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## QUALIFIED IMMUNITY: FURTHER DEVELOPMENTS IN THE POST-PEARSON ERA

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### I. PEARSON V. CALLAHAN

As I noted in my comments last year,<sup>1</sup> the Supreme Court's decision in *Pearson v. Callahan*<sup>2</sup> significantly changed the nature of the mandatory analysis courts were instructed to conduct in resolving the qualified immunity issue in § 1983 litigation.<sup>3</sup> Prior to *Pearson*, the Court required a two-step approach for the qualified immunity analysis.<sup>4</sup> Under *Saucier v. Katz*,<sup>5</sup> the first prong of the analysis required that a court decide whether the complaint stated a violation of a constitutional right under current law before addressing the second

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<sup>1</sup> See Karen M. Blum, *Section 1983 Litigation: Post-Pearson and Post-Iqbal*, 26 *TOURO L. REV.* 433 (2010). I refer the reader to this article for the details of the *Pearson* decision and the criticisms of the "rigid 'order of battle,'" *Brosseau v. Haugen*, 543 U.S. 194, 201-02 (2004) (Breyer, J., concurring), that led the Court to abandon the mandatory approach for one that allows lower courts to use their discretion in determining whether to address the first prong of the qualified immunity analysis or proceed directly to the second prong.

<sup>2</sup> 129 S. Ct. 808 (2009).

<sup>3</sup> *Id.* at 818 ("On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals 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.").

<sup>4</sup> See *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

<sup>5</sup> 533 U.S. 194 (2001).

prong, the question of whether the law was clearly established at the time of the challenged conduct.<sup>6</sup> *Pearson* does not abolish the two-step approach, but rather makes it discretionary.<sup>7</sup> The Court recognized that the approach can be beneficial in promoting “the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.”<sup>8</sup> In the end, the Court has left it to the lower court judges to decide, as a matter of discretion, what “order of decisionmaking will best facilitate the fair and efficient disposition of each case.”<sup>9</sup>

## II. POST-PEARSON DEVELOPMENTS

Last year, I presented an overview of what the post-*Pearson* landscape looked like and I placed the cases in a framework of four categories: (1) cases where the courts find the violation of a clearly established right and thus, deny qualified immunity, (2) cases where the courts find no constitutional violation and grant qualified immunity, (3) cases where the courts invoke their newly found discretion under *Pearson* to avoid reaching the “merits” prong of qualified immunity and grant qualified immunity based on the “clearly established law” prong, and (4) cases where the courts find a constitutional violation but grant qualified immunity because the law was not clearly established at the time. Another year has added a number of new cases to each category, and I will review some of these decisions in an attempt to present an updated description of the post-*Pearson* legal landscape.

### A. Violation of a Clearly Established Right: Qualified Immunity Denied

There are still many cases where the courts will find that official conduct violates a clearly established constitutional right. Some of these cases are relatively non-controversial, presenting situations that encompass fairly obvious constitutional wrongdoing. For exam-

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<sup>6</sup> *Id.* at 201.

<sup>7</sup> *See Pearson*, 129 S. Ct. at 818.

<sup>8</sup> *Id.* at 818.

<sup>9</sup> *Id.* at 821.

ple, in *Raiche v. Pietroski*,<sup>10</sup> the Court of Appeals for the First Circuit found an obvious violation of the Fourth Amendment when an officer slammed the plaintiff and his motorcycle on the ground after the plaintiff had stopped and pulled over in response to the cruiser's overhead lights.<sup>11</sup> On the second prong, the court concluded that a reasonable officer would have understood that such conduct was unconstitutional.<sup>12</sup> In *Holzemer v. City of Memphis*,<sup>13</sup> the Sixth Circuit held "that requesting assistance from a city councilman—whether in writing or in person—constitutes petitioning activity entitled to the protection of the Petition Clause of the First Amendment,"<sup>14</sup> and "that a reasonable city official would have known that retaliation for seeking such assistance from a local, elected official is unlawful."<sup>15</sup> Most courts will continue to address the merits question where the conduct so clearly violates constitutional rights.<sup>16</sup> In an interesting case involving protestors, *Baribeau v. City of Minneapolis*,<sup>17</sup> the Court of Appeals for the Eighth Circuit held that police officers violated plaintiffs' clearly established Fourth Amendment right not to be arrested without probable cause when the officers arrested plaintiffs under a

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<sup>10</sup> 623 F.3d 30 (1st Cir. 2010).

<sup>11</sup> *Id.* at 37.

<sup>12</sup> *Id.* at 39.

<sup>13</sup> 621 F.3d 512 (6th Cir. 2010).

<sup>14</sup> *Id.* at 519.

<sup>15</sup> *Id.*

<sup>16</sup> *See, e.g.,* *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 53 (1st Cir. 2009) (concluding that "forcing a prisoner to undergo an invasive abdominal surgery for the purpose of determining whether or not he is hiding a cell phone in his rectum is a violation of a clearly established constitutional right."); *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 526, 533 (8th Cir. 2009) (en banc) (holding that putting a pregnant prisoner in leg shackles while she was in the midst of labor violated a clearly established constitutional right); *Howard v. Kansas City Police Dep't*, 570 F.3d 984, 988, 991 (8th Cir. 2009) (noting that the court elected to proceed under the traditional framework and concluded that the officers violated clearly established law when they acted unreasonably in responding to dangers posed by hot asphalt); *Grawey v. Drury*, 567 F.3d 302, 309-10 (6th Cir. 2009) (finding that officers discharging enough pepper spray in subdued detainee's face to cause him to lose consciousness violated clearly established law); *Bergeron v. Cabral*, 560 F.3d 1, 7, 12 (1st Cir. 2009) (holding that the county sheriff violated clearly established law when she decommissioned deputy sheriffs based on their political affiliation); *Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1181-85 (11th Cir. 2009) (finding that the two-step analysis was appropriate where defendants violated Amnesty's clearly established right to assemble, protest, and be heard while doing so); *Dominquez v. Corr. Med. Servs.*, 555 F.3d 543, 549, 552 (6th Cir. 2009) (finding that both prongs of the analysis were satisfied when a prisoner's right to medical care was clearly established).

