NOTE

ABSOLUTELY QUALIFIED: SUPREME COURT TRANSFORMS THE DOCTRINE OF QUALIFIED IMMUNITY INTO ABSOLUTE IMMUNITY FOR POLICE OFFICERS*

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I. INTRODUCTION

> *There is no 'slippery slope' toward loss of liberties, only a long staircase where each step downward must first be tolerated by the American people and their leaders.*[1]

What is a "slippery slope"?[2] Rather than look to the dictionary for an answer, we should look to the Supreme Court and its recent decision involving qualified immunity.[3] Not only does *Mullenix v. Luna* expose the very thing Simpson claimed does not exist, it also provides a vivid example of the bottom of such a slope. For years, the Supreme Court has successfully been avoiding this fictional "long staircase"[4] and has ultimately duped the American people with its "sub silentio assault on constitutional tort suits."[5] The Supreme Court's subtle, piece by piece reconstruction of the doctrine of qualified immunity has slowly but increasingly afforded officers using deadly force the protection of the Court.[6] Culminating with the decision in *Mullenix*, the Court has officially turned its back on the victims of constitutional violations and chosen instead to provide police officers with absolute immunity.[7]

This Note discusses how the Court has reaffirmed and strengthened its qualified immunity precedents to a new level, transforming the doctrine of qualified immunity into absolute immunity for police officers in *Mullenix*. Consequently, the decision encourages a detrimental "shoot first, think never"[8]

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1. JOHN H. GEORGE & LAIRD WILCOX, BE REASONABLE: SELECTED QUOTATIONS FOR INQUIRING MINDS, 135 (John H. George & Laird Wilcox eds., 1994) (quoting Alan K. Simpson).

2. Merriam-Webster defines "slippery slope" as "a course of action that seems to lead inevitably from one action or result to another with unintended consequences." MERRIAM-WEBSTER, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY: ELEVENTH EDITION, 1173 (Frederick C. Mish et al. eds., 11th ed. 2004).

3. Mullenix v. Luna, 136 S. Ct. 305 (2015).

4. George & Wilcox, *supra* note 1.

5. Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. 62, 64 (2016) ("In a number of recent rulings, the Court has engaged in a pattern of covertly broadening the defense, describing it in increasingly generous terms and inexplicably adding qualifiers to precedent that then take on a life of their own.").

6. *Id.*

7. Absolute Immunity is as form of immunity under 42 U.S.C. § 1983 that applies to prosecutors acting as advocates. "Under absolute immunity, prosecutors are immunized even when the plaintiff establishes that the prosecutor acted intentionally, in bad faith, and with malice." Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U.L. REV. 53, 54 (2005).

8. *Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting) ("By sanctioning a 'shoot

mentality for officers in the field. Part II provides a detailed recitation of the case. Part III then presents a brief history of the cases leading up to *Mullenix*. Part IV details this Note's criticism of the *Mullenix* decision. Part IV then predicts how the transformed doctrine will affect police behavior moving forward and provides a potential remedy to avoid the bleak outlook. Lastly, Part V concludes the Note with a warning that unreasonable police behavior will be on the rise and the Court will likely maintain its overly protective position.

II. CASE RECITATION

A. Background

1. Facts of the Case. After being approached by an officer of the Tulia, Texas Police Department, Israel Leija, Jr. fled to Interstate 27 ("I-27") in an attempt to evade arrest.[9] Once on I-27, Leija led officers on an 18-minute, high-speed chase, twice threatening to shoot at police officers "if they did not abandon their pursuit." The chase occurred at speeds between 85 and 110 miles per hour on a dry roadway with light traffic and no pedestrians or stopped vehicles in the area.[10] Officers not only believed Leija possessed a weapon, but that he was also intoxicated.[11] As Sergeant Randy Baker and Trooper Gabriel Rodriguez continued the pursuit, Officer Troy Ducheneaux set up tire spikes beneath the Cemetery Road overpass.[12]

Trooper Chadrin Mullenix also responded to the Cemetery Road overpass. Upon learning of Duchenaux's position, Mullenix devised an alternate plan to shoot at Leija's car in order to disable it before reaching the spikes.[13] Mullenix, however, had received no training in the tactic of shooting a vehicle to disable it, nor had he attempted it before. In the three minutes he waited for the chase to arrive, Mullenix discussed how to best execute his plan with another officer and received approval from

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first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow.").

