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Forrest Plesko

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(IM)BALANCE AND (UN)REASONABLENESS: HIGH-SPEED POLICE PURSUITS, THE FOURTH AMENDMENT, AND *SCOTT V. HARRIS*

INTRODUCTION

History teaches that suspects, on occasion, flee from police officers. While this principle has changed very little since the adoption of the Fourth Amendment in 1791, the appropriate response to a suspect's flight has changed very much. At the time of the founding, the law permitted officers to simply kill a fleeing felony suspect rather than allow him to escape;[1] two centuries later, an officer who uses deadly force against a fleeing suspect may be liable in constitutional tort.[2]

The United States Supreme Court's decision in *Scott v. Harris*[3] is the latest in a line of cases that seek to construct a framework for determining when an officer's use of force becomes unreasonable under the Fourth Amendment.[4] But *Scott*, unlike the Court's prior decisions on the constitutionality of excessive or deadly force, addressed a thoroughly modern phenomenon: the high-speed pursuit. In an 8-1 decision, the Court held that an officer may terminate a high-speed pursuit even if doing so entails great risk to the fleeing suspect.[5]

The analysis in *Scott*, however, is problematic. Although the majority followed the Court's Fourth Amendment precedents by applying a balancing test to determine the reasonableness of using deadly force to terminate a high speed pursuit,[6] the majority's characterization of the facts tilted the metaphorical balance in favor of deadly force. This tilting occurred from the majority's reliance on two questionable factual premises.

First, to determine the facts of the case, the majority viewed a videotape of the pursuit shot from dash-mounted cameras on the patrol cars.[7] Although the Northern District of Georgia, the Eleventh Circuit, and Justice Stevens concluded that jurors could have watched the videotape and determined that the officer's use of deadly force was unreason-

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1. *See* Tennessee v. Garner, 471 U.S. 1, 12 (1985) (discussing the history of the common law rule).
2. *See* Michael M. Rosen, *A Qualified Defense: In Support of the Doctrine of Qualified Immunity in Excessive Force Cases, With Some Suggestions for its Improvement*, 35 GOLDEN GATE L. REV. 139, 141-43 (2005).
3. 127 S. Ct. 1769 (2007).
4. *See Garner*, 471 U.S. 1; Graham v. Connor, 490 U.S. 386 (1989).
5. *Scott*, 127 S. Ct. at 1779.
6. *Id.* at 1778.
7. *Id.* at 1775.

able, the majority held otherwise: it found that the suspect's driving was so obviously dangerous that no reasonable jury could disagree.[8] But the substantial differences in interpretation of the videotape voiced in the opinions of Justice Stevens and the Eleventh Circuit suggest that a reasonable jury could indeed disagree with the majority.

In light of the potential for multiple reasonable interpretations of the videotape, the majority relied too heavily on its own interpretation of the videotape to determine the "facts" in *Scott*. By ignoring others' interpretations of the videotape, the majority tilted the balancing test in favor of deadly force. The majority's tilting of the balance may make future uses of deadly force in high-speed pursuits more likely to be found reasonable, and the majority's rationale for its interpretation of the videotape seems to undercut well-established summary judgment standards, thereby giving judges greater interpretational leeway at the summary judgment stage.

Second, in deciding the reasonableness of the officer's use of deadly force to terminate the high-speed pursuit, the majority assumed that the officer had two options at his disposal: complete cessation of the pursuit or deadly force.[9] In reality, however, more than two options existed. An understanding of pursuit psychology, a restrictive pursuit policy, the use of devices such as "stopsticks," the photographing of the suspect's license plate number for apprehension at a later time, and a final loudspeaker warning were all viable, realistic, and available alternatives to deadly force.

By ignoring these alternatives, the majority created an artificial dichotomy of complete cessation or deadly force that did not fully represent reality. Because it did not factor in the efficacy of alternatives, this artificial dichotomy tended to make deadly force appear more reasonable than it perhaps was. By setting a precedent that relied on this artificial dichotomy, *Scott* created the risk that lower courts may not look at all of an officer's available options to terminate future high-speed pursuits, and also may have inadvertently discouraged law enforcement agencies from adopting these alternatives to deadly force.

Part I of this comment discusses the legal background of deadly force and Fourth Amendment reasonableness. Part II summarizes the Court's decision in *Scott*. Part III argues that, although *Scott* followed Fourth Amendment precedents in principle, the majority's application of those precedents, in practice, rested upon questionable factual premises stemming from the majority's interpretation of the videotape, and the majority's refusal to account for alternative methods of ending high-speed pursuits. Part IV concludes this comment.

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8. *Id.* at 1775-76.
9. *Id.* at 1778.

I. BACKGROUND[10]

The Fourth Amendment provides citizens with a constitutional right against unreasonable seizures by the government.[11] At the time of the founding, officers were entitled to use deadly force to prevent a fleeing felon's escape.[12] Although most American jurisdictions discouraged it, the option of using deadly force to stop a fleeing felon remained available well into the twentieth century.[13] In *Tennessee v. Garner*,[14] however, the Court held that this common law rule violated the Fourth Amendment.[15] The Court expanded *Garner*'s holding in *Graham v. Connor*[16] to encompass excessive force under the Fourth Amendment, as well.[17] After *Garner* and *Graham*, therefore, the Fourth Amendment's reasonableness standard governed the propriety of an officer's use of excessive or deadly force. The doctrines developed in both *Garner* and *Graham* are crucial to the Court's Fourth Amendment analysis in *Scott*.

In *Garner*, the Court held that an officer who shot an unarmed fleeing suspect in the back of the head in order to prevent his escape violated the suspect's right against unreasonable seizure.[18] The Court came to this conclusion by balancing the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[19] Because the suspect's interest in his own life outweighed the state's interest in capturing him, the Court found that the officer acted unreasonably.[20]

Although the Court held that deadly force "may not be used unless it is necessary to prevent the [suspect's] escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others,"[21] it also emphasized

10. The Court granted certiorari to *Scott* as an interlocutory appeal from summary judgment against the officer's defense of qualified immunity. *Id.* at 1773-74. The first step in a qualified immunity analysis asks whether an officer violated a claimant's constitutional rights. Saucier v. Katz, 533 U.S. 194, 201 (2001). *See generally* Karen Blum, *Qualified Immunity in the Fourth Amendment: A Practical Application of § 1983 as it Applies to Fourth Amendment Excessive Force Cases*, 21 TOURO L. REV. 571, 576-80 (2005). Although *Scott* came to the Court as a qualified immunity case, *Scott*'s analysis deals only with the first step of the analysis. 127 S. Ct. at 1774, 1776. Because qualified immunity is only tangentially related to the scope of this comment, it will be dealt with only when necessary to address the Fourth Amendment issues.

11. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

12. 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(d), at 38 (4th ed. 2004); *see also* Tennessee v. Garner, 471 U.S. 1, 12-16 (1985).

13. 3 LAFAVE, *supra* note 12, § 5.1(d), at 38.

14. 471 U.S. 1 (1985).

