[Missouri Law Review](https://scholarship.law.missouri.edu/mlr)

Volume 88 | Issue 3 Article 13

Summer 2023

Let's Not Talk About It: How Courts Apply Constitutional Avoidance and Qualified Immunity as a Shield for Law Enforcement Officers

Hanna M. Metzler

NOTE

Let's Not Talk About It: How Courts Apply Constitutional Avoidance and Qualified Immunity as a Shield for Law Enforcement Officers

Lombardo v. City of St. Louis, 38 F.4th 684 (8th Cir. 2022).

Hanna M. Metzler *

I. INTRODUCTION

On the night of December 8, 2015, Nicholas Gilbert was pronounced dead following a tragic incident at the St. Louis Metropolitan Police Department ("SLMPD") station.[1] Was the cause of death excessive force by SLMPD officers? Well, it is wishful thinking to expect a straightforward answer. It is no secret that recent actions of law enforcement officers have garnered unfettered attention from activist movements across the country.[2] Despite the force of movements like Black Lives Matter and Defund the Police, qualified immunity works to protect law enforcement officers against claims that may arise in their line

---

* B.A., University of Mississippi, 2021; J.D. Candidate, University of Missouri School of Law, 2024; Associate Managing Editor, *Missouri Law Review*, 2023–2024; Associate Member, *Missouri Law Review*, 2022–2023. I would like to thank Professor Haley Proctor for her insight, guidance, and constitutional law expertise—all of which were pivotal during the writing of this Note. I would also like to thank Maura Corrigan, Editor in Chief; Kate Frerking, Senior Note and Comment Editor; and the rest of the *Missouri Law Review* for their help in the editing process. Finally, thank you to my family, the best support system.

[1] Lombardo v. Saint Louis City, 38 F.4th 684, 689 (8th Cir. 2022).

[2] *See generally*, Rashawn Ray, *Black Lives Matter at 10 Years: 8 Ways the Movement has been Highly Effective*, BROOKINGS (Oct. 12, 2022), https://www.brookings.edu/blog/how-we-rise/2022/10/12/black-lives-matter-at-10-years-what-impact-has-it-had-on-policing/ [https://perma.cc/GW87-R2CA]; Juliana Kim & Michael Wilson, *'Blue Lives Matter' and 'Defund the Police' Clash in the Streets*, N.Y. TIMES (July 22, 2020), https://www.nytimes.com/2020/07/22/nyregion/ny-back-the-blue-lives-matter-rallies.html [https://perma.cc/7WLA-G7AQ] [hereinafter Kim & Wilson].

of duty and consistently prevails in claims of excessive force.[3] This shield of immunity makes it hard for injured parties to get answers about what constitutes excessive force in a court of law.

Courts rigidly apply the doctrine of constitutional avoidance in qualified immunity cases that involve law enforcement officers, oftentimes to the detriment of legal development on the use of force. Constitutional avoidance encourages courts to "avoid reaching constitutional questions in advance of the necessity of deciding them."[4] The United States Supreme Court has reinforced principles of constitutional avoidance in the doctrine of qualified immunity through the imposition of a two-prong test.[5]

Courts apply qualified immunity protection for officers if (1) the claimant failed to properly show a violation of a constitutional right, or (2) the right being asserted was not clearly established at the time of the incident.[6] However, due to both constitutional avoidance and the development of the qualified immunity analysis demonstrated in *Pearson v. Callahan*, courts have authority to apply only the second prong.[7] If a court finds that the right was not clearly established at the time of the incident, it can avoid ruling on the question of whether a constitutional right was violated.[8] The application of these doctrines together has consequently made the law governing excessive force perpetually unclear, maintaining a blurred line of what is and what is not excessive force.[9] Because the law is not clearly established in this context, excessive force claimants are often left without remedies for harm caused at the hands of

[3] *Qualified Immunity*, CORNELL L. SCH., LEGAL INFO. INST., https://www.law.cornell.edu/wex/qualified_immunity [https://perma.cc/W82N-RLVA] (last visited June 18, 2023). "Specifically, qualified immunity protects a government official from lawsuits alleging that the official violated a plaintiff's rights, only allowing suits where officials violated a 'clearly established' statutory or constitutional right." *Id.*

[4] Camreta v. Greene, 563 U.S. 692, 705 (2011) (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n., 485 U.S. 439, 445 (1988)).

[5] *See* development of qualified immunity test between *Saucier* and *Pearson*. Saucier v. Katz, 533 U.S. 194, 201, 235–36 (2001); Pearson v. Callahan, 555 U.S. 223, 235–36 (2009).

[6] Bell v. Neukirch, 979 F.3d 594, 602 (8th Cir. 2020) (citing Walton v. Dawson, 752 F.3d 1109, 1116 (8th Cir. 2014)).

[7] Marcus R. Nemeth, *How Was That Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. REV. 989, 1001 (2019).

[8] *Id.*

[9] Hannah Beard, *How Ziglar v. Abbasi Sheds Light on Qualified-Immunity Doctrine*, 96 WASH U.L. REV 883, 895 (2019).

law enforcement, and law enforcement officers are left without guidance for future conduct.[10]

Part II of this Note introduces the facts and holding of the district court's decision in *Lombardo v. Saint Louis City*, then outlines the procedural history of the case prior to the Eighth Circuit's instant decision in *Lombardo v. City of St. Louis*.[11] Part III provides an overview of qualified immunity, tracing the development of the doctrine through two important United States Supreme Court cases, *Saucier* and *Pearson*. It then discusses how the doctrine of constitutional avoidance has affected the application of qualified immunity in excessive force cases. Part IV examines the U.S. Court of Appeals for the Eighth Circuit's opinion through the lens of its qualified immunity analysis. Part V illustrates how the doctrine of constitutional avoidance, in conjunction with the qualified immunity doctrine, makes excessive force claims against law enforcement officers effectively impossible to pursue. It concludes by exploring adjustments to qualified immunity application to better balance the interests of law enforcement and individuals seeking to have their wrongs righted.

