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A Right With No Remedy:

The Fourth Amendment, §1983, & Qualified Immunity

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Professor Ristroph

I. Abstract

In the age of cell phone cameras and social media, the use of excessive force by police officers has become a widely discussed and highly publicized topic. Recently, a national discussion on the issue has been spurred on by cases like that of Michael Brown, an unarmed teenager who was shot and killed by a police officer in Ferguson, Missouri, and that of Eric Garner, a 43 year old unarmed man suspected of selling untaxed cigarettes who died after being placed in a chokehold by a New York City police officer. Both of these cases have been followed very closely by the media with a focus on the underlying societal and racial issues they highlight; Both Brown and Garner were black men, and each incident involved a white police officer. From a legal standpoint, the media has paid close attention to whether or not grand juries in each case would decide to indict the individual officers on criminal charges in their respective states. So far, the grand jury in Ferguson has returned a decision not to indict Officer Darren Wilson. Since the decision was announced, the focus of the media and the nation has remained focused on the perceived racial divide in the country, and the protests and riots that have ensued in response to the decision. One question that has not grabbed headlines following the decision is from a legal standpoint, what, if anything, can the Brown family do now? One possibility, and the subject of this article, is for the family to pursue a 42 U.S.C.A. § 1983 civil damages claim in federal court against Officer Wilson for the deprivation of their son's Fourth Amendment rights.¹ However, as this article will endeavor to explain, the Brown family's likelihood of success on such a claim is considerably low. While in theory §1983 gives a glimmer of hope to those who have been

¹ 42 U.S.C.A. § 1983 (West).

deprived of their Fourth Amendment rights, in reality §1983 claims for excessive provide a meaningful remedy in only the most egregious cases.

II. Introduction

The Fourth Amendment to the United States Constitution prohibits the use of excessive force by police in effecting arrests and other seizures. It provides in part, “The right of the people to be secure in their persons...against unreasonable ... seizures...”² When a person believes he or she has been subject to excessive force at the hands of a police officer during a stop or arrest he or she may bring a civil action against the officer for tortious deprivation of their constitutional rights under 42 U.S.C.A. § 1983.³ However, the ability to bring a §1983 claim is by no means a guarantee that the claim will be brought successfully. One potential roadblock to a successful §1983 claim is the defense of qualified immunity. Qualified immunity is not provided for within §1983 itself, but is a court created defense based on the common law good faith and probable cause defense.⁴ The defense offers police officers immunity from suit and protection from liability for damages.⁵ As immunity from suit, the applicability of the qualified immunity defense should be determined at the summary judgment stage.⁶ In analyzing the qualified

² *U.S. Const. amend. IV.*

³ 42 U.S.C.A. § 1983. (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”).

⁴ *Wyatt v. Cole*, 504 U.S. 158, 170, 112 S. Ct. 1827, 1834-35, 118 L. Ed. 2d 504 (1992) (“The good-faith and probable-cause defense evolved into our modern qualified-immunity doctrine.”).

⁵ *Mitchell v. Forsyth*, 472 U.S. 511, 512, 105 S. Ct. 2806, 2808, 86 L. Ed. 2d 411 (1985).

⁶ *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982).

immunity defense in a particular case courts look at two questions, did the defendant's actions violate a constitutional right, and was the right in question clearly established at the time so as to put a reasonable person on notice that the right existed.⁷ Courts have the discretion to address these questions in any order, and in some instances where one question is dispositive courts may need to only address one inquiry or the other.⁸ This discretion allows courts the ability to dispose of cases quickly without ever addressing the merits of the underlying constitutional claim. The freedom courts have to avoid constitutional questions in qualified immunity analysis is particularly problematic in the Fourth Amendment excessive force context. As will be discussed further below, unlike §1983 claims in other constitutional contexts, the §1983 claim in the Fourth Amendment excessive force context is the primary means by which people can seek to have their rights vindicated.⁹ Accordingly, the courts' broad discretion to analyze qualified immunity claims without addressing underlying constitutional questions, creates the potential for the Fourth Amendment's prohibition on excessive force by police officers in the course of an arrest, stop, or other seizure to essentially become a right with no remedy.

This article will proceed by first addressing the Fourth Amendment standard for determining when the use of force by a police officer effecting an arrest or other seizure amounts to excessive force in violation of the Constitution. It will then move on to a discussion of the §1983 claim, its history, elements, and how its application today is far broader than it was at its inception. Next, it will examine the defense of qualified immunity, and provide an analysis of two important cases *Saucier*, in which the Supreme Court found that in addressing the qualified immunity defense courts must first address the merits of the constitutional question before

⁷ *Saucier v. Katz*, 533 U.S. 194, 194, 121 S. Ct. 2151, 2152, 150 L. Ed. 2d 272 (2001).

⁸ *Pearson v. Callahan*, 555 U.S. 223, 225, 129 S. Ct. 808, 812, 172 L. Ed. 2d 565 (2009).

⁹ John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 Sup. Ct. Rev. 115, 135 (2009) (discussing that constitutional tort actions may be the primary means of vindicating rights in excessive force cases).

moving to the “clearly established” or qualified immunity question, and *Pearson*, in which the Supreme Court receded from *Saucier* and gave courts the discretion to determine sequencing. The analysis will continue with a look at how §1983 claims in the excessive force context are unique in comparison to §1983 in other constitutional contexts in the sense that §1983 is essentially the only available means of vindicating rights deprived by police excessive force. It will also discuss how this uniqueness, coupled with the discretion given to courts in *Pearson* creates the troubling potential for the Fourth Amendment’s prohibition on police use of excessive force to become nothing more than a theoretical right with no actual remedy. Finally, this article will conclude that to prevent the Fourth Amendment’s prohibition on police use of excessive force from becoming nothing more than a theoretical right, courts must address the constitutional merits of §1983 excessive force claims.

II. The Fourth Amendment & Excessive Force: From Garner to Graham

The appropriate standard for analyzing the constitutionality of police uses of force in the course of an arrest, or “seizure” of a free citizen was articulated almost 30 years ago in *Tennessee v. Garner*.¹⁰ In *Garner*, the Supreme Court analyzed the constitutionality of using lethal force to prevent the escape of a suspected felon.¹¹ Recognizing that using lethal force to apprehend a suspect constitutes a “seizure”, the Court determined that the officer’s use of force was subject to the “reasonableness requirement of the Fourth Amendment.”¹² In determining the reasonableness of a particular seizure the Court in *Garner* applied a balancing test, balancing “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against

¹⁰ *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

¹¹ *Id.* at 3.

