Suffolk Journal of Trial and Appellate Advocacy

Volume 19 | Issue 1 Article 11

1-1-2014

Constitutional Law - What Constitutes an Objectively Unreasonable Reaction - Tolan v. Cotton

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Recommended Citation
19 Suffolk J. Trial & App. Advoc. 235 (2014)

CONSTITUTIONAL LAW—WHAT CONSTITUTES AN OBJECTIVELY UNREASONABLE REACTION?—*TOLAN V. COTTON*, 713 F.3D 299 (5TH CIR. 2013).

Federal law provides a private right of action for individuals who believe an official acting under state law has violated their Constitutional rights; such right of action is codified at 42 U.S.C. § 1983 ("§ 1983").[1] Officials sued under this statute have an affirmative defense of qualified immunity that, when raised, requires a plaintiff to show a violation of a federal right and that the official's actions were objectively unreasonable in light of current case law to defeat such immunity.[2] In *Tolan v. Cotton*,[3] the United States Court of Appeals for the Fifth Circuit considered whether Tolan produced sufficient evidence to defeat Cotton's qualified immunity defense in a case alleging excessive force.[4] The Fifth Circuit affirmed the trial court's grant of summary judgment for Cotton because he was not objectively unreasonable in using deadly force against Tolan.[5]

On December 31, 2008, at approximately 2:00 a.m. in Bellaire, Texas, police Sergeant Jeffrey Cotton shot and seriously wounded Robbie Tolan on the front porch of his home in front of his friend, parents, and an-

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[1] *See* Civil Rights Act of 1871, 42 U.S.C. § 1983 (2006). Colloquially called "§ 1983," this statute "provides a cause of action against any person who, under color of state law, deprives an individual of any right, privilege, or immunity secured by the Constitution and federal law." McKnight v. Rees, 88 F.3d 417, 419 (6th Cir. 1996). This law does not create new rights; however, it provides for a remedy in the form of a cause of action to enforce existing rights created by the Constitution or federal law. *See* Baker v. McCollan, 443 U.S. 137, 144 (1979) (denying plaintiff relief under § 1983 despite showing tort violations because there were no constitutional violations); *see also* Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906-07 (3d Cir. 1997) (denying plaintiff's § 1983 claim because school did not deprive her of constitutional rights). The Supreme Court has recognized an analogous cause of action, arising directly out of the Constitution, for violations of rights by federal officials. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (holding federal official's violation of constitutional command gives rise to cause of action).

[2] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions 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."). This doctrine provides a broad shield and protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

[3] ("*Tolan II*"), 713 F.3d 299 (5th Cir. 2013).

[4] *Id.* at 301 (laying out issue of case).

[5] *Id.* at 309 (holding summary judgment appropriate for defendant Cotton).

other Bellaire officer, John Edwards.[6] While on patrol in a neighborhood that had had several recent car thefts, Officer Edwards did a routine check on the license plate of Tolan's car, but made a typo entering the information into his computer, so the resulting report erroneously identified the car Tolan was driving as stolen.[7] Cotton arrived at the scene to find Edwards with his gun drawn and Tolan lying face down on his porch, where Edwards had ordered him to remain.[8] Cotton drew his own weapon and assisted in trying to stabilize the scene by moving Tolan's mother away from the fray and towards the garage door.[9] Tolan, angered by the treatment of his mother, screamed at the officer and began to rise from his prone position, drawing his arms towards his chest.[10] At the same moment, Cotton drew his weapon and fired three times, striking Tolan once.[11]

Tolan suffered very serious injuries and, as a result, filed a § 1983 lawsuit against officers Cotton and Edwards.[12] The trial court granted summary judgment against Tolan and he appealed to the Court of Appeals

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[6] *Id.* at 301 (setting scene for alleged excessive force violation). This case received a relatively large amount of attention in local and national media because Robbie Tolan is a minor league baseball player and his father, who was there at the scene of the shooting, is Bobby Tolan, a former major league baseball player who won a World Series title in 1967 with the St. Louis Cardinals. *See* Mike Tolson, *Bellaire Police 'Very Tight-lipped' Over Shooting, Family Says*, HOUSTON CHRONICLE (Jan. 5, 2009), http://www.chron.com/news/houston-texas/article/Bellaire-police-very-tight-lipped-over-1550479.php; *see also* Transcript of Appellant's Oral Argument, Tolan v. Cotton, 713 F.3d 299 (2013) (No. 12-20296) (mentioning notoriety of case).