<sup>17</sup> 596 F.3d 465 (8th Cir. 2010).

disorderly conduct statute for “engaging in an artistic protest by playing music, broadcasting statements, dressing as zombies, and walking erratically in downtown Minneapolis during a week-long festival.”<sup>18</sup> Likewise, the court found no probable cause or “arguable probable cause” to arrest plaintiffs for violating a Minnesota statute that prohibits displaying weapons of mass destruction or simulated weapons of mass destruction.<sup>19</sup>

In a final example, presenting a more controversial merits question, the Fifth Circuit, in *Morgan v. Swanson*,<sup>20</sup> held that “suppression of student-to-student distribution of literature on the basis of religious viewpoint is unlawful under the First Amendment with respect to elementary school students” and that defendant officials had fair warning of the unlawfulness of such suppression at the time of the challenged conduct.<sup>21</sup>

### **B. No Constitutional Right Alleged: Qualified Immunity Granted**

Courts continue to dispose of cases by reaching the first prong of the analysis and deciding that the plaintiff has not asserted the violation of a constitutional right at all.<sup>22</sup> For example, in *Costello v. City of Burlington*,<sup>23</sup> the Court of Appeals for the Second Circuit held that plaintiff’s First Amendment right to free speech was not violated by the enforcement of Burlington’s municipal noise control ordinance.<sup>24</sup> Chief Judge Jacobs took issue with Judge Pooler’s reserva-

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<sup>18</sup> *Id.* at 479.

<sup>19</sup> *Id.* at 480 (construing MINN. STAT. § 609.712(5) (West 2011)).

<sup>20</sup> 627 F.3d 170 (5th Cir. 2010), *reh’g en banc granted*, 628 F.3d 705 (5th Cir. 2010).

<sup>21</sup> *Morgan*, 627 F.3d at 182.

<sup>22</sup> *See, e.g.*, *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382, 385 (5th Cir. 2009) (noting that the officer’s fatal shooting of the suspect was reasonable where the officer could have reasonably believed the suspect was reaching for his weapon); *McCullough v. Antolini*, 559 F.3d 1201, 1205, 1208 (11th Cir. 2009) (holding that there was no violation of the Fourth Amendment where sheriff’s deputies used deadly force on suspect who refused to pull over, engaged in high-speed chase, refused to show hands when stopped and drove his truck toward the deputy); *Case v. Eslinger*, 555 F.3d 1317, 1326, 1327 (11th Cir. 2009) (finding that the two-part inquiry was the “better approach” where Sheriff and City were named defendants and their liability turned on whether constitutional violation had been committed by officer; finding no violation where officer had probable cause for arrest and seizure of property).

<sup>23</sup> 632 F.3d 41 (2d Cir. 2011).

<sup>24</sup> *Id.* at 47.

tion about addressing the first prong of the qualified immunity analysis,<sup>25</sup> concluding that after two trips to the district court and two trips to the circuit, this was a case where it was important to clarify the law and address both the facial and “as applied” challenges to the validity of the ordinance.<sup>26</sup>

In *Hernandez v. Cook County Sheriff's Office*,<sup>27</sup> the Court of Appeals for the Seventh Circuit found that “the plaintiffs were acting as public employees when they complained about unsafe conditions at the jail,” and thus were entitled to no First Amendment protection for such speech.<sup>28</sup> The Tenth Circuit took the same approach in *Chavez-Rodriguez v. City of Santa Fe*,<sup>29</sup> holding that a public employee’s speech was given pursuant to official duties and thus not protected by the First Amendment.<sup>30</sup>

In another example, the Ninth Circuit, in *Bardzik v. County of Orange*,<sup>31</sup> found no constitutional violation and granted qualified immunity to the defendant on the first prong of the analysis in a case where the plaintiff claimed he had been subjected to a retaliatory demotion in violation of his First Amendment rights. The court determined that the plaintiff was a “policymaker” and thus was not protected by the First Amendment from politically motivated retaliatory actions.<sup>32</sup> The court noted that it “elect[ed] to address whether there was a constitutional violation because the policymaker analysis is fact intensive and unsettled. In these circumstances, it is proper to address *Saucier*’s first step first.”<sup>33</sup>

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<sup>25</sup> See *id.* at 50-51 (Pooler, J., concurring).

<sup>26</sup> *Id.* at 48. For another case where the Second Circuit decided the “merits” question first in resolving the qualified immunity issue and held that no constitutional right was violated, see *Kelsey v. County of Schoharie*, 567 F.3d 54, 61, 65 (2d Cir. 2009), which held that there was no Fourth Amendment violation with regard to the change-out procedure in a jail.

<sup>27</sup> No. 10-1440, 2011 WL 650752 (7th Cir. Feb. 24, 2011).

<sup>28</sup> *Id.* at \*7.

<sup>29</sup> 596 F.3d 708 (10th Cir. 2010).

<sup>30</sup> *Id.* at 716 (“Given all of the circumstances surrounding Chavez-Rodriguez’s conversation with Lujan, the court concludes the speech in question was undertaken pursuant to Chavez-Rodriguez’s official duties and not as a private citizen. As a result, this speech is not entitled to First Amendment protection and the Defendants are entitled to qualified immunity.”).

