EXCESSIVE REASONABLENESS

DIANA HASSEL*

ABSTRACT

This Article examines a crucial flaw in the qualified immunity doctrine and explains how it results in overprotection of defendants from liability. When qualified immunity is applied in a Fourth Amendment excessive force case, the defendant, typically a police officer, is protected from liability by two layers of reasonableness. First, qualified immunity absolves an individual government agent from liability under 42 U.S.C. § 1983, notwithstanding his violation of a constitutional right, if his actions were "objectively reasonable." Second, the agent is likewise absolved from liability under the Fourth Amendment itself if the amount of force used was "objectively reasonable." When these two doctrines converge, an almost impenetrable barrier to liability results. Although the Supreme Court has repeatedly tried to resolve conflicts inherent in the qualified immunity doctrine, most recently in *Pearson v. Callahan*, the excessive reasonableness in the qualified immunity regime, and the excessive force that is its practical consequence, remain.

INTRODUCTION

The qualified immunity doctrine arises as a defense to virtually every constitutional claim brought against an individual government actor under 42 U.S.C. § 1983 or its federal defendant analogue, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[1] By dint of the defense, defendants are not liable unless their actions violate a clearly established right "of which a reasonable person would have known."[2] Defendants are entitled to qualified

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* Professor, Roger Williams University School of Law. B.A., 1979, Mount Holyoke College; J.D., 1985, Rutgers University School of Law at Newark. I would like to thank Professors Jared Goldstein, Jonathan Gutoff, Colleen Murphy, and Michael Yelnosky for their helpful comments. Able research assistance was provided by Kyle Posey and Julie Moore. Also, thank you to Ron Shwartz for his skilled editing.

1. Section 1983 was first passed in 1871 and was known as the Ku Klux Klan Act. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (2006)). It was enacted in response to violence against newly freed slaves that was uncontrolled by state governments; the Act was meant to provide a broad federal remedy against violations of civil rights by state government. *See* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 47 (1983). In the absence of a similar remedy against civil rights violations by the federal government, the Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* created a broad remedy, similar to § 1983, for federal officials. 403 U.S. 388, 396-97 (1971).

2. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

immunity if their actions are objectively reasonable.[3] Since its inception, the doctrine has routinely perplexed and frustrated civil rights litigants, federal judges, and even the U.S. Supreme Court. The courts and litigants grappling with the complex qualified immunity defense seem to be following the dance steps required by the doctrine but without any music to give the dance meaning.

In January 2009, the Supreme Court, in *Pearson v. Callahan*,[4] once again attempted to bring some clarity to the qualified immunity regime. *Pearson* gives discretion to the lower courts in the sequence in which they address the issues raised by a qualified immunity defense to a constitutional claim.[5] Rather than requiring that lower courts first determine whether a constitutional right has been violated before moving on to qualified immunity, the courts are permitted to address whether the defendant is entitled to qualified immunity without ever reaching the constitutional issue.[6] This modification may give some relief to courts attempting to apply the qualified immunity defense, but it does not address fundamental problems at the heart of the qualified immunity doctrine. Meaningful improvements can only be made by examining the defense's basic underlying principles.

The Court's development of the qualified immunity doctrine has stretched the rationale underlying the defense to a breaking point. Instead of providing protection only to those government actors who violate the law unwittingly and reasonably, qualified immunity has metastasized into an almost absolute defense to all but the most outrageous conduct. The values of deterrence of unlawful behavior and compensation for civil rights victims have been overshadowed by the desire to protect government agents, particularly police officers, from almost all claims against them. The balance originally struck by the qualified immunity defense—protection for the innocent wrongdoer versus compensation for the victim—has gone awry.

This Article focuses on the most significant feature of the imbalance that now exists in the qualified immunity doctrine: the Court's insistence on applying the objective reasonableness standard of qualified immunity in conjunction with a duplicative underlying constitutional standard. This problem is most acute in excessive force claims. An apparent duplication of the objective reasonableness standard of the Fourth Amendment in excessive force cases and the same objective reasonableness standard in the qualified immunity doctrine has created a nearly impenetrable defense to excessive force claims. Despite critical scholarly commentary and the Supreme Court's own attempts to quiet the controversy created by this excessive reasonableness, the problem remains unresolved.[7]

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3. *Id.* at 818-19.

4. 129 S. Ct. 808 (2009).

5. *Id.* at 818. "[Lower courts] should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first . . . ."

6. *Id.* at 819-20.

7. In addition to the excessive reasonableness problem, an extensive body of critique has

Meanwhile, far removed from the debate over doctrinal niceties, the operational problem of how to address the use of unjustified force by police officers persists. The current legal regime has largely failed in its attempt to control excessive police violence.[8] At least in part that failure flows from the difficulty faced by claimants under § 1983 to overcome the insulation from liability that defendants derive from both the Fourth Amendment requirements and the qualified immunity standard. Until the nearly insurmountable barrier to recovery created by excessive reasonableness is somehow relieved, civil actions based on the Fourth Amendment will not effectively deter police violence.

Addressing the problem of police violence, providing balance to doctrine overly protective of defendants, and simplifying the procedural morass that qualified immunity has created in excessive force cases requires a radical modification of the doctrine. In excessive force cases, the doctrine should be modified to protect a defendant only when there has been a genuine change in the legal standard governing his actions—not merely an application of established doctrine to a somewhat new set of facts. Currently, qualified immunity prevents liability if the defendant's actions do not violate clearly established law "of which a reasonable person would have known."[9] Instead, the standard should be that the defendant will be liable unless his actions violate a newly developed legal standard. In the excessive force context, the protection provided by the reasonableness standard of Fourth Amendment, in conjunction with this more

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developed concerning the qualified immunity defense generally. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 812 (1994) (questioning whether the defense should exist at all); Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229 (2006); Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 185-86 (2007) (discussing whether the qualified immunity defense should be used to quickly resolve civil rights litigation); Henk J. Brands, Note, *Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury*, 90 COLUM. L. REV. 1045, 1057 (1990) (discussing what role judges and juries play in resolving qualified immunity issues); Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031 (2005) (discussing how to determine what rights are "clearly established").

8. *See* JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE (1993); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004); Jeremy R. Lacks, Note, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. ANN. SURV. AM. L. 391 (2008). In particular, police violence has been seen to have a disproportionate effect on racial minorities. *E.g.*, Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219 (2000); Andrea J. Ritchie & Joey L. Mogul, *In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States*, 1 DEPAUL J. FOR SOC. JUST. 175, 177 (2008) (noting the conclusions of the United Nations Committee regarding police violence targeted at racial minorities); Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality,* 44 HASTINGS L.J. 753 (1993).

9. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

limited defense based on a newly developed law, will provide ample protection for the reasonably mistaken officer and will make compensation for the victim possible.

In Part I, this Article explains how the excessive reasonableness problem developed as Fourth Amendment doctrine and the qualified immunity doctrine were independently created and modified. Part II discusses repeated judicial attempts to avoid the difficulties presented by excessive reasonableness. Part III explores a modification of qualified immunity in the excessive force context limited to violations of newly developed legal standards.

I. QUALIFIED IMMUNITY AND EXCESSIVE FORCE CREATE EXCESSIVE REASONABLENESS

A. Excessive Force

In *Graham v. Connor*,[10] the Supreme Court resolved any doubt about the appropriate standard to be applied when assessing the constitutionality of the use of force during a stop or arrest. Determining that the requirements of the Fourth Amendment were the proper focus of an analysis of the use of excessive force during an arrest or stop, the Court announced that an "objective reasonableness" standard would apply.[11] The application of the "objective reasonableness" standard requires "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."[12] Factors such as the crime's severity, the immediacy of the threat to police or others, and whether the suspect is resisting arrest or attempting to flee, must be considered when analyzing reasonableness.[13] The test is an objective one that must make "allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."[14] The Court emphasized that reasonableness "must be judged from the perspective of a reasonable officer on

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10. 490 U.S. 386 (1989). Prior to *Graham*, many courts applied a substantive due process standard to analyze excessive force cases. *Id.* at 392-93. The Court rejected the use of the same standard for all types of excessive force and instead mandated that a more specific constitutional standard, such as the Fourth or Eighth Amendments, be employed in analyzing allegations of excessive force. *Id.* at 394. *Graham* built on the Court's reasoning in *Tennessee v. Garner*, 471 U.S. 1, 7-22 (1985), in which the Court determined that the test for whether deadly force could be used in a seizure was based on an "objective reasonableness" standard. *Graham*, 490 U.S. at 392.

