

**QUALIFIED IMMUNITY AND THE USE OF FORCE:
MAKING THE RECKLESS INTO THE REASONABLE**

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ABSTRACT

This article examines the relationship between the doctrine of qualified immunity and the constitutional limitations placed on the use of force by police officers. The original goal of the qualified immunity doctrine was to make government officials hesitate before taking any action that might arguably violate a person's civil rights. In its current form, the qualified immunity doctrine affords police officers "a double standard of reasonableness"² that has the potential to shield the plainly incompetent officer from liability. The only constitutional limitation on the use of force by police officers is that it be reasonable. When evaluating allegations of excessive force, the level of force used "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."³ This deference to the individual police officer's decision regarding the use of force, combined with the protections afforded by the qualified immunity doctrine, encourages a "'shoot first, think later' approach to policing."⁴

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 2. *Anderson v. Creighton*, 483 U.S. 635, 648 (1987) (Stevens, J. dissenting).
 3. *Graham v. Connor*, 490 U.S. 386, 396 (1989).
 4. *Mullenix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J. dissenting).

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I. INTRODUCTION

On the evening of March 23, 2010, an officer from the Tulia Police Department in Texas was searching for Israel Leija, Jr. to serve a misdemeanor arrest warrant on Leija.⁵ The officer found Leija at a Sonic Drive-In, approached Leija's vehicle, and informed him that he was under arrest.⁶ Leija fled from the officer in his vehicle, and the officer pursued him.⁷

The ensuing high-speed chase lasted approximately 18 minutes and the vehicles involved reached speeds of more than 100 miles per hour.⁸ The entirety of the pursuit occurred in rural areas where traffic was light and where there were no pedestrians.⁹ While Leija refused to obey commands to stop and exceeded the speed limit, he did not run any vehicles off the road, did not collide with any vehicles, and did not cause any collisions.¹⁰ During the pursuit, Leija twice called the Tulia police dispatch on his cell phone in order to warn them that he had a gun and would shoot at the police officers pursuing him if they did not back off.¹¹

Officers from neighboring jurisdictions set up spike strips, used to impede or stop the movement of vehicles by puncturing their tires, at strategic locations along Leija's anticipated route.¹² The hope was that by deploying the spike strips, the officers could safely end the high-speed pursuit by disabling Leija's vehicle.¹³ Although Texas Department of Public Safety (DPS) Trooper Chadrin Mullenix was aware that other officers were deploying spike strips, he decided that he would attempt to disable Leija's vehicle by shooting his .223 caliber M-4 rifle at the vehicle's engine

5. *Id.* at 306; *see* Luna v. Mullenix, 773 F.3d 712, 715-16 (5th Cir. 2014).

6. *Luna v. Mullenix*, 773 F.3d at 715-16.

7. *Id.* at 716.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 720-21.

block.¹⁴ Trooper Mullenix had never previously attempted to stop a vehicle by shooting it, nor been trained to do it, nor seen any other officer do it.¹⁵ He had no idea if such a tactic was likely to be successful.¹⁶

Since Trooper Mullenix wasn't sure if shooting at Leija's vehicle made sense, he contacted DPS dispatch and requested that they contact his supervisor and let him know what he was planning to do.¹⁷ DPS dispatch responded that Trooper Mullenix's supervisor did not want him to shoot at the vehicle, and that he should wait and give the spike strips a chance to work.¹⁸ Trooper Mullenix never heard these instructions because he had already exited his vehicle in order to take up a firing position on top of an overpass.¹⁹

As Leija's vehicle approached the overpass, Trooper Mullenix fired six rounds.²⁰ None of the shots hit the vehicle's radiator, hood, or engine block, but at least four rounds struck Leija in the neck, shoulder, upper arm, and possibly the face.²¹ As Leija's vehicle passed underneath the overpass, it struck the tire spike strips that had been deployed by another officer.²² Leija was most likely already dead when his vehicle came into contact with the spike strips.²³ The car careened out of control, rolled over, and came to rest in the highway median.²⁴

A subsequent investigation by DPS concluded that Trooper Mullenix was not justified in shooting at Leija's vehicle.²⁵ The Texas inspector general concluded that the evidence did not justify Trooper Mullenix's actions because discharging his firearm was reckless and without due regard

14. *Mullenix v. Luna*, 136 S. Ct. 305, 307 (2015).

15. *Luna v. Mullenix*, No. 2:12CV152(J), 2013 U.S. Dist. LEXIS 111414, at *4 (N.D. Tex. Aug. 7, 2013).

16. *See Mullenix*, 136 S. Ct. at 306-07.

17. *Id.*

18. *Id.*

19. *Id.* at 307.

20. *Id.*

21. *Luna v. Mullenix*, No. 2:12CV152(J), 2013 U.S. Dist. LEXIS 111414, at *8 (N.D. Tex. Aug. 7, 2013).

22. *Mullenix v. Luna*, 136 S. Ct. 305, 307 (2015).

23. *Luna v. Mullenix*, 773 F.3d 712, 717 (5th Cir. 2014) (explaining Leija was pronounced dead at the scene).

24. *Mullenix*, 136 S. Ct. at 307.

25. *Luna v. Mullenix*, 773 F.3d at 717, rev'd, 136 S. Ct. 305 (2015).

for the safety of both Leija and the officers who were in the process of deploying spike strips.²⁶

This conclusion is supported by the overwhelming evidence that shooting at a vehicle to stop it is neither effective nor safe.²⁷ Experts in the use of force and police tactics have pointed out that firing at a suspect's vehicle is unlikely to disable it, could injure innocent passengers and, if the driver is struck, endangers the safety of pedestrians and other drivers since the driver is likely to lose control of the vehicle.²⁸ For all of these reasons, the International Association of Chiefs of Police, the U.S. Department of Justice, and most major metropolitan police departments have use of force policies that prohibit officers from firing at vehicles.²⁹

Despite these facts, the Supreme Court had little difficulty finding that Trooper Mullenix was entitled to qualified immunity in the § 1983 action alleging that he had used excessive force when he shot and killed Israel Leija, Jr.³⁰ How is it possible that the Supreme Court views the actions of these police officers to be reasonable when the law enforcement community views these actions to be reckless? The answer is found in the Court's interpretation of both the qualified immunity doctrine that protects officers from reasonable mistakes as to what the law permits and the Fourth Amendment, specifically the deference shown to officers when they use force. Together, the doctrine of qualified immunity and the Fourth Amendment's reasonableness requirement create a hazy border between excessive and acceptable force where the split second judgments of police officers are rarely questioned by the courts.

