

FOURTH AMENDMENT STOPS, ARRESTS AND SEARCHES IN THE CONTEXT OF QUALIFIED IMMUNITY

Erwin Chemerinsky^{*}
Karen M. Blum^{**}

INTRODUCTION

DEAN CHEMERINKSKY: A large percentage of Section 1983 actions come from claims of violations of the Fourth Amendment. What I want to do is review the recent Supreme Court cases regarding the Fourth Amendment, and then attempt to apply those cases in the context of Section 1983 litigation. I am going to look at a category of cases, remind you of what the Supreme Court has done in the last few years, offer initial thoughts on the relationship of Section 1983, and then turn to Professor Karen Blum to talk about Section 1983, particularly in the context of qualified immunity.

I. EXCESSIVE FORCE

The first category that I want to talk about is excessive force. As you know, in 1989 in *Graham v. Connor*,¹ the Supreme Court said that claims of excessive force had to be litigated as a Fourth Amend-

^{*} Dean and Distinguished Professor of Law, University of California, Irvine School of Law. This Article is based on a presentation given at the Practising Law Institute's Twenty-Fifth Annual Conference on Section 1983 Civil Rights Litigation, in New York, New York.

^{**} Professor of Law, Suffolk University Law School.

¹ 490 U.S. 386 (1989).

ment matter.² Previously, especially in the Second Circuit under *Johnson v. Glick*,³ due process could be used as a way of presenting excessive force claims.⁴ The Supreme Court in *Graham* rejected that and said excessive force claims had to be brought under the Fourth Amendment.⁵

Earlier this decade the Court decided the most important case in terms of the relationship between excessive force and Section 1983, *Saucier v. Katz*.⁶ The question in *Saucier* was once it is determined that there was an unreasonable use of force, did that then preclude a qualified immunity defense?⁷ The ultimate standard for both excessive force and qualified immunity is one of reasonableness.⁸ Once it has been determined that there is an unreasonable use of force, is it possible to say that it's reasonable? Can there be a reasonable use of unreasonable force? In *Katz*, the Ninth Circuit answered the question in the negative.⁹

In *Saucier*, a demonstrator attended a speech that was being given by former Vice President Gore.¹⁰ He unfurled a banner that protested the Army's treatment of animals.¹¹ He said that he was roughed up when he was arrested.¹² In the oral arguments, some of the Justices, especially Justice O'Connor, said they had seen the tape

² *Id.* at 388.

³ 481 F.2d 1028 (2d Cir. 1973).

⁴ *Id.* at 1032.

⁵ *Graham*, 490 U.S. at 388.

⁶ 533 U.S. 194 (2001).

⁷ *Id.* at 207.

⁸ *Id.* at 204-06.

⁹ *Katz v. United States*, 194 F.3d 962, 968-69 (9th Cir. 1999).

¹⁰ *Saucier*, 533 U.S. at 197.

¹¹ *Id.* at 198.

¹² *Id.* at 199.

and did not see any indication that he was actually roughed up.¹³

The Supreme Court ruled against him nine-to-nothing.¹⁴ The Supreme Court said the determination of whether or not there was qualified immunity was separate and distinct from the question of whether or not there has been excessive force.¹⁵ Justice Kennedy, writing for the Court, said these were different inquiries.¹⁶ Moreover, it is possible early in the proceedings to find there is qualified immunity without even getting to the question of whether or not there was a violation of the Fourth Amendment.¹⁷ *Saucier* was emphatic; it is a two-step inquiry: is there a constitutional violation; and is the law clearly established.¹⁸ But it is clear the determination of whether there is excessive force is separate and distinct from the qualified immunity inquiry.¹⁹

The other case concerning excessive force is *Scott v. Harris*²⁰ from 2007. In *Scott*, a police officer was engaged in a high-speed car chase.²¹ You can watch it yourself by looking at the video, which is on-line.²² The officer radioed in for permission to use a particular maneuver where cars tap to get a suspect to stop.²³ The dispatcher

¹³ Transcript of Oral Argument at *29-30, *Saucier*, 533 U.S. 194 (No. 99-1977), 2001 WL 300596.

¹⁴ *Saucier*, 533 U.S. at 196.

¹⁵ *Id.* at 204.

¹⁶ *Id.*

¹⁷ *Id.* at 209.

¹⁸ *Id.* at 200.

¹⁹ *Saucier*, 533 U.S. at 204.

²⁰ 127 S. Ct. 1769 (2007).

²¹ *Scott*, 127 S. Ct. at 1772.

²² See SupremeCourtUs.gov, Supreme Court of the United States, Index of Opinions/Video—Record 36, Exh. A, available at http://www.supremecourt-us.gov/opinions/video/scott_v_harris.rmvb.

²³ *Scott*, 127 S. Ct. at 1773. Police use a technique called the “Precision Intervention

responded that permission was granted and said, "take him out."²⁴ The officer radioed back and said the car was going too fast to use this maneuver.²⁵ Instead, the officer rammed the car.²⁶ In the resulting crash, the driver was permanently and seriously injured and subsequently sued.²⁷

The district court said that the issue of excessive force was a matter for a jury to determine.²⁸ The Eleventh Circuit, generally known to disfavor plaintiffs in Section 1983 qualified immunity cases, said the decision could go to the jury.²⁹ The Supreme Court reversed.³⁰ In fact, it was an eight-to-one decision to reverse, with only Justice Stevens dissenting.³¹

What was striking while reading the transcript of the oral argument was how much the Justices referred to their watching the videotape and the conclusions they drew from it.³² In *Scott*, the Supreme Court concluded there was not excessive force; the use of the maneuver ramming the car was justified under the circumstances.³³ I think one of the most compelling arguments made by the victim was that there was no need to ram the car or to conduct the high-speed car

Technique" ("PIT"), which causes the vehicle to spin to a stop. *Id.*

²⁴ *Id.*

²⁵ *Id.* at 1773 n.1.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Scott*, 127 S. Ct. at 1773.

²⁹ *Id.*

³⁰ *Id.* at 1774.

³¹ *Id.* at 1772.

³² See generally Transcript of Oral Argument, *Scott*, 127 S. Ct. 1769 (No. 05-1631), 2007 WL 601927.

³³ *Scott*, 127 S. Ct. at 1778.

chase.³⁴ The officer had the license plate number of the car.³⁵ The officer could have let the car go, and then come back and arrested him.³⁶ Instead, the Supreme Court said that since the driver led the officer on the high-speed chase, the driver is in no position to be able to complain that the high-speed chase occurred with the injuries that resulted from it. What I find particularly troubling in this case is the issue about the appropriate role of the Court of Appeals for the Eleventh Circuit in viewing the evidence for itself.

Videotapes are becoming increasingly available. An increasing number of police cars are equipped with video cameras. There is more occasion for a court of appeals to assess the evidence on its own; but is that the appropriate role of the court of appeals? The Supreme Court found eight-to-one in these circumstances that it was not excessive force.³⁷ Those are the recent cases, and I do think it is striking that we have these Section 1983 cases regarding excessive force.

PROFESSOR BLUM: These cases are, I think, very difficult, especially when the qualified immunity issue is raised. In most excessive force cases there are questions of fact, and it is about whom and what the jury is going to believe. This creates a number of problems.

In the *Saucier* case, the plaintiff's argument was essentially, how can you have objectively unreasonable use of force under the

³⁴ Transcript of Oral Argument at *37, *Scott*, 127 S. Ct. at 1769.

³⁵ *Scott*, 127 S. Ct. at 1773.

³⁶ *Id.* at 1783 (Stevens, J., dissenting).

³⁷ *Id.* at 1772.

Fourth Amendment that is objectively reasonable within the meaning of qualified immunity?³⁸ How does that work? A jury might find the use of a Taser or some novel equipment the police have to be objectively unreasonable under the circumstances under the Fourth Amendment. Depending upon the facts, a judge might still decide there was not much law out there on the use of Tasers, so the legal constraints were not unclear. This might be a case where because the legal constraints were not particularly clear, a reasonable officer might reasonably believe this use of force, even though objectively unreasonable under the Fourth Amendment, is objectively reasonable for purposes of qualified immunity.

It gives the officer a second, if not a third, bite at the apple, because the substantive standard under the Fourth Amendment is very deferential towards the officer, taking into consideration the totality of the circumstances. For example, suppose an officer used deadly force against a suspect whom he believed had a gun, and the object turned out to be a cell phone. If the jury believes the officer perceived a gun, and that the mistake of fact was reasonable, there should not be any Fourth Amendment violation. The use of force would be objectively reasonable. But there might be cases in which it is not a mistake of fact. For example, everybody agrees on the fact that a suspect was Tasered two or three times while handcuffed, but still kicking. Is that objectively reasonable or not?

The jury may find it is objectively unreasonable under the Fourth Amendment to use the Taser on someone who is handcuffed,

³⁸ *Saucier*, 533 U.S. at 204.

even if he is still kicking. The judge may say there is no case law out there making the legal constraints clear, so the officer should have qualified immunity. The idea that an officer might have qualified immunity in an excessive force case, I think is acceptable under some circumstances. In most of these excessive force cases, if the jury believes the plaintiff, the use of force is going to be objectively unreasonable and there is not going to be qualified immunity. But you are going to have the rare case where you could have both unreasonable force and qualified immunity due to the lack of clarity in the law.

