
ESSAY

UNGUIDED MISSILES: WHY THE SUPREME COURT SHOULD PROHIBIT POLICE OFFICERS FROM SHOOTING AT MOVING VEHICLES

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In just an eighteen month period, the Supreme Court decided two cases involving the use of deadly force to end high-speed police pursuits. Although most police departments have policies limiting when officers can initiate pursuits, in both cases, the Court never questioned whether the initial decision by police officers to engage in a high-speed pursuit of the suspects was reasonable. The Court also found that shooting into a moving vehicle in an effort to end the pursuit was reasonable despite the fact that most police departments prohibit officers from using this tactic. The Court should reconsider the excessive leeway given to individual officers in light of the growing consensus among the Department of Justice, experts on the use of force, and local police departments that firing into vehicles creates significant risks and can constitute excessive force.

I. *PLUMHOFF V. RICKARD* AND *MULLENIX V. LUNA*

In May 2014, the Court decided *Plumhoff v. Rickard*.¹ After Rickard was pulled over because of a defective headlight he refused to exit his vehicle and sped away; the police pursued in a high-speed chase.² The ensuing chase lasted over five minutes and Rickard's car attained speeds of over 100 miles per hour as it weaved through traffic.³ Officers attempted to stop the vehicle

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¹ 134 S. Ct. 2012 (2014).

² *Id.* at 2017.

³ *Id.* at 2021.

using a rolling roadblock but were unsuccessful.⁴ Eventually, Rickard's car "spun out into a parking lot and collided with [a police officer's] cruiser."⁵ As Rickard once again tried to escape in his car, officers shot into his car a total of fifteen times, causing him to crash his car and killing him.⁶ The Court concluded that because "Rickard's flight posed a grave public safety risk . . . the police acted reasonably in using deadly force to end that risk."⁷

In November 2015, *Mullenix v. Luna* presented the Court with another high-speed chase by police.⁸ A police officer "approached Leija's car and informed him that he was under arrest" because of an outstanding warrant.⁹ Leija "sped off" and "led the officers on an 18-minute chase at speeds between 85 and 110 miles per hour."¹⁰ In an effort to end the pursuit, police officers set up spike strips at three different locations.¹¹ Instead of waiting for Leija's vehicle to reach the locations where the spike strips were deployed, the defendant police officer decided to try and end the pursuit by "shooting at Leija's car in order to disable it."¹² He fired six shots at Leija's vehicle from his position on an overpass.¹³ Instead of hitting the engine block of the vehicle, his intended target, he hit Leija four times in the upper body, killing him.¹⁴

The Supreme Court considered whether the police officer was entitled to qualified immunity for his actions.¹⁵ If his conduct did not violate clearly established statutory or constitutional rights, then, as a police officer, he could not be subject to personal liability.¹⁶ The Court was quick to point out that it has "never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity."¹⁷ Arguing that the doctrine operates to "protect[] actions in the 'hazy border between excessive and acceptable force,'"¹⁸ the Court concluded that *Mullenix* was entitled to qualified immunity because

4 *Id.* at 2017.

5 *Id.*

6 *Id.* at 2018.

7 *Id.* at 2022.

8 136 S. Ct. 305 (2015).

9 *Id.* at 306.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.* at 307.

14 *Id.*

15 *Id.* at 308.

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

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

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

“excessive force cases involving car chases reveal the hazy legal backdrop against which [the officer] acted.”¹⁹

Contradicting the Court’s impression that excessive force cases involving car chases are “hazy,” police departments have developed clear guidelines for officers to follow when deciding whether or not to engage in a high-speed pursuit and whether to use deadly force. Although the Court concluded that police officers acted reasonably in *Plumhoff* and *Mullenix*, many of the nation’s largest metropolitan police departments have policies restricting high-speed pursuits and expressly forbidding officers from firing into a vehicle in an effort to end pursuits.²⁰ These police protocols support the opposite conclusion: the officers’ actions in these cases were plainly unreasonable.

II. THE REASONABLENESS OF HIGH-SPEED POLICE PURSUITS

Many of the problems with the Court’s analysis of the reasonableness of high-speed pursuits stem from its decision in *Scott v. Harris*.²¹ In *Scott*, the Court held reasonable an officer’s decision to end a high-speed pursuit by ramming his push bumper into the back of the suspect’s car in order to make the vehicle spin to a stop, despite the “high likelihood of serious injury or death” to the suspect.²² The Court rejected the idea that “the innocent public [would] have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit.”²³ The Court dismissed the idea that public safety would be better served by ending the pursuit because there is “no way to convey convincingly [to a suspect] that the chase [is] off” and therefore the suspect is “just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.”²⁴ However, research contradicts the Court’s assumption and suggests that suspects will slow down and stop driving recklessly a short time after officers stop pursuit.²⁵ In fact, police pursuit policies are actually “based on the notion that once an officer or supervisor terminates a pursuit because the risks are too great, the public will be safer than if the pursuit is continued.”²⁶

¹⁹ *Id.* at 309.

