RETHINKING HINDSIGHT: THE FAILED INTERPRETATION OF GRAHAM V. CONNOR

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INTRODUCTION

"You've had your chance to police my community without murdering us and you have failed for 300 years. Enough." —Elie Mystal[1]

Police violence is an epidemic in the United States. In the 2021 calendar year, 1,055 civilians were shot and killed by the police.[2] One might have expected the myriad of social distancing and stay-at-home regulations[3] promulgated during the COVID-19 pandemic to bring a reduction in the number of police shootings. However, even the pandemic, which drastically slowed global economies, could not stop police shootings in the United States.[4] In fact, the rate of police shootings in 2020 was on track to match the corresponding rates for the previous four years.[5] Although police violence affects all members of society, it disproportionately impacts the Black community.[6] In one notorious example, a federal judge sitting in the Southern District of New York found, following a nine-week trial, that the New York City Police Department engaged in a pattern and practice of racial profiling, targeting thousands of Black individuals in New York City.[7] Moreover, while Black individuals made up only 12.5% of the United States population, 24%

1. *More Perfect: Mr. Graham and the Reasonable Man*, RADIOLAB, at 1:01:42–1:01:52 (Nov. 30, 2017), https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/mr-graham-and-reasonable-man [https://perma.cc/4XGV-A7ZJ].

2. *Number of People Shot to Death by the Police in the United States from 2017 to 2021, by Race*, STATISTA, https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/ [https://perma.cc/8QDC-V5UN] (last visited Jan. 26, 2023).

3. *E.g.*, *Documenting New York's path to recovery from the coronavirus (COVID-19) pandemic, 2020-2021*, BALLOTPEDIA, https://ballotpedia.org/Documenting_New_York%27s_path_to_recovery_from_the_coronavirus_(COVID-19)_pandemic,_2020-2021 [https://perma.cc/C3S4-A94M] (last visited June 9, 2023); *CDC Museum COVID-19 Timeline*, CDC, https://www.cdc.gov/museum/timeline/covid19.html [https://perma.cc/N82W-F2WG] (last visited June 9, 2023).

4. AM. C.L. UNION, THE OTHER EPIDEMIC: FATAL POLICE SHOOTINGS (2020), https://www.aclu.org/sites/default/files/field_document/aclu_the_other_epidemic_fatal_police_shootings_2020.pdf [https://perma.cc/4B9Z-ETG3].

5. *Id.*

6. *Id.*

7. Floyd v. City of New York, 959 F. Supp. 2d. 540 (S.D.N.Y. 2013).

of people killed in police shootings from 2015–2020 were Black.[8] This, combined with the intertwined institutional origins of policing and slavery, adds salt to the collective wound of a community whose oppression stems back to before the founding of the Republic.[9] For example, a study analyzing county-level data on historical lynchings of Black individuals and present-day police officer shootings found a positive correlation between a county's number of historical lynchings and the proportion of police shootings in that county where the victim was Black.[10] In stark contrast, the study reported the inverse relationship for white individuals: counties with historically high levels of lynchings saw their share of modern police shootings against white individuals decrease.[11] These findings are indicative of the persistence of racial violence in Black communities—perpetrated by both private and state actors.

The Fourth Amendment, which protects against unreasonable searches and seizures, provides the primary vehicle for civil rights claims against police officers who use non-lethal excessive or deadly force[12] while effectuating a "seizure" of an individual.[13] In practice, however, Fourth Amendment excessive force jurisprudence is little more than a dead letter. A narrow reading of the chief legal precedent, *Graham v. Connor*,[14] combined with the deference that judges and juries grant to police officers, makes it exceedingly difficult to bring a successful excessive force claim against the police.[15]

This Article seeks to analyze current excessive force jurisprudence and offer potential legal and policy solutions for seeking accountability for police violence. First, the Supreme Court should adopt the broader reading of *Graham* that is

8. AM. C.L. UNION, *supra* note 4, at 4.

9. *The Origins of Modern Day Policing*, NAACP, https://naacp.org/find-resources/history-explained/origins-modern-day-policing [https://perma.cc/RZ25-CM3V] (last visited Jan. 26, 2023); Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police [https://perma.cc/WG7A-9BPQ].

10. Jhacova Williams & Carl Romer, *Black Deaths at the Hands of Law Enforcement Are Linked to Historical Lynchings*, ECON. POL'Y INST. (June 5, 2020, 2:42 PM), https://www.epi.org/blog/black-deaths-at-the-hands-of-law-enforcement-are-linked-to-historical-lynchings-u-s-counties-where-lynchings-were-more-prevalent-from-1877-to-1950-have-more-officer-involved-killings/ [https://perma.cc/33LK-FZUS] (adding that "[s]ome have speculated that as many as 75% of historical lynchings 'were perpetrated with the direct or indirect assistance of law enforcement personnel.'").

11. *Id.*

12. Within this article, "deadly force" refers to force by a police officer against an individual that results in that individual's death. "Non-lethal excessive force" refers to all other non-lethal force by a police officer against an individual.

13. Graham v. Connor, 490 U.S. 386, 394 (1989). The Supreme Court of the United States has ruled that a Fourth Amendment seizure occurs when law enforcement officers apply physical force to an individual's body with intent to restrain. Torres v. Madrid, 141 S. Ct. 989, 999 (2021) (holding that officers' seized the plaintiff "the instant that the bullets struck her").

14. 490 U.S. 386.

15. Qualified immunity is another obvious bogeyman that precludes police liability and accountability. This paper, however, does not consider the effects of qualified immunity doctrine on police excessive force cases.

currently endorsed by the Ninth and Tenth Circuit Courts of Appeals in cases of non-lethal excessive force. Under this approach, police who intentionally or recklessly create the need to use force can still be found to have violated the Fourth Amendment, even if the force used at the moment of seizure is found to be "reasonable."[16] Under this capacious interpretation, courts are more willing to find genuine issues of material fact, allowing plaintiffs to survive summary judgment and have their claims heard by factfinders.[17] Moreover, adopting this rule would bring police excessive force cases more in line with other Fourth Amendment jurisprudence, which often requires a "totality of the circumstances" analysis.[18] To the extent that *Graham* remains the law of the land, the Ninth and Tenth Circuits' proper—and more capacious—reading of the Supreme Court's opinion should be adopted by all lower federal courts as well as by the Supreme Court itself. However, other pathways, such as state court and legislative reforms by both Congress and state legislatures, should also be implemented to limit the ability of police to use excessive force, both lethal and non-lethal.

II.
THE DEVELOPMENT OF EXCESSIVE FORCE STANDARDS

A. Supreme Court Precedent: Tennessee v. Garner *&* Graham v. Connor

The first Supreme Court case to address the use of deadly force by the police against an individual was *Tennessee v. Garner*.[19] Two Memphis police officers—Officers Hymon and Wright—were dispatched to answer a call regarding a suspected burglary.[20] The officers began to investigate once they arrived on the scene: Hymon went to the back of the house and saw Edward Garner—a Black fifteen-year-old—run across the backyard.[21] Based on the officer's testimony, as Mr. Garner was climbing a fence and moving away from the house, Hymon shot him in the back of the head. [22] Mr. Garner died on the operating table immediately after the shooting.[23]

In finding that Officer Hymon's shooting of Mr. Garner was unjustified, the Supreme Court first rejected the State of Tennessee's argument that the Fourth

16. Bond v. City of Tahlequah, 981 F.3d 808, 816 (10th Cir. 2020); Nehad v. Browder, 929 F.3d 1125, 1135 (9th Cir. 2019).

