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WHAT'S WRONG WITH QUALIFIED IMMUNITY?

John C. Jeffries, Jr.[*]

I. WHAT IS "QUALIFIED IMMUNITY?"

Qualified immunity protects government officers from damages liability for violating constitutional rights. It does not constrain injunctions, exclusion of evidence, or the defensive assertion of rights in government enforcement proceedings.[1] Nor does it apply to all damage actions. Officers performing legislative, judicial, and certain prosecutorial functions have absolute immunity from the award of money damages.[2] At the other extreme, local governments, which can be sued only for constitutional violations committed pursuant to official policy or custom,[3] have no immunity at all for such violations.[4] But executive officers—including law enforcement officers of all sorts, prison guards, school officials, health care providers, welfare administrators, and government employers—generally enjoy qualified immunity from the award of money damages. That is true both for state and local officers sued under 42 U.S.C. § 1983 and for federal officers sued under the analogous common-law remedy of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[5] Qualified

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1. *See generally* John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CAL. L. REV. 1387 (2007).

2. *See* Imbler v. Pachtman, 424 U.S. 409, 430 (1976) (recognizing absolute immunity for those prosecutorial acts "intimately associated with the judicial phase of the criminal process"); Pierson v. Ray, 386 U.S. 547, 553–55 (1967) (recognizing absolute immunity for judicial acts); Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (recognizing absolute immunity for legislative acts).

3. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978) (holding localities liable for official policy or custom).

4. Owen v. City of Independence, 445 U.S. 622, 638 (1980) (declaring no immunity for local governments).

5. 403 U.S. 388, 397 (1971) (authorizing damages actions for illegal search and seizure by

immunity is thus the most important doctrine in the law of constitutional torts. It states the general liability rule for damage actions seeking to vindicate constitutional rights.

So what is "qualified immunity"? Qualified immunity is the doctrine that precludes damages unless a defendant has violated "*clearly established*" constitutional rights.[6] More fully, damages are barred if "a reasonable officer could have believed" his or her actions to be lawful "in light of clearly established law."[7] This sounds simple enough, and there is every reason to suppose that the Supreme Court originally thought it so. Indeed, at one time, qualified immunity had two prongs: an objective requirement of reasonable grounds for believing one's conduct lawful and a subjective requirement of actual good-faith belief in the legality of that conduct.[8] The subjective branch proved troublesome. Given the broad discovery standards in civil litigation, plaintiffs could rummage around in a defendant's background to find evidence suggestive of malice or bad faith. Accordingly, the Supreme Court lopped off the subjective branch, leaving only the requirement of "objective reasonableness of an official's conduct, as measured by reference to clearly established law."[9] Though conceptually amputated, the resulting doctrine was justified precisely on the ground that the pared-down focus on "clearly established" rights could be easily administered, usually on pre-trial motion.

The Supreme Court's effort to have more immunity determinations resolved on summary judgment or a motion to dismiss—in other words, to create immunity from *trial* as well as from *liability*[10]—has been largely successful.[11] Ease of administration has proved more elusive. In fact, determining whether an officer violated "clearly established" law has proved to be a mare's nest of complexity and confusion. The circuits vary widely in approach, which is not surprising given the conflicting signals from the Supreme Court. The instability has been so persistent and so pronounced that one expert describes qualified immunity as existing "in a perpetual state of crisis."[12]

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federal officers).

6. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added).

7. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

8. Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) (generalizing the defense of "good faith and probable cause" recognized in *Pierson v. Ray*, 386 U.S. 547, 557 (1967)).

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

10. *Cf.* Mitchell v. Forsyth, 472 U.S. 511, 525 (1985) (characterizing qualified immunity for purposes of interlocutory appeal as "an entitlement not to stand trial under certain circumstances").

11. That is not to suggest that it has been uncontroversial. For criticism of the Court's effort to secure pre-trial resolution and the conflict with the usual goal of adjudication on fully developed facts, see generally Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229 (2006).

12. Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155, 1155 (2005); *accord* Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000) ("Wading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate

One can gather some sense of the depth of the problem from the complexity of the efforts to resolve it. A good example comes from the Eleventh Circuit. After a 2002 course correction by the Supreme Court,[13] the Eleventh Circuit reformulated its approach into a three-stage inquiry that categorizes conduct based on its relation to precedent.[14] First is a category of "obvious clarity," in which the relevant constitutional provision is "so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful."[15] The Eleventh Circuit insists that "obvious clarity" must be based specifically on the *words* of the law in question, though one may wonder whether there are any constitutional provisions whose text is quite that clear. This category may be a nearly empty set. For a second category of cases, the court turns to "broad statements of principle [that] are not tied to particularized facts."[16] Such broad, categorical pronouncements can create "clearly established" law for "a wide variety of later factual circumstances."[17] In the third, and by far the largest, category, the court looks for "precedent *that is tied to the facts*."[18] For precedents in this category, the question is whether the instant case is "fairly distinguishable."[19] If so, the law is unclear, and qualified immunity is upheld. If not, the law is "clearly established," and qualified immunity is denied.

In my view, the Eleventh Circuit's current blueprint for identifying "clearly established" law is one of the best of several such attempts.[20] Others are even more elaborate.[21] Still, one cannot help but notice the complexity of this edifice. There are three categories of "clearly established" law. None is self-executing. Indeed, all require evaluative judgments—including, for example, just how textually specific "obvious clarity" must be; whether pronouncements of broad principle are or are not deemed tied to particular facts; and whether a precedent found to be

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court judges routinely face.").