15. *Garner*, 471 U.S. at 10.

16. 490 U.S. 386 (1989).

17. *Id.* at 388.

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

19. *Id.* at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983) (internal quotations omitted)).

20. *Id.* at 9-10.

21. *Id.* at 3.

that *Garner*'s balancing test was fact-driven: an officer's "reasonableness depends on not only when a seizure is made, but also how it is carried out."[22] Furthermore, the Court looked to "whether the totality of the circumstances justified a particular sort of . . . seizure."[23] In sum, *Garner* stood for the proposition that the state's interest in deadly force must be balanced against the suspect's interest in his life in order to determine reasonableness under the Fourth Amendment.

Despite the Court's framing of *Garner* as a Fourth Amendment issue, there remained confusion in the decisions as to whether excessive force claims should be analyzed under the Fourth Amendment's reasonableness standard, or the Fourteenth Amendment's substantive due process approach.[24] In *Graham*, the Court held that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . ."[25] This holding not only reaffirmed the balancing test laid out in *Garner*, but added "objective reasonableness" to the analysis.[26]

Objective reasonableness asks "whether a reasonable police officer in the same circumstances would have used such force."[27] The Court set out factors to assist in determining objective reasonableness, including the severity of the crime, the immediacy of the threat, the suspect's resistance, and the potential for evasion.[28] In applying these factors, however, the Court recognized that "officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[29] The trier of fact, therefore, must determine the "'reasonableness' of a particular use of force . . . from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[30]

After *Garner* and *Graham*, therefore, courts determined the Fourth Amendment reasonableness of excessive or deadly force by balancing the suspect's interest in his Fourth Amendment rights against the government's interest in the intrusion. If the government's interest in the intrusion could be deemed objectively reasonable under the circumstances, then its intrusion on the suspect's Fourth Amendment rights would, on a metaphorical balance, be deemed to outweigh the suspect's

22. *Id.* at 8.
23. *Id.* at 8-9.
24. Graham v. Connor, 490 U.S. 386, 393 (1989); *see also* 2 WILLIAM E. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 22:17, at 48.1 (2d ed. 2007).
25. *Graham*, 490 U.S. at 395.
26. *Id.* at 396-97.
27. 2 RINGEL, *supra* note 24, § 22:17, at 46.
28. *Graham*, 490 U.S. at 396-97.
29. *Id.* at 397.
30. *Id.* at 396.

interest in his Fourth Amendment rights. The government's intrusion would, in short, be reasonable. It is this framework that the majority used in analyzing the Fourth Amendment question in *Scott.*

II. *SCOTT V. HARRIS*

A. Facts

Around 11 o'clock on a Thursday night in 2001, a Coweta County, Georgia, sheriff's deputy clocked Victor Harris's vehicle traveling 73 miles per hour in a 55 mile-per-hour zone.[31] The deputy activated his lights and siren and pursued Harris, but Harris refused to stop.[32] Harris then led the deputy on a high-speed pursuit down a rural two-lane highway.[33]

Although the pursuit began on an open highway, Harris soon entered Peachtree City, Georgia, and pulled into the parking lot of a shopping center.[34] By this time, more officers had responded to the pursuit and attempted to block the exits from the parking lot with their vehicles.[35] One of these officers was Deputy Timothy Scott.[36] The shopping center was closed for the evening, and the parking lot was empty except for Harris and the officers.[37] It appeared that Harris had decided to surrender, but he suddenly began driving toward the exit of the parking lot and collided with Deputy Scott's patrol car as he headed back onto the highway.[38] After this collision, Deputy Scott took over as the lead police vehicle in the pursuit.[39]

Because they were not informed of the underlying reason for the pursuit, the Peachtree City police did not directly participate in pursuing Harris.[40] The Peachtree City police did, however, block intersections along the pursuit route to ensure that cross-traffic would not travel into Harris's path.[41] Despite the lessened risk to innocent motorists due to these roadblocks, Deputy Scott radioed his supervisor for permission to "take [Harris] out" through a Precision Intervention Technique (PIT) maneuver.[42] Deputy Scott believed, however, that the vehicles were

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31. Harris v. Coweta County, No. 01-CV-148, slip op. at 1 (N.D. Ga. Sept. 25, 2003) (denying summary judgment in part), *rev'd in part*, 433 F.3d 807 (11th Cir. 2007), *rev'd sub nom.* Scott v. Harris, 127 S. Ct. 1769 (2007).
32. *Scott*, 127 S. Ct. at 1772.
33. *Id.*
34. *Harris*, No. 01-CV-148, slip op. at 1.
35. *Id.*
36. *Id.*
37. Brief of Plaintiff/Appellee Victor Harris at 12-13, Harris v. Coweta County, 433 F.3d 807 (11th Cir. 2005) (No. 03-15094).
38. *Harris*, No. 01-CV-148, slip op. at 1.
39. *Id.* at 2.
40. Brief of Plaintiff/Appellee Victor Harris, *supra* note 37, at 13.
41. *Harris*, No. 01-CV-148, slip op. at 1.
42. Harris v. Coweta County, 433 F.3d 807, 811 (11th Cir. 2005), *rev'd sub nom.* Scott v. Harris, 127 S. Ct. 1769 (2007). To execute a PIT maneuver, an officer pulls his squad car alongside

traveling too fast to safely execute the PIT maneuver and, instead, rammed Harris's vehicle from behind with the push bar of his squad car.[43] The collision sent Harris's vehicle careening off the road and down an embankment.[44] The crash, although effectively ending the pursuit, left Harris a quadriplegic at 19 years old.[45]

B. Procedural History

Harris filed suit under 42 U.S.C. § 1983, which provides a civil cause of action against those who, under color of law, deprive a citizen of his constitutional rights.[46] Harris alleged that Deputy Scott, through excessive force, violated his Fourth Amendment right against unreasonable seizure.[47] Deputy Scott moved for summary judgment on the basis of qualified immunity,[48] but the Northern District of Georgia denied his motion, finding sufficient disagreement over issues of material fact to "warrant submission to a jury."[49]

On interlocutory appeal, the Eleventh Circuit affirmed the Northern District of Georgia, holding that a reasonable jury could find that Deputy Scott violated Harris's Fourth Amendment right against unreasonable seizure.[50] Deputy Scott appealed from this judgment, and the Supreme Court granted certiorari.[51]

C. Majority Opinion

The Supreme Court majority held that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."[52]

Because *Scott* came to the Court on interlocutory appeal from summary judgment, there had been no factual findings by either judge or jury.[53] The Court therefore reviewed the record de novo.[54] Although the

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the fleeing vehicle and collides with its rear quarter panel. *Id.* at 810. The force of the collision causes the fleeing vehicle to spin out and typically brings it to a stop. *Id.*

