JUDGE WYNN, JUDICIAL CHOICE, AND § 1983*

ANNA COLLINS PETERSON**

The term I spent clerking for Judge Wynn, from the fall of 2019 through the summer of 2020, was a tumultuous one—not in chambers, but in the world beyond our quiet offices in Raleigh. We were in the first unsettling months of what would turn out to be a multiyear global pandemic. Widespread protests against police brutality and racial injustice focused public attention on civil rights, including claims under § 1983 and the related doctrine of qualified immunity—issues that Judge Wynn had written and spoken on before. The public attention to civil rights eventually moved Judge Wynn to write an op-ed published by *The Washington Post*, expressing his view that qualified immunity undermined the purpose of § 1983. His decision to reach for an audience beyond the usual readers of judicial opinions may have surprised some. But those who know Judge Wynn, including his clerks, were not at all surprised. Judge Wynn has long believed that judges have the power and the responsibility to promote justice, both through their legal decision-making and their work in the larger community.

Judge Wynn often invokes the concept he calls "judicial choice."[1] The concept, in its simplest form, is that most cases (at least among those argued before the Fourth Circuit) involve a question without a clear answer from binding authority. All sides can make reasonable legal arguments. Which side ultimately prevails is a matter of judicial choice, a decision based on each judge's view of the facts, policy, and the desirable operation of the law.[2]

** Anna Collins Peterson is an associate at Kaplan Hecker & Fink LLP. She clerked for Judge Wynn from 2019 to 2020. The views expressed in this Essay are solely those of the author and do not reflect the views of Kaplan Hecker & Fink LLP or of Judge Wynn. The author thanks her family for their support and edits, with special gratitude to Derek Behnke for his enthusiasm and enduring patience. The author also thanks her co-clerks for their thoughtfulness and good humor, both during their time together in chambers and in the time since.

1. *See* Judge James A. Wynn, Jr., State v. Mann: *Judicial Choice or Judicial Duty?*, 87 N.C. L. REV. 991, 996–97 (2009) [hereinafter Wynn, Jr., *Judicial Choice or Judicial Duty*]; *see also* ABA Ctr. for Hum. Rts., *The Arc of the Moral Universe: A Conversation with Judge James A. Wynn*, YOUTUBE (Mar. 25, 2021), https://www.youtube.com/watch?v=olfKV2hs0rM [https://perma.cc/D4DM-3NB3] [hereinafter *The Arc of the Moral Universe*].

2. *See The Arc of the Moral Universe*, *supra* note 1, at 1:06:30 ("Judicial choice simply means that you've got an issue for which there is law on one side and law on the other side . . . . [W]hen the judge gets to the point where there's pretty solid law on both sides, and facts, then how does a judge make the choice?").

Judge Wynn used this concept to explore North Carolina Supreme Court Justice Thomas Ruffin's opinion in *State v. Mann*,[3] which held that slave owners had absolute authority over their slaves, including authority to commit acts of physical violence, except where expressly forbidden by statute.[4] Judge Wynn noted that Judge Ruffin "couch[ed] the outcome in *Mann* as a virtual *fait accompli*" despite previous decisions under North Carolina common law that could have laid the foundation for a different outcome.[5] "[T]he common law afforded Judge Ruffin the flexibility to reach a different outcome," and Judge Ruffin used that flexibility in later opinions that fostered economic change.[6] But in *State v. Mann*, Judge Ruffin suggested his "hands were tied" to reach an alternative outcome.[7] In Judge Wynn's view, Judge Ruffin made a judicial choice in deciding *State v. Mann*, even as his opinion tried to suggest otherwise.

The idea of judicial choice has two corollaries. First, context matters. If we recognize that in many cases, judges are selecting from multiple possible outcomes rather than mechanically applying controlling precedent to answer the question before them, the facts surrounding the legal question grow in importance. How the case presents to the court, whether either party is particularly sympathetic, and how social or political conditions bear on the legal questions will all affect the judicial choice that each judge makes. Second, recognizing that outcomes of cases are, in many instances, a result of choice rather than a foreordained conclusion, gives judges (and the advocates who influence them) both responsibility and freedom: responsibility in that judges are not simply announcing balls and strikes but shaping the law and its resulting effect on the parties; and freedom in that if judges are making decisions, they can choose to make decisions that advance justice, rather than pretend their hands are tied by precedent or procedure. Looking to *State v. Mann* as an example again, Judge Ruffin had the freedom to resolve the case another way. As Judge Wynn demonstrates, including with a proposed opinion, Judge Ruffin could have upheld the battery conviction at issue. But Judge Ruffin avoided responsibility for his judicial choice, which Judge Wynn described as "the judicial choice between upholding the legality of slavery as an institution on the one hand, and the recognition that slaves were, in fact, sentient beings and therefore fundamentally different from other property, on the other."[8] But Judge Ruffin painted the outcome as inevitable and irreversible, as though he had made no judicial choice at all.

3. 13 N.C. (2 Dev.) 263 (1829).
4. Wynn, *Judicial Choice or Judicial Duty*, *supra* note 1, at 994–96.
5. *Id.* at 997.
6. *Id.* at 998.
7. *Id.* at 994.
8. *Id.* at 997.

Judicial choice is not unique to any particular area of the law. But Judge Wynn's approach to civil rights claims under § 1983 and the related doctrine of qualified immunity—issues that drew great public attention during my term with Judge Wynn—most clearly illustrates his idea of judicial choice and conveys several of the lessons of clerking in Judge Wynn's chambers. First, context matters. The historical context from which § 1983 arose informs the purpose and desirable operation of that law. And the factual context of each case is essential for identifying the judicial choice. Second, like Judge Ruffin in *State v. Mann*, judges sometimes obscure the judicial choices they make, often by painting the outcome as inevitable despite their ability to reach a different conclusion. And finally, in the § 1983 context, when judges fail to make a judicial choice, or perhaps more commonly, obscure the judicial choice they make, the development of constitutional law stagnates, to the detriments of the litigants and the public generally.

