COMMENT

NOT SECURE IN THEIR PERSONS: BRIDGING *GARNER* AND *GRAHAM*

*Eric Szkarlat**

INTRODUCTION

Black and brown families across America know "the talk."[1] Parents of color warn their children about inevitable police encounters, which too often turn deadly[2] even when citizens of color comply with police orders.[3] But nonfatal force often does not appear reasonable either: when a nine-year-old Black girl failed to comply with orders,[4] the police officer pepper sprayed her and said, "You did it to yourself."[5]

What in the law justifies the use of such force? As this Essay demonstrates, existing case law permits it.[6] Even U.S. Supreme Court Justice Sotomayor noted the Court's reticence to offer basic protection from excessive force under the Fourth Amendment.[7] Such deference to police officers' split-second decisions is acutely dangerous; in 2015 alone, police

* J.D. Candidate, 2022, Fordham University School of Law; B.A. & B.T.A., 2013, University of Michigan. Thank you to my late professor William "Buzz" Alexander for making space for me and so many others to confront racism in criminal law, and thanks to the staff of the *Fordham Law Review* for this bold project.

1. Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).

2. *See* German Lopez, *Black Parents Describe "The Talk" They Give to Their Children About Police*, VOX (Aug. 8, 2016, 11:40 AM), https://www.vox.com/2016/8/8/12401792/police-black-parents-the-talk [https://perma.cc/R84K-EG7A].

3. *See, e.g.*, Mitch Smith, *Video of Police Killing of Philando Castile Is Publicly Released*, N.Y. TIMES (June 20, 2017), https://www.nytimes.com/2017/06/20/us/police-shooting-castile-trial-video.html [https://perma.cc/4L6E-WJNT].

4. Deepti Hajela & Lindsay Whitehurst, *'I Am a Child!': Pepper Spray Reflects Policing of Black Kids*, AP NEWS (Feb. 12, 2021), https://apnews.com/article/policing-black-kids-6708e9f229ed9d28b9c60a41ea988b59 [https://perma.cc/9VAJ-KV9K].

5. Janelle Griffith, *'You Did It to Yourself,' Officer Tells 9-Year-Old Girl Pepper-Sprayed by Police in Newly Released Video*, NBC NEWS (Feb. 12, 2021, 3:41 PM), https://www.nbcnews.com/news/us-news/you-did-it-yourself-officer-tells-9-year-old-girl-n1257630 [https://perma.cc/LWC2-9LMM].

6. *See* Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1189 (2017).

7. Mullenix v. Luna, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting) ("By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow.").

killed an estimated 1240 civilians.[8] Further, excessive force has a disparate racial impact.[9]

However, a recent shift in the Supreme Court's Fourth Amendment jurisprudence emphasized personal security enumerated as a positive right in the amendment's guarantee "to be secure in their persons."[10] This Essay explores the original meaning of the Fourth Amendment and applies it to excessive force cases. Part I reviews the Fourth Amendment's text and its application in excessive force cases. Part II examines the substantive elements the Court considered in *Tennessee v. Garner*[11] and their absence in the later cases *Graham v. Connor*[12] and *Scott v. Harris*.[13] Part III synthesizes the *Graham* balancing test with the Fourth Amendment's original meaning to reinterpret and revitalize the substantive elements of the *Garner* analysis.

I. THE EMERGENCE OF *GRAHAM*

The Fourth Amendment provides an explicit textual source of constitutional protection against police use of excessive force in arrests.[14] Most Fourth Amendment jurisprudence centers on what is "reasonable."[15] Perhaps courts focus on reasonableness because it defines what kinds of government searches and seizures courts will permit. But key text also establishes a personal security right.[16] Part I.A begins by examining that text and the right to personal security. Part I.B discusses the three major cases governing police use of force in arrests.

A. Force and the Fourth Amendment

Policing agencies organize force on a continuum[17] that authorizes greater force as a suspect resists arrest.[18] Suspects generally must comply with police orders or else experience greater force.[19] Because of this escalating

8. Carl Bialik, *A New Estimate of Killings by Police Is Way Higher—And Still Too Low*, FIVETHIRTYEIGHT (Mar. 6, 2015, 4:07 PM), https://fivethirtyeight.com/features/a-new-estimate-of-killings-by-police-is-way-higher-and-still-too-low/ [https://perma.cc/W2J6-XN4E] (extrapolating reported data to include nonreporting agencies and estimating 1240 people killed by police). The United States surpasses its international democratic counterparts in police violence. Evelyn Michalos, Note, *Time over Matter: Measuring the Reasonableness of Officer Conduct in § 1983 Claims*, 89 FORDHAM L. REV. 1031, 1033 (2020).

9. Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 288 (2017).

10. *See* U.S. CONST. amend. IV; Torres v. Madrid, No. 19-292, slip op. at 17 (U.S. Mar. 25, 2021).

11. 471 U.S. 1 (1985).

12. 490 U.S. 386 (1989).

13. 550 U.S. 372 (2007).

14. *Graham*, 490 U.S. at 395.

15. *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 403 (2006) ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness' . . . .").

16. *See* Torres v. Madrid, No. 19-292, slip op. at 17 (U.S. Mar. 25, 2021).

17. When evaluating force, courts generally defer to a police officer's discretion. *See* Garrett & Stoughton, *supra* note 9, at 223, 269–70.

18. Ristroph, *supra* note 6, at 1185–86.

19. *Id.*

force continuum, excessive force cases typically involve significant bodily injury and death.[20] Yet existing Fourth Amendment jurisprudence scantly protects against injury and death in forcible arrests. In fact, courts reviewing excessive force cases rarely focus on the scope of the positive rights the Fourth Amendment affords.[21] Further, remedies for Fourth Amendment violations tend to be weak or unavailable in excessive force cases.[22]

From the Fourth Amendment language articulating "the right of the people to be secure in their persons,"[23] the Supreme Court recently revived the Fourth Amendment interest in "personal security" in the excessive force context when it decided *Torres v. Madrid*.[24] Earlier decisions discussed personal security,[25] but later cases retreated from the term.[26] One sitting justice dissented from the majority opinion in *Torres* and characterized personal security as "penumbral" to the Fourth Amendment.[27] However, the majority rebutted this notion, saying that personal security is anything but penumbral: it is textual.[28]

Case discussions of "personal security" often relate to common law.[29] William Blackstone defined the individual right to "personal security" as "a person's legal and uninterrupted enjoyment of" life, limbs, body, health, and reputation.[30] He noted that the threat of losing one's "life, or . . . limbs, *in case of [one's] non-compliance*" voids otherwise legally executed acts.[31] His contemporaries who drafted the ratified Fourth Amendment almost certainly knew of this terminology.[32] Because virtually all modern police use of force to effectuate an arrest carries the possibility for serious injury to

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20. *See* Graham v. Connor, 490 U.S. 386, 390 (1989) (involving bruising, lacerations, and broken bones); Tennessee v. Garner, 471 U.S. 1, 3 (1985) (involving the death of a young boy suspected of burglary who fled from police).

21. *See* Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 HASTINGS L.J. 713, 717–18 (2014); *see also* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1264 (2016) (noting that the right to be secure is a positive right).

22. *See* Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States, 2010–2011 CATO SUP. CT. REV. 237, 239–44 (discussing the relative weakness of four Fourth Amendment remedies).

23. U.S. CONST. amend IV.

24. *See* Torres v. Madrid, No. 19-292, slip op. at 17 (U.S. Mar. 25, 2021).

25. Terry v. Ohio, 392 U.S. 1, 8–9 (1968) (recognizing an "inestimable right to personal security").

26. One case relegated "personal security" to footnotes of the dissenting opinion. *See* California v. Hodari D., 499 U.S. 621, 637 n.12, 646 n.18 (Stevens, J., dissenting) (1991).

27. *Torres*, slip op. at 24, 26 (Gorsuch, J., dissenting).

28. *Id.* at 17 (majority opinion).

29. *See, e.g.*, *Terry*, 392 U.S. at 9 (quoting a common law tort case, Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

30. 1 WILLIAM BLACKSTONE, COMMENTARIES *129.

31. *Id.* at *130 (emphasis added).

32. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 679–80 n.363 (1999). The final amendment differed significantly from earlier versions. *Compare* Leonard W. Levy, *Origins of the Fourth Amendment,* 114 POL. SCI. Q. 79, 96 (1999) ("[T]he Citizens *shall not be exposed* to unreasonable searches, seizures of their papers, houses, *persons*, or property.") (emphasis added) (citation omitted) (quoting an early draft), *with* U.S. CONST. amend. IV ("[T]he right of the people *to be secure in their persons*, houses, papers, and effects, against unreasonable searches and seizures . . . .") (emphasis added).

