Channels: Where Disciplines Meet

Volume 2
Number 1 *Fall 2017*

Article 4

The Right Balance: Qualified Immunity and Section 1983

Jana Minich
Cedarville University, jminich27@gmail.com

The Right Balance: Qualified Immunity and Section 1983

Abstract
This paper explores qualified immunity jurisprudence in the context of Section 1983 lawsuits against police officers. Following an overview of the history behind this jurisprudence, this research looks into the current problems with the application of qualified immunity: lack of guidance for lower courts, a need for constitutional rights articulation, and a divergence from notice-based standard for particularity. This study suggests guiding the trajectory of case law toward solutions with foundations already present in precedent rather than overhauling the system of qualified immunity.

Keywords
Qualified Immunity, Section 1983, Police, Police Officers, Constitutional Rights, Rights Remediation

The Right Balance: Qualified Immunity and Section 1983

Jana Minich
History and Government — Cedarville University

Introduction

Officer Garrison and his K-9 (police dog), accompanied by another officer, were in pursuit of a robbery and assault suspect.[1] Garrison knew that the suspect was African American, bald, and approximately five-foot, ten inches tall. It was late at night, and the K-9 was tracking the scent of the suspect to an apparently abandoned home near a known homeless camp. Christopher Maney, who had been in the homeless camp, mistook the police for violent enemies of some of the camp's inhabitants and fled in fear. As he hid behind bushes in the dim light of the streetlamps, he never heard the officers' warnings that they were using a K-9. As Garrison and his dog closed in on Maney, the K-9 gave signs that he was near the suspect. Garrison shortened the leash on the K-9 and headed for the abandoned house. Suddenly, the dog leapt into the bushes concealing Maney and began biting him on the head. Garrison almost immediately ascertained that the Caucasian, non-bald man under attack was not the African American, bald suspect. However, for seven to ten seconds, the K-9 continued to bite Maney while Garrison refused to call off the dog. Garrison repeatedly commanded the besieged Maney to show his hands, which he was using at the time to struggle against the attacking dog. When it was all over, Maney was severely injured and bleeding profusely. Maney subsequently sued Garrison for allowing the dog to continue to bite him even though it was clear that he was not the suspect the officer sought.

What happens in Mr. Maney's lawsuit may seem straightforward at first. After all, it is essentially a common tort—a lawsuit for wrongdoing or negligence. However, this case is different because it does not encompass only the concerns and interests of the parties involved. This is a lawsuit against a police officer, and that means it has the inherent ability to affect other officers who find themselves in positions similar to Garrison's. Thus, there are really three perspectives in play.

From Maney's point of view, this was a violent aggression that, while admittedly an accident, was prolonged even when the officer knew that he was innocent. The appellate court acknowledged that Maney was "guilty at worst of being in the wrong place at the

[1] Maney v. Garrison, No. 14-7791 (4th Cir. March 9, 2017) (unpublished). All facts of the case found on pages 3-8 of the opinion.

wrong time and failing to reveal himself to the police."[2] And it's plausible that the reason Maney did not reveal himself is that he was worried he would have startled the officer and dog if he did.[3] Even if that were not a realistic fear, it is fair to say that anyone in his situation would be frozen in fear. Maney's innocence and misfortune are uncontested.

From Officer Garrison's point of view, Maney's actions sparked a "tense, uncertain, and rapidly evolving" situation. More specifically, Officer Garrison faced the horrified shock of finding out that a man was hiding in bushes just feet from him for no clear reason.[4] Garrison also instinctively knew that his K-9 was trained to only attack in very specific circumstances: when the K-9 was commanded to, when the K-9 encountered the tracked suspect, or when Garrison or the K-9 were attacked.[5] Thus, he would have good reason to believe that "the two were hiding together or had recently been in close contact."[6] In far less time than it takes to explain these reasons, Officer Garrison had collected and processed all the information necessary to decide that it was safe to call off his K-9. In those few seconds, he was rightfully looking out for the safety of his colleague and himself. As the court acknowledged, "threats to officer safety are not imaginary, and [] police are often asked to intervene at a moment's notice in tense, difficult situations, on the basis of imperfect information and with little time for deliberation."[7] Is it really reasonable to expect officers to act instantly and correctly in the face of life-threatening situations?

A third consideration goes beyond Garrison, Maney, and their unfortunate encounter. How will the outcome of the case affect officers in the future? If Garrison were excoriated for his mistake, would other officers fear that they risked legal action for defending themselves and their fellow officers? On the other hand, would letting Garrison off the hook with no consequences contribute to a sense of exemption from law and encourage a lack of care in policing? These perplexing questions are at the heart of legal analysis in many lawsuits against police officers and have played a shaping role in the jurisprudence of lawsuits against officers.

This paper addresses lawsuits against officers, specifically focusing on a longstanding legal doctrine known as qualified immunity. Qualified immunity protects public officials from civil liability, given that a certain set of conditions are met.[8] Looking at the interplay between lawsuits against officers and qualified immunity reveals a difficult balancing of important values, which is constantly complicated by changing circumstances and unintended consequences. Beginning with the statutory and historical basis for such litigation and discussing the cases that significantly impacted this jurisprudence, we will examine these values and their related jurisprudential doctrines. Along the way, we will discuss the many issues that arose in constructing this jurisprudence, as well as how the Supreme Court has attempted to mitigate these problems. In the end, we will discuss

[2] Ibid., 8.
[3] Ibid., 6.
[4] Ibid., 21.
[5] Ibid., 4.
[6] Ibid., 18.
[7] Ibid., 22.
[8] Based on Black's Law Dictionary 818 (9th ed. 2009).

suggested changes to the system and how they would affect this area of law, for better or for worse. The challenges of this jurisprudence have varied throughout its many landmark changes, and today it faces a need for increased guidance for lower courts, a renewed focus on constitutional rights articulation, and a notice-based standard for particularity.

Legal Background

The legal ability to sue police officers in federal court comes from the 1871 Federal Civil Rights Act, known also as the Ku Klux Klan Act. Specifically, 42 U.S.C. § 1983 (as it is now codified) provides for a private cause of action for those who had been constitutionally wronged by those with actual or perceived legal authority.[9] This was intended to supersede faulty and deficient state laws and provide remedies for constitutional violations, especially in areas where the Ku Klux Klan violated basic rights with no repercussions.[10] Before the 1960s, however, this law did not provide a remedy for those who suffered violations of their constitutional rights due to officers' illegal conduct. Circuit courts interpreted § 1983 as applying only to state-sanctioned discrimination rather than applying to abuses of power in general, which greatly limited its application as a remedy for constitutional violations.[11] To this effect, the Seventh Circuit held, "The 14th Amendment does not empower Congress to... legislate against the wrongs and personal actions of individuals within the State... the Federal Civil Rights Act was never designed nor intended to redress the breach by a trustee of his equitable duties to the trust beneficiaries."[12] Later, the same court stated, "The Civil Rights Acts do not create a cause of action for false imprisonment unless such imprisonment is in pursuance of a systematic policy of discrimination against a class or group of persons."[13] Other cases ruled similarly and went unaddressed by the Supreme Court.[14]

[9] 42 U.S.C. § 1983 reads, in relevant part: "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..." It is also known under the citations "R.S. 1979" and "§ 1 of the Ku Klux Act of April 20, 1871."

