INSTITUTE FOR AMERICAN POLICING REFORM

Police are essential. So is reform.

IAPR Laws & Policy Legal Theory Paper No. 2023 -1
A White Paper on Police Use of Force in the United States of America

Principle-Based Reform of Peace Officers' Use of Force

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Principle-Based Reform of Peace Officers' Use of Force

Existing legal standards on American police officers' discretion and permissibility in using force are extensively inconsistent and require comprehensive and principled-based reform.

A shift to nationwide uniformity in principle-based laws and policies governing police use of force is essential to ensure trustworthy and reliable policing in the United States. When systemically and comprehensively implemented, the new uniform standard will transform behaviors and practices in American policing. Police officer reform must prioritize and inculcate the highest regard for all human life and human dignity. An ethical and principled transformation of police officer use of force will fortify citizens' trust in policing service and assure policing officials can carry out their duties safely, consistently, and equally. A uniform use of force standard will reestablish a fundamental model of approbated public service where the sanctity of life is relentlessly safeguarded, human dignity is never compromised, and rigorous accountability is consistently applied.

The following principles offer an ethical and reasonable path to reforming police officer use of force.

1. *Clear Necessity Must Dictate the Use of Force.*

   Policing officials may only use force when it is absolutely necessary to do so for a lawful-policing purpose. When force is required, that force shall be only the minimum necessary in the circumstances. Once the necessity for force has ended, no additional force may be used.

2. *The Force Used Must Be Proportional to the Threat.*

   Force shall only be lawful if it is proportionate to the threat posed by an offender and to the harm that a peace officer is seeking to avoid. Proportionality sets the parameter for the appropriate use of force.

3. *Precautions Must be Preplanned to Prevent Loss of Life.*

   The enforcement jurisdiction (local, county, state, federal) is duty-bound to plan policing operations to minimize the risk that officers will resort to using potentially unlawful force, especially lethal force.

4. *The Preservation of Life is a Paramount Duty.*

   The prohibition against arbitrary deprivation of life is non-derogable

All policing entities at local, county, state, and federal levels must adhere to laws, policies, procedures, standards, education, training, customs, and practices, uncompromisingly respecting the inviolability of human dignity.

Nationwide police reform requires a uniform and principle-based foundation to help overcome unpredictable variances in states' laws, use of force policies, and policing practices that lack essential immutable guidance. There is no justification for the citizens of this nation to be subjected to varying policies and practices that allow policing officials to use up to deadly force

against them. Police officials stand on a variety of justifications for their use of force. Often, those justifications are groundlessly based on insufficient information and unmerited fears for personal or public safety. Necessity, proportionality, pre-planning, the highest regard for human life, and preservation of the dignity of all persons must guide police decision-making and behavior.

The guidelines for prevailing policies and practices primarily derived from a single Supreme Court ruling that bestowed officers with immense discretion in determining when the use of force is reasonable – **instead of when the use of force is necessary**. This holding has led to fragmented use of force training among the states and has left police officers with murky guidance on what force is Constitutionally and ethically permissible. As a result, existing statutes and policies foster questionable practices that focus primarily on police officer conduct that is legally defensible rather than conduct based on unyielding principles intended to preserve human life, respect human dignity, and promote accountability.

The reform of police officer use of force is a central focus in the transformation of American systems of policing. The Institute for American Policing Reform (IAPR) is a national nonprofit and nonpartisan organization providing guidance for police reform constructed upon its Five Pillars of Police Reform©: (1) Community Engagement and Education; (2) Peace Officer Accountability; (3) Policing Laws and Policies; (4) Policing Leadership Development; and (5) Policing Standards, Education, and Training. IAPR's value statement is that "Police are essential. So is reform."

There are two parts to this White Paper. Part I introduces the multifaceted problem that arises from existing peace officer[1] use of force standards. This section discusses the historical evolution of the use of force, analyzes Supreme Court jurisprudence, and examines laws and policies governing the use of force. Part II presents IAPR's solution to the multifaceted problems, considers the elements of use of force reform, and proposes IAPR's recommended model peace officer use of force policy.

[1] Throughout this White Paper, the use of "peace officer," "policing officials," or "police officer" is (unless otherwise contextualized) a collective reference to police officers, deputies, federal agents, and any other local, county, regional, state, or federal official with policing or law enforcement authority. Some studies referenced in this paper may have been conducted with specific focus on one, some, or all jurisdictions of these peace officers. Uses of such references in this paper are viewed as relevant and applicable in context.

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Reform of Police Officer Use of Force

Part I: The Problem

As a law enforcement officer, my fundamental duty is to serve the community; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the constitutional rights of all to liberty, equality, and justice.[2]

I. Introduction

Arguably, no other issue threatens the trust and tranquility between local police officers and the communities they serve, more so than police officer use of force. For decades, high-profile incidents of officers' use of force have sparked national outrage, often leading to violent confrontations between officers and community members. Officers, lawmakers, and community stakeholders frequently cite a crisis of public safety and officer safety as the reason why use of force laws and policies should defer to the officers' broad discretion in employing force.[3] On the other hand, surviving family members of those lost to deadly force, community activists, nonprofit organizations, and lawmakers, cite longstanding systemic racial oppression, over-militarized policing, and deadly incidents of excessive force as indicating why use of force laws should be as restrictive as legally permissible.

Uniformly, the prevailing general legal standard for peace officers' use of force lacks consistent ethical principles centralized on preserving life and respecting human dignity. The standard implicitly and pragmatically discourages the use of non-violent means to accomplish law enforcement objectives. While there is, and has been, a consensus around the unreliability of data on national systems for collecting statistics on incidents of force used during the normal course of

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[2] *See* International Association of Chiefs of Police, Law Enforcement Code of Ethics, (Jul. 21, 2021), https://www.theiacp.org/resources/law-enforcement-code-of-ethics ("I will keep my private life unsullied as an example to all and will behave in a manner that does not bring discredit to me or to my agency. I will maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed both in my personal and official life, I will be exemplary in obeying the law and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty. I will never act officiously or permit personal feelings, prejudices, political beliefs, aspirations, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, *never employing unnecessary force or violence* and never accepting gratuities. I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of police service. I will never engage in acts of corruption or bribery, nor will I condone such acts by other police officers. I will cooperate with all legally authorized agencies and their representatives in the pursuit of justice. I know that I alone am responsible for my own standard of professional performance and will take every reasonable opportunity to enhance and improve my level of knowledge and competence. I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession… law enforcement.") (emphasis added)

[3] Police Executive Research Forum, *Guiding Principles on Use of Force*, 4 (Mar. 2016), https://www.policeforum.org/assets/30%20guiding%20principles.pdf.

duty and on the extent of excessive force,[4] there are at least three significant indicators that reasonably illustrate significant issues relating to the use of force in American policing.

First, are police misconduct settlements that ultimately come at taxpayers' expense.[5] Over the past 10 years, public records from 31 of the 50 cities with the highest police-to-civilian ratios in the country have spent more than $3 billion to settle misconduct lawsuits.[6] In examining a sampling of how much cities spent each year on settling police misconduct cases, on average, Indianapolis spent $1,314,977.00, Milwaukee spent $4,001,782.00, and New York City spent $170,412,049.00.[7] Municipalities regularly spend millions of dollars for incidents of misconduct, a majority of which involve physical abuse of suspects, excessive force during ordinary traffic stops, unlawful arrests or searches involving force, and killings by police.[8]

Second, are officer-involved shootings of civilians who displayed signs of mental illness, civilians suspected of nonviolent offenses or where no crime was reported, and civilians who were unarmed. Illustrating the first scenario, in 2020, 1,127 people were killed by police nationwide. Ninety-six percent of those deaths were the result of officer-involved fatal shootings.[9] Out of the 1,127 people killed by police in 2020, 94 people were reported as behaving erratically or having a mental health crisis, underscoring the intersectional issues tied to officer use of force.[10]

In incidents involving nonviolent offenses or cases where no crime was reported, officers killed 121 people in these circumstances, most of which occurred during traffic stops.[11] According to the Washington Post's Fatal Force database – considered to be the country's most complete tabulation of police-involved shootings of Americans by police officers, in the six years from

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[4] Matt Apuzzo & Sarah Cohen, *Data on Use of Force by Police Across U.S. Proves Almost Useless*, NY TIMES (Aug. 11, 2015), https://www.nytimes.com/2015/08/12/us/data-on-use-of-force-by-police-across-us-proves-almost-useless.html

[5] Keith L. Alexander, Steven Rich, & Hannah Thacker, *The Hidden Billion-dollar Cost of Repeated Police Misconduct*, WASHINGTON POST (March 9, 2022), https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-repeated-settlements/

[6] Amelia Thomson-DeVeaux, Laura Bronner & Damini Sharma, *Cities Spend Millions On Police Misconduct Every Year. Here's Why It's So Difficult to Hold Departments Accountable*. (Feb. 22, 2021), https://fivethirtyeight.com/features/police-misconduct-costs-cities-millions-every-year-but-thats-where-the-accountability-ends/ (The cities are: New York City, Chicago, Los Angeles, Washington D.C., Philadelphia, Detroit, Milwaukee, Baltimore, San Francisco, Cleveland, Springfield, MA, Indianapolis, Memphis, Boston, Atlanta, Paterson, NJ, Miami, St. Louis, Orlando, New Orleans, North Charleston, SC, Baton Rouge, Fort Lauderdale, FL, Waterbury, CT, Cincinnati, Charleston, SC, Columbia, Little Rock, Richmond, VA, Roanoke, VA, Cambridge, MA)

[7] *Id.* (Admittedly, there are many factors that caution extrapolating firm conclusions with total police settlement spending as indicating a shortfall in legal standards governing the use of force. For instance, the lack of data provided by municipalities each year, state law enforcement bill of rights protections that increase the likelihood of lawsuits being dismissed with no payouts, and the varying ways municipalities generally define police misconduct, all influence the reliability of this particular data)

[8] *Id.*

[9] Anagha Srikanth, *National Database On Police Killings Tracked 1,127 Deaths Last Year*, THE HILL (March 17, 2021), https://thehill.com/changing-america/respect/equality/543712-national-database-on-police-killings-tracked-1127-police (Ninety-six percent of the 1,127 people killed by police in 2020 were killed by police shootings and half of those killed were reportedly armed with a gun; however, the report also found that 1 in 6 people with a gun were not threatening anyone when they were killed.)