[7] *Tolan II*, 713 F.3d at 301-02 (noting this critical fact to analyze officer's reasonable expectations). The court notes, in support of Edwards' belief, that coincidentally, the report that Edwards' computer returned identified a car of the same make and approximate year as the car Tolan was driving. *Id.* That Edwards typed an incorrect key when entering the license plate number is very important in the court's opinion because Cotton, who responded to an alert Edwards had pulled regarding a stolen car, had no reason to suspect Edwards was mistaken in the identification. *Id.* at 307.

[8] *Id.* at 307 (detailing sequence of events). Edwards took several steps to control the scene upon arrival including having Tolan's father place his hands on the car, moving Tolan's mother against the garage door out of the area, and ordering Tolan to lie face down, in the prone position on the porch. *Id.*

[9] *Id.* at 302. Cotton arrived to a chaotic scene and ordered Tolan's mother to stand against the garage; he re-holstered his pistol, grabbed hold of Tolan's mother, and pushed her into the garage door. *Id.* at 302-03. This shove agitated Tolan and set off the events of Tolan's § 1983 claim. *Id.*

[10] *Id.* at 307 ("Robbie Tolan admitted that he drew his outstretched arms toward his chest . . . .").

[11] *Tolan II*, 713 F.3d at 303 (focusing on moment of gunshots and preceding actions). Addressing the reasonableness of the use of deadly force, the court noted that there had been car burglaries in the neighborhood the night before, the porch where Tolan lay was poorly lit, and Tolan disobeyed the orders of both officers to remain prone. *Id.* at 305.

[12] Tolan v. Cotton ("*Tolan I*"), 854 F. Supp. 2d 444, 448 (S.D. Tx. 2012) (reciting procedural details of Tolan's suit). Tolan, his mother, and the other two family members present commenced a § 1983 action in federal court against Cotton and Edwards. *Id.* at n.2.

for the Fifth Circuit.[13] Tolan limited his appeal to the grant of summary judgment for Cotton.[14] In deciding whether Tolan had shown a genuine dispute of material facts required to defeat summary judgment, the Fifth Circuit focused heavily on whether Cotton acted unreasonably.[15] The court affirmed the grant of summary judgment because it found that Cotton was authorized to use deadly force to respond to a threat to his safety and that Cotton was not unreasonable in believing such a threat existed.[16] Tolan further appealed in a petition to be reheard by the complete Fifth Circuit *en banc* and this was denied by a vote of twelve to three, but not without a written dissent by Judge Dennis ("Dennis Dissent").[17] In short, Cotton was found to have qualified immunity and because this was a question of law, the Fifth Circuit used a *de novo* standard of review.[18]

Section 1983 began as part of the Civil Rights Act of 1871, passed by a Reconstruction-Era Congress in the wake of the Civil War.[19] The

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[13] *Tolan I*, 854 F. Supp. at 477 (granting summary judgment); *Tolan II*, 713 F.3d at 301 (noting case is appeal of summary judgment). Summary judgment was granted for Cotton and Edwards against all four plaintiffs. *Tolan II*, 713 F.3d at 301. Only Tolan and his mother appealed the judgment and they only appealed the judgment for Cotton. *Id.* (explaining there were only two grants of summary judgment on appeal). Summary judgment is appropriate when a court can decide there are no material facts in dispute because qualified immunity is a complete immunity to suit and should be applied as early as the case allows. *See infra* note 50 and accompanying text (explaining this principle of granting summary judgment as soon as qualified immunity can be applied).

[14] *Tolan II*, 713 F.3d at 301. The Fifth Circuit affirmed the grant of summary judgment for Cotton against Tolan's mother in a brief fashion; therefore, it is not discussed in this case comment. *Id.* at 308-09 (giving very brief reasoning why Tolan's mother's claim failed).

[15] *Id.* at 306 (focusing on reasonableness prong of qualified immunity and specifically on reasonableness of Cotton's actions); *see also* Brumfield v. Hollins, 551 F.3d 322, 326 (5th Cir. 2008) (articulating role of reasonableness of official's actions in qualified immunity analysis).