[10] *Monroe v. Pape*, 365 US 167, 173-74 (1961).

[11] Stift v. Lynch, 267 F.2d 237 (7th Cir. 1959), citing Eaton v. Bibb, 217 F. 2d 446 (7th Cir. 1954), and Miles v. Armstrong, 207 F. 2d 284 (7th Cir. 1953). Referenced by Joseph v. Rowlen, 402 F.2d 367, 369 (7th Cir. 1968).

[12] Siegel v. Ragen, 180 F.2d 785 (7th Cir. 1950), cert. denied 339 U.S. 990 (1950), 70 S.Ct. 1015, 94 L.Ed. (Cites In re Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835.)

[13] Truitt v. State of Illinois, 278 F.2d 819, 820 (7th Cir. 1960), cert. denied, 364 U.S. 866, 81 S.Ct. 109, 5 L. Ed. 2d 88 (1960).

[14] Atterbury v. Ragen, 237 F. 2d 953, 956 (7th Cir. 1956),), certiorari denied 353 U.S. 964, 77 S.Ct. 1049, 1 L.Ed.2d 914: "In either case, it is clear that the alleged tortious conduct of defendants was and is contrary to the laws of Illinois. In our view, such charges of aggression by state prison officials and guards, in spite of the general assertion that they were acting under color of state law, do not state a claim upon which relief can be granted under the federal Civil Rights Act." Citing Ortega v. Ragen, 7 Cir., 216 F.2d 561, cert. denied 349 U.S. 940, 75 S.Ct. 786, 99 L.Ed. 1268; and Jennings v. Nester, 7 Cir., 217 F.2d 153, certiorari denied 349 U.S. 958, 75 S.Ct. 888, 99 L.Ed. 1281.

Monroe Era

However, in the 1961 case *Monroe v. Pape*, the Court reversed directions and concluded that a proper interpretation of acting "under color of" law included abuse of power.[15] They derived this interpretation in part from the comments in *Ex parte Virgini*a concerning the Act of March 3, 1879 (20 Stat. 354) and in part from the *United States v. Classic* interpretation of "under color of any law" in 18 U.S.C. § 242 (then 18 U.S.C. § 52), which was later upheld in *Screws v. United States*.[16] Together, these rulings led the Court to hold that § 1983 applied to any misuse of state power, regardless of whether or not it is state-sanctioned. The Court also noted that, unlike the criminal code in *Screws*, § 1983 should be "read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[17] This made § 1983 a much more powerful tool for enforcing constitutional rights and keeping government officials accountable. However, such an interpretation of the statute would lead to many difficult questions concerning how to apply § 1983, which the Court turned to next.

Following *Monroe*, the Court refined common-law immunities in § 1983 litigation. In the 1967 case *Pierson v. Ray*, the Court established, based on congressional intent, analogous precedent, and tort law principles, that common-law defenses available to officers before the institution of § 1983 (such as good faith and probable cause) remained as a "limited privilege" for officers in § 1983 lawsuits.[18] These immunities are important for protecting officers from legal "intimidation" while they exercise the discretion necessary to complete their work.[19] The Court wrote, "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[20] The Court reiterated this view of "good faith, reasonable grounds"[21] immunity in *Scheuer v. Rhodes* (1974), where it stated, "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."[22] *Scheuer* also noted the "injustice, particularly in the absence of bad faith" of holding an official liable for a discretionary decision that his position required him to make, as well as the troubling

[15] Monroe v. Pape.
[16] Ex parte Virginia, 100 U.S. 339, 347 (1880) ("Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."); United States v. Classic, 313 US 299, 326 (1941) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law."); Screws v. United States, 325 US 91, 112-113 (1945).
[17] Monroe at 187.
[18] Pierson v. Ray, 386 US 547, 554-55 (1967); citing Tenney v. Brandhove, 341 U. S. 367 (1951) (immunity for legislators) and Ward v. Fidelity & Deposit Co. of Maryland, 179 F. 2d 327 (C. A. 8th Cir. 1950) (good faith and probable cause immunity for arresting innocents).
[19] Pierson v. Ray at 386.
[20] Ibid., 554-555.
[21] Butz v. Economou, 438 US 478, 485 (1978) (Description of Scheuer and Wood).
[22] Scheuer v. Rhodes, 416 US 232, 247-48 (1974).

prospect of causing officials to shy away from their duties because of the threat of liability.[23]

Qualified immunity became the leading question of § 1983 litigation against police officers. However, these two work against one another, as § 1983 remediates constitutionally wronged citizens, and qualified immunity protects officers from these lawsuits. Accordingly, Court's opinion in *Scheuer* emphasized the importance of balance—maintaining both the remedial intent of § 1983 and "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[24] The case *Butz v. Economou* later addressed this balance, noting that, despite the need to protect officials, "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment."[25]

With qualified immunity so well-grounded in case law, along with policy and practical justifications for it, *Wood v. Strickland* established a test for applying qualified immunity, articulating two prongs: objective analysis of law and subjective analysis of good faith.[26] Under the objective test, the court looked at whether the officer "knew or reasonably should have known" that his actions would violate a constitutional right.[27] In other words, it looked at the status of the law. Under the subjective test, the court looked at whether or not the officer acted with "malicious intention to cause a deprivation of constitutional rights or other injury."[28] In other words, it looked at the officer's motivations. Under this test, qualified immunity is denied if the official displayed "such disregard of... clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."[29] In 1978, *Procunier v. Navarette* reinforced these terms and concepts, reiterating that a "clearly established" right is one which we would expect the official in question to know.[30] This test carried the clear benefit of looking at the holistic picture of the officer's action and targeting the types of malice that created the need for § 1983 remedies in the first place. However, later courts found that the subjective prong of the test could call for virtually infinite amounts of evidence as the courts searched for indications of motives and desires.[31] Such an extensive evidence-collecting process conflicted directly with the purpose of qualified immunity recognized in *Butz v. Economou* and *Scheuer*, that of finding quick resolution to frivolous cases and affecting minimal intrusion into an officer's

[23] Ibid., 240.
[24] Ibid., 504-506. Also addressed in Davis v. Scherer, 468 US 183, 195 (1984): "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties. The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated."
[25] *Butz v. Economou* at 506-507.
[26] Wood v. Strickland, 420 US 308, 321 (1975).
[27] Ibid., 322.
[28] Ibid., 322.
[29] Ibid., 322.
[30] Procunier v. Navarette, 434 US 555, 562 (1978).
[31] Harlow v. Fitzgerald, 457 US 800, 814-817 (1982).

life and work.[32] As the Court later stated, "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit."[33]

Harlow Era

Recognizing this issue, the Court in *Harlow v. Fitzgerald* eliminated the subjective prong of qualified immunity analysis to create an objective-analysis qualified immunity test: "clearly established statutory or constitutional rights of which a reasonable person would have known."[34] This put the focus directly on the law and its clarity rather than an officer's motives, streamlining the process. In order to analyze the case under this test, the Court wrote, "the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred."[35] From this case, qualified immunity jurisprudence drew a new dual-pronged test: 1) an actual rights violation under the facts alleged, and 2) that the right was clearly established at the time of the violation. This test, though changed in its application, continues to form the basic qualified immunity test to the present day.