<sup>31</sup> No. 09-55103, 2011 WL 1108253 (9th Cir. Mar. 28, 2011).

<sup>32</sup> *Id.* at \*5.

<sup>33</sup> *Id.* at \*14 n.6.

### C. Qualified Immunity Granted by Jumping to Second Prong

By far, the largest universe of cases post-*Pearson* consists of those where courts are invoking *Pearson* to jump to the second prong of the immunity analysis without deciding the question of whether there is a constitutional right under the facts alleged by the plaintiff.<sup>34</sup>

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<sup>34</sup> See, e.g., *Noble v. Adams*, No. 09-17251, 2011 WL 906052, at \*4 n.1 (9th Cir. Mar. 17, 2011) (“We conclude pursuant to what is now known as prong [two] of the *Saucier v. Katz*, 533 U.S. 194 (2001) test . . . that it was not clearly established in 2002—nor is it established yet—precisely how, according to the Constitution, or when a prison facility housing problem inmates must return to normal operations, including outside exercise, during and after a state of emergency called in response to a major riot, here one in which inmates attempted to murder staff.”); *Stickley v. Sutherly*, No. 09-2317, 2011 WL 893760, at \*2 (4th Cir. Mar. 14, 2011) (finding that it is “appropriate to forego making a determination of whether defendants actually violated [plaintiff’s] First Amendment rights” and considering only that plaintiff’s “right to comment on his demotion within the Strasburg Police Department was clearly established at the time defendants dismissed him from the force”); *Barton v. Clancy*, 632 F.3d 9, 26 (1st Cir. 2011) (“Leaving for another day the question of whether Barton has stated a constitutional violation, we hold that as of April 2006, the law was not sufficiently clear to put Clancy on notice that declining to reappoint Barton to the volunteer position of Parks Commissioner in retaliation for his *First Amendment* activities was unlawful.”); *Atkins v. City of Chicago*, 631 F.3d 823, 829 (7th Cir. 2011) (“[T]here is no need to decide in this case whether there might be a constitutional entitlement to a judicial hearing in cases of alleged mistaken identity of parole violators. For even if the question were answered in the plaintiff’s favor, it would not warrant any relief. The question is novel, and the defendants therefore protected from liability for damages for possibly answering it incorrectly by the doctrine of qualified immunity.”); *Melendez-Garcia v. Sanchez*, 629 F.3d 25, 35-36 (1st Cir. 2010) (“In light of *Pearson*, we may now address the second prong of the qualified immunity test first. We follow that course here. . . . Even if Meléndez were able to establish that the officials here (1) either (a) created a danger and then failed to protect him from it or (b) limited his ability to protect himself or receive protection from outside sources, and (2) engaged in conscience-shocking conduct, he would still need to prove that it would have been clear to a reasonable UPR official that the relevant behavior here was unlawful. He cannot do so.” (emphasis added)); *Kovacic v. Villarreal*, 628 F.3d 209, 213 (5th Cir. 2010) (“In light of the Supreme Court’s decision in *Pearson v. Callahan*, we are permitted to consider the question of whether a defendant is entitled to qualified immunity without determining whether or not the plaintiff’s constitutional rights were violated.”). *Kovacic* concluded that is not clearly established that state actors could be held liable for private harm caused to individual after he was released from custody. *Id.* at 214. See also *Redd v. Wright*, 597 F.3d 532, 536 (2d Cir. 2010) (noting that the court immediately addressed the second prong and held that the prisoner’s right under the First Amendment and RLUIPA to a religious exemption from prison TB policy was not clearly established); *Walden v. City of Providence*, 596 F.3d 38, 53 (1st Cir. 2010) (observing that the court turned to the second prong and held that “in 2002, public safety employees . . . had [no] clearly established right under the *Fourth Amendment* not to have calls made at work recorded”); *Estrada v. Rhode Island*, 594 F.3d 56, 62-64 (1st Cir. 2010) (choosing to answer the question of qualified immunity first and concluding that it was not clearly established that officer’s line of questioning into plaintiffs’ immigration status prolonged stop, such that independent reasonable suspicion was neces-

