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Qualified Immunity Dissonance in the Sixth Circuit: Why We Must Return to Reasonableness

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QUALIFIED IMMUNITY DISSONANCE IN THE SIXTH CIRCUIT: WHY WE MUST RETURN TO REASONABLENESS

MATT CHIRICOSTA*

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I. INTRODUCTION

A man lies on his bed, apparently unconscious. Two policemen enter the room. The officers are responding after the unconscious man's daughter called 911 to report he was having a seizure. Logically enough, the officers believe they are responding to a medical emergency. After all, the dispatcher told them that the man had suffered a seizure. The police officers, Officers Edgell and Hesnowetz, probably did not know that their response to this "routine" emergency would entangle them in a frustrating and costly lawsuit.¹ They also did not know that their actions that day would lead the Sixth Circuit to render yet another bewildering qualified immunity decision.²

The shibboleth "No man is above the law"³ is an oft-recited maxim of American legal thought. Today, that maxim plays out in § 1983⁴ lawsuits. These suits give civil remedies to plaintiffs whose constitutional rights have been violated by public officials carrying out their official duties. In theory, § 1983 provides citizens with generous protection against having their constitutional rights violated. Over the last forty years, however, the Supreme Court carved out a relatively broad common law qualified immunity defense to shield officials who acted reasonably, but nonetheless violated a plaintiff's constitutional rights.⁵ Unfortunately, the Court's qualified

¹ *McKenna v. Edgell*, 617 F.3d 432 (6th Cir. 2010).

² The Sixth Circuit's application of the doctrine is inconsistent and at times, seemingly arbitrary. *See, e.g., Peete v. Metro. Gov't of Nashville and Davidson Cnty.*, 486 F.3d 217 (6th Cir. 2007) (holding that qualified immunity defense was available to defendant paramedics after the restraint technique they employed as first responders to a seizure victim led to victim's death because paramedics responded in a "medical emergency" capacity). *Contra McKenna*, 617 F.3d at 434 (holding that police officers responding to a 911 call for a seizure were not entitled to qualified immunity after they restrained a seizure victim because a jury decided they acted in a law enforcement capacity). *But see Everson v. Leis*, 556 F.3d 484 (6th Cir. 2009) (holding that police officers were entitled to qualified immunity after they hogtied a seizure victim and put him in a jail cell, without applying or mentioning the *Peete* medical emergency-law enforcement standard).

³ *See, e.g., United States v. Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. . . . [E]very man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.").

⁴ 42 U.S.C. § 1983 (2006).

⁵ *See Saucier v. Katz*, 533 U.S. 194, 201-05 (2001) (holding that qualified immunity is available even when a constitutional violation has occurred if a reasonable official would not have known that his specific conduct violated the plaintiff's clearly established constitutional right); *Siegert v. Gilley*, 500 U.S. 226, 231-33 (1991) (refining further the objective reasonableness test for qualified immunity by establishing two-part test: (1) taking the facts in the light most favorable to the party asserting the injury, the trial judge must determine whether the plaintiff has alleged a deprivation of constitutional rights under current law; and (2) if a constitutional violation did occur, the judge must then determine whether the defendant's conduct was objectively reasonable in light of clearly established law at the time the violative conduct occurred); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (clarifying the definition of a violation of a "clearly established" law that would render the defense inapplicable); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that qualified

immunity jurisprudence has given the lower federal courts broad license to make divergent and confusing law when they apply the defense to specific factual circumstances. Indeed, the doctrine “is in a perpetual state of crisis.”⁶ Nowhere is this more readily apparent than in the Sixth Circuit Court of Appeals’ inconsistent qualified immunity decisions. *McKenna*, the case recounted in the vignette above, is the latest of these bewildering Sixth Circuit decisions dealing with qualified immunity’s application to police officers.

The stakes are high. The Sixth Circuit’s inconsistent jurisprudence threatens the delicate balance that the defense aims to strike between protecting citizens from having their constitutional rights violated on the one hand and protecting government officials from undue interference with their official duties on the other.⁷ This Note critiques the medical emergency-law enforcement response capacity the Sixth Circuit has set forth to help adjudicate qualified immunity claims and suggests improvements the court can make to its qualified immunity jurisprudence.

In Part II, I briefly trace the Supreme Court’s development of the doctrine and outline the doctrine’s policy goals. In Part III, I develop my thesis by exploring the Sixth Circuit’s recent qualified immunity decisions and showing why the court’s analytical framework leads to inconsistent results. Then, I argue that the Sixth Circuit should abandon the artificial medical emergency-law enforcement response capacity test it uses when police officers respond to medical emergencies. Finally, I explain why qualified immunity’s policy rationales demand that if the Sixth Circuit does not abandon the test, it must allow judges to resolve the response capacity issue as a matter of law.

Lastly, in Part IV, I explore what scholars might say about the Sixth Circuit’s test. Part IV also answers critics who assert that qualified immunity is a fatally flawed doctrine. I argue that qualified immunity effectively accomplishes its fairness and social cost reduction goals.

II. THE EVOLUTION OF THE QUALIFIED IMMUNITY DEFENSE

A. *The Defense’s Creation and Evolution in the Supreme Court*

The qualified immunity defense is rooted in the common law.⁸ Specifically, the Supreme Court first recognized the defense in *Pierson v. Ray*.⁹ There, the Court

immunity applies so long as the official’s conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”); *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (holding that qualified immunity applies unless the officer violated “clearly established” law); *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (establishing the common law qualified immunity defense for a police officer who executed an arrest warrant under a statute later declared unconstitutional, and noting that “police officer[s] [are] not charged with predicting the future course of constitutional law”).

⁶ Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155, 1155 (2005).

⁷ *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 900 (6th Cir. 2004) (noting that the qualified immunity defense is intended to strike a balance between allowing litigants to recover damages and preventing the “social costs” of such suits from unduly deterring public officials from dispensing their duties) (citing *Harlow*, 457 U.S. at 814).

⁸ Thomas E. O’Brien, *The Paradox of Qualified Immunity: How a Mechanical Application of the Objective Legal Reasonableness Test Can Undermine the Goal of Qualified*

rejected a §1983 claim against a police officer who arrested the plaintiff under a statute later declared unconstitutional.¹⁰ The defense first recognized in *Pierson* eventually became today's qualified immunity defense. Public officials use the defense to defeat § 1983 lawsuits at the summary judgment stage. After *Pierson*, the Court modified the defense several times.¹¹ A lengthy exposition of the policies behind each of these modifications is outside the scope of this Note.¹² Here, it suffices to note that the recent Supreme Court decisions apply an objective test to both the officer's conduct and the underlying legality of the conduct to determine whether the defense should apply.¹³ A brief explanation of that objective test's evolution frames the problem with the Sixth Circuit's qualified immunity jurisprudence.

1. *Harlow v. Fitzgerald*: "Objectifying" the Defense

*Harlow v. Fitzgerald*¹⁴ is the lynchpin of the modern, objective reasonableness test that determines if qualified immunity applies in a given situation. The Court departed from earlier decisions, such as *Wood v. Strickland*,¹⁵ which held that there was both a subjective and objective component to the defense and based its applicability on a "good faith" standard. In *Wood*, the defense would not apply if the officer "knew or reasonably should have known that the action he took . . . would violate the constitutional rights of the [plaintiff]"¹⁶ (the *objective* component) or if "[the officer] took the action with the malicious intention to cause a deprivation of constitutional rights or other injury"¹⁷ (the *subjective* component). In short, under *Wood*, a court could hold the defense inapplicable even if the officer's conduct was objectively reasonable if the court found that the officer intended to deprive the plaintiff of her constitutional rights.

Harlow abolished *Wood*'s subjective component and adopted a wholly objective test to determine whether the defense applied. In *Harlow*, the plaintiff alleged that

Immunity, 82 TEX. L. REV. 767, 767 (2004) ("Qualified immunity is a judicially created doctrine. . .").

⁹ *Pierson v. Ray*, 386 U.S. 547 (1967).

¹⁰ *Id.* at 555 (holding that a police officer will not be liable for a false arrest when the arrest is made under a statute the officer reasonably believed to be valid).

¹¹ See *supra* note 5 for a quick, but exhaustive list of Supreme Court precedent here.