17. *Bond*, 981 F.3d at 826.

18. The Supreme Court often states that the "touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). In order to determine whether the officers' actions are reasonable, reviewing courts often consider the actions of the defendant, the police's response to those actions, and other surrounding circumstances that would have an impact on either of the prior considerations. *E.g.*, Mack v. City of Abilene, 461 F.3d 547, 552 n.1 (5th Cir. 2006).

19. Tennessee v. Garner, 471 U.S. 1 (1985).

20. *Id.* at 3.

21. *Id.*

22. *Id.* at 4.

23. *Id.*

Amendment has nothing to say about how a seizure is made.[24] Indeed, the Court cited numerous cases that examined the reasonableness of a seizure by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[25] In *Garner*, the Court balanced the strong interest an individual has in his own life and the interest society has in the criminal justice system's determination of guilt or innocence against law enforcement's need for effective policing.[26] Based on the aforementioned factors, the Court articulated the following clear rule: deadly force may not be used against an individual, unless it is (1) necessary to prevent the individual's escape; and (2) the officer has probable cause[27] to believe that the suspect poses a threat of death or serious physical injury to the officer or others.[28]

Four years after *Garner*, the Supreme Court decided *Graham v. Connor*. Dethorne Graham, a Black man and the plaintiff and petitioner in the case, was diabetic.[29] On November 12, 1984 he felt the onset of an insulin reaction and asked a friend, William Berry, to drive him to a convenience store to pick up some orange juice to counteract the reaction.[30] Once Mr. Graham arrived at the convenience store, he noticed the number of people in front of him and hurriedly left.[31] Officer Connor saw Mr. Graham's actions in the convenience store and thought he was acting suspiciously.[32] He followed Mr. Berry's car away from the convenience store, eventually pulling Mr. Berry over to conduct an investigatory stop.[33] Mr. Berry tried to explain that Mr. Graham was a diabetic who was having an adverse reaction to his medication.[34] Officer Connor refused to listen and made them wait while his colleagues investigated what had happened at the convenience store.[35] Mr. Graham, whose condition was worsening, got out of the car, ran around it twice, and finally passed out.[36] In the meantime, more officers arrived on the scene.[37] Ignoring Mr. Graham's pleas for sugar, they handcuffed him, shoved his face into the car's hood, and subsequently threw him headfirst into a

24. *See id.* at 7.

25. *Id.* at 8 (quoting United States v. Place*,* 462 U.S. 696, 703 (1983)).

26. *Id.* at 9.

27. Probable cause is generally defined as the body of information known by a police officer "which would lead a reasonable person who possesses the same expertise as the officer to conclude, under the circumstances, that a crime is being or was committed." People v. McRay, 51 N.Y.2d 594, 602 (N.Y. 1980).

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

29. *More Perfect*, *supra* note 1, at 2:00–2:50.

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

31. *Id.* at 388–89.

32. *Id*. at 389.

33. *Id.*

34. *Id.*

35. *See id.*

36. *Graham*, 409 U.S. at 389.

37. *Id.*

police car.[38] When Mr. Graham's friend finally brought him orange juice, the police refused to give him any.[39] Once Officer Connor confirmed that Mr. Graham had done nothing wrong at the convenience store, the other officers drove him home and released him.[40] The police had broken Mr. Graham's foot, injured his shoulder, cut his wrists, and bruised his forehead.[41] Mr. Graham sued the officers in their individual capacities under 42 U.S.C. § 1983,[42] alleging a violation of his rights under the Fourteenth Amendment.[43]

The Supreme Court's analysis of the *Graham* case made clear that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard."[44] Prior to the Court's holding on this issue, it was unclear which constitutional provisions were implicated by non-lethal excessive force claims.[45] Under the Fourth Circuit's precedent at the time, plaintiffs alleging that police had used excessive force against them when effectuating an arrest or seizure had to prove that the police had acted "maliciously and sadistically for the very purpose of causing harm."[46] This subjective requirement was rejected by the *Graham* Court. The Court's decision in *Graham*, along with its prior decision in *Garner*, held that law enforcement's use of force must be analyzed under the Fourth Amendment's "reasonableness" standard.[47] Unlike the malicious and sadistic inquiry, the reasonableness analysis is objective: courts or factfinders no longer had to determine the subjective intent of the officers who used force against an individual.[48]

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38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 390.

42. Section 1983 provides an individual the right to sue state government employees and others acting "under color of state law" for civil rights violations. 42 U.S.C. § 1983. Section 1983 does not provide civil rights; rather, it provides a means to enforce federal constitutional and statutory rights that already exist.

43. *Graham*, 490 U.S. at 390.

44. *Id.* at 395.

45. *Compare id.* at 390 (stating that the Fourth Circuit majority opinion did not "[attempt] to identify the specific constitutional provision under which the claim arose"), *with* Johnson v. Glick, 481 F.2d 1028, 1032–34 (2d Cir. 1973) (characterizing "the application of undue force by law enforcement officers" as depriving suspects of "liberty without due process of law" and describing the Seventh, Fifth, and Ninth Circuits as extending this protection to actions of "correctional officers").

46. *Graham*, 490 U.S. at 391. Interestingly, the "malicious and sadistic" standard rejected by the *Graham* Court was adopted as the standard for evaluating claims of excessive force committed by prison officials against incarcerated individuals alleging violations of the Eighth Amendment. Whitley v. Albers, 475 U.S. 312, 320–21 (1986).

47. *Graham*, 490 U.S. at 394.

48. Civil rights litigators were initially pleased with the Court's decision in *Graham* because proving the subjective intent prong was a formidable task. *More Perfect*, *supra* note **Error! Bookmark not defined.**, at 27:05–28:13. By changing the standard to an objective one, factfinders no longer had to make a finding related to the subjective intent of the officers: only their outwardly conduct was to be considered. *Graham*, 490 U.S. at 395.

Next, in determining what would be considered "reasonable" under the Fourth Amendment, the *Graham* Court emphasized the fact-intensive and case-specific nature of the inquiry. Indeed, the Court required that when applying the Fourth Amendment's reasonableness requirements, reviewing courts and factfinders must consider the totality of the circumstances, 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"[49] (hereinafter, "*Graham* factors"). Modern federal courts have held that the *Graham* factors "are not exclusive" and that other factors relevant for a particular case can also be used to analyze the challenged conduct.[50] Indeed, the *Garner* rule is one of those case-specific considerations that are employed by courts when analyzing lethal force cases.[51] However, the Court, as it has often done in Fourth Amendment jurisprudence, took into consideration the law enforcement interest at issue.[52] Describing police encounters as "tense, uncertain, and rapidly evolving,"[53] the Court stated that the "'reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[54] Because the Court of Appeals had analyzed the case under the wrong constitutional standard, the Supreme Court remanded for analysis under the reasonableness standard.[55]

Civil rights and liberties lawyers celebrated the *Graham* decision and particularly its holding that police excessive force claims had to be analyzed under the Fourth Amendment's objective reasonableness standard.[56] Plaintiffs' attorneys representing clients who had suffered violence at the hands of police no longer had to prove that the officer (or officers) acted maliciously and sadistically. Disposing of this difficult-to-prove subjective intent standard and focusing solely on the police's objective, outward conduct was thought to be a more plaintiff-friendly approach.[57]

Unfortunately, the *Graham* Court's multifactor standard has proven to be a bogeyman for civil rights claimants alleging unreasonable use of force by the

49. *Graham*, 490 U.S. at 396.

