

Rule Pragmatism: Theory and Application to Qualified Immunity Analysis

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Legal pragmatism is often contrasted to legal methodologies that call for the application of rules. Such juxtaposition suggests that a legal pragmatist would resist adopting any rule of decision making. This Note challenges that notion by explicating rule pragmatism, which employs rules justified not by their pedigree but rather by their producing good results in the aggregate. To illustrate rule pragmatism, the Note analogizes to rule utilitarianism and other concepts in moral philosophy. The Note also contrasts rule pragmatism with other rule-based methodologies. Finally, the Note argues that the Supreme Court took a rule pragmatic position in Saucier v. Katz by requiring a two-step analysis of qualified immunity claims. By contrast, the Second Circuit continues to take an act pragmatic approach to qualified immunity analysis, abandoning the two-step analysis when it doubts that following the rule would produce optimal results.

I. INTRODUCTION

Richard Posner has asserted that “it would be entirely consistent with pragmatism the philosophy *not* to want judges to be pragmatists.”¹ To illustrate his claim, he explains that “a [philosophical] pragmatist committed to judging a legal system by the results the system produced might think the best results would be produced if the judges did not make pragmatic judgments but

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1. Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 3 (1996).

simply applied rules. This pragmatist might . . . be a ‘rule pragmatist.’”² While Posner’s overarching contention that philosophical and legal pragmatism³ need not entail one another is sound, his example of the rule pragmatist does not demonstrate that point.⁴

This Note examines substantive and procedural rule pragmatism⁵ to reveal the latter’s potential value as a legal methodology as distinct from both procedural act pragmatism and other rule-based methods, even those defensible on pragmatic grounds. Part II identifies the analytic differences between these methodologies. Analogues in moral philosophy furnish useful comparisons for this purpose. In particular, the recognized distinction between act and rule utilitarianism illuminates the essential difference between act and rule pragmatism. Part III analyzes a particular legal area to show how these differences can lead to different actual results. Specifically, it contrasts the approaches of the Supreme Court and the Second Circuit Court of Appeals in analyzing claims of qualified immunity. This application demonstrates that, at least in this setting, procedural rule pragmatism offers the optimal resolution of difficult legal issues.

2. *Id.*

3. As a general matter, “philosophical pragmatism is a relativist position which denies that knowledge can be grounded on absolute foundations.” Matthew H. Kramer, *The Philosopher-Judge: Some Friendly Criticisms of Richard Posner’s Jurisprudence*, 59 MOD. L. REV. 465, 476 (1996). Knowledge and truth for the philosophical pragmatist have more to do with what works and advances human interests than with any absolute external reality. William James describes philosophical pragmatism as requiring a specific “attitude,” one of “looking away from first things, principles, ‘categories,’ supposed necessities; and of looking towards last things, fruits, consequences, facts.” William James, *What Pragmatism Means*, in PRAGMATISM 93, 98 (Louis Menand ed., 1997) (emphasis omitted). Similarly, the legal pragmatist seeks “the best decision having in mind present and future needs,” rather than some “correct” legal answer. Posner, *supra* note 1, at 5.

4. Posner analogizes between rule pragmatism and rule utilitarianism to clarify how one can be a philosophical pragmatist without embracing legal pragmatism, and vice versa. Posner, *supra* note 1, at 3. His analogy, however, undermines his own argument. This Note demonstrates that just as a rule utilitarian is still a utilitarian, so a rule pragmatist is still a pragmatist.

5. In general, a substantive methodology determines the substantive rules of decision that a judge applies, while a procedural methodology determines the approach the judge takes in rendering his decision. For example, a procedural methodology affects whether the decision will claim to have far-reaching consequences, whether it will address ancillary issues in dicta, or in what order to address the issues in the opinion. These terms are defined in Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1459–60 (2000).

II. WHAT “RULE PRAGMATISM” MEANS

Posner’s claim — that rule pragmatism does not qualify as a form of legal pragmatism because it entails applying rules even when they seem to produce suboptimal results — is somewhat appealing because pragmatic decisions are results-oriented. This section, however, will show that Posner’s assertion oversimplifies rule pragmatism and that understood properly, it is no less a consequentialist theory than act pragmatism is. As Posner does, this Note will analogize legal pragmatism to utilitarianism,⁶ using familiar concepts in moral philosophy to identify distinctions between first-order pragmatism⁷ of which act and rule pragmatism are two species, second-order pragmatism,⁸ and thorough-going rule-based methods of adjudication.⁹

A. UTILITARIANISM AS A MORAL ANALOGUE TO LEGAL PRAGMATISM

This Note adopts Posner’s general definition of legal pragmatism: “a pragmatist judge always tries to do the best he can do for the present and the future, unchecked by any felt *duty* to secure consistency in principle with what other officials have done in the past.”¹⁰ Thus, while the pragmatist judge sees precedents and statutes as “sources of potentially valuable information about the likely best result in the present case and as signposts that must not be obliterated or obscured gratuitously, . . . he does not depend on them to supply the rule of decision in truly novel cases.”¹¹

6. Posner, *supra* note 1, at 3.

7. A first-order theory justifies the actual decision a judge makes. For example, “X prevails over Y because that outcome will produce the best results,” is a first-order pragmatic judgment. Similarly, “X prevails over Y because previous cases 1, 2, and 3 dictate that result,” is a first-order positivist judgment. For a definition of legal positivism, see *infra* Part II.A.

8. A second-order theory justifies the first-order theory. For example, “I am a legal pragmatist because that approach to judicial decision making produces the best results overall,” is a second-order judgment. Similarly, “I am a positivist because that approach to judicial decision making produces the best results overall,” is a second-order judgment.