[10] *Id.*

[11] David D. Kirkpatrick, Steve Eder, Kim Barker & Julie Tate, *Why Many Police Traffic Stops Turn Deadly*, NY TIMES (Nov. 30, 2021), https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html

January 1, 2015, through January 13, 2021, 183 of the 5,317 fatal shootings involved officers described the suspect as unarmed and not attacking anyone.[12] In assessing the intersectionality race plays in this particular category of policing incidents, since 2015, officers have fatally shot at least 135 unarmed Black men and women nationwide.[13] In that same period, the Fatal Force database recorded 434 unarmed persons as having been killed by officers. Of that total, 257, approximately 59 %, were identified as other than white.[14] Fatal policing encounters involving civilians with a mental illness, a developmental disability, or any other condition that can cause them to behave erratically are primary examples of instances that demand ethical principles grounded in safeguarding life. Likewise, encounters that involve unarmed civilians, represent undeniable examples of incidents that must be significantly reduced, if not eliminated.

Last, are the significant inconsistencies in states' laws governing the use of force. These inconsistencies manifest as irregular and unpredictable justifications for the use of force. For example, following the egregious murder of George Floyd, a surge of public outcries arose. The widespread outcries frequently resulted in peaceful protests; other protests developed into violent riots. In relation to the enforcing officers' ability to use force in these circumstances, nine states expressly permit officers to use deadly force to suppress a riot when reasonable or necessary.[15] Relatedly to using force that may endanger innocent lives, only seven states require officers to consider risks to innocent bystanders before using deadly force.[16] As to requiring officers to employ de-escalation tactics before using force, just eleven states require police officers to exhaust all reasonable options before using deadly force as a last resort.[17]

Specific to the use of deadly force, many state statutes reference the requirement of an officer to reasonably believe that deadly force was "necessary" to effectuate a law enforcement purpose; however, most state laws do not require police officers to use force only when objectively necessary. Moreover, most state laws do not require officers to consider less deadly alternatives, also called "less lethal" force, before using deadly force.[18] This means that in criminal and civil cases alleging unreasonable force, courts may ignore, or prohibit jurors from considering whether

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[12] Mike Males, *Opinion: Police Shooting Statistics Of Unarmed Suspects Show The Young More Likely To Be Killed*, Juvenile Justice Information Exchange (Feb. 11, 2021), https://jjie.org/2021/02/11/police-shooting-statistics-of-unarmed-suspects-show-the-young-more-likely-to-be-killed/

[13] Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021), https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns; *see also* Mapping Police Violence, *Police Violence Map*, https://mappingpoliceviolence.org/ (Black people are disproportionately likely to be killed by police. Black people are 3x more likely to be killed by police than white people and are 1.3x more likely to be unarmed than white people. Police killed Black people at higher rates than white people in 47 of the 50 largest cities. A harrowing example of this deeply troubling reality for people of color, especially Black men, can be found in the city of Miami where between 2013 - 2020 there were no Black-white disparities in police killings since every person killed by the department was Black or Brown.)

[14] *Id.*

[15] Institute for American Police Reform, *Map of State Laws Governing Deadly Force*, (July 2021), https://americanpolicereform.org/mapPage.html (Those states are: Arizona, Delaware, Idaho, Mississippi, Nebraska, Nevada, Ohio, Pennsylvania, and Washington)

[16] *Id*. Those states are: California, Colorado, Delaware, Hawaii, Nebraska, New Jersey, and New York

[17] *Id.* Those states are California, Colorado, Delaware, Iowa, Massachusetts, Minnesota, Oregon, Tennessee, Virginia, Vermont, and Washington D.C.

[18] Police Executive Research Forum, *Exposing the Challenges of Police Use of Force*, 4 (2005) (According to the Police Executive Research Forum, less lethal force is defined as tools or tactics that have less potential than deadly force to cause serious bodily injury or death.)

there were less deadly alternatives available.[19] As such, state statutes and department policies that are silent on authorizing the use of force only when objectively necessary implicitly permit officers to bypass de-escalation tactics that may offer pathways to prevent the taking of life.

Perhaps, more than ever, a need exists for immediate, meaningful principled-based reform. Policing in America is more militarized than at any other time in the nation's history. One study highlighted a relationship between the increase in the militarization of policing and the increase in officer-involved shootings.[20] To accomplish essential reform, there must be a recommitment to the core values and the primary purpose of policing service – to preserve life and uphold community safety. Secondly, there must be a transformational change in policing culture. Policing culture is reflected in the enforcement officers' behaviors, attitudes, and customs. Authoritarianism propels a powerful groupthink alliance throughout American systems of policing. These powerful public officials' shared attitudes, practices, customs, and basic underlying assumptions can form intangible and potent operating principles that represent compelling core values – even when those values are unwritten and understood as "just the way it is." Change requires officers to regard their role, not as warriors,[21] but as guardians – protectors of life and the Constitution – rather than as combatants responding with militarized force to situations where there is no imminent threat of harm to themselves or others.[22]

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[19] *See e.g., Stroik v. Ponseti*, 699 So.2d 1072, 1079 (La. 1997) ("Consequently, the scope of the officers' duty to act reasonably under the circumstances does not operate to restrict the officers to employing only the best of several available alternatives, or the least intrusive. Instead, Officer Ponseti was charged with choosing a reasonable course under the circumstances which he faced. Therefore, while alternatives did exist, there was nothing unreasonable about the alternative elected by the officer under these circumstances."); *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) ("The Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within a range of conduct which is objectively "reasonable" under the Fourth Amendment. Alternative measures which 20/20 hindsight reveal to be less intrusive (or more prudent), such as waiting for a supervisor or the SWAT team, are simply not relevant to the reasonableness inquiry.); *Womack v. U.S.*, 673 A.2d 603, 613 (D.C. 1996) ("Whether handcuffing was the "least intrusive" alternative available to the officers, however, is not the appropriate Fourth Amendment inquiry."); *Mata v. City of Farmington*, 798 F. Supp. 2d 1215, 1219, 1227 (D.N.M. 2011) ("[T]he Fourth Amendment does not require that an officer use the least-intrusive alternative available to protect himself or others so long as the method chosen is reasonable."); *Taylor v. Hudson*, No. CIV 02-0775 JB/RHS, 2003 U.S. Dist. LEXIS 26736, at *18 (D.N.M. Nov. 21, 2003) ("[E]vidence of less intrusive alternatives is irrelevant to the Fourth Amendment reasonableness inquiry . . . .").

[20] Delehanty, Casey; Mewhirter, Jack; Welch, Ryan; Wilks, Jason (2017-04-01). "*Militarization and police violence: The case of the 1033 program*". Research & Politics. 4 (2): 2053168017712885. doi:10.1177/2053168017712885. ISSN 2053-1680

[21] The 2015 International Law Enforcement Educator and Trainers Association Conference featured two sessions each on "Becoming Knights – Teaching Warrior Mindset to the Non-Warrior" and "Building Warrior Women Trainers." Prior years offered additional training sessions with titles like "The Path of the Warrior Mentor," "Filling the Tank – Warriors and Leaders," "Always the Warrior at Every Age," and "Emotional Warrior Training: Combating Stress." Valerie Van Brocklin, Where Have All the Warriors Gone?, LAWOFFICER.COM (Mar. 8, 2012), http://www.lawofficer.com/article/training/where-have-all-warriors-gone [http://perma.cc/XX79-QLEC].

[22] *See* Office of Community Oriented Policing Services. *The President's Task Force on 21st Century Policing Implementation Guide: Moving from Recommendations to Action.* Washington, DC: Office of Community Oriented Policing Services, (2015).

II. The Evolution of Police Use of Force

In the absence of a sufficiently principled constitutional standard, the rules governing the use of force by peace officers have been determined by the states, either through statute or by state court decisions.[23] Use of force standards and training are often overseen by a state Commission on Peace Officer Standards and Training (POST) or similar commission. Accordingly, before the Supreme Court's seminal rulings in the 1980s, most states continued to follow the English common law rule originating in the post-revolutionary establishment of the United States. In daily practices, individual policing agency policy governs officer use of force.

Contemporary police officer use of force standards derive from three sources: (1) common law; (2) modified common law; and (3) the Model Penal Code. Each of these approaches authorized an officer to use force, including deadly force, other than in defense of life. While many states and police departments no longer adhere to these standards, it is worthwhile to understand the origin of the use of force standard and the changes made over time.

A. *Common Law Felony – Misdemeanor Rule*

The common law approach to the authorization of the use of force by a police officer, particularly deadly force, was based upon the English law's distinction between a felony and a misdemeanor.[24] This rationale arose from the fact that all felonies were punishable by death[25], and the fact that, during the 1800s, officers did not carry firearms, and deadly force implied hand-to-hand struggle.[26] The common law felony-misdemeanor rule set the boundaries of permissible force with the suspected class of crime.[27]

Under the common law, an officer could use any force, short of deadly force, to arrest for a misdemeanor.[28] In the case of a felony, deadly force may be used if reasonably necessary to effect an arrest.[29] Until 1985, when the Supreme Court first weighed in on the constitutional limits authorizing deadly force by police, deadly force was legally justified provided that the crime for which the officer had probable cause to arrest was defined as a felony. Under this approach, the

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[23] John C. Hall, *Deadly Force: The Common Law and the Constitution*, FBI Law Enforcement Bulletin (April 1984), https://www.ojp.gov/pdffiles1/Digitization/94043NCJRS.pdf

[24] Note, *Legalized Murder of a Fleeing Felon, 15* VA. L. REV. 582, 583 (1929) (The common law divided crimes into three classes, namely treason, felony, and misdemeanor. The felonies were: felonious homicide (murder or manslaughter), arson, rape, robbery, burglary, larceny, prison breach and rescue of a felon. Misdemeanors comprised those crimes other than treason or felonies.)

[25] *Id.* (These crimes were of such a nature that capital punishment was often superadded, according to the degree of guilt, and in time felony erroneously came to include all crimes punishable by death).

[26] *Id.*

[27] A distinction between felonies and misdemeanors is set forth in 18 U.S.C. § 1 (1982) as follows:

> 1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
> 2) Any other offense is a misdemeanor.
> 3) Any misdemeanor, the penalty for which does not exceed imprisonment of six months or a fine of not more than $500, or both, is a petty offense.