13. Hope v. Pelzer, 536 U.S. 730, 735–36, 744, 748 (2002) (rejecting the Eleventh Circuit's prior approach of requiring a "materially similar" precedent to create "clearly established law").

14. Vinyard v. Wilson, 311 F.3d 1340, 1350–51 (11th Cir. 2002).

15. *Id.* at 1350.

16. *Id.* at 1351.

17. *Id.*

18. *Id.*

19. *Id.* at 1352.

20. Karen Blum, an acknowledged expert in the field, has expressed a similar opinion. *See* Erwin Chemerinsky & Karen M. Blum, *Fourth Amendment Stops, Arrests and Searches in the Context of Qualified Immunity*, 25 TOURO L. REV. 781, 791–92 (2009) (describing *Vinyard* as a "very good structure for deciding when the law is clearly established").

21. *See, e.g.*, Brown v. Muhlenberg Twp., 269 F.3d 205, 220 (3d Cir. 2007) (Garth, J., concurring in part and dissenting in part) (suggesting a four-factor analysis for determining whether rights are clearly established); Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1055–62 (2005) (proposing a five-part procedure for answering that question).

factually grounded is or is not "fairly distinguishable" from the case at hand. Anyone who has survived the first year of law school knows that none of these questions is easy. The cumulation of debatability as one moves through these questions means that even this well-crafted test for "clearly established" law will be fodder for argument, unclear in application, and unsuccessful in predicting results.

II. THE PROBLEMS WITH QUALIFIED IMMUNITY

So what exactly is wrong with qualified immunity? What makes it so difficult? Why is the search for "clearly established" law a source of so much confusion and instability, rather than the straightforward, easy-to-apply standard that the Supreme Court originally envisioned? There are at least three problems. The first is the level of generality at which "clearly established" is assessed. The second is the question of which courts count in determining whether a right is "clearly established." And the third is a dysfunctional interaction between the law of qualified immunity, as currently stated, and the content of certain constitutional rights. Each of these issues is examined below and illustrated through decided cases—some of which require fairly full description. Only by looking at the doctrine in application can one see just how problematic qualified immunity has become.

A. *Generality*

The problem of generality—or, if you prefer, altitude—concerns the level of abstraction at which "clearly established" is assessed. When the Supreme Court first spoke on this point, it seemed to require that the law be clearly established on the ground—that is, at a level of specificity that would give practical guidance to a street-level official. Thus, in *Anderson v. Creighton*, the Court rejected abstract formulations, noting "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[22] This is the language of legal realism, presupposing that the application of general principles to particular facts is not known until a court has spoken. That may be true. But the fact-specific, on-the-ground approach does not mesh with the rhetoric of constitutional law or with the antecedent methodology of the common law. Only rarely—*Brown v. Board of Education*,[23] *Miranda v. Arizona*,[24] *Roe v. Wade*[25]—does the Supreme Court say something

22. Anderson v. Creighton, 483 U.S. 635, 640 (1987).
23. 347 U.S. 483 (1954).
24. 384 U.S. 436 (1966).
25. 410 U.S. 113 (1973).

completely new. More commonly, the Court's opinions look backward to prior decisions through the mediation of general principles. Specific rulings are typically described as being implicit in the propositions laid down in earlier cases. This rhetorical posture follows the methodology of the common law, which reasons analogically from prior decisions and (to an extent) necessarily generalizes their holdings. Thus, despite the Court's injunction to look for "clearly established" law in a "more particularized" sense, it is natural for lawyers and judges to find meaning and guidance in generalizations drawn from prior decisions.[26]

The level of generality is crucially important. A couple of examples will show just how radically the altitude of analysis can affect results. At one extreme is *Callahan v. Millard County*,[27] a Tenth Circuit decision reviewed by the Supreme Court under the name of *Pearson v. Callahan*.[28] At issue was the validity of "consent once removed" to justify the warrantless search of a home. The question arises when an undercover agent posing as a drug user is invited into a dealer's home to make a purchase. Entry is lawful because of consent. Once inside, the agent sees illegal drugs, which furnishes probable cause for arrest. The trouble is that the undercover agent cannot safely make the arrest alone, so he completes the purchase, then calls on officers waiting outside to enter the dealer's home and arrest him. The consent given to the undercover agent is deemed transferred to the waiting officers, hence "consent once removed."

When a panel of the Tenth Circuit considered this theory, there was no local precedent on point. There were, however, decisions from other circuits upholding such searches[29] and no authority directly to the contrary. The Tenth Circuit ruled the search illegal, apparently because the undercover agent was a civilian informant rather than a police officer.[30] The Tenth Circuit also ruled that the defendants lacked qualified immunity and thus had to pay damages to the drug dealer, despite the judicial

26. For insightful exploration of the jurisprudential dimensions of finding "clearly established" law, see generally Saiman, *supra* note 12.

27. 494 F.3d 891 (10th Cir. 2007).

28. 129 S. Ct. 808 (2009). The Supreme Court decision is discussed in John M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139 and John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115.

29. *See, e.g.*, United States v. Pollard, 215 F.3d 643, 648–49 (6th Cir. 2000) (justifying police entry once the defendant "admitted [an] undercover officer and informant" who established probable cause); United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996) (invoking consent-once-removed "where an undercover agent is invited into a home, establishes the existence of probable cause to arrest or search, and immediately summons help from other officers"); United States v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987) (applying the doctrine "where the agent (or informant) entered at the express invitation of someone with authority to consent, at that point established . . . probable cause . . . and immediately summoned help from other officers").