Later in the 1960s, two cases served to broaden the application of qualified immunity in § 1983 lawsuits. In the case *Malley v. Briggs*, the Court wrote, "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law" (emphasis added).[36] Without changing the *Harlow* test, this view nonetheless construed qualified immunity as a broad shield for officers.[37] The next year, in *Anderson v. Creighton*, the Court established that, in order to overcome qualified immunity, the constitutional right in question must be clearly established "in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[38] This is because denying qualified immunity on the grounds that the right is established very broadly (such as a general reference to the Fourth Amendment) would essentially destroy qualified immunity altogether— officers would have no legal notice on which to base decisions about a particular action.[39] The Court noted that, of course, this standard would not require that "the very action in question" has already been ruled unconstitutional, but that "in the light of pre-existing law the unlawfulness must be apparent."[40] Though this standard emphasizes fair notice for officers ("apparent" unlawfulness) and not matching fact patterns ("the very action"), this standard has come to

[32] Butz v. Economou at 507-508; Scheuer v. Rhodes at 245-248.
[33] *Siegert v. Gilley*, 500 US 226, 232 (1991).
[34] Harlow v. Fitzgerald at 818.
[35] Ibid.
[36] Malley v. Briggs, 475 U.S. 335, 341 (1986).
[37] It is arguable that this quotation in Malley was intended to be descriptive of qualified immunity jurisprudence rather than an active expansion. (See Kinports, Kit. "The Supreme Court's Quiet Expansion of Qualified Immunity." Minn. L. Rev. Headnotes 100, no. 62 (2016) at 66.) Nevertheless, this statement was later used by the Court to support expansion of qualified immunity.
[38] Anderson v. Creighton, 483 US 635, 640 (1987).
[39] Ibid., 639.
[40] Ibid., 640.

require plaintiffs to review case law and prove that courts have already recognized the right allegedly violated in a specific enough way to uphold the § 1983 lawsuit. As the Court rephrased this standard later, particularity requires that "various courts have agreed that certain conduct is a constitutional violation *under facts not distinguishable in a fair way* from the facts presented in the case at hand"[41] [emphasis mine].

Saucier Era

In the 1990s, the Supreme Court hinted that the two prongs drawn from Harlow (actual violation and clearly established) ought to be addressed in order. In the case *Siegert v. Gilley*, the Court referred to the first *Harlow* prong as the "first inquiry" and stated that, "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all."[42] However, the Court was not unanimous on this point. Kennedy wrote in his concurrence, "If it is plain that a plaintiff's required [] allegations are insufficient but there is some doubt as to the constitutional right asserted, it seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first."[43]

In the 2001 case *Saucier v. Katz*, the Court made the ordering of the *Harlow* prongs mandatory, establishing what is commonly referred to as "*Saucier* Sequencing."[44] The Court stated that qualified immunity analysis must start with the 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?"[45] Not only is this the logical "threshold question" for allowing the case to proceed, it also "permits courts in appropriate cases to elaborate the constitutional right with greater degrees of specificity."[46] In other words, heeding *Saucier* Sequencing allows courts to contribute to the development of constitutional law in a way that they could not if they routinely skipped straight to the second prong of clear establishment. However, this ruling led to intense debate on several issues, including both principles and practical concerns.

Saucier arguably trespasses on the jurisprudential norms concerning dicta and constitutional avoidance. Some argue that reaching the merits question at all in light of a finding of immunity promotes an authoritative view of dicta (verbiage in a court's opinion that does not affect the outcome of that particular case). While dicta is not inherently harmful, treating it as binding precedent may be considered essentially legislative rather than judicial in nature.[47] However, under *Saucier* Sequencing, courts are required to make judgments about constitutional law issues that have no effect on the outcome of the case

[41] Saucier v. Katz at 202.
[42] *Siegert v. Gilley* at 231-232.
[43] Ibid., 235.
[44] Saucier v. Katz.
[45] Ibid., 201.
[46] Ibid., 201, 207.
[47] Pierre N. Leval, "Judging Under the Constitution: Dicta about Dicta," *New York University* 81, no. 4 (2006): 1249-1282.

because the immunity prevents any liability. And since the purpose of creating this dicta is to clearly establish the law, it is assumed that future courts will treat this dicta as authoritative. Thus, this ruling would seem to violate an important and established judicial norm. On a similar vein, *Saucier* prompted objections over the principle of constitutional avoidance.[48] It is generally established that courts should not rule on constitutional questions if there is another basis on which the decision could be based.[49] Breyer's concurrence (joined by Scalia and Ginsburg) in *Brosseau v. Haugen* expressed the concern that *Saucier* Sequencing, "rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (e. g., qualified immunity) that will satisfactorily resolve the case before the court."[50] Similarly, the dissent in *Morse v. Frederick* argued that the Court should have decided the case on "clearly established" grounds, which were rather straightforward, rather than issuing an "unwise and unnecessary" constitutional holding in keeping with Saucier Sequencing.[51] This understanding would mean that in any case in which immunity is awarded, the court should avoid addressing constitutional issues. However, if this argument is correct, it leaves the question as to how any court could clearly establish the law in light of qualified immunity. This view would leave constitutional rights unarticulated and thereby unprotected by the courts. Thus, others argued that statements on the merits in cases with granted immunity are a proper use of dicta to establish the law and do not resemble the type of judicial overreach that standards concerning dicta and advisory opinion are designed to curtail.[52]

More practical concerns questioned how *Saucier* would affect the quality of precedents. If courts are required to address a constitutional question, they will inevitably address constitutional questions that are fact-bound, already pending in a higher court, or intermingled with state law issues.[53] This concern goes hand-in-hand with the problem of potentially poorly-considered precedents created in situations when the merits decision has no real effect on the outcome of the case and is therefore not thoroughly examined by the judge.[54] And on a deeper level, these issues would likely be exacerbated by insulation from appellate review. That is, if a court found that an officer had violated the constitution and yet awarded immunity, the plaintiff would have no interest in appealing the merits ruling, and the officer—as the prevailing party—would be unable to appeal. This also

---

[48] Ibid.

[49] "Constitutional Avoidance," Wex Legal Dictionary, *Cornell University Law School Legal Information Institute*. https://www.law.cornell.edu/wex/constitutional_avoidance. See also *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 US 439,445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.") (*Citing Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P. C.*, 467 U. S. 138, 157-158 (1984); *Jean v. Nelson*, 472 U. S. 846, 854 (1985); *Gulf Oil Co. v. Bernard*, 452 U. S. 89, 99 (1981); and *Ashwander v. TVA*, 297 U. S. 288, 346-348 (1936) (Brandeis, J., concurring).)

[50] Brosseau v. Haugen, 543 U.S. 194, 201-202 (2004), (Breyer, concurring).

[51] Morse v. Frederick, 127 S. Ct. 2618, 2638 (2007) (Breyer, concurring in the judgment in part and dissenting in part).