II. FACTS AND HOLDING

This Part first delves into the events that took place at the police department which led to Nicholas Gilbert's death. It then traces the procedural posture of the *Lombardo* case.

A. Facts

On December 8, 2015, Nicholas Gilbert was detained and arrested by SLMPD for suspicion of trespassing and failure to appear in court after receiving a traffic ticket.[12] Gilbert remained cooperative during his booking, and when he was asked whether he had any medical conditions SLMPD should be aware of, he checked "no" on his booking form.[13] After booking was completed, Gilbert was transferred to an individual holdover

---

[10] *Id.*; Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1250 (2015).

[11] Lombardo v. Saint Louis City, 361 F. Supp. 3d 882 (E.D. Mo. 2019); Lombardo v. City of St. Louis, 38 F.4th 684 (8th Cir. 2022).

[12] Failure to appear in court for an outstanding traffic ticket is a misdemeanor. Lombardo v. Saint Louis City, 361 F. Supp. 3d 882, 887 (E.D. Mo. 2019), *aff'd sub nom.* Lombardo v. City of St. Louis, 956 F.3d 1009 (8th Cir. 2020), *cert. granted, judgment vacated sub nom.* Lombardo v. City of St Louis, 141 S. Ct. 2239 (2021) and *aff'd sub nom.* Lombardo v. City of St. Louis, 38 F.4th 684 (8th Cir. 2022).

[13] *Id.*

cell in the station.[14] At the time of his arrest, Gilbert had a notably small frame, standing five foot, three inches tall and weighing 160 pounds.[15]

Once Gilbert was in the individual cell, SLMPD police officers—including Officers King, Stuckey, and Wactor—noticed that Gilbert was demonstrating "unusual" behavior.[16] The officers then observed Gilbert tying "an article of clothing around the bars of his cell and to his neck" in what appeared to be an attempt to hang himself.[17]

Once notified, supervisor Sergeant Bergmann responded to the cell area, and multiple officers entered Gilbert's cell in attempt to restrain him and prevent him from harming himself.[18] When the officers entered, Gilbert no longer had anything tied around his neck and "had his hands up."[19] However, as Officer Stuckey attempted to handcuff Gilbert, Gilbert resisted having his second wrist cuffed and began to struggle with the officer.[20] Three officers worked to move Gilbert into a kneeling position, where they were eventually able to place Gilbert's wrists in handcuffs.[21] Once in handcuffs, Gilbert continued to struggle by thrashing and kicking the officers.[22] This struggle eventually caused Gilbert to smash his head on the cell's concrete bench, resulting in a bleeding gash.[23]

As Gilbert continued to resist, the officers proceeded to shackle Gilbert's legs while he was still in the cell.[24] Sergeant Bergmann requested EMS for Gilbert, radioing that Gilbert may be suffering from "possible psychotic issues."[25] Officers in the holding area then sounded the holdover alarm, seeking additional help.[26] Officer Mack subsequently entered the cell to assist the officers with moving Gilbert, who was still resisting.[27] The officers attempted to transition Gilbert from a kneeling position over the concrete bench to a prone position on the floor of the cell.[28] Prone restraint is used by law enforcement to keep subjects in a "more secure" position, as it places them face and chest down on the ground.[29]

---

[14] *Id.*
[15] *Id.*
[16] *Id.* at 888 (internal quotations omitted).
[17] *Id.* (internal quotations omitted).
[18] *Id.*
[19] *Id.*
[20] *Id.* at 889.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 889–90.
[26] *Id.* at 890.
[27] *Id.*
[28] *Id.*
[29] *Id.*

Another SLMPD officer, Officer Opel, entered the cell and was instructed to control Gilbert's left side so he would not thrash his head on the ground.[30] After witnessing Gilbert kicking his shackled legs, several other officers became involved.[31] Officer Cognasso placed his knees on Gilbert's calves to restrain them.[32] Officer Lemon also responded and placed his knee on Gilbert's leg.[33] Officer vonNida assisted in restraining Gilbert's thrashing limbs.[34] Eventually, Gilbert was restrained in the prone position at his shoulders, biceps, and legs but without "body weight on him in a manner that would compress his neck."[35] Gilbert continued to resist in this position by raising his chest up off the ground for several minutes.[36]

Gilbert's breathing began to labor, and he eventually stopped resisting.[37] Officers proceeded to roll Gilbert over to his back but failed to find a pulse.[38] At some point over several minutes, Gilbert stopped breathing completely.[39] Officers unsuccessfully attempted chest compressions until Gilbert was transported to the hospital where he was pronounced dead.[40] Autopsies revealed that Gilbert had "a large concentration of methamphetamine in his system and that he had significant heart disease."[41] The stated manner of death was "Arteriosclerotic Heart Disease Exacerbated by Methamphetamine and Forcible Restraint."[42] As far as training policies, the district court noted that SLMPD teaches their officers to "work as a team" and that prone restraint is not in and of itself prohibited by SLMPD policy.[43]

B. Procedural Posture of the Lombardo *Case*

Following Gilbert's death in 2015, Gilbert's mother, Lombardo, sued the officers and the City of St. Louis ("the City") in district court.[44] The case made its way all the way up to the United States Supreme Court.

