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The State Law Standard

Of the roughly 18,000 government entities in the United States that employ sworn officers, less than one hundred are federal agencies. The vast majority—over 15,000—are city police departments and county sheriffs' offices. The remainder are a mix of state police agencies and special jurisdiction agencies that provide either general policing services to specific geographic entities (e.g., hospital, university, or transit police) or state-wide policing services related to a specific activity or narrow set of activities (e.g., fish and wildlife, alcohol control, or gaming police). Of the roughly 900,000 sworn officers in the United States, more than 750,000 work for state and local police agencies.[1]

As those numbers demonstrate, the overwhelming majority of police agencies and the vast majority of officers derive their authority from state law. State law sets the criteria for who can be an officer, establishing, *inter alia,* age restrictions, minimum education prerequisites, citizenship requirements, criminal history limitations, and physical and mental health standards. State law creates a regulatory framework through which minimum training standards are set, professional licenses are issued, and, at least in forty-four states, police certifications can be revoked. State law determines how police agencies are funded, how they are permitted to procure equipment and services, and how they are to keep and disclose various records. State law also authorizes officers to use force and insulates them from civil or criminal liability for doing so.

In short, state law is an important and relevant standard under which the use of force can be analyzed. We provide in this chapter an overview of when state law applies, what it applies to, and how it applies. The Appendix of State Laws, set out at the end of this book, provides the relevant statutory provisions and, when statutes are lacking, judicial opinions regarding the regulation of police uses of force in all fifty states.

When Does the State Law Standard Apply?

A plaintiff sues an officer, seeking monetary damages for a use of force that they allege was an intentional battery. The plaintiff dies of their injuries, and their estate files a wrongful death lawsuit. A local prosecutor brings the case

to a grand jury to determine whether the officer committed a crime. The state Police Officer Standards and Training Commission opens an investigation to determine whether the officer's actions merit decertification. In each case, the officer's actions will be analyzed under state law.

Criminal Law

Officers, like anyone else, can be prosecuted for committing a crime if they engage in behavior that state law identifies as criminal. In most contexts, criminal cases start with a civilian complaint about, or an officer's firsthand observations of, suspected unlawful conduct. Police personnel will typically investigate and, if they develop probable cause to believe that a crime has occurred, make an arrest. After arrest, criminal cases are generally referred to the local prosecutor's office. A prosecutor reviews the existing information, sometimes works with officers to conduct additional investigation, and ultimately determines whether to pursue charges.

When the subject of the investigation is a police officer, however, different procedures might apply. In some jurisdictions, the agency that employs the officer will conduct the criminal investigation; in others, the agency may voluntarily request or be required to accept an external investigation. The local prosecutors' offices may be significantly more involved in the investigation than they are in most criminal cases. The prosecutor may decide to handle the case in-house, or the close working relationship between the local prosecutor and the police agency may lead the prosecutor to refer the case to the state attorney general or to a "special prosecutor" or an "independent prosecutor" to avoid the appearance of a conflict of interest. Concerns about potential conflicts and the potential appearance of conflicts has led some states to strip local prosecutors of their discretion to handle certain police use-of-force cases. In 2015, for example, New York Governor Andrew Cuomo issued Executive Order No. 147, appointing the state attorney general as the special prosecutor tasked with handling cases involving the use of lethal force by police officers "where, in [the attorney general's opinion], there is a significant question as to whether the civilian was armed and dangerous at the time of his or her death."[2]

The prosecutor can, depending on state law, either charge someone with a crime by filing an "information" or a "complaint" with the court (a process sometimes called "direct filing" or "charging by information") or by presenting the case to a grand jury. By rule or practice, some prosecutors' offices make it a habit to present all police shootings or serious uses of force to a grand jury, although that practice has been criticized because of the secre-

tive nature of the grand jury process and the potential for grand juries to be used to insulate the prosecutor from political backlash. When the prosecutor direct-files a case or when the grand jury believes that there is at least probable cause to believe that an individual committed a crime and returns an indictment (technically a "true bill of indictment"), the officer formally becomes a criminal defendant and the prosecution can proceed.

After charging or indictment, the prosecutor typically engages in plea negotiations with the defendant or the defendant's attorney. The vast majority of criminal cases—at least 90 percent—are disposed of via plea deals;[3] the defendant either pleads guilty or *nolo contendere,*[4] often in exchange for less severe charges or a reduced sentence. If a case does not result in a plea deal, the case goes to trial. Criminal cases are typically tried before a jury (the "petit jury," as distinct from the "grand jury"), although a defendant can typically waive their right to a jury trial and have the case heard by a judge (a "bench trial"). State criminal law cases can only be heard by state courts, just as federal criminal law cases can only be heard by federal courts.

Although it is not uncommon for officers to be prosecuted for a variety of criminal acts—public corruption, sexual assault, and the like—they are only rarely prosecuted for duty-related uses of force. Bowling Green University criminologist Phil Stinson has collected extensive data on officers arrested, which reflects the fact that 7,518 state and local officers were arrested a total of 9,088 times between 2005 and 2013.[5] Of those, just shy of 1,600 arrests were for violent crimes:

1,364 officers were arrested for an assaultive crime
807 officers were arrested for aggravated or simple assault
557 officers were arrested for intimidation
234 officers were arrested for a homicide offense
152 officers were arrested for murder or nonnegligent manslaughter
82 officers were arrested for negligent manslaughter

The vast majority of those officers were arrested for violent acts that they took in their individual capacity rather than their official capacity, even defining "official capacity" broadly.[6] Officers are only very rarely arrested and prosecuted for duty-related uses of force. In Arizona between 2011 and 2018, for example, local prosecutors reviewed 523 officer-involved shootings, with another seventy-one shootings pending review, and prosecuted only one officer.

There are at least two interrelated reasons for the low rate of prosecutions. First, it is likely that most uses of force simply do not meet the criteria for a

criminal act. Several studies have found that the single strongest predictor that an officer will use force is resistance, especially forceful resistance, by the subject.[7] As we will explain in detail below, state law typically authorizes officers to use force when and to the extent it reasonably appears necessary to overcome resistance, so the use of force under such circumstances is not necessarily criminal.

Second, even when a use of force may be a criminal act, proving beyond a reasonable doubt that the officer's actions exceeded the scope of what state law authorized—a question to which we return later in this chapter—can be a Herculean task. In part, that is because the use of force is unlike other acts for which an officer may be arrested. When an officer takes a bribe, for example, they are clearly acting outside the scope of their duties (except in truly exceptional circumstances). The same thing is true when an officer lies under oath or keeps seized money or drugs for themselves instead of properly impounding them. Such actions are *inherently* criminal; if a prosecutor can establish that the officer engaged in the underlying act, conviction should follow as a matter of course. Violence, in contrast, is a legitimate tool that officers can and do use in the course of their work. In light of the potential difficulty of distinguishing lawful from unlawful actions, prosecutors' ethical obligations to refrain from bringing charges unless the evidence both establishes probable cause[8] and is capable of proving guilt beyond a reasonable doubt[9] may dramatically restrict the likelihood of a prosecution in borderline cases.

The interplay between these two reasons means that criminal charges for duty-related violence remains the rare exception, even for the most committed prosecutors' offices. Additional reasons—including, for example, the manner in which police uses of force are typically investigated; prosecutors' conscious or unconscious reluctance to charge officers at a police agency that the prosecutor relies on and works closely with; the political fallout that can accompany the prosecution of a police officer; prosecutors' lack of familiarity with the subject matter (police tactics and techniques); and the longstanding observation that juries are reluctant to convict officers even in fairly egregious cases—also play a significant role in limiting the number of officers prosecuted for duty-related uses of force.

In short, the state criminal law standard applies to internal or external use-of-force investigations, to a prosecutor's decision to file charges or present the case to a grand jury, to a grand jury's decision to indict, to plea negotiations, and to the ultimate conclusion drawn by a judge or jury.

Civil (Tort) Law

Imagine a car crash. Vehicle 1 crashes into Vehicle 2, which was sitting stationary at a red light. The driver of Vehicle 2 sues the driver of Vehicle 1, demanding compensation for their personal injuries and damaged property. That lawsuit is civil, not criminal; it is brought by a private plaintiff, not by a prosecutor, and the goal is to compensate the victim for the harms they've suffered, not to criminally convict the at-fault driver. The driver of Vehicle 2 can file a civil lawsuit regardless of whether the driver of Vehicle 1 is criminally prosecuted. That civil lawsuit does not allege any breach of contract or, indeed, any pre-existing relationship between the drivers of Vehicle 1 and Vehicle 2. Instead, the underlying claim in the lawsuit is that the driver of Vehicle 1 has committed a "tort" (alternatively, a "tortious act"). According to Black's Law Dictionary, "tort" is used "to denote a wrong or wrongful act, for which an action will lie [that is, for which someone may sue], as distinguished from a contract."

State tort suits against police officers are civil allegations of wrongdoing, typically filed for the purpose of obtaining money damages as compensatory relief. Confusingly, issues of state tort law can come up in both state and federal courts. A litigant can file a lawsuit in federal court that alleges that a local police officer violated both state and federal law. If a litigant files a lawsuit in state court that lays out a claim under federal law—such as a violation of 42 U.S.C § 1983, discussed in chapter 1—the defendant officer can "remove" the case to federal court, bringing any state law claims along with it.[10] When a litigant sues a federal agent in state court alleging violations of state law, the federal agent can similarly remove the case to federal court.[11] Under either of the last two scenarios, the federal court will preside over both the federal and state law claims. Regardless of whether the case is heard before a federal or state judge, though, the court will rely on state law, including existing state precedent, to analyze the state law claims.