[28] *See* Moreland, *The Use of Force in Effecting or Resisting Arrest*, 33 NEB. L. REV. 408, 409 (1953)

[29] *Id.*

use of deadly force was permissible for such crimes as murder,[30] auto theft,[31] and even income tax fraud.[32] Until 1985, nearly half the states followed the common law rule.[33]

B. *Modified Common Law*

With an increase in statutory non-violent felonies, some states modified the common law rule and enacted justifiable homicide statutes governing the use of force.[34] Under the modified common law rule, the use of deadly force was either restricted to "dangerous felonies" or only permitted for specific felonies.[35] Moreover, the use of deadly force was usually limited to cases of murder, rape, arson, burglary, robbery, kidnap, mayhem, and aggravated assault.[36] Similar to the common law rule, the modified common law rule failed to equate the use of deadly force with the dangerousness of an arrest situation, and with the severity of subsequent punishment.[37]

C. *Model Penal Code*

A more restrictive approach to governing the use of deadly force, the Model Penal Code[38] (MPC), was promulgated in 1962. In relevant parts, the MPC allowed the officer to use deadly force only when the felon's conduct included the use or threatened use of deadly force, or when there is a substantial risk that the felon will cause death, or risk of serious bodily harm if an arrest is delayed.[39] Additionally, the MPC prohibited using deadly force to arrest for crimes against property,[40] as long as no life has been threatened. During this time, a few states followed this approach.[41]

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[30] *See State v. Sundberg*, 611 P.2d 44, 47 (Alaska 1980) (The common law felonies, as listed in State v. Sundberg, 611 P.2d 44, 47 (Alaska 1980), were rape, murder, manslaughter, robbery, sodomy, mayhem burglary, arson, and prison break. This list comprises the felonies that were recognized in England in 1500.).
[31] Jones v. Marshall, 528 F.2d 132, 133 (2d Cir. 1975).
[32] Many jurisdictions classify income tax fraud as a felony. Id. at 138. For example, see CAL. REV. & TAX. CODE § 19405 (West 1983).
[33] These states were Alabama, Arkansas, Connecticut, Florida, Idaho, Kansas, Mississippi, Michigan, Missouri, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Washington, Wisconsin, Maryland, Virginia, and West Virginia.
[34] These states were Alaska, Arizona, California, Georgia, Illinois, Louisiana, New York, North Dakota, Pennsylvania, and Utah. *See* Wukitsch, *Survey of the Law Governing the Police Use of Deadly Force*, 55 N.Y. B.J. 12, 14 (1983).
[35] K. Matulia. *A Balance of Forces: A Study of Justifiable Homicide by the Police, Executive Summary* 32 (1982).
[36] *Id.* at 10.
[37] Eve M. Coddon, *Use of Force by Law Enforcement Officers in Effecting Seizures of Persons,*22 SAN DIEGO L. REV. 587, 591 (1985). Available at: https://digital.sandiego.edu/sdlr/vol22/iss2/13
[38] Model Penal Code § 3.07 (Proposed Official Draft 1962).
[39] *Id*. The relevant section of the Code provides that the use of deadly force is not justifiable unless: (i) the arrest is for a felony; and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that: **(1)** the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if apprehension is delayed.
[40] *See* MODEL PENAL CODE §§ 220-224.14 (Proposed Official Draft 1962). Among the offenses the Code classifies as property offenses are burglary, arson, robbery, and theft.
[41] *Id.* These states were Colorado, Delaware, Hawaii, Iowa, Kentucky, Maine, Minnesota, Nebraska, North Carolina, and Texas.

While these three statutory approaches established the foundation of the legal standard for police officer use of force, two pivotal U.S. Supreme Court decisions ultimately advanced the standard's evolution to what is most commonly held to be best practice by enforcement officials today.

III. Supreme Court Jurisprudence on Peace Officer Use of Force

U.S. Supreme Court jurisprudence has played a major role in outlining the parameters that the Constitution has placed on peace officer use of force. In civil claims against officers alleging excessive use of force, plaintiffs typically assert that the alleged excessive force violated the Fourth Amendment.[42] The current legal standard used to analyze whether an officer's alleged excessive force was unconstitutional is the "objectively reasonable" standard of the Fourth Amendment, which requires courts to consider the reasonableness of the facts and circumstances surrounding an officer's use of force, rather than the intent or motivation of an officer during that use of force.

Ultimately, the standard set out by the U.S. Supreme Court does not establish a principled-based approach to peace officer use of force. Instead, it has provided a majority of states and departments with the framework for contemporary use of force practices that are legally defensible under the Constitution, rather than a framework for use of force practices primarily designed to prevent the unnecessary taking of life. The "objectively reasonable" standard is rooted in two leading U.S. Supreme Court cases, and through these decisions, the Court has explained whether and when the use of force by a police officer is excessive and, therefore, unconstitutional.

A. *Tennessee v. Garner*

In the 1985 case of *Tennessee v. Garner*, the Supreme Court first introduced the analysis of what determines an unreasonable act of excessive force in violation of the Fourth Amendment.[43] In that case, two Memphis police officers responded to a "prowler inside call."[44] When the officers arrived, they were told by a neighbor that she had heard glass breaking and that "someone" was breaking in next door.[45] As one of the officers searched behind the house that was just broken into, a teenager named Edward Garner was seen running across the backyard.[46] With the aid of a flashlight, the officer could see Garner's face and hands and believed Garner was seventeen or eighteen years old.[47] In reality, Garner was only fifteen years old.[48] The officer admitted that he was "reasonably sure" and "figured" that Garner was unarmed, and as a result, called out, "police, halt!"[49] As Garner began to climb over a fence, the officer shot him in the back of the head,

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[42] . *See Law Enforcement Misconduct*, U.S. DEPT JUST., https://www.justice.gov/crt/law-enforcement-misconduct (last updated July 28, 2017).It also governs in federal prosecutions of federal law enforcement officers accused of excessive force.
[43] 471 U.S. 1 (1985).
[44] *Garner*, 471 U.S. at 3.
[45] *Id.*
[46] *Id.*
[47] *Id* at 4.
[48] *Id*.
[49] *Id.* at 3-4.

convinced that if Garner made it over the fence, he would elude capture.[50] Garner later died at the hospital.[51] Ten dollars and a purse taken from the house were found on his body.[52]

In its review of the case, the Supreme Court rejected the common law rule in Tennessee, which permitted an officer to use whatever force necessary, including deadly force, to arrest a fleeing felon. Discarding the common law rule, the Court held that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." [53] Explaining when deadly force would be reasonable, the Court stated that "[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."[54] Offering further guidance as to when deadly force is reasonable, the Court mentioned, "deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."[55]

For the first time, the Supreme Court established parameters regulating the circumstances permitting police officers to use deadly force to stop a fleeing felon. First, the Court reasoned that deadly force should not be used unless the officer has probable cause to believe the suspect poses a threat of death or serious bodily injury to the officer or others, and second, an officer should, if feasible, give a warning before using deadly force.[56]

The *Garner* Court's creation of a bright-line rule designed to regulate fatal force was praised by critics of subsequent Fourth Amendment jurisprudence.[57] In an attempt to measure the impact that *Garner* had on police killings, Abraham N. Tennenbaum conducted a study and found that there was a sixteen percent reduction in police shootings killing civilians after the Supreme Court's decision.[58] Remarkably, the effect of *Garner* serves as an example of how clear legal rules regulating police officer use of force could contribute to saving lives.

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[50] *Id*. at 4.
[51] *Id.*
[52] *Id.*
[53] *Garner,* 471 U.S. at 11.
[54] *Id.*
[55] *Id.* at 11-12.
[56] *See, e.g.*, Gonzalez v. City of Anaheim, 747 F.3d 789, 793–94 (9th Cir. 2014); Vaughan v. Cox, 343 F.3d 1323, 1329–30 (11th Cir. 2003); Colston v. Barnhart, 130 F.3d 96, 99–100 (5th Cir. 1997); Krueger v. Fuhr, 991 F.2d 435, 438 (8th Cir. 1993)
[57] *See* Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*. 112 NW. U. L. REV. 1476 (2019); *see also* Brandon Garrett & Seth Stoughton*, A Tactical Fourth Amendment,* 103 VA. L. REV. 211, 216 (2017) (calling Garner "a high-water mark" for police violence case law); Nancy C. Marcus*, From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform,* 12 DUKE J. CONST. L. & PUB. POL'Y 53, 80, 82 (2016).
[58] Abraham N. Tennenbaum, *The Influence of the* Garner *Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241, 255–56 (1994) (finding that there was a significant reduction – approx. sixteen percent – between the number of police shootings killing civilians committed before, and after the decision. Further, this reduction was more significant in states that declared their laws regarding police use of deadly force to be unconstitutional after the *Garner* decision)

B. *Graham v. Connor*

Four years after the *Garner* decision, the Supreme Court established the federal standard – nearly universally adopted by the states thereafter – for analyzing whether police use of force violated an individual's constitutional rights. In *Graham v. Connor*, Dethorne Graham, a diabetic, asked his friend, William Berry, to drive him to a convenience store so he could buy orange juice to counteract the onset of an insulin reaction.[59] Berry agreed; however, upon entering the convenience store, Graham saw a long line of people ahead of him, so he quickly hurried out of the store and asked Berry to drive him to a friend's house instead.[60] A Charlotte police officer observed Graham hastily enter and leave the store. [61] The officer became suspicious that something was amiss, followed Berry's car, and made an investigative stop.[62] Berry informed the officer that Graham was suffering from a "sugar reaction"; however, the officer ordered Berry and Graham to wait while he determined if anything had happened at the convenience store.[63] When the officer returned to his patrol car to call for backup assistance, Graham got out of the car, ran around it twice, sat on the curb, and briefly passed out.[64]

Regaining consciousness, Graham asked the officers to check his wallet for a diabetic decal that he carried.[65] In response, one of the officers told him to "shut up" and shoved his face down against the car's hood.[66] Four officers then grabbed Graham and threw him headfirst into the police car.[67] A friend brought Graham some orange juice, but the officers refused to let him have it.[68] Finally, the officers received word that Graham had done nothing wrong at the convenience store, and then drove him home and released him.[69] During the encounter, Graham sustained a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and a permanent loud ringing in his ear.[70]

Graham sued the individual officers involved in the incident, alleging that they used excessive force in making the investigatory stop in violation of his constitutional rights under the Fourteenth Amendment.[71] After the case was tried before a jury, the officers moved for a directed verdict.[72] The district court applied a four-factor test[73] and granted the officers' motion, finding

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[59] 490 U.S. 386 (1989).
[60] *Id*. at 388–89.
[61] *Id*. at 389.
[62] *Id.*
[63] *Id.*
[64] *Id*.
[65] *Id.* at 389.
[66] *Id*.
[67] *Id.*
[68] *Id.*
[69] *Id*. at 390.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] The district court considered the following four factors in assessing whether the officers applied excessive force against Graham:
(1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) "[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* at 390 (quoting *Graham v. City of Charlotte*, 644 F. Supp. 246, 248 (W.D.N.C. 1986)).

that the amount of force used by the officers was appropriate under particular circumstances.[74] A divided panel of the Court of Appeals for the Fourth Circuit affirmed the ruling and agreed that the District Court applied the correct legal standard in assessing Graham's claim of excessive force.[75] The Supreme Court reversed, reasoning that the lower courts erred in applying the Due Process Clause to assess whether the officers' force against Graham was excessive.[76]