9. A thorough-going theorist resists the move to the second-order. Rather than justify adoption of his preferred methodology, the thorough-going theorist merely reasserts the truth of his position. See *infra* Part II.B.

10. Posner, *supra* note 1, at 4 (modifying a definition offered in RONALD DWORKIN, *LAW’S EMPIRE* 161 (1986)).

11. *Id.* at 5.

This approach emerges in contrast to normative judicial positivism, according to which it is “the judge’s duty . . . to find the result in the present case that would promote or cohere with the best interpretation of the legal background as a whole,” regardless of whether this result would be ideal.¹² Under this conception of legal pragmatism, Posner correctly sees utilitarianism as the analogue in moral philosophy to pragmatism in legal adjudication. Just as the pragmatist judge trains his eye exclusively on the results of his decisions, so the utilitarian thinks only about the consequences of his actions rather than any felt duty to a set of pre-ordained principles.

1. *Act and Rule Utilitarianism*

There are two subspecies of utilitarianism: “act” and “rule.”¹³ Whereas the act utilitarian calculates which course would produce the greatest good in each situation, the rule utilitarian adopts a set of rules that, when applied consistently, tend to promote the greatest good in the aggregate.¹⁴ For example, when trying to decide whether to tell the truth in a particular situation, the act utilitarian would ask whether honesty would promote the good in the long run, whereas the rule utilitarian would follow the rule that truth-telling generally promotes the good, without concern for whether doing so would lead to good consequences *in this case*.¹⁵

There are fairly sophisticated versions of both flavors of utilitarianism. An alert act utilitarian, for example, will take into account the long-term effects of his conduct beyond the immediate situation.¹⁶ If, as in the example above, an act utilitarian were deciding whether to lie or tell the truth, he would consider the risk that his lie would be discovered and the ensuing harm both to his reputation and to the general level of trust and trustworthiness in his community.¹⁷ Given the need for trust in a society where people depend upon one another for virtually every-

12. *Id.*

13. *See* WILLIAM H. SHAW, SOCIAL & PERSONAL ETHICS 32 (3d ed. 1999).

14. *Id.* at 32–33.

15. *Id.*

16. *Id.* at 20.

17. *Id.*

thing, those systemic factors might weigh very heavily, such that the act utilitarian would only lie to avert real disaster.

Likewise, the sophisticated rule utilitarian engages in a more complex analysis than his name suggests. A rule utilitarian need not adopt a rule as simple as “Always tell the truth.” The rule itself can have built-in exceptions and take the form “Tell the truth, except in situations A and B.” For example, a rule utilitarian might decide always to tell children that they have limitless potential to achieve their dreams, regardless of whether a particular child shows signs of any real promise. The list of exceptions can be extensive, provided it does not include the catchall, “and whenever else telling the truth would produce bad consequences,” as then it would become act utilitarianism.¹⁸

At first blush, rule utilitarianism seems irrational. If one’s actions can only be justified by reference to their consequences, then to follow a general rule even if it would produce negative results makes little sense. The rule utilitarian defends her position, however, by exploiting the difference in accuracy between ex post and ex ante judgments.¹⁹ One can adopt rules and recognize their exceptions by examining ex post the results of multiple experiences, her own and others’. The large number of situations and the passage of time increase the accuracy of these judgments. One might also find, looking back, that people tend to be poor ex ante predictors of which situations will prove to be exceptions to the general rule. The general uncertainty that comes with any prediction of the future might be exacerbated, moreover, by a systematic tendency to give preference to one’s own interests in particular situations as well as a general inclination to convince oneself that one’s own circumstances are always special.

18. Any rule with such a catchall would require the actor to conduct a case-by-case weighing of the possible outcomes — the hallmark of act utilitarianism.

19. Rawls offers a different justification for rule utilitarianism, relying on the concept of “practices” such as making promises. See John Rawls, *Two Concepts of Rules*, 64 THE PHIL. REV. 3 (1955). In Rawls’s view, the practice of promising entails that it is an inadequate reason to break a promise that it would be better on the whole to do so. *Id.* at 14–18. If someone offered this excuse after having been caught breaking a promise, “one would question whether or not he knows what it means to say ‘I promise.’” *Id.* at 17. Rawls’s view is flawed. A sophisticated act utilitarian can accommodate the practice of rules without fundamentally misunderstanding what he does. Assigning value to the practice of keeping promises and assessing the systemic consequences of breaking one demonstrate that the act utilitarian understands what it is to make a promise, even as he breaks it.

The example of the decision whether to tell all children that they have the potential to succeed illustrates the difficulty of identifying an exception to the rule *ex ante*. Doubtless there are some children who, for any number of reasons, would be better off if someone let them down early and easily about their limited potential, rather than allowing them to suffer harsh disappointment later in life. Equally certain, however, is that many children are done a great disservice by someone telling them to keep their expectations low because that person thinks it is for the best. If the signs of promise are only crude indicators of actual potential, then the rule utilitarian would be justified in following a blanket rule, rather than trying to discern which children have potential and which do not.