[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 890–91.
[37] *Id.* at 891.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 891–92.
[43] *Id.* at 892.
[44] *Id.*

1. Eastern District of Missouri, 2019

On October 16, 2016, Lombardo filed a twenty-count action in the Eastern District of Missouri pursuant to 42 U.S.C. § 1983 and Missouri law against the named officers and the City.[45] Lombardo's claims asserted that the cause of Gilbert's death was excessive force by officers, deliberate indifference to Gilbert's need for medical care, and negligence.[46] Lombardo also asserted that the SMLPD's policies and practices led to the deprivation of Gilbert's rights.[47] The only counts which remained at the district court were the § 1983 claims against the individual officers for excessive force in violation of the Fourth and Fourteenth Amendments, and the § 1983 claims against the City based on its policies, practices, and training.[48]

The City moved for summary judgment, asserting qualified immunity.[49] The district court applied the *Pearson* two-prong qualified immunity test followed by the Eighth Circuit to determine: (1) whether the alleged facts, when viewed in the light most favorable to the plaintiff, demonstrate that the official's conduct violated a constitutional right; and (2) whether the constitutional right being asserted is clearly established.[50] Under this test, failure to establish either prong would entitle the officers to qualified immunity.[51]

Solely applying the second prong, the district court found the law in December 2015 did not clearly establish that the use of prone restraint in the context which the officers used it against Gilbert constituted excessive force.[52] The court recognized that the Eighth Circuit had previously held that the use of prone restraint to control a non-compliant, resistant subject was reasonable, even if the individual was handcuffed or shackled.[53] The court reasoned that because Lombardo failed to demonstrate the conduct in this case violated clearly established standards, the court did not need to return to prong one: whether the officers' conduct was so objectively

[45] *Id.* at 886; 42 U.S.C. § 1983 (providing grounds for citizens to bring a civil claim against the state or its agents for a deprivation of rights, privileges, or immunities secured under the Constitution).

[46] Lombardo v. Saint Louis City, 361 F. Supp. 3d 882, 886 (E.D. Mo. 2019), *aff'd sub nom.* Lombardo v. City of St. Louis, 956 F.3d 1009 (8th Cir. 2020), *cert. granted, judgment vacated sub nom.* Lombardo v. City of St Louis, 141 S. Ct. 2239 (2021) and *aff'd sub nom.* Lombardo v. City of St. Louis, 38 F.4th 684 (8th Cir. 2022).

[47] *Id.* at 887. The court previously dismissed Lombardo's negligence claims, and Lombardo consented to dismissal of the deliberate indifference claims. *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 893 (citing Wallingford v. Olson, 592 F.3d 888, 892 (8th Cir. 2010)).

[51] *Id.*

[52] *Id.* at 901.

[53] *Id.* at 904–05.

unreasonable as to violate a constitutional right.[54] The court found the officers entitled to qualified immunity.[55]

As for the claims against the City, the district court reasoned that "in order for municipal liability to attach, individual liability must be found on an underlying substantive claim."[56] Because the officers were exculpated from liability, the City could not be held liable for any policy or practice violations.[57] The court held that both the City and the officers were entitled to summary judgment, and all remaining counts were dismissed with prejudice.[58]

2. U.S. Court of Appeals for the Eighth Circuit, 2020

On appeal, the Eighth Circuit examined whether there was sufficient evidence from which a reasonable jury could find that the officers violated Gilbert's Fourth Amendment right to be free from excessive force, specifically when in the prone position.[59] The court reviewed the excessive force question using the standard of whether an objectively reasonable officer would have known, in circumstances similar to Gilbert's, that he or she was violating a constitutional right.[60]

The Eighth Circuit's analysis demonstrated how the qualified immunity two-prong test allows courts to reach the same end through different means, depending upon which prong the court relies.[61] In contrast with the district court's reliance on the second prong, the appellate court began its analysis with the first prong: whether the officers violated a constitutional right to be free from excessive force.[62] The Eighth Circuit found the officers' conduct did not amount to unconstitutional excessive force because the court "previously held that the use of prone restraint is not objectively unreasonable when a detainee actively resists officer directives and efforts to subdue the detainee."[63] The court found that the

[54] *Id.* at 915.

[55] *Id.* (citing Smith v. City of Minneapolis, 754 F.3d 541, 546 (8th Cir. 2014).

[56] *Id.* at 916.

[57] *Id.*

[58] *Id.*

[59] Lombardo v. City of St. Louis, 956 F.3d 1009, 1013 (8th Cir. 2020), *cert. granted, judgment vacated sub nom.* Lombardo v. City of St. Louis, 141 S. Ct. 2239 (2021).

[60] *Id.*

[61] *See id.*

[62] *Id.* (stating whether Gilbert's Fourth Amendment rights were violated is "dispositive of the case.").

[63] *Id.*

facts showed Gilbert actively resisted throughout the incident.[64] The court reasoned that since excessive force was not sufficiently demonstrated, it "need not evaluate the clearly established prong of the qualified immunity analysis."[65] Additionally, because the court found no constitutional violation, it held the City could not be liable under § 1983 for alleged shortcomings in training and practices.[66] Therefore, even under a converse analysis, the Eighth Circuit affirmed the district court's grant of summary judgment in favor of the City and the officers.[67]

3. The Supreme Court of the United States, 2021

The United States Supreme Court granted certiorari and vacated the judgment, deciding there were questions about the nature of the Eighth Circuit's holding regarding the issue of excessive force and the use of prone restraint.[68] The Court stated, "it is unclear whether the [Eighth Circuit] thought the use of prone restraint—no matter the kind, intensity, duration, or surrounding circumstances—is *per se* constitutional so long as an individual appears to resist the officers' efforts to subdue him."[69] In an exceptionally brief opinion, the Court vacated the judgment of the Eighth Circuit and remanded "to give the court the opportunity to employ an inquiry that clearly attends to the facts and circumstances in answering those questions in the first instance."[70]

