Florida Law Review

Volume 70 | Issue 5 Article 2

October 2019

Taming Self-Defense: Using Deadly Force to Prevent Escapes

Robert Leider

TAMING SELF-DEFENSE: USING DEADLY FORCE TO PREVENT ESCAPES

Robert Leider[*]

Abstract

The modern fleeing felon rule permits police officers to use deadly force when necessary to prevent the escape of a person who has committed a violent felony. To justify this rule, the Supreme Court has relied on self-defense and defense of others. This Article argues against the self-defense justification. Fleeing felons—even those suspected of violent crimes—are not imminent threats to others solely by virtue of their flight. Stretching 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.

This Article further argues that these difficulties with the modern fleeing felon rule reflect a wider theoretical problem. To cabin excessive police violence, recent scholarship has sought to incorporate limits from self-defense doctrine. This Article argues for a different theoretical approach that examines when states may authorize force against those who resist the most basic compliance with the rule of law. This account recognizes that a state's right to use force does not derive from individual self-defense, and is not coextensive with or analogous to the limitations on individual self-defense.

[*] Assistant Professor of Law, Antonin Scalia Law School, George Mason University. My sincere thanks to Ian Ayres, Will Baude, Samuel L. Bray, Mihailis Diamantis, James Foreman, Orin Kerr, Gregory Klass, Joshua Kleinfeld, Nathan Oman, Lee Otis, Jeremy A. Rabkin, Gregory Shill, Asher Steinberg, Jennifer Weinberg, Robin West, James Whitman, the Georgetown fellows seminar, and the participants of workshops at the Antonin Scalia Law School and Maurice A. Dean School of Law. Also, a special thanks to the Georgetown Law Library for research support and to the editors of the *Florida Law Review*, including Danielle Scheer, Zoe Stein, Katharine Stewart, Kelly Milliron, and Lisa Caldwell.

INTRODUCTION

At common law, government officials and private persons were authorized to use deadly force if necessary to prevent the escape of a suspect who had committed a felony.[1] This is known as the "fleeing felon" rule. The rule rested primarily on two justifications. First, the punishment for a felony was generally death, so the common law viewed felons as having forfeited their lives. Second, some authorities justified the rule as necessary for the defense of the community against dangerous criminals.

In *Tennessee v. Garner*,[2] in response to a constitutional challenge, the Supreme Court modified both the common law rule and its rationale.[3] In language that reads like that used to define the scope of permissible individual self-defense, the Court permitted police officers to use deadly force to effect an arrest only where the fleeing person constitutes a danger to the officers or to others.[4] But within this class, the Court included anyone for whom law enforcement had probable cause to believe had committed a forcible felony. This goes well beyond traditional self-defense, which allows an individual to use only proportionate force to prevent an imminent danger to the individual or others.

1. Davis v. Hellwig, 122 A.2d 497, 499 (N.J. 1956).
2. 471 U.S. 1 (1985).
3. *Id.* at 18–19.
4. *Id.*

This Article argues that the modern fleeing felon rule is both vague and conceptually confused in a way that gives rise to practical and theoretical problems. These range from not laying out clear principles from which to derive useful limits on a police officer's use of force to undermining well-established and useful limits on individual self-defense. The Article further argues that the confusion at the heart of the modern rule stems from a broader trend among legal theorists of both viewing self-defense as the paradigm for defining permissible force and analogizing the circumstances in which the state may legitimately use force to those in which the law authorizes private self-defense.

In fact, however, this analogy is fundamentally flawed. In *Political Writings*, Max Weber claimed that a state "lays claim the *monopoly of legitimate physical violence* within a certain territory."[5] This monopoly of force is the authority of the state to exercise coercive control over individuals.[6] The right of self-defense, which allows private individuals to use force against aggressors in emergency circumstances, is a narrow exception to this monopoly. Therefore, an examination of the rules governing individual self-defense is a poor place to analogize from in seeking to define appropriate limits on the state's use of force. To the contrary, analogizing from individual self-defense actively harms the imposition of limitations for both public and private violence.

Instead, this Article proposes that to devise an appropriate and workable modern fleeing felon rule, courts and theorists must look elsewhere. It suggests that the starting point for this inquiry should be the duty of people to establish and maintain institutions of justice, and the state's concomitant (but not unbounded) right to use force to enforce basic compliance with the rule of law. Finally, it argues that, more generally, theorists and the courts must come to grips with the need to look outside individual self-defense theory to develop a more comprehensive understanding of the permissible use of force by the state.

There is a considerable body of literature criticizing *Garner* and the modern fleeing felon jurisprudence. But this literature has not focused on this problem. It has paid little attention to whether and when a state may authorize violence beyond that necessary for self-defense. Most literature on police violence, including the fleeing felon rule, argues for narrowing the circumstances in which police may use force, generally relying upon the limitations of necessity, imminence, and proportionality from self-defense law.[7] And although much recent scholarship has evaluated the right of self-defense, that literature generally does not evaluate when, if

5. MAX WEBER, POLITICAL WRITINGS 310–11 (Peter Lassman & Ronald Speirs, eds., Cambridge Univ. Press 1994).

6. *See* Dieter Grimm, *The State Monopoly of Force*, *in* INTERNATIONAL HANDBOOK OF VIOLENCE RESEARCH 1043, 1044 (Wilhelm Heitmeyer & John Hagan, eds., 2003).

7. *See infra* note 31.

at all, governments may authorize force beyond that necessary in self-defense.[8]

This Article has four parts. Part I closely examines the common law doctrine on the use of force against fleeing felons and escaping prisoners and the modifications to that doctrine made by contemporary Supreme Court precedent. Although the Court has sought to narrow the fleeing felon rule, this Part argues that contemporary Supreme Court precedent has actually expanded permissible law enforcement violence well beyond common law limits. In the process, the Supreme Court has left the doctrine without a sound justification. The common law permitted deadly force against escaping felons primarily because felons were deemed to have forfeited their lives. The Court, however, rejected the forfeiture theory and has seemingly relied, instead, on the dangerousness of certain felons as a class. Conceptualized this way, the fleeing felon rule is an instantiation of self-defense and defense of others. Part I also examines a closely related problem: the rules governing the use of force against fleeing prisoners. Because of the Model Penal Code's influence, many states widely permit deadly force to prevent pretrial detainees and convicted prisoners from escaping. The Supreme Court has said little about the justification for such laws.

Part II argues that the present self-defense justification for the use of deadly force against escapees is indefensible. Among the key requirements of self-defense is that defensive force be necessary to protect against an imminent threat. Self-defense doctrine does not recognize the legitimacy of preventive force—that is, force used to protect against an inchoate future threat. And neither courts nor commentators have explained why fleeing criminals—including those who committed forcible felonies—are an imminent threat to others simply by virtue of their escape.

Part III considers an alternative possible justification for the fleeing felon rule grounded in the state's right to use force to protect its political authority. An important component of political authority is to conditionally threaten, and if necessary use, force to ensure compliance with the laws. The justification for the fleeing felon rule should look to the fleeing criminal's stubborn refusal to submit to the rule of law. This Part concludes by explaining why political theory partially defines the scope of criminal law justifications. While the state has the responsibility to enforce the law, this responsibility is not unbounded. It is rightfully subject to various prudential considerations in its obligation to protect others from those who resist the most basic compliance with the rule of law.

8. *See, e.g.*, Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871, 884 (1976); Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999, 1004 (2005); *infra* note 155.

I. THE POLICE OFFICER'S LIMITED LICENSE TO KILL

Given the recent public scrutiny of police use of force,[9] it may be surprising that federal and state laws still authorize law enforcement to use deadly force when that force is unnecessary to protect the officers or others from an imminent risk of death or serious bodily injury. Yet it does. When a law enforcement officer has probable cause to believe a suspect has committed a violent felony, the officer is authorized to use deadly force if necessary to effect an arrest. This is known as the "fleeing felon" rule. Similarly, corrections officers have broad power to use deadly force to prevent inmates from escaping, which this Article calls the "prison escape" rule.

This Part discusses both the traditional and the modern doctrinal underpinnings and explanations that have been given for the fleeing felon and prison escape rules. The common law provided two justifications for the "fleeing felon" rule: first, that felons, by virtue of committing violent crimes, had forfeited their lives; and second, that felons were too dangerous to be allowed to evade capture. Recent Supreme Court decisions have largely rejected these reasons. Instead, the Court has reconceptualized the rule around self-defense law, looking to the threat that a fleeing felon poses to discrete individuals. The last section examines the prison escape rule, which remains undertheorized.

A. *The Common Law Rules and Their Justifications*

The common law permitted deadly force to effect an arrest in two circumstances: in self-defense when an offender actively resisted an arrest, and to prevent an escape of a felon.[10] This paper will examine only the latter—that is, the authority of a person to use deadly force to prevent an escape when the offender does not violently resist.

By the time the Supreme Court evaluated the fleeing felon rule's constitutionality in 1985,[11] common law authorities mostly agreed on the legal requirements before a person could use force against a fleeing

9. *See, e.g.*, DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_ report_on_shooting_of_michael_brown_1.pdf; TIMOTHY J. MCGINTY, CUYAHOGA COUNTY PROSECUTOR'S REPORT ON THE NOVEMBER 22, 2014 SHOOTING DEATH OF TAMIR RICE (2015), http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/ Rice%20Case%20Report%20FINAL%20FINAL%2012-28a.pdf; Barry Paddock, *Homicide: Medical Examiner Says NYPD Chokehold Killed Staten Island Dad Eric Garner*, N.Y. DAILY NEWS (Aug. 2, 2014), http://www.nydailynews.com/new-york/nyc-crime/eric-garner-death-ruled-homicide-medical-examiner-article-1.1888808.

10. *See* Tennessee v. Garner, 471 U.S. 1, 12 (1985). *See generally* Karl G. Pearson, *The Right to Kill in Making Arrests*, 28 MICH. L. REV. 957, 970 (1930) (describing this confusion nearly a century ago).

11. *Garner*, 471 U.S. at 3.

felon.[12] In general, courts prohibited an officer from using deadly force unless the force was "necessary" to effect an arrest; an officer could not use deadly force if he could accomplish the arrest by other means.[13] And deadly force could not be used to effect an arrest for a misdemeanant in flight. But as the definition of felony expanded, some courts restricted the fleeing felon rule to cases involving forcible and atrocious felonies.[14]

Although the common law fleeing felon rule may have broadened when the number of felonies increased, it also had an important limitation. To invoke it, a person had to show that the suspect had committed a felony in fact.[15] This requirement differs from ordinary self-defense rules, which permit a person to act on reasonable belief even if that belief is mistaken.[16] By requiring a felony in fact, courts made

12. JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 577 (2d ed. 1859); Pearson, *supra* note 10, at 964–65.

13. Stinnet v. Virginia, 55 F.2d 644, 647 (4th Cir. 1932); *see also* Green v. State, 121 S.W. 727, 728 (Ark. 1909) ("A felon's flight does not justify his pursuer in killing him, unless that is necessary to prevent escape. Reasonable care should be exercised by one placed in such a situation, either as an officer or a private citizen, to prevent the escape of a felon without doing personal violence; and it is only where killing is necessary to prevent the escape of the felon that the slayer is held in law to be justified."); State v. Dierberger, 10 S.W. 168, 170 (Mo. 1888) ("As a general principle, officers of the law, when their authority to arrest or imprison is resisted, will be justified in opposing force to force, even if death would be the consequence. Yet they ought not to come to extremities upon every slight provocation, without a reasonable necessity. If they kill where no resistance is made, it will be murder, and the same rule will exist if they should kill a party after the resistance is over, and the necessity has ceased, provided that sufficient time has elapsed for the blood to cool."); Lamma v. State, 64 N.W. 956, 957 (Neb. 1895) ("[Deputy sheriff] should have exhausted every resource at his command to prevent the escape before the taking of human life."); BISHOP, *supra* note 12, § 577 (discussing when a homicide is justifiable in cases of pursuing a felon).

14. Commonwealth v. Chermansky, 242 A.2d 237, 240 (Pa. 1968) ("Statutory expansion of the class of felonies has made the common law rule manifestly inadequate for modern law. Hence, the need for a change or limitation in the rule is indicated. We therefore hold that from this date forward the use of deadly force by a private person in order to prevent the escape of one who has committed a felony or has joined or assisted in the commission of a felony is justified only if the felony committed is treason, murder, voluntary manslaughter, mayhem, arson, robbery, common law rape, common law burglary, kidnapping, assault with intent to murder, rape or rob, or a felony which normally causes or threatens death or great bodily harm." (footnote omitted)); Commonwealth v. Klein, 363 N.E.2d 1313, 1318 (Mass. 1977) (containing a similar holding to *Chermansky*).

15. *See* Petrie v. Cartright, 70 S.W. 297, 299 (Ky. 1902) ("If he does this, he does so at his peril, and is liable if it turns out that he is mistaken. He may lawfully arrest upon a suspicion of felony, but he is only warranted in using such force in making the arrest as is allowable in other cases not felonious, unless the offense was in fact a felony."); Wiley v. State, 170 P. 869, 873 (Ariz. 1918); Davis v. Hellwig, 122 A.2d 497, 499 (N.J. 1956); *Chermansky*, 242 A.2d at 240 ("If the private citizen acts on suspicion that such a felony has been committed, he acts at his own peril. For the homicide to be justifiable, it must be established that his suspicion was correct.").

16. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 125 (5th ed. 1984); *infra* note 98 and accompanying text. The philosophical literature is divided on whether a person who acts on a reasonable but mistaken belief is justified or excused. *See generally* Kimberly Kessler

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.[17]

The common law fleeing felon rule also applied pretrial and post-conviction to the prison context. "[A]n officer having custody of a person charged with felony may take his life, if it becomes absolutely necessary to do so to prevent his escape; but he may not do this if he be charged simply with a misdemeanor . . . ."[18] Or as the Arkansas Supreme Court put it:

> We can see no principle of reason or justice on which such a distinction can rest. And we therefore hold that the force or violence which an officer may lawfully use to prevent the escape of a person arrested for a misdemeanor is no greater than such as might have been rightfully employed to effect his arrest.[19]

In rigidly distinguishing felons from misdemeanants, common law sources offered two principal justifications for the rule. First, the common law viewed felons as having forfeited their lives.[20] Originally, the common law recognized a small number of felonies.[21] Moreover, these few crimes were considered so serious that they resulted in the death penalty and a complete forfeiture of land and possessions.[22] As the number of felonies expanded, nearly all felonies continued to be punished with death.[23] Individuals who fled from a felony charge could be outlawed, thereby making it lawful for any member of the community to kill them.[24]

Ferzan, *Justifying Self-Defense*, 24 LAW & PHIL. 711, 712 (2005) (explaining the distinction between subjective and objective theories).

17. Bishop maintained that the criminal law recognized a limited exception if the misdemeanor was a dangerous wounding because of a "presumption that the offence may turn out to be a felony." BISHOP, *supra* note 12, § 578, at 373–74.

18. United States v. Clark, 31 F. 710, 713 (C.C.E.D. Mich. 1887).

19. Thomas v. Kinkead, 18 S.W. 854, 856 (Ark. 1892).

20. *See* 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 263 (2d ed. 1898).

21. *Id.* at 264. Pollock and Maitland identify nine felonies: homicide, mayhem, wounding, false imprisonment, arson, rape, robbery, burglary, and larceny. *Id.*

22. *Id.*; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *98 (discussing that felonies "shall be punished with death, . . . as well as with forfeiture").

23. Tennessee v. Garner, 471 U.S. 1, 13 n.11 (1985).

24. 2 POLLOCK & MAITLAND, *supra* note 20, at 322.

Before the death penalty was abolished for many felonies, the forfeiture rationale fit with the fleeing felon rule.[25] By authorizing deadly force only against those fleeing from a felony, the rule made the consequences of fleeing equivalent to the consequences of punishment.[26] As a corollary, the common law forbade deadly force to prevent the escape of misdemeanants.[27] As the North Carolina Supreme Court explained, "[i]t is better that [the suspect] be permitted to escape altogether than that his life be forfeited, while unresisting, for such a trivial offense."[28] The imposition of strict liability upon the officer that the person killed or wounded had actually committed a felony was also grounded in forfeiture; a person suspected—but innocent—would not have forfeited his life.[29]

In addition to the forfeiture rationale, some authorities treated the killing of a felon in flight as an act of community defense. These courts considered felons to be inherently dangerous, such that "the safety and security of society require[d] [their] speedy arrest and punishment."[30] This collective defense justification 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.

As felonies expanded and the death penalty contracted, critics of the fleeing felon rule rightly noted that the forfeiture rationale was outmoded. Many commentators criticized the fleeing felon rule for permitting deadly force when necessary to effect the capture of any felon, no matter how trivial the felony.[31] As the Supreme Court itself noted in *Garner*, "the

25. This was still not a perfect fit. A small number of felonies were not punished with death, 4 BLACKSTONE, *supra* note 22, at *95, and the benefit of clergy frequently mitigated the punishment for a first offense. *Id.* at *365.

26. In fact, the early common law viewed the felon's forfeiture of life so absolutely that the law did not require that the killing of the felon be necessary to effect capture. *See* Schumann v. McGinn, 240 N.W.2d 525, 532–33 (Minn. 1976); *see also* John Simon, Tennessee v. Garner*: The Fleeing Felon Rule*, 30 ST. LOUIS U. L.J. 1259, 1263 (1986) (discussing the fleeing felon doctrine under common law).

27. *See* Holloway v. Moser, 136 S.E. 375, 377 (N.C. 1927).

28. *Id.*

29. Petrie v. Cartwright, 70 S.W. 297, 299 (Ky. 1902).

30. *Holloway*, 136 S.E. at 376; *see also* Tennessee v. Garner, 471 U.S. 1, 14 (1985) ("Courts have also justified the common-law rule by emphasizing the relative dangerousness of felons."); Davis v. Hellwig, 122 A.2d 497, 499 (N.J. 1956) ("Ordinarily, the security of person and property is not endangered by a misdemeanant being at large, while the safety and security of society require the speedy arrest and punishment of a felon.").

31. *See, e.g.*, PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 189–90 (1967); Pearson, *supra* note 10, at 976 (arguing that legislature should reclassify crimes as felonies or misdemeanors based on the nature of the crime); Jay Gerald Safer, *Deadly Weapons In the Hands of Police Officers, On Duty and Off Duty*, 49 J. URB. L. 565, 565 (1971) (examining under what circumstances police officers have a right to use deadly force and whether police officers can carry deadly weapons when off duty); Lawrence W. Sherman,

distinction [between felonies and misdemeanors] is minor and often arbitrary" because "[m]any crimes classified as misdemeanors, or nonexistent, at common law are now felonies" and are not punishable by death.[32] And given the plethora of nonviolent and technical felonies, "the assumption that a 'felon' is more dangerous than a misdemeanant [is] untenable."[33]

At the same time, the common law fleeing felon rule had several underappreciated strengths that its critics failed to note. First, it drew clear lines. For example, officers could use deadly force for felonies but not for misdemeanors. There were no multifactor tests or opaque standards that failed to provide action guidance.[34] Second, courts held officers liable when the rules were breached. Courts upheld criminal convictions and civil liability for officers, some of whom were found to have acted in good faith.[35] Third, courts held officers strictly liable as to some elements, such as whether the suspect committed a felony in fact.[36] These rules would naturally deter officers from relying on the fleeing felon rule unless they were certain that the person had committed a felony.[37]

Execution Without Trial: Police Homicide and the Constitution, 33 VAND. L. REV. 71, 97 (1980) (stating that police justification for use of deadly force should be limited to defense of life).

32. *Garner*, 471 U.S. at 14.

33. *Id.*

34. *Cf.* Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1142–43 (2008) (complaining that the Supreme Court's current multifactor tests produce virtually no action guidance).

35. *See, e.g.*, Reneau v. State, 70 Tenn. 720, 723 (1879) ("While the prisoner in this case seems to have honestly entertained the opinion that his duty required him to do what he did, and to have acted entirely without malice, and while he is entitled to strong sympathy, still we are constrained to affirm the judgment.").

36. Unlike qualified immunity today, officers were routinely prosecuted if they exceeded the bounds of a permissible justification. *See, e.g.*, *id.* at 723 (upholding a manslaughter conviction of a constable); Commonwealth v. Duerr, 45 A.2d 235, 238–39 (Pa. Super. Ct. 1946); Holloway v. Moser, 136 S.E. 375, 379 (N.C. 1927) ("The suggestion that the defendant could not tell whether plaintiff's intestate was a felon or a misdemeanant, and that he acted in good faith, thinking that he had a right to shoot, cannot excuse him, if, in fact, he had no such right under the law. It was no fault of plaintiff's intestate that the defendant failed to observe the class of criminals to which he belonged." (citation omitted)). Also compare Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804), which denied immunity to a military officer who seized a ship in good-faith reliance on orders because those orders were unlawful.

37. *See* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 426 (1993).

B. *From Common Law Rules Based on Forfeiture to Constitutional Standards Based on Self-Defense*

In *Tennessee v. Garner*[38] and *Scott v. Harris*,[39] the Supreme Court addressed the permissible scope of the common law fleeing felon rule under the Fourth and Fourteenth Amendments.[40] In the course of doing so, it modified but did not eliminate the rule. This section discusses the Court's rationales for its revised rule.

1. *Garner*'s Theoretical Confusion

In 1985, the Supreme Court modified the fleeing felon rule in *Tennessee v. Garner*.[41] The Court permitted deadly force only where the person sought to be apprehended constituted a danger to the officers or to others.[42] But within this class, the Court included anyone a law enforcement officer had probable cause to believe had committed a forcible felony.[43]

During the evening of October 3, 1974, two Memphis police officers investigated a suspected home burglary in progress.[44] One officer proceeded behind the house and promptly discovered fifteen-year-old Edward Garner exiting the house and running through the adjacent yard.[45] Garner ran until he reached a fence at the end of the property.[46] At that point, the officer yelled "police, halt," but Garner attempted to climb the fence.[47] Despite being "reasonably sure" that Garner was unarmed, the officer feared that Garner would escape if he made it over the fence.[48] So he shot Garner in the back of the head, killing him.[49] Police found money and a purse on Garner's person, corroborating that he had, in fact, committed a burglary.[50] The officer's actions were justified under Tennessee law, which provided that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."[51] And because Garner committed a felony in fact, the officer's actions likely would have been permissible under the common law fleeing felon rule, provided that the

38. 471 U.S. 1 (1985).
39. 550 U.S. 372 (2007).
40. *Id.* at 374; *Garner*, 471 U.S. at 3.
41. *Garner*, 471 U.S. at 3.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 24 (O'Connor, J. dissenting) (providing Garner's age).
46. *Id.* at 4.
47. *Id.* at 3–4.
48. *Id.*
49. *Id.* at 4.
50. *Id.*
51. *Id.* (quoting TENN. CODE ANN. § 40-7-108 (1982)).

officer was correct that deadly force was necessary to prevent Garner's escape.

The Court held that the Tennessee statute violated the Fourth Amendment insofar as it authorized police officers to use deadly force to capture "an unarmed, nondangerous suspect," including an unarmed burglar.[52] In support, the Court engaged in a "balancing process" weighing Garner's right to life against the state's interests in enforcing the law.[53] Tennessee argued that, by threatening suspected felons with death if they fled, those individuals would submit peacefully, reducing confrontations and leading to more arrests.[54] The Court, however, disagreed that the evidence supported this argument.[55] Moreover, the Court argued that "[t]he use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion."[56] The Court then announced the following rules:

> Where 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. 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, and if, where feasible, some warning has been given.[57]

In rejecting the common law rule, the Court found both traditional justifications inapplicable.[58] First, because nearly all felonies used to be punishable by death, "the killing of a resisting or fleeing felon resulted in no greater consequences than those authorized for punishment of the felony of which the individual was charged or suspected."[59] In 1985, in contrast, nearly all felonies could not be punished by death.[60] Second, although many common law cases relied on a felon's dangerousness, "the assumption that a 'felon' is more dangerous than a misdemeanant [is]

52. *Id.* at 11.
53. *Id.* at 9–11.
54. *Id.* at 9–10.
55. *Id.* at 11 & n.10.
56. *Id.* at 10.
57. *Id.* at 11–12.
58. *Id.* at 14.
59. *Id.* at 13–14 (quoting MODEL PENAL CODE § 3.07 cmt. 3 at 56 (AM. LAW INST., Tentative Draft No. 8, 1958).
60. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 600 (1977). The category of death eligible offenses continues to narrow. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (outlawing the death penalty for child rape).

untenable" because modern-day felonies include many crimes that were misdemeanors or not criminal at common law.[61]

In place of the common law justifications, *Garner* reconceptualized the fleeing felon rule as a rule permitting officers to use deadly force only in self-defense and defense of others. Deadly force "may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[62] Applying that rule, the Court evaluated whether Garner "posed any threat," and ultimately concluded that the officer violated Garner's Fourth Amendment rights because the officer "did not have probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others."[63] Both the holding and the analysis read as if the Fourth Amendment test is coextensive with the general requirements to assert a claim of self-defense or defense of others.

In fact, however, the Court's opinion allows officers to use deadly force in circumstances that go well beyond these requirements and preserves a good deal of the common law fleeing felon rule. Although the Court did not accept the common law's assumption that *all* felons are dangerous, *Garner* attempted to identify a subclass that were. The Court gave two illustrative examples to determine who poses "a threat of serious physical harm, either to the officer or to others": first, any suspect who "threatens the officer with a weapon"; and second, any suspect for whom "there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm."[64] According to the Court, an officer may infer that a person poses a future danger to others simply because he is suspected of having committed a forcible felony.[65] Thus, *Garner* does not require that an escaping suspect pose a specific threat of harm against a person, let alone one that is imminent. And *Garner* permits deadly force "if necessary to prevent *escape*."[66] A self-defense rule, in contrast, would peg necessity to the avoidance of death or serious bodily injury.

So *Garner* appears conflicted between two theories. On the one hand, *Garner* seemingly collapses the fleeing felon rule into self-defense and defense of others by requiring that an officer have probable cause that the suspect is a threat to the officers or others. On the other, *Garner* relies on

61. *Garner*, 471 U.S. at 14.

62. *Id.* at 3; *see also id.* at 11 ("Where 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.").

63. *Id.* at 21.

64. *Id.* at 11.

65. *Id.*

66. *Id.* (emphasis added).

the dubious assumption that anyone who has committed a forcible felony is inherently dangerous and a threat to the community at all times.

2. *Scott*'s Lack of Guidance

While *Garner* did not provide a consistent account for *why* officers may use deadly force against fleeing criminals, it provided a comprehensible account for *when*. *Garner* largely followed the common law requirements to use deadly force against fleeing felons: deadly force could be used when necessary to prevent an escape and, if feasible, after a warning had been given. *Garner* simply restricted the application of the rule to those felons who either were a danger to the officer or others, including anyone who had committed a forcible felony.

In 2007, however, in *Scott v. Harris*, the Court transposed this situation. The Court essentially abandoned any attempt to limit the police use of force in making arrests. The Court replaced *Garner*'s rules with vague standards that do not cabin police violence. On the other hand, the Court clarified *Garner*'s theoretical justification for police use of force against escaping criminals, namely that such force is defensive.

