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**PEARSON v. CALLAHAN AND QUALIFIED IMMUNITY: IMPACT ON FIRST AMENDMENT LAW**

**BY DAVID L. HUDSON, JR.**

**INTRODUCTION**

At first glance, a search and seizure case involving informants, the consent-once-removed doctrine, and other Fourth Amendment concepts would seemingly have little connection to freedom of expression. Commentators have noted, however, that, despite the case's scant media coverage, the United States Supreme Court's 2008 decision in *Pearson v. Callahan* has had a substantial impact on First Amendment litigation.

The Court's decision in *Pearson* dealt with qualified immunity—a doctrine that enables government officials to avoid liability if they have not violated clearly established constitutional or statutory law. The case

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1. The consent-once-removed doctrine means that a suspect or defendant can give consent even though he does not directly give consent to the police. Under this theory, the suspect gives consent when he allows an individual, such as an informant, to enter his home. The consent given to the informant is then transmuted to the police.
involved criminal defendant, Afton Callahan, and his sale of methamphetamine to an informant working for a drug taskforce in Millard County, Utah.\textsuperscript{6} The wired informant gave an arrest signal to officers in the area, who then arrested Callahan on drug charges.\textsuperscript{7}

Callahan asserted that the officers violated his Fourth Amendment rights with their warrantless search and arrest.\textsuperscript{8} A trial court ruled that the officers’ warrantless search was justified by exigent circumstances.\textsuperscript{9} The Court of Appeals for the State of Utah reversed, finding that the search was unconstitutional under exigent circumstances (which the State conceded) or the inevitable discovery rule.\textsuperscript{10}

Callahan then filed a constitutional tort claim in federal court under 42 U.S.C. § 1983,\textsuperscript{11} asserting a violation of his Fourth Amendment rights.\textsuperscript{12} The federal district court granted the state officials qualified immunity, finding that a reasonable officer may have believed that the consent-once-removed doctrine could apply when Callahan gave consent to the informant to come into his home.\textsuperscript{13} On appeal, the Tenth Circuit reversed, finding that the officers were not entitled to qualified immunity.\textsuperscript{14} The court reasoned that the officers knew or should have known that their conduct was unlawful because they knew they did not have a warrant and knew that Callahan did not consent to the police entering his home.\textsuperscript{15}

The United States Supreme Court unanimously reversed, writing that “[w]hen the entry at issue here occurred in 2002, the ‘consent-once-removed’ doctrine had gained acceptance in the lower courts.”\textsuperscript{16}

But the Court did something much more important than rule that the officers were entitled to qualified immunity in the specific civil rights

\textsuperscript{6} Pearson, 555 U.S. at 227–28.
\textsuperscript{7} Id. at 228.
\textsuperscript{8} Id. at 227.
\textsuperscript{9} Id.
\textsuperscript{10} Id. at 228 (citing State v. Callahan, 93 P.3d 103 (Utah Ct. App. 2004)).
\textsuperscript{11} Section 1983 serves as the statutory vehicle for constitutional tort claims.
\textsuperscript{12} Pearson, 555 U.S. at 229.
\textsuperscript{13} Id. (citing Callahan v. Millard Cnty., No. 2:04-CV-00952, 2006 WL 1409130 (2006)).
\textsuperscript{14} Id. (citing Callahan v. Millard Cnty., 494 F.3d 891, 895–99 (2007)).
\textsuperscript{15} Id. at 230 (citing Callahan, 494 F.3d at 899).
\textsuperscript{16} Id. at 244.
case of Alton Callahan. The Court ruled that lower court judges could decide qualified-immunity questions by avoiding the often difficult issue of whether there was a constitutional violation and proceed directly to the inquiry of whether such a right was clearly established.\(^\text{17}\)

Previously, in *Saucier v. Katz*,\(^\text{18}\) the Court had determined that the initial questions to be addressed in a qualified-immunity case were (1) whether there was a violation of a constitutional right and (2) whether that right was clearly established at the time of defendants' conduct.\(^\text{19}\) Some Justices, however, criticized the *Saucier* approach. Justice Stephen Breyer referred to it as the "failed *Saucier* experiment."\(^\text{20}\) The problem with the "rigid order of battle"\(^\text{21}\) mandated by *Saucier* was that the first question—whether there has been a constitutional violation—is often a much more difficult question to resolve than the second question of whether the law was clearly established.\(^\text{22}\)

