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Reconstructing the Right Against Excessive Force

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Abstract

Police brutality has captured public and political attention, garnering protests, investigations, and proposed reforms. But judicial relief for excessive force victims is invariably doubtful. The judicial doctrine of qualified immunity, which favors government interests over those of private citizens, impedes civil rights litigation against abusive police officers under 42 U.S.C. § 1983. In particular, the doctrine forecloses lawsuits unless the law is clearly established that the force would be unlawful, requiring a high level of specificity and precedent that is difficult to satisfy. Further tilting the balance against excessive force victims, Fourth Amendment case law privileges the police perspective, incorporating and fostering police biases and racial stereotypes, and prohibiting inquiry into an officer's state of mind. Examining recent Supreme Court opinions on excessive force and qualified immunity, this Article finds that the two strands of law continue to endorse the "shoot first, think later" police culture of today. Moreover, they obstruct victim compensation and hinder the development of constitutional law defining the limitations on excessive force.

This Article makes an important contribution to the current literature by arguing that the current state of the law cannot be reconciled with the Reconstruction origins of civil rights legislation, which sought to eradicate post-Civil War state violence targeting African-Americans and to implement the Fourteenth Amendment's due process protections. This Article proposes that the Court reconstruct qualified immunity doctrine by recognizing a more generalized right against excessive force in determining whether the law is clearly established. The approach would more properly reflect the remedial purposes of § 1983. This Article further argues that substantive due process supports a general right against excessive force—an approach previously rejected by the Court in favor of an exclusively Fourth Amendment-protected right—that addresses the officer's intent. Similarly guided by the remedial purposes of § 1983, this Article proposes that courts consider statutes, government regulations, and "use of force" policies in determining whether officers knew or should have known that their actions violated the citizen's right to be free from excessive force.

INTRODUCTION

The United States is at another stage of consciousness and anger over state violence against its citizenry, in particular police officers' disproportionate excessive force against African-Americans.[1] This is not

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1. *See* THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 5 (2013), http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf (reporting that police are twice as likely to threaten African-American drivers with, or subject them to, excessive force, than white and Hispanic drivers); Damian Cave & Rochelle Oliver, *The Videos That Are Putting Race and Policing into Sharp Relief*, N.Y. TIMES (Nov. 24, 2015), http://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html; Kimberly Kindy et al., *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015), http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/ (documenting people shot by police in 2015, numbering 965 lives as of December 24, 2015, ninety of whom were unarmed; African-American males made up forty percent of the fatalities, though only six percent of the general population); Denver Nicks & Charlotte Alter, *Thousands Rally Against Police Brutality in Washington and New York City*, TIME (Dec. 14, 2014, 1:13 PM), http://time.com/3632777/police-brutality-protest-washington/; Sandhya Somashekhar et al., *Black and Unarmed*, WASH. POST

the first time. In each era, changes and reforms are suggested in response to heightened awareness of police brutality against minorities.[2] The causes and solutions go well beyond the limited reach of civil litigation—primarily lawsuits against police officers under 42 U.S.C. § 1983. But affording victims their day in court, where they may assert their constitutional right to be free of excessive force and seek economic relief, is crucial to those who have suffered and to the development of constitutional protections against police abuse.[3]

Alternative judicial remedies are likely to prove lacking. The Supreme Court has largely precluded individuals from obtaining injunctive relief and systemic changes to police brutality.[4] Litigants also have had little success in bringing § 1983 claims against municipalities given the Court's near-impossible standards for proving abuse was caused by

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(Aug. 8, 2015), http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed/ (reporting that "unarmed black men are seven times more likely than whites to die by police gunfire").

2. *See, e.g.*, CEDRIC L. ALEXANDER ET AL., FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 37–38 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf (describing the need for changes in policies and procedures due to fatal police shootings throughout the country); Myriam E. Gilles, *Police, Race and Crime in 1950s Chicago:* Monroe v. Pape *as Legal Noir*, *in* CIVIL RIGHTS STORIES 41, 42–45 (2008) (describing racial tensions and violence perpetrated by Chicago police against African-Americans in the first half of the twentieth century); OTTO KERNER ET AL., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 5 (1967), https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf (attributing 1967 race riots to, in part, "a widespread belief among Negroes in the existence of police brutality and in a 'double standard' of justice and protection—one for Negroes and one for whites"); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 249 (2010) ("[T]he 1929 Illinois Crime Survey found that African-Americans made up 30 percent of the recorded killings by police in 1926–1927, though they represented only 5 percent of the population."); U.S. COMM'N ON CIVIL RIGHTS, RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY, AND DISCRIMINATION § 2.1 (1999), http://www.usccr.gov/pubs/larpt/chapter7.htm ("[P]erceptions and incidents of the department's application of excessive force towards people of color continue to occur in Los Angeles. . . . [L]ingering racial and ethnic tensions between minorities and law enforcement authorities remain.").

3. Though § 1983 litigation also may be justified on deterrence grounds, commentators argue that it "has . . . failed to live up to its promise of eradicating widespread and pernicious practices of rank and file officers." Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 20 (2000); *cf.* Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), http://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html (asserting deterrence rationale in support of § 1983 litigation).

4. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983) (imposing heightened standing requirements for injunctive relief); Rizzo v. Goode, 423 U.S. 362, 372 (1976) (requiring showing of deliberate policy to support claim of pervasive unconstitutional police conduct targeting minorities).

policy, custom or widespread practices,[5] or failure to train or discipline.[6] Structural-reform litigation is therefore limited to the often politicized prerogatives of the federal government.[7] Criminal prosecution is also subject to the discretion of prosecutors, who may be influenced by their relationships with officers.[8] Finally, criminal defendants can rarely raise police brutality as part of their defense, leaving little judicial explication of the constitutional contours of excessive force.[9]

Although § 1983 is the primary avenue to obtain a remedy for a police officer's violation of the right against excessive force, the Supreme Court has curtailed the right over the past three decades, making it exceedingly difficult for victims of police brutality to overcome defendants' motions to dismiss or motions for summary judgment. The Court has limited the efficacy of § 1983 through two interdependent doctrinal shifts. First, the Court has diminished a victim's civil rights remedy through a substantive constitutional standard under the Fourth Amendment that privileges the police perspective in excessive force cases, affording latitude to escalation of violence and to police biases.[10] Second, the Court has developed a qualified immunity doctrine that approaches "absolute immunity"[11] for police, holding only "the plainly incompetent or those who knowingly violate the law"[12] potentially responsible for excessive force and avoiding development of constitutional limitations on police violence.[13] Together, these strands have evolved into a judicial apology for—if not an endorsement of—a "shoot first, think later" police culture.[14]

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5. City of St. Louis v. Praprotnik, 485 U.S. 112, 130 (1988).

6. Connick v. Thompson, 563 U.S. 51, 68 (2011).

7. *See, e.g.*, 42 U.S.C. § 14141 (2012); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1378–79 (2015) (noting that most agreements between federal government and local police departments regulate use of force).

8. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 121 (1997). Conflicts of interest that infect state and local prosecutions may not affect federal prosecutions. However, criminal prosecutions of police brutality are highly complex cases that may not prove successful.

9. Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1915–16 (2007).

10. *See* Graham v. Connor, 490 U.S. 386, 397 (1989); Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1127 (2008); Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 864–65 (2014).

11. Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 232 (2006).

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

13. *See* Karen M. Blum, Se*ction 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 946–47 (2015) ("It has been over ten years since the Court has denied qualified immunity to a state actor . . . ."); *see also* White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam) (vacating lower court's denial of qualified immunity to police officer who failed to warn an armed suspect before shooting and killing him, stating: "In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases").

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

The rise of qualified immunity as an obstacle to judicial relief for excessive force is particularly tragic given § 1983's origins, which lay in racialized state brutality. The Reconstruction-era Congress passed the Civil Rights Act of 1871 in response to Southern mob violence and lynchings of African-Americans after the Civil War.[15] The Act included a civil cause of action—now § 1983—for those whose Fourteenth Amendment rights to due process were violated by state and local officers who explicitly or tacitly supported Ku Klux Klan terror and attacks.[16]

Although § 1983 went largely untapped for almost a century, the Court in *Monroe v. Pape*[17] held that individuals could utilize the cause of action against state and local officers to vindicate constitutional rights against brutal police tactics.[18] The Court later held that local governments could be found liable for unconstitutional policies and practices.[19] Today, § 1983 is not limited by race or particular government forms of abuse, affording citizens a critical judicial remedy for constitutional violations. But the Court's more recent and continuing retrenchment of § 1983—through qualified immunity, together with specific aspects of excessive force doctrine—only deter victims of police violence from vindicating their rights, which were at the heart of § 1983's inception.

This Article makes an important contribution to the literature on qualified immunity and excessive force by reconstructing a right against excessive force, one that is consonant with one of the remedial objectives of both the Fourteenth Amendment and § 1983—eradicating state-sanctioned violence against African-Americans. So reconstructed, more victims should overcome qualified immunity and receive a trial on their excessive force claims.

This Article argues that the Court should recognize what it once derided as a "generic" right against excessive force—a general rule requiring police to constrain their use of force, without the necessity of case law addressing each exact situation that police confront. Second, the Court should recognize that the right against excessive force in the prearrest and stop-and-seizure context may derive from the Fourteenth Amendment's Due Process Clause as well as from the Fourth Amendment. Under the Due Process Clause, a court may consider an officer's state of mind and whether the officer abused his authority, considerations largely foreclosed under the Fourth Amendment. In contrast to previous scholars' efforts to overcome narrow definitions of the right against excessive force, this Article argues that this liberty

15. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 665 (1978); Monroe v. Pape, 365 U.S. 167, 172–73 (1961), *overruled in part by Monell*, 436 U.S. 658.

16. *Monroe*, 365 U.S. at 185.

17. 365 U.S. 167 (1961).

18. *Id.* at 175–76.

19. *Monell*, 436 U.S. at 682.

interest is properly located within the Due Process Clause and is supported by the Reconstruction Congress's intent to enforce the Fourteenth Amendment through civil rights legislation, including § 1983.

Finally, this Article recommends an innovation in assessing whether qualified immunity protects an officer. Guided by the remedial objectives of § 1983, courts should consider statutes, government regulations, and policies addressing use of force that support the clearly established constitutional right. Presently, an officer is reasonably expected to know the scope of a citizen's right against excessive force based only on controlling case law. Inclusion of these other sources addresses the Court's longstanding concern that officers receive fair notice of what is prohibited but also may encourage local and state police departments to strengthen and clarify their limitations on use of force.

This Article proceeds in three parts. Part I provides a brief history of § 1983, from its origins to its modern development. It then focuses on the Court's qualified immunity jurisprudence, which has diminished § 1983's utility as a judicial remedy. Part II addresses excessive force doctrine's ambiguity and its excessive deference to police. This Article then examines how the qualified immunity doctrine proves nearly fatal to § 1983 excessive force claims. Finally, in Part III, this Article addresses the potential solutions to the current weakened state of excessive force civil rights litigation as well as possible objections.

I. SECTION 1983: EVOLUTION OF A LIMITED JUDICIAL REMEDY AGAINST STATE VIOLENCE

The origins of § 1983 evidence the inextricable relationship between racism and police regulation.[20] Through civil rights legislation enacted immediately after the Fourteenth Amendment's ratification, Congress sought to implement the constitutional provisions' protections by affording victims of lynching and other brutality a cause of action against state actors.[21] But the current state of qualified immunity law disregards the Reconstruction Congress's intent to afford relief for state violence against African-Americans by immunizing police officers in most instances.[22] The following describes the history of § 1983, its modern evolution, and the Court's departure from the civil rights law's original remedial purposes.

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20. KENNEDY, *supra* note 8, at 121.

21. ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876, at 13 (1985).

22. *See supra* notes 11–13 and accompanying text.

A. *The Civil Rights Act of 1871*

Section 1983 was originally enacted as Section 1 of the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act).[23] In passing the law, Congress sought to enforce the Fourteenth Amendment, in particular against the actions of the Klan in the South, who terrorized African-Americans.[24] The legislation built on other Reconstruction-era statutes, the Civil Rights Act of 1866[25] and the Enforcement Act of 1870,[26] which focused on prohibiting—and, in some cases, criminalizing—racial discrimination and violence.[27]

The 42nd Congress was particularly mindful that Southern authorities did little to protect African-Americans from the Klan or other mob violence and even aided in the abuses.[28] Congressmen described the violence and lack of remedies in vivid detail:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to

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23. Pub. L. No. 42-22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2012)). Section 1983 states, in relevant part:

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

42 U.S.C. § 1983 (2012); *see also* David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2186 n.10 (2005); Gilles, *supra* note 3, at 54–60.

24. *See Monell*, 436 U.S. at 665 (discussing legislative purposes of Civil Rights Act); FRANK J. SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION: A DISTORTION OF CONSTITUTIONAL JURISPRUDENCE 11–12, 91 (2000) (describing "the predominant Republican view of the Fourteenth Amendment as an affirmative conferral of substantive personal rights").

25. 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (2012)).

26. 16 Stat. 140 (codified as amended at 18 U.S.C. § 241 (2012)).

27. Current civil rights provisions derived from the acts include: 42 U.S.C. §§ 1981–82, 1988; 28 U.S.C. §§ 1343(a)(3), 1443; 18 U.S.C. §§ 241–42. *See* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 231 (6th ed. 2008) (discussing early criminal remedies for civil rights violations); THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION 23 (5th ed. 2004) ("There is also an obvious kinship between section 2 of the 1866 Act and 42 U.S.C. § 1983.").

28. *See* EISENBERG, *supra* note 27, at 61; *see also* The Slaughterhouse Cases, 83 U.S. 36, 70 (1873) (describing the lives of African-Americans in former slave states and the need for federal government protection of the former "slave race") ("It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.").

> apply the proper corrective. . . . Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.[29]

One of the Act's primary aims was thus to afford victims of Klan violence a remedy that Southern states failed to provide.[30] In addition to authorizing the federal government to prosecute brutality in the face of inaction, the Act provided a person whose civil rights were injured by lynching or other violence a cause of action against state officers who failed to protect him.[31]

Despite the enactment of these various civil rights statutes, the Supreme Court's rulings in a series of cases over the course of the next decade rendered them largely ineffectual.[32] These cases limited the breadth of the Civil Rights Acts, so narrowly interpreting state action under the Fourteenth Amendment as to remove many instances of violent and discriminatory conduct from federal jurisdiction.[33]

The implications were felt in victims' limited recourse to what became § 1983. Over the next fifty years, courts decided just twenty-one cases under § 1983's precursor.[34] Federal prosecutions under the Civil Rights Acts also declined from 1,304 in 1873 to 25 in 1878.[35] The dormancy of

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29. Monroe v. Pape, 365 U.S. 167, 175 (1961) (quoting CONG. GLOBE, 42d Cong., 1st Sess., 374 (1871) (statement of Rep. David P. Lowe)); *see also* CONG. GLOBE, 42d Cong., 1st Sess., 428 (1871) (statement of Rep. John Beatty) ("[M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.").

30. *Monroe*, 365 U.S. at 174–77 (discussing objectives of section 1 of the Ku Klux Klan Act).

31. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1334 (1952). As an act focused on persons' acts "under color of" law, the section provides a remedy "against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." *Monroe*, 365 U.S. at 176.

32. Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 9 (1985) ("The fact remains, nevertheless, that with a few quick thrusts, the Court cut the heart out of the Civil Rights Acts.").

33. *Id.* at 8–10; The Civil Rights Cases, 109 U.S. 3, 4–5, 11 (1883) (invalidating the Civil Rights Act of 1875, which prohibited theaters, inns, and railroads from denying access to African-Americans on account of their race); United States v. Harris, 106 U.S. 629, 644 (1883) (overturning federal criminal indictments filed pursuant to the Ku Klux Klan Act against private individuals for lynching African-Americans); United States v. Cruikshank, 92 U.S. 542, 557 (1876) (overturning federal criminal indictments under the Civil Rights Act of 1870 of private individuals for their role in lynching African-Americans).

34. Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951).

35. Blackmun, *supra* note 32, at 11. The decline also coincided with the withdrawal of federal troops from the South. *Id.*

§ 1983 and negligible civil rights prosecutions at the turn of the century prompted Justice Harry Blackmun to describe the era as "our Dark Age of Civil Rights."[36]

Significant changes in civil rights law began with the Justice Department's establishment in 1939 of a Civil Rights Section and its prosecution of police brutality and lynch mob cases.[37] In particular, the Court moved away from its crabbed definition of state action for purposes of prosecuting civil rights cases. In *Screws v. United States*,[38] the Supreme Court upheld the civil rights prosecution of three Georgia county police officers for fatally beating an African-American man.[39] The Court embraced a more expansive understanding of police conduct "'"under color of" state law,' bringing misuse or abuse of power authorized by state law within the ambit of the civil rights statute.[40]

B. *Modern Era Development of § 1983*

The "watershed" § 1983 case, *Monroe v. Pape*, emerged in 1961 from Chicago, a city riven by hostile relations between the police and minority residents.[41] In *Monroe*, the Supreme Court recognized a cause of action against individual officers for constitutional rights violations under § 1983 despite state law not having authorized the officer's conduct.[42]

In search of a murder suspect, thirteen Chicago police officers entered the Monroe family's home early in the morning without a warrant, waking the parents and six children at gunpoint, forcing them to stand naked, and ransacking the home.[43] The police held the father, James Monroe, for ten hours, denied him an attorney, and ultimately released

36. *Id.* at 11 ("For the first 40 years of [the twentieth] century, the only judicial relief available was in suits involving official action denying Negroes the right to vote.").

37. *Id.* at 13–14. Despite the Civil Rights Section's creation, states prosecuted very few of the thousands of civil rights complaints that the Section received. *See* Screws v. United States, 325 U.S. 91, 159 (1945) (Roberts, J., dissenting) (noting that of 8,000 to 14,000 complaints received annually, no more than seventy-six complaints were ever prosecuted in one year).

38. 325 U.S. 91 (1945).

39. *Id.* at 92–93, 112–13.

40. *Id.* at 109–10 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). The Court relied on a decision from four years earlier in which the Court held that election officials' altering of Democratic primary ballots were acts under color of law for purposes of depriving people of their constitutional rights, under the criminal statute that is now 18 U.S.C. § 242, even if state law did not authorize those acts. *Classic*, 313 U.S. at 326 ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.").

41. 365 U.S. 167 (1961), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); Gilles, *supra* note 2, at 51–52 (describing racial tensions in Chicago between 1940 and 1960, including hostile relations between police and African-American residents).

42. *Monroe*, 365 U.S. at 183.

43. *Id.* at 169.

him without charges.[44] The Complaint alleged that Detective Frank Pape called Mr. Monroe a "nigger" and "black boy" and that he and other officers physically assaulted Monroe and a number of the children.[45] Though the Court upheld the claims against the individual officers, it dismissed Monroe's claims against Chicago, holding that municipalities did not fall within the purview of § 1983.[46]

In finding that Monroe asserted a valid cause of action, the Court relied on *Screws* and *United States v. Classic*, which held that officers' misuse of state authority constituted state action.[47] The Court examined the congressional debates over the provision's enactment, stressing the failure of states to punish and prevent violence against African-Americans as the basis for a federal remedy.[48] The Court further observed that Congress intended the legislation to apply beyond the Reconstruction era and the South.[49]

The *Monroe* Court also held that liability need not hinge on a showing of an officer's "specific intent to deprive a person of a federal right" but that instead the law "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[50] Ten years later, in *Bivens v. Six Unknown Federal Narcotics Agents*,[51] the Court upheld similar constitutional tort lawsuits against federal officials.[52]

In opening up the possibility of constitutional tort litigation against individual officers, *Monroe* did not presage a strict liability regime. Rather, an officer's reasonable mistake—based on either objective or subjective criteria—could trump liability for an unconstitutional action. In *Pierson v. Ray*,[53] a case involving the arrest and conviction of African-American and White clergy seeking to integrate segregated facilities at an interstate bus terminal in Mississippi, the Court held that defendant police officers were entitled to defenses of good faith and reliance on

44. *Id.* Mary Saisi had identified Monroe from a series of mugshots as the killer of her husband. Gilles, *supra* note 2, at 58. It soon emerged that Saisi had lied, having conspired with her boyfriend to kill her husband. *Id.* at 59–60. She was sentenced to sixty years in prison. *Id.* at 60.