¹² *Id.* at 7

the importance of the governmental interests alleged to justify the intrusion.”¹³ Applying the balancing test discussed in *Garner* to the facts of a specific excessive force case illustrates that the ultimate inquiry in such cases is whether given the totality of the circumstances the “particular sort of... seizure” was justified.¹⁴

Despite the Supreme Court’s application of the Fourth Amendment reasonableness standard in *Garner*, lower courts did not immediately adopt the Supreme Court’s approach in analyzing their own cases of excessive force.¹⁵ Courts were divided on whether to address claims of excessive force in the course of an arrest or seizure under a Fourth Amendment standard or a Fourteenth Amendment due process standard.¹⁶ The division amongst federal courts on whether to apply a Fourth or Fourteenth amendment standard may have been attributable to a belief that both standards were applicable to claims of excessive force during an arrest.¹⁷ The lack of reliance on *Garner* may also have been due in part to a misunderstanding among courts that excessive force claims involving seizures effected by lethal force are distinct, and deserve a distinct constitutional inquiry from that used in excessive force cases involving less than lethal force.¹⁸ However, such a view is not consistent with the idea that force is measured on a sliding scale, or the use of force continuum as it is referred to by many law enforcement agencies across

¹³ *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S. Ct. 1694, 1699, 85 L. Ed. 2d 1 (1985).

¹⁴ *Id.* at 8-9.

¹⁵ *See, e.g.*, *Fernandez v. Leonard*, 784 F.2d 1209 (1st Cir. 1986); *Fiacco v. City of Rensselaer*, 783 F.2d 319 (2d Cir. 1986), *cert. denied*, 480 U.S. 922 (1987) (adopting 14th Amendment due process standard.).

¹⁶ *Id.*; *See also, Lester v. City of Chicago*, 830 F.2d 706, 710 (7th Cir. 1987) (concluding that the proper standard for analyzing excessive force in the arrest context is the Fourth Amendment standard.).

¹⁷ *See, e.g., Leber v. Smith*, 773 F.2d 101 (6th Cir.1985) (applying Fourth Amendment standard where a police officer drew his gun in attempting to arrest a mentally disturbed motorist); *Lewis v. Downs*, 774 F.2d 711 (6th Cir.1985) (applying a Fourteenth Amendment due process standard where police officers kicked a handcuffed woman, and struck her husband and son with nightsticks during an arrest).

¹⁸ This is evidenced by courts continued use of substantive due process standard in analyzing constitutionality of arrests involving less than lethal force despite *Garner*’s application of a Fourth Amendment reasonableness standard. *See, e.g. supra* note 15.

the country.¹⁹ Although there is no standard use of force continuum accepted nationally, most begin with mere officer presence and/or verbal commands and end with lethal force.²⁰ Lethal force is not outside the confines of a use of force continuum; it is merely at the far-end. Still, regardless of why the division existed among federal courts pre and post *Garner*, any confusion was resolved by the Supreme Court's decision in *Graham v. Connor*.²¹

In *Graham*, the Supreme Court made “explicit what was implicit in *Garner*'s analysis and [held] that *all* claims that law enforcement officers have used excessive force- deadly or not- in the course of an arrest, investigatory stop, or other “seizure” of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard, rather than a “substantive due process” approach...”²² In relying on the Fourth Amendment for guidance, the Court in *Graham* announced an objective reasonableness standard.²³ That is, a standard that views the use of force through the eyes of a reasonable officer on site, without the benefit of 20/20 hindsight.²⁴ As in *Garner*, the Court in *Graham* noted that the objective reasonableness standard of the Fourth Amendment is a balancing test.²⁵ The test looks to balance the nature and quality of the intrusion on an individual's Fourth Amendment interests against governmental interests.²⁶ The test considers elements including the severity of the crime, immediacy of the threat to police or others, and whether the suspect is resisting or attempting to flee, and keeps an

¹⁹ Ryan P. Hatch, *Coming Together to Resolve Police Misconduct: The Emergence of Mediation As A New Solution*, 21 Ohio St. J. on Disp. Resol. 447, 478-79 (2006) (describing the “use of force continuum”).

²⁰ Ryan P. Hatch, *Coming Together to Resolve Police Misconduct: The Emergence of Mediation As A New Solution*, 21 Ohio St. J. on Disp. Resol. 447, 478-79 (2006) (providing an example of a typical use of force continuum consisting of six levels starting with officer presence and ending with deadly force).

²¹ *Graham v. Connor*, 490 U.S. 386, 386, 109 S. Ct. 1865, 1866-67, 104 L. Ed. 2d 443 (U.S. 1989).

²² *Id.* at 395.

²³ *Id.* at 386.

²⁴ *Id.* at 396.

²⁵ *Id.*

²⁶ *Id.*

ever mindful eye toward the reality that officers are regularly required to make-split second decisions in dangerous situations.²⁷

III. How §1983 Came to Be: History, Elements, & Expanded Interpretation

Although the Fourth Amendment confers the right to be free from “unreasonable seizures”, and in turn prohibits police use of excessive force in effecting such seizures, it provides no remedy for those individuals whose Fourth Amendment rights have been violated.²⁸ The remedy for such violations comes in the form of 42 U.S.C. §1983. §1983 was enacted in 1871 as part of what is often referred to as the “Ku Klux Klan Act”, but is more formally known as the Civil Rights Act of 1871.²⁹ The primary purpose behind the Civil Rights Act was to provide a civil remedy against the abuses that were being committed in the South after the Civil War.³⁰ The Act itself conferred no rights on citizens, but rather gave them a vehicle by which they could seek recompense for violations of the rights granted to them by the Constitution.³¹

§1983 claims consist of four elements derived directly from the language of the statute. First, the claim must be brought against a “person”.³² “Person” under §1983 includes federal, state, and local employees in their individual capacities. It also includes municipalities and local governments.³³ However, it does not include states, or the United States Government.³⁴ The

²⁷ *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 1866-67, 104 L. Ed. 2d 443 (U.S. 1989).

²⁸ *U.S. Const. amend. IV*. (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

²⁹ *Monroe v. Pape*, 365 U.S. 167, 171, 81 S. Ct. 473, 475, 5 L. Ed. 2d 492 (1961).

³⁰ *See* Cong. Globe, 42d Cong., 1st Sess. 68 (1871).

³¹ *Graham v. Connor*, 490 U.S. 386, 393-94, 109 S. Ct. 1865, 1870, 104 L. Ed. 2d 443 (U.S. 1989).

