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## *Scott v. Harris*: Death Knell for Deadly Force Policies and *Garner* Jury Instructions?

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**SCOTT V. HARRIS: DEATH KNELL FOR DEADLY  
FORCE POLICIES AND GARNER JURY  
INSTRUCTIONS?**

**Karen M. Blum<sup>†</sup>**

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INTRODUCTION

In response to the kind invitation of the *Syracuse Law Review*, I have put together some brief comments and thoughts about the Supreme Court's recent decision in *Scott v. Harris*.<sup>1</sup> While many criticisms might be leveled at the opinion, this piece raises concerns about the Court's refusal to accord special consideration to the use of *deadly* force, and the implications such refusal may have for both deadly force policies adopted by law enforcement agencies throughout the country and deadly force jury instructions currently required or given as a matter of discretion in federal trial courts.

I. BACKGROUND AND LOWER COURT DECISIONS

A prelude to *Scott* was the Court's decision in *Brosseau v. Haugen*.<sup>2</sup>

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<sup>†</sup> Professor of Law, Suffolk University Law School. The author was Counsel of Record on an amicus brief submitted by the National Police Accountability Project on behalf of the respondent in *Scott v. Harris*. See generally Brief of the National Police Accountability Project as Amicus Curiae Supporting Respondents, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631). Many thanks to my very able research assistant, Christianne Reiniger, and to Jack Ryan of the Legal & Liability Risk Management Institute.

1. 127 S. Ct. 1769 (2007).

2. 543 U.S. 194 (2004) (per curiam).

In *Brosseau* the Court summarily reversed a Ninth Circuit decision denying qualified immunity to an officer who had shot a suspect in the back as the suspect was attempting to flee in his vehicle.<sup>3</sup> The facts, viewed in the light most favorable to Haugen, established that Officer Brosseau responded to a call reporting a fight between Haugen and two other men in the yard of Haugen's mother.<sup>4</sup> Haugen ran away when Brosseau arrived.<sup>5</sup> Two other officers with a K-9 arrived to help search the neighborhood.<sup>6</sup> Haugen's girlfriend and her daughter were instructed to remain in their car, parked in the driveway, and the two men who were fighting with Haugen were told to remain in their pick-up, parked in the street in front of the driveway.<sup>7</sup> Haugen eventually returned and attempted to flee in his Jeep, which was also parked in the driveway.<sup>8</sup> Brosseau, with her gun pointed at Haugen, ordered him to get out of the vehicle.<sup>9</sup> When Haugen ignored the command, Brosseau repeatedly hit the driver's window with the handgun.<sup>10</sup> Finally breaking the window, Brosseau struck Haugen on the head with the butt of her gun.<sup>11</sup> Still unsuccessful in preventing Haugen from starting the Jeep, Brosseau stepped back and fired a shot through the rear driver's-side window, hitting Haugen in the back.<sup>12</sup> Haugen drove a short distance down the street and stopped.<sup>13</sup> Brosseau's asserted justification for shooting was her fear that Haugen presented a threat of serious bodily harm to the other officers on foot, who were somewhere in the neighborhood, and the persons in the occupied vehicles in Haugen's driveway.<sup>14</sup> Haugen survived and "subsequently pleaded guilty to the felony of 'eluding,'" which, according to the Court, constituted an admission that he drove with "wanton or wilful disregard for the lives . . . of others."<sup>15</sup>

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3. *Id.*; *Haugen v. Brosseau*, 339 F.3d 857, 874 (9th Cir. 2003), *amended by and reh'g denied*, 351 F.3d 372 (9th Cir. 2003), *rev'd*, 543 U.S. 194 (2004).

4. *Brosseau*, 543 U.S. at 195. One of the men, a former crime partner of Haugen, had reported to Brosseau the previous day that Haugen had stolen some tools, and "Brosseau later learned that there was a felony no-bail warrant out for Haugen's arrest on drug and other offenses." *Id.*

5. *Id.* at 196.

6. *Id.*

7. *Id.*

8. *Brosseau*, 543 U.S. at 196.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 196-97.

13. *Brosseau*, 543 U.S. at 197.

14. *Id.*

15. *Id.* at 197 (quoting WASH. REV. CODE § 46.61.024 (2001)).

Haugen filed a Section 1983 suit and, in response to Brosseau's motion for summary judgment based on qualified immunity, the Ninth Circuit engaged in the now familiar two-step analysis the Supreme Court has mandated lower courts apply when confronting the qualified immunity defense.<sup>16</sup> On the first prong of the analysis, the Court of Appeals

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16. *Haugen*, 339 F.3d at 862 (citing *Saucier v. Katz*, 533 U.S. 194 (2001)). In *Saucier*, the Court reinforced its instruction to lower courts to first assess whether the facts pleaded by the plaintiff state a constitutional violation, and, only if that question is answered affirmatively, to proceed to the second step of asking "whether the right was clearly established" at the time of the challenged conduct. *Saucier*, 533 U.S. at 201. This "rigid 'order of battle,'" *Brosseau*, 543 U.S. at 201-02 (Breyer, J., joined by Scalia, J. and Ginsburg, J., concurring) has been criticized by five Justices, four of whom are still on the Court. *See, e.g.*, *Morse v. Frederick*, 127 S. Ct. 2618, 2638 (2007) (Breyer, J., concurring in part and dissenting in part) ("This Court need not and should not decide this difficult First Amendment issue on the merits. Rather, I believe that it should simply hold that qualified immunity bars the student's claim for monetary damages and say no more."); *Wilkie v. Robbins*, 127 S. Ct. 2588, 2617 n.10 (2007) (Ginsburg, J., joined by Stevens, J., concurring in part and dissenting in part) ("As I have elsewhere indicated, in appropriate cases, I would allow courts to move directly to the second inquiry."); *Scott*, 127 S. Ct. at 1780 (Breyer, J., concurring) ("[L]ower courts should be free to decide the two questions in whatever order makes sense in the context of a particular case."); *Brosseau*, 543 U.S. at 201 (Breyer, J., joined by Scalia, J., and Ginsburg, J., concurring) (expressing concern "that the current rule rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.*, qualified immunity) that will satisfactorily resolve the case before the court."); *Bunting v. Mellon*, 541 U.S. 1019, 1019 (2004) (Stevens, J., joined by Ginsburg J., and Breyer, J., respecting the denial of certiorari) (noting the problem posed by an "unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity."); *Bunting*, 541 U.S. at 1023 (Scalia, J., joined by Rehnquist, C.J., dissenting) (urging that "this general rule [of refusing to entertain an appeal by a party on an issue as to which he prevailed] should not apply where a favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination.").

Lower courts have likewise been critical of the mandatory two-step approach. *See, e.g.*, *McClish v. Nugent*, 483 F.3d 1231, 1253 n.1 (11th Cir. 2007) (Anderson, J., concurring specially) (criticizing the mandatory constitutional-question-first approach and noting that "twenty-eight states and Puerto Rico have recently urged the Supreme Court in an amicus brief to reconsider its mandatory *Saucier* approach to qualified immunity.") (citing Brief for the State of Illinois et al. as Amici Curiae Supporting Petitioner, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631)); *Robinette v. Jones*, 476 F.3d 585, 592 n.8 (8th Cir. 2007) ("[T]he 'law's elaboration from case to case,' would be ill served by a ruling here, where the parties have provided very few facts to define and limit any holding on the reasonableness of the execution of the arrest warrant." (citation omitted)); *Buchanan v. Maine*, 469 F.3d 158, 168 (1st Cir. 2006) ("We do not think the law elaboration purpose will be well served here, where the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts."); *Hydrick v. Hunter*, 449 F.3d 978, 988 (9th Cir. 2006) (repeating the observation that "a motion to dismiss on qualified immunity grounds puts the court in the difficult position of deciding 'far-reaching constitutional questions on a nonexistent factual record.'" (quoting *Kwai Fun Wong v.*

concluded that a reasonable jury, viewing the evidence in the light most favorable to Haugen, could find that at the time Brosseau fired her gun, Haugen did not pose a significant threat of harm to her or others and that Brosseau's conduct violated the Fourth Amendment.<sup>17</sup> On the question of whether the law gave "fair warning"<sup>18</sup> that Brosseau's alleged conduct was unlawful, the court relied on the "'special rule' governing the use of deadly force" established by the Supreme Court in *Tennessee v. Garner*.<sup>19</sup> The Court noted that "[u]nder *Garner*, deadly force is only permissible 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.'"<sup>20</sup> "Viewing the evidence in Haugen's favor, [the Court concluded that] Brosseau's use of deadly force was a clear violation of *Garner*. . ."<sup>21</sup>

The Supreme Court granted certiorari on only the second prong of the immunity question, whether the law gave fair warning to the officer that her conduct was unlawful, leaving untouched the Ninth Circuit's determination on the first prong of the analysis, that the challenged conduct did violate the Fourth Amendment.<sup>22</sup> In the Court's view, *Graham v.*

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United States, 373 F.3d 952, 957 (9th Cir. 2004)); *Lyons v. City of Xenia*, 417 F.3d 565, 583 (6th Cir. 2005) (Sutton, J., joined by Gibbons, J., concurring) (urging the Supreme Court to "permit lower courts to make reasoned departures from *Saucier's* inquiry where principles of sound and efficient judicial administration recommend a variance.").

Despite the legitimate concerns raised about requiring the "rigid order of battle" in all cases, the Court in *Scott* did not deem that case the appropriate vehicle for revisiting the two-step analysis. The Court observed:

Prior to this Court's announcement of *Saucier's* "rigid 'order of battle,'" we had described this order of inquiry as the "better approach," though not one that was required in all cases. There has been doubt expressed regarding the wisdom of *Saucier's* decision to make the threshold inquiry mandatory, especially in cases where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward. We need not address the wisdom of *Saucier* in this case, however, because the constitutional question with which we are presented is . . . easily decided. Deciding that question first is thus the "better approach," regardless of whether it is required.

*Scott*, 127 S. Ct. at 1774 n.4 (citations omitted).

17. *Haugen*, 339 F.3d at 874.

18. See *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (formulating the "salient question" in the qualified immunity inquiry as "whether the state of the law" at the time gave "fair warning" that the challenged conduct was unconstitutional).

19. *Haugen*, 339 F.3d at 873. See *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

20. *Haugen*, 339 F.3d at 873 (citing *Garner*, 471 U.S. at 11).

21. *Id.* at 874.

22. *Brosseau*, 543 U.S. at 195. The Court "express[ed] no view as to the correctness of the Court of Appeals' decision on the constitutional question itself." *Id.* at 198.

