

## TWO MODELS FOR AMENDING THE ‘FLEEING FELON’ RULE

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The so-called “fleeing felon” rule instructs courts and law-enforcement personnel about whether, and when, police may use deadly force to stop a suspect who is attempting to escape arrest.<sup>1</sup> At common law, police were allowed to use deadly force when necessary to prevent the escape of a fleeing felon, even if the escapee did not present an imminent threat of violence to the officers or others.<sup>2</sup> By contrast, the right of private citizens to use deadly force against another person is generally restricted to situations involving self-defense—where an innocent person reasonably believes she is facing an imminent threat of death or serious bodily injury and using deadly force is necessary to prevent those outcomes.<sup>3</sup>

In several cases since the 1980s, the Supreme Court has laid down a constitutional standard which significantly departs from the common-law fleeing felon rule and instead applies the Fourth Amendment’s “objective reasonableness” test, assessing the reasonableness of an officer’s actions under the particular circumstances of the case.<sup>4</sup> In his provocative Article *Taming Self-Defense: Using Deadly Force to Prevent Escapes*<sup>5</sup>, Professor Robert Leider argues (1) that the Court has modeled the modern

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1. “Deadly” force, in this context, means “physical force which, under the circumstances in which it is used, is readily capable of causing death or serious physical injury.” *Use of Deadly Force Law and Legal Definition*, USLEGAL (last visited Sept. 29, 2019) <https://definitions.uslegal.com/u/use-of-deadly-force/> [<https://perma.cc/TNN4-4UBR>].

2. See Robert Leider, *Taming Self-Defense: Using Deadly Force to Prevent Escapes*, 70 FLA. L. REV. 971, 972 (2018).

3. See, e.g., *United States v. Peterson*, 483 F.2d 1222, 1229–30 (D.C. Cir. 1973) (naming the elements of the self-defense justification).

4. See, e.g., *Scott v. Harris*, 550 U.S. 372, 383, 386 (2007) (Applying the Fourth Amendment “reasonableness” test to the facts of the case, and holding that “[a] police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death”); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“Because ‘[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,’ . . . 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.” (alteration in original) (citation omitted)); *id.* at 397 (“As in other Fourth Amendment contexts . . . the ‘reasonableness’ inquiry . . . is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”); *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (“To determine the constitutionality of a seizure, ‘[w]e must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.’” (alteration in original) (citation omitted)).

5. 70 FLA. L. REV. 971 (2018).

fleeing felon rule on the law of self-defense;<sup>6</sup> (2) that in departing from the common-law rule, the Court has introduced a worrisome degree of vagueness into the constitutional standard governing police use of force against fleeing felons, while also ejecting traditional elements which limited the reach of both the common-law fleeing felon rule and the right of self-defense;<sup>7</sup> and (3) that the self-defense paradigm for fleeing felon cases, embraced by the Court in the cases of *Tennessee v. Garner*<sup>8</sup> and *Scott v. Harris*,<sup>9</sup> should be replaced with a different justification based on the state's authority to use deadly force in order to ensure compliance with the law.<sup>10</sup>

First, Professor Leider argues that in assessing an officer's "reasonableness" under the Fourth Amendment balancing test, the Court has over-relied on the law of self-defense and that "[s]tretching self-defense doctrine to justify the fleeing felon rule undermines critical limitations on private self-defense and has not produced an effective set of rules to limit police violence."<sup>11</sup> He sees a broader problem here, not only in the Court's jurisprudence but also in scholarly discussions of deadly force—that "the concept of self-defense is swallowing other possible justifications for the government's authority to enforce the rule of law."<sup>12</sup> Professor Leider concludes that in order to fix the modern fleeing felon rule, courts and scholars must look not to the law of self-defense but to the state's authority to compel obedience to law.<sup>13</sup>

These are broad claims which might be more easily assessed using the Supreme Court's own framework from *Garner*. There the Court held unconstitutional, under the Fourth Amendment reasonableness rubric, the applicable Tennessee statute insofar as it allowed police to use deadly force against an unarmed, fleeing suspect even when (as in the case) the officer does not believe the suspect to be dangerous.<sup>14</sup>

But the *Garner* Court did not hold that officers may never constitutionally use deadly force against suspects who are attempting to

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6. *Id.* at 971. ("To justify [the modern fleeing felon] rule, the Supreme Court has relied on self-defense and defense of others. This Article argues against the self-defense justification.").

