

2018

## Licensed to Kill? An Analysis of the Standard for Assessing Law Enforcement's Criminal Liability for Use of Deadly Force

Raoul Shah

Follow this and additional works at: <https://open.mitchellhamline.edu/policypractice>



Part of the [Fourth Amendment Commons](#)

### Recommended Citation

Shah, Raoul (2018) "Licensed to Kill? An Analysis of the Standard for Assessing Law Enforcement's Criminal Liability for Use of Deadly Force," *Mitchell Hamline Law Journal of Public Policy and Practice*: Vol. 39 : Iss. 1 , Article 1.

Available at: <https://open.mitchellhamline.edu/policypractice/vol39/iss1/1>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Journal of Public Policy and Practice by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

**MITCHELL HAMLINE**  
**LAW JOURNAL OF**  
**PUBLIC POLICY AND PRACTICE**

---

VOLUME 39

SPRING 2018

---

© 2018 by Mitchell Hamline Law Journal of Public Policy and Practice

LICENSED TO KILL?  
AN ANALYSIS OF THE STANDARD  
FOR ASSESSING LAW ENFORCEMENT’S CRIMINAL  
LIABILITY FOR USE OF DEADLY FORCE

*Raoul Shah*

<b>I. INTRODUCTION</b> .....	<b>1</b>
<b>II. SUPREME COURT DECISIONS ON POLICE USE OF FORCE LAWSUITS</b> .....	<b>4</b>
A. <i>Tennessee v. Garner</i> : The Beginning .....	5
B. <i>Graham v. Connor</i> : Elaborating “Reasonableness” .....	8
C. Jumping Forward: <i>Mullenix v. Luna</i> .....	10
D. Clarifying Qualified Immunity: <i>Pauly v. White</i> .....	13
<b>III. DIFFERENTIATING CRIMINAL PROSECUTIONS FROM CIVIL LAWSUITS</b> <b>AND DEFENSES TO CRIMINAL CHARGES</b> .....	<b>16</b>
A. Separating Criminal and Civil Law .....	16
B. Justification Defenses in Criminal Prosecutions .....	18
1. Self-Defense.....	19
2. Defense of Others.....	21
3. Public Authority Justification .....	22
<b>IV. ANALYZING POLICE OFFICER’S CRIMINAL LIABILITY FOR USE OF</b> <b>DEADLY FORCE</b> .....	<b>26</b>
<b>V. CONCLUSION</b> .....	<b>29</b>

---

I. INTRODUCTION

Criminal charges are rare, almost non-existent, for those who are licensed to kill. Those cases that are charged rarely result in convictions. At common law, police officers were essentially given such a license; they were “allowed the use of whatever force was necessary to effect the arrest of a fleeing felon.”<sup>1</sup> The United States Supreme Court imposed some level of restriction on that license by holding that deadly force “may not be used unless it is necessary to

---

1. *Tennessee v. Garner*, 471 U.S. 1, 12 (1985).

prevent the escape” of a felon “and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”<sup>2</sup> However, since *Garner* was a civil case, the States remained free to determine under what circumstances officers can be held criminally liable for using deadly force.<sup>3</sup> Almost all states still provide immense protection for officers who use deadly force on civilians under certain circumstances.<sup>4</sup> According to the United States Supreme Court, that standard is whether the use of force was “reasonable” as determined “from the perspective of a reasonable officer on the scene.”<sup>5</sup> This standard provides great deference to police officers because of their need to “make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>6</sup>

The result of this standard has been a series of “lawful but awful” incidents, as Chuck Wexler, executive director of the Police Executive Research Forum refers to them.<sup>7</sup> What this morbid phrase refers to is “the most controversial police shooting incidents.”<sup>8</sup> Lawful in the sense that “the shooting may be legally justified,” but awful in that “there were missed opportunities to ratchet down the encounter, to slow things down, to call in additional resources, in the minutes *before* the shooting occurred.”<sup>9</sup> But even in these awful situations, the shooting may be lawful because it was what a “reasonable officer on the scene” would do “in light of the facts and circumstances confronting them.”<sup>10</sup> To date, charging decisions related to officer-involved shootings that result in civilian death and

---

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

3. *See* *People v. Couch*, 461 N.W.2d 683, 684 (Mich. 1990) (stating that the United States Supreme Court lacks authority to require states to make shooting non-dangerous fleeing felons a crime, nor did it express a desire to).

4. Chad Flanders & Joseph C Welling, *Police Use of Deadly Force: State Statutes 30 Years after Garner*, ST. LOUIS U. L. J., (2016) [http://www.slu.edu/colleges/law/journal/police-use-of-deadly-force-state-statutes-30-years-after-garner/#\\_ftn12](http://www.slu.edu/colleges/law/journal/police-use-of-deadly-force-state-statutes-30-years-after-garner/#_ftn12).

5. *Graham v. Connor*, 490 U.S. 486, 396 (1989).

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

7. Tribune News Services, *Law enforcement leaders examine new use-of-force principles*, CHICAGO TRIB. (2016) <http://www.chicagotribune.com/news/nationworld/ct-police-use-of-force-20160201-story.html>.

8. Re-engineering Police Training, p.3

9. Re-engineering Police Training, p.3 (emphasis included).

10. *Graham*, 490 U.S. at 396–97.

any cases that have dealt with the issue have used the “reasonableness” standard laid out in *Graham*. Determining what action an officer in a specific situation would have found reasonable has included taking an officer’s training and experience into consideration. Further, Supreme Court decisions have narrowed the analysis such that any “reasonableness” determination must focus on the precise moment the officer applies deadly force.

The Supreme Court’s decisions on how to analyze whether a police officer is liable for his or her use of deadly force present a complex issue for district attorneys contemplating criminal charges. Specifically, the rulings made by the Court all pertain to alleged civil rights violations under the Fourth Amendment. As such, the Court has directed that for civil lawsuits brought under 42 U.S.C. § 1983, a police officer’s conduct must be evaluated using the same “reasonableness” standard listed in the Fourth Amendment. However, criminal cases are different from civil cases. While a defense to a deprivation of constitutional rights claim is whether the actions by a public official were constitutional, defenses to criminal charges usually take the form of justification and, like the criminal laws themselves, are determined by the states. What remains unclear is how the Supreme Court’s decisions are to be taken when determining whether an officer is immune from criminal prosecution for a homicide or assault on the grounds of self-defense or other justification.

This Article will briefly summarize the context and legal basis of the United States Supreme Court’s decisions in police use of force cases in Part II. In Part III, this Article will address the difference between civil and criminal cases and discuss the general principles of justification as a defense to criminal prosecution. Finally, Part IV will argue that the analysis articulated by the Supreme Court in police use of force cases is instructive but not controlling for how prosecutors and state courts should analyze the criminal liability of police officers for certain actions. This argument will be based on the fact that the legal defense of justification to a criminal prosecution differs in significant ways from the legal issues presented in Fourth Amendment civil rights cases.