30. It is not clear why that should matter, but the merits of the Fourth Amendment ruling are not the issue here.

authority declaring such searches legal. The officers, said the court, violated the clearly established "right to be free in one's home from unreasonable searches and arrests."[31]

No wonder the Supreme Court reversed.[32] At the Tenth Circuit's level of generality, *all* rights are clearly established. Lofty abstractions about the "right to be free in one's home from unreasonable searches and arrests" are long-standing and completely familiar. If that is all it takes to make a right clearly established, virtually everything is. If followed generally, this approach would effectively eliminate the defense of qualified immunity from the law of constitutional torts.

At the other extreme are cases finding rights clearly established only when captured in precedent factually on point. A older line of cases from the Eleventh Circuit requiring precedents "materially similar" to the case at hand nicely fits that description,[33] but lest I seem ungrateful to my hosts here in Florida, let me single out for criticism a decision from my own state, the Commonwealth of Virginia. In *Fields v. Prater*,[34] the Fourth Circuit reversed a decision denying qualified immunity to members of the Buchanan County Board of Supervisors. The supervisors were sued for denying employment to the plaintiff on grounds of her political affiliation. The alleged facts—taken as true for the purposes of this decision—were that the plaintiff worked as a social worker and then as the officer manager of the Buchanan County Department of Social Services; that she applied for the position of director of that agency when it became open in 2006; that she was interviewed by a board specially constituted for that purpose; and that the interviewing board ranked her first among seven candidates for that position. Subsequently, the County Board of Supervisors dissolved the interviewing board and appointed their own representatives to fill the vacant post. The new group did not choose the plaintiff, who was a long-time affiliate and supporter of the Republican Party. They chose instead the candidate ranked dead last among the seven original applicants and—no doubt coincidentally—the only candidate actively affiliated with the Democratic Party. The plaintiff alleged that the Democrats on the board had cooked the books to prevent her from being hired in violation of her First Amendment rights.

The Fourth Circuit agreed with the district court that plaintiff's

31. 494 F.3d at 898.

32. 129 S. Ct. at 813.

33. The narrowness of this approach has led some to call the Eleventh Circuit the circuit of "unqualified immunity." *See* Elizabeth J. Norman & Jacob E. Daly, *Statutory Civil Rights*, 53 MERCER L. REV. 1499, 1556 (2002). The most sustained and intense criticism of Eleventh Circuit qualified immunity decisions (through 2002) appears in Mark R. Brown, *The Fall and Rise of Qualified Immunity: From* Hope *to* Harris, 9 NEV. L.J. 185, 197–202 (2008) (discussing cases in which minor factual differences from prior cases precluded liability even in the face of "patent wrongs" and "horrendous facts").

34. 566 F.3d 381 (4th Cir. 2009).

allegations stated a constitutional claim. They could scarcely have done otherwise. The constitutional illegitimacy of partisan political considerations in governmental hiring and firing decisions has been clear for decades.[35] The only question was whether the job plaintiff sought was the type of position (usually called policymaking) for which "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[36] After reviewing Virginia law, the court found that the county director of the social services was not such a job. Policy was set mostly by the state and secondarily by the county board of social services, to which the director reported. The job plaintiff sought, therefore, was an ordinary administrative position to which the constitutional protections against partisan political considerations fully applied.

The Fourth Circuit found, however, that plaintiff's right against political discrimination was not clearly established and that the defendants were, therefore, immune from damages liability. This conclusion flowed from a lack of directly applicable precedent. There was a Fourth Circuit decision saying that Virginia electoral boards could not consult political affiliation in appointing county registrars[37] but nothing dealing directly with Virginia directors of social services. The court, therefore, found that the applicability of First Amendment principles to plaintiff's position was sufficiently unclear to preclude damages liability.

All this sounds plausible enough until one recognizes that state law, which created and defined the position of county director of social services, explicitly required that the position be nonpartisan. Regulations issued by the Virginia State Board of Social Services specified that political affiliation could *not* be considered, a point reiterated in a handbook provided to all county board members by the state. Indeed, the job application completed by the plaintiff and the other candidates carried a prominent declaration that the position was to be filled without regard to political affiliation.[38]

So, we are left to ask, How could county board members *reasonably* have believed that they could "demonstrate that party affiliation is an appropriate requirement"[39] for the director of social services, when they

35. *See* Elrod v. Burns, 427 U.S. 347, 375 (1976) (Stewart, J., concurring) (prohibiting discharge of "nonpolicymaking, nonconfidential government employee" on grounds of political affiliation); Branti v. Finkel, 445 U.S. 507, 517 (1980) (reaffirming and extending *Elrod*); Rutan v. Republican Party of Illinois, 497 U.S. 62, 79 (1990) (making clear that *Elrod* and *Branti* applied to "promotion, transfer, recall, and hiring decisions based on party affiliation and support").

36. *Branti*, 445 U.S. at 518.

37. McConnell v. Adams, 829 F.2d 1319, 1324 (4th Cir. 1987).

38. All this is recounted in *Fields*, 566 F.3d at 386–89, in the context of demonstrating that the position was not one for which partisan political considerations could legitimately be taken into account.

39. *Branti*, 445 U.S. at 518.

had repeatedly and authoritatively been told that it was not? It is true, of course, that the application of First Amendment principles to government employment is a matter of federal law, but it is equally true that the position at issue was created and defined by state law. The federal constitutional prohibition against taking political affiliation into account in filling non-partisan positions was crystal clear, and the state's determination that local social services employees were nonpartisan positions was also crystal clear. Indeed, it was well publicized in the handbook and on the application. How two explicit and unambiguous rules could add up to a lack of clarity remains a mystery. All that was lacking was a prior Fourth Circuit decision saying that two plus two equals four. For the lack of such a precedent, the law was found not "clearly established."

