RENAMING DEADLY FORCE

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Three times a day in the United States, a police officer kills someone. On any given day, this person might be an active shooter, a hostage-taker, or a bomber. But on that same day police might also kill a motorist reaching for his license (Philando Castile), someone selling loose cigarettes (Eric Garner), someone who used a counterfeit bill at a grocery store (George Floyd), or someone fleeing a traffic ticket for a malfunctioning brake light (Walter Scott). Intuitively, these scenarios present radically different uses of deadly force, but the nomenclature we use for deadly force does not account for this—all police killings are simply "deadly force." This Article suggests that this is a mistake that stunts both scholarship and discourse.

Instead, this Article contends, police killings demand a new taxonomy, one that easily and intuitively distinguishes between different types of deadly force. This Article proposes a framework that distinguishes between police killings we intuitively understand to be problematic and those we are more willing to accept. It does so by proposing that deadly force be divided into three categories—preemptive, anticipatory, and reactive—according to the degree of speculation an officer relies on when they decide to use deadly force. Importantly, because this Article advances a descriptive as opposed to doctrinal theory, its proposal need not be adopted by courts to afford substantial benefits to scholars, officers, or litigants. Rather, this Article aims to aid scholars', litigants', and courts' attempts to classify and explain the differences between police killings. Unlike the catch-all term "deadly force," this Article's framework recognizes and accounts for the dissimilarity of many police killings, which have nothing in common besides the end result.

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INTRODUCTION

Police violence in America has been a crisis for nearly a century. In the 1920s, officers "were encouraged to deal violently with suspected criminals on the street, even when violence was unnecessary to apprehend a suspect or protect the officer," prompting juries to begin acquitting suspects who had been subject to unreasonable tactics.[1] Three decades later, police spent a Sunday in March beating peaceful civil rights protestors on Edmund Pettus Bridge in Selma, Alabama.[2] Twenty-six years after that, four officers beat Rodney King "fifty-six times in eighty-one seconds with their two-pound, twenty-four-inch, solid-aluminum Monadnock PR-24 batons," on the side of the road in a Los Angeles suburb.[3] Nearly three decades later, police uses of force remain prevalent. In recent years, mounting frustration with police violence has led to protests and calls for major reform to American police depart-

1 Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 RUTGERS L. REV. 447, 511 (2010) ("Newspapers, books and even films of the late 1920s and early 1930s frequently detailed the horrors of police interrogation. Public attention to the issue meant that juries, already sensitive to the issue in the early 1920s, placed more pressure on the New York Police Department to refrain from third-degree tactics than one might intuit." (footnote omitted)).

2 *E.g.*, ROBERT A. PRATT, SELMA'S BLOODY SUNDAY: PROTEST, VOTING RIGHTS, AND THE STRUGGLE FOR RACIAL EQUALITY 63–65 (2017).

3 JOE DOMANICK, BLUE: THE LAPD AND THE BATTLE TO REDEEM AMERICAN POLICING 3–4 (2015).

ments.[4] Animating this movement is a series of Black men killed at the hands of police: Michael Brown,[5] Eric Garner,[6] Philando Castile,[7] Walter Scott,[8] Samuel DuBose,[9] and George Floyd.[10] All were unarmed.

To accompany the public's mounting anger about police killings, scholars advance innumerable suggestions for reforming America's police departments and the legal doctrines that regulate them.[11] Suggestions have included innovations

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4 The Obama administration seized on public opinion and authored a comprehensive report on steps to reform policing. FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1 (May 2015), https://cops.usdoj.gov/RIC/Publications/cops-p311-pub.pdf [https://perma.cc/U5XC-ZLNB] (noting "recent events" prompted the task force's creation).

5 Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html [https://perma.cc/79MC-PLUZ].

6 Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html [https://perma.cc/HJ84-DXND] ("Mr. Garner's final words—'I can't breathe'—became a rallying cry for a protest movement.").

7 Matt Furber & Mitch Smith, *'I Had No Choice,' Minnesota Officer Testifies on Shooting*, N.Y. TIMES (June 9, 2017), https://www.nytimes.com/2017/06/09/us/jeronimo-yanez-philando-castile-minnesota-shooting.html [https://perma.cc/3VAD-GDLW].

8 Matt Ford, *Shot and Killed While Running Away*, ATLANTIC (Apr. 8, 2015), https://www.theatlantic.com/politics/archive/2015/04/shot-and-killed-while-running-away/389976/ [https://perma.cc/R8RR-TG46].

9 Richard Pérez-Peña, *University of Cincinnati Officer Indicted in Shooting Death of Samuel Dubose*, N.Y. TIMES (July 29, 2015), https://www.nytimes.com/2015/07/30/us/university-of-cincinnati-officer-indicted-in-shooting-death-of-motorist.html [https://perma.cc/BDZ9-DKTL].

10 *How George Floyd Died, and What Happened Next*, N.Y. TIMES (Oct. 5, 2021), https://www.nytimes.com/2020/05/27/us/george-floyd-minneapolis-death.html [https://perma.cc/3TYS-BCFS]; Dionne Searcey & David Zucchino, *Protests Swell Across America as George Floyd Is Mourned Near His Birthplace*, N.Y. TIMES (June 6, 2020), https://www.nytimes.com/2020/06/06/us/george-floyd-memorial-protests.html [https://perma.cc/GXS7-VQWM] (last updated Mar. 11, 2021).

11 *E.g.*, Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2069–81 (2017); Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 307–08 (2016); Monu Bedi, *Toward a Uniform Code of Police Justice*, 2016 U. CHI. LEGAL F. 13, 13; Mary D. Fan, *Violence and Police Diversity: A Call for Research*, 2015 BYU L. REV. 875, 875–76 (2015); 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); Bill Ong Hing, *From Ferguson to Palestine: Disrupting Race-Based Policing*, 59 HOW. L.J. 559, 565 (2016); Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. FORUM 235, 235–36 (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); Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1035–39 (2016); John Rappaport,

in the doctrine of deadly force,[12] changing the way police understand their role in society,[13] and abolishing the police entirely.[14] Unsurprisingly, scholars have paid close attention to deadly force, in particular.[15] But despite this vast base of literature on policing, and the use of force specifically, the way we *describe* killings has not evolved. This Article contends that is a mistake; failure to appropriately label police killings results in analysis and scholarship that does not adequately distinguish between killings that society might be more comfortable justifying from untenable uses of deadly force.

The Supreme Court has only confused the struggle to better regulate and understand deadly force.[16] The Court has told us that "all that matters" is that an officer's use of deadly force is reasonable given the circumstances.[17] On the one hand, the Court's doctrine attempts to treat all instances of deadly force as identical—using the same vocabulary ("deadly force") and analyzed under the same standard for a Fourth Amendment analysis ("reasonableness"). But on the other hand, the Court has driven a qualified immunity doctrine that suggests every killing is somehow unique.[18] This incongruence is not only harmful to plaintiffs recovering when police use unjustified

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Second-Order Regulation of Law Enforcement, 103 CALIF. L. REV. 205, 205 (2015); Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 117 (2016); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3189 (2014); Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 437 (2016); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 391 (2016); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2183–84 (2014); James Tomberlin, Note, *"Don't Elect Me": Sheriffs and the Need for Reform in County Law Enforcement*, 104 VA. L. REV. 113, 115–16 (2018).

12 *E.g.*, Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1119 (2008).

13 Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 612–14 (2016); *see also* Friedman & Ponomarenko, *supra* note 11, at 1875 ("The constraints that may have worked to keep police in line when officers wielded a handgun or a billy club are no longer sufficient in a world of overwhelming police force.").

14 *E.g.*, ALEX S. VITALE, THE END OF POLICING 30 (2017); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020).

15 *E.g.*, Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 635–36 (2018); Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After* Garner, 35 ST. LOUIS U. PUBLIC L. REV. 109, 109 (2015); Richard Rosenfeld, *Ferguson and Police Use of Deadly Force*, 80 MO. L. REV. 1077, 1077–78 (2015).

16 Harmon, *supra* note 12, at 1183.

17 Scott v. Harris, 550 U.S. 372, 383 (2007).

18 *See* Pearson v. Callahan, 555 U.S. 223, 244 (2009); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 27–51 (2015).

force, it is intellectually untenable. Deadly force nomenclature must accomplish two things. First, it must distinguish between when police kill an unarmed motorist reaching for his wallet and when they kill the perpetrator of a mass shooting—we cannot call both just "deadly force." Second, it must also be parsimonious, such that like is grouped with like. Treating every instance of deadly force as simultaneously unique and universally similar is absurd.

Given the doctrinal failures outlined above, this Article makes a simple proposal: Uses of deadly force should be classified according to the degree of speculation an officer relies on in deciding to use deadly force. That is to say: activists, scholarship, and courts should understand deadly force to operate along a continuum in which speculation plays a varying role. At one end, we encounter deadly force in response to an active-shooter. That decision is supported by substantial objective evidence that a threat is present, and reliance on speculation (though present) is minimal. I contend this type of deadly force should be called "reactive" deadly force.[19] In the middle of the spectrum, deadly force that is employed when an officer has some indication a threat exists but places a substantial emphasis on speculation in his decision to use force. This, I contend, should be called "anticipatory" deadly force.[20] And finally, deadly force is sometimes used absent any objective indicia of a threat, and officers make large inferential leaps that are unsupported by the facts before them and statistics. This type of deadly force is what I call "preemptive" deadly force.[21] This model, I argue, articulates how we can begin to treat deadly force with greater specificity and granularity. In turn, it enables us to articulate why deadly force is problematic with greater clarity and ease.

These terms are not cut from whole cloth, I borrow them from literature in the fields of international security and state uses of kinetic force.[22] In that context, labeling the decision to use force as reactive, anticipatory, or preemptive is well-established.[23] And yet, these terms have not been employed to ex-

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19 *See infra* section II.A.1.

20 *See infra* section II.A.2.

21 *See infra* section II.A.3.

22 *See generally* MYRA WILLIAMSON, TERRORISM, WAR AND INTERNATIONAL LAW: THE LEGALITY OF THE USE OF FORCE AGAINST AFGHANISTAN IN 2001 218–221 (1st ed. 2009) (employing the concept of "anticipatory" or "pre-emptive" self-defense in discussing the legality of state use of force in Afghanistan).

23 *See, e.g.*, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 2002), https://2009-2017.state.gov/documents/organization/63562.pdf

plain or describe police killings; likely because state uses of force are deliberate choices and do not require a split-second decision.[24] No matter the reason, the terms carry important analytical power. Instead of arguing for a shift in doctrine, this Article offers a better way to understand and articulate why some police killings are particularly egregious. Renaming deadly force is easily achievable and facilitates efforts to distinguish between police killings that should and should not be understood as acceptable.

This Article proceeds in three parts. In the first, I provide the necessary background and foundation to understand Parts II and III. First, I examine the landscape of deadly force doctrine, sketching the Court's doctrinal evolution from *Tennessee v. Garner*[25] through *Plumhoff v. Rickard*.[26] I discuss how the Court has shifted from a rigorous framework to one that is devoid of analytical utility. I argue current doctrine fails to take account of important empirical truths of policing. This, I contend, is not a failure of doctrinal capacity but rather of doctrinal imagination. The section moves on from the Court to discuss empirical data on the risk individuals pose to officers and the role race plays in police decisions to use force. Finally, it introduces the concept of speculation in officer decisions to use force. Specifically, why although all decisions rely at least in part on officer speculation, the variability in decisions to kill are substantial. This concept, in turn, provides the foundation for the analysis proposed in Part II.

In Part II, I lay out the framework of reactive, anticipatory, and preemptive deadly force. I describe how to identify each category of deadly force, offer illustrative hypotheticals of each, and discuss the interests at play. These labels map closely to how skeptical we should be of an officer's decision to kill. As an officer relies less on speculation, making smaller inferential leaps, the closer he falls to the "reactive" side of the spectrum and the more likely it is that we can accept the force as objectively reasonable.[27] Importantly, however, the framework not

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[https://perma.cc/HYF4-NL9P] (recognizing a distinction between acting "preemptively" and in "anticipatory" fashion).

24 *See id.* at 16.

25 471 U.S. 1 (1985).

26 572 U.S. 765 (2014).

27 Throughout this Article, I use masculine pronouns to include both male and female officers because it reflects the empirical realities of police departments. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, WOMEN IN POLICING: BREAKING BARRIERS AND BLAZING A PATH 3 (2019) ("Women make up more than half of the U.S. population but fewer than 13% of law enforcement officers." (citing FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES (2016))).

only mirrors the likely legality of an officer's conduct, but also its normative defensibility. As I lay out, this framework allows us to pinpoint why some police killings are particularly problematic while others are more normatively defensible. Because the framework maps closely onto the likelihood an officer's conduct is legally and normatively permissible, I suggest we should employ varying degrees of skepticism—akin to how courts treat analyses under the Equal Protection Clause—to claims that deadly force was warranted. I conclude Part II by explaining why courts can adopt the reactive, anticipatory, and preemptive labels under current doctrine.

Finally, in Part III, I discuss the benefits and shortcomings of this Article's framework. I argue that categorizing deadly force as reactive, anticipatory, or preemptive would facilitate more productive conversations about deadly force. Because the categories' foremost benefits are descriptive ones, I explore how classifying instances of deadly force facilitates litigation and scholarship. I explain how the framework allows courts and scholars to more easily identify how to treat officers' claims that force was justified. Rather than attempting to compare apples to oranges, the model allows comparison of like to like—reactive deadly force to reactive deadly force. Similarly, departmental policy and training tools can benefit from the framework by affording officers more concrete touchstones for their decision making. Part III concludes by discussing the shortcomings of the model. Of course, the model creates a paradigm where the category that we assign to an officer's conduct is incredibly important. But this decision is not always an easy one and will often require difficult judgments on the margins. Although in Part II I identify some factors to consider when determining how to categorize an officer's decision, the process will remain imperfect. Unlike the Equal Protection Clause, this framework does not invite varying scrutiny based on easily identifiable features of police conduct. This shortcoming is chiefly felt where officers rely, in good faith, on faulty accounts or incomplete facts. While this shortcoming should be taken seriously, it is important to remember the same is true even in the absence in this framework—analyzing officer decisions to kill when they lack full information will *always* be complicated. This framework is hardly alone in struggling to address these hard cases, but overall remains a positive and important first step in better understanding, describing, and ultimately regulating police decisions to kill.

I
THE LAW OF DEADLY FORCE

An officer's decision to use deadly force is regulated by federal, state, and local law.[28] As a formal matter, the federal Constitution offers no affirmative grant of power to officers, only limitations.[29] And because no federal statute limits the substantive power of officers to deploy deadly force, the Constitution is the only regulator of police at the federal level.[30] The Constitution's role is aggrandized further because twenty-two states and the District of Columbia rely entirely on the federal Constitution to dictate whether deadly force was lawful.[31] But the Supreme Court's precedent regulating police use of force is "deeply impoverished,"[32] provides "little-to-no guidance,"[33] and is "counterproductive."[34]

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28 *See* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 785 (2012) ("Few articles compare institutions in their capacity or incentives to address the problem of policing, or consider all possible mechanisms that might be used to do so. And scholars rarely write about the rest of the 'law of the police'—the body of federal, state, local, and even international law that applies to police officers and departments and influences what they do."); JARED P. COLE, CONG. RSCH SERV., 7-5700, FEDERAL POWER OVER LOCAL LAW ENFORCEMENT REFORM: LEGAL ISSUES 1 (2016) ("The federal government possesses limited powers. Current proposals to address local law enforcement issues at the federal level must be enacted consistent with a constitutionally enumerated power or powers supplemented by the Necessary and Proper Clause; otherwise such authority is reserved to the states.").

29 *See* Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1188 (2017).

30 *See* Law Enforcement Trust and Integrity Act of 2015, H.R. 2875, 114th Cong. (1st Sess. 2015). The Law Enforcement Trust and Integrity Act of 2015, introduced by former Representative John Conyers, would have created national accreditation standards for law enforcement agencies but the bill stalled in committee. *See* Melissa Nann Burke, *Conyers Pushes Police Accountability, Crime Reforms*, DETROIT NEWS (July 23, 2015), http://www.detroitnews.com/story/news/politics/2015/07/23/rep-conyers-police-accountability-crime-reforms/30580027/ [https://perma.cc/D855-VSBS].

31 AMNESTY INT'L, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES 4 (2015) ("Nine states and Washington, D.C. have no laws on use of lethal force by law enforcement of officers: Maryland; Massachusetts; Michigan; Ohio; South Carolina; Virginia; West Virginia; Wisconsin, Wyoming; and the District of Columbia. Thirteen states have laws that do not comply even with the lower standards set by US constitutional law on the use of lethal force by law enforcement officers: Alabama; California; Delaware; Florida; Mississippi; Missouri; Montana; New Jersey; New York; Oregon; Rhode Island; South Dakota; and Vermont." (footnote omitted)).

32 Harmon, *supra* note 12, at 1119.

33 Lee, *supra* note 15, at 655.

34 Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 217 (2017) ("[T]oday's Fourth Amendment case law is not only poorly suited for police training, but actually counterproductive, confounding efforts to draft clear use-of-force policies. The impediments are the result of the flexible,

Rather than growing into its role as a major regulator of police, the Court has shied from the responsibility.[35] The Court's unwillingness to engage with police use of deadly force is striking, in part, because it stands in stark contrast to the death penalty, which results in less than 50 deaths a year but which the Court regulates closely with bright(er)-line rules.[36] Conversely, police kill approximately 1,000 people a year.[37] And yet, the Court's use of force doctrine has become increasingly amorphous, which has increased the Court's ability to avoid deciding important questions of constitutional law.[38] Presently, use of force doctrine affords jurists, scholars, officers, and the public little-to-no ability to predict whether any particular use of deadly force will be lawful or not. In turn, litigants are unable to forecast whether a cause of action will succeed or fail.

As our starting point, this part has three sections, and is designed to lay the foundation for Part II's proposal to recast how we think of deadly force. First, I examine the Court's use of force cases and how they have retreated from a high-water

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'totality of the circumstances' analysis that the Supreme Court adopted to govern use of force under the Fourth Amendment.").

35 Harmon, *supra* note 12, at 1131–33 (describing the Supreme Court's unwillingness to engage on the question of the correct standard for police use of force).

36 *See* Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (holding a statute that provided for a sentence of death for a crime when the victim did not die was unconstitutional); Roper v. Simmons, 543 U.S. 551, 575 (2005) (holding that the execution of an individual who was under the age of 18 at the time of the offense is unconstitutional); Wiggins v. Smith, 539 U.S. 510, 519 (2003) (holding that the Sixth Amendment requires defense counsel to conduct a mitigation investigation in capital cases); Atkins v. Virginia, 536 U.S. 304, 304 (2002) (holding the execution of an intellectually disabled person is unconstitutional); *see also* FRANKLIN E. ZIMRING, WHEN POLICE KILL 8–9 (2017) (noting executions averaged forty-four a year from 2008 through 2012).

37 John Sullivan, Liz Weber, Julie Tate & Jennifer Jenkins, *Four Years in a Row, Police Nationwide Fatally Shoot Nearly 1,000 People*, WASH. POST (Feb. 12, 2019), https://www.washingtonpost.com/investigations/four-years-in-a-row-police-nationwide-fatally-shoot-nearly-1000-people/2019/02/07/0cb3b098-020f-11e9-9122-82e98f91ee6f_story.html [https://perma.cc/T2NC-66YV] ("Last year police shot and killed 998 people, 11 more than the 987 they fatally shot in 2017. In 2016, police killed 963 people, and 995 in 2015. Years of controversial police shootings, protests, heightened public awareness, local police reforms and increased officer training have had little effect on the annual total. Everyone agrees—criminal justice researchers, academics and statisticians—that all of the attention has not been enough to move the number.").

38 Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam) ("Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.")

mark, where the required analysis was both exacting and carefully articulated. I trace the evolution of use of force doctrine from *Tennessee v. Garner*[39] through *Plumhoff v. Rickard*[40] and draw out how, while the Court may have once been focused on analytical rigor, any such sentiment is long gone. In its place, reasonableness given the circumstances reigns supreme. Second, I survey empirical evidence, which affords the foundation for this Article's model described in Part II. I discuss why the doctrine's failure to account for statistical truths is a mistake. Specifically, I contend that because we *know* officers face little threat in many situations, absent indisputable evidence a threat is present—such as a suspect pointing a gun at an officer—deadly force is likely unnecessary. Then, I review the role race plays in officer decisions to use force. While this paper does not delve deep into race, it could not be considered complete without a dialogue on the topic. We must take account of the role race plays in police use of deadly force, because, as scholarship documents, the two are deeply intertwined. Finally, I introduce the concept of speculation in decisions to use deadly force, which is vital to understanding Part II. Turning first, to the Court.