An interesting question is what makes the law clearly established? Obviously, if you have a Supreme Court case on point, the law will be clearly established. Beyond that, most of the courts of appeal advise looking to your own circuit. If there is a case on point or controlling precedent from your circuit, that will make the law clearly established, even if other circuits may disagree.³⁹ If there is nothing from your circuit, you can look to the highest court of the state in which you are sitting. You can also look to the “consensus of persuasive authority” from other circuits.⁴⁰ The Second and the Elev-

³⁹ See, e.g., *Owens by and through Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004) (“Whether a right has been specifically adjudicated or is manifestly apparent from broader applications of the constitutional premise in question, we look ordinarily to ‘the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose’ When there are no such decisions from courts of controlling authority, we may look to ‘a consensus of cases of persuasive authority’ from other jurisdictions, if such exists.”) (internal citations omitted). See also *Hubbard v. Taylor*, 538 F.3d 229, 236, 238 (3rd Cir. 2008) (Neither the Supreme Court nor the Third Circuit has “established a right of pre-trial detainees to be free from triple-celling or from sleeping on a mattress placed on the floor. . . . In the absence of direct authority from the Supreme Court or this Court, the Defendants in this case were not obliged to familiarize themselves with, and adhere to, the decisions of district courts outside their jurisdiction when the very court to whose jurisdiction they were subject repeatedly approved of their practices at Gander Hill.”).

⁴⁰ See, e.g., *Williams v. Bitner*, 455 F.3d 186, 194 (3d Cir. 2006) (“In sum, we hold that the Prison Officials are not entitled to qualified immunity from Williams’s First Amendment

enth Circuits are the only ones that do not look outside of their own circuit on the clearly established law prong.⁴¹ District court opinions generally do not count for much.

DEAN CHEMERINSKY: That of course raises the question of to what extent does there have to be cases in order to say there is clearly established law? I think the Supreme Court has been very inconsistent, and certainly the lower courts are very inconsistent. I can point to Supreme Court cases that say you do not need a case on point in order to say there is clearly established law.

*Hope v. Pelzer*⁴² is the best example of that. In *Hope*, prison guards put a prisoner on the hitching post and left him in the hot sun.⁴³ The Eleventh Circuit found it was cruel and unusual punishment, but there was no case on point.⁴⁴ The Supreme Court reversed six-to-three.⁴⁵ Justice Stevens, writing for the Court said there need not be a case on point; a case on point was sufficient but it is not nec-

claim. Although we had not yet addressed the issue raised here at the time of the incident, the Fifth, Seventh, and Eighth Circuits had addressed First Amendment claims similar to Williams's and held that prison officials must respect and accommodate, when practicable, a Muslim inmate's religious beliefs regarding prohibitions on the handling of pork. Moreover, decisions from the Supreme Court and this Court support the principles underlying the right asserted by Williams. We therefore conclude that the state of the law at the time the violation occurred gave the Prison Officials 'fair warning' that their alleged treatment of Williams was unconstitutional.").

⁴¹ See, e.g., *Pabon v. Wright*, 459 F.3d 241, 255 (2d Cir. 2006) ("When neither the Supreme Court nor this court has recognized a right, the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit."); *Vinyard v. Wilson*, 311 F.3d 1340, 1348 n.11 (11th Cir. 2002) ("Although we cite and examine other circuits' and district courts' decisions under the first prong of *Saucier*, we point out that these decisions are immaterial to whether the law was 'clearly established' in this circuit for the second prong of *Saucier*.").

⁴² 536 U.S. 730 (2002).

⁴³ *Id.* at 734-35.

⁴⁴ *Id.* at 736.

⁴⁵ *Id.* at 732.

essary.⁴⁶

An earlier case, *United States v. Lanier*,⁴⁷ should for the same proposition. But then there are Supreme Court cases that focus very much on whether there is a case on point. In *Wilson v. Layne*,⁴⁸ the Supreme Court addressed the question of whether or not police violated the Fourth Amendment by allowing reporters to come with them in the search of a home.⁴⁹ The Court held eight-to-one that there was qualified immunity.⁵⁰

The last Supreme Court decision in this sequence is *Brosseau v. Haugen*,⁵¹ which analyzed the lack of cases on point in finding there is qualified immunity.⁵² Note the contrast between the circuit cases that say you do not need a case on point, so long as the reasonable officer knows that it is wrong, and other circuit court cases that say there is not a case on point and not a case in this circuit for determining it. Depending on whether you are a plaintiff or a defendant, you do not have plenty of authority in this regard.

Hope uses the words “fair notice” and “fair warning”;⁵³ would a reasonable officer have fair notice, fair warning? Certainly it is obvious the defendant in *Hope* had fair warning and fair notice.⁵⁴ But that may be a more plaintiff-friendly standard.

⁴⁶ *Id.* at 741.

⁴⁷ 520 U.S. 259 (1997) (holding that officials will be on notice that their conduct violates constitutional rights even in novel factual circumstances).

⁴⁸ 526 U.S. 603 (1999).

⁴⁹ *Id.* at 605-06.

⁵⁰ *Id.*

⁵¹ 543 U.S. 194 (2004).

⁵² *Id.* at 201.

⁵³ *Hope*, 536 U.S. at 739-40.

⁵⁴ *Id.* at 741.

PROFESSOR BLUM: I think the Supreme Court is speaking out of both sides of its mouth in these cases, depending on the targeted audience. In *Hope*, the Supreme Court addressed the Eleventh Circuit, criticizing its approach to qualified immunity as being overly rigid and suggesting, in essence, that they “lighten up.” Fair warning is all you need.⁵⁵ You do not need the case on all fours.⁵⁶

In the other cases, *Saucier* and *Brosseau*, the Supreme Court addressed the Ninth Circuit, where virtually every case went to trial.⁵⁷ No officer was given qualified immunity in an excessive force case because it was always a question of fact.⁵⁸ So in those cases, the Supreme Court insisted that more attention be given to the facts in the case at hand and that the right be defined with more particularity.⁵⁹

As Dean Chemerinsky said, plaintiffs cite to *Hope* because that is a favorable standard for them. The plaintiff need only show that the defendant had fair warning of his or her unlawful behavior. Defendants, on the other hand, are citing to *Brosseau*, *Saucier*, and *Wilson*, arguing that more specific precedent is needed for plaintiffs to overcome the qualified immunity defense. In fact, in *Brosseau*, the Supreme Court found that the law was not clearly established because there was no case that “squarely governed.”⁶⁰ How is that so different from what the Eleventh Circuit was saying? So you have mixed signals being sent out.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See *Saucier*, 533 U.S. at 194; *Brosseau*, 543 U.S. at 194.

⁵⁸ See *Saucier*, 533 U.S. at 194; *Brosseau*, 543 U.S. at 194.

⁵⁹ See *Saucier*, 533 U.S. at 194; *Brosseau*, 543 U.S. at 194.

⁶⁰ *Brosseau*, 543 U.S. at 201.

As much as I criticize the Eleventh Circuit, I think *Vinyard v. Wilson*⁶¹ establishes a very good structure for deciding when the law is clearly established or into what category a case might fall. Basically, the Eleventh Circuit said you are going to have cases where it is obvious that you do not need a case on point because the language of the statute or the language of the constitutional provision is so clear, and the conduct is so wrong that anybody would know that this is unlawful.⁶² For example, the cases of *Groh v. Ramirez*⁶³ and *Jones v. Hunt*⁶⁴ are good examples of such cases.

Then you have the second category of cases where the Court says there may be general principles of law announced in cases with a certain set of facts, but the general principles are not tied to those facts, so those general principles might apply with obvious clarity to a different set of facts.⁶⁵ *DeMayo v. Nugent*⁶⁶ and *Landis v. Baker*⁶⁷ fall into this category. In *Landis*, the Sixth Circuit held that its precedent holding the gratuitous or excessive use of pepper spray applied with obvious clarity to the excessive use of a Taser and

⁶¹ 311 F.3d 1340 (11th Cir. 2002).

⁶² *Id.* at 1355.

⁶³ 540 U.S. 551, 563 (2004) (finding that a search warrant was so obviously deficient that the resultant search must be regarded as warrantless and therefore presumptively unreasonable).

⁶⁴ 410 F.3d 1221, 1230 (10th Cir. 2005) (finding that the Fourth Amendment violation was “both obvious and outrageous, and that it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted”) (internal quotation marks omitted).

⁶⁵ See *DeMayo v. Nugent*, 517 F.3d 11, 18 (1st Cir. 2008) (stating “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful”) (internal quotation marks omitted).

⁶⁶ *Id.*

⁶⁷ Nos. 07-2360, 07-2361, 2008 WL 4613547 (6th Cir. Oct. 16, 2008).

should have put officers on notice that their conduct was unlawful.⁶⁸

The third category requires precedent with facts that are very close to the facts in the case before the court to defeat qualified immunity. Here, the legal principles announced in the precedent are closely tied to a particular factual situation, and a defendant will be entitled to qualified immunity unless the plaintiff can show that the facts of his case are not “fairly distinguishable” from the facts in the precedential decision. As the Eleventh Circuit explained, “When fact-specific precedents are said to have established the law, a case that is fairly distinguishable from the circumstances facing a government official cannot clearly establish the law for the circumstances facing that government official; so, qualified immunity applies.”⁶⁹ By placing your case into one of these categories, you can figure out what you need to surmount the clearly-established-law hurdle.