9. The warrant had been filed for a failure to complete community service hours and a complaint of domestic violence. Luna v. Mullenix, 773 F.3d 712, 716 (5th Cir. 2014), *rev'd*, 136 S. Ct. 305 (2015).

10. It also occurred only in rural areas and the roadway was divided by a wide center median. Leija did not collide with any vehicles or cause any collisions. *Id.*

11. Despite his threats and unbeknownst to officers, Leija did not actually possess a weapon. *Id.*

12. *Mullenix*, 136 S. Ct. at 306.

13. Conversely, "Ducheneaux and the other officers had received training on the deployment of spike strips, including on how to take a defensive position so as to minimize the risk posed by the passing driver." *Id.*

Rodriguez to carry it out.[14] Thus, when Leija's vehicle approached the overpass, Mullenix fired six shots.[15] The car then "engaged the spike strip, hit the median and rolled two and a half times."[16] "It was later determined that Leija had been killed by Mullenix's shots, four of which struck his upper body."[17]

2. Procedural History. Beatrice Luna, as a representative of the estate of Leija, sued Mullenix under 42 U.S.C. § 1983,[18] alleging a violation of the Fourth Amendment[19] by using excessive force against Leija.[20] The District Court denied Mullenix's motion for summary judgment on the ground of qualified immunity[21] and Mullenix appealed.[22] The Court of Appeals for the Fifth Circuit subsequently affirmed, stating that the "immediacy of the risk posed by Leija is a disputed fact" and could not be concluded as a matter of law.[23] Mullenix then sought rehearing en banc but was denied. The revised opinion, while recognizing that "objective reasonableness is a question of law that can be resolved on summary judgment," reaffirmed its denial of qualified immunity.[24] The court found Mullenix's

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14. Mullenix also informed his supervisor of the plan but claims not to have heard his supervisor's response to "stand by" and "see if the spikes work first." *Id*. at 306-07.

15. Mullenix later admitted it was difficult to see under the overpass because the area had no streetlights or ambient lighting. Luna v. Mullenix, 773 F.3d 712, 717 (5th Cir. 2014), *rev'd*, 136 S. Ct. 305 (2015).

16. *Mullenix*, 136 S. Ct. at 307.

17. No evidence shows that any of Mullenix's shots hit the radiator, hood or engine block of Leija's vehicle. *Id.*

18. The statute is titled "Civil action for deprivation of rights." It states that "[e]very person who . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . 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." The statute concludes with clause providing immunity only to those acting in a judicial capacity. 42 U.S.C. §1983 (LEXIS through Pub. L. No. 114-165). *See* Catherine A. Daubard, *Quasi-Judicial Immunity of State Officials: Butz v. Economou's Distorted Legacy*, 1985 U. ILL. L. REV. 401 (1985) (discussing the creation of judicial immunity).

19. The Fourth Amendment creates a "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV.

20. *Mullenix*, 136 S. Ct. at 307.

21. The doctrine of qualified immunity was created in order to balance the conflicting concerns of allowing recovery when an official abuses their office, as is possible under 42 U.S.C. §1983, and the substantial social costs of doing so. In short, government officials performing discretionary functions are entitled to qualified immunity, ultimately "shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638 (1987).

22. *Mullenix*, 136 S. Ct. at 307.

23. *Id.*

24. *Id.* at 308.

actions to be objectively unreasonable because several previous justifications for deadly force were not present. These included a presence of innocent bystanders, reckless driving, failing to give spike strips a chance to work, and making a split-second decision. Ultimately, the court concluded that "the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment."[25] Consequently, Mullenix petitioned for a writ of certiorari. The United States Supreme Court granted the petition and reversed the Fifth Circuit in a per curiam opinion.

