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COMMENT

A QUALIFIED DEFENSE: IN SUPPORT OF THE DOCTRINE OF QUALIFIED IMMUNITY IN EXCESSIVE FORCE CASES, WITH SOME SUGGESTIONS FOR ITS IMPROVEMENT

MICHAEL M. ROSEN*

INTRODUCTION

Imagine the following scenario: a police officer serving an arrest warrant surprises the suspect, who promptly leaps into his car, guns the engine, and drives off. The officer, on foot and with gun drawn, opens fire on the vehicle in an effort to disable it and apprehend the suspect. A bullet goes astray and gravely injures the suspect. How does – and should – our constitutional tort system address this situation? Does it matter if the

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event occurred in a high-crime area? If the suspect was aiming his car at the police officer? If it was broad daylight on a street filled with children at play? If the officer's police department had issued guidelines for using deadly force in these instances? If the department or the law enforcement union paid its officers' legal fees?

All of these questions come into play when the complex doctrine of qualified immunity encounters the rough-and-tumble world of excessive force tort lawsuits.¹ Our system strikes a balance between supporting the efforts of law enforcement agents and redressing the wrongs that they visit on ordinary citizens, through the vehicle of qualified immunity.² In an atmosphere in which police officers face a growing movement of "depolicing,"³ qualified immunity remains a bulwark against the costs and over-deterrence that tort trials impose.⁴ Under the standard for qualified immunity, which courts generally apply at the summary judgment⁵ stage of the litigation, a defendant who can show either that no clearly established law barred his or her conduct or that the behavior itself implicated no constitutional concerns will avoid trial and the discovery process.⁶

Critics argue with some force, however, that qualified immunity in the Fourth Amendment excessive force context is an incoherent jumble of legal standards and policy premises that bear no relationship to reality.⁷ This article addresses several criticisms of the qualified immunity doctrine and defends the doctrine, through an examination of the key cases and commentary on them, as a reasonably coherent and effective mechanism for sorting out worthy from unworthy litigation.⁸

¹ "Qualified immunity" can briefly be defined as a protection from trial available to certain government employees acting in their official capacity if the conduct in question did not violate a constitutional right clearly established at the time of the incident.

² See *infra* Part I-B.

³ "Depolicing" refers to a decline in support of the efforts of law enforcement from municipal authorities, usually as a reflection of worsening popular perception of a local police department.

⁴ See *infra* Parts I-A and I-B.

⁵ A summary judgment hearing is held prior to trial when a party believes that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c).

⁶ See *infra* Part I-B.

⁷ See *infra* Part II.

⁸ *Id.*

This article also identifies some important shortcomings in the doctrine and outlines modifications that would improve its functioning, improvements that would quiet the chorus of criticism that several commentators have directed at the doctrine.⁹

Part I provides background information concerning the doctrine of qualified immunity and its application to excessive force cases. Part I also considers the policy debates that the doctrine has bred, concluding that on balance qualified immunity serves two important functions that give the doctrine purpose. Part II defends the doctrine in excessive force cases against three criticisms: that conduct cannot be “reasonably unreasonable,”¹⁰ that summary judgment is ill-matched to the factual and legal questions posed by qualified immunity arguments,¹¹ and that the term “clearly established” is anything but.¹² Part II also responds to the criticisms hurled at the qualified immunity doctrine, demonstrating that conduct can be “reasonably unreasonable,” arguing that through limited discovery qualified immunity would become better suited for summary judgment, and suggesting standards for defining “clearly established law.” Part III concludes the article and recapitulates its major points.

I. BACKGROUND

A. THE DOCTRINE OF QUALIFIED IMMUNITY

Simply put, if an officer’s conduct, viewed in the light most favorable to an excessive force plaintiff, did not violate a clearly established constitutional right at the time of the incident, the defendant can avoid standing trial for the alleged tort. The contemporary standard¹³ for qualified immunity is most clearly articulated in *Harlow v. Fitzgerald*,¹⁴ *Anderson v. Creighton*,¹⁵

⁹ Id.

¹⁰ See *infra* Part II-A.

¹¹ See *infra* Part II-B.

¹² See *infra* Part II-C.

¹³ See, e.g., Barbara Armacost, *Qualified Immunity: Ignorance Excused*, 51 Vand. L. Rev. 583 (1998) and Alan Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 Am. U. L. Rev. 1 (1997) for excellent historical descriptions of the development of the doctrine.

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

¹⁵ *Anderson v. Creighton*, 483 U.S. 635 (1987).

and *Saucier v. Katz*.¹⁶ In *Harlow*, the Supreme Court first articulated the modern view of qualified immunity.¹⁷ There, the plaintiff sued the President of the United States and several of his senior advisors for conspiring unlawfully to discharge him from the Air Force.¹⁸ Defendant Harlow argued that he had acted in good faith and had had no reason to believe a conspiracy existed.¹⁹ Asserting that the social costs of frivolous litigation 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,” Justice Powell found for the majority that the defendants could assert qualified, but not absolute, immunity.²⁰ The Court held that this immunity shields government agents from liability for civil damages so long as their conduct does not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.”²¹

In *Anderson*, the Court refined *Harlow*’s statement of the doctrine by defining “clearly established law” and by holding that the Fourth Amendment itself represented far too broad a standard to constitute clearly established law.²² The court found that if something as general as a constitutional amendment qualified as clearly established law, then officers in the field would lack guidance entirely.²³ Instead of the “extremely abstract rights” that Creighton claimed Anderson violated, in order to escape a defendant’s motion for summary judgment, a plaintiff would need to show that “the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.”²⁴ The phrase

¹⁶ *Saucier v. Katz*, 533 U.S. 194 (2001).

¹⁷ *Harlow*, 457 U.S. at 802.

¹⁸ *Id.* at 802-3.

¹⁹ *Id.* at 804.

²⁰ *Id.* at 814-15.

²¹ *Id.* at 818. In a footnote, the *Harlow* court made an important observation, distinguishing in theory but equating in practice constitutional violations brought against state officials under 42 U.S.C. § 1983 and “suits brought directly under the Constitution against federal officials.” *Id.* at 818 n.30. These latter suits, known as *Bivens* actions after a prototypical case, will remain indistinguishable from § 1983 litigation for the purposes of this article.

²² *Anderson*, 483 U.S. at 639.

²³ *Id.* As Justice Scalia argued for the majority, “if the test of ‘clearly established law’ were to be applied at this level of generality, it would bear no relationship to the ‘objective legal reasonableness’ that is the touchstone of *Harlow*.” *Id.*

²⁴ *Id.* at 640.

“clear contours” has become the touchstone for many qualified immunity scholars who have searched for a definition of “clearly established” law.²⁵

In *Saucier*, the Court held that qualified immunity applied to excessive force cases. A military policeman shoved Katz – the plaintiff – into a van in the wake of Katz’s protest of Vice President Al Gore’s speech at a decommissioned army base in San Francisco.²⁶ Elliot Katz unfurled a banner as Gore began speaking, an action that Donald Saucier and other agents viewed as threatening to the Vice President.²⁷ After the district court denied Saucier summary judgment, the Ninth Circuit affirmed, finding that the defendant’s actions, as alleged by the plaintiff, were “objectively unreasonable.”²⁸ More importantly, the court of appeals asserted, “the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim.”²⁹

The Supreme Court reversed, finding that the Ninth Circuit had misstated the standard for qualified immunity.³⁰ Justice Kennedy, writing for the Court, began by describing the nature of qualified immunity as “an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.”³¹ The Court then observed that the Ninth Circuit had reversed the proper order of the immunity calculus; instead, a court must first examine whether a constitutional right would have been violated based on the plaintiff’s allegations.³² If so, the court must then explore whether the plaintiff’s alleged right was clearly established at the time of the incident.³³ Referring to the “clear contours” language in *Anderson*, Justice Kennedy asserted that the inquiry hinges on “whether it would

²⁵ See *infra* Part II-C; see also Karen M. Blum, *Qualified Immunity: A User’s Manual*, 26 Ind. L. Rev. 187, 202 (1993).

²⁶ *Saucier*, 533 U.S. at 197-99.

²⁷ *Id.* at 198.

²⁸ *Katz v. U.S.*, 194 F.3d 962, 970 (9th Cir. 2000).

²⁹ *Id.* at 968. (quoting, among others, *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1322 (9th Cir. 1995)). This issue will be taken up in Part II-A.

³⁰ *Saucier v. Katz*, 533 U.S. 194 (2001).

³¹ *Id.* at 200-1 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original)).

³² *Saucier*, 533 U.S. at 201.

³³ *Id.*

be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”³⁴ Such unlawfulness can be deduced not only from directly relevant statutes but also from analogous case law.³⁵ In the instance at hand, the plaintiff, Katz, failed to demonstrate that clearly established law prohibited the defendant’s conduct.³⁶

The Court went further in an effort to preempt the criticisms of the concurrence that its formulation enabled “reasonably unreasonable conduct.” Justice Kennedy explained the “further dimension” that qualified immunity adds to the standard reasonableness calculus:

The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer’s mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.³⁷

In other words, for the officer to lose the benefit of qualified immunity, not only must the conduct be unreasonable but the officer’s application of the most relevant legal standard to the situation at hand must also lack a reasonable basis.