26. *Id.*

27. Jon Swaine et al., *Moving Targets*, GUARDIAN (Sept. 1, 2015), <https://www.theguardian.com/us-news/2015/sep/01/moving-targets-police-shootings-vehicles-the-counted>.

28. *Id.* See IACP NAT'L LAW ENFORCEMENT POLICY CTR., USE OF FORCE: CONCEPTS AND ISSUES PAPER (Feb. 2006), available at <https://perma.cc/8XQEG9R5>.

29. See Swaine et al., *supra* note 27; see generally INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY: USE OF FORCE (Feb. 2006), available at <https://www.documentcloud.org/documents/2303826-useofforcepolicy.html> (promoting model policy prohibiting firing at a moving vehicle "unless a person in the vehicle is immediately threatening the officer or another person with deadly force by means other than the vehicle").

30. *Mullenix v. Luna*, 136 S. Ct. 305, 309-10 (2015).

II. QUALIFIED IMMUNITY

The Supreme Court has consistently recognized that government officials are entitled to some form of immunity from suits for damages.³¹ Immunity can be absolute³² or qualified.³³ The Court has found that some government officials are entitled to absolute immunity based on their special functions or constitutional status.³⁴ For example, legislators and judges are entitled to absolute immunity when performing their respective legislative and judicial functions.³⁵ Certain members of the executive branch of government are also entitled to qualified immunity,³⁶ but most executive officials are entitled to only qualified immunity.³⁷

The Supreme Court discussed the rationale for extending only qualified immunity to most public officers in *Harlow v. Fitzgerald*.³⁸ The Court noted that “[t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.”³⁹ When government officials have abused their office, “an action for damages may offer the only realistic avenue for vindication of constitutional guarantees.”⁴⁰ That being said, the Court was also concerned with the social costs associated with claims directed at innocent officials. The Court noted that these social costs include “the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able

31. *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (“[O]ur decisions consistently have held that government officials are entitled to some form of immunity from suits for damages.”).

32. *Id.* at 807.

33. *Id.*

34. *Id.*

35. *See Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 510 (1975); *see also Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978).

36. *See Butz v. Economou*, 438 U.S. 478, 515-17 (1978) (holding that prosecutors are entitled to absolute immunity as well as executive officials engaged in adjudicative functions); *see also Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (holding that the president of the United States is entitled to absolute immunity).

37. *See generally Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (acknowledging that high officials require greater protection than those with less complex discretionary responsibilities).

38. 457 U.S. 800 (1982).

39. *Id.* at 813-14.

40. *Id.* at 814.

citizens from acceptance of public office.”⁴¹ The Court also identified another “danger” associated with allowing claims against public officers, “that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.”⁴² Similar concerns have been raised recently regarding the willingness of law enforcement officers to be proactive following widespread criticism regarding the use of force, a phenomenon sometimes referred to as the “Ferguson Effect.”⁴³

In *Harlow*, the Court acknowledged that in previous decisions on qualified immunity the Court had looked both at the objective conduct of government officials as well as their subjective intent.⁴⁴ Breaking from this, the Court decided that the official’s subjective intent should no longer play a role in decisions on qualified immunity and held that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁴⁵ Therefore, the obligation of a trial judge on a motion for summary judgment based on qualified immunity was to “determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.”⁴⁶ The theory was that if the law was not clearly established at the time, “an official could not reasonably be expected to anticipate subsequent legal developments, nor could he [or she] fairly be said to know that the law forbade conduct not previously identified as unlawful.”⁴⁷

On the other hand, if the law was clearly established, then a government official was not entitled to qualified immunity “since a reasonably competent public official should know the law governing his [or

41. *Id.*

42. *Id.* (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (internal quotation marks omitted).

43. See Matt Ford, *Debunking the Ferguson Effect*, ATLANTIC (Nov. 21, 2015), <http://www.theatlantic.com/politics/archive/2015/11/ferguson-effect/416931/> (criticizing the view that the heightened scrutiny of American law enforcement led them to hesitate more on the job, thereby driving up crime). *But see* David C. Pyrooz, Scott H Decker, Scott E. Wolfe, & John A. Shjarback, *Was There a Ferguson Effect on Crime Rates in Large U.S. Cities*, 46 J. CRIM. JUST. 1, 1 (2016) (stating that, “disaggregated analyses revealed that robbery rates, declining before Ferguson, increased in the months after Ferguson”).

44. 457 U.S. at 815 (citing *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

45. *Id.* at 818.

46. *Id.*

47. *Id.* (internal quotations marks omitted).

her] conduct.”⁴⁸ In essence, ignorance of the law is no more a valid excuse for a government official than for the average citizen. The court left open the possibility that government officials who violate a clearly established law can still be granted immunity if they are able to claim “extraordinary circumstances and can prove that [they] neither knew nor should have known of the relevant legal standard.”⁴⁹

Following the Court’s decision in *Harlow*, the Court declined to grant the U.S. Attorney General absolute immunity in *Mitchell v. Forsyth*.⁵⁰ The Court considered and rejected the argument that:

[T]he national security functions of the Attorney General are so sensitive, so vital to the protection of our Nation’s well-being, that we cannot tolerate any risk that in performing those functions he [or she] will be chilled by the possibility of personal liability for acts that may be found to impinge on the constitutional rights of citizens.⁵¹

The Court found that the Attorney General is entitled to only qualified immunity under the standard articulated in *Harlow*.⁵² The Court reasoned that:

This standard will not allow the Attorney General to carry out his [or her] national security functions wholly free from concern for his [or her] personal liability; he [or she] may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States.⁵³

In the Court’s view, the fact that government officials hesitate to take some action for fear that it might violate statutory or constitutional rights is “precisely the point of the *Harlow* standard.”⁵⁴ The Court did not believe

48. *Id.* at 819.