Scott v. Harris involved the arguable use of deadly force to end a high-speed police chase.[67] A Georgia deputy sheriff attempted to pull over Victor Harris for speeding, but Harris fled.[68] Another deputy, Timothy Scott, joined the pursuit.[69] Parts of the chase occurred at extremely high speeds.[70] At one point, after being boxed in, Harris made a sharp turn and collided with Scott's police car.[71] Eventually, Scott tried to cause Harris's car to spin out by pushing his rear bumper.[72] Scott misapplied the maneuver, however, causing Harris to lose control of his vehicle.[73] Harris's vehicle ran off the road and overturned, injuring him severely.[74]

The Court held that Scott was entitled to qualified immunity.[75] The Court understood *Garner* as applying a "'reasonableness' test" in which the Court will "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."[76] Applying this test, the Court found that Harris's actions were criminally culpable and that his high-speed evasion placed the public in danger.[77] Although Scott

67. 550 U.S. 372, 374 (2007).
68. *Id.*
69. *Id.* at 375.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 386.
76. *Id.* at 382, 383 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).
77. *Id.* at 384.

might have avoided the necessity of deadly force by terminating the chase, the Court did not require law enforcement to back down in the face of resistance because of the perverse incentives that would create for suspects to flee.[78]

Scott explicitly rejected that *Garner* had announced any clear rules limiting law enforcement's use of force to prevent escapes. Harris argued that Scott's vehicle maneuver constituted deadly force. To be justified under *Garner*, Harris claimed, Scott had to show that Harris was a danger to the officer or others, that the use of force was necessary to prevent the escape, and that Scott provided Harris with a warning that deadly force would be used.[79] But the Court rejected this, holding instead that *Garner* "did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"[80] In a footnote, the *Scott* Court also made clear that it understood *Garner* to have announced a kind of self-defense rule.[81] *Garner* seemingly permitted deadly force "if necessary to prevent escape."[82] Justice Scalia, writing for the Court in *Scott*, said this statement was "taken out of context": "The necessity described in *Garner* was, in fact, the need to prevent 'serious physical harm, either to the officer or to others.'"[83] A person who "committed a crime involving the infliction or threatened infliction of serious physical harm" could be killed while trying to escape because "his mere being at large poses an inherent danger to society."[84]

The switch from *Garner*'s rules to *Scott*'s standards expanded law enforcement's power to use deadly force against fleeing suspects well beyond common law limits, especially when combined with the Supreme Court's holdings on qualified immunity. As explained above, even though the common law rule broadly extended to any felon, the common law limited police use of deadly force in three ways: (1) by pronouncing clear rules; (2) by holding officers liable when the rules were breached; and (3) by holding officers strictly liable for some elements, such as whether the suspect committed a felony in fact.[85] The Supreme Court has eviscerated all three protections.

First, the Supreme Court has failed to provide clear rules that guide law enforcement action.[86] Between its decisions in *Garner* and *Scott*, the Court shifted from primarily using rules to evaluate police use of force to

78. *Id.* at 385.
79. *Id.* at 382.
80. *Id.*
81. *Id.* at 382 n.9.
82. Tennessee v. Garner, 471 U.S. 1, 11 (1985).
83. *Scott*, 550 U.S. at 382 n.9 (quoting *Garner*, 471 U.S. at 11).
84. *Id.* at 383 (quoting *Garner*, 471 U.S. at 11).
85. *See supra* notes 35–36.
86. Rachel Harmon makes these points well. *See* Harmon, *supra* note 34, at 1131.

primarily using vague standards. In *Graham v. Connor*,[87] the Supreme Court instructed courts to evaluate the reasonableness of police use of force by examining "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."[88] But while a "multifactor test may aid in identifying relevant facts for analysis," the test "leaves courts adrift once those facts have been identified."[89] Multifactor tests create difficulties not just for the courts, but also for the police. Police 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.

Yet the probability that a similar case will have been adjudicated has been reduced because courts no longer need to decide hard cases on the merits. In *Saucier v. Katz*,[90] the Court announced a two-step process for deciding whether an officer received qualified immunity.[91] First, courts must determine whether the facts pleaded or evidence submitted demonstrate that an officer violated a constitutional right. If so, courts proceed to determine whether that right was clearly established.[92] The Court abandoned this two-step approach eight years later, in *Pearson v. Callahan*.[93] The Court held, instead, that courts may bypass whether a right was violated and decide the case, instead, on whether the right was clearly established.[94] This has the effect of stagnating the law in difficult or novel cases, so law enforcement officers have fewer court decisions to guide their conduct.[95] As the law stagnates, people who may have had their rights violated increasingly find that they lack any remedy in court because they cannot show that their rights were clearly established in similar factual circumstances. This divorces remedies from rights, in violation of the "general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever the right is invaded."[96]

87. 490 U.S. 386 (1998).

88. *Id.* at 396; *see also* Harmon, *supra* note 34, at 1129 (discussing requirements).

89. Dietz v. Bouldin, 136 S. Ct. 1885, 1898 (2016) (Thomas, J., dissenting).

90. 553 U.S. 194 (2001).

91. *Id.* at 201.

92. *Id.*

93. 555 U.S. 223, 236 (2009).

94. *Id.* at 237.

95. *See* Colin Rolfs, Comment, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468, 489 (2011).

96. 3 BLACKSTONE, *supra* note 22, at *23; *see also* 2 EDWARD COKE, THE INSTITUTES OF THE LAW OF ENGLAND 55 (1669) ("And therefore, every subject of this realme, for injury done to him *in bonis*, *in terries*, *vel persona*, by any other subject . . . without exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.").

On top of these epistemic issues, the Supreme Court has also made it difficult to hold law enforcement accountable by applying two layers of deference to police use of force. First, the Court has applied a "reasonable belief" standard for officer actions. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[97] A reasonable belief standard is the traditional requirement when a person acts in self-defense because "[d]etached reflection cannot be demanded in the presence of an uplifted knife."[98] But, for the use of force in law enforcement, the common law applied a stricter standard. An officer had to act correctly with respect to certain elements, such as whether the person committed a felony in fact. Thus, in *Holloway*, the North Carolina Supreme Court reversed a judgment in favor of an officer who claimed that he "could not tell whether [the escapee] was a felon or a misdemeanant, and that he acted in good faith."[99] An erroneous belief, the court said, "cannot excuse him."[100] Today, however, an erroneous judgment will excuse government officers who are using force for law enforcement reasons.[101]

Second, law enforcement officers will not be held liable under 42 U.S.C. § 1983 unless "it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*"[102] At common law, of course, mistake of law was no defense. A constable's manslaughter conviction was affirmed despite "strong sympathy" from the court because he "honestly entertained the opinion that his duty required him to do what he did" and "acted entirely without malice."[103] But in § 1983 actions, even when the legal rule is clearly established (e.g., *Garner*'s rules on fleeing felons), law enforcement must have clear warning that, as applied to the facts at hand, they would be violating the rule. So officers not only get deference when they have a reasonable but mistaken belief about the facts; they also receive deference for their mistaken beliefs about the law.[104] "[Q]ualified immunity provides ample protection

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

98. 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.4(c) (3d ed. 2017) (quoting Brown v. United States, 256 U.S. 335, 343 (1921)).

99. Holloway v. Moser, 136 S.E. 375, 379 (N.C. 1927).

100. *Id.*

101. To be clear, my condemnation of the Court's reasonable belief rule extends only to using force for law enforcement beyond the force necessary in self-defense. Officers acting in self-defense against immediate danger would have the same right of self-defense as any private citizen and could, thus, act on reasonable belief. And with good reason: A person facing an immediate risk of death or serious bodily injury cannot be expected to exercise the same deliberate judgment as a person acting when he does not face personal risk of harm.

102. Saucier v. Katz, 533 U.S. 194, 202 (2001) (emphasis added).

103. Reneau v. State, 70 Tenn. 720, 723 (1879).

104. *See* Heien v. North Carolina, 135 S. Ct. 530, 534 (2014).

to all but the plainly incompetent or those who knowingly violate the law."[105]

The Supreme Court has aggressively enforced this double deference through its power to summarily reverse lower court decisions.[106] The Court has permitted deadly force based on the flimsiest evidence of danger. In *Brosseau v. Haugen*,[107] the Court applied qualified immunity when an officer shot a suspect who was getting into his car to flee, based on the inchoate fear that the suspect might have hit someone with the car.[108] Even more egregiously, the Court will protect officers even where they used deadly force without apparent necessity. In *Mullenix v. Luna*,[109] state police set up spike strips to stop a fleeing vehicle.[110] Despite instructions from superiors to wait and see if the spike strips worked, an officer went on to a highway overpass, grabbed a rifle, and shot at the vehicle, killing the driver.[111] The Supreme Court found qualified immunity because the legality of the officer's actions was not "beyond debate."[112] The Supreme Court, thus, has discouraged courts from ever finding that police violated someone's clearly established rights.

***

Officers have greater power today to use deadly force in law enforcement than they did at common law. Officers are protected by a reasonable belief standard, a fuzzy reasonableness inquiry, and qualified immunity where the facts and law are not clear. And just in case a lower court would think of still holding an officer liable, the Supreme Court stands ready to use its power of supervisory error correction. *Garner* may have narrowed the fleeing felon rule by eliminating an officer's right to use force to capture any felon, but subsequent decisions have expanded law enforcement's power to the point where police may use deadly force against someone who evades arrest for a traffic offense.

Despite these doctrinal problems, the Court has at least attempted to provide a modern rationale for, and corresponding limits on, the fleeing felon rule. At common law, the rule was primarily based on a felon's forfeiture of his life. That justification does not work today because nearly all felonies are not punishable with death. In its place, the Court has conceived of the fleeing felon rule as a defensive rule. Unfortunately, the defensive justification is so far removed from ordinary self-defense that it is a poor fit and has ended up expanding rather than providing

105. Malley v. Briggs, 475 U.S. 335, 341 (1986).
106. William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 86 (2018).
107. 543 U.S. 194 (2004).
108. *Id.* at 200.
109. 136 S. Ct. 305 (2015).
110. *Id.* at 306.
111. *Id.* at 307.
112. *Id.* at 312.

effective limits on officers' use of force to prevent felons from escaping arrest.

C. *The Correction Officer's Broad License to Kill*

The prison environment involves perhaps the rawest use of force by a domestic political authority to achieve compliance with the laws. The right to punish for violations of law is within the core of a state's monopoly of force, and to achieve compliance with the criminal justice system, the state uses or threatens force against inmates. Most visibly, prisons have watch towers where armed guards literally threaten inmates with death if they try to escape.

If "[t]he Supreme Court's Fourth Amendment doctrine regulating the use of force by police officers is deeply impoverished,"[113] its doctrine regulating the use of force by correctional officers is almost barren. A person who is in jail awaiting trial receives less protection under the Fourteenth Amendment's Due Process Clause than someone outside of jail would receive under the Fourth Amendment. And a person in prison under a sentence of confinement receives the least protection; deadly force is prohibited only if that force rises to the level of "cruel and unusual punishment" under the Eighth Amendment.[114] But the Court has generally not explained why prisoners receive so little protection from being killed when they are not imminent threats to others.

1. Laws Authorizing Deadly Force in Jails and Prisons

The common law rules governing the use of deadly force by law enforcement officers were the same whether they sought to arrest the person or keep him in custody.[115] But that is no longer the case. Reform efforts targeted the fleeing felon rule and eventually convinced the Court to limit it in *Garner*, but no similar effort has been directed at laws authorizing jail and prison wardens to shoot escaping prisoners.

Although the Model Penal Code adopted stricter rules than the common law regarding shooting fleeing felons,[116] it provided correctional officers with wider latitude to use deadly force. Section 3.07(3) authorizes "a guard or other person authorized to act as a peace officer . . . [to use] any force, including deadly force, that he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime."[117] The Institute did not fully explain why, except

113. Harmon, *supra* note 34, at 1119.
114. *See* U.S. CONST. amend. VIII.
115. *See supra* note 18 and accompanying text.
116. MODEL PENAL CODE § 3.07(1)–(2) (AM. LAW INST., Proposed Official Draft 1962).
117. *Id.* § 3.07(3).

to note that "[p]ersons in institutions are in a meaningful sense in the custody of the law and not of individuals[, so] the social and psychological significance of an escape is very different in degree from flight from an arrest."[118]

State laws diverge when it comes to the use of force to prevent a prisoner from escaping. Sixteen states follow the Model Penal Code Rule and permit deadly force against anyone housed in a jail or prison on a charge or conviction.[119] In these states, the person does not have to be charged with or convicted of a felony, nor does the person have to be guilty in fact. The only requirements are that the person is housed in a detention or correctional facility, the person is charged with or convicted of a crime, and the killing is done by a correctional officer.

Twenty-four states permit deadly force only against those charged with or convicted of felonies. Of these, fourteen states permit deadly force to prevent the escape of any felon.[120] These states essentially apply the pre-*Garner* common law rule to the prison context. Ten states apply a dangerousness rule similar to the *Garner* fleeing felon rule, and many

118. MODEL PENAL CODE § 3.07 cmt. 4 at 126 (AM. LAW INST., Official Draft and Explanatory Notes 1985).

119. DEL. CODE ANN. tit. 11, § 467(d) (2018); FLA. STAT. § 776.07 (2018); HAW. REV. STAT. § 703-307(4) (2017); 720 ILL. COMP. STAT. 5/7-9 (2018); IND. CODE § 35-41-3-3(e) (2018); KY. REV. STAT. ANN. § 503.090 (West 2018); MONT. CODE ANN. § 45-3-106 (2017); NEB. REV. STAT. § 28-1412(4) (2018); N.J. STAT. ANN. § 2C:3-7(c) (West 2018); N.Y. PENAL LAW § 35.30(5) (McKinney 2018); OR. REV. STAT. § 161.265 (2018); 18 PA. CONS. STAT. § 508(c)(2) (2018); TEX. PENAL CODE Ann. § 9.52 (West 2018); WASH. REV. CODE § 9A.16.040(c)(ii), (iii) (2018) (except county or city jails, in which case the crime must be a felony); WIS. ADMIN. CODE DOC § 306.07(4)(d) (2018) (administrative regulation applying to the Department of Corrections); *see also* GA. CODE ANN. § 17-4-20 (2018) ("Nothing in this Code section shall be construed so as to restrict the use of deadly force by employees of state and county correctional institutions, jails, and other places of lawful confinement or by peace officers of any agency in the State of Georgia when reasonably necessary to prevent escapes or apprehend escapees from such institutions.").