I. JUDICIAL CHOICE IN CONTEXT

In the spring of 2020, the murders of unarmed Black Americans by police spurred nationwide protests.[9] This moment of national reckoning moved Judge Wynn to write publicly for an audience beyond the usual reach of a judicial opinion. He wanted to talk about qualified immunity—an issue that had long been a topic of attention for him and was quickly becoming a part of the national consciousness. In an opinion piece published in *The Washington Post*, Judge Wynn wrote:

> George Floyd's unconscionable killing has properly brought renewed attention to the Supreme Court's doctrine of "qualified immunity," which shields law enforcement officers from civil lawsuits alleging excessive force. The judge-made law of qualified immunity subverts the Civil Rights Act of 1871, which Congress intended to provide remedies for constitutional violations perpetrated by state officers. Eliminating the defense of qualified immunity would improve our administration of justice and promote the public's confidence and trust in the integrity of the judicial system.[10]

9. Dionne Searcey & David Zucchino, *Protests Swell Across America as George Floyd Is Mourned Near His Birthplace*, N.Y. TIMES (June 6, 2020), https://www.nytimes.com/2020/06/06/us/george-floyd-memorial-protests.html [https://perma.cc/XBU6-F6DZ (dark archive)].

10. James A. Wynn, Jr., *As a Judge, I Have To Follow the Supreme Court. It Should Fix This Mistake*, WASH. POST (June 12, 2020, 8:00 AM), https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake/ [https://perma.cc/XP7D-W9A3 (dark archive)] [hereinafter Wynn, *As a Judge*].

To support his argument, Judge Wynn began with a lesson about the 1871 law that was intended to protect individuals' constitutional rights and the twentieth-century judge-made doctrine that had eroded that protection.[11]

To Judge Wynn, understanding the historical context for the statute was essential for understanding its modern significance. But his attention to context is not just historical curiosity. Judge Wynn brings the same attention to the context of the cases before him because understanding that factual context is necessary to identifying and making the judicial choice that each case presents.

A. *The Historical Context of § 1983 Informs Judicial Choice*

Following the Civil War, lawlessness and violence against newly freed African Americans reigned in the South.[12] By 1870, the Ku Klux Klan and other organizations perpetrated violence and terror against African Americans, Republican leaders, and proponents of Reconstruction. Many prominent white Democrats, including those with law enforcement authority, participated in the violence. And even those without a connection to the violence "either minimized the Klan's activities or offered thinly disguised rationalizations for them."[13] "Much Klan activity took place in those Democratic counties where local officials either belonged to the organization or protected it. Even in Republican areas, however, the law was paralyzed."[14]

Eventually, Congress responded by enacting a series of Enforcement Acts in 1870 and 1871 "to counteract terrorist violence."[15] The Civil Rights Act of 1871, often referred to as the Ku Klux Klan Act of 1871, included a measure to criminalize, under federal law, acts and conspiracies to deny citizens their rights, allowing the federal government to prosecute where states failed to act.[16] Section 1 of that Act created *civil* liability for state officials who infringed on individuals' rights, allowing individuals to sue to recover monetary damages for those violations.[17] Section 1 is now codified, along with subsequent amendments to the provision, at § 1983 of Title 42 of the U.S. Code—colloquially referred to as § 1983.[18] The Ku Klux Klan Act was remedial, as it was intended to end the state-sanctioned racial violence occurring in the South, and it was part of a profound change in the relationship between federal and state authorities, particularly in the protection of individual rights against abuses by states and

11. *Id.*

12. *See* Ngiraingas v. Sanchez, 495 U.S. 182, 187 (1990). *See generally* ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 180–98 (2014).

13. FONER, *supra* note 12, at 187.

14. *Id.*

15. *Id.* at 195.

16. *See* Civil Rights Act of 1871, Pub. L. No. 42-22, § 2, 17 Stat. 13, 13–14 (codified as amended at 42 U.S.C. § 1985).

17. *See id.* § 1, 17 Stat. at 13 (codified as amended at 42 U.S.C. § 1983).

18. *See* 42 U.S.C. § 1983.

state officials. Specifically, the Act "was designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others."[19]

Federal enforcement under the Act was effective during Reconstruction in 1871 and 1872.[20] Although only a relatively small number of Klansmen were actually prosecuted, "the federal government's willingness to bring its legal and coercive authority to bear had broken the Klan's back and produced a dramatic decline in violence throughout the South."[21] But like much of the progress made during Reconstruction, enforcement of the Ku Klux Klan Act faded in the later part of the nineteenth century.[22]

The part of the Act providing for civil liability against government actors who violated an individual's civil rights—§ 1983—became more widely used in the twentieth century.[23] But along with the rise in § 1983 actions came the doctrine of qualified immunity, a judicially created doctrine that significantly limits when individuals can actually recover in § 1983 actions.[24] This doctrine essentially requires that a § 1983 plaintiff alleging an official violated her rights demonstrate that, at the time of the alleged violation, the right was "clearly

19. *See* District of Columbia. v. Carter, 409 U.S. 418, 426 (1973).

20. *See id.*

21. FONER, *supra* note 12, at 197.

22. *Id.*

23. *See* Monroe v. Pape, 365 U.S. 167, 168–70 (1961). *Monroe* is generally regarded as the case that opened the door to the modern use of § 1983. *See, e.g.*, MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION (3d ed. 2014), https://www.fjc.gov/sites/default/files/2014/Section-1983-Litigation-3D-FJC-Schwartz-2014.pdf [https://perma.cc/R8M7-639G]. In *Monroe*, the plaintiff alleged that thirteen Chicago police officers, without a warrant, broke into his home and made him and his family stand naked in the living room while the officers ransacked their home and then detained the plaintiff at the police station for ten hours without charges. *Monroe*, 365 U.S. at 169. The Court, reversing the lower court's dismissal of plaintiff's complaint against the individual officers, announced two important holdings. *Id.* at 183–84. First, the Court held that "under color of law," as used in § 1983, included "[m]isuse of power, possessed by virtue of state law." *Id.* at 181–84 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). And second, the Court held that a § 1983 plaintiff need not pursue any available state remedies before bringing a federal § 1983 action. *Id.* at 183.

24. In *Pierson v. Ray*, 386 U.S. 547 (1967), Mississippi police arrested an interracial group of clergy protesting segregation at a bus terminal. *Id.* at 549. Some of the clergy brought a § 1983 action against the police officers. *Id.* at 550. The Supreme Court held that neither the Ku Klux Klan Act nor the Court's decision in *Monroe* abrogated common law immunities or defenses, including the defenses of good faith and probable cause that would be available to the police under Mississippi law. *Id.* at 554–57. Cases in the 1970s further established that tort immunities and common law defenses were available to § 1983 defendants. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976); Scheuer v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, 420 U.S. 308 (1975).

