SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 68 | Issue 2

2017

Rebalancing *Harlow*: A New Approach to Qualified Immunity in the Fourth Amendment

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— Note —

REBALANCING *HARLOW*: A NEW APPROACH TO QUALIFIED IMMUNITY IN THE FOURTH AMENDMENT[1]

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1. This Note's final draft was written before the publication of Joanna Schwartz's recent article demonstrating how qualified immunity may not be as large of an obstacle as formerly believed, arguing that the Supreme Court incorrectly balanced interests in *Harlow v. Fitzgerald*, and exploring the re-incorporation of the subjective prong that existed before *Harlow* as a possible solution. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017). I did not read Schwartz's Article while conceptualizing and organizing this Note, nor use any analysis from Schwartz's Article in writing this Note.

INTRODUCTION

On July 6, 2016, Philando Castile was killed by a police officer in St. Paul, Minnesota during a traffic stop for a broken tail light.[2] Once pulled over, Castile told the officer that he had a firearm on him.[3] The officer asked him not to reach for it, and Castile said he was not. Nevertheless, the officer shot Castile. Castile's girlfriend, Diamond Reynolds, immediately began streaming the aftermath on Facebook.[4] As Castile slumped in his seat, his shirt soaked in blood, Reynolds stated, "You shot four bullets into him, sir. He was just getting his license and registration, sir."[5] The officer later claimed that he "feared for his life."[6] The city settled a lawsuit filed against it by Castile's

2. Camila Domonoske & Bill Chappell, *Minnesota Gov. Calls Traffic Stop Shooting 'Absolutely Appalling at All Levels'*, NPR (Jul. 7, 2016, 7:19 AM), http://www.npr.org/sections/thetwo-way/2016/07/07/485066807/police-stop-ends-in-black-mans-death-aftermath-is-livestreamed-online-video [https://perma.cc/P7MA-RCHY].

3. *Dash Camera Shows Moment Philando Castile Is Shot,* N.Y. TIMES (Jun. 20, 2017), https://www.nytimes.com/video/us/100000005176538/dash-camera-shows-moment-philando-castile-is-killed.html [https://perma.cc/3MQN-4W8B].

4. *Id.*

5. *Philando Castile Death: Aftermath of Police Shooting Streamed Live*, BBC (Jul. 7, 2016), http://www.bbc.com/news/world-us-canada-36732908 [https://perma.cc/S6FL-FS24].

6. Mark Berman, *What the Police Officer Who Shot Philando Castile Said About the Shooting*, WASH. POST (Jun. 21, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/?utm_term=.ab2f31f30319 [https://perma.cc/7T4B-Y5PY].

family 10 days after a jury acquitted the officer of all charges in the shooting.[7]

On March 13, 2009, Jamie Lockard was pulled over for traffic violations in Lawrenceburg, Indiana, and the officer, upon talking to Lockard, believed Lockard was intoxicated.[8] Lockard registered a blood alcohol concentration of 0.07% and refused to submit to a chemical test.[9] The officer obtained a search warrant to gather a blood and urine sample from Lockard.[10] The blood sample was obtained without any problem, but Lockard was unable to provide a urine sample because he "didn't have to go right then."[11] At this point, someone—either the officers or a doctor, but it is unclear who—ordered a catheterization.[12] The officers handcuffed Lockard to a bed and grabbed his ankles while the nurse pulled down his pants, despite Lockard's telling the nurse he did not want to be catheterized.[13] Lockard said it "felt like something twisting where it ain't supposed to be twisting."[14]

Lockard sued the officers for violating his Fourth Amendment rights, but the district court ruled that the officers were entitled to qualified immunity.[15] After an extensive review of the case law surrounding the Fourth Amendment and forced catheterization, the court concluded that "the existence and/or direction of any discernable trend in the law concerning forcible catheterizations is far from

7. Mitch Smith, *Philando Castile Family Reaches $3 Million Settlement*, N.Y. TIMES (Jun. 26, 2017), https://www.nytimes.com/2017/06/26/us/philando-castile-family-settlement.html [https://perma.cc/59LA-6SRN]; Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (Jun. 16, 2017), https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html [https://perma.cc/GH4Y-TKFG]. Qualified immunity most likely would not have been a factor in this lawsuit since it was against the city, and not the officer.

8. Lockard v. City of Lawrenceburg, 815 F. Supp. 2d 1034, 1036–37 (S.D. Ind. 2011).

9. *Id.* at 1037.

10. *Id.*

11. *Id.* at 1037–38.

12. *Id.* at 1038.

13. *Id.*

14. Ken Armstrong, *When the Cops Take Your Urine by Force*, MARSHALL PROJECT (Oct. 3, 2016, 10:00 PM), https://www.themarshallproject.org/2016/10/03/when-the-cops-take-your-urine-by-force#.F4jCD6LPO [https://perma.cc/N6JG-N7VR].

15. *Lockard*, 815 F. Supp. 2d at 1051.

clear."[16] Therefore, the court could not hold the officers liable for their "bad guesses" in a "gray area."[17]

Qualified immunity presents a seemingly insurmountable obstacle for plaintiffs like Lockard and Philando Castile's family if and when they decide to sue individual officers.[18] When plaintiffs sue government officials for violating their constitutional rights, the government officials can assert that they are qualifiedly immune from the suit. This immunity, according to the Supreme Court, protects "government officials performing discretionary functions . . . insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known."[19] The *Harlow v. Fitzgerald*[20] Court—which created the modern qualified immunity doctrine—hoped these words would create a balance between public and governmental interests,[21] but, as currently applied, qualified immunity tips too far in favor of the government. This is especially true in Fourth Amendment cases, where the standards are already deferential to government officials. The combination of qualified immunity and Fourth Amendment standards has made it extraordinarily difficult for plaintiffs to argue the merits.

This is partly by design. One of the main objectives of the current qualified-immunity regime is preventing too many cases from proceeding to the merits.[22] However, the pursuit of this goal has gone too far. The Supreme Court, under the current standard, has heard 28 qualified immunity cases.[23] Of those 28 cases, Fourth Amendment claims pervaded 21 of them.[24] Of those 21, the Court found immunity in all but three.[25] The Court certainly has legitimate interests in

16. *Id.*

17. *Id.*

18. No suit has yet been filed for Philando Castile. However, the judge in Michael Brown's case has not yet ruled on any qualified-immunity issue, but has stated that qualified-immunity issues may appear in the summary-judgment portion of the case. Brown v. City of Ferguson, No. 4:15CV00831 ERW (E.D. Mo. July 16, 2015) (order partially dismissing claims).

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

20. 457 U.S. 800 (1982).

21. *Id.* at 819.

22. *See infra* notes 68–78 and accompanying text.

23. William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. (forthcoming 2018) (manuscript at 45) *available at* https://ssrn.com/abstract=2896508).

24. *Id.*

25. *Id.*

qualified immunity, but the strength the Court has given the doctrine presents too great an obstacle for plaintiffs who potentially have meritorious claims. Too many cases are being denied their day in court.

The *Harlow* standard, therefore, needs rebalancing. This Note argues that in order to strike the appropriate balance the Supreme Court attempted to find in *Harlow*, qualified immunity for Fourth Amendment claims should be determined through a case-by-case balancing test. Before beginning the analysis, a judge would assume there is a constitutional violation and then weigh an objective-reasonableness factor, a subjective-standard factor, and, finally, a constitutional-development factor, which will encourage judges to determine the potential benefits to constitutional development if the case goes to trial.

Part I traces the development of qualified immunity both generally and in the context of the Fourth Amendment. Part II discusses various critiques of qualified immunity. Part III presents the proposed alternative to qualified immunity for the Fourth Amendment. Finally, Part IV presents and compares several other proposed alternatives to the balancing test.

I. THE DEVELOPMENT OF QUALIFIED IMMUNITY

This Section focuses on the development of the current qualified-immunity doctrine and how its evolution was motivated by certain themes and interests repeated by the Supreme Court. The first Subsection lays out the current iteration of the doctrine. The subsequent Subsections focus on the development of qualified immunity, with particular attention to cases that represented shifts in the doctrine. The final Subsection traces the development of qualified immunity in the context of the Fourth Amendment.

A. Qualified Immunity: What Is It?

Qualified immunity is a type of immunity government officials can assert when being sued for violating constitutional rights.[26] It is an immunity from suit, not just an immunity from paying damages.[27] The immunity is qualified—as opposed to absolute—because it applies

26. It also applies to statutory rights. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). Since this Note focuses on the Fourth Amendment, the discussion will be limited to constitutional rights.

27. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

unless: (1) the official violated the plaintiff's constitutional rights, and (2) the right the official violated was clearly established.[28] Those conditions may be addressed in either order.[29] The court has labeled these conditions as the constitutional question and the qualified-immunity question, respectively.[30] The clearly established right cannot be defined "at a high level of generality," meaning, for example, that the right cannot simply be the language of the Fourth Amendment.[31] Furthermore, the right is clearly established if "[t]he contours of the right [are] sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right."[32] The doctrine aims to "give[] government officials breathing room to make reasonable but mistaken judgments about open legal questions."[33] The qualified-immunity question, therefore, is an objective analysis, asking how a reasonable government official would act.[34]

B. Before Harlow

Before *Harlow*, the Supreme Court defined qualified immunity as a good-faith immunity that had both an objective and subjective element.[35] The pre-*Harlow* objective prong is similar to the qualified-immunity question established by *Harlow*. The Supreme Court used such phrases as "reasonably appeared at the time,"[36] "reasonable grounds for the belief formed at the time and in light of all the circumstances,"[37] and "clearly established constitutional rule."[38] These phrases represent one of the cores of qualified immunity: if a reasonable government official would have believed they were not violating

28. Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

29. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

30. *See, e.g.*, Wilson v. Layne, 526 U.S. 603, 609 (1999) ("Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public.").

31. *al-Kidd*, 563 U.S. at 742.

32. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

33. *al-Kidd*, 563 U.S. at 743.

34. *Anderson*, 483 U.S. at 636–37.

35. *Harlow*, 457 U.S. at 815; Gomez v. Toledo, 446 U.S. 635, 641 (1980); Wood v. Strickland, 420 U.S. 308, 321 (1975).

36. Scheuer v. Rhodes, 416 U.S. 232, 247 (1974).

37. *Wood*, 420 U.S. at 318 (quoting *Scheuer*, 416 U.S. at 247–48).

38. Butz v. Economou, 438 U.S. 478, 507 (1978).

the Constitution, then that official deserves immunity.[39] In addition to this objective standard, courts gave equal weight to the official's "good-faith belief" that what they were doing did not violate the Constitution.[40] The Supreme Court repeatedly emphasized the importance of this subjective analysis, stating that "the official himself must be acting sincerely and with a belief that he is doing right."[41]

The Court viewed these questions as two sides of the same immunity coin. Neither question was more important than the other.[42] It would make no sense for an official to knowingly and willfully disregard someone's constitutional rights yet be immune, and it would make no sense for an official to be immune when any other official would have known their actions were not constitutional.[43] Both objective good faith and subjective good faith must be present.[44]

One important pre-*Harlow* case developing this standard is *Scheuer v. Rhodes*.[45] *Scheuer* specifically sheds light on the reasoning and interests behind this analysis, and qualified immunity in general. In *Scheuer*, the Court heard an appeal from the dismissal of a claim by the families of three students who died during the Kent State shootings.[46] The families sued the Governor of Ohio and several officers involved in the shooting.[47] The Court had to decide what kind of immunity applied to each government official.[48] *Scheuer* outlined two historical reasons for recognizing some kind of immunity for government officials: the injustice in holding an official liable for exercising official discretion, and the need to prevent officers from feeling deterred from performing their duties with the firmness needed for the public good.[49] The opinion placed particular emphasis on the latter interest, stating that "the public interest requires decisions and action to enforce laws for the protection of the public."[50] Simultaneously, the

39. *Id.* at 484.

