Qualifying Qualified Immunity

I. INTRODUCTION

I remember well one of my first assignments as a fledgling journalist at an Arkansas newspaper: "Do you want to go hear the President speak tonight?" asked my editor. The answer, of course, was yes—no matter that this was 2007 and Bill Clinton was no longer in the White House. The prospect of attending the speech stimulated feelings of engagement with politics, with current affairs, with the nation as a whole.

I imagine Leslie Weise and Alex Young had similar feelings when, in 2005, they attended a government-funded speech by President George W. Bush in Denver.[1] But those feelings appear to have been mixed with ones of discontent and dissent toward the President—for the pair arrived in a car with a bumper sticker reading "No More Blood for Oil," an obvious jab at Bush's Iraq War policies.[2] On instructions from the White House Advance Office, a volunteer named Michael Casper approached Weise and Young at their seats and ejected them from the event.[3] The Secret Service later told Weise and Young that they were forced to leave because of the bumper sticker.[4]

Those who are not legally trained (and many of those who are) surely will feel viscerally ill at ease with this situation. There is no glossing or spinning the facts: because Weise and Young expressed a view contrary to the President's, they were ejected from his speech and atomized from the spectators whose attendance the White House Advance Office deemed permissible. A crucial thread in our national fabric is the right to dissent, within the bounds of reason, without retaliation for the viewpoint expressed. It would seem obvious that the government overstepped its authority by preventing Weise and Young from hearing the President speak.

Yet, a remedy has not been forthcoming, precisely because the Tenth Circuit found that it was not obvious that the government violated Weise's and Young's First Amendment rights by ejecting them from a public speech for the views expressed on the bumper sticker.[5] The court's exact holding was that the district court properly dismissed the duo's *Bivens* suit[6] against Casper and other individuals who ejected them on the ground of qualified immunity. As discussed in further detail below, a government agent sued in his individual capacity has qualified immunity from suit if his action did not violate the plaintiff's constitutional right at all or if he violated a right that

1. Weise v. Casper, 593 F.3d 1163 (10th Cir. 2010).
2. *Id.* at 1065.
3. *Id.*
4. *Id.*
5. *Id.* at 1070.
6. *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971), held that there is a cause of action against individual federal officials for damages when their actions amount to a violation of constitutional rights.

was not "clearly established" at the time.[7] Weise and Young lost on the latter prong.[8]

There is something dysfunctional about a legal doctrine that dismisses a suit with these facts because the right claimed was not "clearly established." Though the doctrine of qualified immunity serves the important purpose of ensuring that government agents may exercise discretion without fear of a lawsuit, it should not serve this purpose at the expense of leaving people such as Weise and Young without a remedy. Moreover, current qualified immunity doctrine threatens to sacrifice adequate development of the law. In a recent article, Dahlia Lithwick wondered why the War on Terror has not produced an important First Amendment case.[9] The Supreme Court has heard First Amendment petitions about crush videos and violent video games, so why not more substantial issues such as the rights of Leslie Weise and Alex Young to silently protest the Iraq War? One possible answer is that, in the years since the Vietnam era, when it recognized Paul Cohen's right to wear a jacket reading "Fuck the Draft,"[10] the Court has developed a qualified immunity jurisprudence that is overly restrictive in scope.

This Note examines how the Court could modify the doctrine of qualified immunity to ensure adequate protection of individual rights and sufficient development of constitutional law. Part II discusses and analyzes the history of the qualified immunity doctrine. In particular, it explores how rationales the Supreme Court used in earlier articulations of the doctrine might be recovered and used to liberalize qualified immunity. Part III analyzes *Weise v. Casper* as a particular application of qualified immunity doctrine. Though the Supreme Court denied certiorari in 2010,[11] a close reading of the case illustrates the defects of the contemporary qualified immunity inquiry and provides a springboard for developing a more nuanced vision of the doctrine. To this end, Part IV suggests several ways in which qualified immunity might be beneficially modified. Specifically, the Court should consider how its rationales for granting qualified immunity might differ depending on the right at issue and the state actor

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

8. *Weise*, 593 F.3d at 1170.

9. Dahlia Lithwick, *Why Hasn't the War Against Terrorism Produced Any Great First Amendment Cases?*, SLATE, Nov. 26, 2010, http://www.slate.com/id/2276010/.

10. Cohen v. California, 403 U.S. 15 (1971).

11. Weise v. Casper, 131 S. Ct. 7 (2010).

involved. The Court should also better define what it means for a right to be "clearly established," both in terms of how broadly a clearly established right is to be construed and in terms of what sources of law courts may use to evaluate the existence of rights. For example, the Court might implement a burden-shifting scheme requiring a defendant to match a plaintiff's showing of relevant case law. This and other reforms would help prevent defendants from dismissing nonfrivolous lawsuits based on their claimed ignorance of constitutional law. Finally, the Court should assess the cost of its recent decision to allow lower courts discretion in how they order the two prongs of the qualified immunity inquiry. Addressing the constitutional question first will in many cases allow for more robust constitutional jurisprudence.

II. HISTORY OF QUALIFIED IMMUNITY

In its current state, qualified immunity is a two-step inquiry: a court will dismiss a defendant from the suit if she did not violate the plaintiff's constitutional right or if the constitutional right she did in fact violate was not clearly established at the time of the violation. This has not always been the test. Since *Bivens* was decided in 1971, the qualified immunity doctrine has developed so as to increasingly shield defendants from discovery and trial. First, the Supreme Court has abandoned an inquiry into the defendant's subjective motives in favor of an objective test that asks whether the defendant should have known that her action violated the plaintiff's rights.[12] Second, it has incorporated into its qualified immunity doctrine a mistake-of-fact defense: if the defendant violated the plaintiff's rights but did so based on a reasonable mistake, she is immune from suit.[13] Third, it has declined to tailor the qualified immunity defense to the specific constitutional violation alleged or to the level of discretion required of the defendant acting in her official capacity.[14]

To compound these problems—problems, that is, from the plaintiff's perspective—the Supreme Court has never given a fully cogent definition of what it means for a right to be "clearly

12. *Harlow*, 457 U.S. at 818 (1982).
13. Anderson v. Creighton, 483 U.S. 635, 639–40 (1987).
14. *Id.* at 643.

established."[15] The result is an expansion of subjective judicial discretion and a decrease in the overall uniformity of qualified immunity rulings.[16] A right that is clearly established in one jurisdiction may not be so in another, and judges within the same jurisdiction may disagree as to the clarity of a right. The failure to firmly define how judges should determine which rights are "clearly established" benefits defendants, who may cast doubt on the clarity of a right by pointing to contrary authority in other jurisdictions.

Finally, qualified immunity provides a defense only to claims for damages, and not to claims for injunctive relief.[17] Yet, because of the two-part qualified immunity inquiry, a plaintiff may "lose" the suit—that is, receive no monetary recovery—and still have her ultimate right vindicated by the court. Though a ruling that the defendant violated her right may not put cash in the plaintiff's pocket, it sends a message to government actors and sets boundaries for future behavior. However, this function of the qualified immunity doctrine may become less relevant after *Pearson v. Callahan*,[18] a recent case that allows judges to answer the clarity question without reaching the constitutional issue.

This Part traces these doctrinal developments before addressing their consequences in the context of the *Weise* case.

A. Birth of a Doctrine

The qualified immunity doctrine had its genesis in two cases: *Scheuer v. Rhodes*,[19] which sought to hold Ohio's governor accountable for his misuse of the National Guard, and *Wood v. Strickland*,[20] which involved a suit against school officials after they disciplined the plaintiffs. The Court's underlying challenge in these cases was to

15. *See The Supreme Court—Leading Cases*, 123 HARV. L. REV. 272, 278 (2009) ("[W]ith respect to qualified immunity, the Court simply has not articulated a definitive standard for the lower courts to apply.").

16. *Id.* at 281.

17. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 546 (5th ed. 2007).

18. 555 U.S. 223 (2009).

19. 416 U.S. 232 (1974). Though *Scheuer* was a § 1983 suit against state executives, the same principles of qualified immunity were applied to most federal officers subject to *Bivens* suits in *Butz v. Economou*, 438 U.S. 478, 507 (1978). However, *Butz* allowed absolute immunity for executive officials who performed judicial and prosecutorial functions—functions that traditionally require a high level of discretion. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), later granted absolute immunity to the President.

20. 420 U.S. 308 (1975).

define the sort of "qualified" immunity that would protect both individual constitutional rights and officials' need to exercise discretion without fear of punishment. From the beginning, the Court recognized the importance of protecting government officials from suit for actions they took in their official capacities. *Scheuer*, for example, found that the doctrine was rooted in the need to protect officials who are legally required to use discretion.[21] Subjecting officials to suit for their behavior on the job might deter full and effective use of that discretion.[22] However, the Court also acknowledged that damages against individuals are sometimes the only remedy for constitutional wrongs.[23] To give government officials absolute immunity from suit would be to deny a remedy for such wrongs.[24] In balancing officials' need for discretion against enforcement of individual rights, *Scheuer* and *Wood* each employed a combination of subjective and objective factors—although, as discussed below, the cases do not totally agree.

Scheuer involved a suit against the Governor of Ohio and other state officials for their role in employing the National Guard during the 1970 Kent State massacre. In rejecting absolute immunity and defining a standard of qualified immunity, the Court paid particular attention to the level of discretion exercised by different types of officials. The Court reasoned that the strictures of good faith and probable cause limited and defined a police officer's discretion.[25] Governors and other higher officials, on the other hand, more frequently make split-second decisions and face a "virtually infinite" range of choices in their daily activities.[26] The Court did not attempt to outline a precise definition of the qualified immunity standard to apply to state governors.[27] Rather, it laid out two principles of qualified immunity. First, the level of immunity depends on the amount of discretion afforded the individual in his official capacity: "[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the

21. *Scheuer*, 416 U.S. at 239–40.

22. *Id.*

23. *Id.* at 238.

24. Put in somewhat more theoretical terms, the individual officer might be considered stripped of his official role—and thus of his official immunity—when he offends the higher power of the Constitution. *Id.* at 237 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

25. *Id.* at 245.

26. *Id.* at 246.

27. *Id.* at 249.

circumstances as they reasonably appeared at the time."[28] Second, whether qualified immunity is a successful defense depends upon the officer's subjective intentions as well as objective factors: "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity."[29] The Court remanded the case for further examination of the record, thereby implying that when a defendant asserts qualified immunity, a court must find at least *some* facts before dismissing the suit upon that basis.[30]

Though *Scheuer* was a unanimous decision, the Court split 5-4 when it further developed *Scheuer*'s holding in *Wood*. *Wood* involved public school students' claims of due process violations after school officials suspended them for that most classic of schoolhouse pranks—spiking the punch.[31] In *Wood*, the Court reemphasized that the question of qualified immunity contains both subjective and objective elements.[32] An official would not be immune if the plaintiff could show one of two things: "[I]f the [defendant] knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]."[33] In an important distinction from *Scheuer*, the Court stated that the objective prong focused not on an official's responsibility to make a reasonable judgment based on surrounding circumstances, but rather on an official's responsibility to know and act within the constitutional rights of the students she serves.[34] In other words, the Court charged government officials with knowledge of the law. The dissent, by Justice Powell, replied that this standard

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28. *Id.* at 247.