45. Gilles, *supra* note 2, at 59.

46. *Monroe*, 365 U.S. at 187–92.

47. *Id.* at 183–85 (discussing *Classic*, 313 U.S. 299 (1941), and *Screws*, 325 U.S. 91 (1945)).

48. *Id.* at 170–74.

49. *Id.* at 183.

50. *Id.* at 167 (quoting *Screws*, 325 U.S. at 103).

51. 403 U.S. 388 (1971).

52. *Id.* at 392–95.

53. 386 U.S. 547 (1967), *overruled in part by* Harlow v. Fitzgerald, 457 U.S. 800 (1981).

probable cause in § 1983 actions.[54] *Pierson* further clarified *Monroe*, holding that the officers could not be held liable under § 1983, as the Court had not decided the unconstitutionality of the statute under which the officers acted until after the arrests.[55]

The Court appeared to significantly open the door to individual redress of constitutional violations in *Monell v. Department of Social Services of the City of New York*[56] by overturning *Monroe*'s holding that § 1983 did not afford a remedy against a municipality.[57] The Court held that local governments could be liable for constitutional violations based on actions taken pursuant to "official policy" or "governmental 'custom,'" even if the latter were not formally approved.[58] However, the Court rejected vicarious liability for municipalities.[59]

Despite effecting a sea change in constitutional tort liability, the Court left open "what the full contours of municipal liability under § 1983 may be[,] . . . expressly leav[ing] further development of this action to another day."[60] At roughly the same time that the Court appeared to expand possible liability and constitutional vindication in *Monell*, the Court began to limit the full possibilities of remedy as originally suggested in *Monroe*.

C. *Qualified Immunity as a Limitation on the § 1983 Remedy*

Qualified immunity is a substantial obstacle to legal remedies for victims of police brutality and other government abuses. As described below, the Supreme Court has crafted a series of rules that, this Article argues, improperly favor the interests of government defendants over citizen plaintiffs.

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54. *Id.* at 557.

55. *Id.* ("We agree that a police officer is not charged with predicting the future course of constitutional law."). Though the rule is now something of a commonplace, attributed to fairness to the officer, it is not clear that that had to be the alignment of values and concerns. A different rule might have permitted damages liability to flow from a holding of unconstitutionality after the fact, regardless of the reasonableness of the error. This rule would have prioritized remedying constitutional violations over protecting officers from increased exposure to liability. *See* BELL, *supra* note 27, at 231.

56. 436 U.S. 658 (1978).

57. *Id.* at 663.

58. *Id.* at 690–91, 694 ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

59. *Id.* at 691, 694 ("[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents.").

60. *Id.* at 695; *see also id.* at 713 (Powell, J., concurring) (noting that "[d]ifficult questions nevertheless remain for another day" and that "[t]here are substantial line-drawing problems in determining" when municipal liability lies for a constitutional violation).

Most constitutional torts litigation involves executive government workers and municipalities themselves. These persons may include federal, state, and local executive officers. Government entities may include towns, cities, and various local government departments. But other government workers—including members of the judiciary, legislative branch workers, the President, and prosecutors—generally enjoy absolute immunity.[61] Similarly, sovereign immunity protects the United States, as well as the states and their government agencies, from suits for damages under *Bivens* or § 1983.[62]

Despite the availability of litigation against various government defendants, Professor Theodore Eisenberg observed that "[t]he gap between having a legal right and having an effective remedy for that right rarely has been wider than in litigation under section 1983."[63] The primary limitations on § 1983 and *Bivens* remedies are the judicially created doctrine of qualified immunity for individual officers and the high standards of liability for local governments and entities.[64] This Article focuses primarily on qualified immunity, though it ultimately suggests proposals that should impact municipal liability as well.

To survive an officer's motion to dismiss or motion for summary judgment on the basis of qualified immunity, a litigant must allege or demonstrate facts showing that the officer's conduct could be unconstitutional *and* that a reasonable officer would know that the

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61. Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982) (holding absolute immunity from damages liability to apply to acts within the "'outer perimeter' of [the President's] official responsibility"); Imbler v. Pachtman, 424 U.S. 409, 430–31 (1976) (holding prosecutors receive absolute immunity from damages under § 1983 for functions "associated with the judicial phase," including initiating prosecution or presenting a case); Pierson v. Ray, 386 U.S. 547, 554–55 (1967) (holding that § 1983 affords judges absolute immunity); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (holding that legislators enjoy absolute immunity under § 1983).

62. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (holding that "person" in § 1983 does not include states and state agencies); United States v. Sherwood, 312 U.S. 584, 586 (1941) (holding that the United States is protected from suit by sovereign immunity unless it consents to suit).

63. EISENBERG, *supra* note 27, at 11. Professor Eisenberg attributed the gap to "a staggering gauntlet of defenses, immunities, and forum allocation doctrines." *Id.* This Article focuses primarily on qualified immunity as an impediment to relief under § 1983.

64. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) ("For executive officials in general, however, our cases make plain that qualified immunity represents the norm."); James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1629 n.146 (2011) (attributing immunity doctrine to judicial development but noting Congress has authority—and has utilized it—to address immunity as well). Courts apply qualified immunity doctrine no differently in the case of federal or state officials. Butz v. Economou, 438 U.S. 478, 504 (1978); *see also* John C. Jeffries, Jr., *The Liability Rules for Constitutional Torts*, 99 VA. L. REV. 207, 236 (2013) (characterizing the legal standards for identifying official policy or custom as "radically indeterminate").

conduct was prohibited.[65] The Supreme Court characterizes the qualified immunity doctrine as a compromise of "competing values" or "evils inevitable in any available alternative,"[66] specifically: (1) protecting individuals' constitutional rights, (2) limiting government and societal costs, and (3) maintaining vigorous exercise of government duties.[67] But it is a compromise that frequently defers to the government.

On one side of the values ledger, the damages remedy protects citizens' constitutional guarantees and encourages government adherence to the Constitution.[68] Related to this value is the ongoing development of constitutional law.[69] However, the Court has diminished this concern by rejecting its earlier mandate that judges first decide the existence of a constitutional right.[70]

The other two values tend to favor immunity. First, § 1983 litigation means defendant government workers and society bear the costs of lawsuits, specifically "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."[71] Second, lawsuits over-deter officials, discouraging "vigorous exercise" of their jobs.[72] Finally, any balancing

65. *See, e.g.*, Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) ("Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." (quoting *Harlow*, 457 U.S. at 818)).

66. *Harlow*, 457 U.S. at 807, 809, 813–14 (holding presidential aides are not entitled to absolute immunity but to qualified immunity from damages suit for unlawful discharge from Air Force).

67. *Id.* at 813–14.

68. *See id.* at 807, 814; Jeffries, *supra* note 64, at 243.

69. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001) (explaining that "law's elaboration from case to case" is one reason for mandating that courts first determine existence of constitutional right in qualified immunity analysis), *modified by* Pearson v. Callahan, 555 U.S. 223 (2009). Professor James Pfander identifies the three principles guiding qualified immunity as (1) vindication of those whose constitutional rights were violated, (2) limiting the burden suffered by workers and governments due to litigation, and (3) development of constitutional law (avoiding stagnation). Pfander, *supra* note 64, at 1624–25; *see also* Karlan, *supra* note 9, at 1918 ("Damages litigation [under § 1983] offers an opportunity not only to compensate individuals who have been injured by unconstitutional conduct, but to refine constitutional law as well."); Michael T. Kirkpatrick & Joshua Matz, *Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from* Saucier *to* Camreta *(and Beyond)*, 80 FORDHAM L. REV. 643, 672–76 (2011) (discussing the importance of developing constitutional law through civil rights litigation and its superiority to alternatives of municipal liability, declaratory and injunctive relief lawsuits, and suppression challenges).

70. *See Pearson*, 555 U.S. at 236 (permitting courts to use discretion in deciding which qualified immunity prong to analyze first).

71. *Harlow*, 457 U.S. at 814.

72. *See id.* at 807 (quoting Butz v. Economou, 438 U.S. 478, 504–06 (1978)); *see also* Jeffries, *supra* note 64, at 244 ("[T]he Supreme Court has posited overdeterrence—more accurately, unintended deterrence—of socially desirable conduct as the countervailing concern.").

presupposes a policy that ensures "the dismissal of insubstantial lawsuits without trial."[73]

Largely because of these animating principles, the Court's refinement of the qualified immunity doctrine has amounted to the retrenchment of § 1983 liability. Examining current qualified immunity, Professor John Jeffries Jr. considers it "complicated, unstable, and overprotective of government officers."[74] The Court has developed various standards and "rules" that tend to disfavor redressing constitutional violation and favor immunity. The following examines the assumptions on which qualified immunity has developed and criticizes its effect on individuals' liberty interests.

1. Reconsidering the Interests Favoring Qualified Immunity

Concerns over financial costs borne by individual officers and deterrence of vigorous police work due to § 1983 litigation appear overstated.[75] A recent study by Professor Joanna Schwartz determined that local governments almost universally indemnify officers in § 1983 cases.[76] Professor Schwartz thus concludes that "qualified immunity can no longer be justified as a means of protecting officers from the financial burdens of personal liability."[77] Moreover, individual officers are rarely asked to provide any portion of the judgment or settlement or to face discipline.[78]

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73. *Harlow*, 457 U.S. at 808, 814–15.

74. Jeffries, *supra* note 64, at 250.

75. The popularity of § 1983 with litigants helps explain the Courts' imposition of high qualified immunity standards. By one measure, federal civil rights filings increased from 287 in 1960 to 40,420 cases in 2002. EISENBERG, *supra* note 27, at 170. But these data are likely overinclusive. Civil rights filings are based on the Administrative Office's "other civil rights cases" category, which not only covers § 1983 cases but also §§ 1981, 1985, 1988, 2000a, 2000d, and Fifth Amendment claims as well as a few likely others. *Id.* at 172–74; *see also* Blackmun, *supra* note 32, at 2–3 ("[R]ecent opinions of the Supreme Court appear to reflect a growing uneasiness with the heretofore pronounced breadth of the statute and, in my view, a tendency to strain otherwise sound doctrines in order to ease the perceived federalism tensions generated by § 1983 actions.").

76. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912–13 (2014) (finding that, in the forty-four largest jurisdictions in her 2006–2011 study, officers paid only .02% of the money in settlements and judgments relating to civil rights cases stemming from police officers' actions). In raw dollars, officers contributed between a total of $151,300 and $171,300 of the $737 million paid by jurisdiction. *Id.* at 913. It had long been assumed that cities indemnify most officers, but Schwartz's study confirms the general perception. *See, e.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 658, 713 n.9 (1978) (Powell, J., concurring) ("But it reasonably may be assumed that most municipalities already indemnify officials sued for conduct within the scope of their authority, a policy that furthers the important interest of attracting and retaining competent officers, board members, and employees.").

77. Schwartz, *supra* note 76, at 939.

78. *See id.* at 939–40, 943.

As a practical matter, local governments' response to litigation against individual officers and the paying out of settlements and judgments result in de facto vicarious liability.[79] Thus costs are generally borne by local government and taxpayers.[80] Hence the argument for a clearly established test with narrow precedents based on fair notice concerns proves less persuasive given that it is the municipality that is on the hook.

But even in the absence of financial costs, litigation against an officer may take its toll on his time, psyche, prestige, and status.[81] Concerns relating to overdeterrence might then appear justified. Studies demonstrate, however, that whatever the costs, fear of litigation has little impact on officers' conduct.[82]

But even if significant costs—fiscal or otherwise—are conceded, discouraging victims of constitutional violation from seeking damages relief is hard to reconcile with the remedial intent of § 1983. Draped in concerns over preempting insubstantial lawsuits, the Court's test reflects what Professor Alan Chen described as "its wish to move qualified immunity toward something resembling absolute immunity."[83]

If indeed the real fear of the Court in bolstering qualified immunity has been illegitimate lawsuits, then the standards and rules the Court has formulated should be judged at least in part by that metric. It would still seem fair to hold liable the officer who knows or should know better (regardless of whether the law is not clearly established).[84] A formalistic

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79. *Id.* at 944. Though, critically, it is not a de jure vicarious liability; hence the qualified immunity standard still applies. Importantly, in a lawsuit against the local government, the qualified immunity hurdle is not in play, though plenty of barriers arise in proving a *Monell* claim. Numerous academics and lawyers have called for reversing *Monell* and approving vicarious liability in the § 1983 context. Blum, *supra* note 13, at 962–64 (discussing § 1983 reforms and explaining that "adopting respondeat superior would eliminate the enormous amount of time and resources spent litigating and adjudicating the qualified immunity defense").

80. *See* Schwartz, *supra* note 76, at 944, 957.

81. *See* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 854–55 (2001).

82. *See* Schwartz, *supra* note 76, at 942–43. Professor Schwartz is open to the possibility that tweaking indemnification practices—as in New York and Cleveland where officers are made to pay some portion of settlements and judgments—could affect police behavior. *See id.* at 927, 954.

83. Chen, *supra* note 11, at 232; *see also id.* at 237 (noting change in the Court's characterization of qualified immunity as an affirmative defense to an immunity from suit); *id.* at 271 ("[F]actual complexities that inevitably arise in constitutional tort cases are not particularly well suited for pretrial judicial decision making."); Jeffries, *supra* note 64, at 251 (contending that focus on deterrence of frivolous lawsuits "encouraged judges to decide cases before discovery and to be far more forward in resolving the factual predicate for legal conclusions than is customary in American civil litigation").

84. Thanks to Professor Michael Wells for this important observation.

rejection of any and all claims that lack controlling law addressing the same set of facts goes well beyond addressing frivolous actions.[85]

2. The Consequences of Qualified Immunity

In addition to shifting the balance of interests to favor government actors over individual victims, judicial application of qualified immunity results in several collateral effects that prove inimical to redress. These secondary consequences include stagnating constitutional development, a lack of consideration for subjectivity or intent, the creation of the clearly established law test, and changing questions of fact into questions of law.

a. Stagnating Constitutional Development

Since 2009, courts have been permitted to decide which qualified immunity prong they address first: (1) violation of a constitutional or statutory right, or (2) whether the right was clearly established.[86] A negative response to either inquiry may dispose of the case.[87] The Court had previously undertaken an eight-year experiment requiring courts to first decide the constitutional right.[88] The Court in *Saucier v. Katz*[89] insisted on the sequence out of concern that "the law's elaboration" would not occur if courts could skip to the "clearly established" inquiry.[90] Yet in *Pearson v. Callahan*,[91] the Court relaxed its mandate, finding that requiring initial resolution of the constitutional right unnecessarily expends the parties' and courts' resources, increases the chance of decisions of limited value or poor quality, violates the rule of constitutional avoidance, and results in too much inflexibility.[92]

Afforded that discretion, courts are less inclined to decide the constitutional matter at all.[93] Owing to the constitutional question

85. *See* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 866 (2010) ("[I]nsistence on factually similar precedent oversolves that problem.").

86. Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011).

87. *See id.*

88. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001), *modified by* Pearson v. Callahan, 555 U.S. 223 (2009).

89. 533 U.S. 194 (2001).

90. *See id.* at 201.

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

92. *Id.* at 236–42; *see also* Camreta v. Greene, 563 U.S. 692, 707–08 (2011) (cautioning courts against addressing the constitutional merits). Professor Michael T. Kirkpatrick and Professor Joshua Matz warn that the Court's hostility to constitutional rulings may lead to "a 'reverse-*Saucier*' approach that bars merits opinions after a finding of qualified immunity." Kirkpatrick & Matz, *supra* note 69, at 670.

93. The *Pearson* Court acknowledged the concern over constitutional stagnation but insisted that courts could address most of the constitutional issues arising in § 1983 damages and *Bivens* litigation in criminal cases, § 1983 municipal lawsuits, and § 1983 lawsuits seeking

avoidance doctrine, courts may choose to dispose of cases on simply the clearly established ground. As a result, the qualified immunity doctrine creates a silent echo chamber, in which civil rights questions go repeatedly unanswered. Courts need not answer whether there is a constitutional violation because the law is unclear, and the law is unclear because the violation continues to go unaddressed. And so it goes. But the results are more pernicious. Professor James Pfander warns that the doctrine may also result in a "race to the bottom in which courts validate constitutionally dubious official action."[94] Thus the apparently neutral abdication of decision-making can take a negative toll on government misconduct victims.

b. No Consideration of Subjectivity or Intent

In *Harlow v. Fitzgerald*,[95] the Court eliminated the subjective inquiry, which it had endorsed in *Pierson*, from assessing whether qualified immunity protects a government official from liability.[96] In so doing, the Court essentially removed the "good faith" concern from qualified immunity. Previously, the Court had framed the good faith defense as one predicated on objective (reasonableness) and subjective (malice) bases.[97] But now, allegations of malice cannot support constitutional tort litigation.[98] The Court stated that the "special costs" it associated with the subjective intent standard—in particular "broad-ranging discovery" into emotions and internal motivations—would make resolution at summary judgment difficult.[99]

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injunctive relief. *See Pearson*, 555 U.S. at 242; *cf.* John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 131–34 (2009) (criticizing *Pearson*'s "alternative remedies" as unlikely to obtain constitutional decisions).

94. Pfander, *supra* note 64, at 1617.

95. 457 U.S. 800 (1982), *overruled in part by* Harlow v. Fitzgerald, 457 U.S. 800 (1981).

96. *See id.* at 815–18.

97. *See* Wood v. Strickland, 420 U.S. 308, 322 (1975) (holding that qualified immunity does not protect a school board member "from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected" or if he acted with malicious intent to injure the student or deprive the student of his or her constitutional rights), *overruled by Harlow*, 457 U.S. 800; Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) (holding that it is the reasonableness of officials' "belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct"), *overruled by Harlow*, 457 U.S. 800.

98. Qualified immunity does not eliminate, however, the subjective inquiry where intent is relevant to a legal claim, such as in a First Amendment viewpoint discrimination action. *See, e.g.*, Monteiro v. City of Elizabeth, 436 F.3d 397, 404 (3d Cir. 2006) ("In cases in which a constitutional violation depends on evidence of a specific intent, 'it can never be objectively reasonable for a government official to act with the intent that is prohibited by law.'" (quoting Locurto v. Safir, 264 F.3d 154, 169 (2d Cir. 2001))).

99. *Harlow*, 457 U.S. at 816–17 (finding that the discovery and depositions of government workers would prove "peculiarly disruptive of effective government").

In jettisoning a state-of-mind inquiry, the Court prioritized docket saturation and intrusive discovery concerns over intentional government abuses of civil rights.[100] As long as some objective basis for the government conduct can be proffered, a police officer's underlying motivation to act unlawfully is of no consequence.[101] Though the subjective prong might permit some dubious cases to slip past at the motion to dismiss stage, in many instances material fact disputes could still be resolved at summary judgment, albeit after potentially extensive discovery.[102] Litigants also may police themselves, electing not to bring claims that they think difficult or costly to prove. But in all events, the Court has prioritized government inconvenience over potentially intentional wrongdoing.

c. The "Clearly Established Law" Test

In defining qualified immunity in objective terms, the Court developed a reasonableness test that gives officers great leeway. Moreover, with the constitutional merits ruling in disfavor, determining whether the law regarding the right at issue is clearly established becomes the most important question in § 1983 litigation.