"life" and "limb" as a result of noncompliance,[33] all excessive force cases implicate the individual's Fourth Amendment interest in personal security.

B. Excessive Force at the Supreme Court

Three cases represent the Supreme Court's current excessive force jurisprudence. This section discusses those cases in chronological order: first *Garner*, then *Graham*, and finally *Scott*.

1. *Tennessee v. Garner*

Police suspected that Edward Garner, an unarmed Black fifteen-year-old, committed burglary.[34] To seize him, an officer shot Garner in the head as he ran away, killing Garner.[35] Ten dollars and a purse were found on Garner's person.[36] His family sued the Memphis, Tennessee Police Department and brought claims under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.[37]

The Supreme Court applied the conventional Fourth Amendment balancing test, which weighs the government's interests in effectuating the seizure against the intrusion the seizure placed on Garner.[38] Noting that the "intrusiveness of a seizure by means of deadly force is unmatched,"[39] the Court elaborated that deadly force "frustrates" the individual's interests in due process and fair punishment.[40] Thus, the Court held that officers may not use deadly force to effectuate an arrest unless they have probable cause to believe that the person poses a significant threat of death or serious injury either to the officer or to others.[41]

Scholars typically understand *Garner* to represent a bright-line rule in cases where officers use deadly force.[42] But it laid the groundwork for more permissive cases when it hinted, but did not hold, that the courts should review all excessive force claims under the Fourth Amendment.[43] Justice Byron White's analysis suggested that due process, protected at the state level by the Fourteenth Amendment,[44] was somehow within the rights protected by the Fourth Amendment.[45] Perhaps more problematically for

33. *See* Ristroph, *supra* note 6, at 1212.
34. Tennessee v. Garner, 471 U.S. 1, 3, 4 n.2 (1985); *see also* Kevin P. Jenkins, *Police Use of Deadly Force Against Minorities: Ways to Stop the Killing*, 9 HARV. BLACKLETTER J. 1, 6 (1992).
35. *Garner*, 471 U.S. at 3–4.
36. *Id.* at 4.
37. *Id.* at 5.
38. *Id.* at 7–8.
39. *Id.* at 9.
40. *Id.*
41. *Id.* at 11.
42. *See, e.g.*, Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1128 (2008).
43. *See* Graham v. Connor, 490 U.S. 386, 395 (1989).
44. U.S. CONST. amend. XIV, § 1, cl. 2.
45. *See Garner*, 471 U.S. at 13.

later courts,[46] *Garner* expressly abrogated the common law rule permitting deadly force in felony arrests by noting that technological advances cast doubt upon that rule.[47]

2. *Graham v. Connor*

When Dethorne Graham, a diabetic Black man, experienced an insulin reaction, a friend drove him to a convenience store to purchase orange juice.[48] Upon entering, Graham saw that the store had a long checkout line, so he decided not to wait.[49] The police officer, Connor, became suspicious when he witnessed Graham enter and quickly leave the store.[50] He arrested Graham, who pled with officers to check his diabetic card.[51] Officers told him to "shut up" and threw him headfirst into the police car.[52] Graham suffered a broken foot, wrist lacerations, forehead bruises, and a shoulder injury; he also complained of a persistent loud ringing in his right ear.[53] Graham brought a § 1983 claim under the Fourteenth Amendment.[54]

In a landmark case, the Supreme Court declared that the proper test to apply to any excessive force claim—deadly or not—was the Fourth Amendment objective reasonableness test.[55] The Court rejected Graham's Fourteenth Amendment claim, holding that substantive due process is inapplicable because the Fourth Amendment provides an explicit textual source controlling officer conduct.[56] Reasoning that officers must make split-second decisions, the Court ruled that an officer's use of force cannot be evaluated with "the 20/20 vision of hindsight."[57] The decision also enumerated three factors for courts to weigh in excessive force cases: (1) the severity of the crime alleged; (2) whether the suspect poses an immediate threat to anyone's safety; and (3) whether the suspect is resisting arrest or attempting to flee.[58] Despite heavy criticism,[59] *Graham* continues to control in excessive force cases.