²⁰ See *infra* Part III.

²¹ 550 U.S. 372 (2007).

²² *Id.* at 375, 384.

²³ *Id.* at 385.

²⁴ *Id.*

²⁵ David P. Schultz et al., *Evidence-Based Decisions on Police Pursuits*, FBI L. ENFORCEMENT BULL., Mar. 2010, <https://leb.fbi.gov/2010/march/evidence-based-decisions-on-police-pursuits-the-officers-perspective> [<https://perma.cc/T3JP-ZKX8>] (surveying both former suspects and police officers to reach the conclusion that suspects usually slow down very quickly after pursuit is terminated).

²⁶ *Id.*

The Court in *Scott* also feared the “perverse incentive[.]” of “requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people’s lives in danger.”²⁷ However, the perverse incentive is also contradicted by “research [which] has shown that if the police refrain from chasing all offenders or terminate their pursuits, no significant increase in the number of suspects who flee would occur.”²⁸

In *Scott*, *Plumhoff*, and *Mullenix*, the Court focused on the threat to public safety caused by the high-speed pursuit in order to justify the use of deadly force, but never seriously considered whether the pursuit itself should have occurred in the first place. High-speed pursuits involve a great deal of risk to officers, the public, and suspects. One report estimated that an average of 323 people are killed each year because of police pursuits, 28% of them innocent bystanders and police officers.²⁹

Because of the inherent risks involved in high-speed pursuits, two National Institute of Justice studies recommend that departments adopt policies limiting chases to situations involving violent felons who pose an ongoing risk to society.³⁰ When developing policies limiting the use of pursuits, police departments also consider whether the suspect is already identified and the likelihood that he or she can be apprehended at a later time. According to one study, 40% of police departments have policies requiring termination of a chase once the suspect is identified.³¹

Consider the circumstances that led to the pursuit in *Scott*, *Plumhoff*, and *Mullenix*. In *Scott*, an officer initially attempted to stop Victor Harris for allegedly “traveling at 73 miles per hour on a road with a 55-mile-per-hour speed limit.”³² Donald Rickard was pulled over initially for only having one working headlight.³³ He “failed to produce his driver’s license upon request

²⁷ *Scott*, 550 U.S. at 385.

²⁸ Schultz et al., *supra* note 25.

²⁹ See H. Range Hutson et al., *A Review of Police Pursuit Fatalities in the United States from 1982–2004*, 11 PREHOSPITAL EMERGENCY CARE 278, 279, 280 tbl.1 (2007) (calculating that 24.1% of fatalities are occupants of cars other than the vehicle being chased, 2.7% of fatalities are other bystanders, and 1.1% of fatalities are police officers).

³⁰ See HUGH NUGENT ET AL., NAT’L INST. OF JUSTICE, RESTRICTIVE POLICIES FOR HIGH-SPEED POLICE PURSUITS 20 (1990), <https://www.ncjrs.gov/pdffiles1/Digitization/122025NCJRS.pdf> [<https://perma.cc/K5VQ-GNTH>] (“For anyone other than a violent felon, the balance weighs against the high-speed chase.”); Geoffrey P. Alpert, POLICE PURSUIT: POLICIES AND TRAINING, NAT’L INST. JUST.: RES. BRIEF, May 1997, at 7, <https://www.ncjrs.gov/pdffiles/164831.pdf> [<https://perma.cc/2PRB-PK33>] (“A balance of [considerations surrounding high-speed chases] indicates that an appropriate policy would limit chases to violent felons.”).

³¹ CYNTHIA LUM & GEORGE FACHNER, INT’L ASS’N OF CHIEFS OF POLICE, POLICE PURSUITS IN AN AGE OF INNOVATION AND REFORM 31 (2008), <http://www.theiacp.org/Portals/0/pdfs/Publications/Police%20Pursuit.pdf> [<https://perma.cc/4KP3-SFLT>].

³² 550 U.S. at 374.