Justice Alito, with whom Justice Thomas and Justice Gorsuch joined, issued a spirited dissent. The dissent asserted that the majority was "unwilling to face up to the choice between denying the petition (and bearing the criticism that would inevitably elicit) and granting plenary review (and doing the work that would entail)."[71] The dissenting opinion further believed the proper course for addressing the petition would be to receive briefing and arguments to decide whether the police officers used constitutionally reasonable force and were therefore entitled to summary

---

[64] *Id.* at 1013–14 ("Indeed, Gilbert struggled with the Officers to such a degree that he suffered a gash to the forehead, and several of the Officers needed to be relieved throughout the course of the incident as they became physically exhausted from trying to subdue Gilbert.").

[65] *Id.* at 1014 (note that the Eighth Circuit employed the opposite prong of the qualified immunity analysis to come to the same answer).

[66] *Id.* at 1015.

[67] *Id.*

[68] Lombardo v. City of St. Louis, 141 S. Ct. 2239, 2241 (2021).

[69] *Id.*

[70] *Id.* at 2242.

[71] *Id.* (Alito, J., dissenting).

judgment under qualified immunity.[72] Instead, the dissent stated that the majority chose to "take the easy way out" by remanding the case.[73]

On remand, the Eighth Circuit affirmed the grant of summary judgment in favor of the City and the officers, finding the defendants entitled to qualified immunity.[74] In this decision, however, it relied on the second prong of the qualified immunity analysis.[75] This Note will return to the details of the Eighth Circuit's 2022 ruling in Part IV.

III. LEGAL BACKGROUND

Part A of this section provides an overview of the doctrine of qualified immunity, specifically with regard to how it has been applied to protect law enforcement officers from liability when a constitutional question of excessive force is raised. Part B then covers how the doctrine of constitutional avoidance has guided courts' development and implementation of qualified immunity.

A. Qualified Immunity and Law Enforcement Officers

Qualified immunity "shields government officials from civil damage liability for discretionary action that 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[76] The doctrine of qualified immunity originated from the 1967 Supreme Court decision in *Pierson v. Ray*, where petitioners argued they were falsely arrested under a statute which was later deemed unconstitutional.[77] The Court decided that if the police officers—established government officials—acted in good faith, with probable cause, and reasonably believed the statute to be valid, they should be protected from liability.[78]

Following the *Pierson* decision, the standard for addressing qualified immunity questions divided courts across the country until the Supreme Court resolved the issue by establishing a two-step sequencing analysis in *Saucier v. Katz*.[79] *Saucier* required courts to begin the analysis by first addressing the question of whether a government official, such as a police

[72] *Id.*

[73] *Id.* at 2244 (2021).

[74] Lombardo v. City of St. Louis, 38 F.4th 684, 692 (8th Cir. 2022).

[75] *Id.* at 690.

[76] De La Rosa v. White, 852 F.3d 740, 743 (8th Cir. 2017) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[77] 386 U.S. 547, 550 (1967).

[78] *Id.* at 555.

[79] Nemeth, *supra* note 7; *see* Pearson v. Callahan, 555 U.S. 223, 236 (2009).

officer, violated a constitutional right.[80] If a court found a constitutional violation, *then* it would determine if that right was clearly established at the time of the incident.[81] If the right was not clearly established, the officer would nevertheless be entitled to protection from liability under qualified immunity.[82]

However, a mere eight years later in *Pearson v. Callahan*, the Supreme Court disregarded its two-step sequencing and converted the analysis to a two-prong test.[83] Currently, courts apply qualified immunity protection if: (1) the claimant fails to properly show a violation of a constitutional right, *or* (2) the right being asserted was not clearly established at the time of incident.[84] Converting the analysis from a sequential test to a two-prong test after *Pearson* allowed courts to begin with either prong when deciding if an officer was entitled to qualified immunity.[85] If a court begins with prong two, the clearly established prong—and finds the right to not be clearly established at the time of the incident—the court does not have to reach the merits of the claim.[86] It can end its analysis at the clearly established prong without ever deciding if a constitutional right was violated.[87]

For a right to be deemed clearly established, it must be "sufficiently clear" to a reasonable officer that his or her conduct would unlawfully violate a person's rights.[88] The Supreme Court has looked to whether the law is sufficiently settled with a "robust consensus of persuasive authority."[89] All of this must come together to "clearly prohibit the officer's conduct *in the particular circumstances before him*."[90] If this high burden of clear establishment cannot be shown, the officer is entitled

---

[80] Saucier v. Katz, 533 U.S. 194, 201 (2001) ("[T]hreshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry.").

[81] *Id.* ("[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.").

[82] *Id.*

[83] Nemeth, *supra* note 7; *see Pearson*, 555 U.S. at 236 (2009) ("while the sequence . . . is often appropriate, it should no longer be regarded as mandatory.").

[84] Bell v. Neukirch, 979 F.3d 594, 602 (8th Cir. 2020) (citing Walton v. Dawson, 752 F.3d 1109, 1116 (8th Cir. 2014)).

[85] Nemeth, *supra* note 7.

[86] *Id.*

[87] *Id.*

[88] D.C. v. Wesby, 138 S. Ct. 577, 589 (2018) (citing Ashcroft v. al–Kidd, 563 U.S. 731, 741 (2011); Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[89] *Wesby*, 138 S. Ct. at 589 (citing *al–Kidd*, 563 U.S. at 741–42 (internal quotations omitted)).