50. Bryan v. MacPherson, 630 F.3d 805, 826 (9th Cir. 2010); *see also* Estate of Adomako v. City of Fremont, 2018 WL 587146 at *4 (N.D. Cal Jan. 29, 2018).

51. *Estate of Adomako*, 2018 WL 587146 at *4.

52. *Id.* at 397; *see, e.g.*, Soldal v. Cook County, 506 U.S. 56, 71 (1992) (quoting New Jersey v. T.L.O., 468 U.S. 325, 341 (1985) ("[A]s is true in other circumstances, the reasonableness determination [must] reflect a 'careful balancing of governmental and private interest.'")).

53. *Graham*, 490 U.S. at 397.

54. *Id.* at 396.

55. *Id.* at 399.

56. *See More Perfect*, *supra* note **Error! Bookmark not defined.**. *But see* Aidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1773, 1814 (2016) (arguing that, with the benefit of hindsight, the substantive due process standard rejected by the Court in *Graham* is better suited to promote the remedial purposes of § 1983 and the Reconstruction Amendments).

57. *More Perfect*, *supra* note **Error! Bookmark not defined.**.

police. First, the standard articulated in *Graham* is much more difficult for courts and factfinders to apply than the rule articulated by the Court for lethal use of force only four years earlier in *Garner*. The *Garner* rule has two prongs. Courts reviewing the use of deadly force by the police against an individual must first determine whether the use of deadly force was necessary to prevent the escape of the individual.[58] If the answer is no, the inquiry is over and the court finds the officer violated the Fourth Amendment.[59] However, if the answer is yes, courts or factfinders must then determine whether the officers had probable cause to believe the individual posed a threat of death or serious physical injury to the officers or others.[60] Unlike with the *Garner* test, it is unclear which or how many of the *Graham* factors must be met to find an officer's use of force unreasonable under the Fourth Amendment. This ambiguity allows reviewing courts to weigh a certain factor or factors more heavily in a given case, leading to inconsistent results across jurisdictions.[61] And while most tests involving the application of a rule to facts are susceptible to discrepancies, a clear-cut, two-step analysis like the one announced in *Garner* is far more likely to produce consistent results than a murky multi-factor test.

Admittedly, the *Garner* rule could not be applied straightforwardly to the factual circumstances of *Graham* because the officers in *Graham* did not use deadly force.[62] However, the *Graham* court could have undertaken the same balancing inquiry and analysis the *Garner* court conducted to create a rule for cases of nonlethal excessive force. Although the *Graham* Court paid lip service to the balancing of interests,[63] it did not engage in a thorough analysis like the *Garner* Court

58. Tennessee v. Garner, 471 U.S. 1, 3 (1985).

59. *Id.* at 3 (holding that deadly force "may not be used unless it is necessary to prevent the escape *and* the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others") (emphasis added).

60. *Id.*

61. *See, e.g.*, Pauly v. White, 874 F.3d 1197, 1215–16 (10th Cir. 2017) (quoting Bryan v. MacPherson, 630 F.3d 805, 826 (9th Cir. 2010) ("[The] second Graham factor . . . is undoubtedly the 'most important' and fact intensive factor in determining the objective reasonableness of an officer's use of force.")).

62. Quintanilla v. City of Downey, 84 F.3d 353, 357 (9th Cir. 1996).

63. *Compare* Graham v. Connor, 490 U.S. 386, 396 (1989) (stating that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake" followed by a several sentence discussion on the relevant interests) (internal quotations omitted), *with Garner*, 471 U.S. at 8–11 (quoting the same balancing test, but going on to state that "[t]he same balancing process applied in the cases cited above demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement").

but rather used the touchstone of reasonableness to list factors it deemed relevant to the Fourth Amendment inquiry.[64]

Moreover, the ambiguity and confusion caused by the *Graham* Court's reasonableness analysis has created a regime that continuously precludes victims of police abuse and violence from obtaining justice. In particular, the Court seems to be saying that, on the one hand, police action must be viewed and analyzed under a totality of the circumstances approach.[65] The factors cited by the opinion seem to indicate the Court's willingness to analyze all police conduct towards an individual. This includes not only the actual force applied to the plaintiff (such as a gunshot) but also any actions by the police that may have caused the need to use the force in the first place.[66] However, the opinion goes on to state that the "same standard of reasonableness at the moment applies," and to analyze only a narrow window of time. [67] Under the capacious reading of *Graham*, federal courts would be allowed to consider police activity directly preceding the use of force.[68] However, under the majority view, reviewing courts must consider only the moment the allegedly unconstitutional seizure took place: all police conduct directly preceding that seizure, no matter how reckless or intentionally dangerous, is irrelevant to the constitutional analysis.[69] Although most federal circuit courts have adopted a narrow reading of *Graham* based on the Court's statements regarding the reasonableness of an officer at the moment they were on the scene,[70] a proper reading of *Graham* as well as analogous Fourth Amendment jurisprudence strongly suggests a broader understanding of the inquiry.

B. The Circuit Split: What Constitutes "Reasonableness?"

Today, federal district and appellate courts adjudicating police excessive force cases analyze the *Graham* factors to determine whether the use of force by the police violated an individual's Fourth Amendment right to be free from unreasonable seizures.[71] To the extent federal courts continue to analyze excessive force cases under *Graham*'s multifactor reasonableness standard, they should adopt the Ninth and Tenth Circuits' more expansive reading of *Graham*, which allows reviewing courts to consider police conduct prior to the moment when force is used.[72]

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64. *Graham*, 490 U.S. at 395–97.

65. *See id.*

66. *Id.* (citing *Garner*, 471 U.S. at 8–9).

67. *Id.*

68. Bond v. City of Tahlequah, 981 F.3d 808, 816 (10th Cir. 2020).

69. *E.g.*, Salim v. Proulx, 93 F.3d 86, 92 (2d Cir. 1996) ("Officer Proulx'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.").

70. *Graham*, 490 U.S. at 396.

71. *See, e.g.*, Anderson v. Branen, 17 F.3d 552, 559 (2d Cir. 1994).

72. *See Bond*, 981 F.3d at 816; Nehad v. Browder, 929 F.3d 1125, 1135 (9th Cir. 2019).