In *Pearson*, Justice Samuel Alito, Jr. explained that before *Saucier*, judges had the option of whether to apply the steps sequentially or to proceed directly to the clearly established prong.\(^\text{23}\) Justice Alito then explained that the experience with *Saucier* showed that it was too inflexible and should be abandoned in favor of giving the judges needed discretion.\(^\text{24}\) He stated: "On reconsidering the procedure required in *Saucier*, we conclude that while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory."\(^\text{25}\)

\begin{itemize}
\item \(17.\) *Id.* at 227, 243–44.
\item \(18.\) 533 U.S. 194 (2001).
\item \(19.\) *Id.* at 197.
\item \(20.\) Morse v. Frederick, 551 U.S. 393, 432 (2007) (Breyer, J., concurring in judgment and dissenting in part).
\item \(21.\) Brousseau v. Haugen, 543 U.S. 194, 201 (2004) (Breyer, J., concurring) ("Indeed when courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense and can sometimes lead to a constitutional decision that is effectively insulated from review.").
\item \(22.\) See *Hudson*, *supra* note 2.
\item \(24.\) *Id.* at 234–35 (citing cases in which courts disagreed with the "rigid" *Saucier* standard).
\item \(25.\) *Id.* at 236.
\end{itemize}
Justice Alito quoted one complaint which regarded *Saucier* as a "puzzling misadventure in constitutional dictum." He also cited numerous colleagues on the Court who questioned the mandatory sequence of *Saucier*.

However, Justice Alito wrote that, even though no longer mandatory, the two-step protocol is "often beneficial" in part because it "promotes the development of constitutional precedent." He reasoned that lower federal district and circuit court judges are in the best position to determine how to analyze qualified-immunity cases.

Scholars have questioned whether *Pearson* would impede the development of constitutional law. For example, law professor Michael Wells has stated that the decision "will make it easier for courts to decide that the law is unsettled, grant qualified immunity and not get to the merits of important constitutional questions.... Now there is always an argument against facing them." Professor John Jeffries, Jr. warned that the *Pearson* decision, at times, could lead to the "degradation of constitutional rights."

As one commentator wrote, "*Pearson*'s holding has, if anything, intensified the debate over the proper procedural framework for addressing qualified-immunity claims." Other scholars have identified the "post-*Pearson*" period as crucial to studying the vitality of §1983 civil rights litigation.

This piece surveys the impact that *Pearson* has already had on First Amendment law.

27. *Id.* at 234–35.
28. *Id.* at 236.
29. *Id.* at 242.
30. See *Hudson*, supra note 2.
I. IMPACT ON FIRST AMENDMENT LAW

Judges have seized upon the enhanced flexibility to grant qualified immunity provided by Pearson v. Callahan and impacted numerous areas of First Amendment law. For example, the Tenth Circuit utilized its newfound discretion to grant qualified immunity to Park City, Utah officials who prohibited a visual artist from selling his work in public parks and streets. In Christensen v. Park City Municipal Corp., the court remarked, “Fortunately, very recently, while this opinion was being prepared, the Supreme Court jettisoned its prior holding that courts in qualified-immunity cases must determine whether the plaintiff’s constitutional rights were violated before turning to whether the asserted right was clearly established.” The court went on to note that “[t]his case is a prime example of when the discretion to avoid the first half of the Saucier two-step should be exercised.”

A. Student Speech

Pearson’s discernable impact in several areas of the law is especially apparent in student speech. This is understandable in a certain sense, as many questions in student speech remain deeply divided and controversial. Consider the example of student online speech—an area fraught with uncertainty. The Second Circuit ruled that public school officials in Burlington, Connecticut were entitled to qualified immunity when they disciplined a high school student for criticizing school officials with intemperate language on the Internet. “We do not reach

34. See generally Christensen v. Park City Mun. Corp., 554 F.3d 1271 (10th Cir. 2009); see also David L. Hudson, Jr., Utah Artist Feels Impact of High Court Decision, FIRST AMENDMENT CENTER ONLINE (Feb. 16, 2009), http://www.firstamendmentcenter.org/utah-artist-feels-impact-of-high-court-decision.
35. 554 F.3d 1271 (10th Cir. 2009).
36. Christensen, 554 F.3d at 1277 (citing Pearson v. Callahan, 555 U.S. 223 (2009)).
37. Id. at 1278.
the question whether school officials violated Doninger's First Amendment rights by preventing her from running for Senior Class Secretary," the Second Circuit wrote. \footnote{Id. at 346.} "We see no need to decide this question. We agree with the district court that any First Amendment right allegedly violated here was not clearly established." \footnote{Id.} Other courts have questioned whether there is any clearly established law with respect to school officials' regulation of students' online speech. \footnote{Id. at 346.}