But the Court did not establish the qualified immunity standard that applies today until *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in 1982. Rather than a § 1983 action (which can be brought against *state* officials), *Harlow* was a *Bivens* action brought under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in which the Court allowed a plaintiff to bring a suit for damages against *federal* officials for a violation of constitutional rights. *See id.* at 397; *Harlow*, 457 U.S. at 801. Many doctrines that apply to § 1983 actions against state officials also apply to *Bivens*, including qualified immunity. *See* SCHWARTZ, *supra* note 23, at 7–11.

established" such that a reasonable official would have known the official's actions violated the plaintiff's rights.[25] The doctrine, as described by the Supreme Court, is intended to protect government officials from litigation.[26] The upshot is that now, usually at an early stage of litigation (i.e., long before a jury trial), a § 1983 plaintiff must show not only that her legal rights were violated, but also those rights were "clearly established" when the violation occurred.

The historical context of the Ku Klux Klan Act is broadly accepted by historians, as well as by judges and legal scholars. Section 1983 grew out of the violence of the Reconstruction Era South and the overarching purposes of the Act was to protect the civil rights of the victims of that violence.[27] But the doctrinal roots of qualified immunity are not so clear.

Qualified immunity was purportedly grounded in common law tort principles.[28] But scholars have explored the backdrop of the Ku Klux Klan Act and the intent of Congress with respect to immunities and the common law, with some disputing these common law origins.[29] Yet qualified immunity persists, although some U.S. Supreme Court Justices have questioned it: Justice Thomas doubts the common-law roots and statutory basis of the doctrine as it currently stands, and Justice Sotomayor, joined by the late Justice Ginsburg, has repeatedly voiced concern about how far the doctrine has reached.[30]

In his *Washington Post* op-ed, Judge Wynn recounted the historical context of the Act and noted that commentators and judges from across the ideological spectrum had expressed concern about the doctrine of qualified immunity. Then, Judge Wynn identified two lines of Supreme Court cases that have exacerbated the problems with the doctrine.[31] First, he noted cases like *Kisela v. Hughes*,[32] which require plaintiffs to offer a factually similar case to demonstrate a right was "clearly established." Second, he observed a trend towards allowing, and at times even encouraging, lower courts to resolve cases on the question of whether a right was "clearly established" without ever concluding whether the

25. *Harlow*, 457 U.S. at 818.

26. *Id.* at 817–18.

27. *See* FONER, *supra* note 12, at 187–95; *Monroe*, 365 U.S. at 172–80; Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 (1978); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 49 (2018).

28. *Pierson*, 386 U.S. at 554–57.

29. *See, e.g.*, Baude, *supra* note 27, at 52–63; Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018).

30. *See* Baxter v. Bracey, 140 S. Ct. 1862, 1862–64 (2020) (Thomas, J., dissenting from the denial of certiorari); Kisela v. Hughes, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., dissenting); Ziglar v. Abbasi, 137 S. Ct. 1843, 1870–72 (2017) (Thomas, J., concurring in part and concurring in the judgment); Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1282–83 (2017) (Sotomayor, J., dissenting from the denial of certiorari).

31. Wynn, *As a Judge*, *supra* note 10.

32. 138 S. Ct. 1148 (2018).

right was violated.[33] Judge Wynn explained that these two lines of cases converge to make it ever more difficult for plaintiffs to bring § 1983 actions to vindicate their constitutional rights because plaintiffs are caught in a vicious cycle: they must prove that a right was "clearly established" in a factually similar case in order to prevail, but cases are often resolved with the conclusion that the right was *not* clearly established. So, courts rarely clearly establish any rights, much less in a factually similar case, leaving plaintiffs with few options to show that the right they claim was violated was ever clearly established. To Judge Wynn, the result was that in many § 1983 cases, the courts have betrayed the broad, remedial purpose of the Ku Klux Klan Act and rendered constitutional rights essentially unenforceable.[34]

B. *The Factual Context of Each Case Informs Judicial Choice*

The history of the Act and the doctrine of qualified immunity is not the only context that matters to Judge Wynn. Judge Wynn's opinions in both § 1983 cases and in other cases dealing with officer misconduct recognize the importance of the factual context when making the judicial choice. The facts of the specific case obviously shape how the legal questions are presented to the court, but the larger factual reality of the relationship between individuals and government officials—and the question of from whose perspective the facts are viewed—also informs the legal questions and their significance for both the parties and the larger community.

In some instances, courts appear to instinctively trust an officer's account but treat skeptically the facts as asserted by the plaintiff—or, in some instances, evidence offered by the plaintiff. By doing so, a court can ignore the true facts and needlessly tie its hands regarding the outcome.[35] Judge Wynn is attuned to

33. Since *Harlow*, the qualified immunity inquiry has asked two questions: (1) did the defendant officer violate the plaintiff's rights, and (2) at the time of the alleged violation, was the right "clearly established" such that a reasonable officer would have known his conduct violated the plaintiff's rights? *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court mandated that lower courts first evaluate whether the defendant officer violated the plaintiff's rights, then, if the plaintiff had sufficiently shown a violation of her rights, determine whether the right was clearly established at the time of the violation. *Id.* at 201. But in *Pearson v. Callahan*, 555 U.S. 223 (2009), the Court changed course, allowing lower courts to address the two prongs of the qualified immunity analysis in either order, in the court's discretion. *Id.* at 227. And as Judge Wynn noted in his op-ed, the Court has subsequently encouraged lower courts to resolve cases using the "clearly established" prong, which allows lower courts to leave unanswered the question of whether the plaintiff's rights were actually violated. Wynn, *As a Judge*, *supra* note 10 (citing Camreta v. Greene, 563 U.S. 692 (2011)).

34. Calloway v. Lokey, 948 F.3d 194, 212–13 (4th Cir. 2020) (Wynn, J., dissenting); *see also* FONER, *supra* note 12, at 197.

35. A defendant officer may raise a defense of qualified immunity at different points in litigation. Commonly, courts resolve questions of qualified immunity on summary judgment, after the parties have engaged in discovery and the question for the court is whether there are any material facts in dispute that would require a jury to resolve, or whether the case can be resolved as a matter of law. *See*

the risk of judicial bias in favor of institutional forces. But courts betray the promise of § 1983 when they uncritically credit officers' accounts over a plaintiff's allegations or testimony. As the Supreme Court has noted, "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law."[36] The courts ought not always take the states' side. And so, Judge Wynn has at times expressed concern for power imbalances and demonstrated a reluctance to automatically view a case through an official-friendly lens.

