g., *Barrett v. United States*, 64 F.2d 148 (D.C. Cir. 1933); *Stinnett v. Virginia*, 55 F.2d 644 (4th Cir. 1932); *Colorado v. Hutchinson*, 9 F.2d 275 (8th Cir. 1925).

<sup>142</sup> See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 28 (1993).

<sup>143</sup> See, e.g., *Handley v. State*, 11 So. 322 (Ala. 1892); *State v. Mahon*, 3 Del. (3 Harr.) 568 (1839); *State v. Garrett*, 60 N.C. (Win.) 144 (1863).

<sup>144</sup> See 2 LAFAVE, *supra* note 3, § 10.4(e)–(f); 2 ROBINSON, *supra* note 3, § 131(d)(3).

In many states, police officers continue to rely on justification defenses, including self-defense and public authority defenses, to justify their uses of force in state criminal and civil suits challenging their behavior.<sup>145</sup> And yet, despite the fact that police violence was and is frequently litigated in the states in the context of justification defenses, the federal courts and the contemporary academic literature recognize no connection between justification law and the Fourth Amendment question of what police uses of force are reasonable. This disconnect is particularly peculiar in light of the Supreme Court's expressed methodological preference for using the common law to inform decisions under the Fourth Amendment.<sup>146</sup> Adapting the common law doctrines of justification to the constitutional doctrine governing police uses of force affirms and strengthens these legal and historical connections between justification defenses and Fourth Amendment reasonableness in light of the common underlying legal questions all interpersonal force raises.<sup>147</sup>

### B. *Legitimate Law Enforcement Interests*

The first task in outlining a principled constitutional doctrine for evaluating police uses of force is to determine the legitimate interests police officers may use force to protect. Some seem obvious: police must be able to arrest individuals for serious crimes, even if they resist, and they must defend themselves from serious assault. But neither scholars nor courts have given a coherent account of the limits of the interests that justify force. In *Scott*, for example, the Supreme Court suggested that it was influenced by the deterrence value of using force against fleeing felons as well as the need to prevent any harm Harris might cause.<sup>148</sup> Is deterring flight a legitimate reason for the police to use force? The justification defenses themselves cannot answer this question because they assume rather than justify the interests they protect: because there is a defense of others justification defense, citizens may legitimately use force to defend others in some circumstances. Moreover, police uses of force are a form of *state* coercion, and it is fundamentally the limits of the state's authority that the Fourth Amendment defines. By contrast, the common law justification defenses regulate the ways in which *individuals* use nonconsensual force against

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<sup>145</sup> See, e.g., *State v. Smith*, 807 A.2d 500 (Conn. App. Ct. 2002); *State v. Mantelli*, 42 P.3d 272 (N.M. Ct. App. 2002).

<sup>146</sup> See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 326–28 (2001); *Tennessee v. Garner*, 471 U.S. 1, 13–16 (1985).

<sup>147</sup> In adapting justification law defenses to the Fourth Amendment context, I do not intend to suggest that the existence of a criminal law defense for some conduct should necessarily eliminate civil liability for the same conduct. Instead, the structure, though not the entire content, of justification defenses—which are used in both civil and criminal law, see *supra* note 126—is helpful in structuring the Fourth Amendment analysis, a violation of which itself may be the basis for either civil or criminal liability. See *supra* notes 15–21 and accompanying text.

<sup>148</sup> *Scott v. Harris*, 127 S. Ct. 1769, 1779 (2007).

each other. It is therefore necessary to build an account of why the state may authorize police officers to use force against the rest of us. Unlike an account of the common law justification defenses, this account must reconcile the tension created by the fact that police officers are both agents of the state and human individuals.

Although political philosophers and legal scholars have addressed the problem of justifying state coercion, they have done so almost exclusively in the context of punishment, and almost never in the context of policing.<sup>149</sup> It is therefore ironic that understanding which goals the state may pursue through the use of police force begins with the insight that police may not use force as punishment. The practice of punishment involves a state-authorized deprivation of rights following an adjudication of guilt for criminal acts. While the purposes of punishment are controversial,<sup>150</sup> courts, legislatures, and scholars commonly cite retribution—the idea that criminal behavior is wrong and ought to be punished<sup>151</sup>—and a variety of consequentialist goals, including rehabilitating criminals, temporarily incapacitating them, and preventing future crime through general and specific deterrence,<sup>152</sup> as the justifications for this type of state coercion. Physical force used before a conviction cannot be justified on any of these grounds.

Police uses of force are entirely instrumental, which is to say that there are no deontological justifications for the practice of exercising state force against criminal suspects. Probable cause determinations are insufficiently determinate to justify social condemnation;<sup>153</sup> the police are not the appropriate institution for adjudicating guilt—and if they were, it would be unwise to allow or to require them both to find the guilt and to apply the coercion deserved; and police officers' irregular and discretionary decisions to use force hardly constitute the type of due process that supports punish-

<sup>149</sup> See *supra* note 5 and accompanying text.

<sup>150</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 998–99 (1991) (Kennedy, J., concurring) (“Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions . . . . [that] provoke[] intemperate emotions, deeply conflicting interests, and intractable disagreements[,] . . . . [that have resulted in] federal and state criminal systems [that] have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.” (quoting DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 1 (1990))).

<sup>151</sup> See, e.g., *id.*; 18 U.S.C. § 3553(a)(2)(A) (2000) (requiring federal courts to consider in sentencing the need for sentences “to reflect the seriousness of the offense . . . and provide just punishment for the offense”); Kent Greenawalt, *Punishment*, in 3 *ENCYCLOPEDIA OF CRIME & JUSTICE* 1282, 1282–84 (Joshua Dressler ed., 2d. ed. 2002).

<sup>152</sup> See *Harmelin*, 501 U.S. at 998–99 (Kennedy, J., concurring); 18 U.S.C. § 3553(a)(2)(B)–(D) (requiring federal courts to consider in sentencing the need for sentences that deter future criminal conduct, protect society against defendant, and provide effective rehabilitative measures); Greenawalt, *supra* note 151.

<sup>153</sup> In fact, the Supreme Court has expressly and repeatedly described probable cause as “less than evidence which would justify condemnation.” *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (quoting *Locke v. United States*, 11 U.S. (7 Cranch.) 339, 348 (1813)); see, e.g., *Maryland v. Pringle*, 540 U.S. 366, 371 (2003); *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

ing suspects. Thus, police use of force cannot be justified on the ground that the suspect deserves it. Nor does state coercion before conviction advance the utilitarian goals of criminal punishment. Police officers are not institutionally capable of determining whether and how much force is necessary to deter future wrongdoing. And even if the police were legislatively authorized to use force to prevent crime, pain is an inappropriate criminal deterrent;<sup>154</sup> force is an inappropriate tool for the rehabilitation of criminals; and only the most severe uses of force by police officers can incapacitate a criminal and prevent future wrongs for more than the briefest of periods. The state is therefore not justified in empowering its police officers to use force to achieve the goals of punishment.

Instead, the police are fundamentally a state institution that ensures compliance with the state's most direct *commands*—commands to submit, to appear, to cease, or to disperse. In some circumstances, the police have discretion to issue these edicts as well as enforce them: some arrests do not require warrants, and a decision to break up a rowdy crowd is within an officer's discretion. But it is the discretionary capacity to back a state directive with force that constitutes the essence of *policing*.<sup>155</sup> It is this institutional role that makes the police *law enforcement* officers.

This institutional role for the police suggests two sets of interrelated justifications for state coercion before conviction, one internal to our criminal justice institutions—because police uses of force may be necessary to effectuate criminal proceedings against a suspect—and the other external to them—because police are obliged to prevent crime and thus maintain order as well as help punish those guilty of crimes. First, the state cannot usually adjudicate a suspect's guilt in a way that is consistent with the requirements of procedural justice unless the suspect—unwilling and passive though he may be—participates.<sup>156</sup> Nor can the state punish a suspect in most cases without his presence. In addition, institutions of criminal law often require the compliance of others, such as a witness subpoenaed to testify or a

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<sup>154</sup> Gordon Hawkins & Richard S. Frase, *Corporal Punishment*, in 1 ENCYCLOPEDIA OF CRIME & JUSTICE, *supra* note 151, at 258 (discussing normative and empirical arguments against corporal punishment as a deterrent and widespread repudiation of pain as a form of punishment); *see also* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1212 (1985) (arguing that pain is a poor deterrent). Even in the context of the death penalty, the appropriate deterrent effect comes not from the fear of pain, but from the fear of death. Thus, the Court has stated that “modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence.” *Francis v. Resweber*, 329 U.S. 459, 463 (1947); *see also* *Wilkerson v. Utah*, 99 U.S. 130, 135 (1879) (classifying as cruel and unusual the infliction of capital punishment to which “terror, pain, or disgrace were superadded”).

<sup>155</sup> *See* Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE 17, 35 (Herbert Jacob ed., 1974) (arguing that “police work consists of coping with problems in which force *may have to be used*”).

<sup>156</sup> *See* *Tennessee v. Garner*, 471 U.S. 1, 10 (1985) (“Being able to arrest such individuals is a condition precedent to the state’s entire system of law enforcement.” (quoting petitioners’ brief (internal quotation marks omitted))).

homeowner whose house is searched for evidence of a crime of another. In these ways, the state expressly commands individuals when it issues arrest warrants and subpoenas, and implicitly commands them when it authorizes police officers to make an arrest without a warrant. Police uses of force are then justified to ensure that these commands are satisfied, that our criminal justice institutions function after a crime has occurred. In sum, police may use coercive means against citizens when they arrest a suspect, carry out a lawful search, secure a witness under court order, and the like, because criminal law necessitates and demands it.<sup>157</sup>

The police, however, are not simply institutional players in the backward-looking practices of the criminal justice system. The second justification for their coercive role is to prevent crime and maintain order, and they may use force when it is necessary to eliminate a significant threat to public safety.<sup>158</sup> Sometimes when the police use force to stop or prevent harm—for example, when they break up a fight—they trigger the criminal justice system, usually by arresting someone engaged in criminal activity. At other times, however, officers solve the same problems without making an arrest—for example, they might physically separate two teenagers who are pushing each other but not write up assault charges.<sup>159</sup> Terminating ongoing harm or the threat of harm or criminal activity is sufficient to justify these uses of force even when no crime has occurred.<sup>160</sup> Thus, a police officer may use force to stop a distraught person from committing suicide or to break up a rowdy crowd that could injure by riot or stampede, even though doing so entails applying force against someone who is not yet violating a criminal statute.

Uses of force that occur when police officers are preventing crime and protecting public safety are often very controversial<sup>161</sup> because in these cases they often act essentially autonomously, imposing particular solutions

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<sup>157</sup> This is not to suggest that contemporary policing is dominated by activities that are coercive in nature. The research suggests precisely the opposite. See NAT'L RESEARCH COUNCIL, *supra* note 109, at 57–78 (describing research on police activities).

<sup>158</sup> See *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006) (noting that “the role of a peace officer includes preventing violence and restoring order”); NAT'L RESEARCH COUNCIL, *supra* note 109, at 69–71.

<sup>159</sup> See *Terry v. Ohio*, 392 U.S. 1, 13 (1968) (“Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute crime.”); *id.* at n.9 (describing a variety of threats to public order that might justify coercive police intervention but not arrests); NAT'L RESEARCH COUNCIL, *supra* note 109, at 64 (noting that the police often do not arrest those that they have authority to arrest); *id.* at 70 (noting that officers sometimes use physical force to maintain order without arresting anyone).

<sup>160</sup> See MODEL PENAL CODE § 3.07 cmt. 6, at 65 (Tentative Draft No. 8, 1958) (“[I]t makes small sense to sanction use of force for the arrest and to withhold the privilege for the preventive purpose which is the ultimate objective of a prosecution.”).

<sup>161</sup> See, e.g., Diana Marrero & Ann W. O'Neill, *Miami Law Boosts Police Powers to Arrest Protesters*, S. FLA. SUN-SENTINEL, Nov. 14, 2003, at 1A (describing public outcry over a local ordinance allowing police broad authority to arrest protesters and noting civil liberties concerns regarding policing of public protests).

on singular and exigent problems, sometimes with little guidance or supervision. Moreover, the targets of police coercion in these cases frequently have done no wrong. But even though the edges of legitimate police efforts to protect the public are contested and blurry,<sup>162</sup> the prevention of crime and the maintenance of public safety remain central to contemporary policing.<sup>163</sup> And the legitimacy of force to prevent harm is central to our current understanding of police uses of force.

In *Garner*, for example, the use of force could not be justified on the ground that it would trigger the procedures of criminal justice because shooting a suspect in the head frustrates not only “the interest of the individual” but also that “of society, in judicial determination of guilt and punishment.”<sup>164</sup> In fact, as *Garner* points out, “[t]he use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion.”<sup>165</sup> The question, then, is what justifies killing any fleeing felon, including a violent one. Although *Garner* is not explicit on this point, the Court appears to equate the violent nature of the crime with future dangerousness.<sup>166</sup> Thus, following traditional common law justifications,<sup>167</sup> *Garner* suggests that deadly force may be justified against a suspected felon fleeing from a crime in which violence was used or threatened because that type of suspect poses a threat to society.<sup>168</sup> One might contend that *Garner* requires either insufficient or too much evidence of a threat to public order, but neither view challenges the basic reasoning

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<sup>162</sup> See generally Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261 (discussing the legal status of police intrusions that are not directed towards investigating crime).

<sup>163</sup> See, e.g., *Terry*, 392 U.S. at 13–14 n.9; NAT’L RESEARCH COUNCIL, *supra* note 109, at 57; SAMUEL WALKER, *THE POLICE IN AMERICA* 112 (2d ed. 1992).