Regulatory Law

Like doctors, lawyers, and cosmetologists, police officers are, in most states, required to earn and maintain a state-issued certification (some states use the term "license"). According to Roger Goldman, the country's leading expert on police certification regimes, most states require most officers to be certified. State certifications are typically issued by a Police Officer Standards and Training Commission (a "POST Commission") or a Criminal Justice Standards and Training Commission (a "CJSTC"),

although a few states, including Massachusetts and New York, do not have such commissions. With the exception of California and Rhode Island, all of the states that have a POST Commission—as well as New York, which does not—can revoke an officer's state certification for an officer's on-duty behavior, although when they can do so depends on the idiosyncrasies of state law.

As of 2018, every state now also sets minimum training standards for officers. Typically, state statutes do not set out specific requirements, instead delegating that responsibility to the POST Commission or CJSTC. Some states, however, have adopted specific training requirements as a matter of statute. In 2018, voters in Washington state approved Initiative 940, which amended state law by requiring "violence de-escalation training"[12] and "mental health training,"[13] both of which must be provided in an officer's first fifteen months of employment and periodically over the course of their careers. The exact content of that training was left to the state POST Commission, which, by statute, must "consult with law enforcement agencies and community stakeholders" and consider a range of what the legislature determined were relevant factors, including "[d]e-escalation in patrol tactics and interpersonal communication training, including tactical methods that use time, distance, cover, and concealment, to avoid escalating situations that lead to violence" and "[a]lternatives to the use of physical or deadly force so that deadly force is used only when unavoidable and as a last resort."[14]

Directly or indirectly, state law regulates police training—potentially including training on tactics and the use of force—as well as certification and decertification. Clearly, then, the state law standard that can be used to evaluate an officer's use of force can have regulatory ramifications.

What Does the State Law Standard Regulate?

While it is fairly clear that the Fourth Amendment regulates the use of force when that force amounts to a seizure, the state law standard is more complicated. Indeed, it would be more accurate to discuss the variety of state law *standards* because, unlike the solitary concept of "seizure," there is no one definition or single answer to the question of what state law regulates. State law may be best understood as regulating the infliction of various harms caused by the commission of different types of wrongdoing, potentially including the use of force. Understanding the scope of how state law regulates the use of force requires understanding how state law regulates criminal and tortious acts.

Criminal Law

What we commonly refer to as a "crime" is, in somewhat technical terms, the commission of a certain action or actions that, when performed under certain circumstances or when they result in certain consequences, have been identified as criminal. Criminal statutes identify the behaviors, circumstances, and consequences that are the "elements" of a crime: a crime is committed when all of the elements are satisfied.

Consider, for example, South Carolina Code § 16-4-600(E)(1), which states, in part, "A person commits the offense of assault and battery in the third degree if the person unlawfully injures another person. . . ." Parsing that clause into its constituent parts, we see that assault and battery in the third degree consists of three elements: it is a crime for someone to (1) unlawfully (2) injure (3) another person. If any of those three elements are lacking, then the crime of assault and battery has not been committed. If, for example, an individual unlawfully injures a toaster, they have not committed the crime of assault and battery because the third element—"another person"—is not satisfied (although they may have committed a crime other than assault and battery).

As that brief summary of statutory elements suggests, state criminal law regulates a range of behaviors, prescribing punishment for a variety of social harms. Providing a complete list of relevant behaviors is outside the scope of this book, especially given the potential for the criminal law to vary significantly from state to state. Nevertheless, we can offer some general guidance as to the behaviors that are both common in use-of-force situations and are commonly regulated by state criminal law.

Assault: threatening or attempting to physically touch someone else against their will;

Aggravated assault: making threats of physical harm with a weapon or in circumstances that suggest particularly severe harm;

Battery: touching or striking someone else against their will, offensive touching, or causing actual bodily injury;

Aggravated battery: causing serious injury or causing injury to particularly vulnerable victims such as children or the elderly;

Murder: the intentional killing of a human being in cold blood (often referred to as an "intentional" killing or a killing "with premeditation" or "with malice aforethought") or the unintentional killing of a human committed with callous disregard of the risk to human life (often referred to as "depraved heart murder");

Manslaughter: the intentional killing of a human being in hot blood (often referred to as a killing after "adequate provocation") or the unintentional killing of a human being resulting from recklessness or criminal negligence;

Kidnapping: restricting another person's movement or forcing them to move from one location to another against their will;

Attempt: intending and actually trying, unsuccessfully, to commit some underlying crime. For example, planning and attempting to kill another person would not constitute the crime of murder because it did not result in a death, but it could constitute the crime of *attempted* murder; and

Conspiracy: entering into an agreement to commit some underlying crime. For example, planning with another person to kill someone could constitute the crime of conspiracy to commit murder.

State criminal law could potentially apply to a range of actions that officers might take in a use-of-force situation: it is not at all uncommon, for example, for an officer to threaten to use force (assault), to tackle, handcuff, and search the subject (batteries), and to secure them in a police vehicle and transport them to a booking facility (kidnapping). Obviously, we use this example to demonstrate that state criminal law is *potentially* implicated when an officer uses force, not to suggest that an officer's actions, taken in the normal course of their duties, will amount to crimes. In this section, we are concerned only with identifying the type of actions regulated by state criminal law. Later in this chapter, we provide a more in-depth discussion of how to determine whether state criminal law applies in any given case.

Civil (Tort) Law

Like criminal law, there is no one action or set of actions that are regulated by state tort law. Instead, state tort law applies most clearly when there is cognizable harm to a person (emotional harms, personal injury, or death) or property. State tort law may be best understood by dividing it into *intentional* torts and *negligent* torts, both of which are potentially implicated by the use of force by police.

Intentional torts are harms resulting from actions that are purposefully performed. Here are some of the most common intentional torts in the police use-of-force context.

Trespass to chattels, which typically refers to damage done to personal property;

Battery, which typically refers to physically touching another person without their consent;
Assault, which typically refers to threatening to commit or attempting to commit a tortious battery;
False Imprisonment, which typically refers to restraining another person against their will; and
Intentional Infliction of Emotional Distress, which typically refers to intentionally engaging in conduct that reasonably results in outrage.

Some common negligent torts in the police use-of-force context include:
Negligence, which typically refers to the infliction of personal injury resulting from a failure to exercise reasonable care; and
Negligent Hiring, Training, or Retention, which typically refer to a police agency or political subdivision's failure to exercise reasonable care when hiring, training, or continuing to employ officers.

Some tort claims may involve claims of intentional or negligent conduct, depending on the specific facts. A wrongful death claim, for example, can be predicated on an allegation that an officer intentionally killed someone or that an officer's negligence resulted in someone's death.

Regulatory Law

As described above, almost all of the states require officers to earn and maintain professional certifications, and most states have the authority to revoke those certifications under certain circumstances. Sixteen states can revoke an officer's certification only after the officer is convicted of a crime, while other states can revoke an officer's certification if they find that the officer engaged in specified types of misconduct, independent of any other civil or criminal remedies.[15] Even in the states that either lack revocation authority or have only tightly limited revocation authority, state law allows for functional equivalents: in California and Massachusetts, an officer's certification is voided if they are convicted of a felony, while New Jersey has a robust "forfeiture of office" statute that strips public officials, including police officers, of their public office if they are convicted "of an offense involving dishonesty," of an offense of a certain level of severity, or "of an offense involving or touching [the official's] office, position or employment."[16]

In addition to police certification, state law can also regulate officer hiring. Connecticut law, for example, prohibits police agencies from hiring any individual who was previously employed as an officer and "(1) was dismissed for

malfeasance or other serious misconduct calling into question such person's fitness to serve as a police officer; or (2) resigned or retired from such officer's position while under investigation for such malfeasance or other serious misconduct."[17] "Serious misconduct" is defined to mean "improper or illegal actions taken by a police officer in connection with such officer's official duties . . . including . . . repeated use of excessive force."[18]

How Does the State Law Standard Apply?

Imagine a random person—we'll call him John—who walks up to someone else in a shopping mall, tackles them, ties their hands together, carries them out to the parking lot, places them into a waiting vehicle, drives them across town, and locks them in a small room. In most contexts, John would be committing a series of serious crimes and opening himself to substantial civil liability. If John was actually *Officer* John, though, he may engage in functionally identical actions without running afoul of state law. Analysts must consider whether an officer's use of force is the type of action—or, more pertinently, caused the type of social harm—that state law regulates; that is, does state law apply to what the officer did? That is only the first half of the analysis, though. The second and equally important half of the analysis is determining whether state law authorized an officer to take the action or cause the harm under the circumstances. In other words, did the officer violate the applicable state law?

State statutes and common law doctrines can explicitly authorize police officers to engage in what would otherwise be criminal or tortious behavior.* They can also exempt police officers from otherwise applicable restrictions or provide officers with defenses to civil liability or criminal sanctions. For our purposes, there is no relevant distinction between authorizations, exceptions, and defenses; all three effectively allow officers to engage in what could otherwise be unlawful actions. Such authorizations, exceptions, and defenses can be police-specific—for example, authorizing officers, but not others, to act in particular ways—or more generally applicable, including officers within the scope of a broader legal rule.

