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Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense

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REFORMING THE LAW ON POLICE USE OF DEADLY FORCE: DE-ESCALATION, PRESEIZURE CONDUCT, AND IMPERFECT SELF-DEFENSE

Cynthia Lee*

This Article seeks to contribute to the national conversation on reforming police practices by evaluating the current law on police use of deadly force, identifying problems with that law, and suggesting a modest change to that law in the form of model legislation governing police use of deadly force. Existing statutes on police use of deadly force tend to focus on the reasonableness of the officer's belief in the need to use force. This Article suggests that the law should be reformed to explicitly include a focus on the reasonableness of the officer's actions. Under the proposed model statute, to be considered a justifiable shooting, the jury must find that both the officer's beliefs and actions were reasonable. To provide better guidance to juries than that provided by current use-of-force statutes, the model statute specifies three factors that the fact finder must consider when deciding whether the officer's actions were reasonable: (1) whether the victim/suspect had or appeared to have a weapon (and whether he or she refused orders to drop it), (2) whether the officer engaged in de-escalation measures prior to using deadly force, and (3) whether the officer

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engaged in any preseizure conduct that increased the risk of a deadly confrontation. It also borrows from imperfect self-defense law in civilian homicide cases, permitting the jury to find an officer charged with murder not guilty of murder, but guilty of voluntary manslaughter, if the officer's belief in the need to use deadly force was honest but unreasonable or if the officer's belief was reasonable, but his actions were unreasonable.

TABLE OF CONTENTS

I.	INTRODUCTION.....	631
II.	THE LAW ON POLICE USE OF DEADLY FORCE.....	640
	A. U.S. Supreme Court Cases on the Meaning of Excessive Force.....	641
	B. State Laws on Police Use of Deadly Force.....	654
	1. Proportionality.....	656
	2. Necessity.....	658
III.	MODEL LEGISLATION.....	661
	A. Model Legislation on Police Use of Deadly Force.....	664
	1. Tracking Civilian Self-Defense Law.....	666
	2. De-escalation Measures.....	669
	3. Preseizure Conduct.....	671
	4. Imperfect Self-Defense.....	674
	B. Applying the Model Legislation.....	675
	1. Tamir Rice.....	675
	2. Kimberly A. Crawford's Report.....	677
	a. Threat Identification and Action v. Reaction.....	677
	b. Age.....	678
	c. Toy Gun.....	678
	C. Possible Objections.....	681
	1. The Model Legislation Encourages Jurors to Second-Guess Police Officers with the Advantage of Hindsight.....	682
	2. States Should Be Free to Adopt Their Own Rules.....	682
	3. As a Model Statute, the Proposed Reform Has No Teeth.....	682
	4. The Model Legislation Is Too Complicated for the Average Juror to Understand.....	683
	5. Police Officers Need Bright-Line Rules.....	683
	6. Preseizure Conduct Should Not Be Considered.....	684
	7. The Model Statute Goes Beyond What Is Required of Ordinary Civilians Claiming Self-Defense.....	686
	8. Why Not a Civil Remedy?.....	687
	9. The Proposed Reform Would Provoke Civil Unrest.....	688

No. 2] REFORMING THE LAW ON POLICE USE OF DEADLY FORCE 631

*10. Officer Lives Will Be Endangered if Officers
Hesitate to Act out of Fear of Prosecution.....* 689

IV. CONCLUSION 690

I. INTRODUCTION

It seems that we have reached a point of crisis in policing.¹ Every month, sometimes every week, we hear about yet another police shooting involving a victim who, often, is Black.² With all the protests over the killing of Blacks at the hands of police, starting with the 2014 shooting of Michael Brown by Officer Darren Wilson in Ferguson, Missouri, the nation’s attention has been focused on

1. Edward P. Stringham, *Is America Facing a Police Crisis?*, WALL ST. J. (July 29, 2016, 5:34 PM), <https://www.wsj.com/articles/is-america-facing-a-police-crisis-1469828089> (noting that surveys “show citizen confidence in the police at its lowest point in 20 years”). After the shooting of Michael Brown, a USA Today Pew Research Center poll “found Americans by 2 to 1 say police departments don’t do a good job in holding officers accountable for misconduct, treating racial groups equally, and using the right amount of force.” Susan Page, *Poll: Whites and Blacks Question Police Accountability*, USA TODAY (Aug. 25, 2014, 3:35 PM), <https://www.usatoday.com/story/news/nation/2014/08/25/usa-today-pew-poll-police-tactics-military-equipment/14561633/>.

2. I purposely capitalize the “B” in “Black” and the “W” in “White” to call attention to the fact that Black and White are thought of as racial categories.

reforming policing practices.³ Yet, officer-involved shootings keep happening.⁴ In the vast majority of these cases, the person shot by the police had a weapon

3. For example, President Obama created the President's Task Force on 21st Century Policing "to strengthen community policing and trust among law enforcement officers and the communities they serve—especially in light of recent events around the country that have underscored the need for and importance of lasting collaborative relationships between local police and the public." FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING iii (May 2015), <https://ric-zai-inc.com/Publications/cops-p311-pub.pdf>. A plethora of law review articles seeking to reform policing have been published in the last three-to-four years. See, e.g., Monu Bedi, *Toward a Uniform Code of Police Justice*, 2016 U. CHI. LEGAL F. 13, 13 (2016) (proposing that states enact a Uniform Code of Police Justice modeled after the Uniform Code of Military Justice, permitting police officers to be held criminally liable for violations of certain departmental regulations); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1419 (2016); Kami Chavis Simmons, *The Legacy of Stop and Frisk: Addressing the Vestiges of a Violent Police Culture*, 49 WAKE FOREST L. REV. 849, 852 (2014); see also Richard Delgado, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531, 1543 (2016) (echoing proposals calling for police to adopt a "guardian" rather than a "warrior" mentality); Mary D. Fan, *Violence and Police Diversity: A Call for Research*, 2015 BYU L. REV. 875, 875 (2015) (suggesting that further research needs to be done on whether diversifying police departments actually makes a difference); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1827 (2015); Roger Goldman, *Importance of State Law in Police Reform*, 60 ST. LOUIS U. L.J. 363, 363 (2016); Linda Sheryl Greene, *Ferguson and Beyond: Before and After Michael Brown—Toward an End to Structural and Actual Violence*, 49 WASH. U. J.L. & POL'Y 1, 48 (2015) (pushing for greater transparency and accountability by police departments); John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. ON C.L. & C.R. 155, 156 (2016); John P. Gross, *Unguided Missiles: Why the Supreme Court Should Prohibit Police Officers from Shooting at Moving Vehicles*, 163 U. PA. L. REV. ONLINE 135, 135 (2016); Bill Ong Hing, *From Ferguson to Palestine: Disrupting Race-Based Policing*, 59 HOW. L.J. 559, 565 (2016) (reviewing proposals for police reform and advocating disruption both in the streets and in the sense of reframing how police work gets done); Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. F. 235 (2015); Nancy C. Marcus, *Out of Breath and Down to the Wire: A Call for Constitution-Focused Police Reform*, 59 HOW. L.J. 5 (2015); Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 CALIF. L. REV. 263, 264 (2017) (suggesting that Congress enact a federal law modeled after the core provisions of the Voting Rights Act to reform police departments engaged in civil rights violations); Ann C. McGinley, *Policing and the Clash of Masculinities*, 59 HOW. L.J. 221, 226 (2015); J. Michael McGuinness, *Law Enforcement Use of Force: Safe and Effective Policing Requires Retention of the Reasonable Belief Standard*, 39 CHAMPION 26, 33 (2015); Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1035–39 (2016); Melvin L. Otey, *Toward Improving Policing in African American Communities*, 29 J. C.R. & ECON. DEV. 67, 67 (2016); Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 799–800 (2016); John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205 (2015); Richard Rosenfeld, *Ferguson and Police Use of Deadly Force*, 80 MO. L. REV. 1077, 1079 (2015); Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117 (2016); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189 (2014); Kindaka Sanders, *A Reason to Resist: The Use of Deadly Force in Aiding Victims of Unlawful Police Aggression*, 52 SAN DIEGO L. REV. 695, 696 (2015); Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 437 (2016); Nirej Sekhon, *Blue on Black: An Empirical Assessment of Police Shootings*, 54 AM. CRIM. L. REV. 189, 192–93 (2017); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 391 (2015) (arguing that civilians should actively record police-citizen encounters as a means of making police more accountable to the community); Jonathan M. Smith, *Closing the Gap Between What Is Lawful and What Is Right in Police Use of Force Jurisprudence by Making Police Departments More Democratic Institutions*, 21 MICH. J. RACE & L. 315, 336 (2016); Robin G. Steinberg, *Police Power and the Scaring of America: A Personal Journey*, 34 YALE L. & POL'Y REV. 131, 150 (2015); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2183–84 (2014); Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 898 (2014); Seth W. Stoughton, *Principles Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 612–14 (2016) (arguing that police officers should embrace a "guardian" mindset as opposed to a "warrior" mindset); Anna Swanson, *Revisiting Garner with Garner: A Look at Deadly Force and the Use of Chokeholds & Neck Restraints by Law Enforcement*, 57 S. TEX. L. REV. 401, 442 (2016); Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615, 617; Toussaint Cummings, Note, *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, 821 (2014) (proposing that when an officer kills an

and the shooting would be considered justified under existing law. In several recent shootings, however, the person shot did not have a weapon, raising questions about whether the shooting was in fact justified.

Until fairly recently, police officers seemed to enjoy an immunity from scrutiny for fatalities resulting from officer-involved shootings. Very few officers were ever prosecuted after shooting and killing a civilian.⁵ When an officer was criminally charged or sued in civil court, judges and juries, more often than not, would find in favor of the officer.⁶ In part, this was because of a tendency to believe the officer's version of events, especially when there was little evidence contradicting that version. The deceased suspect could hardly testify to the contrary.⁷ Additionally, the law encouraged such favoritism.⁸

This country has seen an increase in the number of officer-involved homicide prosecutions over the last several years.⁹ This increase in prosecutions may be due to the proliferation of cell phones and the ability of ordinary citizens to capture police encounters on video.¹⁰ Additionally, more and more police departments are utilizing body-worn cameras and dashboard cameras, which can

unarmed Black man not involved in any criminal activity at the time of his death, the officer should have to show he was not the initial aggressor and that his conduct was reasonable for his action to be deemed justified); Tahir Duckett, Note, *Unreasonably Immune: Rethinking Qualified Immunity in Fourth Amendment Excessive Force Cases*, 53 AM. CRIM. L. REV. 409, 432 (2016); Rukiya Mohamed, Comment, *Death by Cop: The Lessons of Ferguson Prove the Need for Special Prosecutors*, 59 HOW. L.J. 271, 274 (2015); Sarah Zwach, Comment, *Disproportionate Use of Deadly Force on Unarmed Minority Males: How Gender and Racial Perceptions Can Be Remedied*, 30 WIS. J.L. GENDER & SOC'Y 185, 188 (2015).

4. It is important to acknowledge that only a small percentage of police-civilian encounters involve the use of force and that the most frequently used type of force is nondeadly force. POLICE EXECUTIVE RESEARCH FORUM, EXPOSING THE CHALLENGES OF POLICE USE OF FORCE 3 (2005). I focus on police use of deadly force in this Article, even though it does not reflect what happens in the bulk of encounters between police officers and civilians because the consequences in such cases are usually the most severe.

5. Roger Goldman, *supra* note 3, at 377 (noting that between 2005 and 2015, there were only fifty-four indictments of police officers despite approximately 1,000 police shootings per year); *see also* Zusha Elinson & Joe Palazzolo, *Police Rarely Criminally Charged for On-Duty Shootings*, WALL ST. J. (Nov. 24, 2014, 7:22 PM), <https://www.wsj.com/articles/police-rarely-criminally-charged-for-on-duty-shootings-1416874955?mg=prod/accounts-wsj>; Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted>.

6. Kindy & Kelly, *supra* note 5.

7. As one court put it:

In any self-defense case, a defendant knows that the only person likely to contradict him or her is beyond reach. So a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements and the opinions of experts to decide whether the officer's testimony could reasonably be rejected at trial.

Plakas v. Drinski, 19 F.3d 1143, 1147 (7th Cir. 1994).

8. Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1787–89 (2016) (explaining reasons courts tend to favor qualified immunity for police officers).

9. Goldman, *supra* note 3, at 366 (noting that, while the number of federal prosecutions of state and local police officers has increased since 1960, the total number of such prosecutions is still quite small); Kindy & Kelly, *supra* note 5. Some have criticized what they see as the increasing "politicization of law enforcement." *See* McGuinness, *supra* note 3, at 27 ("More police officers are now being indicted because of interest group pressure on elected prosecutors.").

10. *See* Simonson, *supra* note 3, at 407 (urging more civilians to record police-civilian encounters as a way to hold police accountable). In North Charleston, South Carolina, for example, Officer Michael Slager was charged with murder after he was caught on video, on April 4, 2015, shooting an unarmed Black man named Walter Scott several times in the back while Scott was running away from him and then placing an object near Scott's body. Keith O'Shea & Darran Simon, *Closing Arguments End in Slager Trial, No Verdict Reached*, CNN (Dec. 2, 2016), <http://www.cnn.com/2016/11/30/us/michael-slager-murder-trial-walter-scott>. After a five-week

provide a record of what happened during an officer-involved shooting.¹¹ This increase in prosecutions may also be due, in part, to the fact that over the last

trial, however, the case ended in a mistrial because the jury could not come to a unanimous verdict. Darran Simon et al., *Judge Declares Mistrial in Michael Slager Trial*, CNN (Dec. 6, 2016), <http://www.cnn.com/2016/12/05/us/michael-slager-murder-trial-walter-scott-mistrial>. Apparently, eleven jurors wanted to find Slater guilty of murder, but at least one juror believed Slager's claim of self-defense and refused to convict. *Id.* In May 2017, Officer Slager pled guilty to a federal civil rights charge of using excessive force as part of a plea bargain to resolve charges against him in both federal and state court stemming from his shooting of Walter Scott, CNN (May 2, 2017), <http://www.cnn.com/2017/05/02/us/michael-slager-federal-plea/index.html>. On December 7, 2017, a federal judge sentenced Officer Slager to twenty years in prison. Mark Berman, *Former S.C. Police Officer Who Shot Unarmed Man is Sentenced to 20 Years*, WASH. POST, Dec. 8, 2017, at A2. In another widely publicized case involving a video recording, Officer Jeronimo Yanez shot and killed a Black man named Philando Castile during a traffic stop on July 6, 2016 in Minneapolis, Minnesota and was charged with second-degree manslaughter and endangering the lives of Castile's girlfriend and her four-year-old daughter. Mark Berman, *Minnesota Officer Charged with Manslaughter for Shooting Philando Castile During Incident Streamed on Facebook*, WASH. POST (Nov. 16, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/11/16/prosecutors-to-announce-update-on-investigation-into-shooting-of-philando-castile/>. Although the shooting itself was not caught on video, the aftermath of the shooting was captured by Castile's girlfriend, who streamed the video on Facebook Live. *Id.* Before reaching for his wallet, which contained his driver's license and permit to carry a pistol, Castile had told the officer that he had a firearm with him. Christina Capecchi & Mitch Smith, *Officer Who Shot Philando Castile Is Charged with Manslaughter*, N.Y. TIMES (Nov. 16, 2016), <https://www.nytimes.com/2016/11/17/us/philando-castile-shooting-minnesota.html>. Within seconds of telling Castile not to reach for his weapon and Castile assuring the officer that he was not doing so, Officer Yanez fired seven rounds, fatally wounding Castile. *Id.* The video sparked national protests. Berman, *supra*. In June 2017, a jury found Officer Yanez, who was charged with second degree manslaughter and endangering safety by discharging a firearm, not guilty of all charges. Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html>. It is important to note that videos of officer-involved shootings may tell only part of the story, especially when the moments leading up to the shooting are not recorded. Kimberly Kindy, *What the Camera Doesn't Capture in Those Viral Videos of Police Shootings*, WASH. POST (July 23, 2016), https://www.washingtonpost.com/national/why-those-viral-videos-of-police-shootings-arent-always-as-bad-as-they-look/2016/07/22/63258dde-4dbe-11e6-aa14-e0c1087f7583_story.html?hpid=hp_hp-top-table-main-police-shootings%3Awhy-those-viral-videos-of-police-shootings-arent-always-as-bad-as-they-look%3Ahomepage%2Fstory. For example, in the Alton Sterling case, in which Baton Rouge police officers shot and killed an armed Black man on July 5, 2016, the video of the incident does not show de-escalation measures taken by the officers prior to the shooting, including the deployment of a Taser and telling Sterling to get on the ground twice before taking him to the ground. *Id.* A cell phone video might be taken from an angle that shows things the officer could not see, and sometimes a video will be grainy and not clearly show what the officers on the scene actually saw. An officer might be seconds away from injury, but appear on video to be safe. *Id.* In May 2017, the U.S. Department of Justice decided not to bring charges against the officers involved in the shooting death of Alton Sterling. Matt Zapotosky & Wesley Lowery, *Justice Department Will Not Charge Baton Rouge Officers in Fatal Shooting of Alton Sterling*, WASH. POST (May 2, 2017), https://www.washingtonpost.com/world/national-security/justice-department-will-not-charge-baton-rouge-officers-in-fatal-shooting-of-alton-sterling/2017/05/02/ac962e66-2ea7-11e7-9534-00e4656c22aa_story.html?hpid=hp_hp-top-table-main-police-shootings%3Ajustice-department-will-not-charge-baton-rouge-officers-in-fatal-shooting-of-alton-sterling%3Ahomepage%2Fstory. At the time this Article was being written, the State of Louisiana was still deciding whether to bring charges against the officers involved in Alton Sterling's death.

11. See Kami N. Chavis, *Body-Worn Cameras: Exploring the Unintentional Consequences of Technological Advances and Ensuring a Role for Community Consultation*, 51 WAKE FOREST L. REV. 985, 987 (2016) (discussing the proliferation of body camera technology in police departments). In Chicago, Illinois, on October 20, 2014, for example, Officer Jason Van Dyke was captured on dash-cam video shooting a Black man named LaQuan McDonald from a distance. Annie Sweeney & Jason Meisner, *A Moment-by-Moment Account of What the Laquan McDonald Video Shows*, CHI. TRIB. (Nov. 25, 2015, 6:00 AM), <http://www.chicagotribune.com/news/ct-chicago-cop-shooting-video-release-laquan-mcdonald-20151124-story.html>. The video, which was not released until just over a year after the shooting, shows McDonald walking at some distance from Officer Van Dyke with a knife in his hand, hanging by his side. *Id.*; see also Jason Meisner et al., *Chicago Releases Dash-Cam Video of Fatal Shooting After Cop Charged with Murder*, CHI. TRIB. (Nov. 24, 2015, 7:14 PM), <http://www.chicagotribune.com/news/ct-chicago-cop-shooting-video-laquan-mcdonald-charges-20151124-story.html>. About the same time that the video was released to the public, Officer Van Dyke was suspended without pay or benefits and charged with first-degree murder. Christy Gutowski, *Officer in Laquan McDonald*

three to four years, activists demonstrating under the moniker “Black Lives Matter” have called the nation’s attention to the deaths of many unarmed Blacks at the hands of police and have demanded more police accountability.¹² Despite the increased number of prosecutions in recent years, it is still the case that law enforcement officers are rarely convicted.

The Black Lives Matter movement started an important national conversation on policing that continues today. This Article seeks to contribute to this national conversation in a small way by evaluating the current law on police use of deadly force and suggesting a modest change to that law. In many respects, my proposal for reform is less of a radical change in the law regarding when an officer’s use of deadly force is justifiable, and more of a clarification of the normative underpinnings of that law.¹³ My model statute goes beyond current law by broadening the time frame the law considers relevant when assessing the reasonableness of an officer’s use of deadly force so the law can influence police behavior before the moment in time when an officer is fearing for his life. It does so by explicitly directing jurors to consider any pre-seizure conduct by the police that increased the risk of a deadly confrontation. In another departure from current law, my model statute explicitly encourages jurors to consider whether the officer sought to use de-escalation measures prior to using deadly force and, as part of that inquiry, whether less deadly alternatives were feasible prior to the use of deadly force.

This Article will proceed in two main parts. In Part II, I examine the current law on police use of deadly force. I highlight problems with both the constitutional standard and state use-of-force statutes. In Part III, I offer one fairly modest proposal for reform, a model statute on police use of deadly force that I hope will be adopted by state legislatures. I show how my model statute might make a difference, using the Tamir Rice case as an example, then respond to possible objections. While much of my previous work has offered race-specific proposals for reform,¹⁴ the model statute I offer here is race neutral for two reasons. First,

Killing ‘Not the Monster’ People Think, Wife Says, CHI. TRIB. (May 13, 2016), <http://www.chicagotribune.com/news/laquanmcdonald/ct-jason-van-dyke-wife-laquan-mcdonald-met-20160512-story.html>. His criminal case was still pending at the time this Article was written. Christy Gutowski, *2 Years Later, Laquan McDonald Shooting Leaves a Trail of Change*, CHI. TRIB. (Oct. 20, 2016, 3:49 PM), <http://www.chicagotribune.com/news/laquanmcdonald/ct-laquan-mcdonald-shooting-anniversary-met-20161020-story.html>. Because the data from body-worn cameras and dash-cams belong to the police, some have suggested that it is more fruitful for citizens to videotape police-citizen encounters. Simonson, *supra* note 3, at 414.

12. For a comprehensive examination of the messages and motivations behind the Black Lives Matter movement, see Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 353–54 (2015) (urging law professors to engage with the Black Lives Matter movement by incorporating discussion of the movement’s messages in the law school classroom).

13. Police-use-of-force law is aimed at both giving police the ability to enforce the law and protecting police and civilian lives. Rachel A. Harmon, *When Is Police Violence Justified?*, 102 Nw. U. L. Rev. 1119, 1150–55 (2008). Force used by police must therefore be necessary in order to achieve a law enforcement goal, like effectuating an arrest, preventing the escape of a fleeing felon, or protecting the officer or a member of the police force from harm. *Id.* at 1154, 1158–59. To protect against the loss of human life, deadly force, if used, should be proportional to the force threatened.

14. See, e.g., Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 846–47, 867–69 (2015) (suggesting ways that attorneys can raise awareness of implicit racial bias during voir dire); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1555 (2013) [hereinafter Lee, *Making Race Salient*] (arguing that attorneys concerned about racial

the problem I am addressing in this Article transcends race.¹⁵ Second, I believe legislators are more likely to enact legislation that does not appear to grant special treatment to racial minorities.

It is important to note that no one reform proposal will solve what is essentially a structural problem. This is not a matter of just a few “bad apples” misbehaving, as some seem to believe.¹⁶ Only a multiplicity of reforms will lead to lasting structural changes in policing.¹⁷ In a previous article, I focused on reform

bias should make race salient by calling attention to racial stereotypes); Cynthia Kwei Yung Lee, *Race and Self Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 488 (1996) [hereinafter Lee, *Race and Self Defense*] (proposing race-switching as a means of getting jurors to perceive their own racial biases).