*Connor*<sup>23</sup> and *Garner* “are cast at a high level of generality” and, by themselves, are insufficient to give fair warning of clearly established rights in other than “obvious” cases.<sup>24</sup> The Court observed that Fourth Amendment excessive force cases tend to be fact-specific and concluded that no cases “squarely govern[ed]” the situation confronted by Officer Brosseau, “whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.”<sup>25</sup>

I assume the Court’s avoidance of the “merits” question in *Brosseau* was not based on agreement with the Ninth Circuit’s conclusion, but reflected concern about discounting the record evidence as established by the Court of Appeals in its determination that a jury could find a Fourth Amendment violation based on the facts viewed in the light most favorable to Haugen.<sup>26</sup> The Court of Appeals made the following findings in support of its conclusion:

Viewing the evidence in Haugen’s favor, Brosseau shot Haugen in the back even though he had not committed any crime indicating that he posed a significant threat of serious physical harm; even though Brosseau had no objectively reasonable evidence that Haugen had a gun or other weapon; even though Haugen had not started to drive his vehicle; and even though Haugen had a clear path of escape. Viewing the evidence in Haugen’s favor, there is insufficient objective evidence to support Brosseau’s stated concern that, at the time she shot him, Haugen posed a significant risk to police officers or others in the area.<sup>27</sup>

*Scott v. Harris* presented a much better opportunity for the Court to address the Fourth Amendment issue. There was a high-speed pursuit, a video, and no shooting.<sup>28</sup>

On March 29, 2001, Victor Harris was clocked traveling seventy-three miles per hour in a fifty-five mile-per-hour zone in Coweta County, Georgia.<sup>29</sup> When he ignored attempts by Deputy Reynolds to pull him over, a high-speed pursuit ensued.<sup>30</sup> Timothy Scott, another Coweta County deputy, with no knowledge as to why Harris was being pursued,

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23. 490 U.S. 386 (1989).

24. *Brosseau*, 543 U.S. at 199.

25. *Id.* at 200-01. See *id.* at 202-08 (Stevens, J., dissenting).

26. See *Haugen*, 339 F.3d at 874.

27. *Id.*

28. *Scott*, 127 S. Ct. at 1772-75.

29. *Id.* at 1772.

30. *Id.*

joined the chase and eventually took over as the lead vehicle in the pursuit.<sup>31</sup> The pursuit lasted approximately six minutes and covered nearly ten miles before Deputy Scott asked for permission to perform a Precision Intervention Technique or “PIT” maneuver on Harris’s car.<sup>32</sup> When given approval to “take him out” by the supervisor monitoring the pursuit by radio, Scott realized a PIT maneuver could not safely be performed at speeds approaching ninety miles per hour, so he bumped, or rammed, Harris’s vehicle straight on, resulting in Harris losing control, running down an embankment and crashing.<sup>33</sup> Harris “was rendered a quadriplegic” as a result.<sup>34</sup>

Harris filed a civil action against Scott and others under 42 U.S.C. § 1983, alleging excessive use of force in his seizure.<sup>35</sup> Scott’s motion for

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31. *Id.* at 1773; *Harris v. Coweta County*, 433 F.3d 807, 815 (11th Cir. 2005), *rev’d and remanded*, *Scott v. Harris*, 127 S. Ct. 1769 (2007), *on remand*, *Harris v. Coweta County*, 489 F.3d 1207 (11th Cir. 2007).

32. *Scott*, 127 S. Ct. at 1773.

While referenced by several different names (*e.g.*, Pursuit Intervention Technique, Pursuit Immobilization Technique, or Precision Immobilization Technique), the PIT is generally described as an “intentional contact between a police vehicle and a pursued vehicle in such a manner as to cause a 180-degree spin and subsequent stop of the pursued vehicle.”

Brief for the National Police Accountability Project as Amicus Curiae Supporting Respondent, at 11, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631) (quoting Portland, Oregon Vehicle Pursuits (7a)). Most policies that allow or provide for the PIT maneuver recommend that it be performed at speeds not in excess of 35-40 mph, and either forbid vehicle contact at higher speeds or equate such contact with the use of “deadly force” and prohibit it unless deadly force would be authorized. *See* Brief for the National Police Accountability Project, at 11-20, *Scott*, 127 S. Ct. 1769 (No. 05-1631).

33. *Scott*, 127 S. Ct. at 1773 & n.1; *Harris*, 433 F.3d at 810-11.

34. *Scott*, 127 S. Ct. at 1773.

35. *Scott*, 127 S. Ct. at 1773. There was no question that Harris was seized when Scott intentionally terminated his movement by making contact with the vehicle. *See Scott*, 127 S. Ct. at 1776. *See also Harris*, 433 F.3d at 812 (“The district court concluded, and Scott does not contest, that Harris was seized by Scott when the latter rammed his vehicle, causing him to lose control and crash.”).

42 U.S.C. § 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (2003).

summary judgment based on qualified immunity was denied by the district court.<sup>36</sup> The denial was then affirmed by the Court of Appeals for the Eleventh Circuit.<sup>37</sup> Addressing the constitutional question first, the Court concluded that,

view[ing the summary judgment evidence] in the light most favorable to [Harris], a jury could find that [P]etitioner used “deadly force” when he made contact with [R]espondent’s vehicle to terminate a high-speed pursuit;[<sup>38</sup>] that [R]espondent was a non-violent misdemeanor whose underlying offense was speeding . . . ; that there was no probable cause to believe “that [R]espondent had committed a crime involving the infliction or threatened infliction of serious physical harm[;]” and that [R]espondent, “prior to the chase, pose[d] [no] imminent threat of serious physical harm to [[P]etitioner] or others[;]” that there were other means of tracking [R]espondent down because (pursuing officers had a description of his vehicle and the license plate number); and that absolutely no warning was given to [R]espondent that [P]etitioner intended to use deadly force to terminate the pursuit.<sup>39</sup>

Furthermore, the Court determined

a jury could conclude that Respondent, while traveling at high rates of speed (between 70 and 90 mph) and violating various traffic laws (Respondent passed vehicles on double yellow control lines and ran two red lights), remained in control of his vehicle at all times prior to being rammed by Petitioner’s police cruiser, slowed for turns and intersections, and typically used his directional signals. In addition, a jury could find Respondent never used his vehicle aggressively against Petitioner, pedestrians or other motorists during the course of the pursuit. In fact, the evidence would support a finding that Respondent attempted to *avoid* a collision with Petitioner’s police cruiser in the drug store parking lot.<sup>40</sup>

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36. *Harris v. Coweta County*, No. CIVA 3:01CV148, 2003 WL 25419527, at \*6 (N.D. Ga. Sept. 25, 2003).

37. *Harris*, 433 F.3d at 821.

38. *Id.* The generally accepted definition of “deadly force” is that set out in Section 3.11(2) of the Model Penal Code: “[F]orce that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury.” MODEL PENAL CODE § 3.11(2) (2001). See *Harris*, 433 F.3d at 814 (“‘Deadly force’ is force that creates ‘a substantial risk of causing death or serious bodily injury.’”) (quoting *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985)).

39. Brief for the National Police Accountability Project as Amicus Curiae Supporting Respondent, at 2-3, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631). See *Harris* 433 F.3d at 810, 815 & n.10.

40. Brief for the National Police Accountability Project as Amicus Curiae Supporting

Looking at all of the evidence in the light most favorable to Harris, the Court concluded that a reasonable jury could find that the preconditions to the use of deadly force established by *Tennessee v. Garner*, were not present when Scott rammed Harris, and thus, the use of deadly force to terminate the pursuit would be unreasonable.<sup>41</sup>

Having determined Harris alleged facts sufficient to make out a Fourth Amendment violation, the Eleventh Circuit next considered whether the law at the time the incident occurred was sufficiently clear to give a reasonable officer fair warning that ramming Harris's vehicle, under the particular circumstances confronting Scott, violated the Constitution.<sup>42</sup> The Court concluded that "by 2001 the law was clearly established that a seizure must be reasonable under the circumstances, which include a review of the offense charged; that an automobile can be used as deadly force; and that deadly force cannot be used in the absence of the *Garner* preconditions."<sup>43</sup>

## II. SUPREME COURT DECISION

The Supreme Court, with only Justice Stevens dissenting, reversed the denial of qualified immunity.<sup>44</sup> Grounding its decision on the first prong of the *Saucier* analysis, the Court held that Scott's conduct was reasonable as a matter of law.<sup>45</sup> For eight of the Justices, the videotape, submitted as part

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Respondent, at 3, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631) (citations omitted). See *Harris*, 433 F.3d at 810, 815 ("Harris stayed in control of his vehicle, utilizing his blinkers while passing or making turning maneuvers.").

41. 433 F.3d at 815. In *Garner*, the Supreme Court held:

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.

471 U.S. at 11-12. In *Harris*, the court noted that:

[N]one of the limited circumstances identified in *Garner* that might render this use of deadly force constitutional are present here. Scott did not have probable cause to believe that Harris had committed a crime involving the infliction or threatened infliction of serious physical harm, nor did Harris, prior to the chase, pose an imminent threat of serious physical harm to Scott or others.

433 F.3d at 815.

42. *Id.* at 817.

43. *Id.* at 818-19.

44. *Scott*, 127 S. Ct. at 1779.

45. *Id.*

of the record, dictated a finding that Harris drove in a reckless and dangerous manner, presenting a real threat to bystanders and other drivers on the road.<sup>46</sup> No reasonable juror could conclude otherwise. The majority's rather simplistic "anoint[ing of] the film version of the disputed events as the truth," has been well-noted and criticized by my colleague, Professor Jessica Silbey.<sup>47</sup> Once the Court decided that the videotape was incontrovertible evidence that Harris presented a threat to others on the road, the question remained as to whether Scott's use of force to eliminate the threat was objectively reasonable.<sup>48</sup> Respondent argued

that *Garner* prescribes certain preconditions that must be met before Scott's actions can survive Fourth Amendment scrutiny: (1) the suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape; and (3) where feasible, the officer must have given the suspect

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46. *Id.* at 1775-76. The Court observed that, "[f]ar from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." *Id.* Indeed, during oral argument, Justice Scalia made the comment, "[h]e created the scariest chase I ever saw since 'The French Connection.'" Transcript of Oral Argument at 28, *Harris*, 127 S. Ct. 1769 (No. 05-1631).

47. See Jessica Silbey, Op-Ed., Justices Taken in by Illusion of Film, *BALTIMORE SUN*, May 13, 2007, at 21A; see also Bennett L. Gersham, Justices Go Hollywood, 29 *NAT'L L.J.*, Aug. 1, 2007, at 27 ("A majority of the Supreme Court, apparently overcome by its own reactions to the images on the video, replaced the rule of law with its own ad hoc, unprincipled and idiosyncratic judgment."). My own reaction to the film was amazement that a police officer would engage in such reckless conduct. To borrow, from another context, the words of Justice Scalia, "[s]eldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members." *Atkins v. Virginia*, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting). In the wake of *Scott*, other courts are now relying on video evidence to relate what "really" happened. See, e.g., *Beshers v. Harrison*, 495 F.3d 1260, 1262 n.1 (11th Cir. 2007) (rejecting the plaintiff's factual allegations where inconsistent with the majority's interpretation of two videotapes taken from patrol cars involved in pursuit); *Williams v. City of Grosse Pointe Park*, 496 F.3d 482, 486 (6th Cir. 2007) (affirming grant of summary judgment where the district court "relied almost exclusively on the video captured by the camera in Miller's cruiser for its determination that Miller's conduct was objectively reasonable."); *Sharp v. Fisher*, No. 406CV020, 2007 WL 2177123, at \*1 (S.D. Ga. July 26, 2007); *Martinez v. City of Auburn*, No. C06-0447, 2007 WL 2005584, at \*1 (W.D. Wash. July 9, 2007); *Miller v. Jensen*, No. 06-CV-0328, 2007 WL 1574761, at \*4 (N.D. Okla. May 29, 2007). But see *Beshers*, 495 F.3d at 1268-71 (Presnell, J., concurring) (offering a much different interpretation of the videos than that perceived by the majority); *Williams*, 496 F.3d at 494 (Aldrich, J., dissenting) ("Although the majority asserts that the video demonstrates that Miller reasonably believed that Williams posed a threat of serious harm, the video and the record as a whole do not demonstrate, beyond dispute, that Williams posed an immediate threat of serious harm to Miller, Hoshaw, or to the public.").