43. Scott v. Harris, 127 S. Ct. at 1773.
44. *Id.*
45. *Id.* at 1785 (Stevens, J., dissenting).
46. 42 U.S.C. § 1983 (2006).
47. *Scott*, 127 S. Ct. at 1773.
48. *See* discussion of qualified immunity *supra* note 10.
49. *Scott*, 127 S. Ct. at 1773.
50. *Id.* at 1773-74.
51. *Id.* at 1774.
52. *Id.* at 1779.
53. *Id.* at 1774.
54. *Id.* at 1774-75. Though the majority did not specifically label its review de novo, its independent reexamination of the facts and law for the purpose of summary judgment suggests that standard. *See* 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 5-02, at 5-10 to -11 (3d ed. 1999) ("[W]hile the language of *material fact* often is thought of as the 'standard of review' for summary judgments, it is more precisely the actual, substantive test applied by all courts. The appellate review standard is de novo . . . since the sufficiency issue is a question of law.").

majority recognized that courts are usually "required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion,'"[55] the majority found that, in this case, a videotape showing the entire chase "so utterly discredited" Harris's version of the facts that "no reasonable jury could have believed him."[56] Accordingly, the majority held, no genuine factual dispute existed.[57]

Having absolved itself of a need to rely on a jury to determine the facts, the majority decided the reasonableness of Deputy Scott's actions as a "pure question of law."[58] Though the majority found it "clear from the videotape that [Harris] posed an actual and imminent threat" to bystanders, it also found it "clear that Scott's actions posed a high likelihood of serious injury or death to [Harris] . . . ."[59] Despite the fact that the likelihood of injury to Harris as a result of the seizure was probably greater than the likelihood of Harris's injuring bystanders, the majority found that Harris's culpability put on him—rather than innocent bystanders—the onus of injury.[60] After balancing the risk of injury to Harris against Deputy Scott's interest in protecting the public, the majority concluded that Deputy Scott was reasonable in pushing Harris's car off the road.[61]

Harris, however, argued that Deputy Scott's action was in fact unreasonable.[62] Harris first tried to analogize his case to *Garner*, arguing that Deputy Scott's action was "*per se* unreasonable" because it did not meet *Garner*'s preconditions for the use of deadly force.[63] Harris argued that *Garner* required that the suspect pose a threat of immediate harm to officers or others, that the suspect would have escaped but for the use of deadly force, and that the officer must have given the suspect some warning before using deadly force.[64] Although the majority tacitly admitted that these preconditions were not met, it nevertheless dismissed Harris's argument on the basis of *Garner*'s "vastly different facts."[65] The suspect in *Garner* was unarmed, on foot, and could not have reasonably been considered a threat, the Court noted.[66] Such facts were not

55. *Scott*, 127 S. Ct. at 1774.
56. *Id.* at 1776.
57. *Id.* (explaining that on a motion for summary judgment, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment").
58. *Id.* at 1776 n.8.
59. *Id.* at 1778.
60. *Id.*
61. *Id.*
62. *Id.* at 1777-78.
63. *Id.* at 1777; *see* discussion of *Garner supra* p. 465.
64. *Scott*, 127 S. Ct. at 1777.
65. *Id.*
66. *Id.*

"even remotely comparable to the extreme danger to human life posed by [Harris] in this case."[67]

Harris next claimed that had the police simply ceased their pursuit, Harris would have stopped driving recklessly and the public would have thus been protected without the use of deadly force.[68] The majority rejected this argument outright, noting that while ramming Harris's car off of the road "was *certain* to eliminate the risk that [Harris] posed to the public, ceasing pursuit was not."[69] The majority pointed out that if the police had ceased their pursuit, there was no way to know whether Harris would continue driving recklessly or not.[70]

D. Concurring Opinions

Justice Breyer and Justice Ginsburg each offered concurring opinions. Justice Breyer noted that he disagreed with the majority's articulation of a per se rule of Fourth Amendment reasonableness.[71] Calling *Scott*'s rule "too absolute" for a Fourth Amendment analysis, Justice Breyer argued that determining "whether a high-speed chase violates the Fourth Amendment may well depend upon more circumstances than the majority's rule reflects."[72]

Taking quite an opposite stance, Justice Ginsburg, whose short concurrence largely responded to Justice Breyer's criticisms, pointed out that *Scott*'s rule was not as mechanical or per se as Justice Breyer's concurrence suggested.[73] Rather, she argued that *Scott*'s inquiry and subsequent rule were "situation specific."[74] Justice Ginsburg listed the risk to "lives and well-being of others," and the possibility of a safer way of stopping the fleeing vehicle as "relevant considerations" underlying the rule.[75]

E. Dissenting Opinion

In the lone dissent, Justice Stevens chastised the majority for its reliance on the videotape, its speculation over Harris's behavior, and its setting what he perceived to be an inflexible rule. Justice Stevens first cast doubt on the majority's belief that the events on the videotape "blatantly contradicted" the factual determinations of the Eleventh Circuit and the Northern District of Georgia.[76] Contrary to the majority, Justice Stevens argued that "the only innocent bystanders" placed at risk were

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67. *Id.*
68. *See id.* at 1778.
69. *Id.* at 1778-79.
70. *Id.* at 1779.
71. *Id.* at 1781 (Breyer, J., concurring).
72. *Id.* (Breyer, J., concurring).
73. *Id.* at 1779 (Ginsburg, J., concurring).
74. *Id.* (Ginsburg, J., concurring).
75. *Id.*
76. *Id.* at 1781 (Stevens, J., dissenting).

"the drivers who either pulled off the road in response to the sirens or passed [Harris] in the opposite direction when he was driving on his side of the road."[77] Justice Stevens next addressed Harris's argument—rejected by the majority—that the police could have simply ceased pursuit and arrested Harris later.[78] The majority, Justice Stevens contended, had no evidentiary basis for believing that a cessation of pursuit would not have led to a change in Harris's driving—it simply used the videotape to replace "the rule of law with its ad hoc judgment."[79] Finally, Justice Stevens criticized the majority for ignoring past precedent and setting faulty future precedent.[80] Justice Stevens argued that *Garner* "set a threshold" for the reasonableness of deadly force, and that the reasonableness question should go to a jury.[81] The majority's rule, he concluded, "[flies] in the face of the flexible and case-by-case 'reasonableness' approach" of *Garner* and *Graham*: the reasonableness of the decision should be left up to jurors in Georgia—not justices in Washington.[82]

III. ANALYSIS

The majority, following *Garner* and *Graham*, relied on a balancing test to decide the Fourth Amendment issue in *Scott*.[83] Although the majority did not include the phrase "balancing test" in its holding, it nevertheless considered "the risk of bodily harm that Scott's actions posed to [Harris] in light of the threat to the public that Scott was trying to eliminate."[84] The majority's analysis balanced Deputy Scott's interest in "ensuring public safety" with the "high likelihood of serious injury or death" to Harris and concluded that Deputy Scott reasonably used deadly force.[85] But it is not the majority's application of the balancing test, in and of itself, that makes the decision in *Scott* problematic; rather, it is the "facts" that the majority applied the balancing test to. This comment argues that the majority tilted the balance toward deadly force by relying on questionable factual premises stemming from the majority's singular interpretation of the videotape, and the majority's refusal to consider available alternatives to deadly force.

