SECTION 1983 LITIGATION: THE MAZE, THE MUD, AND THE MADNESS

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INTRODUCTION

Some of us were there at the "founding," and I don't mean in 1871 when 42 U.S.C. § 1983[1] was originally enacted as the Ku Klux Klan Act,[2] but in 1961, when the Court decided *Monroe v. Pape*,[3] a case that resurrected the statute as a viable remedy for those whose constitutional rights were violated by officials acting under color of state law. In *Monroe*, the Court held that conduct of an official who abused his authority or even violated state law fell under the umbrella of the statute's "under color of law" language.[4] Even more of us were there in 1978, when, in *Monell v. Department of Social Services*,[5] the Court overruled that part of *Monroe* that prohibited suits against local government entities, holding that plaintiffs could indeed sue such entities, provided the constitutional wrongs were inflicted pursuant to official policy or custom.[6] *Monroe* and *Monell* breathed new life into the long dormant statutory remedy and fostered an optimistic outlook for enforcement of civil rights. So, fifty-plus years after *Monroe*, many of us are asking, "what went wrong?" There is a growing consensus among practitioners, scholars, and judges that Section 1983 is no longer serving its

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[1] 42 U.S.C. § 1983 (2012) provides:

> 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.

[2] 17 Stat. 13 (1871).

[3] 365 U.S. 167 (1961), *overruled on other grounds by* Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978).

[4] *Monroe*, 365 U.S. at 181–82.

[5] 436 U.S. 658 (1978).

[6] *Id.* at 690–91. Shortly after *Monell*, in *Owen v. City of Independence*, 445 U.S. 622 (1980), the Court clarified that immunities available to individual actors were not available to local governments.

original and intended function as a vehicle for remedying violations of constitutional rights, that it is broken in many ways, and that it is sorely in need of repairs.

Professor John C. Jeffries, Jr., someone who has been in the game from the beginning, has recently lamented the unintelligible, incoherent, inconsistent and nonsensical state of constitutional tort law.[7] Professor Alan Chen, another long time player in this area, notes that "[i]n the nearly fifty years that have passed since *Monroe*, the Supreme Court has issued a series of decisions that have gradually diminished [Section] 1983 in ways that make damages recovery both costly and difficult."[8] In fact, Professor Chen concludes that "[i]f the Court, Congress, and the academic community fail to recognize the valuable role that [Section] 1983 damages claims play in [the broad scheme of constitutional enforcement], then for many litigants, like their video game counterparts, it is 'game over.'"[9]

Plaintiffs who bring claims under Section 1983 can name as defendants the individual actors who are alleged to have engaged in unconstitutional conduct, whether as "line" officers or as supervisors, as well as local government entities whose customs or policies are alleged to have caused the injury.[10] In each instance, barriers erected by the Supreme Court will hinder a plaintiff's ability to seek redress for harms caused by even acknowledged violations of constitutional rights.[11]

The primary focus of this Article is on the befuddled jurisprudence surrounding the defense of qualified immunity. I begin, however, with some brief observations about both municipal and supervisory liability, just to underscore the difficulty of making out those kinds of claims, and thus, assuming the Court's continued dogged adherence to the doctrine of no respondeat superior liability, the importance of providing plaintiffs with a viable damages remedy against non-supervisory officials.

I. THE MAZE: CLAIMS AGAINST GOVERNMENT ENTITIES

While individual officers sued in their individual capacities for damages are afforded the qualified immunity defense to protect from harassment and liability for engaging in conduct that was not clearly unconstitutional, local governments may

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[7] *See generally* John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207 (2013). *See* also John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) (describing the "clearly established" law aspect of the qualified immunity doctrine as "a mare's nest of complexity and confusion").

[8] Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of* Monroe v. Pape, 78 UMKC L. REV. 889, 910 (2010).

[9] *Id.* at 928–29.

[10] *See generally* COLUM. HUM. RTS. L. REV., A JAILHOUSE LAWYER'S MANUAL 392–98 (9th ed. 2011), http://www3.law.columbia.edu/hrlrl;lm/chapter-16.pdf.

[11] As Dean Erwin Chemerinsky noted, "[i]n recent years, the court has made it very difficult, and often impossible, to hold police officers and the governments that employ them accountable for civil rights violations." Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), http://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html.

be held liable for constitutional harm that can be shown to result from official policy or custom, even if the right was not clearly established at the time of the challenged conduct.[12] But, the Court has remained steadfast in its rejection of respondeat superior liability under Section 1983,[13] so plaintiffs have to show that the entity itself has caused the constitutional violation, not simply that the entity employs a constitutional tortfeasor. The Court has recognized basically four different ways a plaintiff might establish local government liability:

1. Plaintiff may establish that her harm was caused by an application of an officially adopted unconstitutional policy.[14]
2. Plaintiff may establish that her harm was caused by an unconstitutional custom, usage, or practice.[15]
3. Plaintiff may attribute a single unconstitutional decision or act of a final policymaker to the entity, taking caution to distinguish a final policymaker from a final policy-implementing official or even a final decision maker.[16]
4. Plaintiff may establish that a failure to train, supervise, discipline, or adequately screen, while not itself unconstitutional,

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[12] *See* Erwin Chemerinsky, *Chemerinsky: Hurt by a Government Official? SCOTUS is Making it Harder and Harder to Sue*, ABA J. (June 24, 2014, 1:40 PM), http://www.abajournal.com/news/article/chemerinsky_its_harder_to_sue_government_officials.

[13] The Court in *Monell* rejected the concept of respondeat superior liability against local government entities under Section 1983. Monell v. Dept. of Soc. Servs., 436 U.S. 658, 691 (1978).

[14] *See, e.g.*, *id.* at 690 (The Department of Social Services and the Board of Education in New York had a written, formal policy requiring pregnant employees to stop working at a certain time, even if it was not medically necessary, and the plaintiff's harm was clearly caused by that policy); *see also* Colwell v. Bannister, 763 F.3d 1060, 1068 (9th Cir. 2014) ("A reasonable jury could find that Colwell was denied surgery, not because it wasn't medically indicated, not because his condition was misdiagnosed, not because the surgery wouldn't have helped him, but because the *policy* of the NDOC is to require an inmate to endure reversible blindness in one eye if he can still see out of the other.").

[15] While the Supreme Court has not decided a "custom or usage" case, the basis for such liability is recognized in the language of the statute itself. *See supra* note 1; *Monell*, 436 U.S. at 694; *see also* Okin v. Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 439–40 (2d Cir. 2009) (finding enough evidence to create an issue of fact as to whether the Village had a pattern or practice of failing to adequately respond to domestic violence complaints).

[16] *See generally* City of St. Louis v. Praprotnik, 485 U.S. 112 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986). *See also* Gschwind v. Heiden, 692 F.3d 844, 847 (7th Cir. 2012) ("In Illinois the school board is the ultimate policymaking body with regard to personnel decisions. The school district's superintendent, although the highest official of the school district, is not a member of the board and does not have the ultimate responsibility for such decisions." (citations omitted)); Zarnow *ex rel.* Estate of Zarnow v. City Of Wichita Falls, 614 F.3d 161, 167 (5th Cir. 2010) ("There is a fine distinction between a policymaker and a decisionmaker. The fact that an official's decisions are final is insufficient to demonstrate policymaker status." (citations omitted)).

> is deliberately indifferent to and the cause of a constitutional violation by a non-policymaker.[17]

Municipal liability claims have become procedurally more difficult for plaintiffs to assert since the Court's imposition of a more stringent pleading standard in *Bell Atlantic Corp. v. Twombly*[18] and *Ashcroft v. Iqbal*,[19] and even more challenging to

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[17] To demonstrate the requisite deliberate indifference, a plaintiff will usually be required to show (1) a pattern of unconstitutional conduct that put policymakers on notice of the problem and failure to take appropriate steps to redress the problem; or (2) if no pattern exists, a plaintiff might be able to demonstrate that the need for more or different training was so obvious that failure to provide such training can be said to be tantamount to deliberate indifference. *See, e.g.*, Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 409 (1997) ("In *Canton*, we did not foreclose the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability."); City of Canton v. Harris, 489 U.S. 378, 390 n.10 (1989) (noting that liability of a municipality for failure to train may be based on a single incident where the need for training was obvious, or based on a pattern of constitutional violations that gave notice of a need for more or different training).

[18] 550 U.S. 544 (2007).

[19] 556 U.S. 662 (2009). Prior to *Twombly* and *Iqbal*, the Supreme Court had rejected a "heightened pleading" requirement for *Monell* claims. *See* Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (holding that a heightened pleading standard that exceeds the pleading standard in the Federal Rules of Civil Procedure should not be applied with respect to claims alleging municipal liability in Section 1983 cases). The Court has recently relied on *Leatherman* when holding that "no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim." Johnson v. City of Shelby, 135 S. Ct. 346, 347 (2014) (per curiam). While *Leatherman* has not been overruled by the Court, the majority of lower courts that have addressed the issue have agreed that the "plateau of plausibility which, under *Iqbal* and *Twombly*, is the new normal[,]" applies to the pleading of municipal liability claims. A.G. *ex rel.* Maddox v. Elsevier, Inc., 732 F.3d 77, 78-79 (1st Cir. 2013); *see, e.g.*, Owens v. Baltimore City State's Attorneys Office, 767 F.3d 379, 403, 404 (4th Cir. 2014) (agreeing with the First Circuit's analysis in *Haley*, and concluding that the complaint, though "couched in general terms," was sufficiently factual to state a plausible claim under *Iqbal*); AE *ex rel.* Hernandez v. Cnty. of Tulare, 666 F.3d 631, 637 (9th Cir. 2012) (holding that the pleading standard announced in *Twombly* and *Iqbal* applies to *Monell* claims); McCauley v. City of Chicago, 671 F.3d 611, 616 (7th Cir. 2011) ("To state a *Monell* claim against the City for violation of Mersaides's right to equal protection, McCauley was required to 'plead[ ] factual content that allows the court to draw the reasonable inference' that the City maintained a policy, custom, or practice of intentional discrimination against a class of persons to which Mersaides belonged. He did not meet this burden . . . . We have interpreted *Twombly* and *Iqbal* to require the plaintiff to 'provid[e] some specific facts' to support the legal claims asserted in the complaint." (citations omitted)); Haley v. City of Boston, 657 F.3d 39, 53 (1st Cir. 2011) ("[I]f the detectives intentionally suppressed the discoverable statements even when such activity was condemned by the courts (as Haley has alleged), it seems entirely plausible that their conduct was encouraged, or at least tolerated, by the BPD. Although couched in general terms, Haley's allegations contain sufficient factual content to survive a motion to dismiss and open a window for pretrial discovery.").

ultimately prove after the Court's decision in *Connick v. Thompson*.[20] In *Connick*, by a five-to-four decision, the Court overturned a fourteen million dollar verdict for John Thompson who had brought an official capacity or *Monell* claim against the Orleans Parish District Attorney in Louisiana,[21] based on a failure to train prosecutors as to *Brady* obligations.[22]

John Thompson had spent eighteen years in prison, including fourteen years on death row, when a private investigator discovered undisclosed blood-test evidence that exonerated Thompson of an attempted armed robbery for which he had been convicted.[23] Because of the possibility of impeachment from the robbery conviction, Thompson chose not to testify at his trial for an unrelated murder, which trial also resulted in conviction.[24] When the robbery conviction was vacated and the murder case was retried, a jury returned a verdict of not guilty.[25] As a result, Thompson brought a wrongful conviction suit against the Office of the District Attorney, claiming that the failure to train assistant district attorneys as to their obligation to turn over exculpatory or impeachment evidence caused the *Brady* violation that injured him. Even though ten exhibits were disclosed at the retrial that had not been disclosed at the initial murder trial, and even though, over a twenty-year period, no fewer than five different prosecutors had known about and failed to turn over the exculpatory blood-test evidence,[26] the majority viewed this egregious conduct as a "single incident" and held that "[f]ailure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*'s hypothesized single-incident liability."[27] The majority underscored that "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to

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[20] 131 S. Ct. 1350 (2011).

[21] Any possibility of an individual capacity suit for damages against Connick, the District Attorney, had been eliminated by the Court's decision in *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009), granting absolute immunity to prosecutors and supervising attorneys in such contexts.

[22] *See* Brady v. Maryland, 373 U.S. 83 (1963).

[23] *Connick*, 131 S. Ct. at 1355.

[24] *Id.*

[25] *Id.* at 1356–57.

[26] *Id.* at 1376, 1378, 1384 (Ginsburg, J., dissenting).

[27] *Id.* at 1361. In *Canton*, all of the Justices agreed that it would be deliberately indifferent for city policymakers to provide no training on the constitutional limits of the use of deadly force to armed police officers who are given authority to arrest fleeing felons. No pattern would be required, and a single constitutional violation caused by the failure to train where the need was so obvious could result in municipal liability. City of Canton v. Harris, 489 U.S. 378, 390 n.10 (1989). The Court in *Connick* distinguished prosecutors from police officers in terms of legal education and training needs, concluding that "[a] licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present the same 'highly predictable' constitutional danger as *Canton's* untrained officer." 131 S. Ct. at 1363. According to the majority, "[t]he reason why the *Canton* hypothetical is inapplicable is that attorneys, unlike police officers, are equipped with the tools to find, interpret, and apply legal principles." *Id.* at 1364.

train,"[28] and observed that none of the four convictions that had been overturned due to *Brady* violations in the 10-year period prior to Thompson's robbery trial had "involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind," and thus, none could have put Connick on notice as to the need for specific training to avoid the constitutional violation in Thompson's case.[29]

Many trees have been destroyed by scholars, myself included,[30] trying to parse and explain the various theories for holding municipalities liable under Section 1983, always cautious about crossing the line the Supreme Court has drawn between vicarious and direct liability. Justice Breyer's call for a reexamination of "the legal soundness of that basic distinction itself,"[31] has gained little traction since he first made the

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[28] *Id.* at 1360 (citing Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397 (1997)).

[29] *Connick*, 131 S. Ct. at 1360; *see also* Kitchen v. Dallas Cnty., 759 F.3d 468, 485 (5th Cir. 2014) ("[T]he record in this case contains no proof, whether in the form of expert evidence or otherwise, that the extraction of mentally ill inmates from jail cells requires specialized training."(footnote omitted)); D'Ambrosio v. Marino, 747 F.3d 378, 388 (6th Cir. 2014) ("In *Connick*, four previous *Brady* violations were insufficient to alert the prosecutor's office that another *Brady* violation might occur in the future in the absence of corrective action. Here, the county's knowledge of only three prior instances in which only one of its prosecutors had made improper comments at trial was less."). *But see* Smith v. Connick, No. 13-52, 2014 WL 585616, at *4–5 (E.D. La. Feb. 14, 2014) (granting the plaintiff leave to amend his complaint to conform with *Connick*, where "the violation of *Brady* concerned the sharing of exculpatory *statements*," and it was "undisputed that Defendants were aware of prior *Brady* violations regarding exculpatory statements in Defendants' office."); Williams v. Sch. Town of Munster, No. 2:12-cv-225-APR, 2014 WL 1794565, at *4 (N.D. Ind. May 6, 2014) ("Courts have interpreted *Canton* and *Connick* to hold municipalities liable when they have failed to provide any training, so long as the matter on which they failed to train was not too nuanced."); *see also* Thomas v. Cumberland Cnty., 749 F.3d 217, 225 (3d Cir. 2014) (finding "the case here is more similar to the hypothetical in *Canton* than to the situation in *Connick*," and concluding a jury could find deliberate indifference in failing to train corrections officers on conflict de-escalation and intervention); Chamberlain v. City of White Plains, 986 F. Supp. 2d 363, 391 (S.D.N.Y. 2013) ("While some have argued that the *Connick* decision so narrowed the single-incident theory as to essentially eliminate it, courts across the country have continued to apply that theory post-*Connick* when its strict requirements have been met.").

[30] *See, e.g.*, Karen M. Blum, *From* Monroe *to* Monell*: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L.Q. 409 (1978) [hereinafter Blum, Monroe *to* Monell]; Karen M. Blum, *Local Government Liability for the Enforcement of State Law*, 41 MUN. LAW. 7 (2000); Karen M. Blum, *Municipal Liability and Liability of Supervisors: Litigation Significance of Recent Trends and Developments*, 29 TOURO L. REV. 93 (2012); Karen M. Blum, *Municipal Liability: Derivative or Direct? Distinguishing the* Canton *Case from the* Collins *Case*, 48 DEPAUL L. REV. 687 (1999).

[31] *Bd. of Cnty. Comm'rs*, 520 U.S. at 430 (Breyer, J., dissenting). This author was among those who first criticized the rejection of respondeat superior liability in *Monell*. *See* Blum, Monroe *to* Monell, supra note 30 (cited in Pembaur v. City of Cincinnati, 475 U.S. 469, 489–90 n.4 (1986) (Stevens, J., concurring in part and concurring in judgment)); *see also* Vodak v. City of Chicago, 639 F.3d 738, 746 (7th Cir. 2011) ("For reasons based on what scholars agree are historical misreadings (which are not uncommon when judges play historian), the Supreme Court has held that municipalities are not liable for the torts of their employees under the

suggestion.[32] The area of municipal or entity liability has become, in the words of

strict-liability doctrine of respondeat superior, as private employers are." (citations omitted)); Pinter v. City of New York, 976 F. Supp. 2d 539, 550 n.23 (S.D.N.Y. 2013) ("Pinter correctly notes that questions have been raised about the accuracy of *Monell*'s analysis of Section 1983. If it were within the province of a federal district court to question Supreme Court precedent based on indications of dissension, I might be inclined to do so in this case. But this Court's task is to apply Supreme Court and Second Circuit law as it stands. As a result, I am constrained to apply *Monell* and its progeny, although I add my voice to the chorus of those who would encourage the Supreme Court to revisit *Monell*'s analysis." (citations omitted)).

