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**2016 November/December LD Brief**



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### Introduction

Hi all,

This is Premier’s second brief of the 2016-2017 season, and the topic is “Resolved: The United States ought to limit qualified immunity for police officers.” We’ve gotten a lot of great feedback over the past year on our free briefs, and while we can’t make them any freer, we can make them better. Please, let us know what you think! And send them around. Not everyone has the resources to pay for briefs and this is one important way to level the playing field. If you use these briefs please help us and direct other debaters to PremierDebate.com/Briefs. The more people that are aware of the service, the more likely it gets to those who need it most.

This edition of the Premier Debate brief was compiled primarily by Jacob Nails and Bo Slade. They worked really hard to provide some of the best evidence you’ll see. Send these coaches a thank you for their hard work!

Lastly, we want to remind the readers about standard brief practice to get the most out of this file. Best practice for brief use is to use it as a guide for further research. Find the articles and citations and cut them for your own personal knowledge. You’ll find even better cards that way. If you want to use the evidence in here in a pinch, you should at least re-tag and highlight the evidence yourself so you know exactly what it says and how you’re going to use it. Remember, briefs can be a tremendous resource but you need to familiarize yourself with the underlying material first.

Good luck everyone. See you ‘round!

Bob Overing & John Scoggin

Directors | Premier Debate

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# Aff



## Legal Implications



### Arbitrariness

#### Standards for immunity are unclear and hinge on the whims of the judge

Stemerman 2

Jonathan M. Stemerman (Lawyer, former clerk to Justice Randy J. Holland of the Delaware Supreme Court). Unclearly Establishing Qualified Immunity: What Sources of Authority May Be Used to Determine Whether the Law Is Clearly Established in the Third Circuit, 47 Vill. L. Rev. 1221 (2002). <http://digitalcommons.law.villanova.edu/vlr/vol47/iss5/8> [Premier]

The **absence of a clear**ly articulated **standard**, coupled with the **highly fact-sensitive** nature of the qualified immunity analysis, often allows the philosophical views of the judge or judges hearing the case to decide the outcome.' 5 ' For example, a judge taking a broad view of the sources of authority that may be considered is more likely to favor the plaintiffs position. 152 Conversely, judges taking a more narrow view of the sources of authority that may be considered are more likely to conclude that particular rights have not been clearly established for purposes of qualified immunity.' 53 Accordingly, when determining the likelihood of success of a claim in a case where qualified immunity is asserted, practitioners must look not only to the strength of the authorities that support their position, but also to the doctrinal position of the decision maker.1 54 V. CONCLUSION The Third Circuit has thus far failed to establish a clearly articulated standard concerning the sources of authority that may be properly considered when determining whether the law is clearly established for purposes of qualified immunity. 155 Although the foundations of a standard may be emerging, in the absence of any clearly articulated standard, the success of an assertion of qualified **immunity is largely dependent on the doctrinal leanings of the judge** or judges hearing the case. 156 Until the Supreme Court or Third Circuit announces a standard for judges, practitioners and officials to follow, in the absence of binding precedent, the question of whether a right is clearly established in the Third Circuit will remain unclear. 157

#### Studies show vast inconsistencies in standards for immunity across regions

Leong 15

Nancy Leong (Assistant Professor of Civil Rights, Constitutional Law, and Criminal Procedure at the University of Denver Sturm College of Law). “A Fresh Look at Qualified Immunity.” Jotwell. 3 December 2015. http://courtslaw.jotwell.com/a-fresh-look-at-qualified-immunity/ [Premier]

Nielson and Walker provide another interesting contribution to the empirical qualified immunity literature by examining disparities in the way that different circuits apply Pearson. For example, the Fifth Circuit chooses to reach constitutional questions 57.6% of the time, while the Ninth Circuit does so only 37% of the time. Another difference lies in the way that the circuits decide cases when they do choose to reach constitutional merits: the Ninth Circuit finds constitutional violations 16.4% of the time, while the Fifth Circuit does so only 1.3% of the time and the Sixth Circuit only 0.8% of the time. As Nielson and Walker observe, “**these circuit-by-circuit disparities may reveal a geographic distortion in the development of constitutional law**,” such that “one could reasonably fear that constitutional **law may develop quite differently in the various circuits**.” (p. 36.) While the numbers are small, the finding is sufficiently interesting—and perhaps sufficiently troubling—to warrant further examination by researchers. (This would be an interesting and feasible project for a student note.)

### Chills Litigation

#### Empirically, qualified immunity deters cases from even being brought to trial

Reinert 11

Alexander A. Reinert (Associate Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University), Does Qualified Immunity Matter?, 8 U. St. Thomas L.J. 477 (2011). http://ir.stthomas.edu/cgi/viewcontent.cgi?article=1261&context=ustlj [Premier]

In litigation brought pursuant to Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), most commentators agree that qualified **immunity plays a substantial role in limiting plaintiffs’ ability to recover compensation.** Many find this tradeoff acceptable, in part because of concerns of fairness to government official defendants and in part because courts may still play a central role in announcing the law without worrying over the retroactive effect their decision will have on the personal funds of the defendant official. This paper considers the different role that qualified immunity may play in Bivens and other civil rights litigation. Empirical support for the proposition that qualified immunity plays a significant role in filed cases is limited and more recent data call it into question. Working from the assumption that qualified immunity plays less of a role in filed cases than has been assumed, this paper considers other ways in which the defense of qualified immunity may affect the course of constitutional litigation. In particular, this paper focuses on the role that qualified immunity may play in case screening and reports on the results of a qualitative survey of civil rights practitioners. The results suggest that lawyers often take qualified immunity into account at the case-screening stage and indeed may in some cases avoid litigation in which qualified immunity is even a potential issue. **This** observation **has ramifications for the theory that qualified immunity enhances the law-announcing function of** federal **courts.**

### Civil Rights Litigation

#### QI is applied arbitrarily and distorts civil rights law in a way designed to discourage redress and cause confusion,

Hassel 99

Hassel, Diana. (Associate Professor, Roger Williams University School of Law) "Living a Lie: The Cost of Qualified Immunity." Missouri Law Review 64.1 (1999): 123-156. [Premier]

The problem with qualified immunity is not so much that the outcomes are¶ sometimes unfair but the fact that qualified immunity blocks a clear view of the¶ real limitations that exist in civil rights law. Civil rights law is, in effect, being¶ designed in the dark. Distinctions are being made about the types of cases that¶ will receive compensation and the types that will not. These distinctions are not¶ articulated as such; instead, the results are understood to be the result of the qualified immunity defense. As we have seen, for example, a procedural¶ complaint in the context of an employment dispute is more likely to survive the¶ qualified immunity defense than is a complaint about whether a police officer¶ used excessive force in the arrest of a dangerous suspect. Rather than¶ organizing civil rights law in these categorical ways, however, qualified¶ immunity makes the civil rights remedial system appear to be about individual¶ cases and the reasonableness of individual defendants.¶ Current qualified immunity doctrine serves as a means to diffuse conflict.¶ Without a clear rule that some kinds of civil rights harms will not be redressed,¶ there is minimal pressure for change. This "hiding of the ball" quality of¶ qualified immunity is why, in spite of many expressions of dissatisfaction with¶ the system, there had been little effective rallying for change. The reason the¶ discontent of the participants in this system has not led to a significant change¶ is that the terms of the debate are defined by the immunity system rather than¶ by the fundamental question of the extent of rights and liabilities in civil rights¶ actions. The civil rights remedial scheme organized around qualified immunity¶ thus has an inherently self-preserving or stabilizing quality. It allows for¶ tinkering at the margins, but fundamental recasting of the terms of the debate¶ is unlikely.¶ My assertion that qualified immunity has a camouflaging effect on civil¶ rights law is supported by a large body of scholarship that explores legal¶ regimes that define reality in a way that limits the ability of the participants in¶ the system to change it.'27 These scholars argue that when a legal system is¶ accepted as being the only available way to organize an activity and thus seems¶ inevitable, the legal system encourages acceptance of the status quo. 28 The insights gained by scholars working in this area are helpful to apply to the¶ qualified immunity standard in order to explore its hold on the civil rights¶ imagination. This analysis maps out the way a doctrine such as qualified¶ immunity can develop into an obstacle to the very aims it professes to¶ accomplish.

### Constitutional Stagnation

#### Qualified immunity encourages constitutional stagnation—rights never become “clearly established”

Beerman 9

Jack Michael Beermann (Professor of Law and Harry Elwood Warren Scholar, Boston University School of Law). “Qualified Immunity And Constitutional Avoidance.” Boston University School of Law Working Paper No. 09-51 (December 2, 2009). http://www.bu.edu/law/workingpapers-archive/documents/beermannj120209.pdf [Premier]

Pearson is another entry in the Court’s struggle to resolve a serious problem created by the standard for determining whether qualified immunity protects an official from damages liability in a constitutional tort case. Under current law, the qualified immunity is overcome only if the defendant violated a clearly established constitutional right of which a reasonable official in the defendant’s position should have known. In some circumstances, **repeated immunity findings can cause the law to stagnate.** With regard to constitutional claims that are likely to be litigated only in the constitutional tort context, **officials might repeatedly engage in the same conduct and successfully defend** damages suits **with qualified immunity**, leaving the scope of constitutional rights undetermined. Some lower courts recognized this and decided to address the merits of the constitutional claims before determining whether any right violated was clearly established at the time of the violation.10 Not only did the Supreme Court come to approve of this practice, in Saucier it held that federal courts were required to reach the constitutional merits before deciding on immunity.

#### Qualified immunity encourages courts to ignore constitutional questions

Friedman 16

Friedman, Leon (Joseph Kushner Distinguished Professor of Civil Liberties Law, Hofstra University; A.B., LL.B., Harvard University) "Qualified Immunity When Facts are in Dispute," Touro Law Review: Vol. 16: No. 3, Article 11. 2016. http://digitalcommons.tourolaw.edu/lawreview/vol16/iss3/11 [Premier]

Indeed, the Second Circuit and other circuits have had a doctrine that **avoids constitutional questions.**' Therefore a case is decided without getting to a constitutional question. It was easy for a court to say that a constitutional right was asserted, and we are not really sure whether there is such a constitutional right, but in any event it was not clearly established. Therefore, the defendants are entitled to qualified immunity. The trouble with such an approach is that you never know whether there is a constitutional fight. **Qualified immunity can go on forever**, because no one ever decides whether there was a constitutional right. Therefore, if the whole point is to establish a fight, then make sure everybody knows what it is, and enforce it thereafter. **By deciding** a case **on qualified immunity you stop the process from continuing.**

### Inherency

#### Qualified immunity super strong now – only the most outrageous conduct overcomes immunity

Hassel 09

Diana Hassel, Professor, Roger Williams University School of Law. B.A., 1979, Mount Holyoke College; J.D., 1985, Rutgers University School of Law at Newark. “Excessive Reasonableness.” 43 Ind. L. Rev. 117 [Premier]

In January 2009, **the Supreme Court, in Pearson** v. Callahan, once again attempted to bring some clarity to the qualified immunity regime. Pearson **gives discretion to** the **lower courts** in the sequence in which they address the issues raised by a qualified immunity defense to a constitutional claim. Rather than requiring that lower courts first determine whether a constitutional right has been violated before moving on to qualified immunity, the courts are permitted **to address whether the defendant is entitled to qualified immunity without ever reaching the constitutional issue.** This modification may give some relief to courts attempting to apply the qualified immunity defense, but it does not address fundamental problems at the heart of the qualified immunity doctrine. Meaningful improvements can only be made by examining the defense's basic underlying principles.**The Court's development of the qualified immunity doctrine has stretched the rationale underlying the defense to a breaking point**. **Instead of providing protection only to those government actors who violate the law unwittingly and reasonably, qualified immunity has metastasized into an almost absolute defense to all but the most outrageous conduct**. **The values of deterrence of unlawful behavior and compensation for civil rights victims have been overshadowed by the desire to protect** government agents, particularly **police officers, from almost all claims against them**. The balance originally struck by the qualified immunity defense-protection for the innocent wrongdoer versus compensation for the victim-has gone awry.