³³ *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2017 (2014).

and appeared nervous.”³⁴ In *Mullenix v. Luna*, police officers were pursuing Israel Leija because of a misdemeanor warrant for his arrest.³⁵ Many jurisdictions across the country prohibit police officers from initiating high-speed pursuits for such minor infractions, let alone resorting to deadly force in an effort to end them.

III. THE USE OF DEADLY FORCE TO END HIGH-SPEED PURSUITS

Once the Court found the use of deadly force—and specifically the act of shooting into a moving vehicle—objectively reasonable in *Plumhoff*, their decision in *Mullenix*—that the officer is entitled to qualified immunity—should not come as a surprise. What is surprising is that almost all police departments prohibit officers from firing at moving vehicles. The International Association of Chiefs of Police (IACP) promotes a model policy on the use of force, prohibiting firing at a moving vehicle “unless a person in the vehicle is immediately threatening the officer or another person with deadly force by means *other than the vehicle*.”³⁶ The policy specifically instructs officers that the moving vehicle itself does not constitute a threat that justifies the use of deadly force and that if an officer is threatened by an oncoming vehicle the officer should “move out of its path instead of discharging a firearm at it or any of its occupants.”³⁷

In developing their policy on the use of force, the IACP discussed the ineffectiveness of shooting at automobiles. “Most conventional police firearms, in fact, will normally fail to penetrate automobile bodies, or steel-belted automobile tires that are in motion, and frequently do not penetrate auto safety glass.”³⁸ The IACP also considered that risk that innocent bystanders could be injured or killed if officers miss or if bullets ricochet off the body of the vehicle.³⁹ Even if an officer is able to disable the vehicle, it “will most likely continue under its own power or momentum for some distance thus creating another hazard.”⁴⁰ “[S]hould the driver be wounded or killed by shots

³⁴ *Id.*

³⁵ *Luna v. Mullenix*, No. 12-152, 2013 WL 4017124, at *1 (N.D. Tex. Aug. 7, 2013), *aff'd*, 773 F.3d 712 (5th Cir. 2014), *rev'd*, 136 S. Ct. 305 (2015).

³⁶ INT’L ASS’N OF CHIEFS OF POLICE, MODEL POLICY: USE OF FORCE 1 (Feb. 2006), <https://www.documentcloud.org/documents/2303826-useofforcepolicy.html> [<https://perma.cc/Q8LE-JEF5>] (emphasis added).

³⁷ *Id.*

³⁸ IACP NAT’L LAW ENF’T POLICY CTR., USE OF FORCE: CONCEPTS AND ISSUES PAPER 7 (updated Feb. 2006), <https://www.documentcloud.org/documents/2303827-useofforcepaper.html> [<https://perma.cc/8XQE-G9R5>].

³⁹ *Id.*

⁴⁰ *Id.*

fired, the vehicle will almost certainly proceed out of control and could become a serious threat to officers and others in the area.”⁴¹

Experts on the use of force by law enforcement have joined in this criticism. The Executive Director of the Police Executive Research Forum, Chuck Wexler, has similarly advised major police departments to ban shooting at moving vehicles, warning that shooting the driver of the vehicle creates “a totally unguided threat.”⁴² Jim Bueermann, head of the Police Foundation, agrees that “shooting into a car is a bad idea for all kinds of reasons.”⁴³ Police departments in New York City, Los Angeles, Boston, Orlando, Miami, Detroit, Houston, Cincinnati, and Cleveland all have policies prohibiting their officers from firing at moving vehicles.⁴⁴

The Department of Justice has adopted the same policy.⁴⁵ In response to allegations that police engaged in patterns of excessive force, the Justice Department has successfully pressured police departments in Las Vegas,⁴⁶ Albuquerque,⁴⁷ Cleveland,⁴⁸ and Philadelphia⁴⁹ to adopt the prohibition. Yet,

41 *Id.*

42 Jon Swaine et al., *Moving Targets*, *GUARDIAN* (Sept. 1, 2015), <http://www.theguardian.com/us-news/2015/sep/01/moving-targets-police-shootings-vehicles-the-counted> [https://perma.cc/SX7T-U86N].

43 Zusha Elinson, *Police Rethink Shooting at Suspects in Moving Cars; Injuries, Deaths Prompt Authorities to Curb the Practice*, *WALL ST. J.* (Feb. 5, 2015), <http://www.wsj.com/articles/police-rethink-shooting-at-suspects-in-moving-cars-1423183205> [https://perma.cc/MC7E-PFKT].