49. *Id.*

50. 472 U.S. 511, 529 (1985).

51. *Id.*

52. 457 U.S. at 819.

53. 472 U.S. 511, 524 (1985).

54. *Id.*

“that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.”⁵⁵

The Court reached a similar conclusion in *Malley v. Briggs*, responding to a claim that a police officer should be entitled to absolute immunity when applying for an arrest warrant. The Court pointed out that the qualified immunity defense “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”⁵⁶ Just as in *Harlow* and *Mitchell*, the Court acknowledged that extending only qualified immunity to government officials may cause them to hesitate when performing an official function, but concluded that:

[S]uch reflection is desirable, because it reduces the likelihood that the officer's request for a warrant will be premature. Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent or, by giving the basis for a suppression motion, benefit the guilty.⁵⁷

One issue that arose in the application of the *Harlow* standard was how to determine whether a law was clearly established so as to provide a government official with adequate notice that certain types of conduct was prohibited.⁵⁸ The application of the *Harlow* standard to cases that involve an alleged violation of the Fourth Amendment was particularly challenging because of the prohibition on “unreasonable searches and seizures.”⁵⁹ Making a determination whether a search or a seizure is reasonable or unreasonable is highly fact-specific.⁶⁰ In *Anderson v. Creighton*, the Supreme Court recognized that the operation of the *Harlow* standard “depends substantially upon the level of generality at which the relevant ‘legal rule’ is to be identified.”⁶¹ The Court observed that if the concept of “clearly established law” included such general propositions as the right to due process of law and the right to be free from unreasonable searches and

55. *Id.*

56. 475 U.S. 335, 341 (1986).

57. *Id.* at 343-44.

58. Stephen E. Balcerzak, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L. J. 126, 133-34 (1985) (“The Harlow Court provided little instruction as to how a district court should actually conduct the modified immunity inquiry.”).

59. *Anderson v. Creighton*, 483 U.S. 635, 644 (1987).

60. *United States v. Walker*, 324 F.3d 1032, 1036 (8th Cir. 2003).

61. 483 U.S. at 639.

seizures, “it would bear no relationship to the ‘objective legal reasonableness’ that is the touchstone of *Harlow*.”⁶²

The Court instead defined “‘clearly established’ in a more particularized, and hence more relevant, sense.”⁶³ The Court held that for a right to be clearly established, “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right.”⁶⁴ The Court also stated that qualified immunity does not extend to any official action “unless the very action in question has previously been held unlawful but it is to say that in the light of pre-existing law the unlawfulness must be apparent.”⁶⁵ In *Anderson*, the Court strikes a balance between the general and the specific when applying the doctrine of qualified immunity. General principles of constitutional law will typically be insufficient to put a government official on notice that specific conduct is prohibited.⁶⁶ At the same time, the specific action taken by a government official does not need to have been declared unconstitutional in order to deny them qualified immunity ; the law need not be crystal clear.⁶⁷

That being said, the Court’s decision in *Anderson* gave government officials an additional layer of protection from civil liability, which Justice Stevens termed in a dissenting opinion as “a double standard of reasonableness – the constitutional standard already embodied in the Fourth Amendment and an even more generous standard that protects any officer who reasonably could have believed that his [or her] conduct was constitutionally reasonable.”⁶⁸ When a court finds a government official is entitled to qualified immunity for an alleged violation of the Fourth Amendment, the court is making a determination that the official reasonably acted unreasonably.

This approach “reflects understandable sympathy for the plight of the officer and an overriding interest in unfettered law enforcement.”⁶⁹ This freedom to act unreasonably may also encourage aggressive police tactics

62. *Id.*

63. *Id.* at 640.

64. *Id.*

65. *Id.* (internal citation omitted).

66. *See id.*

67. *Id.* at 648 (Stevens, J., dissenting).

68. *Id.*

69. *Id.* at 664.

and undermine public confidence in police officers.⁷⁰ At the very least, the qualified immunity that police officers receive is itself an acknowledgment that police officers may not receive adequate training regarding the reasonable use of force.⁷¹ Another concern raised in the dissenting opinion was whether the justifications for granting qualified immunity to executive branch officials are applicable to police officers.⁷² While the President or Attorney General of the United States “must have the latitude to take action in legally uncharted areas without constant exposure to damages suits,”⁷³ it does not follow that police officers should have “the discretion to act in illegal ways.”⁷⁴ It may be more appropriate to give police officers, who are “engaged in the often competitive enterprise of ferreting out crime”⁷⁵, less discretion than other executive officers in the performance of their duties.

The concern that “harassing litigation will unduly inhibit officials in the discharge of their duties”⁷⁶ may also be less of a concern in a criminal justice system where 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas.⁷⁷ Police officers are seldom, if ever, called to testify at a trial in criminal court⁷⁸ and the doctrine of qualified immunity decreases the likelihood that they will have to answer allegations regarding the propriety of their conduct in civil proceedings. In addition, the actual use of force by police officers is exceedingly rare, which undercuts the argument that permitting litigation over the use of force to

70. See Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1483-84 (2016).

71. *Anderson*, 483 U.S. at 666 (“Arguably, if the Government considers it important not to discourage such conduct, it should provide indemnity to its officers. Preferably, however, it should furnish the kind of training for its law enforcement agents that would entirely eliminate the necessity for the Court to distinguish between the conduct that a competent officer considers reasonable and the conduct that the Constitution deems reasonable.”).