#### QI is basically absolute immunity – and it’s getting stronger!

Hassel 09

Diana Hassel, Professor, Roger Williams University School of Law. B.A., 1979, Mount Holyoke College; J.D., 1985, Rutgers University School of Law at Newark. “Excessive Reasonableness.” 43 Ind. L. Rev. 117 [Premier]

**The Saucier decision** also **reflects the increasingly protective nature of qualified immunity and the Court's transformation of the defense into a kind of absolute immunity**. Since its early adoption as a common law "good faith and probable cause" defense, **qualified immunity has grown steadily more favorable for defendants: it was transformed into an objective test** to protect defendants from lengthy litigation; **resolution** of qualified immunity **prior to** allowing the plaintiff any significant **discovery is favored**; **and** interlocutory appeals are allowed so that **a defendant need not wait until the end of trial to appeal a denial of qualified immunity.** 110 **It has come to be viewed** not merely **as** a defense against liability, but also **an "immunity from suit" similar to absolute immunity.** 111 **Protection of government agents** from civil rights claims **is seen as** [\*133] **particularly appropriate when the accusations stem from a violent confrontation** between a law enforcement official and an apparent law breaker. 112

#### S’quo law uses the objective reasonableness test

Hassel 09

Diana Hassel, Professor, Roger Williams University School of Law. B.A., 1979, Mount Holyoke College; J.D., 1985, Rutgers University School of Law at Newark. “Excessive Reasonableness.” 43 Ind. L. Rev. 117 [Premier]

**In Graham** v. Connor, the Supreme Court resolved any doubt about the appropriate standard to be applied when assessing the constitutionality of the use of force during a stop or arrest. Determining that the requirements of the Fourth Amendment were the proper focus of an analysis of the use of excessive force during an arrest or stop, **the Court announced that an "objective reasonableness" standard would apply.** **The** application of the "objective reasonableness" **standard requires "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."** **Factors such as the crime's severity**, the immediacy of the **threat to police** or others, and whether the suspect is **resisting arrest** or attempting to flee, **must be considered** when analyzing reasonableness. **The test is an objective one that must make "allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving." The Court emphasized that reasonableness "must be judged from the perspective of a reasonable officer on** [\*121] **the scene, rather than with the 20/20 vision of hindsight."**

#### Qualified immunity is strong now, and SCOTUS is leaning even more toward protecting public officials

Kinports 16

Kit Kinports, prof @ Penn State, Professor Kinports is a leading scholar of feminist jurisprudence, criminal law and federalism and an award-winning classroom teacher, The Supreme Court's Quiet Expansion of Qualified Immunity, 100 Minn. L. Rev. Headnotes 62 (2016). <http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1269&context=fac_works> p. 67-68 [Premier]

**The Court’s** tendency in recent cases to use a **different tenor in** **describing** the **qualified immunity** standard without explanation or acknowledgement may seem to be just a subtle shift in tone, but it **signals a potentially significant alteration in the Justices’ views of the relative weight owed to the interests of plaintiffs and defendants in §1983 litigation**. In Mullenix v. Luna, the most recent decision in this line of cases, the Court’s entire description of the controlling standard reads as follows:

**The doctrine of qualified immunity shields officials from civil liability so long as their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”** 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.”** “We do not require a case directly on point, but **existing** /// **precedent must have placed the statutory or constitutional question beyond debate**.” “Put simply, **qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.”**24

Noticeably absent from this summary of the law—which borrowed extensively from the modifications described above— is any reference to the countervailing interests in vindicating constitutional rights and compensating victims of constitutional injury. The need to balance these competing goals in fashioning the qualified immunity defense was recognized in Harlow v. Fitzgerald, and at least received lip service in later Supreme Court opinions that ultimately sided with the defendant.25 Even if just a shift in tone, these **generous characterizations of the qualified immunity defense can act to place a thumb on the scales favoring public officials in constitutional tort litigation and to justify dismissing an even greater majority of § 1983 suits on qualified immunity grounds**.2

#### Qualified immunity protects officers who make a reasonable mistake

Kinports 16

Kit Kinports, prof @ Penn State, Professor Kinports is a leading scholar of feminist jurisprudence, criminal law and federalism and an award-winning classroom teacher, The Supreme Court's Quiet Expansion of Qualified Immunity, 100 Minn. L. Rev. Headnotes 62 (2016). <http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1269&context=fac_works> p. 75 [Premier]

Rather, **the Court held** in Saucier v. Katz, **law enforcement officials are entitled to qualified immunity if they make a reasonable mistake “as to whether a particular amount of force is legal” in the circumstances confronting them**,58 explaining further in Brosseau v. Haugen that **the law governing the permissible use of force is “one in which the result depends very much on the facts of each case.”**59 The Court made a similar point in discussing the Fourth Amendment concept of probable cause in Anderson v. Creighton, concluding that **qualified immunity protects police officers who “reasonably but mistakenly” believe they have the probable cause needed to search or arrest**.60

#### Qualified immunity super forgiving now

Kinports 16

Kit Kinports, prof @ Penn State, Professor Kinports is a leading scholar of feminist jurisprudence, criminal law and federalism and an award-winning classroom teacher, The Supreme Court's Quiet Expansion of Qualified Immunity, 100 Minn. L. Rev. Headnotes 62 (2016). <http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1269&context=fac_works> p. 77-78 [Premier]

**the Justices’** amorphous **suggest**ion that **qualified immunity is a “forgiving”** rather than “demanding” **standard**—and the implication that **public officials who make “sloppy” errors may nevertheless satisfy qualified immunity’s objective reasonableness inquiry**— mirror the change in the tone used to characterize the qualified immunity defense that is discussed in Part I. Justice Sotomayor, dissenting **in Heien**, criticized **the majority**’s **insist**ence **on leaving “undefined” the objective reasonableness standard it was endorsing** in that case as well as the failure to “elaborat[e]” on the distinction between that Fourth Amendment standard and the qualified immunity inquiry, predicting that the difference “will prove murky in application.”69 **Given the Court’s tendency to qualify its precedents and thereby covertly expand the qualified immunity defense, it would not be at all surprising to find future § 1983 decisions citing Heien in referring to qualified immunity as a “forgiving” defense** and in **dismissing a government actor’s misunderstanding of constitutional doctrine as merely “sloppy”** rather than “plainly incompetent”

### Stagnation Impact—Tasers

#### Legal stagnation caused by police immunity undermines regulation of new tech like tasers

Blum et al. 13

Blum, Karen (Professor and Associate Dean at Suffolk University Law School; J.D., Suffolk University Law School; L.L.M., Harvard); Chemerinsky, Erwin (Dean and Distinguished Professor of Law, University of California, Irvine School of Law); and Schwartz, Martin (Professor of Law at Touro Law Center, a leading authority on and author of a multivolume treatise on Section 1983 civil rights litigation). "Qualified Immunity Developments: Not Much Hope Left for Plaintiffs," Touro Law Review: Vol. 29: No. 3, Article 9. 2013. <http://digitalcommons.tourolaw.edu/lawreview/vol29/iss3/9> [Premier]

Similarly, the Sixth Circuit in Embody v. Ward112 left undecided the question of whether the Second Amendment provides a right to bear arms within state parks.113 Where such a right was not clearly established at the time of the arrest, the officer was entitled to qualified immunity.114 And, in Hagans v. Franklin County Sherriff, 115 involving a repeated tasing of an individual after he resisted arrest,116 the court avoided the merits question: whether there was a Fourth Amendment violation.117 The court held that the law governing taser use on a suspect who was resisting arrest was not clearly established, and as a result, the officer was entitled to qualified immunity.118 **Qualified immunity often arises in cases involving** the use of **a taser**, which is a relatively new technology with **very little governing law**, and consequently, some courts have jumped to the second prong without resolving whether the use of the taser in the particular situation was unlawful.119 Like the Supreme Court, lower courts too have left constitutional issues unanswered as a result of Pearson.

### No Constitutional Basis

#### Qualified immunity has no legal basis, which leads to inconsistent application

Burney 16

Nathaniel Burney (Lawyer, former assistant to chief justice Warren Burger). “A Tiny Bit More on Qualified Immunity.” The Criminal Lawyer. 11 February 2016. http://burneylawfirm.com/blog/2016/02/11/a-tiny-bit-more-on-qualified-immunity/ [Premier]

The problem was, **the Supreme Court made up Qualified Immunity out of whole cloth.** They tried to find an existing legal principle to justify it, but when the law was enacted in 1871 there really wasn’t one. So they invented it. Instead of basing it on legal principles, they based it on “policy” principles, which translates to “what we think is best.” That’s a problem. When the Court replaces what the law is with what it thinks the law ought to do, things get really messy. Cases get decided based on the desired outcome, rather than on the application of a consistent and **predictable legal standard.** When you see confusing, inconsistent, or irreconcilable lines of cases, this is often the explanation. The rulings meander because they’re rudderless.

### Redundancy

#### Excessive force is necessarily unreasonable, so qualified immunity should not apply

Urbonya 89

Urbonya, Kathryn (Associate Professor of Law, Georgia State University), "Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force" (1989). Faculty Publications. Paper 472. <http://scholarship.law.wm.edu/facpubs/472> [Premier]

When subject to force during an arrest, plaintiffs in actions arising under section 1983 of the Civil Rights Act212 have alleged violations of both the fourth213 and fourteenth amendments.214 **Courts have disagreed about whether qualified immunity is available as a defense** to these claims.215 The United States Supreme Court's decisions in Anderson v. Creighton 216 and Malley v. Briggs 217 provide the framework for analyzing whether officials have qualified immunity when they use excessive force during an arrest. As discussed in the previous section, in both Anderson and Malley, the Court recognized two standards of reasonableness, one relating to the fourth amendment claim, the other relating to the issue of qualified immunity under section 1983.218 Determining whether conduct was objectively reasonable for the purpose of immunity requires consideration of the clarity of the law; objective reasonableness is to be "measured by reference to clearly established law."219 After Anderson, this determination involves consideration not only of the general law but also of the "contours" of the asserted right, which must be "sufficiently clear" to notify officials of unlawful conduct. 220 Although it is unclear how to ascertain the contours of a right, courts generally have studied decisions by the United States Supreme Court and circuit courts in determining the clarity of the law. 221 In addition, because the Harlow standard was designed to afford officials a pretrial resolution of the issue, 222 courts must also consider the procedural and substantive aspects of the defense when determining whether officials have qualified immunity. Application of the Harlow standard to excessive force claims under the fourth and fourteenth amendments indicates that **qualified immunity is not available** as a defense. It is not a defense to a violation of the substantive due process component of the fourteenth amendment because under that amendment conduct is actionable only if egregious. 223 **Because** the **immunity** defense **applies only to objectively reasonable conduct, it does not shelter conduct that is egregious**; such conduct signifies a greater degree of culpability and it is per se objectively unreasonable.