<sup>164</sup> *Tennessee v. Garner*, 471 U.S. 1, 9 (1985).

<sup>165</sup> *Id.* at 10.

<sup>166</sup> See, e.g., *id.* at 11–12 (“Where the officer has probable cause to believe that the suspect *poses a threat of serious physical harm, either to the officer or to others*, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon *or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm*, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.” (emphasis added)). *Scott* reads *Garner* in this way. See *Scott v. Harris*, 127 S. Ct. 1769, 1777 n.9 (2007) (interpreting *Garner* to permit force when a suspect has committed a crime involving or threatening violence because “his mere being at large poses an inherent danger to society”).

<sup>167</sup> See, e.g., *Holloway v. Moser*, 136 S.E. 375, 376 (N.C. 1927) (defending the common law rule permitting deadly force against fleeing felons but not fleeing misdemeanants by stating, “[t]he reason for the distinction is obvious. Ordinarily, the security of person and property is not endangered by a misdemeanor being at large, while the safety and security of society require the speedy arrest and punishment of a felon”).

<sup>168</sup> Although *Garner* rejects the common law rule regarding precisely when deadly force is justified, it shares one component of common law reasoning: that either immediate or future danger justifies deadly force in some circumstances, but not others. See *Garner*, 471 U.S. at 11–12.

that the state's legitimate interest in maintaining order—that is, eliminating a future threat of harm to the public—justifies the use of deadly force, even though it prevents adjudicating the criminal conduct.

Thus, in addition to using force to initiate the backward-looking procedures of criminal justice, police officers may be authorized to look forward, too, in order to control imminent threats to public safety. Importantly, however, this justification also limits the police uses of force associated with it. The force used must be preventative or curative: officers cannot use force or inflict pain to deter future misbehavior or impose just desserts. It also must be authorized: order-maintaining force must back an express state command or reflect order-maintaining discretion granted to officers beyond their role in enforcing criminal statutes.<sup>169</sup>

### *C. The Derivative State Interest in Officer Safety*

Although the state's interests in facilitating law enforcement and maintaining order are the only interests that justify coercive policing, to understand the limits of state coercion it is also essential to consider the practical constraints that shape the pursuit of state ends. Individual people must make material the coercive power of the state. A suspect is not an arrestee until a police officer physically lays hands on him to arrest him. As a result, the characteristics and limitations of the state's tools used to exercise its coercive power, namely, human police officers and the limited technologies with which they interact, structurally constrain the state's pursuit of the public interest. Most significantly, because human police officers are the instruments by which the state pursues its interests in law and order, threats to those police officers often result in justified defensive force in excess of what would otherwise be required to serve the state's interests.

Not every threat of harm to an officer directly threatens the state's interests in law and order.<sup>170</sup> If a suspect attacks an officer with a number of

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<sup>169</sup> A police officer is an agent of the state who must be authorized in all his activities, including most especially the use of force. Essentially, in saying that police officers may use this type of force, I am arguing that the state may legitimately authorize police to do so.

<sup>170</sup> *Cf.* *Terry v. Ohio*, 392 U.S. 1, 26–27 (1968) (“[P]etitioner’s argument . . . assumes that the law of arrest has already worked out the balance between the particular interests involved here—the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual. But this is not so. An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society’s interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual’s freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. Moreover, a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime.”).

other officers around, for example, there may be little threat to the success of the arrest or to public order except that one officer is likely to get hurt. The amount of force necessary to again subdue the suspect might be significantly less if other officers were unconcerned about their colleague's safety. While defensive force by police officers is often viewed as self-defense,<sup>171</sup> it is more accurately justified as derivative of the state's interests in law and order. If allowing officers to defend themselves did not serve the state's interests, the state could simply demand that officers contract away, at least partially, their right to self-defense as a condition of employment, rather than recognize the right as justifying defensive force while on the job.<sup>172</sup> Doing so would serve the important state interest of increasing freedom for the citizens of a state by minimizing state coercion against them, and the state could still satisfy its interests in punishing and deterring such attacks on officers through subsequent civil or criminal penalties.

In fact, however, not only do states not restrict officers in these ways, they allow officers to defend themselves even in circumstances when others cannot,<sup>173</sup> because officers' defensive force serves the state's ends as well as the officer's. Even conceiving the state's interests narrowly, an injured or dead officer is a very serious thing. The immediate state interests that required police intervention will often go unserved if the officer is injured or killed in line of duty. Furthermore, officers are not easily replaced. Not only is there a significant shortage of qualified applicants for law enforcement positions in the United States,<sup>174</sup> but even if there were not, screening, selection, and training costs make replacing an officer an expensive proposition.<sup>175</sup> Moreover, officers prohibited from defending them-

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<sup>171</sup> See, e.g., *State v. Reppert*, 52 S.E.2d 820 (W. Va. 1949).

<sup>172</sup> Consider, for example, that the Hatch Act significantly restricts the kinds of political activities federal employees may engage in as a condition of their employment. See 5 U.S.C. §§ 7321-7326 (2000).

<sup>173</sup> See, e.g., ARK. CODE ANN. § 5-2-607 (2006) (excepting police officers from the duty to retreat); HAW. REV. STAT. § 703-304 (2007) (excepting police officers from the duty to retreat and prohibiting civilian defenders from using force to resist even unlawful arrest); *State v. Dunning*, 98 S.E. 530 (N.C. 1919) (noting that officers are not subject to the ordinary rules of retreat for self-defense).

<sup>174</sup> E.g., Kris Axtman, *Calling All Future Police Officers*, CHRISTIAN SCI. MONITOR, Jan. 23, 2006, at 3; Larry Copeland, *Shortages Leave Roads Without a Trooper*, USA TODAY, June 26, 2007, at 4A; John Pomfret, *Police Finding It Hard to Fill Jobs*, WASH. POST, Mar. 27, 2006, at A01.

<sup>175</sup> Consider, for example, the Philadelphia Police Department's selection process, which is typical for larger departments. (Large departments employ the majority of police officers in the United States. See BRIAN A. REAVES, DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2004, at 1 (2007).) Philadelphia's selection process involves a two and a half hour written exam, a reading exam, a fitness test, a drug-screening test, a broad background investigation, a medical evaluation, and a psychological evaluation before selection and training. See Philadelphia Police Department, Selection and Hiring Process, [http://www.ppdonline.org/career/career\\_hire.php](http://www.ppdonline.org/career/career_hire.php) (last visited Feb. 13, 2008). Once recruits are selected, basic training programs for recruits typically include 720 hours of training. HICKMAN, *supra* note 115, at 9. Even if these costs were not so great, replacing experienced officers with inexperienced ones may make police forces less effective and more injurious to the public. See, e.g., William Terrill & Stephen D. Mastroski, *Situational and Officer-Based Determi-*

selves might well become less effective in serving the state if they suffer more injuries when attacked or become hesitant in carrying out their mission.<sup>176</sup> In addition to these more pragmatic concerns, the state might reject a contract that severely restricted defensive force by police officers as contrary to state interest for deontic reasons. Given that the law recognizes the right of self-defense because we are not easily made whole after physical pain and injury,<sup>177</sup> it is not unreasonable for the state to conclude that asking officers to suffer such injuries—while permissible—is overly coercive and against public policy for analogous reasons. For all these reasons, it is no surprise that allowing officers to defend themselves is a long-standing and deeply held aspect of Anglo-American legal culture.<sup>178</sup>

But we should not be misled. Not all of the considerations affecting the state's interest cut in favor of permitting officers to defend themselves forcibly. For example, deontic considerations protect suspects as well as officers. Just as in civilian self-defense, moral constraints pose an upper limit on permissible force used to defend police officers as well as a lower one.<sup>179</sup> Moreover, while the state has a significant interest in the safety of its officers, police violence also imposes a significant cost on the public. Excessive uses of force have a deleterious effect on public confidence in the police, and may also undermine public adherence to criminal laws and cooperation with police activities related to law and order.<sup>180</sup> Thus, in principle at least, under some social conditions, a state could reasonably decide to restrict the use of defensive force by police officers beyond the ordinary limits on self-defense, even if it knew that some police officers would be injured or killed as a result. Such a decision might be justified as a permissible balancing of the state's interest in the safety of its officers, its officers' interests as individual members of the body politic, and the interests of ci-

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*nants of Police Coercion*, 19 JUST. Q. 215, 238 (2002) (finding older and more experienced officers use less force).

<sup>176</sup> See *Stinnett v. Virginia*, 55 F.2d 644, 647 (4th Cir. 1932) (“[T]he courts should not lay down rules which will make it so dangerous for officers to perform their duties that they will shrink and hesitate from action which the proper protection of society demands.”).

<sup>177</sup> For a discussion of the distinctive nature of pain, see ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* (1985).

<sup>178</sup> See, e.g., *State v. Reppert*, 52 S.E.2d 820 (W. Va. 1949); *Durham v. State*, 159 N.E. 145 (Ind. 1927); *Loveless v. Hardy*, 79 So. 37 (Ala. 1918); *Perkins*, *supra* note 138, at 283 & n.500 (citing cases).

<sup>179</sup> Cf. *United States v. Schatzle*, 901 F.2d 252, 253–54 (2d Cir. 1990) (upholding the conviction of a Secret Service agent charged with violating 18 U.S.C. § 242 for beating a man who allegedly spit on him).

<sup>180</sup> See Robert J. Kane, *Compromised Police Legitimacy as a Predictor of Violent Crime in Structurally Disadvantaged Communities*, 43 CRIMINOLOGY 469 (2005) (finding that reduced police legitimacy resulting from police misconduct leads to increased violent crime in highly disadvantaged communities); Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84 (2004) (arguing that public cooperation is necessary for police order-maintenance activities); Ronald Weitzer, *Incidents of Police Misconduct and Public Opinion*, 30 J. CRIM. JUST. 397 (2002) (discussing a significant increase in negative attitudes towards police resulting from highly publicized incidents of excessive force).

vilians to be free from the consequences of police uses of force. For these reasons, although the practical considerations that affect the state's interest in limiting defensive force by police officers, combined with the moral constraints on permitting and restricting that force, suggest the need for some defensive force by police officers under current conditions, we should remain cognizant that the nature of the justifications for that force are both limited and contingent.

Even taking defensive force by officers to be justified as a general matter, when an officer faces no threat to his safety, he may not use force beyond that which is necessary to arrest the suspect or preserve order. A police officer facing a compliant suspect during an arrest finds himself in exactly this situation. Thus, there are many cases where the state's interest in the officer's self-preservation is irrelevant to the amount of force he may legitimately use. Under some circumstances, however, an officer may justly use force not only to serve the state's interests in law and order, but also to defend himself. On these occasions, force is a direct consequence of the fact that state coercion is implemented by vulnerable human actors and not automata.

One might be tempted to view defensive force by police officers simply as an agency cost. After all, police officers are hardly unique in having interests as public officials that go beyond those of the state: Judges may want to impose light sentences on children of their friends; prosecutors may choose to pursue unjustified charges against political enemies; and legislators often desire to line their own pockets at the cost of public interest. Even police officers might prefer to arrest those they dislike. An officer's interest in protecting his own body in the course of his official conduct, however, is not like these other motivations because officer safety is often essential to the state's capacity to serve its law and order ends. To the degree that defensive force by police officers serves the state, the additional force an officer uses is a transaction cost rather than an agency cost: It is simply not a cost that can be overcome by the actor's adherence to his duty. Instead, it derives from the fact that the state's policing work is necessarily done by individual officers.

The state's need for immediate forcible compliance justifies police uses of force. But as broad as this role is, it limits the state's appropriate use of the police, too. In sum, constitutionally permissible police uses of force must serve one or more of three interests: (1) *law*—assisting our institutions of criminal adjudication, most commonly by enabling a lawful arrest or facilitating an authorized search; (2) *order*—maintaining public safety by preventing or stopping disorderly conduct; and (3) *self-defense*—protecting the officer from physical harm. Thus, in determining what constitutes constitutionally reasonable force, the “totality of the circumstances” should include *only* circumstances that are relevant to these ends and the state's ability to achieve them, and only to the degree that they are relevant. Although these legitimate justifications appear frequently in case law on po-

lice uses of force, they do so neither coherently nor exclusively. And yet, to consider other factors—or to consider relevant factors for improper reasons—is to permit force to be used for illegitimate purposes. Moreover, even when these interests are at stake, the state may not authorize the police to use force as a means of social expression—sending a message of social condemnation, for example—nor as a means of serving its legitimate interests indirectly, as it might use imprisonment to serve its legitimate interest in rehabilitation. As the above discussion demonstrates, uses of force to punish suspects or deter future bad conduct are out of bounds. Instead, the state may authorize the police to use force only in direct pursuit of its interests in law, order, and officer self-defense.

*D. The Consequences of the Limited Interests Justifying  
Police Use of Force*

While the above consideration of the limited ends justifying police force may be abstract, its legal implications are quite practical. These justifications set parameters on the “governmental interests alleged to justify the intrusion” that courts must balance against the “intrusion on the individual[]”<sup>181</sup>—parameters that are not fully consistent with Supreme Court and lower court reasoning about what is relevant to decisions on the use of force. *Graham*, for example, instructs lower courts to consider the severity of the underlying crime in evaluating the reasonableness of a use of force,<sup>182</sup> and lower courts have almost universally followed this mandate.<sup>183</sup> Although *Scott* implicitly dismisses *Graham*’s factors in evaluating *Scott*’s use of force,<sup>184</sup> *Scott* does not preclude consideration of the severity of the underlying crime in evaluating uses of force, nor does it explain when it is irrelevant. It is therefore likely that courts will continue to consider the severity of the underlying crime in many circumstances. But the severity of the crime is germane in only three ways.