A. The Doctrine

The Supreme Court's deadly force doctrine began with bright line rules, but that era was short-lived. Since 1985, when the Court decided *Graham v. Connor*,[41] the Court has retreated from stringent regulation of the use of force. Today, the doctrine has virtually no content and holds uses of deadly force to only a single question: Was it reasonable?[42] This subpart describes the Court's steady doctrinal withdrawal from regulating deadly force, which explains the need for a model like the one this Article proposes in Part II.

The Court first articulated a constitutional standard for use of deadly force in *Tennessee v. Garner*.[43] That decision arose after Memphis Police Officer Elton Hymon shot Edward Garner, a 100 pound, 5'4" 15-year-old in the back of the head while Garner attempted to flee the scene of an alleged bur-

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39 471 U.S. 1 (1985).

40 572 U.S. 765 (2014).

41 490 U.S. 386 (1989).

42 Scott v. Harris, 550 U.S. 372, 383 (2007) ("Whether or not Scott's actions constituted application of 'deadly force,' *all that matters* is whether Scott's actions were reasonable." (emphasis added)).

43 471 U.S. 1 (1985).

glary.[44] On the night of October 3, 1974, Hymon and his partner responded to a call that a break-in was in progress.[45] As Hymon moved around to the home's backyard, he heard the backdoor slam and saw someone—Edward Garner—running across the yard.[46] When Garner stopped, about six feet from a fence, Hymon could see Garner's face and hands, and was "reasonably sure" Garner was unarmed.[47] Hymon ordered Garner to "halt" but Garner began to climb the fence, at which point Hymon shot Garner in the back of the head.[48] Garner died shortly thereafter.[49]

The Court's analysis began by stating that any use of deadly force must, at base, be reasonable.[50] But the opinion went further, saying, "[i]t is not better that all felony suspects die than that they escape."[51] The Court offered meaningful guidance, holding it is not unreasonable for an officer to use deadly force to prevent escape if he has "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[52] Specifically, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm."[53] Put differently, if a suspect is a danger to others, than an officer does not violate the Constitution if he uses deadly force to prevent a suspect's escape (*i.e.* to effectuate an arrest).[54]

The rule the Court articulated was clear, administrable,[55] and most importantly impactful. As municipalities moved to

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44 *Id.* at 3–4 n.2.

45 *Id.* at 3.

46 *Id.*

47 *Id.*

48 *Id.* at 4.

49 *Id.*

50 *Id.* at 7–8 ("Petitioners and appellant argue that if this requirement is satisfied the Fourth Amendment has nothing to say about *how* that seizure is made. This submission ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" (quoting United States v. Place, 462 U.S. 696, 703 (1983)) (alteration in original)).

51 *Id.* at 11.

52 *Id.*

53 *Id.* at 11–12.

54 *Id.*

55 *See, e.g.*, Martin v. Dishong, 57 F. App'x 153, 155 (4th Cir. 2003) (explaining that "*Garner* . . . approves the use of deadly force by a police officer against a fleeing suspect if the suspect (1) poses a threat to the officer, (2) poses a threat to

implement *Garner*'s holding, police shootings dropped.[56] But *Garner*'s supremacy was ultimately short-lived. Just four years after *Garner*, the Court decided *Graham v. Connor*.[57] Dethorne Graham, a diabetic, was in the midst of an insulin crisis, outside of a convenience store in Charlotte, North Carolina. Because they thought he was shoplifting, and disbelieved his claims of insulin shock, police handcuffed him, slammed him on the hood of their car, and shoved him into the back of a police cruiser.[58] Chief Justice Rehnquist's opinion held that "*all* claims that law enforcement officers have used excessive force—deadly or not—. . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard."[59] The Chief's opinion continued to say "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' *in light of the facts and circumstances* confronting them."[60]

While *Garner* had articulated what seemed to be a clear rule, *Graham* suggested balancing a number of interests "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."[61] At first glance, *Graham* appeared to be a natural outgrowth of *Garner*. But the Court's shift to balancing the government's interest against the interest of a suspect—like any other seizure case[62]—was a major departure

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others, or (3) has committed a serious violent crime"); Abraham v. Raso, 183 F.3d 279, 288 (3d Cir. 1999) (explaining that *Garner* "required that deadly force must be necessary to prevent escape *and* the fleeing suspect must pose 'a significant threat of death or serious physical injury to the officer or others'").

56 *See* Abraham N. Tennenbaum, *The Influence of the* Garner *Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241, 254 (1994) (finding that police shootings declined by 16% after *Garner*); Jerry R. Sparger & David J. Giacopassi, *Memphis Revisited: A Reexamination of Police Shootings After the* Garner *Decision*, 9 JUST. Q. 211, 224 (1992) (identifying a substantial decrease in police shootings after Memphis PD revisited its use of force policy after *Garner*).

57 490 U.S. 386 (1989).

58 *Id.* at 389–90. In all, Graham suffered a broken foot, injured shoulder, cuts and bruises on his wrists and forehead, and developed a chronic ringing in his ears. *Id.* at 390.

59 *Id.* at 386.

60 *Id.* at 397 (emphasis added).

61 *Id.* at 396.

62 *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976). *Compare Graham*, 490 U.S. at 396 (explaining that a Fourth Amendment analysis "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") *with* United States v. Place, 462 U.S. 696, 706 (1983) ("Given the fact that seizures of property can vary in intrusiveness, some brief detentions of personal effects may be so

from *Garner*'s categorical understanding of force.[63] Lower courts, in turn, became fluent in citing *Graham* but often failed to meaningfully engage with the balancing *Graham* contemplated.[64] Whatever portion of *Garner*'s firm approach *Graham* left intact, the Court swept away less than twenty years later.

In 2007, the Court decided *Scott v. Harris* and completed the shift Justice Rehnquist had begun in *Graham*.[65] After clocking Victor Harris's vehicle going 73 miles an hour in a 55-mile-per-hour zone, a Georgia county deputy gave chase.[66] After nearly 10 miles of chasing, Deputy Timothy Scott opted to perform a "Precision Intervention Technique maneuver" against Harris's vehicle, which is to say he attempted to drive Harris's vehicle off the road by slamming Harris's vehicle with his cruiser.[67] Harris lost control of his vehicle, which left the roadway and flipped, which left him paralyzed from the neck down.[68]

The Court's opinion in *Scott* dispensed with much of what had been understood to be the law since *Garner* and *Graham*.[69]

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minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure . . . .").

63 Rachel Harmon argues that *Graham* has contributed to the use of force doctrine's underdevelopment. *See* Harmon, *supra* note 12, at 1130–35. Harmon contends that "*Graham* provides a weak tool for evaluating the use of force, particularly in the common complex encounters that result in nondeadly uses of force by officers." *Id.* at 1130. Harmon's argument is not that courts have failed to make law on the use of force, but rather that they have too religiously adhered to *Graham*'s articulation. *Id.* at 1132. The Supreme Court's unwillingness to engage coupled with lower courts making no effort to put content into the *Graham* test results in an inability to understand what is reasonable officer conduct and what is not. *Id.* at 1133.

64 *See, e.g.*, Thacker v. Lawrence Cnty. Loc. Gov't, No. 1:04-CV-00265, 2005 WL 1075019, at *6–9 (S.D. Ohio Apr. 19, 2005) (granting a motion for summary judgment without substantive discussion of the *Graham* factors); Byrd v. Hopson, 265 F. Supp. 2d 594, 611–13 (W.D.N.C. 2003) (granting a motion for summary judgment based on the nature of the intrusion without substantive discussion of the *Graham* factors), *aff'd*, 108 Fed. Appx. 749 (4th Cir. 2004); DeBellis v. Kulp, 166 F. Supp. 2d 255, 271–74 (E.D. Pa. 2001) (denying a summary judgment motion without substantive discussion of the *Graham* factors).

65 Scott v. Harris, 550 U.S. 372, 372–397 (2007).

66 *Id.* at 374.

67 *Id.* at 375 (citation omitted).

68 *Id.*

69 *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 197–98 (2004) ("These cases establish that claims of excessive force are to be judged under the Fourth Amendment's 'objective reasonableness' standard. Specifically with regard to deadly force, we explained in *Garner* that it is unreasonable for an officer to 'seize an unarmed, nondangerous suspect by shooting him dead.'" (citations omitted)); Ludwig v. Anderson, 54 F.3d 465, 470–73 (8th Cir. 1995) ("[W]e reverse and hold that material questions of fact remain as to whether Ludwig's actions at the time of the shooting, even if 'dangerous, threatening, or aggressive,' 'pose[d] a threat of serious physical harm' as required by *Garner*." (alteration in original) (citations

First, the Court's opinion rejected the notion that it needed to decide whether Scott's actions were "deadly force" at all.[70] But the Eleventh Circuit,[71] Harris,[72] and Scott had all thought that the distinction between deadly and non-deadly force was an important one.[73] Instead, the opinion picked up where *Graham* left off and held courts should "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[74] *Garner*, the Court held, did not establish "rigid preconditions" to the lawful use of deadly force.[75] Rather, *Garner* was merely an *application* of *Graham*'s Fourth Amendment "reasonableness" test, and whatever factors it may have articulated had "scant applicability" to Harris's case.[76] The Court, apparently, did not find it odd that *Garner*, decided in 1985, was an application of a case decided in 1989.[77] Instead, the Court seemed to think this principle was well-established: "Whether or not Scott's actions constituted

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omitted)); Donovan v. City of Milwaukee, 17 F.3d 944, 949–51 (7th Cir. 1994) ("Police officers may, and ought to, pursue fleeing suspects, and where those suspects present 'a threat of serious physical harm, either to the officer[s] or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.'" (alteration in original); Abney v. Coe, No. 1:04CV00652, 2005 U.S. Dist. LEXIS 41890, at *24–26 (M.D.N.C. Dec. 15, 2005) (explaining that, under *Garner*, "a seizure will generally be found reasonable only if the officer had reason to believe that the suspect posed a threat of serious physical harm to the officer or others, or had committed a serious violent crime and was attempting to escape"); Adams v. St. Lucie Cnty. Sherriff's Dep't, 998 F.2d 923, 923 (11th Cir. 1993) (en banc) (explaining that *Garner* "held that the use of deadly force to apprehend a fleeing felon constitutes an unreasonable seizure . . . unless law enforcement officers have probable cause to believe the felon poses a threat of serious bodily harm to the officers or to others"); Williams v. City of Beverly Hills, No. 4:04-CV-631 CAS, 2006 U.S. Dist. LEXIS 15129, at *23–25 (E.D. Mo. Mar. 31, 2006) (explaining that, under *Graham*, the analysis "depends on . . . (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officer or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight").

70 *Scott*, 550 U.S. at 382.

71 Harris v. Coweta County, 433 F.3d 807, 813–15 (11th Cir. 2005) (holding that Scott's use of force did not satisfy *Garner* because Harris did not pose an imminent threat of physical harm and was not suspected of a violent crime), *rev'd sub nom.* Scott v. Harris, 550 U.S. 372 (2007).

72 Brief for Respondent at 18–29, *Scott*, 550 U.S. 372 (2007) (No. 05-1631), 2007 WL 118977, at *17–29.

73 Brief for Petitioner at 12–14, *Scott*, 550 U.S. 372 (2007) (No. 05-1631), 2006 WL 3693418, at *12–14.

74 *Scott*, 550 U.S. at 383.

75 *Id.* at 382.

76 *Id.* at 382–83.

77 *Id.*

application of 'deadly force,' *all that matters* is whether Scott's actions were reasonable."[78]

In less than twenty-five years, the Court had all but overruled *Garner* and replaced Justice White's multi-factor test with what the *Scott* Court called the "factbound morass of 'reasonableness.'"[79] Suddenly, a police officer killing a citizen was constitutional, provided it was "objectively reasonable."[80] And yet, the *Scott* majority offered no actual explanation for how to determine if an action is objectively reasonable.[81] After *Scott*, the Court began to decide use of deadly force cases more frequently but typically in conjunction with a grant (or denial) of qualified immunity.[82] Of course, because overcoming qualified immunity requires a plaintiff's rights be "clearly established,"[83] the highly fact intensive nature of use of force inquiries has led to police consistently prevailing at the Court.[84]

One such instance is *Kisela v. Hughes*, where the Court expressed serious doubt that a Fourth Amendment violation occurred when officers shot a woman within a minute of arriving on the scene because she did not drop a knife while standing on her front lawn.[85] The Court has continued to stake out that objective reasonableness is truly the only inquiry—all while continuing to provide no actual content to that standard.[86] Arguably, the objective reasonableness standard has

78 *Id.* at 383 (emphasis added).

79 *Id.* at 383.

80 *Id.* at 383.

81 *Id.* at 383–85.

82 *E.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1151 (2018) (per curiam) ("The Court of Appeals first held that the record, viewed in the light most favorable to Hughes, was sufficient to demonstrate that Kisela violated the Fourth Amendment. The court next held that the violation was clearly established because, in its view, the constitutional violation was obvious and because of Circuit precedent that the court perceived to be analogous." (citations omitted)).

83 Ashcroft v. al-Kidd, 563 U. S. 731, 735 (2011).

84 *See, e.g.*, Mullenix v. Luna, 577 U.S. 7, 16 (2015) ("Cases decided by the lower courts since *Brosseau* likewise have not clearly established that deadly force is inappropriate in response to conduct like Leija's."); *Kisela*, 138 S. Ct. at 1153 (per curiam) ("Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers. But the general rules set forth in '*Garner* and *Graham* do not by themselves create clearly established law outside an "obvious case."'" (alterations omitted) (quoting White v. Pauly, 137 S.Ct. 548, 552 (2017)); Plumhoff v. Rickard, 572 U.S. 765, 781 (2014) ("In the alternative, we note that petitioners are entitled to qualified immunity for the conduct at issue because they violated no clearly established law.").

85 *Kisela*, 138 S. Ct. at 1152 (per curiam) ("For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.").

86 County of Los Angeles v. Mendez, 137 S. Ct. 1539, 1546-47 (2017) ("'Excessive force claims . . . are evaluated for objective reasonableness based upon the

become even *narrower* as an inquiry. For example, in *County of Los Angeles v. Mendez*, the Court repeatedly emphasized that a court should not go further than what was known to the officer when he decided to use deadly force.[87] Current doctrine, because it does not explicitly distinguish between knowledge and speculation, does not adequately account for an officer's fear as opposed to knowledge.[88]

Or consider the case of Donald Rickard. Rickard led a total of six police cruisers on a high speed chase along Interstate 40 towards Memphis, Tennessee.[89] While trying to make a sharp turn, Rickard caused contact with Officer Evans's cruiser, which caused Rickard's vehicle to spin out into a parking lot.[90] Rickard's car became wedged between cruisers but he continued to press down on the accelerator.[91] Plumhoff responded by firing three shots into the car.[92] After the shots, Rickard's vehicle was dislodged and reversed down the street, prompting two officers to fire at least twelve more shots at Rickard's vehicle.[93] Rickard's surviving daughter argued that firing a total of fifteen shots into her father's vehicle constituted excessive force.[94] The Court disagreed, reasoning that once it is reasonable for an officer to shoot a suspect, the officer can shoot "until the threat has ended."[95] The substance of the Court's analysis, moreover, gave virtually no weight to *Garner*, citing it only twice in analyzing the possible Fourth Amendment violation.[96] And the two

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information the officers had when the conduct occurred.' That inquiry is dispositive: When an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim." (alteration in original) (emphasis added) (quoting Saucier v. Katz, 533 U.S. 194, 207 (2001))).

87 *Id.*

88 *See* Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1278 (2017) (Sotomayor, J., dissenting from the denial of certiorari) ("Salazar-Limon claims the officer shot him as he tried to walk away from a confrontation with the officer on an overpass. The officer, by contrast, claims that Salazar-Limon turned toward him and reached for his waistband—as if for a gun—before the officer fired a shot."); Greenidge v. Ruffin, 927 F.2d 789, 790 (4th Cir. 1991). Because the law credits an officer's fear that the suspect is reaching for the gun, training mirrors this permissive standard. *Cf.* VITALE, *supra* note 14, at 10 ("[I]n South Carolina, a state trooper drove up to a young man in his car at a gas station and asked him for his driver's license. He leaned into the car to comply and the officer shot him without warning: see unexpected movement, shoot." (footnote omitted)).

89 *Plumhoff*, 572 U.S. at 769.

90 *Id.*

91 *Id.* at 770.

92 *Id.*

93 *See id.*

94 *Id.*

95 *Id.* at 777, 781 (reversing the judgement of the Court of Appeals for the Sixth Circuit).

96 *Id.* at 774, 779.

citations to *Garner* the Court *did* offer suggested that the only thing that mattered was reasonableness.[97]

If the cases after *Scott* left any room for debate about the continuing force of *Garner's* analytic framework, *Plumhoff v. Rickard* essentially closed the question.[98] In *Plumhoff*, the Court addressed the merits of a Fourth Amendment excessive force claim and confirmed that *Scott* had ended *Garner*'s multi-factor analysis.[99] While *Scott* does not foreclose *Garner* being good law, *Plumhoff* demonstrates that the *Garner* factors have vanished from the deadly force ecosystem, and have been replaced by "objective reasonableness" given the circumstances.[100] *Plumhoff* quite plainly reveals that *Scott*, not *Garner's* factors, controls.[101] Essentially, deadly force doctrine has become a truncated "totality" of the circumstances analysis.[102] Although police use of deadly force is the only context where the State can permissibly kill its citizens on U.S. soil without *ex ante* restraint,[103] a rigorous and exacting doctrine regulating deadly force is lacking.

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97 *Id.*

98 This is, of course, not to say that *Garner* was overruled by *Scott*. Evidenced by numerous Courts of Appeals continuing to recognize that *Garner* continues to have persuasive force, such a contention would be incorrect. *E.g.*, Johnson v. City of Philadelphia, 837 F.3d 343, 349–50 (3d Cir. 2016) ("*Scott* abrogates our use of special standards in deadly-force cases and reinstates 'reasonableness' as the ultimate—and only—inquiry. 'Whether or not [an officer's] actions constituted application of "deadly force," all that matters is whether [the officer's] actions were reasonable.' This is not to say that the considerations enumerated in *Garner* are irrelevant to the reasonableness analysis; to the contrary, in many cases, including this one, a proper assessment of the threat of injury or the risk of flight is crucial to identifying the magnitude of the governmental interests at stake. But such considerations are simply the means by which we approach the ultimate inquiry, not constitutional requirements in their own right." (alteration in original) (citation omitted)); Penley v. Eslinger, 605 F.3d 843, 850 (11th Cir. 2010) ("[N]one of these [*Garner*] conditions are prerequisites to the lawful application of deadly force . . . ."); Acosta v. Hill, 504 F.3d 1323, 1324 (9th Cir. 2007) (holding that after *Scott*, a separate jury charge specifically on the use of deadly force is unnecessary). But *Scott* and its progeny surely end the debate whether deadly force is *only* permissible in the situation that *Garner* contemplated: a fleeing felon who poses a risk to others.

99 *Plumhoff*, 572 U.S. at 774 ("A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's 'reasonableness' standard." (citations omitted)).

100 *Id.*

101 *Id.* at 774, 779 (referencing *Tennessee v. Garner* only twice in the majority opinion and citing it only once).

102 *Id.* at 774.

103 *Cf.* Michael Epstein, *The Curious Case of Anwar Al-Aulaqi: Is Targeting a Terrorist for Execution by Drone Strike a Due Process Violation When the Terrorist Is a United States Citizen?*, 19 MICH. ST. J. INT'L L. 723, 723–24 (2011) (explaining that, on *foreign* soil, U.S. operatives allegedly had pre-approval to kill certain high-risk terrorists).

B. The Statistics

Hundreds of Americans are killed by police every year in situations where they pose minimal threat to officers or others.[104] When citizens and officers come together because of traffic stops, petty crime, or through no crime at all, the citizen poses, statistically, no risk to the officer.[105] And yet, in the last decade, countless individuals have been killed during interactions precipitated by a traffic violation,[106] a petty crime,[107] or

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104 *Cf.* 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) ("For example, the FBI reports that there were 410 'justifiable police homicides' in 2012 in which the victim had a weapon. However, statistics elsewhere indicate that police shootings resulting in the deaths of unarmed civilians are much higher." (citations omitted)); Lee, *supra* note 15, at 653 ("[I]n 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."); *The Counted: People Killed by Police in the U.S.*, GUARDIAN, https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database [https://perma.cc/L5YR-NB7L] (last visited May 16, 2020) (listing 405 Americans killed in 2015 through 2016 despite being "unarmed").