2. *Act and Rule Pragmatism*

The act-rule distinction in utilitarianism also presents itself in legal pragmatism, in both the obvious substantive sense and a less obvious procedural sense.²⁰ Posner's example of a statute of limitations²¹ nicely illustrates the act-rule distinction on the substantive side. When a statute of limitations defense is properly raised, a pragmatic judge will almost always dismiss on that ground. Because the defense is so deeply entrenched in our legal system, upsetting lawyers' and potential litigants' reliance interest by ignoring the statute would create massive new uncertainty in the law, almost surely with disastrous consequences. That factor would carry great weight for the substantive act pragmatist who, like the act utilitarian considering the systemic effects of lying on the overall level of trust in his community, sensitively considers the frequent "trade-off between rendering substantive justice in the case under consideration and maintaining the law's certainty and predictability."²² However, substantive act prag-

20. The terms "substantive" and "procedural" rules of decision are borrowed from Peters, *supra* note 5, at 1459. To illustrate the difference between substantive and procedural rules of decision, Peters refers to the difference between substantive minimalism, which "counsels altering or avoiding the decision of the case . . . out of deference to the political branches," and procedural minimalism, which "counsels fully and fairly deciding the case . . . , while limiting the binding impact of that decision as closely as possible to the particular facts of the case." *Id.*

21. Posner, *supra* note 1, at 5.

22. *Id.*

matism leaves open the theoretical possibility that there could be a case where the stakes are so high that the best thing to do is truly to ignore the statute of limitations and allow the case to proceed.²³ The substantive rule pragmatist, by contrast, would not deviate from the statute of limitations despite his genuine belief that, all things considered, the best long-term result in the immediate case would be to do so.

Procedural legal pragmatism, as the name suggests, does not describe the rules followed in deciding the outcome of a case, but rather the judge's approach to the decision's structure. To illustrate the difference between act and rule procedural pragmatists, one could consider procedural minimalism, according to which a judge issues opinions that stick close to the facts and avoid broad generalizations and unnecessary hypotheticals.²⁴ Procedural minimalism would be justified in pragmatic terms if one concluded that narrow decisions that do not purport to bind courts in a broad range of cases generally lead to the best results. Moreover, a pragmatist inclined to issue minimalist decisions has to choose between taking the minimalist path on an ad hoc basis, as an act procedural minimalist,²⁵ and doing so in all cases, perhaps with a few principled exceptions, as a rule procedural minimalist.

Much like rule utilitarianism, rule pragmatism can be justified by taking uncertainty seriously. In the legal context, just as in life, it can be difficult to predict the precise results of choosing one path over another. The best a judge can do, the rule pragmatist would argue, is select and apply the rule that will produce the best results in the aggregate. Although there will be occasions when it seems almost certain that following a legal rule will generate bad outcomes, the rule pragmatist will resist the temptation to deviate from that rule out of a distrust of that very assessment.

23. Substantive act pragmatism might be closest to what Posner has in mind when he describes pragmatic adjudication when he discusses the proper treatment of a statute of limitations defense. *See id.* Posner might be what will be described as a substantive rule pragmatist and only distances himself from rule pragmatism because he does not understand it to be first-order pragmatism at all.

24. *See* Peters, *supra* note 5, at 1459–60.

25. *See* Cass R. Sunstein, *The Supreme Court 1995 Term—Foreward: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996). Professor Sunstein seems to advocate act minimalism when he claims, “we cannot come up with an algorithm to decide when minimalism makes sense, [although] some generalizations may be helpful.” *Id.* at 30.

With this analysis of act and rule pragmatism in mind, one can challenge Posner's assertion that rule pragmatism does not count as a pragmatic theory. If one justifies his use of rules in pragmatic terms, it would be accurate to label him a pragmatist. Even though the judge may doubt that his decision will produce optimal results, he renders such a decision, not because of a duty to maintain consistency with the past, rather because, given his wariness of *ex ante* judgments, he believes that the best he can do is ignore his doubts and follow a rule that has worked in the past.

A full understanding of rule pragmatism, however, requires not just contrasting it with act pragmatism, but also setting it against other rule-based methodologies for judicial decision making. Moreover, in that setting, one can examine Posner's broader claim that a philosophical pragmatist need not embrace legal pragmatism.

B. LEGAL PRAGMATISM VERSUS OTHER RULE-BASED LEGAL METHODOLOGIES

Posner contrasts legal pragmatism with "strong judicial positivism," the theory under which a judge must consider "cases, statutes, administrative regulations, and constitutional provisions — all these and only these being 'authorities' to which the judge must defer in accordance with [the] suggestion that a [non-pragmatist judge] has a duty to secure consistency in principle with what other officials have done in the past."²⁶ The positivist judge, then, would follow the rules set out in these authorities without regard for whether they would produce the best results in the actual case. On its face, this appears identical to rule pragmatism, because under either theory the judge might find himself following a rule despite his own suspicion that a different path would be preferable. This similarity is misleading, however, and identifying the difference between judicial positivism and rule pragmatism helps clarify rule pragmatism.

The fundamental difference between strong judicial positivism and rule pragmatism is that the positivist applies a rule from an earlier case regardless not only of whether doing so would produce the best result in the case at hand but also of whether the

26. Posner, *supra* note 1, at 4.

rule itself is justified on pragmatic grounds. The rule pragmatist, by contrast, may have doubts about whether the rule holds in the particular case, but she believes that in general the rule is pragmatically justified. For example, if the rule to be applied is one of strict liability, the positivist would point to factually similar cases where strict liability applied, contrast the facts to cases where it did not, and explain that she is bound by precedent to render the judgment he does. On the other hand, the rule pragmatist would certainly be interested in the case law, but would also justify her decision with a demonstration, or at least an assertion, that in factually similar circumstances it is generally best to impose strict liability even if she doubts that the rule holds in the case at hand.