The Court held that all claims alleging excessive use of force by law enforcement officials during an arrest, stop, or other seizure of a person must be analyzed for reasonableness under the Fourth Amendment as opposed to the Due Process Clause.[77] Cementing the standard for determining whether the force used violated an individual's Fourth Amendment rights, the Court stated that, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on scene, rather than with the 20/20 vision of hindsight."[78] Setting precedent for judicial deference to officers involved in alleged excessive force, the Court explained that "[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."[79] Finally, the Court noted that an officer does not have to be correct in his assessment of the need to use force. An officer does not violate the Fourth Amendment merely because he or she was mistaken or wrong, if his or her mistake was reasonable.[80]

The Court's landmark decision in *Graham* "established the modern constitutional landscape for police excessive force claims."[81] Today, thirty-five states plus Washington D.C., require an officer's decision to use deadly force to be "reasonable."[82] Although it has become the prevailing standard for analyzing whether an officer's use of force was unconstitutional, the "objectively reasonable" officer standard has faced significant scrutiny for its shortfalls, particularly as it relates to the lack of meaningful guidance as to whether and when a police officer's use of deadly force is justified under *Graham.*[83] Moreover, the standards set by the Supreme Court in *Graham* have been subject to exacting international criticism for not being

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[74] *Id.*
[75] *Id*. at 391.
[76] *Id.* at 397-99.
[77] *Id.* at 388.
[78] *Id.* at 396.
[79] *Id.* at 396-97
[80] *Id.* at 396.
[81] Obasogie & Newman, *supra* note 57, at 1465.
[82] Institute for American Police Reform, *supra* note 15
[83] Rachel A. Harmon, *When Is Police Violence Justified?*, 102 Nw. U. L. Rev. 1119, 1130 (2008). Harmon points out that, "*Graham* permits courts to consider any circumstance in determining whether force is reasonable without providing a standard for measuring relevance, it gives little instruction on how to weigh relevant factors, and it apparently requires courts to consider the severity of the underlying crime in all cases, a circumstance that is sometimes irrelevant and misleading in determining whether force is reasonable."; *see also* William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1044 (1995) ("The Court in *Graham* does not define this standard, except to say that it is objective….and that its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *One searches in vain for any body of case law that gives this standard some content*.") (emphasis added).

codified based on principles of necessity and proportionality, nor promoting individual officer accountability.[84]

IV. Laws and Policies Governing the Use of Force

Apart from the Supreme Court's decisions interpreting the Fourth Amendment and the limits of police officer authority in employing force, federal criminal laws, state statutes, and local police department policies, serve as the most crucial guidepost for governing police officer use of force. Practice and history have proven that interdepartmental policies and internal departmental policing decision-making are insufficient to transform a significant component of policing culture – the attitudes, behaviors, practices, institutional habits, justification standards, and customs related to officers' use of force. A change in the American police officer use of force culture requires incorporating and inculcating essential principles for the preservation of all human life and for the highest regard for human dignity within laws and policies relating to the authority of police officers to use any measure of force.

A. *Federal Laws Regulating Police Use of Force*

Currently, there is no federal statute governing police officer use of force, including deadly force.[85] While there is no federal law regulating officers' use of force, a federal criminal statute prohibits officers from willfully depriving another of a constitutional right while acting under color of law or official capacity. The provision in the federal criminal code is 18 U.S.C. § 242, which includes state or local law enforcement accusations of excessive force.[86]

Despite Congresses' intentions of creating a legal remedy to punish government official misconduct, the statute's vague wording and subsequent Supreme Court decisions raising the standard of proof needed for a civil rights violation under this section, has made it exceedingly

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[84] *See* University of Chicago Law School - Global Human Rights Clinic, *"Deadly Discretion: The Failure of Police Use of Force Policies to Meet Fundamental International Human Rights Law and Standards"* (2020). Global Human Rights Clinic, https://chicagounbound.uchicago.edu/ihrc/14 ("While the Constitution sets some limits on the use of force, the standards set by the Supreme Court in its case law fall woefully short of meeting the international standards")

[85] *See* Amnesty International, *Deadly Force: Police Use of Lethal Force in the United* States, 17, (2015), https://www.amnestyusa.org/files/aiusa_deadlyforcereportjune2015.pdf

[86] 18 U.S.C. § 242 (2012) ("Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death")

difficult for federal prosecutors to hold law enforcement accountable under this statute.[87] Thus, it is rarely successfully used in practice.[88]

B. *State Laws Authorizing Police Use of Force*

The Tenth Amendment grants to states the rights and powers "not delegated to the United States," to establish and enforce laws protecting the public.[89] Included in those state powers, is the right to govern police use of force. State use of force statutes governs criminal prosecutions against police officers charged with homicide or assault.[90] While many state criminal laws follow a uniform model code, state laws pertaining to officers' use of force, principally deadly force, are not uniform. For example, in 2015, nine states had no laws on the use of lethal force by law enforcement officers.[91]

Although state statutory approaches vary considerably, most states permit police officers to use deadly force if the officer reasonably believes that such force was necessary to protect the officer or another person.[92] Precisely understanding what constitutes a "reasonable" belief has proven difficult for state legislatures to answer definitively. Generally, state laws offer the most direct and effective path for reforming police use of force. With over 18,000 individual police departments and agencies across the country, the prospects of change loom largest through a concerted effort by the fifty states to reform laws governing police use of force.

C. *Law Enforcement Agency Use of Force Policies*

Apart from federal and state statutes and case law, official rules for when, how, and in what manner police officers may use force originate from local departmental use of force policies.[93] Use of force policies serve at least two core overlapping functions: (1) they are the guidelines and

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[87] Brian R. Johnson & Phillip B. Bridgmon, "*Depriving Civil Rights: An Exploration of 18 U.S.C. 242 Criminal Prosecutions 2001–2006,*" Criminal Justice Law Review 34, no. 2 (2009), 196, 204 (observing that prosecutions under § 242 are a relatively rare event)

[88] Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3203 (2014) (noting DOJ's lack of resources to bring civil rights criminal prosecutions) (Between 1981 and 1990, te DOJ only prosecuted 1% of civil rights complaints it received.)

[89] U.S. Const. amend. § 1. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.")

[90] Matthew,Lippman, *Criminal Procedure* 442 (2d ed. 2014).

[91] Amnesty International, *supra* note 85, at 4 (listing Maryland, Massachusetts, Michigan, Ohio, South Carolina, Virginia, West Virginia, Wisconsin, Wyoming, and the District of Columbia as jurisdictions that lack laws on the use of lethal force by law enforcement officers).

[92] *Id. see* ALA. CODE § 13A-3-27(b) (2015); ALASKA STAT. § 11.81.370(a) (2015); ARIZ. REV. STAT. ANN. § 13-410(C) (2015); ARK. CODE ANN. § 5-2-610(b) (2015); CONN. GEN. STAT. § 53a-22(c) (2021); FLA. STAT. § 776.05(3) (2015); 720; KAN. STAT. ANN. § 21-5227(a) (West 2015); ME. REV. STAT. tit. 17-A, § 107(2) (2015); MO. REV. STAT. § 563.046(3) (2015); N.H. REV. STAT. ANN. § 627:5(II) (2015); N.J. STAT. ANN. § 2C:3-7(b) (2) (West 2015); N.Y. PENAL LAW § 35.30(1) (McKinney 2015); N.C. GEN. STAT. § 15A-401(d)(2)(a–b) (2015); OKLA. STAT. tit. 21 § 732 (2021); OR. REV. STAT. § 161.239 (2015); 12 R.I. GEN. LAWS §§ 12-7-9 (2015); TEX. PENAL CODE ANN. § 9.51(c) (West 2015); UTAH CODE ANN. §76-2-404 (West 2015). VT STAT. ANN. tit. 20, § 2368(c) (2021); VA. CODE ANN. § 19.2-83.5 (A)(2021); D.C. CODE ANN. § 5-351.01 (emergency amendment, temporary) (Eff. From December 3, 2020 until July 16, 2021).

[93] Osagie K. Obasogie and Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 Cornell L. Rev. 1281 (2019) Available at: https://scholarship.law.cornell.edu/clr/vol104/iss5/3

instructions police departments use to train and direct officers on when, where, and how much force to use; and (2) they are also used to decide whether an officer's conduct is appropriate or punishable by the department after an incident.[94]

While the existence of written local policies regulating the use of force is commonplace across every police and sheriff's department jurisdiction in the United States today, that was not the case in 1960, when most local chiefs and sheriffs did not have a policy on the use of force.[95] Local use of force policies overwhelmingly hold the most significant influence in guiding officers' behavior; however, a large sample of these policies refrain from explicitly guiding officer behavior in a way that ensures officers preserve human life at all reasonable costs. For example, in an analysis of use of force policies from the seventy-five largest cities in the U.S.,[96] Professor Osagie K. Obasogie and Zachary Newman found that most of these policies failed to require substantive protections for citizens and obligations placed upon officers.[97] For instance, requirements that officers engage in de-escalation tactics appeared in 52% of the policies.[98] Substantive rules mandating officers to exhaust all alternatives before using force appeared in just 31% of the policies.[99] Finally, rules requiring proportionality for force used against a civilian appeared in only 17% of the policies examined.[100]