105 *See* Zwach, *supra* note 104, at 186–87.

106 Philando Castile was shot after being pulled over as part of a *Terry v. Ohio* traffic stop. Mark Berman, *Minnesota Officer Charged with Manslaughter for Shooting Philando Castile During Incident Streamed on Facebook*, WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/11/16/prosecutors-to-announce-update-on-investigation-into-shooting-of-philando-castile/ [https://perma.cc/99MM-Z6J4]. Samuel DuBose's was killed by Ray Tensing, a University of Cincinnati police officer, during a traffic stop Tensing initiated because DuBose's car was missing front license plate. David A. Graham, *How One Campus Cop Undid a City's Police Reforms*, ATLANTIC (July 30, 2015), https://www.theatlantic.com/politics/archive/2015/07/samuel-dubose-local-police/399977/ [https://perma.cc/JUR7-QNVU]. On April 4, 2015, North Charleston PD officer Michael Slager shot and killed Walter Scott during a traffic stop initiated because Scott's 1990 Mercedes had a non-functioning third brake light. Andrew Knapp, *Dash Video Strikes at Heart of Problem, Critics of Police Say*, POST & COURIER, (Apr. 8, 2015), https://www.postandcourier.com/archives/dash-video-strikes-at-heart-of-problem-critics-of-police-say/article_e431fcb3-96c8-5cb1-9d9a-19949ad1207a.html [https://perma.cc/RHG6-FW7W] (last updated Nov. 2, 2016).

107 Michael Brown, an unarmed teenager in a St. Louis, Missouri suburb was shot after allegedly stealing cigarillos from a convenience store. Monica Davey, *Fatal Encounter in Ferguson Took Less Than 90 Seconds, Police Communications Reveal*, N.Y. TIMES (Nov. 15, 2014), https://www.nytimes.com/2014/11/16/us/ferguson-shooting-michael-brown-darren-wilson.html?smid=pl-share [https://perma.cc/T9CZ-5XLM]. No less than five police approached Eric Garner for selling loose cigarettes. One of the officers killed him by placing him in a chokehold while Garner gasped "I can't breathe." Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES (July 18, 2014), https://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html?smid=pl-share [https://perma.cc/NP4K-MCM8]. Alton Sterling was shot by Baton Rouge police when they responded to a call and observed him selling knockoff CDs outside a convenience store. Joshua Berlinger, Nick Valencia & Steve Almasy, *Alton Sterling Shooting:*

indeed no crime at all.[108] I do not mean to suggest that it is impossible for a citizen to pose a threat to an officer when they come into contact for a mundane reason. Rather, I am suggesting that when an officer uses deadly force after coming into contact with a citizen for a mundane reason, his choice is contrary to substantial evidence. Consider the following: From 2011 through 2015, traffic stops resulted in twenty-five officers being killed.[109] And while those deaths are tragic, officers conduct nearly twenty million traffic stops each year.[110] The risk to officers during traffic stops is essentially non-existent.

Homeless Man Made 911 Call, Source Says, CNN (July 8, 2016), https://www.cnn.com/2016/07/07/us/baton-rouge-alton-sterling-shooting [https://perma.cc/2QGQ-NZBR].

108 Individuals in mental health crisis are routinely killed by officers despite having committed no crime. Shaun King, *If You Are Black and in a Mental Health Crisis, 911 Can Be a Death Sentence*, INTERCEPT: VOICES (Sept. 29, 2019) https://theintercept.com/2019/09/29/police-shootings-mental-health/ [https://perma.cc/8NWA-SKYF] ("Studies show that as many as 50 percent of people killed by American police had registered disabilities and that a huge percentage of those were people with mental illnesses. One study states that people with untreated mental illnesses are a staggering 16 times more likely to be shot and killed by police."). Some research estimates that up to twenty percent of all police interventions involve individuals with mental illness. VITALE, *supra* note 14, at 80. For example, in 2015, Dallas police shot Jason Harrison after being called by his mother because he wouldn't take his medication; Harrison had not committed a crime. Elliot C. McLaughlin, *Video: Dallas Police Open Fire on Schizophrenic Man with Screwdriver*, CNN (March 19, 2015), https://www.cnn.com/2015/03/18/us/dallas-police-fatal-shooting-mentally-ill-man-video [https://perma.cc/3M2R-U2T2]. Harrison was holding a screwdriver and standing in the doorway of his own home when police opened fire. *Id.* While stories like Harrison's are less likely to be headline news or to capture the national attention, their deaths are no less tragic. Police killings of individuals with mental health issues are, as Ta-Nehisi Coates insightfully notes, undoubtedly a product of American society believing that the criminal legal system is the proper vehicle to address all social ills: mental health crises, homelessness, and addiction to name a few. Ta-Nehisi Coates, *The Myth of Police Reform*, ATLANTIC (Apr. 15, 2015), https://www.theatlantic.com/politics/archive/2015/04/the-myth-of-police-reform/390057/ [https://perma.cc/AR3E-7GWB].

109 *See 2015 Law Enforcement Officers Killed & Assaulted*, FBI, https://ucr.fbi.gov/leoka/2015/tables/table_23_leos_fk_circumstance_at_scene_of_incident_2006-2015.xls [https://perma.cc/RS89-NY3K] (last visited Oct. 11, 2021) [hereinafter FBI] (categorizing the incidents where police officers were either killed or assaulted between 2006 and 2015).

110 *See* ELIZABETH DAVIS, ANTHONY WHYDE & LYNN LANGTON, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015 4 (2018), https://www.bjs.gov/content/pub/pdf/cpp15.pdf [https://perma.cc/VG4R-X75U] (noting 19.2 million traffic stops in 2015); Erik Ortiz, *Inside 100 Million Police Traffic Stops: New Evidence of Racial Bias*, NBC NEWS (Mar. 13, 2019), https://www.nbcnews.com/news/us-news/inside-100-million-police-traffic-stops-new-evidence-racial-bias-n980556 [https://perma.cc/GH7B-VUBY] ("Police pull over about 20 million drivers across the United States each year, according to researchers.").

More broadly, however, the point is simple: Citizens rarely pose a substantial risk to officers. From 2008 through 2013, citizens attacked and killed 275 police officers, or an average of about forty-six officers a year.[111] Let's assume that police only interacted with citizens during traffic stops from 2008 through 2013 and police averaged twenty million traffic stops a year. If that were true, 275 officer deaths would represent deaths in two *millionths* of one percent of interactions.[112] If we add instances where a citizen attacked and injured the officer—which occurs about 14,000 times a year[113]—then officers are at risk in one ten thousandth of one percent of interactions. The data reveals further important information, as well. Of the 275 officers killed by a member of the public, 268 were killed by a firearm—or 97.5% of cases.[114] What that tells us should, again, be clear. Absent the presence of a firearm, police have a 7 in 120 million chance of being killed—and that's a conservative estimate. This means that we can be nearly certain that unless an officer *sees a gun*, the odds the individual poses a threat are so miniscule that an officer's belief that a threat is present cannot be deemed objectively reasonable.

Despite what the Court might have us believe, police-citizen interactions do not spontaneously burst into being or exist only in an officer's mind. Every interaction between officer and citizen is the product of a precipitating event. There is, necessarily, some incident to bring officer and citizen together—be it a broken taillight or a 911 call. If policing activities like traffic stops are deadly, they are deadly for citizens not officers.[115] Absent some objective indicia of a threat, we know a citizen poses, essentially, no risk to an officer or others.[116] Conversely, an individual pointing a gun, at an officer or another person, is reasonably concrete evidence a threat exists.[117] Ad-

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111 ZIMRING, *supra* note 36, at 96.

112 Jordan Woods estimates that police are at risk of death in 1 in 6.5 million traffic stops. Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 640 (2019) ("Based on a conservative estimate, I found that the rate for a felonious killing of an officer during a routine traffic stop for a traffic violation was only 1 in every 6.5 million stops.").

113 ZIMRING, *supra* note 36, at 92–93.

114 *Id.* at 96.

115 *Id.* at 61–62 (illustrating the distribution various circumstances constitute in police killing statistics).

116 *See* DAVIS, WHYDE & LANGTON, *supra* note 110, at 4.

117 It is important to pause, here, to note that objective indicia of threat are of course subject to fabrication in *post hoc* accounts from police. *See, e.g.*, Josh Sanburn, *Chicago Releases Video of Laquan McDonald Shooting*, TIME (Nov. 24, 2015), https://time.com/4126670/chicago-releases-video-of-laquan-mcdonald-shooting/ [https://perma.cc/CC2C-RG7K] (highlighting the concern that officers

mittedly, even if some objective evidence does exist, an officer nonetheless relies, at least in part, on his subjective understanding of the situation. A suspect's gun might be a toy, or unloaded; some facts that would negate the existence of a threat may elude an officer.[118] Of course, subjective belief is not only amorphous but also laden with bias.[119] Thus, all decisions rely, to some degree, on an officer's *speculation* a threat exists—speculation that his understanding of the facts are a true and correct accounting of the situation.

The Supreme Court's use of "reasonableness" in areas like stop-and-frisk has enabled police to frequently interact with Black Americans, which has led to more use of deadly force against the Black community.[120] In turn, Black Americans are disproportionately represented among the victims of police killings. Black people represent 13 percent of the population but 32.4 percent of police-caused deaths.[121] The alarming scope of

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sometimes provide inaccurate accounts for what happened). Jason Van Dyke, the officer who shot and killed Laquan McDonald, initially claimed McDonald lunged towards him with a knife, which was categorically disproven when video of the encounter was released. *Id.* This Article does not solve this problem, and I openly conceded that it is a substantial difficulty with understanding force. *See infra* Part III. While whether the suspect *pointed* a weapon at an officer may not be immediately evident, there are substantial limitations on an officer's ability to fabricate such a narrative. First, as the Van Dyke's absurd claim demonstrates, the rising prevalence of cameras will seriously curtail officer's ability to successfully claim something happened when it did not. *See, e.g.*, 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). Second, if an individual who is killed does not have a weapon, then an officer's claim that objective indicia of a threat is clearly false and easily rejected.

118 *E.g.*, Shaila Dewan & Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html [https://perma.cc/X6YN-9UEB].

119 Benjamin Wallace-Wells, *Police Shootings, Race, and the Fear Defense*, NEW YORKER (July 12, 2016), https://www.newyorker.com/news/benjamin-wallace-wells/police-shootings-race-and-the-fear-defense [https://perma.cc/8HQ9-JRUM] ("[Harvard economist Roland Fryer] could detect racial bias in nearly every type of encounter that police had with citizens. They were more likely to stop African-Americans than white citizens. In those stops, officers were more likely to draw their guns when the suspect was Black, and once the weapon was drawn, they were more likely to point it at someone who was African-American. Blacks were more likely to get handcuffed, thrown against a wall, and pushed down. The racial discrepancy, controlling for circumstance, was present in nearly every situation.").

120 PAUL BUTLER, CHOKEHOLD 184–85 (2017).

121 *E.g.*, Sarah DeGue, Katherine A. Fowler, & Cynthia Calkins, *Deaths Due to Use of Lethal Force by Law Enforcement: Findings From the National Violent Death Reporting System, 17 U.S. States, 2009–2012*, 51 AM. J. PREVENTATIVE MED. S173, S176 (2016).

this phenomenon means that we must pause, here, to examine the role that race plays in decisions to use force. As noted above, all decisions to use force rely, at least in part, on a degree of speculation. Because of this, implicit (and explicit) bias plays a central role in the use force. Off the bat, white individuals are more likely to take note of Black persons than whites.[122] So too, sociological research has shown that white individuals are more likely to shoot Black individuals.[123] This, of course, means that Black people are not only more likely to draw the *attention* of police, they are more likely to be shot by an officer once they are in contact with the officer. This bears out in the data, which shows that Black individuals who are shot by police are *significantly* more likely to be unarmed.[124] From 2009 through 2012, forty unarmed white Americans were shot.[125] For the same period, despite comprising roughly one-fifth of the population, thirty-nine unarmed Black Americans were killed.[126] As we move through Parts II and III, keep this top of mind. The reasonableness of officer's reliance on speculation cannot be divorced from the reality that Black individuals are the ones who disproportionately end up dead when officers arrive at the wrong conclusion.

At base, an officer who shoots a citizen during a traffic stop is faced with a categorically different risk profile than an officer who shoots a gunman who is robbing a bank. In a world where deadly force is used only against individuals who drive down public roads at 110 miles an hour[127] and mass shooters,[128] the

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122 Sophie Trawalter, Andrew R. Todd, Abigail A. Baird & Jennifer A. Richeson, *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCH. 1322, 1323 (2008).

123 Joshua Correll, Bernadette Park, Charles M. Judd & Bernd Wittenbrink, *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCH. 1314, 1315–18 (2002).

124 DeGue, Fowler & Calkins, *supra* note 121, at S178, S182.

125 *Id.* at S182.

126 *Id.* at S176, S182.

127 Mullenix v. Luna, 577 U.S. 7, 8 (2015) (per curiam).

128 *E.g.*, Richard Holguin, *Police Snipers Get Only One Chance to Be on the Mark*, L.A. TIMES (Nov. 16, 1986), https://www.latimes.com/archives/la-xpm-1986-11-16-me-7719-story.html [https://perma.cc/W7PH-UP45]; AnneClaire Stapleton & Ralph Ellis, *Timeline of Orlando Nightclub Shooting*, CNN (June 17, 2016), https://www.cnn.com/2016/06/12/us/orlando-shooting-timeline/ [https://perma.cc/9QQP-EDKQ]; *14 People Killed in Shooting at Inland Regional Center in San Bernardino*, ABC7 (Dec. 3, 2015), https://abc7.com/news/12-killed-in-shooting-at-san-bernardino-social-services-facility/1106844/ [https://perma.cc/64KA-5JEU] ("Police said 14 people were killed when a man and woman opened fire at the Inland Regional Center in San Bernardino on Wednesday. Two suspects who were killed in a dramatic shootout with officers have been identified.").

absence of a distinction between degrees of speculation would be, frankly, inconsequential. In such a world, when an officer stated, *ex post*, that he feared for his life or the lives of others, we could be reasonably confident that the underlying basis for that fear was reasonable.

That is, of course, not the world we live in. Speculation, as Alice Ristroph notes, plays a major (and arguably disproportionate) role in police decisions to use force.[129] Officers routinely use force when they have no concrete reason to believe a threat exists. Yet, courts and scholars have not explored how objective reasonableness might require our understanding and descriptions of deadly force to distinguish between degrees of police reliance on speculation. Indeed, as the Court has decided more use of force cases, it has become clear that once an officer is able to even passably say he fears for his safety, the doctrine will almost always lead a court to decide no Fourth Amendment violation occurred.[130] "Reasonableness" given the circumstances, which the Court hangs its hat on, demands a meaningful inquiry into the underlying nature of the officer-citizen interaction.

The inferential leap an officer makes when he kills a citizen during a traffic stop, after a petty crime, or during a conversation on the street, is statistically indefensible. Deadly force, however, has erroneously been treated alike, regardless of the presence of objective evidence of a threat. Because "the circumstances" are a vital part of the consideration in objective reasonableness, we should not divorce our doctrinal analysis from the statistical truth of officer-citizen interactions.[131] To be sure, courts' deferring to officers, in lieu of adopting such a distinction, is not surprising; Anna Lvovsky and others have thoroughly documented courts' willingness to credit officers accounts of events.[132] But that should not be confused with it

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129 Ristroph, *supra* note 29, at 1200–02.

130 *See* Kisela v. Hughes, 138 S. Ct. 1148, 1153–54 (2018) (per curiam).

131 Plumhoff v. Rickard, 572 U.S. 765, 774–75 (2014).

132 Barry Friedman, Response, *Why Do Courts Defer to Cops?*, 130 HARV. L. REV. FORUM 323, 324–25 (2017); Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751, 754–57 (2010); Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 816 (2014); Lvovsky, *supra* note 11, at 2025 ("Tracking closely with the rise of the police expert witness, judges also began invoking the police's criminological insights as grounds for deference under the Fourth Amendment. Against a wealth of research questioning the value of police judgment, courts in the 1950s and 1960s embedded police expertise into their probable cause analysis and transformed the debate around investigative stops, a practice

being defensible. Trusting speculation to accurately reflect the need for deadly force is extremely problematic for two reasons. First, as discussed above: A citizen who has been pulled over for blowing a red light is *exceedingly* unlikely to present a threat to the officer's life.[133] Second, we have ample evidence that police speculation is often wrong.[134] Empirical research has shown that although police are sometimes better able to identify a threat than the lay population, they still incur an error rate of at least ten percent.[135]

Let's recap. First, we know it is highly improbable that a member of the public poses a threat to an officer when the interaction arises for a mundane reason and the suspect has not brandished a weapon.[136] Second, an officer's decision to use force is a product of how he perceives an individual's behavior—which imbues the process with implicit (or explicit) bias. Third, an officer's perception of a threat is the product of

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long upheld on other grounds, into a referendum on police judgment."); Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 533 (2015).

133 *See* FBI, *supra* note 109. Indeed, for all of the concerns about officer safety, the risk of a citizen will attempt feloniously kill an officer is exceedingly low. *See id.*; *see also* ZIMRING, *supra* note 36, at 96 ("If the seventeen crashes are excluded from the six years of attacks that killed police, the total deaths from intentional attack in the six years under study is reduced modestly from 292 cases to 275 fatalities."). While the risk of injury is orders of magnitude larger, placing substantial emphasis on injury to justify deadly force would be misguided. As Frank Zimring has noted, the relationship between injury risk and death risk is powerful and *inverse*. Injuries are overwhelmingly inflicted with blunt force weapons (*e.g.*, a baseball bat), which are exceedingly unlikely to cause death despite their prevalence. *Id.* at 93–95.

134 Lee, *supra* note 15, at 653 ("[I]n 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."); *see also* MERRICK J. BOBB ET AL., L.A. CTY. SHERRIFF'S DEPARTMENT, 30TH SEMIANNUAL REPORT 63 (2011), https://static1.squarespace.com/static/5498b74ce4b01fe317ef2575/t/54fc751de4b0d3db827f155f/1425831197873/30th+Semi-annual+Report.pdf [https://perma.cc/V243-UK5B] ("[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. Whether the subject is actually trying to reach for something or just pulling up his pants is often not clear."); 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 [https://perma.cc/5TBL-NHEW] (explaining the Bobb *et al.* report on L.A. County policing practices).

135 *See, e.g.*, Dawn M. Sweet, Christian A. Meissner & Dominick J. Atkinson, *Assessing Law Enforcement Performance in Behavior-Based Threat Detection Tasks Involving a Concealed Weapon or Device*, 41 L. & HUM. BEHAV. 411, 414 (2017) (noting officers' overall ability to detect weapon concealment was "poor" and "officers with greater experience were more likely to perceive [weapon] 'concealment'").

136 *See supra* notes 111–115 and accompanying text.

a combination of objective evidence and speculation that a threat exists. In this part, I have shown why these three statements are, alone, uncontroversial. Next, I move on to show how can we begin to give life to *each* of these truths—alone and together—in our understanding of deadly force.

II
RENAMING DEADLY FORCE

There is no shortage of scholarship that puts forth theories of how use of force doctrine could be ameliorated. Rachel Harmon has argued imminence and necessity should be imported to better capture when force is justified.[137] Nancy Marcus contends the Court should return to *Garner* in lieu of *Graham*'s malleable objective reasonableness standard.[138] Seth Stoughton has suggested that police should be required to exercise "tactical restraint," even if that means withdrawing from a pursuit.[139] While suggestions to improve doctrine are important, the fact remains they are unlikely to shift the needle on the Court's decision making process. So long as 'reasonableness' is the law, we will continue to be plagued by the challenges of understanding what exactly that term means.[140] This Article's objective is not to change doctrine—quite the contrary, in fact. Rather, its aim is to provide a means to articulate and explain *why* an officer's conduct is unreasonable in a broader sense

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137 Harmon, *supra* note 12, at 1166–67 ("The ideas of necessity, imminence, and proportionality are legal means of analyzing the temporal and spatial factors that must be considered to ensure that each individual's interests receive adequate protection when the police use force.").