72. *Id.* at 651-52.

73. *Id.* at 654.

74. *Id.* at 653.

75. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

76. *Anderson*, 483 U.S. at 638.

77. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (citing BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, Table 5.22.2009, available at <http://www.albany.edu/sourcebook/pdf/t5222009.pdf>).

78. *Id.* (“In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”).

proceed to trial will impose a substantial burden on the officers involved.⁷⁹ At the same time, approximately 75 percent of people who had force used against them report that they felt it was excessive, a figure that suggests that a lack of accountability may contribute to the use of excessive force.⁸⁰

Anderson creates a powerful disincentive to litigate unless the law is clearly established to a degree that the potential litigant is reasonably certain that the offending officer will be denied qualified immunity. If applied properly, the procedure outlined by the Court in *Harlow* and clarified in *Anderson* to determine government officials' entitlement to qualified immunity makes it possible to hold government officials accountable if they later engage in similar behavior. A government official that violates a constitutional right that was not clearly established at the time is immune from suit, but notice has been given that the conduct now deemed unlawful will not be tolerated in the future.

The Supreme Court's decision in *Wilson v. Layne* illustrates this point. In *Wilson*, federal marshals and local sheriff's deputies invited a newspaper reporter and a photographer to accompany them while they executed an arrest warrant.⁸¹ The issue before the Court was whether the inclusion of the media or of a third party during the execution of a warrant violates the Fourth Amendment rights of homeowners.⁸² The Court first addressed the question of "whether the plaintiff has alleged a deprivation of an actual constitutional right."⁸³ Noting that the Fourth Amendment embodies a centuries-old principle of respect for the privacy of the home, the Court concluded that the presence of the reporter and photographer "was not related to the objectives of the authorized intrusion."⁸⁴ It held that "it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant."⁸⁵

After finding a violation of a constitutional right, the Court then addressed whether the right was clearly established when the government

79. Christine Eith & Matthew R. Durose, *Contacts between Police and the Public, 2008*, BUREAU OF JUST. STATISTICS 1, 11 (2008), <http://www.bjs.gov/content/pub/pdf/cpp08.pdf>.

80. *Id.*

81. *Id.* at 607.

82. *Id.* at 608.

83. *Id.* at 609 (citing *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)).

84. *Id.* at 611.

85. *Id.* at 614.

official violated it. The Court established in *Anderson* that “the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.”⁸⁶ Therefore, “the appropriate question is the objective inquiry whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed.”⁸⁷ However, the Court noted that the “the constitutional question presented by this case is by no means open and shut,”⁸⁸ and that “media ride-alongs of one sort or another had apparently become a common police practice.”⁸⁹ The Court found that “there were no judicial opinions holding that this practice became unlawful when it entered a home,”⁹⁰ which led the Court to conclude that it was not unreasonable for a police officer “to have believed that bringing media observers along during the execution of an arrest warrant (even in a home) was unlawful.”⁹¹ While the officers in *Wilson* could not be subject to money damages “for picking the losing side of the controversy,” officers who engaged in similar conduct in the future could be.⁹²

It is worth considering the observation made by the Court in *Wilson* that the practice held to be unconstitutional was “a common police practice”⁹³ at the time and one which was authorized by internal police policy.⁹⁴ It seems that the Court is excusing an unconstitutional practice, at least in part, because it has been normalized by the internal policy of a majority of police departments. Because the practice complained of in *Wilson* was widespread and previously unchallenged,⁹⁵ this raises the question of whether the fear that denying qualified immunity to law enforcement will result in a flood of litigation. The requirement that the law be clearly established before a government official can be held liable for damages almost certainly contributes to the spread of practices that are

86. *Id.* at 615.

87. *Id.*

88. *Id.*

89. *Id.* at 616.

90. *Id.*

91. *Id.* at 615.

92. *Id.* at 618.

93. *Id.* at 616.

94. *Id.* at 617 (“[I]mportant to our conclusion was the reliance by the United States marshals in this case on a Marshals Service ride-along policy that explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests. The Montgomery County Sheriff’s Department also at this time had a ride-along program that did not expressly prohibit media entry into private homes.”)

95. *Id.*

eventually deemed unlawful. There is very little incentive to litigate when the state of the law is arguably unclear. As *Wilson* illustrates, even if a litigant is successful in establishing that their constitutional rights were violated, they may not be financially compensated. There is very little incentive to spend the time and money associated with a lawsuit when the end result will be a benefit, not to the actual litigant, but to future litigants.

The application of the qualified immunity doctrine to allegations of excessive force were complicated by the Supreme Court's holding in *Graham v. Connor* that an officer's use of force must be "objectively reasonable in light of the facts and circumstances confronting them."⁹⁶ The issue of how to integrate the Court's holding in *Graham* into the qualified immunity analysis set forth in *Anderson* was addressed by the Court in *Saucier v. Katz*.⁹⁷ In *Saucier*, the Court of Appeals had found that the question of whether an officer had used excessive force and the question of whether an officer is entitled to qualified immunity are the same question: specifically, whether the officer's conduct was objectively reasonable under the circumstances.⁹⁸ The Supreme Court disagreed and found "the ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest."⁹⁹

The Court emphasized that "the first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals."¹⁰⁰ The Court's insistence on the continued use of a two-step inquiry when considering if an officer is entitled to qualified immunity in a case alleging excessive force makes it clear that the Court's holding in *Graham* is of little value. It is an acknowledgment that *Graham* was decided at a high level, perhaps the highest level, of generality since the Court held that the use of force by police officers need only be objectively reasonable under the circumstances.¹⁰¹ As the Court notes in *Saucier* the fact that *Graham* "establishes the general proposition that use of force is contrary to the

96. 490 U.S. 386, 397 (internal quotation marks omitted).