³² 42 U.S.C.A. § 1983.

³³ 6 Fed. Proc., L. Ed. § 11:308.

³⁴ *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 58, 109 S. Ct. 2304, 2305, 105 L. Ed. 2d 45 (1989).

second element of §1983 is that the person acted “under color of [law]”.³⁵ This requires that defendant exercised power by “virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”³⁶ The understanding of “under color of [law]” was originally narrowly tailored to include only official’s actions taken on the basis of actual state authority or law, not inclusive of any abuses of authority or violations of state law by such officials.³⁷ However, the interpretation of “under color of [law]” was expanded in *Monroe v. Pape* to include such abuses of power and violations of law committed by state officials while acting in their official capacity.³⁸ The third element of §1983 claims is that the defendant’s action “subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof”, to the deprivation of rights.³⁹ This is the causal connection component of §1983 claims. The deprivation of rights must be the result of the defendant’s conduct for liability to attach.⁴⁰ The final element of §1983 claims is that plaintiff’s rights are in fact deprived.⁴¹ While §1983 itself does not provide any substantive rights to citizens, it is the vehicle by which citizens can seek to be compensated for the deprivation of rights provided to them elsewhere.⁴² Accordingly, for a §1983 claim to survive, plaintiffs must show that a right conferred either by the United States Constitution or some other federal statute has in fact been deprived.⁴³

³⁵ 42 U.S.C.A. § 1983.

³⁶ *Monroe v. Pape*, 365 U.S. 167, 184, 81 S. Ct. 473, 482, 5 L. Ed. 2d 492 (1961).

⁴⁵ *Monroe v. Pape*, 365 U.S. 167, 202, 81 S. Ct. 473, 492, 5 L. Ed. 2d 492 (1961) (Frankfurter, J., dissenting).

³⁸ *Id.*

³⁹ 42 U.S.C.A. § 1983.

⁴⁰ Teresa E. Ravenell, *Blame It on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense*, 41 Seton Hall L. Rev. 153, 159 (2011).

⁴¹ 42 U.S.C.A. § 1983.

⁴² *Graham v. Connor*, 490 U.S. 386, 393-94, 109 S. Ct. 1865, 1870, 104 L. Ed. 2d 443 (U.S. 1989).

⁴³ § 3573.2 Section 1983 Actions—Scope of Action: Elements of Claim, Remedies, 13D Fed. Prac. & Proc. Juris. § 3573.2 (3d ed.).

From the start, §1983 was intended to provide a federal cause of action supplemental to any state cause of action for the deprivation of individual's rights by officials acting under color of state law.⁴⁴ However, the original interpretation of §1983, specifically the language "under color of [law]" was narrow, and accordingly, the availability of §1983 was limited. Justice Frankfurter's dissent in *Monroe v. Pape* illustrates just how narrow that interpretation had been in the years following its enactment. In his dissent Justice Frankfurter states in part:

We must determine what Congress meant by 'under color' of enumerated state authority. Congress used that phrase not only in R.S. s 1979, but also in the criminal provisions of s 2 of the First Civil Rights Act of April 9, 1866, 14 Stat. 27, from which is derived the present 18 U.S.C. s 242, 18 U.S.C.A. s 242, and in both cases used it with the same purpose. During the seventy year which followed these enactments, cases in this Court in which the 'under color' provisions were invoked uniformly involved action taken *either in strict pursuance of some specific command of state law or within the scope of executive discretion in the administration of state laws*.⁴⁵

The idea behind the narrow view of "under color of [law]" held by Justice Frankfurter and many courts prior to *Monroe* rests on the idea that when an official acts outside of their given authority they can no longer be considered state actors.⁴⁶

⁴⁴ *Monroe v. Pape*, 365 U.S. 167, 183, 81 S. Ct. 473, 482, 5 L. Ed. 2d 492 (1961)

⁴⁵ *Monroe v. Pape*, 365 U.S. 167, 202, 81 S. Ct. 473, 492, 5 L. Ed. 2d 492 (1961) (Frankfurter, J., dissenting) (citing *Carter v. Greenhow*, 114 U.S. 317, 330, 5 S.Ct. 928, 962, 29 L.Ed. 202, 207; *Bowman v. Chicago & N.W. Ry. Co.*, 115 U.S. 611, 6 S.Ct. 192, 29 L.Ed. 502; *Giles v. Harris*, 189 U.S. 475, 23 S.Ct. 639, 47 L.Ed. 909; *Devine v. City of Los Angeles*, 202 U.S. 313, 26 S.Ct. 652, 50 L.Ed. 1046; *Myers v. Anderson*, 238 U.S. 368, 35 S.Ct. 932, 59 L.Ed. 1349; *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759; *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281; *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 882, 87 L.Ed. 1324.).

⁴⁶ *Id.* at 242-43 ("In concluding that police intrusion in violation of state law is not a wrong remediable under R.S. s 1979, the pressures which urge an opposite result are duly felt. The difficulties which confront **514 private citizens who seek to vindicate in traditional common-law actions their state-created rights against lawless invasion of their privacy by local policemen are obvious,⁷⁰ and obvious is the need for more effective modes of redress. The answer to these urgings must be regard for our federal system which presupposes a wide range of regional autonomy in the kinds of protection local residents receive. If various common-law concepts make it possible for a policeman—but no more possible for a policeman than for any individual hoodlum intruder—to escape without liability when he has vandalized a home, that is an evil. But, surely, its remedy devolves, in the first instance, on the States. Of course, if the States afford less protection against the police, as police, than against the hoodlum—if under authority of state 'statute, ordinance, regulation, custom, or usage' the police are specially shielded— *243 s 1979 provides a remedy which dismissal of petitioners' complaint in the present case does not impair. Otherwise, the protection of the people from local delinquencies and shortcomings depends, as in general it must, upon the active consciences of state executives, legislators and judges.⁷¹ Federal intervention, which must at best be limited to securing those minimal guarantees afforded by the evolving concepts of due process and equal protection, may in

In *Monroe v. Pape*, the Supreme Court reviewed a case from Chicago involving police officers that broke into the home of an African American family without a warrant.⁴⁷ Once inside, the police woke the family up, made them stand naked in the living room, and tore the house apart.⁴⁸ The police then proceeded to take the father of the family, Mr. Monroe, to the police station where they interrogated him regarding a murder case, and did not allow him to make any calls or contact a lawyer.⁴⁹ Eventually, the police released Mr. Monroe without charging him.⁵⁰ The Monroe family subsequently brought a §1983 claim against the police alleging that they had violated their civil rights.⁵¹ In reviewing the case, the Court overturned the lower court's decision to dismiss Mr. Monroe's complaint.⁵² In doing so, the Court held that "under color of [law]" included actions by officials that were not explicitly authorized by the laws of the state, and further that individuals could seek redress in federal court under §1983 without first resorting to state law remedies.⁵³

