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DEFINING REASONABLENESS:

A SUBSTANTIVE AND PROCEDURAL OVERVIEW OF POLICE USE OF FORCE

*Bradley Prewitt**

I. INTRODUCTION

On March 29, 2001, a Coweta County, Georgia deputy clocked Victor Harris' vehicle at 73 miles-per-hour in a 55 mile-per-hour zone.[1] The deputy activated his blue lights, but Harris continued driving.[2] The deputy pursued, and Harris fled at speeds between 70 and 90 miles per hour. During the pursuit, Harris "stayed in control of his vehicle, utilizing his blinkers while passing or making turning movements."[3] Deputy Timothy Scott joined the pursuit.[4] Harris entered Peachtree City, slowed down, "activated his blinker, and turned into a drugstore parking lot located in a shopping complex . . . [where] Scott proceeded around the opposite side of the complex in an attempt to prevent Harris from leaving the parking lot.[5] Harris attempted to avoid hitting Scott's

* J.D., Lincoln Memorial University Duncan School of Law, December 2020

[1] Harris v. Coweta Cty., 406 F.3d 1307, 1311 (11th Cir. 2005).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*

car, but the two vehicles "came in contact with each other, causing minor damage to Scott's cruiser." Harris entered the highway and continued his flight.[6]

Despite having no training in the technique, Scott requested permission to perform the "PIT maneuver" (Precision Immobilization Technique). Scott's supervisor gave him permission to do so with no knowledge of the justification for the pursuit, no knowledge of the speeds involved, and no knowledge of the number of vehicles or pedestrians on the roadway.[7] Scott then determined that he "could not perform the PIT maneuver because he was going too fast."[8] Instead he "rammed his cruiser directly into Harris' vehicle, causing Harris to lose control, leave the roadway, run down an embankment, and crash."[9] Harris sustained serious injuries, rendering him a quadriplegic.[10]

Harris brought a 42 U.S.C. § 1983 claim for violation of his Fourth Amendment right to be free from unreasonable seizure (i.e. excessive force) "under color of law" against Deputy Scott and others.[11] Scott responded by moving for dismissal of Harris' complaint for failure to state a claim as a matter of law pursuant to Rule 56 of the Federal Rules of Civil Procedure.[12] Scott based this motion on the qualified immunity doctrine, which provides immunity to claims of excessive force when the officer has a reasonable, good faith belief that the force at issue was permissible.[13] The Federal District Court for the Northern District of Georgia denied the grant of qualified immunity for both Scott and his supervisor.[14] Under procedure permitted for denials of qualified immunity, Scott entered an interlocutory appeal on

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[6] *Id.*
[7] *Id.* at 1311-12.
[8] *Id.* at 1312.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 1313.
[12] *Id.* at 1310-12.
[13] *See* David J. Oliveiri, Annotation, *Defense of good faith in action for damages against law enforcement official under 42 U.S.C.A § 1983, providing for liability of person who, under the color of law, subjects another to deprivation of rights,* 61 A.L.R. Fed. 7.
[14] *See* Scott v. Harris, 550 U.S. 372, 376 (2007).

the issue of qualified immunity.[15] The Eleventh Circuit Court of Appeals reviewed the written record, then affirmed the denial as to Scott, but reversed the denial (i.e. effectively granting) as to his supervisor.[16] It appears that the case was going to trial, except that the United States Supreme Court granted certiorari on Deputy Scott's interlocutory appeal.[17]

In the opinion that followed, Justice Antonin Scalia gave an excoriating opinion admonishing the Eleventh Circuit and granting Deputy Scott's motion for summary judgment based on qualified immunity.[18] In doing so, Justice Scalia stated, "We have little difficulty in concluding it was reasonable for Scott to take the action that he did."[19] What can explain this glaring difference in the conclusions (and underlying analyses) of the District, Circuit, and Supreme Court?

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[20] This single, deceptively simple sentence actually consists of three important components: (1) the right of citizens to be secure in their "persons, houses, papers, and effects"; (2) against unreasonable searches and seizures (i.e. the reasonableness requirement); and (3) a requirement that warrants be "based on probable cause, supported by oath or affirmation."[21] The following is focused on the second component – the requirement of reasonableness – as it relates to the use of force by the police.

The Fourth Amendment has been interpreted to apply to a law enforcement officer's use of force against an individual (e.g. grabbing, tasing, spraying, striking, strangling, shooting) – a seizure under the Amendment.[22]

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[15] *See Harris v. Coweta Cty.*, 406 F.3d at 1321.
[16] *Id.*
[17] Scott v. Harris, 549 U.S. 991 (2006).
[18] *See Scott*, 550 U.S. at 386.
[19] *Id.* at 384.
[20] U.S. Const. amend. IV.
[21] *See id.*
[22] *See* Graham v. Connor, 490 U.S. 386, 388 (1989).

This interpretation brings police use of force under federal purview and makes any police use of force, whether by a local, state, or federal officer, a potential constitutional violation.[23] Despite this, police officers are privileged to use such force without violating the U.S. Constitution, so long as that force is reasonable when considered against the circumstances in which it was applied.[24] The application of the privilege to use force hinges on a determination of reasonableness by the court.[25] But what is a *reasonable* use of force? That which may appear reasonable to some might be unreasonable to others. By what standard do we judge reasonableness? Should we consider the police officer's intent? Perhaps we should consider what the proverbial *reasonable person* would do? Is it even possible to know?

Defining reasonableness has proven difficult. No constitutional provision, statute, rule, doctrine, or judicial decision has been shown to adequately formulate a simple test that accounts for the myriad of circumstances that police may encounter. The current rules, discussed below, are in a constant state of flux. Courts vary in their interpretations. Contradictory doctrines are developed among the various Circuits and uncertainty abounds. This is to say nothing of the various state approaches. As a result, law enforcement agents, agencies, and the public are left largely in the dark as to when and how much force is legally permissible.[26]

Added to this milieu of misunderstanding is a much-maligned and equally misunderstood qualified immunity doctrine. Most law enforcement use of force jurisprudence is drawn from summary proceedings – the grant or denial of qualified immunity – typically held in the course of a 42 U.S.C. § 1983 action.[27] Qualified immunity is a defense generally available to governmental actors engaged in their respective discretionary functions and is generally offered in

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[23] *See id.*
[24] *See id.* at 392-99.
[25] *Id.*
[26] Matthew McNamara, *Legal Corner: Departmental Liability for Failure-to-Train*, POLICE1 (August 1, 2006), https://www.police1.com/legal/articles/legal-corner-departmental-liability-for-failure-to-train-2u9f7FahaUF5Hcrr/.
[27] *See* 88 A.L.R. 2d 1330.

support of a summary judgment motion (Fed. R. Civ. P. 56).[28] The doctrine is a recognized exception to our general legal formula of allowing a jury to make factual determinations.[29] As applied to law enforcement in the use of force context, the defense permits the summary dismissal of excessive force allegations based on the officer's reasonable, good faith belief that the force at issue was permissible.[30] Unfortunately, the summary standards at issue are antiquated, at best. In such summary proceedings, courts make very limited factual inquiries and accept the facts "in the light most favorable to the non-moving party" (i.e. the non-law enforcement plaintiff), no matter how "rash and improbable" they appear.[31] Thus, the "facts" presented are often just the plaintiff's version of the events. As a result, the doctrine allows patently false claims to proceed to trial, irrespective of compelling evidence of their falsity.