Writing in concurrence, Justice Ginsburg, along with Justices Stevens and Breyer, sought to consolidate, as the Ninth Circuit did, the qualified immunity inquiry into the simple question of “whether officer Saucier, in light of the facts and circumstances confronting him, could have reasonably believed he acted lawfully.”³⁸ Under this approach, the two-part test recommended by *Anderson* would not constitute an appropriate model for excessive force cases, an area of the law that is undergoing continuous change.³⁹ But the majority’s test is the

³⁴ *Id.* at 202.

³⁵ *Id.* See *infra* Part II-C.

³⁶ *Saucier*, 533 U.S. at 209.

³⁷ *Id.* at 205.

³⁸ *Id.* at 211.

³⁹ *Id.* at 214.

regnant standard for qualified immunity, even in excessive force cases. An examination of how well this doctrine relates to the delicate real-world interactions between police officers and the civilians they serve occupies the next section.

B. POLICY ANALYSIS

Public policy seeks to balance the need to protect law enforcement officers from frivolous lawsuits against the desire to support citizens in serious ones.¹ This section addresses various data and policy arguments presented by police unions and others in favor of early dismissal of unworthy cases. Most importantly, these arguments revolve around costs and deterrence. Groups like the National Association of Police Organizations (“NAPO”) argue that litigation against law enforcement has proliferated over the years and that officers and/or their employers are forced to spend increasing amounts of money defending against frivolous suits.⁴⁰ They also argue that the specter of a trial negatively affects officers’ behavior on the job in a serious way.⁴¹ The trend of “depolicing” or of civilian municipal leadership failing to support the efforts of law enforcement has exacerbated the situation, as was evident from an interview I conducted with Detective Jesse H. Grant, an Oakland, California, police officer.⁴²

Critics contend, however, that the policy arguments, if anything, tilt in favor of abolishing qualified immunity. Alan Chen,⁴³ Barbara Armacost,⁴⁴ and others argue that because agents are indemnified by the government, they have little reason to fear litigation, or at least to allow that fear to impact their job performance. In addition, some argue that the courts have moved away from relying on deterrence and have focused strictly on costs.⁴⁵ They contend that qualified immunity im-

⁴⁰ See Brief of Amicus Curiae National Association of Police Organizations and National Law Enforcement Officers’ Rights Center, in Support of the Petitioner at 2, *Saucier v. Katz*, 533 U.S. 194 (2001) (No. 99-1977) (hereinafter *NAPO Amicus*).

⁴¹ *Id.*

⁴² Interview with Jesse H. Grant, Detective, Oakland Police Department’s Special Victims Unit, in Somerville, Massachusetts (Jan. 14-16, 2003). Detective Grant works as a patrolman and an investigator in the Oakland (Calif.) Police Department’s Special Victims Unit. He graciously provided his time and insights for this article.

⁴³ Chen, *supra* note 13.

⁴⁴ Armacost, *supra* note 13.

⁴⁵ *Id.*

poses more costs, by creating uncertainty and the potential for interlocutory appeals, than it saves, by terminating lawsuits at an early stage.⁴⁶ Upon careful examination of these various claims, it becomes clear that some form of qualified immunity is warranted by the policy arguments.

1. *Reducing Costs and Deterring Crime Through Qualified Immunity*

It is hard to deny that the more time police officers spend at trial defending their conduct, the less time they spend patrolling the streets, the more money their departments expend in their defense, and the more frequently the officers will second-guess certain behaviors in the heat of the moment. These drawbacks may well be justified for the sake of society's prevention of tortious and unreasonable conduct on the part of law enforcement agents. Nevertheless, police agencies, Supreme Court justices, and some scholars highlight the important role that qualified immunity can play in reducing unnecessary costs and in improving deterrence of crime.

In its amicus brief in support of the *Saucier* petitioner, NAPO addressed several concerns related to costs and deterrence.⁴⁷ It began by asserting that officers currently face too many lawsuits related to their conduct, litigation that generally is resolved in their favor and therefore wastes taxpayer time and money.⁴⁸ It pointed to an "ever increasing number of lawsuits against law enforcement officers" and the threat that increase poses to the general public interest.⁴⁹ The increased threat of lawsuits, according to this argument, deters effective police performance, thereby diminishing public safety.⁵⁰ NAPO referred to Justice Scalia's assertion in *Anderson v. Creighton*⁵¹ that permitting frivolous lawsuits against law enforcement to go to trial "entail[s] substantial social costs, including the risk

⁴⁶ *Id.*

⁴⁷ See generally NAPO Amicus, *supra* note 40.

⁴⁸ *Id.* at 2.

⁴⁹ *Id.*

⁵⁰ *Id.* at 7-8. NAPO claimed that the Ninth Circuit's ruling in *Saucier* "places officers at risk of undue interference in the performance of their duties" and "directly impacts public safety, as officers become reluctant to use any force while restraining, arresting, or frisking an individual, for fear of being sued for any force that they use." *Id.*

⁵¹ 483 U.S. 635 (1987).

that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.”⁵²

Several scholars echo NAPO’s concerns. Richard Fallon and Daniel Meltzer describe the fears of the Supreme Court in *Harlow v. Fitzgerald*,⁵³ explaining that such litigation works its evils by deterring officers through the threat of personal liability. Barbara Armacost notes that such liability begets poor law enforcement, which in turn harms the very people the officers are sworn to protect.⁵⁴ The chief of the Federal Bureau of Investigation Academy’s Legal Instruction Unit echoes these sentiments.⁵⁵ Thus, at least in theory, the proliferation of lawsuits appears to involve serious risks⁵⁶ to agents as well as the public.

Of course, this entire edifice hangs on the assumption that law enforcement agents regularly face *personal* liability for their conduct when acting under color of law. Fallon and Meltzer challenge this premise.⁵⁷ They contend that in most situations, the police department and/or the officers’ union make use of a legal defense fund while the officer need not expend a

⁵² *Id.* at 638. In poetic language, another court found that the danger of being sued might “dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.” *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

⁵³ See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1821 (1991).

⁵⁴ Armacost, *supra* note 13, at 586. Armacost observes that the system’s “unbalanced incentive structure may drive officials toward inaction, underenforcement, delay and other defensive tactics that limit their personal costs but disadvantage the public.” *Id.* See also Peter H. Schuck, *Suing Government* 68-77 (1983).

⁵⁵ Daniel L. Schofield, *Personal Liability – the Qualified Immunity Defense*, FBI Law Enforcement Bulletin, (March 1990) (no page numbers provided), *quoted in NAPO Amicus*, *supra* note 40, at 11. The FBI Academy’s Legal Instruction chief asserts that “the fear of personal liability can seriously erode this necessary confidence and willingness to act. Even worse, law enforcement officers who have an unrealistic or exaggerated fear of personal liability may become overly timid or indecisive and fail to arrest or search to the detriment of the public’s interest in effective and aggressive law enforcement.” *Id.*

⁵⁶ NAPO also argues that the increase in lawsuits hampers recruiting efforts. In its words, “It is no wonder that police departments are having difficulty recruiting officers, with poor morale being the biggest obstacle to retaining current officers and a major factor in recruiting new ones.” *NAPO Amicus*, *supra* note 40, at 3. Fallon and Meltzer echo this sentiment, noting that the *Harlow* court feared that a proliferation of litigation “harmed the public interest by deterring able persons from entering public service.” Fallon and Meltzer, *supra* note 53, at 1821.

⁵⁷ Fallon and Meltzer, *supra* note 53, at 1822.

penny of his or her own.⁵⁸ Thus, Fallon and Meltzer contend that the entire policy argument rests on a false assumption.

Nonetheless, despite the unlikelihood of an officer facing personal liability, frivolous litigation imposes serious secondary costs on his or her conduct. First, contributions or premiums paid to a legal defense insurance plan will likely increase with the amount of litigation the officer faces. Second, the officer's career may endure a stain or stigma despite a victory on the merits of an excessive force case. Third, the department, as the officer's employer, may impose discipline, whether formal or informal, on any officer's involvement in litigation, whether successful or unsuccessful. Suspensions or unpaid leave may accompany lawsuits faced even by officers who are ultimately victorious in court. Thus, litigation indeed affects officers' conduct, in the heat of the moment, whether reasonably or not.⁵⁹

This effect dovetails with a growing tendency toward "de-policing" that has become prevalent in several of America's urban cores.⁶⁰ According to many officers, recent years have seen an increase in lawsuits and informal complaints brought against law enforcement, a correlate tendency in departments to steer officers away from necessarily risky conduct in do-or-die situations, and a concomitant decline in officer morale.⁶¹ In

⁵⁸ *Id.* Fallon and Meltzer state that "the notion that constitutional violations are the private wrongs of individual defendants has always been substantially fictitious." *Id.* Armacost agrees with these sentiments, arguing that:

the instrumental rationale has largely ignored or underestimated the impact of indemnification. If governmental officials do not bear the financial effects of individual liability then, as compared to their private counterparts, they may simply have less to gain or lose. In other words, given indemnification and absent some systemic bias, incentives might be balanced such that officials will, in fact, consider all the societal costs and benefits of their actions. If so, governmental liability would present little or no risk of overdeterrence, making qualified immunity unnecessary.