15. While much of the nation’s attention has been focused on police shootings of Black men, White males are actually killed by police more often than any other group. In 2016, for example, 46% of those who died as a result of an officer-involved shooting were White males. Kimbriell Kelly et al., *Fatal Shootings by Police Remain Relatively Unchanged After Two Years*, WASH. POST (Dec. 30, 2016), https://www.washingtonpost.com/investigations/fatal-shootings-by-police-remain-relatively-unchanged-after-two-years/2016/12/30/fc807596-c3ca-11e6-9578-0054287507db_story.html?hpid=hp_hp-top-table-main-police-shootings%3Afatal-shootings-by-police-remain-relatively-unchanged-after-two-years%3Ahomepage%2Ft%3Afc807596-c3ca-11e6-9578-0054287507db_story.html. When adjusted for their presence in the overall population, however, Black males “were three times as likely to die as their White counterparts.” *Id.* Moreover, when it comes to fatal police shootings of unarmed individuals, Black men are disproportionately the victims. For example, 34% of the unarmed individuals shot and killed by police in 2016 were Black males. *Id.*

16. U.S. Attorney General Jeff Sessions reflected this just a few bad apples point of view during his confirmation hearing for U.S. Attorney General. Then-Senator Sessions remarked that officers have come to feel “unfairly maligned and blamed for the unacceptable actions of a few of their bad actors.” Matt Zapposky et al., *Sessions Emphasizes the Primacy of the Law over His Political Views*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/world/national-security/sessions-faces-plenty-of-issues-in-confirmation-hearings-but-is-expected-to-be-approved/2017/01/09/17d85a52-d681-11e6-9f9f-5cdb4b7f8dd7_story.html?hpid=hp_hp-top-table-main-police-shootings%3Afatal-shootings-by-police-remain-relatively-unchanged-after-two-years%3Ahomepage%2Ft%3Afc807596-c3ca-11e6-9578-0054287507db_story.html; see also Ryan J. Reilly, *Jeff Sessions Blames Bad Apples for Police Abuse. He Should Read These DOJ Reports*, HUFFINGTON POST (Jan. 11, 2017, 10:50 AM), http://www.huffingtonpost.com/entry/police-jeff-sessions-civil-rights-police_us_58767eb3e4b092a6cae4ac97 (noting that during his confirmation hearing, Senator Sessions testified, “I think there’s concern that good police officers and good departments can be sued by the Department of Justice when you just have individuals within a department who have done wrong[.]”).

17. A multitude of proposals for reform of policing practices have been offered by others. Seth Stoughton, a former police officer who now teaches law at the University of South Carolina, has suggested that police departments should embrace more of a “guardian” mentality, rather than a “warrior” mentality. Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 614, 666–75 (2016); see also Delgado, *supra* note 3, at 1543 (suggesting a new approach to policing with “cops as guardians or even friends”). Stephen Rushin has argued that Congress should expand federal oversight of policing. STEPHEN RUSHIN, *FEDERAL INTERVENTION IN AMERICAN POLICE DEPARTMENTS* 4 (2017). Sunita Patel has proposed more community involvement in public-law efforts to reform police departments. Sunita Patel, *Towards Democratic Police Reform: A Vision for Community Engagement Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 798, 867–77 (2016); see also Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 545–54 (2015) (discussing deliberative democracy as a theory for including public participation in police decision-making). Lorie Fridell has supported the use of role plays and incorporation of implicit-bias training to help police officers overcome implicit bias. Lorie Fridell, *This Is Not Your Grandparents’ Prejudice: The Implications of the Modern Science of Bias for Police Training*, TRANSLATIONAL CRIMINOLOGY, Fall 2013, at 11–13, <http://cebcp.org/wp-content/TCmagazine/TC5-Fall2013>. Many have urged police departments to equip their officers with body-worn cameras. Ryan Pulley, *Law Enforcement and Technology: Requiring Technological Shields to Serve and Protect Citizen Rights*, 6 WAKE FOREST J.L. & POL’Y 459, 492–93 (2016) (advocating body-worn camera implementation as a means of holding law enforcement accountable and exonerating officers committing no misconduct); David A. Harris, *What Criminal Law and Procedure Can Learn from Criminology*, 7 OHIO ST. J. CRIM. L. 149, 196–97 (2009) (urging video and audio recordings of searches and seizures as one method to increase compliance with the Fourth Amendment); see also Chavis, *supra* note 11, at 1007–13 (offering a model body-worn camera policy and discussing best practices for implementing body-worn camera programs). Some have even proposed disarming the police. Paul Takagi, *A Garrison State in “Democratic” Society*, CRIM. & SOC. JUST. 1, 10 (1974) (“Perhaps the only immediate solution at this time is to disarm the police . . . [to] lower the rate of police killings of civilians[.]”); James Jacobs, *Disarming the Police Would Make Gun Control Effective*, in GUN CONTROL 42, 43 (Charles P. Cozic ed., 1992) (noting that disarming police would

at the departmental level.¹⁸ I proposed the use of high-definition simulators coupled with a shooting program aimed at both reducing racial bias and increasing accuracy in the decision to shoot.¹⁹ I also recommended that police officers be required to engage in regular and ongoing traditional martial arts training as a way to train officers to remain calm in situations of danger and to minimize the impulse to shoot.²⁰ Traditional martial arts training, which usually includes meditation before and after each practice, could help officers remain calm in dangerous situations and hone their intuitive skills, which could help officers better identify truly dangerous individuals, choose the right course of action, and increase their confidence and ability to handle combative suspects.²¹

In this Article, I focus on doctrinal reform, suggesting model legislation on police use of deadly force. Existing statutes on police use of deadly force tend to focus on the reasonableness of the officer's *belief* in the need to use force. I argue that the law should be reformed to include a focus on the reasonableness of the officer's *actions*. Under my model statute, for a shooting to be considered justifiable, both the officer's beliefs and actions must have been reasonable. To provide better guidance to juries than current use-of-force statutes, my model statute specifies three factors the fact finder must consider when deciding whether the officer believed and acted reasonably: (1) whether the victim/suspect had or appeared to have a weapon (and whether he or she refused orders to drop it), (2) whether the officer engaged in de-escalation measures prior to using deadly force, and (3) any pre-seizure conduct by the officer that increased the risk of a deadly confrontation. Tracking traditional self-defense doctrine, the model statute I propose explicitly requires necessity, proportionality, and attention to the immediacy of the need to use deadly force.²²

My model statute also imports the concept of imperfect self-defense into the police use of force arena. If the jury finds that an officer's belief in the need to use deadly force was honest but unreasonable, or if the jury finds that the officer's belief was reasonable but that his use of deadly force was unreasonable, the jury may acquit the officer of murder and find him guilty of voluntary manslaughter.²³

set the stage for disarming citizens). I do not support disarming the police. Unless and until we get guns off the streets and out of the homes of ordinary citizens, we cannot and should not even think about disarming our police. The above-listed reforms are just a few of the many proposals for reform of policing practices.

18. Cynthia Lee, *Race, Policing and Lethal Force: Remediating Shooter Bias with Martial Arts Training*, 79 LAW & CONTEMP. PROBS. 145, 150–51 (2016) [hereinafter Lee, *Race, Policing and Lethal Force*].

19. *Id.* at 160–62.

20. *Id.* at 165–70.

21. *Id.*

22. Rachel Harmon has proposed importing the traditional requirements of self-defense doctrine—necessity, imminence, and proportionality—into Fourth Amendment law on when police use of force is excessive. Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1166–83 (2008). The Supreme Court's decisions in this area suggest that the Court would be resistant to adopting Harmon's helpful suggestion. Unlike the Supreme Court, state legislators are more sensitive to the demands of the public, so state law reform might be possible if there is sufficient public pressure to reform these laws.

23. In states that recognize the defense of imperfect self-defense, a person charged with murder can be found guilty of voluntary manslaughter instead of murder if she honestly, but unreasonably, believed that the force used was necessary or was attacked with nondeadly force and wrongfully escalated the conflict by using deadly force in response. *See, e.g., In re Christian S.*, 872 P.2d 574, 575 (Cal. 1994).

I recognize the limits of criminal prosecution as a vehicle for police reform. As my colleague Mary Cheh has noted: “Criminal law can punish, and in some instances, deter police brutality, but it cannot of itself force fundamental change in how a department is run, supervised, led, and made accountable.”²⁴ Because criminal prosecutions of police officers “occur within a structure designed to protect individual defendants through procedural safeguards, including rights to counsel, to confront witnesses, to a jury and against self-incrimination and, most important, the requirement that the government prove guilt beyond a reasonable doubt,”²⁵ many of these officer-involved shooting prosecutions result in either a hung jury or a not guilty verdict.

Changing the law on police use of deadly force may not have an immediate impact on what judges and juries do in homicide prosecutions involving police officers claiming that they acted in self-defense. Results will vary depending on the jurisdiction, as different communities have differing views on police, but many judges and jurors will not want to convict an officer who used deadly force thinking his or her life, or the life of another person, was in danger. Many juries will continue to acquit police officers no matter what the legal standard is, except, perhaps, in the most egregious cases where there is clear evidence that the victim/suspect did not pose a threat of danger to the officer or anyone else.²⁶ Judges and jurors know that police officers have a difficult job to do. They may feel it is unfair to send an officer to jail if the officer employed deadly force believing it was necessary to protect his or her life or the life of another person.

Despite the fact that reforming the law on police use of deadly force may not result in more guilty verdicts, it may encourage police officers on the ground to act with more care before using deadly force, which should be the ultimate goal. We want police officers to exercise appropriate care and caution before using deadly force. The instinct to defend oneself will always be present in any situation when an officer is contemplating the use of deadly force. Reforming the law in a way that encourages the use of deadly force only when it is proportionate and necessary can provide a useful counter to that self-preservation instinct.

Even though the changes in the law I am proposing may not have an immediate impact on jury verdicts in officer-involved shooting cases, changing the law may influence what juries do in the long run. Today, jurors may feel that an officer’s use of force was not appropriate, but because the current legal standard

24. Mary M. Cheh, *Are Lawsuits an Answer to Police Brutality?*, in *POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE* 247, 247 (Geller & Toch eds., 1996).

25. William Yeomans, *The Red Herring in Prosecuting Officers: Washington Post Opinion*, OREGONIAN (May 27, 2016), http://www.oregonlive.com/opinion/index.ssf/2016/05/the_red_herring_in_prosecuting.html (opining that the acquittal of Officer Nero, one of the five Baltimore police officers charged with homicide in the death of Freddie Gray, is a reminder that criminal prosecution of police officers is “an unreliable tool for a national reckoning on race and policing”).

26. Even in such cases, some jurors may hesitate to convict. For example, in the case involving the shooting of Walter Scott, a Black man who was stopped for a nonfunctioning brake light, even though Officer Michael Slager was caught on video shooting the unarmed Scott while he was trying to run away, at least one juror refused to convict, resulting in a hung jury. Simon et al., *supra* note 10. Slager later pled guilty to a federal criminal charge. Matt Zapotosky & Wesley Lowery, *Ex-Officer Pleads Guilty in S.C.*, WASH. POST (May 3, 2017), <https://www.pressreader.com/usa/the-washington-post/20170503/281590945467498>.

suggests that an officer is justified as long as his *belief* in the need to use such force is reasonable, jurors may feel they must acquit. By requiring juries to find that both the officer's beliefs *and* actions were reasonable, my model statute focuses the jury's attention on whether the objective facts suggest that the officer's response was proportionate and necessary.

Changing the law may also encourage prosecutors to bring charges against police officers who shoot and kill under questionable circumstances. Prosecutors today are often reluctant to bring charges against officers, even when the circumstances surrounding a shooting suggest that it was not a justifiable shooting, for a host of reasons. Prosecutors may consider police officers to be "on the same team," which may bias them in ways they do not even realize.²⁷ Prosecutors may fear that police officers will retaliate by refusing to testify favorably in other cases if one of their own has been charged.²⁸ Prosecutors may also be concerned about bringing charges when the chances of success are very small.²⁹ Current law contributes to this concern by favoring the officer at almost every step of the way.³⁰ My model statute tries to be more balanced than current law, giving prosecutors a better chance at securing a conviction in cases where a conviction is appropriate.

Much of what I am proposing is already part of many police department regulations,³¹ which do not have the force of law and are unenforceable.³² The things I suggest juries should be directed to consider when assessing the reasonableness of an officer's use of force are measures that many police chiefs

27. Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1450 (2014); see also Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 22 (2001) ("[P]rosecutors often enjoy too close of a relationship with local police and are therefore reluctant to turn against those with whom they have worked.").

28. As Kate Levine has noted:

[Prosecutors] rely on the police for successful convictions, and therefore, must have a good working relationship with the police for professional advancement. A prosecutor who reports police crimes or advocates zealous prosecution of the police will necessarily run afoul of law enforcement's good graces, which may impact conviction rates and therefore her career advancement.

Id. at 1472.

29. *Wayte v. United States*, 470 U.S. 598, 607 (1985) (noting that prosecutorial charging decisions are influenced by a number of factors, including the strength of the case, which impacts the likelihood of conviction).

30. For example, many courts do not allow juries to consider whether less deadly alternatives were available to the officer. See *infra* cases cited in note 198. Many courts do not permit the jury to consider pre-seizure conduct by the officer that created the risk of a deadly confrontation. See *infra* cases cited in note 249; see also Cover, *supra* note 8, at 1773 (explaining how the law on qualified immunity makes it virtually impossible for a civilian to obtain redress against an officer who has violated his constitutional rights).

31. Cf. *infra* notes 201 and 241.

32. The mere fact that an officer violated a police regulation is not sufficient to sustain a conviction. *Wilson v. Meeks*, 52 F.3d 1547, 1554 (10th Cir. 1995) (holding that "violation of a police department regulation is insufficient for liability under section 1983"); *Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993) (holding that, when determining whether an officer's use of deadly force was reasonable, the issue is whether the officer "violated the Constitution or federal law, not whether he violated the policies of a state agency"); *Edwards v. Baer*, 863 F.2d 606, 608 (8th Cir. 1988) ("[P]olice department guidelines do not create a constitutional right."). Moreover, some courts have held that whether the officer violated police policy is irrelevant to whether the officer's use of force was lawful. *Tanberg v. Sholtis*, 401 F.3d 1151, 1161-62 (10th Cir. 2005) (holding that a police department's standard operating procedures are inadmissible in excessive force claims because they are "irrelevant to the federal claims and likely to cause jury confusion regarding the state claims"); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (holding that an officer's violation of standard police procedures is not relevant to whether the officer acted reasonably in using deadly force).

acknowledge are critically important.³³ The advantage of my model legislation, if adopted by state legislatures, would be that it would have the force of law. Because of its enforceability in a court of law, an enacted statutory provision would have far more potential to shape police culture than internal police regulations.

My model statute responds to a call to action raised by NYU law professor Barry Friedman in his recently published book, *Unwarranted: Policing without Permission*.³⁴ Professor Friedman, the lead reporter on the American Law Institute's current Policing Project, observes that we are quick to criticize the police but fail to recognize the extent to which we are to blame for problematic policing practices.³⁵ We are at fault, according to Professor Friedman, because we—or, more accurately, our legislators—have not written rules to govern police practices, but have allowed the police to police themselves.³⁶ My model statute is one attempt to provide better rules to govern police use of deadly force.

II. THE LAW ON POLICE USE OF DEADLY FORCE

Currently, there is no federal statute governing police use of deadly force.³⁷ Police use of force in the United States is governed by U.S. Supreme Court case law, state statutes, and state case law. Supreme Court jurisprudence on when police force is considered excessive and in violation of the Fourth Amendment is what governs in civil lawsuits brought by individuals claiming excessive use of force by police officers.³⁸ State use-of-force laws govern in criminal prosecutions against police officers charged with homicide or assault.³⁹ While U.S. Supreme Court jurisprudence on excessive force and state laws on when deadly force is justifiable are similar in many ways, they operate in separate realms. If a state has a statute governing police use of force, then that state statute and state case law, not U.S. Supreme Court case law, controls in a state criminal prosecution of a law enforcement officer for homicide or assault. Conversely, in a Section 1983 civil action against a law enforcement officer alleging that the officer used excessive force, U.S. Supreme Court case law controls, not state law. I

33. POLICE EXEC. RESEARCH FORUM, DEFINING MOMENTS FOR POLICE CHIEFS 25, 26, 28, 58 (May 2015) (encouraging consideration of pre-seizure conduct and de-escalation measures).

34. See BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION (2017).

35. *Id.* at 15.

36. *Id.* at 27.

37. H.R. 1529, 65th Leg., Reg. Sess. (Wash. 2017); AMNESTY INT'L, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES 17 (2015). In 2015, Representative John Conyers introduced legislation entitled The Law Enforcement Trust and Integrity Act of 2015. See Law Enforcement Trust and Integrity Act of 2015, H.R. 2875, 114th Cong. (1st Sess. 2015). This legislation, which sought the development of national standards for the accreditation of law enforcement agencies as well as the development of national standards on use-of-force procedures, stalled in committee. See Melissa Nann Burke, *Conyers Pushes Police Accountability, Crime Reforms*, DETROIT NEWS (July 23, 2015, 3:21 PM), <http://www.detroitnews.com/story/news/politics/2015/07/23/rep-conyers-police-accountability-crime-reforms/3058002/> (noting that the legislation introduced by Representative Conyers would force the adoption of uniform standards to enhance communities' ability to hold law enforcement accountable).

38. It also governs in federal prosecutions of federal law enforcement officers accused of excessive force. See *Law Enforcement Misconduct*, U.S. DEP'T JUST., <https://www.justice.gov/crt/law-enforcement-misconduct> (last updated July 28, 2017).

39. MATTHEW LIPPMAN, CRIMINAL PROCEDURE 442 (2d ed. 2014).

examine both the leading U.S. Supreme Court cases on whether and when the use of force by a law enforcement officer is excessive and, therefore, unconstitutional and state use-of-force laws.

A. *U.S. Supreme Court Cases on the Meaning of Excessive Force*

Tennessee v. Garner,⁴⁰ *Graham v. Connor*,⁴¹ and *Scott v. Harris*⁴² are the leading U.S. Supreme Court cases on when the use of force by a law enforcement officer is excessive and, therefore, unconstitutional. In *Garner*, a police officer responding to a “proowler inside” call observed an African American⁴³ teenager named Edward Garner running across the backyard of a home that had just been broken into.⁴⁴ With the aid of a flashlight, the officer saw Garner’s face and hands and guessed that Garner was seventeen or eighteen years old.⁴⁵ Garner was actually fifteen years old.⁴⁶ The officer, who later admitted that he was reasonably sure Garner was unarmed, called out, “police, halt.”⁴⁷ When Garner began climbing over the fence, the officer shot him in the back of the head, fearing that if Garner made it over the fence, he would elude capture.⁴⁸ Garner was taken to a hospital where he died on the operating table.⁴⁹ “Ten dollars and a purse taken from the house were found on his body.”⁵⁰

In reviewing the case, the Supreme Court criticized the common law rule in effect in Tennessee and other states at the time, which permitted an officer to use whatever force was necessary, including deadly force, to effectuate the arrest of a fleeing felon. Rejecting the common law rule, the Court held that “[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.”⁵¹ The Court explained that only

40. 471 U.S. 1 (1985).

41. 490 U.S. 386 (1989).

42. 550 U.S. 372 (2007).

43. The Court does not mention Garner’s race in its opinion, but several sources report that Edward Garner was Black. Mary Maxwell Thomas, *The African American Male: Communication Gap Converts Justice into “Just Us” System*, 13 HARV. BLACKLETTER L.J. 1, 6 (1997); Jerry R. Sparger & David J. Giacompassi, *Memphis Revisited: A Reexamination of Police Shootings After the Garner Decision*, 9 JUST. Q. 211, 212 (1992).

44. *Garner*, 471 U.S. at 3.

45. *Id.*

46. *Id.* at 24 (O’Connor, J., dissenting). Social science research suggests that individuals tend to think Black kids are older than they really are. In one study, for example, Philip Atiba Goff showed pictures of boys of various ages and races to individuals, told them that the boys were suspected of a particular crime, then asked the subjects to guess the ages of the boys in the photos. *See, e.g.*, Philip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 530 (2014). In case after case, the subjects thought the Black kids were much older than White and Latino kids of the same age, suspected of the same crime. *Id.* at 532. They also thought the Black kids were more culpable (blameworthy) for their actions than the White or Latino kids. *Id.* Goff did the same experiment on police officers and found that police officers also overestimated the age of Black and Latino kids suspected of crime, while not overestimating the age of White children. *Id.* at 535. Black thirteen-year-old kids were repeatedly perceived to be adults. *Id.*

47. *Garner*, 471 U.S. at 3–4.

48. *Id.* at 4.

49. *Id.*

50. *Id.*

51. *Id.* at 11.

where an officer has probable cause to believe the suspect poses a threat of serious physical harm, either to the officer or to others, is it constitutionally reasonable to prevent escape by using deadly force:⁵²

[I]f 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.⁵³

Garner was widely understood as establishing two clear guidelines regarding when police officers can use deadly force to stop a fleeing felon. First, deadly force should not be used unless the officer has reasonable grounds to believe the suspect poses a threat of death or serious bodily injury to the officer or others, and second, an officer should, if feasible, give a warning prior to using deadly force.⁵⁴

The number of persons shot and killed by police decreased dramatically after the *Garner* decision, in large part because many police departments, which had previously embraced the common law rule, changed their policies to conform to the decision.⁵⁵ After the decision was announced, approximately 30% of the most populous cities' police departments revised their policies to conform to it.⁵⁶ The remaining 70% did not revise their policies because their policies were already in accordance with, or more restrictive than, *Garner*.⁵⁷ The new legal standard announced in *Garner*, coupled with the net increase in the number of police departments with more restrictive shooting policies after *Garner*, resulted in a substantial reduction in both the number of police shootings and the number of persons shot and killed by police,⁵⁸ offering an example of how a change in the law can have a significant impact on the ground.

Four years after deciding *Garner*, the Court retreated from its embrace of clearly defined guidelines for police use of deadly force. In *Graham v. Connor*, Dethorne Graham, a diabetic, "felt the onset of an insulin reaction," and asked a friend, William Berry, to take him to a nearby store so he could buy some orange juice.⁵⁹ Berry did so, but when Graham entered the convenience store and saw a long line of people waiting to check out, he quickly left the store.⁶⁰

52. *Id.*

53. *Id.* at 11–12.

54. *See, e.g.*, *Gonzalez v. City of Anaheim*, 747 F.3d 789, 793–94 (9th Cir. 2014); *Vaughan v. Cox*, 343 F.3d 1323, 1329–30 (11th Cir. 2003); *Colston v. Barnhart*, 130 F.3d 96, 99–100 (5th Cir. 1997); *Krueger v. Fuhr*, 991 F.2d 435, 438 (8th Cir. 1993).

55. Abraham N. Tennenbaum, *The Influence of the Garner Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241, 255–56 (1994) (finding that overall police shootings declined by 16% following the *Garner* decision).

56. Samuel Walker & Lorie Fridell, *Forces of Change in Police Policy: The Impact of Tennessee v. Garner*, 11 AM. J. POLICE 97, 101 (1992). Of the one hundred large cities surveyed, four did not respond. *See id.* at 109–10.

57. *Id.*

58. *Id.* at 107; *see also* Sparger & Giacomassi, *supra* note 43, at 224 (finding that, after the Memphis Police Department revised its shooting policy to conform to *Tennessee v. Garner*, the overall number of shootings and the racially discriminatory application of lethal force in Memphis declined significantly).

59. *Graham v. Connor*, 490 U.S. 386, 388 (1989).

60. *Id.* at 388–89.

Officer Connor, an African American police officer with the Charlotte, North Carolina, Police Department,⁶¹ happened to see Graham enter and rapidly exit the store.⁶² Officer Connor suspected that Graham, an African American male,⁶³ had stolen something from the store, so he followed and then stopped Berry's car about a half mile from the store.⁶⁴ Berry told Officer Connor that his friend Graham was suffering from a sugar reaction.⁶⁵ Officer Connor told the two men to wait in the car.⁶⁶ When Officer Connor went back to his patrol car to call for backup, Graham got out of the car, ran around it twice, and then passed out briefly.⁶⁷

Several officers arrived at the scene in response to Officer Connor's call for backup.⁶⁸ One officer handcuffed Graham's hands tightly behind his back, ignoring Berry's pleas for sugar for Graham.⁶⁹ Another officer said, "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up."⁷⁰ Several officers lifted the unconscious Graham up and placed him face down on the hood of Berry's car.⁷¹ When Graham regained consciousness, he asked the officers to check his wallet for a diabetes decal that he carried.⁷² In response, one of the officers insisted that he "shut up" and subsequently shoved his face against the hood of the car.⁷³ Four officers then grabbed Graham and threw him headfirst into the police car.⁷⁴ A friend of Graham's brought some orange juice to the car, but the officers refused to give the juice to Graham.⁷⁵ Finally, after Officer Connor received a report that Graham had done nothing illegal at the convenience store, the officers drove him home and released him.⁷⁶

Graham suffered a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder as a result of his encounter with the police.⁷⁷ He also developed a loud ringing in his right ear that continued long after the incident.⁷⁸ Graham brought suit against the individual officers involved in the incident, alleging

61. *More Perfect, Mr. Graham and the Reasonable Man*, RADIOLAB (Nov. 30, 2017), <https://www.wnyc.org/story/mr-graham-and-reasonable-man>.