C. PHILOSOPHICAL VERSUS LEGAL PRAGMATISM

Having thus distinguished rule pragmatism from other rule-based legal methodologies, it is now possible to confront Posner's claim that philosophical pragmatism does not necessarily entail legal pragmatism. Posner's assertion is sound in that it is possible to defend legal positivism, or any other legal methodology, on pragmatic grounds. For example, Richard Fallon takes a fundamentally pragmatic position in arguing that when assessing any methodology, "the relevant question is whether the current state of affairs . . . would be improved if [the methodology] achieved broad adherence."²⁷ Similarly, Posner explains elsewhere that only second-order pragmatism could justify originalism,²⁸ a different rule-based methodology, claiming that, "[t]he only good reason for originalism is pragmatic and has to do with wanting to curtail judicial discretion and thus transfer political power from judges to legislators, including the framers and ratifiers of constitutional provisions and amendments."²⁹

27. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 573 (1999).

28. Originalism, a theory employed most often in constitutional law, instructs judges to defer to the intent and understandings of constitutional or statutory framers. For an archetypal example of originalism, see *United States v. Lopez*, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring).

29. Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 591 (2000).

Posner's position, however, is not beyond reproach. A thorough-going originalist might just accept the truth of the claim that the judge has a duty to give effect to the intent of legislators and in that case would see no reason to justify doing so by evaluating its consequences. On the other hand, anyone who resists the notion that judges have duties that simply "exist" will ultimately find himself giving a pragmatic justification for whichever methodology he chooses.

Incidentally, the idea of second-order pragmatism opens up another interesting possibility for a judge trying to settle on a legal methodology. If he is a second-order act pragmatist, he would not be bound to apply the same approach in all settings. He might find that one area of the law is particularly well suited to originalism, another to rule pragmatism, a third to act pragmatism, and so on. This set of choices might, of course, only serve to create a new dimension of uncertainty in the law, but as a sophisticated act pragmatist, he would have taken that into account when choosing his methodology in the first place.

Contrary to Posner's claim, rule pragmatism is not just understandable in pragmatic terms, but it also counts as a first-order version of pragmatism because the judge has in mind the best possible results when deciding cases. With this analysis of rule pragmatism in mind, one can consider at length one example of rule pragmatism at work and consider whether it might, in fact, produce better results than act pragmatism or some other rule-based approach.

III. RULE PRAGMATISM IN QUALIFIED IMMUNITY ANALYSIS

Section 1983 of Title 42 of the U.S. Code³⁰ provides a remedy for federal constitutional violations by state actors.³¹ State offi-

30. The statute states, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (2000).

31. Similarly, plaintiffs can pursue monetary damages against federal officials under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

cially enjoy qualified immunity in suits for monetary damages “insofar as their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known” at the time of the alleged violation.³² In other words, even if an official does commit a constitutional violation, she will not have to pay damages to her victim if the law was not clearly established when the violation occurred. Thus, a defendant can prevail on an assertion of qualified immunity if she shows either that the plaintiff has not pleaded facts that amount to a constitutional violation or that a reasonable official at the time of the putative violation could have believed that her conduct was lawful.³³

For years, courts freely chose which inquiry, the merits or the state of the law, they would address first,³⁴ often finding that the law was unclear in the area in question and dismissing the case without further discussion.³⁵ Then, in *Saucier v. Katz*, the Supreme Court found that courts *must* address the merits of the constitutional allegation before turning to whether the law was clearly established at the time.³⁶ Nevertheless, some lower courts, specifically various panels of the Second Circuit, have carved out an apparently growing list of exceptions to the *Saucier* rule.³⁷ This section examines the *Saucier* and Second Circuit opinions, comparing the rule-pragmatic underpinnings of the Supreme Court’s rule and the act-pragmatic rationale of the Second Circuit’s. Juxtaposing these courts’ approaches demonstrates the value of rule pragmatism in the qualified immunity context.

32. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

33. See Siegert v. Gilley, 500 U.S. 226, 232 (1991) (setting forth the two-step qualified immunity analysis).

34. See County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) (explaining that deciding the merits of the constitutional claim first is “normally” the “better approach” but not requiring that sequence).

35. See John M.M. Greabe, *Mirabile Dictum!: The Case for “Unnecessary” Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 410 n.35 (1999) (noting that in 51 of 79 “representative” pre-*Saucier* appellate cases where officials were granted qualified immunity, the courts did not address the merits of the constitutional claim).

36. 533 U.S. 194, 200 (2001).

37. See Ehrlich v. Town of Glastonbury, 348 F.3d 48, 55–57 (2d Cir. 2003).

A. THE RATIONALE BEHIND QUALIFIED IMMUNITY

As an initial matter, it is worth noting that qualified immunity is itself a pragmatic doctrine, justified not by appeal to precedent or principle but rather to specific policy considerations. In the seminal case of *Harlow v. Fitzgerald*, the Supreme Court described qualified immunity as “the best attainable accommodation of competing values.”³⁸ Although the Court was aware that “an action for money damages may offer the only realistic avenue for vindication of constitutional guarantees,”³⁹ it saw the need to balance that consideration against an array of social costs associated with forcing public officials to stand trial. In particular, these costs include “the expenses of litigation, the diversion of official energy from pressing public issues . . . , the deterrence of able citizens from acceptance of public office,” and “the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.”⁴⁰ The Court concluded that qualified immunity offered the best balance of these considerations because it “would permit insubstantial lawsuits to be quickly terminated,”⁴¹ while still offering a remedy for many governmental abuses.

Admittedly, the Court may not have struck the correct balance between providing a remedy for constitutional wrongs and keeping down social costs. Perhaps constitutionally protected interests are of so basic a character that they are worth high litigation expenses, and maybe public officials should flinch a little when the discharge of their duties becomes constitutionally questionable. Whether the qualified immunity doctrine is truly pragmatically justified, however, is less important for present purposes than the fact that the Supreme Court has explicitly focused on the consequences of its decision, rather than the pedigree of the doctrine.