Especially strong candidates for jumping to the second prong are cas-

sary); *Weise v. Casper*, 593 F.3d 1163, 1170 (10th Cir. 2010) (“Because it is plain that the constitutional right claimed was not clearly established at the time of the alleged violation, Defendants are entitled to qualified immunity. Therefore, we need not reach the question of whether Defendants violated Plaintiffs’ constitutional rights.”); *Phillips v. Hust*, 588 F.3d 652, 657-58 (9th Cir. 2009) (stating on remand from the Supreme Court that “this is a case ‘in which the constitutional question is so fact-bound that the decision [would] provide[] little guidance for future cases.’ . . . Thus, gladly exercising our newfound authority, we do not decide whether Hust’s actions violated Phillips’s constitutional rights. Rather, we proceed directly to ask whether Hust is entitled to qualified immunity. . . . In light of the Supreme Court’s flexible rules for pro se filings, which do not require and perhaps do not even permit comb-binding, we have no difficulty concluding that Hust is entitled to qualified immunity.” (alteration in original) (quoting *Pearson*, 129 S. Ct. at 819)); *Matrisciano v. Randle*, 569 F.3d 723, 735-36 (7th Cir. 2009) (holding that the law was not clearly established, such that officials would have understood that transferring Assistant Deputy Director in the Department of Corrections for having testified on behalf of an “infamous prisoner” before Prison Review Board violated First Amendment rights); *Tibbetts v. Kulongoski*, 567 F.3d 529, 535, 538-40 (9th Cir. 2009) (holding that the parameters of Plaintiff’s right to name-clearing hearing were not clearly established); *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 579 (5th Cir. 2009) (holding that the officer’s action in terminating threat posed by presumptively intoxicated suspect fleeing down narrow, curvy highway at excessive rates of speed did not violate clearly established law, even though no bystanders were threatened at time officer “bumped” suspect’s car, resulting in suspect’s death); *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2009) (exercising judicial restraint after *Pearson*; only deciding the more clearly-established-law question, and holding that “[a]t the time of their detention, neither the Supreme Court nor this court had ever held that aliens captured on foreign soil and detained beyond sovereign U.S. territory had any constitutional rights—under the *Fifth Amendment*, the *Eighth Amendment*, or otherwise”); *Lewis v. City of West Palm Beach*, 561 F.3d 1288, 1290-92 (11th Cir. 2009) (holding that the law was not clearly established as to the officers’ use of hogtie or hobble on noncompliant suspect, resulting in his death was unlawful); *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1022-24 (9th Cir. 2009) (holding that the claim of unlawful pat-down violated clearly-established Fourth Amendment right, while on an unlawful arrest claim, granted qualified immunity on grounds that a reasonable officer would not have known his conduct was unlawful under the circumstances); *Chaklos v. Stevens*, 560 F.3d 705, 711, 716 (7th Cir. 2009) (disposing of case by holding that case law did not give fair warning to defendants that their conduct was unconstitutional where “quirky facts” complicated constitutional inquiry in First Amendment employee retaliation case); *Rodis v. City, Cnty. of San Francisco*, 558 F.3d 964, 970-71 (9th Cir. 2009) (declining on remand in light of *Pearson* to address the “merits” question and holding that officers were entitled to qualified immunity for their conduct in arresting suspect for possession of a counterfeit bill when it was not clearly established that specific intent beyond tender of counterfeit note was required for probable cause); *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1278 (10th Cir. 2009) (exercising its “newfound discretion” and holding that law enforcement officers would not have known that it was unconstitutional “to enforce a general ordinance prohibiting unlicensed outdoor business activity on public property against an artist wishing to sell his wares in a park”); *Morgan v. Hubert*, No. 08-30388, 2009 WL 1884605, at \*4 (5th Cir. July 1, 2009) (stating that “because the obligation of prison officials to protect prisoners from violence at the hand of other inmates is clear”); *Fennell v. Gilstrap*, 559 F.3d 1212, 1217 n.6 (11th Cir. 2009) (observing that *Pearson* “has no application in a Fourteenth Amendment excessive-force claim because the qualified immunity analysis involves only the first prong”).

cases where deciding the constitutional question would require the interpretation of unclear state law. In *Waeschle v. Dragovic*,<sup>35</sup> for example, the issue presented to the Sixth Circuit was whether there was a property interest in the brain of a relative.<sup>36</sup> A woman died while staying in a nursing home, and her daughter suspected some foul play.<sup>37</sup> Based on her suspicions, an autopsy was completed and forensic evidence was gathered.<sup>38</sup> The brain was removed and the body was given back to the daughter for burial; however, she was not informed that the brain was not reinserted into the body.<sup>39</sup> After discovering that her mother's brain had not been returned, the daughter brought a lawsuit; the question became whether she had a property interest in her mother's brain that was protected under state law.<sup>40</sup> The Sixth Circuit declined to decide the issue, instead ordering certification of the question to the Michigan state court.<sup>41</sup> Similarly, in *Cortes-Reyes v. Salas-Quintana*,<sup>42</sup> where the merits question turned on "whether a transitory government employee ha[d] an entitlement to his or her continued employment," and the law of Puerto Rico was "both sparse and contradictory on the question," the First Circuit resolved the immunity question on the ground that the law was not clearly established.<sup>43</sup>

Other cases, presenting tough constitutional merits questions, have generated more controversy. In *Kelly v. Borough of Carlisle*,<sup>44</sup> the Third Circuit, in a case raising the question of whether a passenger in a vehicle had a right to videotape an officer during a traffic stop,<sup>45</sup> expressly declined to adopt a position advocated by the American Civil Liberties Union ("ACLU") in an amicus brief.<sup>46</sup> The

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<sup>35</sup> 576 F.3d 539 (6th Cir. 2009).

<sup>36</sup> *Id.* at 542.

<sup>37</sup> *Id.* ("[The daughter] suspected that neglect or abuse caused the fall.").

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Waeschle*, 539 F.2d at 542.

<sup>41</sup> *Id.* at 551 ("Given our view that the Michigan courts are better suited to answer the unsettled state-law aspect of *Waeschle*'s due process claim than we are, we will exercise our discretion to have the district court certify the above-stated issue to the Michigan Supreme Court.").

<sup>42</sup> 608 F.3d 41 (1st Cir. 2010).

<sup>43</sup> *Id.* at 51, 52.

<sup>44</sup> 622 F.3d 248 (3d Cir. 2010).

<sup>45</sup> *Id.* at 251-52.

<sup>46</sup> *Id.* at 259 n.6 ("[The Court] declined to adopt the rule proffered by the ACLU because



ACLU's position was that the court, despite the new found discretion afforded to it, should only deviate from the mandatory two-step approach when presented with an unusual fact-driven situation or a situation involving uncertain state law.<sup>47</sup> In rejecting the ACLU's argument, the court held that the district court's discretion was broad.<sup>48</sup> As such, the lower court was within its discretion when it bypassed the first prong—whether the plaintiff asserted a constitutional violation—of the analysis.<sup>49</sup>

Concluding that “there was insufficient case law establishing a right to videotape police officers during a traffic stop,”<sup>50</sup> the court held that a police officer could not have been put on “‘fair notice’ that seizing a camera or arresting an individual for videotaping police during the stop would violate the First Amendment.”<sup>51</sup> Therefore, qualified immunity was granted to the police officer on the First Amendment claim.<sup>52</sup>

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it is inconsistent with *Pearson*”).