7. *See id.* at 982–85.

8. 471 U.S. 1 (1985).

9. 550 U.S. 372 (2007).

10. Leider, *supra* note 2, at 974 ("[The Article] considers an alternative possible justification for the fleeing felon rule grounded in the state's right to use force to protect its political authority.").

11. *Id.* at 971.

12. *Id.* at 1008.

13. *Id.* at 1011 ("Thus, rather than looking to self-defense, the fleeing felon and prison escape rules may have their justification in the idea that legitimate political authority may use deadly force to compel obedience to the law and the legal process.").

14. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of force against such fleeing suspects.").

escape. Instead, it clarified that:

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape . . . .<sup>15</sup>

Parsing the Court's language helps to tease out a couple of complexities in Professor Leider's argument. The first part of the passage undoubtedly invokes self-defense and defense of others, holding that officers may use deadly force when they have "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others," and then again affirming the right to use deadly force "if the suspect threatens the officer with a weapon."<sup>16</sup> This language envisions cases (unlike *Garner*) in which police officers chase a fleeing suspect, who they believe poses a threat of serious harm to the officers or others, or are confronted during the chase by a suspect who threatens them with a weapon. Such things do happen, of course—the 2014 shooting of Michael Brown in Ferguson, Missouri and the 2018 shooting of Stephon Clark in Sacramento, California, are two recent cases where police officers, while chasing a suspect, came to believe that the suspect posed a deadly threat to them, shot the suspect dead, and were later determined to have acted in self-defense.<sup>17</sup> As Professor Leider points out, the Court in *Garner* did not explicitly import into its reasonableness calculation such elements of the self-defense justification as the imminence or necessity elements. Still, self-defense is clearly what the Court had in mind here, and in such cases the self-defense model certainly offers a natural place from which to assess reasonableness.

But the latter part of the above excerpt from *Garner* has quite a different valence. It appears to affirm the reasonableness of using deadly force when the suspect may *not* have threatened to do physical harm to the officer or unknown others, but when "there is probable cause to

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15. *Id.*

16. *Id.*

17. See, e.g., Eric Eckholm & Matt Apuzzo, *Darren Wilson Is Cleared of Rights Violations in Ferguson Shooting*, N.Y. TIMES (Mar. 4, 2015), <https://www.nytimes.com/2015/03/05/us/darren-wilson-is-cleared-of-rights-violations-in-ferguson-shooting.html> [<https://perma.cc/C57F-2PMM>]; Chris Hagan et al., *No Criminal Charges for Sacramento Police Officers Who Fatally Shot Stephon Clark*, NAT'L PUB. RADIO (March 2, 2019), <https://www.npr.org/2019/03/02/699719214/officers-in-stephon-clark-shooting-wont-be-charged-says-sacramento-d-a> [<https://perma.cc/2NGG-J3M6>].

believe that [the suspect] *has committed* a crime involving the infliction or threatened infliction of serious physical harm.”<sup>18</sup> This seems to reference the paradigmatic “fleeing felon” case, in which a suspect commits a violent crime, then flees the scene pursued by a police officer, who ultimately shoots him dead *solely to prevent the suspect’s escape*.<sup>19</sup> May a pursuing police officer use deadly force against a person the officer believes has committed a forcible felony, simply to prevent the escape? The answer to that question constitutes the “fleeing felon” rule and seems to distinguish it from the clear cases of self-defense referenced in the first part of the passage. The Court in *Garner* appears to say that police officers may constitutionally use deadly force to prevent escape when they reasonably believe the fleeing suspect has committed a forcible felony, but has not necessarily threatened them or others with future violent harm.