¹² See Saiman, *supra* note 6, at 1155-1168 for an excellent, in-depth discussion of the Supreme Court's qualified immunity jurisprudence; see also Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261 (2003).

¹³ See, e.g., *Saucier v. Katz*, 533 U.S. 194 (2001) (holding that the defense is available if a reasonable official would not have known that his specific conduct violated the plaintiff's "clearly established" constitutional right).

¹⁴ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

¹⁵ *Wood v. Strickland*, 420 U.S. 308 (1975).

¹⁶ *Id.* at 322.

¹⁷ *Id.*

former senior aides to President Nixon violated his constitutional rights by conspiring to wrongfully discharge him.¹⁸ The Court held 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*.”¹⁹ The Court’s holding assumed that an objective test, which eliminated any need for the purely factual inquiry into the officer’s subjective intent, would permit the resolution of many claims via summary judgment. Resolving constitutional tort claims early by applying a purely objective test to official conduct would theoretically shield government officials and society from the potentially crippling social costs of excessive litigation.²⁰ In sum, the Court noted, “[subjective] [i]nquiries of this kind can be peculiarly disruptive of effective government.”²¹ *Harlow* gave birth to the purely objective qualified immunity inquiry.

2. *Siegert v. Gilley*: Refining *Harlow*’s Objective Test

*Siegert v. Gilley*²² clarified *Harlow*’s general objective test into a two-prong inquiry that is now the standard for assessing whether qualified immunity applies in a given situation. *Siegert* sued his former employer, a federal hospital. He alleged that his former supervisor defamed him when the supervisor responded to *Siegert*’s prospective employer’s reference request by saying that he could not recommend *Siegert* because he was “inept and unethical, perhaps the least trustworthy individual I have supervised. . . .”²³ The supervisor asserted qualified immunity under *Harlow* and argued that he did not violate any “clearly established right” as required under *Harlow*’s objective test.²⁴ The District Court denied the defense, but the appeals court and the Supreme Court both held that the supervisor was entitled to summary judgment under the objective qualified immunity test.

In *Siegert*, the Court crafted a two-prong test to determine whether qualified immunity applies. The Court held that the applicability of qualified immunity necessarily involved two questions. First, the court must take the facts in the light most favorable to the plaintiff and determine if the plaintiff has alleged the violation

¹⁸ *Harlow*, 457 U.S. at 802. More specifically, the *Harlow* plaintiff alleged that the conspiracy to wrongfully discharge him was part of the infamous larger Watergate conspiracy that defines the Nixon presidency. For a detailed factual account of the larger conspiracy, see *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

¹⁹ *Harlow*, 457 U.S. at 818 (emphasis added).

²⁰ *Id.* at 816-17 (“Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to ‘subjective’ inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. . . . Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official’s professional colleagues.”).

²¹ *Id.* at 817.

²² *Siegert v. Gilley*, 500 U.S. 226 (1991).

²³ *Id.* at 228.

²⁴ *Id.* at 229.

of a *clearly established* constitutional right under *current law*.²⁵ Second, if the plaintiff has indeed asserted such a violation, a court must apply *Harlow* to determine whether a reasonable official acting under the circumstances and in light of current law would have found the conduct in question to be reasonable.²⁶ If the answer to either question is “no,” then qualified immunity applies. Here too, the Court crafted its holding with a social costs rationale in mind, as it noted that expediently resolving meritless suits via summary judgment would spare government officials from the social costs of litigation.²⁷ That much, at least, was nothing revolutionary for qualified immunity. The Court’s refined test, however, created a new issue it would soon resolve: What is a “clearly established” law? A decade passed before the Court definitively answered that question in *Saucier v. Katz*.

3. *Saucier v. Katz*: Expanding the Defense *vis-à-vis* the Clearly Established Law Standard

In *Saucier v. Katz*,²⁸ the Court added yet another wrinkle to the qualified immunity analysis. *Siegert*’s first prong mandated that the plaintiff allege that the official violated a “clearly established law.” In *Saucier*, a military officer shoved Saucier, who was protesting at an Al Gore speech, into a van because he had a threatening banner. The plaintiff sued the officer, and the officer asserted qualified immunity. *Saucier* clarified two issues that had plagued lower courts after *Siegert*.

First, the lower courts were uncertain of how to analyze if a law had been “clearly established”: Did it fold into the general inquiry of whether the official violated the plaintiff’s constitutional rights, or was it a separate issue? The Court answered the latter. It held that courts must first determine whether the plaintiff has alleged a constitutional violation before even considering whether the particular conduct violated clearly established law.²⁹ The plaintiff’s baldly alleging a constitutional violation would not suffice to defeat summary judgment based on qualified immunity. In order to defeat summary judgment under *Siegert*, the plaintiff also had to show that the officer violated “clearly established law,” which had been a point of significant confusion in the lower courts.

Second, the Court clarified just how a “law” becomes “clearly established.” Before *Saucier*, many courts folded the issue into the general constitutional inquiry, which by nature is a fact-based inquiry. For instance, in analyzing an excessive force claim under the Fourth Amendment, a court considers, among other things,

²⁵ *Id.* at 232 (“A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is ‘clearly established’ at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.”).

²⁶ *Id.*

²⁷ *Id.* (“Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits. One of the purposes of [qualified] immunity . . . is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.”).

²⁸ *Saucier v. Katz*, 533 U.S. 194 (2001).

²⁹ *Id.* at 201.

“the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”³⁰ *Saucier* held that courts should not equate an affirmative finding of a constitutional violation under the circumstances with a finding that the law was clearly established. To the contrary, a law will only be “clearly established” if there is pre-existing case law clearly announcing that the official’s *specific conduct* was illegal.³¹ The Court noted that the governing standard is “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”³² The Court then went on to demonstrate how a “reasonable officer” could determine that the conduct he was about to engage in was in fact unlawful:

It is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts. 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. If the officer’s mistake as to what the law requires is reasonable, however, the officer is entitled to the [qualified] immunity defense.³³

In short, the Court clearly held that a law is only “clearly established” for purposes of defeating the defense if there is clearly analogous case law or a statute forbidding the officer’s precise, fact-specific conduct.³⁴ The thrust of *Saucier* is a bit paradoxical, as an officer can be found to have acted unreasonably *vis-à-vis* the appropriate constitutional standard but still held to have acted reasonably in applying the relevant legal standard, or lack thereof, to the situation if there is no directly analogous case law on point.³⁵ Qualified immunity applies unless the officer had clear notice through prior, directly analogous case law that his conduct violated the plaintiff’s rights. In the end, *Saucier*, like the other landmark qualified immunity decisions that came before it, has confused the lower courts. This Note discusses how the Sixth Circuit’s application of the clearly established law standard is

³⁰ *Id.* at 205 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

³¹ *Id.* (“The qualified immunity inquiry, on the other hand, has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct.”).

³² *Id.* at 202.

³³ *Id.* at 205.

³⁴ *Id.*

³⁵ Commentators criticized *Saucier* for establishing a seemingly illogical standard of “reasonable unreasonableness.” See, e.g., David Rudovsky, *Saucier v. Katz: Qualified Immunity as a Doctrine of Dilution of Constitutional Rights*, in *WE DISSENT: TALKING BACK TO THE REHNQUIST COURT: EIGHT CASES THAT SUBVERTED CIVIL LIBERTIES AND CIVIL RIGHTS 172-187* (Michael Avery ed., 2009). For an excellent argument that the *Saucier* standard is not in fact paradoxical, see Michael M. Rosen, Comment, *A Qualified Defense: In Support of the Doctrine of Qualified Immunity in Excessive Force Cases, with Some Suggestions for its Improvement*, 35 *GOLDEN GATE U. L. REV.* 139, 151-56 (2005).

inconsistent, leads to arbitrary outcomes, and undermines the goals of qualified immunity.³⁶

B. *A Delicate Balancing Act: The Defense's Rationales*

A brief description of qualified immunity's policy goals helps frame the issues with the Sixth Circuit's qualified immunity jurisprudence. In theory, the defense aims to do four things. First, the word "qualified" in the defense means it is not an absolute bar to government official liability. The defense's limited nature ensures that plaintiffs will have the right to legal remedies in order to vindicate unreasonable violations of their constitutional rights.³⁷ Second, the defense ensures that public officials will not be held liable for every single constitutional violation.³⁸ Third, the defense encourages public officials to discharge their duties with zeal by quelling the fear that every action they take is a potential ticket to the "litigation lottery."³⁹ Finally, the defense allows courts to dispose of many suits at the summary judgment stage, which substantially reduces the social costs of litigation on public officials.⁴⁰ This last rationale posits that constitutional tort claims should be resolved quickly wherever possible in order to permit the official to resume his socially valuable official duties.⁴¹ The Sixth Circuit's inconsistent application of the defense undermines each of these policies.⁴²