II. ARREST-RELATED CASES

DEAN CHEMERINSKY: Let me move to the second category of Fourth Amendment cases; arrest-related cases. Statistically, a significant percentage of the Section 1983 Fourth Amendment cases deal with claims of illegal arrest. We will discuss a few recent Supreme Court cases about arrest, and then I will come back when we cover car searches and deal with arrests that relate to the car context.

In *Maryland v. Pringle*,⁷⁰ a police officer lawfully stopped a car occupied by three men and observed drugs and money in the

⁶⁸ *Id.* at *10.

⁶⁹ *Vinyard*, 311 F.3d at 1352.

⁷⁰ 540 U.S. 366 (2003).

car.⁷¹ The officer told the men that if one of them admitted to ownership of the drugs and money, only that person will be arrested.⁷² All three denied ownership of the items.⁷³ The officer arrested all three of them.⁷⁴ The question became whether the arrest was a lawful arrest under those circumstances.⁷⁵ If there is reason to believe the contraband belongs to one person, is there probable cause for three arrests? The Supreme Court, in an opinion by Chief Justice Rehnquist, held it was a lawful arrest under the circumstances.⁷⁶ Where the officer sees there is contraband and there are three people who might reasonably be linked to it, and the officer cannot sort it out, it is permissible to arrest all three.⁷⁷

In *Virginia v. Moore*,⁷⁸ a police officer stopped a driver for a relatively minor traffic violation of an expired license.⁷⁹ Under Virginia law, just a citation should have been issued.⁸⁰

In violation of Virginia law, the officer arrested the individual.⁸¹ The officer told the driver he wanted the driver to take the officer to where the driver lived.⁸² When they got to the driver's residence, the officer realized he never did a search incident to the

⁷¹ *Id.* at 367-68.

⁷² *Id.* at 368.

⁷³ *Id.* at 368-69.

⁷⁴ *Id.* at 369.

⁷⁵ *Pringle*, 540 U.S. at 370.

⁷⁶ *Id.* at 374.

⁷⁷ *Id.* at 372.

⁷⁸ 128 S. Ct. 1598 (2008).

⁷⁹ *Id.* at 1601.

⁸⁰ *Id.* at 1602.

⁸¹ *Id.*

⁸² *Id.* at 1601 n.1.

arrest.⁸³ He conducted the search incident to the arrest and found drugs in the driver's pocket.⁸⁴

The driver brought a suppression motion.⁸⁵ The Virginia Supreme Court ruled in favor of the driver as a matter of Fourth Amendment law.⁸⁶ It turns out Virginia does not have the exclusionary rule as a matter of Virginia law.⁸⁷ Of course the Virginia Supreme Court obeys the Fourth Amendment, where the Fourth Amendment requires the exclusionary rule.⁸⁸ The Virginia Supreme Court held that because the subject arrest was illegal as a matter of Virginia law, the search that followed it violated the Fourth Amendment. Therefore, the Fourth Amendment required that the search incident to the arrest be suppressed.⁸⁹ The United States Supreme Court unanimously reversed.⁹⁰

Justice Scalia wrote the opinion for the Court.⁹¹ Justice Scalia stated that the only relevant question is whether or not there was probable cause from a Fourth Amendment perspective.⁹² Since there was probable cause that this individual violated state law, the fact that it was an illegal arrest under state law did not matter for purposes of Fourth Amendment analysis.⁹³

⁸³ *Morre*, 128 S. Ct. at 1601 n.1.

⁸⁴ *Id.* at 1601.

⁸⁵ *Id.* at 1602.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Moore*, 128 S. Ct. at 1602.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1601.

⁹¹ *Id.*

⁹² *Id.* at 1605.

⁹³ *Moore*, 128 S. Ct. at 1608.

In *Atwater v. City of Lago Vista*,⁹⁴ a police officer in Texas observed a woman driving in a pickup truck with her two children in the front seat without seatbelt restraints.⁹⁵ The officer pulled her over to issue her a ticket.⁹⁶ There was a verbal altercation between the driver and the officer, and finally the officer said, “You’re going to jail.”⁹⁷ After a friend came upon the scene and took the children, the officer put the woman in the squad car and drove her to the station house where she was booked and held until arraignment.⁹⁸

The question presented was whether there was a violation of the Fourth Amendment when an individual is arrested for a minor traffic infraction?⁹⁹ The Supreme Court, ruling five-to-four, found no violation of the Fourth Amendment.¹⁰⁰ It was an unusual split among the Justices. Justice Souter wrote the opinion for the court.¹⁰¹ His opinion was joined by Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, and Justice Thomas.¹⁰² Justice O’Connor joined with Justices Stevens, Ginsburg, and Breyer for the dissent.¹⁰³ Justice Souter’s majority opinion said that where there is probable cause, there can be a custodial arrest even for a minor infraction.¹⁰⁴ However, Justice Souter noted this was not an instance where the arrest

⁹⁴ 532 U.S. 318 (2001).

⁹⁵ *Id.* at 323-24.

⁹⁶ *Id.* at 324.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Atwater*, 532 U.S. at 326.

¹⁰⁰ *Id.* at 322.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Atwater*, 532 U.S. at 354.

was illegal under state law.¹⁰⁵

In *Virginia v. Moore*, the arrest was illegal under state law.¹⁰⁶ Nonetheless, nine-to-nothing, the Supreme Court said that there was no violation of the Fourth Amendment for the arrest under those circumstances.¹⁰⁷ Justice Scalia said that if the state wants as a matter of state law to exclude the evidence, it can do so.¹⁰⁸ As a matter of Fourth Amendment law, so long as there is probable cause for arrest, it is lawful and the fruits of the search do not need to be suppressed.¹⁰⁹

PROFESSOR BLUM: It is pretty consistent if you consider the two articulated requirements for a Section 1983 claim: you must have conduct under color of state law and conduct that violates a federal statutory or constitutional right.¹¹⁰ It is clear that a violation of state law does not give rise to a claim under Section 1983.¹¹¹

III. SEARCH OF THE HOME

DEAN CHEMERINSKY: Let me talk about a third category of cases; search of the homes cases. Surprisingly there are a number of major Supreme Court cases in recent years, but what I think is more surprising is most of them have come about in the Section 1983 context. We have three cases that have been decided; and one case

¹⁰⁵ *Id.* at 344.

¹⁰⁶ *Moore*, 128 S. Ct. at 1602.

¹⁰⁷ *Id.* at 1608.

¹⁰⁸ *Id.* at 1606.

¹⁰⁹ *Id.* at 1607.

¹¹⁰ 42 U.S.C. § 1983 (1996).

¹¹¹ *See Moore*, 128 S. Ct. at 1598. *See also* *Steen v. Myers*, 486 F.3d 1017, 1023 (7th Cir. 2007) (“[A] failure to comply with departmental policy does not implicate the Constitutional protections of the Fourteenth Amendment.”).

on the docket this term that is enormously important in the qualified immunity context.

The first case is *Muehler v. Mena*,¹¹² in which I participated as counsel. Unfortunately, we lost nine-to-nothing.¹¹³ In *Muehler*, the police were looking for a particular gang member to question him.¹¹⁴ They obtained a warrant to search a home they believed the individual was residing in.¹¹⁵ They executed the search warrant at seven in the morning and the only person present was a young woman by the name of Iris Mena.¹¹⁶

Not surprisingly, since the police arrived at seven in the morning, Ms. Mena was asleep and she was dressed in a nightshirt.¹¹⁷ They took her out in the cold and they held her for about two hours while they searched the house for this particular gang member.¹¹⁸ It turned out they found this man at another location.¹¹⁹ They briefly questioned him and let him go, so he was released while Iris Mena was still being detained.¹²⁰ The police brought INS agents to question her.¹²¹ She was a lawful United States citizen, but they held her for two hours nonetheless.¹²² The question presented was, whether it is permissible to detain an individual when there is absolutely no rea-

¹¹² 544 U.S. 93 (2005).

¹¹³ *Id.* at 94.

¹¹⁴ *Id.* at 95.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 106.

¹¹⁷ *Muehler*, 544 U.S. at 107 (Stevens, J., concurring).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 96 (majority opinion).

¹²² *Muehler*, 544 U.S. at 96.

son to believe that individual has done anything wrong?¹²³ What they were searching for was a particular gang member.¹²⁴ He obviously was not in the house.¹²⁵ She was alone in the house.¹²⁶ Can you detain her?

The Supreme Court held that it was permissible to detain Ms. Mena while the search of the house was going on.¹²⁷ The Supreme Court relied on an earlier case, *Michigan v. Summers*,¹²⁸ which held that when there is a search of a home the occupants of the home can be detained.¹²⁹ The Supreme Court reiterated in *Muehler* that an occupant can be detained so as to make sure they do not interfere with the police and their searching.¹³⁰ An individual can be detained for a reasonable amount of time to answer any questions the police may have, or to unlock things that the police have the right to search.¹³¹

The court remanded to the Ninth Circuit on the question of whether or not the length of the detention of Ms. Mena was reasonable.¹³² Ultimately, the Ninth Circuit affirmed.¹³³ The Supreme Court emphatically reaffirmed that the government may detain individuals, even individuals about whom there is no suspicion if they are in the home at the time the search is being executed.¹³⁴

¹²³ *Id.*

¹²⁴ *Id.* at 95.

¹²⁵ *Id.* at 107 (Stevens, J., concurring).

¹²⁶ *Id.*

¹²⁷ *Muehler*, 544 U.S. at 95 (majority opinion).

¹²⁸ 452 U.S. 692 (1981).