Is this portion of the Court’s holding grounded in the right of *self-defense*? Not so clear.

It is certainly possible that the *Garner* Court intended this clause—allowing police use of deadly force, solely to prevent escape, in cases where the officer reasonably believes the suspect has committed a forcible felony—as merely an example of the general principle it announced just before in *Scott*, that the use of deadly force is constitutionally permissible in cases of self-defense or defense of others. In his opinion for the majority in *Scott*, Justice Scalia suggests as much, writing in a footnote that

[t]he necessity described in *Garner* was, in fact, the need to prevent ‘serious physical harm, either to the officer or to others.’ By way of example only, *Garner* hypothesized that deadly force may be used ‘if necessary to prevent escape’ when the suspect is known to have ‘committed a crime involving the infliction or threatened infliction of serious physical harm,’ so that his mere being at large poses an inherent danger to society.<sup>20</sup>

If Justice Scalia was correct in characterizing *Garner*’s holding in that way, the Court in *Garner* may have been using the suspect’s supposed

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18. *Garner*, 471 U.S. at 11 (1985) (emphasis added).

19. In the Stephon Clark case, the officers used deadly force, killing Clark, under the mistaken belief that Clark was carrying a gun. See Hagan, *supra* note 17. Under longstanding self-defense doctrine, however, a person claiming the defense does not have to prove that their belief in the necessity to use deadly force was *correct*; only that it was *reasonable*. See, e.g., *United States v. Peterson*, 483 F.2d 1222, 1230 (D.C. Cir. 1973) (“These beliefs must not only have been honestly entertained, but also objectively reasonable in light of the surrounding circumstances.”).

20. *Scott v. Harris*, 550 U.S. 372, 382 n.9 (2007) (internal citations omitted). Professor Leider suggests that this footnote supports the idea that the Court in *Scott* “understood *Garner* to have announced a kind of self-defense rule.” Leider, *supra* note 2, at 984.

commission of a forcible felony as a proxy for his level of dangerousness or threat to others, as many modern-day self-defense statutes do.<sup>21</sup>

On the other hand, the language in Justice Scalia's footnote seems at least equally compatible with the common-law "community defense" rationale as Professor Leider describes it.<sup>22</sup> Under that rubric, police use of deadly force against an escaping felon was sometimes justified as necessary for the protection of society on a "collective defense justification," which "differed from individual self-defense or defense of others in that the justification relied on the felon's intangible threat to the community rather than the felon's threat to particular individuals."<sup>23</sup> I was left wondering how, if at all, the Court's reasoning in *Scott* supports Professor Leider's claim that the Court has modeled the fleeing felon rule specifically—that is, the rule that allows police in some circumstances to use deadly force solely to prevent a suspected felon's escape—on the law of self-defense.

The Article makes a strong case as to Professor Leider's second argument, that the Court's Fourth Amendment "reasonableness" analysis offers scant guidance to legislators, courts, and police departments as they assess the limits of the fleeing felon rule. As Professor Leider describes, the common-law rule, though quite broad in some ways, also imposed clear limits on police use of deadly force to prevent a suspect's escape.<sup>24</sup> For example, the rule generally did not allow the use of deadly force against escaping misdemeanants, and it required that the use of deadly force against a fleeing felon be justified by a subsequent affirmative finding that the person had indeed committed a "felony in fact."<sup>25</sup> That is, a police officer's reasonable, but mistaken, belief that the fleeing

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21. See, e.g., *People v. Goetz*, 68 N.Y.2d 96, 106 (1986) (citing New York state statute which allows a person to use "deadly physical force", *inter alia*, when the person "reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcibly sodomy or robbery").