### Spillover

#### QI spills over into other areas of law

Brooks 13

Brooks, Rosa (2013), pf @ Georgetown Law, "The Trickle-Down War," Yale Law & Policy Review: Vol. 32: Iss. 2, Article 8. Available at: <http://digitalcommons.law.yale.edu/ylpr/vol32/iss2/8> [Premier]

In this brief Essay, I have focused on **policing**, the state secrets privilege in civil litigation, classified information in criminal litigation, immigration, First Amendment jurisprudence, and surveillance issues for the simple reason that these are the **[is one] area**s **in which I was able to find the largest amount of information suggesting a potential spillover of war into ordinary law and law enforcement.** However, many other areas call out for additional research. **For instance**, one might wish to look more broadly at various forms of judicial deference to the executive, to see if the patterns of deference emerging from national-security-related cases are correlated with an increase in deference in other kinds of cases. Stephen Vladeck has already done some valuable work in this and related areas, looking at the political question doctrine, the availability of Bivens remedies, federal common law defenses to state-law suits against government contractors, and **qualified immunity**. Ultimately, he notes: [As**] "national security"-based exceptions increasingly become the rule in contemporary civil litigation against government officers**-**whether with regard to** new 'special factors' under **Bivens**, new bases for contractor preemption under **Boyle**, proliferation of the political question doctrine, **or even more expansive reliance upon the qualified immunity defense-the line between the unique national security justifications giving rise to these cases and ordinary civil litigation will increasingly blur**. 9

#### QI protections are transsubstantive

**Coenen 14**

Michael Coenen, pf @ LSU Law, “SPILLOVER ACROSS REMEDIES” 98 MINN. L. REV. (2014),digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1120&context=faculty\_scholarship [Premier]

**A further complication with remedial exceptions involves their generally transsubstantive character. Just as substantive rights tend to apply uniformly across remedies, so too does the law of remedies tend to apply uniformly across substantive rights. Qualified immunity protections do not change depending on whether a § 1983 plaintiff alleges a Fourteenth Amendment violation or an Eighth Amendment violation**;131 the harmless error standard does not change depending on whether a trial court misapplies the Fourth Amendment or the Fifth Amendment;132 and, with a few exceptions,133 the same nonretroactivity restrictions on habeas corpus relief apply across a wide variety of substantive claims. **The transsubstantive nature of these and other remedial exceptions renders them a problematic means of attacking** cross-remedial **spillover**.

### AT Court Capital, Court Politics

#### QI has expanded for institutional, not ideological reasons. There’s widespread, unanimous support for QI on the Supreme Court

Huq 15 Aziz Huq, prof at UChicago Law, “JUDICIAL INDEPENDENCE AND THE RATIONING OF CONSTITUTIONAL REMEDIES” Duke Law Journal 65(1), October 2015, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3816&context=dlj> [Premier]

**There have been instances, to** be sure, in which liberal Justices resisted the increasing calcification of constitutional tort law via **qualified immunity, but this resistance was** to prove **short lived**. In Anderson v. Creighton, 251 for example, Justices Stevens, Brennan, and Marshall criticized “the Court’s (literally unwarranted) extension of qualified immunity,” noting that the Fourth Amendment’s rule of probable cause already provided officers with ample breathing room.252 By 2014, however, Anderson had become sufficiently routinized that liberal Justices not only joined opinions that cited its rule, but agreed to per curiam reversals on its basis.253 And where the application of the demanding Anderson rule elicits dissents, **it is a supermajority of Justices that includes both liberals and conservatives** to be found **insisting on a harsh application of that rule**.254 **In short, there is little reason to gloss the emergence of qualified immunity as a doctrinal change associated with the conservative, pro-law-and-order wing of the Court. Rather, that doctrine has long had substantial cross-ideological support—support that has only deepened over time. Qualified immunity doctrine yields one further item of evidence that suggests the role of institutional, rather than ideological, concerns in shaping the law.** In 2001, the Court held in Saucier v. Katz255 that courts engaged in a qualified immunity analysis had to follow a certain sequence of analysis starting with a mandatory “initial inquiry” into whether a constitutional rule had been violated before any determination of clearly established law.256 Writing for the Court in Saucier, Justice Kennedy explained that this analytic sequence would facilitate “the process for the law’s elaboration from case to case”257 and hence ensure expeditious development of clearly established rules to serve as a predicate for constitutional tort liability. Yet eight years later, the Court in **Pearson** v. Callahan258 unanimously abandoned the Saucier sequencing rule in favor of a rule that allowed lower courts to forego the “initial inquiry” into the law in favor of a ruling on whether a “clearly established” rule had been violated.259 Because this reversal has the effect of decelerating the rate at which constitutional rules become clearly established, it **not only** **increases the chances that a plaintiff** subject to Pearson rule **will lose**, **but also diminishes the chances that many other future plaintiffs will lose for want of a clearly established rule.** Pearson is telling not merely because **it was unanimous**, but because it was liberal Justices, led by Justice Breyer, who launched the call for Saucier’s reconsideration—and did so on the basis of institutional consideration. In 2004, Justice **Breyer criticized Saucier on the ground that “when courts’ dockets are crowded, a rigid ‘order of battle’ makes little administrative sense**.”260 In 2007, he reiterated his concern that the rule was “wasting judicial resources.”261 That is, it was **a liberal Justice** who pressed **first and most urgently for enlarged application of qualified immunity’s fault rule in a way that predictability would conduce to less clearly established law and fewer constitutional tort recoveries. He did so expressly out of institutional concerns related to his conception of the federal judiciary’s sound operation. Qualified immunity doctrine, in short, embodies powerful evidence that ideological considerations do not exhaust the causal forces motivating the rise and currently hegemonic status of faultbased gatekeeping rules**.

### AT Court Clog

#### Non-unique – tons of cases brought against officers every year

Hassel 09

Diana Hassel, Professor, Roger Williams University School of Law. B.A., 1979, Mount Holyoke College; J.D., 1985, Rutgers University School of Law at Newark. “Excessive Reasonableness.” 43 Ind. L. Rev. 117 [Premier]

In the **thousands of excessive force cases** that **have followed Graham**, courts have analyzed the question of what is objectively reasonable. Most recently, in Scott v. Harris, the Court emphasized that **in determining whether the Fourth Amendment was violated there is no avoiding the necessity of "slosh[ing]** our way **through the** factbound **morass of 'reasonableness.'" The cases analyzing the excessive force standard have arisen in a variety of factual scenarios, including: termination of high speed chases, shootings, use of restraints, beatings, and use of police dogs. Actions based on excessive force are some of the most common civil rights claims and consume a large portion of federal courts'** § 1983 **docket**. Article: Excessive Reasonableness, 43 Ind. L. Rev. 117 \*

### AT Protect from Suit

#### Crafty lawyers can get around QI to find liability

Hassel 99

Hassel, Diana. (Associate Professor, Roger Williams University School of Law) "Living a Lie: The Cost of Qualified Immunity." Missouri Law Review 64.1 (1999): 123-156. [Premier]

On the other side of the lawsuit, qualified immunity promises much more¶ to the defendant than it delivers. The defense is [it’s] supposed to protect government¶ actors not only from liability but also [and] from entanglement with litigation. The¶ promise is often not kept because the qualified immunity defense presents a¶ combination of fact and law questions that cannot be quickly disposed of prior¶ to trial. However, the theoretical protection offered by the defense and the low¶ incidence of actual judgments against government actors lulls government¶ employees into acquiescence to the system.

## Policing Implications



### Legitimacy Impact

#### Loss of police legitimacy hinders law enforcement, especially in minority communities

OJP 16

Office of Justice Programs (Agency of the Department of Justice). “Race, Trust and Police Legitimacy.” National Institute of Justice. 14 July 2016. http://www.nij.gov/topics/law-enforcement/legitimacy/pages/welcome.aspx [Premier]

Research consistently shows that minorities are more likely than whites to view law enforcement with suspicion and distrust. Minorities frequently report that the police disproportionately single them out because of their race or ethnicity. The public's perceptions about the lawfulness and legitimacy of law enforcement are an important criterion for judging policing in a democratic society. Lawfulness means that police comply with constitutional, statutory and professional norms. Legitimacy is linked to the public's belief about the police and its willingness to recognize police authority. Racial and ethnic minority perceptions that the police lack lawfulness and legitimacy, based largely on their interactions with the police, can lead to distrust of the police. Distrust of police has serious consequences. It undermines the legitimacy of law enforcement, and without legitimacy police lose their ability and authority to function effectively. Many law enforcement agencies have allowed researchers to study efforts to improve the lawfulness and legitimacy of their policing activities. They do so because they want to raise the level of trust and confidence of the people they serve while controlling crime effectively.

### Overbroad

#### Qualified immunity undermines substantive law to insulate police from punishment

Balcerzak 85

Stephanie E. Balcerzak (Court of Appeals, Seventh Circuit, 1986 term; BA, Georgetown; JD, Yale). “Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation.” The Yale Law Journal, Vol. 95, No. 1 (Nov., 1985), pp. 126-147. <http://www.jstor.org/stable/796123> [Premier]

In adopting a purely objective standard of qualified immunity, the Supreme Court in Harlow failed to consider the overlap between the law of qualified immunity as formulated in Wood v. Strickland and the constitutional law underlying a plaintiff's substantive claim. By eliminating malicious intent from the law of qualified immunity, the Harlow Court surely did not mean to **insulate officials from liability** in all cases in which the controlling substantive law makes the official's state of mind an essential component of the alleged constitutional violation.40 Unfortunately, **it articulated an immunity standard which**, if applied literally, **would do just that**. Had the Harlow Court actually intended to restrict a plaintiff's ability to recover to those actions in which the controlling substantive law contains no subjective elements, it would have granted the defendant officials' motion for summary judgment on appeal instead of remanding the case for further factual findings concerning the purpose behind plaintiff Fitzgerald's termination.4" Fitzgerald had alleged that he was dismissed in retaliation for his exercise of his First Amendment rights.42 Under the controlling legal doctrine, Fitzgerald was required to establish that his constitutionally protected speech was a substantial or motivating factor in his dismissal."' If the Court had in fact wanted to eliminate this sort of purpose inquiry, it could easily have done so in Harlow. A. Subjective Elements in Substantive Constitutional Law The **drastic implications** of the Harlow standard for civil rights litigation are evidenced by the **wide range** of constitutional claims for which the controlling substantive law contains some type of subjective element." Subjective issues in substantive constitutional doctrine have arisen in two contexts. Certain constitutional guarantees have been interpreted to re- quire a showing of specific intent to establish a violation. For example, a purposeful discriminatory intent is required to establish an equal protection violation.46 Similarly, a violation of the Eighth Amendment's prohibition against cruel and unusual punishment requires a showing of "deliberate indifference."46 Hence, a prison official who negligently fails to protect an inmate from attack by another inmate has not violated the Eighth Amendment, but a prison official who knows of such an attack and does nothing to prevent the inmate from being injured will have com- mitted a constitutional violation.47

### Too Strict

#### Recent rulings have drastically increased the hurdles for overcoming immunity

Blum et al. 13

Blum, Karen (Professor and Associate Dean at Suffolk University Law School; J.D., Suffolk University Law School; L.L.M., Harvard); Chemerinsky, Erwin (Dean and Distinguished Professor of Law, University of California, Irvine School of Law); and Schwartz, Martin (Professor of Law at Touro Law Center, a leading authority on and author of a multivolume treatise on Section 1983 civil rights litigation). "Qualified Immunity Developments: Not Much Hope Left for Plaintiffs," Touro Law Review: Vol. 29: No. 3, Article 9. 2013. <http://digitalcommons.tourolaw.edu/lawreview/vol29/iss3/9> [Premier]

DEAN CHEMERINSKY: The heightened standard is facially apparent in the test’s phrasing. The Harlow standard for thirty years focused on whether it was clearly established law that “a” reasonable officer should know; now it must be law that “every” reasonable officer should know.169 Now, after Ashcroft v. Al-Kidd, **it must be a right that is beyond dispute.**170 Why did no Justice challenge this? Perhaps it was that Justice Scalia did not call attention to the shift and the other Justices simply did not notice the change in the law.171 Therefore, courts are able to grant qualified immunity and dismiss Section 1983 claims by **requiring an exact case** on point **from a high level court** and the recently implemented heightened standard for proving a clearly established law. V. CONCLUSION PROFESSOR BLUM: Looking through any lens, it is difficult to avoid the conclusion that the Roberts Court is strongly pro-immunity. The scope of absolute immunity has been expanded to include prosecutors engaged in administrative functions172 and witnesses before grand juries.173 With respect to qualified immunity, it appears the Court is ready to afford the protection to various categories of private actors working with government officials, and Richardson will be confined to its facts.174 The standard for determining when the law is clearly established **has been ratcheted up.** Hope, while not overruled, is largely ignored or distinguished by both the Supreme Court and lower courts. Beyond the issue of how one determines whether the law is clearly established, many other questions regarding the qualified immunity defense to Section 1983 claims remain unanswered.175 For litigators in this area, it is imperative to keep up with the many twists and turns that may result from Supreme Court cases that often confuse more than clarify the issues. One thing is certainly clearly established. Whether you represent plaintiffs or defendants in these cases, you have a tough job, and staying on top of the law, as murky as it may be, is essential.