[32] Indeed, the rationale of *Monell* that Justice Breyer has called into question has been mechanically applied by lower federal courts to private corporations sued under Section 1983. *See, e.g.*, Pyles v. Fahim, 771 F.3d 403, 410 n.23 (7th Cir. 2014) ("Although Wexford is a private corporation, we analyze claims against the company as we would a claim of municipal liability."); Rouster v. County of Saginaw, 749 F.3d 437, 453 (6th Cir. 2014) ("Private corporations that 'perform a traditional state function such as providing medical services to prison inmates may be sued under § 1983 as one acting under color of state law.'" (quoting Street v. Corr. Corp. of Am., 102 F.3d 810, 814 (6th Cir. 1996)) (internal quotation marks omitted)). However, private corporations cannot be held liable on the basis of respondeat superior or vicarious liability. *Id.* at 818."); Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1139 (9th Cir. 2012) ("Every one of our sister circuits to have considered the issue has concluded that the requirements of *Monell* do apply to suits against private entities under § 1983. Like those circuits, we see no basis in the reasoning underlying *Monell* to distinguish between municipalities and private entities acting under color of state law." (citations omitted)).

For a thoughtful and refreshing opinion questioning the application of *Monell*'s "policy, practice, or custom" requirement, with its concomitant rejection of respondeat superior liability, to private corporations, see *Shields v. Ill. Dept. of Corr.*, 746 F.3d 782, 789–92 (7th Cir. 2014) (Hamilton, J., concurring) (critically examining history, precedent, and policy surrounding application of *Monell* to private corporations, questioning whether private health care provider for prisoners should be able to take advantage of *Monell*, and urging en banc "fresh consideration" of precedent rejecting respondeat superior liability for private corporations providing essential governmental services), *cert. denied*, 2015 WL 132994 (Jan. 12, 2015). *See also* Shehee v. Saginaw Cnty., No. 13-13761, 2015 WL 58674, at *7 (E.D. Mich. Jan. 5, 2015) ("Perhaps it is time to question the rationale for allowing private contractors to avoid liability for the acts of its employees."); Horton v. City of Chicago, No. 13-CV-06865, 2014 WL 5473576, at *4 n.2 (N.D. Ill. Oct. 29, 2014) ("In *Shields v. Illinois Dep't of Corr.*, 746 F.3d 782 (7th Cir. 2014), the Seventh Circuit suggested that it may overrule precedents establishing that private corporations cannot be found liable for § 1983 violations under a theory of respondeat superior. However, as long as those precedents remain good law, the Court is bound to apply the current rule that respondeat superior liability does not exist under § 1983, even where a corporate defendant acts under color of state law."); Herrera v. Santa Fe Pub. Sch., CIV 11-0422 JB/KBM, 2014 WL 4294970, at *120 (D.N.M. Aug. 29, 2014) (noting agreement with Judge Hamilton's view, but concluding that "[w]hatever the merits of this argument, . . . Tenth Circuit precedent binds the Court on this point."); Revilla v. Glanz, 8 F. Supp. 3d 1336, 1341 (N.D. Okla. 2014) ("The reasoning of *Shields*, and its thorough analysis of Supreme Court precedent, provides potent arguments for *not* extending *Monell* to private corporations like CHC. However, this Court is bound to follow Tenth Circuit precedent, and the settled law in all Circuits to have decided the issue is that *Monell* extends to private corporations and thus they cannot be held liable on a respondeat superior basis for their employees' conduct."); Hutchison v. Brookshire Bros., Ltd., 284 F. Supp. 2d 459, 473 (E.D. Tex. 2003) ("[N]either *Monell* nor its progeny can be read

Justice Breyer, a "highly complex body of interpretive law,"[33] indeed, a maze that judges and litigants must navigate with careful attention to all the twists and turns.

Professor Joanna Schwartz has done an empirical study involving forty-four of the largest police departments and law enforcement agencies in the country, as well as thirty-seven small and mid-sized agencies, and concludes that her findings "support the presumption that officers across the country, in departments large and small, are virtually always indemnified."[34] Based on her findings, one may question both the need for qualified immunity to protect individual officers and the rejection of respondeat superior liability for government entities. But as Professor Schwartz points out, given the seemingly widespread indemnification practices, one can also argue that there is no great need to replace theories of municipal liability with respondeat superior liability.[35] It's happening anyway and there may be some value to playing the *Monell* game in terms of "settlement, leverage, fault-fixing, and information gathering."[36] Whatever its merits and however questionable the foundation on which it has been built, it appears that the direct/vicarious line drawn in *Monell* is here to stay for the foreseeable future. The net result of adherence to the no-respondeat-superior rule is that plaintiffs will have to work through the maze of complex and stringent criteria for making out municipal liability claims and courts will be more concerned about strengthening the immunity defenses available to individual actors.

II. THE MUD: CLAIMS AGAINST SUPERVISORS

Supervisory liability is a form of individual liability and presents no special problems when the supervisor is an active participant in the underlying constitutional violation.[37] It is when the supervisory liability claim is based on a "failure to ____"—for example, failure to supervise, discipline, train or adequately screen—that matters have become muddied. The doctrinal change that the Supreme Court announced in *Iqbal*,[38] with respect to the standard for holding supervisors liable under Section

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to shield private corporations from vicarious liability when their employees have committed a § 1983 violation while acting within the scope of their employment.").

[33] *Bd. Of Cnty. Comm'rs*, 117 S. Ct. at 430.

[34] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 937 (2014).

[35] *Id.* at 945.

[36] *Id.*

[37] *See, e.g.*, Terebesi v. Torreso, 764 F.3d 217, 234 (2d Cir. 2014) ("[A] supervisor may be held liable if he or she was personally a 'direct participant' in the constitutional violation. In this Circuit, a 'direct participant' includes a person who authorizes, orders, or helps others to do the unlawful acts, even if he or she does not commit the acts personally." (citations omitted)); *see also* Dodds v. Richardson, 614 F.3d 1185, 1199 (10th Cir. 2010) ("A plaintiff may therefore succeed in a § 1983 suit against a defendant-supervisor by demonstrating: (1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.").

[38] Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009) ("In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term 'supervisory liability' is a

1983, has left a sea of uncertainty, confusion, and disagreement among the lower courts as to when, if ever, supervisory liability may attach for claims based on inaction, rather than affirmative acts.[39] Post-*Iqbal*, the majority of Circuits have engaged in avoidance of the issue whenever possible.[40] The most recent excursion into the "muddied waters"[41] of supervisory liability has been by the Third Circuit Court of Appeals. In *Barkes v. First Correctional Medical, Inc.*,[42] the court noted that *Iqbal* "expressly tied the level of intent necessary for superintendent liability to the underlying constitutional tort,"[43] and further observed that "[t]his aspect of *Iqbal* has bedeviled the Courts of Appeals to have considered it, producing varied interpretations of its effect on supervisory liability."[44] Rejecting the view that *Iqbal* has "abolished supervisory liability in its entirety,"[45] the Third Circuit joined ranks "with those courts that have held that, under *Iqbal*, the level of intent necessary to establish supervisory liability will vary with the underlying constitutional tort alleged."[46] Thus, in the case before the court, where the claim was based on an Eighth Amendment denial of medical care, the state of mind required was subjective deliberate indifference.[47] The court left "for another day the

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misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.").

[39] *See, e.g.*, Palmer v. Wexford Med., No. CV 12-08214-PCT-SPL, 2014 WL 5781305, at *9 (D. Ariz. Nov. 6, 2014) (noting that "under Sixth Circuit law, liability under § 1983 requires active unconstitutional behavior; failure to act or passive behavior is insufficient. But under Ninth Circuit law, a defendant can be liable for the failure to act." (citations omitted) (internal quotation marks omitted)).

[40] *See, e.g.*, Raspardo v. Carlone, 770 F.3d 97, 115 (2d Cir. 2014) (noting that the circuit "ha[s] not yet determined the contours of the supervisory liability test . . . after *Iqbal*"); Chavez v. United States, 683 F.3d 1102, 1113 (9th Cir. 2012) (Wallace, J., concurring) ("[A]t least eight opinions from other circuit courts have explicitly recognized that *Iqbal* might restrict supervisory liability, but have refused to rule on the extent of the restriction when the question could be avoided.").

[41] Barkes v. First Corr. Med., Inc., 766 F.3d 307, 316 (3d Cir. 2014) (quoting Bistrian v. Levi, 696 F.3d 352, 366 n.5 (3d Cir. 2012)); *see also Dodds*, 614 F.3d at 1209–10 (Tymkovich, J., concurring) ("As the majority points out, the Supreme Court recently muddied further these already cloudy waters. . . . *Iqbal* unfortunately did not provide a unified theory for the variety of supervisory liability cases we face.").

[42] 766 F.3d 307 (3d Cir. 2014).

[43] *Id.* at 318.

[44] *Id.*

[45] *Id.* at 319. *See* Ashcroft v. Iqbal, 556 U.S. 662, 693 (2009) (Souter, J., dissenting) ("Lest there be any mistake, . . . the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely.").

[46] *Barkes*, 766 F.3d at 319.

[47] *Id.*; *see also* Franklin v. Curry, 738 F.3d 1246, 1250, 1251, 1252 n.7 (11th Cir. 2013) (per curiam) ("The discussion of purposeful intent in *Iqbal* pertained to claims of invidious discrimination, not deliberate indifference. . . . Nothing in *Iqbal* suggests that supervisors cannot be held liable for deliberate indifference toward risks posed by their subordinates or that such liability requires a higher *mens rea* than any other deliberate indifference claim. So long as

question whether and under what circumstances a claim for supervisory liability derived from a violation of a different constitutional provision remains valid."[48] I,[49] as well as a number of my dear colleagues,[50] have examined the question of the liability of supervisors post-*Iqbal*. Despite the amount of ink invested, the area remains a mess. I stick to my position on this and recommend a uniform standard for "failure to" claims against supervisors based on inaction. "Supervisory inaction that is subjectively and deliberately indifferent to continued or future constitutional wrongdoing by subordinates should be treated as conduct that is itself violative of substantive due process, regardless of the underlying constitutional violation."[51] Thus, whether the underlying constitutional violation is based on an Eighth Amendment excessive force claim, requiring a malicious and sadistic state of mind, or based on a Fourth Amendment excessive force claim, requiring only objective unreasonableness, a supervisor who has subjective knowledge of the wrongful conduct and who condones or acquiesces in such conduct, should be found to have committed an independent Fourteenth Amendment substantive due process violation.[52]

Post-*Connick* and post-*Iqbal* plaintiffs will struggle to get past summary judgment on municipal and supervisory liability claims. Even pleading these claims has become more onerous. The inability to pursue such claims might be tempered if plaintiffs were assured a remedy against the "street level" tortfeasors, with the assurance of indemnification in most cases, but to prevail on claims against non-supervisory state actors who engage in unconstitutional conduct, plaintiffs must first vault the immunities hurdles.

III. THE MADNESS: QUALIFIED IMMUNITY

A. The Basic Terrain of Immunities

Certain functions performed by individual state actors have been afforded absolute immunity under Section 1983. Thus, if the constitutional-offending conduct involves

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a supervisor's own conduct—and not that of his subordinate—constitutes deliberate indifference, his status as a supervisor changes nothing." (citations omitted)).

[48] *Barkes*, 766 F.3d at 320.

[49] *See* Karen M. Blum, *Supervisory Liability After* Iqbal*: Misunderstood but Not Misnamed*, 43 URB. LAW. 541 (2011) [hereinafter Blum, *Supervisory Liability*].

[50] *See, e.g.*, Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-*Iqbal/Connick *World*, 47 HARV. C.R.-C.L. L. REV. 273 (2012); Kit Kinports, Iqbal *and Supervisory Immunity*, 114 PENN ST. L. REV. 1291 (2010); Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After* Iqbal, 14 LEWIS & CLARK L. REV. 279 (2010).

[51] Blum, *Supervisory Liability*, *supra* note 49, at 557.

[52] I disagree with the Supreme Court's view in *Iqbal*, 556 U.S. at 677, that knowledge of and acquiescence in a subordinate's intentional discrimination on the basis of race, sex, religion or national origin is not enough to hold the supervisor liable for a constitutional violation. While knowledge and acquiescence may not be enough to establish an equal protection claim against the supervisor, subjective knowledge and acquiescence in such behavior by a subordinate should suffice for an independent substantive due process claim.

an official engaged in a judicial,[53] legislative,[54] prosecutorial,[55] or testimonial function,[56] plaintiffs will be without a damages remedy under Section 1983. The Court, in essence, has made a determination that for certain kinds of functions, there will be a categorical immunity, regardless of the egregiousness of the conduct of the individual actor. Recently, the Court has extended absolute immunity for prosecutorial functions to even admittedly "administrative" functions of training or supervising when done by a supervisory prosecutor in connection with the prosecution of a particular case in that office.[57]

More prevalent and problematic have been developments in the area of qualified immunity, an affirmative defense that, while having its roots at common law,[58] is

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[53] *See, e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978) (providing absolute immunity for judge acting within jurisdiction). Officials acting in a judicial or quasi-judicial capacity will also be afforded absolute immunity. *See, e.g.*, Capra v. Cook Cnty. Bd. of Rev., 733 F.3d 705, 709-10 (7th Cir. 2013) (providing individual members of the Cook County Board of Review with absolute quasi-judicial immunity when performing "duties [ ] functionally comparable to judicial officer[s]."); Engebretson v. Mahoney, 724 F.3d 1034, 1039 (9th Cir. 2013) ("We now join our sister circuits and hold that prison officials charged with executing facially valid court orders enjoy absolute immunity from § 1983 liability for conduct prescribed by those orders."); Keystone Redevelopment Partners, LLC v. Decker, 631 F.3d 89, 101 (3d Cir. 2011) ("In sum, we hold that the *Butz* factors, on balance, clearly support quasi-judicial immunity for members of the Pennsylvania Gaming Control Board."). *But see* Burton v. Infinity Capital Mgmt., 753 F.3d 954, 956–61 (9th Cir. 2014) (holding that an attorney who drafts an order at the request of a judge is not entitled to absolute quasi-judicial immunity).

[54] *See, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44 (1998) (providing absolute immunity for local legislators performing a legislative function); *see also* Tenney v. Brandhove, 341 U.S. 367 (1951) (providing absolute immunity for members of state legislature).

[55] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976) (finding absolute immunity for prosecutors performing prosecutorial acts); *see also* Burns v. Reed, 500 U.S. 478 (1991) (granting a prosecutor absolute immunity for functions performed during a probable cause hearing, but only qualified immunity when giving legal advice to the police).

[56] *See, e.g.*, Briscoe v. LaHue, 460 U.S. 325, 342 (1983) (holding that police officers are entitled to absolute immunity for claims brought pursuant to Section 1983, arising out of allegedly perjured testimony at criminal trials); *see also* Rehberg v. Paulk, 132 S. Ct. 1497, 1505–08 (2012) (affording grand jury witnesses the same absolute immunity as trial witnesses).

[57] *See generally* Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009). A number of circuits have also extended absolute immunity to social workers and child welfare workers engaged in the prosecution of child dependency proceedings. *See, e.g.*, Booker v. S. Carolina Dep't of Soc. Servs., 583 F. App'x 147, 148 (4th Cir. 2014) ("[W]e agree with the district court that Sullivan was entitled to absolute immunity from Booker's claim that she made intentional misstatements when preparing and presenting a petition for J.J.'s retention in SCDSS's custody."); B.S. v. Somerset Cnty., 704 F.3d 250, 270 (3d Cir. 2013) (Where the "underlying function of [a child case worker's] actions throughout that judicial proceeding—including during the investigation and composition of the report—was fundamentally prosecutorial in nature, she is entitled to absolute immunity for this claim.").

[58] *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 557 (1967) ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under [§] 1983.").

acknowledged by most today to be largely a product of policy-driven decisions by the Supreme Court in the past thirty years or so.[59] The modern era of qualified immunity begins with *Harlow v. Fitzgerald*.[60] In *Harlow*, qualified immunity was explained as a doctrine that accommodates the need to balance "the importance of a damages remedy to protect the rights of citizens" 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."[61] The defense is available only to an individual defendant[62] sued in her individual capacity for damages.[63] The basic idea is to give public officials some breathing room for making reasonable mistakes and to have an officer's liability for damages turn on whether the officer violated "clearly established" law.[64] The Court has hammered home that the defense is concerned not only about imposing liability, but also about subjecting officials to the burdens of discovery and litigation for claims that lack merit.[65] Thus, the push has been to resolve the issues surrounding the qualified immunity defense sooner rather than later in the litigation.[66] *Harlow* established the test for qualified immunity as an objective one. Would a reasonable officer have understood that the conduct engaged in violated rights that were clearly established at the time?

In 1993, while noting agreement "with those who have concluded that the costs of the defense may outweigh the benefits to such a degree that the defense should be abandoned as an inefficient allocation of resources," this author was nevertheless able to cobble together a plausible "user's manual" to assist lawyers and judges who confronted qualified immunity issues on a regular basis.[67] Today, such a manual might better be designed as a travel guide, pointing litigants to plaintiff-friendly or

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[59] *See* Anderson v. Creighton, 483 U.S. 635, 644–45 (1987) (acknowledging that the Court in *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law . . . .").

[60] 457 U.S. 800 (1982).

[61] *Id.* at 807.

[62] *See, e.g.*, Benison v. Ross, 765 F.3d 649, 665 (6th Cir. 2014) ("[P]ersonal immunity defenses, such as absolute immunity or qualified immunity, are not available to government officials defending against suit in their official capacities.").

[63] *See, e.g.*, Hydrick v. Hunter, 669 F.3d 937, 939–40 (9th Cir. 2012) ("Qualified immunity is only an immunity from a suit for money damages, and does not provide immunity from a suit seeking declaratory or injunctive relief.").

[64] *See, e.g.*, *Benison*, 765 F.3d at 664.

[65] *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (finding immunity to mean "*immunity from suit* rather than a mere defense to liability"). Thus, a denial of a pretrial motion to dismiss based on qualified immunity, to the extent that it turns on an issue of law, is immediately appealable. *Id.* at 530; *see also* Behrens v. Pelletier, 516 U.S. 299, 308, 309 (1996) (holding that defendants may pursue a second interlocutory appeal from a denial of qualified immunity at the summary judgment stage).

[66] *See, e.g.*, Hunter v. Bryant, 502 U.S. 224, 228 (1991) (per curiam) ("Immunity ordinarily should be decided by the court long before trial.").

[67] Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 189 (1993).

defendant-friendly locations.[68] One has to work hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within[69] and among[70] themselves. A short trip through the current landscape of qualified immunity should suffice to reveal its Alice-in-Wonderland[71] quality and explain why this centerpiece of Section 1983 litigation needs revamping.