48. *Scott*, 127 S. Ct. at 1776.

some warning.<sup>49</sup>

Justice Scalia, writing for the majority, rejected respondent's argument.<sup>50</sup> His response, like his reliance on the video, was rather simplistic:

*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>51</sup>

I think the Court's singular reliance on the video is misguided and that Victor Harris should have had an opportunity to present his case to a jury. A jury might have found Scott's conduct justifiable under the circumstances or might have found his conduct violated Harris' Fourth Amendment right to be free from excessive force. Even if a jury had found Scott's conduct violated the Constitution, a judge might still have granted qualified immunity on the second prong of the qualified immunity analysis, depending on the jury's determination of the facts.<sup>52</sup> Regardless of how one views Scott's conduct, Justice Scalia's treatment of *Garner* is troubling. First, it reflects his own inability or unwillingness to recognize that death is different and that the employment of deadly force should be constrained by more stringent and more specific standards than the use of non-deadly force.<sup>53</sup> Removing "deadly force" from a special category of

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49. *Id.* at 1777 (footnote omitted) (citing Brief of Respondent at 17-18, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631)).

50. *Id.*

51. *Id.*

52. *See Saucier v. Katz*, 533 U.S. 194, 204-05 (2001) (holding that the merits of the excessive force inquiry under the Fourth Amendment is distinct from the qualified immunity inquiry and that an officer could have a reasonable belief that objectively unreasonable use of force was reasonable).

53. That Justice Scalia does not admit to any distinction between deadly force and excessive force in the context of seizures under the Fourth Amendment is unremarkable. He has persistently denied the legitimacy, and even ridiculed, that strain of jurisprudence as it has arisen under the Eighth Amendment. *Compare* *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("While *Furman* did not hold that the infliction of the death penalty Per [sic] se violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice.") and *Woodson v. North Carolina*, 428 U.S. 280, 322 (1976) (Rehnquist, J., dissenting) ("The plurality also relies upon the indisputable proposition that 'death is different' for the result which it reaches in Part III-C.") with *Atkins v. Virginia*, 536 U.S. 304, 337-38, 352 (2002) (Scalia, J., dissenting) ("Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not

force that triggers certain preconditions will encourage police agencies to rewrite policies that currently treat deadly force as different, placing clear restraints on its use. Second, a decision like *Scott*, to the extent that it is bound up by the particular facts of the case, does nothing to clarify the law or set the standard for future cases. To the extent it establishes a *per se* rule, it is a dangerous one; in effect authorizing summary execution of anyone who flees from the police in a motor vehicle.<sup>54</sup> Third, a one-size-

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even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members. . . . Today's opinion adds one more to the long list of substantive and procedural requirements impeding imposition of the death penalty imposed under this Court's assumed power to invent a death-is-different jurisprudence." See also *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1686 (2007) (Scalia, J., dissenting) ("Whether one regards improvised death-is-different jurisprudence with disdain or with approval, no one can be at ease with the stark reality that this Court's vacillating pronouncements have produced grossly inequitable treatment of those on death row."); *Schriro v. Summerlin*, 542 U.S. 348, 357 (2004) ("The dissent also advances several variations on the theme that death is different (or rather, 'dramatically different') . . ."); *Wiggins v. Smith*, 539 U.S. 510, 557 (2003) (Scalia, J., dissenting) ("Today's decision is extraordinary—even for our 'death-is-different' jurisprudence.") (quoting *Simmons v. South Carolina*, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting)); *Shafer v. South Carolina*, 532 U.S. 36, 55 (2001) (Scalia, J., dissenting) ("Today's decision is the second page of the 'whole new chapter' of our improvised "'death-is-different' jurisprudence" that *Simmons* began.") (quoting *Simmons*, 512 U.S. at 185) (Scalia, J., dissenting)); *Simmons*, 512 U.S. at 185 (1994) (Scalia, J., dissenting) ("I fear we have read today the first page of a whole new chapter in the 'death-is-different' jurisprudence which this Court is in the apparently continuous process of composing."); *Dobbs v. Zant*, 506 U.S. 357, 363 (1993) (Scalia, J., concurring in judgment) ("There was, in short, no reason to grant this petition and correct this (admittedly clear) technical error, except to place another obstacle in the way of a death penalty that has been suspended within this Court's 'death is different' time warp since 1974."); *Morgan v. Illinois*, 504 U.S. 719, 751-52 (1992) (Scalia, J., dissenting) ("Today, obscured within the fog of confusion that is our annually improvised Eighth Amendment, 'death is different' jurisprudence, the Court strikes a further blow against the People in its campaign against the death penalty. Not only must mercy be allowed, but now only the merciful may be permitted to sit in judgment. Those who agree with the author of Exodus, or with Immanuel Kant, must be banished from American juries—not because the People have so decreed, but because such jurors do not share the strong penological preferences of this Court. In my view, that not only is not required by the Constitution of the United States; it grossly offends it.") (footnote omitted).

54. It may be fair to draw an analogy between this possible license to engage in summary execution and Justice Stevens' concern with judicial overrides of jury verdicts, as expressed in his dissent in *Harris v. Alabama*:

Overrides . . . sacrifice the legitimacy of jury verdicts, at potentially great cost. Whereas the public presumes that a death sentence imposed by a jury reflects the community's judgment that death is the appropriate response to the defendant's crime, the same presumption does not attach to a lone government official's decree. Indeed, government-sanctioned executions unsupported by judgments of a fair cross section of the citizenry may undermine respect for the value of human

fits-all use of force standard will discourage judges from exercising discretion to give “deadly force” instructions to a jury, will make such instructions unnecessary where now required, and will no doubt impact jury determinations in excessive force cases.

### III. DEADLY FORCE IS DIFFERENT

The facts of *Garner* are familiar to all who are involved in law enforcement. A police officer shot a “young, slight, and unarmed” male who was fleeing, on foot, the scene of a home burglary.<sup>55</sup> The youth was shot in the back of the head while scaling a fence to escape.<sup>56</sup> The sole purpose of using deadly force was to prevent the escape of the fleeing felon.<sup>57</sup> The state statute, to the extent it authorized the use of deadly force under such circumstances, was declared unconstitutional.<sup>58</sup>

*Garner* made clear “that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.”<sup>59</sup> As such, “the nature and quality of the intrusion on the individual’s Fourth Amendment interests [must be balanced] against the importance of the governmental interests alleged to justify the intrusion.”<sup>60</sup> To this extent, Justice Scalia is right in *Scott* when he portrays *Garner* as an application of the Fourth Amendment “reasonableness” test set out in *Graham*.<sup>61</sup> The Court in *Garner*, however, unlike the Court in *Scott*, recognized that “[t]he intrusiveness of a seizure by means of deadly force is unmatched.”<sup>62</sup> Killing someone, or attempting to kill someone, is qualitatively different from using handcuffs, pepper

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life itself and unwittingly increase tolerance of killing.  
513 U.S. 504, 522-23 (1995) (Stevens, J., dissenting).

55. *Garner*, 471 U.S. at 4, 21.

56. *Id.* at 4.

57. *Id.* at 3.

58. *Id.* at 11. The statute provided that “[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.” *Id.* at 4 (citing TENN. CODE ANN. § 40-7-108 (1982)). “The Department policy was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary.” *Garner*, 471 U.S. at 5.

59. *Id.* at 7.

60. *Id.* at 8 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). In *Graham*, the Court stated that the “proper application [of the balancing test] requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” 490 U.S. at 396.

61. *See Scott*, 127 S. Ct. at 1777.

62. *Garner*, 471 U.S. at 9.

spray, a baton, or other less-than-lethal weapons to effectuate a seizure. The Court in *Garner*, in effect, engaged in the balancing test itself and established a constitutional baseline for the use of deadly force, prohibiting its use unless an “officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others . . . .”<sup>63</sup> In this sense, *Garner* did establish a “magical on/off switch” for uses of deadly force.<sup>64</sup> A certain threshold requirement exists in every case involving the use of deadly force, a requirement that has nothing to do with “slosh[ing] . . . through the factbound morass of ‘reasonableness,’”<sup>65</sup> and everything to do with acknowledging that, regardless of the facts, the “unmatched” intrusion represented by the use of deadly force should trigger special consideration.<sup>66</sup>

For law enforcement agencies throughout the country, *Garner* has set the standard, not just for scenarios matching the particular facts of *Garner* itself, but for all uses of deadly force.<sup>67</sup> Some policies essentially mirror the preconditions set out by *Garner*.<sup>68</sup> Others, like the policy adopted by the Department of Justice, have preconditions that are arguably more restrictive than those established by *Garner*.<sup>69</sup> The Legal & Liability Risk

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63. *Id.* at 11. The Court gave as examples a suspect who threatened an officer with a weapon or a suspect as to whom “there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm . . . .” *Id.* As to the latter, “deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.” *Id.* at 11-12.

64. *Contra Scott*, 127 S. Ct. at 1777 (“*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute ‘deadly force.’”)

65. *Id.* at 1778.

66. *Garner*, 471 U.S. at 9.

67. On the facts in *Garner*, the Court noted that most law enforcement agencies would not have authorized the use of deadly force. *Id.* at 18-19. In reaching its decision, the Court took into consideration “[t]he fact that . . . a majority of police departments in this country ha[d] forbidden the use of deadly force against nonviolent suspects,” observing that “[i]f those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases.” 471 U.S. at 10-11.

68. See, e.g., Altamonte Springs Police Department, P/P 83-03, Subject: Firearms and Response to Resistance REVISION: #25 (Dec. 2, 2004) at \*3-4 (“Members authorized to carry a firearm may discharge it under the following circumstances: . . . 4. To defend themselves and/or other persons against unlawful force when there is probable cause to believe that such action is necessary to prevent imminent death or great bodily harm. 5. When necessary to effect an arrest or to prevent the escape of a felon whom the officer has probable cause to believe has committed a forcible felony. Further, the officer shall have a reasonable belief based upon the known circumstances that, by remaining at liberty, the felon would pose a substantial threat to the safety of the citizens of the community.”).