40. *Scheuer*, 416 U.S. at 247–48.

41. *Wood*, 420 U.S. at 321.

42. *Id.*

43. *Id.*

44. *Scheuer*, 416 U.S. at 247–48.

45. 416 U.S. 232 (1974); John C. Williams, Note, *Qualifying Qualified Immunity*, 65 Vand. L. Rev. 1295, 1299 (2012).

46. *Scheuer*, 416 U.S. at 234.

47. *Id.*

48. *Id.* at 242.

49. *Id.* at 239–40.

50. *Id.* at 241.

Court recognized that this interest was not strong enough to provide officers complete immunity from suit.[51] Therefore, the Court weighed the interests between the need to redress constitutional wrongs and the need to protect officials performing discretionary functions.

The Court did not directly address the exact parameters of immunity for higher executive officials such as the Governor, but it did lay out the parameters for qualified immunity for police officers, which is the subjective and objective standard discussed above.[52] In creating this standard, the Court emphasized that police officers' conduct should be evaluated based on probable cause and good faith.[53] The probable-cause factor lives in the objective prong and the good-faith factor lives in the subjective standard.[54]

There are several important takeaways from the Court's earliest qualified immunity analyses: (1) the Court saw both the subjective and objective analysis as intertwined; (2) the defendant had to be within both the subjective and objective standards to obtain immunity;[55] (3) the Court's analysis was based on the intricacies of police work; and (4) the Court emphasized that constitutional wrongs should be redressed.[56]

C. Harlow *and the Elimination of Subjectivity*

Harlow announced the qualified-immunity standard still in force today. The Supreme Court has clarified the standard since the decision, but it has not deviated from the balance struck by *Harlow*.

In *Harlow*, a former Air Force official sued two senior White House aides for a conspiracy to violate his constitutional rights.[57] He claimed that the aides had fired him due to his plan to "'blow the whistle' on some 'shoddy purchasing practices.'"[58] Before addressing the scope of qualified immunity, the Court first held that these aides enjoyed only qualified immunity instead of an absolute executive

51. *Id.* at 247–48.

52. *Id.*

53. *Id.* at 245; Williams, *supra* note 45, at 1300.

54. The Court went on to remand the case to the lower court, as it could not make a decision on the factual record before it. *Scheuer*, 416 U.S. at 249. This implies that the lower courts "must find at least some facts before dismissing the suit upon [the] basis [of qualified immunity]." Williams, *supra* note 45, at 1301.

55. Wood v. Strickland, 420 U.S. 308, 321 (1975).

56. Williams, *supra* note 45, at 1303.

57. Harlow v. Fitzgerald, 457 U.S. 800, 802 (1982). The official did not allege any violation of his Fourth Amendment rights.

58. *Id.* at 804.

immunity.[59] The Court emphasized that qualified immunity for officials "balance[s] competing values" of affording a damages remedy for constitutional violations against protecting officials who must use their discretion to perform official duties.[60]

The Court then announced that qualified immunity would no longer be the two-part subjective and objective analysis outlined in *Scheuer*; qualified immunity would be limited to *Scheuer's* objective prong.[61] Qualified immunity would only protect "government officials performing discretionary functions . . . [when] their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[62] The Court gave the following reasons for rejecting the subjective standard.

First, the subjective standard caused procedural problems.[63] Qualified immunity is raised before trial, when judges make decisions based on law, not fact.[64] However, good faith is typically a fact question that should be resolved by a jury. Therefore, qualified immunity pre-*Harlow* asked courts to engage in an analysis that was properly left for the jury.[65] Furthermore, because of the procedural posture, a plaintiff could easily survive a qualified-immunity defense by alleging malice and finding enough facts in the defendant's history to suggest such malice.[66]

These procedural issues created a second issue: it did not permit "insubstantial lawsuits to be quickly terminated."[67] One of the main motivators behind qualified immunity according to the Court is the ability to dispose of "insubstantial claims" before they go to trial.[68]

The need to dispose of these claims is important because of the third—and most significant—issue created by the subjective analysis:

59. *Id.* at 808–09.

60. *Id.* at 807.

61. *Id.* at 817–18.

62. *Id.* at 818.

63. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010); Williams, *supra* note 45, at 1303.

64. *See* FED. R. CIV. P. 12(b)(6), 56.

65. *See* Williams, *supra* note 45, at 1303 ("As the Court saw it, the question of an official's intent is one of fact; because questions of fact require a jury verdict, consideration of intent must await completion of the summary judgment phase.").

66. Jeffries, *supra* note 63, at 852.

67. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (internal quotations omitted).

68. *Id.* at 815–16, 818.

increased costs to the parties.[69] The Court stated that the defendants bore the typical costs from the lawsuit, including: distraction from duties, stifling discretion, and deterring potential officers who would otherwise want to serve.[70] But subjectivity had "special costs."[71] Fact-finding for subjectivity in discretionary acts has "no clear end."[72] Parties would have to engage in broad discovery that would be especially "disruptive of effective government."[73] While these costs may seem to rest only on the defendant, the Court specifically noted that these costs are to "society as a whole."[74]

The Court decided that a purely objective standard would avoid these issues. Objectivity based on clearly established law is much easier to administer than a subjective standard, thus eliminating the procedural issues in the subjective analysis.[75] Determining whether law is clearly established is well within the competence of a judge at summary judgment.[76] The Court hoped the standard would enable lower courts to dismiss "insubstantial claims," which would lead to less disruption of government[77] and fewer costs to society. By changing the procedure to lessen the burdens of discovery and trial on government officials, the Court changed the substance of the law and its effects on society.[78]

The Court also thought the objective standard would protect officials better than an objective and subjective standard. The Court outlined how this new standard would function:

> If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until

69. *Id.* at 817–18; Williams, *supra* note 45, at 1303; Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 Iowa L. Rev. 261, 275–76 (1995).

70. *Harlow*, 457 U.S. at 816.

71. *Id.*

72. *Id.* at 816–17.

73. *Id.* at 817.

74. *Id.* at 814; Chen, *supra* note 69, at 276.

75. Jeffries, *supra* note 63, at 852.

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

77. *Id.*

78. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 251 (2013).

> this threshold immunity question is resolved, discovery should not be allowed.[79]

This standard would better protect officials exercising their discretion because the current standard is a direct function of how an official would use their discretion: take the law as they know it and make a decision.[80] Furthermore, the new standard would protect against over-deterrence of official conduct.[81] Early in the opinion, the Court emphasized the need to protect officials exercising their discretion.[82] This purely objective standard would give officials a wide range of discretion, so they would not have to fear repercussions for every single action they take.[83]

The Court also believed that this new standard still honored the public interests in qualified immunity.[84] The Court stated that an official who should know the law ought to hesitate, and any injury from not hesitating could be actionable.[85] This goes directly to the public interest in obtaining money damages for constitutional wrongs.[86] This also deters officials from committing constitutional torts in the future,[87] which is obviously in the interest of the public. Furthermore, the Court reasoned that preventing over-deterrence is also a public interest. The Court briefly stated that the public interest "*may* be better served by action taken with independence and without fear of consequences."[88] Therefore, over-deterrence should weigh in both the public's and the government's favor.[89] The Court has stood by these assertions and has vehemently emphasized the importance of qualified immunity to the public by reversing lower courts' denials of

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

80. *Id.*

81. Chen, *supra* note 69, at 264.

82. *Harlow*, 457 U.S. at 807.

83. *See id.* at 819 (explaining how an objective test protects the public interest).

84. *Id.*

85. *Id.*

86. *See id.* at 807 (discussing the interests balanced by qualified immunity).

87. Chen, *supra* note 69, at 263.

88. *Harlow*, 457 U.S. at 819 (emphasis added) (internal quotations omitted).

89. Aside from cost-saving and procedural fixes, the Court did not explain: 1) the drawbacks of including a subjective analysis, or 2) how a subjective analysis fails to aid interests in damages for constitutional remedies and protect officials who exercise their discretion. *See id.* at 814, 816, 818–19.

qualified immunity.[90] In fact, the Court believes that qualified immunity is important enough to the public that it feels the need to "often correct[] lower courts."[91]

Harlow left several questions open about how qualified immunity functions. One of the first questions was what right must be clearly established? Using the text of the Constitution itself creates a broad clearly established right that is easy to violate: any action that violates the Constitution is clearly established.[92] This does not protect discretion in the way envisioned by *Harlow*, and there would be no balance in the *Harlow* interests.[93] Therefore, the Court announced that "[t]he contours of the right must be sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right."[94] The Court has reinforced this notion repeatedly, admonishing lower courts "not to define clearly established law at a high level of generality."[95] This insures *Harlow*'s objective of giving officials "breathing room."[96]

Another question that arose was what makes clearly established law? Directly after announcing "the contours of the right," the Court stated: "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent."[97] What kinds of law makes the law "apparent" was still unanswered. The current commonly accepted answer is that lower courts must look to the Supreme Court's controlling precedent to decipher whether a right was clearly established.[98] The Court in *Ashcroft v. al-Kidd*[99] broadly concluded: "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."[100] The Court cited a Fourth Amendment qualified immunity case, which only

90. *See* City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) (listing cases in which lower courts wrongfully subjected individual officers to liability).

91. *Id.*

92. Anderson v. Creighton, 483 U.S. 635, 639 (1987).

93. *Id.*

94. *Id.* at 640.

95. Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011).

96. *Id.* at 743.

97. *Anderson*, 483 U.S. at 640 (internal citation omitted).

98. *al-Kidd*, 563 U.S. at 741.

99. 563 U.S. 731 (2011).

100. *Id.* at 741.

stated that "[d]efendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concludeed that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized."[101]

The sweeping generalization in *al-Kidd* ignored controlling precedent to the contrary. In *Wilson v. Layne*,[102] the Court permitted United States marshals to reference their own policy in considering whether a reasonable marshal would be able to ascertain case law.[103] In this case, officers entered a home pursuant to an arrest warrant, but they also allowed reporters into the home pursuant to the department's ride-along policies.[104] The reporters took pictures of the home and observed the officers' conduct.[105] The Court held that bringing the reporters into the home violated the Fourth Amendment because their presence "was not in aid of the execution of the warrant."[106] Nevertheless, the officers were entitled to qualified immunity because "the state of the law . . . was at best undeveloped, [so] it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies."[107]

Furthermore, in *Hope v. Pelzer*,[108] the Court explicitly relied on a Department of Corrections regulation, a Department of Justice report, and the outrageousness of the defendant's conduct to hold that the defendants did not deserve qualified immunity.[109] In this case, prison guards punished a prisoner by chaining him to a hitching post, shirtless, for 7 hours under the sun.[110] The Court held—in addition to violating clearly established precedent—the prison guards' actions were clearly unlawful because a DOJ report and a DOC regulation told the prison that this practice was unlawful before this incident.[111] Beyond the report, the "obvious cruelty" in the guards' actions should have put the guards on notice that they were violating the prisoner's

101. Malley v. Briggs, 475 U.S. 335, 341 (1986).

102. 526 U.S. 603 (1999).