B. Down the Rabbit-Hole: Second Step First

For a number of years, the Supreme Court had instructed lower federal courts, that in resolving qualified immunity, they were required to engage in a two-prong analysis,

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[68] *See generally* Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445 (2000) [hereinafter Wilson, *Location*]. As the title suggests, the point of the article was to demonstrate that whether a right is found to be "clearly established" is very much a function of which circuit (and I would add, which judge) is asking the question, and how that question is framed. Judge Wilson sits on the Court of Appeals for the Eleventh Circuit.

[69] *Compare, e.g.*, Tobey v. Jones, 706 F.3d 379, 391 & n.6 (4th Cir. 2013) ("Mr. Tobey's right to display a peaceful non-disruptive message in protest of a government policy without recourse was clearly established at the time of his arrest. . . .[E]ven though the dissent purports to understand factually analogous precedent is not a prerequisite for finding that a right is clearly established, the entire dissent seemingly hinges on this very premise."), *with id.* at 395–97 (Wilkinson, J., dissenting) ("One would think the Supreme Court's admonitions on the need for some modicum of specificity in notice to defendants might actually mean something. And yet, by allowing Tobey's suit to proceed by enunciating legal principles at the highest and most nebulous level of generality, the majority deprives the doctrine of its value. . . . Neither Tobey nor the majority points to a single court decision addressing a situation even remotely similar in time, place, or manner to the one that occurred here, let alone a decision that would have made the unlawfulness of defendants' actions 'apparent.' They cite no decision involving the period before scores of passengers board airplanes, no decision involving the security-screening area of an airport, and no decision involving distracting conduct that poses a potential security threat. . . . The complete dearth of pertinent precedent should be dispositive of the question whether it was clearly established that defendants' conduct was unreasonable: it was not." (citations omitted)).

[70] *Compare, e.g.*, Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011) ("In summary, though not unqualified, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment. Accordingly, we hold that the district court did not err in denying qualified immunity to the appellants on Glik's First Amendment claim."), *with* True Blue Auctions v. Foster, 528 F. App'x 190, 193 (3d Cir. 2013) ("[T]he plaintiffs are simply incorrect in claiming that '[e]very court has ruled there is a First Amendment right to videotape police in non-traffic stops situations in public forums.' Instead, . . . courts have come to divergent conclusions on the issue. . . . Thus, our case law does not clearly establish a right to videotape police officers performing their official duties such that the officers here should have been on notice that Dreibelbis had a First Amendment right to film them. Accordingly, the District Court correctly concluded that the officers were entitled to qualified immunity." (citations omitted)).

[71] The reference is, of course, to *Alice's Adventures in Wonderland* by Lewis Carroll. *See generally* LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND (1865).

first deciding whether the plaintiff alleged the violation of a constitutional right under current law before addressing the second prong, whether the law was clearly established at the time of the challenged conduct.[72] The first prong, considered the rights-defining, standards-establishing step, was mandatory.[73] After much criticism of the mandatory nature of this approach,[74] the Court revisited the analysis and, in *Pearson v. Callahan*,[75] made the first step discretionary. The Court highlighted the most common criticisms of the "rigid order of battle:"[76] (1) deciding the constitutional question first often resulted in substantial expenditures of resources by litigants and courts on "questions that ha[d] no effect on the outcome of the case;"[77] (2) the development of constitutional doctrine was not furthered by decisions that were often "so factbound that the decision provide[d] little guidance for future cases;"[78] (3) it made little sense to force lower courts to decide a constitutional question that was pending in a higher court or before an en

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[72] Saucier v. Katz, 533 U.S. 194, 201 (2001) ("A court required to rule upon the qualified immunity issue must consider, then, this 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? This must be the initial inquiry. . . . [I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.").

[73] *Id.*

[74] *See, e.g.*, *id.* at 210 (Ginsburg, J., concurring) ("The two-part test today's decision imposes holds large potential to confuse."); *see also* Morse v. Frederick, 551 U.S. 393, 425 (2007) (Breyer, J., concurring in part and dissenting in part) ("This Court need not and should not decide this difficult First Amendment issue on the merits. Rather, I believe that it should simply hold that qualified immunity bars the student's claim for monetary damages and say no more."); Wilkie v. Robbins, 551 U.S. 537, 583 n.10 (2007) (Ginsburg, J., concurring in part and dissenting in part) ("As I have elsewhere indicated, in appropriate cases, I would allow courts to move directly to the second inquiry."); Scott v. Harris, 550 U.S. 372, 387 (2007) (Breyer, J., concurring) ("[L]ower courts should be free to decide the two questions in whatever order makes sense in the context of a particular case."); Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (per curiam) (Breyer, J., concurring) (expressing concern "that the current rule 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"); Bunting v. Mellen, 541 U.S. 1019, 1019 (2004) (Stevens, J., concurring) (noting the problem posed by an "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"); *id.* at 1023 (Scalia, J., dissenting) (urging that "this general rule [of refusing to entertain a party's appeal on an issue as to which she prevailed] should not apply where a favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination").

[75] 555 U.S. 223 (2009). When the Court granted review in *Pearson*, it *sua sponte* "required the parties to address the additional question whether the mandatory procedure set out in *Saucier* should be retained." *Id.* at 227.

[76] *Id.* at 234.

[77] *Id.* at 237.

[78] *Id.*

banc panel;[79] (4) it likewise did little to further the development of constitutional precedent to force a decision that depended on "an uncertain interpretation of state law;"[80] (5) requiring a constitutional decision at the pleading stage based on bare or sketchy allegations of fact, or one at the summary judgment stage resting on "woefully inadequate" briefs, created a risk of "bad decisionmaking;"[81] (6) the mandated two-step analysis often shielded constitutional decisions from appellate review when the defendant lost on the "merits" question but prevailed on the clearly-established-law prong of the analysis (and such un-reviewed decisions may have "a serious prospective effect" on conduct);[82] and, finally, (7) the approach required unnecessary determinations of constitutional law and "depart[ed] from the general rule of constitutional avoidance."[83]

Despite these criticisms, the Court acknowledged that it is "often beneficial"[84] to address the merits prong of the immunity analysis. Yet, in a number of post-*Pearson* cases, the Supreme Court has avoided the benefits of "promot[ing] the development of constitutional precedent[,]"[85] providing little or no guidance or explanation as to why it has jumped to the second prong where it would have been helpful to set out the constitutional rule for cases going forward. In its most recent second-step-first opinion,[86] the Court reversed and remanded a decision from the Court of Appeals for the Third Circuit, holding only that the court erred in denying qualified immunity to the defendant state police officer because the rule regarding the "knock and talk" exception[87] to the warrant requirement was not "beyond debate" at the time of the events giving rise to the civil rights action. *Carroll v. Carman*[88] involved two officers from the Pennsylvania

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[79] *Id.* at 238.

[80] *Id.*

[81] *Id.* at 238, 239.

[82] *Id.* at 240. In *Camreta v. Greene*, 131 S. Ct. 2020 (2011), the Court concluded that it "generally may review a lower court's constitutional ruling at the behest of a government official granted immunity." *Id.* at 2026. *But see* Wheeler v. City of Lansing, 660 F.3d 931, 940 (6th Cir. 2011) (suggesting that such review at the behest of a prevailing party should be limited to the Supreme Court's review of an appellate opinion that might be viewed as clearly establishing the constitutional principle, as opposed to a circuit's review of a district court decision that does not serve as binding precedent in the circuit).

[83] *Pearson*, 555 U.S. at 241.

[84] *Id.* at 236.

[85] *Id.*

[86] Carroll v. Carman, 135 S. Ct. 348 (2014).

[87] When the case went to the jury in the district court, the jury was instructed:

> [T]hat the 'knock and talk' exception 'allows officers without a warrant to knock on a resident's door or otherwise approach the residence seeking to speak to the inhabitants, just as any private citizen might.' The District Court further explained that 'officers should restrict their movements to walkways, driveways, porches and places where visitors could be expected to go.'
>
> The jury then returned a verdict for Carroll.

Id. at 350 (citations omitted).

[88] *Id.* at 348.

State Police who were following up on a report that an armed suspect who had stolen a car might have fled to the home of the Carmans.[89] In approaching the house, the officers knocked on a sliding glass door that opened onto a deck. An angry Mr. Carman resisted the officers' requests for information and a scuffle ensued between Officer Carroll and Mr. Carman.[90] In the end, Mrs. Carman appeared and permission was given for the officers to search the house.[91] The suspect was not found and no arrests were made.[92] The Carmans pursued a civil rights action against Officer Carroll, claiming, among other things, that the officer violated the Fourth Amendment through an unlawful entry when he approached the house from the side deck entrance instead of the front door.[93] In reversing the jury's verdict for Officer Carroll and entering a judgment for the Carmans as a matter of law, the Third Circuit held that the "knock and talk" exception required officers to begin their encounter at the front door of a home, and that the law was clearly established such that Officer Carroll was not entitled to qualified immunity.[94] After explaining why the precedent relied on by the Third Circuit was not controlling,[95] and noting that other circuits had rejected the rule adopted by the Third Circuit,[96] the Court concluded, "[w]e do not decide today whether those cases were correctly decided or whether a police officer may conduct a 'knock and talk' at any entrance that is open to visitors rather than only the front door."[97] Rather, the Court jumped to the second prong and found that whatever the correct rule may be, it was not

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[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* at 349.

[93] *Id.*

[94] *Id.* at 350 (citing Carman v. Carroll, 749 F.3d 192, 199 (3d Cir. 2014)).

[95] The Third Circuit relied on *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003), for the proposition that the rule regarding the "knock and talk" exception was clearly established. However, as the Supreme Court notes:

> In concluding that Officer Carroll violated clearly established law in this case, the Third Circuit relied exclusively on *Marasco*'s statement that 'entry into the curtilage after not receiving an answer at the front door might be reasonable.'. . . In the court's view, that statement clearly established that a 'knock and talk' must begin at the front door. But that conclusion does not follow. *Marasco* held that an unsuccessful 'knock and talk' at the front door does not automatically allow officers to go onto other parts of the property. It did not hold, however, that knocking on the front door is *required* before officers go onto other parts of the property that are open to visitors. Thus, *Marasco* simply did not answer the question whether a 'knock and talk' must begin at the front door when visitors may also go to the back door.

Carroll, 135 S. Ct. at 351.

[96] *Id.* at 351–52 (discussing cases from the Second, Seventh, and Ninth Circuits, and one decision from the Supreme Court of New Jersey).

[97] *Id.* at 352.

"beyond debate" and Officer Carroll was entitled to qualified immunity.[98] It's not clear why the Court chose to avoid the merits question. While the facts will certainly vary from case to case as to the configuration and layout of home entrances, the basic issue of whether the "knock and talk" exception to the warrant requirement applies only when officers approach the front door of a home is not so "factbound" that it would not be useful to resolve for future cases.

Pearson itself is a case where it would have made sense to address the merits question. The issue in *Pearson* was whether the "consent-once-removed" doctrine applied to an entry and search orchestrated with the assistance of a confidential informant, as opposed to an undercover police officer.[99] The doctrine normally applies when a warrantless entry is made by officers who have been alerted by a signal given by an undercover police officer who was permitted inside the suspect's home and sees contraband in plain view.[100] The concept is that the consent given to the undercover officer operates as consent as to the remaining officers, even though the defendants have no knowledge of the undercover officer's true identity.[101] In *Pearson*, the cue was given by a confidential informant, rather than an undercover officer, who entered a home as part of a "sting."[102] The Tenth Circuit decided that the doctrine did not apply, that a constitutional violation occurred when the consent given was to a confidential informant, rather than a police officer,[103] and that it was clearly established that such an entry by the police under these circumstances would violate the Fourth Amendment.[104] Without addressing or overruling the constitutional holding of the Tenth Circuit, the Supreme Court reversed on the grounds that the law on the "consent-once-removed" doctrine was not clearly established at the time of the challenged conduct such that a reasonable officer would have understood the conduct here to be unlawful.[105] Answering the "merits" question in *Pearson*, whether the "consent-once-removed" doctrine would provide an exception to the warrant requirement when a confidential informant rather than a police officer was the recipient of the operative consent, would not result in the kind of "factbound" decision that would "provide little guidance" for cases in the future. Indeed, as in *Carroll*, it would be quite helpful for officers and citizens to have a holding on a Fourth Amendment question that is likely to be an issue in many cases going forward.

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98 *Id.*

99 Pearson v. Callahan, 555 U.S. 223, 229 (2009).

100 *See id.*

101 *Id.*

102 *Id.* at 227 ("In 2002, Brian Bartholomew, who became an informant for the task force after having been charged with the unlawful possession of methamphetamine, informed Officer Jeffrey Whatcott that respondent Afton Callahan had arranged to sell Bartholomew methamphetamine later that day.").

103 *Id.* at 229.

104 *Id.* at 230.

105 *Id.* at 243–44.

Similarly, in *Reichle v. Howards*,[106] the Court left unresolved the merits question presented, "whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest,"[107] deciding only that at the time of the events in question, "it was not clearly established that an arrest supported by probable cause could violate the First Amendment."[108] Mr. Howards was arrested after Secret Service agents overheard him making comments critical of then-Vice President Cheney's policies in Iraq, witnessed him touching the shoulder of the Vice President, and engaged him in questioning during which he lied about the touching.[109] He was transferred by the Secret Service to the custody of local law enforcement officers and charged with harassment under state law, which charge was ultimately dismissed.[110]

Howards brought suit against the Secret Service agents asserting *Bivens* claims[111] under both the Fourth and First Amendments.[112] The Tenth Circuit granted the agents qualified immunity on the Fourth Amendment claim, finding that there was probable cause to arrest Howards for having lied to federal agents about touching the Vice President, but denied immunity on the First Amendment claim because there was a factual dispute as to whether the arrest was motivated by the comments overheard by the Secret Service, and, according to the court, the law was clearly established in the Tenth Circuit that a retaliatory arrest violated the First Amendment even if supported by probable cause.[113]

Electing to jump to the second prong, the Supreme Court concluded that the "specific right" in question, the "right to be free from a retaliatory arrest that is otherwise supported by probable cause," had never been recognized by the Supreme Court, nor clearly established by Tenth Circuit precedent.[114] This question, like the question presented in *Pearson*, does not seem particularly fact sensitive and is certain to be one

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[106] 132 S. Ct. 2088 (2012).

[107] *Id.* at 2093.

[108] *Id.* at 2090.

[109] *Id.* at 2091.

[110] *Id.* at 2092.

[111] A so-called *Bivens* action is the federal common law counterpart to a Section 1983 suit, and may be available when the tortfeasors act under color of federal rather than state law. In *Bivens*, the Court held that a cause of action for damages could be brought against federal agents directly under the Fourth Amendment. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 395–96 (1971).

[112] *See* Howards v. McLaughlin, 634 F.3d 1131, 1135 (10th Cir. 2011).

[113] Reichle v. Howards, 132 S. Ct. 2088, 2092 (2012).

[114] *Id.* at 2094. In *Hartman v. Moore*, 547 U.S. 250 (2006), the Supreme Court held that a plaintiff must plead and prove the absence of probable cause to state a claim for retaliatory *prosecution*. Because precedent relied on by the Tenth Circuit in *Reichle* to clearly establish the law was made of cases including claims of both retaliatory arrest and prosecution, with no clear distinction drawn between the two, the Supreme Court concluded that a reasonable official could have believed that *Hartman*'s rationale applied to retaliatory arrest claims. *Reichle*, 132 S. Ct. at 2095.

frequently raised in Section 1983 litigation. The Supreme Court has yet to decide the merits question presented in *Reichle* and, unless and until the right to be free from a retaliatory arrest supported by probable cause is recognized, the likelihood is that the majority of circuits will continue to grant qualified immunity on such claims without resolving the merits of this important constitutional question.[115]

Even more perplexing was the Court's failure to address the merits question in *Stanton v. Sims*.[116] In *Stanton*, the Ninth Circuit Court of Appeals held that an officer's warrantless entry into the yard of the plaintiff was unconstitutional where the officer was in pursuit of a fleeing misdemeanant and no emergency existed to justify the warrantless entry.[117] Furthermore, the court held that Officer Stanton was not entitled to qualified immunity because the law was clearly established that curtilage was entitled to the same Fourth Amendment protection as a home and "that a warrantless entry into a home cannot be justified by pursuit of a suspected misdemeanant except in the rarest of circumstances."[118] In reversing the Ninth Circuit, the Supreme Court observed that "federal and state courts nationwide are sharply divided on the question whether

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[115] *See, e.g.*, Abeyta v. City of New York, 588 F. App'x 24, 25 (2d Cir. 2014) (relying on *Reichle* to reject the plaintiff's challenge to the District Court's dismissal of his First Amendment retaliation claim where a jury had found probable cause on a Fourth Amendment claim); Wilson v. Vill. of Los Lunas, 572 F. App'x 635, 643 (10th Cir. 2014) ("We need not decide whether *DeLoach* survives *Hartman*. It is enough to know that in July 2009 it was not clearly established in this circuit that there is a First Amendment right to be free from retaliatory arrest when the arrest is supported by probable cause. The officers are entitled to qualified immunity."); Ashcraft v. City of Vicksburg, 561 F. App'x 399, 401 (5th Cir. 2014) ("[W]e are hard-pressed to find that Chief Deputy Dolan's alleged misconduct violated Ms. Ashcraft's First Amendment rights because Ms. Ashcraft has not demonstrated that she had a clearly established 'right' to be free from a retaliatory arrest that was otherwise supported by probable cause."); George v. Rehiel, 738 F.3d 562, 586 (3d Cir. 2013) ("[B]ecause we have found that the individual Federal Officials' search and questioning of George during the screening did not violate George's Fourth Amendment rights, we are hard-pressed to find that it could result in a First Amendment retaliation claim on this record. Accordingly, the individual Federal Officials are entitled to qualified immunity on George's First Amendment retaliation claim." (citations omitted)); Thayer v. Chiczewski, 705 F.3d 237, 253 (7th Cir. 2012) ("As the Supreme Court held in *Reichle*, the 'clearly established' standard is not met in this case because neither our circuit nor the Supreme Court has 'recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause.'"). *Compare* Acosta v. City of Costa Mesa, 718 F.3d 800, 825–26 (9th Cir. 2013) ("[E]ven assuming that Acosta was arrested in retaliation for his remarks, because probable cause existed for a violation of § 2-61, the officers are still entitled to qualified immunity[.]"), *with* Ford v. City of Yakima, 706 F.3d 1188, 1193 (9th Cir. 2013) ("In this Circuit, an individual has a right 'to be free from police action motivated by retaliatory animus but for which there was probable cause.' That right was violated when the officers booked and jailed Ford in retaliation for his protected speech, even though probable cause existed for his initial arrest." (citations omitted)).

