

Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers

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I. INTRODUCTION

A series of shootings has started a national debate about the use of deadly force by law enforcement officers. Though this debate has entered mainstream media and the public consciousness, the law gives little guidance on when the use of force by police is justified. While the Supreme Court has made it clear that the Fourth Amendment applies to questions about the use of deadly force, the Court has never given any specific guidance to law enforcement on when the use of deadly force is

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justified—and the standard of review the Court has promulgated is highly deferential to the judgment of police officers.¹

The first part of this article examines the Supreme Court's decisions regarding the use of deadly force by police officers, concluding that the Court has failed to provide law enforcement with any meaningful guidance on when the use of deadly force is appropriate.

The second part of this article calls into question the Court's justifications for not limiting the use of deadly force by law enforcement. The Court overestimates the deterrent effect of civil rights litigation and places too much confidence in police professionalism on the one hand, while failing to take into account the militarization of law enforcement and exaggerating the inherent dangerousness of police work on the other.

The third part of the article illustrates the malleability of the reasonable officer standard promulgated by the Supreme Court. Three recent cases in which a police officer was charged with homicide are explored in order to demonstrate how officers can use unscientific training and tactical practices, along with exaggerated claims regarding the dangerousness of police work, to justify the use of deadly force.

The fourth part of the article evaluates the purported need for broad use of force doctrine—the dangerousness of police work—by analyzing available data on the number of homicides committed by law enforcement and number of officers feloniously killed in the line of duty. When the number of homicides committed by law enforcement officers is compared to the number of officers feloniously killed between 2003 to 2009, it was the suspect who was killed 94%–97% of the time.² A similar analysis of data collected during 2015 also resulted in a finding that when an encounter between police officers and a suspect ended with the death of either the officer or the suspect, it was the suspect who was killed 97% of the time.³

The article concludes by arguing that the number of suspects killed by police officers is grossly disproportionate to the number of police officers who are killed by suspects, which suggests that law enforcement officers are using deadly force before any threat to their safety has materialized. This is a result, at least in some part, of the Supreme Court's failure to impose meaningful restrictions on the use of deadly force, which has encouraged law enforcement officers to prioritize their own safety over the safety of civilians.

¹ See *Saucier v. Katz*, 533 U.S. 194, 204–05 (2001) (explaining that the test for whether officer acted reasonably in using force as one that “caution[s] against the ‘20/20 vision of hindsight’ in favor of deference to the judgment of reasonable officers on the scene.”) (quoting *Graham v. Connor*, 490 U.S. 386, 393 (1989)).

² See discussion *infra* Part IV.

³ See discussion *infra* Part IV.

II. THE LACK OF JUDICIAL OVERSIGHT OR CLEAR GUIDANCE ON THE USE OF FORCE BY LAW ENFORCEMENT

The United States Supreme Court seldom addresses the issue of police officer use of force; when the issue is addressed, legal justifications for the use of force, and the limitations on when the use of force is appropriate are not analyzed or discussed in any great detail.⁴

The first time the Court dealt with the use of force was in *Tennessee v. Garner*.⁵ In *Garner*, a police officer used deadly force despite being “reasonably sure” that the suspect was an unarmed teenager “of slight build” who was running away from him.⁶ In defending his actions, the officer relied on a Tennessee statute that authorized a police officer to “use all the necessary means to effect the arrest” of a suspect.⁷ The Court held that the use of deadly force is subject to the Fourth Amendment’s reasonableness requirement, and that the Tennessee statute was unconstitutional in so far as it authorized the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances.⁸

The Court noted in its reasoning that “[t]he intrusiveness of a seizure by means of deadly force is unmatched,”⁹ and characterized use of deadly force as “frustrate[ing] the interests of the individual, and of society, in judicial determination of guilt and punishment.”¹⁰ The Court added that the use of deadly force is “self-defeating” since, if used successfully, “it guarantees that [the criminal justice mechanism] will not be set in motion.”¹¹ The Court also based their decision, at least in part, on the fact that the policies of most police departments only authorize the use of deadly force in defense of human life or to protect the officer or another person from serious physical injury.¹² Beyond that baseline authorization, the Court also found that the Fourth Amendment allowed the use of deadly force against a fleeing suspect “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.”¹³

The mistake the Court made in *Garner* was to equate the use of deadly force with a “seizure” under the Fourth Amendment, thereby

⁴ See Rachael A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1122 (2008) (calling the Supreme Court’s Fourth Amendment doctrine regulating the use of force by police officers “deeply impoverished” and “indeterminate and undertheorized”).

⁵ *Tennessee v. Garner*, 471 U.S. 1 (1985).

⁶ *Id.* at 1.

⁷ *Id.*

⁸ *Id.* at 2.

⁹ *Id.* at 9.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 10.

¹² *Id.* at 18.

¹³ *Id.* at 11.

subjecting use of force situations to reasonableness analysis.¹⁴ As the Court pointed out, the use of deadly force “frustrates the interests of the individual, and of society, in judicial determination of guilt and punishment.”¹⁵ But a normal search or seizure—even an unreasonable one—does not prevent a judicial determination of guilt. That is, while the search for evidence and the arrest of an individual are steps in the adjudication process, the use of deadly force actually prevents any adjudication process from happening altogether. Thus, the use of deadly force denies a suspect all of the other procedural rights that are designed to ensure the accuracy and reliability of the adjudication process as it places the officer who uses deadly force in the effective role of judge, jury, and executioner. The Fourth Amendment reasonableness requirement for searches and seizures is ill-suited to use of force analysis since the requirement that the use of deadly force be merely “reasonable” is inconsistent with the requirement that the state prove a defendant’s guilt beyond a reasonable doubt.

Several years after *Garner*, the Court reiterated that the use of force by police officers is subject to the Fourth Amendment’s reasonableness requirement in *Graham v. Connor*.¹⁶ In *Graham*, the Court was called on to decide whether police officers had used excessive force during the course of an investigatory stop that did not ultimately lead to an arrest.¹⁷ Upholding the officers’ actions, the Court explained that the reasonableness of the level of force used by police “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”¹⁸ The fact that officers may ultimately be wrong about a suspect’s guilt was ruled not to matter if, based on what the officers knew at the time, the amount of force used to detain a suspect was reasonable.¹⁹ The Court added, in what has become an often quoted portion of the decision,²⁰ that “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”²¹ Notably, the Court did not say that police officers should be shown some amount of deference in their decision making when the situation they are in *actually* is “tense, uncertain, and rapidly evolving,” but simply because they are *often*

¹⁴ *Id.* at 7 (“While it is not always clear just when minimal police interference becomes a seizure . . . there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.”) (citations omitted).

¹⁵ *Id.* at 9.

¹⁶ *Graham v. Connor*, 490 U.S. 386, 388–389 (1989).

¹⁷ *Id.*

¹⁸ *Id.* at 396.

¹⁹ *Id.*

²⁰ Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 865 (2014) (“Since the Supreme Court first introduced that description in 1989, federal district and circuit courts have repeated it on more than 2,300 occasions.”).

²¹ *Graham*, 490 U.S. at 396–97.

placed in such situations.²²

In *Saucier v. Katz*,²³ the Court reiterated factors set forth in *Graham* that should be used when evaluating a claim of excessive force, including “the severity of the crime, whether the suspect poses a threat to the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”²⁴ But the Court went one step further, suggesting that police officers could use force if they thought that a suspect was *likely* to fight back: “If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.”²⁵

In *Scott v. Harris*,²⁶ the Court ruled that police officers are permitted to use force against a suspect who drives recklessly in an attempt to evade the police.²⁷ There, the Court found that an officer’s decision to ram his push bumper into the back of a suspect’s car in order to make the vehicle spin to a stop was reasonable under the circumstances, even though this act “posed a high likelihood of serious injury or death” to the suspect.²⁸ Though the decision in *Garner* seemed to have created a bright line rule regarding the use of deadly force against a fleeing suspect, the Court in *Harris* stated that “*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute ‘deadly force.’”²⁹ The Court rejected the idea of an “easy-to-apply legal test,” concluding that “in the end we must still slosh our way through the factbound morass of ‘reasonableness.’”³⁰

The Court revisited the use of force during a high-speed car chase in *Plumhoff v. Rickard*,³¹ where a suspect who had been pulled over because of a defective headlight refused to exit his vehicle and sped away. After leading police officers on a high-speed chase, the suspect’s car spun out into a parking lot and collided with a police cruiser.³² The suspect once again tried to escape in his car, but officers exited their vehicles and shot into the suspect’s car fifteen times, killing the suspect.³³ Just as in *Scott*, the Court concluded that because the suspect’s flight posed a grave risk to public safety “the police acted reasonably in using deadly force to end that risk.”³⁴ The Court also considered whether the number of shots fired, fifteen, was unreasonable under the

²² *Id.* at 396.

²³ *Saucier v. Katz*, 533 U.S. 194 (2001).

²⁴ *Id.* at 195.

²⁵ *Id.*

²⁶ *Scott v. Harris*, 550 U.S. 372 (2007).

²⁷ *Id.* at 386.

²⁸ *Id.* at 384.

²⁹ *Id.* at 382.

³⁰ *Id.* at 383.

³¹ *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014).

³² *Id.* at 2017.

³³ *Id.* at 2018.