¹²⁹ *Id.* at 705.

¹³⁰ *Muehler*, 544 U.S. at 98.

¹³¹ *Id.*

¹³² *Id.* at 102.

¹³³ *Mena v. City of Simi Valley*, 156 Fed. App'x 24, 27 (9th Cir. 2005).

¹³⁴ *Muehler*, 544 U.S. at 98.

The second search of the home case that received a great deal of media attention was *Georgia v. Randolph*.¹³⁵ The police responded to a domestic disturbance call.¹³⁶ The wife answered the door and the police asked if they could come in and look around.¹³⁷ The wife agreed and added that her husband had cocaine upstairs in the bedroom and invited the police to go find it.¹³⁸

The husband was present and told the police they did not have his permission to search the home.¹³⁹ The police went in and found cocaine.¹⁴⁰ The issue is whether the police can search a home when one occupant gives consent but the other occupant who is the target of the search refuses consent.¹⁴¹ The Supreme Court, five-to-three, held no; there cannot be a search under those circumstances.¹⁴² If the target of the search is present and does not give consent, then the police under those circumstances cannot search the home.¹⁴³ Justice Souter wrote the opinion for the Court.¹⁴⁴ Chief Justice Roberts wrote quite a vehement dissent.¹⁴⁵ This raises interesting questions. What if the police went down the street, sat in their squad cars and waited until the husband was no longer there; came back and said to the wife who was the only one home, can we come in and search

¹³⁵ 547 U.S. 103 (2006).

¹³⁶ *Id.* at 107.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Randolph*, 547 U.S. at 107.

¹⁴¹ *Id.* at 106.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 105.

¹⁴⁵ *Randolph*, 547 U.S. at 141 (“[T]he majority has taken a great deal of pain in altering Fourth Amendment doctrine, for precious little (if any) gain in privacy.”) (Roberts, J., dissenting).

now? Does the earlier refusal of the husband matter? Obviously, then you have the question how much time must elapse. In that instance the Supreme Court was quite protective with regard to the search of the homes.¹⁴⁶

The third case, and a more recent case, is *Brigham City, Utah v. Stuart*.¹⁴⁷ In *Stuart*, the police got a call of a disturbance at three in the morning about a loud noise from a party.¹⁴⁸ The police responded and observed a party in the backyard where it appeared that teenagers were drinking beer.¹⁴⁹ The police peered into the window and saw a man hit a teenager, and it appeared the teen was spitting blood.¹⁵⁰ The officers, upon seeing the punch being thrown, immediately went into the house.¹⁵¹ The issue is whether those were exigent circumstances?¹⁵² The Supreme Court has always been extremely protective of the home as a special place.¹⁵³ The Supreme Court has held that without a warrant, generally the police can only enter if it was either hot pursuit or exigent circumstances.¹⁵⁴

Were these exigent circumstances? The Utah Supreme Court found this to be an illegal entry in violation of the Fourth Amend-

¹⁴⁶ *Id.* at 114-15.

¹⁴⁷ 547 U.S. 398 (2006).

¹⁴⁸ *Id.* at 400-01.

¹⁴⁹ *Id.* at 401.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Stuart*, 547 U.S. at 402.

¹⁵³ *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“ ‘At the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’ ”) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)); *Wilson*, 526 U.S. at 610 (observing that “[t]he Fourth Amendment embodies [a] centuries-old principle of respect for privacy of the home”).

¹⁵⁴ *Stuart*, 547 U.S. at 403.

ment.¹⁵⁵ Notice there is a pattern of state supreme courts, as a matter of Fourth Amendment law, being more protective of the Section 1983 plaintiffs' Fourth Amendment rights, but the Supreme Court has reversed, like in *Virginia v. Moore*.¹⁵⁶

In *Stuart*, the Supreme Court reversed and Chief Justice Roberts wrote the opinion for the court.¹⁵⁷ Chief Justice Roberts said police may enter a home without a warrant if there are exigent circumstances.¹⁵⁸ He said if police reasonably believe that safety is in danger in your home, they can enter.¹⁵⁹ Here, Chief Justice Roberts said once the police saw the punch was thrown, that was justification to believe there was a threat to safety and they can enter the home.¹⁶⁰

The case that is pending for this term is *Pearson v. Callahan*.¹⁶¹ The question is if a person gives consent for one individual with law enforcement affiliation to enter a home, does that give consent for others to enter?¹⁶² In *Pearson*, a person who was involved in a drug transaction brought a police informant into the house, with consent.¹⁶³

Once that person came into the house, the other officers immediately followed.¹⁶⁴ The person gave consent for one individual;¹⁶⁵

¹⁵⁵ *Id.* at 402.

¹⁵⁶ *See id.* at 398; *Moore*, 128 S. Ct. at 1598.

¹⁵⁷ *Stuart*, 547 U.S. at 399.

¹⁵⁸ *Id.* at 403.

¹⁵⁹ *Id.* at 406-07.

¹⁶⁰ *Id.* at 406.

¹⁶¹ *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007), *cert granted sub nom.*, *Pearson v. Callahan*, 128 S. Ct. 1702 (2008). *See infra* text accompanying note 168.

¹⁶² Transcript of Oral Argument at *6-7, *Pearson*, 128 S. Ct. at 1702 (No. 07-751), 2008 WL 4565749.

¹⁶³ *Callahan*, 494 F.3d at 893.

¹⁶⁴ *Id.*

is there some notion that there is derivative consent or ongoing consent that would make this permissible? This is in the context of a Section 1983 suit, and the Supreme Court said they are also going to consider the issue of whether there must always be a two-step inquiry that *Saucier* and *Wilson* prescribed; do courts need to first determine whether there was a constitutional violation before getting to the issue of qualified immunity?¹⁶⁶

It is going to be important as a Fourth Amendment case, probably even more important with regard to the sequence of analysis for qualified immunity.

PROFESSOR BLUM: The *Pearson* case is definitely one to watch because the Court, *sue sponte*, asked the parties to brief the issue of whether *Saucier* should be overruled in terms of the mandatory two-step analysis. If you read the oral argument transcript, there is no question that they are going to get rid of the mandatory two-step analysis.¹⁶⁷ As Dean Chemerinsky said, it is just a question of what will replace it.¹⁶⁸

¹⁶⁵ *Id.*

¹⁶⁶ Transcript of Oral Argument at *24-25, *Pearson*, 128 S. Ct. at 1702.

¹⁶⁷ *Id.*

¹⁶⁸ The Supreme Court has now rendered its opinion in *Pearson v. Callahan*, 129 S. Ct. 808 (2009). In an unanimous opinion authored by Justice Alito, the Court reexamined the mandatory constitutional-question-first procedure required by *Saucier* and concluded “that a mandatory, two-step rule for resolving all qualified immunity claims should not be retained.” 129 S. Ct. at 817. The Court acknowledged much of the criticism that had been leveled at the “rigid order of battle” by lower court judges and by members of the Court. *Id.* The Court justified its overruling of precedent by highlighting the various criticisms that have been directed at *Saucier*’s two-step protocol: (1) Deciding the constitutional question first often results in substantial expenditures of resources by both the parties and the courts on “questions that have no effect on the outcome of the case.” *Id.* at 818. (2) The development of constitutional doctrine is not furthered by decisions that are often “so fact-bound that the decision provides little guidance for future cases.” *Id.* at 819. (3) It makes little sense to have lower courts forced to decide a constitutional question that is pending in a higher court or before an en banc panel. *Id.* (4) It likewise does little to further the development of

The substantive Fourth Amendment issue is the doctrine of

constitutional precedent to force a decision that depends on “an uncertain interpretation of state law.” *Id.* (5) Requiring a constitutional decision at the pleading stage based on bare or sketchy allegations of fact or one at the summary judgment stage resting on “woefully inadequate” briefs creates a risk of “bad decisionmaking.” *Id.* at 820. (6) The mandated two-step analysis often shields constitutional decisions from appellate review when the defendant loses on the “merits” question but prevails on the clearly-established-law prong of the analysis. Such unreviewed decisions may then have “a serious prospective effect” on conduct. *Id.* (7) Finally, the approach requires unnecessary determinations of constitutional law and “departs from the general rule of constitutional avoidance.” *Id.* at 821.

While abandoning the mandatory nature of two-step analysis, the Court continued to recognize that the approach can be beneficial in promoting “the development of constitutional precedent,” *Id.* at 818, and “is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.” *Id.* In the end, the Court has left it to the lower court judges to decide, as a matter of discretion, what “order of decisionmaking will best facilitate the fair and efficient disposition of each case.” *Id.* at 821. The Court addressed expressed “misgivings” about its decision. First, the *Saucier* approach is not prohibited; it is simply no longer mandated. Second, constitutional law will continue to develop in other contexts, such as criminal cases, cases involving claims against government entities and cases involving claims for injunctive relief. Third, the Court does not predict a flood of suits against local governments by plaintiffs pursuing novel claims. *Id.* at 821, 822. Nor does the Court anticipate a new “cottage industry of litigation” over the proper standards to use in deciding whether to reach the merits in a given case. *Id.* at 822.