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46. *See infra* notes 79–86 and accompanying text.
47. *Garner*, 471 U.S. at 13.
48. *Graham*, 490 U.S. at 388; Charles Lane, Opinion, *A 1989 Supreme Court Ruling Is Unintentionally Providing Cover for Police Brutality*, WASH. POST (June 8, 2020, 6:57 PM), https://www.washingtonpost.com/opinions/a-1989-supreme-court-ruling-is-unintentionally-providing-cover-for-police-brutality/2020/06/08/91cc7b0c-a9a7-11ea-94d2-d7bc43b26bf9_story.html [https://perma.cc/WP4Q-P2UX].
49. *Graham*, 490 U.S. at 389.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 390.
54. *Id.*
55. *Id.* at 392.
56. *Id.* at 395.
57. *Id.* at 396.
58. *Id.*
59. *See, e.g.*, Harmon, *supra* note 42, at 1129–40 (criticizing the *Graham* factors and their application in subsequent cases).

3. *Scott v. Harris*

In 2007, the Court had the opportunity to apply *Graham* again. While driving on a highway, Black nineteen-year-old Victor Harris exceeded the speed limit by eighteen miles per hour.[60] Officers, including Deputy Timothy Scott, began pursuing him.[61] Harris increased his speed to elude capture.[62] To terminate the chase, Scott crashed his own bumper into Harris's car.[63] The crash left Harris with quadriplegia.[64]

Surprisingly, the majority opinion in *Scott* cited the seemingly on-point *Graham* decision only twice.[65] Justice Antonin Scalia spent most of the decision criticizing *Garner*.[66] He configured *Garner* as an application of the later-decided *Graham*.[67] He reasoned that the question of whether Scott used deadly force was irrelevant,[68] suggesting that *Garner* may not constitute a bright-line test after all.[69] Justice Scalia also argued that the danger present to pedestrians and other motorists justified the government's intrusion on Harris, so Scott's use of force was reasonable under the Fourth Amendment.[70] Blurring the lines between deadly and nondeadly force, *Scott* weakened *Garner*'s holding.

II. THE IMBALANCE IN THE FORCE TEST

Garner represents the last major case in which the Supreme Court applied a balancing test which seriously discussed any individual interests to excessive force claims.[71] Because textualists have reacted to the *Garner* holding's mixed approach[72] with some disapproval, current excessive force doctrine fails to afford individual Fourth Amendment interests adequate weight. Thus, *Graham* predominates, but applying its test has failed to account for personal security. Part II.A revisits *Garner* to better understand what individual Fourth Amendment interests the Court weighed. Part II.B examines how the Court's refusal to consider those interests led to imbalanced decisions in *Graham* and *Scott*.

60. Scott v. Harris, 550 U.S. 372, 374 (2007).
61. *Id.* at 374–75.
62. Harris later said he ran because he feared going to jail for driving on a suspended license. *See Why I Ran: Christie/Victor* (A&E television broadcast Oct. 12, 2008) (interviewing Victor Harris).
63. *Scott*, 550 U.S. at 375.
64. *Id.*
65. *Id.* at 381–82.
66. *Id.* at 381–83.
67. *Id.*
68. *Id.* at 383.
69. *See* Harmon, *supra* note 42, at 1135–37.
70. *Scott*, 550 U.S. at 383–84.
71. *Torres* did not reach the balancing test, ruling only that an application of physical force with intent to restrain is a Fourth Amendment seizure. *See* Torres v. Madrid, No. 19-292, slip op. at 1 (U.S. Mar. 25, 2021).
72. *See supra* notes 44–45 and accompanying text.

A. Which Amendment in Garner*?*

The *Garner* decision's evocation of constitutional rights enumerated in other amendments might have led subsequent decisions to emphasize Fourth Amendment interests.[73] The *Garner* Court called a person's life an "unmatched" interest.[74] It further analyzed the individual and societal interests in due process and meaningful punishment.[75] The *Garner* approach seemed in tune with the Fourteenth Amendment, while *Graham* and *Scott* more heavily emphasized the government's interests under the Fourth Amendment.[76]