<sup>47</sup> *Id.* (urging the court “to establish a rule that the *Saucier* sequence should be the default approach to qualified immunity analysis, especially in cases alleging violations of the First Amendment”).

<sup>48</sup> *Id.* (stating that “the [Supreme] Court held that district courts have wide discretion to decide which of the two prongs . . . to address first”).

<sup>49</sup> *Kelly*, 622 F.3d at 259 n.6.

<sup>50</sup> *Id.* at 262.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 263 (holding “that the right to videotape police officers during traffic stops was not clearly established and [in turn the officer] was entitled to qualified immunity on [the] First Amendment claim”). In *Kelly*, the court not only bypassed the first prong of the qualified immunity analysis on the question of videotaping a police officer during a traffic stop, but the Third Circuit also discussed an existing Fourth Amendment claim. *Id.* at 254 (“Kelly claim[ed the officer] violated his clearly established Fourth Amendment rights by arresting him without probable cause.”). The court declared that the district court erred in granting qualified immunity without conducting a sufficient analysis of state law. *Kelly*, 622 F.3d at 254 (“[T]he [d]istrict [c]ourt bypassed the question of whether Kelly’s constitutional rights were violated and first considered whether the law was clearly established. Although the [d]istrict [c]ourt explicitly held that the First Amendment law was not clearly established, its analysis of the Fourth Amendment did not engage the relevant state court precedents interpreting the Wiretap Act.”). Evidently the state law was very clear. *Id.* at 256 (indicating that the lower court failed to adequately analyze the existing state law). According to two different Pennsylvania Supreme Court cases, covertly recording a police officer was not a violation of the Pennsylvania wiretap law. See *Agnew v. Dupler*, 717 A.2d 519, 524 (Pa. 1998) (holding that “[a]ppellant did not have a reasonable expectation of non-interception because he lacked the requisite reasonable expectation of privacy in the conversations”); see also *Commonwealth v. Henlen*, 564 A.2d 905, 907 (Pa. 1989) (holding that “[o]ne applying these principles to the instant case is led to the conclusion that the circumstances do not establish that Trooper Dibler possessed a justifiable expectation that his words would not be subject to interception”). However, the officer obtained advice from the prosecutor as to whether or

In an exercise of its discretion under *Pearson*, in *Bame v. Dillard*,<sup>53</sup> the Court of Appeals for the District of Columbia avoided the constitutional violation question and concluded that “it was not clearly established in 2002 that the strip search of a person being introduced into a detention facility violated the Fourth Amendment.”<sup>54</sup> *Bame* was a class action suit brought by protestors who had been arrested<sup>55</sup> and eventually delivered that same day to the custody of Dillard, a United States Marshal for the Superior Court for the District of Columbia. After passing through metal detectors and being patted down, the male protestors were strip searched and visually inspected in groups of about ten and then placed in holding cells to await disposition of the charges against them.<sup>56</sup> All of the protestors were charged with misdemeanors and subsequently released, some of them paying a fine, some with no sentence or fine imposed at all.<sup>57</sup> The district court denied qualified immunity to Dillard because at the time of the searches of these protestors, the law was clearly established “that blanket strip searches of non-violent, non-felony arrestees were unlawful.”<sup>58</sup>

In addressing the qualified immunity question on appeal, the court began by noting that “[i]n this case the principle of constitutional avoidance counsels that we turn directly to the second question.”<sup>59</sup> Although *Bame* relied on a consensus of persuasive authority in 2002 that had held such suspicionless strip searches of non-violent, misdemeanant arrestees was unlawful,<sup>60</sup> the majority of the Court of

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not he was able to arrest an individual for videotaping the officer during a traffic stop, but the prosecutor gave him inaccurate advice. See *Kelly*, 622 F.3d at 251-52. As such, the case also raised the issue of whether reliance on the advice of prosecutors should shield the police officer. *Id.* at 251-52, 254. See generally Karen M. Blum, *Qualified Immunity: Discretionary Function, Extraordinary Circumstances, and Other Nuances*, 23 TOURO L. REV. 57 (2007).

<sup>53</sup> No. 09-5330, 2011 WL 1085882 (D.C. Cir. Mar. 29, 2011).

<sup>54</sup> *Id.* at \*1.

<sup>55</sup> *Id.* Plaintiffs were arrested on the morning of September 27, 2002 while they were protesting a meeting of the International Monetary Fund and the World Bank in downtown Washington, D.C. *Id.* at \*2.

<sup>56</sup> *Id.*

<sup>57</sup> *Bame*, 2011 WL 1085882 at \*2.

<sup>58</sup> *Bame v. Dillard*, 647 F. Supp. 2d 43, 55 (D.D.C. 2009).

<sup>59</sup> *Bame*, 2011 WL 1085882 at \*3.