## II. SUPREME COURT DECISIONS ON POLICE USE OF FORCE LAWSUITS

Over the course of time, the United States Supreme Court has heard a number of cases regarding a police officer's use of force against a civilian—both when that force has resulted in death and when the force was alleged to be excessive but not fatal. Most of these cases arise under 42 U.S.C. § 1983, which provides a civil cause of action for the deprivation of rights. Specifically, the statute says that:

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.<sup>11</sup>

As stated by the Supreme Court, “[t]he purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.”<sup>12</sup> The federal statute was enacted:

to override certain kinds of state laws, to provide a remedy where state law was inadequate, to provide a federal remedy where the state remedy, although adequate in theory, was not available in practice, and to provide a remedy in the federal courts supplementary to any remedy any State might have.<sup>13</sup>

Thus, when a government official acts to deprive a citizen of a constitutional right, that citizen may seek damages pursuant to § 1983. This statute is often the basis for lawsuits against police officers for their use of force.

---

11. 42 U.S.C. § 1983.

12. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citing *Carey v. Piphus*, 435 U.S. 247, 254–57 (1978)).

13. *McNeese v. Bd. of Ed. for Cmty. Unit School Dist.*, 187, 373 U.S. 668, 672 (1963) (internal citations and quotations omitted).

### A. Tennessee v. Garner: *The Beginning*

One of the earliest and most commonly referenced cases on a police officer's authority to use deadly force is the Supreme Court's 1985 decision, *Tennessee v. Garner*.<sup>14</sup> On October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright responded to a "proowler inside call."<sup>15</sup> When they arrived at the scene, a woman was standing on her porch pointing at the house next door and stated that she heard glass breaking, which led her to believe that someone was breaking in.<sup>16</sup> Officer Hymon went behind the house while Officer Wright radioed in to dispatch.<sup>17</sup> Officer Hymon heard a door slam and saw someone run across the backyard, eventually spotting Edward Garner in front of a 6-foot-high chain link fence at the end of the yard.<sup>18</sup> Using his flashlight, Officer Hymon could see Garner's face and hands and saw no weapon.<sup>19</sup> He later said he was "reasonably sure" or "figured" that Garner was unarmed.<sup>20</sup> Officer Hymon announced that he was a police officer and called for Garner to halt, taking a few steps forward.<sup>21</sup> Garner began to climb the fence, and Officer Hymon, worried that Garner may elude capture, shot him in the back of the head.<sup>22</sup> Garner later died on a hospital operating table.<sup>23</sup>

At the time, a Tennessee statute allowed officers to "use all necessary means to effect the arrest" of a suspect who is fleeing after the officer announces his presence.<sup>24</sup> The Memphis Police Department's policy "was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary."<sup>25</sup> No criminal action was ever filed, nor did the Memphis Police Firearm's Review Board institute disciplinary action.<sup>26</sup>

---

14. 471 U.S. 1 (1985).

15. *Id.* at 3.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 4.

22. *Id.*

23. *Id.*

24. *Id.* (citing Tenn. Code Ann. § 40-7-108 (1982)).

25. *Garner*, 471 U.S. at 5.

26. *Id.*

Seeking redress for his son's death, Garner's father brought an action for damages under § 1983.<sup>27</sup> The complaint alleged that Officer Hymon's act of shooting Garner violated the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.<sup>28</sup> The District Court dismissed the claim, concluding that Officer Hymon's actions were authorized by Tennessee statute, that Officer Hymon "had employed the only reasonable and practicable means of preventing Garner's escape," and that "Garner had 'recklessly and heedlessly attempted to vault over the fence to escape, thereby assuming the risk of being fired upon.'"<sup>29</sup> The Sixth Circuit Court of Appeals affirmed, finding that Officer Hymon had "acted in good-faith reliance on the Tennessee statute and was therefore within the scope of his qualified immunity."<sup>30</sup> The case was remanded, however, to determine whether the use of deadly force in these circumstances was constitutional, among other issues regarding the City's liability.<sup>31</sup> The Court of Appeals reversed, finding that killing a fleeing suspect is a seizure under the Fourth Amendment, and thus, only constitutional if the killing is "reasonable."<sup>32</sup> According to the appellate court, since the statute did not limit deadly force by distinguishing between felonies of different magnitudes, it was not reasonable.<sup>33</sup>

The Supreme Court began its analysis by explaining that "[w]henver an officer restrains the freedom of a person to walk away, he has seized that person."<sup>34</sup> As such, "there can be no question that apprehension by the use of deadly force is a seizure."<sup>35</sup> Thus, the use of deadly force implicates the Fourth Amendment, which protect people from "unreasonable searches and seizures."<sup>36</sup> Thus, for Fourth Amendment purposes, the use of deadly force is subject to the requirement that it be "reasonable."<sup>37</sup> To determine the constitutionality of seizures, courts "must balance the nature and

---

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 6.

32. *Id.*

33. *Id.*

34. *Id.* at 7 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)).

35. *Garner*, 471 U.S. at 7.

36. *Id.*; U.S. CONST. amend. IV.

37. *Garner*, 471 U.S. at 7.

quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."<sup>38</sup> Balancing competing interests is seen as "the key principle of the Fourth Amendment."<sup>39</sup> In *Garner*, the Court balanced a "suspect's fundamental interest in his [or her] own life" against the "governmental interests in effective law enforcement."<sup>40</sup>

In balancing these interests, the Court held that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable" and that "where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him [or her] does not justify the use of deadly force to do so."<sup>41</sup> However, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."<sup>42</sup> In other words, it does not violate the Fourth Amendment to seize a fleeing suspect by using deadly force to prevent the escape of a suspect who poses a threat of serious physical harm.

Ultimately, the Court held that Officer Hymon's seizure of Garner through use of deadly force was not reasonable because "Officer Hymon could not reasonably have believed that Garner— young, slight, and unarmed—posed any threat."<sup>43</sup> By the time the case got to the Supreme Court, however, the complaint against Officer Hymon had already dismissed and his personal civil liability had not been an issue raised. As such, the Court's holding was limited to the fact that the statute purporting to give Officer Hymon the authority to use deadly force in that situation was unconstitutional and invalid under the Fourth Amendment.<sup>44</sup>

---

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

39. *Garner*, 471 U.S. at 8 (quoting *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981)).

40. 471 U.S. at 9.

41. *Id.* at 11.

42. *Id.*

43. *Id.* at 21.

44. *See Id.* at 22.