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[94] *Id.*
[95] David Alan Sklansky, *A Pattern Of Violence: How The Law Classifies Crimes And What It Means For Justice* 93, 106 (2021).
[96] *Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More,* U.S. CENSUS BUREAU (2016), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk [https: //perma.cc/RF83-Z8Y4]. The cities are: 1. New York City; 2. Los Angeles; 3. Chicago; 4. Houston; 5. Phoenix; 6. Philadelphia; 7. San Antonio; 8. San Diego; 9. Dallas; 10. San Jose; 11. Austin; 12. Jacksonville; 13. San Francisco; 14. Columbus; 15. Indianapolis; 16. Fort Worth; 17. Charlotte; 18. Seattle; 19. Denver; 20. El Paso; 21. Washington, D.C.; 22. Boston; 23. Detroit; 24. Nashville; 25. *Memphis (not included because use-of force policy not available. Replaced by #76 Fort Wayne, IN);* 26. Portland; 27. Oklahoma City; 28. Las Vegas; 29. Louisville; 30. Baltimore; 31. Milwaukee; 32. Albuquerque; 33. Tucson; 34. Fresno; 35. Sacramento; 36. Mesa, AZ; 37. Kansas City; 38. Atlanta; 39. Long Beach; 40. Colorado Springs; 41. Raleigh; 42. Miami; 43. Virginia Beach; 44. Omaha; 45. Oakland; 46. Minneapolis; 47. Tulsa; 48. Arlington, TX; 49. New Orleans; 50. Wichita; 51. Cleveland, 52. Tampa; 53. Bakersfield, CA; 54. Aurora, CO; 55. Honolulu; 56. Anaheim, CA; 57. Santa Ana, CA; 58. Corpus Christi, TX; 59. Riverside, CA; 60. Lexington, KY; 61. St. Louis; 62. Stockton, CA; 63. Pittsburgh; 64. St. Paul, MN; 65. Cincinnati; 66. Anchorage; 67. Henderson, NV; 68. Greensboro, NC; 69. Plano, TX; 70. Newark; 71. Lincoln, NE; 72. Toledo, OH; 73. Orlando; 74. Chula Vista, CA; 75. Irvine, CA.
[97] Obasogie & Newman, *supra* note 93 at 1307.
[98] *Id.* at 1308. *See also,* In New Orleans, Louisiana, the use of force policy states: "Force shall be de-escalated immediately as resistance decreases." NEW ORLEANS POLICE DEP'T, PROCEDURE MANUAL 29 (2013), https:// static 1. squarespace.com/static/56996151cbced68b 170389f4/t/569adafed82 d5eOd876a81b2/1452989185205/NOLA+use+of+force+policy.pdf [https://perma.cc/ZWY3-TJ73].
[99] *Id. See also*, In Nashville, Tennessee, the use of force policy states that police "are permitted to use only that force which is reasonable and necessary under the particular circumstances to protect themselves or others from bodily injury, and only after other reasonable alternatives have been exhausted or it is determined that such alternative action(s) would be ineffective under the circumstances." NASHVILLE POLICE DEP'T, DEPARTMENT MANUAL 700 (2018), https://www.nashville.gov/Portals/0/SiteContent/Police/dos/Strategic%2Development/MNPDManual.pdf [https://perma.cc/PR7H-Q2RG].
[100] *Id. See also*, In San Antonio, Texas, the use of force policy states that officers may use force "on an ascending scale of the officer's presence, verbal communications, open/empty hands control, physical force, intermediate weapon and deadly force, according to and *proportional* with the circumstances of the situation." SAN ANTONIO POLICE DEP'T, GENERAL MANUAL: PROCEDURE 501-USE OF FORCE

Relative to the influence *Graham* has had on police department use of force policies, the above-mentioned study found that virtually every use of force policy (from the seventy-five largest cities in the U.S.) contained the language of "reasonableness" reiterated in *Graham v. Connor*, without much discussion of the tactical measures that should be taken in the field when using force.[101] While specific substantive protections for citizens and obligatory duties placed upon officers are not required under the constitutional bare minimum standard of reasonableness defined in *Graham*, substantive protections and obligations based on principled constructs in policing force and resistance incidents would be transformational. If enacted uniformly across the United States, unambiguous delineated protections and obligations would proactively limit incidents of police officer-involved violence.

In supplementing state statutes governing police officer use of force, departmental use of force policies provide officers with operational courses of action to follow during the performance of their duty. Recognizing the importance and impact of these policies is paramount to accomplishing any measure of significant change in police officer use of force. Because there is wide variation among jurisdictions with respect to the stringency and specificity of these policies, reform must include uniformly addressing police department use of force policies through a principled-based approach.

End of Part I

1 (2014) (emphasis added), https://static1.squarespace.com/static/56996151 cbced68b 170389f4/t/569be875dc5cb4298582fc94/1453058170849/San+Antonio+Use+of+Force+Policy.pdf [https: //perma.cc/23Q3-S3FL].

[101] *Id.*

Part II: The Solution

Part I of this paper discusses the contemporary status of American peace officer use of force standards in the broadly inconsistent, ill-defined, and largely controversial state it has been throughout the history of the sanctioned service. Although the current federal legal standard for the use of force is not solely responsible for the broad number of problematic issues associated with American policing, it lends interpretation and practice to be widely unpredictable and fails to embody essential principles that support unyielding commitment to the preservation of life.

The Institute for American Policing Reform is committed to forwarding a solution that comprehensively revises laws, policies, and standards authorizing police use of force. A principled solution grounded in the preservation of life is essential to the development and advancement of the American policing culture toward practices consistently reflecting the highest regard for all human life and dignity. Judiciously implemented, these critical elements of policing reform will reduce incidents of use of force and readily hold enforcement officers accountable when unnecessary force is used. Such reform contains four elements.

At a general level, officers' use of force reform must:

1. **Replace the baseline, indeterminate "reasonable officer" analysis** that currently instructs officers when to use force, with a principle of necessity that dictates when force should be used.

2. **Require officers to use measured force directly related to an imminent threat** by requiring officers to use force proportionate to the threat posed by a suspect.

3. **Mitigate the risk of death or serious injury to any member of the public or officer** by ensuring enforcement jurisdictions preplan operations designed to prevent loss of life.

4. **Ensure officers uphold the preservation of life as a paramount duty** by requiring all peace officer standards, policies and procedures, training, and education to indoctrinate inalienable regard for all persons' life and dignity.

The pathway to reform runs through state legislatures and law enforcement agencies. Accordingly, this section describes the requisite elements of a reformed peace officer use of force standard and proposes statutory language to accomplish that reform.

I. Elements of Reform

IAPR posits a principled-based approach to peace officer use of force intended to identify values in use of force decisions linking all force options to the preservation of life and the highest regard for human dignity. Contextually, principles are self-evident, and – as part of most traditions and philosophies over the ages – they've been woven into the fabric of societies throughout human history. They often concern human behavior and govern interactions between people. Principles represent an objective reality that transcends cultures and individuals.

Four fundamental principles are essential to laws and policies governing the use of force. The principles of a) necessity, b) proportionality, c) precaution, and d) the preservation of life are the foundations for attitudes, behaviors, practices, institutional habits, justification standards, and customs related to officers' use of force. By incorporating these principles into constructs of reform, the role of officers as "law enforcers" transforms into the role of servant leaders and "peace officers" grounded in precepts of respect for the sanctity of life.

A. *Clear Necessity Must Dictate Officer Use of Force*

Clear necessity must dictate the officer's use of force. That is, the principle of necessity determines the quintessential inquiry of whether peace officers should use any force. Necessity has three interrelated elements: the duty to use non-violent means wherever possible, the duty to use force only for a legitimate law enforcement purpose, and the duty to use only the minimum necessary force that is sufficient based on the totality of the circumstances.[102]

Central to the first duty of the necessity principle is the idea that non-force tactics should be the primary response to effecting a lawful objective. This principled approach, affirmed by the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, explains, among other things, "[l]aw enforcement officials, in carrying out their duty, shall, as far as possible, apply-non-violent means before resorting to the use of force and firearms.[103] Such non-violent tactics include verbal communication or de-escalation.

In addition, each use of force must be for a legitimate law enforcement purpose. Legitimate law enforcement purposes include but are not limited to: (i) effecting an arrest or detention, (ii) carrying out a search, (iii) preventing an escape of a person from custody, (iv) preventing the destruction of evidence or property, and (v) preventing the person's entry into a secured area. Accordingly, force must never be used vindictively or as a form of extrajudicial punishment; meted out in a discriminatory manner; or applied against an individual offering no resistance.[104] Furthermore, no additional force is lawful when the need has passed, such as when a suspect is safely and lawfully detained.[105] Disparate practices, such as those carried out by enforcement officials against minorities, are clear violations of US Constitutional and international laws.[106]

Essential to the principle of necessity, is that when force is necessary, it must be no more than the minimum sufficiently needed based on the totality of the circumstances. Force is necessary when there are no sufficient alternative means to effect the lawful objective and avoid the use of force. In the context of using deadly force, the principle of necessity permits the use of lethal force

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[102] United Nations Office on Drugs and Crime, *E4J University Module Series: Crime Prevention and Criminal Justice, Use of Force and Firearms*, ((March 2019), https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-4/key-issues/3--the-general-principles-of-use-of-force-in-law-enforcement.html

[103] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 2, U.N. Doc. A/CONF.144/28/Rev.1 (1991) [hereinafter UN Basic Principles], available at http://www.ohchr.org/Documents/ProfessionalInterest/firearms.pdf. (the U.N. Basic Principles are meant to "assist Member States in their task of ensuring and promoting the proper role of law enforcement officials")

[104] UNODC module series, *supra* note 102, at 1.

[105] *Id.*

[106] *Id.*

only in response to an imminent and particularized threat, and only as a last resort.[107] The U.N. Basic Principles explains, "intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."[108]

An example of recently enacted state legislation incorporating the principle that clear necessity must dictate police use of force can be examined in Massachusetts. In 2015, Massachusetts was one of nine states that had no codified laws governing police use of deadly force. In other words, the state had not yet taken a principled-based approach to govern police use of force. As of July 1, 2021, Massachusetts integrated the principle of necessity into its laws on police use of force by enacting Mass. Gen. Laws Ann. ch. 6E, § 14.[109]

Relevantly, the statute explains:

Mass. Gen. Law Ann. ch. 6E § 14 (2021)

> Section 14. (a) **A law enforcement officer shall not use physical force upon another person unless de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances and such force is necessary to**: (i) effect the lawful arrest or detention of a person; (ii) prevent the escape from custody of a person; or (iii) prevent imminent harm and the amount of force used is proportionate to the threat of imminent harm; provided, however, that a law enforcement officer may use necessary, proportionate and non-deadly force in accordance with the regulations promulgated jointly by the commission and the municipal police training committee pursuant to subsection (d) of section 15.
>
> (b) A law enforcement officer shall not use deadly force upon a person unless de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances and **such force is necessary to prevent imminent harm to a person and the amount of force used is proportionate to the threat of imminent harm**.

By requiring clear necessity to dictate police officer use of force, officers are prohibited from bypassing non-violent tactics that could preserve life, unless non-violent means have first been attempted and failed, or are not feasible because of an imminent threat of harm. Ultimately, in theory, and practice, preserving life is at the forefront of this particular Massachusetts statute authorizing use of force.

The Metro Nashville Police Department's decision in 2021 to update its use of force policy provides another example of recent reform incorporating the principle that clear necessity must dictate officer use of force.[110] The relevant provision of the policy follows below:

Title 11: Use of Force

11.10 Use of Force

[107] *See* University of Chicago Law School - International Human Rights Clinic, *supra* note 84, at 14.
[108] *Id*. at special provision 9.
[109] Mass. Gen. Laws Ann. ch. 6E, § 14 & 15
[110] Metropolitan Police Department, Nashville, Tennessee, *Department Manual: Use of Force*, (2021) https://www.nashville.gov/sites/default/files/2021-07/Department-Manual-Use-of-Force-Policy.pdf?ct=1627300741

The Metropolitan Nashville Police Department recognizes and respects the value and special integrity of each human life. When investing police employees with the lawful authority to use force to protect the public welfare, a careful balancing of all human interests is required.

