Police Use of Deadly Force: Revising Judicial and Statutory Standards to Limit Unjustified Violence

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INTRODUCTION

Police homicides continue to cause public concern and unrest throughout the country, leading to calls for reform.[1] The lawfulness of police use of lethal force often focuses on the officer's split-second decision to use such force to counter an apparent imminent threat posed by a criminal suspect.[2] The officer must assess in the field whether the suspect's actions create a serious risk of death or bodily harm to the officer or others, or whether the suspect has committed or is about to commit certain statutorily enumerated felonies that by their nature may pose a serious risk to public safety.[3] For example, is the officer justified in deciding to use deadly force to stop a suspect fleeing from the commission of a homicide or in deciding to use deadly force where he believes a felony suspect is armed with a loaded revolver or is pointing a gun or knife at the officer or another person?

Legal challenges to police use of deadly force arise most often in two legal contexts where the officer's use of force is alleged to be excessive. First, the issue is raised as one of liability in § 1983 actions in federal court seeking damages for the loss of the criminal suspect's life or in a state court action for wrongful death or assault and battery seeking monetary relief.[4] Second, deadly force issues arise as a defense to the officer's potential criminal liability in a state

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1 *See, e.g.*, *infra* notes 80–82 and accompanying text.

2 *See* Withers v. City of Cleveland, 640 Fed. App'x 416, 420 (6th Cir. 2016); *see also* Graham v. Connor, 490 U.S. 386, 396–97 (1989) ("[P]olice officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.").

3 *See* Toussaint Cummings, *I Thought He Had a Gun: Amending New York's Justification Statute to Prevent Police Officers from Mistakenly Shooting Unarmed Black Men*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 781, 810, 811 (2014).

4 *See* 42 U.S.C. § 1983 (2012); N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 2019); *e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1151 (2018); Bridenbaker v. City of Buffalo, 28 N.Y.S.3d 545, 546 (App. Div. 2016).

prosecution for homicide.[5] In both contexts, the life-preservation interest of the criminal suspect (who may have not even been charged with a crime) conflicts with the societal interests in public safety and enforcement of the criminal law.

To help reduce unwarranted instances of lethal force by law enforcement, reform should be examined on two fronts. First, as explained below, the Fourth Amendment jurisprudence operative in 1983 actions needs to be more evenly balanced to give greater recognition to the criminal suspect's interest in preserving his own life. Second, the New York State statute, New York Penal Law Section 35.30,[6] should be amended to limit the use of deadly force to situations where the criminal suspect's imminent threat poses a risk of death or serious bodily injury to the officer or a third party. The Supreme Court case, *Kisela v. Hughes*, illustrates some of the inadequacy of the current Fourth Amendment standards governing police use of deadly force.

I. *KISELA V. HUGHES*

On May 21, 2010, Tucson police officers Andrew Kisela and Officer-in-Training Alex Garcia responded to a welfare check concerning "a woman chopping away at a tree with a knife."[7] A neighbor of the woman had called 911 to make the report.[8] When Kisela and Garcia arrived at the scene, they encountered the 911 caller who advised them that the woman with a knife, Amy Hughes, had been acting "erratically" with the knife.[9] Moments later, another police officer Lindsay Kunz pulled up to the scene on her bicycle.[10] At around the same time, Officer Garcia saw a woman "later identified as Sharon Chadwick, standing next to a car in the driveway of a nearby house."[11] A chain link fence separated the officers from Chadwick.[12]

At that point, the officers observed Hughes, who matched a description of the woman with the knife, emerge from the house holding a kitchen knife.[13] Hughes approached Chadwick with the

[5] *See* N.Y. PENAL LAW § 35.30 (McKinney 2019); *e.g.*, People v. Colecchia, 674 N.Y.S.2d 10, 10–11 (App. Div. 1998).

[6] PENAL § 35.30.

[7] *See Hughes*, 138 S. Ct. at 1155 (Sotomayor, J., dissenting).

[8] *See id.* at 1151 (per curiam).

[9] *Id.*

[10] *See id.*

[11] *Id.*

[12] *Id.*

[13] *See id.*

knife and "stopped no more than six feet from her."[14] The three officers all drew service revolvers and told Hughes to drop the knife at least twice.[15] Chadwick then told the officers to "take it easy," but Hughes refused to acknowledge the presence of the police or to drop the knife.[16] Within roughly a minute from the time he initially saw her and after she refused to drop the knife, Officer Kisela dropped to the ground and shot Hughes four times through the chain link fence.[17]

In confronting this incident, all three officers believed that Hughes posed a serious threat of imminent bodily harm to Chadwick.[18] Chadwick herself later stated that she did not feel endangered at any time.[19] After the shooting, the officers learned that Hughes had a history of mental illness and that she was upset with Chadwick over a twenty-dollar debt.[20] Chadwick, who was also Hughes's roommate, stated that Hughes occasionally had episodes where she acted inappropriately, but she was only attempting to garner attention.[21] None of this background was known by the officers at the time of the shooting.[22]

"Hughes sued Kisela under Rev. Stat. § 1979, 42 U.S.C. § 1983, alleging that Kisela had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed."[23] The Ninth Circuit held the evidence, viewed in the light most favorable to Hughes, was sufficient to establish that Kisela violated the Fourth Amendment.[24] The court found, because of circuit precedent it viewed as directly analogous, that the violation was clearly established and the constitutional violation obvious.[25] The Ninth Circuit relied on three of its own decisions[26] to establish that

[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *See id.* (stating that paramedics transported Hughes to the hospital where she was treated for non-life-threatening injuries).
[18] *See id.*
[19] *See id.*
[20] *See id.*
[21] *Id.*
[22] *See id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] Hughes v. Kisela, 862 F.3d 775, 780, 783–85 (9th Cir. 2016), *amended by* 862 F.3d 775 (9th Cir. 2017) (citing Glen v. Washington Cty., 673 F.3d 864 (9th Cir. 2011); Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2000); Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997)).

Kisela had used excessive force.[27] Kisela filed a petition for a rehearing en banc, which was denied over the dissent of seven judges.[28] The Supreme Court granted Kisela's petition for certiorari.[29]

In a per curiam opinion, the Supreme Court reversed the judgment of the Ninth Circuit and remanded the case for further proceedings.[30] Reiterating its holdings in *Tennessee v. Garner*[31] and *Graham v. Connor*,[32] the majority indicated that police-use-of-force cases are subject to a Fourth Amendment test of reasonableness focusing on the severity of the crime, the immediate threat posed by the suspect to the officer and others, and whether the suspect is fleeing or attempting to evade arrest, all judged from the standpoint of an officer on the scene.[33] Recognizing that officers on the scene are called upon to make split second judgments, the reasonableness test does not employ 20/20 hindsight.[34] Having explained the Fourth Amendment test, the Court refused to decide the case on grounds of reasonableness because, in the majority's view on the facts presented, Kisela was entitled to qualified immunity from suit.[35]

Qualified immunity shields an officer from liability for civil damages unless he violates a statutory or constitutional right that has been clearly established when the challenged conduct took place.[36] A sound legal principle must have a clearly established foundation in existing precedent.[37] The majority reasoned that, even though the Court's precedent does not require a case directly on point to qualify as "clearly established," the existing precedent "must have placed the statutory or constitutional question beyond debate."[38] In practical terms, the Court reiterated, qualified "immunity protects all but the plainly incompetent or those who knowingly violate the law."[39] Recognizing that officers in the field may have difficulty

[27] *See id.* at 785.
[28] *Hughes*, 138 S. Ct. at 1151.
[29] *See id.* at 1151–52.
[30] *See id.* at 1150, 1154–55.
[31] Tennessee v. Garner, 471 U.S. 1 (1984).
[32] Graham v. Connor, 490 U.S. 386 (1989).
[33] *Hughes*, 138 S. Ct. at 1152 (first quoting *Garner*, 471 U.S. at 11; then quoting *Graham*, 490 U.S. at 396–97).
[34] *See id.* (quoting *Graham*, 490 U.S. at 396–97).
[35] *See id.*
[36] *See* Stanton v. Sims, 571 U.S. 3, 5–6 (2013) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)); Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam) (citing Saucier v. Katz, 533 U.S. 194, 206 (2001)).
[37] *See Hughes*, 138 S. Ct. at 1152 (quoting White v. Pauly, 137 S. Ct. 548, 551 (2017)).
[38] *See id.* (quoting *Pauly*, 137 S. Ct. at 551).
[39] *See id.* (quoting *Pauly*, 137 S. Ct. at 551).

determining how existing precedent applies to the actual circumstances arising in a specific case, the officer using excessive force is entitled to qualified immunity unless existing precedent "squarely governs" the specific facts in dispute.[40] Applying this test, the Court found that the Ninth Circuit misapplied the doctrine of qualified immunity because its own precedent did not clearly define conduct that an officer in Kisela's position would have known that he was violating.[41]

On the facts presented, Kisela was confronted with a woman wielding a knife close to Chadwick.[42] Kisela had mere seconds to assess the danger to Chadwick, and Hughes did not heed his commands to drop the knife.[43] According to the majority, this scenario was "far from [the] obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment."[44] The majority found that the Ninth Circuit erred in concluding that its own precedent constituted clearly-established law under these circumstances,[45] instead finding that the most analogous circuit precedent actually favored Kisela.[46] To contrast, not one of the three decisions relied upon by the Ninth Circuit when fairly read, supports denying Kisela the benefit of the qualified immunity doctrine. In each of the three decisions, the Supreme Court distinguished the precedent relied on by the Ninth Circuit as inapplicable to the present case.[47] For these reasons, the

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[40] *Id.* at 1152–53 (quoting Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam)).

[41] *See id.* at 1153.

[42] *See id.*

[43] *See id.*

[44] *Id.*

[45] *See id.*

[46] *See id.* (citing Blanford v. Sacramento Cty., 406 F.3d 1110 (9th Cir. 2005)). In *Blanford v. Sacramento County*, the case the Supreme Court found most closely analogous, the police responded to a report of a man wielding a sword and acting erratically. *Blanford*, 406 F.3d at 1112. They shot him after he refused to drop the sword in response to their commands and where in the officers' view, he posed an immediate threat to the safety of others. *See id.* at 1119. On those facts, the Ninth Circuit found that the police use of deadly force did not violate the Fourth Amendment. *See id.* at 1119. Under the doctrine of qualified immunity, Kisela could well have believed the same was true in the instant case.

