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## Note – Return to “Reasonable” in Section 1983 Police Pursuit Excessive Force Litigation

Benjamin Buchwalter

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## Notes

### Return to “Reasonable” in Section 1983 Police Pursuit Excessive Force Litigation

BENJAMIN BUCHWALTER\*

*Scott v. Harris set the standard that a police officer’s use of deadly force to terminate a high-speed chase is presumptively reasonable, even if it is likely to kill or seriously injure the suspect. The implications of this are troubling: twenty-eight percent of people killed in police pursuits each year are innocent bystanders, and vehicle accidents are the most common cause of police deaths. Scott was wrongly decided because it departed from the case-by-case reasonableness standard upon which the Supreme Court previously relied for excessive force cases, failed to consider the potential risk that these chases added to the public, and did not contemplate safe alternative means of punishing suspects.*

*Despite the dangers of Scott’s presumptive reasonableness standard, reversal is not likely. This was emphasized by the Supreme Court’s 2014 Plumhoff v. Rickard decision, in which the Court reaffirmed—by a nine-to-zero margin—that use of deadly force to terminate a high-speed chase is presumptively reasonable. Accordingly, this Note argues that federal courts should consider state and local excessive force guidelines to determine what is “reasonable” and what violates “clearly established law.” This Note also presents guideline excessive force policies that are tailored to urban and rural areas. These policies take into account the danger that police chases add to the public and set forth means that are available to apprehend suspects safely at a later time, while understanding the duty of police officers to ensure that potentially violent criminals are apprehended quickly.*

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## INTRODUCTION

On December 14, 2013, a shooting suspect fled from police officers and slammed into Stacy Garcia Gray’s car, killing the mother of three.<sup>1</sup> Two days later, Edward Gaerlan was severely injured when another suspect—also attempting to flee from the police—struck his Jeep, causing it to flip over.<sup>2</sup> This pursuit began when officers received a report that the suspect had a knife in a Target store.<sup>3</sup> A bystander who witnessed the incident highlighted the avoidable nature of this accident: “I don’t think necessarily if somebody has a knife that that has to be a high-speed chase where you’re putting lots and lots of lives in danger.”<sup>4</sup> These incidents rounded out a set of four high-speed police chases near Los Angeles that killed five people and hospitalized a half dozen more in only four days.<sup>5</sup>

High-speed police chases create a significant danger for innocent bystanders, whether they occur in cities, towns, or rural areas. In their portrayal of police pursuits, films, television shows, and television news programs often assume that this risk is necessary for the police to catch and apprehend dangerous criminals. However, such pursuits have

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1. Elex Michaelson, *Police Chase Policies Questioned After Four Deaths*, KABC LOS ANGELES (Dec. 16, 2013, 12:00 AM), [http://abclocal.go.com/kabc/story?section=news/local/los\\_angeles&id=9362857](http://abclocal.go.com/kabc/story?section=news/local/los_angeles&id=9362857).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

dangerous consequences: twenty-eight percent of those killed in high-speed police chases in 2007 were innocent civilians,<sup>6</sup> and vehicle accidents are the most common cause of police deaths, accounting for forty percent between 1987 and 2006.<sup>7</sup> The deaths of these officers and innocent bystanders should be prevented at all reasonable costs.

These unnecessary deaths raise a question central to the Supreme Court's nearly three-decade struggle with deadly force litigation: When, in the interest of public safety, are police officers better off temporarily letting a suspect go in order to avoid unnecessarily risking the lives of innocent bystanders, police officers, and the suspects themselves? The Supreme Court addressed this question when it reviewed the use of deadly force to terminate high-speed car chases in *Scott v. Harris*.<sup>8</sup>

*Scott* involved a police pursuit that began when an officer clocked Harris driving seventy-three miles per hour in a fifty-five miles per hour zone.<sup>9</sup> After Harris initiated a high-speed pursuit, Officer Scott used a ramming technique to terminate the pursuit by pushing Harris' car off the road, but the car flipped over and caused injuries that left Harris paralyzed.<sup>10</sup> In a departure from precedent,<sup>11</sup> the Supreme Court held that Officer Scott's use of deadly force was presumptively reasonable because no reasonable jury could find that the chase lacked the inherent danger to justify such force.<sup>12</sup> To make this determination, the Court focused on the relative culpability of each party in beginning the pursuit, and barely considered the danger that the pursuit itself could have added to the public.<sup>13</sup>

In a lively dissent, Justice Stevens noted that the officer's decision to pursue Harris may have *increased* the danger to the public, and that the public might have been better served if the police had temporarily suspended the pursuit and apprehended Harris later.<sup>14</sup> Justice Stevens' concerns did not persuade the eight-to-one Court, and in its 2014 *Plumhoff v. Rickard* decision, the Court reaffirmed that use of deadly force to

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6. FATALITIES IN MOTOR VEHICLE TRAFFIC CRASHES INVOLVING POLICE IN PURSUIT, NCSA INFORMATION SERVICES TEAM 51-52 (2008), available at [http://www.pursuitsafety.org/images/PURSUIT\\_A%201982-2007.PDF](http://www.pursuitsafety.org/images/PURSUIT_A%201982-2007.PDF) [hereinafter CRASHES INVOLVING POLICE IN PURSUIT].

7. See CYNTHIA LUM & GEORGE FACHNER, POLICE PURSUITS IN AN AGE OF INNOVATION AND REFORM, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE 7 (2008) ("By far, vehicle-related incidents are the most likely cause of on-duty police deaths, the largest proportion of which are accidents.").

8. 550 U.S. 372 (2007).

9. *Id.* at 374.

10. *Id.* at 375.

11. See *infra* Part I.A.

12. *Scott*, 550 U.S. at 384, 386.

13. *Id.* at 384.

14. *Id.* at 393 (Stevens, J., dissenting).

terminate a high-speed chase is presumptively reasonable, almost regardless of the facts of the individual case.<sup>15</sup>

*Scott* has become a casebook example of the Court's standard for summary judgment and interlocutory review. It is perhaps more significant, however, because it changed the rules for police officer liability for use of excessive force following high-speed chases in litigation brought under 42 U.S.C. § 1983. Section 1983 enables individuals to sue state actors in state or federal court for violations of federal constitutional rights.<sup>16</sup> The Supreme Court has held that unreasonable use of deadly force constitutes an "unmatched" violation of the Fourth Amendment prohibition on unreasonable searches and seizures.<sup>17</sup> Until *Scott*, use of deadly force was only permitted in limited circumstances determined on a case-by-case basis.<sup>18</sup> *Scott* moved the goal posts for review of deadly force used against a particular class of suspects—those who attempt to flee police detection, even in cases where the underlying offense is a minor or nonviolent traffic infraction.<sup>19</sup>

This departure from the Court's prior case-by-case analysis<sup>20</sup> exposes innocent bystanders to the dangers of police chases and has created a dangerous precedent for trial courts.<sup>21</sup> Though the full scope of *Scott*'s influence on local police departments has not yet become apparent, local police departments can develop more restrictive policies, especially considering that "local community concerns can trump court rulings, a phenomenon which does not always characterize the relationship between court rulings and police practices."<sup>22</sup>

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15. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021 n.3 (2014) ("In *Scott*, however, we declined to 'lay down a rule requiring the police to allow suspects to get away whenever they drive so recklessly that they put other people's lives in danger,' concluding that the Constitution 'assuredly does not impose this invitation to impunity-earned-by-recklessness.'"). The Court also held that even if their conduct was not reasonable, the officers would "still be entitled to summary judgment based on qualified immunity." *Id.* at 2023. A complete discussion of qualified immunity is outside the scope of this Note. For an in depth discussion of *Scott*'s impact on the Court's qualified immunity jurisprudence, see generally Mark R. Brown, *The Rise and Fall of Qualified Immunity: From Hope to Harris*, 9 NEV. L.J. 185 (2008); see also *George v. Morris*, 736 F.3d 829, 835–36 (9th Cir. 2013); *id.* at 849–50 (Trott, J., concurring in small part and disagreeing in large part).

16. 42 U.S.C. § 1983 (2011) ("Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.").

17. See *Garner v. Tennessee*, 471 U.S. 1, 9 (1985); see also U.S. Const. amend. IV.

18. Specifically, when the use of force is "necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury." *Garner*, 471 U.S. at 12–13; see *infra* notes 29–35 and accompanying text.