### B. *Graham v. Connor: Elaborating “Reasonableness”*

Four years after *Garner*, the famous and again, often-cited language of *Graham v. Connor* was written by the Court.<sup>45</sup> Quotes from *Graham* are often used in discussions regarding review of a police officer’s conduct, both in civil and criminal cases. *Graham* instructs that “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>46</sup> “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers’ violates the Fourth Amendment.”<sup>47</sup> Instead, “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>48</sup> As such, the Court held that “reasonableness” inquiries in excessive force cases must be objective.<sup>49</sup> The question “is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”<sup>50</sup>

However, the context of this decision is just as important as the decision itself. The issue presented to the Court was “what constitutional standard governs a free citizen’s claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other ‘seizure’ of his person.”<sup>51</sup>

On November 12, 1984, Dethorne Graham, who was diabetic, felt that he was beginning to have an insulin reaction and called his friend, William Berry, to drive him to a nearby store to purchase some orange juice to counter the reaction.<sup>52</sup> When they arrived at the store and Graham entered, he saw that there was a long line at check-out and, concerned about the delay, left the store and asked

---

45. 490 U.S. 386 (1989).

46. *Id.* at 396.

47. *Id.* (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)), *cert. denied*, 414 U.S. 1033.

48. *Graham*, 490 U.S. at 396–97.

49. *Id.* at 397.

50. *Id.*

51. *Id.* at 388 (emphasis added).

52. *Id.*

Berry to take him to a friend's house instead.<sup>53</sup> Officer Connor saw Graham go in and out of the store and became suspicious, so he followed Berry's car.<sup>54</sup> About a half-mile from the store, Officer Connor pulled the car over.<sup>55</sup> Officer Connor told Berry and Graham that they had to wait while he figured out what happened at the convenience store, despite the fact that Berry said that Graham was simply having an insulin reaction.<sup>56</sup> As Officer Connor returned to his patrol car to request backup, Graham got out of Berry's car, ran around it twice, sat down on the curb, and passed out.<sup>57</sup>

A number of other officers arrived on scene and one rolled Graham over on the sidewalk, cuffing his hands tightly behind his back.<sup>58</sup> Despite Berry's pleas to get Graham some sugar, the officer said "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up."<sup>59</sup> The officers carried Graham to Berry's car, slammed his face on the hood, and eventually threw him into the back of a squad car.<sup>60</sup> During the encounter, Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder, and claimed to have a loud ringing in his right ear.<sup>61</sup>

Graham sued the individual officers under § 1983 alleging that the officers had used excessive force against him in violation of his Fourteenth Amendment rights.<sup>62</sup> The Supreme Court rejected the idea that there was a "single generic standard" to govern excessive force claims under § 1983 because that section "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'"<sup>63</sup> Instead, a § 1983 analysis must begin by "identifying the specific constitutional right allegedly infringed by the challenged application of force."<sup>64</sup> The

---

53. *Id.* at 388–89.

54. *Id.* at 389.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 390.

62. *Id.*

63. *Id.* at 393–94 (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)).

64. *Id.* at 394.

Court recognized that in most cases, “that will be either the Fourth Amendment’s prohibition against unreasonable seizures of the person, or the Eighth Amendment’s ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct.”<sup>65</sup> Most claims of excessive force that arise from an arrest or investigatory stop will be under the Fourth Amendment.<sup>66</sup> Thus, the Court recognized that civil rights claims brought under § 1983 that allege excessive force by the police during a stop or arrest will almost always be Fourth Amendment claims and therefore need to be evaluated by the Fourth Amendment’s standard of “reasonableness,” as stated in *Garner*.<sup>67</sup>

The Supreme Court explained that to determine whether a specific instance of force used is “‘reasonable’ under the Fourth Amendment,” courts must balance “the nature and quality of the intrusion on the individual’s Fourth Amendment interest against the countervailing governmental interests at stake.”<sup>68</sup> Again, the Court’s language indicates that this is the standard for Fourth Amendment claims in particular. After announcing this standard and using the famed language about analyzing officers’ actions listed above, the Court remanded the case for reconsideration “under the proper Fourth Amendment standard.”<sup>69</sup>

### C. *Jumping Forward: Mullenix v. Luna*

The Supreme Court has continued to hear cases brought under § 1983 alleging that police officers used excessive force since *Graham* and continued to use the “reasonableness” standard for those implicating the Fourth Amendment. A full discussion of each of these cases is beyond the scope of this Article. Instead, it will summarize a couple of the most recent Supreme Court cases dealing with police use of force and the analysis used there.

Toward the end of 2015, the Supreme Court decided *Mullenix v. Luna*, which involved a police officer shooting and killing a man

---

65. *Id.*

66. *Id.*

67. *Id.* at 394–95.

68. *Id.* at 396 (quoting *Garner*, 471 U.S. at 8).

69. *Id.*

in a vehicle.<sup>70</sup> On March 23, 2010, Israel Leija, Jr., sped away from a Texas police officer who approached him to arrest him on a warrant.<sup>71</sup> Texas police officers and troopers from the Texas Department of Public Safety quickly took chase after Leija.<sup>72</sup> As Leija was driving, he called the police dispatcher, “claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit.”<sup>73</sup> These threats were relayed to the officers in the field, along with a report that Leija might be intoxicated.<sup>74</sup>

Officers set up spike strips in three locations, one of which was beneath an overpass that Leija was expected to pass through.<sup>75</sup> Trooper Chadrin Mullenix of the Department of Public Safety arrived at that overpass and, upon seeing spike strips set up, began to consider shooting Leija’s car to disable it.<sup>76</sup> Trooper Mullenix “had not received training in this tactic and had not attempted it before, but he radioed” the idea to his supervisor to see if it was an idea “worth doing.”<sup>77</sup> However, before receiving a response from his supervisor, Trooper Mullenix got out of his squad “and, armed with his service rifle, took a shooting position on the overpass.”<sup>78</sup> There was some debate as to whether or not Trooper Mullenix was able to hear his supervisor’s response, directing him to wait to see if the spike strips would work first.<sup>79</sup> While he waited for Leija’s vehicle, Trooper Mullenix was informed that there were other officers below the overpass.<sup>80</sup> About three minutes after he took a position to shoot, Trooper Mullenix saw Leija’s vehicle and fired six shots as the vehicle approached the overpass.<sup>81</sup> Leija’s car continued forward and under the overpass, “where it engaged the spike strip, hit the median, and rolled two and a half times.”<sup>82</sup> Leija was found dead, and it was determined that the cause of death was

---

70. 136 S.Ct. 305 (2015).

71. *Id.* at 306.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 306–07.