A. Interpretation of the Videotape

To determine the threat that Harris's flight posed to the public, and to thus analyze whether Deputy Scott reasonably used deadly force against Harris, the majority relied on a videotape of the pursuit from

77. *Id.* at 1783.
78. *Id.*
79. *Id.* at 1784.
80. *Id.* at 1784-85.
81. *Id.* at 1784.
82. *Id.* at 1785.
83. *Id.* at 1778.
84. *Id.*
85. *Id.*

Deputy Scott's dash-mounted camera.[86] Although Justice Scalia quaintly referred to the videotape as an "added wrinkle" to the Court's usual adoption of the nonmoving party's version of the facts when determining the appropriateness of summary judgment,[87] in the context of *Scott*, the videotape proved to be substantially more than a wrinkle. Indeed, because the majority relied on its interpretation of the videotape to determine the "facts," the videotape—and the majority's interpretation of it—affected the entire outcome of the case.

The majority's reliance on its interpretation of the videotape is questionable, however, in light of the differing interpretations of the videotape discussed in opinions by Justice Stevens and the Eleventh Circuit.[88] Despite the interpretations of these presumably reasonable judges, the majority refused to acknowledge the validity of any interpretation contrary to its own. Although the majority indeed analyzed the "facts" in *Scott* using the balancing test laid out in *Garner* and *Graham*, its insistence that the videotape could be interpreted in only one way tilted the metaphorical balance in favor of deadly force. This tilting is not only apt to make deadly force in the context of high-speed pursuits more likely to be adjudged reasonable, but it threatens to undercut well-established summary judgment standards by giving judges greater interpretational leeway at the summary judgment stage.

It is well established that summary judgment requires courts to view the facts in the light most favorable to the nonmoving party.[89] Only if "no genuine issue as to any material fact" exists will the moving party be granted summary judgment.[90] Applying this standard and viewing the facts in the light most favorable to Harris, the Eleventh Circuit concluded

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86. The use of videotape in the courtroom is a relatively common occurrence. Karen Martin Campbell, Note, *Roll Tape—Admissibility of Video-Tape Evidence in the Courtroom*, 26 U. MEM. L. REV. 1445, 1451-52 (1996). Its use in a United States Supreme Court decision, however, is somewhat rare: the Court has viewed videotape evidence in only a handful of cases. *See, e.g.*, Saucier v. Katz, 533 U.S. 194, 212 (2001) (Ginsburg, J., concurring) (finding that videotape suggested officer not solely responsible for alleged excessive force); United States v. Playboy Entm't Group, 529 U.S. 803, 812 (2000) (noting that videotape examples of signal bleed of pornographic programming showed salaciousness and snow); Koon v. United States, 518 U.S. 81, 86-87 (1996), *superseded by statute*, Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, PUB. L. NO. 108-21, 401(d)(1), 117 Stat. 670, *as recognized in* Rita v. United States, 127 S. Ct. 2456, 2472 (2007) (describing videotaped events of LAPD's beating of Rodney King); Madsen v. Women's Health Ctr., 512 U.S. 753, 785-90 (1994) (Scalia, J., concurring in part and dissenting in part) (describing videotape of protest at issue in the case); Pennsylvania v. Muniz, 496 U.S. 582, 586 (1990) (determining which portions of defendant's post-DUI arrest videotape should be excluded for lack of *Miranda* warning); Estes v. Texas, 381 U.S. 532, 536-37 (1965) (finding that videotape of the media frenzy at defendant's trial supported defendant's contention of due process deprivation).

87. *Scott*, 127 S. Ct. at 1775.

88. *See id.* at 1781-85 (Stevens, J., dissenting); *see* Harris v. Coweta County, 433 F.3d 807, 815-17 (11th Cir. 2005).

89. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.").

90. FED. R. CIV. P. 56(c).

that a reasonable jury could believe Harris's version of the facts.[91] The Supreme Court majority, however, after viewing the videotape, concluded that no reasonable jury could believe Harris's version of the facts: "[f]acts must be viewed in the light most favorable to the nonmoving party," it wrote, "only if there is a 'genuine' dispute as to those facts."[92] If a party's version of the events is "so utterly discredited by the record that no reasonable jury could have believed" it, then "a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[93]

At first blush, the majority's position appears sensible. Surely a plaintiff whose version of the facts misrepresents what actually happened should not be given the benefit of the doubt in the face of videotape evidence. Furthermore, ignoring a videotape of the actual events and relying solely on the pleadings would seem anachronistic in the ubër-tech environment of the twenty-first century. Indeed, one commentator notes that plaintiffs sometimes "allege sufficiently egregious facts in order to clear the summary judgment hurdle" and thereby circumvent the qualified immunity privilege altogether—whether deservedly or not.[94] But the decision in *Scott*, based as it was on the majority's interpretation of the videotape, which happened to be quite different from those of Justice Stevens and the Eleventh Circuit, begs the question of whose interpretation of the videotape better predicted the inclinations of a reasonable jury.

Only by watching the videotape—as Justice Breyer invited "interested reader[s]" to do via a link on the Court's website[95]—can one get a sense of the disagreement among the majority, Justice Stevens, and the Eleventh Circuit. Shot in low-resolution black-and-white, with the police officers' radio traffic barely discernible even when played at high volume, the videotape depicts the chase from two different police vehicles: the first deputy's (who clocked Harris's speeding), and then Deputy Scott's, including the push from behind.[96] The Eleventh Circuit described the events almost nonchalantly, emphasizing the positive aspects of Harris's driving:[97]

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91. *Harris*, 433 F.3d at 810, 814.

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

93. *Id.*

94. Rosen, *supra* note 2, at 152.

95. *Scott*, 127 S. Ct. at 1780 (Breyer, J., concurring).

96. Videotape, Scott v. Harris, 127 S. Ct. 1769 (2007) (No. 05-1631), *available at* http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb.

97. Nowhere in its opinion does the Eleventh Circuit confirm that it actually watched the videotape. Harris v. Coweta County, 433 F.3d 807 (11th Cir. 2005), *rev'd*, 127 S. Ct. 1769 (2007). However, the parties' briefs cite the videotape repeatedly, which indicates its presence in the appellate record. *See* Brief of Defendants-Appellants Mark Fenniger & Timothy Scott at 5-10, Harris v. Coweta County, 433 F.3d 807 (11th Cir. 2005) (No. 03-15094); Brief of Plaintiff/Appellee Victor Harris at 10-19, *Harris*, 433 F.3d 807 (No. 03-15094); Reply Brief of Defendants-Appellants Mark

> Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. . . . Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.[98]

The majority described the same events quite differently, portraying Harris as a madman set loose on the Georgia highway system:

> [W]e see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up.[99]

Oddly, both the Eleventh Circuit's version of the chase and the majority's version are plausible, if not accurate, when compared with the videotape. Harris did seem to be in control of his vehicle, yet there is no doubt that he was traveling at very high speeds.[100] Harris also signaled before making turns, but then wildly crossed the double-yellow-line numerous times to pass motorists.[101] And while the highway had been cleared of most of the traffic due to roadblocks, there is no doubt that the police officers pursuing Harris had to drive unsafely in order to keep up with him.[102] These interpretive differences suggest that a greater factual dispute existed than the majority cared to admit. Justice Stevens incisively commented, "[i]f two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding the pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events."[103] This observation appears warranted after watching the videotape and comparing the respective interpretations of the Eleventh Circuit and the majority.

