



The Police Encounter with a Fleeing Motorist: Dilemma or Debacle?

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Despite most law enforcement experts agreeing that shooting at a moving vehicle is not an effective way to stop a fleeing motorist, in recent years hundreds of people were injured or killed by police officers who did just that. This Article concludes that Supreme Court jurisprudence related to these shooting incidents is at odds with current law enforcement policies. A review of relevant federal circuit court cases illustrates that lower courts disagree on how to evaluate officer conduct in these situations.

To reduce the public safety hazard that this widely debunked policing tactic represents, this Article recommends that the Supreme Court bring its thinking up to date. In addition, this Article encourages state legislatures to consider incorporating a prohibition against firing at or into moving vehicles into state statutes governing the use of deadly force by law enforcement officers.

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INTRODUCTION

One hot summer afternoon in 2016, an eighteen-year old African-American male, in a stolen Jaguar with a friend, was joyriding around the south side of Chicago.¹ Chicago police identified the car as stolen and gave chase.² In an attempt to stop the car and apprehend its occupants, two officers parked their SUV directly in the Jaguar's path as it traveled towards them on a residential street.³ As the Jaguar approached at high speed, the officers jumped out of their SUV to avoid being hit if the driver did not stop in time.⁴ Indeed, the young driver did not stop when faced with the police SUV squarely in his path.⁵ Instead, the driver succeeded in maneuvering around the SUV and continued travelling at high-speed past the officers.⁶ One of the officers had pulled out his firearm as the Jaguar approached and he began firing at the car as it whizzed by him.⁷ He continued firing at the car as it sped away down the street.⁸ His partner fired a single shot at the Jaguar after it had already passed by him and continued down the street.⁹

These officers used deadly force against the Jaguar's occupants even though they were not suspected of having committed any violent crime and there was no other information to suggest they might be violent.¹⁰ The officers discharged their firearms in a residential neighborhood during daytime hours placing nearby residents at risk.¹¹ The officers also placed their colleagues in harm's way.¹² These officers

¹ *IPRA Report on Fatal Police Shooting of Paul O'Neal*, CHI. TRIB. 3 (Jan. 12, 2018, 3:57 PM), <http://www.chicagotribune.com/news/ct-ipra-report-on-paul-oneal-shooting-20180112-htmstory.html> [hereinafter *Incident Report*]. Body-cam and in-car video of the incident has been released to the public, CIVILIAN OFFICE OF POLICE ACCOUNTABILITY, SUMMARY REPORT LOG #1081642 (Aug. 4, 2016), <https://www.chicagocopa.org/case/1081642/>.

² *Incident Report*, *supra* note 1, at 3.

³ *Id.* at 3, 45.

⁴ *Id.* at 3.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 44.

¹¹ *Id.* at 45.

¹² Video from the officers' body cameras shows that the officer's initial shots directed at the Jaguar narrowly missed his partner. *Id.* at 45. *But see* Roseanna Sommers, *Will Putting Cameras on Police Reduce Polarization?*, 125 YALE L.J. 1305, 1345 (2016) (finding based on the analysis of a large empirical study that "proponents

fired their weapons under these circumstances, despite the fact that doing so was in violation of explicit Chicago Police Department policy.¹³

The officers' firing at the Jaguar had tragic consequences. Two additional Chicago police officers in a second SUV traveling behind the firing officers observed gunshots coming directly at them.¹⁴ Not knowing that it was their colleagues who had fired in their direction, both officers assumed the bullets coming their way were shot by the occupants of the Jaguar that was now headed toward them at high speed.¹⁵ Within seconds, the Jaguar crashed head-on into the second police SUV.¹⁶ The young driver jumped out of the Jaguar and started to flee.¹⁷ Mistakenly believing that the young driver had fired at the officers' car, the officers pursued the young driver on foot and one of them ultimately shot and killed him.¹⁸

This incident is one of many in which a police officer attempts to stop a fleeing motorist by firing at or into a moving vehicle despite the fact that many police departments prohibit doing so.¹⁹ In fact, this

of body cameras may be unduly optimistic that video footage can decisively resolve ambiguous cases").

¹³ *Incident Report*, *supra* note 1, at 42.

¹⁴ *Id.* at 19-20.

¹⁵ *Id.* at 19-20, 53.

¹⁶ *Id.* In officer Mohammad Baker's Tactical Response Report of the incident, he wrote that "offender used his vehicle as a weapon to intentionally strike/ram officers vehicle." See *Tactical Response Report*, CHI. POLICE DEP'T, <https://www.chicagocopa.org/wp-content/uploads/2016/10/TRR1-redacted.pdf>. The Tactical Response Report of officer Jose R. Diaz stated that "[s]ubject intentionally rammed his vehicle into RO's [responding officer's] vehicle while numerous shots were simultaneously heard coming from the direction of the offenders vehicle. During pursuit offender failed to comply to verbal commands while reaching into his waist band." See *Tactical Response Report*, CHI. POLICE DEP'T, <https://www.chicagocopa.org/wp-content/uploads/2016/10/TRR3-redacted.pdf>.

¹⁷ *Incident Report*, *supra* note 1, at 3.

¹⁸ *Id.* at 3.

¹⁹ See INT'L ASS'N OF CHIEFS OF POLICE, NATIONAL CONSENSUS POLICY AND DISCUSSION PAPER ON USE OF FORCE 14-15 (2017), https://www.theiacp.org/sites/default/files/all/n-o/National_Consensus_Policy_On_Use_Of_Force.pdf [hereinafter NATIONAL CONSENSUS POLICY] ("Officers should consider this use of deadly force only when a person in the vehicle is immediately threatening the officer or another person with deadly force by means other than the vehicle, or when the vehicle is intentionally being used as a deadly weapon and all other reasonable means of defense have been exhausted (or are not present or practical).") (internal quotation marks omitted); Jon Swaine, Jamiles Lartey & Oliver Laughland, *Moving Targets*, GUARDIAN (Sept. 1, 2015, 9:42 AM EDT), <https://www.theguardian.com/us-news/2015/sep/01/moving-targets-police-shootings-vehicles-the-counted> ("The US Department of Justice, prominent international policing experts and most major police departments across the US agree: police officers should not

particular type of officer-involved shooting incident continues to occur with relative frequency in communities across the country.²⁰ According to a Washington Post database, between January 2015 and May 2017, police nationwide killed nearly 200 people who were inside a moving car.²¹ This number does not account for the incidents in which officers fired at a car but no one was hit or killed.

From December 2015 to October 2017, I served as the Chief Administrator of the Independent Police Review Authority, the civilian oversight agency responsible for investigating firearms discharge incidents involving members of the Chicago Police Department. During my tenure with the agency, I reviewed the circumstances of dozens of officer-involved shooting incidents, including several in which one or more officers discharged a firearm at or into a moving vehicle. Although Chicago Police Department policy explicitly prohibited firing at or into moving vehicles for at least fifteen years, these incidents continued to occur.

As will be outlined below, a review of the federal civil litigation related to similar incidents occurring nationwide illustrates that the tactic of firing at or into a motor vehicle is problematic and that law enforcement agencies whose policies prohibit such conduct are prudent.²² To be sure, the Supreme Court has yet to review a case involving an incident of this nature and find that the officer's conduct was unconstitutional.²³ The Court's way of balancing law enforcement

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.”); see, e.g., S.F. POLICE DEPT., GENERAL ORDER 5.01: USE OF FORCE 13 (Dec. 21, 2016) <https://sanfranciscopolice.org/sites/default/files/Documents/PoliceDocuments/Transparency/DGO%205.01.pdf> [hereinafter S.F. USE OF FORCE] (“An officer shall not discharge a firearm at the operator or occupant of a moving vehicle unless the operator or occupant poses an immediate threat of death or serious bodily injury to the public of an officer by means other than the vehicle.”).

²⁰ See German Lopez, *Police Have Known for 45 Years They Shouldn't Shoot at Moving Cars. But They Still Do It*, VOX (May 8, 2017, 12:50 PM EDT), <https://www.vox.com/policy-and-politics/2017/5/8/15533536/police-shooting-moving-cars-jordan-edwards>.

²¹ Wesley Lowery et al., *Police Have Killed Nearly 200 People Who Were in Moving Vehicles Since 2015, Including 15-year-old Jordan Edwards*, WASH. POST (May 3, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/05/03/police-have-killed-nearly-200-people-who-were-in-moving-vehicles-since-2015-including-15-year-old-jordan-edwards/?utm_term=.305a9af81cbc (documenting that police killed at least 193 people inside vehicles between January 2015 and May 2017).

²² See *infra* Part III, IV.

²³ *Mullenix v. Luna*, 136 S. Ct. 305, 310 (2015) (“The Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth

needs and the interests of public safety is misguided and at odds with a broad consensus among law enforcement experts about how officers should handle these situations.²⁴

Moreover, the lack of guidance the Court has provided to lower courts has resulted in significant disparities regarding how federal courts evaluate the constitutionality of officer conduct in these incidents.²⁵ This is problematic because civil remedies are an important mechanism for promoting police accountability²⁶ as criminal charges against police officers for excessive force are exceedingly rare.²⁷

This Article adds to the chorus of commentators calling for an evolution in the legal doctrine governing the use of deadly force by law enforcement as a way to ensure greater police accountability.²⁸ In particular, this Article will join other commentators advocating for the Supreme Court to evolve its stance on the propriety of shooting at fleeing motorists.²⁹ In addition, because action by the highest court

Amendment, let alone to be a basis for denying qualified immunity.”).

²⁴ See *infra* Part II, outlining how the Supreme Court has sanctioned firing at or into moving vehicles, and Part IV, which summarizes the prevailing view of law enforcement agencies and experts which generally denounce shooting at or into moving vehicles.

²⁵ See *infra* Part III.

²⁶ William Heinke, Note, *Deadly Force: Differing Approaches to Arrestee Excessive Force Claims*, 26 S. CAL. REV. L. & SOC. JUST. 155, 159 (2017) (“When the families of individuals shot by police feel that the criminal justice system has failed them, one of the only options left is to seek redress and justice through civil lawsuits.”).

²⁷ John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. ON C.L. & C.R. 155, 164-65 (2016) (discussing how Supreme Court jurisprudence on qualified immunity has made it extremely difficult for plaintiffs to prevail in excessive force claims against the police) (citing Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.433713d8c0bf); see also Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L. J. 639, 641, 648 (2003) (arguing that abusive police officers are under-prosecuted by state prosecutors and that uncooperative police witnesses pose a significant obstacle to prosecution).

²⁸ See, e.g., Gross, *supra* note 27, at 156 (arguing that the Supreme Court “has failed to provide law enforcement with any meaningful guidance on when the use of deadly force is appropriate”); Heinke, *supra* note 26, at 159 (“By analyzing the wide disparities in how courts have treated excessive force claims brought by arrestees under federal law, I will advocate in this Note for a uniform approach to these claims that seeks greater police accountability and public trust.”).

²⁹ Patrick T. O’Connor & William L. Norse, Jr., *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 MERCER L. REV. 511, 512 (2005) (noting that “[t]he manner and method of apprehensions, especially in

may not be possible in the near-term, this Article will also encourage state legislatures to consider incorporating a prohibition against firing at or into moving vehicles into state statutes governing the use of deadly force by law enforcement officers.

Part I of this Article will review the legal framework that sets the boundaries governing the use of deadly force by law enforcement officers. Part II will review the Supreme Court cases involving an officer shooting at or into a motor vehicle and will discuss how the Supreme Court analyses these incidents. More specifically, a review of the handful of relevant Supreme Court cases will show that the Court's holdings are driven by two key assumptions. The first assumption is that the use of deadly force to end a vehicle pursuit is permissible because the motorist's reckless behavior prior to the use of force indicates the motorist will continue to be a threat to the public even if the officer abandons the pursuit. The second assumption upon which the Supreme Court relies is that shooting at a motor vehicle (as opposed to the driver) is an effective way to stop a moving vehicle. As will be outlined in Part IV, both of these assumptions are at odds with the views of law enforcement experts.

Part III will summarize an analysis of federal circuit court cases involving incidents in which one or more law enforcement officers discharged a firearm at or into a moving vehicle. This analysis reveals that this particular type of officer-involved shooting incident is fairly prevalent as these incidents represent a significant proportion of the federal circuit court cases addressing the use of deadly force.³⁰ Although relevant circuit court cases can be found among each of eleven federal Courts of Appeal, the case law is most developed in the 5th, 6th, and 11th circuits which collectively account for the majority of the relevant cases identified in this analysis. There is a significant degree of variation in how the federal circuit courts approach these cases. For example, as will be discussed below, the courts disagree on the issue of whether deadly force is permissible where the only justification is that the driver might continue driving recklessly if the pursuit were abandoned.³¹ Notably, almost four in ten of the circuit court cases reviewed pursuant to this analysis resulted in a reversal of the district court's determination, indicating that the lower courts are

cases of automobile pursuits [is] an object of criticism and disagreement for many commentators").

³⁰ This analysis is based on a subset of circuit court cases in which the primary Supreme Court precedent governing the use of deadly force, *Tennessee v. Garner*, 471 U.S. 1 (1985), is referenced.