69. The Department’s policy statement provides that “[l]aw enforcement officers and

Management Institute has recently formulated a use-of-force or “response-to-resistance” policy that is being adopted by nearly a thousand law enforcement departments nationwide.<sup>70</sup> The policy’s guidelines with respect to the use of deadly force are based on *Garner*.<sup>71</sup> The International Association of Chiefs of Police (IACP) relies on *Garner* for its model policy on use of deadly force.<sup>72</sup>

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correctional officers of the Department of Justice may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.” U.S. DEP’T OF JUSTICE, POLICY STATEMENT, USE OF DEADLY FORCE, § I (1995), available at <http://www.usdoj.gov/ag/readingroom/resolution14b.htm>. With respect to fleeing felons, the policy states that “[d]eadly force may be used to prevent the escape of a fleeing subject if there is probable cause to believe: (1) the subject has committed a felony involving the infliction or threatened infliction of serious physical injury or death, and (2) the escape of the subject would pose an imminent danger of death or serious physical injury to the officer or to another person.” *Id.* at § I.A. The Commentary to the policy notes that “the Department deliberately did not formulate this policy to authorize force up to constitutional or other legal limits.” U.S. DEP’T OF JUSTICE, COMMENTARY REGARDING THE USE OF DEADLY FORCE IN NON-CUSTODIAL SITUATIONS, § I (1995), available at <http://www.usdoj.gov/ag/readingroom/resolution14c.htm>.

70. E-mail from Jack Ryan, Legal & Liability Risk Management Institute, to Karen Blum, Professor of Law, Suffolk University Law School (Aug. 6, 2007, 08:59:27 ST) (on file with author). The Legal & Liability Risk Management Institute (LLRMI) is a division of the Public Agency Training Council (PATC) and was created “to assist Risk management and law enforcement in providing a proactive approach to reduce exposure to liability and provide the best legal expertise when faced with litigation.” About the LLRMI—Mission Statement, <http://www.llrmi.com/About/mission.cfm> (last visited Aug. 30, 2007). “PATC is the largest privately held law enforcement training company in the nation . . .” About PATC—History <http://www.patc.com/about/history.shtml> (last visited Aug. 30, 2007).

71. The policy provides that

[t]he use of deadly force is objectively reasonable when:

- a. The officer is faced with an imminent threat of serious bodily harm or death to him/herself, or some other person who is present, or;
- b. To prevent the escape of an individual in cases where the officer has probable cause to believe that the subject has committed a violent felony involving the infliction or threatened infliction of serious bodily harm or death AND by the subject’s escape they pose an imminent threat of serious bodily harm or death to another.
- c. Officers should warn the subject prior to using deadly force where feasible.

LEGAL & LIABILITY RISK MANAGEMENT INSTITUTE, MODEL POLICY: RESPONSE TO RESISTANCE 3 (2006).

72. IACP NAT’L LAW ENFORCEMENT POL’Y CENTER, USE OF FORCE I (2006), available at <http://www.iacp.org/pubinfo/PolCtr.htm> [hereinafter *Concepts and Issues Paper* (2006)]. The *Concepts and Issues Paper* provides:

A. Use of Deadly Force

1. Law enforcement officers are authorized to use deadly force when one or both of the following apply:
  - a. To protect the officer or others from what is reasonably believed to be a threat of death or serious bodily harm.

According to the majority in *Scott*:

*Garner* held that it was unreasonable to kill a ‘young, slight, and unarmed’ burglary suspect by shooting him ‘in the back of the head’ while he was running away on foot and when the officer ‘could not reasonably have believed that [the suspect] . . . posed any threat,’ and ‘never attempted to justify his actions on any basis other than the need to prevent an escape.’ Whatever *Garner* said about the factors that *might have* justified shooting the suspect in that case, such ‘preconditions’ have scant applicability to this case, which has vastly different facts.<sup>73</sup>

This is simply wrong, or, at best, misguided, and reflects an exercise in reconstruction of a case that has clearly stood for more than its particular facts for over twenty years. 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. Treating all uses of force, deadly or not, under the general “objective reasonableness” umbrella, with no base line requirements or special consideration for the use of *deadly* force will lead to bad policies and bad policing. As the IACP has recognized, “[o]fficers must be provided with a clear and concise departmental policy that establishes guidelines and limitations on the use of force generally *and the use of deadly force in particular*.”<sup>74</sup> *Scott* may serve as an incentive for agencies to re-write their policies in more general terms, avoiding specific

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b. To prevent the escape of a fleeing violent felon who the officer has probable cause to believe will pose a significant threat of death or serious physical injury to the officer or others. Where practicable prior to discharge of the firearm, officers shall identify themselves as law enforcement officers and state their intent to shoot.

*Id.*

In the *Concepts and Issues Paper* accompanying the 2005 revisions, the IACP explains that “[a] prior revision of [the] policy eliminated use of the term ‘imminent’ in reference to the threat that a suspect may pose to the officer or others in order to justify the use of deadly force.” IACP NAT’L LAW ENFORCEMENT POL’Y CENTER, USE OF FORCE 4 (2005) [hereinafter *Concepts and Issues Paper* (2005)]. The term was eliminated because of the added burden it placed on officers in deciding what the term means in particular situations and because of its potential for “impos[ing] a burden of proof upon officers in court settings that is unnecessary.” *Id.*

On the requirement of “imminence,” see *Rosales v. City of Bakersfield*, No. CV-F-05-237, 2007 WL 1847628, at \*28 (E.D. Cal. June 27, 2007), where a plaintiff challenged a use of force policy as unconstitutional on its face because it lacked an “immediacy requirement.” While the court noted that “it may have been better had the Firearms Policy at issue used the term ‘immediate,’ it is questionable that a policy can be found to be unconstitutional merely because it does not use that specific term.” *Id.*

73. 127 S. Ct. at 1777 (alteration in original) (citations omitted).

74. *Concepts and Issues Paper* (2005), *supra* note 72, at 1 (emphasis added).

preconditions for the use of deadly force. After *Scott*, such preconditions would not be constitutionally mandated and, if ignored by an officer, might serve as the basis for state law liability based on negligence.<sup>75</sup> Without such standards and the training that accompanies them, officers will no doubt be more confused about when the use of deadly force is appropriate. Agencies should think twice about re-writing policies to “take advantage” of *Scott*. A reduction in exposure to state law liability may be countered by an increase in the number of lawsuits agencies must defend due to lack of clear standards, guidelines, and training. Confusion as to policy and standards cannot be good for police or the citizens whom they encounter. Unfortunately, *Scott* does little to help and much to confuse the landscape on the use of deadly force.

#### IV. SCOTT’S FAILURE TO “CLEARLY ESTABLISH” THE LAW

In *County of Sacramento v. Lewis*, a majority of the Court reinforced the view that, “the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all.”<sup>76</sup> Justice Souter, writing for the majority, explained that, “if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals.”<sup>77</sup> Prior to the Court’s insistence on resolution of

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75. A violation of agency policy is not necessarily a violation of the federal Constitution. See, e.g., *Abney v. Coe*, 493 F.3d 412, 419 (2007) (4th Cir. 2007) (“It is . . . settled law that a violation of departmental policy does not equate with constitutional unreasonableness.”) (citing *Davis v. Scherer*, 468 U.S. 183, 193-96 (1984)); *Steen v. Myers*, 486 F.3d 1017, 1023 (7th Cir. 2007) (“[A] failure to comply with departmental policy does not implicate the Constitutional protections of the Fourteenth Amendment.”) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 838-39 (1998)); *Andujar v. Rodriguez*, 480 F.3d 1248, 1252 n.4 (11th Cir. 2007) (“Whether a government official acted in accordance with agency protocol is not relevant to the Fourteenth Amendment inquiry.”) (citing *Taylor v. Adams*, 221 F.3d 1254, 1259 (11th Cir. 2000)); *Thompson v. City of Chicago*, 472 F.3d 444, 455 (7th Cir. 2006) (“Whether Officer Hesper’s conduct conformed with the internal CPD General Orders concerning the use of force on an assailant was irrelevant to the jury’s determination of whether his actions on December 5, 2000 were ‘objectively reasonable’ under the Fourth Amendment.”); *Tanberg v. Sholtis*, 401 F.3d 1151, 1164 (10th Cir. 2005) (“[W]e decline Plaintiffs’ invitation here to use the Albuquerque Police Department’s operating procedures as evidence of the constitutional standard.”).

76. 523 U.S. at 841 n.5.

77. *Id.* Justice Stevens would limit this analytical approach to cases where the constitutional issue is clear. *Id.* at 859 (Stevens, J., concurring). Where the question is “difficult and unresolved,” he would prefer its resolution in a context where municipal

the constitutional question first, a common approach of the lower courts was to leave the constitutional “merits” question unresolved and dispose of cases simply on the ground that, whether or not such a right exists under current law, the right was not clearly established at the time of the alleged conduct.<sup>78</sup> The practice of many lower courts of granting immunity without deciding whether a right existed left the state of the law uncertain and permitted immunity in subsequent cases. But, as the Court in *Scott* acknowledged, to reach its conclusion that Scott had not violated Harris’ Fourth Amendment rights, required “slosh[ing] . . . through the factbound morass of ‘reasonableness.’”<sup>79</sup> In the end, the Court’s constitutional holding produced the “rule” 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>80</sup>

In arriving at this rule, the Court “weigh[ed] the perhaps lesser probability of [Harris] injuring or killing numerous bystanders against the perhaps larger probability of [Scott] injuring or killing a single person,” Harris, and advised that in the weighing process, it was appropriate “to take into account not only the number of lives at risk, but also their relative

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liability is raised and the case cannot be disposed of on qualified immunity grounds. *Id.* Justice Breyer wrote separately in *Lewis* to express his agreement with Justice Stevens’ view that lower courts should not be denied “the flexibility, in appropriate cases, to decide 42 U.S.C. § 1983 claims on the basis of qualified immunity, and thereby avoid wrestling with constitutional issues that are either difficult or poorly presented.” *Id.* at 858-59 (Breyer, J., concurring). For other criticisms of the mandatory “constitutional-question-first” approach, see sources cited *supra* note 16.

78. See, e.g., *Joyce v. Town of Tewksbury*, 112 F.3d 19, 23 (1st Cir. 1997) (en banc) (“There is some cost in not deciding the Fourth Amendment issue on the merits, even in the form of dictum. But the *en banc* court is agreed that qualified immunity applies, and there is less consensus about the underlying constitutional issue.”); *Giuffre v. Bissell*, 31 F.3d 1241, 1255 (3d Cir. 1994) (“Where appropriate, we may consider whether the constitutional rights asserted by Giuffre were ‘clearly established’ at the time the individual officials acted, without initially deciding whether a constitutional violation was alleged at all.”); *Severino v. Negron*, 996 F.2d 1439, 1441 (2d Cir. 1993) (“If we were to rule today on the due process question, we likely would hold that a violation has occurred. . . . We do not need to rule definitively on the constitutional question, however, because even if there were a violation of due process, the appellee officials would be protected by qualified immunity.”); *Long v. Norris*, 929 F.2d 1111, 1115 (6th Cir. 1991) (“We need not define in this case precisely what level of individualized suspicion is required in the context of prison visitor searches. The question before the court is not whether the proper standard should be reasonable suspicion or . . . probable cause, but whether . . . [the] right to be free from [a] strip . . . search absent probable cause [sic] was clearly established at the time of [the conduct] . . .”).

79. 127 S. Ct. at 1778.