First, the strength of the state’s law interest in ensuring the suspect’s arrest is strongly—almost definitionally—correlated with the seriousness of the suspected crime. Thus, in the case of a fleeing suspect, the extent to which escape would frustrate the state’s interest in the application of its criminal law, and therefore how much force is reasonable, depends in part on how serious a crime is at issue.<sup>185</sup> The same would be true for suspects’

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<sup>181</sup> See *Scott v. Harris*, 127 S. Ct. 1769, 1778 (2007) (citation omitted) (internal quotation marks omitted).

<sup>182</sup> See *Graham v. Connor*, 490 U.S. 386, 396 (1989) (noting that determining whether force is reasonable under the Fourth Amendment “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue”).

<sup>183</sup> See *supra* note 42.

<sup>184</sup> See *supra* text accompanying notes 83–92.

<sup>185</sup> See, e.g., *Head v. Martin*, 3 S.W. 622 (Ky. 1887) (noting that deadly force is not permitted against misdemeanants because “[t]he security of person and property is not endangered by a petty of-

other nonviolent means of subverting arrest. For example, when a suspect resists without threatening the officer with harm—such as by refusing to give his arms to the officer for handcuffing—he jeopardizes the success of the arrest. When the state’s interest in the arrest is insufficiently strong or can be satisfied without the use of force, no force should be used to overcome that resistance.

The second reason that the severity of the crime may be relevant to the use of force stems from the state’s interest in order rather than law. If a suspect flees, but is likely to be caught later, his flight poses little threat to the state’s interest in “setting the criminal justice mechanism in motion.”<sup>186</sup> His escape may nevertheless threaten officers or bystanders at the scene.<sup>187</sup> The severity of the crime may aid an officer’s assessment, during arrest or flight, of how dangerous a suspect is, especially if that danger is otherwise ambiguous. If, for example, an officer does not know whether the suspect is armed or cannot assess the suspect’s intentions, the violent nature of a suspect’s crime might inform those determinations. In such circumstances, it may be reasonable for an officer to conclude that a suspected bank robber is more likely to be armed and dangerous than a suspected check kiter; a suspect facing the death penalty is more likely to kill to prevent capture than a speeder.<sup>188</sup> Unlike the first kind of relevance, this justification depends on the implicit empirical claim that the nature and severity of the crime effectively predict the suspect’s conduct at arrest.

The third way in which the severity of the crime may be relevant is closely related to both the first and the second. It addresses the state’s interest in preserving order, but involves the threat posed by the suspect’s escape to future public safety. Although the state has an interest in subduing a suspect because of its interest in subjecting him to the criminal process, it also has an interest in subduing him if in freedom he may pose an ongoing threat to public order or safety.<sup>189</sup> His alleged crime helps illuminate the

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fender being at large, as in the case of a felon,” and “the very being of society and government requires the speedy arrest and punishment of the latter”).

<sup>186</sup> *Tennessee v. Garner*, 471 U.S. 1, 10 (1985).

<sup>187</sup> In *Scott*, for example, the Supreme Court found that Harris’s flight threatened both civilians and officers, see *Scott v. Harris*, 127 S. Ct. 1769, 1775–76 (2007), but did not contest the court of appeals’ statement in *Harris v. Coweta County*, 433 F.3d 807 (11th Cir. 2005), that “there is no question that there were alternatives for a later arrest” in Harris’s case. *Id.* at 815.

<sup>188</sup> The prior suspected criminal conduct is not relevant where the threat to the officer is unambiguous. Thus, when a suspect has his hands raised in surrender, his violent crime does not justify force against him. Conversely, if a suspect is known to be armed and has not surrendered, his trivial crime does not eliminate the danger he potentially poses. See *Storey v. State*, 71 Ala. 329 (1882) (“It is quite true that no one can, without lawful excuse, kill a blood-thirsty ruffian any more than he can the most orderly citizen; but it is plain that an overt act done by the former may reasonably justify prompt action, as a necessary means of self-preservation, than if done by the latter. It may sometimes be as material to prove that a man, who assailed you, was a Thug in character, as that he was a Thug in reality.”).

<sup>189</sup> See *Scott*, 127 S. Ct. at 1777 n.9 (“*Garner* hypothesized that deadly force may be used ‘if necessary to prevent escape’ when the suspect is known to have ‘committed a crime involving the infliction or

strength of this threat. Thus, for example, deadly force might be justified to prevent a suspected serial killer from escaping, even when his flight poses no immediate threat to officers or bystanders and when the force used against him would undermine the state's interest in adjudicating and punishing his guilt. This justification too is dependent on an empirical claim about the relevance of a suspect's crime in predicting his future bad acts. Unless the nature of the suspected offense is sufficiently predictive of future violence, courts should not permit this reasoning to justify high levels of force.<sup>190</sup>

In other circumstances, the nature of the crime is almost always irrelevant. For example, when the interest justifying the use of force is officer safety, an officer may use force to prevent an attacking suspect from injuring him, no matter what the crime—whether the suspect is being arrested for jaywalking or assassinating the President. Force may be used only to the degree necessary to protect the officer's safety, and the seriousness of the crime neither necessarily sets limits on this force nor justifies it. Because of misleading guidance by the Supreme Court, courts have not always recognized this fact. In *Jones v. Buchanan*, for example, Jones voluntarily went to jail to sober up, but got into a confrontation with an officer there.<sup>191</sup> He sued, and the court of appeals reversed the district court's summary judgment order against him in part because Jones was not under arrest or suspected of committing any crime at the time the officer used force.<sup>192</sup> While this fact certainly suggests that no force should have been used to achieve an arrest, it is—despite *Graham's* counsel—irrelevant to the question whether the officer had reason to use force to defend himself against aggression from Jones, the only question in the case.<sup>193</sup>

Once the appropriate role of the severity of the crime is understood in this way, it is easier to make sense of the Supreme Court's rejection of the

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threatened infliction of serious physical harm,' so that his mere being at large poses an inherent danger to society. [Harris] did not pose that type of inherent threat to society, since (prior to the car chase) he had committed only a minor traffic offense and, as far as the police were aware, had no prior criminal record.'"). Of course, the government's interest in seeing a suspect subdued also depends in large part on how certain it is that the suspect committed a crime of that severity. Current law simply requires probable cause to believe that the particular suspect committed a violent crime, see *Garner*, 471 U.S. at 11, though one might reasonably argue that a higher standard is more appropriate in the context of deadly force, given the likely consequences.

<sup>190</sup> In fact, empirical evidence suggests that many factors other than the violent nature of the crime are significant in predicting recidivism: the category of crime at issue (e.g., robbery or firearms versus drug trafficking), the criminal history of the suspect, demographic characteristics (e.g., age, gender, marital and employment status), and drug use, to name a few. See, e.g., U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 11–15 (2004) (discussing the effect of various offender characteristics on recidivism rates).

<sup>191</sup> 325 F.3d 520, 523–25 (4th Cir. 2003).

<sup>192</sup> *Id.* at 523, 528.

<sup>193</sup> *Id.* at 528.

lower court opinions in *Scott*.<sup>194</sup> Both lower courts focused on the triviality of Harris's crime.<sup>195</sup> Despite the Supreme Court's statement that Harris's case is unlike Garner's because cars and guns are different,<sup>196</sup> in fact, if Harris posed no threat to the public by his flight, his case would have been identical to Garner's in the relevant respect. That is, if his escape posed no danger to the public because, for example, the roads were deserted or because he did not drive recklessly, the state's law interest, rather than its order interest, would have been the only immediate interest threatened by his flight.<sup>197</sup> In that case, the scope of the state's interest would be connected only to the crime at issue, speeding in Harris's case—a crime much less significant than that at issue in *Garner* and clearly too weak to justify the use of serious force to secure an arrest.<sup>198</sup> Nor did Harris's speeding suggest future dangerousness from which the public needed protection. Thus, Harris's *crime*, like Garner's, did not justify deadly force.

The real difference between *Scott* and *Garner* is the factual conclusion by the Supreme Court that Harris's *flight* itself posed "extreme danger."<sup>199</sup> This fact alone explains why the severity of the crime is irrelevant in *Scott*. Assuming that Harris's high speed escape posed a deadly threat to the officers on hand and to civilian drivers nearby, and assuming—as the Court did—that giving up the chase would not necessarily end that danger, Scott was justified in using force to eliminate that threat, regardless of the original justification for the traffic stop.<sup>200</sup> In other words, Scott may have justifiably used force to advance the state's interest in order. Moreover, because the Court found that Harris's flight posed an unambiguous risk to others, the nature of the underlying crime was unnecessary to interpret the threat posed by his present conduct. Thus, although the Court in *Scott* makes controversial factual and empirical claims about what danger Harris posed and about what might have happened if Scott had given up the chase, it properly identifies the legitimate interest at stake—the threat that the Court took Harris to pose to public safety—and correctly suggests that Harris's initial of-

<sup>194</sup> See *supra* notes 62–69 and accompanying text.

<sup>195</sup> See *Harris v. Coweta County*, 433 F.3d 807, 815 (11th Cir. 2005) ("The use of deadly force is not 'reasonable' in a high-speed chase based only on a speeding violation and traffic infractions . . ."); *Harris v. Coweta County*, No. 3:01CV148(WBH), 2003 WL 25419527, at \*5 (N.D. Ga. Sept. 25, 2003) ("The central fact that guides this Court's decision is that, prior to Reynolds' decision to instigate a high-speed chase, Harris's only crime was driving 73 miles per hour in a 55 miles-per hour zone.").

<sup>196</sup> *Scott v. Harris*, 127 S. Ct. 1769, 1777 (2007).

<sup>197</sup> *Id.* at 1777 n.9 (noting that Harris did not pose a threat due to the nature of his crime but only as a result of his flight itself). It should be noted that unlike Officer Hyman, Officer Scott did not know the nature of Harris's crime, see *Harris*, 433 F.3d at 815, though presumably it would have been easy to discover.

<sup>198</sup> In addition, presumably, police officers could have mailed Scott the speeding ticket or showed up on his doorstep. See *Harris*, 433 F.3d at 815 ("[T]here is no question that there were alternatives for a later arrest.").

<sup>199</sup> *Scott*, 127 S. Ct. at 1777.

<sup>200</sup> See *id.* at 1775–76, 1778–79.

fense did not render unreasonable the use of force to defend this interest.<sup>201</sup> The Court's decision to distinguish *Garner* is consistent with the limited justifications for which force may be used, although not, as the Court suggests, because *Garner* is limited to its facts. Instead, the cases are distinguishable because they implicate different state interests: *Garner* analyzes whether the state's interest in preventing any *future* danger the suspect may have posed justified force, while *Scott* deals with whether a *contemporaneous* threat the suspect posed to the officers and the public made force reasonable.

In *Jones v. Buchanan*, the case of the officer and the drunken man at a jail, the court of appeals inappropriately considered the minor nature of the underlying crime as an argument against the defendant's use of force to defend himself.<sup>202</sup> But some courts and juries may be more likely to misjudge the opposite case—that is, they may find force reasonable where the nature of the underlying crime is serious, but where no police use of force is in fact justified. Officers often use excessive force in response to perceived threats to their authority.<sup>203</sup> Many incidents of excessive force stem from overreactions to resistance by arrestees and follow legitimate uses of force.<sup>204</sup> Sometimes a suspect is brought under control only after a struggle,<sup>205</sup> or a suspect leads officers on a high speed chase before he is apprehended.<sup>206</sup> Adrenaline and anger lead to a desire for revenge, and an officer beats a suspect while he is handcuffed.<sup>207</sup> When the suspect is fully under control, the seri-

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<sup>201</sup> *Id.* at 1778 (“[I]n judging whether Scott’s actions were reasonable, we must consider the risk of bodily harm that Scott’s actions posed to [Harris] in light of the threat to the public that Scott was trying to eliminate. Although there is no obvious way to quantify the risks on either side, it is clear from the videotape that [Harris] posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase.”). Although the Court emphasized that Harris posed a threat to the officers as well as to the public, as the Court acknowledged, the threat to the officers existed only because they pursued Harris. See *id.* If Harris’s flight did not pose a risk to the public (and therefore a threat to order) and the state’s law interest did not itself justify force, then the state could not justify force on the ground that its own pursuit of Harris created a risk to officers that justified the use of force.

<sup>202</sup> See 325 F.3d 520, 538 (4th Cir. 2003).

<sup>203</sup> See Alpert & Smith, *supra* note 56, at 483 (“The targets of police abuse are almost always lower class males, and the most common factor associated with abuse is disrespect shown to the police by these suspects.”); see, e.g., *United States v. Brown*, 250 F.3d 580, 582–84 (7th Cir. 2001) (describing officers who violently punished a truck driver for failing to respect their authority).

<sup>204</sup> See, e.g., *United States v. Johnstone*, 107 F.3d 200, 203 (3d Cir. 1997) (noting that the officer beat the handcuffed arrestee following a struggle); *United States v. Boyland*, No. 91-6069, 1992 WL 332002, at \*1–2 (6th Cir. Nov. 12, 1992) (unpublished table decision) (per curiam) (noting that the officer assaulted the handcuffed suspect following a struggle).

<sup>205</sup> See, e.g., *Johnstone*, 107 F.3d at 203; *Boyland*, 1992 WL 332002, at \*1–2.

<sup>206</sup> See, e.g., *United States v. Williams*, 343 F.3d 423, 429–30 (5th Cir. 2003); *United States v. Conley*, 249 F.3d 38 (1st Cir. 2001); Brief for the United States as Appellee at 3–4, *United States v. Wyrick*, No. 05-40012 (5th Cir. June 22, 2005).