II. DISCUSSION

A. *Examples of the Sixth Circuit's Inconsistent Qualified Immunity Jurisprudence*

McKenna v. Edgell,⁴³ the case from the introductory vignette,⁴⁴ is just the latest in a long line of conflicting Sixth Circuit qualified immunity jurisprudence. The Sixth Circuit is not the only federal court to struggle with the doctrine. Indeed, the defense's "application and administration continue to perplex courts."⁴⁵ The Sixth Circuit is unique, however, in its wholesale attempts to add analytical steps to the doctrine. These attempts simply muddy the waters and prevent qualified immunity from serving its explicit policy goals. Particularly, the Sixth Circuit exacerbates the problem further when it does not consistently apply its own innovations to the cases it decides. If the Sixth Circuit's inconsistent approach to qualified immunity

³⁶ See *infra* Part III.

³⁷ O'Brien, *supra* note 8, at 768.

³⁸ 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, 3 (1997).

³⁹ *Id.* at 3-4.

⁴⁰ *Id.* at 4.

⁴¹ See, e.g., *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (noting that courts should resolve the issue of qualified immunity expediently).

⁴² See *infra* Part III.B.

⁴³ *McKenna v. Edgell*, 617 F.3d 432 (6th Cir. 2010).

⁴⁴ See *supra* Part I.

⁴⁵ Chen, *supra* note 38, at 4.

continues, basic notions of justice and fairness inherent in the doctrine will fall by the wayside. Examples of the Sixth Circuit's inconsistency in action frame the problem.

1. *Peete v. Nashville*: The Medical Emergency-Law Enforcement "Test"

In *Peete v. Nashville*,⁴⁶ the decedent's grandmother called 911 to report that her grandson was experiencing an epileptic seizure.⁴⁷ The defendants, an assorted group of firefighters, paramedics, and emergency medical technicians, arrived at the scene and briefly discussed the decedent's history of epilepsy with the grandmother.⁴⁸ The defendants then approached the decedent, restrained him, and used their bodies to apply pressure to his neck and head, pinning the decedent in a prone position.⁴⁹ Despite their medical training, the defendants did not take any measures to ensure that the decedent had a clear airway.⁵⁰ Within minutes, the decedent died.⁵¹ The District Court denied the defendants' qualified immunity motion.⁵² The court held that the defendants were not entitled to qualified immunity because "the rights at issue 'are clearly established.'"⁵³

On appeal, the Sixth Circuit reversed the district court and granted qualified immunity based on a problematic bifurcated standard that cannot be found in other courts' qualified immunity jurisprudence.⁵⁴ The court held that qualified immunity would be more readily available if a given defendant responded in a medical emergency capacity, rather than a law enforcement capacity.⁵⁵ The Court addressed the "clearly established" law standard, noting that "there are no cases applying the Fourth Amendment to paramedics coming to the aid of an unconscious individual as a result of a 911 call by a family member."⁵⁶ More specifically, the court reversed the trial court's holding that the defendants violated "clearly established law": "[W]here the purpose is to render solicited aid *in an emergency rather than to enforce the law* . . . there is no federal case authority creating a constitutional liability for the [conduct] alleged in the instant case."⁵⁷ Finally, the court reasoned

⁴⁶ *Peete v. Nashville*, 486 F.3d 217 (6th Cir. 2007).

⁴⁷ *Id.* at 219-220.

⁴⁸ *Id.* at 220.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* The plaintiff also alleged two other claims: (1) failing to provide medical attention; and (2) failing to protect the decedent from other emergency actions.

⁵³ *Id.*

⁵⁴ *Id.* at 223. The standard seems sensible enough, and indeed can lead to desirable outcomes. The problem comes when the standard is arbitrarily applied based on a mere job title or when the court completely defers to a jury's finding on what capacity the officer responded in. See the discussion of *McKenna v. Edgell*, *infra* Part III.A.2.

⁵⁵ *Peete*, 486 F.3d at 219.

⁵⁶ *Id.* at 220.

⁵⁷ *Id.* at 221 (emphasis added).

that qualified immunity applied because the defendants did not seize the decedent to interfere with his liberty or to enforce the law; rather, they were responding to his request for medical assistance.⁵⁸ Here, even though the paramedics “badly botched the job,” qualified immunity attached because they were assisting the decedent.⁵⁹ *Peete* should have “clearly established” that a state actor giving medical care was entitled to qualified immunity. But, *McKenna* shows that it established no such coherent principle.

2. *McKenna v. Edgell*:⁶⁰ the *Peete* Test and the Danger of Overdeferring to the Jury

In *McKenna*, the Sixth Circuit denied the defendant police officers the defense based on facts strikingly similar to *Peete*. The defendant-officers arrived at the plaintiff’s home after the plaintiff’s daughter called 911 to report that her father was suffering a seizure.⁶¹ The daughter directed the officers to the man’s bedroom, where they found him lying in bed.⁶² From there, the factual accounts departed. The daughter testified that the officers asked her if the plaintiff used drugs. According to her, the officers became frustrated when McKenna protested their requests for him to get out of bed; they then handcuffed his wrists and ankles.⁶³ On the other hand, the officers testified that McKenna was comatose when they arrived. The officers testified that they roused McKenna by “placing a hand on his shoulder.”⁶⁴ In response, McKenna became enraged and shoved the officers so hard that one of them fell down.⁶⁵ By the officers’ account, they handcuffed him to protect themselves and McKenna.⁶⁶ Then, the officers searched McKenna’s dresser drawer and medicine cabinet for possible legal or illegal drugs that had caused his condition.⁶⁷ McKenna himself testified he had “no recollection” of his behavior during the seizure.⁶⁸

⁵⁸ *Id.* at 222 (“They are unlike the police officers in *Champion* who handcuffed and shackled the plaintiff in order to arrest and incapacitate him. The cases are not the same because the paramedics acted in order [to] provide medical aid to Becerra [the decedent].”).

⁵⁹ *Id.* (“They were attempting to help him, although they badly botched the job according to the complaint. Since Becerra was neither communicative, nor conscious and the paramedics were attempting to render aid, neither *Green* nor *Champion* applies.”).

⁶⁰ *McKenna v. Edgell*, 617 F.3d 432 (6th Cir. 2010).

⁶¹ *Id.* at 435.

⁶² *Id.*

⁶³ *Id.* at 435-36. It is worth noting that the daughter admitted that she was talking to one of the officer’s at the start of the incident and “‘couldn’t see exactly what was going on’ for some period.” *Id.* at 435. The majority downplayed this admission, which could have been crucial if they elected to review *de novo* the jury’s finding as to the officers’ response capacity. See *infra* Part III.B.2.

⁶⁴ *Id.* at 435.

⁶⁵ *Id.* at 435-36.

⁶⁶ *Id.* at 436.

⁶⁷ *Id.*

⁶⁸ *Id.*

The Sixth Circuit applied the *Peete* medical emergency-law enforcement standard to deny the officers the qualified immunity defense. It completely deferred to the trial jury's finding that the officers acted in a law enforcement capacity even though 911 dispatched the officers to assist with a seizure, a medical condition.⁶⁹ The officers temporarily restrained McKenna, just as the *Peete* defendants did; however, unlike the *Peete* defendants, they did not pin him or use other similar physical force to physically harm him. So, in a sense, the consequences of the officers' actions here did not lead to the severe physical consequences seen in *Peete*. Yet, the jury concluded that the officers acted in a law enforcement capacity because they executed a limited search of McKenna's top dresser drawer and medicine cabinet and ran his license plates because the officers "believed [they] might be dealing with an intoxicated person . . . or a person having a diabetic reaction."⁷⁰ These limited actions, which presumably could be justified as reasonable by a medical professional responding to the same scene, sufficed to convince the Sixth Circuit that the jury acted within its proper discretion. The patently unfair result here is all the more jarring in light of the court's other recent qualified immunity decisions. I will now discuss how the Sixth Circuit can ameliorate some of this unfairness and inconsistency.