In the remainder of this chapter, we first address the relationship between the constitutional standard and the state law standard. We then discuss police-specific state laws before broadening our perspective by briefly discussing more generally applicable state laws. Readers are advised that the

* To avoid overwhelming readers with endnotes, this section contains citations to state judicial opinions, but not to state statutory law except when a statute is directly quoted. The text of all relevant state statutes may be found in the Appendix of State Laws.

statutory analysis offered in the following pages is accurate as of the date of writing, but, as always, state law is subject to amendment.[19]

The Relationship Between the Constitutional Standard and the State Standard

The standard for analyzing the use of force under state law is distinct from the constitutional standard, although both are properly understood as *legal* standards. Without legal training or an unusually sophisticated understanding of the structures of American government, the distinction between state law and constitutional law can be difficult to grasp. Indeed, there is substantial confusion even among lawyers about the relationship between the constitutionality and the legality of a use of force. Strictly speaking, the constitutionality of an officer's use of force can be entirely distinct from the question of whether the officer violated state law. As Flanders and Welling put it, "The standards for criminal liability in a state criminal prosecution do not have to mimic the standards for a Constitutional tort."[20]

The relationship between constitutional law and state law is something like the relationship between the color of a car and the vehicle's speed. A car can be both red and fast, but a car can be red without being fast or be fast without being red. So it is with constitutional and state law: an officer's actions can be both unconstitutional and a violation of state law, but it is also true that an officer's actions can be unconstitutional without violating state law or be constitutional and still violate state law.

An officer's actions can be unconstitutional without violating state law because although the Constitution limits government authority, it does not require states to impose civil liability or criminal punishment on officials who exceed those limits. That is, states cannot authorize constitutional violations, but they are not required to civilly or criminally punish those violations, either.

An officer's actions can be constitutional and still run afoul of state law. The Fourth Amendment protects civilians' right to be free of unreasonable seizures, not officers' right to use force, which means that the states are free to pass laws that are more protective of individual rights than the Constitution itself by restricting the use of force. The California Supreme Court, for example, held that "state negligence law . . . is broader than federal Fourth Amendment law."[21] Thus, a use of force that may be objectively reasonable as a matter of constitutional law may still be negligent as a matter of state law.

Many states keep state law distinct from, and formally unaffected by, constitutional law. Indeed, many states do not even reference Fourth Amendment

jurisprudence when applying or interpreting state law. Some states, however, have on at least one occasion implicitly or explicitly adopted part or all of the constitutional framework into state law. The following paragraphs identify, in both the less-lethal and lethal force contexts, cases in which state courts have incorporated or referenced constitutional law into the interpretation or application of state law. In our discussion, we are not concerned with cases involving the application of both constitutional law and state law, such as those in which the plaintiff brings both a § 1983 claim alleging a Fourth Amendment violation and, distinctly, a state tort claim. Further, we do not mean to suggest that a court that *has* incorporated constitutional law, at least in part and at some point, into state law will always do so. It is beyond the scope of this book to chart a definitive path of the evolution of state law in all fifty states. Here, we aim merely to provide examples of incorporation and reference. Finally, we note that this analysis is complicated by the fact that most states simply do not have very many, if any, judicial opinions interpreting state statutory or common law in the context of police uses of force. Indeed, in a handful of states, we were completely unable to find any judicial opinions applying or interpreting state law in the police use-of-force context.

In the context of less-lethal force, judicial decisions have incorporated at least some portion of the *Graham v. Connor* framework into state law in twenty-seven states: Alaska,[22] Arizona,[23] Arkansas,[24] California (in reference to an earlier version of state law),[25] Colorado,[26] Connecticut,[27] Delaware,[28] Florida,[29] Georgia,[30] Illinois,[31] Indiana,[32] Iowa,[33] Louisiana,[34] Maine,[35] Maryland,[36] Michigan,[37] Nebraska,[38] Nevada,[39] New Mexico,[40] Ohio,[41] Oklahoma,[42] Rhode Island,[43] South Carolina,[44] Vermont,[45] Virginia,[46] West Virginia,[47] and Wyoming.[48] Maryland offers perhaps the clearest example of this approach. In a state law tort case, the state Supreme Court described *Graham* as "the touchstone" for analyzing excessive force claims. It wrote that the principle of objective reasonableness, "announced in the context of a § 1983 claim for the violation of Federal Constitutional rights, is the appropriate one to apply as well to petitioner's claim under Article 26 of the Maryland Declaration of Rights and for the common law claims of battery and gross negligence."[49] Importantly, though, not every state that incorporates some aspect of constitutional law into state law goes so far as to incorporate every aspect of constitutional law into state law.

Four states—Idaho,[50] Kentucky,[51] Mississippi,[52] and New York[53]—have referenced *Graham v. Connor* without incorporating it, or at least without incorporating any aspect of its analytical framework into state law. Mississippi, for example, quotes *Graham* for the idea that "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,'

amounts to a constitutional deprivation,"[54] but it does not otherwise adopt Fourth Amendment jurisprudence as a matter of state law. New York provides less complimentary treatment, discussing and ultimately rejecting *Graham v. Connor* as an appropriate guideline for the state law framework.[55]

The remaining nineteen states—Alabama, Hawaii, Kansas, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Minnesota, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin—do not have any judicial opinions that reference or incorporate *Graham v. Connor* into the state law regulating the use of less-lethal force by police. Some of those states do have judicial opinions that separately address Fourth Amendment and state law claims, but they do not conflate the two standards or use the constitutional standard to interpret or apply state law.

A different picture emerges when it comes to the state law regulation of deadly force. Ten states have explicitly incorporated some aspect of *Tennessee v. Garner* or *Scott v. Harris* into state law: Colorado,[56] Georgia,[57] Iowa,[58] Michigan,[59] Nevada,[60] New Mexico,[61] New York,[62] Ohio,[63] Rhode Island,[64] and Wyoming.[65] The purpose for and extent to which states incorporate constitutional law varies. Michigan concluded that the Supreme Court had held unconstitutional the state's fleeing-felon rule,[66] for example, while Nevada followed a slightly different tack by adopting the Supreme Court's rejection of the fleeing-felon rule.[67]

Nine other states have referenced constitutional law in a case applying state law: Arizona,[68] California (in reference to an earlier version of state law),[69] Delaware,[70] Florida,[71] Kentucky,[72] Maryland,[73] Minnesota,[74] South Carolina,[75] and West Virginia.[76] A number of the states that have referenced Fourth Amendment jurisprudence have not done so in the context of evaluating a use of deadly force, though. Instead, their focus in on a distinct aspect of *Garner* or *Harris*. The Delaware Supreme Court, for example, discussed the *Garner* Court's conclusion that burglary was not a serious offense, ultimately disagreeing.[77] An Arizona appellate court relied on *Tennessee v. Garner* (in a footnote) for a different reason. The plaintiff in that case had argued that the officer could not invoke a state statute authorizing the use of force to effectuate an arrest because the officer was not "effectuating an arrest" at the time. Although concluding that the issue was not properly raised on appeal, the court noted that *Garner* had identified that the use of deadly force was a seizure, and therefore asserted that an officer who had used deadly force was necessarily seeking to effectuate an arrest.[78]

Thirty-two states, a significant majority, have simply not referenced constitutional law when interpreting or applying state law in the context of deadly

force: Alabama, Alaska, Arkansas, Connecticut, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin.

Police-Specific Authorizations and Justification Defenses

Each state has its own statutes and common law doctrines that authorize officers to use force or protect officers from civil or criminal liability for doing so. Forty-two states regulate police uses of force by statute; thirty-six states have statutes that govern the use of both deadly and nondeadly force, while six states have statutes only for deadly force. The remaining eight states lack statutes to regulate police uses of force, doing so entirely through judicial decisions.

The forty-two states in which statutory law regulates at least some uses of force have a total of fifty-eight different statutes, with the earliest originally enacted in 1787 (Vermont), 1872 (California), 1858 (Tennessee), and 1863 (Georgia). Almost half of the statutes (twenty-eight, or 48 percent) were originally enacted in the 1970s; of the others, twenty (35 percent) were adopted prior to the 1970s and the remaining ten (17 percent) were enacted since 1970. The various states have taken very different approaches to amending these statutes. California's "justifiable homicide" law, for example, went unamended for almost 150 years—from the time it was enacted in 1872 until its amendment in 2019—while Georgia's law has been re-codified and amended some fifteen times since its original enactment in 1863. Of the fifty-eight total statutes, fifteen have never been amended, twenty-two have been amended only once, twelve have been amended two or three times, and nine have been amended more than three times.

In this subsection, we discuss several notable features of state law, focusing primarily but not exclusively on statutory law. We first explore the state statutes that set out the justifications for and limits of less-lethal force, then turn our attention to state statutes governing deadly force. In the Appendix of State Laws, we reproduce the text of state statutes and, when statutes are lacking, provide relevant quotations from judicial opinions regarding the regulation of police uses of force in all fifty states.

The Relevance of Assertive and Defensive Force: Applicability of Other State Laws

When applying state law to evaluate an officer's use of force, the characterization of that force as assertive or defensive is a relevant consideration. Assertive force refers to actions taken against a subject who is noncompliant or resisting, but whose resistance does not threaten the physical safety of the officer or others. Assertive force refers to situations in which an officer initiates violent action (typically as a response to a subject's failure to comply with orders or with nonviolent resistance). Defensive force, in contrast, refers to actions taken against a subject who has initiated violence by physically threatening the officer or others.

In the state law analysis, this distinction can be critical. Some states provide specific limits to the exemptions from civil or criminal liability that officers can otherwise claim, and those limits depend on whether the officers' use of force was assertive or defensive (although the state laws do not use that terminology explicitly). In Alabama, for example, the statute that regulates the use of both deadly and nondeadly force states explicitly: "Nothing in [the subdivisions regulating the use of assertive force] constitutes justification for reckless or criminally negligent conduct by a peace officer amounting to an offense against or with respect to persons being arrested or to innocent persons whom he is not seeking to arrest or retain in custody."[79] That statute does not allow officers to claim that their reckless or criminally negligent use of assertive force was justified, but appears to allow exactly such a claim in the context of defensive force.