The expansion of the understanding of "under color of [law]" in *Monroe* has allowed far more people to bring §1983 actions. Still, even if a plaintiff brings a claim that satisfies the essential elements of §1983, they may not yet be home free. Defendants in these cases, as in any case, have defenses available to them.⁵⁴ These defenses can pose a significant roadblock for individuals seeking to have their rights vindicated. Under the current state of the law, in some

the long run do the individual a disservice by deflecting responsibility from the state lawmakers, who hold the power of providing a far more comprehensive scope of protection. Local society, also, may well be the loser, by relaxing its sense of responsibility and, indeed, perhaps resenting what may appear to it to be outside interference where local authority is ample and more appropriate to supply needed remedies.").

⁴⁷ *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

⁴⁸ *Id.* at 169.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 167.

⁵² *Id.* at 191-92.

⁵³ *Monroe v. Pape*, 365 U.S. 167, 174-75, 81 S. Ct. 473, 477, 5 L. Ed. 2d 492 (1961).

⁵⁴ *Anderson v. Creighton*, 483 U.S. 635, 642-43, 107 S. Ct. 3034, 3040-41, 97 L. Ed. 2d 523 (1987) (acknowledging defense of absolute and qualified immunity in §1983 actions).

cases these defenses prevent plaintiffs from obtaining a decision as to the merits of their case, and in even more cases they effectively deny any possibility of recovery.⁵⁵ One of the most common defenses to §1983, and the most relevant for purposes of this article, is the defense of qualified immunity.

IV. Qualified Immunity & The Order-of-Battle

Qualified immunity is a defense that applies in many §1983 cases. It protects government officials from liability for civil damages when their conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have known.⁵⁶ However, it is not merely immunity from liability, but immunity from suit altogether.⁵⁷ Accordingly, qualified immunity determinations should be made at the earliest possible point in the litigation prior to any discovery.⁵⁸ This means qualified immunity questions are to be answered at the summary

⁵⁵ Currently courts have discretion to determine sequencing in qualified immunity analysis leaving open the possibility that constitutional questions will be avoided, and cases resolved solely on the qualified immunity question. Even where the constitutional question is answered, if the right had not been clearly established prior to the determination in the case at hand, then that particular defendant will still be granted qualified immunity based on the “clearly established” prong of the qualified immunity analysis; effectively denying an award of damages regardless of the constitutional violation. The discretionary constitutional determinations are merely prospective, and subsequent police officers who exhibit similar behavior will not get the benefit of qualified immunity the next time around. *See generally, Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

⁵⁶ *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982) (holding that “that government officials performing discretionary functions generally are shielded from liability for civil damages **insofar** as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

⁵⁷ *Mitchell v. Forsyth*, 472 U.S. 511, 512, 105 S. Ct. 2806, 2808, 86 L. Ed. 2d 411 (1985).

⁵⁸ *Id.* at 526 (stating the *Harlow* Court refashioned the qualified immunity doctrine in such a way as to “permit the resolution of many insubstantial claims on summary judgment” and to avoid “subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery” in cases where the legal norms the officials are alleged to have violated were not clearly established at the time.); *See also, Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S. Ct. 2727, 2736-37, 73 L. Ed. 2d 396 (1982).

judgment stage.⁵⁹ If a case moves past the summary judgment stage without having addressed qualified immunity the defense is effectively waived.⁶⁰

The underlying principle of qualified immunity is to avoid imposing liability on officers for their actions based on newly imposed laws.⁶¹ In one case, the Court described the purpose of qualified immunity, saying “Qualified immunity balances two important interests- the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”⁶² Qualified Immunity protects officials for reasonable mistakes made in their official capacity, be it mistakes of fact, law, or both.⁶³ However, qualified immunity is not absolute immunity.

In its earliest form, qualified immunity was akin to the common law good faith defense, in that it had a subjective element to it.⁶⁴ This subjective element, that the defendant “took the action with the malicious intention to cause a deprivation of constitutional rights or other injury”,⁶⁵ made it easy for plaintiff’s to defeat defendants’ summary judgment motions based on qualified immunity, because the subjective intent of the officer was hard to determine without further inquiry.⁶⁶ In fact, some courts have contemplated that a question of subjective intent is a question of fact that should be left to a jury, not decided on a motion for summary judgment.⁶⁷

⁵⁹ *Mitchell v. Forsyth*, 472 U.S. 511, 512, 105 S. Ct. 2806, 2808, 86 L. Ed. 2d 411 (1985).

⁶⁰ *Id.* (“Such entitlement is an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively **lost** if a case is erroneously permitted to go to trial.”).

⁶¹ *Pearson v. Callahan*, 555 U.S. 223, 224, 129 S. Ct. 808, 811, 172 L. Ed. 2d 565 (2009).

⁶² *Id.* at 231.

⁶³ *Id.*

⁶⁴ *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

⁶⁵ *Harlow v. Fitzgerald*, 457 U.S. 800, 801, 102 S. Ct. 2727, 2729, 73 L. Ed. 2d 396 (1982).

⁶⁶ *Id.* at 816-17.

⁶⁷ *Harlow v. Fitzgerald*, 457 U.S. 800, 816, 102 S. Ct. 2727, 2737, 73 L. Ed. 2d 396 (1982) (footnoting *E.g., Landrum v. Moats*, 576 F.2d 1320, 1329 (CA8 1978); *Duchesne v. Sugarman*, 566 F.2d 817, 832–833 (CA2 1977); cf. *Hutchinson v. Proxmire*, 443 U.S., at 120 n.9, 99 S.Ct., at 2680, n.9 (questioning whether the existence of “actual malice,” as an issue of fact, may properly be decided on summary judgment in a suit alleging libel of a public figure).