Yet *Garner* also couched its analysis squarely within the Fourth Amendment.[77] The Court did not stray into questions of unfairness, for example, which would draw originalist ire.[78] Rather, the decision's attention appeared to focus de facto on personal security from unreasonable seizure.[79] Killing Garner for having $10 and a purse on him was unreasonable because his personal security interest—his life—outweighed any government interest.[80] Thus, while the Court's analysis was not grounded in constitutional *text*, it could have been: the Court could have emphasized the first part of the Fourth Amendment.[81] By failing to do so, the *Garner* Court set into motion several decades of permissive Fourth Amendment jurisprudence which have given police a blank check for brutality.[82]

B. The Graham *Imbalance*

In contrast to *Garner*, the *Graham* test weighs strikingly few individual interests. *Graham* outlined the conventional Fourth Amendment test[83] that balances the government's interest in executing the search or seizure against its intrusiveness on the individual's interests.[84] In the context of arrests, courts consider the individual interests that the Fourth Amendment protects.[85] Thus, considerations of procedural and substantive due process, as well as cruel and unusual punishment, are inapposite.[86]

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73. *See supra* notes 55, 65–69 and accompanying text.
74. Tennessee v. Garner, 471 U.S. 1, 9 (1985).
75. *Id.*
76. *See* Scott v. Harris, 550 U.S. 372, 383 (2007); Graham v. Connor, 490 U.S. 386, 396 (1989).
77. *Garner*, 471 U.S. at 7.
78. *See* Perry v. New Hampshire, 565 U.S. 228, 249 (1996) (Thomas, J., concurring) (decrying substantive due process claims involving "unfairness").
79. *See Garner*, 471 U.S. at 11.
80. *Id.*
81. *See supra* notes 24–32 and accompanying text.
82. *See* Ristroph, *supra* note 6, at 1189 ("The constitutional law of police force is not indeterminate, but determinately permissive.").
83. Graham v. Connor, 490 U.S. 386, 396 (1989).
84. *Id.*
85. *See* United States v. Place, 462 U.S. 696, 703 (1983).
86. *See Graham* at 395; *see also* Scott v. Harris, 550 U.S. 372, 383 (2007) (discussing the balancing test).

Nevertheless, the *Graham* Court did not clearly articulate any individual interests to consider.[87] It noted three relevant factors which focused almost exclusively on the government's interest.[88] Graham's diabetes figured into the Court's factual summary, but not its analysis.[89] If the Court had apprehended that Graham had a right to be secure in his person, then his health would factor into the analysis.[90]

Justice Scalia in *Scott* likewise failed to perform a serious balancing test. He dismissed the question of whether the officer's driving maneuver constituted "deadly" force.[91] Justice Scalia stated that Harris endangered others by fleeing;[92] perhaps he reasoned that Harris waived his Fourth Amendment rights by engaging in reckless and dangerous conduct.[93] But nowhere did Justice Scalia note evidence at trial showing that Scott was not trained in the maneuver he used on Harris.[94] He also ignored that Scott admitted the maneuver was wrongfully executed.[95] Recognizing Harris's Fourth Amendment right to his limbs might have forced the Court to justify this trial evidence.[96] As it was, Justice Scalia did not identify any significant counterweight to the government's interest in arrest.

Taking language from the *Garner* dissent, *Graham* itself repudiated *Garner* by emphasizing officers' "split-second judgments."[97] Graham's attorneys initially saw the decision as a victory because it would move the burden away from difficult-to-prove subjective tests.[98] Instead, by offering overly simplistic factors[99] and limiting the role race can play in an excessive force complaint,[100] the shift to an objective standard yielded another manipulable and preclusive standard.[101] As a result, the *Graham* standard did not improve, and might have worsened, the reality of racist police violence.[102]

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87. *See Graham*, 490 U.S. at 396 (identifying three factors to determine reasonableness, but not identifying the individual's Fourth Amendment interests).

88. *Id.*

89. *See* Garrett & Stoughton, *supra* note 9, at 231.

90. *See supra* note 30 and accompanying text. An attorney for Graham later said that they lost on remand. More Perfect, *Mr. Graham and the Reasonable Man*, WNYCSTUDIOS, at 28:24–29:50 (Nov. 30, 2017), https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/mr-graham-and-reasonable-man [https://perma.cc/J9ZF-6FER].

91. *Scott*, 550 U.S. at 381–83.

92. *See id.* at 384.

93. *See id.*

94. Garrett & Stoughton, *supra* note 9, at 234.

95. *Id.* at 235.

96. *See supra* notes 24–32 and accompanying text.