120. ALA. CODE § 13A-3-27(h)(1) (2018) (deadly force is permitted if a person is charged with or convicted of a felony); ALASKA STAT. § 11.81.410 (2017) (deadly force is not permitted if peace officer knows the person is a misdemeanant); ARK. CODE ANN. § 5-2-613 (2018) (deadly force not permitted if peace officer knows the person is a misdemeanant); CAL. PENAL CODE § 196(3) (West 2018) (deadly force is permitted against felons who have escaped); COLO. REV. STAT. § 18-1-707(8)(a) (2018) (deadly force is permitted if a person is charged with or convicted of a felony); IDAHO CODE § 18-4011(3) (2018) (deadly force is permitted if a person is charged with or suspected of having committed a felony); ME. STAT. tit. 17-A, § 107(5-A) (2018) (deadly force is permitted against persons housed in Maine state prison); MISS. CODE ANN. § 97-3-15(c), (d) (2018) (deadly force is permitted against any felon); NEV. REV. STAT. § 200.140(3)(a) (2017) (deadly force is permitted against any felon); N.H. REV. STAT. ANN. § 627:5(V) (2018) (deadly force is permitted against any felon); N.M. STAT ANN. § 30-2-6(4) (2018) (deadly force is permitted against any felon); N.C. GEN. STAT. § 15A-401(d)(2)(c) (2018) (deadly force is permitted against any felon); OHIO ADMIN. CODE § 5120-9-01(c)(3)(b) (2018) (authorizing prison officials to use deadly force to prevent escapes); S.D. CODIFIED LAWS § 22-16-32 (2018).

of these states simply do not distinguish initial arrests and escapes.[121] Finally, ten states have no specific provisions.[122]

Pursuant to a 1995 Attorney General memorandum, federal policy lies halfway in between the Model Penal Code and a self-defense approach. This policy authorizes deadly force to prevent escapes by individuals housed in non-secure facilities or in immigration detention facilities only when the person presents an imminent danger to others.[123] For individuals housed in secure facilities (or in transit to or from such a facility), deadly force is authorized in all cases to prevent an escape.[124] Curiously, however, the policy also provides that "[a]fter an escape from the facility or vehicle and its immediate environs has been effected, officers attempting to apprehend the escaped prisoner may not use deadly force unless such force would otherwise be authorized in accordance with this policy."[125] In other words, once a person successfully makes it off prison grounds, the *Garner* fleeing felon rule applies. This itself is a strange limitation if the true justification for using deadly force against escaping prisoners is that they are an imminent danger to the community.

Thus, the rules governing the use of deadly force to prevent escapes remain largely in a pre-*Garner* state. Thirty states do not require the prisoner to be dangerous, and sixteen states do not even require the person to have committed a felony. These rules do not seem to be based on the dangerousness of the person escaping.

2. Constitutional Constraints and the Failure to Explain Why Prison Guards Have Such Broad Power

The Supreme Court has given scant consideration to the use of deadly force to prevent escapes in the jail or prison context. Because the Fourth Amendment does not apply in the jail context, the Court has based the rights of inmates on the Fourteenth Amendment's Due Process Clause (for charged inmates) and the Cruel and Unusual Punishment Clause (for

121. ARIZ. REV. STAT. ANN. § 13-410 (2018); CONN. GEN. STAT. § 53a-22(c)(2) (2018); IOWA CODE §§ 804.8, 804.13 (2018); KAN. STAT. ANN. § 21-5227 (2018) (only general law enforcement authority to use force in making arrests; no specific provision governing correctional officers); MINN. STAT. § 609.066(2) (2017); MO. REV. STAT. § 563.056(2) (2017) (requiring guards to rely on other deadly force provisions); N.D. CENT. CODE § 12.1-05-07(2)(e) (2017); OKLA. STAT. tit. 21 § 732 (2014); TENN. CODE ANN. § 40-7-108 (2018) (only general law enforcement authority); UTAH CODE ANN. § 76-2-404 (LexisNexis 2017) (general arrest authority).

122. Louisiana; Maryland; Massachusetts; Michigan; Rhode Island; South Carolina; Vermont; Virginia; West Virginia; Wyoming.

123. ATTORNEY GEN., OCTOBER 17, 1995 MEMORANDUM ON RESOLUTION 14, 1 (1995), https://www.justice.gov/archives/ag/attorney-general-october-17-1995-memorandum-resolution-14-attachment-0.

124. *Id*.

125. *Id.*

convicted inmates). Both provisions afford inmates minimal protection against the use of deadly force by correctional officers. That leaves prisoners in a netherworld. Like fleeing felons, nearly all prisoners are judicially subject to imprisonment, not death. Yet, prisoners may simply lack a constitutional right that guards not kill them if they try to escape.

The Fourteenth Amendment's Due Process Clause governs excessive force claims by corrections officers against a charged—but not convicted—inmate.[126] Because pretrial detainees are not convicted, the government has no right to punish them, so officers may not use force against pretrial detainees for punitive purposes.[127] Beyond that, the Supreme Court has not specified the precise reasons that can trigger a correction officer's right to use deadly force against a pretrial detainee. An officer's use of force must simply be "rationally related to a legitimate nonpunitive governmental purpose" and not "appear excessive in relation to that purpose."[128] And the Court has provided a non-exhaustive list of factors as guidance on what constitutes excessive force:

> the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.[129]

Convicted inmates receive even less protection because they are subject to punishment by virtue of their convictions. The Eighth Amendment's prohibition against cruel and unusual punishments "serves as the primary source of substantive protection to convicted prisoners in cases . . . where the deliberate use of force is challenged as excessive and unjustified."[130] The Court has identified a similar list of factors in the pretrial context including "the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted."[131] But the Court applies a much higher bar to make out a claim. A prison guard will be justified if the "force was applied in a good faith effort to maintain or restore discipline."[132] The prisoner must therefore demonstrate that a guard imposed an "unnecessary and wanton infliction of pain."[133] It is not

126. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015); Graham v. Connor, 490 U.S. 386, 395 n.10 (1989).

127. Bell v. Wolfish, 441 U.S. 520, 538 (1979).

128. *Kingsley*, 135 S. Ct. at 2473 (quoting *Bell*, 441 U.S. at 561).

129. *Id.* at 2473.

130. Whitley v. Albers, 475 U.S. 312, 327 (1986).

131. *Id.* at 321 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

132. *Id.* at 320 (quoting *Glick*, 481 F.2d at 1033).

133. *Id.* at 320.

sufficient that the force was unnecessary or unreasonable.[134] And like police officers, prison officials receive qualified immunity.[135]

Courts permit corrections officers to use deadly force against escaping prisoners beyond what is necessary for self-defense. In *Gravely v. Madden*, David Gravely, a prisoner, escaped from a minimum security prison facility.[136] Corrections officers found him four days later, visiting a friend.[137] When the officers approached, Gravely fled with an object in his hands.[138] When Gravely ignored the officers' command to halt, an officer fatally shot him in the back.[139] The officer later discovered that the object in Gravely's hand was a butcher knife, but the officer testified "that he did not believe Gravely posed an immediate threat."[140] The officer relied instead on a regulation authorizing deadly force if necessary to stop an escaped prisoner.[141] The Court held that the officer was protected by qualified immunity because he did not fire his gun "maliciously or sadistically for the purpose of inflicting harm on Gravely."[142] Other courts have reached similar results when deadly force was used to prevent an escape.[143]

Courts have not explained why prisoners receive so little protection, and the result is seemingly inconsistent with *Garner*. Like fleeing felons, nearly all convicted criminals are not under sentence of death, so few inmates could be said to have forfeited their lives. And the Court has never suggested that, after conviction, nonviolent felons and misdemeanants become more dangerous to the community if they escape. At the American Law Institute, Professor William Mikell asked:

> May I ask what we are killing [the suspect] for when he steals an automobile and runs off with it? Are we killing him for stealing the automobile? . . . It cannot be . . . that we allow the officer to kill him because he stole the automobile, because the statute provides only three years in a penitentiary for that. Is it then . . . for fleeing that we kill him? Fleeing from arrest . . . is punishable by a light penalty, a penalty much less than that for stealing the automobile. If

134. *Id.* at 319.
135. Gravely v. Madden, 142 F.3d 345, 349 (6th Cir. 1998).
136. *Id.* at 347 (describing facts).
137. *Id*.
138. *Id*.
139. *Id*.
140. *Id*.
141. *Id.*
142. *Id.* at 349.
143. *See, e.g.*, Brothers v. Klevenhagen, 28 F.3d 452, 457 (5th Cir. 1994) (finding qualified immunity where use of force was necessary to prevent escape).

> we are not killing him for stealing the automobile and not killing him for fleeing, what are we killing him for?[144]

The same question may be asked *mutatis mutandis* to the escape conviction. Even if the penalties are stiff for escaping prison (as opposed to fleeing police arrest), they are much less than death.[145] If the original offense cannot be punished with death, and the escape cannot be punished with death and if no one is at imminent risk of death or serious bodily injury, why should there be a right to kill the escaping convict?

One may object that this is the wrong inquiry. Not every wrong has a remedy under the federal Constitution. In Hohfeldian terms, prison guards may have a liberty right to shoot escaping inmates (if permitted by state law) simply because nothing in the federal constitution precludes them from doing so.[146] The Court may just be cabining already broad federal constitutional tort claims.

This objection would explain why the Court has not found a federal constitutional tort, but it still leaves the question why many state laws permit deadly force against all escaping inmates. Even assuming that states have stronger interests in keeping convicts behind bars than in capturing fleeing felons, that does not explain why the government may enforce its stronger interest with the threat of death. *A fortiori*, it is unclear why prison guards may kill persons merely charged, who are simply in jail for safekeeping pending trial, if they try to escape.

Examining the legitimacy of the use of force to prevent 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.

II. NECESSITY AND IMMINENCE: THE FAILURE OF THE FLEEING FELON AND PRISON ESCAPE RULES AS SELF-DEFENSE OR DEFENSE OF OTHERS

The Court has erred in justifying the fleeing felon rule by claiming that officers use deadly force in self-defense or defense of others. Traditional self-defense requires that the use of force be necessary to protect against an imminent and proportionate threat. Yet, the fleeing felon rule authorizes a police officer to use deadly force long before any imminent threat of violence materializes. Although for simplicity this part of the Article will focus primarily on the fleeing felon rule, the arguments it makes apply *a fortiori* in the prison escape context because prison

144. Sherman, *supra* note 31, at 84 (quoting Edwin R. Keedy, *Discussion of Administration of the Criminal Law Tentative Draft No. 1*, 9 A.L.I. PROC. 173, 187 (1931) (statement of Professor William Mikell)).

145. *See, e.g.*, 18 U.S.C. § 751 (2012) (punishing escape with imprisonment up to five years).

146. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913).

guards have even more power to use deadly force when use of such force is not necessary and the threat is not imminent.

A. *Triggering Conditions of and Limitations on Self-Defense*

A person who uses force in self-defense must show four elements. That person must (1) reasonably believe that such force was; (2) necessary to protect himself against; (3) the imminent; and (4) unlawful use of force by another.[147] Further, a person who uses deadly force (i.e., force readily capable of causing death or serious bodily injury) must show that the aggressor threatened to inflict death or serious bodily injury.[148] In other words, deadly force must be proportionate to the threat.[149] Many states also permit deadly force to prevent certain forcible felonies.[150] The precise list varies in each jurisdiction, but the enumerated crimes are usually the kind of felonies that inherently place people in fear of death or serious bodily injury.[151]

In examining these requirements, Paul Robinson offers a helpful distinction between *triggering conditions* and *limitations* on the right of self-defense.[152] Triggering conditions are the kinds of facts that make one liable to violent resistance.[153] Theorists are divided on what facts make someone liable to defensive harm. To oversimplify, some think that being causally responsible for an unjust threat is enough, while others think that the aggressor must also be morally culpable for creating the threat.[154]

147. United States v. Peterson, 483 F.2d 1222, 1229–30 (D.C. Cir. 1973); 2 LAFAVE, *supra* note 98, § 10.4; 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(b), at 73 (1984); Cynthia V. Ward, *"Stand Your Ground" and Self-Defense*, 42 AM. J. CRIM. L. 89, 94 (2015).

148. 2 LAFAVE, *supra* note 98, § 10.4(a).

149. *Id.* § 10.4(b).

150. 2 ROBINSON, *supra* note 147, § 131(d)(2), at 83.

151. States that have adopted the Model Penal Code specify "kidnapping or sexual intercourse compelled by force or threat." MODEL PENAL CODE § 3.04(2)(b) (AM. LAW INST., Proposed Official Draft 1962). Other states have broader lists. Florida, for example, allows deadly force "to prevent the imminent commission of a forcible felony," FLA. STAT. § 776.012 (2018), which includes "treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual." FLA. STAT. § 776.08 (2018).

152. PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 98 (1997); *see also* Ferzan, *supra* note 16, at 730 (explaining and using the distinction).