138 Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform*, 12 DUKE J. CONST. L. & PUB. POL'Y 53, 83 (2016) ("Ideally, police departments that seek to curtail excessive use of lethal force will continue to emphasize the clear constitutional prohibition of *Garner* on use of lethal force against non-dangerous fleeing suspects while also adding additional safeguards and limitations on use-of-force, such as extending that rule to prohibitions against shooting at fleeing cars, as departments such as the NYPD have done."); *see also* Nancy C. Marcus, *Out of Breath and Down to the Wire: A Call for Constitution-Focused Police Reform*, 59 HOW. L.J. 5, 38 (2015) ("Th[e] use-of-force limiting principle has been a well-established rule of law for thirty years, having been clearly and adamantly set forth as a basic constitutional mandate in the . . . *Garner* decision.").

139 Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. FORUM 225, 232 (2015) ("To be clear, not all violence is avoidable. The use of force, including deadly force, will sometimes be necessary. But when violence *is* avoidable and when avoiding it doesn't sacrifice the police mission, officers should be required to use tactical restraint even when that means holding their position or temporarily withdrawing." (footnote omitted)).

140 *See supra* notes 32–34 and accompanying text.

and to facilitate our ability to identify which police killings are normatively indefensible.

At the broadest level, deadly force doctrine seems simple: be reasonable given the circumstances.[141] But, in practice, that command is exceedingly difficult to apply.[142] Faced with the morass of deadly force doctrine, what do we truly know? First, we know reasonableness turns, at least in part, on an officer's perception that a threat is present.[143] If the officer perceives no threat, his force cannot be reasonable.[144] Use of force in such a situation would be divorced from any legitimate need.[145] And second, we also know the existence of a threat is a function of an officer's perception of objective indicia and subjective interpretation of those criteria. That is to say, the certainty a threat exists can be identified on a spectrum of speculation. At one end, we have an officer who relies on minimal speculation that a threat is present; on the other, an officer who relies heavily on supposition.

Indeed, we have strong evidence that supports a conclusion that decisions to use deadly force, when predicated on large degrees of speculation, are often incorrect.[146] A study of Los Angeles Police Department officers revealed that two-thirds of instances where the officer *believed* the suspect was reaching for a weapon resulted in an unarmed citizen being killed.[147]

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141 Scott v. Harris, 550 U.S. 372, 383 (2007).

142 Harmon, *supra* note 12, at 1185 ("Current Fourth Amendment doctrine provides poor guidance to lower courts about what factors are relevant to determining whether force is reasonable, especially given the complex uncertainties that surround police use of nondeadly force, precisely because it has been developed piecemeal in the absence of a framework that integrates all the relevant interests and practical considerations that properly bear on the justification of police violence.").

143 Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene." (quoting Graham v. Connor, 490 U.S. 386, 396–97)) .

144 *Scott*, 550 U.S. at 386 (noting that officers believed Harris speeding constituted a threat to members of the public); *see also, e.g.*, Lolli v. County of Orange, 351 F.3d 410, 417 (9th Cir. 2003) ("[W]here there is no need for force, any force used is constitutionally unreasonable.") (alteration in original) (citation omitted).

145 *See* Harmon, *supra* note 12, at 1151–53 ("Police uses of force are entirely instrumental, which is to say that there are no deontological justifications for the practice of exercising state force against criminal suspects. . . . Instead, the police are fundamentally a state institution that ensures compliance with the state's most direct *commands*—commands to submit, to appear, to cease, or to disperse.").

146 *E.g.*, BOBB ET AL., *supra* note 134, at 63 (noting a high percentage of cases where an officer believes an individual is reaching for a gun when the individual was, in fact, unarmed).

147 *Id.*

Further, we know many situations, like traffic stops, are exceedingly unlikely to pose a risk to officers.[148] In these situations, there will often be no concrete evidence that a citizen poses a risk which would necessitate a deadly response. Therefore, an officer's decision to use deadly force will necessarily require a large inferential leap to conclude that a risk is present. And yet, the Court has not taken account of this when assessing officer conduct.[149] Whether we call it "objective reasonableness,"[150] "careful attention to the facts,"[151] or the "factbound morass,"[152] use of force doctrine can account for an officer's reliance on his own speculation. Neither courts nor scholars have, thus far, articulated such a framing of deadly force. This section offers a new way to label uses of deadly force, and accounts for the differences between various types of police killings.

Here, I argue deadly force is not a unitary, hegemonic concept; rather, there are no less than three kinds of deadly force. I argue these three categories of officer decisions to use deadly force represent differing degrees of reliance on speculation. At one end, we have use of force where an officer's reliance on speculation is minimal—which is not to say non-existent—and an officer has observed conduct that strongly suggests a threat is present. I call this "reactive deadly force." In the middle of the spectrum, we find decisions to use force based on a moderate amount of speculation, where some evidence suggests a threat is present, but an officer is nonetheless making an inferential leap. In this situation, I call force "anticipatory." And finally, at the other end of the spectrum, we have deadly force being used in a manner that is based entirely on an officer's speculation that a threat exists. I call this "preemptive deadly force."[153]

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148 FBI, *supra* note 109.

149 *Cf.* Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam) ("In *Graham . . .* the Court held that the question whether an officer has used excessive force '*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.'") (emphasis added) (citation omitted); *Scott*, 550 U.S. at 383 (noting an officer's actions must be reasonable).

150 Graham v. Connor, 490 U.S. 386, 399 (1989).

151 *Kisela*, 138 S. Ct. at 1152 (per curiam).

152 *Scott*, 550 U.S. at 383.

153 There is a fourth type of deadly force, wherein force is deployed absent *any* basis for believing a threat is present—subjective or objective. Deploying force in this way must be called "preventive" because there is no conceivable need for it when deployed and it is used without clarity about when, where, and if a threat

These categories offer a more robust means of understanding how objectively reasonable an officer's conclusion was that a suspect posed a "significant threat of death or serious physical injury to the officer or others."[154] Using this framework, I argue that as an officer's decision to use force relies more on speculation, his actions should be regarded with increasing skepticism. I suspect some will scoff at this argument because they believe its central thesis is implicit in existing doctrine and the words *reasonable* and *circumstances*. That may be true, but to the extent this standard has been tacitly adopted—a suggestion I would contest—a more explicit articulation is in order. By specifically articulating how we think of and analyze uses of deadly force, we can begin to better communicate across judicial decisions, scholarship, and communities.

To be clear, I am not suggesting that officers should be precluded from using deadly force when it is statistically unlikely a threat will emerge. Officers must be allowed to use force when necessary.[155] But, as I explain in this section, if an officer opts to use deadly force in a situation where he relies heavily on speculation, then we should be *particularly* exacting in analyzing whether the force was reasonable. This higher standard recognizes that using force based on speculation, alone, is decidedly unlikely to be necessary. So too, using force preemptively vindicates few if any interests and actually frustrates many desirable and important objectives. As the officer moves closer to not relying on concrete evidence that deadly force is needed, the more he usurps a role that is not his—arbiter of guilt.

This section has three subparts. In the first, I lay out what I mean by reactive, anticipatory, and preemptive deadly force and offer hypothetical examples of each. In the course of discussing each type of force, I equally examine the citizen, officer, and state interests when force is used. In the second subpart, I

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may emerge. Such a use of force would, under any reading of the Court's cases, be unlawful and so I do not discuss it in any great depth. Instead, I focus on the tripartite framework I have laid out above: reactive, anticipatory, and preemptive deadly force.

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

155 I offer this concession in large part because of the prevalence of firearms in the United States. In a nation where there are more firearms than people, it is difficult to conclude that officers will not be met with situations that necessitate the use of deadly force. Christopher Ingraham, *There Are More Guns Than People in the United States, According to a New Study of Global Firearm Ownership*, WASH. POST (June 9, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership/ [https://perma.cc/BR4A-34X6].

articulate how a tripartite model necessitates holding officers to differing burdens of proof across the types of deadly force. Finally, I explain why this understanding of deadly force is in fact an articulation of a more rigorous reasonableness inquiry, consistent with existing doctrine. Given this proposal is inherent in objective reasonableness I argue this proposal requires no doctrinal correction and is merely a better framework to understand existing case law.

A. Reactive, Anticipatory & Preemptive Force

This part articulates a new framework that can be applied to better understand and describe police uses of deadly force. Understanding force as reactive, anticipatory, or preemptive is common in the realm of nation-state uses of force, but is wholly novel in the context of police killings.[156] As here, the category of force used by nation states is relevant as a matter of description, normative assessment, and legality.[157] Despite uses of force being a well understood and categorized phenomenon at the international level, this Article is the first to apply the model to policing.

1. *Reactive*

In the course of policing, officers will come into contact with individuals who appear to pose a concrete risk of serious injury to the officer or others. This truth leads us to our first type of deadly force: reactive deadly force. Reactive deadly force is the least controversial of the types I discuss in this Article.[158]

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156 *See, e.g.*, Christine Gray, *The US* National Security Strategy *and the New "Bush Doctrine" on Preemptive Self-defense*, 1 CHINESE J. INT'L L. 437, 440–43 (2002) (discussing potential preemptive use of force by the Unites States in response to terrorism); Christopher Greenwood, *International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 9 (2003) (arguing there is a lack of clarity of what conduct fits into which category); Niaz A. Shah, *Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism*, 12 J. CONFLICT & SEC. L. 95, 112–15 (2007) (explaining arguments in support of the use of pre-emptive "self-defence" by nations); Leo Van den hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L L. REV. 69, 73–74 (2003) (discussing anticipatory "self-defence" in the context of Article 51 of the U.N. Charter); Matthew C. Waxman, *The Use of Force Against States That* Might *Have Weapons of Mass Destruction*, 31 MICH. J. INT'L L. 1, 6 (2009) ("The international legal doctrine of anticipatory self-defense regulates the use of military force against attacks that have not yet occurred.").

157 *See* Ashley S. Deeks, *Taming the Doctrine of Pre-emption*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 661, 663–69 (Mark Weller ed., 2015) (discussing the categories of anticipatory, preemptive, and preventive self-defense).

158 Which is, of course, not to say uses of deadly force in this context is *un*controversial.

Reactive deadly force is deployed in response to facts that, if true, would constitute a threat that permits a deadly response. Put differently, the officer has a firm basis to conclude the person before him presents a threat of "serious physical harm, either to the officer or to others."[159] That is not to say, of course, that reactive deadly force exists only when the officer *is certain* a threat exists. Rather, reactive force presents a situation where the officer places minimal—but likely still some—reliance on his speculation that a risk exists. To crystalize what constitutes reactive deadly force, consider the following examples.

1. An officer responds to a robbery in progress. The robbers are surrounded by officers and have few prospects for escape. In a last-ditch effort to escape, the robbers emerge and begin shooting at officers indiscriminately. The officer shoots the robbers.

2. An officer responds to a hostage situation in progress. As negotiations fail, the hostage taker emerges with a gun pointed at a hostage's head. He promises to shoot the hostage unless the officers retreat. The officer shoots the hostage taker.

3. An officer responds to a call regarding an ongoing school shooting. On the scene quickly, he enters the school with his weapon drawn. He hears shots being fired in a particular classroom. Moments later, an individual (who is plainly not law enforcement) walks out of the classroom holding a firearm. The officer points his weapon, orders the individual to drop his gun, and when he refuses, shoots him.

These examples provide clear cut examples of reactive deadly force. Example One presents the simplest case of reactive deadly force. The officers are obviously aware that a threat has emerged because they are under fire. And in response to that threat, the officers return fire and shoot the suspect. In Example Two, there has been no loss of life, but the hostage taker emerges with a gun pointed at a hostage's head. The officer observes the hostage taker promise to kill the hostage while brandishing a firearm. The officer is, therefore, aware of a significant threat to the life of the hostage and the use of deadly force is in direct response to that threat. Finally, in Example Three, the officer knows that there is someone shooting innocent individuals inside the school but is not sure precisely where. Upon entering the school, the officer hears gunshots in a classroom but does not directly witness the

159 *Garner*, 471 U.S. at 11.

shooting. When someone who is plainly not law enforcement emerges, the officer demands the suspect drop his weapon. When the suspect refuses to comply, the officer uses deadly force to end the clear and ongoing threat.

In each of these hypotheticals, when the officer uses deadly force, he relies on a small degree of speculation that a threat exists. Examples Two and Three, in particular, exhibit why it is nearly impossible to eliminate speculation from decisions to use deadly force. The hostage-taker may be using a fake gun and the individual in the school may not be the school-shooter. And yet, it is hardly difficult to conclude a court would find a sufficient threat existed, in all three hypotheticals, and hold the officer was justified in using deadly force.[160] To hold otherwise would require officers to wait for shots to be fired before using deadly force. Therefore, the use of deadly force in this context is the most likely to be lawful. Reactive deadly force is employed when a suspect engages in conduct that, if true, is plainly threatening—*i.e.*, if the gun the hostage-taker holds is both real and loaded. In turn, officers react to the perceived threat; they are not anticipating or preempting one. Speculation is omnipresent—the officer must reason the gun is loaded, that the knife is real, and so on—but it plays a minimal role in the officer's decision to use deadly force.

Scholarship has provided an extensive overview of the interests at stake when police use deadly force.[161] Generally, there are three parties whose interests are, in some form, at stake when police use deadly force: the suspect, the officer, and the State. Deadly force implicates a number of a citizen's interests: life, liberty, vindication through the judicial process. Conversely, an officer who opts to use deadly force implicates his own interest in being free from violence and threats of death, as well as his interest in carrying out his obligation to society. And finally, when police use deadly force, they impli-

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160 There is a serious argument that threats even as serious as this one do not necessitate a deadly force response. Police have multiple tools that can incapacitate a suspect that do not constitute deadly force, such as Tasers, beanbag guns, pepper spray, and canine units. Chris Woodyard, *Police Are Looking for Alternatives to Guns. How Effective Are They?*, USA TODAY (Feb 1, 2019), https://www.usatoday.com/story/news/nation/2019/02/01/deadly-force-police-grapple-how-subdue-without-killing/2741275002/ [https://perma.cc/2CDF-TVJD] (last updated Feb. 5, 2019). These options are not without risk to officers. For example, tasing or pepper spraying a suspect generally requires an officer to be quite close to a suspect. *See id.*

161 Harmon, *supra* note 12, at 1150–59 (describing the police and state interests at play in the use of force, generally); *see also Garner*, 471 U.S. at 9 ("The suspect's fundamental interest in his own life need not be elaborated upon.").

cate the state's interests which, in fact, have an important duality. The State has an interest in the officer's and public's safety. Both cut in favor of allowing deadly force. But the State's interest in adjudicating a suspect's guilt in a court of law and in protecting the life of the suspect cut against deadly force.

While reactive deadly force is the least problematic type of deadly force, the interests at stake do not uniformly cut in favor of deadly force. When an officer uses reactive deadly force, his interests are at their apex. Reactive deadly force means that the officer's interest in life and the protection of others has been heavily implicated. The acts that would trigger an officer's use of reactive force would necessarily be crimes in and of themselves, so the officer's interest in enforcing the law would also be implicated.[162] These interests are surely substantial. Officers must take steps to protect others when a threat emerges.

But reactive deadly force (like all deadly force) frustrates some major interests from the citizen's perspective. Reactive deadly force of course implicates the citizen's right to life.[163] That right is not extinguished, even by committing serious criminal acts.[164] (If it was, administration of the death penalty would be a vastly simpler endeavor.) So, the citizen retains some interest in their life not being ended by the state. Reactive deadly force also frustrates the citizen's right to access the criminal legal system.[165] Yet in the case of reactive deadly force, the citizen's interest in exoneration is comparatively low—there is clearly no dispute the citizen committed the act in question. But reactive deadly force will most often (but not always) be deployed without an understanding of the mitigating factors the legal system would consider in assessing culpability, such as mental health issues. All told, the citizen's interests remain substantial, even when police use reactive deadly force.

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162 *E.g.*, 18 U.S.C § 1203 (2018) (making it a federal crime to "seize[ ] or detain[ ] and threaten[ ] to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained").

163 *Garner*, 471 U.S. at 9 ("The suspect's fundamental interest in his own life need not be elaborated upon.").

164 *See id.*

165 *Id.* ("The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.").

The State's interests are, in fact, largely frustrated by the use of deadly force.[166] Deadly force *precludes* the State from adjudicating guilt, exacting appropriate punishment, and seeking retribution.[167] Instead, the State's interests when police use deadly force are almost entirely derivative of the officer and public's interests in safety and security. Rachel Harmon points out that the State has an interest in the orderly administration of the law.[168] That is true in the case of non-deadly force, which is sometimes necessary to take suspects into custody and secure compliance, but not in the case with deadly force. Put simply, deadly force does not contribute to the orderly administration of the law.[169] A suspect cannot be taken into custody if he is dead. Deadly force serves one purpose: it ends the threat the individual (ostensibly) poses. If the objective was anything other than ending the threat, then non-deadly alternatives would be used. In the specific context of reactive deadly force, the state's interests are similarly at the apex in favor of deadly force—which is not to say the State's interests *favor* deadly force.[170] Because the need to protect others has concretely emerged, the State's derivative interest in the security of the officer and the public is robust.

The interests that reactive deadly force implicates are, compared to anticipatory and preemptive force, simple. In sum, the officer and the State have a substantial interest in protecting the officer and the public, by the means they deem most likely to succeed. The suspect, meanwhile, has an interest in life and legal process. This Article does not attempt to definitively balance these interests, because doing so is not only exceedingly difficult but also unnecessary for this endeavor. It suffices to say that deadly force is surely most acceptable when it is "reactive." On the continuum of force, instances of reactive deadly force do not require the same skepticism or exacting scrutiny the next two types demand.

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166 *Id.* at 10 ("The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion. And while the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts, the presently available evidence does not support this thesis." (footnotes omitted)).

167 *Id.*

168 Harmon, *supra* note 12, at 1156 ("While defensive force by police officers is often viewed as self-defense, it is more accurately justified as derivative of the state's interests in law and order." (footnote omitted))

169 *Garner*, 471 U.S. at 10.

170 *See supra* note 160 and accompanying text.

2. *Anticipatory*

In the course of policing, the vast majority of contacts will not present facts that rise to the level of concrete risk such that force used against them could be called reactive. But some situations will present police with facts that could support a conclusion that an individual poses a risk. When police use force against a suspect who they have some reason to think is a risk to the officer or others—but have no concrete evidence of this risk—the force should be understood as anticipatory deadly force. An officer who uses anticipatory deadly force is relying on something extraneous to support his conclusion that force is necessary. And so, we should begin to regard the officer's decision with skepticism.

Anticipatory deadly force, unlike reactive force, occurs when an officer lacks definitive evidence a threat is present and, in turn, relies on a greater degree on speculation. Specifically, he has a combination of circumstantial indicators that support—but do not demand—a conclusion that a person poses a risk. Examples of circumstantial evidence that would give rise to anticipatory deadly force would be physical descriptions, proximity, and behavior. Thus, the officer's decision to use force relies on an inferential leap not required by reactive force. But unlike preemptive deadly force (discussed *infra*), the officer has some concrete basis for thinking that a threat exists. Again, hypotheticals are helpful.

1. An officer hears over his radio that a nearby convenience store has been robbed. The store clerk says the robbery took place at gunpoint, describes the suspect, and says he left on foot. While driving around the neighborhood, the officer observes the individual who matches the store clerk's description. The officer stops the individual and when the suspect reaches for his waistband, the officer shoots him.

2. An officer observes an individual behaving suspiciously outside a jewelry store. As he stops him to conduct a *Terry* frisk, he feels a bulge in the man's jacket that he believes is a gun. The man begins to run before the officer can be certain about what's in the jacket. The officer gives chase and corners the man in a dead-end alley. When he realizes he cannot escape, the man turns to the officer and reaches for his jacket pocket. The officer opens fire and shoots the man.

These examples provide simplified versions of uses of anticipatory deadly force. In Example One, the officer has some reason to believe the individual he stops is the convenience store robber. The man matches the description, is proximate to

the scene of the robbery, and is travelling on foot. And yet, the officer is making an inference when he decides deadly force is necessary; he relies on the clerk's description of the man who robbed the store and the claim that a gun was used. When the man reaches for his waistband the officer is speculating first, that he has identified the correct individual and, second, that the man is reaching for the gun the officer believes he has. The officer's supposition may well be correct—this may well be the right man and he may indeed be reaching for a gun to shoot the officer—but then again there is a real risk that the officer's speculation is wrong.

Similarly, in Example Two, the officer has some basis for concluding the man is a threat: the man's suspicious behavior, the bulge the officer feels in his jacket that he believes is a firearm, the man's flight, and his reach for the bulge when he is cornered. But, like in Example One, the officer's decision to use deadly force requires an inferential leap—here, that the suspect does, in fact, have a firearm. The speculation that the man is about to shoot him may be incorrect. The bulge the officer supposes is a firearm could be innumerable household items. Thus, his decision to use deadly force must balance the facts that suggest the man is indeed a risk against the risk his belief is mistaken.