The Ninth Circuit recently considered an interesting case involving a student who filed an Establishment Clause challenge based on a series of comments made by his Advanced Placement History teacher that allegedly showed hostility toward Christianity and religion in general. \footnote{See, e.g., T.V. v. Smith-Green Cmty. Sch. Corp., No. 1:09-CV-290-PPS, 2011 WL 3501698 (N.D. Ind. Aug. 10, 2011).} In \textit{C.F. v. Capistrano Unified School District}, \footnote{C.F. v. Capistrano Unified Sch. Dist., 654 F.3d 975 (9th Cir. 2011).} the Ninth Circuit had little trouble with moving to the "clearly established" prong in part because the case was considered unique. \footnote{Id.} It reasoned, "We have little trouble concluding that the law was not clearly established at the time of the events in question — there has never been any reported case holding that a teacher violated the Establishment Clause by making statements in the classroom that were allegedly hostile to religion." \footnote{See id. at 986.} While many may agree with this holding, the court ultimately erred in declining to address whether the teacher's alleged hostility toward religion in class crossed the line for Establishment Clause purposes. \footnote{Id.} Had the court done so, it would have given better guidance to students, teachers and school administrators in an area of First Amendment law known as a culture war. \footnote{Id. at 986.}

\footnote{40. \textit{Id}. at 346.}
\footnote{41. \textit{Id}.}
\footnote{43. \textit{C.F. v. Capistrano Unified Sch. Dist.}, 654 F.3d 975 (9th Cir. 2011).}
\footnote{44. \textit{Id}.}
\footnote{45. \textit{See id}. at 986.}
\footnote{46. \textit{Id}.}
\footnote{47. \textit{Id}.}
\footnote{48. \textit{See} \textbf{JONATHAN ZIMMERMAN}, \textit{WHOSE AMERICA? CULTURE WARS IN AMERICA'S PUBLIC SCHOOLS} (2002).}
B. Public Employee Speech

Public employee First Amendment jurisprudence is especially susceptible to the Pearson analysis. For years, the seminal test for determining the free-speech rights of public employees was the Pickering-Connick test derived from *Pickering v. Board of Education* and modified by *Connick v. Myers*. Under this test, a public employee had to show that his or her speech touched on matters of public concern or public importance. This threshold prong was designed to “weed out” claims that were more akin to personal grievances. If employee speech touches on matters of public concern, the analysis proceeds to a balancing prong. Under such balancing, the court weighs the employee’s free-speech rights against the employer’s efficiency interests in a disruptive-free workplace.

In 2006, the United States Supreme Court added another threshold inquiry in *Garcetti v. Ceballos*. Under *Garcetti*, a public employee has to show that he spoke as a citizen, not as an employee. In other words, he must show that his speech does not relate to his official job duties. As a result of this standard, the Court ruled in the case that an assistant district attorney’s internal office memorandum recommending dismissal of a criminal case was part of his official duties rather than expression he would have made as a citizen.

Courts struggle mightily with all three prongs of this public employee free-speech test: (1) whether an employee is speaking as an employee or a citizen (“the Garcetti” prong); (2) whether the speech touches on a matter of public concern; and (3) the balancing prong.

51. *Id.* at 142.
54. *Id.*
56. *Id.* at 421.
57. *Id.*
58. *Id.*
Because of the difficulty and complexity of the test’s prongs, several lower courts have used the *Pearson* shortcut.

For example, in *Stickley v. Suterly*, the Fourth Circuit determined that a police chief and town manager were entitled to qualified immunity even though they took disciplinary action against a police officer right after the officer spoke out against his demotion. The Fourth Circuit analyzed this issue by stating, “[H]aving reviewed the substantive law governing employee speech, we are persuaded that the law in this area is not ‘clearly established’ such that a reasonable person would have known what the law necessarily required in many cases.”

The court reasoned that the Supreme Court’s public-concern test—determining whether employee speech speaks to important public issues—leads “to the conclusion that an employee’s right to speech in any particular situation will often not be immediately evident.”

The Seventh Circuit used *Pearson* to grant qualified immunity to prison officials who transferred an Illinois assistant deputy director after he voluntarily testified on behalf of an inmate at a Prisoner Review Board. Specifically, in *Mastrisciano v. Randle*, the assistant deputy director, Ronald Mastrisciano, testified on behalf of inmate Harry Aleman, at Aleman’s parole hearing. The testimony was controversial, in part, because Aleman was a defendant who had obtained an acquittal on murder charges in the early 1970’s. It was later determined that Aleman had bribed the trial judge. The appeals court explained that “[i]n these particular circumstances, the law at the time was not such that reasonable officials would know that transferring Matrisciano [the assistant deputy director] after his testimony before the Board was unlawful.” However, the Seventh Circuit has determined that retaliating