[52] Jack M. Beermann, "Qualified Immunity and Constitutional Avoidance," *The Supreme Court Review* 2009, no. 1 (2009): 139-79.

[53] *Pearson v. Callahan*, 129 S. Ct. 808, 818-821 (2009)

[54] Ibid.

means that, if the officer repeated the act, he would face liability for an act that was declared unconstitutional in an unappealable decision.[55] Furthermore, the mere fact of requiring briefing on complex constitutional issues threatens to undo the point of qualified immunity, which is to provide a quick dismissal for unsubstantial claims.[56]

Because of these complaints, *Saucier* was unpopular in the lower courts, which sometimes ignored it.[57] Even at the Supreme Court, Justices turned against *Saucier*. Justice Breyer wrote in *Morse v. Frederick*, "I would end the failed *Saucier* experiment now," and Justice Alito's opinion for the Court in *Pearson* detailed many of the complaints about *Saucier*.[58] With just shy of eight years' reign and a growing mountain of objections, mandatory *Saucier* Sequencing was struck down by *Pearson v. Callahan*.[59]

Pearson Era

Analyzing the considerations involved in *stare decisis* and court-made rules, as well as the complaints against *Saucier*, the *Pearson* Court concluded that "experience supports our present determination that a mandatory, two-step rule for resolving all qualified immunity claims should not be retained" and announced that *Saucier* Sequencing "should no longer be regarded as mandatory."[60] However, *Pearson* did not end the question of *Saucier* Sequencing by making it optional. The Court's opinion stated that *Saucier* Sequencing is "often appropriate" and "often beneficial."[61] The Court called on lower courts to use, "their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[62] Consequently, this ruling failed to address many concerns about *Saucier* jurisprudence, leaving lower courts with a gargantuan field of discretion and parties with substantial legal uncertainty. This is far from the ideal, which would be a straightforward legal system in which no more than one plaintiff goes without remediation for a given rights violation for the sake of establishing the law and providing officers "fair notice."[63] Instead, "[s]ubstantial uncertainty and unpredictability have become the norm in qualified immunity cases because of the inherent manipulability of the test."[64] This uncertainty can waste time with unwanted briefs on the merits, or it can lead to litigant strategizing, such as neglecting to address a merits in order to convince a court to avoid the question altogether (although

[55] Aaron Belzer, "The Audacity of Ignoring *Hope*: How the Existing Qualified Immunity Analysis Leads to Unremedied Rights," *Denver University Law Review* 90, no. 3 (2013): 647-689.
[56] *Pearson v. Callahan* at 818-821.
[57] Ryan E. Meltzer, "Qualified Immunity and Constitutional-Norm Generation in the Post-Saucier Era: 'Clearly Establishing' the Law Through Civilian Oversight of Police," *Texas Law Review* 92, no. 5 (2014): 1277-1315.
[58] Morse v. Frederick at 2642 (Breyer, concurring in the judgment in part and dissenting in part); Pearson v. Callahan at 818-821.
[59] Pearson v. Callahan.
[60] Ibid., 817-18.
[61] Ibid., 818.
[62] Ibid., 818.
[63] Belzer; Hope v. Pelzer, 536 US 730 (2002).
[64] "Federal Courts. Qualified Immunity. Sixth Circuit Denies Qualified Immunity to Police Officer for Arrest for Speech at Public Meeting. Leonard v. Robinson, No. 05-1728, 2007 WL 283832 (6th Cir. Feb. 2, 2007)." Harvard Law Review 120, no. 8 (2007): 2238-245.

Justice Scalia strongly opposes this method of "snookering"[65]).[66] Judges also may be tempted by the potential for strategic rulings that comes with so much discretion.[67] Because the *Pearson* decision increases judges' ability to influence the possibility of appeal and the likelihood of appeals courts reaching the merits, they are motivated to act in their best policy interests rather than as neutral arbiters.

Pearson also left open the question of constitutional development. Although the Court noted in both *Saucier* and *Pearson* that much of the legal system's articulation of rights relies on constitutional rulings in § 1983 claims, the absence of clear guidance leaves little incentive for courts to address difficult constitutional questions, as well as broad discretion to skip over the merits without necessarily explaining why. And the lower courts do just that, leading the justice system definitively away from constitutional rights development.[68] Practically speaking, this means that every time a court declines to reach the merits of a § 1983 constitutional claim because it grants immunity, the law remains not "clearly established." Thus, the next case, even if virtually identical, will have the same result: immunity and no constitutional ruling. If the law is never clearly established because the merits are always passed over, rights become constricted as they remain undetermined by the courts.[69] This is a devastating blow to constitutional rights as a whole. Indeed, "[a]t a time in which it is vital for constitutional law to keep pace with changes in technology, social norms, and political practices, this trend toward granting immunity while failing to articulate constitutional rights will surely have far-reaching negative repercussions."[70]

The Current Era

The latest landmark cases for qualified immunity include *Camreta v. Greene*, which weighed in on appellate insulation, rights articulation, and standards for reaching the merits. This case opened up the possibility for prevailing party review—accepting appeals from officers who won immunity but lost merits rulings. The Court wrote, "We conclude that this Court generally may review a lower court's constitutional ruling at the behest of a government official granted immunity."[71] They limited this doctrine, though, by requiring that all parties involved still have prospective interest, or a "'personal stake' in the suit."[72] Not only does this weed out cases without a prospective effect on the parties involved, it also ensures that

---

[65] City and County of San Francisco v. Sheehan, 135 S.Ct. 1765 (2015).
[66] Beermann, 143 ff.
[67] Michael T. Kirkpatrick and Joshua Matz, "Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from Saucier to Camreta (and Beyond)," *Fordham Law Review* 80, no. 2 (2011): 643-679.
[68] Stephen R. Reinhardt, "The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences," Mich. L. Rev. 113 (2014): 1219-1254, at 1244 - 1249. (Citing Karen Blum et al., Qualified Immunity Developments: Not Much Hope Left for Plaintiffs, 29 Touro L. Rev. 633, 657 (2013) at 647.)
[69] Belzer at 654.
[70] Reinhardt at 1250.
[71] *Camreta v. Greene*, 131 S. Ct. 2020, 2026 (2011).
[72] *Camreta v. Greene* at 2028 (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, ___, 129 S.Ct. 1142, 1148-1149, 173 L.Ed.2d 1 (2009)).

the case retains its adversarial nature, "which sharpens the presentation of issues."[73] Based on this doctrine, the court found that the officer involved in the case had standing to appeal because he "regularly engages in that conduct as part of his job" that was ruled unconstitutional by the lower court and therefore "suffers injury caused by the adverse constitutional ruling."[74] Thus, "So long as it continues in effect, he must either change the way he performs his duties or risk a meritorious damages action."[75] Although the majority developed this doctrine, they declined to use it in this case because the plaintiff, a child at the time of the alleged offense, was about to turn eighteen and had moved away to another state.[76] Therefore, the Court declared the case moot and voided the constitutional rulings from below. This demonstrates a main limitation on prevailing party review—all parties involved must remain in a position of potential harm. This construction of prevailing party review keeps appeals from slipping out of the context of legal adversity and into the realm of legal hypotheticals. However, this restriction could limit its application to areas such as excessive force cases (where officers would have a difficult time explaining why they expected to be in a similar situation again) or cases involving children (who may reach the age of eighteen before the case reaches the Supreme Court).[77] Nevertheless, this ruling addresses the concern of appellate insulation, even if imperfectly.