80. *Id.* at 1779.

culpability.”<sup>81</sup> This added wrinkle of a consideration of culpability in the “objective reasonableness” analysis arguably serves to make the rule more “per se” and less fact-bound. Frankly, I am not sure how a court measures the “level of culpability.”<sup>82</sup> If the measure of culpability is an objective one, in the high-speed pursuit context, one will always be able to say that the subject of the pursuit is more culpable in the sense that he or she should have stopped and submitted to the show of police authority.<sup>83</sup> What kind of a “rule” is this? Both Justice Ginsburg and Justice Breyer commented on the factual limitations of the holding.<sup>84</sup> To the extent the holding is “situation specific,” it will do little to clarify the law or inform officers as to whether conduct in a different factual scenario might be constitutional.<sup>85</sup> To the extent it may be interpreted as providing a “per se rule,” it invites irresponsible, if not reckless, behavior on behalf of law enforcement officers; behavior that most officers would consider unreasonable and that most law enforcement agencies would not condone.<sup>86</sup>

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81. *Id.* at 1778.

82. How does one measure the culpability of innocent passengers who may be urging the driver to stop? *See* discussion *infra* Part IV.

83. Judge Presnell makes this point in *Beshers*, where he notes: Realistically, a suspect fleeing the police in a car will inevitably violate some traffic laws. By doing so, he will endanger the lives of innocent motorists (as well as the pursuing officers). And that danger will always outweigh the threat posed to the suspect by the officer’s use of deadly force, because the suspect is the one who chose to put everyone else at risk by refusing to stop. 495 F.3d at 1272 (Presnell, J., concurring) (footnote omitted).

84. *See Scott*, 127 S. Ct. at 1779 (Ginsburg, J., concurring) (rejecting a reading of the decision “as articulating a mechanical, *per se* rule,” and noting the inquiry made by the Court is “situation specific”); *id.* at 1780 (Breyer, J., concurring) (noting the “highly fact-dependent nature of this constitutional determination”). If the holding is so factually limited, one wonders why the Supreme Court would spend its limited resources on such a case. In the October Term 2006, “[t]he Justices decided 68 cases after argument . . . , the lowest number in recent history.” Akin Gump Strauss Hauer & Feld LLP, *Statistics for the Supreme Court’s October Term 2006*, 76 U.S.L.W. 3052 (Aug. 7, 2007).

85. As the Court of Appeals for the First Circuit has observed, “the law elaboration purpose” is not “well served . . . where the Fourth Amendment inquiry is a reasonableness question which is highly idiosyncratic and heavily dependent on the facts.” *Buchanan*, 469 F.3d at 168.

86. *See* Brief for the National Police Accountability Project as Amicus Curiae Supporting Respondent, at 5, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631), arguing that the Court would not be unduly interfering with sound law enforcement policies throughout the country, but rather would be rendering an opinion consistent with those policies by affirming the Eleventh Circuit’s determination that Officer Scott’s conduct, assuming the jury found in favor of respondent on the facts alleged and supported by the summary judgment record, constituted an unreasonable seizure of respondent and was conduct a reasonable officer would have understood to be unlawful given the totality of the circumstances confronting

In the short time that has passed between the rendering of the Supreme Court's decision in *Scott* and the writing of this article, lower courts have begun the task of trying to figure out whether, and if so, how, *Scott* might control or affect the outcome in cases with somewhat different facts. Viewing the limited landscape that exists thus far, I predict that *Scott* will leave little room for a real balancing test and will be taken to establish a *per se* rule that Justices Ginsburg and Breyer will come to regret.

In *Abney v. Coe*, the first federal appellate court decision in the wake of *Scott*, Abney, a fleeing motorcyclist, was run off the road and killed after a collision with Deputy Sheriff Coe's vehicle during a high-speed pursuit.<sup>87</sup> The chase began when Deputy Coe witnessed Abney illegally pass another vehicle while turning around a sharp curve.<sup>88</sup> Abney, rather than pulling over after Deputy Coe put on his siren and flashing lights, proceeded to cross over double yellow lines and swerve around other vehicles to avoid capture, at one point even running another vehicle off of the road.<sup>89</sup> Deputy Coe finally caught up to Abney, but the parties disputed whether or not he intentionally rammed Abney's motorcycle to prevent escape.<sup>90</sup> Deputy Coe claimed that Abney's motorcycle spun out of control leading to the unavoidable collision with his cruiser, while Abney's estate argued that Coe applied a PIT maneuver in order to end the pursuit.<sup>91</sup>

The trial court denied Deputy Coe's motion for summary judgment on the grounds that there was sufficient evidence from which a jury could find that Coe deliberately collided with Abney, and that such use of deadly force would have been objectively unreasonable under *Garner*.<sup>92</sup> The Fourth Circuit reversed, relying heavily on the analysis of *Scott*.<sup>93</sup> The Court of Appeals found that the record supported the conclusion that Abney's driving "put other motorists at substantial risk of serious harm," and thus, Deputy Coe was "eminently reasonable to terminate the chase in order to avoid further risks to the lives of innocent motorists."<sup>94</sup>

The court's blanket application of *Scott* is troubling. Ignoring obvious differences between the facts of *Scott* and those in the case before it, the

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him at the time.

87. 493 F.3d at 413.

88. *Id.* at 414.

89. *Id.*

90. *Id.*

91. *Id.* at 414, 415.

92. *Abney*, 493 F.3d at 415.

93. *Id.* at 420.

94. *Id.* at 417.

Fourth Circuit treats *Scott* as though it does establish a *per se* rule, making an officer's termination of a pursuit by means of deadly force reasonable whenever the subject of the pursuit engages the officer in a high-speed pursuit that is arguably dangerous. It was daytime, Abney was driving a motorcycle, not a car, there was heavy traffic on the highway portion of the pursuit, neither Abney nor Coe exceeded the posted 55 mile-per-hour speed limit, the Department policy prohibited the use of PIT maneuvers to terminate pursuits, and Deputy Coe was of the opinion that had he intentionally rammed Abney's motorcycle, that would have been an excessive use of force.<sup>95</sup> While the court is right that violations of departmental policies do not establish "constitutional unreasonableness," and that Deputy Coe's subjective beliefs about the reasonableness of his conduct are not dispositive,<sup>96</sup> it is not so clear that these factors, combined with the other facts which distinguish *Abney* from *Scott*, should be treated as "irrelevant to the constitutional inquiry."<sup>97</sup> To discount the importance of these differences is to render the holding in *Scott* "too absolute,"<sup>98</sup> and to ignore the warnings of Justice Ginsburg and Justice Breyer that "whether a high-speed chase violates the Fourth Amendment may well depend upon more circumstances than the majority's rule reflects."<sup>99</sup>

The only other court of appeals' opinion to have been announced at the time of this writing, *Beshers v. Harrison*, provides a similar analysis of *Scott*, with a result that is likewise predictable and disturbing. In *Beshers*, the City of Toccoa, Georgia, Police received a report that an individual had tried to steal beer from a package store after he had been refused service.<sup>100</sup> There was a surveillance tape of the suspect's truck and Officer Scott Harrison, after viewing the tape, spotted a truck matching the suspect's at a nearby service station.<sup>101</sup> Harrison activated his emergency lights and began following Beshers when he ran a stop sign and pulled out onto a four-lane highway.<sup>102</sup> Beshers did not pull over, and both vehicles

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95. *Id.* at 414-17.

96. *Id.* at 419.

97. *Abney*, 493 F.3d at 420.

98. *Scott*, 127 S. Ct. at 1781 (Breyer, J., concurring).

99. *Id.* (referencing Justice Ginsburg's concurring opinion in *Scott*, 127 S. Ct. at 1779-80).

100. *Beshers*, 495 F.3d at 1262. The individual was later identified as Beshers. *Id.* He had made several purchases of alcohol from the same location that day. *Id.*

101. *Id.*

102. *Id.* A short time thereafter, the driver of the truck, who turned out to be Beshers, pulled into a shopping center and let out a passenger carrying a white plastic bag about the size of a six pack of beer. *Beshers*, 495 F.3d at 1269. (Presnell, J., concurring).

proceeded at fifty-five miles per hour in a forty-five mile per hour zone.<sup>103</sup> Two other officers, approaching from the opposite direction, and informed of the chase by radio, attempted to stop Beshers by setting up a roadblock with their vehicle.<sup>104</sup> Beshers swerved to avoid the roadblock, crossed into the oncoming lane, and then returned to his lane and kept driving south on the highway.<sup>105</sup> At this point, Beshers was being followed by Harrison and three other officers in two vehicles.<sup>106</sup> At an intersection where Beshers attempted to go around a car stopped at a red light, the car made a right and Beshers' truck and the car collided.<sup>107</sup> Beshers proceeded and eventually turned onto Georgia Highway 145, "a narrow, winding two-lane country road . . ."<sup>108</sup> Beshers proceeded at speeds of fifty-five to sixty-five miles per hour.<sup>109</sup> Harrison took over the lead in the pursuit and attempted to stop Beshers by means of passing him and blocking his truck.<sup>110</sup> When Beshers tried to get around Harrison, Harrison intentionally rammed the truck, causing it to flip over several times.<sup>111</sup> Beshers was killed on impact.<sup>112</sup>

In analyzing the reasonableness of the seizure, the majority of the panel acknowledged that pre-*Scott*, its inquiry would have been guided by the three preconditions *Garner* established for the use of deadly force.<sup>113</sup> *Scott*, however, was taken to limit *Garner's* applicability, and thus, the only question was whether Harrison's conduct was reasonable.<sup>114</sup> In performing

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103. *Id.*

104. *Id.* at 1262.

105. *Id.*

106. *Id.*

107. *Beshers*, 495 F.3d at 1262-63. Interestingly, as noted by the concurrence, the collision at the intersection was witnessed by Deputy Brian Perrin of the Stephens County Sheriff's Office. *Id.* at 1270 (Presnell, J., concurring). Harrison, who knew Perrin, shouted for Perrin to "Go! Go!" and join the chase. *Id.* Perrin contacted his agency and was told that the Sheriff's Office only authorized pursuits in cases involving "forcible felonies." *Id.* Based on Perrin's description of the events he witnessed, his supervisor refused to allow him to join in the chase. *Id.*

108. *Beshers*, 495 F.3d at 1263.

109. *Id.*

110. *Id.*

111. *Id.* The court assumed that "Harrison intentionally caused the collision" because a jury could reasonably have concluded that the impact was intentional. *Id.* at 1263 n.3.

112. *Id.* at 1263. The majority viewed the evidence, except where contradicted by the videos, in the light most favorable to Beshers. *Beshers*, 495 F.3d 1266. Therefore, although Harrison claimed he did not intend to ram Beshers' truck, the court determined that a reasonable juror could conclude the collision was intentional and Beshers was "seized" for Fourth Amendment purposes. *Id.*

113. *Id.* at 1267.