The decision is so grudging that it is difficult not to wonder whether it might have been motivated by hostility to the underlying right, a consideration properly above the pay grade of Fourth Circuit judges. In any event, the Fourth Circuit's demand for precedent precisely on point reduces the search for clearly established law to something like a snipe hunt. When precisely applicable precedent cannot be found, qualified immunity expands beyond all sensible bounds and goes a long way toward disabling the damages remedy for violations of constitutional rights.

B. *Sources of "Clearly Established" Law*

The second problem in ascertaining established law exacerbates the first. Since "clearly established" must be sought in sources more specific than abstract principles, where may such sources be found? The obvious answer is binding precedent—decisions of the Supreme Court, of the U.S. Court of Appeals for the circuit where the issue arose, and of the U.S. district court for cases in that district. But what about the decisions of other circuits? Or other districts? Or those of state courts? In short, what are the sources that count in determining whether a right is "clearly established"?

Not surprisingly, the circuits disagree. The Eleventh Circuit limits the sources of "clearly established" law to decisions of the Supreme Court, of the Eleventh Circuit, and of the highest state court of the jurisdiction.[40] Other circuits are willing to look beyond the law of their circuit, sometimes grudgingly as in the Sixth Circuit,[41] and sometimes quite broadly. The

40. Vinyard v. Wilson, 311 F.3d 1340, 1351 n.22 (11th Cir. 2002) ("'[W]hen case law is needed to 'clearly establish' the law applicable to pertinent circumstances, we look to decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state.'" (quoting Marsh v. Butler County, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001))).

41. *See, e.g.*, Walton v. City of Southfield, 995 F.2d 1331, 1336 (6th Cir. 1993) ("[I]t is only in extraordinary cases that we can look beyond Supreme Court and Sixth Circuit precedent to find 'clearly established law.'").

Ninth Circuit will apparently accept "whatever decisional law is available,"[42] including decisions of other circuits, state courts, district courts, and even unpublished district court opinions.[43] The First, Fifth, Seventh, Eighth, and Tenth Circuits are similarly latitudinarian.[44]

The narrower the category of cases that count, the harder it is to find a clearly established right. Thus, a restrictive approach to relevant precedent beefs up qualified immunity and makes its protections more difficult to penetrate. Under the Eleventh Circuit's approach, a right would have to be squarely established over and over again, in circuit after circuit, before violations could routinely be vindicated by awards of money damages nationwide. In my view, this is too restrictive. When a narrow view of relevant precedent is added to the demand for extreme factual specificity in the guidance those precedents must provide, the search for "clearly established" law becomes increasingly unlikely to succeed, and "qualified" immunity becomes nearly absolute.

C. *The Interaction Between Qualified Immunity and Constitutional Rights*

The third problem is the lack of fit between qualified immunity doctrine and the content of certain rights. I have argued elsewhere that a systemic weakness of constitutional tort doctrine is its attempt to treat all rights the same.[45] In fact, there are significant differences among constitutional rights in structure, aim, and the availability of alternative remedies. It follows that one-size-fits-all often does not fit. Qualified immunity illustrates the point. The search for clearly established law works best for rights stated in relatively specific rules and doctrines. When stable, such doctrines yield clearly established law. When the rules change, the new law is not clearly established—and thus not sufficient to support money damages—until government actors have had the benefit of the clarifying decision.[46] In such areas, the chief effect of qualified immunity is to avoid damages liability for failure to anticipate developments in the law.

Qualified immunity works less well for other rights. It works least well when constitutional doctrine is stated at a very high level of generality

42. Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985).

43. *See, e.g.*, Drummond v. City of Anaheim, 343 F.3d 1052, 1060 (9th Cir. 2003) ("Even 'unpublished decisions of district courts may inform our qualified immunity analysis.'" (quoting Sorrels v. McKee, 290 F.3d 965, 971 (9th Cir. 2002))).

44. *See* Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 125–26 (2009) (reviewing and citing cases from those circuits); Catlett, *supra* note 21, at 1048 (describing the broad approach and citing cases).

45. *See generally* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259 (2000); Jeffries, *supra* note 28.

46. This is the rationale for merits-first adjudication in constitutional tort actions, a point developed at some length in Jeffries, *supra* note 28.

unaccompanied by particularizing doctrine. As applied to those rights, qualified immunity can be analytically troubling. The Eighth Circuit noticed the problem early on in *Anderson v. Creighton*, in which the legality of a warrantless search depended on probable cause and exigent circumstances. The Eighth Circuit denied qualified immunity on the ground that the right against warrantless searches absent exigent circumstances was clearly established.[47] The Supreme Court reversed, stating that the unlawfulness of the officers' conduct had to be clearly established at a "more particularized, and hence more relevant sense."[48] In dissent, Justices John Paul Stevens, William J. Brennan, and Thurgood Marshall objected to the "double standard of reasonableness" in applying qualified immunity to Fourth Amendment claims.[49] Allowance for reasonable error was already built into the underlying constitutional standard because probable cause depends on what the officers reasonably believed about the facts before them. Allowing the officers to invoke reasonableness again in claiming qualified immunity "'if they reasonably (though erroneously) believed that they were acting reasonably is to confuse the jury and give the defendants two bites at the apple.'"[50]

Despite its oxymoronishness (to coin a word), reasonably unreasonable[51] behavior is not an empty concept. As Justice Antonin Scalia pointed out,[52] it is analytically possible to be reasonably mistaken about any legal standard, even one couched in terms of reasonableness. The point would be easy to see, Scalia noted, if the Fourth Amendment had used a different word, such as forbidding "undue" searches and seizures.[53]

There is certainly no logical contradiction in asking whether an officer could be reasonably mistaken in thinking that a search was or was not undue. If that were a close call, a mistake could be reasonable.