Conversely, perhaps to compensate for this otherwise plaintiff-friendly approach, the qualified immunity doctrine requires that all claims be "well established."[32] As if to ensure that neither plaintiff nor defendant could reasonably expect a rational proceeding, pursuant to a recent change in procedural jurisprudence, judges may choose to forego any inquiry into the reasonableness of the force at issue. This procedural change thus allows judges to avoid their constitutional imperative to establish the precedent that plaintiffs, officers, agencies, and the public rely upon as guidance in determining what is reasonable force.[33] Recent empirical evidence indicates that this change in use of force procedural law disincentives an objective analysis of the use of force itself, while encouraging over-reliance on the "well established" requirement - resulting in the dismissal of

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[28] FED. R. CIV. P. 56; *see* WHITNEY K. NOVAK, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS, 1 (Cong. Res. Serv. 2020); *see also* 3 Civil Rights Actions P 10.03 (2020).
[29] Fed. R. Civ. P. 38.
[30] *See* 61 A.L.R. Fed. 7; *see also* Novak, *supra* note 28 at 1.
[31] *See* 45 A.L.R. Fed. 864.
[32] Mitchell v. Forsyth, 472 U.S. 511, 572 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
[33] *See* Pierson v. Ray, 386 U.S. 547 (1967).

otherwise meritorious claims of excessive force.[34] As fewer substantive rulings are issued, the public and law enforcement agencies and officers are left largely in the dark as to the appropriate standard.[35]

In the void left by this lack of a consistent statement on the permissible use of force, the public's suspicion of law enforcement and government in general grows.[36] Increasingly, this distrust plays out in America's streets, businesses, and homes. Resistance to legitimate authority is on the rise – ironically and sadly resulting an increase in use of force incidents.[37] And yet, this need not be the case. In this modern age of vehicle-mounted and body-worn cameras, public and private video surveillance systems, and omnipresent cellular telephones with video-recording capabilities, it is now possible to review many police use of force incidents, in slow motion and frame by frame if necessary. These recordings now make up a part of the evidentiary record available for review in summary proceedings.[38] Despite this ability, some judges reviewing the evidentiary record decline to take full advantage of the possibilities afforded by such recordings and the extent to

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[34] *See e.g.* John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120 (2009).

[35] *See* Daphne Duret and Jessica Priest, *Police training cited as defense in many use of force cases. But experts say it's outdated*, USA TODAY, (Sept. 22, 2020), https://www.usatoday.com/story/news/investigations/2020/09/22/police-use-force-cases-cite-training-defense-its-outdated/5861668002/.; *see also* Tim Dees, *15 things cops wish the public knew about policing*, POLICE1, (July 16, 2019), https://www.police1.com/police-humor/articles/13-things-we-wish-the-general-public-knew-about-police-work-5g0rb3QhSysBIVal/.

[36] *See e.g.* Farah Stockman*, 'They Have Lost Control' Why Minneapolis Burned*, N.Y. TIMES, (July 13, 2020), https://www.nytimes.com/2020/07/03/us/minneapolis-government-george-floyd.html.

[37] *See e.g.* Bill Hutchison, *Police officers killed surge 28% this year and some point to civil unrest and those looking to exploit it*, ABC NEWS,(July 22, 2020), https://abcnews.go.com/US/police-officers-killed-surge-28-year-point-civil/story?id=71773405

[38] *See* U.S.C.S. FED. R. CIV. P. 56; *see also Scott,* 550 U.S. at 378-81.

which courts may rely on such evidence is in question.[39] The difficulties described above have been recognized by others, and no small amount of legal scholarship has been dedicated to identifying some of the problems with modern use of force jurisprudence, arguing for radical change, or offering some significant alternative.[40] Rather than any of these, this article simply aims to inform the discussion and offers some practical changes aimed at reconciling use of force procedural law with modern reality. It attempts to inform the debate and simplify what is, admittedly, a rather complex concept.

The following work focuses on the category of force recognized by most of the American public - the force employed by uniformed officers upon free citizens during the course of the officers' regular duties. This article will focus on federal jurisprudence, in order to provide the broadest, most accurate, and most applicable information. Ultimately, any serious research into police use of force must confront the reasonableness inquiry – which is always at issue in the use of force analysis. It is at issue in reviewing the application of force itself – in establishing a constitutional violation - and it becomes central in any resultant Section 1983 Action and qualified immunity defense. This inquiry is presented by detailing the modern history of use of force jurisprudence, presented by three seminal cases (the substantive law). That history continues to the present as courts grapple with new technology and techniques – creating novel questions of law and requiring a continual readdressing and refining of the reasonableness standard. The following section describes some major aspects of use of force litigation (the procedural law) – namely the Section 1983 action and the qualified immunity doctrine. The substantive and procedural foundation established, the next section identifies and establishes some problems with the current legal standard. Finally, this work will use a short case study to address the major question posed by this

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[39] *See Scott,* 550 U.S. at 378-81; *see also* Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 122-25 (2008).

[40] *See*, *e.g.*, Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 607-10 (2009).

introduction and demonstrate the effects of the two-step objective reasonableness inquiry and use of judicial video review on summary judgment proceedings.

II. HISTORY OF USE OF FORCE JURISPRUDENCE (THE SUBSTANTIVE LAW)

The history of use of force jurisprudence is less than straight-forward. Rather, our current understanding of police use of force has evolved, beginning in the 1970s, and continuing to the present. In fact, it was not immediately apparent to the courts that police use of force would be governed by the Fourth Amendment, let alone what standard would be applied to ensure the Amendment's guarantee of reasonableness.[41] Below are three seminal cases that illustrate the court's evolution and eventual adoption of an objective reasonableness standard under the Fourth Amendment.[42]

A. SUBSTANTIVE DUE PROCESS TEST - *JOHNSON V. GLICK*

Johnson v. Glick was an early attempt by the court to establish a framework for analyzing law enforcement use of force. *Glick* illustrates the struggle pre-*Connor* courts had in developing the constitutional framework by which law enforcement use of force could be judged. In *Glick*, the plaintiff brought an excessive force claim under 42 U.S.C. § 1983.[43] The Second Circuit Court of Appeals considered and rejected application of the Eighth and Fourth Amendments to an incident of alleged excessive force involving a correctional officer and a pre-trial detainee.[44] Ultimately, the court found that neither the Fourth Amendment nor the Eighth Amendment apply to the facts alleged.[45] The court instead found that the Fourteenth Amendment's guarantee of due process of law prohibited the behavior alleged.[46] *Glick*

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[41] *See* discussion *infra,* Sections II.A, II.B, II.C.
[42] *See generally Graham*, 490 U.S. at 392-397.
[43] Johnson v. Glick, 481 F.2d 1028, 1029 (2d Cir. 1973).
[44] *See id.*
[45] *Id.* at 1032.
[46] *Id.*

illustrates the courts use of various factors in weighing the competing governmental and individual interests, "In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted . . . ."[47] Of note, the court found a *mens rea* requirement applicable to such an allegation of violation of due process of law, "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm,"[48] a consideration which, oddly, the Supreme Court would reject in *Graham v. Connor*.[49] Later cases would also find the Fourth Amendment, rather than the Fourteenth, as the source of the Constitutional guarantee against unreasonable force.[50] *Glick* endures, however, in the court's continued consideration of competing interests in its inquiry into the reasonableness of law enforcement use of force.[51]

B. TOTALITY OF THE CIRCUMSTANCES - *TENNESSEE V. GARNER*

In a landmark use of force decision in 1985, the Court determined that the common law "fleeing felon rule," as enacted in Tennessee statute, was an unconstitutional violation of the Fourth Amendment's guarantee against unreasonable seizure.[52] On October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to a prowler call.[53] A witness informed them that she heard glass breaking and that someone was inside an adjacent house.[54] Officer Hymon went behind the house where he heard a door slam and saw the suspect run across the backyard.[55] The fleeing suspect, later identified as 16-year-