[16] *Tolan II*, 713 F.3d at 308 (explaining law on use of force). The court noted that neither party disputed that it was "clearly established that an officer had the right to use deadly force if that officer harbored an objective and reasonable belief that a suspect presented an 'immediate threat to [his] safety.'" *Id.* at 306 (summarizing state of law for officials when their safety is threatened).

[17] Tolan v. Cotton (*Dennis Dissent*), No. 12-20296, 2013 WL 3948950 at *1 (5th Cir. Aug. 1, 2013) (Dennis, J., dissenting from denial of rehearing *en banc*). Judge Dennis argued that the court applied a confused mix of the two prongs of qualified immunity analysis. *See infra* note 24 and accompanying text (exploring Dennis' reasoning in more detail). Rehearing a case *en banc* is not favored, as it demands all the court's active judges' attention; further, a motion to be reheard *en banc* is not required of counsel to fulfill his ethical duty to provide zealous advocacy. *See* FED. R. APP. P. 35 ("An *en banc* hearing or rehearing is not favored and ordinarily will not be ordered.").

[18] *Tolan II*, 713 F.3d at 304; *see also* Burge v. Parish of St. Tammany, 187 F.3d 452, 464 (5th Cir. 1999) ("[S]ummary judgment is reviewed *de novo*, applying the same criteria employed by the trial court in the first instance.").

[19] *See* Enforcement Act of 1871 (*Civil Rights Act of 1871*)., ch. 31, 17 Stat. 13 (1871) (codified as amaended at 42 U.S.C. § 1983 (2006).

law's intent was to prevent state officials from disenfranchising southern blacks, but since 1961 it has been used to hold state officials accountable for their actions.[20] Today, the most relevant part of the Civil Rights Act of 1871 is codified as 42 U.S.C. § 1983 and remains a tool to remedy a deprivation of rights.[21] Section 1983 suits are a tangle of legal and factual questions, but are nonetheless useful in many situations.[22]

A § 1983 action based on excessive force imposes two prongs that the plaintiff must satisfy in order to defeat qualified immunity.[23] One prong involves a question of law: whether a Constitutional right has been violated; the other prong involves a question of fact: whether the official's conduct objectively reasonable in light of clearly established law.[24] What makes a law "clearly established" for the purposes of § 1983 has not been conclusively found.[25] A litigant relying on intra-circuit precedent to argue whether a right is clearly established should try to find supporting language in a Supreme Court case to solidify his or her claim of clear establishment.[26]

A court considering both prongs will ask if there is an injury of

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[20] *See* Karen M. Blum & Kathryn R. Urbonya, *Section 1983 Litigation*, 2 (1998) (available at http://www.fjc.gov/public/pdf.nsf/lookup/Sect1983.pdf/$file/Sect1983.pdf) (noting one of the act's original titles "Klu Klux Klan Act"); *see also* Monroe v. Pape, 365 U.S. 167, 183 (1961) (noting § 1983 provides remedy for actions of state officials as actions under color of law).

[21] 42 U.S.C. § 1983 (2006) (codifying Civil Rights Act of 1871 as "civil action for the deprivation of rights").

[22] *See Monroe*, 365 U.S. at 173-74 (outlining three major implications of § 1983). The Court found that § 1983 remedies existed even where state law remedies were present, so as to give plaintiffs a federal forum, provide a federal remedy where state remedies were illusory, and override certain kinds of state laws. *Id.*

[23] *See* Rockwell v. Brown, 664 F.3d 985, 990-91 (5th Cir. 2011) ("[T]he qualified-immunity inquiry has two prongs: (1) whether an official's conduct violated a constitutional right of the plaintiff, and (2) whether that right was clearly established at the time of the violation."). The "second prong of the qualified immunity test is better understood as two separate inquiries: whether the allegedly violated constitutional rights were *clearly established at the time of the incident*; and, if so, whether the [defendant's conduct] was objectively unreasonable in the light of that then clearly established law." Hare v. City of Corinth, 135 F.3d 320, 326 (5th Cir. 1998).

[24] *Rockwell*, 664 F.3d at 990-91 (detailing two prongs of qualified immunity); *see supra* note 23 and accompanying text (detailing considerations and importance of each prong). In the denial of rehearing *en banc*, Judge Dennis argues that the second prong is one largely of law – whether a reasonable mistake of law has been made – but the vast majority of the court agreed with the panel decision's analysis. *Dennis Dissent*, 2013 WL 3948950, at *1-2 (Dennis, J., dissenting from denial of rehearing *en banc*).