For example, in *Scinto v. Stansberry*,[37] a former prisoner brought an action against a prison doctor and prison officials for denying the prisoner insulin to treat his diabetes and for failing to provide the prisoner aid in a medical emergency.[38] The district court in the case had concluded there was no genuine dispute of material fact that the alleged deprivation was not sufficiently serious and that the prison doctor did not act with a sufficiently culpable state of mind.[39]

Judge Wynn's opinion conveyed surprise that a district court would conclude *as a matter of law* (i.e., that no reasonable jury could conclude otherwise) that withholding insulin from an insulin-dependent diabetic was not sufficient to establish serious risk to the plaintiff. As to the doctor's state of mind, Judge Wynn noted repeatedly that the very same doctor was involved in the plaintiff's care and knew of his diabetes and need for insulin.[40] And where the district court had required the plaintiff to provide medical expert testimony to support his claims, Judge Wynn rejected the district court's conclusions, holding that "when the seriousness of an injury or illness and the risk of leaving that injury or illness untreated would be apparent to a layperson, expert testimony is not necessary to establish a deliberate indifference claim."[41] Judge Wynn was unwilling to assume good faith on the part of the official where the facts did not suggest any such assumption was warranted.

But the question of factual perspective is not limited to § 1983 and *Bivens* actions (lawsuits similar to § 1983 actions but against *federal* officials) and issues of qualified immunity. Judge Wynn's concern that courts will unthinkingly adopt the perspective of police and disregard the experiences of individuals who

FED. R. CIV. P. 56. Qualified immunity can also arise earlier in the case, on a motion to dismiss, where the court must accept all factual allegations in the plaintiff's complaint as true and evaluate whether the plaintiff's allegations state a plausible claim for relief. *See* FED. R. CIV. P. 12(b)(6).

36. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

37. 841 F.3d 219 (4th Cir. 2016).

38. *Id.* at 227. Because *Scinto* involved the claim of a former federal prisoner suing *federal* prison officials, the case was a *Bivens* action, rather than a § 1983 action. *See* discussion *supra* note 24.

39. *Scinto*, 841 F.3d at 228.

40. *Id.* at 229.

41. *Id.* at 230.

encounter those officers appears in other cases too. In *Lee v. Town of Seaboard*,[42] the plaintiff brought state-law tort claims against a police officer who had shot and wounded him after he escaped an attacking mob at a party.[43] The case did not involve a claim under § 1983 or traditional questions of qualified immunity.[44] But it did raise the question of whether a jury could conclude the officer's use of deadly force was unreasonable.[45]

The officer testified that the plaintiff had struck the officer with the plaintiff's car immediately before the officer shot the plaintiff.[46] The district court accepted this testimony and deemed the fact to be undisputed. But other testimony—including testimony from another officer—contradicted this account.[47] Reviewing the evidence, Judge Wynn, writing for the court, concluded the district court had erred when it found there were not disputes of material fact as to whether the plaintiff's car posed an imminent threat to the officer or bystanders and whether deadly force was necessary to mitigate that threat.[48]

In the criminal case, *United States v. Slager*,[49] Judge Wynn again paid close attention to the seemingly conflicting facts presented by the parties. There, he considered a police officer's appeal of his conviction for the *criminal* deprivation of civil rights under color of law.[50] The case involved Michael Slager, a North Charleston Police Department officer who shot and killed Walter Scott in April 2015.[51] Scott was unarmed and running away from Mr. Slager, who had pulled Mr. Scott's vehicle over due to a broken taillight.[52] Mr. Scott's killing was caught on video by a bystander and received significant public attention.[53] Indeed, Mr. Scott's death was one of a long history of police murders of Black people leading to the 2020 protests and Judge Wynn's *Washington Post* article.[54] The case was unusual, however, in that Mr. Slager faced criminal charges.[55]

42. 863 F.3d 323, 324 (4th Cir. 2017).
43. *Id.* at 324.
44. *Id.* at 328.
45. *Id.* at 325.
46. *Id.* at 328.
47. *Id.* at 328–29.
48. *Id.* at 328–31.
49. 912 F.3d 224 (4th Cir. 2019).
50. *Id.* at 227.
51. *Id.* at 227–28.
52. *Id.* at 228.
53. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), https://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html [https://perma.cc/7MV4-YJ9P (dark archive)].
54. *See, e.g.*, Elizabeth Alexander, *The Trayvon Generation*, NEW YORKER (June 15, 2020), https://www.newyorker.com/magazine/2020/06/22/the-trayvon-generation [https://perma.cc/4XA5-2KQF (dark archive)].
55. United States v. Slager, 912 F.3d 224, 227 (4th Cir. 2019).

Although Mr. Slager had pleaded guilty to federal charges of depriving Mr. Scott of his civil rights under color of law, on appeal, he argued the district court erred in sentencing him, ultimately raising the issue of whether the government had offered evidence sufficient to prove him guilty of second-degree murder—a question relevant to the appropriate calculation of Mr. Slager's advisory sentence under the federal sentencing guidelines.[56] The evidence presented at sentencing included Mr. Slager's statements about the shooting, the bystander's testimony, and the video captured by the bystander, which did not capture the entirety of the interaction between Mr. Slager and Mr. Scott.[57] The district court had discredited Mr. Slager's statements, and the court of appeals found that "the record amply supports that credibility determination."[58] Writing for the court, Judge Wynn's evaluation of the district court's assessment of Mr. Slager's credibility carefully tracked the variations and new details in each of his statements.[59] Judge Wynn was unwilling to unquestioningly accept Mr. Slager's account—recognizing that reports and statements from the police are only one piece of evidence and not deserving of automatic acceptance.

Just as Judge Ruffin incorrectly disclaimed judicial authority to resolve *State v. Mann* differently, automatically accepting an official's account of the facts and ignoring contrary evidence falsely limits a court's power. Judge Wynn's openness to the full factual picture of each case is a vital part of understanding the judicial choice; attention to the range of facts is necessary to fully understand the choices before a judge. And so, because Judge Wynn takes judicial choice seriously, he takes the factual context seriously.