97. 533 U.S. 194, 200-07 (2001).

98. *Katz v. United States*, 194 F.3d 962, 968 (9th Cir. 1999).

99. *Saucier*, 533 U.S. at 197.

100. *Id.* at 200.

101. *Id.* at 205 ("*Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts.>").

Fourth Amendment if it is excessive under objective standards of reasonableness... is not enough.”¹⁰²

The Court believes that the benefits of the two-step process are that it “serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable.”¹⁰³ Justice Ginsburg’s concurring opinion in *Saucier* points out that by tacking on “a second, overlapping objective reasonableness inquiry” to *Graham* “purportedly demanded by qualified immunity doctrine” the decision in *Saucier* “holds large potential to confuse.”¹⁰⁴ If a meaningful distinction can be drawn between the test applied to evaluate the level of force used by officers and the test for qualified immunity, it lies in a distinction between a mistake of fact and a mistake of law.¹⁰⁵ *Graham* focuses on the reasonable, but possibly mistaken, beliefs regarding the factual circumstances that lead an officer to use force.¹⁰⁶ As the Court points out in *Saucier*, “[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.”¹⁰⁷ The Court goes on to say that “[t]he qualified immunity inquiry, on the other hand, has a further dimension.”¹⁰⁸ It is an acknowledgment that “reasonable mistakes can be made as to the legal constraints on particular police conduct.”¹⁰⁹

Less than a decade after the Court’s admonition in *Saucier* that judges first determine if a constitutional right had been violated before deciding if that right was clearly established, the Court decided to permit judges to grant immunity based solely on a finding that a right was not clearly established. In *Pearson v. Callahan*, the Court acknowledged that “[l]ower court judges, who have had the task of applying the *Saucier* rule on a regular basis for the past eight years, have not been reticent in their criticism”¹¹⁰ of the mandatory two-step process required by *Saucier*. The

102. *Id.* at 201-02.

103. *Id.* at 201.

104. *Id.* at 210 (Ginsburg, J. concurring).

105. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (“The protection of qualified immunity applies regardless of whether the government official’s error is ‘a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.’”); *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting) (quoting *Butz v. Economou*, 438 U.S. 478, 507 (1978), for the proposition qualified immunity covers “mere mistakes in judgment, whether the mistake is one of fact or one of law”).

106. 490 U.S. 386, 396-97 (1989).

107. *Saucier*, 533 U.S. at 205.

108. *Id.*

109. *Id.*

110. 555 U.S. 223, 234 (2009).

Court pointed out that the decision in *Pearson* “does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases.”¹¹¹ The Court downplays the concern that the development of constitutional law would be stunted if lower courts declined to rule on the constitutionality of specific conduct and instead simply decided that the law applicable to that conduct was not clearly established.¹¹² The constitutional avoidance in *Pearson* keeps the contours of rights unclear; it shrouds constitutional rights in a fog of uncertainty.

In *Ashcroft v. al-Kidd* the Court extended even greater protection to government officials by slightly altering the test for qualified immunity under *Anderson*. In *Anderson*, the Court ruled that a right was clearly established when “[t]he contours of the right” are “sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right.”¹¹³ In *Ashcroft*, the Court changed “a reasonable official” to “every reasonable official.”¹¹⁴ The wording “a reasonable official” suggests a single standard of reasonableness, one that uses an objectively reasonable official as a guide. The wording “every reasonable official” suggests that there is a range of reasonableness and what is reasonable will vary from one official to another. This change interjects a greater degree of subjectivity to the qualified immunity analysis.

The Court has also made it clear that a violation of internal policy or a failure to follow generally accepted procedures does not, in and of itself, make a government official’s actions unreasonable. Recently, in *City & County of San Francisco v. Sheehan*, when evaluating a claim of excessive force, the Court held that even if police officers failed to act as they were trained and in violation of department policy that those facts were not relevant to the determination of qualified immunity: “Even if an officer acts contrary to her training... that does not itself negate qualified immunity where it would otherwise be warranted.”¹¹⁵ The Court was also somewhat dismissive of expert testimony regarding proper police procedures stating, “[A] plaintiff cannot avoid summary judgment [on the grounds of qualified immunity] by simply producing an expert’s report that an officer’s conduct

111. *Id.* at 242.

112. *Id.*

113. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

114. 563 U.S. 731, 741 (2011).

115. 135 S. Ct. 1765, 1777 (2015).

leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.”¹¹⁶

The result is that the doctrine of qualified immunity creates a fog of uncertainty surrounding constitutional rights. The violent actions of police officers occupy the “hazy border between excessive and acceptable force”¹¹⁷. Officers are immune from liability unless every reasonable officer would have known that their actions were unconstitutional. Even if internal police policies prohibit their actions or internal investigations condemn them after the fact, courts may still grant them immunity.

III. THE REASONABLE USE OF FORCE

The Supreme Court has avoided establishing any specific preconditions for the use of force by police officers and has instead required only that their actions be reasonable under all of the surrounding circumstances.¹¹⁸ In *Tennessee v. Garner*, the Court found that the use of deadly force to apprehend a suspect was a seizure under the Fourth Amendment and therefore subject to that Amendment’s reasonableness requirement.¹¹⁹ In *Garner*, a police officer, who was responding to a report of burglary, used deadly force despite being “reasonably sure” that the fleeing suspect was an unarmed teenager.¹²⁰ In defending his actions, the officer relied on a Tennessee statute that authorized a police officer to “use all the necessary means to effect the arrest” of a suspect.¹²¹

The Court found that the statute was unconstitutional in so far as it authorized “[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances.”¹²² The Court noted that “[t]he intrusiveness of a seizure by means of deadly force is unmatched”¹²³ and that it also “frustrates the interests of the individual, and of society, in judicial determination of guilt and punishment.”¹²⁴ The Court described the use of deadly force as “self-defeating” since, if used successfully, “it

116. *Id.* (quoting *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002)).