11. *Graham*, 490 U.S. at 388 ("This case requires us to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person. We hold that such claims are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather that under a substantive due process standard.").

12. *Id.* at 396 (quoting *Garner*, 471 U.S. at 8).

13. *Id.*

14. *Id.* at 397.

the scene, rather than with the 20/20 vision of hindsight."[15]

In the thousands of excessive force cases that have followed *Graham*, courts have analyzed the question of what is objectively reasonable.[16] Most recently, in *Scott v. Harris*,[17] the Court emphasized that in determining whether the Fourth Amendment was violated there is no avoiding the necessity of "slosh[ing] our way through the factbound morass of 'reasonableness.'"[18] The cases analyzing the excessive force standard have arisen in a variety of factual scenarios, including: termination of high speed chases,[19] shootings,[20] use of restraints,[21] beatings,[22] and use of police dogs.[23] Actions based on excessive force are some of the most common civil rights claims and consume a large portion of federal courts' § 1983 docket.[24]

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15. *Id.* at 396.

16. *See, e.g.*, Chew v. Gates, 27 F.3d 1432, 1439 (9th Cir. 1994); Quezada v. County of Bernalillo, 944 F.2d 710, 716-17 (10th Cir. 1991). The question of whether the amount of force used was "objectively reasonable" is often submitted to the jury. *Id.* at 715 (citing Calamia v. City of New York, 879 F.2d 1025, 1035 (2d Cir. 1989).

17. 550 U.S. 372 (2007).

18. *Id.* at 383.

19. *Id.* at 374.

20. *E.g.*, McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1238 (11th Cir. 2003); Hemphill v. Schott, 141 F.3d 412, 414 (2d Cir. 1998).

21. *E.g.*, Muehler v. Mena, 544 U.S. 93, 95 (2005); Garrett v. Athens-Clarke County, 378 F.3d 1274, 1279 (11th Cir. 2004).

22. *E.g.*, Reese v. Herbert, 527 F.3d 1253, 1257-61 (11th Cir. 2008); Phelps v. Coy, 286 F.3d 295, 297 (6th Cir. 2002).

23. *E.g.*, Jarrett v. Town of Yarmouth, 331 F.3d 140 (1st Cir. 2003); Vathekan v. Prince George's County, 154 F.3d 173, 175 (4th Cir. 1998).

24. Richard P. Shafer, Annotation, *When Does Police Officer's Use of Force During Arrest Become So Excessive as to Constitute Violation of Constitutional Rights, Imposing Liability Under Federal Civil rights Act of 1871*, 60 A.L.R. Fed. 204 § 2(a) (1982); 21 AM. JUR. 3D *Proof of Facts* 685 (2009). Some argue that Fourth Amendment doctrine on the issue of excessive force is deeply flawed and results in unprincipled and indeterminate results. *See* Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1132-33 (2008). Harmon maintains that the Court has provided little guidance on how to determine how much police force is "reasonable" under the Fourth Amendment. *Id.* Having received little guidance, the lower courts "have recited *Graham* as if it were a mantra and then gone on to try to make sense of the facts of individual cases using intuitions about what is reasonable for officers to do." *Id.* at 1132. For example, some Circuits have required that a plaintiff suffer an actual physical injury in order to successfully bring an excessive force claim. Bryan N. Georgiady, Note, *An Excessively Painful Encounter: The Reasonableness of Pain and De Minimis Injuries for Fourth Amendment Excessive Force Claims*, 59 SYRACUSE L. REV. 123, 137-38 (2008); *see also* Kathryn R. Urbonya, *Dangerous Misperceptions: Protecting Police Officers, Society, and the Fourth Amendment Right to Personal Security*, *in* SWORD & SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983, at 259 (Mary Massaron Ross ed., 1998).

In a typical case, such as *Jennings v. Pare*,[25] the plaintiff alleges that the force used in restraining him during an arrest was excessive. In *Jennings*, state police officers entered a smoke shop run by the Narragansett Indian Tribe and were attempting to search it when the plaintiff, one of the employees of the shop, objected to the search and began struggling with the police as they tried to handcuff him.[26] In the course of the struggle one of the officers, the defendant in the action, grabbed the plaintiff's ankle and twisted it—the plaintiff's ankle was broken in the process.[27] The plaintiff claimed that the defendant kept twisting even after the plaintiff stopped resisting.[28] The defendant claimed that he was properly executing an "ankle turn control technique" to restrain the plaintiff.[29]

In analyzing whether the defendant's behavior violated the Fourth Amendment, the court reviewed, in detail, all the conflicting factual evidence about the actions of the plaintiff and the actions of the police before, during, and after the struggle.[30] Focusing on the conflicting testimony regarding whether the plaintiff kept resisting after the "ankle turn control technique" was administered, the court concluded that "[the plaintiff] failed to present any evidence that, under the circumstances confronting [the defendant], 'no objectively reasonable officer' would have applied the ankle turn control technique in the manner that [the defendant] did."[31] In determining that there had been no Fourth Amendment violation, the court emphasized that police officers must act "'in circumstances that are tense, uncertain, and rapidly evolving,' and that their conduct 'must be judged from the perspective of a reasonable officer on the scene.'"[32]

Thus, in applying the *Graham* objective reasonableness standard, the benefit of the doubt goes to the defendant police officer. If there is any way his actions could have been believed to be a reasonable response to the situation, as perceived by the officer at the time, the Fourth Amendment is not violated.

B. Qualified Immunity

Meanwhile, the Court was refining the standard for qualified immunity. Qualified immunity was initially understood to be similar to the good faith

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25. No. 03-572-T, 2005 WL 2043945, (D.R.I. Aug. 24, 2005), *vacated sub nom.*, Jennings v. Jones, 479 F.3d 110 (1st Cir. 2007).

26. *Id.* at *1-2.

27. *Id.* at *2.

28. *Id.*

29. *Id.*

30. *Id.* at *6. The jury found that the defendant's actions constituted excessive force but the court determined that the issue should not have been submitted to the jury and granted a motion for judgment as a matter of law for the defendant. *Id.* at *1, *13-14. That motion was later vacated by the First Circuit Court of Appeals. Jennings v. Jones, 479 F.3d 110, 112 (1st Cir. 2007).

31. *Jennings*, 2005 WL 2043945 at *7.

32. *Id.* at *6 (quoting Graham v. Connor, 490 U.S. 386, 396-97 (1989)).

defense available under common law in 1871 when § 1983 was adopted.[33] The common law immunity foreclosed liability when a government officer acted with good faith and probable cause in making an arrest.[34] The Court was particularly concerned with the unfairness of imposing liability on a government official based on newly developed law: police officers should "not [be] charged with predicting the future course of constitutional law."[35] In time, the qualified immunity defense was expanded beyond law enforcement officials to cover virtually any kind of government actor.[36] So long as the officer reasonably and with good faith believed that he was acting within constitutional limits, immunity would be granted.

Because the qualified immunity defense contained a subjective element—that the officer acted in good faith—factual disputes with respect to the officer's state of mind could easily defeat a summary judgment motion on the issue of qualified immunity. Because few qualified immunity defenses could be resolved prior to trial, government officials might well be involved in lengthy, but essentially meritless, litigation. This concern led the Court in *Harlow v. Fitzgerald*,[37] to eliminate the subjective component of qualified immunity.[38] The newly articulated qualified immunity test provided that "government officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[39] The Court hoped that the elimination of the subjective good faith portion of the standard would make it possible to dismiss frivolous suits at the summary judgment stage.[40] No longer would a plaintiff be able to prolong a civil rights suit by alleging that the defendant acted in bad faith.[41] The objective qualified immunity standard was seen to represent

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33. *See* Pierson v. Ray, 386 U.S. 547, 550-51 (1967).

34. *Id.* at 555. In *Pierson*, police officers arrested the plaintiffs under a statute that was later held to be unconstitutional. *Id.* at 550. The Court reasoned that it would be unfair to hold the police officers liable "for acting under a statute that [they] reasonably believed to be valid but that was later held unconstitutional." *Id.* at 555.

35. *Id.* at 557.