³¹ See *infra* Section III.B.2.

not clear on how to apply Fourth Amendment principles when assessing these incidents.³² This lack of clarity in the law is problematic because it is a significant impediment to a civil plaintiff's ability to overcome the barrier to relief inherent in the qualified immunity doctrine.³³

Part IV of the Article will summarize the current state of the relevant police department policies and the views of law enforcement experts. This review indicates that the current views of law enforcement experts are at odds with those of the highest Court. For example, while the Supreme Court has sanctioned firing at or into a moving vehicle in an attempt to disable the vehicle,³⁴ many law enforcement agency policies do not condone this tactic.³⁵

In concluding, this Article will suggest that the Supreme Court jurisprudence is outmoded relative to and should evolve to better recognize the expertise within the law enforcement community. Moreover, given that Supreme Court jurisprudence evolves slowly, this Article will also conclude that state legislatures should consider evolving state statutes governing the use of deadly force to address this issue.

I. THE LEGAL FRAMEWORK GOVERNING THE USE OF DEADLY FORCE BY LAW ENFORCEMENT

The use of force by law enforcement personnel is governed by law and policy. As will be outlined below, the core principles underlying both law and policy are grounded in the Fourth Amendment of the United States Constitution.³⁶ In addition, a majority of the states have promulgated statutes that govern the use of deadly force by law

³² See *infra* Section III.A.

³³ See *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (“Public officials are immune from suit under 42 U.S.C. § 1983 unless they have violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.” (quoting *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2004) (internal quotation marks omitted))).

³⁴ See *Mullenix v. Luna*, 136 S. Ct. 305, 312 (2015).

³⁵ See Lowery et al., *supra* note 21 (noting a “national shift toward policies that prevent officers from shooting at moving vehicles”).

³⁶ *Graham v. Connor*, 490 U.S. 386, 394 (1989) (“Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right ‘to be secure in their persons . . . against unreasonable . . . seizures’ of the person.”).

enforcement personnel.³⁷ Supreme Court jurisprudence interpreting the Fourth Amendment's application to use of force incidents governs in federal civil lawsuits brought by individuals or estates claiming excessive force.³⁸ Relevant state statutes and related state case law control in criminal prosecutions against officers charged with homicide or assault.³⁹ Lastly, the rules and policies of thousands of law enforcement agencies across the country, which typically amplify the constitutional principles, provide additional checks and balances on the use of force by officers.⁴⁰

A. Federal Law

As outlined in a 1989 Supreme Court case, *Graham v. Connor*, the legal framework for assessing whether an officer's use of force is acceptable has its foundation in the United States Constitution.⁴¹ Claims of excessive force that occur in the context of an arrest are analyzed based on Fourth Amendment standards.⁴²

In *Graham*, the Supreme Court explained that an excessive force claim arising in the context of an arrest or an investigatory stop of a

³⁷ See Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After Garner*, 35 ST. LOUIS U. PUB. L. REV. 109, 134-56 (2015) (surveying the rules on police officer use of force in all fifty states, showing that all but eight have one or more statutes on the books governing the use of deadly force by police officers: Maryland, Massachusetts, Michigan, Montana, Ohio, South Carolina, West Virginia, and Wyoming).

³⁸ See *Graham*, 490 U.S. at 395 (explicitly stating that “all claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard” (emphasis in original)); see also Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 640 (2018).

³⁹ See *People v. Couch*, 461 N.W.2d 683, 684 (Mich. 1990) (noting “the power to define conduct as a state criminal offense lies with the individual states, not with the federal government or even the United States Supreme Court”); see also Flanders & Welling, *supra* note 37 (reviewing state statutes while noting that states “have the authority to dictate under what circumstances police could justifiably use deadly force, and so avoid punishment under state law”).

⁴⁰ See *Tennessee v. Garner*, 471 U.S. 1, 18 (1985) (noting that the policies adopted by police departments had become more restrictive than the common-law rules).

⁴¹ The two primary sources of constitutional protection against physically abusive governmental conduct are grounded in the Fourth Amendment's prohibition against unreasonable seizures of the person and the Eighth Amendment's ban on cruel and unusual punishments. *Graham*, 490 U.S. at 394.

⁴² See *Garner*, 471 U.S. at 7; *Whitley v. Albers*, 475 U.S. 312, 326 (1986) (claims that excessive force was used to subdue a convicted prisoner are analyzed under Eighth Amendment standards).

free citizen is most properly characterized as one invoking the Fourth Amendment's guarantee of a citizen's "right to be secure in their persons . . . against unreasonable . . . seizures of the person."⁴³

Determining whether the force used to effect a particular seizure was "reasonable" under the Fourth Amendment requires a careful balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."⁴⁴ According to the Supreme Court, "reasonableness" under the Fourth Amendment has no precise definition, nor can it be assessed through mere mechanical application of a simple legal rule.⁴⁵ The balancing of the competing interests implicated by the use of force is highly dependent on the facts and circumstances of each particular case.⁴⁶

A court reviewing a given use of force incident must endeavor to adopt the perspective of a reasonable officer in the same circumstances existing at the moment force was used, rather than benefiting from any insights or information available in hindsight.⁴⁷ The officer's conduct is measured against an objective standard — what a reasonable officer would do under the same circumstances.⁴⁸ Thus, the officer's actual intent or motive is irrelevant to the inquiry.⁴⁹ When judging an officer's acts, reviewing courts recognize 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."⁵⁰

In *Tennessee v. Garner*,⁵¹ the Supreme Court defined a more specific legal standard governing the use of *deadly* force.⁵² More specifically,

⁴³ *Graham*, 490 U.S. at 394 (internal quotations omitted).

⁴⁴ *Id.* at 396 (internal quotations omitted).

⁴⁵ *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 599 (1979)).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 397. In a footnote, however, the Court noted that "in assessing the credibility of an officer's account of the circumstances that prompted the use of force, a fact-finder may consider, along with other factors, evidence that the officer may have harbored ill-will toward the citizen." *Id.* at 399, n.12.

⁵⁰ *Id.* at 397.

⁵¹ *Tennessee v. Garner*, 471 U.S. 1 (1985).

⁵² In *Garner*, the Court found a Tennessee statute unconstitutional in so far as it permitted the use of deadly force against *any* fleeing subject. *Garner*, 471 U.S. at 11-12. The Court acknowledged that it had "often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity," *id.* at 13, which allowed the use of "whatever force was necessary to effect the arrest of a

Garner established the prism through which courts view deadly force incidents:

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.⁵³

Although reasonableness under the Fourth Amendment would continue to be a highly fact-specific inquiry, *Garner* provided courts with a much-needed framework with which to assess how dangerous an arrestee had to be to sufficiently warrant the use of deadly force.

Adding complexity to the legal landscape relevant to the use of force is the doctrine of qualified immunity. To obtain relief for allegations of excessive force against a police officer, a plaintiff must do more than substantiate a constitutional violation pursuant to *Tennessee v. Garner* or *Graham v. Connor*. A plaintiff must also clear the hurdle established by the doctrine of qualified immunity. This judge-made construct is intended to balance two often competing interests: “[T]he need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”⁵⁴ Under this doctrine, a government official performing her duties is generally shielded from liability for civil damages so long as her conduct did not violate a *clearly established* statutory or constitutional right.⁵⁵ The goal is to ensure that the official had fair notice that her conduct was unlawful before she can be held liable for a constitutional

fleeing felon.” *Id.* at 12. However, recognizing a “sweeping change in the legal and technological context,” *id.* at 13, regarding the use of force by law enforcement, the Court narrowed the circumstances in which deadly force may be used against a fleeing subject to only where the person to be arrested has threatened the officer with a weapon or has “committed a crime involving the infliction or threatened infliction of serious physical harm.” *Id.* at 11.

⁵³ *Garner*, 471 U.S. at 11-12.

⁵⁴ *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

⁵⁵ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

violation.⁵⁶ Thus, the conduct is assessed relative to law on the books at the time of the incident in question.⁵⁷

To overcome the barrier to relief that qualified immunity represents, while a case directly on point is not required, there must be existing precedent that is close enough to convey that the conduct at issue was beyond what the constitution allows.⁵⁸ Thus, where there is no such “clearly established” law, qualified immunity serves not merely as a defense, it functions as “an immunity from suit.”⁵⁹ Because reviewing courts are not required to address the question of whether a constitutional right was violated before determining whether the relevant law was clearly established, the doctrine does little to foster greater clarification of the legal boundaries governing the use of force.⁶⁰ As will be outlined *infra* in Part III, this lack of clarity is readily apparent in the case law emanating from the lower courts.

B. State Law

Although federal constitutional law sets the standard for when an officer can be held liable for a constitutional violation related to the use of force, the states have the authority to further define the boundaries governing when deadly force is permissible.⁶¹ All but eight of the fifty states have such statutes on the books.⁶² Although there is

⁵⁶ See *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).

⁵⁷ *Id.*; see also *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

⁵⁸ *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (internal quotations omitted) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)).

⁵⁹ *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

⁶⁰ At one time, Supreme Court precedent, namely, *Saucier v. Katz*, 533 U.S. 194 (2001), mandated a two-step sequence for resolving qualified immunity whereby the first step was to “decide whether the facts that a plaintiff has alleged make out a violation of a constitutional right” and the second step was to decide whether the law defining the contours of that right were “clearly established” for qualified immunity purposes. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). However, in 2009, bowing to criticism that the two-step procedure was rigid and to concerns about judicial efficiency, the Court reversed itself and held that, in their discretion, courts may resolve cases on the basis of qualified immunity without reaching the constitutional question. *Id.* at 236.

⁶¹ Flanders & Welling, *supra* note 37, at 110 (“States . . . have the authority to dictate under what circumstances police could justifiably use deadly force, and so avoid punishment under state law.”); see also *People v. Couch*, 461 N.W.2d 683, 684 (Mich. 1990) (noting the Supreme Court’s lack of authority to prevent states from establishing further limits on the use of deadly force by police).

⁶² See Flanders & Welling, *supra* note 37, at 134-56 (2015); see, e.g., *Couch*, 461 N.W. 2d at 684-86 (acknowledging that there was no statute on the books regarding the use of deadly force against a fleeing felon, but rather a general statute resorting to

variation among them, many of these statutes track closely to the holding in *Tennessee v. Garner*.⁶³ Most incorporate the “reasonableness” concept as developed in federal case law and permit an officer to use deadly force only when the officer reasonably believes such force is necessary under the circumstances.⁶⁴ Courts within the few states without relevant statutes have developed case law which is generally consistent with or adapted from *Tennessee v. Garner*.⁶⁵

As an example, Illinois law governing the use of deadly force by peace officers is embedded in the criminal code.⁶⁶ In Illinois, “[t]he measure of the police officer’s civil liability for use of deadly force is co-extensive with his criminal liability.”⁶⁷ The Illinois statute, which codifies the common law doctrine as it has developed in Illinois,⁶⁸ states that a police officer is justified in using deadly force only when:

(a) [H]e reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:

(1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and

(2) The person to be arrested has committed or attempted a forcible felony which involves the infliction or threatened infliction of great bodily harm or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.⁶⁹

The Illinois statute is neither the most restrictive nor the least restrictive among the relevant state statutes.⁷⁰ None of the state

the common law for crimes not enumerated in the state criminal code).

⁶³ Flanders & Welling, *supra* note 37, at 111.

⁶⁴ Lee, *supra* note 38, at 637.

⁶⁵ Flanders & Welling, *supra* note 37 (surveying state statutes and case law on police use of force).

⁶⁶ 720 ILL. COMP. STAT. ANN. 5/7-5 (2012).

⁶⁷ See *LaMonte v. City of Belleville*, 355 N.E.2d 70, 76 (Ill. App. Ct. 1976) (citing *Krantz v. O’Neil*, 240 N.E.2d 180 (Ill. App. Ct. 1968)).

⁶⁸ *LaMonte*, 355 N.E.2d at 76-77 (discussing 720 ILL. COMP. STAT. ANN. 5/7-5).

⁶⁹ 720 ILL. COMP. STAT. ANN. 5/7-5.

⁷⁰ See AMNESTY INT’L, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES 34-102 (2015), http://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf (surveying state use of force statutes in all fifty states).

statutes contain any provisions specific to the use of deadly force to stop a fleeing motorist.⁷¹

C. Law Enforcement Agency Policies on Deadly Force

Because the legal framework created by statutory and common law leaves the critical concepts governing the use of force relatively undefined, there is no single, universal set of rules that governs when officers should use force and how much.⁷² Each law enforcement agency promulgates its own policies and procedures related to the use of force, often restricting officer conduct more than the constitutional standard.⁷³ There can be wide variation in these policies across the 18,000 or more law enforcement agencies across the United States.⁷⁴

Police department policies are important because they can have a significant impact on how force is used in daily encounters with citizens.⁷⁵ In addition to providing more specific guidance to officers

⁷¹ Based on a review of the relevant statutes conducted by the author as of July 31, 2018. However, interestingly, the relevant Colorado statute allows the use of deadly force to affect an arrest or prevent the escape from custody of a person who the officer reasonably believes is “likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay” unless such dangerousness is indicated through a motor vehicle violation. COLO. REV. STAT. ANN. § 18-1-707 (2016) (originally enacted in 1975, and amended in 2016).

⁷² See also Lindsey Webb, *Legal Consciousness as Race Consciousness: Expansion as the Fourth Amendment Seizure Analysis Through Objective Knowledge of Police Impunity*, 48 SETON HALL L. REV. 403, 437 (2018) (noting “there are no bright-line rules regarding when an officer is justified in employing violence against a civilian”). See generally *Police Use of Force*, NAT’L INST. OF JUST. (Nov. 29, 2016), <http://nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/welcome.aspx>.

⁷³ See, e.g., *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir. 1992) (noting that police department policies may be more restrictive than the constitutional boundaries); S.F. USE OF FORCE, *supra* note 19, at 13 (“An officer shall not discharge a firearm at the operator or occupant of a moving vehicle unless the operator or occupant poses an immediate threat of death or serious bodily injury to the public or an officer by means other than the vehicle.”).