[25] *See* Reichle v. Howards, 132 S. Ct. 2088, 2094 (2012) ("*Assuming arguendo* that controlling Court of Appeals' authority could be a dispositive source of clearly established law....") (emphasis added). The Court did not conclusively decide whether a right could be simply established in the Circuit where the incident occurred, or the alternative, whether a Supreme Court precedent must be cited. *Id.*

[26] *See supra* note 25 and accompanying text (cautioning that Supreme Court only assumed *arguendo* that intra-circuit precedent qualified as clear establishment).

constitutional import that resulted from excessive force, and if this force is objectively unreasonable in light of clearly established law; a failure on either prong is fatal to the plaintiff's case.[27] If the plaintiff can produce sufficient evidence on these two prongs he can defeat summary judgment on the affirmative defense of qualified immunity.[28] The second prong allows an officer acting reasonably under clearly established law to be found immune, regardless of whether the plaintiff's rights were violated under current law.[29]

The second prong of the qualified immunity test concerns only the actions of the official under clearly established law, allowing the court to avoid ruling on the actual constitutionality of the official's conduct.[30] Courts can choose to focus first on the second prong because of a recent United States Supreme Court decision that the order of decision is not mandated.[31] This potential order provides further incentive for plaintiffs not only to demonstrate that their allegedly violated right was clearly established, but also to engage in expansive factual investigation to accentuate how unreasonable the officer's conduct was when arrayed against the clearly established legal framework.[32] Many courts focus on the second prong because it allows for issues to be disposed of fairly yet efficiently, with the least effect on the law, and thereby avoid constitutional issues.[33] Because

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[27] *Rockwell*, 664 F.3d at 990-91 (detailing two-pronged qualified immunity inquiry).

[28] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, 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."); *see also supra* note 2 and accompanying text (explaining development and purpose of qualified immunity).

[29] *See* Hare v. City of Corinth, 135 F.3d 320, 326 (5th Cir. 1998) (noting second prong considers laws as they existed at time of incident); *see also supra* note 23 (describing *Hare* reasoning).

[30] *See Reichle*, 132 S. Ct. at 2093 ("[C]ourts may grant qualified immunity on the ground that a purported right was not 'clearly established' by prior case law, without resolving the often more difficult question whether the purported right exists at all.").

[31] *See* Pearson v. Callahan, 555 U.S. 223, 227 (2009) (holding order of prong analysis not mandatory). The two-prong procedure originated in *Saucier v. Katz*, however, it was overruled just eight years later. Saucier v. Katz, 533 U.S. 194, 197, 200 (2001), *overruled by* Pearson v. Callahan, 555 U.S. 223, 227 (2009). In *Pearson*, the *Saucier* procedure was declared no longer mandatory and instead, courts could "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236.

[32] *See cases cited supra* note 23 and accompanying text (noting second prong's focus on facts).

[33] *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); *see also* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004 (1994) ("The 'last resort rule' dictates that a federal court should refuse to rule on a constitutional

of the focus on the second prong, the plaintiff must advance a strong argument on the reasonableness of the official's actions under the law, because courts may look there first and last.[34] The minutiae of what constitutes a valid claim of excessive force to provide good reasons for a court to avoid the issue by deciding the case on the second prong alone.[35]

In *Tolan v. Cotton*, the Fifth Circuit decided Tolan had not satisfied the second prong of the qualified immunity inquiry and awarded the defendant qualified immunity.[36] Echoing other decisions, the court noted that there was no requirement to analyze the facts against these prongs in any particular order.[37] The court chose to analyze the second prong first, noting that if it found that the plaintiff could not show sufficient evidence that Cotton acted unreasonably, the analysis would proceed no further.[38] Ultimately, the court did not decide the first prong of the analysis, because it held that Tolan had not presented sufficient evidence to show that Cotton's actions were unreasonable.[39] This decision to not consider the first prong and the manner in which the court analyzed the second prong formed the crux of the disagreement in the *Dennis Dissent*.[40]

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issue if the case can be resolved on a nonconstitutional basis.").