38. 457 U.S. 800, 814 (1982).

39. *Id.*

40. *Id.* (internal quotations and modifications omitted).

41. *Id.* (quoting *Butz v. Economou*, 438 U.S. 478, 507–08 (1978)) (internal quotations and modifications omitted).

B. THE SAUCIER DECISION

As noted above, *Saucier* changed the status of a merits-first approach from a preferred option to a mandatory one.⁴² The merits-first approach appeals to the extent that it provides a “process for the law’s elaboration from case to case.”⁴³ When courts opt to skirt the merits, “standards of official conduct . . . tend to remain uncertain, to the detriment both of officials and individuals.”⁴⁴ Ostensibly, clarifying these standards is valuable to officials who need to know where constitutional boundaries lie so that they can be vigorous in their conduct without being abusive. The benefit to the individual is even more obvious. Qualified immunity, like any immunity, works harm to the extent that it leaves a rights violation unremedied. By clarifying the law as part of a qualified immunity analysis, the courts allow officials to have one free pass but no more. In future cases, plaintiffs will have a remedy if they have suffered a similar rights violation.

Of course, the same constitutional question might arise for resolution in a related suit in which qualified immunity plays no role, like a criminal proceeding, claim for injunctive relief, or claim directly against a municipality.⁴⁵ In that situation, the merits-bypass⁴⁶ has no negative consequences. Often, however, these alternatives are not available,⁴⁷ and it is unpredictable

42. Greabe, *supra* note 35, at 411–15, notes that some courts saw this shift in *Siegert v. Gilley*, 500 U.S. 226 (1991), but given the extent to which many courts still understood their own discretion in qualified immunity analysis and footnote 5 of *Lewis*, the relevant moment was really *Saucier*.

43. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

44. *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

45. *Id.* (citing Stephen J. Shapiro, *Public Officials’ Qualified Immunity in Section 1983 Actions Under Harlow v. Fitzgerald and its Progeny*, 22 U. MICH. J.L. REFORM 249, 265 n.109 (1989)).

46. This term is from Greabe, *supra* note 35, at 406.

47. *Lewis*, 523 U.S. at 841 n.5. A criminal proceeding never takes place if charges are not brought or if the defendant makes a deal before trial. Injunctive relief might not be available if the plaintiff cannot establish a significant likelihood that he or she will suffer the same violation in the future. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Finally, municipalities are not liable under the doctrine of respondeat superior, so if the plaintiff cannot show that the official was acting pursuant to the policy of the municipality, municipal liability might not be available. See *Monell v. Dept. Soc. Svcs.*, 436 U.S. 658 (1978).

when they will be available.⁴⁸ Because courts cannot rely on the possibility that the underlying dispute will be resolved in a related suit, the Court determined that “the requisites of a qualified immunity defense must be considered in proper sequence,” — merits first, then the state of the law.⁴⁹

Saucier has the markings of a procedural rule pragmatic decision. It is procedural because it dictates how the lower courts should frame their decisions and which issues they should address. It is rule pragmatic because it lays out a firm rule that seems to be justified only on forward-looking grounds. Before *Saucier*, lower courts could choose in which cases they would address the merits and in which they would bypass them. The shift toward a rigid rule is justified by the Supreme Court’s discovery that the merits-bypass occurred too frequently because, even though lower courts knew that the merits-first approach was preferable, they too regularly departed from the general rule.⁵⁰

This discovery tracks the suspicions underlying rule pragmatism generally: it is difficult to know at the time whether a case truly represents a standard case or an exception, and having to look at qualified immunity only one case at a time exacerbates the myopic tendency to find that the issues in any particular case are especially difficult. The Supreme Court, on the other hand, had a different perspective. It would have been able to take the long view of an accumulation of cases and see whether lower courts were producing the best results in the aggregate with the case-by-case approach. Concluding that they were not, the Court was then in a position to bind lower tribunals to an inflexible rule, with an eye toward the consequences of qualified immunity analysis.

48. Even if criminal proceedings are initiated, they can be settled at any time, and the court might have to engage in lengthy analysis to determine if a given case is suitable for injunctive relief or municipal liability.

49. *Saucier v. Katz*, 533 US 194, 200 (2001).

50. The *Saucier* opinion itself does not justify the move to the rigid rule. Rather than describing why the Court actually ruled as it did, this Note offers what seems to be the best rationale for constraining the lower courts.

C. THE SECOND CIRCUIT'S RATIONALE

Although the Supreme Court strongly endorsed the value of the merits-first approach, the Second Circuit, in a series of pre- and post-*Saucier* cases, has articulated important considerations that weigh against it.⁵¹ In particular, the court has raised three arguments that generally counsel courts against ruling on the constitutional issue. The first two are quite weak and are given little explanation in the decisions. The third argument, upon which the decisions seem to rely most heavily, is of most interest in the context of this Note because it is fundamentally act pragmatic.

1. *The Lesser Arguments*

First, and least interestingly, these courts have found that “when a constitutional violation is particularly egregious, but the right at issue is ill-defined, ‘the public interest in clarifying the law is much greater than in cases’ where the violation is less serious.”⁵² In other words, the court has little reason to insist on clarifying the standards of official conduct when the alleged violation is relatively minor. This argument is the least persuasive of the three as it does not in itself present a reason not to decide the merits so much as a mitigation of the rationale behind *Saucier*. While it is certainly possible that some constitutional violations are worse than others, it is difficult to argue that a true constitutional violation is so insignificant that, all things being equal, a court’s time is not well spent assuring that remedies are available to future litigants who suffer the same harm.