Armacost, *supra* note 13, at 586-87.

⁵⁹ Justice Scalia in a footnote in *Anderson* provides another justification by challenging the argument that "conscientious officials care only about their personal liability and not the liability of the government they serve." *Anderson*, 483 U.S. at 641 n.3. In other words, law enforcement officers may also have good reason to fear stigma and financial penalties attaching to their employer. In the *Anderson* context itself, Justice Scalia went on to find that the plaintiffs did not and could not "reasonably contend that the programs to which they refer make reimbursements [to defendants] sufficiently certain and generally available to justify" upsetting the balance of costs the Court has traditionally relied on. *Id.*

⁶⁰ Interview with Jesse H. Grant, *supra* note 42.

⁶¹ *Id.*

1981 in the State of California,⁶² residents placed 8,686 complaints against peace officers, of which 1,552 or 18% were ultimately sustained.⁶³ In 2000, Californians recorded 23,395 complaints, of which 2,395 or 10% were sustained.⁶⁴ This ballooning of claims – in particular unsuccessful ones⁶⁵ – is as troubling as it is dramatic. The Oakland, California, Citizens Police Review Board (“CPRB”) embodies this deterrent effect.⁶⁶ This board provides an independent forum in which aggrieved citizens can register their complaints about police conduct.⁶⁷ At the same time, Detective Jesse H. Grant, who has had personal experience appearing before the CPRB, notes that complaints, more than 80% of which were not sustained in 2002, impose a serious deterrent effect on police conduct.⁶⁸ Officers now more than ever think twice and act conservatively – although not necessarily safely – when engaged in violent altercations with or apprehensions of dangerous suspects.⁶⁹

Ironically, the presence of entities like the CPRB undermines the justification for excessive force lawsuits to begin with: by providing an avenue for voicing grievances over police conduct, such boards obviate some of the need for civil actions. Moreover, they reflect the deterrent effect that wide-open public access to disciplinary bodies can breed. Thus, there exist significant reasons for the courts to grant some kind of immunity to law enforcement officials in order to ensure the contin-

⁶² While nationwide statistics may or may not support the California data, the various state attorneys general share the concern of law enforcement across the country. In their amicus brief to *Saucier*, twenty-seven attorneys general argued that the case “directly impacts state law enforcement.” Brief of The States of Texas, Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Maryland, Massachusetts, Mississippi, Montana, Nebraska, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, and Washington as Amici Curiae in Support of Petitioner at 2, *Saucier v. Katz*, 533 U.S. 194 (2001) (No. 99-1977) (hereinafter *Attorneys General Amicus*).

⁶³ California State Attorney General’s Office, Crime and Delinquency Annual Report, Table 56 available at <http://caag.state.ca.us/cjsc/publications/candd/cd00/odb.pdf>

⁶⁴ *Id.*

⁶⁵ Based on the same statistics, unsustained claims increased threefold between 1981 and 2000. *Id.*

⁶⁶ Interview with Jesse H. Grant, *supra* note 42. See also generally City of Oakland Citizens’ Police Review Board, 2001 Annual Report (hereinafter *CPRB Annual Report*).

⁶⁷ CPRB Annual Report, *supra* note 66, at 1.

⁶⁸ *Id.* See also City of Oakland Citizens’ Police Review Board, 2002 Annual Report, at 5 (hereinafter *CPRB 2002 Annual Report*).

⁶⁹ Interview with Jesse H. Grant, *supra* note 42.

ued quality of their work. By increasing the threat of litigation, frivolous lawsuits can serve to deter officers' reasonable conduct, thus imperiling public safety and upending the delicate balance society seeks between forcefully fighting crime and respectfully treating all citizens.

2. *Counterarguments: Costs, Not Deterrence*

Despite the theoretical existence of the costs described above, many critics of the qualified immunity regime object that the concerns are misplaced. These commentators contend that Supreme Court jurisprudence on qualified immunity has focused unnecessarily on costs to law enforcement and the judicial system and not enough on deterrence. Furthermore, this line of reasoning goes, the justices have calculated the cost equation improperly: the present qualified immunity standard imposes undue costs on excessive force *plaintiffs*. The following discussion presents and responds to these arguments.

Alan Chen argues, first, that such plaintiffs encounter a system concerned more with costs than with actual deterrence.⁷⁰ He asserts that in *Harlow v. Fitzgerald*,⁷¹ the Court became more concerned with the litigation burdens placed on the court system than with the financial burdens imposed on offending officers.⁷² Yet, this criticism fails to recognize the relationship between costs and deterrence as a continuum: pressure on one end of the spectrum will ultimately diffuse across the continuum to the other end. Increasing the costs to the system, whether directly through personal liability or indirectly through liability imposed on departments or legal funds, will inevitably, if less immediately, affect the conduct of law enforcement agents.⁷³

Chen also engages the second argument by pointing to the "secondary burdens" – the "social costs specifically generated by the litigation of the qualified immunity defense" – faced by excessive force plaintiffs.⁷⁴ The party contending that the offi-

⁷⁰ See generally Chen, *supra* note 13.

⁷¹ 457 U.S. 800 (1982).

⁷² Chen, *supra* note 13, at 22.

⁷³ In addition, costs to these funds impose burdens on police unions or on the departments themselves. Such costs directly affect those institutions and indirectly impact local and state budgets.

⁷⁴ Chen, *supra* note 13, at 99.

cer abused his or her civil rights, according to Chen, must essentially try the case twice: at the pretrial qualified immunity hearing and then, if successful, at trial.⁷⁵ Without a qualified immunity option, the plaintiff, as well as the defendant, could save money by proceeding directly to trial.⁷⁶ Chen notes that when a defendant seeks interlocutory relief the costs multiply further; since qualified immunity decisions may under some circumstances be appealed before the beginning of trial, such appeals may consume large amounts of time and money and, as such, impose great burdens on all parties.⁷⁷ These concerns lead others to denounce qualified immunity as inefficient.⁷⁸

These potential costs raise the possibility that qualified immunity may not actually save time and money.⁷⁹ Yet, it cannot be forgotten that by short-circuiting unsuccessful lawsuits, the qualified immunity doctrine conserves time, money, and judicial resources. Coupled with the very real benefits it can provide police officers, these savings, however slight, render qualified immunity an important mechanism for preserving the balance between effective law enforcement and justice for constitutional tort victims. Having responded to the cost criticisms of the qualified immunity doctrine, this article now turns to the problems that critics have found lurking within the doctrine. The following Part takes up three important criticisms, offers rebuttals, and presents suggestions for improving qualified immunity.

II. A QUALIFIED DEFENSE: CRITIQUES OF THE DOCTRINE, RESPONSES, AND SUGGESTIONS FOR IMPROVEMENT

Given that public policy arguments favor the application of qualified immunity in excessive force cases, what problems lurk within the doctrine, and how can they best be addressed?

⁷⁵ *Id.* at 99-100.

⁷⁶ *Id.*

⁷⁷ *Id.* at 101.

⁷⁸ Blum, *supra* note 25, at 189. Blum concludes that "the costs of the defense may outweigh the benefits to such a degree that the defense should be abandoned as an inefficient allocation of resources." *Id.*

⁷⁹ Chen, *supra* note 13, at 102. Chen writes that "presently, there is no empirical foundation for the advocates of the present qualified immunity doctrine or its critics." *Id.* Such an empirical exploration would no doubt cast light on these issues, although it may prove difficult for critics and advocates of the doctrine to locate and evaluate the data in the same way.

First, many critics, including dissenting supreme court justices, believe that qualified immunity ineluctably and irrationally means finding that an officer “reasonably acted unreasonably,” since his or her actions may have been unreasonable as a matter of fact although he or she reasonably erred in legal interpretation.⁸⁰ According to these critics, the qualified immunity calculus is far too complex and should be reduced, instead, to an examination of the merits of the case.⁸¹ Yet, the “surface appeal” of this argument, in Justice Scalia’s felicitous phrase, is merely semantic.⁸² Under armacost’s eloquent comparison of fault and notice, as a matter of fairness, it is possible to reasonably act unreasonably.⁸³ This fairness is related to the question of exactly what qualified immunity immunizes against; the doctrine, by seeking to dispose of cases at summary judgment, constitutes for the most part immunity from trial.

Second, others, primarily Chen, believe that the unique nature of the factual and legal inquiry of qualified immunity jurisprudence renders it ill-suited for summary judgment disposition.⁸⁴ As a combination of law and fact, this argument contends that qualified immunity inherently demands findings of fact. These factual issues, however, can be set aside or taken in the plaintiff’s favor, in almost every case, leaving the judge well-positioned to find “reasonableness” as a matter of law.⁸⁵ Nevertheless, this critique presents a different factual problem that cannot be swept aside as easily. Because the factual first prong is often so critical, plaintiffs may simply allege sufficiently egregious facts in order to clear the summary judgment hurdle, thereby rendering the qualified immunity doctrine almost useless. In such cases, a limited discovery process designed to address only the immunity finding would solve many problems.