⁷⁴ See NATIONAL CONSENSUS POLICY, *supra* note 19; Jon Greenberg, *How Many Police Departments are in the United States?*, PUNDITFACT (July 10, 2016, 6:26 PM), <http://www.politifact.com/punditfact/statements/2016/jul/10/charles-ramsey/how-many-police-departments-are-us/> (citing comments made by former Philadelphia Police Commissioner Charles Ramsey during the July 10, 2016 airing of Meet the Press when he argued that the U.S. has too many police departments, and this is linked to an unnecessarily high number of police killings during routine patrol stops); Lowery et al., *supra* note 21 (describing the possibility of nationwide uniformity among law enforcement agencies as “nearly impossible”).

⁷⁵ Michael D. White, *Hitting the Target (or not): Comparing Characteristics of Fatal, Injurious, and Noninjurious Police Shootings*, 9 POLICE Q. 303, 306 (2006) (noting prior

than cases or statutes, local department policies play an important role in police accountability because they define the conduct for which police officers can be held accountable administratively.⁷⁶

As will be outlined *infra* Part IV, many law enforcement agencies have adopted similar policies that prohibit officers from firing at or into moving vehicles.

II. SUPREME COURT CASES INVOLVING DEADLY FORCE USED AGAINST FLEEING MOTORISTS

Since *Garner*, the Supreme Court has reviewed only four cases involving claims of excessive force against a law enforcement officer who used deadly force against a fleeing motorist: *Brosseau v. Haugen*, *Scott v. Harris*, *Plumhoff v. Rickard*, and *Mullenix v. Luna*. In each of these cases, the Court foreclosed relief.⁷⁷ The Supreme Court has never found the use of deadly force against a fleeing motorist to violate the Fourth Amendment.⁷⁸ Note that only three of these four cases involved the discharge of a firearm at or into a moving vehicle, which is the focus of this Article.⁷⁹ In *Scott v. Harris*, the officer stopped the pursuit by ramming his police vehicle into the subject's vehicle.⁸⁰ Although the incident in *Scott* did not involve the discharge of a firearm, that case is the most instructive regarding how the Court evaluates the use of deadly force in this context. Therefore, we start herein with a discussion of *Scott*.

research demonstrating that administrative policy significantly influences the prevalence of deadly force); *see also* U.S. DEP'T OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS (2003), <https://www.justice.gov/archive/crs/pubs/principlesofgoodpolicingfinal092003.pdf>.

⁷⁶ *See* SAMUEL WALKER, POLICE ACCOUNTABILITY: CURRENT ISSUES AND RESEARCH NEEDS 4 (2006), <https://www.ncjrs.gov/pdffiles1/nij/grants/218583.pdf>.

⁷⁷ *Mullenix v. Luna*, 136 S. Ct. 305, 312 (2015); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2024 (2014); *Scott v. Harris*, 550 U.S. 372, 386 (2007); *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004).

⁷⁸ This fact was explicitly stated in *Mullenix*, 136 S. Ct. at 310. To confirm that there were no relevant cases since, the author reviewed the Supreme Court cases citing either *Scott v. Harris* or *Mullenix v. Luna*, and found no other Supreme Court cases involving high-speed chases.

⁷⁹ *See Mullenix*, 136 S. Ct. at 307; *Plumhoff*, 134 S. Ct. at 2017-18; *Brosseau*, 543 U.S. at 196-97.

⁸⁰ *Scott*, 550 U.S. at 375.

A. *Scott v. Harris* (2007)

The incident at issue in *Scott v. Harris* began when a car whizzed by a Georgia County Deputy traveling at seventy-three miles per hour in a fifty-five mile per hour zone.⁸¹ When the deputy attempted to pull the car over, the driver sped away, and the deputy followed in pursuit.⁸² The deputy radioed in to report the car chase.⁸³ Deputy Scott heard the radio communication and joined the pursuit along with other officers.⁸⁴ The subject vehicle pulled into a shopping center parking lot and was surrounded by various police vehicles.⁸⁵ The subject vehicle collided with Deputy Scott's vehicle as the driver evaded the officers at high speed.⁸⁶ Another vehicle pursuit ensued and Deputy Scott took over as the lead police vehicle.⁸⁷ After approximately ten miles, Deputy Scott decided to try to end the pursuit by employing a "precision intervention technique," a maneuver used to cause a fleeing vehicle to spin to a stop.⁸⁸ After radioing his supervisor for permission, which was granted, Deputy Scott bumped into the rear of the subject vehicle causing the driver to lose control.⁸⁹ The driver was severely injured in the resulting crash.⁹⁰

The driver filed suit in federal court claiming the maneuver amounted to excessive force. The District Court denied qualified immunity for Deputy Scott holding that a jury could find that he violated the driver's constitutional rights.⁹¹ The United States Court of Appeals for the Eleventh Circuit affirmed the denial.⁹² When the District Court and Court of Appeals decisions were decided, Supreme Court precedent required lower federal courts to undertake a two-step process when reviewing such constitutional claims: first, deciding whether a constitutional violation had in fact occurred, and second,

⁸¹ *Id.* at 374.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 375.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* (stating that the crash rendered the respondent a quadriplegic).

⁹¹ *Harris v. Coweta Cty.*, No. 3:01-CV-148-WBH, 2003 WL 25419527, at *12 (N.D. Ga. Sept. 25, 2003).

⁹² *Harris v. Coweta Cty.*, 433 F.3d 807, 815-16 (11th Cir. 2005).

deciding whether the constitutional right that had been violated was clearly established in law at the time of the incident.⁹³

The Supreme Court granted the officer's petition for a writ of certiorari and reversed, finding no constitutional violation.⁹⁴ The Court held that a "police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."⁹⁵

Surprisingly, the Court found that the maneuver Deputy Scott used to stop the fleeing vehicle was not a "use of deadly force" because the force was directed at the vehicle, not the driver. Because of this, the Court found that *Tennessee v. Garner* was not relevant to the case.⁹⁶ Although the Court acknowledged that ramming a fleeing car represents a significant risk of harm to the driver, it considers such risk considerably less significant when compared to the risk of potential harm from the discharge of a firearm at a fleeing person.⁹⁷

Importantly though, in *Scott*, the Court most clearly articulated the danger and culpability it attributes to fleeing motorists.⁹⁸ The Court explicitly prioritized the safety of innocent bystanders, who are at risk of potential harm from the fleeing motorist's reckless driving, over the potential injury or death to the driver who took on such risk by engaging in the high speed chase in the first place: "We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability."⁹⁹

The Court rejected the argument that abandoning a pursuit, as opposed to using force to end a pursuit, is a more appropriate way to

⁹³ In a 2001 case, *Saucier v. Katz*, the Supreme Court held that reviewing courts must first address whether a government official had violated a constitutional right before reaching the question of whether the official was protected by the doctrine of qualified immunity. 533 U.S. 194, 201 (2001). Bowing to complaints about judicial inefficiency, the Court later reversed itself and now allows courts to determine whether the two-step process is necessary or appropriate. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

⁹⁴ *Scott*, 550 U.S. at 381 ("[W]e think it is quite clear that Deputy Scott did not violate the Fourth Amendment.").

⁹⁵ *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021 (2014) (quoting *Scott*, 550 U.S. at 386).

⁹⁶ *Scott*, 550 U.S. at 383.

⁹⁷ *Id.* ("A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." (quoting *Adams v. St. Lucie Cty. Sheriff's Dept.*, 962 F.2d 1563, 1577 (11th Cir. 1992) (Edmondson, J., dissenting), *adopted by* 998 F.2d 923 (11th Cir. 1993) (en banc) (per curiam)).

⁹⁸ *Id.* at 384.

⁹⁹ *Id.*

avoid or minimize risk to bystanders because doing so is not guaranteed to prevent the driver from continuing to drive recklessly.¹⁰⁰ In fact, the Court explicitly expressed disdain for creating a rule that would require officers to abandon a pursuit when a subject drives recklessly¹⁰¹ which, as will be outlined *infra* Part IV, is precisely what law enforcement experts suggest is the right thing to do.¹⁰²

Video footage of the car chase at issue in *Scott* was part of the record, and had a profound impact on the justices' views of the case.¹⁰³ The majority explicitly admonished the Eleventh Circuit for failing to view the facts "in the light depicted by the videotape."¹⁰⁴ Justice Breyer (concurring in the judgment) went so far as to suggest that readers watch the video, which is available online.¹⁰⁵

However, some research suggests that the video footage of the incident at issue in *Scott* was not quite as convincing to lay viewers as it was to the justices. After the *Scott* decision, the Harvard Law Review published an article documenting a study conducted to examine how jurors, rather than justices, would view the officer's version of the events after viewing the video.¹⁰⁶ The authors showed the video of the high-speed chase to more than 1000 individuals and surveyed their opinions as to the reasonableness of the officer's use of deadly force.¹⁰⁷

¹⁰⁰ *Id.* at 385 (rejecting the view that abandoning the chase would reduce the safety risk to the public because "there would have been no way to convey convincingly to [the driver] that the chase was off, and that he was free to go").

¹⁰¹ *Id.* ("[W]e are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger.").

¹⁰² See, e.g., INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY: VEHICULAR PURSUITS 3 (Dec. 2015), https://www.theiacp.org/model-policy/model_policy/vehicular-pursuit/ [hereinafter IACP VEHICULAR PURSUIT MODEL POLICY] (requiring that officers "terminate the pursuit whenever it is reasonable to believe the risks associated with continued pursuit are greater than the public safety benefit of making an immediate apprehension").

¹⁰³ *Scott*, 550 U.S. at 378, 380 (majority found that the video "more closely resembles a Hollywood-style car chase of the most frightening sort" and that it "quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals"); *Id.* at 387 (Breyer, J., concurring) ("[W]atching the video footage of the car chase made a difference to my own view of the case . . .").

¹⁰⁴ *Id.* at 381.

¹⁰⁵ *Id.* at 387 (Breyer, J., concurring) ("Because watching the video footage of the car chase made a difference to my own view of the case, I suggest that the interested reader take advantage of the link in the Court's opinion . . . and watch it.").

¹⁰⁶ Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838 (2009).

¹⁰⁷ *Id.*

Although the justices in the majority found the video highly convincing that the officer's conduct was appropriate, the survey results indicated a fairly substantial minority did not agree.¹⁰⁸

Justice Stevens, alone in dissent, chastised the majority for conducting a "de novo" review of the video evidence.¹⁰⁹ Despite what the video showed, Justice Stevens was unconvinced that the pursuit presented a risk to public safety sufficient to warrant the use of deadly force against the driver.¹¹⁰ In Justice Stevens' view, the risk to public safety from continuing the "nighttime chase on a lightly traveled road in Georgia where no pedestrians or other 'bystanders' were present" was speculative.¹¹¹ Justice Stevens pointed out that, had the officers abandoned the chase, they were likely to apprehend the driver at a later time because they had his license plate number.¹¹² In sum, Justice Stevens argued that the majority's conclusion created nearly a "bright line" rule that an officer's use of deadly force to terminate a dangerous high-speed car chase will not violate the Fourth Amendment, a rule that "fl[ies] in the face of the flexible and case-by-case 'reasonableness' approach applied in *Garner* and *Graham v. Connor*."¹¹³ Justices Ginsburg and Breyer wrote separate concurrences noting that, although they agreed with the outcome, they disagreed with the majority opinion to the extent that it implied a *per se* rule allowing the use of deadly force to stop a fleeing motorist.¹¹⁴ But apparently their

¹⁰⁸ Approximately seventy-five percent agreed and twenty-six percent disagreed that the use of deadly force was warranted. Reflecting some equivocation, however, nearly a quarter agreed or disagreed only slightly. *Id.* at 866. Interestingly, approximately forty-five percent of respondents felt that the chase was not worth the risk that it posed to the public. *Id.* at 865.

¹⁰⁹ *Scott*, 550 U.S. at 389 (Stevens, J., dissenting).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 393.

¹¹³ *Id.* at 396.

¹¹⁴ Justice Breyer concurred in the judgment, but wrote separately "with one suggestion and two qualifications." *Id.* at 387 (Breyer, J., concurring). The suggestion was that readers should view the video. *Id.* The first qualification was a recommendation that the Court overrule the requirement announced in *Saucier v. Katz* that lower courts must first decide the constitutional question before turning to the issue of qualified immunity. *Id.* The second qualification was his disagreement with the Court "insofar as it articulates a *per se* rule." *Id.* Justice Ginsburg also disagreed with creating a *per se* rule. *Id.* at 386 (Ginsburg, J., concurring) ("I do not read today's decision as articulating a mechanical, *per se* rule.") However, Justice Ginsburg did not support Justice Breyer's view that the facts of the case provided an appropriate basis for overruling *Saucier v. Katz*. *Id.* In the later case *Plumhoff v. Rickard*, the Court seemed to base its ruling that shooting at a fleeing motorist was

arguments were insufficient to convince the other members of the majority.