44 Swaine et al., *supra* note 42.

45 See OFFICE OF THE ATTORNEY GEN., OCTOBER 17, 1995 MEMORANDUM ON RESOLUTION 14 (1995), <http://www.justice.gov/ag/attorney-general-october-17-1995-memorandum-resolution-14-attachment> [https://perma.cc/TX3A-4UP2] (limiting the use of deadly force to stop fleeing suspects who have committed violent felonies or whose escape would otherwise “pose an imminent danger of death or physical injury to the officer or to another person”).

46 JAMES K. STEWART ET AL., U.S. DEP’T OF JUSTICE, COLLABORATIVE REFORM PROCESS: A REVIEW OF OFFICER-INVOLVED SHOOTINGS IN THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT 10, 27 (Oct. 2012), http://www.cops.usdoj.gov/pdf/e10129513-Collaborative-Reform-Process_FINAL.pdf [https://perma.cc/TL82-NBDM].

47 See Letter from Jocelyn Samuels & Damon P. Martinez, U.S. Dep’t of Justice, to Richard J. Berry, Mayor of Albuquerque 14 (Apr. 10, 2014), http://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf [https://perma.cc/9SAJ-9HUF] (encouraging the Albuquerque Police Department to adopt a more restrictive standard on firing into moving vehicles); see also ALBUQUERQUE POLICE DEP’T, PROCEDURAL ORDERS: USE OF FORCE 2-52-3(F)(4)(c) (2014) (“Officers shall not discharge a firearm at or from a moving vehicle unless an occupant of the vehicle is using lethal force, other than the vehicle itself . . .”).

48 See Letter from Vanita Gupta & Steven M. Dettelbach, U.S. Dep’t of Justice, to Frank G. Jackson, Mayor of Cleveland 16 (Dec. 4, 2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [https://perma.cc/TXX9-JENZ] (noting that the Cleveland Division of Police recently adopted the Department of Justice’s recommended policy prohibiting firing at a moving vehicle “unless deadly physical force is being used against the police officer or another person present, by means other than the moving vehicle”).

49 See GEORGE FACHNER & STEVEN CARTER, U.S. DEP’T OF JUSTICE, COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF DEADLY FORCE IN THE PHILADELPHIA POLICE DEPARTMENT 51 (2015), <http://ric-zai-inc.com/Publications/cops-wo753-pub.pdf> [https://perma.cc/

somehow, a practice that the Department of Justice views as evidence of a pattern and practice of excessive force is viewed by the Supreme Court as a reasonable use of force. This discrepancy arises from the Court's reliance on its own inaccurate assumptions regarding the relative risks associated with high-speed police pursuits and the use of deadly force to end those pursuits. The Court should instead rely on the evidence-based policies promulgated by law enforcement.

The dissonance between the Court's view of reasonableness and the views of law enforcement places suspects, the public, and police officers in greater danger. The Court in *Mullinix* found a reasonable justification in the officer's fear that "Leija might attempt to shoot at or run over the officers manning the spike strips."⁵⁰ But shooting the driver of a moving vehicle will most likely result in the driver losing control of the vehicle, which increases the chance that a pedestrian or officer will be struck. When Trooper Mullenix shot Leija as his vehicle was approaching the underpass, he launched an unguided missile at his fellow officers.

IV. THE CHOICE BETWEEN RECKLESS AND REASONABLE

In *Scott*, the Court questions how it should weigh the various interests at stake when an officer decides to terminate a high-speed pursuit using a tactic that could seriously injure or kill a fleeing suspect. The Court weighs the potential risk to the suspect against the risk that the suspect poses to the general public, but states that "there is no obvious way to quantify the risks on either side."⁵¹ The Court characterizes the decision to use deadly force to terminate a high-speed pursuit as a "choice between two evils."⁵²

The *Mullenix* Court asserts that qualified immunity applied "because officers entitled to terminate a high-speed chase selected one dangerous alternative over another."⁵³ The Court notes that spike strips present a danger "not only to drivers who encounter them . . . but also to officers manning them."⁵⁴ The opinion rejects the argument that Trooper Mullenix should have waited to see if the spike strips were effective as disputing "the merits of the options available"⁵⁵ to terminate a high-speed chase.

G6KF-DNN7] (noting that the Philadelphia Police Department's policy bars officers from firing at vehicles unless the occupants are firing at officers).

⁵⁰ *Mullinix v. Luna*, 136 S. Ct. 305, 310 (2015).

⁵¹ *Scott v. Harris*, 550 U.S. 372, 383-84 (2007).

⁵² *Id.* at 384.

⁵³ *Mullinix*, 136 S. Ct. at 310.

⁵⁴ *Id.*

⁵⁵ *Id.* at 311.