Third, and perhaps more importantly, this Part explores how the entire qualified immunity doctrine turns critically on the meaning of “clearly established.”⁸⁶ Depending on the thoroughness and specificity of the requirement, courts may or may

⁸⁰ See *infra* Part II-A.

⁸¹ *Id.*

⁸² *Anderson*, 483 U.S. at 643.

⁸³ *Armacost*, *supra* note 13, at 620.

⁸⁴ See *infra* Part II-B.

⁸⁵ Karen Blum argues similarly. See *Blum*, *supra* note 25, at 208, 225.

⁸⁶ See *infra* Part II-C.

not find a law to be clearly established. Building on the work of several scholars, interpreting the relevant case law, and considering police departmental guidelines reveals a reasonable and useful definition of clear establishment and can help dispel confusion and inconsistencies. First, it is critical to examine the issue of “double reasonableness.”

A. HOW CONDUCT CAN BE “REASONABLY UNREASONABLE”

The first major criticism leveled against the qualified immunity doctrine relates to the idea of double-counting reasonableness. According to this argument, the doctrine permits a law enforcement agent to act unreasonably as a matter of fact, under a Fourth Amendment or other standard, but to do so reasonably as a matter of law. This “reasonably unreasonable” conduct, according to critics, offends not only an appropriate sense of justice and balance in the system but also basic logic. Yet, despite what Justice Scalia in *Anderson* calls the “surface appeal” of this argument,⁸⁷ it poses only a minor, semantic obstacle to a proper and just understanding of the doctrine.

Justice Stevens, dissenting in *Anderson*, appears to have been among the first to provide this critique.⁸⁸ In his language, the Court appeared to “approve a double standard of reasonableness – the constitutional standard already embodied in the Fourth Amendment and an even more generous standard that protects any officer who reasonably could have believed that his conduct was constitutionally reasonable.”⁸⁹ According to the dissent, this double-insulation of the officer from liability comports neither with justice nor with fundamental logic.⁹⁰ Justice Stevens, who earlier contended “an official search and seizure cannot be both ‘unreasonable’ and ‘reasonable’ at the same time,”⁹¹ argued in *Anderson* that the Court counted “the law enforcement interest twice and the individual’s privacy interest only once.”⁹² Thus, he stated, there exist reasons of basic fair-

⁸⁷ *Anderson*, 483 U.S. at 643.

⁸⁸ *Id.* at 648.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *U.S. v. Leon*, 468 U.S. 897, 960 (1984).

⁹² *Anderson*, 483 U.S. at 664.

ness and linguistic integrity to reject the majority's articulation of the qualified immunity doctrine.⁹³

Yet, despite the pedigree of this argument,⁹⁴ it fails to pass muster as a genuine objection. Justice Scalia, writing for the majority in *Anderson*, noted that the seeming illogic of "double-reasonableness" in the Fourth Amendment context – which through its "unreasonable seizure" language governs excessive force cases – results from the collision of a fortuity with a two-part test.⁹⁵ To be sure, the qualified immunity doctrine involves factual and legal determinations, one directed to the conduct itself and the other to the application of relevant law to the facts. While this second determination, according to the Court, always involves a finding of reasonableness, the standard for the first, factual finding depends on the relevant conduct. In the Fourth Amendment context, since the Constitution bars "unreasonable" searches and seizures, the factual standard, like the legal one, is one of reasonableness. In Justice Scalia's words, "had an equally serviceable term, such as 'undue' searches and seizures been employed, what might be termed the 'reasonably unreasonable' argument . . . would not be available."⁹⁶ The linguistic misfortune of the double-reasonableness standard derives more from happenstance than from an inherent illogic. Put differently, in the context of tort law, the factual reasonability – if such is the relevant standard – applies to the breach portion of the analysis while the legal reasonability pertains to the duty.⁹⁷

In the particular context of excessive force cases, the need for both legal and factual insulation from liability becomes clear. Technically, the "unreasonable . . . seizure"⁹⁸ involved in an excessive force case is the force itself: it is constitutionally

⁹³ *Id.*

⁹⁴ Alan Chen provides a similar objection. Chen, *supra* note 13, at 50-52.

⁹⁵ *Anderson*, 483 U.S. at 643.

⁹⁶ *Id.* at 643.

⁹⁷ In its *Saucier* brief, NAPO offered a similar argument. The Association argued, quite simply, that "a police officer's conduct may be unreasonable within the meaning of the Fourth Amendment but nevertheless objectively reasonable for qualified immunity purposes." *NAPO Amicus*, *supra* note 40, at 17. Likewise, the state attorneys general, in equating Fourth Amendment search cases to seizure incidents, asserted that "reasonable mistakes that cause unreasonable searches are analytically indistinguishable from reasonable mistakes that cause unreasonable uses of force." *Attorneys General Amicus*, *supra* note 62, at 11.

⁹⁸ U.S. Const. amend. IV.

unreasonable to seize control of a suspect's body with greater force than is necessary.⁹⁹ Thus, the Constitution enjoins a police officer to employ only reasonable force in subduing an individual. Yet, this objective legal standard provides the officer precious little guidance absent the further clarification required by the "clear establishment"¹⁰⁰ element of the qualified immunity calculus – for instance, a rule that an officer may not use deadly force against a fleeing suspect unless the suspect poses a mortal or highly dangerous risk to others. The officer must then apply the relevant guidelines – in which constitutional reasonableness is embedded – to the facts at hand, an application that he or she can make either reasonably or unreasonably.

Put differently, there exist three main possibilities when a court is considering a defendant's conduct at a qualified immunity summary judgment hearing, two of which will end the litigation in the officer's favor and one of which will compel proceeding to trial and full-fledged discovery.¹⁰¹ The first possibility is that, under the plaintiff's version of the facts, the officer's actions comported with the factual requirements of the given conduct, such as a "reasonable search" of a suspect's home. In such an instance, the case would end since the defendant has established, on *Saucier*'s first prong, that his or her behavior implicated no constitutional concerns. The second possibility is that, again under the plaintiff's version of the facts, the officer's conduct might have violated the rules governing those actions as a matter of fact. But at the same time, the law in that particular area might not have been clearly established, thus rendering reasonable his or her otherwise problematic application of law to fact. This situation, of "reasonable misconduct" – whether the standard for the misconduct itself is reasonableness, undueness, gross negligence, etc. – would also result in early termination of the litigation since the officer would prevail on the second prong of *Saucier*. The third possibility is that the officer's conduct might, under the plaintiff's version of the facts, be factually problematic with clearly established law

⁹⁹ See *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 51 (1993).

¹⁰⁰ See *infra* Part II- C.

¹⁰¹ Interview with William Stuntz, Professor of Law, Harvard Law School, in Cambridge, Mass. (Jan. 7, 2003). William Stuntz developed this approach, upon which the author expands.

demonstrating, without question, its wrongfulness. In such a situation, if the defendant officer's version of the facts would put the case within the first possibility (i.e., no factual misconduct), a genuine issue of fact would exist and a trial would be necessary to resolve the conflict between the plaintiff's and defendant's versions of what happened.

Other scholars echo this view of the relevance of fairness to the legal prong of the qualified immunity test by noting that it would be unreasonable to expect police officers to make heat-of-the-moment decisions in the excessive force context that somehow take into account the niceties of legal balancing tests.¹⁰² In Armacost's understanding, "limiting constitutional damages liability to cases involving truly blameworthy conduct may best preserve the moral force of such liability."¹⁰³ An officer, in other words, should not be faulted for an inability to apply law that is not clearly established to the specifics of the altercation in which he or she is involved.¹⁰⁴ Thus, the "reasonably unreasonable" challenge, while helping to elucidate the complex doctrine of qualified immunity, fails to invalidate it. While it may appear superficially that conduct cannot simultaneously be reasonable and unreasonable, in fact it can.

B. MIXTURE OF FACT AND LAW

1. *Summary Judgment, According To Critics, Is An Inappropriate Stage At Which To Consider Qualified Immunity*

Despite the doctrine's escape from the double-reasonableness objection, it is precisely its dual requirements of factual and legal findings that leave it susceptible to the objection that pretrial summary judgment is inappropriate. Alan Chen, among others, observes that the mixture of fact and law required in a qualified immunity determination renders it seriously unfit for disposition at summary judgment.¹⁰⁵ In the ex-

¹⁰² Armacost, *supra* note 13, at 661. Armacost asserts that this second stage of clear establishment is necessary "because governmental officials are not blameworthy if their only error was in failing to predict how the courts would view the balance of interests that defines a constitutional use of force." *Id.*

¹⁰³ *Id.* at 680.