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59. 416 F. App’x 268 (4th Cir. 2011).
60. See id.
61. Id. at 272.
62. Id.
63. Matrisciano v. Randle, 569 F.3d 723 (7th Cir. 2009), abrogated by Fairley v. Andrews, 578 F.3d 518 (7th Cir. 2009).
64. Id.
65. Id. at 727.
66. Id.
67. Id. at 735.
68. Id.
against public employees after testimony in court or at other hearings constitutes unlawful retaliation.69

The Second Circuit has relied upon Pearson to bypass the first prong of the Saucier test and, in doing so, determined that eight Connecticut state officials did not violate clearly established law when they removed the former executive director and general counsel of the State Ethics Commission for criticizing their conduct during his disciplinary hearing.70 In Plofsky v. Giuliano,71 the Second Circuit bluntly stated, “Here, we exercise our discretion to move immediately to the second step of the qualified immunity analysis.”72 Because of the short-circuited qualified-immunity analysis, the Second Circuit’s decision fails to provide future public employee litigants with a sense of where their free-speech rights begin and end in employment retaliation cases.

C. Inmates

Perhaps because inmate litigation comprises such a sizeable portion of the dockets for federal district courts,73 the Pearson shortcut has been embraced in these courts. Even though the Prison Litigation Reform Act74 has made it tougher for inmates to pursue litigation, they

69. See, e.g., Shimer v. Washington, 100 F.3d 506 (7th Cir. 1996) (explaining that where a prison guard is willing to testify on behalf of a prisoner, “[t]he prison administration must proffer some evidence to support its restriction of prison guards’ constitutional rights”). Admittedly, the Seventh Circuit took great pains in its Matrosciano decision to distinguish its earlier Shimer decision. Matrosciano, 569 F.3d at 735-36.
70. Plofsky v. Giuliano, 375 F. App’x 151, 153 (2d Cir. 2010) (citing Pearson v. Callahan, 555 U.S. 223 (2009)).
71. 375 F.App’x 151.
72. Id. at 153.
still file a large number of lawsuits. One California federal magistrate judge acknowledged this reality and stated, “And nothing we’re able to do will ever stem the tide of prisoner lawsuits.”

One way for courts to deal with the sheer mass of prisoner lawsuits is to handle as many cases in an expedited fashion. Enter Pearson v. Callahan and qualified immunity, as sometimes courts in inmate cases follow the traditional two-step Saucier procedure. But the Ninth Circuit recently used Pearson and its grant of discretion to courts to give prison officials qualified immunity, even though they instituted an eighteen-month ban on visits from minors. A federal district court also cited Pearson in finding that prison officials were entitled to qualified immunity when they denied a Muslim inmate prayer oils. Another federal district court held that officials were entitled to qualified immunity over a Nation of Islam inmate’s allegations that his constitutional and statutory rights were violated by the denial of his request for a Halal meal. A federal district court in Massachusetts declined to resolve the question of which constitutional standard from the United States Supreme Court should apply in a challenge by an inmate alleging he had a First Amendment right to send e-mail to family


77. See e.g., Black v. Calunga, 656 F. Supp. 2d 625, 633 (E.D. Tex. 2009) (holding that “[t]he Supreme Court mandated that courts must employ a two-step sequence in evaluating whether government officials are entitled to qualified immunity claims”).

78. Dunn v. Castro, 621 F.3d 1196, 1199–1201 (9th Cir. 2010) (holding that government officials were entitled to qualified immunity when they temporarily revoked a prisoner’s visitation rights because the prisoner had a sexually explicit phone conversation with his wife while their minor child was also on the line).


Rather than resolving the question, the court conveniently relied on Pearson and found no clearly established right.82 Another federal district court cited Pearson favorably in denying an inmate’s right to receive any erotic magazine subscriptions.83 The court purported to rely on the “clearly established” prong in awarding prison officials qualified immunity, though the court seemingly did not need to do so as it had already determined there was no underlying valid First Amendment claim.84 In another recent decision, a federal district court in Texas dismissed a prison inmate’s First Amendment retaliation claim by granting officials qualified immunity.85 Here, the court noted the two prongs to the test for qualified immunity and maintained that, under Pearson, the court had “discretion ‘in deciding which of the two prongs of the qualified immunity analysis should be addressed first’”86. The court, however, ultimately decided the case based on the “clearly established” prong.87

As another example, a federal district court in Oregon granted qualified immunity to prison officials who censored an inmate’s outgoing letters for containing racial and ethnic slurs.88 The court reasoned that there was no clearly established right for an inmate to send letters with such hateful language.89


82. Id. at *4 (“The Court need not decide here which standard is appropriate, because Parisi’s claims fail in any event because of the doctrine of qualified immunity.”).