B. The Supreme Court's Reasoning

1. Per Curiam Opinion of Justices Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito and Kagan. The per curiam opinion begins with a short discussion of the doctrine of qualified immunity and establishes when an official is not entitled to the defense.[26] It stated that an official is not entitled when his conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known."[27] A clearly established right must be "sufficiently clear that every reasonable official would have understood what he is doing violates that right."[28] In turn, precedent must place the statutory or constitutional question "beyond debate."[29]

The Court then explained that the analysis must not be performed at a "high level of generality" and instead requires an analysis focusing on the facts of each individual case.[30] The opinion further elaborated on the need for specificity by presenting two prior cases in which the Court reversed an appellate court's analysis for failing to analyze the situation or circumstances before an officer.[31] Transitioning to its analysis of Mullenix's individual case, the Court noted that "such specificity is especially important in the Fourth Amendment context" because "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the

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25. *Id.*

26. *Id.* at 308.

27. *Mullenix*, 136 S. Ct. at 308. (citing Pearson v. Callahan, 555 U.S. 223, 231 (2009), and Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

28. *Id.*

29. *Id.* (citing Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

30. *Id.*

31. *Mullenix*, 136 S. Ct. at 309 (discussing Brosseau v. Haugen, 543 U.S. 194, 198 (2004) and Anderson v. Creighton, 483 U.S. 635, 640 (1987)). *But see* Tennessee v. Garner, 471 U.S. 1, 11 (1985) (affirming an appellate court's decision).

factual situation the officer confronts."[32]

At the start of its analysis of Mullenix's situation, the Court again stated that the relevant inquiry for the Court was whether Mullenix acted unreasonably "beyond debate."[33] Next, the Court briefly analogized Mullenix's situation to that of the officer in *Brosseau* not only to support its ultimate decision but to display the "hazy legal backdrop against which Mullenix acted."[34] In *Brosseau*, the Court held that an officer who shot a fleeing suspect out of fear that other officers, citizens or vehicles that were or might have been in the area would have been endangered was entitled to qualified immunity. Accordingly, the Court believed that "[t]he threat Leija posed was at least as immediate as that presented by a suspect who had just begun to drive off and was headed only in the general direction of officers and bystanders."[35] When Mullenix shot, Leija had led officers on a high-speed chase for 25 miles while reportedly being intoxicated, threatening to shoot at officers, and heading in the direction of another officer.

In short, the Court believed that no precedent squarely governed the facts confronting Mullenix or showed that he acted unreasonably "beyond debate."[36] Since the decision in *Brosseau*, the Court has "never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity."[37] In continuing this trend, the Court stated that "the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect."[38] The Court believed that police are not required to take chances and hope for the best when analyzing a suspect's unpredictable behavior.[39] Taking into account all of the

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32. *Mullenix*, 136 S. Ct. at 308 (quoting Saucier v. Katz, 533 U.S. 194, 205 (2001)); *See* Pasco v. Knoblauch, 566 F.3d 572, 580 (stating that "[I]t would be unreasonable to expect a police officer to make the numerous legal conclusions necessary" to apply a broad, general rule).

33. *Mullenix*, 136 S. Ct. at 309.

34. *Mullenix*, 136 S. Ct. at 309-10.

35. The suspect in *Brosseau* was shot only moments after beginning to flee and barely managed to travel a half block before coming to a halt. *Brosseau*, 543 U.S. at 196-97. The officer claimed to have shot out of a concern for "other officers on foot who [she] *believed* were in the immediate area," "the occupied vehicles in [Brosseau's] path," and "any other citizens who *might* be in the area." *Mullenix*, 136 S. Ct. at 309-10.

36. *Id.* at 310-11.

37. *Id.*; *see, e.g.*, Scott v. Harris, 550 U.S. 372 (2007) (protecting an officer who caused a fleeing suspect to crash during a police chase); Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) (protecting officers who fired twelve shots at a fleeing suspect).

38. *Mullenix*, 136 S. Ct. at 311 (citing Long v. Slaton, 508 F. 3d 576, 581-82 (2007)).

39. *But see* Smith v. Cupp, 430 F. 3d 766, 774-777 (2005) (denying qualified

circumstances surrounding Leija's flight from officers and even accepting that they may "fall somewhere between . . . two sets of cases," the Court held that "qualified immunity protects actions in the hazy border between excessive and acceptable force."[40] Thus, the Court, in its per curiam opinion, granted Mullenix's petition for certiorari and reversed the Fifth Circuit decision that Mullenix was not entitled to qualified immunity.