36. *See* Wood v. Strickland, 420 U.S. 308, 322 (1975) (expanding qualified immunity to cover school board officials); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (expanding qualified immunity to cover all executive branch officers). Some government officials, judges, legislators, prosecutors, and the president, are entitled to absolute immunity. *See* Nixon v. Fitzgerald, 457 U.S. 731, 757 (1982) (president entitled to absolute immunity); Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976) (prosecutors protected by absolute immunity); Pierson v Ray, 386 U.S. 547, 553-54 (1967) (judges covered by absolute immunity); Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (legislators absolutely immune).

37. 457 U.S. 800 (1982).

38. *Id.* at 816-18.

39. *Id.* at 817-18.

40. *Id.*

41. *See id.* In addition, defendants in civil rights suits have the right to an immediate interlocutory appeal of a denial of qualified immunity. Mitchell v. Forsyth, 472 U.S. 511, 530

the proper balance between conflicting interests: the interest in providing compensation for, and deterring unconstitutional conduct against the need to protect against frivolous lawsuits and to encourage vigorous enforcement of the law.[42]

Evaluation of a qualified immunity defense requires courts to determine whether the acts alleged by the plaintiff constitute a violation of a federal right and, if so, to determine whether that violation has been sufficiently established so that a reasonable official would know his acts violate the law. For example, in *Jennings*, the excessive force case discussed earlier,[43] the court determined that even if the police officer's actions had violated the Fourth Amendment, he was nonetheless entitled to qualified immunity.[44] The court first determined that the unlawfulness of using an "ankle turn control technique" in the circumstances confronted by the officer, had not been clearly established by prior case law.[45] The court then determined that even if the law had been clearly established, the defendant was still entitled to qualified immunity because any misapprehension of the law or the factual circumstances he might have had would be reasonable given the ambiguity of the situation with which he was confronted.[46]

As articulated by *Harlow* and as subsequently interpreted by the courts, qualified immunity has provided a broad and generally successful defense to most civil rights claims.[47] As the Court has explained, qualified immunity ensures that only "the plainly incompetent or those who knowingly violate the law" will be found liable under § 1983.[48] Qualified immunity has moved closer to a system of absolute immunity for most defendants, resulting in a finding of liability for only the most extreme and most shocking misuses of police power.

C. Application of the Two Standards

Operating on two different fronts, the Court, by the late 1980s, had created two almost identical objective reasonableness tests: One governed excessive force under the Fourth Amendment and the other governed qualified immunity. Difficulty arose, however, when these two standards were called into play at the

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(1985).

42. *See* Diana Hassel, *Living A Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 131 (1999).

43. *See supra* text accompanying notes 25-32.

44. Jennings v. Pare, No. 03-572-T, 2005 WL 2043945, at *13 (D.R.I. Aug. 24, 2005), *vacated sub nom.* Jennings v. Jones, 479 F.3d 110 (1st Cir. 2007).

45. *Id.* at *10.

46. *Id.* at *11.

47. *See* SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION 46-53 (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 3rd ed. 2006). Claims involving prisoner rights and actions against police officers appear to be particularly unlikely to succeed. Melissa L. Koehn, *The New American Caste System: The Supreme Court and Discrimination Among Civil Rights Plaintiffs*, 32 U. MICH. J.L. REFORM 49, 103 (1998).

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

same time in considering the liability of a defendant in a civil rights action. When these two standards are both operating, a court must first determine whether a defendant's actions are objectively reasonable. Then, assuming that the actions were not objectively reasonable, the court must determine whether it was nonetheless objectively reasonable for the defendant to have believed his actions were objectively reasonable. The application of this nonsensical series of questions leads to skewed results. Most problematically the two doctrines lead to two levels of protection for a defendant. Additionally, courts must jump through convoluted analytical hoops that result in unclear and needlessly complicated decisions.

The problem of having two reasonableness standards could come into play in any Fourth Amendment claim, but the difficulty is most acute in an action concerning excessive force. Although other Fourth Amendment questions, such as the legality of searches or the legality of arrests, are also ultimately based on reasonableness, the standards governing such actions are much more concrete and specific than those governing excessive force.[49] The excessive force standard, as articulated by *Graham* is just a generalized reasonableness test—thus, the closest parallel to the qualified immunity doctrine.

Following the convergence of the qualified immunity doctrine and the excessive force standards, the courts of appeals attempted to apply the odd doctrinal regime. Although some courts attempted to comply with the message from the Court in *Anderson v. Creighton*,[50] that the Fourth Amendment inquiry was separate from the qualified immunity question even in an excessive force case, others found such an application impossible.[51] For example, in *Roy v. City of Lewiston*,[52] the First Circuit Court of Appeals grappled with the qualified

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49. Concern with the convergence of reasonableness standards has arisen in Fourth Amendment contexts other than excessive force. This aggregation of reasonableness was commented on by Justice Stevens in his dissent in *Anderson v. Creighton*, where he criticized the "two layers of insulation from liability" that result in the application of the qualified immunity defense to a Fourth Amendment claim. 483 U.S. 635, 659 (1987) (Stevens, J., dissenting). *Anderson* concerned the application of the qualified immunity defense to a Fourth Amendment claim based on a warrantless search by the FBI. *Id.* at 637. Justice Stevens argued that the underlying Fourth Amendment standard provided ample protection for the reasonably mistaken law enforcement official and that by adding another reasonableness standard to the mix, "the Court counts the law enforcement interest twice and the individual's . . . interest only once." *Id.* at 664 (Stevens, J., dissenting) (footnote omitted); *see also* Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent that Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869 (1998).

50. 483 U.S. 635 (1987).

51. *E.g.*, Scott v. Henrich, 39 F.3d 912, 914 (9th Cir. 1994) (finding no distinction between qualified immunity inquiry and inquiry on the merits in excessive force case); Brown v. Glossip, 878 F.2d 871, 873 (5th Cir. 1989) (discerning "no principled distinction between availability of qualified immunity" in unreasonable search case and qualified immunity in excessive force case).

52. 42 F.3d 691 (1st Cir. 1994).

immunity defense in a case alleging excessive force in the course of an arrest.[53] Determining that the substantive liability issue and the qualified immunity issue were the same, the court expressed doubt that, in an excessive force case, the issue of the Fourth Amendment violation could have a different outcome from the qualified immunity question.[54] In another attempt to work with the qualified immunity doctrine, the Second Circuit Court of Appeals in *Finnegan v. Fountain*,[55] separated the two different prongs of qualified immunity.[56] The aspect of the qualified immunity defense that precludes liability when the conduct of the defendant does not violate clearly established rights was available in an excessive force claim.[57] But the second prong of the qualified immunity defense, which asks whether the defendant's belief that his actions were lawful was objectively reasonable, would already have been answered in a determination that the actions violated the Fourth Amendment.[58] In the end, the Tenth, Ninth, Seventh, Sixth, and D.C. Circuit Courts of Appeals abandoned the attempt to follow *Anderson*'s guidance and held that the two questions—use of excessive force and qualified immunity—merged into one inquiry.[59]

Academic commentators also questioned the workability or the necessity of the simultaneous application of the qualified immunity and the excessive force standards.[60] Kathryn Urbonya argued that the qualified immunity standard defense is unnecessary in excessive force claims because the substantive standards already includes the protection inherent in a reasonableness standard.[61] Urbonya and others maintained that once the Fourth Amendment issue is resolved, the qualified immunity issue has also been resolved, and to treat the

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53. *Id.* at 693.

54. *Id.* at 695. "In theory, substantive liability and qualified immunity are two separate questions and, indeed, may be subject to somewhat different procedural treatment. In police misconduct cases, however, the Supreme Court has used the same 'objectively reasonable' standard in describing both the constitutional test of liability, and the Court's own standard for qualified immunity. It seems unlikely that this case would deserve a different outcome even if the qualified immunity defense had not been raised." *Id.* (citations omitted).

55. 915 F.2d 817 (2d Cir. 1990).

56. *Id.* at 822-23.

57. *Id.* at 823.

58. *Id.*

59. *See, e.g.*, Katz v. United States, 194 F.3d 962, 968 (9th Cir. 1999), *rev'd sub nom.* Saucier v. Katz, 533 U.S. 194 (2001); Frazell v. Flanigan 102 F.3d 877, 886 (7th Cir. 1996); Scott v. District of Columbia, 101 F.3d 748, 759 (D.C. Cir. 1996); Street v. Parham, 929 F.2d 537, 540 (10th Cir. 1991); Holt v. Artis, 843 F.2d 242, 245-46 (6th Cir. 1988).