Yet despite the fact that there is nothing conceptually impossible about applying qualified immunity to constitutional claims based on

47. Anderson v. Creighton, 483 U.S. 635, 637–38 (1987), *rev'g* Creighton v. St. Paul, 766 F.2d 1269 (8th Cir. 1985).

48. *Id.* at 640.

49. *Id.* at 648 (Stevens, J., dissenting).

50. *Id.* at 664 n.20 (quoting Llaguno v. Mingey, 763 F.2d 1560, 1569 (7th Cir. 1985) (en banc)).

51. *Cf. id.* at 659 ("I remain convinced that . . . 'an official search and seizure cannot be both "unreasonable" and "reasonable" at the same time.'" (quoting United States v. Leon, 468 U.S. 897, 960 (1984) (Stevens, J., concurring in judgment and dissenting in part))). The concept of reasonable unreasonableness has sparked criticism and debate. *See, e.g.*, Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent that Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869, 870–71 (1998).

52. 483 U.S. at 641 (majority opinion).

53. *Id.* at 643.

reasonableness, there is a serious practical problem lurking in these cases. Its marker is not the use of "reasonableness" in the underlying constitutional right, nor indeed any particular form of words. The problem lies, rather, in the architecture of a constitutional right that is 1) defined at a high level of generality; 2) in terms meant to take all relevant considerations into account; and 3) without resort to particularized rules and doctrines that clarify and define the right. For rights having this architecture, an independent role for qualified immunity is hard to understand and even harder to justify. The premier—though not the only—example of such a right is the constitutional protection against excessive force. The Supreme Court has said that such claims should be analyzed under the Fourth Amendment.[54] The test is one of "objective reasonableness," which "requires careful attention to the facts and circumstances of each particular case, including 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."[55] These factors are not to be assessed "with the 20/20 vision of hindsight" but from the perspective of a reasonable officer on the scene at the time with whatever information is then available. So defined, the constitutional standard for excessive use of force would seem to encompass all relevant concerns, including reasonable mistakes that an officer might make about whether the suspect was armed, whether he posed a risk to the officer, whether he would be dangerous to others if he got away, etc. Indeed, the Supreme Court's definition of "objective unreasonableness" might plausibly be called "subjective unreasonableness," as it turns so heavily on the individual actor's knowledge and situation.

Given that the underlying right incorporates all these potentially exculpatory considerations, the role of qualified immunity in excessive force cases is not at all obvious. One might have thought that qualified immunity would simply merge into the merits. If, taking all the limitations on the officer's time, information, and perceptions into account, the officer's use of force was "objectively unreasonable," arguably there would be no need for an independent inquiry into whether a reasonable officer could have believed such conduct to be lawful.

In fact, the Ninth Circuit (and others) took just this approach, only to be

54. *See* Graham v. Connor, 490 U.S. 386, 395 (1989) ("[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment . . . ." (emphasis omitted)).

55. *Id.* at 396 (identifying the question as "whether the totality of the circumstances justified a particular . . . seizure" (quoting Tennessee v. Garner, 471 U.S. 1, 8–9 (1985))).

told by the Supreme Court that they had it wrong. In *Katz v. Saucier*,[56] involving a rather trifling excessive force claim brought by a political protestor, the Ninth Circuit denied summary judgment and scheduled the case for trial to resolve disputed facts. The Supreme Court all but unanimously reversed,[57] insisting that the excessive force and qualified immunity inquiries were different and had to be kept distinct. It was true that the excessive force standard required "deference to the judgment of reasonable officers on the scene" and the avoidance of hindsight.[58] As the Court put it, "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed."[59] Qualified immunity, however, added something more:

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. 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. 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 allows is reasonable, however, the officer is entitled to the immunity defense.[60]

In application, this is irreducibly murky. If, taking all exculpatory considerations into account, an officer's use of force has been found objectively unreasonable, and if the legal standard is that objectively unreasonable force is unconstitutional, it is hard to see what reasonable exculpatory belief the officer could have entertained. If the officer reasonably believed in mistaken facts, the conduct would not be objectively unreasonable. But if the conduct is objectively unreasonable, how could an officer reasonably believe it legal? It is plain, of course, that the *Saucier* Court wanted summary judgment. The Justices thought the Ninth Circuit should have been more forward in precluding trial of an excessive force claim that had precious little to support it. With that conclusion, one may well agree. But the notion that the police officers needed some additional clarification of the *law* is puzzling.

But that's what the Supreme Court said. So what are the lower courts to

56. 194 F.3d 962 (9th Cir. 1999). *Saucier* involved a federal defendant sued under the authority of *Bivens* rather than 42 U.S.C. § 1983, but the immunity doctrine is the same.

57. Justice David Souter joined in the Court's discussion of qualified immunity but thought that the case should be remanded for application of that standard. Saucier v. Katz, 533 U.S. 194, 217 (Souter, J., concurring in part and dissenting in part).

58. *Id.* at 205 (majority opinion).