The second argument is that a strong presumption exists that courts should not “[reach] out to adjudicate constitutional matters unnecessarily,” especially if the issue is particularly difficult.⁵³ In other words, if the plaintiff will lose on the state of the law question either way, courts should avoid passing on the constitutional question as a general rule. This concern is not the heart of the

51. *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 55–56 (2d Cir. 2003); *Horne v. Coughlin*, 191 F.3d 244 (2d Cir. 1999); *Wilkinson v. Russell*, 182 F.3d 89, 112 (2d Cir. 1999) (Calabresi, J., concurring).

52. *Ehrlich*, 348 F.3d at 56 (quoting *Horne*, 191 F.3d at 249).

53. *Id.* at 56 (quoting *Horne*, 191 F.3d at 246).

Second Circuit's reasoning,⁵⁴ which is encouraging because, as it is used in this area, it is essentially formalistic (or positivistic) and difficult to defend on pragmatic grounds. The decisions that reference the policy of avoidance make no attempt to justify it beyond recognizing that it is a "fundamental and longstanding principle[] of judicial restraint"⁵⁵ and adding a citation to Justice Brandeis,⁵⁶ as if to give power to the position by heralding its pedigree.

To be fair to the argument, however, one might trace the principle of avoidance to its source to see how it can be justified and whether that justification holds in qualified immunity analysis. The Second Circuit looks to the Brandeis concurrence in *Ashwander* as the ultimate wellspring of this rule, and as this opinion has been generally influential on this point,⁵⁷ it is probably best to follow the Second Circuit's cue. Brandeis embraced the avoidance principle primarily because it honors "the separation of powers principle"⁵⁸ that "[o]ne branch of the government cannot encroach on the domain of another, without danger."⁵⁹ Respecting the domains of the various branches of government is certainly an important consideration for any responsible judge, so the Second Circuit is correct to give weight to a rule of decision that tends to promote that balance.

While courts should be sensitive to the separation of powers, the notion that qualified immunity analysis has separation of powers consequences is suspect. In deciding the constitutional question in qualified immunity analysis, courts are typically not asked to pass on the validity of acts of Congress or even high executive officials. The usual case involves an individual official and his or her actions in a particular situation, usually in the absence of or contrary to municipal or federal policy. Unlike higher-

54. In both *Horne* and *Ehrlich*, the avoidance principle was given only a paragraph and was not discussed beyond being mentioned and properly cited. See *Ehrlich*, 348 F.3d at 56; *Horne*, 191 F.3d at 246.

55. *Horne*, 191 F.3d at 246 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)).

56. See *Ehrlich*, 348 F.3d at 56 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)).

57. See Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1012 (1994) (describing the Brandeis concurrence as "the primary legacy of *Ashwander*").

58. *Id.* at 1016.

59. *Ashwander*, 297 U.S. at 355 (1936) (quoting *Sinking Fund Cases*, 99 U.S. 700, 718 (1871)).

level officials, the most common § 1983 defendants are not “constitutional experts” and are therefore not “well-equipped to judge the constitutionality of their conduct.”⁶⁰ In the context of qualified immunity, then, courts are not asked to pit their own constitutional judgments against that of another branch,⁶¹ so the separation of powers concern is inapposite. Because the justification for the constitutional avoidance principle does not apply to qualified immunity cases, the Second Circuit’s reliance on it is largely unpersuasive.

2. *The Pragmatic Argument*

At the core of the Second Circuit’s resistance to a rigid, merits-first rule is its reluctance to announce a new constitutional right in dictum that has “no role in supporting the action taken by the court — the dismissal of the case by reason of qualified immunity.”⁶² This consideration is the best developed of the three, and it presents the best arguments, pragmatic or otherwise, against adopting the *Saucier* rule. Before addressing the reasons for being concerned about announcing rights in dicta, however, one should assess whether the merits findings at issue would in fact be dicta.

a. Merits Findings are Dicta — The Analytic Argument

The Second Circuit opinions rightly point out that not all merits decisions constitute dicta. For instance, when the court determines that the plaintiff has failed to allege a constitutional violation, “the finding of no right is the holding.”⁶³ That an alternate and equally dispositive reason to dismiss the case exists, i.e., that the law was not clearly established, does not demote the

60. Greabe, *supra* note 35, at 407.

61. Of course, if the official were acting according to municipal or federal policy, the court would have to pass judgment on the constitutionality of the policy of another branch, but in that case, the issue would arise anyway when the court turned to the question of entity liability, for which there is no qualified immunity. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 647 n.29 (1980).

62. *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 56 (2d Cir. 2003) (quoting *Horne v. Coughlin*, 191 F.3d 244, 247 (2d Cir. 1999)) (internal quotations omitted).

