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Qualified Immunitity: When is a Loss Ultimately a Win?

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QUALIFIED IMMUNITY: WHEN IS A LOSS ULTIMATELY A WIN?

Scott v. Harris, 127 S. Ct. 1769 (2007)

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A Georgia sheriff's deputy clocked Victor Harris driving seventy-three miles per hour in a fifty-five mile per hour zone.[1] After Harris ignored the deputy's signal to pull over for speeding, the deputy began a high-speed chase and radioed dispatch for backup. Deputy Timothy Scott heard the broadcast and became Harris's lead pursuer.[2] Scott ended the chase by striking his cruiser's push bumper against the back of Harris's car, causing Harris's car to fall down an embankment and crash, rendering Harris a quadriplegic.[3]

Harris filed suit for monetary damages pursuant to 42 U.S.C. § 1983,[4]

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* J.D., May 2008, University of Florida Levin College of Law. For my family, whose loving support has given me the confidence to "[t]est all things [and to] hold fast what is good." 1 *Thess.* 5:21. I'd like to thank The Honorable Elizabeth A. Kovachevich; Sheila F. McNeill, Esq.; N. Sherrill Newton, Esq.; Professor Sharon E. Rush; The Honorable Charles R. Wilson; and the members and staff of the Florida Law Review. This Comment expresses my own views, not necessarily those of the persons who have either shared their penetrating insights with me or participated in the publication process.

1. Scott v. Harris, 127 S. Ct. 1769, 1772 (2007).

2. *Id.* at 1773.

3. *Id*. Scott and Harris encountered one another in a shopping center parking lot before Harris reentered the highway and continued leading the officers on the high-speed chase. *Id.* Harris "was nearly boxed in" by Scott's and other officers' vehicles, but he managed to escape by "colliding with Scott's police car, exiting the parking lot, and speeding off once again down a two-lane highway." *Id.* Scott later radioed his supervisor for permission to perform the "Precision Intervention Technique" maneuver, which causes a fleeing vehicle to spin and stop. *Id.* He allegedly had his supervisor's permission to "take [Harris] out." *Id.* (quoting Harris v. Coweta County, 433 F.3d 807, 811 (11th Cir. 2005)). Scott claimed that he decided against performing the maneuver after all because he thought it might be unsafe, given the high speeds at which the cars were moving. *Id.* at 1773 n.1. None of these facts, however, affected the outcome of the case. *Id.* As the Supreme Court noted, "[i]t is irrelevant to [the] analysis whether Scott had permission to take the precise actions he took," *id.*, because Scott acted under color of state law. *See* Monroe v. Pape, 365 U.S. 167, 184 (1961) (holding that a state officer *qua* state officer acts under color of state law even if his actions are not taken pursuant to any official state policy).

4. *Scott*, 127 S. Ct. at 1773. The statute reads:

> Every person who, under color of [law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

alleging, among other things, that Scott violated the Fourth Amendment by using excessive force during the chase.[5] Scott entered into the record a video recording of the car chase to support his claim that Harris's reckless driving posed a substantial threat of imminent physical harm to others.[6] Scott moved for summary judgment based on qualified immunity, which the district court denied.[7] The Eleventh Circuit affirmed on interlocutory appeal,[8] and Scott petitioned for a writ of certiorari, which the Supreme Court granted.[9] The Court reviewed the video recording de novo and found that the recording "utterly discredited" Harris's version of the facts adopted by both the district and circuit courts.[10] The Supreme Court accordingly reversed the Eleventh Circuit and HELD that Scott acted reasonably when he ended the car chase, that he did not violate the Fourth Amendment, and that he was entitled to qualified immunity.[11]

When a person alleges that a police officer violated that person's rights and sues for monetary damages, the officer may assert immunity as an affirmative defense.[12] The officer may be entitled to absolute immunity or qualified immunity, depending on the governmental function he performed when the alleged violation occurred.[13] Usually, a police officer is entitled to absolute immunity only when he is testifying in court as a witness.[14] Since absolute immunity defenses tend to apply categorically, they generally can be resolved on motions to dismiss.[15]

However, most governmental functions performed by police officers afford them only qualified immunity.[16] The qualified immunity doctrine tries to balance the public policy that wrongfully injured plaintiffs should

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42 U.S.C. § 1983 (2000). Section 1983 creates a cause of action against a person acting under color of state law who violates federal constitutional or statutory laws. *Id.* The statute does not create federal court jurisdiction. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002); Maine v. Thiboutot, 448 U.S. 1, 4–6 (1980).