With a subjective prong to the qualified immunity test, even bare bones allegations of malice in the face of a defendant's claim for the defense could lead to extensive discovery.⁶⁸ However, as a defense from suit, trial costs and the costs of in-depth discovery were the types of things qualified immunity was meant to protect officials from in the first place.⁶⁹

Eventually, in *Harlow v. Fitzgerald*, the Supreme Court was given the chance to resolve the inconsistency between the subjective-prong of the qualified immunity test, and the intent behind the defense.⁷⁰ In *Harlow*, the Court made quick work of eliminating the subjective portion of the analysis, opting for an objective test with the goal of allowing judges to dismiss frivolous suits at the summary judgment stage.⁷¹ The Court noted in its decision that, "bare allegations of malice should not suffice to subject government officials either to the costs of trial or the burdens of broad-reaching discovery."⁷² The new standard for qualified immunity as articulated in *Harlow* is that "officials.... generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁷³ After *Harlow*, it became clear that there are two questions at the heart of qualified immunity claims. The court must decide whether the defendant's actions violated a constitutional or statutory right, and also whether the right was clearly established at the time so as to put a reasonable person on notice that the right existed.⁷⁴ However, the order-of-battle, as it has come to be known, would not be addressed until years later.

⁶⁸ *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17, 102 S. Ct. 2727, 2737, 73 L. Ed. 2d 396 (1982)

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 808.

⁷² *Supra* note 68.

⁷³ *Harlow v. Fitzgerald*, 457 U.S. 800, 801, 102 S. Ct. 2727, 2729, 73 L. Ed. 2d 396 (1982).

⁷⁴ *Id.*

In the 2001 decision in *Saucier v. Katz*, the Supreme Court addressed for the first time the order-of-battle in determining whether to grant defendants qualified immunity in constitutional tort cases.⁷⁵ The order-of-battle as it is commonly referred to asks in what sequence should courts address the questions underlying qualified immunity. In *Saucier*, despite disagreement amongst the Justices, the Court found that the mandatory sequence in which courts should address the questions underlying qualified immunity is to first address the constitutional question, and then answer the qualified immunity question, that being whether the right was clearly established.⁷⁶ Essentially, under *Saucier*, courts must first determine the merits of the plaintiff's constitutional claim before turning to the question of qualified immunity.⁷⁷ In support of its opinion, the Court noted that the rule set out in *Saucier* encourages the development of constitutional law, and provides crucial guidance to officials in terms of what the Constitution requires.⁷⁸ Lower courts were not overly pleased with the ruling of *Saucier*.⁷⁹ One court questioned the sequencing rule stating "Whether [the *Saucier*] rule is absolute may be doubted".⁸⁰ Still other courts deliberately disobeyed *Saucier*, and declined to apply mandatory sequencing where the question of qualified immunity could be answered without resolving the

⁷⁵ *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 201.

⁷⁹ See, *Pearson v. Callahan*, 555 U.S. 223, 234-35, 129 S. Ct. 808, 817, 172 L. Ed. 2d 565 (2009) ("Lower court judges, who have had the task of applying the *Saucier* rule on a regular basis for the past eight years, have not been reticent in their criticism of *Saucier*'s "rigid order of battle." See, e.g., *Purtell v. Mason*, 527 F.3d 615, 622 (C.A.7 2008) ("This 'rigid order of battle' has been criticized on practical, procedural, and substantive grounds"); Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U.L.Rev. 1249, 1275, 1277 (2006) (hereinafter Leval) (referring to *Saucier*'s mandatory two-step framework as "a new and mischievous rule" that amounts to "a puzzling misadventure in constitutional dictum"). And application of the rule has not always been enthusiastic. See *Higazy v. Templeton*, 505 F.3d 161, 179, n. 19 (C.A.2 2007) ("We do not reach the issue of whether [plaintiff's] Sixth Amendment rights were violated, because principles of judicial restraint caution us to avoid reaching constitutional questions when they are unnecessary to the disposition of a case"); *Cherrington v. Skeeter*, 344 F.3d 631, 640 (C.A.6 2003) ("[I]t ultimately is unnecessary for us to decide whether the individual Defendants did or did not heed the Fourth Amendment command ... because they are entitled to qualified immunity in any event"); *Pearson v. Ramos*, 237 F.3d 881, 884 (C.A.7 2001) ("Whether [the *Saucier*] rule is absolute may be doubted")

⁸⁰ *Pearson v. Ramos*, 237 F.3d 881, 883-84 (7th Cir. 2001).

constitutional issue. In one such instance the Sixth Circuit justified its avoidance of *Saucier's* sequencing declaring "We do not reach the issue of whether [plaintiff's] Sixth Amendment rights were violated, because principles of judicial restraint caution us to avoid reaching constitutional questions when they are unnecessary to the disposition of the case."⁸¹ Even members of the Supreme Court criticized *Saucier* at the time it was decided and afterward.⁸² In *Morse v. Frederick*, Justice Breyer described *Saucier's* sequencing as a "failed...experiment".⁸³ Again, in *Bunting v. Mellen*, Justice Ginsburg described mandatory sequencing as the, "unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity."⁸⁴ Even in the *Saucier* decision itself Justice Ginsburg in her concurrence stated, "The two-part test today's decision imposes holds large potential to confuse."⁸⁵ It seemed that one of the main concerns over *Saucier's* mandatory sequencing was that it forced courts to decide the constitutional question, a fact sensitive inquiry, at the summary judgment stage, while in many cases courts felt that the constitutional determination was not necessary to the ultimate qualified immunity decision.⁸⁶ What *Saucier* forced upon courts was exactly the type of situation that *Harlow's* removal of the subjective prong from the qualified immunity test looked to avoid. Still, *Saucier's* sequencing was far from unworkable.

⁸¹ See, *Higazy v. Templeton*, 505 F.3d 161, 179 (2d Cir. 2007).

⁸³ *Morse v. Frederick*, 551 U.S. 393, 432, 127 S. Ct. 2618, 2642, 168 L. Ed. 2d 290 (2007).

⁸⁴ *Bunting v. Mellen*, 541 U.S. 1019, 124 S. Ct. 1750, 1751, 158 L. Ed. 2d 636 (2004).

⁸⁵ Notably, as related to the argument of this article, Justice Ginsburg's concurrence in *Saucier* seemed to argue that qualified immunity analysis was unnecessary, and that the inquiry should simply be the Fourth Amendment reasonableness analysis. So, despite her distaste for sequencing, she would still have the constitutional merits resolved. See, *Saucier v. Katz*, 533 U.S. 194, 210, 121 S. Ct. 2151, 2160-61, 150 L. Ed. 2d 272 (2001) (Ginsburg J. concurring).

⁸⁶ See generally, *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 2160-61, 150 L. Ed. 2d 272 (2001).