153. Ferzan, *supra* note 16, at 730.

154. Some commentators place significance on the attack itself. *See, e.g.*, JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 366–71 (1990); SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE 188 (1994); David Wasserman, *Justifying Self-Defense*, 16 PHIL. & PUB. AFF. 356, 371–78 (1987). Others rely on aggressors having at least some culpability for their actions. *See, e.g.*, Larry Alexander, *Recipe for a Theory of Self-Defense: The Ingredients, and Some Cooking Suggestions*, *in* THE ETHICS OF SELF-DEFENSE 20, 26 (Christian Coons & Michael Weber eds., 2016); DAVID RODIN, WAR AND SELF-DEFENSE 26–34 (2002);

Critically, however, mere necessity does not trigger a right of self-defense.[155] For example, *A* cannot kill *B* simply because *A* needs a heart transplant and *B* has a compatible heart. For *A* to be justified in using defensive force against *B*, *B* must do something to lower the moral barriers against harming him—thereby triggering *A*'s right.[156] The limitations on self-defense are those circumstances in which a defender would act wrongly, even if the aggressor has acted in a way that would make him subject to a right of self-defense.[157] Necessity, imminence, and proportionality are the traditional limitations on the right of self-defense.[158]

Ferzan, *supra* note 16, at 733–39; *see also* Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 624 (1996) (discussing whether or not killing for self-defense is justified killing). Jeff McMahan takes a hybrid approach: the attack has some moral significance, but so too does culpability. Jeff McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 ETHICS 252, 281 (1994).

155. Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 289–92 (1991).

156. Thus, some courts have been wrong to say that "the law of self-defense is a law of necessity" and "arises only when the necessity begins, and equally ends with the necessity." United States v. Peterson, 483 F.2d 1222, 1229 (D.C. Cir. 1973) (quoting Holmes v. United States, 11 F.2d 569, 574 (D.C. Cir. 1926)). The right of self-defense might end with necessity, but it does not begin there.

157. Ferzan, *supra* note 16, at 730.

158. This summary of the philosophical framework makes some simplifying assumptions. First, it accepts the distinction between triggering conditions and limitations, even though one might argue that there is no significant theoretical distinction between them. A person acts wrongly if he uses force against someone whom he does not reasonably believe is a threat (and thus, has not triggered a right of self-defense). But a person also acts wrongly if he uses force against an aggressor when he can avoid the threat without force (and thus, there is no necessity). In the second case, the aggressor arguably has a claim against the defender that the defender not use force. *See* Kai Draper, *Necessity and Proportionality in Defense*, *in* THE ETHICS OF SELF-DEFENSE, *supra* note 154, at 171, 172–73 (distinguishing internalist and externalist accounts); *see also infra* notes 168–72 and surrounding text (explaining the distinction). Second, this summary ignores for present purposes the philosophical debate over how many limitations self-defense law actually has. Some scholars think there are three separate limitations: necessity, imminence, and proportionality. RODIN, *supra* note 154, at 40–43. Others believe that there are only two: necessity and proportionality; imminence, in their view, is an auxiliary of necessity. *See, e.g.*, 2 ROBINSON, *supra* note 147, § 131(b)(3); Stephen J. Schulhofer, *The Gender Question in Criminal Law*, *in* CRIME, CULPABILITY, AND REMEDY 105, 127 (Ellen Frankel Paul et al. eds., 1990); Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 69 (1994). The Model Penal Code also uses the "immediately necessary" formulation. *See infra* notes 180–85 and surrounding text. For a critique of this approach, see Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 247 (2004). And Larry Alexander asserts that the main limitation is proportionality—and that necessity is a specification of that requirement. Alexander, *supra* note 154, at 34. (From Alexander's perspective, the triggering conditions may also just be ways of specifying proportionality because the facts that lower the moral barrier against harming someone must be the kinds of facts that would justify losing one's life over.) Regardless, doctrinally, necessity, imminence, proportionality, and the triggering conditions all have independent content, so this part treats them as separate requirements here.

B. *Necessity, Imminence, and the Wild Beast Theory of Fleeing Felons*

The self-defensive justification for the fleeing felon rule fails for two reasons. First, officers cannot know that their use of force is necessary to protect others from a future attack by the felon. Second, an escaping felon does not, solely by virtue of an escape, place others in imminent danger.

In *Scott*, the Supreme Court understood the fleeing felon rule to be justified by self-defense and defense of others.[159] Deadly force against some fleeing felons is permitted, the Court said, because of "the need to prevent 'serious physical harm, either to the officer or to others.'"[160] *Scott* rejected that the "necessity" in *Garner* was simply the need to prevent an escape.[161] And why do some fleeing felons pose such a risk? *Scott* essentially likens them to wild beasts: because of their previous crimes, their "mere being at large poses an inherent danger to society."[162] Neither *Scott* nor *Garner* explains how the fleeing felon rule fits into the traditional necessity or imminence limitations of self-defense.[163]

In most states, the permission of correctional officers to use deadly force to prevent escape is even further removed from traditional self-defense and defense of others. In states that have adopted the Model Penal Code, correctional officers may use deadly force whether the escapee has committed (or is charged with) a felony or misdemeanor, whether the underlying crime is violent or not, and whether the escape is accompanied by force or threat of force.[164] Most states do not require that the use of deadly force in a prison environment be necessary to protect against unlawful violence by the escapee.

Necessity is arguably the most crucial limitation on self-defense.[165] The necessity requirement has two components. First, defensive force is permitted only when such force is necessary to protect the victim.[166] Second, the amount of force is limited to that force which is necessary for protection.[167]

159. Scott v. Harris, 550 U.S. 372, 386 (2007).

160. *Id.* at 382 n.9 (quoting Tennessee v. Garner, 471 U.S. 1, 11 (1985)).

161. *Id.*

162. *Id.*

163. *Garner* and *Scott* try to stipulate to proportionality by understanding the fleeing felon rule to be justified only to the extent that deadly force is necessary to protect the officer or others from death or serious bodily injury.

164. *See supra* note 116 and accompanying text.

165. United States v. Peterson, 483 F.2d 1222, 1229 (D.C. Cir. 1973).

166. 2 ROBINSON, *supra* note 147, § 131(c), at 77.

167. *Id.*

Philosophers are divided over who is wronged by unnecessary force. Internalists argue that necessity is internal to defensive liability.[168] By this, they mean that aggressors have a claim against defenders that they not use unnecessary force, so unnecessary defensive force wrongs the aggressor.[169] Externalists take the opposite view: unnecessary force against an unjustified attacker is morally wrong, but it does not violate the attacker's rights.[170] Stated in the language of triggering conditions and limitations, externalists believe that fulfilling the triggering conditions for defensive harm (being an unjust threat) is necessary and sufficient to make an attacker liable to defensive harm, while internalists believe that fulfilling the triggering conditions is necessary but not sufficient.[171]

Even on the externalist view of necessity, fleeing felons present a unique claim that they are wronged by the unnecessary use of force. The externalist view treats being an unjust threat as sufficient to create in the aggressor a liability to defensive violence. A violent attack has moral significance because it threatens a special kind of irreparable harm to the victim—a harm that can interfere with the person's future capacities as an autonomous being.[172] As Locke colorfully argued, "[t]he law could not restore life to my dead carcass."[173] Because fleeing felons have not created such a harm, they have not done an act that triggers a right of self-defense and the use of force is not necessary to protect any identifiable victim's rights.

Garner and *Harris* are predicated on the dog-bite theory of people: once a person commits a violent felony, he is vicious and, thus, forever creates a risk of serious injury or death to the community. But there is no causal relationship between past misconduct and future threats of harm. We hold people liable for the actions that they have done, not the actions that they might do.[174] At most, past violence correlates with a future risk of dangerousness.[175] Individuals, however, are not subject to defensive

168. Helen Frowe, *The Role of Necessity in Liability to Defensive Harm*, *in* THE ETHICS OF SELF-DEFENSE, *supra* note 154, at 152, 153; Draper, *supra* note 158, at 172; Jeff McMahan, *The Limits of Self-Defense*, *in* THE ETHICS OF SELF-DEFENSE, *supra* note 154, at 185, 191.

169. Draper, *supra* note 158, at 172.

170. Frowe, *supra* note 168, at 153–54; Draper, *supra* note 158, at 172–73. For externalist account, see Joanna Mary Firth & Jonathan Quong, *Necessity, Moral Liability, and Defensive Harm*, 31 L. & PHIL. 673, 673 (2012).

171. Firth & Quong, *supra* note 170, at 673.

172. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 207 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

173. *Id.*

174. One could object here that violent felons may be held responsible for having committed a forcible felony, but that would equate the fleeing felon rule with a form of punishment. Delegating to law enforcement officers the power to summarily punish people creates its own theoretical problems.

175. A study of recidivism of prisoners released in 30 states found that approximately 33% were arrested within five years for another violent offense. U.S. DEP'T OF JUSTICE, RECIDIVISM OF

violence simply because there is an increased risk (compared to the general population) that they will attack someone in the future.

If the fleeing felon rule were a true defensive rule, then it has odd limitations. States that have adopted the Model Penal Code limit the use of deadly force against fleeing felons to law enforcement or persons assisting law enforcement.[176] And they similarly restrict the use of deadly force against escaping prisoners to guards and other peace officers.[177] If, as *Scott* contends, fleeing felons are an inherent danger to the entire community, then these limitations are not justifiable. We generally believe that the government has the moral obligation to extend a right of self-defense against people who threaten us.[178] If fleeing felons and escaping convicts pose the kind of danger that *Scott* and *Garner* claim, then any private person should have the power to kill them if necessary to prevent their escape. Thus, on the externalist account, the fleeing felon and prison escapee are not liable to defensive force because they have not become an unjust, violent threat.

The objections to unnecessary force, in my view, extend beyond those that the externalist account permits. Even where violent threats exist, I believe that the internalists are correct that the use of unnecessary force violates aggressors' rights. The reasons why involve the interplay between necessity and imminence.

The imminence requirement (especially in conjunction with the necessity requirement) performs several vital functions. First, the requirement partitions risk between potential aggressors and their victims.[179] Earlier defensive force favors defenders because they cannot know when and where an attack will take place. To borrow an example from the *Godfather*: When the Tattaglia family killed Luca Brasi (the enforcer of a rival family) during a meeting, they almost certainly saved

---

PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 SUPPLEMENTAL TABLES 2 tbl.2 (2016), https://www.bjs.gov/content/pub/pdf/rprts05p0510_st.pdf.

176. MODEL PENAL CODE § 3.07(2)(b) (AM. LAW INST., Proposed Official Draft 1962).

177. *Id.* § 3.07(3).

178. *See* Ferzan, *supra* note 158, at 238 ("On the other hand, the individual's right to self-defense is a moral right, which we believe the state is obligated to extend to citizens as a legal right."); V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1710 (2003) ("To eliminate self-defense is to create a world in which there is fear of the violent attacker, of being assaulted and of having no recourse. But it is also a world in which citizens are likely to change their attitudes toward their government, in which the government that once was seen as protecting them has abandoned them to the violence of their fellow citizens."). *But see generally* Claire Oakes Finkelstein, *On the Obligation of the State to Extend a Right of Self-Defense to its Citizens*, 147 U. PA. L. REV. 1361, 1363 (1999) (attacking the conventional wisdom of this right).

179. *See* Ferzan, *supra* note 158, at 244–45 (explaining why some theorists think imminence is a corollary of the necessity requirement).

the lives of members of their family.[180] And yet, they killed Brasi long before he carried out any future attacks against them.[181]

But this partition is not merely dividing risk between innocent victims and guilty aggressors. To illustrate the potential difficulties plaguing those who engage in preemptive violence to defend themselves, consider the Bernard Goetz case. Goetz is the so-called "subway vigilante" because he shot four youths on a subway train.[182] The four teenagers had surrounded Goetz and asked him for $5; Goetz construed their request as the beginning of a robbery and shot them.[183] Three of the four eventually recovered, but one youth was permanently paralyzed.[184] The reasonableness of Goetz's beliefs and the proportionality of his response became major issues in his trial.[185]

Goetz's case is far from a paradigm example of self-defense, but the case demonstrates the hazards of broad preemptive use of force. Epistemically, the earlier one permits defensive force, the less certain a defender can be that an attack will actually occur. The use of defensive force may be a mistake; the alleged aggressors may not have formed a plan to attack. Goetz had no knowledge that the youths were actually planning to rob him. He preempted based on intuition and racial stereotypes. But even if aggressors have formed a plan to attack, they may change their minds before going through with it. The fleeing felon rule, for example, permits deadly force whether the escaping person intends to hurt anyone or not, simply on the future possibility that the escapee *might decide* to hurt someone. The earlier one permits defensive force, the less certain one can be that defensive force is actually necessary to protect against harm.

Even if aggressors are determined to attack, the imminence requirement also protects aggressors' rights to due process of law. In general, when someone has committed a legally wrong action against another, and therefore has made himself liable to suffer consequences, a neutral magistrate should determine both whether, in fact, the individual committed the wrong, and the consequences deriving from that wrong

180. THE GODFATHER (Paramount Pictures 1972).

181. *Id.*

182. Bob Kappstatter, *The Story of Bernard Goetz, the Subway Vigilante*, NY DAILY NEWS (Aug. 14, 2017), http://www.nydailynews.com/new-york/story-bernhard-goetz-subway-vigilante-article-1.815968.

183. *Id.*

184. *Id.*

185. The shooting also prompted concerns about racism. Goetz was white, the youths were black, and Goetz shot them without any firm evidence that a robbery was actually imminent. Ultimately, Goetz only was convicted of illegally possessing and carrying a firearm. *See generally* People v. Goetz, 529 N.Y.S.2d 782 (N.Y. App. Div. 1988), *aff'd*, 532 N.E.2d 1273 (N.Y. 1988) (discussing proportionality of shooter's response).

action.[186] Early preventative violence preempts the police and the judicial system's ability to hold people accountable for planning violent acts.