Indeed, the majority's interpretation of the videotape has not gone without criticism. In an excoriating editorial, Jessica Silbey noted that the majority "disregarded all other evidence and anointed the film ver-

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Fenniger and Timothy Scott at 1-3, *Harris*, 433 F.3d 807 (No. 03-15094). It seems to be a safe assumption, therefore, that the Eleventh Circuit watched the videotape to inform its decision.

98. *Harris*, 433 F.3d at 815-16 (citations omitted).
99. *Scott*, 127 S. Ct. at 1775.
100. Videotape, *supra* note 96.
101. *Id.*
102. *Id.*
103. *Scott*, 127 S. Ct. at 1785 (Stevens, J., dissenting).

sion of the disputed events as the truth."[104] Professor Silbey argued that the majority's failure

> to recognize how all film manifests a distinct point of view (and not others) and how it is inevitably framed (by the size of the camera and the length of the film) to exclude what other witnesses to the event would have seen is a grave error on the part of a fact-finder—or a film critic. Films never speak for themselves; they require interpretation.[105]

Professor Silbey is not alone in believing that videotape evidence requires a more critical view than the majority seemed to give it in *Scott*. A federal appellate judge, after interpreting the events of a videotaped high-speed pursuit differently than his colleagues, argued in concurrence that jurors and not judges "ought to be deciding whether the risk posed by the fleeing suspect is too minimal, or the suspected crime too minor, to make killing [the suspect] a reasonable way to halt the chase."[106] When considered alongside Justice Stevens's skepticism about the dangerousness of the events on the videotape, and alongside the Eleventh Circuit's interpretation of the videotape, the majority's interpretation of the videotape is questionable. As Professor Silbey summarizes, films always require interpretation: what is left out of the film may be just as important as what is in it.[107] By treating its own interpretation of the videotape as indisputable fact the majority, much like a Faulknerian narrator, faithfully related what it perceived but nevertheless missed the big picture.

Although it did go on to analyze with a balancing test the "facts" it culled from the videotape, the undue weight the majority gave to its interpretation of the videotape tilted the balance in favor of deadly force. The majority weighed "the risk of bodily harm that Scott's actions posed to [Harris] in light of the threat to the public that Scott was trying to eliminate."[108] Conceptually, then, there were two "sides" to this metaphorical balance: Harris's "risk of bodily harm" on the one side, and the "threat to the public" on the other. The majority's interpretation of the videotape—finding Harris's driving indisputably dangerous—added weight to the "threat to the public" side of the balance. Although factoring in Justice Stevens's and the Eleventh Circuit's interpretation of the videotape—finding Harris's driving only debatably dangerous—would have subtracted weight from the "threat to the public" side of the balance, the majority declined to consider it. By ignoring Justice Stevens's and the Eleventh Circuit's interpretations of the videotape, the majority

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104. Jessica Silbey, Op-Ed., *Justices Taken in by Illusion of Film*, BALT. SUN, May 13, 2007, at 21A.

105. *Id.*

106. Beshers v. Harrison, 495 F.3d 1260, 1272 (11th Cir. 2007) (Presnell, J., concurring).

107. Silbey, *supra* note 104.

108. *Scott*, 127 S. Ct. at 1778.

transmogrified its own interpretation into objective truth and thus weighted the "threat to the public" side of the balance to reflect a greater threat than perhaps existed in reality. This greater threat, in turn, urged a greater necessity for the use of deadly force.

Naturally, *Scott*'s tilted balance will have some effect on future cases dealing with the use of deadly force in high-speed pursuits. In applying *Scott* to these future cases, courts may have to account for not only the objective reasonableness factors of *Graham*,[109] but the majority's interpretation of the videotape in *Scott*. Future high-speed pursuits may, at the very least, be compared with the *Scott* videotape and the majority's pronouncements of Harris's indisputable dangerousness. If the future high-speed pursuit is not less threatening to the public than the pursuit in *Scott* (and the majority's interpretation of that threat), the use of deadly force against the fleeing suspect would be, at least in theory, almost per se reasonable.[110]

But *Scott*'s analysis of the videotape will likely reach further than high-speed pursuit cases. The majority's implication that judges can interpret videotapes as well as (or better than) jurors seems likely to entrust judges with greater interpretational authority at the summary judgment stage. In the Fourth Amendment context, this has the potential to put the disposition of excessive or deadly force claims much more squarely into the hands of judges.[111]

Although the Eleventh Circuit, following well-established summary judgment standards,[112] viewed the videotape in the light most favorable to Harris, the Supreme Court majority took issue with those standards.[113] Using language bordering on the hyperbolic—characterizing Harris's version of events as "blatantly contradicted" by the videotape, "utterly discredited by the record," and "visible fiction"—the majority declared

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109. *See* discussion of *Graham supra* p. 466.

110. Both Justice Breyer and Justice Stevens complained that *Scott* set an inflexible, "per se" rule, at odds with the fact-driven inquiries normally used in Fourth Amendment cases. *Scott*, 127 S. Ct. at 1781 (Breyer, J., concurring); *id.* at 1785 (Stevens, J., dissenting). Some lower court opinions have expressed this concern as well. *See Beshers*, 495 F.3d at 1272 (Presnell, J., concurring) ("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.").

111. *Cf.* Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229 (2006). Professor Chen argues that the Court has a pattern of ignoring the importance of factual disputes in qualified immunity claims, treating reasonableness as a "pure legal analysis because of its desire that judges, rather than juries, resolve such claims." *Id.* at 232. "The Court's characterization of qualified immunity as a question of law," Professor Chen contends, "is not driven by analytical factors ordinarily applied to the law/fact distinction, but by its purely functional decision to allocate all decision making concerning qualified immunity to judges." *Id.* at 264. Professor Chen concludes that the Court "has shed the doctrine of adherence to conventional understandings of summary judgment procedure, cavalierly dismissing its strict and detailed requirements for adjudicating factual issues prior to trial." *Id.* at 277.

112. Harris v. Coweta County, 433 F.3d 807, 810 (11th Cir. 2005), *rev'd*, 127 S. Ct. 1769.

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

that the Eleventh Circuit "should have viewed the facts in the light depicted by the videotape."[114] This declaration assumes, as the majority did in *Scott*, that there is only one reasonable interpretation of a videotape.[115] This assumption of interpretational uniformity suggests that *Scott* will provide all judges a similar power to unquestionably rely on their subjective interpretations of videotapes at the summary judgment stage.