Before analyzing the Ninth and Tenth Circuits' approach, it is important to understand how most federal circuit courts analyze police excessive force cases. A majority of circuit courts, and by extension district courts, reads *Graham* narrowly to apply only at the moment the force was used.[73] As Judge Wilkinson of the Fourth Circuit has explained, "*Graham* requires us to focus on the moment force was used; conduct prior to that moment is not relevant in determining whether an officer used reasonable force."[74] For example, in *Waterman v. Batton*, the Fourth Circuit stated that "the reasonableness of the officer's actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis; rather, reasonableness is determined based on the information possessed by the officer at the moment that force is employed."[75] The plaintiff in *Waterman* was inside of his vehicle when he began to lurch towards the officers.[76] The officers on the scene subsequently shot him eight times.[77] The Fourth Circuit stated that "the officers were forced to immediately decide whether Waterman was attempting to assault the officers ahead of him or whether he intended only to drive by them, leaving them unharmed."[78] Although the court did acknowledge that reasonable officers on the scene would have considered a host of factors,[79] the court concluded that "the critical reality here is that the officers did not have even a moment to pause and ponder these many conflicting factors."[80] Thus, the court ultimately held that the split-second nature of the decision made the officers' use of force reasonable and did not find a Fourth Amendment violation.[81]

The Second Circuit also rejected a broader understanding of *Graham* in *Salim v. Proulx*.[82] The case arose from the death of 14-year-old Eric Reyes in East Hartford, Connecticut. According to the plaintiff's statement of facts, Reyes was resisting arrest while the police officer was being hit and kicked by five or six other children.[83] Although it was conceded that the police officer's use of force was reasonable at the moment that it occurred, Reyes's estate argued that the officer's actions should nevertheless be considered unreasonable because he created the situation in which deadly force became necessary.[84] Specifically, the plaintiff argued that the officer failed to call for back-up and failed to disengage in a non-

73. *Salim*, 93 F.3d at 86; Waterman v. Batton, 393 F.3d 471 (4th Cir. 2005); Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir. 1992); Thomas v. City of Columbus, 854 F.3d 361 (6th Cir. 2017); Carter v. Buscher, 973 F.2d 1328 (7th Cir. 1992); Frederick v. Motsinger, 873 F.3d 641 (8th Cir. 2017).

74. Elliott v. Leavitt, 99 F.3d 640, 643 (4th Cir. 1996).

75. 393 F.3d 471, 477 (4th Cir. 2005).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 478.

81. *Waterman*, 393 F.3d at 478–79.

82. 93 F.3d 86 (2d Cir. 1996).

83. *Id.* at 91.

84. *Id.* at 92.

lethal manner when the other children entered the situation.[85] The Second Circuit rejected this approach and held that the reasonableness inquiry depends only upon the officer's knowledge of the situation immediately preceding the decision to deploy deadly force.[86] Indeed, in an opinion decided only last year, the Second Circuit reaffirmed the *Salim* rule, stating that "actions 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."[87] The other federal appellate courts that have addressed the issue, save for the Ninth and Tenth Circuits, are all in accord.[88]

Unlike the majority of federal circuit courts of appeals, the Ninth and Tenth Circuits allow courts to consider an officer's actions prior to the use of force. Reading *Graham* broadly, these circuits have held that officers who create the need to use deadly force may be found to have, under the totality of the circumstances, acted unreasonably.[89] For instance, the Tenth Circuit's rule states that "[t]he reasonableness of [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 conduct during the seizure unreasonably created the need to use such force."[90] Although the Ninth Circuit has not articulated a reckless or deliberate standard like the Tenth Circuit, it has stated that "[s]ometimes, however, officers themselves may 'unnecessarily creat[e] [their] own sense of urgency'"[91] and that "when an officer creates the very emergency he then resorts to deadly force to resolve, he is not simply responding to a preexisting situation."[92]

Both the Ninth and Tenth Circuits recently had the opportunity to show how their broader reading of *Graham* applies. In *Bond*, the Tenth Circuit found that the officers' reckless or deliberate conduct before their use of deadly force against the plaintiff-decedent created a genuine dispute of material fact such that it denied the defendant's motion for summary judgment.[93] *Bond* involved the shooting of

85. *Id.*

86. *Id.*

87. Ferreira v. City of Binghamton, 975 F.3d 255, 279 (2d Cir. 2020) (quoting *Salim*, 93 F.3d at 92).

88. Fraire v. City of Arlington, 957 F.2d 1268, 1275 (5th Cir. 1992); Thomas v. City of Columbus, 854 F.3d 361, 365 (6th Cir. 2017); Carter v. Buscher, 973 F.2d 1328, 1331 (7th Cir. 1992); Frederick v. Motsinger, 873 F.3d 641, 645 (8th Cir. 2017). The Sixth and Seventh Circuits use a slightly different approach, known as the "Segmented Approach," that breaks down the incident into different parts and analyzes the reasonableness of each part on its own. *See* Jack Zouhary, *A Jedi Approach to Excessive Force Claims: May the Reasonable Force Be with You*, 50 U. TOL. L. REV. 1, 8 (2018).

89. Bond v. City of Tahlequah, 981 F.3d 808, 816 (10th Cir. 2020); Nehad v. Browder, 929 F.3d 1125, 1135 (9th Cir. 2019).

90. *Bond*, 981 F.3d at 816 (quoting Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir. 1995)).

91. *Browder*, 929 F.3d at 1135.

92. Porter v. Osborn, 546 F.3d 1131, 1141 (9th Cir. 2008) (although this decision involved a Fourteenth Amendment claim, the Courts' rationale incorporated Fourth Amendment excessive force claims).

93. *Bond*, 981 F.3d at 812, 824. The City eventually petitioned the Supreme Court to review the Tenth Circuit's rule. Petition for Writ of Certiorari, City of Tahlequah v. Bond, 595 U.S. 9 (2021)

Dominic Rollice,[94] who was retrieving tools from his ex-wife's house.[95] After he refused to leave her house, Mr. Rollice's ex-wife called 911 and asked the dispatcher to send police to arrest him.[96] She told the dispatcher that Mr. Rollice was intoxicated and that he was in her garage.[97] As the officers slowly moved towards Mr. Rollice, he reached a workbench in the garage and grabbed a hammer.[98] The officers told Mr. Rollice to drop the hammer, but he did not comply; eventually, he pulled the hammer behind his head and the officers shot him multiple times.[99] He was pronounced dead at the hospital.[100]

The *Bond* Court began its analysis by citing the *Graham* factors.[101] The Court noted that the *Graham* inquiry is a "'totality of the circumstances' analysis" which involves conduct that is "'immediately connected' to the use of deadly force" by the police.[102] The Court first conducted the *Graham* analysis at the moment that the officers used lethal force and determined that it presented a "close call on whether summary judgment was proper."[103] However, in stark contrast to the other federal circuits, the Court continued and stated "our review is not limited to that narrow timeframe. Instead, we consider the totality of circumstances leading to the fatal shooting, including the actions that resulted in Dominic being cornered in the back of the garage by three armed police officers."[104] Analogizing to other Tenth Circuit precedent, where the court had previously found that officers who recklessly confronted armed and impaired individuals had violated the Fourth Amendment, the court held that "[a] reasonable jury could find that the officers' reckless conduct unreasonably created the situation that ended Dominic's life."[105]

The Ninth Circuit has similarly addressed whether unreasonable conduct by the police immediately preceding the use of deadly force may violate the Fourth Amendment.[106] Fridoon Nehad encountered Andrew Yoon outside of the bookstore where Mr. Yoon worked.[107] According to Mr. Yoon, Mr. Nehad showed him an unsheathed knife and said that he wanted to hurt people.[108] Mr.