62. *Garner*, 480 U.S. at 389.

63. While the opinion does not mention Graham's race, it appears Graham was a Black man. *Court v. Cop Misconduct*, ELYRIA CHRON. TELEGRAM, Oct. 13, 1989, at A4 ("Graham, who is black, says police handcuffed him, then dumped him in his yard").

64. *Graham*, 490 U.S. at 389. The Supreme Court has held that an officer needs reasonable suspicion of criminal activity based on specific and articulable facts to stop an individual. *Terry v. Ohio*, 392 U.S. 1, 32 (1968). The *Graham* Court, however, did not seem concerned that entering and quickly exiting a convenience store hardly seems to give rise to a reasonable suspicion of criminal activity.

65. *Graham*, 490 U.S. at 389.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* "M.F." stands for "mother fucker" and "S.B." stands for "son of a bitch."

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 390.

78. *Id.*

that they had used excessive force in making the investigatory stop in violation of his constitutional rights.⁷⁹ The case was tried before a jury, but the jury did not get to decide the case.⁸⁰ After the defense finished presenting its case and before the case went to the jury, the officers moved for a directed verdict.⁸¹ The district court applied a four-factor test⁸² and granted the officers' motion for a directed verdict, finding that the amount of force used by the officers was appropriate under the circumstances.⁸³ A divided panel of the Court of Appeals for the Fourth Circuit affirmed, holding that the district court applied the correct legal standard in assessing Graham's claim of excessive force.⁸⁴ The Supreme Court reversed, not because it felt the officers used excessive force, but because the lower courts erred in applying the Due Process Clause to assess whether the force the officers used against Graham was excessive.⁸⁵

The Court held that all claims alleging excessive use of force by a law enforcement official during an arrest, stop, or other seizure of a person must be analyzed for reasonableness under the Fourth Amendment as opposed to the Due Process Clause.⁸⁶ Importantly, the *Graham* Court declined to set clear guidelines for police use of force. Instead, the Court stated that "determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of . . . the individual's Fourth Amendment interests against the . . . governmental interests . . ."⁸⁷ Acknowledging that this balancing test "is not capable of precise definition or mechanical application,"⁸⁸ the Court explained that:

[I]ts proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.⁸⁹

79. *Id.*

80. *Id.* at 390–91.

81. *Id.*

82. The district court considered the following four factors in assessing whether the officers applied excessive force against Graham:

(1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) "[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm."

Id. at 390 (quoting *Graham v. City of Charlotte*, 644 F. Supp. 246, 248 (W.D.N.C. 1986)).

83. *Id.* at 390–91.

84. *Id.* at 391.

85. *Id.* at 397–99.

86. *Id.* at 388.

87. *Id.* at 396.

88. *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

89. *Id.* (citing *Garner*, 471 U.S. 1, 8–9).

The Court explained that in conducting reasonableness balancing, courts should apply an objective standard of reasonableness.⁹⁰ The officer's actual intent or motive is irrelevant in this objective inquiry.⁹¹ Moreover, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the twenty-twenty vision of hindsight."⁹² "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."⁹³ Finally, the Court noted that an officer does not have to be correct in his assessment of the need to use force. The Fourth Amendment is not violated merely because an officer was mistaken, as long as his mistake was reasonable.⁹⁴

One problem with the *Graham* Court's embrace of reasonableness is that racial stereotypes about Blacks and other racial minorities can affect perceptions of whether an officer's use of force was reasonable. Blacks are often associated with aggression, violence, and criminality.⁹⁵ The negative association between Blacks and crime is so common that it has a name: the Black-as-Criminal stereotype.⁹⁶ In acknowledging the prevalence of racial stereotypes, I am not suggesting that all, nor even most, police officers are racist. Indeed, most people today, including most police officers, do not endorse the stereotype or believe that all Blacks are criminals.⁹⁷ Nonetheless, most people cannot help being affected by stereotypes, including this one. A wealth of research on implicit social

90. *Id.* at 397.

91. *Id.* In a footnote, however, the Court noted that "in assessing the credibility of an officer's account of the circumstances that prompted the use of force, a fact finder may consider, along with other factors, evidence that the officer may have harbored ill-will toward the citizen." *Id.* at 399 n.12.

92. *Id.* at 396.

93. *Id.* at 396–97.

94. *Id.* at 396.

95. CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 138–46 (NYU Press 2003) [hereinafter LEE, *MURDER AND THE REASONABLE MAN*] (discussing the Black-as-Criminal stereotype); Lee, *Race and Self Defense*, *supra* note 14, at 403 (discussing negative stereotypes about Blacks, Latinos, and Asian Americans); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2045 (2011); Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 278 (2007). Professor Donald Jones has pointed out that the way the Black-as-Criminal stereotype is deployed changes depending on the context: "In his classroom, or on our screens, dressed in a dapper pinstripe suit Henry Louis Gates is received with applause, not suspicion. Similarly, Evan Howard on the campus of Morgan State College is generally safe. And shopping at Target or Walmart, Trayvon would have had no trouble buying a belt. But when they cross certain lines they [are] thrust into a police regime in which their mere presence creates a presumption of criminality. Thus a Black man who lives in a ghetto zip code finds himself a perpetual suspect, stopped 257 times...How do we explain this dualism: blacks have achieved incredible vertical and horizontal integration in our society. Yet the notion that blacks are inherently criminal is widely, if subliminally held." D. MARVIN JONES, *DANGEROUS SPACES: BEYOND THE RACIAL PROFILE* 43 (2016).

96. LEE, *MURDER AND THE REASONABLE MAN*, *supra* note 95, at 138–54 (providing examples of different ways the Black-as-Criminal stereotype operates to harm African Americans); Lee, *Race and Self Defense*, *supra* note 14, at 402–23 (discussing the Black-as-Criminal stereotype).

97. See MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE* 47 (2013).

cognition has repeatedly demonstrated that even the most egalitarian-minded individuals are implicitly biased in favor of Whites over Blacks.⁹⁸ Implicit racial bias can encourage police officers and others to perceive danger when dealing with a Black individual, even when that individual does not, in fact, pose a threat of violence.⁹⁹

And it is not just Blacks who are subjected to negative racial stereotypes. Latinos are also commonly stereotyped as criminal and dangerous.¹⁰⁰ Muslim and Middle Eastern Americans are commonly stereotyped as terrorists.¹⁰¹

It is noteworthy that both of the individuals who were the subjects of police force in *Tennessee v. Garner* and *Graham v. Connor* were African American, although this fact is not apparent from a simple reading of either opinion.¹⁰² Many of the Supreme Court's Fourth Amendment opinions ignore race even when consideration of race would likely change the analysis. For example, in *Terry v. Ohio*,¹⁰³ the Supreme Court's well-known opinion allowing police officers to stop and frisk individuals upon reasonable suspicion, the Court never mentioned the races of the suspects or the police officer. In *Stopping the Usual Suspects: Race and the Fourth Amendment*, Anthony Thompson critiques the *Terry v. Ohio* Court for its failure to acknowledge that two of the suspects were Black and that the third suspect and the officer who stopped and frisked the men were White.¹⁰⁴ Thompson also explains how the racial dynamics of the case likely influenced not only the officer who suspected the men were involved in criminal activity, but also the Justices on the Supreme Court who found the officer's suspicions reasonable.¹⁰⁵

Similarly, in *Florida v. Bostick*,¹⁰⁶ a bus-sweep case in which the Supreme Court modified the "free to leave" test for a seizure of a person, the Court ignored the race of the defendant and of the officers who questioned and searched

98. *Id.* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1475 (1998). For an excellent examination of how implicit racial bias manifests itself in different areas of the law and society, see generally IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012). A recently published book on implicit bias in the law, published by the American Bar Association, provides practical strategies for judges and attorneys interested in overcoming implicit bias. See generally ENCHANTING JUSTICE, REDUCING BIAS (Redfield ed., 2017).

99. Cynthia Lee, *But I Thought He Had a Gun: Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POVERTY L.J. 1, 60 (2004) (documenting numerous cases in which an unarmed Black individual was shot and killed by an officer who mistakenly thought the suspect/victim had a gun); Cynthia Lee, *Race, Policing, and Lethal Force*, *supra* note 18, at 160 (discussing shooter bias studies showing that most individuals are quicker to shoot an unarmed Black person than an unarmed White person).

100. Brian Rodriguez, *Latinos and the Criminal Justice System: Overcoming Racial Stigma from Trial to Incarceration*, 40 T. MARSHALL L. REV. ONLINE 7, 2 (2015), <http://tmlawreview.org/assets/uploads/2015/03/Latinos-and-The-Criminal-Justice-System-Brian-Rodriguez-volume-40-issue-.71.pdf>; Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. U. L. REV. 1081, 1090 (2001).

101. Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in A Post-9/11 America*, 47 GONZ. L. REV. 429, 477–78 (2012).

102. See *supra* notes 43 & 63.

103. See 392 U.S. 1 (1968).

104. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 962–73 (1999).

105. *Id.*

106. See 501 U.S. 429 (1991).

him. In (*E*)*Racing the Fourth Amendment*, Devon Carbado critiques the *Bostick* Court's color-blind approach and explains how acknowledging that the defendant was Black and the officers were White would have yielded a more realistic analysis and most likely a different answer to the question whether a reasonable person in the defendant's shoes would have felt free to terminate the encounter with the police than the analysis Justice O'Connor suggested.¹⁰⁷

Failure to acknowledge the significance of race is not limited to Supreme Court opinions. Racially charged criminal cases are often handled with the same color-blind approach. The trial of George Zimmerman, the man who shot and killed Trayvon Martin, is an example of this. At trial, the judge made clear she was running a color-blind trial and was not going to allow any reference to racial profiling.¹⁰⁸ The prosecution assured the judge that it was not going to talk about racial profiling.¹⁰⁹ One of the prosecutors even told the jurors during his closing argument that the case was not about race despite widespread popular belief that the case was all about race.¹¹⁰ Many people thought the reason Zimmerman was not charged initially was because he had shot an unarmed Black male and that if the victim had been White, he would have been charged right away.

A second problem with the *Graham* Court's embrace of reasonableness balancing is that it fails to provide meaningful guidance to lower courts, attorneys, and litigants regarding whether and when a police officer's use of deadly force is justified, which is precisely the question it is supposed to help answer. While it is true that the *Graham* Court lists several factors, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actually resisting arrest or attempting to evade arrest by flight,"¹¹¹ to weigh in the balance, it provides little other guidance. As Rachel Harmon notes:

Graham permits courts to consider any circumstance in determining whether force is reasonable without providing a standard for measuring relevance, it gives little instruction on how to weigh relevant factors, and it apparently requires courts to consider the severity of the underlying

107. Devon W. Carbado, (*E*)*Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 977–78 (2002) (critiquing Justice O'Connor's colorblind approach to the question of whether a Black man questioned by two White law enforcement officers in *Florida v. Bostick* would have felt free to terminate the encounter or decline the officers' requests).

108. See Cynthia Lee, *Denying the Significance of Race: Colorblindness and the Zimmerman Trial*, in TRAYVON MARTIN, RACE, AND AMERICAN JUSTICE: WRITING WRONG 31, 31 (K.J. Fasching-Varner et al. eds., 2014) [hereinafter Lee, *Denying the Significance of Race*] (examining the reasons why the judge, prosecutor, and defense attorneys in the Zimmerman case treated the case as if it had nothing to do with race); Cynthia Lee, (*E*)*Racing Trayvon Martin*, 12 OHIO ST. J. CRIM. L. 91, 102 (2014) [hereinafter Lee, (*E*)*Racing Trayvon Martin*] (providing a critical race critique of the Zimmerman trial, more commonly known as the Trayvon Martin case); see also Lee, *Making Race Salient*, *supra* note 14 (examining the ways in which implicit racial bias manifested in the Trayvon Martin case).

109. Lee, *Denying the Significance of Race*, *supra* note 108 at 31–32; Lee, (*E*)*Racing Trayvon Martin*, *supra* note 108, at 105.

110. See CrimeTimeVids, *Trayvon Martin: George Zimmerman Trial Closing Arguments Day 14 Part 3*, YOUTUBE (July 12, 2013) https://www.youtube.com/watch?v=xatLPHKCXY&feature=em-share_video_user.

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

crime in all cases, a circumstance that is sometimes irrelevant and misleading in determining whether force is reasonable.¹¹²

Harmon also points out that since *Graham*, the lower courts have not significantly developed the law on excessive use of force by police.¹¹³

Fast forward eighteen years to 2007 when the Court held in *Scott v. Harris* that a police officer's act of ramming his patrol car into the back of a suspect's vehicle during a high-speed chase, causing the vehicle to crash and rendering the African American¹¹⁴ driver a quadriplegic, was reasonable under the circumstances.¹¹⁵ Victor Harris, the person whose car the police rammed, argued that the officer's actions were not justified since the officer did not have probable cause to believe that Harris posed a threat of death or serious bodily injury to the officer or others, as required by *Tennessee v. Garner*, when the officer rammed his patrol car into Harris's car.¹¹⁶ Notably, the Court rejected Victor Harris's attempt to have the Court follow *Tennessee v. Garner*, recasting *Garner* as simply an application of Fourth Amendment reasonableness balancing rather than a bright-line rule for police officers contemplating the use of deadly force against a fleeing felon.¹¹⁷

Justice Scalia, writing for eight members of the Court, felt that the dash cam video clearly showed that the officer did not use excessive force, claiming "Respondent's [Victor Harris's] version of events is so utterly discredited by the record that no reasonable jury could have believed him."¹¹⁸ Justice Scalia continued, "[i]t is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase."¹¹⁹

112. Harmon, *supra* note 13, at 1130. As an example of this, Harmon notes that even though the crime at issue in *Scott v. Harris*, 550 U.S. 372 (2007), was speeding—not an extremely serious or violent offense—the Court found the officer's use of deadly force in that case reasonable. Harmon, *supra*, at 1133.

113. *Id.* at 1131 ("There has been no substantial advance over the Supreme Court's formulation, no further attempt at a test or a structure, almost nothing to help officers, victims, juries, or the public understand the nature of legitimate police force.").

114. The Court does not mention Victor Harris's race, but Harris is described as a nineteen-year-old African American male in other sources. Ann C. McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII: An Examination of Ricci v. DeStefano*, 57 N.Y.L. SCH. L. REV. 865, 871 (2012). It appears that Harris is African American in a YouTube video, featuring Harris. Vic2k3, *Why I Ran.*, YOUTUBE (Dec. 8, 2009), <https://www.youtube.com/watch?v=JATVLUOjzVM> (interview with Victor Harris, explaining why he fled from police).

115. *Scott v. Harris*, 550 U.S. 372, 384 (2007).

116. *Harris*, 550 U.S. at 381–82.

117. *Id.* at 382. Rachel Harmon laments that in rejecting the factors articulated in *Tennessee v. Garner* as central to analyzing reasonableness, the *Scott v. Harris* Court not only emasculated *Garner*, it also "reduced the Fourth Amendment regulation of reasonable force to its vaguest form: an ad hoc balancing of state and individual interests unconstrained by any specific criteria." Harmon, *supra* note 13, at 1136–37.

118. *Harris*, 550 U.S. at 380. As Brandon Garrett and Seth Stoughton note, the *Scott v. Harris* Court weighed the "relative culpability" of the officer and the victim of the force, even though comparative fault is a novel concept in Fourth Amendment law. Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 236 (2017). Garrett and Stoughton also note that while the Court was quick to compare the actions of the victim to the actions of the officer, it "failed to compare the actions of the officers in this case with the actions that may have been taken by well-trained police officers—actions that may have avoided the high-speed chase or the need to use deadly force." *Id.*

119. *Harris*, 550 U.S. at 384.

Justice John Paul Stevens, however, explained in his dissent that he viewed the same videotape and came to the opposite determination.¹²⁰ In Justice Stevens's opinion, Harris did not pose an actual and imminent threat to the lives of the officer or others.¹²¹ Responding to the majority's concern for the lives of pedestrians placed at risk from Harris's attempt to flee, Justice Stevens noted, "[t]he Court's concern about the 'imminent threat to the lives of any pedestrians who might have been present,' . . . while surely valid in an appropriate case, should be discounted in a case involving a nighttime chase in an area where no pedestrians were present."¹²² Justice Stevens further pointed out that all the officer had to do was stop chasing Harris, and any threat posed by the car chase would have ended.¹²³

The three judges on the court of appeals and the district court judge who heard the case below also felt that the officer's use of force was not reasonable.¹²⁴ It is hard to say that Justice Stevens, the three judges on the court of appeals, and the U.S. district court judge, all of whom thought the officer used excessive force, were not reasonable people reflecting the views of at least some of the individuals who might have served on Harris's jury had the case not been dismissed on summary judgment.

After the *Harris* decision, Dan Kahan, David Hoffman, and Donald Braman conducted a study to examine the validity of the majority's claim that no reasonable juror would believe Victor Harris's version of events.¹²⁵ They showed more than 1,000 individuals the video of the high-speed chase at issue in *Harris* and asked these individuals whether they thought it was reasonable for the officer to ram Victor Harris's car to prevent him from fleeing.¹²⁶ Not surprisingly, they found disagreement over whether the officer's use of force was reasonable.¹²⁷ Certain groups of individuals, including African Americans, low-income workers, individuals from the Northeast, and individuals who self-identified as liberal and Democrat, tended to view the officer's actions as unreasonable and excessive.¹²⁸ Individuals who embraced hierarchical and individualistic values, in contrast, tended to agree with the Court's view of the case and saw the officer's acts as reasonable.¹²⁹ Kahan, Hoffman, and Braman concluded that cultural values influenced the way individuals perceived the reasonableness of the officer's actions and that this fact alone suggested it was inappropriate for a case involving questions regarding the reasonableness of an officer's use of deadly

120. *Id.* at 395–96 (Stevens, J., dissenting).

121. *Id.* at 393.

122. *Id.*

123. *Id.* at 393–94.

124. *Harris v. Coweta Cty.*, 433 F.3d 807, 815 (11th Cir. 2005); *Harris v. Coweta Cty.*, No. 3:01-CV-148-WBH, 2003 U.S. Dist. LEXIS 27348, at *16 (N.D. Ga. Sept. 25, 2003).

125. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838 (2009).

126. *Id.*

127. *Id.*

128. *Id.* at 841.

129. *Id.*

force to be adjudicated on a motion for summary judgment as opposed to a jury trial.¹³⁰

The Supreme Court has not followed Kahan, Hoffman, and Braman's advice. On November 9, 2015, the Court issued a *per curiam* opinion granting qualified immunity to a police officer who shot and killed a man who had led police on a high-speed chase. In *Mullenix v. Luna*, Israel Leija, Jr., a twenty-four-year-old Latino male,¹³¹ led police on a high-speed chase after an officer approached his car and informed him that he was under arrest.¹³² During the chase, Leija called 911, said he had a gun, and threatened to shoot police officers if they did not call off the chase.¹³³ Officer Mullenix joined the effort to catch Leija and suggested shooting at Leija's car to disable it.¹³⁴ Officer Mullenix asked the dispatcher to inform his supervisor of his plan and to ask the supervisor if he thought Mullenix should shoot at Leija's car.¹³⁵ Leija's estate claimed that Officer Mullenix heard his supervisor telling him to stand by and wait to see if the spike strips set in place by the other officers would disable Leija's vehicle when it reached a particular overpass, but Officer Mullenix did not follow his supervisor's suggestion.¹³⁶ Approximately three minutes after Officer Mullenix exited his vehicle, he spotted Leija's vehicle as it approached the overpass.¹³⁷ Instead of waiting to see if the spike strips would disable the vehicle, he fired six shots at the vehicle.¹³⁸ Four of the six shots hit Leija, killing him.¹³⁹

Leija's estate sued Officer Mullenix, claiming he used excessive force.¹⁴⁰ Mullenix moved for summary judgment, claiming qualified immunity.¹⁴¹ The doctrine of qualified immunity shields federal and state officials from money damages unless the plaintiff can show "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct."¹⁴²

The district court denied the officer's motion for summary judgment on the ground that genuine issues of fact existed as to whether the officer acted recklessly or reasonably.¹⁴³ The Fifth Circuit Court of Appeals affirmed the district

130. *Id.* at 881.

131. See *Fatal Encounters Database*, FATAL ENCOUNTERS, https://archive.org/details/perma_cc_65MJ-H76F (last visited Jan. 21, 2018).

132. *Mullenix v. Luna*, 136 S. Ct. 305, 306 (2015).

133. *Id.*

134. *Id.*

135. *Id.* at 306–07.

136. *Id.* at 307.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Avidan Cover explained that, in an excessive force case, qualified immunity confusingly involves two similar inquiries into the reasonableness of the officer's conduct. Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1807 (2016). First, the constitutional (or merits) inquiry asks whether the officer's use of force was reasonable. *Id.* Second, the clearly established inquiry asks whether the officer's use of force was reasonable in light of legal precedent. *Id.*

143. *Mullenix*, 136 S.Ct. at 307.

court's denial of Officer Mullenix's motion for summary judgment and concluded that Officer Mullenix was not entitled to qualified immunity.¹⁴⁴ The court of appeals found that Officer Mullenix's actions were objectively unreasonable since there was no threat to innocent bystanders, Leija's driving was relatively controlled, and the officer did not make a split-second decision to shoot.¹⁴⁵

The Supreme Court reversed.¹⁴⁶ Without deciding whether Officer Mullenix acted unreasonably in violation of the Fourth Amendment, the Court concluded that, given its precedents, it could not conclude that Mullenix violated clearly established law.¹⁴⁷ Even though there were genuine issues of fact as to whether the officer acted reasonably, facts best left to a jury representative of the community to sort out, Leija's family was not able to litigate those facts in a court of law because the Court found that the officer was entitled to qualified immunity for his actions.¹⁴⁸

Justice Sotomayor, the sole Justice to dissent from the Court's ruling, blamed the Court for supporting a "shoot first, think later" culture of policing.¹⁴⁹ She noted that when Officer Mullenix confronted his supervisor after the shooting, his first words were "How's that for proactive?," referencing an earlier counseling session in which his supervisor had suggested Mullenix was not enterprising enough.¹⁵⁰ Justice Sotomayor lamented:

[T]he comment seems to me revealing of the culture this Court's decision supports when it calls it reasonable . . . to use deadly force for no discernible gain and over a supervisor's express order to "standby." By sanctioning a "shoot first, think later" approach to policing, the Court renders the protections of the Fourth Amendment hollow.¹⁵¹

Salazar-Limon v. City of Houston, Texas is another example of the Supreme Court favoring the police officer over the civilian in a case involving disputed facts that probably should have gone to a jury.¹⁵² Around midnight on October 29, 2010, Houston Police Officer Chris Thompson, who was manning a speed gun on the freeway, observed a truck weaving in and out of traffic.¹⁵³ Officer Thompson turned on his lights and sirens and pulled over Ricardo Salazar-Limon, a Mexican national.¹⁵⁴ After running a check on Salazar-Limon's

144. *Id.* at 307–08.

145. *Id.* at 308.

146. *Id.*

147. *Id.* at 310.

148. *Id.* at 307, 312.

149. *Id.* at 316 (Sotomayor, J., dissenting).

150. *Id.*

151. *Id.*; see also Mark Joseph Stern, *Sonia Sotomayor Takes a Stand Against Police Brutality*, SLATE (Nov. 9, 2015, 3:40 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/11/sonia_sotomayor_dissents_in_mullenix_police_shooting_case.html.

152. 137 S. Ct. 1277, 1277–78 (2017) (Alito, J., concurring).

153. *Id.* at 1279 (Sotomayor, J., dissenting).