2. Justice Scalia's Concurring Opinion. Although joining the decision of the Court, Justice Scalia focused his concurring opinion on the semantics of the per curiam opinion.[41] Rather than frame the discussion around whether Mullenix's decision to use deadly force was appropriate, he believed it should have focused on whether it was "reasonable to shoot at the engine in light of the risk to Leija."[42] Dissimilar to prior cases, Justice Scalia believed that while Mullenix's decision to shoot was "force sufficient to kill, it was not applied with the object of harming the body of the felon."[43] Therefore, it was unfair to characterize Mullenix's actions in this manner and stack "the deck against the officer."[44]

3. Justice Sotomayor's Dissenting Opinion. After a brief recitation of the facts, Justice Sotomayor laid the foundation for what she believed is the correct analysis of an alleged Fourth Amendment violation.[45] In her view, the court should first ask whether the officer violated a constitutional right, followed by an inquiry as to whether a reasonable officer would have understood a right was being violated.[46] She further claimed that the questioned conduct of the officer does not need to have been held unlawful by a prior court decision.[47] Instead, officers simply need "fair notice" that their conduct is unconstitutional.[48] In order to determine whether the conduct was unconstitutional, Justice Sotomayor thought the Court should have balanced any government interests in using deadly force against the intrusion created by the force.[49] Therefore, the question for the Court, as

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immunity because a suspect's flight did not pose an immediate threat to officers or bystanders).

40. *Mullenix*, 136 S. Ct. at 312.
41. *Id.* (Scalia, J., concurring).
42. *Id.* at 313.
43. *Id.*
44. *Id.*
45. *Id.* at 314 (Sotomayor, J., dissenting).
46. *Id.* (citing Saucier v. Katz, 533 U.S. 194, 201-02 (2001)).
47. *Id.* (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
48. *Id.* (citing Hope v. Pelzer, 536 U.S. 730, 739 (2002)).
49. *Id.*; *see also* Scott v. Harris, 550 U.S. 372, 383 (2007) (quoting United States v.

well as Mullenix, should have been whether "there was a governmental interest in shooting at the car rather than waiting for it to run over spike strips."[50]

Justice Sotomayor felt there was no such interest. Mullenix's act of shooting the car in no way alleviated any of the potential threats posed Leija as he approached the spike strips. He was going to encounter the spike strips regardless of Mullenix's success. Mullenix had no evidence that shooting the car would be more likely to succeed than the spike strips. Any threat that Leija posed after being stopped existed regardless of how his car was stopped. Even taking into account the facts focused on by the majority, such as Leija's threat to shoot officers, there was no governmental interest to justify shooting at the car over allowing the car to hit the spike strips. Justice Sotomayor believed the *Mullenix* decision, while already appearing unreasonable for the aforementioned reasons, appeared even more unreasonable after taking into account the minutes Mullenix spent contemplating the action before actually choosing to take the shot, a fact which the majority "glosse[d] over."[51] Lastly, Justice Sotomayor stated that "sanctioning a 'shoot first, think later' approach to policing . . . renders the protections of the Fourth Amendment hollow."[52]

III. BRIEF HISTORY

Beginning in 1982, when the Court "refashioned" its qualified immunity analysis to no longer include a subjective prong, government defendants have been reaping the benefit of increased protection under the doctrine.[53] Thereafter, the Court began applying this new objective-only standard and started the overwhelming trend of dismissing in favor of government officials.[54] Even *Garner, a case that falls within the small minority of case law favoring plaintiffs,* still provided that the use of deadly force against fleeing suspects may be permissible, though "constitutionally unreasonable," if the suspect is

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Place, 462 U.S. 696, 703 (1983)).

50. *Mullenix*, 136 S. Ct. at 314.

51. *Id.*

52. *Id.*

53. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (overruling Wood v. Strickland, 420 U.S. 308, 322 (1975), which included a subjective analysis for qualified immunity).