78. *Id.* at 307.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

the shots from Trooper Mullenix's firearm, four of which had hit Leija in the upper body.<sup>83</sup> None of the shots appeared to have hit the car's radiator, hood, or engine block—the places that Trooper Mullenix would have had to hit to disable the car.<sup>84</sup>

Leija's representatives sued Trooper Mullenix under § 1983, alleging a violation of the Fourth Amendment for the use of excessive force against Leija.<sup>85</sup> Trooper Mullenix's motion for summary judgment on the grounds of qualified immunity was denied by the district court and the denial was affirmed on appeal.<sup>86</sup> When Trooper Mullenix sought a rehearing, the Fifth Circuit Court of Appeals denied it, but two judges withdrew their previous opinions to issue a new one.<sup>87</sup> "The revised opinion recognized that objective unreasonableness is a question of law that can be resolved on summary judgment . . . but reaffirmed the denial of qualified immunity."<sup>88</sup> The new majority opinion found that the trooper's use of force was "objectively unreasonable because several of the factors that had justified deadly force in previous cases were absent here: There were no innocent bystanders, Leija's driving was relatively controlled," and Trooper Mullenix's decision was not a split-second judgment.<sup>89</sup> Additionally, the court denied qualified immunity because it found that "the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment."<sup>90</sup>

The Supreme Court reviewed only the qualified immunity issue and not whether there was a violation of the Fourth Amendment.<sup>91</sup> As stated by the court, "the doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>92</sup> This immunity protects

---

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 308.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)) (internal quotations omitted).

public officials from civil liability for alleged constitutional violations. A right is clearly established when it is “sufficiently clear that every reasonable official would have understood that what he [or she] is doing violates that right.”<sup>93</sup> The Court acknowledged that police use of force cases almost always depends on the specific facts of the case, and that officers generally receive qualified immunity whenever there is no case that “*squarely governs*” the same facts as those present in the case being heard.<sup>94</sup> In other words, unless there is a case that is almost directly factually on point with a case being heard, the officer will almost always receive the benefit of qualified immunity. Here, the Court held that “excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted,” so the trooper could not have been expected to know that shooting from an overpass may violate a constitutional right.<sup>95</sup> While the Supreme Court did not reach the issue of “reasonableness” in *Mullenix*, it is important to note that the case was brought as an alleged Fourth Amendment violation under § 1983, similar to *Graham*.

#### D. Clarifying Qualified Immunity: Pauly v. White

The most recent Supreme Court case regarding a police officer’s use of deadly force was decided on January 9, 2017.<sup>96</sup> Daniel Pauly was involved in a road-rage incident on a highway in New Mexico and two women called 911 to report him as a “drunk driver” who had been “swerving all crazy.”<sup>97</sup> The women followed Daniel on the highway, until he pulled over at an off-ramp, confronted them, then got back in his truck and drove “to a secluded house where he lived with his brother, Samuel Pauly.”<sup>98</sup> Officers Kevin Truesdale, Ray White, and Michael Mariscal responded to the off-ramp the two women had called 911 from, and used the license plate number provided by the two women to locate the Pauly brothers’ address.<sup>99</sup> Officers Truesdale and Mariscal then went to the Pauly residence to

---

93. *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012).

94. *Mullenix*, 136 S.Ct. at 309 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004)) (emphasis included).

95. *Mullenix*, 136 S.Ct. at 309–10.

96. *Pauly v. White*, 137 S.Ct. 548 (2017).

97. *Id.* at 549 (internal quotations omitted).

98. *Id.*

99. *Id.*

get Daniel's side of the story, while Officer White remained at the off-ramp in case Daniel returned.<sup>100</sup> Neither Officer Truesdale nor Officer Mariscal turned on their squad lights as they approached the Pauly residence.<sup>101</sup>

Upon arriving at the residence, the officers realized that there were two different houses.<sup>102</sup> There were no lights on inside the first house, and the second house was located behind the first, on a hill.<sup>103</sup> Lights were on in the second house.<sup>104</sup> The officers parked by the first house and covertly approached the second house, using flashlights intermittently.<sup>105</sup> When they got to the front door of the second house, Officer Truesdale turned on his flashlight, they discovered Daniel's pickup truck, and saw two men moving around inside.<sup>106</sup> At this point, the officers radioed Officer White, who left the off-ramp to join them.<sup>107</sup>

There was an exchange around 11:00 p.m., where the Pauly brothers realized that the officers were outside and yelled out, asking who was at the door.<sup>108</sup> The officers yelled back in to open the door, that the house was surrounded, and that the officers would be coming in.<sup>109</sup> Through the closed door, neither Pauly brother could hear the officers identify themselves as police.<sup>110</sup> One of the brothers then yelled back that they were armed inside the house.<sup>111</sup> Officers Truesdale and Mariscal saw someone running to the back of the house and yelled to the brothers to come outside.<sup>112</sup>

Officer White arrived at the first house and was approaching the front door when he heard the shouting from the second house.<sup>113</sup> He went over to the Paulys' house and arrived just in time to hear the

---

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 549–50.

110. *Id.* at 550.

111. *Id.*

112. *Id.*

113. *Id.*

brothers announce that they were armed.<sup>114</sup> In response, Officer White “drew his gun and took cover behind a stone wall 50 feet from the front of the house.”<sup>115</sup> Officer Mariscal found cover behind a pickup truck.<sup>116</sup> Daniel then stepped out of the back door and fired two shotgun blasts, followed by Samuel opening the front window and pointing a handgun towards Officer White.<sup>117</sup> Officer Mariscal shot at Samuel and missed, but Officer White shot four to five seconds later and killed Samuel.<sup>118</sup>

Samuel’s estate and Daniel sued the individual officers, alleging in part that the officers were liable under § 1983 for violating Samuel’s Fourth Amendment right to be free from excessive force.<sup>119</sup> All three officers moved for summary judgment based on qualified immunity, with Officer White arguing that his use of force did not violate the Fourth Amendment “and, regardless, that Samuel’s Fourth Amendment right to be free from deadly force under the circumstances of this case was not clearly established.”<sup>120</sup> The District Court denied qualified immunity and the Tenth Circuit Court of Appeals affirmed that decision.<sup>121</sup> The majority decided that a reasonable officer in Officer White’s shoes would have given a warning, especially since he was positioned behind a stone wall where he could not be shot unless he moved, and that the rule requiring a warning under those circumstances was clearly established at the time of Samuel’s death.<sup>122</sup>

The Supreme Court reversed and held that Officer White did not violate clearly established law.<sup>123</sup> According to the Court, since the Tenth Circuit had “failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment,” that court had applied the “clearly established” rule incorrectly.<sup>124</sup> Instead of using general terms to describe clearly established laws, “the clearly established law must

---

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 550–51.

123. *Id.* at 551.

124. *Id.* at 552.

be ‘particularized’ to the facts of the case.’<sup>125</sup> Ultimately, the Court stated that:

[c]learly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here.<sup>126</sup>

Thus, because no case with nearly identical facts to those at issue in *White* had determined that Samuel Pauly had a clearly established Fourth Amendment right to receive a warning before being shot, Officer White was entitled to qualified immunity.