(No. 20–1668). The Court refused to review the rule, however, and instead held that the officers were entitled to qualified immunity. City of Tahlequah v. Bond, 595 U.S. 9 (2021) (per curiam).

94. Bond v. City of Tahlequah, 981 F.3d 808, 814 (10th Cir. 2020).
95. *Id.* at 812.
96. *Id.*
97. *Id.*
98. *Id.* at 813.
99. *Id.* at 814.
100. *Bond*, 981 F.3d at 814.
101. *Id.* at 816.
102. *Id.*
103. *Id.* at 822.
104. *Id.*
105. *Id.* at 824.
106. *See* Nehad v. Browder, 929 F.3d 1125, 1135 (9th Cir. 2019).
107. *Id.* at 1130.
108. *Id.*

Yoon ignored him and returned to work inside of the bookstore.[109] A few minutes later, Mr. Nehad came back into the store without a knife and repeated that he wanted to harm people before leaving the bookstore from a side door into an adjoining alley.[110] Mr. Yoon then called 911 and told the dispatcher that he had been threatened with a knife by Mr. Nehad.[111] Officer Browder of the San Diego Police Department arrived at the scene.[112] According to eyewitness testimony, Officer Browder ordered Mr. Nehad to "stop, drop it."[113] Less than five seconds after exiting his vehicle, Officer Browder fired a shot at Mr. Nehad, fatally striking him in his chest.[114] Officer Browder never identified himself as a police officer or warned that he was going to shoot.[115] A few hours after the shooting, Officer Browder told police investigators that he did not see Mr. Nehad carrying any weapons.[116] Indeed, the investigators did not find any weapons in the alley and, upon examining Mr. Nehad's body, found that he had been carrying a metallic blue pen.[117]

After Officer Browder won his motion for summary judgment at the district court, Mr. Nehad's estate appealed.[118] Officer Browder argued, *inter alia*, that the court should primarily focus its analysis on the five seconds between his exiting of the vehicle and the use of deadly force against Mr. Nehad.[119] The court acknowledged that "officers must act 'without the benefit of 20/20 hindsight,' and must often 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.'"[120] However, the court further stated that "officers themselves may 'unnecessarily creat[e] [their] own sense of urgency.'"[121] Adopting a capacious "totality of circumstances" approach similar to that of the *Bond* court, the Ninth Circuit[122] found that "[r]easonable triers of fact can, taking the totality of the circumstances into account, conclude that an officer's poor judgment or lack of preparedness caused him or her to act unreasonably."[123]

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109. *Id.*
110. *Id.*
111. *Id.*
112. *Browder*, 929 F.3d at 1130.
113. *Id.* at 1131.
114. *Id.*
115. *Id.* at 1135.
116. *Id.*
117. *Id.*
118. *Browder*, 929 F.3d at 1132.
119. *See* Appellees' Answering Br. at *28 (including the "less than five seconds" language); *Browder*, 929 F.3d at 1134–35 ("[A]ppellees make much of the (asserted) fact that Browder had less than five seconds between the time he exited his vehicle and the moment he shot Nehad.").
120. *Browder*, 929 F.3d at 1135 (quoting Graham v. Connor, 490 U.S. 386, 396–97 (1989)).
121. *Id.* (quoting Torres v. City of Madera, 648 F.3d 1119, 1126 (9th Cir. 2011)).
122. *Id.* at 1135.
123. *Id.*

The court held that, under the totality of the circumstances, including Officer Browder's actions prior to his use of deadly force against Mr. Nehad, created a genuine dispute of material fact rendering summary judgment inappropriate.[124] For instance, the court noted Mr. Nehad was walking at a relatively slow pace and did not appear to say or do anything that could be deemed threatening.[125] Furthermore, the court noted that the lighting was sufficient to see and identify the color of the pen.[126] Most importantly, the court emphasized that Officer Browder never identified himself as a police officer or warned Mr. Nehad he was going to shoot.[127] In reversing the district court's summary judgment order, the *Browder* court evaluated the deadly incident as a whole, rather than just the moment of the shooting.[128]

III.
ADOPTING THE CAPACIOUS RULE IN NON-LETHAL EXCESSIVE FORCE CASES: WHY THE NINTH AND TENTH CIRCUITS ARE CORRECT

The Ninth and Tenth Circuits' broad reading of *Graham* to allow factfinders to consider officers' conduct prior to using lethal or non-lethal excessive force should be adopted by the remaining federal appellate courts. If reckless or deliberate police conduct created a situation where officers felt that lethal or excessive force was necessary, the taint of that initial recklessness travels with the officers, rendering what could be a "reasonable" use of force, under a truly constrained timeframe, unreasonable under the totality of the circumstances.

First, the Ninth and Tenth Circuits' rule is consistent with *Graham*. These circuits' consideration of police conduct that is causally linked to the perceived need to use deadly force can best be described as a component of the second *Graham* factor, "whether the suspect poses an immediate threat to the safety of the officers or others."[129] By incorporating police-created phenomena directly linked to the eventual use of force by the officer into the analysis of the second *Graham* factor, courts and factfinders can properly consider whether an individual actually posed a threat to officers or others or whether they were simply reacting to the police officers' actions. This leads to a more thorough and robust analysis of "the

124. *Id.* at 1142–43.

125. *Browder*, 929 F.3d at 1135.

126. *Id.*

127. *Id.* at 1137.

128. *Id.* at 1142–43.

129. Graham v. Connor, 490 U.S. 386, 396. By limiting the inquiry to police recklessness that is linked to the eventual use of force, the capacious standard limits the scope of police conduct that can be analyzed. Specifically, only police-created phenomena that has a causal nexus to the use of force will be part of the analysis. This limiting principle ensures that not all police conduct would become relevant for the inquiry, maintaining the second *Graham* factor's focus on "immediacy." Sevier v. City of Lawrence, Kan., 60 F.3d 695, 699 n.8 (10th Cir. 1995) (stating "if the preceding events are merely negligent or if they are attenuated by time or intervening events, then they are not to be considered in an excessive force case.").

most important *Graham*"[130] factor. Importantly, this more comprehensive approach does not ask courts or factfinders to consider police conduct with the benefit of "20/20 hindsight."[131] Rather, it simply broadens the relevant temporal scope of the analysis. Courts can, and indeed should, analyze officers' reckless conduct without the benefit of hindsight. Thus, if the police's conduct prior to the use of lethal force cannot be deemed reckless based on the facts and circumstances known to the officer at the time, then the plaintiff should not be able to rely on it to prove a Fourth Amendment violation.

