QUALIFIED IMMUNITY LAID BARE

F. Andrew Hessick & Katherine C. Richardson

QUALIFIED IMMUNITY LAID BARE

F. Andrew Hessick[*] *and Katherine C. Richardson*[**]

Qualified immunity is a powerful defense that precludes actions for damages against officials for even egregious constitutional violations. But qualified immunity has not always been so strong. It has evolved over time from a modest extension of the common law defense for officials conducting arrests with probable cause to today's expansive doctrine that shields an official from liability for any constitutional violation unless the official's particular conduct was clearly unconstitutional.

This Article critiques that evolution. Although doctrinal changes typically embody an effort to balance competing interests, that has not been the case with qualified immunity. Two basic policies compete for recognition in the qualified immunity doctrine: one is to vindicate constitutional rights as embodied in 42 U.S.C. § 1983 and other civil rights statutes; the other is to protect officials from oppressive suits. Qualified immunity's development has been the product of an ever-increasing drive to protect officials at the expense of the statutorily-enshrined interest in vindicating constitutional rights—to the extent that the Supreme Court no longer mentions the latter in its opinions.

The Article highlights several particular shortcomings resulting from this laser focus on protecting officials. It argues that, although not all cases equally implicate the policies at stake with qualified immunity, the emphasis on protecting officials has led the Court to reject introducing any nuance into the doctrine. Thus, qualified immunity does not vary according to the importance of the right violated, nor does it consider the official's risk of making a legal error. Further, the Article argues, today's highly protective qualified immunity doctrine distorts the effects of the doctrines used to

* Judge John J. Parker Distinguished Professor of Law, University of North Carolina School of Law.

** Law clerk for the United States Court of Appeals for the District of Columbia, 2021–22 term. We would like to thank William Baude, John Coyle, Carissa Hessick, Michael Morley, Aaron Nielson, Leigh Osofsky, Richard Re, Richard Simpson, and Chris Walker for their helpful feedback on earlier drafts.

implement rights. Because qualified immunity depends on the clarity of the doctrine implementing a right, it devalues indeterminate rights—such as the Fourth Amendment prohibition on "unreasonable" searches—by limiting their enforceability. The Article contends that refining qualified immunity to account for these considerations would result in a superior doctrine.

TABLE OF CONTENTS

INTRODUCTION

Qualified immunity had a big moment in the summer of 2020. For years, the doctrine was largely known exclusively to lawyers as a technical defense for officials who violate constitutional rights.[1] But in May 2020, it began to show up everywhere: in headlines in the *New York Times*,[2] on Instagram feeds dedicated to qualified immunity's downfall,[3] and on signs carried by protestors that tumultuous summer.[4] Everyone, from politicians to pastors to high school classmates on Facebook, was talking about qualified immunity.

The doctrine was suddenly thrust into the spotlight in the waning hours of Memorial Day weekend 2020, when a camera caught the death of a Black man, George Floyd, at the hands of four white

1. *See, e.g.*, Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000).

2. *See, e.g.*, Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (June 23, 2020), https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html.

3. *See, e.g.*, @endingqualifiedimmunity, INSTAGRAM, https://www.instagram.com/endingqualifiedimmunity/ (last visited Aug. 12, 2021).

4. *See, e.g.*, Jenny McNeece, *Protestors Pack Square, Hoping for Change*, SUN-COM. (June 3, 2020), https://www.suncommercial.com/news/article_61e41e0a-a532-11ea-baee-975d2099b7e9.html.

Minneapolis police officers.[5] Suspecting Mr. Floyd of having paid for cigarettes with a counterfeit bill, the officers handcuffed him and pinned him to the ground while one officer knelt heavily on Mr. Floyd's neck for more than eight minutes, resulting in Mr. Floyd's death.[6] These events led to protests against police brutality and racism.[7] Almost immediately, it became apparent that qualified immunity posed a serious threat to suits against the individual officers.[8] Public outrage ensued.

Although the broader public may not have known much about qualified immunity until 2020, disapproval of the doctrine in the legal community is nothing new. Several Justices on the Supreme Court have expressed unease with the doctrine,[9] prompting litigants to file multiple certiorari petitions challenging it, but the Court has not granted any petition for a writ of certiorari.[10] Moreover, commentators have increasingly criticized qualified immunity.[11]

---

5. Patrick Jaicomo & Anya Bidwell, *Police Act Like Laws Don't Apply to Them Because of "Qualified Immunity." They're Right*, USA TODAY (June 9, 2020, 2:36 PM), https://www.usatoday.com/story/opinion/2020/05/30/police-george-floyd-qualified-immunity-supreme-court-column/5283349002/.

6. Richard A. Oppel Jr. & Kim Barker, *New Transcripts Detail Last Moments for George Floyd*, N.Y. TIMES (Apr. 1, 2021), https://www.nytimes.com/2020/07/08/us/george-floyd-body-camera-transcripts.html.

7. *How George Floyd Died, and What Happened Next*, N.Y. TIMES (May 25, 2021), https://www.nytimes.com/article/george-floyd.html.

8. *See, e.g.*, Editorial Board, *How the Supreme Court Lets Cops Get Away With Murder*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html; *see also* Debra Cassens Weiss, *Death of George Floyd Brings Debate on Qualified Immunity for Police Misconduct*, ABA J. (June 2, 2020, 11:18 AM), https://www.abajournal.com/news/article/death-of-george-floyd-brings-debate-on-qualified-immunity.

9. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (noting his "growing concern with [the Court's] qualified immunity jurisprudence"); Mullenix v. Luna, 577 U.S. 7, 26 (2015) (per curiam) (Sotomayor, J., dissenting) (criticizing qualified immunity for "sanctioning a 'shoot first, think later' approach to policing").

10. *See* Amy Howe, *Court Grants Two New Cases*, SCOTUSBLOG (June 15, 2020, 4:29 PM), https://www.scotusblog.com/2020/06/court-grants-two-new-cases/.

11. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 45 (2018) (arguing that qualified immunity lacks legal foundation); Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 961 (2019) (arguing that qualified immunity provides too much protection to officials); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1865 (2010) (describing ways in which qualified immunity departs from historical practice); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 12–19 (2017) (identifying inaccurate empirical assumptions underlying the qualified immunity doctrine). Although the amount of critical scholarship has increased, criticisms of qualified immunity are not new. Articles criticized the doctrine soon after its creation in 1967. *See, e.g.*, Joseph H.

These criticisms range from arguing that qualified immunity is unlawful[12] to statements that qualified immunity is not necessary to protect officials from burdensome suits.[13]

This Article offers a different critique of qualified immunity—one that focuses on the way in which the doctrine has developed.[14] Qualified immunity is a judge-made doctrine.[15] Statutes like 42 U.S.C. § 1983, which authorizes actions against state officials for civil rights violations, do not include the defense of qualified immunity.[16] Instead, the Court created the defense in the 1967 decision of *Pierson v. Ray*.[17]

Like other judicially fashioned doctrines, qualified immunity has evolved over time through the common law process.[18] But the path of its evolution has not been a good one.

The aim of the common law process is to produce doctrines that accommodate different competing policy considerations.[19] Each case

---

King, Jr., Comment, *Compensation of Persons Erroneously Confined by the State*, 118 U. PA. L. REV. 1091, 1100 (1970) ("The doctrine of official immunity, while not totally consistent in its application, has prevented many victims of clearly invalid confinements from obtaining relief."). Of course, not all scholarship has been negative. *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1853 (2018) (responding to several criticisms of qualified immunity).

12. *See* Baude, *supra* note 11, at 46.

13. *See* Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 316–17 (2020) (arguing that dispensing with qualified immunity would not significantly affect officials).

14. Few articles have addressed how qualified immunity implements the principles at stake. For one example of an article that starts this inquiry, see Richard H. Fallon, Jr., *Asking the Right Questions about Officer Immunity*, 80 FORDHAM L. REV. 479, 482 (2011) (asking tentative questions about the values driving qualified immunity).

15. Pierson v. Ray, 386 U.S. 547, 556 (1967).

16. 42 U.S.C. § 1983.

17. 386 U.S. 547 (1967).

18. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 887 (2006) (noting that judges engage in lawmaking comparable to fashioning common law rules when developing doctrine implementing statutes).

19. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897) ("Behind the logical form [of common law doctrine] lies a judgment as to the relative worth and importance of competing legislative grounds . . . ."). Of course, this is the modern understanding of the common law. Before the twentieth century, many understood the common law simply to exist, with judges discovering it instead of making it. *See* R.W.M. DIAS, JURISPRUDENCE 151 (5th ed. 1985) ("The orthodox Blackstonian view, however, is that judges do not make law, but only declare what has always been law."); Schauer, *supra* note 18, at 885 n.7 ("There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable." (quoting Willis v. Baddeley [1892] QB 324 at 326 (Lord Esher MR))). But nearly a century ago, Holmes and others disproved that view, and it is now

provides an opportunity for a court to reassess that doctrine—and modify it if necessary—in order to maximize benefits while minimizing costs.[20] But that has not been the case with qualified immunity.

Two general policies compete for recognition in the qualified immunity doctrine. One policy, embodied in § 1983 and other civil rights statutes, is the need to provide an avenue for redress for individuals whose rights have been violated.[21] The other policy represents the desire to protect officials from potentially oppressive suits for damages arising from actions taken in carrying out their duties.[22] Although in early cases the Court sought to balance these considerations, over time the Court has paid increasingly less attention to the former while increasingly emphasizing the latter.[23] The lopsided focus on protecting officials has led to changes in the doctrine. What began as a modest extension of the common law defense available to officers who conducted searches and seizures with probable cause has vastly expanded. It now excuses from suit any officer who violates the Constitution unless the law was so "clearly established" at the time of the violation that no reasonable officer could have thought that the conduct was legal.[24]

The laser focus on protecting officials has also led the Court to reject adding any nuance to the qualified immunity doctrine.[25] Qualified immunity arises across a large array of cases.[26] Those cases do not equally implicate the policies at stake with qualified immunity, but the Court has refused to modulate qualified immunity to account for those differences.[27] For example, in stark contrast to many other legal doctrines, qualified immunity does not vary according to the

---

understood that judges do indeed make common law. *See id.* at 886 (discussing the switch in understanding about the common law).

20. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 23 (1921) ("Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered.").

21. *See* 42 U.S.C. § 1983.

22. *See* Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

23. *See infra* Part II.

24. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) ("A Government official's conduct violates clearly established law when . . . every 'reasonable official would [have understood] that what he is doing violates that right.'" (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987))).

25. *See* Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1940–41 (2018).

26. *See* Gabrielle Pelura, Note, *Section 1983 & Qualified Immunity: Qualifying the Death of Due Process and America's Most Vulnerable Classes Since 1871. Can it be Fixed?*, 26 WM. & MARY J. RACE, GENDER, & SOC. JUST. 749, 755–64 (2020) (analyzing a series of cases that address qualified immunity issues).

27. *See Anderson*, 483 U.S. at 646 ("We are unwilling to Balkanize the rule of qualified immunity by carving exceptions at the level of detail the Creightons propose.").

importance of the right violated or the importance of providing a damages remedy for that violation.[28] Similarly, qualified immunity does not account for the relative risk an official faces of making a legal error.[29] Although the primary purpose of qualified immunity is to avoid chilling officials in the performance of their duties,[30] the doctrine does not distinguish between officials who face a high risk of making a legal error, such as officials who must make split-second decisions, and those who have more time to reflect.[31]

Less obvious, but no less important, this one-size-fits-all doctrine of qualified immunity distorts the effects of the doctrines used to implement rights. Whether an officer is entitled to qualified immunity depends on how clearly a constitutional right is defined.[32] But not all constitutional rights have equally defined contours. Some rights have relatively sharply defined edges; others have hazier boundaries because they depend on vague balancing tests or indeterminate standards.[33] The optimal degree of determinacy depends on many different considerations.[34] Indeterminate doctrines are desirable when the doctrine applies to a wide array of factual situations, and the principles underlying that doctrine suggest different outcomes depending on the specific facts.[35] Indeterminacy provides flexibility to apply the law with precision.[36] But because of the Court's emphasis on the "clearly established" standard as the lynchpin of the qualified immunity test today, this indeterminacy triggers qualified immunity protection.[37] The more indeterminate the right, the greater the likelihood that qualified immunity bars the claim.[38] Consequently, qualified immunity converts the virtues of indeterminacy into a liability.[39]

---

28. *See infra* Subpart III.A.

29. *See infra* Subpart III.A.

30. Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982) ("[P]ublic officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.").

31. *See infra* Subpart III.A.

32. *Anderson*, 483 U.S. at 640 (stating that an officer is immune unless "[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right").

33. *See infra* Subpart III.B.1.

34. *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (discussing the relative benefits of indeterminate and determinate doctrines).

35. *See id.* at 563–64 (arguing for rules when "the frequency of application in recurring fact scenarios is high").

36. *See* Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 23 (2000).

37. *See infra* Subpart III.B.2.

38. *See infra* Subpart III.B.2.

39. *See infra* Subpart III.B.2.