22. Leider, *supra* note 2, at 978. Professor Leider seems to acknowledge this at one point, arguing that *Garner* is "conflicted between two theories"—that of self-defense and of the common-law fleeing felon rule. *Id.* at 982–83. But Professor Leider then goes on to say that in Justice Scalia's footnote in *Scott*, referenced above in footnote 19, the Court "clarified *Garner's* theoretical justification for police use of force against escaping criminals, namely that such force is defensive." *Id.* at 983. The footnote in question seems a slender reed on which to rest the proposition that *Garner* was premised on self-defense. Note, for example, that Justice Scalia's characterization of *Garner*, in footnote 9 of *Scott*, ends by saying that under *Garner*, deadly force could be used to prevent escape when the suspect is believed to have committed a felony and "so his mere being at large poses an inherent danger to society." *Scott*, 550 U.S. at 382 n.9. (emphasis added). Using Professor Leider's definitions of the relevant terms, that sounds more like the common-law "community defense" rationale than the justification of self-defense. Clarification would be helpful here.

23. Leider, *supra* note 2, at 978.

24. See *id.* at 976

25. See, e.g., *id.*

suspect had committed a felony had the effect of denying the officer a “fleeing felon” defense to a criminal charge arising from the officer’s use of deadly force.<sup>26</sup> As Professor Leider notes, the “felony in fact” doctrine thus had protective effects from the viewpoint of criminal suspects: “By requiring a felony in fact, courts made reliance on the justification precarious for those who were uncertain whether the suspect actually committed a crime and, if he did commit a crime, whether the crime constituted a felony.”<sup>27</sup>

The Supreme Court did not import the felony in fact doctrine into its analysis of the modern cases. In addition, the Court’s modern take on the fleeing felon rule, as represented in *Garner* and *Scott*, has not embraced key elements which limit the reach of self-defense, such as the rule that use of deadly force is justified only when the party claiming the defense was faced with an “imminent threat” and when the claimant reasonably believed that deadly force was necessary to prevent death or serious bodily injury.<sup>28</sup> Finally, as to vagueness, Professor Leider argues that the Court’s holding in *Scott*, and to a lesser extent its holding in *Garner*, replaced the clear lines drawn by the common law rule with a fact-specific reasonableness standard under which “[p]olice lack any way to know *ex ante* whether their use of force is lawful, unless courts happen to have adjudicated a case involving a similar fact pattern.”<sup>29</sup> In an era of heightened attention to excessive use of force by police, these issues of vagueness and lack of boundaries are, and should be, important concerns.

Where does this leave us? How, in the absence of more specific constitutional guidance, should we think about reforming the modern fleeing felon rule? For those who believe that police use of deadly force against escaping suspects should be more restricted than it has been in the past, one emerging solution *embraces* the self-defense model by adopting its limits as well as its permissions.

For example, in California (where Stephon Clark was killed)<sup>30</sup>, state legislators recently proposed a police use-of-force bill that closely parallels the fleeing felon provision in *Garner* but adds limits familiar to the law of self-defense.<sup>31</sup> In relevant part, AB 392 provides that the killing of a suspect by police is justifiable “when the officer reasonably believes,

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26. *Id.* at 976–77 (Professor Leider notes that “[t]his [felony in fact] requirement differs from ordinary self-defense rules, which permit a person to act on reasonable belief even if that belief is mistaken.”) t

27. *Id.* at 976–77.

28. *See id.* at 982.

29. *Id.* at 985.

30. *See* Christine Hauser, *Sacramento Man Fatally Shot by the Police in His Backyard*, N.Y. TIMES (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/us/stephon-clark-police-shooting.html> [<https://perma.cc/NP6N-PYX8>].