B. What the Sixth Circuit Can Do to Craft a More Consistent Qualified Immunity Doctrine

McKenna, *Peete*, and other cases discussed in the following section show that the Sixth Circuit's attempts to add nuance to qualified immunity's open-ended reasonableness standard leads to more problems than solutions. This part of the Note first shows why the Sixth Circuit should abandon the *Peete* medical emergency-law enforcement test and faithfully adhere to *Harlow* and its progeny. It then goes on to establish why strong policy reasons require the Sixth Circuit to take the medical emergency-law enforcement inquiry from the jury if it continues to use the test.

1. The Court Must Discard the Medical-Law Enforcement Dichotomy and Refrain from Making Further "Innovations" to the Doctrine

The Sixth Circuit's attempt to clarify the open-ended reasonableness inquiry through the medical emergency-law enforcement test flies in the face of Supreme Court precedent.⁷¹ The divergent results in *McKenna* and *Peete* testify to the problem with the test: It leads to unfair and arbitrary results that turn on the defendant's job title rather than the actual purpose of the defendant's conduct. A closer look shows that *Peete*'s medical emergency-law enforcement test does not hold up to legal scrutiny.

⁶⁹ *Id.* at 444. Although the Sixth Circuit does not explicitly note that it is deferring to the jury, its wholesale deferral is implicit in its *McKenna* reasoning. It notes, "[h]ere, as in *Champion*, 'we are acutely aware that a jury, faced directly with the tasks we cannot undertake, believed the evidence presented by the Plaintiff.'" *Id.* at 437-38.

⁷⁰ *Id.* at 436.

⁷¹ The Supreme Court has repeatedly held that qualified immunity is an inquiry into the reasonableness of conduct, not an inquiry into the purposes of the conduct. See cases cited *supra* note 5.

First, more unfair and arbitrary outcomes will result if the court continues to apply the standard. Compare the result in *Peete* with the result in *McKenna*. In *Peete*, paramedics received qualified immunity after they restrained a seizure victim and applied pressure to his back, causing him to die.⁷² Here, the court established the medical emergency-law enforcement test, “where the purpose is to render . . . aid in an emergency rather than to enforce the law . . . there is no federal case authority creating a constitutional liability for the negligence, deliberate indifference, and incompetence alleged in the instant case.”⁷³ After *Peete*, a reasonable public official should have been able to conclude that qualified immunity attached if she acted to “render . . . aid in an emergency.”⁷⁴

The court proved otherwise in *McKenna*. Here, police officers who responded to a scenario strikingly similar to *Peete* were denied qualified immunity based on the *Peete* test. The officers were bewilderingly held to have acted in a law enforcement capacity despite their using a less severe restraint method (i.e., they did not pin the plaintiff as in *Peete*). More crucially, the plaintiff did not die like the *Peete* plaintiff did. The result seems extraordinarily unfair in light of other Sixth Circuit cases, like *Everson v. Leis*,⁷⁵ where the defense immunized officers who hogtied a seizure victim and took him to a jail cell.⁷⁶ Given the “fact-sensitive”⁷⁷ nature of qualified immunity, the standard is likely to lead to more unfair results like *McKenna*.

Skeptics might argue that these fairness concerns are overstated because in many situations, “safety nets” like a union legal defense fund or an insurance policy will protect officers’ personal assets from a costly judgment.⁷⁸ At a basic economic level, this argument sounds rational enough. But, it fails to account for the “secondary social costs” that any litigation, regardless of outcome, will impose on an officer.⁷⁹ An officer forced to endure a lengthy trial on a matter within a judge’s province could face higher insurance premiums, reputational damage, and job discipline, such as unpaid leave pending conclusion of the litigation.⁸⁰ In sum, the fairness concerns extend beyond the “bottom line” issue of monetary liability, and indemnification

⁷² *Peete v. Metro. Govt. of Nashville & Davidson Cnty.*, 486 F.3d 217, 219-20 (6th Cir. 2007).

⁷³ *Id.* at 221.

⁷⁴ *Id.*

⁷⁵ *Everson v. Leis*, 556 F.3d 484 (6th Cir. 2009).

⁷⁶ *Id.* at 488-89. The Court decided *Everson* two years after *Peete*, but it curiously did not mention the medical emergency-law enforcement capacity standard, despite the officers’ responding to a 911 call for a seizure. Furthermore, in every imaginable instance, “hogtying” a victim and taking him to the police station constitute more severe restrictions on the plaintiff’s Fourth Amendment rights than temporarily restraining him at his home until medical help arrives. The officers’ actions encompass the very definition of “law enforcement” under the standard: they acted “to incarcerate,” however briefly the incarceration actually lasted.

⁷⁷ See Saiman, *supra* note 6, at 1184 (“the standard must be calibrated to the specific facts of the case”).

⁷⁸ On this point, see Rosen, *supra* note 35, at 147-48.

⁷⁹ *Id.* at 148.

⁸⁰ *Id.*

gives the officer precious little comfort during the stressful litigation process itself. In fact, these additional fairness concerns likely spurred the Supreme Court to espouse the social costs rationale as the primary policy behind qualified immunity.⁸¹

Second, the Sixth Circuit created the test without any support in the case law. Neither the *Peete* standard nor anything like it can be found in the other circuits or the Supreme Court. To the contrary, the Supreme Court molded this common law doctrine to turn on objective reasonableness in light of all the relevant facts.⁸² It did not intend the inquiry to turn on one fact, such as the officer's response capacity. In *Peete*, the court made a leap that defied logic. Somehow, the court reasoned that since there was no "clearly established law" governing paramedics' conduct, it had the authority to craft a standard that does not exist in other courts' qualified immunity law.⁸³ The Sixth Circuit overstepped its authority in creating this "artificial distinction"⁸⁴ and its qualified immunity law now conflicts with Supreme Court case law.

That conflict arises because the *Peete* test conflicts with *Saucier*'s "clearly established law" standard. Under *Saucier*, a law would only be "clearly established" (and qualified immunity would be denied) if "clearly analogous" case law announces that the officer's conduct is illegal.⁸⁵ *Saucier* reaffirms that qualified immunity inquiries must be fact-specific.⁸⁶ Moreover, the inquiries must take all the relevant facts into account.⁸⁷ The medical emergency-law enforcement capacity standard incorrectly shifts the focus from all the facts to a single, often murky fact: In what capacity did the officer respond? This improper focus places officers in an insurmountable Catch-22.

This Catch-22 prevents police officers responding to medical emergencies from knowing what capacity they are acting in as a matter of law. Consider the following twist on *McKenna*. Assume the officers respond to a 911 call for a seizure victim, the victim's daughter lets them in, and they find a man unconscious on the bed. The officers handcuff the man after they rouse him awake, and he shoves them. This time, however, the man's daughter tells the officers that her father is diabetic and that seizures tend to make him aggressive. She tells them her father needs insulin and that he keeps it somewhere in his room, but she is unsure if it is in his dresser or medicine cabinet. The officers then search both after restraining him, just as the officers in *McKenna* did, and find nothing. What result will a jury reach under the

⁸¹ Chen, *supra* note 38, at 4.

⁸² For a quick survey of the relevant Supreme Court qualified immunity case law, see *supra* Part II.A. For a more detailed summary of the doctrine's history, see Saiman, *supra* note 6.

⁸³ Orin Kerr, *McKenna v. Edgell and Civil Liability for Police Officers Responding to 911 Calls for Assistance*, THE VOLOKH CONSPIRACY (Aug. 18, 2010, 11:45 PM), <http://volokh.com/2010/08/18/mckenna-v-edgell-and-civil-liability-for-fourth-amendment-violations/> ("There are no artificial categories like '*Peete* protection' that get triggered as a matter of stare decisis based on dicta from a qualified immunity ruling in an earlier case.")

⁸⁴ *Id.*

⁸⁵ *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

⁸⁶ Kerr, *supra* note 83.

⁸⁷ *Id.*

medical emergency-law enforcement test? Under *McKenna*, a reasonable jury could reach either conclusion. Undoubtedly, police officers frequently encounter similar scenarios. The unpredictable nature of the test suggests that any law established under the test will be far from clear to police officers who must make split-second decisions.