This Article argues that, by focusing on protecting officials to the exclusion of other considerations in developing qualified immunity, the Court has not sought to maximize the benefits and minimize the costs. Consequently, the Court has failed to develop qualified immunity in an appropriately nuanced way. Part I describes the current landscape of qualified immunity law. Part II recounts the evolution of qualified immunity from its inception as a modest extension of the common law defense against trespass claims for officials conducting arrests with probable cause to the current clearly established test that applies to all constitutional violations. Along the way, Part II demonstrates that the evolution is the product of an ever-increasing worry about overly deterring officials. Part III argues that the one-size-fits-all doctrine of qualified immunity makes it a poor tool at implementing the considerations underlying civil rights actions and qualified immunity. That Part explains that the doctrine fails to account for the importance of the rights that have been violated and whether the official faced a situation that created a high risk of his committing a legal error that warrants qualified immunity. It also demonstrates that, by tying the availability of qualified immunity to the clarity with which a right is defined, qualified immunity undermines the central benefit of indeterminate rights: allowing courts to dispense justice at a retail level. Part IV begins exploring ways to refine qualified immunity to address these shortcomings. This discussion is particularly important because of the very real possibility that Congress or the Court might be more open to reworking the doctrine instead of discarding it altogether if either were to reconsider qualified immunity.

I. QUALIFIED IMMUNITY TODAY

Federal law creates various causes of action against government officials who violate rights. The most prominent is 42 U.S.C. § 1983, which creates a private cause of action against anyone who "under color of" state law violates a person's constitutional or other federal rights.[40] Despite the categorical entitlement to recovery under this statute, courts have limited recovery through qualified immunity.[41]

Qualified immunity is a judicially created defense that shields government officials from personal liability for violating

40. 42 U.S.C. § 1983.

41. In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, the Supreme Court created as a matter of federal common law a rough federal counterpart to § 1983 for actions against federal officials. 403 U.S. 388, 397 (1971). According to the Court, the same qualified immunity applies to those *Bivens* actions. *See* Wilson v. Layne, 526 U.S. 603, 609 (1999). This Article accordingly does not address those actions separately.

constitutional rights.[42] In a suit in which a plaintiff establishes that an officer violated the Constitution, the officer is entitled to qualified immunity if the official's conduct did not violate clearly established law.[43] Under this test, qualified immunity bars a claim for relief if any reasonable officer could have thought that his conduct was lawful at the time that he engaged in it.[44] The only time immunity is unavailable is when the illegality of the official's conduct is so severe that no competent officer could have thought that his conduct was legal.[45]

In applying this test, courts must evaluate whether a right is clearly established by defining the right with specificity instead of "at a high level of generality."[46] It is not enough to demonstrate that the *legal test* that the officer violated is clearly established.[47] Instead, the

---

42. *See* James E. Pfander, Iqbal*,* Bivens*,* and the Role of Judge-Made Law in Constitutional Litigation, 114 PA. ST. L. REV. 1387, 1405 (2010) (observing that qualified immunity is a "judge-made right of action").

43. *E.g.*, City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019) (per curiam); Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam).

44. Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam) ("A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" (quoting Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012))).

45. *Id.* at 12 ("[E]xisting precedent must have placed the statutory or constitutional question beyond debate."); Carroll v. Carman, 574 U.S. 13, 17 (2014) (per curiam) ("[Qualified immunity] protects 'all but the plainly incompetent or those who knowingly violate the law.'" (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011))). Under current doctrine, circuit decisions can establish law just as easily as Supreme Court decisions can. *See* Hope v. Pelzer, 536 U.S. 730, 745–46 (2002) (stating that Eleventh Circuit decisions clearly established law); *see also* Camreta v. Greene, 563 U.S. 692, 702–03 (2011) (basing Article III standing on the conclusion that Ninth Circuit decisions can clearly establish law). But the Court has recently indicated that it might revisit that doctrine, suggesting that only Supreme Court decisions can clearly establish law. *See, e.g.*, *Carroll*, 574 U.S. at 17 (questioning whether "a controlling circuit precedent could constitute clearly established federal law"). That position would be difficult to defend, not only because circuit precedent otherwise is treated as law, but also because the Supreme Court's docket has shrunk from 160 cases per year when it first developed the clearly established test in the 1980s to today's rate of around 80 cases per year. *See* Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1463–64 (2020); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1368 (2006).

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

47. *Mullenix*, 577 U.S. at 13 (overturning a decision where the officer had been denied qualified immunity for violating a generalized rule and explaining that "[t]he correct inquiry . . . was whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the [situation at hand]").

plaintiff must prove that it is clearly established that the *particular conduct* that the official engaged in is unlawful.[48]

For example, in a suit alleging that an official violated the Fourth Amendment's prohibition on unreasonable seizures by shooting at a car driven by a person, who was fleeing a traffic stop but posing no immediate danger,[49] it is not enough to point out that the text of the Fourth Amendment clearly prohibits "unreasonable . . . seizures."[50] Instead, the plaintiff must demonstrate that the Fourth Amendment clearly prohibits an officer from shooting at a car in the circumstances faced by the officer.[51] Accordingly, under the facts presented by this particular case, to avoid the defense of qualified immunity the plaintiff was required to point to a prior judicial decision holding that the Fourth Amendment prohibits shooting a person suspected of robbery fleeing the police and driving toward a normally deserted house where kids sometimes hang out violates the Fourth Amendment.[52]

By requiring such a high level of similarity between prior judicial decisions and the case at hand, qualified immunity provides an extremely powerful defense to officers in civil rights suits. Officials are often held liable only when a court has previously held that virtually identical conduct is unlawful.[53] Consequently, qualified

---

48. *Id.* at 12 ("The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" (quoting *al-Kidd*, 563 U.S. at 742)); *see also Emmons*, 139 S. Ct. at 504 ("While there does not have to be a case directly on point, existing precedent must place the lawfulness of the [individual's] particular [action] beyond debate." (quoting District of Columbia v. Wesby, 138 S. Ct. 577, 581 (2018))).

49. *See* Latits v. Phillips, 878 F.3d 541, 544 (6th Cir. 2017) (granting qualified immunity to officers in similar circumstance).

50. U.S. CONST. amend. IV.

51. *See Latits*, 878 F.3d 547–52.

52. *Id.*

53. See Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1889 (2018) ("[R]ecent qualified immunity jurisprudence . . . [requires] an indistinguishable case." (quoting Nelson v. City of Albuquerque, 283 F. Supp. 3d 1048, 1107 n.44 (D.N.M. 2017), *rev'd and remanded on other grounds*, 921 F.3d 925 (9th Cir. 2019))); Martin A. Schwartz, *The Supreme Court's "Double Deference" to Police Use of Force*, 2 J. PLI PRESS 205, 212 (2018). ("Even though the Court says it does not require precedent 'directly on point' to clearly establish the law, it does demand a high degree of specificity with respect to both facts and circumstances relevant to the officer's use of force . . . ."); *see also* Caroline H. Reinwald, Comment, *A One-Two Punch: How Qualified Immunity's Double Dose of Reasonableness Dooms Excessive Force Claims in the Fourth Circuit*, 98 N.C. L. REV. 665, 682–83 (2020) ("Lacking a prior case with functionally identical circumstances in the relevant jurisdiction, a plaintiff can suffer an endless trove of abuses under the Fourth Amendment with zero legal recourse.").

immunity frequently shields officers for actions that appear to be egregious violations of rights.[54]

Consider the Eleventh Circuit's decision in *Corbitt v. Vickers*.[55] There, an operation to apprehend Chris Barnett led law enforcement officers onto a neighbor's yard. Although Barnett was not in the yard, six children, an adult, and a family dog—none of whom had any connection to Barnett—*were* in the yard.[56] After the officers forced everyone in the yard to lie face-down on the ground, one of the officers, Deputy Vickers, shot at the dog even though he was not threatening the officers in any way.[57] After the first shot missed, Vickers shot again, despite the dog's continued nonthreatening behavior. [58] Vickers' second shot also missed the dog, but it hit one of the children who was still lying face-down only a foot and a half away from Vickers. Amazingly, the Eleventh Circuit held that Vickers was entitled to immunity.[59]

The court acknowledged the general principle that an officer conducts an unreasonable seizure if he fires his weapon when there is no reasonable threat of harm.[60] But it reasoned that it was not clear that Vickers' conduct violated that principle. Although the court recognized that the officer used unreasonable force and that the gunshot hit the child only because he had been ordered to lie down by the police, the court explained that no prior case had held that an unreasonable seizure occurs when an officer uses unreasonable force that accidentally hurts someone else.[61] Accordingly, the court said that because the child was not the intended target of the gunshot, nor was the child the intended target of arrest, Vickers did not clearly violate the Fourth Amendment by shooting him.[62]

To be sure, courts have occasionally denied qualified immunity despite the lack of a prior decision with materially identical facts. In those cases, the clearly established finding was based on the conclusion that the official's conduct was obviously unlawful.[63] A recent example is the Supreme Court's decision in *Taylor v. Riojas*.[64] There, an inmate sued correctional officers for violating the Eighth Amendment.[65] According to Taylor, the officers confined him in a cell completely covered in feces for four days, during which time Taylor

54. *See* Reinwald, *supra* note 53, at 682–83.
55. 929 F.3d 1304 (11th Cir. 2019).
56. *Id.* at 1307.
57. *Id.*
58. *Id.*
59. *Id.* at 1323.
60. *Id.* at 1315–16.
61. *Id.* at 1317.
62. *Id.* at 1323.
63. *See, e.g.*, Taylor v. Riojas, 141 S. Ct. 52, 54 (2020) (per curiam).
64. 141 S. Ct. 52 (2020) (per curium).
65. *Id.* at 53.

could not eat or drink because of the risk of contamination.[66] The officers then moved Taylor naked to a freezing cold cell without a toilet or bed, forcing him to sleep in sewage.[67] The Court held that the officers were not entitled to qualified immunity.[68] Although no prior decision had held that the Eighth Amendment prohibits this precise treatment, the Court explained that no reasonable officer could think that this barbaric behavior comported with the Eighth Amendment.[69]

But denials of that sort are the exception, not the norm. Courts regularly apply qualified immunity for violations of rights—one recent study found that the circuit courts grant immunity in 72.3% of cases[70]—even when those violations are outrageous.[71] If anything, cases like *Riojas* illustrate the breadth and power of qualified

66. *Id.*

67. *Id.*

68. *Id.* at 55.

69. *Id.* at 54. Other cases in which courts have denied immunity also involve outrageous conduct. One example is *Thompson v. Virginia*, 878 F.3d 89, 94 (4th Cir. 2017). There, the Fourth Circuit denied immunity to prison guards who, in retaliation for an inmate filing grievances against guards, deliberately drove a van dangerously to hurt an inmate who was shackled in the van but whose seatbelt the guards had not buckled. *Id.* at 107. A second example comes from *Deorle v. Rutherford*, 272 F.3d 1272, 1275 (9th Cir. 2001). There, officers responded to a call of a mentally ill person who was suicidal. *Id.* at 1276. Although the suspect was contained and posed no threat to the officers and a team of negotiators was en route, one of the officers decided to get closer to the suspect. *Id.* at 1277. The suspect, who was carrying a bottle of lighter fluid, began to walk toward the officer when he saw him. *Id.* Although the suspect had complied with previous police instructions to drop weapons and was walking slowly, the officer did not ask the suspect to halt or drop the can but instead shot him in the head, causing grievous injuries. *Id.* at 1278. A divided court denied immunity. *Id.* at 1275. The majority concluded that it was obviously unlawful to shoot an unarmed man, who posed no immediate threat, without first asking him to halt; the dissent argued that the officer was entitled to immunity because no prior case prohibited this conduct. *Id.* at 1284, 1288.

70. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 34 (2015) (finding courts denied immunity in only 27.7% of cases between 2009 and 2012).

71. *See, e.g.*, McCoy v. Alamu, 950 F.3d 226, 233–34 (5th Cir. 2020) (granting qualified immunity to officer who, without provocation, pepper sprayed an inmate in the face, because no case prohibited that conduct), *vacated*, 141 S.Ct. 1364 (2021); Crawford v. Cuomo, 721 F. App'x 57, 58, 60 (2d Cir. 2018) (granting qualified immunity to correction officer who deliberately fondled inmate's genitals for sexual gratification); Aldaba v. Pickens, 844 F.3d 870, 871, 876 (10th Cir. 2016) (granting qualified immunity to officers who suffocated non-violent suspect with pneumonia by straddling his back).

immunity. Despite the barbarity of the officers' conduct, the Fifth Circuit in *Riojas* held that the officers were entitled to immunity.[72]

II. THE EVOLUTION OF QUALIFIED IMMUNITY

Qualified immunity has not always been such a significant impediment to damages suits for violations of rights.[73] When first created, qualified immunity provided substantially less protection than the modern iteration of the doctrine.[74] Like other judicially created doctrines, qualified immunity has evolved over time through the common law process.[75] Unlike many other evolutionary processes, however, qualified immunity's contorted evolution has not been for the better.