### Police-Civilian Relations

#### Aff would be a crucial step in repairing relationships with police

#### **De Stefan 17**

De Stefan, Lindsey, (J.D. Candidate, 2017, Seton Hall University School of Law) “No Man Is Above the Law and No Man Is Below It:” How Qualified Immunity Reform Could Create Accountability and Curb Widespread Police Misconduct" (2017). Law School Student Scholarship. Paper 850. [Premier]

By beginning to mend[ing] the qualified immunity doctrine in these ways, the Court will allow¶ more civil suits for the vindication of constitutional rights to succeed. This will help to reduce the¶ public mentality—strengthened by recent events—that cops get away with everything, in every¶ regard. Civil suits avoid subjecting law enforcement to any criminal liability that, because of¶ recent events, many laypersons believe is warranted. While this may be true in select¶ circumstances, reality demonstrates that criminal charges are highly unlikely to stick against a¶ police officer. But allowing more civil suits to go forward will serve as an important reminder to¶ both civilians and law enforcement that the police are not above the law, and that they are held¶ accountable for their wrongdoings. In turn, this accountability will begin to heal the relationship¶ between law enforcement and communities by serving as the first step on what will surely be a¶ long path to rebuilding the trust that is so crucial.

#### The aff rebuilds good perceptions of the CJS

**Reinhardt 15**

Stephen R. Reinhardt, (Circuit Judge, United States Court of Appeals for the Ninth Circuit.) The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219 (2015). Available at: http://repository.law.umich.edu/mlr/vol113/iss7/3 [Premier]

This is an especially unfortunate time to be limiting the opportunities of¶ those who have been unconstitutionally convicted or sentenced by the¶ courts to gain their freedom. It is an equally unfortunate time to be preventing¶ those who have been unlawfully treated by law enforcement from seeking¶ the remedies provided under one of our first civil rights acts.161 Both¶ movements are taking our law in the wrong direction. Confidence in our legal system is probably at an all-time low among minorities, while their¶ belief that they receive unfair and unequal treatment at the hands of law¶ enforcement may well be at an all-time high. This is a particularly sensitive¶ matter, as so disproportionate a number of those incarcerated in our penal¶ institutions162 and so disproportionate a number of those subjected to excessive¶ force by law enforcement are members of minority groups.163 The clear¶ perception of the minority community, right or wrong, is that justice in this¶ nation is stacked against them. The Court has often remarked that “to perform its high function in the¶ best way[,] ‘justice must satisfy the appearance of justice.’ ”165 In a country in¶ which a disproportionate number of individuals who are behind bars or¶ have been treated unlawfully by law enforcement are minorities—indeed, a¶ country in which black juveniles are more than four times as likely as white¶ juveniles to be incarcerated, even though evidence shows that they commit¶ many offenses at similar rates166—satisfying the appearance of justice means¶ ensuring that individuals do not remain in prison in violation of the Constitution¶ or face excessive force at the hands of law enforcement without a¶ proper remedy. On this score, the Court has simply failed in its mission.

#### The public would love the aff, De Stefan 2017

De Stefan, Lindsey, (J.D. Candidate, 2017, Seton Hall University School of Law) “No Man Is Above the Law and No Man Is Below It:” How Qualified Immunity Reform Could Create Accountability and Curb Widespread Police Misconduct" (2017). Law School Student Scholarship. Paper 850. [Premier]

Of course, the Post’s figures are subject to varying interpretations, each of which have¶ some merit. Some may consider the recent shootings to be an unfortunate but nonetheless routine¶ consequence of enforcing the laws. On the other hand, nationwide protests have demonstrated that¶ others consider civilian deaths at the hands of police officers to be an insult to constitutional rights.¶ And surely the opinions of many Americans lie somewhere on the spectrum in between. While¶ the statistical truth may forever remain a mystery, one thing is clear: the need for change.134 The American public has lost trust in its law enforcement, not only because of the perceived frequency¶ of the use of lethal force, but because of subsequent investigations into such incidents, which many¶ view as biased.135¶ The nation is calling for reform,136 and various government agencies,¶ 137¶ branches of local government,138 and even the President139 have responded to the outcry. But¶ although the need for change has been duly acknowledged, the question of how to implement¶ comprehensive reform on a national scale remains unresolved.¶ VI. Amending Qualified Immunity Doctrine as a Catalyst for Curbing Police Violence¶ Altering the qualified immunity doctrine is an excellent way to begin the path to restoring trust by establishing a much-needed sense of accountability. Civil remedies are a good jumping¶ off point because, as repeated failures to indict officers—even in the face of video footage—have¶ demonstrated, accountability via the criminal law is a far-off possibility, if it is possible at all. Prosecutors are generally disinclined to bring charges against law enforcement officers,¶ 140 and¶ grand juries are equally as hesitant to indict them.141¶ Independent investigations, as suggested by the Task Force, are an excellent idea, but establishing a feasible system nationwide would take¶ time. On the other hand, Supreme Court amendment of the stringent immunity afforded to police¶ officers could take effect relatively quickly.

### Police State

#### QI is a primary tool that props up and holds a police state together,

Pattis 10

Pattis, Norm. (Pattis is a lawyer focused on high stakes criminal cases and civil right violations. He is a veteran of more than 100 jury trials.) "Qualified Immunity And The Police State." Norm Pattis Blog. N.p., 16 Oct. 2010. Web. 30 Oct. 2016. <http://www.pattisblog.com/index.php?article=Qualified\_Immunity\_And\_The\_Police\_State\_2675>. [Premier]

I get many calls each week from people who believe they have been abused by the police. That is because for many years I was at the forefront of police misconduct litigation. But these days I rarely file a complaint against police officers. It is not that I have become a police groupie. Rather, I've read the handwriting on the wall. In the past decade, there has been a silent coup d' etat. Our courts have transformed themselves into the guardians of a police state in a stunning, and largely unnoticed, act of judicial activism. Their primary tool was a tricky legal doctrine known as qualified immunity.¶ This coup has gone unnoticed by the general public. Even academics seem blind to its import. Practitioners know better.¶ Consider the following fact pattern: A man calls to complain that his son was brutalized by local law enforcement officers. He was hit with fists, kicked and subjected to high-voltage shock by a police officer using a Taser. The man is angry. How could police do this?¶ I ask what crime the boy was charged with. The man seems surprised by the question. How had I known his son had been arrested? I know the boy must have been charged with interfering with a police officer, a charge that makes it a misdemeanor to obstruct, hinder or delay an officer in the performance of his lawful duty. Just what does this mean? The statute is so broad that almost anything other a supine bending of the knee is a crime. Police routinely charge the crime when force is used to take a person into custody. It is the first line of defense against a charge of unreasonable force: We needed to use force against resistance.¶ The boy's father did not want to hear a word of it. How can a boy in handcuffs resist arrest?, he asks with scorn. I tell him about cases I have seen. Young men in handcuffs who kicked out windows of police cruisers, in one case kicking so hard as to dislodge a car door from its joints. I try to explain that the law permits the police to use reasonable force to overcome a person's resistance. There are many judges who would conclude that the use of a Taser is justified against a person wildly kicking while cuffed. Bringing a civil action against the police carries with it a substantial risk that the case will be thrown out by a judge granting the police officers qualified immunity. By now the caller has transferred his anger against the police to me. The police were wrong, he tells me. The case is a slam dunk, he insists. I tell him to take the slam dunk elsewhere. There is no such thing in the world of police misconduct. The call ends with the man no doubt wondering whether I am defending police officers. I hate fielding such calls.¶ We boast about the rule of law, saying that no one is beyond the law's reach. That's not quite true. The law recognizes broad immunities. If life is a board game, the rule of law defines what pieces on the board can do to one another. An immunity removes a piece from the board, placing it beyond the reach of the law. Thus, a lawmaker trashing a person on the floor of a legislative chamber is absolutely immune from a suit for defamation. We say the lawmaker is immune by operation of law: In other words, any person who knows the law knows that the lawmaker cannot be sued.¶ A qualified immunity is one that a judge is free to impose or not, depending on the facts presented to the judge. In the context of police misconduct litigation, judges are free to grant a police officer immunity from suit if the officer's conduct does not violate clearly established law or if reasonable police officers could disagree about whether the alleged conduct violated the law. Translated into lay terms, police officers are given the benefit of the doubt in close cases. But judges, not juries, make this call. That's the coup.¶ Qualified immunity is a prime example of judicial activism, yet no one on the right seems very concerned when judicial activism narrows the rights of ordinary Americans. Fifteen years ago, the courts rarely granted qualified immunity to police officers; now it happens with a regularity that makes it pointless to file suit against police officers in all but the most egregious cases. In other words, a powerful legal doctrine created by judges has declared broader and broader ranges of police conduct beyond the reach of the law. Police misconduct cases rarely it to juries any longer. Judges, not the people, decide what is reasonable for police to do.¶ The judiciary is self-satisfied about this, and why not? Throwing a case out of court is a whole lot less trouble than going to trial. But it comes at a cost. The cost is a police state. Officers are free to act with impunity, their conduct beyond the review of ordinary citizens so long as it satisfies the jaundiced eye of a judiciary free to decided without real review what is and is not reasonable.¶ I read these judicial decisions and although I do not weep, I heed what they teach. There is little point in filing a suit that will simply be tossed from court. I send most callers away these days. There are a lot of angry people out there who aren't getting justice in the courts. I suppose when there are enough of them out there someone will listen. But the listeners aren't on the bench; the nation's judges have become accomplices in a police state; most of them don't even realize it.

### Race

#### The aff would be an acknowledgement of racial discrimination, oppression and lack of a post-racial society,

Reinhardt 15

Stephen R. Reinhardt, (Circuit Judge, United States Court of Appeals for the Ninth Circuit.) The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219 (2015). Available at: http://repository.law.umich.edu/mlr/vol113/iss7/3 [Premier]

On today’s Court, the unbroken march toward limiting constitutional¶ rights and remedies for criminal defendants and the victims of police abuse¶ reflects a continuing lack of understanding of the lives that so many minority¶ group members experience in our country. After all, a Court that was¶ attentive to the unequal treatment of minorities would fulfill its obligation¶ to enforce the law regarding discrimination, rather than facilely asserting¶ that “[t]he way to stop discrimination on the basis of race is to stop discriminating¶ on the basis of race.”172 Surely, the Court would not abdicate its role¶ with respect to the criminal law on the ground that “the way to stop murder¶ is to stop murdering,” or that “the way to stop crime is to stop committing¶ it.” More basically, a Court that understood the injustices faced by minorities¶ every day in this country would not assume that the time of the postracial¶ society has arrived and that the effects of our deeply rooted history of racial discrimination have been eradicated.173 Indeed, an enlightened Court¶ would recognize that, particularly in light of the growing distrust of police¶ and the criminal justice system in minority communities, federal courts¶ must be allowed to play their historic role as the guardians of constitutional¶ rights, not prohibited from doing so by a judiciary that elevates its concern¶ for comity above the constitutional rights to which all persons are entitled.