<sup>207</sup> See, e.g., *United States v. Harris*, 293 F.3d 863, 867–68 (5th Cir. 2002); *Johnstone*, 107 F.3d at 203; *United States v. Reese*, 2 F.3d 870, 874–75 (9th Cir. 1993); *United States v. Cobb*, 905 F.2d 784, 785 (4th Cir. 1990).

ousness of the suspect's alleged crime is no longer relevant to the use of force on the suspect. Ironically, the more unnecessary the use of force, the less relevant the nature of the crime or other prior misconduct. Understanding the limited state interests that justify police uses of force helps explain why: an officer cannot justify force against a subdued arrestee because the sole justifications for police coercion—the state's interests in apprehending suspects, maintaining order, or protecting officers—have already been served.

Notably, though *Graham* and its progeny call for consideration of the nature of the suspect's crime, these are civil and criminal cases *against the officer*. In mandating consideration of the *suspect's* crime, *Graham* authorizes the introduction of evidence that is sometimes both extremely prejudicial and irrelevant to the adjudication of the reasonableness of the use of force. When a court permits evidence about the nature of the suspect's wrongdoing and then gives either a *Graham* instruction that such evidence is relevant to whether force was reasonable or a more general instruction advising the jury to consider all of the circumstances, the court invites the jury to focus on the alleged actions of the arrestee rather than asking whether the officer's actions were justified. Such a focus encourages, and even authorizes, jury nullification, already a problem in civil rights cases.<sup>208</sup> Since police officers frequently encounter criminals, what the arrestee allegedly did is often very bad.<sup>209</sup> While *Scott* appropriately focuses on Harris's conduct in flight rather than the nature of his underlying offense, it muddies the water and reiterates *Graham's* mistake by encouraging lower

<sup>208</sup> Cheh, *supra* note 9, at 253, 256.

<sup>209</sup> Consider Billy Ray Stone. In July 2001, Billy Ray Stone kidnapped Charlene Wright, a fifty-five-year-old woman, in Tupelo, Mississippi. During a high speed chase that followed, Stone pushed Wright—naked and bound—out of his car, causing the popular Lee County Sheriff Harold Ray Presley to run her over. She died the following day from her wounds. When Presley and his deputies caught up with Stone a few hours later, a gun battle ensued, in which Stone shot Sheriff Presley six times, killing him. Deputies subdued Stone, who had been shot once during the fight. According to overwhelming evidence at the federal criminal trial of two of the sheriff's deputies, these and other deputies kicked Stone and hit him with a flashlight repeatedly while he lay handcuffed, suffering from a gunshot wound to the chest. Emergency personnel also testified that the charged deputies prevented them from treating Stone, who died at the scene of massive head trauma and his gunshot wound. Nevertheless, a federal jury acquitted the officers accused of using excessive force against Stone in three hours. See Lela Garlington, *Late-Night Walk Led to Brutal Fate in Tupelo*, COMMERCIAL APPEAL, July 15, 2001, at B1; Clay Harden, *Stories Conflict in Lee Slaying*, CLARION-LEDGER, Oct. 29, 2002, at 1A; Clay Harden, *Witness in Trial of Lee Deputies Details Beating*, CLARION-LEDGER, Oct. 30, 2002, at 1A; *Medical Tech Told Not to Help Suspect, He Says—Testimony Continues in Lee Deputies' Trial*, COMMERCIAL APPEAL, Nov. 1, 2002, at DS4; Jerry Mitchell, *Deputies May Be Indicted*, CLARION-LEDGER, Mar. 27, 2002, at 1A; *Witnesses Testify They Saw Officers Beat Suspect After Sheriff Was Slain*, COMMERCIAL APPEAL, Oct. 31, 2002, at A12. Under the circumstances, one could easily believe that the jury might have acquitted the officers who killed Billy Ray Stone no matter what the law was, but by encouraging the jury to consider the “totality of the circumstances,” including Stone's horrific crimes, in reaching a decision on the reasonableness of the deputies' use of force, a *Graham* instruction comes close to authorizing this result, and at the very least, fails to force a jury like this one to confront openly its decision to nullify.

courts to take into account the culpability of the suspect in weighing the interests at stake when an officer uses force, without much guidance about the appropriate role for this factor.<sup>210</sup> Although most juries and courts may intuitively do the right thing, emphasizing the severity of the crime or the culpability of the suspect without carefully circumscribing the relevance of such a consideration may shield some truly unreasonable uses of force from liability.

The reasoning in the *Scott* opinion is also inconsistent with the limited legitimate force justification principles in another way. In *Scott*, the Court revives a justification for deadly force rejected by *Garner*—that it will deter future suspects from flight.<sup>211</sup> Aside from the strong practical objections to *Scott*'s deterrence argument,<sup>212</sup> the limited justifications for police uses of force prohibit using force to deter future wrongdoing. I argue above that deterrence is an inappropriate justification for *police* uses of force.<sup>213</sup> Although the state has an interest in successful arrests and thus an interest in both specifically and generally deterring flight or resistance that might undermine arrest, this deterrence interest justifies criminal penalties for resisting arrest and flight, *not* additional force by police officers.<sup>214</sup> To use force by officers rather than other penalties to deter flight is to misunderstand the instrumental purposes that police coercion may legitimately serve.<sup>215</sup> Of course, one could argue that the nature of these crimes undermines the state's ability to prosecute those who commit them, but this is ordinarily an

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<sup>210</sup> See *Scott v. Harris*, 127 S. Ct. 1769, 1778 & n.10 (2007) (“Culpability *is* relevant, however, to the *reasonableness* of the seizure—to whether preventing possible harm to the innocent justifies exposing to possible harm the person threatening them.”).

<sup>211</sup> Compare *Scott*, 127 S. Ct. at 1779 (“[W]e are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people’s lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights.”), with *Tennessee v. Garner*, 471 U.S. 1, 9–10 (1985) (“It is argued that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee. . . . [W]hile the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts, the presently available evidence does not support this thesis.” (footnotes omitted) (citations omitted)).

<sup>212</sup> Many departments severely limit high speed pursuits where such a pursuit would endanger officers or civilians, see IACP, PROTECTING CIVIL RIGHTS, *supra* note 14, at 131–33, and there is no evidence that such restrictions on the police encourage high speed flight.

<sup>213</sup> See *supra* notes 149–54 and accompanying text.

<sup>214</sup> See *Garner*, 471 U.S. at 11 n.9 (describing punishment as “the usual manner of deterring illegal conduct”). As the *Garner* Court pointed out, because of the lenient legislative treatment of fleeing from a misdemeanor arrest, permitting deadly force against a fleeing misdemeanant means that if the fleeing suspect is caught, he will be subject to a small fine, and if not, he may be subject to being shot. See *id.* It seems particularly unjust for judges to permit police officers to compensate with force where legislatures have avoided identifying a crime as serious enough to entail significant penalty, but I would argue equally that legislatures may not pass laws authorizing officers to use force upon catching fleeing suspects in order to deter future flight.

<sup>215</sup> See *supra* Part II.B–C.

argument for tailoring penalties to reflect the difficulty of catching such criminals,<sup>216</sup> not a justification for permitting additional force against suspects.<sup>217</sup> Whether or not Scott's use of force was ultimately reasonable, deterring Harris and others from fleeing is not a legitimate ground for arguing that it is.

Law enforcement violence is special. We cannot—as scholars have often done—consider the nature of legitimate state force in the abstract,<sup>218</sup> nor can we—as judges do—look at force intuitively, isolated from the circumscribed legitimate rationales for its use and from the interests of the human individuals who enact that force.<sup>219</sup> Both practical and theoretical considerations must inform the process of identifying which public interests are weighty enough to justify police uses of force. And yet, these considerations, however important, are just the beginning. The limited interests described above indicate only the first necessary condition for using force. In the next Part, I consider the additional criteria needed to justify a police use of force.

### III. TOWARDS A BETTER ANALYSIS OF POLICE USES OF FORCE

In Part II, I argue that three sets of interests may justify the use of force by police officers: force may be used for law (for example, conducting an arrest), for order (for example, controlling a riotous crowd), or for officer self-defense. These interests tell us *why* police officers may use force. The questions of when, what kind, and how much remain. Part II suggests some initial avenues for answering these questions: police may use force only when and to the extent necessary to accomplish one of the three legitimate aims. Moreover, a standard must balance the interests of the state and police officers in using force to serve these legitimate ends against the risk of harm the use of force creates for the public and for suspects. In this Part, I argue that these interests can and should be balanced by importing the basic requirements of justification defenses into the Fourth Amendment and tailoring them to fit the sometimes very different circumstances surrounding police uses of force. Justification defenses permit force only if it is a response to an imminent threat to a legitimately protected interest, is necessary in degree to defend against that threat, and creates a risk of harm that is not grossly disproportionate to the interest that is being protected.<sup>220</sup> Reasonable force by police officers should satisfy the same criteria.

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<sup>216</sup> See, e.g., Posner, *supra* note 154, at 1206–14 (discussing the need to increase the severity of penalties for crimes with lower probabilities of apprehension).

<sup>217</sup> Arguably, the nature of resisting or fleeing arrest makes it highly likely that one suspected of these crimes is guilty because the police officer has experienced the resistance or flight firsthand. Nevertheless, strong evidence is usually considered an insufficient reason for courts to dispense with trial.

<sup>218</sup> See *supra* note 5 and accompanying text.

<sup>219</sup> See *supra* notes 133–36 and accompanying text.

<sup>220</sup> See *supra* note 3 and accompanying text.

The ideas of necessity, imminence, and proportionality are legal means of analyzing the temporal and spatial factors that must be considered to ensure that each individual's interests receive adequate protection when the police use force. In the context of policing, as in the criminal law's justification defenses, these ideas begin rather than end debate: much work by lower courts will be needed to flesh out these concepts in the context of police uses of force. Nevertheless, these concepts form a doctrinal framework that is necessary for the development of a coherent and principled Fourth Amendment jurisprudence that balances the goals of law, order, and police safety against the costs of unreasonable violence by the police.

#### A. Imminence

Imminence, the first requirement for defensive force, is a matter of timing. Most modern criminal codes require that for self-defense to be lawful, a defender must reasonably perceive an "imminent" threat of force.<sup>221</sup> The imminence requirement is essential to making self-defense a meaningful concept.<sup>222</sup> If a threat has not yet materialized, a forcible response is too early and constitutes preemptive force; if the threat has passed, a forcible response is retaliation.<sup>223</sup> In neither case is the force justified. An imminent threat under the law is one that has a looming, "visible manifestation" and is highly likely to beat the state to your door.<sup>224</sup> If his timing is right, someone who acts in self-defense legitimately breaches the state's presumptive monopoly on violence in part because the threat is so immediate that there is no other recourse to protect the interest at stake. If his timing is wrong, his response instead constitutes taking the law into his own hands, an usurpation of the role of the police, the courts, and the legislature.<sup>225</sup>

The timing of force is crucial in evaluating the reasonableness of police violence. There are many cases of excessive force in which officers hit a

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<sup>221</sup> See 2 LAFAVE, *supra* note 3, § 10.4(d) (citing statutes). Almost all other states either have different language that emphasizes timing or a court-inferred timing requirement. See *id.* § 10.4(d).

<sup>222</sup> Although some scholars argue that an imminence requirement is simply a way of restating the requirement that responsive violence must be necessary, see 2 ROBINSON, *supra* note 3, § 131(b)(3), or that the imminence requirement leads to unfortunate results in some subsets of cases, such as those involving battered women, see 2 LAFAVE, *supra* note 3, § 10.4(d); Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 274–86 (2002), these views are not dominant among scholars and do not reflect current law. See *supra* note 221; see, e.g., Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 257–60 (2004); George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 567–71, 576–78 (1996).

<sup>223</sup> GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE* 20 (1988); Fletcher, *supra* note 222, at 556–58.

<sup>224</sup> See Fletcher, *supra* note 222, at 557. Justice Holmes famously described the threatening power of an "uplifted knife." See *Brown v. United States*, 256 U.S. 335, 343 (1921) ("Detached reflection cannot be demanded in the presence of an uplifted knife.").

<sup>225</sup> Fletcher, *supra* note 222, at 570.

suspect *before* the suspect resists or flees.<sup>226</sup> Such uses of force are sometimes designed to preempt resistance or to avenge behavior that is not resistant but nevertheless challenges the officer's authority. Commonly, such anticipatory or retributive uses of force occur when suspects mouth off.<sup>227</sup> The timing and aim of such force makes it illegitimate because using violence to discourage future resistance or punish verbal complaints goes beyond the proper role of state uses of force through the police.<sup>228</sup> Similarly, officers sometimes hit a suspect *after* the suspect is under control, frequently following an act of outright resistance or flight.<sup>229</sup> For example, police sometimes use too much force in the adrenaline-filled moments following a high speed chase,<sup>230</sup> or when they exact revenge against a suspect who is handcuffed after substantial struggle.<sup>231</sup> Timing in these cases also makes the officer's actions wrongful, even if force was necessary earlier, because none of the interests deemed to justify force—law, order, or the safety of the officer—is threatened at the time of the use of force. In order to ensure a close connection between the use of force and the legitimate end it is intended to protect in these types of cases, the Supreme Court should expressly require police use of force to be a response to an imminent threat to either the safety of the officer or the state's legitimate law enforcement interests.

As these examples suggest, an imminence requirement would capture a significant component of what makes some uses of force excessive. In addition, it would have significant advantages for the ways officers and the

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<sup>226</sup> See, e.g., Brief for the United States as Appellee at 7–11, *United States v. Johnstone*, 107 F.3d 200 (3d Cir. 1997) (No. 95-5833), 1996 WL 33657050, at \*7–11 (describing three incidents in which officers used force before the suspects resisted authority).