On the issue of rights articulation, the majority considered the fact that leaving constitutional questions without answers because of qualified immunity can result in unarticulated rights. Taking immunity as a reason to avoid the merits "for another day" faces the problem that such a "day may never come—that our regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo."[78] Along these lines, the Court made clear that it does not consider constitutional rulings in cases where immunity is awarded to be unimportant for future cases. The majority wrote that, "The constitutional determinations that prevailing parties ask us to consider in these cases are not mere dicta or 'statements in opinions.'"[79] In other words, even though the constitutional rulings do not affect the outcome of the case, they should nonetheless be considered authoritative for the purpose of clearly establishing the law. In the eyes of those who emphasize the need to develop constitutional law through merits decisions, this case "brought badly needed clarity to the dicta/precedent boundary, tipping merits decisions issued alongside a finding of qualified immunity decisively toward the realm of 'precedent.'"[80] However, not all the justices agreed on this point. Justice Kennedy wrote in his dissent (joined by Justice

[73] Ibid., 2028 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)).
[74] Ibid., 2029.
[75] Ibid., 2029.
[76] Ibid., 2033-2034.
[77] Kirkpatrick at 662 (application to excessive force).
[78] *Camreta v. Greene* at 2031 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 841, n. 5, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)).
[79] *Camreta v. Greene* at 2030 (quoting *California v. Rooney*, 483 U.S. 307, 311, 107 S.Ct. 2852, 97 L.Ed.2d 258 (1987) (per curiam)).
[80] Kirkpatrick at 669.

Thomas), "Dictum, though not precedent, may have its utility; but it ought not to be treated as a judgment standing on its own."[81]

The Court also took a step toward further defining the standards for reaching the merits. Referencing *Pearson*, they wrote that they had recently established, "a range of circumstances in which courts *should address only the immunity question*" [emphasis added]. Michael Kirkpatrick and Joshua Matz argue that reading this statement in light of *Pearson* signals a standard that lower courts are not permitted to reach the merits in 1) fact-bound cases, 2) issues pending in a higher court, 3) questions muddled with state law, and 4) unclear claims.[82] If this interpretation is correct, this case is definitely an improvement in providing clear standards for lower courts. However, not every justice agreed with the majority opinion on this matter. Justice Kennedy's dissent declares that the majority's decision "results from what is emerging as a rather troubling consequence from the reasoning of our recent qualified immunity cases…the correct solution is not to override jurisdictional rules that are basic to the functioning of the Court and to the necessity of avoiding advisory opinions…So, while acknowledging the problem the Court confronts, my concern with the rule adopted for this case calls for this respectful dissent."[83] Similarly, although Justice Scalia concurred with the Court's decision, he suggested turning *Saucier* on its head by stopping "the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity."[84] These separate opinions illustrate qualified immunity's ever-present tension between rights articulation and restraint based on common judicial rules. And given the varied views expressed by the justices, the Court clearly has not settled on a comfortable compromise. Scalia's suggestion and Kennedy's dissent are concerning to those who see merits rulings as valuable enough to override traditional constitutional avoidance, fearing the "worrisome possibility that several Justices are losing faith in the basic framework of qualified immunity doctrine."[85]

Occurring in tandem with *Camreta*, the case *Ashcroft v. al-Kidd* spoke to the Court's standard for particularity. Here, the Court held that qualified immunity requires that "existing precedent must have placed the statutory or constitutional question beyond debate" in order to hold officers liable.[86] Scalia wrote for the Court, "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.' *Anderson v. Creighton*."[87] By breaking up the sentence in this quotation from *Anderson* and replacing what used to be the word "a"

[81] *Camreta v. Greene* at 2037 (Kennedy, dissenting).
[82] Kirkpatrick at 677.
[83] *Camreta v. Greene* at 2037 (Kennedy, dissenting).
[84] *Camreta v. Greene* at 2036 (Scalia, concurring) (citing *Saucier v. Katz*).
[85] Kirkpatrick at 669.
[86] Ashcroft v. al-Kidd, 563 U.S. 731, 131 S. Ct. 2074, at 2083 (2011).
[87] Ashcroft v. al-Kidd at 2083.

with the word "every," the Court expanded the standard for qualified immunity subtly but substantially.[88] Following cases reinforced this revision by quoting the alteration.[89]

Through recent years, this expanded view of qualified immunity protection has guided Supreme Court cases. In *City and County of San Francisco v. Sheehan* (2015), police shot and killed a dangerous mentally-ill woman. In concluding that the officers were entitled to qualified immunity, the Court skirted both the legal questions pertaining to the Americans with Disabilities Act and the question of whether or not the officers' actions violated the Fourth Amendment, stating, "...so long as 'a reasonable officer could have believed that his conduct was justified,' a plaintiff cannot 'avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.'"[90] In *Mullenix v. Luna* (2015), the Court ruled in favor of qualified immunity for an officer who shot and killed a man instead of following orders to use a spike strip to stop his vehicle. Addressing only the question of qualified immunity and not the merits of the constitutional claim, the Court chastised lower courts for relying on "established law at a high level of generality"[91] and instead upheld an analysis "in light of the specific context of the case, not as a broad general proposition."[92] This Court opinion also did not mention the § 1983 interest of upholding constitutional rights or remediating their violation.[93] In the case *White v. Pauley* (2017), the Court granted qualified immunity because plaintiffs had "failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment."[94] Yet, courts have used materials other than case law to determine that right was clearly established, leaving the questions of why a court should seek analogous precedent at all if there is a convincing reason that the officer was awarded fair notice that his actions would be illegal.[95] Nevertheless, decisions such as these as well as the "increasingly generous terms" applied to qualified immunity show a trend toward a broad view of qualified immunity protections.[96]

---

[88] Kit Kinports, "The Supreme Court's Quiet Expansion of Qualified Immunity," *Minn. L. Rev. Headnotes* 100, no. 62 (2016) at 65 ff.

[89] See *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015); and *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015).

[90] *City and County of San Francisco v. Sheehan* at 1777 (2015) (quoting *Billington v. Smith*, 292 F.3d 1177 (C.A.9 2002)).

[91] *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

[92] *Mullenix v. Luna* at 308 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198, (2004), which in turn was quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

[93] Kinports at 68.

[94] *White v. Pauley*, 580 U.S. __ (2017). (Slip opinion at page 6).

[95] Meltzer at 1295ff.

[96] Kinports at 64. ("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. This pattern began in 2011 with *Ashcroft v. al-Kidd* and continued with last Term's decisions in *City and County of San Francisco v. Sheehan* and *Heien v. North Carolina*.").