114. *Id.*

a rather perfunctory “balancing” test pursuant to *Scott*, the court concluded that Harrison “had reason to believe Beshers was a danger to the pursuing officers and others and was driving under the influence of alcohol,” and thus, there was “no doubt that Harrison’s alleged use of deadly force to stop Beshers did not violate the Fourth Amendment.”<sup>115</sup>

Given the Supreme Court’s decision in *Scott*, Judge Presnell from the Middle District of Florida, sitting by designation, was “compelled to concur in the panel decision.”<sup>116</sup> In doing so, however, Judge Presnell writes an incredibly powerful opinion that underscores major concerns this author has about the implications of *Scott* for future cases. Viewing the same record and the same videos, Judge Presnell opines that Beshers’ conduct, while “undeniably dangerous,” was not “particularly heinous,” and was not conduct that a reasonable person would determine “warranted death.”<sup>117</sup> *Scott*, however, compelled Judge Presnell “to conclude that, as a matter of law, Harrison had the right to end the chase by killing Beshers . . . .”<sup>118</sup> While acknowledging, as I acknowledge with *Scott*, that a reasonable jury could decide, based on a weighing of all the evidence, that Harrison’s use of deadly force was justified, Judge Presnell finds the decision in the case troubling.<sup>119</sup> He sums up the problem with the astute and, in my opinion, accurate assessment of *Scott*’s effect:

For all of its talk of a balancing test, the *Harris* 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.

As a practical matter, a police officer’s qualified immunity to use deadly force in a car chase situation is now virtually unqualified. *Harris* and this opinion allow a police officer to use deadly force with constitutional impunity if the fleeing suspect poses any danger to the public. In my humble opinion, I believe we will live to regret this precedent.<sup>120</sup>

Thus, while eschewing the notion that *Garner* established some sort of “magical on/off switch” for deadly force cases, the Court in *Scott* appears to have substituted its own version of the “on/off switch” in the toothless balancing test that in reality affords “no weight” to the likelihood of killing

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115. *Id.* at 1268.

116. *Beshers*, 495 F.3d at 1268 (Presnell, J., concurring).

117. *Id.* at 1270.

118. *Id.* at 1272.

119. *Id.*

120. *Id.*

the suspect.<sup>121</sup>

In *Sharp v. Fisher*, two South Carolina officers clocked Katie Sharp going eighty-six miles per hour in a seventy mile-per-hour zone on Interstate-95, headed towards Georgia.<sup>122</sup> Refusing to pull over, she led the officers on a pursuit that lasted forty-five minutes, covered over seventy-five miles and reached speeds up to 107 miles per hour.<sup>123</sup> Twenty miles after the pursuit entered Georgia, State Trooper William Fisher, without knowing why Sharp was being pursued, without communicating with the South Carolina officers, and after only fifty-seven seconds of observing Sharp's driving, exercised his discretion to perform a PIT maneuver on Sharp's SUV.<sup>124</sup> Sharp's vehicle was sent across all lanes of traffic, off the interstate, and into a tree-filled ditch.<sup>125</sup> Both Sharp and her passenger were killed.<sup>126</sup> Suit was brought by Sharp's parents on behalf of Sharp and her surviving child.<sup>127</sup> In ruling on Fisher's motion for summary judgment based on qualified immunity, viewing the facts as depicted by three videos, the court first addressed the issue of whether Fisher's conduct was

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121. *Beshers*, 495 F.3d at 1272.

122. 2007 WL 2177123, at \*1.

123. *Id.*

124. *Id.* at \*2.

125. *Id.*

126. *Id.* at \*1. The presence of the passenger in *Sharp* raises an interesting twist in these pursuit cases. *Sharp* dealt only with the claims asserted on behalf of the driver and her surviving child. *Id.* In *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989), the Supreme Court held that a Fourth Amendment seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied.*" An unintended or accidental termination of movement does not invoke Fourth Amendment protection, but rather is subjected to the more stringent "shocks the conscience" standard applied to Fourteenth Amendment substantive due process claims. *See Lewis*, 523 U.S. at 843-44, 847 (no seizure took place when a high-speed police chase ended with a police cruiser unintentionally hitting and killing the passenger who fell off the motorcycle). To address this question, most courts have held that when an officer intentionally shoots at or rams a fleeing vehicle, the passenger, as well as the driver, is "seized" within the meaning of the Fourth Amendment. *See, e.g., Vaughan v. Cox*, 343 F.3d 1323, 1328 (11th Cir. 2003) (bullet meant to stop car and its passengers seized passenger when it hit him); *Fisher v. City of Memphis*, 234 F.3d 312, 318-19 (6th Cir. 2000) (by shooting at the driver of moving car, the officer intended to stop the car, effectively seizing everyone inside, including a passenger); *Tubar v. Clift*, 453 F. Supp. 2d 1252, 1255-56 (W.D. Wash. 2006) (a passenger was seized when hit by gunfire intentionally aimed at car). *But see Schultz v. Braga*, 455 F.3d 470, 482 (4th Cir. 2006) (distinguishing *Vaughan* and *Fisher* and holding that a driver was not seized when a bullet that caused injury to the passenger was not intended to terminate the driver's freedom of movement and did not terminate her freedom of movement); *Willis v. Oakes*, 493 F. Supp. 2d 776, 784 (W.D. Va. 2007) (a passenger was not seized when wounded by shots intended for the driver of vehicle).

127. *Sharp*, 2007 WL 2177123, at \*1.

objectively reasonable under the Fourth Amendment.<sup>128</sup> Both *Scott* and *Abney* were distinguished on the basis that “a jury here could conclude that Fisher’s actions endangered not only the culpable driver, but also the (culpability unknown) passenger *and* the innocent drivers and passengers of the vehicles Fisher passed seconds before pushing [Sharp]’s SUV.”<sup>129</sup> Because “Fisher did not see or hear of *any* public-endangering, evasive action or out-of-control driving by Sharp,” the court found that “[Fisher’s] actions suggest[ed] he felt he had carte blanche to ‘take out’ Sharp by whatever means necessary solely because she would not pull over.”<sup>130</sup> This conduct, the court concluded, was objectively unreasonable and violated the Fourth Amendment.<sup>131</sup>

On the second prong of the qualified immunity analysis, however, plaintiffs cited no case that gave fair warning “that stopping a recalcitrant but controlled driver by initiating a PIT maneuver was a clearly established violation of the Fourth Amendment” at the time of the challenged conduct.<sup>132</sup> In 2003, the Eleventh Circuit had denied qualified immunity to a Deputy who had fired “into the cabin of a pickup truck, traveling at approximately eighty miles per hour on Interstate-85 in the morning.”<sup>133</sup> Looking at the facts in a light most favorable to the plaintiff and relying on *Garner*, the Court of Appeals held in *Vaughan v. Cox* that a jury could find the deputy’s conduct unlawful and that *Garner* provided fair warning that such conduct violated the Fourth Amendment.<sup>134</sup> In the opinion of the district court in *Sharp*, *Vaughan* is no longer good law after *Scott*, which makes the question of objective reasonableness a “pure question of law,” and which rejects *Garner* as the source of any “bright-line deadly force test.”<sup>135</sup> While not good law now, the court pointed out that *Vaughan* was clearly established law at the time of the incident in *Sharp*.<sup>136</sup> But even had the plaintiffs in *Sharp* raised *Vaughan*, the district court made clear that a *Vaughan*-based argument would have failed.<sup>137</sup> Relying on the distinction drawn in *Scott* between the “near *certainty* of death” posed by shooting at a fleeing motorist’s car as opposed to the “high likelihood of

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128. *Id.* at \*1, \*4.

129. *Id.* at \*5.

130. *Id.* at \*6.

131. *Id.* at \*7.

132. *Sharp*, 2007 WL 2177123, at \*7.

133. *Vaughan*, 343 F.3d at 1333.

134. *Id.* at 1331-33.

135. *Sharp*, 2007 WL 2177123, at \*7 n.2 (citing *Scott*, 127 S. Ct. at 1776 n.8, 1778).

136. *Id.*

137. *Id.* at \*7.

serious injury or death” presented by ramming the suspect’s vehicle,<sup>138</sup> the district court concluded that *Vaughan* would not have provided fair warning to Fisher that use of the PIT maneuver was unlawful under the circumstances.<sup>139</sup> Given the summary judgment facts the district court assumed for purposes of ruling on the qualified immunity question, my own opinion is that no case law was needed to put a well-trained officer on notice that the conduct in which Fisher engaged was unreasonable, and, if case law was needed, *Vaughan* gave fair warning that using deadly force—whether shooting or ramming at high speed—under such circumstances violated Sharp’s Fourth Amendment right to be free from an unreasonable seizure.

In another post-*Scott* decision, *Willis v. Oakes*, Deputy McNally arrived after midnight at a convenience store parking lot to arrest a known drug dealer on an outstanding warrant.<sup>140</sup> The drug dealer, whom McNally arrested, was standing next to Kirby Willis’ vehicle, in a “secluded” part of the parking lot, speaking to him through the window.<sup>141</sup> McNally, awaiting the arrival of Deputy Yost who was going to take the arrestee into custody, questioned Kirby Willis and his passenger, Bruce Willis, eventually asking Kirby to step out of his vehicle and submit to a breath-alcohol test.<sup>142</sup> When Kirby repeatedly inhaled rather than exhaled into the tube, McNally threatened to take him in for driving under the influence.<sup>143</sup> Upon learning that his car would be towed if his passenger was found to be intoxicated, Willis fled to his vehicle, with Deputies Yost and McNally in pursuit.<sup>144</sup> During the ensuing struggle in the front seat of the car, the vehicle went into gear, and Deputy McNally fired three shots at Kirby at close range.<sup>145</sup> Two of the shots passed through Kirby, killing him and wounding both

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138. *Scott*, 127 S. Ct. 1769, at 1778. Some in law enforcement might question the assumption underlying this comparison. As the International Association of Chiefs of Police has noted:

The popular cinematic and television characterization of the police does not reflect the abilities of most officers under actual combat shooting conditions. Research in major metropolitan police departments, in fact, reveals miss rates of between 42 and 82 percent of rounds fired during actual deadly force confrontations.

*Concepts and Issues Paper* (2005), *supra* note 72, at 4-5.

139. *Sharp*, 2007 WL 2177123, at \*7.

140. 493 F. Supp. 2d at 779.

141. *Id.*

142. *Id.* at 779-80.

143. *Id.* at 780.

144. *Willis*, 493 F. Supp. 2d at 780.

145. *Id.*

Deputy Yost and Bruce Willis.<sup>146</sup> After the shooting, the vehicle “lurched forward through the parking lot, hitting two cars, and went over an embankment.”<sup>147</sup> According to Bruce Willis, there was no movement of the vehicle before Kirby was shot.<sup>148</sup>

In deciding McNally’s claim to qualified immunity, the court relied upon *Scott* to assess the “relative culpability” of the parties involved, found that “Kirby intentionally placed himself, Bruce, and innocent bystanders in danger by recklessly attempting to drive off,” and thus, concluded that McNally’s actions were objectively reasonable.<sup>149</sup> The decision in *Willis* is clearly inconsistent with the decision rendered on the merits of the Fourth Amendment question by the Ninth Circuit in *Brosseau*.<sup>150</sup> Although the Supreme Court decision in *Brosseau* left the constitutional “holding” of the Ninth Circuit untouched, it is likely that *Scott* will lead more courts to weigh “relative culpability” and come to conclusions like that reached by the court in *Willis* on facts that resemble those in *Willis* or *Brosseau*.