By declaring Justice Stevens's and the Eleventh Circuit's interpretations of the videotape an impossibility, and relying instead on its own interpretation, the majority might have added another hurdle to getting excessive and deadly force claims past summary judgment: the alleged Fourth Amendment violation must be so egregious that it is unquestionable. Close cases—like *Scott*—may now be disposed on summary judgment because courts are apparently not obligated to view the facts in light of the nonmoving party if the judge believes that the record does not warrant this kind of treatment. A number of courts have already applied this rule.[116] As demonstrated by the differing interpretations of the videotape in *Scott*, a "genuine" factual dispute is something quite different depending on whose opinion one relies on. Post-*Scott* summary judgment standards, allowing a subjective determination of "genuine," may turn out to be somewhat less restrained than the majority would have anticipated.

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114. *Id.*

115. *Id.* at 1775, n.5. During oral argument, several justices shared their interpretations of the videotape: "He created the scariest chase I ever saw since 'The French Connection,'" exclaimed Justice Scalia. Transcript of Oral Argument at 24, *Scott*, 127 S. Ct. 1769 (No. 05-1631). Justice Alito pointed out that he "looked at the videotape on this" and thought that Harris "created a tremendous risk of [sic] drivers on that road." *Id.* Justice Ginsburg commented that Harris clearly endangered the lives and safety of others: "Anyone who has watched that tape has got to come to that conclusion, looking at the road and the way that this car was swerving, and the cars coming in the opposite direction. This was a situation fraught with danger." *Id.* at 36. Justice Breyer questioned the Eleventh Circuit's interpretation of the videotape, asking: "But suppose I look at the tape and I end up with Chico Marx's old question with respect to the Court of Appeals: Who do you believe, me or your own eyes?" *Id.* at 49.

116. *See, e.g.*, Beshers v. Harrison, 495 F.3d 1260, 1262 (11th Cir. 2007) (Presnell, J., concurring) ("[I]n this case, as in [*Scott*], we have the benefit of viewing two videotapes from the patrol cars involved in the pursuit. Thus, to the extent Appellant's version of the facts is clearly contradicted by the videotapes, such that no reasonable jury could believe it, we do not adopt his factual allegations."); Sharp v. Fisher, No. 406-CV-020, 2007 U.S. Dist. LEXIS 54535, at *3 (S.D. Ga. July 26, 2007) ("[B]ecause [the] evidence includes three different videos of the [high-speed pursuit] in question, the Court 'views the facts in the light depicted by the video[s].'"); Martinez v. City of Auburn, No. C06-0447, 2007 U.S. Dist. LEXIS 49236, at *3 (W.D. Wash. July 9, 2007) (Because "[t]he Supreme Court has recently endorsed reliance in [videotape] evidence, . . . the Court outlines the events that lead [sic] to the shooting as shown in the video . . . ."); Miller v. Jensen, No. 06-CV-0328, 2007 U.S. Dist. LEXIS 39252, at *11 (N.D. Okla. May 29, 2007) ("Even though plaintiff is the nonmoving party, the Court will not adopt plaintiff's version of the facts if it clearly contradicts the factual depictions in the videotapes."); Mott v. City of McCall, No. CV-06-063, 2007 U.S. Dist. LEXIS 35241, at *2-3 (D. Idaho May 14, 2007) ("[F]or purposes of Defendants' summary judgment motion, the Court will view the facts in the light most favor [sic] to Plaintiff, except for those facts that are depicted by the videotape.").

B. Refusal to Consider Alternatives to Deadly Force

As disturbed as the majority apparently was by the videotaped pursuit, it is not surprising that the it rejected Harris's suggestion that the public's safety could have been equally well maintained had the officers simply ceased their pursuit and let Harris "escape."[117] In rejecting this argument, the majority pointed out that ceasing pursuit would not have ensured that Harris would have suddenly begun to drive normally again and, therefore, the public would still be in danger.[118] But the majority's analysis is suspect because it did not consider alternatives to end the pursuit other than complete cessation or deadly force. In fact, a number of feasible alternatives existed between these two extremes that could have ended the pursuit without injury to the public, the police, or the perpetrator.[119]

By refusing to take these alternatives into account, the majority painted itself into a syllogistic corner: ending high-speed pursuits protects the public; deadly force is guaranteed to end a high-speed pursuit; therefore, in order to protect the public, deadly force must be used to end high-speed pursuits. This overly simplified approach created an artificial dichotomy of complete cessation or deadly force that lent deadly force a semblance of objective reasonableness that it may not have deserved. By relying on this artificial dichotomy, the majority had no need to recognize that Deputy Scott had a third option, and this tilted the balance in favor of deadly force. Under *Scott*, courts do not appear to have any responsibility to factor alternative options for ending high-speed pursuits into their balancing analyses; rather, they are free to rely on the majority's artificial dichotomy. Furthermore, by taking a firm stance in support of deadly force, *Scott* may have inadvertently discouraged law enforcement agencies' adoption and use of alternative options for ending high-speed pursuits.

The majority's position—that ceasing pursuit would not have been as effective as the use of deadly force—is a disputable one. Indeed, one survey found that seventy percent of "jailed suspects who had been involved in a high-speed pursuit . . . would have slowed down if police had terminated the pursuit."[120] Although the post-capture ponderings of suspects likely facing substantial jail time are perhaps not the most reliable predictor of future suspects' behavior, some commentators have come to a similar conclusion by focusing less on the role of the suspect in the pursuit and more on the role of the police.

117. *Scott*, 127 S. Ct. at 1778.

118. *Id.* at 1779.

119. *Id.* at 1783.

120. Patrick T. O'Connor & William L. Norse, Jr., *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 MERCER L. REV. 511, 513 (2005-06).

Kathryn R. Urbonya suggests that police, by engaging in a pursuit, exert "psychological force" on the suspect.[121] The act of pursuit "not only communicate[s] a command to stop, but also that the police will continue to pursue until the individual stops."[122] The psychological force in a pursuit creates a vicious cycle: the more the police gain on a suspect's vehicle, the faster the suspect will go in order to get away.[123] The police, in turn, will increase their speed to keep up with the suspect.[124] The entire process carries on, presumably, until the vehicles reach their mechanical limits. Thinking of a high-speed pursuit in terms of psychological force puts the pursuit squarely in the control of the police: "By abandoning the pursuit, the psychological force compelling the [suspect] to continue the pursuit ceases."[125] If Professor Urbonya is correct, many high-speed pursuits could be safely terminated by simply letting the suspect go.

Whatever validity Professor Urbonya's theory may have, it is of course inapplicable unless the police decide to actually pursue a suspect. Although most commentators agree that the police should sometimes be permitted to engage in high-speed pursuits, there is substantial disagreement over when.[126] Because the vast majority of high-speed pursuits do not involve suspects whose underlying offenses pose a great danger to society,[127] Travis N. Jensen argues that high-speed pursuits should be limited to "violent felony suspects" whose escape would imperil society.[128] To facilitate this, Jensen puts forward a "categorical approach" that would obviate the need for officers to "perform a complex balancing test in the seconds before each decision to pursue."[129] "It is clear," he

121. Kathryn R. Urbonya, *The Constitutionality of High-Speed Pursuits Under the Fourth and Fourteenth Amendments*, 35 ST. LOUIS U. L.J. 205, 233 (1991).