59. *Id.*

60. *Id.*

do? If, as *Saucier* and other cases indicate,[61] borderline excessive force claims should be resolved in favor of defendants before trial, and if courts are still bound by the Federal Rules of Civil Procedure,[62] which push borderline cases to trial, what should lower courts do? How are they to achieve pre-trial resolution of doubtful cases under summary judgment rules that schedule doubtful cases for trial? The answer is to frame the substantive standard of "clearly established" law in a way that facilitates summary judgment. *Harlow v. Fitzgerald*[63] began that strategy, and recent interpretations of "clearly established" vastly extend it. As we have seen, they require not only that the use of force be objectively unreasonable but also that there has been specific precedent declaring a comparable use of force objectively unreasonable on similar facts. If "clearly established" law requires a prior ruling on similar facts, then defendants will be entitled to summary judgment whenever there happens to be no binding precedent precisely on point.

This solves the summary judgment problem but only by grossly distorting qualified immunity. If "clearly established" law requires factually similar precedent, excessive force will be actionable only when there happens to be a controlling decision factually on point. Under that approach, many instances of wholly *un*justified use of force will be effectively immune from redress. Take, for example, *Snyder v. Trepagnier*.[64] James Snyder was in a car stopped for speeding after a high-speed chase. Snyder jumped out of the car and ran into a swamp. An officer caught up with him when Snyder became stuck in the mire, perhaps hampered by the fact that he had only one arm. The officer shot him in the back at very close range, leaving him paralyzed from the waist down. Snyder was unarmed. The jury found, by special verdict, that the officer had been objectively unreasonable in using deadly force but that he "had a reasonable belief that his actions would not violate Snyder's constitutional rights."[65] With respect, it is hard to see how both conclusions could be true. The Supreme Court granted certiorari to address that issue but subsequently

61. *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 201 (2004).

62. Sometimes, at least, the Court speaks as if the usual rules apply. *See, e.g.*, *id.* at 195 n.2 ("Because this case arises in the posture of a motion for summary judgment, we are required to view all facts and draw all reasonable inferences in favor of the nonmoving party . . . .").

63. 457 U.S. 800 (1982).

64. 142 F.3d 791, 794 & n.1 (5th Cir. 1998). The case is unusual in that the qualified immunity determination was made by a jury, but it nicely illustrates the difficulty of requiring specific precedents in excessive-force cases. *Snyder* has attracted a good deal of attention. *See* Eskow & Cole, *supra* note 51, at 883–84; *see generally* Harvey S. Bartlett III, Comment, *"The Swamp's a Hell of a Place to Die, Ain't It?": How Objective Reasonableness Has Stagnated the Flow of Fourth Amendment Deadly Force Law at Its Juncture with the Qualified Immunity Defense*, 74 TUL. L. REV. 301 (1999) (discussing *Snyder*).

65. 142 F.3d at 800–01.

dismissed the writ as improvidently granted.[66] So far as we can tell, therefore, a use of deadly force found objectively unreasonable based on what the officer knew and did under the circumstances at the time could nevertheless be protected by qualified immunity.[67] The justification for that result is, to me, obscure. After all, the only law the officer need have known is that the use of deadly force must be reasonable in light of the facts known to him at the time.[68]

An even better example is *Willingham v. Loughnan*, decided by the Eleventh Circuit in 2001.[69] Betty Willingham was shot twice by police officers engaged in a confrontation with her brother on her front lawn. She screamed at them, called for help, and threw several objects, including bottles and a kitchen knife, at the police (or at their dog). A jury concluded that she threw a knife at the officer and convicted her of battery and attempted second-degree murder. When she subsequently sued under § 1983, a second jury found the use of deadly force objectively unreasonable and awarded her more than $5 million in damages, including punitives. The Eleventh Circuit accepted the jury's conclusion on excessive force but reversed on qualified immunity. The question, as described by the court, was astonishingly specific:

> [W]hether Defendant Officers violated clearly established federal law in 1987, by shooting Plaintiff within a "split second" after she attacked two officers—having just tried to kill one of them—while she, at the moment, was not in the physical control of the police and was standing unarmed but near the area from which she had already obtained four objects she had used as weapons, at least one of which was a potentially lethal weapon.[70]

This question was answered in favor of qualified immunity because "in 1987 it was not clearly established that it constituted excessive force to shoot a person under the circumstances presented in this case."[71] Of course, if the police officers had been reasonable—not necessarily accurate—in believing that she currently posed a threat to them, the shooting would not have been objectively unreasonable in the first place. Given that deadly force was found to be objectively unreasonable—meaning that they shot

66. *Id.* at 791, *cert. granted*, 525 U.S. 1098 (1999), *and cert. denied*, 526 U.S. 1083 (1999).

67. *See id.* at 800 ("[Q]ualified immunity is available as a defense to monetary liability for an objectively unreasonable use of excessive force under the Fourth Amendment." (quoting Brown v. Glossip, 878 F.2d 871, 873–74 (5th Cir. 1989))).

68. Of course, to say that the jury's findings seem incompatible is not to say which one was right. Conceivably the jury's error was in finding the shooting objectively unreasonable in the first place rather than in concluding that the officer could reasonably have believed the shooting lawful.

69. 261 F.3d 1178 (11th Cir. 2001).

70. *Id.* at 1186.

71. *Id.* at 1187.

her when she posed no immediate threat—it is far from clear how the officers could reasonably have believed their actions lawful. The search for a precedent specific to "the circumstances presented in this case" sets an almost impossible standard for "clearly established" law, effectively precluding vindication of constitutional rights through money damages.