<sup>227</sup> See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 114–15 (1983) (Marshall, J., dissenting) (describing how an African-American man who dropped his hands after being frisked and then complained about pain in his hands was subjected to a chokehold).

<sup>228</sup> See *supra* Part II.B–C.

<sup>229</sup> See, e.g., *United States v. Harris*, 293 F.3d 863, 867–68 (5th Cir. 2002) (describing an incident in which an officer beat a handcuffed arrestee sitting in the back of a police car with a baton in the face after the arrestee refused to stop thrashing about in the car); *Johnstone*, 107 F.3d at 203 (describing various incidents involving beatings of handcuffed arrestees); *United States v. Reese*, 2 F.3d 870, 874–80 (9th Cir. 1993) (describing various incidents in which handcuffed arrestees were assaulted by police); *United States v. Cobb*, 905 F.2d 784, 785 (4th Cir. 1990) (describing an incident in which four officers severely beat a handcuffed arrestee).

<sup>230</sup> See, e.g., *United States v. Williams*, 343 F.3d 423, 429–31 (5th Cir. 2003) (describing an incident in which an officer shot a man who was “standing motionless with his arms raised” following confrontation and a high speed chase); *United States v. Conley*, 249 F.3d 38 (1st Cir. 2001) (describing an incident in which officers mistakenly beat a plainclothes policeman, believing him to be a suspect, following a car chase); Brief for the United States as Appellee, *United States v. Wyrick*, *supra* note 206, at 3–4 (describing an incident in which an officer punched an elderly man in the face following a high speed chase).

<sup>231</sup> See, e.g., *Johnstone*, 107 F.3d at 203 (describing the beating of a suspect who resisted being handcuffed); *United States v. Boyland*, No. 91-6069, 1992 WL 332002, at \*1–2 (6th Cir. Nov. 12, 1992) (unpublished table decision) (per curiam) (same).

public talk and think about the use of force. In assessing reasonableness, courts and juries impose, at least implicitly, a standard for when officers may respond to a potential threat, a probabilistic measure of how likely an attack or escape must be to justify force.<sup>232</sup> Many public controversies about police uses of force may be viewed as controversies about what this measure should be. Where juries or community groups focus on the difficulty of police work and on the myriad threats officers face, they consider officers' conduct reasonable in part because they have an unstated, but generous, view of what constitutes an imminent threat to an officer. When members of the community instead distrust police officers' ability to accurately perceive threats—perhaps because they believe that police officers hold racist assumptions—they see police conduct as too quick, and police officers as too likely to err at the expense of innocent lives.<sup>233</sup> Thus, they tend to implicitly apply a narrower interpretation of imminence. Not surprisingly, what is perceived by some as preemption or retaliation frequently looks to others like a legitimate response to an imminent threat. Making the judicial analysis of this measure transparent would reveal and refine judgments now buried in the vague balancing standard, enabling us to focus and perhaps resolve aspects of that public debate.

A clear timing requirement might help officers, too. Instead of asking themselves whether the force they are using is generally reasonable, police officers could instead ask a more concrete question: whether the force is used too soon or too late. Obviously, where circumstances are most pressing, officers will not be able to stop and think safely. But it is precisely those instances in which force is correctly timed. In other situations, however, police officers may be better able to check their own behavior and, perhaps more frequently, that of their fellow officers by routinely asking themselves about the timing of the force, whether the moment for force has not yet come or has passed.

While importing an imminence requirement from the law of justification would help impose boundaries on reasonable force under the Fourth Amendment and improve our ability to talk about what might make force excessive, the question whether the precise parameters of that requirement should mirror those of self-defense still arises. On balance, it seems that police uses of force should be governed by something very similar to the

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<sup>232</sup> Cf. Ripstein, *supra* note 128, at 691 (defining imminence in the self-defense context as danger that is reasonably likely to occur “even if, for reasons unknown to the parties involved, it would not actually have happened”).

<sup>233</sup> Compare, e.g., George L. Kelling, *Policing Under Fire*, WALL ST. J., Mar. 23, 1999, at A22 (explaining the shooting of Amadou Diallo by arguing that police-citizen street encounters are complex, brief, and dangerous, making occasional deadly mistakes inevitable), with Jeffrey Abramson, *A Story the Jury Never Heard*, N.Y. TIMES, Feb. 26, 2000, at A15 (explaining acquittal of officers who shot Amadou Diallo by contending that, to a jury in Albany, New York, where the case was moved, “it seems reasonable for police officers to jump quickly to the conclusion that a black man reaching for something in his pocket must be reaching for a gun”).

imminence standard that applies to self-defenders. For example, in self-defense law, the requirement that there must be a “visible manifestation” of the threat, or “uplifted knife,” to show imminence functions as a form of burden allocation: one may use force to defend oneself, causing harm or even death to another, but only when the intent of the other party is clearly hostile.<sup>234</sup> This makes sense for ordinary citizens. We interact with others so frequently, but face potentially dangerous encounters so rarely, that even if we only occasionally mistake innocent conduct for a true threat, our assessment in any particular instance that a person poses a threat is much more likely to be wrong than right.<sup>235</sup> Since many of the perilous situations that we in fact face involve clear physical threats, the sensitivity of our assessments—that is, the proportion of true positives that we recognize out of all actual threats—is by contrast likely to be high. For us then, a legal regime can reduce inappropriate force and still permit us to defend ourselves sufficiently by demanding clear evidence of the impending threat before permitting defensive force.

But requiring a visible manifestation of a threat also makes sense for police officers, though perhaps for different reasons. By the terms of their employment, police officers engage in frequently hostile and potentially dangerous interactions, making the proportion of actually threatening situations they face much higher than for civilians. Officers might argue that this high frequency of threats, combined with the potentially dramatic consequences of a false negative assessment of the threats to them, justifies an easing of the imminence requirement. Yet other considerations cut against this conclusion. First, a strong imminence requirement may be necessary to encourage officers to identify risk appropriately—to reduce their likelihood of overestimating the threat. With good reason, police officers are constantly aware of the risks they face.<sup>236</sup> Yet the higher number of positive instances of actually threatening situations may make officers more susceptible to fear an uplifted knife where there is none, making a manifestation requirement essential when the police use violence. More importantly, since police officers know that they face danger and are trained to avoid it or respond to it without using violence when possible,<sup>237</sup> they are better situated to assess its significance than are civilians. For these rea-

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<sup>234</sup> See *supra* note 224 and accompanying text.

<sup>235</sup> For instance, assuming for simplicity that we always recognize a real threat correctly, if we mistake 1 in 10,000 innocent acts as life-threatening, and face 1 in 100,000 true threats, we are almost ten times more likely to attack the innocent than respond to real danger.

<sup>236</sup> In the ten years from 1997 through 2006, 562 law enforcement officers were feloniously killed in the line of duty. See FBI, U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, 2006, at 1 (2007), available at <http://www.fbi.gov/ucr/killed/2006/downloadablepdfs/feloniouslykilled.pdf>.

<sup>237</sup> See HICKMAN, *supra* note 115, at 14, 19 (noting that in basic training 88% of law enforcement training academies train officers in verbal tactics; 65% of academies teach threat assessment; and 97% teach officers how to tactfully disengage or withdraw from a stop or arrest).

sons, it hardly seems unfair to impose a meaningful imminence requirement upon officers, one that is similar to that applied to civilians.<sup>238</sup> While this standard may be informed by civilian self-defense law, it is not tied to it. Should circumstances change or evidence develop regarding the distinctive dangers officers face and pose to others when they use force, then courts will naturally and inexorably refine this standard accordingly over time.<sup>239</sup>

Police officers use force in complicated and fluid situations: a suspect initially may be subdued and then out of control; force may sometimes be briefly justified, and then not. This instability may sometimes constitute a reason not to hold officers liable for accidentally using too much force,<sup>240</sup> but the difficult conditions in which law enforcement officials operate do not excuse our conceptual confusion about what constitutes appropriate force. On the contrary, they require carefully conceived principles to guide police and courts tasked with evaluating police uses of force. An attention to timing is essential to any coherent analysis of police violence. This aspect of Supreme Court reasoning is particularly poorly developed, and an imminence rule would go a long way toward improving constitutional law in this area. Current law may mislead juries or even courts to believe that timing is but one factor among many in analyzing the use of force.<sup>241</sup> An imminence requirement would instead make crystal clear that arresting officers may not use force unless they face a real and immediate threat of escape, disorder, or injury.

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<sup>238</sup> Requiring that officers' use of reasonable force under the Fourth Amendment be in response to an external manifestation of an imminent threat also permits courts and juries to evaluate whether officers' claims of imminence are objectively reasonable. Any lesser standard would deny courts a basis for reviewing officers' decisions to use force. *See Terry v. Ohio*, 392 U.S. 1, 21–22 (1968) (“The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?” (footnote omitted) (citations omitted)); *see also id.* at 21 n.18 (citing Supreme Court precedent on the requirement of specificity of information before police action is allowed).

<sup>239</sup> Although this discussion emphasizes an imminent threat to the officer's safety, the imminent threat requirement would apply to threats to other state interests as well. Thus, for example, an officer would be permitted to use force in response to a suspect who made a run for it, but not a suspect whose inching towards the door suggested a willingness to flee.

<sup>240</sup> *See, e.g., Weiner v. Lappegard*, No. Civ. 04-630(RHK/JSM), 2005 WL 1155943, at \*6–8 (D. Minn. May 16, 2005) (finding that the officers did not act objectively unreasonably in using force during an arrest given that “the scene was chaotic and the officers had to make quick judgments about how much force to use under circumstances that were tense, uncertain, and rapidly evolving”); *Ortiz v. Santora*, 223 F. Supp. 2d 387, 394 (D. Conn. 2002) (describing an officer's use of force during a “veritable melee” and concluding that “reasonable officers could disagree regarding whether [the] level of force [used to arrest a suspect] was necessary under . . . fast-developing potentially dangerous circumstances”).

<sup>241</sup> *See, e.g., supra* notes 48–50 and accompanying text.

*B. Necessity*

The second requirement for justification defenses holds that the *extent* of a violent response must be necessary to protect the interest at stake. It focuses attention on both what kinds of threats justify force and what kinds of force the threats justify. In justification defenses, this requirement is essential: if the force used is not necessary in both its *nature* and *degree* to respond adequately to a threat to one of the recognized interests, it is a crime. Therefore, an action is illegitimate if it was or should have been clear to the actor that no violent response was needed, or that a much less drastic degree or kind of a response was likely to be effective.<sup>242</sup> By asking whether force is needed at a given moment, the necessity requirement helps define *under what circumstances*, as well as *how much* and *what kinds*, of force are permissible.

Although some idea of necessity is implicit in the concept of reasonable force,<sup>243</sup> the Court has only sporadically and sometimes only implicitly required that a use of force be measured by whether it is necessary in kind and degree to achieve the legitimate law enforcement goal at stake. *Garner* allows deadly force if it is “necessary to prevent escape,”<sup>244</sup> but while some of *Graham*’s language suggests such a requirement, the *Graham* factors do not make necessity central or mandatory, since they emphasize the suspect’s conduct in isolation rather than tying reasonableness to whether force was required to overcome that conduct and achieve the officer’s aims.<sup>245</sup> In *Scott*, the Court implicitly considered whether Scott’s force was necessary to achieve a legitimate government interest, but rejected *Garner*’s necessity requirement as a “precondition” for using force in favor of the broader, vaguer standard of “reasonableness.”<sup>246</sup> This lacuna is a substantial weakness in the Court’s formulation of the Fourth Amendment standard, one that has consequences in lower court opinions. Of course, the question of necessity appears—albeit often indirectly—in discussions by lower courts

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<sup>242</sup> 2 ROBINSON, *supra* note 3, § 121(a)(2)(A); *see also* Kopf v. Wing, 942 F.2d 265, 269 (4th Cir. 1991) (“[E]ven if it found that force was necessary to arrest [the suspect], a reasonable jury could nonetheless find the *degree* of force excessive.”).

<sup>243</sup> *See, e.g.*, Waite, *supra* note 137, at 301 (framing the line between lawful and excessive force during an arrest in terms of what is necessary to achieve the arrest).

<sup>244</sup> *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Although the courts of appeals frequently take there to be a necessity requirement, *see, e.g.*, Lolli v. County of Orange, 351 F.3d 410, 417 (9th Cir. 2003) (“[A] jury could conclude that little to no force was necessary or justified here.”), others implicitly reject such a requirement, by, for example, finding that force that does not cause injury cannot be unreasonable, even if it is unnecessary. *See, e.g.*, Tarver v. City of Edna, 410 F.3d 745, 752 (5th Cir. 2005) (noting that a Fourth Amendment violation requires “more than de minimis” injury); Durruthy v. Pastor, 351 F.3d 1080, 1094 (11th Cir. 2003) (“[E]ven if the force applied . . . was unnecessary, plainly it was not unlawful.”); Crumley v. City of St. Paul, 324 F.3d 1003, 1007–08 (8th Cir. 2003) (rejecting excessive force claims because “a de minimus . . . injury is insufficient to support a finding of a constitutional violation”).

<sup>245</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989).

<sup>246</sup> *See Scott v. Harris*, 127 S. Ct. 1769, 1777–79 & n.9 (2007).

about what constitutes reasonable force,<sup>247</sup> but in the absence of the proper conceptual structure, the analysis is often stunted or problematic. Consider, for example, that a number of federal courts have effectively ruled that the relationship between the amount of nondeadly force an officer used and the amount that was necessary is irrelevant so long as some force was justified.<sup>248</sup> Others have suggested that so long as *Garner*'s test for deadly force is satisfied, it is irrelevant whether less deadly force would have achieved the same end.<sup>249</sup> While the varying and fast-moving circumstances in which officers use force may justify giving officers some leeway in determining what force appears to be reasonably necessary—and this determination must be judged according to the circumstances they faced at the time they used force—in these jurisdictions there is no difference between a forcible but controlled takedown and repeated baton blows to the legs. Because these courts do not recognize that force must be proper in degree to satisfy a necessity requirement, they permit excessive force.