19. *Scott*, 550 U.S. at 382 n.9 ("[Harris] committed only a minor traffic offense and, as far as the police were aware, has no prior criminal record.").

20. *Id.* at 396 (Stevens, J., dissenting).

21. See *infra* Part II.C.

22. LUM & FACHNER, *supra* note 7, at 6.

Even before *Scott*, individuals attempting to sue state officers under § 1983 faced the challenging burden of proving that the officer’s actions were unreasonable and violated a “clearly established” constitutional principle at the time of the incident.<sup>23</sup> *Scott*’s presumption of reasonableness makes this burden more difficult to satisfy. It is now nearly impossible for a plaintiff injured by an officer’s use of force to terminate a pursuit to establish that the officer’s conduct was unreasonable—let alone that it violated a “clearly established” constitutional principle. A better rule would consider whether an officer’s conduct violated clearly established state or local guidelines to determine whether an officer’s conduct was, in fact, reasonable. Such a rule would empower state and local governments to protect the safety of their citizens and police officers from the dangers of unreasonable police chases by enacting policies and legislation to clarify when the use of excessive force to terminate a police pursuit would be considered reasonable.<sup>24</sup>

This Note analyzes *Scott*’s problematic holding and suggests a statutory guide for local governments to restrict the nearly boundless scope of police authority to use deadly force to terminate high-speed pursuits. Part I discusses leading excessive force case law prior to *Scott* and the Supreme Court’s departure from this precedent. Part II discusses three problems that undermine *Scott*’s reasonableness analysis, including its troubling impact on lower courts. Part III encourages local governments to adopt statutes that clearly define when an officer’s conduct is not reasonable, and suggests unique guidelines for urban and rural areas.

#### I. *SCOTT* CREATED A PER SE RULE THAT IGNORES COURT PRECEDENT

Prior to *Scott*, the Court considered a number of important factors to determine whether an officer’s use of force to stop a fleeing suspect was reasonable. In the landmark case *Tennessee v. Garner*, for example, the Court held that an officer’s use of deadly force to stop a fleeing suspect was unreasonable because the suspect was unarmed and posed no lasting threat to the public.<sup>25</sup> The Court applied the *Garner* analysis for more than twenty years, always interpreting it to require a case-by-case reasonableness determination.<sup>26</sup> *Scott* departed from this precedent and adopted a per se rule that the use of a ramming technique to terminate a police pursuit is always reasonable, almost regardless of the

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23. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Harlow v. Fitzgerald*, 547 U.S. 800, 817 (1982); see 42 U.S.C. § 1983 (2011).

24. See *supra* note 6 and accompanying text.

25. *Tennessee v. Garner*, 471 U.S. 1, 3, 21 (1985).

26. See *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“[*Garner*’s] proper application requires careful attention to the facts and circumstances of each particular case . . .”).

facts of the particular chase.<sup>27</sup> When the Court reviewed the video of Scott's chase, it applied this per se rule rather than the *Garner* case-by-case reasonableness test that the district and appellate courts had previously applied.<sup>28</sup> This Part argues that the Court should not have adopted this presumption.

A. *SCOTT* ABANDONED THE COURT'S CASE-BY-CASE PRECEDENCE

*Scott's* holding was a dramatic departure from two prior cases that together set a clear and workable standard for deadly force litigation. The facts of *Garner* and *Graham v. Connor* are distinct from the facts in *Scott* because neither involved a high-speed police pursuit. However, both cases relied on an analysis of the facts of a particular case to guide the ultimate determination of whether the officer's conduct was reasonable; this case-by-case analysis can and should be applied to any deadly force case.

*Garner* involved an unarmed suspect who was shot and killed by an officer while the suspect fled the scene.<sup>29</sup> The Court held that the officer acted unreasonably because deadly force can only be used if it is "necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury."<sup>30</sup> The Court determined that the officer's use of deadly force was not reasonable because, even if the act was necessary to prevent escape, the unarmed suspect did not pose significant threat.<sup>31</sup> The Court reasoned that use of deadly force constitutes a seizure subject to the Fourth Amendment and that the nature of the intrusion should be balanced against the governmental interests based on the totality of the circumstances.<sup>32</sup> Although the State has a significant interest in apprehending fleeing suspects, this alone does not justify use of deadly force because "[t]he intrusiveness of a seizure by means of deadly force is unmatched."<sup>33</sup> By weighing the officer's conduct against the specific suspect's conduct, *Garner* established a case-by-case analysis for deadly

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27. *Scott v. Harris*, 550 U.S. 372, 386 (2007) ("A police officer's attempt to terminate a dangerous high-speed 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.").

28. *See Harris v. Coweta Cnty., Ga.*, 433 F.3d 807, 815-16 (11th Cir. 2005).

29. *Garner*, 471 U.S. at 3-4.

30. *Id.* at 3.

31. *Id.* at 11 ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.").

32. *Id.* at 7-9.

33. *Id.* at 9.

force litigation<sup>34</sup> and set a high bar to justify the use of deadly force because “unmatched” intrusion “should trigger special consideration.”<sup>35</sup>

The next significant excessive force case, *Graham v. Connor*, involved a § 1983 claim against an officer who refused to allow a suspect detained on the side of the road to treat his diabetic reaction.<sup>36</sup> The Court held that an officer’s alleged use of force is properly analyzed under the Fourth Amendment “objective reasonableness” standard.<sup>37</sup> The Court clarified that this reasonableness test “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue . . . and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.”<sup>38</sup> In so holding, *Graham* reaffirmed *Garner* and solidified the standard for deadly force, upon which courts relied until *Scott*.

Neither *Garner* nor *Graham* contemplated a per se rule justifying the use of deadly force against suspects that disregarded the specific facts at issue. If *Scott* had relied on *Garner* and *Graham*, the Court could have properly found that Officer Scott’s conduct was unreasonable.<sup>39</sup> As in *Garner*, the deadly force in *Scott* was an unmatched intrusion, the police pursuit was not necessary to prevent escape,<sup>40</sup> and the chase could have added danger to the public.<sup>41</sup> Writing for the Court, Justice Scalia refused to consider the *Garner* factors, however, and re-framed the precedent by noting that “*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute ‘deadly force.’ *Garner* was simply an application of the Fourth Amendment’s ‘reasonableness’ test to the use of a particular type of force in a particular situation.”<sup>42</sup> Put differently, Justice Scalia essentially

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34. *Id.* at 8 (“To determine the constitutionality of a seizure ‘[w]e must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.’”) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

35. Karen M. Blum, *Scott v. Harris: Death Knell for Deadly Force Policies and Garner Jury Instructions?*, 58 SYRACUSE L. REV. 45, 57 (2007).

36. *Graham v. Connor*, 490 U.S. 386, 389 (1989). As a result of not treating the diabetic reaction, Graham passed out and suffered a broken foot, cuts on his wrists, a bruised forehead, and an injured right shoulder. *Id.* at 390.

37. *Id.* at 388.

38. *Id.* at 396.

39. Prior to *Scott*, many observers thought that *Garner* “provided a reliable backdrop against which to evaluate such police pursuit tactics as ramming . . . [but] the contours of reasonableness changed significantly after the decision in *Scott*.” Geoffrey P. Alpert & William C. Smith, *Police Pursuits After Scott v. Harris: Far from Ideal?*, IDEAS IN AM. POLICING (Police Foundation, D.C.), June 2008, at 4, available at [http://www.policefoundation.org/sites/g/files/g798246/f/Alpert%20\(2008\)%20-%20Police%20Pursuits.pdf](http://www.policefoundation.org/sites/g/files/g798246/f/Alpert%20(2008)%20-%20Police%20Pursuits.pdf).