B. *Brosseau v. Haugen (2004)*

Brosseau v. Haugen, decided three years before *Scott*, sheds minimal light on the issues because the Court decided the case on qualified immunity grounds, avoiding the constitutional question as to whether or not the officer used excessive force. In this case, Officer Brosseau ended a relatively short vehicle pursuit by firing a single shot through the rear window of Haugen's vehicle. The incident began when an acquaintance of Haugen informed the officer that Haugen had stolen tools from the acquaintance's shop.¹¹⁵ The officer also learned that there was a felony no-bail warrant out for Haugen's arrest on drug and other offenses.¹¹⁶ After learning that Haugen was at his mother's house, the acquaintance and a friend went to that residence.¹¹⁷ The men became embroiled in a physical fight which a neighbor reported by calling 911.¹¹⁸

Officer Brosseau responded to the mother's residence, and when he arrived, Haugen fled and hid in the neighborhood.¹¹⁹ Additional officers and a K-9 unit responded to the scene to assist in the search for Haugen.¹²⁰ As they searched, the officers instructed the two men as well as Haugen's girlfriend, who was there with her three-year old daughter, to remain in their cars.¹²¹ After approximately thirty to forty-five minutes, a neighbor reported that she had seen a man in her backyard and the officer went to look for him.¹²² Haugen then appeared, and a foot-chase ensued.¹²³ Haugen ran back to his mother's

constitutional at least in part because of the particular facts of that case, where he was driving extremely recklessly at over 100 miles per hour. *See Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021-22 (2014) ("In light of the circumstances we have discussed, it is beyond serious dispute that Rickard's flight posed a grave public safety risk, and here, as in *Scott*, the police acted reasonably in using deadly force to end that risk.").

¹¹⁵ *Brosseau v. Haugen*, 543 U.S. 194, 195 (2004).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 196.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 196, 200. This fact is acknowledged to the extent that Haugen's flight put these innocent bystanders at risk.

¹²³ *Id.* at 196.

house, jumped into his Jeep, and locked the door.¹²⁴ Believing Haugen had run to the car to retrieve a weapon, the officer pointed her gun at him and demanded that he get out of the car.¹²⁵ Haugen ignored her commands as he looked around inside the car for the keys.¹²⁶ After the officer knocked on the driver's side window three or four times, the window shattered.¹²⁷ The officer unsuccessfully tried to grab the keys and hit Haugen on the head with the butt of her gun.¹²⁸

Haugen started the Jeep and, shortly after it began to move, the officer fired one shot through the rear driver's side window hitting Haugen in the back.¹²⁹ Despite being hit, Haugen was able to maneuver the car to avoid the other vehicles and continued down the street.¹³⁰ Haugen stopped approximately halfway down the street when he realized that he had been shot.¹³¹ Haugen pled guilty to the felony of "eluding," which required that he admit that he drove in a manner indicating "a wanton or willful disregard for the lives . . . of others."¹³²

Haugen filed suit claiming the shot Brosseau fired constituted excessive force in violation of his constitutional rights.¹³³ The district court granted summary judgment, finding that Brosseau was entitled to qualified immunity.¹³⁴ The Ninth Circuit reversed, finding that Brosseau had used excessive force and that she was not entitled to qualified immunity.¹³⁵ Brosseau petitioned for a writ of certiorari on both issues.¹³⁶ The Supreme Court granted the petition on only the issue of qualified immunity and reversed.¹³⁷

In a *per curiam* opinion, while finding qualified immunity appropriate, the Court acknowledged that the officer's conduct fell

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 196-97 ("She later explained that she shot Haugen because she was fearful for the other officers on foot who she believed were in the immediate area, and for the occupied vehicles in Haugen's path and for any other citizens who might be in the area." (internal quotations and modifications omitted)).

¹³⁰ *Id.* at 197.

¹³¹ *Id.*

¹³² *Id.* at 197 (citing WASH. REV. CODE § 46.61.024 (2010)).

¹³³ *Id.* at 194-95.

¹³⁴ *Id.* at 195.

¹³⁵ *Haugen v. Brosseau*, 339 F.3d 857, 860 (9th Cir. 2003).

¹³⁶ *Brosseau*, 543 U.S. at 195.

¹³⁷ *Id.*

within the “hazy border between excessive and acceptable force.”¹³⁸ Because the Court did not weigh in on the constitutionality of the officer’s conduct, *Brosseau* does little to clarify that “hazy border.”

Justice Stevens, alone in dissent, found the facts were sufficient to resolve the constitutional question in favor of the driver and to find that the officer’s conduct violated clearly established law, therefore rendering qualified immunity inappropriate.¹³⁹ In Justice Stevens’ view, Haugen presented no serious threat of harm to either the officer or to others¹⁴⁰ and there was sufficient uncertainty regarding the reasonableness of the officer’s decision to use deadly force that a jury should be able to decide the qualified immunity issue.¹⁴¹ Justice Stevens found that “[t]he most common justifications for the use of deadly force [were] plainly inapplicable.”¹⁴² In support of his view, Justice Stevens noted:

Haugen was not a person who had committed a violent crime; nor was there any reason to believe he would do so if permitted to escape. Indeed, there is nothing in the record to suggest he intended to harm anyone.¹⁴³

In Justice Stevens’ view, the inquiry must address whether the potential harm the fleeing motorist could cause if the officer did not act was sufficiently probable and sufficiently serious to justify the very real possibility that the suspect would be killed.¹⁴⁴ According to Justice Stevens, this is “a quintessentially fact-specific question, not a question that judges should try to answer as a matter of law.”¹⁴⁵ Unlike the majority, Justice Stevens advocated for an approach that would assess the fleeing suspect’s dangerousness based on facts evident in the circumstances of the event, rather than the mere speculative assumption of dangerousness the majority so clearly attributes to fleeing motorists.

¹³⁸ *Id.* at 201 (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

¹³⁹ *Id.* at 202 (Stevens, J., dissenting) (“Under the Fourth Amendment, it was objectively unreasonable for Officer Brosseau to use deadly force against Kenneth Haugen in an attempt to prevent his escape.”).

¹⁴⁰ *Id.* at 204.

¹⁴¹ *Id.* at 206-07.

¹⁴² *Id.* at 204.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 204-05 (opining that “the sole justification for [the officer’s] use of deadly force was the risk that while fleeing in his vehicle [the motorist] would accidentally collide with a pedestrian or another vehicle”).

¹⁴⁵ *Id.* at 206 (internal quotations omitted).

C. Plumhoff v. Rickard (2014)

The Supreme Court found the facts of *Plumhoff v. Rickard* to be even more favorable to the involved officers than those of *Brosseau*. This is evident in the Court's deciding the constitutional question in the officers' favor in addition to finding them entitled to qualified immunity.¹⁴⁶ The incident at issue in *Plumhoff* started with a traffic stop.¹⁴⁷ Donald Rickard was driving with a passenger when a police officer pulled him over because only one of the car's headlights was operating.¹⁴⁸ When the officer asked Rickard to step out of the car, rather than following the officer's direction, Rickard sped away.¹⁴⁹ The officer jumped back in his car, gave chase, and was soon after joined by five other police cruisers in pursuit of Rickard's car on a highway.¹⁵⁰ The police unsuccessfully attempted to stop Rickard by using a "rolling roadblock."¹⁵¹ The chase proceeded through traffic, at speeds over 100 miles per hour at times.¹⁵²

Rickard eventually exited the highway and collided with a police cruiser causing his car to spin out into a parking lot and collide with Officer Plumhoff's cruiser.¹⁵³ In an attempt to escape, Rickard put the car in reverse.¹⁵⁴ Plumhoff and another officer got out of their cars and approached Rickard's car.¹⁵⁵ Rickard's tires started spinning and his car was rocking back and forth, indicating Rickard was using the accelerator even though the bumper of his car was flush against a police cruiser.¹⁵⁶

Plumhoff fired three shots into Rickard's car.¹⁵⁷ Rickard then reversed and maneuvered away onto the street, forcing one of the officers to move out of the way to avoid being hit.¹⁵⁸ One officer fired ten shots toward the vehicle, initially from the passenger side and then from the back of the vehicle, all while the vehicle was moving away

¹⁴⁶ *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2017, 2021-22 (2014).

¹⁴⁷ *Id.* at 2017.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

from the officers.¹⁵⁹ Yet another officer fired two shots at the vehicle.¹⁶⁰ In total, fifteen shots were fired at or into the vehicle which ultimately crashed.¹⁶¹ Rickard and his passenger died from some combination of gunshot wounds and injuries suffered in the crash.¹⁶²

When the estates of the shooting victims sued the officers, the District Court found the officers were not entitled to qualified immunity.¹⁶³ The Sixth Circuit affirmed, holding that the officers' conduct violated the Fourth Amendment.¹⁶⁴ The Sixth Circuit found the facts of this case were easily distinguishable from *Scott*.¹⁶⁵ The court noted that the officers fired fifteen shots at close range, twelve of which hit the driver and expressed concern that the officers knew there was a passenger in the car, thereby "doubling the risk of death."¹⁶⁶ The court also found the video evidence insufficient support for the officers' assertions that they perceived themselves to be in personal danger.¹⁶⁷

Citing its reasoning in *Scott v. Harris*, the Supreme Court reversed, finding the officers' conduct squarely within constitutional bounds.¹⁶⁸ More specifically, the Court reiterated that a "police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or

¹⁵⁹ Estate of Allen v. City of West Memphis, 509 F. App'x 388, 390 (6th Cir. 2012).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 394.

¹⁶² *Id.* at 390.

¹⁶³ Estate of Allen v. City of West Memphis, Nos. 05-2489, 05-2585, 2011 WL 197426, at *10-11 (W.D. Tenn. Jan 20, 2011).

¹⁶⁴ A motion panel of the Sixth Circuit initially dismissed the appeal for lack of jurisdiction. Plumhoff v. Rickard, 134 S. Ct. 2012, 2018 (2014) (referring to Estate of Allen v. City of West Memphis, No. 11-5266, 2012 WL 6603083 (6th Cir. 2012)). However, the motion panel later vacated its dismissal order, granted rehearing and left the jurisdictional question to be decided by a merits panel. *Id.* The merits panel then affirmed the district court's decision. Estate of Allen, 509 Fed. App'x at 393.

¹⁶⁵ Estate of Allen, 509 F. App'x at 391 ("Although the framework of the two cases is similar, as always, the devil is in the details, and it is those details that cause us to conclude that *Scott* is distinguishable.")

¹⁶⁶ *Id.* at 392.

¹⁶⁷ *Id.* But see Sommers, *supra* note 12, at 1345 (finding based on the analysis of a large empirical study that "proponents of body cameras may be unduly optimistic that video footage can decisively resolve ambiguous cases").

¹⁶⁸ Plumhoff, 134 S. Ct. at 2022 ("In light of the circumstances we have discussed, it is beyond serious dispute that Rickard's flight posed a grave public safety risk, and here, as in *Scott*, the police acted reasonably in using deadly force to end that risk.")

death.”¹⁶⁹ In particular, the Court noted that Rickard’s “outrageously reckless driving posed a grave public safety risk.”¹⁷⁰ Again, the Court appeared to presume that the fleeing driver posed a deadly threat to others if allowed to escape.¹⁷¹ The Court also found that the firing of fifteen shots at the vehicle did not amount to excessive force.¹⁷²

D. *Mullenix v. Luna* (2015)

Mullenix v. Luna is the most recent case in which the Supreme Court reviewed the use of deadly force against a fleeing motorist.¹⁷³ The incident at issue in *Mullenix* was initiated when a police officer attempted to serve an arrest warrant on Israel Leija, Jr.¹⁷⁴ When the officer approached Leija’s car in the parking lot of a drive-in restaurant and informed him he was under arrest, Leija sped off.¹⁷⁵ The officer followed in pursuit and was joined in the chase shortly thereafter by a Texas state trooper.¹⁷⁶ Leija led the officers on an eighteen-minute chase at speeds between eighty-five and 110 miles per hour.¹⁷⁷ Twice during the chase, Leija called the police dispatcher, claiming to have a gun and threatening to shoot at the officers if they did not abandon their pursuit.¹⁷⁸ The dispatcher relayed this information, as well as a report that Leija might be intoxicated, to law enforcement.¹⁷⁹ While the officer and state trooper continued the pursuit, other law enforcement personnel set up tire spikes at three locations.¹⁸⁰

In response to hearing about the chase, Trooper Mullenix drove to a highway overpass to set up spikes there, but then started thinking

¹⁶⁹ *Id.* at 2021 (quoting *Scott v. Harris*, 550 U.S. 372, 386 (2007)).

¹⁷⁰ *Id.* The Court noted that “the chase in this case exceeded 100 miles per hour and lasted over five minutes,” and that the driver “passed more than two dozen other vehicles, several of which were forced to alter course.”

¹⁷¹ *Id.* at 2022 (“Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road.”)

¹⁷² *Id.* (“It stands to reason 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.”).

¹⁷³ *Mullenix v. Luna*, 136 S. Ct. 305 (2015).