In both hypotheticals, we see the inherent tension of anticipatory deadly force. We see an officer who has some reason to think the person before him poses a risk, but we also see the world of possible mistakes the officer is making. The risk the officer makes the wrong decision and needlessly shoots someone is real—it happens often. But, stepping back, we might see that the interests at play actually strongly disfavor anticipatory deadly force and necessitate serious skepticism about decisions to deploy force anticipatorily.

When an officer uses anticipatory deadly force, the interests at stake are decidedly less in favor of deadly force. First, the officer's interest in personal safety is not categorically irrational but it is certainly not on firm ground. Because the officer is being forced to rely on speculation that a threat exists, the possibility such a threat does *not* exist discounts his interests. A similar discounting applies to the officer's interest in enforcing the law and protecting others. Accordingly, the fact that the officer's interests slightly favor allowing deadly force because the officer has *some* basis for believing a threat exists does not mean the officer has a robust interest in using deadly force.

Conversely, the suspect's interest in the adjudicatory process and his life are greater than in reactive situations. Because a suspect who is subjected to anticipatory deadly force may have committed no crime, his interest in his guilt being adjudicated by a court of law is increased. His interest in his life is similarly increased. The officer who uses deadly force makes a decision to attempt to end the suspect's life based, in part, on conjecture. Thus, the suspect's interests cut heavily against deadly force.

Finally, the State's interests predominantly cut against deadly force. The individual who is subjected to deadly force is not necessarily guilty of a crime. While there might be some evidence that could support such a conclusion, as we have seen, that conclusion may be incorrect. And so, the State's interest in adjudicating guilt through the ordinary legal process is higher than reactive force. So too, the State's interest in officer and public safety is decreased because the threat is indeterminate and may neither exist nor emerge.

As this section hopefully makes clear, anticipatory deadly force is the most complex type of deadly force. Anticipatory deadly force functions as a question of degrees, which makes accounting for the interests difficult. Many of the factors that might support a conclusion that deadly force is necessary are vague and ineffable. There is no magic formula to quantify the behavior and evidence that police believe supports their conclusion that a suspect is a risk against the chance they are wrong. But we do know that police often get that balance wrong. Police routinely shoot individuals who, it turns out after the fact, were unarmed and thus presented no risk to the officer. Given the very real possibility that anticipatory deadly force will be deployed improperly, police use of force in this manner should be carefully scrutinized.

3. *Preemptive*

Having examined reactive and anticipatory deadly force, there is just one remaining type of deadly force to analyze: preemptive deadly force. It is surely the most problematic and least justifiable type of deadly force—but that is not to say it is uncommon. Preemptive deadly force, unlike its cousins, occurs when an officer has no concrete touchstones to suggest a threat is imminent and relies *entirely* on his speculation a threat will emerge. Preemptive deadly force, therefore, represents an inferential leap of immense proportions. In turn, because the overwhelming majority of citizens pose no threat to

an officer,[171] and those who pose some risk of harm are exceedingly unlikely to pose risk of death or serious injury,[172] preemptive deadly force is morally untenable. Therefore, when an officer uses preemptive deadly force, he must be held to an exceedingly high standard of reasonableness because he relies on intangible and ephemeral indicators that a threat exists.

As with the other types of deadly force, it is helpful to begin by laying out the features of what I call preemptive deadly force. Preemptive deadly force, as its names implies, is deadly force deployed by an officer who has no concrete reason to believe a threat exists, and is preempting the emergence of one. Here, the suspect does not match a description, has not made a verbal threat, nor brandished of a weapon. The distinguishing feature of preemptive deadly force is that the officer relies *heavily* on speculation and has no concrete evidence a threat exists or will emerge. He relies only on things that *could* suggest a threat exists but are equally likely to be mundane, legal behavior. Again, some hypotheticals add some texture to what I mean by preemptive deadly force.

1. An officer pulls a car over because its right taillight is not working. As he walks up to the car, he notices the man driving the car is shifting in his seat. When he reaches the driver's window, the driver informs the officer he has a lawfully registered firearm in the glovebox. The officer draws his weapon, ordering the man to "not reach for it," the man assures the officer he is not reaching for the firearm. The officer shoots the man.[173]

2. An officer notices a man sitting in a park and believes he is behaving suspiciously because he looks uncomfortable and is scanning his surroundings. The man gets up and begins to walk away with his hands buried in his pockets when he notices the officer is approaching him. The officer tells the man to stop, at which point the man turns around with his hands still buried in his pockets. The officer orders the man to remove his

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171 *Compare* ZIMRING, *supra* note 36, at 92–95 (describing injury and death data for on duty officers, reflecting approximately 55,000 injuries and 50 deaths a year) *with* FBI, *supra* note 109 (reporting that between 2006 and 2015 a total of 491 officers were killed or assaulted while on duty).

172 ZIMRING, supra note 36, at 95 (noting 292 officers died between 2008 and 2013). If police *only* interacted with citizens during traffic stops for the entirety of the relevant period, police deaths would occur in 0.000025 percent of officers' interactions.

173 These facts are a close approximation of the shooting of Philando Castile. Berman, *supra* note 106.

hands from his pockets, which he does not immediately do. The officer shoots the man.

Both hypotheticals are simplistic, but they are not unrealistic.[174] In Example One, we see an officer who pulls someone over for a violation of the traffic code—hardly an indication that the individual is a threat. The man informs the officer that he has a firearm in the vehicle, and he has a license that entitles him to carry a concealed firearm.[175] At this point, the officer has minimal evidence that the man he has pulled over actually presents a risk of serious bodily injury or death. *Could* the man inflict such harm? Of course. But when the officer shoots the man in Example One, he relies almost exclusively on his speculation that such a risk is present. The officer is inferring that because a firearm is present, generally, a threat exists and deadly force is appropriate.

This holds true for Example Two, as well. In this case the officer believes the man looks "suspicious," but has no concrete evidence the man presents a threat. Looking "suspicious" and "uncomfortable" are not evidence that someone poses a threat. The man's refusal to remove his hands from his pockets is still not evidence he poses a threat. The man may have a physical impairment,[176] an intellectual disability, or may simply freeze

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174 *See supra* notes 95–97 and accompanying text. Indeed, officers all too frequently invoke amorphous justifications for force, when there is in fact little basis to conclude a risk is present. *See* ZIMRING, *supra* note 36, at 62 (noting 6% (twenty-seven individuals) of all police killings between January 1, 2015, and June 30, 2015, were the result of the suspect making a "suspicious movement.").

175 The expansion of Second Amendment rights will, in all likelihood, lead to an increase of police shootings when a citizen has committed no actual crime. For commentaries noting how an increase in gun ownership will lead to additional police shootings see Michael Wood, *The Second Amendment Is a Recipe for Police Killings*, GUARDIAN (Jul. 18, 2016), https://www.theguardian.com/commentisfree/2016/jul/18/second-amendment-police-killings-gun-control-baton-rouge [https://perma.cc/ZC5J-9G72] ("The right to bear arms means that police operate in an environment in which members of the public can purchase, store and practice with weaponry similar to that of police and military. Some of this weaponry can send pieces of armor-piercing lead through whatever bullet protection police officers may be wearing. This threat makes many police feel scared for their lives.") and Adam Winkler, *Ferguson: With So Many Guns in America, Police Are Trained to Live in Fear*, HUFFPOST (Aug. 19, 2014), https://www.huffpost.com/entry/ferguson-guns-america-police-fear_b_5688750 [https://perma.cc/PG4Q-SB53] ("Anytime a police officer pulls over a car, he or she must worry that the person inside that car will have a gun that could be turned on them.") (last updated Oct.–19, 2014).

176 James Doubek, *Oklahoma City Police Fatally Shoot Deaf Man Despite Yells of 'He Can't Hear,'* NPR (Sept. 21, 2017), https://www.npr.org/sections/thetwo-way/2017/09/21/552527929/oklahoma-city-police-fatally-shoot-deaf-man-despite-yells-of-he-cant-hear-you/ [https://perma.cc/678U-RXZZ]; Brad Heath, *Policeman Who Shot, Killed Detroit Man Shares His Story*, USA TODAY (Aug. 26,

in fear at the sight of an officer with his weapon drawn. Again, the man *could* pose a threat—indeed, he may have a weapon in his pockets. But when the officer uses force, he relies heavily on his speculation a threat exists.

Both of these hypotheticals should highlight the doubtful foundation on which preemptive deadly force rests. I suspect it is uncontroversial to suggest that preemptive deadly force is the most indefensible type of deadly force. Because of the lack of concrete touchstones, preemptive deadly force should make us deeply uncomfortable. While a general trust in law enforcement is ubiquitous in the law,[177] preemptive deadly force asks us to stretch that trust to its absolute limit. The issues with preemptive deadly force are only reinforced when we examine the interests at play.

The officer's interest in using preemptive deadly force is decidedly slight. The officer's interest in his life is omnipresent but there is, in our hypotheticals, no concrete evidence that the officer's interest in his life is even implicated when he uses preemptive deadly force. Thus, his own security does not heavily weigh in favor of deadly force. So too, the officer's interest in enforcing the law cannot be regarded as cutting in favor of deadly force. Petty crime and civil ordinance violations do not necessitate arrest let alone deadly force.[178] The officer has some interest in using deadly force, but these interests must be regarded as slight if not non-existent.

The citizen's interests cut uniformly against deadly force and are at their zenith as compared to reactive and anticipatory deadly force. Preemptive deadly force, as I have highlighted in the hypotheticals, will often involve a citizen who has committed no crime at all. Having committed no actual crime, the citizen's interest in life must be regarded as unimpeachable. Similarly, having committed no crime, his interest in being shown to be guilty of a crime before being subjected to deadly force must also be regarded as a substantial interest. Put simply, the citizen's interest in not being shot when he has given the officer no concrete reason to think he poses a risk to others can be neither contested nor overstated.

2014), https://www.usatoday.com/story/news/nation/2014/08/26/krupinski-detroit-police-shooting/14634913/ [https://perma.cc/CM52-E76J].

177 *See supra*, note 132 and accompanying text.

178 *See* Harmon, *supra* note 11, at 316–18 ("Even for more serious crimes, the minimum standard for a lawful arrest, probable cause, is almost by definition not enough proof to establish blameworthiness.").

Having expounded on the State's interests several times, our assessment here can be brief; the State's interests cut against deadly force. To the extent the State shares some of the officer's interest in his avoiding harm, the triviality of that interest is damning. The officer's interests in life and security are so minute in a preemptive context, that they may in fact *undercut* the State's interest in deadly force being used preemptively. In fact, preemptive deadly force requires the State to subjugate its obligation to protect citizens to speculations of an individual officer. The State's interest in protecting citizens who have committed no crime from the mistaken speculations of an officer are immense.

The State, citizen, and officer interests that preemptive deadly force implicates cut almost uniformly against preemptive deadly force. This is unsurprising. Civil violations or petty crimes (at most) will be the reason for interactions that lead to preemptive deadly force. We know officer and citizen come into contact for a mundane reason because a non-mundane reason would likely create a situation of *anticipatory* deadly force. Moreover, we also know that citizens who come into contact with officers for mundane reasons essentially never pose an actual risk to officers.[179] For the aforementioned reasons—the fact that officers will often be wrong in their conclusion that a risk is present, the interests cut against it, and the citizen who is subjected to deadly force will often have committed no crime[180]—we should regard preemptive deadly force with the utmost skepticism.

This tripartite framework, I have argued, is a new way to categorize and conceptualize the universe of police uses of deadly force. Cases like Eric Garner, Philando Castile, Walter Scott, and Samuel DuBose are illustrative of the rampant use of police deadly force that is far from the threshold this part has laid out for reactive deadly force.[181] Reactive, anticipatory, and preemptive deadly force each have unique characteristics, implicate unique interests, and are inherently more or less tolerable. Categorizing uses of deadly force in this way offers important descriptive power and, as I outline in the next part, analytical power as well.

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179 *See supra* notes 146–148 and accompanying text.

180 *Cf.* Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 680–81 (2015) ("Traffic violators can avoid criminal sanctions and admit fault more conveniently by paying a traffic ticket without having to appear in court.").

181 *See supra* notes 106–108 and accompanying text.

B. Objective Reasonableness

This Article's model allows us to discuss deadly force with greater accuracy. To the extent courts or parties wish to employ it in litigation, however, the model must be evaluated in conjunction with objective reasonableness.[182] This section aims to answer how a tripartite model of reactive, anticipatory, and preemptive deadly force could be employed in conjunction with litigation. It argues the model can be combined with statistical data about the risk officers face in their interactions with citizens, and that this combination can inform the objective reasonableness inquiry. The core argument this section puts forth is a relatively simple one: Preemptive deadly force must overcome a higher showing to achieve the constitutional standard of objective reasonableness.[183] More specifically, the model and statistical data dictate that objective reasonableness requires us to more carefully scrutinize deadly force predicated on greater degrees of speculation—*i.e.*, preemptive deadly force.

Treating government conduct with varying degrees of skepticism is hardly a novel proposition. This section outlines why the model I propose affords a simple framework to classify police killings according to how skeptical we should be of the officer's claim of legality. As I explain, as the officer is able to identify objective criteria and demonstrate he was not speculating a threat was present, the more lenient any analysis can be. Specifically, I advocate that "objective reasonableness" invites an analysis akin to equal protection, which requires the government to meet more or less exacting showings as the case demands.[184] Like equal protection cases, as the underlying basis for deadly force exhibits different characteristics, we should analyze and understand it differently.

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182 Scott v. Harris, 550 U.S. 372, 383 (2007).

183 *Cf. id.* at 381 ("It is also conceded, by both sides, that a claim of 'excessive force in the course of making [a] . . . "seizure" of [the] person . . . [is] properly analyzed under the Fourth Amendment's "objective reasonableness" standard.'" (alterations in original) (citation omitted)).

184 *E.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."); *see also* Johnson v. California, 543 U.S. 499, 506 (2005) (reasserting that strict scrutiny prevents the improper use of race); Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (same); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995) (same); Andrew Koppelman, *Beyond Levels of Scrutiny:* Windsor *and "Bare Desire to Harm*," 64 CASE W. RES. L. REV. 1045, 1060 (2014) ("Certain legislative classifications are so closely associated with prejudice that courts presume an illegitimate purpose.").

Accordingly, when we confront police uses of deadly force, we should first categorize them as reactive, anticipatory, or preemptive. From there, the question shifts and we should ask how carefully we should scrutinize an officer's claim that deadly force was justified. As I have noted throughout, reactive deadly force is the most likely to be an acceptable use of deadly force, anticipatory less likely to be permissible, and preemptive quite unlikely to be acceptable.[185] Thus, the analytical framework this section proposes mirrors this truth. We should be most skeptical when we find force to be preemptive and more willing to uphold force that is reactive.[186]

Of course, the Court's equal protection jurisprudence provides a clear model to base our analysis on. The framework of strict scrutiny, intermediate scrutiny, and rational basis provides the starting point for this Article's suggestion.[187] To be clear, I am not suggesting deadly force should be "narrowly tailored" or the "least restrictive" form of force, nor that we demand a "compelling interest" in the use of force.[188] Rather, this Article contends that the equal protection framework provides a strong starting point because it reveals that analysis of government action can be more or less demanding based on conduct's characteristics.[189] In addition, the equal protection framework is a strong starting point because it exhibits the necessary degrees of flexibility. For example, in the context of

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185 *See supra* subpart II.A.

186 A willingness to uphold reactive deadly force should not be taken as a sanctioning of its normative value. To be sure, any use of deadly force by a police officer is a serious decision that should be taken only when absolutely necessary. For a narrative discussion of the decision to use lethal force, see Joe Sexton, "*I Don't Want to Shoot You, Brother*," PROPUBLICA (Nov. 29, 2018), https://features.propublica.org/weirton/police-shooting-lethal-force-cop-fired-west-virginia/ [https://perma.cc/8ZE3-39TP] ("Mader had received no training in how to handle such situations. No one in the Weirton department had. But he was familiar with the phenomenon of suicide by cop, and aware that such shootings often proved controversial. And so he waited. 'I didn't want to shoot him,' Mader said. 'I don't want to say this, because it's really corny, but I was kind of sacrificing my well-being for him. I'm not going to shoot this kid for my well-being. I'm going to wait to see more from him.' That said, he would fire if it were warranted. He wasn't interested in dying.").

187 Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 798–99, 806 (2006) (discussing the three types of scrutiny under the equal protection framework).

188 *E.g.*, *Johnson*, 543 U.S. at 505 ("We have held that '*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.' Under strict scrutiny, the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'" (alterations in original) (quoting *Adarand Constructors, Inc.*, 515 U.S. at 227)).

189 *See* Winkler, *supra* note 187, at 815.

racial classifications, strict scrutiny is a stand in for what we all recognize to be true: given the deep history of racial discrimination in the United States, we should be deeply—almost insurmountably—skeptical of legislation that divides people on the basis of race.[190] Similarly, intermediate scrutiny inherently recognizes classifications on the basis of sex are unlikely to be justifiable, but also that we cannot universally preclude justifiable distinctions on the basis of sex.[191] And, as rational basis review acknowledges, there are instances of government

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190 *See J.A. Croson*, 488 U.S. at 493; *see also* Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting) ("The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."). To be sure, some take this skepticism to an extreme. For example, Chief Justice Roberts's embrace of an understanding of this truth expands skepticism of racial classification to achieve an aspirational color-blindness that is largely divorced from the actual reasons we should be skeptical of racial classifications in legislation. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."); *see also* Theodore R. Johnson, *How Conservatives Turned the 'Color-Blind Constitution' Against Racial Progress*, ATLANTIC (Nov. 19, 2019), https://www.theatlantic.com/ideas/archive/2019/11/colorblind-constitution/602221/ [https://perma.cc/45VV-BTKZ] ("What was once a legal framework for justifying the extension of citizenship and rights to oppressed black Americans is now an argument for the unconstitutionality of any measure intended to address the harms caused by the state-sanctioned denial of those rights. In its application today, color-blind means protecting white Americans from the discrimination that some conservatives perceive results from attempts to remediate historical wrongs."). But to the extent this view is overinclusive and includes instances of government conduct that might not necessitate exacting scrutiny, it only reinforces the claim that certain forms of government conduct warrant particularly rigorous investigation. *Compare Parents Involved in Cmty. Sch.*, 551 U.S. at 745–48 (applying strict scrutiny to racial classifications used to achieve racial integration) *with* Trump v. Hawaii, 138 S. Ct. 2392, 2392, 2420 (2018) (applying rational basis review to government policy barring entry by foreign nationals).

191 Craig v. Boren, 429 U.S. 190, 215 (1976) (Stewart, J., concurring) ("The disparate statutory treatment of the sexes here, without even a colorably valid justification or explanation, thus amounts to invidious discrimination." (citing Reed v. Reed, 404 U.S. 71, 77 (1971))); *see also Reed*, 404 U.S. at 76 ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). While *United States v. Virginia* made clear that "inherent differences" may not be used to "denigrat[e]" one of the sexes, it equally recognized that some differences between the sexes do exist. 518 U.S. 515, 533 (1996) ("Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" (alterations in original) (quoting Ballard v. United States, 329 U.S. 187, 193 (1946))). Thus, while some instances of gender classification might be able to pass constitutional muster, gender classifications should be analyzed carefully.

conduct which may be of dubious wisdom[192] but where the need for skepticism is comparatively slight.[193] Thus, my proposal is to mirror the levels of skepticism the equal protection framework demands. When we should be *most* skeptical of police use of deadly force, we should emulate strict scrutiny's deep distrust of government conduct. Conversely, when we have relatively little reason to distrust police uses of deadly force, our review may be more permissive.

Taking our categories in reverse order, we will begin with preemptive deadly force. To review, preemptive deadly force is displayed in instances where an officer faces almost no statistical risk because no weapon is present, and the citizen has come into contact with the officer for a mundane reason.[194] Preemptive deadly force is predicated heavily on an officer's speculation that a threat is present—the officer's inferential leap is a large one. So too, we know that officers, when dealing with Black men and women, are more likely to incorrectly make that inferential leap.[195] Finally, there is a long history of police

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192 *See* N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196, 209 (2008) (Stevens, J., concurring) ("But as I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: 'The Constitution does not prohibit legislatures from enacting stupid laws.'").