<sup>60</sup> *Id.* at \*4. The court referenced the following cases relied on by the Plaintiff: *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001), *overruled by Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc); *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001); *Masters v.*

Appeals concluded that the controlling Supreme Court decision was *Bell v. Wolfish*,<sup>61</sup> and that “nothing in *Bell* requires individualized, reasonable suspicion before strip searching a person entering a detention facility.”<sup>62</sup> In granting qualified immunity, the majority explained:

We are aware of no Supreme Court case . . . that suggests a reasonable officer could not have believed his actions were lawful despite a consensus among the courts of appeals when a precedent of the Supreme Court supports the lawfulness of his conduct. A different reading of *Bell* by the several circuits to have considered the issue before 2002 could not ‘clearly establish’ the unconstitutionality of strip searches in this context.<sup>63</sup>

I find it disturbing, and somewhat bizarre, that the Court of Appeals is sending out a message to law enforcement officials that, despite a consensus of persuasive authority from the federal courts of appeals holding certain conduct unlawful in light of Supreme Court precedent at the time, an officer can prevail on qualified immunity so long as the Supreme Court itself had not clearly held the precise conduct in question as unlawful. As Judge Judith Rogers noted in her dissent, “The Eleventh and Ninth Circuits have the authority to change clearly established law upon rehearing en banc, but under Su-

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Crouch, 872 F.2d 1248 (6th Cir. 1989); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); *Stewart v. Lubbock County*, 767 F.2d 153 (5th Cir.1985); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), *overruled by* *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc); *Hill v. Bogans*, 735 F.2d 391 (10th Cir.1984); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir.1983); and *Logan v. Shealy*, 660 F.2d 1007 (4th Cir.1981). *See id.* at \*19, n.\*. The Third Circuit has recently joined the Ninth and Eleventh Circuits in holding that strip searches of non-violent, non-felony arrestees who are to be placed in general population are reasonable under the Fourth Amendment. *See Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 621 F.3d 296, 308 (3d Cir. 2010), *cert. granted*, 2011 WL 202772 (U.S. Apr. 4, 2011) (“Like the Ninth and Eleventh Circuit Courts of Appeals, we conclude that the security interest in preventing smuggling at the time of intake is as strong as the interest in preventing smuggling after the contact visits at issue in *Bell*. We reject Plaintiffs’ argument that blanket searches are unreasonable because jails have little interest in strip searching arrestees charged with non-indictable offenses. This argument cannot be squared with the facts and law of *Bell*.”).

<sup>61</sup> 441 U.S. 520 (1979).

<sup>62</sup> *Bame*, 2011 WL 1120287, at \*5.

<sup>63</sup> *Id.*

preme Court precedent Marshal Dillard had no such authority to ignore clearly established law.”<sup>64</sup>

*Lopera v. Town of Coventry*<sup>65</sup> is yet another example of a court taking advantage of its discretion under *Pearson*, in this case to avoid a merits decision on what might be perceived as a fact-driven Fourth Amendment issue. In *Lopera*, a group of high school boys on a visiting soccer team were subjected to a search by police officers when accusations were made by an unruly crowd of home team spectators and players that certain items had been taken from the home team locker room.<sup>66</sup> Plaintiffs asserted both Fourth Amendment and Fourteenth Amendment claims.<sup>67</sup> The panel agreed that it was not clearly established that the racially motivated epithets and hostility of the crowd could be imputed to the police officer defendants and that there was “no evidence that all officers of reasonable competence would have believed the search was undertaken because of the national origin or race of the players.”<sup>68</sup> On the Fourth Amendment qualified immunity question, the issue was whether a reasonable officer could have believed that the visiting team’s coach gave voluntary consent to the search of his players. The majority of the panel concluded that “On the plaintiffs’ version of the facts, we cannot say that all officers of reasonable competence would have concluded that Coach Marchand’s consent to the search was invalid.”<sup>69</sup> Judge Thompson, in dissent on the Fourth Amendment issue, would have denied qualified immunity on the basis that “the officers’ request of Coach Marchand while he was surrounded by an angry mob and unable to depart with his players left little room for choice,”<sup>70</sup> thus making the search nonconsensual and, furthermore, “a reasonable officer

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<sup>64</sup> *Id.* at \*18 (Rogers, J., dissenting).

<sup>65</sup> No. 09-2386, 2011 WL 1205661 (1st Cir. Apr. 1, 2011).

<sup>66</sup> *Id.* at \*1. The facts of the case are disturbing. The visiting team from Central Falls, Rhode Island, consisted of Hispanic players and one Portuguese player. *Id.* The home team, from the Town of Coventry, were predominantly white. *Id.* While some of the Central Falls players used the restrooms in the locker room, the locker room in question was open, unlocked, and accessible by anyone, not just players. *Id.* The players from Central Falls alleged that they were subjected to racial epithets during the game and during the events that unfolded after the game. *Lopera*, 2011 WL 1205661, at \*1.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at \*12, \*13 (Thompson, J., dissenting in part, but agreeing that plaintiffs’ equal protection claim failed).

<sup>69</sup> *Id.* at \*11.

<sup>70</sup> *Id.* at \*13 (Thompson, J., dissenting).

in the defendants' position could [not] have concluded that [the Coach] voluntarily consented to the search."<sup>71</sup>

Given the clear prevalence of cases in which courts are now opting to dispose of qualified immunity on the second prong,<sup>72</sup> there is no doubt that courts will be establishing fewer rights than when they are forced to resolve the merits through the mandated two-step approach of *Saucier*.<sup>73</sup> Some empirical data suggests that, in fact, when the courts addressed the issue of whether there is a constitutional right first, they most often found that there was no right.<sup>74</sup> For example, in the three cases just discussed—*Kelly*, *Bame*, and *Lopera*—it is not clear that if the courts addressed the constitutional question first, they would have found a right. However, in some cases, plaintiffs may want to have the law clearly established, and that argument should be made to the court. If the case presents issues that are likely to recur in subsequent cases, it makes sense to set a standard that will be applicable in other cases. Thus, at least in *Kelly* and *Bame*, it might have benefited both plaintiffs and defendants to have the standard for videotaping officers in the course of a traffic stop and the standard for strip searching non-violent, non-felony detainees established through a decision on the first prong of the immunity analysis. The more factually particular a case is, the more successfully a defendant can argue that the merits question should not be addressed first, because a decision establishing a rights violation would be of little use in future cases.