#### V. *SCOTT*’S IMPLICATIONS FOR GARNER “DEADLY FORCE” INSTRUCTIONS

One of the more perplexing issues raised by *Scott* is what effect it will have on jury trials in Section 1983 deadly force cases in particular, and excessive force cases in general. When qualified immunity is raised in either a motion to dismiss or at the summary judgment stage, the Supreme Court has stressed the legal nature of the issue and has instructed that “[i]mmunity ordinarily should be decided by the court long before trial.”<sup>151</sup>

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146. *Id.* at 780. Because Yost and Bruce were not the intended objects of the shooting, neither was “seized” for Fourth Amendment purposes and Bruce’s claim failed under the “shocks the conscience” standard. *Id.* at 784. The court concluded that “Bruce has pointed to no facts that would suggest that Deputy McNally’s conduct was such an abuse of official power that it shocks the conscience.” *Id.* at 784.

147. *Willis*, 493 F. Supp. 2d at 780.

148. *Id.* at 781.

149. *Id.* at 783. It is not clear what “innocent bystanders” were present in the parking lot at 12:30 a.m. or shortly thereafter. In any event, it was irrelevant to the court whether Kirby “had actually driven the Tahoe forward before the shots were fired.” *Id.* at 783. Furthermore, relying on the Fourth Circuit’s “at the moment” approach in determining the reasonableness of the use of force, see *Greenidge v. Ruffin*, 927 F.2d 789, 791-92 (4th Cir. 1991), the district court refused to consider any of McNally’s conduct prior to the moment of the shooting itself. *Willis*, 493 F. Supp. 2d at 783. Evidently, “relative culpability” does not take into account “relative stupidity.” One wonders if McNally’s conduct would have been found objectively reasonable if Deputy Yost had been killed.

150. See discussion, *supra* Part I.

151. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam). The Court has explained that qualified immunity is “an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether

The Court has yet to speak to the question of how the issue is to be resolved if summary judgment is precluded by the existence of material issues of fact, but most circuits have held that the issue of qualified immunity remains a legal one to be resolved by the court, while questions of fact should be given to the jury by way of special interrogatories.<sup>152</sup> In *Scott*, once the Court decided that the videotape eliminated any genuine issue of material fact as to the threat presented by Harris' driving, the question of the objective reasonableness of Scott's use of force was a "pure question of law."<sup>153</sup> The Court was addressing the first prong of the qualified immunity analysis under *Saucier*, the constitutional "merits" question of whether Scott's conduct was objectively reasonable under the Fourth Amendment.<sup>154</sup> In *Curley v. Klem*, the Court of Appeals for the Third Circuit noted "[c]onfusion between the threshold constitutional inquiry and the immunity inquiry," suggesting that "the most helpful approach is to consider the constitutional question as being whether the officer made a reasonable mistake of fact, while the qualified immunity

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the conduct of which the plaintiff complains violated clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). It is "an *immunity from suit* rather than a mere defense to liability . . ." *Id.*

152. *See, e.g.*, *Curley v. Klem*, 499 F.3d 199, 208-11 & n.12 (3d Cir. 2007) (surveying circuit opinions and concluding that "whether an officer made a reasonable mistake of law and is thus entitled to qualified immunity is a question of law that is properly answered by the court, not a jury."); *Cortez v. McCauley*, 478 F.3d 1108, 1120-21 (10th Cir. 2007) (en banc) ("The parties agree on the 'what happened' questions. In such a circumstance, for qualified immunity purposes, there is no such thing as a 'genuine issue of fact' as to whether an officer 'should have known' that his conduct violated constitutional rights. The conduct was either objectively reasonable under existing law or it was not.") (citation omitted); *Int'l Ground Transp., Inc. v. Mayor and City Council of Ocean City*, 475 F.3d 214, 219, 220 n.3 (4th Cir. 2007) (implicitly expressing disapproval of submission of qualified immunity to jury: "Entitlement to qualified immunity is a legal question to be decided to [sic] the court, although factual issues underlying the qualified immunity analysis may be submitted to a jury.") (citing *Willingham v. Crooke*, 412 F.3d 553, 558-59 (4th Cir. 2005)); *Harvey v. Plains Twp. Police Dep't*, 421 F.3d 185, 194 n.12 (3d Cir. 2005) ("The parties appear to be in disagreement over the proper role of the jury in qualified immunity determinations. Although the courts of appeals are not unanimous on this issue, this Court has held that 'qualified immunity is an objective question to be decided by the court as a matter of law.'") (citing *Carswell v. Borough of Homestead*, 381 F.3d 235, 242 (3d Cir. 2004)); *Smith v. City of Hemet*, 394 F.3d 689, 704 n.7 (9th Cir. 2005) (en banc) ("Whether the officers are entitled to qualified immunity may depend in large part on factual determinations the jury will be required to make."); *Littrell v. Franklin*, 388 F.3d 578, 585 (8th Cir. 2004) ("Where, as in this case, factual questions prevent a district court from ruling on the issue of qualified immunity, it is appropriate to tailor special interrogatories specific to the facts of the case. This practice allows the jury to make any requisite factual findings that the district court may then rely upon to make its own qualified immunity ruling.")

153. *Scott*, 127 S. Ct. at 1776 n.8.

154. *See supra* notes 16 and 52.

question is whether the officer was reasonably mistaken about the state of the law.”<sup>155</sup> Under *Scott*, if there are no genuine issues of material fact in dispute, the ultimate question of whether the officer made a reasonable mistake of fact is a question of law to be decided by the court.<sup>156</sup> It is unclear to me how this question of law can be given to the jury, even under the first prong of *Saucier*, once the jury decides the underlying “who-what-when-where-why type of historical fact issues.”<sup>157</sup> The logical implication of *Scott* is that if there *are* material issues of fact to be sent to the jury, the jury should decide those issues by way of special interrogatories and the court should decide the legal question of the objective reasonableness, as a matter of fact, of the use of force.<sup>158</sup> If this is so, one might question the need to give instruction to a jury even on the *Graham* elements of an excessive force claim, let alone the *Garner* preconditions for *deadly* force.<sup>159</sup> A jury would simply be required to return answers to interrogatories that would flesh out the material facts that had to be decided for the court to make the “objective reasonableness” determination. Based on the jury’s findings of fact, the court would decide the “pure question of law.”<sup>160</sup> If the court were to decide the challenged conduct was objectively

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155. 499 F.3d at 214.

156. *Scott*, 127 S. Ct. at 1776 n.8.

157. *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996).

158. *See, e.g., Sharp*, 2007 WL 2177123, at \*7 n.2 (“*Vaughan* is no longer good law after *Scott*. Under *Vaughan*, the issue of reasonableness is a jury issue. 343 F.3d at 1330 (“We conclude that a reasonable jury could find, under *Vaughan*’s version of the facts, that Deputy Cox’s use of deadly force to apprehend *Vaughan* and *Rayson* was unconstitutional”). That is no longer true.”) (citing *Scott*, 127 S. Ct. at 1776 n.8); *see also Curley*, 2007 WL 2404803, at \*10 n.14:

We note that in the Supreme Court’s recent decision in *Scott*, the Court stated that, because the case ‘was decided on summary judgment, there [had] not yet been factual findings by a *judge* or jury. . . .’ Without wanting to read too much into that statement, since it may refer to nothing more than a case in which the parties waive any right to a jury, it appears the Court at least contemplated a circumstance where a judge may resolve factual issues. Certainly the dissent in *Scott* was concerned about judicial fact finding.

(alterations in original) (citations omitted).

159. *See Graham*, 490 U.S. at 396 (requiring, in performance of the Fourth Amendment balancing, that “careful attention [be given] to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”).

160. Judge Presnell observed in *Beshers*:

If a balancing test is to have any real meaning, 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. Nevertheless, based on my reading of *Harris*, that decision has been taken away from the jury where,

unreasonable as a matter of fact under the first prong of *Saucier*, the court might still grant qualified immunity under the second prong, if the conduct was objectively reasonable as a matter of law because the “legal constraints on particular police conduct” were not clearly established at the time of the incident.<sup>161</sup>

Even if courts continue to give excessive force instructions which require the jury to decide, based on its findings of historical fact, the ultimate constitutional question of objective reasonableness of the defendant’s conduct, *Scott* will no doubt have an effect on jury instructions given in Section 1983 cases involving the use of deadly force. The Court in *Scott* rejected the view that *Garner* established any “magical” preconditions to the use of deadly force.<sup>162</sup> Rather, *Garner* was simply an application of the general Fourth Amendment objective reasonableness test to particular facts.<sup>163</sup> Currently, the Third, Seventh, and Ninth Circuits include separate *Garner* language in their Model Jury Instructions for deadly force cases.<sup>164</sup> Furthermore, in *Monroe v. City of Phoenix*,<sup>165</sup> the Ninth Circuit had held that “[a]n excessive force instruction is not a substitute for a *Garner* deadly force instruction,” and that “where there was no dispute that deadly force was used, the district court abuses its discretion

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as here, the fleeing suspect has endangered others.  
495 F.3d at 1272.

161. 533 U.S. at 205.

162. 127 S. Ct. at 1777.

163. *Id.*

164. *See, e.g.*, 3d Cir. Civ. Jury Instr. § 4.9.1 (2007), available at [http://www.ca3.uscourts.gov/civiljuryinstructions/toc\\_and\\_instructions.htm](http://www.ca3.uscourts.gov/civiljuryinstructions/toc_and_instructions.htm) (follow “Chapter 4” hyperlink) (last visited Oct. 21, 2007) (In deadly force case, the plaintiff must prove one of the following: “deadly force was not necessary to prevent [plaintiff’s] escape; or [defendant] did not have probable cause to believe that [plaintiff] posed a significant threat of serious physical injury to [defendant] or others; or it would have been feasible for [defendant] to give [plaintiff] a warning before using deadly force, but [defendant] did not do so.”) (alterations in original); 7th Cir. Civ. Jury Instr. § 7.09 (2005), available at <http://www.ca7.uscourts.gov/7thcivinstruct2005.pdf> (last visited Oct. 21, 2007) (“An officer may use deadly force when a reasonable officer, under the same circumstances, would believe that the suspect’s actions placed him or others in the immediate vicinity in imminent danger of death or serious bodily harm.”); 9th Cir. Civ. Jury Instr. § 9.23 (2007):

In general, a seizure of a person is unreasonable under the Fourth Amendment if a police officer uses deadly force without having probable cause to believe the person poses an imminent threat of death or serious bodily injury to the officer or to others. Thus, in order to prove an unreasonable seizure in this case, the plaintiff must prove by a preponderance of the evidence that the officer[s] did not have probable cause to believe the plaintiff posed an imminent threat of death or serious bodily injury to the officer or to others.

