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Reforming Police Use of Deadly Force to Arrest

The killing of George Floyd by a police officer during an arrest for the alleged passing of a counterfeit $20 bill has reignited the long-standing call for reforming police practices. Central to the Floyd case, as well as numerous other arrests of unarmed Black men that have spiraled into death, is the issue of when police are authorized to use deadly force to arrest a suspect. Statutes in most of the 50 states are outdated, authorizing the use of deadly force whenever a police officer subjectively believes such force is reasonable. These laws cry out for reform, at the very least as a means of rebalancing the relationship between the citizenry and those sworn to protect them. Reforming state law regarding the use of deadly force will prevent more unjustified killings by police, as the statutes are both the starting point for police training and used by prosecutors in making charging decisions, which can deter inappropriate and unnecessary uses of deadly force. If the police are to regain the respect of the public they serve, the use of deadly force must be limited to only those arrests where the use of such force is objectively necessary to prevent imminent loss of life or serious bodily injury to the police or third parties.

No amount of legal reform will result in meaningful change in the absence of police department leadership creating, fostering, and demanding a change in policing culture. To that end, police departments should train officers to avoid placing themselves, the suspect, and third parties in deadly force situations in the first place — by, *inter alia*, exploring alternatives that de-escalate police encounters with those who have apparently committed minor crimes, before and after an arrest. Both the Floyd case and the recent killing of Rayshard Brooks by an Atlanta policeman can serve as tragic object lessons for when police should undertake alternatives to the use of deadly force, especially when *unarmed* and intoxicated suspects either resist arrest or are being taken into custody.

This article begins by reviewing the current legal standards authorizing the police to use deadly force to arrest and proposes reforms to the majority of state laws that now allow the police to use deadly force in too many circumstances. A simple model is proposed for reforming state laws regarding the use of deadly force, and the Floyd and Brooks cases are examined briefly to focus attention on creating alternatives to the use and an escalation of force and different incentives for police interaction with suspects who have committed nonserious crimes.

The Current Legal Standards Authorizing/Prohibiting Police Use of Deadly Force

In 1985, the Supreme Court held that laws authorizing police use of deadly force to apprehend fleeing, unarmed, nonviolent felony suspects violated the Fourth Amendment of the U.S. Constitution. In that case, *Tennessee v. Garner*, a father brought a federal civil rights action for damages pursuant to 42 U.S.C. § 1983 on behalf of his young son, who was shot and killed when fleeing the scene of a nighttime burglary. At the time, numerous states, including Tennessee, had

BY STEVEN M. SALKY AND JOSHUA A. LEVY

statutes providing that if, after a police officer has given notice of an intent to arrest a criminal suspect, the suspect flees or forcibly resists, "the officer may use all necessary means to effect the arrest." This so-called "Any Felony Rule" reflected the common law that was developed prior to the invention of firearms and typically authorized the use of deadly force to make an arrest of a fleeing felony suspect at a police officer's discretion.

Justice Byron White, writing for a six-member majority, first ruled that the apprehension of a fleeing felon constituted a seizure under the Fourth Amendment.[1] Accordingly, the seizure was subject to the "reasonableness requirement" of the Fourth Amendment. The majority then determined that "reasonableness" required balancing the suspect's right to be free from unreasonable seizure against the government's interest in effective law enforcement, and found, as had the court of appeals, that the use of deadly force to prevent the escape of any felony suspect, regardless of the circumstances, was per se unreasonable. The key language was as follows:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. … Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.[2]

But the *Garner* decision also contained dicta that it was not unreasonable to prevent escape by a felony suspect by the use of deadly force "[w]here the officer has probable cause to believe the suspect poses a threat of serious physical harm, either to the officer or to others." Thus, after *Garner*, many state statutes were revised to make the officer's *subjective* belief in the need to use deadly force the paramount consideration governing its use in arresting fleeing felony suspects. Today, the majority of states with use of deadly force statutes authorize its use to effect the arrest of a suspected felon, so long as the officer *"reasonably believes"* such deadly force is justified.[3] Going a step further to protect law enforcement, some states have even authorized the police to use deadly force without regard to whether an arresting officer's belief that the suspect presents a danger to the police or others was reasonable.