29. *Id.* at 247–48.

30. *Id.* at 249–50. This implication is in stark contrast to the Court's later use of qualified immunity to dismiss suits as quickly as possible. *See, e.g.*, Saucier v. Katz, 533 U.S. 194, 200 (2001) ("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.").

31. Wood v. Strickland, 420 U.S. 308, 311 (1975).

32. *Id.* at 321.

33. *Id.* at 322. Though the *Wood* majority explicitly limited its holding to school administrators, it subsequently applied the same subjective/objective test to other government officials. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 n.25 (noting subsequent cases in which the *Wood* standard for qualified immunity was used).

34. *Wood*, 420 U.S. at 322.

was significantly stricter than the one established in *Scheuer*, precisely because it hinged liability on an official's objective ignorance of constitutional law rather than on the reasonableness of her actions in light of the circumstances known to her.[35]

B. Harlow v. Fitzgerald *and the Ascendance of the Objective Standard*

Only seven years later, Justice Powell wrote the majority opinion in *Harlow v. Fitzgerald*,[36] eliminating the subjective element of qualified immunity in favor of the same sort of objective test he decried in his *Wood* dissent. The defendants in *Harlow* were personal aides to President Richard Nixon; the plaintiff alleged that the aides conspired to fire him from his Air Force position in retaliation for his congressional testimony about the mismanagement of plane purchases.[37] The Court first rejected the defendants' argument that they were entitled to absolute immunity. The Court suggested that absolute immunity might be appropriate for a presidential aide who had "discretionary authority in such sensitive areas as national security or foreign policy," but not in the case of these particular aides.[38] The Court then went on to announce a new standard for qualified immunity stripped of the subjective prong: "[G]overnment 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."[39] The Court also provided the defendants with a second way out of the suit: "If the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained."[40]

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35. *Id.* at 330 (Powell, J., dissenting). By granting officials qualified immunity if their behavior was factually reasonable, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), essentially incorporated Justice Powell's critique into the Court's qualified immunity doctrine.

36. 457 U.S. 800 (1982).

37. The full facts are given in a companion case, *Nixon v. Fitzgerald*, 457 U.S. 731, 733–34 (1982).

38. *Harlow*, 457 U.S. at 812. The Court's reasoning on this point conformed to its "varying scope" analysis in *Scheuer*: the greater the need for official discretion, the greater the need for official immunity while exercising that discretion. *See id.* at 811–12 ("This form of argument accords with the analytical approach of our cases.").

39. *Id.* at 818.

40. *Id.* at 819.

Why this about-face? The Court's reasoning provides some clues as to why it suddenly found the subjective prong of the test problematic. Contrary to *Scheuer* and *Wood*, which emphasized the need to hold government officials accountable when they violate constitutional rights, *Harlow* emphasized a different purpose for the qualified immunity doctrine: the need to dismiss "insubstantial lawsuits" that come at a "cost not only to defendant officials, but to society as a whole."[41] Employing the sort of cost-benefit balancing common to the Court's jurisprudence of this era,[42] the Court found a particularly high cost to inquiring into the subjective intent of officials. As the Court saw it, the question of an official's intent is one of fact; because questions of fact require a jury verdict, consideration of intent must await completion of the summary judgment phase.[43] Any court that inquired into subjective motivation would have to conduct broad discovery to unearth sufficient facts to make a decision.[44] Not only would such a process distract officials from doing their real jobs; it might also require the disclosure of traditionally protected information, and it could be manipulated by plaintiffs able to create material issues of fact out of small bits of evidence.[45] In his concurrence, Justice Brennan stated that qualified immunity analysis still required some discovery as to the defendant's knowledge of the law.[46] If the defendant actually knew he was violating the plaintiff's right, then it would be irrelevant whether it was reasonable for him to know that he was violating the right.[47]

Harlow made it more difficult for plaintiffs to bring allegations of constitutional violations to trial.[48] An inquiry into an officer's intent necessarily requires more factual discovery than an objective examination into the current state of the law. *Harlow*'s language suggested that plaintiffs may not conduct this discovery.[49] And,

41. *Id.* at 814.

42. *E.g.*, United States v. Leon, 468 U.S. 897, 906–07 (1984) (weighing the costs and benefits of the exclusionary rule to create the reasonable good faith exception).

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

44. *Id.* at 817.

45. *Id.* at 817 n.29 (quoting Halperin v. Kissinger, 606 F.2d 1192, 1214 (D.C. Cir. 1979)).

46. *Id.* at 821 (Brennan, J., concurring).

47. *Id.*

48. *See* CHEMERINSKY, *supra* note 17, at 548 ("The Court's concern was more with protecting officers from the additional cost of defending essentially meritless suits than with ensuring that injured individuals receive compensation for the wrongs they have suffered.").

49. In actual fact, the Court has never foreclosed discovery altogether where the defendant claims qualified immunity. Though it has stressed that "qualified immunity questions should be

Justice Brennan's concurrence notwithstanding, the opinion implied that an officer could act in bad faith so long as the right claimed was not clearly established.

Regardless of how one views *Harlow*'s impact on the plaintiff-defendant balance, the case presented several other problems. As Justice Powell indicated in his *Wood* dissent, it is difficult to define the nature of a clearly established law.[50] How was the Court to conduct its objective legal reasonableness test? Moreover, as Justice Brennan predicted in his *Harlow* concurrence, eliminating the subjective prong did not eliminate the need to conduct factual discovery before an immunity ruling.[51]

C. Defining "Clearly Established"

Harlow's "clearly established" prong has presented at least three difficulties for courts attempting to apply it. First, how general or specific is the right that the plaintiff alleges the defendant violated? For example, should a court examine whether it is clearly established that a government official may not use deadly force in most circumstances, or is the inquiry, rather, whether it was clearly established that it was impermissible to use deadly force in the particular way the defendant used it? The Court has almost always

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resolved at the earliest possible stage of a litigation," *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987), where the complaint pleads facts sufficient to state a clearly established constitutional violation, immediate dismissal on the ground of qualified immunity is inappropriate. Where there is a fact dispute, for example, discovery tailored to the question of qualified immunity will be warranted. *See id.* (stating that on remand limited discovery would be required if the parties disagreed as to the defendant's actions); *see also* Johnson v. Jones, 515 U.S. 304, 313 (1995) (holding that a defendant may not immediately appeal denial of summary judgment for lack of qualified immunity where the denial is based on an outstanding fact issue). Discovery will often be required where the plaintiff's substantive claim requires a showing of the defendant's state of mind. *See* Crawford-El v. Britton, 523 U.S. 574, 597–601 (1998) (describing discovery procedures district courts may follow when a defendant asserts qualified immunity in response to a claim requiring a showing of intent). Discovery may even be necessary to show that the defendant is entitled to qualified immunity in the first place. For example, in *Weise* it was initially unclear whether several defendants could be treated as government actors for the purpose of qualified immunity. Weise v. Casper, 507 F.3d 1260, 1263 (10th Cir. 2007).

50. *See* Wood v. Strickland, 420 U.S. 308, 329 (1975) (Powell, J., dissenting) ("One need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are 'unquestioned constitutional rights.' ").

51. For an older discussion of how courts dealt with the problem of discovery after *Harlow*, see Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 642–61 (1989).

required specificity. However, its edicts on this point have sometimes been contradictory and have ignored the problem of factual discovery that *Harlow* purported to solve. Second, what sources of law should a court examine to discern the clarity of the right? The Supreme Court has been especially obscure on this question. Consequently, the federal courts of appeal take divergent approaches to the issue.[52] Finally, is it ever possible for a right to be clearly established if courts have issued conflicting opinions on the matter?

1. Specificity of the Right

How specific must the plaintiff's claim be to state a clearly established right? The Court spoke most clearly on this question in *Anderson v. Creighton*,[53] a suit against a police officer for a Fourth Amendment violation. The officer searched the plaintiff's house, without a warrant, on the mistaken belief that a bank robber was there. The Court held that the question was not whether the law was sufficiently clear that it is illegal to conduct a warrantless search of a house absent probable cause and exigent circumstances.[54] Rather, the question was whether the defendant could have believed probable cause and exigent circumstances to be present considering the facts known to him at the time.[55] Like *Harlow*, *Anderson* expressed distrust of plaintiffs bringing "insubstantial claims": "A passably clever plaintiff would always be able to identify an abstract clearly established right that the defendant could be alleged to have violated . . . ."[56] In dissent, three Justices argued that the Court had established a "double standard of reasonableness": an officer who violated the Fourth Amendment's reasonableness standard might nevertheless be dismissed as a defendant because he made a reasonable factual mistake.[57]

Anderson advanced *Harlow*'s march toward the defendant's side of the aisle, but it did so with much greater clarity. For the first

52. *See infra* notes 93–98 and accompanying text.

53. 483 U.S. 635.

54. *Payton v. New York*, 445 U.S. 573 (1980), held that it is unconstitutional for officers to search a house without a warrant unless there are exigent circumstances.

55. *Anderson*, 483 U.S. at 640–41 ("It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable.").

56. *Id.* at 640 n.2.

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

time, the Court flatly rejected the suggestion in *Scheuer* that the scope of immunity depends on the discretion of the officer. Indeed, as the *Anderson* dissent would have ruled, the *Scheuer* Court explicitly equated immunity with Fourth Amendment requirements of good faith and probable cause.[58] Now, however, the Court thought otherwise: "[W]e have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated."[59]

Both the dissent and the majority claimed *Harlow*'s mantle. The dissent emphasized that *Harlow*'s policy concerns were twofold: to allow officers to perform their jobs without fear of suit and to avoid making officers prophets of developments in constitutional law.[60] But those rationales did not allow courts to dismiss defendants from lawsuits where, from an ex post perspective, they violated clearly established law. In this case, the defendant could still make a claim that he subjectively believed there to be exigent circumstances and probable cause at the time of arrest; but that claim was one properly considered by a jury.[61] The majority, on the other hand, emphasized that its rule was consistent with the "objective legal reasonableness" of *Harlow*.[62] The primary concern was not whether the officer knew the law, but whether the officer knew that what he was doing violated the law.[63]

Ultimately, *Anderson* has two flaws—one concerning facts and one concerning law. Under the *Anderson* approach, the defendant may plead facts in his affirmative immunity defense. Yet, the plaintiff is generally not in a position to dispute these facts. The Court must judge the reasonableness of the defendant's action without affording the plaintiff an opportunity to inquire into the truth of the defendant's claims. This situation creates an obvious imbalance in favor of defendants. Specifically, it creates the risk that a defendant will avoid

58. Scheuer v. Rhodes, 416 U.S. 232, 245 (1974) ("When a court evaluates police conduct relating to an arrest its guideline is 'good faith and probable cause.' In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices . . . is virtually infinite." (citation omitted)).