60. *E.g.*, Eskow & Cole, *supra* note 49, at 878-79; Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMP. L. REV. 61 (1989); Stephen Yagman, *Excessive Force—What Is It Good for? Absolutely Nothing, Juries are Supposed to Decide Whether Force Is Excessive, and, When They Do, There Is No Qualified Immunity*, 568 PRACT. L. INST. 735 (1997). *But see* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 659 (1998).

61. Urbonya, *supra* note 60, at 108.

two separately would unfairly benefit the defendant.[62]

The two standards also created difficulties in allocating resolution of factual and of legal issues between the judge and the jury. Determining whether a particular set of actions is reasonable under the Fourth Amendment will often present factual questions that normally are submitted to a jury. In contrast, qualified immunity is characterized as a legal question to be resolved by the judge.[63] Because the two questions—Fourth Amendment and qualified immunity—require resolution of the same reasonableness issues, courts struggled to determine how to divide the task between the judge and the jury.[64] Some even argued that once a jury finds that a defendant's acts were determined to be an unreasonable use of force under the Fourth Amendment, it was a usurpation of the jury's role for the judge to, in effect, undo that determination by concluding that the actions were reasonable under the qualified immunity standard.[65]

Application of the qualified immunity defense is less difficult when the underlying constitutional standard is not one of objective reasonableness. For example, in civil rights actions based on a violation of a public employee's First Amendment rights, the court first determines if the employee's actions were protected by the First Amendment.[66] For public employee speech, the relevant questions include whether the employee was speaking on a matter of public concern, whether the employee was speaking as an employee or as a citizen, and how disruptive the speech was to the workplace function.[67] If the court finds that the facts alleged by the plaintiff support a finding of a violation of the First Amendment, the court must then determine if the law on the issue was clearly established, and whether a reasonable official would have been aware of that constitutional right.[68] The last step ensures that the court does "not impose on the official a duty to sort out conflicting decisions or to resolve subtle or open issues."[69]

For example, in *Lindsey v. Orrick*, the Eighth Circuit Court of Appeals

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62. Urbonya, *supra* note 60, at 105-09; Armacost, *supra* note 60, at 661.

63. Hunter v. Bryant, 502 U.S. 224, 228 (1991).

64. *See* Tatro v. Kervin, 41 F.3d 9, 15 (1st Cir. 1994); Finnegan v. Fountain, 915 F.2d 817, 821 (2d Cir. 1990) (explaining that it was error to submit the issue of qualified immunity to the jury because the application of qualified immunity is for the court to decide); Hall v. Ochs, 817 F.2d 920, 924 (1st Cir. 1987) (explaining that the objective reasonableness assessment for qualified immunity is for the judge to make, not the jury).

65. Yagman, *supra* note 60, at 737 ("In [excessive] force cases . . . juries decide if too much force was used, and when they do, there is no qualified immunity defense. A finding of excessive force makes a finding of qualified immunity factually and legally impossible, and a finding of reasonable force renders the issue of qualified immunity moot.").

66. Lindsey v. City of Orrick, 491 F.3d 892, 897 (8th Cir. 2007).

67. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006); Charles v. Grief, 522 F.3d 508, 512 (5th Cir. 2008); Campbell v. Galloway, 483 F.3d 258, 266 (4th Cir. 2007) (citing *Garcetti*, 547 U.S. at 421); *Lindsey*, 491 F.3d at 897.

68. *Campbell*, 483 F.3d at 271-72.

69. *Id.* at 271 (citing to McVey v. Stacy, 157 F.3d 271, 277 (4th Cir. 1998)).

affirmed a lower court's denial of the defendant's motion for summary judgment because the facts alleged by the plaintiff established that her speech was protected and that a reasonable official would have realized that firing her because of the speech was unconstitutional.[70] The plaintiff's speech—raising concerns about the city's compliance with open meetings law—was protected because it was made as a citizen, not an employee, it was on a matter of public concern, and there were insufficient allegations that the employee's speech was disruptive to the workplace.[71] Having determined that the plaintiff's allegations supported a violation of her First Amendment rights, the court then addressed the question whether "[the] right was clearly established such that a reasonable official would have known [the firing] was unlawful."[72] Only at this point was the reasonableness of the defendant's behavior evaluated. The court in *Lindsey* rejected the defendant's assertions of a reasonable mistake, finding that the law in the area was too well established and the protected nature of the speech was too obvious for the defendant's behavior in terminating the plaintiff to be objectively reasonable.[73]

Although the questions relating to First Amendment doctrine and the limits of the constitutional protection of public employee speech may be complex, the doctrine does not include a cushion for reasonable mistakes made by a government official. Any wiggle room for the official only comes into play when the qualified immunity test is applied. The substantive First Amendment standard does not allow for reasonable, even if mistaken, actions. Only when the qualified immunity defense is asserted does the wiggle room provided by reasonableness come into play. By contrast, in an excessive force case, the court must first determine whether the amount of force used was reasonable given the circumstances faced by the officer and then determine whether it was reasonable for the officer to believe that the amount of force used was constitutional.

II. The Supreme Court's Flawed Solutions

As voices of discontent with the two standards grew in the lower courts and among legal scholars, the Court attempted to quiet the waters with a firm reiteration of basic principles.

A. Saucier v. Katz

In 2001, the problem presented by the two reasonableness standards made its way to the U.S. Supreme Court in *Saucier v. Katz*.[74] This case grew out of the arrest of a demonstrator at a speech given by Vice President Al Gore at a U.S. Army base in California.[75] The plaintiff, an animal rights activist, began to

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70. *Lindsey*, 491 F.3d at 902.

71. *Id.* at 901.

72. *Id.*

73. *Id.* at 901-02.

74. 533 U.S. 194 (2001).

75. Katz v. United States, 194 F.3d 962, 965 (9th Cir. 1999), *rev'd sub nom.* Saucier v. Katz,

unfurl a banner during Gore's speech concerning the treatment of animals.[76] He was forcibly removed and placed in a van by military police officers.[77] He was detained briefly and then released.[78] The plaintiff alleged, among other things, that the force used during his seizure was excessive.[79] Because of factual disputes concerning both the amount of force used and whether the plaintiff resisted the actions of the police, the district court denied the defendant's motion for summary judgment on the excessive force claim.[80] The court stated that because there was a factual dispute on the substance of the Fourth Amendment claim, there could be no resolution of the qualified immunity issue: "the qualified immunity inquiry is the same as the inquiry on the merits in an excessive force claim."[81]

The Ninth Circuit Court of Appeals, consistent with many circuits, held that "'the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim.'"[82] Therefore a factual dispute with respect to the merits of an excessive force claim would preclude the resolution of summary judgment of the qualified immunity defense. The court distinguished those situations where the qualified immunity defense was based not on the objective reasonableness of the officer's belief in the lawfulness of his action, but on the fact that the law was not clearly established.[83] Factual disputes would not prevent a court from granting summary judgment for the defendant if the actions alleged by the plaintiff did not violate clearly established law.[84]

In support of the court of appeals's decision, briefs submitted to the Supreme Court argued that the qualified immunity issue and the excessive force issue merge into a single analytical question and that the *Graham* standard already gave an officer substantial latitude in the amount of force that could be used.[85] The reconsideration of the same factor twice would give the defendant an unfair advantage in excessive force cases and would, in effect, increase the plaintiff's burden of proof.[86] At the oral argument the respondents urged that the *Graham*

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533 U.S. 194 (2001).

76. *Id.*

77. *Id.*

78. *Id.* at 965-66.

79. *Id.* at 966.

80. *Id.*

81. *Id.*

82. *Id.* at 968 (citing Alexander v. County of Los Angeles, 64 F.3d 1315, 1322 (9th Cir. 1995)).

83. *Id.* at 970.

84. *Id.*

85. *See, e.g.*, Brief for Amicus Curiae Ass'n of the Bar of the City of N.Y. in Support of Respondents at 13, Saucier v. Katz, 533 U.S. 194 (2001) (No. 99-1977), 2001 WL 173525; Brief Amicus Curiae of the ACLU et al. at 8, in Support of Respondents, Saucier v. Katz, 533 U.S. 194 (2001) (No. 99-1977), 2001 WL 173522.