5. *Scott*, 127 S. Ct. at 1773.

6. *Id.* at 1775–76. Harris did not allege that the videotape was doctored, *id.* at 1775, and the Eleventh Circuit examined the facts in the light most favorable to Harris, as the law required. *Id.* at 1774–75 (citing Saucier v. Katz, 533 U.S. 194, 201 (2001); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam)).

7. *Id.* at 1773.

8. *Id.* A district court's denial of qualified immunity can be immediately appealed. *Id.* at 1773 n.2 (citing Mitchell v. Forsyth, 472 U.S. 511, 526–27 (1985)).

9. *Id.* at 1774.

10. *Id.* at 1775–76.

11. *Id.* at 1779.

12. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 509–10, 514 (4th ed. 2003).

13. *Id.* at 512.

14. *Id.* at 526–27.

15. LARRY W. YACKLE, FEDERAL COURTS 426 (2d ed. 2003) (citing Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 262 (1995)).

16. CHEMERINSKY, *supra* note 12, at 528–29.

be compensated and the public policy that officers should not be constantly subject to liability for their "judgment calls made in a legally uncertain environment."[17] Qualified immunity defenses, accordingly, tend to be more fact-sensitive than absolute immunity defenses.[18]

The Supreme Court established the groundwork for the current standard for qualified immunity in *Harlow v. Fitzgerald*.[19] The respondent filed suit after losing his job at the Air Force,[20] alleging that the petitioners violated his federal legal rights by conspiring to discharge him for exposing the Air Force's cost overruns.[21] Before *Harlow*, the respondent could have recovered monetary damages if he could prove that the petitioners acted with malice.[22] The *Harlow* Court observed, however, that plaintiffs could too easily allege malice and disrupt governmental operations,[23] hoping to find evidence during discovery to support their allegations.[24] The Court responded by establishing a solely objective standard to determine whether officers are entitled to qualified immunity.[25] Under *Harlow*, officers "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[26]

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17. Ryder v. United States, 515 U.S. 177, 185 (1995) (citing Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982)).

18. YACKLE, *supra* note 15, at 432.

19. 457 U.S. 800, 818–19 (1982).

20. *Id.* at 803. It is irrelevant for the purposes of defining the qualified immunity doctrine that *Harlow* was not filed in federal district court as a § 1983 action. *See* CHEMERINSKY, *supra* note 12, at 514. Because the defendants in *Harlow* were federal, not state, officials, their actions were not subject to suit pursuant to § 1983. However, the Supreme Court provided plaintiffs a cause of action against federal officers for alleged violations of federal law in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

21. *Harlow*, 457 U.S. at 803 & n.2.

22. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 322 (1975).

23. Discovery can be costly and time-consuming for the officers, and trial courts would generally have difficulty granting summary judgment on the issue of malice because the issue presents a question of fact that normally would be resolved at trial. *Harlow*, 457 U.S. at 816–17. Moreover, the cost of law enforcement officers as defendants spills over to society as a whole. Public safety can be compromised if officers are over-deterred from performing their duties for fear of legal action against them. *Id.* at 814 (noting that "society as a whole" will bear the "expenses of litigation" given the "diversion of official energy from pressing public issues").

24. *See* CHEMERINSKY, *supra* note 12, at 531.

25. *See Harlow*, 457 U.S. at 815–18.