Why the Officer's Subjective Reasonable Belief Requires Reform

States that have codified the dicta in *Garner* to permit police officers to use deadly force whenever that officer reasonably believes it to be justified disproportionately put the thumb of the police officer who used deadly force on the scale of justice. When a law makes the officer's subjective belief govern his or her liability instead of focusing on whether a reasonable officer would have used deadly force under the circumstances, the mere claim by the officer regarding his or her state of mind effectively swallows the "reasonableness" requirement.[4] Where the officer's testimony is virtually dispositive, the citizenry is deprived of a critical check on the police use of deadly force — *i.e.*, the determination of its objective reasonableness.

More importantly, use of a subjective standard is contrary to the decision in *Graham v. Connor*, a 1989 case in which the U.S. Supreme Court held "that all claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other *seizure* of a free citizen should be analyzed under the Fourth Amendment and its objective "reasonableness" standard. …"

Further, because police have been more likely to use force, including deadly force, against Black individuals than against other racial or ethnic groups,[5] the subjective standard for use of deadly force puts Black suspects at a particular disadvantage when it comes to holding police officers accountable.

Potential Ways to Reform Existing State Use of Deadly Force Laws

Even prior to the renewed cry for reform arising from the Floyd killing, a few states enacted statutes containing standards worth careful consideration.

For instance, in response to the killing of an unarmed Black suspect named Stephon Clark, California passed a law in 2019 allowing police to use deadly force only when "necessary in defense of human life," based on "the totality of the circumstances known to or perceived by the officer at the time."[6] Although it is too early to know if the "necessity" standard will result in fewer deadly police shootings in California, which saw more such incidents in 2018 than any other state and had a higher rate of police killings than all but 12 states, the law is a promising new beginning.

But the "necessity" standard, justifiably hailed as a means of deterring the police use of deadly force, should not be the end of statutory reform at the state level. Indeed, while California appears to have made it harder for police to use deadly force by substituting "necessary" for "reasonable belief," the new statute's conditioning of "necessary" use of force on "the totality of the circumstances known to or perceived by the officer at the time" creates an open question about the extent to which that condition includes an objective or subjective test.[7]

Two areas of further reform appear obvious. First, as mentioned, most states — 36 — consider the reasonableness of the use of deadly force to arrest from the standpoint of subjective belief of the arresting officer. For instance, Missouri, where Michael Brown's killing became a subject of national attention, continues to justify the use of deadly force whenever the arresting officer "reasonably believes that such use of deadly force is immediately necessary to effect the arrest" of anyone who has committed or attempted to commit a felony.[8] States, such as Missouri, should replace this subjective standard with an objective one, as the state of Washington has done. In 2019, Washington revised its deadly force statute to exonerate officers from criminal liability in most cases, but only so long as the officer acted in "good faith," and defined "good faith" as an objective standard based on "whether a similarly situated reasonable officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual."[9] This very modest revision, ultimately supported by several police agencies in Washington, makes it more likely to hold police accountable for unjustifiably killing unarmed suspects during an arrest.

Second, many states still allow police to use deadly force in connection with an arrest for *any* felony. Felonies include dozens of nonviolent and relatively petty crimes, including in many states the possession of almost any quantity of an illegal drug.[10] Given the extraordinary number of minor crimes that constitute felonies in every state, authorizing the use of deadly force to effectuate an arrest for *any* felony is too broad and does not fit the Fourth Amendment "reasonableness" standard for balancing legitimate law enforcement against a citizen's right to be free from being killed under either *Garner* or *Graham*. Accordingly, more states need to limit the use of deadly force to make an

arrest of a person reasonably believed to have committed or attempted to commit a particular type of felony, as several states have already sensibly done. For instance, Alaska allows the use of deadly force only if the felony "involved the use of force against a person."[11] Arizona limits the use of deadly force to arrest a person reasonably believed to have "committed [or] attempted to commit … a felony involving the use or a threatened use of a deadly weapon."[12] Delaware permits the use of deadly force if the officer "believes the arrest is for a felony involving physical injury or threat. …"[13]