86. Brief Amicus Curiae of the ACLU et al., in Support of Respondents at 18, *supra* note 85.

standard provides adequate protection for reasonable mistakes made by government officials and that it "gives a buffer for the trial court judge to get rid of an insubstantial case."[87]

The Supreme Court reversed the court of appeals in *Saucier* and held that, contrary to what many of the circuits had determined, "the ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest."[88] The Court explained that the standard articulated in *Graham* with respect to reasonableness is different from the reasonableness inquiry required by qualified immunity.[89] Specifically, the Fourth Amendment asks the question whether the officer reasonably believed that amount of force used was necessary.[90] Even if that reasonable assessment was a mistake, the officer did not violate the Fourth Amendment.[91] The qualified immunity defense asks the further question whether the officer made a mistake with respect to "the legal constraints on particular police conduct."[92] Qualified immunity is appropriate when the officer correctly perceives "all of the relevant facts but [has] a mistaken understanding as to whether a particular amount of force is legal in those circumstances."[93]

In applying these standards, the Court instructed the lower courts to first determine if the Fourth Amendment right against excessive force was violated and then separately determine whether the defendant is entitled to qualified immunity.[94] On a summary judgment motion, the court should determine if the facts viewed most favorably to the plaintiff show that the *Graham* standard was violated.[95] If there is a constitutional violation, the court should then determine if it has been clearly established that the amount of force used in these circumstances is excessive.[96] Qualified immunity will protect the defendant

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87. Transcript of Oral Argument at 28, *Saucier*, 533 U.S. 194 (No. 99-1977). Arguing on behalf of the petitioner, the Deputy Solicitor General maintained that the Fourth Amendment and qualified immunity standards should be kept separate. *Id.* at 4. The Deputy Solicitor General explained the difference between the two standards as the "[Fourth Amendment] looks at the force used and asks whether that force was reasonable," whereas the qualified immunity test "takes a broader look at what the preexisting law was and asks whether the officer was on notice that his conduct . . . violated clearly-established law." *Id.* at 4, 13.

88. Saucier v. Katz, 533 U.S. 194, 197 (2001). Justice Kennedy wrote the opinion of the Court and was joined by Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Thomas and in part by Justice Souter. Justices Souter and Ginsburg wrote a concurring opinion in which Justices Stevens and Breyer joined and Justice Souter filed an opinion concurring in part and dissenting in part. *Id.* at 196.

89. *Id.* at 203-04.

90. *Id.* at 201-02.

91. *Id.* at 205.

92. *Id.*

93. *Id.*

94. *Id.* at 202.

95. *Id.* at 201-02.

96. *Id.* at 202.

when his actions fall on the "'hazy border between excessive and acceptable force.'"[97] On a concrete level, the questions for the court are whether the amount of force used is reasonable given the *Graham* factors: severity of the crime, whether the suspect posed an immediate threat, and whether the suspect was actively resisting arrest.[98] That assessment must be made with "careful attention to the facts and circumstances of each particular case."[99] Assuming the court can resolve that issue, it must then ask if it was reasonable for the defendant to believe that his actions did not violate the standard articulated in *Graham* and its progeny. If there is a controlling case exactly on point, qualified immunity should be denied. If, as is more likely, the particular factual situation presented by the case has not been previously litigated, the court must ask whether there is specific enough notice from *Graham* and other case law to put the defendant on notice that his actions were unconstitutional.[100]

A separate analysis of the Fourth Amendment violation and qualified immunity also served the purpose of clarifying constitutional standards. The resolution of the constitutional standard may well become the basis for a determination in a future case that the law is clearly established.[101] The Court's belief that a separate analysis of the constitutional claim would enhance the development of the law served as one of the rationales for the *Saucier* holding.[102]

The flaw in the Court's instructions in *Saucier* is that the second reasonableness inquiry required by *Saucier*—given the state of the law, whether it was reasonable for a defendant to believe the amount of force he used was lawful—is hard to distinguish from the first reasonableness inquiry under *Graham*. For both questions, the answer turns on the threat as perceived by the officer, including the dangerousness of the plaintiff to the officer and to the public. The same factors that determine whether a particular use of force is reasonable under *Graham* will also determine whether the actions could reasonably be considered unlawful. The mere assertion that the two reasonable standards are different does not make them so.

In her concurring opinion, Justice Ginsburg, argued that the methodology laid out by the Court to resolve qualified immunity in an excessive force case was too complicated.[103] Justice Ginsburg concluded that, "[t]he two-part test today's decision imposes holds large potential to confuse."[104] In the end, the analysis of whether there has been excessive force and whether the defendant is entitled to qualified immunity is the same: "Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer,

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97. *Id.* at 206 (citing Priester v. Riviera Beach, 208 F.3d 919, 926-27 (11th Cir. 2000)).
98. *Id.* at 205 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).
99. *Graham*, 490 U.S. at 396.
100. *Saucier*, 533 U.S. at 202.
101. *Id.* at 201.
102. *See id.*
103. *Id.* at 210 (Ginsburg, J., concurring).
104. *Id.*

identically situated, have believed the force employed was lawful?"[105] Justice Ginsburg rejected the inherent duplication in the Court's two part inquiry regarding excessive force and qualified immunity, and argued that "[o]nce it has been determined that an officer violated the Fourth Amendment by using 'objectively unreasonable' force as that term is explained in *Graham v. Connor*, there is simply no work for a qualified immunity inquiry to do."[106]

Saucier rejected the reasoning of several courts of appeals and many commentators by insisting that the qualified immunity defense would be handled in excessive force cases just as it was in other civil rights claims.[107] There were likely several forces at work causing the Court to insist on this almost certainly unworkable regime. Among those motivations may have been a desire for consistency and an adherence to *Harlow*; a reluctance to diminish the protection from liability in excessive force cases; a desire to keep qualified immunity firmly in the hands of the judge not a jury; and a desire to encourage resolution of qualified immunity issues in the early stages of litigation.

Harlow set forth a general "objective reasonableness" standard for qualified immunity to be applied regardless of the underlying constitutional claim.[108] To allow a variation of that standard in excessive force cases might start to unravel other, often criticized, aspects of the qualified immunity doctrine.[109] The prospect of evaluating the appropriateness of the qualified immunity standard in conjunction with doctrine relating to a wide range of constitutional rights may have seemed to the Court to be a step toward an even more complicated civil rights regime.

The *Saucier* decision also reflects the increasingly protective nature of qualified immunity and the Court's transformation of the defense into a kind of absolute immunity. Since its early adoption as a common law "good faith and probable cause" defense, qualified immunity has grown steadily more favorable for defendants: it was transformed into an objective test to protect defendants from lengthy litigation; resolution of qualified immunity prior to allowing the plaintiff any significant discovery is favored; and interlocutory appeals are allowed so that a defendant need not wait until the end of trial to appeal a denial of qualified immunity.[110] It has come to be viewed not merely as a defense against liability, but also an "immunity from suit" similar to absolute immunity.[111] Protection of government agents from civil rights claims is seen as

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105. *Id.*

106. *Id.* at 216-17.

107. *See supra* notes 47-64 and accompanying text.

108. Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982).

109. *See, e.g.*, Armacost, *supra* note 60, at 584-85 (discussing inconsistency of emphasis on individual fault inherent in qualified immunity defense and reality of indemnification); Chen, *supra* note 7, at 229-30 (arguing that qualified immunity doctrine is inconsistent in its insistence on early termination of suits while failing to acknowledge the critical role fact finding must play in resolving an assertion of a qualified immunity defense).

110. *See* Chen, *supra* note 7, at 233-41.

111. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

particularly appropriate when the accusations stem from a violent confrontation between a law enforcement official and an apparent law breaker.[112]

The reluctance to collapse the excessive force and qualified immunity issues also stems from a desire to keep the immunity question out of the hands of the jury.[113] Although the substantive issue of whether the Fourth Amendment was violated may be appropriate for a jury, in the Court's view, the question of whether a defendant is entitled to qualified immunity is not.[114] By insisting that the Fourth Amendment analysis be kept separate from the qualified immunity analysis, the *Saucier* rule ensures that the role of the jury in the resolution of qualified immunity be kept to a minimum. The Rehnquist Court's qualified immunity doctrine may also reflect a more general distrust of juries and hostility to the trial process itself.[115] Andrew Siegel has concluded that the Court's approach to qualified immunity is part of a larger attempt to limit litigation,[116] that is to remove the resolution of civil disputes from trial courts by limiting the suits that can be brought,[117] limiting the damages that can be awarded,[118] and by requiring claims to be resolved through arbitration or other private dispute resolution mechanisms.[119] Qualified immunity doctrine illustrates this hostility to litigation by broadly eliminating liability for constitutional wrongs. At bottom, Siegel believes that the Court in recent years has exhibited "doubt in the efficacy of a lawsuit as a mechanism for resolving the problem at hand, coupled perhaps with a disproportionate animosity towards those who believe otherwise."[120]

Regardless of the forces that led to the decision, following *Saucier*, the courts of appeals dutifully attempted to apply the two-part standard in excessive force cases.[121] Attempting to separate the excessive force analysis from the qualified immunity analysis, however, proved difficult.[122] In many cases, of course, the

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112. Koehn, *supra* note 47, at 51. Koehn maintains that suits against police officers are among the least likely to result in successful outcomes for plaintiffs. *Id.* at 50-51; *see* Hassel, *supra* note 42, at 146.

113. Chen, *supra* note 7, at 262-63.

114. Karen Blum, *Qualified Immunity in the Fourth Amendment: A Practical Application of §1983 As It Applies to Fourth Amendment Excessive Force Cases*, 21 TOURO L. REV. 571, 594-95 (2005) (explaining that while the issue of whether there has been excessive force under the Fourth Amendment should be decided by the jury, the question of qualified immunity must be decided by the court. If the two issues are 'intertwined' with unresolved factual issues, special interrogatories should be submitted to the jury.).

115. Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1130-32 (2006).

116. *Id.* at 1132.

117. *Id.* at 1133-34.

118. *Id.* at 1136-37.

119. *Id.* at 1140-41.

120. *Id.* at 1115.

121. *See infra* notes 122-23.

122. Interestingly, while *Saucier* has led to more courts delineating the contours of

courts found that there was no violation of the Fourth Amendment and thus determined that the qualified immunity issue need not be reached.[123]

Frequently, however, courts painstakingly concluded that a Fourth Amendment violation had occurred and that, almost inevitably, the defendant was not entitled to qualified immunity. For example, in *Jennings v. Jones*,[124] the First Circuit Court of Appeals set forth the inquiry required by *Saucier*:

> (1) whether the claimant has alleged the deprivation of an actual constitutional right; (2) whether the right was clearly established at the time of the alleged action or inaction; and (3) if both these questions are answered in the affirmative, whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right.[125]

Having determined that a violation of a clearly established right occurred, the court then asked the last question—whether the objectively reasonably officer would have realized he was violating a constitutional right and admits candidly, "[a]t first glance, this inquiry appears indistinguishable from that in the first prong."[126] Struggling to find a distinction, the court concluded that, "the key distinction is that prong one deals with whether the officer's conduct *was* objectively unreasonable, whereas prong three deals with whether an objectively

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constitutional rights, those delineations have resulted in a contraction of rights, that is, more losses for plaintiffs. *See* Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 688-89 (2009) (arguing that once the court determines that qualified immunity is appropriate, it is reluctant to at the same time determine that a right has been violated). *But cf.* Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401 (2009) (asserting that *Saucier* sequencing results in articulation of constitutional rights).

123. *See e.g.*, McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1246 (11th Cir. 2003); Ewolski v. City of Brunswick, 287 F.3d 492, 507 (6th Cir. 2002).

124. 499 F.3d 2 (1st Cir. 2007). *Jennings* grew out of a highly publicized raid by state authorities of a smoke shop run by the Narragansett Indian Tribe in Rhode Island. *Id.* at 3-4. Jennings was arrested during that raid and claimed that excessive force, resulting in a broken ankle, was used to restrain him. *Id.* at 5. Jennings sought damages against the police officer for battery under state law and damages for excessive force under § 1983. *Id.* After the jury awarded Jennings $301,000 in damages, the trial judge granted the police officer's post-verdict motion for judgment as a matter of law, stating that there was no evidence of a constitutional violation and even if there was, the defendant was entitled to qualified immunity. *Id.* at 6-7. The First Circuit, after re-hearing, reversed the trial judge and held that the plaintiff's Fourth Amendment rights were violated, that the right to be free from excessive force was clearly established, and that a reasonable police officer would have known his actions were a violation. *Id.* at 20-21. At the re-trial, the jury ruled in favor of the defendant police officer, determining that there was no Fourth Amendment violation because the officer acted reasonably. Jennings v. Jones, C.A. 03-572ML (D.R.I. July 29, 2008).

125. *Jennings*, 499 F.3d at 10 (citations omitted).

126. *Id.* at 18.

reasonable officer would have *believed* the conduct was unreasonable."[127] The difference between these two questions is difficult to grasp as both questions turn on the reasonableness of the defendant's understanding of the situation at the time the force was used and an assessment of the threat presented by the plaintiff. It is unclear how if the plaintiff's conduct was unreasonable, based on the facts known to him at the time, he nonetheless could have believed that his conduct was reasonable.

As the court in *Jennings* concedes, the third prong of the *Saucier* analysis "seems nonsensical at first blush."[128] However, soldiering on, the court gamely continues through the analysis and determines that the defendant violated the Fourth Amendment and is, not surprisingly given the similarity of the analysis, not entitled to qualified immunity.[129] One approach, then, post-*Saucier*, is for a court to focus its analysis of the Fourth Amendment issue and determine that excessive force was used, then rather cursorily deny qualified immunity.[130]

The cases in which a violation of the Fourth Amendment has been found and qualified immunity is granted to the defendants are even more analytically disingenuous. The courts either conduct only a brief analysis of whether a Fourth Amendment violation has occurred, and assuming it has, turn to the qualified immunity question,[131] or grant qualified immunity because the case law establishing the Fourth Amendment violation was unclear at the time the government official acted,[132] never reaching the second reasonableness issue. The difficulty presented by the three part test mandated by *Saucier* is avoided by breezing past the Fourth Amendment analysis or by truncating the qualified immunity analysis to the question of what law is clearly established. By focusing merely on the first or second prong of the *Saucier* test, these courts avoid the difficulty of grappling with all three inquiries.

Even the Supreme Court had trouble following the regime it set forth in *Saucier*. In *Brosseau v. Hagen*,[133] the Court addressed the question of whether a police officer who shot a fleeing suspect violated the Fourth Amendment and whether he was entitled to qualified immunity.[134] Rather than addressing the Fourth Amendment violation, the Court merely adopted the court of appeals conclusion that there was a constitutional violation: "We express no view as to the correctness of the Court of Appeals' decision on the constitutional question

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127. *Id.*

128. *Id.*

129. *Id.* at 20.

130. *See, e.g.*, Cortez v. McCauley, 478 F.3d 1108, 1128 (10th Cir. 2007); Smoak v. Hall, 460 F.3d 768, 783 (6th Cir. 2006); Clem v. Corbeau, 284 F.3d 543, 550 (4th Cir. 2002).

131. *See, e.g.*, Humphrey v. Mabry, 482 F.3d 840, 846-47 (6th Cir. 2007); Parks v. Pomeroy, 387 F.3d 949, 957-58 (8th Cir. 2004); Carswell v. Borough of Homestead, 381 F.3d 235, 240 (3d Cir. 2004).

132. *See, e.g.*, Waterman v. Batton, 393 F.3d 471, 483 (4th Cir. 2005); Smith v. Wampler, 108 F. App'x 560, 566 (10th Cir. 2004); Ross v. City of Ontario, 66 F. App'x 93, 96 (9th Cir. 2003).

133. 543 U.S. 194 (2004).