103. *Id.* at 617.

104. *Id.* at 607.

105. *Id.* at 607–08.

106. *Id.* at 614.

107. *Id.* at 617.

108. 536 U.S. 730 (2002).

109. *Id.* at 741–42.

110. *Id.* at 734–35.

111. *Id.* at 744–45.

constitutional rights.[112] But in *al-Kidd*, the Court still limited itself to precedent, and it is commonly accepted that case law is the source of clearly established law.[113]

D. The Saucier *Experiment: The Interest in Constitutional Development*

The Supreme Court divided the *Harlow* test into two questions: (1) the "constitutional question," which asks whether a constitutional right has been violated; and (2) the "qualified-immunity question," which asks whether that right was clearly established.[114] The Supreme Court attempted to restrict the way lower courts examine these questions in *Saucier v. Katz*.[115] In *Saucier*, the Court declared that lower courts must address the constitutional question before addressing the qualified-immunity question.[116]

To justify this, the Court added a new interest to the qualified-immunity analysis: constitutional development. The Court stated:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.[117]

This is a plain acknowledgment that articulating the boundaries of constitutional rights is just as valuable as the interests outlined in

112. *Id.* at 745.

113. *See* Stephen R. Reinhardt, *The Demise of the Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1247 (2015) ("*Hope* was short lived."); Avidan Cover, *Reconstructing the Right Against Excessive Force*, 68 Fla. L. Rev. 1773, 1814–16 (2016) (discussing the Court's refusal to look beyond case precedent).

114. Saucier v. Katz, 533 U.S. 194, 200 (2001); *see supra* note 30, and accompanying text.

115. 533 U.S. 194 (2001).

116. *Id.* at 201.

117. *Id.*

Harlow.[118] By creating this system, the Court hoped that as courts ruled on more and more qualified-immunity cases, the law would become clearer and clearer, making it easier for future plaintiffs to recover for violations of their constitutional rights.[119] It is plain to see how increasing the clarity of the law would also further the public-interest values announced in *Harlow*. The clearer the law, the more likely a reasonable official would know the law and hesitate before acting, thus protecting citizens from unconstitutional discretionary acts.[120] It would also prevent over-deterrence because the clearer the law is, the more confident officials can be that their actions are constitutional.[121]

This approach, however, was widely criticized. One critique was that the sequencing conflicts with the Court's dedication to constitutional avoidance.[122] The Court has long adhered to the rule that if there are two grounds for deciding a case, one constitutional and one not, the Court should choose the latter course.[123] The doctrine is based on separation of powers; the judiciary should not infringe on another branch's constitutional powers if there is another basis for a decision.[124] *Saucier*, however, asks courts to decide a constitutional question essentially as dictum before reaching the true holding of a case.[125] Another major concern related to the practical effects of sequencing is the expenditure of judicial resources in deciding an unnecessary question.[126] Justices opposed to sequencing voiced this concern often. Their view is best summarized by Justice Breyer:

118. Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 412 (2012).

119. Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 674 (2009); *see* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (discussing how absolute and qualified immunity have evolved through their application by the courts); Bunting v. Mellen, 541 U.S. 1019, 1023–24 (2004) (Scalia, J., dissenting) (arguing that denial of review of an unfavorable collateral decision "undermines the purpose served by initial consideration of the constitutional question, which is to clarify constitutional rights without undue delay.").

120. *See* Chen, *supra* note 69, at 308 (discussing the benefits of clear constitutional rules to public officials).

121. *See Harlow*, 457 U.S. at 819.

122. Morse v. Frederick, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in part and dissenting in part).

123. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

124. Leong, *supra* note 119, at 676–77.

125. Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275–76 (2006).

126. Leong, *supra* note 119, at 679–80.

"[W]hen courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense . . . ."[127] This practical effect also cuts straight to the core of the *Harlow* doctrine: sequencing creates more costs in a doctrine aimed at reducing costs.[128] One final criticism worth noting is that sequencing creates "bad constitutional law."[129] The argument is that when a case raises complex constitutional issues, the court is not in a good position to decide those issues early in the proceedings, when most qualified-immunity motions occur.[130] Therefore, it would be better to allow the court to avoid deciding the constitutional question because "[n]o law . . . is better than bad law."[131] There is data to support this position. Nancy Leong conducted an empirical study of the effects of sequencing and found that most of the cases denied the existence of a right.[132] Thus, sequencing did not expand constitutional rights as it was intended to do, even though it created more constitutional law.[133]

The Court responded to this criticism by rejecting the rigidity of *Saucier* in *Pearson v. Callahan*.[134] The Court recognized that sequencing can create unnecessary costs for the judiciary.[135] The Court also recognized the potential for bad constitutional precedent from sequencing.[136] Sequencing can create bad constitutional precedent, according to the Court, for the following reasons: 1) the decision may be so fact-bound that it has no precedential value,[137] 2) the value of deciding the question is reduced when the question will likely be decided by a higher court,[138] 3) the decision may rely on an "uncertain interpretation of state law,"[139] 4) the factual basis for a claim may be unclear due to qualified immunity's assertion at the pleading stage,[140]

127. Brosseau v. Haugen, 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring).

128. Leong, *supra* note 119, at 680.

129. Leval, *supra* note 125, at 1277.

130. Cty. of Sacramento v. Lewis, 523 U.S. 833, 859 (1998) (Stevens, J., concurring in the judgment); Leong, *supra* note 119, at 680–81.

131. Leong, *supra* note 119, at 681.

132. *Id.* at 693.

133. *Id.* at 670.

134. 555 U.S. 223 (2009).

135. *Id.* at 236–37.

136. *Id.* at 237.

137. *Id.*

138. *Id.* at 237–38.

139. *Id.* at 238.

140. *Id.* at 238–39.

and 5) the briefing for the lower court may be "woefully inadequate."[141] The Court also recognized sequencing's tension with constitutional avoidance.[142]

However, despite all of the recognized costs of sequencing, the Court did not forbid lower courts from using the *Saucier* framework; it simply made it voluntary. The Court held that judges should be permitted to use their discretion in deciding which prong of the qualified-immunity analysis to address first.[143] The Court recognized two situations where sequencing might help the lower courts. First, there are situations where deciding the constitutional rights question is necessary to deciding whether that right was clearly established.[144] Second, there is a value to developing constitutional precedent "with respect to questions that do not frequently arise in cases in which a qualified-immunity defense is unavailable."[145] Therefore, the Court recognized that there are situations where constitutional development can be useful. While the strict framework of *Saucier* died with *Pearson*, the Court preserved a new interest in qualified immunity: the possible need for constitutional development.[146] It has seen fit to adhere to *Saucier* sequencing in cases after *Pearson*.[147]

E. Qualified Immunity and the Fourth Amendment

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

141. *Id.* at 239.

142. *Id.* at 241.

143. *Id.* at 236.

144. *Id.* (quoting Lyons v. City of Xenia, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring)).

145. *Id.*

146. *See* Nancy Leong, *Improving Rights*, 100 Va. L. Rev. 377, 384 (2014) ("*Pearson* thus reinforces the importance of rights-making and maintains qualified immunity adjudication as a vehicle for such rights-making.").

147. *See, e.g.,* Safford Unified Sch. Dist. No. 1. v. Redding, 557 U.S. 364, 379 (2009) (holding that an assistant principal's reasonable suspicion that a 13-year-old student was distributing drugs did not justify a strip search, but that he was still qualifiedly immune because he did not violate clearly established law); Plumhoff v. Rickard, 134 S. Ct. 2012, 2024 (2014) (holding that a police officer's use of force, firing 15 shots, to end a car chase was reasonable and did not violate clearly established law).

> particularly describing the place to be searched, and the persons or things to be seized.[148]

There are two important phrases in this Amendment for the sake of this analysis: "unreasonable searches and seizures" and "probable cause."[149]

> [Probable cause] merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.[150]

Without a warrant, searches and seizures need to meet some level of reasonableness and depend on the facts before the officer.[151] This will become important as the Court applies qualified immunity to Fourth Amendment claims.

Post-*Harlow*, the Court quickly faced cases applying their new qualified-immunity standard to Fourth Amendment claims. In *Malley v. Briggs*[152] the Court heard a claim that officers violated two men's Fourth and Fourteenth Amendment rights by applying for warrants for their arrest without probable cause.[153] A judge signed the warrants

148. U.S. CONST. amend IV.

149. *Id.*

150. Texas v. Brown, 460 U.S. 730, 742 (1983) (citation omitted).

151. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 397 (1989) (stating that an officer does not use excessive force if the officer's conduct was "objectively reasonable"); United States v. Watson, 423 U.S. 411, 414–15 (1976) (holding a warrantless public arrest was reasonable even without the presence of accepted exceptions to the warrant requirement); United States v. Robinson, 414 U.S. 218, 235 (1973) (holding that a full search of person after arrest based on probable cause is reasonable without a separate warrant for the search); Terry v. Ohio, 392 U.S. 1, 24 (1968) (holding that an officer may seize a person and search them for weapons if they have a reasonable articulable suspicion the person is going to commit a crime and that they are armed); Camara v. Mun. Court, 387 U.S. 523, 533 (1967) (discussing that when a court decides whether to create an exception to the warrant requirement, it balances the privacy interests of the public against the legitimate government interests in being unburdened by a warrant); Katz v. United States, 389 U.S. 347, 352–53 (1967) (holding that a search under the Fourth Amendment occurs when there is a subjective expectation of privacy and that expectation of privacy is reasonable).

152. 475 U.S. 335 (1986).

153. *Id.* at 338. Interestingly, the lower court did not hear the claim for qualified immunity until the close of the plaintiff's case at trial. *Id.* This

after they were filed, the men were arrested, but a grand jury did not indict them.[154] The officers argued that they were absolutely immune because the arrest had been permitted by a judge, and if they were not absolutely immune, "applying for a warrant is per se objectively reasonable, provided that the officer believes that the facts alleged in his affidavit are true."[155] The Court quickly disposed of the officers' first arguments, stating that it is possible for a situation to be so "obvious that no reasonably competent officer would have concluded that a warrant should issue."[156] The Court further laid out a framework for when an officer cannot be qualifiedly immune when sued for violating constitutional rights even with a warrant: "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable . . . will the shield of immunity be lost."[157] Applying for a warrant would not always be reasonable because a reasonable officer could know that a warrant application does not actually establish probable cause. Therefore, before applying for a warrant, officers must use "reasonable professional judgment."[158]

The next year, in *Anderson v. Creighton*,[159] the Court held that qualified immunity was available to officers sued for allegedly unreasonable warrantless searches.[160] According to the plaintiffs, they were spending a quiet evening at home when, suddenly, a spotlight, held by officers brandishing shotguns, flashed through their front door.[161] The officers believed that a man suspected of robbery might be in the house.[162] When Mr. Creighton led the officers to the garage to look at his car, one of the officers punched him in the face claiming that Mr. Creighton attempted to grab his gun, but Mr. Creighton said he was only attempting to open the garage door.[163] Mrs. Creighton then phoned her mother but was allegedly kicked by an officer who

seems, on the surface, to go against one of the purposes of qualified immunity: preventing needless trials.

154. *Id.*

155. *Id.* at 339, 345.