Second, the Ninth and Tenth Circuits' capacious rule would bring excessive and lethal police force cases in line with other Fourth Amendment doctrine that already places great weight on a totality of the circumstances analysis. The Supreme Court has stated, in considering various police-citizen encounters, that a totality of the circumstances inquiry is necessary to determine whether the Fourth Amendment has been violated. For example, determining whether an individual consented to a search or was, instead, forced to comply with the officer's demand is determined by the totality of the circumstances.[132] Indeed, the totality of circumstances approach extends to analyzing whether an individual is considered seized under the Fourth Amendment[133] and whether exigent circumstances justify the search of a home without a warrant.[134] The objectivity required by the word "reasonable" necessitates examining all of the relevant police conduct towards the plaintiff in order to determine whether those actions fall within the scope of the Fourth Amendment's protections. Limiting the inquiry to a single moment in time does not permit an accurate analysis. The majority reading of *Graham* stands in stark contrast to other relevant Fourth Amendment doctrine and inquiries.

Arguments that the unique nature of excessive police force cases requires a more limited analysis compared to other areas of Fourth Amendment jurisprudence are unpersuasive. Proponents of law enforcement may contend that legal standards governing the police should account for the dangerous and volatile nature of police work to limit liability to only the most egregious actors. Yet, all police-civilian encounters, not just those that end with the use of deadly force by

130. Pauly v. White, 874 F.3d 1197, 1215–16 (10th Cir. 2017); *see* Brianna Vollman, *The Use of Force: The Proper Timeframe to Assess Reasonableness in Excessive Force Cases*, UNIV. OF CIN. L. REV. BLOG (July 28, 2020), https://uclawreview.org/2020/07/28/the-use-of-force-the-proper-timeframe-to-assess-reasonableness-in-excessive-force-cases/ [https://perma.cc/PV8N-6VS4] (analyzing actions and conduct by police officers that may have led to individuals under arrest acting in a particular manner).

131. *Graham*, 490 U.S. at 396.

132. United States v. Drayton, 536 U.S. 194, 207 (2002).

133. United States v. Mendenhall, 446 U.S. 544, 557 (1980).

134. *See* Lange v. California, 141 S. Ct. 2011, 2021–22 (2021) (rejecting a categorical warrant exception when a suspected misdemeanant enters their home while fleeing from the police and holding that reviewing courts must look "to the totality of circumstances" including the suspects' conduct prior to the home entry when determining whether exigencies are present).

the police, are filled with risk and can be characterized as potentially dangerous.[135] General Fourth Amendment doctrine, which takes into account officer safety and other considerations that favor law enforcement, nevertheless requires courts to consider a broader, more encompassing set of facts to determine whether there was a Fourth Amendment violation.

Under the current legal structure, courts can consider facts from a broad time period when determining whether warrantless entry into a home was justified by exigent circumstances.[136] However, if the very same intrusion resulted in a death at the hands of police, most courts would limit their analysis solely to the moment officers deployed deadly force.[137] This limitation is absurd, as it is based solely on whether the police used deadly force. Indeed, a plaintiff in the previous hypothetical challenging the two distinct Fourth Amendment violations would likely prevail under the unlawful search claim but fail on their excessive force claim even though the police conduct is the exact same for both violations. Today's deadly or excessive force jurisprudence thus deviates from the totality approach that is so fundamental to Fourth Amendment law.[138]

A. Responding to Pushback Against the Capacious Interpretation

Police officers and the groups representing their interests may argue that the Ninth and Tenth Circuits' reckless conduct rule[139] is unconstrained, would lead to excessive police liability, and would fundamentally limit effective policing. For example, the City of Tahlequah's Petition for Certiorari with the Supreme Court argued that the Tenth Circuit's rule "is plainly wrong, as evidenced by the untenable position in which it leaves officers, who face liability and being branded unconstitutional actors even if they act reasonably in self-defense. Officers deserve better than to be put in that no-win position."[140]

These arguments are unconvincing for several reasons. First, the reckless conduct rule is not unconstrained: It is limited to conduct that is "immediately

135. David D. Kirkpatrick, Steve Eder, Kim Barker & Julie Tate, *Why Many Police Stops Turn Deadly*, N.Y. TIMES (Nov. 30, 2021) https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html [https://perma.cc/5MQB-N72Y]; Gabriel L. Schwartz & Jaquelyn L. Jahn, *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities, 2013-2017*, 15 PLOS ONE, no. 6, June 2020, https://doi.org/10.1371/journal.pone.0229686 [https://perma.cc/9PEV-ZFWP].

136. *Lange*, 141 S. Ct. 2021–22; *see also supra* text accompanying note 134.

137. *See supra* note 73 (citing cases demonstrating the limited temporal analysis most federal circuits conduct in excessive force litigation).

138. Indeed, the Supreme Court has stated "Graham commands that an officer's use of force be assessed for reasonableness under the "totality of the circumstances." County of Los Angeles v. Mendez, 581 U.S. 420, 429 n.* (2017). To the extent the majority of circuits fail to consider a broader temporal scope, their analysis of a police excessive force case cannot be considered a "totality of the circumstances" analysis in any meaningful way.

139. The term "reckless conduct rule" is the author's descriptor for the Ninth and Tenth Circuits' tests.

140. Petition for Writ of Certiorari at 3, Bond v. City of Tahlequah, 981 F.3d 808 (10th Cir. 2020) (No. 20-1668), 2021 WL 2226441.

connected" to the use of force by the police.[141] A causal nexus is required between the officers' reckless conduct and the subsequent use of force in order for that conduct to be taken into account when conducting the Fourth Amendment analysis.[142] Absent such a nexus, the officers' actions prior to the use of force will not play a role in determining whether the Fourth Amendment has been violated.[143] Moreover, the rule is further limited by its reference to "reckless or deliberate,"[144] legal terms of art that have been widely interpreted in both criminal and tort law.[145] Negligent actions by officers that lead to the use of lethal or excessive force, but do not rise to the level of reckless or deliberate, would fall outside the scope of the rule.

Furthermore, it is not clear that the reckless conduct rule would necessarily lead to more police liability. In practice, the rule would likely have the greatest effect at the summary judgment stage, by creating genuine disputes of material fact. Indeed, both *Bond* and *Browder*, as well as the circuit precedents they rely on, were appealed following a district court's order of summary judgment.[146] While surviving summary judgment extends the proceedings, it in no way guarantees a finding of liability for officers accused of unreasonable use of force. The plaintiff still has the burden of proving their case by a preponderance of the evidence at trial. Surviving summary judgment will undoubtedly increase settlement pressure, but given that many jurisdictions indemnify officers who are sued, the threat of a large settlement does not impact individual officers as much as the public may think.[147] Realistically, this means that officers found liable or those who decide to settle with plaintiffs out of court do not pay for any of the damages from their own pockets.[148] As a result, pro-police legal and policy arguments, such

141. *Bond*, 981 F.3d at 816.

142. *Id.*

143. Estate of Ceballos v. Husk, 919 F.3d 1204, 1214 (10th Cir. 2019) (stating that "conduct attenuated by time or intervening events is not to be considered").

144. *Id.*

145. MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST., Proposed Official Draft 1962) (defining recklessness as "a person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."); RESTATEMENT (SECOND) OF TORTS § 500 (AM. L. INST. 1965) (defining recklessness as "reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent."); The Cornell Legal Information Institute defines the adjectival form of "deliberate" as "refer[ring] to intentional or predetermined action or omission." *Deliberate*, CORNELL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/deliberate [https://perma.cc/3H25-XY3S] (last visited June 9, 2023). Proving recklessness or deliberate intention is each a higher burden to meet than negligence because the plaintiff must show that the defendant engaged in some mental calculus prior to engaging in the conduct or action at the center of the dispute.