31. *See, e.g.*, 2019 Cal. Legis. Serv. ch. 170 (AB 392) (West) (amending Cal. Penal Code §§ 196, 835a).

based on the totality of the circumstances, that such force is necessary for either of the following reasons:<sup>32</sup> First, “[t]o defend against an imminent threat of death or serious bodily injury to the officer or to another person.”<sup>33</sup> Or second, “[t]o 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.”<sup>34</sup> Additionally, the second scenario also requires that “[w]here feasible, a peace officer shall . . . make reasonable efforts to identify themselves . . . [and] warn that deadly force may be used” unless the suspect unless stops trying to escape.<sup>35</sup> The bill further guides the determination of whether deadly force is necessary by stating that “officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques *if reasonably safe and feasible to an objectively reasonable officer.*”<sup>36</sup>

Within a framework which generally mirrors the language and the Fourth Amendment “reasonableness” approach of *Garner*, AB-392 adds restrictions which invoke the “imminence” and “necessity” elements of self-defense.<sup>37</sup> Other states and some individual police departments have moved in the same direction, importing restrictions which make clear that police use of deadly force against fleeing suspects can be justified only when necessary—for example, when the police have first attempted to de-escalate the confrontation and, if feasible, have first tried non-lethal methods of apprehending the suspect.<sup>38</sup> This type of solution could

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* (emphasis added). See also Anita Chabria, *Why California’s proposed law on deadly police force isn’t as tough as it seems*, L.A. TIMES (Apr. 4, 2019), <https://www.latimes.com/politics/la-me-california-use-of-force-police-shootings-stephon-clark-20190404-story.html> [<https://perma.cc/P4WP-D6RU>] (discussing the implications of the new bill).

36. 2019 Cal. Legis. Serv. ch. 170 (AB 392) (West) (emphasis added).

37. See *id.*; see also, e.g., *United States v. Peterson*, 483 F.2d 1222, 1229–30 (1986) (“There must have been a threat, actual or apparent, of the use of deadly force against the defender. The threat must have been unlawful and immediate. The defender must have believed that he was in imminent peril of death or serious bodily harm, and that his response was necessary to save himself therefrom.”).

38. See, e.g., James Drew, *Deal Reached on Police Deadly Force Law After Sides Iron Out ‘Good Faith’ Standard*, TACOMA NEWS TRIB. (Jan. 14, 2019), <https://www.thenewstribune.com/news/politics-government/article224537100.html> [<https://perma.cc/G9KK-VGJT>] (discussing deadly force legislation in Washington state); Tatyana Hopkins, *GW Law Professor Crafts Police Use of Force Legislation*, GW TODAY (Mar. 20, 2019), <https://gwtoday.gwu.edu/gw-law-professor-crafts-police-use-force-legislation> [<https://perma.cc/J3EA-6SVE>] (discussing police use of force legislation in Maryland); Hannah Wiley, *Time, Money, and a ‘Culture Shift:’ How Three California Police Departments Overhauled Their Policies*, SACRAMENTO BEE (Mar. 25, 2019)

strengthen the analogy of the fleeing felon rule to the law of self-defense.

Professor Leider recommends a very different approach. Rather than looking to self-defense law to justify the fleeing felon rule, he suggests justifying the rule under the state's general authority to compel compliance with the law.<sup>39</sup> Critiquing the lack of modern scholarship examining the question of "when governments may permissibly authorize deadly force apart from self-defense,"<sup>40</sup> he argues:

Fleeing felons and escaped convicts have committed a double breach of the community's laws. They have committed the underlying crime, and then renounced their obligation to submit to the legal system. The community, in turn, authorizes deadly force to protect the community's way of life by enforcing minimal obligations to submit to the rule of law. Thus, rather than looking to self-defense, the fleeing felon and prison escape rules may have their justification in the idea that legitimate political authority may use deadly force to compel obedience to the law and the legal process.<sup>41</sup>

Professor Leider further suggests that the *Scott* court, in the above-referenced footnote,<sup>42</sup> may have been wrong to define the relevant meaning of "necessity" as "the need to protect human life against the threat posed by the felon,"<sup>43</sup> a definition which (he argues) evokes the right of self-defense. Instead, Professor Leider writes, "the relevant metric of necessity . . . [should have been] the need to protect the legal system against those trying to escape [it]."<sup>44</sup>