40. See *infra* Part II.B.

41. See *infra* Part II.A.

42. *Scott v. Harris*, 550 U.S. 372, 382 (2007) (citation omitted). This holding applies regardless of the severity of the underlying crime and whether the pursuit or use of force could add danger to the public. *Id.* at 386. (“A police officer’s attempt to terminate a dangerous high-speed chase that

isolated police pursuits from other excessive force cases and applied a brand new—much broader—Fourth Amendment standard that presumes reasonableness. Though *Garner* and *Graham* remain good law, *Scott* essentially rendered their holdings moot when applied to vehicle pursuits.<sup>43</sup>

Of course, the Court can apply unique standards for distinct situations. In *United States v. Montoya de Hernandez*, to pick one example, the Court held that “the Fourth Amendment’s balance of reasonableness is qualitatively different at the international border than in the interior,”<sup>44</sup> and thereby modified Fourth Amendment rights in these specific situations. *Scott*’s per se rule was wrongly decided, however, because it pulls Fourth Amendment protections out of the reach of an entire class of suspects,<sup>45</sup> but does not satisfy any particular government interests. In situations occurring along the U.S. border, as in *Montoya de Hernandez*, the government arguably has an interest in reducing Fourth Amendment protections.<sup>46</sup> Any supposed government interest contemplated by *Scott*’s standard is not being accomplished, however, because police pursuits often *add* danger to the public, and officers can use other means to catch and apprehend criminals.<sup>47</sup>

Applying this per se rule to the facts of *Scott*, Justice Scalia focused primarily on the threat to the public that Officer Scott sought to eliminate.<sup>48</sup> But instead of adopting a *Garner*-esque case-specific analysis, Justice Scalia concluded flatly 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.”<sup>49</sup> Despite purporting to consider the danger to public safety, Justice Scalia did not contemplate the risk to the public *added* by the officer’s decision to pursue

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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.”)

43. Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1136–37 (2008) (“[T]he Court not only emasculated *Garner*, but in the same paragraph—without comment or analysis—implicitly dismissed the factors articulated in *Graham* as central to analyzing reasonableness. In doing so, the Court reduced the Fourth Amendment regulation of reasonable force to its vaguest form . . . .”); Blum, *supra* note 35, at 59 (“This reconstruction of *Garner* so as to diminish its general applicability will prove detrimental to law enforcement agencies and to the communities they serve, including many innocent bystanders who have no culpability at all.”).

44. 473 U.S. 531, 538 (1985).

45. In addition, there is a significant risk that *Scott*’s standard will be applied to other types of excessive force rather than just to police pursuits, given that there is a dearth of Supreme Court guidance on excessive force more generally. See Harmon, *supra* note 43, at 1119–20, 1127.

46. Due to the interest in preventing smuggling and terrorism, “the Fourth Amendment balance between the interests of the Government and the privacy right of the individual are also struck much more favorably to the Government at the border.” *Montoya de Hernandez*, 473 U.S. at 540.

47. See *infra* Part II.A.

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

49. *Id.* at 386. For a detailed description of such available tactics, see *infra* Part II.B.

the chase, as would typically be required under a *Garner* analysis.<sup>50</sup> In fact, the suspect could likely have been safely apprehended later using widely available police tactics, such as GPS tracking. Though perhaps slightly overstated, this rule essentially authorizes “summary execution of anyone who flees from the police in a motor vehicle” and yet does nothing to reduce the number of innocent bystanders, police officers, and suspects who are killed in police pursuits each year.<sup>51</sup> While the Court’s broad reasonableness standard might reduce the potential for danger in a vacuum, a realistic review of police pursuits indicates that complete deference to officers’ decisions to use deadly force will do little to reduce the prevalence of pursuits and could add unnecessary danger.<sup>52</sup>

Justice Scalia’s approach established the per se rule<sup>53</sup> that the use of ramming techniques—which could cause serious injury or death—is *always* reasonable to terminate a vehicle pursuit,<sup>54</sup> rejecting the previously-accepted application of *Garner* to deadly force cases.<sup>55</sup> If the Court had applied *Garner*, Officer Scott’s actions may have been deemed unreasonable given that the Eleventh Circuit already determined that Harris’ conduct was not dangerous and rejected the argument that Harris’ attempt to flee necessitated excessive force.<sup>56</sup> In fact, the Eleventh Circuit noted that “Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns.”<sup>57</sup> In reviewing the videotape, though, the Court overruled this factual finding and determined that when the suspect created the risk, use of force to end a police chase was presumptively reasonable regardless of the consequences.<sup>58</sup>

Justice Stevens’ dissent highlights that a reasonable juror could have determined that Harris did not create a dangerous condition that justified the use of deadly force. After viewing the videotape, for example, Justice

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50. Harmon, *supra* note 43, at 1160 n.187.

51. Blum, *supra* note 35, at 55.

52. Alpert & Smith, *supra* note 39, at 4; JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE II (1994) (noting that “fleeing motorists become prime candidates for painful lessons at the ends of police nightsticks”).

53. *Scott*, 550 U.S. at 389 (Breyer, J., concurring) (“I disagree with the Court insofar as it articulates a per se rule.”); *Beshers v. Harrison*, 495 F.3d 1260, 1272 (11th Cir. 2007) (Presnell, J., concurring) (“For all of its talk of a balancing test, the *Harris* court has, in effect, established a per se rule . . .”).

54. Harmon, *supra* note 43, at 1139 n.98 (“The Court’s conclusion . . . likely represents something very close to a per se rule.”).

55. *Id.* at 1135.

56. *Harris v. Coweta Cnty., Ga.*, 433 F.3d 807, 815–16 (11th Cir. 2005), *rev’d sub nom. Scott*, 550 U.S. 372 (2007).

57. *Id.*

58. *Scott*, 550 U.S. at 380–81.

Stevens himself concluded that the pursuit was not necessarily dangerous<sup>59</sup> and that abandonment of the chase may have best served public safety.<sup>60</sup> Even if a jury deemed Harris' conduct dangerous, Justice Stevens emphasized that it was not "a capital offense, or even an offense that justified the use of deadly force rather than abandonment of the chase."<sup>61</sup> Thus, in finding Scott's use of excessive force reasonable, the Court's rule "fl[ies] in the face of the flexible and case-by-case 'reasonableness' approach applied in *Garner* and *Graham*."<sup>62</sup> *Scott* makes it more difficult for suspect-plaintiffs in § 1983 cases to survive summary judgment, but the broad reasonableness standard now threatens to prevent plaintiffs from recovery at all stages of litigation, as courts have recently used *Scott* to decline to read "deadly force" jury instructions at trial.<sup>63</sup>

*Scott*'s presumption has become even more entrenched with the Supreme Court's 2014 *Plumhoff* decision, which concerned another § 1983 high-speed pursuit case.<sup>64</sup> *Plumhoff* involved an excessive force case brought by the family of Donald Rickard, who was killed—along with a passenger—when police officers fired fifteen shots into his vehicle after a prolonged police pursuit.<sup>65</sup> As in *Scott*, the Justices watched a video of the pursuit at oral argument and determined that the officer's conduct was reasonable.<sup>66</sup> At oral arguments, the Court spent much of its time lecturing the plaintiff's attorney that, in order to prevail, he would need to show that it is "clearly established . . . that police cannot shoot to kill when a car is moving."<sup>67</sup> The Court ultimately concluded—after mere references to *Garner* and *Graham*—that "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."<sup>68</sup>

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59. *Id.* at 392 (Stevens, J., dissenting) ("At no point during the chase did respondent pull into the opposite lane other than to pass a car in front of him . . . and, on most of those occasions, used his turn signal . . . [T]he video does not reveal any incidents that could even be remotely characterized as 'close calls.'").

60. *Id.* at 393 (Stevens, J., dissenting) ("What would have happened if the police had decided to abandon the chase? We now know that they could have apprehended respondent later because they had his license plate number.").

61. *Id.*

62. *Id.* at 396.

63. *See, e.g.,* *Terranova v. New York*, 676 F.3d 305, 307, 309 (2d Cir. 2012) (holding that it was reasonable for the lower court to remove "deadly force" jury instructions because under *Scott*, "it was inappropriate to instruct the jury on the *Garner* factors in cases with dissimilar facts").

64. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2017–23 (2014).

65. *Id.*

66. Lyle Denniston, *Argument Analysis: To Decide, or Not*, SCOTUSBLOG (Mar. 4, 2014, 1:14 PM), <http://www.scotusblog.com/2014/03/argument-analysis-to-decide-or-not>.

67. *Id.* (quoting Chief Justice Roberts).

68. *Plumhoff*, 134 S. Ct. at 2022.

This Note argues that the Court has misapplied the “clearly established” standard in order to create a bright line rule that has proven to be problematic in practice. The question should not be whether officer conduct violated clearly established law in a vacuum, but rather whether the conduct violated clearly established law based on the facts of the particular case. Even if firing shots at a moving vehicle does not necessarily violate clearly established law, for example, firing fifteen shots to end a police pursuit might violate clearly established law if the conduct put innocent bystanders at risk or if the officer could have used less lethal means to apprehend the suspect. To make this fact-specific determination, courts should consider not only whether the officer’s conduct violated clearly established Supreme Court rulings, but also whether the conduct expressly violated state and local policies regulating excessive force.