134. *Id.* at 194-95.

itself."[135] Instead, the Court focused on the qualified immunity analysis and determined that the lower court was incorrect in denying the defense.[136] Indeed, Justice Breyer in his concurrence suggested that the requirement of considering the constitutional issue separately from the qualified immunity issue made little sense.[137] In *Scott v. Harris*,[138] the Court was faced with the question of whether a police pursuit that resulted in a collision that severely injured a fleeing motorist violated the Fourth Amendment and, if so, whether the defendants' were nonetheless entitled to qualified immunity.[139] Again avoiding a separate analysis of the Fourth Amendment excessive force issue and the qualified immunity issue, the Court concluded, based largely on a videotape of the police chase in question, that the Fourth Amendment had not been violated.[140]

Just as pressure built up prior to *Saucier* for the Court to provide additional guidance for the thorny problems created by qualified immunity and excessive force, again in the years post-*Saucier* the Court was faced with considerable discontent with the regime it had mandated. As illustrated above, lower courts found ways to avoid the strictures of the three prong test. Commentators also began to question the wisdom of *Saucier*. Most of the criticism of *Saucier* centered on the "order-of-battle" aspect of the qualified immunity test.[141] That is, that the court must *first* determine that a constitutional violation has been alleged and the only *secondly* analyze whether the defendant is entitled to qualified immunity. Justice Breyer criticized this aspect of the *Saucier* rule lamenting 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."[142] Others argued that the benefit of forcing courts to clearly articulate

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135. *Id.* at 198. Even though the Court did not follow the two-step process outlined in *Saucier*, it reaffirmed its instructions that the constitutional issue must be addressed separately from the qualified immunity issue. *Id.* at 198 n.3.

136. *Id.* at 201 (finding the defendant's actions "fell in the 'hazy border between excessive and acceptable force'" (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001))).

137. *Id.* (Breyer, J., concurring) ("I am concerned 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.").

138. 550 U.S. 372 (2007).

139. *Id.* at 375-76.

140. *Id.* at 384. Many commentators have critiqued the Court's unusual step in acting as the fact finder based solely on the evidence presented by the videotape. *E.g.*, Erwin Chermerinsky, *A Troubling Take on Excessive Force Claims*, 43 TRIAL 74 (2007); George M. Dery, III, *The Needless "Slosh" Through the "Morass of Reasonableness": The Supreme Court's Usurpation of Fact Finding Powers in Assessing Reasonable Force in* Scott v. Harris, 18 GEO. MASON U. CIV. RTS. L.J. 417 (2008); 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 (2009).

141. *E.g.*, Michael L. Wells, *The "Order of Battle" in Constitutional Litigation*, 60 SMU L. REV. 1539 (2007).

142. *Brosseau*, 543 U.S. at 201 (Breyer, J., concurring).

constitutional standards outweighed the disadvantages of the regime.[143]

Although the critiques were framed in terms of the "order-of-battle" requirement, the problem was, of course, exacerbated, at least in the excessive force context, by the difficulty in untangling the merits of the Fourth Amendment claim from the qualified immunity defense. It especially made no sense to require a court to separately analyze the constitutional claim and qualified immunity when the two questions, were, in effect, the same.

In 2009, several decades after the standards developed in *Graham* and *Harlow*, the Court again attempted to bring order and coherence to an inherently unworkable doctrine. Apparently bowing to the pressures from both within and without, the Court has again revised the qualified immunity doctrine.

B. Pearson v. Callahan

In an unusual move, the Supreme Court, on its own, in *Pearson v. Callahan*, sought review of the question of whether *Saucier*'s approach to qualified immunity should be overruled.[144] The *Pearson* case involved a denial by the Tenth Circuit Court of Appeals of qualified immunity for a warrantless search of the plaintiff's home.[145] The Supreme Court granted certiorari on the questions of whether the defendants' search of the home violated the Fourth Amendment, whether the defendants were entitled to qualified immunity, and added the question of whether *Saucier* should be overruled.[146]

The police officers as petitioners argued that *Saucier*'s mandate that the constitutional issue be resolved first, before a court moves to the question of qualified immunity, either be entirely overruled or modified.[147] The petitioner

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143. Wells, *supra* note 141, at 1554.

144. Pearson v. Callahan, 128 S. Ct. 1702 (2008) ("In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: 'Whether the Court's decision in *Saucier v. Katz* should be overruled?'" (citation omitted)). Numerous critiques of the workability of the *Saucier* two-step mandate preceded the Court's unusual step. *See, e.g.*, *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 214 (2007); Wells, *supra* note 141, at 1539-43 (defending the *Saucier* rule, while noting numerous criticisms of the doctrine).

145. Callahan v. Millard County, 494 F.3d 891, 893-94 (10th Cir. 2007), *rev'd*, 129 S. Ct. 808 (2009). The issue in *Callahan* was whether police entry into the plaintiff's home without a warrant violated his Fourth Amendment rights, given that there were no exigent circumstances. *Id.* The defendant argued that consent to enter was given to his confidential informant and so it was reasonable for the defendant to enter. *Id.*

146. Pearson v. Callahan, 129 S. Ct. 808, 813 (2009). Sam Kamin has taken the position that *Saucier* should not be overruled and that to allow courts to reach the qualified immunity issue, without first determining whether the constitution has been violated will be contrary Article III's ban on advisory opinions. Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of* Saucier v. Katz, 16 GEO. MASON L. REV. 53, 55-57 (2008).

147. Brief for Petitioner at 55, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751), 2008 WL 2367229; *see* Brief for the United States as Amicus Curiae Supporting Petitioners at 23,

argued that the *Saucier* "order of battle" rule should be abandoned in Fourth Amendment cases, or at least in Fourth Amendment cases involving the unconstitutional seizure of evidence.[148] The development of constitutional standards, one goal of *Saucier*'s requirement that the constitutional issue be addressed before qualified immunity, is not necessary in Fourth Amendment cases because the constitutional issues are frequently litigated in the course of criminal prosecutions.[149] Accordingly, the petitioners argued, the court should be able to address the qualified immunity issue without first resolving whether a Fourth Amendment violation has occurred.[150]

Similarly, the United States as amicus curiae argued that the *Saucier* "two-step approach" should not be mandatory.[151] Although there may sometimes be benefits to resolving the constitutional question before reaching qualified immunity, the United States suggested that discretion should be left with the lower courts with respect to the order of resolving the issues.[152] Significantly, the United States identified one of the benefits of resolving the constitutional issue first as the defendant getting the benefit of the double reasonableness inherent in the Fourth Amendment and qualified immunity standards.[153] If a court avoids the Fourth Amendment issue and turns only to qualified immunity the "risk of conflating [the two standards] . . . would be exacerbated."[154] Even though "courts have had difficulties" with the task of separating the Fourth Amendment standard from qualified immunity, addressing them separately "ensures that courts will treat the two forms of 'reasonableness' as distinct and that the important interests protected by the qualified-immunity doctrine will be served."[155] Notwithstanding the benefit of adhering to the *Saucier* mandate, the

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Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751) (arguing for a modification, but stating that there was "no reason . . . to overrule [*Saucier*]").

148. Brief for Petitioner, *supra* note 147, at 56-60. When the resolution of the qualified immunity issue is particularly fact intensive, the trial court should bypass the constitutional issue and go directly to qualified immunity. *Id.*

149. *Id.* at 57-58.

150. *Id.* at 58-59. The petitioner argues that the *Saucier* rule is particularly inapposite in Fourth Amendment cases involving the seizure of evidence since those issues are litigated so frequently in criminal cases. *Id.* However, Fourth Amendment issues, such as excessive force, which are not litigated in criminal court, might still be subject to the *Saucier* rule. *Id.*

151. Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 147.

152. *Id.* at 30.

153. *Id.* at 26-27.

154. *Id.*

155. *Id.* at 27; *e.g.*, Brief for the Nat'l Campaign to Restore Civil Rights as Amicus Curiae in Support of Respondent, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751), 2008 WL 3831555; Brief of Liberty Legal Inst. as Amicus Curiae in Support of Respondent Afton Callahan, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751), 2008 WL 3851625; Brief of Amici Curiae Nat'l Police Accountability Project & Ass'n of Am. Justice in Support of Respondent, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751), 2008 WL 3851626; Brief Amicus Curiae of the ACLU in Support of Respondent, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751), 2008

United States argued that the lower courts should have discretion in deciding whether to first address the question of whether there has been a violation of the Fourth Amendment.