Most officers "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or

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100. *See* Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 653 n.200 (1997) ("A plaintiff's showing that the defendant has abused his power ought to be enough to overcome [concerns over expanded litigation and discovery]. At any rate, outside the immunity context the Court has not remained faithful to the principle of favoring objective inquiries.").

101. These same concerns arise in the Fourth Amendment context whether it entails excessive force claims or suppression of evidence, irrespective of qualified immunity. *See* Whren v. United States, 517 U.S. 806, 813 (1996) (rejecting "any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved"); Graham v. Connor, 490 U.S. 386, 397 (1989) ("As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."), *overruled in part by* Saucier v. Katz, 533 U.S. 194 (2001), *modified by* Pearson v. Callahan, 555 U.S. 223 (2009).

102. It also may be that recent amendments to general provisions governing discovery, which incorporate concerns of proportionality in defining the scope of discovery (including needs of the case, importance of issues at stake, amount in controversy, relative access to information sought, parties' resources, importance of discovery to resolution, and costs and benefits) will reduce wide-ranging discovery and burdensome costs in these cases. *See* FED. R. CIV. P. 26(b)(1); FED. R. CIV. P. 26 advisory committee's note to 2015 amendment. The amendments also contemplate increased judicial management of the discovery process, which may allay concerns over unnecessarily broad discovery requests if judges assume a discovery-regulating function from the outset of litigation. *See* FED. R. CIV. P. 26. Advisory committee's note to 2015 amendment.

constitutional rights of which a reasonable person would have known."[103] If the law around the right at issue is not clearly established, then a reasonable officer cannot be expected to have known the conduct would violate the Constitution.

However, the Court has defined "clearly established" so as to require that case law involve an almost exact same set of facts and that the case come from the Supreme Court or a circuit court of the same jurisdiction.[104] The clearly established law test's rigid specificity requirement has proven difficult for plaintiffs to surmount. The Court has admonished courts not to look to generalities of law but only to precedents mirroring the complaint's set of facts.[105]

The Court has justified this level of specificity on the grounds of fair notice.[106] The Court recently reiterated: "An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it,' meaning that 'existing precedent . . . placed the statutory or constitutional question beyond debate.'"[107] Yet the level of definiteness requires a precedent that could

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

104. Other than Supreme Court precedent, it is not altogether certain what law is "clearly established." *See* Blum, *supra* note 13, at 955 (noting that "there is lingering uncertainty about where one looks to decide whether the law was clearly established"). Addressing various circuit court decisions, the Supreme Court repeatedly assumes that "a controlling circuit precedent could constitute clearly established federal law in [particular] circumstances." City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1776 (2015) (quoting Carroll v. Carman, 135 S. Ct. 348, 350 (2014)); *see also* Wilson v. Layne, 526 U.S. 603, 617 (1999) (noting the absence of "cases of controlling authority in [plaintiffs'] jurisdiction at the time of the incident . . . [or] a consensus of cases of persuasive authority" in upholding qualified immunity). Most circuits also consider cases from outside their jurisdiction to assess what is clearly established law in the event there is no apposite case from their own circuit. *See* Screws v. United States, 325 U.S. 91, 100–05 (1945) (citing many Supreme Court decisions on the issue of qualified immunity); Blum, *supra* note 13, at 955.

105. Mullenix v. Luna, 136 S. Ct. 305, 309 (2015) ("The general principle that deadly force requires a sufficient threat hardly settles this matter."); Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." (citation omitted)); *Saucier*, 533 U.S. at 201–02 (rejecting the right against excessive force in *Graham* as too generalized), *modified by* Pearson v. Callahan, 555 U.S. 223 (2009). The Court has been similarly narrow-minded in the first prong analysis addressing whether there is a constitutional violation. *See* Scott v. Harris, 550 U.S. 372, 383 (2007) (rejecting a proposed "easy-to-apply legal test in the Fourth Amendment context" because each case requires the Court to "still slosh [its] way through the factbound morass of 'reasonableness'").

106. Brosseau v. Haugen, 543 U.S. 194, 198 (2004) ("Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.").

107. *Sheehan*, 135 S. Ct. at 1774 (alteration in original) (citation omitted) (first quoting Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014); then quoting *al-Kidd*, 563 U.S. at 741)); *see also* White v. Pauly, 137 S. Ct. 548, 552 ("This is not a case where it is obvious that there was a

leave no room for daylight with the litigated matter. Under the call of "fair notice," the Court has thus foreclosed a plaintiff's reliance on any rule of law that might require an iota of extrapolation or on any nonconstitutional source.

City of San Francisco v. Sheehan,[108] a case from the Court's 2014 term, illustrates well the myopia of the clearly established law test. Two police officers re-entered the room of Teresa Sheehan, a woman suffering from schizoaffective disorder, after she had threatened the group home supervisor and also brandished a knife, threatening to kill the officers on their first entry.[109] On their second entry, the officers pepper sprayed and shot Sheehan multiple times.[110] Sheehan survived and ultimately sued the city and county of San Francisco and the two police officers for unlawful entry and excessive force under the Fourth Amendment and § 1983.[111]

The U.S. Court of Appeals for the Ninth Circuit held that the officers were not entitled to qualified immunity because a jury could have found a Fourth Amendment violation and that case law "would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry."[112] The court relied in part on *Graham v. Connor*, Supreme Court precedent requiring a balancing of interests in assessing the reasonableness of the police's search and seizure.[113] The Ninth Circuit also relied on its own cases, one of which held that force was excessive when police could retreat, avoid confrontation, and await a negotiation team.[114] Another Ninth Circuit

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violation of clearly established law under *Garner* and *Graham*."); al-Kidd, 563 U.S. at 2083 (requiring law's clarity such that "every 'reasonable official would have understood'" (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987))); Malley v. Biggs, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"). The level of specificity provides "government officials breathing room to make reasonable but mistaken judgments." *al-Kidd*, 563 U.S. at 743.

108. 135 S. Ct. 1765 (2015).

109. *Id.* at 1769–71.

110. *Id.* at 1771.

111. *Id.* Sheehan also sued San Francisco under the Americans with Disabilities Act for failing to accommodate her disability in its use of force. *Id.*

112. Sheehan v. City of San Francisco, 743 F.3d 1211, 1229 (9th Cir. 2014), *rev'd in part, cert. dismissed in part sub nom.* 135 S. Ct. 1765 (2015).

113. *Id.* at 1228 (applying Graham v. Connor, 490 U.S. 386, 396 (1989) and concluding: "If there was no pressing need to rush in, and every reason to expect that doing so would result in Sheehan's death or serious injury, then any reasonable officer would have known that this use of force was excessive.").

114. *Id.* (citing Deorle v. Rutherford, 272 F.3d 1272, 1281–85 (9th Cir. 2001)). The Ninth Circuit also relied on *Deorle* for the proposition that "if 'it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in

opinion held that "it was unreasonable for the officers to storm the house of a man whom they knew to be a mentally ill, elderly, half-blind recluse who had threatened to shoot anybody who entered."[115] Finally, the court noted that because the facts were disputed as to whether the officers' entry was necessary or Sheehan could escape, summary judgment was inappropriate.[116]

The Supreme Court reversed.[117] The Court took a hyper-factual approach to distinguishing the cases on which the Ninth Circuit relied. Of *Graham* and one of the Ninth Circuit cases, the Court stressed they did not involve armed individuals, rendering them unhelpful and unreliable.[118] In addition, the Court characterized *Graham*'s proscription of excessive force as "far too general a proposition to control this case."[119] As for the third case, the Court contended it was a poor fit—a limited holding—and that police cannot be held liable over "bad tactics" or be judged with "the 20/20 vision of hindsight."[120]

However, even if the Court accepted the Ninth Circuit's reading of the law, the Court stressed, "*no precedent clearly established that there was not 'an objective need for immediate entry' here*."[121] The Court insisted that without cases specifically detailing that officers could not reenter a room to prevent a person from fleeing or obtaining more weapons, the officers lacked "fair notice" and were therefore entitled to qualified immunity.[122]

But as the Ninth Circuit's opinion read, viewing the facts most favorably for Sheehan, Sheehan did not pose either a flight risk or a danger to others while inside her room.[123] Thus, requiring such precedent

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determining, under *Graham*, the reasonableness of the force employed.'" *Id.* at 1227 (quoting *Deorle*, 272 F.3d at 1283). The court acknowledged that, in contrast to Sheehan, Deorle was unarmed, but found that her containment made the case apposite. *Id.* at 1227 n.10.

115. *Id.* at 1228 (quoting Alexander v. City of San Francisco, 29 F.3d 1355, 1366 (9th Cir. 1994)). The *Alexander* court characterized the officers' entry as "a classic Fourth Amendment violation under *Graham*." *Id.* (quoting *Alexander*, 29 F.3d at 1366).

116. *Id.* at 1229.

117. *Sheehan*, 135 S. Ct. at 1778.

118. *Id.* at 1776 ("[*Graham*] did not involve a dangerous, obviously unstable person making threats, much less was there a weapon involved. There is a world of difference between needlessly withholding sugar from an innocent person who is suffering from an insulin reaction, and responding to the perilous situation [the officers] confronted. *Graham* is a nonstarter." (citations omitted)); *id.* ("[T]he differences between [*Deorle*] and the case before us leap from the page. Unlike Deorle, Sheehan was dangerous, recalcitrant, law-breaking, and out of sight.").

119. *Id.* at 1775.

120. *Id.* at 1776–77 (quoting Billington v. Smith, 292 F.3d 1177, 1190 (9th Cir. 2002)).

121. *Id.* at 1777.

122. *Id.*

123. *See* Sheehan v. City of San Francisco, 743 F.3d 1211, 1218, 1227 (9th Cir. 2014) (stating that officers were informed the building had been cleared of other residents and that the

was gratuitous and required a level of similarity and specificity that would have likely proved impossible to obtain or would have been arbitrarily available, based merely upon the chance of similar preceding events.

There may be legitimate concerns that holding government workers accountable based on platitudes of law does not provide them a clear and fair understanding of what is prohibited and could lead to under-enforcement or less than the vigorous exercise of duties.[124] But the narrow definition of what is clearly established law underestimates government workers' understanding of rules, over-weights the costs to officers and society, and undervalues the citizen's right to a jury trial.

d. Changing Fact Questions Into Law Questions

The Supreme Court's resistance to § 1983 litigation is evident not only in the contours of the qualified immunity doctrine but also in the Court's interpretation and application of the doctrine. Ascribing motivations to insubstantial lawsuit avoidance, commentators have observed that courts often transform factual inquiries into legal ones, thus dispensing with litigation at the pleadings or summary judgment stage.[125] In so doing, courts do not formally break from the summary judgment standard, for example, but instead tend to make determinations that favor the movant government actor. Courts may accomplish this in one of two ways, often in concert with one another. First, courts may frame the question as a purely legal inquiry, even if facts are inevitably part of the analysis.[126] Second, courts may elide issues of material fact or ignore viewing facts in the plaintiff's favor as required on a defendant's motion to dismiss or for summary judgment.[127] Courts also may reach dispositive factual decisions, such as whether a police officer's use of force was reasonable,

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only way out of Sheehan's room other than the main door was a second-story window requiring a ladder to exit).

124. *See* Jeffries, *supra* note 64, at 244 ("It is only because constitutional law is full of open-ended criteria of illegality that unintended deterrence of social desirable conduct looms so large.").

125. *See* Chen, *supra* note 11, at 232, 262; Jeffries, *supra* note 64, at 251. There is not, however, evidence of the frequency with which courts so interpret factual questions as legal ones.

126. Chen, *supra* note 11, at 233 ("[T]he Court ignores the critical role that facts play in articulating legal principles in constitutional adjudication.").

127. *See* Scott v. Harris, 550 U.S. 372, 395 (2007) (Stevens, J., dissenting) (criticizing majority for treating question of whether deadly force was necessary as a legal rather than a factual one and thus "usurp[ing] the jury's factfinding function"); Blum, *supra* note 13, at 942–43; Chen, *supra* note 11, at 233; Jeffries, *supra* note 64, at 251–52 (suggesting qualified immunity spurs courts to resolve cases without discovery and may lead to conflicts with Federal Rules of Civil Procedure 12 and 56 and the Seventh Amendment).

due to their own biases.[128] At best, the issue should be seen as one entailing application of law to fact and not the exclusive province of the judge.[129] But instead, qualified immunity becomes a doctrine formed on the basis of a court's "public policy" determinations.[130]

In *Sheehan*, for example, the Court accepted the officer's version of facts that escape was a reasonable concern justifying the reentry of Sheehan's room.[131] The Court appeared to draw inferences in the officer's favor rather than for Sheehan, the non-movant. Noting that a ladder would likely have been necessary to escape through Sheehan's second story window, the Court acknowledged that the officers had not "asked [the social worker supervisor] about a fire escape, but if they had, it seems he 'probably' would have said there was one."[132] The Ninth Circuit, on the other hand treated concern over escape as a disputed issue, noting the inaccessible second story window and Sheehan's lack of demonstrated interest in leaving her room.[133] The usurpation of the jury role here reflects a policy preference for general immunity and a departure from basic summary judgment rules requiring that a court view the evidence in the light most favorable to the nonmoving party.[134]

e. Additional Imbalances Favoring Individual Officers

Officers facing constitutional tort lawsuits also have an advantage in that they may appeal denials of qualified immunity motions.[135] Ordinarily, a denial of a motion to dismiss or for summary judgment is not a final decision and is therefore not immediately appealable.[136] But because qualified immunity is not merely a defense to liability but amounts to immunity from suit, a denial of qualified immunity comes within the collateral order doctrine.[137] The Court justifies the unique

128. *See* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 886, 896–97 (2009) (discussing how police–citizen encounters elicit different responses from "members of groups who share a distinctive understanding of social reality that informs their view of the facts"); *see also* Andrew S. Pollis, *The Death of Inference*, 55 B.C. L. REV. 435, 474 (2014) (noting the "inherent danger in allowing a case to fall prey to a single judge's heuristics rather than a diverse jury's").

129. Chen, *supra* note 11, at 263; *see also* Jeffries, *supra* note 64, at 252.

130. Chen, *supra* note 11, at 267.

131. City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1777 (2015).

132. *Id.* at 1770.

133. Sheehan v. City of San Francisco, 743 F.3d 1211, 1224 n.8, 1229 (9th Cir. 2014, [rev'd in part, cert. dismissed in part, 135 S. Ct. 1765.]).

134. *Id.* at 1218 n.1 ("[F]or purposes of evaluating the defendants' motion for summary judgment we view the evidence in the light most favorable to Sheehan, the nonmoving party."); *see* discussion *infra* Subsection II.D.2.

135. Plumhoff v. Rickard, 134 S. Ct. 2012, 2019 (2014).

136. *Id.* at 2018.

137. *Id.* at 2019.

treatment on two grounds. First, the Court characterizes the qualified immunity determination as separate from the merits.[138] This rationale is dubious because deciding whether an action is unconstitutional and whether the officer should have known that the act was prohibited are inevitably fact-laden determinations. Second, the Court justifies an appellate right here based on its qualified immunity litigation-costs rationale.[139] Limiting an appeal to "final judgment[s]" would mean "the immunity from standing trial will have been irretrievably lost."[140]

In addition, the Supreme Court may review a lower court's constitutional holding even when the defendant officer prevails on the clearly established prong.[141] Without that appellate right, the Court explained, the official must either accept an uncontestable ruling or risk exposure to future liability.[142] These exceptions to general appellate rules—declining interlocutory appeals or those brought by prevailing parties—evince the extent to which qualified immunity's balancing favors the government interest over the possibly wronged individual.[143]

II. EXTRA QUALIFIED IMMUNITY FOR EXCESSIVE FORCE CLAIMS

The problems that plague qualified immunity are only exacerbated when the doctrine meets excessive force claims. Qualified immunity's supposed anodyne balancing of values weighs even heavier in favor of police officers against victims' claims of abuses, reducing the chances of discovery and recovery of damages. Factors tending to explain the imbalance reflect both the unsettled and officer-protective state of qualified immunity law *and* the unsettled and officer-protective state of excessive force law. Moreover, because excessive force already generally escapes judicial review in the criminal context, applying qualified immunity to police brutality in civil cases stunts constitutional law's evolution in this area. The following focuses on the particulars of excessive force law and then examines how qualified immunity bolsters the doctrine's standards that protect officers.

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138. *Id.*

139. *Id.*

140. *Id.*

141. Camreta v. Greene, 563 U.S. 692, 708 (2011). This rule is limited in that it applies only to Supreme Court review and is discretionary. *Id.* at 708–09.

142. *Id*. at 708.

143. *Id.* at 717 (Kennedy, J., dissenting) ("The rule against hearing appeals or accepting petitions for certiorari by prevailing parties is related to the Article III prohibition against issuing advisory opinions."); Johnson v. Jones, 515 U.S. 304, 309 (1995) (noting that in light of 28 U.S.C. § 1291, "interlocutory appeals—appeals before the end of district court proceedings—are the exception, not the rule"). Professor Kirkpatrick and Professor Matz generally praise *Camreta* for enabling elaboration and clarification of constitutional law. *See* Kirkpatrick & Matz, *supra* note 69, at 666. But they advise leveling the field slightly by also allowing for review of plaintiffs' cross-petition for reconsideration of the clearly established law prong. *See id.* at 667.

A. *Excessive Force is Different*

Excessive force law is largely a product of § 1983 litigation.[144] There are few criminal prosecutions of police officers for excessive force.[145] More importantly, criminal defendants generally cannot invoke police brutality—in contrast to unlawful searches, for example—to exclude evidence.[146] As a result, criminal courts have little occasion to address and delimit police use of force.[147] Limits on standing and injunctive relief under § 1983 also discourage lawsuits seeking to enjoin excessive force.[148] In addition, instances of egregious police brutality usually settle, further winnowing case law.[149] Moreover, the difficult qualified

144. *See* Jeffries, *supra* note 93, at 135–36 ("Under current law, the most (nearly) plausible redress for excessive force is the award of money damages.").

145. State criminal prosecutions of police officers for excessive force may be limited due to relationships between prosecutors and police. KENNEDY, *supra* note 8, at 121. Federal prosecutions face challenges owing in part to a required showing of specific intent to deprive a victim of her constitutional right. Paul J. Watford, Screws v. United States *and the Birth of Federal Civil Rights Enforcement*, 98 MARQ. L. REV. 465, 482 (2014). Misreading qualified immunity opinions concerning excessive force that address only the qualified immunity prong but do not address the constitutional question may also affect prosecutors' decisions regarding indictments. Opinions touching on solely the clearly established prong should offer no guidance on the probable cause determination regarding criminality. Such a misreading appears to have been at least one factor in the Cuyahoga County Prosecutor's decision not to indict police officers for their actions in connection with the death of Tamir Rice, a twelve-year-old boy who was playing with a toy gun. TIMOTHY J. MCGINTY, CUYAHOGA COUNTY PROSECUTOR'S REPORT ON THE NOVEMBER 22, 2014 SHOOTING DEATH OF TAMIR RICE 38–41 (2015), http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Rice%20Case%20Report%20FINAL%20FINAL%2012-28a.pdf (relying on *City of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015) to contend that use of "bad tactics" could not support a Fourth Amendment violation, but relevant language cited and quoted from *Sheehan* only addresses what constitutes clearly established law, and not unreasonable conduct for purposes of a Fourth Amendment violation).

146. Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 STAN. L. REV. 987, 1009 (2014); Nancy Leong & Aaron Belzer, *Enforcing Rights*, 62 UCLA L. REV. 306, 316–17 (2015); *see also* Karlan, *supra* note 9, at 1916 ("[L]aw enforcement behavior that does not directly undergird criminal prosecutions—such as the harassment of innocent citizens or even the use of substantial physical force to arrest criminal suspects—is less likely to be litigated.").

147. Defendants may, however, raise the issue of force in connection with coercive interrogations and seek to exclude as inadmissible the information that police extracted. *See*, *e.g.*, Brown v. Mississippi, 297 U.S. 278, 281, 287 (1936) (reversing convictions of African-American men who were convicted based on their confessions secured through whippings and mock lynching).

148. City of Los Angeles v. Lyons, 461 U.S. 95, 97–98, 105 (1983) (holding plaintiff lacked standing to sue over chokehold because he could not show a plausible threat of future injury); Karlan, *supra* note 9, at 1917–18; Leong & Belzer, *supra* note 146, at 318.

149. Leong & Belzer, *supra* note 146, at 318; Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 491, 493 (2011) (reporting on a study of civil rights

immunity standards no doubt dissuade many police abuse victims from even filing a lawsuit.[150] Finally, proving that racial bias animates brutality is near impossible.[151] The resulting lack of case law and clarity on what amounts to unconstitutional police brutality only exacerbate the problems attendant to qualified immunity's approach to excessive force, particularly the clearly established law test. Understanding the impediments that qualified immunity poses to excessive force litigation is therefore critical to eventually affording remedies to police abuse victims and to regulating police misconduct.

Rescuing the excessive force standard is also critical because the Fourth Amendment places few limitations on an officer's discretion to stop and arrest a person.[152] In a criminal decision from the 2014 term,

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litigants in which "multiple respondents indicated that they only accepted the most egregious cases for representation, which made it unlikely that qualified immunity would play a role").

150. Reinert, *supra* note 149, at 492 ("Nearly every [experienced civil rights attorney], regardless of the breadth of her experience, confirmed that concerns about the qualified immunity defense play a substantial role at the screening stage."). Similarly, the Court's adoption of a heightened pleadings standard has also apparently discouraged many civil rights litigants from bringing claims, for fear that they will not overcome government motions to dismiss. *See* Ashcroft v. Iqbal, 556 U.S. 662, 682 (2009) (holding that post-9/11 detainee's complaint alleging *Bivens* claims over treatment "must contain facts plausibly showing that [government officers] purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin"); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553, 570 (2007) (requiring that complaint alleging antitrust conspiracy include enough "facts to state a claim to relief that is plausible on its face"); KENNEDY, *supra* note 8, at 121 (noting that brutalized plaintiffs are dissuaded from suing because of "expense, delay, doctrinal impediments, and the need to be an attractive party who will win sympathy of jurors"); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2122, 2143 (2015) (reporting on a study of court decisions that found "dismissals of employment discrimination and civil rights cases [particularly those brought *pro se*] have risen significantly in the wake of *Iqbal*").

151. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 465 (1996) (requiring discriminatory intent, rather than discriminatory impact, to show an equal protection violation in enforcement of law); Whren v. United States, 517 U.S. 806, 813 (1995) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1063–64 (2010) (discussing challenges to bringing racially infected police misconduct claims).

152. Atwater v. City of Lago Vista, 532 U.S. 318, 323, 354 (2001) (holding that police have discretion to arrest people for misdemeanor seatbelt violations punishable only by a fine); Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000) (noting that fleeing from police provides the basis for a stop and frisk); *Whren*, 517 U.S. at 813 (prohibiting inquiry into the motives for a stop); Colorado v. Bertine, 479 U.S. 367, 374 (1987) (suggesting police have discretion to impound a car after a stop); New York v. Belton, 453 U.S. 454, 460 (1981) (holding that police have discretion to search a car's passenger compartment incident to an arrest), *amended by* Arizona v. Gant, 556 U.S. 332 (2009); United States v. Robinson, 414 U.S. 218, 235 (1973) (noting that

Heien v. North Carolina,[153] the Court upheld a police stop and subsequent search that was based on a police officer's mistaken understanding of the law.[154] The Court explained that, under a more demanding standard than qualified immunity, mistakes of law should be accommodated, provided that the relevant statute is "unclear" or "the law at issue is 'so doubtful in construction' that a reasonable judge could agree with the officer's view."[155] As the majority illustrated, "[a] law prohibiting 'vehicles' in the park either covers Segways or not, but an officer will nevertheless have to make a quick decision on the law the first time one whizzes by."[156] Thus, new factual situations may make explication of the law more difficult, and therefore, reasonable, regardless of error.

However sympathetic the officer's interpretive plight, it is not clear why the law should permit a seizure on that misinterpretation. Weighing the interests of the officer and the state against those of the individual civilian, it is hard to understand why the latter's interests—here, criminal liability and liberty—should be given short shrift.[157] Expanding police authority to conduct seizures based on the officer's "legal interpretation (or misinterpretation)" that a statute has been violated will make it difficult for "a citizen seeking to be law-abiding and to structure his or her behavior to avoid these invasive, frightening, and humiliating encounters."[158] Qualified immunity and its demand for near-identical law on point, however, will protect the officer from civil liability.[159] And admitting evidence will not deter officers from aggressively interpreting the law.

Justice Sandra Day O'Connor has lamented that "unbounded discretion carries with it grave potential for abuse."[160] The abuse is both

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police have discretion to search people they arrest for a traffic violation), *amended by Gant*, 556 U.S. 332.

153. 135 S. Ct. 530 (2014).

154. *Id.* at 534.

155. *Id.* at 541 (Kagan, J., concurring); *see also id.* at 539 (majority opinion) ("[T]he inquiry is not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity for a constitutional or statutory violation.").

156. *Id.* at 539 (majority opinion) (citation omitted).

157. *Id.* at 546 (Sotomayor, J., dissenting) ("One is left to wonder, however, why an innocent citizen should be made to shoulder the burden of being seized whenever the law may be susceptible to an interpretive question."). Tolerating police misinterpretations of law also may undermine law's development and therefore maintain ambiguity concerning law governing police–citizen encounters. *See supra* Subsection I.C.2.a (discussing constitutional stagnation). By focusing solely on the reasonableness of the legal interpretation, courts may opt not to interpret the law themselves. *Heien*, 135 S. Ct. at 544. Eighth Circuit courts have "observed that they need not decide interpretive questions under their approach." *Id.*

158. *Heien*, 135 S. Ct. at 543–44 (Sotomayor, J., dissenting).

159. *Id.* at 544.

160. Atwater v. City of Lago Vista, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting).

discriminatory and physical. First, unfettered police authority is more often exercised in poor and minority neighborhoods.[161] Second, these police–citizen encounters increase the probability of excessive force, also with disproportionate racial impact.[162] Recognizing that an officer has at her ready an "arsenal" of legal authorities to stop a person, and that her own motivations for the stop are not of judicial concern, Justice O'Connor insisted that the Court "must vigilantly ensure that officers' poststop actions . . . comport with the Fourth Amendment's guarantee of reasonableness."[163] But the Court's ongoing affirmation of police actions as reasonable under the Fourth Amendment raises the question of whether a different source of constitutional law would better protect the liberty interests implicated by excessive force.[164] Indeed, as the following discusses, the Fourth Amendment just does not seem entirely the right fit.

B. *Excessive Force Law Doctrine*

In *Graham v. Connor*, the Court adopted an "objectively reasonable" test to examine a police officer's use of force while making an arrest or a stop, pursuant to the Fourth Amendment's prohibition on unreasonable seizures.[165] The test entails balancing the intrusion on the individual's Fourth Amendment interests and the countervailing government interests.[166] Assessing the "reasonableness" of the force involves reviewing the totality of the circumstances, "including the severity of the

161. *See* Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH. L. REV. 245, 252 (2010).

162. Sendhil Mullainathan, *Police Killings of Blacks: Here Is What the Data Say*, N.Y. TIMES (Oct. 16, 2015) http://www.nytimes.com/2015/10/18/upshot/police-killings-of-blacks-what-the-data-says.html. Mullainathan observes that African-Americans comprise 31.8 percent of people shot by police and 28.9 percent of arrestees, but only represent 13.2 percent of the general population. *Id.* He infers from the relatively comparable killing and arrest rates that police are not more likely to shoot people because of racial bias but to arrest people due to such bias—and it is the encounter with police that carries the greater risk of being shot. *Id.*

163. *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting).

164. The Court's Fourth Amendment jurisprudence appears inflexible, unable—or unwilling—to recognize, for example, the "significant qualitative differences between a traffic stop and a full custodial arrest." *Id.* at 363 (noting that "the latter entails a much greater intrusion on an individual's liberty and privacy interests"); Graham v. Connor, 490 U.S. 386, 400 (1989) (Blackmun, J., concurring) (noting that some use of force might, albeit "only rarely," offend the Due Process Clause but not the Fourth Amendment's reasonableness standard), *overruled in part by* Saucier v. Katz, 533 U.S. 194 (2001), *modified by* Pearson v. Callahan, 555 U.S. 223 (2009).

165. *Graham*, 490 U.S. at 395–97; *see also* Scott v. Harris, 550 U.S. 372, 386 (2007) ("A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."); Tennessee v. Garner, 471 U.S. 1, 11–12 (1985) ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.").

166. *Graham*, 490 U.S. at 395–97.

crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[167] But the inquiry should be taken "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and should recognize "that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[168] Finally, as an objective test, courts should not consider the officer's intent or motivation behind the force.[169]

Graham has sustained significant criticism for its lack of clarity and thus diminished predictive utility.[170] Professor Rachel Harmon argues that current excessive force law "provides unprincipled, indeterminate, and sometimes simply misleading guidance to lower courts, police officers, jurors, and members of the public because it fails to articulate a systematic conceptual framework for assessing police uses of force."[171] The law currently offers little direction as to which government interests might justify force.[172] The test also fails to account for the dynamic nature of a police–citizen encounter, insufficiently addressing how the use of force's legitimacy depends on the variability and timing of resistance and compliance.[173]

Excessive force law is also confused over its constitutional underpinnings. Prior to *Graham*, most courts applied a substantive due process test to any excessive force claim.[174] But current doctrine offers four constitutional provisions to choose from.[175] *Graham* identified the Fourth Amendment right to be free from unreasonable seizures as the exclusive locus for protection against force used in the course of stops

167. *Id.* at 396.

168. *Id.* at 396–97.

169. *Id.* at 397 ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.").

170. *See, e.g.*, Harmon, *supra* note 10, at 1130; Karlan, *supra* note 9, at 1916 (noting the "relatively few clear lines in the use of force area—other than the rejection of the fleeing felon doctrine in *Tennessee v. Garner*").

171. *See* Harmon, *supra* note 10, at 1127.

172. *Id.* at 1127.

173. *Id.* at 1130–31.

174. *Graham*, 490 U.S. at 392–93 (discussing substantive due process test established in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973)).

175. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2477 (2015) (Scalia, J., dissenting); *see also Graham*, 490 U.S. at 393–94 ("We reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard. . . . In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force.").

and arrests.[176] Whereas, once a person is in custody or detained, the Fifth and Fourteenth Amendment's due process right is implicated.[177] And once a person is convicted or punished, the Eighth Amendment's ban on cruel and unusual punishment governs.[178] As a result, in each scenario, which may differ factually only to the extent that "force is applied outside the police car, in the police car, or at the jail a few minutes later,"[179] varying standards will apply that may lead to different outcomes despite the common abuse.[180]

C. *Accommodating Police Aggression and Racial Bias*

Excessive force law also incorporates an analysis that favors police and invites and protects their resort to biases and stereotypes. Professor Seth Stoughton demonstrates that the excessive force standard encourages deference to police because it is predicated on a "misleading" account that characterizes use of force as the product of "split-second judgments" in "tense, uncertain, and rapidly evolving" situations.[181]

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176. *Graham*, 490 U.S. at 394 ("Where . . . the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment . . . ."). However, a police chase not amounting to a seizure would fall within the Due Process Clause rather than the Fourth Amendment. *See* Cty. of Sacramento v. Lewis, 523 U.S. 833, 844 (1998) ("[N]o Fourth Amendment seizure would take place where a 'pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit,' but accidentally stopped the suspect by crashing into him." (quoting Brower v. Cty. of Inyo, 489 U.S. 593, 596–97 (1989))).

177. *See, e.g.*, *Kingsley*, 135 S. Ct. at 2472–73 (holding that the Fourteenth Amendment's Due Process Clause applies to the case of a jailed, pre-trial detainee); *Graham*, 490 U.S. at 395 n.10 (1989) ("[T]he Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.").

178. *Graham*, 490 U.S. at 392 n.6 ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." (quoting Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977))).

179. Wells, *supra* note 100, at 658.

180. *Graham*, 490 U.S. at 398 ("Differing standards under the Fourth and Eighth Amendments are hardly surprising: the terms 'cruel' and 'punishments' clearly suggest some inquiry into subjective state of mind, whereas the term 'unreasonable' does not."); Wells, *supra* note 100, at 658. Which constitutional right and which standard of review may apply in a given scenario are very much in flux. Justice Samuel Alito would have first decided whether the pretrial detainee had a Fourth Amendment excessive force claim before addressing the substantive due process claim. *Kingsley*, 135 S. Ct. at 2479 (Alito, J., dissenting). And the majority conceded that its application of the objective standard to the pretrial detainee "may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners." *Id.* at 2476 (plurality opinion).

181. Stoughton, *supra* note 10, at 864–65; *see also* Jeffrey J. Noble & Geoffrey P. Alpert, *State-Created Danger: Should Police Officers Be Accountable for Reckless Tactical Decision Making?*, *in* CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 567, 574 (Roger G. Dunham & Geoffrey P. Alpert eds., 7th ed. 2015) ("The reality of policing is that there are very

Operating within this narrative, officers are viewed as forced to react and make quick and defensive decisions that should not be judged harshly. To the contrary, Professor Stoughton argues, most "use-of-force incidents" are "typified by tactical preparation, a degree of premeditation, low levels of resistance, low levels of force, and a low probability of injury."[182] Where the situation requires a split-second judgment, police often "create[] or enhance[] the likelihood of a need" to use force.[183] However, courts largely accept *Graham*'s errant generalization, influencing how judges and juries evaluate the reasonableness of police use of force, regardless of the actual facts.[184]

The Court's emphasis—whether accurate or not—on the compressed time frame and uncertainty facing officers also risks legitimizing as "reasonable" police officers' use of force that is influenced by racial stereotypes.[185] Implicit bias studies demonstrate that people associate African-Americans more than other racial groups with violence and criminality.[186] Similarly, people register greater fear and threat perception when shown subliminal images of African-American faces than white faces.[187] Moreover, people are more susceptible to stereotypes in pressured situations.[188] Thus, a police officer is more likely to make

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few instances where police officers only have a split second to make a significant use-of-force determination.").

182. Stoughton, *supra* note 10, at 868; *see also id.* at 866–67 (noting that use of force is "relatively rare" and that "in 2008, officers used or threatened force in less than 2% of approximately forty million civilian interactions").

183. Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 321 (2003). Various circuits will not consider the actions by police leading up to the use of force at issue in the case but consider only the "final frame." Noble & Alpert, *supra* note 181, at 571–74.

184. *See* Stoughton, *supra* note 10, at 864–65. Stoughton identifies over 2,300 references to "split-second judgments" and "tense" circumstances in federal district and circuit court opinions and notes their inclusion in federal and state pattern jury instructions. *Id.* at 865; *see also* Avery, *supra* note 183, at 322 ("Many of the lower federal courts have become mesmerized by the concept that police officers are forced to make decisions about the use of force in split seconds."); Kahan et al., *supra* note 128, at 888 (noting the Fourth Amendment's various "rule-like *presumptions of reasonableness* for generically defined fact patterns").

185. Brief of the NAACP Legal Defense & Educational Fund, Inc., as Amicus Curiae in Support of Petitioner at 24–25, Tolan v. Cotton, 134 S. Ct. 1861 (2014) (No. 13-551), 2013 WL 6843336 [hereinafter NAACP Brief].

186. NAACP Brief, *supra* note 185, at 20–21; Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004).

187. NAACP Brief, *supra* note 185, at 20–21; Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1510–11 (2005).

188. NAACP Brief, *supra* note 185, at 23; DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20–21 (2011) (describing quick decisions as governed by System 1 thinking, which entails reversion to biases and stereotypes).

the "split-second judgment[]" that an African-American suspect has a gun rather than a wallet and therefore fire his weapon.[189] A standard that fails to account for (or even compel) deliberation and forethought in many police–citizen encounters may foster and excuse racially biased police brutality. The *Graham* standard, with its accommodation of split-second judgments, effectively invites and pardons bias. A fair excessive force standard, on the other hand, would require that courts not simply accept the "snap-judgment" truism but assess the facts before them, including to what extent the use of force was a product of police initiative and deliberation. That inquiry should consider the time and alternatives that police had before them before exerting the force.

The objective reasonableness test also precludes any examination of the officer's state of mind, including the role of racial bias or animus. Professor Michael Wells criticizes the test, faulting the Court's dubious locating of much of excessive force law's provenance in the Fourth Amendment.[190] He argues that the test simply parrots the Fourth Amendment's standards that safeguard privacy but offers little textual basis for guarding against police excessive force.[191] Though in some instances the subjective inquiry may pose an evidentiary hurdle for plaintiffs, it would ensure that courts address malicious or intentional wrongdoing, including racist motivation.[192]

Mullenix v. Luna,[193] a decision from the 2015 term, illustrates these shortcomings. Texas police officers had received reports that an officer was in pursuit of a suspect, Israel Leija Jr., who threatened to shoot officers and was possibly intoxicated, driving at speeds ranging from 85

189. *See, e.g.*, NAACP Brief, *supra* note 185, at 22; Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399, 403 (2003) (finding video game participants more likely to shoot unarmed African-Americans than unarmed whites); *cf.* Mullainathan, *supra* note 162 (contending, based on the disproportionate African-American arrest rate compared with the general population—but comparable arrest and police shooting rate of African-Americans—that racial bias makes arrests more likely but not shootings).

190. *See* Wells, *supra* note 100, at 653. Wells also notes that the Court did away with subjective inquiries in the immunity context out of concern that it would overburden government workers with additional discovery and more trials. *Id.* at 653 n.200. The Court has rejected similar arguments "that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." Whren v. United States, 517 U.S. 806, 813 (1996); *see also* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011) ("Efficient and evenhanded application of the law demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer." (footnote omitted)).

191. *See* Wells, *supra* note 100, at 628–29.

192. *See id.* at 654–55 (acknowledging some plaintiffs may win more easily under reasonableness test).

193. 136 S. Ct. 305 (2015) (per curiam).

to 110 miles per hour.[194] Anticipating the route of the chase, officers deployed tire spikes, per their training, along the highway.[195] Texas Department of Public Safety Trooper Chadrin Mullenix decided, however, that he would use his rifle to shoot the car's engine block once Leija came into his sights.[196] Despite the fact that his supervisor told him to "'stand by' and 'see if the spikes would work first,'" Mullenix fired off all six shots, hitting Leija four times and killing him.[197]

The Supreme Court did not address the constitutional question, but it granted Mullenix qualified immunity, holding that no law "squarely governs" or addresses the "specific context" of the situation that Mullenix confronted.[198] In discussing the case, however, the Court ignored the many minutes of deliberation that preceded Mullenix's shooting.[199] Instead, the Court adopted *Graham*'s split-second judgment meme, describing Leija as an "immediate" threat to officers, "moments away," and "speeding towards a confrontation with officers he had threatened to kill."[200] But officers had of course intentionally stationed themselves in the way of Leija to stop him.[201] Moreover, Mullenix had enough time to plan to shoot, discuss his idea with fellow officers, and ultimately disregard his superior's order.[202]

In addition to ignoring the deliberative nature of the encounter, the Court also did not consider—nor could it have under the Fourth Amendment—Mullenix's reasons for shooting.[203] After firing the six shots, Mullenix asked his superior, "How's that for proactive?", an apparent reference to prior critiques of his lack of initiative.[204] The Court's combined refusal to apply general rules limiting deadly force, while ignoring Mullenix's motives for shooting and embracing the "split-second" narrative, amounted to what Justice Sonia Sotomayor described as "sanctioning a 'shoot first, think later' approach to policing."[205]

194. *Id.* at 306.