26. *Id.* at 818. It is interesting, perhaps ironic, that the test for qualified immunity is now solely objective. *Harlow* essentially overturned *Wood v. Strickland*, 420 U.S. 308, 321 (1975), in which the Supreme Court noted that the test for whether an official is entitled to qualified immunity included both objective and subjective elements. Under *Wood*, an official was not entitled to qualified immunity if "he knew or reasonably should have known that the action [at issue] . . . would violate . . . constitutional rights . . . or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Id.* at 322. Justice Powell's dissent in

The *Harlow* Court did not explain what it means for the law to be "clearly established."[27] However, through further development of the qualified immunity doctrine, the Supreme Court has stated that a right can be clearly established even if there is no prior case law on point.[28] But, unless the officer *obviously* violates a right,[29] the plaintiff often will have to show that the right was clearly established in light of precedent.[30]

The Court's precedent showed that the Fourth Amendment right against "the use of deadly force against nonviolent suspects" was clearly established at the time Harris led the deputies on the car chase.[31] In *Tennessee v. Garner*,[32] Memphis police officers were dispatched to respond to a "prowler inside call."[33] One of the officers saw the fleeing suspect approach a chain-link fence.[34] The officer was "reasonably sure" that the suspect was unarmed.[35] The officer then cried "police, halt" and approached the suspect, but the suspect tried to climb the fence.[36] The officer was convinced that if the suspect made it over the fence, the suspect would not be captured.[37] The officer shot the suspect in the back of the head and killed him.[38] In light of these facts, the *Garner* Court held that

> deadly force to prevent the escape of an apparently unarmed suspected felon . . . may not be used unless it is necessary to

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Wood criticized the objective component of the test because it is difficult to define the law in such a way that a reasonable officer would know that the conduct at issue violated clearly established rights. *See id.* at 329 (Powell, J., dissenting).

27. The Honorable Charles R. Wilson, Judge, United States Court of Appeals for the Eleventh Circuit, "*Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 453 (2000). There is little agreement among the federal circuit courts about what the term "clearly established" means. *Id.* at 447. Some circuits interpret the term broadly, while others, including the Eleventh Circuit, are "reluctant to find that the law is 'clearly established' for qualified immunity purposes unless the right which the government actor allegedly violated has been clearly identified and protected in an earlier, factually similar context." *Id.* at 448.

28. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 740–41 (2002); United States v. Lanier, 520 U.S. 259, 270–71 (1997).

29. *Lanier*, 520 U.S. at 271 (recognizing that "a general constitutional rule . . . may apply with obvious clarity to the specific conduct in question" even when the challenged conduct has not yet been held unlawful).

30. *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (per curiam).

31. *See* Tennessee v. Garner, 471 U.S. 1, 10–11 (1985).

32. 471 U.S. 1 (1985).

33. *Id.* at 3.

34. *Id.*

35. *Id.*

36. *Id.* at 4.

37. *Id.*

38. *Garner*, 471 U.S. at 4.

> prevent the escape *and* the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.[39]

Because Fourth Amendment cases tend to be fact-sensitive,[40] determining whether an officer is entitled to qualified immunity sometimes appears so intertwined with the question whether the officer violated the law that the two questions should be treated as one.[41] The Supreme Court addressed that possibility in *Saucier v. Katz*.[42] The petitioner, a military police officer, was warned by his supervisors to expect protests during a celebration at which then-Vice President Al Gore was scheduled to speak.[43] When Gore began speaking from behind a waist-high fence, the respondent approached the fence and revealed a protest banner that he had with him.[44] As the respondent tried to post the banner, the petitioner and another officer[45] grabbed the respondent from behind, seized the banner, and rushed him out.[46] "Each officer had one of respondent's arms, half-walking, half-dragging him, with his feet barely touching the ground."[47] The officers then allegedly shoved the respondent into a military van, causing him to fall to the floor of the van where he caught himself just in time to avoid any injury.[48] They took him to a military police station, briefly detained him, and eventually released him.[49]

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39. *Id.* at 3 (emphasis added).