Without addressing or overruling the constitutional holding of the Court of Appeals, the Court reversed the Tenth Circuit on the grounds that the law on the “consent-once-removed” doctrine was not clearly established at the time of the challenged conduct such that a reasonable officer would have understood the conduct here to be unlawful. As the Court explained:

When the entry at issue here occurred in 2002, the ‘consent-once-removed’ doctrine had gained acceptance in the lower courts. This doctrine had been considered by three Federal Courts of Appeals and two State Supreme Courts starting in the early 1980’s. It had been accepted by every one of those courts. Moreover, the Seventh Circuit had approved the doctrine’s application to cases involving consensual entries by private citizens acting as confidential informants. The Sixth Circuit reached the same conclusion after the events that gave rise to respondent’s suit, and prior to the Tenth Circuit’s decision in the present case, no court of appeals had issued a contrary decision. The officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on “consent-once-removed” entries. The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions. . . . [H]ere, where the divergence of views on the consent-once-removed doctrine was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct.

129 S. Ct. at 822, 823 (internal citations omitted).

consent once removed which provides that when the person to whom consent is given inside the house is an undercover police officer—even though the individual does not know he is a police officer—the consent to that police officer operates as consent to the other officers to come in.¹⁶⁹

From my experience, most policemen would get a warrant before they entered even when it is a police officer who is in there. But there is this doctrine of consent-once-removed when the undercover person is a police officer. So the issue in the *Pearson* case was when the person is a civilian undercover operative and not a police officer, does the consent-once-removed doctrine apply?¹⁷⁰

The Tenth Circuit held that the doctrine of consent-once-removed does not apply when the undercover operative is a private individual, not a police officer.¹⁷¹ The court also denied qualified immunity, finding that the law was clearly established that without consent or exigent circumstances, a warrantless entry of the home was unlawful.¹⁷² Other circuits, such as the Sixth and Seventh Circuits, had cases that said the consent-once-removed doctrine does apply when the undercover operative is not a police officer.¹⁷³

Even if the *Saucier* two-step analysis is not mandatory, this is

¹⁶⁹ *United States v. Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995) (stating that the doctrine of consent once removed applies “where the undercover agent or government informant: (1) entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search; and (3) immediately summoned help from other officers”).

¹⁷⁰ Transcript of Oral Argument at *17, *Pearson*, 128 S. Ct. at 1702.

¹⁷¹ *Callahan v. Millard County*, 494 F.3d 891, 897 (10th Cir. 2007), *rev'd on other grounds by Pearson v. Callahan*, 129 S. Ct. 808 (2009).

¹⁷² *Callahan*, 494 F.3d at 899.

¹⁷³ *Akinsanya*, 53 F.3d at 856; *United States v. Yoon*, 398 F.3d 802 (6th Cir. 2005).

a case where it makes sense to reach the merits question, because it is an issue that I suspect will come up many times, an issue on which both police and citizens could use guidance. It is not so fact-specific that you would be announcing a principle that would be applied in only one case. On the other hand, it is an issue that will be raised and can be decided in the context of a criminal suppression hearing, where it might be better briefed and more fully explored than in the qualified immunity setting.

DEAN CHEMERINSKY: There are many cases that say once a person has said one officer may come in, another office can come in without needing separate consent.¹⁷⁴ I do not believe there are Supreme Court cases on this, but I think most of the circuits have gone in that direction. However, they have differed on how far the rule should be extended.¹⁷⁵

PROFESSOR BLUM: Additionally, there is another doctrine dealing with the consent required of officers before entering into the home: the “fellow officer rule.” The fellow officer rule says that if a police officer is in the home, the knowledge of that officer could be imputed to the other officers, who can then rely on that as probable cause.¹⁷⁶ I think the other issue here is, why do you need to rely on consent; if you have time to get a warrant, why aren’t you getting the warrant?

¹⁷⁴ *Akinsanya*, 53 F.3d. at 856.

¹⁷⁵ Circuit Review Staff, *Current Circuit Splits*, 4 SETON HALL CIR. REV. 129, 146 (2007).

¹⁷⁶ Judge Robert W. Lee, *The Fellow Officer Rule and the Officer Assistance Statute in Florida: Separate Assessments of Probable Cause*, 73 FLA. B.J. 55, 55 (1999).

IV. CAR AND PASSENGER SEARCHES

DEAN CHEMERINSKY: The next category is the search of cars and passenger cases. In terms of the Supreme Court, the largest number of Fourth Amendment cases this year have involved various aspects of automobile searches of drivers and passengers.¹⁷⁷ I always find these cases somewhat ironic because you find opinions by Justice Thomas that say the Fourth Amendment means the same thing today as it did in 1791 when it was adopted.¹⁷⁸

I will first discuss the car cases. There are car cases with several subcategories. The first, and something that transcends the car concept, is to emphasize that objective reasonableness is the basis for the inquiry of the Fourth Amendment.¹⁷⁹ The subjective perception of the officer is irrelevant.¹⁸⁰ This can be seen in the Court's earlier decision in *Whren v. United States*,¹⁸¹ decided in 1996.

Here, undercover police officers were in a neighborhood known for having a large number of drug transactions.¹⁸² They saw a car and thought the car stopped at the stop sign for an exceptionally long period of time.¹⁸³ They followed the car and observed the vehicle make a turn without a turn signal, and stopped the car and found

¹⁷⁷ See, e.g., *Regalado Cellular v. United States*, 128 S. Ct. 1994 (2008); *United States v. Ressam*, 128 S. Ct. 1858 (2008).

¹⁷⁸ Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 904, 927-28 (2002).

¹⁷⁹ *Whren v. United States*, 517 U.S. 806, 813 (1996) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 806.

¹⁸² *Id.* at 808.

¹⁸³ *Id.*

drugs.¹⁸⁴ Washington D.C. had clear rules that undercover police officers were not to enforce traffic laws.¹⁸⁵

These officers violated those rules in doing so. The question was does that mean the fruits of the search had to be suppressed? When the case came to the Supreme Court it was phrased, is the appropriate inquiry whether the reasonable officers in the circumstances would have done this, or just whether the reasonable officers in the circumstance could have done this?¹⁸⁶

The Supreme Court, in an opinion by Justice Scalia, said it only matters whether a reasonable officer could have done this.¹⁸⁷ The subjective intent of the officers is irrelevant.¹⁸⁸ It only matters whether there is probable cause for the stop.¹⁸⁹ The fact that the traffic stop was completely a pretext is irrelevant so long as there was probable cause that there was a traffic violation.¹⁹⁰

The driver made a turn without a turn signal.¹⁹¹ This was sufficient under the circumstances. It makes it very difficult to argue that something is a pretextual stop. The Court said so long as there is probable cause, it is sufficient.¹⁹² The reality is if you follow any driver long enough, at some point the person is going to turn without a turn signal, change lanes without a turn signal, or maybe not stop quite long enough at the stop sign and so on. *Whren* also makes it

¹⁸⁴ *Whren*, 517 U.S. at 808-09.

¹⁸⁵ *Id.* at 815.

¹⁸⁶ *Id.* at 810.

¹⁸⁷ *Id.* at 813 (quoting *Scott*, 436 U.S. at 138).

¹⁸⁸ *Id.*

¹⁸⁹ *Whren*, 517 U.S. at 818.

¹⁹⁰ *Id.* at 816.

¹⁹¹ *Id.* at 808.

¹⁹² *Id.* at 818.

much harder to object to racial profiling because so long as there is probable cause, it is permissible. There are many cases where the Supreme Court has reaffirmed that it is an objective, and not a subjective test, under the Fourth Amendment.¹⁹³

Another recent case is *Devenpeck v. Alford*.¹⁹⁴ It has some colorful facts. The police officer came to believe a particular motorist was impersonating an officer.¹⁹⁵ Specifically, the suspect stopped and pretended to be an officer and offered roadside assistance to somebody.¹⁹⁶ The officer pulled over the car with the suspect, had a conversation with him, and then discovered the driver was recording their conversation.¹⁹⁷ The officer arrested the driver for illegally recording the conversation without the consent of the other party.¹⁹⁸ However, it turned out there was no law prohibiting this in the state where it occurred, so there was no basis for the arrest.¹⁹⁹

As a result of the arrest, no charges were brought.²⁰⁰ The driver brought a civil suit against the officer for illegal arrest.²⁰¹ The officer's defense was he could have arrested the man for impersonating an officer and therefore the arrest was lawful at the time even though the right grounds were not given for the arrest.²⁰² The Su-

¹⁹³ See *Devenpeck v. Alford*, 543 U.S. 146 (2004).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 148-49 (citing *Alford v. Haner*, 333 F.3d 972, 974-75 (9th Cir. 2004)).

¹⁹⁶ *Id.* at 148 (citing *Alford*, 333 F.3d at 974-75).

¹⁹⁷ *Id.* at 149 (citing *Alford*, 333 F.3d at 975).

¹⁹⁸ *Devenpeck*, 543 U.S. at 149-50.

¹⁹⁹ *Id.* at 151.

²⁰⁰ *Id.*

²⁰¹ *Id.* (citing *Alford*, 333 F.3d at 975).

²⁰² *Id.* at 152 (citing *Alford*, 333 F.3d at 976-77).

preme Court ruled in favor of the officer.²⁰³

The Supreme Court said it is an objective test; was there probable cause?²⁰⁴ The fact that the officer gave the wrong grounds for the arrest does not matter.²⁰⁵ This relates to the question of how much the Court emphasizes the inquiry for Fourth Amendment purposes is objective; would the reasonable officer have found probable cause.²⁰⁶ It is not subjective why that officer acted.²⁰⁷

Still focusing on the car search category; what is the authority of the police to search the car incident to a stop and/or arrest of a driver? In *New York v. Belton*,²⁰⁸ the Supreme Court said that when the police lawfully pull over a car and order the driver out of the car, they can search in the area of the car where the driver and passengers are located.²⁰⁹ The Supreme Court's concern was for the safety of the officers.²¹⁰ When they merely have the driver and/or the passengers get out of the car, there is still concern about whether they could reach in and get a weapon.²¹¹ Therefore, rather than trying to calculate the wingspan or the armspan of the driver and the passengers, the Court in *Belton* articulated a bright line rule that gives the police permission to search the area of the car where the driver and the passengers were.²¹²

²⁰³ *Devenpeck*, 543 U.S. at 156.