II. OBSCURING THE JUDICIAL CHOICE

Judges sometimes disguise a judicial choice by ignoring relevant facts. But other times, as Judge Ruffin did in *State v. Mann*, they obscure their judicial choices by suggesting their legal options are limited, even when they actually have multiple available paths. In the context of claims under § 1983, judges sometimes do this by framing the legal right at issue in a qualified immunity analysis in such a way that the result appears inevitable, thus obscuring the judicial choice that went into the initial framing of that right. In other instances, judges may blur the legal standards that govern the posture of a case—particularly the standards that require them to accept the plaintiff's factual allegations or view the evidence in the light most favorable to the plaintiff—resulting in a defendant-officer-friendly outcome that appeared inevitable. And

56. *Id.*
57. *Id.* at 227–30.
58. *Id.* at 233.
59. *Id.* at 229–30.

finally, judges sometimes arbitrarily reject decisional tools available to them, thus unnecessarily painting themselves into a legal corner and presenting the resulting outcome as required.

A. *Issue Framing Can Obscure Judicial Choice*

One way in which judges sometimes act as though their hands are tied (and therefore obscure their judicial choice) in § 1983 cases is by strategic framing of the issues. As Judge Wynn puts it to his clerks and to other young lawyers, "if you allow me to frame the issue, I can win every time."[60] In § 1983 cases, where the question of whether a right was clearly established prior to the alleged violation is usually dispositive, how the parties or the court describe that right can decide the case. The Supreme Court has offered instruction on framing the issue in § 1983 cases, directing lower courts "not to define clearly established law at a high level of generality."[61] Defendant officials often describe the right at issue in unduly specific terms, making it nearly impossible to find a case on point. And even beyond the question of the appropriate level of specificity, Judge Wynn has, in his dissents, criticized majority opinions for "framing the issue to address the rights of the governmental officers, rather than the rights of the individual."[62] Such framing subverts the broad remedial purpose of the Ku Klux Klan Act and its goal of protecting individual rights.

Similarly, in *Scinto*, the case involving the prison doctor who denied the diabetic prisoner medical care, Judge Wynn called attention to how the issue was framed.[63] To overcome the defendant official's assertion of qualified immunity, a plaintiff must essentially offer binding precedent with similar facts showing that a reasonable officer would have known his conduct was unlawful.[64] How the parties or the court describe the legal right at issue will make a previous case look more or less on point. So in addressing whether the prison officials in *Scinto* were entitled to qualified immunity, the defendant prison doctor argued the issue was whether it was "clearly established that a prison medical provider runs afoul of the Eighth Amendment when he does not give one single dose of insulin to a federal inmate, after the inmate becomes angry and hostile . . . and the doctor implements a plan to monitor the inmate thereafter."[65] And the other defendant prison officials framed the issue as whether "a reasonable official would have known it violated a clearly established constitutional right to follow

60. Judge Wynn attributes this principle to Bryan Garner. And Bryan Garner expresses a similar idea. *See* Bryan A. Garner, *The Deep Issue: A New Approach To Framing Legal Questions*, 5 SCRIBES J. LEGAL WRITING 1, 10–11 (1994–1995). But this specific expression of the idea is Judge Wynn's.

61. Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (quoting City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1776 (2015)).

62. Calloway v. Lokey, 948 F.3d 194, 205 (4th Cir. 2020) (Wynn, J., dissenting).

63. Scinto v. Stansberry, 841 F.3d 219, 227 (4th Cir. 2016).

64. *See Kisela*, 138 S. Ct. at 1152.

65. *Scinto*, 841 F.3d at 235.

protocol by placing an inmate in administrative detention after [the official] receives an incident report."[66]

Writing the unanimous majority opinion, Judge Wynn "reject[ed] [the defendants'] invitations to define the rights at issue in accordance with the 'very actions in question.'"[67] Instead, Judge Wynn defined the right with the focus on the plaintiff: "[W]e define the right in question as the right of prisoners to receive adequate medical care and to be free from officials' deliberate indifference to their known medical needs."[68] Careful attention to defining the right at issue follows the Supreme Court's guidance "not to define clearly established law at a high level of generality."[69] But Judge Wynn is also careful to frame the issue in a way that reflects § 1983's focus on individual rights, rather than the rights of law enforcement. Such a plaintiff-centered focus is mandated by the plaintiff-oriented language of § 1983 as well as by the procedural rules at certain stages of litigation, as discussed further below.

That's not to say that Judge Wynn always adopts a plaintiff's framing of an issue in § 1983 cases, especially where binding precedent and the *Kisela* principle counsel otherwise. *Lefemine v. Wideman*[70] involved an anti-abortion protestor's claim that a local sheriff's department violated his First Amendment rights when employees from the department asked the protestor and his group "to remove large, graphic signs depicting aborted fetuses that they were using as part of a roadside demonstration."[71] The plaintiff asserted that the right "should be framed as whether it was clearly established that law enforcement is barred from giving vent to a heckler's veto"—essentially, whether law enforcement may suppress "offensive" speech out of concern over the response such speech may provoke.[72] But Judge Wynn, writing for the court, found that "such a broad construction would unquestionably run afoul of the of interest-balancing inherent in the qualified immunity analysis" as described by the Supreme Court.[73] Judge Wynn agreed with the defendants and the district court that the right was "properly framed as whether, at the time of Plaintiff's 2005 anti-abortion demonstration in Greenwood County, it was clearly established that law enforcement officers could not proscribe the display of large, graphic photographs in a traditional public forum."[74] The Court concluded that it was not.

66. *Id.*

67. *Id.* at 236 (alteration omitted).

68. *Id.*

69. *Kisela*, 138 S. Ct. at 1152 (quoting City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1776 (2015)).

70. 672 F.3d 292 (4th Cir. 2012), *vacated*, 568 U.S. 1 (2012).

71. *Id.* at 295.

72. *Id.* at 299 n.3.

73. *Id.* at 299.

74. *Id.*

B. *Blurring the Legal Standard Can Obscure the Judicial Choice*

Another way in which judges sometimes act as though their hands are tied is in using an incorrect standard in granting qualified immunity on a motion to dismiss or a motion for summary judgment.[75] But in many instances, the standards applicable to those motions—accepting the plaintiff's allegations as true or viewing the evidence in the light most favorable to the plaintiff—in fact leave space for judicial choice. In multiple cases, Judge Wynn has emphasized that applying the correct standard is an essential first step, one that brings a judge face-to-face with the true judicial choice presented by the case.