Scott v. Harris provides a great illustration of the Supreme Court's application of the mandatory sequencing laid out in *Saucier*.⁸⁷ *Scott* also shows that despite the fact bound nature of the constitutional question in qualified immunity analyses the question can still be resolved on motion for summary judgment.⁸⁸ *Scott* was a case that involved a high-speed police chase wherein an officer rammed the fleeing suspect's vehicle with his patrol car leaving the 19-year-old suspect a quadriplegic.⁸⁹ There was a video recording of the chase.⁹⁰ The Eleventh Circuit had determined that the officer's actions were in violation of a clearly established constitutional right, following the mandatory sequencing of *Saucier*.⁹¹ In reviewing the decision below, the Supreme Court noted that it must first "resolve a "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" The Court continued, laying out the second part of the *Saucier* sequence stating, "If, and only if, the court finds a violation of a constitutional right, "the next, sequential step is to ask whether the right was clearly established...in light of the specific context of the case."⁹² Turning to the threshold inquiry, the Court applied the Fourth Amendment's objective reasonableness standards to the facts before them, noting that despite the desire for an "easy-to-apply legal test" there was no way to analyze the constitutional question, but to "slosh through the fact bound morass of "reasonableness."⁹³ Getting to the facts of the case, and relying on the video taped account, the Court looked at a number of factors essentially performing the requisite balancing test.⁹⁴ The Court noted that despite the dangers posed to the fleeing suspect

⁸⁷ *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

⁸⁸ *Id.*

⁸⁹ *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

⁹⁰ *Id.* at 379-80

⁹¹ *Harris v. Coweta Cnty., Ga.*, 433 F.3d 807 (11th Cir. 2005) *rev'd sub nom. Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

⁹² *Scott v. Harris*, 550 U.S. 372, 377, 127 S. Ct. 1769, 1774, 167 L. Ed. 2d 686 (2007).

⁹³ *Id.* at 383.

⁹⁴ *Id.*

by the officer's actions, that danger did not compare to the "certainty of death" presented in a case in which an officer shoots a fleeing felon.⁹⁵ The Court further noted, that the fleeing suspect himself posed a high risk of harm to any pedestrians or bystanders.⁹⁶ Relying on the video of the incident, the Court pointed out that "multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop."⁹⁷ By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent."⁹⁸ On those facts the Court found that no reasonable juror could have found the force used to be unreasonable, and that summary judgment was warranted.⁹⁹ The Court held: "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment even when it places the fleeing motorist at risk of serious injury or death."¹⁰⁰ Because the Court found no constitutional violation, the second question of the mandatory sequence, whether the right was clearly established, was unnecessary.

Despite the Supreme Court's ability to apply the procedure laid out in *Saucier*, lower courts nonetheless persisted in their distaste for mandatory sequencing in qualified immunity cases.¹⁰¹ In fact, despite the binding nature of *Saucier*, some lower courts simply declined to follow its holding.¹⁰² The issues with the mandatory sequencing regime were not only illustrated by lower court defiance, or lower court decisions.¹⁰³ In *Bunting v. Mullen*, a case in which the Supreme Court denied certiorari, the Court highlighted one of the strongest arguments for those

⁹⁵ *Scott v. Harris*, 550 U.S. 372, 384, 127 S. Ct. 1769, 1774, 167 L. Ed. 2d 686 (2007).

⁹⁶ *Id.* at 380.

⁹⁷ *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

⁹⁸ *Id.* at 384.

⁹⁹ *Id.* at 372.

¹⁰⁰ *Id.* at 373.

¹⁰¹ *Pearson v. Callahan*, 555 U.S. 223, 234, 129 S. Ct. 808, 817, 172 L. Ed. 2d 565 (2009).

¹⁰² *Id.*

¹⁰³ *Id.* at 235.

opposed to mandatory sequencing.¹⁰⁴ *Bunting* presented an establishment clause case involving the constitutionality of a supper prayer at a state-run military college.¹⁰⁵ Although the General who required cadets to participate in the prayer was granted qualified immunity, the Fourth Circuit still determined that the prayer requirement did violate the Establishment Clause.¹⁰⁶ Following the Fourth Circuit's decision, despite having prevailed on qualified immunity grounds, General Bunting sought review of the lower court's constitutional determination. The Supreme Court denied certiorari, and in a dissent by Justice Scalia, which was joined by Chief Justice Rehnquist, Scalia discussed the negative implications that the denial illustrated.¹⁰⁷ In his dissent, Scalia pointed out the "procedural tangle" that the decision represented. This procedural tangle essentially meant that defendants who were successful on qualified immunity grounds lost the ability to obtain appellate review of prospective constitutional determinations; regardless of the negative impact they might have on the defendant. In the *Bunting* context this negative impact would be that the school could no longer hold a prayer prior to supper. Despite recognizing the "procedural tangle" described by Scalia, the majority in *Bunting* considered the procedural shortcoming a "byproduct" of *Saucier's* mandated sequencing.¹⁰⁸

Eventually, the Supreme Court had a second chance to address the decision it made in *Saucier*.¹⁰⁹ In *Pearson v. Callahan*, reevaluated *Saucier's* mandatory sequencing regime, noting some common criticisms of the merits first procedure.¹¹⁰ The Court first noted that "[Sequencing] may result in a substantial expenditure of scarce judicial resources on difficult

¹⁰⁴ *Bunting v. Mellen*, 541 U.S. 1019, 124 S. Ct. 1750, 158 L. Ed. 2d 636 (2004) (Scalia, J. dissenting); *See also*, *Pearson v. Callahan*, 555 U.S. 223, 225, 129 S. Ct. 808, 812, 172 L. Ed. 2d 565 (2009) (discussing appellate issue.).

¹⁰⁵ *Bunting v. Mellen*, 541 U.S. 1019, 124 S. Ct. 1750, 158 L. Ed. 2d 636 (2004).

¹⁰⁶ *Mellen v. Bunting*, 327 F.3d 355, 360 (4th Cir. 2003)

¹⁰⁷ *Bunting v. Mellen*, 541 U.S. 1019, 124 S. Ct. 1750, 158 L. Ed. 2d 636 (2004) (Scalia, J. dissenting).

¹⁰⁸ *Bunting v. Mellen*, 541 U.S. 1019, 124 S. Ct. 1750, 1751, 158 L. Ed. 2d 636 (2004).