What is lacking here, it seems to me, is a sense of "common social duty."[72] The phrase comes from Justice Oliver Wendell Holmes, who used it to suggest how we know not to commit crimes. We all know that the law is written down somewhere—at least it is supposed to be. But we also know that it is fanciful to assume that ordinary citizens have access to the statutes that define criminal offenses or to the volumes of decisions that interpret them or that, if they did, they would have the skill or aptitude to understand such materials.[73] People go to three years of law school to learn how to do that. The "notice" given in these technical legal documents is, in most circumstances, both fictitious and superfluous. The truth is that criminals simply should know better. They learn this from the society in which they live, not from studying prior decisions (which is why the excuse of "rotten social background" is, in some cases, not entirely unappealing).

In much the same way, police should have a "common social duty" not to use excessive force. No specific legal precedent should be required to tell the police officer in *Snyder* that he should not shoot, at a range of fewer than twelve inches, an unarmed, one-armed suspect who is unable to get away. Really being ticked off at having to chase someone into a swamp is not a good enough reason to shoot him. If that is what the officer did, he should be liable, period, whether or not there is precedent precisely on point. And the same is true for the police officers in *Willingham*. If, as the jury found, the police shot Mrs. Willingham as she stood in her doorway, having thrown her bottles and her kitchen knife and being currently unarmed and unable to inflict harm, they should be liable. The award of money damages should not depend on whether precisely the same thing has happened before.

I do not wish to be understood as suggesting a lack of concern for police officers who find themselves in volatile confrontations with obstreperous citizens. Police are right to fear for their safety. Potentially dangerous confrontations can develop suddenly, can easily be misunderstood, and must be handled in an adrenalin-drenched sense of emergency. No one expects police officers to get everything right. Sad as it may be, there will be legally justified shootings of suspects who turn out to be unarmed and undangerous. The Supreme Court is quite right to counsel against hindsight and to remind judges and juries alike to evaluate these situations from the perspective of the officer on the scene at the time with whatever limited

72. Nash v. United States, 229 U.S. 373, 377 (1913).

73. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 209–11 (1985).

opportunities and information were then available. But if, under this appropriately deferential standard of liability, the use of deadly force is properly found objectively unreasonable, qualified immunity should not preclude recovery of money damages. The idea that officers in such situations could reasonably believe objectively unreasonable actions (as so defined) to be lawful because of the absence of precedent precisely on point is factually false—and should be legally irrelevant.

III. SUGGESTED FIXES

So what should we do? I have two suggestions, both of which are relatively modest. First, the Supreme Court needs to say explicitly and openly what has been implicit in its qualified immunity decisions for twenty years—namely, that its goal in formulating qualified immunity is chiefly to affect the administration of summary judgment in constitutional tort actions. Much of the problem with "clearly established" law derives from the effort to devise a substantive standard so narrowly "legal" in character that it can be applied by courts on summary judgment or a motion to dismiss. In my view, this is a mistake. What the Court actually wants—or should want—is not a liability rule that requires a factually on-point prior decision but rather an administration of summary judgment that is more sensitive to the need to resolve weak cases before trial. That, at least, is my reaction to the Court's decision in *Saucier v. Katz*. The case involved an animal rights activist who wanted to protest at a speech by Vice President Al Gore. He unfurled a banner and moved toward the speaker's platform. Military police grabbed him and took him to a military van, where, the plaintiff claimed, they used excessive force in shoving him inside.[74] Given his allegations, there was a disputed issue of material fact, but even if all his allegations had been true, it would have been small potatoes. The Ninth Circuit's decision to send the case to trial may have been consistent with traditional summary judgment practice, but it was inconsistent with the Supreme Court's desire to resolve minor cases before trial. What the Supreme Court really wanted in *Saucier* was to preclude putting constitutional tort defendants to the burden of trial in weak cases.

The insistence on factually similar precedent oversolves that problem. It not only exculpates the military police in *Saucier*, who were at worst ungentle, because no precisely similar case had occurred before, but it also exculpates the officers in *Snyder* and *Willingham*, who actually shot people. Obviously, the law wants to treat serious and insubstantial cases differently. Traditional summary judgment law largely leaves that discrimination to the jury, though, in the decades since *Celotex Corp. v. Catrett*,[75] courts have played (I think properly) an increasingly prominent

74. Saucier v. Katz, 533 U.S. 194, 197–98 (2001).

75. 477 U.S. 317 (1986).

role in performing this function. In constitutional tort cases, the Supreme Court sees a particular need to weed out weak cases pretrial. If that is what the Supreme Court wants, that is what the Court should say, directly and explicitly, rather than trying to tease that result from an artificially narrow standard of liability.

Some may object that the Supreme Court has no business tinkering with summary judgment practice in this way. After all, there is an authorized process for changing the Federal Rules of Civil Procedure, and it includes study and recommendation by the advisory committee, opportunity for public comment, formal approval by the Supreme Court, and notice to Congress. Whether that objection has compelling force I rather doubt, but, in any event, it is beside the point. The Supreme Court may not be entitled unilaterally to alter summary judgment practice as such, but it is surely entitled to alter the substantive law on which summary judgment is based. Thus, for example, in defamation cases, the Court has, for substantive reasons, required "clear and convincing" evidence rather than a mere preponderance.[76] This enhanced standard of proof (presumably) alters results at trial but it also—and, perhaps, more importantly—restricts the cases that get to trial.[77] Given sufficient justification, it is perfectly appropriate for the Court to craft rules of law (such as the standard of proof in defamation) *in order to* protect defendants from the burdens of trial, as well as the risk of liability. That, of course, is what the Supreme Court has done with qualified immunity. It would be helpful, in my judgment, if the Court were more open and straightforward in saying that the qualified immunity standard is *designed* to facilitate pre-trial resolution of doubtful cases rather than to constrict liability to situations that have occurred before.[78]

A second suggestion would be to change the doctrinal formula for qualified immunity. Rather than asking whether the defendant violated a "clearly established" right, I would ask whether the defendant's conduct was "clearly unconstitutional." By "*clearly* unconstitutional," I mean to signal that borderline violations would not trigger damages liability (though

76. New York Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964) ("Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands . . . ."); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255— 56 (1986) (referring to "the *New York Times* clear and convincing evidence requirement").