The benefit of the common law process is that it provides repeated opportunities for courts to develop sophisticated doctrines to accommodate competing social values.[76] With each case, a court may assess the doctrine against those social values and make changes aimed at maximizing the benefits while minimizing the costs.[77]

But that has not been the case with qualified immunity. Two principal competing considerations drive and limit qualified immunity. The first, embodied in § 1983 and other civil rights statutes, is to provide an avenue for redress for individuals whose rights have been violated.[78] The other is to protect officials from potentially oppressive suits for damages arising from actions taken in carrying out their duties.[79] In early opinions on qualified immunity, the Court aimed to balance those interests. But over time, the Court has increasingly focused on protecting officials while paying less and less attention to vindicating individuals' rights—to the point that recent opinions rarely mention that interest.[80]

The change in focus has led to change in doctrine.[81] In early decisions discussing qualified immunity, the doctrine provided a

---

72. Taylor v. Stevens, 946 F.3d 211, 222 (5th Cir. 2019) (granting qualified immunity because "[t]he law wasn't clearly established"), *rev'd sub nom.* Taylor v. Riojas, 141 S. Ct. 52 (2020) (per curiam).

73. Pierson v. Ray, 386 U.S. 547, 555 (1967).

74. *See infra* Supbart II.B.

75. Schauer, *supra* note 18, at 886–87 (describing the common law process).

76. *Id.* at 906.

77. CARDOZO, *supra* note 20, at 23 ("Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered.").

78. *See, e.g.*, 17 U.S.C. § 1983.

79. Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

80. *Compare* Pierson v. Ray, 386 U.S. 547, 558 (1967), *with* McCoy v. Alamu, 950 F.3d 226, 228 (5th Cir. 2020), *vacated*, 141 S.Ct. 1364 (2021).

81. F. Andrew Hessick, *Doctrinal Redundancies*, 67 ALA. L. REV. 635, 642 (2016) (arguing that as values change, "existing doctrines are repurposed to protect these new values"); *see also* Oliver Wendell Holmes, *Law in Science and*

limited shield similar to the common law defense for officers conducting arrests with probable cause.[82] That version of the doctrine balanced the interest in plaintiff recovery against the need to allow officials to do their jobs. But over time, as the Court has focused more on protecting officials, immunity has gone far beyond its common law origins[83] and now protects any official who violates a constitutional right, so long as he had any reason to doubt that his conduct was unlawful.[84]

A. The Common Law Origins of Qualified Immunity

Qualified immunity developed out of the common law defense for officers who were sued for false arrest.[85] That defense shielded a police officer from liability for false arrest, when the officer arrested someone based on probable cause, if the arrestee was later found innocent.[86] The reason for the defense was that, although a person is ordinarily entitled to recover for false arrest, an officer should not be held liable for performing his duties.[87]

The Court's 1967 *Pierson* decision relied on the false arrest immunity rationale to create qualified immunity. In *Pierson*, a group of Black ministers were arrested under a Mississippi law forbidding any congregation of people that might disturb the peace.[88] Four years later, the segregationist law was found unconstitutional for violating the Fourteenth Amendment, and the ministers brought suit under § 1983.[89] Analogizing to the common law defense, the Court explained that an officer should not be held liable for enforcing in good faith a law later found to be unconstitutional.[90] Just as an officer should not be held responsible for failing to predict that the person he lawfully arrested might be acquitted, an officer should not be held liable for failing to predict that a duly enacted statute forming the basis of arrest is unconstitutional.[91] As the Court put it, an officer should not be forced to "choose between being charged with dereliction of duty if

---

Science in Law, 12 HARV. L. REV. 443, 450–51 (1899) (identifying the phenomenon and providing numerous examples).

82. *See infra* Subpart II.A.

83. Baude, *supra* note 11, at 60 (arguing that qualified immunity is significantly broader than the common law defense).

84. *See infra* Subpart II.C.

85. Baude, *supra* note 11, at 52–53 (examining and criticizing the common law origins of qualified immunity).

86. *Id.* at 53; *see also* Pierson v. Ray, 386 U.S. 547, 551 (1967).

87. *Pierson*, 386 U.S. at 551.

88. *Id.* at 555.

89. *Id.* at 550.

90. *Id.* at 557. This good faith requirement was part of the common law defense. *See* Comment, *Absolute Immunity: Too Broad A Protection for the "Public Interest"?*, 10 STAN. L. REV. 589, 593 (1958) (noting that under the common law defense, "recovery will be granted where malice is proved").

91. *Pierson*, 386 U.S. at 555.

he does not arrest when he has probable cause, and being mulcted in damages if he does."[92]

That conclusion makes sense. Officers are not experts in assessing the constitutionality of criminal statutes under the Fourteenth Amendment, and it would have been unfair to hold the officers liable for enforcing statutes that were presumptively constitutional. Thus, although the defense is not in the text of § 1983, the Court's decision to recognize the defense is perhaps forgivable.

B. Protecting Officials Who Make Good-Faith Errors

During the 1970s, qualified immunity changed in two significant ways. First, the Court untethered immunity from the common law defense that protected an officer who made a probable cause arrest.[93] The change extended immunity to officers who made a good-faith error by arresting a person *without* probable cause.[94] That shift in rationale—from protecting officers who arrested with probable cause to protecting officers who made good-faith errors—prompted the second shift in qualified immunity. Because immunity was no longer tied to probable cause, the Court extended it to rights other than the Fourth Amendment.[95]

The first case to abandon the probable cause roots of qualified immunity was *Scheuer v. Rhodes*.[96] The issue in that case was whether the officials involved in the Kent State shootings were entitled to immunity.[97] The Court concluded that the officials were entitled to qualified immunity even if they lacked probable cause to shoot, so long as they had reasonable grounds to believe they could act.[98]

Scheuer represents a significant step beyond *Pierson*. *Pierson* held that it was unfair to hold an officer who conducted an otherwise lawful stop responsible for a future finding that the statute that provided the basis for the arrest is unconstitutional under the Fourteenth Amendment.[99] The point was to protect officials who

---

92. *Id.*

93. Scheuer v. Rhodes, 416 U.S. 232, 245 (1974), *overruled by* Davis v. Scherer, 468 U.S. 183 (U.S. 1984).

94. *Id.*

95. Procunier v. Navarette, 434 U.S. 555, 565 (1978).

96. 416 U.S. 232, 245 (1974). Earlier decisions had recognized the possibility of a broader form of "qualified privilege" for executive officials. *See, e.g.*, Barr v. Matteo, 360 U.S. 564, 568–69 (1959) (plurality opinion), *superseded by statute*, Federal Employee Liability and Tort Claims Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988), *as recognized in* Pelletier v. Fed. Home Loan Bank of San Fran., 968 F.2d 865 (9th Cir. 1992); *see also* Henry M. Hart, Jr., *The Supreme Court 1958 Term*, 73 HARV. L. REV. 84, 237–39 (1959) (noting the soundness of the idea of "providing only a qualified privilege for . . . executive officers").

97. *Scheuer*, 416 U.S. at 245.

98. *See id.* at 247–48.

99. Pierson v. Ray, 386 U.S. 547, 555 (1967).

correctly concluded that they had probable cause based on all the information they had. But in *Scheuer*, the Court extended immunity to officials who *wrongly* concluded that they had probable cause based on the information they had.[100] The Court justified the immunity on the ground that imposing liability on officials who made reasonable mistakes while trying to comply with the law was unfair and would deter officers from performing their duties with decisiveness.[101] It was better to permit some errors in enforcement than to prevent enforcement altogether.[102]

This shift in rationale—from protecting officers who had probable cause to protecting officers who made reasonable errors—provided the foundation for the clearly established test. The Court first announced this test four years after *Scheuer* in its 1978 decision in *Procunier v. Navarette*.[103] But *Procunier*'s clearly established test differs from the modern clearly established test in one important respect. Unlike today's doctrine, *Procunier* did not stress that courts should define the violated right with specificity in evaluating whether the law was "clearly established." Instead, the Court evaluated the claim at a very high level of generality. The primary claim in *Procunier* was that prison officials had violated First Amendment rights by preventing an inmate from sending mail to his attorneys and others.[104] In holding that the officials had not violated clearly established law, the Court did not mention the circumstances under which the officials acted. Instead, the Court stated that there was no general First Amendment right protecting the mailing privileges of state prisoners.[105]

Moreover, unlike today's doctrine, *Procunier* and the cases before it stressed that, even if a right was not clearly established, an officer was entitled to immunity only if he acted in good faith—that is, that the officer actually acted based on his belief that his actions were lawful.[106] As the Court explained the following year in *Wood v.*

---

100. *Scheuer*, 416 U.S. at 246–48.

101. *Id.* at 240 (stating that immunity was necessary to avoid "injustice . . . [and] the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good").

102. *Id.* at 242 ("[I]t is better to risk some error and possible injury from such error than not to decide or act at all.").

103. 434 U.S. 555 (1978).

104. *Id.* at 557–58.

105. *Id.* at 565.

106. *See* Wood v. Strickland, 420 U.S. 308, 322 (1975), *abrogated by* Harlow v. Fitzgerald, 457 U.S. 800 (1982) ("[Officers] must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges."); *see also id.* at 321–22 (stating that an officer is entitled to immunity if (1) he acted objectively reasonably and (2) he subjectively acted in good faith). This requirement of good faith distinguished qualified immunity from absolute immunity. *See* Barr v.

Strickland,[107] limiting immunity in this way was essential to keep the "promise of § 1983."[108]

The shift to the clearly established test also opened the door to extending qualified immunity to violations of rights other than rights falling under the Fourth Amendment. Immunity was originally limited to the Fourth Amendment because it derived from the common law defense applied to false arrests.[109] But the switch in justification from "officials should not be held liable for consequences down the road when they act with probable cause" to the justification that "officials should be excused for reasonable, good-faith errors" removed immunity's logical tether to the Fourth Amendment.[110] The Court soon expanded immunity to suits alleging First, Fifth, and Fourteenth Amendment claims.[111]

C. Establishing the Clearly Established Law Test

During the 1980s, the Court moved away from the theory that qualified immunity was necessary to protect officers who made honest mistakes. Instead, the Court increasingly focused on the need for qualified immunity to prevent deterring officers from acting[112] and to avoid forcing unnecessary trials.[113] At the same time, the Court

---

Matteo, 360 U.S. 564, 572 (1959) (plurality opinion), *superseded by statute*, Federal Employee Liability and Tort Claims Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988), *as recognized in* Pelletier v. Fed. Home Loan Bank of San Fran., 968 F.2d 865 (9th Cir. 1992). In the 1950s, a plurality of the Court also recognized absolute immunity for high-level executive officials for common law torts for actions taken while exercising the functions of their offices. *Id.* at 574. The defense was based on the idea that officials should be free to exercise their duties without fear of damage suits for how they exercise those duties. *Id.* Although the Court recognized that officials who act maliciously should be subject to liability, the Court reasoned that holding inquiries to sort those officials who acted with malice from those who did not would interfere too much with official duties, and therefore, the Court concluded that it was "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Id.* at 572.

107. 420 U.S. 308 (1975).

108. *Id.* at 322.

109. *See* Butz v. Economou, 438 U.S. 478, 485–87 (1978).

110. *Compare* Pierson v. Ray, 386 U.S. 547, 557 (1967), *with* Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974), *overruled by* Davis v. Scherer, 468 U.S. 183 (U.S. 1984).

111. *See Butz*, 438 U.S. at 483, 504, 522.

112. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (arguing that qualified immunity is necessary to combat "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'" (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949))).

113. *Id.* at 813–14 (justifying qualified immunity on the ground that it would "defeat insubstantial claims without resort to trial"); *see also* Mitchell v. Forsyth,

began to focus less on ensuring that qualified immunity did not extinguish the ability to recover for violations of rights. These concerns prompted two major changes that strengthened the doctrine. First, the Court abandoned the good-faith requirement.[114] Immunity was no longer limited to officers who were trying to comply with the law. Instead, the only inquiry was whether the law was clearly established.[115] Second, the Court created the specificity requirement that dominates qualified immunity today.[116]

The first change occurred in *Harlow v. Fitzgerald*.[117] *Harlow* arose from the tumultuous fallout after the release of the Watergate tapes.[118] Ernest Fitzgerald, an employee with the Secretary of the Air Force, was fired when he blew the whistle on various government cover-ups.[119] When the Watergate tapes were released, President Nixon could be heard discussing his role in firing Fitzgerald.[120] Fitzgerald subsequently brought suit against Nixon and his aides, who all claimed absolute immunity.[121]

The Supreme Court denied absolute immunity for Nixon's aides, stating that they were only entitled to qualified immunity.[122] In doing so, the Court shifted away from the goal of protecting officers who tried in good faith to comply with the law but failed to do so. Instead, the Court in *Harlow* said that qualified immunity was necessary to protect officers from insubstantial lawsuits, finding that many § 1983 actions were brought against innocent officers "at a cost not only to the defendant officials, but to society as a whole."[123] Chief among the costs listed by the Court was that the fear of suit would make officers too cautious in carrying out their duties.[124] The Court also warned about the resources spent on litigation, the diversion of

---

472 U.S. 511, 526 (1985) (stating that qualified immunity is "an immunity from suit rather than a mere defense to liability").

114. *Harlow*, 457 U.S. at 815–18.

115. *Id.* at 818–19.

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

117. 457 U.S. 800 (1982).

118. *Id.* at 802–03.

119. *Id.* at 803.

120. *Id.*

121. *Id.* at 802–03, 805–06.

122. *Id.* at 808–09.

123. *Id.* at 813–14.