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

60. *Id.* at 649 (Stevens, J., dissenting).

61. *Id.* at 650–53.

62. *Id.* at 639 (majority opinion).

63. *Id.* at 640 ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

suit by selectively remembering—or blatantly lying about—facts that cause his ignorance of the law to appear reasonable.[64]

Regarding the latter flaw, *Anderson* ultimately left open the question of how specific a right must be in order to be "clearly established." The Court asserted that its holding did not require that "the very action in question has previously been held unlawful" in order for the qualified immunity defense to fail; it meant only that "in the light of pre-existing law the unlawfulness must be apparent."[65] This statement contradicted the outcome of the case, for it was certainly "apparent" that officers are prohibited from entering a house without a warrant absent exigent circumstances. More importantly, it left a gaping hole in qualified immunity law. It was not enough to allege a general violation, but the specific action need not previously have been held unlawful to defeat an immunity defense. What criteria were courts to use to assess the "apparent unlawfulness" of an officer's action?

These problems became apparent in two subsequent cases, *Hope v. Pelzer*[66] and *Brosseau v. Haugen*.[67] *Hope* involved an Eighth Amendment challenge to an Alabama prison's practice of handcuffing prisoners to a "hitching post" under the blazing sun for hours at a time.[68] The Eleventh Circuit granted the defendant prison guards qualified immunity because no previous case had ruled that "materially similar" facts amounted to cruel and unusual punishment.[69] The Supreme Court reversed, holding that the question was whether the officials had "fair warning" that their actions violated

64. It is true that *Anderson* acknowledged the need for limited factual discovery in some qualified immunity cases, and subsequent developments bore out the implications of this acknowledgment. *See supra* note 49 (discussing discovery in qualified immunity cases). However, discovery is in major tension with the need to end cases against government officials quickly, one of the central purposes of the qualified immunity doctrine. *See* Mitchell v. Forsyth, 472 U.S. 511, 526–27 (1985) (characterizing qualified immunity as the "right not to stand trial" and stating, "*Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government' " (alteration in original)). For one example of how courts may dismiss on the ground of qualified immunity despite unsettled facts, see *infra* notes 79–80 and accompanying text.

65. *Anderson*, 483 U.S. at 640. The case might not have been an ideal one in which to announce this rule. Exigent-circumstance doctrine is notoriously muddy, and it might be plausibly argued in many cases that the existence of exigent circumstances was not clear.

66. 536 U.S. 730 (2002).

67. 543 U.S. 194 (2004).

68. *Hope*, 536 U.S. at 733–35.

69. *Id.* at 736.

the Eighth Amendment.[70] The dissent contended that the Court should have looked specifically to whether previous rulings held the use of a hitching post to be an Eighth Amendment violation.[71]

The question in *Brosseau* was whether the defendant police officer violated the plaintiff's Fourth Amendment rights when she shot him in the back as he fled arrest in his Jeep.[72] Supreme Court precedent clearly prevents the use of deadly force unless an officer has probable cause to believe that the suspect threatens physical harm to the officer or to others.[73] However, the Court ruled that this bare precedent was not enough to clearly establish the right claimed. Instead, the question was whether, given the particular factual situation, the officer should have known that shooting the plaintiff violated his Fourth Amendment rights.[74] Finding no case that applied the Court's excessive-force precedent to the facts at hand, the Court dismissed the suit.[75] It stressed in particular that Fourth Amendment excessive-force cases are fact intensive: where the officer's actions straddle the "hazy border between excessive and acceptable force," the officer will have qualified immunity.[76] The dissent agreed that excessive-force cases are fact specific. It argued, however, that a jury rather than a judge should address those facts.[77] When defendants raise a qualified immunity defense, the question is whether the law is clear—not whether the courts have previously disapproved of behavior that was factually similar to the defendants'.[78]

It is difficult to reconcile *Hope* with *Brosseau*. Indeed, the Court's specific rule on deadly force offers much clearer guidance to officials than the Eighth Amendment's general prohibition on cruel and unusual punishment. If the purpose of qualified immunity is to excuse officers where the law was not clear, it seems that *Hope* offered the better case for qualified immunity. Nevertheless, *Brosseau* did not

70. *Id.* at 741.

71. *Id.* at 752–53 (Thomas, J., dissenting).

72. *Brosseau*, 543 U.S. at 194–97.

73. Tennessee v. Garner, 471 U.S. 1, 11 (1985).

74. *Brosseau*, 543 U.S. at 200.

75. *Id.* at 201.

76. *Id.* (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001)).

77. *Id.* at 206 (Stevens, J., dissenting) ("Although it is preferable to resolve the qualified immunity question at the earliest possible stage of litigation, this preference does not give judges license to take inherently factual questions away from the jury.").

78. *Id.* at 205 ("[T]he Court's search for relevant case law applying the *Garner* standard to materially similar facts is both unnecessary and ill advised.").

even cite *Hope*'s "fair warning" standard. It instead returned to *Anderson*'s equation of "clarity" with "factual similarity."

Indeed, *Brosseau* is an especially potent illustration of the way the stricter *Anderson* inquiry favors defendants. The specific question to be considered, the Court wrote, was whether there is a violation of clearly established law when an officer shoots "a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight."[79] This formulation makes the assumption that there were in fact "persons in the immediate area." However, the only indication that this was actually true was the defendant's bare testimony—testimony that other evidence contradicted.[80] Hence, there remained a question of fact as to whether the defendant really had probable cause to fear for the lives of others, as required for the lawful use of deadly force. The Court imported this question of fact into its legal determination of whether the defendant violated the plaintiff's clearly established Fourth Amendment right. When a court formulates a legal question with such factual specificity, it is much more likely to find that the right in question is not clearly established. The probability of finding a clearly established right will also depend on the curiosity of the court: a court that roams broadly through the case law is more likely to find a factual situation on point than one that limits its search.

2. Sources of Law

If a court is required to look to the specific facts at issue in order to determine whether a right is clearly established—apparently the rule after *Brosseau*—then it is important to enumerate the sources of law that may establish the right. However, the Supreme Court did not perform this task in *Harlow*, and it has not done so in the intervening thirty years.[81] Rather, it has adopted a sort of "lead by example" approach—that is, it has erratically turned to varying sources of law and left it to the lower courts to determine whether those sources are appropriate for their own cases.

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79. *Id.* at 200.

80. *Id.* at 197; Haugen v. Brosseau, 339 F.3d 857, 867–68 (9th Cir. 2003) (discussing fact dispute over whether the plaintiff's actions posed a risk of harm to others).

81. *See The Supreme Court—Leading Cases*, *supra* note 15, at 278 ("[W]ith respect to qualified immunity, the Court simply has not articulated a definitive standard for the lower courts to apply.").

A brief survey of the post-*Harlow* cases demonstrates this point.[82] *Wilson v. Layne*[83] found that there was no clearly established Fourth Amendment protection against having reporters accompany police into a home while executing a valid search warrant.[84] After finding that "general principles of the Fourth Amendment" did not establish the right, the Court found that no judicial opinions held the practice to be unlawful.[85] The Court then suggested that the outcome might have been different had the plaintiffs pointed to "cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely,"[86] or to "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."[87] Thus, after *Wilson*, it appeared that a court faced with a qualified immunity challenge would conduct a two-part inquiry. First, did general constitutional principles establish the right? Second, was there controlling authority within the jurisdiction or other persuasive authority that clearly established the right?

The Court has not subsequently followed this test. As discussed above,[88] the clarity of a right is fact intensive; it cannot usually be shown by appealing to general constitutional principles. Moreover, the Court itself has consulted a variety of law beyond jurisdictional precedent and persuasive case authority. In *Hope*, the Court found a clearly established Eighth Amendment right by looking to jurisdictional precedent, an Alabama Department of Corrections regulation, and a Department of Justice report on the unconstitutionality of tying prisoners to hitching posts.[89] In *Brosseau*, the Court held that cases from multiple circuit courts did not establish a constitutional violation.[90] In *Pearson v. Callahan*,[91] the Court found

82. *Harlow* itself remanded for a determination of clarity of the right without describing sources of law the lower court must use to make that determination. Harlow v. Fitzgerald, 457 U.S. 800, 819–20 (1982).

83. 526 U.S. 603 (1999). One commenter has called *Wilson* the Court's clearest pronouncement on the issue. *The Supreme Court—Leading Cases*, *supra* note 15, at 277–78.

84. *Wilson*, 526 U.S. at 617–18. The Court held, however, that the practice is a violation of the Fourth Amendment. *Id.* at 614. Thus, since 1999 it has been clearly established that reporters may not accompany police executing a warrant into a home.

85. *Id.* at 615–16.

86. *Id.* at 617.

87. *Id.*

88. *Supra* Part II.C.1.

89. Hope v. Pelzer, 536 U.S. 730, 741–42 (2002).

90. Brosseau v. Haugen, 543 U.S. 194, 199–201 (2004).

no clear constitutional infirmity in a search-and-seizure theory known as "consent-once-removed" after looking to three out-of-circuit federal appellate decisions and two state supreme court decisions that approved the practice.[92]

The Court's lack of consistency has led the circuits to adopt their own formulae when faced with a qualified immunity question. Not every decision on the clearly established prong is a case-counting game, and the circuits exhibit some inconsistency in the language they use to describe required sources of law. But when they must count, most circuits are rather flexible and will look to other case law if there is no Supreme Court or circuit court opinion on point.[93] (They vary in their assessment of how much consensus must have been reached outside the circuit.) Though one commenter has characterized the Sixth and D.C. Circuits' tests as more restrictive,[94] these circuits will also consider outside case law when none is available within the jurisdiction.[95] The Fourth Circuit generally looks only to the Supreme Court, circuit precedent, and the highest court from the state in which the case arose.[96] The Second Circuit sometimes uses language

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91. 555 U.S. 223 (2009).

92. *Id.* at 244.

93. *See* Schmidt v. Creedon, 639 F.3d 587, 598 (3d Cir. 2011) (stating that the court will look to the law of other circuits when the Third Circuit has not addressed the plaintiff's asserted right); Morgan v. Swanson, 659 F.3d 359, 371–72 (5th Cir. 2011) (stating that a court may look to a robust consensus of authority, but that a right is not clearly established if there is a circuit split); Ault v. Speicher, 634 F.3d 942, 946 (7th Cir. 2011) (requiring the plaintiff to point to "case law" articulating the right claimed and applying it to a similar factual circumstance); Coates v. Powell, 639 F.3d 471, 476 (8th Cir. 2011) (stating that the circuit "applies a flexible standard, requiring some, but not precise factual correspondence with precedent"); Howards v. McLaughlin, 634 F.3d 1131, 1141 (10th Cir. 2011) (stating that the plaintiff must show a Supreme Court or Tenth Circuit decision on point, or that the weight of other authority supports her argument); Bryan v. MacPherson, 630 F.3d 805, 833 (9th Cir. 2010) (finding no Supreme Court or Ninth Circuit case on point and looking outside the circuit); Jennings v. Jones, 499 F.3d 2, 16 (1st Cir. 2007) (holding that a right is clearly established if "courts have previously ruled that materially similar conduct was unconstitutional").