These four cases highlight the high standard that the Supreme Court has determined governs whether a plaintiff can succeed in a § 1983 case alleging excessive force by the police. However, as has been repeatedly stated, § 1983 cases are civil cases brought at a federal level to seek a remedy for a violation of a person’s constitutional rights. In cases where police officers are alleged to have used excessive force, the lawsuit is often brought with reference to the Fourth Amendment.<sup>127</sup>

### III. DIFFERENTIATING CRIMINAL PROSECUTIONS FROM CIVIL LAWSUITS AND DEFENSES TO CRIMINAL CHARGES

#### A. *Separating Criminal and Civil Law*

There is a significant difference between civil cases and criminal cases. Civil cases are generally private disputes between individual persons or organizations.<sup>128</sup> A person or entity claiming that another person or entity failed to fulfill a legal duty owed to the first person usually starts a civil case.<sup>129</sup> A legal duty can include a duty to respect rights that are established under the Constitution, as

---

125. *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

126. *White*, 137 S.Ct. at 552.

127. *See Graham*, 490 U.S. at 394.

128. *See Civil Cases vs. Criminal Cases – Key Differences*, FINDLAW, <http://litigation.findlaw.com/filing-a-lawsuit/civil-cases-vs-criminal-cases-key-differences.html> (last visited Dec. 11, 2017).

129. *Id.*

well as those established from federal or state laws.<sup>130</sup> Civil suits generally relate to settling disputes between private parties,<sup>131</sup> often seeking to collect money owed or compensation for damages.<sup>132</sup> Section 1983 claims fit firmly within this category—private parties allege that public officials violated a legal duty stemming from rights under the Constitution and the party suing seeks compensation for resulting damages bring them. As seen from the cases above, qualified immunity is sometimes a defense to civil cases. Additionally, the Supreme Court has historically analyzed Fourth Amendment cases by the “reasonableness” of the official’s conduct since the Fourth Amendment only protects from “unreasonable” searches and seizures.

In contrast, criminal law is based on state systems of laws designating crimes and focused on punishment of individuals who violate those laws.<sup>133</sup> A crime is “any act or omission in violation of a law prohibiting it, or omitted in violation of a law ordering it.”<sup>134</sup> Generally, criminal cases “involve an action that is considered to be harmful to society as a whole.”<sup>135</sup> Thus, while civil cases are based on a wrong against a specific person, criminal cases are based on actions that wrong all of society. Another key difference between criminal and civil cases is who brings the case. The victim of a crime has no responsibility to bring the case.<sup>136</sup> Instead, the government—local, state, or federal—brings the case on behalf of the citizens of the community (the city, state, or United States).<sup>137</sup> Criminal law has its own set of defenses determined by statute that differs greatly from those available in civil law.<sup>138</sup>

---

130. *Id.*

131. *See Civil Law*, WEX LEGAL DICTIONARY, [https://www.law.cornell.edu/wex/civil\\_law](https://www.law.cornell.edu/wex/civil_law) (last visited Dec. 11, 2017).

132. <http://sheriff.org/faqs/displayfaq.cfm?id=ba787291-0b05-4ab2-9840-b9697bba4cce>.

133. *See Criminal Law*, WEX LEGAL DICTIONARY, [https://www.law.cornell.edu/wex/criminal\\_law](https://www.law.cornell.edu/wex/criminal_law) (last visited Dec. 11, 2017).

134. *Id.*

135. *See Civil Cases vs. Criminal Cases – Key Differences*, *supra* note 128.

136. *Id.*

137. *Id.*

138. <http://sheriff.org/faqs/displayfaq.cfm?id=ba787291-0b05-4ab2-9840-b9697bba4cce>

### *B. Justification Defenses in Criminal Prosecutions*

It should be noted at the outset that this Article does not seek to act as a definitive guide to justification defenses in criminal law prosecutions. Rather, this Article seeks only to touch on the basics of justification defenses to analyze how they differ from the constitutional defenses used in § 1983 deprivation of civil rights claims.

A justification defense is a type of affirmative defense; the defendant acknowledges that the crime occurred but argues that he or she should not be held criminally liable because the act was justified. The burden is on the defendant to assert the defense, and the prosecution must disprove one of the elements of the defense beyond a reasonable doubt.<sup>139</sup> Justification defenses have specific elements that must be met for them to be asserted successfully in a criminal case. First, there must be a triggering condition that authorizes the actor to act under a justification.<sup>140</sup> Essentially, there must be some set of circumstances that exist that allows the actor's action to be justified.<sup>141</sup> There are several different types of justifications, each of which involve different triggering conditions.<sup>142</sup> For example, defensive force justifications concern threats of harm to a particular interest.<sup>143</sup> In self-defense cases, this involves a threat to the actor seeking to use the defense.<sup>144</sup> Other examples could be threats to other persons or to property.<sup>145</sup> Public authority justifications, in contrast, permit authorized public officials to engage in conduct that would otherwise be a criminal offense when needed to protect or further a public interest.<sup>146</sup> In those situations, public officials may act affirmatively to defend public or private interests, assuming they act within the realm of their authority.<sup>147</sup>

Second, for a justification defense to apply, the response “must be *necessary* to protect or further the interest at stake,” and can only

---

139. 6 Am. Jur. 2d Assault and Battery § 64.

140. § 121 Justifications—Generally, 2 Crim. L. Def. § 121.

141. *Id.*

142. *Id.*

143. § 131 Defensive force defenses—Generally, 2 Crim. L. Def. § 131.

144. *Id.*

145. *Id.*

146. § 141 Public authority defenses—Generally, 2 Crim. L. Def. § 141.

147. *Id.*

cause “a harm that is *proportional* or reasonable in relation to the harm threatened or the interest to be furthered.”<sup>148</sup> The defense will only apply if the person acted “*when and to the extent* necessary to protect or further the interest at stake.”<sup>149</sup> In other words, the person seeking to use the defense may only do so if his or her use of force was actually needed to defend from an immediate threat. Additionally, the defense will only be successful if the actor uses “that degree of force actually necessary for self-protection . . . the force used is not justified if the individual actor could protect himself effectively with less.”<sup>150</sup> Finally, the proportionality requirement “bars justification when the harm caused by the actor may be necessary to protect or further the interest at stake, but is too severe in relation to the value of that interest.”<sup>151</sup> This requirement essentially requires a balancing of the harm threatened against the harm inflicted by the actor. If the latter outweighs the former, then the action is not justified.

As mentioned above, there are several types of justification defenses to criminal prosecutions. The application of each of these defenses depends on the circumstances of each case. The justifications most relevant in cases where police officers use deadly force against civilians are the doctrines of self-defense, defense of others, or public authority.