But these too are modest changes. State laws could instead help make clear that allowing suspects to escape immediate apprehension for almost every crime is a more reasonable alternative than killing them, reserving the use of deadly force for those instances where the felony suspect is objectively an imminent danger to either the police officer or to members of the public. Several states have moved incrementally in this direction. For instance, the state of Arkansas limits the use of deadly force to arrest a felon to those cases where the officer reasonably believes the person "is presently armed or dangerous."[14] New Jersey allows the use of deadly force to arrest only those suspects the officer reasonably believes have committed certain enumerated violent crimes and when deadly force is "necessary to thwart the commission of" those same enumerated violent crimes.[15] And Colorado recently limited the use of deadly force to arrest a fleeing felon to situations only in which the officer reasonably believes the person has both committed or attempted to commit a felony involving or threatening the use of a deadly weapon and there is an imminent threat of the person using the weapon as part of his or her escape.[16]

Situations Where Police Use of Deadly Force Was Objectively Unreasonable

An arrest can lead quickly, if not instantly, to the use of force that can encounter resistance. Under the law of almost every state, a suspect does not have the right to resist arrest, and resisting is generally a criminal act carrying a potential sentence of imprisonment.[17] But not every suspect is compliant, and the making of an arrest and certainly the use of force can put the officer as well as the suspect at risk, sometimes at a substantial and life-threatening risk. The arrests of George Floyd and Rayshard Brooks both present examples of when the use of deadly force was objectively unreasonable and can be used as counterexamples for police around the country.

In George Floyd's case, the police were called by a convenience store clerk about a man who had paid for a package of cigarettes with a counterfeit $20 bill and was sitting in a car "awfully drunk and … not in control of himself." As a nearby video camera revealed, two police officers arrived and one pulled a stumbling Mr. Floyd out of the driver's seat, handcuffed him, and escorted him to a nearby wall, where he was placed sitting on the ground. Six minutes into the arrest, Mr. Floyd was walked across the street by several officers, who tried to place him in a police car. Mr. Floyd was apparently noncompliant, telling the officers he did not want to enter the car because he was claustrophobic. Shortly thereafter, Officer Derek Chauvin and a fourth officer arrived at the scene, and everyone knows what happened next: by virtue of his apparent unwillingness to get into a police vehicle, Mr. Floyd had the life snuffed out of him by Officer Chauvin placing his knee on Mr. Floyd's windpipe for 8 minutes and 46 seconds, as bystanders screamed in protest, and, critically, three other officers took no action.

There can be no debate in this case that there were alternative means of having Mr. Floyd comply with being transported to the police station other than killing him. While Minnesota law would appear to limit the use of deadly force to felonies "involving the use or threatened use of deadly force" in one subsection of the statute, Minn. Stat. 609.066, Sub.2(2) (2019), another subsection of the statute, Minn. Stat. 609.066, Sub.2(3) (2019), creates an ambiguity by permitting the use of deadly force for *any* felony when the officer knows or has reason to believe that the person being arrested or fleeing "will cause death or great bodily harm if the person's apprehension is delayed." If the latter subsection had limited the use of deadly force to felonies "involving the use or threatened use of deadly force," the three other officers might not have failed to intervene when Officer Chauvin was choking Mr. Floyd to death. At the very least, the statute — were it modified as recommended — may have created an incentive for them to intervene, as there was no ambiguity that Mr. Floyd had not committed a felony involving the use or threat of deadly force.