¹⁷⁴ *Id.* at 306.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

about shooting at Leija's car in order to disable it.¹⁸¹ Mullenix had not received any training on this tactic, nor had he ever attempted it before.¹⁸² Mullenix radioed in to propose this idea to his supervisor.¹⁸³ Although Mullenix claims not to have heard him do so, the Supervisor instructed Mullenix to "stand by" and "see if the spikes work first."¹⁸⁴ Mullenix took up a shooting position on an overpass approximately twenty feet above the highway.¹⁸⁵ As he awaited Leija's car, Mullenix discussed his plan with a Deputy Sheriff who noted that there was another officer located beneath the overpass.¹⁸⁶ Eventually Leija's car approached the overpass and Mullenix fired six shots.¹⁸⁷ Leija's car continued through the underpass, went over the spike strip, hit the median and rolled over.¹⁸⁸ The evidence confirmed that Leija was killed by Mullenix's shots, four of which struck his upper body.¹⁸⁹ There was nothing in the record to suggest that any of the shots fired by Mullenix hit the radiator, hood, or engine block of Leija's car.¹⁹⁰

When Leija's estate sued, the District Court denied summary judgment, finding the officer ineligible for qualified immunity because there were material issues of fact as to whether his conduct was reasonable under the circumstances.¹⁹¹ The Fifth Circuit affirmed finding that Mullenix's conduct was objectively unreasonable noting that: there were no innocent bystanders, Leija's driving was relatively controlled, Mullenix had not first given the spike strips a chance to work, and his decision to fire was not a "split-second judgment."¹⁹²

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 307.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Luna v. Mullenix*, No. 2:12-CV-152-J, 2013 WL 4017124, at *6 (N.D. Tex. Aug. 7, 2013) (holding beyond the reasonableness question that "[t]here are genuine issues of material fact as to whether Mullenix did or did not hear, and should have obeyed, the instructions from his superior officer to let the other officers responding to the situation first try the planned non-lethal or less-dangerous methods being utilized to end the high-speed pursuit. There also exist genuine questions of material fact as to the existence of any immediate threat to officers involved in the pursuit . . . or an immediate threat to other persons who were miles away from the location of the shooting").

¹⁹² The case took a somewhat unusual route to the highest court. Upon its initial review, the Fifth Circuit agreed with the district court that the immediacy of the risk

The Supreme Court granted a writ of certiorari. As in *Brosseau*, the Supreme Court avoided the constitutional question, but reversed on the issue of qualified immunity, finding that there was no clearly established rule prohibiting Mullenix from shooting at or into the car under those circumstances.¹⁹³ The Court rejected the Fifth Circuit's view that Mullenix had violated a clearly established rule that prohibits the use of deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others, finding that rule too general to be the basis for denying qualified immunity.¹⁹⁴ The Court acknowledged a lack of clarity in the law governing excessive force, specifically in cases involving car chases.¹⁹⁵ The Court explicitly mentioned that its review of deadly force incidents involving fleeing motorists was limited to only three prior cases.¹⁹⁶ Moreover, the Court also acknowledged that it had yet to find a constitutional violation or a reason to deny qualified immunity to an officer for the use of deadly force within the context of this kind of case.¹⁹⁷ The Court has thereby left the law in this area woefully undeveloped. As outlined *supra* Part I.A, the doctrine of qualified immunity serves as a barrier to relief for plaintiffs alleging excessive force against a police officer where the officer cannot be shown to have violated clearly established law. Because Supreme Court jurisprudence related to these cases is so undeveloped, qualified immunity serves as a nearly insurmountable barrier to relief for plaintiffs in these cases.

However, in *Mullenix*, the Court did reiterate that it places great emphasis on the danger that suspects fleeing at high-speed represent

Leija posed was a disputed fact that a reasonable jury could find in plaintiff's favor and affirmed the denial of summary judgment. *Luna v. Mullenix*, 765 F.3d 531, 533 (5th Cir. 2014), *opinion withdrawn and superseded*, 773 F.3d 712 (5th Cir. 2014), *cert. granted, rev'd*, 136 S. Ct. 305, 312 (2015) (reversing the Fifth Circuit's determination that Mullenix was not entitled to qualified immunity). Mullenix sought rehearing *en banc* before the Fifth Circuit, but the appellate court denied his petition. 777 F.3d. 221 (2014) (per curiam). However, on the same day, the two members forming the original panel majority withdrew their previous opinion and substituted a new one which reaffirmed the denial of qualified immunity but recognized that "objective reasonableness" is a question of law that can be resolved on summary judgment. *Mullenix*, 773 F.3d at 720-24; *see also Mullenix*, 136 S. Ct. at 308.

¹⁹³ *Mullenix*, 136 S. Ct. at 308.

¹⁹⁴ *Id.* at 308-09, 312.

¹⁹⁵ *Id.* at 309 ("Far from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted.").

¹⁹⁶ *See id.* at 310.

¹⁹⁷ *Id.* ("The Court has thus 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.")

to officers and bystanders.¹⁹⁸ The Court also conveyed the high degree of deference it affords officers in these situations: “[I]t would be unreasonable to expect a police officer to make the numerous legal conclusions necessary to apply *Garner* to a high-speed car chase”¹⁹⁹

In *Mullenix*, the Court elucidated its view that officers may use deadly force to address the risk of harm a fleeing motorist represents not only to the occupied vehicles observably in the motorist’s path, but also to “any other citizens who *might* be in the area.”²⁰⁰ In other words, to justify the use of deadly force, an officer need not be aware of and concerned about any specific individuals in the vehicle’s path, rather, the officer need only consider that there “might” be citizens who could be harmed if the pursuit were to continue. As will be outlined *infra* Part III, the circumstances under which officers are permitted to use deadly force in response to this generalized risk to the public is a source of debate among the circuit courts.

Justice Scalia wrote a concurrence in *Mullenix* to reiterate his belief that shooting to disable a car should not be considered “the application of deadly force in effecting an arrest” because, even though such force is sufficient to kill, it is not directed *at the person* to be arrested.²⁰¹ Even though Mullenix’s shots fired at the vehicle placed the driver at serious risk of death or bodily harm, Justice Scalia found them akin to the bumper push in *Scott*, which, in an opinion delivered by Justice Scalia, the Court declined to characterize as a use of deadly force.²⁰² Justice Scalia posed a hypothetical situation to support his opinion:

The police might, for example, attempt to stop a fleeing felon’s car by felling a large tree across the road; if they drop the tree

¹⁹⁸ *Id.* (comparing Leija to the fleeing suspect in *Brosseau*, the Court found that the “threat Leija posed was at least as immediate as that presented by a suspect who had just begun to drive off and was headed only in the general direction of officers and bystanders”).

¹⁹⁹ *Id.* at 309, quoting *Pasco v. Knoblauch*, 566 F.3d 572, 574 (5th Cir. 2009) (involving a high-speed chase that was ended when officers bumped the fleeing motorist’s vehicle off the road).

²⁰⁰ *Id.* at 309-10 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004)).

²⁰¹ *Id.* at 312-13, (Scalia, J., concurring) (using the same emphasis of the phrase “at the person” in Justice Scalia’s concurring opinion) Justice Scalia further opined, “[i]t does not assist analysis to refer to all use of force that happens to kill the arrestee as the application of deadly force.” *Id.* at 312.

²⁰² *Id.* at 312-13 (Scalia, J., concurring) (“Though it was force sufficient to kill, it was not applied with the object of harming the body of the felon.”).

too late, so that it crushes the car and its occupant, I would not call that the application of deadly force. Though it was force sufficient to kill, it was not applied with the object of harming the body of the felon.²⁰³

This view is wholly unconvincing and also demonstrably inconsistent with many law enforcement agency policies which define “deadly force” to include force that inherently risks death or great bodily harm to the subject of an arrest.²⁰⁴ To be sure, Justice Scalia’s logic in *Mullenix* seems to “bend over backwards” to accommodate the officer’s conduct.²⁰⁵

In dissent, Justice Sotomayor characterized Officer Mullenix’s conduct as rogue and in violation of Leija’s clearly established constitutional rights.²⁰⁶ Justice Sotomayor questioned the propriety of Mullenix’s attempt to stop Leija’s vehicle by shooting at its engine, “without any training in that tactic, against the wait order of his superior officer, and less than a second before the car hit spike strips deployed to stop it.”²⁰⁷ Unlike the majority, which credited Mullenix for trying to stop the car “in a manner that avoided the risks to other officers and other drivers that relying on spike strips would entail,”²⁰⁸

²⁰³ *Id.* (Scalia, J., concurring).

²⁰⁴ The Chicago Police Department defines “deadly force” to include “firing of a firearm at a vehicle in which the person to be arrested is riding.” CHI. POLICE DEP’T, GENERAL ORDER G03-02: USE OF FORCE 2 (Oct. 16, 2017), <http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-44306f3da7b28a19.pdf?hl=true> [hereinafter CHI. USE OF FORCE]. Additional examples include: the San Francisco policy which includes “certain interventions to stop a subject’s vehicle” in the definition of “deadly force.” S.F. USE OF FORCE, *supra* note 19. The Houston policy which defines “deadly force” as “[f]orce intended or known to cause or in the manner of its use or intended use is capable of causing death or serious bodily injury.” HOUS. POLICE DEP’T, GENERAL ORDER 600-17: USE OF FORCE 1 (Jan. 4, 2008), <https://static1.squarespace.com/static/56996151cbced68b170389f4/v/569ad82357eb8d0f1146093f/1452988454120/Houston+use+of+force+policy.pdf>.

²⁰⁵ Officer Mullenix fired six rounds at the car, none of which hit the engine block, while at least four struck Leija in the upper body. *Mullenix*, 136 S. Ct. at 307. Despite these facts, Justice Scalia focuses on the officer’s claim, that the plaintiff did not dispute, that the officer shot at the car, not its driver, in an attempt to stop the car by destroying its engine. *Id.* at 313. Justice Scalia does acknowledge that this tactic was inherently dangerous to the vehicle’s occupants. *Id.* at 313 (Scalia, J., concurring). Nonetheless, in Justice Scalia’s view, the question at issue should not be framed as whether it was reasonable for the officer to use deadly force against the driver, but rather whether it was reasonable to shoot at the engine in light of the risk of harm to the driver. *Id.* In the author’s view, this differentiation is as good an example of “mental gymnastics” as any.

²⁰⁶ *Id.* at 313-15 (Sotomayor, J., dissenting).

²⁰⁷ *Id.* at 313.

²⁰⁸ *Id.* at 311 (majority opinion).

Justice Sotomayor found “no evidence in the record” to suggest that shooting at the car was a safer way to end the chase.²⁰⁹

Reviewing this line of cases as a group, unfortunately, makes clear that the Supreme Court’s guidance in this area of law is not as robust as it could be, particularly since the Court avoided the core constitutional question in two of the four cases. However, there are two key themes that emerge. The first key theme is that the Court views fleeing motorists as so inherently dangerous that deadly force is permissible against a fleeing motorist even where there are no identifiable individuals in the vehicle’s path or otherwise at risk of imminent harm.²¹⁰ In *Plumhoff*, the officers fired at or into the vehicle while it was moving away from them. Yet, the Court found no constitutional violation because the subject “was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road.”²¹¹ In *Scott*, the Court found the officer’s use of deadly force a better choice than merely abandoning the chase because the Court assumed there was no way to convincingly convey to the fleeing motorist that the officers were no longer in pursuit, therefore, the motorist “might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.”²¹² The second key theme is that the Court considers shooting at or into a moving vehicle is a sufficiently effective tactic to deem its use reasonable. As will be outlined *infra* Part IV, these two assumptions run counter to the way law enforcement experts view these incidents.

III. FEDERAL COURT OF APPEALS CASES INVOLVING SHOTS FIRED AT OR INTO MOVING VEHICLES

A. Overview

A review of federal appellate court cases involving this particular type of officer-involved shooting incident reveals that litigation over

²⁰⁹ *Id.* at 314 (Sotomayor, J., dissenting). However, given the broad consensus within the law enforcement community that shooting at a moving vehicle is unlikely to stop the car and can actually create more hazard, it would seem that the officer’s hope was misplaced. See *infra* Part IV.

²¹⁰ See *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014) (finding that where officers fired while vehicle was moving away from them, there was no constitutional violation because the subject “was intent on resuming his flight and that, if he was allowed to do so, he would once against pose a deadly threat for others on the road”).

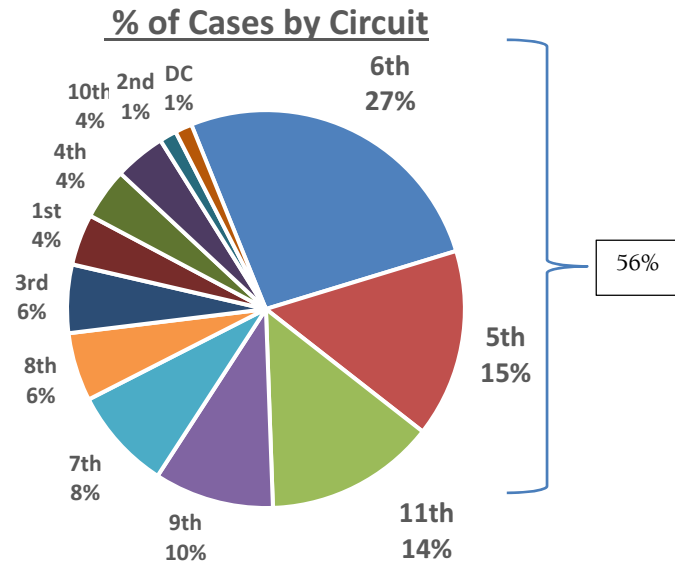
²¹¹ *Id.*

²¹² See *Scott v. Harris*, 550 U.S. 372, 385 (2007).

such incidents is prevalent, as these incidents represent a significant proportion of the federal appellate court cases addressing the use of deadly force.²¹³ Thus, it is important that legal guidance be clarified.

The author has identified a total of seventy-two relevant cases among the federal circuit courts.