117. *Saucier v. Katz*, 533 U.S. 194, 206 (2001).

118. *See* Rachael A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1119 (calling the Supreme Court’s Fourth Amendment doctrine regulating the use of force by police officers “deeply impoverished” and “indeterminate and undertheorized”).

119. 471 U.S. 1, 7 (1985).

120. *Id.* at 3.

121. *Id.* at 4.

122. *Id.* at 11.

123. *Id.* at 9.

124. *Id.*

guarantees that [the criminal justice mechanism] will not be set in motion.”¹²⁵ The Court also based its decision, at least in part, on the fact that the policies of most police departments only authorized the use of deadly force in defense of human life or to protect the officer or another person from serious physical injury.¹²⁶ The Court did, however, authorize the use of deadly force against a fleeing suspect “if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.”¹²⁷

The *Garner* decision did not, however, provide an analytical framework for evaluating the use of force by police officers generally. Justice O’Connor’s dissenting opinion pointed out this lack of guidance.

The Court’s silence on critical factors in the decision to use deadly force simply invites second-guessing of difficult police decisions that must be made quickly in the most trying of circumstances. Police are given no guidance for determining which objects, among an array of potentially lethal weapons ranging from guns to knives to baseball bats to rope, will justify the use of deadly force. The Court also declines to outline the additional factors necessary to provide “probable cause “ for believing that a suspect poses a significant threat of death or serious physical injury when the officer has probable cause to arrest and the suspect refuses to obey an order to halt.¹²⁸

The holding of *Garner* is limited to the use of deadly force and rests on the belief that “[i]t is not better that all felony suspects die than that they escape.”¹²⁹

Another critique of the Court’s reasoning in *Garner* decision is the categorization of deadly force as a “seizure” under the Fourth

125. *Id.* at 10.

126. *Id.* at 18.

127. *Id.* at 11.

128. *Id.* at 32 (O’Connor, J., dissenting) (citing *Payton v. New York*, 445 U.S. 573, 619 (White, J., dissenting)).

129. *Id.* at 11 (majority opinion).

Amendment.¹³⁰ As the Court pointed out, the use of deadly force “frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.”¹³¹ A search or a seizure, even an unreasonable one, should not prevent a judicial determination of guilt. To put it another way, the search for evidence or the arrest of an individual are steps in the adjudication process. The use of deadly force ensures that the adjudication process never happens. Arguably, *Garner* implies that the use of deadly force must be more than reasonable under the circumstances – it must also be necessary.

The argument was made in *Garner* “that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee.”¹³² The Court rejected that argument and concluded that “[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force.”¹³³ Further, the Court emphasized “that laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime-fighting ability of law enforcement agencies.”¹³⁴ At the very least, the Court implied that the use of deadly force is unreasonable unless there is a compelling justification for its use.¹³⁵

Several years after *Garner*, the Court reiterated in *Graham v. Connor* that the use of force by police officers is subject to the Fourth Amendment’s reasonableness requirement.¹³⁶ The allegation in *Graham* was that police officers had used excessive force during the course of an investigatory stop that did not ultimately lead to an arrest.¹³⁷ The Court made it clear that the reasonableness of the level of force used “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”¹³⁸ The fact that the officers ultimately may be wrong about a suspect’s guilt was ruled not to matter if, based on what the officers

130. *Id.* at 7 (“While it is not always clear just when minimal police interference becomes a seizure, there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.” (citation omitted)).

131. *Id.* at 9.

132. *Id.*

133. *Id.* at 11.

134. *Id.* at 19.

135. *Id.*

136. 490 U.S. 386, 388-389 (1989).

137. *Id.*

138. *Id.* at 396.

knew at the time, the amount of force used to detain a suspect was reasonable.¹³⁹ Then, in what has become an often quoted portion of the decision,¹⁴⁰ the Court found that “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.”¹⁴¹ This reasoning stands in contrast to that used by the Court when extending only qualified immunity to most government officials, specifically that officials should be made to hesitate when there is a question regarding the constitutionality of their actions.¹⁴²

The Court’s decision to view the reasonableness of the force used through the eyes of “a reasonable officer on the scene”¹⁴³ creates a standard of review that takes into account an officer’s training and experience, subjective as that may be. It also, perhaps unintentionally, emphasizes officer safety over the safety of a suspect. Any reasonable officer would seek to protect their own safety, and the safety of their fellow officers, at the expense of the safety of a suspect. Unlike in *Garner*, where the Court took into account the overall safety of police officers, suspects and citizens, *Graham* gives preference to the safety of police officers.

While the Court in *Graham* noted that in analyzing the reasonableness of the use of force courts should pay “careful attention to the facts and circumstances of each particular case,”¹⁴⁴ the Court listed only three specific factors: “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”¹⁴⁵ Notably absent is from this calculus is the likelihood that the suspect can be apprehended at a later time. There is also no requirement that the amount of force be limited to the amount necessary to gain control over

139. *Id.*

140. Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 865 (2014) (“Since the Supreme Court first introduced that description in 1989, federal district and circuit courts have repeated it on more than 2,300 occasions.”).

141. *Graham*, 490 U.S. at 396-97.

142. *Harlow*, 457 U.S. 800, 819 (1982) (“Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.”).

143. *Graham*, 490 U.S. at 396.

144. *Id.*

145. *Id.*

the suspect. *Graham* permits officers to use a reasonable amount of force but not the least amount of force necessary.

In *Saucier v. Katz*, the Court reiterated the factors set forth in *Graham* that should be used when evaluating a claim of excessive force, “which include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”¹⁴⁶ Then the Court went one step further and suggested that police officers could use force if they thought that a suspect was *likely* to fight back: “If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.”¹⁴⁷ Officers are not required to wait for a suspect to resist; if they reasonably believe that the suspect will resist an arrest, they can preemptively use force against them.