### Generic Solvency Advocate

#### Congress should roll back qualified immunity to increase accountability and change police behavior

Wright 15

Sam Wright, public interest lawyer, “Want to Fight Police Misconduct? Reform Qualified Immunity” 11-3-15, <http://abovethelaw.com/2015/11/want-to-fight-police-misconduct-reform-qualified-immunity/?rf=1> [Premier]

Instead, **police officers** have recourse to the broad protections of the judicially established doctrine of qualified immunity. Under this doctrine, state actors **are protected from suit even if they’ve violated the law by, say, using excessive force, or performing an unwarranted body cavity search — as long as their violation was not one of “clearly established law of which a reasonable officer would be aware.”** **In other words, if there’s not already a case where a court has held that an officer’s identical or near-identical conduct rose to the level of a constitutional violation, there’s a good chance that even an obviously malfeasant officer will avoid liability** — will avoid accountability. **To bring about true accountability and change police behavior, this needs to change.** And **change should begin with an act of Congress rolling back qualified immunity. Removing the “clearly established” element of qualified immunity would be a good start — after all, shouldn’t it be enough to deviate from a basic standard of care, to engage in conduct that a reasonable officer would know is illegal, without having to show that that conduct’s illegality has already been clearly established in the courts?**

### Plan: Abolish for Low-Level Officials

#### The best compromise is eliminating qualified immunity for low level police officers and replacing qualified immunity with insurance or indemnification programs.

**Kirby 90**

Kirby, John D. (Kirby graduated cum laude from Cornell Law School and is currently an attorney in San Diego.) "Qualified Immunity for Civil Rights Violations: Refining the Standard ." Cornell Law Review 75.2 (1989-1990): 461-495. [Premier]

The most sweeping, and ultimately most satisfying, long-term¶ reform of the qualified immunity doctrine would be its eventual abrogation¶ for lower level officials in view of the increasing availability¶ of insurance and government indemnification programs for damages¶ stemming from section 1983 and Bivens claims.¶ In Creighton, the plaintiff argued that the growing availability of¶ insurance for damage claims arising from civil rights suits undercuts¶ the rationale for the qualified immunity doctrine.' 64 Justice Scalia,¶ however, dismissed this argument, implying in part that the risk of¶ governmental liability would produce the same hesitation to act as¶ would holding the official individually liable.1 65 He also noted that¶ existing state and federal reimbursement programs are not sufficiently¶ certain or available to justify a change in the Harlow¶ standard. 1¶ 66¶ 1. The Current Availability of Insurance and Indemnification¶ Few states indemnify or insure their officials specifically for damages assessed in section 1983 actions. 167 Similarly, there is no¶ general provision for either insurance or indemnification of federal¶ officials. 168 A majority of states, however, have passed more general¶ statutes either allowing or mandating insurance' 69 or indemnification¶ 170 of different classes of public officials. Moreover, although¶ most of the indemnification statutes and insurance policies issued¶ pursuant to statute have various limitations as to the types and amounts of damages they cover, 171 on their face they apply to section¶ 1983 damages. 172 At present, these programs are insufficient¶ to replace qualified immunity, 173 but they do show a willingness on¶ the part of state and local entities to protect their public officials.¶ The slow growth of the government reimbursement programs ¶ actually may be attributable to the Court's strengthening of the¶ qualified immunity doctrine. As long as the doctrine provides such¶ a broad scope of protection, there is little incentive for public officials¶ to push for more widespread insurance and indemnification¶ programs. Further, regardless of the direct causal link between the¶ two, if the Court were to announce the imminent abrogation of¶ qualified immunity for lower-level officials, then states surely would¶ develop these programs.¶ The reaction by municipalities to state court abrogation of municipal¶ immunity for tort claims-the passage of measures to conform¶ to the change-supports this argument. 174 By signalling the¶ demise of sovereign immunity for state and local governments, the¶ state courts, in effect, compelled city and state legislatures to act. By signalling a determination to abrogate the qualified immunity doctrine¶ for lower-level public officials, the Court could accomplish the¶ same result-in effect forcing the federal and state governments to¶ provide for comprehensive insurance or indemnification programs¶ for these officials.¶ Although abrogating qualified immunity for lower-level officials¶ might force the hand of state and federal legislatures, it does not¶ amount to judicial usurpation of the legislative function. The qualified¶ immunity doctrine from its inception was a creation of the¶ Court.' 75 Faced with the broad language of section 1983, which on¶ its face does not provide for any official immunity,' 76 the Court attempted¶ to develop a system of protection that would provide the¶ best balance between individual rights and the smooth operation of¶ government. 77 However, the confusion in the lower courts,' 78 the¶ inapplicability of the doctrine to a broad category of cases,1 79 and¶ the current overprotection of lower-level officials make it apparent¶ that the Court's attempt to achieve the desired balance has¶ failed. By announcing the pending abrogation of qualified immunity¶ for lower-level officials, the Court would be discarding the¶ product of twenty-two years ofjudicial legislation. This abrogation¶ would force the state and federal governments to confront an issue¶ that should not have been delegated to the Court in the first place.

### AT Current Indemnification Solves

#### Empirics prove that officers rarely contribute anything to the judgments brought against them, Schwartz 14

Schwartz, Joanna C. (Schwartz is an Assistant Professor of Law, at UCLA School of Law.) "POLICE INDEMNIFICATION." New York University Law Review 89 (2014): 885-1005. Web. 17 Oct. 2016. <https://www.prisonlegalnews.org/media/publications/Police%20Indemnification%20Joanna%20Schwartz%20N.Y.U.%20L.%20Rev.%202014.pdf>. [Premier]

The assumption that law enforcement officers are personally¶ responsible for settlements and judgments entered against them¶ underlies several judicial doctrines that limit plaintiffs’ ability to¶ recover compensatory and punitive damages in civil rights damages¶ actions. Defense attorneys also use the assumption that police officers¶ will be held personally liable to their strategic benefit in the litigation¶ of police misconduct cases. Yet, this Article reveals that officers¶ almost never contribute anything to settlements and judgments in¶ police misconduct suits. Law enforcement officers employed by the¶ forty-four largest jurisdictions in my study were personally responsible¶ for just .02% of the over $730 million paid to plaintiffs in police misconduct¶ suits between 2006 and 2011. Law enforcement officers¶ employed by the thirty-seven small and mid-sized departments in my¶ study paid nothing towards settlements and judgments entered against¶ them during this period. Officers did not contribute to settlements and¶ judgments even when they were disciplined, terminated, or criminally¶ prosecuted for their misconduct. And officers were not required to¶ contribute to settlements and judgments even when applicable law¶ prohibited indemnification.

### AT Pessimism

#### The court has potential for change and can correct itself on this issue,

**Reinhardt 15** Stephen R. Reinhardt, (Circuit Judge, United States Court of Appeals for the Ninth Circuit.) The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219 (2015). Available at: http://repository.law.umich.edu/mlr/vol113/iss7/3 [Premier]

I am an optimist. I still believe that “the arc of the moral universe is¶ long, but it bends toward justice.”178 As we look back on our constitutional¶ history, I see a trend toward progress and social justice, sometimes after¶ painful battles and sometimes after painful lapses or even painful defeats. Yet¶ this is a nation that in most respects continues to improve its democracy,¶ sometimes dragging the Supreme Court with it and sometimes being dragged¶ in that direction by its judiciary. I would hope that some of the recent¶ errors the Court has made will be corrected as the arc of history unfolds and¶ that the Court will in the long run recognize that we are a single nation,¶ with a Constitution dedicated to promoting the general welfare, ensuring¶ the equality of all individuals, and guaranteeing liberty and justice to all—a¶ Constitution that lives and breathes as our great nation evolves in light of¶ the moral, economic, and scientific forces that shape our destiny.

### AT Police Won’t Pay

#### Insurance can hold departments accountable even if police never pay out of pocket

Rappaport 16

John Rappaport (Assistant professor at the University of Chicago Law School). “Cops can ignore Black Lives Matter protesters. They can’t ignore their insurers.” Washington Post. 4 May 2016. https://www.washingtonpost.com/opinions/cops-can-ignore-black-lives-matter-protesters-they-cant-ignore-their-insurers/2016/05/04/c823334a-01cb-11e6-9d36-33d198ea26c5\_story.html [Premier]

My research on municipal liability insurance turned up this and other examples of police chiefs — including some reform-minded administrators — who owe their jobs to pushy insurance adjusters. The insurance companies (with names like National Casualty, JWF Specialty and Genesis) offer policies that reimburse cities held liable for harm their law enforcement officers inflict. The coverage is broad: It often includes intentional acts such as discrimination or assault and battery, as well as punitive damages, which are meant to punish egregious misbehavior. There is no national data about the size of this insurance market, but it’s big. Lawsuits stemming from recent shootings by officers, such as those of Laquan McDonald in Illinois and Walter Scott in South Carolina, have settled in the ballpark of $6 million per case. The arrangement creates a potential moral-hazard problem — a risk that insured municipalities will be less vigilant against police misconduct than they’d be in the absence of insurance. But it also empowers insurers, which are committed to strategies of “loss prevention.” In an age when police departments, backed by politicians and powerful unions, are said to resist complaints about brutality and abuse, some **insurance companies are playing an unheralded role: as private regulators** of police activity. Insurers work closely with police departments on policies and training. Do you want to know how to conduct a strip search without violating the Constitution? Travelers Insurance has a pamphlet on that. Insurers provide video libraries and online training systems, and they even do some classroom instruction. The companies sometimes bring in outside consultants — usually police veterans — to do this work or send departments off-the-shelf rules from policy-writing services such as Lexipol. Insurance companies also subsidize the use of otherwise prohibitively expensive use-of-force virtual-reality simulators. The Kentucky League of Cities Insurance Services, for example, purchases three new simulators every three years and circulates them among the agencies it covers. Early academic research shows that these simulators help cops prevent crises and decrease the number of unjustified shootings. Underwriters don’t just train; they follow up, too. Audits are common. Insurance officers review internal documentation, make site visits and do ride-alongs. Many keep a “watch list” of departments that have been having problems and audit them more frequently and intensely. My favorite audit technique is from an insurer out West who said she sends representatives to visit “cop bars” incognito to listen to the local gossip. And when they uncover problems that may turn into lawsuits, **insurers pressure agencies to make changes or even terminate “bad apples”** from the beat. In Irwindale, Calif., the California Joint Powers Insurance Authority forced the police department to implement a “performance improvement plan” in 2013 in order to keep its coverage. That same year, the city of Niota, Tenn., fired two officers even though the charges against them (in connection with a beating) had been dismissed. The city’s insurer had threatened to drop its coverage if the officers went back on duty. The carrots and sticks here all have to do with the availability and pricing of coverage. Both affect the public treasury directly; the consequences of “going bare” can be severe. Inkster, Mich., recently raised property taxes by an average of $178 per household to finance a seven-figure settlement involving a police officer. In extreme cases, municipalities have even shut down their police forces after their insurers pulled coverage. Niota has been down that road; so have Point Marion, Pa.; Sorrento, La.; Lincoln Heights, Ohio; and Maywood, Calif. Civil rights activists have often claimed that police departments are unaccountable — a complaint that intensified after the shooting of Michael Brown in Ferguson, Mo., and the birth of the Black Lives Matter movement. But if police leaders sometimes avoid political accountability, they still answer to their underwriters, which therefore have significant leverage over them.

#### Yes payment - Insurance or higher salaries for officers so they could pay the costs

**Kirby 90,** Kirby, John D. (Kirby graduated cum laude from Cornell Law School and is currently an attorney in San Diego.) "Qualified Immunity for Civil Rights Violations: Refining the Standard ." Cornell Law Review 75.2 (1989-1990): 461-495. [Premier]

Neither the language of section 1983, nor Congress' rejection¶ of the Sherman Amendment, however, should be construed to prohibit¶ the Court from abrogating a doctrine it developed, even if such¶ action would force governmental entities to provide indemnification¶ for their officials. The Monell decision rested on the conclusion that¶ Congress had not intended to impose vicarious liability upon governmental¶ entities. 186 Monell did not proscribe the voluntary assumption¶ of such liability.' 87 By announcing the prospective abrogation¶ of qualified immunity, the Court would simply be removing an illconceived¶ cushion that enabled governmental entities to avoid paying¶ the costs imposed by both section 1983 and Bivens for constitutional¶ violations committed by their officials.' 88 In the absence of¶ qualified immunity, society will pay these costs, either by increasing¶ the salaries of lower-level officials to compensate them for the risk¶ of liability, or by providing insurance or indemnification. Insurance¶ and indemnification programs are the most attractive alternative, as they would be less costly to implement.