#### D. Constitutional Right Asserted but Not Clearly Established

There have been some post-*Pearson* cases where courts have

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<sup>71</sup> *Lopera*, 2011 WL 1205661, at \*21.

<sup>72</sup> See *supra* note 34 and accompanying text.

<sup>73</sup> See *supra* note 6 and accompanying text.

<sup>74</sup> Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 693 (2009).

In 76% of the cases where an appellate court ultimately granted qualified immunity for the defendants, the court also held that the asserted constitutional right did not exist, while in only 17% of cases did the court acknowledge the existence of the right. At a basic level, therefore, our results similarly demonstrate that courts are more likely to deny than to acknowledge constitutional rights.

*Id.*

found a constitutional right but applied qualified immunity because the right was not clearly established at the time.<sup>75</sup> The Supreme Court has adhered to the *Saucier* approach in a post-*Pearson* case where plaintiffs asserted claims against individual defendants, along with a *Monell* claim against a government entity. In *Safford Unified School District, No. 1 v. Redding*,<sup>76</sup> the Court held that school officials' strip search of a thirteen-year-old middle school girl, suspected of bringing prescription-strength ibuprofen to school, was a violation of the student's Fourth Amendment rights. Applying the rationale of *New Jersey v. T.L.O.*,<sup>77</sup> the majority concluded that the scope of the search was totally unwarranted in light of the age and sex of the student and the minimal threat presented by the specific "drugs" being sought.<sup>78</sup> While eight Justices found the search unlawful, only Justices Stevens and Ginsburg would have denied qualified immunity to the school official who ordered the search.<sup>79</sup> As Justice Stevens put it, this was "in essence, a case in which clearly established law meets clearly outrageous conduct."<sup>80</sup> The Court remanded the case for con-

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<sup>75</sup> In addition to the cases discussed in the text, *see also* *Schmidt v. Creedon*, Nos. 09-2051, 10-1633, 2011 WL 1134259, at \*1 (3d Cir. Mar. 29, 2011) ("We now hold that, except for extraordinary situations, under Pennsylvania law, even when union grievance procedures permit a policeman to challenge his suspension after the fact, a brief and informal pre-termination or pre-suspension hearing is necessary. However, because this rule was not clearly established at the time of Schmidt's suspension, we conclude that appellees are entitled to qualified immunity."); *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1115 (9th Cir. 2010) ("[G]oing forward, reasonable government officials are on notice that deliberately falsifying evidence in a child abuse investigation and including false evidentiary statements in a supporting declaration violates constitutional rights where it results in the deprivation of liberty or property interests, be it in a criminal or civil proceeding. However, given the distinctions between criminal prosecutions and civil foster care proceedings, we cannot say that this right was clearly established as of 2001, when the conduct at issue in this case occurred."); *Ray v. Twp. of Warren*, 626 F.3d 170, 177 (3d Cir. 2010) ("Until our decision in this case, the question of whether the community caretaking doctrine could justify a warrantless entry into a home was unanswered in our Circuit. Given the conflicting precedents on this issue from other Circuits, we cannot say it would have been apparent to an objectively reasonable officer that entry into Ray's home on June 17, 2005 was a violation of the law."); *Taravella v. Town of Wolcott*, 599 F.3d 129, 135-36 (2d Cir. 2010) ("Although Taravella has alleged a violation of a constitutional right, and although that constitutional right was clearly established at the time of the alleged violation, Dunn's conduct was objectively reasonable in light of the information he had.");

<sup>76</sup> 129 S. Ct. 2633 (2009).

<sup>77</sup> 469 U.S. 325 (1985).

<sup>78</sup> *Safford Unified Sch. Dist. No. 1*, 129 S. Ct. at 2643.

<sup>79</sup> Only Justice Thomas would have upheld the constitutionality of the search. *See id.* at 2646 (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>80</sup> *Id.* at 2644 (Stevens, J., joined by Ginsburg, J., concurring in part and dissenting in

sideration of the *Monell* claim against Safford, Arizona.<sup>81</sup>

In *Doe v. South Carolina Department of Social Services*,<sup>82</sup> a Fourth Circuit case, the court clarified that a child involuntarily taken from the home and put into foster care is owed an affirmative duty of protection.<sup>83</sup> While a number of circuits had addressed the issue, the Fourth Circuit had not, thus arguably making the law not clearly established in the Fourth Circuit.<sup>84</sup> The Fourth Circuit established that state officials owed a foster child an affirmative duty of care under such circumstances, but granted qualified immunity.<sup>85</sup>

In *Bryan v. MacPherson*,<sup>86</sup> the Ninth Circuit addressed prong one of the qualified immunity analysis in order to establish that a taser, “when used in dart-mode constitute[s] an intermediate, significant level of force that must be justified by the governmental interest involved.”<sup>87</sup> The court held that as such, the use of a taser in dart mode on an individual who was an unarmed traffic offender, admittedly behaving bizarrely but not attempting to flee and presenting no threat to the officer, was an unconstitutional use of excessive force.<sup>88</sup> Having found a constitutional violation, the court went on to decide whether a reasonable officer would have understood that his conduct was unlawful at the time.<sup>89</sup> The court determined that Supreme Court precedent,<sup>90</sup> as well as Ninth Circuit case law,<sup>91</sup> would have put a rea-

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part).