Even without explicit limits like those set forth in Alabama law, the assertive/defensive typology can help analysts determine whether they need to review and apply *other* aspects of state law and, if so, which other aspects. When officers use assertive force to make an arrest, for example, analysts may have to establish that the arrest was, in fact, lawful. This threshold determination is often easily satisfied, as when officers make an arrest pursuant to a valid warrant, but reviewers cannot take for granted that such is the case, especially in the context of warrantless arrests. Some states authorize officers to make warrantless arrests for all felonies, but only for certain misdemeanors (e.g., misdemeanors that are committed in the officer's presence, amount to a breach of peace, or are specifically designated by statute[80]). Other states restrict the severity of force that officers can use to effect misdemeanor arrests. The Virginia Supreme Court, for example, has adopted a common-law restriction on the use of assertive force, holding almost one hundred years ago that "officers have no right to inflict serious bodily harm upon one who is

simply fleeing arrest for a misdemeanor."[81] If an officer uses force assertively to effect an arrest, then analysts may have to review state law to determine that the arrest was lawful, which may require, *inter alia*, assessing whether the underlying offense was a misdemeanor or a felony.

Similar review may be necessary when officers use defensive force. In such cases, analysts must be prepared to determine whether the subject who threatened the officer (or others) was acting lawfully. This analysis requires a more robust review of state laws authorizing private persons to use force than this text can provide; it is sufficient for our purposes to note that some states authorize private persons to use force to resist unlawful arrests or to resist the use of excessive force in the course of a lawful arrest. An officer's use of force to protect themselves from a subject's violent actions may violate state law if the subject is lawfully resisting the officer's efforts. An officers' use of defensive force, in short, may require analysts to review the propriety of the subject's actions. That determination will often be straightforward, but reviewers must be attuned to such rarer circumstances that demand a more searching inquiry.

State Law Justifications for Less-Lethal Force

Thirty-seven states have a total of forty statutes that regulate, to at least some extent, the use of less-lethal force by police. Although these state statutes vary significantly in their particulars, many of them share certain common features. Indeed, many states share almost identical wording, at least in part.[82] Most obviously, the state statutes that authorize the use of force have commonalities in the purpose(s) for which force may be used (including to make an arrest, to prevent an arrestee from escaping, and to defend the officer or others) and in how much force may be used (from reasonably necessary force to force perceived as necessary). The following paragraphs discuss each of those dimensions in detail.

TO MAKE AN ARREST

All thirty-seven states with statutes governing the use of less-lethal force authorize officers to use force to make an arrest (five states explicitly include detentions). In this context, there are a variety of different requirements that apply in different states.

Reasonable Belief in the Lawfulness of Arrest. Ten states—Alaska, Arizona, California, Connecticut, Minnesota, Missouri, New York, North Carolina,

Texas, and Wisconsin[83]—allow officers to use force to effect an arrest that they reasonably believe is lawful. States provide differing degrees of guidance for determining when such a belief is reasonable. Most states do not provide extensive guidance. Alaska is instructive; the statute states that officers can only use force to make an arrest when they "reasonably believe[] the arrest . . . is lawful."[84] Connecticut, on the other hand, provides far more extensive guidance; the statute in that state authorizes the use of force to "[e]ffect an arrest . . . of a person whom [the officer] reasonably believes to have committed an offense, unless [the officer] knows that the arrest is unauthorized," and it defines the phrase "reasonable belief that a person has committed an offense" to mean "a reasonable belief in facts or circumstances which if true would in law constitute an offense."[85] The statute goes on to make clear that while a reasonable but mistaken belief of the facts can support the use of force to effect an arrest, a mistaken understanding of the law will not: "If the believed facts or circumstances would not in law constitute an offense, an erroneous though not unreasonable belief that the law is otherwise does not render justifiable the use of physical force to make an arrest."[86]

Subjective Belief in the Lawfulness of the Arrest. Nine states—Alabama, Arkansas, Colorado, Delaware, Kentucky, Maine, Nebraska, New Hampshire, and Oregon—permit the use of force to make an arrest when the arresting officer subjectively believes the arrest is lawful. Most of those states do so by authorizing the use of force "unless the officer knows that the arrest is unlawful." A few states make substantially the same point in another way. Delaware, for example, authorizes arrests pursuant to a warrant when "the warrant is valid or believed by the [officer] to be valid," and warrantless arrests when the officer "believes the arrest to be lawful."[87] Kentucky, in contrast, provides a justification defense for the use of force in the arrest context only when the officer "[b]elieves the arrest to be lawful."[88] (Although several states that use this formulation have a separate statutory provision defining "believes" to mean "reasonably believes," Kentucky does not have such a law.) Two states—Nebraska, and New Hampshire—provide a justification defense for uses of force when officers believe, even mistakenly, that they are making a lawful arrest, unless that belief is based on a mistake of law.

Actual Lawfulness. A few states have statutes authorizing the use of force to make lawful arrests without any indication that a reasonable or subjective belief in the lawfulness of the arrest is sufficient. Florida law states that officers "need not retreat or desist from efforts to make a lawful arrest."[89] Louisiana allows force for the purpose of making "a lawful arrest."[90]

South Dakota permits the use of force "in the performance of any legal duty."[91] While it is not clear that such statutes adopt an "actual lawfulness" standard, the statutes suggest as much. It is also worth noting that some states—including Massachusetts,[92] Michigan,[93] and Nevada[94]—that lack statutory law provide a common law authorization for or defense of the use of force to effect a lawful arrest.

Importantly, six states—Hawaii, Illinois, Indiana, Iowa, Kansas, and Pennsylvania—have adopted an "actual lawfulness" approach for warrantless arrests, meaning that officers are authorized to use force to a make a warrantless arrest only when the arrest is actually lawful. For arrests pursuant to a warrant in those states, however, the use of force is permissible unless the officer knows that the warrant is invalid (that is, the use of force is permissible so long as the officer subjectively believed that the warrant was valid). New Jersey takes a very similar approach, but requires that officers reasonably believe that the warrant was valid. More confusingly, Idaho authorizes the use of force for warrantless arrests when they are lawful (i.e., when there is "probable cause to believe that the person has committed an offense") and for any arrest "under the authority of a warrant."[95]

Further, it is worth pointing out that some states authorize private persons to use self-defense to protect themselves against *unlawful* arrests. In Georgia, for example, the state Supreme Court has held, "Where an arrest is not lawful, the person sought to be so arrested, contrary to his right if the arrest had been lawful, has the right to resist."[96] This approach does not definitively answer the question of whether state law authorizes officers to use force to make arrests only when those arrests are lawful, of course; it is possible for state law simultaneously to give the subject a right to resist an unlawful arrest and to insulate the officer from civil or criminal liability for using force to make that unlawful arrest. Nevertheless, it provides some evidence of the legal value that the state puts on the actual lawfulness of the arrest underlying a use of force.

Without Regard for the Lawfulness of Arrest. Four states—Montana, Tennessee, Utah, and Washington—have statutes that authorize officers to use force to effect an arrest without specifying whether the arrest must be lawful, or whether the officer must reasonably or subjectively belief that the arrest was lawful.

Identification or Information-Forcing Requirements. Six states—Arizona, Delaware, Hawaii, Kentucky, Nebraska, New Jersey authorize the use of force to make an arrest only if (1) an officer makes known the purpose or fact of arrest, (2) the purpose or fact of arrest is known or reasonably appears to be known by the subject, or (3) the purpose or fact of arrest cannot reasonably

be made known under the circumstances. Texas has the same provisions, but also requires officers to identify themselves. Other states have adopted similar, though less nuanced, approaches. Minnesota law appears to permit the use of force only after "a peace officer has informed a defendant that the officer intends to arrest the defendant."[97] Tennessee authorizes force in the arrest context only after officers identify themselves.

Resistance to Arrest. Most statutes authorize the use of force to overcome a subject's resistance to an arrest without qualifying the nature of resistance. Some states, however, take what appears to be a more limited approach. Idaho, Minnesota, Washington, for example, authorize the use of force if the subject flees or forcibly resists; there is no explicit statutory authorization to use force to overcome passive resistance.

TO PREVENT AN ARRESTEE FROM ESCAPING

Twenty-four states explicitly authorize the use of force to prevent the escape of an arrestee or other person in custody. The majority of these states have a single statutory provision that authorizes the use of force to effect an arrest or to prevent an arrestee's escape: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Maine, Minnesota, Missouri, New Hampshire, New York, North Carolina, and Oregon. Most of the remainder have a separate subdivision that authorizes the use of force to prevent escape (or to recapture an escaped arrestee) to the same extent that force could have been used to effect the initial arrest: Delaware, Hawaii, Indiana, Kentucky, Montana, Nebraska, New Jersey, and Pennsylvania. Florida law authorizes the use of force when "retaking felons who have escaped,"[98] but has no provision specific to escaped misdemeanants.

Two more states appear to implicitly authorize the use of force for such purposes. North Dakota law sets out that the use of force is justified when "required or authorized by law,"[99] which conceivably extends to preventing escape. South Dakota, meanwhile, permits the use of force "in the performance of any legal duty."[100]

This is not to suggest that the other states would not allow officers to use force to prevent an arrestee from escaping. Retaining an arrestee in custody is as important to the governmental interest in criminal justice as taking the arrestee into custody is in the first place, so we do not read the lack of clear statutory authorization to preclude officers from using force to prevent escape.

TO DEFEND THE OFFICER OR OTHERS

Eighteen states authorize the use of force to protect the officer or another person. Fifteen of those states countenance the use of defensive force in the context of making an arrest or preventing escape: Alabama, Arkansas, Colorado, Connecticut, Florida, Illinois, Iowa, Kansas, Maine, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, and Utah. Alabama's law is representative, authorizing an officer to use force "[t]o defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while making or attempting to make an arrest for a misdemeanor, violation or violation of a criminal ordinance."[101] Delaware takes a similar, but more limited, approach by authorizing the use of force when a would-be arrestee "has taken a hostage" and the officer "believes that the use of force is necessary to prevent physical harm to any person taken hostage" or has been ordered to use force "by an individual the [officer] believes possesses superior authority or knowledge."[102]

Four states use almost identical statutory wording to explicitly authorize the use of defensive force in other contexts, including to prevent the subject's suicide; to prevent the self-infliction of serious injury; or to prevent the commission of a crime involving actual or threatened physical injury, damage to or loss of property, or a breach of the peace: Delaware, Nebraska, New Jersey, and Pennsylvania.