That unpredictability is largely due to the Sixth Circuit's failing to define the *Peete* test in any legally significant way. For police officers who wish to discern just what law *Peete* and *McKenna* have "clearly established," *McKenna*'s discussion of the *Peete* standard is circular at best. *McKenna* claims that *Peete* does not make liability contingent on the official's profession.⁸⁸ But, it does not tell us what *Peete* actually stands for. Instead, the court equivocates, "*Peete* may stand for the proposition that when a government agent acting in the *role* of a paramedic—any medical-emergency responders—commits an unreasonable search or seizure, it is not yet clearly established that the conduct violates the Fourth Amendment."⁸⁹ The court then concludes, "[T]he police officers here were not necessarily offering medical assistance. Although [they] were first on the scene . . . it is not clear that trying to get someone out of bed and get him dressed constitutes medical assistance."⁹⁰ The court leaves a trained lawyer (or police officer) to ponder just what conduct might "clearly" constitute medical assistance. Neither *Peete* nor *McKenna* give a coherent legal test that either judges or juries can apply to determine whether the official acted in a medical or law enforcement capacity.⁹¹

Without a coherent legal standard, police officers making split-second decisions in a medical response context will be left with precious little assurance that they will not be held liable in certain situations. In theory, qualified immunity ensures that public officials can vigorously discharge their duties without fear of being civilly liable for reasonable errors in judgment.⁹² Here, the lack of a defined standard means that police officers responding to medical emergencies may hedge their bets and do the "bare minimum" in order to avoid a jury finding that they acted to enforce the law. The Supreme Court did not intend this result when it framed the doctrine to encourage public officials to vigorously discharge their duties.⁹³

⁸⁸ *McKenna v. Edgell*, 617 F.3d 432, 438-439 (6th Cir. 2010) ("As a general matter, exposure to liability does not depend merely on the profession of the government actors.").

⁸⁹ *Id.* at 439.

⁹⁰ *Id.*

⁹¹ On this point, see Kerr, *supra* note 83. Also, it is difficult to say what kind of test the court could possibly come up with, given the variety of situations police officers encounter. But one can imagine some type of multi-factor test styled after other torts, with no single factor being dispositive. Sample factors might include how the officer arrived at the scene, the extent to which reasonable officers would believe they are responding to a medical emergency in a similar situation, the extent of the officer's professional training in dealing with a materially similar medical issue, the extent to which a reasonable officer would realize the conduct at issue may implicate constitutional rights, and the like. To be sure, some type of substantive standard would be superior to the Sixth Circuit's standard, which announces no test at all.

⁹² See Chen, *supra* note 38, at 14; see also *supra* Part II.B.

⁹³ See, e.g., *Wood v. Strickland*, 420 U.S. 308, 319 (1975) ("Denying any measure of immunity in these circumstances 'would contribute not to principled and fearless decision-making but to intimidation.'").

Worse yet, the test also leaves trained legal minds to question when the test, however undefined it is, will apply at all. *Everson v. Leis*⁹⁴ was decided between *Peete* and *McKenna*, but *Everson* did not apply the standard despite similar facts. Recall that in *Everson* police officers hogtied the epileptic plaintiff and took him into custody after he allegedly kicked and swung at them. Here, the Sixth Circuit gave the officers qualified immunity.⁹⁵ Yet, the court made no mention of the year-old *Peete* test. Since the officers not only hogtied the man, but also jailed him, a *Peete* inquiry seemed appropriate. Under *Peete*, the officers' claim to qualified immunity should have been subject to stricter scrutiny under the law enforcement prong since they jailed the plaintiff. Here, the court cryptically rebuts the plaintiff's reliance on *Peete* without mentioning or applying the test.⁹⁶ Instead, the court held that an Ohio statute codifying a standard of care for police officers responding to a medical emergency⁹⁷ did not "clearly establish" that the officers' conduct was forbidden.⁹⁸ One ponders how the Sixth Circuit expects its case law to guide officers in such situations if it does not consistently apply the test when the conduct treads the line between law enforcement and medical response, as it did in both *McKenna* and *Everson*.

This inconsistent application of the test to medical situations similarly undermines the officer's ability to respond using his best, but rudimentary medical judgment and training. Professor Orin Kerr characterizes the standard as one implicating puzzling "constitutional metaphysics."⁹⁹ Indeed, it seems that this test creates more problems than it solves. For instance, when does the standard apply? The *Peete*, *Everson*, and *McKenna* trio leave that question unanswered. Also, what is the governing legal standard that decides whether the officer acted in a law enforcement or medical response capacity? Again, the Sixth Circuit gives us no Hand formula or any remotely qualitative legal standard to evaluate the conduct. The test merely announces a nominal dichotomy between medical and law enforcement capacity. This test gives officers little guidance in evaluating their own conduct. It leaves complicated issues to wallow in the ether.

The court's inability to announce a coherent legal test and its failure to apply the nebulous standard consistently show why it is so important to follow the Supreme

⁹⁴ *Everson v. Leis*, 556 F.3d 484 (6th Cir. 2009).

⁹⁵ *Id.* at 500.

⁹⁶ *Id.* at 499 ("Contrary to *Everson*'s argument on appeal, law enforcement officials are not necessarily precluded under federal law from arresting someone who displays symptoms of a known medical condition. . . . The cases from this circuit that *Everson* relies upon, *Champion* and *Peete*, are inapposite. . . . As for *Peete*, the court found that paramedics did not violate the right of the epileptic plaintiff to be free of unreasonable seizure by the government.").

⁹⁷ OHIO REV. CODE § 2305.43(A) (2010) provides:

A law enforcement officer shall make a diligent effort to determine whether any disabled person he finds is an epileptic or a diabetic, or suffers from some other type of illness that would cause the condition. Whenever feasible, this effort shall be made before the person is charged with a crime or taken to a place of detention.

⁹⁸ *Everson*, 556 F.3d at 500.

⁹⁹ Kerr, *supra* note 83.

Court's general, but fact-intensive qualified immunity inquiry.¹⁰⁰ Qualified immunity's fact-sensitive nature does not render it amenable to artificial distinctions like the Sixth Circuit's medical emergency-law enforcement test. The court should discard the test and return to analyzing qualified immunity on an objective reasonableness standard under *Harlow* and *Saucier*. But, until it chooses to do so, the court's analytical framework under the *Peete* test needs serious work.

2. If the Sixth Circuit Retains the Standard, the Officer's Response Capacity Should be a Question of Law for the Court

Qualified immunity primarily aims to resolve frivolous claims against public officials at summary judgment in order to prevent burdensome excessive social costs to both the officials and society.¹⁰¹ So, qualified immunity is a question of law that a judge typically resolves before trial.¹⁰² But, in cases like *McKenna*, where the outcome turns on disputed factual testimony, the Supreme Court's qualified immunity framework requires taking the facts in the light most favorable to the plaintiff, and summary judgment is precluded.¹⁰³ In these situations, the jury ultimately determines qualified immunity. Here, the qualified immunity issue becomes a mixed question of law and fact.¹⁰⁴ Mixed questions of law and fact are best thought of as lying on a continuum, with some questions lying closer to the

¹⁰⁰ See *supra* Part IV.

¹⁰¹ *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) ("At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing social issues, and the deterrence of able citizens from acceptance of public office.").

¹⁰² Chen, *supra* note 38, at 4; *Harlow*, 457 U.S. at 818 ("On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.").

¹⁰³ FED. R. CIV. P. 56(c); see also *Saucier v. Katz*, 533 U.S. 194, 201 (2001) ("A court required to rule upon qualified immunity must consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?").

¹⁰⁴ Professor Alan Chen does an excellent job describing the "continuum" that exists between questions of law and questions of fact:

Rather than following a strict dichotomy, a continuum exists between "pure" questions of law at one extreme and questions of "historical" fact at the other. Courts can resolve pure questions of law by the application of legal principles to a set of undisputed facts. For example, issues involving the meaning of a particular word in a statute or the Constitution are legal issues. If no disputed facts exist, the assessment of whether a necessary element of a claim or defense has been met is a purely legal one. In contrast, a "historical" fact is a "thing done, an action performed, or an event or occurrence," such as a trigger pulled, a fist swung, or a word spoken. The trier of fact has the responsibility of resolving disputes over historical facts, or concerning reasonable inferences to be drawn from such facts.