[47] *Id.* at 1033.
[48] *Id.*
[49] *Graham,* 490 U.S. at 397.
[50] *See* Tennessee v. Garner 471 U.S. 1, 20-21 (1985); *Graham*, 490 U.S. at 397.
[51] *Garner,* 471 U.S. at 9; *Graham,* 490 U.S. at 396.
[52] *Garner*, 471 U.S. at 20-21.
[53] *Id.* at 3.
[54] *Id.*
[55] *Id.*

old Edward Garner, stopped at a chain-link fence at the edge of the yard.[56] Officer Hymon called out, "police, halt" and took a few steps toward Garner, who began to climb over the fence.[57] To prevent Garner's escape from a felony (aggravated burglary), Hymon fired one shot at the teen, striking him in the back of the head.[58] Edward Garner died shortly thereafter.[59] There was no indication that Garner was armed during the encounter.[60] Officer Hymon, in firing on the unarmed teen, was acting under the authority accorded to him at the time by Tennessee Code, which provided that "If, after notice of the intention to arrest the defendant, [the defendant] either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."[61]

After addressing several issues at the district court and court of appeals, including the question of Officer Hymon's qualified immunity, the Sixth Circuit found the statute at issue permitted an unreasonable (and thus unconstitutional) seizure under the Fourth Amendment.[62] Thereupon, the state of Tennessee intervened and appealed to the United States Supreme Court. The Supreme Court agreed with the Circuit Court but found only that the statute at issue was unconstitutional in its application (perhaps out of respect for federalism and separation of powers).[63] The high court engaged in a Fourth Amendment interest balancing test, weighing the defendant's "fundamental interest in his own life" against the government's interest in effective law enforcement (e.g. reduced violence by encouraging the individual to submit to arrest rather than flee).[64] The court found that the individual's interest outweighed the government's interest, and that the use of deadly force actually frustrated society's interest in seeing a "judicial determination of guilt and punishment."[65] In doing so, the Court laid down the seminal rule regarding the use of

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[56] *Id.*
[57] *Id.* at 4.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] TENN. CODE ANN. § 40-7-108 (1982).
[62] *Garner*, 471 U.S. at 20-21.
[63] *Id.* at 25.
[64] *Id.* at 9.
[65] *Id.*

deadly force by law enforcement. That rule requires that deadly force may be used to prevent escape only:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others . . . . [t]hus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.[66]

This decision established a rule which still stands and prompted a statutory change in Tennessee.[67] As later cases will show, the court's balancing of the government's interest against the individual's interest against unreasonable seizure will continue to be an important consideration.[68] While the Court in *Garner* employed the Fourth Amendment as the source of the substantive right not to be shot while fleeing a non-violent felony, the case did not definitively state that the Fourth Amendment was the primary source of substantive rights in non-deadly use of force cases.[69] Beyond identifying the Fourth Amendment as the font for this substantive right, the case also reaffirmed the "totality of the circumstances" standard to be considered in the analysis of reasonableness.[70] The Supreme Court would not be long in providing a more definitive, but complex, framework for analyzing police use of force – one which retained the "totality of the circumstances" concept.

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[66] *Id.* at 11-12.
[67] *See* TENN. CODE ANN. § 40-7-108 (2020); *see also* 1985 Tenn. Pub. Acts 359, § 1; 1990 Tenn. Pub. Acts 980, § 19 (abrogating Tennessee's fleeing felon statute); *compar.* TENN. CODE ANN. § 40-7-108 (1984).
[68] *See*, *e.g.*, *Graham*, 490 U.S. at 396-99.
[69] *Garner*, 471 U.S. at 20-22.
[70] *Graham*, 490 U.S. at 396.

C. OBJECTIVE REASONABLENESS TEST - *GRAHAM V. CONNOR*

Clearly, courts have struggled to define the rights enjoyed by free citizens when encountering police and struggled with the best means to uphold those rights. The courts had successfully established a workable framework for evaluating deadly force incidents, having found Tennessee's "fleeing felon" statute invalid in its application.[71] But what of non-deadly force (which makes up the great bulk of use of force incidents involving law enforcement)?[72] To address this lack of a legal framework, the Supreme Court crafted a rule that has stood since its announcement in 1989. The profound effect of that rule cannot be overstated, and the case itself has been cited over 54,000 times and has been the subject of nearly 1,200 law review articles.[73] Simply put, it is the foundation of the civil legal system's modern understanding of police use of force.

In 1984, Dethorne Graham, a severe diabetic, began to feel the onset of a diabetic "sugar reaction."[74] A friend, William Berry, drove him to a Charlotte, North Carolina convenience store to purchase some orange juice to stave off the reaction.[75] Graham entered the store, but upon seeing the long line of customers waiting to check out, hurriedly exited the store without making a purchase.[76] Graham and Berry left, intent on reaching Berry's residence.[77] Connor, a Charlotte Police Department officer, saw Graham hastily enter and leave the store.[78] Connor became suspicious, followed Berry's car as it pulled away from the store, then

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[71] *See Garner*, 471 U.S. at 20-22.
[72] *See* SHELLEY S. HYLAND ET AL., POLICE USE OF NONFATAL FORCE, 2002-11, 9 (Bureau of Just. Stats. 2015).
[73] Lance J. LoRusso, *Graham v. Connor: Three decades of guidance and controversy*, POLICE1 (May 23, 2019), https://www.police1.com/officer-shootings/articles/graham-v-connor-three-decades-of-guidance-and-controversy-uqgh9iY6XPGTdHrG/.
[74] *Graham*, 490 U.S. at 388.
[75] *Id.*
[76] *Id.* at 388-89.
[77] *Id.*
[78] *Id.* at 389.

made an investigative traffic stop.[79] During that stop, Connor "ordered Berry and Graham to wait while he found out what, if anything, had happened at the convenience store."[80] When Officer Connor returned to his patrol car to call for backup assistance, Graham got out of the car, ran around it twice, and finally sat down on the curb, where he passed out briefly due to a diabetic reaction."[81]

Unfortunately, responding backup officers mistook Graham's symptoms for alcohol intoxication.[82] These symptoms are quite similar.[83] Graham was handcuffed and placed face-down on Berry's car.[84] During this ordeal, Berry and Graham repeatedly informed officers that Graham was diabetic, but they were ignored.[85] Graham was thrown headfirst into a police car.[86] During the struggle with officers, Graham sustained some minor injuries and a broken foot.[87] Shortly thereafter, Connor learned that Graham had not committed any crime inside the convenience store. Graham was driven home and released.[88]

Graham initiated a §1983 action against the involved officers, claiming excessive use of force during the encounter in violation of the Fourteenth Amendment.[89] The United States District Court for the Western District of North Carolina directed the verdict for Connor and the other officers, finding that the force used by officers "was not applied maliciously or sadistically for the very purpose of causing harm," but rather in a "good faith effort to maintain or restore order in the face of a potentially explosive situation" (the standard applied in *Glick*).[90] The Fourth

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[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] Arthur Hsieh, *Drunk Versus Diabetes: How Can You Tell?*, EMS1 (July 7, 2020) https://www.ems1.com/ems-products/ambulance-disposable-supplies/articles/drunk-versus-diabetes-how-can-you-tell-IPqqk8mtnAjBmJFv/
[84] *Graham*, 490 U.S. at 389.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 390.
[88] *Id.* at 389.
[89] *Id.* at 390.
[90] *Id.* at 390-91.

Circuit Court of Appeals affirmed. The United States Supreme Court granted certiorari,[91] reversed the District and Circuit, and established the objective reasonableness analytical framework of the Fourth Amendment that is still in effect.[92]

In the following opinion, Chief Justice Rehnquist, perhaps grasping the enormity of the shift he was instituting, gave a rather detailed and justified exposition of the objective reasonableness test that attempts to provide consistency and certainty while advancing some legal novelties.[93] Rehnquist positively affirmed that the test of reasonableness for a law enforcement officer's use of force "must be judged from the perspective of a *reasonable officer* on the scene."[94] This was a departure from the traditional and recognizable reasonable person standard and sparked no small amount of controversy.[95]

The Chief Justice also took the opportunity to clarify what the standard was not. Rehnquist completely disregarded the subjective intent component of the *Glick* Fourteenth Amendment analysis, stating, "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."[96] The Chief Justice disregarded the *Glick* Due Process Right to be free of excessive force, instead finding the right at issue under the more-firmly rooted Fourth Amendment's guarantee against unreasonable seizure,

> Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in

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[91] *Id.* at 391-92.
[92] *Id.* at 397-99.
[93] *See id.* at 392-99.
[94] *Id.* at 395 (emphasis added).
[95] *See* LoRusso, *supra* note 73.
[96] *Graham*, 490 U.S. at 397 (citing Scott v. United States, 436 U.S. 128, 138 (1978)).