94. *The Supreme Court—Leading Cases*, *supra* note 15, at 279 & nn.83–84.

95. *See* Bame v. Dilliard, 637 F.3d 380, 384 (D.C. Cir. 2011) (stating that that court will consider the consensus view of other circuits if there is one); O'Malley v. City of Flint, 652 F.3d 662, 667–68 (6th Cir. 2011) (stating that the court will look outside the circuit if there is a lack of other precedent) (quoting Walton v. City of Southfield, 995 F.2d 1331, 1336 (6th Cir. 1993)). *Walton* also stated the stingier proposition that a court should look outside the circuit only in an "extraordinary case." *Walton*, 995 F.2d at 1336. But few district courts and no Sixth Circuit panel has cited the case for that proposition in the past decade.

96. *See* Doe v. S.C. Dep't of Soc. Servs., 597 F.3d 163, 176 (4th Cir. 2010). However, in some cases the Circuit has gone beyond these sources and looked to "a consensus of cases of persuasive

indicating refusal to look outside the circuit, but this refusal is not absolute.[97] The Eleventh Circuit less equivocally declines to look beyond the jurisdiction.[98]

3. When Laws Collide

When courts face conflicting sources of law, can a right ever be clearly established? It might plausibly be argued that the answer is "no." How can a point of law be "clear" if no court has ruled on it or if courts have conflicted in their interpretations? *Wilson* provided support for this argument by stating, "If judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."[99] *Pearson* also provided strong support for this position by finding a lack of clarity based on three out-of-circuit federal rulings and two state supreme court rulings suggesting that "consent-once-removed" is constitutional.[100]

This argument is susceptible to a number of criticisms, however. First, it appears to assume that officials actually know the court pronouncements that purportedly guide them. In the case of police officers, at least, this is often a dubious proposition.[101] Second, the reasoning that the Court articulated in *Wilson* suggests that government officials are disinterested in the outcome of the legal

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authority." *See* Owens v. Lott, 372 F.3d 267, 280 (4th Cir. 2004) (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999)).

97. *Compare* Reuland v. Hynes, 460 F.3d 409, 420 (2d Cir. 2006) (requiring that the Supreme Court or Second Circuit have recognized the right for it to be found clearly established), *with* Scott v. Fischer, 616 F.3d 100, 105 (2d Cir. 2010) (stating that the decisions of other circuits may be considered to clearly establish a right if they "clearly foreshadow a particular ruling on the issue").

98. *See* Coffin v. Brandau, 642 F.3d 999, 1013 (11th Cir. 2001) (stating that the court looks to the Supreme Court, the Eleventh Circuit, and the highest court of the state in which the claim arose to determine if the right is clearly established).

99. *Wilson*, 526 U.S. at 618.

100. Pearson v. Callahan, 555 U.S. 223, 244 (2009).

101. *See* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 332–45 (1991) (studying police knowledge of the law of search and seizure and finding that well-trained officers were mistaken about the law approximately thirty percent of the time); Albert T. Quick, *Attitudinal Aspects of Police Compliance with Procedural Due Process*, 6 AM. J. CRIM. L. 25, 26 (1978) ("[The police officer's] perception of himself as a crime-fighting craftsman is outwardly manifested by a general hostility toward concepts of procedural due process and those institutions that are identified with securing individual rights—the courts and the liberal element of society.").

battle at issue; they merely "pick[] side[s]."[102] But the official will generally "pick" the side that allows him to do his job most effectively, and this will tend to be the rule that approves a practice of questionable constitutional pedigree. Qualified immunity as *Wilson* envisions it essentially allows government officials to play with house money—they can err on the side of questionable practice without paying the price later. Of course, the point of the doctrine, at least partially, is to protect officials from the disorganized state of the law. But there must be some cutoff point at which a judicial opinion or series of judicial opinions is no longer considered to muddy the constitutional waters. Where two reasonable interpretations of a right exist, officials should be required to "pick" the one most protective of rights. Finally, if a court requires only a few decisions to find that a right is unclear, defendants will be able to dismiss suits with greater frequency. As discussed above, the Supreme Court has expressed concern that plaintiffs can introduce frivolous lawsuits simply by alleging violation of a general right. The Court should also be concerned that defendants are able to dismiss suits simply by pointing to a handful of nonbinding cases to justify their constitutional theory.

The Court recently addressed this last critique in *Safford United School District No. 1 v. Redding*.[103] The case involved school administrators who asserted qualified immunity against a student's claim that a strip search violated her Fourth Amendment rights.[104] The Court called attention to the "outrageous conduct" principle: Because flagrant violations are rare, they are rarely condemned in judicial precedent. Their clear unconstitutionality is thus allowed to speak for itself.[105] The Court also downplayed the extent to which conflicting opinions threaten the clarity of the law.[106] Finally, it stated that lower court disagreement is irrelevant if the Supreme Court has spoken clearly.[107] However, none of these concerns worked to defeat qualified immunity in *Safford*, where two circuit courts had previously interpreted Fourth Amendment law to permit strip searches of

102. *Wilson*, 526 U.S. at 618.

103. 129 S. Ct. 2633 (2009).

104. *Id.* at 2638.

105. *Id.* at 2643 (citing K.H. v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990) (Posner, J.)).

106. *Id.* at 2644 ("We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts.").

107. *Id.* ("[T]he fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear.").

students.[108] In the ultimate analysis, then, *Safford*'s effect on qualified immunity doctrine is uncertain. Though mere "disuniform views" between courts are not enough to "guarantee" qualified immunity, opinions of two circuit courts apparently suffice to do just that. The spaces in between remain arguable.

D. Saucier *and Its Demise*

Do courts need to address the two prongs of qualified immunity in any particular order? "Yes," said *Saucier v. Katz*,[109] which held that courts must first consider whether the defendant violated the plaintiff's constitutional rights. Yet the Court reversed itself only eight years later in *Pearson v. Callahan*.[110] *Pearson* responded to much grumbling about the inefficiency of requiring courts to address constitutional issues where the fruits of their labor might subsequently be erased on the "clearly established" inquiry. But it has also caused its own difficulties, not the least of which is the potential for stagnation in constitutional law.

The *Saucier* opinion itself is a puzzling document, mostly because it offers no convincing rationale for the so-called "rigid order of battle" that it adopts. The rule of the case is that when faced with a qualified immunity defense, a court must evaluate whether the pleadings establish a constitutional violation before addressing whether that violation is clearly established law.[111] The Court opined, without elaboration, that this approach would allow for the development of constitutional principles, thus providing the basis for future clearly established rights.[112] That *Saucier* was an excessive-force case might partly explain the holding. The Court was displeased that the Ninth Circuit had merged the questions of whether the use of force was objectively reasonable under substantive constitutional

108. *Id.* The Court did reach the constitutional question, however, and found that the strip search violated the student's Fourth Amendment rights. *Id.* So, while the student was barred from receiving damages, her rights were vindicated, and the Court established clear law on the constitutionality of strip searches. For the importance of deciding the constitutional prong of qualified immunity even if the plaintiff loses on the "clearly established" prong, see *infra* Part II.D.

109. 533 U.S. 194 (2001).

110. 555 U.S. 223 (2009).

111. *Saucier*, 533 U.S. at 200.

112. *Id.* at 201.

law[113] and of whether the use of force was objectively reasonable under qualified immunity analysis.[114] The Court stated that a particular use of force might be "objectively unreasonable" for constitutional purposes but not for immunity purposes.[115] Requiring that courts first address the constitutional prong of the qualified immunity test presumably clarified this distinction.[116]

Whatever its initial rationale, the strict inquiry found many detractors.[117] The Court responded in *Pearson* by unanimously reversing the rule and allowing lower courts discretion to address the qualified immunity prongs in whichever order they please.[118] The Court conceded that the *Saucier* rule may be "especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."[119] But it offered a litany of reasons in favor of reversal. Requiring the constitutional determination drains judicial resources, especially where it is apparent that the right was not clearly established.[120] The rule may lead to poor constitutional decisionmaking by judges who, convinced that the right is not clearly established, inadequately address the

113. *Graham v. Connor*, 490 U.S. 386, 395 (1989), held that use of force must be objectively unreasonable in order to amount to a Fourth Amendment violation.

114. *Saucier*, 533 U.S. at 197.

115. *Id.* at 206 ("[E]ven if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable, warrantless search, *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions. The same analysis is applicable in excessive force cases."). To state the Court's reasoning another way, an officer could make a mistake of fact when assessing the need to use force on an arrestee. If that mistake of fact were unreasonable, the officer would have violated the arrestee's Fourth Amendment rights under *Graham*. However, the officer could still gain qualified immunity if he made an additional reasonable mistake as to the legality of his conduct. The *Saucier* concurrence objected that the legal and factual reasonableness standards are essentially the same in excessive-force cases, where legality is based on the officer's factual assessment of whether force may be used. *Id.* at 213–14 (Ginsburg, J., concurring). The concurrence's implication is that a double reasonableness inquiry is more appropriate in the law of search and seizure—which frequently changes and catches judges, not to mention police officers, off balance—than in the more stable law of excessive force. *Id.* at 214–15.

116. On the other hand, it seems that the particular error that concerned the Court in *Saucier* is avoided if the judge keeps in mind the distinction between "substantive" reasonableness and "qualified immunity" reasonableness, "order of battle" notwithstanding.

117. *See* Pearson v. Callahan, 555 U.S. 223, 234 (2009) ("Lower court judges, who have had the task of applying the *Saucier* rule on a regular basis for the last eight years, have not been reticent in their criticism of *Saucier*'s 'rigid order of battle.' ").

118. *Id.* at 242.

119. *Id.* at 236.

120. *Id.* at 236–37.

constitutional prong.[121] Where defendants assert qualified immunity at the pleading stage and facts have not yet been fully developed, it is difficult to make a constitutional decision.[122] The "rigid order of battle" violates the canon of constitutional avoidance.[123] A defendant who wins on the clearly established prong but who loses on the constitutional prong will not be able to appeal that adverse ruling, because she has "won" the case.[124] And this list of objections is not exhaustive. The Court attacked the *Saucier* rule so vigorously that one wonders why it was ever required in the first place.

Pearson has several potentially deleterious effects. As other commentators have pointed out, it threatens disuniformity among circuits that use different tests for determining whether a right is clear, and this in turn creates uncertainty for litigants.[125] Most importantly, though, it promises to hinder the development of constitutional rights by making it that much easier to dismiss cases on the clearly established prong.[126] *Pearson* listed formidable objections to the *Saucier* rule, but these should not blind courts to the value of addressing constitutional rights first in appropriate circumstances.