³⁴ *Id.* at 2022.

circumstances.³⁵ The Court reasoned that “if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.”³⁶

In 2015, *Mullenix v. Luna*³⁷ presented the Court with another a high-speed chase. A police officer approached Israel Leija’s vehicle and informed him that he was under arrest because of an outstanding warrant.³⁸ Leija sped off and “led the officers on an 18 minute chase at speeds between 85 and 110 miles per hour.”³⁹ In an effort to end the pursuit, police officers set up spike strips at three different locations.⁴⁰ Instead of waiting for Leija’s vehicle to reach the locations where the spike strips were deployed, Trooper Chadrin Mullenix decided to try and end the pursuit by “shooting at Leija’s car in order to disable it.”⁴¹ Mullenix fired six shots at Leija’s vehicle from his position on an overpass.⁴² Instead of hitting the engine block of the vehicle—his intended target—he hit Leija four times in the upper body, killing him.⁴³

The Supreme Court considered whether Mullenix was entitled to qualified immunity for his actions.⁴⁴ If Mullenix’s conduct did not violate clearly established statutory or constitutional rights, then, as a police officer, he could not be subject to personal liability.⁴⁵ The Court was quick to point out that it had “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.”⁴⁶ Arguing that the doctrine “protect[s] actions in the ‘hazy border between excessive and acceptable force,’”⁴⁷ the Court concluded that Mullenix was entitled to qualified immunity because “excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted.”⁴⁸

The decisions in *Garner*, *Graham*, *Saucier*, *Scott*, *Plumhoff*, and *Mullenix* offer almost no guidance to law enforcement, judges, or juries as to what types of force are reasonable under a specific set of circumstances.⁴⁹ What guidance they do provide is contradictory because the Court condemns the use of deadly force to apprehend a fleeing burglary suspect in *Garner*, but then approves of an act likely to cause

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Mullenix v. Luna* 136 S. Ct. 305 (2015).

³⁸ *Id.* at 306.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 307.

⁴³ *Id.*

⁴⁴ *Id.* at 308. For discussion on civil rights litigation and qualified immunity in police use of force cases, see *infra* Part II.B.

⁴⁵ *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (“[O]ur cases establish that the right the official is alleged to have violated must have been ‘clearly established’”)

⁴⁶ *Mullenix*, 136 S. Ct. at 310.

⁴⁷ *Id.* at 312 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004)).

⁴⁸ *Id.* at 309.

⁴⁹ See generally Harmon, *When Is Police Violence Justified?*, *SUPRA* NOTE 5 (IDENTIFYING A LACK OF GUIDANCE PROVIDED BY SUPREME COURT JURISPRUDENCE ON USE OF FORCE).

serious injury or death to apprehend someone who was driving recklessly in *Scott*.⁵⁰ The decisions in *Plumhoff* and *Mullenix* highlight just how contradictory the Court's reasoning can be—in those cases, the Court found that shooting into a car in an effort to stop a fleeing suspect was a reasonable use of deadly force, despite the fact that the vast majority of law enforcement agencies instruct officers to never fire into a moving car.⁵¹ The end result is a highly deferential standard by which to determine whether use of force is justified; the decision to use deadly force is left almost entirely up to the individual officer, and judges and juries are encouraged to give the officer the benefit of the doubt when deciding if use of deadly force was reasonable.⁵²

III. INACCURATE ASSUMPTIONS ABOUT LAW ENFORCEMENT

What accounts for this judicial deference toward police officers when it comes to the use of deadly force? In part, the Court has stated that “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.”⁵³ Beyond the vagueness of the constitutional standard, the Court may also be reluctant “to require that police officers take unnecessary risks in the performance of their duties.”⁵⁴ However, while those concerns may have an impact on the Court's decision making, ultimately, the Court's reluctance to regulate the use of force by police officers is based, in large part, on inaccurate assumptions regarding the nature of policing.

A. Police Officers' Aggressive Use of Force

The Court assumes that police officers are regularly forced to make split-second decisions regarding the use of force, and that they typically

⁵⁰ See generally *Tennessee v. Garner*, 471 U.S. 1 (1985); *Scott v. Harris*, 550 U.S. 372 (2007) (holding seemingly contradictory conclusions about the reasonableness of use of force against a fleeing suspect).

⁵¹ Jon Swaine, Jamiles Lartey & Oliver Laughland, *Moving Targets*, THE GUARDIAN (Sept. 1, 2015, 9:42 AM), <http://www.theguardian.com/us-news/2015/sep/01/moving-targets-police-shootings-vehicles-the-counted>, <https://perma.cc/SVTN-NLFJ> (“The US Department of Justice, prominent international policing experts and most major police departments across the US agree: police officers should not fire their guns into moving cars. The shots are widely viewed as ineffective for stopping oncoming vehicles, and the risks to innocent parties are seen as overwhelming.”).

⁵² Harmon, *When Is Police Violence Justified?*, *supra* note 5, at 1123 (arguing that “the Supreme Court's few opinions fail to answer the basic questions of why, when and how much force officers can use, while at the same time permitting, if not encouraging, the use of irrelevant and prejudicial considerations in evaluating whether an officer acted reasonably.”).

⁵³ *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

⁵⁴ *Terry v. Ohio*, 392 U.S. 1, 23 (1968).

must use force for self-defense.⁵⁵ The opposite is actually true—police officers typically use force offensively rather than defensively and do so with at least some degree of premeditation.⁵⁶

Police officers often regard noncompliance with their orders as a provocation that justifies the use of force.⁵⁷ For decades, police officers have seen themselves as fighting a “war on crime,” and their training has reflected that mentality, emphasizing the use of firearms and defensive tactics, while virtually ignoring crisis intervention and de-escalation strategies.⁵⁸ The increased use of Special Weapons and Tactics (SWAT) teams,⁵⁹ as well as the militarization of police forces across the country, has transformed police officers from guardians into warriors.⁶⁰ With help from the Defense Department, local police forces have been equipped with body armor, assault rifles, grenade launchers, and armored vehicles.⁶¹ The “President’s Task Force on 21st Century Policing” recognized the need to change the culture of law enforcement and recommended that law enforcement officers “embrace a guardian—rather than a warrior—mindset” in order to build trust and legitimacy.⁶²

⁵⁵ See *Graham*, 490 U.S. at 396 (“The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”).

⁵⁶ Stoughton, *Policing Facts*, *supra* note 21, at 868 (“The vast majority of the time, then, officers use force aggressively, not defensively. That is, they act forcefully to establish control over a suspect rather than defend themselves, a third party, or the suspect from some imminent harm. . . . Considering that the vast majority of use-of-force incidents involve the use of aggressive force by police officers—typified by tactical preparation, a degree of premeditation, low levels of resistance, low levels of force, and a low probability of injury—the Court’s description of ‘split-second judgment’ is simply wrong almost all the time.”).

⁵⁷ Sunil Dutta, *I’m a Cop. If You Don’t Want to Get Hurt, Don’t Challenge Me.*, WASH. POST (Aug. 19, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/08/19/im-a-cop-if-you-dont-want-to-get-hurt-dont-challenge-me/>, <<https://perma.cc/6DRA-4RLG>>.

⁵⁸ Matt Apuzzo, *Police Rethink Long Tradition on Using Force*, N.Y. TIMES (May 4, 2015), http://www.nytimes.com/2015/05/05/us/police-start-to-reconsider-longstanding-rules-on-using-force.html?_r=0, <<https://perma.cc/N5KR-8HUA>>.

⁵⁹ Clyde Haberman, *The Rise of the SWAT Team in Americana Policing*, N.Y. TIMES (Sept. 7, 2014), http://www.nytimes.com/2014/09/08/us/the-rise-of-the-swat-team-in-american-policing.html?_r=0, <<https://perma.cc/7DQP-SWSW>>.

⁶⁰ See generally RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* (2013) (describing the militarization of police forces in the United States).

⁶¹ Matt Apuzzo, *What Military Gear Your Local Police Department Bought*, N.Y. TIMES (Aug. 19, 2014), <http://www.nytimes.com/2014/08/20/upshot/data-on-transfer-of-military-gear-to-police-departments.html?module=Search&mabReward=relbias%3Ar%2C{%221%22%3A%22R1%3A9%22}&abt=0002&abg=0>, <<https://perma.cc/YL5R-9264>>; Rachel A. Harmon, *FEDERAL PROGRAMS AND THE REAL COSTS OF POLICING*, 90 N.Y.U. L. REV. 870, 918–19 (2015) (noting that federal grant programs have encouraged an aggressive and militaristic style of policing and that police departments have used the Homeland Security Grant Program to purchase bomb-detection robots, Kevlar helmets, unmanned aerial vehicles and tactical armored vehicles).

⁶² OFFICE OF CMTY. ORIENTED POLICING, *FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING I* (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf, <<https://perma.cc/3F4K-TPHX>>.

B. The Absence of Effective Deterrents

The Court's also assumes that deterrents such as legislation and the threat of civil rights litigation operate to prevent excessive use of force by police. In *Atwater v. City of Lago Vista*,⁶³ the Court declined to limit the power of officers to make custodial arrests based on the assumption that "the good sense (and, failing that, the political accountability) of most local lawmakers and law enforcement officials" would prevent police officers from making unnecessary arrests.⁶⁴ In deciding that a violation of the "knock and announce" rule was not a sufficient justification for excluding incriminating evidence in *Hudson v. Michigan*,⁶⁵ the Court reasoned that the police had other incentives—the threat of civil rights litigation, the increasing professionalism of police forces, and internal discipline—to not violate a suspect's constitutional rights thus making the exclusion of evidence unnecessary as a deterrent.⁶⁶

The Court's confidence in the "good sense" of law enforcement officers and lawmakers may be misplaced when it comes to the regulation of the use of deadly force. While there have been recent efforts to make police officers more accountable, including an increase in the use of body cameras and a ban on the use of grand juries in the investigation of officers when a suspect has been killed,⁶⁷ lawmakers tend to be highly deferential to law enforcement.⁶⁸ Even modest attempts to regulate police officers by local lawmakers, such as a New York City Council proposal to require officers to ask permission before making

⁶³ *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

⁶⁴ *Id.* at 353.