11.10.010 Purpose

The main responsibility of MNPD officers is to protect the life and property of citizens. In compliance with applicable law, **officers shall use only the amount of force necessary and reasonable to accomplish lawful objectives and to control a situation**, **effect an arrest, overcome resistance to arrest, or defend themselves or others from harm.**

When force is necessary, the degree of force employed should be in direct relationship to the amount of resistance exerted, or the immediate threat to the officers or others. There is a compelling public interest that officers authorized to exercise the use of force do so in an objectively reasonable manner and in a way that does not violate the civil rights guaranteed by our Constitution, the Tennessee Constitution, and applicable law. Officers should attempt to use non-confrontational verbal skills, empathy, and/or active listening to stabilize a person in crisis or when confronted with a situation where control is required to effect an arrest or protect the public's safety. Officers who use excessive or unjustified force degrade the confidence of the community that they serve, undermine the legitimacy of a police officer's authority, and hinder the Department's ability to provide effective law enforcement services to the community.

Here, the integration of the principle of necessity requires officers to respect and value the special integrity of each human life by specifically using only the amount of force necessary to accomplish a lawful objective. In addition, the policy upholds the paramount duty of preserving life by encouraging officers first to use non-violent means to achieve the intended lawful goal when confronted with a situation where control is required to protect public safety. Once more, the principle of necessity solidifies the justification for reforming a police department's use of force policy.

i. An Imminent Threat of Harm Must Be Present Before the Use of Force.

While not a standalone principle, the concept of imminence plays a very important and tangential role alongside the principle of necessity. Imminence indicates "when" force, especially deadly force, should be used. A threat is considered imminent when the person who poses the threat sufficiently appears to have the present ability, opportunity, and intent to immediately inflict injury.[111] Supporting the concept of imminence as essential to law and policy governing use of force is a report completed by the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary

[111] *See* Policing Project, NYU School of Law, Comprehensive Use of Force Statute (Mar. 24, 2021), https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/605e079e43da3703cf0265d2/1616775070741/Comprehensive+Use+of+Force+Statute_3.24.21+for+website.pdf (defining when a threat is imminent)

Executions, which states that "force may also only be used in response to an imminent or immediate threat—a matter of seconds, not hours."[112]

Although some states have incorporated the concept of imminence, in many police officer use of force statutes, there is no imminence requirement before authorizing force. That is to say, there is no requirement for officers to sufficiently believe that they faced an imminent threat of injury before using force or faced an imminent threat of death or serious bodily injury before using deadly force. Not requiring imminence before authorizing force fully diverges from the U.S. federal standard governing federal law enforcement officers and correctional officers of the Department of Justice ("DOJ"). The DOJ's deadly force policy states that "deadly force may be used where a DOJ officer has a reasonable belief that the subject of such force poses an *imminent* danger of death or serious physical injury to the officer or another person."[113] Furthermore, not requiring imminence before authorizing force is directly contrary to President Biden's recent release of his "Executive Order to Advance Effective, Accountable Policing and Strengthen Public Safety," which requires new standards that integrate the principle of necessity and the concept of imminence, among other things, within use of force policies mandated for all federal agencies.[114]

Notably, the concept of imminence is most critical in situations concerning an alleged fleeing felon. As such, some states have restricted the use of force against fleeing felons, while some have not. For instance, Alabama, Florida, Mississippi, Nevada, Rhode Island, and South Dakota allow deadly force against felons, even non-violent felons.[115] States that incorporate the concept of imminence ensure that police officers are certain that immediate harm is likely before using force. This tactical response prevents unnecessary force from being used in circumstances without any indication of immediate harm to an officer or other person.

California provides a strong example of how including the concept of imminence can assist peace officers in upholding the paramount duty of preserving life. In 2019, California revised its state laws governing the use of force by, among other things, incorporating the concept that an imminent threat of harm must be present before use of deadly force. Effective January 1, 2020,

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[112] Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. A/HRC/26/36 (Apr. 1, 2014) (by Chrystof Heyns) [hereinafter UNSR Report], available at https://undocs.org/A/HRC/26/36. (The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, formerly Mr. Chrystof Heyns and currently Ms. Agnès Calcamard, is an international human rights expert appointed by the U.N. Human Rights Council, an inter-governmental body of 47 U.N. member states charged with protecting and enforcing human rights. Among other things, the Special Rapporteur's mandate requires her/him to report to the U.N. Human Rights Council and U.N. General Assembly "on the situation worldwide in regard to extrajudicial, summary or arbitrary executions and [make] recommendations for more effective action to combat this phenomenon."); *see also* OHCHR, Overview of the Mandate, at http://www.ohchr.org/EN/Issues/Executions/Pages/Overview.aspx.

[113] Department of Justice, Policy Statement: Use of Deadly Force, July 1, 2004. The components' policies are based on the commentary to an earlier version of the Department's policy, referred to as Resolution 14, approved by the Attorney General on October 17, 1995. The 2004 policy does not include a commentary.

[114] Department of Justice Policy on Use of Force, adopted May 20, 2022. "It is the policy of the Department of Justice to value and preserve human life…. Law enforcement officers and correctional officers of the Department of Justice may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person."

[115] Institute for American Police Reform, *supra* note 82.

Cal. Penal Code § 835a established a blueprint for demonstrating how imminence can encourage a policing culture of life protectors.

In relevant parts, the statute **Cal. Penal Code § 835a**[116] states:

> "(c)(1) . . . [A] peace officer is justified in using deadly force only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons:
>
> (A) To defend against an imminent threat of death or serious bodily injury to the officer or to another person.
> (B) To apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.
>
> "(e) For purposes of this section, the following definitions shall apply:
> **(2) A threat of death or serious bodily injury is 'imminent' when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.**

So often, the primary focus when examining the uses of deadly force centers on whether officers used force to defend themselves or another person from immediate harm of serious bodily injury. There is no doubt that police officers are routinely thrust into dangerous circumstances. However, fear of future harm and the likelihood of the harm, no matter how great, do not amount to "imminent harm" under California law. Unlike any other statute in the country, Cal. Penal Code § 835a requires officers to use deadly force only when there is imminent harm, "from appearances, instantly confronted and addressed." Pragmatically, this provision prohibits officers from arbitrarily claiming that their lives were in danger when under the totality of the circumstances, an officer in the same situation would disagree that a person had the intent to cause imminent harm or injury to that officer.

With reason, the concept of imminence motivates peace officers to protect life, rather than permit a policing culture to exist that is grounded in employing authoritarian excessive force to

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[116] Cal. Penal Code § 835a,
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=835a.&lawCode=PEN

gain compliance. Indeed, the above examples demonstrate ethical and reasonable methods that States, and policing departments can take by adopting a principled-based approach to the use of force that incorporates the principle of necessity, and to an extent, the concept of imminence.

It is important to note that there have been objections to incorporating the principle of necessity and the concept of imminence into laws and policies governing use of force standards. The most common objection to legal standards based on necessity and imminence is that strict compliance is impossible because policing requires a flexible standard that allows wide discretion to use force in dangerous circumstances. While these objections are understandable, to the extent peace officers require discretion to use force when protecting themselves or others from imminent harm, a use of force standard that provides clear guiding factors to aid officers in determining whether force is necessary lessens the concerns of these objections. For example, some of the factors all officers should uniformly consider include (i) whether there was an opportunity to engage in de-escalation measures or less lethal force tactics to reduce the immediacy of the threat, (ii) whether the suspect in the use of force possessed or appeared to possess a weapon, and (iii) the seriousness of the suspected crime. As such, officers are still given discretion in deciding whether force is appropriate; importantly, however, officers are also given clear guidance on the elements that should be considered before force is used.

B. *The Measure of Force Used Must Be Proportional to the Threat*

Force shall only be lawful if it is proportionate to the threat posed by a suspect and/or the harm that a police officer is seeking to avoid. The principle of proportionality indicates the "amount" of force that is appropriate to use by police officers. Supporting this principle is the U.N. Code of Conduct, which notes that "national principles of proportionality are to be respected" and that lethal force should only be used when a subject "offers armed resistance or otherwise jeopardizes the lives of others."[117]

Often misinterpreted, proportionality does not mean that the force used by an officer must be in strict accord with any use of force continuum (with the level of force generally escalated in stages), nor as an in-kind response to violence from a criminal suspect (a fist fighter suspect does not limit the response to a one-on-one fistfight). Instead, the principle of proportionality requires officers to consider using necessary force to mitigate the threat and evaluate whether there are alternative options that will safely and effectively achieve the same objective.[118]

Proportionality requires that the risk of harm faced by a person corresponds to the degree of seriousness of the public interest that is being served by the use of force.[119] This requirement of proportionality means that even when force is the minimum necessary force to achieve a law-enforcement end, its use may be impermissible if the harm it would cause is disproportionate to

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[117] Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169 of 17 (Dec. 17, 1979) at article 3, commentary (b) and (c) [hereinafter UN Code of Conduct].
[118] Police Executive Research Forum, *supra* note 3, at 21
[119] Barry Friedman, Brandon Garrett, Christopher Slobogin, Rachel A. Harmon & Tracey L. Meares, *Proportional Use of Force*, The ALI Advisor (March 23, 2017), https://www.thealiadviser.org/policing/proportional-use-force/

the end that officers seek to achieve.[120] The proportionality principle demands that law-enforcement interests go unserved if achieving them would impose undue harm.[121]

In arguments against the requirement of proportionality, there is often a misdirection of focus on the gravity of being able to make this decision in a timely and safe manner for all involved. Without oversimplifying the rationale needed, the decision-making process is similar to a decision to discharge a taser against a combatant suspect who has taken a clear fighting stance in response to an officer's lawful commands, versus discharging a firearm against the suspect because the officer feared losing in the confrontation. Additionally, there is often a discomfort with a proportionality principle because it may require that officers withdraw or stand down from a violator. That is a concept that for some it feels contrary to traditional roles as "enforcers". Proportionality is a principle that can be codified through explicit statutory provisions that officers should remain mindful of when determining appropriate degrees of necessary force.

In states without language requiring proportionality, officers are legally permitted to use deadly force *even if* they know that the suspect poses no risk of harm to the officer or another person. While the proportionality principle is implicit in some local use of force policies,[122] all state statutes and enforcement departments should explicitly require officers to use greater force only when the weight of the public interest justifies it. Some states and police departments have codified that requirement.