[34] *See Pearson*, 555 U.S. at 237 ("Unnecessary litigation of constitutional issues also wastes the parties' resources."). In making this argument in a use of deadly force case, the plaintiff must make a strong factual argument because it is well established that officers have the right to use deadly force when they have a reasonable belief someone is a threat to their safety. *See* Deville v. Marcantel, 567 F.3d 156, 167 (5th Cir. 2009) ("Excessive force claims are necessarily fact-intensive; whether the force used is 'excessive' or 'unreasonable' depends on 'the facts and circumstances of each particular case.'" (quoting Graham v. Connor, 490 U.S. 386, 396 (1989))).

[35] *See* LaCross v. City of Duluth, 713 F.3d 1155, 1158 (8th Cir. 2013) (finding officer's use of taser on plaintiff was not unreasonable in light of then-current law). The Eighth Circuit found that, although the taser causes arguably *de minimis* injuries, it still causes an "excruciating pain," so a plaintiff may be able to show a constitutional violation. *Id.* ("[A]lthough a *de minimis* use of force is insufficient to support a claim, a *de minimis* injury does not necessarily foreclose a claim." (citing Chambers v. Pennycook, 641 F.3d 898, 906 (8th Cir. 2011))). However, the *LaCross* court resolved the case using only the second prong and held that because the incident occurred in 2006, prior to the *Chambers* decision, the officer was not unreasonable because he could have believed that as long as he did not cause more than *de minimis* injury, he would not violate LaCross's Fourth Amendment rights. *Id.*

[36] *Tolan II*, 713 F.3d at 305-06 (setting out its analysis of case in light of precedent).

[37] *Id.* at 305 ("the sequence of analysis is immaterial . . . ." (citing Pearson v. Callahan, 555 U.S. 223 (2009))); *see supra* note 31 and accompanying text (explaining state of law pertaining to order of qualified immunity prong analysis).

[38] *Tolan II*, 713 F.3d at 306 (presenting first prong in cursory fashion before heading into extensive second-prong analysis).

[39] *Id.* ("[W]e do not reach whether Sergeant Cotton's shooting Robbie Tolan violated his Fourth Amendment right against excessive force (as noted, the district court relied on this first prong of qualified-immunity analysis).").

[40] *Dennis Dissent*, 2013 WL 3948950, at *1-2. The panel's opinion considered what law was clearly established in regards to using force and next appropriately considered whether an objectively reasonable officer in Cotton's position would have believed he was acting in accordance

To decide whether Sergeant Cotton's actions were unreasonable, the court quickly first laid down the clearly established law against which it was to judge the facts: police officers can use deadly force when they have an objective and reasonable belief that a suspect presents an immediate threat.[41] The law makes the nature of the threat the most important question, so the court went into detail regarding what Tolan did in the moments preceding his shooting to see if he presented an objectively reasonable threat to Cotton.[42] The court noted that Cotton believed Tolan was a car thief from the moment he arrived on the scene and that when Tolan raised up from his prone position and pulled his arms in towards his body, he constituted an immediate threat.[43] Cotton said Tolan reached towards his waistband, a fact Tolan disputes, but the court found that on the agreed facts the threat still existed.[44] With a threat present, Cotton could not be expected to wait until a weapon was conclusively seen; instead, a split-second decision was appropriate and lawful, allowing Cotton qualified immunity.[45] Despite reaching the same conclusion as the district court, the Fifth Circuit plainly noted it did so on different grounds, citing its desire to avoid constitutional issues.[46]

The Fifth Circuit was correct in using a more cautious order of analysis than the district court in deciding to affirm the case on grounds of qualified immunity.[47] The lower court conducted an equally extensive analysis as the Fifth Circuit, but put the emphasis on the Fourth Amendment claim of excessive force.[48] There is no precedent that mandates a

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with Tolan's constitutional rights. *Tolan II*, 713 F.3d at 306-07 ("[F]or Robbie Tolan to prevent Sergeant Cotton's having qualified immunity, he must show a genuine dispute of material fact on whether every reasonable official would have understood Cotton's using deadly force was objectively unreasonable . . . .") (internal quotations omitted).

[41] *Tolan II*, 713 F.3d at 306 (stating such law is "clearly established").