District courts can mitigate some of *Pearson*'s concerns through their authority to manage trials. Though the Court has stressed that qualified immunity is to be granted at the earliest stage of the proceedings, this does not mean that the defendant is automatically entitled to dismissal after answering the plaintiff's complaint. Where the court needs further facts to adjudicate the claim, limited discovery should be required.[127] Whether the other objections are convincing depends on the circumstances. *Pearson*'s argument about the conservation of judicial resources appears to be most applicable to obvious cases—not to the harder claims in real need of legal analysis. Likewise, a judge who engages in poor constitutional decisionmaking

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121. *Id.* at 239.

122. *Id.* at 238–39.

123. *Id.* at 241.

124. *Id.* at 240.

125. *The Supreme Court—Leading Cases*, *supra* note 15, at 280–81.

126. At least one quantitative study has found mixed data on lower courts' use of qualified immunity for the purpose of constitutional avoidance. This study found that post-*Pearson*, nearly twenty-five percent of circuit courts dismissing on qualified immunity grounds did so on the "clearly established" prong, as opposed to just over six percent during the *Saucier* era. Colin Rolfs, Comment, *Qualified Immunity after* Pearson v. Callahan, 59 UCLA L. REV. 468, 491 (2011). However, district courts used the clearly established prong to dismiss in only two percent of cases post-*Pearson*, down from just over six percent during *Saucier*. *Id.* at 494.

127. *See supra* note 49 (discussing discovery in qualified immunity cases).

because he is convinced that a claimed right is unclear is either dealing with an easy case or is showing inadequate care for his craft. If the first, *Pearson* is correct that the "rigid order of battle" is pointless. If the second, the judge is no more likely to pay sufficient attention to the clearly established prong—the defect is in the practitioner rather than the practice. As for the canon of constitutional avoidance, it would not seem to be implicated where a constitutional claim is clearly before a court, regardless of whether the issue is a novel one.[128]

Indeed, even after *Pearson*, courts have continued to address the constitutional question before finding that a right is not clearly established. As a result, there are still defendants who are found guilty of a constitutional violation while winning the case on the clearly established prong. The Court attempted to deal with this problem in *Camreta v. Green*, which held that such defendants may appeal to the Supreme Court without violating the Article III case or controversy requirement.[129] Though the *Camreta* rule promises breathing space for the development of constitutional law, it is limited to Supreme Court appeals; the Court declined to hold that an appellate court may correct the constitutional holding of a district court where the defendant wins on the clearly established prong.[130] As the passionate *Camreta* dissent suggests, the Court still has many issues to work out in its qualified immunity jurisprudence.[131]

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128. *See* Camreta v. Greene, 131 S. Ct. 2020, 2031 (2011) ("[W]e have long recognized that . . . our regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo. Consider a plausible but unsettled constitutional claim asserted against a government official in a suit for money damages. The court does not resolve the claim because the official has immunity. He thus persists in the challenged practice; he knows that he can avoid liability in any future damages action, because the law has still not been clearly established. Another plaintiff brings suit, and another court both awards immunity and bypasses the claim. And again, and again, and again. So the moment of decision does not arrive.").

129. *Id.* at 2028–30.

130. *Id.* at 2033.

131. *See id.* at 2044 (Kennedy, J., dissenting) ("It would be preferable at least to explore refinements to our qualified immunity jurisprudence before altering basic principles of jurisdiction.").

III. *WEISE V. CASPER* AND THE FLAWS OF THE DOCTRINE

A. The Case

On March 21, 2005, Leslie Weise and Alex Young arrived at Denver's Wings Over the Rockies Museum to hear President George W. Bush deliver a speech.[132] The speech was an official event funded by the government.[133] Tickets to the speech were available to the general public; Weise and Young obtained their tickets from the office of Congressman Bob Beauprez.[134] Beyond the ticketing requirement, the White House Advance Office established its own policies as to who could attend presidential events.[135] One of those policies was to prevent those who disagreed with the President from attending the President's official speeches.[136]

Weise and Young travelled to the event together in Weise's car, which displayed a bumper sticker reading "No More Blood For Oil."[137] Before Weise went through security, Jay Bob Klinkerman, a White House volunteer, told her that she would have to wait to speak with the Secret Service before she was allowed to enter.[138] Michael Casper, another volunteer, arrived shortly thereafter dressed in Secret Service garb.[139] He said that Weise would be allowed in, but that she would be "arrested" if she tried any "funny stuff" or if she had any "ill intentions."[140] Moments later, Casper spoke with White House Advance Office employees Steven Atkiss and James O'Keefe, who instructed Casper to remove Weise and Young from the museum.[141] The Secret Service later told Weise and Young that they were ejected because of the bumper sticker on their car.[142] Both Weise and Young

132. Weise v. Casper, 593 F.3d 1163, 1165 (10th Cir. 2010).
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*

disclaimed intent to cause a disruption; Young said he would have asked a question if the chance arose.[143]

Weise and Young sued Klinkerman, Casper, Atkiss, and O'Keefe for violating their First Amendment rights. After some wrangling over whether Klinkerman and Casper, as White House volunteers rather than government officials, were permitted to assert qualified immunity in the first place,[144] the plaintiffs conceded that the pair could assert the defense.[145] The district court subsequently dismissed Klinkerman and Casper on the basis of qualified immunity.[146] Framing the issue as a question of whether the President "had the right, at his own speech, to ensure that only his message was conveyed," the court held that the defendants did not violate the plaintiffs' First Amendment rights.[147] Furthermore, the right claimed had not been clearly established by prior precedent. As the court reasoned, Weise and Young had cited no case that "defines the contours of this right as it applies to a situation in which the President, speaking in a limited private forum or limited nonpublic forum, excludes persons for the reasons identified in this Order."[148]

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143. *Id.* at 1165–66. Young's question may not have been quite as terrible as his companion's bumper sticker promised it to be. Laura Kalman relates a classic tale about the unpredictable byproducts of open discourse, revolving around former Chief Justice Earl Warren's visit to the University of California, San Diego, in 1970:

> [A] huge crowd of students, faculty, and San Diegans packed the quadrangle of John Muir College to hear Warren's talk. As he rose to speak, several students unfurled a large banner from a nearby balcony. A hush fell over the throng, most of whom expected the worst in student graffiti, perhaps "F—k the Chief Justice." [UCSD's] campus and hundreds of others across the nation had been rocked by student strikes in April when President Nixon launched the invasion of Cambodia. At Kent State and Jackson State, national guardsmen and state troopers had gunned down protesters. Earl Warren, former Chief Justice of the United States, represented the Establishment. But instead of an expletive, the banner read, "Right on, Big Earl!" The crowd roared its approval. Warren flashed a broad grin and proceeded to deliver a scathing attack on those who believed the country could have law and order without social justice.

LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 57 (1996) (first alteration in original) (quoting Michael Parrish, *Earl Warren and the American Judicial Tradition*, 1982 AM. B. FOUND. RES. J. 1179, 1179).

144. *See* Weise v. Casper, 507 F.3d 1260, 1263 (10th Cir. 2007) (discussing district court proceedings on whether defendants could claim qualified immunity).

145. Weise v. Casper, No. 05-cv-02355-WYD-CBS, 2008 U.S. Dist. LEXIS 90211, at *4 (D. Colo. Nov. 6, 2008).

146. *Id.* at *23.

147. *Id.* at *22.

148. *Id.* at *22–23

By a 2-1 vote, the Tenth Circuit upheld the district court's decision.[149] Freed from the "rigid order of battle" by *Pearson*, it elected to first consider the clarity prong of the qualified immunity test.[150] Noting that the President gave his speech on "private property," the court found that the plaintiffs alleged no clearly established "doctrine that prohibits the government from excluding them from an official speech . . . on the basis of their viewpoint."[151] The government did not suppress the plaintiffs' views or "prosecute" them for their speech.[152] Moreover, the plaintiffs did not identify cases suggesting that attendance at a speech was itself protected speech.[153]

The court suggested a fatal flaw in the pleading: the issue "should have been structured as a First Amendment retaliation case."[154] The court found that the manner in which Weise and Young actually presented the issue—by asking whether the "President has a right to exclude those who disagree with his policies and whether it is clearly established that individuals have a right to be free of viewpoint discrimination"—was problematic in two ways.[155] First, it introduced the question of whether the President, as a speaker, has a right to determine who participates in his speech.[156] The most relevant case to this question was *Sistrunk v. City of Strongsville*,[157] a Sixth Circuit case that found the Bush-Quayle campaign committee could eject an attendee wearing a Clinton-Gore button.[158] This precedent supported the argument that the plaintiffs had alleged no clearly established right.[159]

Second, the allegation that the defendants discriminated based on viewpoint was too general to sustain a qualified immunity

149. Weise v. Casper, 593 F.3d 1163, 1165 (10th Cir. 2010).

150. *Id.* at 1167.

151. *Id.* at 1168. The court listed the following sources that might establish this doctrine: "[A] Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts." *Id.* at 1167.

152. *Id.* at 1168.

153. *Id.* at 1169. The court contrasted cases in which the government discriminated against "protected speech." *Id.* Because the plaintiffs' mere attendance was not such "protected speech," ejecting them could not have been a First Amendment violation. *Id.*

154. *Id.* at 1168 n.1.

155. *Id.*

156. *Id.*

157. 99 F.3d 194 (6th Cir. 1996).

158. *Weise*, 593 F.3d at 1170.

159. *Id.*

challenge.[160] Citing *Brosseau* for the proposition that plaintiffs must allege more than a violation of a general right, the court reasoned that a "First Amendment claim must be stated somewhere within the free speech jurisprudence."[161] This Weise and Young had failed to do.[162] Finally, the Court found that this was not one of those "obvious situations" where more general authority informs the defendant that his action violates a right.[163]

Judge Holloway dissented. After opening with the sentiment that "[i]t is simply astounding that any member of the executive branch could have believed that our Constitution justified this egregious violation of Plaintiffs' rights,"[164] the dissent proceeded to address the substantive constitutional issue.[165] Adherence to the *Saucier* approach was necessary for two reasons. First, the district court decided the case when *Saucier* was still in force; it was important to subject *Saucier*'s mandatory constitutional finding to review.[166] Second, this was one of those "questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."[167] As *Pearson* suggested, it was useful to apply the "rigid order of battle" to such cases.[168]

On the constitutional question, the dissent objected that *Sistrunk* was totally inapposite. That case dealt with an event sponsored by a private campaign committee; this one dealt with a taxpayer-sponsored event.[169] Moreover, the majority misconceived the theory of the plaintiffs' case: the question was not whether they tried to take part in the President's speech or whether they tried to disrupt the speech, but whether the government impermissibly ejected them because of their outside, nondisruptive, protected expression.[170] The plaintiffs did not allege a desire to participate in the President's

160. *Id.* at 1168 n.1.

161. *Id.* at 1168.