54. Kinports, *supra* note 5, at 63 (discussing a fifteen-year period over which the Court heard eighteen qualified immunity cases and dismissed sixteen in favor of government officials). As of 2016, the Court had not "ruled in favor of a § 1983 plaintiff . . . in more than a decade." *Id.*

dangerous to officers or others.[55]

Transitioning to the 2000s, five recent cases set the stage for the *Mullenix* decision. First, the Court heard *Brosseau* and found an officer's shooting at a fleeing suspect to be reasonable given her fear for officers and citizens she "believed" were or "might" have been in the area.[56] Next, the Court heard a case in which an officer ended a police chase by forcing the suspect's vehicle off the road, ultimately causing it to crash.[57] Continuing with the trend of protecting government officials, the Court in that case reversed the court of appeals and ruled in favor of the officer.[58] Four years later, the Court again strengthened the qualified immunity doctrine in *Ashcroft v. al-Kidd*[59] through its statement that "existing precedent must have placed the statutory or constitutional question *beyond debate*."[60] Then in 2014, the Court ruled in favor of officers, stating that a decision to fire twelve shots at a fleeing suspect's vehicle was reasonable because of the threat posed to officers, pedestrians, and other motorists.[61] Lastly, and most recently, the Court reinforced the language of *Ashcroft* by finding officers' assertion of deadly force against a mentally ill culprit reasonable because no precedent placed the question "beyond debate."[62] Thereafter, the Court rendered its decision in *Mullenix*, finding that an officer who fired six shots at a fleeing suspect's vehicle, moments before encountering spike strips, was entitled to qualified immunity.[63]

IV. QUALIFIED IMMUNITY BECOMES ABSOLUTE

> By sanctioning a "shoot first, think later" approach to policing, the Court renders the protections of the Fourth Amendment hollow.[64]

A. Mullenix reaffirms and strengthens precedent to an unreasonable level

Since the Court's ruling in *Harlow v. Fitzgerald*, the doctrine of qualified immunity has undergone significant changes despite

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55. Linda Sheryl Greene, *Ferguson and Beyond: Before and After Michael Brown + - Toward an End to Structural and Actual Violence*, 49 WASH. U. J.L. & POL'Y 1, 37.

56. Brosseau v. Haugen, 543 U.S. 194, 197 (2004).

57. Scott v. Harris, 550 U.S. 372, 375 (2007).

58. *Id.* at 386.

59. 563 U.S. 731 (2011).

60. *Id.* at 741 (emphasis added); Kinports, *supra* note 5, at 66 (citing *Ashcroft*).

61. Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014).

62. City & Cty. Of S.F. v. Sheehan, 135 S. Ct. 1765, 1774-78 (2015).

63. *Mullenix*, 136 S. Ct. 305, 312 (2015).

64. *Id.* at 316 (Sotomayor, J., dissenting).

the seemingly subtle nature in which they have occurred.[65] Not only has the subjective prong of qualified immunity analysis been dropped,[66] the Court has now added a qualifier that plaintiff must produce precedent to prove the officer's conduct to be unreasonable "beyond debate."[67] Then, in *Mullenix*, the Court affirmed these precedents and provided its latest alteration. By giving "very little consideration . . . to the interests of the individual,"[68] the Court finally provided the straw to break the Fourth Amendment's back.

Now, in order to obtain relief for a Fourth Amendment violation, plaintiffs are burdened with the seemingly impossible task of producing Supreme Court precedent that puts the officer's actions "beyond debate."[69] Even if this hurdle is cleared, plaintiffs must then convince the court to reinstate a policy of considering their interest in recovery over the governmental interests in protecting the officers. Thus, the newly formed, extremely heightened protection of officers has transformed the doctrine of qualified immunity into that of absolute immunity[70] and rendered recovery under Fourth Amendment futile.

B. Mullenix encourages a "shoot first, think never" mentality for police officers

Wrestling with the extent to which government officials should be immune from liability, the Court has previously withheld absolute immunity from police officers, recognizing that "not all government functions [are] sufficiently important to

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65. Kinports, *supra* note 5, at 64 (claiming that the Court has been "covertly broadening the defense" of qualified immunity and has made a "sub silentio assault on constitutional tort suits").

66. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

67. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011); Kinports, *supra* note 5, at 66.