Defensive violence also subjects potential aggressors to more harm than they would face in the criminal justice system. The proportionality requirement in self-defense is more coarsely grained than proportionality in punishment. Self-defense takes place in emergency circumstances, and the purpose of defensive force is protection from harm, not punishment in accordance with moral desert. Consequently, defenders do not make their defensive force exactly proportional to the attacker's moral culpability. And except for murder, those consequences will not result in taking the life of the offender. Aggressors, thus, usually face more harm from deadly force in self-defense than they would from punishment. So when self-defense rules provide broad permission to use preventative or retaliatory force, aggressors suffer at a premium, compared with the consequences they could face from the legal system. So both early preemptive force and late retaliatory force supplant an aggressor's rights to due process of law with private violence.[187]

To avoid these problems, self-defense law not only requires that a use of defensive force be necessary, it also requires the "adversary's unlawful violence to be almost immediately forthcoming."[188] State laws use different language. Some require that the attack be "imminent."[189] Others use the Model Penal Code's formulation that the use of defensive force be "immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."[190]

The problem is that the fleeing felon rule does not conceivably fit within either formulation of the imminence requirement. The rule authorizes deadly force based on a felon's flight, even when the felon is not presently attacking someone. Indeed, if all the fleeing felon rule did was specify that deadly force was permissible against fleeing felons who were attacking, the rule would be unnecessary and coextensive with self-defense and defense of others. The rule is a closer fit with the Model Penal Code's "immediately necessary" requirement because one could argue that if a felon is not immediately stopped, he may present a danger

186. *See* LOCKE, *supra* note 172, § 124; *see also id.* § 13 (stating that one will be partial to themselves if they are expected to be judges on their own cases); Immanuel Kant, *The Metaphysics of Morals*, *in* PRACTICAL PHILOSOPHY 382 (Mary J. Gregor trans. & ed., 1996); *cf.* 2 POLLOCK & MAITLAND, *supra* note 20, at 572 (discussing the restriction of self-help).

187. *See, e.g.*, David Gauthier, *Self-Defense and the Requirement of Imminence: Comments on George Fletcher's* Domination in the Theory of Justification and Excuse, 57 U. PITT. L. REV. 615, 616 (1996).

188. 2 LAFAVE, *supra* note 98, § 10.4(d).

189. 2 ROBINSON, *supra* note 147, § 131(b)(3).

190. MODEL PENAL CODE § 3.04(1) (AM. LAW INST., Proposed Official Draft 1962).

later.[191] But even there, it would run afoul of the limitation that the escaping criminal threaten to use unlawful force "on the present occasion."[192] Compared to the normal self-defense rules, the fleeing felon rule allows extremely early preventative force.[193] And the Model Penal Code's prison escape rules are even more extreme because, unlike *Garner*, they do not require the escapee to have committed a violent felony.

To illustrate the distinction between the fleeing felon rule and ordinary self-defense, consider the capture of two escaped convicts in New York in 2015.[194] Richard Matt and David Sweat, both convicted murderers, executed a *Shawshank Redemption*-style escape from a New York prison in 2015 by sawing through prison walls and pipes.[195] They fled into the woods surrounding the prison, triggering an extensive manhunt.[196]

Matt's capture, which occurred three weeks later, was consistent with actual self-defense and defense of others.[197] Police were alerted to Matt's location (about forty miles from the prison) when they received reports of shots being fired in the area.[198] Federal officers searched the surrounding woods and discovered Matt armed with a shotgun. They killed him after he refused to drop the shotgun and surrender.[199]

David Sweat was captured two days after Matt was killed, but unlike Matt's capture, Sweat's was not consistent with a claim of immediate self-defense by the officers.[200] A state trooper found Sweat on a rural road less than two miles from the Canadian border.[201] Sweat fled into an open field, and the trooper ordered him to halt.[202] When Sweat refused the request, the trooper shot him twice in the back with a pistol from over fifty yards away.[203]

---

191. *Id.*

192. *Id.*

193. *Id.*

194. *See* Corky Siemaszko, *David Sweat, Prison Escape Mastermind, Sentenced for Breakout*, NBC News, Feb. 3, 2016, http://www.nbcnews.com/news/us-news/david-sweat-prison-escape-mastermind-sentenced-breakout-n510406.

195. *Id.*

196. William K. Rashbaum, *New York Prisoner's Keys to Escape: Lapsed Rules, Tools and Luck*, N.Y. TIMES (July 20, 2015), https://www.nytimes.com/2015/07/21/nyregion/in-new-york-prison-escape-patience-timing-and-luck-for-david-sweat.html?_r=0.

197. Ray Sanchez et al., Deborah Feyerick, & Alexandra Field, *New York Escapee Richard Matt Killed; David Sweat Still on the Run*, CNN (June 27, 2015), http://www.cnn.com/2015/06/26/us/new-york-prison-break/.

198. *Id.*

199. *Id.*

200. Rashbaum, *supra* note 196.

201. *Id.*

202. *Id.*

203. *Id.*

Sweat's case fits within the core of the fleeing felon rule. When apprised of the circumstances, one criminal justice professor concluded that "[t]here cannot be any clearer situation than this one"; Sweat was "a real threat" because of his previous conviction for killing a police officer.[204] Yet, from a theoretical perspective, more needs to be said. Sweat was running away, unarmed, in an open field. He was half a football field away from the trooper trying to arrest him. Sweat was neither an imminent danger to the officer nor to anyone else in the area (if anyone else was even in the area).

Thus, doctrinally and philosophically, self-defense cannot justify the fleeing felon rule. The rule authorizes deadly force based on inchoate fears of what felons *might* do during or after the escape. Defensive violence is only justifiable based on an actual or threatened imminent attack. The fleeing felon rule's justification, if there is one, must lie somewhere else.

III. BEYOND SELF-DEFENSE

The failure of the fleeing felon and prison escape rules to accord with the basic limitations of self-defense leads us to three possible conclusions.

First, perhaps the necessity and imminence limitations are not necessary requirements of self-defense. But as explained in Part II, there are strong reasons to reject this view. The necessity and imminence limitations protect aggressors' rights to due process of law, and they preserve the state's role as the arbiter of who has done wrong and the consequences that should follow.[205] The limitations also prevent defensive force from being applied too early—even before aggressors have made up their minds to attack.[206]

The second possibility is that the special fleeing felon and prison escape rules are unjustifiable and should be eliminated. These rules may just be the vestiges of an earlier time when most felonies were punished with death and where people who escaped would be outlawed and beyond the king's peace. Although *Garner* partially ameliorated the problem by narrowing the rule, it may be time to reevaluate its existence. As I will argue below, a state has no moral obligation to extend the fleeing felon rule, unlike its obligation to extend a right of private self-defense against imminent harm.

---

204. Associated Press, *David Sweat Shooting: N.Y. Trooper Had Law on His Side When He Fired on Escapee*, NBCNEWS (June 30, 2015), http://www.nbcnews.com/storyline/new-york-prison-escape/trooper-had-law-his-side-when-he-shot-unarmed-escapee-n383981.

205. *See supra* Part II.

206. They also have a long historical pedigree and strong support from legal theorists over a long period of time and with a wide range of premises, approaches, and other views.

But there is a third possibility that this Part seeks to explore. Perhaps the fleeing felon and prison escape rules are justified because government has the normative authority to permit deadly force for reasons beyond self-defense and defense of others. Specifically, the government can use deadly force against those who stubbornly resist the most basic legal institutions. This may be a corollary of the government's having a Weberian monopoly of force—or, at the very least, a corollary of the duty to establish and maintain legal institutions capable of preserving rights.

This Part has three sections. The first section will return to the structure and function of self-defense and argue that self-defense rules widely permit deadly force for reasons beyond the necessity of saving life. Unless our use-of-force rules are seriously deficient, this gives us some reason to believe that the state may justifiably authorize deadly force beyond that immediately necessary for the preservation of human life. The second section will sketch out an argument for why an account of normative political authority might recognize that governments have the power to authorize deadly force against escaping criminals. If governments have this power, then the relevant metric of necessity for using force in the escape context is the need to protect the legal system against those trying to escape from justice, not the need to protect human life. The third section will explain why an inquiry into the permissible reasons for government authorization of deadly force is important, even apart from evaluating the justifiability of the fleeing felon and prison escape rules.

A. *Defending the Community's Way of Life and the Secondary Self-Defense Rules*

The idea that governments may authorize deadly force for reasons other than merely saving human life is already well grounded in our law. Our self-defense law, as it presently exists, recognizes this normative power of government through secondary self-defense rules, which define how we measure necessity and imminence in self-defense.

Before proceeding to the secondary rules, consider first what a strict necessity standard for self-defense would look like. In general, states apply something approaching a strict necessity standard to the use of force *against* law enforcement officers in self-defense. Consider this example:

> *Innocent arrestee*: Without justification or probable cause, police attempt to arrest Erin. In the course of the arrest, they use gratuitous violence. May Erin use violence to defend herself from the police?

Modern law has severely curtailed the common law right of self-defense against police. The Model Penal Code, which many states follow,

flatly bars the use of force to resist an unlawful arrest made by a peace officer.[207] The Code states, "The use of force is not justifiable . . . to resist an arrest that the actor knows is being made by a peace officer, although the arrest is unlawful."[208] In drafting the provision, the American Law Institute noted that "it was undoubtedly the prevailing rule in penal law as well as tort law that one might use moderate force to defend oneself against an illegal arrest."[209]

In formulating the provision, the Institute made two critical distinctions. First, it disabled citizens from using force in self-defense only to prevent an illegal arrest.[210] Individuals could still use force in self-defense against bodily injury, whether from deadly threats or excessive force.[211] Second, the lack of justification only applies if the person arrested knows he is being arrested by a peace officer.[212] Without much explanation, the Institute simply noted that "[t]he reasons for demanding submission to official action, with the concomitant possibility of providing an effective remedy against the state or the municipality, have no application to the case of private action—even for purported law enforcement."[213]

Although many states distinguish between illegal arrest and bodily injury,[214] some states are more restrictive. Pennsylvania and Washington courts permit resistance to police only to resist unlawful *deadly* force.[215]

Three reasons are commonly cited for largely disabling the right of self-defense against the police. First, remedies at law are adequate to compensate for the harm of an illegal arrest.[216] Second, resistance to an unlawful arrest would probably result in more significant injury to the arrestee than unlawful detention.[217] Third, the law of arrest is complicated and best tested through judicial proceedings rather than through trial by combat in the streets.[218]

When it comes to self-defense against private citizens, however, these considerations are discarded. A person may use force to prevent a false

207. MODEL PENAL CODE § 3.04(2)(a)(i) (AM. LAW INST., Proposed Official Draft 1962).

208. *Id.*

209. MODEL PENAL CODE § 3.04 cmt. 3(a) at 42 (AM. LAW INST., Official Draft and Explanatory Notes 1985) (footnote omitted).

210. *Id.*

211. *Id.* § 3.04 cmt. 3 at 42.

212. *Id.*

213. *Id.* § 3.04 cmt. 3(a) at 44.

214. *Id.* at 45 n.27.

215. Commonwealth v. Biagini, 655 A.2d 492, 499 (Pa. 1995); State v. Holeman, 693 P.2d 89, 91–92 (Wash. 1985).

216. § 3.04, cmt. 3(a) at 42–43. On nondeadly force, *compare id.* at 43 (distinguishing unlawful arrest from bodily injury), *with* cases cited *supra* note 215 (treating only unlawful deadly force as not amenable to a true judicial remedy).

217. § 3.04, cmt. 3(a) at 43.

218. *Id.*

arrest by a private citizen.[219] Likewise, a person may use reasonable force to defend property, even if the property is of a kind that is fungible and easily replaceable.[220] Thus, in many circumstances, self-defense law permits individuals to use force to protect their rights even when they may otherwise have to appeal to the legal system for redress.

These circumstances are not limited to cases where a person uses reasonable, non-deadly force to protect smaller interests, such as protecting personal property. Self-defense law also allows *deadly* force when such force is not strictly necessary for the protection of human life. Moreover, when an individual acts in self-defense, that individual often could have made a series of different choices that would have obviated the need for defensive violence. A series of secondary rules, which artificially define the necessity and imminence requirements,[221] lay out how this works.

Consider the following examples:

> *Stand Your Ground*: Adam is standing just outside his open apartment door in a common apartment hallway. He sees someone walking down the hallway threatening to kill him with a knife. May Adam stand his ground and fight back, or is he obligated to step into his apartment and lock the door?
>
> *Castle Doctrine*: Becca is at home when she hears glass break and sees an armed burglar try to enter through her back door. Becca has time to escape out her front door. Must she leave? Or can she use force in self-defense if necessary to protect herself in her home?
>
> *Armed Robbery*: Charlie is held up at gunpoint, and the robber says, "Your money or your life." Charlie believes that the robber will not hurt him if he surrenders his money. Must he give up his wallet? Or may he judge the necessity of using deadly force on what would happen if he refused to give up his wallet?
>
> *Law Enforcement*: David, a police officer, is pursuing a shoplifting suspect. The suspect, knowing David is trying to arrest him, threatens to kill David if he comes any further.

219. *Id.* at 43–45 ("It should be noted also that the limitation does not apply to the resistance of illegal arrest by a person not known to the actor to be a peace officer. . . . All jurisdictions have continued to allow persons to resist illegal arrests by other private persons . . ."). A person may also resist an unlawful arrest if it is unknown whether the person is a police officer. *See id.*

220. *See* 2 LAFAVE, *supra* note 98, § 10.6, at 553.