Notably, the generally plaintiff-friendly standards required by these procedural postures—accepting the plaintiff's allegations as true on a motion to dismiss or viewing the evidence in the light most favorable to the plaintiff on a motion for summary judgment—are sometimes in tension with the goals of qualified immunity. In recent years, the Supreme Court has increasingly emphasized that the "driving force" behind qualified immunity is protecting government officials from the burdens of litigation.[76] But accepting the plaintiff's allegations as true or viewing the evidence in the plaintiff's favor will often *prolong* litigation against government officials.

In several cases, Judge Wynn has concluded the district court or the panel majority on the Fourth Circuit failed to apply the appropriate standard—standards that are required by law. For example, in *Durham v. Horner*,[77] the plaintiff brought a § 1983 claim after he was charged and jailed for more than three months before a prosecutor acknowledged that the investigating officer—who had failed to corroborate information from an unreliable database—had mistaken his identify.[78] On appeal, the court affirmed the grant of summary judgment to the defendant.[79]

In his dissent, Judge Wynn argued that "[o]n a motion for summary judgment, the evidence and all reasonable inferences drawn from it should be viewed in the light most favorable to the nonmoving party," and "[w]hen viewed in this light, the evidence indicates that Officer Horner erroneously relied on a report from Accurint, a system which conspicuously warns that the information given needs corroboration."[80] Judge Wynn worked through all the

75. *See* Tolan v. Cotton, 572 U.S. 650, 657–60 (2014) (per curiam) (vacating grant of summary judgment to defendant-officer on basis of qualified immunity because lower court failed to view evidence in light most favorable to the nonmovant plaintiff); Harris v. Pittman, 927 F.3d 266, 270–75 (4th Cir. 2019); *see also* Durham v. Horner, 690 F.3d 183, 192–93 (4th Cir. 2012) (Wynn, J., dissenting); Calloway v. Lokey, 948 F.3d 194, 205 (4th Cir. 2020) (Wynn, J., dissenting).

76. Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987)).

77. 690 F.3d 183 (4th Cir. 2012).

78. *Id.* at 185.

79. *Id.* at 190.

80. *Id.* at 192 (Wynn, J., dissenting).

evidence the officer had before him indicating that he had identified the wrong person: the officer knew the target drove a vehicle with a stolen Tennessee license plate but that the plaintiff had a Mississippi driver's license; the officer believed the target was approximately 60 years old, but knew the plaintiff was only 49; and the officer knew that although the investigation was focused on an area in Virginia, the plaintiff lived in Mississippi and had not lived in Virginia for at least six years.[81]

Judge Wynn rejected the majority's conclusion that the indictment absolved the officer of any liability under § 1983 by demonstrating that a grand jury had found there to be probable cause.[82] Rather, Judge Wynn concluded, the information before the officer at the time of the investigation could support a jury finding that the officer's actions and mistakes were not objectively reasonable.[83] Summary judgment, therefore, was not appropriate. And Judge Wynn, as he does across many areas of law, recognized the imbalance of power between the parties and the vulnerable position of the individual plaintiff in this case:

> Officer Horner's unreasonable reliance and alleged failure to perform his duties thoroughly and competently set in motion a chain of events that ended with Durham's wrongful arrest and imprisonment for over ninety days. . . . [T]he undeniable truth remains that, but for Officer Horner's actions, Durham would never have been arrested and incarcerated. If the investigative officer cannot be held accountable for his recklessness or incompetence, then where is an innocent man to turn?[84]

In many cases brought by individuals against government officials, the individual faces an uphill battle—qualified immunity, unequal resources, and unsympathetic judges or juries may all stand in the way for a plaintiff. But Judge Wynn recognizes that it is especially unfair when courts fail to apply the legally required standard and kick a plaintiff out of court at an early stage.

C. *Discarding Decisional Tools Can Obscure the Judicial Choice*

Finally, judges can also suggest that their legal choices are limited by arbitrarily rejecting some legal tools otherwise available for resolving cases. As Judge Wynn argued in his Madison Lecture at the New York University School of Law, this arbitrary rejection is a form of judicial activism that *increases* the instances in which a judge resolves a case based on his or her policy

81. *Id.* at 192–93.
82. *Id.*
83. *Id.*
84. *Id.* at 192.

preferences.[85] In his Madison Lecture, Judge Wynn explored textualism as an activist method of statutory construction: "textualists categorically reject a long-recognized tool for statutory construction: legislative history. That categorical rejection expands the universe of situations in which a court can rest a decision on its own policy preferences, without even addressing whether those policy preferences are consistent with the statute's legislative history."[86] But this rejection of certain decisional tools is, of course, itself a choice. And as Judge Wynn notes, one that ultimately gives more power and fewer limitations to the deciding judge.[87]

Judge Wynn identified several decisional tools the Supreme Court rejected in *Rucho v. Common Cause*,[88] a case in which the Supreme Court disclaimed its authority (and the authority of federal courts more broadly) to hear cases challenging partisan gerrymanders.[89] Rejecting some of those decisional tools has consequences similar to the deficiencies in § 1983 litigation discussed above.[90] For example, in Judge Wynn's view, in *Rucho*, the Court "did not account for several lines of relevant precedent, thereby skirting another meaningful constraint on judicial discretion."[91] The Court's requirement, reiterated in *Kisela*, that lower courts identify a factually similar case to find a right clearly established, essentially instructs lower courts to disregard relevant precedent—all the cases that would typically serve as points of comparison, but whose importance is minimized by the dictates of *Kisela*.[92] Another of Judge Wynn's observations about *Rucho*, that the Court "discarded the well-established decisional tool of transparency," particularly about its own rationale, is similarly applicable to § 1983 actions.[93] In resolving questions of qualified immunity, courts can obscure their own rationales by obfuscating the applicable legal standard and by framing the issue in a way that makes the outcome seem inevitable.[94]

Judge Wynn's Madison Lecture focused on textualism and *Rucho*.[95] But his observations about how rejecting decisional tools actually increases judicial discretion, while allowing judges to portray their decisions as inevitable or

85. James Andrew Wynn, *When Judges and Justices Throw Out Tools: Judicial Activism in* Rucho v. Common Cause, 96 N.Y.U. L. REV. 607, 624–26 (2021) [hereinafter Wynn, *When Judges and Justices Throw Out Tools*].