193 *E.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."). Of course, this deferential review invites inappropriate trouble if the category of conduct reviewed under such a standard is too broad. *See* Neelum J. Wadhwani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 804 (2006) ("No court, already operating under a presumption that the government's action is constitutional, would be unable either to envision or invent a rational purpose underlying the governmental conduct or view that conduct as a conceivably rational approach to realizing that purpose."). But even a review that is more trusting of government conduct does not mean the government always wins. *See, e.g.*, United States v. Windsor, 570 U.S. 744, 775 (2013) ("[N]o legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."); City of Cleburne v. Cleburne Living Ctr., Inc. 473 U.S. 432, 448–50 (1985) (holding a permit requirement for homes for the intellectually disabled rested on "irrational prejudice"); Plyler v. Doe, 457 U.S. 202, 229–30 (1982) (holding the government may not deny a public education to undocumented children).

194 *See supra* notes 111–115 and accompanying text.

195 *See* Cynthia Lee, *"But I Thought He Had a Gun": Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POVERTY L.J. 1, 14–15 (2004) (discussing the shooting of Andre Burgess, a seventeen-year-old Black high school student who was shot because an officer thought a candy bar was a gun); Cynthia Kwei Yung Lee, *Race and Self Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 402–23 (1996) (discussing the Black-as-criminal stereotype and the role of bias); *see also* CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM, 138–46 (2003) (discussing the existence of a stereotype that Blacks are prone to criminality and why that stereotype is illogical).

officers using force that is indefensible,[196] much like the long history of invidious racial discrimination by government actors.[197] Thus, given the statistical improbability a threat is present, the heavy reliance on speculation, and the likelihood the decision to use force is infected with racial bias, preemptive deadly force is categorically unlikely to be objectively reasonable. This leads us to a common-sense conclusion: we should be inherently distrustful of police use of preemptive deadly force. Further still, because officers are more likely to see threats where none exist when the member of the public is Black, we should be *particularly* suspicious of police decisions to use preemptive—and indeed anticipatory—force against individuals who are Black.

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196 To say nothing of the individual instances of excessive force that never make the headlines, there are considerable examples to draw on since the 1950s, alone. On March 7, 1965, state troopers beat and tear gassed more than 500 civil rights marchers at the Edmund Pettus Bridge outside Selma, Alabama. Mazzone & Rushin, *supra* note 11, at 287 (citing GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY 85–89 (2013)); *1965: Police Attack Alabama Marchers*, BBC NEWS: ON THIS DAY, http://news.bbc.co.uk/onthisday/hi/dates/stories/march/7/newsid_4318000/4318021.stm [https://perma.cc/QD7U-S3VK] (last visited Apr. 4, 2021). In August 1968, Chicago police beat protesters during the 1968 Democratic National Convention. David Taylor & Sam Morris, *The Whole World is Watching: How the 1968 Chicago 'Police Riot' Shocked America and Divided the Nation*, GUARDIAN, https://www.theguardian.com/us-news/ng-interactive/2018/aug/19/the-whole-world-is-watching-chicago-police-riot-vietnam-war-regan [https://perma.cc/39U2-S546] (last visited Oct. 16, 2021). Early on March 3, 1991, four LAPD officers beat motorist Rodney King, striking him "fifty-six times in eighty-one seconds with their two-pound, twenty-four-inch, solid-aluminum Monadnock PR-24 batons." DOMANICK, *supra* note 3, at 3–4. On August 9, 1997, Abner Louima was arrested after a verbal altercation and was beaten in the police car by various New York Police Department officers who, after beating him, shoved a broken broomstick about six inches into his rectum in a stationhouse bathroom. *See* United States v. Volpe, 78 F. Supp. 2d 76, 79–80 (E.D.N.Y. 1999). On February 4, 1999, officers of the New York Police Department's controversial street crime unit shot at an unarmed Black man named Amadou Diallo forty-one times, hit him nineteen times, and killed him because they thought he was reaching for a gun, when it was, in fact, his wallet. Christian Red, *Years Before Black Lives Matter, 41 Shots Killed Him*, N.Y. TIMES (July 19, 2019), https://www.nytimes.com/2019/07/19/nyregion/amadou-diallo-mother-eric-garner.html [https://perma.cc/CBM8-LSEC]; Geoff Edgers, *Four Police Officers Shot Amadou Diallo 19 Times. A New Photography Project Names Them*, WASH. POST (Dec. 3, 2020), https://www.washingtonpost.com/entertainment/ava-duvernay-police-accountability-project-leap/2020/12/02/a52362f6-34b2-11eb-8d38-6aea1adb3839_story.html [https://perma.cc/58V4-962N].

197 *E.g.*, Korematsu v. United States, 323 U.S. 214, 223–24 (1944); Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857) (concluding Black Americans "are not included, and were not intended to be included, under the word 'citizens' in the Constitution"), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW 20–58 (2010) (surveying the long history of racial discrimination in the United States).

Although I am not prepared to say that all instances of preemptive deadly force must result in an officer being held liable, I will concede it is as close to that result as possible. Tellingly, the analysis we look to for guidance—strict scrutiny—is almost always fatal to the government's cause.[198] The same is no less true here. The skepticism and careful review of the record is what strict scrutiny demands are the true lessons to be drawn. Preemptive deadly force is to be deeply distrusted, morally condemned, and rarely, if ever, upheld.

Accordingly, in the context of litigation, if police use of deadly force was preemptive, courts must subject any claim of lawfulness to an exacting review. Of course, since claims of excessive force most often arise in the context of § 1983 lawsuits, this principle can be stated from a plaintiff's perspective, as well; it should be *easiest* to prove an officer's conduct was unreasonable when deadly force is used preemptively. When evaluating an incident of preemptive deadly force, we should carefully consider the facts. We should question police narratives. We should trust witness accounts. We should rely on social science that conclusively suggests that police are rarely, if ever, at risk of physical harm without knowing it. But above all else, we should rarely deem the use of preemptive deadly force lawful. The question remains the same: Was the officer's decision reasonable?[199] This proposal merely suggests that we regard preemptive deadly force as decidedly *unreasonable* unless the facts quite clearly show that, despite the absence of objective indicia of a threat, one was in fact present and that the officer was somehow aware of this.

Anticipatory deadly force tracks along a similar arc. Much like intermediate scrutiny, we know many, but certainly not all, instances of deadly force will be impermissible.[200] We know that as officers come to rely more on speculation, the likelihood they will unnecessarily use deadly force increases. Take for example Terrence Crutcher—a motorist killed when he reached into his car while multiple Tulsa Police Department officers

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198 Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Powell, J., concurring) (noting strict scrutiny is "scrutiny that is strict in theory, but fatal in fact"). *But see* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2214 (2016) ("The University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner's application [satisfied strict scrutiny]."); Winkler, *supra* note 187, at 815 (finding legislation has a variable level of success in surviving scrutiny based on the nature of rights it infringes).

199 For a discussion of how this proposal is consistent with current doctrine, see *infra* at subpart II.C.

200 *See, e.g.*, Red, *supra* note 196 (providing an example of the impermissible use of anticipatory deadly force).

pointed their guns at him.[201] Until that point, Crutcher had not pointed a weapon, nor had he threatened officers, and thus posed virtually no risk to the officers. The officers, therefore, were making a substantial inferential jump in concluding that by reaching into his car, Crutcher posed a threat.[202] So, while some instances of anticipatory deadly force are lawful, they must be regarded cautiously. If the analysis of anticipatory force is too weak, it will degrade into a deferential analysis that does not properly capture police misconduct. Officers who use anticipatory deadly force may be right in doing so, but there is a real chance they will be wrong. Any analysis must therefore be carefully tuned to identify each correctly.

Our skepticism of anticipatory deadly force can be more tempered than preemptive deadly force because the officer has some objective indicia an individual poses a threat. Recognizing the force as lawful is less likely to require trusting the officer's subjective understanding of the situation. Yet, speculation continues to play a substantial role in the context of anticipatory deadly force. The lacuna between the objective evidence before the officer and the conclusion the officer draws remains wide. And so, we must equally hold anticipatory deadly force to a high—but not impossible—standard. Plaintiffs should generally be able to show that anticipatory deadly force was unreasonable, but where an officer is able to show it was truly reasonable to believe a threat existed, the absence of overwhelming concrete evidence of a threat cannot be regarded as fatal to his claim of lawfulness. While courts should carefully examine the facts in a case of anticipatory deadly force, they should be more willing to find conduct lawful. Importantly, however, they should maintain a healthy skepticism of anticipatory deadly force.

Finally, reactive deadly force is the most likely to be objectively "reasonable" under *Scott*'s framework—in large part because it is accompanied by the greatest volume of objective

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201 Joshua Barajas, *Tulsa Police Release Graphic Footage of Fatal Shooting of Terence Crutcher*, PBS (Sep. 19, 2016), https://www.pbs.org/newshour/nation/tulsa-police-release-graphic-footage-of-fatal-shooting-of-terence-crutcher [https://perma.cc/ZM9L-J4MH] (last updated Sept. 22, 2016) ("As [the officers] got closer to the vehicle, [Crutcher] reached inside the vehicle and at that time there was a Taser deployment and a short time later there was one shot fired.") (alterations in original).

202 *Cf.* Ristroph, *supra* note 29, at 1210 ("In some tragic cases, the very effort to comply with a police command might provide the indicia of noncompliance that renders a use of force objectively reasonable: A suspect wearing headphones tries to turn off his music to better hear an officer, and the officer believes the suspect to be reaching for a weapon.").

indicia a threat exists.[203] Because reactive force manifests only when an officer has substantial objective evidence a threat is present, we are not required to rely on an officer's subjective speculation. This, in turn, allows us to be relatively confident that most instances of reactive force will be "reasonable." Of course, there is always the chance the officer is misinterpreting the facts—the gun may not be loaded or may be a toy—but these leaps are small compared to uses of deadly force that killed Philando Castile, Walter Scott, or Michael Brown.204 Further, the reasonableness of reactive force does not suggest reactive deadly force is normatively good, only that it is lawful under presently constructed doctrine. There are serious arguments that even reactive deadly force is not normatively good. Even if a suspect presents a threat, de-escalation tactics may resolve the situation without deadly force being used, meaning killing the individual is not a normatively desirable result.[204] But the law, of course, does not require de-escalation, only reasonableness.[205] And, when a gun—or something that appears to be a gun—is pointed at an officer or another person, it is difficult to imagine a court would hold the use of deadly force was unreasonable.

By dividing our skepticism of police deadly force claims into three categories, ranging from exacting to relatively deferential, we are able to better articulate how police uses of force should be understood. To the extent we are instinctively dubious of preemptive deadly force, while meanwhile regarding reactive deadly force as more intrinsically acceptable, this Article's proposal merely mirrors existing wisdom. It may well be the case that common sense dictates this result, but no scholarship nor court has said as much. Articulating this more granular form of analysis is important—it adds texture to, but does not replace, the existing standard of reasonableness.

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203 *See* Scott v. Harris, 550 U.S. 372, 383 (2007) ("[I]n judging whether Scott's actions were reasonable, we must consider the risk of bodily harm that Scott's actions posed to respondent in light of the threat to the public that Scott was trying to eliminate.").

204 Zaid Jilani, *Police Officers Should Be Trained in De-Escalation. It Works.*, INTERCEPT (Nov. 9, 2017), https://theintercept.com/2017/11/09/baltimore-police-deescalation-video/ [https://perma.cc/M8Y4-ZMU9]; *see also* Lee, *supra* note 15, at 669–71 (describing how a proposed model statute would allow the use of de-escalation techniques to be considered). *See generally* Janet R. Oliva, Rhiannon Morgan, & Michael T. Compton, *A Practical Overview of De-Escalation Skills in Law Enforcement: Helping Individuals in Crisis While Reducing Police Liability and Injury*, 10 J. POLICE CRISIS NEGOTIATIONS 15, 17–21 (2010) (providing an overview of de-escalation techniques).

205 *Scott*, 550 U.S. at 383.

While the ultimate standard for all uses of deadly force may be reasonableness, it is a mistake to believe that the starting point for all instances of deadly force must be the same. The framework I proposed in this section offers a way to better analyze and contextualize police uses of deadly force in keeping with the recognition that not all shootings are alike.

C. Speculation

For better or for worse, the objective reasonableness standard from *Graham* and its progeny is here to stay.[206] Yet scholars continue to criticize use of force doctrine because it lacks concrete touchstones,[207] has poor analytical strength,[208] and decidedly favors the police.[209] These critiques are, of course, well-deserved. The suggestions to improve the doctrine have undoubtedly been excellent and would improve the regulation of policing. But the academy's suggestions have almost uniformly required a material change to the doctrine.[210] Consequently, these suggestions have largely fallen on deaf ears.

Recent cases have trended decidedly in favor of finding police officers' decisions to use force were lawful,[211] suggesting that proposals that curtail or limit officers' capacity to kill are doomed, barring a major shift in the composition of the Court. At base, the Justices remain resolutely unwilling to reconsider use of force doctrine.[212] Thus, improvements to the doctrine

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206 *E.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam).

207 *See, e.g.*, Harmon, *supra* note 12, at 1120 (calling deadly force doctrine "indeterminate" and "incomplete").

208 *See, e.g.*, William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2141 (2002) ("Right now, Fourth Amendment law devotes an enormous amount of attention to the *fact* of searches and seizures, but almost none to how those searches and seizures are carried out.").

209 *Cf.* Ristroph, *supra* note 29, at 1184–85 (noting that use of force doctrine allows police to use force based on suspicion alone).

210 Consider, for example, Rachel Harmon's seminal paper, *When is Police Violence Justified?*, which argues, "the concepts that structure justification defenses can and *should be imported*, subject to appropriate modifications, into the Fourth Amendment doctrine regulating police violence." Harmon, *supra* note 12, at 1120 (emphasis added). Harmon's proposal, while well-reasoned and productive, would necessitate a doctrinal shift to be fully implemented. *See id.*

211 *See* Plumhoff v. Rickard, 572 U.S. 765, 774–76 (2014); Mullenix v. Luna, 577 U.S. 7, 14–15 (2015) (citing *Scott* and *Plumhoff*); *Kisela*, 138 S. Ct. at 1152 (per curiam); White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam) (vacating a court of appeals opinion that relied on factors not strictly dictated by *Garner* or *Scott*).

212 The Court's decisions from the last two decades should dissuade us of any belief that the academy's call for novel importations into the doctrine will be adopted. The Court is not even closely divided. These decisions routinely divide in 8-1 or 7-2 lineups with Justice Sotomayor offering the only consistent voice for more stringent regulation of policing. *See, e.g.*, *Kisela*, 138 S. Ct. at 1155,

must come from within. Rather than attempting to reshape use of force doctrine,[213] we must offer better articulations and understandings of *existing* doctrine such that courts are better able to evaluate and explain objective reasonableness under the circumstances. This Article's suggestions are consistent with the Supreme Court's admonition that "all that matters" is reasonableness.[214]

Because this Article's proposal is descriptive and not doctrinal, unlike the majority of legal scholarship on policing, it does not require an adjustment to doctrine to be useful.[215] More carefully examining facts when an officer relies on his own interpretation of facts is not inconsistent with reasonableness—in fact, it's *implicit* in the word. This Article's articulation of reasonableness does nothing more than offer a clearer way of describing deadly force. The syllogism that the decision to use force is less reasonable as it relies on speculation is a descriptive tool, not a doctrinal innovation. Whatever may be said of deadly force doctrine, courts are surely not precluded from using descriptive tools to facilitate their analysis.

Stretching back to *Garner* and *Graham*, the Court has held that reasonableness requires "careful attention to the facts and circumstances of each particular case."[216] The Court has explained that the type of facts we should pay attention to "includ[e] 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."[217] But this language is *inclusive*, not exclusive. Today, the command to pay particular attention to the facts of each case remains an accepted part of the doctrine.[218]

But a second, more subtle feature of the Court's understanding of use of force also supports this Article's theory. Justices are quick to remind us that analyzing uses of force must occur without the benefits of what they call "20/20 vision of

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1161–62 (Sotomayor, J., dissenting) ("[The majority's decision] tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.").

213 *E.g.*, Harmon, *supra* note 12, at 1120; *see also* Lee, *supra* note 15, at 637 (proposing doctrinal reform and suggesting model legislation on police use of deadly force).

214 *Scott*, 550 U.S. at 383.

215 For a discussion of the benefits of this proposal, see *infra* Part III.

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

217 *Id.* (citing Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)).

218 *See* Kisela v. Hughes, 138 S. Ct. 1148, 1152 (per curiam) (citing *Graham*, 490 U.S. at 396).

hindsight" and must be from the perspective of a reasonable officer on the scene.[219] Thus, we must ask what the officer knows and does not know at the scene. Again, though, speculation is not knowledge. When an officer uses force preemptively, he *thinks* a threat exists based on no objective indicia. He knows that he *does not know* whether the suspect has a weapon and thus poses a threat. However, the absence of concrete evidence that a suspect *lacks* a weapon should not be taken seriously as evidence to support the use of deadly force. Such circular reasoning would mean police would *always* be justified in using deadly force because any person could hypothetically have a weapon.[220]

This is not to say that the Court's holdings command us to disregard speculation—quite the opposite.[221] Rather, what I mean to suggest is that doctrine allows us to account for the differing value of objective and subjective evidence. We are not using 20/20 vision of hindsight when we descriptively distinguish between instances of reactive and preemptive deadly force. Instead, we are examining what the officer knew as opposed to what he thought. Calling deadly force that is supported by nothing more than speculation—which is itself often the product of fear[222]—something different than deadly force against an active, ongoing, and objective threat not only com-

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219 *Id.* (quoting *Graham*, 490 U.S. at 396).

220 Courts have long credited police as experts and trusted their judgment more when a situation is unclear. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968) (urging that police be deferred to given their "experience"). *See generally* Lvovsky, *supra* note 11, at 2069 (documenting courts' willingness to credit officers' accounts of events). But deferring to expertise goes to the weight an officer's account should be entitled to, not the degree of speculation we should employ when considering the incident more broadly.

221 Discussion of suspicion is replete in the Court's cases. *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 695 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible."); Alabama v. White, 496 U.S. 325, 330 (1990) ("Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause."); *Terry*, 392 U.S. at 27 (determining whether the officer had reasonable suspicion by noting the inferences he was entitled to make from his experience); *see also* Ristroph, *supra* note 29, at 1199–1203 (discussing the role of suspicion in authorizing police uses of force).

222 Brendan O'Flaherty & Rajiv Sethi, *How Fear Contributes to Cops' Use of Deadly Force*, MARSHALL PROJECT (May 1, 2019), https://www.themarshallproject.org/2019/05/01/can-understanding-fear-mitigate-police-violence [https://perma.cc/SG5S-V9T4] ("A climate of fear produces powerful incentives for preemptive killing. Those who are fearful are dangerous, and those who are seen as dangerous have reason to be afraid.").

plies with objective reasonableness, but in fact gives life to that principle.[223]

III
THE BENEFITS

Part II laid out a new way to think of the ways in which police use deadly force. It argued that objective reasonableness under *Garner* and *Scott* plainly supports its articulation of at least three types of deadly force: reactive, anticipatory, and preemptive. This Article's goal is not to reshape doctrine. Rather, I have endeavored to offer a way to better explain and understand the use of deadly force, given the circumstances. A more robust understanding of deadly force is, alone, a substantial benefit and worth pursuing. Better articulations of how we understand police use of deadly force would be a substantial tool to ameliorate the American public's crisis of confidence in policing.[224] By providing a common language, the proposal can reduce the divide between departments and the public and in turn increase confidence in the institution of policing.

By articulating a more granular definition of reasonableness, this Article's proposal presents a more analytically rigorous and intellectually honest understanding of deadly force. While scholars and observers generate countless critiques of deadly force, they have not had a common language beyond the Court's admonition of reasonableness. This Article's explanation of deadly force allows us to begin to speak about and understand deadly force in a way that does not lump all instances under a single rubric. Indeed, such nomenclature has been used by scholars in the literature surrounding uses of force by nation states for decades.[225] In the context of categorizing uses of force against extraterritorial threats, international law has facilitated a full-bodied and healthier discussion of the normative merits of force. Police use of force, conversely, has never embraced this delineation. The explanatory power and new generation of scholarship that this Article's framework invites are reason alone to take its suggestions seriously.

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223 Scott v. Harris, 550 U.S. 372, 383 (2017).

224 *See* Megan Brenan, *Amid Pandemic, Confidence in Key U.S. Institutions Surges*, GALLUP (Aug. 12, 2020), https://news.gallup.com/poll/317135/amid-pandemic-confidence-key-institutions-surges.aspx [https://perma.cc/UD6C-AN2Q] ("Confidence in the police fell five points to 48%, marking the first time in the 27-year trend that this reading is below the majority level.").