[47] *See Hughes*, 138 S. Ct. at 1154 (citations omitted); *see also* Deorle v. Rutherford, 272 F.3d 1272, 1275, 1282–84 (9th Cir. 2001) (finding excessive force when police shot an unarmed victim in the face, where there was a clear line of retreat, there were no bystanders nearby, and the victim had been generally compliant with the officers' commands); Harris v. Roderick, 126 F.3d 1189, 1193–94, 1205 (9th Cir. 1997) (finding excessive force when an, an FBI sniper, sitting safely on a hilltop, shot a man in the back while he was retreating to a cabin during the Ruby Ridge standoff). Importantly, *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011), was not decided until after the events in *Kisela v. Hughes* took place and, therefore, could not possibly have given fair guidance to Kisela because he is not required to foresee judicial decisions that do not yet exist.

majority concluded that the Ninth Circuit had erred, and its judgment was reversed.[48]

Justice Sotomayor dissented, and Justice Ginsburg joined the dissenting opinion.[49] She took an entirely different view of the facts, noting at the outset that, on an appeal from a summary judgment, the facts must be viewed in the light most favorable to Hughes as the non-moving party.[50] When so viewed, Justice Sotomayor deemed Kisela's use of deadly force to be unreasonable because Hughes posed no imminent threat to others inasmuch as she remained calm and held the knife away from Chadwick.[51] Hughes was a safe distance away from the officers and she had not committed an illegal act or threatened Chadwick or anyone else with the knife.[52]

The dissent conducted a two-part legal analysis. First, the dissent addressed whether there was a violation of a constitutional right.[53] Under the Fourth Amendment, a claim may only be defeated when the officers' actions are "'objectively reasonable' in light of the facts and circumstances confronting them."[54] This inquiry involves an analysis of the severity of the crime, "whether the suspect poses an immediate threat to the safety of the officers or others[]" and whether the suspect is fleeing or attempting to evade arrest.[55] Applying these factors, the dissent found a Fourth Amendment violation because Hughes committed no crime, the officers had not suspected her of committing a crime, and a jury could reasonably conclude that she did not present an immediate threat to Chadwick or the officers.[56] Moreover, "Hughes did not resist or evade arrest[]" and Kisela could have resorted to less severe measures prior to using deadly force.[57] Notably, the dissent faulted the majority for skipping to the qualified-immunity analysis and not first deciding the reasonableness of Kisela's actions.[58]

The dissent viewed the qualified immunity analysis from a different perspective. Instead of attempting to locate precedent that previously held similar police conduct to be unlawful, Justice

[48] *See Hughes*, 138 S. Ct. at 1154–55.
[49] *See id.* at 1155 (Sotomayer, J., dissenting).
[50] *See id.* (quoting Tolan v. Cotton, 572 U.S. 650, 657 (2014)).
[51] *See id.* at 1157.
[52] *See id.*
[53] *See id.* at 1156.
[54] *See id.* at 1156 (quoting Graham v. Connor, 490 U.S. 386, 397 (1989)).
[55] *Id.* at 1156–57 (quoting *Graham*, 490 U.S. at 396).
[56] *See id.* at 1156, 1157–58.
[57] *Id.* at 1157.
[58] *See id.* at 1158.

Sotomayor stated that the core of the analysis was "whether Kisela had 'fair notice' that he acted unconstitutionally."[59] From the dissent's standpoint, the issue is whether, under existing precedent or controlling authority, Kisela had any legitimate interest that justified the use of deadly physical force against Hughes.[60] Here, in the dissent's view deadly force was not warranted because Hughes posed no objective threat to the officers, she had committed no crime, and as she appeared calm and non-threatening during the entire encounter.[61]

The dissent noted that Ninth Circuit case law demonstrated that Kisela's conduct was unreasonable under existing law.[62] Unlike the majority, the dissent viewed the *Deorle* case, where the circuit court held the use of deadly force as unlawful,[63] as directly analogous to the case before the Court.[64] Like Hughes, the emotionally unstable man in *Deorle* carried a weapon but he did not threaten anyone with it before the police shot him in the face without warning.[65] Similarly, the dissent in *Kisela* relied on other circuit case law for the proposition that using deadly force against an armed suspect who poses no objective threat to the officers or others is unreasonable and is grounds to forfeit use of the qualified immunity defense.[66]

The dissent distinguished *Blanford*, a circuit case the majority relied on to support the immunity defense, because in that case the suspect clearly posed an imminent danger that justified the use of deadly force.[67] In *Blanford,* police officers saw a man passing through a neighborhood carrying a sword.[68] Instead of dropping the sword when asked to do so by the police, the suspect continued to enter a house while growling.[69] Under those circumstances, the majority in *Blanford* concluded that the immunity defense applied because a real danger was present that justified the use of deadly force.[70] By contrast, in *Kisela*, even though Hughes did not drop her knife as

[59] *Id*. at 1158 (citing Hope v. Pelzer, 546 U.S. 730, 741 (2002)).

[60] *See id.* (first citing Tennessee v. Garner, 471 U.S. 1, 11 (1985); then citing Scott v. Harris, 550 U.S. 372, 383 (2007)).

[61] *See id.*

[62] *See id.* (citing Brosseau v. Haugen, 543 U.S. 194, 199 (2004)).

[63] *See* Doerle v. Rutherford, 272 F.3d 1272, 1285 (9th Cir. 2001).

[64] *See Hughes*, 138 S. Ct. at 1159 (Sotomayor, J., dissenting).

[65] *See Doerle*, 272 F.3d at 1285.

[66] *See Hughes*, 138 S. Ct. at 1160–61 (Sotomayor, J., dissenting) (citing cases).

[67] *See id.* 1161 (citing Blanford v. Sacramento County, 406 F.3d 1110 (9th Cir. 2005)).

[68] *See Blanford*, 406 F.3d at 1112.

[69] *See id.* at 1112–13.

[70] *See id.* at 1119.

requested by the police, she remained calm and posed no immediate threat of harm to anyone.[71]

Two grounds explain the marked differences in the majority's and dissent's analysis of Kisela's use of deadly force. First, the differing assessment of the facts before the Court in this and the related circuit precedent stems from the varying application of the settled rule that, on appeal from a motion for summary judgment, the facts and inferences drawn from them must be viewed in the light most favorable to the non-moving party, here Hughes.[72] The dissent rigorously employs that rule by emphasizing certain facts favoring Hughes, and the majority did not.[73] Second, the majority and dissent approach the immunity defense from a different standpoint. In determining whether the officer's use of force is constitutional, the majority looks to precedent existing at the time that is very similar, or to use the dissent's phrase "identical" to the case at bar.[74] To contrast, the dissent looks to whether the existing precedent places the constitutionality of the officer's conduct "beyond debate."[75]

When one places these legal nuances aside the pivotal inquiry must be whether this case establishes a reliable guidepost for officers who, in the field, are called upon to make split-second judgments on the use of deadly force. The answer is that the case does not provide such informed and easily understood guidance to the police in the field or to those who must train them. To illustrate, there are numerous disparate views of the federal judges who ruled in this case at the district level, circuit level, and at the Supreme Court. In total, eight judges (one district court judge and seven members of the Supreme Court) found Kisela's use of force to be lawful,[76] whereas five judges found his use of force to be unlawful (three circuit judges and two members of the Supreme Court),[77] a split of 61% to 49%. With such

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[71] *See Hughes*, 138 S. Ct. at 1158 (Sotomayor, J., dissenting).

[72] *See id.* at 1155; *see also id.* at 1151 (majority opinion).

[73] "[W]e must 'view the evidence . . . in the light most favorable to' Hughes, the nonmovant, 'with respect to the central facts of this case.' The majority . . . conspicuously omits several critical facts and draws premature inferences that bear on the qualified-immunity inquiry." *Id.* at 1155 (Sotomayor, J., dissenting) (quoting Tolan v. Cotton, 572 U.S 650, 657 (2014)).

[74] *Id.* at 1161; *see also id.* at 1152–53 (majority opinion) (differentiating the facts from prior precedent).

[75] *Id.* at 1161 (Sotomayor, J., dissenting) (quoting District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018)).

[76] Only Justices Ginsberg and Sotomayor dissented. *See* Amy Howe, *Justices Grant One New Case, Summarily Reverse in Excessive-Force Case*, SCOTUSBLOG (Apr. 2, 2018, 1:02 PM), https://www.scotusblog.com/2018/04/justices-grant-one-new-case-summarily-reverse-in-excessive-force-case/ [https://perma.cc/9B5M-9PWP].

[77] *See id.*; Howard Fischer, *Woman Shot By UA Police Can Make 'Excessive Force' Claim To Jury*, ARIZ. DAILY STAR (Nov. 28, 2016), https://tucson.com/news/local/woman-shot-by-ua-

a close split among the judiciary, how is an officer in the field to ascertain whether his conduct accords with guiding legal standards when those standards are not themselves clearly established?

Given the fact that a criminal suspect faces a potential loss of life pre-trial, it seems unjust to insulate members of law enforcement from potential liability unless they act from criminal motives or are totally incompetent. Legal standards are needed to fairly balance the suspect's personal safety and liberty interests with the public safety and law enforcement interests at stake.[78] Overall, judicial deference to police decision-making in the field may be based on a flawed assumption of police expertise.[79]

Over the last several years, the national consciousness has been shaken by police homicides involving Walter Scott, Akai Gurley, Samuel Dubose, Terence Crutcher, Tamir Rice, Michael Brown and others.[80] Claims of excessive force have resulted in lawsuits alleging racial profiling and bias in the use of excessive force.[81] A 2015 study by RTI International on behalf of the Bureau of Justice Statistics found that in 2011 and from 2003 to 2009 the federal government tracking sources failed to report at least twenty-eight percent of the 7,427 police homicides in the United States during that time.[82] Another article reports that there were approximately 1,000 people fatally shot by the police each year.[83] The FBI statistics indicate that there were 987 fatal police shootings in 2017 and 996 fatal police

police-can-make-excessive-force-claim/article_c24c09d5-18fc-5b14-88d5-5d21057c8e1b.html [https://perma.cc/D4WX-56E2] ("Judge William Sessions, writing for the unanimous three-judge panel.").

[78] *See* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 762–63 (2012).

[79] *See* Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2081 (2017).

[80] *See* Jasmine C. Lee & Haeyoun Park, *15 Black Lives Ended in Confrontations with Police. 3 Officers Convicted.*, N.Y. TIMES (May 18, 2017), https://www.nytimes.com/interactive/2017/05/17/us/black-deaths-police.html [https://perma.cc/N3WK-EWPT].