⁶⁵ *Hudson v. Michigan*, 547 U.S. 586 (2008).

⁶⁶ *Id.* at 598 ("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.").

⁶⁷ Tracey Kaplan, *California Bans Grand Juries in Fatal Shootings by Police*, MERCURY NEWS (Aug. 11, 2015, 1:53 PM) http://www.mercurynews.com/crime-courts/ci_28621966/gov-brown-oks-nations-1st-ban-grand-juries, <<https://perma.cc/SY85-G26D>>; Kate Mather, *LAPD's Long-Awaited Body Cameras Will Hit the Street on Monday*, L.A. TIMES (Aug. 26, 2015, 10:24 AM), <http://www.latimes.com/local/lanow/la-me-ln-lapd-body-cameras-20150826-story.html>, <<https://perma.cc/Y3B4-Z5QR>>; Reid Wilson, *Police Accountability Measures Flood State Legislatures after Ferguson, Staten Island*, WASH. POST (Feb. 4, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/04/police-accountability-measures-flood-state-legislatures-after-ferguson-staten-island/>, <<https://perma.cc/CYT4-LQQT>>; but see Radley Balko, *80 Percent of Chicago PD Dash-Cam Videos Are Missing Audio Due to "Officer Error" or "Intentional Destruction"*, WASH. POST (Jan. 29, 2016), <https://www.washingtonpost.com/news/the-watch/wp/2016/01/29/80-percent-of-chicago-pd-dash-cam-videos-are-missing-audio-due-to-officer-error-or-intentional-destruction/>, <<https://perma.cc/RBH5-4AJT>>.

⁶⁸ See Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1352–53 (explaining that federal lawmakers have "never acted as 'the front line troops in combating . . . police abuse,'" instead using "cost-raising mechanisms" to address police misconduct that are "ill equipped to combat the organizational roots of police wrongdoing.") (quoting *Police Brutality: Hearing Before the H. Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 102d Cong. 133 (1991) (statement of John R. Dunne, U.S. Dep't of Justice)).

certain warrantless searches and to provide minimal information to suspects by identifying themselves by name, rank, and command during a street stop, are opposed by law enforcement.⁶⁹ Lawmakers have actually taken affirmative steps to insulate officers from internal discipline by passing Law Enforcement Officer Bill of Rights Laws.⁷⁰ External discipline, in the form of criminal prosecution, is extremely rare.⁷¹

With respect to the Court's assumption that threat of civil litigation will curb police misconduct, their confidence is misplaced. Pursuant to 42 U.S.C. § 1983, the victims of excessive force can file a civil action against the officers responsible.⁷² However, police officers are entitled to qualified immunity "so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁷³ The Court has stated that the qualified immunity doctrine exists in order to "protect actions in the hazy border between excessive and acceptable force,"⁷⁴ and it protects "all but the plainly incompetent or those who knowingly violate the law."⁷⁵

The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality."⁷⁶ In the Court's opinion, the dispositive question is "whether the volatile nature of a *particular* conduct is clearly established."⁷⁷ The Court does not "require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."⁷⁸ The Court has also narrowly defined when a right has been clearly established, explaining that a clearly established right is one that is "sufficiently clear 'that every reasonable official would [have understood] that what he is doing

⁶⁹ Mara Gay, *William Bratton Bucks City Council*, WALL ST. J. (June 29, 2015, 8:51 PM), <http://www.wsj.com/articles/william-bratton-bucks-city-council-1435625376>, <<https://perma.cc/883C-B3E8>> ("I wish to say respectfully, but firmly, that these are the purview of the police commissioner and the police department, and not of legislative control," Mr. Bratton testified at a City Council hearing on the package of bills.)

⁷⁰ Walter Olson, *Police Misconduct and "Law Enforcement Officers' Bill of Rights" Law*, CATO INSTITUTE, (Apr. 24, 2015, 1:34 PM), <http://www.cato.org/blog/police-misconduct-law-enforcement-officers-bill-rights>, <<https://perma.cc/J2SP-6C4L>>.

⁷¹ Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/>, <<https://perma.cc/KTG6-N8VX>>. See also Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L. J. 639, 641, 648 (2003) (arguing that abusive police officers are under-prosecuted by state prosecutors and that uncooperative police witnesses pose a significant obstacle to prosecution).

⁷² 42 U.S.C. § 1983 (2012) ("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.")

⁷³ *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))).

⁷⁴ *Id.* at 312 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004)).

⁷⁵ *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

⁷⁶ *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).

⁷⁷ *Mullenix*, 136 S. Ct. at 308 (emphasis in original) (quoting *al-Kidd*, 563 U.S. at 742).

⁷⁸ *al-Kidd*, 563 U.S. at 742.

violates that right.”⁷⁹

The result is that plaintiffs alleging a violation of § 1983 face an uphill battle.⁸⁰ It is not enough to prove that their constitutional rights were violated—in order to avoid summary judgment based on the doctrine of qualified immunity, they must also prove that every reasonable officer would have understood that the officer’s actions violated those rights.⁸¹ Even if they overcome that hurdle, the jury will ultimately be instructed that they should view the reasonableness of an officer’s use of force from the perspective of a reasonable officer on the scene.⁸² Thus, police officers are protected from liability by two levels of reasonableness—the reasonableness of an officer’s understanding of a violation of a clearly established right, and the Fourth Amendment reasonableness requirement of the amount of force used—which effectively insulates them from liability.⁸³

In addition, research about the effect that lawsuits have on the conduct of law enforcement shows that when law enforcement agencies gather and analyze data about lawsuits the data has been successfully used to reduce misconduct,⁸⁴ but most police departments rarely have the kind of information about lawsuits that is necessary in order to make reasoned policy decisions.⁸⁵ Some members of the Court have openly doubted whether the threat of civil rights lawsuits effectively deters police misconduct, although the assumption that it does continues to promote deference to law enforcement.⁸⁶

⁷⁹ Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012).

⁸⁰ See generally Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633 (2012) (discussing developments in qualified immunity jurisprudence and concluding that qualified immunity doctrine poses a substantial obstacle to plaintiffs).

⁸¹ *Id.* at 656.

⁸² See Geoffrey P. Alpert & William C. Smith, *How Reasonable is the Reasonable Man?: Police and Excessive Force*, 85 *J. CRIM. L. & CRIMINOLOGY* 481, 486 (1994) (emphasizing the contradictory nature of the reasonableness assessment in excessive force cases by noting that the jury’s duty is “to determine if the police actions were reasonable or unreasonable based upon subjective objectivity.”).

⁸³ Diana Hassel, *Excessive Reasonableness*, 43 *IND. L. REV.* 117, 117 (2009) (arguing that when qualified immunity is applied in a Fourth Amendment excessive force case, the defendant, typically a police officer, is protected from liability by two layers of reasonableness. “First, qualified immunity absolves an individual government agent from liability under 42 U.S.C. § 1983, notwithstanding his violation of a constitutional right, if his actions were ‘objectively reasonable.’ Second, the agent is likewise absolved from liability under the Fourth Amendment itself if the amount of force used was ‘objectively reasonable.’”). See Blum, *Qualified Immunity Developments*, *supra* note 81, at 654–55 (2013) (discussing recent decisions making it more difficult for § 1983 plaintiffs to establish that the federal law was clearly established).

⁸⁴ Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 *UCLA L. REV.* 1023, 1023 (2010).

⁸⁵ *Id.* at 1085. (“Most police departments lack sufficient information about past suits to draw any sensible lessons. Some police departments completely ignore information from lawsuits. Other departments try to gather information from suits, but their efforts are frustrated by technological problems, human error, and efforts to obfuscate relevant information.”). See also Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 *CARDOZO L. REV.* 841, 891 (2012) (“Despite widespread reluctance to pay attention to litigation data, law enforcement agencies can—and do—learn from lawsuits.”).

⁸⁶ See *Hudson v. Michigan*, 547 U.S. 586, 611 (2008) (Breyer, J., dissenting) (criticizing the assumption that the threat of civil liability is an effective deterrent to police misconduct).