221. On the distinction between primary and secondary requirements, see, for example, BOAZ SANGERO, SELF-DEFENCE IN CRIMINAL LAW 147 (2006).

> May David continue the arrest or must he cease the arrest and try again another time?

In each of these cases, there is real doubt as to whether deadly force is strictly "necessary." One answer could be that deadly force is unnecessary because all four defenders could undertake a simple action to avoid the threat. On the other hand, a more nuanced answer could be that deadly force is necessary because all four can measure the necessity of using deadly force without accounting for actions that they have no duty to take.

States measure necessity differently in different circumstances. Generally, all states recognize the castle doctrine and the right of law enforcement officers to stand their ground,[222] but states split on whether Adam could stand his ground or would have to retreat because Adam had the option to retreat with complete safety.[223]

Underlying these rules are nuanced value judgments that individuals may use deadly force to protect individual and societal interests beyond ensuring mere safety from unjust bodily injury. Take, for example, the Model Penal Code's position on self-defense outside the home. The Model Penal Code generally requires a person to retreat if he can do so "with complete safety" because

> the protection of life has such a high place in a proper scheme of social values that the law should not permit conduct that places life in jeopardy, when the necessity for doing so can be avoided by the sacrifice of the much smaller value that inheres in standing up to an aggression.[224]

In states that have adopted the Model Penal Code, Adam thus has to go inside his apartment and lock his door. Yet, the Code also recognizes that Charlie may use deadly force, even if he could perhaps avoid the need for doing so by giving up his wallet. The ALI says simply that "proper policy cannot demand submission to a robbery."[225]

---

222. 2 LAFAVE, *supra* note 98, § 10.4(f), at 547. Depending on the jurisdiction, there are exceptions, such as when a conflict arises between two individuals from the same household. *See* 2 ROBINSON, *supra* note 147, § 131(d), at 86–87 n.61 (collecting authority).

223. 2 LAFAVE, *supra* note 98, § 10.4(f), at 547–48.

224. MODEL PENAL CODE § 3.04 cmt. 4(c) at 54.

225. *Id.* § 3.04 cmt. 4(d) at 58. The common law recognized a similar distinction, generally requiring retreat—but not in the face of a robbery. *See* 3 EDWARDO COKE, INSTITUTES OF THE LAW OF ENGLAND 55 (1809) ("As if a thiefe offer to rob or murder B. either abroad, or in his houfe, and thereupon affault him, and B. defend himfelfe without any giving back, and in his defence killeth the thief, this is no felony; for a man fhall never give way to a thief . . . .").

Some of these judgments may reasonably be disputed. It is not self-evident, for example, why a person must sacrifice part of his liberty by retreating to avoid taking the life of an unjust

The debate today over "Stand Your Ground" laws raises similar questions. These laws dispense with the duty to retreat in public places.[226] In essence, Stand Your Ground laws apply to public places those self-defense rules that would otherwise apply to persons attacked in their homes. Despite some claims to the contrary, these laws do not dispense with the necessity requirement. But they do measure necessity without accounting for a duty to retreat. Those who favor such laws typically argue that individuals should not have their freedom curtailed by those who seek to do them felonious harm.[227] Those who oppose such laws generally argue that human life is too important to allow it to be taken when a person can avoid doing so at low cost.[228] Interestingly, Stand Your Ground law opponents have not launched similar attacks against the Castle Doctrine, which suggests that most people recognize that deadly force may be used, in part, to defend a person's interests in not fleeing his home.

In sum, self-defense law does not restrict defensive violence only to those circumstances in which violence is strictly necessary to protect one's rights to bodily integrity. The secondary rules reflect a tacit acceptance that some values, beyond the bare necessity of protecting human life, are worth protecting with deadly force. Likewise, the justification for the fleeing felon rule may rest outside the bare necessity of protecting human life.

B. *Towards a More Complete Account of the Permissibility of Deadly Force*

Our understanding of the permissible use of deadly force is impoverished in two ways. First, the Fourth Amendment doctrine itself is impoverished.[229] The replacement of common law rules with a Fourth Amendment general reasonableness standard has failed to provide basic action guidance to law enforcement or the courts on when deadly force is permissible. Police may now use too much force with few or no consequences.

But our understanding of the permissible use of deadly force is philosophically impoverished, too. Contemporary political philosophers

---

aggressor but not to avoid the loss of a trivial amount of property. But for present purposes the key point is that they rest on considerations that go beyond the general rule that a person may use deadly force where necessary to protect against an imminent threat to her own life.

226. *See generally* Ward, *supra* note 147, at 108 (discussing these laws).

227. *See, e.g.*, Heidi M. Hurd, *Stand Your Ground*, *in* THE ETHICS OF SELF-DEFENSE, *supra* note 154, at 254.

228. *See, e.g.*, Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 567 (1903).

229. Harmon, *supra* note 34, at 1119.

generally "consider state coercion . . . in the context of punishment."[230] In the past 30 years, many scholars of ethics and political philosophy have also engaged with the right of self-defense.[231] But little contemporary work has been done examining when governments may permissibly authorize deadly force apart from self-defense.

As a result, the concept of self-defense is swallowing other possible justifications for the government's authority to enforce the rule of law. This impoverishment is seen in *Garner* and *Scott*, which cannot conceive why deadly force could be permissible unless it was necessary in self-defense or defense of others.[232] It is also seen in international law, where self-defense against armed aggression has swallowed other possible justifications for just war.[233] And it is occasionally seen in philosophical justifications of punishment, some of which try to bring punishment within self-protection.[234]

This effort to reduce all permissible violence to some form of self-defense is a contemporary phenomenon. Anglo-American criminal law has long recognized the permissibility of deadly force for punishment and for law enforcement.[235] Ironically, the right of self-defense—understood as a personal right of a victim to protect himself—developed centuries later.[236] Similarly, the scope of permissible war has undergone a profound change. Enlightenment scholars had a rich theoretical framework of just war that permitted both defensive and offensive wars. Countries could go to war defensively when attacked and when in imminent danger. But they also had power to go to war offensively to redress violations of certain rights.[237]

As a reform project, the effort to reduce all permissible violence to some form of self-defense has several advantages. First, it cabins the scope of permissible violence, thereby potentially preventing violence over trivial conflicts. For this reason, international law outlawed

230. *Id.* at 1121.

231. *See, e.g.*, *supra* notes 154–55.

232. Scott v. Harris, 550 U.S. 372, 382 n.9 (2007); Tennessee v. Garner, 471 U.S. 1, 11 (1985).

233. *Compare, e.g.*, 2 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 130 (Richard Tuck ed., Liberty Fund, Inc. 2005) (1625) (distinguishing defensive war from war designed for recovery or punishment), *and* SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 168 (James Tully ed., Michael Silverthorne trans., Cambridge Univ. Press 1991) (1682) (discussing justifications for war and peace), *and* 3 EMER DE VATTEL, THE LAW OF NATIONS 293 (Béla Kapossy & Richard Whatmore eds., Liberty Fund, Inc. 2008) (1758) (distinguishing offensive and defensive war), *with* General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57, *and* U.N. Charter art. 51.

234. *See* Warren Quinn, *The Right to Threaten and the Right to Punish*, 14 PHIL. & PUB. AFF. 327, 336 (1985) (discussing the philosophical misconceptions of punishment).

235. *See* 4 BLACKSTONE, *supra* note 22, at 178–81 (discussing justifiable homicide).

236. *See* 2 POLLOCK & MAITLAND, *supra* note 20, at 479.

237. *See* sources cited *supra* note 233.

offensive war in the twentieth century. War was not deemed an appropriate method of adjudicating disputes between countries. Second, it provides an established legal framework to evaluate legitimate violence. Despite disputes at the margins, the three self-defense limitations of necessity, imminence, and proportionality provide helpful guidance for when someone may use force. Third, the use of self-defense provides us with an easy justification once we establish that something is an act of self-defense. Self-defense has an almost self-justifying character about it. So to assert that a violent act *is* an act of self-defense has the advantage of dispensing with further justification for why the act is permissible.

As a philosophical topography of permissible violence, however, the self-defense framework falls short. For it leaves unanswered the most fundamental question: What interests are so valuable that we may take human life to defend them? We generally agree that protection of innocent human life is one such thing, which is why the self-defense framework is so enticing. But is the protection of human life the only thing that justifies killing? The answer is no.

As one illustration where the right to use force extends beyond saving human life, take just war theory. Most generally agree that at least defensive wars are permissible. But what are we defending in a just war?

One possibility is that we are simply protecting human life writ large, and all war may be reduced to individual self-defense.[238] But this is a thin account of permissible war, and a highly controversial one at that.[239] Many wars are about disputes over sovereignty and in the nature of conditional threats to human life. When Russia invaded Ukraine, Russia sought to exercise sovereignty over the territory of Crimea. Individual Ukrainians likely would not face a threat of death if they simply acceded to the Russian demands.

A second possibility—and perhaps a better explanation—is that just wars defend a common way of life.[240] Political sovereignty matters because our political and personal freedom are inextricably linked with who governs us and how. The American Revolution was about whether the American people would rule themselves or whether British Parliament would exercise ultimate sovereignty. Decisions over political sovereignty have a profound impact on deciding who makes the law and which political and civil rights inhabitants will have. A claim of "self-

238. *Cf.* JEFF MCMAHAN, KILLING IN WAR 157 (2009) (stating that killing in war is not solely based on self-defense). This paragraph takes a slightly narrower version than McMahan has proposed.

239. *See, e.g.*, RODIN, *supra* note 154, at 122–40 (rejecting a self-defense account).

240. *See id.* at 141–62 (describing such an account, although finding it inadequate to fully explain just war).

defense" in war generally means that a party uses deadly force to defend its preferred common way of life over a particular territory.

Likewise, and most relevant for present purposes, defending 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.[241] The maintenance of legal institutions requires that the state have power to overcome resistance to the laws. Political philosophers have not discussed the permissibility of the state's use of force to establish and maintain the rule of law as extensively as other topics, but one can find threads of the discussion.

In *War and Murder*, G.E.M. Anscombe argued that "[i]n a peaceful and law abiding country . . . [although] it may not be immediately obvious that the rulers need to command violence to the point of fighting to the death those that would oppose it . . . brief reflection shows that this is so."[242] Human beings require a society to flourish. And to have a just society in which people can flourish, a polity must have just law backed by enough force to overcome those who would act unjustly towards others.[243] Similar views are expressed by Augustine and Aquinas.[244]

Immanuel Kant offers a related, but slightly different view. Kant does not say, as Hobbes does, that the state of nature is a state in which people "deal[] with one another only in terms of the degree of force each has."[245] Instead, Kant argues that the state of nature is a state "devoid of justice" because no one is competent to decide conflicts of rights.[246] To establish a state in which justice is possible, Kant argues that "each [person] may impel the other by force to leave this state and enter into a rightful condition."[247]

In some sense, deadly force against fleeing criminals aims to force them to "enter into a rightful condition."[248] Fleeing felons and escaped convicts have committed a double breach of the community's laws. They

241. The first sentence of the Massachusetts Constitution, drafted principally by John Adams and adopted in 1780, recognizes the relationship between maintaining a government and the protection of individual rights. It states, "The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life . . . ." MASS. CONST. pmbl. My thanks to Jeremy Rabkin for this point.

242. G.E.M. Anscombe, *War and Murder*, *in* NUCLEAR WEAPONS: A CATHOLIC RESPONSE 46 (Walter Stein ed., 1961).

243. *Id.* at 45.

244. *See* Paul J. Weithman, *Augustine and Aquinas on Original Sin and the Function of Political Authority*, 30 J. HIST. PHI. 353, 354 (1992).

245. IMMANUEL KANT, THE METAPHYSICS OF MORALS 90 (Mary Gregor trans. & ed., 1996).

246. *Id.*

247. *Id.*

248. *Id.*

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.

While the idea that governments, as part of their rule, must fight some people to the death "may not be immediately obvious,"[249] we seem to recognize it in extreme cases. After American forces killed Osama bin Laden, President Obama gave a speech to the country in which he claimed that "[j]ustice has been done."[250] The speech did not argue that troops killed bin Laden either in self-defense or defense of the nation. In fact, the President barely mentioned self-defense at all; his speech emphasized bringing terrorists to justice. And evidence suggests that bin Laden was unarmed and not an imminent threat to the troops when he was killed.[251]

The prison escape rules are another example. Prisons are mini-societies in which a minority rule over a majority that has lost its freedom because of misconduct. Prison inmates greatly outnumber prison guards—often by a ratio of three to four inmates per staff member.[252] In this environment, compelling prisoners to obey the rules requires the use (and threatened use) of force beyond what is necessary for immediate self-defense.

The use of force to prevent escapes, although not a good fit with the specific rules governing individual self-defense, nonetheless may find useful the necessity, imminence, and proportionality questions that we usually ask in that context because they leave open the most basic question: What interests are deadly force necessary to protect? That is, what are the legitimate triggering conditions for the right to use force? On this front, *Scott* was wrong to judge "necessity" as the need to protect human life against the threat posed by the felon.[253] The relevant metric of

249. Anscombe, *supra* note 242, at 46.

250. Macon Phillips, *Osama Bin Laden Dead*, WHITE HOUSE (May 2, 2011, 12:16 AM), https://obamawhitehouse.archives.gov/blog/2011/05/02/osama-bin-laden-dead.

251. Brian Ross & Lee Ferran, *Osama Bin Laden Unarmed When Killed, White House Says*, ABCNEWS (May 3, 2011), http://abcnews.go.com/Blotter/osama-bin-laden-unarmed-killed-white-house/story?id=13520152.