[90] *Id.* at 590 (emphasis added).

to qualified immunity.[91] Effectively, qualified immunity should protect all officers, with only the exception of those who incompetently or intentionally violate the law.[92]

The Supreme Court implements qualified immunity with the intent to balance "the need to hold government officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties responsibly."[93] The Court has historically given deference to the actions of law enforcement officers and emphasized the importance of qualified immunity "to society as a whole."[94] In effect, the Supreme Court has been able to uphold assertions of qualified immunity without much resistance due to the leeway afforded under *Pearson's* two-prong test.

B. Constitutional Avoidance at Play in Qualified immunity Cases

The practice of avoiding constitutional questions when presented in courts can be traced back to *Ashwander v. Tennessee Valley Authority*.[95] Justice Brandeis stated in his concurring opinion that the Court should not answer constitutional questions "if there is also present some other ground upon which the case may be disposed of."[96] Constitutional avoidance is rooted in the "fundamental and longstanding principle of judicial restraint [requiring] that courts avoid reaching constitutional questions in advance of the necessity of deciding them."[97] In the context of qualified immunity cases, it follows that constitutional avoidance tells courts to use the constitutionality prong sparingly. Courts should address the merits of the case *only if* they cannot dispose of the case using the clearly established prong first.

In Supreme Court cases, constitutional avoidance has resulted in the Court implementing the qualified immunity test strictly.[98] Often, the Court will base its analysis only on whether a right was clearly established at the

[91] *Id.*

[92] *Id.* at 589 (citing *al–Kidd*, 563 U.S. at 741; *Malley*, 475 U.S. at 341).

[93] Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 11 (2017).

[94] *Id.* at 6 (internal quotations omitted).

[95] 297 U.S. 288, 347 (1936) (Brandeis, J. concurring); Beard, *supra* note 9, at 901.

[96] *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring).

[97] Xiong v. Lynch, 836 F.3d 948, 950 (8th Cir. 2016) (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988)).

[98] Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 141 (2009).

time of conduct.[99] This practice persists today, especially in excessive force litigation.[100] As noted, if a court grants qualified immunity using the clearly established prong, it is not necessary for the court to address the merits of the plaintiff's claim, and it can avoid the question of whether a constitutional right was violated altogether.[101] Due to the availability of resolving a qualified immunity case at the clearly established prong, constitutional avoidance encourages, and the Supreme Court sometimes requires, that courts do not proceed further in their analysis.[102]

IV. INSTANT DECISION

On remand, the Supreme Court instructed the Eighth Circuit to reassess its qualified immunity analysis to tie up some lose ends. The Eighth Circuit again recognized that it possessed discretion to decide which of the two qualified immunity prongs to assess first.[103] In contrast to its prior 2020 opinion, which focused on whether a constitutional right had been violated, the Eighth Circuit decided to begin its analysis by considering the clearly established prong instead.[104] Part of its reasoning for using a different prong to decide the outcome of the case was because "[t]he Supreme Court has cautioned that '[i]n general, courts should think hard, and then think hard again' before deciding a constitutional question that need not be resolved to dispose of a case," thereby invoking the principle of constitutional avoidance.[105]

The Eighth Circuit noted that there was not clearly established law or precedent from the Supreme Court or the Eighth Circuit to determine whether prone restraint was unconstitutional in general or in a particular set of circumstances.[106] Reciting cases where prone restraint was held to be excessive force in violation of the Constitution, the Eighth Circuit concluded that the cases were significantly factually different than the

---

[99] *Id.* ("Under current law, the qualified immunity is overcome only if the defendant violated a clearly established constitutional right of which a reasonable official in the defendant's position should have known.").

[100] *See generally* Lombardo v. Saint Louis City, 361 F. Supp. 3d 882 (E.D. Mo. 2019), *aff'd sub nom.* Lombardo v. City of St. Louis, 956 F.3d 1009 (8th Cir. 2020), *cert. granted, judgment vacated sub nom.* Lombardo v. City of St Louis, 141 S. Ct. 2239 (2021) and *aff'd sub nom.* Lombardo v. City of St. Louis, 38 F.4th 684 (8th Cir. 2022); Kisela v. Hughes, 200 138 S. Ct. 1148, 1150 (2018); White v. Pauly, 580 U.S. 73, 77 (2017).

[101] Beard, *supra* note 9, at 885.

[102] Beermann, *supra* note 98.

[103] Lombardo v. City of St. Louis, 38 F.4th 684, 690 (8th Cir. 2022) (citing Ashcroft v. al–Kidd, 563 U.S. 731, 735 (2011)).

[104] *Id.*

[105] *Id.* (citing Camreta v. Greene, 563 U.S. 692, 707 (2011)).

[106] *Id.*

present case.[107] Therefore, in 2015, when Gilbert was killed in a holding cell at the police department, the right to be free from prone restraint while forcibly resisting officers was not a clearly established right.[108] Further, because that right was not clearly established, the officers were entitled to qualified immunity and summary judgment was proper.[109]

Because the court found there was no clearly established constitutional right to be free from prone restraint at the time, the court held that Lombardo's § 1983 claims against the policies and practices of SLMPD must also fail.[110] The court reasoned that "the lack of clarity in the law precludes a finding that the municipality had an unconstitutional policy at all because its policymakers cannot properly be said to have exhibited a policy of deliberate indifference to constitutional rights that were not clearly established."[111] Consequently, the Eighth Circuit took a step back in drawing a line regarding what conduct constitutes excessive force by instead relying on a finding that the law was not clearly established.[112]