[116] 134 S. Ct. 3 (2013) (per curiam).

[117] Sims v. Stanton, 706 F.3d 954, 963 (9th Cir. 2012), *rev'd per curiam*, Stanton v. Sims, 134 S. Ct. 3 (2013).

[118] *Id.* at 964.

an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect."[119] Despite acknowledgment of the sharp divide and a framing of the question that would result in an answer not particularly "factbound" and, as in *Pearson*, one that would assist law enforcement in future cases, the Court left the merits question unresolved and reversed on the clearly-established-law prong. "We do not express any view on whether Officer Stanton's entry into Sims' yard in pursuit of Patrick was constitutional. But whether or not the constitutional rule applied by the court below was correct, it was not 'beyond debate.'"[120]

In *Wood v. Moss*,[121] a case from the 2013 term, the Court unanimously reversed the Ninth Circuit's denial of qualified immunity to Secret Service agents who were alleged to have discriminated against anti-Bush protestors based on their viewpoint, in violation of the First Amendment.[122] Plaintiffs claimed that on a visit by then-President George W. Bush to Jacksonville, Oregon, the Secret Service responded to an unscheduled presidential lunch stop by relocating the anti-Bush protestors, but not Bush supporters, such that the anti-Bush group was farther away than the pro-Bush group from the inn where the President was dining.[123] Limiting its decision to the qualified immunity question,[124] the Court held that there was no precedent to "alert Secret Service agents engaged in crowd control that they bear a First Amendment obligation" to ensure that all groups had "equal access" to the President.[125] *Wood* was a perfect case for jumping to the second prong, as the issue presented was the paradigm of "factbound," involving Secret Service agents responding to a situation "unsettled" by a "spur-of-the-moment decision" by the President.[126]

In the two other qualified immunity opinions from last term,[127] the Court followed the *Saucier* order-of-battle approach and addressed the merits question first. In *Plumhoff v. Rickard*,[128] noting that it "will be 'beneficial in 'develop[ing] constitutional precedent' in an area that courts typically consider in cases in which the defendant asserts a qualified immunity defense,"[129] the Court held that where a high-speed pursuit

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[119] *Stanton*, 134 S. Ct. at 3.

[120] *Id.* at 8.

[121] 134 S. Ct. 2056 (2014).

[122] Because the defendants in the case were federal agents, the suit was a *Bivens* action. *See supra* note 111. The Court assumed, without deciding, that *Bivens* extends to First Amendment claims. Wood v. Moss, 134 S. Ct. 2056, 2066 (2014).

[123] *Id.* at 2061.

[124] *Id.* at 2070.

[125] *Id.* at 2067–68.

[126] *Id.* at 2061.

[127] Lane v. Franks, 134 S. Ct. 2369 (2014); Plumhoff v. Rickard, 134 S. Ct. 2012 (2014). For a discussion of *Lane* see *infra* notes 299–316 and accompanying text.

[128] 134 S. Ct. 2012 (2014).

[129] *Id.* at 2020 (quoting Pearson v. Callahan, 555 U.S. 223, 236 (2009) (alteration in original)). Justice Ginsburg did not join the portion of the Court's opinion discussing the merits

"exceeded 100 miles per hour and lasted over five minutes," and "passed more than two dozen other vehicles, several of which were forced to alter course," it was "beyond serious dispute that Rickard's flight posed a grave public safety risk, and here, as in *Scott* [*v. Harris*, 550 U.S. 372 (2007)], the police acted reasonably in using deadly force to end that risk."[130] While holding that on the undisputed facts in *Plumhoff*, there was no Fourth Amendment violation, the Court buttressed its opinion with the backup position that even if the force used under these circumstances was excessive, the law was not clearly established at the time of the events in question such that the unlawfulness of the conduct would have been "beyond debate."[131] Fourth Amendment excessive force claims are probably more "factbound" than most other kinds of constitutional claims brought under Section 1983,[132] so the default for such cases might likely be prong two of the qualified analysis,[133] but the holding in *Plumhoff* on the merits does clarify for both officers and citizens that deadly force will be deemed justified whenever undisputed facts support a finding that the force was used to terminate an ongoing serious threat to the safety of the officers or the public.

Encouraged by the Supreme Court to exercise the discretion afforded by *Pearson*,[134] many lower courts are eschewing tough constitutional questions, instead disposing of cases on the ground that whether or not a constitutional right has been violated on the facts alleged, the defendant prevails on qualified immunity because the

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of the Fourth Amendment claim, but neither dissented nor wrote a separate concurrence. *Id.* at 2016 n.*.

[130] *Id.* at 2021–22. Justice Breyer did not join the portion of the Court's opinion rejecting the claim that the number of shots was excessive, but neither dissented nor wrote a separate concurrence. *Id.* at 2016 n.*.

[131] *Id.* at 2023 (quoting Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011)). The Court pointed to its decision in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam), in which qualified immunity was granted to a police officer who shot the driver of a fleeing vehicle, perceived as a threat to the safety of those in the area. Because the behavior of the driver in *Plumhoff* was even more threatening than that of the driver in *Brosseau*, and because the plaintiff could point to no intervening case law between the time of the events in *Brosseau* (1999) and those in *Plumhoff* (2004) "that could be said to have clearly established the unconstitutionality of using lethal force to end a high-speed car chase," the officers were entitled to qualified immunity. *Plumhoff*, 134 S. Ct. at 2023–24.

[132] *Brosseau*, 543 U.S. at 201 (having surveyed the excessive force cases the plaintiff relied on to argue against qualified immunity, the Court noted that "this area is one in which the result depends very much on the facts of each case").

[133] Indeed, in *Brosseau*, a case that preceded *Pearson*, the Court "express[ed] no view as to the correctness of the Court of Appeals' decision on the constitutional question itself," and disposed of the case on the basis of qualified immunity, rather than the merits. *Id.* at 198.

[134] *See, e.g.*, *Ashcroft*, 131 S. Ct. at 2080 ("Courts should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'" (quoting *Pearson*, 555 U.S. at 236–37)); Camreta v. Greene, 131 S. Ct. 2020, 2032 (2011) ("In general, courts should think hard, and then think hard again, before turning small cases into large ones.").

right was not clearly established at the time.[135] Taking this path in *West v. Murphy*,[136] and *Cantley v. West Virginia Regional Jail & Correctional Facility Authority*,[137] two

[135] For recent examples of courts doing the second step first, see *Fenwick v. Pudimott*, No. 15-5130, 2015 WL 590295, at *3 (D.C. Cir. Feb. 13, 2015) (concluding that "the constitutional question is 'far from obvious,'" the court proceeds "directly to consider whether the deputies' use of deadly force violated law that was clearly established at the time of the shooting."). *See also* Occupy Nashville v. Haslam, 769 F.3d 434, 442 (6th Cir. 2014) ("To avoid potentially 'difficult questions that have no effect on the outcome of the case,' and being mindful of the unusual circumstances under which we preside [all of the judges of the Sixth Circuit have recused themselves in this appeal], we will focus on *Saucier*'s second step—whether the alleged constitutional right was clearly established at the time of the Use Policy's adoption." (citations omitted)); Jay v. Hendershott, 579 F. App'x 948, 950 (11th Cir. 2014) ("Here, because we conclude that Plaintiffs' Fourth Amendment claim is one 'in which it is plain that a constitutional right [was] not clearly established,' we address only the second prong of the qualified-immunity analysis and do not reach the issue of whether the complaint sufficiently alleges a constitutional violation." (citations omitted)); Burgess v. Town of Wallingford, 569 F. App'x 21, 23 (2d Cir. 2014) ("[T]he protection that Burgess claims he deserves under the Second Amendment—the right to carry a firearm openly outside the home—is not clearly established law."); De Boise v. Taser Int'l, Inc., 760 F.3d 892, 896 (8th Cir. 2014) ("Courts have discretion to decide which part of the inquiry to address first. Here, we begin with second inquiry. Though the outcome of this encounter was tragic, and even if the reasonableness of the officers' actions was questionable, Appellants cannot defeat the officers' defense of qualified immunity unless they are able to show that a reasonable officer would have been on notice that the officers' conduct violated a clearly established right." (citations omitted)); MacDonald v. Town of Eastham, 745 F.3d 15 (1st Cir. 2014) ("Given the nature of the qualified immunity inquiry, it is sufficient to hold—as we do in this opinion—that because these questions are not resolved by clearly established law, the officers who entered and searched the plaintiff's dwelling are entitled to the shield of qualified immunity. We need go no further."); Stauffer v. Gearhart, 741 F.3d 574, 584 (5th Cir. 2014) ("We need not decide whether Stauffer's rights were actually violated, because even if they were, Stauffer has not proven that those rights were clearly established at the time of the alleged violations."); Findlay v. Lendermon, 722 F.3d 895, 899 (7th Cir. 2013) ("*Pearson v. Callahan*, 555 U.S. 223, 242–43 (2009), encouraged courts to begin with the substantive constitutional violation, but we remain free to consider first whether the right is clearly established if doing so will conserve judicial resources. We find it economical to do so here and thus consider only whether Findlay has shown that the alleged constitutional violation—tackling a suspect under the circumstances presented in this case—was clearly established."); Becker v. Bateman, 709 F.3d 1019, 1022 (10th Cir. 2013) ("In reviewing the grant of summary judgment to Officer Bateman, we decline to consider whether the district court erred in concluding no constitutional violation occurred and instead opt to address whether the rights at issue were clearly established at the time of the alleged violation."); Padilla v. Yoo, 678 F.3d 748, 768 & n.16 (9th Cir. 2012) ("[A]lthough we hold that the unconstitutionality of torturing an American citizen was beyond debate in 2001–03, it was not clearly established at that time that the treatment Padilla alleges he was subjected to amounted to torture. . . . For these reasons, we hold that Yoo is entitled to qualified immunity on the plaintiffs' claims. . . . We have discretion to decide which of the two prongs of qualified immunity analysis to address first. Here, we consider only the second prong." (citations omitted)).

[136] 771 F.3d 209 (4th Cir. 2014).

[137] 771 F.3d 201 (4th Cir. 2014).

cases raising important questions about the constitutional limits of strip-searching detainees who are held outside of the general population, the Fourth Circuit Court of Appeals disposed of both cases on the second prong of the qualified immunity analysis, leaving for another day the task of much needed "clarification and elaboration"[138] of the legal principles applicable in this area. *West* was brought by two men representing a class of persons who had been arrested for offenses that did not involve "weapons, drugs, or felony violence,"[139] and strip searched[140] at Baltimore Central Booking and Intake Center (Central Booking) prior to or without being arraigned before a judicial officer.[141] Throughout the booking process, arrestees are placed in holding rooms with other arrestees, some of whom have been arrested for more serious offenses and, within twenty-four hours, are brought before a commissioner or released without charges.[142] Roughly one half of all arrestees "were released before or after seeing a court commissioner," and thus, while they were never placed in the general housing unit of Central Booking, these arrestees did have contact with others who were placed in general population.[143] From the time the litigation commenced in 2005, until 2013, the district court had denied the warden defendants qualified immunity, relying on three Fourth Circuit precedents for the proposition that it was clearly established that strip searches conducted without individualized suspicion of persons arrested for offenses that did not involve weapons or contraband violated the Fourth Amendment.[144]

While *West* was pending in the district court, however, the Supreme Court rendered its decision in *Florence v. Board of Chosen Freeholders of the County of Burlington*,[145] holding that suspicionless strip searches of adult detainees were constitutional, regardless of the seriousness of the offense, if the detainees were to be placed in the general population of a jail or prison.[146] In light of *Florence*, the district court did a turnabout and held that "*Florence* not only overruled some aspects of Fourth Circuit law (on which this court previously relied in denying the motion to dismiss) but in doing so left the contours of any 'exception' that would apply to the plaintiffs in this

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[138] *West*, 771 F.3d at 217 (Wynn, J., concurring).

[139] *Id.* at 211.

[140] A strip search was defined as "the removal, pulling down, or rearrangement of clothing for the visual inspection of a person's genital and/or anal areas, which may also include requiring the person to squat and cough, in the presence of one or more guards." *Id.* (quoting Jones v. Murphy, 2013 WL 822372, at *3 (D. Md. Mar. 5, 2013)).

[141] *Id.*

[142] *Id.*

[143] *Id.* at 212.

[144] Jones v. Murphy, 470 F. Supp. 2d 537, 547 (D. Md. 2007) (citing Amaechi v. West, 237 F.3d 356, 365 (4th Cir. 2001); Abshire v. Walls, 830 F.2d 1277, 1279–80 (4th Cir. 1987); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981)). The Fourth Circuit found each of these cases distinguishable from the facts before the court in *West*. *West*, 771 F.3d at 215–16. *See infra* note 150 and accompanying text.

[145] 132 S. Ct. 1510 (2012).

[146] *Id.* at 1522–23.

case unclear and open to debate."[147] The Fourth Circuit affirmed, but grounded its decision on a different rationale. Because *Florence* was decided after the occurrence of the events giving rise to the action in *West*, the Fourth Circuit astutely noted the temporal irrelevance of the *Florence* decision to the clearly-established-law question presented in *West*.[148] Instead, the court affirmed the grant of qualified immunity on the basis that each Fourth Circuit precedent in existence at the time of the challenged conduct and relied on by the district court was factually distinguishable from *West* and did not suffice to give an official notice that the strip searches conducted at Central Booking were unlawful.[149] As the court explained:

> Under the *Bell* [*v. Wolfish*] balancing test, the searches in *Logan*, *Amaechi*, and *Abshire* were unconstitutional because there were no security reasons strong enough to justify the intrusive and public nature of the searches. The searches allegedly performed at Central Booking, however, were conducted in a different and less public setting than those described by our precedents, and the security justifications for the Central Booking searches were more compelling.[150]

Thus, without addressing the constitutional merits of the plaintiffs' claim, the Fourth Circuit concluded that the officials were entitled to qualified immunity "because the law did not clearly establish at the time that the searches were conducted that they were unlawful."[151]

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[147] Jones v. Murphy, No. CIV. CCB-05-1287, 2013 WL 822372, at *6 (D. Md. Mar. 5, 2013), *aff'd by* West v. Murphy, 771 F.3d 209 (4th Cir. 2014). *Florence* left open the question of whether exceptions to its rule would be appropriate in cases "where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees." *Florence*, 132 S. Ct. at 1522–23.

[148] *West*, 771 F.3d at 214. For a further discussion of this decision, see *infra* note 328 and accompanying text.

[149] *See id.* at 215–16.

[150] *Id.* at 216. The plaintiff in *Logan* was a female attorney who had been arrested for D.W.I. She claimed to have been stripped searched in a holding room with broken blinds, allowing others to observe. She was not intermingled with the general population of the jail or held with any other arrestees. Logan v. Shealy, 660 F.2d 1007, 1009–10, 1013 (4th Cir. 1981). In *Abshire*, the plaintiff alleged that he was strip searched in a utility closet after his gun and ammunition had already been taken away from him and "in front of six to eight police officers—five who were in the room with him and several others, including a female officer, who witnessed the search while standing in the adjacent hallway." Abshire v. Walls, 830 F.2d 1277, 1280 (4th Cir. 1987). The strip search in *Amaechi* was conducted on a public street and involved a male officer "actually touching and penetrating the [female] arrestee's exposed genitalia." Amaechi v. West, 237 F.3d 356, 364 (4th Cir. 2011).

[151] *West*, 771 F.3d at 216.

Judge Wynn, in a separate concurrence, agreed with the majority opinion, but underscored "the importance of addressing the legality of strip searching detainees held outside the general population in the appropriate case."[152] Because the trial court and the parties in *West* had focused on only the clearly-established-law prong of immunity, Judge Wynn joined the majority in kicking the constitutional can down the road, but lamented that the result was to "leave corrections officers adrift in uncharted waters."[153] It does appear, however, that Judge Wynn's willingness to forego reaching the constitutional issue in *West* rested in part on his belief that the issue was properly teed up and would be addressed in *Cantley*.[154]

In *Cantley*, the Fourth Circuit reviewed a challenge to the strip search and delousing procedures used in two different jails in West Virginia.[155] Cantley, one of the plaintiffs in the case, had been arrested, arraigned, and ordered to be committed to the general population of the Western Regional Jail before he was strip searched, so with respect to him, the Fourth Circuit affirmed the district court's determination that *Florence* was controlling on the merits question and the strip search was constitutional.[156] The circumstances surrounding the strip search of plaintiff Teter were different. Teter had been arrested for a minor offense and had not yet appeared before a magistrate when he was strip searched.[157] After the strip search and shower, he was placed in a holding cell with one other arrestee.[158] While there is no indication that other detainees were placed in the cell with Teter and his cellmate, each of the two holding cells used for detainees at the Tygart Valley facility was capable of holding up to fifteen detainees.[159] The next morning, Teter was escorted through the area that housed the general population to a video-conferencing room where he appeared via video before a magistrate judge who ordered him to be released on bond following the conference.[160]

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[152] *Id.* at 217 (Wynn, J., concurring).

[153] *Id.*

[154] In *West*, Judge Wynn took note of the fact that "pending before this same panel is *Cantley v. West Virginia Regional Jail*, [771 F.3d 201 (4th Cir. 2014)], in which the district court held that the strip search of a detainee held outside the general jail population was constitutional." *West*, 771 F.3d 209, at 217 n.*.

[155] *Cantley*, 771 F.3d at 203. Plaintiffs sought damages and injunctive relief and named as defendants the West Virginia Regional Jail and Correctional Facility Authority (WVRJA), the state agency charged with overseeing the regional jails, and three former and current Executive Directors of the WVRJA. *Id.*

[156] *Id.* at 203–04. Note that even though *Florence* was decided after the events in question, *Florence* clearly controlled and operated to defeat Cantley's strip search claim on the merits.

[157] *Id.* at 204. The Tygart Valley jail facility had a blanket strip search policy in effect at the time. Thus all detainees, regardless of the basis for the arrest and whether pre- or post-arraignment, were strip searched before being placed in a holding cell. *Id.* at 205.

[158] *Id.* at 204.

[159] *Id.* at 205.

[160] *Id.* at 204.