146. *Bond*, 981 F.3d at 826; Nehad v. Browder, 929 F.3d 1125, 1141–42 (2019).

147. Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 943 (2014).

148. *Id.* at 900.

as those related to qualified immunity,[149] that unjustifiably claim that civil liability will hinder "police work" are unfounded and often meritless. The courthouse doors and the constitutional claims litigants bring against police officers should not be closed off by considerations that have little to no real-world effect on the conduct of officers.[150]

The last concern, the effective use of force by officers, necessarily begs the question: is current use of force by the police "effective" if it kills or seriously injures those it is ostensibly protecting? About 1,000 people die every year from police shootings, most of whom are young men.[151] This rate has remained steady despite the social-distancing measures put in place to help combat the COVID-19 pandemic.[152] Moreover, despite constituting less than 13% of the United States' population, Black Americans are shot and killed by the police at more than twice the rate of white Americans.[153] Under a definition of the word "effective" that prioritizes community safety, police across the United States continually drop the ball. An institution that proudly proclaims to "protect and serve" the public must be held accountable for the lives lost at its hands.

IV.
IS THE CAPACIOUS RULE ENOUGH IN THE DEADLY FORCE CONTEXT? ADVOCATING FOR STANDARDS BEYOND *GRAHAM*

Although a capacious reasonableness rule allowing courts and factfinders to consider whether an officer's reckless or deliberate conduct led to the use of excessive force would likely lead to more police accountability, it still misses the mark, at least in the context of lethal excessive force cases. Courts should go a step farther and adopt a legal standard that limits police authority to use deadly force to only the most extreme situations. It is important to note that *Graham* was not a deadly force case: Mr. Graham, although injured by the police, thankfully walked away with his life.[154] Because *Graham* was a non-lethal excessive force case, its factors and case-specific reasonableness analysis should not govern cases

149. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)) (stating that "fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials] in the unflinching discharge of their duties'").

150. ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE 88–90 (2017) (analyzing the breadth of qualified immunity "and the often insurmountable obstacle it presents to enforcing the Constitution"); Schwartz, *supra* note 147 (summarizing study's findings and stating that "[b]etween 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor, and their contributions amounted to just .02% of the over $730 million spent by cities, counties, and states in these cases. Officers did not pay a dime of the over $3.9 million awarded in punitive damages.").

151. *Fatal Force: Police Shooting Database*, WASH. POST, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/EY2V-ZGBF] (last visited Nov. 16, 2022).

152. *Id.*

153. *See* AM. C.L. UNION, *supra* note 4.

154. Graham v. Connor, 490 U.S. 386, 390 (1989).

where police use lethal force against a civilian. Rather, the Fourth Amendment's reasonableness analysis should lead to the following standard: lethal force should only be allowed if necessary to defend against an imminent threat of death or serious bodily injury to the officer or to another person, and only after all other alternatives to lethal force have been exhausted (hereinafter, "reformed necessary approach").[155] In determining whether the use of lethal force was necessary, courts should incorporate the Ninth and Tenth Circuits' "reckless conduct" test to determine whether the officer's actions created the need to use force.[156] The higher standard and the broad temporal scope used to analyze police conduct under that rule creates a legal test that prioritizes human life.

Although this standard is similar to the *Garner* test, it is fundamentally different in two key ways. First, to the extent that courts use the *Garner* test to determine the legality of deadly force, its temporal scope is limited by the narrow reading of *Graham* that is endorsed by a majority of circuits. Under the suggested reformed necessary approach, courts would be able to consider police conduct directly leading up to the use of lethal force.[157] This, in turn, ensures that the police's actions are evaluated when determining whether the use of deadly force was truly "necessary" or whether it was used only after police created a situation where they felt it was necessary. Without this limiting principle, officers could still escape liability by arguing that the use of force was necessary to stop the fleeing suspect, even if the officers' own actions caused the suspect to flee.

Relatedly, while *Garner* only allows officers to use lethal force against suspects if they have a good faith belief that the fleeing suspect poses a threat to the officers or others,[158] the flexibility of that standard provides officers with greater leeway to use lethal force. Under the reformed necessary approach, police officers will only be able to use deadly force if it is *absolutely necessary* to prevent death or harm to themselves or third parties. Indeed, this approach effectively calls for a "least-restrictive means" analysis akin to strict scrutiny to determine whether the police's deadly actions were legally justified.[159] Moreover, the reformed necessary approach strikes a more appropriate balance between the pertinent Fourth Amendment interests at stake—the life of an individual, on the one hand, and law

155. *See* AM. C.L. UNION, *supra* note 4 (expressing the ACLU's support for this standard).

156. *See* Bond v. City of Tahlequah, 981 F.3d 808, 816 (10th Cir. 2020); Nehad v. Browder, 929 F.3d 1125, 1135 (9th Cir. 2019).

157. Conduct "directly leading up to the use of legal force" is akin to traditional causation analysis and would be limited by the proximate cause doctrine, thereby ensuring attenuated police action does not lead to liability. *See* Arnold v. Olathe, Kansas, City of, 550 F. Supp. 3d 969, 984 (D. Kan. 2021), *aff'd sub nom.* Arnold v. City of Olathe, Kansas, 35 F.4th 778 (10th Cir. 2022) (quoting Sevier v. City of Lawrence, Kansas, 60 F.3d 695, 699 n.8 (stating "if the preceding events . . . are attenuated by time or intervening events, then they are not to be considered in an excessive force case.")).

158. Tennessee v. Garner, 471 U.S. 1, 3 (1985).

159. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

enforcement interests, on the other.[160] If plaintiffs can persuasively show that the police had a less intrusive alternative than the use of deadly force, the police would be held liable. This legal rule would force police officers to take their training seriously and incentivize them to focus on de-escalation.

Lastly, legal rules and decisions should be adopted based on practical concerns as well as real-life consequences. Although many a legal academic will likely argue to the contrary, the law is not an objective science whose wisdom can be "found" through the rational decisions of well-reasoned, objective jurists.[161] Legal rules and decisions do not exist in a vacuum; their implications and rationales have real life consequences, not only for the particular individuals involved in a case but also for society at large. The legal fiction of artificially blinding oneself to the "facts on the ground" will inevitably lead to standards, rules, and decisions that fail to consider the lived experiences and realities of the people who will be most affected by those outcomes.

To the extent that this broad reading of the Fourth Amendment is unattainable in federal court, litigators and activists should utilize state courts and legislatures to advance more protective Fourth Amendment standards. Indeed, state constitutional analogues to the Fourth Amendment, which can be interpreted independently of the Fourth Amendment, should be used to achieve a more protective standard.