The recent case of Rayshard Brooks in Atlanta presents another scenario where the use of force — and certainly the use of deadly force — was unnecessary. In this case, police were called because Mr. Brooks had fallen asleep in his car, which was parked in a fast-food restaurant drive thru lane, causing others to drive around him. After waking Mr. Brooks, the police had him move his car to a nearby parking spot, had him step out of his car, ensured that he had no weapons, and engaged in lengthy conversations with him. After some discussion, Mr. Brooks agreed to take a breathalyzer test and apparently failed. He then offered to leave his car behind, give up his keys, and walk to his sister's house, which he said was nearby. After failing the sobriety test, however, one of the two police officers began to handcuff him and place him under arrest, saying he was too drunk to drive. Mr. Brooks, in turn, resisted. A struggle between Mr. Brooks and the two officers then ensued, taking all three individuals to the ground. When one of the officers tried to stun Mr. Brooks with a Taser, Mr. Brooks took the Taser, threw a wild punch at the officer, and ran, with the officers in pursuit. According to the Georgia Bureau of Investigation's revised report, "[d]uring the chase, Mr. Brooks turned and pointed [and fired] the Taser at the officer," and "the officer fired his weapon, striking Brooks [in the back]."[18] Mr. Brooks died that evening at the hospital from the police officer's gunshot wounds.

Putting aside what the officer who fired the deadly shots will say he reasonably believed at the time he killed Mr. Brooks,[19] it is appropriate to ask whether the police needed to use deadly force to effect Mr. Brooks's arrest.[20] Chasing Mr. Brooks was warranted, as would have been calling for backup to ensure his apprehension. But firing three shots into his back as he fled? The police well knew that the Taser in Mr. Brooks's possession, having been discharged twice, was no longer capable of additional firings and that Mr. Brooks had no intent to harm anyone else.

Additionally, the following question can be asked: what if Georgia's use of deadly force laws judged an officer's use of deadly force on the standard of an *objectively* reasonable officer? Might not such a higher threshold have motivated this officer to think twice about shooting Mr. Brooks as he fled? We think so. And isn't that what we want our laws to do: cause police to give a second thought to killing an unarmed suspect?

Conclusion

The time is ripe for states to reform their laws on the use of deadly force to arrest. A model use of deadly force statute could state simply: "A

police officer is authorized to use deadly force to arrest only those suspects who the police have probable cause to believe have committed violent felonies [which the statute could define] and only when a similarly situated reasonable police officer would have used deadly force in order to prevent death or imminent serious physical harm to the officer or another individual." Such a provision would sensibly rebalance legitimate law enforcement objectives toward a suspect's right not to be killed in order to be apprehended. Leaving state use of deadly force laws as they are currently written will put an untold number of suspects, police officers, and bystanders at greater risk. Legal reform, however helpful, will not succeed without police department leaders demanding strong cultures of judgment, restraint, discipline when it comes to the use of force, and, above all else, respect for the lives of the people they serve. To that end, police should use the cases of George Floyd and Rayshard Brooks as teaching tools to explore what actions could and should have been taken to diffuse those situations away from what became unjustified uses of deadly force, while also satisfying legitimate law enforcement and community objectives.

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Notes

1. Prior to this decision, most federal courts analyzed the use of deadly force by state actors (including state and local police) under the Due Process Clause of the Fourteenth Amendment.

2. After the Supreme Court's decision in *Garner*, federal courts continued to analyze cases involving law enforcement use of nondeadly force under the Due Process standard of the Fourteenth Amendment. In 1989, the Supreme Court issued its opinion in *Graham v. Connor*, which, building on the legal framework from *Garner*, applied a reasonableness Fourth Amendment standard to all law enforcement use of force cases.

3. Approximately 10 states do not have statutes governing police use of deadly force, leaving the matter up to local regulations and applicable decisions of their state courts, often guided by federal court precedents.

4. *See* Steven Salky, Jacob Schuman & Keisha N. Stanford, *Lawful Use of Deadly Force by the Police: What's Wrong in Ferguson and Elsewhere*, The Champion, May 2015, at 20 (advocating for the replacement of the subjective standard of reasonableness with an objective standard, as a means of holding more officers accountable for unjustified use of deadly force).