> their persons . . . against unreasonable . . . seizures . . . ."[97]

Rehnquist's majority opinion went still further in blurring the analytical distinction between deadly and non-deadly force, proclaiming that all claims "that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."[98]

In rejecting the subjective intent of the officer and the reasonable person standard, the Court substituted several factors to be considered in evaluating the reasonableness of a law enforcement officer's use of force. These factors include: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight."[99] In establishing this three-pronged test the Court built upon the totality of the circumstances approach employed in *Tennessee v. Garner*.[100]

Frustratingly, the Court did not establish the kind of bright-line rule that observers might have hoped for. Instead, the Court found that the test of Fourth Amendment reasonableness is incapable of precise definition, but required "careful attention to the facts and circumstances of each particular case."[101] Given the fact-specific, individualized rule the court was crafting, it is no surprise that Chief Justice Rehnquist provided lower courts with an "interpretive lens" through which to evaluate use of force cases.[102] The court warned that the reasonableness of a law enforcement officer's particular use of force "must be judged from the perspective of a reasonable officer on the scene,

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[97] *Id.* at 394.
[98] *Id.* at 395.
[99] *Id.* at 396 (*citing Garner*, 471 U.S. at 8-9).
[100] *See Garner*, 471 U.S. at 9.
[101] *Graham*, 490 U.S. at 396 (citing Bell v. Wolfish, 441 U.S. 520, 559 (1979)).
[102] RICHARD M. THOMPSON II, POLICE USE OF FORCE: RULES, REMEDIES, AND REFORMS 5 (Cong. Res. Cent., 2015).

rather than with the 20/20 vision of hindsight."[103] In case there was still a question about the latitude courts were to allow officers, Chief Justice Rehnquist posited, "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation."[104] Subsequent courts have struggled to uniformly apply the standard created in *Connor* to the myriad of circumstances surrounding use of force incidents.

III. REFINING REASONABLENESS

Since the establishment of the objective reasonableness standard, judges and justices have attempted to refine the standard to adequately account for the myriad of circumstances that officers confront. Reviewing courts confront novel questions of law brought by changes in law enforcement equipment and techniques. This should not come as a surprise, as use of force jurisprudence is, by its nature, reactive to such changes. Courts operate to restrict particular types and amounts of force as they are confronted with them, case by case, rather than proscribing the types and amounts of force permitted.[105] These courts have adapted the objective reasonableness standard, identifying new and more precise factors to be considered, and elaborating upon the three prongs of *Graham v. Connor*, while applying the *interpretive lens* of the reasonable officer on the scene.[106] In so doing, the courts established new precedent which later courts built upon. The courts employ the totality of the circumstances concept to describe the circumstances against which the officer's use of force is to be judged. That concept has been interpreted to describe a multitude of individual factors as applied to the use of force, including: "the need for the application of force" and its

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[103] *Graham*, 490 U.S. at 396-97 (emphasis added).
[104] *Id.*
[105] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 45 (6th ed. 2019).
[106] *See Graham*, 490 U.S. at 396.

"relationship to the amount of force used,"[107] the extent of any resultant injury,[108] and "whether the force was applied in good faith or maliciously and sadistically."[109] The Third Circuit, in *Sharrar v. Felsing*, identified several additional factors: "the possibility that the persons subject to the police action are themselves violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time."[110] As one might imagine, this multitude of factors (itself not exhaustive) in no way simplified the objective reasonableness analysis. Rather, the courts have repeatedly cautioned that each use of force encounter requires a fact-based, case-by-case analysis.[111]

One aspect of this refining process has been the recognition of reasonable mistakes of fact. The courts have repeatedly affirmed that officers in the line of duty are to be granted appropriate leeway; reasonable mistakes are to be permitted.[112] A reasonable mistake can even rise to the use of deadly force without constituting a Fourth Amendment violation.[113] This is not surprising, given that the force used by an officer is supposed to be evaluated from the officer's perspective, without the benefit of hindsight "in recognition of the fact that officers cannot be expected to respond to information they did not possess at the time they acted."[114] The permissible mistakes most often relate to reasonable mistakes of fact, not law. Thus, where the facts as *reasonably* believed (or perceived) by the officer would have justified the use of deadly force, the use of such force, even when the officer was mistaken as to those facts, may still be justified. Examples include officer's shooting of a person after

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[107] Jackson v. Sauls, 206 F.3d 1156, 1170 n.18 (11th Cir. 2000).
[108] *Id*.
[109] Moore v. Gwinnett Cty., 967 F.2d 1495, 1498 (11th Cir.1992) (quoting Leslie v. Ingram, 786 F.2d 1533, 1536 (11th Cir.1986)).
[110] Sharrar v. Felsing, 128 F.3d 810, 822 (3d Cir. 1997).
[111] *See Scott*, 550 U.S. at 383.
[112] Milstead v. Kibler, 243 F.3d 157, 165 (4th Cir. 2001).
[113] Culosi v. Bullock, 596 F.3d 195, 200-01 (4th Cir. 2010).
[114] Melgar ex rel. Melgar v. Greene, 593 F.3d 348, 355 (4th Cir. 2010).

mistakenly perceiving him or her brandishing a firearm,[115] or shooting a fleeing driver where the officer reasonably but mistakenly believed the driver backed over another officer.[116] But, how is this substantive law actually applied?

IV. PROCEDURAL ASPECTS OF USE OF FORCE LITIGATION

In the United States, the individual's constitutional protection against unreasonable or excessive force by police is found in the Fourth Amendment to the United States Constitution.[117] No discussion of this federal constitutional protection against such force would be complete without discussing the actual mechanism for enforcing that protection. The primary civil action available against the individual police officer or agency is the Civil Action for Deprivation of Rights, or more commonly the 'Section 1983 Action', codified at 42 U.S.C. § 1983.[118] As an important defense against these § 1983 Actions, law enforcement officers and agencies have at their disposal the oft-maligned and equally misunderstood qualified immunity doctrine. In the realm of excessive force claims, the § 1983 action and qualified immunity defense go hand-in-hand.

A. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

> 42 U.S.C. § 1983 states in relevant part:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

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[115] *See* McLenagan v. Karnes, 27 F.3d 1002, 1006-09 (4th Cir. 1994)
[116] Wilkinson v. Torres, 610 F.3d 546, 551 (9th Cir. 2010).
[117] *Graham*, 490 U.S. at 394.
[118] Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (formerly codified as 8 U.S.C. § 43).

> the party injured in an action at law, suit in equity, or other proper proceeding . . . .[119]

A "person," under this statute, has been interpreted to include local governmental entities, including municipal and county governments. [120] Despite this interpretation, § 1983 does not impose a pure *respondeat superior* liability; rather, the plaintiff in a § 1983 action against the government entity must prove the entity's liability is pursuant to some "policy" or "custom" of the entity that caused the plaintiff's injury.[121]

To sustain a § 1983 action, under the language of the statute, the complaint must allege: "(1) that the conduct complained of was engaged in under color of state law, and (2) that such conduct subjected the plaintiff to the deprivation of rights, privileges, and immunities secured by the Federal Constitution and laws."[122] Specific to the typical law enforcement excessive force claim,[123] where there is little argument whether the on-duty police officer was acting under the color of law, the plaintiff's complaint must allege "an injury that resulted directly and only from an objectively unreasonable, excessive use of force.[124] Section 1983 does not create an independent right of action in and of itself, rather it is a vehicle for asserting a violation of another recognized right, which may be established under constitutional or statutory authority.[125] Of course, § 1983 was not the only statute enacted to protect the newly-won freedoms of freed African Americans. A similar, criminal statute was established by the 1866 Civil Rights Act, codified at 18 U.S.C. § 242.[126] Despite the existence of this separate statute, § 1983 actions are far more common than § 242 actions in excessive force claims.[127] This is not an accident.