156. *Id.* at 341.

157. *Id.* at 344–45 (citation omitted).

158. *Id.* at 346.

159. 483 U.S. 635 (1987).

160. *Id.* at 641.

161. Creighton v. City of St. Paul, 766 F.2d 1269, 1270 (8th Cir. 1985).

162. *Anderson*, 483 U.S. at 637.

163. *Creighton*, 766 F.2d at 1270–71.

grabbed the phone and told her to hang up.[164] As the Creightons' children ran out of the house to safety, officers chased them and allegedly grabbed and shook the Creightons' 10-year-old daughter.[165] The officers did not find the robbery suspect or any evidence that the Creightons were involved in the crime, but they arrested Mr. Creighton for obstructing justice.[166] The Creightons argued that qualified immunity should not apply to alleged Fourth Amendment violations because the core of a Fourth Amendment allegation is unreasonable conduct, and one cannot reasonably behave unreasonably.[167]

The Court expressly rejected the Creightons' contention.[168] The Court principally relied on stare decisis, stating that the Creightons' argument was invalid because the Court has already applied qualified immunity to Fourth Amendment violations.[169] The Court further argued that the perceived problem rested on the terminology of the Fourth Amendment, as opposed to the substance.[170] If the Framers had used "undue" instead of "unreasonable," the Creightons would have no argument.[171] The Court went on to point out that the liberties guaranteed by the Fourth Amendment are an accommodation between the government and the individual; therefore, reasonableness applies.[172] The Court noted that officers deserve the same deference for objectively reasonable decisions regarding difficult questions as any other official.[173] The Court reasoned that qualified immunity applies even in situations of unlawful warrantless searches of innocent parties' homes.[174] Tailoring the analysis to the right creates undue complexity, in the Court's view.[175] Furthermore, qualified immunity is supposed to provide protection for officers making reasonable determinations, re-

164. *Id.* at 1271.

165. *Id.*

166. *Id.*

167. *Anderson*, 483 U.S. at 643.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 643–44.

173. *Id.* at 644.

174. *Id.*

175. *Id.* at 645.

gardless of the nature of the violation alleged.[176] On remand, the district court held that the officer was entitled to qualified immunity.[177]

The Court held this ground in *Saucier*.[178] In *Saucier*, the Court heard similar arguments to those made by the Creightons but regarding an excessive-force claim.[179] The Court previously held that excessive-force claims should be judged by the "objective reasonableness standard" of the Fourth Amendment, as opposed to a substantive due process standard.[180] The plaintiff in *Saucier* argued that the merits analysis in excessive-force cases mirrored the immunity analysis.[181] Therefore, officers already receive the protection desired in *Anderson* through the excessive-force standard.[182] Furthermore, the plaintiff argued that the standard works well, making the qualified-immunity standard "superfluous and inappropriate."[183] The Court disagreed. The Court held that the reasonableness in qualified-immunity and excessive-force claims were different.[184] The Court argued that qualified-immunity reasonableness was only about whether the officer made a "reasonable mistake[]" about the applicability of a rule.[185] "An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances;" they can make a reasonable mistake about the rule while violating the rule.[186] Qualified immunity, according to the Court, can still protect officers operating in the "hazy border between excessive and acceptable force."[187]

The same stacking of analyses present in the reasonableness standard is also present in the method for interpreting facts in qualified immunity under the Fourth Amendment. In a typical motion for summary judgment or motion to dismiss, the facts are interpreted in

176. *Id.* at 646.

177. Creighton v. Anderson, 724 F. Supp. 654, 661 (D. Minn. 1989).

178. Saucier v. Katz, 533 U.S. 194, 204 (2001).

179. *Id.* at 203–04.

180. Graham v. Connor, 490 U.S. 386, 388 (1989).

181. *Saucier*, 533 U.S. at 204.

182. Brief for Respondents at 7, Saucier v. Katz, 533 U.S. 194 (2001) (No. 99-1977), 2001 WL 173527, at *5.

183. *Id.*; *Saucier*, 533 U.S. at 204.

184. *Saucier*, 533 U.S. at 204–05.

185. *Id.* at 205.

186. *Id.*

187. *Id.* at 206 (citing Priester v. Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000)).

the light most favorable to the non-moving party.[188] However, this standard does not fully apply to the qualified-immunity defense. When qualified immunity is asserted, the Court should "consider[] only the facts that were knowable to the defendant officers."[189] Therefore, only the facts knowable to the officers may be considered, but they must be construed in a light most favorable to the plaintiff.[190] This idea stems directly from how courts determine objective reasonableness for Fourth Amendment violations. In *White v. Pauly*,[191] the Court cited a non-qualified-immunity excessive-force decision for this standard.[192] The cited case stated that objective reasonableness must be determined "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight."[193] Therefore, the method of interpreting facts for a qualified-immunity claim under the Fourth Amendment is the exact same method as how facts must be interpreted when deciding the merits of an alleged Fourth Amendment violation.

The Court has not wavered from the holdings of *Anderson* and *Saucier*, and has freely scrutinized facts to determine whether officers acted unreasonably.[194]

188. United States v. Diebold, 369 U.S. 654, 655 (1962).

189. White v. Pauly, 137 S. Ct. 548, 550 (2017) (citing Kingsley v. Hendrickson, 135 S. Ct. 2466, 2474 (2015)).

190. *Id.*

191. 137 S. Ct. 548 (2017).

192. *Id.* at 550.

193. *Kingsley*, 135 S. Ct. 2466, 2473 (2015).

194. In 2012, the Court held that it was reasonable for an officer to search for multiple firearms even though the warrant limited the search to one firearm, and that the officer was not "entirely unreasonable" in searching for gang paraphernalia when the officer believed they had probable cause pursuant to a warrant. Messerschmidt v. Millender, 132 S. Ct. 1235, 1246–47 (2012). The Court noted that it was not necessary to decide whether probable cause existed, but only whether the officers were "plainly incompetent." *Id.* at 1249. In 2013, the Court found that it was not clearly established that a police officer's warrantless entry into someone's backyard while in hot pursuit of a suspect violated the plaintiff's Fourth Amendment rights because no case law clearly established this right. Stanton v. Sims, 134 S. Ct. 3, 7 (2013). The Court did not state whether or not the police officer violated the Fourth Amendment; it stated only that the officer was not "plainly incompetent." *Id.* In 2014, the Court held that officers were entitled to qualified immunity because they acted reasonably in using deadly force, by firing fifteen shots, to terminate a high-speed car chase. Plumhoff v. Rickard, 134 S. Ct. 2012, 2021–22 (2014). Therefore, there was no Fourth Amendment violation. *Id.* at 2024. In 2015, the Court held there was no Fourth Amendment violation when officers used potentially deadly force on a mentally ill patient wielding a knife who would not stop

One of the more recent Fourth Amendment qualified-immunity cases deserves lengthier attention: *Mullenix v. Luna*.[195] On March 23, 2010, in Tulia, Texas, Israel Leija, Jr., led the police on an 18-minute car chase on I-27 at speeds between 85–110 miles per hour. He called the police dispatcher twice saying he had a gun and would shoot the police if they did not stop the chase. The dispatcher informed pursuing officers of these threats and that Leija may be intoxicated. Officers—who had received training on how to set up spike strips and take defensive positions while waiting for the suspect—set up tire spikes at three locations. One officer arrived after the spike strips were set and took a position on an overpass above them. He took this position to explore another tactic: shooting Leija's car to disable it. He had never attempted this tactic before and had no training in it. He told the dispatcher to ask his supervisor whether he should proceed with this tactic, but he took a shooting position before receiving a response. It was alleged, however, that the officer could hear the supervisor's response of "see if the spike strips work first" from his position. Once Leija's car came into sight, the officer fired six shots at the vehicle. The vehicle kept moving, hit the spike strips, hit the median, and came to a stop. Leija was killed by the officer's shots, four of which hit Leija and none of which hit the car.[196] When the officer encountered his supervising officer later, he said, "How's that for proactive?"[197]

The Supreme Court reversed the United States Court of Appeals for the Fifth Circuit's denial of qualified immunity.[198] It chastised the lower court for defining the right at too high a level of specificity.[199] The Fifth Circuit defined the right as "it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."[200] Instead, the Supreme Court held the Fifth Circuit should have examined whether

approaching the officers, and the officers' entry was not unreasonable just because it caused a violent reaction. City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1775–77 (2015). Despite this holding, the Court noted that it "need not decide whether the Constitution was violated" because the officers' conduct did not violate clearly established precedent. *Id.* at 1778.

195. 136 S. Ct. 305 (2015).

196. *Id.* at 306–07.

197. *Id.* at 316 (Sotomayor, J., dissenting).

198. *Id.* at 312 (majority opinion).

199. *Id.* at 308–09.

200. Luna v. Mullenix, 773 F.3d 712, 725 (5th Cir. 2014).

the officer acted unreasonably "beyond debate."[201] The Court held that none of its precedents involving car chases "squarely governs" this case given the light traffic on I-27 at the time and the threats Leija made against officers.[202] Against this backdrop, the Court could not conclude that the officer's actions were "plainly incompetent."[203] While ignoring the constitutional question, the Court did note the importance of specificity of the Fourth Amendment right because "it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts."[204]

In *Mullenix*, the Court exhibited several of the trends that have come up in the development of qualified immunity: (1) it reiterated the importance of applying qualified immunity to officers;[205] (2) it applied qualified immunity to a reasonableness standard;[206] (3) it reiterated the importance of appropriately defining the right;[207] (4) it ignored rules and policies—here being the supervisor's order—and instead focused on judicial precedent;[208] and (5) it failed to state whether or not there was a constitutional violation.

II. Critiques of Qualified Immunity

A. Qualified Immunity Generally—Weighing Heavily for the Government

1. Inappropriately Defining Clearly Established Law

Many commentators have criticized the Court's definition of clearly established law.[209] Though the Court has frequently stated that prior cases which are factually identical are not required,[210] the Court inevitably searches for factually similar cases.[211] Courts, therefore,

201. *Mullenix*, 136 S. Ct. at 309.

202. *Id.* at 310.

203. *Id.*

204. *Id.* at 308.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 310.

209. *See infra* notes 225–229, 231, 236, 238–240 and accompanying text.

210. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

211. Karen Blum et al., *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 Touro L. Rev. 633, 656 (2013); Cover, *supra* note 113, at 1792; Jeffries, *supra* note 78, at 257.

compare the facts of the case before it to these similar precedents. This "extends qualified immunity beyond any defensible rationale."[212]

Making judges search for factually similar cases creates a cover for judges to overlook liability in cases that may merit liability.[213] There can be conduct that is both unconstitutional and unreasonable, yet escapes liability because no case is exactly on point.[214] The Court seemed to recognize this concern in *Hope* when it did not limit its search for clearly established law to precedent.[215] However, in *Brosseau v. Haugen*,[216] the Court "veered back toward requiring precedential specificity."[217]

Brosseau also represents the paradigm of this issue in determining clearly established law. In *Brosseau*, officers responded to a call that men were fighting in a yard.[218] When the officers arrived, Haugen—one of the fighting men—disappeared. The officers searched for 30 to 45 minutes. When the officers heard a report that Haugen was down the street, an officer ran to pursue. When she arrived, Haugen appeared and jumped into a jeep. The officer arrived at the jeep, drew her gun, and told Haugen to get out of the vehicle. Haugen ignored the commands and looked for the keys. The officer struck Haugen in the head with her gun, but Haugen still found the keys and started the car. Once Haugen began to drive, the officer shot him because she thought other officers in the area or citizens would be in danger with him driving. Haugen suffered a collapsed lung but survived.[219] The Court examined three cases and held: "These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case."[220] Therefore, no case clearly established a violation of the Fourth Amendment.[221] Although it may seem that the use of deadly force was unreasonable because there was no evidence Haugen had a weapon or intended to do anyone

212. Jeffries, *supra* note 78, at 256.

213. *Id.*

214. *Id.*

215. *Id.*; *see also supra* notes 102–112 and accompanying text (describing cases where the Court defined "clearly established law" broadly, beyond just Supreme Court precedent).