As with the strip search of Cantley, the district court had found the strip search of Teter to be constitutional.[161] The Fourth Circuit affirmed the judgment for the individual defendants, but found it "unnecessary to reach the constitutional merits of the strip search of Teter."[162] The court distinguished the circumstances surrounding Teter's search from those accompanying the strip search of the pre-arraignment detainee in *Logan v. Shealy*,[163] the case relied on by plaintiff as clearly establishing the unlawfulness of his search. In *Logan*, a female attorney was arrested for suspected D.W.I. and claimed to have been strip searched in a room that permitted others to view the search through a window in the door.[164] She was in jail for approximately two-and-a-half hours and there was no mention of her being intermingled with other arrestees and no credible security threat presented.[165] The Fourth Circuit concluded that "*Logan* did not clearly establish that it was unconstitutional for a correctional officer to conduct a visual strip search in a private room of an arrestee, who was to be held until the next morning in a holding cell with possibly a dozen or more other arrestees."[166]

On the delousing claims, the district court had granted summary judgment for the defendants, holding that the delousing procedures used were constitutional with respect to both Cantley and Teter. The Fourth Circuit affirmed, but, as with the strip search claim of Teter, determined only that the unlawfulness of the conduct was not clearly established by Supreme Court or Fourth Circuit precedent at the time of the events in question.[167] *Amaechi*,[168] the case relied on by plaintiffs to clearly establish the unlawfulness of the delousing procedures, involved the arrest of a woman for a noise violation and her subjection to a "sexually abusive" search in front of her home with her husband and children watching.[169] As the Fourth Circuit noted, "the delousing of Cantley and Teter was done in a private room with only one officer, who was of the same sex, and it did not entail the officer himself touching either plaintiff."[170]

Because the district court had held both the searches and the delousing procedures constitutional, all claims had been resolved on summary judgment.[171] The Fourth Circuit's disposition, resolving Teter's strip search claim and the delousing claims on the second prong of the qualified immunity analysis left the status of the claims for injunctive and declaratory relief unresolved. Given that qualified immunity is a defense

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[161] *Id.* at 205 (citing Cantley v. W. Va. Reg'l Jail, 2013 WL 5531855, at *10 (S.D.W. Va. Oct. 4, 2013)).

[162] *Id.*

[163] 660 F.2d 1007 (4th Cir. 1981).

[164] *See id.* at 1009–10.

[165] *Cantley*, 771 F.3d at 206.

[166] *Id.*

[167] *Id.*

[168] 237 F.3d 356 (4th Cir. 2001).

[169] *Cantley*, 771 F.3d at 206.

[170] *Id.* at 207.

[171] *Id.*

only as to damages claims asserted against individual defendants,[172] the merits of these claims would have to be addressed before deciding the appropriateness of any equitable relief that might be ordered against the administrators of the institutional defendant. Noting that "[e]ven before *Florence* came down, the WVRJA had ordered Tygart Valley to cease any blanket practice of strip-searching and delousing pre-arraignment arrestees not designated for the general jail or prison population,"[173] and warning that "*Florence* made clear that blanket strip searches prior to arraignment of arrestees not designated for assignment to the detention facility's general population are constitutionally suspect in the absence of some particularized justification,"[174] the court opted to exercise its discretion in favor of allowing West Virginia officials an opportunity "to apply their own experience in complying with *Florence* and the shifting boundaries of the law in this area."[175]

Judge Wynn again concurred, noting that while the majority had not addressed the merits question raised by Teter's search, its opinion did raise concerns about "the legality of similar searches going forward."[176] He made clear that in his view, "strip searching pre-arraignment detainees who are held outside the general population of a detention facility is unconstitutional absent reasonable suspicion."[177] The Fourth Circuit chose not to take a full swing at the merits question so nicely teed up in *Cantley*, but left little doubt as to how the panel would view future cases involving pre-arraignment detainees not destined to be placed in the general population of a jail. One can share the panel's aspiration that the administrators of the West Virginia jails will make good faith attempts to conform their policies "to the directives of the [Supreme] Court"[178] in *Florence*, without sharing the view that it was improvident to establish more concrete constitutional guidance in these cases.

In a similar context, Judge Rogers has recently criticized the constitutional avoidance approach taken by the Court of Appeals for the District of Columbia. In both *Bame v. Dillard*[179] and *Johnson v. District of Columbia*,[180] the court refused to address the merits of the constitutionality of strip searches of arrestees who have been arrested on minor charges and held outside of the general population, instead granting qualified immunity on the ground that the law was not clearly established.[181] As Judge Rogers reflected:

> Not deciding the constitutional question "threatens to leave standards of official conduct permanently in limbo." By proceeding

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[172] *See supra* notes 62–63 and accompanying text.
[173] *Cantley*, 771 F.3d at 208.
[174] *Id.*
[175] *Id.*
[176] *Id.* at 208 (Wynn, J., concurring).
[177] *Id.*
[178] *Id.*
[179] 637 F.3d 380 (D.C. Cir. 2011).
[180] 734 F.3d 1194 (D.C. Cir. 2013).
[181] *See Johnson*, 734 F.3d at 1202–04; *Bame*, 637 F.3d at 384.

> directly to the immunity question, not only do "[c]ourts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements," but the failure to decide constitutional questions "may frustrate 'the development of constitutional precedent' and the promotion of law-abiding behavior[.]"[182]

The lawfulness of jail strip searches after *Florence* inevitably will turn to some degree on the peculiar facts of the arrest, as well as the booking and detainment procedures of the particular detention facilities implicated. But, until courts address the merits of strip searches that fall outside the parameters of those held constitutional in *Florence* and begin to establish guidelines as to what circumstances qualify as exceptions to the rule of *Florence*, the law will remain unclear, corrections officers will remain adrift, and lower courts will continue to jump to the second prong in resolving these cases.

C. Through Whose "Looking Glass?"[183]

The Court has told us that qualified immunity is a question of law, "ordinarily" to be decided by the judge.[184] When the Court has made the facts or circumstances confronting the officer in a particular case an important aspect of framing the qualified immunity question,[185] how can the issue be resolved as a pure question of law when there are material issues of fact to be resolved?[186] A court must take the facts pleaded at the motion to dismiss stage or supported by the evidence at the summary judgment stage, in the light most favorable to the non-moving party.[187] If, based on those facts as pleaded or supported, a reasonable official would have understood that the conduct alleged or supported violated clearly established law, qualified immunity should be denied.[188] When material facts are disputed and summary judgment is denied, jurors should be the fact-finders and, only once the facts are determined, should the judge decide whether the conduct as found by the jury violated clearly established law. But

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[182] *Johnson*, 734 F.3d at 1206 (Rogers, J., concurring) (alterations in original) (citations omitted).

[183] LEWIS CARROLL, THROUGH THE LOOKING-GLASS (1871). (Strangely, originally published the same year Section 1983 was enacted!).

[184] Hunter v. Bryant, 502 U.S. 224, 228 (1991) (per curiam) ("Immunity ordinarily should be decided by the court long before trial.").

[185] *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 641 (1987) ("The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.").

[186] As Professor Chen has noted, "As any experienced civil rights practitioner or federal trial judge knows, the primary impediment to expedited termination of constitutional tort suits through qualified immunity-based summary judgment claims is the existence of material fact disputes." Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230 (2006).

[187] *See id.* at 261.

[188] *See id.* at 235.

requiring a jury to resolve the factual disputes would mean that the case would not be disposed of "long before trial,"[189] and for many judges, that delay exposes government officials to just the kind of harassment and interference that qualified immunity is intended to prevent. There are more and more cases where, in my opinion, judges are usurping the role of jurors and deciding facts under the guise of determining the qualified immunity issue as a matter of law.[190] Runaway judges are more common than runaway jurors.[191] But, I am encouraged by a sense that some on the Supreme Court may be tuned into the problem.

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[189] *Hunter*, 502 U.S. at 228.

[190] *See, e.g.*, Poole v. City of Shreveport, 691 F.3d 624, 635 (5th Cir. 2012) (Elrod, J., dissenting) ("The majority opinion's disagreement about the videotape evidence only underscores why this case should go to a jury. Nowhere does the majority opinion indicate that Creighton would be entitled to qualified immunity under my understanding of the facts."). See also *Lopera v. Town of Coventry*, 640 F.3d 388, 396–98, 402, 403 (1st Cir. 2011), where the majority of the panel granted officers qualified immunity after deciding that reasonable officers could have believed a coach "consent[ed]" to the search of his team. Judge Thompson dissented, saying the case should have gone to a jury on facts that raised a question about whether consent was voluntarily given. *Id.* at 404–06 (Thompson, J., dissenting in part).

Also troublesome are the cases where the court does send the case to the jury and should be reserving the qualified immunity determination for itself based on the jury's determination of the facts, but instead gives the immunity question to the jurors in the form of a question as to whether the defendant violated a clearly established right of the plaintiff or whether the defendant's conduct was objectively reasonable even if excessive under the Fourth Amendment. These cases usually create problems of inconsistent verdicts and/or unintelligible instructions, requiring new trials, appeals, reversals, or remands. *See, e.g.*, Gandy v. Robey, 520 F. App'x 134, 145–47 (4th Cir. 2013) ("Unfortunately, special interrogatories [No.] 3 and [No.] 4 permitted the jury to answer these interrelated questions in an inconsistent manner. According to the jury, Deputy Robey reasonably believed that David posed an imminent threat of serious harm, yet the jury concluded that Deputy Robey used excessive force in preventing David from carrying out such a threat of harm. In addition to being inconsistent with each other, of course, these interrogatory answers are inconsistent with the general verdict awarding Terry $267,000 in compensatory damages. . . . These inconsistencies implicate Fed. R. Civ. P[.] 49(b)(4) and leave us no choice but to remand for a new trial."); Stephenson v. Doe, 332 F.3d 68, 79, 80 (2d Cir. 2003) ("[W]e conclude that the qualified immunity verdict is legally inconsistent with the verdict on excessive force and should not stand. . . . We conclude that under all the circumstances in this case a new trial is warranted. . . . On remand, the district court should substantially follow the procedure it outlined, and the parties agreed to, during precharge conferences. The court should charge the jury on excessive force, but not on qualified immunity. If the jury returns a verdict of excessive force against Dingler, the court should then decide the issue of qualified immunity.").

[191] Indeed, in *Scott v. Harris*, 550 U.S. 372 (2007), Justice Stevens chastised his colleagues as the eight "jurors" on the Court who thought no reasonable person could reach a contrary result, even when three federal appeals court judges and one federal district court judge had disagreed with the eight Supreme Court "jurors'" assessment of the evidence. *Id.* at 389, 390, 395–96 (Stevens, J., dissenting). *See generally* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841–42

In *Tolan v. Cotton*,[192] sending an important signal, the Supreme Court granted certiorari, vacated and remanded a decision of the Court of Appeals for the Fifth Circuit in which the panel had granted summary judgment for the defendant police officer on qualified immunity, but had done so by "fail[ing] to view the evidence at summary judgment in the light most favorable to [the Plaintiff] with respect to the central facts of th[e] case."[193] In *Tolan*, the circumstances surrounding the shooting of a young, unarmed, black male on his own front porch were disputed, but the Fifth Circuit gave the officer the benefit of the doubt based on his version of the facts.[194] Due to a mistake in keying in the numbers on a license plate, officers believed that Robert Tolan was driving a stolen car when he parked on the street in front of his parents' home.[195] Officer Edwards, with gun drawn, ordered Tolan to lie down on his porch, which Tolan did.[196] When Tolan's parents appeared and inquired as to the reason their son was being held at gunpoint, the discussion led to Officer Cotton, who arrived after Edwards radioed for assistance, using force against Tolan's mother, precipitating a response from Tolan that resulted in Officer Cotton's shooting of Tolan.[197] In granting qualified immunity to Officer Cotton, the Fifth Circuit concluded that it was not clearly established that Cotton's actions violated Tolan's Fourth Amendment rights because an objectively reasonable officer could have perceived Tolan as presenting an immediate threat to the officers' safety.[198] The ruling was premised on the following facts: that the front porch was dimly lit, that Tolan's mother had refused the officers' orders, that Tolan had delivered a verbal threat, and that Tolan was moving to intervene in the officers' treatment of his mother, permitting Cotton reasonably to fear for his life.[199] Each of these facts was disputed by Tolan. In vacating and remanding, the Supreme Court stressed that even in the qualified immunity context, normal rules of summary judgment apply and reasonable inferences must be drawn in favor of the nonmoving party.[200] While I do not believe the Supreme Court intended to invite petitions for review in the "very large category" of cases that turn on the "utterly routine" question of the sufficiency of the evidence for summary judgment, I do believe the Court was

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(2009) ("[T]he Court in *Scott* was wrong to privilege its own view. . . . By insisting that a case like *Scott* be decided summarily, the Court not only denied those citizens an opportunity, in the context of jury deliberations, to inform and possibly *change* the view of citizens endowed with a different perspective. It also needlessly bound the result in the case to a process of decision making that deprived the decision of any prospect of legitimacy in the eyes of that subcommunity whose members saw the facts differently.").

[192] 134 S. Ct. 1861 (2014) (per curiam).

[193] *Id.* at 1863, 1866.

[194] *Id.* at 1863–65.

[195] *Id.* at 1863.

[196] *Id.*

[197] *Id.* at 1863–64.

[198] Tolan v. Cotton, 713 F.3d 299, 306–07 (5th Cir. 2013), *vacated*, 134 S. Ct. 1861 (2014).

[199] *Id.* at 307.

[200] *Tolan*, 134 S. Ct. at 1867–68.

noting that the summary judgment practice in the context of qualified immunity had strayed from the norm and needed correction.

Two weeks after *Tolan*, the Supreme Court granted certiorari, vacated and remanded another Fifth Circuit case for reconsideration in light of *Tolan*.[201] Robert Tolan lived to give testimony in his case, and his mother, father, and cousin were all witnesses to the shooting. In *Thomas v. Nugent*,[202] an arrestee, Baron Pikes, died after being repeatedly tased by the arresting officer.[203] The Fifth Circuit held that an arresting officer's use of a stun gun six to eight times on a handcuffed Mr. Pikes to obtain compliance with police commands to cooperate in the effect of his arrest, was not objectively unreasonable in light of clearly established law, and thus the officer's actions were protected under qualified immunity from a Section 1983 excessive force suit.[204] In a footnote, the panel observed:

> Essentially the only evidence in the record about the reasonableness or unreasonableness of the force applied comes from the arresting and jail officers. Consequently, although there were numerous tasings, which certainly raises suspicion as to the excessiveness of force, none of the evidence shows that the tasings were an unreasonable response under the circumstances reflected in the record before us.[205]

Of course, "the circumstances" were those as related by the officers involved. Even in the wake of the rather pointed message sent by the Supreme Court in vacating and remanding both *Tolan* and *Thomas*, the Fifth Circuit has continued to render seemingly improper summary judgment rulings on qualified immunity.[206]

A good case to contrast with the Fifth Circuit's approach in *Tolan* and *Thomas* is *Cruz v. City of Anaheim*.[207] In *Cruz*, Anaheim police officers were given information

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[201] Thomas v. Nugent, 134 S. Ct. 2289 (2014).

[202] 539 F. App'x 456 (5th Cir. 2013), *cert. granted*, 134 S. Ct. 2289 (2014), *vacated and remanded in light of Tolan*, 134 S. Ct. 1861.

[203] *Id.* at 458.

[204] *Id.* at 458, 461.

[205] *Id.* at 461 n.35.

[206] *See, e.g.*, Dawson v. Anderson Cnty., 566 F. App'x 369, 371–72, 376–79 (5th Cir. 2014) (Dennis, J., dissenting) ("The majority concludes that Dawson has failed to present a genuine issue of material fact regarding whether the Defendants . . . violated clearly established Fourth Amendment law by repeatedly shooting at her with a pepperball gun during a strip search in which she was undressed, unarmed, and surrounded by multiple officers. The majority fails to view the evidence in the light most favorable to Dawson and disregards reasonable inferences that jurors could draw from the record to conclude that under clearly established law, the officers used excessive force and conducted a strip search in an unreasonable manner in violation of Dawson's Fourth Amendment rights. Accordingly, I respectfully dissent and would reverse and remand for trial." (footnote omitted), *pet. for reh'g and reh'g en banc denied*, 769 F.3d 326 (5th Cir.)). *But see* Luna v. Mullenix, 773 F.3d 712, 720 (5th Cir. 2014).

[207] 765 F.3d 1076 (9th Cir. 2014).

about Cruz by a confidential informant.[208] Told that Cruz was a gang member who sold drugs and carried a gun, the officers converged on Cruz while he was in his vehicle, surrounding him in a Walmart parking lot.[209] According to the officers, Cruz disobeyed orders to get on the ground as he exited his vehicle and instead reached for his waistband, bringing all five officers to fire a total of twenty shots in two to three seconds.[210] As they approached the car, they found Cruz's body was entangled in his seatbelt.[211] There was no gun found on his body, but a loaded weapon was later found on the passenger seat of Cruz's vehicle.[212] The district court granted summary judgment for the officers based on their uncontradicted version of the facts.[213] As Judge Kozinski explained, in reversing the grant of summary judgment, this was a case of "'we said, he's dead,'"[214] in which the reasonableness of the use of deadly force will turn on the jury's answer to the question of whether Cruz reached for his waistband.[215] For the court deciding the motion for summary judgment, however, the question is a different one: "Could any reasonable jury find it more likely than not that Cruz *didn't* reach for his waistband?"[216] As the court notes, this question should not be answered by considering only the officers' self-serving testimony. The court must consider whatever circumstantial evidence might discredit their story.[217] Given the undisputed fact that no gun was found on Cruz, a jury might question why he would have been reaching for his waistband.[218] This, along with other "material factual discrepancies," led the Ninth Circuit panel to reverse the grant of summary judgment.[219] Whether *Tolan* represents a unique response to a particularly egregious misapplication of summary judgment rules to an especially horrendous set of facts or whether it will be invoked to ward off summary judgment on qualified immunity in a much broader spectrum of cases remains to be seen. Since *Tolan*, there have been other decisions recognizing and applying the appropriate standard for summary judgment in the qualified immunity context.[220] My guess is that *Tolan*, while not on the

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[208] *Id.* at 1077.
[209] *Id.* at 1077–78.
[210] *Id.* at 1078.
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.* at 1077.
[215] *Id.* at 1079.
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.* at 1080.
[220] *See, e.g.*, Luna v. Mullenix, 773 F.3d 712, 720 (5th Cir. 2014) ("Mullenix asserts that, as a matter of law, his use of force was not objectively unreasonable because he acted to protect other officers, including Officer Ducheneaux beneath the overpass and officers located further north up the road, as well as any motorists who might have been located further north. However, accepting plaintiffs' version of the facts (and reasonable inferences therefrom) as true, these

merits of the qualified immunity defense, will be one of the more helpful and significant Supreme Court opinions in terms of process for plaintiffs asserting Section 1983 claims against officials in their individual capacities.