63. *Horne*, 191 F.3d at 249.

merits determination to dictum.⁶⁴ However, in cases where the plaintiff ultimately loses on qualified immunity grounds, the Second Circuit has consistently construed the assertion that there has been a rights violation as dictum.⁶⁵

At least one commentator, John Greabe, has challenged this assertion, arguing that the merits finding is part of the “natural order” of the qualified immunity inquiry and therefore is properly considered part of the holding.⁶⁶ Greabe argues that “legal rulings that form an essential part of the natural process by which a court reaches a dispositive ruling are essential to its rationale, even if not strictly necessary to the case’s result when viewed *post hoc*.”⁶⁷ The merits analysis is part of this process, Greabe believes, because qualified immunity is an affirmative defense, which the court should only address if the plaintiff has stated a cause of action, which requires passing on the merits of the constitutional claim.⁶⁸

While Greabe’s perspective possesses a certain logic, it is not analytically unassailable. Greabe analogizes to an appellate court’s finding of a harmless error at the trial level.⁶⁹ Just because the court ultimately determines that the error was harmless, he argues, does not mean that the finding of error is mere dictum.⁷⁰ Similarly, he posits, just because a court announces that the law had not been clearly established earlier does not relegate the merits-finding to the status of dictum.⁷¹

Several problems exist with Greabe’s natural process argument. First, his analogy between a harmless error finding and an unclear violation breaks down upon examination. It is natural in the harmless error situation to determine at the outset if any error occurred because the analysis of whether an error caused harm proceeds from the premise that an error occurred in the

64. See Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2042–44 (1994).

65. See *Ehrlich*, 348 F.3d at 56; *Horne*, 191 F.3d at 247; *Wilkinson v. Russell*, 182 F.3d 89, 112 (2d Cir. 1999) (Calabresi, J., concurring). When a court reverses an earlier finding that the conduct at issue did not constitute a violation, the reversal is not dicta despite the lack of clearly established law in support thereof.

66. Greabe, *supra* note 35, at 426.

67. *Id.* at 424 (citing, inter alia, Dorf, *supra* note 64, at 2045) (emphasis omitted).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 424–25.

first place. If a court chooses to skip the first step, it must assume *arguendo* that the error existed. In qualified immunity analysis, however, if the court chooses to skip the merits question, it does not logically have to assume *arguendo* that a violation occurred. The state of the law constitutes a completely separate inquiry that does not rely on the merits finding to provide the basis for any foundational assumption.

Second, the most natural process for deciding whether an official is entitled to qualified immunity reverses the order required by *Saucier*. A judge unavoidably reaches the conclusion that the law is not settled before being able to establish precedent for the future. If the law were clearly established at the time of the violation, of course, the judge would reach simultaneous conclusions about the state of the law and the merits of the case because the discovery of controlling precedent will immediately settle both issues. If the law were unclear, the judge would first observe the lack of controlling precedent and then try to resolve the problem before him. In that sequence (state of the law first, merits second), the merits determination is more clearly dictum because the court truly must go beyond what the natural process of the analysis requires to decide the case in order to state that there was a rights violation.⁷²

b. Merits Findings are Dicta — The Functional Arguments

Regardless of whether merits findings belong under the formal heading “dicta,” they have two functional characteristics of dicta — a greater likelihood of inaccuracy and unappealability — both of which are concerns for the Second Circuit in announcing new constitutional rights when the case is going to be dismissed on the state of the law inquiry. Each of these characteristics is examined in turn.

72. With the correct natural process for qualified immunity analysis in mind, one can revisit Greabe’s analogy. The finding of a violation when the law was unclear is actually like a finding of no error, but that the error would have been harmful if it had occurred, which one might think really does look like dictum. The Supreme Court has never explained why it requires courts to look at the merits *first*, rather than just oblige them to reach the merits somewhere in their decision. Perhaps it has been trying to mask the fact that its sequence requires courts routinely to issue constitutional dicta, but that can only be speculation.

i. *Inaccuracy*

The first argument that merits findings are functionally dicta is that they will tend to be less accurate because judges receive inadequate briefing by defendants on the constitutional issues and are themselves less careful when their pronouncements do not affect the outcome of the immediate case. The second prong of this concern, that the judge will be less scrupulous, is common to all statements made in dicta, but the first prong plays out somewhat uniquely in qualified immunity analysis. Often, issues addressed in dicta might not be fully briefed because they are truly incidental to the case at hand and of little importance to the parties. The Second Circuit's worry in the qualified immunity setting, however, is that defendants might not fully brief the constitutional question if they are confident that they will win on the "clearly established" inquiry.⁷³ Whatever the cause of inadequate briefing, courts are generally wary of deciding issues that have not been fully litigated because they lack the "concrete adverse-ness . . . upon which the court so largely depends for illumination of difficult constitutional questions."⁷⁴

Many critics of this view have argued that, contrary to the received wisdom, holdings are not more likely to state the "right" answer than dicta, despite their being fully litigated.⁷⁵ One might question the basic assumption of the adversary system that the best path to just and good outcomes is to ask the parties to a dispute to make fundamentally self-serving presentations.⁷⁶ Answering such an attack, however, is beyond the scope of this Note.

Even assuming that dicta are less reliable, the Second Circuit offers at least a partial mitigation of its own accuracy concern. As long as everyone understands that the finding of a constitutional violation is dictum not binding on a future court facing a similar fact pattern, the likelihood that the first court was mis-

73. Indeed, inadequate briefing was an important reason why it chose to bypass the merits in at least one post-*Saucier* case. See *African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355, 359 (2d Cir. 2002) (noting that "the merits of this issue are scarcely mentioned in the briefs on appeal, let alone adequately briefed").

74. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

75. See Dorf, *supra* note 64, at 2002 & n.19 (noting the debate and summarizing the literature).

76. *Id.* at 2002.

taken presents less of a danger.⁷⁷ In other words, the dictum of the first case merely puts officials on notice that certain conduct probably violates rights, removing the availability of qualified immunity, but does not burden them in the second case with binding precedent on point about the existence of a rights violation.⁷⁸

ii. *Unappealability*

This mitigation, however, points directly to the second of the two concerns about announcing rights in dicta. Defendants who prevail on the “clearly established” inquiry are obviously unable to appeal the finding that they committed a rights violation. This situation leaves officials in an awkward position if they suspect that the court erred in its constitutional ruling:

Only by defying the views of the lower court, adhering to practices that have been declared illegal, and thus inviting new suits will the state officials be able to ensure appellate review of lower court declarations of the unconstitutionality of official conduct. Thus, officials may often be placed in the untenable position of complying with the lower court’s advisory dictum without opportunity to seek appellate review, or appearing to defy the lower court’s assertion and thus exposing themselves to a risk of punitive damages.⁷⁹

The facts of *Ehrlich* illuminate this issue. In that case, the plaintiff asserted a violation of her Fourth Amendment rights when police officers entered her home after being authorized to do so by the temporary conservator of her father’s estate, the owner of the home.⁸⁰ The merits of the constitutional question depended on “the degree of authority given to conservators to enter a jointly occupied home,” a question of state law that had not been “definitively decided by Connecticut courts.”⁸¹ The Second

77. *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 56 n.11 (2d Cir. 2003).

78. It bears noting that this characterization of a finding of a constitutional violation in a case where qualified immunity is granted yields the puzzling result that dicta, not binding on any court, is powerful enough to clearly establish the law in a jurisdiction.

79. *Horne v. Coughlin*, 191 F.3d 244, 247 (2d Cir. 1999).

80. *Ehrlich*, 348 F.3d at 57–60.

81. *Id.* at 53.

Circuit's concern would be that if it ruled that there was a violation, according to its best guess about Connecticut law, its guess might be incorrect, but that the error would never be revealed because officials would not want to challenge the decision.

This objection, like the accuracy argument, may or may not be very strong. What matters for present purposes is that it is essentially forward-looking, concerned with how the decision in the case will affect future outcomes. Unlike the desire not to render unnecessary constitutional decisions, the considerations that counsel against announcing constitutional rights in dicta are fundamentally pragmatic.

c. The Second Circuit is Act Pragmatic

Taken as a whole, the Second Circuit's approach to qualified immunity analysis is properly described as act pragmatic. There is a recognition that, in general, it would be better to address the merits of the constitutional issue, but the Second Circuit nevertheless reserves the discretion to abandon the *Saucier* sequence when its "underlying rationale [does] not apply" and it would be better to proceed directly to the state of the law.⁸² Accordingly, since *Saucier*, the Second Circuit has found the rationale inapposite in three situations: the constitutional issue was inadequately briefed,⁸³ the constitutional issue could be litigated in a related criminal proceeding,⁸⁴ and the constitutional issue depended on a question of state law.⁸⁵ The Second Circuit has also cited with approval a First Circuit decision that argued that *Saucier* might not apply when the underlying constitutional issue "may depend on a kaleidoscope of facts not yet fully developed."⁸⁶

Of this list of exceptions, only the state law exception from *Ehrlich* lends itself to being incorporated into a principled rule. Whether an issue is sufficiently briefed, whether it is likely to be litigated in an alternate forum, and whether it is just too fact intensive all require a case-by-case judgment that the state law

82. *Id.* at 57. Significantly, the *Saucier* opinion itself never offered such room to the lower courts. It spoke in absolute terms.

83. *African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355 (2d Cir. 2002).

84. *Koch v. Town of Brattleboro*, 287 F.3d 162 (2d Cir. 2003).

85. *Ehrlich*, 348 F.3d at 57.

86. *Id.* (citing *Dirrane v. Brookline Police Dep't*, 315 F.3d 65, 69–70 (1st Cir. 2002)).

exception does not. Thus, the Second Circuit approach must be understood as a series of departures from the *Saucier* rule, rather than as a refinement of it. As such, it is properly characterized as an act pragmatic alternative to the rule pragmatism adopted by the Supreme Court.

D. COMPARING THE TWO APPROACHES

In general, it is unclear if the Second Circuit has been wise to eschew the directions of the Supreme Court. *Saucier* itself is barely three years old, and *Ehrlich* is quite recent. Still, the Supreme Court was in the best position to view the aggregate effects of several years of the merits bypass, saw a troubling trend, and concluded that the best remedy was to lay down a rigid rule. The attempts by lower courts to subvert that rule might substantially erode the *Saucier* rule until it has little more effect on lower courts' decisions than those earlier cases that expressed the preferability of the merits-first approach. If that situation happens, the lessons learned from looking at cases in the aggregate would be lost by lower courts intently focused on the case before them.

Perhaps distinguishing from the *Saucier* rule will not have any negative consequences. The mandatory language of *Saucier* may lead courts to lean more heavily on the merits-first side of the scale when they balance the interests involved in their approach to qualified immunity analysis. That systematic extra weight to the merits-first approach, then, might be enough to correct whatever discount the courts had given to the importance of resolving the merits prior to *Saucier*. Either way, it is possible now to see how rule pragmatism can be effectively brought to bear on a concrete legal issue, despite the temptation by act pragmatists to resist being bound by rules.

IV. CONCLUSION

Legal pragmatists have overlooked the conceptual difference between act and rule pragmatism. Because legal pragmatism's greatest champion decidedly favors act pragmatism, it is easy to forget that there can be such a thing as a pragmatically justified rule, as opposed to individual pragmatic choices or an entire methodology of rules justified on pragmatic grounds only at the second order. Not only do such rules exist, however, but when

they are aptly applied, as in the context of qualified immunity analysis, they offer unique advantages over both act pragmatism and other rule-based methodologies. Pragmatic rules can correct systematic defects that might plague the case-by-case judgments of an act pragmatist, and yet they are not bound to outmoded precepts like the judicial positivist methodology. Rule pragmatism, then, stands as the best option among these three because it not only looks forward, but it also looks back at its own mistakes, discovers systematic errors, and makes an appropriate adjustment.