216. 543 U.S. 194 (2004).

217. Jeffries, *supra* note 78, at 257.

218. *Brosseau*, 543 U.S. at 195.

219. *Id.* at 195–97.

220. *Id.* at 201.

221. *Id.*

harm, the Court could not answer that question because no case was on point.

Furthermore, requiring plaintiffs to find precedent with this level of specificity creates a heightened standard that is difficult to overcome.[222] The ambiguity in the definition of the right[223] means that clearly established law has to be at "a very specific level of generality."[224] The narrower the right, the more difficult it is to find factually similar precedent.[225] This makes any claim that a right was clearly established likely to fail and converts qualified immunity to near absolute immunity.[226]

2. Inappropriate Fact-Finding

Some commentators believe that the legal analysis in qualified immunity is actually a factual analysis best reserved for the jury.[227] The Supreme Court proclaims that qualified immunity is supposed to be a legal question decided by a court.[228] In reality, asking courts to decide whether the right was clearly established is a mixed question of law and fact.[229] This creates several issues. First, asking a court to decide what a reasonable official would think was legal asks judges to put themselves in the defendant's shoes.[230] They must look at the facts and decide how a reasonable officer would perceive them in light of the law.[231] Construing facts is necessarily the job of the fact-finder at trial, not a judge before trial.[232] Second, many potential qualified-immunity cases involve competing narratives with disputed facts,

222. Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 Mo. L. Rev. 123, 151 (1999).

223. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) (discussing how the lower court incorrectly found clearly established law).

224. Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. Pitt. L. Rev. 935, 988 (1989).

225. Jeffries, *supra* note 63, at 859.

226. *Id.*

227. *See, e.g.*, Jeffries, *supra* note 78, at 252.

228. Hunter v. Bryant, 502 U.S. 224, 228 (1991).

229. Jeffries, *supra* note 78, at 252; Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 Am. U. L. Rev. 1, 7 (1997); Sheldon Nahmod, *The Restructuring of Narrative and Empathy in Section 1983 Cases*, 72 Chi.-Kent L. Rev. 819, 827 (1997).

230. Nahmod, *supra* note 229, at 828–29.

231. *Id.* at 828.

232. Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 Wm. & Mary Bill Rts. J. 913, 940 (2015).

making it inappropriate for a court to resolve these factual disputes in deciding whether a right was clearly established.[233] Third, because qualified immunity is typically raised early in the proceedings, the court denies plaintiffs the opportunity to appropriately develop their narrative and facts.[234] Plaintiffs are denied an opportunity for discovery and therefore must present a "barebones" version of their story.[235] Fourth, the effects of the factual analysis are in tension with the Federal Rules of Civil Procedure.[236] The *Harlow* standard asks judges to be more proactive in resolving cases than contemplated by Rules 12 and 56 of the Federal Rules of Civil Procedure; the standards laid out by those rules are in tension with how judges view facts in qualified immunity.[237]

This problem is evident in *Mullenix*. Justice Sotomayor's lone dissent framed her approach as the appropriate way to evaluate the facts.[238] She claimed that the majority ignored the officer asking for permission to shoot from his supervisor and spent minutes in shooting position before Leija arrived.[239] Instead, "[t]he majority recharacterizes [the officer]'s decision to shoot at Leija's engine block as a split-second, heat-of-the-moment choice, made when the suspect was 'moments away.'"[240] Instead of construing the facts in favor of the plaintiff, the majority reframed the facts in a manner advantageous to the officer.

3. Lack of Constitutional Development

The discretion granted by the Court in *Pearson* comes at the price of constitutional development. Courts have significant incentives to avoid analyzing the merits of the case and skip straight to the clearly established prong.[241] One of the main critiques of *Saucier* is

233. Nahmod, *supra* note 229, at 831–32.

234. *Id.*

235. *Id.*

236. Jeffries, *supra* note 78, at 251.

237. *Id.* at 251–52.

238. *See* Mullenix v. Luna, 136 S. Ct. 305, 313, 316 (2015) (Sotomayor, J., dissenting) ("Resolving all factual disputes in favor of plaintiffs, as the Court must on a motion for summary judgment," and "[a]n appropriate reading of the record on summary judgment would thus render Mullenix's choice even more unreasonable.").

239. *Id.* at 316.

240. *Id.*

241. Cover, *supra* note 113, at 1789–90; John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 Sup. Ct. Rev. 115, 131 (2009).

that it expended unnecessary judicial resources.[242] Now, free from *Saucier*, overworked judges may want to take the "short route" instead of dealing with the merits of a case.[243] This creates future costs.[244] Judges constantly taking the easy way out in one area of the law creates a situation where "civil rights questions go repeatedly unanswered."[245] This becomes a cycle where a constitutional violation need not be answered "because the law is unclear and the law is unclear because the violation continues to go unaddressed."[246]

White provides a telling example. In this case, police responded to a road rage incident where a man had a nonviolent confrontation with two women on the highway. After the confrontation, the man went home, where he lived with his brother. Two officers arrived at the house and "approached it in a covert manner to maintain officer safety."[247] When the officers spotted two men in the house, they called Officer White for backup. When the brothers realized there was someone outside their home, they shouted, wanting to know who was outside. The two officers laughed and informed the brothers they were surrounded and needed to come out. At some point one of the officers identified themselves as state police, but the brothers did not hear the announcement. They informed the officers that they had guns. Officer White arrived in time to hear the brothers shout they had guns and immediately drew his gun. The man then stepped out of the house and fired two shots, and his brother stepped out of the house and pointed his gun towards Officer White. Officer White shot and killed the brother.[248] The brother's estate sued all three officers for violating his Fourth Amendment rights. The District Court for the District of New Mexico denied the officers' motions for qualified immunity, and the Court of Appeals for the Tenth Circuit affirmed. The lower courts analyzed the qualified-immunity claim of Officer White separately from the other officers since he arrived at the scene later.[249] The Tenth Circuit determined that it was clearly established that "a reasonable officer in White's position would believe that a warning [of the use of force] was required despite the threat of serious harm."[250]

242. Jeffries, *supra* note 241, at 126–27.

243. *Id.* at 131.

244. *Id.*

245. Cover, *supra* note 113, at 1790.

246. *Id.*

247. White v. Pauly, 137 S. Ct. 548, 549 (2017).

248. *Id.* at 549–50.

249. *Id.* at 550.

250. *Id.* at 551.

The Tenth Circuit also held that a jury could reasonably conclude that White used excessive force.[251]

The Supreme Court vacated the denial of White's qualified-immunity claim and remanded.[252] It did not address whether Officer White violated the Fourth Amendment. Instead, it held that no clearly established rights were violated.[253] It was reasonable for White to assume proper procedure had been followed prior to his arrival.[254] It further recognized that because of White's delayed arrival, this case was unique factually.[255] Because of that uniqueness, "[n]o settled Fourth Amendment principle requires that officer[s] . . . second-guess the earlier steps already taken by [their] fellow officers in instances like the one White confronted here."[256] Now, there most likely never will be. The Court recognized that this is a unique situation, in terms of finding similar precedent,[257] yet it refused to take this opportunity to clearly establish whether or not this is a violation. Though the situation may be unique in terms of Supreme Court precedent, it is not a stretch to assume that officers arriving at scenes late is not unique. But because the Court had not ruled on this specific fact pattern before, it could not rule on it here. This case furthers a situation where a constitutional violation need not be answered "because the law is unclear, and the law is unclear because the violation continues to go unaddressed."[258]

4. Lack of Subjectivity

Eliminating subjectivity from the *Harlow* standard leaves the gap mentioned in *Scheuer*.[259] Objective intent now trumps intentional wrongdoing.[260] Justice Stevens stated that the lack of subjectivity in the immunity analysis causes problems in two kinds of cases: (1) cases where the court awards damages only if a culpable state of mind is established; and (2) if the official's conduct is regulated by "an ex-

251. *Id.* at 550–51.

252. *Id.* at 553.

253. *Id.* at 552.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. Cover, *supra* note 113, at 1790.

259. *See supra* Part I.C., D.

260. Cover, *supra* note 113, at 1790.

tremely general and deeply entrenched norm, such as the command of due process or probable cause."[261]

The second problem is present in many qualified-immunity cases—especially Fourth Amendment cases. The Fourth Amendment standards are "extremely general and deeply entrenched."[262] This exact problem is evident in *Mullenix*, where, after the officer disobeyed a supervisor and fired six shots at a speeding car, he said "How's that for proactive?"[263] This comment, however, has no impact on the immunity analysis because the analysis only focuses on objective reasonableness. If subjective intent had been a factor, the officer's comment and refusal to follow orders could have shifted the case towards a denial of immunity.

B. Qualified Immunity and the Fourth Amendment

1. Double Reasonableness Protection

The arguments offered by the plaintiffs in *Anderson* and *Saucier* decrying the double reasonableness of Fourth Amendment qualified immunity—double reasonableness being the stacking of one reasonableness analysis on top of another—have been supported by both Justices and commentators.[264] Justice Stevens critiqued double reasonableness in his dissent in *Anderson*. He described probable cause as a form of immunity in and of itself.[265] Thus, by applying qualified immunity in *Anderson*, the Court created a double layer of insulation for law enforcement officers.[266] He claimed that there was no reason to create this double layer of immunity when "the probable-cause standard itself recognizes the fair leeway that law enforcement officers must have in carrying out their dangerous work."[267] The *Harlow* standard in this context does no more to encourage action when officers are uncertain of the law than the existing Fourth Amendment standard.[268]

261. Anderson v. Creighton, 483 U.S. 635, 656 n.12 (1987) (Stevens, J., dissenting).

262. *Id.*

263. Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).

264. *See infra* notes 265–295 and accompanying text; *but see, e.g.*, Wesby v. District of Columbia, 765 F.3d 13, 26 (D.C. Cir. 2014) ("This inquiry into the 'objective legal reasonableness' of the officers' actions parallels but does not duplicate the reasonableness aspect of the Fourth Amendment probable cause analysis."), *cert. granted* 137 S. Ct. 826 (2017).

265. *Anderson*, 483 U.S. at 660 (Stevens, J., dissenting).

266. *Id.* at 659.

267. *Id.* at 661.

268. *Id.* at 664, 664 n. 20.