86. *Id.* at 635–36.

87. *Id.* at 624–26.

88. 139 S. Ct. 2484 (2019).

89. Wynn, *When Judges and Justices Throw Out Tools*, *supra* note 85, at 650–60.

90. *See supra* Sections II.A–B.

91. Wynn, *When Judges and Justices Throw Out Tools*, *supra* note 85, at 654.

92. *See* Kisela v. Hughes, 138 S. Ct. 1148 (2018).

93. Wynn, *When Judges and Justices Throw Out Tools*, *supra* note 85, at 657–59.

94. *See supra* Sections II.A–B.

95. Wynn, *When Judges and Justices Throw Out Tools*, *supra* note 85, at 624–26.

mandatory, apply as well to the resolution of § 1983 actions and issues of qualified immunity.

III. ALLOWING JUDGES TO MAKE THE JUDICIAL CHOICE

Judge Wynn's 2020 *Washington Post* op-ed homed in on an additional increasing problem in qualified immunity jurisprudence: a failure of courts to resolve the question of whether a constitutional right was violated, thus leaving future plaintiffs without a case on point and leaving law enforcement little guidance on the contours of the Constitution.[96] This failure to further define constitutional rights comes, at least in part, from the Supreme Court's decision in *Pearson v. Callahan* allowing courts to resolve qualified immunity claims on the "clearly established" prong.[97] The principle is all the more damaging because the Supreme Court has made appeals of denial of qualified immunity more available than in many other cases.[98]

A. *Courts Need Discretion To Make the Judicial Choice*

Under current doctrine, courts may grant officer-defendants qualified immunity without addressing whether a plaintiff's constitutional rights were actually violated. The Supreme Court first *permitted* such an approach in the 2009 case *Pearson v. Callahan*.[99] Shortly thereafter, in *Camreta v. Greene*, the Court shifted to *encouraging* lower courts to "think hard, and then think hard again" about whether to resolve the often difficult but important issue of whether there was an underlying constitutional violation.[100]

The justices may well have meant the instruction to "think hard, and then think hard again before turning small cases into large ones" as an admonition *against* resolving the constitutional question.[101] But Judge Wynn seems to have taken the instruction at face value. After all, the Supreme Court in *Camreta* recognized that it "is sometimes beneficial to clarify the legal standards governing public officials."[102] And in Judge Wynn's view, declining to address the constitutional question leaves the clarification of constitutional rights to stagnate—and leaves future victims of constitutional violations without "clearly established" law on which to bring claims.[103] So Judge Wynn has followed this Supreme Court directive to think hard, which often leads him to conclude that

96. Wynn, *As a Judge*, *supra* note 10.
97. *See infra* Section III.A.
98. *See infra* Section III.B.
99. 555 U.S. 223, 231 (2009).
100. 563 U.S. 692, 707 (2011).
101. *Id.*
102. *Id.*
103. Wynn, *As a Judge*, *supra* note 10.

the court *should* address the constitutional question or at least acknowledge the consequences of failing to do so.

When courts fail to address whether a constitutional violation occurred, they make it harder for future plaintiffs to bring claims and they deprive government officials of constitutional guidance. For example, *West v. Murphy*[104] was a § 1983 action challenging strip searches of arrestees in Baltimore's Central Booking and Intake Center.[105] The court affirmed the district court's conclusion that "the law did not clearly establish at the time that the searches were conducted that they were unlawful."[106] Judge Wynn concurred, "writ[ing] separately to underscore the importance of addressing the legality of strip searching detainees held outside the general population in the appropriate case."[107] Judge Wynn joined with the majority in not addressing the constitutional question because the "clearly established" question was the basis of the district court's decision and the focus of the parties' arguments.[108] But he observed that failing to address the question "[l]eaves corrections officers adrift in uncharted waters."[109]

Not long after, *Cantley v. West Virginia Regional Jail & Correctional Facility Authority*,[110] a case before the same panel, raised similar questions about strip searches of detainees.[111] Again, the majority did not address whether the search of one of the plaintiffs violated the Constitution, instead affirming the district court on the basis that the law was not clearly established at the time of the challenged search.[112] Judge Wynn concurred separately, noting that "[t]he majority opinion does not reach the precise question of whether the strip search conducted on [a particular detainee] was unconstitutional, but it does cast serious doubt on the legality of similar searches going forward."[113]

The effect of failing to address the constitutional question in *West* was on display in *Cantley*: had the court addressed the constitutionality of these types of searches before the *Cantley* plaintiffs were searched, at least one of the plaintiffs might have been able to recover because the law would have been clearly established. And Judge Wynn's concurrence was pragmatic—although the majority opinion did not directly address the constitutionality of the search, Judge Wynn used his concurrence to help future plaintiffs by describing the majority opinion as casting serious doubt on the constitutionality of the

104. 771 F.3d 209 (4th Cir. 2014).
105. *Id.*
106. *Id.* at 216.
107. *Id.* at 217 (Wynn, J., concurring).
108. *Id.*
109. *Id.*
110. 771 F.3d 201 (4th Cir. 2014).
111. *Id.* at 203.
112. *Id.* at 205–07.
113. *Id.* at 208 (Wynn, J., concurring).

search.[114] Judge Wynn's interpretation of the majority was not binding precedent, but his concurrence could support the argument that such a search violated constitutional rights.

As Judge Wynn noted in *The Washington Post*, the trend toward resolving cases on the question of whether a right was clearly established and not addressing whether a right was violated results in fewer cases "against which to measure whether a law enforcement officer's conduct amounted to a 'clearly established' violation of constitutional rights."[115] He continued,

> [i]n effect, those who allege that police officers have used excessive force are trapped in a never-ending self-fulfilling prophecy: They cannot sue officers who harm them because the harmful conduct has never been "clearly established" as a constitutional violation in a factually similar case. But because so many cases are dismissed without addressing whether the challenged conduct was in fact a constitutional violation, it is rarely "clearly established" that there *was* a violation.
>
> This cycle prevents plaintiffs from pursuing their claims, gives officers little guidance on the contours of individuals' rights and excuses ever more egregious conduct from liability.[116]

At bottom, when courts do not take up the work of defining the contours of constitutional rights, they fail to fulfill the basic functions of courts: facilitating compensation of victims of violations of the law and promoting compliance with the legal standards that govern our communities.