124. *Id.* ("[F]ear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949))). Earlier decisions had also mentioned that risk. *See* Owen v. City of Independence, 445 U.S. 622, 655–56 (1980) ("At the heart of this justification . . . is the concern that the threat of *personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decision-making process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy.").

officials from their duties to deal with litigation, and the risk of deterring anyone from seeking a government job.[125]

This shift in focus to protect officers from dealing with meritless lawsuits led the Court to discard the good faith requirement for qualified immunity. Because the determination of whether an officer acted in good faith is a factual question that can only be determined by a jury, that requirement prevented courts from dismissing claims based on qualified immunity before trial.[126] In the Court's estimation, letting these lawsuits go to trial needlessly entangled officers with the legal system and deterred them from their jobs.[127] As a result, the Court said the only question for qualified immunity was whether the law was clearly established at the time the official acted—a question that a court can answer on the pleadings.[128]

This reasoning was very shaky. Although shifting to the clearly established test allowed courts to dismiss cases against officials, the clearly established test does not do so in a way that targets meritless lawsuits. Meritless claims would *already* be dismissed on the ground that the alleged facts did not establish that the officials violated a right.[129] The only role that the clearly established requirement played was to preclude suits that *did* have merit.[130]

With the abandonment of the good faith requirement, the new battleground of qualified immunity post-*Harlow* became the definition of "clearly established." In earlier cases, the Court evaluated whether a right was clearly established at a relatively high level of generality. For example, in *Procunier*, the Court granted

125. *Harlow*, 457 U.S. at 814 (stating that subjecting innocent officials to suit creates "social costs" that "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office").

126. *Id.* at 816 ("[A]n official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury."); *see also* Brandon L. Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 61, 80 (2017) ("A subjective standard resulted in a factual inquiry, which many judges sensibly thought was inherently a jury question.").

127. *Harlow*, 457 U.S. at 816–17.

128. *Id.* at 817–18.

129. The Court had previously recognized this point in *Butz v. Economou*, 438 U.S. 478 (1978), stating that "[i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss." *Id.* at 507–08.

130. *See* Mitchell v. Forsyth, 472 U.S. 511, 526–29 (1985) ("An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim.").

immunity on the ground that there was no general First Amendment right protecting the mailing privileges of state prisoners.[131]

The Court continued that high level of generality in the next case following *Harlow*. In *Mitchell v. Forsyth*,[132] the Court considered whether officials were entitled to qualified immunity for obtaining "warrantless domestic security wiretaps."[133] In granting qualified immunity, the Court did not examine whether the law clearly established that the particular circumstances under which officials obtained the wiretap violated the Fourth Amendment. Instead, it considered the question at a high level of generality, stating that the legality of warrantless domestic security wiretaps as a group was "anything but clear"[134] when the alleged violation occurred.[135]

The Court in *Mitchell* highlighted its relatively high generality approach to qualified immunity by dropping a footnote to say that the grant of immunity was "not intend[ed] to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances."[136] Rather, the Court found, immunity should be granted "where there is a legitimate question whether an exception to the warrant requirement exists. . . ."[137]

But two years later, in *Anderson v. Creighton*,[138] the Court shifted course, instituting the high level of specificity that dominates qualified immunity today.[139] The case stemmed from a search for Vadaain Dixon, "a man suspected of a bank robbery committed earlier that day."[140] Officers believed that Dixon might be at the Creighton residence, because the fugitive was Mrs. Creighton's brother.[141] According to the Creightons, the officers forced their way into the Creighton house without a warrant and without asking the Creightons for permission to enter, assaulted the residents, and committed other atrocities.[142] The Eighth Circuit denied qualified immunity, concluding that the officers had violated the clearly established prohibition of the Fourth Amendment against

131. Procunier v. Navarette, 434 U.S. 555, 565 (1978).
132. 472 U.S. 511 (1985).
133. *Id.* at 513.
134. *Id.* at 531.
135. *Id.* at 535.
136. *Id.* at 535 n.12.
137. *Id.*
138. 483 U.S. 635 (1987).
139. *Id.*
140. *Id.* at 637.
141. Creighton v. St. Paul, 766 F.2d 1269, 1271 (8th Cir. 1985), *rev'd sub nom.* Anderson v. Creighton, 483 U.S. 635 (1987).
142. *Anderson*, 483 U.S. at 664 n.21 (Stevens, J., joined by Brennan & Marshall, J.J., dissenting).

warrantless searches of houses without probable cause and exigent circumstances.[143]

The Supreme Court overturned the Eighth Circuit's decision on the ground that it had evaluated whether the law was clearly established at too high a level of generality.[144] According to the Court, the appropriate inquiry was not whether it was clearly established that the Fourth Amendment forbids warrantless searches without probable cause or exigent circumstances.[145] Instead, the appropriate inquiry was whether it was clearly established that *the circumstances confronting the officers* did not establish probable cause or exigent circumstances.[146] The Court reasoned that this level of specificity was necessary to give teeth to qualified immunity.[147] If courts assessed whether a right was clearly established at a high level of generality, the Court said, a plaintiff could avoid qualified immunity "simply by alleging violation of extremely abstract rights."[148]

The Court's primary reason for strengthening qualified immunity through the specificity requirement was to avoid inhibiting officers from carrying out their duties.[149] The ruling also aligned with earlier efforts to limit lawsuits, although the Court did not rely on this reason. The specificity requirement increases the ability of courts to dismiss cases based on the pleadings instead of proceeding to discovery.[150]

In contrast to the pages devoted to stressing the importance of immunity, the Court paid little attention to the interest of ensuring that qualified immunity did not unduly prevent recoveries for violations of constitutional rights. The Court wrote a single sentence noting that actions for damages may be the only realistic avenue for vindicating constitutional rights.[151] Practically, this is because almost no plaintiff will ever be able to meet the unrealistically high specificity requirement set forth in *Anderson*.[152] Arguably, no two police encounters and subsequent constitutional rights violations are exactly the same, meaning that plaintiffs will almost *never* be able to

143. *Id.* at 640–41 (majority opinion).
144. *Id.*
145. *Id.* at 640.
146. *Id.* at 640–41.
147. *Id.* at 639–40.
148. *Id.* at 639.
149. *Id.* at 638.
150. *See generally* Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229 (2006) (describing the ways in which courts sought to minimize fact questions in qualified immunity).
151. *Anderson*, 483 U.S. at 638 ("[A]ction[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982))).
152. *See* Tyler Finn, Note, *Qualified Immunity Formalism: "Clearly Established Law" and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 460 (2019).

prove that the officers' unconstitutional behavior was clearly established.[153]

No doubt, there may be other considerations that helped drive the growth of qualified immunity—considerations that the Court has not expressed. It may be, for example, that some Justices see qualified immunity as a tool to counterbalance what some view as too much litigation against officials.[154] Or it may be attributable in part to the view that damages are unwarranted because the tort system is a poor tool to regulate behavior.[155] The validity of using these types of considerations to moderate a statutory cause of action varies, and we cannot be sure of the degree to which these considerations have affected the growth of qualified immunity because the Court has not voiced those considerations. In any event, those possible motivations do not ameliorate the problem that the Court has increasingly disregarded the goal of providing an avenue for relief for individuals whose rights have been violated.

Since *Anderson*, the Court has only sharpened the specificity requirement for evaluating qualified immunity. Gone are the days when the Court evaluated qualified immunity by defining the right at issue as something as general as freedom from "warrantless domestic security wiretaps."[156] Now the focus is on the officers' particular conduct in the specific circumstances they faced.[157] Typical is the Court's approach in *Kisela v. Hughes*, [158] in which the Court confronted the question of whether it was clearly established that the Fourth Amendment prohibited shooting a person who had hacked a tree with a knife, was standing near another person but on the other side of a chain-link fence from that person, and failed to drop the knife when ordered to do so.[159] Relying on this specificity requirement, the Court has granted qualified immunity twenty-six times since *Anderson*.[160] Notably absent from those opinions is any attention to

153. *See, e.g.*, *id.* at 447.

154. *See, e.g.*, *Harlow*, 457 U.S. at 813–14 (discussing the "balance between the evils" inherent in resolution of immunity questions, including the need to consider the societal cost of litigation).

155. *See generally* Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 YALE L. & POL'Y REV. 1, 10 (2004) (discussing the Coase Theorem and stating that a group's ability to regulate behavior is stronger when proceeding as private individuals than if they were to defer to tort law to regulate the same behavior).

156. Mitchell v. Forsyth, 472 U.S. 511, 534 (1985).

157. *See* Finn, *supra* note 152, at 447.

158. 138 S. Ct. 1148 (2018) (per curiam).

159. *Id.* at 1153.

160. *See* Baude, *supra* note 11, at 82, 88–90 (recounting twenty-three instances since *Anderson* in which the Court approved of immunity and two instances in which the Court has denied it). Since the publication of Professor William Baude's list in 2018, the Court has granted immunity in three cases, *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019) (per curiam); *Kisela*, 138 S.

the importance of ensuring that qualified immunity does not cut off the ability to vindicate individuals' rights.[161]

The only time that the Court has tempered the specificity requirement during this period was in *Hope v. Pelzer*.[162] There, the Court denied immunity to prison guards who punished an inmate for wrestling with a prison guard by handcuffing the inmate to a hitching post in the hot sun for seven hours.[163] During the time they held him, they taunted him, provided him with extremely limited water, and denied him bathroom breaks.[164] In doing so, the Court stated that the clearly established test requires only that an officer have "fair warning" that his conduct is illegal, and it suggested that, under this test, an earlier decision with "materially similar" facts is unnecessary to avoid qualified immunity. [165]

But since *Hope*, the Court has abandoned any pretense of cabining the specificity requirement. To the contrary, the Court has arguably sharpened the requirement even further. In *Anderson*, the Court stated that "[t]he contours of the right must be sufficiently clear [such] that a reasonable official would" know that his conduct was illegal.[166] But in *Ashcroft v. al-Kidd*,[167] another opinion that does not mention the importance of providing an avenue for vindicating rights, the Court replaced the "a" with "every," proclaiming that an officer is immune unless "*every* 'reasonable official'" would have understood that the officer's conduct violated the Constitution.[168]

On its face, the change in phrasing—denying immunity if *one* reasonable officer could conclude his conduct is illegal to denying immunity only if *all* reasonable officers would think the conduct is illegal—suggests a substantial strengthening of qualified immunity. But the true significance of this change is unclear. But courts did not apply the "a reasonable officer" test in evaluating qualified immunity

---

Ct. at 1154–55 ; *District of Columbia v. Wesby*, 138 S. Ct. 577, 593 (2018), and denied it in one, *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (per curiam).

161. *See, e.g.*, *Wesby*, 138 S. Ct. at 589 (admonishing the lower courts for addressing the merits of the constitutional claim in addition to qualified immunity).

162. 536 U.S. 730 (2002).

163. *Id.*

164. *Id.*

165. *Id.* at 740–41 (quoting United States v. Lanier, 520 U.S. 259, 269, 270–71 (1997)).

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

167. 563 U.S. 731 (2011).

168. *Id.* at 741 (emphasis added) (quoting *Anderson*, 483 U.S. at 640); *see* Fallon, *supra* note 11, at 956 ("*Ashcroft v. al-Kidd* subsequently altered this language, apparently to enhance the scope of the qualified immunity to which officials are entitled.").

under *Anderson*.[169] Courts have regularly granted immunity in cases in which a reasonable officer could have thought that the challenged conduct violated the Constitution. *Anderson* itself granted immunity even though *a* reasonable officer could have thought that he lacked exigent circumstances to enter the house.[170]

Still, although courts did not apply the "a reasonable officer" test articulated in *Anderson*, they may have operated under a theory that a right was clearly established if a significant portion of reasonable officers would have understood the conduct to violate the Constitution.[171] The formulation in *al-Kidd* rejects that possibility by stating that the clearly established requirement is satisfied only if *every* officer would understand the conduct to violate the Constitution.[172] At a minimum, *al-Kidd*'s formulation of the test reinforces the importance of assessing claims of qualified immunity at an extremely granular level.[173]

None of this is to say that the Court always rules in favor of immunity. The Court has occasionally ruled against qualified immunity.[174] But those decisions have not cast doubt on the specificity requirement.[175] Instead, they have concluded that the law clearly established that the officer's specific conduct was illegal.[176] For example, in *Riojas*, the Court did not deny immunity to the officials who treated an inmate inhumanely on the ground that the

---

169. *See Anderson*, 483 U.S. at 646 n.6 ("[O]n remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful.").

170. *See id.* at 641 ("We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials–like other officials who act in ways they reasonably believe to be lawful–should not be held personally liable.").

171. An analogous uncertainty has arisen in the realm of facial challenges. Some justices have argued that facial challenges can succeed only if a law is unconstitutional in all applications. *See* United States v. Salerno, 481 U.S. 739, 745 (1987). Others have argued that only a substantial amount of applications must be unconstitutional. *See* City of Chicago v. Morales, 527 U.S. 41, 55 (1999) (plurality opinion).

172. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (quoting *Anderson*, 483 U.S. at 640).

173. Fallon, *supra* note 11, at 956 ("At the very least, the altered wording signals the Court's commitment to a robustly protective doctrine of qualified immunity.").