### AT Discretion / Effectiveness / Overdeterrence

#### Lawsuits increase police effectiveness by encouraging accountability and transparency

Shircore 05, Mandy Shircore, Associate Lecturer, James Cook University, POLICE LIABILITY FOR NEGLIGENT INVESTIGATIONS: WHEN WILL A DUTY OF CARE ARISE? MANDY SHIRCORE\* DEAKIN LAW REVIEW VOLUME 10 No 2, <http://researchonline.jcu.edu.au/4657/1/4657_Shircore_2006.pdf> p. 26-27 [Premier]

Of greater significance is the compelling argument that **the fear of litigation promotes better policing practices.** 142 As has been noted, **'nothing more effectively focuses the mind and hence improves the quality of decisions by a police officer than the knowledge that the decision may be subject to scrutiny by a court of law.**' 143 Lord **Keith's argument that 'the general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by imposition of such liability' was premised on the basis that police always apply their best endeavours to their public duty, a sentiment, which** as the court acknowledged in Brooks, **is no longer universally accepted. Police corruption and misconduct are still of major concern** in Australian police forces **and public dissatisfaction with police complaints mechanisms has been seen as a contributing factor to the increase in civil litigation** against police **and a driving force for demands for greater transparency and accountability.** 144 **Concerns of encouraging defensive practices, once raised in an attempt to limit medical negligence claims, have long since been rejected. There is no suggestion that law enforcement**, in jurisdictions where Hill public policy grounds have not been imposed to deny a duty, **has been detrimentally affected in this way**.

#### A reasonable margin for error is already allowed under the 4th Amendment – QI doesn’t add anything

**Rudovsky 89**

Rudovsky, David. (Senior Fellow @ University of Pennsylvania Law School) "The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights." University of Pennsylvania Law Review 138.1 (1989): 23-81. JSTOR. Web. 19 Oct. 2016. <http://www.jstor.org/stable/10.2307/3312179?ref=search-gateway:edda993b030587705c9de39de7bdad83>. [Premier]

Proponents of a broad immunity argue that this standard is necessary to protect against over deterrence. According to this theory, if¶ officials are accountable in damages when the proper course of conduct is not clearly predictable, the officials will steer too far from the¶ line, resulting in a loss of governmental effectiveness.291 This argument would have more force if the governmental interests had not¶ already been taken into account. Consider a police officer's right to¶ use deadly force. In Tennessee v. Garner,292 the Court ruled that an¶ officer may use deadly force to apprehend a criminal suspect when [a]¶ that person poses a significant threat of physical harm to the officer¶ or others. ¶ The fourth amendment standard provides a significant margin of error for the officer; no liability accrues if the officer reasonably believed that the suspect threatened the use of a deadly force weapon or "committed a crime involving the infliction or threatened¶ infliction of serious physical harm."293¶ The Constitution's prohibition on the use of deadly force where¶ the requisite reasonable belief does not exist is not a strict liability¶ concept. Errors of judgment, if reasonable, are protected. Deadly¶ force may be justified without an actual threat of violence. No further insulation from liability is needed to ensure society's interest in¶ the vindication of its criminal laws. If an officer cannot show an¶ "articulable basis to think [the suspect] was armed,"294 holding the¶ officer accountable in damages does not deter legitimate law¶ enforcement. By contrast, extending immunity to the unreasonable¶ use of deadly force disallows compensation, prevents the vindication¶ of rights, and erodes fourth amendment protect.

#### Suits rarely deter officers to begin with, no fiscal impact means no accountability. De Stefan 17

De Stefan, Lindsey, (J.D. Candidate, 2017, Seton Hall University School of Law) “No Man Is Above the Law and No Man Is Below It:” How Qualified Immunity Reform Could Create Accountability and Curb Widespread Police Misconduct" (2017). Law School Student Scholarship. Paper 850. [Premier]

The judicial system’s somewhat naïve faith in the power of civil suits as a deterrent has¶ inadvertently produced another problem in qualified immunity jurisprudence.¶ 93¶ This belief has¶ generated concern in the Supreme Court about overdeterrence—the notion that fear of being sued¶ “is so strong that it can ‘dampen the ardor of all but the most resolute, or the most irresponsible¶ [public officials], in the unflinching discharge of their duties.’”94 This trepidation about too much¶ deterrence and its potentially chilling effect on government operations has played a powerful role¶ in shaping Court decisions toward limiting civil remedies.95¶ Of course, lawsuits are intended to¶ have this deterrent effect—indeed, are relied upon to have such effect as part of our system of¶ accountability for government officials. Unfortunately, reality suggests that the deterrent power¶ of lawsuits is not quite as potent as the Supreme Court envisions.96¶ The Court specifically fears that financial liability, in the form of paying compensatory¶ damages to victims whose constitutional rights an officer has violated, will be a vehicle of¶ overdeterrence.97 But the widespread practice of indemnification means that individual officers¶ are almost never financially responsible for civil judgments against them, practically eliminating¶ any fiscal motivation for avoiding harmful conduct.98¶ In fact, in many instances, even the police¶ department that employs the officer suffers no direct financial consequences because police¶ litigation costs and damages awards are often paid from a city or insurer’s general budget.99 The¶ police department is not financially penalized, and thus has no incentive to discipline the officer¶ or attempt to prevent him from repeating the unconstitutional behavior in the future. And because¶ law enforcement officials are often unaware of the allegations set forth in lawsuits filed against¶ them or their employees, officers’ conduct often goes uninvestigated and undisciplined, and¶ allegations of unconstitutional conduct do not affect performance reviews or opportunities for promotion.¶ 100¶ Finally, although many law enforcement officers claim that the threat of incurring¶ liability deters them from misconduct, studies contrarily indicate that potential liability does not¶ actually alter most officers’ on-the-job actions.101

#### Qualified immunity to prevent hesitation is flawed logic that means officers have no limits. Kirby 90

Kirby, John D. (Kirby graduated cum laude from Cornell Law School and is currently an attorney in San Diego.) "Qualified Immunity for Civil Rights Violations: Refining the Standard ." Cornell Law Review 75.2 (1989-1990): 461-495. [Premier]

The Creighton Court rejected [rejection of] the insurance alternative[s] [argue]on the¶ ground that, in addition to existing programs being inadequate, the¶ risk of government liability would inhibit officials in the performance of¶ their duties.' 96 To the extent that any degree of liability will cause¶ hesitation, the majority is probably correct. Indeed, while the possibility¶ of governmental liability for the official's violation would not¶ provide the same level of deterrence as would the threat of personal¶ liability, the potential adverse effects on the official's career of frequent¶ and costly constitutional violations would, no doubt, lead to a¶ certain level of hesitancy.¶ This objection, however, begs the question. Taking the Court's¶ reasoning to its logical conclusion, all officials should be absolutely immune because anything short of absolute immunity would, to¶ some extent, inhibit public officials in the performance of their duties.¶ The real question is how much the Court should sacrifice individual¶ rights for the sake of effective government. In making this¶ determination, the Court should consider the importance that both¶ the Constitution and our democratic society place on individual¶ rights. The Bivens Court recognized the primacy of these rights¶ when it declared that " '[t]he very essence of civil liberty certainly¶ consists in the right of every individual to claim the protection of the¶ laws, whenever he receives an injury.' 11

#### Won’t affect police performance

Shircore 05, Mandy Shircore, Associate Lecturer, James Cook University, POLICE LIABILITY FOR NEGLIGENT INVESTIGATIONS: WHEN WILL A DUTY OF CARE ARISE? MANDY SHIRCORE\* DEAKIN LAW REVIEW VOLUME 10 No 2, <http://researchonline.jcu.edu.au/4657/1/4657_Shircore_2006.pdf> p. 26 [Premier]

Although research has suggested that police do hold genuine fears of litigation,139 other **research has argued the impact of fear on police performance and willingness to act has been exaggerated**. 140 **In relation to advocate's immunity, the majority in D 'Orta acknowledged that although arguments that imposition of liability would lead to defensive practices were not** irrelevant, they were also 'not **of determinative significance**.' 14

### AT Other Reforms

#### Current police reforms like body cameras are superficial; without strong financial liability, they will only instill complacency

Hansford 14

Justin Hansford (Human rights activist and law professor at St. Louis University School of Law; graduate of Howard University and Georgetown University Law Center). “Why Police Body Cameras Won't Work.” Hartford Courant. 5 December 2014. http://www.courant.com/opinion/op-ed/bc-body-cameras-wont-work-need-accountability-20141205-story.html [Premier]

**Lax laws prevent us from holding police accountable, not a lack of evidence.** But the presence of police body cameras will simply lull the country into believing that we can solve the problems of racial profiling and police violence without holding police accountable for their actions. State excessive-force laws make criminal conviction of police officers for murder almost impossible; a police officer has nothing to lose by killing unarmed black men. **Even in civil suits, officers are never** personally **financially responsible** for paying for damages; state and local governments cover it for them. This is the textbook definition of impunity. In addition to their ineffectiveness, the information captured by body cameras raises serious questions about citizen privacy. The Fourth Amendment prohibits unreasonable search and seizure, and many jurisdictions prohibit recording of a person without his or her consent if the surveillance takes place in an area of expected privacy. The big brother state stands in direct contradiction to the freedom from unreasonable searches that the Fourth Amendment guarantees us. President Obama isn't alone in his misguided approach. Across the country, local police departments are considering the use of body cameras and perpetuating the view that this will end police brutality. But if this country wants to get serious about this problem, we should do what government always does when it wants to alter behavior on a systematic level: Impose financial penalties. For example, a proposal that has gained traction locally is the creation of mandatory personal liability insurance for police officers. Even if cities decide to pay the base premiums for police, the **increased premiums for officers prone to violence** and brutality **would provide a measure of accountability.** That's a start on the police violence side. In the absence of accountability, financial or criminal, we can expect no changes in police behavior. The roots of the problem are too deep. **For real change to happen, it has to cost them something.**

## First Amendment Aff



### QI Chills Free Speech Law

#### Flexible qualified immunity on the right to record police creates a chilling effect on free speech by ossifying First Amendment law

Derrick 13

Geoffrey J. Derrick (Fellow, Center for Appellate Litigation, New York, NY. J.D., magna cum laude, 2012, Boston University School of Law; B.S., 2007, Northwestern University). “Qualified Immunity and the First Amendment Right to Record Police.” 22 B.U. Pub. Int. L.J. 243 (2013). https://ssrn.com/abstract=2202388 [Premier]

The doctrinal shift from Saucier to Pearson coincides with the increase in civil rights litigation nationwide concerning the First Amendment right to record police officers in public.27 Two recent cases, American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012), cert. denied, 133 S. Ct. 651 (2012), and Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011), have affirmed a First Amendment right to record police in public. Most other lower federal courts to address the issue since Pearson have avoided the merits of whether arresting or threatening to arrest citizens for recording the police violates the First Amendment, **instead finding** a **qualified immunity** defense because the First Amendment right to record was not clearly established in their respective Circuits.28 Indeed, the Circuits are split over whether the First Amendment right to record police is clearly established in their case law.29 The **uneven recognition** of this federal right is likely to generate further litigation in the federal courts and make it a recurring constitutional question that has important consequences for both First Amendment doctrine and the traditional role of citizens to monitor the conduct of government officials. **Pearson’s flexible qualified immunity** analysis **impedes the resolution of this open issue** because the unguided discretion of lower courts may never result in adjudication on the merits. The common law development of this and other federal constitutional rights ossifies when courts repeatedly reach the question of immunity but not the merits.30 The current nationwide civil rights litigation concerning the First Amendment right to record police officers in public illustrates **the pressing need** for standards to guide judicial discretion over whether to reach the merits in First Amendment cases.31 Judges that choose to decide these cases on immunity grounds—that the First Amendment is not “clearly established” in their Circuit—**risk chilling protected speech by leaving the right in limbo.** Citizens are less likely to record police in two-party consent states if First Amendment doctrine is not sufficiently developed in their Circuit to provide a defense to wiretapping charges or to sustain a later civil lawsuit. The thesis of this article is that the unique consequence of chilling protected speech that flows from immunity findings in First Amendment qualified immunity cases demands Saucier’s merits-first adjudication. Saucier’s mandatory sequencing would counteract the ossification of the First Amendment right to record because a determination of whether the right actually exists is **the strongest evidence for future courts** in assessing whether such a right was “clearly established” in the Circuit.32 At the very least, courts deciding civil rights lawsuits alleging a violation of the First Amendment should use their discretion under Pearson to consider whether an immunity finding might have a chilling effect.