162. *Id.*

163. *Id.* at 1170.

164. *Id.* at 1171 (Holloway, J., dissenting).

165. *Id.* at 1172.

166. *Id.* at 1173.

167. *Id.* at 1172.

168. *See supra* text accompanying note 119.

169. *Weise*, 593 F.3d at 1173 (Holloway, J., dissenting). The dissent also pointed out that the record did not support a finding either way as to whether the Wings Over the Rockies Museum was a private venue. *Id.* at 1172 n.2.

170. *Id.* at 1176–77.

speech, and it was absurd to assume that attendance at a speech was tantamount to participation in that speech.[171] For the dissent, the constitutional violation was obvious: the President cannot exclude individuals solely because their viewpoint conflicts with his own.[172] Citing *Hope*, the dissent concluded that, as a general proposition, the prohibition on viewpoint discrimination was sufficiently well established to defeat the qualified immunity defense.[173]

By a 5-5 vote, the Tenth Circuit refused to review the case en banc.[174] In October 2010, the Supreme Court denied certiorari to Weise and Young.[175] Justices Ginsburg and Sotomayor dissented from the denial. Citing Judge Holloway's dissent with approval, they stated that "solidly established law may apply with obvious clarity even to conduct startling in its novelty."[176] They also rejected the majority's equivalence of attendance at a speech with participation in that speech—instead, they believed the claim was properly construed as a retaliation argument.[177] They concluded by expressing hope that the case would come before the Court in the future: "Suits against the officials responsible for Weise's and Young's ouster remain pending and may offer this Court an opportunity to take up the issue avoided today."[178]

That hope will not be realized. In June 2011, the Tenth Circuit upheld the trial court's dismissal of the plaintiffs' claims against Steven Atkiss and Joe O'Keefe, the White House Advance Office employees who ordered their removal from President Bush's speech.[179]

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171. *Id.* at 1175–76 ("It simply makes no sense to suppose that the mere presence in the audience of persons who might have some disagreement with the President on some issues would have any effect on the President's message.").

172. *Id.* at 1175 ("Because the prohibition on viewpoint discrimination is so well established, Defendants violated Plaintiffs' established rights by excluding them from the President's speech solely on the basis of the protected message of the bumper sticker.").

173. *Id.* at 1178.

174. Brief for Appellants at 8, Weise v. Casper, 424 F. App'x 799 (10th Cir. 2011) (No. 10-1438).

175. Weise v. Casper, 131 S. Ct. 7 (2010).

176. *Id.* at 7.

177. *Id.* at 8 (quoting Hartman v. Moore, 547 U.S. 250, 256 (2006)).

178. *Id.*

179. *Weise*, 424 F. App'x 799, 800 (10th Cir. 2011). The technical ground for dismissal was judicial estoppel. This situation arose from a somewhat complicated procedural posture. The district court originally granted qualified immunity to only defendants Casper and Klinkerman. Plaintiffs asked the district court to certify final judgment as to these defendants under Federal Rule of Civil Procedure 54(b) so an immediate appeal could be taken. The plaintiffs' motion stipulated that they would accept the Tenth Circuit's ruling as to the remaining defendants if it

The next month, the District Court for the District of Columbia dismissed a related suit against two former directors of the White House Advance Office.[180] As of this writing, Weise and Young have no pending claims arising from the Denver incident.

B. The Controversy

Weise and Young became minor celebrities after their expulsion, a consequence of the media uproar that ensued.[181] The incident appears to have offended a layman's instinct that such practices are a clear violation of First Amendment rights. But the legal system did not actualize that instinct. Rather than addressing the merits of the First Amendment claim, courts hearing Weise and Young's case engaged a broader controversy, one that is a focal concern of qualified immunity in our jurisprudence: How difficult should it be to obtain judgment on the merits in lawsuits for violations of constitutional rights?

Harlow's now-formulaic articulation—that a government official is immune unless he has violated a clearly established right of which a reasonable person would have known—is the doctrinal tool with which courts seek to answer that question. That tool has little utility, however, unless we sufficiently define what it means to be "clearly established." In Part II.C, I addressed ways in which courts have sought to determine whether a right is "clearly established." The dominant method is simply to count—are there enough decisions to tell an official that his action is unconstitutional? Put another way, does a particular legal premise already exist, or would finding liability in a given circumstance create new precedent?

These are wrongheaded questions, for they equate doctrine with law. Law is more than a series of doctrines applied to fact. At a fundamental level, law is a set of general principles given shape through doctrine. Doctrine serves law, not vice versa. By defining

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affirmed the district court. *Id.* at 800–01. Because the Tenth Circuit affirmed, the plaintiffs' stipulation in the 54(b) motion precluded them from pursuing additional claims against Atkiss and O'Keefe. *Id.* at 802–03.

180. Weise v. Jenkins, No. 07-1157 (CKK), 2011 U.S. Dist. LEXIS 75031, at *2–3 (D.D.C. July 13, 2011). Specifically, the court held that the plaintiffs failed to state a claim that the defendants' policy for attendance at presidential events caused their ejection from the speech. *Id.* at *31.

181. *See, e.g.*, Elisabeth Bumiller, *Denver Three Gain Support in Quest*, N.Y. TIMES, June 27, 2005, at A11 (reporting on the incident); Jim VandeHei, *Three Were Told to Leave Bush Town Meeting*, WASH. POST, Mar. 30, 2005, at A04 (same).

"clearly established" merely by asking whether a court has previously articulated an argued-for doctrine, the contemporary approach to qualified immunity threatens to deaden our constitutional law rather than honor its motivating principles.

How do we determine what those principles are? In the context of substantive First Amendment law, Professor Robert Post has argued that the Constitution does not protect speech *qua* speech; rather, it requires judges to assess social context to determine if speech should be protected in a given case.[182] This point would seem to be equally true of other constitutional rights.[183] Though they may be stated abstractly, principles of constitutional law often obtain meaning through an examination of specific facts.[184] If that is so, a procedural requirement blocking a hearing on the merits unless a plaintiff claims more than "broad, general propositions of law"[185] leaves our law in a state of limbo. That a plaintiff articulates a constitutional principle abstractly should not in itself prevent a court from giving the principle more concrete form.

Of course, development of constitutional law and remedying constitutional wrongs are not absolute values. Courts must weigh these interests against the need of government officials to exercise their discretion and to work free from harassing and frivolous lawsuits. But a more nuanced approach is required to strike the proper balance. The contemporary qualified immunity doctrine fixates on the level of generality at which a plaintiff articulates a constitutional right, but it has failed to reach consensus on when a pleading is specific enough. It is completely predictable that the parties will choose the precedent that favors their case, but which precedent the judge will rely on is much less so. *Weise* illustrates this

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182. *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1272 (1995) ("Were the Constitution to recognize and impose a single general value for speech, it would in a Procrustean way force the entire spectrum of state regulation of forms of social interaction into conformity with the particular social practices required by that single value. But our social life is simply too diverse and rich to be compressed into any such single pattern.").

183. *See id.* ("Because law is ultimately a form of governance, it does not deal with merely abstract ideals or principles. Values in the law function instead to signify concrete forms of actual or potential social life in which what we consider desirable may find its realization.").

184. *See* John Paul Stevens, Address, *The Freedom of Speech*, 102 YALE L.J. 1293, 1300 (1993) ("[J]udges have frequently reminded us that their work involves more than the logical application of general propositions to particular facts; instead, in the crucible of litigation, those facts often reshape the very propositions that have been applied to them.").

185. Weise v. Casper, 593 F.3d 1163, 1167 (10th Cir. 2010) (citing Brosseau v. Hogan, 543 U.S. 194, 198–99 (2004) (per curiam)).

phenomenon. The majority, applying the stricter standard of *Brosseau*, could locate no specific free speech violation.[186] The dissent, looking at the same filings but applying the looser "fair warning" standard of *Hope*—a standard the plaintiffs also argued[187]—found that the defendants' actions violated a general prohibition on viewpoint discrimination.[188]

Moreover, to require the plaintiff to state the constitutional right with an exacting standard of specificity threatens to impose overly formalistic requirements on the plaintiff's legal arguments. Once again, the *Weise* case illustrates. In their complaint, Weise and Young used the language of retaliation to describe the facts behind their action.[189] However, at no time do they appear to have specifically stated the legal premise of their complaint as "retaliation" or to have alleged the formal elements of a retaliation claim. Rather, they described the defendants' actions as "viewpoint discrimination."[190] The court might have read the filings more generously to advance the argument that government officials act wrongfully when they punish citizens for their speech on matters of public concern. Such behavior violates rights whether we call it "viewpoint discrimination" or "retaliation"—regardless of the plaintiff's specific legal theory, the general First Amendment landscape is sufficiently clear to reach the

186. *Id.* at 1167–68.

187. Brief for Appellants at 1, Weise v. Casper, 593 F.3d 1163 (10th Cir. 2010) (No. 09-1085) [hereinafter First Appellate Brief] (framing the issue as whether "Casper and Klinkerman violated the First Amendment Rights of Weise and Young to be free from discrimination based on their viewpoint").

188. *Weise*, 593 F.3d at 1177 (Holloway, J., dissenting).

189. *See* Complaint and Jury Demand at 5, Weise v. Casper, 2008 U.S. Dist. LEXIS 90211 (D. Colo. Nov. 6, 2008) (No. 05-cv-02355-WYD-CBS) (stating that Casper threatened the plaintiffs upon their arrival to the speech "solely because of the bumper sticker on Ms. Weise's car and his perception . . . that Ms. Weise had a viewpoint that was different from the President's"); *id.* at 7 ("After the event, the Secret Service confirmed to Ms. Weise and Mr. Young that they were ejected from the event as a result of the bumper sticker on Ms. Weise's vehicle.").

190. *See id.* at 8 (claiming generally that "Defendants violated Plaintiffs' First and Fourth Amendment rights by ejecting them from this event on the basis of their viewpoint"); Plaintiffs' Response to Motions to Dismiss by Defendants Casper and Klinkerman at 10–11, *Weise*, 2008 U.S. Dist. LEXIS 90211 (No. 05-cv-02355-WYD-CBS) ("[I]t has been clear for decades that the government cannot exclude individuals on the basis of the content or viewpoint of their message."); First Appellate Brief, *supra* note 187, at 1 (framing the issue as whether "Casper and Klinkerman violated the First Amendment Rights of Weise and Young to be free from discrimination based on their viewpoint"). *Compare id.*, *with* First Amended Complaint at 6, Howards v. Reichle, 2009 U.S. Dist. LEXIS 68526 (D. Colo. July 28, 2009) (No. 06-cv-01964-CMA-CBS) (claiming retaliatory arrest for plaintiff's exercise of free speech rights and stating with particularity the legal elements of a retaliation claim).

merits of the claim. The court could then have sorted out the particulars of the substantive First Amendment doctrine. This result causes no injustice to the defendants—on the contrary, it is proper that they endure a trial on the merits, because their alleged behavior was wrongful regardless of legal spin.[191]

However, the *Weise* majority did not emphasize the defendants' alleged behavior. Instead, it stressed the inadequacy of the plaintiffs' specific legal arguments.[192] Not only that, but it went beyond the plaintiffs' claims to embrace the defendants' theory of the case—a theory that relies on the undeveloped government speech doctrine and a novel application of the Supreme Court's compelled speech jurisprudence.[193] In other words, instead of reading the plaintiffs' claims in their plainest fashion, the *Weise* majority interjected the defendants' claims in a way that caused legal confusion.[194] This is a

191. This is indeed how the *Weise* dissent treated the filings. It drew no rigid distinction between "retaliation" and "viewpoint discrimination," but nevertheless would have found the plaintiffs' claims sufficient to reach the merits. *See Weise*, 593 F.3d at 1178 (Holloway, J., dissenting) ("It has been . . . well established for years that taking action against a person for exercise of protected rights is prohibited in most circumstances.").