68. Johnathan M. Smith, *Closing the Gap Between What is Lawful and What is Right in Police Use of Force Jurisprudence by Making Police Departments More Democratic Institutions*, 21 MICH. J. RACE & L. 315, 319 (2016) (discussing how the Fourth Amendment has been converted "from a tool to protect the civil liberties of individuals to a shield from liability for law enforcement" and even claims that the "scales have tilted so far away from the individual's interest such that it barely plays a role in the analysis.").; Kinports, *supra* note 5, at 68 (claiming that "any reference to the countervailing rights and compensating victims of constitutional injury" is absent from the Court's summary of law).

69. The Court appears to have strengthened the "beyond debate" language from *Ashcroft*, implying that "clearly established law can only be created by Supreme Court Opinions." Kinports, *supra* note 5, at 69.

70. *See* Johns, *supra* note 7; Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY. L.J. 229, 237 (2006) (discussing how qualified immunity and absolute immunity both provide "immunity from suit").

70. Smith, *supra* note 68, at 319.

warrant absolute immunity."[71] By doing so, the Court not only provided a way for victims of constitutional violations to be compensated, but a method for "deter[ring] public officials' misconduct."[72] In short, the Court chose not to provide public officials with "great power to abuse citizens' constitutional rights."[73] Instead, police officers came to receive a lesser form of protection known as qualified immunity.[74] The Court believed this lower level of immunity would both satisfy the policy goals for withholding absolute immunity and provide sufficient protection to the officers in performing their official duties.[75]

Yet, in *Mullenix*, the Court appears to have forgotten the "deleterious effects"[76] of absolute immunity[77] and no longer believes in the importance of compensating the victims of constitutional violations.[78] Instead, it focuses more on "presumptions of legitimate government action, rather than the high cost of abuse of governmental power."[79] By extending absolute immunity to police officers under the guise of "qualified" immunity's impossibly high standards, the Court has essentially provided officers with the "great power to abuse citizens' constitutional rights" it previously sought to avoid.[80] The interests of the victims of constitutional violations have been cast aside (and nearly excluded from the Court's analysis), leaving the door wide open for officers to abuse their power.[81] This extension of absolute immunity has taken Justice Sotomayor's dissenting opinion in *Mullenix* one step further, sanctioning not a "shoot

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71. Daubard, *supra* note 18, at 401 ("Despite the strong argument for absolute judicial immunity, the Court refused to give the police officers absolute immunity.") (discussing Pierson v. Ray 386 U.S. 547 (1967)). Extending absolute immunity to judges, unlike police officers, stems from a need for "judicial independence" and a desire to keep the unsatisfied, losing party to every lawsuit from charging the judge with malice or corruption. *Id*. (discussing the reasons for judicial, absolute immunity laid out in Bradley v. Fisher, 80 U.S. 335, 349 (1871)). *But see* Greene, *supra* note 55, at 44 ("scrutiny of particular police decisions after the fact would cripple law enforcement").

72. Daubard, *supra* note 18, at 401; *see* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA. L. REV. 261, 263 (1995) (discussing the benefits of subjecting officers to liability).

73. Daubard, *supra* note 18, at 401.

74. *Id.* at 275 ("qualified immunity is presumed to provide sufficient protection from excessive litigation").

75. *Id.*

76. Daubard, *supra* note 18, at 401.

77. For more information about the negative effects of absolute immunity, see Johns, *supra* note 7 (discussing the issues with absolute immunity and why it should be reconsidered).

78. Daubard, *supra* note 18, at 401.

79. Greene, *supra* note 55, at 36.

80. Daubard, *supra* note 18, at 401. *But see* Chen, *supra* note 70, at 236-37 (discussing the arguments against subjecting officers to liability).

81. Smith, *supra* note 68, at 319.

first, think second" but a "shoot first, think *never*" mentality. Police officers must no longer fear liability for their actions and can commit constitutional violations without suffering the consequences. Protection under the Fourth Amendment has become "hollow."[82]

C. Unreasonable police behavior toward black communities serves as a warning of what is to come

Even prior to the ruling in *Mullenix*, the negative effects of heightened police immunity have reared their ugly head, specifically in black communities and should serve as a warning of what is to come.[83] In recent years, studies have shown that young black males were 21 times more likely to be shot dead by police than similarly-situated white males.[84] In order to close this gap, more than one white male would have to be fatally shot each week, totaling 185 more per year.[85] Moreover, when the Department of Justice investigated the "disproportionate use of police deadly or excessive force in numerous cities," it found departments' use of deadly force to be both "unnecessary" and "excessive."[86] Some departments even used tactics that placed "officers in situations where avoidable force [became] inevitable."[87]