It is difficult to know what to make of this proposal. The notion that the legal system has some sort of right to protect itself by using deadly force against its citizens is simultaneously mundane and terrifying. If "the need to protect the legal system against those trying to escape it" simply restates the law's authority to punish defiance of its prohibitions, this is (to put it mildly) nothing new—and indeed raises the question of how, exactly, Professor Leider's proposed focus on such protections would move us forward from the *status quo*. On this interpretation, Professor Leider's suggested approach does not seem to advance the central argument of the article—that "government has the normative authority to permit deadly force for reasons beyond self-defense and defense of

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<https://www.sacbee.com/news/politics-government/capitol-alert/article227278314.html> [<https://perma.cc/F3CG-8XG2>] (discussing police departments in Los Angeles, San Francisco, and Stockton making changes to their deadly force policies).

39. See Leider, *supra* note 2, at 974.

40. *Id.* at 1008.

41. *Id.* at 1010–11.

42. See *supra*, note 20 and accompanying text.

43. Leider, *supra* note 2, at 1011.

44. *Id.* at 1003.

others,”<sup>45</sup> and that such authority has been under-theorized and under-discussed in the relevant scholarly literatures.<sup>46</sup>

But Professor Leider suggests a different meaning, one that relates more closely to longstanding political-theory debates over the nature and legitimacy of “just war” and related issues which explore the state’s authority to “defend a common way of life.”<sup>47</sup> He writes:

[D]efending the common way of life may also justify state coercion *within* civil society. Having and maintaining legal institutions are integral components of our ability to exercise our rights free from the interference of others. The maintenance of legal institutions requires that the state have power to overcome resistance to the laws.<sup>48</sup>

Professor Leider draws the inference that the state may have a previously unacknowledged right, in domestic cases involving citizens, to use “deadly force against fleeing criminals . . . to force them” into compliance with the law.<sup>49</sup> To the extent that such a rule envisions the state as an entity with the right to kill citizens before they have been afforded the legal guarantees which authorize just punishment—arrest, indictment, conviction, sentencing—it is hard to see what the beneficial result of such a rule would be. Although it is certainly true that a fleeing suspect who is suspected of committing a forcible felony violates the law simply by escaping, the idea that the escape alone gives law enforcement the right—in service of defending the law and the community’s way of life—to kill the person, seems vulnerable to one of the same flaws that Professor Leider identified in analyzing the faults of the modern fleeing felon rule: A lack of proportionality between the offense and the sanction.<sup>50</sup>

Indeed, perhaps in recognition of the breadth, and potential for abuse, of such state authority, Professor Leider ultimately suggests that the same limitations—necessity, imminence, and proportionality—which confine the right of self-defense, could be useful in cabining the state’s authority to compel compliance with law by using deadly force against fleeing felons.<sup>51</sup> What he does not do, at least in this Article, is conduct a detailed comparison of his proposal with proposals such as AB-392, which appear to seek reform of the fleeing felon rule by embracing, rather than

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45. *Id.*

46. *See id.* at 1007–09.

47. *Id.* at 1009.

48. *Id.* at 1010.

49. *Id.*

50. *See id.* at 993 (“Examining the legitimacy of the use of force to prevent [prison] escapes from prisons presents similar questions as the fleeing felon rule. Although nearly all convicted inmates are sentenced to lose their liberty, they have not been sentenced to lose their lives.”).

51. *See id.* at 1011–12.

rejecting, the model of self-defense. Such a comparison would be enormously helpful, both to a clearer understanding of the implications of Professor Leider's proposal and to a rational calculation of its relative costs and benefits. Perhaps Professor Leider plans to do such a comparison in future work. In its absence, the self-defense model for amending the fleeing felon rule—perhaps by importing traditional restraints such as imminence and necessity—seems to offer the historical context, intuitive boundaries, and practical accessibility that can usefully guide reform-minded courts, legislatures, and law enforcement.