In *Scott v. Harris*, the Court ruled that police officers are sometimes permitted to use force against a suspect who drives recklessly in an attempt to evade the police.¹⁴⁸ In *Scott*, the Court found that the officer’s decision to ram his push bumper into the back of the suspect’s car in order to make the vehicle spin to a stop was reasonable under the circumstances, even though this act “posed a high likelihood of serious injury or death” to the suspect.¹⁴⁹ Even though *Garner* would seem to have created a bright line rule regarding the use of deadly force against a fleeing suspect, the Court in *Harris* stated that “*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute ‘deadly force.’”¹⁵⁰ The Court rejected the idea of an “easy-to-apply legal test” and stated that “in the end we must still slosh our way through the factbound morass of ‘reasonableness.’”¹⁵¹

In *Scott*, the Court found that an officer’s decision to end a high-speed pursuit by ramming his push bumper into the back of the suspect’s car in order to make the vehicle spin to a stop was reasonable under the circumstances, even though this act “posed a high likelihood of serious injury or death” to the suspect.¹⁵² The Court rejected the idea that “the innocent public [would] equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit.”¹⁵³ The Court

146. 533 U.S. 194, 195 (2001).

147. *Id.* at 205.

148. 550 U.S. 372, 386 (2007).

149. *Id.* at 384.

150. *Id.* at 382.

151. *Id.* at 383.

152. *Id.* at 384.

153. *Id.* at 385.

dismissed the idea that public safety would be better served by officers discontinuing pursuit because there is “no way to convey convincingly [to a suspect] that the chase was off” and therefore, the suspect is “just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.”¹⁵⁴ However, the Court’s assumption is contradicted by research suggesting that suspects will slow down and stop driving recklessly a short time after officers stop pursuit.¹⁵⁵ In fact, police pursuit policies are actually “based on the notion that once an officer or supervisor terminates a pursuit because the risks are too great, the public will be safer than if the pursuit is continued.”¹⁵⁶

The Court was also concerned in *Scott* about creating a perverse incentive by “requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people’s lives in danger.”¹⁵⁷ However, research “has shown that if the police refrain from chasing all offenders or terminate their pursuits, no significant increase in the number of suspects who flee would occur,” which contradicts any claim that restricting the ability of police to engage in high speed pursuits would encourage more suspects to drive recklessly in an attempt to avoid capture.”¹⁵⁸

The Court revisited the use of force during a high-speed car chase in *Plumhoff v. Rickard*¹⁵⁹ where a suspect who had been pulled over because of a defective headlight refused to exit his vehicle and sped away. After leading police officers on a high-speed chase, the suspect’s car spun out into a parking lot and collided with a police cruiser.¹⁶⁰ The suspect once again tried to escape in his car, but officers exited their vehicles and shot into the suspect’s car a total of 15 times, killing the suspect.¹⁶¹ As in *Scott*, the Court concluded that because the suspect’s flight posed a grave risk to public safety, “the police acted reasonably in using deadly force to end that

154. *Id.*

155. David P. Schultz et al., *Evidence-Based Decisions on Police Pursuit: The Officer’s Perspective*, FBI L. ENFORCEMENT BULL. (Mar. 2010), <https://leb.fbi.gov/2010/march/evidence-based-decisions-on-police-pursuits-the-officers-perspective>.

156. *Id.*

157. *Scott*, 550 U.S. at 385.

158. Schultz et al., *supra* note 155.

159. 134 S. Ct. 2012 (2014).

160. *Id.* at 2017.

161. *Id.* at 2017-18.

risk.”¹⁶² The Court also considered whether firing 15 shots was unreasonable under the circumstances.¹⁶³ The Court reasoned that “if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.”¹⁶⁴

In November 2015, *Mullenix v. Luna* presented the Court with another a high-speed chase. A police officer approached Israel Leija, Jr.’s vehicle and informed him that he was under arrest because of an outstanding warrant.¹⁶⁵ Leija sped off and “led the officers on an 18 minute chase at speeds between 85 and 110 miles per hour.”¹⁶⁶ In an effort to end the pursuit, police officers set up spike strips at three different locations.¹⁶⁷ Instead of waiting for Leija’s vehicle to reach the spike strips, Trooper Chadrin Mullenix decided to end the pursuit by “shooting at Leija’s car in order to disable it.”¹⁶⁸ Mullenix fired six shots at Leija’s vehicle from his position on an overpass.¹⁶⁹ Instead of hitting the engine block of the vehicle, his intended target, he hit Leija four times in the upper body, killing him.¹⁷⁰

The Supreme Court considered whether Mullenix was entitled to qualified immunity for his actions.¹⁷¹ If Mullenix’s conduct did not violate clearly established statutory or constitutional rights, then, as a police officer, he could not be subject to personal liability.¹⁷² The Court was quick to point out that it has “never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity.”¹⁷³ Arguing that the doctrine operates to “protect actions in the ‘hazy border between excessive and acceptable force,’”¹⁷⁴ the Court concluded that Mullenix was entitled to qualified immunity because “excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted.”¹⁷⁵ Collectively,

162. *Id.* at 2022.

163. *Id.* at 2024.

164. *Id.* at 2022.

165. 136 S. Ct. 305, 306 (2015).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 307.

170. *Id.*

171. *Id.* at 308.

172. *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (“[W]e emphasized in *Anderson* ‘that the right the official is alleged to have violated must have been ‘clearly established.’” (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))).

173. *Mullenix*, 136 S. Ct. at 310.

174. *Id.* at 312 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004)).

175. *Id.* at 309.