C. A Lack of Professionalism and Internal Discipline

The Supreme Court's confidence in the professionalism of police forces is not shared by the members of Congress who passed 42 U.S.C. § 14141 as part of the Violent Crime Control and Law Enforcement Act of 1994.⁸⁷ The statute makes it unlawful for a police agency to engage in a pattern or practice that "deprives persons of rights, privileges, or immunities secured or protected by the Constitution."⁸⁸ It also grants the attorney general the authority to file a civil action demanding equitable and declaratory relief.⁸⁹ Within the last ten years, the Department of Justice has filed actions alleging patterns and practices of abuse against the Pittsburgh Police Department, the New Jersey State Police, the District of Columbia Metropolitan Police Department, the Los Angeles Police Department, the Cincinnati Police Department, the Columbus Police Department, the Buffalo Police Department, the Detroit Police Department, the Orange County Sheriff's Office, the Seattle Police Department, and the New Orleans Police Department, among others.⁹⁰ One expert estimates that currently "nearly one in five Americans is served by a law enforcement agency that has been subject to a Department of Justice . . . investigation via § 14141."⁹¹ In terms of the unreasonable use of force, "[a]lmost every single negotiated settlement signed by the DOJ pursuant to § 14141 addresses the policing agency's use of force."⁹²

A trio of recent reports on large metropolitan police forces also calls into question the Court's reliance on "police professionalism." A United States Department of Justice (DOJ) investigation of the Albuquerque Police Department (APD) found that the APD engages in a pattern or practice of use of excessive force, including deadly force.⁹³ The DOJ concluded "that structural and systemic deficiencies—including insufficient oversight, inadequate training, and ineffective policies—contribute to the use of unreasonable force."⁹⁴ The DOJ also found that because of "the department's inadequate accountability systems, the department often endorses questionable and sometimes

⁸⁷ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 42 U.S.C.).

⁸⁸ 42 U.S.C. § 14141(a) (2012).

⁸⁹ *Id.* § 14141(b).

⁹⁰ Stephen Rushin, *Federal Enforcement of Police Reform*, 82 *FORDHAM L. REV.* 3189, 3247 (2014).

⁹¹ Rushin, *Structural Reform Litigation*, *supra* note 69, at 1347-48.

⁹² *Id.* at 1378-79.

⁹³ LETTER FROM U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TO RICHARD J. BERRY, MAYOR OF ALBUQUERQUE, N.M. (Apr. 10, 2014), http://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf, <<https://perma.cc/5YWS-KXTH>>.

⁹⁴ *Id.*

unlawful conduct by officers.”⁹⁵

The DOJ came to similar conclusions following an investigation of the Cleveland Division of the Police (CDP).⁹⁶ The lack of supervision and guidance of CPD officers results in “policing that is sometimes chaotic and dangerous; interferes with CPD’s ability to effectively fight crime; compromises officer safety; and frequently deprives individuals of their constitutional rights.”⁹⁷ The DOJ also found that “CDP’s pattern or practice of excessive force is both reflected by and stems from its failure to adequately review . . . allegations of misconduct; identify and respond to patterns of at-risk behavior; provide its officers with the support, training, supervision, and equipment needed to allow them to do their jobs safely and effectively; adopt and enforce appropriate policies; and implement effective community policing strategies.”⁹⁸

A DOJ-funded study on the use of deadly force by the Philadelphia Police Department (PPD) “uncovered policy, training, and operational deficiencies” and made ninety-one recommendations regarding the reform of the department’s deadly force practices.⁹⁹ The report found that “PPD officers do not receive regular, consistent training on the department’s deadly force policy”¹⁰⁰ and that “officers do not regularly receive in-service training on threat perception, decision making, and de-escalation.”¹⁰¹

These three studies demonstrate that the Supreme Court overestimates the level of training and supervision that police officers receive in the use of deadly force. The fact that these reports found that the tactics used by these police departments actually created the need to use deadly force is especially troubling.

D. Exaggerated Impression of the Danger of Policing

Finally, the Court’s deferential attitude toward the use of force may also be influenced by the popular perception that law enforcement is extremely dangerous work and that police officers are under constant

⁹⁵ *Id.* at 4; *see also* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 796–97 (2012) (arguing that civil service laws make it difficult for police departments to effectively discipline officers).

⁹⁶ LETTER FROM U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., TO FRANK G. JACKSON, MAYOR OF CLEVELAND, OHIO (Dec. 4, 2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf, <<https://perma.cc/CQ2R-VCGG>>.

⁹⁷ *Id.*

⁹⁸ *Id.* at 3–4.

⁹⁹ GEORGE FACHNER & STEVEN CARTER, COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF DEADLY FORCE IN THE PHILADELPHIA POLICE DEPARTMENT 9 (2015), <http://ric-zai-inc.com/Publications/cops-w0753-pub.pdf>, <<https://perma.cc/8HKK-XGTT>>.

¹⁰⁰ *Id.* at 4.

¹⁰¹ *Id.* at 5.

threat of attack.¹⁰² While law enforcement can be dangerous, those dangers have been greatly exaggerated.¹⁰³ The reality is that more police officers are killed accidentally by motor vehicles than are fatally shot.¹⁰⁴ Over a ten-year period from 2004 to 2013, 511 law enforcement officers were feloniously killed,¹⁰⁵ while 636 were accidentally killed while on the job.¹⁰⁶ Being a truck driver, construction worker, or a roofer is more dangerous than being a police officer.¹⁰⁷

Traffic stops provide a noteworthy example of the overestimation of danger faced by police officers. Police officers typically characterize the routine traffic stop as highly dangerous and requiring the utmost vigilance.¹⁰⁸ In *Pennsylvania v. Mimms*¹⁰⁹ the Supreme Court seemed to agree, referencing “the inordinate risk confronting an officer as he approaches a person seated in an automobile” as it held that it was reasonable under the Fourth Amendment to order a driver to exit a vehicle during a stop, and “declin[ing] to accept the argument that traffic violations necessarily involve less danger to officers than other types of

¹⁰² See, e.g., Matt Apuzzo, *Training Officers to Shoot First, and He Will Answer Questions Later*, N.Y. TIMES (Aug. 1, 2015), http://www.nytimes.com/2015/08/02/us/training-officers-to-shoot-first-and-he-will-answer-questions-later.html?_r=0, <<https://perma.cc/K6HN-U6GD>> (discussing the research of one expert witness that shows the high threat level under which police officers must act); Dean Scoville, *The Hazards of Traffic Stops: Pulling over a Motorist Can Result in a Citation or a Raging Gun Battle. You have to Be Prepared for Either One.*, POLICE MAG. (Oct. 19, 2010), <http://www.policemag.com/channel/patrol/articles/2010/10/duty-dangers-traffic-stops.aspx>, <https://perma.cc/GC3L-FLPB> (describing the traffic stop as “one of the most dangerous aspects of police work.”).

¹⁰³ Radley Balko, *Once Again: Police Work Is NOT Getting More Dangerous*, WASH. POST (Oct. 2, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/10/02/once-again-police-work-is-not-getting-more-dangerous/>, <<https://perma.cc/CLQ8-64H5>>; see also David Feige, *The Myth of the Hero Cop*, SLATE (May 25, 2015, 7:18 PM), http://www.slate.com/articles/news_and_politics/politics/2015/05/the_myth_of_the_hero_cop_police_unions_have_spread_a_dangerous_message_about.html, <<https://perma.cc/9YRL-8L4N>>.

¹⁰⁴ See FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2013, TABLE 35 (2014), https://www.fbi.gov/about-us/cjis/ucr/leoka/2013/tables/table_35_leos_fk_with_firearms_type_of_firearm_and_size_of_ammunition_2004-2013.xls, <<https://perma.cc/K4GH-JBME>> (showing that from 2004 through 2013, 345 law enforcement officers were killed with hand guns); FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2013, TABLE 61 (2014), https://www.fbi.gov/about-us/cjis/ucr/leoka/2013/tables/table_61_leos_ak_circumstance_at_scene_of_incident_2004-2013.xls, <<https://perma.cc/FS6T-TWHR>> (showing that from 2004 through 2013, 368 law enforcement officers were killed in auto accidents, 58 were killed in motorcycle accidents and another 101 were killed when they were struck by automobile vehicles).

¹⁰⁵ FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2013, TABLE 19 (2014), https://www.fbi.gov/about-us/cjis/ucr/leoka/2013/tables/table_19_leos_fk_circumstance_at_scene_of_incident_2004-2013.xls, <<https://perma.cc/DBG2-UY6U>>.

¹⁰⁶ FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2013, TABLE 61 (2014), https://www.fbi.gov/about-us/cjis/ucr/leoka/2013/tables/table_61_leos_ak_circumstance_at_scene_of_incident_2004-2013.xls, <<https://perma.cc/FS6T-TWHR>>.

¹⁰⁷ See BUREAU OF LABOR STATISTICS, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2014, CHART 2 (2015), <http://www.bls.gov/news.release/pdf/cfoi.pdf>, <<https://perma.cc/G9D7-HKT8>>.

¹⁰⁸ See, e.g., Scoville, *The Hazards of Traffic Stops*, *supra* note 103.

¹⁰⁹ *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

confrontations.”¹¹⁰ The Court cited to a study that estimated 30% of police shootings occurred when an officer approached a suspect seated in an automobile to support the conclusion that traffic stops are just as dangerous as other types of confrontations.¹¹¹

The problem with the Court’s reasoning is it fails to take into consideration the number of times officers make traffic stops compared to the number of times they engage in other types of confrontations with suspects. In other words, if officers spend most of their time performing traffic stops, then the fact that 30% of officer deaths occur during traffic stops would suggest traffic stops are less dangerous than other types of confrontations.

The reality is that police officers spend most of their time performing traffic stops, which means that they are less dangerous than other types of confrontations. In 2011 police officers made over 26 million traffic stops¹¹² and just 11 officers were killed during those stops.¹¹³ During the same year, police made just over 3 million arrests¹¹⁴ and 23 police officers died in arrest situations.¹¹⁵ In terms of relative dangerousness, police officers were eighteen times more likely to be killed during an arrest than during a traffic stop. The chance of an officer being killed in either situation is incredibly small: officers have a 0.00077% chance of being killed during an arrest and a 0.00004% chance of being killed during a traffic stop.