#### B. THE SUPREME COURT EXPANDED ITS AUTHORITY BY REJECTING FACTUAL FINDINGS OF LOWER COURTS

*Scott* also stands for the rule that when video of a police pursuit exists, the Court can review this video itself rather than rely on the district court’s factual findings.<sup>69</sup> Typically, the Court must defer to the district courts for questions of fact, though it can review these findings for clear error.<sup>70</sup> In reviewing issues of fact, the Court should “give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.”<sup>71</sup> Additionally, even though he did not do so in *Scott*, Justice Scalia acknowledged that in a summary judgment motion, “facts must be viewed in the light most favorable to the nonmoving party.”<sup>72</sup> Both the district court and the Eleventh Circuit determined that Harris’ conduct did not, by itself, create a public danger that justified the use of deadly force.<sup>73</sup> Thus, if the Court deferred to local judges and weighed the facts in the light most favorable to the non-moving party, *Scott* would be an open-and-shut denial of summary judgment.

In reviewing the video, however, the Court took the then-unusual step of relying on its own senses to make factual determinations to justify a legal rule, echoing Justice Stewart’s famous line “I know [obscenity]

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69. *Scott v. Harris*, 550 U.S. 372, 378 (2007) (“The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.”).

70. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

71. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

72. *Scott*, 550 U.S. at 380; Fed. R. Civ. P. 56(c).

73. *Harris v. Coweta Cnty., Ga.*, 433 F.3d 807, 815–16 (11th Cir. 2005), *rev’d sub nom. Scott*, 550 U.S. 372 (2007) (“As noted by the district court judge, taking the facts from the non-movant’s viewpoint, Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns.”).

when I see it.”<sup>74</sup> If the Court had relied on the conclusions of local judges and weighed the evidence in the light most favorable to Harris, the result likely would have been different. Indeed, Justices Breyer and Ginsburg each acknowledged that watching the video footage of the car chase affected their determination of the case.<sup>75</sup>

After reviewing the videotape, the Court erred in holding that “no reasonable jury” could find that Harris’ driving was not per se dangerous. In fact, one Supreme Court Justice, three Appellate Court Judges, and the District Court Judge who presided over the case each found that Harris’ conduct was not inherently dangerous and did not justify the use of deadly force.<sup>76</sup> Moreover, studies indicate that different communities—which could form the jury pool for a case like *Scott*—have different conceptions of what constitutes dangerous driving and when police force is reasonable.<sup>77</sup> After watching the video, for example, most respondents to one study reported that they considered Harris’ driving to be dangerous, but African Americans and low-income workers “tended to perceive less danger in Harris’ flight, to attribute more responsibility to the police for creating the risk for the public, and to find less justification in the use of deadly force to end the chase.”<sup>78</sup>

The Court’s review of the video therefore raises two central concerns. First, it forces the Court to attempt to determine what a reasonable jury could decide based not on what an actual jury could decide, but based on the values of the nine Justices.<sup>79</sup> By neglecting the views of certain sub-communities that might be sympathetic to the suspect and critical of the officer, the Court essentially endorsed the potential for denying a victim the right to a jury of her peers.<sup>80</sup> Second, reviewing the video creates the potential for an inequitable application of justice; the presence or absence of a video should not contribute to the determination of a defendant’s guilt

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74. 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, 903 n.211 (2009) (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

75. *Scott*, 550 U.S. at 387 (Breyer, J., concurring) (“[W]atching the video footage of the car chase made a difference to my own view of the case.”); *id.* (Ginsburg, J., concurring) (“The video footage of the car chase . . . demonstrates that the officer’s conduct did not transgress Fourth Amendment limitations.”).

76. *Id.* at 392 (Stevens, J., dissenting); *Harris*, 433 F.3d at 815–16.

77. Kahan et al., *supra* note 74, at 864–65.

78. *Id.* at 841.

79. *See id.* at 853 (“The facts highlighted by Justice Scalia’s analysis . . . all relate to moral (and legal) attributions of blame. Perceptions of those facts . . . are likely to be motivated by extrinsic moral evaluations of the putatively blameworthy actors—Harris and the police.”).

80. *See* U.S. CONST. amend. VI. This system also undermines the legitimacy of the jury system—in both criminal and civil courts—because it prevents jurors from certain backgrounds from the exercising an opportunity to serve on a jury. Kahan et al., *supra* note 74, at 887 (“[O]rdering that the case be decided summarily based on the video was wrong precisely because doing so denied a dissenting group of citizens the respect they were owed, and hence denied the law the legitimacy it needs, when the law adopts a view of the facts that divides citizens on social, cultural, and political lines.”).

or innocence. Under *Scott*, an appellate court could find a defendant guilty based on watching the video,<sup>81</sup> but find the defendant not guilty in the absence of a video by relying on the lower court’s factual findings.

In *Morton v. Kirkwood*, for example, the Eleventh Circuit interpreted *Scott* to hold that “where an accurate video recording completely and clearly contradicts a party’s testimony, that testimony becomes incredible.”<sup>82</sup> The court held further that Kirkwood, an officer who shot the suspect-plaintiff Morton seven times after a vehicle pursuit, fell short of this standard because rather than a video recording, he merely offered “forensic evidence that [did] not so utterly discredit Morton’s testimony that no reasonable jury could believe it.”<sup>83</sup> Taken to its logical extreme, this holding indicates that it could become even more difficult for a suspect-plaintiff to succeed on a § 1983 claim if the police officer produces video that undermines any aspect of the victim’s testimony.

## II. *SCOTT*’S REASONABLENESS ANALYSIS IGNORED IMPORTANT FACTORS

The Supreme Court can depart from its own precedent (here, *Garner* and *Graham*) and create new rules with impunity.<sup>84</sup> But with *Scott*, the Court did not simply modify its excessive force analysis; it completely rewrote the book on use of deadly force as applied to vehicle pursuits. Even if, as Justice Scalia posits,<sup>85</sup> *Scott* simply marks a change in how the reasonableness test is applied, it ignores three central elements that courts should consider when analyzing use of force applied to police pursuits. First, the police pursuit *added* danger to the public. Second, the Court did not consider police tools that indicate strongly that the officers could have apprehended Harris safely if they had abandoned the chase. Third, subsequent decisions indicate that *Scott* is unworkable and has led to problematic holdings in the lower courts. The absence of these considerations underscores *Scott*’s flawed reasoning.

### A. THE PURSUIT ADDED DANGER TO THE PUBLIC

*Scott* erred in neglecting the severity of Harris’ underlying offense or the public safety risk *added* by pursuing—rather than abandoning—the chase. *Scott*’s holding contravenes the purpose of most police

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81. Or, as the case may be, selecting only the video that would be the most helpful to the prosecution’s case. In *Scott*, the Court’s opinion does not mention three other videotapes entered into the record, which may have corroborated Harris’s version of the facts. Alpert & Smith, *supra* note 39, at 11.

82. *Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013).

83. *Id.*

84. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“The doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.”).

85. *Scott v. Harris*, 550 U.S. 372, 382 (2007) (“*Garner* was simply an application of the Fourth Amendment’s ‘reasonableness’ test.”).

department policies regarding high-speed pursuits.<sup>86</sup> Indeed, according to a survey of pursuit policies nationwide, the average policy “mandates that an officer may initiate a high-speed pursuit only after the officer concludes that the risk to the public by not apprehending the suspect outweighs the dangers such a pursuit presents.”<sup>87</sup>

Georgia itself, where the pursuit at issue in *Scott* took place, requires that an officer terminate a pursuit when “the immediate danger to the public created by the pursuit is greater than the immediate or potential danger to the public should the suspect remain at large.”<sup>88</sup> Georgia police departments also mandate that officers abandon a pursuit “when the violator’s identity has been established to the point that later apprehension can be accomplished without danger to the public.”<sup>89</sup> Under Georgia’s guidelines, Scott’s conduct was unreasonable because Harris posed no danger to the public before the pursuit, did not add significant risk during the pursuit, and police could have apprehended him safely after the pursuit by tracking his license plate number (among other tactics). Courts should consider these state and local guidelines in their interpretation of whether an officer’s conduct was reasonable or violated clearly established law.