Figure 1

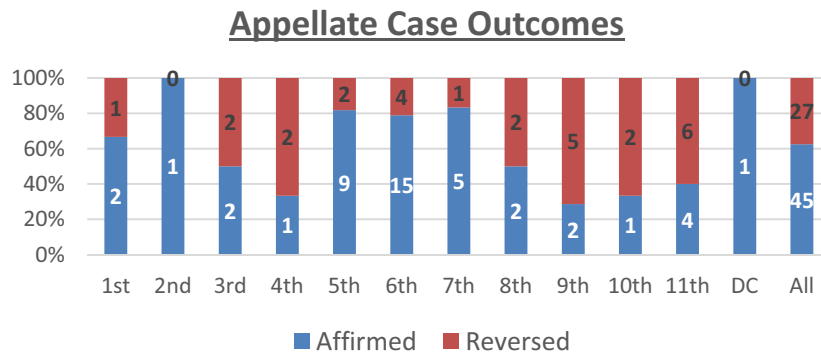


²¹³ This author conducted a search for federal court of appeals cases involving litigation over the use of deadly force, more specifically, the discharge of a firearm, by a law enforcement officer against a fleeing motorist. The relevant cases were identified through search within the Westlaw case database. The first step in the search was to identify cases in which the use of deadly force was an issue in the litigation by identifying those cases in which *Tennessee v. Garner* was cited as a reference. A search within that group of cases was conducted to identify the cases involving the discharge of a firearm at a fleeing motorist or otherwise at or into a moving vehicle. More specifically, the terms for this query were: fleeing /s (car vehicle) & (officer /s (shot shooting)). A review of the cases identified through these search terms identified additional relevant cases that had not been identified through the initial query. Those were added to the list. Through this methodology, the author identified a total of seventy-two federal Court of Appeal cases involving the discharge of a firearm at a fleeing motorist or otherwise at or into a moving vehicle. This represents approximately seven percent of the 1014 cases Westlaw identified as citing *Tennessee v. Garner* as a reference.

As depicted in Figure 1 above, a majority of the cases arise from the Fifth, Sixth, and Eleventh Circuits.²¹⁴

Analysis of the federal circuit court cases shows that the Supreme Court's jurisprudence has resulted in a lack of clarity among the lower courts as almost four in ten appellate court cases reverse district court findings. See Figure 2 below.

Figure 2



B. Circuit Courts Demonstrate Conflicting Views on Key Issues Relevant to Case Outcomes

There are several areas of inquiry relevant to the analysis of cases involving fleeing motorists for which the circuit courts demonstrate conflicting or differing views. These include: (1) whether the reviewing court may consider the officer's conduct leading up to the moment that deadly force was used; (2) whether deadly force may be used against a fleeing motorist based merely on the potential risk of harm to unknown bystanders, and if so, the degree of recklessness the driver must exhibit to warrant the use of deadly force; (3) whether the court should consider the availability of alternatives to deadly force, such as the opportunity to move out of the vehicle's path; and (4) whether an officer's violation of their respective law enforcement

²¹⁴ The author has not ventured to reach any conclusions as to why these cases appear clustered within these three circuits. There are many variables at play here that could affect the number of incidents that occur that are beyond the scope of this paper. There are also a variety of factors that could contribute to the number of cases that work their way up to appellate litigation.

agency's policy should be considered as a factor in the reasonableness assessment.

1. The Circuit Courts Disagree About Whether an Officer's Pre-seizure Conduct Is Relevant to the Reasonableness Assessment

Tennessee v. Garner and *Graham v. Connor* have established that, pursuant to the Fourth Amendment, a court's review of the use of force by a law enforcement official should be based on an assessment of whether the officer's conduct was objectively reasonable based on the "totality of the circumstances."²¹⁵ Yet, several circuit courts take the view that pre-seizure conduct is not relevant to the Fourth Amendment analysis.²¹⁶ To be sure, the Eighth Circuit interprets Supreme Court precedent, namely, *California v. Hodari D.*, to limit the analysis of use of force incidents to the moment force was used.²¹⁷ The Second and Fourth Circuits take a similar view, limiting the reasonableness assessment to the circumstances in existence at the moment deadly force was used.²¹⁸

Taking the opposite view, the First Circuit has found that these other courts have misread *Hodari* to support the view that context is irrelevant to a Fourth Amendment inquiry.²¹⁹ In accord, the Sixth

²¹⁵ *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) ("[T]he question was whether the totality of the circumstances justified a particular sort of . . . seizure.").

²¹⁶ *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) ("[W]e scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment."); *see also* *Thompson v. Mercer*, 762 F.3d 433, 440 (5th Cir. 2014) ("[R]egardless of what had transpired up until the shooting itself, the question is whether the officer had reason to believe, at that moment, that there was a threat of physical harm." (internal quotations omitted) (modifications omitted) (quoting *Freire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992))).

²¹⁷ *See, e.g., Cole*, 993 F.2d at 1332 (8th Cir. 1993) ("In *California v. Hodari D.*, the Supreme Court held that a seizure occurs only when the pursued citizen is physically touched by the police or when he submits to a show of authority by the police." (citing *California v. Hodari D.*, 499 U.S. 621, 626 (1991))).

²¹⁸ *Terebesi v. Torreso*, 764 F.3d 217, 234 n.16 (2d Cir. 2014) ("[C]ourts in this Circuit and others have discarded evidence of prior negligence or procedural violations, focusing instead on the split-second decision to employ deadly force." (internal quotations omitted) (citation omitted); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) ("[A]ctions leading up to the shooting are irrelevant to the objective reasonableness of [the officer's] conduct at the moment he decided to employ deadly force."); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (stating that events which occurred before the seizure "are not relevant and are inadmissible").

²¹⁹ *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 n.4 (1st Cir. 1995) ("We understand *Hodari* to hold that the Fourth Amendment does not come into play *unless* there has been a seizure, not that it does not come into play *until* there has

Circuit allows for the consideration of the moments leading up to the force incident when weighing the totality of the circumstances.²²⁰ In a recent case, the court explained that assessing whether a subject presents an imminent danger to officers or to the public requires “analysis of both the moments before the shots were fired and the prior interactions” between the officer and the subject.²²¹ The Third Circuit similarly rejects “a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished.”²²² The Third Circuit explains that “[t]otality’ is an encompassing word” which “implies that reasonableness should be sensitive to all of the factors bearing on the officer’s use of force.”²²³ The Tenth Circuit has held that “[t]he reasonableness of [a given] use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers’ own ‘reckless or deliberate conduct during the seizure unreasonably created the need to use such force.’”²²⁴

The Ninth Circuit had explicitly sanctioned the consideration of pre-seizure conduct within the context of the reasonableness assessment of a use of force.²²⁵ Following the Ninth Circuit’s approach, where an officer intentionally or recklessly provoked a violent response, and the provocation was an independent constitutional violation, such provocation could render an otherwise reasonable defensive use of force unreasonable as a matter of law.²²⁶ However, in *County of Los Angeles v. Mendez*, the Supreme Court recently rejected this view, finding it an “unwarranted and illogical expansion” of *Graham v. Connor*.²²⁷ Yet, in *Mendez*, the Court explicitly declined to address whether *Graham* allows courts to consider unreasonable police conduct that foreseeably created a need to use force, leaving this issue to the lower courts to decide.²²⁸ Reflecting a change in view following *Mendez*, the Seventh Circuit has

been a seizure.”).

²²⁰ See, e.g., *Latits v. Phillips*, 878 F.3d 541, 548 (6th Cir. 2017).

²²¹ *Id.*

²²² *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999).

²²³ *Id.*

²²⁴ *Pauly v. White*, 874 F.3d 1197, 1219 (10th Cir. 2017) (quoting *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004)).

²²⁵ See, *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002), *abrogated by County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017).

²²⁶ *See id.*

²²⁷ *Mendez*, 137 S. Ct. at 1548.

²²⁸ *Id.* at 1547 note.

recently adopted the view that pre-seizure conduct may be considered.²²⁹

This distinction is important. The events leading up to a use of force can be particularly relevant in the context of shooting incidents involving motor vehicles because they may reflect whether the officer's conduct unnecessarily created the circumstances that would necessitate the use of deadly force. It can hardly be said that a reasonable officer would cause the need for deadly force where there otherwise would not be.

2. There Is Inconsistency Among the Circuit Courts Regarding How Dangerous a Fleeing Motorist's Behavior Must Be to Warrant the Use of Deadly Force

In *Scott v. Harris*, the Supreme Court explicitly held that “a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”²³⁰ The Court rationalized its prioritization of the safety of the public over the potential harm to the fleeing individual by blaming the driver for producing the situation that forced the officer to have to choose between the “two evils”: either taking steps that risk serious harm to the driver, or allowing the reckless driving that places the public at risk to go unchecked.²³¹ When interpreting *Scott*, the circuit courts are inconsistent regarding the degree of dangerousness a fleeing motorist must exhibit to warrant the use of deadly force to prevent potential harm to the public.

²²⁹ *Doornbos v. City of Chicago*, 868 F.3d 572, 583 (7th Cir. 2017) (acknowledging the question left open in *Mendez* when stating: “When an officer's unreasonable (and unconstitutional) conduct proximately causes the disputed use of force, that conduct is part of the ‘totality of the circumstances’ that should be considered to determine if the use of force was reasonable, especially since the officers here were not in uniform”). *But see* *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994) (“[W]e judge the reasonableness of the use of deadly force in light of all that the officer knew [at the moment force was used]. We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct.”).

²³⁰ *Scott v. Harris*, 550 U.S. 372, 386 (2007).

²³¹ *Id.* at 384 (“We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted.”).

Several circuits emphasize the inherent danger fleeing motorists represent to innocent bystanders who might be harmed if the subject were allowed to continue his reckless flight. The First Circuit holds that deadly force is permissible to prevent potential harm to the involved officers as well as “any civilians who happened to be nearby.”²³² Likewise, the Fourth Circuit has found “high-speed flight through a residential neighborhood” sufficiently dangerous to warrant the use of deadly force.²³³

Perhaps taking a cue from the Ginsburg and Breyer concurrences in *Scott*, that there should be no *per se* rule allowing deadly force against a fleeing motorist, other courts acknowledge that situations involving a fleeing motorist are inherently dangerous to the public but that deadly force is not necessarily always appropriate. According to the Fifth Circuit:

Nearly any suspect fleeing in a motor vehicle poses some threat of harm to the public. As the cases addressing this all-too-common scenario evince, the real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable.²³⁴

The Tenth Circuit takes a similar view: that the use of deadly force against a fleeing motorist must be based on “more than the general dangers posed by reckless driving.”²³⁵ As the Tenth Circuit stated in *Cordova v. Aragon*, the Supreme Court’s decision in *Scott* “did not declare open season on suspects fleeing in motor vehicles.”²³⁶ The court explained:

Car chases inherently risk injury to persons who might happen along their course, and if that risk alone could justify

²³² *McGrath v. Tavares*, 757 F.3d 20, 30-31 (1st Cir. 2014) (emphasis added) (finding that the facts for the case at bar were more favorable to the defending police officer than in *Brosseau v. Haugen*, the court noted that here the decedent had already begun to flee in a manner which “indisputably posed a danger both to the officers involved and to any civilians who happened to be nearby” (quoting *Brosseau v. Haugen*, 543 U.S. 194 (2014))).

²³³ *Martin v. Dishong*, 102 F. App’x 780, 783 (4th Cir. 2004).

²³⁴ *Lytle v. Bexar Cty.*, 560 F.3d 404, 415 (5th Cir. 2009) (referencing Ginsburg’s concurrence in *Scott v. Harris* stating that the Court was not creating a “mechanical *per-se* rule” *Id.* at 414-15.).

²³⁵ *Cordova v. Aragon*, 569 F.3d 1183, 1190 (10th Cir. 2009).

²³⁶ *Id.* (quoting *Lytle*, 560 F.3d at 414).

shooting the suspect, every chase would end much more quickly with a swiftly-fired bullet.²³⁷

The Sixth Circuit has developed “a consistent framework in assessing deadly-force claims involving vehicular flight.”²³⁸ As outlined in Sixth Circuit cases, deadly force is justified against “a driver who objectively appears ready to drive into an officer or bystander with his car,” but generally not “once the car moves away, leaving the officer and bystanders in a position of safety,” unless “the officer’s prior interactions with the driver suggest that the driver will continue to endanger others with his car.”²³⁹ The Sixth Circuit has found deadly force justified by prior interactions when the suspect demonstrated “he either was willing to injure an officer that got in the way of escape or was willing to persist in *extremely reckless* behavior that threatened the lives of all those around.”²⁴⁰ The Sixth Circuit distinguishes between motorists whose conduct prior to the use of force is so reckless as to present an imminent risk of danger to the public and those whose prior conduct does not indicate such risk, finding the use of deadly force only appropriate against the former.²⁴¹ The lack of clarity in making this distinction is the crux of the issue here.

The Ninth Circuit has also rejected the general risk to the public as justification for the use of deadly force against a fleeing motorist.²⁴² This view is consistent with the Ninth Circuit’s emphasis on the “immediacy of the threat posed by the subject” as the most important of the factors to be weighed under *Graham*.²⁴³ In an unpublished opinion, the Third Circuit indicated a similar view.²⁴⁴

²³⁷ *Id.*

²³⁸ *Cass v. City of Dayton*, 770 F.3d 368, 375 (6th Cir. 2014).

²³⁹ *Id.* (citations omitted).

²⁴⁰ *Smith v. Cupp*, 430 F.3d 766, 775 (6th Cir. 2005) (characterizing the suspects in both *Scott v. Clay Cty.*, 205 F.3d 867, 872 (6th Cir. 2000) and *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992)).