#### Free speech is chilled now due to overly broad laws on police recording

Derrick 13

Geoffrey J. Derrick (Fellow, Center for Appellate Litigation, New York, NY. J.D., magna cum laude, 2012, Boston University School of Law; B.S., 2007, Northwestern University). “Qualified Immunity and the First Amendment Right to Record Police.” 22 B.U. Pub. Int. L.J. 243 (2013). https://ssrn.com/abstract=2202388 [Premier]

The citizen privacy interest underlying the federal wiretapping statute41 motivated some states to adopt protective two-party consent wiretapping statutes.42 For example, the Massachusetts Electronic Surveillance Statute criminalizes “interception of any wire or oral communication” and defines “interception” as “secretly record[ing without] . . . prior authority by all parties to such communication.”43 In Massachusetts, “the legislative focus was on the protection of privacy rights and the deterrence of interference therewith by law enforcement officers’ surreptitious eavesdropping as an investigative tool.”44 At least twelve other states have similar wiretapping statutes that require two-party or all-party consent.45 However, unlike the federal wiretapping statute46 and more than three-dozen state wiretapping statutes,47 several outliers like Massachusetts48 and Illinois49 do not require the parties intercepted to have a reasonable expectation of privacy in order for the interception to be a criminal act. As a result, officers in two-party consent states are enforcing wiretapping statutes to shield themselves from audio and audiovisual recordings in public even when it is unreasonable to think that their words and actions are private.50 This application has allowed state wiretapping statutes to become unhinged from the citizen privacy interests they serve. The sweeping breadth of the wiretapping statutes in Massachusetts and Illinois deters citizens from engaging in socially valuable newsgathering and citizen oversight activities that traditionally have been recognized as protected First Amendment activities.51 Such deterrence raises the First Amendment concern of chilling protected speech.

### Right to Petition

#### Police recording is fundamental to the right to petition

Derrick 13

Geoffrey J. Derrick (Fellow, Center for Appellate Litigation, New York, NY. J.D., magna cum laude, 2012, Boston University School of Law; B.S., 2007, Northwestern University). “Qualified Immunity and the First Amendment Right to Record Police.” 22 B.U. Pub. Int. L.J. 243 (2013). https://ssrn.com/abstract=2202388 [Premier]

The First Amendment enshrines the right of citizens to petition the government for a redress of grievances without the fear of retaliation. **This right would be hollow absent the ability** for citizens **to legally document** and disseminate **the basis for their grievances.** The Supreme Court has affirmed that the public’s access to truthful information about its own government is fundamental to the First Amendment right to petition for a redress of grievances.77 Similarly, the Supreme Court has held that the ability of citizens to verbally criticize police officers is **fundamental to this oversight function.**78 Since the arrest of Henry Louis Gates, Jr., by the Cambridge Police Department in July 2009, arrests based purely on what one says to a police officer have received much scholarly attention.79 Officers do not have authority to arrest individuals who speak their minds unless the words “inflict injury or tend to incite an immediate breach of the peace,” thereby removing the speech from First Amendment protection.80 While not entirely akin to the right to verbally oppose police officers recognized in City of Houston v. Hill, 81 the right to record police officers in public serves the same fundamental First Amendment value of governmental accountability.82 Accountability requires the free flow of accurate information about those implementing the government’s laws and exercising its powers. The ubiquity of modern image capture technology makes audio and audiovisual recordings **extremely useful** methods of monitoring and disseminating such information.83 Citizen recording is perhaps **the most effective form of police oversight** because so many citizens possess recording devices and the marginal cost of recording is close to zero.84

### Solves Police Misconduct

#### Citizen recording is the best check on police misconduct; every alternative fails

Derrick 13

Geoffrey J. Derrick (Fellow, Center for Appellate Litigation, New York, NY. J.D., magna cum laude, 2012, Boston University School of Law; B.S., 2007, Northwestern University). “Qualified Immunity and the First Amendment Right to Record Police.” 22 B.U. Pub. Int. L.J. 243 (2013). https://ssrn.com/abstract=2202388 [Premier]

**Video recordings provide a direct check on police misconduct while other forms of oversight are more attenuated** in their effect.85 Internal checks in police departments such as internal affairs investigations and disciplinary measures are often toothless due to a combination of bureaucratic delay, lack of public knowledge, and an institutional bias against disciplining officers.86 Judicial checks like the exclusionary rule in criminal cases,87 civil sanctions,88 municipal liability,89 and criminal prosecution of officers90 only redress individual incidents of police misconduct and have empirically failed to address systemic problems.91 External checks such as civilian and community police oversight boards suffer from political appointments, a lack of regulatory power, and police union backlash.92 The ever-present possibility of citizen recording encourages police officers to behave in a professional manner when exercising their authority in public.93 Recordings also have collateral benefits to citizens such as “**powerfully rebut**[ting] **jury bias favoring police** credibility”94 and sparking the interest of persons who are not otherwise involved in police oversight.95 These benefits make citizen recording a **powerful, democratic tool** for governmental monitoring and transparency that is usable by everyone. The ease of dissemination of recordings and their ability to capture community attention are factors that **motivate everyday citizens** to record police officers in public and thereby participate in a new form of twenty-first-century police accountability.

#### Recording police drastically reduces police brutality

Ly 14

Laura Ly (CNN Reporter). “Can cell phones stop police brutality?” CNN. 18 November 2014. http://www.cnn.com/2014/11/18/us/police-cell-phone-videos/ [Premier]

Paul Callan, a CNN contributor and former prosecutor, said he believes that drastic reduction has already begun. "I believe that the existence of cell phone video and social media postings has **substantially reduced police brutality over the long run**. Although the intensity of news coverage of cases such as [George] Zimmerman and Michael Brown makes it feel like there is more police brutality, my sense of the situation as a lawyer who is in court several times a week is that the number of cases is diminishing," Callan said. Some police departments are embracing camera technology and are even utilizing it to strengthen transparency and accountability between their officers and the community. Police departments in Rialto, California, and Mesa, Arizona, have implemented body-camera programs for their officers. Cop Conundrum: Protect without criminalizing The initiative seems to be working. A 2014 study by the U.S. Department of Justice cites both departments, noting an **88% reduction in** citizen **complaints** and a 60% reduction in officer use-of-force incidents after one year of camera deployment in Rialto. In Mesa, there were 40% fewer complaints for officers with cameras and 75% fewer use-of-force complaints overall.

### Freedom of Press

#### The right to record is a pre-requisite to freedom of speech and press

Derrick 13

Geoffrey J. Derrick (Fellow, Center for Appellate Litigation, New York, NY. J.D., magna cum laude, 2012, Boston University School of Law; B.S., 2007, Northwestern University). “Qualified Immunity and the First Amendment Right to Record Police.” 22 B.U. Pub. Int. L.J. 243 (2013). https://ssrn.com/abstract=2202388 [Premier]

B. The Freedom of the Press The First Amendment’s protection for newsgathering and reporting can independently ground the right to record police officers in public.98 The central purpose of the First Amendment is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”99 A vibrant marketplace requires both the gathering and dissemination of all relevant information in order to fully inform the public.100 The Supreme Court has found that the First Amendment **undoubtedly** protects the disclosure, dissemination, and receipt of information that touches on matters of public concern.101 Information gathering, however, is antecedent to information disclosure and the Court has found it to be **just as vital to a free press**, holding that “without some protection for seeking out the news, **freedom of the press could be eviscerated**.”102 The Court recognized recently in Citizens United v. Federal Election Commission that the government may not “repress speech by silencing certain voices at any of the various points in the speech process.”103 Here, two-party consent statutes operate to restrict the medium of expression and thereby impinge upon the dissemination of constitutionally protected speech.104 Similarly, with a free press, the ability to record video and audio is critical to effective newsgathering expression and communication.105 Professional journalists and citizens alike enjoy the freedom of the press.106 The First Circuit in Glik explained that “[t]he First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public’s right of access to information is coextensive with that of the press.”107 Citizen recordings serve as an unfiltered record of the conduct of government officials and are an essential part of the information-gathering process that undergirds a free and open marketplace of ideas. Some scholars have argued that the right to record and gather the content of speech is a **prerequisite** to fully exercising one’s free speech rights because **speech devoid of justification would be impotent** in the marketplace of ideas.108 One scholar also contends that the modern right to report would be handicapped in the absence of a right to record.109 However, “generally applicable laws” prohibiting criminal conduct that have only “incidental effects on [the press’s] ability to gather and report the news” can circumscribe the freedom to gather information.110 Such laws prevent compelling persons to supply information against their will,111 but do not restrain the press from recording images and audio that have already been exposed for public consumption.112 Audio or audiovisual recordings of police officers in public places do not compel the officers to reveal private information; they preserve information that the officer has already decided to make public. Cases decided before video recording was ubiquitous cited taking pictures and photographs of the police as core First Amendment activity.113 The Seventh Circuit in Alvarez used the freedom of the press to support a First Amendment right to record police in public.114 Alvarez concluded that Illinois’s two-party consent statute directly targets videotaping as a medium of expression and undercuts the press freedom to gather and disseminate information.115

### Double Standards

#### Citizens must have the same right to record as police; the status quo is a legal double standard

Derrick 13

Geoffrey J. Derrick (Fellow, Center for Appellate Litigation, New York, NY. J.D., magna cum laude, 2012, Boston University School of Law; B.S., 2007, Northwestern University). “Qualified Immunity and the First Amendment Right to Record Police.” 22 B.U. Pub. Int. L.J. 243 (2013). https://ssrn.com/abstract=2202388 [Premier]

While two-party consent statutes are content-neutral on their face, it is important to recognize that **the First Amendment does not permit two tiers of privacy protection**, one for police officers and one for private citizens speaking to police officers.144 A private citizen’s statement to an on-duty police officer can be admitted into evidence in either a civil or criminal proceeding as a matter of course.145 Both the private citizen and the officer derive their privacy interest from the same sources, privacy torts at state common law or state wiretapping statutes, which do not distinguish between police officers and private citizens.146 In fact, police officers routinely employ audio or audiovisual recording devices on the dashboards of their squad cars in order to record their interactions with citizens.147 These recordings can serve to exculpate police officers from liability and to provide evidence in criminal cases brought against the citizens in the recording. The reasonable expectations of privacy for both police officers and private citizens in citizen-police encounters **must rise or fall together** in order for two-party consent statutes to be content-neutral.