Moreover, most policies forbid pursuits when the underlying offence is a nonviolent misdemeanor or a traffic violation.<sup>90</sup> In *Scott*, the officers originally recorded Harris driving seventy-three miles per hour in a fifty-five miles per hour zone, and Harris had no warrants out for his arrest.<sup>91</sup> Because most police departments would not condone the type of protracted pursuit displayed in *Scott*, the officer’s conduct could not have been presumptively reasonable and would have been contrary to clearly established law in light of these policies.<sup>92</sup>

This conclusion is supported by the fact that the pursuit likely increased the risk of public danger.<sup>93</sup> A 1997 analysis of police pursuit policies nationwide acknowledged that “increasing the number of vehicles involved in police pursuits increased the likelihood of apprehension, but

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86. See Brief for the National Police Accountability Project as Amicus Curiae Supporting Respondents at \*5, *Scott*, 550 U.S. 372 (No. 05-1631), 2007 WL 128585 [hereinafter Brief for the National Police Accountability Project].

87. *Id.* at \*6.

88. Brief for the Georgia Association of Chiefs of Police, Inc. as Amicus Curiae Supporting Neither Party at \*33, *Scott*, 550 U.S. 372 (No. 05-1631), 2006 WL 3693417.

89. *Id.*

90. Brief for the National Police Accountability Project, *SUPRA* note 86, at \*6.

91. *Scott*, 550 U.S. at 390; Kahan et al., *supra* note 74, at 844.

92. See Brief for the National Police Accountability Project, *supra* note 86, at \*6; *Tennessee v. Garner*, 471 U.S. 1, 10-11 (1985) (“The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects.”).

93. Kahan et al., *supra* note 74, at 894 (“When police decide to initiate a high-speed chase—and to persist in it until they manage to force the suspect to lose control of his vehicle and crash—they create *immense* risk for members of the public generally.”).

also the chance of accidents, injuries, and property damage.”<sup>94</sup> Statistics indicate that an alarming number of civilians and innocent bystanders are killed as a result of police pursuits.<sup>95</sup> Of the 424 people killed in police pursuits in 2007 alone, for example, 119 (twenty-eight percent) were innocent civilians, compared to nine (two percent) who were police officers, and 296 (seventy percent) who were occupants of the chased vehicle.<sup>96</sup> If the officers had temporarily abandoned the pursuit and apprehended Harris later, they would not have created an added danger to the public or risked contributing to this troubling statistic.

There is no dispute that pursuit policies must give some deference to officers who “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.”<sup>97</sup> But allowing too much deference can cause unnecessary risk to suspects and innocent bystanders because these tense situations often involve an officer who has been in “an adrenaline-driven chase, and who is highly excited or extremely angry at the suspect.”<sup>98</sup> Thus, by virtue of having challenged police authority by attempting to flee, “fleeing motorists become prime candidates for painful lessons at the ends of police nightsticks,”<sup>99</sup> or, as the case may be, police vehicles.

Retributive force, a potential byproduct of these adrenaline-laden pursuits, raises additional Fourth Amendment concerns.<sup>100</sup> Although it is important to give some deference to officers in the line of duty, involved parties often disagree about what constitutes excessive force.<sup>101</sup> Thus, whatever deference is given to officers should be accompanied by policies that protect the public and state clearly what conduct is considered reasonable. If courts considered state and local policies to guide their reasonableness determinations, then officers would be more likely to abide by these regulations and err on the side of caution because of their knowledge that the use of force could trigger tort liability.

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94. Geoffrey P. Alpert et al., *Police Pursuit: Policies and Training*, National Institute of Justice, May 1997, at 2, available at <https://www.ncjrs.gov/pdffiles/164831.pdf>.

95. CRASHES INVOLVING POLICE IN PURSUIT, *supra* note 6, at 51–52.

96. *Id.*

97. *Graham v. Connor*, 490 U.S. 386, 397 (1989).

98. Geoffrey P. Alpert et al., *Police Pursuits and the Use of Force: Recognizing and Managing “The Pucker Factor”—A Research Note*, 14 JUST. Q. 371, 383 (1997).

99. SKOLNICK & FYFE, *supra* note 52, at 11.

100. *Schneekloth v. Bustamonte*, 412 U.S. 218, 223 (1973) (noting in a search consent case that use of police brutality to obtain a confession is unconstitutional).

101. Alpert et al., *supra* note 98, at 381. In one report, suspects reported the use of force in fifty-seven percent of criminal apprehensions, while in another report, only forty-seven percent of officer supervisors reported the use of force. *Id.* Force was officially reported in only seventeen percent of these apprehensions. *Id.*

B. HARRIS COULD HAVE BEEN APPREHENDED IF THE CHASE HAD BEEN ABANDONED

In today's world, evading police officers who have information about the suspect's car, license plate number, location, and potential destinations would require criminal sophistication on par with Hollywood heist films.<sup>102</sup> To apprehend suspects safely without a high-speed chase, police officers employ traditional tactics—including license plate tracking and helicopter detection<sup>103</sup>—or newly available technological methods<sup>104</sup> to prevent danger and catch the suspect without unnecessarily endangering the public.

Another of *Scott's* central weaknesses is that it has a short half-life because what society considers reasonable must depend partially on the resources available to police officers. Police technology has advanced dramatically since the days of *Dragnet*<sup>105</sup> and *Magnum, P.I.*,<sup>106</sup> and the Court should not identify a per se rule for police pursuits given that reasonableness factors are ever-changing in the face of new technology. Instead of taking this into account, the Court ignored technological advances and found that Scott's conduct was reasonable due partially to the necessity of preventing Harris from escaping.<sup>107</sup> In reality, newly available technology likely could have enabled the police to apprehend Scott later.

Paul D. Shultz, the Chief of Police for Lafayette, Colorado, has stated that new technological methods, including GPS systems, "are reducing the need for police pursuits. This technology enables officers to apprehend a dangerous suspect at a later date *when the safety of the community can be maximized.*"<sup>108</sup> In addition to GPS technology, Chief Shultz lauded automatic license plate recognition technology, which permits license plate numbers to be automatically synthesized using optical character recognition to glean additional information about the suspect—including name and address—so that the officers can temporarily suspend the search and make a safe arrest later.<sup>109</sup> Furthermore, high-tech radios enable officers to share photographs and video footage of the suspect

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102. See, e.g., *OCEAN'S ELEVEN* (Warner Bros. 2001).

103. See Ed Grabianowski, *How Police Chases Work*, HOW STUFF WORKS, <http://people.howstuffworks.com/police-chase.htm> (last visited Aug. 1, 2014) (explaining traditional methods used to end police pursuits).

104. See Paul D. Shultz, *The Future is Here: Technology in Police Departments*, POLICE CHIEF MAGAZINE, June 2008, available at [http://www.policechiefmagazine.org/magazine/index.cfm?article\\_id=1527&fuseaction=display&issue\\_id=62008](http://www.policechiefmagazine.org/magazine/index.cfm?article_id=1527&fuseaction=display&issue_id=62008) (describing modern technologies that could help to reduce the danger of police pursuits); see also *infra* notes 112–14 and accompanying text.

105. *Dragnet* (NBC television broadcast 1951–59).

106. *Magnum, P.I.* (CBS television broadcast 1980–88).

107. *Scott v. Harris*, 550 U.S. 370, 385 (2007).

108. Shultz, *supra* note 104 (emphasis added).

109. *Id.*

and share license plate numbers “across thousands of miles in minutes or even seconds.”<sup>110</sup> These modern tools to ameliorate the dangers of police pursuits are supported by the establishment of an international database with information and statistics about pursuit suspects.<sup>111</sup>

Police technology is sure to develop even further in the coming years. Such technology will increase the likelihood of safe apprehension in lieu of dangerous police chases. GPS bullets, for example, “allow officers to shoot tracking devices onto other vehicles to be monitored remotely and are already reportedly in use in four states” at little to no danger to the suspect.<sup>112</sup> The California Peace Officer’s Association has expressed interest in High Speed Avoidance Laser Technology, which would allow officers to reduce the speed of a fleeing suspect’s car by firing a laser at the engine.<sup>113</sup> Additionally, one company developed a microwave gun that would enable police officers to overload the fleeing suspect’s car’s electrical system and stop the engine.<sup>114</sup>

Current technologies, in addition to these promising experimental technologies, indicate that suspension of police pursuits in favor of safe apprehension of suspects without added public danger will only become more viable in the coming years.<sup>115</sup> As such use grows more common, Jay Stanley of the American Civil Liberties Union predicts that individuals “being chased by the police [will] realize that they have no hope of escape unless they somehow get that device off of their car.”<sup>116</sup> Use of such technology would reduce the necessity for high-speed pursuits, meaning that—absent *Scott*—officers would need to satisfy a high bar to properly use force.