¹⁰⁴ *Id.*

¹⁰⁵ See generally Chen, *supra* note 13.

cessive force context in particular, in which factual disputes and permutations abound, one might question whether a jury ought to determine whether the officer can invoke immunity. On the other hand, as Justice Kennedy observed in *Saucier*, once the case is allowed to go to trial, the defendant officer effectively loses his or her immunity.¹⁰⁶ Factual objections notwithstanding, a judge in an excessive force case, as in any summary judgment hearing, ordinarily can consider undisputed facts and interpret disputed ones in the plaintiff's favor for the sake of assessing the legal issues involved.¹⁰⁷

To begin with, one wonders whether the judges involved in the *Saucier* case engaged in fact-finding or simply interpreted factual questions appropriately. It appears striking that Judge Thompson of the Ninth Circuit read the facts differently from Justice Kennedy and the majority, who in turn interpreted them differently again from the concurring justices.¹⁰⁸ Thus, three different sets of judges emerged with three different readings of the facts. This suggests either that they dabbled in some fact-finding of their own or that there does not appear to be a consistent way of interpreting the facts of the *Saucier* case for the purposes of summary judgment.

Chen asserts that precisely this kind of confusion frequently reigns in qualified immunity determinations.¹⁰⁹ He notes that even the *Anderson* court acknowledged the "fact-specific" nature of the qualified immunity inquiry.¹¹⁰ Chen also quotes a district court opinion to the effect that "it often will be

¹⁰⁶ See *Saucier v. Katz*, 533 U.S. 194, 200-1 (2001). Yet, while immunity may disappear, strictly speaking, the defendant can invoke a *defense* of qualified immunity even at trial. The critical question, again, is whether the case should be allowed to proceed to trial and the costs and benefits involved in that decision.

¹⁰⁷ During a motion for summary judgment, the court views the evidence in the light most favorable to the nonmoving party and determines whether there are any genuine issues of material fact. *Holley v. Crank*, 386 F.3d 1248, 1255 (9th Cir. 2004); see also Fed. R. Civ. P. 56(c).

¹⁰⁸ Recall that the Ninth Circuit believed that *Saucier's* actions in subduing *Katz* were objectively unreasonable; reading the facts in a light favorable to *Katz*, Judge Thompson concluded that no reasonable officer could have behaved as *Saucier* did. In reversing the Ninth Circuit, the majority of the Supreme Court, however, pointed to "the uncontested fact that the force was not so excessive that respondent suffered hurt or injury." *Saucier*, 533 U.S. at 209. And the concurring justices cleared *Saucier* of wrongdoing only because "at no point did *Katz* say specifically, that *Saucier* himself ... pushed or shoved" him. *Id.* at 212. These vastly different readings of the facts are surprising, to say the least.

¹⁰⁹ Chen, *supra* note 13, at 37.

¹¹⁰ *Id.* (quoting *Anderson*, 483 U.S. at 641).

impossible to assess the objective reasonableness of the defendant's conduct without a resolution of the factual disputes surrounding the incident from which the action arises."¹¹¹ He argues further that even the legal prong of the analysis – i.e., whether the relevant law was clearly established – depends on a determination of historical or “ultimate” fact – i.e., how clearly established the law actually was at the time of the incident.¹¹²

Yet, again, despite the “surface appeal” of this objection, it admits of a fairly straightforward resolution. David Ignall offers a simple and compelling rejoinder to this objection.¹¹³ An excessive force defendant moving for summary judgment can prevail only if, on the basis of undisputed facts or disputed facts viewed in the light most favorable to the plaintiff, the judge concludes as a matter of law that no violation took place.¹¹⁴ The plaintiff bears the burden of alleging facts that, if supported, would substantiate his or her claim of a constitutional violation; but if the plaintiff cannot proffer such facts, his or her case will fail.¹¹⁵

¹¹¹ Chen, *supra* note 13, at 41 (quoting *McGaughey v. City of Chicago*, 664 F. Supp. 1131, 1138 (N.D. Ill. 1987)).

¹¹² Chen, *supra* note 13, at 40.

¹¹³ David Ignall, *Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact*, 30 Cal. W. L. Rev. 201, 203 (1994).

¹¹⁴ *Id.* Ignall observes that “the defendant loses his shield of immunity not when the plaintiff can create a question about which reasonable minds could differ, but when the facts are sufficiently egregious so that reasonable minds, including the defendant's, could not differ as to the legality of the defendant's actions.” *Id.* at 215. See generally *Holley v. Crank*, 386 F.3d 1248, 1255 (9th Cir. 2004).

¹¹⁵ Ignall, *supra* note 113, at 215. Blum, *supra* note 25, at 208. Blum provides a helpful table of the different possibilities at summary judgment. She writes that: A district court's denial of a qualified immunity summary judgment motion must embrace the following conclusions of law:

- (1) The plaintiff has asserted a valid constitutional claim upon which relief may be granted;
- (2) The constitutional right defendant allegedly violated was clearly established at the time of the challenged conduct;
- (3) When the facts are undisputed, a reasonable officer, given the facts and circumstances confronting this officer at the time, would have understood her conduct to have violated plaintiff's clearly established right;
- (4) When the facts are in dispute:
 - (a) looking at the facts in the light most favorable to the plaintiff, a reasonable officer would have understood her conduct to have violated plaintiff's clearly established constitutional rights OR

The hypothetical situation depicted previously in this article illustrates this point.¹¹⁶ Most law enforcement agencies recognize some form of the rule that a peace officer may use deadly force to subdue a fleeing suspect only if that suspect poses a serious and imminent danger to the officer or to others.¹¹⁷ Thus, in order to overcome a defendant officer's qualified immunity summary judgment motion, a plaintiff shot in the back by the officer would need to allege that he or she posed no imminent danger to anyone, and that the officer used deadly force. Whether the facts are undisputed or simply viewed in a light favorable to the plaintiff, the plaintiff would clear the first, factual prong of the immunity inquiry. The plaintiff would also pass the second element of the test, since the rule barring the unreasonable conduct was clearly established at the time of the incident. Chen's worries about factual determinations are therefore misplaced: as at any summary judgment hearing, no factual findings are made. Instead, the judge simply accepts undisputed facts and views the disputed ones in the light most favorable to the nonmoving party¹¹⁸ – in this case, the plaintiff.

So too can the seemingly contradictory "interpretations" of the *Saucier* facts be resolved. The Ninth Circuit simply applied the qualified immunity test incorrectly, effectively collapsing the pretrial inquiry into a case on its merits.¹¹⁹ In so doing, the court easily made a finding of objective unreasonableness. The Supreme Court majority, however, never actually reached a finding of fact, whether undisputed or otherwise, because it announced that Katz's claim failed the second, legal prong of clearly established law.¹²⁰ Finally, the concurrence, motivated by the logic of the Ninth Circuit, nevertheless concluded that the plaintiff's failure explicitly to state a claim that could warrant relief – in this case his neglecting to name the defendant

(b) even accepting the defendant's version of the facts, a reasonable officer would have understood her conduct to have violated plaintiff's clearly established constitutional rights.

Id. at 225.

¹¹⁶ See *supra* Parts I, II-A.

¹¹⁷ See Interview with Jesse H. Grant, *supra* note 42.

¹¹⁸ See *Holley v. Crank*, 386 F.3d 1248, 1255 (9th Cir. 2004).

¹¹⁹ See *Katz v. U.S.*, 194 F.2d 962, 968 (9th Cir. 2000).

¹²⁰ See *Saucier v. Katz*, 533 U.S. 194, 209 (2001).

as the shover – doomed his case.¹²¹ Indeed, the concurrence found facts different from those of the Ninth Circuit, yet this discrepancy between what should be consistent findings may simply reflect the perceptive eye of Justice Ginsburg.

But what of Chen's contention that even the legal prong depends on factual findings? Indeed, strictly speaking, determining whether clearly established law in a given area existed at a particular time has factual elements to it. Yet, the clear establishment question fundamentally and overwhelmingly revolves around legal interpretation, albeit with residual elements of fact. As would any issue that can be resolved as a matter of law, a finding that a given law or rule was not clearly established should short-circuit a suit at the summary judgment stage.

In terms of the example above, whether a rule that prohibits using deadly force against a suspect in the absence of exigent circumstances was clearly established admittedly involves asking questions that involve facts. Such questions might include: How widespread was this rule? Was the average police officer aware of it? What was its source? Was it statutory? Did it derive from case law? Still, these questions are stereotypically those that a judge would ask in an effort to understand the state of the law, not the kinds of inquiries a jury would conduct. To be fair to Chen, however, the concept of clear establishment remains extremely murky, a problem that will be addressed later.¹²² Nevertheless, it dwells in the realm of the legal and therefore represents an appropriate target for early judicial disposition.

Thus, the objection that granting qualified immunity infringes an excessive force plaintiff's rights has been parried. But what if the current summary judgment arrangement threatens the rights of the accused officer? The existing formulation leaves the qualified immunity doctrine seriously vulnerable because a savvy plaintiff would surely allege facts that render the officer's conduct a constitutional violation, assuming the law was clearly established.¹²³ In such a situation, the de-

¹²¹ See *Id.* at 212.