165. 248 F.3d 851, 859-60 (9th Cir. 2001).

by not giving a *Garner* deadly force instruction.” As this article was in the final editing process, however, the Ninth Circuit overruled *Monroe*. In *Acosta v. Hill*,<sup>166</sup> the court held:

We had previously held that ‘[a]n excessive force instruction is not a substitute for a . . . deadly force instruction.’ *Monroe v. City of Phoenix*, 248 F.3d 851, 859 (9th Cir. 2001). We reached this conclusion based on the observation that ‘the Supreme Court . . . established a special rule concerning deadly force.’ *Id.* at 860. *Scott* explicitly contradicts that observation. *Scott* controls because it is ‘intervening Supreme Court authority’ that is ‘clearly irreconcilable with our prior circuit authority.’ *Monroe*’s holding that an excessive force instruction based on the Fourth Amendment’s reasonableness standard is not a substitute for a deadly force instruction is therefore overruled.

While the Eighth Circuit has no separate *Garner*/deadly-force model jury instruction, the Court of Appeals has held, in *Rahn v. Hawkins*,<sup>167</sup> that “[j]ury instructions that discuss only excessive force in only a general way do not adequately inform a jury about when a police officer may use deadly force,” and, it can be reversible error not to give a deadly-force instruction.<sup>168</sup> As the court explained:

The problem with giving only the more general excessive-force

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166. \_\_\_ F.3d \_\_\_, No. 05-56575, 2007 WL 3013451, at \*1 (9th Cir. Oct. 17, 2007) (citations omitted) (alterations in original).

167. 464 F.3d 813, 818 (8th Cir. 2006). See generally 8th Cir. Civ. Jury Instr. § 4.10 (2005), available at [http://www.juryinstructions.ca8.uscourts.gov/civil\\_instructions.htm](http://www.juryinstructions.ca8.uscourts.gov/civil_instructions.htm) (follow “PDF Version” hyperlink).

168. The court noted the differences between the plaintiff’s proposed instruction and that given by the court:

Mr. Rahn asked for a deadly-force instruction that read, “While the use of ‘force’ is reasonable under the Fourth Amendment if it would seem justified to a reasonable police officer in light of the surrounding circumstances, the use of ‘deadly force’ is only justified if the officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others.” The district court refused the proposed instruction, citing its general trepidation about giving instructions that vary from the Eighth Circuit model instructions and its fear that the jury would be confused if it gave both Mr. Rahn’s deadly-force instruction and the so-called verdict-director instruction that it did give. The instruction that it gave was derived from Eighth Circuit Model Jury Instruction (Civil) 4.10. The relevant portion of that instruction states, “In determining whether such force was ‘not reasonably necessary,’ you must consider such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether a reasonable officer on the scene, without the benefit of 20/20 hindsight, would have used such force under similar circumstances.”

*Id.* at 817.

instruction is that it may mislead the jury as to what is permissible under the law. One can easily imagine a jury, having been given only the general standard, concluding that an officer was “objectively reasonable” in shooting a fleeing suspect who posed no threat to the officer or others. But such a result would be contrary to the law and would work an injustice to the injured plaintiff.<sup>169</sup>

The Second Circuit has no model jury instructions, but a recent district court opinion reflects what will likely become the typical post-*Scott* approach to a request for deadly force instructions. In *Blake v. City of New York*,<sup>170</sup> plaintiffs, suspected burglars, hid from police in a ventilation shaft in a maintenance garage. After an hour’s search, the police found them and ordered them out of the shaft.<sup>171</sup> There was a dispute as to whether plaintiffs struggled with the officers and as to whether their hands were visible.<sup>172</sup> Blake claimed that one of the officers commanded DJ, the police canine, to “get” him and that he was bitten “on the face, upper neck, and both arms.”<sup>173</sup> Defendants claimed that Blake was bitten on just the left arm.<sup>174</sup> The court viewed these as material issues of fact which had to be decided by a jury.<sup>175</sup> Plaintiffs argued that a properly trained police dog can constitute deadly force and asked the court to instruct the jury on deadly force.<sup>176</sup>

Relying on *Scott*, the court found it unnecessary to decide the question of whether the use of the dog in *Blake* constituted deadly force and unnecessary, indeed, improper, to give a deadly force instruction.<sup>177</sup> *Scott* established that “deadly force is simply a type of excessive force,” and that “[n]o separate legal standard applies to cases involving deadly force.”<sup>178</sup> The court acknowledged that pre-*Scott*, the distinction between deadly and non-deadly force would have been important because jurors would have been “instructed to apply more stringent standards in deadly force cases

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169. *Id.* at 818.

170. No. 05-CV-6652, 2007 WL 1975570, at \*1 (S.D.N.Y. July 6, 2007).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Blake*, 2007 WL 1975570, at \*4.

176. *Id.* at \*2. The district court accurately noted that “[w]hile the Second Circuit has not decided the question, several other circuits have held that a properly trained police dog cannot, as a matter of law, constitute deadly force.” *Id.* at \*2 n.2 (citing *Dunigan v. Noble*, 390 F.3d 486, 492 n.8 (6th Cir. 2004); *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988); *Kuha v. Minnetonka*, 365 F.3d 590, 598 (8th Cir. 2004)).

177. *Blake*, 2007 WL 1975570, at \*3, 4.

178. *Id.* at \*3.

than in cases that did not involve deadly force.”<sup>179</sup> Likewise, the court notes that instructions that include the *Garner* preconditions present defendants with a greater challenge in justifying their conduct as objectively reasonable.<sup>180</sup> After *Scott*, however, “the Court need only craft a charge which will help a jury decide whether the force used in this case was reasonable under all the circumstances.”<sup>181</sup> The jury would be allowed to consider the *Graham* factors,<sup>182</sup> as well as factors suggested by the parties or any other factors that would assist in their reasonableness analysis.<sup>183</sup> The jury would not be instructed “as to the definition of deadly force or the specific circumstances under which deadly force is or is not reasonable.”<sup>184</sup>

Defendants in Section 1983 cases involving deadly force will be quick to realize the significance of *Scott*. Circuits with model jury instructions based on the *Garner* preconditions will no doubt be revisiting those instructions. Cases holding that it can be reversible error to fail to include *Garner* instructions in deadly force cases are no longer good law.<sup>185</sup> As a practical matter, *Scott* will have a very real impact on jury trials in Section 1983 excessive and deadly force cases.

#### CONCLUSION

Regardless of one’s views with respect to Deputy Scott’s conduct on the night of March 29, 2001, *Scott* is a case that should have proceeded to trial. A jury should have been instructed as to the *Garner* factors, which “set a threshold under which the use of deadly force would be considered constitutionally unreasonable . . . .”<sup>186</sup> A jury may well have decided that Scott’s conduct was reasonable, or, in the event of a plaintiff’s verdict, the district court may well have granted qualified immunity on the ground that the law was not clearly established in such a way as to give Scott “fair warning” that his conduct was unlawful. By taking it upon themselves to judge the reasonableness of Scott’s conduct, the majority of the Court has rendered a decision with potentially serious consequences. Videotape has

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179. *Id.*

180. *Id.*

181. *Id.* at \*4.

182. *See supra*, note 60.

183. *Blake*, 2007 WL 1975570 at \*4.

184. *Id.*

185. *See, e.g., Rahn*, 464 F.3d at 818; *Monroe*, 248 F.3d at 860, *overruled by Acosta*, 2007 WL 3013451.

186. *Scott*, 127 S. Ct. at 1784 (Stevens, J., dissenting).

been anointed the bearer of truth; law enforcement agencies will be encouraged to abandon deadly force policies; and federal courts will no longer instruct on *Garner* preconditions or advise as to any special factors governing the use of deadly force. In the process, the Court has done nothing to clarify the law in excessive force cases to the extent that they are admittedly fact-bound, or, to the extent that the only relevant fact becomes whether the subject of a pursuit drives in a dangerous manner, the Court has created a *per se* rule that usurps the jury's function. Whatever would have been the result of a jury trial in *Scott*, it would have been far easier to accept and much less likely to have infected the law than the product that has resulted from the majority's night out at the movies. In the words of Judge Presnell, "I believe we will live to regret this precedent."<sup>187</sup>

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187. *Beshers*, 495 F.3d at 1272 (Presnell, J., concurring). Indeed, just as this article was going to press, the Court of Appeals for the Eleventh Circuit rendered a decision that pushes *Scott* to its limits and underscores the prescience of Judge Presnell's warning in *Beshers*. See generally *Long v. Slaton*, \_\_\_ F.3d \_\_\_, No. 06-11439, 2007 WL 3407680 (11th Cir. Nov. 16, 2007). In *Long*, the court reversed the denial of qualified immunity to an officer who responded to a doctor's call for help with his psychotic son. *Id.* at \*1. The doctor was unable to have the son committed because of a lack of available hospital beds. *Id.* Deputy Slaton arrived at the house and upon exiting his vehicle, left the keys in the ignition and the driver's door open. *Id.* Long's father informed Slaton that Long had not been violent but that he wanted him detained because of a psychotic episode. *Id.* Deputy Slaton approached Long with handcuffs to take him into custody. *Id.* Long, who was standing in the driveway, ran to the police cruiser, got in, and began backing down the driveway. *Id.* Slaton ordered him to get out of the car or he would shoot. *Id.* When Long did not comply with the request, Deputy Slaton shot and killed Long. *Id.* In an opinion by Chief Judge Edmondson, joined by Judge Hull, the court held that, as a matter of law, Deputy Slaton's conduct was objectively reasonable. *Id.* at \*3. The court noted that "[a]lthough Slaton's decision to fire his weapon risked Long's death, that decision was not outside the range of reasonableness in the light of the potential danger posed to officers and to the public if Long was allowed to flee in a stolen police cruiser." *Id.* In the alternative, even if there was some doubt about the objective reasonableness of Slaton's conduct, the court held the law was not clearly established at the time of the challenged conduct. *Id.* at \*5. The court concluded that neither *Vaughan v. Cox*, nor *Garner* gave sufficient warning that Slaton's use of deadly force under these circumstances was unreasonable. *Id.* at \*6-7. See *supra* note 133 and accompanying text for discussion on *Vaughan*. The court determined that *Vaughan* was "too different from this case to cause every objectively reasonable officer to know that the use of deadly force in the circumstances of this case must violate federal law." *Id.* at \*6. As for *Garner*, the court found:

Simply put, the Supreme Court's decision in *Garner*—which does not involve a fleeing motor vehicle—offered little insight on whether an officer, consistently with the Fourth Amendment, may use deadly force to stop a man who has stolen a police cruiser and has been given clear warnings about the use of deadly force.

*Id.* at \*7. As in *Beshers*, the contrary voice came from a district court judge, Judge Forrester, sitting by designation. *Id.* at \*8. Judge Forrester brought to light two facts not mentioned by the majority of the panel: that "Deputy Slaton had dealt with the deceased before without any major problem and that the shooting occurred in a fairly rural area

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several miles from Florence, Alabama.” *Id.* (Forrester, J., concurring in part and dissenting in part). Finding no “arguable probable cause” that there was a “serious threat of imminent or immediate physical harm to the officer or others[,]” and noting that “the possibility that a nonviolent fleeing felon will later pose a threat of physical harm to others is remote and highly speculative[,]” Judge Forrester would not have found the use of deadly force by Slaton objectively reasonable. *Id.* Furthermore, in Judge Forrester’s view, *Vaughan* gave ample warning that the use of deadly force under these circumstances was unlawful. *Id.*