97. *See* Tennessee v. Garner, 471 U.S. 1, 23 (1985) (O'Connor, J., dissenting); *see also* Garrett & Stoughton, *supra* note 9, at 232.

98. *See* Lane, *supra* note 48.

99. *See* Harmon, *supra* note 42, at 1131.

100. *See* Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of* Graham v. Connor, 112 NW. U. L. REV. 1465, 1486 (2018) (finding a drop in federal court treatments of race in police violence after *Graham*).

101. *Id.* at 1497 ("[T]he Fourth Amendment, as interpreted by *Graham*[ ]actually produces racialized police violence . . . .").

102. *See id.*; Lane, *supra* note 48.

III. GUARANTEEING PERSONAL SECURITY

The Court's retreat from *Garner* resembles the retreat from "personal security."[103] In both areas, restrained justices retreated from reasoning which appeared to "posit penumbras."[104] However, the Court's recent revival of personal security invites the revival of *Garner*.[105] Thus, by drawing on the original meaning of "personal security" and reframing *Garner* in this light, reviewing courts can properly balance the *Graham* factors against the individual's personal security interests.

The original public meaning of the Fourth Amendment guarantees the right of personal security from unreasonable arrest.[106] But when nearly 26 percent of people killed by police are Black—while Black people make up only about 13 percent of the national population[107]—there is a material reason why Black families have "the talk."[108] Current jurisprudence on excessive force allows police, regardless of any officer's intent, to make Black families fear for their lives in police encounters.[109] Ultimately, the question should be: what does it mean to be secure in one's person from an unreasonable seizure?[110]

Some critics may argue this definition of personal security—including life, limb, body, health, and reputation[111]—is too sweeping. Further, they might argue that the common law allowed the use of deadly force to effectuate felony arrest, and because the Framers of the Fourth Amendment were certainly aware of this practice, their omission is actually a commission of the practice. But their interpretation of the Fourth Amendment cannot stand. First, the requirement of "reasonableness" counterbalances the breadth of personal security.[112] Where the government's interest in the arrest outweigh the individual's interest in personal security, the government prevails.[113] Second, the Framers had no concept of massive, professionalized municipal police forces armed with handguns such that the Framers could exclude routine forcible arrest, sometimes by shooting, from the Constitution's protections.[114] Indeed, the Fourth Amendment's text broadly protects the people from fear of unreasonable seizure.[115] Read with the original public

103. *Compare supra* notes 65–70, 97–102 and accompanying text (describing the retreat from *Garner*), *with supra* notes 24–28 and accompanying text (describing the retreat from personal security).

104. Torres v. Madrid, No. 19-292, slip op. at 24 (U.S. Mar. 25, 2021) (Gorsuch, J., dissenting).

105. *See supra* notes 24–28 and accompanying text.

106. *See supra* notes 24–28 and accompanying text.

107. Garrett & Stoughton, *supra* note 9, at 288.

108. *See supra* notes 1–5 and accompanying text.

109. *See supra* note 101 and accompanying text.

110. Milligan, *supra* note 21, at 734–37.

111. *See supra* notes 24–32 and accompanying text.

112. Some scholars argue that "unreasonable" originally meant nonconformity to common law. *See, e.g.*, Donohue, *supra* note 21, at 1264.

113. *See supra* notes 83–86 and accompanying text.

114. *See* Torres v. Madrid, No. 19-292, slip op. at 8–9 (U.S. Mar. 25, 2021).

115. *See supra* notes 24–32 and accompanying text.

meaning of "personal security" in mind,[116] the Fourth Amendment text is the elephant "before us,"[117] sweepingly protecting life, limb, and reputation.[118] Thus, reviewing courts should weigh Blackstone's definition of personal security against the government's interest in arrest.[119]

Reading the Fourth Amendment to consider the right to personal security in excessive force cases should not have unintended consequences in the search context.[120] Blackstone's commentary on the right to personal security demonstrates that the original public meaning of a right "to be secure" in one's person meant freedom from the fear of losing life and limb for failure to comply with law enforcement.[121] Threats to this right are virtually inapplicable in the search context.[122] Searches alone do not kill, maim, or destroy reputations. Excessive force in arrest does.