D. Clearly Established Law: "But I Don't Want to Go Among Mad People."[221]

The question of "what makes the law clearly established" is riddled with contradictions and complexities. As Judge Hall of the Second Circuit has recently noted, "[f]ew issues related to qualified immunity have caused more ink to be spilled than whether a particular right has been clearly established, mainly because courts must calibrate, on a case-by-case basis, how generally or specifically to define the right at issue."[222] Judge Wilson has observed:

> [T]he way in which courts frame the question, "was the law clearly established," virtually guarantees the outcome of the qualified immunity inquiry. Courts that permit the general principles

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facts are sufficient to establish that Mullenix's use of deadly force was objectively unreasonable."); Williams v. Holley, 764 F.3d 976, 980 (8th Cir. 2014) ("Holley contends there is insufficient evidence for a reasonable juror to find his decision to use lethal force against Cletis was unreasonable. Holley, in essence, contends the court is bound to accept his version of events because he is the only surviving eyewitness of the altercation. Holley, however, overlooks the circumstantial evidence which shows possible inconsistencies with Holley's account of the shooting. As the district court found, the circumstantial evidence raised questions of fact regarding material aspects of Holley's account of the event. We must view these inconsistencies in the light most favorable to Roseetta, giving Roseetta the benefit of all reasonable inferences." (citing Tolan v. Cotton, 134 S. Ct. 1861, 1863 (2014); Edwards v. Byrd, 750 F.3d 728, 731 (8th Cir. 2014)); Miller v. Gonzalez, 761 F.3d 822, 828–29 (7th Cir. 2014) ("The district court's decision ultimately rests on the proposition that an accidental use of force cannot be excessive under the Fourth Amendment. But whether Gonzalez's use of force was accidental is precisely the disputed question—a question that cannot be resolved on this record given the competing versions of the event. . . . If Miller is believed, Gonzalez saw him subdued at gunpoint, lying motionless and spread-eagled on the ground, and then deliberately brought down his knee on Miller's jaw with enough force to break it." (citations omitted)); Felders *ex rel.* Smedley v. Malcom, 755 F.3d 870, 885 (10th Cir. 2014) ("When the district court concludes that a reasonable jury could view the facts a certain way, we take them as true. Thus, at this stage in the litigation, we cannot rule out the possibility that Bairett caused the car doors to remain open, Malcom was aware that Bairett caused the car doors to remain open, and Duke [a drug sniffing dog] failed to properly alert before entering the vehicle. If that is what actually happened, then Malcom violated clearly established law." (footnote omitted)), *cert. denied*, 2015 WL 133498 (Jan. 12, 2015).

[221] CARROLL, *supra* note 71. ("'But I don't want to go among mad people,'" Alice remarked. 'Oh, you can't help that,' said the Cat: 'we're all mad here. I'm mad. You're mad.'").

[222] Golodner v. Berliner, 770 F.3d 196, 205 (2d Cir. 2014). Judge Hall recommends application of the "Goldilocks principle," an approach I have also recommended to judges in training programs. *Id.* at 206. Under such a principle, the court should frame the right neither so narrowly that "government actors will invariably receive qualified immunity," nor so broadly that "immunity will be available rarely, if ever." *Id.*

> enunciated in cases factually distinct from the case at hand to "clearly establish" the law in a particular area will be much more likely to deny qualified immunity to government actors in a variety of contexts. Conversely, those courts that find the law governing a particular area to be clearly established only in the event that a factually identical case can be found, will find that government actors enjoy qualified immunity in nearly every context.[223]

The source of these different approaches may be traced to the forked tongue with which the Supreme Court has spoken. In reviewing cases from the Ninth and Eleventh Circuits, the Court has sent out mixed signals.[224] Defendants will cite to language from *Saucier v. Katz*,[225] *Brosseau v. Haugen*,[226] *Ashcroft v. al-Kidd*,[227] *Ryburn v. Huff*,[228] and *Stanton v. Sims*,[229] all decisions reversing the Ninth Circuit and demanding a more factually specific framing of the right in question. Plaintiffs will cite to *Hope v. Pelzer*,[230] an opinion chastising the Eleventh Circuit for its insistence on a case with "'materially similar' facts" in order to have the law clearly established, and stressing that "fair warning"[231] is all that is needed. As I have noted elsewhere, I do not think there is much *Hope* left for plaintiffs.[232] It has been over ten years since the Court has

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[223] Wilson, *Location*, *supra* note 68, at 475.

[224] Jeffries, Jr., *What's Wrong with Qualified Immunity?*, *supra* note 7, at 852 (commenting on the "conflicting signals" from the Supreme Court).

[225] 533 U.S. 194, 201 (2001) (explaining that the clearly established law inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition").

[226] 543 U.S. 194, 200, 201 (2004) (per curiam) (framing the question in a very fact-specific way—whether it was clearly established that it was unconstitutional "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight," and noting that none of the cases proffered by the plaintiff to demonstrate clearly established law "squarely govern[ed] the case here").

[227] 131 S. Ct. 2074, 2083 (2011) ("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.' We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." (alteration in original)) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

[228] 132 S. Ct. 987, 990 (2012) (per curiam) ("No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case.").

[229] 134 S. Ct. 3, 7 (2013) (per curiam) ("[W]hether or not the constitutional rule applied by the court below was correct, it was not 'beyond debate.'" (quoting *al-Kidd*, 131 S. Ct. at 2083)).

[230] 536 U.S. 730 (2002).

[231] *Id.* at 741 ("[T]he salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.").

[232] *See generally* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left For Plaintiffs*, 29 TOURO L. REV. 633 (2013).

denied qualified immunity to a state actor,[233] and whether that trend will continue will be tested when the Court renders its opinion in *City and County of San Francisco v. Sheehan*,[234] a case from the Ninth Circuit granted certiorari as this Article was being written. In *Sheehan*, a social worker called the San Francisco Police Department to ask for assistance in taking into custody, for purposes of treatment and evaluation, a mentally-ill, middle-aged woman who lived in a group home for persons with mental

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[233] *See* Groh v. Ramirez, 540 U.S. 551, 563 (2004) ("Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid."); *see also Hope*, 536 U.S. at 752–60 (denying qualified immunity to prison guards who attached a prisoner to a hitching post for seven hours in the hot sun with no shirt, no bathroom breaks and little, if any, water). In the Court's last term, it issued three opinions addressing the merits of the qualified immunity defense, ruling unanimously in each case that the officials were entitled to qualified immunity. *See* Lane v. Franks, 134 S. Ct. 2369, 2382–83 (2014) ("At the time of Lane's termination, Eleventh Circuit precedent did not provide clear notice that subpoenaed testimony concerning information acquired through public employment is speech of a citizen entitled to First Amendment protection . . . . There is no doubt that the Eleventh Circuit incorrectly concluded that Lane's testimony was not entitled to First Amendment protection. But because the question was not 'beyond debate' at the time Franks acted, Franks is entitled to qualified immunity." (quoting *al-Kidd*, 131 S. Ct. at 2083)); Wood v. Moss, 134 S. Ct. 2056, 2068 (2014) ("No decision of which we are aware . . . would alert Secret Service agents engaged in crowd control that they bear a First Amendment obligation 'to ensure that groups with different viewpoints are at comparable locations at all times.'" (quoting Moss v. U.S. Secret Serv., 711 F.3d 941, 952 (9th Cir. 2013) (O'Scamlain, J., dissenting)); Plumhoff v. Rickard, 134 S. Ct. 2012, 2022, 2023 (2014) ("We have held that petitioners' conduct did not violate the Fourth Amendment, but even if that were not the case, petitioners would still be entitled to summary judgment based on qualified immunity . . . . '[E]xisting precedent must have placed the statutory or constitutional question' confronted by the official 'beyond debate.' In addition, '[w]e have repeatedly told courts . . . not to define clearly established law at a high level of generality,' since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." (third and fourth alteration in original) (quoting *al-Kidd*, 131 S. Ct. at 2074, 2083–84)).

The Supreme Court's tendency to rarely deny qualified immunity to public officials has not gone unnoticed by judges and scholars. See, for example, *C.B. v. City of Sonora*, 769 F.3d 1005 (9th Cir. 2014) (Smith, J., concurring in part and dissenting in part), where Judge Smith notes:

> The Supreme Court's recent case law illustrates the substantial protection that qualified immunity affords police officers. Although each case is decided based on its specific facts, the reality is that the Supreme Court in the recent past has rarely denied qualified immunity to police officers. As one scholar has observed, before the recent reversal of a grant of qualified immunity in *Tolan*, 134 S. Ct. 1861, the Court had not ruled against a police officer in a qualified immunity case since *Groh v. Ramirez*, 540 U.S. 551 (2004), decided nearly a decade earlier.

Id. at 1038 n.5 (internal citation omitted).

[234] Sheehan v. City and Cnty. of San Francisco, 743 F.3d 1211 (9th Cir. 2014), *cert. granted*, City and Cnty. of San Francisco v. Sheehan, 135 S. Ct. 702 (2014). Because Justice Breyer's brother was the district court judge in the case, he did not participate in the decision to grant certiorari.

illness.[235] Teresa Sheehan had stopped taking her medications, was not taking care of herself, and had threatened to kill the social worker with a knife when he tried to enter her room to perform a welfare check.[236] When Officer Holder and Sergeant Reynolds arrived at the home, they accompanied the social worker to Ms. Sheehan's room. After knocking and announcing that they were police, the officers entered the room using a key. Ms. Sheehan grabbed a knife, walked towards the officers, told them they didn't have a search warrant, and threatened to kill them unless they left her alone.[237] Following the threat, the officers retreated, closed the door and left Ms. Sheehan in her room. They called for backup and instructed the social worker to await the back-up officers and let them in on arrival. So far, so good. Instead of awaiting the backup, however, Sergeant Reynolds and Officer Holder, with service weapons drawn, forced open the door to Ms. Sheehan's room.[238] When Sheehan advanced with a knife, Sergeant Reynolds initially used pepper spray, but to no effect. Both officers then fired, and Sheehan was hit five or six times.[239] Sheehan survived and, after prevailing on the criminal charges brought against her,[240] she filed a civil rights action against the officers as well as the City and County of San Francisco, alleging Fourth Amendment claims under Section 1983 for unreasonable search and seizure and excessive force.[241] The

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[235] 743 F.3d at 1217. The social worker was an "authorized person" who could initiate a 72-hour detention under California Welfare & Institutions Code § 5150. *Id.* at 1218.

[236] *Id.* at 1217.

[237] *Id.* at 1218–19.

[238] *Id.* at 1219.

[239] *Id.* at 1220.

[240] Sheehan was prosecuted:

> [F]or two counts of assault with a deadly weapon, two counts of assaulting a police officer with a deadly weapon and one count of making criminal threats against Hodge [the social worker]. . . . The jury hung on the four assault counts and acquitted on the criminal threats count. The city elected not to retry Sheehan.

Id.

[241] *Id.* Sheehan also asserted a claim under the Americans with Disabilities Act (ADA), as well as various state law claims. *Id.* There is disagreement among the circuits as to whether and to what extent the ADA applies in the context of arrests or other seizures of emotionally disturbed or mentally ill persons. *See id.* at 1231. In addressing the issue as a matter of first impression, the Ninth Circuit held that the ADA does apply in the context of arrests, and that a jury could find that the city failed to reasonably accommodate Sheehan's disability "when the officers forced their way back into her room without taking her mental illness into account." *Id.* at 1232–33. One of the questions on which the Supreme Court has granted certiorari is "[w]hether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." Petition for Writ of Certiorari, City and Cnty. Of San Francisco v. Sheehan, 135 S. Ct. 702 (2014) (No. 13-1412). The extent to which the ADA applies to arrests or other seizures of mentally ill persons is beyond the scope of this Article, but I expect a majority of the Court may adopt a legal principle that runs close to that of the Fifth Circuit's position in *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000). In *Hainze*, the court held that

> Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve

district court granted summary judgment on all claims for the defendants, and Ms. Sheehan appealed.[242]

In addressing the issues raised by the Fourth Amendment claims, the Ninth Circuit panel examined the conduct of the officers at each step of the encounter and was unanimous in concluding that the initial entry into Ms. Sheehan's room without a warrant was lawful under the emergency aid exception to the warrant requirement.[243] There was also agreement that the initial entry was conducted in a reasonable manner. The officers knocked and announced, used a pass key, and entered without weapons drawn.[244] As to the second entry, however, while all agreed that the emergency aid exception still applied and there remained no need for a warrant,[245] the majority of the panel refused to hold, as a matter of law, that the decision to force the second entry was reasonable.[246] Taking into consideration the report of Lou Reiter, plaintiff's expert,[247] along with

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> subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life. Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents.

Id. at 801. If the Court were to embrace a theory that the ADA does apply to arrests, it would not be unreasonable to limit the reasonable accommodations requirement to situations where officers have "secur[ed] the scene and ensur[ed] that there is no threat to human life." *Id.* There would still be a question about how that approach might apply to the facts of *Sheehan*, and resolution of that question will depend on whether the Court views the undisputed facts as having established that Ms. Sheehan was "secured" and presenting "no threat to human life" at the time of the second forced entry that precipitated the shooting. *Tolan*'s admonition that reasonable inferences must be drawn in favor of the non-moving party would lend support to Ms. Sheehan's claim that the scene was secured, she had no means of escape, and she presented no threat to others or herself while confined to her room. She had never threatened to harm herself. *See Sheehan*, 743 F.3d at 1226.

[242] *Sheehan*, 743 F.3d at 1220.

[243] *Id.* at 1222. As the court explained, "[T]he emergency aid exception applies when: '(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need.'" *Id.* at 1221 (citing United States v. Snipe, 515 F.3d 947, 952 (9th Cir. 2008)).

[244] *Id.* at 1223.

[245] *Id.* at 1224–25.

[246] *Id.* at 1225.

[247] The author acknowledges that she knows Mr. Reiter well and respects his professional opinion as to the "reasonableness" of the officers' conduct. According to the court, Reiter explained "officers are trained not to unreasonably agitate or excite the [mentally ill] person, to contain the person, to respect the person's comfort zone, to use nonthreatening communications and to employ the passage of time to their advantage." *Id.* at 1225.

the training the officers had received,[248] and the totality of the circumstances, and viewing the facts in the light most favorable to the plaintiff,[249] the majority concluded that "a reasonable jury could find that the officers' decision to force a confrontation with Sheehan was objectively unreasonable,"[250] and thus violated the Fourth Amendment.

Having determined that a reasonable jury could find that the second entry constituted a constitutional violation, the majority proceeded to deny qualified immunity on this Fourth Amendment claim, relying primarily on *Graham v. Connor*,[251] *Alexander v. City and County of San Francisco*,[252] and *Deorle v. Rutherford*[253] as cases that clearly

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[248] San Francisco training materials "advise officers to request backup, to calm the situation, to communicate, to move slowly, to assume a quiet, nonthreatening manner, to take time to assess the situation and to 'give the person time to calm down.'" *Id.* For an excellent article that makes the case for taking into account how police are trained regarding emotionally disturbed persons when assessing the constitutionality of the use of force against such persons, see Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261 (2003).

[249] Viewing the facts favorably to the plaintiff, the officers had been told by the social worker that there was no avenue of escape from plaintiff's room other than the door they were guarding and that all other occupants of the building had been evacuated. *Sheehan*, 743 F.3d at 1226. Plaintiff was not suicidal. *Id.* Furthermore, backup was on the way at the time of the second entry, and trained negotiators with less lethal weapons would be available to defuse the situation. *Id.* at 1228. *Cf.* Aldaba v. Pickens, No. 13-7034, 2015 WL 451227, at *4 (10th Cir. Feb. 4, 2015) ("When an individual poses a more severe and immediate threat to himself, a higher level of force may be reasonable in order to seize him for protective custody purposes."); Rice v. ReliaStar Life Ins. Co., 770 F.3d 1122, 1131 (5th Cir. 2014) (holding that "the threat an individual poses to himself may create an exigency that makes the needs of law enforcement so compelling that a warrantless entry is objectively reasonable under the Fourth Amendment").

[250] *Id.* at 1226.

[251] 490 U.S. 386 (1989). Invoking the balancing test of *Graham*, the majority weighed the significant intrusion on Ms. Sheehan's Fourth Amendment rights against the need for an immediate re-entry of her room, "apparently without warning and with guns drawn, under conditions that were likely to result in her death" and concluded that "any reasonable officer would have known that this use of force was excessive." *Sheehan*, 743 F.3d at 1228.

[252] 29 F.3d 1355 (9th Cir. 1994). In *Alexander*, the plaintiff claimed that officers executing an administrative warrant for the health inspection of a home "storm[ed] the house of a man whom they knew to be a mentally ill, elderly, half-blind recluse who had threatened to shoot anybody who entered." *Id.* at 1366. The confrontation ended with the elderly man being killed. *Id.* at 1358. While the use of deadly force in *Alexander* may have been justified at the moment of the shooting, the Ninth Circuit concluded that summary judgment for the officers was inappropriate because if a jury found that the officers entered for the purpose of assisting in a health inspection, the jury could also find that the use of a SWAT team to make such an entry constituted excessive force under the circumstances. *Id.* at 1366–67. In *Alexander*, backup was summoned and negotiation was attempted before making the forced entry. *Id.* at 1358.