Current Questions in Qualified Immunity

As these recent cases make clear, the Court is still wrestling with the processes and consequences behind qualified immunity jurisprudence. The main concerns in the era of *Camreta* and *Ashcroft* are 1) remaining appellate insulation, 2) rights articulation and constitutional avoidance, 3) standards for reaching the merits and 4) particularity. The trends in these areas are mixed—by opening a door to appellate review for prevailing parties, *Camreta* dealt with a large portion of the appellate insulation problem. It also emphasized the importance of rights articulation and its position on the precedent/dicta boundary, clearing the way for courts to establish rights even when granting immunity. Furthermore, it arguably took a step toward increased guidance for lower courts on when to reach the merits and when to address only immunity. However, the Court's positions in *Camreta* are neither unanimous nor irrevocable. It is possible that the Court will shift positions again, trading the current concerns about flouting constitutional avoidance norms for the opposite concern of stagnating constitutional rights articulation.

While *Camreta* works in favor of plaintiffs by increasing rights articulation, *Ashcroft* works against plaintiffs by making lawsuits much more difficult to win. As *Sheehan*, *Mullenix*, and *White* demonstrate, the current construction of particularity makes establishing liability extraordinarily difficult. In other words, under *Ashcroft*, qualified immunity protection has expanded as § 1983 remedy for right violations has contracted. Although this expansion presents itself as most disconcerting in cases that involve alarming fact patterns, the real question is how qualified immunity ought to apply broadly—whether an increased application of qualified immunity continues to uphold the balance between protection of officers and the § 1983 remedy. This question is distinctly important because qualified immunity is a "judge-made rule"[97] and does not carry the legal weight of a Congressionally-passed federal law. Yet, it works against § 1983 as a limiting factor, justified mainly by the fact that § 1983 did not explicitly repeal common-law immunities that might limit it.[98] As qualified immunity expands, it encroaches more and more on the effective use of § 1983, making this judicially-created norm a powerful force to stymie § 1983 actions.[99] Even absent practical concerns or disturbing facts, this encroachment on the separation of powers should be closely watched. Contrary to the particularity standards once supported in *Hope v. Peltzer* that focused on fair notice for officers and rejected the idea that cases had to be factually similar in order to apply, it is clear from the cases following *Ashcroft* that particularity standards have shifted toward a focus on factual similarity. [100] This tips the scales away from remedy for violations and puts plaintiffs in a bind if they are unable to match their factual circumstances with precedents, even when a right has clearly been violated.[101]

---

[97] *Pearson v. Callahan* at 816.
[98] *Pierson v. Ray* at 554-555.
[99] See Kinports at 78.
[100] *Hope v. Pelzer* at 741 (quoting *United States v. Lanier*, 73 F. 3d 1380, 1393 (CA6 1996)) ("officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in Lanier, we expressly rejected a requirement that previous cases be 'fundamentally similar.'").
[101] Aaron Belzer illustrates this using the case *Kerns v. Bader*. See Belzer, *supra*, note 55; *Hope v. Pelzer*.

The Legal Argument in *Maney v. Garrison*

Naturally, these current concerns come into play in lower courts—the only courts that most litigants will ever see. Returning to the case discussed at the beginning illustrates how courts apply qualified immunity precedent—for better or for worse. The court here identified the legal question as: "[W]hether a police canine handler, whose dog suddenly and mistakenly bites a concealed bystander while tracking the scent of a robbery suspect, clearly violates the Fourth Amendment if he momentarily extends the seizure to assess the potential threat to officer safety."[102] Stating also that the case and legal questions were too fact-bound to be of good use for precedent, they skipped the first *Harlow* prong (actual violation) and analyzed only the second (clearly established).[103] In its analysis, it relied mainly on *Pearson*, *Harlow*, and *al-Kidd*. The court did mention the need to balance officer accountability and protection from frivolous suits.[104] However, the court leaned much more heavily on *al-Kidd*, citing the "beyond debate" idea no less than five times.[105] The opinion also cites the "every reasonable officer" idea multiple times as though it is the implicitly obvious legal standard, but it never cites it as coming from *al-Kidd*.[106] The court also pulled in language from *Malley* through *al-Kidd*, stating, "Like the district court, I cannot say Appellee acted perfectly under the circumstances. But by the same token I cannot say his actions rose to the level of plain incompetence or knowing violations of the law."[107] Further, adopting the particularity standard of *al-Kidd* and *Mullinex*, the court sets forth the familiar high bar for particularity.[108]

Tying this framework in with the facts of the case and the pertinent cases, the court found that none of the cases cited by the Appellant (Maney) were close enough to the facts at hand to render the legal question "clearly established." The factually closest case, *Kopf v. Wing*, was not considered close enough to Maney's case because it, "only found that a jury may conclude that forcing a person to show his hands prior to calling off the police K-9 is

---

[102] *Maney v. Garrison* at 3.
[103] Ibid., 9.
[104] Ibid., 9.
[105] Ibid., 10 ("beyond debate"), 13 ("beyond debate"), 15 ("beyond constitutional debate"), 19 ("beyond debate"), 21 ("beyond question").
[106] Ibid., 15 (referencing appellant's argument), 17 ("The question, then, is whether every reasonable officer would have known the second and third bites were clearly unreasonable"), 21 ("Under those circumstances, we cannot say that every reasonable officer would have known his conduct was, beyond question, a violation of the Fourth Amendment"), 23 ("common sense tells me that things may not be as clear to every cop on the beat as the dissent would suggest"), and footnote 7 ("The timing of the events in question is, however, relevant to the question we do answer: whether every reasonable officer in Appellee's shoes would have known his conduct violated the Fourth Amendment").
[107] Ibid., 25.
[108] Ibid., 9-10. ("We therefore proceed to the second question, keeping in mind that "a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014). In other words, while a case directly on point is not required, "existing precedent must have placed the . . . constitutional question beyond debate." al-Kidd, 563 U.S. at 741. "The dispositive question is whether the violative nature of particular conduct is clearly established." Mullinex v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam) (emphasis in original) (internal quotation marks omitted)."

excessive force, but did not state definitively that such conduct did in fact amount to a constitutional violation" (internal citation and quotation marks removed).[109] Thus, based on the broad view of qualified immunity protection embodied in more recent cases, the Fourth Circuit upheld the District Court's award of qualified immunity for Garrison. This is despite the fact that, in the judge's words, "I would not hold, must less suggest, that Appellee's deployment of [his police dog] complied with the Fourth Amendment."[110]

For those concerned with constitutional rights articulation, this raises important questions. If the Fourth Circuit was able to articulate a discrete legal question about Garrison's actions, why did they not take the chance to answer it? Even in this case, they posit that no analogous precedent exists for the undeserved harm done to Maney. This alone, then, should be reason enough to offer legal guidance for similar future situations. Otherwise, this area of law remains just as obscure as the court argues it was when the alleged violation took place. Furthermore, what should courts focus on when determining whether or not the right in question has been particularly established? As expressly stated in *Hope* (and arguably implied in *Anderson*), the crux would be fair notice for officers.[111] However, for the court in *Maney*, the main focus is the *al-Kidd* approach: whether or not they can find case law that applies so particularly that it cannot be distinguished from the case at hand in any meaningful way.