Police work has gotten safer over the years—police fatalities have fallen over time as measured per resident, per officer, and in absolute terms.¹¹⁶ Available data suggests that 2015 was one of the safest years ever for law enforcement officers.¹¹⁷ Despite this fact, the inherent hazard of policing is a central component of police training.¹¹⁸ Officers

¹¹⁰ *Id.* at 110.

¹¹¹ *Id.*

¹¹² U.S. DEP’T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, AT 15 (2013), <http://www.bjs.gov/content/pub/pdf/pbtss11.pdf>, <https://perma.cc/2V95-GJL5>.

¹¹³ FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2011, Table 19 (2012), https://www.fbi.gov/about-us/cjis/ucr/leoka/2011/tables/table-19_2 <<https://perma.cc/Y6AU-QWR9>>.

¹¹⁴ U.S. DEP’T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, *SUPRA* NOTE 113, at 15.

¹¹⁵ FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2011, Table 19, *supra* note 114.

¹¹⁶ Daniel Bier, *It Has Never Been Safer to Be a Cop*, NEWSWEEK (Sept. 14, 2015, 3:27 PM), <http://www.newsweek.com/it-has-never-been-safer-be-cop-372025>, <<https://perma.cc/3ZWU-GWJG>>.

¹¹⁷ See *id.* (“Fatalities and murders of police have been falling for decades—per resident, per officer and even in absolute terms.”); Mark J. Pery, *Is There Really a “War on Cops”? The Data Show That 2015 Will Likely Be One of the Safest Years in History for Police*, AM. ENTERPRISE INST. (Sept. 9, 2015, 2:58 PM), <https://www.aei.org/publication/is-there-really-a-war-on-cops-the-data-show-that-2015-will-likely-be-one-of-the-safest-years-in-history-for-police/>, <<https://perma.cc/QMR4-WMES>> (reporting that “2015 is on track to be the safest year for law enforcement in the US since 1887 (except for a slightly safer year in 2013)”).

¹¹⁸ See generally Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATLANTIC (Dec. 12, 2014), <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/>, <<https://perma.cc/23B7-MV6V>> (finding causation between police training and police use of force).

are taught the “first rule of law enforcement” is to go home at the end of their shift.¹¹⁹ Since hesitation can be fatal, “officers are trained to shoot before a threat is fully realized, [and] to not wait until the last minute because the last minute may be too late.”¹²⁰ This has led to what Justice Sotomayor has called a “shoot first, think later approach” to law enforcement.¹²¹

IV. SLOSHING THROUGH THE “MORASS OF REASONABLENESS”

The lack of well-defined standards regarding the use of deadly force means that judges and juries have to slosh through the “morass of ‘reasonableness’”¹²² without any specific guidelines regarding what constitutes excessive force or how to determine if the use of deadly force was reasonable under the circumstances.¹²³ In order to support their defense that their use of force was reasonable “from the perspective of a reasonable officer on the scene,”¹²⁴ police officers often rely on expert testimony that overemphasizes the potential threat to officer safety.¹²⁵ This testimony serves to reinforce a juror’s preconceived notion that law enforcement is extremely dangerous work and that police officers are under constant threat of attack.¹²⁶ In the absence of any specific instructions or guidance from the trial court on how to evaluate the reasonableness of force used by an officer, expert testimony from fellow officers is often the only reference point for jurors.¹²⁷

Three recent cases illustrate just how malleable the concept of reasonableness is when it comes to the use of deadly force by police

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Mullinix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).

¹²² *Scott v. Harris*, 550 U.S. 372, 383 (2007).

¹²³ Harmon, *When Is Police Violence Justified?*, *supra* note 5, at 1144 (noting that the current “imprecise current legal framework” regarding the use of force influences juries because jury instructions are based on existing case law so they provide “exceptionally little help in shaping a determination about excessiveness.”).

¹²⁴ *Graham*, 490 U.S. at 396.

¹²⁵ See Apuzzo, *Training Officers to Shoot First*, *supra* note 103 (describing an expert witness’ research as having been “roundly criticized by [other] experts,” including the Justice Department, which “denounced his findings as ‘lacking in both foundation and reliability.’”).

¹²⁶ James C. McKinley Jr. & Al Baker, *Grand Jury System, With Exceptions, Favors the Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014), http://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html?_r=0, <<https://perma.cc/PQ7T-DU6C>> (pointing out that in grand jury proceedings for police shooting cases, “officers often testify that they perceived a deadly threat and acted in self-defense. This stance can inoculate them even if the threat later turns out to be false.”).

¹²⁷ See, e.g., Tom Jackman, *Defense Expert in John Geer Case Says Police Shooting Was Reasonable*, WASH. POST (Apr. 12, 2016), <https://www.washingtonpost.com/news/true-crime/wp/2016/04/12/defense-expert-in-john-geer-case-says-police-shooting-was-reasonable/>, <<https://perma.cc/9HRT-F8SP>> (reporting on the dispute about an expert witness’ testimony in a police shooting case).

officers.¹²⁸ In each case, officers used deadly force against a suspect and were subsequently charged with a criminal offense.

A. Police Officer Randall Kerrick

In September 2013, three police officers in Charlotte, North Carolina, responded to a 2:00 a.m. report of an attempted burglary.¹²⁹ Jonathan Ferrell, the suspected burglar, had been knocking on the doors of houses looking for help after he had been in a car accident.¹³⁰ Ferrell was walking toward the three Charlotte-Mecklenburg Police Department officers when one of the officers pointed a laser-sighted Taser at Mr. Ferrell's chest.¹³¹ Ferrell then fled and Officer Randall Kerrick fired 12 rounds at him. Ferrell was hit ten times, eight while he was on the ground, killing him.¹³²

At his trial on charges of voluntary manslaughter, the justification offered by Officer Kerrick for the use of deadly force was that he feared that *if* he had to get into a physical fight with Ferrell, that Ferrell *might* be able to gain control of his weapon and use it against him.¹³³ While that is a possibility, and weapon retention is a point of emphasis during police training, it is hardly a realistic fear since the Federal Bureau of Investigation (FBI) reports that between 2004 and 2013 there were 33 officers killed with their own weapon, an average of just over 3 a year.¹³⁴ Notably, there was no indication at the time he fired Officer Kerrick and Ferrell would be in a physical altercation, since Ferrell was fleeing. Further, Officer Kerrick was not alone; he had two other officers with him, one of whom had already drawn his weapon and aimed it at Ferrell.¹³⁵ Nevertheless, Officer Kerrick argued that it was reasonable for him to shoot a fleeing suspect based on the possibility that the suspect might decide to attack him and that, during the course of that attack, the

¹²⁸ See Alpert, *How Reasonable is the Reasonable Man?*, *supra* note 83, at 486 (1994) (describing the objectivity assessment for police use of force as a “guided tour” with a different guide—the expert witness on use of force—for each tour).

¹²⁹ Christine Hauser, *Video Is Released from 2013 North Carolina Police Shooting of Jonathan Ferrell*, N.Y. TIMES (Aug. 6, 2015), <http://www.nytimes.com/2015/08/07/us/dashboard-camera-video-is-released-from-2013-north-carolina-police-shooting.html>, <<https://perma.cc/PZR4-4GU6>>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Jonathan M. Katz, *Shooting Unarmed Black Man Was Self-Defense, Officer's Lawyer Tells Charlotte Jury*, N.Y. TIMES (Aug. 18, 2015), <http://www.nytimes.com/2015/08/19/us/charlotte-officer-argues-that-shooting-black-man-at-door-was-self-defense.html>, <<https://perma.cc/8Q4Z-VD39>> (“Officer Kerrick, who was suspended without pay, testified that he had no choice but to shoot because he thought Mr. Ferrell might try to take his gun.”).

¹³⁴ See FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2013, TABLE 14 (2014) https://www.fbi.gov/about-us/cjis/ucr/leoka/2013/tables/table_14_leos_fk_with_own_weapons_victim_officers_type_of_weapon_2004-2013.xls, <<https://perma.cc/AEE4-KBJN>> (noting that 33 victim officers were killed with their own weapons from 2004 through 2013).

¹³⁵ Hauser, *Video Is Released*, *supra* note 130.

suspect might be able to gain possession of his weapon and use it against him.¹³⁶ Officer Kerrick's argument would justify shooting any fleeing suspect who the officer reasonably thought might be able to overpower him or her physically *if* a physical altercation were to occur. The trial ended in a mistrial because the jury could not reach a unanimous verdict.¹³⁷

B. Police Officers Dominique Perez and Keith Sandy

In March of 2014, James Boyd was shot and killed by two police officers in Albuquerque, New Mexico, following a three-hour standoff with a team of tactical officers.¹³⁸ Boyd, who suffered from mental illness, was "illegally camping" when the officers attempted to take him into custody.¹³⁹ Boyd was holding a small knife in each of his hands when the officers claim he moved toward another "unarmed" officer, and that they fired to protect their fellow officer.¹⁴⁰ The "unarmed" officer was not carrying a firearm because he was a K-9 officer and was instead "armed" with a German Shepherd.¹⁴¹

Two of the officers involved in the shooting, Officer Dominique Perez and Officer Keith Sandy, were charged for an on-duty shooting, something which had not happened to a police officer in Albuquerque in over 50 years.¹⁴² The officers argued during their preliminary hearing that it was reasonable for them to use deadly force to protect a fellow officer from a suspect wielding two small knives.¹⁴³ The officer's dog was not considered adequate protection, even though when executing search warrants, police officers routinely shoot and kill dogs because they believed that dogs can be considered threats to their safety.¹⁴⁴ While

¹³⁶ Alex Johnson, *Officer in Jonathan Ferrell Killing: "He Kept Trying to Get My Gun"*, NBC (Aug. 13, 2015, 6:01 PM), <http://www.nbcnews.com/news/us-news/officer-jonathan-ferrell-killing-he-kept-trying-get-my-gun-n409491>, <<https://perma.cc/L937-A5RJ>>.