V. COMMENT

Constitutional avoidance is a well-established tool of judicial restraint and a widely accepted doctrine, but the consequences can be life or death when introduced at the intersection of law enforcement and qualified immunity. Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit characterized the Supreme Court's qualified immunity approach as having "[created] such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights."[113] Because the current qualified immunity approach allows courts to resolve a case without discussing the merits of a plaintiff's claim, "the same right may be violated

[107] *Id.* at 691–92. The court deemed the following cases distinguishable from circumstances with Gilbert. *Id.* at 691. In *Weigel*, officers' use of prone restraint was deemed unreasonable since they continued to apply pressure to the subject after they had stopped resisting. Weigel v. Broad, 544 F.3d 1143, 1152–55 (10th Cir. 2008). In *Champion*, the officers' conduct of fully laying on top of the subject was deemed unreasonable. Champion v. Outlook Nashville, Inc., 380 F.3d 893, 903 (6th Cir. 2004). The officers in *Drummond* were not entitled to qualified immunity for kneeling on the neck and back of an individual who was not resisting. Drummond v. Anaheim, 343 F.3d 1052, 1062 (9th Cir. 2003).

[108] *Lombardo*, 38 F.4th at 692.

[109] *Id.*

[110] *Id.*

[111] *Id.* (quoting Szabla v. City of Brooklyn Park, 486 F.3d 385, 394 (8th Cir. 2007) (en banc) (internal quotations omitted)).

[112] *See id.*

[113] Schwartz, *supra* note 93, at 7; Reinhardt, *supra* note 10, at 1245.

time and again, with courts declining each time to provide a remedy or state the law for future cases."[114] Skirting around these pressing questions keeps officers uninformed as to what degree of force is constitutional and keeps future claimants from securing any redress for the wrongs the United States Constitution claims to protect and uphold.[115] Repeated resolution of cases under the clearly established prong prevents any constitutionality line from being drawn. This creates "a functionally insurmountable hurdle for future civil rights plaintiffs" as their rights remain "indefinitely unclear."[116]

Part A will assess how the courts applied qualified immunity throughout *Lombardo* and how the doctrine of constitutional avoidance ultimately dissolved any hope of an answer for the Lombardo family. It will also examine how the outcome of *Lombardo* does not stand alone; instead, the consequences of a constitutionally-avoidant qualified immunity application have had long-term, widespread consequences. Part B will wade through how to better balance the interests at stake in excessive force qualified immunity cases and pose the question of whether there is hope for moving forward without upsetting that delicate balance.

A. Constitutional Avoidance in Lombardo *and Elsewhere*

When the *Lombardo* case came across the Eighth Circuit's docket, national attention on excessive force in law enforcement was at an all-time high.[117] Societal pressure on courts to provide answers was in direct tension with the doctrine of constitutional avoidance in qualified immunity cases.[118] The Eighth Circuit surely weighed the interest in adhering to constitutional avoidance when contemplating which qualified immunity prong to use in its 2020 decision, but ultimately, it did not shy away from the constitutional questions at issue. In fact, the court sought out a way to define the line for when excessive force may or may not be

[114] Reinhardt, *supra* note 10, at 1249.

[115] *Id.*

[116] Beard, *supra* note 9.

[117] The *Lombardo* case and its ongoing litigation received both local and national media attention. Brandon Gilbert, *Man who Died in STL Police Custody ID'd*, KSDK (Dec. 9, 2015, 2:03 PM), https://www.ksdk.com/article/news/local/man-who-died-in-stl-police-custody-idd/63-290448698 [https://perma.cc/UST8-9PKM]; Danielle Scruggs, et al., *Suspect, 27, Dies in St. Louis Police Custody*, FOX2NOW (Dec. 9, 2015, 5:38 AM), https://fox2now.com/news/27-year-old-suspect-dies-in-st-louis-police-custody/ [https://perma.cc/7CDQ-ATWV]; Ariane de Vogue, *Supreme Court Considers Plea From Parents of Man Killed in St. Louis Jail who was Shackled Facedown*, CNN (May 13, 2021, 11:38 AM), https://www.cnn.com/2021/05/13/politics/qualified-immunity-st-louis-supreme-court/index.html [https://perma.cc/ZPL6-U2PG].

[118] Beermann, *supra* note 98, at 177.

constitutional.[119] The Eighth Circuit could have easily affirmed the district court's grant of summary judgment without trudging through the case's factual details to determine whether the officers' conduct was constitutional.[120] Instead, it chose to take a different and rather unusual route by addressing the merits head-on.[121] This choice was not without consequences.

The impact of the Eighth Circuit addressing the constitutionality prong was predictable. As demonstrated by it's subsequent decision in *Lombardo*, the Supreme Court has continued to jump at the opportunity to interfere with lower court decisions that attempt to draw a perceptible constitutionality line.[122] When lower courts provide explicit answers to the question of whether an individual's Fourth Amendment rights have been violated due to excessive force from law enforcement officers, the Supreme Court has not hesitated to grant certiorari.[123] The Supreme Court in *Lombardo* seemed reluctant to accept the Eighth Circuit's finding of no unconstitutionally excessive force—at least to the extent that finding would contribute to developing a clearly established law of what conduct is or is not constitutional.[124] To the Court, creating such a benchmark in the form of a "per se rule would contravene the careful, context-specific analysis required by this Court's excessive force precedent."[125] The Supreme Court's predominate motive for remanding centered around considerations of constitutional avoidance.[126] It seemed as though to the Court, those considerations outweighed the competing interests involved in providing a clear answer to the Lombardo family or law enforcement.

---

[119] Lombardo v. City of St. Louis, 956 F.3d 1009, 1013 (8th Cir. 2020) (stating that the excessive force question "is dispositive of the case").