For example, on April 10, 2021, Maryland passed sweeping new measures incorporating the principle that the measure of force used is proportional to the threat into its statute governing the use of force. Set to become effective July 1, 2022, the statute in relevant parts is set out below:

Md. Code, Pub. Safety § 3-524 [123]

> (c) Each police officer shall sign an affirmative written sanctity of life pledge to respect every human life and act with compassion toward others.
>
> (d)(1) A police officer may not use force against a person unless, under the totality of the circumstances, **the force is necessary and proportional to:**
> (i) prevent an imminent threat of physical injury to a person; or
> (ii) effectuate a legitimate law enforcement objective.
> (2) a police officer shall cease the use of force as soon as:
> (i) the person on whom the force is used:
> 1. is under the police officer's control; or
> 2. no longer poses an imminent threat of physical injury or death to the police officer or to another person; or
> (ii) the police officer determines that force will no longer accomplish a legitimate law enforcement objective.

[120] *Id.*
[121] *Id.*
[122] Obasogie & Newman, *supra* note 93, at 1308 (Rules requiring proportionality in the amount of force used against a civilian appeared in 17% of policies)
[123] Md. Code, Pub. Safety § 3-524

This principled-based approach to the use of force sets guiding parameters on lawful uses of force directly related to a real threat posed by an individual or group of individuals and an offense that has been or is about to be committed. By prohibiting police officers in Maryland from using any type of force unless the force is necessary and proportional to prevent an imminent threat of injury or effect a law enforcement objective, the state legislature has ensured that the sanctity of every human life in Maryland will be safeguarded in situations where force must be used.

C. *Precautions Must be Preplanned to Prevent Loss of Life*

Under the principle of precaution, the enforcement jurisdiction (local, county, state, and federal) is duty-bound to plan policing operations to minimize the risk of policing agencies and their officials having recourse to potentially lethal force.[124] The rationale is to limit the risk of death or serious injury to any member of the public or law enforcement official. Where force or potentially deadly force is used, and the threat is stopped, there is an immediate duty to revert to decisive efforts to preserve life. According to the UNSR report, "measures need to be taken upstream in the operational planning phase to avoid situations where the decision on whether to pull the trigger arises, or to ensure that all the possible steps have been taken to ensure that if that happens, the damage is contained as much as is possible."[125]

The principle of precaution is meant to encourage and require enforcement jurisdictions to approach the use of force in a preventative manner. Intentionally broad, the precaution principle places the onus on police department chiefs, sheriffs, state and federal lawmakers, and state standards and training councils to preplan the tactical and strategic responses that police officers should take to preserve life. Steps law enforcement jurisdictions can take to minimize recourse to potentially lethal force include, but are not limited to: (1) adopting policy statements making it clear that de-escalation is the preferred, tactically sound approach in many critical circumstances; (2) ensuring training academy cultures reflect agency principles; (3) mental health incorporated hiring; (4) adopting independent oversight committees to review all uses of force; and (5) implementing community proximity learning.

Indeed, some states have already concretely incorporated and implemented the principle of precaution regarding police use of force. For example, following the killing of Elijah McClain in 2019, which involved a violent police encounter and medical responders administering ketamine to McClain, Colorado passed legislation to prevent loss of life. Lawmakers introduced a bill intended to prevent similar incidents and increase the possibility of unlawful force being prosecuted.[126] Below is the relevant statute:

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[124] UNODC module series, *supra* note 102, at 1.

[125] UNSR special report, *supra* note 112, at para. 69.

[126] Elise Schmelzer, *Aurora police fire officer who punched, used Taser repeatedly on man lying on floor*, DENVER POST, (Feb. 11, 2021), https://www.denverpost.com/2021/02/11/aurora-police-officer-fired-excessive-force-king-soopers/ (In February 2021, Former Aurora Police Officer Robert Rosen was fired for the excessive use of force on a suspect, as well as failure to turn on his body camera, failure to document why he used the Taser and beat the suspect, and unsatisfactory performance. Aurora Police Chief Wilson cited Rosen's failure to de-escalate the situation, give verbal order before administering force, and repeatedly and unnecessarily using a Taser on the suspect); *see also* Eduardo Medina, *After a Violent Arrest, 2 Police Officers in Colorado Face Charges*, NEW YORK TIMES, (July 30, 2021) https://www.nytimes.com/2021/07/28/us/aurora-police-officers-unarmed-beating.html (In late July 2021, two Aurora police officers were arrested for excessive force. One officer was charged with three

Colo. Rev. Stat. § 18-1-707[127]

(1) Peace officers, in carrying out their duties, shall apply nonviolent means, when possible, before resorting to the use of physical force. A peace officer may use physical force only if nonviolent means would be ineffective in effecting an arrest, preventing an escape, or preventing an imminent threat of serious bodily injury or death to the peace officer or another person.

(2) When physical force is used, a peace officer shall:
(a) Not use deadly physical force to apprehend a person who is suspected of only a minor or nonviolent offense;
(b) Use only a degree of force consistent with the minimization of injury to others;
(c) Ensure that assistance and medical aid are rendered to any injured or affected persons as soon as practicable; and
(d) Ensure that any identified relatives or next of kin of persons who have sustained serious bodily injury or death are notified as soon as practicable.

In the Colorado statute, the principle that reasonable precautions must be preplanned to prevent loss of life directly justifies the requirement for officers to ensure that assistance and medical aid is rendered as soon as reasonably practicable. Requiring officers to render aid to a recipient of force, which exhibits an ethical response to using force, also epitomizes the principle of precaution, and, more significantly, embodies the principle of preserving life as a paramount duty.

A different example of how states have demonstrated a commitment to upholding the principle of precaution can be examined in Texas. In 2021, the Texas legislature passed and enacted SB69, which requires peer intervention for excessive force. Peer officer intervention requirements have become increasingly more common across the country,[128] duty to intervene statutes operationally mitigate the risk of loss of life from uses of force, which directly aligns with the principle of precaution. Effective September 1, 2021, below is the relevant Texas statute:

Texas S.B. No. 69

Art. 2.1387. INTERVENTION REQUIRED FOR EXCESSIVE FORCE
(a) A peace officer has a duty to intervene to stop or prevent another peace officer from using force against a person suspected of committing an offense if:

felonies: attempted first-degree assault, second-degree assault and felony menacing. The accompanying officer faces criminal charges for not intervening during the excessive force incident).

[127] Colo. Rev. Stat. § 18-1-707

[128] Andrew Selsky, *After Death of George Floyd, States Look to Require Cops Who Witness Misconduct to Intervene,* Statesman Journal (April 5, 2021), https://www.statesmanjournal.com/story/news/politics/2021/04/05/after-death-george-floyd-states-look-require-cops-intervene/7098222002/ (Since George Floyd's death, Colorado, Connecticut, Massachusetts, Nevada, New Jersey, and Texas have passed laws requiring police to intervene when they see a fellow officer engaged in misconduct)

> (1) the amount of force exceeds that which is reasonable under the circumstances; and
> (2) the officer knows or should know that the other officer's use of force:
> (A) violates state or federal law;
> (B) puts a person at risk of bodily injury, as that term is defined by Section 1.07, Penal Code, and is not immediately necessary to avoid imminent bodily injury to a peace officer or other person; and
> (C) not required to apprehend the person suspected of committing an offense.
>
> (b) A peace officer who witnesses the use of excessive force by another peace officer shall promptly make a detailed report of the incident and deliver the report to the supervisor of the peace officer making the report.

Accordingly, by requiring peace officers to stop other officers from using force that either violates state law, puts a person at risk of unnecessary bodily injury, or is not required to apprehend the person, Texas lawmakers have made it abundantly clear that taking preventative measures to safeguard life is an essential duty.

Lastly, there is a unique example of how a state has incorporated the essential principle of precaution within laws governing police use of force. On August 12, 2021, the Connecticut State Police Officer Standards and Training Council unanimously approved a new use of force training program required for all peace officers in the state. The training particularly emphasizes moral courage, empathy, and de-escalation efforts to reduce fatal shootings and other violent acts by officers.[129] The program is believed to be the first use of force training program in the country to be mandated across an entire state. More than 8,000 peace officers in the state were required to take the four-hour training program by Dec. 31, 2022.[130] The training specifies when officers can use any kind of force, non-lethal and lethal, under new state laws.[131]

In sum, a principled-based approach to the use of force requires enforcement jurisdictions to proactively strategize and implement operations designed to mitigate any consequences related to the loss of life. To fully ensure peace officers uphold the paramount duty of preserving life, policing authorities must facilitate the enactment of less harmful measures.

D. *The Preservation of Life is a Paramount Duty*

At the core of all peace officer standards, policies, procedures, training, education, behavior, and customs, there must be indoctrination to inculcate the inviolability of human dignity. The prohibition against arbitrary deprivation of life is always non-derogable.

The leading private, for-profit corporation that contracts with hundreds of law enforcement agencies across the United States to write their law enforcement manuals and training modules,

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[129] Dave Collins, *New Police Use-Of-Force Training Focuses on 'Moral Courage'*, (Aug 14, 2021) Bristol Press, https://patch.com/connecticut/across-ct/new-police-use-force-training-focuses-moral-courage

[130] *Id.*

[131] *Id.*

Lexipol LLC, has explicitly agreed with this assertion.[132] Nevertheless, by tending to follow closely to *Graham*, many use of force policies simply restate the language outlined in *Graham*, rather than going beyond the minimum constitutional limits and requiring specific use of force tactics to ensure officers safeguard human life. However, some police departments have gone beyond this standard. For instance, the Berkeley Police Department, a client of Lexipol LLC, modified their use of force policy in relevant parts, as follows:

> In fulfilling this Department's mission to **safeguard the life, dignity, and liberty of officers themselves and all members of the community they are sworn to protect and serve, this policy requires more of our officers than simply not violating the law**. As a result, this policy is more restrictive than the minimum constitutional standard and state law in two important respects. First, it imposes a higher duty upon officers to strive to use a minimal amount of force objectively necessary to safely achieve their legitimate law enforcement objective. And second, this policy imposes a stricter obligation on officers to exert only such force that is objectively proportionate to the circumstances, requiring a consideration of the seriousness of the suspected offense, the availability of de-escalation and other less aggressive techniques, and the risks of harm presented to members of the public and the officers involved.[133]

Rather than adding little more than an interpretation of Fourth Amendment constitutional law and an aspirational instruction to safeguard the sanctity of life, the Berkeley Police Department's use of force policy goes beyond and requires **"more of their officers than simply not violating the law."** Not only does this policy adjustment demonstrate a commitment for police officers to preserve their own lives and the lives of members of the community they serve, but it also elevates the level of professionalism expected from these very police officers.

Municipal police departments are not the only jurisdictions that have committed to upholding the paramount duty of preservation of life, state-level jurisdictions have also done so. For example, no state was arguably under more domestic and international pressure to reform laws governing police use of force than Minnesota. With the murder of George Floyd taking place in Minneapolis, the attention of the world was placed on the Minnesota Legislature, Minneapolis City Council, and Minneapolis Police Department to reform their laws and policies governing police use of force. Minnesota did just that. The new deadly force statute, which became effective March 1, 2021, is as follows:

Minn. Stat. § 609.066 Subd. 1a (1) [134]

A peace officer's use of deadly force shall be "exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life."