B. *Making the Judicial Choice Promotes the Definition of Constitutional Rights*

One final oddity of qualified immunity jurisprudence warrants brief discussion: the availability of interlocutory appeals for officers denied immunity. It is a well-established rule of federal appellate practice that the courts of appeals typically hear cases involving only final orders.[117] The Supreme Court created an exception to this finality rule for orders denying qualified immunity to government officials.[118] Accordingly, the courts of appeals often hear cases in which a district court has denied an official's motion to dismiss or motion for summary judgment on the basis of qualified immunity. And in some situations, a case comes before a court of appeals multiple times—after denial

114. *Id.*

115. Wynn, *As a Judge*, *supra* note 10.

116. *Id.*

117. *See* 28 U.S.C. § 1291; FED. R. CIV. P. 54.

118. Mitchell v. Forsyth, 472 U.S. 511, 524–30 (1985). The Supreme Court created yet another exception to the usual rules of appeals in *Camreta v. Greene*, 563 U.S. 692 (2011), when it permitted officer defendants who had *prevailed* in their claim to qualified immunity at the court of appeals to nonetheless seek Supreme Court review of the appellate court's determination that they had violated the plaintiff's right (even if the right was not clearly established at the time). *See id.* at 707–08.

of qualified immunity at multiple stages of litigation.[119] This could, in theory, give appellate courts multiple opportunities to define the contours of constitutional rights.

But more definition of constitutional rights has not been the outcome. Instead, the Supreme Court has discouraged lower courts from resolving the constitutional questions before them—even while acknowledging that addressing those questions is "sometimes beneficial to clarify the legal standards governing public officials."[120] So judges are left to make their own judgments whether addressing the constitutional question would be beneficial, but they do so with the Supreme Court's instruction to "think hard" before doing so.[121] This steers judges toward the option to resolve cases on the "clearly established" prong, without seriously considering whether answering the constitutional question would be beneficial (or to whom it might be beneficial).[122]

This is another matter of judicial choice: binding precedent does not *require* judges to abstain from defining the contours of constitutional rights that were not previously clearly established.[123] The Supreme Court itself has acknowledged that clarifying those legal principles can be beneficial and has given the lower courts a path to do so.[124] And so Judge Wynn often makes the choice to address whether a constitutional violation occurred because he recognizes choosing *not* to address the constitutional question leaves individuals vulnerable to police misconduct. Judge Wynn is aware of those consequences even when he concludes that a particular plaintiff in a case before him cannot recover.

For example, *Bellotte v. Edwards*[125] was a somewhat unusual case for Judge Wynn, as he found himself dissenting from a majority of the court that *denied* qualified immunity to police officers.[126] Police officers executed a late-night, no-knock entry into a family home based on a shaky justification for such action.[127] The majority affirmed a denial of qualified immunity for the officers involved in the no-knock entry.[128] Judge Wynn dissented in part, agreeing that the no-

119. *See, e.g.*, Scinto v. Stansberry, 507 F. App'x 311 (4th Cir. 2013); Scinto v. Stansberry, 841 F.3d 219 (4th Cir. 2016); Harris v. Pittman, 668 F. App'x 486 (4th Cir. 2016); Harris v. Pittman, 927 F.3d 266 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1550 (2020).

120. *Camreta*, 563 U.S. at 707.

121. *Id.*

122. *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 37–38 (2015) (finding, based on empirical analysis, that overall rate of courts reaching constitutional questions in qualified immunity cases declined after *Pearson*).

123. Indeed, both *Pearson* and *Camreta* emphasized lower courts' discretion to address the constitution question. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009); *Camreta*, 563 U.S. at 707.

124. *Pearson*, 555 U.S. at 236; *Camreta*, 563 U.S. at 707.

125. 629 F.3d 415 (4th Cir. 2011).

126. *Id.* at 428 (Wynn, J., dissenting in part).

127. *Id.* at 417–18, 421 (majority opinion).

128. *Id.* at 424.

knock entry was unlawful, but finding the right at issue was *not* clearly established at the time.[129] But even as he concluded the officers should have received qualified immunity, Judge Wynn recognized the importance of speaking clearly to the question of whether a right was violated: "As a result of this case, the law will be clearly established as to any similar entries in the future."[130]

CONCLUSION

Section 1983 represents both one of the greatest promises and one of the greatest disappointments of our legal systems. On one hand, as Judge Wynn laid out in his *Washington Post* op-ed, § 1983 comes from congressional action to protect individual rights during a period of rampant racial violence.[131] It was intended to enable individuals who suffer constitutional wrongs to vindicate their rights through the courts. But the horrifying consequences of the current status of § 1983 jurisprudence and qualified immunity were on full display during my clerkship in 2020. By so frequently failing to resolve the constitutional question, courts leave officers "adrift in unchartered waters."[132] By excusing police from liability even when they do violate an individual's constitutional rights (because there is no controlling case "clearly establishing" that specific right), courts send the message to police that they will not be held accountable for misconduct. And, even worse, courts imply that police are justified in using egregious force. Many of the unfulfilled promises of § 1983 are a result of court actions: the judge-made doctrine of qualified immunity and subsequent judicial choices that have increasingly limited the availability of remedies under the statute.

Judge Wynn's concept of judicial choice teaches that the current state of § 1983 and qualified immunity were not inevitable. They are the result of choices by judges. But perhaps more important, the concept of judicial choice also teaches that they are not irreversible. Each new § 1983 case, properly viewed in its full factual context, presents a choice about how the law can apply to the specific facts, and when judges recognize their power to make that choice, a march toward justice is possible. As Judge Wynn asked in a recent American Bar Association program, "What is a court for if you cannot do justice?"[133] In my view, few questions better capture the lessons of clerking for Judge Wynn. If courts—whether through the judge-made doctrine of qualified immunity or through judges' own refusal to embrace the judicial choice—do not recognize the constitutional rights of individuals and hold officers who violate those rights

129. *Id.* at 428 (Wynn, J., dissenting in part).

130. *Id.*

131. *See* Wynn, *As a Judge*, *supra* note 10.

132. West v. Murphy, 771 F.3d 209, 217 (4th Cir. 2014) (Wynn, J., concurring).

133. *See The Arc of the Moral Universe*, *supra* note 1, at 36:00.

accountable, then what purpose do the courts serve? But if courts *are* intended to promote justice, and if judges recognize their own power to do so, then a more just future is possible.