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[119] 42 U.S.C. § 1983.
[120] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); *see also* Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397 (1997).
[121] *Monell*, 436 U.S. at 694; Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81 (1986).
[122] 15 AM. JUR. 2D *Civil Rights* § 58 (2020).
[123] *See* 15 AM. JUR. 2D *Civil Rights* § 72 (2020).
[124] *See* Hogan v. Cunningham, 722 F.3d 725, 734 (5th Cir. 2013).
[125] Baker v. McCollan, 443 U.S. 137, 140 (1979).
[126] American Bar Association Resolution 301A, 12 (August 2020).
[127] *Id.*

Prosecution of the civil § 1983 action, at least compared to the criminal § 242 action, is much more straight forward. Whereas 42 U.S.C. §1983 contains no *mens rea* requirement and the standard of proof is the preponderance of the evidence, 18 U.S.C. § 242 has been interpreted to contain a *mens rea* element and requires proof beyond a reasonable doubt.[128] Importantly, as § 1983 is a civil action, damage awards (sometimes rather large) are also at stake.

B. THE QUALIFIED IMMUNITY DOCTRINE

To defend against claims of excessive force, individuals and governmental entities may assert the defense of qualified immunity. Qualified immunity is a good-faith defense, analogous to Common Law torts defenses.[129] Qualified immunity differs from a *per se* good faith defense, however, in that the qualifying grantee must demonstrate more than a subjective good intention[130]. Rather, he or she must also demonstrate the reasonableness of their belief or conduct leading to the use of force.[131] Qualified immunity is designed to protect government officials who perform discretionary functions from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[132] And yet, to classify qualified immunity as a defense conveys a misunderstanding of the doctrine, as it is less a defense to liability than an immunity from suit.[133] As such, "it is effectively lost if a case is erroneously permitted to go to trial."[134] While the defense must be affirmatively asserted, law enforcement officers are generally entitled to qualified immunity "when an official's conduct does not violate clearly established statutory or constitutional rights

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[128] *See* Screws v. United States, 325 U.S. 91,101-07 (1945); *compare* 42 U.S.C. § 1983, *with* 18 U.S.C. § 242.
[129] *See Pierson*, 386 U.S. at 557 ("We hold that the defense of good faith and probable cause . . . is also available to [law enforcement] in the action under § 1983.").
[130] Manfredonia v. Barry, 401 F. Supp. 762, 768 (E.D.N.Y. 1975).
[131] 61 A.L.R. Fed. 7.
[132] Sigley v. City of Parma Heights, 437 F.3d 527, 536 (6th Cir. 2006) (quoting *Harlow*, 457 U.S. at 817-18).
[133] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).
[134] *Id.*

of which a reasonable person would have known."[135] The defense is most often asserted pursuant to a summary judgment motion where, if granted, the defense may obviate the need for a trial.[136] It may be appropriate for a judge to make a determination as to the reasonableness of the officer's conduct at issue on summary judgment motion, either granting or denying in whole or in part the motion, as the reasonableness of a use of force is a legal determination, not a pure question of fact.[137] Summary judgment based on qualified immunity is granted when the moving party (law enforcement defendant) shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[138] Courts have emphasized that the alleged factual dispute must be both *genuine* and *material*.[139] The grant of qualified immunity at this summary stage, as in other civil actions, allows the defendant to avoid the time and expense of an unnecessary trial.[140]

There are strong policy arguments for granting the immunity early in the course of litigation, where appropriate.[141] These arguments include avoidance of any "excessive disruption of government" and the "resolution of insubstantial claims" by summary judgment.[142] Other arguments include the safeguarding of government funds, preservation of judicial resources, and eliminating any disincentive for police officers to carry out their duties.[143] In accord with these purposes, the Supreme Court has repeatedly stressed the importance of resolving immunity questions "at the earliest possible stage in litigation."[144]

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[135] White v. Pauly, 137 S. Ct. 548, 551 (2017).
[136] *See* FED. R. CIV. P. 56.
[137] *See* Fitzgerald v. Santoro, 707 F.3d 725, 733 (7th Cir. 2013).
[138] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587, (1986); *see* FED. R. CIV. P. 56(a).
[139] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).
[140] *See* FED. R. CIV. P. 1; *see also Anderson*, 477 U.S. at 248.
[141] *See Mitchell*, 472 U.S. at 526; *see also Harlow*, 457 U.S. at 819.
[142] *Harlow*, 457 U.S. at 818; 15 AM. JUR. 2D *Civil Rights* § 102 (2020).
[143] *See* Philip Sheng, *An "Objectively Reasonable" Criticism of the Doctrine of Qualified Immunity in Excessive Force Cases Brought Under 42 U.S.C. § 1983*, 26 BYU J. PUB. L. 99, 100 (2012); *see also Harlow,* 457 U.S. at 818-19.
[144] Hunter v. Bryant, 502 U.S. 224, 227 (1991).

Recognizing that an order to trial irrevocably terminates the immunity and defeats these public policy goals, courts permit interlocutory appeal for denials of immunity.[145]

Despite the policy arguments in support of an early grant of qualified immunity, several procedural protections are in place and designed to ensure that meritorious claims are not unjustifiably dismissed. While the question of the reasonableness of an officer's actions are typically reviewed as a question of law, courts, even in summary proceedings, typically do not make findings of fact.[146] Upon a motion for summary judgment, including a motion based on qualified immunity, the judge must view the admissible evidence on the record "in the light most favorable to the non-moving party" (the plaintiff).[147] This procedural safeguard is designed to ensure that no case is dismissed where material facts are in dispute, before the trier of fact can weigh the evidence through trial. Stated another way, the judge should grant the motion only if "no reasonable trier of fact could ever find in the opposing party's favor based on the admissible evidence in the record."[148] The inquiry is whether the trier of fact *could* find in the plaintiff's favor, not whether a reasonable trier of fact likely *would*.[149] These procedural safeguards represent the public policy interest in ensuring just relief to an afflicted party.

When evaluating a claim to qualified immunity, the Court's threshold inquiry is whether the plaintiff's allegations, when taken as true, establish a constitutional violation.[150] If the plaintiff's allegations do not establish a constitutional violation, the inquiry ends.[151] If the plaintiff's allegations, taken as true, do establish a constitutional violation, the court must then determine whether the right at issue was clearly established at the time of the alleged violation.[152] This requirement that the violation be "clearly established" serves to ensure that officers are "on notice their

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[145] *Mitchell*, 472 U.S. at 527.
[146] *Anderson,* 477 U.S. at 250.
[147] *See Scott*, 550 U.S. at 380.
[148] McIndoe v. Huntington Ingals, 817 F.3d 1170, 1176 (9th Cir. 2016).
[149] *Id.*
[150] Hope v. Pelzer, 536 U.S. 730, 736 (2002).
[151] 15 AM. JUR. 2D *Civil Rights* § 106 (2020).
[152] Saucier v. Katz, 533 U.S. 194, 201 (2001).

conduct is unlawful."[153] Such a standard purports to protect officers when they are acting within the "sometimes hazy border" between justifiable and excessive force.[154] The degree of factual similarity required for the right to be "well-established" varies among the lower courts and among the circuits.[155] In all circuits, the degree of similarity "must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply."[156]