84. Id. at *6–8.


86. Id. (quoting Pearson v. Callahan, 555 U.S. 223, 236 (2009)).

87. Id.


89. Id. at *7.
Unfortunately, many people in society do not care about prisoner rights. They reason that people that violate legal norms and harm others do not deserve the various protections the Constitution provides. The sheer amount of inmate litigation, however, and the fact that there appear to be so many deprivations of First Amendment rights within the prison context, should compel the courts to more clearly articulate the parameters of constitutional freedoms.

II. THE PEARSON PROBLEM

The First Amendment rights of students, public employees, and prisoners are just some areas noticeably impacted by Pearson and represent only a narrow part of First Amendment jurisprudence. The Pearson decision gives judges the discretion to avoid tough constitutional questions and decide cases based on the "clearly established" prong in other situations as well. One law professor has referred to the decision as an example of "procedural judicial activism." As such, Pearson certainly gives judges more power to avoid deeper constitutional analysis and dismiss cases in a more expedited fashion; a reality especially problematic in the First Amendment arena.

Specifically, a serious problem could emerge if lower court judges regularly cite Pearson to avoid the Saucier two-prong approach. Courts could simply avoid deciding important constitutional questions and the law could stagnate, as courts fail to explain when certain governmental conduct violates First Amendment and other constitutional


91. Id.

92. Pearson applies to other constitutional claims. The case itself was decided on Fourth Amendment grounds and has been applied in many Fourth and Eighth Amendment cases. It also has been applied in other First Amendment areas. See, e.g., Wiese v. Casper, 593 F.3d 1163 (10th Cir. 2010) (using Pearson to dismiss First Amendment claims of protestors at political event, and reasoning that the law was not clearly established).


As United States District Judge Lynn Adelman and Jon Dietrich explained:

While allowing courts to decide the 'easy' question and avoid the hard one might make sense from a judicial economy standpoint, it would impede the development of constitutional law. If courts regularly decided the question of immunity before determining whether the defendant had violated a constitutional right, they would establish few such rights.96

Other commentators agree, writing that “there is good reason to believe that courts will generally elect to decide qualified-immunity cases solely on the basis of the ‘clearly established’ prong wherever possible.”97

This caveat applies with great force in the First Amendment context where there are so many difficult, complex and unsettled areas of law. These include:

- When does speech cross the line from protected speech into an unprotected true threat?98
- When does profane speech directed at another person constitute “fighting words”?99
- When can school officials punish students for off-campus speech by reasoning that such

95. Id.
97. Friedland et. al., supra note 3, at 52.
98. See David L. Hudson, Jr., True Threats, First Amendment Center Online (May 12, 2008), http://www.firstamendmentcenter.org/true-threats (“True threat jurisprudence remains a muddled mess.”).
speech might cause a substantial disruption?\textsuperscript{100}

- When can school officials punish students for pro-gay and anti-gay themes?\textsuperscript{101}
- When does a student’s insulting speech to a teacher constitute a threat or “fighting words”?\textsuperscript{102}
- Whether funeral protest statutes limiting the time and distance at which protests can take place are constitutional?\textsuperscript{103}
- Whether speech is classified as political speech or commercial speech?\textsuperscript{104}

**CONCLUSION**

The potential remains that federal judges will decide at least some First Amendment cases on qualified immunity grounds by deciding simply whether the right was clearly established and not address the merits of whether certain government conduct violates the First Amendment in the first place. As Professor Michael Wells stated, “First Amendment values and constitutional values in general would be better served by an approach that obliges courts to decide constitutional questions.”\textsuperscript{105}

Many courts could avoid deciding important questions of constitutional law and simply hold, “The right was not clearly established.” This could hinder the development of First Amendment

\textsuperscript{100} See J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 937 (3rd Cir. 2011) (Smith, J., concurring) (“Lower courts, however, are divided on whether \textit{Tinker}'s substantial-disruption test governs students' off-campus expression.”).

\textsuperscript{101} See Zamecnik v. Indian Prairie Sch. Dist., 636 F.3d 874 (7th Cir. 2011).

\textsuperscript{102} See In Re Nickolas S., 245 P.3d 446 (Ariz. 2011).


\textsuperscript{105} See Hudson, \textit{supra} note 2.
law and deprive litigants of proper redress. Hopefully, federal judges will take heed of Justice Alito’s recognition that the *Saucier* approach “is often beneficial” and “promotes the development of constitutional precedent.”


108. *Id.*