Respondent, and many amice, took the position that the *Saucier* two-step process should not be overruled or modified.[156] Rather than seeing the two-step process as an advantage for defendants in civil rights cases, respondent argued that the benefit of establishing clear constitutional precedent by requiring courts to address the constitutional question at issue outweighs the disadvantages of the two-step process.[157] If the two-step process can be avoided, constitutional law will not be developed and defendants will continually be able to claim that they are entitled to qualified immunity because of lack of clarity in the law.[158]

Rather predictably, given that it raised the issue, the Court issued a unanimous opinion written by Justice Alito overruling the requirement of *Saucier* that a court first resolve the constitutional issue before reaching qualified immunity, concluding that a "mandatory, two-step rule for resolving all qualified immunity claims should not be retained."[159] Rather, lower court judges "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[160] The Court determined that the requirement that the constitutional violation be analyzed before turning to the issue of qualified immunity was inefficient, sometimes resulted in insufficiently briefed and reasoned decisions, could make appellate review of the constitutional ruling difficult, and generally was contrary to the general rule of the avoidance of constitutional issues.[161]

Although the discussion in *Pearson* focused on the problems with unnecessarily addressing a constitutional issue when a court can resolve a case by deciding that the defendant is entitled to qualified immunity, the problem is more fundamentally that the two standards are the same in the Fourth Amendment context. If the Court now allows the lower courts to bypass a

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156. Brief of Respondent at 48-49, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751), 2008 WL 3895481 (doubting whether *Pearson* is an appropriate case to bring up the continued viability of *Saucier*); *see* Wells, *supra* note 141 (outlining benefits of two step regime).

157. Brief of Respondent, *supra* note 156, at 51-52.

158. Brief for Nat'l Campaign to Restore Civil Rights as Amicus Curaie in Support of Respondent, *supra* note 155, at 3; Brief of Liberty Legal Inst. as Amicus Curaie in Support of Respondent, *supra* note 155, at 15.

159. *Pearson*, 129 S. Ct. at 817.

160. *Id.* at 818.

161. *Id.* at 818-21. The Court downplayed the concern that by allowing courts to avoid constitutional issues, new constitutional norms would never be clearly established reasoning that constitutional norms could be developed in criminal cases, in cases against municipalities, or in cases that seek injunctive relief. *Id.* at 822. The Court noted that "the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity." *Id.* at 821-22.

separate analysis of the excessive force issue, it seems inevitable that the two standards will collapse bringing us back to the situation that existed pre-*Saucier*.[162] Some courts will, in effect, conflate the excessive force and qualified immunity standards. Others will attempt to separate them, thus providing additional protection to defendants by applying reasonableness twice. Rather than address the heart of the conflicts inherent in qualified immunity, the Court in *Pearson* merely provided a mechanism to paper over those problems.

III. A NEW LEGAL STANDARD FOR QUALIFIED IMMUNITY IN EXCESSIVE FORCE CLAIMS

The problems that bubbled up to the Court in *Saucier*, and now in *Pearson*, are not merely based on the order of the inquiry in a qualified immunity analysis, but rather are caused by the unworkability of combining the Fourth Amendment constitutional standard with qualified immunity. Although *Pearson* applied another temporary fix to the problem by allowing courts to forego a constitutional analysis and focus only on qualified immunity, the underlying problem remains unchanged. Rather than looking at the order in which the issues are decided in a Fourth Amendment civil rights action, a more radical solution is needed that addresses the heart of the difficulty.

The current regime poses at least three questions in resolving qualified immunity in an excessive force case: 1) whether the facts establish an unreasonable use of force; 2) whether the unreasonableness of that use of force was clearly established at the time of the defendant's actions; and 3) whether an objectively reasonable official would have known that his actions violated the clearly established right. The incoherency of this regime becomes most acute when a court attempts to answer the third inquiry—whether the reasonable official would have known that his actions violate a clearly established right.[163] Given that it has already determined that the amount of force used was unreasonable, the court must now somehow apply another level of reasonableness to the facts. To alleviate that problem, the qualified immunity standard, at least in the excessive force context, should become a purely legal question—does the determination that the defendant's actions violate the Fourth Amendment represent a new development in the law? Rather than three questions, the court will resolve only two: 1) whether the facts establish an unreasonable use of force; and 2) whether a new legal standard has been applied by the court.

For example, in the *Jennings v. Pare* factual scenario discussed earlier,[164] the

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162. As one amicus points out, "lower courts have struggled in their application of qualified immunity in the use-of-force context" resulting in lower standards for police behavior. Brief of Amicus Curiae Nat'l Police Accountability, Project & Ass'n of American Justice in Support of Respondent, *supra* note 155, at 20-21.

163. *See* Catlett, *supra* note 7, at 1052-54 (noting that apart from assessing reasonableness, even determining what is "clearly established" can be problematic).

164. *See supra* Part I.A-B.

court would determine whether the police officer's twisting of the plaintiff's ankle violated the Fourth Amendment. To do that the court would determine whether the officer's actions were reasonable given the circumstances apparent to the officer at the time he acted. Consideration would be given to the factors outlined in *Graham*, such as the severity of the crime the plaintiff was thought to be committing, the threat the plaintiff posed to the officer or to others, and whether the plaintiff was resisting arrest. If the court determined that a Fourth Amendment violation had occurred, the only task left for qualified immunity would be to ascertain if the Fourth Amendment standard applied represented a departure from settled law. If not, then the defendant would not be entitled to qualified immunity.

This reformulation would provide critical protection for the defendant from being held responsible for predicting novel developments in the law. This concern, after all, was one of the primary motivating forces behind the adoption of qualified immunity.[165] The new standard would also make the qualified immunity question purely a legal one, thus eliminating confusion between the roles of the judge and the jury. It is the second reasonableness inquiry that creates questions of fact in a qualified immunity analysis—a court could address purely as a legal matter whether it is adopting new law while omitting the confusing and unnecessary second inquiry into reasonableness.

Of course, determining whether new law has been developed is not a simple task. As Chaim Saiman has pointed out, law created by courts is not framed as the articulation of new black letter rules, but rather by the application of precedent to a particular set of facts.[166] Notwithstanding these difficulties, however, certain kinds of decisions could be relatively clearly identified as creating new legal standards. For example, *Graham* itself, which announced for the first time that the Fourth Amendment would be the framework in which seizures made with excessive force are analyzed, represented a break with the past and an articulation of new standards.[167] Similarly, an analysis which explicitly repudiates or overrules prior cases would also be a new development in the law. A decision which applied a well established general standard to a new set of facts would likely not be developing new law. Only in those game changing moments when a police officer's behavior is being evaluated by a genuinely new standard would qualified immunity come into play to protect a police officer caught in between old and new constitutional standards.

Because articulations of genuinely new law are rare, the result of such a reformulated qualified immunity standard would be that qualified immunity would rarely be granted in excessive force cases. One result might be that government officials would more often be found liable for unconstitutional acts. This might well have a beneficial impact on the behavior of police officers and

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165. Pierson v. Ray, 386 U.S. 547, 557 (1967) (noting that qualified immunity is necessary because police officers should not be charged "with predicting the future course of constitutional law").

166. Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155, 1156-57 (2003).

167. *See* Graham v. Connor, 490 U.S. 386, 393-95 (1989).

the training they receive. More likely, however, is that cases will be resolved on the basis of the Fourth Amendment rather than because of the qualified immunity defense. It is quite possible that defendants would not lose appreciably more § 1983 cases, only that the basis for a defendant's success would be the requirements of the Fourth Amendment rather than qualified immunity.

Requiring that the Fourth Amendment, rather than qualified immunity, do the work of determining which police behaviors should be sanctioned and which should be excused, will lead to more clarity for the guidance of police officers and also more open understanding by the public of the range of permissible police behavior. The elimination of the obfuscation provided by qualified immunity may make it more possible to have a constructive discussion concerning the appropriate use of police force and the remedies for abuses of that force. Reforming the legal regime to provide a more meaningful deterrent to police violence can start by making the rules applicable to such claims more simple and coherent.

CONCLUSION

Over the past thirty years, courts and litigants have attempted to forge a workable regime for applying qualified immunity in excessive force cases. These attempts have been largely unsuccessful and have led to an increasingly complicated and unsatisfactory set of steps that a district court must execute when these cases arise. Because of its complexity and incoherence, the current system seems to work for no one—not police defendants, not judges, and most particularly not victims of police abuse. It has become apparent that periodic fixes by the Supreme Court will not solve the problem—a more profound rethinking of the doctrine is required.

In excessive force cases the qualified immunity defense should be modified to eliminate the reasonableness inquiry, allowing the Fourth Amendment to do the work of assessing reasonableness. This change would go a long way toward simplifying and reforming the defense. Other changes in the doctrine may well also be necessary to create a more usable and rational system. If the current approach is left intact without any profound alternations, the promise of § 1983 as a meaningful remedy to police abuse will be unfulfilled, and judges will be left to dance through a complex set of steps without any music to give it meaning.