5. *See, e.g.*, Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race -Ethnicity, and Sex*, Proceedings of the National Academy of Sciences (Aug. 2019), 116 (34) 16793-1678: DOI: 10.1073/pnas. 1821204116, https://www.pnas.org/content/116/34/16793 (finding that Black men are at the highest risk of being killed by police use of force); Frank Edwards, Michael H. Esposito & Hedwig Lee, *Risk of Police-Involved Death by Race/Ethnicity and Place, United States, 2012–2018,* 108 Am. J. Pub. Health 1241-1248 (2018), https://doi.org/10.2105/AJPH.2018.304559 (concluding that nationwide Black and Latino men are at higher risk to be the victims of police homicides than are white men, with markedly varying disparities depending on the location).

6. Cal. Penal Code § 835a(2), (4). California police unions initially fought against the passage of the new use of force law. They dropped their opposition only after legislators removed language requiring de-escalation tactics, weakened the "necessary" standard, and altered provisions concerning the potential "criminal negligence" of officers involved in deadly force incidents. *See* Anita Chabria, *Newsom Signs 'Stephon Clark's Law,' Setting New Rules on Police Use of Force*, L.A. Times, August 19, 2019, https://www.latimes.com/politics/la-pol-ca-california-police-use-of-force-law-signed-20190711-story.html.

7. Cal. Penal Code § 835a(2), (4).

8. Mo. Rev. Stat. § 563.046.3(2).

9. Wash. Rev. Code § 10.31.050 (4).

10. *See, e.g.*, Ala. Code § 13A-12-212; Va. Code § 18.2-250.

11. Alaska Stat. § 11.81.370(a)(1).

12. Ariz. Rev. Stat. § 13-410(2)(a).

13. 11 Del. Code § 467(c)(1).

14. Ark. Code § 5-2-610(b)(1).

15. N.J. Stat. § 2C:3-7.

16. Colo. Rev. Stat. § 18-1-707 (2)(b)(I).

17. *See, e.g.*, Md. Code Ann, Crim. Law § 9-408. Although some state laws make it a crime to resist only if the arrest is "lawful," this requirement has been interpreted by most courts not to give rise to a right to resist an unlawful arrest at the time it occurs, but rather only as a basis for later defending against the criminal charge and/or suing for damages.

18. Georgia Bureau of Investigation, *GBI Investigates Officer Involved in Shooting in Atlanta* (Update #2) (June 13, 2020), https://gbi.georgia.gov/press-releases/2020-06-13/gbi-investigates-officer-involved-shooting-atlanta.

19. Georgia law allows a police officer to use deadly force only if "he or she reasonably believes that such threat or force … is necessary to prevent death or great bodily injury to himself or herself or a third person. …" Ga. Code § 17-4-20(b). The prosecution of the officer who killed Mr. Brooks is pending, and the district attorney will attempt to prove that the officer could not have reasonably believed he was in danger of "great bodily injury" when he fired the deadly shots by virtue of the fact that he knew Mr. Brooks had already fired the Taser twice, thereby eliminating Mr. Brooks' ability to cause any further harm. Although the case will present obstacles for the prosecution, it was a reasonable exercise of prosecutorial discretion to charge the officer criminally, as he shot Mr. Brooks in the back while Mr. Brooks was running away.

20. Inasmuch as the police had apparently secured Mr. Brooks's car keys, one could also reasonably ask whether an arrest was necessary at all. ■

About the Authors

Steven M. Salky recently retired from a 35-year career as a criminal and civil litigation lawyer at Zuckerman Spaeder LLP and is currently taking the prerequisites to attend nursing school.

NACDL MEMBER

Steven M. Salky
Email stevensalky@gmail.com

Joshua A. Levy is a partner at Levy Firestone Muse LLP.

Joshua A. Levy
Levy Firestone Muse LLP
Washington, DC
202-845-3215
Email jal@levyfirestone.com
Website www.levyfirestone.com