40. *See* DANIEL E. HALL, CRIMINAL LAW & PROCEDURE 372 (4th ed. 2003) (asserting that "[s]earch and seizure problems can be complex" because "[that] area of law is highly fact-sensitive"). Professor Steinberg has argued that "the vast preponderance of the historical evidence suggests that the framers adopted the Fourth Amendment *solely* to proscribe unlawful physical intrusions into houses." David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1076 (2004) (emphasis added). *But see* Lisa A. Mattern, Comment, *Constitutional Law: Knock-and-Announce Violations and the Purposeful Enforcement of the Exclusionary Rule*, 59 FLA. L. REV. 465, 465–66 (2007) (noting that the Fourth Amendment does not specify how the courts should protect the right against unreasonable seizures and discussing the Fourth Amendment's application in police evidence-gathering practices).

41. *See* Saucier v. Katz, 533 U.S. 194, 197 (2001).

42. 533 U.S. 194 (2001).

43. *Id.* at 197–98.

44. *Id.* at 198. The respondent was not protesting Gore's attendance at the celebration. *Id.* at 197. Instead, he sought to demonstrate his concern that a military hospital would be used to conduct experiments on animals. *Id.*

45. *Id.* at 198. The other officer was not a party to the suit. *Id.*

46. *Id.*

47. *Id.* (internal citation and quotation marks omitted). The respondent was also allegedly wearing a knee-high leg brace, but the petitioner testified that he did not recall noticing it when he and the other officer rushed the respondent out. *Id.*

48. *Id.*

49. *Id.*

The respondent alleged that the petitioner violated the Fourth Amendment by using excessive force during the arrest.[50] The petitioner claimed that he was entitled to qualified immunity, which the district court denied.[51] The Ninth Circuit affirmed, concluding that the questions "whether the law governing the official's conduct was clearly established" and whether "a reasonable officer could have believed . . . that his conduct was lawful"[52] were identical because both questions "concern the objective reasonableness of the officer's conduct in light of the circumstances the officer faced on the scene."[53]

The Supreme Court disagreed and established a two-step "fixed order-of-battle rule"[54] for the federal courts to follow in qualified immunity cases.[55] The first step is to determine "whether a constitutional right would have been violated [by the officer] on the facts alleged."[56] If not, then the officer is entitled to qualified immunity.[57] But if so, then "the next, sequential step is to ask whether the right was clearly established" when the alleged violation occurred.[58] Unless the right was clearly established, the court will grant qualified immunity.[59] The *Saucier* Court believed that the legal standards for officer conduct would be more clearly developed through case law with the fixed order of battle than without it.[60]

While acknowledging that Harris's alleged facts were not completely inaccurate, the *Scott* Court found that the district and circuit courts misunderstood the legal relevance of those facts.[61] Harris's alleged facts

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50. *Id.* at 198–99.
51. *Id.* at 199. Like *Harlow*, *Saucier* was a *Bivens* action. *Id.*
52. *Id.* (citations omitted).
53. *Id.* at 200.
54. *See* Scott v. Harris, 127 S. Ct. 1769, 1780 (2007) (Breyer, J., concurring).
55. *Saucier*, 533 U.S. at 197, 200–01.
56. *Id.* at 200.
57. *Id.* at 201. (Note: These are citations to *Saucier*.)
58. *Id.*
59. *See id.* at 201–02.
60. *Id.* at 201. The Court stated:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that an officer's conduct was unlawful in the circumstances of the case.

Id.

61. *See* Scott v. Harris, 127 S. Ct. 1769, 1776 n.7 (2007) (recognizing that not "every factual statement made by the Court of Appeals [was] inaccurate").

emphasized particular moments during the chase.[62] Although "Harris remained in control of his vehicle, slowed for turns and intersections, . . . typically used his indicators for turns," and "did not run any motorists off the road,"[63] the videotape showed that he was also driving dangerously fast on a two-lane highway, swerving around traffic, and running through red lights.[64] Just because the officers and bystanders may not have been in actual imminent danger at particular moments did not preclude Scott's reasonable belief, based on the totality of the circumstances, that Harris's reckless driving posed a substantial threat of imminent physical harm.[65]