[81] *See, e.g.*, Matt Stevens, *Lawsuit Filed in Police Shooting of Unarmed Black Man*, N.Y. TIMES, Jan. 29, 2019, at A17; *see also* Lee & Park, *supra* note 80 ("Cases in which black people were killed by the police . . . have risen to national prominence in recent years, often prompting protests nationwide.").

[82] DUREN BANKS ET AL., ASSESSMENT OF COVERAGE IN THE ARREST-RELATED DEATHS PROGRAM 1 (2015).

[83] Kimberly Kindy et al., *A Year of Reckoning: Police Fatally Shoot 1,000*, WASH. POST (December 26, 2015), https://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/ [https://perma.cc/23SN-GG43]; *see also* John Sullivan et al., *Four Years in a Row, Police Nationwide Fatally Shoot Nearly 1,000 People*, WASH. POST (Feb. 12, 2019, 4:26 PM), https://www.washingtonpost.com/investigations/four-years-in-a-row-police-nationwide-fatally-shoot-nearly-1000-people/2019/02/07/0cb3b098-020f-11e9-9122-82e98f91ee6f_story.html [https://perma.cc/9P7S-HQAB].

shootings in 2018; the majority of the victims were white.[84] Controlling for a number of factors, another researcher has found that blacks are 27.4% *less* likely to be shot at by police than non-blacks and non-Hispanics.[85] More studies are required to determine whether there is racial bias in police use of deadly force.[86]

Recent research demonstrates that police officers in making use-of-force decisions in the field employ a naturalistic decision-making process.[87] The naturalistic decision-making process means the field police officers rely on intuition rather than a highly analytical approach when they decide whether to use deadly force.[88] In other words, when faced with uncertain and time-pressured circumstances, police officers rely upon gut instinct, which includes their inner sense of the perceived danger posed by the suspect and the surroundings.[89] They do not analyze scenarios using a number of different use of force options.[90] In fact, they cannot do so because those scenarios happen too quickly for a police officer to deliberately consider judicial precedent on deadly force. Additionally, many officers experience memory malfunctions where the mind goes blank and they cannot even recall a partner's name from the stress of deadly force scenarios.[91] This research plainly demonstrates the necessity for police training based on a simplified set of legal rules and policies that become almost instinctual to guide use of force decisions in the field.

Despite the need for clear rules and policies, the legal standards applicable to police use of deadly force are ambiguous and vague.[92] And from the high visibility shootings covered in the press, there is a growing sense that the law does not give adequate weight to the

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[84] *See People Shot to Death by U.S. Police, by Race 2017–2019*, STATISTA (Jan. 3, 2020), https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/ [https://perma.cc/HZ7M-YEP9]. In 2017, 457 of the victims were white and 223 were black and in 2018, 399 of the victims were white and 209 of the victims were black. *Id.* The remaining victims each year were identified as Hispanic, other, or unknown. *See id.*

[85] Roland G. Fryer, Jr., *Reconciling Results on Racial Differences in Police Shootings*, 2 PAPERS & PROC. HARV. U., May 2018, at 2.

[86] *Id*. at 5.

[87] Kelly A. Hine et al., *Exploring Police Use of Force Decision-Making Processes and Impairments Using a Naturalistic Decision-Making Approach*, 45 CRIM. JUST. & BEHAV. 1782, 1783 (2018).

[88] *Id*. at 1785.

[89] *See id.* at 1784–85, 1790, 1795.

[90] *See id.* at 1790–91.

[91] *See id.* at 1792.

[92] *See* Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281, 1287 (2019).

interest of the criminal suspect and his family in preserving his life.[93] Further, the police are authorized to use lethal force in most states (including New York) to arrest or prevent the escape of a dangerous felon.[94] Unlike a case where the officer's act in self-defense, the arrest or apprehension of a dangerous felon requires the police to make predictive judgments (sometimes with limited or conflicting information) as to whether the suspect poses a real and present danger (did he commit a felony involving a danger to life or is he carrying a deadly weapon) of death or serious bodily injury.[95] When the police make a mistake, the suspect may be killed even when he never actually posed a risk of harm or death to anyone.

To address these issues, this article will begin with an examination of the historical common law standards applicable to police use of deadly force. The common law rules in this area can be traced to medieval England and predominated for centuries, only losing majority support in the mid-1980s.[96] The common law standard which allowed law enforcement to shoot any fleeing felon is embedded in our jurisprudence and has had an enduring impact on court decisions up to the present time.[97] As a result, efforts to balance the interests of the individual suspect and those of law enforcement have been difficult.

Next, I will analyze the Fourth Amendment jurisprudence that the Supreme Court applied in *Kisela v.Hughes,* from a critical perspective in civil and criminal cases. Coupled with this analysis will be a

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[93] *See* Kia Gregory, *How Videos of Police Brutality Traumatize African Americans and Undermine the Search for Justice*, NEW REPUBLIC (Feb. 13, 2019), https://newrepublic.com/article/153103/videos-police-brutality-traumatize-african-americans-undermine-search-justice, [https://perma.cc/YYB6-GPWY]; Elliot C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN, https://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/index.html, [https://perma.cc/VN5L-YLLJ].

[94] *See* N.Y. PENAL LAW § 35.30(1) (McKinney 2019); Michael Tram, *Shot in the Back: When Can Police Fire on Fleeing Suspects?*, AP NEWS (June 28, 2018), https://apnews.com/fb33a7eb824b47c492f01130c73878eb/Shot-in-the-back:-When-can-police-fire-on-fleeing-suspects? [https://perma.cc/4KRW-W2DZ]; The Associated Press, *New York State Trooper Had the Law on His Side When He Shot Unarmed Escapee*, DENVER POST (June 29, 2015, 1:44 PM), https://www.denverpost.com/2015/06/29/new-york-state-trooper-had-the-law-on-his-side-when-he-shot-unarmed-escapee, [https://perma.cc/4A2U-DEN6].

[95] *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989) (citations omitted); Tram, *supra* note 94.

[96] *See* JOHN S. DEMPSEY & LINDA S. FORST, AN INTRODUCTION TO POLICING 152 (8th ed. 2016); Jason Lee Steorts, *When Should Cops Be Able to Use Deadly Force?*, ATLANTIC (Aug. 27, 2015), https://www.theatlantic.com/politics/archive/2015/08/use-of-deadly-force-police/402181, [https://perma.cc/VJ3V-6EFZ].

[97] *See* Abraham N. Tennenbaum, *The Influence of the Garner Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241, 244–45 (1994).

discussion of the merits of the qualified immunity doctrine. I will then assess the drawbacks of Fourth Amendment jurisprudence and qualified immunity. As others have concluded, there is insufficient guidance provided by the existing case law and the courts should turn elsewhere to establish a set of understandable rules in this area.[98]

The common law of justification is based on principles like imminent harm and necessity, which restrict the use of force to situations where the officer is confronted with a threat of serious harm to himself or others.[99] These concepts need to be considered in the context of a Fourth Amendment standard applicable to police use of deadly force. In addition, the defense of justification applicable to criminal prosecutions in New York will also be considered from a critical perspective questioning whether it strikes a proper balance between the needs of law enforcement and the criminal suspect's interest in preserving his life. As shown below, the present statute gives insufficient weight to the interests and rights of the criminal suspect to be free from lethal seizures. The statute should be amended to strike a proper balance by limiting the law enforcement justification defense to situations where the suspect poses a risk of lethal harm to the officer or a third party.

II. THE COMMON LAW RULE PERMITTED THE USE OF DEADLY FORCE TO APPREHEND A FLEEING FELON REGARDLESS OF WHETHER THE FLEEING FELON POSED AN IMMINENT RISK OF HARM TO THE OFFICER OR OTHERS

At common law, the police were permitted to use whatever force was necessary to arrest a fleeing felon, but not a misdemeanant.[100] Deadly force was authorized to arrest non-violent felons well into the twentieth century.[101] The rationale for the rule arose when nearly all felonies were punishable by death—thus the fatal shooting of a fleeing felon "resulted in no greater consequences than those authorized for punishment of the felony of which the individual was

[98] *See* POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 18 (2016); Obasogie, *supra* note 92, at 1287, 1289.

[99] *See* Tennenbaum, *supra* note 97, at 243.

[100] *See, e.g.*, Iowa v. Smith, 103 N.W. 944, 944, 945 (Iowa 1905); Brooks v. Commonwealth, 61 Pa. 352, 357, 360 (1869); Holloway v. Moser, 130 S.E. 375, 376 (N.C. 1927); Reneau v. Tennessee, 70 Tenn. 720, 723 (1879).

[101] *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1099, 1102 & n.70 (3d ed. 1982); Steven C. Day, *Shooting the Fleeing Felon, State of the Law*, 14 CRIM. L. BULL. 285, 286, 289 (1978).

charged or suspected."[102] The common law rule was also supported by the perception that felons were more dangerous than misdemeanants; therefore, lethal force was needed to protect the public from harm.[103]

The roots of the fleeing felon rule can be traced to early English common law.[104] Prior to the nineteenth century, there were no formalized local police departments charged with the duty of preventing crime and apprehending criminal suspects.[105] If a fleeing felon avoided capture, then he usually avoided apprehension altogether. Moreover, prior to the manufacture of accurate and easily used revolvers, sheriffs or constables had very basic weapons to use for self-defense.[106] Arrests were frequently made in violent face-to-face encounters, sometimes with the use of a sword.[107] The common law legal standards concerning police use of deadly force persisted well into the twentieth century.[108]

Eventually, the laws governing police use of deadly force fell into one of four general categories: the Any-Felony Rule, the Defense-of-Life Rule, the Model Penal Code, and the Forcible Felony Rule.[109] Under the Any-Felony Rule, officers were authorized to use any means, including deadly force, to arrest felony suspects or to prevent them from fleeing.[110] For example, between 1925 and 1945, New Orleans police homicides "account[ed] for one out of every twenty homicides in the city and claim[ed] more victims than did local robbers."[111] In the 1980s, police were still permitted to use deadly force to prevent the escape of any fleeing felon in at least nineteen states.[112] However, at the same time, some states (like California) have enforced a statute that limits the justification for using deadly

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[102] *See* MODEL PENAL CODE § 3.07 cmt. 3 (AM. LAW INST., Tentative Draft Nos. 8, 9, & 10 1958).