192. *See Weise*, 593 F.3d at 1168 ("Plaintiffs simply have not identified any First Amendment doctrine that prohibits the government from excluding them from an official speech on private property on the basis of their viewpoint.").

193. The *Weise* majority accepted the notion that the critical question in the case was whether the President has the right to secure the integrity of his own communication by excluding those who disagree with his viewpoint. *See Weise*, 593 F.3d at 1168 n.1 ("[T]he issue on appeal as framed by the Plaintiffs is whether the President has a right to exclude from his appearances those who disagree with his policies and whether it is clearly established that individuals have a right to be free from viewpoint discrimination. Aside from the law on viewpoint discrimination, framing the issue in this manner implicates the intersection of the President's rights as a speaker under the government speech doctrine, his rights to expressive association, and the nature of the forum." (citations omitted)). Though this is not the place for a criticism of the defendants' government speech argument, a recent student comment explains why the theory was inapplicable in *Weise*. Jacqueline Blaesi-Freed, Comment, *From Shield to Suit of Armor: Qualified Immunity and a Narrowing of Constitutional Rights in the Tenth Circuit*, 50 WASHBURN L.J. 203, 223–25 (2010). The *Weise* defendants conflated their government speech argument with a compelled speech argument derived from *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), and, less convincingly, *Sistrunk v. City of Strongsville*, 99 F.3d 194 (6th Cir. 1996). To my mind, Judge Holloway's dissent is a convincing explanation of a point that already seems perfectly plain: the compelled speech doctrine is not implicated by the attendance of a silent audience member who has left her contrary views at the door (or in the parking lot, as it were). *See Weise*, 593 F.3d at 1173–74 (Holloway, J., dissenting) (pointing out that the plaintiffs did not attempt to express any opinion while listening to the President's speech).

194. Judge Holloway agreed with this assessment. *See Weise*, 593 F.3d at 1173 (Holloway, J., dissenting) ("[T]he district court's analysis was based on a patently erroneous reading of the Complaint: Plaintiffs' claim is surely not based on denial of the opportunity to participate in the President's speech.").

highly problematic approach. Qualified immunity is only meant to spare officials the burden of trial where they could not have known that their actions were wrongful. It is not meant to allow defendants to beg out of trial by creating novel legal arguments. It is appropriate, of course, for defendants to put forth such arguments; but the proper time for courts to address them is at a hearing on the merits.

Whether a court reaches the merits of a claim should not depend on whether its judges wake up in a *Hope* mood or a *Brosseau* mood. Nor should plaintiffs be held to some sort of heightened pleading standard in order to establish the clarity of a right. And a motion to dismiss based on qualified immunity should not be an opportunity for defendants to sow legal confusion and end the suit by making novel legal claims. How can the Court tailor qualified immunity to avoid dismissal of seemingly blatant violations while at the same time maintaining protections for government officials who truly do need discretion in legally nebulous situations? The following Part proposes a few solutions.

IV. QUALIFYING QUALIFIED IMMUNITY

The Court should reevaluate its qualified immunity doctrine, both to deter and to remedy obvious constitutional infractions such as those in *Weise* and to clarify some of the doctrine's uncertainties. In light of the *Weise* case and the discussion and analysis in Part II of this Note, I propose four alterations to qualified immunity doctrine. First, courts should acknowledge that *Saucier* often maintains its usefulness, particularly in First Amendment cases. Second, the Supreme Court should disentangle the relationship between *Hope* and *Brosseau*. Third, the Supreme Court should reconsider its usual refusal to tailor qualified immunity questions to particular actors and particular rights. And fourth, the Supreme Court should tackle the issue of how to show in litigation that a right is clearly established, either by implementing a burden-shifting scheme or by requiring defendants ex ante to err on the side of constitutional behavior where there is uncertainty among courts over the constitutionality of a particular practice.

A. A Modified Return to the "Rigid Order of Battle"

Though qualified immunity only applies in a suit against individual officials for damages, monetary recovery may not be the plaintiff's primary concern. Whether it is or is not depends on the

circumstances, of course. Recovery for certain excessive-force claims is likely to be considerable.[195] On the other hand, damages to compensate for an injury such as Weise's and Young's—the inability to attend a presidential speech and the embarrassment of being ejected from the venue—are not really quantifiable, and wouldn't be worth much if they were.[196] The real victory for such plaintiffs is the vindication of their constitutional rights by a court of law. This is one reason why it is important to address the constitutional issue in suits where defendants claim qualified immunity.

Of course, considering the vehemence with which the Court rejected the rule of *Saucier*, it is safe to say that there will be no reversion to the "rigid order of battle" in the near future. However, courts retain discretion to order the test as they see fit. And, as the Court noted in *Pearson*, the strict inquiry may be appropriate where the constitutional issue tends to be tested only when a qualified immunity defense is available.[197] Judge Holloway emphasized that *Weise* was just such a case.[198] What other defendants could have redressed Weise's and Young's injuries? This concern is especially acute if we assume that courts will take advantage of their new

195. This is a point that certainly interests the government, which often must pay individual claims. The availability of indemnification for individual officials appears to be an understudied element in scholarship on qualified immunity. *See* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 581, 586 & n.12 (noting variance in state indemnity schemes and listing several studies on the issue). As Professor Armacost suggests, a major rationale for qualified immunity—to prevent overdeterrence of useful official action—becomes much less convincing if the government ultimately pays claims. *Id.* at 587. Though qualified immunity today purports to shield officials from the risk of reasonable violations, this has not always been the case. *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1870 (2010) ("Today, courts view the qualified immunity doctrine as one that requires them to strike the proper balance between the interests of the victims and the interests of government actors. Too much immunity may leave victims uncompensated and fail to assure proper respect for the law; too little may chill government officials in the zealous discharge of their appointed duties. Antebellum courts did not attempt to strike this delicate balance; instead, they simply addressed the issue of legality and left Congress in charge of calibrating the incentives of government officials. Congress offered government employees a mix of salary, fees, and forfeitures to ward off bribery and ensure zealous enforcement; Congress provided further incentives by indemnifying from any liability only those government officials who acted in good faith. But Congress might also refuse to indemnify, thus leaving the loss on the official who acted without just cause.").

196. Although there seems to be *some* money in such a suit: two other plaintiffs in the *Weise* case settled with the government for $80,000. *See* Weise v. Jenkins, No. 07-1157 (CKK), 2011 U.S. Dist. LEXIS 75031, at *16 n.5 (D.D.C. July 13, 2011) (describing settlement).

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

198. *Weise*, 593 F.3d at 1172 (Holloway, J., dissenting).

discretion under *Pearson* to more frequently dismiss cases on lack-of-clarity grounds.[199]

It is difficult to establish a general principle for when courts should address the constitutional issue first. For example, requiring the rigid order in every First Amendment case would transgress the concerns the Court expressed in *Pearson*—even though there may be plausible responses to those concerns.[200] And in many cases, the plaintiff will be able to sue a municipality, school district, or other government body that created a policy causing violation of a First Amendment right. These lawsuits may vindicate the right even if an individual official is dismissed from the suit.

In cases where qualified immunity is available, courts should instead explicitly address the very concern the Court raised in *Pearson*: Will failure to consider the constitutional issue leave the plaintiff without another opportunity to air his grievance?[201] If so, the rule of *Saucier* should apply. If not, a court may apply the two prongs of the qualified immunity test as it sees fit. This would give courts a sort of dual discretion. First, a court would have discretion to determine whether the suit is susceptible to filing against institutional defendants not subject to qualified immunity. If there is such an institutional defendant, the court will have additional discretion over application of the test. This scheme recognizes that it is well within a court's expertise to make a judgment about possible ways to structure a suit.[202]

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199. This assumption may or may not be sound. *See supra* note 126 (discussing study of how courts have ordered the qualified immunity inquiry after *Pearson*).

200. *See supra* Part II.D.

201. By this I mean that a court should ask whether the claim at issue is of the type that will generally arise only where qualified immunity is available. I am not referring to whether the plaintiff should bring his claim in state or federal court. Qualified immunity is a federal defense that applies in state court, but different appellate rules may apply depending on where the plaintiff files the claim. *See* Johnson v. Fankell, 520 U.S. 911, 915–16 (1997) (holding that state law finality doctrine applies for the purposes of immediately appealing a denial of qualified immunity in state court).

202. The reader will note that this approach primarily advances the interest of law development rather than that of vindication of individual rights. If the claim is in fact of the sort that may be heard in other circumstances, the law presumably will be articulated in those circumstances. But various procedural bars may block an individual plaintiff from pursuing her particular claim if the suit is defectively structured. If, for example, she sues only an individual official and is dismissed for qualified immunity, she may be estopped from subsequently suing a municipality that she could have included in the original suit.

B. Clarifying the Breadth of the Right

It is difficult to imagine rules more at odds with one another than those established in *Hope* and *Brosseau*. The Court should clarify this uncertainty in favor of the *Hope* rule that officials will have no qualified immunity if there is "fair warning" of the unconstitutionality of their behavior. Of course, the Court has stated time and again that the purpose of qualified immunity is to dismiss suits as soon as possible—a goal clearly at odds with the more lenient *Hope* test. But this goal works inequities when the violation is as blatant as that in *Weise*. Though the Court has repeatedly stated that obvious violations do not require fact-specific similarities to prior cases in order to be clear, the outcome of *Weise* suggests that the "obvious" violation test is too arbitrary to be useful.

Requiring the more general "fair warning" inquiry, rather than the fact-specific inquiry of *Brosseau*, is an appropriate way to correct the bias toward defendants in the latter test. First, it prevents a defendant from successfully dismissing a suit by alleging an extremely specific factual situation that a court is not likely to have addressed previously. Second, it avoids the problem of forcing judges to make factual determinations that are more appropriate for a jury. Finally, it will encourage officials to be more cognizant of the constitutional rights of the citizens they serve. Under the *Brosseau* test, a defendant can essentially claim ignorance of the law, even if he in fact had a strong suspicion that what he was doing was unconstitutional. A broader test prevents officials from squirming out of their duties so easily. The current Court might argue that this rule would penalize officials for their innocent mistakes. However, the skeptic would respond that the rule ensures that officials avoid those mistakes in the first place by taking a closer account of what the Constitution permits. Moreover, nothing in the "fair warning" test exposes officials to liability when the law is truly undeveloped.