¹⁰⁹ *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)

¹¹⁰ *Id.*

questions that have no effect on the case's outcome, and waste the parties' resources by forcing them to assume the costs of litigating constitutional questions and endure delays attributable to resolving those questions when the suit otherwise could be disposed of more readily.”¹¹¹ The Court also noted that although *Saucier* was intended to promote elaboration of constitutional law, in many cases where the constitutional question is addressed, courts fail to provide any meaningful addition or elaboration of the law, generally because the cases are highly fact sensitive.¹¹² The Court also noted “the first step may create a risk of bad decision-making, as where the briefing of constitutional questions is woefully inadequate.”¹¹³ The Court further pointed out the issue presented in *Bunting* that application of *Saucier* might make it difficult “for affected parties to obtain appellate review of constitutional decisions having a serious prospective effect on their operations. For example, where a court holds that a defendant has committed a constitutional violation, but then holds that the violation was not clearly established, the defendant, as the winning party, may have his right to appeal the adverse constitutional holding challenged.”¹¹⁴ The Court further pointed that, “because rigid adherence to *Saucier* departs from the general rule of constitutional avoidance, the Court may appropriately decline to mandate the order of decision that the lower courts must follow.” adding, “This flexibility properly reflects the Court's respect for the lower federal courts.”¹¹⁵ While the Court remained generally neutral in its opinion in *Pearson*, conceding that in many cases the *Saucier* sequence may be advantageous, it determined that sequencing should be left to the discretion of individual

¹¹¹ *Id.* at 224.

¹¹² *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

judges.¹¹⁶ Still, while many courts got what they wanted with the discretion and flexibility granted in *Pearson*¹¹⁷, the discretion the Court gave might have been too broad.

VI. An Exception to Discretion: Merits First for Excessive Force

Since *Pearson* was decided in 2009 one of the strongest justifications in support of the Supreme Court's decision to move away from *Saucier*'s mandatory sequencing has become outdated. In the 2011 case of *Camreta v. Greene*, the Supreme Court went against what it had previously stated in *Bunting*, and decided that it could review constitutional determinations that were unfavorable to a defendant who had won his case in a lower court on qualified immunity grounds.¹¹⁸ The decision essentially untangled the "procedural tangle" formerly caused by *Saucier*'s requirements. The untangling in *Camreta* relieved some of the concern expressed in *Pearson* over the application of the two-step *Saucier* procedure in certain cases.¹¹⁹ Nevertheless, despite *Saucier*'s sequencing being advantageous in many cases, and the Court's recent decision in *Camreta* effectively resolving the procedural issue raised in *Bunting*, the discretion granted in *Pearson*, if exercised appropriately, can still be very beneficial.¹²⁰ For example, in a case where the constitutional question posed in the qualified immunity analysis is similar to a constitutional

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Camreta v. Greene*, 131 S. Ct. 2020, 179 L. Ed. 2d 1118 (2011).

¹¹⁹ *Pearson v. Callahan*, 555 U.S. 223, 225, 129 S. Ct. 808, 812, 172 L. Ed. 2d 565 (2009)(discussing inability of successful defendant to seek appellate review of adverse constitutional ruling.).

¹²⁰ *Pearson v. Callahan*, 555 U.S. 223, 238, 129 S. Ct. 808, 819, 172 L. Ed. 2d 565 (2009) ("Similar considerations may come into play when a court of appeals panel confronts a constitutional question that is pending before the court en banc or when a district court encounters a constitutional question that is before the court of appeals.").

question in a case pending before a higher court it makes sense from a judicial economy standpoint to give the lower court the discretion to avoid answering the question.¹²¹

Although *Saucier*'s mandatory sequencing is clearly still beneficial in many instances, a complete reversion to the holding of *Saucier* is not warranted or necessary. What is necessary, however, is a qualification to the broad discretion of *Pearson*, and a recommendation that lower courts apply two-step sequencing in qualified immunity analyses §1983 excessive force cases. Such a qualification would provide that although courts generally have discretion in terms of sequencing the qualified immunity analysis, §1983 claims for excessive force are a specific instance of the type of case where sequencing would be "advantageous" as the Court in *Pearson* acknowledged such cases more generally.¹²² Some Justices who have generally been opposed to *Saucier* sequencing have seemed to imply that excessive force cases are such an instance where sequencing is advantageous. For example, Justice Breyer's concurrence in *Scott*, a case involving a claim of excessive force, seemed to think that addressing the constitutional question in that instance was necessary despite his disagreement with *Saucier* generally.¹²³ This call for a qualification to the discretion granted in *Pearson* is necessary, because of the uniqueness of excessive force claims in comparison to §1983 claims in other contexts. In an excessive force case the §1983 damages claim is generally the only vehicle by which such plaintiffs can have their Fourth Amendment rights vindicated.¹²⁴ Violations of other constitutional rights for which

¹²¹ *Id.*

¹²² *Pearson v. Callahan*, 555 U.S. 223, 238, 129 S. Ct. 808, 819, 172 L. Ed. 2d 565 (2009).

¹²³ *Scott v. Harris*, 550 U.S. 372, 387, 127 S. Ct. 1769, 1780, 167 L. Ed. 2d 686 (2007) ("Instead, lower courts should be free to decide the two questions in whatever order makes sense in the context of a particular case. Although I do not object to our deciding the constitutional question in this particular case...").

¹²⁴ John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 Sup. Ct. Rev. 115, 135-36 (2009) ("The real problem with *Pearson*, however, is not the abandonment of *Saucier* when constitutional tort actions are secondary avenues for vindicating constitutional rights. The trouble is that constitutional tort actions are sometimes primary. Even within the doctrinal ambit of the Fourth Amendment, for example, there are constitutional violations for which exclusion of evidence is irrelevant. They include what is arguably the greatest challenge in all the law of

§1983 claims may also be brought to enjoy the benefit of alternative and more easily attainable remedies for vindicating their rights. In those instances, unlike in the excessive force context, the §1983 claim is secondary. For example, in the Fourth Amendment search context a plaintiff may seek damages under §1983 secondarily to their seeking exclusion of certain evidence in a criminal trial.¹²⁵ Again, in a §1983 Establishment Clause case the plaintiff may be seeking damages as well as some type of injunctive or declaratory relief from for example mandatory prayers as in *Bunting*.¹²⁶ However, in excessive force claims §1983 damages are not an alternative or secondary remedy, but rather the sole method by which such individuals can seek to have such violations of their Fourth Amendment right vindicated. This is due in part to the inherent nature of the violations. In the excessive force context the violating conduct is typically a brief one-time occurrence, while for example in the context of an Establishment Clause case the violation is likely ongoing.¹²⁷ Accordingly, to ensure that plaintiffs in excessive force cases are not perpetually denied the only remedy available to them for violations of their constitutional rights, the law in this area must be allowed to develop. For this to happen the merits in §1983 excessive force cases should be addressed prior to the question qualified immunity question. Allowing otherwise, as the broad discretion of *Pearson* currently permits, leaves open the possibility that courts will avoid the constitutional question in these cases allowing officers to repeatedly use the same types of excessive force, while at the same time denying each §1983 claim brought in relation to that force on qualified immunity grounds, because the law in the area

constitutional remedies--inhibiting the abusive and excessive use of force by law enforcement. Although such wrongs are analyzed under the Fourth Amendment, illegal seizure is not the problem, and exclusion of evidence not a remedy. Under current law, the most (nearly) plausible redress for excessive force is the award of money damages.”)