The Court accordingly distinguished *Scott* from *Garner*.[66] Unlike the suspect in *Garner*, who did not pose a significant threat of serious injury to others,[67] Harris endangered the officers and bystanders by speeding in his car.[68] Thus, the Court rejected the suggestion that *Garner* could have put the deputy on fair notice that bumping Harris's car, even though doing so involved deadly force,[69] violated the Fourth Amendment.[70]

The *Scott* Court also assessed the reasonableness of Scott's actions.[71] It found that Scott's use of deadly force was collateral to the reasonableness of his actions.[72] The Court "'balance[d] the nature and quality of the intrusion [into Harris's] Fourth Amendment interests against the importance of the governmental interests alleged to justify the

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62. *See* Harris v. Coweta County, 433 F.3d 807, 815–16 & n.11 (11th Cir. 2005), *rev'd sub nom*. Scott v. Harris, 127 S. Ct. 1769 (2007).

63. *Id.* at 815–16.

64. *Scott*, 127 S. Ct. at 1775.

65. *See id.* at 1775–79.

66. *Id.* at 1777.

67. Tennessee v. Garner, 471 U.S. 1, 3 (1985).

68. *Scott*, 127 S. Ct. at 1777. The Court further found that Harris's allegations that there were no motorists or pedestrians in the way at the instant Scott used the push bumper cut against Harris's case. *See id.* at 1775. The absence of motorists or pedestrians at that moment suggested that "Scott *waited* for the road to be clear before executing his maneuver." *Id.* at 1776 n.7.

69. Scott was on notice that, under prior case law, his police car, like a gun, can be a deadly weapon. *See* United States v. Gualdado, 794 F.2d 1533, 1535 (11th Cir. 1986).

70. *Scott*, 127 S. Ct. at 1777–78. Reiterating the Eleventh Circuit's own precedent, the *Scott* Court asserted that "'*Garner* had nothing to do with one car striking another or even with car chases in general . . . . A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person.'" *Id.* at 1777 (alteration in original) (quoting Adams v. St. Lucie County Sheriff's Dep't, 962 F.2d 1563, 1577 (11th Cir. 1992) (Edmondson, J., dissenting), *reh'g granted and vacated*, 998 F.2d 923 (11th Cir. 1993) (en banc). The *Scott* Court added, "Nor is the threat posed by the flight on foot of an unarmed suspect *even remotely comparable* to the extreme danger to human life posed by [a fleeing driver speeding on a public highway]." *Id.* (emphasis added).

71. "Whether or not Scott's actions constituted application of 'deadly force,' all that matters is whether Scott's actions were reasonable." *Id.* at 1778.

72. *Id.*

intrusion'" by assessing Scott's and Harris's relative culpability.[73] Scott claimed that he tried to ensure public safety by bumping Harris off the road.[74] Yet, in so doing, he posed a substantial risk of bodily harm to Harris.[75]

On the other hand, Harris's reckless driving imminently threatened the lives of the officers in the chase and any bystanders who might have been around.[76] By ignoring the flashing lights and police sirens, Harris caused the high-speed chase to occur.[77] The Court concluded that Scott acted reasonably under the circumstances.[78] In so concluding, the Court found, in answer to the first *Saucier* inquiry, that the facts alleged by Harris failed to establish that Scott violated his constitutional rights. The Court also announced a new constitutional rule: "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." By finding no constitutional violation, the Court did not need proceed to the second *Saucier* inquiry.

Yet, by explaining that *Garner* did not clearly establish a right that controlled the outcome in *Scott*,[79] the Court showed that the two *Saucier* inquiries can overlap. The *Scott* Court, accordingly, had the opportunity to reconsider *Saucier*'s fixed order of battle.[80] The Court could have used *Scott* as precedent to allow the lower federal courts to conduct the *Saucier* inquiries in the order that they find appropriate under the circumstances of the individual cases before them.[81] The *Scott* Court could have done that by not announcing the new rule.[82] But by announcing the new rule, the *Scott* Court further developed individual rights.