195. *Id.*

196. *Id.* at 306–07.

197. *Id.* at 307.

198. *Id.* at 309–12 (quoting Brosseau v. Haugen, 543 U.S. 194, 198, 201 (2004)).

199. *Id.* at 316 (Sotomayor, J., dissenting) (noting that the Court "dwells on the imminence of the threat" but "glosses over the facts" tending to show the time and deliberation Mullenix took before shooting).

200. *Id.* at 309–11 (majority opinion); *see also id.* at 316 (Sotomayor, J., dissenting) ("The majority recharacterizes Mullenix's decision to shoot at Leija's engine block as a split-second, heat-of-the-moment choice, made when the suspect was 'moments away.'").

201. *Id.* at 306 (majority opinion).

202. *Id.* at 306–07; *id.* at 316 (Sotomayor, J., dissenting).

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

204. *Id.*

205. *Id.*

D. *Enter Qualified Immunity*

The confused state of excessive force law, coupled with its structural police officer bias, has significant consequences for § 1983 plaintiffs and police defendants. Consider the clearly established law test and its insistence on highly specific precedent: excessive force case law, already so fact dependent, rarely offers principles sufficiently clear as to overcome qualified immunity.[206] Though the Court has intoned that general rules have utility and that specifically formulated standards are not required, time and again the Court lambasts lower courts for their reliance on *Graham* or the Fourth Amendment without more particularity.[207] The following describes how qualified immunity doctrine adds yet another layer of protection to police officers.

1. Reasonable Unreasonable Police Brutality

Excessive force doctrine does not align well with the two-pronged qualified immunity analysis. The qualified immunity analysis is commonly understood to undertake two similar inquiries into the reasonableness of the officer's conduct. The constitutional or merits inquiry addresses whether the officer's use of force was *reasonable*.[208] The clearly established inquiry asks whether the officer's use of force was legally *reasonable* in light of legal precedent.[209] But as Justice Ruth Bader Ginsburg explained in her concurrence in *Saucier*, the merits and the clearly established prongs "both hinge on the same question: Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer, identically situated, have believed the force employed was lawful?"[210] The question is necessarily one of mixed law and fact. The "double counting" of the question is therefore more likely to confuse than elucidate.[211]

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206. Harmon, *supra* note 10, at 1140 ("In many areas of the law, indeterminacy is unfortunate; in the context of § 1983 litigation, because of qualified immunity law, it is devastating."); Jeffries, *supra* note 64, at 269 ("Immunity is the general policy, and liability the exception [in excessive force cases].").

207. *Mullenix*, 136 S. Ct. at 308–09; Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2084 (2011); Brosseau v. Haugen, 543 U.S. 193, 199 (2004); Saucier v. Katz, 533 U.S. 194, 202–03 (2000), *modified by* Pearson v. Callahan, 555 U.S. 223 (2009). On the other hand, the *Graham* test could be seen as sufficiently capacious to address all police uses of force, rendering the clearly established test unnecessary; that is, the inquiry is primarily fact-bound. *See* Jeffries, *supra* note 64, at 264–69 (questioning the fairness of the clearly established law inquiry in excessive force cases because the excessive force standard "seemingly encompasses within its terms all possibility of reasonable mistake").

208. *Saucier*, 533 U.S. at 204–05; *Pearson*, 555 U.S. at 232.

209. *Saucier*, 533 U.S. at 205; *Pearson*, 555 U.S. at 244 (quoting Wilson v. Layne, 526 U.S. 603, 614 (1999)).

210. *Saucier*, 533 U.S. at 210 (Ginsburg, J., concurring).

211. *See id.* at 210, 214.

Justice John Paul Stevens raised the same concerns over the admixture of the reasonableness test and qualified immunity years earlier in a search case, *Anderson v. Creighton*.[212] He criticized the majority's application of "a double standard of reasonableness—the constitutional standard already embodied in the Fourth Amendment and an even more generous standard that protects any officer who reasonably could have believed that his conduct was constitutionally reasonable."[213] That standard allows a search and seizure to "be both 'unreasonable' and 'reasonable' at the same time."[214] Justice Antonin Scalia responded, however, that any qualified immunity case will involve a two-pronged assessment of reasonableness, and it is only the repeated terminology that rings dissonant.[215] The majority justified its application of qualified immunity in part on the vagueness and unintelligibility of the probable cause standard itself.[216]

But importing probable cause's double reasonableness test to excessive force is not so obvious a course of analysis. Justice Ginsburg explains in *Saucier* that it is probable cause's confusing and ever-changing law that justifies qualified immunity and its clearly established law test.[217] An officer might *reasonably* conduct a search that *lacks* cause.[218]

Justice Ginsburg considers excessive force a much simpler matter. Deciding the reasonableness of an officer's force may be resolved by applying *Graham*, which asks simply whether an officer could have believed his use of force was lawful.[219] If he could not so believe, then the force is unreasonable and no immunity should attach. Therefore, Justice Ginsburg concludes, qualified immunity analysis should be adjusted, if not eliminated, for excessive force cases.[220] The majority was not convinced of an "excessive force/probable cause distinction," however, noting the "limitless factual circumstances" for which *Graham* may not offer a "clear answer."[221]

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212. 483 U.S. 635, 648 (1987) (Stevens, J., dissenting).

213. *Id.*; *see also* Jeffries, *supra* note 64, at 264–69 (discussing the "double standard of reasonableness" examined by Justice Stevens in *Anderson*).

214. *Anderson*, 483 U.S. at 659 (quoting United States v. Leon, 468 U.S. 897, 960 (1984) (Stevens, J., dissenting)).

215. *Id.* at 643–44 ("The fact is that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable . . . .").

216. *See id.* at 644.

217. *Saucier*, 533 U.S. at 210, 214–15 (Ginsburg, J., concurring).

218. *See id.* at 215.

219. *See id.* at 213–15.

220. *Id.* at 216–17.

221. *Id.* at 205–06 (plurality opinion).

Even if Justice Ginsburg's positive take on the ease with which excessive force may be gauged is not persuasive, her conclusion that qualified immunity is not "meet," i.e. proper, in use of force cases is sound.[222] Justice Ginsburg's fusion of the use of force reasonableness question reflects the necessary admixture of law and fact that courts must address under *Graham*.[223] But the prevailing view insists on dissecting the question into one of fact ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.") and one of law ("The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. . . . If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.").[224] However, the doubling or bifurcation of questions leads not only to two reasonableness inquiries; some lower courts undertake a third inquiry, further benefitting the officer's perspective and transforming the purported reasonable mistake of law question into another evaluation of facts.

2. Reasonably Unreasonable, Unreasonable Police Brutality

Several circuit courts have adopted a third step in their qualified immunity analysis.[225] The U.S. Court of Appeals for the Fifth Circuit, for example, characterizes the second qualified immunity prong as entailing "two distinct, but intertwined, elements."[226] The Fifth Circuit asks, in addition to the "merits" question, "'[2] whether the allegedly violated constitutional rights were clearly established at the time of the incident; and, if so, [3] whether the [defendant's conduct] was *objectively unreasonable* in the light of that then clearly established law."[227] This third step, however, adds yet another reasonableness inquiry. The court

222. *See id.* at 210, 214 (Ginsburg, J., concurring).

223. Assessing probable cause necessarily entails "a mixed question of law and fact" as well. Ornelas v. United States, 517 U.S. 690, 696 (1996) (describing the second component of the determination as "the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause").

224. *Saucier*, 533 U.S. at 205.

225. *See* Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not*, 24 TOURO L. REV. 501, 510–12 (2008) (observing that some courts of appeals "seem to prefer a waltz to the two-step" and describing the various third inquiries); *see also* Bailey v. Pataki, 708 F.3d 391, 404 n.8 (2d Cir. 2013); Quigley v. Tuong Vinh Thai, 707 F.3d 675, 680 n.2 (6th Cir. 2013); CarePartners, LLC v. Lashway, 545 F.3d 867, 876 n.6 (9th Cir. 2008). Circuits asking the third question frame the inquiry in different ways.

226. Tolan v. Cotton, 713 F.3d 299, 305 (5th Cir. 2013), *vacated*, 134 S. Ct. 1861 (2014).

227. *Id.* at 305 (third alteration in original) (quoting Hare v. City of Corinth, 135 F.3d 320, 326 (5th Cir. 1998)).

explains that in excessive force cases, the "objective reasonableness" tests "remain distinct and require independent inquiry."[228] But the repeated question allows courts to find conduct was reasonable despite having found that the conduct violated clearly established law.[229]

Another reasonableness test makes it even harder for plaintiffs to succeed against defendant officers. Then-U.S. Court of Appeals for the Second Circuit Judge Sotomayor argued that the third step poses "an additional hurdle to civil rights claims against public officials that has no basis in Supreme Court precedent."[230] The additional reasonableness inquiry provides "defendants a second bite at the immunity apple," further upsetting whatever balance of rights and liability qualified immunity purports to maintain.[231]

Double counting and third-step reasonableness inquiries also foster additional judicial fact-finding—determinations more appropriate for the jury. Embedding the second reasonableness test within the qualified immunity analysis encourages courts to resolve factual questions, albeit often masquerading as legal determinations, thereby skirting the restrictions on summary judgment, demanding denials when material facts are disputed, and resolving facts in the light most favorable to the nonmovant.[232] A 2013 Fifth Circuit opinion vacated by the Supreme Court illustrates well the dangers of qualified immunity's double-counting or third-step reasonableness in the excessive force context.

Tolan v. Cotton[233] involved the police shooting of an unarmed African-American man.[234] At about 2:00 a.m. on December 31, 2008,

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228. *Id.* (quoting Brumfield v. Hollins, 551 F.3d 322, 326 (5th Cir. 2008)).

229. Taravella v. Town of Wolcott, 599 F.3d 129, 138 (2d Cir. 2010) (Straub, J., dissenting); Blum, *supra* note 225, at 512.

230. Walczyk v. Rio, 496 F.3d 139, 166 (2d Cir. 2007) (Sotomayor, J., concurring).

231. *Id.* at 169.

232. *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 206 (2004) (Stevens, J., dissenting) ("Rather than uncertainty about the law, it is uncertainty about the likely consequences of Haugen's flight . . . that prevents me from answering the question of qualified immunity that this case presents. This is a quintessentially 'fact-specific' question, not a question that judges should try to answer 'as a matter of law.'").

233. 854 F. Supp. 2d 444 (S.D. Tex. 2012), *aff'd*, 713 F.3d 299 (5th Cir. 2013), *vacated*, 134 S. Ct. 1861 (2014).

234. *Id.* at 461, 463. Tolan's claim of racial profiling and discrimination under the Equal Protection Clause was dismissed and went unaddressed in the appeals. *See Tolan*, 134 S. Ct. at 1864 n.2. Yet, even if Tolan's race went unmentioned in the court of appeals' opinion, one wonders to what extent implicit racial bias may have affected the Fifth Circuit's determination that the officer's perception of Tolan as a threat and his resulting shooting were legally reasonable. The court notes, for example, that Tolan wore a "hoodie," concealing whether Tolan had a gun in his waistband. *Tolan*, 854 F. Supp. 2d at 460. The Fifth Circuit's opinion, which the court wrote in the midst of the George Zimmerman trial for the shooting of Trayvon Martin, who had famously worn a hoodie when he was shot, was likely cognizant of the negative associations with the

Robbie Tolan and his cousin exited their car in front of Robbie's parents' home.[235] Noticing the car, a police officer mistyped one of the car's license plate characters, resulting in an inaccurate report that the car was stolen.[236] Drawing his pistol, the officer accused the men of stealing the car and ordered them onto the ground.[237] Tolan responded that the car belonged to him and then complied, lying down on the home's porch.[238] Awakened by the encounter, Tolan's parents came onto the porch in their pajamas and explained that the car did in fact belong to them.[239] Officer Cotton soon arrived at the scene and ordered Tolan's mother to stand by the garage door, who was incredulous at the order.[240] It was disputed whether Officer Cotton pushed her against the door and left bruises or escorted her in a manner that would not have caused bruises.[241] It was similarly unclear whether Tolan then rose to his knees or to his feet.[242] It was agreed, however, that Tolan told Cotton, "'[G]et your fucking hands off my mom'" from a distance of about fifteen to twenty feet.[243] Cotton then fired three shots at Tolan, causing chest and internal injuries.[244]

The Fifth Circuit upheld Officer Cotton's qualified immunity on Tolan's excessive force claims, applying its third step reasonable test.[245] Declining to address whether the evidence could support a Fourth Amendment violation, the Fifth Circuit stated that it was applying the second qualified immunity prong.[246] The court held that "it was clearly established that shooting an unarmed, non-threatening suspect is a Fourth-Amendment violation."[247] But in assessing whether Cotton's actions were objectively unreasonable in light of the clearly established law—the third step—the court strayed entirely from the required legal reasonableness question into a factual inquiry.

"hoodie." *See, e.g.*, *Trayvon Martin Case: Is Young, Black and Wearing a Hoodie a Recipe for Disaster?*, (Mar. 22, 2012, 1:41 PM), http://usnews.nbcnews.com/_news/2012/03/22/10814211-trayvon-martin-case-is-young-black-and-wearing-a-hoodie-a-recipe-for-disaster (discussing negative perception of young African-American men in hoodies).

235. *Tolan*, 134 S. Ct. at 1863.
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 1864.
241. *Id.*
242. *Id.*
243. *Id.* (alteration in original).
244. *Id.*
245. Tolan v. Cotton, 713 F.3d 299, 305–06 (5th Cir. 2013).
246. *Id.* at 306.
247. *Id.* at 307.

The Fifth Circuit did not address whether Cotton had made a reasonable mistake of law, as it should have.[248] Instead, the court undertook a review that accepted all ambiguous or disputed facts in Officer Cotton's favor. The analysis confused qualified immunity's indulgence of legal ambiguity in the defendant's favor with an equally protective embrace of factual disputes to the defendant's advantage.

In overturning the Fifth Circuit, the Court simply held that the lower court failed to follow summary judgment precedents directing that courts view evidence in the light most favorable to the nonmovant.[249] The Court failed to draw the critical link between the third step's employment and the resulting disregard for summary judgment strictures.[250]

By failing to focus on the standard and proscribe the third step (and double counting as well) in qualified immunity cases, lower courts may continue to shade facts under a legal guise, a practice which favors police in excessive force cases.[251] The fusion of an excessive force standard, which already privileges the police perspective, with a qualified immunity analysis, which requires specific precedent holding the actions unconstitutional and indulges in multiple "reasonableness" inquiries, prejudices courts against police officer liability.[252] This approach invariably offends basic summary judgment rules, accommodates police's rash and racially biased conduct, and undermines § 1983's remedial objectives, all in the name of affording latitude to "reasonable mistakes."[253]

E. *Closing the Courthouse Door to Victims of Police Brutality*

Police brutality undermines the legitimacy of law enforcement and the criminal justice system. And an inadequate mechanism for redress only

248. *See* Tolan v. Cotton, 538 F. App'x 374, 376 (5th Cir. 2013) (en banc) (mem.) (Dennis, J., dissenting) ("After the panel opinion states that it will use only the *Saucier* second prong analysis to decide this case, one would expect it to address whether Cotton made a reasonable mistake of law in using deadly force against Robbie, for that is the purpose of the second prong.").

249. *See Tolan*, 134 S. Ct. at 1868–69 (Alito, J., concurring) (noting that Court addressed only the "routine" question of whether evidence supported summary judgment). The Court found that the Fifth Circuit had improperly resolved four factual disputes in the defendant's favor: (1) the porch's lighting ("fairly dark"); (2) Tolan's mother's demeanor (agitated and noncompliant); (3) Tolan's conduct ("shouting" and "verbally threatening"); and (4) Tolan's interaction with the police (attempting to interfere). *Id.* at 1866–67.

250. *See id.* at 1865 n.3.

251. Chen, *supra* note 11, at 232. However, Professor Karen Blum suggests that the decision sends a message to lower courts to refrain from usurping the jury's role in qualified immunity cases. Blum, *supra* note 13, at 941–43.

252. *See* discussion *supra* Section I.C.

253. *See* discussion *supra* Section I.C.

feeds the perception that the legal system is unfair.[254] Justice Scalia observed "that the appearance of justice is as important as its reality."[255] At a time of heightened consciousness over the grossly disproportionate incarceration rate and police shootings of African-Americans and other minorities, the perception and the reality of the injustice is manifest.[256]

Section 1983 can contribute to the fairness of the justice system by compensating victims and potentially moderating police excesses. But the structural biases in excessive force civil litigation and qualified immunity standards are more likely to foster the view that the justice system is unfair.[257] Foreclosing jury trials in excessive force cases deprives the law's development of "democratic legitimacy."[258] And the particular protection that police enjoy in cases of excessive force closes the courthouse doors to victims of police brutality.

The current state of civil liability for police excessive force thus requires correction. Almost from its inception, qualified immunity has depicted a set of interests and assigned them different values, which favors police interests. Ninth Circuit Judge Stephen Reinhardt locates in the Court's qualified immunity jurisprudence over the past decade "a strictly conservative and often extreme ideology that elevates" government officers' interests over those seeking to vindicate their constitutional rights under § 1983.[259]

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254. *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 172 (1999) (noting the importance of peoples' perceptions about procedures to their beliefs about a justice system's legitimacy); Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 221 (2012) ("Almost certainly, the police lose perceived legitimacy when they intentionally or willfully (or even recklessly or negligently) employ excessive force.").

255. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting); *see also* Bowers & Robinson, *supra* note 254, at 265 ("[E]ffective law enforcement is probably undermined (at least to a degree) when the public believes authorities are behaving unfairly.").

256. *See* WASHINGTON POST-ABC NEWS POLL 12–13 (2014), https://assets.documentcloud.org/documents/1389460/2014-12-14-trend-for-release.pdf (reporting 63% of whites are confident that police treat blacks and whites equally, whereas 77% of blacks are not confident that the police treat races equally, and that 60% of whites are confident that police are held accountable for misconduct, but that 75% of blacks are not confident that police are kept accountable); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1250–51 (2015).

257. A criminal justice system's legitimacy depends in part on its perceived procedural fairness. *See* Bowers & Robinson, *supra* note 254, at 213–14. Fair procedures should be "neutral, accurate, consistent, trustworthy, and fair." *Id.* at 215. Legal authorities should "act impartially, honestly, transparently, respectfully, ethically, and equitably." *Id.* at 216.

258. *See* Kahan et al., *supra* note 128, at 887; *see also* Pollis, *supra* note 128, at 477 (noting importance of jury to shaping community standards).