[103] *See Holloway*, 136 S.E. at 376.

[104] *See* DEMPSEY, *supra* note 96, at 152.

[105] *See* CAROL. A. ARCHBOLD, POLICING: A TEXT/READER 33 (2012).

[106] *See, e.g.*, Tennenbaum, *supra* note 97, at 243.

[107] *See id.*

[108] *See id.* at 242.

[109] *See id.*

[110] *See id.*

[111] *See* Jeffrey S. Adler, *"The Killer Behind the Badge": Race and Police Homicide in New Orleans, 1925–1945*, 30 LAW & HIST. REV. 495, 505 (2012).

[112] *See* James J. Fyfe & Jeffrey T. Walker, Garner *Plus Five Years: An Examination of Supreme Court Intervention into Police Discretion and Legislative Prerogatives*, 14 AM. J. CRIM. JUST. 167, 177–78 (1990).

force to situations involving the protection of human life, either that of the officer or another person.[113]

The Model Penal Code (MPC) rule and the Forcible Felony Rule amounted to middle-ground approaches seeking to ameliorate the scope of the Any-Felony Rule. The MPC established two preconditions for the use of deadly force to effect an arrest: first, the arrest must be for a felony; and second, the officer must believe that "the crime for which the arrest is made involved conduct including the use or threatened use of deadly force," or that a delay in apprehension will create a substantial risk that "the person to be arrested will cause death or serious bodily injury" to the officer or a third party.[114] Under the MPC, the use of deadly force to prevent an escape is justified whenever it would have been justified to effect the arrest.[115]

The Forcible Felony Rule begins with statutory definitions of certain felonies as "forcible felonies."[116] States adopting this rule permit the police to use deadly force against only people suspected of committing forcible felonies like murder, arson, rape, kidnapping and armed robbery.[117] These felonies typically involve the use of force, often deadly force, and are deemed serious enough to warrant a serious and even lethal response from law enforcement.

III. THE SUPREME COURT AND THE FOURTH AMENDMENT JURISPRUDENCE ON POLICE USE OF DEADLY FORCE

Police Officer Elton Hymon responded to a report of a prowler and observed eighth-grader, Edward Garner, fleeing across a yard and beginning to climb over a fence.[118] Hymon called out to Garner to stop, and when he refused, Hymon shot him in the back of the head, killing him to prevent his escape.[119] Although Hymon thought that Garner was unarmed, he believed that Garner would escape if he made it over the fence.[120]

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[113] *See* CAL. PENAL CODE § 835(c)(1) (West 2019); N.Y. PENAL LAW § 35.30(1)(c) (McKinney 2019).

[114] MODEL PENAL CODE § 3.07(2)(b) (AM. LAW INST. 2020).

[115] *See id.* at § 3.07(3).

[116] *See* J. Paul Boutwell, *Use of Deadly Force to Arrest a Fleeing Felon—A Constitutional Challenge, Parts I & III*, *in* READINGS ON POLICE USE OF DEADLY FORCE 65, 73 (James J. Fyfe ed., 1982).

[117] *See id.*

[118] *See* Tennessee v. Garner, 471 U.S. 1, 3–4 & n.2 (1985).

[119] *See id.* at 4.

[120] *See id.* at 3, 4 n.3.

Garner's father commenced a wrongful death action under the federal civil rights statute against the police officer and his respective department for the fatal shooting of his son as he fled the burglary scene.[121] Justice White, writing for the Supreme Court and relying on the Fourth Amendment, held that deadly force "may not be used unless it is necessary to prevent the escape [of a fleeing felon] and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[122] The Court balanced the state's interest in apprehending criminal suspects with the individual's interest in preserving his life.[123] In weighing these interests, the majority concluded that at least in the case of nonviolent felons, the individual's interest in preserving his life wins out over the state's interest in apprehending criminal suspects.[124]

The *Garner* decision overturned the longstanding common-law rule that the police could use deadly force to prevent the escape of any fleeing felon. However, because *Garner* is grounded on the Fourth Amendment test of reasonableness, there is debate as to the actual scope of the ruling.[125] Some scholars conclude that *Garner* "created a constitutional right to run for many felony suspects,"[126] others suggest that the case restricted a police officer's right to use deadly force to those situations involving the protection of life.[127] At the state level, the impact of *Garner* was muted because only three of the twenty-two states amended their any-felony deadly force statutes to accord with the *Garner* decision.[128]

In 1989, only four years after *Garner*, the Supreme Court addressed the limits on police use of force under the Fourth Amendment in *Graham v. Connor*.[129] In *Graham v. Connor*, the Court affirmed *Garner* and its balancing of interest analysis.[130] It also recognized that courts presiding over police excessive-force cases

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[121] *See id.* at 5.

[122] *See id.* at 3, 7.

[123] *See id.* at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983); then citing Delaware v. Prous 440 U.S. 648, 654 (1979); United States v. Martinex-Fuerte, 428 U.S. 543, 555 (1967)).

[124] *See id.* at 11.

[125] *See id.* at 7; Michael D. Greathouse, *Criminal Law—The Right to Run: Deadly Force and the Fleeing Felon:* Tennessee v. Garner*, 105 S. Ct. 1694 (1985)*, 11 S. ILL. U. L.J. 171, 184 (1986).

[126] *See* Greathouse, *supra* note 125, at 184.

[127] *See* David B. Griswold, *Controlling the Police Use of Deadly Force: Exploring the Alternatives*, AM. J. POLICE, 1985, at 93, 102.

[128] *See* Fyfe & Walker, *supra* note 112, at 178.

[129] *See* Graham v. Connor*,* 490 U.S. 386, 388 (1989).

[130] *See id.* at 395–96 (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985)).

should analyze the facts under the Fourth Amendment as a "seizure" of the person, not as a substantive due process claim.[131] In *Graham*, the police observed Graham walking into a grocery store.[132] A few minutes later, Graham rushed out of the store and, after concluding he was acting suspiciously, they detained him.[133] Believing he had robbed that store and after Graham refused to cooperate, the police ultimately beat Graham, but then released him after learning he was merely a diabetic suffering from an insulin reaction.[134]

Graham is important because it specifically identified factors that courts should use in analyzing the Fourth Amendment, including (1) the seriousness of the crime at issue, (2) whether the suspect poses an imminent threat to the safety of the officers or others, (3) whether the suspect is resisting arrest, or (4) whether he is attempting to flee from the officer.[135] Finally, although the *Graham* Court indicated that the test of reasonableness is objective, the facts must always be viewed from the perspective of the officer when the incident occurred.[136] This analysis requires accounting for the pressure-packed and split-second judgments that police officers frequently confront.[137]

The factors identified in *Graham* do not sufficiently guide police officers or courts and juries who may need to determine whether the officer's decision to use of force in a particular case constitutes a lawful and reasonable use of force. Although the Court set forth guiding principles to analyze the reasonableness of an officer's use of deadly force, it did not address how courts should weigh those factors and what significance, if any, they should give to the suspect's flight or resistance to a lawful arrest. The Supreme Court's guiding principles also do not contemplate a spectrum of possible choices, or that force short of deadly force must be resorted to as a first option prior to turning to the lethal option. Therefore, the law has not developed to the point where police, courts, juries, and the public generally understand the lawful limits of police use of force.

The next Supreme Court pronouncement on police use of force occurred in *Scott v. Harris*.[138] Police officers observed Harris speeding in a vehicle and, when he refused to pull over, a high-speed

[131] *See id.* at 388.
[132] *See id.* at 388–89.
[133] *See id.* at 389.
[134] *See id.*
[135] *Id.* at 396 (citing *Garner*, 471 U.S. at 8–9).
[136] *See Graham*, 490 U.S. at 396 (citing Terry v. Ohio, 392 U.S. 1, 20–22 (1968)).
[137] *See Graham*, 490 U.S. at 396–97.
[138] *See* Scott v. Harris, 550 U.S. 372, 374 (2007).

chase ensued.[139] One of the police officers, Officer Scott, joined the chase and, to apprehend Harris and possibly avoid injury to other citizens, Officer Scott used his police vehicle to ram Harris's vehicle and stop him.[140] As a result, Harris's vehicle careened down an embankment, and he suffered disabling injuries.[141]

Harris commenced a civil rights action under 42 U.S.C § 1983 and state law contending, in part, that Scott used excessive and deadly force in violation of his rights by ramming his vehicle with the police cruiser.[142] Scott and the other defendants moved for summary judgment dismissing Harris's lawsuit.[143] The district court applied the fact-intensive analysis set forth in *Graham* to address each of Harris's claims.[144] In applying *Graham*, the district court dismissed several claims and denied summary judgment on the Fourth Amendment cause of action alleging that Scott unreasonably seized Harris when he rammed his vehicle with the police cruiser.[145] The court of appeals affirmed the district court's denial of summary judgment.[146]

The Supreme Court reversed the judgment of the Eleventh Circuit and held that Scott's actions did not violate Harris's rights under the Fourth Amendment.[147] In reviewing the record, the Supreme Court, unlike the courts below, concluded that Harris's reckless use of his automobile in a high-speed chase placed the officers and innocent bystanders in danger of serious injury.[148] In reaching this determination, the Court used the balancing test that it used in *Garner*.[149] It balanced the government's interest in protecting the safety of the officers and innocent third parties against the danger of injury arising from Scott's use of the police vehicle to ram into Harris's vehicle.[150] In weighing these interests, the Court upheld the government's interest because Harris put numerous lives at risk in a situation that he created.[151]

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[139] *See id.* at 374–75.
[140] *See id.* at 375.
[141] *See id.*
[142] Harris v. Coweta Cty., No. CIVA 3:01CV148 WBH, 2003 WL 25419527, at *3 (N.D. Ga. Sept. 25, 2003).
[143] *Id.* at *1.
[144] *See id.* at *4 (quoting Graham v. Connor, 490 U.S. 386, 397 (1989)).
[145] *See Harris*, 2003 WL 25419527, at *5, *6, *12.
[146] Harris v. Coweta Cty., 433 F.3d 807, 822 (11th Cir. 2005).
[147] *See* Scott v. Harris, 550 U.S. 372, 386 (2007).
[148] *See id.* at 379–81.
[149] *See id.* at 381, 382, 386.
[150] *See id.* at 383.
[151] *See id.* at 384.