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110. *Id.*

111. See LUM & FACHNER, *supra* note 7, at 1 (“The goal of this project was to create an internet-based, interactive computerized reporting system by which police agencies could submit and manage reports of vehicular pursuits and in turn, access the full database for statistical reports compiled from all pursuits recorded in the database.”). Programs like COMPSTAT already perform a similar function on a more local level by helping “precincts and boroughs share knowledge with each other.” *Id.* at 12.

112. Joshua Rhett Miller, *The Cop of the Future: Will Crooks Have a Chance Against Smart Bullets, Crowd-Stun Cannons and Eyes Everywhere?*, FOXNEWS.COM (Jan. 27, 2014), <http://www.foxnews.com/us/2014/01/27/cop-future-will-crooks-have-chance-against-smart-bullets-crowd-stun-cannons-and>.

113. Jessica Garrison, *High-Tech HALT to Chases*, L.A. TIMES, (May 29, 2000), <http://articles.latimes.com/2000/may/29/local/me-35280>.

114. Grabianowski, *supra* note 103.

115. Civil liberties advocates have lauded such technologies as “less lethal” than traditional methods of detection, and note that if used properly, they will not open a Pandora’s box of new privacy concerns. See Miller, *supra* note 112.

116. *Id.*

### C. *SCOTT* SET A DANGEROUS PRECEDENT FOR LOWER COURTS

The potential for the police to apprehend a suspect safely in the absence of force points toward a single conclusion that weighs strongly in favor of abandoning *Scott*: it created a dangerous precedent, which, when applied to other circumstances, *increases* the danger of pursuits to the public. Since *Scott*, district and appellate courts have grappled with the presumptive reasonableness standard for use of excessive force and have even extended the broad reasonableness standard to more dangerous situations.<sup>117</sup>

*Scott's* strain on lower courts is best illustrated by the Eleventh Circuit's *Beshers v. Harrison* decision.<sup>118</sup> The facts of *Beshers* are remarkably similar to the facts of *Scott*. Beshers' son filed a § 1983 claim after a police officer used deadly force to end a high-speed police pursuit, killing Beshers.<sup>119</sup> Despite his finding that the suspect's conduct was not "particularly heinous," and certainly did not warrant death, Judge Presnell's concurrence stated that *Scott* compelled him "to conclude that, as a matter of law, [Officer] Harrison had the right to end the chase by killing Beshers."<sup>120</sup> Judge Presnell explained that his decision and *Scott's* precedent troubled him because it ignores the danger to the suspect. "For all of its talk of a balancing test, the [*Scott*] court has, in effect, established a per se rule: Unless the chase occurs below the speed limit on a deserted highway, the use of deadly force to end a motor vehicle pursuit is always a reasonable seizure."<sup>121</sup> In other words, Judge Presnell lamented *Scott's* implication that officers could kill a suspect to end nearly *any* police pursuit.

Since *Beshers*, lower courts have found that use of force was not reasonable only when the facts were markedly distinct from *Scott*, like when officers terminated a pursuit by shooting the suspect multiple times.<sup>122</sup> But the *Plumhoff* decision, which applied *Scott's* reasonableness presumption even where the suspect and his passenger were killed after

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117. See, e.g., *Abney v. Coe*, 493 F.3d 412, 413 (4th Cir. 2007) (finding that an officer's use of deadly force on suspect on a motorcycle was objectively reasonable).

118. 495 F.3d 1260 (11th Cir. 2007).

119. *Id.* at 1263; 42 U.S.C. § 1983 (2011).

120. *Beshers*, 495 F.3d at 1271–72 (Presnell, J., concurring).

121. *Id.*

122. See, e.g., *Zion v. Nassan*, No. 12–3193, 2014 WL 323373, at \*5 (3d Cir. Jan. 30, 2014) ("[I]t may be reasonable for an officer to bump a car off the road to stop a reckless driver who is placing others in peril, while simultaneously unreasonable to shoot directly at a driver who is coming toward an officer when the officer has the opportunity to move out of the way."); *Lyte v. Bexar Cnty., Tex.*, 560 F.3d 404, 408, 417 (5th Cir. 2009) (finding that the officer's conduct was not reasonable when he fired his weapon through the suspect's rear window, killing a passenger). This is not always the case; the Tenth Circuit held, for example, that an officer's use of deadly force—shooting the suspect in the back of the head to end the pursuit—was reasonable. *Cordova v. Aragon*, 569 F.3d 1183, 1189–90 (10th Cir. 2010).

officers fired fifteen shots into the car, indicates that even use of deadly force by gunfire is now considered reasonable.<sup>123</sup>

Most cases involving the use of force to terminate a simple vehicle pursuit have resolved in favor of the officer, which supports the contention that these cases are no longer reviewed based on the jury’s determination of the facts, but based on *Scott’s* presumption favoring summary judgment.<sup>124</sup> This was one of the results that Judge Presnell criticized in *Beshers*: under the balancing test, “a jury ought to be deciding whether the risk posed by the fleeing suspect is too minimal, or the suspected crime too minor, to make killing him a reasonable way to halt the chase,” but due to *Scott’s* precedent, “that decision *has been taken away from the jury* where, as here, the fleeing suspect has endangered others.”<sup>125</sup> A more suitable test would apply the Court’s deadly force analysis not based on the type of weapon used—police firearm or police car—but on the likelihood that the use of force would kill or seriously injure the pursued suspect, the risk of harm to the public, and whether local policies condone the use of force in the given situation.

The Fifth Circuit’s decision in *Pasco v. Knoblauch*<sup>126</sup> highlights the powerful impact of the presumptive reasonableness standard because the Court decided *Scott* after the district court denied Officer Knoblauch’s motion for summary judgment. *Pasco* involved a police chase in which the suspect was killed as a result of injuries incurred after police used a ramming technique to terminate a pursuit.<sup>127</sup> The suspect had been driving over ninety miles per hour in a rural area to evade police detection.<sup>128</sup> The officer conceded that the chase did not directly threaten pedestrians or motorists and that *Pasco* slowed down toward the end of the pursuit, but argued that the ramming technique used to run the suspect’s car off the road was still reasonable.<sup>129</sup> Before *Scott*, the district court relied on *Garner* to hold that the officer “violated clear Fourth Amendment law because [he] ‘was acting contrary to police department protocol’ when he bumped *Pasco* off the road.”<sup>130</sup> The Fifth Circuit reversed, citing the newly decided *Scott* decision to hold that the officer’s ramming technique was permissible because “it was reasonable for the officer to choose to end the chase in light of the relative culpability of those at risk.”<sup>131</sup> *Pasco* underscores the sea change in excessive force litigation

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123. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022–23(2014).

124. *See supra* Part I.A; *see also Beshers*, 495 F.3d at 1263; *Pasco v. Knoblauch*, 566 F.3d 572, 580–81 (5th Cir. 2009).

125. *Beshers*, 495 F.3d at 1272 (Presnell, J., concurring) (emphasis added).

126. 566 F.3d 572 (5th Cir. 2009).

127. *Id.* at 574.

128. *Id.*

129. *Id.* at 579.

130. *Id.*

131. *Id.* at 581.

and indicates that some officers may interpret *Scott* to permit the use of force even when it violates the officer's own department protocol and will not reduce the risk of danger to the public.

*Scott's* broad application does not end there. Some circuits have approved of the use of force when the suspect's significant injury or death is even more assured. In *Abney v. Coe*, for example, the Fourth Circuit expanded *Scott's* reach to apply to excessive force used against suspects on motorcycles.<sup>132</sup> This is particularly troubling given that motorcycles provide very little protection; a police officer's ramming technique nearly guarantees the suspect's death. The court wrote, however, that "the fact that Abney was driving a motorcycle, rather than a car, does not require a different result since the probability that a motorist will be harmed by a Precision Intervention Technique is high in either circumstance."<sup>133</sup> The Fourth Circuit held that the officer's conduct was reasonable under the Fourth Amendment based on *Scott's* presumptive reasonableness standard, even though *Scott* did not contemplate use of deadly force for suspects who were fleeing on motorcycles.