¹³⁷ See Abby Ohlheiser, *Mistrial Declared for Charlotte Police Officer Charged With Manslaughter*, WASH. POST (Aug. 21, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/08/19/a-jury-is-deliberating-the-fate-of-the-charlotte-police-officer-who-fatally-shot-jonathan-ferrell/>, <<https://perma.cc/VKU8-F227>> ("The jury deliberated for three and a half days but failed to reach a unanimous decision.")

¹³⁸ Ryan Boetel, *APD Officer, Former Detective Will Stand Trial for Murder in Boyd Shooting*, ALBUQUERQUE J. (Aug. 18, 2015, 10:49 AM), <http://www.abqjournal.com/630216/news/defense-closing-police-made-split-second-decision-in-fatal-shooting-of-boyd.html>, <<https://perma.cc/PP3Y-H8F8>>.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See *id.* (explaining that lawyers for the police officers argued that they fired "because they thought the life of a K-9 officer approaching Boyd was in danger.")

¹⁴⁴ Radley Balko & J. L. Greene, *Cops Shoots Dog: Untrained Officers Commit "Puppicide"*, HUFFPOST POLITICS, (Apr. 27, 2012, 12:22 PM), http://www.huffingtonpost.com/2012/04/27/cop-shoots-dog-puppicide_n_1446841.html, <<https://perma.cc/UM6Z-2G33>> ("In drug raids, killing any dog in the house has become almost perfunctory."). See generally Conor Friedersdorf, *When Police Shoot Dogs*, THE ATLANTIC (Oct. 21, 2014),

a judge found that there was probable cause to try the two officers for murder, a jury will still have to apply the Supreme Court's vague reasonableness standard, which leaves the ultimate outcome of the case in doubt.¹⁴⁵

C. Police Officer Lisa Mearkle

In February of 2015, Police Officer Lisa Mearkle attempted to stop David Kassick because he was driving a car that had expired inspection and emission stickers.¹⁴⁶ Kassick attempted to flee from the officer.¹⁴⁷ After leading officers on a brief pursuit, Kassick pulled his car into a residential driveway and fled on foot.¹⁴⁸ Officer Mearkle then exited her car, pursued Kassick and was able to get close enough to him to use her Taser in an effort to subdue him. Kassick was struck by the darts fired from the Taser and fell to the ground.¹⁴⁹

The rest of the incident was recorded by the camera attached to the officer's Taser.¹⁵⁰ The video shows Officer Mearkle repeatedly ordering Kassick to lie face down on the ground and show her his hands.¹⁵¹ Over the course of a minute, she activates her Taser three times. Kassick remained face down on the ground, often writhing in pain.¹⁵² At times he stretched out his hands so that she could see them, but at other times his left hand moved underneath his body, out of Officer Mearkle's view.¹⁵³ Officer Mearkle then fired two shots into Kassick's back while he was lying on the ground; he died shortly thereafter.¹⁵⁴

<http://www.theatlantic.com/national/archive/2014/10/policeman-shoots-dog-video-contradicts-his-explanation/381651/>, <<https://perma.cc/TSZ7-ASNU>> (discussing the frequency of police shooting dogs).

¹⁴⁵ Elizabeth Reed & Blair Miller, *APD Officers Will Stand Trial for Murder in Shooting of James Boyd*, KOB 4 (Aug. 18, 2015, 12:50 PM), <http://www.kob.com/article/stories/s3882437.shtml#.Vx7ZW6MrKT8>, <<https://perma.cc/2WMR-RKD8>>.

¹⁴⁶ See Megan Trimble, *Hummelstown Traffic Stop to Fatal Officer-Involved Shooting: Timeline of Events*, PENNLIVE (Mar. 24, 2015, 6:21 PM), http://www.pennlive.com/midstate/index.ssf/2015/03/kassick_mearkel_shooting_humme.html, <<https://perma.cc/RF44-KDJP>>.

¹⁴⁷ Sebastian Murdock, *Police Officer Who Killed Unarmed Motorist Cleared of All Charges*, HUFFINGTON POST (Nov. 6, 2015, 12:57 PM), http://www.huffingtonpost.com/entry/police-officer-lisa-mearkle_us_563cc556e4b0411d3070a9f4, <<https://perma.cc/UCB4-QVPB>>.

¹⁴⁸ Wesley Robinson, *Hummelstown Officer Shot Unarmed Man in the Back, District Attorney Says*, PENNLIVE (Mar. 24, 2015, 12:31 PM), http://www.pennlive.com/midstate/index.ssf/2015/03/video_from_taser_shows_unarmed.html, <<https://perma.cc/SS6Y-YX28>>.

¹⁴⁹ *Id.*

¹⁵⁰ See Dauphin County District Attorney's Office, VIDEO OF OFF. LISA MEARKLE/DAVID KASSICK, CRIMEWATCH (Nov. 5, 2015), <https://dauphin.crimewatchpa.com/da/310/post/video-lisa-mearkle-david-kassick>, <<https://perma.cc/8BE6-KLQF>>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Robinson, *Hummelstown Officer Shot Unarmed*, *supra* note 149

The video convinced prosecutors to charge her with murder, voluntary manslaughter, and involuntary manslaughter.¹⁵⁵ At her trial, Officer Mearkle called an expert on the use of force by police officers who “walked the jury through a number of police techniques, from ‘the red zone’—an area around the torso where officers have known suspects to conceal weapons—to the ‘reaction time principle,’ or the three-quarters of a second an officer takes to perceive a movement or action and react.”¹⁵⁶

On cross-examination, the defense expert admitted that the guidelines relied upon by police officers for the use of deadly force had not been scientifically proven with control groups or peer reviewed, since “law enforcement journals are not scientific journals.”¹⁵⁷ Despite the fact that Officer Mearkle admitted that she never saw any weapon in Kassick’s possession and he never acted aggressively toward her, the jury acquitted Officer Mearkle of all the charges against her,¹⁵⁸ including the charge of involuntary manslaughter, which is defined as causing the death of another person by “doing of a lawful act in a reckless or grossly negligent manner.”¹⁵⁹

D. The Reasonable Officer Standard

What makes these results possible is that juries are asked to view the situation through the eyes of a “reasonable officer.”¹⁶⁰ Inherent in this definition is the idea that police officers see things differently than an average reasonable civilian. What might be an innocuous gesture to a civilian is seen as a “furtive gesture” by a well-trained police officer.¹⁶¹ Since the trier of fact needs to understand how a trained police officer would view the situation, the “reasonable officer” standard opens the door to testimony regarding the training of police officers and

¹⁵⁵ See *id.*

¹⁵⁶ Megan Trimble, *Officer Mearkle Followed Accepted Police Guidelines in Deciding to Use Force: Defense Expert*, PENNLIVE (Nov. 4, 2015, 1:24 PM), http://www.pennlive.com/news/2015/11/lisa_mearkle_murder_trial_davi.html#incart_river_index_index_pics, <<https://perma.cc/KW7H-GCRU>>.

¹⁵⁷ *Id.*

¹⁵⁸ Matt Miller, *Jury Acquits Hummelstown Police Officer Lisa Mearkle of All Charges*, PENNLIVE (Nov. 5, 2015, 2:42 PM), http://www.pennlive.com/midstate/index.ssf/2015/11/mearkle_verdict.html, <<https://perma.cc/9ZJP-KQEV>>.

¹⁵⁹ 18 PA.STAT. AND CONS. STAT. ANN. § 2504(a) (West 2016); *Commonwealth v. Fabian*, 60 A.3d 146, 151 (2013).

¹⁶⁰ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

¹⁶¹ See Kathryn R. Urbonya, *Dangerous Misperceptions: Protecting Police Officers, Society, and the Fourth Amendment Right to Personal Security*, 22 HASTINGS CONST. L.Q. 623, 661 (1995) (“Some courts have determined that a ‘furtive gesture’ by a suspect justifies an officer to reasonably believe the suspect was reaching for a weapon. To justify a shooting under the ‘furtive gesture’ doctrine, officers do not need to see a gun, knife, or even a glint of steel. . . Furtive gestures can create an inference of danger because experts believe that the suspect has time to kill the officer by the time a police officer sees a glint of steel.”).

departmental policies on the use of force.¹⁶² The quality of training the officer received and the soundness of department policies on the use of force are not important.¹⁶³ If an officer was trained to do something a certain way, then doing it that way is reasonable, even if the effectiveness of that technique has never been scientifically validated.¹⁶⁴

The “21-Foot Rule” is an example of how police officers can rely on their training to justify their actions. The 21-Foot Rule was developed in 1983 by Lieutenant John Tueller, a firearms instructor in the Salt Lake City Police Department.¹⁶⁵ Tueller set up a drill where a “suspect” armed with a knife was placed a certain distance away from an officer with a holstered sidearm.¹⁶⁶ The goal of the drill was to determine at what distance an assailant armed with an edged weapon would reach an officer before the officer was able to draw the sidearm and accurately fire at the assailant.¹⁶⁷ Tueller came to the conclusion that a suspect who was within twenty-one feet of an officer could reach that officer and strike before the officer was able to draw a weapon.¹⁶⁸

The 21-Foot Rule has been part of police training ever since it was developed, despite the fact that Tueller’s findings have never been scientifically proven.¹⁶⁹ Even more troubling is that the 21-Foot Rule only applies to situations where an officer’s gun is holstered.¹⁷⁰ One expert has written that while the 21-Foot Rule has become “informal doctrine within the law enforcement community, I have heard it misstated, misrepresented, and bastardized by use-of-force, firearms, and police practices experts from all sides.”¹⁷¹ Some departments are

¹⁶² See, e.g., Radley Balko, *When the “Reasonable Police Officer” Standard Isn’t Reasonable At All*, WASH. POST (Dec. 17, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/12/17/when-the-reasonable-police-officer-standard-isnt-reasonable-at-all/>, <<https://perma.cc/7L9B-APSK>> (recounting the different emphasis placed by the prosecution and defense on Baltimore Police Department trainings and policies in the trial of an officer charged with the involuntary manslaughter of Freddie Gray).