Noticeably absent from the Court's analysis in *Scott v. Harris* is a discussion of the four factors discussed in *Graham* that govern police officers' use of both deadly and non-deadly force.[152] The Court in *Scott* rejected the notion that its precedent established any preconditions for the use of deadly force.[153] The Court stated, "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"[154] It pointed out that *Scott* counseled that "[w]hether or not [the officer's] actions constituted application of 'deadly force,' all that matters is whether [his or her] actions were reasonable."[155] *Scott* means that there is no easy way to apply a legal test and, in each instance, the trial court must "slosh . . . through the factbound morass of 'reasonableness.'"[156] A vague standard of this type leaves the police and the lower courts in the dark as to when any of the factors discussed in *Graham* come into play, what weight should be accorded them, and when they should not be looked to for guidance. Complicating the matter further is the doctrine of qualified immunity which becomes relevant in § 1983 civil rights actions against the police for excessive use of force.[157] Indeed, when qualified immunity is in play the courts may skip over the Fourth Amendment test of reasonableness and analyze the applicability of immunity from suit.[158] The Court did just that in *Kisela v. Hughes*.[159]

To establish civil liability in a section 1983 action, the plaintiff must prove that a constitutional right was violated and that the

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[152] *See id.* at 381–83 (citing Graham v. Connor, 490 U.S. 386, 388 (1989)) (stating that both sides conceded that a claim of "excessive force" is properly analyzed under the Fourth Amendment's "objective reasonableness" standard and citing to *Graham*, yet never discussing the factors under that standard).

[153] *See id.* at 382.

[154] *Id.*

[155] *Id.* at 383.

[156] *Id.*

[157] *See* Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (quoting White v. Pauly, 137 S. Ct. 548, 551 (2017)) ("Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). "Use of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Id.* at 1153 (quoting Mullenix v. Luna, 136 S. Ct. 305, 309 (2015)).

[158] *See id.* at 1152.

[159] *See id.* ("Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.").

governmental actor is not entitled to immunity from civil liability.[160] Prosecutors receive absolute immunity from civil claims and police officers and other public officials receive qualified immunity.[161] Case law makes plain, however, that the doctrine of qualified immunity insulates the police from civil liability in most excessive-force cases.

The qualified-immunity analysis is a two-pronged analysis.[162] The first prong seeks to determine "whether the facts that a plaintiff has alleged make out a violation of a constitutional right."[163] The second prong concerns "whether the right at issue was clearly established at the time of defendant's alleged misconduct."[164] As such, the qualified-immunity inquiry is the same inquiry that is made on the merits.[165] The Second Circuit has stated that in excessive-force cases the qualified immunity and the Fourth Amendment analyses hinge on the same question: whether given the factual circumstances faced by the officer, a reasonable officer would believe that the force to be used is lawful.[166]

In civil actions claiming excessive force the defendant police officer is entitled to summary judgment under the Fourth Amendment, if the actions of the police officer (1) are not open to "serious debate" regarding the unreasonableness of such actions and (2) are of a type that only a "plainly incompetent" police officer or one who knowingly violates clearly established law would have committed.[167] Clearly established law is present when the law is beyond debate as to what the police are prohibited from doing.[168] The prior decisions which make up the "clearly established law" must provide "reasonable" or

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[160] *See* Richard P. Shafer, Annotation, *When Does Police Officer's Use of Deadly Force During Arrest Become So Excessive as to Constitute Violation of Constitutional Rights, Imposing Liability Under Federal Civil Rights Act of 1871, 42 U.S.C.A. § 1983*, 60 A.L.R. Fed. 204 § 12 (2016); *see also* 42 U.S.C. § 1983 (2012).

[161] *See* Imbler v. Pachtman, 424 U.S. 409, 418–19, 427, 431 (1976).

[162] *See* Saucier v. Katz, 533 U.S. 194, 199 (2001).

[163] Brown v. Montoya, 662 F.3d 1152, 1164 (10th Cir. 2011) (quoting Leverington v. Colorado Springs, 643 F.3d 719, 732 (10th Cir. 2011)); *see also Saucier*, 533 U.S. at 200.

[164] *Brown*, 662 F.3d at 1164 (quoting *Leverington*, 643 F.3d at 732); *see also Saucier*, 533 U.S. at 200.

[165] *See* O'Bert v. Vargo, 331 F.3d 29, 37 (2d Cir. 2003) (quoting Scott v. Henrich, 39 F.3d 912, 914 (9th Cir. 1994)).

[166] *See* Cowan v. Breen 352 F.3d 756, 764 (2d Cir. 2003) (quoting *O'Bert*, 331 F.3d at 36).

[167] *See* City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015) (citing Ashcroft v. al-Kidd, 563 U.S. 731, 741, 743 (2015)).

[168] *See* District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (quoting *Ashcroft*, 563 U.S. at 741; Malley v. Briggs, 475 U.S. 335, 341 (1986)). "'Clearly established' means that at the time of the officer's conduct, the law was 'sufficiently clear' that every reasonable official would understand that what he is doing is unlawful. . . . This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 589 (quoting *Ashcroft*, 563 U.S. at 741; *Malley*, 475 U.S. at 341).

"fair warning" that the police use of force violates the constitutional rights of the plaintiff.[169] It would seem then that in evaluating the validity of the qualified immunity defense, the trial court would examine past cases with materially similar facts to the case at bar to ascertain whether they provide fair warning to the officer that his conduct is unlawful. However, the Supreme Court has specifically rejected such an approach.[170] With such a high burden, simple negligence or an error in judgment cannot serve as the basis for civil liability for the excessive use of force.[171] Police incompetence and disregard for procedure may be condoned, and only blatantly unlawful conduct may form the basis for civil liability.[172]

The Supreme Court's decision in the recent case of *White v. Pauly*,[173] illustrates the robust nature of the defense of qualified immunity. There, the Court held that a defendant officer who shot a suspect after the suspect's brother had fired two shotgun blasts at the officers and the suspect himself had pointed a handgun in the direction of the defendant officer was entitled to qualified immunity.[174] The Tenth Circuit had held that the defendant was not entitled to qualified immunity because a reasonable officer would have known that "he could not have used deadly force without first warning [the suspect] to drop his weapon."[175] In reversing, the Supreme Court reminded the lower courts that "'clearly established law' should not be defined 'at a high level of generality'" and admonished the Tenth Circuit for failing to "identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated the Fourth Amendment."[176] In particular, the Supreme Court noted that the Tenth Circuit had acknowledged that the case "present[ed] a unique set of facts and circumstances" and that this observation alone "should have been an important indication to the majority that [the defendant's conduct] did not violate a 'clearly established' right."[177]

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[169] *See* Hope v. Pelzer, 536 U.S. 730, 739–40 (2002) (citing United States v. Lanier, 520 U.S. 259 (1997)).

[170] *See id.* at 733, 739.

[171] *See Wesby*, 138 S. Ct. at 589 (citing *Malley*, 475 U.S. at 341).

[172] *See id.* at 590.

[173] White v. Pauly, 137 S. Ct. 548 (2017).

[174] *See id.* at 552 (2017).

[175] *See id.* at 550–51.

[176] *See id.* at 552 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2015)).

[177] *See id.*

IV. JUDICIAL RELUCTANCE TO USURP THE ROLE OF THE JURY IN POLICE EXCESSIVE-FORCE CASES

Even though the factual circumstances present vary widely at least in the Second Circuit the courts are reluctant to grant summary judgment to the police in civil cases where there is a genuine dispute in the evidence.[178] The Second Circuit has rigorously applied the settled summary judgment rule that the evidence must be viewed in the light most favorable to the non-moving party.[179] This rule has particular relevance in deadly force cases where the suspect and only other key witness is deceased and where the estate plaintiff relies on forensic evidence relevant to the police shooting.

The reluctance to grant summary judgment in police deadly shooting cases is illustrated by *Public Administrator of Queens County v. City of New York*.[180] The defendant police officers responded to a report of a stolen vehicle and witnessed Guzman driving erratically and evading the officers by refusing to stop when ordered to do so.[181] Eventually, Guzman pulled into a driveway and begin to flee from the police.[182] Officer Bagdziunas confronted him and a struggle ensued for the officer's weapon.[183] According to Officer Connolly, he arrived on the scene to find Bagdziunas on the ground with Guzman holding the officer's weapon.[184] Connolly immediately fired a total of nine shots at Guzman killing him.[185] The officers claimed that they were entitled to dismissal of Guzman's estate's action because Connolly reasonably believed that his fellow officer had been shot and that his own life was in danger.[186] Because Guzman was dead, his counsel relied on forensic evidence to dispute the officer's version of the shooting.[187] Specifically, the plaintiff introduced forensic to demonstrate that the fatal shooting could not have occurred in the manner described by Officer Connolly because the expert's wound analysis showed that Guzman was not facing him

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178 *See, e.g.*, Cowan v. Breen, 352 F.3d 756, 763 (2d Cir. 2003) (citing Saucier v. Katz, 533 U.S. 194, 216 (2001) (Ginsberg, J., concurring)).

179 *See, e.g.*, *id.* at 763 (denying summary judgment to defendant police officer in § 1983 claim where genuine fact issue was present).

180 Pub. Adm'r of Queens Cty. v. City of New York, No. 06 Civ. 7099, 2009 WL 498976 (S.D.N.Y. Feb. 24, 2009).

181 *See id.* at *1.

182 *See id.*

183 *See id.*

184 *See id.* at *2.

185 *See id.*

186 *See id.* at *1, *6.

187 *See id.* at *6.

and standing only five feet away.[188] Given this dispute in the evidence, the court refused to dismiss the case based on the officer's testimony finding ample factual issues for trial.[189]

A strict application of the summary judgment standard goes a long way towards avoidance of unfair reliance on the officer's testimony, and places credibility issues in the hands of a jury.[190] The dissenters in *Kisela v. Hughes* believed that the same approach should have been taken on appeal from a summary judgment in that case, and the plaintiff should have been given her day in court.[191] Yet it seemed that the Court was simply inclined to accept the police version of the shooting.[192] The majority and dissenters analyzed the same prior precedent and could not agree on what factors meaningfully distinguish one case from another one.[193] How then is the officer in the field to know whether the use of force is acceptable in any given context?