²⁰⁴ *Id.* at 153.

²⁰⁵ *Id.* (quoting *Scott*, 436 U.S. at 138).

²⁰⁶ *Id.* (quoting *Scott*, 436 U.S. at 138).

²⁰⁷ *Id.*

²⁰⁸ 453 U.S. 454 (1981).

²⁰⁹ *Id.* at 460.

²¹⁰ *Id.* at 457.

²¹¹ *Id.*

²¹² *Id.* at 460.

A few years ago in the Supreme Court decision of *Thornton v. United States*,²¹³ the police wanted to pull a car over, but before they were able to do so, the driver pulled the car over on his own because he had reached his destination.²¹⁴ The driver got out of the car and the police then arrested him, took him to their squad car, and put him in handcuffs in the back of the squad car.²¹⁵ The police went back and searched the car, and pursuant to *Belton*, investigated in the areas of the vehicle where the driver had been.²¹⁶ The question is, was that permissible? The Supreme Court said yes, under the *Belton* rule where the driver had just gotten out of the vehicle, it was permissible for the police to search the area of the car where the driver had been.²¹⁷

Justices Scalia and Ginsburg questioned this in a concurring opinion by stating that a *Belton* search is about protecting the security of the officer, and therefore it makes little sense to allow such a search where the driver is restrained in the back of a squad car, and there is no chance he could possibly reach into the car to get a weapon.²¹⁸

I remember speaking here after this case came down and saying it could very well be the catalyst for change, given the questions Justices Scalia and Ginsburg raised, and their willingness to rethink *Belton* under these circumstances. The Supreme Court recently

²¹³ 541 U.S. 615 (2004).

²¹⁴ *Id.* at 618.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 620-21.

²¹⁸ *Thornton*, 541 U.S. at 625 (Scalia, J., concurring).

granted certiorari in *Arizona v. Gant* on exactly that issue; whether there can still be a search of the car incident to the arrest when the occupants of the car are restrained, they are away from the car, and they cannot reach into the car; or do the police then have to get a warrant for the search of the car?²¹⁹ The case was argued in October, so a decision should come down relatively soon.

I think the issue of burden of proof in these cases is quite confusing. The Supreme Court has not yet addressed. I think one can say well, if you are the plaintiff, you have the burden of proof. This is an element of your offense. On the other hand, I think it is a strong argument that no, it is really an affirmative defense that is being raised, that there was another ground for the arrest and therefore the defendant should have the burden of proof. There is not a Supreme Court case that addresses this issue.

Another case regarding cars was about passengers. There was an important Supreme Court decision from June of 2007—*Brendlin v. California*.²²⁰ The issue in *Brendlin* was if the police lawfully stop a car, is the passenger seized at the same time?

In *Brendlin*, the police pulled over a car and discovered drugs on a passenger.²²¹ The passenger wanted to bring a suppression motion with regard to the drugs.²²² The Supreme Court of California ruled against the passenger.²²³ The Supreme Court of California reasoned that the passenger is not seized when the car is stopped, mean-

²¹⁹ *Arizona v. Gant*, 128 S. Ct. 1443, 1444 (2008).

²²⁰ 127 S. Ct. 2400 (2007).

²²¹ *Id.* at 2404.

²²² *Id.*

²²³ *Id.* (citing *Brendlin v. California*, 136 P.3d 845, 848 (Cal. 2006)).

ing that only the driver can object to the search of the car, and therefore the passenger has no ability to object to the search of the car.²²⁴

The Supreme Court unanimously reversed the California Supreme Court and ruled in favor of the passenger's Fourth Amendment rights.²²⁵ If you notice, most of the cases that are discussed, the police—the government—win in the Fourth Amendment context. Not in this case. Here the Supreme Court ruled, and ruled unanimously, in favor of the passenger.

Justice Souter wrote the opinion for the unanimous Court, which said that the test articulated in *United States v. Mendenhall*,²²⁶ is would a reasonable person feel free to leave under the circumstances?²²⁷ Justice Souter said when a car is pulled over, the passenger is seized just like the driver is seized; that the passenger would not reasonably feel free to walk away from the car and leave.²²⁸ Therefore, since the passenger is seized when a car is stopped, she can also bring a challenge to the search of the car—or the stop of the car on Fourth Amendment grounds. The Supreme Court did not use the word “standing” but conceptually that is what it is about. The Supreme Court is saying the passenger has standing to be able to challenge the stop of the vehicle.

There is a case this term, *Arizona v. Johnson*,²²⁹ which is slated on the December calendar for oral argument, and follows up on

²²⁴ *Id.* at 2404-05 (quoting *Brendlin*, 136 P.3d at 846).

²²⁵ *Brendlin*, 127 S. Ct. at 2405.

²²⁶ 446 U.S. 544 (1980).

²²⁷ *Brendlin*, 127 S. Ct. at 2405 (quoting *Mendenhall*, 446 U.S. at 554).

²²⁸ *Id.* at 2406-07.

²²⁹ See Transcript of Oral Arguments, *Johnson*, 128 S. Ct. at 2961 (No. 07-1122), 2008 WL 5151621.

Brendlin. In *Johnson*, the police officer pulled over a car, saw a passenger, and allowed him to stay in the car.²³⁰ Thereafter, the officer briefly questioned him, and then she started asking him about things that had nothing to do with what the stop was about.²³¹ The officer noticed the passenger was wearing clothes that indicated gang affiliation, wanted to question him about his gang affiliation, and what the clothes meant outside the presence of the others.²³² Subsequently, the officer asked the passenger to get out of the car and she performed a pat-down search of the passenger, where she found drugs on his person.²³³ The question was whether she needed more in the way of probable cause or reasonable suspicion to do this.

The Court of Appeals of Arizona ruled in favor of the passenger.²³⁴ The court said once the questioning shifts to something that has nothing to do with why the car was stopped, it is then a consensual encounter between the passenger and the officer.²³⁵ At that point, since it was entirely consensual, she had no authority to pat him down unless there was reasonable suspicion to believe he had a weapon or contraband.²³⁶

The Supreme Court granted certiorari.²³⁷ The Court of Appeals of Arizona decided this after *Brendlin*; *Brendlin* was in June of 2007, this case was in September of 2007, so it was very much a fol-

²³⁰ *State v. Johnson*, 170 P.3d 667, 669 (Ariz. 2007).

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 673-74.

²³⁵ *Johnson*, 170 P.3d at 673.

²³⁶ *Id.*

²³⁷ The Oyez Project, Archive of Case Discussions, http://www.oyez.org/cases/2000-2009/2008/2008_07_1122/ (last visited Jan. 15, 2009).

low-up to the *Brendlin* decision.²³⁸

PROFESSOR BLUM: It is also important to remember that some state courts and state law may differ on this issue of when the police may order the passenger out of the car.²³⁹ In *Maryland v. Wilson*,²⁴⁰ the Supreme Court said just as you can order the driver out of the car, the officer has the right without any reason to order the passenger out.²⁴¹ For example, in Massachusetts the officer must articulate some reason, if challenged, as to why the passenger was ordered out of the car.²⁴² So just beware that there are different standards.

In addition, the issue of the passenger being seized has come up in another context involving cars—when officers shoot at cars. For example, suppose the officer is shooting at the car and hits the passenger rather than the driver; is the passenger seized within the meaning of the Fourth Amendment or is this a substantive due process claim? Most circuits that have addressed this issue have said that if the officer is shooting at a car to stop the car, then anybody hit in the car is seized under the Fourth Amendment.²⁴³

The characterization of the claim makes a significant differ-

²³⁸ See *Brendlin*, 127 S. Ct. at 2400; *Johnson*, 170 P.3d at 667.

²³⁹ See *Commonwealth v. Torres*, 674 N.E.2d 638, 642 (Mass. 1997).

²⁴⁰ 519 U.S. 408 (1997).

²⁴¹ *Id.* at 414-15.

²⁴² *Torres*, 674 N.E.2d at 642.