Garner, *Graham*, *Saucier*, *Scott*, *Plumhoff*, and *Mullenix*, give little guidance to law enforcement agencies attempting to develop use of force policies. What guidance they do provide is, at times, contradictory since in *Garner*, the Court condemned the use of deadly force to apprehend a fleeing suspect, but in *Scott*, approved of an act likely to cause serious injury or death to apprehend someone who was driving recklessly in an effort avoid capture. The decisions in *Plumhoff* and *Mullenix* are especially problematic since the Court approved of shooting into a car in an effort to stop a fleeing suspect despite the fact that the vast majority of law enforcement agencies instruct officers to never fire into a moving car.¹⁷⁶ The Court appears to be more willing to permit the use of deadly force than the executive officers charged with protecting public safety..¹⁷⁷

IV. CONCLUSION

Considering the fact that the Court found the use of deadly force, and specifically the act of shooting into a moving vehicle, objectively reasonable in *Plumhoff*, its decision in *Mullenix* that the officer was entitled to qualified immunity is entirely consistent with prior case law. It is also worth noting that even if the Court had found that Trooper Mullenix's actions were unreasonable, the doctrine of qualified immunity and the "hazy border between excessive and acceptable force" would have shielded him from liability because of the Court's prior decision in *Plumhoff*. What is troubling about the Court's decision in *Mullenix* is that almost all police departments prohibit officers from firing at moving vehicles. The International Association of Chiefs of Police (IACP) has a model policy on the use of force that prohibits firing at a moving vehicle "unless a person in the vehicle is immediately threatening the officer or another person with deadly force by means other than the vehicle."¹⁷⁸ The policy specifically

176. Swaine et al., *supra* note 27 ("The US Department of Justice, prominent international policing experts and most major police departments across the US agree: police officers should not fire their guns into moving cars. The shots are widely viewed as ineffective for stopping oncoming vehicles, and the risks to innocent parties are seen as overwhelming.").

177. Harmon, *supra* note 118, at 1123 (arguing that "the Supreme Court's few opinions fail to answer the basic questions of why, when and how much force officers can use, while at the same time permitting, if not encouraging, the use of irrelevant and prejudicial considerations in evaluating whether an officer acted reasonably").

178. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 29, at (IV)(B)(3).

instructs officers that the moving vehicle itself does not constitute a threat that justifies the use of deadly force and that if an officer is threatened by an oncoming vehicle he/she should “move out of its path instead of discharging a firearm at it or any of its occupants.”¹⁷⁹ Ironically, the Supreme Court relied upon a report by the International Association of Chiefs of Police on the use of force policies then in effect in the majority of police departments when deciding *Garner*.¹⁸⁰

It is also ironic that the Court’s view of a police tactic as reasonable when most of law enforcement would regard it as reckless actually places not just suspects and the public in greater danger, but also police officers. The Court in *Mullenix* found the officer’s fear that “Leija might attempt to shoot at or run over the officers manning the spike strips”¹⁸¹ to be a sufficient justification for shooting at his vehicle. But shooting the driver of a moving vehicle will most likely result in the driver losing control of the vehicle, increasing the chance that a pedestrian will be struck. When Trooper Mullenix shot Leija as his vehicle was approaching the underpass, he increased the likelihood of injury to the officers who were deploying spike strips.

In *Scott*, the Court questioned how it should weigh the various interests at stake when an officer decides to terminate a high-speed pursuit using a tactic that could seriously injure or kill a fleeing suspect.¹⁸² The Court considered the potential risk to the suspect and weighed it against the risk that the suspect posed to the general public but stated that “there is no obvious way to quantify the risks on either side”¹⁸³ and characterized the decision to use deadly force to terminate a high-speed pursuit as a “choice between two evils.”¹⁸⁴

In *Mullenix*, the Court points out that they have never denied an officer qualified immunity “because officers entitled to terminate a high-speed chase selected one dangerous alternative over another.”¹⁸⁵ The Court notes that spike strips present a danger “not only to drivers who encounter them... but also to officers manning them”¹⁸⁶ and views the argument that Trooper

179. *Id.*

180. *Garner*, 471 U.S. at 19 (“Overall, only 7.5% of departmental and municipal policies explicitly permit the use of deadly force against any felon; 86.8% explicitly do not. K. Matulia, A Balance of Forces: A Report of the International Association of Chiefs of Police.”).

181. *Mullenix*, 136 S. Ct. at 310.

182. *See generally*, 550 U.S. 372 (2009).

183. *Id.* at 383-84.

184. *Id.* at 384.

185. *Mullenix*, 136 S. Ct. at 310.

186. *Id.*

Mullenix should have waited to see if the spike strips were effective as one that disputes “the merits of the options available”¹⁸⁷ to terminate a high-speed chase.

The Court seems to accept the idea that when dealing with threats to their own safety or to public safety, police officers should be permitted to use any tactic that can be viewed as reasonable. The fact that one course of action may involve less risk to the officer, to the suspect or to the general public is not determinative of whether the actions taken by the officers were reasonable. In *Mullenix* the Court concluded that “there is no obvious way to quantify the risks on either side,”¹⁸⁸ but police departments have adopted evidence-based policies on high-speed pursuits and the use of deadly force based on the risks to the officers, the suspect and the general public.¹⁸⁹ The end result is that the Court transforms what is reckless into something which is reasonable.

The Court needs to recognize that when police officers are confronted with a range of dangerous alternatives, it is reasonable to require them to choose the least dangerous alternative. Law enforcement agencies have adopted evidence based policies that take into account the risks associated with the use of force to suspects, officers and the general public. The Court should not blindly accept the policies on use of force advanced by law enforcement agencies, in the same way that it refused to accept the argument in *Garner* that the use of deadly force on a fleeing suspect would reduce overall violence. However, when a use of force policy represents a reasonable balance between the safety of the suspect, the officer and the general public, the Court should not hesitate to endorse the policy. Doing so would bring into focus the currently hazy border between excessive and acceptable force.

187. *Id.* at 311.

188. *Scott*, 550 U.S. at 383-84.

189. *See, e.g.*, INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 29.