[253] 272 F.3d 1272 (9th Cir. 2001). In *Deorle*, the court denied qualified immunity to an officer who shot an unarmed mentally ill person with a less lethal weapon (lead-filled beanbag round), where there was no threat presented to the officer, he had a clear line of retreat,

established the law and "would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry."[254] The majority was careful to emphasize that its conclusions as to the merits of the Fourth Amendment violation and the denial of qualified immunity were based on its view of the facts and reasonable inferences drawn therefrom in the light most favorable to Ms. Sheehan.[255] On facts the majority considered "disputed," there was an acknowledgment that at trial, a jury might find that "Sheehan was not contained, that she presented a flight risk, that officers or others were in danger, or that the officers reasonably but mistakenly believed that their entry was necessary to prevent Sheehan's escape or ensure the safety of themselves or others."[256]

Frankly, it is somewhat difficult to discern if there are really any material facts in dispute in *Sheehan* or whether the facts are essentially agreed upon and the question is just one of the reasonableness of the officers' conduct under the given set of facts. The one material fact that the panel identifies as apparently disputed is whether Hodge, the social worker, "told the officers that no one else was in the building."[257] If defendants do not dispute the fact that Hodge informed the officers that he had cleared the building and if there are no other material facts in dispute, then under *Scott v. Harris*,[258] the question of the reasonableness of the officers' conduct given the undisputed facts is a "pure question of law" for the court to decide.[259]

For plaintiff to prevail in the Supreme Court on the unlawfulness of the second entry, the Court[260] would have to agree that there were disputed material facts that, if found in favor of plaintiff, would support a jury's determination that the officers' decision to make the second entry at the time and in the manner they did, without awaiting backup, was objectively unreasonable. The Court could also conclude that there are no material facts in dispute and decide the reasonableness of the second entry as a

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and where a confrontation could easily have been avoided. *Id.* at 1282. The court also stated that "where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed." *Id.* at 1283.

[254] *Sheehan*, 743 F.3d at 1229.

[255] *Id.* at 1228–29.

[256] *Id.* at 1229.

[257] *Id.* at 1218 n.1.

[258] 550 U.S. 372 (2007).

[259] *Id.* at 381 n.8. This author does not agree that the question of "objective reasonableness" under the Fourth Amendment should always be a question for the court rather than a jury. In cases where the answer is not obvious, I agree with Justice Stevens's assessment in *Scott* that "[w]hether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury." *Id.* at 395 (Stevens, J., dissenting).

[260] Justice Breyer has recused himself from the case, so the Ninth Circuit opinion as to the Fourth Amendment issues could be affirmed by a 4–4 split.

matter of law. If a majority decides (1) that the disputed facts when viewed in the light most favorable to the plaintiff could not support a jury's finding of objective unreasonableness as to the second entry, or that there are no disputed facts, and (2) that the second entry was objectively reasonable as a matter of law, then it's "game over" for the plaintiff on the Fourth Amendment unreasonable search and seizure and excessive force claims. The panel was in agreement that "the officers' use of deadly force—*viewed from the standpoint of the moment of the shooting*—was reasonable as a matter of law."[261] It was only under the Ninth Circuit's "provocation theory"[262] that the shooting could be deemed unreasonable. Thus, the officers could be found liable for the harm caused by the shooting only if the second entry constituted an independent Fourth Amendment violation that recklessly provoked the violent confrontation with Sheehan. Thus, under the Ninth Circuit's analysis, the claim of excessive force will stand or fall with the claim based on the wrongful entry.

A holding against the plaintiff on the merits of the second entry would obviate the need to address the second prong of the immunity analysis, the clearly-established-law question. But, if the Court were to find in favor of the plaintiff on the unlawfulness of the second entry, the plaintiff would have to convince the Court that the Ninth Circuit's clearly-established-law analysis withstands scrutiny. Of course, pursuant to *Pearson* and as it did in *Stanton*, the Court could jump to the second prong and hold that the officers should be granted qualified immunity because, whether or not their conduct in making the second entry violated the Fourth Amendment, the unlawfulness of entering the home of a mentally ill person who, at the moment before entry, could not escape and posed no imminent threat to herself or others, including the officers, was not clearly established by Supreme Court or Ninth Circuit precedent and was not beyond debate. It is clear that there is no Supreme Court precedent that would be controlling with respect to the facts in *Sheehan*. While *Graham* clarifies the general framework to be applied to claims of unreasonable seizures under the Fourth Amendment,[263] and "clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness,"[264] as the Court explained in *Saucier*, that may not be enough to put an officer on notice that his or her conduct was "unlawful in the situation he confronted."[265] *Deorle* involved the use of a beanbag round against a mentally ill person and an officer who

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[261] *Sheehan*, 743 F.3d at 1229.

[262] *Id.* at 1230 (citing Billington v. Smith, 292 F.3d 1177, 1189 (9th Cir. 2002) ("[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force.")).

[263] *Graham* sets forth factors to be used in determining whether the use of force is excessive under the Fourth Amendment—factors that include the severity of the crime, whether the suspect poses a threat to the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. Graham v. Connor, 490 U.S. 386, 396 (1989).

[264] Saucier v. Katz, 533 U.S. 194, 201–02 (2000).

[265] *Id.* at 202.

unnecessarily provoked the encounter. Yet, the facts may be distinguished in material ways. Deorle was unarmed, had complied with officers' demands, and had not threatened to harm anyone when he was shot.[266] Nor did *Deorle* entail an entry into a room or home.

Alexander did involve the forcible entry into the home of a man known to be mentally impaired pursuant to an administrative warrant authorizing a forcible entry for purposes of conducting a health inspection.[267] When Quade, the occupant, refused to cooperate and threatened to shoot anyone who entered, the sergeant on the scene called for a tactical team and negotiators to assist. After an hour of fruitless negotiation attempts, the decision was made to forcibly enter the home in order "to take Quade into custody."[268] Quade responded as promised and was shot and killed in return fire.[269] Plaintiff's challenge in *Alexander*, as in *Sheehan*, was based on the allegedly unlawful entry, not the use of deadly force at the moment the officers were confronted with an armed and threatening occupant. Plaintiff argued that the administrative warrant did not authorize an entry for the purpose of arresting Quade, and that without exigent circumstances,[270] an arrest warrant was required to enter a home for a felony arrest.[271] The Ninth Circuit found that "[a] genuine dispute exist[ed] as to whether or not defendants ordered the storming of the house primarily for the purpose of arresting Quade,"[272] but agreed with plaintiff that if the forcible entry were for the purpose of arrest, the law was clearly established that an arrest warrant was needed.[273] Furthermore, on the amount of force used in effecting the entry, the court concluded that the jury's resolution of the disputed fact as to the purpose of the entry would also

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[266] Deorle v. Rutherford, 272 F.3d 1272, 1285 (9th Cir. 2001).

[267] Alexander v. City and Cnty. of San Francisco, 29 F.3d 1355, 1357–58 (9th Cir. 1994).

[268] *Id.* at 1358–59. After the event, a captain on the scene gave the following statement to the press:

> It wasn't necessarily dangerous but we could have been waiting all day long. The man was just unresponsive to any of our demands, any of our requests. And with the hostage negotiators and myself it appeared that he was not going to respond and uh we felt that rather than keep traffic blocked up and the streets blocked all day long we would try to go in and arrest him.

Id.

[269] *Id.*

[270] As Judge Kozinski noted in his concurring opinion, "No exigency stood in the way of seeking a warrant. The suspect was encircled and was no threat to anybody. Keeping the house blockaded long enough to apply for a warrant would have been a nuisance but, as best the record discloses, posed no danger to the community." *Id.* at 1368 (Kozinski, J., concurring) (citations omitted).

[271] *Id.* at 1360.

[272] *Id.* at 1364.

[273] *Id.* ("If [arrest] is the purpose, clearly established law requires an arrest warrant, and also prohibits the conversion of an administrative warrant into an all-purpose tool in the hands of law enforcement authorities.").

bear on the jury's determination of the reasonableness of the means used to make the entry.[274] A reasonable jury might find that "storming the house" was unreasonable as a means of executing a health inspection warrant, but might be reasonable as a means of executing the arrest of someone who had threatened to shoot anyone who entered his home.[275] On the clearly-established-law issue, the Ninth Circuit found *Alexander* to have much in common with the facts of *Sheehan*:

> In both cases, police officers had a legal right to enter a person's home (to render emergency aid in Sheehan's case and to execute an administrative warrant in *Alexander*). In both cases, the subject was contained and had threatened those who entered. In both, the officers knew they were dealing with someone who was mentally ill and acting irrationally. And in both, police officers decided to force an entry, knowing it was likely to result in a violent confrontation, absent the need to do so.[276]

In fact, the conduct of the officers in *Alexander* was arguably more reasonable. They awaited backup and attempted negotiation before making the forcible entry.[277]

If the Supreme Court addresses the clearly-established-law prong of the qualified immunity analysis in *Sheehan*, we will learn how much *Hope* is left. While *Graham* may be too general and *Deorle* may be too factually dissimilar, *Alexander* would seem to satisfy the "Goldilocks" test[278] in giving fair warning of the unlawfulness of forcibly entering the home of an armed and threatening, mentally-ill person "when there was no objective need for immediate entry."[279] In my opinion, on the facts of *Sheehan*, one could also make a case that the conduct of these officers, one of whom held the rank of Sergeant, was "plainly incompetent."[280] Both officers had been trained in how to conduct themselves in encounters with mentally ill persons.[281] They had called for backup which had arrived as they were engaged in the second entry. They were not in some remote, rural area where backup might take time to arrive. There appeared to be no urgent need to enter the room before the negotiators and the officers equipped with less-than-lethal weapons were available. Indeed, to borrow from Alexander Pope, one might conclude that this was a case of "fools rush[ing] in."[282]

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[274] *Id.* at 1366–67.

[275] *Id.* at 1367.

[276] Sheehan v. City and Cnty. of San Francisco, 743 F.3d 1211, 1228–29 (9th Cir. 2014).

[277] *Id.* at 1229.

[278] *See supra* note 222 and accompanying text.

[279] *Sheehan*, 743 F.3d at 1229.

[280] *See* Malley v. Briggs, 475 U.S. 335, 341 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

[281] *See supra* notes 241–48 and accompanying text.

[282] ALEXANDER POPE, AN ESSAY ON CRITICISM 36 (1711). The full line is "[f]ools rush in where angels fear to tread." *Id.* Having said this, given the Ninth Circuit's long losing streak in

Defining the contours of the right in question is only one aspect of the clearly-established-law puzzle. Even if one can agree on what the "right" in question is, there is lingering uncertainty about where one looks to decide whether the law was clearly established. What law counts? Note that in both *Carroll* and *Reichle*, the Court assumed *arguendo* that "a controlling circuit precedent could constitute clearly established federal law."[283] Despite some Supreme Court guidance on what law counts in the clearly-established-law analysis, the question of what law controls is itself still amazingly unclear.[284] In *Wilson v. Layne*,[285] the Supreme Court indicated that "cases of controlling authority in [the] jurisdiction at the time of the incident which clearly established the rule on which [plaintiffs] seek to rely" or "a consensus of cases of persuasive authority" could serve to clearly establish the law.[286] In the absence of controlling authority from the Supreme Court or the relevant jurisdiction, the majority of circuits will consider circuit cases from other jurisdictions on the clearly-established-law prong of the analysis.[287]

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qualified immunity cases and the Court's clear deference to law enforcement officials, I am not optimistic about Ms. Sheehan's chances of prevailing on her Fourth Amendment claims. I hope I am wrong.

[283] Carroll v. Carman, 135 S. Ct. 348, 350 (2014); *see also* Reichle v. Howards, 132 S. Ct. 2088, 2094 (2012). The tentativeness on the relevance of circuit law made some sense in *Reichle*, where the defendants were federal law enforcement agents who operate nationally. In *Ashcroft v. al-Kidd*, some members of the Court expressed a willingness to give more deference to an official who functions on a national level because "[t]he official with responsibilities in many jurisdictions may face ambiguous and sometimes inconsistent sources of decisional law."). 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring). In *Carroll*, however, the Court's hedging on the controlling nature of circuit precedent was not so justified and not explained. The law enforcement officer in *Carroll* was a local official whose conduct would be governed by the law of the Ninth Circuit. Perhaps the Court's hesitation was a reflection of its general disagreement with Ninth Circuit rulings. *See generally Carroll*, 135 S. Ct. 348.

[284] This subject provided fodder for a fascinating blog discussion. *See* Richard M. Re, *Should Circuit Precedent Deprive Officers of Qualified Immunity?*, RES JUDICATA (Nov. 17, 2014, 6:49 AM), http://richardresjudicata.wordpress.com/2014/11/17/should-circuit-precedent-deprive-officers-of-qualified-immunity/and http://richardresjudicata.wordpress.com/2014/11/14/does-circuit-precedent-deprive-officers-of-qualified-immunity/more-1757.

[285] 526 U.S. 603 (1999).

[286] *Id.* at 617.

[287] *See, e.g.*, Terebesi v. Torreso, 764 F.3d 217, 231 & n.12 (2d Cir. 2014); Jacobson v. McCormick, 763 F.3d 914, 918 (8th Cir. 2014); Brent v. Wenk, 555 F. App'x 519, 526–27 (6th Cir. 2014); Bame v. Dillard, 637 F.3d 380, 384 (D.C. Cir. 2011); Maldonado v. Fontanes, 568 F.3d 263, 270–71 (1st Cir. 2009); Williams v. Bitner, 455 F.3d 186, 194 (3d Cir. 2006); Owens by and through Owens v. Lott, 372 F.3d 267, 280 (4th Cir. 2004); McClendon v. City of Columbia (McClendon II), 305 F.3d 314, 329–30 (5th Cir. 2002) (en banc); Roska v. Peterson, 304 F.3d 982, 998–1000 (10th Cir. 2002); Burgess v. Lowery, 201 F.3d 942, 944–46 (7th Cir. 2000). For the most liberal view of what can serve to clearly establish the law, see *Prison Legal News v. Lehman*, 397 F.3d 692, 701–02 (9th Cir. 2005) ("In determining whether PLN's rights in this case were clearly established, and whether a reasonable person would have known his or her actions violated these rights, we may look at unpublished decisions and

The combination of (1) uncertainty about how precisely or broadly the right may be defined, (2) the role of Supreme Court, federal circuit and state law cases in establishing the defined right, and (3) the temporal problem of determining what law was controlling at the time of the challenged conduct for purposes of giving sufficient notice to public officials of the lawfulness of their conduct, makes for some decisions that would baffle the best of us. One might say, "here's where qualified immunity gets 'curiouser and curiouser.'"[288] For example, in 1992, in *Hudson v. McMillian*,[289] the Supreme Court addressed the question of "whether the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury."[290] The Court answered the question in the affirmative, holding:

> When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.[291]

The Fourth[292] and Eighth[293] Circuits misconstrued the Supreme Court decision for a number of years, requiring more than de minimis injury to state an excessive force

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the law of other circuits, in addition to Ninth Circuit precedent."). And for the most conservative view on this question, see *Vinyard v. Wilson*, 311 F.3d 1340, 1348 n.11 (11th Cir. 2002) ("Although we cite and examine other circuits' and district courts' decisions under the first prong of *Saucier*, we point out that these decisions are immaterial to whether the law was 'clearly established' in this circuit for the second prong of *Saucier*."). One might conclude that neither the Ninth Circuit nor the Eleventh Circuit has yet discovered the "Goldilocks" principle.

For a case where officers were afforded qualified immunity because their conduct was in conformance with precedent of the Supreme Court of the state even though not consistent with the law of the relevant circuit, see *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 573 (7th Cir. 2014) ("In the absence of a controlling decision by the United States Supreme Court, the Wisconsin cases are thus as relevant as our own precedents in evaluating what a Milwaukee police officer might have thought the law permitted in responding to a report that the occupant of a private dwelling was in danger of harming herself.").

[288] CARROLL, *supra* note 71.

[289] 503 U.S. 1 (1992).

[290] *Id.* at 4.

[291] *Id.* at 9.

[292] *See, e.g.*, Taylor v. McDuffie, 155 F.3d 479, 480 (4th Cir. 1998) (refusing to recognize excessive force claim by prisoner where only de minimis injury alleged); Riley v. Dorton, 115 F.3d 1159, 1160 (4th Cir. 1997) (same); Norman v. Taylor, 25 F.3d 1259, 1260 (4th Cir. 1994) (en banc) (same).

[293] *See, e.g.*, Meehan v. Thompson, 763 F.3d 936, 946, 947 (8th Cir. 2014) ("We recognized for the first time in *Chambers v. Pennycook*, 641 F.3d 898 (8th Cir. 2011), that police conduct that causes only *de minimis* injury could constitute excessive force."); Crumley v. City of St. Paul, 324 F.3d 1003, 1007 (8th Cir. 2003) ("[W]hile this court has stated '[i]t remains an open

claim. In 2010, in *Wilkins v. Gaddy*,[294] the Supreme Court finally set them straight in reversing the Fourth Circuit with the criticism that the Fourth Circuit's strained reading of *Hudson* was indefensible.[295] Despite the Supreme Court's holding in *Hudson* and *Gaddy*'s criticism of circuit law ignoring *Hudson* 's clear implications, both the Fourth[296] and Eighth[297] Circuits have recently issued opinions granting qualified immunity to officers who did not violate the law as it existed in the respective circuits at the time, even though the circuit law in each instance was clearly inconsistent with Supreme Court precedent.[298] While we might instruct first year law students, as well as police officers, that Supreme Court opinions trump circuit law, apparently this is not the case when it comes to qualified immunity. Even the Supreme Court has deferred to bad circuit law on the qualified immunity issue.

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question in this circuit whether an excessive force claim requires some minimum level of injury,' *Hunter v. Namanny*, 219 F.3d 825, 831 (8th Cir. 2000), a de minimus use of force or injury is insufficient to support a finding of a constitutional violation." (alterations in original)).

[294] 559 U.S. 34 (2010).

[295] *Id.* at 39.

[296] *See* Hill v. Crum, 727 F.3d 312, 322 (4th Cir. 2013) (acknowledging that the Fourth Circuit had been applying the incorrect standard, but granting qualified immunity because "[i]n 2007 under *Norman*, a reasonable correctional officer would have objectively believed that the law in this circuit was what the Fourth Circuit said it was; that is, a plaintiff could not prevail on an excessive force claim 'absent the most extraordinary circumstances,' if he had suffered only *de minimis* injury"); Williams v. Calton, 551 F. App'x 50, 51 (4th Cir. 2013) (per curiam) (same).