¹²² See *infra* Part II-C.

¹²³ This last condition is not insignificant, but for the purposes of this section the clear establishment prong will be put on hold, assuming that it is met. Controlling the "clearly established" requirement will permit careful inspection of the role of facts and

fendant officer would rarely prevail at summary judgment. While some scholars might applaud such a result, it raises the question of what function the doctrine performs.

It is useful to return to the example¹²⁴ of the plaintiff whom the defendant officer shot in the back. Assume that the rule prohibiting using deadly force against fleeing suspects except in cases of exigency was indeed clearly established at the time of the shooting and that the defendant should reasonably have known about it. At the qualified immunity hearing, the plaintiff will simply allege that he or she posed no danger to anyone else, and that the defendant used deadly force. The judge will credit the plaintiff's allegations for the purposes of summary judgment and decline to award the defendant summary judgment based on qualified immunity. Plaintiffs in excessive force cases, therefore, have every incentive to claim particularly and perhaps exaggeratedly egregious behavior in order to clear summary judgment.¹²⁵

discovery. However, to the extent that the second prong involves some degree of resolution of factual issues, such as whether a law was as a matter of fact clearly established and whether the defendant should reasonably have applied it to his or her situation, those issues are considered here too; such factual elements of the legal issue may also require a mini-discovery to resolve fairly and finally. For instance, in *Prokey v. Watkins*, 942 F.2d 67 (1st Cir. 1991) the First Circuit drew precisely such a distinction, finding that:

Whether . . . a reasonable policeman, on the basis of the information known to him, could have believed there was probable cause is a question of law, subject to resolution by the judge not the jury. . . . [I]f what the policeman knew prior to the arrest is genuinely in dispute, and if a reasonable officer's perception of probable cause would differ depending on the correct version, that factual dispute must be resolved by a fact finder.

Id. at 73. In other words, there indeed exist factual elements of the legal prong of the qualified immunity analysis that may require resolution through full-fledged fact finding.

¹²⁴ See *supra* Part I.

¹²⁵ The judge might reduce incentives for the plaintiff to exaggerate the alleged conduct either by imposing sanctions, later at trial, for statements later found to be wantonly hyperbolic, or, perhaps more practically, by requiring the plaintiff to meet a certain burden of production in order to proceed. The Federal Rules of Civil Procedure already provide a method of punishing frivolous lawsuits and the threat of perjury prosecution would help to ensure truthful statements. See Fed. R. Civ. P. 11(b). In addition, the court could raise the evidentiary bar for proceeding to trial by, for instance, compelling the plaintiff to establish a *prima facie* violation by clear and convincing evidence. This would likely require a somewhat abrupt change in common law, a formal alteration of the federal rules, or congressional action, but could be of great use in winnowing meritless suits. For instance, in patent law an infringement defendant seeking to invalidate a plaintiff's patent must do so by clear and convincing evi-

2. *Summary Judgment and Discovery in Qualified Immunity Cases Can Be Improved*

a. *Bifurcating the Trial or Submitting Qualified Immunity Facts to a Jury*

Several scholars and judges have noticed this problem and have proposed various solutions. Ignall argues for doing away with pretrial qualified immunity hearings, sending the case directly to the jury instead, and bifurcating the jury's responsibility into the immunity findings and the case on the merits.¹²⁶ This would permit the jurors to make the relevant factual findings while still terminating the litigation at an early stage, prior to considering its merits.¹²⁷ In a different approach, Blum suggests furnishing the jury at a unified trial – i.e., one considering the case's merits and any immunity defense – with interrogatories aimed at a qualified immunity finding.¹²⁸ In her approach, the jury could receive special interrogatories on facts related to qualified immunity; based on the jury's findings, the judge could decide the ultimate legal question of whether the doctrine applies.¹²⁹ This division of labor would allow the jury to make the appropriate factual findings but would reserve the legal ruling for the judge.¹³⁰

Yet, while both of the above suggestions contain promise, they also suffer from important drawbacks. Ignall's proposed trial bifurcation would indeed engage the jury in a fact-finding exercise and would postpone the most intensive part of the trial – the case on the merits – until after a qualified immunity finding. Unfortunately, this bifurcation proposal would still require selecting and dealing with a jury, in effect constituting a mini-trial. The involvement of a jury would appropriately resolve important issues and may deter a plaintiff from alleging exaggerated facts, but by tilting too far toward an actual trial, this approach would effectively deprive the defendant of pretrial *immunity*. Likewise, Blum's suggestion of jury interroga-

dence. See *Bernhardt, L.L.C. v. Collezione Europa USA, Inc.*, 386 F.3d 1371, 1378 (Fed. Cir. 2004).

¹²⁶ Ignall, *supra* note 113, at 216-7.

¹²⁷ *Id.*

¹²⁸ Blum, *supra* note 25, at 226.

¹²⁹ *Id.*

¹³⁰ *Id.*

tories nicely reserves a factual role for a jury and a legal one for a judge but suffers from a similar deficiency: by waiting until trial to determine whether qualified immunity is appropriate, the interrogatory plan similarly squanders the savings that the doctrine would ordinarily provide.

b. Restricting Discovery

A more promising alternative involves engaging a judge-led abbreviated discovery before a hearing upon a motion for qualified immunity summary judgment. If appropriately limited, such a mini-discovery would resolve tricky factual issues and forestall a plaintiff's hyperbolic factual charges. All the while, this mini-discovery would also maintain the doctrine's conservation of judicial resources and protection of law enforcement defendants. Such discovery could be restrained to questions pertaining only to the qualified immunity test and thereby avoid the problems associated with full-blown, open-ended trial-caliber discovery. This idea appears to have first been broached by the Court in *Anderson*. There, Justice Scalia wrote in a footnote that:

If the actions [the defendant] claims he took are different from those [the plaintiffs] allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before [the defendant's] motion for summary judgment on qualified immunity can be resolved. Of course, any such discovery should be tailored specifically to the question of [the defendant's] qualified immunity.¹³¹

Thus, the possibility of mini-discovery receives significant support, albeit in a footnote, from the Supreme Court.¹³² Further-

¹³¹ *Anderson*, 483 U.S. at 646 n.6.

¹³² Blum suggests a similar idea, noting that:

In some cases, factual disputes can be resolved prior to trial simply by allowing limited discovery to proceed on the facts crucial to the qualified immunity defense. Rather than deny qualified immunity at this early stage (which inevitably leads to delay and more expense in the form of an interlocutory appeal), the district court should simply defer its decision on qualified immunity until the material facts are sufficiently developed or clarified so that a decision can be made at the summary judgment stage.

Blum, *supra* note 25, at 207-8.

more, abbreviated discovery should provide an added benefit by saving time and money for both plaintiff and defendant.

The Federal Rules of Civil Procedure contain abundant authority for limiting discovery when appropriate. In general, the catchall discovery rule outlines the normal course that discovery takes “[u]nless otherwise limited by order of the court in accordance with these rules.”¹³³ In addition, a district court may enter, upon the motion of any party, any protective order “which justice requires.”¹³⁴ Even without the parties’ presentation of any motions, the court is empowered to quash or modify third-party subpoenas as it sees fit under certain circumstances.¹³⁵ Finally, while in most federal litigation the parties are required to provide certain initial disclosures of documents, damages, and planned expert testimony, those burdens are lifted from certain actions and litigants.¹³⁶ In short, the Federal Rules generally contemplate the need to adjust the otherwise onerous obligations of discovery when appropriate.

This tendency can be seen, in particular, in two instances. In patent litigation, a determination of whether a patent is infringed¹³⁷ or invalid¹³⁸ depends heavily on the interpretation of the patents’ claims, or the exact nature of the invention at issue. In order to provide a jury of laypeople with a clear statement of what the invention claims, most district judges hold a “*Markman* hearing,” named after a landmark patent case establishing that judges determine the meaning of a patent’s claims as a matter of law.¹³⁹ Different courts hold *Markman* hearings, on the results of which the entire litigation may turn, at often vastly different stages of discovery, some on the very eve of trial.¹⁴⁰ What this illustrates is that the courts have wide discretion to tailor critical portions of discovery to suit the needs of a particular area of practice.

¹³³ Fed. R. Civ. P. 26(b).

¹³⁴ Fed. R. Civ. P. 26(c).

¹³⁵ See Fed. R. Civ. P. 45(c)(3)(B).

¹³⁶ See Fed. R. Civ. P. 26(a)(1)(E)(i-viii).

¹³⁷ 35 U.S.C. § 271.

¹³⁸ 35 U.S.C. §§ 102-103.

¹³⁹ *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995).

¹⁴⁰ David C. Doyle & Richard C. Kim, *Determining The Scope Of Patent Rights (Claim Construction) In Southern Cal.*, (Fed. Bar Assoc. Newsletter), San Diego Chapter 2003, at 4.