Therefore, while the Court's aims were noble, Justice Stevens felt that the Court's holding double counted the officer's interest, while an individual's interest gets counted only once.[269] Justice Ginsburg renewed this criticism in her concurrence in *Saucier*. She stated that the Court's excessive-force standard is "sufficient to resolve cases."[270] Justice Ginsburg emphasized that the Court's double reasonableness will lead to confusion for lower courts.[271] This confusion arises because the constitutional inquiry and immunity inquiry ask the same question: "Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer, identically situated, have believed the force employed was lawful?"[272] This confusion places added difficulty on courts in Fourth Amendment qualified-immunity cases.[273] Courts must attempt to distinguish the two reasonableness analyses, even though they seem indistinguishable.[274]

Even if the double reasonableness could easily be distinguished, the confusion and discomfort with a double-reasonableness analysis can be shown by the following example: A jury could find that it is objectively unreasonable to tase a handcuffed suspect, but a judge may find that no case law made the officer's actions unreasonable.[275] Further,

> if the jury believes the plaintiff, the use of force is going to be objectively unreasonable and there is not going to be qualified immunity. But you are going to have the rare case where you could have both unreasonable force and qualified immunity due to the lack of clarity in the law.[276]

Therefore, the Court has created a standard where an officer can reasonably act unreasonably. This creates even more deference for the officer than originally envisioned in *Harlow*.[277]

This double reasonableness also creates practical issues. The confusion and deference created has led lower courts to find immunity

269. *Id.* at 664.

270. Saucier v. Katz, 533 U.S. 194, 210 (2001) (Ginsburg, J., concurring).

271. *Id.*

272. *Id.*

273. Hassel, *supra* note 222, at 144.

274. *Id.*

275. Erwin Chemerinsky & Karen M. Blum, *Fourth Amendment Stops, Arrests and Searches in the Context of Qualified Immunity*, 25 Touro L. Rev. 781, 786–87 (2009).

276. *Id.* at 787.

277. *Id.* at 786.

in situations when "liability seems fully justified."[278] Furthermore, double reasonableness creates more avenues for inappropriate fact-finding by the judge.[279] Justice Stevens' dissent in *Brosseau* supports this view, stating that the appropriate question in *Brosseau* was "how a reasonable officer making the split-second decision to use deadly force would have assessed the foreseeability of a serious accident."[280] Justice Stevens argued that no matter how strong the interest in resolving these cases at early stages, there was no justification in taking away this fact question from the jury.[281] Therefore, the general problem of courts answering fact questions as legal questions is even greater in the Fourth Amendment context.

2. Difficulty in Enforcing the Fourth Amendment

The Supreme Court's emphasis on appropriately defining the right has come at the cost of making it difficult to enforce the Fourth Amendment. In *Mullenix*, the Court reversed the denial of qualified immunity because the right was defined too broadly.[282] Justice Sotomayor's dissent chastises the Court for creating a culture of "shoot first, think later."[283] Justice Sotomayor notes that this culture makes "the protections of the Fourth Amendment hollow."[284] While the approach Justice Sotomayor discusses also involves inappropriately scrutinizing facts,[285] the approach relies heavily on the level of specificity of the right. By repeatedly emphasizing the need to specifically define the right, the Court renders the Fourth Amendment "hollow"[286] because no clearly established law can unambiguously define such a specific right. The Fourth Amendment is uniquely difficult because it involves officers applying broad standards to specific situations.[287] When the right is defined too specifically, no Fourth

278. Jeffries, *supra* note 78, at 267–68. *See id.* at 268–69 (providing an example where the district court found two officers' use of deadly force to be objectively unreasonable but the Eleventh Circuit Court of Appeals still reversed, finding the officers to be qualifiedly immune due to lack of clarity).

279. Cover, *supra* note 113, at 1802.

280. Brosseau v. Haugen, 543 U.S. 194, 206 (2004) (Stevens, J., dissenting).

281. *Id.*

282. Mullenix v. Luna, 136 S. Ct. 305, 308 (2015).

283. *Id.* at 316 (Sotomayor, J., dissenting).

284. *Id.*

285. *See supra* Part II.A.

286. *Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting).

287. *Id.* at 308 (majority opinion).

Amendment violation can be clearly established; this causes the Fourth Amendment to lose its teeth, leaving it difficult to enforce.[288]

3. Clearly Established Law Defined by Case Law Is Inappropriate

Using case law to define reasonableness overestimates a typical officer's knowledge of case law. The ability to parse complex rules from a body of case law is a skill people attend law school for three years to acquire.[289] It therefore seems preposterous to create a standard that expects officers to be familiar with complex, ever-changing case law when they are better versed in local policies.[290] This overly technical idea of notice should be inapplicable when there is, instead, a "common social duty" not to do something one should know is wrong.[291] Similarly, police officers should feel a "common social duty" not to use excessive force absent precedent putting them on notice in a factually similar situation.[292]

4. The Lens for Interpreting Facts Is the Same Lens as the Fourth Amendment

Just as the qualified-immunity reasonableness analysis is the same as that for Fourth Amendment reasonableness, facts are interpreted similarly in qualified-immunity and in Fourth Amendment cases. Qualified immunity takes the facts that were knowable to the officer at the time, which is the same method used to interpret facts in Fourth Amendment cases.[293] Though admittedly not as troublesome as double reasonableness, this stacking of similar analyses distances the analysis from the actual case and facts in a manner that is unnecessary and confusing.

5. Financial Costs and Deterrence Claims Are Unfounded

Though one of the main motivations for the *Harlow* standard is the prevention of personal-liability costs and over-deterrence, these

288. The Fourth Amendment can still be enforced in the criminal context, but even then, the Fourth Amendment's enforcement is limited by the exclusionary rule. *See* Davis v. United States, 564 U.S. 229, 241 (2011) (holding that evidence cannot be excluded even when obtaining the evidence violated the Fourth Amendment as long as the officer reasonably relied on binding court decisions).

289. Jeffries, *supra* note 63, at 865.

290. *See* Cover, *supra* note 113, at 1814 (advocating for the incorporation of use-of-force policies into clearly established law).

291. Nash v. United States, 229 U.S. 373, 377 (1913) (citation omitted); Jeffries, *supra* note 63, at 865.

292. Jeffries, *supra* note 63, at 865.

293. *See supra* notes 189–204 and accompanying text.

fears do not seem founded on reality.[294] Joanna Schwartz's study shows that police officers rarely contribute financially to the settlement or judgment of a civil-rights case.[295] She also stated that other studies indicate that officers' conduct is not substantially influenced by potential liability in civil-rights suits.[296] Consequently, she concluded that, to the extent qualified immunity aims at protecting officers from the financial burdens of suit and preventing overdeterrence, qualified immunity's stringent standards have no justification.[297]

III. A New Balance to Qualified Immunity in the Fourth Amendment

This Section lays out the argument for a new qualified-immunity standard in the context of the Fourth Amendment. First, it discusses why the Fourth Amendment should have its own qualified-immunity standard. Then, it presents the new standard.

A. Why the Fourth Amendment Deserves Its Own Qualified-Immunity Standard

Fourth Amendment qualified immunity materially differs from qualified immunity in other contexts. This is largely due to the double-reasonableness problem.[298] Qualified immunity works best with definite rules and doctrines that create a stable body of law that can easily be clearly established.[299] Qualified immunity "works least well when constitutional doctrine is stated at a very high level of generality unaccompanied by particularizing doctrine."[300] The doctrines developed from the Fourth Amendment are such standards.[301] They are defined at a high level of generality.[302] The standards are all based on reasonableness—a far cry from a stable rule because reasonableness

294. Cover, *supra* note 113, at 1786.

295. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 914, 939 (2014).

296. *Id.* at 943.

297. *Id.*

298. *See supra* Part II.B.1.

299. Jeffries, *supra* note 63, at 859.

300. *Id.* at 859–60.

301. *See supra* Part I.E.

302. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) (using the Fourth Amendment as an example of defining a right at too high a level of generality).

varies from situation to situation. Therefore, due to the high generality, vague standards, and specialized problems discussed above,[303] the *Harlow* standard does not work well with the Fourth Amendment. Furthermore, double reasonableness makes it more difficult for courts to avoid engaging in fact-finding on a supposedly purely legal question.[304] Also, the Fourth Amendment standards mimic the qualified-immunity analysis.[305] They permit reasonable error, which is part of qualified-immunity's aim,[306] and they interpret facts the same way.[307] Therefore, courts essentially perform the same analysis twice.

These arguments would lay a convincing foundation for abolishing qualified immunity in Fourth Amendment settings. If the Fourth Amendment allows for reasonable mistakes and interprets facts the same way as qualified immunity, then the easiest solution would be to eliminate qualified immunity in this context.[308]

However appealing this argument may be, it is impractical. The Supreme Court decided that alleged Fourth Amendment violations deserve potential qualified-immunity protection long ago, and it refuses to waver.[309] The Supreme Court wants to afford officers some kind of extra protection in these situations beyond Fourth Amendment standards. Thus, the best solution would be to recognize that the Fourth Amendment creates special problems for qualified immunity, and fixing those problems requires a specialized solution.[310]

303. *See supra* Part II.B.

304. *See supra* Part II.B.1.

305. *Id.*

306. Jeffries, *supra* note 63, at 860–61.

307. *See supra* Part II.B.4.

308. *See* Jeffries, *supra* note 63, at 861 ("One might have thought that qualified immunity would simply merge into the merits.").

309. *See supra* Part I.E.; Anderson v. Creighton, 483 U.S. 635, 646 (1987) ("The general rule of qualified immunity is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.' . . . Where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law." (internal citation omitted)).

310. This is not to say that other Amendments do not deserve their own standard as well, or that the new standard that will be argued below could not be applicable to qualified immunity generally. Such an argument is outside the scope of this Note. The standard outlined below was created with the issues of qualified immunity generally and in the context of the Fourth Amendment in mind.

B. The New Balance

To address the problems with qualified immunity in the Fourth Amendment context, this Note proposes two major alterations to the analysis: (1) the constitutional question should be eliminated from the analysis, and (2) courts should balance three factors to decide whether a case should proceed to trial. The three factors should be the subjective prong of *Scheuer*,[311] a reasonableness test based on what a reasonable officer would have done, and a question asking whether allowing the case to proceed to trial and thus get a decision on the merits "will be 'beneficial' in 'develop[ing] constitutional precedent.'"[312]

1. Removing the Constitutional Question

Removing the question of whether there was a constitutional violation from the qualified-immunity analysis clarifies that the qualified-immunity question is separate from the constitutional question. Qualified immunity is not about whether there was a violation; it is about protecting officials reasonably exercising their discretion.[313] Entertaining the idea of whether there was a constitutional violation as a basis for immunity is a recipe for the creation of bad law.[314] Neither the judge nor the defendant has an incentive to address the question adequately because immunity necessarily hinges on the reasonableness of the officer's conduct.[315] Furthermore, the immunity question and the constitutional question in the Fourth Amendment context are essentially the same question, and they are analyzed in the same way.[316] Eliminating the constitutional question will help distinguish the two analyses and brings qualified immunity closer to eliminating the double-reasonableness problem. Finally, due to the complexity and fact-laden analysis of Fourth Amendment violations, courts are not in a good position to decide these questions definitively.[317] Qualified immunity is difficult enough to navigate as it is, so shifting the focus will allow for a more cohesive analysis.

This would not preclude the courts from answering the constitutional question before trial. Defendants still could attempt to

311. *See supra* Part I.B.

312. Plumhoff v. Rickard, 134 S. Ct. 2012, 2020 (2014) (quoting Pearson v. Callahan, 555 U.S. 223, 236 (2009)).

313. *See supra* notes 79–83 and accompanying text.

314. Leval, *supra* note 125, at 1277.

315. *Id.* at 1278.