The surprising lack of any police-specific authorization for officers to use force to defend themselves or others outside of the context of an arrest may be explained, at least in some states, by generally applicable legal principles that allow everyone, including officers, to use force for self-defense or the defense of others. Some states make this point explicitly; Indiana, for example, does not have a specific statutory authorization for officers to use force defensively. However, the state does have a statute that establishes that officers have "has the same right as a person who is not a law enforcement officer to assert self-defense under" the generally applicable self-defense statute.[103] We discuss potential conflicts between police-specific use-of-force statutes and generally applicable use-of-force statutes later in this chapter.

Beyond the circumstances that can justify the use of force, most state statutes also identify, at least at a certain degree of abstraction, the degree of force that officers can use when force is authorized: reasonably necessary force, reasonable force, and necessary force.

Reasonably necessary force. With regard to how much (less-lethal) force officers may use, the prevailing approach by far is the adoption of a

"subjective objectivity"[104] standard, discussed at length in chapter 1, that authorizes force to the extent that it is reasonably necessary or that it is reasonably perceived by the officer as necessary. Twenty-seven states do so by statute: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, and Utah. Eight of the states without statutes typically follow the same approach via judicial decision: Georgia,[105] Massachusetts,[106] Michigan,[107] Mississippi,[108] Nevada,[109] New Mexico,[110] Ohio,[111] and South Carolina.[112]

Rhode Island takes a prohibitionist approach by precluding "unnecessary or unreasonable force."[113] Most states, in contrast, affirmatively authorize the use of force when reasonably necessary or when perceived as such. Oregon's law is representative: "a peace officer is justified in using physical force upon another person only . . . to the extent that the peace officer reasonably believes it necessary."[114] Four states—Arizona, Missouri, New Jersey, and Texas—appear to take a restrictive approach, authorizing the use of force only when it reasonably appears to be "immediately necessary."

A few states have statutes that appear to adopt a purely subjective approach, but the standard is clarified either by another statutory provision or by case law. Pennsylvania's law authorizes force when an officer "believes [it] to be necessary,"[115] but an earlier statutory provision defines "believes" to mean "reasonably believes."[116] The same is true in Hawaii.[117] Delaware has a similar law, permitting the use of force when the officer "believes that such force is immediately necessary to effect the arrest,"[118] but a separate provision denies a justification defense to anyone who "is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of the use of force."[119] Nebraska appears to adopt a purely subjective approach by statutorily authorizing force to the extent that the officer believes it to be necessary and *not* having any provision that defines "believes" to mean "reasonably believes," but that statute has nevertheless been interpreted to allow only reasonably necessary force.[120] Kentucky's statute has been interpreted in the same way.[121]

Florida authorizes force to the extent that the officer "reasonably believes [it] to be necessary to defend himself or herself or another from

bodily harm while making the arrest," but does not use the same language in the other contexts in which force is authorized.[122]

Reasonable Force. Four states—California, Louisiana, Maine, and Wisconsin—have statutes that authorize force to the extent that it is reasonable. A few states do the same by common law, including Maryland,[123] Oklahoma,[124] Vermont,[125] Virginia,[126] and West Virginia.[127]

Necessary Force. Two states—South Dakota and Washington—have statutes that authorize the use of force to the extent it is necessary, but do not explicitly define how necessity is to be determined. Florida permits officers to use physical force "[w]hen necessarily committed in retaking felons who have escaped" and "in arresting felons fleeing from justice."[128]

OTHER LIMITS ON THE DEGREE OF FORCE

Minnesota authorizes reasonable force in one statute and necessary force in another, leaving the statutory standard somewhat unclear. North Dakota, meanwhile, is something of an outlier, having adopted a statutory tautology by authorizing force in circumstances and to the extent it is "required or authorized by law."[129]

No overview or summary can capture all of the nuances in the various statutes, of course, so it is worth noting that, beyond the justifications for and limits to the use of force, some statutes have idiosyncratic features. We discuss just a few here:

Georgia precludes police agencies from adopting "any rule, regulation, or policy which prohibits a peace officer from using that degree of force to apprehend a suspected felon which is allowed by the statutory and case law of this state."[130]

New Hampshire and Maine both reject the exclusion of evidence or the invalidation of an arrest as consequences for an unlawful use of force, stating in identically worded statutory provisions: "Use of force that is not justifiable under this section in effecting an arrest does not render illegal an arrest that is otherwise legal and the use of such unjustifiable force does not render inadmissible anything seized incident to a legal arrest."[131]

Regrettably, there is no reliable source of information about the frequency or severity of police uses of force in the various states. The lack of reliable data about officers' uses of force makes it impossible, at this point, to evaluate the relationship between statutory authorizations of force and how officers actually use force. We discuss this in more depth in the conclusion of the book.

State Law Justifications for Threats of Force

In most states, an individual commits the crime of assault by, *inter alia*, "intentionally placing another person in reasonable apprehension of imminent physical injury."[132] That means that it is not only the use of force that potentially runs afoul of state criminal or tort law; threats of force are also potentially subject to sanction. An officer's threat to use force, then, may need to be assessed even if the situation is resolved without the actual application of force.

Most states do not have any statutory provisions related specifically to threats of force, but a few do. In those statutes that do explicitly regulate threats of force by statute, threats of less-lethal force are regulated in the same way as the use of less-lethal force. In Arizona, for example, state law uses the same statutory language to authorize "threatening or using physical force against another."[133]

To the extent that state law regulates threats of lethal force, however, they are typically regulated rather differently. Our analysis has identified three distinct approaches. First, some statutes appear to regulate threats of deadly force implicitly. Statutes in Idaho, Minnesota, Washington, and Wisconsin authorize officers to use "all . . . means" to effect an arrest, a phrase that we read to include threats of lethal force.[134] Idaho's law, for example, authorizes "all reasonable and necessary means to effect the arrest" without distinguishing between the use of force and the threat of force.[135]

Second, statutes in Alaska, Arkansas, South Dakota, and Tennessee explicitly regulate threats to use deadly force, equating such threats with the use of less-lethal force and regulating them in exactly the same way. Arkansas is representative of this approach, stating: "A law enforcement officer is justified in using nondeadly physical force or threatening to use deadly physical force upon another person" when certain statutory conditions, discussed above, are met.[136]

Third, Arizona takes a unique approach, regulating threats of deadly force differently, at least to some extent, than either the use of less-lethal force or the use of lethal force. Under Arizona law, officers may threaten to use less-lethal force, but not deadly force, to apprehend a fleeing misdemeanant. At the same time, they may threaten to use deadly force in situations in which the actual use of deadly force would not be justified, such as to prevent the escape of a fleeing, nonviolent felon.

State Law Justifications for Deadly Force

Forty-two states have statutory law governing the use of deadly force, and the remainder set out the standard in judicial decisions. In this section, we adopt the prevailing definition of deadly force: deadly force is that which is likely to cause death or great bodily harm.[137]

Prior to 1985, twenty-three states retained some version of the common-law "fleeing felon" rule that authorized officers to use deadly force to prevent the escape of a fleeing felon.[138] That year, the Supreme Court decided *Tennessee v. Garner*, which held that the Fourth Amendment limited the use of deadly force to situations in which an officer had probable cause to believe that the subject presented a risk of death or great bodily harm to the officer or another person.[139] Over the next thirty years, other states followed suit, often limiting the common-law rule by statute or state-level judicial decision. In a 2016 article, Chad Flanders and Joseph Welling counted twelve states that retained the common-law rule, thirty-seven states that rejected it, and one state where the law governing the police use of deadly force remained unclear. As they put it, "There is only the one question: Are you sticking with the common law, or are you following *Garner*?"[140]

While we appreciate and respect Flanders and Welling's work, our review of the state statutes suggests the need for a more nuanced taxonomy. State statutory law is better divided into three nonexclusive categories, which we present from most permissive to most restrictive: the "fleeing felon" approach, "partially restrictive" approaches, and the *Garner* approach.[141] Additionally, some states adopt one of the preceding frameworks, but also apply some number of additional restrictions atop those frameworks that are more restrictive, in some ways, than the *Garner* approach. Importantly, a state may fall into more than one category, as their statutes authorize the use of deadly force in a variety of different circumstances. Beyond setting out the circumstances that justify the use of lethal force, state laws also vary when it comes to the quantum of proof that officers must have before using deadly force; most states, for example, authorize the use of deadly force when it is reasonably necessary for the identified purposes, while others require it to be necessary to overcome actual resistance.