Improving the System: Accountability, Rights Articulation, and Standards

With both its advantages and pitfalls, qualified immunity jurisprudence could be improved in the areas of accountability, rights articulation, and standards for both reaching the merits and discerning the correct application of particularity. The changes sought in these areas should adhere to the role of the judiciary, meaning that they do not rest on individual desired outcomes but on consistency and fairness. While judges may not relish the idea of imposing liability on officers who made poor split-second decisions, § 1983 jurisprudence ought to be based on a fair balance of interest that remediates and establishes law in an even-handed and predictable way. Judges also need not allow their jurisprudence to be clouded by considering too heavily the costs of liability, since "Police officers are virtually always indemnified."[112] This means that mercy on a particular officer in a § 1983 case is really only a break for the municipality who would have been required to pay the judgment against an officer. Thus, increasing the qualified immunity protection for officers ultimately could serve to disincentivize robust training and appropriate disciplinary steps by local governments, all while denying plaintiffs their just remediation.

---

[109] Ibid., 13.
[110] Kopf v. Wing, 942 F.2d 265 (4th Cir. 1991); Maney v. Garrison at 22 (citing the district court's decision, J.A. 383).
[111] Hope v. Pelzer at 741.
[112] Joanna C. Schwartz, "Police Indemnification," New York University Law Review 89 (2014): 885-1005, at 890.

Addressing Appellate Insulation

Michael Kirkpatrick and Joshua Matz suggest that the current system needs very little revision, as it represents an imperfect but necessary balance that they call "structured discretion."[113] Viewing *Camreta* as a well-crafted solution to many of the issues under *Saucier* and *Pearson*, they write that the next improvement to make is expanding prevailing party review to *en banc* appeals, which would help to balance out extreme panel decision and cultivate a sense of accountability in the appeals court panels.[114]

Rights Articulation and Reaching the Merits

Jack Beerman wrote that reaching the merits should be the default for courts unless they are dealing with a certain type of case (useless or fact-bound precedent, a conflict with state law, or an imminent higher court decision).[115] Under those cases, the court would not be permitted to reach the merits. Aaron Belzer proposes a similar solution, recommending instead that the courts use practical criteria for reaching the merits, looking at 1) the remedy for the plaintiff, 2) the capability of repetition, and 3) the goal of adequate development for the sake of establishing legal precedent.[116] These methods would eliminate the unbridled discretion that plagues current qualified immunity disputes. It would also require courts to articulate their reasons for not reaching the merits. In the process, it would encourage and promote constitutional law development. These solutions may or may not fix the issue of wasted litigant resources, as the counsel could not be entirely sure whether the court would reach the merits or avoid them, but in the very least they would give criteria to guide briefing and make the process more predictable. Moreover, since these ideas closely approximate the kind of standards that *Camreta* seemed to favor, this improvement may come in time, being established in following qualified immunity cases.

Particularity

The issue of particularity standards blocking § 1983 is mitigated in part by increased rights articulation—more cases clearly establishing rights means more factual scenarios in which rights are expressly protected. However, this is by no means a satisfactory solution, since it leaves much room for plaintiffs to face the wall of qualified immunity even when they ought to be afforded the remedy that § 1983 intends to award. Thus, the Court needs to re-center its particularity rulings so as to better balance competing concerns. Unless the goal is to limit § 1983 to only repeated, virtually identical violations, a further emphasis on fair notice rather than analogous precedent is in order. The basis for this focus is already established in *Hope*, and even back in the softer language of *Anderson*. Thus, a move to a less strict view of particularity would not require a strong divergence from precedent but only a shift in the way such standards are expressed.

---

[113] Kirkpatrick at 656.
[114] Ibid., 664-665.
[115] Beermann at 160 ff.
[116] Belzer at 687.

Litigant-Led Change

In the absence of Court-mandated changes, James Pfander has recommended the use of lawsuits for nominal damages in order to clarify the law without presenting a threat to individual officers.[117] This has an advantage over declaratory judgment suits in that they need not be prospective (requiring the plaintiff to show that the action in question will likely be repeated). And since nominal damages claims would not serve to impose a substantial personal liability on officers, Pfander argues, they should not give rise to qualified immunity claims. Clearly, this method would have to rely on special interest groups and nonprofits to fund monetarily unprofitable litigation. However, this method could be extraordinarily effective in helping to establish rights in the absence of Court rulings that prioritize rights articulation. This is especially important if indeed, "The shift from *Pearson* to *Camreta* thus signals disfavor toward merits rulings and a broad new range of circumstances under which the merits cannot be reached."[118] However, this solution would require courts to accept this method because it is not an established method for avoiding qualified immunity.

Naturally, these solutions do not establish a perfect system. However, that can be expected in the legal context, which carries the difficult requirement of handling wildly differing factual scenarios and problems.

Radical Solutions: More Drawbacks Than Benefits

"Efforts to reform doctrine always raise the possibility that a court is simply trading one problem for another."[119] Because of this, and because qualified immunity jurisprudence is not hopelessly broken, violent revisions of the system are neither necessary nor desirable. One such solution is to abolish qualified immunity and create a system in which juries determine which alleged facts are true and the judge determines the reasonableness of the officers' actions based on the jury's findings.[120] This approach would place the emphasis on a reasonableness standard rather than the *Harlow* standards, resolving the ambiguity of "clearly established" jurisprudence. It would also ensure that juries and judges played their proper roles—judges determining law and juries determining facts. However, it also destroys the purpose of qualified immunity, which is to ensure that police officers are not made less effective by either the threat or the actuality of being embroiled in litigation. This would also be an extremely abrupt reversal of well-established jurisprudence, meaning that the Court would likely not consider such a solution.

Other solutions involve outsourcing the legal questions. Instead of courts, Civilian Complaint Review Boards could have authority to investigate complaints, clearly establish

[117] James E. Pfander, "Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages," Columbia Law Review 111, no. 7 (2011): 1601-1639.
[118] Kirkpatrick at 670.
[119] Ibid., 667-70.
[120] Philip Sheng, "An 'Objectively Reasonable' Criticism of the Doctrine of Qualified Immunity in Excessive Force Cases Brought Under 42 U.S.C. § 1983," BYU Journal of Public Law 26, no. 1 (2011): 99-110.

the law, promulgate their rulings as law, and recommend punishments to police boards for verified officer misconduct.[121] This suggestion has the advantage of a firm grounding in already existent boards, so it has some empirical evidence in its favor. It could also be less costly and more specialized than typical jury trials. However, handing the interpretation of law to such boards seems to be an unwarranted and unwise delegation of power. It would also be difficult to curb corruption or bias, and there is no clear way to resolve disparities between review board rulings. This idea also does not fix the issue of constitutional avoidance but rather farms out difficult and unclear legal issues to less qualified individuals. Is it really desirable for these agencies to be "constantly engaged in constitutional-norm generation"?[122] It also leaves the question as to how officers can be expected to keep abreast the scads of law coming from the boards—New York City alone settled 9,570 claims in 2012.[123] This really defeats the idea of officers having fair notice of the law. It is also possible that these review board investigations would have the same negative effect as a lawsuit on police effectiveness.