What is troubling about these arguments is that they reveal just how little effort the Court expends analyzing the use of deadly force by police officers. While it is true that high-speed pursuits are inherently dangerous, the Court abdicates its duty by announcing that “there is no obvious way to quantify the risks on either side.”⁵⁶ The Court never considers that the high-speed pursuits should not have happened in the first place. Police departments have adopted evidence-based policies on high-speed pursuits *and* the use of deadly force. Shooting at a moving vehicle or using spike strips to disable it is not a choice between two evils; it a choice between doing something reckless and doing something reasonable.

The Court hides behind the Fourth Amendment’s reasonableness clause, content to regard policing as more of an art than a science. The Court’s failure to hold officers accountable is troubling, considering the increasing criticism of the use of deadly force by officers. Several incidents where police officers have shot at suspects in moving vehicles have attracted widespread media attention.⁵⁷ More troubling is the number of police officers who continue to both pursue suspects for minor offenses and shoot at moving vehicles, despite the recommendations of law enforcement experts and internal policies that prohibit these acts. According to one study, 91% of police pursuits are precipitated by a nonviolent offense.⁵⁸ From January to August of 2015, police officers fatally shot 30 people in moving vehicles.⁵⁹ One recent victim of what Justice Sotomayor described as a “shoot first, think later’ approach”⁶⁰ was a six-year-old boy in Louisiana.⁶¹

⁵⁶ *Scott*, 550 U.S. at 383-84.

⁵⁷ See, e.g., Richard A. Oppel, Jr., *State Will Not Charge South Carolina Officer Who Shot Zachary Hammond*, N.Y. TIMES (Oct. 27, 2015), <http://www.nytimes.com/2015/10/28/us/state-will-not-charge-south-carolina-officer-who-killed-zachary-hammond.html> [<https://perma.cc/QNS4-2MM4>] (discussing the decision not to bring charges against an officer who fatally shot an unarmed 19-year-old through his car window during an attempted drug arrest); Richard Pérez-Peña, *University of Cincinnati Officer Indicted in Shooting Death of Samuel Dubose*, N.Y. TIMES (July 29, 2015), <http://www.nytimes.com/2015/07/30/us/university-of-cincinnati-officer-indicted-in-shooting-death-of-motorist.html> [<https://perma.cc/XC7C-QATC>] (reporting on a shooting of an unarmed man by police during a traffic stop); Noelle Phillips, *Denver Police Department Change Policy on When Officers Can Shoot at Moving Vehicles*, DENVER POST (June 9, 2015), http://www.denverpost.com/news/ci_28280661/denver-police-change-policy-shooting-at-cars [<https://perma.cc/QPU8-95PR>] (discussing the Denver Police Department’s policy change after two officers shot and killed a 17-year-old woman who “drove a car toward them”).

⁵⁸ See LUM & FACHNER, *supra* note 31, at 56 tbl.10 (indicating that only 8.6% of pursuits were initiated due to violent felonies, the other categories do not involve violence).

⁵⁹ Swaine et al., *supra* note 42.

⁶⁰ *Mullinix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting).

⁶¹ Wesley Lowery, *Louisiana Officers Charged with Murder in Shooting of Boy*, 6, WASH. POST (Nov. 7, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/11/07/2-louisiana-police-officers-face-murder-charges-in-the-fatal-shooting-of-a-6-year-old-boy/> [<https://perma.cc/6TJT-EN5X>].

In the past, the Court has rejected “rigid preconditions”⁶² or “an easy-to-apply legal test”⁶³ when evaluating the use of deadly force by police officers, choosing instead to “slosh . . . through the factbound morass of ‘reasonableness.’”⁶⁴ However, when it comes to high-speed pursuits and the use of deadly force during those pursuits, experts in law enforcement have already developed evidence-based policies that the Court could adopt, but chooses to ignore.

One of the justifications the Court has used in the past for not regulating police conduct is the belief that the increasing professionalism of police departments makes it unnecessary.⁶⁵ While the degree of professionalism in many police departments is debatable, it seems odd to trumpet the professionalism of modern police departments but ignore the guidelines they have overwhelmingly adopted regarding high-speed pursuits and the use of deadly force. The time has come for the Court to realize that shooting at moving vehicles is not reasonable—it is reckless.

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⁶² *Scott v. Harris*, 550 U.S. 372, 382 (2007).

⁶³ *Id.* at 383.

⁶⁴ *Id.*

⁶⁵ *See Hudson v. Michigan*, 547 U.S. 586, 598 (2006) (“Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline.”).