²⁴³ See, e.g., *Tubar v. Clift*, 286 Fed. App'x. 348, 2008 WL 1734196, at *2 (9th Cir. Apr. 11, 2008) ("Because both Morehouse and Tubar were suspects at the time that Clift shot at the vehicle, Clift's intent to stop the vehicle also constituted intent to seize both of them. Accordingly, we conclude that by shooting Tubar, Clift seized Tubar for purposes of the Fourth Amendment."); *Fisher v. City of Memphis*, 234 F.3d 312, 318-19 (6th Cir. 2001) ("Here, Becton's car was the intended target of Defendant's intentionally applied exertion of force. By shooting at the driver of the moving car, he intended to stop the car, effectively seizing everyone inside, including the Plaintiff."). See also Kathryn R. Urbonya, "Accidental" Shootings as Fourth Amendment Seizures, 20 HASTINGS CONST. L.Q. 337, 369 (1992).

ence because the standard applied to Fourth Amendment claims is quite different than that of a substantive due process claim: Fourth Amendment claims ask whether the use of force is objectively reasonable.²⁴⁴ If you are not seized, then you must resort to a Fourteenth Amendment substantive due process claim under *County of Sacramento v. Lewis*,²⁴⁵ where you have to prove purpose to harm that is unrelated to any legitimate law enforcement purpose.²⁴⁶

DEAN CHEMERINSKY: One other case with regard to the Fourth Amendment and cars is *Illinois v. Caballes*,²⁴⁷ which concerned the ability of the police to use dogs for a search when a car is lawfully stopped. In *Caballes*, a police officer pulled over a car for going sixty-three miles per hour in a fifty-five mile per hour zone.²⁴⁸ The officer took a very long time, around ten minutes, to phone in the driver's license and check if there were any outstanding warrants.²⁴⁹ While the officer was doing this, another officer with a drug-sniffing dog came to the scene.²⁵⁰ The drug-sniffing dog went to the trunk of the car and gave the signal indicating drugs were present, and the officers used this as a basis for opening the trunk where they found drugs.²⁵¹

The question was whether the use of the drug-sniffing dog was permissible. The Supreme Court said yes in an opinion by Jus-

²⁴⁴ *Whren*, 517 U.S. at 813 (quoting *Scott*, 436 U.S. at 138).

²⁴⁵ 523 U.S. 833 (1998).

²⁴⁶ *Id.* at 836.

²⁴⁷ 543 U.S. 405 (2005).

²⁴⁸ *Id.* at 406.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

tice Stevens.²⁵² The Court analogized that officers can use any of their senses when they are lawfully present, for example, if an officer is lawfully present, the officer can then use plain view.²⁵³ The Supreme Court here said that the dog is just an extension of the senses of the officer, and if the officer is lawfully present, then the dog is present under the circumstances.²⁵⁴ The Court was very clear that it was speaking only in the traffic context because of a lawful stop of a vehicle.²⁵⁵

There are other places where the Supreme Court has allowed dog searches; airports, for example.²⁵⁶ However, the Court was saying that extending its decision to mean that a dog sniff is proper anytime an officer is lawfully present, is not something the Court has to deal with at this time. At least in the context of cars—the Court has always been more deferential to law enforcement—if there is a lawful stop, there can be the use of the dogs as well.

However, the Supreme Court seems to treat homes differently. Specifically, in *Kyllo v. United States*,²⁵⁷ the Court looked at whether the use of a thermal imaging device is a search within the meaning of the Fourth Amendment. In *Kyllo*, the police had reason to believe that there was a marijuana growing operation.²⁵⁸ Since indoor marijuana growth relies on the use of a great deal of energy, the

²⁵² *Caballes*, 543 U.S. at 409.

²⁵³ *Id.* at 416 n.6.

²⁵⁴ *Id.* at 408.

²⁵⁵ *Id.* at 410.

²⁵⁶ See *Florida v. Royer*, 460 U.S. 491, 506 n.10 (1983).

²⁵⁷ 533 U.S. 27 (2001).

²⁵⁸ *Id.* at 29.

officers took a thermal image of the area in question.²⁵⁹ The resulting image looked like a dark house with a bright light on in the attic, showing a great deal of energy.²⁶⁰

The question was whether the use of a thermal imaging device constituted a search. The Supreme Court, in an opinion by Justice Scalia, ruled that using such a device was a search.²⁶¹ Justice Scalia said the home is a special place within the meaning of the Fourth Amendment.²⁶² Furthermore, he said thermal imaging can detect body heat, and therefore an officer conducting such a search may be able to see people engaged in intimate activities.²⁶³ As a result, the Court found officers must have a warrant before using a thermal imaging device.²⁶⁴

The Court also stressed the reason why it was a search is because this is not something that is in “routine” use by the police.²⁶⁵ How does all that relate to dog sniffs? Well, you are dealing with the home. Dog sniffs probably will not be able to detect intimate activity in the same way thermal imaging would. Dog sniffs are more routine than thermal imaging.

With regard to schools, under *New Jersey v. T.L.O.*,²⁶⁶ there is always a lower standard than probable cause. The Court in *T.L.O.* said it is a reasonable suspicion standard for searching a student’s

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 52 app. 1.

²⁶¹ *Id.* at 40.

²⁶² *Kyllo*, 533 U.S. at 31 (quoting *Silverman*, 365 U.S. at 511).

²⁶³ *Id.* at 37-38.

²⁶⁴ *Id.* at 40.

²⁶⁵ *Id.* at 39 n.6.

²⁶⁶ 469 U.S. 325 (1985).

purse or backpack.²⁶⁷ The question is whether you may have dog sniffs with less than reasonable suspicion. Officers can lawfully be in the school. If the officer can lawfully be in the school, can the officer bring a dog-sniffing dog in the school, and is that sufficient?

V. BOARDER SEARCHES

The fifth major category with regard to the exclusionary rule concerns borders. With regard to borders, a recent Supreme Court case, where the certiorari petition is now pending, raises a very important issue that can also ultimately lead to a *Bivens*-related suit. This can come up in the *Bivens* context with relation to Section 1983, but has the same underlying Fourth Amendment rules.

In *United States v. Flores-Montano*,²⁶⁸ the issue was whether the police at the border may stop a car and take apart its gas tank without any reasonable suspicion or probable cause. That is exactly what happened in this case. The car was at the checkpoint at the border, and the border agents thought there may have been drugs inside so they stopped the car, kept it for two hours, and had mechanics take apart the gas tank.²⁶⁹ Sure enough, drugs were found in the gas tank.²⁷⁰

The issue under the circumstances is did the police need to have reasonable suspicion or probable cause? It is interesting how the United States chose to litigate this case. I think the United States could have argued there was at least reasonable suspicion, but they

²⁶⁷ *Id.* at 367.

²⁶⁸ 541 U.S. 149 (2004).

²⁶⁹ *Id.* at 150-51.

²⁷⁰ *Id.* at 151.

were trying to win the larger principle, and they did in the Supreme Court.²⁷¹ Chief Justice Rehnquist writing the opinion for the Court said borders were different because the government has a special responsibility with regard to securing them and, therefore, the government can stop a car at the border to take apart its gas tank, and there does not have to be reasonable suspicion or probable cause.²⁷²

PROFESSOR BLUM: I remember the oral argument in the gas tank case. I remember Justice Ginsburg's obsession with the length of time it takes to take apart the gas tank. She made the attorney go through this kind of description or elaborate explanation of how you do it, and how long it took.

DEAN CHEMERINSKY: The application of this is now pending in the Supreme Court in a case called *United States v. Arnold*.²⁷³ *Arnold* involves the ability of border officials to search the contents of a laptop computer without probable cause or reasonable suspicion. A person entered the United States at the border, coming in through the airport, and custom officials looked at where the guy had been.²⁷⁴ After learning he had been to Thailand and observing he was a single male traveling, the agents asked him to turn on his laptop, and then searched through his files where they found child pornography.²⁷⁵ The question was whether there must be reasonable suspicion in order to search the laptop? The United States District Court, in an opinion by Judge Dean Pregerson, found that this was an

²⁷¹ *Id.* at 155.

²⁷² *Id.* at 154-55.

²⁷³ See 523 F.3d 941 (9th Cir. 2008).

²⁷⁴ *Id.* at 943.

²⁷⁵ *Id.*

illegal search.²⁷⁶ Judge Pregerson said that laptops can contain very personal information, be an extension of the thoughts of the individual, and therefore there has to be reasonable suspicion in order to conduct such a search.²⁷⁷

The Ninth Circuit reversed.²⁷⁸ The Ninth Circuit said borders are special places, that the government has authority to search persons and things that cross the border, and therefore not have to be reasonable suspicion to search a laptop.²⁷⁹ Following the Ninth Circuit's decision in *Arnold*, the Department of Homeland Security adopted rules providing that when a person enters at the border, their laptop may be detained for a period of time to permit a search of the laptop so as to see whether or not it has contraband or other illegal material.²⁸⁰

Therefore, any person that enters the border, the government can literally take their laptop under the regulations and keep it until they have a chance to search. I think the Homeland Security regulations go significantly beyond the Ninth Circuit opinion. The Ninth Circuit upheld the right of border agents to search a laptop.²⁸¹ However, the Homeland Security regulations allow a detention of the laptop. *Arnold* is seeking certiorari in the United States Supreme Court, and the petition is now pending.²⁸² It will be interesting to see what

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 944.

²⁷⁸ *Arnold*, 523 F.3d at 948.

²⁷⁹ *Id.* at 944, 946.

²⁸⁰ Ellen Nakashima, *Travelers' Laptops may be Detained at Border*, WASH. POST, Aug. 1, 2008, at A01.

²⁸¹ *Arnold*, 523 F.3d at 948.

²⁸² Petition for Writ of Certiorari, *Arnold*, 129 S. Ct. at 312.

the Supreme Court does with regard to this issue.

However, the law is absolutely clear on luggage. The Supreme Court has already said one reason you can search luggage that comes into the border is to make sure that it does not have drugs.²⁸³ A laptop is not going to have drugs with regard to turning it on. The luggage could have a diary, but again I imagine they could open the diary to see if there are drugs within the pages of the diary, but that justification—the main reasons why the Court has always allowed the border to be different is illegal smuggling of people or illegal smuggling of drugs. The laptop does not relate to either.