252. U.S. GOV'T ACCOUNTABILITY OFFICE, BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 78 tbl.14 (2012), http://http://www.gao.gov/assets/650/648123.pdf; Joe Davidson, *Too Many Inmates, Too Few Correctional Officers: A Lethal Recipe in Federal Prisons*, WASH. POST (Sept. 1, 2015), https://www.washingtonpost.com/news/federal-eye/wp/2015/09/01/too-many-inmates-too-few-correctional-officers-a-lethal-recipe-in-federal-prisons/?utm_term=.6f4cb5e42941.

253. Scott v. Harris, 550 U.S. 372, 382 n.9 (2007).

necessity, instead, should have been the need to protect the legal system against those trying to escape it.

A non-self-defense account also better explains the distinctions between the fleeing felon and prison escape rules and self-defense rules. For example, we generally believe that a state has a moral obligation to extend a right of self-defense.[254] A state that made self-defense unlawful—that punished victims for resisting unjust attacks—would be complicit in the violence of unjust aggressors.[255] In contrast, a state does not have an inherent moral obligation to allow individuals to kill fleeing felons. Fleeing criminals, unlike unjust aggressors, do not necessarily threaten immediate tangible harm to individuals. And a fleeing criminal can always be arrested, re-imprisoned, and punished both for the underlying crime, and for the escape, whereas a tort suit is a poor remedy for unjust violence. At most, a state may give certain individuals a liberty right to kill certain fleeing felons, but no individual—including a law enforcement officer—has a claim-right against the state to be allowed to kill a fleeing criminal.

As a corollary, the state may also limit the fleeing felon rule in ways that are incompatible with self-defense. In general, a person can defend anyone from an unjust threat—that is, a person may act in self-defense or defense of others. Analogous to self-defense, the state would commit a serious moral wrong if it imposed criminal penalties upon a bystander who defended a victim from an illegal attack. The fleeing felon rule, however, is not necessarily as capacious. In states that have adopted the Model Penal Code, only peace officers and persons acting on behalf of peace officers may use deadly force against fleeing felons.[256] And similarly, only correctional officers may use deadly force to prevent a jail or prison escape.[257] If the fleeing felon rule were a form of self-defense and defense of others, then the common law rule, which allowed any private person to use deadly force to effectuate an arrest,[258] would be morally obligatory. Thus, understanding that not all permissible force is defensive helps distinguish circumstances in which a state has a moral obligation to extend a right to use force from those in which a state has a moral permission—but not an obligation.

To be clear, this analysis is not complete. As with recent examinations of the right of self-defense,[259] a more thorough examination would

254. *See supra* note 178 and accompanying text.

255. *See* Nourse, *supra* note 178, at 1710.

256. MODEL PENAL CODE § 3.07(2)(b) (AM. LAW INST. 1985).

257. *Id.* § 3.07(3).

258. Commonwealth v. Chermansky, 242 A.2d 237, 240 (Pa. 1968).

259. *See, e.g.*, Daniel Statman, *On the Success Condition for Legitimate Self-Defense*, 118 ETHICS 659, 659 (2008) (discussing legitimate self-defense conditions); Thomson, *supra* note 155, at 283.

attempt to list the necessary and sufficient conditions to use deadly force to protect the community way of life. It certainly cannot be the case—and this Article does not suggest—that any marginal threat to the integrity of the legal system may be resisted with deadly force.

The claim made here is much narrower—that the community may resist only certain grave breaches of the community's laws that are tantamount to renouncing one's duty to be subject to the rule of law.

C. *Taming Self-Defense*

I want to end with an explanation for why the inquiry into permissible political violence is important beyond the immediate question of whether some version of the fleeing felon rule is justified. This inquiry is important, first, for policy reasons: Governments actually use force against those who do not pose an imminent threat, and it seems unlikely and undesirable that they will stop doing so any time soon. After all, one of the major reasons people form governments is to promote the peaceful resolution of disputes, and that purpose cannot be accomplished unless a government can use force to compel compliance with this system. Second, the inquiry is important philosophically because we have a poor understanding about the maximum amount of force a state can rightfully authorize.

In response to terrorism, the U.S. government has expanded its understanding of when preemptive force is permissible. In 2003, the United States invaded Iraq and overthrew Saddam Hussein's regime.[260] The United States mustered multiple arguments in support of the invasion.[261] First, the United States argued that Iraq breached its ceasefire obligations imposed after the First Gulf War, and thus, the United States was entitled to resume hostilities under previous U.N. resolutions.[262] Second, and questionably, the United States claimed that the actions were "necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area."[263] The second claim touched off a firestorm of controversy about how necessity and imminence should constrain the use of force in warfare.[264]

---

260. John Bolton, *Overthrowing Saddam Hussein Was the Right Move for the US and its Allies*, The Guardian (Feb. 26, 2013), https://www.theguardian.com/commentisfree/2013/feb/26/iraq-war-was-justified.

261. *See* Permanent Rep. of the U.S. to the U.N., Letter dated Mar. 20, 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/351 (Mar. 20, 2003).

262. *Id.*

263. *Id.*

264. *See, e.g.*, GEORGE P. FLETCHER & JENS DAVID OHLIN, DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY 163–70 (2008); Ferzan, *supra* note 158, at 217; John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 775 (2004); Michael Skopets, Comment, *Battered Nation*

The controversy only deepened when, on September 30, 2011, the Obama Administration had two unmanned aerial drones fire Hellfire missiles at Anwar al-Awlaki, a U.S.-born al-Qaeda cleric, and Samir Khan, a U.S. citizen who published anti-American propaganda on an al-Qaeda linked website.[265] Both were killed in the attack.[266] At the time of the drone strike, neither al-Awlaki nor Khan was carrying out a terrorist strike or en route to do so.[267] The use of force was, thus, unnecessary to prevent an imminent attack.

Before the operation, the Department of Justice wrote a White Paper justifying the use of deadly force against U.S. citizens who were senior leaders of al-Qaeda but located outside the zone of active hostilities.[268] That paper claimed that the United States could use deadly force when three circumstances were met:

> (1) where an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) where a capture operation would be infeasible—and where those conducting the operation continue to monitor whether capture becomes feasible; and (3) where such an operation would be conducted consistent with applicable law of war principles.[269]

The limit to targeting an "individual [who] poses an imminent threat of violent attack against the United States" rarely accords with operational realities, at least under any ordinary understanding of "imminent."[270] Drone strikes occur when the U.S. government has the opportunity, not necessarily when the targets are presently engaged in violence against the United States.[271] To address this problem, the Department argued that "the threat posed by al-Qa'ida and its associated

---

Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law, 55 AM. UNIV. L. REV. 753, 755–56 (2006).

265. Jennifer Griffin, *Two U.S. Born Terrorists Killed in CIA-Led Drone Strike*, FOX NEWS (Sept. 30, 2011), http://www.foxnews.com/politics/2011/09/30/us-born-terror-boss-anwar-al-awlaki-killed.html; Carol J. Williams, *Awlaki Death Rekindles Legal Debate on Targeting Americans*, L.A. TIMES (Sept. 30, 2011), http://articles.latimes.com/2011/sep/30/world/la-fg-awlaki-due-process-20111001.

266. Williams, *supra* note 265.

267. *Id.*

268. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QAI'IDA OR AN ASSOCIATED FORCE (2013), http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

269. *Id.* at 6.

270. *Id.*

271. *A National Security Symposium: The Constitutionality and Consequences of America's Use of Drones and the NSA Spying Program*, 41 W. ST. U. L. REV. 535, 561–62 (2014).

forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat."[272] The Department then provided a multifactor test that collapsed imminence into necessity and convenience: "imminence must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans."[273] The White Paper effectively eliminated the requirement of an "imminent" threat.

That is not to say that the White Paper was wrong on the bottom line. Two sets of constraints govern the use of war in warfare. The first set, the *jus ad bellum* criteria, governs when states may resort to war.[274] These include, among others, necessity, imminence, proportionality, and the probability of success.[275] But after hostilities have commenced, *jus in bello* rules govern the conduct of conflict.[276] And *jus in bello* rules only require a distinction between combatants and noncombatants, proportionality (meaning only that excessive harm is not caused to noncombatants), and military necessity.[277] Imminence is not a requirement of *jus in bello* rules, so a country does not need to wait until individual enemy soldiers present an imminent risk of danger before attacking.[278] Thus, if drone strikes against American members of al-Qaeda are simply extending the battlefield of open hostilities, the Department had no need to argue that the threat was imminent in the first place.

The Department's efforts to dilute the imminence requirement pose difficult doctrinal questions. In the domestic criminal law context, the imminence requirement has come under fire before, most notably from those arguing that domestic violence victims should be permitted to use force against abusive partners.[279] Their arguments tend to be analogous to the White Paper's: An abuse victim does not know when she will be

272. DEP'T OF JUSTICE, *supra* note 268, at 7.

273. *Id.*

274. Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of* Jus ad Bellum *and* Jus in Bello *in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 49 (2009).

275. *Id.* at 103.

276. *Id.* at 49.

277. *Id.* at 103. There are additionally some prohibited means of force, such as using prohibited weapons or ammunition.

278. Geoffrey S. Corn, *Self-Defense Targeting: Blurring the Line Between the* Jus ad Bellum *and the* Jus in Bello, 88 INT'L L. STUD. 57, 66–67 (2012).

279. For discussions on how imminence should apply to battered women and to states engaged in war, see, for example, Ferzan, *supra* note 158, at 215–17; Whitley Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342, 360 (2007); Michael Skopets, *Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law*, 55 AM. U. L. REV. 753, 774 (2006).

attacked, and once attacked, she is at a distinct disadvantage.[280] Consequently, her use of force against an abuser may be immediately necessary for protection, even if her abuser is not presently attacking her.[281]

This argument has received a mixed response from legislatures and the courts. Some courts consider abusive circumstances as part of a decision whether an abused partner reasonably believed that her use of force was necessary to stop an imminent attack.[282] Others have rejected these claims, holding that abuse victims should resort to police and the courts when they are not presently being attacked.[283]

As this confusion indicates, we simply lack a clear understanding of the necessary and sufficient conditions to authorize legitimate violence. We may use similar terms—necessity, imminence, and proportionality—across different doctrine and circumstances. But these labels lack value unless there is some shared understanding of what they mean. And these concepts likely will have different content when agents of the state engage in violence than when private citizens do so.

Relatedly, the study of legitimate political violence is important philosophically because we presently have a poor understanding of how much force governments can legitimately authorize. Most recent academic discussion of this question has taken place in the limited context of whether the state has a moral obligation to extend a right of self-defense and if so what should be its permissible scope.[284]

But the maximum level of force that a state may authorize is not coextensive with the right of self-defense. Instead, the upper bounds involve the exercise and delegation of the state's monopoly of force. Political theory plays a central role in criminal law justifications

The fleeing felon and prison escape rules are paradigm examples. Even if the fleeing felon rule is morally justifiable, it is certainly not inherently morally necessary that a state give anyone the power to prevent

280. *See* Ferzan, *supra* note 158, at 215–16 (describing these arguments before rejecting their position).

281. *Id.* at 240–41 (describing argument).

282. *See, e.g.*, State v. Gallegos, 719 P.2d 1268, 1271 (N.M. 1986), *abrogated by* State v. Alberico, 861 P.2d 192 (N.M. 1993); State v. Leidholm, 334 N.W. 2d 811, 820 (N.D. 1983); Commonwealth v. Stonehouse, 555 A.2d 772, 781–82 (Pa. 1989).

283. *See* State v. Norman, 378 S.E.2d 8, 15 (N.C. 1989) ("This would result in a substantial relaxation of the requirement of real or apparent necessity to justify homicide. Such reasoning proposes justifying the taking of human life not upon the reasonable belief it is necessary to prevent death or great bodily harm—which the imminence requirement ensures—but upon purely subjective speculation that the decedent probably would present a threat to life at a future time and that the defendant would not be able to avoid the predicted threat.").

284. *See* Ferzan, *supra* note 158, at 238. Most people generally believe that a state must extend some right of self-defense, particularly against threats of deadly force because those threats offer a kind of harm that legal systems cannot adequately remedy.

escapes with deadly force. Likewise, it also does not seem morally necessary that a state restrict the fleeing felon and prison escape rules to law enforcement officers. A government that invests private citizens with the law enforcement power to make arrests might also invest private citizens with the power to use deadly force to prevent escapes. To be sure, there are strong prudential arguments against doing so. After all, the state's monopoly on force is the state's, and the state therefore has a duty to control how force of that type is exercised by the people whom it authorizes to exercise it. Moreover, private citizens seem likely to be more apt to abuse the power to use deadly force compared with trained law enforcement officers. But this may be more true at some times and places than others. In addition, how to proceed may depend on the size and resources of the state's police force. Thus, an argument against expanding the fleeing felon rule to private citizens is more complicated than simply asserting that the rule authorizes the use of force when that force is unnecessary to protect human life.

In sum, political theory plays a large role in criminal law justifications. How a government authorizes force depends on what values the state seeks to protect and how it diffuses law enforcement power among its agents and private citizens. Studying the right of self-defense against deadly threats (as much present scholarship does) is part of this inquiry. But more work outside of this narrow area remains.

CONCLUSION

The use of deadly force to prevent fleeing felons and prisoners from escaping presents a puzzle. These are not actions of self-defense because fleeing criminals do not pose an imminent risk of danger simply by taking flight. If the rules are justifiable at all, we must look to political theory and the right of states to authorize force in defense of their legal systems. This area of scholarship remains underdeveloped, but it is crucial to understanding the right of self-defense, the right to use force in law enforcement, and the right to use force in warfare. The effort to justify all force as defensive has had the salutary purpose of trying to narrow the reasons why some people may kill others. But reconceptualizing all force as defensive paradoxically weakens the necessity, imminence, and proportionality requirements that cabin defensive force in the first place.