316. *See supra* Part II.B.1. (discussing double reasonableness).

317. *See supra* note 130 and accompanying text.

dispose of a case before trial through a motion to dismiss or a motion for summary judgment based on the constitutionality of the defendants' actions.[318] In fact, this is a more appropriate place for adjudicating whether or not there was a constitutional violation before trial. Qualified immunity currently confuses the rules of civil procedure.[319] A case should be dismissed before trial on a constitutional question only if a reasonable jury could not find for the plaintiff.[320] Removing the constitutional question will allow courts to adjudicate the constitutional question appropriately by forcing defendants to use the proper channels of civil procedure.

2. The Three-Pronged Balancing Test

The three-pronged balancing test would ask three questions that would be balanced to decide whether an officer is immune: (1) whether the plaintiff has pled enough facts to prove malice, (2) whether a reasonable officer would engage in the same conduct, and (3) whether allowing the case to proceed to trial "will be 'beneficial' in 'develop[ing] constitutional precedent.'"[321] Each question will be explained in the following sections.

a. Reincorporating Pre-Harlow Subjectivity

The first factor will ask the court to examine whether the plaintiff pled enough facts to prove malice. The lack of subjectivity in *Harlow* creates situations where an officer can have apparent or obvious bad intent but still escape liability because the law is unclear. Qualified immunity is not intended to protect these officers; it is supposed to protect officers using appropriate discretion. Bad intent is inherently not an appropriate use of discretion. Therefore, the pre-*Harlow* test correctly emphasized the importance of an intertwined subjective and objective narrative.[322]

This prong is necessary in the context of Fourth Amendment qualified immunity for two reasons. First, officers perform a fast-paced, dangerous job where they need to make decisions in a split second. Because of how quickly they need to make decisions, it might be easier for emotions to get the best of proper judgment in particularly intense situations. Therefore, situations where this has occurred should not go overlooked, so that it may set a precedent and en-

318. Fed. R. Civ. P. 12(b)(6), 56.

319. Jeffries, *supra* note 78, at 251. *See also supra* Part II.A.2.

320. Fed. R. Civ. P. 12(b)(6), 56.

321. Plumhoff v. Rickard, 134 S. Ct. 2012, 2020 (2014) (quoting Pearson v. Callahan, 555 U.S. 223, 236 (2009)).

322. *See supra* Parts I.B., II.A.4.

courage officers and police departments to ensure that their training minimizes this danger. Second, subjectivity is most needed in situations where the discretionary standard is broad and difficult to define.[323] The Fourth Amendment standards are both: they rely on an officer's reasonableness, and they are definable only in relation to facts. Abuse of that discretion is more likely and more dangerous in this standard because the abuse is easier to hide.

b. Would a Reasonable Officer Engage in the Same Conduct?

This prong asks the court to examine the reasonableness of the officer's actions. It makes two significant changes: (1) it removes constitutionality from the reasonableness inquiry, and (2) it focuses on the officer's actions as opposed to clearly established law.

Removing constitutionality from the reasonableness inquiry is a necessary step for two reasons. First, removing the constitutional question requires shifting the whole analysis away from deciding the constitutionality of the officer's actions in any way. Second, in order to eliminate double reasonableness, the objective standard needs to shift away from constitutionality entirely.

Focusing on the officer's conduct shifts the analysis away from clearly established law and the problems that come with it. The analysis is focused on what an officer did as opposed to comparing what the officer did to judicial precedent. This removes the problems inherent in searching for clearly established law.[324]

This prong also creates a more realistic reasonableness standard than clearly established law. It will allow courts to look beyond case precedent in deciding the reasonableness of an officer's actions. Courts would be able to look at factors that are more relevant in informing an officer's actions, such as department policies. Using department policies grounds the reasonableness analysis in the reality of an officer's job because they actually use these policies. This shift also better captures the goals of qualified immunity. Since qualified immunity aims to protect officials using reasonable discretion, it is best to judge that discretion by the policies actually informing it. Case law in the murky waters of the Fourth Amendment most likely do not inform most officer's actions from day to day. It is complicated and not easy to apply to a fact pattern,[325] especially in the split second given to an officer to make a life or death decision. Police-department policies, however, are made for officers to inform them on how to act in

323. *See* Anderson v. Creighton, 483 U.S. 635, 656 n.12 (1987) (Stevens, J., dissenting) (explaining the problems associated with the purely objective standard set out in *Harlow*).

324. *See supra* Parts II.A.1., II.B.3.

325. Mullenix v. Luna, 136 S. Ct. 305, 308 (2015).

any situation. Removing the standard from clearly established law and constitutionality allows the courts to refocus the analysis on factors that more directly inform officers' actions.

c. Whether Allowing the Case to Proceed to Trial "will be 'beneficial' in 'develop[ing] constitutional precedent'"[326]

This standard asks courts to determine whether there is a need for constitutional development given the facts of the case. Though this interest was not present in *Harlow*, the Court emphasized it in *Saucier*, and it did not go away. *Pearson* gives courts leeway to structure the analysis in a way to develop constitutional law. They structure this approach by deciding whether it "will be 'beneficial' in 'develop[ing] constitutional precedent.'"[327]

This standard also preserves the Supreme Court's encouragement to explore the clarity of precedent. Case law could still be examined under the objective prong, but not with the same thoroughness as the clearly established law standard. Under this proposal, instead of asking whether the law is clearly established, courts would have to examine how clearly established the law is. The less clear the law is, the more beneficial it might be to allow the case to proceed to trial and resolve the case on the merits. The clearer the law is, the less the court should care about constitutional development in deciding whether to allow the case to proceed to the merits.

This standard does not give courts inappropriate discretion. Judges would examine this question in the same fashion they examine whether a right is clearly established: look at precedent and decipher whether there are clear rules. This factor only reframes the analysis so that instead of deciding whether something is clearly established, courts would look at how clearly established the law is.

Furthermore, asking judges to examine the need for constitutional development balances the concerns of the *Saucier* framework and the shortcomings of the current regime. The main critique of *Saucier* was that it ignored the doctrine of constitutional avoidance by deciding constitutional questions as dictum, leading to bad constitutional rulings.[328] But the current regime creates a cycle where constitutional violations go unaddressed.[329] Asking courts to consider the clarity of constitutional law avoids the critiques of *Saucier* because the judge would no longer have to decide any constitutional question. It also addresses the problems of the current regime by asking judges to di-

326. *Plumhoff*, 134 S. Ct. at 2020 (quoting *Pearson*, 555 U.S. at 236).

327. *Id.*

328. *See supra* Part I.D.

329. *See supra* Part II.A.3.

rectly examine how constitutional violations may or may not go unaddressed in similar situations.

This prong is important for the Fourth Amendment. Fourth Amendment standards are vague, broad, and largely fact dependent. Because of this, under the current qualified-immunity standard, it is incredibly difficult to find clearly established law. There can be many unique fact patterns, making it difficult to find exactly matching precedent.[330] This creates a situation where a right can never become clearly established because it was not clearly established in the first place.[331] Encouraging judges to critically examine the landscape of Fourth Amendment jurisprudence in relation to the current fact pattern gives judges discretion to clearly establish the Fourth Amendment, which hopefully will lead to fewer Fourth Amendment violations.

3. Balancing the Factors

After examining the three factors, courts would then balance them and decide whether the scales tip in favor of the government and a finding of immunity, or the plaintiff and proceeding to trial. It would be in the court's discretion to determine how to weigh the factors, but the following situations illustrate how it could work. In situations where there is substantial evidence of malice, the first prong would weigh heavily in favor of proceeding to trial, and perhaps could even be dispositive on the immunity issue. When an officer's conduct is obviously reasonable given departmental policies, no matter how underdeveloped the law is, the court should hold the officer immune. The final prong should never be dispositive, but it will be informative in situations between the extremes of subjectivity and objectivity. In fact, the gray area between the extremes is the exact reason why the final prong is important: it encourages courts to decide whether the gray area needs to be clarified.

The case-by-case nature of this balancing is not in tension with *Harlow*'s emphasis on preventing over-deterrence.[332] As discussed above, officers are not deterred by the threat of liability.[333] Therefore, creating a more case-by-case balancing standard should have no effect on an officer's conduct.

330. *See supra* Parts II.A.2., II.B.3.

331. *See supra* Part II.A.3.

332. *See supra* Part I.C. (discussing the current qualified immunity standard).

333. *See supra* Part II.B.5. (discussing that financial costs and deterrence claims are unfounded).

IV. Comparison to Other Proposals

This section will compare the three-factor balancing test to three other proposed solutions to qualified immunity.

A. Changing the Standard to a Rule

Alan Chen argues that qualified immunity should be converted from a standard to a rule under which officials either are absolutely immune or must defend the merits.[334] This argument is largely based on the premise that courts engage in balancing when faced with qualified-immunity claims. He argues that any standard involving a reasonableness inquiry is necessarily a balancing test because it is "open-ended."[335] The case-by-case reasonableness inquiry of *Harlow* "grants courts greater discretion in balancing the importance of enforcing a constitutional right against the value of efficient functioning of government."[336] Chen argues that a rule-based immunity creates several benefits. First, it eliminates the distortion of the underlying constitutional standard.[337] Second, it "promote[s] the advancement of substantive constitutional law by permitting adjudication of substantive, rather than procedural, issues."[338] Third, a rule-based immunity facilitates more development of substantive constitutional law.[339] Finally, rule-based immunity creates more public interest in immunity issues.[340] The rule could be based on a number of different variables. It could be based on the types of officials,[341] the officials' subjective belief in the lawfulness of their conduct, perhaps based on whether they were lawfully authorized,[342] or a hybrid of different variables.[343]

This proposal certainly appeals to a desire to abolish qualified immunity. It is unjust for officials who violate someone's constitutional rights to be immune simply because the right at issue was not clearly established when the violation occurred. Chen's proposal also would promote the advancement of constitutional law, which could

334. Chen, *supra* note 69, at 332.

335. *Id.* at 291.

336. *Id.* at 292.

337. *Id.* at 336.

338. *Id.*

339. *Id.* at 337.

340. *Id.*

341. *Id.* at 333.

342. *Id.* at 334.

343. *Id.* at 335.

put officials more on notice of their actions, which in turn could lead to fewer inadvertent constitutional violations.

However appealing this proposal may be, the Supreme Court has absolutely refused to back down from the principles of qualified immunity. The Court repeatedly has stated that officials should be held to a reasonableness standard in order to protect both the government's interests and the public's interests.[344] Therefore, though desirable, Chen's proposal seems impracticable at this point.

Chen's analysis is also based on a faulty assumption about how the qualified-immunity doctrine functions. Though Chen argues that qualified immunity requires case-by-case balancing, qualified immunity functions more like a checklist than a balancing act. Unless courts can answer both the constitutional and qualified-immunity questions in the affirmative, the case cannot proceed. Unless courts can find factually similar precedent, a right was not clearly established. Though courts have discretion in interpreting whether a right was violated and the relatedness of precedent, the actual functioning of qualified immunity relies less on open-ended reasonableness than a regimented scheme. There is less wiggle room for policy balancing than Chen de-scribes. *Harlow* itself is the result of a balancing of interests, but that balancing created a scheme that courts must adhere to, not a scheme that lets courts balance those same *Harlow* interests from case to case.