[42] *Tolan II*, 713 F.3d. at 307-08 (detailing series of events that gave Cotton sense Tolan might be presenting deadly threat). The court noted that Cotton was responding as backup to Edwards, who was detaining two suspected car thieves. *Id.* at 307. Immediately upon arriving at the scene, Cotton had a reasonable belief that there might be a safety threat. *Id.*

[43] *Id.* at 307 (stating that hands drawn into body raised reasonable belief of threat).

[44] *Id.* ("[W]hether Robbie Tolan reached into or toward his waistband does *not* create a genuine dispute of material fact on objective reasonableness . . . .").

[45] *Tolan II*, 713 F.3d at 307 ("Cotton's split-second decision to use deadly force does not amount to the type of 'plain [] incompeten[ce]' necessary to divest him of qualified immunity." (quoting Brumfield v. Hollins, 551 F.3d 322, 326 (5th Cir. 2008))).

[46] *Id.* at 306 ("[A]lthough based on a prong of qualified-immunity analysis different from that relied upon by the district court, Sergeant Cotton is entitled to qualified immunity.").

[47] *See supra* notes 33-34 and accompanying text (discussing virtues of deciding factual issues of second prong before constitutional issues of first prong).

[48] *Tolan I*, 854 F. Supp. 2d at 470-77 (detailing Tolan's claim of whether his Fourth Amendment right against unreasonable seizures was violated).

qualified immunity analysis be undertaken in a set manner and, after *Tolan*, courts in the Fifth Circuit will know to avoid addressing the first prong, if possible.[49] The two-prong procedure arose as a way to resolve a case at the earliest stage of litigation.[50] However, in *Pearson*, the Supreme Court realized that the *Saucier* procedure called constitutional rights into question in every case and decided to instead retreat from a formalized order.[51]

This less formalized order, used here by the Fifth Circuit and now effectively mandated for the lower intra-circuit courts, advances a cornerstone of constitutional jurisprudence: minimalism.[52] While this case may have presented no particular concern of charting new constitutional grounds, it serves all courts well to enter the constitutional arena only if necessary, because doing so, in light of the Court's expressed preference for constitutional avoidance, decreases the likelihood that they will be overturned on appeal.[53] Because the Fifth Circuit made the permissible choice of deciding the second prong first, the analysis became a simple recitation of the facts that gave the officer a reasonable belief of an imminent threat.[54] Reducing a case to that simple analysis, while avoiding implicating the Fourth Amendment, saves judicial resources and protects the Constitution from overreaching interpretation.[55]

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[49] *See* Pearson v. Callahan, 555 U.S 223, 227, 236 (2009) ("[T]he *Saucier* procedure should not be regarded as an inflexible requirement . . . ."); *supra* note 31 and accompanying text (detailing relationship between *Saucier* and *Pearson*).

[50] *See* Saucier v. Katz, 533 U.S. 194, 200-01 (2001) (laying out threshold question of first prong); *see also supra* note 31 and accompanying text (explaining creation of two-prong test). *Saucier* instituted this rigid analysis order in an attempt to quash § 1983 suits at the question of law stage by answering whether an official had violated any constitutional rights rather than undertaking a fact-intensive reasonableness inquiry. *Saucier*, 533 U.S. at 200. The Court rejected the Ninth Circuit's view that a reasonableness inquiry merged with the constitutional inquiry and therefore a jury should decide the close factual allegations. *Id.* Qualified immunity should operate as early as possible in the process because it is a complete immunity, not an affirmative defense. *Id.* at 201-02.

[51] *See supra* note 31 and accompanying text (explaining that *Pearson* overruled mandatory order of *Saucier* two-prong analysis).

[52] *See supra* note 33 and accompanying text (characterizing Supreme Court's choice to decide constitutional issues as last resort).

[53] *See supra* note 30 and accompanying text (explaining courts may grant immunity on grounds that right did not clearly exist without deciding constitutional question).

[54] *Tolan II*, 713 F. 3d at 307 (focusing solely on reasonability of Cotton's belief); *see also supra* notes 10 and 11 (recounting sequence of events); *supra* note 45 and accompanying text (reasoning Cotton had a reasonable belief of imminent threat).