154. Stephanie Mencimer, *These Four Cases Will Quickly Show Who Gorsuch Really Is*, MOTHER JONES (Apr. 7, 2017, 8:43 PM), <http://www.motherjones.com/politics/2017/04/gorsuchs-impact-likely-be-immediate> (noting that Salazar-Limon was a twenty-five-year-old Mexican immigrant, lawfully in the country and unarmed, at the time of the incident and that Officer Thompson's shooting left him paralyzed from the waist down);

driver's license, which did not reveal any outstanding warrants, Officer Thompson returned to Salazar-Limon's truck and asked Salazar-Limon to step out of the vehicle.¹⁵⁵ Officer Thompson tried to put Salazar-Limon into handcuffs so he could conduct a blood-alcohol test.¹⁵⁶ Salazar-Limon resisted and a brief struggle ensued.¹⁵⁷ At the end of this struggle, Salazar-Limon turned away from the officer and began to walk back to his car.¹⁵⁸ The officer drew his firearm and told Salazar-Limon to stop.¹⁵⁹

What happened next is a matter of dispute. According to the officer, after he told Salazar-Limon to stop, Salazar-Limon's hands went to his waistband as if he was reaching for a weapon, and Salazar-Limon turned toward him.¹⁶⁰ Salazar-Limon, in contrast, claimed that Officer Thompson shot him in the back right after telling him to stop and that when the bullet hit him, he began to turn toward the officer, then fell to the ground.¹⁶¹ No gun was ever recovered from the scene.¹⁶²

Salazar-Limon sustained crippling injuries as a result of being shot in the back.¹⁶³ He sued Officer Thompson and the City of Houston, alleging that his constitutional rights were violated.¹⁶⁴ Defendants Thompson and the City of Houston moved for summary judgment, arguing that Officer Thompson was entitled to qualified immunity.¹⁶⁵ The district court granted summary judgment in favor of the officer and the City of Houston.¹⁶⁶ The Fifth Circuit affirmed.¹⁶⁷ Salazar-Limon filed a petition for a writ of certiorari with the Supreme Court.¹⁶⁸ The Supreme Court denied Salazar-Limon's petition on April 24, 2017, holding that the lower court acted responsibly and did not conspicuously fail to apply the governing legal rule.¹⁶⁹ Justice Alito, concurring in the denial of certiorari, found noteworthy the fact that Salazar-Limon never denied reaching for his waistband.¹⁷⁰

Justice Sotomayor, dissenting from the denial of certiorari, argued that it was error for the courts below to resolve the case on summary judgment since summary judgment is appropriate only when "there is no genuine dispute as to

Mark Joseph Stern, *The Empty Waistband*, SLATE (Apr. 24, 2017 6:05 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/04/justice_sotomayor_takes_aim_at_police_brutality_in_salazar_limón_v_houston.html.

155. *Salazar-Limon*, 137 S. Ct. 1279 (Sotomayor, J., dissenting).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 1282.

163. *Id.* at 1283.

164. *Id.*

165. *Id.*

166. *Id.* at 1280.

167. *Id.*

168. *Id.* at 1277 (majority opinion).

169. *Id.* at 1278 (Alito, J., concurring).

170. *Id.* at 1277.

any material fact.”¹⁷¹ In deciding whether there are disputed facts in question, a court is supposed to view the facts in the light most favorable to the party opposing the motion for summary judgment—in this case, in the light most favorable to Salazar-Limon.¹⁷² In this case, Justice Sotomayor noted, there was a genuine dispute over whether Salazar-Limon reached for his waistband.¹⁷³ Under Officer Thompson’s account of the events, he shot Salazar-Limon *after* he saw Salazar-Limon turn and reach for his waistband.¹⁷⁴ Under Salazar-Limon’s account, Thompson fired immediately after telling Salazar-Limon to stop and *before* Salazar-Limon turned toward him.¹⁷⁵ When Salazar-Limon turned and whether Salazar-Limon reached for his waistband were material facts because, if Salazar-Limon turned and reached for his waistband before he was shot, Officer Thompson’s use of force was reasonable; if Salazar-Limon did not reach for his waistband and did not turn toward the officer until after he was shot, Officer Thompson’s use of force was excessive.¹⁷⁶ Justice Sotomayor noted, “The most natural inference to be drawn from Salazar-Limon’s testimony was that he neither turned nor reached for his waistband before he was shot—especially as no gun was ever recovered.”¹⁷⁷ If he did not have a gun on him, why would he have reached for his waistband? Justice Sotomayor concluded that the Supreme Court’s decision to deny certiorari:

continues a disturbing trend regarding this Court’s resources. We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force. But we rarely intervene when courts wrongly afford officers the benefit of qualified immunity in the same cases. The erroneous grant of summary judgment in qualified-immunity cases imposes no less harm on “society as a whole,” than does the erroneous denial of summary judgment in such cases.¹⁷⁸

Justice Sotomayor’s dissent is particularly noteworthy in light of the fact that in many police shooting cases involving a claim that the officer shot the suspect because he was reaching for his waistband, it is later found that the suspect was actually unarmed. For example, one study that reviewed six years of shootings by Los Angeles County Sheriff’s Deputies found that in two-thirds of the shootings where the deputy shot the suspect because he thought the suspect was reaching for his waistband, the suspect was actually unarmed.¹⁷⁹

171. *Id.* at 1278 (Sotomayor, J., dissenting).

172. *Id.* at 1281.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 1282.

178. *Id.* at 1282–83.

179. MERRICK J. BOBB ET AL., POLICE ASSESSMENT RES. CTR., THE LOS ANGELES COUNTY SHERIFF’S DEPARTMENT 30TH SEMI-ANNUAL REPORT 63 (2011), <https://static1.squarespace.com/static/5498b74ce4b01fe317ef2575/t/54fc751de4b0d3db827f155f/1425831197873/30th+Semi-annual+Report.pdf> (“[I]n nearly two-thirds of cases where the deputy acted on a waistband movement without seeing a weapon, the suspect had no weapon and thus must have been doing something other than arming himself.”); Robert Faturechi, *Half of L.A. County Deputies’ ‘Waistband Shootings’ Involve Unarmed People*, L.A. TIMES (Sept. 23, 2011), <http://articles.latimes.com/2011/sep/23/local/la-me-unarmed-shootings-20110923>.

B. State Laws on Police Use of Deadly Force

Aside from U.S. Supreme Court case law on when police use of force is excessive, the other main source of law on police use of deadly force is state law. State laws on police use of deadly force are not uniform. Some states do not have any laws on the books governing police use of deadly force, so police simply follow their own departmental rules and regulations and U.S. Supreme Court case law on the use of force.¹⁸⁰ Some states do not require the police officer to have a reasonable belief in the need to use deadly force, allowing the officer's subjective belief to control.¹⁸¹ Most states, however, permit the police to use deadly force if the officer had a reasonable belief that such force was necessary under the circumstances.¹⁸²

Many of the problems with state statutes on police use of deadly force mirror the problems with the Supreme Court's excessive force jurisprudence. For example, reasonableness, which is the standard in excessive force cases as well

180. AMNESTY INT'L, *supra* note 37, at 4 (listing Maryland, Massachusetts, Michigan, Ohio, South Carolina, Virginia, West Virginia, Wisconsin, Wyoming, and the District of Columbia as jurisdictions that lack laws on the use of lethal force by law enforcement officers).

181. For example, in Nebraska, a police officer is justified in using deadly force if the officer is arresting someone for a felony and *believes* the force employed involves no substantial risk of injury to innocents, and either (1) the crime of arrest involved the use or threat of deadly force, or (2) there is a substantial risk that the arrestee will cause death or serious bodily injury if apprehension is delayed. NEB. REV. STAT. § 28-1412(3) (2015). As recently as 2010, the Nebraska State Legislature considered a bill that would have added the word "reasonably" wherever the word "believes" appears in this statute, but this bill was not enacted. Legislative Bill 889, 101st Leg., 2nd Sess. (Neb. 2010); *see also* WASH. REV. CODE § 9A.16.040(3) (2015) ("A public officer or peace officer shall not be held criminally liable for using deadly force without malice and with a *good faith belief* that such act is justifiable pursuant to this section.") (emphasis added). Some use-of-force statutes appear to adopt a subjective standard by using the word "police," but then define "believes" as "reasonably believes." *See, e.g.,* HAW. REV. STAT. § 703-307(3) (2015) ("The use of deadly force is not justifiable under this section unless: [t]he arrest is for a felony; [and t]he person effecting the arrest is authorized to act as a law enforcement officer [and t]he actor *believes* that the force employed creates no substantial risk of injury to innocent persons; and [t]he actor *believes* that: [t]he crimes for which the arrest is made involved conduct including the use or threatened use of deadly force; or [t]here is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed.") (emphasis added); *id.* § 703-300 ("Believes" means "reasonably believes."); 18 PA. CONS. STAT. § 508(a) (2015) ("[A peace officer] is justified in using deadly force only when he *believes* that such force is necessary to prevent death or serious bodily injury to himself or such other person, or when he *believes* both that: such force is necessary to prevent the arrest from being defeated by resistance or escape; and the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.") (emphasis added); *id.* § 501 ("Believes" or "belief." Means "reasonably believes" or "reasonable belief.").

182. *See* ALA. CODE § 13A-3-27(b) (2015); ALASKA STAT. § 11.81.370(a) (2015); ARIZ. REV. STAT. ANN. § 13-410(C) (2015); ARK. CODE ANN. § 5-2-610(b) (2015); COLO. REV. STAT. § 18-1-707(2) (2015); CONN. GEN. STAT. § 53a-22(c) (2015); FLA. STAT. § 776.05(3) (2015); 720 ILL. COMP. STAT. 5/7-5 (2015); KAN. STAT. ANN. § 21-5227(a) (West 2015); LA. STAT. ANN. § 14:20(A) (2015); ME. REV. STAT. tit. 17-A, § 107(2) (2015); MO. REV. STAT. § 563.046(3) (2015); MONT. CODE ANN. § 45-3-102 (West 2015); N.H. REV. STAT. ANN. § 627:5(II) (2015); N.J. STAT. ANN. § 2C:3-7(b) (2) (West 2015); N.Y. PENAL LAW § 35.30(1) (McKinney 2015); N.C. GEN. STAT. § 15A-401(d)(2)(a-b) (2015) (authorizing a law enforcement officer to use deadly force "to defend himself or a third person from what he *reasonably believes* to be the use or imminent use of deadly physical force; [or] to effect an arrest or prevent the escape from custody of a person who he *reasonably believes* is attempting to escape by means of a deadly weapon, or who by his conduct or any other means indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay . . .") (emphasis added); OR. REV. STAT. § 161.239 (2015); 12 R.I. GEN. LAWS §§ 12-7-8, 12-7-9 (2015); TEX. PENAL CODE ANN. § 9.51 (West 2015); UTAH CODE ANN. § 76-2-404 (West 2015).

as in most use-of-force statutes, is such an open-ended standard; alone, it provides little-to-no guidance to the jury deciding whether an officer's use of force was justified.

A second problem involves the fact that reasonableness is usually equated with typicality. Because the officer's beliefs are measured against the beliefs of the reasonable officer, understood to mean the average or typical officer, any subconscious racial biases that a typical officer might have become part of the reasonable officer's perspective. Racial stereotypes linking certain minorities with criminal activity often cause ordinary people to fear those minorities.¹⁸³ The same racial stereotypes linking Blacks and other minorities with criminal activity that influence most people are likely to influence police officers as well,¹⁸⁴ especially those who work in high-crime neighborhoods and have repeated contact with individuals involved in criminal activity.¹⁸⁵ These stereotypes may also encourage legal decision-makers to find an officer's belief in the need to shoot reasonable, even in cases involving individuals who are shot while unarmed or while not actually posing an immediate threat of violence to the officer or others.

Another problem with most state statutes on police use of force is that they focus on the reasonableness of the officer's beliefs. If the focus is on the reasonableness of the officer's beliefs, not the reasonableness of his actions, legal decision-makers may be quicker to find an officer's use of deadly force justified even if deadly force was not necessary to control the situation. They might be quicker to find an officer's use of deadly force justified even if the officer's use of force was not proportionate to the force threatened by the suspect. Necessity and proportionality, standard features of the defense of self-defense, can easily be forgotten if the focus is simply on the reasonableness of the officer's beliefs. This is because focusing on the reasonableness of the officer's beliefs often ends up being an inquiry into the reasonableness of the officer's fear of the suspect.

183. Because of the strong association between Blacks and violence and criminality, fear that a Black person is armed and dangerous becomes a "reasonable" fear when reasonableness is equated with typicality. Lee, *Race and Self Defense*, *supra* note 14, at 459 (providing examples of the Black-as-Criminal stereotype); *see also* LEE, MURDER AND THE REASONABLE MAN, *supra* note 95, at 138–46 (discussing the Black-as-Criminal stereotype and why it is not logical to assume most Blacks are dangerous or prone to criminality). Latinos and Muslims are also stereotyped as dangerous and violent. Mary Romero observes that Latino males are characterized as "super-predators" who are "violent, inherently dangerous and endangering." Romero, *supra* note 100, at 1084. Sahar Aziz notes that Muslims are stereotyped as being "inherently prone to terrorism" and "violent, savage, and anti-American." Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429, 477–78 (2012). Donald Jones notes that the presumption of criminality that attends Blacks, Latinos, and Arab-Americans is amplified depending on where the particular person of color finds themselves—for Blacks, the most dangerous space is the inner city; for Arabs, the airport; and for Latinos, the border. D. MARVIN JONES, DANGEROUS SPACES: BEYOND THE RACIAL PROFILE (2016).

184. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 889 (2004) (finding that police officers, like civilians, tend to associate Blacks with the concept of crime).

185. Richard T. Ford, *Why We Tolerate Biased Policing*, BOS. REV. (Jan 22, 2015), <http://bostonreview.net/blog/richard-thompson-ford-biased-policing> ("Police who work in poor high-crime neighborhoods of color have countless experiences that reinforce racial prejudice."); *cf.* David Klingler et al., *Race, Crime, and the Micro-Ecology of Deadly Force*, 15 CRIMINOLOGY & PUB. POL'Y 193 (2015) (finding neither racial composition of neighborhood nor their level of disadvantage directly increases the frequency of police shootings).

Finally, the vast majority of statutes on justifiable police use of force do not track the requirements of traditional self-defense doctrine, which apply to ordinary civilians. In most police use-of-force statutes, there is no imminence requirement. The officer need not reasonably believe he or she is faced with an *imminent* threat of death or serious bodily injury before using deadly force. As explained in details above, many use-of-force statutes appear to include a proportionality requirement, but do not actually require proportionality. And while most use-of-force statutes include language suggesting a necessity requirement, those same statutes permit an officer to use deadly force even if that force was not actually necessary. I discuss proportionality and necessity at greater length below.

1. *Proportionality*

In most states, a civilian charged with a criminal homicide claiming self-defense needs to show that her use of deadly force arose out of an honest and reasonable belief that she was being threatened with death or serious bodily injury. In other words, a civilian claiming self-defense needs to show that her use of force was proportional to the force threatened. Not so when it comes to police officers in many jurisdictions. In many states, proportionality is not required when an officer uses deadly force to effectuate an arrest or prevent the escape of a fleeing felon.

Many state statutes appear to have a proportionality requirement but do not actually require proportionality. These statutes may permit a police officer to use deadly force if the officer reasonably believes such force is necessary to: (1) effectuate the arrest of a felon; (2) prevent a felon's escape; or (3) protect the officer or another person from a threat of death or serious bodily injury posed by the suspect.¹⁸⁶ One or more conditions may give these laws the appearance of a proportionality requirement, but if there is an "or" before the last clause, an officer would be justified in using deadly force even if the suspect posed no threat of death or serious bodily injury.

186. ALA. CODE § 13A-3-27(b) ("A peace officer is justified in using deadly physical force upon another person when and to the extent that he reasonably believes it necessary in order (1) to make an arrest for a felony or to prevent the escape from custody of a person arrested for a felony, unless the officer knows the arrest is unauthorized; or (2) to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.") (emphasis added); ALASKA STAT. § 11.81.370(a); S.D. CODIFIED LAWS § 22-16-32 (2015) (providing that "[h]omicide is justifiable if committed by a law enforcement officer . . . (3) [i]f necessarily committed in arresting felons fleeing from justice"); *id.* § 22-16-33 (providing that "[h]omicide is justifiable if necessarily committed in attempting . . . to apprehend any person for any felony committed . . ."); UTAH CODE ANN. § 76-2-404; *see also* N.C. GEN. STAT. § 15A-401(d)(2)(c) (permitting a law enforcement officer to use deadly force if it appears reasonably necessary to "prevent the escape of a person from custody imposed upon him as a result of a conviction for a felony"); OR. REV. STAT. § 161.239(1) ("[A] peace officer may use deadly physical force only when the peace officer reasonably believes that: (a) The crime committed by the person was a felony or an attempt to commit a felony involving the use or threatened imminent use of physical force against a person; or (b) The crime committed by the person was kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or . . . (d) *The crime committed by the person was a felony or an attempt to commit a felony and under the totality of the circumstances existing at the time and place, the use of such force is necessary; or (e) The officer's life or personal safety is endangered in the particular circumstances involved.*") (emphasis added).

For example, Alabama's statute on police use of deadly force tracks the above language. In Alabama, a police officer may use deadly force if the officer reasonably believes it necessary:

- (1) To make an arrest for a felony or prevent the escape from custody of a person arrested for a felony, *or*
- (2) To defend himself or a third party from the immediate use of deadly physical force.¹⁸⁷

This means that if a police officer is trying to arrest a man suspected of shoplifting, a felony in Alabama,¹⁸⁸ the officer is legally permitted to use deadly force against the shoplifter if the officer reasonably believes such force is necessary to effectuate the arrest. This would be the case even if the officer knows that the suspect is unarmed and poses no risk of harm to the officer or another person. While appearing to require proportionality, the Alabama statute allows officers to use deadly force to make an arrest or prevent the escape of a fleeing felon so long as the officer believes that the use of deadly force is reasonably necessary to make that arrest or prevent that escape, even if the officer does not believe that the individual poses an imminent threat of death or serious bodily injury to the officer or others.¹⁸⁹

Similarly, in Alaska, a police officer may use deadly force if she reasonably believes such force is necessary to

arrest or terminate the escape or attempted escape from custody of a person the officer reasonably believes (1) has committed or attempted to commit a felony which involved the use of force against a person; (2) has escaped or is attempting to escape from custody while in possession of a firearm on or about the person; *or* (3) may otherwise endanger life or inflict serious bodily injury unless arrested without delay.¹⁹⁰

This provision sounds reasonable at first glance, but because the word "or" separates the last two clauses, the statute would permit an officer to shoot someone who, while stealing an iPhone from a person on the street, pushed that person.¹⁹¹ The push would constitute the use of force against a person, and if the iPhone was worth over \$750, the theft would constitute a felony in Alaska.¹⁹² Because the Alaska statute does not specify that the felon must have used or threatened *deadly* force upon a person, it permits an officer to use deadly force on someone like our hypothetical iPhone snatcher who has not used and does not threaten to use deadly force.¹⁹³

Another way that state statutes on police use of force can undermine proportionality is by following the old common law rule permitting police officers

187. ALA. CODE § 13A-3-27(b)(1-2) (emphasis added).

188. Theft of property worth more than \$500 but less than \$1,499 is a class D felony under Alabama law. ALA. CODE § 13A-8-4.1.

189. *Id.* § 13A-3-27(b)(1-2).

190. ALASKA STAT. § 11.81.370(a)(1-3) (2015).

191. *Id.*

192. Theft of property worth more than \$750 but less than \$25,000 is a class C felony under Alaska law. ALASKA STAT. § 11.46.130.

193. ALASKA STAT. § 11.81.370(a)(1-3).

to use any amount of force necessary to prevent the escape of a fleeing felon. Surprisingly, some states continued to follow the old common law rule even after it was rejected in *Tennessee v. Garner*.¹⁹⁴ In states that still follow the common law rule today, a police officer is permitted to use deadly force if the officer reasonably believes it necessary to prevent the escape of a fleeing felon, even if the officer does not believe the suspect poses a threat of death or serious bodily injury.

Contrary to common belief, statutes that retain the common law rule by permitting an officer to use deadly force to prevent the escape of a fleeing felon even if the individual does not pose a threat of death or serious bodily injury to the officer or another, are not necessarily unconstitutional even though they contradict the holding of *Tennessee v. Garner*. *Tennessee v. Garner* was a civil suit brought by Garner's estate against the officer who shot Garner. The standards set forth by the U.S. Supreme Court for determining whether force is excessive, and therefore unconstitutional, apply when an officer is sued for excessive force under 42 U.S.C. §1983. State use-of-force statutes, not Supreme Court case law, govern in criminal prosecutions. As Chad Flanders and Joseph Welling explain, "*Garner* involved the application of the [common law] standard within a federal civil rights statute, not in a state criminal prosecution."¹⁹⁵ "The standards for criminal liability in a state criminal prosecution do not have to mimic the standards for a constitutional tort."¹⁹⁶ In states that adhere to the common law rule, an officer may be able to escape criminal liability if prosecuted for his use of deadly force even if the officer's actions could subject him to Section 1983 civil liability under *Tennessee v. Garner*.¹⁹⁷

2. *Necessity*

In most states, a civilian charged with murder or manslaughter claiming self-defense would need to show he or she reasonably believed it was *necessary* to use deadly force to counter a threat of death or serious bodily injury. If the civilian could have used nondeadly force to escape the threatened harm, it would be hard to conclude that the civilian's belief in the necessity of using deadly force was a reasonable belief. This is because a less deadly alternative was available.

Most state laws on police use of deadly force are silent on whether the jury may consider whether less deadly alternatives to using deadly force were avail-

194. See, e.g., ALA. CODE § 13A-3-27(b)(1); MISS. CODE ANN. § 97-3-15 (1)(d) (2015); OR. REV. STAT. § 161.239 (1)(d) (2015); 12 R.I. GEN. LAWS ANN. § 12-7-9 (2015); S.D. CODIFIED LAWS § 22-16-33 (2015); see also Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After Garner*, 35 ST. LOUIS U. PUB. L. REV. 109, 121 (2015) (naming several states that have retained the common law rule, including Alabama, Mississippi, Missouri, New Mexico, Oregon, Rhode Island, South Dakota, Washington, and Michigan). In 2016, Missouri finally abandoned the common law rule and changed its use-of-force statute to comport with *Tennessee v. Garner*. H.B. 2332, 98th Gen. Assemb. Reg. Sess. (Mo. 2016).

195. Flanders & Welling, *supra* note 194, at 125.

196. *Id.* at 126.

197. *Id.* at 128 ("The substantive criminal law of the fifty states does not have to meet a constitutional standard of reasonableness.").

able to the officer. Courts addressing this issue are split over whether the availability of less deadly alternatives is a relevant factor that the jury may consider when assessing the reasonableness of an officer's use of force. Many courts do not allow the jury to consider whether there were less deadly alternatives, claiming the availability of less deadly alternatives is irrelevant to whether the officer's use of force was reasonable.¹⁹⁸ It is understandable that courts concerned about juries second-guessing the police officer have tended to reject the idea of allowing the jury to consider whether less deadly alternatives were available and not used, but this automatic rejection does not seem appropriate given that assessments of reasonableness are supposed to involve a consideration of the totality of the circumstances.¹⁹⁹ Moreover, if a less deadly alternative was available—if an officer could have effectuated the arrest, prevented the escape, or countered the threat without resorting to deadly force—it is difficult to conclude that the officer's use of deadly force was necessary. For these reasons, many courts do permit the jury to consider whether less deadly alternatives were available but not used in assessing the reasonableness of an officer's use of force.²⁰⁰ Additionally, many police departments recognize that an officer should employ deadly force only if no lesser alternatives are available.²⁰¹

198. See, e.g., *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) (“Alternative measures which 20/20 hindsight reveal to be less intrusive (or more prudent), such as waiting for a supervisor or the SWAT team, are simply not relevant to the reasonableness inquiry.”); *Plakas v. Drinski*, 19 F.3d 1143, 1149 (7th Cir. 1994) (“We do not believe the Fourth Amendment requires the use of the least or even a less deadly alternative so long as the use of deadly force is reasonable”); *United States v. Melendez-Garcia*, 28 F.3d 1046, 1052 (10th Cir. 1994) (“We must avoid ‘unrealistic second-guessing’ of police officers’ decisions . . . and thus do not require them to use the least intrusive means in the course of a detention, only reasonable ones.”); *Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993) (noting that while “other courses of action, such as another stationary roadblock, might conceivably have been available,” a seizure need only be objectively reasonable, not the most prudent course of conduct); *Posey v. Davis*, No. 11-1204, 2012 W. Va. LEXIS 883, *12 (W. Va. 2012) (“[I]t is irrelevant that plaintiff’s expert came forward with other reasonable alternatives [less likely to injure].”); *Mata v. City of Farmington*, 798 F. Supp. 2d 1215, 1219, 1227 (D.N.M. 2011) (“[T]he Fourth Amendment does not require that an officer use the least-intrusive alternative available to protect himself or others so long as the method chosen is reasonable.”); *Taylor v. Hudson*, No. CIV 02-0775 JB/RHS, 2003 U.S. Dist. LEXIS 26736, at *18 (D.N.M. Nov. 21, 2003) (“[E]vidence of less intrusive alternatives is irrelevant to the Fourth Amendment reasonableness inquiry”).

199. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“Because ‘[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,’ however, its proper application requires careful attention to the facts and circumstances of each particular case”) (citation omitted) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

200. *Glenn v. Washington County*, 673 F.3d 864, 872 (9th Cir. 2011) (“[Whether listed in *Graham*,] [o]ther relevant factors include the availability of less intrusive alternatives to the force employed”); *Chew v. Gates*, 27 F.3d 1432, 1440 n.5 (9th Cir. 1994) (noting that “the availability of alternative methods of capturing or subduing a suspect may be a factor to consider” in determining whether a particular application of force was unreasonable); *Estate of Crawley v. McRae*, Case No. 1:13-CV-02042-LJO-SAB, 2015 U.S. Dist. LEXIS 123132, at *78 (E.D. Cal. 2015) (“A court may also consider other factors relevant to the particular circumstances, such as the availability of less intrusive alternatives [in assessing whether an officer used excessive force].”); *Estate of Heenan v. City of Madison*, 111 F. Supp. 3d 929, 942 (W.D. Wis. 2015) (“The failure to use an alternative, non-deadly force is not dispositive, although whether such an alternative existed is a factual question that may weigh on a trier of facts’ ultimate determination of objective reasonableness.”) (emphasis in original); *Becker v. City of Evansville*, No. 3:12-cv-182-WGH-TWP, 2015 U.S. Dist. LEXIS 8414, at *37 (S.D. Ind. 2015) (“[T]he availability of other means of apprehension presents a relevant consideration in the *Graham* analysis”).

201. POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 34 (Mar. 2016) [hereinafter GUIDING PRINCIPLES ON USE OF FORCE] (noting that the Philadelphia Police Department’s mission statement provides, “The application of deadly force is a measure to be employed only in the most extreme circumstances

One exception to the general rule that a civilian claiming self-defense must honestly and reasonably believe it necessary to use deadly force to protect against an imminent threat of death or serious bodily injury is the no-duty-to-retreat rule that exists in a majority of states.²⁰² A no-duty-to-retreat rule has long been a part of American self-defense doctrine.²⁰³ As far back as 1921, the U.S. Supreme Court supported a no-duty-to-retreat rule, noting that “[d]etached reflection cannot be demanded in the presence of an uplifted knife.”²⁰⁴ Today, thirty-three states allow individuals to use deadly force in self-defense without requiring retreat.²⁰⁵ In these no-duty-to-retreat states, sometimes called “Stand Your Ground” states, an individual can use deadly force in self-defense against another individual even if a safe retreat is known and available.

Seventeen states do require individuals using deadly force in self-defense to retreat if a safe retreat is known and available.²⁰⁶ In these duty-to-retreat

and all lesser means of force have failed or could not be reasonably employed.”); *see also* POLICE EXEC. RESEARCH FORUM, AN INTEGRATED APPROACH TO DE-ESCALATION AND MINIMIZING USE OF FORCE 26 (Aug. 2012) [hereinafter AN INTEGRATED APPROACH TO DE-ESCALATION] (noting that the Madison, Wisconsin Police Chief believes officers should try to use the minimum amount of force necessary).

202. *See infra* note 205.

203. Garrett Epps, *Any Which Way but Loose: Interpretive Strategies and Attitudes Toward Violence in the Evolution of the Anglo-American “Retreat Rule,”* 55 LAW & CONTEMP. PROBS. 303, 305 (1992).

204. *Brown v. United States*, 256 U.S. 335, 343 (1921).

205. For a helpful chart with detailed information on stand-your-ground laws by state, see Tamara F. Lawson, *Stand Your Ground Laws 50 State Table* (Mar. 21, 2014) (unpublished manuscript) (on file with author). ALA. CODE § 13A-3-23(b) (2015); ALASKA STAT. § 11.81.370(b) (2015); ARIZ. REV. STAT. ANN. § 13-410(C) (2015); FLA. STAT. § 776.05(3) (2015); GA. CODE ANN. § 16-3-23.1 (2015); IND. CODE § 35-41-3-2(c)(2) (2015); KAN. STAT. ANN. § 21-5230 (2015); KY. REV. STAT. ANN. § 503.055(3) (West 2006); LA. STAT. ANN. § 14:20(C) (2015); MICH. COMP. LAWS § 780.972(1) (2015); MISS. CODE ANN. § 97-3-15(4) (West 2015); NEV. REV. STAT. § 200.120(2) (2015); N.H. REV. STAT. ANN. § 627:4(III) (2015); N.C. GEN. STAT. § 14-51.3(a) (2015); OKLA. STAT. tit. 21, § 1289.25(D) (2015); 18 PA. CONS. STAT. § 505(b)(2.3) (2015); S.C. CODE ANN. § 16-11-440(C) (2015); S.D. CODIFIED LAWS § 22-18-4 (2015); TENN. CODE ANN. § 39-11-611(2) (2015); TEX. PENAL CODE ANN. § 9.32(c) (West 2015); UTAH CODE ANN. § 76-2-401 (West 2015); W. VA. CODE § 55-7-22(b) (2015); WIS. STAT. § 939.48(1)(a) (2015); *California v. Zuckerman*, 132 P.2d 545, 549 (Cal. Dist. Ct. App. 1942); *People v. Toler*, 9 P.3d 341, 347 (Colo. 2000); *State v. McGreevey*, 105 P. 1047, 1051 (Idaho 1909); *People v. Hughes*, 360 N.E.2d 1363, 1369–70 (Ill. App. Ct. 1977); *State v. Bingman*, 745 P.2d 342, 348 (Mont. 1987); *State v. Horton*, 258 P.2d 371, 373 (N.M. 1953); *State v. Sandoval*, 156 P.3d 60, 64 (Or. 2007); *State v. Hatcher*, 706 A.2d 429, 435 (Vt. 1997); *Foote v. Commonwealth*, 396 S.E.2d 851, 855 (Va. Ct. App. 1990); *State v. Redmond*, 78 P.3d 1001, 1003 (Wash. 2003). At the time this Article was being written, the Ohio State Legislature was considering legislation that would eliminate the duty to retreat. Jackie Borchardt, *Concealed Carry Bill with ‘Stand Your Ground’ Provision: How They Voted*, CLEVELAND.COM (Mar. 21, 2014, 2:13 PM), http://www.cleveland.com/open/index.ssf/2014/03/concealed_carry_bill_with_stan.html (noting that the Ohio State House passed HB 203, eliminating the duty to retreat. House Bill 203 died in the Senate due to opposition from the Ohio Prosecuting Attorneys Association and the Fraternal Order of Police of Ohio. Andrew Shepper-son, *Stand-Your-Ground Gun Bill Revived in Ohio*, GUNS.COM (Aug. 16, 2017), www.guns.com/2017/08/16/stand-your-ground-gun-bill-revived-in-ohio/. On August 15, 2017, the Ohio Senate introduced Senate Bill 180, which would eliminate the duty to retreat. *Id.*; Jason Aubry, *Ohio Senate Debates Proposed ‘Stand Your Ground’ Bill*, NBC4i (Nov. 14, 2017, 6:41 PM), <http://nbc4i.com/2017/11/14/ohio-senate-debates-proposed-stand-your-ground-bill/>. Senate Bill 180 was referred to the Judiciary Committee on September 7, 2017. *Senate Bill 180*, The Ohio Legislator, <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA132-SB-180>.

206. ARK. CODE ANN. § 5-2-607(b)(1)(A) (2015); CONN. GEN. STAT. § 53a-19(b) (2015); DEL. CODE ANN. tit. 11, § 464(c)(2) (2015); HAW. REV. STAT. § 703-304(5)(b) (2015); ME. STAT. ANN. tit. 17-A, § 108(2)(C)(3)(a) (2015); NEB. REV. STAT. ANN. § 28-1409(4)(b) (2015); N.J. STAT. ANN. § 2C:3-4(b)(2)(b) (West 2015); N.Y. PENAL LAW § 35.15(2)(a) (McKinney 2015); N.D. CENT. CODE § 12.1-05-07(2)(b) (2015); *State v. Sedig*, 16 N.W.2d 247, 250 (Iowa 1944); *Redcross v. State*, 708 A.2d 1154, 1157–58 (Md. Ct. Spec. App. 1998); *Commonwealth v. Toon*, 773 N.E.2d 993, 999 (Mass. App. Ct. 2002); *State v. Edwards*, 717 N.W.2d

states, if a safe retreat is known and available to the defendant and she uses deadly force without retreating, she loses the right to claim self-defense.²⁰⁷

Some states do not require retreat but allow the jury to consider whether a safe retreat was known and available in assessing the reasonableness of the defendant's belief in the need to act in self-defense.²⁰⁸ In these jurisdictions, if a safe retreat was known and available to the defendant, the jury may rely on this fact to decide that it was not reasonable for the defendant to believe he needed to use deadly force to protect himself from imminent death or serious bodily injury.²⁰⁹

While a majority of states do not impose a duty to retreat prior to using deadly force in the civilian context, most states do require a person who is the initial aggressor to retreat prior to using deadly force unless the initial aggressor completely withdraws from the affray and successfully communicates his withdrawal to the other person.²¹⁰ This is the rule even in Stand-Your-Ground states. In contrast, most statutes on police use of force do not contain an initial aggressor limitation.

III. MODEL LEGISLATION

In this Section, I propose model legislation on police use of deadly force that would require a finding that both an officer's beliefs and actions were reasonable before an officer's use of deadly force could be deemed justifiable.²¹¹ My model statute is different from most police use-of-force statutes in several ways. First, it specifies that jurors must consider the reasonableness of the officer's actions, not just the reasonableness of his beliefs.

Second, my model statute, unlike most current statutes on when police use of force is justifiable, lists three factors the jury must consider when trying to decide whether an officer's use of force was reasonable. What counts as a rea-

405, 413 (Minn. 2006); *State v. Miller*, 653 S.W.2d 222, 224 (Mo. Ct. App. 1983); *State v. Walker*, 598 N.E.2d 89, 90 (Ohio Ct. App. 1991); *State v. Silvia*, 836 A.2d 197, 200 (R.I. 2003); *State v. Jackson*, 681 S.E.2d 17, 21 (S.C. Ct. App. 2009); *Baier v. State*, 891 P.2d 754, 760 (Wyo. 1995).

207. Under what is known as the castle doctrine, if one is attacked in one's home in a duty-to-retreat state, one need not retreat before using deadly force even if a safe retreat is known and available. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* §18.02[C][3] (7th ed. 2015) (citing *Wilson v. State*, 7 A.3d 197, 204 n.3 (Md. 2010)).

208. *Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979) (holding that the law of the District of Columbia "does not impose a duty to retreat but does allow a failure to retreat, together with all the other circumstances, to be considered by the jury in determining if there was a case of true self-defense"); *State v. Wenger*, 593 N.W.2d 467, 471 (Wis. Ct. App. 1999) (noting that under Wisconsin law, the ability to retreat "goes to the reasonableness of the defendant's conduct").

209. See, e.g., *Wenger*, 594 N.W.2d at 471 ("[W]hether the opportunity to retreat was available may be a consideration regarding whether the defendant reasonably believed the force used was necessary to prevent or terminate the interference.").

210. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* (6th ed. 2012) (noting that "the only way [a deadly aggressor] may regain the right of self-defense is by withdrawing in good faith from the conflict and fairly communicating that fact, expressly or impliedly, to his intended victim").

211. I have proposed a similar change to the law of self-defense. See Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 *BUFF. CRIM. L. REV.* 191, 236-37 (1998) [hereinafter Lee, *The Act-Belief Distinction in Self-Defense Doctrine*].

sonable use of force will change over time, but because the meaning of reasonableness evolves in specific doctrinal contexts, the more meaning law-makers can give to the term “reasonableness,” the better.²¹²

One of the factors specified in my proposal—whether the deceased or injured person was or appeared to be in possession of a deadly weapon and refused an order to drop the object or any other order reasonably related to officer safety—is obviously relevant. A jury could find an officer’s use of deadly force was reasonable if the suspect had or appeared to have a deadly weapon and refused orders to drop it. Even in an open-carry state (a state that permits citizens with the proper licensing to carry firearms in public), it is reasonable for an officer to view a person carrying a gun as potentially dangerous.²¹³ An officer cannot know whether an individual with a gun is a law-abiding citizen or a person who will not hesitate to shoot the officer. Anyone with a gun can lift, point, and fire it within a matter of seconds. It is not reasonable to ask an officer to wait until a person who has refused an order to drop a gun starts to lift it before the officer can fire; if the officer does wait, it may be too late.²¹⁴

The second factor—whether the officer engaged in de-escalation measures before using deadly force—is also relevant to the question whether the officer’s use of deadly force was reasonable because it goes to the necessity of using that force. De-escalation techniques include increasing distance between an officer and a subject, trying to calm down a combative subject, waiting for backup and a supervisor to arrive, and trying to resolve situations without deadly force when a suspect is unarmed.²¹⁵ If an officer rushes into a situation and immediately uses deadly force without first trying to take steps to peacefully resolve the situation, it is difficult to say that the officer’s use of deadly force was reasonable.

More and more police organizations are recognizing de-escalation as a way to make policing safer. For example, in January 2017, “[a] group of 11 national police organizations issued a model policy for police departments nationwide that for the first time incorporates the concept of ‘de-escalation’ when an officer is facing the choice of using deadly force.”²¹⁶ The model policy states that “[a]n officer shall use de-escalation techniques and other alternatives to higher levels of force consistent with his or her training whenever possible and appropriate

212. California Supreme Court Justice Goodwin Liu made this point at the ALI’s Annual Meeting in May 2017 during discussion of the ALI’s Policing Project. Justice Goodwin Liu, American Inst. 95th Annual Meeting (May 2017).

213. *Gun Carry Laws Can Complicate Police Interactions* (NPR radiobroadcast July 19, 2016), <http://www.npr.org/2016/07/19/486453816/open-carry-concealed-carry-gun-permits-add-to-police-nervousness>.

214. See J. Pete Blair et al., *Reasonableness and Reaction Time*, 14 POLICE Q. 323, 336 (2011) (explaining that the process of perceiving a suspect’s movement, interpreting the action, deciding on a response, and executing the response generally takes longer for a police officer than it will take a suspect to shoot, even when the officer already has his gun aimed at the suspect); see also John Z. Banzhaf, *Did Scott in Charlotte Point Gun at Officers?—Question May Be Irrelevant*, VALUEWALK (Sept. 23, 2016, 3:29 PM), <https://www.valuewalk.com/2016/09/keith-scott/>; CRAWFORD, *infra* note 224 (discussing the action-reaction gap in time).

215. Tom Jackman, *Police Groups Add ‘De-escalation’ to Use of Force Policy*, WASH. POST (Jan. 17, 2017), <https://www.washingtonpost.com/news/true-crime/wp/2017/01/17/national-police-groups-add-de-escalation-to-new-model-policy-on-use-of-force/>.

216. *Id.*

before resorting to force and to reduce the need for force.”²¹⁷ The Police Executive Research Forum, also known as “PERF,” a think tank devoted to researching issues involving the police, also supports de-escalation measures.²¹⁸

The third factor—whether the officer engaged in any pre-seizure conduct that increased the risk of a deadly confrontation—is also relevant to the question of whether the officer’s use of deadly force was reasonable. If the officer created the conditions leading to the need to use deadly force, this suggests that his use of deadly force was not necessary since the need to use deadly force could have been avoided from the beginning. For example, an officer who jumps in front of a moving vehicle for no reason, then shoots the driver, claiming that at that moment he reasonably believed that it was necessary to use deadly force to protect himself from death, has engaged in pre-seizure conduct (jumping in front of the moving vehicle for no good reason) that increased the risk of a deadly confrontation. Indeed, the officer in this hypothetical created the need to use deadly force when that need could have been completely avoided if the officer had not jumped in front of the vehicle. Whether the jury should be permitted to consider an officer’s pre-seizure conduct is an issue that has split the lower courts.²¹⁹ As explained in greater detail below, my model statute takes the position that pre-seizure conduct is relevant and should be considered in assessing the reasonableness of an officer’s actions.²²⁰

Third, unlike most use-of-force statutes, my model statute tracks traditional self-defense doctrine, explicitly requiring necessity, proportionality, and attention to timing akin to the imminence requirement in traditional self-defense doctrine. Instead of asking whether the threatened force was imminent, however, my model statute asks whether the officer’s use of force was immediately necessary. This shift in focus from the imminence of the threatened force to whether the use of force was immediately necessary is an innovation borrowed from the Model Penal Code.²²¹ It has already been adopted by a few states,²²² and is explained in more detail below.

217. NATIONAL CONSENSUS POLICY ON USE OF FORCE 12–23 (Jan. 2017) (defining de-escalation as “[t]aking action or communicating verbally or nonverbally during a potential force encounter in an attempt to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation without the use of force or with a reduction in the force necessary” and noting that de-escalation “may include the use of such techniques as command presence, advisements, warnings, verbal persuasion, and tactical repositioning”).

218. See, e.g., AN INTEGRATED APPROACH TO DE-ESCALATION, *supra* note 201, at 12–13 (discussing need for de-escalation training); GUIDING PRINCIPLES ON USE OF FORCE, *supra* note 201, at 40 (recommending that police departments adopt policies and orders making it clear that de-escalation is the preferred tactically-sound approach in many critical incidents). The 2016 report provides that “[d]e-escalation policy should . . . include discussion of proportionality, using distance and cover, tactical repositioning, “slowing down” situations that do not pose an immediate threat, calling for supervisory and other resources, etc.”). GUIDING PRINCIPLES ON USE OF FORCE, *supra* note 201, at 40.

219. See *infra* notes 249, 250 & 254.

220. See Cynthia Lee, *Officer Created Jeopardy: Pre-seizure Conduct and the Reasonableness of a Police Officer’s Use of Deadly Force* (unpublished manuscript) (on file with author).

221. MODEL PENAL CODE § 3.04 (AM. LAW INST. 2016) (“[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”).

222. HAW. REV. STAT. § 703-307(1) (2015) (“[T]he use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is

Fourth, my model statute imports the concept of imperfect self-defense into the police use-of-force arena. If an officer is charged with murder, the fact finder would be permitted to find the officer not guilty of murder but guilty of voluntary manslaughter if, for example, the officer's belief in the need to use deadly force was honest but unreasonable. Allowing the fact finder to find the officer charged with murder guilty of the lesser offense of manslaughter as opposed to facing an all-or-nothing choice between guilty and not guilty of murder may reduce the risk of a mistrial from a hung jury.

I outline my proposed model statute below, show how the model statute would apply in real life, and then address possible objections to my proposal.

A. *Model Legislation on Police Use of Deadly Force*

I propose that states replace or supplement their current statutes on police use of force with the following model statute. My model statute addresses only the question of when police can justifiably use deadly force. Current state statutes on police use of force would still govern in cases in which an officer used nondeadly force.

Model Statute on Police Use of Deadly Force

A. A police officer is justified in the use of deadly force if:

The officer honestly and reasonably *believed* deadly force was immediately necessary to protect the officer or another from the threat of death or serious bodily injury, and

The officer's *actions* were reasonable given the totality of the circumstances.

B. The reasonableness of an officer's beliefs and actions should be assessed from the perspective of a reasonable officer in the defendant officer's shoes.

C. The jury must consider the following factors along with any other factors it deems relevant as part of the totality of the circumstances when assessing whether the officer's beliefs and actions were reasonable:

1. Whether the deceased or injured person was, or appeared to be, in possession of a deadly weapon or an object that could be used as a deadly weapon and refused to comply with an order to drop the object or any other order reasonably related to officer or public safety prior to being shot;

immediately necessary to effect a lawful arrest."); MO. ANN. STAT. § 563.046.3(2) (2015) ("In effecting an arrest or in preventing an escape from custody, a law enforcement officer is justified in using deadly force . . . (2) when the officer reasonably believes that such use of deadly force is immediately necessary to effect the arrest or prevent the escape from custody and also reasonably believes the person to be arrested . . . (c) May otherwise endanger life or inflict serious physical injury to the officer or others unless arrested without delay."). While the Hawaii statute appears to require just a subjective belief that the force used was immediately necessary, section 703-300 defines the word "believes" as "reasonably believes." HAW. REV. STAT. §703-300.

No. 2] REFORMING THE LAW ON POLICE USE OF DEADLY FORCE 665

2. Whether the officer engaged in de-escalation measures, such as taking cover, waiting for backup, trying to calm the deceased or injured person, and/or using less lethal types of force prior to the use of the force in question, if such measures were feasible; and
3. Any pre-seizure conduct by the officer that increased the risk of a deadly confrontation.
- D. In cases where an officer has been charged with murder, if the officer acted with an honest, but unreasonable, belief in the need to use deadly force or if his beliefs were reasonable but his actions unreasonable, the officer may be found not guilty of murder and guilty of voluntary manslaughter.

E. Definitions

1. “Deadly force” constitutes force likely or intended to create a substantial risk of death or serious bodily injury.
2. A “deadly weapon” is an inanimate object that, as used or intended, is likely to cause death or serious bodily injury.

A few clarifications are in order. First, the short list of factors in the model statute is not meant to be exhaustive. It is meant to provide guidance to the jury by clarifying a few factors they should consider when assessing the reasonableness of the officer’s use of deadly force. Rather than provide a long list that might confuse the jury, the model statute keeps things simple by listing just three factors.

Second, like current law, the proposed reform does not require that the police officer be correct in his or her assessment of the threat. If an officer thought a suspect was armed and it turns out the suspect was unarmed, this does not mean that the officer was unjustified in using deadly force. The proposed reform just requires the fact finder to find that both the officer’s beliefs and actions were reasonable, not that the officer was right.

Third, like current law, the model statute instructs the fact finder to assess the reasonableness of the officer’s beliefs and actions from the perspective of a reasonable officer in the shoes of the defendant officer on the scene. Unlike civilians, police officers undergo extensive training, including training on threat perception, and are more attuned than the average citizen to behaviors indicative of threat.²²³ Therefore, it makes sense to assess the reasonableness of an officer’s beliefs and actions from the perspective of a reasonable officer in the defendant officer’s shoes.

Assessing the reasonableness of an officer’s use of deadly force from the perspective of a reasonable officer in the shoes of the defendant officer comports with two concepts that Kimberly A. Crawford, a retired FBI Special Agent, advises are universal to all law enforcement training regarding the use of force:

²²³. See Lee, *Race, Policing and Lethal Force*, *supra* note 18, at 155–59 (discussing shooter-bias studies finding police officers better than civilians at deciding when to shoot).

(1) threat identification and (2) action v. reaction.²²⁴ Threat identification, Crawford tells us, refers to the fact that human beings are not born knowing how to recognize a threat.²²⁵ Being able to identify a threat is something that is learned through training.²²⁶ Law enforcement officers are trained to scrutinize an individual's behavior for signs signaling their intent.²²⁷ If an individual is believed to be armed, officers are taught to focus on the individual's hands.²²⁸ "If the hands move in the direction of a 'high risk area' – an area where a weapon might be concealed, such as inside a jacket, towards the waistband of pants, or under the seat of a car, well-trained officers will immediately identify this as a serious threat."²²⁹

The concept of "action v. reaction" "is simply the recognition that there is a certain amount of time required for every person to recognize a stimulus, formulate a response to that stimulus, and then carry out that response."²³⁰ As applied to a deadly force situation, Crawford explains that:

[A]ction v. reaction refers to the time it takes for an officer to observe the actions of an individual, such as the movement of an individual's hands, perceive those actions as threatening, calculate possible responses to the threat, determine what level of force is necessary, and then complete the reaction.²³¹

Crawford notes that "[t]he practical effect of action v. reaction in deadly force situations is that officers cannot wait to react until they are absolutely certain of an individual's malicious intent."²³² "If an officer waits to be certain that the individual is . . . retrieving a weapon, action v. reaction dictates that the weapon could easily be used against the officer before he or she has an opportunity to respond."²³³

1. *Tracking Civilian Self-Defense Law*

How is the proposed model statute different from current law? First, borrowing from self-defense law that applies to civilians, the proposed statute explicitly includes a necessity, proportionality, and an immediacy requirement. The model statute requires the jury to find that the officer's actions were reasonable, and to help the jury assess the reasonableness of the officer's actions, the model statute directs the jury to consider whether there were less deadly alternatives known and available but not taken. In this sense, the model statute tracks

224. KIMBERLY A. CRAWFORD, LEGAL INSTRUCTION UNIT, FED. BUREAU OF INVESTIGATION, REVIEW OF DEADLY FORCE INCIDENT: TAMIR RICE 3.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 3–4.

the law of self-defense's focus on whether the force used was reasonably necessary. If there were less deadly alternatives, it is difficult to say that the use of deadly force was reasonable.