The police receive detailed training on the use of non-deadly force in the police academy.[194] Generally, they receive sixty hours of training on firearms skills, twelve hours of instruction on the proper use of nonlethal weapons, and forty-four hours on self- defense.[195] However, when it comes to use of lethal force, officers are reminded to act reasonably or simply advised of the factors discussed in *Graham* as a basis for the determination of what is reasonable force.[196] There is simply no principled set of guidelines governing the use of force.[197] This situation is aggravated by the present public focus on police violence. In attempting to justify the use of force, the

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[188] *Id.*

[189] *See id.* at *10 (citing Cowan v. Breen, 352 F.3d 756, 764 n.7 (2d Cir. 2003)). Following a bench trial, the court heard all of the evidence and granted judgment in favor of the defendant officers. *See* Pub. Adm'r of Queens Cty. v. City of New York, No. 06 Civ. 7099, 2010 WL 4457312, at *11 (S.D.N.Y. Nov. 3, 2010).

[190] *See* Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving Section 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 186 (2007).

[191] *See* Kisela v. Hughes, 138 S. Ct. 1148, 1155 (2018) (Soytomayor, J., dissenting).

[192] *See id.* at 1159–60.

[193] *See supra* notes 60–75 and accompanying text.

[194] *See* MATTHEW J. HICKMAN, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2002 14 (2005).

[195] *Id.* at 9 tbl. 16.

[196] *See* Graham v. Connor, 490 U.S. 386, 395, 397 (1989) (citing Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)); POLICE EXEC. RESEARCH FORUM, CRITICAL ISSUES ON POLICING SERIES: GUIDING PRINCIPLES ON USE OF FORCE 15, 16 (2016).

[197] *See* POLICE EXEC. RESEARCH FORUM, *supra* note 196, at 16. Most police departments do have internal departmental guidelines that address the use of force, which may track federal or state legal standards or may even impose more restrictive standards. Even so, there is a need for coherent legal standards applicable at the state and national level.

government is unable to rely on specific standards to explain any given case. When litigation ensues, jurors are called upon to decide issues of liability with jury instructions made up of vague pronouncements concerning reasonableness which can only lead them to guess and conjecture. And the public too has no understandable framework from which to assess whether the actions of the police reported in the media are lawful or not.

V. TOWARD A MORE REASONED AND BALANCED JURISPRUDENCE IN POLICE EXCESSIVE-FORCE CASES—REVISING THE FOURTH AMENDMENT STANDARD OF REASONABLENESS

There is wide scholarly consensus that the present federal court jurisprudence in this area is inadequate.[198] To begin with, the reasonableness standard does not provide the police with adequate guidance on the permissible standards for use of force. For example, is the use of deadly force limited to cases where the life of the officer or a third party is threatened? Some clear boundaries for what will and what will not constitute "reasonable force" must be agreed upon as a matter of law, or else juries and the public will be left in the dark as to what constitutes lawful police conduct. The reasonableness of police conduct during an arrest cannot be weighed in the same manner as one would weigh the reasonableness of an automobile driver's response to a traffic situation. Public confidence in the police requires fair and definite standards and without such standards, there may be a chilling effect on the efforts of law enforcement in dealing with serious crime for fear of liability.

The defense of qualified immunity suffers from the same inadequacies. Where qualified immunity applies, the court is required to survey the legal landscape to determine whether the officer is prohibited from using lethal force in a particular factual scenario according to clearly established case law.[199] Without doubt, the vagueness and uncertainty associated with the current legal standards is highlighted in high visibility police shooting cases where the victim does not appear to present a clear threat to life and limb.

Reform is possible and would require both legislative amendments and changes to the approach that courts take in these cases. From the standpoint of the judicial response, there are three areas of focus

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[198] *See e.g.*, Rachel A Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1146 (2008).

[199] *See supra* notes 162–177 and accompanying text.

which if implemented may lead the public and the legal system to a clearer and more informed understanding of the limits of excessive force by the police. The Supreme Court would need to take the lead in this area of the law, but it would need to recast (but not necessarily overrule) some of its prior precedent. To summarize, the Court could restrict the granting of summary judgment to the police in excessive-force cases, it could develop and refine the *Graham* factors and insist on their use, or it could redefine Fourth Amendment jurisprudence entirely and place more restrictions on the use of force such as by incorporating the law of justification into Fourth Amendment jurisprudence. And while these options are considered in isolation here, they could be combined as well. For example, in the proper case the Court could speak to the limits of summary judgment and adopt some the justification concepts like necessity and imminence into Fourth Amendment jurisprudence.

Because so many of these cases arise in the context of summary judgment motions,[200] one approach would be to adopt the reasoning of the dissent in *Kisela v. Hughes* and rigorously view the record evidence in the light most beneficial to the non-moving party (usually the suspect) and draw all reasonable inferences in her favor.[201] In some cases summary judgment may be appropriate. For example, in *Garner*, at issue was the constitutionality of a department policy based on state law that allowed police to use deadly force to prevent the escape of any felony suspect.[202] The Supreme Court ruled the policy unconstitutional because the only proffered justification for that particular application of deadly force was to prevent escape, a decision on the law.[203] To contrast, in a case like *O'Bert v. Vargo*, the district court denied summary judgment to a defendant officer who invoked qualified immunity allowing the case to go before a jury.[204]

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[200] *See e.g.*, Hughes v. Kisela, 138 S. Ct. 1148, 1151 (2018) (per curiam).

[201] Justice Sotomayor writes,

> This case arrives at our doorstep on summary judgment, so we must 'view the evidence . . . in the light most favorable to' Hughes, the nonmovant, 'with respect to the central facts of this case.' . . . The majority purports to honor this well-settled principle, but its efforts fall short. Although the majority sets forth most of the relevant events that transpired, it conspicuously omits several critical facts and draws premature inferences. . . . Those errors are fatal to its analysis, because properly construing all of the facts in the light most favorable to Hughes, and drawing all inferences in her favor, a jury could find that [Kisela used excessive force].

Id. at 1155 (Sotomayor, J., dissenting) (quoting Tolan v. Cotton, 572 U.S. 650, 657 (2014))

[202] *See Garner*, 471 U.S at 3, 4.

[203] *See id.* at 11.

[204] *See* O'Bert v. Vargo, 331 F.3d 29, 32 (2d Cir. 2003).

In affirming this denial, the court did not reject the officer's version of the shooting, in which he professed himself to be confronting resistance from an armed suspect.[205] Rather, trial was necessary because the plaintiff disputed the officer's account and on plaintiff's version of the facts, "no reasonable officer would have believed that . . . deadly force was necessary."[206] Generally, trial courts are very familiar with the summary judgment standard and understand that it should never be a substitute for a trial.[207] If the Supreme Court were to choose the right case to make this point in a police excessive-force case, then the substantive law could remain essentially the same but it might be applied more evenhandedly.[208] And for those cases that do not settle, it would be the jury drawn from the community, not the court, deciding whether the force used in a particular case was unreasonable and hence excessive.

The second option would be a return to *Graham* to develop the factors set forth in that case. As discussed above, the Supreme Court in *Scott* seemed to abandon the specific criteria for the reasonableness determination described in *Graham*.[209] To reiterate, the Court in *Graham* instructed that in assessing the reasonableness of the force used under the Fourth Amendment the courts should examine "the severity of the crime," the "immediate threat to the safety of the officers or others" by the suspect, "whether [the suspect] is actively resisting" the officers or attempting to flee.[210] This objective test based on the totality of the circumstances is fairly easy to apply because it focuses on the actions of the suspect, not the subjective intent or motivation of the officer. The Court could use future cases to add to or refine these factors. For example, there is no reference in the *Graham* factors to timing–and specifically when does the threat from the suspect to the officer or others become apparent. As one commentator has stated, "[i]f force occurs after the

[205] *See id.* at 38–39.

[206] *See id.* at 38–39, 40.

[207] *See* Tolan v. Cotton, 572 U.S. 650, 656 (2014) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)).

[208] For example, the Supreme Court has cautioned that summary judgment is not a substitute for trial and that the trial court should resolve all doubts in favor of the non-moving party focusing on whether there is any issue for trial. Indeed, the "'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter[,] but to [decide] whether there is a genuine issue for trial.'" *Id.* at 656–57 (first quoting Anderson, 477 U.S. at 249 (1986); then citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970)).

[209] *See supra* notes 152–156 and accompanying text.

[210] Graham v. Connor, 490 U.S. 386, 396 (1989) (citing Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)).

threat terminates, it is excessive regardless of what . . . [occurred] before it."[211]

Similarly, because we have moved beyond the common law rule where the officer could kill any fleeing felon to prevent his escape, consideration should be given to the issue of whether the officer considered using non-lethal force prior to resorting to deadly force.

Finally, because the Supreme Court has already de-emphasized the *Graham* factors in *Scott*, perhaps it is an opportune time to establish an alternative form of the Fourth Amendment based on the reasonableness standard, but which looks to the law of justification for its substance. Generally, the police may use force to effect an arrest or prevent the escape of a criminal suspect, to maintain public order, or to protect the life of an officer or a third party.[212] These factors do not always appear in isolation, and they sometimes overlap.[213] The law of justification provides that the police may use that amount of force which is reasonably necessary to protect against the imminent use of force by the criminal suspect.[214] In addition, police use of force must not create a risk of harm that is disproportionate to the interest that is being protected.[215] This defense ordinarily arises when a police officer is charged with assault or homicide in a criminal action, where justification is an affirmative defense for which the defendant officer has the burden of proof.[216] However, it may also arise in a state law claim for assault and battery where the plaintiff must prove an offensive bodily contact and that the battery does not fall within the protection of statutes like New York Penal Law section 35.30, "which provides that a police officer may employ deadly force when 'the use of deadly physical force is necessary to defend the police officer . . . or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.'"[217]

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[211] Harmon, *supra* note 198, at 1131.

[212] *See id.* at 1166.

[213] *See, e.g.*, *id.* at 1160.

[214] *See id.* at 1166.

[215] *See id.*

[216] *See* United States v. Leahy, 473 F.3d 401, 408–09 (1st Cir. 2007); Harmon, *supra* note 211, at 1149.

[217] Henry-Lee v. City of New York, 746 F. Supp. 2d 546, 563 (S.D.N.Y. 2010) (alteration in original); *see* N.Y. PENAL LAW § 35.30 (McKinney 2019).