To be sure, if the Court had not announced the rule, it would arguably have disposed of *Scott* more efficiently.[83] The *Scott* Court had a sufficient legal basis to reverse the Eleventh Circuit by distinguishing *Scott* from *Garner* and concluding that there was no clearly established law to put

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73. *Id.* (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

74. *Id.*

75. *Id.*

76. *Id.* at 1778 ("Although there is no obvious way to quantify the risks on either side, it is clear from the videotape that [Harris] posed an actual and imminent threat . . . .").

77. *Id.*

78. *Id.* at 1778–79.

79. *See supra* note 70.

80. *See id*. at 1780 (Breyer, J., concurring) (noting that in an amicus brief, twenty-eight states had asked the *Scott* Court to reconsider *Saucier*'s fixed order of battle).

81. *Id.*

82. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001).

83. *See Scott*, 127 S. Ct. at 1780 (Breyer, J., concurring).

Scott on fair notice that he used excessive force on Harris.[84] Alternatively, the Supreme Court could have reversed the Eleventh Circuit and granted Scott qualified immunity even if Scott conceded that he used excessive force and violated the Fourth Amendment.[85] It would not have mattered in either situation how the Supreme Court ruled on the constitutional question.[86] Scott would have been entitled to qualified immunity under either line of analysis.[87] In sum, the rule can be criticized as being both inefficient and unnecessary.

But these criticisms are misplaced. By articulating the rule, the *Scott* Court struck a balance between the often-competing values of maintaining the judicial role of developing individual rights, and judicial efficiency.[88] Although the rule does not appear on its face to identify any limits on what a police officer may do to stop a fleeing driver,[89] the *Scott* Court, paradoxically, developed individual rights by attempting to clarify their scope vis-à-vis the use of force by police officers.[90]

The *Scott* rule informs not only police officers, who often have to make split-second decisions while performing their discretionary duties,[91] but also potential plaintiffs who may consider filing excessive-force claims in the federal courts.[92] With the *Scott* rule, rather than without it, potential

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84. *See id.*

85. *See* The Honorable Pierre N. Leval, Judge, United States Court of Appeals for the Second Circuit, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1277–78 (2006) (discussing the unnecessary theoretical constitutional inquiry after good faith immunity is established); *see also* Benjamin J. Robinson, Comment, *Constitutional Law: Suppressing the Exclusionary Rule*, 59 FLA. L. REV. 475, 484 (2007) (suggesting that even a threat of a suit for monetary damages under § 1983 may not be enough to deter unconstitutional police misconduct).

86. *See Saucier*, 533 U.S. at 210 (Ginsburg, J., concurring); *see also* Leval, *supra* note 85, at 1277–78.

87. *See* Leval, *supra* note 85, at 1277–78.

88. *See* Lynn Adelman & Jon Deitrich, *Saying What the Law Is: How Certain Legal Doctrines Impede the Development of Constitutional Law and What Courts Can Do About It*, FED. CTS. L. REV., May 2007, at 1, 8, at http://www.fclr.org/docs/2007fedctslrev1.pdf (on file with the Florida Law Review).

89. *Scott*, 127 S. Ct. at 1774, 1779. Professor Blum has criticized the rule as being both too broad and too narrow. *See* Karen M. Blum, Scott v. Harris*: Death Knell for Deadly Force Policies and* Garner *Jury Instructions?*, 58 SYRACUSE L. REV. 45, 62 (2007). To the extent that it is a broad, "per se" rule, it may foreclose successful constitutional challenges even to irresponsible, perhaps reckless, police conduct. *Id.* To the extent that the rule is narrow and limited to the facts of *Scott*, it fails to clearly establish the law as to whether police conduct under even slightly different circumstances would be excessive. *Id.*

90. *Scott*, 127 S. Ct. at 1779.