The model statute also includes a proportionality requirement, specifying that the officer must honestly and reasonably believe deadly force is immediately necessary to protect the officer or another against a threat of death or serious bodily injury. The model statute is thus more restrictive than existing state use-of-force statutes that allow an officer to use deadly force to effectuate an arrest or stop a fleeing felon even if the suspect does not pose a threat of death or serious bodily injury to the officer or anyone else.²³⁴ Requiring proportionality is extremely important in light of the fact that so many state statutes appear to require proportionality when, in fact, they permit officers to use deadly force if necessary to effectuate an arrest or prevent escape even if there is no threat of death or serious bodily injury.

In addition to necessity and proportionality, the model statute, like self-defense doctrine for civilians, requires the jury to focus on the timing of the use of force. Many use-of-force statutes, even those that require proportionality, do not require a finding that the threat of death or serious bodily injury was imminent, as is required in traditional self-defense doctrine.²³⁵ My model statute includes an immediacy requirement in police use-of-force law for the same reasons that imminence is required in self-defense law. If the suspect did not pose an imminent threat of death or serious bodily injury, or if it was not immediately necessary to use deadly force against the suspect at the time the officer shot him, then it is hard to say it was necessary at that moment to shoot him.

Instead of requiring that the threat of death or serious bodily injury be imminent, which is the way an imminence requirement appears in most self-defense statutes, I borrow from the Model Penal Code, which uses the language "immediately necessary" rather than "imminence" in its self-defense provision.²³⁶ At least two states have adopted "immediately necessary" language in their use-of-force statutes.²³⁷ Sometimes a person might need to act in self-defense even though the threat of death or serious bodily injury is not imminent at that moment because if the person waits until the threat of death or serious bodily injury is imminent, it will be too late. Paul Robinson provides a hypothetical that illustrates the difference between traditional self-defense doctrine's focus on the imminence of the threat and the Model Penal Code's focus on whether the force the defendant used was immediately necessary:

Suppose A kidnaps and confines D with the announced intention of killing him one week later. D has an opportunity to kill A and escape each morn-

234. See *supra* note 186 (listing state statutes that appear to include a proportionality requirement, but actually allow the use of deadly force even when the suspect is not threatening deadly force).

235. Flanders & Welling, *supra* note 194, at 117.

236. MODEL PENAL CODE § 3.04 (AM. LAW INST. 2016) ("[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.").

237. See HAW. REV. STAT. § 703-304 (2015); MO. REV. STAT. § 563.046 (2015).

ing as A brings him his daily ration. Taken literally, the *imminent* requirement would prevent D from using deadly force in self-defense until A is standing over him with a knife, but that outcome seems inappropriate. If the concern of the limitation is to exclude threats of harm that are too remote to require a response, the problem is adequately handled by requiring simply that the response be “necessary.” The proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense. If a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier—as early as is required to defend himself effectively.²³⁸

Under traditional self-defense doctrine, D’s claim of self-defense would have to be rejected if he killed A when A was bringing him his daily ration because he would not have been facing an imminent threat of death or serious bodily injury. This is because the word “imminence” is generally understood to mean impending or about to happen.²³⁹

Under the Model Penal Code, in contrast, D would be able to argue self-defense if his use of deadly force was immediately necessary. Arguably, it was immediately necessary for D to use deadly force at that time because that was when D had his only chance to escape near-certain death. Shifting the focus from whether the threat of death or serious bodily injury was imminent to whether the defendant’s need to use deadly force was immediately necessary is fairer to defendants facing situations where the threat is fairly certain even though not impending.

Applied to the law enforcement context, we might imagine a situation where a police officer has the ability to shoot and disable a suspect who has threatened to kill or seriously harm individuals at some specified time in the future. Even though the suspect is not, at that exact moment, posing a threat of imminent death or serious bodily harm, if the officer hesitates and does not act then, the officer may not be able to stop the suspect from killing or seriously injuring the individuals later. For example, suppose a suspect has taken a room full of hostages and threatens to kill one individual each hour beginning in twenty-four hours if the police fail to deliver one million dollars and a helicopter for his escape. A police sharpshooter currently has the suspect in his sight and can take the suspect out if he shoots the suspect at that moment. The threat of death is not imminent because the first hostage is not likely to be killed for another twenty-four hours. The suspect, however, is starting to cover up the windows, so if the police sharpshooter waits another twenty-three hours and fifty-five minutes, he may not have the ability to stop the suspect from killing the hostages because it is unlikely that the suspect will be standing in front of a window at that time. This would be a situation where the threat of death is not imminent but the need to use deadly force is immediately necessary.

238. 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(c)(1), at 78 (1984).

239. *State v. Norman*, 389 S.E.2d 8, 13 (N.C. 1989) (suggesting “imminent” means “about to happen”); *Bechtel v. State*, 840 P.2d 12 n.11 (Okla. Ct. Crim. App. 1992) (noting that the word “imminent” traditionally is understood to mean near at hand, impending, on the point of happening).

2. *De-escalation Measures*

Second, the model legislation explicitly permits the jury to consider whether the officer engaged in de-escalation measures, such as taking cover, talking with the suspect, and using less lethal types of force, if feasible, prior to using deadly force. Many police chiefs already acknowledge that de-escalation tactics should be used and that officers should try to use less deadly alternatives, if feasible, before using deadly force.²⁴⁰

A number of police departments have adopted regulations that instruct officers to engage in de-escalation measures or use deadly force only as a last resort.²⁴¹ Several cities, including Las Vegas and Dallas, have seen a marked reduction in the number of fatal police shootings after implementing de-escalation measures.²⁴²

240. See *supra* notes 255 & 256.

241. See LINCOLN POLICE DEP'T, GENERAL ORDER 1510, FORCE AND CONTROL TECHNIQUES (2016) ("Officers are expected to use de-escalation strategies, when possible, in order to minimize the need for the use of control techniques."); MINNEAPOLIS POLICE DEP'T, SPECIAL ORDER § 5-304, THREATENING THE USE OF FORCE AND DE-ESCALATION (2016) ("Whenever reasonable according to MPD policies and training, officers shall use de-escalation tactics to gain voluntary compliance and seek to avoid or minimize use of physical force. . . . When safe and feasible, officers shall: Attempt to slow down or stabilize the situation so that more time, options and resources are available."); SAN ANTONIO POLICE DEP'T, GENERAL MANUAL § 501 (2015) ("If circumstances allow, Officers should attempt to de-escalate tense situations through 'advisements, warnings, verbal persuasion, and other tactics' to reduce the need for force."); SEATTLE POLICE DEP'T, MANUAL, § 8.100 (2015) ("When safe and feasible under the totality of circumstances, officers shall attempt to slow down or stabilize the situation so that more time, options and resources are available for incident resolution."); see also DALLAS POLICE DEP'T, GENERAL ORDER § 906.01(C), USE OF DEADLY FORCE (2009) ("Deadly force will be used with great restraint and as a last resort only when the level of resistance warrants the use of deadly force") (emphasis added); MIAMI POLICE DEP'T, DEPARTMENTAL ORDER 6, USE OF FORCE (2015) ("Respect for human life requires that, in all cases, deadly force be used as a last resort. . . ."); OAKLAND POLICE DEP'T, DEPARTMENTAL GENERAL ORDER K-3 § 2.1, LETHAL FORCE (2007) (lethal force authorized only if "[a]ll other reasonably available means of apprehending the person have failed, are inadequate, or are immediately unavailable"); PHILA. POLICE DEP'T, DIRECTIVE 10.1, USE OF FORCE – INVOLVING THE DISCHARGE OF FIREARMS (2015) ("The application of deadly force is a measure to be employed only in the most extreme circumstances and all lesser means of force have failed or could not be reasonably employed."); PHX. POLICE DEP'T, OPERATIONS ORDER 1.5, USE OF FORCE (2016) ("Officers are trained to utilize deadly force only as a last resort when other measures are not practical under the existing circumstances.")

242. Las Vegas was once considered one of the deadliest jurisdictions in terms of incidents involving police use of deadly force, but after the Las Vegas Police Department implemented de-escalation training in 2012 as part of a collaborative agreement with the Department of Justice, the number of fatal police shootings and the number of officer-involved shooting incidents plummeted. Ricardo Torres-Cortez, *Feds Praise Metro on Use-of-Force Reforms as Police Shootings Plummet*, L.V. SUN (Jan. 19, 2017, 2:00 AM), <https://lasvegassun.com/news/2017/jan/19/feds-praise-metro-police-transparency-use-of-force/>; see also Mike Blasky, *Federal Report: Las Vegas Police Shootings Down, Department Reforms Up*, L.V. REV.-J. (May 23, 2014, 6:47 AM), <https://www.reviewjournal.com/local/local-las-vegas/federal-report-las-vegas-police-shootings-down-department-reforms-up/>; Daniel Hernandez, *How One of the Deadliest Police Forces in America Stopped Shooting People*, QUARTZ (Dec. 4, 2015), <https://qz.com/565011/how-one-of-the-largest-police-forces-in-america-stopped-shooting-people/>; The Associated Press, *Could Training Stem Police Shootings? Las Vegas Is a Test*, SEATTLE TIMES (June 22, 2015, 9:51 AM), <http://www.seattletimes.com/nation-world/could-training-stem-police-shootings-las-vegas-is-a-test/>. The Dallas Police Department in Dallas, Texas experienced similar results after implementing de-escalation training. David Taffet, *DPD a Model of De-escalation Training*, DALLAS VOICE (July 15, 2016), <http://www.dallasvoice.com/dpd-model-de-escalation-training-10223260.html>. Dallas now has the lowest rate of police shootings of any major city in the United States. *Id.*; Ted Robbins, *Dallas Has Been Called A Leader in Police Training, Transparency*, NPR (July 8, 2016, 5:08 PM), <http://www.npr.org/2016/07/08/485274691/dallas-has-been-called-a-leader-in-police-training-transparency> (noting that the number of complaints alleging excessive and improper use of force by Dallas police officers fell from 147 in 2009 to thirteen through mid-November of 2015); see also Drake Baer, *The Dallas Police Force Is Evidence*

Despite the growing recognition of the benefits of de-escalation by police chiefs and others, many courts still do not permit juries to consider whether less deadly alternatives were available and not used.²⁴³ By including de-escalation and less deadly alternatives as factors for the jury to consider, the model statute gives officers an incentive to engage in de-escalation measures and consider less deadly alternatives before using deadly force. Providing for consideration of de-escalation measures in the law is more likely than a police regulation to encourage a change in police culture since officers know that policies contained in police rules and regulations are not enforceable in a court of law.

Including de-escalation as a factor for the jury's consideration could end up helping police officers who do engage in de-escalation measures prior to using deadly force. An officer who engages in de-escalation measures before using deadly force can credibly assert that there was nothing else he could have done.²⁴⁴

It is important to note that the proposed reform does not require a finding that the officer was unjustified in using deadly force if the officer could have, but did not, engage in de-escalation measures.²⁴⁵ Whether the officer engaged in de-escalation measures prior to using deadly force is merely one factor for the fact finder to consider when assessing the reasonableness of the officer's actions. The model legislation is drafted to encourage the officer to engage in de-escalation measures prior to using deadly force. If an officer does not engage in such

That 'De-escalation' Policing Works, CUT (July 8, 2016, 5:05 PM), <https://www.thecut.com/2016/07/deescalation-policing-works.html> (noting that in 2009, the Dallas Police Department received 147 excessive force complaints and that within five years of implementing de-escalation measures, excessive force complaints were down to fifty-three in 2014) (citing Albert Samaha, *Dallas Officer-Involved Shootings Have Rapidly Declined in Recent Years*, BUZZFEED (July 8, 2016, 8:08 AM), https://www.buzzfeed.com/albertsamaha/dallas-police-numbers?utm_term=.hlzyLEa8b#.anwVyM89v.); Michael A. Cohen, *Dallas Police Department Leads the Way in De-Escalation*, BOS. GLOBE (July 9, 2016), <https://www.bostonglobe.com/opinion/2016/07/08/dallas-police-department-leads-way-escalation/pxvSK7SpFx86m3mV3UuJbl/story.html>; Ryan Grenoble & Andy Campbell, *In the Face of Violence, Dallas Police Vow to Continue De-escalation Tactics*, HUFFINGTON POST (July 8, 2016, 3:29 PM), http://www.huffingtonpost.com/entry/dallas-police-department-de-escalation_us_577fd030e4b0c590f7e91508; Christopher I. Haugh, *How the Dallas Police Department Reformed Itself*, ATLANTIC (July 9, 2016), <https://www.theatlantic.com/politics/archive/2016/07/dallas-police/490583/> (noting that excessive force complaints against the department dropped by 64% over a five-year period). Unfortunately, most states do not require their police officers to engage in de-escalation training. Curtis Gilbert, *Most States Neglect Ordering Police to Learn De-escalation Tactics to Avoid Shootings*, MPR NEWS (May 5, 2017), <http://www.mprnews.org/story/2017/05/05/police-de-escalation-training>.

243. See *supra* note 198. But see *supra* note 200 (citing cases saying that the availability of less deadly alternatives is a relevant factor and may be considered).

244. At Professor Erik Girvan's suggestion, I thought about including a provision that would give police officers a get out of jail free card if the officer or officers engaged in de-escalation measures. See Erik J. Girvan & Grace Deason, *Social Science Evidence in Law: Psychological Case for Abandoning the "Discriminatory Motive" Under Title VII*, 60 CLEV. ST. L. REV. 1057 (2013) (proposing a safe-harbor approach in the Title VII discrimination context). Ultimately, I decided against such a provision because of the difficulty of predicting all possible circumstances in advance. A situation might arise where an officer engages in de-escalation measures, and yet it is not reasonable for the officer to use deadly force. I would prefer to let the jury in each individual case decide whether the officer believed and acted reasonably.

245. This was one problem with the Ninth Circuit's provocation rule, which required a finding that an officer's use of force was unreasonable if the officer's intentional or reckless conduct provoked that violent confrontation and constituted an independent Fourth Amendment violation. *Billington v. Smith*, 292 F3d 1177, 1189 (9th Cir. 2002). I believe the question of whether an officer's use of force was excessive or reasonable should be left to the jury's discretion.

measures, the officer's actions could still be considered reasonable. As one court explained, "unreasonable police behavior before a shooting does not necessarily make the shooting unconstitutional."²⁴⁶ That court, however, also wisely noted, "[b]ut that does not mean we should refuse to let juries draw reasonable inferences from evidence about events surrounding and leading up to the seizure."²⁴⁷

3. *Preseizure Conduct*

Third, the proposed model statute allows the fact finder to consider preseizure conduct or what some have called "officer-created jeopardy."²⁴⁸ The term "preseizure conduct" is used to refer to conduct by the officer prior to the shooting that helped create the dangerous situation or increased the likelihood that deadly force would need to be used to protect the officer or others. Currently, there is a split in the lower courts over whether preseizure conduct of the officer can be considered by the jury when assessing the reasonableness of the officer's use of force.

Many lower courts have held that preseizure conduct by the officer that contributed to creating the risk of a deadly confrontation should not be considered by the jury²⁴⁹ or should be considered only in limited circumstances.²⁵⁰

246. *Gardner v. Buerger*, 82 F.3d 248, 253 (8th Cir. 1996).

247. *Id.*

248. For commentary on whether juries should be allowed to consider an officer's preseizure conduct in assessing the reasonableness of his use of force, see Jeffrey J. Noble & Geoffrey P. Alpert, *State-Created Danger: Should Police Officers Be Accountable for Reckless Tactical Decision Making?*, in *CRITICAL ISSUES IN POLICING* 572–74 (Dunham & Alpert eds. 2015); Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 *COLUM. HUM. RIGHTS L. REV.* 261 (2003); Aaron Kimber, Note, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim*, 13 *WM. & MARY BILL OF RIGHTS J.* 651 (2004).

249. The Second, Fourth, Sixth, and Seventh Circuits do not allow consideration of preseizure conduct, finding such conduct irrelevant to the reasonableness of an officer's use of deadly force. *Terebesi v. Torreso*, 764 F.3d 217, 235 (2d Cir. 2014) ("In cases [where the officer's prior conduct may have contributed to later need to use force], courts in this Circuit and others have discarded evidence of prior negligence or procedural violations, focusing instead on 'the split-second decision to employ deadly force.'"); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) ("[A]ctions leading up to the shooting are irrelevant to the objective reasonableness of [the officer's] conduct at the moment he decided to employ deadly force."); *Dickerson v. McClellan*, 101 F.3d 1151, 1162 (6th Cir. 1996) ("[I]n reviewing the plaintiffs' excessive force claim, we limit the scope of our inquiry to the moments preceding the shooting."); *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994) ("[W]e judge the reasonableness of the use of deadly force in light of all that the officer knew [at the point when the subject charged at him]. We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct."); *Bella v. Chamberlin*, 24 F.3d 1251, 1256 (10th Cir. 1994) ("[W]e scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment.") (quoting *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993)); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) ("[P]re-seizure conduct is not subject to Fourth Amendment scrutiny."); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (events which occurred before the seizure "are not relevant and are inadmissible").

250. The Ninth and Tenth Circuits permit consideration of preseizure conduct under limited circumstances. *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002) (allowing consideration of an officer's intentional or reckless conduct that provokes a violent response in assessing the reasonableness of an officer's defensive use of force only if the officer's preseizure conduct constitutes an independent constitutional violation); *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) (limiting consideration of preseizure conduct of the officer to reckless or deliberate conduct immediately connected with the use of force); *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995) ("The reasonableness of [the officers'] actions depends both on whether the officers were in danger at the precise moment that they used force and on whether [their] own reckless or deliberate

Unfortunately, many of the decisions that disallow consideration of pre-seizure conduct provide little or no explanation of why it makes sense to preclude such consideration, simply stating that officers need to make split-second judgments about the amount of force that is necessary in rapidly evolving situations and that, therefore, pre-seizure conduct is irrelevant to the reasonableness of the officer's use of force.²⁵¹

In *Cole v. Bone*, however, the Eighth Circuit attempted to explain why the jury's focus should only be on the seizure itself, not the events leading up to the seizure, noting that "[t]he Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general."²⁵² This attempted explanation, however, merely states a fact—the Fourth Amendment prohibits unreasonable seizures—but does not explain why the officer's conduct leading up to the moment she uses deadly force is not relevant to the reasonableness of the use of deadly force.

The Seventh Circuit in *Plakas v. Drinski* attempted another explanation: Our historical emphasis on the shortness of the legally relevant time period is not accidental. The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing. . . . [W]e judge the reasonableness of the use of deadly force in light of all that the officer knew. We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct.²⁵³

While the Seventh Circuit's explanation is somewhat more fulsome than the Eighth Circuit's, it still does not explain why an officer's conduct that increased the risk of a deadly confrontation prior to the officer's use of deadly force should not be considered by the fact finder in assessing the overall reasonableness of the officer's actions.

Other courts do permit consideration of pre-seizure conduct, recognizing that such conduct is relevant to the reasonableness of the officer's use of force.²⁵⁴

conduct during the seizure unreasonably created the need to use such force." In 2017, the Supreme Court ruled that the Ninth Circuit's provocation rule was [unconstitutional] in *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017). The Eleventh Circuit and the D.C. Circuit have not yet taken a clear position on whether pre-seizure conduct may be considered in assessing reasonableness in an officer-involved shooting case.

251. See, e.g., *Salim*, 93 F.3d at 92 (holding that the officer's "actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force"); *Greenridge*, 927 F.2d at 792 ("[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 . . . events which occurred before . . . are not probative of the reasonableness of [the officer's] decision to fire the shot.").

252. 993 F.2d 1328, 1333 (8th Cir. 1993).

253. *Plakas*, 19 F.3d at 1150.

254. The First, Third, and Eighth Circuits permit consideration of pre-seizure conduct. See, e.g., *Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005) ("[T]he [trial] court did not abuse its discretion in instructing the jury that 'events leading up to the shooting' could be considered by it in determining the excessive force question."); *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999) ("[W]e want to express our disagreement with

The fact finder is supposed to consider the totality of the circumstances. What the officer did or failed to do before using deadly force is simply part of that totality of circumstances.

There is increasing recognition by police chiefs and others that the decisions leading up to the moment that an officer uses deadly force are relevant to whether the officer's use of deadly force was necessary. As Cathy Lanier, former Chief of Police for the District of Columbia's Metropolitan Police Department, noted: "The question is not 'Can you use deadly force?' The question is, 'Did you *absolutely have to* use deadly force?' . . . And the decisions *leading up to* the moment when you fired a shot ultimately determine whether you had to or not."²⁵⁵

The late John F. Timoney, former First Deputy Commissioner of the New York City Police Department, former Commissioner of Police in Philadelphia, and former Chief of Police in Miami, echoed these concerns, noting:

Too often, we only look at the exact moment when an officer uses deadly force. We also need to "go upstream" and see whether officers are missing opportunities to de-escalate incidents, in order to prevent them from ever reaching the point where a use of force is required or justified.²⁵⁶

While these police chiefs were speaking in the context of training officers to engage in de-escalation strategies, as opposed to urging legal reform, their comments show an increasing recognition of the important role that pre-seizure conduct plays in the decision to use deadly force. Juries in ordinary self-defense cases often consider the defendant's conduct prior to the confrontation in assessing whether the defendant honestly and reasonably believed deadly force was necessary to combat an imminent threat of death or serious bodily injury.²⁵⁷ Juries in officer-involved shooting cases should be allowed to consider pre-seizure conduct as well.

The Supreme Court has not yet explicitly addressed the question of whether pre-seizure conduct of the officer can be considered, but has suggested

those courts which have held that analysis of 'reasonableness' under the Fourth Amendment requires excluding any evidence of events preceding the actual 'seizure.'"); *Gardner v. Buerger*, 82 F.3d 248, 253 (8th Cir. 1996) (suggesting the jury should be permitted to draw "reasonable inferences from evidence about events surrounding and leading up to the seizure" while acknowledging that "unreasonable police behavior before a shooting does not necessarily make the shooting unconstitutional"); *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995) ("We first reject defendants' analysis that the police officers' actions need be examined for "reasonableness" under the Fourth Amendment only at the moment of the shooting. . . . [O]nce it has been established that a seizure has occurred, the court should examine the actions of the government officials leading up to the seizure.").

255. GUIDING PRINCIPLES ON USE OF FORCE, *supra* note 201, at 16.

256. *Id.* at 47.