225 *See supra* notes 156–157 and accompanying text.

The benefits to understanding deadly force under the threefold framework I have proposed are, however, not cabined only to intellectual rigor. Both litigation and broader systemic forces would be improved by incorporating a tripartite framework. Civil and criminal litigation would be more easily administered if deadly force were broken out into reactive, anticipatory, or preemptive. These benefits comprise the bulk of the improvements this model would offer in both civil and criminal litigation. On the civil side, families of those killed by officers would not be forced to settle under the long shadow of an amorphous and ill-defined doctrine. This would better recompense families whose loved ones were killed unnecessarily by an officer relying on fear, not facts.[226] So too, criminal litigation, which relies on the degree of definition afforded constitutional rights, would be ameliorated. It would be easier for federal prosecutions under 18 U.S.C. § 242 to survive with greater granularity and texture in the doctrine.[227] State prosecutions, as well, would be improved to the extent they rely heavily on limits inherent in the word "reasonable."[228] Yet the second-order advantages should not be dismissed. Increased definition and clarity in constitutional standards would have

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226 *See* ZIMRING, *supra* note 36, at 131–34 (describing the monetary recompense and frequency with which civil suits against police settle). A comprehensive Los Angeles Times investigation for claims against police between 2002 and 2011 revealed shockingly low payouts to victims and families of those against whom police use deadly force. *Legal Payouts in LAPD Lawsuits*, L.A. TIMES: DATA DESK (Jan. 22, 2012), https://spreadsheets.latimes.com/lapd-settlements/ [https://perma.cc/8WCU-3PA7]. The Times found that *all* settlements for *any* police misconduct—including sexual harassment, wrongful death, and myriad other instances of misconduct in addition to unlawful killings—have led to just twenty-four settlements for more than a million dollars. *Id.* While that could suggest that LAPD officers are models of good behavior and restraint, that seems unlikely. *See* Sam Levin, *Hundreds Dead, No One Charged: The Uphill Battle Against Los Angeles Police Killings*, GUARDIAN (Aug. 24, 2018), https://www.theguardian.com/us-news/2018/aug/24/los-angeles-police-violence-shootings-african-american [https://perma.cc/XAS9-LC47] ("Since 2000, there have been no charges for the more than 1,500 shootings by police in the county."); *see also* Peter J. Boyer, *Bad Cops*, NEW YORKER (May 13, 2001), www.newyorker.com/magazine/2001/05/21/bad-cops [https://perma.cc/HC9V-ZW4B] ("[A] thirty-two-year-old Los Angeles police officer named Rafael Perez, who had been caught stealing a million dollars' worth of cocaine from police evidence-storage facilities, signed a plea bargain in which he promised to help uncover corruption within the Los Angeles Police Department.").

227 *See* Screws v. United States, 325 U.S. 91, 101 (1945) (noting "willful" requires each case to turn on the officer's specific knowledge of the illegality of his conduct, suggesting that a higher degree of granularity in descriptions of deadly force would facilitate prosecutions for violations of § 242).

228 *See, e.g.*, MINN. STAT. § 609.06(1) (2020) ("[R]easonable force may be used upon or toward the person of another without the other's consent when the following circumstances exist or the actor reasonably believes them to exist . . . .").

material and important trickle-down effects. This Article's framework would greatly improve departmental policy and decision-making, which would in turn ameliorate officer training and conduct. To the extent we believe a more robust and articulated constitutional doctrine will find its way into police training manuals across the country, it is not an overstatement to say that a clearer, more rigorous understanding of objective reasonableness will save lives.[229]

A. Litigation

1. *Civil Litigation*

In recent years, scholars and observers of police in America have unleashed a torrent of scholarship on the difficulty of holding public officials accountable for their conduct in a civil suit under 42 U.S.C. § 1983.[230] The question of who to blame for the rise of qualified immunity and the conundrum courts

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229 *See* Tennenbaum, *supra* note 56, at 254; Sparger & Giacopassi, *supra* note 56, at 224.

230 *E.g.*, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 10 (2017) ("Although courts rarely dismiss Section 1983 suits against law enforcement on qualified immunity grounds, there is every reason to believe that qualified immunity doctrine influences the litigation of Section 1983 claims in other ways. The threat of a qualified immunity motion may cause a person never to file suit, or to settle or withdraw her claims before discovery or trial."); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1519–24 (2016); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015); Karen Blum, Erwin Chemerinsky, & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633, 654 (2013); Susan Bendlin, *Qualified Immunity: Protecting "All But the Plainly Incompetent" (And Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023, 1023 (2012) ("Public officials can be more certain than ever before that qualified immunity will shield them from suits for money damages even if their actions violate the constitutional rights of another."); John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010); Caryn J. Ackerman, Comment, *Fairness or Fiction: Striking a Balance Between the Goals of § 1983 and the Policy Concerns Motivating Qualified Immunity*, 85 OR. L. REV. 1027, 1028 (2006) (calling qualified immunity "one of the most significant obstacles for § 1983 plaintiffs"); *see also* C.J. Ciaramella, *Courts Grant Qualified Immunity to Cops in More Than Half of Cases When Invoked*, REASON (May 8, 2020), https://reason.com/2020/05/08/courts-grant-qualified-immunity-to-cops-in-more-than-half-of-cases-when-invoked/ [https://perma.cc/KRJ5-P3MN] ("Reuters analyzed 252 federal appellate opinions from 2015 to 2019 where law enforcement defendants claimed qualified immunity. The courts ruled in the police's favor in 57 percent of the cases."); Matt Ford, *Should Cops Be Immune From Lawsuits?*, NEW REPUBLIC (Sept. 12, 2018), https://newrepublic.com/article/151168/legal-revolt-qualified-immunity [https://perma.cc/2F77-Q9N7] (discussing how "[q]ualified immunity's impact radiates beyond each individual case" by stagnating the development of constitutionally protected rights).

find themselves in, while interesting, is best saved for another day.[231] Needless to say, far too often police are able to avoid civil liability for conduct that is—to put it mildly—horrific. Police have managed to escape liability for a range of deplorable and unnecessary conduct like shooting children while trying to kill a family pet,[232] unleashing a police dog on a surrendering suspect,[233] and stealing property while searching a home[234]—to say nothing of the numerous instances of excessive force.[235] To be sure, some of the underlying purposes of qualified immunity, such as judicial expediency, are valid and often laudable goals. But as many note, the doctrine's balance has strayed from whatever reasonable roots the doctrine may have had. Alone, this Article's proposal is not enough to recalibrate qualified immunity's equilibrium, but it would be an important step.

Qualified immunity requires an act's unlawfulness be "clearly established," meaning a decision establishing the unlawfulness is available. That is difficult when amorphous reasonableness is all that guides official conduct in the Fourth Amendment context.[236] This Article's suggestions for understanding deadly force accord substantial benefits first and foremost because they add texture to the word "reasonableness." By better capturing what a plaintiff must show to demonstrate an officer's conduct was unreasonable, this Article offers the first step to restoring a healthy ecosystem of civil litigation against police.

This Article's proposal equally allows us to move towards a more balanced approach to analyzing claims under § 1983 because it ends the trend of understanding all uses of deadly force as comparable. Uses of deadly force, as discussed at length, are deeply and inherently distinct from one another,[237]

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231 For a general discussion of qualified immunity and its legal foundation, see William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018).

232 Corbitt v. Vickers, 929 F.3d 1304, 1315–16 (11th Cir. 2019) (holding that an officer was entitled to qualified immunity when he struck a ten-year-old in the leg while shooting the family dog).

233 *E.g.*, Baxter v. Bracey, 751 F. App'x 869, 870 (6th Cir. 2018) (holding an officer was entitled to qualified immunity for his decision to release a police dog on a suspect whose hands were in the air).

234 *E.g.*, Jessop v. City of Fresno, 936 F.3d 937, 942 (9th Cir. 2019) (holding officers who stole $225,000 in cash and rare coins were entitled to qualified immunity because their conduct did not clearly violate the Constitution).

235 *E.g.*, Kelsay v. Ernst, 933 F.3d 975, 978, 981 (8th Cir. 2019) (en banc) (holding an officer who placed an unarmed woman in a "bear hug" and body-slammed her to the ground did not violate clearly established rights).

236 *See* Scott v. Harris, 550 U.S. 372, 383 (2017) (stating that reasonableness is "all that matters").

237 *See supra* subpart II.A.

and treating them as coequal is misguided and bound to invite mischief. Qualified immunity fuels instances of the so called "lawful but awful" determinations in part because the doctrine relies on plainly permissible cases to establish principles in awful cases. Or, put differently: qualified immunity requires us to have a plainly analogous use of *reactive* deadly force to hold an officer liable for a use of *preemptive* deadly force. But preemptive deadly force will *never* find an analogue in uses of reactive deadly force; it is a quintessential example of comparing apples to oranges. It should not surprise us, therefore, that officers who use force preemptively are able to avoid liability. Thus, the first benefit to civil litigation this Article's suggestions would offer is to articulate the different uses of deadly force that we know exist. Once we know the different types of deadly force, we can begin to compare like with like.

While qualified immunity disposes of innumerable civil suits against officers, some cases do make it to trial.[238] There too, this Article's proposal would offer important benefits. While the Court may have us believe we are doomed to wade through the "factbound morass," there is no reason we should not take a map. This Article would offer any finder of fact—be it a judge or a jury—a starting point to evaluate a claim of unreasonable use of deadly force. Indeed, if a case has overcome qualified immunity claims at the motion to dismiss or summary judgment stage, it is more likely than not that it is a case about anticipatory or preemptive deadly force.[239] These types of deadly force are exceedingly complicated and necessitate guidance.[240] While few instances of deadly force make it to a civil trial, this Article's more robust articulation of types of deadly force would accord material benefits that facilitate a finder of fact's consideration of the issues.

This Article's ability to inject some balance into qualified immunity analysis is an intrinsically desirable benefit. But by adding a greater depth to the qualified immunity analysis, it would also influence a vital part of the civil litigation ecosystem: settlement. Settling a lawsuit is a normal and beneficial feature of the American legal system. It allows the parties to come to a mutually agreeable solution and thus to avoid pursuing litigation for no reason. In the context of police killings,

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238 *E.g.*, Matt Stevens, *Jury Awards $38 Million to Family of Maryland Woman Shot by Police*, N.Y. TIMES (Feb. 17, 2018), https://www.nytimes.com/2018/02/17/us/korryn-gaines-shooting-award.html [https://perma.cc/YD28-8KJJ].

239 *See supra* subpart II.A.

240 *See id.*

however, the equities of settlements are decidedly one sided in favor of the officer. The chief reason for this is the very existence of qualified immunity; officers are able to negotiate settlements that grossly under-compensate a plaintiff because an officer is able to avoid all liability if he can prevail on qualified immunity. Litigants must therefore weigh the likelihood they can overcome an officer's qualified immunity, the odds a jury will rule for them, and the possibility that a judge might reverse the jury's findings if a financial award is granted.[241] This calculus is complicated by geography, public opinion, and race.[242]

Unsurprisingly, many lawsuits against police officers for excessive force are settled before a court has the chance to rule on the legality of the officer's actions.[243] Families are understandably unwilling to risk walking away empty handed when their loved one was killed by police. Philando Castile's family received $3 million in the summer of 2017, a year after he was killed.[244] Just six months after Walter Scott was killed in April 2015, his family agreed to a payment of $6.5 million in ex-

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241 *See* Timothy Williams & Mitch Smith, *$16 Million vs. $4: In Fatal Police Shootings, Payouts Vary Widely*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/us/police-shootings-payouts.html [https://perma.cc/H6UJ-ELFA] ("But [Quintonio] LeGrier's family did not receive a settlement—in fact, the city briefly tried to sue his estate before backing off. The family sued, and on Wednesday a jury awarded them $1 million, but the judge reversed the decision, awarding nothing.").

242 *See id.* Not only does where a victim lives affect the calculus of whether to settle, it also affects the likely amount they will get if they *do* settle. Baltimore paid out $5.7 million from 2011 through September 2014 to victims of police violence. Mark Puente, *Undue Force*, BALT. SUN (Sept. 28, 2014), https://data.baltimoresun.com/news/police-settlements/ [https://perma.cc/B4JF-PHRN]. In 2016, alone, the LAPD paid out $81 million in settlements across all forms of suits, including $15 million for LAPD's officers shooting of a thirteen-year-old boy. Richard Winton, *LAPD Settlements Soar as Officials Close the Books on High-Profile Lawsuits Against Police Officers*, L.A. TIMES (May 9, 2017), https://www.latimes.com/local/lanow/la-me-ln-lapd-litgation-costs-20170509-story.html [https://perma.cc/Z2EW-55DQ]. In Chicago, the police department spent more than $80 million to settle cases stemming from a *single officer's* misconduct. Dan Hinkel, *A Hidden Cost of Chicago Police Misconduct: $213 Million to Private Lawyers Since 2004*, CHI. TRIB. (Sept. 12, 2019), https://www.chicagotribune.com/investigations/ct-met-chicago-legal-spending-20190912-sky5euto4jbcdenjfi4datpnki-story.html [https://perma.cc/6Y7B-FEK3].

243 *See* Winton, *supra* note 242; Williams & Smith, *supra* note 241 (listing lawsuits that settled on various amounts).

244 Mitch Smith, *Philando Castile Family Reaches $3 Million Settlement*, N.Y. TIMES (June 26, 2017), https://www.nytimes.com/2017/06/26/us/philando-castile-family-settlement.html [https://perma.cc/H7JU-YDT8].

change for foregoing legal action.[245] And in 2015, the family of Eric Garner settled their wrongful death claim for $5.9 million.[246]

All of these cases never reached a judicial ruling, even though it appears almost certain a court would have ruled in favor of the families and created favorable precedent on the Fourth Amendment question. By settling, many of the most egregious examples of police uses of deadly force impinge the cause of creating a body of clearly established law for the purposes of qualified immunity. Of course, no victim of police violence or their family should be expected to forego a multi-million dollar settlement in the name of possibly creating favorable case law for future litigants. This pay-to-go-away system allows cities to expend millions of dollars to settle a small number of cases in the name of frustrating a vast number of cases that may be similarly indefensible, but which lack media and public attention.[247]

While large settlements are reached in the most disturbing cases, the compensation plaintiffs receive drops off quickly.[248] This Article's suggestion, which increases scrutiny of police shootings when warranted and offers a strong narrative tool to understand and explain police use of force, is a good step towards better compensating *all* who are affected by police killings. If cases of preemptive or anticipatory deadly force are more likely to be carefully scrutinized by a court, litigants will be more likely to succeed and those who decide to forego a lawsuit will be better compensated when they settle. Offering a clearer articulation of what reasonableness demands will allow

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245 Richard Fausset, *Walter Scott Family Reaches a $6.5 Million Settlement for South Carolina Police Shooting Case*, N.Y. TIMES (Oct. 8, 2015), https://www.nytimes.com/2015/10/09/us/walter-scott-settlement-reached-in-south-carolina-police-shooting-case.html [https://perma.cc/SV45-LQD4].

246 J. David Goodman, *Eric Garner Case Is Settled by New York City for $5.9 Million*, N.Y. TIMES (July 13, 2015), https://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html [https://perma.cc/8ZFU-S9SF].

247 This problem is compounded by cities universally indemnifying their police officers for the costs of civil litigation arising out of their official duties. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) ("Between 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."). Thus, whatever costs *are* incurred as a result of an officer's killing of a citizen, the officer bears little actual costs outside of potential demotion or firing.

248 *E.g.*, *Legal Payouts in LAPD Lawsuits*, *supra* note 226.

plaintiffs to better assess and evaluate their likelihood of success at trial. This Article's more textured understanding of deadly force facilitates the first steps to move plaintiffs out from qualified immunity's long shadow.

2. *Criminal Prosecutions*

This Article's suggestions would offer two benefits in the arena of criminal prosecutions. Much like civil litigation, because criminal prosecutions under 18 U.S.C. § 242 depend on constitutional rights—here freedom from unreasonable seizures—being clearly established,[249] a tripartite framework would offer similar benefits in helping to firm up the nature of those rights. Presently, as with civil litigation, the amorphous nature of reasonableness is unhelpful to prosecutions under § 242. The benefit that a tripartite framework would offer is difficult to quantify but should not be discounted. By offering a common point of reference, the framework affords prosecutors, defense attorneys, juries, and jurists a common nomenclature to employ. Again, while the Court would have us wade through the "factbound morass of reasonableness"[250] without any additional guidance of means, we need not subject ourselves to that punishment. Discussing the merits of pursuing prosecution against officers can only be improved if we are able to better understand why or why not deadly force is problematic.

The limits of prosecuting officers under 18 U.S.C. § 242 are well documented, as is the statute's long and complicated history.[251] Neither discussion needs restating here. Today, the statute makes a federal crime of any person that "under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[252] In *Screws v. United States*, the Court held that the statute requires a jury to find the specific "purpose to deprive the [victim] of a constitutional right."[253] Although *Screws* was only a plurality decision,

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249 *See* Screws v. United States, 325 U.S. 91, 104 (1945) ("[T]he specific intent required by [§ 242] is an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.").

250 Scott v. Harris, 550 U.S. 372, 383 (2007) (internal quotation marks omitted).

251 *See generally* Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2122–93 (1993) (discussing the history of civil rights criminal statutes including § 242 and *Screws v. United States*).

252 18 U.S.C. § 242 (2018).

253 *Screws*, 325 U.S. at 107.

it is the accepted rule for Section 242 prosecutions.[254] Therefore, "[t]o get a conviction, the [federal] prosecution must prove 'specific intent' on the part of the local official to violate a federal right, as distinct, for example, from an intent simply to assault the victim."[255]

The framework should theoretically make it easier to articulate a specific intent to violate a federal right or to ascertain reasonableness under state law statutes. That is because, as described at length above, there are limited circumstances in which an officer can deploy force lawfully. If force is understood in the broad class of "reasonableness," proving specific intent is challenging.[256] Much like with "clearly established law" under qualified immunity, the framework will allow us to zero in on precisely what type of force is at issue—making clearly establishing the right far simpler. And if we begin to label and train use of force as "preemptive" or "reactive," then we are better able to show that an officer had the specific intent to violate Fourth Amendment rights by showing the officer deviated from accepted norms of when force is permissible.

The second benefit in the realm of criminal prosecutions is tangential to the criminal process and difficult to quantify. At present, there is a substantial lacuna of understanding between the public and the criminal legal system in its handling of police officers. What the public sees is a system that almost uniformly insulates and protects officers.[257] Decisions to not prosecute are at times valid and normatively desirable, even in the context of police killings. But for local district attorney and federal prosecutors, explaining their decisions in the language

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254 *See, e.g.*, Williams v. United States, 341 U.S. 97, 101–02 (1951) (stressing the "willful" requirement announced in *Screws*); United States v. Epley, 52 F.3d 571, 576 (6th Cir. 1995) (following *Screws* in interpreting § 242 as requiring specific purpose to deprive a constitutional right); United States v. Garza, 754 F.2d 1202, 1210 (5th Cir. 1985) (same); United States. v. Kerley, 643 F.2d 299, 302 (5th Cir. 1981) (same); United States v. Ehrlichman, 546 F.2d 910, 920–21 (D.C. Cir. 1976) (citing *Screws* as the "seminal" case interpreting 18 U.S.C. § 242); United States v. Stokes, 506 F.2d 771, 774–76 (5th Cir. 1975) (same); United States v. Messerlian, 832 F.2d 778, 790 (3d Cir. 1987) (same).

255 PAUL CHEVIGNY, EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS 107 (1995).

256 *E.g.*, John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 810 (2000) ("The [Civil Rights] Division reviewed 10,129 civil rights complaints during that year. It filed only seventy-nine cases, including both grand jury cases and 'non-felonies not requiring Grand Jury approval;' of those, only twenty-two were 'official misconduct' cases, some of which were police abuse cases." (footnotes omitted)).

257 *E.g.*, Chase Madar, *Why It's Impossible to Indict a Cop*, NATION (Nov. 25, 2014), https://www.thenation.com/article/archive/why-its-impossible-indict-cop/ [https://perma.cc/RU27-S2MN].

of reasonableness is bound to invite confusion, disagreement, and ultimately anger. Conversely, with this model, we can offer all those involved a common starting point of nomenclature. While likely a slight total benefit, we should take seriously the possibility that the criminal legal system might be better positioned to explain police prosecution decisions by using this model.