Continuing to follow the *Graham* test without recognizing the role of the right to personal security in the Fourth Amendment will continue the Court's permissive attitude toward police brutality.[123] Ultimately, Justice Scalia correctly determined that *Garner* was an application of *Graham*.[124] Both decisions focus on reasonableness,[125] but each decision construes it differently.[126] In *Graham* and *Scott*, the Court failed to mention the individual interest in personal security and created an imbalanced result.[127] Courts should restore the balance of the interests by considering the right to personal security in every excessive force case.[128]

Garner, however unartfully, alludes to the role personal security must play in the analysis.[129] When the *Garner* Court weighed Edward Garner's interests in life and due process, their decision can be understood within

116. *See supra* notes 24–32 and accompanying text.

117. *Cf.* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (2020).

118. *See supra* notes 24–32 and accompanying text.

119. *See supra* notes 24–32 and accompanying text.

120. Within the search context, property rights receive much attention in originalist discussions on the Fourth Amendment. *See* Donohue, *supra* note 21, at 1235–40 (analyzing property and general warrants in England around the time of the Founding). Blackstone also defined the right to property in his writings. *See* 1 BLACKSTONE, *supra* note 30, at *138.

121. Blackstone's writings hint at the common law right to resist unlawful arrest. *Compare* 1 BLACKSTONE, *supra* note 31, at *130 (noting that legal instruments are void when executed under threat), *with* Ristroph, *supra* note 6, at 1190 (discussing common law right to resist unlawful arrest).

122. Even considering "proprietary security" interests does not change the Fourth Amendment beyond recognition. For a discussion of original Fourth Amendment meaning in the context of property rights, see Davies, *supra* note 32, at 706–10.

123. *See supra* notes 7, 82 and accompanying text.

124. Scott v. Harris, 550 U.S. 372, 382 (2007) ("*Garner* [applied the *Graham* test] to the use of a particular type of force in a particular situation.").

125. *See supra* notes 43, 55 and accompanying text.

126. *Compare supra* notes 73–82 and accompanying text, *with supra* notes 83–96 and accompanying text.

127. *See supra* notes 83–96 and accompanying text.

128. This Essay argues only for clarifying, and affording adequate weight to, the individual's Fourth Amendment interests when performing the balancing test to determine reasonableness. Thus, the *Graham* standard itself would be unaltered. *See supra* notes 55–59, 83–86 and accompanying text.

129. *See supra* notes 73–82 and accompanying text.

Blackstone's definition of "personal security"[130] in which life is an express interest and "due process" implicates one's "reputation."[131] Recognizing these interests to lie within the Fourth Amendment was necessary but never done in *Graham* or *Scott*.[132] The *Graham* Court, for example, should have balanced Dethorne Graham's health against the need to arrest him.[133] Similarly, the *Scott* Court should have balanced Victor Harris's interest in the use of his limbs against the need to stop him from speeding.[134] Perhaps this balancing test would not have changed the result in these cases.[135] But this test would force reviewing courts to do more than rubber-stamp police conduct.

Justice Scalia rightly blurred the lines between deadly force and other types of force.[136] Because police organize force along a continuum,[137] all excessive force cases evoke the right to personal security.[138] Imagining a situation where another Dethorne Graham dies at the hands of another Officer Connor is not difficult; people with disabilities frequently die at the hands of police.[139] Further, an exceedingly permissive constitutional standard of review for excessive force means that compliance with police orders will not always guarantee a person's safety.[140]

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130. *See supra* note 30 and accompanying text.

131. *See supra* note 30 and accompanying text. Scrutiny of police brutality frequently leads to media attention on the wrongs a victim of police brutality committed in their life. *See* Melissa Pandika, *Elijah McClain and the Pitfalls of the "Perfect Victim" Narrative*, MIC (July 16, 2020), https://www.mic.com/p/elijah-mcclain-the-pitfalls-of-the-perfect-victim-narrative-29135795 [https://perma.cc/4GQ2-3KVF].

132. *See supra* notes 87–91 and accompanying text.

133. *See supra* notes 89–90 and accompanying text.

134. *See supra* notes 91–96 and accompanying text.

135. In particular, the danger Victor Harris posed to other road users may still have outweighed his personal security interest, especially considering Justice Scalia's waiver approach. *See supra* notes 92–93 and accompanying text. However, reckless driving is not a felony in Georgia. GA. CODE ANN. § 40-6-390 (2021). Thus, under the common law rule, officers would lack authority to use deadly force to effectuate his arrest. *See* Tennessee v. Garner, 471 U.S. 1, 12 (1985) (noting that using deadly force in apprehending a misdemeanant was illegal under common law).