77. *See Anderson*, 477 U.S. at 255 ("[T]he determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case.").

78. Ultimately, of course, the Court's choices on judge-jury allocations are constrained by the Seventh Amendment. Summary judgment practice as it has developed after Celotex, however, reveals that the constitutional constraints are not as narrow as might once have been thought. Full analysis of this issue is beyond the scope of this lecture. It suffices here to say that I contemplate no new position with respect to the Seventh Amendment. Whatever the grounds exist for reconciling that provision with current practice would also apply to my proposal. *See infra* note 84.

of course other remedies would be unaffected). This basic proposition aligns with current law, and in many circumstances, there would be no difference between the formulations. If, for example, there were a change or development in the law, until the new rule was settled, the law would not be "clearly established" and conduct violating it would not be "clearly unconstitutional." This is the strongest case for qualified immunity, and it would be covered equally well by either formulation.

The same would be true when the validity of a particular rule or doctrine is simply unresolved. *Pearson v. Callahan* is an example. "Consent once removed" as a justification for warrantless searches had been approved by other circuits but not by the Tenth. Unless and until the Tenth Circuit ruled, a "consent once removed" search would not violate a "clearly established" right nor would it be "clearly unconstitutional." Qualified immunity would be upheld under either formulation.

In other circumstances, restating qualified immunity would make a difference. Asking whether conduct violates a "clearly established" right directs one's attention to the search for factually similar precedent and to the kind of "lawyer's notice" that technical legal sources provide.[79] Asking whether conduct is "clearly unconstitutional" is less tied to precedent and less technical. Most importantly, it incorporates the notion of common social duty. Conduct would be clearly unconstitutional if it contravened factually specific precedent, as is currently true, *or* if it clearly and unambiguously contravened constitutional principles. The nature of the constitutional violation would matter, whether or not it had previously arisen on closely similar facts.

The Fifth Circuit has said the fact "that we are 'morally outraged', or the 'fact that our collective conscience is shocked' by the alleged conduct does not mean necessarily that the officials should have realized that it violated a constitutional right . . . ."[80] The statement is narrowly correct. Moral outrage does not *necessarily* mean that officers should have known they were acting unconstitutionally—but neither is it irrelevant. If the conduct does violate a constitutional right, outrageousness should preclude qualified immunity, whether or not the specific misconduct has been adjudicated before.

Thus, for example, I would part company from the Fifth Circuit's decision in *Doe v. Louisiana*, where defendant social workers engaged in a "nightmarish" "witch hunt" of a father alleged (by them) to have sexually abused his daughter. The defendants suppressed reports of medical examinations, misrepresented the results of those examinations, used deception in obtaining a court order, and knowingly presented false information to prosecutors. Their charges were completely unfounded.[81]

79. Jeffries, *supra* note 73, at 211, 216.

80. Foster v. City of Lake Jackson, 28 F.3d 425, 430 (5th Cir. 1994) (citation omitted).

81. Doe v. Louisiana, 2 F.3d 1412, 1421 (5th Cir. 1993) (King, J., concurring).

Concurring in the judgment upholding qualified immunity, Judge Carolyn Dineen King said, "That the actions of which Doe complains are egregious, however, does not mean that he has asserted the violation of a federally protected right . . . ."[82] Again, the statement is technically correct. Egregiousness does not establish unconstitutionality, but neither should it be irrelevant to damages liability. In my view, truly appalling unconstitutional misconduct should not be protected by qualified immunity. Egregiousness may be irrelevant in the search for "clearly established" law,[83] but it would not be irrelevant in determining whether conduct is "clearly unconstitutional."[84]

CONCLUSION

In short, qualified immunity needs a course correction. The doctrine is supposed to create a balance between the "competing values [of] the importance of a damages remedy to protect the rights of citizens [and] 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'"[85] The Court's attempts to frame that balance may have seemed sensible in the abstract, but the press of litigation has revealed substantial defects. Today, the law of qualified immunity is out of balance, particularly in the context of rights defined generally without particularizing rules and doctrines, a category of which unconstitutionally excessive force case is both the clearest and most important example. The Supreme Court needs to intervene, not only to reconcile the divergent approaches of the Circuits but also, and more fundamentally, to rethink qualified immunity and get constitutional tort law back on track.

82. *Id.*

83. In fact, as Judge Richard Posner has pointed out, egregiousness may cut against finding a violation of a "clearly established" right, as the "easiest cases" are not likely to have arisen before. K.H. v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990) (noted in Saiman, *supra* note 12, at 1189 n.186).

84. There is no reason to think that a "clearly unconstitutional" standard for qualified immunity would encounter any more or less Seventh Amendment problem than requiring a "clearly established" right. Both standards can be administered by courts on the same basis.

85. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)) (internal citation omitted).