VI. THE DEFENSE OF JUSTIFICATION AS A SOURCE OF LEGAL STANDARDS TO SUPPLEMENT THE EXISTING FOURTH AMENDMENT STANDARD

Justification traditionally encompasses a broad range of affirmative defenses recognized at common law, including necessity and self-defense.[218] To understand justification, it must be distinguished from the doctrine of excuse.[219] The doctrine of excuse involves conduct by the actor which society does not approve of but owing to the circumstances will condone, such as the defense of mistake.[220] On the other hand, the defense of justification involves conduct which society approves of like self-defense.[221] The defense of justification incorporates two important concepts: imminence and necessity.[222]

The justification defense will be established only if the defendant proves the following elements:

> (1) that defendant was under an unlawful and present, imminent and impending [threat] of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;
> (2) that defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be [forced to choose the criminal conduct];
> (3) that defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm; and
> (4) that a direct causal relationship may be reasonably anticipated between the [criminal] action taken and the avoidance of the [threatened] harm.[223]

Applying the elements of justification to the typical case of police use of force, the threat faced by the officer from the suspect's actions must be imminent.[224] Imminence is a key determinant of when the use of force is reasonable. If the actions of the suspect have not yet

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[218] *See Leahy*, 473 F.3d at 406.
[219] *See* United States v. Newcomb, 6 F.3d 1129, 1133 (6th Cir. 1993).
[220] *See id.*
[221] *See id.*
[222] *See* United States v. Butler, 485 F.3d 569, 572 (10th Cir. 2007) (citing United States v. Vigil, 743 F.2d 751, 755 (10th Cir. 1984)).
[223] *Id.* at 572 (alterations in original) (quoting *Vigil*, 743 F.2d at 755).
[224] *See id.* at 573 (citing United States v. Al-Rekabi, 454 F.3d 1113, 1125 (10th Cir. 2006)).

risen to the point of posing a risk to the officer or others, then there is no imminent threat that would justify the use of lethal force.[225] In the case of *Kisela v. Hughes*, it may be argued that by simply standing beyond the fence with her knife in hand Hughes did not pose an imminent threat.[226] On the other hand, if she raised the knife toward her roommate or advanced in her direction with the knife, then the threat could reasonably be deemed to be imminent.[227] The reasonableness of the use of force should be judged from the facts presented to the officer immediately prior to and at the moment he made the decision to use deadly force, and at no other time.[228]

The justification doctrine also encompasses the concept of necessity. At present, the Fourth Amendment reasonableness standard 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."[229] The Fourth Amendment has not been interpreted to require the least or even a less deadly alternative so long as the use of deadly force is deemed reasonable using the factors described in *Garner* or *Graham*.[230] The doctrine of necessity requires instead that the amount of force used bear a direct relationship to the threat posed by the suspect (and be necessary in that sense) and that there be no available non-lethal means for achieving the result sought by law enforcement.[231]

A concrete application of the necessity doctrine arises in a situation where the police are asked to respond to a call "for an unstable individual wielding a knife." When the police arrive on the scene, the individual emerges from the house wielding what appears to be a knife.[232] One of the three officers responding to the scene is carrying both a service revolver and a taser. The suspect refuses to respond

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[225] *See* Nimely v. City of New York, 414 F.3d 381, 390 (2d Cir. 2005) (quoting Tennessee v. Garner, 471 U.S.1, 11 (1985)).

[226] *See* Kisela v. Hughes, 138 S. Ct. 1148, 1151 (2018).

[227] *Contra id*.

[228] *See Nimely*, 414 F.3d at 390–91 (quoting Cowan v. Breen, 352 F.3d 756, 762 (2d Cir. 2003)).

[229] *Garner*, 471 U.S. at 3.

[230] *See, e.g.*, Plakas v. Drinski, 19 F.3d 1143, 1149 (7th Cir. 1994) (citing Graham v. Connor, 490 U.S. 386, 396–97 (1989); *Garner*, 471 U.S. at 7).

[231] *See* Elizabeth Wicks, *The Greater Good? Issues of Proportionality and Democracy in the Doctrine of Necessity as Applied in* Re A, 32 COMMON L. WORLD REV. 15, 20 (2003).

[232] This is a situation commonly confronted by the police and often is ultimately recorded as a "suicide by cop" when deadly force results in the loss of the mentally ill suspect's life. *See* Rahi Azizi, *When Individuals Seek Death at the Hands of the Police: The Legal and Policy Implications of Suicide by Cop and Why Police Officers Should Use Nonlethal Force in Dealing with Suicidal Suspects*, 41 GOLDEN GATE U. L. REV. 183, 186 (2011) (discussing generally suicide by cop and how it relates to lawsuits under 42 U.S.C. § 1983).

to the order to drop the knife and he slowly approaches them, coming to a stop about twenty feet from the officers. The officer carrying the taser uses it to subdue the suspect and they then discover that he was carrying a toy knife. They later learn that he has a history of serious mental illness. The taser in this context provides a means to use non-lethal force on facts similar to *Kisela v. Hughes*.[233]

Like the Fourth Amendment reasonableness analysis, the doctrine of necessity examines the situation faced by police on the scene.[234] In our example, as the suspect approaches the officers they are confronted with what reasonably appears to be the imminent use or threatened use of deadly physical force by the suspect wielding what appears to be a knife. However, once the suspect comes to a stop it is reasonable for the officer to use non-lethal force as a first option by employing the taser, rather than shooting the suspect with his service revolver. The suspect's interest in preserving his life appears to outweigh the state's interest in subduing him. There is clearly an available non-lethal means for subduing the suspect which the doctrine of necessity would on these facts appear to require prior to using deadly force.

The justification doctrine has elements which appear supportive of a more principled and grounded law of deadly force. Any assessment of the reasonableness of the officer's conduct must include a consideration of (1) the imminence of the harm posed by the criminal suspect's actions and (2) the actual necessity for using deadly force as a last resort to address the situation faced by the officer.[235] Building these concepts into the Fourth Amendment analysis will not result in judicial second guessing of the officer's conduct. Rather, use of these analytical tools will help to avoid baseless police shootings. They may also be easily incorporated in an understandable manner into police training. Finally, only with a test founded on imminence and necessity will the suspect's interest in his life be given adequate recognition.

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[233] *See supra* notes 7–21 and accompanying text. I do not suggest that from a practical standpoint the use of a taser is a panacea. One can imagine, however, that as technology in this area develops it may become much easier to quickly incapacitate a criminal suspect without using a service revolver.

[234] *See* Wicks, *supra* note 231, at 20.

[235] *See* Harmon, *supra* note 211, at 1147–48.

VII. NEW YORK'S DEFENSE OF JUSTIFICATION IN THE LAW-ENFORCEMENT CONTEXT—REBALANCING THE STATUTORY INTERESTS TO PREVENT THE NEEDLESS FORFEITURE OF LIFE

In New York, as in other states, the legislature has codified a version of the justification defense, along with similar defenses like ordinary self-defense. Specifically, New York Penal Law section 35.30, "Justification; use of physical force in making an arrest or in preventing an escape," provides in pertinent part, as follows:

> 1. A police officer or a peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent an escape from custody, of a person whom he or she reasonably believes to have committed an offense, . . . [may use] deadly physical force . . . for such purposes only when he or she reasonably believes that:
>
> (a) The offense committed by such person was:
>
> (i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; or
>
> (ii) kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or
>
> (b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon; or
>
> (c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the police officer or peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.[236]

The New York justification statute broadly covers three situations involving the police use of deadly force: (1) "effecting or attempting to effect an arrest," (2) "preventing or attempting to prevent an escape from custody," and (3) "defend[ing] the police officer or peace officer or another person from what the officer reasonably believes to be the

[236] N.Y. PENAL LAW § 35.30 (McKinney 2019).

use or imminent use of deadly physical force."[237] The New York statute encompasses the doctrines of necessity and imminence, but only in the context of self-defense.[238] This is important because unlike the vague Fourth Amendment test of reasonableness crafted by the Supreme Court, the New York statute conditions the use of deadly force on the presence of an imminent threat, at least in defense of the officer or a third person.[239] In other words, the use of deadly force is reasonable in the defense of an officer or a third person when the threat is immediately apparent. There is no similar guidance provided by the Supreme Court in the cases discussed above.

The statute also addresses the amount of force that may be used by a police officer in effecting an arrest of a criminal suspect or preventing his escape. In these instances, the New York legislature has limited the use of deadly force to certain types of felonies, namely those involving the use of force against a person, those in which a firearm or deadly weapon is used, and the enumerated crimes of "kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime."[240] The statute authorizes the use of deadly force in situations involving specific types of arrests or escapes from custody, that the legislature has deemed by their very nature to involve a danger to the lives of the officer and others.[241] Therefore, according to the New York statute, a police officer may use deadly force simply because it is needed to prevent the escape of a suspect who has committed an arson or one who has attempted to commit a kidnapping.[242] However, in these instances, there may be no imminent threat of harm to the officer or others.[243]

To summarize, when a police officer uses deadly force to effect an arrest or prevent the escape of a dangerous felon his actions are judged from the standpoint of what a reasonable officer would do under the circumstances.[244] The reasonableness standard is akin to

[237] *Id.*
[238] *See id.* § 35.30(1)(c).
[239] *See id.*
[240] *Id.* § 35.30(1)(a), (b).
[241] *See id.*
[242] *See id.* § 35.30(1)(a).
[243] *See id.*
[244] *See id.* § 35.30(1); Heath v. Henning, 854 F.2d 6, 9 (2d Cir. 1988) (citing Tennessee v. Garner, 471 U.S. 1, 7 (1985); Davis v. Little, 851 F.2d 605, 609 (2d Cir. 1988)).

the Fourth Amendment used by the Supreme Court and discussed above.[245]

What law enforcement interests would justify the use of deadly physical force in a situation where the officer himself is in no imminent physical danger? The legislature has determined that the mere commission of certain enumerated felonies justifies the use of deadly force to affect an arrest or prevent an escape of any person committing these felonies.[246] There is a perceived deterrence value of using force against fleeing felons and preventing any harm that they might cause to others.[247] However, certain of the felonies enumerated in the statute, like arson or burglary do not necessarily involve the use of force at all, but the dangerous nature of these crimes apparently caused the New York legislature to justify the use of deadly force to apprehend the perpetrators of these offenses.[248] Similarly, the statute authorizes the officer to use deadly physical force when the officer reasonably believes that the felon is armed with a firearm or deadly weapon,[249] regardless of whether the felon is using or threatening to use the firearm or another deadly weapon.