Thus, in addition to applying too broadly in deadly force cases involving vehicles, *Scott's* extension to motorcycles creates confusion regarding how the presumptive reasonableness standard should be applied in analogous circumstances that could create an even greater risk of death or serious injury to the suspect.<sup>134</sup> For this reason, a case-by-case standard for police pursuit excessive force claims is preferable, and courts should defer to local policies and guidelines—taking into account the unique characteristics of the city or state—to determine reasonableness.

### III. PUBLIC POLICY FAVORS CIRCUMVENTING *SCOTT*

Given the problems inherent in *Scott*, a suitable solution would consider the potential danger that the police pursuit adds to the public, the ability for the officers to safely catch and apprehend the suspect later, and the workability of a new rule. To accomplish this, the Court would need to overrule *Scott's* presumptive reasonableness standard and re-establish the case-by-case reasonableness analysis that the Court approved in *Garner* and *Graham*.<sup>135</sup> But overruling an eight-to-one

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132. See *Abney v. Coe*, 493 F.3d 412, 413 (4th Cir. 2007) (finding that an officer's use of deadly force on suspect on motorcycle was objectively reasonable).

133. *Id.* at 418. Some courts have distinguished *Scott* in § 1983 claims involving motorcycles. See *Walker v. Davis*, 649 F.3d 502, 503 (6th Cir. 2011) (finding the officer's conduct unreasonable because the suspect's motorcycle did not pose an immediate threat to anyone).

134. Though not the focus of this Note, *Scott's* disdain for suspects who flee from police officers has led to restrictions for criminal defendants outside of the § 1983 context. See *Terranova v. New York*, 676 F.3d 305, 307 (2d Cir. 2012) (holding that it was reasonable for the lower court to remove "deadly force" jury instructions because under *Scott*, "it was inappropriate to instruct the jury on the *Garner* factors in cases with dissimilar facts").

135. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *Graham v. Connor*, 490 U.S. 386, 396 (1989).

precedent—even one as flawed as *Scott*—is not likely, as became clear in *Plumhoff*.<sup>136</sup> As a result, the onus falls on state and local governments to craft guidelines to clarify when the use of force is considered reasonable. Even if courts do not take state and local guidelines under consideration, establishing clear policies and training procedures could still reduce the prevalence of dangerous police pursuits.<sup>137</sup>

Any solution to this problem must also address Justice Scalia’s concern regarding the risk of creating the perverse incentive for suspects to evade police officers.<sup>138</sup> Of course, any new rule would not be workable if it was interpreted as condoning or promoting evasion of police officers. But this would not result from the rules proposed by this Note. In fact, by strengthening police tactics to apprehend the suspect *after* pursuit, suspects will know that any attempt to evade police detection would be futile result in a more significant punishment when the suspect was inevitably apprehended.

Local governments must take it upon themselves to determine the circumstances in which it would be reasonable to terminate any pursuit, especially considering that “reasonableness is judged against the backdrop of the law at the time of the conduct.”<sup>139</sup> If the pursuit is triggered by a nonviolent infraction and the police conduct would add danger to the public, for example, the officer’s use of potentially deadly force would be unreasonable. If a violent crime involving significant risk to others triggered the pursuit, on the other hand, then an officer’s conduct terminating the pursuit would still be presumptively reasonable. Given that the danger to the public will differ based on the specific jurisdiction, local governments could establish different rules depending on their size,

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136. See *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023–24 (2014) (holding in a nine-to-zero decision that use of force to terminate a police pursuit is presumptively reasonable).

137. To be clear, federal courts are under no *obligation* to consider local preferences when drawing their reasonableness determinations. Federal courts must defer, however, to state courts on questions of substantive law. *Erie R.R. Co. v. Thompkins*, 304 U.S. 64, 78 (1938). Courts frequently defer to state preferences on issues that could be applied differently depending on local values. See, e.g., *Johnson v. Williams*, 133 S. Ct. 1088, 1094 (2013) (ruling that federal courts should defer to state determinations in habeas proceedings). Indeed, Justice Brandeis famously hailed the status of states as laboratories of democracy. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 387 (1932) (Brandeis, J., dissenting). This Note argues that even in the absence of a federal obligation, taking such local preferences into account would mark a meaningful improvement in the Court’s excessive force jurisprudence because it is a common sense way to determine how a reasonable police officer in those circumstances would act.

138. *Scott v. Harris*, 550 U.S. 372, 385 (2007) (“[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. It is obvious the perverse incentives such a rule would create . . .”).

139. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). It is important to note, however, that local government standards may not impact the Court’s reasonableness analysis. The Court has determined, for example, that “qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.” *Id.*

resources, and level of congestion. This Part analyzes two potential rules: one for urban areas, using the San Francisco Police Department (“SFPD”) as an example, and the other for highways, using the California Highway Patrol (“CHP”) as an example.

#### A. URBAN AREAS: SAN FRANCISCO EXAMPLE

Due to congestion and the presence of pedestrians and other innocent bystanders, urban areas raise unique questions regarding the utility of high-speed police pursuits. The SFPD’s pursuit policy should guide other cities because its primary goal is the safety of city residents, it forbids ramming as a technique to terminate a pursuit, and it urges that a pursuit should be abandoned if it would add danger to the public.<sup>140</sup> But the SFPD’s pursuit policy was last revised in 1997—a decade before the Court overhauled deadly force standards related to pursuits. Thus, given the post-*Scott* potential for confusion regarding which techniques are reasonable for officers to use in police chases, the SFPD (and other cities) should revise its policy to specify exactly when an officer’s conduct would be considered unreasonable.

The SFPD encourages officers to take “reasonable efforts to apprehend fleeing violators,” but states that “if an emergency response or pursuit would pose an unreasonable risk to persons or property, the pursuit or emergency shall not be initiated.”<sup>141</sup> Moreover, when “it becomes apparent that the benefits of immediate apprehension are clearly outweighed by an unreasonable danger to the officer or others, the pursuit shall not be initiated or, if already in progress, shall be terminated.”<sup>142</sup> The policy encourages officers to consider a number of factors to determine whether to pursue the fleeing suspect, including the seriousness of the triggering crime, public safety, speed, volume of pedestrian and vehicular traffic, and weather conditions.<sup>143</sup>

The SFPD policy primarily condones “following actions,” such as boxing in, heading off, driving alongside, and channeling.<sup>144</sup> Offensive tactics are rarely used, and the policy specifies that officers “shall not attempt to stop a vehicle by ramming it or forcing the vehicle off the road.”<sup>145</sup> Other offensive tactics, like roadblocks and “road spikes,” are only approved in dire circumstances with heavy supervision.<sup>146</sup>

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140. S.F. POLICE DEP’T, GENERAL ORDER 5.05: RESPONSE AND PURSUIT DRIVING IV.M.1 (Feb. 12, 1997).

141. *Id.* at I.B. I.C.

142. *Id.* at IV.B(2).

143. *Id.* at IV.B(3).

144. *Id.* at IV.M(1).

145. *Id.*

146. *Id.* at IV.M(2)–(3).

The SFPD policy suggests that any ramming technique—like the one employed by Officer Scott—would be unreasonable.<sup>147</sup> It also implies that an officer's use of force would be unreasonable if the suspect could have been safely apprehended later, if the triggering offense was a minor violation, or if the pursuit created an added danger to the public.<sup>148</sup> But given *Scott's* broad reasonableness standard, a lower court would likely defer to the Supreme Court and condone an officer's conduct even in the absence of the factors set out in the SFPD policy.<sup>149</sup> Thus, courts should consider state and local policies that state clearly what officer conduct is reasonable, especially given the unique dangers created by police pursuits in urban areas and the documented variety of public opinion regarding dangerous driving and reasonable police force.<sup>150</sup>

Like the SFPD policy, urban policies should prohibit ramming techniques or only condone running the suspect's vehicle off the road to terminate pursuits initiated by a violent triggering crime. At the most permissive end of the spectrum, urban pursuit policies should only permit ramming when there are no other cars or innocent bystanders in sight. Thus, an officer's use of force following a police pursuit would be unreasonable if the triggering crime was nonviolent or minor, or if the maneuver occurred in a congested area such that it added to the public danger.