136. *See supra* notes 67–70 and accompanying text.

137. *See supra* note 17 and accompanying text.

138. *See supra* notes 17–20 and accompanying text.

139. For example, in 2018, New York Police Department officers killed Saheed Vassell, a man who needed treatment for bipolar disorder. Laura Dimon et al., *NYPD Cops Fatally Shoot Bipolar Black Man Holding Metal Pipe Police Mistake for Gun on Brooklyn Street*, N.Y. DAILY NEWS (Apr. 5, 2018, 3:21 AM), https://www.nydailynews.com/new-york/brooklyn/nypd-cops-shoot-kill-bipolar-black-man-metal-pipe-nyc-article-1.3914960 [https://perma.cc/36E2-JDEC].

140. One police officer shot a Black mental health worker who had complied with police orders. Charles Rabin, *Cop Shoots Caretaker of Autistic Man Playing in the Street with Toy Truck*, MIA. HERALD (July 21, 2016, 8:39 AM), https://www.miamiherald.com/news/local/crime/article90905442.html [https://perma.cc/NP8U-374B]. The officer's statement noted that he acted "in a split second," which echoes the language of *Graham*. *See* Erik Ortiz, *North Miami Cop Who Shot Unarmed Man Charles Kinsey: 'I Did What I Had to Do'*, NBC NEWS (July 22, 2016, 2:37 PM), https://www.nbcnews.com/news/us-news/north-miami-cop-who-shot-unarmed-man-charles-kinsey-i-n614766 [https://perma.cc/4PD9-G5MT]; *see also supra* note 57 and accompanying text.

When police pepper-sprayed a nine-year-old Black girl, was it constitutional?[141] There should be little doubt it was not. Yet in the United States in 2021, police can seriously injure and kill citizens, disproportionately people of color, without running afoul of the Fourth Amendment. Justice Scalia may have meant to exclude process and punishment concerns when stating that the balancing test involves only interests protected by the Fourth Amendment.[142] But both rights relate to the security of one's person. The current standard allows police in the United States to kill or maim people who may be unarmed and innocent in a "split-second judgment,"[143] whereas courts over the last forty-five years have sentenced to death many fewer people found guilty of gravely serious crimes.[144] This result is absurd; in cases reaching trial and sentencing, the Fifth, Eighth, and Fourteenth Amendments will afford greater personal security than the amendment which expressly affords that right. In cases where police exceed their force authorizations, these amendments can be read as surplusage. Even the first clause of the Fourth Amendment is surplus when it is so rarely invoked to protect individual rights.

Graham has been applied as a minimum justification standard.[145] Accordingly, the *Graham* standard recommends a scheme for justifying unreasonable and intolerable police violence.[146] This application cannot stand. It fails to consider properly the meaning of the Fourth Amendment's text.[147] Courts should revitalize the reasoning in *Garner* to formulate a *serious* balancing test between the individual's interest in personal security and any governmental interest in effectuating an arrest. The Fourth Amendment demands an aspiration to end the need for "the talk."[148]

CONCLUSION

Courts must correct the constitutional controls on police use of force. To do so, they should emphasize the textual "personal security" interest recently revived at the Supreme Court. Reviewing courts should incorporate this interest into the *Graham* balancing test to determine reasonableness. *Garner* properly weighs the individual's interest in their personal security as interests in their life, limbs, health, and reputation, ensuring that courts may incorporate personal security interests without disrupting precedent.

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141. *See supra* notes 4–5 and accompanying text. *But see* Torres v. Madrid, No. 19-292, slip op. at 9–10 (U.S. Mar. 25, 2021) (declining to determine whether pepper spraying a suspect who eludes capture constitutes a Fourth Amendment "seizure").

142. Scott v. Harris, 550 U.S. 372, 383 (2007).

143. *See supra* notes 57, 97 and accompanying text.

144. *Compare* Bialik, *supra* note 8, *with Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Mar. 24, 2021) https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf [https://perma.cc/NR5K-CFQB] (counting 1532 total executions at the state and federal levels since 1976).

145. *See supra* note 82 and accompanying text.

146. *See supra* note 82 and accompanying text.

147. *See supra* notes 24–32 and accompanying text.

148. *See supra* notes 1–5 and accompanying text.