[55] *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (citing virtue of prudent course of avoiding constitutional interpretations); *see also supra* note 33 and accompanying text (outlining judicial theory that cases should be decided on nonconstitutional grounds whenever possible). It is worth noting that while a court's assessment an officer's reasonableness does involve some legal issues, such as whether the law allows the use of deadly force when faced with an imminent threat, it avoids deciding whether t the Fourth

The *Dennis Dissent*, while a minority view signed onto by only one other judge, is worth discussing in the context of what a litigant should emphasize when presenting an argument in a § 1983 suit.[56] The most useful part of this dissent from a denial of an *en banc* rehearing is the way Judge Dennis describes the second prong as whether "the law was so clearly established that an objectively reasonable officer in Cotton's position would have known that his actions violated Robbie and Marian's Fourth Amendment rights."[57] Litigants must focus on the clear establishment of the law and then whether an objectively reasonable person in the same situation would know he or she were violating that law.[58] In doing so, they must advance strong factual arguments because the panel's analysis is now precedent.[59] The *Dennis Dissent* makes the argument that the panel applied the law incorrectly, but at the heart of its text it simply disagrees with the panel's findings of undisputed facts.[60] The *Dennis Dissent* is less useful as a legal argument and instead more useful to see how a litigant must frame his or her arguments.[61]

Amendment has itself been violated, and is therefore consistent with the last resort rule. *See supra* note 16 and accompanying text (detailing Fifth Circuit's view on established law regarding officers' authority to use force).

[56] *See supra* notes 24 and 40 and accompanying text (outlining main argument in *Dennis Dissent*).

[57] *Dennis Dissent*, 2013 WL 3948950 at *3.

[58] *Id.* The *Dennis Dissent* seems to ignore that the panel decision did discuss these exact two points in finding that officers generally have a clearly established "right to use deadly force," and then analyzing the undisputed facts, and finding a reasonable officer in Cotton's shoes would believe he was acting within the law. *Tolan II*, 713 F.3d at 306-07. The panel notes that shooting an unarmed suspect would plainly be unreasonable in light of clearly established law, but instead the circumstances must be considered to decide whether an officer could reasonably believe Tolan was armed. *Id.* at 307 ("[T]he remainder [of the reasonableness analysis] depends upon the totality of the circumstances as viewed by a reasonable, on-the-scene officer without the benefit of retrospection.").

[59] *See supra* note 42 and accompanying text (describing panel's consideration of facts that established reasonability of Cotton's actions).

[60] *Dennis Dissent*, 2013 WL 3948950, at *2 (calling panel's recitation of facts "pro-defendant"). This dissent ignores that Tolan himself does not dispute raising up, in violation of police order, which is itself a violation of the law requiring persons to obey peace officers, nor does Tolan dispute that he raised his arms towards his chest. *Tolan II*, 713 F.3d at 307 ("Robbie Tolan admitted that he drew his outstretched arms toward his chest, did a push-up maneuver, and began turning to his left to face Sergeant Cotton; under the above-described circumstances, these actions could have placed an objectively reasonable officer in, as Sergeant Cotton testified, fear for his life."); *see also* TEX. TRANSP. CODE ANN. § 542.501 (West 2013) ("[A] person may not wilfully fail or refuse to comply with a lawful order . . . of: a police officer.").

[61] *See supra* note 60 and accompanying text (noting *Dennis Dissent*'s shortcomings). The *Dennis Dissent* looks past undisputed facts that would show Tolan constituted a threat: the panel said conclusively that arguing exact arm position did not create a material dispute of fact. *Tolan II*, 713 F.3d at 307 ("[W]hether Robbie Tolan reached into or toward his waistband does *not* create a genuine dispute of material fact on objective reasonableness . . . .").

Given a case that involved a noteworthy victim, an innocent mistake in entering a license plate, and very serious injuries, the Fifth Circuit did well to steer a calm and rational course through the facts. Because it chose to avoid the constitutional issue, the situation largely came down to the facts in the record. To the average citizen, that the officer did not act unreasonably under the law may seem unfair. Despite this impression, it is well established that qualified immunity is meant to protect officials acting in good faith to the extent that all but the plainly incompetent are protected. Further, the holding underscores the importance of § 1983 plaintiffs making clear factual arguments to accentuate the officer's unreasonableness and of introducing compelling evidence to support such arguments. While Robbie Tolan suffered extensive injuries, despite being unarmed and on his own front porch, the court found no relief pursuant to the law. In doing so, the most significant impact was not this one outcome, but the signal the court sent to all the trial courts within its jurisdiction: tread carefully across the Constitution, and avoid venturing into its parameters entirely if at all possible.

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