Such decisions suggest the importance of applying an express necessity requirement to police uses of force. Force is necessary if it serves a proper purpose, provided that meaningful and less harmful practicable alternatives are unavailable. When a police officer uses force, the courts should ask first whether a reasonable officer in that position would believe any force was necessary to protect the goals of law, order, or officer safety, and second, whether the amount and kind of force used would have reasonably appeared to be essential to achieving the end. Although attention must be

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<sup>247</sup> See, e.g., *Burch v. Naron*, 333 F. Supp. 2d 816, 825 (W.D. Ark. 2004) (noting that there was a question whether “any force was necessary under the circumstances”); *Ortiz v. Santora*, 223 F. Supp. 2d 387, 394 (D. Conn. 2002) (granting summary judgment for an officer because dangerous circumstances made his use of force necessary); see also *supra* note 135.

<sup>248</sup> See, e.g., *Marquez v. City of Albuquerque*, 399 F.3d 1216, 1221–22 (10th Cir. 2005) (upholding the exclusion of expert testimony that reasonable force should be the minimum amount necessary on the ground that it was only “tangentially related” to the question of whether the officer acted reasonably); *Forrester v. City of San Diego*, 25 F.3d 804, 807–08 (9th Cir. 1994) (“Police officers . . . are not required to use the least intrusive degree of force possible. Rather . . . , the inquiry is whether the force that was used to effect a particular seizure was reasonable, viewing the facts from the perspective of a reasonable officer on the scene. Whether officers hypothetically could have used less painful, less injurious, or more effective force in executing an arrest is simply not the issue. Each officer had the discretion to use force or not, and if deciding to do so, how much force to apply.” (footnotes omitted) (citations omitted)).

<sup>249</sup> See, e.g., *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) (“The 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’ under the Fourth Amendment. Alternative measures which 20/20 hindsight reveal to be less intrusive (or more prudent) . . . are simply not relevant to the reasonableness inquiry. For clarity, the reasonableness inquiry in cases such as this where deadly force is used is simply whether ‘the officer [using the force] has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.’” (quoting *Garner*, 471 U.S. at 3)); *Plakas v. Drinksi*, 19 F.3d 1143, 1149 (7th Cir. 1994) (“We do not believe the Fourth Amendment requires the use of the least or even a less deadly alternative so long as the use of deadly force is reasonable under *Garner v. Tennessee* and *Graham v. Connor* . . .”).

given to what cannot be expected of officers—officers cannot be expected to precisely calibrate the amount of force that will solve a problem—if an officer is reasonably capable of warding off blows and getting a suspect under control without using a type of force that might seriously injure the suspect, he must do so. Like timing, a necessity requirement provides a framework for a coherent and productive jurisprudence on what uses of force by state actors are permissible.

The concept of necessity also grounds what is constitutionally reasonable in the real constraints that police officers face. In the law of justification defenses, necessity is evaluated from the perspective of the strengths and limits of individual defenders. A self-defender capable of stopping a threat without injuring his attacker, because of special skills or training, is not justified in using more force than is required.<sup>250</sup> In contrast, a weak and frail person might legitimately—or as we often say, “out of necessity”—use more injurious force when faced with the same threat. In the context of policing, officers should be required to use their special training and skills to avoid force or minimize its harm. While self-defense training is a factor in evaluating whether a civilian’s use of force is necessary for the purposes of self-defense, this factor is ever-present in evaluating whether a police officer’s use of force is necessary. Officers are properly trained and expected to, if possible, strike suspects in ways and areas of the body that will cause pain significant enough to make the suspect vulnerable to other control techniques, but that are unlikely to cause permanent injury.<sup>251</sup> Except in exceptional circumstances, an officer who punches a suspect in the face rather than using basic defensive tactics uses force that is in degree and kind unnecessary. Incorporating a necessity requirement into the Fourth Amendment standard for evaluating reasonableness would make this clear.

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<sup>250</sup> See 2 ROBINSON, *supra* note 3, § 121(a)(2)(A) (“Even if greater force might be reasonable in relation to the harm threatened, and even if most persons would find it necessary to use greater force, the force used is not justified if the individual actor could protect himself effectively with less. For instance, assume the actor is a karate expert who can, with no risk of harm to himself, dislodge an attacker’s weapon with a high kick. While the average person might be justified in shooting an armed attacker, this actor may only use karate to disarm, since any more harmful force, such as shooting, is not *necessary* to protect himself.”).

<sup>251</sup> One widely used defensive force training program, the Monadnock Defensive Tactics System, for example, expressly teaches officers to attempt to gain control of a resistant or assaultive suspect by first striking specific body parts that will result in momentary dysfunction, but that are not likely to cause serious injury to the suspect. See MONADNOCK POLICE TRAINING COUNCIL, MONADNOCK DEFENSIVE TACTICS SYSTEM, BASIC COURSE HANDBOOK FOR STUDENTS & INSTRUCTORS 6–7 (2004), available at <http://www.armortrainingacademy.com/bp/pdf/handbookMDTS.pdf>. This program, like all police defensive tactics programs, also teaches methods of controlling resisting suspects with escort holds, takedowns, wrist locks, handcuffing methods, and blocking techniques. *Id.* at 15–44; see, e.g., PPCT MANAGEMENT SYSTEMS, PPCT DEFENSIVE TACTICS INSTRUCTOR SCHOOL COURSE DESCRIPTION 1–2 (2004), available at <http://www.ppct.com/pdfs/DT.pdf> (emphasizing such techniques and the use of pressure point control measures).

Conversely, what constitutes necessary force for an officer must also be informed by the facts that police officers can only run so fast, fight so hard, and shoot so well,<sup>252</sup> and that they suffer from the technological limitations of their weapons. As a suspect starts to flee, for example, an officer faces a choice of (1) using force, such as tackling the suspect, hitting him with a baton, or pepper spraying him, to stop him; (2) running after him (with the hope of stopping him with less force or persuading him to allow himself to be detained); or (3) allowing him to escape. As the suspect puts distance between himself and the officer, the choice becomes starker: shoot the suspect or let him go, because the officer's less murderous means of exercising force cannot usually be used at a distance.<sup>253</sup> The state's tools—human and otherwise—change our necessity analysis. While a suspect is close, nondeadly force suffices; at a distance it does not.

Unfortunately, although federal courts have often gestured broadly to the difficulties police officers face in limiting force,<sup>254</sup> they have not always understood the significance of these constraints on police uses of force. In the *Scott* decision, for example, the Court suggests that Scott's use of a car against Harris was not as serious as the gun used by Elton Hymon against Edward Garner, contrasting "the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head, or pulling alongside a fleeing motorist's car and shooting the motorist," with the "high likelihood of serious injury or death" Scott posed to Harris when he rammed him.<sup>255</sup> On empirical grounds, this is simply untrue. While gun deaths account for the vast majority of homicides by police officers,<sup>256</sup> gun force is surprisingly ineffective. Even well-trained officers overwhelmingly miss their targets

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<sup>252</sup> The corporeality of human police officers also has psychological significance. For example, an officer who is fearful, angry, or excited is likely to experience the effects of hormones, such as adrenaline or cortisol, that may make him less able to shoot accurately. See, e.g., BRUCE K. SIDDLE, SHARPENING THE WARRIOR'S EDGE: THE PSYCHOLOGY AND SCIENCE OF TRAINING 46–47, 57 (1995) (noting that adrenal hormones released in high stress situations reduce individuals' fine motor skills, including the ability to aim accurately). See generally STRESS AND HUMAN PERFORMANCE (James E. Driskell & Eduardo Salas eds., 1996).

<sup>253</sup> Although new technologies, most commonly tasers, are intended to offer less lethal alternatives for stopping suspects at a distance, only 12% of local and state law enforcement academies, training 9% of all new recruits, presently provide training on the use of tasers. See HICKMAN, *supra* note 115, at 13. Moreover, even when available, it is not yet clear how tasers change the calculus of force. It is not yet known whether they make deadly force less likely. Even if they do, because tasers permit officers to exercise nondeadly force with significantly less risk to themselves than other available methods of exercising nondeadly force, officers using tasers may resort to serious force in circumstances where other officers would use no force at all.

<sup>254</sup> See, e.g., *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

<sup>255</sup> *Scott v. Harris*, 127 S. Ct. 1769, 1778 (2007) (citations omitted).

<sup>256</sup> See JODI M. BROWN & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, POLICING AND HOMICIDE, 1976–98: JUSTIFIABLE HOMICIDE BY POLICE, POLICE OFFICERS MURDERED BY FELONS 3 (2001), available at <http://www.ojp.gov/bjs/pub/pdf/ph98.pdf>.

when it matters,<sup>257</sup> and suspects who are shot only sometimes die.<sup>258</sup> By contrast, while less deadly, baton blows and ramming cars miss less often, and therefore more frequently deny suspects another chance to submit and avoid harm. In short, police officers—who are extensively trained in using force<sup>259</sup>—may sometimes be more injurious to suspects when using alternatives to guns and may be less deadly at a distance than one might expect.<sup>260</sup> When federal courts “slosh” through the facts of a particular case, they should engage in a detailed empirical analysis under the rubric of a necessity analysis. Such analyses already influence law enforcement training regimens<sup>261</sup> and would clarify and improve public debate over the legitimate use of police force.<sup>262</sup>

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<sup>257</sup> WILLIAM A. GELLER & MICHAEL SCOTT, DEADLY FORCE: WHAT WE KNOW 100–06 (1992); Gregory B. Morrison, *Police and Correctional Department Firearm Training Frameworks in Washington State*, 6 POLICE Q. 192, 216 n.2 (2003) (citing “hit percentages” ranging from 14% to 38%). These percentages are without doubt significantly lower when the officer is shooting from or at a moving vehicle, as the *Scott* Court envisioned.

<sup>258</sup> From 1992 to 1995, for example, there were approximately 1650 firearms injuries annually resulting from legal intervention. Of those, approximately 19% died. See Valerie Beaman et al., *Lethality of Firearm-Related Injuries in the United States Population*, 35 ANNALS OF EMERGENCY MED. 258, 261 (2000).

<sup>259</sup> State and local law enforcement training academies almost universally provide substantial training in self-defense and the use of nonlethal weapons, in addition to extensive firearms training. See HICKMAN, *supra* note 115, at 9, 12–13 (discussing the extensive training requirements and firearms training for officers, especially in large law enforcement departments).

<sup>260</sup> Nevertheless, the *Scott* Court was not wrong that guns and cars are different. See *Scott*, 127 S. Ct. at 1778. Most significantly, because guns can be used when the officer is out of reach of the suspect, they allow police officers to stop fleeing felons at a substantially lower risk to themselves than cars or most other weapons. In evaluating force, courts should consider that officers with guns—and tasers—have weaker personal incentives to search for alternatives to applying force when confronted with such a suspect, though professional and legal consequences may mitigate this effect.

<sup>261</sup> See IACP, PROTECTING CIVIL RIGHTS, *supra* note 14, at 117–24. Despite weak guidance from the courts, law enforcement agencies are already attentive to the idea that force must be necessary. *Id.* at 117–18. Many agencies train officers to consider the amount of resistance they face and to apply force only as necessary to respond to that amount of resistance. *Id.* at 119–22.

<sup>262</sup> Many of the most contested cases of alleged police brutality—especially shootings and cases where some wrongdoing by the alleged victim is apparent—have sparked serious public discussion that can be viewed best through the lens of necessity. When someone is killed by police officers, outraged citizens often challenge the nature and extent of the police use of force. If an officer shot a suspect, they might ask, “why couldn’t the officer shoot the suspect in the leg?” For just a few examples, see Meg Kissinger, *Mental Health Advocates Ask if Death Was Avoidable*, MILWAUKEE J. SENTINEL, Sept. 8, 2004, at 8B (quoting a witness as saying, “‘Why didn’t they just shoot him in the leg or use pepper spray on him[?]’”); Bruce Owen & David Kuxhaus, *Knife-Wielding Teen Shot Dead by Police*, WINNIPEG FREE PRESS, Feb. 1, 2005, at A1 (quoting a witness as saying, “‘Why couldn’t they just shoot him in the legs?’”); Tim Sheehan, *Photos Fail to Clear Shooting Dispute*, FRESNO BEE, June 12, 2004, at A1 (quoting witness as saying “‘Why couldn’t they shoot him in the leg or something?’”); Tom Zucco, *Fatal Confrontation Begins with Laser Light*, ST. PETERSBURG TIMES, Feb. 5, 2005, at 1B (quoting a victim’s father as saying, “‘Why not shoot him in the leg?’”). These questions effectively challenge the necessity of the officers’ force, asking whether there was a less costly means of defending the interest at stake.