Conclusion

The system of § 1983 litigation has seen many changes in the nearly 150 years since its enactment. Throughout this time, it has faced varying challenges, sometimes trading one set of jurisprudential concerns for another. At the current point, this area of law could be improved by increased accountability and standards for the lower courts, as well as a proper priority given to rights articulation and remediation. If used properly, § 1983 litigation serves not only to keep law enforcement in check, but also to "translate constitutional norms into specific rules, thereby achieving the related goals of redressing individual violations and effectuating deeper values."[124] At the same time, courts need not abandon the principles of notice and fairness that give legitimacy to the idea of qualified immunity. Such a balance is difficult in the face of the various cases that complicate the application of these ideas, but a just and consistent jurisprudence is possible through respecting the boundaries appropriate for each aspect.

[121] Meltzer 1280 ff.
[122] Ibid., 1294.
[123] Ibid., 1293.
[124] Kirkpatrick at 672.

Bibliography

42 U.S.C. § 1983 (1871).

Belzer, Aaron. "The Audacity of Ignoring Hope: How the Existing Qualified Immunity Analysis Leads to Unremedied Rights." *Denver University Law Review* 90, no. 3 (2013): 647-689.

Beermann, Jack M. "Qualified Immunity and Constitutional Avoidance." *The Supreme Court Review* 2009, no. 1 (2009): 139-79.

Black's Law Dictionary (9th ed. 2009).

"Constitutional Avoidance." *Wex Legal Dictionary*. Cornell University Law School Legal Information Institute.

"Federal Courts. Qualified Immunity. Sixth Circuit Denies Qualified Immunity to Police Officer for Arrest for Speech at Public Meeting. Leonard v. Robinson, No. 05-1728, 2007 WL 283832 (6th Cir. Feb. 2, 2007)." Harvard Law Review 120, no. 8 (2007): 2238-45.

"Fourth Amendment — Qualified Immunity — Third Circuit Holds That Police Officer's Good Faith Reliance on Legal Advice Creates a Presumption of Reasonableness. — Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010)." Harvard Law Review 124, no. 8 (2011): 2083-090.

Kappeler, Victor E. *Critical Issues in Police Civil Liability*. Long Grove: Waveland Press, 2006.

Kinports, Kit. "The Supreme Court's Quiet Expansion of Qualified Immunity." *Minnesota Law Review Headnotes* 100 (2016): 62-78.

Kirkpatrick, Michael T. and Joshua Matz. "Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from Saucier to Camreta (and Beyond)." *Fordham Law Review* 80, no. 2 (2011): 643-679.

Leval, Pierre N. "Judging Under the Constitution: Dicta about Dicta." *New York University* 81, no. 4 (2006): 1249-1282.

Meltzer, Ryan E. "Qualified Immunity and Constitutional-Norm Generation in the Post-Saucier Era: 'Clearly Establishing' the Law Through Civilian Oversight of Police." *Texas Law Review* 92, no. 5 (2014): 1277-1315.

Pfander, James E. "Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages." *Columbia Law Review* 111, no. 7 (2011): 1601-1639.

Reinhardt, Stephen R. "The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences." Mich. L. Rev. 113 (2014): 1219-1254.

Schott, Richard G. "Qualified Immunity: How It Protects Law Enforcement Officers." *FBI Law Enforcement Bulletin* 81, no. 9 (2012): 22-32.

Schott, Richard G. "Double Exposure: Civil Liability and Criminal Prosecution in Federal Court for Police Misconduct." *FBI Law Enforcement Bulletin* 77, no.5 (2008): 23-32.

Schwartz, Joanna C. "Police Indemnification." *New York University Law Review* 89 (2014): 885-1005.

Sheng, Philip. "An 'Objectively Reasonable' Criticism of the Doctrine of Qualified Immunity in Excessive Force Cases Brought Under 42 U.S.C. § 1983." *BYU Journal of Public Law* 26, no. 1 (2011): 99-110.

Case Law

Anderson v. Creighton, 483 U.S. 635 (1987).

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

Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956), http://openjurist.org/237/f2d/953/united-states-atterbury-v-e-ragen.

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), https://supreme.justia.com/cases/federal/us/403/388/.

Brandon v. Holt, 469 U.S. 464 (1985).

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

Bryan County, OK v. Brown, 520 U.S. 397 (1997), https://supreme.justia.com/cases/federal/us/520/397/case.html.

Bunting v. Mellen, 541 U.S. 1019 (2004).

Butz v. Economou, 438 U.S. 478, 485 (1978).

Camreta v. Greene, 563 U.S. 692 (2011).

Conn v. Gabbert, 526 U.S. 286 (1999).

County of Sacramento v. Lewis, 523 U.S. 833 (1998).

City and County of San Francisco v. Sheehan, 135 S.Ct. 1765 (2015).

Davis v. Scherer, 468 U.S. 183 (1984).

Ex parte Virginia, 100 U.S. 339 (1880).

Graham v. Connor, 490 U.S. 386 (1989), https://supreme.justia.com/cases/federal/us/490/386/.

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

Hope v. Pelzer, 536 U.S. 730 (2002).

Kingsley v. Hendrickson, 576 U.S. __ (2015), https://www.supremecourt.gov/opinions/14pdf/14-6368_m6hn.pdf.

Kopf v. Wing, 942 F.2d 265 (4th Cir. 1991).

Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439 (1988).

Malley v. Briggs, 475 U.S. 335 (1986), https://supreme.justia.com/cases/federal/us/475/335/case.html.

Maney v. Garrison, No. 14-7791 (4th Cir. March 9, 2017) (unpublished).

Mitchum v. Foster, 407 U.S. 225 (1972), https://supreme.justia.com/cases/federal/us/407/225/case.html.

Monell v. Department of Social Services, 436 U.S. 658 (1978).

Monroe v. Pape, 365 U.S. 167 (1961).

Morse v. Frederick, 551 U.S. 393 (2007).

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

Owen v. Independence, 445 U.S. 622 (1980).

Pearson v. Callahan, 555 U.S. 223 (2009).

Pierson v. Ray, 386 U.S. 547 (1967).

Procunier v. Navarette, 434 U.S. 555 (1978).

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

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

Scheuer v. Rhodes, 416 U.S. 232 (1974).

Screws v. United States, 325 U.S. 91 (1945).

Siegel v. Ragen, 180 F.2d 785 (7th Cir. 1950), cert. denied 339 U.S. 990, 70 S.Ct. 1015, 94 L.Ed.

Siegert v. Gilley, 500 US 226 (1991).

Stift v. Lynch, 267 F.2d 237 (7th Cir. 1959).

Taylor v. Barkes, 135 S. Ct. 2042 (2015)

Truitt v. State of Illinois, 278 F.2d 819 (7th Cir. 1960).

United States v. Classic, 313 U.S. 299 (1941).

White v. Pauley, __ U.S. __ (2017).

Will v. Michigan Department of State Police, 491 U.S. 58 (1989), https://supreme.justia.com/cases/federal/us/491/58/case.html.

Wilson v. Layne, 526 U.S. 603 (1999).

Wolf v. Colorado, 338 U.S. 25 (1949).

Wood v. Strickland, 420 U.S. 308 (1975).