174. *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 563–64 (2004) (denying immunity for executing a search of a home with a warrant that failed to describe the "things to be seized"); Taylor v. Riojas, 141 S. Ct. 52, 53 (2020) (per curiam).

175. *Groh*, 540 U.S. at 564.

176. *See Riojas*, 141 S. Ct. at 53 ("But no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time.").

Eighth Amendment generally forbids cruel and unusual punishment.[177] Instead, the Court denied immunity because the officers' *specific* conduct—confining an inmate for days first in a cell covered in feces and second nude in a freezing cold cell without a toilet or bed[178]—was so utterly beyond the pale that its unconstitutionality was unquestionable.[179] And even in this opinion, the Court did not mention the importance of providing damages to vindicate rights.[180]

Qualified immunity has evolved in several important ways. To start, the rationale behind the doctrine has changed. The reason for immunity is no longer tethered to the common law defense of protecting an officer from liability for arresting people in good faith based on probable cause. It no longer aims to protect officers who err in their good faith efforts to comply with the Constitution's requirements.[181] Instead, the rationale is that officers should typically not be saddled with litigation, even when they ignore constitutional rights.[182]

The change in rationale has brought about changes in the doctrine.[183] Qualified immunity today focuses only on whether a right is clearly established.[184] Moreover, the test for whether a right is clearly established has become more granular.[185] It is not enough for the legal doctrine to be clearly established to overcome immunity; instead, an officer is entitled to immunity unless it is clearly established that the specific conduct in question is illegal under the

177. *Riojas*, 141 S. Ct. 52, 53 (2020).

178. *Id.* at 53.

179. *Id.* at 54.

180. *See generally id.*

181. *See Strickland*, 420 U.S. at 319 (addressing a good faith inquiry).

182. *See* Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982).

183. Beyond these doctrinal changes, the Court's decisions have strengthened qualified immunity in more subtle, non-doctrinal ways. The almost uniform direction of the Court's decisions consistently communicates that awarding immunity is correct and denying immunity is wrong. Moreover, the Court has repeatedly criticized courts for evaluating qualified immunity at too high a level of generality. *E.g.*, City of Escondido v. Emmons, 139 S. Ct. 500, 503–04 (2019) (per curiam) (lamenting that "the Court of Appeals' formulation of the clearly established right was far too general"); Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam) ("[We have] 'repeatedly told courts . . . not to define clearly established law at a high level of generality.'" (quoting City & County of S.F. v. Sheehan, 135 S. Ct. 1765, 1775–76 (2015))); *accord* Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011); *see also* Brosseau v. Haugen, 543 U.S. 194, 198–99 (2004) (per curiam). These signals could very well push judges to err on the side of caution by assessing whether a right is clearly established at an atomistic level. *See* Nelson v. City of Albuquerque, 283 F. Supp. 3d 1048, 1107–08 n.44 (D.N.M. 2017) ("[M]uch of what lower courts do is read the implicit, unwritten signs that the superior courts send them through their opinions."), *rev'd and remanded on other grounds*, 921 F.3d 925 (9th Cir. 2019).

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

185. *See* Finn, *supra* note 152, at 447.

relevant legal standard.[186] The consequence is that qualified immunity today has traveled far from its common law origins and is far more absolute than qualified.[187]

III. THE FAILURE TO CALIBRATE QUALIFIED IMMUNITY

Qualified immunity is a common law doctrine, meaning it should be subject to judicial changes as societal circumstances change.[188] In examining how the doctrine has evolved over time, however, the ways in which it has *not* evolved come into sharp relief. Most strikingly, qualified immunity has remained invariable: it does not account for the variability of situations in which it may arise.[189] The major considerations underlying qualified immunity—vindicating rights and protecting officials—are not constant across these cases. Some suits raise more important interests and rights than others. Other suits arise from circumstances that present a significantly lower risk of an official committing a legal error than other circumstances would. These differences cut against today's one-size-fits-all qualified immunity doctrine.

This one-size-fits-all doctrine of qualified immunity creates other, less obvious, problems as well. Although the same test applies to all cases, the doctrine does not affect all constitutional rights equally. Because of the specificity requirement, qualified immunity is more likely to bar vindication of rights implemented through doctrines whose requirements vary depending on the facts of the

186. *See* Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam).

187. The precise mechanism that has led to qualified immunity developing in this way is difficult to identify. No doubt, a significant reason is that judges today hold different views about the appropriate level of immunity than the judges of yesterday, but there may be other factors that could be responsible for at least part of the pro-immunity drift. For example, it may be that judges simply relate much more to officers than to victims. *Cf.* Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 326–27 (2002) (noting that judges recognize injury based on their own preferences and experiences). Or it may be that, as repeat qualified immunity players, governments have been in a better position to influence the development of qualified immunity law than the individuals who claim that their rights have been violated. *See generally* Andrew Hessick, *The Impact of Government Appellate Strategies on the Development of Criminal Law*, 93 MARQ. L. REV. 477 (2009) (discussing the comparative advantage of the government in helping to fashion criminal law).

188. 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, 1284 (2014).

189. *Id.* at 1285.

case.[190] In doing so, qualified immunity devalues rights implemented through standards and other indeterminate doctrines.[191]

A. Lack of Tailoring

Whether the law should recognize qualified immunity depends on the interests in vindicating individuals' rights and protecting officials who may make legal errors. The degree to which those interests are implicated varies wildly across cases. But qualified immunity does not account for these variations.

Constitutional rights protect a variety of different interests. For example, the Equal Protection Clause of the Fourteenth Amendment protects against unjustifiable government discrimination;[192] the Due Process Clauses protect against deprivations of life, liberty, or property without adequate process;[193] and the Eighth Amendment protects convicts from cruel and unusual punishment.[194] The Fourth Amendment protects an array of interests, ranging from the interest against unreasonable entries onto property to the interest against unreasonable uses of deadly force.[195]

These interests do not all merit the same level of protection against the government. A deeply embedded principle of American law is that some interests are more important than others; the more important the interest, the greater the protections required.[196]

Many legal doctrines reflect this principle. Consider the differing tiers of scrutiny that apply to government interference with different interests. The government can regulate property and non-fundamental rights so long as it has a rational basis for doing so.[197] By contrast, the government must have a compelling interest to interfere with fundamental liberties.[198] Similar distinctions apply to different types of discrimination. Most of the time, the government

---

190. *See generally* Larry Alexander, *"With Me, It's All er Nuthin'": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530 (1999) (discussing the indeterminacy of many legal rules and doctrines).

191. *See id.* (explaining when doctrines are indeterminate).

192. U.S. CONST. amend. XIV § 1; *see also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (suggesting that the clause prohibits unjustifiable discrimination).

193. U.S. CONST. amends. V, XIV § 1.

194. U.S. CONST. amend. VIII § 1.

195. *See* Palmer v. Sanderson, 9 F.3d 1433, 1435–36 (9th Cir. 1993).

196. *See id.*

197. *See* Armour v. City of Indianapolis, 566 U.S. 673, 680 (2012) ("This Court has long held that 'a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" (quoting *Heller v. Doe,* 509 U.S. 312, 319–320 (1983))).

198. *See, e.g.*, Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (applying strict scrutiny to law that interfered with the fundamental right to vote).

needs only a rational reason for discriminating against a particular group.[199] But government discrimination on the basis of sex is permissible only if necessary to protect an important interest,[200] and discrimination on the basis of race requires an even stronger justification.[201] These tiers of scrutiny signify the greater level of importance that the law places on some interests.[202] Similarly, the amount of process that the Due Process Clause requires when the government seeks to deprive an individual of life, liberty, or property depends on the importance of the interest at stake.[203] Simply put, the more important the interest, the more process the government must provide when depriving a person of that interest.[204]

Sub-constitutional doctrines also embody the principle that more important interests deserve greater protection. For example, the defense of duress excuses a person for committing a crime when he faces threats of harm if he does not commit the crime,[205] but it traditionally does not excuse homicide.[206] The theory is that, although we will excuse a person under threat for most types of harms that he inflicts, we will not excuse him for killing another person because life is too valuable.[207]

The justification defense is similar. That defense exonerates a person for committing a crime when he reasonably believes that the crime is necessary to avoid a greater injury.[208] This defense embodies

---

199. *Armour*, 566 U.S. at 680.

200. *See* United States v. Virginia, 518 U.S. 515, 524 (1996).

201. *See* Johnson v. California, 543 U.S. 499, 505 (2005) ("We have held that '*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.'" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995))).

202. *See* Palmer v. Sanderson, 9 F.3d 1433, 1435–36 (9th Cir. 1993).

203. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

204. *See id.*

205. CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 52 (15th ed. 2020) ("At common law and by statute in some states, when a defendant engages in conduct which would otherwise constitute a crime, it is a defense that he was coerced to do so by a threat of imminent death or serious bodily injury.").

206. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *30 ("[H]e ought rather to die himself than escape by the murder of an innocent."); 41 C.J.S. *Homicide* § 515 (2021) ("[A] duress instruction may be refused in a first-degree murder case, in accordance with the view that duress is not a defense to intentional homicide . . . ."); TORCIA, *supra* note 205, at § 52 ("At common law and by statute in many states, a defendant is not allowed to take the life of an innocent third person even when he is ordered to do so under a threat of instant death.").

207. People v. Reichard, 919 N.W.2d 417, 418 (Mich. Ct. App. 2018), *rev'd on other grounds*, 949 N.W.2d 64 (2020).

208. 22 C.J.S. *Criminal Law: Substantive Principles* § 49 (2021) ("Conduct that would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an imminent public or private injury greater

the principle that some interests deserve more protection than others, as a person can use deadly force to protect himself or another person from deadly force, but he cannot use deadly force to protect property.[209]

At their core, these constitutional and sub-constitutional doctrines embody the principle that some rights warrant more protection than others. These doctrines do not prohibit invasions of these important rights altogether. They recognize that sometimes the reason for invading a right can be strong enough to warrant the invasion.[210] But the more important the right, the better the reason required to justify the invasion.[211]

Qualified immunity has not evolved to embody this principle. The Court has self-consciously opted to apply the same test—is the right clearly established?—to all civil rights actions for damages, regardless of the importance of the right or interest at stake.[212] Accordingly, in fashioning qualified immunity, the Court has not focused on the interests at stake; instead, it has focused only on whether the law has provided clear enough notice to state officials.[213] That notice requirement does not depend on the values underlying a particular constitutional right.[214] It depends only on whether the law has adequately specified the legal requirements.[215]

Instead of requiring officials to be more careful when they could do the most harm, qualified immunity creates the same obstacle to recovery for all suits asserting constitutional violations.[216] The same

---

than the injury sought to be prevented by the statute defining the offense charged.").

209. *Id.*

210. *Id.*

211. *See* Palmer v. Sanderson, 9 F.3d 1433, 1435–36 (9th Cir. 1993).

212. Anderson v. Creighton, 483 U.S. 635, 643 (1987) ("[W]e have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated."); *see also* Fallon, *supra* note 14, at 490 ("In theory, it would be possible for the Supreme Court (or Congress) to make immunity—or the degree of immunity that an official can claim—depend on the right that the official allegedly violated. The Court, however, has never taken this approach.").

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

214. *Id.*

215. *Id.*

216. Often when courts establish one-size-fits-all doctrines that apply across a range of situations implicating different interests, those doctrines fracture into different sub-doctrines to address those different interests. Consider Article III standing. To establish standing to bring suit in federal court, a plaintiff must demonstrate that he has suffered, or is about to suffer, an injury in fact. Although the injury in fact test applies to all cases, courts have developed specific doctrines for implementing that test in separate areas. *See* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1068–69 (2015). There are separate, complex doctrines to determine standing for plaintiffs raising

clearly established test applies to an officer who wrongfully kills a person and an officer who wrongfully trespasses on property. By applying the same test to all circumstances, qualified immunity fails to create greater deterrence against conduct that could lead to those greater harms, and it fails to provide stronger protection for those interests by providing better avenues for redress.

On the other side of the ledger, qualified immunity also does not account for the risk the official faces when his actions are based on erroneous judgments about the law.[217] Officials do not always have the same opportunities to ensure that their conduct complies with the law. Sometimes, an officer does not have time to evaluate the situation thoroughly because he must make quick decisions, such as when a suspect suddenly flees.[218] An official may also be more prone to error if he is alone on the scene or if the situation poses a danger, features high emotions, or involves many different things happening.[219]

In other situations, however, officials do not face the same risk of error, such as when the situation does not pose a danger, features a single individual, and does not require split-second decisions, like when an official decides to dismiss an employee.[220] These officials have more time to reflect, consider other options, and—most importantly—obtain legal advice. Qualified immunity makes more sense in situations where decisions are made under circumstances that increase the likelihood that they will be erroneous. The Supreme Court has occasionally justified qualified immunity on this ground.[221] By contrast, immunity is less warranted in situations where officers have more opportunity to ensure that their decisions comply with the law.[222]

But qualified immunity does not distinguish between these two situations. Instead, the same qualified immunity standard applies regardless of the circumstances under which the officer acted.[223] Qualified immunity thus creates a least common denominator that favors government officials. It operates on the assumption that officers make all decisions under the worst-case scenario. By doing

---

Establishment Clause claims, standing for plaintiffs raising Equal Protection claims, standing for plaintiffs raising claims implicating national security, and standing for government entities. *See id.* at 1071–81 (discussing the separate and complex challenge of establishing standing for each type of claim).