Chen, *supra* note 38, at 88.

legal side of the continuum and others lying closer to the factual side of the continuum.¹⁰⁵

In his seminal work on facts and summary judgment, Judge William Schwarzer attempts to guide courts along that continuum. He identifies a particular type of mixed question of law and fact called the “ultimate fact.”¹⁰⁶ “Ultimate facts” require the resolution of certain historical facts, but have a “decidedly more law-like aspect to them.”¹⁰⁷ Ultimate facts are “derived by reasoning or inference from evidence, but, like issues of law, they incorporate legal principles . . . that give them independent legal significance. . . . Ultimate facts can be more ‘factual’ (e.g., whether a driver . . . negligently operated an automobile), or more ‘legal’ (e.g., whether a defamation plaintiff is a public figure for First Amendment purposes).”¹⁰⁸ Ultimate facts may lie on either side of the continuum (i.e., more factual or more legal).¹⁰⁹

The determination of what side of that continuum a particular ultimate fact lies on is important because it serves a “functional purpose.”¹¹⁰ That is, if the proper answer mandates “‘an assessment of human behavior and expectations within the common experience’ of the average person,”¹¹¹ then the ultimate fact is on the continuum’s factual side, and the jury should resolve it. On the other hand, if the ultimate fact question “relate[s] to matters of law and policy and disputes involving technical issues,”¹¹² then the judge should resolve it as a matter of law because “[t]he administration of the rules under which they arise benefits from consistency, uniformity, and predictability.”¹¹³ In sum, trained judges, not juries, should resolve those ultimate facts that are more legal in nature to promote consistent outcomes in similar cases.¹¹⁴

The ultimate fact under the medical emergency-law enforcement standard, the determination of what capacity the officer responded in, lies on the legal side of the continuum and should be resolved by a judge. The Sixth Circuit rejected this approach in *McKenna* by deferring to the jury’s verdict on appeal.¹¹⁵ The court drew a facially appealing analogy to negligence law and asserted, “juries are often asked to go beyond the finding of historical facts and to make objective

¹⁰⁵ *See id.*

¹⁰⁶ *Id.* at 89.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 89 (citing William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 456-57 (1992)).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *McKenna v. Edgell*, 617 F.3d 432, 442-43 (2010) (“Were we to determine this issue, we would simply be substituting our judgment about the overall character of a set of facts for that of the jury.”).

characterizations.”¹¹⁶ It acknowledged that leaving the issue to the jury would lead to varied results, but noted that this result did not differ from other objective characterizations left to the jury (e.g., negligence).¹¹⁷ The majority then cautioned that it retained the authority to make a determination as a matter of law when “a reasonable jury could come to but one conclusion.”¹¹⁸

This deference to the jury on the ultimate fact determination of response capacity fails to uphold three of qualified immunity’s explicit policy goals.

First, under qualified immunity, basic notions of fairness mandate that public officials should not be held personally liable for every constitutional violation.¹¹⁹ Members of the general public, who ultimately comprise the jury, tend to stigmatize police officers as untrustworthy, inept, or corrupt.¹²⁰ The *Peete* standard is in its infancy, and any empirical data reflecting how juries will find on the medical-law enforcement question is lacking. So the argument here is purely hypothetical. The argument, however, is rooted in our common experience. If the court leaves the medical response-law enforcement issue to the jury, juries (composed of common people who tend to distrust law enforcement and authority) are more likely than not to view police officers acting in “gray area” factual circumstances like *McKenna* with the suspicion of law enforcement. This hypothetical scenario will potentially expose police officers to unfair liability in situations where a court could hold that as a matter of law, the police officer acted in a medical emergency capacity.

Second, that potential unfair exposure to liability could cause police officers to “pull their punches” and refrain from performing their duties with zeal.¹²¹ Qualified immunity aims to avoid precisely this result. If an officer responding to a medical

¹¹⁶ *Id.* at 442.

¹¹⁷ *Id.* at 443.

¹¹⁸ *Id.*

¹¹⁹ Chen, *supra* note 38, at 2. See also *Wood v. Strickland*, 420 U.S. 308, 319 (1975) (“Liability for damages for every action which is found subsequently to have been violative of . . . constitutional rights . . . would unfairly impose upon [the official] the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties.”).

¹²⁰ See, e.g., Mary Pieper, *Some Crime Victims Fear Retaliation, Distrust Police*, GLOBE GAZETTE (Mason City, Iowa), May 27, 2010, http://www.globegazette.com/news/local/article_3abeda64-69e6-11df-8582-001cc4c002e0.html; *1 Year Later: Less Crime, More Mistrust*, AUSTIN NEWS, May 12, 2010, available at <http://www.kxan.com/dpp/news/kxan-1-yr-after-officer-involved-nathaniel-sanders-shooting>; Anne Michaud, *NY Cops Biased, Crain’s Poll Finds Minorities Treated Differently; Overall, City Supports NYPD*, CRAIN’S NEW YORK BUSINESS, Apr. 8, 2007, available at http://www.charneyresearch.com/2007Apr8_Crains_NYCopsBiased.htm (noting that 45% of New Yorkers believe police are too aggressive); see also Rosen, *supra* note 35, at 140 (noting that police officers labor under a “growing movement” of “depolicing,” where government decreases its support for police officers as a result of growing popular discontent towards police departments and their personnel”).

¹²¹ The National Association of Police Organizations asserts that the threat of a trial negatively impacts officers’ conduct in a grave manner. Rosen, *supra* note 35, at 145 (citing Brief of Amicus Curiae National Ass’n of Police Organizations & National Law Enforcement Officers’ Rights Center, in Support of the Petitioner at 2, *Saucier v. Katz*, 533 U.S. 194 (2001) (No. 99-1977)).

call knows that any potential treatment or action could lead to a jury finding he acted in a law enforcement capacity, he may elect to simply do the bare minimum until trained medical personnel arrive. Picture Officers Edgell and Hesnowetz arriving in McKenna's bedroom to find him unconscious or incapacitated. If the officers knew then what they know now, that a jury will make the complex determination of their response capacity, perhaps they will think it more prudent to secure the scene and wait for properly trained medical personnel. Instead of trying to rouse the patient, which can lead to aggression, the officers may avoid creating any trouble for themselves. Perhaps because of this caution, the officers neglect to perform basic CPR, and Mr. McKenna's airway becomes blocked. As a result, he dies. Qualified immunity discourages this type of fatal inertia. It intends to ensure that the public is amply protected by officials who can zealously perform their duties without fear of reprisal for reasonable mistakes. Officials will be far more likely to act in these "gray areas" if they know their fate is in the hands of a legally trained judge who is well versed in the policies underlying the law.

Third, and most crucially, leaving the determination of the "ultimate fact" of response capacity to the jury undermines the dominant contemporary justification for qualified immunity, which is to reduce the social costs of litigation against public officials by allowing judges to dispose of suits at the summary judgment stage.¹²² Put simply, compelling reasons support giving a judge the power to rule as a matter of law on the officer's response capacity. These compelling reasons square with general principles of tort law and common sense.

Lawsuits against public officials for deprivations of constitutional rights sound in tort law. Although tort law often leaves dispositive issues to the jury (e.g., whether a defendant was negligent),¹²³ tort law leaves some issues to the court. The determination of whether an activity is abnormally dangerous for the purposes of strict tort liability, for instance, is a question of law for the judge to decide.¹²⁴ That determination is left to the court because it is "no part of the province of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend [is abnormally dangerous]."¹²⁵ In other words, the judge makes the determination because she can best evaluate the policy consequences of finding a given activity to be abnormally dangerous. Recall again that under Schwarzer's dichotomy, a judge resolves ultimate facts implicating "matters of law and policy" in order to maintain predictability and consistency.¹²⁶

A judge should determine the officer's response capacity because the issue implicates matters of law and policy. No rational basis justifies allowing a jury to

¹²² Indeed, the Supreme Court has made the social cost reduction rationale the primary policy justification for qualified immunity. See *Saucier*, 533 U.S. at 200 ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive."); see also *Chen*, *supra* note 38, at 4.