C. PROCEDURAL SUMMARY

In summary, 42 U.S.C. § 1983 does not establish a stand-alone right; the plaintiff must allege a violation of an underlying right by the defendant acting "under color of law."[157] To establish such a violation, the plaintiff must demonstrate that a reasonable officer, with the facts known to the officer at the time the force was used, without the benefit of hindsight, in the given circumstances (totality of the circumstances), would have known that the right was clearly established.[158] This standard, at least on its face, permits mistakes so long as they are reasonable.[159] In practice, the officer's ultimate liability turns on the objective reasonableness of the force employed assessed against the clearly established law at the time the force was employed.[160] As should be clear from the language in *Graham v. Connor* and its progeny, and the language employed to describe the qualified immunity doctrine, the reasonableness inquiry as applied to the use of force at issue and the qualified immunity defense is substantially the same inquiry.[161] At least, that is how the inquiry used to progress. Unfortunately, a fairly recent procedural change has

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153 Pearson v. Callahan, 555 U.S. 223, 243-44 (2009).
154 *Saucier*, 533 U.S. at 206.
155 See Zadeh v. Robinson, 928 F.3d 457, 479 (5th Cir. 2019).
156 District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018).
157 42 U.S.C. § 1983.
158 *See Harlow*, 457 U.S. at 818.
159 *Saucier*, 533 U.S. at 205.
160 Wilson v. Layne, 526 U.S. 603, 614 (1999); *Graham*, 490 U.S. at 397.
161 *See* Sheng, *supra* note 143, at 108; 15 AM. JUR. 2D *Civil Rights* § 109 (2020).

introduced some judicial discretion in applying the reasonableness inquiry – leading to some unfortunate, lasting effects.

V. PROBLEMS WITH THE CURRENT SUMMARY JUDGMENT STANDARD

In determining whether the alleged actions violate clearly established law, courts employ the same standard used in evaluating the use of force itself - the objective reasonableness test.[162] Like other civil cases, and despite the difficulty in compiling accurate nation-wide data, it is evident the vast majority of excessive force claims do not end in trial.[163] Rather, it is by evaluation of the use of force analysis performed at the summary judgment stage, as a question of law, that law enforcement and entity counsel, officials, and trainers develop agency policy and training regimes.[164] Hence, the importance of the court's analysis regarding the use of force cannot be overstated. Unfortunately, this two-step inquiry, once mandatory, has recently been abrogated by the Supreme Court. This loosening of the Court's procedural requirements has allowed lower courts to avoid difficult constitutional questions.[165] Coupled with the loosening of the court's constitutional imperative, the increasing use of video review by courts, as the availability of such audio and video evidence has increased, sparked a reaction among some legal academics, who argued against extensive judicial review or

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[162] *See Graham*, 490 U.S. at 388.
[163] *See* Christina Carrega, *Millions in Lawsuit Settlements Are Another Hidden Cost of Police Misconduct, Legal Experts Say*, ABC NEWS, (June 14, 2020), https://abcnews.go.com/US/millions-lawsuit-settlements-hidden-cost-police-misconduct-legal/story?id=70999540; *see also* KENNETH ADAMS ET AL., USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 10 (U.S. Dep't. of Just., Off. of Just. Programs 1999); John Barkai et al., *A Profile of Settlement*, 42 CT. REV. Iss. 3-4, 2-3 (2006).
[164] *See* Duret and Pri, *supra* note 35.
[165] *See Pearson*, 555 U.S. at 234-35; *see also* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 5 (2015).

reliance on such evidence.[166] The legitimacy of judicial video and audio review has been called into question, and the degree to which individual judges are taking advantage of this evidence varies.[167] These two recent developments have led to a situation in which courts variably rule only on the facts as presented by the plaintiff, to the exclusion of more reliable audio-video evidence, or else skip to the "well-established" prong of the analysis – avoiding the objective reasonableness analysis altogether. In either eventuality, courts are producing less and less-useful excessive force precedence – contrary to the needs of future courts, law enforcement, and the public.

A. ELIMINATION OF THE *SAUCIER* MANDATE

In the 2009 *Pearson v. Callahan* ruling, in response to criticism and complaints from lower courts and other interested parties, the Supreme Court held that the identification of a constitutional violation, with its necessary objective reasonableness test, while often "appropriate," was no longer to be regarded as mandatory.[168] This change allowed courts to avoid the determination of a constitutional violation and skip to the determination of whether the purported right was well-established – effectively shortcutting the whole objective reasonableness analysis of the force at issue.[169] Since the elimination of the two-step inquiry (*Saucier*) requirement, many courts have elected to forego the Fourth Amendment reasonableness analysis in favor of simply considering whether the alleged excessive force violated "clearly established law."[170] This result was foreseeable and was actually predicted by a number of legal scholars.[171] This forgoing of the two-step *Saucier* analysis has produced some troubling results.[172] Among them, the

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[166] *See*, *e.g.*, Howard Wasserman, *Mixed Signals on Summary Judgment*, 2014 MICH. ST. L. REV. 1331, 1337-40 (2014).
[167] *Compare* Mullenix v. Luna, 577 U.S. 7 (2015), *with* Luna v. Mullenix, 773 F.3d 712 (5th Cir. 2014) (reversed and remanded).
[168] *See Pearson*, 555 U.S. at 234-35.
[169] *See id*. at 236.
[170] *Zadeh*, 928 F.3d at 479-80.
[171] *See*, *e.g.*, Jeffries, *supra* note 34, at 120.
[172] *See How Ziglar v. Abbasi Sheds Light on Qualified-Immunity Doctrine*, 96 WASH. U. L. REV. 883, 890 (2019).

avoidance of the "knotty constitutional inquiry" has led to "constitutional stagnation."[173] This stagnation is perhaps more pronounced due to the discretion permitted by *Callahan*. Courts predominantly continue to make legal findings regarding the reasonableness of a particular use of force in obvious cases.[174] In contrast, courts tend to forego this discretionary analysis when confronted with the most difficult legal questions, a trend which is supported by the post-*Callahan* empirical data.[175] Stated another way, it would appear that the discretion afforded by the abrogation of the *Saucier* two-step analysis has resulted in courts avoiding the close legal calls – the cases where judicial interpretation is needed most.[176] As fewer courts undertake the reasonableness inquiry in difficult cases, less applicable case law is issued by those same courts; later courts then lack the necessary precedent to determine whether a right is "well established."[177] Constitutional questions are allowed to go unanswered because they were unanswered before, This foreseeable result has been aptly described as "Section 1983 meets Catch-22."[178]

Some of the arguments advanced for abrogating the *Saucier* requirement are legitimate, but these complaints pale in comparison to the very real danger of constitutional stagnation. Strictly speaking, *Saucier* did require courts to confront a constitutional issue where it might otherwise be avoided, running contrary to the court's long-held policy of constitutional avoidance.[179] Yet, it's academic folly, bordering on the ridiculous, to argue that courts should practice constitutional avoidance when evaluating excessive force claims – which are based on the Fourth Amendment to

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[173] *Zadeh*, 928 F.3d at 479-80; *see* Nielson & Walker, *supra* note 165, at 4-7.
[174] *See* Nielson & Walker, *supra* note 165, at 6.
[175] *See id.*
[176] *See* Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 67 (2016).
[177] *See Zadeh*, 928 F.3d at 464.
[178] *Id.* at 479-80; *see* Reichle v. Howards, 566 U.S. 658, 664 (2012).
[179] *See* Ashwander v. TVA, 297 U.S. 288, 347 (1936); *see also* Pierre N. Level, *Madison Lecture: Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1276-77 (2006).

the United States Constitution.[180] Also, *Saucier* did require courts to expend judicial resources where it was not strictly necessary – at least as to the necessity of the analysis in the case before it.[181] This argument against the expenditure of judicial resources is diminished when the results of foregoing the analysis, now supported by a decade of post-*Callahan* cases, is the avoidance of close constitutional questions – the cases in which an objective reasonableness analysis is most needed.[182] The long-term nature of this stagnation – lack of precedent compounded further by lack of precedent – is such that as this avoidance continues, the void in constitutional precedent grows ever wider.