THE "FLEEING FELON" APPROACH

These statutes maintain the common-law rule that allows officers to use lethal force to prevent the escape of a felon. Four states still codify this rule: Alabama, Florida, Mississippi, and South Dakota. Florida law provides a

justification defense to criminal charges related to the use of deadly force to arrest a fleeing felon, but imposes additional restrictions on officers who seek to invoke a justification defense against civil claims; we discuss that dichotomy in our discussion of liability rules, later in this chapter. Oregon appears to adopt a version of the fleeing-felon rule, authorizing the use of deadly force against subjects who have committed or attempted to commit a felony when "the use of such force is necessary" under the totality of the circumstances, although the statute does not clearly set out the purpose for which the use of force must be "necessary."[142]

Separately, though relatedly, a number of states have, by statute or common law, explicitly precluded the use of deadly force for the purposes of arresting a misdemeanant. In 1936, for example, the West Virginia Supreme Court held that "[a]n officer may not wound or kill a fleeing misdemeanant."[143] The Georgia Supreme Court followed suit in 1943, adopting the fleeing-felon rule (which has since been abrogated in that state) in an opinion that made a point of saying, "But where the arrest is only for a misdemeanor, such extreme and deadly force merely to effect the arrest and prevent escape is not justified."[144] The Michigan Attorney General came to the same conclusion in 1976, writing, "A peace officer may not use deadly force when attempting to stop or arrest a person who has committed a misdemeanor."[145]

"PARTIALLY RESTRICTIVE" APPROACHES

The partially restrictive approach falls between the fleeing-felon rule and the *Garner* rule, requiring more than merely the suspected commission of a felony, but less than an imminent threat of death or great bodily harm. The states take a variety of different approaches in what exactly is required.

Violent Felonies/The Use or Threatened Use of Deadly Force. Most commonly, such statutes authorize the use of lethal force to effect the arrest of a subject who is believed to have committed a violent felony, a felony involving the use or threatened use of deadly force, or a felony involving physical injury, great bodily injury, or death. Under this type of statute, for example, officers could hypothetically use deadly force against a ninety-year-old suspect of an armed robbery committed seventy years prior. Twenty-four states have statutes that follow this approach: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Kansas, Maine, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Texas, Tennessee, and Utah. Indiana takes a slightly narrower approach, permitting the use of

deadly force when an officer has probable cause that it is necessary to prevent the commission of a forcible felony, a term that is defined by statute as "a felony that involves the use or threat of force against a human being, or in which there is imminent danger of bodily injury to a human being."[146]

Certain Crimes. Three states—New Jersey, New York, and Oregon—allow deadly force to be used to effect an arrest or prevent escape, but specifically identify certain predicate crimes. New York and Oregon, in identical statutory provisions, identify "kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime."[147] New Jersey identifies substantially the same crimes (substituting "burglary of a dwelling" for "burglary in the first degree"), but adds homicide, robbery, and sexual assault crimes to the list.[148]

Future Threats. Nineteen states permit the use of deadly force against individuals who may present a threat of death or great bodily harm unless apprehended without delay: Alaska, Arizona, Colorado, Delaware, Hawaii, Illinois, Iowa, Kansas, Maine, Minnesota, Missouri, Nebraska, New Hampshire, Oklahoma, Pennsylvania, Tennessee, Texas, and Utah. We read this to imply a risk of future harm, rather than an imminent threat as that term is properly understood.*

Escaping, Armed Subjects. Six states authorize deadly force to address armed subjects who are attempting to escape, but there are different iterations of this approach. Pennsylvania allows officers to use deadly force to prevent the escape of a subject, without further clarification, who is armed with a deadly weapon. Arkansas does the same, but limits it to preventing the escape of a felony suspect who is armed or dangerous. Georgia, Maine, and New York do so when the escaping felony subject is armed with a dangerous or deadly weapon. Alaska takes a narrower approach, allowing deadly force when the subject has escaped or is attempting to escape while armed with a firearm.

Information Forcing. Rhode Island goes beyond the fleeing-felon rule in a very different way; that state authorizes the use of deadly force to make an arrest for a felony consistent with the fleeing-felon rule, but requires the officer to reasonably believe that "the person to be arrested is aware that a peace officer is attempting to arrest him or her."[149]

Convicted Felons. North Carolina permits the use of deadly force to prevent the escape of a convicted felon (but not, it appears, a suspected felon).

Combinations. Some states combine some of the partially restrictive approaches discussed above. Kentucky, for example, permits the use of deadly

* We discuss "imminent threat" at length in chapter 1.

force when making an arrest only "for a felony involving the use or threatened use of physical force likely to cause death or serious physical injury" *and* the officer "believes that the person to be arrested is likely to endanger human life unless apprehended without delay."[150] California's recently amended law takes a similar approach, but also requires officers to attempt to identify themselves and warn the fleeing subject that deadly force may be used.

THE "*GARNER* RULE" APPROACH

As in *Garner*, these statutes permit officers to use deadly force when the subject presents a threat of death or great bodily harm to the officer or others. Twenty-five states permit the use of deadly force under such conditions: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Kansas, Maine, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Utah, and Washington.

California, like many of these states, limits the use of deadly force to "imminent threats," but is unique in that it provides a statutory definition of that term:

> A threat of death or serious bodily injury is "imminent" when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.[151]

Seven states—Arizona, Illinois, Kansas, Missouri, New Hampshire, North Carolina, and Oklahoma—specifically authorize the use of deadly force when the subject is escaping or attempting to escape by using a deadly weapon or dangerous instrument, a particular subset of cases in which the subject may present an imminent threat of death or great bodily harm.

Additionally, eight states—Connecticut, Florida, Indiana, Nevada, New Mexico, Tennessee, Utah, and Washington—require officers to give a warning, when feasible, before using deadly force. As the Court made the same suggestion in *Garner*, we include this "requirement" as a component of the *Garner* rule.

ADDITIONAL RESTRICTIONS

Some statutes adopt the basic framework from one of the "partially restrictive" approaches or from *Garner*, but add additional restrictions. There are a few different types of restrictions:

Risk to Innocent Persons. Four states—Delaware, Hawaii, Nebraska, and New Jersey—have statutes that permit the use of deadly force only when there is "no substantial risk of injury to innocent persons." Massachusetts does the same by judicial decision.[152] Pennsylvania takes a similar approach, but only with regard to deadly force used to prevent suicide or the commission of a crime.

Suicidal Subjects. Six states—Delaware, California, Nebraska, New Jersey, Pennsylvania, and Tennessee—prohibit officers from using deadly force against suicidal subjects who pose an imminent threat of death or great bodily harm only to themselves.

Actual Resistance. Three states—Idaho, Mississippi, and Washington—authorize the use of deadly force under certain circumstances only when that force was used to overcome "actual resistance."

Exhaustion Requirements. Three statutes, two in Tennessee and one in Delaware, have exhaustion requirements; in both states, deadly force is permitted only when "all other reasonable means of apprehension have been exhausted." Iowa allows the use of deadly force "only . . . when a person cannot be captured any other way."[153] New Hampshire allows for deadly force only when "there is apparently no other possible means of effecting the arrest."[154] California law includes a legislative declaration instructing officers to "use other available resources and techniques [instead of deadly force] if reasonable safe and feasible to an objectively reasonable officer."[155]

Information-Forcing Requirements. Three states—Maine, New Hampshire, and Tennessee—have notification or information-forcing requirements of various types. Tennessee requires that officers to inform the subject of their identity when it is feasible to do so. Maine and New Hampshire go further, requiring officers both to inform the subject of their identity and their intent to make an arrest, although both states waive that requirement when the officer has reason to believe that the subject is already aware of those facts.

Limitations on Predicate Crime. Colorado, which has essentially codified the *Garner* rule, does not permit officers to use lethal force when the only indication that the subject presents a threat of death or serious bodily harm is the subject's commission of "a motor vehicle violation."[156]

Two states, Montana and South Carolina, defy the above categorization, leaving the standard for deadly force unclear. In Montana, the statute permits "all reasonable and necessary force . . . in making an arrest," but does not specify any rules for deadly force.[157] In South Carolina, a confusing state supreme court case cited *Tennessee v. Garner* for the proposition that "an officer may use whatever force is necessary to effect the arrest of a felon including deadly force to effect that arrest," leaving the disconnect between the *Garner* rule and the fleeing-felon rule unresolved.[158]

We would be remiss if we did not mention a few notable idiosyncrasies. Some statutes that appear to authorize the use of force in situations that are even more permissive than the common law's fleeing-felon rule. Nine states—Arizona, Delaware, Idaho, Mississippi, Nebraska, Pennsylvania, South Dakota, Vermont, and Washington—authorize the use of deadly force to suppress a riot or mutiny that, at least in certain circumstances, may not present an immediate threat of death or great bodily harm. Here, too, there is some variation. Arizona and Washington permit the use of lethal force only if the subject or another person participating in the riot "is armed with deadly weapon,"[159] while Delaware and Nebraska both authorize the lethal force "after the rioters or mutineers have been ordered to disperse and warned, in any manner that the law may require, that such force will be used if they do not obey."[160] The remaining states authorize the use of lethal force to suppress a riot, but do not set out any other explicit requirements or limitations for that context.

Illinois and Colorado have adopted statutory restrictions on certain types of force: chokeholds. Illinois restricts chokeholds, which it defines "direct pressure to the throat, windpipe, or airway of another with the intent to reduce or prevent the intake of air" to circumstance where deadly force is justified.[161] Colorado, meanwhile, defines chokeholds as a restriction on breathing, and it limits them in the same way and using the same statutory language that it uses to restrict deadly force.

As with less-lethal force, most state statutes also identify the relevant quantum of proof that must exist before lethal force is permitted: when lethal force is reasonably necessary, when it is necessary, when the officer reasonably believes that certain conditions exist, and when the officer believes that certain conditions exist (apparently without regard for the reasonableness of that belief).

REASONABLY NECESSARY/REASONABLE BELIEF

Thirty-four states have statutes that adopt a "subjective objectivity"[162] approach by authorizing lethal force when it is reasonably necessary or

reasonably perceived as necessary for at least some statutory purpose, or when the officer reasonably believes that certain statutory justifications are present (e.g., that the subject presents an imminent threat of death or great bodily harm): Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky,[163] Maine, Missouri, Montana, Nebraska,[164] New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Tennessee, Utah, and Washington. (As with less-lethal force, a few states have statutes that appear to adopt a purely subjective approach in the context of deadly force, but either another statutory provision or case law clarifies that the standard is actually reasonable belief. This is the case in Delaware, Hawaii, Kentucky,[165] Nebraska,[166] and Pennsylvania.)