217. Harlow v. Fitzgerald, 457 U.S. 800, 813–14 (1982).

218. *Id.*

219. *Id.*

220. *Id.*

221. Heien v. North Carolina, 574 U.S. 54, 66 (2014) (justifying qualified immunity when an officer must "make a quick decision on the law").

222. *See* Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1497 (2019) (considering whether, when legal clarity is the relevant concern, the factual context increasing the likelihood of error makes sense).

223. Anderson v. Creighton, 483 U.S. 635, 643 (1987).

so, qualified immunity provides no incentive for officers who could reflect or seek advice to do just that.[224]

One might argue that qualified immunity does account for the importance of rights and the circumstances facing officials, because whether a right is clearly established depends on the doctrines implementing that right, and the doctrine itself accounts for these considerations. For example, under the Fourth Amendment, officers can use deadly force only if they have reason to believe that the suspect poses a threat to others.[225] In assessing whether an officer violated the Fourth Amendment by using deadly force, a court considers whether the officer violated the clearly established law surrounding deadly force (instead of, say, the law surrounding arrests). Likewise, whether the use of force is reasonable depends in part on whether the police had to act quickly to protect others.[226] Although this is true, it is beside the point. Qualified immunity provides an additional level of cushion to an official who violates a right. That level of cushion does not vary depending on the importance of the right. Instead, it depends on the clarity with which the right has been defined.[227] If the doctrine surrounding deadly force is less clear than the doctrine surrounding arrests, then an officer who violates that right will likely receive immunity.

B. Devaluing Indeterminate Rights

Another consideration not captured in today's qualified immunity test is the degree to which the substantive doctrines implementing constitutional rights articulate clear, determinate rules. Qualified immunity shields officials from liability unless "[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."[228] But not all constitutional rights have equally defined contours. Some are relatively clear, while others are extremely open ended.[229] But qualified immunity does not treat these constitutional rights equally. The more indeterminate a legal test, the greater the likelihood an

224. Put another way, qualified immunity reallocates the costs of uncertainty. Under § 1983, an official bears the cost of learning the content of the law or faces the risk of liability for violating rights, and he will choose the former option when it is cheaper than the latter option. Qualified immunity reallocates that cost to the victim, even though the victim does not have the choice of learning the content of the law if that path is cheaper.

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

226. City & County. of S.F. v. Sheehan, 135 S. Ct. 1765, 1775 (2015) ("The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay 'would gravely endanger their lives or the lives of others.'" (quoting Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298–99 (1967))).

227. *Id.*

228. *Anderson*, 483 U.S. at 640.

229. *See infra* Subpart III.B.2.

officer is entitled to qualified immunity.[230] The consequence is that qualified immunity devalues indeterminate rights and makes them systematically less desirable.[231]

1. Determinacy of Constitutional Rights

Constitutional doctrines lie on a spectrum from determinate to highly indeterminate.[232] Determinate doctrines specify precise limitations or requirements.[233] By contrast, indeterminate ones merely list values or norms that interpreters must apply.[234]

The most determinate doctrines constitute bright-line rules.[235] These rules identify a fact *ex ante* that triggers the application of the rule, and that factual trigger does not change depending on the particular facts of the case.[236] By identifying a particular fact that triggers liability, rules generalize.[237] They lump together all individuals who share the triggering fact. They also provide notice.[238] Because these rules specify the facts that constitute the violation of the law, officials know their precise legal obligations at the time they act.

One example of a constitutional rule with a high level of determinacy, albeit one that does not typically arise in the § 1983 context, is the requirement that guilt in criminal cases be proven beyond a reasonable doubt.[239] That prohibition creates a clear rule. The government cannot convict a person of a criminal offense based on a lower standard of proof, regardless of their reasons for doing so.[240]

---

230. *See infra* Subpart III.B.2.

231. *See infra* Subpart III.B.2.

232. Schauer, *supra* note 18, at 888 ("[A]t times a court will announce a crisp and precisely defined rule . . . [and] at other times it will announce a broad and less determinate principle.").

233. *See* Korobkin, *supra* note 36, at 23.

234. *See id.*

235. The classic example is a law prohibiting driving more than fifty-five miles per hour. *Id.* All drivers who exceed that speed are breaking the law. It does not matter why they were driving over fifty-five miles per hour. *See id.*

236. *See id.* at 25 ("Rules establish legal boundaries based on the presence or absence of well-specified triggering facts.").

237. *See* Alexander, *supra* note 190, at 545. Although rules generalize, rules need not be broad. *See* Ruth Gavison, *Comment: Legal Theory and the Role of Rules*, 14 HARV. J. L. & PUB. POL'Y 727, 747–48 (1991) (suggesting that only the strength of entrenchment and not breadth be incorporated in the concept of "ruleness").

238. *See* Alexander, *supra* note 190, at 545–46.

239. *See* In re Winship, 397 U.S. 358, 361–63 (1970).

240. *See id.* at 364 ("[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.").

Most constitutional doctrines are significantly less determinate.[241] They leave room for disagreement about what conduct the doctrine prohibits. Indeterminacy can be a product of linguistic ambiguity in the doctrine.[242] Consider the prohibition on government discrimination based on sex unless that discrimination furthers an "important" government interest.[243] Reasonable people can readily disagree about what exactly "important" means in this context.

Another major source of doctrinal indeterminacy arises from the fact that the doctrine requires qualitative assessments, even if everyone agrees about the meaning of the words in the doctrine.[244] Instead of defining the precise facts that trigger the doctrine, these doctrines provide norms or principles.[245] The requirements of the doctrine thus depend on value judgments, which may be weighed differently by different interpreters.

Consider the Eighth Amendment prohibition on "cruel and unusual" punishment.[246] That prohibition does not identify a particular fact that makes a punishment cruel and unusual. Instead, whether a particular punishment is cruel and unusual depends on a variety of considerations, such as the offense committed,[247] the proportionality of the punishment to the crime,[248] and the social acceptability of the punishment.[249]

---

241. Alexander, *supra* note 190, at 545 ("[A] quite specific rule can be . . . indeterminate . . . ."). Often, determinacy is described in terms of rules and standards. But there is significant disparity in how those terms are used. *See* Kaplow, *supra* note 34, at 560 n.2. For example, one might dispute whether the prohibition on "driving at an excessive speed" sets forth a standard or an indeterminate rule. *Compare id.* at 560 (defining "driving at an excessive speed" as a standard), *with* Alexander, *supra* note 190, at 543–545 (defining "[d]riv[ing] safely" as an indeterminate rule). The precise definitions do not matter to this article; what matters is indeterminacy.

242. *See* Re, *supra* note 222, at 1505–07.

243. Craig v. Boren, 429 U.S. 190, 197 (1976).

244. *See* Re, *supra* note 222, at 1508 (arguing that lack of legal clarity can result when judges "disagree about what available information is legally dispositive").

245. *See* Alexander, *supra* note 190, at 543 (stating that indeterminacy arises from tests that rely on "norms that contain vague or controversial moral or evaluative terms").

246. U.S. CONST. amend. VIII.

247. Graham v. Florida, 560 U.S. 48, 74–75 (2010).

248. *Id.* at 59 ("For the most part, however, the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime.").

249. Moore v. Texas, 137 S. Ct. 1039, 1048 (2017) ("'To enforce the Constitution's protection of human dignity,' we 'loo[k] to the evolving standards of decency that mark the progress of a maturing society' . . . ." (quoting Hall v. Florida, 572 U.S. 701, 708 (2014))). Similar ambiguity surrounds the rule prohibiting deliberate indifference that endangers an inmate's safety or health.

Unlike determinate doctrines, indeterminate doctrines do not generalize by automatically grouping individuals who share a common characteristic. Instead, the requirements can vary according to the specific facts. For example, imposing a sentence of life imprisonment violates the prohibition on cruel and unusual punishment in some instances but not in others.[250] Moreover, indeterminate doctrines provide less notice of their requirements than determinate ones.[251] Unlike a determinate doctrine, which specifies its precise requirements *ex ante*, indeterminate doctrines gain meaning through judicial application in particular cases.[252] The consequence is that officials do not know when they act on their precise legal obligations under an indeterminate doctrine.[253] They learn of those obligations only afterwards when a judge determines whether the official's conduct was lawful.

The degree of indeterminacy varies among constitutional doctrines. The most indeterminate doctrines are those that contain broad or vague terms, which embed many different principles and values, and direct courts to consider all the facts to determine whether the doctrine is satisfied. Consider the Fourth Amendment prohibition on "unreasonable" searches.[254] Reasonableness depends on a huge array of considerations, and whether a search is reasonable is a highly fact-specific inquiry.[255] It depends on all the circumstances giving rise to the search, the nature of the search, and any other fact

---

See Farmer v. Brennan, 511 U.S. 825, 834 (1994). Another example is the intermediate-scrutiny doctrine that implements the Equal Protection Clause's prohibition on gender discrimination. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). Under that doctrine, the government cannot discriminate based on gender unless doing so is necessary to protect an important interest. *Id.* The doctrine prescribes a rule, but the precise requirements of the rule are unclear. Whether an interest is "important" depends on values and judgment calls. Similar indeterminacy infects rules implementing the First Amendment, substantive due process, and other parts of the Equal Protection Clause. *See, e.g.*, Eric K. Weingarten, Comment, *An Indeterminate Mix of Due Process and Equal Protection: The Undertow of In Forma Pauperis*, 75 DENVER L. REV. 631, 631 (1998) (discussing the indeterminance of Equal Protection jurisprudence).

250. *See Graham*, 560 U.S. at 74–75.

251. *See* Re, *supra* note 222, at 1516–17 (arguing that legal uncertainty affects the predictability of a doctrine).

252. *See* Korobkin, *supra* note 36, at 25–26. ("[U]nder a rule it is possible for citizens . . . to know the legal status of their actions with reasonable certainty *ex ante*. Standards, in contrast, require adjudicators . . . to incorporate into the legal pronouncement a range of facts . . . ." (citation omitted)).

253. *See id.*

254. U.S. CONST. amend. IV.

255. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (stating the constitutionality of a search depends on whether it "was reasonably related in scope to the circumstances which justified the interference in the first place" (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968))).

that could inform a rational person's assessment of the reasonableness of the officer's conduct.[256]

Other indeterminate doctrines are more definitive because they limit the considerations relevant to their application.[257] For example, the test for whether the government has provided adequate procedural due process for the deprivation of a right depends on only three factors: (1) the amount of process and the importance of the interest at stake; (2) the utility of providing process; and (3) the cost of providing that process.[258] Limiting courts to these three factors reduces uncertainty.[259] It informs people that other factors—such as the gender of the person suffering the deprivation or the reason for the deprivation—do not matter.

2. The Effect of Indeterminacy on Qualified Immunity

The determinacy of a constitutional doctrine is what establishes the availability of qualified immunity for violations of that right. When a court asks whether a right is "clearly established," it is asking about the level of clarity of the constitutional doctrine that the official allegedly violated.[260] The more determinate the right—the more clearly its contours are defined—the more likely it is to be "clearly established."[261]

When a doctrine implementing a right sets forth a highly determinate rule, qualified immunity will not preclude suits alleging violations of that right. Crisply defining the law's requirements by identifying *ex ante* the precise conduct that triggers the rule leaves no uncertainty about what the law forbids or requires.[262] Whenever the triggering fact is satisfied, the rule is violated. For example, if the Sixth Amendment establishes a clear rule prohibiting the interrogation of a defendant about an offense for which he has been indicted in the absence of counsel, no reasonable official would think that the law might permit interrogating defendants in these

256. *Id.*

257. *See* Alexander, *supra* note 190, at 543 (arguing that standards are more determinate if they restrict the considerations that can go into them); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 772 (1982) (describing the same phenomenon).

258. Mathews v. Eldridge, 424 U.S. 319, 341–47 (1976). But these limitations do not eliminate the indeterminacy. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989) (complaining that balancing tests do not establish legal rules).

259. *See* Alexander, *supra* note 190, at 543.

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

261. *See id.*

262. *See* Alexander, *supra* note 190, at 543–44.

circumstances.[263] And qualified immunity would be unavailable for an officer who breaks the rule.[264]

Introducing indeterminacy creates the possibility for an officer to claim qualified immunity. Indeterminacy blurs the contours of a constitutional right. It generates uncertainty about what a doctrine requires under particular circumstances. This uncertainty creates the possibility that reasonable officials may disagree about what the law requires.[265] In the face of that uncertainty, an official will not know what the law requires until after he has acted and until the doctrine is applied by a judge.[266]

The room for reasonable disagreement among officials grows as one introduces more indeterminacy. Accordingly, the more indeterminate a doctrine, the greater the likelihood that an officer is entitled to qualified immunity.[267] For instance, because the reasonableness of a search under the Fourth Amendment depends on a vast number of considerations that reasonable people could apply differently to the same set of facts,[268] qualified immunity erects an extremely high barrier to suits alleging Fourth Amendment violations.[269]

Limiting recovery based on the indeterminacy of a doctrine implementing a right has several consequences. First, it devalues indeterminate rights. From the rightsholder's perspective, rights

---

263. *See* Massiah v. United States, 377 U.S. 201, 205 (1964).

264. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that "government officials performing discretionary functions generally are shielded from liability" as long as they do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known").

265. *See* Alexander, *supra* note 190, at 543 (stating that indeterminacy arises from tests that rely on "norms that contain vague or controversial moral or evaluative terms").

266. Kaplow, *supra* note 34, at 562 (noting that standards leave officers "imperfectly informed of the law's commands" when they act).

267. *See, e.g.*, Kathryn R. Urbonya, *Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 CORNELL J.L. & PUB. POL'Y 397, 400 (2001) ("Police officers, suspects, prosecutors, judges, and juries often disagree as to what constitutes 'reasonable' . . . under the Fourth Amendment . . . .").

268. *Id.*

269. District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018) (stating that the "specificity" requirement of qualified immunity is "especially important in the Fourth Amendment context," because "[p]robable cause 'turn[s] on the assessment of probabilities in particular factual contexts'" (first quoting Mullenix v. Luna, 577 U.S. 7, 12 (2015) (per curiam); then quoting Illinois v. Gates, 462 U.S. 213, 232 (1983))); *see also Mullenix*, 577 U.S. at 10; Saucier v. Katz, 533 U.S. 194, 205 (2001) ("It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances.").

have value to the extent that they can be vindicated.[270] Qualified immunity limits the ability to vindicate indeterminate rights but not determinate ones.[271] Yet determinate rights do not categorically warrant vindication more than indeterminate ones.

Second, such limited recovery undermines the utility of indeterminate doctrines. The principal reason for establishing indeterminate doctrines is to afford flexibility so that courts can reach optimal results in individual cases.[272] Because they lump together all cases based on the existence of a triggering fact, determinate rules are either overinclusive or underinclusive.[273] They consequently do not always yield the best results. A determinate rule prohibiting driving over fifty-five miles per hour prohibits all driving over that speed, even when there are good reasons to do so, like getting an injured person to a hospital.[274]

Flexible, indeterminate doctrines permit courts to make case-specific decisions to more accurately implement the values underlying the right protected by the doctrine.[275] That flexibility is particularly important when the principles informing a right are difficult to articulate[276] or when the right applies to a wide range of differing

---

270. *See* The W. Maid, 257 U.S. 419, 433 (1922) ("Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp."); *see also* Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 943 (2d Cir. 1930) ("[A] right without any remedy is a meaningless scholasticism . . . ."); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (arguing that rights exist only to the extent that they are enforced).

271. Levinson, *supra* note 270, at 858.

272. This assumes that each case has different facts that should matter to the outcome. If all cases shared the same facts, then a rule would be more sensible. Kaplow, *supra* note 34, at 563–64 (arguing for rules when "the frequency of application in recurring fact scenarios is high").

273. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 31–34 (1991) ("A rule's factual predicate is a generalization . . . [that is] not necessarily true for *all* cases.").

274. *See supra* note 235 and accompanying text.

275. *See* Frederick Schauer, *Rules, the Rule of Law, and the Constitution*, 6 CONST. COMMENT. 69, 69 (1989) (arguing that determinate rules "disable wise, well-intentioned, and capable decisionmakers from reaching the optimal results in individual instances").

276. *See* United States v. McCoy, 517 F.2d 41, 44 (7th Cir. 1975) (stating that standards are appropriate for matters where "the factors which may properly influence [a] decision are so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair [the] ability to deal fairly with a particular problem than to lead to a just result"); *see also* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 512–13 (1988) (discussing inability to articulate with precision the content of some principles, such as liberty).

scenarios and the principles underlying the right point in different directions depending on the facts of the case.[277]

By limiting the enforceability of indeterminate doctrines, qualified immunity reduces that utility. Qualified immunity restricts the options courts have to remedy violations of indeterminate rights, and it less effectively deters officials from violating those rights. The doctrine thus converts the virtue of indeterminacy into a liability.

These negative effects have grown worse over time because the degree of determinacy required to satisfy qualified immunity has varied over time. Recall that, in its earlier form, the qualified immunity inquiry asked at a relatively high level of generality whether the constitutional right was clearly established. [278] Satisfying that test did not require showing that the official's particular conduct was illegal; the test thus tolerated some degree of indeterminacy. The introduction of the specificity requirement in *Anderson* increased the level of determinacy required to overcome qualified immunity. [279] To prevail against a qualified immunity defense, a plaintiff now must show that the law was defined with enough precision to outlaw the particular conduct of the official.[280]

Of course, we have not reached a point where qualified immunity has stripped indeterminate rights of all value in damages cases. Qualified immunity does not bar all suits alleging violations of indeterminate rights. [281] Even if the precise requirements of a doctrine are not well defined, some conduct clearly falls outside the bounds of permissibility.[282] All reasonable officers know that the

277. Kaplow, *supra* note 34, at 622. Also important is whether those factual situations are likely to recur. *Id.* at 564 (arguing for standards when a doctrine applies to "heterogeneous behavior[s] . . . many of which are materially different from each other and, when considered in isolation, are unlikely to occur"). Consider again the Fourth Amendment restriction on unreasonable seizures. The Fourth Amendment applies to a vast array of different factual situations, and many different considerations bear on whether a search is reasonable. *See supra*, notes 254–56 and accompanying text. Articulating a determinate rule would require providing an extensive list of different factual scenarios and stating whether a search is or is not reasonable. Even then, that list would inevitably include searches that never occurred and leave off others that do occur. Indeterminacy allows courts to determine with precision whether a particular search complies with the Fourth Amendment or violates it.

278. *See supra* notes 103–05 and accompanying text.

279. *Id.* at 639–40.

280. As Professor Richard Re has observed, one of the risks of establishing a test that turns on the determinacy of a legal doctrine is the tendency to ratchet up the level of determinacy required to satisfy that doctrine. *See* Re, *supra* note 222, at 1521 ("What starts out as a rule that most qualified interpreters must agree can turn into a requirement that clarity exists only if there is a specific case or statute precisely on point.").

281. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 745–46 (2002).

282. *Id.*

Fourth Amendment prohibits them from shooting a person just because he is about to jaywalk on an empty street and that the Eighth Amendment prohibits the imposition of drawing and quartering as a punishment.[283] But the extent to which a doctrine "obviously" prohibits particular conduct depends on the degree of indeterminacy of the doctrine.[284] The more indeterminate a doctrine, the less clarity it provides about its requirements, and consequently, the less clearly it establishes what constitutes an "obvious" violation.[285]

Precedent has also reduced indeterminacy to some degree.[286] The degree to which the precedent reduces indeterminacy depends on the scope of the ruling.[287] It can significantly reduce indeterminacy if a court proclaims that the existence of a particular fact always establishes a violation—for example, if a court were to declare that waterboarding a suspect is per se unreasonable under the Fourth Amendment.[288] By doing so, the court can establish a determinate rule that lumps together all cases that share that triggering fact.[289] By contrast, if the court simply rules that, given these particular facts, a right was violated, then the precedent does little to clarify the law.[290] The precedent provides minimal information to the next official who faces circumstances that share some, but not all, of the same facts.

Brosseau v. Haugen[291] illustrates this point. There, the Court granted qualified immunity to a police officer who attempted to stop a car containing a burglary suspect by using the butt of her gun to smash the window of the car and then by shooting at the driver as he pulled away.[292] The Court cited the indeterminacy of the Fourth Amendment standard, explaining that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or

283. Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878) (noting that, despite the "[d]ifficulty . . . to define with exactness" what constitutes cruel and unusual, "it is safe to affirm that punishments of torture . . . , and all others in the same line of unnecessary cruelty, are forbidden . . . .").

284. *See* Re, *supra* note 222, at 1505–06 (discussing legal clarity, ambiguity, and reasonable disagreement).

285. *Id.*

286. Schauer, *supra* note 18, at 889 ("[A] norm set forth by the deciding court will operate as constraining law for future cases."); *see also* Saucier v. Katz, 533 U.S. 194, 201 (2001) (directing courts to resolve the constitutional question before asking whether the law was clearly established in order to establish the law).

287. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 591 (1987).

288. *Id.* at 577 (explaining that the value of precedent depends on characterization of the importance of particular facts).

289. *See* Korobkin, *supra* note 36, at 25. ("Rules establish legal boundaries based on the presence or absence of well-specified triggering facts.").

290. *Id.*

291. 543 U.S. 194 (2004).

292. *Id.* at 196–97.

mechanical application."[293] Thus, although the plaintiff cited cases establishing Fourth Amendment violations in other circumstances where an officer shot at a suspect fleeing in a car, the Court found that none of them "squarely" governed because they involved different facts.[294]

For the most part, the Court has not sought to reduce the indeterminacy of indeterminate doctrines by laying out broad, categorical rules in its opinions applying those doctrines. Instead, the Court's decisions tend to be fact-specific and narrow holdings that control the outcome in only a small set of factual scenarios.[295]

To be sure, courts have fashioned some categorical rules implementing indeterminate doctrines. But these rules have not notably weakened qualified immunity for indeterminate doctrines because, as a practical matter, those rules tend to favor the government—at least for the rights that regularly form the basis of § 1983 actions.[296] For example, courts have established categorical rules permitting officers to conduct searches incident to arrest,[297] to order passengers out of a vehicle that the officers have stopped for a traffic violation,[298] and to conduct searches at the border.[299]

By contrast, courts have rarely adopted rules categorically prohibiting government conduct. Based on the idea that the Constitution is not "a suicide pact,"[300] virtually every constitutional

293. *Id.* at 199 (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)).

294. *Id.* at 201. For other instances of the Court granting qualified immunity for Fourth Amendment claims, see Mullenix v. Luna, 577 U.S. 7, 13 (2015) (per curiam) (granting qualified immunity because no prior case established that the Fourth Amendment prohibits "confront[ing] a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer"); City & County of S.F. v. Sheehan, 135 S. Ct. 1765, 1776 (2015) (finding qualified immunity for a Fourth Amendment claim despite earlier cases prohibiting similar conduct because the "differences between that case and the case before us leap from the page"); Saucier v. Katz, 533 U.S. 194, 209 (2001) (granting qualified immunity for military seizure of an animal rights activist approaching the Vice President as he was speaking at a military base because no earlier decision forbade that conduct).

295. *See, e.g.*, Blum, *supra* note 53, at 1899 ("Fourth Amendment excessive force cases are inevitably fact specific.").

296. *See* Re, *supra* note 222, at 1541–43 (exploring how indeterminacy in the relevant law helps to strengthen officers' qualified immunity claims).

297. United States v. Robinson, 414 U.S. 218, 234–35 (1973), *superseded by statute on other grounds as recognized in* Commonwealth v. Pierre, 72 Mass. App. Ct. 580 (2008).

298. Maryland v. Wilson, 519 U.S. 408, 413–15 (1997).

299. Boyd v. United States, 116 U.S. 616, 623 (1886) (discussing the Founders' intention to make border searches reasonable per se).

300. Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

limitation on government conduct has exceptions.[301] For example, courts have not declared any type of seizure per se unreasonable.[302] *Every* type of seizure is theoretically permissible, including use of deadly force, so long as the government has a good enough reason.[303] Nor, for example, have courts categorically forbidden particularly nefarious types of discrimination or infringements of fundamental rights.[304] Officials can likewise infringe these rights so long as they have a good enough reason.

But courts have not specified what constitutes a good enough reason, and that indeterminacy leads to qualified immunity. For example, in *Wood v. Moss*,[305] the Court granted qualified immunity to secret service agents, who forced a group protesting the President to move to a location significantly further away from the President than a group who was supporting the President.[306] Although the First Amendment prohibits viewpoint discrimination, the Court explained that the immunity was warranted, in part, because the need to protect the President can sometimes warrant viewpoint discrimination, and no prior decision suggested that the safety concerns on these facts did not suffice.[307]

Admittedly, there are some determinate doctrines that limit the government. For example, the Eighth Amendment creates a bright-line prohibition on drawing and quartering and other barbaric punishments.[308] But determinate doctrines are few and far between, at least for rights regularly raised in § 1983 actions.[309]

---

301. Ziglar v. Abbasi, 137 S. Ct. 1843, 1883 (2017) (Breyer, J., dissenting) ("The Constitution itself takes account of public necessity.").

302. *See id.* at 1867.

303. *Id.*

304. *See supra* notes 197–204 and accompanying text (showing that one can discriminate or violate a fundamental right so long as they pass strict scrutiny review or have a compelling interest).

305. 572 U.S. 744 (2014).

306. *Id.* at 751–54, 764.

307. *Id.* at 748. Another example is the public safety exception to *Miranda*'s requirement of informing a person in custody of their rights. *See* New York v. Quarles, 467 U.S. 649, 657–58 (1984). Though in any event, courts have suggested that *Miranda* violations are not actionable under § 1983. *See* Chavez v. Martinez, 538 U.S. 760, 772 (2003) (plurality opinion); Hannon v. Sanner, 441 F.3d 635, 637–38 (8th Cir. 2006).

308. Wilkerson v. Utah, 99 U.S. 130, 136 (1879) (declaring torture and similar punishments to be unconstitutional); *see also* Massiah v. United States, 377 U.S. 201, 205–06 (1964) (holding that the Sixth Amendment prohibits interrogating a defendant in the absence of counsel after indictment about the charged offense).