[120] *Id.* "[L]ower courts have the discretion to decide which of the two prongs of qualified-immunity analysis to tackle first." *Id.* (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011)). The court went on to point out that that Gilbert was leg shackled, handcuffed, in an asphyxiating position, within a secure holding cell–providing an inference that these contextual characteristics were considered during the qualified immunity analysis. *Id.* at 1014.

[121] *See id.* at 1009.

[122] Schwartz, *supra* note 93, at 6.

[123] *Id.* ("The Court has also granted a rash of petitions for certiorari in cases in which lower courts denied qualified immunity to law enforcement officers, reversing or vacating every one.").

[124] Lombardo v. City of St. Louis, 141 S. Ct. 2239, 2241–42 (2021) ("[T]he court's opinion could be read to treat Gilbert's 'ongoing resistance' as controlling as a matter of law.").

[125] *Id.* at 2242. Justice Alito rejected the majority's position on this point; maybe, his suggestion to directly address the Eighth Circuit's constitutionality reasoning is more in line with establishing clear law going forward. *Id*; *see supra* notes 70–72 and accompanying text.

[126] *See Lombardo*, 141 S. Ct. at 2242.

When the case returned to the Eighth Circuit on remand, the court instead focused only on the clearly established prong, avoiding altogether a decision that would further legal development on excessive force.[127] The Eighth Circuit rationalized its analytical switch by pointing to the "intensive factual nature of this case, and the 'longstanding principle of judicial restraint.'"[128] Frankly, in *Lombardo*, the Supreme Court strongly disincentivized the Eighth Circuit from providing an answer for whether an individual has a constitutional right to be free from prone restraint.[129] Specifically, whether a detainee in a holding cell has a constitutional right to avoid being placed in the prone position by multiple officers for several minutes while already handcuffed and leg-shackled.[130]

The qualified immunity doctrine undeniably plays an important role in the United States court system. It is an indispensable mechanism for protecting law enforcement officers when they carry out their duties to protect and defend.[131] Yet, the line for how far that protection should extend remains blurred, and the Supreme Court has persisted in keeping it blurred for those individuals looking to assert their constitutional rights.[132] The *Lombardo* decision is not the only case where the Court has turned a blind eye to possible constitutional wrongs in the pursuit of protecting law enforcement officers.[133]

In *Kisela v. Hughes*, an officer shot an individual four times as the man approached his roommate from a distance wielding a knife.[134] The severity of the circumstances was contested between the officers and the roommate, who pleaded with the officers to not shoot.[135] The Supreme Court granted the officers qualified immunity without reaching the merits of the case.[136] It determined that the law was not clearly established since it was not apparent that a reasonable officer in similarly situated

[127] Lombardo v. City of St. Louis, 38 F.4th 684, 690 (8th Cir. 2022).

[128] *Id.* (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988)).

[129] *Lombardo*, 141 S. Ct. at 2241.

[130] Lombardo v. City of St. Louis, 956 F.3d 1009, 1013 (8th Cir. 2020), *cert. granted, judgment vacated sub nom.* 141 S. Ct. 2239 (2021).

[131] David D. Coyle, *Getting It Right: Whether to Overturn Qualified Immunity*, 17 DUKE J. CONST. L. & PUB. POL'Y 283, 286–87 (2022).

[132] Schwartz, *supra* note 93, at 6.

[133] *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148 (2018); White v. Pauly, 580 U.S. 73 (2017).

[134] *Kisela*, 138 S. Ct. at 1151.

[135] *Id.* The shots were nonfatal. *Id.*

[136] *Id.* at 1152 ("Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.").

circumstances would know his or her conduct may violate the Constitution.[137]

Similarly, in *White v. Pauly*, the Supreme Court vacated a district court's denial of qualified immunity to an officer who arrived late on a scene where other officers had ambushed brothers at their home at night.[138] While hiding behind a stone wall far away, the officer shot and killed Samuel Pauly, who was pointing a gun out the front window.[139] The record was contested as to whether the officers who first arrived ever adequately identified themselves as law enforcement.[140] Once again, however, the Supreme Court determined that the law was not clearly established to alert an officer in a similar position that his or her conduct would be in violation of the Constitution, entitling the officer to qualified immunity.[141] As courts continue to refuse to draw a clear line, the scope of conduct protected by qualified immunity remains unsettled and leaves law enforcement action in question.[142]

B. Moving Forward

This Note has focused on how the failure to answer constitutional questions prevents future litigants from ascertaining whether an incident may amount to a claim which can withstand the high bar of qualified immunity protection. Excessive force claimants, like the plaintiff in *Lombardo*, risk spending vast time and resources on litigation, with little return, when they attempt to fight against qualified immunity's shield. This risk exists not only for the livelihood of litigants, but qualified immunity's blurred lines can invoke confusion for officers as well.[143] Officers may act blindly under the guise that all conduct will be protected by qualified immunity.[144] Unfortunately, these consequences are often

---

[137] *Id.* at 1153–54.

[138] *White*, 580 U.S. at 74–79.

[139] *Id.* at 76.

[140] *Id.* at 77 (The district court stated, "accepting as true plaintiffs' version of the facts, a reasonable person in the officers' position should have understood their conduct would cause Samuel and Daniel Pauly to defend their home and could result in the commission of deadly force[.]") (internal quotations omitted).

[141] *Id.* at 79 ("The panel majority misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment.").

[142] Tahir Duckett, *Unreasonably Immune: Rethinking Qualified Immunity in Fourth Amendment Excessive Force Cases*, 53 AM. CRIM. L. REV. 409, 424 (2016).