259. Reinhardt, *supra* note 256, at 1250.

Qualified immunity's biases date back, however, at least three decades. The Court's alignment of interests in *Harlow* set the stage for an analysis that favored the police. Whatever the rule or test that the Court adopts, litigation costs and concerns over muted police enforcement trump the individual's liberty interests.[260] In recognition of the perception and the reality of qualified immunity's unfair weighing of interests, the following Part proposes reforms that would give a greater weight to citizens' right to be free from excessive force.[261]

III. THE 'GENERIC' RIGHT AGAINST EXCESSIVE FORCE AND THE SIGNIFICANCE OF USE OF FORCE POLICIES

As currently structured, qualified immunity—in particular, the clearly established law test—poses too great a hurdle for victims of police excessive force. This impediment to relief cannot be squared with the unique problem of police brutality or with the Fourteenth Amendment and § 1983 drafters' particular focus on state violence. These considerations support recognizing a more generalized rule and right for assessing the legitimacy of the use of force. A general right against excessive force presumes a personal liberty from police use of force; specific circumstances may attenuate the right, but they should be considered a posteriori.

Generality may be better framed if the prohibition on prearrest and stop and seizure excessive force is also housed in the Fourteenth Amendment's Due Process Clause. Recognition of a substantive due process right would not displace the Fourth Amendment but would afford litigants additional sources of protection. Importantly, under the qualified immunity prong, a court should also consider non-constitutional authorities on use of force, including statutes, regulations, and police department policies. This approach does not derive constitutional rights from § 1983 or constitutionalize torts and rule infractions; rather it more fully realizes the civil rights statute's remedial objectives.

A. *The Case for Generality*

A generalized rule will better protect citizens from police excessive force than the current clearly established law framework. How specific

260. *Id.* at 1246 (describing Court's qualified immunity doctrine as "a construction that has once again exalted a lesser concern over the protection of constitutional rights").

261. *Id.* at 1253 ("[A]n enlightened Court would recognize that, particularly in light of the growing distrust of police and the criminal justice system in minority communities, federal courts must be allowed to play their historic role as the guardians of constitutional rights, not prohibited from doing so by a judiciary that elevates its concern for comity above the constitutional rights to which all persons are entitled."); Bowers & Robinson, *supra* note 254, at 266 ("Our bottom line is simply that lay perceptions ought to matter to this balance [between liberty and order].").

the law must be to be considered clearly established inevitably decides the game.[262] Requiring specification thus entails a prioritization of values.[263] It is not a neutral analysis. The more specific the rule, the more protective it is of the officer. The more general the rule, the more solicitous it is of the citizen's interests.[264] Thus, for example, the right at issue in *Bowers v. Hardwick* could be framed specifically as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy"[265] or, more generally, as "'the right to be let alone."[266] Addressing the analysis of fundamental liberty interests, Professors Laurence Tribe and Michael Dorf observe: "When we automatically incorporate the factors that provide the state's possible justifications for its regulation into the initial definition of a liberty, the fundamental nature of that liberty nearly vanishes."[267]

Something of the same sort occurs with qualified immunity in the Court's pursuit of near-identical Fourth Amendment precedent, the facts of which are indistinguishable from the case before it. By moving in *Sheehan*, for example, from requiring a case-distilled right to be free of excessive force to solely a right that takes into account a host of reasons the police might enter, the established nature of that right ineluctably frays.[268] The more exacting the demand for similarity in precedent, the less likely there is to be precedent and the more the standard protects officer's interests.[269] As a result, whatever liberty interest in freedom from excessive force exists is invariably truncated.

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262. Jeffries, *supra* note 64, at 261 ("[I]t is important to ask the right question—not whether the decision was anticipated by a factually similar decision in the same jurisdiction, but whether the decision followed from the principles of prior decisions as any reasonable person would have understood them."); Irina D. Manta & Cassandra Burke Robertson, *Secret Jurisdiction*, 65 EMORY L.J. 1313, 1347 (2016) ("Delineating this right can be difficult, as its definition—and thus its protection—can vary greatly depending on what level of abstraction or generality is applied."); Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 475 (2000) ("[T]he way in which courts frame the question, 'was the law clearly established,' virtually guarantees the outcome of the qualified immunity inquiry.").

263. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058, 1096–97 (1990).

264. *See* Wilson, *supra* note 262, at 475 (noting that adherence to general principles leads to denials of qualified immunity and that insistence on factually identical cases results in grants of qualified immunity); *see also* Blum, *supra* note 13, at 946 (discussing generally the defendants' citation of cases "demanding a more factually specific framing of the right in question" and the plaintiff's invocation of cases permitting only that which provides "fair warning").

265. Tribe & Dorff, *supra* note 263, at 1065 (citing Bowers v. Hardwick, 478 U.S. 186, 190 (1986)).

266. *Id.* (quoting *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting)).

267. *Id.* at 1096.

268. *See* City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1777 (2015).

269. Tribe & Dorf, *supra* note 263, at 1096–97.

By insisting that only particular courts' holdings on near-identical sets of facts may permit a case to proceed beyond summary judgment or the pleadings, current doctrine ignores the utility of broad legal principles. As a result, the Court also finds no value in analogy; opinions with remotely distinguishable facts that might bear on the immediate cases are sliced and diced so that no applicable law can be derived or applied. Yet police have to make scores of decisions, not all of which prior cases have addressed. Just as judges and lawyers engage in an interpretive practice when it comes to applying a rule to a situation, so too do all people, including police officers.[270] By underestimating police officers' ability—or not demanding that they learn—to adhere to constitutional rules, current doctrine ignores reality. Police can be expected to—indeed they already do—generalize from broad rules of decision and apply them to different scenarios.[271] If something is truly sui generis, then an officer may be entitled to immunity.[272] But this should be the exception rather than the default.

The Court has at times at least rhetorically gestured to the relevance of rules of generality. In *Saucier*, the Court explained: "This is not to say that the formulation of a general rule is beside the point, nor is it to insist the courts must have agreed upon the precise formulation of the

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270. *See id.* at 1098 ("Legal thought has everything to do with the evenhanded application of general principles to concrete situations. A prerequisite for the lawyer's art, therefore, is the enunciation of principles. A principle connects our intuitions about specific fact situations at a higher level of abstraction.").

271. One may argue that this would foist on police an unreasonable burden requiring a lawyer's acumen. *See, e.g.*, Heien v. North Carolina, 135 S. Ct. 530, 543 (2014) (Sotomayor, J., dissenting) ("[I]t is courts, not officers, that are in the best position to interpret the laws."); Pasco v. Knoblauch, 566 F.3d 572, 580 (5th Cir. 2009) ("'[I]t would be unreasonable to expect a police officer to make the numerous legal conclusions necessary to apply *Garner* to a high-speed car chase."). This Article, however, maintains, first, that all police can be expected to understand the general principles relating to police misconduct and that drawing from these is already done in a myriad of actions each day. This is the foundational point of Justice Ginsburg's concurring opinion in *Saucier*—that police can apply the *Graham* standard (the general law) to different factual scenarios that they confront. Saucier v. Katz, 533 U.S. 194, 214–15 (Ginsburg, J., concurring), *modified by* Pearson v. Callahan, 555 U.S. 223 (2009). But, as it is constitutional rights that are at stake, and the current doctrine is built on the conceit that police are expected to have parsed each fact and holding of relevant Supreme Court and circuit court cases within their jurisdiction, the burden is manageable and fair. Moreover, the proposal that use of force policies also serve as guidance should lighten the interpretive burden. *See* discussion *infra* Section III.C.

272. The U.S. Court of Appeals for the Tenth Circuit appears to recognize the utility—if not the necessity—of generality, employing a "sliding scale" to decide what is clearly established law. Browder v. City of Albuquerque, 787 F.3d 1076, 1082 (10th Cir. 2015) ("[T]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." (quoting Shroff v. Spellman, 604 F.2d 1179, 1189–90 (10th Cir. 2010))).

standard."[273] Justice Ginsburg seemed to take the majority at its word, though, suggesting that the excessive force evaluation lent itself to application of general rules.[274] But despite the majority's purported nuanced approach, in practice the Court has hewed to highly specific rules for all civil rights claims, including excessive force.[275]

From where might a general rule logically follow? Professor John Jeffries Jr. proposes a "clearly unconstitutional" standard, which would afford broader liability, tying the measure less to "specific precedent" than to a "common social duty."[276] By "common social duty", Professor Jeffries explains, he means the sentiment that "[w]e all know that the law is written down somewhere—at least it is supposed to be."[277] Thus, it follows, excessive force is "clearly unconstitutional."[278]

Professor Jeffries's "clearly unconstitutional" test derives from a concern that liability not hinge solely on the "happenstance" of a directly relevant precedent.[279] Absent a case on point, an officer should reasonably be expected to understand that outrageous or egregious conduct is unconstitutional.[280] His test would still afford immunity in cases of unsettled law and close calls.[281]

Professor Jeffries' desire to infer notice in more instances, and thus to expand liability as a necessary adjustment to qualified immunity's balancing of values, is commendable. Applying a rule of generality would replace the two- or three-tiered reasonableness test. But "common social duty" and "clearly unconstitutional" remain all too vague terms, along the lines of "I know it when I see it," and will fall prey to criticisms of

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273. *Saucier*, 533 U.S. at 202. *See also* White v. Pauly, 137 U.S. 548, 552 ("Of course, 'general statements of the law are not inherently incapable of giving fair and clear warning' to officers." (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)).

274. *See id.* at 210, 214–15 (Ginsburg, J., concurring).

275. *See* discussion *supra* Subsection I.C.2.c.

276. Jeffries, *supra* note 64, at 263 (quoting Nash v. United States, 229 U.S. 373, 377 (1913)).

277. Jeffries, *supra* note 85, at 865; Jeffries, *supra* note 64, at 260, 263 ("Notice can be found as well in what Holmes called 'common social duty.'" (quoting Nash v. United States, 229 U.S. 373, 377 (1913))). Some lower courts have gravitated to a similar position. *See Browder*, 787 F.3d at 1082 ("[S]ome things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing."); Vinyard v. Wilson, 311 F.3d 1340, 1350 (11th Cir. 2002) (recognizing the "'obvious clarity' case [in which] the words of a federal statute or federal constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful").

278. *See* Jeffries, *supra* note 85, at 865 ("[P]olice should have a 'common social duty' not to use excessive force.").

279. Jeffries, *supra* note 64, at 261–63.

280. *Id.* at 263–64.

281. *Id.* at 263.

subjectivity and ambiguity. It is unmoored from objective sources of law, constitutional or otherwise.

B. *The Due Process Right Against Excessive Force*

Substantive due process as an additional limit on prearrest and stop and seizure excessive force would allow for greater generality in regulating police use of force. Indeed, locating the prohibition on excessive force in the Due Process Clause provides an additional—and arguably more legitimate—textual basis for the prohibition. Additionally, the move to due process also should enable consideration of the officer's abuse of authority and his state of mind where appropriate.[282]

1. *Graham*'s Error

The Court's rejection of due process as a constitutional limit on excessive force in *Graham* was mistaken. The Court compounded its error by rendering the Fourth Amendment the exclusive means of guarding against excessive force, precluding the assertion of two constitutional claims—under the Fourth Amendment and the Fourteenth Amendment.[283]

The Court based its exclusive application of the Fourth Amendment to arrests and investigatory stops on its "explicit textual source of constitutional protection" as opposed to "the more generalized notion of 'due process.'"[284] To be sure, the Fourth Amendment's ambit of protection is more limited. But, as Professor Wells observes, "nothing in the background of the Fourth Amendment, nor in the Fourth Amendment precedents before *Garner* . . . support the notion that one of the amendment's aims is to protect the interest in personal security against physical harm."[285] It is therefore unclear why the proscription on searches and seizures is more apposite to excessive force than the prohibition on depriving persons of life and liberty without due process of law.

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282. *See* Wells, *supra* note 100, at 653.

283. *Compare* Graham v. Connor, 490 U.S. 386, 395 (1989) ("[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (emphasis omitted)), *with id.* at 399–400 (Blackmun, J., concurring) (objecting to the majority's decision to hold that courts should address excessive force claims under the Fourth Amendment rather than substantive due process).

284. *Id.* at 395 (majority opinion).

285. Wells, *supra* note 100, at 629 (footnote omitted). For other criticism of *Graham*, see Toni M. Massaro, *Reviving Hugo Black? The Court's "Jot for Jot" Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086, 1090 (1998); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 852 (2003).

Moreover, restricting a person's protection against police excessive force to the Fourth Amendment becomes less supportable when the constitutional limitations on other uses of force are considered. When a person is pursued by police,[286] in police custody,[287] or detained in jail,[288] the Fourteenth Amendment governs use of force.

The Court has failed to adequately explain its constitutionally myopic approach to excessive force claims. It may well reflect several of the Justices' unease with the open-ended innovations of substantive due process.[289] But the same machinations are invariably involved in explicating the meanings of the Fourth Amendment or the Eighth Amendment.[290] In addition, the Court's insistence on the Fourth Amendment's exclusive applicability to excessive force cases contradicts its general tolerance of multiple constitutional claims.[291] Moreover, by foreclosing substantive due process claims the Court further diminishes the possibility of constitutional growth in the already fallow field of excessive force law.[292]

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286. Cty. of Sacramento v. Lewis, 523 U.S. 833, 841–44 (1998) (substantive due process applies to a high-speed police chase resulting in the death of a motorcycle passenger and the Fourth Amendment does not apply, because a chase does not amount to a seizure); California v. Hodari D., 499 U.S. 621, 626 (1991) (police pursuit attempting to seize a person does not amount to "seizure" within the Fourth Amendment); Brower v. Cty. of Inyo, 489 U.S. 593, 596–97 (1989) (only intentional termination of movements amounts to "seizure" under the Fourth Amendment).

287. Chavez v. Martinez, 538 U.S. 760, 773 (2003) (the Fourteenth Amendment's Due Process Clause governs police torture and brutality that does not produce statements used at trial); Rochin v. California, 342 U.S. 165, 172 (1952) (applying the "shocks the conscience" test under the Due Process Clause to police stomach pumping of suspect).

288. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015) ("[T]he Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." (quoting *Graham*, 490 U.S. at 395 n.10)); Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." (footnote omitted)). In *Kingsley*, however, the Court applied the Fourth Amendment's reasonableness standard in the pretrial jail context. *Kingsley*, 135 S. Ct. at 2473.

289. *See Graham*, 490 U.S. at 395; Wells, *supra* note 100, at 643.

290. Wells, *supra* note 100, at 643–44 (arguing that a judge's application of the Fourth Amendment to police excessive force cases entails "as much a creative role" as application of substantive due process); *id.* at 644 (characterizing the Court's rejection of substantive due process in favor of more explicit textual sources as "a desire to keep up appearances").

291. *See* Soldal v. Cook Cty., 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn."); *see also* Massaro, *supra* note 285, at 1113 ("[I]n cases other than *Graham*, and its few Supreme Court applications, the Court has never declared that one constitutional provision 'occupies the field'; rather, each is analyzed independently."); Rubin, *supra* note 285, at 859 ("[T]he ordinary rule is that a single act can violate more than one constitutional provision.").

292. Professor Peter Rubin offers at least one narrow view of *Graham*, under which substantive due process claims would be preempted only where they directly overlap with the

2. Reclaiming the Generic Due Process Right to be Free from Excessive Force

An approach that makes room again for substantive due process claims concerning excessive force at the "seizure" stage of the police–citizen encounter would focus on the deprivation of the liberty interest. As the Second Circuit explained in *Johnson v. Glick*,[293] "quite apart from any 'specific' of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law."[294]

For almost fifteen years after *Glick*, most federal courts applied its substantive due process standard to all excessive force claims.[295] But *Graham* rejected *Glick*, in part, out of concern that courts assumed "that there is a generic 'right' to be free from excessive force, grounded not in any particular constitutional provision but rather in 'basic principles of § 1983 jurisprudence.'"[296] Regardless of whether the Court's perception of lower courts' rationale was accurate, the Court should recognize a general right against police excessive force, albeit one based not in § 1983 but in its constitutional progenitor, the Fourteenth Amendment's Due Process Clause. Courts should not, however, forget the remedial purposes of § 1983 in analyzing an excessive force claim.

The fundamental liberty interest in freedom from excessive force under substantive due process is well-established in history and tradition dating back to at least Reconstruction.[297] The ratification of the

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interests protected by the Fourth Amendment, but claims alleging conscience-shocking conduct under substantive due process would still be allowed, albeit under specific amendments. Rubin, *supra* note 285, at 868–70.

293. 481 F.2d 1028 (2d Cir. 1973), *overruled by Graham*, 490 U.S. 386.

294. *Id.* at 1032.

295. *Graham*, 490 U.S. at 393. *Glick* instructed:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Glick, 481 F.2d at 1033.

296. *Graham*, 490 U.S. at 393.

297. The liberty interest in freedom from excessive force may well satisfy the Court's disputed substantive due process requirement that the rights be "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Kingsley v. Hendrickson, 135 S. Ct. 2466, 2479 (2015) (Scalia, J., dissenting) (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)); Kerry v. Din, 135 S. Ct. 2128, 2134 (2015) (discussing the standard under *Glucksberg* that "before conferring constitutional status upon a previously unrecognized 'liberty,' we have

Fourteenth Amendment and passage of the Civil Rights Acts reflected a similar intention to nationalize civil rights enforcement, including eradicating state violence against African-Americans.[298] Congress was acutely aware of the threat state violence posed to citizens' liberty interests under the Due Process Clause.[299] Support for a due process right to freedom from excessive force may also be found in the Court's cases upholding prosecutions under 18 U.S.C. § 242, the criminal counterpart to § 1983.[300]

In *Screws v. United States*,[301] the Court recognized that instances of police excessive force may constitute due process violations.[302] The case concerned the federal prosecution of three Georgia local law enforcement officers, who had beaten to death Robert Hall, a young African-American man whom they had arrested for stealing a car tire.[303] The officers claimed that they "assaulted Hall in order to protect themselves and to keep [him] from escaping."[304] The federal government prosecuted the men under the criminal statute that derived from § 2 of the 1866 Civil Rights Act, which Congress intended "to enforce the Fourteenth Amendment."[305] The government contended that the deadly assault violated Hall's due process rights.[306] The officers challenged the criminal statute, arguing in part that it was too vague as to what constituted a due process violation.[307]

The Court rejected the officers' generality argument, holding that "it is plain that basic to the concept of due process of law in a criminal case is a trial—a trial in a court of law, not a 'trial by ordeal.'"[308] It noted that the Fourteenth Amendment's Due Process Clause was no less vague than

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required a 'careful description of the asserted fundamental liberty interest'"); *see also* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 166 (2015) (arguing that *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) overruled the *Glucksberg* substantive due process test); *cf.* Cty. of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998) (describing the "historical examples of protected liberty" as significant "in determining whether a given statute could be judged to contravene the Fourteenth Amendment" but not relevant to executive action).

298. *See* discussion *supra* Section I.A.

299. *See* KACZOROWSKI, *supra* note 21, at 13; *see also* discussion *supra* Section I.A.

300. *Glick*, 481 F.2d at 1032 n.5 (discussing criminal prosecutions of police officers in support of civil liability for due process violations under § 1983) (citing Williams v. United States, 341 U.S. 97 (1951); United States v. Price, 383 U.S. 787 (1966)).

301. 325 U.S. 91 (1945).

302. *See id.* at 106. For a comprehensive discussion of *Screws*, see Watford, *supra* note 145, at 465.

303. 325 U.S. at 92–93.

304. *Id.* at 107.

305. *Id.* at 93, 98.

306. *Id.* at 93–94.

307. *Id.* at 100–05.