122. *Id.* at 234.

123. *See id.* at 235 n.153 ("At a dog race, in order to make the dogs run faster, a metal frame is placed in front of them with the appearance of a rabbit on it. The dogs' pace increases as the speed of the frame moves faster. . . . [T]he police officers' vehicle represents a similar kind of compulsion to the pursued driver, except this time the force is behind the driver.").

124. *Id.*

125. *Id.* at 234-35.

126. *See, e.g.*, Michael Douglas Owens, Comment, *The Inherent Constitutionality of the Police Use of Deadly Force to Stop Dangerous Pursuits*, 52 MERCER L. REV. 1599 (2001). Owens, a former sheriff's deputy-turned-law student, argues that police officers are always constitutionally justified to end high-speed pursuits through deadly force. *Id.* at 1600. Owens posits that a person fleeing the police in a vehicle always presents a threat of death or serious physical harm to others. *Id.* at 1631. This threat from a suspect who "has a two thousand-pound weapon at his fingertips," he writes, is sufficient to warrant the use of deadly force. *Id.* at 1632. Furthermore, Owens points out that the reasonableness of the use of deadly force should be "judged solely with reference to the danger presented by the suspect's flight"—not by the suspect's underlying offense. *Id.* at 1633. Because evading the police is a crime in and of itself, Owens argues, the "predicate offense for which the stop was initiated" becomes irrelevant: it is the pursuit that endangers the public, not the initial offense. *Id.* at 1635.

127. A high-speed pursuit's most frequent impetus is a minor traffic offense. O'Connor & Norse, *supra* note 120, at 512; Urbonya, *supra* note 121, at 225.

128. Travis N. Jensen, Note, *Cooling the Hot Pursuit: Toward a Categorical Approach*, 73 IND. L.J. 1277, 1292 (1998).

129. *Id.*

writes, "that a suspect's escape must equal [a pursuit's] inherent risk to society before a pursuit could be justified."[130] Pursuits over "minor crimes and traffic violations," Jensen concludes, are unacceptable.[131] Assuming that fewer high-speed pursuits create fewer injuries, it may be safer for police to not engage in pursuits at all.[132]

But neither Professor Urbonya's theory of slowing a high-speed pursuit by letting the suspect go, nor Jensen's proposal of summarily avoiding high-speed pursuits, answer a question that seemed crucial to the holding in *Scott*: namely, if Deputy Scott would have discontinued the pursuit, how would Harris have known that the pursuit was over? Harris, the majority posited, "might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow."[133] Rather than "tak[ing] that chance and hop[ing] for the best," the majority concluded that "Scott's action—ramming [Harris] off the road—was *certain* to eliminate the risk that [Harris] posed to the public . . . ."[134]

The majority's question is more than mere conjecture: at least one survey of fleeing suspects revealed that they "often did not know whether a pursuit had been called off."[135] Even so, the majority failed to consider alternative options that may have been equally "certain" to eliminate the risk Harris posed to the public. Perhaps the most available alternative is the "stopstick." This device is a spiked strip that is carried in the trunk of a police car.[136] An officer deploys the stopstick in the path of the suspect's vehicle and, after the suspect passes over it, the officer pulls the stopstick off the road to allow the pursuing police vehicles to pass.[137] The spikes from the stopstick puncture the suspect's tires and allow them to slowly deflate, bringing the vehicle to a controlled stop.[138] Also available is "air support and photographic evidence of identity."[139] Although a small department like the one Deputy Scott belonged

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130. *Id.*

131. *Id.* at 1277.

132. Police departments have indeed implemented policies similar to that proposed by Jensen: after adopting a policy restricting pursuits to violent felonies, for example, the Metro-Dade Police Department reduced its pursuits from 279 in 1992 to 51 in 1993. Geoffrey P. Alpert, Andrew C. Clarke & William C. Smith, *The Constitutional Implications of High-Speed Police Pursuits Under a Substantive Due Process Analysis: Homeward Through the Haze*, 27 U. MEM. L. REV. 599, 621 (1996-97). Likewise, the Houston Police Department experienced a 40 percent drop in pursuits after adopting a more restrictive pursuit policy. *Id.*

133. Scott v. Harris, 127 S. Ct. 1769, 1778 (2007).

134. *Id.* at 1778-79

135. O'Connor & Norse, *supra* note 120, at 513.

136. John Hill, *High-Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction*, FBI LAW ENFORCEMENT BULL., July 2002, at 13, 16, *available at* http://www.fbi.gov/publications/leb/2002/july2002/july02leb.htm.

137. *Id.*

138. *Id.*

139. Jensen, *supra* note 128, at 1294.

to probably could not afford to operate a helicopter,[140] it definitely could afford video equipment (as evidenced by the videotape of the chase). With the suspect's license plate number and criminal activity clearly recorded on videotape, the police could arrest him at a later time by simply showing up at his residence. Finally, as Justice Stevens suggested in his dissent, "a simple warning issued from a loudspeaker . . . could have avoided such a tragic result."[141]

Though theories such as Professor Urbonya's, policy proposals such as Jensen's, and devices such as the stopstick are all somewhat imperfect, they would necessarily affect the outcome of a Fourth Amendment balancing analysis. In *Scott*, however, the majority proceeded as if these alternatives did not exist: because Harris "intentionally placed himself and the public in danger by unlawfully engaging in [a] reckless, high-speed flight" and ignored the implied warnings of the "[m]ultiple police cars, with blue lights flashing and sirens blaring, [that] had been chasing [him] for nearly 10 miles," it was Harris who "ultimately produced the choice between two evils that Scott confronted."[142] The problem with this conclusion is that Deputy Scott had a choice between more than "two evils."

Because it assumed that only deadly force would ensure the public's safety, and that the public's safety took priority over the "risk of bodily harm" to Harris, the majority unqualifiedly found Deputy Scott's use of deadly force to be objectively reasonable.[143] But the majority's objective reasonableness analysis rests on a questionable premise. By classifying complete cessation as allowing Harris to continue endangering the public, and deadly force as preventing Harris from endangering the public, the majority left itself with no real choice: *of course* Harris should be prevented from endangering the public. Any reasonable officer in the same circumstances—that is, a reasonable officer shackled by an artificial dichotomy of complete cessation or deadly force—would have used such force.[144] The "threat to the public" side of the metaphorical balance (already heavily weighted by the majority's interpretation of the videotape) would have been weighted even more if Deputy Scott had completely ceased the pursuit and let Harris drive on and further endanger the public. Under the artificial dichotomy, therefore, Deputy Scott's only objectively reasonable option was deadly force.

Yet had the majority taken pursuit psychology into account, Deputy Scott's use of deadly force may have looked less objectively reasonable

140. The Coweta County Sheriff's Department is comprised of 54 officers who patrol 442 square miles of rural Coweta County and, apparently, do not possess a helicopter. Coweta County Sheriff's Office, http://www.cowetaso.com/Patrol.html (last visited Sept. 30, 2007).