B. Secondary

While litigation benefits are undoubtedly "real world" benefits, litigation about deadly force is a relatively small portion of the universe of interactions between police and citizen, whether deadly or not.[258] This Article's articulation of deadly force is desirable because it reaches *beyond* the courtroom and has the capacity to impact day-to-day policing. State regulations of police uses of deadly force are common; in all, forty-two states have statutes that regulate police use of deadly force.[259] Many state laws shifted after *Garner* to comport with the new stan-

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258 There is no clear understanding of the number of interactions that result in police use of deadly force. *See generally* Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1128–45 (2013) (describing a general lack of effort by government agencies to collect data on policing); Grace E. Leeper, Note, *Conditional Spending and the Need for Data on Lethal Use of Police Force*, 92 N.Y.U. L. REV. 2053, 2053–69 (2017) ("[The federal government] currently cannot provide a comprehensive count of how often police officers use lethal force against its citizens."). But we can safely say that a relatively small number of interactions lead to uses of deadly force. *Compare* DAVIS, WHYDE & LANGTON, *supra* note 110, at 4 (noting approximately fifty-three million people interact with police every year) *with Fatal Force: 999 People Were Shot and Killed by Police in 2019*, WASH. POST, https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/ [https://perma.cc/JBC5-4ZCL] (last updated Aug. 10, 2020) (finding 999 Americans were shot and killed by police in 2019).

259 ALA. CODE § 13A-3-27 (2014); ALASKA STAT. § 11.81.370 (2019); ARIZ. REV. STAT. ANN. § 13-410 (2021); ARK. CODE ANN. § 5-2-610 (2021); CAL. PENAL CODE § 835A (West 2020); COLO. REV. STAT. § 18-1-707 (2021); CONN. GEN. STAT. §§ 53A-18 (2019); DEL. CODE ANN. tit. 11, § 467 (West 2021); FLA. STAT. § 776.05 (2020); GA. CODE ANN. § 17-4-20 (2013); HAW. REV. STAT. § 703-307 (2021); IDAHO CODE § 18-4011 (2021); 720 ILL. COMP. STAT. 5/7-5 (2012); IND. CODE § 35-41-3-3 (2021); IOWA CODE § 804.8 (2020); KAN. STAT. ANN. § 21-5227 (2011); KY. REV. STAT. ANN. § 503.090 (West 2021); LA. STAT. ANN. § 14:20 (2014); ME. REV. STAT. tit. 17-A, § 107 (2007); MINN. STAT. § 609.066 (2021); MISS. CODE ANN. § 97-3-15 (2016); MO. REV. STAT. § 563.046 (2017); MONT. CODE ANN. § 45-3-106 (2021); NEB. REV. STAT. § 28-1412 (2021); NEV. REV. STAT. § 171.1455 (2021); N.H. REV. STAT. ANN. § 627:5 (2020); N.J. STAT. ANN. § 2C:3-7 (West 2021); N.M. STAT. ANN. § 30-2-6 (2021); N.Y. PENAL LAW § 35.30 (McKinney 2004); N.C. GEN. STAT. § 15A-401 (2011); N.D. CENT. CODE § 12.1-05-07 (2021); OKLA. STAT. tit. 21, § 732 (2021); OR. REV. STAT. § 161.239 (2021); 18 PA. CONS. STAT. § 508 (2011); 12 R.I. GEN. LAWS § 12-7-9 (2021); S.D. CODIFIED LAWS § 22-18-2 (2021); TENN. CODE ANN. § 39-11-620 (2021); TEX. PENAL CODE ANN. § 9.51 (West 2021); UTAH CODE ANN. § 76-2-404 (West 2015); VT. STAT. ANN. tit. 20, § 2368(c) (2021); WASH. REV. CODE § 9A.16.040 (2019); WIS. STAT. § 939.45 (2015).

dard.[260] To the extent courts adopt this Article's articulation of the forms of deadly force, state laws may well change.

However, it is likely more realistic for this Article's benefits to be felt at the level of departmental policy. As an intuitive matter, because police chiefs and those who approve departmental policy are accountable to the order of government who will be financially responsible if an officer violates the law, they *should* have a greater incentive to set a more restrictive limit for permissible officer conduct than that set by the state.[261] Paradoxically, however, that does not bear out in practice. Of the fifty largest police agencies in the country, about half simply rely on the *Graham* standard and set no additional limits.[262] Because this Article's suggestion is a more detailed understanding of how to think about force *within* the existing framework, it offers departments a way to better train officers in the use of deadly force. Departments can endorse and train reasonableness at varying levels of granularity. This Article has argued that a granular understanding of reasonableness best advances societal and individual interests.

Training that adopts this understanding of deadly force would help officers recognize that not only is preemptive deadly force indefensible, it is also unnecessary. Instances of preemptive deadly force are almost always based on officer fear, which creates an untenable risk that innocent citizens will be killed. As Rachel Harmon said, "Instead of asking themselves whether the force they are using is generally reasonable, police officers could instead ask a more concrete question: whether the force is used too soon or too late."[263] Harmon's point was a doctrinal one—her piece argues imminence requirements should be imported and adapted into the law of police force—but the argument holds its own even in the context of a descriptive proposal.[264] When officers have concrete touchstones to explain what makes force reasonable, they are positioned to make better choices. Because it is a clear articulation that does not depend on legalese, this Article's proposal offers pre-

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260 Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After* Garner, 35 ST. LOUIS U. PUB. L. REV. 109, 133 (2015) ("[*Garner*] set the constitutional standard and in so doing, it doubtlessly inspired many states to change their laws so that they no longer conflicted with [the decision].").

261 *Cf.* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1148 (2016) (describing how many police departments are expected to contribute to payouts from policing misconduct).

262 *See* Garrett & Stoughton, *supra* note 34, at 285.

263 Harmon, *supra* note 12, at 1169.

264 *Id.* at 1183.

cisely such a basis for delineating between uses of deadly force. Explaining an officer's use of deadly force was impermissible because it was "preemptive" is far easier than the amorphous statement it was "unreasonable"—even if the preemptive standard is merely a stand-in for reasonableness.

As any first-year law student could tell us, the law is replete with reasonableness standards.[265] And in many instances, the vagaries of where the word might take us is of little consequence. That is not the case in the context of deadly force. Because so much of departmental policy and trainings rely on judicial understandings of reasonableness, poor articulation of what *is* reasonableness results in needless police killings. We know this because after *Garner* police killings dropped precipitously.[266] The Court's opinion offered a clear, easily applied rule and deaths fell as a result. So too, dividing deadly force into numerous categories would likely reduce deaths because reasonableness would be more easily defined, taught, and understood. If even a single death could be prevented because an officer is able to better realize when he lacks objective indicia of a threat, then adjusting the way we approach deadly force is a worthwhile endeavor.

While the trickle-down effects to state law, departmental policy, and officer conduct are difficult (if not impossible) to quantify and predict, they could prove to be substantial. Yet even if the benefits outside of litigation are relatively slight, they are worth seriously considering given the irreversible consequences of using deadly force.

C. Shortcomings

While the benefits of understanding deadly force in keeping with this Article's framework are important, so too are the shortcomings. This Article's articulation of deadly force has two major shortcomings. First, the model relies on being able to correctly ascertain the facts that were present at the time

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265 Reasonableness arises amongst others in criminal law, tort law, constitutional law, commercial law, and antitrust law. *E.g.*, Benjamin C. Zipursky, *Reasonableness in and out of Negligence Law*, 163 U. PENN. L. REV. 2131, 2135–36 (2015) ("The range of uses of 'reasonableness' in law is so great that a list is not an efficient way to describe and demarcate it."). *See generally* Kevin P. Tobia, *How People Judge What Is Reasonable*, 70 ALA. L. REV. 293, 305–12 (2018) (proposing a normative theory of reasonableness that applies across multiple legal domains); Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 324–27 (2012) (discussing the implication of reasonableness for tort law).

266 Tennenbaum, *supra* note 56, at 254; Sparger & Giacopassi, *supra* note 56, at 224.

force was used. This necessitates relying on, at least in part, an officer's account, which invites the usual mischief and incentives for an officer to overstate the objective indicia of a threat. Second, there exist instances where police might use deadly force, but this framework might struggle to adequately classify the decision to use force. Both of these shortcomings should be taken seriously because they are important limitations on understanding deadly force, although ultimately not fatal.

In the aftermath of police use of deadly force, facts are often unclear, disputed, and subject to mischaracterization by the officer who used force.[267] For example, when Chicago police officer Jason Van Dyke shot and killed seventeen-year-old Laquan McDonald, he claimed McDonald "was behaving strangely and had lunged at officers with a knife when they opened fire."[268] That account was definitively refuted when video of the shooting was released.[269] The lack of clarity and confusion that exists in these moments would substantially hinder the model's utility.

I can offer at least three responses to this critique, however. First, while the lack of clarity that exists in the wake of a shooting might make it more challenging to properly assess whether force was reactive, anticipatory, or preemptive, it is far from impossible. Many of the facts that inform what type of deadly force was used cannot be fabricated or mischaracterized. For example, an officer cannot fabricate a school shooting or hostage situation to make force reactive. So too, he cannot claim he was responding to a dispatch for a violent crime when no such call existed. To be sure, the officer does have some room to confuse the issue of characterizing the deadly force used. An officer could say an individual was pointing the weapon at him when he was simply holding it. And an officer could say a weapon was present when none was. These issues

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267 *See, e.g.*, Michael Brice-Saddler, *Police Said an Officer Shot a Man Who Opened a Door While Aiming a Gun. Then the Body-Cam Video Came Out.*, WASH. POST (July 31, 2019), https://www.washingtonpost.com/nation/2019/07/31/police-said-they-shot-man-when-he-opened-his-door-aiming-gun-then-body-cam-video-came-out/ [https://perma.cc/Z6VN-3DLP] (reporting on an incident in which body-camera footage contradicted the police officer's account of facts).

268 Sam Levine, *Chicago Police Really Didn't Want to Release Video of a Cop Shooting Laquan McDonald 16 Times*, HUFFPOST (Nov. 25, 2015), https://www.huffpost.com/entry/chicago-laquan-mcdonald-video_n_565603e0e4b079b2818a06f6 [https://perma.cc/3BFE-5QML] (last updated Nov. 27, 2015).

269 *Id.* ("City officials release[d] footage of McDonald's death, which shows him walking away from police when he [was] shot, contradicting initial police reports of the incident.").

are important and pose a serious limitation on this Article's theory. But the broader point holds firm: this model does not make these things *more* true. Rather, it merely accentuates our reliance on officers' accounts. And, at bottom, the model places us in no worse a position than we are under the status quo.

Second, the rising prevalence of cameras in policing will provide an important data point to quickly attempt to clarify facts.[270] While cameras are decidedly imperfect as a means to understand what transpired during an interaction,[271] they offer a good starting point. Cameras have, in a number of police shootings, contradicted police accounts of events and clarified what actually took place.[272] Although we typically conceive of

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270 *Research on Body-Worn Cameras and Law Enforcement*, NAT'L INST. JUST. (Dec. 4, 2017), https://nij.ojp.gov/topics/articles/research-body-worn-cameras-and-law-enforcement [https://perma.cc/423F-U2HT] ("47% of general-purpose law enforcement agencies had acquired body-worn cameras; for large police departments, that number is 80%. Among agencies that had acquired body-worn cameras, 60% of local police departments and 49% of sheriffs' offices had fully deployed their body-worn cameras.").

271 *See* P.R. Lockhart, *Body Cameras Were Supposed to Help Improve Policing. They Aren't Living Up to the Hype.*, VOX (Mar. 27, 2019), https://www.vox.com/2019/3/27/18282737/body-camera-police-effectiveness-study-george-mason [https://perma.cc/2PK2-YVDP]; Lindsey Van Ness, *Body Cameras May Not Be the Easy Answer Everyone Was Looking For*, PEW (Jan. 14, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/01/14/body-cameras-may-not-be-the-easy-answer-everyone-was-looking-for [https://perma.cc/5D4H-PS7Y]; Timothy Williams, James Thomas, Samuel Jacoby, & Damien Cave, *Police Body Cameras: What Do You See?*, N.Y. TIMES (Apr. 1, 2016), https://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html [https://perma.cc/AXN9-D66C] ("Our interpretation of video is just as subject to cognitive biases as our interpretation of things we see live." (quoting Professor Seth W. Stoughton).

272 Alex Horton, *In Violent Protest Incidents, A Theme Emerges: Videos Contradict Police Accounts*, WASH. POST (June 6, 2020), https://www.washingtonpost.com/nation/2020/06/06/police-protester-incidents-video/ [https://perma.cc/Q4HF-87KE] ("But in one widely condemned moment, U.S. Park Police were shown striking an Australian news cameraman with a shield, jabbing at his camera and swinging a baton at the anchor. . . . The agency's union responded with a statement defending the actions of the officers, suggesting the camera crew 'may have fallen.'"); Jeffrey Collins, *Body Camera Footage of SC Shooting Contradicts Police Claims*, ABC NEWS (July 29, 2019), https://abcnews.go.com/US/wireStory/body-camera-footage-sc-shooting-contradicts-police-claims-64638097 [https://perma.cc/NV6B-H8N6] ("A South Carolina homeowner who was shot by a deputy checking a medical alarm did not jerk open his front door with a gun and was instead standing in the home's foyer when the officer shot through a window, according to body camera footage released Monday."); Dan Hinkel, *Video Contradicts Accounts of Chicago Cops in a 2014 Fatal Shooting of Teen*, CHI. TRIB. (Nov. 30, 2017), https://www.chicagotribune.com/news/breaking/ct-met-chicago-police-shooting-roshad-mcintosh-20171127-story.html [https://perma.cc/ML7N-QQM3]; Monica Davey & Mitch Smith, *3 Chicago Officers Charged with Conspiracy in Laquan McDonald Case*, N.Y. TIMES (June 27, 2017), https://

body-worn cameras as the major avenue of accountability, the spread of privately used cameras such as dashcams, doorbell cameras, and cellphones will only serve to bolster video evidence's ability to confirm the events that precede police violence. And, to be sure, as cameras become smaller and able to record higher quality video, their use will only increase. To the extent we need to quickly understand what transpired, cameras—body worn and not—are able to provide a starting point to understand what occurred.

Finally, a more macro point: this model's utility is not confined to the moments after a shooting. This Article is not meant to solve the problem of disputed accounts of police shootings, as that problem is likely here to stay. Rather, it is a generalized proposal to reshape how we think, understand, and speak of police uses of force in academic, judicial, and societal conversations. Indeed, its benefits are more strongly felt the *further* from a shooting we get. While the facts that surround a shooting might be unclear in the hours, days, or even weeks after something transpires, we do not necessarily need to resolve those facts quickly. This Article is meant to offer us an explanatory tool once those facts *are* established. Thus, we must continue to rely on the ordinary process of investigation and potential litigation to adequately develop those facts to understand what transpired. And, importantly, if the facts are so confusing that this model offers no benefit in a given case, we are certainly in no worse a position than we are under the status quo.

The second critique that could be leveled against this Article is that it fails to capture instances where police operate in

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www.nytimes.com/2017/06/27/us/chicago-officers-indicted-laquan-mcdonald-shooting.html [https://perma.cc/7UFH-FNKK] ("But other officers—including the three charged on Tuesday—backed up Officer Van Dyke's account that Mr. McDonald had moved menacingly toward him with a knife and swung the weapon. The dashboard video contradicted those accounts, and showed Mr. McDonald, who was clutching a knife, seeming to veer away from the police when Officer Van Dyke began firing his weapon."); Bruce Smith, *Jury Hears that Ex-Cop's Account Contradicted by Video*, AP NEWS (Nov. 14, 2016), https://apnews.com/3837f37ab6c340429779c621c1395c06 [https://perma.cc/ZSU6-KYA9] ("Jurors in the murder trial of a former South Carolina police officer heard testimony Monday that the white officer's initial account of the shooting of an unarmed black motorist contradicted what a cellphone video of the shooting shows."); Matt Apuzzo & Timothy Williams, *Video of Walter Scott Shooting Reignites Debate on Police Tactics*, N.Y. TIMES (Apr. 8, 2015), https://www.nytimes.com/2015/04/09/us/video-of-fatal-shooting-of-walter-scott-reignites-debate-on-police-use-of-force.html [https://perma.cc/2BPP-PB6Z] ("In February, two Pelham, N.Y., officers retired after a video contradicted their account of an arrest of a black man.").

good faith but with faulty information. Consider the following example: Police serve a warrant on an address that they in good faith believe is the correct address. The officers believe that an armed suspect is in apartment ninety-six and are warned he may attempt to shoot his way out when they enter the apartment. When the officers enter the apartment, which they believe is number ninety-six, they see a man who they believe is wearing a gun holster and when he turns towards them, the officers shoot and kill the man. But after shooting the man, the officers discover he was wearing a baby carrier, not a gun holster, and the apartment they believed to be ninety-six was in fact ninety-nine, with the second "nine" having fallen loose and inverted itself.

Candidly, there is no entirely satisfactory answer to the critique that the model does not account for instances where officers operate under incorrect information. That is not to say the critique is fatal to this Article's proposal. No model is perfect and hard cases will always push and strain the explanatory power of a theory. Here, the facts suggest the case would be exceedingly difficult to categorize into one of our three categories. The Court's admonition that we must evaluate claims of deadly force from the perspective of what the officer knew suggests the force would likely need to be called reactive. But the question is surely a close and difficult one. And, again, if we adopt the understanding of deadly force this Article puts forth, we are surely no worse off, even if there may be the odd case the framework does not cleanly categorize.

Overall, the potential criticisms of this proposal are warranted and worth taking seriously. Ultimately, however, the critiques are far from fatal. In offering a more well-rounded, intellectually honest explanation of the many types of deadly force, we certainly invite some difficulties and hard questions. These hard questions bespeak the difficulty of the problem this Article has sought to address. In offering a clearer understanding of deadly force to facilitate a more equitable litigation posture, better departmental policy, and ultimately better officer decision-making, the benefits of this proposal far outweigh the possible hard cases the framework might struggle with. There are no simple, catch-all solutions and I would never claim this Article offers one.

CONCLUSION

Police are the only government officials who wield the power to lawfully kill an American citizen without *ex ante* re-

view.[274] For a country that has seen thousands of police killings, the broader framework for discussing, understanding, and analyzing deadly force remains poor. This continuing lack of understanding is inexcusable. Concerns about police killings have been present since the 1930s,[273] and as evidenced by protests after the deaths of George Floyd and Daunte Wright, are going nowhere. Despite this, the Supreme Court has not only offered little guidance, but has gone so far as to undermine the guidance we *did* have.[274] While the Court has taken it upon itself to regulate minutiae of government operations, it has made clear that it will take no part in articulating a clear and robust explanation of police killings.[275] And so, that task falls to us.

While police decisions to use deadly force may arise in a moment, they do not arise in a vacuum. In the real world, officers will be faced with a wide range of conduct, some of which might suggest a threat exists, but much of which is not only legal, but mundane. Deadly force is not a hegemonic concept; a decision to kill a hostage-taking bank-robber and an unarmed teenager are not coequal, so calling them the same name is disingenuous. This common-sense principle has, until now, not appeared in scholarship. Instead, we have been deeply focused on doctrinal reforms at the expense of better understandings of "reasonableness."

Police use of deadly force operates along a spectrum. Here, I have attempted to both identify that continuum and explain how officer uses of force can be classified along it. At its core, this Article offers a new way to understand, think of, and speak of deadly force. It recognizes that there are instances when a forceful response is necessary. But it also explains why we should be deeply skeptical of deadly force in the absence of objective indicia. We can understand that, at times, officers fear for their lives, without believing that fear alone should justify the use of deadly force. Thus far, courts and scholars alike have not distinguished between objective indicia of a threat and subjective belief. But treating what an officer *thinks* as something he *knows* is, as a matter of theory, unjustifiable.

The framework of reactive, anticipatory, and preemptive deadly force takes full account of all these realities and offers a new and clearer nomenclature for deadly force. By calling the

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273 *See* MacNeil Oliver, *supra* note 1, at 511–12.

274 *See supra* Part I.

275 *See* Scott v. Harris, 550 U.S. 372, 383 (2007) (stating that reasonableness is "all that matters").

decision to kill people like Michael Brown, Eric Garner, Samuel DuBose, Philando Castile, Alton Sterling, and Walter Scott the same thing as the decision to kill an armed and shooting assailant, we distort and diminish the heinousness of the decision that deadly force was appropriate. The confusing world of reasonableness is both dissatisfying and intellectually bankrupt. It is important that we call different types of deadly force exactly what they are—*different*. Distinguishing between killings that occur when an officer is faced with concrete, indisputable evidence of a threat and killings that rely on an officer's speculation is merely the first step to a more intellectually honest and robust conversation about police violence.