¹⁶³ See, e.g., *id.* (highlighting defense counsel’s emphasis on police department written policy being “routinely ignored” in order to argue that officer did not act unreasonably).

¹⁶⁴ See *Graham*, 490 U.S. at 396 (“The ‘reasonableness’ of a particular-use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”).

¹⁶⁵ Ron Martinelli, *Revisiting the “21-Foot Rule”*, POLICE MAG. (Sept. 18, 2014), <http://www.policemag.com/channel/weapons/articles/2014/09/revisiting-the-21-foot-rule.aspx>, <<https://perma.cc/V3ZG-RZTM>>.

¹⁶⁶ Beth Schwartzapfel, *Will the “21 Foot” Defense Work for the Chicago Cop Who Shot Laquan McDonald?*, THE MARSHALL PROJECT (Nov. 25, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/11/25/will-the-21-foot-defense-work-for-the-chicago-cop-who-shot-laquan-mcdonald#.UbdqY6Z9C>, <<https://perma.cc/N6QR-P2PL>>.

¹⁶⁷ See John Carlin, *The 21-Foot Rule*, WLS10 (Mar. 2, 2016, 5:15 PM), <http://wsls.com/2016/03/02/the-21-foot-rule/>, <<https://perma.cc/77ZG-NVJE>> (describing officer training drills based on the 21-foot rule).

¹⁶⁸ Schwartzapfel, *Will the “21 Foot” Defense Work*, *supra* note 167.

¹⁶⁹ See Martinelli, *Revisiting the “21-Foot Rule”*, *supra* note 166 (“No forensic testing, examination, reconciliation of data, or scientific oversight of a research model was ever conducted” to test the 21-Foot Rule).

¹⁷⁰ Schwartzapfel, *Will the “21 Foot” Defense Work*, *supra* note 167.

¹⁷¹ Martinelli, *Revisiting the “21-Foot Rule”*, *supra* note 166; see also Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATLANTIC (Dec. 12, 2014), <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training->

considering no longer teaching officers the 21-Foot Rule since it “is often interpreted by officers to mean they are justified in shooting any suspect with a knife or edged weapon who comes within 21 feet of them.”¹⁷²

Judges and juries are obliged to “slosh [] through the factbound morass of ‘reasonableness’” without clear legal standards and under the influence of popular misconceptions about the dangerousness of law enforcement and the need for officers to use deadly force.¹⁷³ The end result is that almost any use of deadly force can appear to be reasonable.

V. UNRECOGNIZED BUT PERVASIVE PATTERNS OF EXCESSIVE FORCE

Case-specific determinations regarding the reasonableness of use of deadly force by police officers can obscure patterns of excessive force. Compounding the problem is the lack of reliable data regarding the use of force by police officers.¹⁷⁴ The Department of Justice has acknowledged that current systems in place for reporting the use of force by police officers are inadequate.¹⁷⁵

While the FBI collects data on the number of police officers killed and assaulted every year, there has not been an equivalent effort to collect information on the number of civilians killed or assaulted by police officers.¹⁷⁶ However, the Bureau of Justice Statistics (BJS) was

ferguson/383681/, <<https://perma.cc/23B7-MV6V>> (describing being taught at the police academy “that a knife-carrying suspect standing 20 feet away can run up to an officer and start stabbing before the officer can get their gun out of the holster.”).

¹⁷² Wesley Lowery, *Police Chiefs Consider Dramatic Reforms Officer Tactics, Training to Prevent So Many Shootings*, WASH. POST (Jan. 29, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/01/29/police-chiefs-consider-dramatic-reforms-to-officer-tactics-training-to-prevent-so-many-shootings/>, <<https://perma.cc/X7ZG-T4ZS>>.

¹⁷³ *Scott v. Harris*, 550 U.S. 372, 383 (2007).

¹⁷⁴ See Naomi Shavin, *Our Government Has No Idea How Often Police Get Violent With Civilians*, NEW REPUBLIC (Aug. 25, 2015), <http://www.newrepublic.com/article/119192/police-use-force-stats-are-incomplete-and-unreliable>, <<https://perma.cc/F5VM-7H6G>> (“[N]o federal authority comprehensively and reliably documents the use of force by police officers across the country.”); see also Matt Apuzso & Sarah Cohen, *Data on Use of Force By Police Across the U.S. Proves Almost Useless*, N.Y. TIMES (Aug. 11, 2015), <http://www.nytimes.com/2015/08/12/us/data-on-use-of-force-by-police-across-us-proves-almost-useless.html>, <<https://perma.cc/P37C-VW53>> (describing a Justice Department survey revealing that police departments nationwide “kept track of their shootings, but in accounting for all uses of force, the figures varied widely.”); see generally Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119 (2013) (identifying factors contributing to a lack of data on policing).

¹⁷⁵ U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL HOLDER URGES IMPROVED DATA REPORTING ON BOTH SHOOTINGS OF POLICE OFFICERS AND USE OF FORCE BY THE POLICE (2015), <http://www.justice.gov/opa/pr/attorney-general-holder-urges-improved-data-reporting-both-shootings-police-officers-and-use>, <<https://perma.cc/XNE9-C53Q>> (“‘The troubling reality is that we lack the ability right now to comprehensively track the number of incidents of either uses of force directed at police officers or uses of force by police,’ the Attorney General said in his remarks.”) (emphasis in original).

¹⁷⁶ But see *How the Washington Post Is Examining Police Shootings in the U.S.*, WASH. POST (June 30, 2015), <http://www.washingtonpost.com/national/how-the-washington-post-is-examining-police->

charged with collecting data on the number of homicides committed by law enforcement from 2003 to 2009.¹⁷⁷ The number of “officers feloniously killed” during that time was 359¹⁷⁸ and the number of homicides by law enforcement reported to the BJS was 2,931.¹⁷⁹

Any analysis of the use of deadly force by police officers needs to take into account the number of police officers feloniously killed and the number of homicides committed by police officers. While comparing these numbers does not provide specific information on whether the use of deadly force by police officers was justified in any particular case, knowing the percentage of suspects who are killed relative to the number of police officers who are killed illustrates how often police officers are using deadly force compared to how many times they are victims of deadly force. It stands to reason that the more likely officers are to be killed by suspects, the more reasonable it is for them to use deadly force in order to protect themselves.

Using the numbers above, when an encounter between police officers and a suspect ends with the death of either the officer or the suspect, it is the suspect who is killed 89% of the time. However, the data collected by BJS on the number of homicides committed by law enforcement was incomplete: BJS noted in 2015 that there were “concerns about definitions, data quality, and undercoverage error” in its data on homicide by law enforcement.¹⁸⁰ They ultimately concluded that the Arrest-Related Death Program (ARDP) captured at best 49% and at worst 36% of the homicides committed by law enforcement.¹⁸¹

If we assume the ARDP only captured 49% of the homicides committed by law enforcement, then the number of homicides by law enforcement over this period increases to 5,979, and when an encounter between police officers and a suspect ended with the death of either the officer or the suspect, the suspect was killed 94% of the time.¹⁸² If we assume that the ARDP only captured 36% of the homicides committed by law enforcement then the number of homicides by law enforcement over this period increases to 8,118 and, when an encounter between

shootings-in-the-us/2015/06/29/f42c10b2-151b-11e5-9518-f9e0a8959f32_story.html, <<https://perma.cc/8CVF-BP72>> (explaining the Washington Post’s database compilation of “every fatal shooting in the United States by a police officer in the line of duty in 2015.”).

¹⁷⁷ ANDREA M. BURCH, BUREAU OF JUSTICE STATISTICS, ARREST RELATED DEATHS, 2003–2009 STATISTICAL TABLES (2011), <http://www.bjs.gov/content/pub/pdf/ard0309st.pdf>, <https://perma.cc/GRD2-WSBL> [hereinafter ARREST RELATED DEATHS, 2003–2009 STATISTICAL TABLES].

¹⁷⁸ See FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2009, TABLE 1 (2010), <https://www.fbi.gov/about-us/cjis/ucr/leoka/2009>, <<https://perma.cc/A6DH-J5K3>> (showing number of victim officers for each year from 2000 to 2009).

¹⁷⁹ ARREST RELATED DEATHS, 2003–2009 STATISTICAL TABLES, *SUPRA* note 178, at 4.