Another example can be found in trade secret litigation. Under California law, when a party sues for trade secret misappropriation, the plaintiff cannot commence discovery until he or she identifies with “reasonable particularity” the contents of the trade secret itself.¹⁴¹ The purposes of this provision include “assist[ing] the court in framing the appropriate scope of discovery,” permitting the defendant to formulate a well-reasoned defense, and generally preventing a trade secret plaintiff from embarking on a “fishing expedition” designed to harass a competitor defendant.¹⁴² The provision is binding on federal courts as well as California courts.¹⁴³ Thus, there exist mechanisms for federal courts to impose appropriate limits upon otherwise untamed discovery. Such limits could be applied to the area of qualified immunity determinations in excessive force cases as well.

To be sure, the mini-discovery alternative in this context is not without its problems. First and foremost, both Blum¹⁴⁴ and Chen¹⁴⁵ question whether discovery can be limited in any meaningful way. Chen observes that “the facts relevant to the immunity issue will be precisely the same facts necessary for the evaluation of liability” on the merits.¹⁴⁶ Because the “substantive constitutional law inquiry and the qualified immunity inquiry are intertwined,” contends Chen, there can be no principled distinction between full-fledged discovery and one limited to the immunity question.¹⁴⁷

It is possible, however, to outline limiting principles that could regulate an abbreviated discovery. First, the judge may restrict discovery on the *legal* prong of the analysis to the factual issues contained therein, for example, the sources of law that would establish whether the conduct in question was prohibited by clearly established law.¹⁴⁸ While, to be sure, a trial jury could also be charged with finding such facts, the judge

¹⁴¹ Cal. Civ. Proc. Code § 2019.210 (West 2005).

¹⁴² *Computer Economics, Inc. v. Gartner Group, Inc.*, 50 F. Supp. 2d 980, 985 (S.D. Cal. 1999).

¹⁴³ *Id.* at 991; *see also* *Vermont Microsystems, Inc. v. Autodesk, Inc.*, 88 F.3d 142, 147 (2d Cir. 1996); *Del Monte Fresh Produce Co. v. Dole Food Co., Inc.*, 148 F. Supp. 2d 1322, 1325-26 (S.D. Fla. 2001).

¹⁴⁴ Blum, *supra* note 25, at 208-9.

¹⁴⁵ Chen, *supra* note 13, at 74.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *See infra* Part II-C.

could order limited discovery, with the judge as fact-finder, revolving around those circumstances. In this regard, documentary discovery could be restricted to directives and regulations¹⁴⁹ available to the officer from the police department at the time of the incident. The plaintiff could also be permitted to propound interrogatories¹⁵⁰ upon the officer and to request admissions¹⁵¹ related to whether the officer knew or should have known that his or her conduct was impermissible. The plaintiff could also seek discovery into the practices that the police department employs to share relevant legal information with its officers. Ultimately, either side could move for summary judgment or partial summary judgment, at which point the judge would decide whether the law proscribing the officer's behavior was clearly established at the time of the incident.

Second, the judge could open discovery to the factual issues involved in whether the officer's conduct *violated* clearly established law but limit the kinds of evidence that could be adduced to affidavits and eyewitness testimony, for instance. In a typical summary judgment motion, the parties introduce declarations of undisputed matters.¹⁵² In addition, the court must view disputed matters in the light most favorable to the nonmoving party.¹⁵³ Thus, if the officer moves for summary judgment on qualified immunity grounds, the plaintiff can avoid summary judgment by introducing sworn declarations testifying to his or her version of the events – assuming, of course, that the plaintiff's version substantiates a violation of clearly established law. This arrangement would empower the plaintiff but also require him or her to submit statements sworn under penalty of perjury, unlike a complaint in which bare allegations can be presented.

In addition, by excluding other forms of evidence – say, forensic or ballistic reports – the judge could conserve time and money by adjudicating only the reliability of various sworn statements. Hiring independent experts to pore over test results can occupy many months and can cost the parties tens of

¹⁴⁹ In federal court, parties obtain documentary discovery through Fed. R. Civ. P. 34.

¹⁵⁰ See Fed. R. Civ. P. 33.

¹⁵¹ See Fed. R. Civ. P. 36.

¹⁵² See *Orsini v. O/S Seabrooke O.N.*, 247 F.3d 953, 955 (9th Cir. 2001).

¹⁵³ *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996).

thousands of dollars. While certain tests might ultimately become necessary at trial, the judge could reasonably limit discovery to weighing the sworn statements the parties submit.¹⁵⁴ Alternatively, the court, with the parties' consent, could choose its own ballistics or forensic expert to render an unbiased opinion. Through abbreviated discovery, judges could weed out frivolous claims at an early stage of litigation, while still providing plaintiffs with a fair opportunity to move forward. Having formulated an abbreviated version of discovery that resolves factual issues while conserving resources and protecting law enforcement defendants, this article moves on to explore what exactly defines a law as "clearly established."

C. MORE CLEARLY DEFINING "CLEAR ESTABLISHMENT"

1. *The Current State of the Law Leaves "Clear Establishment" Anything But*

Once the judge has resolved the factual issues involved in the first prong of the analysis, he or she must confront the requirement that the relevant law be clearly established. This section will explain how specifically the "clearly established" law must be defined and what sources of law qualify. The touchstone of clear establishment involves enabling an officer to identify the "clear contours" of the law, a term that should include analogous case law and departmental directives. First, though, it is useful to examine how the courts have interpreted "clear establishment."

Judge Thompson, in the Ninth Circuit *Saucier* opinion, offered a fairly expansive view of clear establishment that appeared limited only by the Fourth Amendment's injunction against "unreasonable search and seizure" and a vague balancing test.¹⁵⁵ As previously recounted, Justice Scalia in *Anderson*, echoed by Justice Kennedy in *Saucier*, stated,¹⁵⁶ "the contours of the right must be sufficiently clear."¹⁵⁷ However, this confusion, combined with the ambiguity of the term "clear contours,"

¹⁵⁴ The judge might also, more radically, admit direct and cross-examination only of the parties involved – the defendant officer and the excessive force plaintiff. This option might require an amendment to Rule 56 of the Federal Rules of Civil Procedure.

¹⁵⁵ See *Katz v. U.S.*, 194 F.3d 962, 968 (9th Cir. 1999).

¹⁵⁶ See *supra* Part II-A.

¹⁵⁷ *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

hardly defines the limits of clear establishment if at all. Blum observes that, according to several circuit court decisions, “when the right in question is subject to a balancing test, the right will rarely be found clearly established.”¹⁵⁸ Yet, says Blum, “even within the same circuit, there is not always agreement on whether the contours of the right have been clearly established.”¹⁵⁹ Nevertheless, the meaning of “clear establishment” need not vary according to the details and context of every particular case.

2. *Outlining the Contours of Clear Establishment*

Instead, by piecing together portions of Supreme Court opinions, the ideas of various scholars, and public policy considerations, it is possible to formulate a useful and uniform understanding of clearly established law. The definition of the elusive term should encompass statutes, judge-made law, analogous cases, and even relevant police department regulations designed to interpret and give effect to recent court rulings. These various sources of law provide a range of different areas with which society can expect its law enforcement agents to be familiar. Finally, as Barbara Armacost suggests, the clearly established law requirement should be relaxed to include an exception for truly egregious conduct.

To begin with, directly applicable statutes appear to be squarely within the contemplation of the Court in its language of “clear contours.” Analogous case law, and by extension clearly on-point case law, are explicitly mentioned in *Saucier*. There, Justice Kennedy stated that:

Assuming, for instance, that various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard.¹⁶⁰

¹⁵⁸ Blum, *supra* note 25, at 200 and accompanying cases in n.58.

¹⁵⁹ *Id.* at 202.

¹⁶⁰ *Saucier*, 533 U.S. at 202-3.

The Court thus provides some guidance in defining clearly established law by accepting the role of indistinguishable facts as a valid form of such law.¹⁶¹ In this way, judicial determination of the legal prong at a qualified immunity hearing may revolve around competing briefs, alternately equating and distinguishing the facts of a relevant case from those in the situation at hand. In another recent case, the Supreme Court stated that the purpose of the “clearly established” language is to provide law enforcement with “fair warning” that their conduct violates established law even in novel factual circumstances.¹⁶²

The Fourth Amendment and excessive force contexts seem particularly well suited to analogous law determinations. As Ignall notes, criminal defendants have helped place Fourth Amendment issues among the most litigated in the country by challenging various rules and thereby helping to clarify the substantive law of criminal procedure.¹⁶³ Detective Grant avers that officers in the Oakland Police Department, as well as those in several others in Northern California, receive monthly bulletins from the county district attorney keeping them apprised of recent developments in relevant case law.¹⁶⁴ These updates should serve the notice function that, according to Armacost, ensures the fair treatment of defendant officers.¹⁶⁵

But what about consistency among the circuits? Analogizing cases with similar facts should extend to litigation drawn from outside of the circuit in which the hearing is held. Just as in most cases, applicable or analogous rulings inside a given circuit are considered dispositive while those from outside the circuit are persuasive, so too should cases offering analogous rules, standards, or facts enjoy dispositive value, if inside the circuit, or persuasive value, if outside. Unfortunately, Blum finds that there exist wide discrepancies in how different circuits defer to the clear establishment jurisprudence of their

¹⁶¹ See also Armacost, *supra* note 13, at 633.