309. There are examples of absolute restrictions on the government that do not typically arise in § 1983 actions—such as the requirement of proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 364 (1970), the prohibition on double jeopardy, *Blockburger v. United States*, 284 U.S. 299, 304 (1932), and the restriction on imprisoning a defendant who was not afforded the right to counsel, *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972).

IV. REFINING QUALIFIED IMMUNITY

There are two basic ways to remedy the problems this Article has identified.[310] The first way would be to change the nature of rights and the doctrines that implement them. For example, courts could declare that all rights are equally important, limit the rights' scope so that officials always face the same risk of committing legal errors, or refashion indeterminate rights as determinate ones. The second way would be to change qualified immunity itself.

The first approach is dangerous and unrealistic. Declaring all rights to be equally important would risk diluting rights that society deems to be more important.[311] It would mean, for example, that the fundamental rights recognized today are no more important than the property rights that thrived during the *Lochner* era.[312] And changing a right in a way that ensures that it applies only in circumstances where officials enforcing the right always face roughly the same risk of error would so fundamentally change the nature and scope of constitutional rights that such a change would require rewriting the Constitution.

Courts could more readily reduce the effect of qualified immunity on indeterminate doctrines by actively striving to establish determinate rules to implement those doctrines. Indeed, judges who oppose qualified immunity have incentives to write opinions that lay out broad, determinate doctrines.[313] But that is not a good approach. Constitutional doctrines are indeterminate *because* we think that

---

310. Of course, a third option would be simply to abolish qualified immunity. These two options apply if the Court decides to keep some version of qualified immunity—which seems much more likely than the abolition of the doctrine altogether.

311. *See* Gary S. Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 497–98 (1973) (describing how the Court has not made all the necessities of life "fundamental rights" because such an approach would be similar to mistakes made in *Lochner*).

312. *See id.*

313. The Court has made clear that whether an opinion clearly establishes law does *not* depend on whether that part of the opinion is the holding. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) (holding that courts can determine whether a rights violation occurred to clearly establish law but are not obliged to do so). Thus, when it comes to qualified immunity, opinions in prior cases are more valuable than precise holdings. This arrangement is inconsistent with the Article III rule that courts should decide only cases and controversies. *See* U.S. CONST. art. III, § 2, cl. 1. It gives legal effect to discussions about legal issues that are unnecessary to resolve cases and controversies. *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1259 (2006) (arguing that "lawmaking through dictum" violates Article III). That the legal determination is unnecessary to the case also creates a larger risk that the doctrine will not be as careful as it should be. *Id.* at 1260–61 ("When [judges] make law in dictum, the likelihood is high that it will be bad law.").

they should apply differently in different circumstances.[314] The indeterminacy allows courts to implement the various principles underlying the doctrine.[315] Creating broad determinate rules to implement those doctrines would risk under- or over-enforcing some of those principles.[316]

Notably, altering the scope of rights just to overcome qualified immunity would let the tail wag the dog. Rights define the entitlements of individuals and the duties that the government owes the rightsholder.[317] They determine how the government interacts with people. Violations of rights can lead to a variety of remedies that do not implicate qualified immunity, such as injunctions and the exclusion of evidence.[318] Qualified immunity applies only to a small subset of those remedies. In that light, it is better to alter qualified immunity than to rework the entire relationship between the government and the people.

There are many ways to improve qualified immunity. One could imagine a variable qualified immunity that operates differently depending on the importance of the right at stake, the circumstances under which an officer acted, or the determinacy of the doctrine implementing the allegedly violated right. For example, courts could limit qualified immunity in suits alleging violations of fundamental rights or in suits where officials have time to seek legal advice but fail to do so. Or they could adopt a higher level of generality for assessing qualified immunity in suits alleging violations of the Fourth Amendment.

---

314. *See* Re, *supra* note 222, at 1501 (noting that the degree of doctrinal clarity given depends on the context and a court's ultimate goals).

315. *Id.*

316. Indeed, the Court has gone further and discouraged courts from even making these fact-bound determinations in qualified immunity cases. It has said that, if a court can resolve a case on the ground that the law was not clearly established, then it should decide the case on that ground without resolving whether a violation occurred at all. *See* Camreta v. Greene, 563 U.S. 692, 707 (2011). "Courts should think hard, and then think hard again, before turning small cases into large ones." *Id.*; *see also Pearson*, 555 U.S. at 239–41 (arguing that courts may opt to decide qualified immunity cases on the ground that the law is not clearly established instead of on the merits to avoid "bad decisionmaking [sic]" and creating unnecessary constitutional doctrine).

317. *Duties and Rights Law and Legal Definition*, U.S. LEGAL, https://definitions.uslegal.com/d/duties-and-rights/ (last visited Aug. 24, 2021).

318. Some scholars have argued that rights are "functionally inseparable" from their remedies. Levinson, *supra* note 270, at 858. On that theory, one might say, modifying rights to handle qualified immunity would not be the tail wagging the dog because changing the right is indistinguishable from changing the remedy. But that symmetry does not hold with qualified immunity because it applies to only one type of remedy. *See supra* Subpart III.A. Redefining qualified immunity would affect only damages actions; redefining the right would affect *all* types of actions, including actions for injunctions and declaratory relief.

The reason the Court has given for refusing to vary qualified immunity, depending on the officer's duty or the nature of the right that was violated, is that such a tactic would unnecessarily "complicate" qualified immunity.[319] In other words, the Court has suggested that it is better to have an overinclusive rule in favor of qualified immunity than to tailor immunity to the considerations underlying the doctrine.[320] Although the Court has not elaborated on this reasoning, there are two potential bases for this conclusion.

The first possibility is that it is not worthwhile to vary qualified immunity depending on the right violated or the nature of the violation because the cost of qualified immunity does not vary depending on those considerations.[321] This theory is incorrect. As explained above, some rights protect more important interests than others.[322] Likewise, granting immunity to officers is more important in some situations than in others, like when they have to make split-second decisions or when the consequences of not acting could be particularly dire.[323] Moreover, applying the same specificity test across the board results in disparate application of qualified immunity because of the differing nature of different rights.

The second potential basis for opposition to change is that the cost of requiring officers to learn qualified immunity requirements, which depend on the right asserted or the situation the officer faced when violating that right, eclipses the costs of refusing to enforce those rights.[324] But this fear is overblown. Society already charges officials with learning a wide array of complex legal doctrines for different rights. For example, they need to know Fourth Amendment

---

319. Anderson v. Creighton, 483 U.S. 635, 643 (1987) ("[W]e have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated."); *see also* Fallon, *supra* note 14, at 490 ("In theory, it would be possible for the Supreme Court (or Congress) to make immunity—or the degree of immunity that an official can claim—depend on the right that the official allegedly violated. The Court, however, has never taken this approach.").

320. *See, e.g.*, *Anderson*, 483 U.S. at 643.

321. Fallon, *supra* note 14, at 490 ("A trans-substantive immunity must be defended instead on the ground that some of the social costs inherent in the enforcement of rights vary so little from right to right that they can be addressed most efficiently on an across-the-board basis.").

322. *See* Palmer v. Sanderson, 9 F.3d 1433, 1435–36 (9th Cir. 1993).

323. Graham v. Connor, 490 U.S. 386, 396–97 (1989).

324. *See* Manzanares v. Roosevelt Cnty. Adult Det. Ctr., 331 F. Supp. 3d 1260, 1294 n.10 (D.N.M. 2018) ("The Supreme Court's obsession with the clearly established prong assumes that officers are routinely reading Supreme Court and Tenth Circuit opinions in their spare time, carefully comparing the facts in these qualified immunity cases with the circumstances they confront in their day-to-day police work. It is hard enough for the federal judiciary to embark on such an exercise, let alone likely that police officers are endeavoring to parse opinions.").

law to make judgments about searches and seizures,[325] the doctrine surrounding *Miranda v. Arizona*[326] to determine whether they must read arrestees their rights,[327] and First Amendment law to determine the extent to which they can act against protestors.[328] More than that, officers need to know the various doctrines in each area. For example, just in the realm of seizures, an officer is required to know the array of doctrines delineating whom he may seize and the types of seizure he may affect—such as a stop, an arrest, restraining force, or deadly force.[329] Given what we already require of officers, it is hard to see that separating qualified immunity into different doctrines would necessarily unduly burden public officials. To be sure, it may be that some officials do not actually learn these doctrines. But those officials do not bear the cost of qualified immunity because applying it requires knowing the doctrines implementing rights. Additionally, officials would not bear the extra cost of a more varied qualified immunity doctrine.

In any event, the marginal additional cost of varying qualified immunity need not be significant. The Court has many options for improving immunity. For instance, it could limit qualified immunity to apply to only some rights,[330] or it could draw broader categories—such as dividing qualified immunity into two or three types.[331] No doubt, creating a vast number of different qualified immunity doctrines could be overwhelming and make the doctrine's application

325. *See* Carpenter v. United States, 138 S. Ct. 2206, 2261 (2018) (Alito, J., dissenting) (noting "the enormous complexity" surrounding the Fourth Amendment).

326. 384 U.S. 436 (1966).

327. *Id.* at 466 (requiring officers to read warnings before interrogating suspects in custody); *see also, e.g.*, Dickerson v. United States, 530 U.S. 428, 441 (2000) (noting ways in which the Court has broadened *Miranda* and made exceptions to it).

328. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004) (noting the complexity of First Amendment doctrine).

329. *See, e.g.*, *Your 4th Amendment Rights*, ATLANTA CITIZENS REV. BD., https://acrbgov.org/education/your-4th-amendment-rights/ (last visited Aug. 24, 2021).

330. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) (arguing that qualified immunity should exist only to the extent "immunity existed at common law").

331. It is important to note that refining qualified immunity in this way could actually strengthen immunity in some cases. By focusing on the policies underlying the doctrine, a court might conclude, for example, that powerful immunity is warranted when officials must make difficult decisions in particularly stressful situations—such as in handling a 9/11-type terrorist attack.

difficult to predict.[332] But more modest refinements could avoid those problems and would go a long way to improving the law.[333]

CONCLUSION

Qualified immunity has evolved over time, but that evolution has not been for the better. Concerns about exposing officials to lawsuits that might deter them from performing their duties have led to qualified immunity becoming increasingly powerful. Qualified immunity today looks nothing like the qualified immunity of fifty-five years ago. Instead of limiting immunity to officials, who would have enjoyed immunity under the common law, or even to officials, who made good-faith efforts to comply with the Constitution, courts have declared that officials are presumptively entitled to immunity unless their precise conduct was clearly unlawful.

The ever-increasing focus on protecting officials has also led the Court to reject adding any nuance to the qualified immunity doctrine. Although some rights are more important than others, qualified immunity does not account for the importance of the rights raised in a suit. It applies equally to all rights. Nor does qualified immunity account for the circumstances under which an official acts, even though some circumstances create a significantly greater risk of an official making an erroneous legal decision. Qualified immunity also does not account for the way in which it interacts with the doctrinal tests that implement the violated rights. Although the same qualified immunity doctrine applies to all rights, the doctrine creates a significantly greater impediment to rights implemented through more indeterminate doctrines than rights implemented through more determinate doctrines. The result is a doctrine that not only provides unduly powerful protection for officials but also unevenly impairs the ability to vindicate constitutional rights.

It is possible that the current qualified immunity doctrine has resulted in broader rights. Commentators have argued that courts are more willing to expand rights when doing so will not result in expensive remedies;[334] thus, they say, the specificity requirement of qualified immunity may have resulted in broader substantive

---

332. Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305, 308 (2020).

333. One might object to this proposal on the ground that qualified immunity is based on an interpretation of § 1983 and that the meaning of § 1983 should not vary depending on the type of state official sued and the right at stake. But qualified immunity is not an effort to interpret § 1983; no one claims that it seeks to implement Congress's will. It is a judicially created common law doctrine that limits § 1983 actions. *See* Baude, *supra* note 11, at 49–74 (reciting the various justifications for qualified immunity, none of which is that it is a product of statutory interpretation).

334. *See* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 678–79 (1983); Levinson, *supra* note 270, at 889–99.

constitutional rights.[335] But it is unclear how much qualified immunity has led to the growth of rights—if any growth at all. What is clear is that the qualified immunity doctrine has developed into an unnuanced doctrine that prevents recovery for violations of rights in an insensible way.

335. *See* Fallon, *supra* note 14, at 485 ("[W]e are better off with a package that couples decisions such as *Brown* and *Miranda* with immunity doctrines than with a package that omits immunity doctrines but would have made the Supreme Court's *Brown* and *Miranda* rulings pragmatic impossibilities."); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 101–02 (1999) (arguing that lack of immunity in damages suits could make courts hesitant to recognize rights). Professor Joanna C. Schwartz has contested this point on the ground that suits seeking constitutional rights invariably include requests for injunctive relief which are not subject to qualified immunity. *See* Schwartz, *supra* note 13, at 320. But the merits of that objection are highly contestable in light of decisions that erect significant jurisdictional barriers to requests for prospective—but not retrospective—relief. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 105–06 (1983) (rejecting injunctive relief of prohibition on chokeholds for lack of imminent injury claim but permitting damages claim to proceed).