If federal courts were to make consistently explicit this component of the constitutional standard for excessive force, they would facilitate the discussion among concerned citizens, police departments,

In the context of necessity, as with the concept of imminence, the federal courts will confront difficult questions: does Fourth Amendment reasonableness require some absolute level of confidence that a use of force will stop a threat to a legitimate state or officer interest? Or does reasonableness simply require that the use of force reduce the risk that officer safety will be compromised or the success of the arrest thwarted? Related questions arise about how exactly courts should address uses of force where less forcible alternatives would have reduced but not eliminated the threat to the state's interest or to the officer, an issue that existed in *Scott*.<sup>263</sup> The concept of necessity does not do away with these hard questions. Instead, it brings them out of the intuitive realm and into the light, allowing them to be carefully considered and perhaps resolved over time. The necessity element in the justification analysis of police use of force will mature into a clearer and more definite concept only as courts struggle to put flesh on its bones. This process of making necessity more meaningful and definitive has been stunted under current law. A principled framework for analyzing police uses of force that includes an explicit necessity requirement, by contrast, provides a skeleton to which such tissue can adhere. In the meantime, cases in which the necessity of police violence is most difficult to assess will continue to challenge courts and may provide unpredictable results. Like the ubiquitous concept of reasonableness, the usefulness of the concept of necessity lies in the empirically informed, case-specific analyses it will require courts to engage in. But even so, the concept of necessity would considerably improve current doctrine because it captures an essential aspect of Fourth Amendment reasonableness now frequently buried and confused.

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prosecutors, and the courts about what is at stake in cases of alleged excessive force. Thus, for example, if officers shoot at a suspect, they are instructed to fire at the center of the suspect's body until the threat stops, despite the potential for serious harm, both because it is almost impossible for even highly trained officers to shoot so accurately as to stop someone by shooting him in the leg and because suspects are often capable of injuring officers even after they are shot. See, e.g., UREY W. PATRICK, U.S. DEP'T OF JUSTICE, HANDGUN WOUNDING FACTORS AND EFFECTIVENESS 2-3 (1989), available at <http://www.firearmtactical.com/pdf/fbi-hwfe.pdf> (describing immediate incapacitation as the goal of law enforcement shootings and noting that "training is quite properly oriented towards 'center of mass' shooting" because of the difficulties presented by situations in which shootings are necessary, including "the extreme difficulty of shooting a handgun with precision under such dire conditions"); *id.* at 8-9 (describing physiological, physical, and psychological factors that permit individuals to continue to function after they have been shot); Anthony J. Pinizzotto, Harry A. Kern & Edward F. Davis, *One-Shot Drops: Surviving the Myth*, FBI LAW ENFORCEMENT BULL., Oct. 2004, at 16, 20 (noting the danger that suspects may pose to officers after they are shot, describing as a "myth" the idea that officers "will inflict immediate incapacitation if they shoot offenders anywhere in the torso," and instructing that "[i]f lethal force is warranted and appropriate under the circumstances, the officer *must shoot until the threat ceases*").

<sup>263</sup> See *Scott*, 127 S. Ct. at 1778-79 ("Whereas Scott's action—ramming [Harris] off the road—was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not.").

### C. Proportionality

Scholars of justification defenses describe the third element as a proportionality requirement.<sup>264</sup> This requirement ensures that the harm caused by a defender's response is reasonable in relation to the importance of the societal interest at stake, even if a greater response would be necessary to protect that interest.<sup>265</sup> I cannot kill another to prevent him from pricking me with a pin, even if it is the only way to do so, because extraordinary harm may not be used to protect interests of minimal importance. Thus, this requirement ultimately limits *how much* and *what kinds* of force are legitimate. The proportionality requirement is logically linked to the concept of necessity. Whereas necessity requires that the least coercive means to achieve a given legitimate end be used, proportionality tests whether those means are worth it—whether the end is important enough to justify the cost of achieving it. If deadly force is needed to stop the fleeing felon, is stopping him so vital that we should allow the officer to shoot? Put another way, if a less forcible alternative to achieve a legitimate end is available, the greater use of force is not justified because it fails the necessity test. For example, an officer may use extreme force to subdue a serial killer, but only if a come-along hold will not succeed in bringing him into custody. But if the legitimate end is not important enough to justify the harm risked by the minimum force necessary to achieve it, the use of force is not justified because it fails the proportionality test. If the only way to stop a fleeing purse thief is to kill him, the use of force is not justified.

Most jurisdictions do not impose an explicit proportionality requirement on justification defenses.<sup>266</sup> Instead, they establish bright-line rules that distinguish between the use of deadly and nondeadly force. Thus, in most jurisdictions, nondeadly force is permitted in response to a threat of bodily harm, and deadly force is permitted only in response to a threat of death, serious bodily harm, or extreme interference with an important personal freedom—such as rape or kidnapping.<sup>267</sup> In *Garner*, the Supreme Court implicitly applied a proportionality requirement to police uses of force governed by the Fourth Amendment in much the same way. Under the facts in *Garner*, a teenage boy suspected of burglarizing a house was fleeing from the police when an officer shot him in the head to stop him.<sup>268</sup> It was uncontested that the shooting was necessary to accomplish the apprehension of the suspect. Moreover, the threat to the legitimate goal of arresting the boy was clearly imminent since he was in the process of escaping when he was shot. Nevertheless, the Court found the shooting unconstitutional because the state's interests were not weighty enough to jus-

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<sup>264</sup> See 2 ROBINSON, *supra* note 3, § 131(d).

<sup>265</sup> *See id.*

<sup>266</sup> *See id.* § 131(d)(1)–(2), at 82–84.

<sup>267</sup> 2 LAFAVE, *supra* note 3, § 10.4(b); *see* 2 ROBINSON, *supra* note 3, § 131(d)(1)–(2).

<sup>268</sup> *Tennessee v. Garner*, 471 U.S. 1, 3–4 (1985).

tify it, thus implicitly recognizing that there is a constitutionally imposed proportionality requirement on uses of force by police officers. In the words of the *Garner* Court, “It is not better that all felony suspects die than that they escape. 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.”<sup>269</sup>

Regardless of whether the *Garner* Court set precisely the right line, and despite *Scott*’s dismissive treatment of the distinction between deadly and nondeadly force,<sup>270</sup> this distinction is a reasonable way to make sense of proportionality in some contexts, including that of a fleeing felon. Deadly force is simply unreasonable and therefore unconstitutional when applied against a nondangerous suspect.<sup>271</sup> Nevertheless, this distinction is too blunt an instrument to regulate fully the proportionality of police uses of force under the Fourth Amendment: A bright-line rule limiting deadly force will not ensure that police do not cause harm significantly out of proportion with the interests at issue in cases of nondeadly force. Within the spectrum of nondeadly or less-than-lethal force, some techniques—such as an attacking canine or a taser—cause immense harm or pain, and others—such as handcuffing or a controlled takedown—do not. Police are trained to use their bodies and weapons in many ways, giving them a range of alternative forms of force that most civilians lack.<sup>272</sup> Moreover, police are trained and prepared to assess dangerous situations and respond accordingly, while ordinary self-defenders are not.<sup>273</sup> As a result, the proportionality rule governing police uses of force should be more precise than that of justification defenses. Thus, the federal courts should require that in order to be reasonable under the Fourth Amendment, police uses of force may not be substantially disproportionate to the interest that they are intended to protect, regardless of whether the force is deadly or nondeadly.

Demanding that police respond with proportional force, even when using nondeadly force, is not radical or unreasonable: it is no more than they are trained to demand of themselves. Police are usually trained to choose force according to a use of force continuum,<sup>274</sup> which is effectively a pro-

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<sup>269</sup> *Id.* at 11.

<sup>270</sup> See *supra* note 80 and accompanying text.

<sup>271</sup> This is not to imply that deadly force against dangerous suspects is always justified.

<sup>272</sup> Nearly all basic training academies for police officers provide training in the use of more than one type of firearm and batons in addition to defensive tactics training, such as pressure point control techniques and ground fighting techniques. Most also include training on chemical agents, such as pepper spray. See HICKMAN, *supra* note 115, at iv, 9, 14; see also *supra* note 251 (describing defensive force training programs).

<sup>273</sup> See HICKMAN, *supra* note 115, at 14 (noting that in addition to other training, more than ninety percent of police basic training academies use reality-based scenarios to teach arrest control tactics and self-defense techniques, and about two-thirds use similar reality-based scenarios to train officers to assess threats).

<sup>274</sup> See *id.*; IACP, PROTECTING CIVIL RIGHTS, *supra* note 14, at 119.

portionality chart for a wide variety of threats that limits even less-than-lethal force based on an assessment of the threat the officer faces.<sup>275</sup> While the fast-paced and uncertain circumstances police face suggest that police cannot be expected to assess and match perfectly the threats they face, incorporating an express proportionality requirement into the Fourth Amendment doctrine governing police uses of force only subjects police officers to the same kind of standard their own departments have long recognized as legitimate.

Although *Garner* relied on the common law distinction between non-deadly and deadly force, and the Court has never expressly required that uses of force be proportionate to the interests they protect, a broader, more rigorous proportionality requirement is not inconsistent with the Court's doctrine. In fact, *Scott* may be read as reaffirming the significance of proportionality in assessing police uses of force without reference to whether the force was deadly. In *Scott*, the Court rejected the factual findings below, concluding that Harris engaged in "a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury,"<sup>276</sup> rather than posing "little, if any, actual threat."<sup>277</sup> The revised description of the chase was significant because it changed the proportionality analysis as well as the necessity analysis. If Harris had threatened only the state's interest in prosecuting his traffic offense, ramming his car would have protected that interest—but only by imposing a risk of harm that is not justified by that state interest, even if it had been necessary to protect it.<sup>278</sup> But given that the Supreme Court believed that the use of force was necessary to protect the state's interest in order, in protecting innocent bystanders from the unreasonable and grievous risk of

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<sup>275</sup> See IACP, PROTECTING CIVIL RIGHTS, *supra* note 14, at 119–21, for some sample visual representations of use of force continua. Departments use a wide variety of diagrams to represent use of force continua, and the details of such diagrams vary depending on particular department policies and local laws on the use of force. See *id.* at 118–123. Generally, however, these diagrams divide specific policing techniques, starting with verbal communication and ending with deadly force, into progressive categories of force and then match these categories to suspect behavior that may justify them. See, e.g., *id.* at 119–21. By matching particular suspect behavior to particular officer responses, a use of force continuum dictates what force will be considered excessive, even if it is necessary. See, e.g., *id.* at 119 (reproducing the Federal Law Enforcement Training Center Use-of-Force Model, which indicates, for example, that deadly force is not an elective response to resistant and assaultive behaviors that do not pose risk of serious bodily harm or death, and that striking a suspect with a baton is not an elective enforcement tactic for a passively resistant suspect).

<sup>276</sup> *Scott v. Harris*, 127 S. Ct. 1769, 1775–76 (2007).

<sup>277</sup> *Id.* at 1775 (quoting *Harris v. Coweta County*, 433 F.3d 807, 815 (11th Cir. 2005)) (internal quotation marks omitted).

<sup>278</sup> According to both the district court and the court of appeals, ramming the car was unnecessary as well as disproportionate, since the courts recognized that other methods of achieving the state's interest in the speeding offense, presumably mailing Harris the ticket or showing up at his house to arrest him, would have sufficed. See *Harris v. Coweta County*, 433 F.3d 807, 815 (11th Cir. 2005); *Harris v. Coweta County*, No. 3:01CV148(WBH), 2003 WL 25419527, at \*5 (N.D. Ga. Sept. 25, 2003). The Supreme Court drew no conclusions about such alternatives.

harm Harris imposed by his flight, the proportionality question was instead whether that risk justified the potentially lethal force that Scott used against Harris. And it was this proportionality question that the Court answered in the affirmative.<sup>279</sup> In this way, *Scott* should be read as affirming and refining the Fourth Amendment proportionality analysis rather than as rejecting it.

*Scott* appeared to express skepticism about the constitutional significance of the distinction between deadly and nondeadly force, reiterating instead that force must simply be reasonable in order to be found constitutional.<sup>280</sup> And yet, after *Scott*, deadly force against a fleeing suspect that poses a serious threat to the public during flight is constitutional, at least under some circumstances, and deadly force against fleeing non-dangerous felons is excessive, at least in cases similar to *Garner*. In this light, rather than reading *Scott*'s apparent disavowal of "easy-to-apply legal test[s]"<sup>281</sup> as a rejection of the possibility of rules governing categories of cases—like those of *Garner* and *Scott*—that prohibit or permit the use of deadly force in some circumstances, one may instead take *Scott* to reject *Garner* as adequate to regulate fully the reasonableness, and in particular, the proportionality of police uses of force. In this way, *Scott* may be viewed as embracing—or at least as consistent with—a broader and more precise conception of proportionality as a part of reasonableness than the deadly-nondeadly force distinction permits.

Like the necessity and imminence requirements, a proportionality standard enables courts to make sense of what is reasonable while taking into account the circumstances in which police do their work. For example, although the state should not prohibit officers from protecting themselves against significant threats, given their role and training it is not unreasonable for the state to demand that they withstand minor threats without response. Thus, while officers may respond to threats of physical harm, even before those threats manifest themselves in action, no other words should be fighting words to a police officer.<sup>282</sup> Moreover, just as there are crimes that do not justify a high level of force for an arrest, there are minor threats to an officer's bodily integrity that we should expect him to suffer rather than inflicting on others the force necessary to prevent them. Thus, an offi-

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<sup>279</sup> *Scott*, 127 S. Ct. at 1779.

<sup>280</sup> *See id.* at 1777.

<sup>281</sup> *Id.* at 1778.