¹⁶² Hope v. Pelzer, 536 U.S. 730, 740 (2002).

¹⁶³ Ignall, *supra* note 113, at 218.

¹⁶⁴ Interview with Jesse H. Grant, *supra* note 42.

¹⁶⁵ Armacost quotes a First Circuit opinion asserting that “whether the right was reasonably well settled at the time of the challenged conduct and whether the manner in which the right related to the conduct was apparent. . . . [C]ourts may neither require that state actors faultlessly anticipate the future trajectory of the law nor permit claims of qualified immunity to turn on the eventual outcome of a hitherto problematic constitutional analysis.” *Martinez v. Colon*, 54 F.3d 980, 988 (1st Cir. 1995), *quoted in* Armacost, *supra* note 13, at 620.

sister circuits, with the Fourth, Sixth, and Eighth Circuits being the least deferential.¹⁶⁶ It is therefore important to ensure that the different circuits give at least some effect to clear establishment rulings in all federal appellate courts; such a move might require amendments to the Federal Rules of Appellate Procedure or the rules of precedent of the individual circuits. This may not ensure uniformity of “clearly established law” across all circuits but it will promote some amount of consistency.

As for excessive force balancing tests, it would be unrealistic to expect officers in the heat of the moment to balance various public policy arguments. Armacost quotes a Seventh Circuit case to this effect, arguing that:

differences in the nature of the competing interests from case to case make it difficult for a governmental official to determine, in the absence of case law that is very closely analogous, whether the balance he strikes is an appropriate accommodation of the competing individual and governmental interests.¹⁶⁷

Still, officers should be aware of the *relevant case law* involved in those balancing tests and capable of applying the same logic to the situation they face. Armacost sums this up nicely in her own words, stating that:

qualified immunity protects from liability an official whose only error was in failing to predict how courts would evaluate the relevant competing interests. If, however, an official can be charged with “knowledge of the law” via the surrogate of “previously-decided case(s) with clearly analogous facts,” that official will be deemed blameworthy and qualified immunity will be denied.¹⁶⁸

¹⁶⁶ Blum, *supra* note 25, at 203-05.

¹⁶⁷ *Gregorich v. Lund*, 54 F.3d 410, 414 (7th Cir. 1994), *quoted in* Armacost, *supra* note 13, at 650. The *Gregorich* court also noted that “governmental officials are not expected to be prescient and are not liable for damages simply because they legitimately but mistakenly believed that the balancing of interests tipped in the State’s favor.” *Gregorich*, 54 F.3d at 414-5.

¹⁶⁸ Armacost, *supra* note 13, at 650-51 (quoting *Borucki v. Ryan*, 827 F.2d 836, 848 (1st Cir. 1987)).

Eschewing balancing tests as grounds for clearly established law poses no serious problems so long as analogous factual situations can form the basis for a finding of clearly established law.¹⁶⁹

In addition to analogous cases, clearly established law should also encompass the various rules and regulations formulated by individual police departments or county prosecutors. Detective Grant notes that Oakland police officers are responsible for learning and obeying departmental rules as well as for participating in ongoing and regular training seminars.¹⁷⁰ Any such departmental rules that concern constitutional conduct¹⁷¹ – whether they involve searches, arrest, or the use of force – should be considered clearly established law for qualified immunity purposes. After all, officers are on notice in theory and in practice of these regulations and it is perfectly fair to hold them responsible for following the rules. While such regulations may exceed the constitutional floor for determining Fourth Amendment violations, they offer instructive help in defining what constitutes a clearly established law.

These considerations can profitably be applied to our hypothetical case of the suspect shot in the back. In such a case, the plaintiff, in order to escape summary judgment on the legal prong, could pursue any number of avenues in order to show the clear establishment of the law barring the officer's conduct. The rule forbidding the use of deadly force against a fleeing suspect, absent exigency, could be formulated as a statute. Short of that, it could emerge as a standard from particular cases, whether inside or outside the circuit. It may also be nothing more than a vague statement in dictum, but cases with identical or similar fact patterns may apply to render it clearly established. Finally, individual police departments may issue regulations reciting a rule barring such conduct. In any such instance, the plaintiff ought to prevail at the qualified immunity hearing.

One exception should apply to this understanding of clearly established law as well as to the qualified immunity

¹⁶⁹ Armacost, *supra* note 13, at 650-51.

¹⁷⁰ Interview with Jesse H. Grant, *supra* note 42.

¹⁷¹ Regulations regarding non-constitutional matters, such as attire or hygiene requirements, would, of course, not qualify as clearly established law or form the basis for a private cause of action.

calculus in general. Armacost argues that certain conduct, based on facts alleged by an excessive force plaintiff, can be so egregious as to obviate summary judgment entirely.¹⁷² Such conduct, resembling behavior that fails the “shocks-the-conscience” test of due process, can be defined, according to Armacost, as “contain[ing] indicia of its own blameworthiness.”¹⁷³ In other words, the conduct, as alleged, is so plainly impermissible that clearly established law is unnecessary to establish a constitutional violation. Armacost cites, by way of example, a case in which an officer held a gun to a nine-year-old child’s head, threatening to pull the trigger, despite the absence of a threat to the safety of anyone.¹⁷⁴ The court there refused to dismiss on the basis of qualified immunity, despite the absence of a precisely analogous case, since “[i]t would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books.”¹⁷⁵ In other words, it is important to place certain limits on conduct that is especially repulsive but that is described in no previous case, since failing to do so would simply invite that egregious behavior.¹⁷⁶ Setting that exception aside, this subsection has developed and clarified the ill-defined idea of “clearly established law.” By drawing on statutes, dispositive and analogous case law, and departmental rules and regulations, it is possible to formulate a more thorough version of the requirements of the second, legal prong of the qualified immunity analysis.

III. CONCLUSION

The qualified immunity doctrine derives from society’s need to balance the competing concerns of effective crime-fighting and support for those who daily put their lives on the line for the community on the one hand, and ordinary citizens whose civil rights are grossly abused on the other. The Su-

¹⁷² See Armacost, *supra* note 13, at 661-63.

¹⁷³ *Id.* at 662.

¹⁷⁴ McDonald v. Haskins, 966 F.2d 292, 292-3 (7th Cir. 1992), cited in Armacost, *supra* note 13, at 662.

¹⁷⁵ McDonald, 966 F.2d at 295, quoted in Armacost, *supra* note 13, at 662.

¹⁷⁶ See also Ignall, *supra* note 113, at 218.

preme Court has formulated a standard of qualified immunity that hinges on two critical elements. To make out an actionable claim and avoid dismissal at summary judgment, an excessive force plaintiff must demonstrate first that the conduct, as alleged by the plaintiff, amounted to a constitutional violation. Second, after this factual showing, the plaintiff must also convince a judge that the conduct in question was forbidden by clearly established law of which any reasonable officer would be aware.

This doctrine has become especially important amidst a retrenchment in support for urban law enforcement. Unsustainable complaints against police behavior appear to be on the rise and, whether or not personal financial liability plays an important role in the calculus, the conduct of police officers seems to be influenced by these trends. All of these developments necessitate some system of terminating unjustified lawsuits at an early stage.

Yet, this seemingly simple qualified immunity standard actually contains great complexity. Supreme Court justices and scholars have questioned whether, in the excessive force context, the qualified immunity doctrine double-counts reasonableness and offers the defendant “two bites at the apple.” Ultimately, the “double-reasonableness” of the doctrine reflects happenstance and fundamental fairness more than a rational impossibility. Others have contended that the factual nature of excessive force cases renders them unfit for adjudication at the summary judgment stage. In most cases, though, the judge can simply assume the necessary facts in order to decide both the factual and legal prongs of the inquiry. Still, rather than abdicating the immunity investigation to the jury, courts might usefully employ some limited system of judge-led discovery in order to resolve thorny disputes of fact, to conserve judicial resources, and to deter false allegations. Finally, the definition of clear establishment is as murky as it is crucial. This article outlined a vision of what the term encompasses, ranging from statutes to analogous case law to departmental regulations. While certain problems continue to bedevil such an explication of clearly established law, it is possible to improve on the courts’ attempts to foster clarification.

By restricting, as the present qualified immunity doctrine does, liability in excessive force cases to constitutional violations of clearly established law, our legal system offers abused

plaintiffs and law enforcement the optimal balance of enabling effective crime-fighting and stigmatizing truly blameworthy conduct.¹⁷⁷ By providing for limited discovery and better defining the scope of clear establishment, our system can better equilibrate that balance and serve the interests of all.

¹⁷⁷ In closing, Armacost concludes her own thoughts with the following: "limiting, rather than expanding, the scope of liability for constitutional violations – by authorizing its use only against clearly and 'genuinely threatening' conduct – may be the best way to reinforce the special place of constitutional rights in our jurisprudence and . . . in the public consciousness." Armacost, *supra* note 13, at 680.