The three-factor proposal takes away the checklist aspect of qualified immunity and converts it back to a balancing of interests, which is what gives it an advantage over Chen's proposal. Qualified immunity is supposed to represent a compromise between public interests and government interests,[345] but it is currently more similar to the kind of bright-line rule Chen advocates. Chen's proposal takes away any kind of interest balancing, when what is needed is a fairer interest balancing.

Chen might take particular issue with the constitutional-development factor of the three-factor proposal. He might say that it grants courts more of the kind of discretion he fears they have in the current qualified-immunity regime. But the constitutional-development factor only reframes the discretion to change the balance. In the current qualified immunity regime, a right not being clearly established weighs in the government's favor.[346] But in the three-factor proposal, a right not being clearly established weighs in the public's favor. The constitutional-development factor removes the discretion

344. *See supra* Part I.

345. *See supra* Part I.B.

346. *See supra* Part II.A.1.

courts have to hide behind clearly established law as a reason to not address the merits. Therefore, the three-factor proposal better addresses the dangerous discretion given to courts by changing how it is weighed.

B. "Clearly Unconstitutional"[347]

John Jeffries argues that the "clearly established law" prong should be replaced with a "clearly unconstitutional" prong.[348] Jeffries bases this argument on the idea that qualified immunity is no longer a reasonableness test; it is a recklessness or gross-negligence standard.[349] Though *Harlow* envisioned a reasonableness standard, the Court has significantly raised the bar.[350] The principle of notice embedded in qualified immunity should be broader than merely factually similar precedent.[351] An unreasonable constitutional violation is not suddenly reasonable because the Court has not previously said this is a violation.[352] But these acts are outside of qualified immunity because the clearly established law prong is "hyper-technical and unbalanced."[353] Therefore, Jeffries argues for a shift back to reasonableness.[354] "Clearly unconstitutional" embodies this shift.[355] It signals a less rigid and technical process of determining reasonableness.[356] This signal leads to a broader idea of notice, not firmly planted in precedent.[357] It moves the analysis away from precedent and more toward a "common social duty."[358] Outrageous conduct could now be deemed "clearly unconstitutional," whereas the outrageousness of the conduct is not important in the *Harlow* standard as currently interpreted.[359]

Jeffries's solution solves many of the *Harlow* standard's problems. It frees qualified immunity from a search for factually similar precedent. It allows courts to look at the totality of the circumstances

347. Jeffries, *supra* note 78, at 263.

348. *Id.*; Jeffries, *supra* note 63, at 867.

349. Jeffries, *supra* note 78, at 258.

350. *Id.*

351. *Id.* at 260.

352. *Id.*

353. *Id.* at 262.

354. *Id.*

355. *Id.* at 263.

356. *Id.*

357. *Id.* at 262.

358. *Id.* at 263 (quoting Nash v. U.S., 229 U.S. 373, 377 (1913)).

359. *Id.* at 263–64.

informing an official's conduct, which could allow the court to consider the possibility of malice.[360] It also better embodies the goals of *Harlow*: protecting officials using reasonable discretion.

But Jeffries's solution still leaves many of *Harlow*'s problems intact. First, it does not address inappropriate judicial fact-finding.[361] Asking whether something is clearly unconstitutional is just as much a mixed question of law and fact as clearly established law.[362] Courts still have to look at the facts from an officer's perspective in order to decide how a reasonable officer would view them. Reasonableness, therefore, is necessarily a fact question, even if it is couched in more appropriate terms. This leads to the same problems created by *Harlow*'s inappropriate fact-finding.[363] In fact, it is possible the clearly unconstitutional standard would lead to even more inappropriate fact-finding, because comparing case facts to past cases is inherently simpler than looking at the totality of the circumstances to find a "common social duty."[364] Therefore, the necessary complexity and broader scope of Jeffries's analysis asks for more fact-finding, making the fact-finding problem of *Harlow* worse. Second, in the context of the Fourth Amendment, Jeffries's solution worsens the problems of double reasonableness.[365] In a Fourth Amendment case, to decide whether something was clearly unconstitutional, a court would have to ask whether an officer's conduct was clearly unreasonable.[366] This makes the qualified-immunity question even more like the constitutional question, since the court will be directly asking the constitutional question as opposed to asking whether an officer made a reasonable mistake about the law.[367] Third, now that a court would directly be asking a constitutional question under the clearly unconstitutional standard, this standard raises the typical standard at civil trials. Instead of a preponderance of the evidence standard, courts would be asking whether a right was clearly violated, which appears similar to a clear and convincing evidence standard.[368] These remain-

360. Malice could help create obviously outrageous conduct.

361. *See supra* Part II.A.2.

362. *See supra* note 229 and accompanying text.

363. *See supra* Part II.A.2.

364. Nash v. United States, 229 U.S. 373, 377 (1913) (internal quotation omitted).

365. *See supra* Part II.B.1.

366. *See supra* Part I.E.

367. *See supra* Part II.B.1.

368. *See* Santosky v. Kramer, 455 U.S. 745, 768–70 (1982) (discussing the clear and convincing evidence standard).

ing problems leave the scales of qualified immunity tipped heavily in favor of the government.[369]

The three-factor proposal, on the other hand, has the same benefits as clearly unconstitutional without the drawbacks. Like Jeffries's standard, the three-factor proposal is not based on finding factually similar precedent, it allows an examination of all the circumstances, and it better protects the aims of *Harlow*. Unlike Jeffries's proposal, it does address inappropriate judicial fact finding. By changing the terminology, courts will be able to interpret facts appropriately for the stage of the proceeding. Also, unlike Jeffries's proposal, the double-reasonableness problem is directly solved by the three-factor proposal. Jeffries's standard preserves the constitutional standards, which is what creates many of qualified immunity's problems. The three-factor proposal, by eliminating the constitutional question, eliminates the possibility for double reasonableness, and separates immunity from constitutionality. Finally, the three-factor proposal—unlike Jeffries's proposal—does not raise the burden of proof for the constitutional question to clear and convincing because the court no longer is asking the constitutional question.

C. Expanding the Definition of Clearly Established Law

Avidan Cover proposes a specific solution for qualified immunity in the context of excessive-force claims: expanding the definition of clearly established law to include "statutes, regulations, and department or agency policies applicable to the officer."[370] Cover's proposition would not allow violations of use-of-force policies to "amount to a *per se* constitutional violation,"[371] but rather, "[t]he policy would only inform the clearly established analysis."[372] This takes the analysis out of the abstraction of comparing case law and grounds it in the reality of police officers. It is more reasonable to expect officers "to be familiar with their own department['s] use of force policies than all relevant or controlling circuit court opinions."[373] Cover states that it helps remove the qualified-immunity analysis from the search for specific fact patterns in precedent.[374] He also states that this analysis

369. Jeffries acknowledges that this standard does not solve all of qualified immunity's problems, but is a "move in the right direction." Jeffries, *supra* note 78, at 264. I tend to agree.

370. Cover, *supra* note 113, at 1824.

371. *Id.* (emphasis added).

372. *Id.*

373. *Id.* at 1825.

374. *Id.*

creates at least the same fair notice envisioned in *Harlow*.[375] Therefore, the concerns of hardship on officers, embodied in *Harlow*, are not undercut by this standard when it holds officers accountable to standards with which they are more familiar.[376]

Cover's solution addresses several of the problems with qualified immunity for the Fourth Amendment specifically. Use-of-force policies begin to address the problem of double reasonableness. The policies will allow courts to move beyond abstractly figuring out whether a reasonable mistake was made and how to differentiate the two levels of reasonableness; the courts can now reference concrete policies and hold the officer's conduct to those policies. Instead of evaluating the officer's conduct through a double-reasonableness lens, the court can compare the officer's conduct to their use-of-force policies. It is also a better standard for preventing over-deterrence of police conduct than the *Harlow* standard.[377] Police officers are most likely more familiar with their department's use-of-force policies than clearly established law. Knowing that their liability will be judged by these more familiar policies, officers would feel more confident in their actions. They would feel more capable of acting, which is what the *Harlow* Court wanted.[378]

Cover's solution, like Jeffries's, still does not fully address the misbalanced scales of the *Harlow* standard. Like Jeffries's standard, Cover's solution does not solve the inappropriate fact-finding in qualified immunity.[379] It also creates a new issue: it may be possible for a court to grant qualified immunity to an officer who follows a use-of-force policy, even if the use-of-force policy is unconstitutional. Cover responds that this actually benefits society as a whole, because municipalities can still be held liable for the unconstitutional policy and therefore be motivated to change them.[380] While this certainly creates benefits down the line, it still creates a problem in suits against officers where unconstitutional conduct can go without a remedy because of a systemic problem. Unless the plaintiff also sues the municipality, the systemic problem goes unaddressed. This does not promote efficiency by dismissing claims quickly, as envisioned by *Harlow*. Furthermore, a use-of-force policy could allow egregiously unconstitutional behavior—the same kind that Jeffries wanted to

375. *Id.*

376. *Id.*

377. *See supra* Part II.B.5.

378. *See supra* Part I.C.

379. *See supra* Parts II.A.2.

380. Cover, *supra* note 113, at 1836–37.

capture[381]—and would then protect an officer's egregiously unconstitutional behavior.

The three-factor solution, on the other hand, does address the misbalanced scales of the *Harlow* standard. It, similar to Cover's solution, will allow courts to look at police policies as a source of reasonableness, but it goes beyond just clearly established to take other factors into account. Cover's solution does not address the possibility of an officer's subjective intent, but the three-factor proposal weighs that evidence equally with other forms of reasonableness. Furthermore, the three-factor proposal can still find officers liable for following an unconstitutional policy because it considers more factors than just objective reasonableness. Overall, the three-factor proposal is a more complete solution than Cover's proposition.

Conclusion

The *Harlow* balance is off. There are many reasons why—even beyond those explored in this Note—but that conclusion is inescapable. Considering the thorough examination this Note gave to the development of qualified immunity and the issues associated, the impulse to simply abandon the doctrine is appealing. Abandoning the doctrine might look like a Chen-like approach to immunity, or, as has recently been posited, attacking the very legality of qualified immunity itself.[382] Unfortunately, these arguments have not changed, and most likely will not change, the minds of those who adhere to qualified immunity. The Justices have too deeply entrenched themselves in the doctrine.

Instead, the best response is a compromise, which is what the three-factor approach offers. The three-factor approach attempts to correct the *Harlow* misbalance while still taking into account the values the Justices value in qualified immunity. None of the factors adds a new value to the analysis; it is built on the idea that the current Supreme Court will not change its mind on the existence of qualified immunity, and the best strategy for justice is to accept the terms of qualified immunity as provided and work from that point.

Of course, the three-factor approach aims to do the one thing the Supreme Court has actively resisted: litigate more Fourth Amendment cases on their merits. The values the Supreme Court has preached are valid, but they have been weighed incorrectly. Too much deference has been given to government officials in the interest of avoiding litigation. Because of this, too much unconstitutional con-

381. Jeffries, *supra* note 78, at 263–64.

382. *See generally* Baude, *supra* note 22 (discussing the legality of the doctrine of qualified immunity).

duct goes unchecked. In order to correct the misbalance, the solution will necessarily result in more litigation. People like Jaime Lockard, the Creightons, and Israel Leija, Jr.'s family should not have the doors of justice closed on them before being heard. Their arguments deserve more consideration than simply being compared to obscure legal precedent. Hopefully, the three-factor approach can help open these doors.

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