141. Scott v. Harris, 127 S. Ct. 1769, 1785 (2007).

142. *Id.* at 1778.

143. *Id.* at 1779.

144. *See* discussion of *Graham supra* p. 466.

in light of the theory that pursuit causes a fleeing suspect to drive faster. Had the majority taken the lack of a categorical pursuit policy[145] into account, Deputy Scott's use of deadly force may have looked less objectively reasonable in light of the fact that the pursuit stemmed from an insignificant traffic violation.[146] And had the majority taken the failure to use stopsticks or issue a loudspeaker warning before resorting to deadly force into account, Deputy Scott's use of deadly force may have looked less objectively reasonable in light of the relative ease by which these measures could have been taken. Of course none of these alternatives, which all happen to fall somewhere between complete cessation and deadly force, were ever considered by the majority in deciding the objective reasonableness of Deputy Scott's use of deadly force.

The majority's artificial dichotomy of complete cessation or deadly force may go well beyond the immediate result in *Scott*. First, it potentially relieves courts of the responsibility to factor in alternative methods of ending high-speed pursuits. Courts may be able to decide whether a high-speed pursuit warranted deadly force without addressing all of an officer's available options. Second, it may also have inadvertently set back law enforcement agencies' adoption of safer methods of stopping fleeing suspects by failing to provide any incentive for their implementation.

Although courts have characterized *Garner* as asking whether "a reasonable non-deadly alternative exist[ed] for apprehending the suspect,"[147] *Scott*'s holding seems to override this concern for alternatives in high-speed pursuit scenarios. Even the importance of *Graham*'s factors for determining objective reasonableness—the severity of the crime, the immediacy of the threat, the suspect's resistance, and the potential for evasion[148]—seem diminished in light of the majority's artificial dichotomy. Rather, *Scott* directs courts to consider only the certainty of deadly force, or the uncertainty of complete cessation.[149] Some courts have already embraced this rationale.[150]

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145. The Coweta County Sheriff's Department had a pursuit policy which left "decisions regarding the initiation, continuation, and termination of pursuits . . . to the discretion of the officer and supervisor in the field." Harris v. Coweta County, No. 01-CV-148, at *6 (N.D. Ga. Sept. 25, 2003) (order denying in part summary judgment). This "judgmental" policy is substantially more liberal than the "categorical" policy advocated by Jensen.

146. *Scott*, 127 S. Ct. at 1772.

147. Brower v. County of Inyo, 884 F.2d 1316, 1318 (9th Cir. 1989).

148. Graham v. Connor, 490 U.S. 386, 396 (1989).

149. *Scott*, 127 S. Ct. at 1778-79.

150. The Eleventh Circuit held, for example, that an officer reasonably used deadly force when he rammed the vehicle of a fleeing suspect whom the officer suspected of driving under the influence. Beshers v. Harrison, No. 05-17096, 2007 U.S. App. LEXIS 19289, at *1 (11th Cir. Aug. 14, 2007). The collision caused the suspect's vehicle to roll over several times, resulting in the suspect's death. *Id.* at *5. The court reasoned that, because Scott "specifically rejected the notion that police can protect the public by ceasing a pursuit," the officer's only reasonable option to ensure public safety was to use deadly force against the suspect. *Id.* at *20-21. Similarly, the Fourth Circuit held that an officer's decision to ram a fleeing motorcyclist off the road, which resulted in the motorcy-

Fourth Amendment reasonableness for the use of deadly force, even before *Scott*, never insisted that courts second-guess the judgment of a reasonable officer on the scene.[151] But with the many options to terminate high-speed pursuits other than complete cessation or deadly force, the majority's artificial dichotomy ignores the tools that are readily available to reasonable officers on the scene. Under the majority's analysis in *Scott*, therefore, courts do not have to account for objective reality in determining objective reasonableness.

A further ramification of the majority's artificial dichotomy may be its effect on law enforcement agencies. Although the trend in law enforcement has been toward adopting restrictive pursuit policies and deploying alternative devices for terminating pursuits,[152] *Scott* failed to offer any kind of incentive to continue this trend. While officer safety is a constant concern in attempting to end high-speed pursuits, the threat of litigation, too, has loomed over law enforcement in high-speed pursuit situations.[153] *Scott* may have removed the threat of litigation as a check against officers' use of deadly force in high-speed pursuits. It may also have taken away law enforcement agencies' incentives to invest in the development of restrictive pursuit policies and the adoption of alternative tools to end pursuits. If it discourages law enforcement agencies from adopting alternatives to deadly force, the majority's artificial dichotomy may indeed prove a self-fulfilling prophesy.

CONCLUSION

It is true that the majority did not resurrect the draconian common law precept of allowing officers to kill fleeing suspects rather than pursue them. Far from it: the majority faithfully applied the Fourth Amendment balancing test developed by *Garner* and *Graham*. But tilting the metaphorical balance in favor of deadly force by relying on questionable factual premises has the potential to compel similar results. After *Scott*, the use of deadly force in high-speed pursuits appears almost per se reasonable. And in cases where videotape evidence is presented, it looks as if judges rather than juries have the final word in resolving questions of reasonableness. Furthermore, *Scott* may free courts from analyzing all of an officer's options for terminating a high-speed pursuit, and may also

clist's death, was reasonable under Scott because "an officer's decision whether to let a suspect go in the hopes of catching him later is not governed by just how dangerous the suspect can make the pursuit." Abney v. Coe, No. 06-1607, 2007 U.S. App. LEXIS 15841, at *17 (4th Cir. July 3, 2007). The court wrote that the officer faced a "dreadful choice" of complete cessation or deadly force. *Id.* at *18. Following Scott's artificial dichotomy, the court concluded that the officer's only option to protect the public was deadly force. *Id.*

151. *See* discussion of objective reasonableness *supra* p. 465-66.

152. Alpert, Clarke & Smith, *supra* note 132, at 604-06.

153. Erik Savas, Comment, *Hot Pursuit: When Police Pursuits Run Over Constitutional Lines*, 1998 DET. C.L. REV. 857, 858-59 (1998).

have reduced law enforcement agencies' incentives to adopt alternatives to deadly force for ending high-speed pursuits.

As Justice Stevens posited in his dissenting opinion, the answer to the question of whether an officer reasonably used deadly force to end a high-speed pursuit depends on the particular circumstances: it "may be an obvious 'yes,' an obvious 'no,' or sufficiently doubtful that the question . . . should be decided by a jury, after a review of the degree of danger and the alternatives available to the officer."[154] But by concluding that no reasonable jury could disagree with its interpretation of the videotape, and analyzing objective reasonableness in the context of an artificial dichotomy of complete cessation or deadly force, the *Scott* majority took the decision from the hands of the jury and the constraints of reality, and set a precedent of imbalance and unreasonableness.

Forrest Plesko[*]

154. Scott v. Harris, 127 S. Ct. 1769, 1781 (2007) (Stevens, J., dissenting).

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