Three states—Indiana, New Mexico, and Oklahoma—specify that the officer must have probable cause that lethal force is reasonably necessary.

Two states—Missouri and Texas—appear to take a restrictive approach, authorizing the use of deadly force only when it reasonably appears to be "immediately necessary."

Idaho law states that deadly force must be reasonably necessary to overcome "actual resistance."[167] Washington has adopted a similar approach, holding that deadly force is authorized only when the officer, in good faith (a test that has both objective and subjective elements), uses force to overcome "actual resistance."[168]

NECESSARY

Five states—Minnesota, Mississippi, Nevada, North Dakota, and South Dakota—have statutes that authorize deadly force when it is "necessary" or when it is "necessarily committed" for identified purposes. Nevada permits deadly force when necessary to prevent escape only if there is "probable cause to believe" that certain conditions exist.[169]

The relationship between the legal regulation of deadly force and the actual application of deadly force is more nuanced than it might first appear. We reviewed the US Census Bureau's state population data and the number of lethal police shootings in the four-year period from 2015 to 2018 as collected by the *Washington Post*. Readers should note that the available data suffers from serious limitations. First, it captures only actual deaths; it does not include any uses of force, including shootings, that do not result in death. Second, even with regard to actual deaths, the data is both under- and overinclusive. The *Washington Post* methodology includes "only those shootings in which

a police officer, in the line of duty, shoots and kills a civilian" and specifically excludes "deaths of people in police custody, fatal shootings by off-duty officers or non-shooting deaths."[170] Thus, the data fails to include fatalities resulting from uses of force other than a shooting. Despite its many limitations, the information reflected in this chart is the best available data to date.

Figure 2.1 depicts the number of lethal police shootings in the relevant period per 100,000 residents of each state and the District of Columbia. The rates range from a high of 0.982 per 100,000 people in New Mexico to a low of 0.086 per 100,000 people in New York. The "National Rate" reflects that there were 0.304 lethal police shootings per 100,000 people in the population of the country as a whole, while the "Average State" rate shows that a hypothetical average state—with an average population and an average number of police shootings—would have had 0.307 lethal police shootings per 100,000 people.

State-level legal regulation is, of course, only one of many factors that likely affect the rate of officer-involved homicides. Those rates are almost certainly affected by the pre- and in-service training provided to officers, agency policies, the quality of supervision, the delay before medical first responders arrive, the proximity to trauma-care facilities, and a host of other factors. Consider, for example, that the average rate of lethal police shootings in the twelve states with a population of more than eight million—California, Florida, Georgia, Illinois, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas, and Virginia—was 0.255 per 100,000 people, significantly lower than the national rate of 0.304 per 100,000. In fact, only two of those states were above the national rate: Georgia, which was marginally above the national rate at 0.309 per 100,000 people, and California, which was substantially above the national rate at 0.384 per 100,000 people.

Indeed, the relative permissiveness or restrictiveness of a state's statutory and common law regulation of police uses of deadly force are not necessarily reflected clearly in the number of lethal shootings in the state. Florida, for example, provides broad statutory authorization for officers to use deadly force when it is reasonably necessary to prevent the escape of a fleeing felon. Tennessee, in contrast, has a restrictive statute that requires officers to have probable cause, does not allow officers to use deadly force unless all other reasonable means of apprehension have been exhausted or are infeasible, and requires officers to inform subjects of their identity when feasible. Yet the available data suggests that officers kill many more people per capita in Tennessee (0.355/100,000) than in Florida (0.292/100,000).

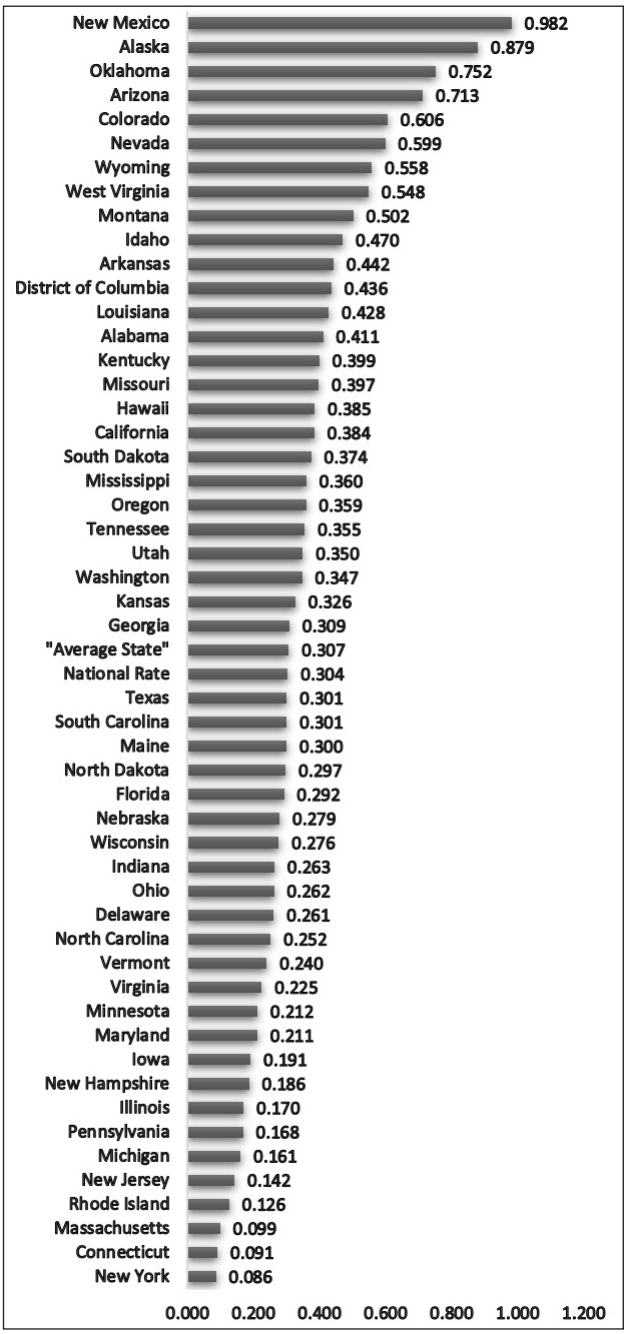

Figure 2.1. Lethal Police Shootings per 100,000 People (2015–2018)

State Law Limitations on Police-Specific Justification Defenses

Some of the same statutes that authorize police to use force also limit the liability defenses that officers can raise.

Three states deny a justification defense to officers who act culpably. Alabama does not allow a justification defense for officers who recklessly or criminally negligently use assertive force ("[t]o make an arrest . . . or to prevent . . . escape") against anyone, either "persons being arrested or . . . innocent persons."[171] Hawaii and Nebraska both authorize the use of force that officers believe to be necessary (for statutorily defined reasons), but officers whose belief was reckless or negligent remain liable for such recklessness or negligence. North Carolina takes an even broader approach, with the statute reading, "Nothing in this subdivision constitutes justification for wilful, malicious or criminally negligent conduct by any person which injures or endangers any person or property."[172]

Six states do not allow officers to invoke a justification defense against claims brought by innocent persons (that is, persons that the officer was not attempting to arrest or prevent from escaping). Minnesota takes the broadest approach, disallowing officers from claiming a statutory justification to use less-lethal or deadly force "in a civil action brought by an innocent third party."[173] Maine and New Hampshire follow suit, but only in the context of deadly force, rejecting the justification defense in cases where officers used deadly force against anyone whom the officer "is not seeking to arrest or retain in custody."[174] New York does not extend the justification defense to officers who recklessly use deadly force in a way "amounting to an offense against or with respect to innocent third persons whom [the officer] is not seeking to arrest or retain in custody." Oregon takes a very similar approach, disallowing any justification defense for the use of deadly force that amounts to "reckless or criminally negligent conduct . . . against or with respect to innocent persons whom the peace officer is not seeking to arrest or retain in custody."[175] Colorado precludes officers from claiming justification after recklessly or negligently using deadly force assertively ("to effect an arrest, or prevent . . . escape") in claims brought by innocent persons.[176]

Further, states do not necessarily adopt the same approach to justification defenses in the civil and criminal contexts. Florida Statute § 776.05(3), for example, states that officers making a lawful arrest are "justified in the use of any force . . . when necessarily committed in arresting felons fleeing from justice." As indicated above, this statute authorizes officers to use deadly force (and thus precludes them from being prosecuted for using deadly force) even in situations in which the use of deadly force would run afoul of the consti-

tutional limitations set out in *Tennessee v. Garner*. This is not the end of the statutory story, though. The law continues:

> However, this subsection shall not constitute a defense in any *civil action for damages* brought for the wrongful use of deadly force *unless* the use of deadly force was necessary to prevent the arrest from being defeated by such flight and, when feasible, some warning had been given, and
> A. The officer reasonably believes that the fleeing felon poses a threat of death or serious physical harm to the officer or others; or
> B. The officer reasonably believes that the fleeing felon has committed a crime involving the infliction or threatened infliction of serious physical harm to another person.[177]

Thus, under Florida law, an officer may be civilly liable, but not criminally liable, for shooting a fleeing, nonviolent felon who is not believed to present any risk of death or serious physical harm to anyone.

The laws that specifically authorize officers' uses of force or limit officers' liability for using force can vary significantly from state to state, making universal declarations largely inaccurate. See the Appendix of State Laws for the text of state statutes and relevant quotations from state judicial opinions.