¹⁸⁰ BUREAU OF JUSTICE STATISTICS, ARREST RELATED DEATHS PROGRAM: DATA QUALITY PROFILE 1 (2015), <http://www.bjs.gov/content/pub/pdf/ardpdqp.pdf>, <<https://perma.cc/4Q6U-DEEX>>.

¹⁸¹ *Id.*

¹⁸² For the raw data from which these numbers are calculated, see ARREST RELATED DEATHS, 2003–2009 STATISTICAL TABLES, *SUPRA* note 178.

police officers and a suspect ended with the death of either the officer or the suspect, it was the suspect who was killed 96% of the time.¹⁸³

Another factor to consider is the number of police officers who were feloniously killed in an “ambush” over this period. From 2003 to 2009, seventy-nine officers were killed by ambush,¹⁸⁴ the threat of which could increase the likelihood that officers would use deadly force when encountering suspects. Presumably these officers had no opportunity to use deadly force in their own defense. If we no longer factor these deaths into the total number of officers feloniously killed and we assume the ARDP captured 49% of the homicides committed by law enforcement, it is the suspect who was killed 95% of the time.¹⁸⁵ If we no longer factor these deaths into the total number of officers feloniously killed and we assume the ARDP captured 36% of the homicides committed by law enforcement, it was the suspect who was killed 97% of the time.¹⁸⁶

During 2015, The Washington Post collected data on the number of civilians shot and killed by police officers.¹⁸⁷ The Washington Post identified 965 civilians shot by officers in 2015.¹⁸⁸ The FBI has not released the number of police officers “feloniously assaulted” in 2015, but the nonprofit “Officer Down Memorial Page” and the “Preliminary 2015 Law Enforcement Officer Fatalities Report” from the National Law Enforcement Officers Memorial Fund can be relied upon for a rough estimate.¹⁸⁹

The “Officer Down Memorial Page” identifies thirty-nine police officers who were killed by gunfire in 2015.¹⁹⁰ However, that figure is over-inclusive since it includes four police officers who were shot in Puerto Rico and four police dogs.¹⁹¹ In addition, six of the officers are identified as having been killed in “ambush” situations.¹⁹² That leaves twenty-five police officers killed in the line of duty by gunfire in 2015. Using The Washington Post and “Officer Down Memorial Page” estimates for 2015, when an encounter between police officers and a suspect ended with the death of either the officer or the suspect, it was

¹⁸³ *Id.*

¹⁸⁴ FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED REPORT FOR 2009, TABLE 19 (2010), <https://www.fbi.gov/about-us/cjis/ucr/leoka/2009>, <<https://perma.cc/A6DH-J5K3>>.

¹⁸⁵ *See id.*; ARREST RELATED DEATHS, 2003–2009 STATISTICAL TABLES, *SUPRA* note 178.

¹⁸⁶ *Id.*

¹⁸⁷ *See A Year of Reckoning: Police Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015), <http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/>, <<https://perma.cc/RKG8-KADV>> (describing findings in its report on police killings in the United States).

¹⁸⁸ *Id.*

¹⁸⁹ *Honoring Officers Killed in 2015*, OFFICER DOWN MEM’L PAGE (2015), <https://www.odmp.org/search/year?year=2015>, <<https://perma.cc/U463-GQAZ>>; NAT’L LAW ENFORCEMENT OFFICERS MEM’L FUND, *Preliminary 2015 Law Enforcement Officer Fatalities Report 1* (2015), <http://www.nleomf.org/assets/pdfs/reports/2015-EOY-Officer-Fatalities-Report.pdf>, <<https://perma.cc/9M6Q-BRTQ>>.

¹⁹⁰ OFFICER DOWN MEM’L PAGE, *HONORING Officers Killed in 2015*, *supra* note 190.

¹⁹¹ *Id.*

¹⁹² *Id.*

the suspect who was killed 97% of the time.

According to the “Preliminary 2015 Law Enforcement Officer Fatalities Report” from the National Law Enforcement Officers Memorial Fund, fifty-two police officers were feloniously killed in 2015 and forty-two of them were killed by gunfire.¹⁹³ Of the forty-two officers killed by gunfire, six of them were killed in ambush situations.¹⁹⁴ That leaves thirty-six police officers killed in the line of duty by gunfire in 2015. Using The Washington Post and the “Preliminary 2015 Law Enforcement Officer Fatalities Report” estimates for 2015, when an encounter between police officers and a suspect ended with the death of either the officer or the suspect, it was the suspect who was killed 96% of the time.

Those numbers should raise serious concerns about the use of deadly force by police officers. As a matter of public policy, we would not want to see more police officers killed by suspects than suspects killed by police officers. However, we would also expect police officers to only use deadly force as a last resort and to delay the use of deadly force until a threat materializes. That would create the possibility that the officer would be killed before having the opportunity to use deadly force against a suspect. With all that in mind, if deadly encounters between police officers and suspects are ending with the death of the suspect 94%–97% of the time, then police officers may be using deadly force before an objectively reasonable threat to their safety has materialized.

Another concern is that the percentage of suspects killed relative to law enforcement officers killed appears to have remained relatively constant since 2003.¹⁹⁵ Whatever deterrent effect internal discipline, criminal prosecution, and civil rights litigation may have on the use of deadly force, it does not appear to be increasing over time. In contrast, the violent crime rate over the last decade has fallen significantly.¹⁹⁶ From 2004 to 2013, the FBI estimates that violent crime dropped by approximately 20%.¹⁹⁷

The lack of clear guidance to law enforcement on when it is appropriate to use deadly force, along with aggressive police tactics, inadequate training, the lack of internal review and discipline for officers who use excessive force, the lack of effective legal means to punish officers who use excessive force, and an overestimation of the potential dangers facing law enforcement may all contribute to excessive use of deadly force by police officers.

¹⁹³ NAT'L LAW ENFORCEMENT OFFICERS MEM'L FUND, *Preliminary 2015 Law Enforcement Officer Fatalities Report*, *supra* note 190, at 1.

¹⁹⁴ *Id.* at 2.

¹⁹⁵ ARREST RELATED DEATHS, 2003–2009 STATISTICAL TABLES, *SUPRA* note 178.

¹⁹⁶ See FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2013, TABLE 1A (2014), https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1994-2013.xls, <<https://perma.cc/F3VV-8DFK>> (depicting crime statistics in the United States from 1994 to 2013).

¹⁹⁷ See *id.* (depicting crime statistics in the United States from 1994 to 2013).

VI. CONCLUSION: WHOSE LIFE MATTERS MORE?

At a recent forum entitled “Taking Policing to a Higher Standard,” hundreds of the nation’s most prominent police chiefs, Department of Justice officials, and police training experts convened in Washington, D.C. to discuss new training methods and departmental policies that could lead to a decrease in the number of fatal shootings each year.¹⁹⁸ At that meeting, Tom Manger, the Chief of Police of Montgomery County, Maryland, identified a troubling predominant attitude among police officers: “It almost gets to the point that officers are thinking ‘my safety is more important than the safety of anyone else’s.’ . . . We’ve got to change the culture of American policing. . . . Our goal should be to have everyone go home safely at the end of the day.”¹⁹⁹

Ultimately, in order to fashion rules regarding the use of deadly force by police officers, we need to decide if the life of a police officer is more valuable than that of another citizen. Using deadly force against someone who *might* have a weapon is only reasonable if we value the safety of the officer more than that of the suspect. Debates over restrictions on the use of force by police officers often begin and end with the argument that imposing restrictions on the use of deadly force will result in the death of more police officers.²⁰⁰ Even assuming that is true, the counterargument is that not imposing those restrictions will just as surely lead to the death of more suspects who are unarmed, guilty of minor, nonviolent offenses or—even worse—innocent.

If everyone is entitled to equal justice under the law, then we should not tolerate a criminal justice system that values the lives of police officers more than the lives of suspects. The current law regarding the use of deadly force by police officers results in an Orwellian criminal justice system where all are equal but some are more equal than others. If we value all lives equally, we should require officers to actually see a gun before they decide to use deadly force. Academics and activists alike have expressed support for policies and laws that reflect the idea that a threat should be “imminent” before police resort to the use of deadly force.²⁰¹ Police departments and policymaking bodies should support efforts to collect reliable data about the use of force and when it is needed, and implement changes in training, tactics, and culture among

¹⁹⁸ Lowery, *Police Chiefs Consider Dramatic Reforms*, *supra* note 173.

¹⁹⁹ *Id.*

²⁰⁰ See, e.g., Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATLANTIC (Dec. 12, 2014), <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/>, <<https://perma.cc/23B7-MV6V>> (noting that a common phrase among officers discussing use of force is: “Better to be judged by twelve than carried by six.”).

²⁰¹ See generally Harmon, *When Is Police Violence Justified?*, *supra* note 5 (arguing that a threat must be imminent before force can be used by police officers); *Limit Use of Force*, CAMPAIGN ZERO, <http://www.joincampaignzero.org/solutions/#solutionsoverview>, <<https://perma.cc/9VQK-ULY2>> (calling for a revised use of force policies that authorize the use of force only when there is an imminent threat).

law enforcement organizations to ensure that instances of unwarranted and excessive use of force are diminished. In turn, the judicial branch should revise its police officer use of force analysis to incorporate a realistic view of the dangerousness of police work and the deterrents operating to limit use of force, in order to provide meaningful guidance to legislatures and law enforcement bodies about protecting civilian's constitutional rights.