¹²⁵ *Id.*

¹²⁶ *Bunting v. Mellen*, 541 U.S. 1019, 124 S. Ct. 1750, 158 L. Ed. 2d 636 (2004).

¹²⁷ *Mellen v. Bunting*, 181 F. Supp. 2d 619 (W.D. Va.) *amended*, 202 F. Supp. 2d 511 (W.D. Va. 2002) and *aff'd in part, vacated in part*, 327 F.3d 355 (4th Cir. 2003) (addressing ongoing supper prayers as alleged violation of Establishment Clause.).

never becomes clearly defined.¹²⁸ For example, if an excessive force claim is brought under §1983 for a police officer's use of a taser, and lower courts grant qualified immunity without ever reaching the constitutional question, officers will be able to continually reap the benefit of qualified immunity despite the possibility that using a taser constitutes excessive force in violation of the Fourth Amendment. To avoid these potential injustices, and to avoid turning the unreasonable seizure provision of the Fourth Amendment into a shell of a right, the Supreme Court should specify §1983 excessive force cases as a type of case in which *Saucier* sequencing is "advantageous".¹²⁹ In addition to the suggestion that courts apply *Saucier* sequencing they should also require that when courts decide not to answer the constitutional question in such cases they should place on the record their reasons for doing so. This will help to ensure that constitutional questions that warrant resolution are not avoided lazily in the excessive force context where development of the law is most crucial.

VII. Conclusion

The availability of the qualified immunity defense in the §1983 context is crucial to the proper functioning of law enforcement. Without the defense, police officers' ability to carry out their duties in dangerous and rapidly evolving situations might be severely stunted due to fear of suit and liability. However, the discretion given to courts under *Pearson* in allowing them to approach the qualified immunity analysis in whatever sequence they deem appropriate leaves open the potential for serious instances of injustice, particularly in the §1983 excessive force context. This potential injustice comes when courts avoid the constitutional question as to police use of force, and resort to resolving the analysis by looking solely at the qualified immunity, or

¹²⁸ *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001).

¹²⁹ *Pearson v. Callahan*, 555 U.S. 223, 225, 129 S. Ct. 808, 812, 172 L. Ed. 2d 565 (2009).

clearly established prong of the test. This potential stagnation of constitutional law in the Fourth Amendment excessive force context is particularly troublesome, because unlike the Fourth Amendment search context, where constitutional law has a chance to develop outside of §1983 through exclusionary rule jurisprudence, or the Establishment Clause context where the law can develop through suits for injunctive or declaratory relief without concern for qualified immunity, the only real way for constitutional law to develop in the Fourth Amendment excessive force context is through the §1983 action itself. §1983 excessive force plaintiffs stand on unique ground in comparison to plaintiffs asserting §1983 claims in other contexts. In other §1983 contexts, the §1983 action may be secondary to some other action for exclusion of the evidence in a search case, injunctive relief in a case involving prayers, or declaratory judgment.¹³⁰ Such alternatives are typically unavailable in excessive force cases, and therefore the §1983 claim for damages is the primary vehicle by which such plaintiffs can seek to have the violation of their rights vindicated.¹³¹ Accordingly, with the principles of *Marbury v. Madison* in mind, greater care to protect plaintiffs' rights in these cases should be taken.¹³² To encourage this greater protection the Supreme Court should specify excessive force cases as the type of case falling under the umbrella noted in *Pearson* in which mandatory sequencing is "appropriate" and "beneficial".¹³³ Further, notwithstanding the sometimes fact specific constitutional rulings that result, the Court should strongly recommend that courts apply *Saucier* sequencing in analyzing qualified immunity in §1983 excessive force cases. To that point, the fact specificity of the constitutional determinations in excessive force case seems to pose less and less of an issue for

¹³⁰ *Bunting v. Mellen*, 541 U.S. 1019, 124 S. Ct. 1750, 158 L. Ed. 2d 636 (2004); *See generally*, John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 Sup. Ct. Rev. 115, 135-36 (2009).

¹³¹ John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 Sup. Ct. Rev. 115, 135-36 (2009).

¹³² *Marbury v. Madison*, 5 U.S. 137, 147, 2 L. Ed. 60 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

¹³³ *Pearson v. Callahan*, 555 U.S. 223, 224, 129 S. Ct. 808, 811, 172 L. Ed. 2d 565 (2009).

courts as technology advances. This is clearly evidenced by the qualified immunity analysis in *Scott*. The video in *Scott* seemed to make the fact bound inquiry fairly workable despite the inherent nature of summary judgment. With excessive force cases coming to the forefront of national consciousness, rampant use of cell phone cameras, and an increased use of body cameras by police agencies across the country, it is likely that videos will be more readily available in excessive force cases and courts will be able to rely on those video accounts of address the constitutional issue summarily without resort to unnecessary judicial fact finding. In addition to a strong suggestion that courts apply *Saucier* in the §1983 police excessive force context for the reasons stated herein, the Court also needs to place a power check on lower courts to ensure that they make their best efforts to adhere to this suggestion. Such a check on the discretion granted in *Pearson* might include that when a lower court resolves qualified immunity analysis without addressing the constitutional question in a §1983 excessive force case they must place on the record their reasons for doing so, and the courts justifications should be appealable by the plaintiff. These additional considerations to qualified immunity analysis will allow for constitutional law in the area of police excessive force to develop from case to case, and provide guidance to officials as to what the Constitution requires of them. Even when this development of constitutional law and clarification of rights occurs in cases where officers who are found to have used excessive force are granted qualified immunity anyway, concerns as to the wastefulness or incorrectness of these prospective determinations are significantly reduced post-*Camreta*. These suggested caveats to the generally broad discretion with which courts can address qualified immunity are necessary in the §1983 excessive force context to legitimize the Fourth Amendment's prohibition on police excessive force, and to ensure that violations of peoples' right to be free from unreasonable seizures at the hands of the police can be vindicated.