²⁴¹ *Latits v. Phillips*, 878 F.3d 541, 550 (6th Cir. 2017) (noting the “relatively low” risk to the public presented by the fleeing motorist in that case because the chase occurred at relative low speeds on an “effectively empty highway surrounded by non-populated areas (a cemetery and vacant state fairgrounds), passing no pedestrians, cyclists, or motorists besides the police trailing him.” The court further noted that “[the fleeing motorist’s] conduct prior to being shot, when viewed in the light most favorable to the Plaintiff, showed a persistent intent to flee but not an intent to injure, and never placed the public or the officers at imminent risk” *Id.*).

²⁴² *Gonzalez v. City of Anaheim*, 747 F.3d 789, 795-96, 808 (9th Cir. 2014) (rejecting the dissent’s view that the “risk of violence is inherent to vehicle flight”).

²⁴³ *Id.* at 793.

²⁴⁴ *Zion v. Nassan*, 556 F. App’x 103, 107 (3d Cir. 2014) (“Continuing to drive at

The Fifth Circuit case law on this point is murky. In a 2009 case, *Lytle v. Bexar County*,²⁴⁵ the court stated that “a suspect that is fleeing in a motor vehicle is not so inherently dangerous that an officer’s use of deadly force is *per se* reasonable.”²⁴⁶ The court reiterated this view in 2014 in the case that was ultimately reversed by the Supreme Court in *Mullenix v. Luna*.²⁴⁷ However, in another 2014 case, *Thompson v. Mercer*,²⁴⁸ the court noted that it “recognizes the inherent danger of vehicular flight even when no bystanders or other motorists are immediately present.”²⁴⁹

3. Circuit Courts Differ on Whether the Availability of Alternatives to Deadly Force Should Be Considered When Assessing Reasonableness

Case law across the appellate courts is inconsistent on the issue of whether the availability of alternatives to the use of deadly force, including the opportunity to move out of the vehicle’s path, should be considered when assessing the reasonableness of an officer’s conduct.

The Second Circuit has recognized expert testimony that “proper police procedure when faced with an on-coming vehicle is to get out of the way rather than shoot.”²⁵⁰ The Ninth Circuit considers “alternative methods of capturing or subduing a suspect” available to the officers as relevant to the reasonableness analysis.²⁵¹ Other circuit courts consider the availability of alternative tactics immaterial to the reasonableness assessment.²⁵²

relatively slow speed away from the police after a minor collision with a parked car does not create a level of danger to justify the use of deadly force.”).

²⁴⁵ 560 F.3d 404 (5th Cir. 2009).

²⁴⁶ *Lytle*, 560 F.3d at 416.

²⁴⁷ *Luna v. Mullenix*, 773 F.3d 712, 720 (5th Cir. 2014), *cert. granted, rev’d*, *Mullenix v. Luna*, 136 S. Ct. 305 (2015).

²⁴⁸ 762 F.3d 433 (5th Cir. 2014).

²⁴⁹ *Id.* at 439 (internal quotations and citation omitted).

²⁵⁰ *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756, 763 (2d Cir. 2003).

²⁵¹ *Gonzalez v. City of Anaheim*, 747 F.3d 789, 794 (9th Cir. 2014). The facts for this case are notably different from those discussed before, as the police officer who opened fire was actually inside the moving car. *Id.* at 792.

²⁵² *See, e.g., Clark v. Bowcutt*, 675 F. App’x 799, 808 (10th Cir. 2017) (rejecting Plaintiff’s arguments that the officer “was required to use alternative less intrusive means” and the officer’s “ability to move out of the way” as unavailing); *Davis v. Romer*, 600 F. App’x 926, 930 (5th Cir. 2015) (rejecting the argument that the officer could have moved away from the fleeing vehicle); *Cole v. Bone*, 993 F.2d 1328, 1334 (1999) (“The Constitution, however, requires only that the seizure be objectively reasonable, not that the officer pursue the most prudent course of conduct as judged

4. Circuit Courts Differ on Whether an Officer's Violation of Department Policy Is Relevant to the "Reasonableness" Assessment

The Sixth Circuit considers whether or not an officer followed police procedures as relevant to the question of reasonableness.²⁵³ The Eighth Circuit disagrees.²⁵⁴

Given these significant inconsistencies in the way the appellate courts analyze these cases, more clear direction to lower courts is necessary and appropriate. As outlined *supra* in Part I, because qualified immunity serves to protect officers from suit where the law is not clearly established, the lack of clarity in the legal boundaries make it nearly impossible for plaintiffs to achieve redress for unreasonable uses of deadly force in the context of these incidents.

IV. LAW ENFORCEMENT POLICIES RELEVANT TO THE DISCHARGE OF A FIREARM AT OR INTO A MOVING VEHICLE

The New York City Police Department may have been the first law enforcement agency to explicitly bar firing at or into a moving vehicle, having done so back in 1972.²⁵⁵ But, since that time, many other law enforcement agencies have followed suit.²⁵⁶ Experts recognize that when officers shoot at a moving vehicle "the likelihood of them hitting their target is relatively low."²⁵⁷ Even if the officer is able to successfully hit the driver of a vehicle, "it likely places the officers and

by 20/20 hindsight vision."); see *Estate of Starks v. Enyart*, 5 F.3d 230, 233 (7th Cir. 1993) ("Police officers do place their own lives at risk in the course of performing their job, and we agree with Black's position that they may use deadly force to protect themselves, even after choosing a risky course of action to stop a fleeing felon.").

²⁵³ *Latits v. Phillips*, 878 F.3d 541, 552 (6th Cir. 2017) ("[A]lthough police procedures do not set the bounds of the Fourth Amendment, we consider it relevant that [the defending police officer] repeatedly violated police procedures in both ramming [plaintiff] and running up to his car.").

²⁵⁴ *Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993) ("We need not determine whether [the officer] violated [department] policy, however, for under section 1983 the issue is whether the government official violated the Constitution or federal law, not whether he violated the policies of a state agency.").

²⁵⁵ Swaine, Lartey & Laughland, *supra* note 19 (noting NYPD's Regulation TOP-237); see also Lopez, *supra* note 20.

²⁵⁶ See NATIONAL CONSENSUS POLICY, *supra* note 19, at 14-15.

²⁵⁷ White, *supra* note 75, at 304 (noting that "prior research consistently indicates that police officers who use deadly force miss their intended targets far more often than they hit them"); see also Lowery et al., *supra* note 21.

bystanders at additional danger” because the car “essentially becomes an unguided missile.”²⁵⁸

In Chicago, specific guidance regarding the discharge of firearms at or into a moving vehicle appears as early as 2002, when the Chicago Police Department enacted a policy that required officers, when “confronted with an oncoming vehicle and that vehicle is the only force used against them,” to “move out of the vehicle’s path.”²⁵⁹ In response to a specific firearms discharge incident in which the officer demonstrated particularly poor tactics,²⁶⁰ in February 2015, the department revised its deadly force policy to better emphasize the prohibition against shooting at or into moving vehicles. In that incident, two officers among a team conducting a narcotics investigation fired several shots into a vehicle with two occupants despite the fact that the vehicle represented no threat to the officers or anyone else.²⁶¹ An analysis of the evidence, specifically the bullet hole trajectories, clearly showed that, at the time they fired their weapons, the officers were standing next to, not in the path of the moving vehicle.²⁶² A week after this incident occurred, the department revised its “Deadly Force” policy to explicitly prohibit “[f]iring at or into a moving vehicle when the vehicle is the only force used against the sworn member or another person.”²⁶³

The current Chicago Police Department policy is even more explicit. The current policy prohibits:

Firing at or into a moving vehicle when the vehicle is the only force used against the sworn member or another person,

²⁵⁸ Lowery et al., *supra* note 21 (internal quotations omitted) (quoting Jonathan Smith, Executive Director of the Washington Lawyers Committee for Civil Rights and a former Justice Department official).

²⁵⁹ CHI. POLICE DEP’T, GENERAL ORDER 03-02-03: DEADLY FORCE (Oct. 1, 2002), <https://www.chicagocopa.org/wp-content/uploads/2017/10/Use-of-Force-Policy-Report-Final.pdf>, at 21 (Appendix A).

²⁶⁰ See CIVILIAN OFFICE OF POLICE ACCOUNTABILITY, INDEPENDENT POLICE REVIEW AUTHORITY: SUMMARY REPORT LOG #1073693 (2015), <https://www.chicagocopa.org/wp-content/uploads/2016/07/L1073693U15-02.pdf>.

²⁶¹ *Id.* at 4.

²⁶² *Id.* at 13 (noting that the rounds hit the driver’s side of the subject vehicle either going directly into the side of the car or at an angle traveling from the back to the front of the car; that one of the officers admitted that he had created distance between himself and the vehicle; and the other officer admitted that he was no longer in front of the vehicle when he fired into the driver’s side window).

²⁶³ CHI. POLICE DEP’T, GENERAL ORDER GO 03-02-03: DEADLY FORCE 1 (Feb. 10, 2015), <http://directives.chicagopolice.org/directives/data/a7a57be2-1290de63-7db12-90f0-e9796f7bbbc1a2d2.pdf?hl=true> (rescinding policy effective Oct. 1, 2002).

unless such force is reasonably necessary to prevent death or great bodily harm to the sworn member or to another person.

[. . .]

When a vehicle is the only force used against a member, the member will not place themselves in the path of the moving vehicle and will make every effort to move out of the path of the vehicle.²⁶⁴

Chicago is one of many law enforcement agencies with such a policy on the books,²⁶⁵ reflecting a broad consensus within the law enforcement community that prohibiting officers from firing at or into moving vehicles is just plain sound policy.

In March 2016, in the wake of the numerous high-profile officer-involved shooting incidents across the country, the Police Executive Research Forum (“PERF”), a non-profit police research and policy organization, published a set of Guidelines on the Use of Force.²⁶⁶ Noting that such policy had been among PERF’s recommendations “for years,” the organization encouraged law enforcement agencies that had not yet done so, to incorporate a prohibition against firing at moving vehicles into their use of force policies and training.²⁶⁷ In the publication announcing PERF’s Guidelines on the Use of Force, the Denver Police Chief acknowledged revising his agency’s policies and training in recognition of the fact that seven officers had fired into moving vehicles in the prior decade.²⁶⁸ The law enforcement leaders behind PERF’s guidelines emphasized the importance of adopting such a rule: “[I]n the large majority of cases, a strict rule against

²⁶⁴ CHI. USE OF FORCE, *supra* note 204, at 3.

²⁶⁵ POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 44 (2016), <http://www.policeforum.org/assets/30%20guiding%20principles.pdf> [hereinafter PERF USE OF FORCE GUIDELINES] (noting that the following police departments had active policies: New York Police Department (enacted in 1972), Boston Police Department, Chicago Police Department, Cincinnati Police Department, Denver Police Department, Philadelphia Police Department, and Washington, DC Metropolitan Police Department); *see also* DEP’T OF JUSTICE, GUIDE TO CRITICAL ISSUES IN POLICING 3, <https://www.justice.gov/crs/file/836416/download> (acknowledging that “[p]olice departments are also reviewing and tightening their policies on high-speed vehicle pursuits and to prohibit shooting at or from moving vehicles, in order to reduce the risks to the public”).

²⁶⁶ PERF USE OF FORCE GUIDELINES, *supra* note 265, at 1-2.

²⁶⁷ *Id.* at 44. (“Agencies should adopt a prohibition against shooting at or from a moving vehicle unless someone in the vehicle is using or threatening deadly force by means other than the vehicle itself.”)

²⁶⁸ *Id.* at 45.

shooting at cars will not only save lives, it will keep our cops out of trouble, out of the press, and God forbid, out of jail.”²⁶⁹

In October 2017, a coalition of eleven organizations representing various factions within the law enforcement community issued their own set of guidelines on the use of force, the “National Consensus Policy on Use of Force,” which also advocated for agencies to adopt a prohibition against firing at or into a moving vehicle.²⁷⁰ The guidance was “a collaborative effort among 11 of the most significant law enforcement leadership and labor organizations in the United States,” namely:

- Association of State Criminal Investigative Agencies
- Commission on the Accreditation of Law Enforcement Agencies, Inc.
- Fraternal Order of Police
- Federal Law Enforcement Officers’ Association
- International Association of Chiefs of Police
- Hispanic American Police Command Officers Association
- International Association of Directors of Law Enforcement Standards and Training
- National Association of Police Organizations
- National Association of Women Law Enforcement Executives
- National Association of Black Law Enforcement Executives
- National Tactical Officers Association²⁷¹

More specifically, the National Consensus Policy on Use of Force states:

Firearms shall not be discharged at a moving vehicle unless (1) a person in the vehicle is threatening the officer or another person with deadly force by means other than the vehicle; or (2) the vehicle is operated in a manner deliberately intended to strike an officer or another person, and all other reasonable means of defense have been exhausted (or are not present or practical), which includes moving out of the path of the vehicle.²⁷²

²⁶⁹ *Id.* at 46.

²⁷⁰ NATIONAL CONSENSUS POLICY, *supra* note 19, at 4.

²⁷¹ *Id.* at 2, 16.

²⁷² *Id.* at 4.