¹²³ See, e.g., RESTATEMENT (SECOND) OF TORTS § 520 cmt. 1 (1977) ("Whether the . . . defendant . . . has been negligent is ordinarily an issue to be left to the jury.")

¹²⁴ *Id.* ("Whether the activity is an abnormally dangerous one is to be determined by the court. . .").

¹²⁵ *Id.*

¹²⁶ *Chen*, *supra* note 38, at 89.

make this crucial determination in qualified immunity suits in the Sixth Circuit. Requiring a judge to decide whether an activity is abnormally dangerous as a matter of law protects important economic and public interests from sympathetic, overzealous juries.¹²⁷ Similarly, a judge evaluating qualified immunity under facts that implicate the medical emergency-law enforcement standard should decide as a matter of law what capacity the officer responded in in order to protect the public's interest in effective law enforcement.

Judges can decide the issue based on an impartial balancing of the facts with qualified immunity's policies. Judges will better recognize the need to promote qualified immunity's policies.¹²⁸ Specifically, they will recognize that consistency in outcomes will encourage officers to do all in their power when responding to a medical emergency. The judge's superior ability to marshal precedents and legal concepts will promote fairness and consistency under the *Peete* test. Most importantly, the judge's determining the issue at the outset will decrease the social costs of litigation.¹²⁹ On one hand, if the officers did act in a medical emergency capacity, summary judgment will more likely follow; on the other hand, if the officers are found to have acted in a law enforcement capacity, then precious resources and time need not be wasted at the trial on what should be a threshold issue.

In *McKenna*, the majority's reasons for its refusing to make the officer's response capacity a matter of law fail to persuade. First, the court asserted that judges do not have "any unique experience or expertise" that would make them superior to the jury in evaluating an officer's response capacity.¹³⁰ Granted, judges, like juries, lack expertise in proper medical protocol. But, they do have superior legal abilities. Those legal abilities will empower the judge to make rulings based on sophisticated policy considerations that a jury cannot consider. Here again, the abnormally dangerous activity analogy further weakens the majority's self-deprecating analysis. Judges are tasked with weighing social and scientific policy considerations¹³¹ against the damage that the activity is causing and asked to rule on the issue as a matter of law. Judges typically do not have any special scientific or economic skills that make them better suited than the jury to weigh these factors. Yet, policy considerations demand a judge's impartiality and analytical sophistication in order to promote consistent, sensible outcomes so that tort law does not overburden socially valuable activities.

Here too, important policy considerations demand a judge's trained reasoning to promote socially valuable law enforcement activity. Indeed, judges are actually logically intended to deal with this issue even more so than the abnormally dangerous activity issue. Suits against public officials generally arise from alleged

¹²⁷ On this point, see RESTATEMENT (SECOND) OF TORTS § 520 cmt. 1 (1977).

¹²⁸ See *supra* Part II.B.

¹²⁹ Again, this point is most crucial because the social cost reduction rationale is now the dominant contemporary justification for qualified immunity. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

¹³⁰ *McKenna v. Edgell*, 617 F.3d 432, 442 (6th Cir. 2010).

¹³¹ For instance, judges will consider evidence of the damage the activity causes the community, the usefulness of the activity to the community, the extent to which the activity is customarily carried out in the community, and other factors.

deprivations of constitutional rights. Presumably, judges are far more competent than the jury to apply constitutional principles and policies to a set of given facts. The judge's expertise in applying the relevant constitutional principles (e.g., the standards for unreasonable search and seizures under the Fourth Amendment) to alleged constitutional violations ensures the judge will make a far more nuanced, objective evaluation of the officer's conduct against the backdrop of proper constitutional standards. In sum, contrary to *McKenna's* assertion, judges have substantially superior ability to resolve the medical emergency-law enforcement issue as a matter of law before the case goes to trial.

The Sixth Circuit improperly places the response capacity issue too far along the "factual" side of Schwarzer's continuum.¹³² It gives far too much power and deference to the jury on a question that a judge should answer as a matter of law. If the Sixth Circuit continues to apply the *Peete* medical emergency-law enforcement standard, it should apply a *de novo* standard of review to the officer's response capacity to resolve the qualified immunity inquiry. This standard could help ensure that arbitrary results, like *McKenna*, get overruled as a matter of law. Judge Rogers took this position in his *McKenna* dissent.¹³³ *De novo* review alone, however, is not enough. In order to eliminate the problems discussed above, the Sixth Circuit should also guide the confused lower courts and unequivocally hold that the medical emergency-law enforcement issue is a question of law for the court, rather than the jury. In sum, in order to preserve any fairness or logic left under the Sixth Circuit's questionable test, the court must entrust judges to resolve the issue based on qualified immunity's underlying policy and fairness considerations.

IV. IS QUALIFIED IMMUNITY THE PROBLEM? A RESPONSE TO THE DOCTRINE'S CRITICS¹³⁴

Scholars have roundly criticized the Supreme Court's qualified immunity framework under *Harlow* and its progeny.¹³⁵ Professor Alan Chen, a renowned critic of qualified immunity law, argues that the current approach is problematic because the defense's main goal of resolving claims early cannot be reconciled with the inherently fact-intensive inquiry the defense's framework demands.¹³⁶ Indeed, Chen argues that qualified immunity is fundamentally incompatible with summary judgment, "[t]he principal, but surprisingly unrecognized, doctrinal consequence of the Court's current approach is that the factual aspect has made qualified immunity

¹³² See Schwarzer, *supra* note 108.

¹³³ *McKenna*, 617 F.3d at 447 (Rogers, J., dissenting) ("Here, the relevant standard concerns whether the officers acted as law enforcement officers or as emergency medical responders, and this court must therefore review the answer to this question *de novo*.").

¹³⁴ This section of the Note primarily focuses on the hypothetical arguments Professor Alan K. Chen might make in favor of the Sixth Circuit's qualified immunity jurisprudence. The arguments are purely hypothetical and should not be construed to represent Chen's actual views. The arguments are hypothetical because as of this writing, Professor Chen had not responded to a request for comment on the Sixth Circuit developments.

¹³⁵ See, e.g., Chen *supra* note 38; Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L. J. 229 (2006); Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583 (1983).

¹³⁶ Chen, *supra* note 38, at 6-8.

conceptually irreconcilable with traditional summary judgment doctrine.”¹³⁷ The ideas and critiques at the heart of Chen’s scholarship may have inspired the Sixth Circuit to run roughshod over the Supreme Court’s qualified immunity framework. This section of the Note highlights Chen’s ideas, identifies how they may have inspired the Sixth Circuit’s medical emergency-law enforcement standard, and shows why his discounting the positive effects the current doctrine has on public officials is flawed.

Chen would assert that the Sixth Circuit’s medical emergency-law enforcement standard results from qualified immunity’s irreconcilable paradox between facts and summary judgment.¹³⁸ He notes the upshot of this paradox, “what may be occurring . . . is that federal courts now view entitlement to qualified immunity not as a pure matter of law, but as a question of ‘ultimate fact.’”¹³⁹ Chen would argue that because the “substantial factual component” in qualified immunity analysis has prohibited the lower courts from establishing a coherent analytical approach, the Sixth Circuit’s adding the medical emergency-law enforcement capacity wrinkle to its qualified immunity inquiry is unsurprising.¹⁴⁰ Chen ultimately concludes that since qualified immunity and summary judgment are fundamentally incompatible, qualified immunity should be treated as a defense “on the merits” that should be asserted at trial, rather than in pre-trial motions.¹⁴¹ Furthermore, Chen argues that qualified immunity’s fact-intensive nature and open-ended reasonableness standard not only fail to reduce social costs associated with litigation, but they also generate the “secondary social costs” of litigating the defense itself at the summary judgment stage.¹⁴²

Given those arguments, Chen would likely endorse the Sixth Circuit’s attempt to distill qualified immunity into a more nuanced, fact-based inquiry. Since the Sixth Circuit expressly endorsed sending the medical emergency-law enforcement issue to the jury,¹⁴³ Chen would argue that the doctrine and others like it will shift the qualified immunity issue to what he views as the proper place, the trial.¹⁴⁴ Chen’s scholarship indicates that he would reject the policy arguments advanced in this Note that would encourage judges to rule on the medical response-law enforcement

¹³⁷ *Id.* at 69. See also *id.* at 72 (“[S]o long as it remains ‘qualified,’ or fact-dependent, [qualified] immunity can never be entirely successful . . . in acting as a barrier to trial or pretrial discovery.”).