## 1. Self-Defense

The courts and the law have long recognized that one may act to defend himself when attacked.<sup>152</sup> In fact, “[e]very American Jurisdiction provides a justification of self-defense in one form or another.”<sup>153</sup> Essentially, force that would be considered a criminal offense is justified if the aggressor (or victim) unlawfully threatens the actor (or criminal defendant).<sup>154</sup> The actor may then act only when necessary and to the extent necessary for self-protection, and only when the harm caused by the actor would be proportionate to

---

**148.** 2 Crim. L. Def. § 121 (emphasis included).

**149.** *Id.* (emphasis added).

**150.** *Id.*

**151.** *Id.*

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

**153.** § 132 Self-defense, 2 Crim. L. Def. § 132.

**154.** *Id.*

the harm threatened by the aggressor.<sup>155</sup> If the actor provokes the aggressor to attack him, the self-defense justification will not apply.<sup>156</sup> Some jurisdictions may require that the actor attempt to retreat from the situation before the use of force in self-defense is justified.<sup>157</sup> However, that duty to retreat may not apply to public officials who are “using force in the performance of his [or her] duties” and officials who are “justified in using force in making an arrest or preventing an escape [are] not obliged to desist from efforts to perform such duty.”<sup>158</sup>

Theoretically, the self-defense justification would be available to a police officer in almost the same way that it would apply to any other citizen. So long as the officer does not provoke an individual into attacking, if that individual attacks the officer then the officer may use a proportional amount of force to defend against the attack. Where this justification differs when applied to police officers is in the duty to retreat. If the officer is seeking to make an arrest or prevent an escape, the officer may not have to retreat but could instead use force to defend against the attack and effect the arrest, even where a civilian would have been required to retreat. This, of course, will depend on the laws that the specific state where the incident occurred.

What the self-defense justification would not allow, however, is for a police officer to use deadly force against an attack where the aggressor is not using deadly force against the officer. For example, if an individual punches a police officer, that officer is not justified in shooting and killing the individual. The self-defense doctrine allows only the use of *proportional* force, which turns on the balancing of harms. While many would argue that there is a strong public interest in allowing police officers to use the force necessary to enable them to do their jobs, it strains common sense to say that the harm caused by killing a civilian adequately balances against the harm caused by punching a police officer. This is especially true when the harm to society is considered. Over the past few years, there have been many instances where police officers shot and killed individuals in situations where those individuals were not using

---

155. *Id.*

156. Model Penal Code § 3.04(2)(b)(i).

157. Model Penal Code § 3.04(2)(b)(ii).

158. *Id.*

deadly force against the officer.<sup>159</sup> Each time this happens, community trust for law enforcement takes a hit. While there is a public interest in allowing police officers to do their jobs, there is also a strong public interest in ensuring good relations between communities and the officers that police them. Thus, it is unlikely that an officer's use of force against an individual who does not attack with deadly force will be justified under the doctrine of self-defense.

## 2. Defense of Others

The common law recognized that the use of force in defense of another was usually a valid defense to a charge of assault.<sup>160</sup> Again, “[n]early every American jurisdiction recognizes a justification for the defense of other persons.”<sup>161</sup> Essentially, one is justified in using force against an aggressor to protect a third person if: (1) the actor would be justified “in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect;” (2) the third person would be justified in using protective force; (3) and the actor believes that intervention is necessary to protect the third person.<sup>162</sup> One difference from the self-defense justification is that the actor is not required to retreat unless he knows that doing so would secure the safety of the third person.<sup>163</sup> However, if retreat of the third person is possible, the actor is

---

**159.** See e.g., Larry Buchanan, Ford Fessenden, K.K. Rebecca Lai, Haeyoun Park, Alicia Parlapiano, Archie Tse, Tim Wallace, Derek Watkins & Karen Yourish, *What Happened in Ferguson?* N.Y. TIMES (Aug. 10, 2015) [https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?\\_r=0](https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0); *What we know about the death of Jamar Clark*, STAR TRIB. (Mar. 30, 2016) <http://www.startribune.com/what-we-know-about-the-death-of-jamar-clark/353199331/>; Al Baker, J. David Goodman & Benjamin Mueller, *Beyond The Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (Jun. 15, 2015) <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>; Merideth Edwards & Dakin Andone, *Ex-South Carolina cop Michael Slager gets 20 years for Walter Scott Killing*, CNN (Dec. 7, 2017) <http://www.cnn.com/2017/12/07/us/michael-slager-sentencing/index.html>.

**160.** *United States v. Grimes*, 413 F.2d 1376, 1379 (7th Cir. 1969) (citing 6 Am. Jur. 2d, Assault and Battery, § 63).

**161.** § 133 Defense of others, 2 Crim. L. Def. § 133.

**162.** Model Penal Code § 3.05. See also 2 Crim. L. Def. § 133.

**163.** Model Penal Code § 3.05, Explanatory Note.

required to try to convince that person to retreat before using force.<sup>164</sup> Again, like self-defense, the actor may only use force when and to the extent necessary to protect the third person, and such force must be proportional to the harm threatened.<sup>165</sup>

For similar reasons to self-defense, it seems that police officers' reliance on the defense of others justification as an affirmative defense to criminal prosecution is limited. The defense only applies when the actor would be justified in acting in self-defense if he or she were in the place of the third person. Further, the restrictions of necessity and proportionality are still in play. Under these limitations, it once again appears that the defense of others justification would only apply to officers who use deadly force when the aggressor was using deadly force against a third person.

### 3. Public Authority Justification

In contrast to self-defense and defense of others, the public authority justification protects affirmative use of force, rather than limiting its protection to reactive use of force.<sup>166</sup> Public authority justifications apply when the actor is "specifically authorized to engage in the conduct constituting the offense in order to protect or further a public interest."<sup>167</sup> Generally speaking, the elements of a public authority defense are that: (1) the actor has been granted public authority; (2) there is a need for action to protect or further the particular interests at stake; and (3) the actor engages in conduct that would otherwise be an offense, consistent with his authority.<sup>168</sup> Public authority differs from the self-defense and defense of others doctrines in that it is limited only to those who have been granted the authority to act in specified ways, rather than to the world at large.<sup>169</sup> Law enforcement officers receive some form of authority in every state to act in ways that may otherwise be offenses if committed by civilians.<sup>170</sup>

---

**164.** *Id.*

**165.** 2 Crim. L. Def. § 133.

**166.** 2 Crim. L. Def. § 141.

**167.** *Id.*

**168.** *Id.*

**169.** *Id.*

**170.** § 142 Law enforcement authority, 2 Crim. L. Def. § 142.

Public authorization to use deadly force is a proverbial “license to kill” under certain circumstances. State law generally defines the specific situations under which law enforcement officers may use deadly force. The Model Penal Code offers an example of such a statutory scheme.<sup>171</sup> The Code begins by authorizing law enforcement officers to use the amount of force that appears to be “immediately necessary” in order to effect a lawful arrest.<sup>172</sup> The next section is titled “Limitations on the Use of Force,” and includes a section about deadly force.<sup>173</sup> The Model Penal Code provides that “[t]he use of deadly force is not justifiable under this Section unless” the arrest is for a felony and is being made by a law enforcement officer, the officer believes the force used will not create a risk of injury to bystanders.<sup>174</sup> Further, the officer must believe that “the crime for which the arrest is made involved conduct including the use or threatened use of deadly force” or that “there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed.”<sup>175</sup> The Code authorizes law enforcement officers to use deadly force but *only* under very specific circumstances. This is especially evident because that authorization falls under a section defining limitations on the use of force, rather than one giving blanket authorizations.<sup>176</sup>