It is less about the degree of intrusiveness and more about the other side of the balance in terms of the law enforcement justification. The Supreme Court has said so often that the test for the Fourth Amendment is reasonableness. You have to balance the reasonable expectation of privacy against the law enforcement justification.

More private things may be in suitcases than what may be in a laptop. On the other hand, the law enforcement justification that has always been stressed with regard to the border are illegal immigration of individuals, contraband, weapons—that seems so unlikely when you turn on a laptop and see the files.

Judge Pauley's question in terms of the bomb, the weapon that could be in the luggage is on point. I guess in theory the files on the laptop could be designs for building a bomb. The Ninth Circuit came down on the side of the customs officials here reversing the District Court.

²⁸³ See *Flores*, 541 U.S. at 152-53.

VI. REMEDIES AND THE EXCLUSIONARY RULE

I want to briefly address a sixth and final category in recent Supreme Court cases and that concerns remedy and the exclusionary rule. Two years ago in 2006, to the surprise of everyone in *Hudson v. Michigan*,²⁸⁴ at least four Justices indicated they wanted to eliminate the exclusionary rule to remedy the Fourth Amendment cases.²⁸⁵ *Hudson* actually posed a narrow question; does the exclusionary rule apply when the police violate the requirements for knocking and announcing before searching a residence?

This is a case where police had a warrant to search a residence with regard to drugs and weapons.²⁸⁶ The police knocked as they were supposed to, and then announced, but then they immediately went in.²⁸⁷ In fact, when the officer was asked how long he waited to go in, he said it took about five seconds.²⁸⁸ He was asked why he waited so long, to which he responded, that he did not wait, but that was “how long it took me to go in the door.”²⁸⁹

The Michigan courts, all nine Justices on the Supreme Court, agreed the police violated the Fourth Amendment by not waiting a reasonable short amount of time before entering. Accordingly, the only issue in this case was whether the following search violated the

²⁸⁴ 547 U.S. 586 (2006).

²⁸⁵ David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283, 307-08 (2006).

²⁸⁶ *Hudson*, 547 U.S. at 588.

²⁸⁷ *Id.*

²⁸⁸ Petition for Writ of Certiorari, *Hudson*, 547 U.S. 586 (No. 04-1360), 2005 WL 856040 (2005).

²⁸⁹ *Id.*

Fourth Amendment so its fruits had to be suppressed.²⁹⁰

The holding in the case was five-to-four that the exclusionary rule does not apply when the police violate the knock and announce requirement of the Fourth Amendment.²⁹¹ What makes the case particularly significant is that Justice Scalia wrote the majority opinion. I want to stress it was a majority opinion for the part I am going to describe now.

The opinion was joined by Chief Justice Roberts, Justice Thomas, and Justice Alito. Justice Scalia said in deciding whether to apply the exclusionary rule, courts need to use a balancing test, which consists of weighing the need for the exclusionary rule against the cost of the exclusionary rule.²⁹² He said the exclusionary rule is unnecessary because the traditional justification for the rule was deterring police misconduct, but we do not need it for that purpose today because citizens can now bring a civil action against police officers, under Section 1983 for violations of the Fourth Amendment.²⁹³

Additionally, Justice Scalia said there is increased professionalization among police officers which makes the exclusionary rule unnecessary.²⁹⁴ The majority then articulated that there is real cost to the exclusionary rule; guilty, dangerous people can go free if evidence is suppressed.²⁹⁵ But the dissent noted this was not an argument for an exception to the exclusionary rule in the knock and an-

²⁹⁰ Lusine Ajdaharian, Note, *Knocking Down the "Knock and Announce" Rule: A Casenote on Hudson v. Michigan*, 29 WHITTIER L. REV. 183, 187 (2007).

²⁹¹ *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring).

²⁹² *Id.* at 594 (majority opinion).

²⁹³ *Id.* at 594-98.

²⁹⁴ *Id.* at 598.

²⁹⁵ *Hudson*, 547 U.S. at 591.

nounce situation, but rather was the traditional argument for eliminating the exclusionary rule.²⁹⁶

Justice Kennedy concurred and said the continued operation of the exclusionary rule is not in doubt.²⁹⁷ But the dissent noted there seemed to be four Justices who wanted to eliminate the exclusionary rule, so it will continue to exist.²⁹⁸ Exceptions will be created to the extent that Justice Kennedy wants them.

There was another exclusionary rule case recently decided earlier this year called *Herring v. United States*.²⁹⁹ In *Herring*, an investigator received inaccurate information from a police department in another jurisdiction.³⁰⁰ Based on that erroneous information, the officer arrested the suspect and did a search incident to arrest.³⁰¹ The Supreme Court previously stated if the police receive inaccurate information from a court and make an arrest based on it, then the fruits of the arrest do not have to be suppressed.³⁰² The issue presented here is where the police get wrong information from a police department in another jurisdiction, does the exclusionary rule apply there, or is there a good faith exception? It is an interesting issue in and of itself. It is also the first occasion the Supreme Court had to deal with the exclusionary rule since *Hudson* in 2006, so it is another reason to pay attention to the case.

PROFESSOR BLUM: The *Herring* case brings up the issue

²⁹⁶ *Id.* at 614 (Breyer, J., dissenting).

²⁹⁷ *Id.* at 603 (Kennedy, J., concurring).

²⁹⁸ *Id.* at 614 (Breyer, J., dissenting).

²⁹⁹ 129 S. Ct. 695 (2009).

³⁰⁰ *Id.* at 698.

³⁰¹ *Id.*

³⁰² *Id.*

of qualified immunity where the police are relying on information they received from another police department, or where police officers are relying on the advice of a prosecutor who very often tells them they have probable cause, and then it turns out that they do not—then the Section 1983 suit is brought. There are some cases in my qualified immunity outline under the heading of extraordinary circumstances. These are cases where even though there has been a constitutional violation, or the court may decide there was no probable cause for the arrest, there may nevertheless be qualified immunity if the police were relying on the advice of a prosecutor or the advice of counsel, or relying on a statute that was presumptively constitutional and had not yet been held unconstitutional.³⁰³

When reviewing those cases, you have to remember *Malley v. Briggs*.³⁰⁴ The Supreme Court held that if the affidavit for the warrant on its face clearly does not support probable cause, the officer is ultimately responsible even if a judge signs off on it.³⁰⁵ In addition, another concept we did not talk about was the notion of arguable probable cause, which is evidently all you need to get qualified immunity in most circuits.³⁰⁶

³⁰³ Karen M. Blum, *Qualified Immunity: Discretionary Function, Extraordinary Circumstances, and Other Nuances*, 23 *TOURO L. REV.* 57, 65 (2007).

³⁰⁴ 475 U.S. 335 (1986).

³⁰⁵ *Id.* at 339.

³⁰⁶ *See, e.g., Cortez v. McCauley*, 478 F.3d 1108, 1120 & n.15 (10th Cir. 2007) (en banc)

In sum, we find that viewing the undisputed facts in the light most favorable to the Plaintiffs, an arrest without probable cause occurred. As we discuss below, no exigent circumstances would justify a warrantless arrest either. This conclusion does not, however, end our analysis. Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity. . . . Therefore, when a warrantless arrest or seizure is the subject of a § 1983 action, the defendant is entitled to qualified immunity if a reasonable officer could

Another issue we have not touched on at all, involves searches in the prison context. Specifically, there are a lot of cases challenging strip searches of those who are arrested and initially brought to the jail or prison for admittance. Many cases out there involve blanket strip search policies without individualized suspicion. There are two interesting cases. The first is a decision from the Ninth Circuit, *Bull v. City and County of San Francisco*.³⁰⁷ The other one is a recent case out of the Eleventh Circuit, *Powell v. Barrett*.³⁰⁸ The issue is one that I believe will ultimately get to the Supreme Court because it calls for a clarification and application of the Supreme Court's decision in *Bell v. Wolfish*.³⁰⁹ Is the concern about security in prisons or security in jails enough in and of itself to justify an automatic strip search of anyone who is going to be placed in the general population, regardless of the nature of the offense for which that person has been arrested and regardless of whether there is individualized suspicion that the person may be secreting weapons, drugs, or other contraband?

In *Powell*, the Eleventh Circuit held that the practice of conducting full body visual strip searches on all jail detainees being booked into the general population for the first time did not violate

have believed that probable cause existed to arrest or detain the plaintiff. . . . Some courts have referred to this standard as "arguable probable cause."

See also Lana Larson Dean, *Constitutional Law: Civil Rights—§ 1983 Police: Immunity*, 28 STETSON L. REV. 760, 761 (1999).

³⁰⁷ 539 F.3d 1193 (9th Cir. 2008), *reh'g en banc ordered by Bull v. City and County of San Francisco*, 558 F.3d 887 (9th Cir. Feb. 20, 2009).

³⁰⁸ 541 F.3d 1298 (11th Cir. 2008).

³⁰⁹ 441 U.S. 520 (1979).

the Fourth Amendment.³¹⁰ However, in *Bull*, the Ninth Circuit panel opinion went the other way on this.³¹¹ It will be interesting to see if the en banc Court agrees. I think either the *Bull* or the *Powell* case will eventually reach the Supreme Court, where, hopefully, *Bull* will be clarified and the issue will be resolved, even if not to everyone's liking.

³¹⁰ *Powell*, 541 F.3d at 1300, 1302.

³¹¹ *Bull*, 539 F.3d at 1194.