308. *Id.* at 106 (quoting Brown v. Mississippi, 297 U.S. 278, 285 (1936)).

the Privileges and Immunities Clause or Equal Protection Clause.[309] But, the Court qualified, not all officers' torts amounted to federal crimes; those were crimes only if officers intentionally denied people their rights under the Constitution or federal laws.[310] Though *Screws* references only a procedural due process violation, Professor Peter Rubin persuasively argues that the Court might also have treated the police officers' "arbitrary" and "conscience-shocking" fatal beating as a distinct substantive due process violation.[311]

Similarly, in *Williams v. United States*[312] the Court upheld the conviction of a police officer for violating a person's "right and privilege not to be deprived of liberty without due process of law" by beating and torturing a theft suspect to get an admission.[313] The Court held that the Due Process Clause violations—apparently both substantive and procedural due process violations—were self-evident and fell well within the scope of the criminal statute.[314] It acknowledged that a different question would be raised if "less obvious methods of coercion" were used.[315]

Notably, however, the *Williams* Court connected the remedial goals of the criminal civil rights statute with that of the due process violation in suggesting a lenient review of the prosecution. "Our concern is to see that substantial justice is done, not to search the record for possible errors which will defeat the great purpose of Congress in enacting § 20 [now § 242]."[316] Similarly, the Court should examine claims of due process violations for excessive force with a more forgiving analysis that provides added weight to the constitutional violation.

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309. *Id.* at 100. Justice Rutledge stated in his concurrence that Congress clearly intended the criminal statute to protect the Fourteenth Amendment's "expressly guaranteed rights not to be deprived of life, liberty or property without due process of law." *Id.* at 123 (Rutledge, J., concurring). Responding to the vagueness argument, he stated that the Fourteenth Amendment's rights "are all phrases of large generalities. But they are not generalities of unillumined vagueness; they are generalities circumscribed by history and appropriate to the largeness of the problems of government with which they were concerned." *Id.* (quoting Malinski v. New York, 324 U.S. 401, 413 (1945) (Frankfurter, J., concurring)).

310. *See id.* at 109 (plurality opinion); *see also* Paul v. Davis, 424 U.S. 693, 699–701 (1976) (discussing the limits of *Screws*'s holding and cautioning against making "the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States").

311. Rubin, *supra* note 285, at 884 ("[E]ven a hearing can't render a fatal beating by police permissible.").

312. 341 U.S. 97 (1951).

313. *See id.* at 103–04 (quoting indictment).

314. *See id.* at 101; *see also* Johnson v. Glick, 481 F.2d 1028, 1032 n.5 (2d Cir. 1973) (describing indictment and jury charges in *Williams*, which suggested both substantive and procedural violations).

315. *See Williams*, 341 U.S. at 101.

316. *Id.* at 104.

Under a substantive due process approach to prearrest and stop and seizure excessive force, a plaintiff could assert a due process claim when he alleges facts that concern abuse of power or implicate an officer's state of mind—factors that escape the Fourth Amendment's reach.[317] Claims along these dimensions should be permitted by the Fourteenth's Amendment's prohibition on depriving people of liberty without due process.[318] And where the plaintiff alleges malice, the issue of clearly established law is hardly relevant, calling into question the rigid application of the qualified immunity test. Subjective motivations should be considered when supported by evidence.[319] In these instances, courts would not often find uses of force reasonably unreasonable.[320]

Further, *Graham*'s truism that officers are forced to make split second judgments should not hold sway in the due process inquiry.[321] And courts should consider whether police have abused their authority in escalating the use of force or failing to pursue alternative, lesser uses. A plaintiff could satisfy that test without having to allege conduct that "shocks the conscience."[322] Justice Sotomayor's reframing of the excessive force question in *Mullenix* offers a variant of the proposed inquiry, in which she asked whether the force was justified by a governmental interest in shooting the car rather than using less dangerous spike strips.[323] Justice Sotomayor would have required plausible reasons for opting to shoot over waiting for the strips to take effect.[324] This form of inquiry would also help guard against pardoning biases—racial and otherwise—that may infect police behavior as products of "split-second judgments." Moreover, under due process, a fact finder could also address *Mullenix*'s "proactive" remark as part of its inquiry into his state of mind when he shot Leija.[325]

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317. *See* Rubin, *supra* note 285, at 868–70; Wells, *supra* note 100, at 653. As the Court in *Kingsley* recently construed *Glick*, substantive due process may not mandate a subjective inquiry, but it is an example of one factor to consider in assessing the excessiveness of force. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2475–76 (2015).

318. Alternatively, reinstating the good faith defense eliminated in *Harlow* might address the state of mind concerns. *See* discussion *supra* Subsection I.C.2.b. More thanks to Professor Wells for this point.

319. *See* Wells, *supra* note 100, at 653–54.

320. *See* Saucier v. Katz, 533 U.S. 194, 210 (2001) (Ginsburg, J., concurring), *modified by* Pearson v. Callahan, 555 U.S. 223 (2009); Anderson v. Creighton, 483 U.S. 635, 648 (1987) (Stevens, J., dissenting).

321. *See* Stoughton, *supra* note 10, at 864–68.

322. *See, e.g.*, *Kingsley*, 135 S. Ct. at 2472–73 (applying an objective reasonableness test in analyzing a substantive due process excessive force claim in jail context).

323. *See* Mullenix v. Luna, 136 S. Ct. 305, 314 (2015) (Sotomayor, J., dissenting).

324. *See id.* at 314–15.

325. *Id.* at 316.

C. *Use of Force Policies as Clearly Established Law*

Aside from elaborating on the constitutional sources of the right against excessive force, this Article maintains that the qualified immunity analysis' scope requires expansion. Nonconstitutional limitations on excessive force should satisfy the "clearly established" test when they protect the constitutional rights against excessive force.[326] Such recourse upholds qualified immunity's concerns over clarity and fair notice to officers.

Under this Article's proposal, a victim of police brutality would not be limited to Supreme Court or federal circuit court cases to demonstrate that the right is clearly established. Rather, the victim could also invoke statutes, regulations, and department or agency policies applicable to the officer to show that it was, or should have been, clear that the particular use of force was prohibited. A policy infraction would not amount to a per se constitutional violation. The policy would only inform the clearly established analysis. And policies would only be relevant to that review when they buttress case law on the particular rights against excessive force. This approach does not draw constitutional rights from § 1983 or constitutionalize torts and rule infractions. Rather, it realizes the civil rights statute's original remedial purposes, particularly the protection of due process. Indeed, it compels local and state police to enforce their rules against excessive force—one of the primary concerns of the Reconstruction Congress.

Use of force policies bear striking similarity to the constitutional proscriptions against excessive force. Most police policies provide guidance on when force is generally permitted and standards similar to the *Graham* and *Glick* tests, along with more specific protocols.[327] Thus the policies at once embrace fairly generalized standards while also providing more detailed rules of what must or should be done in particular circumstances relating to force. These policies—in both their generalized and more specific aspects—appear designed to realize the general prohibition of unlawful force.

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326. Professor Avery has proposed that, in addressing the totality of the circumstances to determine the reasonableness of police officers' use of force on emotionally disturbed people, courts consider their relevant training and established practices. *See* Avery, *supra* note 183, at 331–32.

327. *See, e.g.*, CINCINNATI POLICE DEP'T, PROCEDURE MANUAL 12.545: USE OF FORCE 6–8 (2015), http://www.cincinnati-oh.gov/police/assets/File/Procedures/12545.pdf; DENVER POLICE DEP'T, OPERATIONS MANUAL 105.00: USE OF FORCE POLICY 105-1 to 105-4, https://www.denvergov.org/Portals/720/documents/OperationsManual/105.pdf; S.F. POLICE DEP'T, GENERAL ORDER 5.01, USE OF FORCE 1–3, 7–8 (1995), http://www.sf-police.org/modules/ShowDocument.aspx?documentid=14790.

The San Francisco Police Department Use of Force Policy, for example, provides that officers will execute their police mission "with the highest regard for the dignity of all persons and with minimal reliance upon the use of physical force."[328] The Order also states that "force may not be resorted to unless other reasonable alternatives have been exhausted or would clearly be ineffective under the particular circumstances."[329] While the Order recognizes the need for force in some circumstances—to protect police and others—it insists that officers articulate reasons justifying the force.[330] The Order further details preferred categories of force, beginning with verbal persuasion, moving to physical restraints, nonlethal weapons and mechanisms, and finally to firearms.[331]

Identifying police department use of force policies as expounding on the constitutional prohibition on excessive force addresses the problematic, highly specific clearly established law standard. To the extent the Court propounds fair notice as the basis for its clearly established law standard, incorporating local policies in the analysis raises no concern. Indeed, it is more sensible to expect officers to be familiar with their own department use of force policies than all relevant or controlling circuit court opinions. Thus, it should work no hardship to hold officers accountable for these violations.

1. Judicial Responses to Policy as Clearly Established Law Arguments

The Court has previously fielded arguments that local policies may augment clearly established law. In *Davis v. Scherer*,[332] the Court held that an administrative regulation requiring notice and a hearing before termination did not constitute clearly established law for purposes of eliminating qualified immunity protection for a procedural due process violation.[333] More specifically, the Court rejected a proposal similar to the one this Article attempts to resuscitate: Recourse to a statute or policy would be "limited by requiring that plaintiffs allege clear violation of a

328. S.F. POLICE DEP'T, *supra* note 327, at 1.

329. *Id.*

330. *Id.* The Order also provides that that the use of force as "summary punishment or for vengeance" is "clearly improper and unlawful." *Id.* at 7. Indiscriminate use of force will subject officers to civil and criminal liability and Department discipline. *Id.* at 8.

331. *See id.* at 2. Further guidance is provided on the use of each method. *Id.* at 3–7. For example, the policy regulates the use of physical force, advising that officers consider "calling for additional cover officers prior to the [physical] contact." *Id.* at 4. The policy also prohibits choking by means of applying pressure to the trachea. *Id.*

332. 468 U.S. 183 (1984).

333. *Id.* at 196–97.

statute or regulation that advanced important interests or was designed to protect constitutional rights."[334]

Despite its rejection, the Court has not been indifferent to the appeal of referencing or incorporating government agency policies in its assessment of clearly established law.[335] Indeed, *Hope v. Pelzer*[336] (which appears an outlier in the Court's qualified immunity jurisprudence[337]) suggested an initial move away from the fixed state of clearly established law. There, the Court held that qualified immunity did not protect corrections officers who had handcuffed a prison inmate to a hitching post and left him there for seven hours in the sun.[338] Though the court below found the conduct unconstitutional, it nevertheless ruled that the law was not clearly established at the time, determining that circuit court precedents that had held unlawful the handcuffing of an inmate to a fence for prolonged periods of time were so different as to not provide notice.[339] But the Supreme Court relied on a prison policy in conjunction with the reasoning of a binding circuit opinion to find that the officers "were fully aware of the wrongful character of their conduct."[340]

In his dissent, Justice Clarence Thomas did not contest the Court's methodological approach, i.e., the reliance on prison regulations, but instead took issue with the majority's interpretation of what the regulation proscribed and the officers' compliance.[341] Justice Thomas found that the regulation in fact authorized the use of the hitching posts and that there was no evidence the officers failed to adhere to the limitations on the

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334. *See id.* at 195.

335. *See* Amanda K. Eaton, Note, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of* Hope v. Pelzer *on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 705 (2004) (describing Supreme Court response to the issue as confusing); Amelia A. Friedman, Note, *Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hole in Clearly Established Law*, 90 TEX. L. REV. 1283, 1289 (2012) (addressing whether courts may consider regulations and policies as sources of clearly established law); Ryan E. Meltzer, Note, *Qualified Immunity and Constitutional-Norm Generation in the Post-*Saucier *Era: "Clearly Establishing" the Law Through Civilian Oversight of Police*, 92 TEX. L. REV. 1277, 1295 (2014) ("[T]he Court itself has cited to a variety of authorities other than decisional law in its qualified immunity holdings.").

336. 536 U.S. 730 (2002).

337. *See* Reinhardt, *supra* note 256, at 1247 ("*Hope* was short-lived."); *id.* at 1247–48 (describing the general trend after *Hope* toward a highly specific clearly established law standard).

338. *See Hope*, 536 U.S. at 741–42.

339. *See id.* at 741 (discussing *Gates v. Collier*, 501 F.2d 1291 (11th Cir. 1974)).

340. *Id.* at 743–44. The Court further relied on a Department of Justice Report informing the Alabama Department of Corrections that the prior documented use of the hitching post was impermissible punishment. *See id.* at 744–45. The Court noted that the report "buttressed" its "conclusion that 'a reasonable person would have known,' of the violation." *Id.* at 744 (citation omitted) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

341. *See id.* at 760 (Thomas, J., dissenting).

post's use.[342] The *Hope* Justices' disagreement reflects what was, once at least, a comfort with utilization of extra-judicial sources in determining what conduct is clearly prohibited, even with constitutional consequences.

The Court's invocation of the guidelines in some instances may also be seen as evidence of how obviously established the Court viewed the right. Indeed, in the case of a patently unconstitutional action there might be a dearth of case law explicating the right, prompting a court to turn to internal policies to support the self-evident clarity of the right.

In *Groh v. Ramirez*,[343] the Court appeared to rely in part on ATF guidelines in holding that the prohibition on the search was clearly established and denying qualified immunity protection to the ATF agent.[344] The Court first held that the text of the Fourth Amendment clearly established that a warrant must describe with particularity the items to be seized, making it unreasonable for an officer to execute a warrant without such detail.[345] But the Court also relied on ATF's internal policies to support its view that it was reasonable to expect the officer to know execution of the warrant was improper.[346] The Court found that an ATF directive that warned agents they could be held liable for executing facially insufficient warrants "placed him on notice."[347] In a footnote, however, the Court sought to minimize the significance of its reference to the ATF orders, stating: "We do not suggest that an official is deprived of qualified immunity *whenever* he violates an internal guideline. We refer to the ATF Order only to *underscore* that petitioner should have known that he should not execute a patently defective warrant."[348]

In *Sheehan*, the Court also rejected relying on department policy and training in assessing reasonableness and clearly established law.[349] The Court considered irrelevant to the question of qualified immunity police department materials that instructed officers interacting with the mentally ill to "ensure that sufficient resources are brought to the scene," "contain the subject" and "respect the suspect's 'comfort zone,'" "use time to their advantage," and "employ non-threatening verbal communication and open-ended questions to facilitate the subject's participation in

342. *See id.* at 760–61.

343. 540 U.S. 551 (2004).

344. *See id.* at 564.

345. *Id.* at 563.

346. *Id.* at 564.

347. *Id.* The Court relied on two ATF orders. *Id.*

348. *Id.* at 564 n.7 (emphasis added).

349. *See* City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1777–78 (2015). The Court held that violations of the training would not negate qualified immunity, though it also questioned whether there were in fact any such violations in light of the "generality of that training." *Id.* at 1777.

communication."[350] Similarly, the Court found insignificant the city's policy of using hostage negotiators "when dealing with 'a suspect [who] resists arrest by barricading himself.'"[351] The Court appeared especially concerned that plaintiffs could simply produce expert reports testifying to policy violations in order to preclude summary judgment.[352]

Despite the Court's apparent rejection of government agency policies in assessing the clarity of constitutional rights, the Court has referenced these very policies in upholding individual officer actions as reasonable. In *Plumhoff v. Rickard*,[353] the Court considered whether police officers' fifteen ultimately fatal shots of a passenger in a high-speed car chase were unconstitutional under the Fourth Amendment.[354] Rejecting the claim that the number of shots was gratuitous, and hence unjustified, the Court noted that officers were taught to shoot until they perceived the threat was over.[355]

In *Wilson v. Layne*,[356] the Court addressed whether U.S. marshals violated Charles and Geraldine Wilsons' Fourth Amendment rights when they brought a news reporter and photographer into the Wilsons' home during the execution of a warrant for the arrest of their son, a wanted fugitive.[357] Though the Court held the entry unconstitutional, it found that the marshals were entitled to qualified immunity because the law had not been clearly established at the time of the entry.[358] The Court ruled that the U.S. marshals' reliance on the service's ride-along policies, which permitted media to accompany them in entering homes to arrest fugitives, was appropriate because the law was not otherwise evident.[359]

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350. *Id.*; *see also* Sheehan v. City of San Francisco, 743 F.3d 1211, 1225 (9th Cir. 2014) (describing expert testimony on San Francisco Police Department training materials and policy regarding the mentally ill).

351. *Sheehan*, 135 S. Ct. at 1777; *see also Sheehan*, 743 F.3d at 1225.

352. *Sheehan*, 135 S. Ct. at 1777.

353. 134 S. Ct. 2012 (2014).

354. *Id.* at 2017–18.

355. *Id.* at 2022 ("It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. As petitioners noted below, 'if lethal force is justified, officers are taught to keep shooting until the threat is over.'" (quoting Estate of Allen v. West Memphis, 509 F. App'x 388, 392 (6th Cir. 2012))).

356. 526 U.S. 603 (1999).

357. *See id.* at 606–08. The opinion describes the entry by at least five street-clothed men with guns as having occurred in the early morning hours and notes that they subdued and restrained Charles Wilson, clad only in briefs, while a Washington Post reporter took pictures. *Id.* at 607. After conducting a search, officers realized the son was not in the home. *Id.* While inside the home, the photographer took multiple pictures. *Id.*

358. *See id.* at 614–16.

359. *See id.* at 617 (characterizing the policy as "important to [the Court's] conclusion").

There is nothing wrong with considering training and use of force materials in assessing a police officer's reasonableness. It would seem particularly unfair to an officer to hold her liable for reasonably following her training and official policy. In these instances, however, assuming unconstitutionality, municipalities should not escape liability.[360] Indeed, it may well be more sensible to expect an officer to be cognizant of her own department's policies than the holdings of a circuit court. Though, as the *Wilson* Court noted, a contrary policy would not render controlling case law unclear for purposes of qualified immunity.[361] But if compliance with police training or policy is to be relied on to support an individual officer's use of force, the same materials should be considered in assessing whether an officer knew or should have known the conduct was prohibited. An officer who violates police department policy, therefore, should not be permitted to claim that she lacked notice entitling her to qualified immunity.

Taking their cues from the Court's confusing stance on whether nonconstitutional sources inform clearly established rights, the lower courts' opinions are also ambiguous on this score. Courts have generally shied away from asserting a bright-line rule as to the relevance of nonconstitutional sources for the clearly established inquiry, but they have relied on department policies in a variety of contexts.[362]

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360. *See* Teressa E. Ravenell, *Blame It on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense*, 41 SETON HALL L. REV. 153, 155 (2011) ("[O]ne might argue that an individual defendant should be afforded qualified immunity when municipal liability is imposed because, due to the municipality's acts or omissions, he did not realize the illegality of his conduct.").

361. *See Wilson*, 526 U.S. at 617.

362. *See, e.g.*, Furnace v. Sullivan, 705 F.3d 1021, 1030 (9th Cir. 2013) (suggesting that "barring urgency or exigent circumstances," courts may consider prison written policies in assessing qualified immunity); Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 433–34 (2d Cir. 2009) (holding that a court "may examine statutory or administrative provisions in conjunction with prevailing circuit or Supreme Court law to determine whether an individual had fair warning that his or her behavior would violate the victim's constitutional rights"); Weigel v. Broad, 544 F.3d 1143, 1154–55 (10th Cir. 2008) (citing to officers' training materials, in addition to case law from the circuit, to conclude that officers' use of force violated victim's clearly established constitutional rights); Drummond v. City of Anaheim, 343 F.3d 1052, 1062 (9th Cir. 2003) (holding that the police department's "training materials are relevant not only to whether the force employed in this case was objectively unreasonable, but also to whether reasonable officers would have been on *notice* that the force employed was objectively unreasonable." (citation omitted)); Treats v. Morgan, 308 F.3d 868, 875 (8th Cir. 2002) (holding "[p]rison regulations governing the conduct of correctional officers are . . . relevant in determining whether an inmate's right was clearly established"). *Compare* Barker v. Goodrich, 649 F.3d 428, 435 (6th Cir. 2011) (noting that prison practices and policies, case law, and the "obvious cruelty inherent in the conduct" standard may afford notice for qualified immunity purposes), *with* Cass v. City of Dayton, 770 F.3d 368, 377 (6th Cir. 2014) ("[The detective's] alleged violations of City

2. Limits on Introducing Use of Force Policies

The *Groh* Court's efforts to cabin the significance of internal agency guideline violations in assessing the clearly established status of a right may be prudentially wise. The Court considered the ATF guidelines relevant because they explicitly addressed liability for an invalid warrant but explained that a policy violation should not eliminate qualified immunity "whenever."[363] A sensible rule emerges that where agency guidance addresses the same issue or concerns that the constitutional right implicates, the guidance or policy should hold constitutional significance in the qualified immunity context.[364] Because to the extent that qualified immunity is concerned that an officer not be held liable for things about which he did not have notice, that matter is resolved. An officer cannot complain that the behavior is not clearly prohibited. At a minimum, the Court in *Groh* acknowledged, the guidance "underscore[s]" the clear establishment of the right.[365] Thus, at the very least, in a close case reference to policy should tip the balance in favor of the right's establishment.