The language authorizing use of deadly force by law enforcement officers differs from state to state, with some states taking on similar restrictive language as the Model Penal Code and others granting more broad authority to law enforcement. Florida law says that officers are “justified in the use of any force” that the officer “reasonably believes to be necessary to defend himself or herself or another from bodily harm while making the arrest” and when the use of force is used to capture escaped felons or arrest fleeing felons.<sup>177</sup> In California, “[h]omicide is justifiable when committed by public officers [ . . . ] in obedience to any judgment of a competent Court,” when necessary to overcome resistance to the performance of a legal duty, or “[w]hen necessarily committed

---

171. MODEL PENAL CODE § 3.07.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. FLA. STAT. ANN. § 776.05 (West 1997).

in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.”<sup>178</sup>

Texas authorizes law enforcement officers to use force in making lawful arrest or conducting a lawful search after identifying himself or herself as a peace officer and “manifests his purpose to arrest or search.”<sup>179</sup> Use of deadly force, after those pre-requisites have been met, is authorized “when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest, or to prevent escape after arrest.”<sup>180</sup> Further, the officer must believe that “the conduct for which arrest is authorized included the use or attempted use of deadly force; or [ . . . ] there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the actor or another if the arrest is delayed.”<sup>181</sup> Under Texas law, law enforcement officers do not have a duty to retreat before using deadly force in the circumstances listed.<sup>182</sup> However, the statute also says, “[d]eadly force may *only* be used under the circumstances enumerated in Subsections (c) and (d).”<sup>183</sup> A separate section authorizes peace officers and correctional facility guards to use deadly force when “immediately necessary to prevent the escape of a person from the correctional facility.”<sup>184</sup>

New York authorizes law enforcement officers to use force to effect an arrest or prevent an escape from custody “to the extent he or she reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or in self-defense or to defend a third person from what he or she reasonably believes to be the use or imminent use of physical force.”<sup>185</sup> However, the law continues, stating, “that deadly physical force may be used for such purposes only” under enumerated circumstances.<sup>186</sup> First, law enforcement is

---

**178.** CAL. PENAL CODE § 196.

**179.** TEX. PENAL CODE ANN. § 9.51(a) (West 1994).

**180.** TEX. PENAL CODE ANN. § 9.51(c) (West 1994).

**181.** *Id.*

**182.** TEX. PENAL CODE ANN. § 9.51(e) (West 1994).

**183.** TEX. PENAL CODE ANN. § 9.51(g) (West 1994) (emphasis added) (Subsection d covers use of deadly force by civilians operating in a peace officer’s presence and at the peace officer’s direction).

**184.** Tex. Penal Code Ann. § 9.52 (West 1994).

**185.** N.Y. PENAL LAW § 35.30, subdiv. 1 (McKinney 2004).

**186.** *Id.*

authorized to use deadly force if the offense was a felony or attempted felony that involves the use or threatened use of physical force, or if the offense was kidnapping, arson, first-degree escape, or first-degree burglary.<sup>187</sup> Second, deadly force is authorized if the offense that was committed or attempted was a felony and the person was armed with a firearm or deadly weapon “in the course of resisting arrest therefor or attempting to escape from custody.”<sup>188</sup> Finally, “[r]egardless of the particular offense which is the subject of the arrest or attempted escape,” law enforcement officers may use deadly force when “necessary to defend the [officer] or another person from what the officer reasonably believe to be the use or imminent use of deadly physical force.”<sup>189</sup> The New York law also provides that the use of deadly force as prescribed to effect an arrest or prevent an escape “does not constitute justification for reckless conduct by such police officer or peace officer amounting to an offense against or with respect to innocent persons whom he or she is not seeking to arrest or retain in custody.”<sup>190</sup> Thus, a law enforcement officer can still be held criminally liable if he or she injures an innocent bystander while using deadly force recklessly while trying to effect an arrest or prevent an escape.

Finally, Minnesota law states that “the use of deadly force by a peace officer in the line of duty is justified only when necessary” under specific listed circumstances.<sup>191</sup> First, an officer in Minnesota may use deadly force when necessary “to protect the peace officer or another from apparent death or great bodily harm.”<sup>192</sup> Second, deadly force is authorized “to effect the arrest or capture, or prevent the escape, of a person whom the peace officer knows or has reasonable grounds to believe has committed or attempted to commit a felony involving the use or threatened use of deadly force.”<sup>193</sup> Finally, Minnesota peace officers are justified in using deadly force when necessary “to effect the arrest or capture, or prevent the escape of a person” whom the officer reasonably believes has committed or attempted a felony “if the officer

---

**187.** *Id.*

**188.** *Id.*

**189.** *Id.*

**190.** N.Y. PENAL LAW § 35.30, subdiv. 2 (McKinney 2004).

**191.** Minn. Stat. § 609.066, subdiv. 2 (2001).

**192.** *Id.*

**193.** *Id.*

reasonably believes that the person will cause death or great bodily harm if the person's apprehension is delayed."<sup>194</sup>

As noted, some of the state statutes discussed above contain limiting language regarding the use of deadly force by law enforcement officers. Even the statutes that started by giving law enforcement officers fairly broad authority to use force in general become more restrictive when enumerating specific conditions under which the use of deadly force will be justified. These are all examples of the public authority justification; the States grant law enforcement officers the authority use force, and deadly force, in certain situations. As long as those conditions or circumstances are met, the law enforcement officer can assert the public authority justification as a defense to criminal prosecution. Since this justification is more specific than general self-defense, and offers a higher level of protection to public authorities, this is likely where the defense will be raised.

#### IV. ANALYZING POLICE OFFICER'S CRIMINAL LIABILITY FOR USE OF DEADLY FORCE

There is a fundamental difference between lawsuits against police officers for deprivations of civil rights under Section 1983 and criminal prosecutions against the same officers. As discussed, Section 1983 is meant to redress the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."<sup>195</sup> The goal of that federal law is to prevent government actors from using "the badge of their authority to deprive individuals of their federally guaranteed rights."<sup>196</sup> This is where the Fourth Amendment "reasonableness" standard comes into play.<sup>197</sup> The Fourth Amendment guards not against all searches and seizures, but against "unreasonable" searches and seizures.<sup>198</sup> Section 1983 provides citizens with a civil remedy for violations of that constitutional right.<sup>199</sup> However, such a violation only exists if the search or seizure was "unreasonable." Thus, if it is determined that

---

194. *Id.*

195. 42 U.S.C. § 1983 (1996).

196. Wyatt, 504 U.S. at 161.

197. U.S. CONST. amend. IV.

198. *Id.*

199. 42 U.S.C. § 1983.

the officer's action was reasonable, there is no violation of the Fourth Amendment and therefore no Section 1983 claim.