[143] Reinhardt, *supra* note 10.

[144] Walker v. City of Pine Bluff, 414 F.3d 989, 993 (8th Cir. 2005) ("In close qualified immunity cases, the absence of judicial guidance can be significant because '[p]olice officers are not expected to parse code language as though they were participating in a law school seminar.'" (quoting Lawyer v. City of Council Bluffs, 361 F.3d 1099, 1108 (8th Cir. 2004)).

overshadowed by strict adherence to the doctrine of constitutional avoidance.

Many legal scholars appreciate the need to balance the significant role qualified immunity plays in our society and the importance of enforcing the constitutional rights of private citizens.[145] Legal scholars have recently pushed for a return to *Saucier* sequencing on the grounds that qualified immunity, as applied, is flawed.[146] A return to *Saucier* encourages courts to not only determine whether the right was clearly established, but to also decide whether the facts amount to a constitutional violation before invoking protection.[147] One scholar notes that courts should be encouraged to decide the merits when it would benefit judicial economy by preventing re-litigation, when articulation of the law outweighs the benefits of constitutional avoidance, and when the issue is not fact-bound but instead primarily legal.[148]

However, regardless of any encouragement to address the merits more frequently, excessive force cases likely do not fit in the subset of cases which are primarily legal. Inextricably fact-bound cases like those involving excessive force are unlikely to provide precedential value.[149] Therefore, deciding the merits of a fact-intensive case is "unlikely to aid in the establishment of clear law."[150] This is the crux of the interplay between qualified immunity, constitutional avoidance, and excessive force cases: excessive force cases are almost always inseverable from the facts of the particular incident.[151] So, even a broader application of the rights analysis in qualified immunity cases would rarely reach claims of excessive force.[152] It follows that, unless the current doctrine is replaced with a new approach, the constitutionality of excessive force from law enforcement will remain perpetually unclear.

Hopefully, by engaging in rights-related discussions over time, a standard will develop that "prevent[s] stagnation of constitutional law and [prevents] defendants from escaping liability through repeated rulings that

[145] Coyle, *supra* note 131.

[146] *See generally* Schwartz, *supra* note 93 ("Legal scholars and commentators describe qualified immunity in equally stark terms, often criticizing the doctrine for closing the courthouse doors to plaintiffs whose rights have been violated.").

[147] Beard, *supra* note 9, at 904; Beermann, *supra* note 98, at 175.

[148] Beard, *supra* note 9, at 904.

[149] Beermann, *supra* note 98, at 176–78.

[150] *Id.*

[151] Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) ("Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." (citing Mullenix v. Luna, 136 S. Ct. 305, 309 (2015)).

[152] *Id.*

rights are not clearly established."[153] Even if a court determines a right was not clearly established at the time, there may be an advantage to having courts fully assess how a certain case might have been decided on the merits. Courts, including the Supreme Court, are often tasked with delving into unnecessary aspects of a case when it "makes sense in light of the need for rational development of the law," or to "provide guidance."[154] Excessive force is an area where actors could use additional guidance that courts may be uniquely able to provide.

Excessive force in the context of law enforcement conduct is a contentious and important issue facing the judiciary today.[155] When death results from excessive force at the hands of law enforcement officers, litigants demand answers, and they often look to courts to provide justifications. The purpose of qualified immunity is to help officers do their jobs with esteem and legitimacy. Constitutional avoidance frustrates this goal by depriving officers of the guidance that comes with the development of law. Returning to sequencing of the qualified immunity doctrine will serve both parties by maintaining a balance between the interests of law enforcement and the interests of the public. Police departments can use the direction from courts on what is—or is not—excessive force and mold their policies and tactics to respect the rights of citizens accordingly. Additionally, individuals can operate with a strong assumption of what their rights are and have a better understanding of when those rights may be violated.

It is obvious that the various interests at stake in excessive force cases are often far too important to be reduced to a general, sweeping rule. However, if a court sees fit to reach the merits of a case and answer the constitutional right question, it helps all parties to let that decision stand. Maybe allowing courts to exercise flexibility in applying the qualified immunity doctrine will gradually establish clear law without offending the invaluable principle of qualified immunity.[156] Remember Justice Alito's dissent. Justice Alito thought the proper remedy in the *Lombardo* case would be for the Supreme Court to inquire into whether the officers conduct resulted in constitutional or unconstitutional force to decide the case—this outcome would have been a step in the right direction.[157] If the Supreme Court had let the Eighth Circuit's 2020 opinion stand, at least officers could look at the facts of that case and tell themselves, "this is where the line has been drawn, now I can do my best not to cross it."

[153] Beermann, *supra* note 98, at 176.

[154] *Id.* at 156.

[155] *See generally* Ray, *supra* note 2; Kim & Wilson, *supra* note 2.

[156] *See supra* text accompanying notes 70–72; *see also* Lombardo v. City of St. Louis, 141 S. Ct. 2239, 2242 (2021) (Alito, J. dissenting).

[157] *Lombardo*, 141 S. Ct. at 2242.

VI. CONCLUSION

The *Lombardo* decision is a perfect demonstration of how the doctrine of constitutional avoidance has shaped the way courts apply qualified immunity in the context of excessive force. If courts continue to avoid addressing the merits of excessive force cases, law enforcement officers are left without guidance and claimants are left without hope of remedies or answers. While it is imperative that law enforcement officers are granted protection in carrying out their duties, the seemingly automatic application of qualified immunity should not come at the expense of claimants who truly believe they have been wronged. It is time for courts to lower the shield of qualified immunity and begin establishing clearly defined law in the area of excessive force. The line simply cannot stay blurred forever.