Where do these staggering statistics and practices stem from? They stem from "racism by officers and by the administrators who encourage or allow them to express it by shooting blacks in situations in which they would refrain from shooting whites."[88] Combined with the already heightened qualified immunity provided by the Court prior to *Mullenix*, this percolation of individual racism has created a "sanctioned arbitrariness in the imposition of death that has affected Black communities around the nation."[89] Now, after its decision in *Mullenix,* the Court has unleashed even "deeper pathologies of power"[90] and extended the reach of police officers' unruly behavior far beyond just black communities.

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82. Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).

83. *See* Greene, *supra* note 55, at 4 (discussing the "role of police departments and the criminal system in the lives of poor [b]lacks").

84. *Id.* at 11.

85. *Id.*

86. *Id.* at 11-12.

87. *Id.* at 12.

88. *Id.* at 13.

89. *Id.* at 43.

90. *Id.* at 20.

D. In order to determine the reasonableness of an officer's behavior, the Court must look beyond just the facts of the case to account for studies, statistics, and department policies

Because judges act as the ultimate authority for determining the constitutionality of police behavior, change must stem from within the courts. As seen in *Mullenix*, the Court's current analysis disregards both local and national department policies aimed at controlling officers and does not account for modern studies or statistics pertaining to police conduct.[91] Instead, it has chosen to "slosh . . . through the factbound morass of 'reasonableness'" and formulate its own opinions about reasonable behavior.[92] In order to more appropriately ascertain the "reasonableness" of an *officer's* actions, however, the Court must account for the abundance of studies, statistical evidence, and local department policies pertaining to police behavior.[93] Doing so will not only connect the Court to individuals who work directly with officers, but further educate judges on the effects of police behavior before deciding the case and simplify the process with clearer standards against which to judge the reasonableness of an officer's conduct.

V. CONCLUSION

Throughout the recent decades preceding *Mullenix*, the Court has subtly expanded the doctrine of qualified immunity, recognizing the "hazy legal backdrop"[94] officers operate against and the need for split-second choices in the field. However, the Court's most recent attempt to protect those who claim to be protecting us comes at a price. The *Mullenix* iteration of the qualified immunity doctrine now renders police officers "absolutely qualified" for immunity when acting in their official capacity. Consequently, the already prevalent abuse of power exhibited in black communities[95] will now percolate into the

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91. John P. Grosst, *Unguided Missiles: Why the Supreme Court Should Prohibit Police Officers from Shooting at Moving Vehicles*, 163 U. PA. L. REV. ONLINE 135 ("[W]hen it comes to high-speed pursuits and the use of deadly force during those pursuits, experts in law enforcement have already developed evidence-based policies that the Court could adopt, but chooses to ignore."); *see, e.g.,* Mullenix v. Luna, 136 S. Ct. 305, 314-15 (2015) (identifying the lack of evidence supporting the fallible qualities of spike strips).

92. Grosst, *supra* note 91, at 135.

93. *See id.* (presenting research that shows "if the police refrain from chasing all offenders or terminate their pursuits, no significant increase in the number of suspects who flee would occur"). For more research, studies, and police department policies, see Grosst, *supra* note 109, at 135.

94. *Mullenix*, 136 S. Ct. at 309-10.

95. Greene, *supra* note 55, at 4 (describing the unreasonable police behavior toward black communities).

remainder of society with officers choosing to "shoot first, think second," if at all. Behind us are the days when the Court would account for the interests of individuals suffering constitutional violations at the hands of this nations police officers.[96] Even worse, the Court will likely continue ignoring statistical evidence of police abuses of power and departmental policies attempting to reign in the great leeway afforded to officers in the field.[97] Thus, this Note answers the ultimate question: "Watcha gonna do, whatcha gonna do when they come for you?"[98] Not file a suit under 42 U.S.C. § 1983, alleging a violation of the Fourth Amendment by using excessive force.

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96. Smith, *supra* note 68, at 319.

97. Grosst, *supra* note 91, at 135.

98. INNER CIRCLE, BAD BOYS (RAS Records Inc. 1987).