New York is one such example. Though Article I, Section 12, Clause 1 of the New York State Constitution is textually identical to the federal Fourth Amendment,[162] the New York Court of Appeals has made clear that it will construe Article I, Section 12 "independently of its Federal counterpart when the analysis adopted by the Supreme Court in a given area has threatened to undercut the right of our citizens to be free from unreasonable government intrusions."[163] It has done so on numerous occasions.[164] For example, the Court of Appeals in New York, the highest state court, has recognized four different types of police-civilian encounters, all of which require a necessary factual predicate to justify the police's conduct.[165] These encounters range from limited inquiries to full-blown arrests

160. *See Garner*, 471 U.S. at 8 (stating that the "balancing of competing interests" is "the key principle of the Fourth Amendment" and "[b]ecause one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out").

161. *See, e.g.*, David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 469 (1990) ("[T]here is no precedent the judge may not at his need either file down to razor thinness or expand into a bludgeon" (quoting KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 180 (1930)).).

162. N.Y. CONST. art. I, § 12.

163. People v. Dunn, 77 N.Y.2d 19, 24 (N.Y. 1990).

164. *See, e.g., id.*; People v. Torres, 74 N.Y.2d 224, 230 (N.Y. 1989); People v. De Bour, 40 N.Y.2d 210 (N.Y. 1976).

165. People v. Hollman, 79 N.Y.2d 181, 185 (N.Y. 1992) ("[W]e are convinced that the four-part *De Bour* analysis still has vitality. Each progressive level, however, authorizes a separate degree of police interference with the liberty of the person approached and consequently requires escalating suspicion on the part of the investigating officer.").

requiring probable cause.[166] By requiring that all police-civilian conduct be justified by some factual predicate, the Court of Appeals has implicitly shown its willingness to provide greater protections for New York State residents under the state constitution than they have under the federal constitution.

California is another example. In 2019, the California legislature introduced and passed the California Act to Save Lives,[167] which provides that "a peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary."[168] Although far from a perfect bill, due to its dilution following pressure from pro-law enforcement groups and its lack of race-conscious language,[169] the Act still goes above and beyond Fourth Amendment protections, since police would only be able to use force if it is truly "necessary"—not just if it could be considered "reasonable."

Litigating in state court under state constitutional provisions and statutes may provide not only substantive but also procedural benefits for plaintiffs. A plaintiff who sues a police officer from the same state under purely state law will not have to worry about the officer removing the case to federal court, assuming both are domiciliaries of the state.[170] By contrast, if a plaintiff were to sue a police officer under the federal constitution in state court, the police officer would be able to remove their case to the federal forum encompassing that state court.[171] Given the number of federal judges appointed by a presidential administration that was generally hostile to civil rights,[172] this change in forum would likely to make it more difficult for the plaintiff to succeed. Furthermore, plaintiffs may also be able to dodge Supreme Court review of potential victories under the adequate and independent state ground ("AISG") doctrine, which forecloses appellate review by the federal Supreme Court of state high court opinions that rely on adequate and independent state law grounds.[173] These procedural safeguards can help insulate

166. *Id.*

167. California Act to Save Lives, 2019 Cal. Stat. 2500–02.

168. A.B. 392, ch. 170.

169. Eliana Machefsky, *The California Act to Save [Black] Lives? Race, Policing, and the Interest-Convergence Dilemma in the State of California*, 109 CALIF. L. REV. 1959, 1993, 2002 (2021) (arguing that the Act's failure to use race-conscious language and its failure to statutorily define "necessary" fails to provide the protection needed against police officers).

170. *See* 28 U.S.C. § 1441.

171. *Id.*

172. *See generally* LAMBDA LEGAL, COURTS, CONFIRMATIONS, & CONSEQUENCES: HOW TRUMP RESTRUCTURED THE FEDERAL JUDICIARY AND USHERED IN A CLIMATE OF UNPRECEDENTED HOSTILITY TOWARD LGBTQ+ PEOPLE AND CIVIL RIGHTS (2021), https://www.lambdalegal.org/sites/default/files/judicial_report_2020.pdf [https://perma.cc/HZE5-BUT9].

173. Republican Nat'l Comm. v. Burton, 455 U.S. 1301, 1302 (1982). Admittedly, this latter proposition is not fool-proof. *See* Michigan v. Long, 46 U.S. 1032, 1040–41 (1986) (holding that when state court opinions interpreting state constitutional provisions "fairly appear to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," they are presumptively not independent state law grounds for the purposes of appellate review). State courts interpreting

plaintiffs from an unfriendly federal judiciary. Litigating excessive police force claims in state court under state constitutional provisions and statutes can lead to broader protections for civil rights claimants, as well as more encompassing constitutional protections for citizens.

CONCLUSION

The police believe that their duty to "protect and serve" creates safer environments for all citizens.[174] However, time and again, the police fall short of this lofty goal.[175] Indeed, the police often create an environment of fear and mistrust amongst the communities, particularly communities of color, that they ostensibly claim to keep safe.[176]

In order to combat the terror of police forces, federal courts hearing excessive force claims brought by civil rights plaintiffs must adopt more protective constitutional standards. In particular, in non-lethal excessive force cases, more federal courts and the Supreme Court should adopt the capacious reading and understanding of *Graham v. Connor* currently only used by the Ninth and Tenth Circuits.[177] Adopting this broader reading of *Graham* will allow courts to consider the reckless and deliberate actions by police officers that created the need to deploy excessive force. Moreover, in lethal force cases, a more stringent standard should apply: the "reformed necessary standard." Namely, it should only be considered reasonable for police officers to deploy lethal force when it is necessary to prevent harm to the officer or a third party.

To the extent either of these approaches fail in federal court, civil rights litigators should turn to the states and Congress for action. Advocates should push state courts to adopt these more protective standards under their respective state constitutional provisions. So, too, should litigators push state and federal

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state constitution Fourth Amendment analogues often incorporate federal Fourth Amendment standards, which would negate an AISG defense and open the door to Supreme Court review. *Id.*

174. *See* N.Y.C. Police Dep't, *Mission Statement*, https://www.nyc.gov/site/nypd/about/about-nypd/mission.page [https://perma.cc/6L9K-MMGZ] (last visited Dec. 5, 2022) (stating "[t]he mission of the New York City Police Department is to enhance the quality of life in New York City by working in partnership with the community to enforce the law, preserve peace, protect the people, reduce fear, and maintain order.").

175. *See, e.g.*, ALEX VITALE, THE END OF POLICING (2017); DAVID BAYLEY, POLICE FOR THE FUTURE 3, 10, 55 (1996).

176. *See* Illinois v. Wardlow, 528 U.S. 119, 133 (2000) (Stevens, J. dissenting) ("[A]mong some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence."); Laura Santhanam, *Two-Thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do.*, PBS NEWSHOUR: POLITICS (June 5, 2020, 12:00 PM), https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do [https://perma.cc/9RNW-53SU]; Grace Sparks, *Polling Highlights Stark Gap in Trust of Police Between Black and White Americans*, CNN (June 2, 2020, 7:35 PM), https://www.cnn.com/2020/06/02/politics/polls-police-black-protests/index.html [https://perma.cc/2SL7-9TKB].

177. *See supra* note 72.

legislatures to pass laws that limit law enforcement's ability to use lethal force. Police use of force jurisprudence must evolve to ensure police accountability and public safety. Failure to do so will lead to a jurisprudence that falls demonstrably short of the guarantees enshrined in the Constitution and to the countless unnecessary deaths of Americans—particularly, Black and Brown Americans.