C. Different Standards for Different Actors and Rights

In its original guise, qualified immunity doctrine exhibited a clear proportionality principle: the more discretion required of an official, the more "qualified" immunity will be.[203] It was this principle

203. *See* Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) ("[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being

that led the Court to grant absolute immunity to the President in *Nixon v. Fitzgerald*,[204] but to give his aides only qualified immunity in *Harlow v. Fitzgerald*. However, with *Anderson*, the Court rejected this principle. It is unlikely that the Court will return to a pre-*Anderson* world.[205] However, *Weise* suggests the potential value of a return to the proportionality principle.

Anderson might be conceptualized as an opinion that acknowledges the difficult decisions a police officer must make on a day-to-day basis. Granted, a police officer does not exercise the discretion needed by a police chief. Her behavior is guided by a set of rules, namely those of probable cause and reasonable suspicion. However, the manner in which those rules apply is not always certain, and an officer may make mistakes when the rules must be applied in a rapid fashion. Our legal system should not penalize officers for such mistakes with cumbersome lawsuits.

Even if this reading of *Anderson* is correct, the same concerns do not apply to all lower-level government officials. Then why afford the same leniency to such officials in qualified immunity analysis? *Weise* acutely illustrates the problem. The two defendants in the case were employees of the White House Advance Office. According to one official description of the office, it is responsible for the "planning and preparation that go into supporting the President at events around the country and world."[206] This description suggests that the job of a White House Advance staffer requires very little discretion; it is difficult to see how the position requires decisionmaking about who should and should not attend open presidential events. Contrast the advance man to the Secret Service agent, whose job undoubtedly requires the protection of the President. To ensure that this is done properly, the agent must make split-second decisions based on the circumstances known to him—tasks similar to those of the police officer in *Anderson*. As a result, deference to his decisions may be

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dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time.").

204. *See supra* note 19.

205. *See* Anderson v. Creighton, 483 U.S. 635, 643 (1987) ("[W]e have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated."). The concurring Justices in *Saucier* repeated this sentiment. Saucier v. Katz, 533 U.S. 194, 214 (2001) (Ginsburg, J., concurring).

206. *Presidential Department Descriptions*, THE WHITE HOUSE, http://www.whitehouse.gov/about/internships/departments (last visited Feb. 13, 2012).

appropriate when he claims qualified immunity. This is not to suggest that, had a Secret Service agent rather than a White House Advance staffer removed Weise and Young, the agent's action would ultimately have been entitled to immunity. But, given their differing duties, it is more appropriate to apply a factual-reasonableness inquiry to the Secret Service agent than to the advance man.

On a related note, it might be appropriate to conduct different reasonableness inquiries under different areas of constitutional law. The *Weise* majority alluded to (and rejected) this possibility: "[M]erely stating that the government cannot engage in viewpoint discrimination is just about as general as stating that the government cannot engage in unreasonable searches and seizures."[207] The court's point rings false. As a textual matter, the language of the First Amendment is less equivocal than the Fourth Amendment's vague "reasonableness" standard. And not only is the prohibition on viewpoint discrimination a time-honored feature of First Amendment law, it is also much easier to identify viewpoint discrimination than behavior that violates Fourth Amendment "reasonableness." Put another way, what is legally reasonable tends to vary based on the circumstances, but viewpoint discrimination remains viewpoint discrimination, even if an official who suppresses speech can offer some plausible alternative explanation for doing so. Where it is less difficult for officials to interpret and observe rights, a court faced with a qualified immunity claim should pay less attention to the factual circumstances that the defendant faced.

This intuition finds support in the Court's approach to law development in other situations. In the context of appellate review, for example, the Court has often used the doctrine of constitutional fact in First Amendment cases to "review the evidence to make certain that [constitutional] principles have been constitutionally applied."[208] This is true even though appellate courts typically pay deference to trial courts' credibility determinations and other findings of fact. The rationale for the departure is that independent review is required to

207. Weise v. Casper, 593 F.3d 1163, 1168 n.1 (10th Cir. 2010).

208. Bose Corp. v. Consumers Union, 466 U.S. 485, 508 (1984); *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 567 (1995) ("[T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection.").

ensure protection of First Amendment rights.[209] Similar reasoning can be applied to First Amendment cases in a qualified immunity posture, where judges must determine whether to exercise their full lawmaking authority or to defer to the defendant's exercise of discretion.

Of course, different legal contexts bring with them different equities. When determining whether to overturn lower court findings of fact, appellate courts are primarily concerned with the administrative efficiency of the judicial system and the relative competence of trial and appellate courts to apply law to fact. In a qualified immunity posture, a key issue is whether permitting a lawsuit would deter government officials, typically executive officials, from using their discretion and performing their jobs properly. But it is worth remembering that, like refusal to exercise appellate jurisdiction, refusal to hear a claim on the merits may deny a plaintiff rights and stagnate the law. Because it shares these concerns with qualified immunity, the doctrine of constitutional fact can serve as a useful analogue.[210]

D. Determining Sources of Law

Because the fact-specific approach of contemporary qualified immunity doctrine already favors defendants, the Court should not allow defendants to claim constitutional confusion by pointing to just a few cases that support their actions. One way to respond to this concern is to abandon the current rule that the plaintiff must

209. *See Bose Corp.*, 466 U.S. at 510–11 ("The requirement of independent appellate review . . . reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.").

210. Though the constitutional-fact doctrine has a basis in First Amendment law, courts have not so limited it in recent years. *See* Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1453–56, 1459–62 (2001) (describing how courts have "most consistently applied" constitutional-fact doctrine to questions of substantive First Amendment law, and commenting on its more recent application to cases involving procedural rights such as those found in the Fourth and Fifth Amendments). Where the Court has found that the "relevant legal principle can be given meaning only through its application to the circumstances of a case," it has more robustly reviewed the facts below. Miller v. Fenton, 474 U.S. 104, 114 (1985) (reviewing the voluntariness of a confession under the Fifth Amendment); *see also* Ornelas v. United States, 517 U.S. 690, 697 (1996) (reviewing de novo findings of probable cause and reasonable suspicion under the Fourth Amendment). This approach might likewise inform a court's assessment of whether to reach the merits in non–First Amendment cases.

establish the clarity of the right.[211] Instead, the Court could adopt a burden-shifting scheme. If the plaintiff presents at least some authority suggesting that the right exists, the defendant must present an equal amount of authority suggesting that it does not. This approach will ensure protection for defendants from constitutional claims that they in truth could not have anticipated. At the same time, it prevents defendants from weaseling out of their obligations by citing obscure cases to support spurious claims that the existence of a right was "unclear." Less frequently will defendants be able to kill the suit by citation to a novel legal theory; and if both parties propose novel theories, then courts may squarely test them against one another. This approach also promises to strike a balance when courts opt to address the clarity issue first. Courts will more frequently get beyond the "clearly established" prong to reach the merits; defendants will still be able to obtain dismissal by arguing that their actions were not in fact a constitutional violation.

A second response—one that focuses on an official's ex ante behavior rather than ex post applications of qualified immunity doctrine—is to require officials to err on the side of constitutionality if there is a legitimate legal dispute about whether a particular practice is constitutional. If it is true that officials monitor court developments to determine what they may and may not do, then there is no reason to dismiss them from lawsuits when they apply novel theories that are restrictive of constitutional rights. When current legal doctrine does not anticipate an official's behavior, respect for rights and the need to clarify the law require that the case be tried. Adoption of such a rule will present officials with a clear ex ante choice: either remain within the time-honored bounds of constitutional rights or choose a novel theory and accept the attendant risk of a lawsuit.

Granted, this option does not strike the balance of a burden-shifting scheme, and it promises to impose the cost of trial on officials much more frequently than the current regime. This appears especially true where new technology is involved.[212] Still, as it exists

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211. *See* Weise v. Casper, No. 05-cv-02355-WYD-CBS, 2008 U.S. Dist. LEXIS 90211, at *14–15 (D. Colo. Nov. 6, 2008) ("Once the defense is raised by a defendant, the burden shifts to the plaintiff to come forward with facts or allegations sufficient to show both that the defendant's actions violated a constitutional or statutory right and that the right was clearly established at the time of the defendant's unlawful conduct.").

212. Consider Tasers, a relatively new instrument of police force. Courts have recently been asked to assess not only whether Taser use amounts to constitutionally excessive force, but also whether constitutional misuse of Tasers is clearly established. In *Mattos v. Agarano*, for

today, the qualified immunity inquiry is stacked heavily in favor of the government. If the doctrine is truly meant to balance competing values,[213] stern measures may be needed to recalibrate the scales.

V. CONCLUSION

Modern qualified immunity doctrine is flawed. By drawing a very narrow definition of what it means for constitutional law to be clearly established, it favors the interests of defendants over those of plaintiffs and threatens to leave the law in limbo. Some of the Court's cases are simply contradictory. To resolve one such conflict, the Court should opt for *Hope*'s "fair warning" standard of objective reasonableness over *Brosseau*'s fact-intensive approach. This approach would acknowledge that the sources of our law are not limited to the previous decisions of federal courts. Of course, federal case law will remain our primary index of legality. To ensure equitable use of that case law in litigation, the Court should require defendants to match plaintiffs' burden to show that a right is clearly established. Where cases are in equipoise or where there is a legitimate dispute over general legal principles, it should consider adjusting the imbalance between defendants and plaintiffs by requiring defendants to err on the side of constitutionality. Finally, the Court should consider how it might revive aspects of its past qualified immunity jurisprudence, including the "rigid order of battle" and inquiries that are tailored to the discretion of the official or the nature of the right at issue.

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example, the Ninth Circuit found that police who Tased a pregnant woman who refused to accept a traffic citation violated the Fourth Amendment. 661 F.3d 433, 446 (9th Cir. 2011). However, the court counted no cases on point, and thus found insufficient legal clarity to have guided the defendants. *Id.* at 448. Under my proposal, the outcome would be different. Because Taser use in such situations is legally nebulous, officers would simply be required to refrain from it when arresting someone in circumstances such as these. If the court were to address the clarity prong first, then it would reach the merits; and if it found the defendant's actions unconstitutional, as it did in *Mattos*, the defendant would be liable for damages. At the same time, courts would swiftly dismiss officers in easier cases, such as where they Tased a suspect charging at them with a weapon. My scheme essentially reallocates the risk of unconstitutionality—in close cases, the loss falls on the defendant rather than the plaintiff.

213. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

Whatever approach the Court takes, *Weise v. Casper* makes one thing apparent: reevaluation of qualified immunity is necessary not only to clarify this confused doctrine, but also to ensure a fuller flourishing of rights.

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