But what should the courts do about this unfortunate, but rather predictable, result? That answer is simple – reinstitute the two-step reasonableness inquiry which was, until recently, mandatory under *Saucier*.[183] This return to pre-2009 procedural requirements would force courts to address the difficult constitutional questions and begin to address the widening precedential black hole that has been developing since *Pearson v. Callahan*. Put simply, require the courts to fulfill their constitutional duty by evaluating the specific use of force incidents presented to them.

B. UNCERTAINTY OF VIDEO REVIEW

Even righting the court's error in abrogating the two-step analysis requirement will only return use of force jurisprudence to the *status quo ante* pre-*Callahan*. It would do nothing to update or modernize that jurisprudence which, as explained above, was developed in the 1970's and 1980's. The procedural underpinning of that jurisprudence is currently in a state of transition, as the courts and legal system grapple with the appropriate place of judicial audio

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[180] 42 U.S.C. § 1983; *see* David B. Owens, *Fourth Amendment Remedial Equilibration: A Comment on Herring v. United States and Pearson v. Callahan*, 62 STAN. L. REV. 563, 583 (2010).
[181] *See Scott*, 550 U.S. at 387-88 (Breyer, J., concurring).
[182] *See* Nielson & Walker, *supra* note 165, at 6.
[183] *Saucier,* 533 U.S. at 201.

and video review.[184] Judicial decisions since *Scott v. Harris* evidence this struggle, as decisions demonstrate varying degrees of reliance on available recorded evidence.[185] In 2007, a major change occurred in procedural jurisprudence in this regard. Like many use of force cases, the courts were reviewing an alleged excessive force claim under the Fourth Amendment, before them on the defendant's interlocutory appeal of the lower court's denial of qualified immunity. Unlike the vast majority of these cases, however, this case came under the review of the Supreme Court. Since that decision, described in detail below, legal commentators and some lower courts have taken the Court's holding as a mandate to allow video evidence to "speak for itself,"[186] The reaction to this perceived mandate was strong and immediate. Legal comments and articles flooded the discourse, arguing against any reliance on the reviewing judge's perception of the recorded incident.[187] Some, perhaps due to the lack of empirical data from legal sources, sought support from film studies.[188] Many of these works raise the specter of cognitive bias altering the reviewing judge's perspective of the incident during video review.[189] While such bias should certainly not be wholly dismissed, concerns over such bias should not be afforded such weight as to preclude review of evidence as valuable and reliable as audio-visual recordings. Rather, recent cases demonstrate that the legal system is more than capable of affording video and audio evidence its proper weight.[190]

Furthermore, any of these commentaries were premature, as the bulk of these critical works appear to take for granted that the review of such video evidence by judges

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[184] *See*, *e.g.*, Denise K. Berry, *Snap Judgment: Recognizing the Propriety and Pitfalls of Direct Judicial Review of Audiovisual Evidence at Summary Judgment*, 83 FORDHAM L. REV. 3343, 3377-80 (2015).

[185] *Compare Mullenix*, 577 U.S. 7 (2015), *with* Luna v. Mullenix, 773 F.3d 712 (5th Cir. 2014) (reversed and remanded).

[186] *See* Wasserman, *supra* note 166, at 1336-38.

[187] *See id.*

[188] *See id.*

[189] *See id.*

[190] *See* Mitch Zanoff, *Assessing the Impact of Police Body Camera Evidence on the Litigation of Excessive Force Cases*, 54 GA. L. REV. 1, 59 (2019).

would unjustly work against the plaintiff in civil rights cases. Now, more than a decade after the *Scott* decision, empirical-based research demonstrates the opposite – the availability of audio video evidence for review actually aids the meritorious case in overcoming some of the procedural hurdles described above.[191] The availability and admissibility of such evidence bodes well for the excessive force plaintiff's chance of ultimate recovery.[192] Given the goals of the qualified immunity and the procedural summary safeguards designed to counterbalance the doctrine, judges and justices should take full advantage of audio and video review to afford the procedural justice that interested parties should expect in our world of omnipresent recording. Beyond implementation in the courtroom, recent research demonstrates overall positive outcomes for law enforcement and the public when audio and video recording technologies are employed by officers on the street.[193] Overall, when cameras are introduced, use of force incidents go down and positive police-citizen encounters go up.[194] To align Fourth Amendment procedural doctrine with the justified expectations of the public,[195] and the legitimate needs of law enforcement,[196] the courts should consider making full use of available audio and video graphic evidence on review, consistent with the purpose of summary judgment.[197] The

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191 *See id.*

192 *See id.* at 5; *see also* Greg Sobolski & Matt Steinberg, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of Pearson v. Callahan*, 62 STAN. L. REV. 523, 525, 556 (2010).

193 ANTHONY BRAGA ET. AL., THE BENEFITS OF BODY-WORN CAMERAS: NEW FINDINGS FROM A RANDOMIZED CONTROLLED TRIAL AT THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT, 50-51 (U.S. Dep't. of Just., Off. Of Just. Programs 2017).

194 *Id.*

195 *See*, *e.g.*, Wasserman, *supra* note 40, at 611.

196 *See* Kami N. Chavis, *Body-Worn Cameras: Exploring the Unintentional Consequences of Technological Advances and Ensuring a Role for Community Consultation*, 51 WAKE FOREST L. REV. 985, 102-03 (2016); *see also* Braga, *supra* 193, at 50-3.

197 *See* FED. R. CIV. P. 56 advisory committee's note (1963 amendment) ("The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial).

arguments for and against audio-video review aside, what is the effect of such a review in practice?

VI. THE POWER OF VIDEO AND THE MANDATORY TWO-STEP INQUIRY – *SCOTT V. HARRIS*

The introduction to this article posed the question of what can explain the glaring difference between the conclusions and analyses of the District, Circuit, and Supreme Court regarding the reasonableness of Deputy Timothy Scott's decision to force Victor Harris' car off the roadway – severely injuring him. The short answer to that question – the video. Deputy Scott submitted his "dashcam" (dashboard mounted camera) video containing the entirety of his involvement in the pursuit and seizure at issue.[198] The nine justices of the Supreme Court, unlike the judges at the Eleventh Circuit Court of Appeals and the Northern District of Georgia, actually watched the video.[199] The eight-to-one decision that followed illustrates the power and the utility of video evidence in analyzing law enforcement use of force. The video review, of course, did not alter the result of the pursuit. Deputy Scott did end the pursuit by "applying his push bumper to the rear of the vehicle, causing it to leave the road and crash."[200] Harris was rendered quadriplegic in the ensuing crash.[201] Deputy Scott never disputed his actions or Harris' injuries[202] What the review of the video did, for the Justices, was provide the context against which the objective reasonableness of Scott's actions in using deadly force on a fleeing motorist could be judged.

Justice Scalia begins his analysis by applying the tried-and-true two-step *Saucier* summary judgment analysis. In so doing, Justice Scalia recognized the importance of the extra judicial step in establishing precedent.[203] Justice Scalia acknowledged that the two-step inquiry contradicted the Court's usual policy of avoiding unnecessary adjudication, but recognized the importance of

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198 *See Scott*, 550 U.S. at 378.
199 *Id.* at 380-81.
200 *Id.* at 375.
201 *Id.*
202 *See id.* at 376.
203 *See id.* at 377.

the practice as necessary in establishing the precedent that would become the basis for future holdings dependent on a right's clear establishment.[204] Justice Scalia affirmed that in questions of qualified immunity courts must first resolve the threshold question: whether or not the facts alleged, "taken in the light most favorable to the party asserting the injury," establish a constitutional violation.[205] At this threshold inquiry, the Supreme Court's inquiry took a marked turn from the lower courts' analyses, and the power and utility of judicial video review becomes clear.