Minn. Stat. § 609.066 Subd. 2

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[132] Lexipol, *Police Use of Force*, https://useofforce.lexipol.com/law-enforcement/ ("At Lexipol, we believe that for law enforcement policy to be effective, it must be applicable, practicable and functional, while having a primary focus on the preservation of life.")

[133] City of Berkeley, *Berkeley Police Department: Use Of Force,* https://www.cityofberkeley.info/uploadedFiles/Police_Review_Commission/Commissions/2020/2020-11-18-handout-2.pdf

[134] Minn. Stat. Ann. § 609.066

(a) The use of deadly force by an officer is justified "only if an objectively reasonable officer would believe, based on the totality of the circumstances known to the officer at the time and without the benefit of hindsight, that such force is necessary:

(1) to protect the peace officer or another from death or great bodily harm, provided that the threat:
(i) can be articulated with specificity by the law enforcement officer;
(ii) is reasonably likely to occur absent action by the law enforcement officer; and
(iii) must be addressed through the use of deadly force without unreasonable delay; or

(2) 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 and the officer reasonably believes that the person will cause death or great bodily harm to another person under the threat criteria in clause (1), items (i) to (iii), unless immediately apprehended.

(b) A peace officer shall not use deadly force against a person based on the danger the person poses to self if an objectively reasonable officer would believe, based on the totality of the circumstances known to the officer at the time and without the benefit of hindsight, that the person does not pose a threat of death or great bodily harm to the peace officer or to another…"

Minn. Stat. Ann. § 626.8452 Subd.1a(3)

Less lethal measures must be considered first.

Under the revised Minnesota statute authorizing the use of force, peace officers are required to use deadly force "judiciously" and with "respect for human rights and dignity." Here, the immutable principle of preserving life as a paramount duty is explicitly codified within the very first section of the new statute, accomplishing two essential goals. First, it acknowledges and acts upon the outpouring of demands voiced by community members to pass meaningful reform of peace officer use of force laws that ensure their lives matter and are valued. Furthermore, it requires officers to respect human dignity, which directly admonishes and prohibits conduct that denigrates individuals based on the characteristics of their human identity i.e. race, ethnicity, gender, sexual orientation, citizenship status, etc.

Second, the statute sets the tone for the transformation of policing practices for every officer in the state of Minnesota. By incorporating the principle of preserving life as a paramount duty, the state legislature has made it clear that the law has no tolerance for officers arbitrarily using deadly force and disrespecting human rights and dignity.

II. Proposed Model Standard

IAPR purports that state laws and peace officer use of force policies must incorporate the essential principles of necessity, proportionality, precaution, and the preservation of life. To that end, below is a sample state statute proposing a peace officer use of force standard that satisfies principle-based statutory criteria. The language is inspired, in part, by multiple bills enacted in several states, recommendations from law enforcement agencies, international laws, community activists, academic scholars, and media outlets.

Contrary to the amorphous analysis courts confront when determining whether force was "objectively reasonable" under the *Graham* standard, analyzing whether force was "necessary" through this proposed standard should prove more evident. Therefore, to bring clarity to litigation arising from allegations of excessive force, the below statute includes a "necessary force test" that provides a wide array of factors for judges, lawyers, juries, attorneys, plaintiffs, defendants, and the general public to consider when any type of criminal proceeding commences. By requiring a balancing test, jurists will be able to weigh the importance of multiple factors that ultimately allow greater consideration of multifaceted issues like the alleged excessive use of force by officers.

Peace Officer Use of Force Statute

Section I: Definitions

(1) The following definitions apply:

(a) "Force" is any non-negotiable use of policing authority to influence a person's behavior. Included are low-level force options (authoritative presence, verbal commands, use of restraints) through higher-level force options.

(b) "Deadly force" is any force that is substantially likely to cause serious bodily injury or death to the person against whom it is used.

(c) "De-escalation tactics" are tactics, maneuvers, or tools that reduce the use of force; including, requesting additional officers, tactical repositioning, attempts to calm the subject before the use of physical force, verbal warning of force to be applied; and the deployment of specialized equipment or resources, such as personnel trained in crisis intervention, or mental health professionals.

(d) A threat is "imminent" when an objectively reasonable officer in the same situation would conclude that the person who poses the threat reasonably appears to have the present ability, opportunity, and intent to immediately inflict injury.

(e) "Lawful objective" Those objectives include: (i) protecting against imminent harm to officers or others; (ii) effecting an arrest or detention that the officer reasonably believes is lawful; (iii) preventing an escape of a person from custody; (iv) carrying out a search that the officer reasonably believes is lawful; (v) preventing the person's entry into a secured area; and (vi) preventing the destruction of evidence or property.

(f) "Less lethal force" are tools or tactics with less potential than deadly force to cause serious bodily injury or death.

(g) "Necessary force" is force, that is necessary, given the totality of the circumstances, when there are no reasonable alternative means to effect the officer's lawful objective(s) and avoid the use of force, including the exhaustion of all reasonable less lethal force tactics or techniques intended to reduce the immediacy of the threat, such as de-escalation tactics. An alternative to the use of force may be a reasonable alternative even if it extends the overall duration of the interaction.

(h) "Serious bodily injury" means bodily injury that results in a permanent disfigurement, extreme physical pain, loss or impairment of a bodily function, loss of limb or organ, or a significant risk of death.

(i) "Totality of the circumstances" means all facts known to the officer at the time, including the conduct of the officer and of the subject leading up to the use of force, including deadly force.

Section II: The Preservation of Life is a Paramount Duty

(1) A peace officer's use of force shall be exercised judiciously and with the utmost respect for life and human dignity and a determination for the preservation of every human life.

Section III: Authorized Use of Physical Force by Peace Officers

(1) A peace officer is authorized to use or attempt to use force only when:

(a) it is necessary to accomplish a lawful objective;

(b) the degree of force used or attempted is proportional to the lawful objective; and

(c) both the decision to use force and the degree of force used are objectively reasonable under a totality of the circumstances.

Necessary Force Test

(2) In determining if a peace officer's use or attempted use of force is necessary under a totality of the circumstances, the following factors shall be considered:

(a) the amount of time available to the officer to make a decision;

(b) whether the subject of the use of force (i) possessed or appeared to possess a weapon and (ii) refused to comply with the officer's lawful order to surrender an object believed to be a weapon prior to the officer using force;

(c) whether the officer engaged in de-escalation measures or less lethal force tactics, to reduce the immediacy of the threat, if such measures were feasible;

(d) whether the officer engaged in any actions that substantially increased the likelihood that the use of force would be necessary;

(e) the seriousness of the suspected crime;

(f) the severity of the threat, if any, posed to the officer or others; and

(g) when force is used to effect an arrest, carry out a search or seizure, or prevent the destruction of property, the severity of the suspected offense or property damage at issue, and the degree to which the lawful objective could be achieved at a later date or time

without substantially impairing the government's interest in such prevention, search or seizure, or arrest.

(3) A peace officer shall cease using force as soon as the subject is under the officer's control or no longer poses an imminent threat of death or serious bodily injury to the officer or another person.

(4) A peace officer shall not use force against a person based on the danger that person poses to himself or herself if another officer's evidenced belief is that the person does not pose an imminent threat of death or serious bodily injury to the enforcing officer or another person.

(5) A peace officer shall intervene to prevent or terminate the use of force by another peace officer beyond what is authorized under this section.

(6) Force does not become inevitably necessary solely because the officer engages in any actions that substantially increased the likelihood that the use of force would become necessary.[135]

Section IV: Authorized Use of Deadly Force by Peace Officers

(1) A peace officer is authorized to use or attempt to use deadly force only when it is:

(a) necessary to protect the officer or another from an imminent threat of death or serious bodily injury;

(b) necessary to effect an arrest when:

(i) there is probable cause to believe that the person to be arrested just committed or attempted a forcible felony which involves the infliction or threatened infliction of great bodily harm or is attempting to escape by use of a deadly weapon, or otherwise indicates that he or she will endanger human life or inflict great bodily harm unless arrested without delay; and

(ii) the officer's use of deadly force does not create a significant risk of serious bodily injury to any person other than the person against whom the deadly force is directed.

Necessary Deadly Force Test

(2) In determining if a peace officer's use or attempted use of deadly force is necessary under a totality of the circumstances, the following factors shall be considered:

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[135] S*ee* Policing Project, NYU School of Law, *Comprehensive Use of Force Statute* (Mar. 24, 2021, https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/605e079e43da3703cf0265d2/1616775070741/Comprehensive+Use+of+Force+Statute_3.24.21+for+website.pdf (defining physical force as necessary "when there are no reasonable alternative means to effect a law enforcement objective)

(a) the amount of time available to the law-enforcement officer to make a decision;

(b) whether the subject of the use of deadly force (i) possessed or appeared to possess a deadly weapon and (ii) refused to comply with the law enforcement officer's lawful order to surrender an object believed to be a deadly weapon prior to the law enforcement officer using deadly force;

(c) whether the officer engaged in de-escalation measures or less lethal force tactics, to reduce the immediacy of the threat, if such measures were feasible;

(d) whether the officer engaged in any actions that substantially increased the likelihood that the use of deadly force would be necessary; and

(e) the seriousness of the suspected crime.

(3) Deadly force may not be used:

(a) solely to protect property.

(b) against a person who poses a risk of harm only to themselves.

(4) A peace officer shall not use deadly force against a person based on the danger that person poses to himself or herself if another officer's evidenced belief supports that the person does not pose an imminent threat of death or serious bodily injury to the enforcement officer or to another person.

(5) A peace officer shall intervene to prevent or terminate the use of deadly force by another police officer beyond what is authorized under this section.

(6) Deadly force does not become inevitably necessary solely because the officer engages in any actions that substantially increased the likelihood that the use of force would become necessary.

III. Conclusion

The four guiding principles outlined in this paper offer an ethical and well-reasoned solution to transforming the prevailing legal standard on police use of force while effecting needed changes in policing culture in the United States. The IAPR proposed standard ensures that the paramount duty of preserving all human life is upheld and that the sanctity of human dignity is respected by requiring principled conduct that goes beyond the minimum constitutional limits held by the Supreme Court in *Graham v. Connor*.

Most importantly, the proposed standard accomplishes these goals without jeopardizing the safety of peace officers or the safety of the community. These changes will improve policing accountability and restore public trust, without vilifying officers making difficult decisions in hostile circumstances, and by valuing the sanctity of all lives. In other words, it embodies IAPR's value statement that "Police are essential. So is reform."