[297] *See* Peterson v. Kopp, 754 F.3d 594, 601 (8th Cir. 2014) ("[Officer] Kopp could have reasonably believed his actions were constitutionally permissible as long as they did not cause more than de minimis injury"); Bishop v. Glazier, 723 F.3d 957, 962 (8th Cir. 2013) ("The amount of force that Glazier allegedly used did not cause more than *de minimis* injury. Glazier is thus entitled to qualified immunity, because he did not violate Bishop's then clearly established constitutional rights under the Fourth Amendment." (citations omitted)); LaCross v. City of Duluth, 713 F.3d 1155, 1158 (8th Cir. 2013) ("In September 2006, when Mark deployed his Taser, 'a reasonable officer could have believed that as long as he did not cause more than *de minimis* injury to an arrestee, his actions would not run afoul of the Fourth Amendment.'").

[298] As Judge Thacker noted in her dissent in *Hill v. Crum*:

> Under prevailing Supreme Court precedent available at the time of the assault in this case, it was clearly established that an officer could not maliciously or sadistically impose harm on a custodial, handcuffed, and completely non-resistant inmate without violating the inmate's Eighth Amendment right to be free from cruel and unusual punishment—and any *reasonable* officer would have known as much. . . . Appellant Crum claims that he was entitled to assault Mr. Hill unabated for over two minutes so long as any resulting injury was *de minimis*. . . . Not so. Under controlling Supreme Court precedent at the time—not to mention applying pure common sense—no reasonable officer could have believed such abuse was lawful. . . .On November 1, 2007, the controlling Supreme Court authority for excessive force cases in the Eighth Amendment context was *Hudson v. McMillian*, 503 U.S. 1 (1992).

Hill v. Crum, 727 F.3d 312, 325–26 (4th Cir. 2013) (Thacker, J., dissenting).

In *Lane v. Franks*,[299] the Court granted certiorari "to resolve discord among the Courts of Appeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities."[300] In 2006, Edward Lane was hired by Central Alabama Community College (CACC) to be the Director of Community Intensive Training for Youth (CITY), a "statewide program for underprivileged youth."[301] When conducting an audit of the financially struggling program's expenses, Lane discovered that Suzanne Schmitz, an Alabama State Representative, had been on the payroll of the program but was virtually a "no show" employee.[302] Though advised of the possible political repercussions, Lane fired Schmitz, prompting an investigation by the FBI into Schmitz's employment with CITY.[303] The investigation culminated with federal criminal charges and ultimately a conviction against Schmitz. Lane gave truthful testimony under subpoena at the trial resulting in Schmitz's conviction.[304] Shortly thereafter, Steve Franks, then President of CACC, fired Lane, and Lane subsequently brought suit against Franks in his individual capacity for damages, claiming that Lane's termination was in retaliation for his protected speech and violated his First Amendment rights.[305] The Eleventh Circuit affirmed the district court's grant of summary judgment for Franks,[306] relying on *Garcetti v. Ceballos*,[307] the Supreme Court decision in which the Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[308] The Eleventh Circuit concluded that Lane's speech was based on information he had learned pursuant to his job duties and thus was unprotected, and the fact "[t]hat Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, [did] not bring Lane's speech within the protection of the First Amendment."[309] Furthermore, the court noted that even if Franks' conduct was found to have violated the First Amendment under these circumstances, he would have been entitled to qualified immunity because the law was not clearly established at the time.[310]

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[299] 134 S. Ct. 2369 (2014).

[300] *Id.* at 2377.

[301] *Id.* at 2375.

[302] *Id.*

[303] *Id.*

[304] *Id.*

[305] *Id.* at 2376. Lane sued Franks in his official capacity as well for equitable relief, including reinstatement. *Id.*

[306] Lane v. Cen. Ala. Cmty. Coll., 523 F. App'x 709, 709–10 (11th Cir. 2013) (per curiam).

[307] 547 U.S. 410 (2006).

[308] *Id.* at 421.

[309] *Lane*, 523 F. App'x at 712.

[310] *Id.* at 711 n.2.

The Supreme Court reversed the Eleventh Circuit on the first prong of the immunity analysis, noting that "[i]n holding that Lane did not speak as a citizen when he testified, the Eleventh Circuit read *Garcetti* far too broadly."[311] As the Court put it, "[t]here is no doubt that the Eleventh Circuit incorrectly concluded that Lane's testimony was not entitled to First Amendment protection."[312] Indeed, it's fair to say that the Eleventh Circuit's strained reading of *Garcetti* was not defensible.[313] Not only did *Garcetti* say "nothing about speech that simply relates to public employment or concerns information learned in the course of public employment,"[314] but, as the Court pointed out, "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth."[315] Despite there being "no doubt" that the Eleventh Circuit got it wrong, the Court affirmed the Eleventh Circuit's grant of summary judgment for Franks on qualified immunity grounds because "[a]t the time of Lane's termination, Eleventh Circuit precedent did not provide clear notice that subpoenaed testimony concerning information acquired through public employment is speech of a citizen entitled to First Amendment protection."[316]

Another bizarre twist in a qualified immunity case can be found in a recent Sixth Circuit decision. In *T.S. v. Doe*,[317] seven minors were arrested at an underage drinking party and transported to a juvenile detention facility where they were strip searched and held in a cell together until the following day.[318] The underage drinking charges were ultimately dropped.[319] The parents of two of the children brought suit under Section 1983 on behalf of the juveniles, charging the correctional officers who performed the

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311 *Lane*, 134 S. Ct. at 2378–79.

312 *Id.* at 2383.

313 *See* Wilkins v. Gaddy, 559 U.S. 34, 39 (2010) ("The Fourth Circuit's strained reading of *Hudson* is not defensible."). As the concurring Justices in *Lane* noted, the question presented in the case "require[d] little more than a straightforward application of *Garcetti*." *Lane*, 134 S. Ct. at 2383; *see also* Gibson v. Kilpatrick, 773 F.3d 661, 667–69 (5th Cir. 2014) ("*Lane* seems to us to be an application of prior Supreme Court precedent. It was, after all, undisputed in *Lane* that 'Lane's ordinary job responsibilities did not include testifying in court proceedings.' *Lane* does not appear to have altered the standard for whether public employees speak pursuant to their official duties, but appears rather to be an application of *Garcetti*'s rule." (citations omitted)).

314 *Lane*, 134 S. Ct. at 2379.

315 *Id.*

316 *Id.* at 2382–83; *see also* Moore v. Money, No. 14-3173, 2014 WL 5648156, at *3, *4 (6th Cir. Nov. 4, 2014) (relying on *Lane* to grant qualified immunity because "at the time of Moore's testimony, there was no 'controlling authority' or a 'consensus of cases of persuasive authority' that could have put Defendants on notice that Moore's testimony was protected by the First Amendment").

317 742 F.3d 632 (6th Cir. 2014).

318 *Id.* at 634.

319 *Id.*

search and other supervisory officials with Fourth Amendment violations.[320] In 2009, at the time of the challenged conduct, controlling law in the Sixth Circuit held that "the suspicionless strip search of [adult] pretrial detainees held on minor, nonviolent offenses violated the Fourth Amendment."[321] As common sense might dictate, and as plaintiffs argued, a prohibition on suspicionless strip searches of adult pretrial detainees under such circumstances would *a fortiori* make any similar search of juvenile misdemeanants unlawful.[322] The district court in *T.S.* found *Florence* to be irrelevant to the facts of *T.S* and denied qualified immunity[323] based on the law as clearly established by the Sixth Circuit in *Masters v. Crouch*.[324] On interlocutory review, the Court of Appeals acknowledged that it was "simply not possible to square" its decision in *Masters* with *Florence* and thus, *Masters* was abrogated.[325] But *Florence* did not directly control in the context of the facts of *T.S.* such that the Sixth Circuit could readily dispose of the case by a citation to the Supreme Court opinion.[326] Instead of deciding the merits question left open in the wake of *Florence*, the court chose to dispose of the case on the "clearly-established-law" prong. The court observed:

> We admittedly face a unique situation. If this case involved adult detainees, *Florence* clearly holds that there would be no constitutional violation. Here, however, *Florence* does not squarely address the constitutional issue, so that we could dispose of the merits of this case with nothing more than a citation. In the interest of avoiding an advisory constitutional ruling, we should first look to whether the rule that the plaintiffs advocate here was clearly established at the time, so as to trigger liability for any potential constitutional violation.[327]

Thus, the court framed the novel question as whether an official may "benefit from a subsequent Supreme Court case that would cause a reasonable official to have at least a good-faith doubt that a given practice is prohibited?"[328] While acknowledging

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[320] *Id.* at 633–34.

[321] *Id.* at 635 (citing Masters v. Crouch, 872 F.2d 1248, 1250 (6th Cir. 1989)).

[322] *Id.* The court disagreed that this was the "type of common-sense conclusion that we may draw absent established legal principle." *Id.* at 640.

[323] *Id.* at 635.

[324] *Masters*, 872 F.2d at 1248.

[325] *T.S.*, 742 F.3d at 637.

[326] *Id.*

[327] *Id.*

[328] *Id.* It is worth comparing the Fourth Circuit's approach to the same temporal dilemma posed in *West*, discussed in *supra* notes 136–54 and accompanying text. That court, rightly in my opinion, explained:

> Decisions issued after the allegedly unconstitutional conduct do not affect whether the law was clearly established at the time of the conduct unless,

that "[a] ruling after the fact has no bearing on the official's integrity at the time of the conduct,"[329] the court nevertheless determined that officials here should be afforded qualified immunity because "[b]y June 2009, a reasonable official could have consulted the numerous Supreme Court opinions cited [by the court in *T.S.*], or the more recent opinions of our sister circuits, and, in objective good faith, concluded that *Masters* was no longer good law."[330]

So, one might say the "take away" from these cases for public officials is that an official who violates a constitutional right established by Supreme Court case law might still be entitled to qualified immunity if she has acted in reasonable reliance on the law of her circuit, even if the circuit law is clearly wrong. Or, an official might ignore circuit law and engage in conduct that appears to clearly violate the law as pronounced by the circuit and yet still be entitled to qualified immunity if a reasonable official could predict, after consulting Supreme Court cases and cases from other circuits, that the circuit law would no longer be good law at the time of the Section 1983 suit. Are we so far off from "being among mad people?"

> of course, the later decision addresses or otherwise illuminates whether the law was clearly established at the time of the challenged official action. In some instances, the law may change for the apparent benefit of government officials. But though such a change in law may indicate that there was no constitutional violation on the merits, it does not affect whether the law was clearly established because the favorable judicial decision could not have informed the officials' understanding of whether their actions were unlawful. Of course the need for prior notice is a two-way street. It is just as likely that a later-in-time judicial decision could clearly establish the illegality of the conduct in question. But later-in-time is not at the time, and prescience is not to be presumed in granting or withholding the immunity.

West v. Murphy, 771 F.3d 209, 214 (4th Cir. 2014); *see also* Bame v. Dillard, 637 F.3d 380, 399, 400 (D.C. Cir. 2011) (Rogers, J., dissenting) ("The Supreme Court aimed to protect Constitutional rights by limiting the availability of qualified immunity to those officials who learn the law as it stands before they act and then act in accordance with that law, not those who apply their subjective views instead . . . . The majority's approach means there are no objective limits to the scope of qualified immunity because a court may one day hold that the settled consensus of persuasive authority misapprehended a Supreme Court opinion on the requirements of the Constitution.").

[329] *T.S.*, 742 F.3d at 638.

[330] *Id.* at 639–40. The Sixth Circuit's esteemed view of the ability of officials to devote time to digesting and analyzing case law is not universal. *See, e.g.*, Gonzalez v. City of Schenectady, 728 F.3d 149, 162 (2d Cir. 2013) ("The policeman is not expected to know all of our precedents or those of the Supreme Court, or to distinguish holding from dicta, or to put together precedents for line-drawing, or to discern trends or follow doctrinal trajectories."); Ganwich v. Knapp, 319 F.3d 1115, 1125 (9th Cir. 2003) ("It may be argued that judges should not expect police officers to read *United States Reports* in their spare time, to study arcane constitutional law treatises, or to analyze Fourth Amendment developments with a law professor's precision. We do not expect police officers to do those things.").

CONCLUSION: TAKE TWO ASPIRIN

In my forty years of teaching, I have participated in Section 1983 programs for litigants[331] and judges[332] all over the country. For twenty years, I have co-authored a treatise on Police Misconduct Litigation under Section 1983[333] and taught a course on the same subject. It astounds me that so much of the law surrounding Section 1983 litigation remains uncertain, unpredictable, and seemingly dependent upon the "judicial experience and common sense"[334] of the particular judge hearing the case.

In thinking about how this area of the law has developed and the myriad challenges it presents for civil rights plaintiffs, I reached out to the core group I have been associated with for many years, academics and lawyers who eat, sleep, and breathe Section 1983. I asked for a short answer to the question: "What would be at the top of your list to change in the jurisprudence of Section 1983 litigation as it now exists?" With permission, I share their responses:

> Professor Michael Avery:[335] In general the jurisprudence is based on the culpability of the perpetrator, rather than the nature of the act performed or the injury to the victim. The need to show intentional discrimination to prove a Fourteenth Amendment equal protection violation is a perfect example. Too often there is a bad faith or evil intent requirement, *Monroe v. Pape* notwithstanding. The Section 1983 statute merely requires causation, but the courts require more.
>
> Attorney Gerald Birnberg:[336] Reverse *Pearson v. Callahan* and modify *Saucier v. Katz* to require an explanation of a constitutional right where fairly raised in a case and not clearly established by prior law. Otherwise, constitutional principles can almost never become "clearly established."

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[331] I have presented at programs for attorneys representing both plaintiffs and defendants in Section 1983 cases.

[332] The judicial programs for federal magistrate judges and federal district court judges are sponsored by the Education Division of the Federal Judicial Center.

[333] MICHAEL AVERY, DAVID RUDOVSKY, KAREN BLUM & JENNIFER LAURIN, POLICE MISCONDUCT: LAW AND LITIGATION (3d ed. 2014–15) [hereinafter POLICE MISCONDUCT].

[334] Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

[335] Professor Emeritus, Suffolk University Law School. Professor Avery is a co-author of POLICE MISCONDUCT, *supra* note 333. Before teaching, Professor Avery was a civil rights lawyer for over 25 years.

[336] Managing Partner at Williams, Birnberg & Anderson, LLP, Houston, Texas. Attorney Birnberg has argued or been on the brief in several cases before the United States Supreme Court, including *Farrar v. Hobby*, 506 U.S. 103 (1992).

> Dean Erwin Chemerinsky:[337] Change immunity law: eliminate absolute immunity and have a much more plaintiff-friendly standard for qualified immunity.
>
> Professor Rosalie Levinson:[338] The easiest, most dramatic fix would be to amend the statute or change its interpretation to recognize respondeat superior liability.
>
> Professor Sheldon Nahmod:[339] Change the conversion of qualified immunity into the equivalent of absolute immunity: the immediate appealability from the denial of immunity plus the elimination of the subjective part. The law is much too pro-defendant currently.
>
> Attorney David Rudovsky:[340] The theory that we incorporate respondeat superior as a basis for relief against the governmental entity in one elegant move removes all of the difficult and irrelevant issues regarding municipal policy and practice and qualified immunity.
>
> Professor Martin A. Schwartz:[341] Change the no-respondeat-superior liability rule.

I cast my vote with those who think it is time to revisit *Monell* and the Court's mistaken rejection of respondeat superior liability. Adopting respondeat superior liability would not eliminate the need for plaintiffs to plead and prove an underlying

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[337] Founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law, with a joint appointment in Political Science. Dean Chemerinsky has authored numerous books, treatises, and articles in the areas of constitutional law, federal jurisdiction, and civil rights. His latest book is THE CASE AGAINST THE SUPREME COURT (2014).

[338] Phyllis and Richard Duesenberg Professor of Law, Valparaiso University School of Law. In addition to numerous articles, Professor Levinson is co-author of ROSALIE BERGER LEVINSON & IVAN BODENSTEINER, CIVIL RIGHTS LEGISLATION AND LITIGATION (3d. ed. 2014).

[339] Distinguished Professor of Law, IIT Chicago-Kent College of Law. Professor Nahmod has authored numerous articles involving Section 1983 litigation and is the author of CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (4th ed. 2014).

[340] Attorney Rudovsky is a founding partner of Kairys, Rudovsky, Messing & Feinberg, LLP, Philadelphia, Pennsylvania, and, since 1987, he has been a Senior Fellow at the University of Pennsylvania School of Law. Attorney Rudovsky is a co-author of POLICE MISCONDUCT, *supra* note 333 and argued both *Mitchell v. Forsythe*, 472 U.S. 511 (1985), and *City of Canton v. Harris*, 489 U.S. 378 (1989), before the Supreme Court.

[341] Professor of Law, Touro College Jacob D. Fuchsberg Law Center. Professor Schwartz is the author of a multi-volume treatise entitled SECTION 1983 LITIGATION: CLAIMS AND DEFENSES (4th ed. 2014).

constitutional violation. The challenges of *Iqbal* and the need to prove whatever level of culpability is required for the constitutional tort, as well as the need to prove causation, would still present formidable roadblocks to success in these suits. But, adopting respondeat superior would eliminate the enormous amount of time and resources spent litigating and adjudicating the qualified immunity defense, as well as the hours that presently go into establishing or defeating *Monell* claims. Thirty-seven years after first criticizing the Court's interpretation of the statute, I have come full circle to say it again. While, as Professor Levinson notes, the change could be made legislatively by simply amending the language of Section 1983 to make clear that respondeat superior liability is authorized, we all know the likelihood of Congress taking such action is virtually nil. In *Monell*, the Court engaged in self-correction,[342] and likewise, it should not shy away from this much-needed and long overdue reexamination of the soundness of the decision rendered in that case. As David Rudovsky so succinctly puts it, "in one elegant move," the Court could do much to eviscerate what I have characterized as the maze, the mud, and the madness of Section 1983 jurisprudence. From his lips to the Court's ears.[343]

[342] In *Monell*, the Court overturned *Monroe* to the extent that it had totally rejected local government liability under Section 1983. Monell v. Dept. of Soc. Servs., 436 U.S. 658, 701 (1978) ("[A]bsent a clear statement in the legislative history supporting the conclusion that § 1 was not to apply to the official acts of a municipal corporation—which simply is not present—there is no justification for excluding municipalities from the 'persons' covered by § 1.").

[343] And, for those of you who remain skeptical, recall the Queen's words to Alice: "Why, sometimes I've believed as many as six impossible things before breakfast." CARROLL, *supra* note 71.