257. The consideration of pre-shooting conduct by a civilian defendant claiming self-defense often arises in the context of initial-aggressor rules. *See, e.g., Freeze v. State*, 491 N.E.2d 202, 204–05 (Ind. 1986); *Southard v. State*, 422 N.E.2d 325, 331 (Ind. Ct. App. 1981); *Neale v. State*, No. 1406, 2015 Md. App. LEXIS 769, at *26–27 (Md. Ct. Spec. App. May 20, 2015); *State v. Edwards*, 717 N.W.2d 405, 411–12 (Minn. 2006); *State v. Anthony*, 319 S.W.3d 524, 529–30 (Mo. Ct. App. 2010); *State v. Salazar*, No. 45050-6-I, 2000 Wash. App. LEXIS 2541, *10–11 (Ct. App. Dec. 26, 2000).

that pre-seizure conduct should not be considered when assessing whether an officer's use of force was unreasonable under the Fourth Amendment.²⁵⁸ In 2017, the Court had the opportunity to weigh in on this question when ruling on the constitutionality of the Ninth Circuit's provocation rule, but declined to do so, leaving the issue open for future consideration.²⁵⁹

4. *Imperfect Self-Defense*

A fourth way the model statute differs from current law is in its importation of the concept of imperfect self-defense. In the civilian context, some states have recognized the defense of imperfect self-defense, under which a defendant charged with murder can be found not guilty of murder but convicted of voluntary manslaughter if he honestly but unreasonably believed in the need to act in self-defense or used force that was disproportionate to the force threatened and thus unreasonable.²⁶⁰ In such cases, the defendant's claim of self-defense is imperfect either because the defendant cannot show that his belief in the need to act in self-defense was reasonable, a requirement for a perfect self-defense claim, or because he cannot show his use of deadly force was proportionate to the force threatened, another requirement of normal self-defense law. Without imperfect self-defense, the jury would need to choose between finding the defendant guilty of murder or letting the defendant walk.

In an officer-involved shooting case where the officer honestly believed he needed to use deadly force but his belief was unreasonable, the legally appropriate course of action under current law would be to find the officer guilty of murder because his claim of justifiable force would not be perfect. A jury, however, may feel this officer is not as culpable as an officer who intends to kill a suspect without any belief in the need to protect human life. Without an imperfect self-defense doctrine, a jury may acquit the officer who honestly, but unreasonably, believed he was acting justifiably rather than find him guilty of murder. An acquittal, however, would be an unsatisfying result to the family and friends of the victim. The imperfect self-defense doctrine allows the jury to hold the officer accountable for the death he caused yet not label the officer a murderer.

While some may be dismayed that an imperfect self-defense type of option would allow the officer to receive a lighter punishment than if he were convicted of murder, the fact is that many officers are currently not even indicted, and

258. *San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 (2015) (noting that a Fourth Amendment violation cannot be established based merely on "bad tactics that result in a deadly confrontation that could have been avoided").

259. On March 22, 2017, the Court heard oral argument on whether the Ninth Circuit's provocation rule, which rendered an otherwise reasonable use of force unreasonable if an officer intentionally or recklessly provoked the violent confrontation through an independent Fourth Amendment violation, comported with the Fourth Amendment. *County of Los Angeles v. Mendez*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/county-of-los-angeles-v-mendez/> (last visited Jan. 21, 2018). On May 30, 2017, the Court held that the provocation rule did not comport with the Fourth Amendment. *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1547 (2017) (explicitly declining to address whether the fact finder can take account of any unreasonable police conduct prior to the use of force).

260. See, e.g., *In re Christian S.*, 872 P.2d 574, 575 (Cal. 1994).

those who are indicted are often found not guilty.²⁶¹ This may be because when faced with an all-or-nothing choice between finding the officer guilty of murder or finding the officer not guilty, the jury may feel a not-guilty verdict is the better choice.²⁶²

B. *Applying the Model Legislation*

In this Part, I will use the Tamir Rice case to show how the model statute might be applied to an actual case.

1. *Tamir Rice*

At approximately 3:20 PM on November 22, 2014, an individual in Cleveland, Ohio called 911 to report that there was a “guy with a pistol” in the park by the West Boulevard Rapid Transit Station, pointing it at people.²⁶³ At 3:26 PM, the 911 dispatcher requested an available unit to respond to a Code 1 at the Cudell Recreation Center.²⁶⁴ Officers Frank Garmback and Timothy Loehmann advised the dispatcher that they were able to respond.²⁶⁵ The two officers were in a fully marked patrol car and both officers were in uniform.²⁶⁶ Officer Garmback drove the patrol car, and Officer Loehmann was in the front passenger seat.²⁶⁷ The 911 dispatcher told the officers:

[I]t’s at Cudell Rec Center, 1910 West Boulevard, 1-9-1-0 West Boulevard . . . [The caller] said in the park by the youth center there’s a black male sitting on a swing. He’s wearing a camouflage hat, a gray jacket with black sleeves. He keeps pulling a gun out of his pants and pointing it at people.²⁶⁸

The 911 dispatcher did not tell the officers that the caller had also said the gun was “probably fake” and the suspect was “probably a juvenile.”²⁶⁹

The officers arrived at the scene at approximately 3:30 PM.²⁷⁰ At that time, Tamir Rice, a twelve-year-old African American male, was sitting by himself at a gazebo.²⁷¹ According to surveillance video, at 3:30:13 PM, Rice stood up and took three or four steps in the direction of the approaching police car.²⁷² His hands were out of his pocket and midway between his waist and chest.²⁷³ As the

261. Matt Ferner & Nick Wing, *Here’s How Many Cops Got Convicted of Murder Last Year for On-Duty Shootings*, HUFFINGTON POST (Jan 13, 2016, 11:34 AM), http://www.huffingtonpost.com/entry/police-shooting-convictions_us_5695968ce4b086bc1cd5d0da.

262. *Id.*

263. Report by S. Lamar Sims, Esq. to the Office of the Prosecuting Attorney on the officer involved shooting of Tamir Rice on November 22, 2014, at 2–5 (Oct. 6, 2015).

264. CRAWFORD, *supra* note 224, at 1.

265. *Id.*

266. Sims, *supra* note 263, at 7.

267. *Id.* at 6.

268. *Id.*

269. *Id.* at 5.

270. *Id.* at 7.

271. *Id.*

272. *Id.*

273. *Id.*

patrol car came to a stop near the gazebo, Rice's hands dropped to his waistband area.²⁷⁴ At 3:30:23 PM, Officer Loehmann opened the passenger door of the patrol car, firing his gun twice at Rice.²⁷⁵ After Rice fell to the ground, Officer Loehmann moved rapidly around the back of the patrol car to a position behind the rear of the patrol car on the driver's side with his weapon drawn and aimed in Rice's direction.²⁷⁶ At about the same time, Officer Garmback got out of the patrol car with his weapon drawn and moved around the front of the patrol car to a position near the front-right bumper.²⁷⁷ Both officers arrived at their positions of cover at 3:30:32 PM.²⁷⁸ "The surveillance video shows that the critical events took place in less than ten seconds."²⁷⁹

The Office of the Prosecuting Attorney for the City of Cleveland, Ohio retained two experts to review the case and render an opinion as to whether Officer Loehmann's use of deadly force was reasonable or excessive.²⁸⁰ Both experts evaluated Officer Loehmann's use of deadly force under the constitutional standard, applying *Graham v. Connor* rather than Ohio's law regarding the use of force in self-defense.²⁸¹ Both concluded that Officer Loehmann's use of deadly force was reasonable and therefore justified.²⁸² These reports were presented to a grand jury, which declined to indict Officer Loehmann.²⁸³ I review

274. *Id.*

275. *Id.*; see also TIMOTHY J. MCGINTY, CUYAHOGA COUNTY PROSECUTOR'S REPORT ON THE NOVEMBER 22, 2014 SHOOTING DEATH OF TAMIR RICE 4, 31 (noting that Officer Loehmann fired at Rice twice, hitting him once).

276. Sims, *supra* note 263, at 7.

277. *Id.*

278. *Id.*

279. *Id.* For a video of the shooting, see *Tamir Rice: Police Release Video of 12-year-old's Fatal Shooting* – Video, GUARDIAN (Nov. 26, 2014, 6:07 PM), <https://www.theguardian.com/us-news/video/2014/nov/26/cleveland-video-tamir-rice-shooting-police>.

280. See CRAWFORD, *supra* note 224, at 1; Sims, *supra* note 263, at 1.

281. CRAWFORD, *supra* note 224, at 2 ("The only constitutional provision at issue when law enforcement officers seize[d] an individual by using deadly force is . . . the Fourth Amendment . . ."); Sims, *supra* note 263, at 10 ("[W]here issues arise regarding the criminality of use of force by police officers, Ohio courts have looked to Federal constitutional analysis and principles.").

282. CRAWFORD, *supra* note 224, at 7 ("[I]t is my conclusion that Officer Loehmann's use of deadly force falls within the realm of reasonableness under the dictates of the Fourth Amendment."); Sims, *supra* note 263, at 14 ("I conclude that Officer Loehmann's belief that Rice posed a threat of serious physical harm or death was objectively reasonable as was his response to that perceived threat.").

283. Teddy Cahill et al., *Calls for Calm After Grand Jury Declines to Indict Officers in Death of Tamir Rice*, WASH. POST (Dec. 29, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/12/28/tamir-rice-grand-jury-announcement-expected-monday/>. It is interesting that the prosecutor presented these two reports, which cleared the officers of any wrongdoing, to the grand jury. Ordinarily, the prosecutor leading a grand jury proceeding presents evidence that supports an indictment, not evidence that suggests the defendant is innocent. While some states require the prosecutor to present exculpatory evidence to the grand jury, the U.S. Supreme Court has held that a prosecutor has no constitutional duty to present exculpatory evidence to the grand jury. *United States v. Williams*, 504 U.S. 36, 55 (1992). Likewise, in Ohio, there is no law requiring the prosecutor to present exculpatory evidence to the grand jury. See *State v. Ball*, 595 N.E.2d 502, 503 (Ohio Ct. App. 1991) ("R.C. 2939.01, *et seq.* imposes no statutory duty upon the prosecutor to present exculpatory evidence to the grand jury."). One appellate court in Ohio, however, has held that "in the interest of justice, if the prosecuting party is aware of any substantial evidence negating guilt he should make it known to the grand jury, at least where it might reasonably be expected to lead the jury not to indict." *Mayes v. City of Columbus*, 664 N.E.2d 1340, 1348 (Ohio Ct. App. 1995).

one of these reports below—the report that provides the most detailed explanation supporting the conclusion that Officer Loehmann’s use of deadly force was reasonable under U.S. Supreme Court precedents.

2. *Kimberly A. Crawford’s Report*

Crawford, a retired FBI Special Agent previously assigned to the Legal Instruction Unit, starts her report by noting that the Fourth Amendment does not require a law enforcement officer to be correct, but only requires that he act with objective reasonableness.²⁸⁴ She also notes that in *Graham v. Connor*, the Supreme Court specified that the assessment of whether an officer’s use of force is reasonable must be viewed “from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight.”²⁸⁵ Crawford emphasizes that the relevant facts are only those facts known to the officer at the time the officer made the decision to use force.²⁸⁶ Crawford notes that information acquired after the shooting, including the fact that Rice was twelve years old and that the weapon in question was an airsoft gun, not a real gun, is not relevant to a constitutional review of Officer Loehmann’s actions.²⁸⁷ Likewise, the 911 caller’s comments to the dispatcher speculating that the individual he was calling about might have been a minor and that the weapon in question was probably fake should not be considered because this information was not conveyed to the officers who responded to the 911 dispatcher’s call for help.²⁸⁸

a. Threat Identification and Action v. Reaction

Applying the concepts of threat identification and action v. reaction discussed above,²⁸⁹ Crawford found that Officer Loehmann’s “response was a reasonable one.”²⁹⁰ Crawford explains:

When Officers Garmback and Loehmann arrived on the scene, Officer Loehmann was on the passenger side of the vehicle which was within close proximity to Rice. At the time, Rice was reportedly armed with a handgun, and Officer Loehmann was without cover. Following universal training and procedures, Officer Loehmann’s attention would be focused on Rice’s hands as they moved towards his waist band and lifted his jacket. Unquestionably, the actions of Rice could reasonably be perceived as a serious threat to Officer Loehmann. Waiting to see if Rice came out with a firearm would be contrary to action versus reaction training. Considering Officer Loehmann’s close proximity to Rice and lack of cover, the need to react quickly was imperative. Delaying the use of force until Officer Loehmann

284. CRAWFORD, *supra* note 224, at 2 (“It is significant that the Fourth Amendment does not require a law enforcement officer to be *right* when conducting a seizure. Rather, the standard is one of objective reasonableness.”) (emphasis in original).

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *See supra* text accompanying notes 224–29.

290. CRAWFORD, *supra* note 224, at 4.

could confirm Rice's intentions would not be considered a safe alternative under the circumstances.²⁹¹

b. Age

Crawford also discusses the fact that Tamir Rice was only twelve years old at the time of the shooting. Crawford notes that both officers said they thought Rice was in his late teens or early twenties.²⁹² Empirical research suggests a common tendency by both civilians and police officers to overestimate the age of Black youths.²⁹³ Crawford opines that whether Rice looked his age or not is irrelevant in the assessment of the reasonableness of Officer Loehmann's use of force.²⁹⁴ She explains that "[a] twelve-year-old with a gun, unquestionably old enough to pull a trigger, poses a threat equal to that of a full-grown adult in a similar situation."²⁹⁵ Crawford then discusses the use of interactive video scenarios to train FBI agents on the Department of Justice's use-of-deadly-force policy.²⁹⁶ One of these scenarios requires the agent to confront a mildly handicapped fifteen-year-old with a gun.²⁹⁷ Most agents focused on the individual's behavior, rather than his apparent disability or age.²⁹⁸ The few agents who did take note of the subject's age or disability, and consequently hesitated to use deadly force, were not able to react in a timely manner when the subject quickly raised the gun and fired several shots.²⁹⁹ The point of this training scenario, Crawford notes, was to illustrate that a firearm in the hands of *any* person capable of pulling the trigger can pose a serious threat regardless of the holder's physical or mental development.³⁰⁰

c. Toy Gun

Crawford also addresses the fact that Rice was in possession of an airsoft gun, not a real handgun, in her report.³⁰¹ Crawford explains that this after-acquired fact is not relevant to whether the officer's decision to use deadly force was reasonable in the moment since the officer did not have any information to suggest that the weapon was anything but a real handgun.³⁰² Apparently, at some point before the day in question, the gun, which belonged to Rice's friend, had been broken and was fixed by the friend's father, but the father was unable to

291. *Id.*

292. *Id.*

293. Goff et al., *supra* note 46, at 532, 535. Most of the photos of Tamir Rice in the news media depict a thin, youthful looking boy. At the time he was shot, Rice was 5 foot 7 inches tall and approximately 200 pounds. Sims, *supra* note 263, at 9.

294. CRAWFORD, *supra* note 224, at 4–5.

295. *Id.* at 5.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

get the orange safety tip back on the end of the muzzle.³⁰³ Therefore, the gun that Rice had in his possession the day he was shot did not have the orange safety tip that would have indicated to officers that it was a toy gun. At least one witness (other than the person who called 911) thought the gun was a real gun until Rice showed her the little green plastic balls that he was using as ammunition.³⁰⁴

Special Agent Crawford's report is extremely persuasive. It is true that when assessing the reasonableness of an officer's use of force, only the facts known to the officer or the facts that the officer should have known at the time are relevant. It is not fair to consider facts acquired after the incident. It is also true that officers are trained to recognize threats that the ordinary civilian might not recognize.³⁰⁵ It is true that it takes time to recognize a threatening action, calculate possible responses to that threat, and then act.³⁰⁶ Under current Supreme Court law on when the use of force is unreasonable or excessive and thus unconstitutional, Crawford's analysis is largely correct.

Under my model statute, however, a jury could reach a different conclusion. Recall that under my model statute, the jury would be permitted to consider any pre-seizure conduct by the officer or officers involved that increased the risk of a deadly confrontation in assessing whether their actions were reasonable. In this case, the video surveillance shows that Officer Garmback drove right up to the gazebo where Rice was sitting, putting Officer Loehmann in a very dangerous position.³⁰⁷ Officer Loehmann exited the car, even though by doing so, he put himself in a very vulnerable position without cover and increased the risk that deadly force would be necessary to protect his safety.³⁰⁸ The jury would also be permitted to consider whether the officers could have but did not engage in any de-escalation measures. Here, one might argue that Officer Garmback could have stopped the patrol car further away so both officers could have gotten out of the patrol car and taken cover before engaging with Rice. If Officer Garmback had stopped the patrol car further away from Rice, the officers could have tried to talk with Rice instead of immediately firing upon him. They could have asked or told him to drop the gun and walk away from it with his hands above his head.³⁰⁹ In this case, while it appeared that Rice had a real gun, the officers never ordered him to drop it.

A prosecutor could argue that a reasonable officer would have known, and Officer Garmback should have known, that driving the patrol car within a few feet of an individual with a gun would leave his partner vulnerable and without

303. Sims, *supra* note 263, at 2.

304. *Id.* at 4.

305. Lee, *Race, Policing and Lethal Force*, *supra* note 18, at 169 (noting that studies have found police officers are better than ordinary civilians at recognizing whether or not an individual has a gun).

306. See Blair et al., *supra* note 214, at 336.

307. See Sims, *supra* note 263, at 13 (noting that the police car driven by Officer Garmback stopped within just ten feet of Rice).

308. *Id.* at 12.

309. One might object that this sounds like a lot of Monday-morning quarterbacking, which is precisely what the *Graham v. Connor* court warned was not appropriate. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989). Juries, however, are tasked with looking at the totality of the circumstances in assessing whether those circumstances support a finding that the officer's use of force was reasonable, and it is the job of the attorneys to explain to the jury which facts are or are not relevant.

cover. Both officers knew, or should have known, that it would be wise to take cover, then try to talk with Rice and encourage him to drop the gun, but they did not take these actions prior to the fatal shooting.³¹⁰ If they had, perhaps they would have realized from his voice that Rice was not an adult. In light of the objective facts, a jury could conclude that the officers' actions were not reasonable even though it may have been reasonable at the moment Officer Loehmann shot Rice for him to *believe* it was necessary to do so to protect himself from a threat of death.³¹¹

Not mentioned in either Crawford's nor Sims's report, but found in Cuyahoga County Prosecutor Timothy J. McGinty's report on the November 22, 2014 shooting death of Tamir Rice, is the fact that it had recently snowed and the ground was wet and covered with wet leaves and snow.³¹² McGinty noted, "Due to the conditions, the police car slid about 40 feet and stopped right in front of the gazebo. Simultaneously with the car sliding, Tamir took a couple of steps northwest toward the open field, and then approached the sliding police car."³¹³ This additional information changes the equation, suggesting Officer Garmback should not be faulted for putting his partner in a vulnerable and dangerous situation if he did not intentionally drive the patrol car right up to the gazebo. A jury with this additional information about the wet, slippery road conditions described in Prosecutor McGinty's report could decide that the officers believed and acted reasonably.

Under my model statute, it would be up to the jury to decide whether, under the totality of the circumstances, the officer or officers in question believed and acted reasonably. It is appropriate in cases involving contested facts for a jury to decide such matters. In some cases, we may not like what the jury decides, but it is the jury's prerogative, as the conscience of the community, to make these difficult decisions.

Another piece of information that Crawford did not address in her report was the fact that, prior to joining the Cleveland Police Department, Officer Loehmann "had resigned from another department after being found unfit for duty and recommended for dismissal."³¹⁴ Apparently the Deputy Chief from the Independence, Ohio Police Department felt Loehmann was so unfit to be a police officer that he wrote, "I do not believe time, nor training, will be able to

310. Officer Loehmann shot Rice within seconds of exiting the patrol car. Sims, *supra* note 263, at 7.

311. Under my proposal, if the officers were charged with murder, the jury could return a verdict of not guilty of murder, but guilty of voluntary manslaughter if the officers' beliefs were reasonable but their actions were unreasonable.

312. TIMOTHY J. MCGINTY, CUYAHOCA COUNTY PROSECUTOR'S REPORT ON THE NOVEMBER 22, 2014 SHOOTING DEATH OF TAMIR RICE 4.

313. *Id.*

314. James Downie, *Lessons of Tamir Rice's Death*, CHI. TRIB. (Jan. 4, 2016, 8:50 AM), <http://www.chicagotribune.com/news/opinion/commentary/ct-tamir-rice-police-shootings-20160104-story.html>; see also Roger Goldman, *Importance of State Law in Police Reform*, 60 ST. LOUIS U. L.J. 363, 372 (2016). Roger Goldman points to the "need for a way to track law enforcement officers who have engaged in serious misconduct so that a department will not unknowingly hire an unfit officer." *Id.* at 383. He notes that "there is a databank, the National Decertification Index (NDI), which is administered by the International Association of Directors of Law Enforcement Standards and Training (IADLEST)" and that "[t]he executive directors of all the state POSTs may query the NDI" and "authorize law enforcement agencies in their states to access the NDI." *Id.*

change or correct these deficiencies.”³¹⁵ Four other police departments rejected Officer Loehmann before the Cleveland Police Department hired him.³¹⁶ On May 30, 2017, the Cleveland Police Department fired Officer Loehmann for lying on his application.³¹⁷

C. Possible Objections

My model statute will likely be resisted for a number of reasons. Below, I outline some of the expected objections to my proposal and my responses to those objections.

315. Goldman, *supra* note 3, at 372. Approximately four months after the Independence Police Department hired Officer Timothy Loehmann, Deputy Chief Jim Polak wrote a memorandum to the Human Resources Director, recommending Loehmann’s dismissal. Memorandum from Deputy Chief Jim Polak on Patrolman Loehmann to Human Resources Director Lubin 4 (Nov. 29, 2012), <http://www.documentcloud.org/documents/1374235-independence-timothy-loehmann-response-to.html#document/p56>. Deputy Chief Polak based his recommendation for dismissal on four incidents that occurred during Loehmann’s short period of employment, stating that they demonstrated “a pattern of a lack of maturity, indiscretion and not following instructions.” *Id.* at 2. The first incident occurred during firearms qualification training, where Loehmann was “distracted and weepy,” and “could not follow simple directions, could not communicate clear thoughts nor recollections, and his handgun performance was dismal.” *Id.* at 1. Loehmann suffered an “emotional meltdown” and was sent home early because he was unable to continue with the training. *Id.* Loehmann also stated that he did not have any friends and had cried over his girlfriend “every day for four months.” *Id.* The second incident occurred when Loehmann was issued his firearm and was told that it needed to be secured in his locker while he was not working. *Id.* at 2. When asked if he had a lock, Loehmann replied that he did. The next day, however, Sergeant Tinnirello noticed that Loehmann’s locker did not have a lock on it. *Id.* When Tinnirello asked Loehmann why there was not a lock on his locker, Loehmann replied that he did have a lock, but did not have time to put it on the locker because he left it at home, and therefore left his firearm unsecured in his locker overnight. *Id.* The third incident occurred when Sergeant Tinnirello told Loehmann to sit in the dispatch center as part of his orientation. *Id.* Shortly after giving these instructions, Tinnirello found Loehmann in the patrol room, and when he asked him why he was not in the dispatch center, Loehmann replied that the dispatchers told him he was done and to go upstairs. *Id.* Loehmann later confessed to Tinnirello that he had lied—the dispatchers never told him to go upstairs; he went on his own. *Id.* The final incident took place when Sergeant Tinnirello issued Loehmann his bulletproof vest and told him to wear it in order to get used to it. *Id.* About a half hour later, Tinnirello found Loehmann with the vest off, and when questioned, Loehmann stated that he took it off because he was “too warm.” *Id.* Deputy Chief Polak recommended Loehmann for dismissal in light of these occurrences, stating that Loehmann displayed a “dangerous lack of composure during live range training,” and an inability to manage personal stress. *Id.* at 4. Before Loehmann could be dismissed from his position, he resigned from the Independence Police Department, citing “personal reasons” as the cause for his resignation. Letter from Timothy Loehmann to Jim Polak, Deputy Chief, Independence Police Department (Dec. 5, 2012), <http://www.documentcloud.org/documents/1374235-independence-timothy-loehmann-response-to.html#document/p7>.

316. Downie, *supra* note 314; *see also* Goldman, *supra* note 3, at 382 (proposing that every state enact a “comprehensive law that takes away the ability of unfit officers to continue in law enforcement”).