¹³⁸ *Id.* at 72.

¹³⁹ *Id.* at 88. For a detailed discussion of Judge Schwarzer’s “ultimate fact” regime, see *supra* Part III.B.2; see also Schwarzer, *supra* note 108.

¹⁴⁰ See Chen, *supra* note 38, at 79.

¹⁴¹ *Id.* at 31. In particular, Chen advocates the defense on the merits approach in his so-called “I didn’t do it” situations, where the entitlement to qualified immunity turns on which version of the facts the jury accepts. In other words, when the question of whether entitlement to qualified immunity is clearly proper or improper turns on which version of disputed facts the jury wishes to accept, the judge would have little or no role in making a legal judgment at the summary judgment stage.

¹⁴² *Id.* at 98-99.

¹⁴³ *McKenna v. Edgell*, 617 F.3d 432, 443 (6th Cir. 2010).

¹⁴⁴ See Chen, *supra* note 38, at 31.

standard as a matter of law. Indeed, he generally asserts that constitutional rights rarely become strict questions of law, “[t]he only context in which the issue of the clearly established nature of the legal rights at stake can be considered to be a pure question of law is when the Court truly breaks new ground and develops, in common-law fashion, an entirely new constitutional doctrine.”¹⁴⁵ He would likely agree with the *McKenna* majority that if judges decided the issue, they would merely “substi[tute] [their] judgment about the overall character of a set of facts for that of the jury.”¹⁴⁶ The Sixth Circuit, then, seems to have either been influenced by Chen’s ideas or to have shared his general concerns about the role of facts and the jury in resolving qualified immunity.¹⁴⁷

Chen’s and the Sixth Circuit’s arguments to support an increased role of the factfinder in qualified immunity analysis do not lack merit, but Chen himself concedes that the assertions lack empirical support.¹⁴⁸ He also couches that concession by noting that arguments favoring the present doctrine also lack empirical support.¹⁴⁹ Here, Chen goes too far. Although critics and advocates alike lament the lack of empirical data on qualified immunity,¹⁵⁰ empirical data exists that at a minimum demonstrates the need for preemptive deterrence that qualified immunity in its present (or a very similar) form provides. For example, the increase in unsuccessful lawsuits against police officers demonstrates the growing public distrust towards police officers. In 1981, California residents placed 8,686 complaints against police, and only 18% (1,552) of those complaints were sustained.¹⁵¹ In 2000, the trend worsened, as residents filed 23,395 complaints against police officers, and only 10% (2,395) of those complaints were sustained.¹⁵²

These statistics alone do not tell us much about qualified immunity’s effectiveness, but they do allow one to infer that restricting qualified immunity with artificial tests, like the *Peete* test, will only serve to deter litigation-weary officers further. To be sure, qualified immunity in its present form is an imperfect doctrine. In this regard, it differs little from any other legal doctrine that produces varied results. Chen might argue that the *Peete* test is laudable because it discourages the “secondary social costs” of “try[ing] the case twice” by forcing counsel to litigate the

¹⁴⁵ *Id.* at 42.

¹⁴⁶ *McKenna*, 617 F.3d at 443.

¹⁴⁷ *See, e.g., id.* at 442 (“The law enforcement/medical-emergency responder distinction matters only in the narrow class of cases in which *Peete* might bar suit. And while this question involves more than determining what acts took place, juries are often asked to go beyond the finding of historical facts and to make objective characterizations in their role as factfinders.”).

¹⁴⁸ Chen, *supra* note 38, at 102 (“Unfortunately, this is all speculation . . . there is no empirical foundation for the advocates of the present qualified immunity doctrine or its critics.”).

¹⁴⁹ *Id.*

¹⁵⁰ *See id.*; *see also Rosen, supra* note 35, at 151 n.79.

¹⁵¹ Rosen, *supra* note 35, at 149 (citing 2000 CAL. ST. ATT’Y GEN. OFF., CRIME & DELINQ. ANN. REP., Table 56, available at <http://caag.state.ca.us/cjsc/publications/candd/cd00/odb.pdf>).

¹⁵² *Id.*

defense at the summary judgment stage.¹⁵³ This argument, however, fails to credit qualified immunity's careful balance between entitling legitimate plaintiffs to redress and preserving the effectiveness of law enforcement.¹⁵⁴

To strike this balance, qualified immunity entitles the defendant to summary judgment only if the judge, viewing the facts in the light most favorable to the plaintiff, concludes no constitutional violation occurred.¹⁵⁵ In essence, a summary judgment hearing on qualified immunity ends in one of three ways: (1) The plaintiff's facts show that the officer's conduct did not violate a constitutional right, and the case ends under *Saucier's* first prong; (2) The plaintiff's facts show that a constitutional violation occurred, no "clearly established law" governed the officer's conduct, and the case ends under *Saucier's* second prong; or (3) The disputed facts would either establish or refute that the officer committed a constitutional violation of a clearly established law, and the court will deny summary judgment.¹⁵⁶ The upshot of this trio is that a "savvy plaintiff" has "every incentive to claim . . . exaggeratedly egregious behavior in order to clear summary judgment."¹⁵⁷ In other words, legitimate constitutional tort plaintiffs should have no trouble defeating summary judgment at minimal cost under the current standard. Similarly, even plaintiffs with arguably frivolous claims can defeat summary judgment by pleading exaggerated facts or omitting facts showing the officers acted reasonably from the pleadings. In either scenario, Chen's concern that litigating the defense creates substantial secondary costs seems illusory, or at least exaggerated. Chen's lack of empirical evidence supports this conclusion. In sum, Chen unfairly discounts qualified immunity's deterrent effects, and his hypothetical support of the *Peete* test would not carry empirical weight.

V. CONCLUSION

Qualified immunity's forgiving standard leaves little doubt that the *Peete* test is unnecessary, because current qualified immunity doctrine achieves its balancing purpose by permitting meritorious claims to go forward and prohibiting frivolous claims from doing so. To be sure, qualified immunity has its shortcomings. Even advocates of the current doctrine have suggested changes, like a restricted discovery at the motion stage to help the judge resolve factual issues bearing on the legal prong of the analysis.¹⁵⁸ But, to establish a wholesale, ill-defined innovation of the doctrine

¹⁵³ See *id.* at 150-51.

¹⁵⁴ *Id.* at 151.

¹⁵⁵ David J. Ignall, *Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact*, 30 CAL. W. L. REV. 201, 202-03 (1994).

¹⁵⁶ Rosen, *supra* note 35, at 155-56.

¹⁵⁷ *Id.* at 161.

¹⁵⁸ Rosen, *supra* note 35, at 163-67. Rosen suggests permitting discovery of materials like the regulations available to the officer at the time of the incident, limited interrogatories, and discovery into the practices the police department employs to give relevant legal information to its officers. These would establish whether a law was clearly established. He also suggests that plaintiffs should be allowed to introduce limited affidavits and eyewitness testimony to establish the nature of the officer's conduct. See also *Anderson v. Creighton*, 483 U.S. 635, 646 n. 6 (1987) (noting that where the facts are disputed, discovery specially tailored to the qualified immunity question might be necessary before the motion can be adjudicated).

that applies whenever an officer responds to a medical emergency opens a proverbial gaping wound where a small bandage would suffice. Furthermore, if such small improvements are made to qualified immunity, the Sixth Circuit and other lower courts should wait for the Supreme Court to make them. If the lower federal courts were to continue making *Peete*-type innovations, qualified immunity would be thrown into a hapless state of inconsistency in the courts. Constitutional tort plaintiffs and officers alike stand to suffer significantly if the law falls into such an inconsistent state.

Qualified immunity as it currently stands effectively accomplishes its goals of giving plaintiffs right to redress for legitimate constitutional violations, insulating officers from crippling liability in unfair circumstances, and ensuring that society and officers do not have to bear excessive social costs from frivolous litigation. The complex relationship between facts and the relevant constitutional legal principles demand courts take steps to resolve the issue as a matter of law wherever possible. The current doctrine permits this outcome in many scenarios. The *Peete* test and similar innovations, however, do not. They take too much power away from judges skilled in resolving decidedly legal questions. Such a usurping threatens to undermine the very policies qualified immunity intends to support.