State criminal law differs. Criminal laws proscribe certain actions that society—namely lawmakers—have decided should not be tolerated and seek to punish those individuals who violate the laws. However, crimes such as murder or manslaughter do not require a Fourth Amendment violation as an element that must be proven. Additionally, states have legislation that defines what specific, narrow defenses to crimes are. These defenses are embodied in laws that govern self-defense, defense of others, and justifiable or authorized use of force.

A violation of criminal law exists when the conduct proscribed by the statute is committed. For example, the crime of murder is generally committed when a person intentionally causes the death of another person. Likewise, a defense to criminal prosecution is established when the circumstances listed under those defensive statutes are present. For example, when Person A attacks Person B with a deadly weapon without provocation, Person B may assert self-defense if he uses a deadly force back against Person A. Likewise, in most states, a police officer could assert a defense of authorized use of deadly force if it is necessary for the officer to prevent the escape of a person who committed a violent felony with a deadly weapon under most state laws. But in criminal law, these defenses are defined by statute. Most of those statutes do not include a provision authorizing law enforcement officers to use deadly force if doing so would be a reasonable seizure; instead, they lay out the specific circumstances where those officers' use of deadly force would be authorized.

When state legislatures have been explicit with what their laws are intended to cover, courts will generally decline to extend those laws to cover a broader scope, out of concern for a separation of powers issue. Essentially, courts say that if the legislature intended the statute to cover more, the lawmakers would have written the law to do so. This concept should apply with equal force to police officers' use of deadly force. State legislatures have taken it upon themselves to write statutes that enumerate the circumstances under which police officers may use deadly force justifiably. Additionally, police officers might be able to rely on other statutory defenses available to the public at large, such as self-defense or defense of others, to the same extent as the statutes that apply only to law enforcement. It makes little sense to read the Fourth Amendment

standard into state criminal law when state legislatures chose not to include it.

Further, state criminal laws apply to all persons in that state's jurisdiction. The conduct proscribed by criminal laws is conduct that society, through its lawmakers has deemed so undesirable that it should be punishable by the state government. Murder and manslaughter are both covered by criminal laws and prohibit one person from killing another. However, the existence of statutory defenses like self-defense show that under specific sets of circumstances, society recognizes that such killing may be justified and should not be punished. Any citizen who kills another is eligible for punishment under the state's criminal laws unless their situation fits one of those statutory defenses.

Additionally, in almost every state, law enforcement officers have a separate law that justifies their use of deadly force under additional circumstances. If citizens can only be immunized from a state criminal law violation by meeting the elements of statutory defenses, then it only seems fair that law enforcement officers should only be immunized from criminal prosecution if they meet one of the statutory defenses as well. State legislatures, by creating separate statutes authorizing law enforcement officers' use of deadly force in a broader set of circumstances, have already determined that law enforcement officers are different and should not be subject to criminal prosecutions for using deadly force in as many situations as civilians. Many of these statutes authorizing police officers to use deadly force incorporate the *Garner* standard. However, in the decades since *Graham*, few—if any—jurisdictions have incorporated the “reasonableness” standard into their statutes. These decisions are for the legislature, not for the courts or prosecutors.

The statutes created by the legislature are the codification of the legislature's decision. Prosecutors, in determining whether to charge a police officer with murder or manslaughter, should look to those statutes in assessing whether they can prove guilt beyond a reasonable doubt and whether the officer would have a successful public authority justification defense. Likewise, in determining whether to dismiss a case for lack of probable cause or whether the officer was justified in using deadly force as a matter of law, judges should also rely on those same statutes. Justifications to criminal prosecutions, such as those codified in self-defense, defense of others, and other authorization statutes, are the qualifiers on

criminal liability. The lack of a constitutional violation under the Fourth Amendment has no bearing on whether an officer can be held criminally liable.

Finally, state criminal laws are different from the Fourth and other Amendments in terms of whose conduct they restrict. State criminal laws proscribe certain types of conduct—murder, rape, robbery, drunk driving, and so on—for all persons present in that state. The Amendments to the Constitution, on the other hand, proscribe conduct by the government. While criminal laws say no person shall kill another, the Fourth Amendment says only that government officials should refrain from unreasonable searches and seizures. This is yet another indicator that the Constitution's Amendments are separate from state criminal laws.

Since *Graham*, *Mullenix*, and *Pauly* all involved § 1983 claims brought for the deprivation of civil rights, alleging Fourth Amendment violations, they do not have any direct applicability or precedential value in state criminal proceedings. These cases are still important, as they can and should be used by law enforcement, attorneys, and the courts to determine whether a police officer is civilly liable for damages under § 1983. The United States Supreme Court's narrowing of the analysis, however, focusing only on the moment the officer used deadly force and restricting the factors that may be looked at, cannot be read in as a defense to criminal prosecution for the use of deadly force. State legislatures are free to codify these holdings into the statutes authorizing officers to use deadly force, as many states did after *Garner*. Until that happens, prosecutors, defense attorneys, and the courts must continue to rely on the state criminal laws and statutory defenses in assessing criminal liability of a law enforcement officer who uses deadly force against a civilian.

## V. CONCLUSION

In recent years, the media has shed a bright light on law enforcement officers' use of deadly force and the lack of criminal prosecutions in those cases. Prosecutors, defense attorneys, and courts have often looked to cases evaluating civil liability by police officers for use of deadly force in federal civil rights cases brought under the Fourth Amendment. However, those civil actions for constitutional violations differ significantly from criminal

prosecutions brought under state laws with specific codified defenses.

*Graham* did not seek to immunize police officers from criminal prosecutions nor did it proclaim to present a defense to such an action. Indeed, the language used throughout *Graham* shows that the Court was only concerned with constitutional violations under the Fourth Amendment in determining that case.<sup>200</sup> Thus, *Graham* and its progeny have simply set forth what analysis should be used when determining if an officer who used deadly force violated the constitution. The analysis for criminal liability is different. State laws provide law enforcement officers with a license to kill under specific, limited, and enumerated circumstances. The criminal justice system should refrain from misreading *Graham* to extend that license to be a blanket immunity.

---

---

**200.** 490 U.S. at 396.

---

## **Mitchell Hamline Open Access**

Mitchell Hamline Open Access is the digital archive of Mitchell Hamline School of Law. Its mission is to preserve and provide access to our scholarly activities, for the benefit of researchers and members of the legal community.

Mitchell Hamline Open Access is a service of the Warren E. Burger Library.  
[open.mitchellhamline.edu](https://open.mitchellhamline.edu)

---

**MH**

MITCHELL | HAMLINE

*School of Law*

© Mitchell Hamline School of Law  
875 Summit Avenue, Saint Paul, MN 55105  
[mitchellhamline.edu](https://mitchellhamline.edu)