State Law "Mistake of Fact" Defenses

The preceding discussions focused on state laws that authorize—or, phrased differently, provide a justification defense for—the use of force by officers. Even when an officer's actions are not authorized, however, the officer may avoid criminal liability if state law provides a "mistake of fact" defense. Essentially, a defense of this type can partially or completely exculpate a criminal defendant who successfully argues that they acted the way they did based on a misunderstanding of the facts and, had the facts been what they thought, their actions would have been appropriate. Law professor Paul Robinson and attorney Tyler Williams have concluded that states take three different approaches to this type of defense.

The first category consists of states that follow a Model Penal Code approach to *mens rea*: the extent to which an officer's mistaken belief that force is justified will be exculpatory will depend on the culpability of the mistake. As Robinson and Williams write,

> If the officer has made an honest but a reckless mistake as to the necessity for the use of force, then he or she may have a defense to offenses requiring [in-

> tent] or [knowledge], such as murder, but would have no defense to an offense that requires only recklessness, such as manslaughter. Similarly, if the officer is negligent in mistakenly believing that the use of force is necessary, then he or she can be held liable for an offense requiring negligence, such as negligent homicide, but would get a defense to offenses requiring recklessness, knowledge, or intention, such as manslaughter or murder.[178]

Robinson and Williams count five states that follow this approach: Delaware, Hawaii, Kentucky, Nebraska, and Pennsylvania.[179]

The second category provides a complete defense for officers who reasonably, if mistakenly, believe that their conduct is justified, but no defense for officers whose mistake was negligent, reckless, or otherwise unreasonable. They count twenty-nine states that take this approach to mistake: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming.[180]

The third and final category consists of states that authorize the use of force only when it is necessary, but provide a mistake defense to officers who use force when they mistakenly believe that it was necessary. As Robinson and Williams put it, these states "provide a mistake as to justification defense or mitigation but do so in a separate mistake excuse provision apart from their objective justification defense."[181] They count seventeen states that take this approach: Arizona, Idaho, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Rhode Island, South Dakota, Vermont, Washington, and West Virginia.[182]

General Exceptions and Defenses

In addition to laws that specifically authorize the police to use force or exempt officers from liability for using force, state laws also provide for more generic rules that regulate the use of force, such as the laws governing self-defense, defense of others, defense of habitation, and defense of property. The potential availability of these non-police-specific authorizations to use force raise the question of whether officers can claim *both* a police-specific authorization and a general authorization in any given situation. Indiana resolves this issue by stating explicitly that "a law enforcement officer who is a defendant in a criminal proceeding has the same right as a person who is not a law enforcement officer to assert self-defense,"[183] but other states are less clear on that point.

To see the potential relevance of these more generalized laws to police uses of force, consider two cases from Florida. While working in plain clothes and driving an unmarked car, former Palm Beach Gardens Officer Nouman Raja pulled over to investigate what he apparently thought was an abandoned vehicle. The owner, Corey Jones, a legal concealed-weapons permit holder, was in the vehicle at the time; it had broken down and he was waiting for assistance. Although Raja later said he identified himself as an officer, a recording of a phone call between Jones and a roadside assistance company suggests otherwise. As Raja approached Jones' vehicle, Jones exited and, perhaps thinking that Raja was a potential assailant, pointed a gun at him. Raja responded by fatally shooting Jones. The local prosecutor charged Raja with manslaughter by culpable negligence, among other crimes, stating that he "chose to approach Corey Jones' vehicle in a tactically unsound, unsafe, and grossly negligent manner." Because he approached the vehicle in that manner, the prosecutor believed, he was criminally liable for creating the situation and ultimately killing Jones.[184]

In a separate incident, former Broward County Sheriff's Deputy Peter Peraza responded to a call about a man who was walking through a neighborhood with a rifle. Peraza and other deputies found the subject, Jermaine McBean, who was carrying what looked like a rifle, but was in fact a pellet gun that he had just purchased from a nearby pawn shop. Peraza and several other deputies ordered him to put the weapon down, but he didn't do so. Peraza fatally shot McBean; he was the only officer to open fire, and he later claimed that McBean appeared to be raising the weapon threateningly. The investigation ultimately revealed that McBean probably did not hear the deputies' orders; he had earbuds in and may have been listening to music at the time. Peraza was charged with manslaughter.[185]

Both Raja and Peraza argued that they could not be prosecuted. Their arguments were not based on state law related to an officer's ability to use deadly force, but rather upon Florida's "Stand Your Ground" law. Passed in 2005, that law states that an individual who is in a place where they have a legal right to be does not have to retreat before using deadly force in self-defense; they can instead stand their ground. In essence, Raja and Peraza claimed that even if they were not authorized to use deadly force as officers, they *were* authorized to use deadly force in the same way any civilian would have been under the circumstances. In both cases, the prosecutors objected, arguing that laws that specifically regulate police uses of force take precedence over the more general law governing civilians' use of force. At least one state appellate court agreed with that position; former Haines City Officer Juan Caamano, who was prosecuted for attempted battery relating to an on-duty use-of-force incident, was

not allowed to assert a "Stand Your Ground" defense for exactly the reasons argued by the prosecutors in the Raja and Peraza cases.

That position was ultimately rejected by the Florida Supreme Court, which held in late 2018 that "law enforcement officers are eligible to assert Stand Your Ground immunity."[186] That holding was predicated on the statutory language of the Stand Your Ground Act, which granted the defense to "any person." That expansive phrase was read to include officers, who are, after all, persons.

As the Raja, Peraza, and Caamano cases demonstrate, an officer's use of force may implicate state law beyond the police-specific laws discussed in the preceding section. While a complete review of such laws is beyond the scope of this text, we briefly describe the more relevant laws here:

Self-Defense. By statute or common law, every state in the country authorizes the use of physical force in self-defense, including the use of deadly force in certain circumstances. When the elements of a self-defense claim have been satisfied, the defense precludes criminal liability for violent actions. When some, but not all, of the elements of a self-defense claim have been satisfied, an "imperfect" self-defense claim may serve as a partial excuse that reduces, but does not completely eliminate, criminal liability (e.g., by reducing the relevant crime from murder to manslaughter). State laws vary in several ways, including whether they recognize imperfect self-defense claims and whether, when, and how an individual loses the right to use self-defense by becoming an "aggressor." State laws also vary with regard to whether individuals have a duty to retreat; no state imposes an unqualified duty to retreat in one's own home, and about half the states do not require retreat from a public place before using deadly force.

Defense of Others. State laws typically authorize one person to use force to protect another person when that other person had the right to use self-defense. States follow one of two different approaches: under the "reasonable perception" rule, Person A is authorized to use force to defend Person B if it reasonably appears to Person A that Person B had the right to use self-defense. Under the "alter ego" rule, Person A is authorized to use force to defend Person B only when Person B actually has the right to use self-defense, regardless of how the situation appears to Person A.

Defense of Habitation. State laws typically authorize individuals to use force to prevent someone from committing a felony inside their home or to prevent someone from entering their home for the purposes of committing a felony.

Defense of Property. State laws typically authorize individuals to use force to protect property—their own or others—from being stolen or damaged. Most states do not allow for the use of deadly force to protect property.

Arrest and Prevention of Escape. In addition to the laws that authorize police officers to use force for the purposes of making an arrest or preventing an escape, most states also permit private persons to use force for those purposes. Often, although not always, the state laws regulating what is often known as "citizen's arrests" are more restrictive than the laws that govern arrests by officers; some states do not allow civilians to make arrests for misdemeanors, for example, while others hold that civilians are liable for arresting persons who turn out to be innocent even in situations in which officers would *not* be liable because there was probable cause to believe the subject committed a crime. In some states, however, the state law may provide more leeway to civilians than to officers. As mentioned above, the South Carolina case law regarding officers' use of deadly force is unclear, but the state law governing civilians' ability to use deadly force is readily understandable. South Carolina Code § 17-30-20 states:

> A citizen may arrest a person in the nighttime by efficient means as the darkness and the probability of escape render necessary, even if the life of the person should be taken, when the person:
>
> (a) has committed a felony;
> (b) has entered a dwelling house without express or implied permission
> (c) has broken or is breaking into an outhouse with a view to plunder;
> (d) has in his possession stolen property; or
> (e) . . . flees when he is hailed [under circumstances which raise just suspicion of his design to steal or to commit some felony].

Thus, a civilian may use deadly force even in situations in which an officer would almost certainly be prohibited from doing so—such as when a fleeing person is in possession of five dollars of stolen property, a misdemeanor under state law.

These state laws, and perhaps others, leave open an interesting and important issue: when an officer's use of force is *not* authorized by "police law," can the officer invoke more generally applicable law as a defense to civil or criminal liability? Unfortunately, we cannot provide any clear and universal answer; analysts and policy makers must be attuned to the issue and aware of the relevant law in their jurisdiction.

Conclusion

In this chapter, we reviewed the various state law standards that can apply in criminal, civil, and regulatory dimensions. Confusingly, there is no one "thing" that state law regulates in the use-of-force context; instead, state law regulates a range of behaviors that may or may not be implicated in any given use of force. For example, state criminal and civil tort law may both generally prohibit individuals from making threats, touching another person against their will, and inflicting physical injury. In many cases, however, officers are authorized by statutory and common law to engage in conduct that would, for anyone else, constitute a crime or tort. In other cases, officers may be protected by the laws that authorize any civilian to use force in the situation. Determining whether an officer's use of force was a criminal or tortious act, then, may require applying both police-specific laws and laws that are more generally applicable, including laws related to self-defense, defense of others, and defense of property.

Although a complete and nuanced discussion of the laws of all fifty states are beyond the scope of this text, this chapter offered an overview of how state law regulates police uses of force. An Appendix of State Laws, set forth at the end of this book, provides the text of police-specific state statutes and, when statutes are lacking, relevant quotations from state judicial opinions regarding the regulation of police uses of force.