Over the years, the New York statute has broadened the use of deadly force in situations involving the arrest or prevention of escape of suspected felons.[250] As pointed out by a leading commentator, the statute initially required that in order to use deadly force the perpetrator must have committed a felony involving the use or threatened use of deadly physical force.[251] The statute was amended to its present language and it requires only a felony involving "physical force" as a predicate for the use of deadly force.[252] The impetus behind the amendment was the sense that some rapes or robberies may not involve the use of deadly force and yet are deemed abhorrent enough to justify police use of deadly force, and in any case it was deemed "unfair to saddle the police with the difficult burden of determining when the force used in any given case [by the suspect] was of a 'deadly' nature."[253]

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[245] *See supra* note 136 and accompanying text.
[246] *See* PENAL § 35.30(1)(a).
[247] *See* Scott v. Harris, 550 U.S. 372, 385–86 (2007).
[248] *See* PENAL § 35.30(1)(a).
[249] *See id.* § 35.30(1)(b).
[250] *See id.* § 35.30(1); William C. Donnino, Practice Commentary, in N.Y. PENAL LAW § 35.00 (McKinney 2019).
[251] Donnino, *supra* note 250.
[252] *See id.*
[253] *Id.*

Under the New York statute, the officer also has broad authority to use deadly force in apprehending a felon who is resisting arrest or attempting to escape.[254] The officer is permitted by the statute to use deadly physical force when the officer has a reasonable belief that the felon is armed with a firearm or deadly weapon.[255] There is no requirement, however, that the felon is using or attempting to use the weapon.[256] As such, the statute may justify the use of lethal force against a fleeing felon the officer suspects of carrying a firearm who in fact is only carrying a toy gun.[257]

The defense of justification as set forth in the New York statute is not a panacea for those who would tie the use of force to an imminent threat of serious harm to the officer or another person. Unlike the Model Penal Code discussed above,[258] the New York statute permits the use of deadly force to effect the arrest or prevent the escape of a suspected felon who has committed a felony involving the use of physical force (even of a non-deadly nature) or who is suspected of carrying a firearm or deadly weapon.[259] As a result, the process of arrest may bring about the death of a suspect who might only face a minor prison term if convicted of the underlying crime and the escape. There are certainly strong societal interests supporting the use of force to bring a suspected criminal to justice and to prevent danger to the community from a felon at large. But these societal interests must yield, at least to a degree, when the suspected felon faces a potential loss of life through the police officer's actions.

The New York justification statute should be amended to provide greater protection for the interests of the criminal suspect in protecting his own life; until a conviction he is cloaked with the presumption of innocence and should not forfeit his life prior to arrest

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[254] *See* PENAL § 35.30(1)(b).

[255] *See id.*

[256] *See id.*

[257] The Supreme Court decisions in *Tennessee v. Garner*, 401 U.S. 1 (1985), and *Scott v. Harris*, 550 U.S. 372 (2007), do not seem to undermine the key provisions of the New York statute. Indeed, in *Garner*, the Court stated,

> 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.

Garner, 471 U.S. at 11–12 (emphasis added).

[258] *See supra* notes 114–115 and accompanying text.

[259] *See* PENAL § 35.30(1)(a), (b).

and trial. The concepts of necessity and imminence are incorporated into the rule that governs the use of deadly force in a situation where the officer is facing the use of deadly force by the suspect and acting to protect life.[260] This portion of the statute should be retained. However, the use of deadly force to arrest a felon or prevent his escape should only be permitted where (1) the officer reasonably believes that the felon has committed or attempted to commit a felony involving the use of deadly force, and (2) the officer reasonably believes that deadly physical force is necessary to protect the officer or a third party from the actual or threatened imminent use of deadly force or serious bodily injury.[261] In essence, the New York statute should be amended to incorporate these elements so that the lawfulness of the police conduct is not judged solely from the standpoint of what a police officer might deem to be reasonable.

The amended statute could serve as a basis for the Fourth Amendment jurisprudence, which at present contains no real understandable and consistent standards. Here it is submitted that the test of reasonableness that the Supreme Court has addressed many times in police shooting cases must place a greater weight on preservation of the suspect's life. This can be done by linking the use of lethal force to an actual or threatened use of deadly force by the suspect.[262] The test would remain an objective one—based on the facts that the officer is presented with at the scene and giving full recognition to the difficulty faced in making these split-second

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[260] *See* PENAL § 35.30(1)(c).

[261] Under the MPC, the use of deadly force is justified when the officer believes that (a) "the crime for which the arrest is made involved conduct including the use or threatened use of deadly force," or (b) "there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed." MODEL PENAL CODE § 3.07 (AM. LAW INST. 2020).

[262] The relevant California statute has been amended in this manner and now provides, in relevant part, as follows:

> [A] peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons:
>
> (A) To defend against an imminent threat of death or serious bodily injury to the officer or to another person.
>
> (B) To apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.

CAL. PENAL CODE § 835(C)(1) (West 2019).

decisions. However, an officer would be prohibited from shooting and killing a fleeing felony suspect simply because he committed a felony involving the use of force and is attempting to evade or resist arrest.

VIII. *KISELA V. HUGHES* RECONSIDERED

The value of this type of standard may be realized by applying it to the facts of *Kisela v. Hughes*. In that case, Hughes emerged from the house carrying a knife and was standing a short distance from Chadwick.[263] Notably, the officers viewed her from the other side of a fence and she refused the order to drop the knife.[264] At the moment of the shooting, the action of Kisela must be evaluated as an attempt to protect Crawford or the officers from the use or threatened use of deadly physical force.[265] Certainly, the knife is a deadly weapon and under certain circumstances would justify the use of deadly physical force. But as pointed out by Justice Sotomayor in her dissent, Hughes held the kitchen knife down at her side and away from Chadwick.[266] Hughes and Chadwick were speaking with one another and both seemed composed.[267] The officers did not observe Hughes commit any crime, nor was she a criminal suspect.[268] Further, when Hughes was given the order to drop the knife, it appeared that either she did not hear or understand the officers.[269]

Inasmuch as this case arose on summary judgment, the facts when viewed in the light most favorable to Hughes, do not support the use of deadly force. First, the officers were responding to a check welfare call and Hughes was not a criminal suspect.[270] She held a knife but it was pointed away from Chadwick.[271] Second, a fact finder could reasonably conclude that Hughes presented no imminent threat of harm to Chadwick or the officers.[272] The police never witnessed any erratic conduct on Hughes's part prior to her shooting.[273] Further, Kisela never considered using less lethal means prior to employing deadly physical force–the use of lethal force was not a necessity.[274]

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[263] *See* Hughes v. Kisela, 138 S. Ct. 1148, 1151 (2018) (per curiam).
[264] *See id.*
[265] *See id.* at 1152 (quoting Tennessee v. Garner, 471 U.S. 1, 11 (1985)).
[266] *See id.* 1155 (Sotomayor, J., dissenting).
[267] *See id.* at 1155–56.
[268] *See id.* at 1155.
[269] *See id.* at 1157.
[270] *See id.*
[271] *See id.* at 1155, 1157.
[272] *Id.* at 1157.
[273] *See id.*
[274] *See id.*

The record established that Kisela was carrying a taser and he could have used that device to subdue Hughes.[275] The record plainly showed that there was time to continue to issue commands to Chadwick or Hughes; Kisela was not required to make a split second decision to use deadly force.[276] Finally, there is no strong law enforcement interest which would justify the use of deadly force. Hughes was not fleeing or resisting arrest through the use of a firearm or other deadly weapon.[277] There was no immediate threat of danger to the public that precluded the use of other means short of deadly force to diffuse the situation faced by the officers.

CONCLUSION

Specific instances of police use of deadly force have generated public debate and criticism throughout the country, and these cases have raised concerns regarding racial bias and profiling.[278] Beginning with the *Garner* case in 1985, the Supreme Court has had several opportunities to develop a balanced and clear Fourth Amendment standard that fairly balances the interests of law enforcement, society and the criminal suspect.[279] This has not happened. Instead, perhaps owing to the persistence of centuries old legal standards that authorized "shoot to kill" fleeing criminal suspects or perhaps because of an undue deference to the perceived public safety concerns, the Court sanctions a robust qualified immunity defense which condones virtual all uses of lethal short of those that are grossly reckless. This is incongruous for a Court that has severely restricted the death penalty for murder, but at the same time authorizes what amounts to governmental execution without trial.

I have proposed three ways to provide a more balanced approach in police shooting cases. First, the courts need to rigorously apply the test on summary judgment to avoid a dismissal whenever the parties genuinely dispute the circumstances of the shooting. Second, the courts should eschew a vague test of reasonableness and adopt instead a more principled approach tied to the factors enumerated by the Supreme Court in *Graham v. Connor*. Third, the courts should supplement the Fourth Amendment analysis and the qualified

[275] *See id.*
[276] *See id.*
[277] *See id.*
[278] *See supra* text accompanying notes 81–86.
[279] *See supra* Part III.

immunity defense with justification principles like imminence and necessity.

In the same vein, New York's justification statute should be amended to limit the use of force to situations involving a threat to the life of the officer or another person. At present, New York's justification statute permits the use of deadly force in situations where the criminal suspect does not pose an imminent threat of death or serious injury to the officer or a third party.[280] The statute needs to be amended to provide that, even in cases where the officer is arresting or preventing the escape of a felony suspect, that suspect must pose an imminent threat of death or bodily injury to justify the officer in using deadly force to make an arrest or prevent an escape from custody. The amended statute would then strike a balance between the threat posed by the suspect and the amount of force that may be used by the police. Where the suspect poses a threat of deadly force to the officer or a third person, only then may the officer use deadly force against a criminal suspect.

Critics may argue that such a statutory amendment gives insufficient weight to the safety of the officer and the general public. To the contrary, the amended statute would further public protection because it would be founded on well settled legal tenets pertaining to the defense of life. It also provides a clear standard for police training and actual action in the field. By providing an easily understood legal benchmark, it may also limit the use of excessive and deadly force in cases where it is clearly not warranted—and thereby possibly prevent baseless shooting. Finally, it may improve the overall impression of the police, particularly in communities of color where many of the most controversial police shootings have occurred in the past.[281]

[280] *See* N.Y. PENAL LAW § 35.30 (McKinney 2019); *supra* note 259 and accompanying text.

[281] In addition to the legal reform urged here, there are other changes to police practices that should be implemented. These include the following: 1) de-escalation training aimed at defusing potentially deadly police-citizen confrontations; 2) mandated body worn cameras to create a visual record of such confrontations; 3) implicit bias training to improve police citizen relationships in minority communities; and 4) civilian oversight review of police use of lethal force incidents.