But a violation of the order—or testimony of that violation—would not be determinative of unreasonableness or a violation of substantive due process under the merits prong. Instead, the policy's existence would be limited to the clearly established prong.[366] A litigant would need to

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policy do not change our conclusion that he did not act objectively unreasonably under the circumstances.").

363. *See* Groh v. Ramirez, 540 U.S. 551, 564 n.7 (2004).

364. *See* Estate of Gaither v. District of Columbia, 833 F. Supp. 2d 110, 123 n.7 (D.D.C. 2011) (suggesting regulation is relevant to notice inquiry when relationship between regulation and constitutional violation is not "attenuated").

365. *See Groh*, 540 U.S. at 564 n.7.

366. The Ninth Circuit in *Sheehan* focused on the policy and training material for purposes of deciding the merits or constitutional question rather than the clearly established law question. The court characterized the materials as "germane to the excessive force inquiry because they were designed to protect individuals such as Sheehan from harm." Sheehan v. City & of San Francisco, 743 F.3d 1211, 1225 (9th Cir. 2014). In *County of Sacramento v. Lewis*, the Supreme Court rejected violation of internal police policies as a factor in the substantive due process "shocks the conscience" evaluation. 523 U.S. 833, 852, 855 (1998). The Ninth Circuit had held that a police pursuit of a motorcycle resulting in the death of a motorcycle passenger violated a Sacramento County Sheriff's Department General Order and amounted to deliberate indifference, thereby establishing a matter for trial. *Id.* at 838–39. But the Supreme Court, in addition to holding the appropriate measure to be the higher standard of "shocks the conscience" instead, held that such noncompliance would not rise to the requisite level of culpability for a due process violation. *Id.* at 855 ("Regardless whether [the deputy sheriff's] behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and petitioners are not called upon to answer for it under § 1983."); *see also* Chavez v. Martinez, 538 U.S. 760, 772 (2003) ("Rules designed to safeguard a constitutional

show that the policy was intended to protect constitutional rights or significant liberty interests. But a court could find, as a matter of law, that deviation from the training was justified or the policy was not clear as to the prohibition.

Would the outcome in *Sheehan* have been different under an approach in which policies could be considered sources of clearly established rights? While the alleged deviations from policy would not necessarily have short-circuited summary judgment, they would doubtless have made it a closer call. It adds another source of notice to the officer that certain conduct is prohibited. But a court may still find that the proscription or required procedure does not address the interest allegedly implicated, either due to the perceived design of the statute or policy, or its ambiguity.

3. Objections

The *Davis* Court characterized reliance on statutes and policies as unworkable because it would (1) increase lawsuits of unlimited scope; (2) grant greater discretion to judges to interpret statutory and administrative provisions to defeat qualified immunity; (3) expose officials to protracted litigation because of the complicated inquiry into the clarity of the statute or regulation; and (4) deter officials' discretionary exercise of the "plethora of rules," which defy complete compliance.[367] The added focus on use of force policies also might deter government entities from enacting any rigorous or comprehensive guidelines. This Section addresses these concerns in turn and finds that they do not prove compelling.

a. Increased Litigation of Unlimited Scope

Incorporating nonconstitutional sources to clearly establish a right at issue will almost certainly increase litigation. But allowing courts to determine whether the use of force policy was intended to protect the constitutional right or other significant interests hardly seems outside the competence of courts. Addressing that initial legal question will enable courts to filter out frivolous and invalid lawsuits.

Moreover, including extant policies and guidance within the clearly established inquiry does not "superimpose[]" constitutional law on them or "tortify the Fourteenth Amendment."[368] Rather, all this Article urges is an examination of the officers' knowledge of these policies and their

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right, however, do not extend the scope of the constitutional right itself, just as violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person.").

367. Davis v. Scherer, 468 U.S. 183, 195–96 (1984).

368. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2479 (2015) (Scalia, J., dissenting) (quoting Daniels v. Williams, 474 U.S. 327, 332 (1986)).

relevance to the clarity of a constitutional right asserted. It is irrelevant whether these policy infractions might support additional relief through internal discipline or state law claims for assault and battery.[369]

Analogous arguments were made in the criminal context at the advent of federal prosecutions under the criminal provisions of the Civil Rights Acts. In *Screws*, the police argued unsuccessfully that, because they were criminally liable for murder under state law, they should not be prosecuted for civil rights violations.[370] But the fact that alternative remedies exist should not preclude constitutional relief.

One might also argue that reliance on use of force policies creates a body of excessive force law that would vary from jurisdiction to jurisdiction.[371] However, the Court has in fact considered the rules of individual states in assessing reasonableness under the Fourth Amendment.[372] Moreover, the inclusion of use of force policies here is limited to the qualified immunity question and thus addresses only the question of notice, not whether there was a constitutional violation.

b. Judicial Discretion

The mixed question of law and fact—whether a reasonable officer could think that the conduct was lawful in light of the statute, regulation, or policy—could also be decided by a court (though this Article suggested earlier that that issue is better suited for a jury) with no more difficulty than the already-required inquiry into the clarity of case law. The *Davis* Court complained that it would be "unfair and impracticable" to require officials to know the rules as well as their intent.[373] But here, a court would assess whether it was objectively reasonable for an officer not to understand that the statute's enactment or policy's promulgation fell within the ambit of the right. That inquiry is little different from the one courts already undertake in assessing the clarity of case law.[374] If

369. *See, e.g.*, *id.* (questioning "tortify[ing]" of constitutional rights when there are other sources of law by which relief may be sought).

370. *See* Screws v. United States, 325 U.S. 91, 108 (1945) ("The fact that it is also a violation of state law does not make it any the less a federal offense punishable as such.").

371. *See* Whren v. United States, 517 U.S. 806, 815 (1996) ("Moreover, police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable, and can be made to turn upon such trivialities." (citations omitted)).

372. *See* Tennessee v. Garner, 471 U.S. 1, 15–16 (1985).

373. Davis v. Scherer, 468 U.S. 183, 196 n.13 (1984) ("Such an understanding often eludes even trained lawyers with full access to the relevant legislative or administrative materials.").

374. The *Davis* dissenters would have relied, for example, on the Florida Attorney General's Opinion requiring due process prior to termination and the regulation as "evidence demonstrating the objective unreasonableness of appellants' conduct." *Id.* at 204 (Brennan, J., dissenting). Characterizing the regulation as at least "relevant," Justice Brennan contended that "[s]uch an objective basis of knowledge provides at least as reliable a measure of the reasonableness of

indeed that interpretation were ambiguous or elusive, then a court should find the officer's actions reasonable and hold qualified immunity protects the officer.

One might think of the inclusion of use of force policies as an interpretive aid to deciphering constitutional laws' prohibition on excessive force. The Fourth and Fourteenth Amendment's prohibitions are not all that distinct from H.L.A. Hart's legal rule forbidding vehicles in the park.[375] Case law may expand a bit on the rule's scope, but a Segway coasting by for the first time may call into question the rule's reach.[376] Sympathetic to the police officer's quandary, the Court has refused to make her undertake the legal analysis based simply on the general rule. But it would make little sense to not hold the officer accountable for failure to enforce the no-vehicles rule if her police handbook states that Segways may not enter the park. In the qualified immunity context, use of force policies may clarify the "hazy border between excessive and acceptable force."[377] They should be seen as an aid to the general rule against excessive force, the relevance of which the Court may determine, taking into account the purposes of the constitutional prohibition.[378]

c. Protracted Litigation due to Complexity

Additional sources of clearly established law will likely require more vetting by a court. But most of these issues could be resolved on a motion to dismiss or for summary judgment, meaning only that more briefing on a policy's significance would be required.

A reasonable objection is that use of force guidance may not always prove helpful. The Justices' disagreement over the meaning of the regulation at issue in *Hope*, for example, evidences the potential limitations of turning to these sources.[379] Additional "clearly established" references may sometimes prove no more beneficial than case law if they are also ambiguous or inscrutable.[380]

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official action as does a court's *post hoc* parsing of cases." *Id.* at 204 n.2.

375. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

376. *See* Heien v. North Carolina, 135 S. Ct. 530, 539 (2014).

377. *See* Saucier v. Katz, 533 U.S. 194, 206 (2001) (quoting Priester v. Riviera Beach, 208 F.3d 919, 926–27 (11th Cir. 2000)).

378. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 662–63 (1958) (advocating finding meaning through purpose of rule).

379. *Compare* Hope v. Pelzer, 536 U.S. 730, 744–45 (2002) (holding clearly established law was violated when respondents did not comply with the regulation at issue), *with id.* at 760–61 (Thomas, J., dissenting) (arguing the regulation at issue expressly authorized the challenged conduct).

380. *See, e.g.*, City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1777 (2015) (finding training material unhelpful to clarity of law because of their generality); *see also* Harmon, *supra*

Moreover, critics have identified certain police training and policies as the very causes of brutality because they inculcate a "warrior mindset," emphasizing firearms usage and defensive tactics over restraint and de-escalation.[381] Changes are doubtless required. Potential improvements to these policies would then add to the development of clearly established rights against excessive force. Thus, on balance, consideration of more sources should move courts toward finding a clearly established right in close cases and at least addressing the constitutional inquiry, if not producing jury trials. From the perspective of those concerned with police excessive force, this should not prove problematic—rather, it should be desirable.

d. Overdeterrence

Research on the long-maintained argument that constitutional liability spurs excessive caution in officers suggests these concerns are overstated.[382] Officials do not appear to refrain from discretionary duties and practices out of fear of § 1983 litigation.[383] Moreover, it is not clear whether expansive constitutional tort liability would expose officers to significantly more litigation. Officers who violate statutes or policies can already be sued where the statute at issue affords a cause of action, subject to discipline or punishment through internal systems, or held liable for

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note 10, at 1141–42 (describing use of force policies as rehash of ambiguous law). A related concern is that use of force policies do not adequately limit excessive force. While the critique is not without merit, adopting these policies for purposes of notice under the qualified immunity prong can only foreclose some scenarios where police might otherwise claim lack of fair warning due to a paucity of case law on point.

381. Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. FORUM 225, 225 (2015); Matt Apuzzo, *Police Rethink Long Tradition on Using Force*, N.Y. TIMES (May 4, 2015), http://www.nytimes.com/2015/05/05/us/police-start-to-reconsider-longstanding-rules-on-using-force.html; Al Baker, *Police Leaders Unveil Principles Intended to Shift Policing Practices Nationwide*, N.Y. TIMES (Jan. 29, 2016), http://www.nytimes.com/2016/01/30/nyregion/police-leaders-unveil-principles-intended-to-shift-policing-practices-nationwide.html.

382. *See* discussion *supra* Subsection I.C.1; Schwartz, *supra* note 76, at 943.

383. *See* discussion *supra* Subsection I.C.1; Schwartz, *supra* note 76, at 943; *see also* Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R. L.J. 479, 495 (2009). Professor Schwartz suggests that high profile cases and substantial damages awards, in contrast to "run-of-the-mill damages actions," may generate changes in police conduct. Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 846 (2012). The proliferation of videos of police brutality—captured through citizens' smart phones or police dashboard cameras—that have gone viral and received significant attention and criticism has raised questions of whether such attention deters excessive force but also deters enforcement of laws. *See* Sari Horwitz, *Attorney General: There Is 'No Data' Backing Existence of a 'Ferguson Effect,'* WASH. POST (Nov. 17, 2015), https://www.washingtonpost.com/world/national-security/loretta-lynch-there-is-no-data-backing-the-existence-of-a-ferguson-effect/2015/11/17/ebac5f1a-8d56-11e5-acff-673ae92ddd2bstory.html.

torts such as assault or battery. Finally, causing officers to act with some additional physical restraint in encounters with citizens would in fact be a benefit of such a rule.

e. Government Responses

Resorting to department and agency policies as sources of clearly established law could have significant impacts on government. In the police context, where municipalities almost universally indemnify the officers, the near-vicarious liability state of affairs means that increased damages liability for individual officers would translate into larger government payouts. To the extent that municipalities would perceive these polices as being used against them, they might believe it in their interest to either eliminate use of force policies altogether or at least maintain a hazy ambiguity around strictures on use of force to ensure the officer's qualified immunity. Municipalities also might limit their policies' strictures to only those of the Constitution's general prohibitions to reduce their indemnification-liability exposure.[384] This would stunt or reverse local government's police-reform efforts, which increase accountability and deter unnecessary use of force through restrictions exceeding those of the constitutional floor.[385]

This argument has some appeal, but it is unlikely to occur in the main. First, a municipality may be held liable for an officer's unconstitutional act, even when the officer is granted qualified immunity.[386] Governments are not likely to dispense with use of force policies, because the lack of policy may evidence a city's deliberate indifference to unconstitutional excessive force. In the use of deadly force context, for example, the

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384. I am grateful to Professor Rachel Harmon for her challenging observation about this potential effect of this Article's proposal to include use of force policies within the clearly established law corpus.

385. For example, if courts were to view use of force policies as clearly established sources in the qualified immunity analysis, then local police departments might retire policies that prohibit shooting at moving vehicles, because there is no such constitutional requirement. *See* POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 36 (2016), http://www.policeforum.org/assets/30%20guiding%20principles.pdf (proposing that police departments adopt use of force polices that exceed the *Graham* "objective reasonableness" test and prohibit shooting at moving vehicles). *Compare* Mark Fazllolah & Dylan Purcell, *Shooting at Drivers*, PHILLY.COM (June 7, 2015), http://www.philly.com/philly/news/Shooting_at_drivers.html (describing Philadelphia Police Department policy prohibiting police from firing weapons at moving vehicles unless they are under fire), *with* Plumhoff v. Rickard, 134 S. Ct. 2012, 2021 n.3 (2014) ("[W]e declined to 'lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger,' concluding that the Constitution 'assuredly does not impose this invitation to impunity-earned-by-recklessness.'" (quoting Scott v. Harris, 550 U.S. 372, 385–86 (2007))).

386. *See*, *e.g.*, City of Canton v. Harris, 489 U.S. 378, 390 (1989), *abrogated by* Farmer v. Brennan, 511 U.S. 825 (1994); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 (1978).

Supreme Court has asserted that the probability of constitutional violation without training and limiting policies should be so obvious that no prior incident or pattern and practice of use of force violations may be required to prove municipal liability.[387]

A lack of use of less-than-deadly force policy may, however, present more difficult questions concerning municipal liability. There is a range of uses of force short of deadly force that police may undertake.[388] In such instances of alleged excessive force, the Court could require a pattern of similar constitutional violations, the similarity of which may call to mind the problematic specificity of the clearly established law inquiry.[389] But given the "moral certainty" of police encounters with suspects—ranging from simple stops to pursuing "fleeing felons"—policies and training covering the entire range of use of force should be expected.[390] The lack of these policies and training should suffice to establish municipal liability for a constitutional violation regardless of prior incident, addressing historical concerns over a police culture in which policymakers and supervisors have been willfully blind to excessive force.[391]

Second, it is in society and the government's interest to deter police excessive force. Excessive force has caused, and exacerbates, the fractious relations between police and communities—particularly poor and minority populations, which only encumber crime prevention and deterrence. Removing or weakening use of force policies would hardly serve these interests. Indeed, regardless of litigation, officers may desire clearer guidance on use of force than case law, a determination evidenced by police departments' wide publication of such polices.

Third, litigation is not always the tail that wags the dog. Municipalities generally have not altered their policies and practices in response to

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387. *See* Connick v. Thompson, 563 U.S. 51, 64 (2011) (describing the "obvious need for specific legal training" because new police officers are unlikely to know "constitutional constraints" or have requisite "legal knowledge"); *Harris*, 489 U.S. at 390 n.10 ("[T]he need to train officers in the constitutional limitations on the use of deadly force can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." (citation omitted)).

388. *See, e.g.*, S.F. POLICE DEP'T, *supra* note 327, at 2.

389. *See Connick*, 563 U.S. at 74–75 (Scalia, J., concurring); Bd. of Comm'rs v. Brown, 520 U.S. 397, 409–10 (1997).

390. *Harris*, 489 U.S. at 390 n.10 (1989) ("For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons.").

391. *See* Cty. of Sacramento v. Lewis, 523 U.S. 833, 859 (1998) (Stevens, J., concurring) ("Sound reasons exist for encouraging the development of new constitutional doctrines in adversarial suits against municipalities, which have a substantial stake in the outcome and a risk of exposure to damages liability even when individual officers are plainly protected by qualified immunity."); Gilles, *supra* note 2, at 63–67 (describing a police code of silence regarding police misconduct, including failing to report or discipline officers who brutalize victims).

§ 1983 litigation. Increased financial exposure has had surprisingly little impact on police conduct.[392] Thus, it does not appear that increased financial exposure would incentivize cities and towns to eliminate use of force policies.

Finally, and alternatively, increased financial liability and heightened legal prominence of use of force policies might prove a tipping point in municipal responses to police officer misconduct. The proposal could impel municipalities to strengthen their use of force policies, aiding officer accountability. Governments may also alter their indemnification practices, holding officers at least financially responsible for policy violations. For example, governments might refuse to indemnify officers who violate clear policies.[393] Litigation of use of force policies could also translate into increased internal discipline of officers. Any of these changes to police culture would be a welcome collateral effect of these § 1983 reforms.

CONCLUSION

More than a quarter century ago, Justice Thurgood Marshall decried the Court's preclusion of equitable relief for systematic police violence as limiting the judicial power to "levying a toll" for constitutional violations.[394] Today, that fee is even harder to collect. Though courts cannot end police brutality, the Court's self-imposed limitations on relief deprive victims of an economic remedy and articulation of constitutional values.

The Fourteenth Amendment and § 1983 were envisioned as substantive and procedural routes toward preventing state violence and aiding its victims. Civil rights litigation thus became a means by which to vindicate the constitutional right against excessive force. Fourth Amendment jurisprudence and qualified immunity have, however, proven increasingly significant obstacles to victims of police abuse seeking relief, repeatedly granting police the benefit of the doubt and keeping victims from their right to trial. A return to general principles prohibiting excessive force, in which courts give the Due Process Clause greater scope and consider local governments' own rules against excessive force before granting qualified immunity, should enable courts to reclaim the remedial role envisioned for them by the drafters of the Civil Rights statute.

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392. *See* Schwartz, *supra* note 76, at 954–58.

393. *See* George A. Berman, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1190–91, 1196–97 (1977) (suggesting the government might be entitled to indemnification from a misbehaving employee if the city is held liable or has to pay); Schwartz, *supra* note 76, at 953–54.

394. City of Los Angeles v. Lyons, 461 U.S. 95, 137 (1983) (Marshall, J., dissenting).