91. YACKLE, *supra* note 15, at 552.

92. *See generally* Wilson, *supra* note 27, at 472–75 (discussing the dilemma of allowing public officials to do their jobs, while permitting plaintiffs to pursue worthy claims of constitutional violations). Maintaining uncertainty by avoiding a difficult legal question may also be "incompatible with prevailing notions of the judicial role, in which courts are obligated to resolve

plaintiffs can better assess their chances of success in overcoming summary judgment based on qualified immunity and in proceeding on the merits of their claims. The rule promotes judicial efficiency to the extent that it may discourage potential plaintiffs from filing suit when it appears unlikely that they can present excessive-force cases with genuine issues of material fact.[93]

This is not to say that the *Scott* rule will prevent future plaintiffs in situations similar to Harris's from recovering monetary damages. Just because excessive-force cases can be distinguished based on the facts they present[94] does not mean that the *Scott* rule has no purpose. To the extent that it upholds *Saucier*, the *Scott* rule maintains the federal courts' role in developing individual rights in cases that do not proceed to trial.[95] The rule reflects the *Scott* Court's apparent recognition that the fixed order of battle helps maintain a meaningful difference between absolute and qualified immunity.[96]

By maintaining that difference, *Scott* helps give plaintiffs in excessive-force cases their day in court. Unlike an absolute immunity case, a qualified immunity case usually cannot be resolved on a fact-insensitive motion to dismiss.[97] A qualified immunity case is instead typically resolved after the defendant officer moves for summary judgment.[98] In contrast to resolving a motion to dismiss, resolving a motion for summary judgment requires a court to take account of the facts in the record.[99] By declining to relax the order of the *Saucier* inquiries,[100] the *Scott* Court has

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the matters brought before them regardless of the consequences of doing so." Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 749–50 (2006). Professor Oldfather also raises the possibility that such an understanding of the judicial role is misguided. *Id.* at 750; *see also* Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 716, 732 (2001) (suggesting that the federal circuit courts do not generally have the authority to avoid adjudicating claims before them).

93. *See, e.g.*, Neal v. City of Bradenton, No. 8:05-cv-00790-T-17-TBM, 2006 WL 1804585, at *3–4 (M.D. Fla. June 27, 2006) (granting the defendant police officer's motion for summary judgment based on qualified immunity after finding that the § 1983 plaintiff presented an "uneven recollection of the facts" and would have difficulty showing that genuine issues of material fact existed for trial).

94. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 39 (1997) (noting that judges can reach desired results by distinguishing precedent cases).

95. *See* Blum, *supra* note 89, at 76–77, and David Kessler, Comment, *Justices in the Jury Box: Video Evidence and Summary Judgment in* Scott v. Harris*, 127 S. Ct. 1769 (2007)*, 31 HARV. J.L. & PUB. POL'Y 423, 430–35 (2008), for arguments supporting the district and circuit courts' position that Harris's claims should have gone to trial.

96. *But see infra* note 102.

97. YACKLE, *supra* note 15, at 432.

98. *Id.*

99. *Cf.* FED. R. CIV. P. 12(b) and FED. R. CIV. P. 56(c).

100. *See* Scott v. Harris, 127 S. Ct. 1769, 1780 (Breyer, J., concurring).

assured future plaintiffs in excessive-force cases that they will have the opportunity to present their allegations at summary judgment and possibly recover monetary damages from individual officers, without fear that their allegations will be immediately dismissed as if the officers were entitled to absolute immunity.[101]

The *Scott* rule is therefore not the inefficient and unnecessary rule that it may appear at first to be. The rule is fundamentally an extension of precedent. And although it seems counterintuitive, the *Scott* Court traveled the path of least resistance by ruling on a constitutional question when that ruling might have been unnecessary to resolve the case.[102] In so doing, the Court avoided the more challenging tasks of deciding whether to reconsider *Saucier* and of determining a new standard of review for qualified immunity cases. Instead, the Court ensured that future plaintiffs in excessive-force cases will continue to have their day in court. Thus, while *Scott* was a loss for the individual plaintiff Harris, it was ultimately a win for the federal courts' role in developing individual rights.

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101. *See* YACKLE, *supra* note 15, at 432-33.

102. *See Scott*, 127 S. Ct. at 1774 n.4 ("We need not address the wisdom of *Saucier* in this case, however, because the constitutional question with which we are presented is . . . easily decided. Deciding that question first is thus the 'better approach,' . . . regardless of whether it is required.") (citing County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998)). *See also* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).