According to its authors, the National Consensus Policy reflects “the best thinking of all consensus organizations” and was intended “to serve as a template for law enforcement agencies to compare and enhance their existing policies.”²⁷³

The Philadelphia Police Department policy includes an explanation for why officers are prohibited from discharging a firearm at or from a moving vehicle:

- To avoid unnecessarily endangering innocent persons, both when inside the vehicle and in the vicinity.
- Bullets fired at a moving vehicle are extremely unlikely to disable or stop the vehicle.
- Disabling the driver of a moving vehicle creates unpredictable circumstances that may cause the vehicle to crash and injure other officers or innocent bystanders.
- Moving to cover in order to gain and maintain a superior tactical advantage maximizes officer and public safety while minimizing the need for deadly or potentially deadly force.²⁷⁴

Experts explain that firing at or into a moving vehicle “often presents an unacceptable risk to innocent bystanders.”²⁷⁵ Even if, despite the odds, the vehicle is successfully disabled by the officer’s shots, it still has the potential to continue to travel for some distance under its own power or momentum, creating yet another hazard.²⁷⁶ In addition, if the driver is killed or wounded, the vehicle could travel uncontrolled, presenting risk to surrounding officers and others in the vicinity.²⁷⁷

Consensus is also building within the legal community on this issue. The American Law Institute draft guidelines regarding the use of force also include a prohibition against firing at or into moving vehicles.²⁷⁸

Given this relatively broad consensus among experts in the law enforcement and legal communities, it is appropriate to question why

²⁷³ *Id.* at 2.

²⁷⁴ PHILA. POLICE DEP’T, DIRECTIVE 10.1 §(4)(H)(3) (Sept. 18, 2015), <https://www.phillypolice.com/assets/directives/D10.1.pdf>.

²⁷⁵ NATIONAL CONSENSUS POLICY, *supra* note 19, at 14.

²⁷⁶ *See id.*

²⁷⁷ *Id.*

²⁷⁸ *See* PRINCIPLES OF THE LAW POLICING: DRAFT GUIDANCE ON USE OF FORCE (TENTATIVE DRAFT NO. 1) § 5.04 (AM. LAW INST. 2017) (“Some uses of force are almost invariably disproportionate and for that reason should be barred. Many agencies already prohibit . . . firing at or from moving vehicles except in situations in which the officers or others face an imminent threat of death or serious injury.”).

this view is not reflected when the Court interprets reasonableness under *Graham*. In his dissent in *Scott*, Justice Stevens specifically acknowledged that the majority opinion was at odds with broadly used police department policies.²⁷⁹

Perhaps the Court has yet to find evidence in the record that is sufficiently compelling to convince a majority to override the broad discretion the Court bestows on police officers who are forced to make these split-second decisions. Among the four relevant Supreme Court cases, none of the amicus briefs filed by law enforcement entities discussed policy prohibitions against firing at moving vehicles. In *Plumhoff*, no law enforcement entity signed on as amici. In *Scott*, the only law enforcement entity that submitted an amicus brief was the Georgia Association of Police Chiefs, Inc. that filed in support of neither party, but rather, to convince the Court that the PIT maneuver employed by *Scott* can be executed in a safe manner and thus should remain available to law enforcement.²⁸⁰ In *Brosseau*, the Police Officers Research Association of California Legal Defense Fund, along with several other, mostly state, police organizations filed an amicus brief in support of the officer arguing that the Ninth Circuit's decision created an unnecessary circuit split and denied fair warning to peace officers.²⁸¹ In *Mullenix*, the National Association of Police Organizations and National Sheriff's Association filed a brief in support of the officer focusing on the importance of the doctrine of qualified immunity to police officers.²⁸²

Acknowledging that these law enforcement entities have weighed in to support the officers, it is important to bear in mind that law enforcement organizations have a vested interest in minimizing the

²⁷⁹ *Scott v. Harris*, 550 U.S. 372, 394 (2007) (Stevens, J., dissenting) (“There is no evidentiary basis for an assumption that dangers caused by flight from a police pursuit will continue after the pursuit ends. Indeed, rules adopted by countless police departments throughout the country are based on a judgment that differs from the Court’s.” (citing Brief of Amicus Curiae, Georgia Association of Chiefs of Police, Inc. in Support of Neither Party at 52, *Scott v. Harris*, 550 U.S. 372 (2007) (No. 05-1631), 2006 WL 3693417)).

²⁸⁰ Brief of Amicus Curiae, Georgia Association of Chiefs of Police, Inc. in Support of Neither Party at 2-3, *Scott v. Harris*, 550 U.S. 372 (2007) (No. 05-1631), 2006 WL 3693417.

²⁸¹ See Brief Amicus Curiae of Police Officers Research Association of California Legal Defense Fund and Other Groups in Support of Petition for Writ of Certiorari at 6-10, *Brosseau v. Haugen*, 543 U.S. 194 (2004) (No. 03-1261), 2004 WL 692248.

²⁸² See Brief of Amici Curiae National Association of Police Organizations and National Sheriffs' Association in Support of Petitioner at 4-10, *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (No. 14-1143), 2015 WL 1848099.

legal constraints imposed by the Court on their members such that they have more flexibility to set their own rules and regulations. For example, the Georgia Association of Police Chiefs filed their amicus brief in *Scott* to dissuade the Court from banning the “Precision Intervention Technique” (“PIT maneuver”) as unconstitutional, despite the fact that few law enforcement agencies allow for the use of this tactic.²⁸³

Further, law enforcement agency policies governing how, when and why officers engage in vehicle pursuits are also relevant here. Experts advocate for, and many, if not most, departments have policies that not only allow officers to terminate a vehicle pursuit, but actually require them to disengage when the circumstances indicate the public risk outweighs the law enforcement objective.²⁸⁴ For example, the model vehicle pursuit policy promoted by the International Chiefs of Police requires officers to “reevaluate and assess the pursuit situation including all of the initiating factors and terminate the pursuit whenever it is reasonable to believe the risks associated with continued pursuit are greater than the public safety benefit of making an immediate apprehension.”²⁸⁵ Contrary to the view expressed by the Supreme Court, some research suggests termination of pursuits improves safety because subjects more often than not would be inclined to stop driving recklessly once the police end their pursuit.²⁸⁶

²⁸³ The term “PIT maneuver” refers to “maneuvers in which the pursuing vehicle makes contact with the back end of the fleeing vehicle, causing it to spin out, or lose control, prompting the fleeing driver to stop.” CYNTHIA LUM & GEORGE FACHNER, POLICE PURSUITS IN AN AGE OF INNOVATION AND REFORM, THE IACP POLICE PURSUIT DATABASE 31 n.17 (2008), [hereinafter, IACP POLICE PURSUIT DATABASE]. According to a 2008 review of department policies governing vehicle pursuits conducted on behalf of the International Association of Police Chiefs, approximately three percent of agency policies reviewed allowed for the use of “PIT” maneuvers. *Id.* at 31. Moreover, according to data compiled in the IACP database, the PIT maneuver was used to terminate only 0.7% of vehicle pursuits. *Id.* at 66.

²⁸⁴ According to a 2008 review of department policies governing vehicle pursuits conducted on behalf of the International Association of Police Chiefs, approximately two-thirds of department policies are “restrictive,” meaning that they “restrict decisions of officers to specific criteria such as type of offense, speed, etc.” IACP POLICE PURSUIT DATABASE, *supra* note 283, at 33.

²⁸⁵ IACP VEHICULAR PURSUIT MODEL POLICY, *supra* note 102, at 3.

²⁸⁶ According to the IACP, “[t]here is also little evidence that more individuals will flee if the police adopt more restrictive pursuit policies (or even no-pursuit policies).” IACP POLICE PURSUIT DATABASE, *supra* note 283, at 25. In a survey of jailed suspects who had been involved in a high-speed pursuit, seventy percent stated they would have slowed down if police had terminated the pursuit. O’Connor & Norse, *supra* note 29, at 513 (citing John Hill, *High-Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction*, 71 FBI L. ENFORCEMENT BULL. 14 (2002)).

CONCLUSION

Today, there are numerous controversies related to policing and police accountability that have resulted in deeply felt conflict between law enforcement agencies and the communities they serve. Such conflict can seriously undermine public safety. It would seem logical that courts, which play an important role in the police accountability infrastructure, would find it appropriate and necessary to reinforce sound policing strategies and tactics for which there is a broad consensus of support among experts.

As outlined above, law enforcement experts and agencies generally agree that firing at or into moving vehicles is an unsound police tactic. The Supreme Court should recognize this. Moreover, the Court should reconsider its opinion that using deadly force is almost always a more effective way to end a vehicle pursuit than merely abandoning the pursuit. Most law enforcement experts and policies do not support this view. Instead they demand that officers abandon a pursuit when the circumstances become unreasonably dangerous.²⁸⁷ There is debate over the legitimacy of these pursuits because so many arise from minor traffic infractions.²⁸⁸ Many of the shooting incidents at issue in the federal cases discussed herein involve vehicle pursuits that became so unsafe that they probably should have been abandoned well before the chase was terminated by the discharge of a firearm. For example, in *Plumhoff*, officers persisted in a pursuit traveling at speeds of over 100 miles per hour, attempted a “rolling roadblock” thereby putting the officers in jeopardy — all to apprehend a subject who was pulled over for a broken headlight.²⁸⁹

Supreme Court jurisprudence should evolve to better reflect law enforcement expertise on these issues and the Court would be wise to show greater deference to lower courts that do so. There is precedent

²⁸⁷ According to the 2008 IACP policy review, 97.8% of department policies include directives regarding when to terminate a pursuit. IACP POLICE PURSUIT DATABASE, *supra* note 283, at 32. For example, this view is reflected in the Illinois Law Enforcement Training and Standards Board Police Pursuit Guidelines, which are “designed to inform the decisions of law enforcement agencies in the formulation of policies governing pursuits,” and advocate for the termination of a pursuit when “[t]he danger to the public or the pursuing peace officer outweighs the necessity for immediate apprehension of the suspect.” ILLINOIS LAW ENFORCEMENT TRAINING AND STANDARDS BOARD POLICE PURSUIT GUIDELINES, REVISED MARCH 2004, at 9 (2004), <https://iletsbei.com/docs/publications/PURGUIDE.pdf>.

²⁸⁸ O’Connor & Norse, *supra* note 29, at 512 (“[M]any question the need for pursuit when the majority of police pursuits arise out of minor traffic violations.”).

²⁸⁹ *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2017 (2014).

for this kind of evolution in the Court's reasoning. For example, the Court's holding in *Garner* was predicated, at least in part, on the evolution of policies and practices by police departments.²⁹⁰ An easy first step would be for the Court to recognize the broad consensus within the law enforcement community that firing at or into a moving vehicle, whether to incapacitate the driver or the vehicle itself, is an unsound tactic. The Court should also consider whether an officer violated any relevant law enforcement agency policy when assessing the reasonableness of her conduct under *Graham*. Greater clarity from the highest court on these issues is essential to further define Fourth Amendment jurisprudence, particularly given that plaintiffs must prove a violation of clearly established law to overcome the officer's qualified immunity protection. Clearer definition of the legal boundaries will provide better guidance to potential litigants and better direction to lower courts who are closest to the facts when evaluating individual cases.²⁹¹ Moreover, it could also encourage police departments to improve policies and training on how to handle these kinds of incidents.

However, because Supreme Court jurisprudence is relatively slow to develop, state legislatures should also consider codifying a prohibition against firing at or into moving vehicles. Because most states already have relevant statutes on the books, incorporating this prohibition could be accomplished through amendments to existing law. As outlined above, although many police departments have adopted such policies prohibiting firing at or into a motor vehicle, the incidents continue to occur with relative frequency. Having state laws on the books that would subject law enforcement personnel to potential criminal or state civil liability would place additional pressure on departments to ensure that their officers are appropriately trained and would serve as an additional deterrent to the conduct of individual officers.²⁹²

²⁹⁰ *Tennessee v. Garner*, 471 U.S. 1, 2 (1985) (“[I]n light of the varied rules adopted in the States indicating a long-term movement away from the common-law rule, particularly in the police departments themselves, that rule is a dubious indicium of the constitutionality of the Tennessee statute.”)

²⁹¹ Other commentators have recognized the lack of guidance provided by the relevant Supreme Court cases. See, e.g., Gross, *supra* note 27, at 160 (“The decisions in *Garner*, *Graham*, *Saucier*, *Scott*, *Plumhoff*, and *Mullenix* offer almost no guidance to law enforcement, judges, or juries as to what types of force are reasonable under a specific set of circumstances.”)

²⁹² Enhancing state law is considered an important source of police reform. See generally, Roger Goldman, *Importance of State Law in Police Reform*, 60 ST. LOUIS U. L.J. 363 (2016).

Controversial use of force incidents continue to gain national attention and generate debate about policing tactics and accountability among politicians and communities across the country. The debate often hinges on the challenge inherent in balancing the need to afford law enforcement officers the discretion to protect themselves when responding to rapidly unfolding events, with the need to protect the lives and constitutional rights of citizens. Although there remain numerous, substantial controversies regarding how to strike the right balance, addressing this particular issue could be an easy quick win for all, enhancing safety for officers and the public alike. Experience has shown and law enforcement experts agree that a prohibition against firing at or from a moving vehicle can result in significantly fewer shooting incidents without jeopardizing officer safety.²⁹³ The Court and state legislatures should take note.

²⁹³ When explaining the justification for recommending that police agencies adopt prohibitions against shooting at or into moving vehicles, the Police Executive Research Forum (“PERF”) noted the “immediate, sharp reduction in uses of lethal force in New York City” following the NYPD’s adoption of such policy in 1972. PERF USE OF FORCE GUIDELINES, *supra* note 265, at 15. The year after the policy change there was a thirty-three percent reduction in shooting incidents, and a continuous decline thereafter. *Id.* at 26. Yet, the change did not appear to adversely impact officer safety, as the number of officers injured or killed in the line of duty also declined significant following the policy change. *Id.* According to John F. Timoney, a former First Deputy Commissioner of the NYPD who went on to lead the Philadelphia and Miami Police Departments, similar policies implemented in those cities reduced police shootings without endangering officers’ safety. *See id.* at 47.