Under modern use of force jurisprudence, the question of a constitutional violation must be evaluated based on the objective reasonableness of the officer's actions.[206] This is necessarily a fact-driven analysis.[207] Thus, it is no surprise that Justice Scalia's analysis turns to the relevant facts. The material facts of the pursuit were contested, as Scott and Harris gave wildly different accounts of the incident.[208] Recognizing that no factual findings had been conducted, the Justice, consistent with precedent, acknowledged that in such a case courts are required to "view the facts and draw reasonable inferences in the light most favorable" to the non-moving party - usually the plaintiff.[209] At this juncture, however, Justice Scalia's analysis makes a radical departure from those of the lower courts.

That departure was prompted by the "added wrinkle" of a videotape of the pursuit in the record of the case.[210] Here, eight of the nine Justices, unlike the judges of the lower courts, apparently took the opportunity to view the events as they unfolded, at least to the extent possible, from an unbiased source.[211] The justices found that the dashcam video tape "clearly contradict[ed] the version of the story told

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[204] *Id.* (quoting *Saucier*, 533 U.S. at 201).
[205] *Id.*
[206] *See Graham*, 490 U.S. at 392-99.
[207] *Id.* at 396; *Scott*, 550 U.S. at 383 ("[W]e must still slosh our way through the factbound morass of 'reasonableness'").
[208] *See Scott*, 550 U.S. at 378.
[209] *Id.* at 378 (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)); *see also Saucier*, 533 U.S. at 201.
[210] *Scott*, 550 U.S. at 378.
[211] *Id.* ("There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened.").

by respondent and adopted by the Court of Appeals."[212] But what were the justices to do with this evidence? Should they have, as offered by some, ignored the evidence before their eyes? Should they have affirmed the lower courts' denial of qualified immunity to Deputy Scott (who, based on the video, had done nothing wrong), and allowed the case to proceed to a trial or settlement for a plaintiff who was clearly misrepresenting the facts of the case?

No. Instead, Justice Scalia, joined by seven of the remaining eight justices, chose to cut to the heart of the Rule 56 presumption in favor of the plaintiff - that the "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts."[213] Emphasizing this standard, the majority determined that "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[214] Instead, this Court based its determination on the video evidence before them. Based on that evidence, the Court found the respondent's account to be "utterly discredited by the record," and evaluated the facts of the case as presented by the dashcam recording, rather than simply accepting Harris' account.[215] True to precedent, the Court then turned to the inescapable paradigm - the objective reasonableness analysis – "in the end we must still slosh our way through the factbound [*sic*] morass of 'reasonableness.'"[216]

The majority turned to the recurring Fourth Amendment balancing of the individual's interest against the government's interests.[217] The Court, again using the video evidence at its disposal, identified the "paramount government interest in ensuring public safety."[218] The Court

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[212] *Id.*

[213] *Id.* at 380 (citing FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.*; *see also* United States v. Place, 462 U.S. 696, 703 (1983).

[218] *Scott*, 550 U.S. at 383.

weighed the risk that Harris' actions posed to the public (governmental interest) against the threat that Scott's actions posed to Harris (individual's interest). The court found that "it is clear from the videotape that respondent [Harris] posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase," while recognizing that Scott's actions "posed a high likelihood of serious injury or death" to Harris.[219] To resolve this less-than-obvious balance of competing interests, Justice Scalia found it "appropriate" to consider more than the number of lives at risked, but also Scott's and Harris' relative culpability.[220] With this consideration and the video evidence before them, the Court's conclusion was predictable. The majority found that Harris' actions "produced the choice between two evils that Scott confronted," citing: (1) Harris' choice to engage in and continue his "reckless, high-speed flight;" (2) which continued over the course of nearly ten miles; and (3) his placing innocent motorists and pedestrians in imminent danger of death or serious injury. [221] Rejecting the plaintiff's now-discredited claim of being a "cautious and controlled driver" over the course of the pursuit, Justice Scalia characterized the plaintiff's flight as something resembling "a Hollywood-style car chase of the most frightening sort."[222] Based on this balancing of interests, and considering Harris' own culpability, the Court had "little difficulty" in determining that Scott's decision to force Harris off the roadway to end the pursuit was reasonable.[223] Finding Deputy Scott's actions objectively reasonable, the Supreme Court reversed the lower courts and granted Deputy Scott's motion for summary judgment based on qualified immunity.[224]

Scott is an excellent example of the power of video. One aspect of that power is the ability of video to place the reviewing court, at least to some extent, "in the shoes" of the officer in a way that a police report, affidavit, deposition, or

[219] *Id.* at 385.
[220] *Id.*
[221] *Id.* at 384.
[222] *Id.* at 380.
[223] *Id.* at 384
[224] *Id.* at 385.

even trial testimony simply cannot. That ability is on display in Justice Scalia's majority opinion, but is even more apparent in Justice Breyer's concurrence, wherein the Justice unequivocally stated, "Because watching the video footage of the car chase made a difference to my own view of the case, I suggest that the interested reader take advantage of the link in the Court's opinion . . . and watch it."[225] Having done so, Justice Breyer also found that no reasonable jury could find that the deputy violated the Constitution.[226] That same ability allows the reviewer to see and appreciate what the officer sees –the defendant/plaintiff's culpability. It is perhaps this element that ultimately tipped the balance in Deputy Scott's favor as, based on the majority's opinion, Harris' culpability was their final consideration before finding Deputy Scott's actions reasonable.[227]

VII. CONCLUSION

Yet, this impact of the video aside, it is important to note that *Scott* did not create a real change in legal precedent, nor did the Court rely on some novel legal analysis to arrive at the conclusion that Deputy Scott acted reasonably.[228] Conversely, the Court relied on the well-established objective reasonableness test established in *Graham v. Connor*.[229] Justice Scalia even rejected plaintiff's attempt to craft a new rule, "Garner did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force,'"[230] finding, as previous courts had, that law enforcement use of force, even deadly force, is to be analyzed under the reasonableness test of the Fourth Amendment.[231]

The holding in *Scott* provided a much-needed degree of certainty to the lower courts, law enforcement, and the public. The Court did so by applying the *Saucier* two-step reasonableness inquiry, and by taking full advantage of the

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[225] *Id.* at 387.
[226] *Id.* at 387.
[227] *See id.* at 384.
[228] *See id.*
[229] *See Graham*, 490 U.S. at 392-99.
[230] *Scott*, 550 U.S. at 382
[231] *Id.*

unbiased evidence available to it, rather than eschewing the opportunity to review the video.[232] As video recording technology continues to be implemented by law enforcement agencies across the country, the resultant empirical data supports that the judicial review of captured video and audio has a desirable effect – genuine claims of excessive force are proven in higher numbers while fraudulent claims are dismissed earlier in the course of litigation. In this way, video review furthers the goals of the qualified immunity doctrine while aiding the meritorious plaintiff in overcoming some of its procedural barriers to recovery. Finally, in some circumstances, video review allows the courts to establish factual elements which would otherwise be unknown and unknowable. As a result, these reviewing courts can establish and refine excessive force jurisprudence in a meaningful way – based on the events that actually occur, untainted by the bias of the interested parties, while continuing to apply the same well-established objective reasonableness standard. Given the possibilities afforded when video review is available, the now-evident negative consequences of *Callahan's* abrogation of the once-mandatory two-step reasonableness inquiry, the consequential dearth of meaningful excessive force case law, and the resultant uncertainty among lower courts, law enforcement, and the public, it becomes obvious that the *Saucier* mandatory two-step reasonableness analysis should be reinstituted. The courts should do what society needs and expects them to do, rule on important constitutional questions and provide the guidance that future courts, law enforcement, and the public require. Finally, in the spirit of *Scott*, it is appropriate to include a link to the infamous video so that the interested reader (or watcher) might judge Deputy Scott's and Victor Harris' actions for themselves.[233]

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[232] If anything can truly be said to be "mandatory" for the Supreme Court.

[233] *Scott v Harris (USSC 05-1631) Pursuit Video*, YOUTUBE (Sept. 3, 2008), https://www.youtube.com/watch?v=qrVKSgRZ2GY.