<sup>282</sup> *See City of Houston v. Hill*, 482 U.S. 451, 471 (1987) (rejecting an ordinance making it illegal to verbally disrupt a police officer in light of "the constitutional requirement that, in the face of verbal challenges to police action, officers . . . must respond with restraint"); *id.* at 462 ("[A] properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words." (citations omitted) (internal quotation marks omitted)); *United States v. Cobb*, 905 F.2d 784, 787, 790 (4th Cir. 1990) (approving a jury instruction that "[n]o law enforcement officer is entitled to use force against someone based on that person's verbal statements alone").

cer should not use significant force to stop a suspect from spitting on him,<sup>283</sup> or—more controversially—from kicking him,<sup>284</sup> if the suspect is under control and therefore poses no threat to the state’s immediate legitimate interests, though subsequent criminal penalties may be appropriate. While, at the extremes, police officers should not be expected to allow the state’s interests to trump their own interest in self-preservation, in less acute situations they should be expected to respect their special role as state actors, which gives them some additional responsibility to show restraint, a responsibility properly considered in the course of a proportionality analysis.<sup>285</sup>

In discussing imminence, necessity, and proportionality above, I suggest that police officers and civilians are not always similarly situated. Thus, imminence varies with the types of threats we face, and necessity incorporates an examination of distinctive training and limitations. Similarly, because officers act with state authority, are trained to use force, and are obliged to show restraint, a more rigorous proportionality requirement is appropriate for them than that imposed on ordinary self-defenders. As these points demonstrate, there are some limits to the analogy between justification defenses and police uses of force, limits that arise because officers are empowered by the state. There are many such differences between police officers and civilians: officers cannot “call the police” to avoid using force; they often are not permitted to retreat; they are trained and prepared to use force;<sup>286</sup> and they routinely and legitimately initiate contact that subsequently requires force to be used. These differences will require careful

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<sup>283</sup> For an example of a case in which a law enforcement officer allegedly used force in response to being spat at, see *United States v. Schatzle*, 901 F.2d 252, 253–54 (2d Cir. 1990).

<sup>284</sup> In *United States v. Harris*, 293 F.3d 863, 867–868 (5th Cir. 2002), for example, the police chief of Golden, Mississippi was prosecuted for striking an arrestee who was handcuffed in the back of a police car repeatedly in the body and head. Right before this beating, the defendant also struck the arrestee with a baton for kicking at the officer when the officer opened the door of the car. *Id.* at 868. Since the officer needed to do no more than shut the car door to escape the “threat” posed by the arrestee, no force was justified.

<sup>285</sup> And in fact, police officers overwhelmingly display exactly this type of professionalism in the face of constant challenges. Despite frequent and often inflammatory confrontations with citizens, police officers use force quite rarely. See Joel H. Garner & Christopher D. Maxwell, *Measuring the Amount of Force Used by and Against the Police in Six Jurisdictions*, in NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, *USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA* 25, 25–44 (1999) (discussing the frequency of a variety of forms of force and reporting, for example, that police officers used physical force—where physical force was defined broadly to include grabbing the suspect’s arm, the most frequently used form of force—in less than one in five adult custody arrests); Lawrence A. Greenfeld et al., *Revising and Fielding the Police-Public Contact Survey*, in *USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA*, *supra*, at 15, 16 (noting that in a major national survey of police-public contacts, “[a]bout 1 percent of the [estimated 44.6 million] people reporting contacts with police indicated that officers used force or threatened force,” and “[i]n the majority of those instances, respondents said that their own actions, such as threatening police or resisting arrest, may have provoked officers”).

<sup>286</sup> In fact, in order to ensure that the state’s coercion of its citizens is minimized, the state is obliged, to the greatest extent practicable, to choose officers who are able to use the least force to achieve legitimate aims, and to equip them and train them to use and avoid force accordingly.

ongoing examination and will necessarily inform the appropriate interpretations of imminence, necessity, and proportionality as applied to police uses of force.<sup>287</sup>

The predominant law governing police uses of force in this country is analytically impoverished. I argue that the imminence, necessity, and proportionality requirements of justification defenses can and should be adapted to the Fourth Amendment doctrine governing police uses of force. This analysis takes from the law of justification defenses what it does best: evaluating physical conflicts between individuals in light of both their circumstances and the competing interests that such conflicts inevitably involve. Explicitly importing the elements of justification defenses into the Fourth Amendment and tailoring them to the interests and circumstances of police use of force would dramatically improve the analysis of when and why police may use force.

#### CONCLUSION

The Fourth Amendment doctrine governing police uses of force has received surprisingly little theoretical analysis. Yet it is difficult to think of an issue more central to the academic debate over the Fourth Amendment or the public perception of our institutions of law and order. The paucity of reasoned analysis in this area of the Fourth Amendment has undermined both the evolution of a principled case law defining clear requirements for the legitimate use of police force and the development of an accessible and transparent framework that the public may use to analyze highly publicized uses of police force. Fortunately, the law of justification defenses provides a ready-made framework for comprehending, clarifying, and correcting current Supreme Court doctrine governing police uses of force. Building on an understanding of the distinctive nature of policing and police officers, I argue that police uses of force should be considered reasonable within the meaning of the Fourth Amendment if they are necessary to protect against an imminent threat to the state's interests in facilitating the institutions of criminal justice, preserving public order, and protecting officer safety; and if the harm the force risks is not disproportionate to the importance of the

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<sup>287</sup> The law of justification defenses must be adapted to the Fourth Amendment context in another way as well. While there is some variation in justification law, a defendant must generally have an honest and reasonable belief as to the existence of circumstances that would justify defensive force in order to use such a defense. 2 LAFAVE, *supra* note 3, § 10.4(c). That is to say that most states impose both an objective and a subjective requirement on defensive force. But the Fourth Amendment standard—as *Graham* makes clear—is entirely objective. *See Graham v. Connor*, 490 U.S. 386, 396–97 (1989). The question is whether the use of force is reasonable under the circumstances as they would have appeared to “a reasonable officer on the scene,” regardless of the motive, intent, or belief of the officer who used force. *Id.* at 396. Thus, for Fourth Amendment doctrine, the question is whether a threat would have appeared imminent to a reasonable officer on the scene, whether force reasonably appeared necessary, and whether the force used in response was not substantially disproportionate from the perspective of a reasonable officer.

state interest at stake. Moreover, I argue that in interpreting this standard, courts must take seriously the circumstances in which police officers use force, including their distinctive responsibilities as state actors and the physical and technological limitations they face.

This Article focuses almost entirely on one aspect of police use of force, the force used to subdue suspects. The Supreme Court too, in describing what force is reasonable, focused exclusively in *Graham*, *Garner*, and *Scott* on uses of force by police officers to seize suspects. In fact, as suggested earlier,<sup>288</sup> police officers sometimes use force in different settings, such as when they enforce a subpoena or when they stop individuals from interfering with a police search. One advantage of my proposed framework is that it is not limited to evaluating police seizures. It applies equally well to other situations in which officers use force.

In recent decades, the Supreme Court has spent an enormous amount of its time deciding whether police searches are reasonable.<sup>289</sup> It has developed such elaborate schema to address the constitutionality of various searches that the law of reasonable searches looks more like Darwinian evolution—in which small chance modifications lead to a diverse set of rules that coexist in an accidental ecosystem—than intelligent design. But, as Bill Stuntz has pointed out, in this body of case law the Court has shown itself much more concerned with the kinds of invasion of privacy such searches constitute than with the violent injuries and indignities caused by police uses of force during such searches.<sup>290</sup> In fact, the Supreme Court has only recently clearly indicated that the same use of force doctrine applies to force used by police officers during searches as to force used by officers during arrest.<sup>291</sup>

*Garner*, *Graham*, and *Scott* are ill-suited to the task of regulating police uses of force in contexts other than arrests. *Garner* is specific to fleeing, and its pronouncements therefore hold little relevance for the search context, where flight of an individual is not usually disruptive.<sup>292</sup> Moreover, although some of the *Graham* factors may be relevant,<sup>293</sup> their relative importance and relationship to what kinds of force should be permitted are even more ambiguous during searches, where force is usually used to pre-

<sup>288</sup> See *supra* text accompanying notes 156–57.

<sup>289</sup> A causal count reveals that since *Garner* was decided, there have been more than forty such cases. In 2006 alone, the Supreme Court decided *Brigham City v. Stuart*, 547 U.S. 398 (2006), *Georgia v. Randolph*, 547 U.S. 103 (2006), and *Samson v. California*, 547 U.S. 843 (2006), all considering the reasonableness of various searches. See also *United States v. Grubbs*, 547 U.S. 90, 97, 99 (2006) (deciding that anticipatory warrants may satisfy the particularity and probable cause requirements of the Fourth Amendment).

<sup>290</sup> See Stuntz, *supra* note 1, at 1042–44.

<sup>291</sup> See *Muehler v. Mena*, 544 U.S. 93, 98–99 (2005) (applying *Graham* to the use of force to effectuate detention during a search); *id.* at 102–03 (Kennedy, J., concurring).

<sup>292</sup> This is of course not true when the individual rather than a location is subject to search.

<sup>293</sup> See *supra* notes 37–50 and accompanying text (discussing the *Graham* factors).

vent bystanders from interfering, and where the individuals against whom force may be used are not necessarily suspected of committing any crime. While the nature of the crime may still strengthen the government's interest in seeing the search executed, that interest is more diffuse because the connection between a particular search and the resolution of the crime is often more indirect than in the arrest context. *Scott* is no more helpful: *Scott*'s rule applies only to force against those fleeing in cars, and its general approach to reasonableness provides even less guidance than *Graham* does.

Given the parallel treatment in the Fourth Amendment of searches and seizures and the frequency with which searches and seizures occur in the same encounter between suspects and citizens,<sup>294</sup> a useful standard for analyzing the use of force in police seizures would also apply smoothly to searches. Unlike the Supreme Court's current doctrine, the framework I propose meets this test: it requires that courts evaluating force during a search first identify the legitimate interest the force was used to promote, and then apply the requirements of imminence, necessity, and proportionality to that use of force. Most often, the interests at stake will be either a physical threat to an officer or attempts to interfere with the search itself. As I suggest above, both are appropriate justifications for responsive force, the first because it threatens an officer and the second because it threatens the state's interest in effectively enforcing its criminal laws.<sup>295</sup> The imminence requirement governs when such force is appropriate, and the requirements of necessity and proportionality guide how much force and what kinds may be legitimate. Under this framework, the constitutional law governing force during searches and seizures would be subject to the same test, and yet meaningfully accommodate the distinctive features of each context. In this way, we can explain, justify, and regulate the use of force in non-arrest settings.

While theoretical refinement is a worthwhile ideal, constitutional criminal procedure is ultimately a functional rather than transcendental exercise. In this case, however, the conceptual and practical coincide. Current Fourth Amendment doctrine provides poor guidance to lower courts about what factors are relevant to determining whether force is reasonable, especially given the complex uncertainties that surround police use of non-deadly force, precisely because it has been developed piecemeal in the absence of a framework that integrates all the relevant interests and practical considerations that properly bear on the justification of police violence. Because the Supreme Court has acted without such a framework, its deci-

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<sup>294</sup> When a police officer arrests a suspect, for example, Fourth Amendment doctrine permits—and departments usually encourage or require—officers to search the suspect and the area immediately surrounding him, including, for instance, the entire passenger compartment of his car for weapons and, in many cases, evidence. *See, e.g.,* *Thornton v. United States*, 541 U.S. 615 (2004); *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969).

<sup>295</sup> *See supra* Part II.B–C.

sions are insufficiently precise, as in the case of *Graham*'s factors, or concrete, as in *Scott*, to ensure principled and consistent action by lower courts. As a result, lower court decisions fail to serve the critical function of giving fair notice of the limits of acceptable police uses of force to the police and public alike. The limited interests police uses of force may serve and the requirements of imminence, necessity, and proportionality that govern the use of force even when pursuing those limited interests provide a more practical and principled doctrine that promises to remedy the current shortcomings of judicial decisions in this area.

Despite the ineliminable difficulties of evaluating the factual complexities of police-suspect encounters, these interactions are amenable to doctrinal analysis. While no meaningful standard regulating the use of force can avoid the hard work required of courts in hard cases, the doctrinal innovation proposed here has the potential to provide more just and predictable outcomes than does existing law without effecting a doctrinal or methodological revolution. Even under current doctrine, lower courts would benefit from using the analysis presented in this Article to guide their assessments of what force is reasonable. Of course, more significant benefits would arise from Supreme Court adoption of this analysis and rigorous development of it by lower federal courts over time. By limiting the interests that may justify police uses of force, and by using concepts of imminence, necessity, and proportionality to shape the application of the Fourth Amendment, the Court would provide fertile soil for careful consideration of police uses of force by the lower courts. It would also provide clearer and more just guidance for police officers using force on suspects than does the law as it stands, better enabling them to avoid excessive force in some cases and thus to be held accountable when they fail to do so, and assist judges and juries in determining whether an officer is justified in or liable for using force in a particular instance. Finally, it could help the public understand why an apparently outrageous case of police violence might sometimes be a tragedy but not a crime.

I contend here that a more nuanced understanding of the implications of the state's use of human actors to apply force leads to a clearer picture of the fundamental principles at stake when the state coerces its citizens. These principles concern both the relationship of the state to the citizen who is the target of state force and the interests of the police officers responsible for using force on behalf of the state. Such an understanding may also throw light on other instances of state coercion that involve individual agents. Correctional officers, for example, are also confronted with threats to weighty personal interests in the course of their work. And like police officers, theirs is a role that depends heavily on the material reality of the state's methods and means of incarceration. And yet, the circumstances of corrections are distinct enough to require careful further consideration. In this way, this analysis may inform a reconsideration of the Eighth Amendment jurisprudence on excessive force as well. An adequate theory of po-

lice uses of force, in other words, must frame and answer the most basic questions of justice and violence in a liberal society. It draws attention to the limits of legitimate force by civilians in the context of state coercive power, and it allows us to explore the justice of state coercion in the name of law enforcement. Not least, it forces us to see clearly the state's reliance on human agents—those neglected, complex, and essential figures who form the living boundary between the state's coercive power and civilian freedom.