<sup>81</sup> *Id.*

<sup>82</sup> 597 F.3d 163 (4th Cir. 2010).

<sup>83</sup> *See id.* at 175 (“[W]here it is alleged and the proof shows that the state officials were deliberately indifferent to the welfare of the child, liability may be imposed.” (quoting *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987))).

<sup>84</sup> *Id.* at 176, 177. Indeed, the court noted that

Here, when the placement decisions were made, there was no authority from the Supreme Court or this circuit that would have put Thompson on fair notice that her actions violated Jane’s substantive due process rights. On the contrary, given the precedents that did exist in our circuit on the issue of affirmative state protection of foster children, we think it quite reasonable for jurists and officials to have believed that we would have answered the *DeShaney* question in the negative and foreclosed the existence of such a right.

*Id.* at 177.

<sup>85</sup> *See id.*

<sup>86</sup> 630 F.3d 805 (9th Cir. 2010).

<sup>87</sup> *Id.* at 826.

<sup>88</sup> *Id.* at 832.

<sup>89</sup> *Id.*

<sup>90</sup> *See Graham v. Connor*, 490 U.S. 386 (1989).

sonable officer on fair notice that the use of intermediate level of force was unjustified under the circumstances confronting Officer MacPherson.<sup>92</sup> The court went on, however, and recognized that “as of July 24, 2005, there was no Supreme Court decision or decision of [the Ninth Circuit] addressing whether the use of a taser, such as the Taser X26, in dart mode constituted an intermediate level of force.”<sup>93</sup> Thus, Officer MacPherson was entitled to qualified immunity on prong two because a reasonable officer “could have made a reasonable mistake of law in believing the use of the taser was reasonable.”<sup>94</sup>

In *Greene v. Camreta*,<sup>95</sup> the Supreme Court granted certiorari to consider the constitutionality of the conduct of a child-protection caseworker and a deputy sheriff who entered a school without a warrant or court order and seized and interrogated, in a private office at the school, a child suspected of being sexually abused by a parent.<sup>96</sup> The Ninth Circuit applied the same Fourth Amendment warrant and warrant-exception standards to this situation that would be applied to the seizure and interrogation of a criminal suspect, and held that the child’s Fourth Amendment rights were violated when the child was interrogated without “a warrant, a court order, exigent circumstances, or parental consent.”<sup>97</sup> Nevertheless, the court granted qualified immunity to both the caseworker and the deputy sheriff because the legal parameters for this kind of interrogation in the school context were not clearly established at the time of the conducted interview.<sup>98</sup> Subsequently, the Supreme Court granted certiorari on both the question of whether it was appropriate to apply traditional Fourth Amendment standards in the context of an in-school detention and interrogation of a child witness or victim and whether the decision on the merits prong is reviewable by the Supreme Court, where the indi-

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<sup>91</sup> See *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001); *Headwaters Forest Def. v. Cnty. of Humboldt*, 240 F.3d 1185 (9th Cir. 2000), *vacated and remanded on other grounds sub nom.*, *Cnty. of Humboldt v. Headwaters Forest Def.*, 534 U.S. 801 (2001).

<sup>92</sup> *Bryan*, 630 F.3d at 833 (“A reasonable officer in these circumstances would have known that it was unreasonable to deploy intermediate force.”).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> 588 F.3d 1011 (9th Cir. 2009), *cert. granted*, 131 S. Ct. 456 (2010).

<sup>96</sup> See *Camreta*, 588 F.3d at 1016-17.

<sup>97</sup> *Id.* at 1030.

<sup>98</sup> See *id.* at 1033.



vidual defendants actually prevailed on the second prong of qualified immunity.<sup>99</sup> For purposes of our post-*Pearson* discussion, the second question is the more interesting one.

In a case called *Mellen v. Bunting*,<sup>100</sup> where a challenge was made to the mandatory supper prayer at Virginia Military Institute (“VMI”),<sup>101</sup> the Fourth Circuit Court of Appeals held that mandating prayer in such a public institution of higher learning was unconstitutional, but nonetheless granted General Bunting, the official in charge of the school, qualified immunity.<sup>102</sup> When the prevailing party sought certiorari to challenge the merits holding of the case, Justice Scalia and then-Chief Justice Rehnquist, in dissenting from the Court’s denial of certiorari, expressed concern about the “perceived procedural tangle”<sup>103</sup> created by the then-mandatory two-part qualified immunity analysis, which would often shield a constitutional merits determination from review when the defendant was the prevailing party on the second prong.<sup>104</sup> Justice Scalia argued that the general rule of not entertaining an appeal by a prevailing party 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.”<sup>105</sup> While the lower courts are no longer required to resolve the merits question in addressing qualified immunity, the “perceived procedural tangle”<sup>106</sup> noted by Justice Scalia is still apparent when a court exercises its discretion to establish rights on the first prong and grants qualified immunity on the second. The Supreme Court in *Greene* now seems poised to address this important question of whether the merits determination can be appealed by the party who prevails in the court below on qualified immunity. Stay tuned!

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<sup>99</sup> See *Greene*, 131 S. Ct. 456.

<sup>100</sup> 327 F.3d 355 (4th Cir. 2003), *cert. denied*, 541 U.S. 1019 (2004).

<sup>101</sup> See *Mellen*, 327 F.3d at 362-63.

<sup>102</sup> *Id.* at 376-77.

<sup>103</sup> *Bunting*, 541 U.S. at 1022 (2004) (Scalia, J., joined by Rehnquist, C.J., dissenting).

<sup>104</sup> *Id.* at 1023-24.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1022.