This Note does not suggest a policy that could help dangerous criminals escape police detection. Consider a 2013 San Francisco police pursuit that occurred after the suspect fired his gun from his vehicle early in the morning.<sup>151</sup> Although the pursuit ended in a crash that killed two innocent bystanders,<sup>152</sup> this pursuit would be considered reasonable because the armed suspect continued to pose a significant risk to the public until he was apprehended. If, on the other hand, the pursuit and use of force were triggered by a nonviolent or minor violation, indicating that the suspect did not pose a grave danger to the public, then the officer's conduct would have been unreasonable.<sup>153</sup> An officer's conduct

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<sup>147.</sup> *Id.*

<sup>148.</sup> *Id.*

<sup>149.</sup> See *Scott v. Harris*, 550 U.S. 372, 386 (2007).

<sup>150.</sup> See Kahan et al., *supra* note 74, at 841 (noting that African Americans and low-income individuals "tended to perceive less danger in Harris' flight, to attribute more responsibility to the police for creating the risk for the public, and to find less justification in the use of deadly force to end the chase").

<sup>151.</sup> Jill Tucker, *Driver Flees from SF Traffic Stop; 2 Die*, S.F. CHRON. (Jan. 1, 2013), <http://www.sfgate.com/crime/article/Driver-flees-from-SF-traffic-stop-2-die-4159713.php>.

<sup>152.</sup> *Id.*

<sup>153.</sup> The example of the high-speed pursuit that officers initiated because the suspect had a knife, sending two innocent bystanders to the hospital, for example, should be considered unreasonable. Michaelson, *supra* note 1.

would also be considered unreasonable if she used unnecessarily risky tactics to end the pursuit.<sup>154</sup>

B. HIGHWAYS AND RURAL AREAS: CALIFORNIA HIGHWAY PATROL  
EXAMPLE

Outside of urban areas, police officers should have more leeway to pursue a suspect because it is less likely that such pursuits will add danger to the public, given that highways are typically free from pedestrians, include fewer obstacles, and often span rural areas. As in an urban pursuit, the local government's pursuit policy should consider the officer's use of force reasonable if the pursuit was triggered by a violent crime, the pursuit did not add danger to the public, and the suspect likely could not have been apprehended later. For highway patrols, though, these standards are likely to be applied differently than in an urban context. Due to the lack of pedestrians on highways, for example, it is less likely that the officer's conduct will add danger to the public. Moreover, due to the potential for very high speeds on highways and their frequent connection to other states or even countries, it may be more difficult to apprehend the suspect later if the highway patrol officer temporarily suspends the chase. For this reason, an officer's conduct would likely be deemed reasonable more frequently than in an urban context.

California lawmakers have developed guidelines for when a CHP officer may pursue a suspect in a high-speed chase.<sup>155</sup> California Senate Bill 719 requires police officers to undergo training for police pursuits, keep detailed records of such pursuits, and “develop uniform, minimum guidelines for adoption by [California] law enforcement agencies for response to high-speed vehicle pursuits.”<sup>156</sup> The Peace Officers Research Association of California introduced Senate Bill 719—nicknamed “Kristie’s Law”—after Kristina Priano was killed when a fifteen year-old being chased by police officers collided with Kristie’s family’s minivan.<sup>157</sup> Reviewing the prior law, which granted broad immunity to police officers for deaths that resulted from high-speed police pursuits, a California Court of Appeal urged the legislature to “seriously reconsider the balance between public entity immunity and public safety. The balance appears to have shifted too far toward immunity and left public safety, as

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154. One officer, for example, drove more than one hundred miles per hour into incoming traffic, and “leap-frogged” other vehicles before killing an innocent motorist in a “fiery explosion.” Mark Maroney, *DA: Cop ‘Leap-Frogged’ Other Cars at 101 mph*, THE EXPRESS (Jan. 29, 2014), <http://www.lockhaven.com/page/content.detail/id/549268/DA--Cop-leap-frogged-other-cars-at-101-mph.html>.

155. CAL. S. B. 719, Ch. 485 (2005).

156. *Id.* at B(4).

157. Laura Smith, *Prianos File Suit over Death of Daughter*, CHICO NEWS & REVIEW (Jun. 27, 2002), <http://www.newsreview.com/chico/prianos-file-suit-over-death-of-daughter/content?oid=9875>.

well as compensation for innocent victims, twisting in the wind."<sup>158</sup> Governor Arnold Schwarzenegger signed Kristie's Law in 2005 and the Legislature later codified it as California Vehicle Code section 17.004.7.<sup>159</sup>

The Bill's stated goal is to protect the public against injury or death by improving officer training and reducing the number of police pursuits.<sup>160</sup> The adopted code provision is weaker than the proposed bill. Despite requiring certain minimum training standards for pursuits, for example, the law states that as long as such training is provided, the officer is "immune from liability for civil damages for personal injury to or death of any person" that the officer pursues.<sup>161</sup> The law also clarifies that its provisions "represent minimum policy standards and do not limit an agency from adopting additional policy requirements," but provides no clear guidance for when an officer's conduct would be considered reasonable.<sup>162</sup> Section 17004.7, as adopted, falls short in two important respects. First, in stating that "[p]ursuit intervention tactics include, but are not limited to, blocking, ramming, boxing, and roadblock procedures,"<sup>163</sup> the law lacks sufficient specificity to constitute a clear guideline. Additionally, in order to satisfy Fourth Amendment obligations when the intrusiveness of deadly force is "unmatched,"<sup>164</sup> a suitable law should clearly state when the officer's conduct would be considered unreasonable.

Still, courts can infer when CHP believes an officer's conduct is unreasonable based on the guidelines listed in section 17004.7. The code specifies that CHP officers should be trained to consider many elements, including when to initiate a pursuit, when to terminate a pursuit, and the hazards the pursuit creates to uninvolved pedestrians and motorists.<sup>165</sup> Any decision to initiate a pursuit, for example, should "address the importance of protecting the public and balancing the known or reasonably suspected offense, and the apparent need for immediate capture against the risks to peace officers, innocent motorists, and others to protect the public."<sup>166</sup> To determine whether to terminate the pursuit, the CHP officer must consider a variety of factors, including the risk to the public, the protection of the public "given the known or reasonably suspected offense and apparent need for immediate capture," traffic safety and volume, and whether the suspect can be apprehended later.<sup>167</sup>

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158. *Nguyen v. City of Westminster*, 127 Cal. Rptr. 2d 388, 394 (Cal. Ct. App. 2002).

159. CAL. VEH. CODE § 17004.7 (2007).

160. S. Bill 719 at (L)(5)(g)-(i).

161. VEH. § 17004.7(b)(1).

162. *Id.* § 17004.7(e).

163. *Id.* § 17004.7(c)(6).

164. *Tennessee v. Garner*, 471 U.S. 1, 9 (2007).

165. *See generally* VEH. § 17004.7.

166. *Id.* § 17004.7(c)(1).

167. *Id.* § 17004.7(c)(9).

Despite the law's drawbacks, courts should consider laws like section 17004.7 rather than rely on *Scott's* presumptive reasonableness standard because such state and local policies represent what each jurisdiction considers reasonable based on local customs and characteristics. *Scott* and *Plumhoff*, however, essentially undermine code provisions like section 17004.7 by setting a broad reasonableness standard for officers who terminate police pursuits and by assuming that the officer's termination of a police pursuit is reasonable regardless of the triggering violation, the danger to the public, or traffic conditions.<sup>168</sup> Thus, given that Supreme Court precedent governs § 1983 claims, if federal courts do not consider state and local guidelines when looking at reasonableness and clearly established law, then victims of death or serious injury will be precluded from bringing a civil claim even in the most flagrant examples of unreasonable officer conduct.

#### CONCLUSION

Clearer local statutes that set sharp boundaries for when use of deadly force is reasonable to terminate a police pursuit will not resolve all questions of excessive force. Indeed, in the past four decades, federal courts have consistently limited § 1983 claims and have granted qualified immunity much more broadly. But outside of the context of § 1983, courts are typically hesitant to set their own rules, and prefer to follow the stated preferences of local governments (provided that they are constitutional). The Court should consider such local guidelines rather than blindly apply the per se rule that use of force is reasonable even when it is likely to cause the suspect's death. By following the guidelines for local police pursuit statutes set forth in this Note, cities and states nationwide can send the message that this "unmatched" invasion of Fourth Amendment rights is itself unreasonable and unsustainable.

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