317. Lindsey Bever & Wesley Lowery, *Cleveland Police Officer Who Fatally Shot 12-Year-Old Tamir Rice Is Fired—But Not for the Killing*, WASH. POST (May 30, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/05/30/cleveland-police-officer-who-fatally-shot-12-year-old-tamir-rice-is-fired/?utm_term=.fcb228c66805 (“[Loehmann] concealed key details about his near-firing from another local police department and his failed attempts to be hired at several other departments before applying to work for the Cleveland police.”); Adam Ferrise, *Cleveland Officer Timothy Loehmann Fired in Wake of Tamir Rice Shooting*, CLEVELAND.COM (May 30, 2017), http://www.cleveland.com/metro/index.ssf/2017/05/cleveland_officer_timothy_loeh_1.html; Jason Hanna & Amanda Watts, *Tamir Rice Shooting Probe: 1 Officer Fired, 1 Suspended*, CNN (May 30, 2017), <http://www.cnn.com/2017/05/30/us/cleveland-tamir-rice-police-officers-disciplined/> (noting that Loehmann failed to mention on his application form that he would have been fired if he had not resigned from the Independence Police Department and did not disclose that he had failed a written exam while applying for a job with the police department in Maple Heights).

1. *The Model Legislation Encourages Jurors to Second-Guess Police Officers with the Advantage of Hindsight*

One objection that might be lodged against my proposal is that, by explicitly directing jurors to consider whether the officer engaged in de-escalation measures, including the use of less deadly alternatives, prior to using deadly force, the model legislation encourages jurors to engage in Monday-morning quarterbacking, or second-guessing, of police officers. My response to this objection is that jurors in all cases involving claims of self-defense or defense of others, which is the essence of a police officer's claim of justifiable force, engage in an after-the-fact assessment of the facts.

To mitigate the possibility of unfair second-guessing, my model statute, like current law, has the jury assess the reasonableness of the officer's use of deadly force from the perspective of a reasonable officer in the defendant officer's shoes. This means that only the facts and circumstances known to the officer at the time are relevant. Information acquired afterwards is not relevant if the defendant officer did not know, or have reason to know of, such information at the time.

2. *States Should Be Free to Adopt Their Own Rules*

Another objection to my proposal might be called a federalism objection. One concerned about federal restrictions on states' rights might argue that states should be free to adopt their own rules regarding when a law enforcement officer's use of deadly force is justified. Each state is primarily responsible for the health, safety, and welfare of its residents. A state may have special concerns that support a different set of rules than the rules that are adopted in another state.

This objection is misplaced. My proposal does not prohibit states from adopting their own laws regarding the use of deadly force by law enforcement officers. My proposal is not a federal statute that would govern in all states. My model statute is offered simply as a model for states to follow if they so choose. As a matter of policy, I think my model statute is better than existing state statutes on police use of force, and I would support federal legislation based on my model statute, but since I am proposing a model statute, not a federal statute, states would remain free to adopt or reject my model statute.

3. *As a Model Statute, the Proposed Reform Has No Teeth.*

A third objection that might be lodged against my proposal is that, as a model statute, it would have no teeth. Indeed, one might ask, what incentive would state legislators have to pass legislation that might be viewed as making it more difficult for police officers to do their jobs? A vote for such legislation might be perceived as being "soft on crime."

I admit that given the current political climate, the chances of state legislatures adopting my model legislation are fairly slim. Nonetheless, many Americans are troubled by the spate of police shootings that have largely impacted Black individuals.³¹⁸ The time has come for state legislators to step up to the plate and do what they can to try to reduce the loss of life that occurs when police use deadly force in cases where they could have taken steps to avoid the loss of life. Legislators can address this pressing problem by enacting my model statute.³¹⁹

4. *The Model Legislation Is Too Complicated for the Average Juror to Understand.*

A fourth objection that might be lodged against my proposed model legislation is that it is too complicated for the average juror to follow. Jury instructions need to be short and simple. One opposed to my model statute might argue that it complicates the inquiry into whether an officer's use of deadly force was justified and makes it more difficult for jurors to do their job.

While I agree that short and simple is usually the best policy when it comes to jury instructions, I do not think my model legislation makes it too difficult for the average juror to assess whether a police officer was justified in the use of deadly force when a person has been killed. By listing just three factors that the jury should consider, my model legislation provides more guidance than current use-of-force statutes, which simply tell jurors to assess whether the officer's belief in the need to use deadly force was reasonable. By disaggregating beliefs from actions, and requiring jurors to find that the officer's beliefs and actions were both reasonable, my model legislation makes explicit the normative inquiry that is merely implicit in most current statutes. The officer's actions must have been proportionate, necessary, and appropriate under the circumstances. Rather than complicating matters, the model statute brings clarity to the table.

The problem with current police use-of-force statutes is that they provide no guidance to jurors with regard to when an officer's use of force is or is not reasonable, simply leaving it up to jurors to decide this difficult question on their own. The model legislation provides jurors with much-needed guidance, using clear and simple language that the average layperson can understand.

5. *Police Officers Need Bright-Line Rules.*

A related objection is the argument that police officers need clear, bright-line rules to guide their decisions in the field, especially in tense, rapidly evolving situations involving suspects who are threatening the officer or others with

318. Mazzone & Rushin, *supra* note 3, at 266–67 (“Today, across the political spectrum is deep and widespread concern about abusive police practices and their impact upon racial minorities.”).

319. Passing such legislation might be difficult, however, because of resistance from powerful police unions. See Kate Levine, *Police Suspects*, 115 COLUM. L. REV. 1197 (2016); L. Song Richardson & Catherine Fisk, *Police Unions*, 85 GEO. WASH. L. REV. 712 (2017); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2017).

death or serious bodily injury.³²⁰ The Supreme Court itself has recognized that “[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.”³²¹ As the Court has noted:

A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts, and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges regularly feed, but they may be “literally impossible of application by the officer in the field.”³²²

My response to this objection is that current law does not provide police officers with a clear, bright-line rule. Most use-of-force statutes utilize a reasonableness standard that is open-ended and subject to interpretation. By providing a list of factors that can inform the reasonableness inquiry, my model statute provides officers with more guidance than current use-of-force statutes. I acknowledge that my model statute does not provide bright-line rules for either police officers or jurors, but this is because I believe it important that the jury retain discretion to consider the facts and circumstances and render a verdict without being directed to find either for or against the officer.

6. *Preseizure Conduct Should Not Be Considered.*

Another possible objection to my proposal is the argument that juries should not be allowed to consider preseizure conduct. As noted above, the term “preseizure conduct” is used to refer to conduct by the officer prior to the shooting that helped create the dangerous situation or increased the likelihood that deadly force would need to be used to protect the officer or others. As mentioned above, whether the jury should be allowed to consider preseizure conduct is an issue that has split the courts.³²³

My response to this objection is that, as long as reasonableness is the standard used to assess whether an officer’s use of force was justified, it makes sense to permit the jury to consider preseizure conduct as part of the totality of the circumstances. Reasonableness standards are purposely open-ended to allow consideration of all the facts and circumstances. Whether the officer engaged in conduct prior to the shooting that increased the risk of a deadly confrontation is relevant to whether the officer acted reasonably. As one court explained:

[W]e do not see how these cases [that preclude consideration of preseizure conduct] can reconcile the Supreme Court’s rule requiring examination of the “totality of the circumstances” with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished.

320. A recent national survey of 450 law enforcement leaders across the country found that when it came to external regulation of law enforcement, simplicity and safety were two of their top most important concerns. Stephen Rushin & Roger Michalski, *Constitutional Policing and Compromise* (unpublished manuscript) (on file with author).

321. *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)).

322. *New York v. Belton*, 453 U.S. 454, 458 (1981) (quoting Wayne R. LaFave, “*Case-by-Case Adjudication*” *Standardized Procedures*: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142).

323. See *supra* notes 249–54.

“Totality” is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer’s use of force.³²⁴

It is important to remember that even if an officer acted negligently or violated police procedures, and thereby increased the risk of a deadly confrontation, this would not preclude a jury from finding that the officer’s use of force was reasonable. For example, in *Greenidge v. Ruffin*, a female police officer in plain clothes observed a man and a woman engaging in an act of prostitution in a car.³²⁵ With her police badge hanging from her neck, the officer opened the car door with one hand, identified herself as an officer, and ordered the two passengers to place their hands in plain view.³²⁶ When neither complied, the officer pointed her revolver into the vehicle and repeated her order.³²⁷ When the male passenger reached for a long cylindrical object behind the seat, the officer thought he was reaching for a shotgun and fired her weapon at him, striking him in the jaw and causing permanent injury.³²⁸ The long cylindrical object he was reaching for turned out to be a wooden nightstick.³²⁹

The man brought suit against the officer, alleging that the use of deadly force during the arrest for prostitution was unreasonable and in violation of his constitutional rights.³³⁰ At trial, the court excluded evidence of the officer’s alleged violation of standard police procedure for nighttime prostitution arrests, which, if followed, would have entailed employing proper backup and using a flashlight.³³¹ The plaintiff alleged that the officer’s pre-seizure conduct in violation of police procedure recklessly created a dangerous situation.³³² The Fourth Circuit affirmed the trial court’s decision to exclude the evidence of the officer’s pre-seizure conduct, finding it irrelevant and thus inadmissible.³³³ The court explained, “[W]e are persuaded that events which occurred before Officer Ruffin opened the car door . . . are not probative of the reasonableness of Ruffin’s decision to fire the shot.”³³⁴

Under my model statute, the trial court would have to allow the jury to consider the officer’s alleged violation of police procedure in assessing the reasonableness of her use of deadly force. Such consideration would not likely change the outcome. The fact that the officer failed to use a flashlight or employ backup did not make her decision to use deadly force unreasonable when both passengers refused to comply with her order to show their hands and the male passenger started reaching for a long, cylindrical object behind him that could have been a shotgun or rifle.

324. *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999).

325. *Greenidge v. Ruffin*, 927 F.2d 789, 790 (4th Cir. 1991).

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* at 791.

332. *Id.*

333. *Id.*

334. *Id.* at 792.

One might wonder why courts should allow juries to consider this kind of pre-seizure conduct if such consideration would be unlikely to alter the verdict? One should permit the jury to consider pre-seizure conduct even though it might not make a difference in this case because it might make a difference in another case. As a general matter, giving the jury more, rather than less, information will help them make better decisions.

There are a few additional reasons why it makes sense to permit juries to consider pre-seizure conduct. First, juries in ordinary self-defense cases involving the deployment of deadly force are permitted to consider events preceding the use of deadly force, including anything the defendant did that might have created the dangerous situation or increased the likelihood of a deadly confrontation.³³⁵ For example, during the 2013 murder trial of George Zimmerman, the Neighborhood Watch person who shot and killed Trayvon Martin, an African American teenager, the prosecution was allowed to bring up the fact that Zimmerman, the defendant in that case, ignored a 911 dispatcher's suggestion that he stay in his car and wait for police.³³⁶ If juries in ordinary self-defense cases are allowed to consider the pre-seizure conduct of civilian-defendants that increased the likelihood of a violent confrontation, juries in officer-involved shooting cases should also be allowed to consider the pre-seizure conduct of the officer-defendant that increased the likelihood of a violent confrontation.

Second, jurors in officer-involved shooting cases are allowed to consider the pre-seizure conduct of the victim-suspect in assessing the reasonableness of the officer's use of force.³³⁷ If jurors can consider the pre-seizure conduct of the victim, they should be allowed to consider the pre-seizure conduct of the officer-defendant as well. It is not fair to allow consideration of the victim's pre-seizure conduct and disallow consideration of the officer-defendant's pre-seizure conduct.

7. *The Model Statute Goes Beyond What Is Required of Ordinary Civilians Claiming Self-Defense.*

Another possible objection is that my model statute goes beyond what is required of ordinary civilians in self-defense cases. Current self-defense law focuses on the reasonableness of the civilian's belief in the need to act in self-

335. See *supra* note 257.

336. The recording of the 911 call was played to the jury at Zimmerman's trial. See Axiom Amnesia, *Sean Noffke (911 Operator) Testimony 6/24/2013 - Trayvon Martin George Zimmerman Trial*, YOUTUBE (June 26, 2013), <https://youtu.be/aorB-sT8Co0>. For excellent analysis of why Zimmerman was acquitted, see Alafair Burke, *What You May Not Know About the Zimmerman Verdict: The Evolution of the Jury Instruction*, HUFFINGTON POST (July 15, 2013), http://www.huffingtonpost.com/alafair-burke/george-zimmerman-jury-instructions_b_3596685.html; see also Lee, *Denying the Significance of Race*, *supra* note 108, at 31–37 (examining the reasons why the judge, prosecutor, and defense attorneys in the Zimmerman case treated the case as if it had nothing to do with race); Lee, *(E)Racing Trayvon Martin*, *supra* note 108, at 101 (providing a critical race critique of the Zimmerman trial, more commonly known as the Trayvon Martin case); Lee, *Making Race Salient*, *supra* note 14, at 1602.

337. Thomson v. Salt Lake Cty., 584 F.3d 1304, 1313 (10th Cir. 2009); Phillips v. James, 422 F.3d 1075, 1081 (10th Cir. 2005); Pace v. Capobianco, 283 F.3d 1275, 1281 (11th Cir. 2002); Pethel v. W. Va. State Police, 568 F. Supp. 2d 658, 667 (N.D.W. Va. 2008).

defense and does not separately require an inquiry into the reasonableness of the civilian's actions.

I have three responses to this objection. First, unlike ordinary civilians, police officers are entrusted with the power to use force against the citizenry for the citizenry's protection. When an officer allegedly abuses that power, that officer should be held to a higher standard than ordinary civilians.

Second, even though self-defense doctrine in most states explicitly focuses on whether the individual reasonably *believed* in the need to use force, whether the individual's *actions* were reasonable is an implied requirement. In order to be found not guilty on self-defense grounds, one who uses deadly force in self-defense must have reasonably believed it was necessary to use deadly force to protect against an imminent threat of death or serious bodily injury. In other words, one's use of force must have been necessary as well as proportionate. I have elsewhere proposed that self-defense doctrine explicitly require a finding that one's actions as well as one's beliefs were reasonable.³³⁸ Here, I am proposing the same explicitness in the police use-of-deadly-force context.

Third, my model statute simply encourages the fact finder to engage in the same kinds of inquiries that jurors in self-defense cases consider. In assessing necessity, jurors in ordinary self-defense cases often consider whether there were less deadly alternatives available to the defendant. In assessing proportionality, jurors in ordinary self-defense cases involving the use of deadly force often consider whether the victim posed a threat of death or serious bodily injury. In deciding questions regarding whether the defendant was the initial aggressor, jurors in ordinary self-defense cases often consider the pre-seizure conduct of the defendant. The questions that my model statute encourages jurors to ask in officer-involved shooting cases are similar to the questions jurors in ordinary self-defense cases usually consider.

8. *Why Not a Civil Remedy?*

Some might object to my proposal on the ground that a civil remedy would be a much better way to effectuate police reform than model legislation on police use of force. As noted by my colleague Mary Cheh over twenty years ago, a civil remedy would provide the victim or his or her estate a number of advantages over criminal prosecution:

First, a victim of police misconduct can sue on his or her own behalf and need not await the government's decision to go forward. Second, an injured party need not overcome the heightened procedural protections afforded the criminally accused. For example, a plaintiff can prevail under a preponderance of evidence standard rather than proof beyond a reasonable doubt. Third, . . . the civil law provides compensation to victims who have been harmed by police misconduct. Recompense is beneficial in itself, and damage awards can spur reform if the costs of misbehavior are big.³³⁹

338. See LEE, MURDER AND THE REASONABLE MAN, *supra* note 95, at 269–73; Lee, *The Act-Belief Distinction in Self-Defense Doctrine*, *supra* note 211, at 221–38 (1998).

339. Cheh, *supra* note 24, at 248.

I considered adding language to my model statute that would grant victims of unjustified police use of deadly force a civil remedy, but decided against doing so because my area of expertise is criminal, not civil, law. As noted at the beginning of this Article, I believe reform of policing practices must be multifaceted. I am not opposed to civil remedies, but I leave the drafting of such proposals to others who have more expertise on such matters.

9. *The Proposed Reform Would Provoke Civil Unrest*

Another objection to my proposed reform is that by making it easier to convict police officers who assert a use of force defense, the reform would increase the number of criminal prosecutions of police officers but not necessarily result in more convictions, leading to more civil unrest. Police officers by and large would still be found not guilty because judges and juries would still favor police officers regardless of changes to the law.³⁴⁰ The more police officers are prosecuted but not convicted, the more angry certain segments of the population (those concerned about police misconduct, those concerned about police overreach, those concerned about police killings of Black and Brown individuals, etc.) will become. The widespread unrest in St. Louis, Missouri following the not guilty verdict in September 2017 in the case of James Stockley, a White former police officer, charged with murder in the 2011 shooting of Anthony Lamar Smith, a twenty-four-year-old Black man, provides an example of how a not guilty verdict seen as unjust by the community can result in widespread protests that can turn violent.³⁴¹ Rather than help bridge relations between police and the community, criminal prosecutions of police officers that end in acquittals can exacerbate existing tensions between the community and the police.³⁴²

I agree that my proposed reform has the potential to provoke civil unrest, which would not be a good thing. One of the biggest impediments to successful reform is the distrust that currently exists between certain communities and the police. It is critically important that we build trust between community members and the police and between police and the communities they serve. Adopting my

340. See *supra* notes 6–7.

341. Jim Salter & Summer Ballentine, *9 Arrested in St. Louis During Protests After Officer's Acquittal*, WASH. POST, Sept. 18, 2017, at A4; Mark Berman & Wesley Lowery, *Ex-St. Louis Officer Found Not Guilty of Murder*, WASH. POST, Sept. 16, 2017, at A3; Mark Berman, *St. Louis Remains on Edge, Days After Acquittal*, WASH. POST, Sept. 19, 2017, at A2.

342. In the Stockley case, prosecutors thought they had a fairly strong case for conviction since Officer Stockley was recorded during a high-speed chase of Smith, saying he was going to kill Smith. Berman & Lowery, *supra* note 341. Stockley then approached Smith's vehicle and fired five times into the car, hitting Smith five times and killing him. *Id.* Stockley claimed he shot Smith in self-defense, but prosecutors argued that Stockley planted the gun found in Smith's car, noting that the only DNA found on the gun belonged to the Stockley. Berman, *St. Louis Remains on Edge, Days After Acquittal*, *supra* note 341. Stockley waived his right to a jury trial, and was found not guilty by Judge Timothy Wilson who said he agonized over the evidence, but was "simply not firmly convinced" of Stockley's guilt. *Id.* The Stockley case suggests a problem with the allocation of the burden of proof in self-defense cases in general and police claims of justifiable force in particular. Most states place the burden of disproving a defendant's claim of self-defense on the prosecution rather than placing the burden of proving self-defense on the defendant. Self-defense, however, is generally considered to be an affirmative defense, not a case-in-chief defense, so the legislature may allocate the burden of proof to either party. *Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432 U.S. 197 (1977).

proposed legislation would go a long way towards encouraging such trust, especially if such legislation brings about significant reductions in officer-involved shootings of unarmed individuals.

Ultimately, successful police reform requires a shift in cultural norms both within police departments and within society. The law can help promote change in cultural attitudes, but it is only one vehicle for such change.

10. *Officer Lives Will Be Endangered if Officers Hesitate to Act out of Fear of Prosecution.*

A final possible objection to my proposal is that by toughening up the legal standard, even slightly, my model statute will result in more prosecutions and, in turn, more convictions of police officers who use deadly force on the job.³⁴³ Knowing that they might face criminal prosecution and possible incarceration may discourage police officers from using deadly force in situations when they should use deadly force, endangering officers and leading to more officer deaths.³⁴⁴ This, in turn, will lead to fewer individuals being willing to become police officers, exacerbating a problem already facing many departments—a shortage of good officers.³⁴⁵

J. Michael McGuinness, for example, argues that the “increasing criminalization of American policing is among the most dangerous legal developments in law enforcement jurisprudence in recent decades.”³⁴⁶ McGuinness, however, fails to recognize that there has actually been very little reform of state use-of-force statutes. Nonetheless, this is perhaps the hardest objection to counter because it is true that a change to the legal standard will likely have an impact “on the ground” in terms of what officers do.³⁴⁷ As Rachel Harmon acknowledges, “officers prohibited from defending themselves might well become less effective in serving the State if they suffer more injuries when attacked or become hesitant in carrying out their mission.”³⁴⁸ Similarly, Larry Rosenthal noted that “a regime that simply exposes officers to an enhanced risk of sanctions when they intervene in the streetscape likely biases officers toward inaction.”³⁴⁹ Rosenthal argues that making it easier to impose criminal or civil liability on

343. See McGuinness, *supra* note 3, at 26–27.

344. See *id.* at 33.

345. Harmon, *supra* note 13, at 1156 (noting the significant shortage of qualified applicants for law enforcement positions in the United States and the fact that “screening, selection and training costs make replacing an officer an expensive proposition”).

346. McGuinness, *supra* note 3, at 27.

347. Stephen Rushin and Griffin Edwards hypothesize that given the uptick in property crimes in jurisdictions with DOJ consent decrees, police officers may pull back and not act as proactively as they might otherwise in response to federal intervention. Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721, 758–59 (2017).

348. Harmon, *supra* note 13, at 1156–57.

349. Lawrence Rosenthal, *Good and Bad Ways to Address Police Violence*, 48 URB. L. 675, 718 (2016).

police officers is likely to result in overdeterrence or depolicing, *i.e.* less aggressive enforcement of the criminal laws, which he suggests may lead potential criminal offenders to commit more crimes.³⁵⁰

It is important to recognize that officers put their lives on the line for all of us and sometimes need to make split-second decisions,³⁵¹ relying on the information available to them at the time—decisions that may end up being just plain wrong when the person they thought was armed turns out to be unarmed—which is why my model statute, like current law, does not require that the officer be correct in his or her assessment of the threat and allows the jury to assess the reasonableness of an officer's beliefs and actions from the perspective of a reasonable officer in the defendant's shoes.

It is also important to recognize that current law has proven inadequate to discourage the use of deadly force in many situations where it appears such force was not appropriate. The modest change in the legal standard that my model statute proposes would play an important role in shaping police culture by encouraging officers to engage in the types of conduct that many police chiefs and others recognize would help reduce the incidents of bad police shootings.³⁵² If adopted, my model statute would perform the dual function of encouraging officers to engage in de-escalation strategies while helping to insulate from criminal liability those officers who do engage in de-escalation measures. My model statute would also provide useful guidance to the jury by specifying the factors it must consider in assessing the reasonableness of an officer's beliefs and actions.

If officers started engaging more frequently in de-escalation strategies, this would buttress police legitimacy in the public eye. Increased legitimacy would go a long way toward establishing public trust in police, which would help police officers do their jobs. Rather than overdeter, my model statute should encourage officers in dangerous situations, where the instinct to self-preserve is strongest, to be more careful before using deadly force.

IV. CONCLUSION

Our nation's police officers are entrusted with power and authority that the average civilian does not possess. When an officer uses that power to shoot an individual, that officer's decision to use deadly force should be carefully evalu-

350. *Id.* at 718–19. See also Frank Rudy Cooper, *Understanding 'Depolicing': Symbiosis Theory and Critical Cultural Theory*, 71 UMKC L. REV. 335 (2002-2003) (critiquing the practice of depolicing).

351. Seth Stoughton, a former police officer, argued that deference to police officers based on the need to make split-second decisions is not warranted in most cases since most use of force incidents are "typified by tactical preparation, a degree of premeditation, low levels of resistance, low levels of force, and a low probability of injury . . ." Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 868 (2014).

352. In terms of shaping police culture, a statute enacted by a democratically elected legislature might bear more legitimacy to certain groups, including police officers, than decisions by the U.S. Supreme Court, which some see as an elite group of individuals legislating from the bench on subjects about which they know very little. I thank Christopher Paul, a student in my Criminal Procedure class during the spring of 2017, for this suggestion.

No. 2] REFORMING THE LAW ON POLICE USE OF DEADLY FORCE 691

ated to ensure that it was the appropriate choice of action under the circumstances. “The use of force, including deadly force, is at once *necessary* to achieve law enforcement goals and *contrary* to the core mission to protect life.”³⁵³ Making sure the law allows police officers to use deadly force only when such force is necessary and proportionate is critically important, especially today when public confidence in police is at a historic low. My model statute responds to the need to restore public trust in police in communities where that trust has eroded.

353. POLICE EXEC. RESEARCH FORUM, STRATEGIES FOR RESOLVING CONFLICT AND MINIMIZING USE OF FORCE 1 (Ederheimer ed. April 2007).