#### Double standards in recording bias the trial process

Slaughter 15

Matthew Slaughter (Law clerk to the Honorable Karen L. Hayes of the United States District Court for the Western District of Louisiana). “First Amendment Right to Record Police: When Clearly Established is Not Clear Enough.” John Marshall Law Review. Volume 49, Issue 1, Article 4. Fall 2015. http://repository.jmls.edu/cgi/viewcontent.cgi?article=2437&context=lawreview [Premier]

A prevailing argument against a citizen’s right to record police activity in public is that the police and the public’s privacy interests are violated by such conduct. 189 However, law enforcement agencies around the country have equipped individual police officers with recording technology to film the public while conducting their official duties.190 Since most police departments have instituted some form of recording device on police officers and police cars, it displays the **inherent double standard** the State wishes to employ.191 Studies have shown that these programs do work and police departments with officer-worn recording devices have seen a **drastic decrease in officer-related incidents and formal complaints** filed with police departments.192 The only reason for police departments to suppress citizen recordings is to have **just one perspective**, the officer’s perspective. The State would prefer to have its side of alleged incidents on the evidentiary record without any opposing viewpoints.193 As Jesse Alderman argues, **the probative value of these recordings makes them essential to trials** and hearings.194

### Democracy

#### The right to record is key to democratic checks on power

Slaughter 15

Matthew Slaughter (Law clerk to the Honorable Karen L. Hayes of the United States District Court for the Western District of Louisiana). “First Amendment Right to Record Police: When Clearly Established is Not Clear Enough.” John Marshall Law Review. Volume 49, Issue 1, Article 4. Fall 2015. http://repository.jmls.edu/cgi/viewcontent.cgi?article=2437&context=lawreview [Premier]

B. Freedom of Speech and Press Promotes Ideas of Popular Sovereignty. The specific expansions of the First Amendment guarantees by the Supreme Court are also consistent with historical legal principles.23 An **essential function** of the First Amendment is to protect the free and open discussion of information to prevent potential abuses of governmental power.24 The First Amendment requires courts to err on the side of allowing speech rather than restricting it to prevent any potential chilling effect.25 The Supreme Court has recognized the importance of preventing the government from limiting the stock of information available to the public.26 This is **especially true** when the information is about what public officials do on public property and is a “matter of public interest.”27 As the Court has noted, “[f]reedom of expression has particular significance with respect to government because ‘[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.’”28 Moreover, **the right to disseminate information** about public officials **is instrumental to a free working democracy.**29 Political speech is often afforded the highest First Amendment protection and the Supreme Court has instructed courts “to err on the side of protecting political speech rather than suppressing it.”30

### Civil Damages Key

#### Monetary damages are the most effective enforcement of the right to record

Derrick 13

Geoffrey J. Derrick (Fellow, Center for Appellate Litigation, New York, NY. J.D., magna cum laude, 2012, Boston University School of Law; B.S., 2007, Northwestern University). “Qualified Immunity and the First Amendment Right to Record Police.” 22 B.U. Pub. Int. L.J. 243 (2013). https://ssrn.com/abstract=2202388 [Premier]

IV. CONSTITUTIONAL TORTS AS THE VEHICLE FOR DEVELOPMENT OF THE FIRST AMENDMENT RIGHT TO RECORD. Constitutional torts, i.e. suits under 42 U.S.C. § 1983 for backward-looking relief such as money damages, are the **best vehicle** for courts **to develop First Amendment doctrine relating to the** First Amendment **right to record police.** Qualified immunity analysis is confined to suits under § 1983 for money damages and offers a defense only to individual officer defendants, not municipalities or police departments.203 Dean John C. Jeffries, Jr., argues that money damages liability for constitutional torts is not the appropriate remedial structure to encourage the development of constitutional rights.204 He contends that forward-looking or prospective relief under § 1983 such as an injunction best serves the goal of constitutional development because it “continually shifts societal resources from the past to the future,” while backward-looking or retrospective relief, such as money damages, does not.205 Under Dean Jeffries’ view, damages liability under § 1983 suffers from two main problems: (1) it creates the externality of draining government budgets,206 and (2) qualified immunity may preclude money damages if “a reasonable officer could have believed” her actions to be lawful “in light of clearly established law.”207 With regard to the second problem, damages liability requires the “fault” of a government official in order to avoid qualified immunity while injunctions can provide a remedy even without proving that the government official was at fault.208 Taken together, these criticisms suggest that § 1983 actions for money damages are reactive rather than proactive, thereby “risk[ing] the ossification of constitutional law by raising the cost of innovation.”209 In addition to injunctive relief under § 1983, suits against municipalities under Monell v. Department of Social Services of New York are an alternative to individual suits against police officers for money damages.210 Monell holds that local governments can be liable for constitutional violations committed pursuant to official policy or custom.211 Monell liability is an additional route to adjudication on the First Amendment right to record police officers on the merits that has the added benefit of precluding a qualified immunity defense.212 However, despite the arguments that Dean Jefferies and others put forward, both injunctive relief and Monell liability have disadvantages that make them **inappropriate to remedy the chilling effect** created by two-party consent wiretapping statutes and catchall criminal charges. Section 1983 suits for injunctive relief are less likely than suits for money damages to develop the First Amendment right to record because permanent injunctions require the plaintiff to prove an “irreparable injury,” i.e., one that a court cannot remedy with “monetary damages.”213 In addition to this difficulty in proving injury, citizen recorder plaintiffs in suits for injunctive relief **may lack the redressability** sufficient **for Article III standing**.214 In right-to-record suits for injunctive relief, a plaintiff would seek an injunction against the enforcement of two-party consent statutes or a declaration that state wiretapping statutes do not apply to recordings of police officers made in public. A declaration or injunction would provide a citizen plaintiff forward-looking relief by removing the threat of future prosecution and the chilling effect on protected speech. The requirement that a plaintiff assert an “irreparable injury” that “monetary damages” cannot remedy **stifles** § 1983 **actions for forward-looking injunctive relief** as a tool for constitutional development.215 Injury-in-fact analysis is grounded in the harm-based model created in FCC v. Sanders Bros. Radio Station216 and Data Processing Services Organizations v. Camp217 that explicitly disavowed the prior personal rights model.218 After Sanders Bros. and Camp, a plaintiff need not assert the violation of a legal right to demonstrate injury-in- fact sufficient for Article III standing. As applied to right-to-record cases, citizen recorders who the police arrest suffer factual harm to their interest in videotaping even if the Constitution does not clearly enshrine that interest in a personal right. Thus, § 1983 plaintiffs seeking backward-looking relief to compensate them for a prior arrest can easily allege factual harm sufficient for injury-in-fact and Article III standing.

### Legal Certainty Key

#### Only legal uniformity can guarantee a right to record; uncertainty over “clearly established” rights creates a chilling effect

Slaughter 15

Matthew Slaughter (Law clerk to the Honorable Karen L. Hayes of the United States District Court for the Western District of Louisiana). “First Amendment Right to Record Police: When Clearly Established is Not Clear Enough.” John Marshall Law Review. Volume 49, Issue 1, Article 4. Fall 2015. http://repository.jmls.edu/cgi/viewcontent.cgi?article=2437&context=lawreview [Premier]

All courts have held there is a right to record police activity in public, and that a reasonable restriction on this right exists. First Amendment jurisprudence supports the recognized right to film police activity as articulated by the circuits. Some commenting circuits have held the right is clearly established, while others have declined to extend their holdings so far. Practically, citizens are restrained from freely exercising their right to film police activity in public even in circuits that have found the right clearly established. Because **reasonable restrictions have not yet been clearly articulated,** citizens have the recourse to film the police and merely hope that their unique situation is afforded First Amendment protections. **Such uncertainty will inevitably lead to a chilling effect** on the protected activity and encourage police officers to continue to limit the right to film police in public. The police could also potentially be liable for civil rights violations and a citizen may have to deal with the unflattering prospect of being detained or even arrested for this activity. **A national standard could alleviate the confusion** and issues **for both citizens and police** alike. The standard should affirmatively memorialize such a right, as well as articulate objective reasonable restrictions to prevent a chilling of a citizen’s exercise of valid First Amendment conduct.

### *Saucier* Precedent Key

#### Merits-first adjudication for First Amendment cases is key to reverse the chilling effect on free speech

Derrick 13

Geoffrey J. Derrick (Fellow, Center for Appellate Litigation, New York, NY. J.D., magna cum laude, 2012, Boston University School of Law; B.S., 2007, Northwestern University). “Qualified Immunity and the First Amendment Right to Record Police.” 22 B.U. Pub. Int. L.J. 243 (2013). https://ssrn.com/abstract=2202388 [Premier]

V. THE NEED FOR SAUCIER V. KATZ’S MANDATORY SEQUENCING IN FIRST AMENDMENT CONSTITUTIONAL TORTS. While the First and Seventh Circuits laudably addressed the merits of whether the First Amendment right to record police officers exists, judges in **all other Circuits have avoided the merits** and held that the right was not “clearly established” in their Circuit.247 This qualified immunity analysis would not have been possible before Pearson’s 2009 ruling because Saucier’s rigid order of battle imposed a mandatory sequencing of the merits prong first and the clearly established prong second.248 The Pearson majority recognized that Saucier’s “two-step procedure” is valuable when it “promotes the development of constitutional precedent” but offered no further guidance on when to consider the merits prong before the clearly established prong.249 Therefore, it remains **entirely at the discretion of lower** federal **courts** whether or not to reach the merits in qualified immunity cases after Pearson. 250 Pearson discretion threatens to eliminate qualified immunity jurisprudence as a mechanism for the development of constitutional law so long as courts address only the “clearly established” prong of the analysis.251 Saucier previously mandated that courts deviate from the usual principle of constitutional avoidance because the merits determination facilitates the development of constitutional law.252 Justice Kennedy, writing for the Saucier majority, concluded that the explanation of the law would suffer “were a court simply to skip ahead to the question whether the law clearly established that the officer’s conduct was unlawful in the circumstances of the case.”253 Even though courts have most often exercised their Pearson discretion in favor of immunity-first adjudication,254 the Supreme Court recently championed the Saucier merits-first model in Camreta v. Greene, holding that “our regular policy of avoidance . . . threatens to leave standards of official conduct permanently in limbo.”255 Camreta held that in qualified immunity cases where the government prevails on the immunity prong but loses on the constitutional merits, the government may appeal the adverse constitutional merits ruling.256 The majority further explained, “[I]t remains true that following the two-step sequence—defining constitutional rights and only then conferring immunity—is sometimes beneficial in clarifying the legal standards governing public officials.”257 However, Justice Scalia’s concurrence258 and Justice Kennedy’s dissent, joined by Justice Thomas,259 in Camreta display a palpable disdain for lower courts’ discretion to address the merits before immunity. The disagreement in Camreta may signal that the Supreme Court is losing faith in current qualified immunity doctrine.260 While Pearson noted that “the two-step Saucier procedure is often, but not always, advantageous,”261 Camreta cautions that “courts should think hard, and then think hard again, before turning small cases into large ones.”262 In one way, these passages suggest that Camreta is in favor of discretion and affirm Pearson’s presumption against Saucier’s rigid order of battle. However, Justice Kennedy’s argument in his Camreta dissent that municipal liability, suppression hearings, and declaratory judgments are more preferable vehicles than Pearson discretion for developing constitutional law suggests **doctrinal instability** in post-Pearson qualified immunity analysis.263 Such instability creates an opening for a qualified immunity doctrine that is tailored to the First Amendment. Requiring Saucier’s merits-first adjudication in First Amendment cases would address the concern that repeated immunity findings might leave citizens in the “limbo” contemplated by Camreta. Without clear notice about their First Amendment rights, citizen recorders will stop recording due to fear of harassment, arrest, wiretapping charges, or catchall charges. Since wiretapping is a felony in certain states, some two-party consent state wiretapping statutes give prosecutors the tools to seek up to five years in prison for citizens who record police officers in public.264 Even if prosecutors ultimately drop the charges, public arrests for recording embarrass citizens in the full view of their community members and thereby deter citizen recording. Because the specter of criminal charges presently deters citizens from recording the police, it is possible that citizens are chilled from engaging in conduct that is protected by the First Amendment. In addition to **chilling protected speech**, judges that continue to practice constitutional avoidance risk ossifying First Amendment doctrine in their respective Circuits. The Third Circuit police recording case, Kelly v. Borough of Carlisle, explained that “it would be unfaithful to Pearson if we were to require district courts to engage in ‘an essentially academic exercise’ by first analyzing the purported constitutional violation in a certain category of cases.”265 Ironically, the Third Circuit here viewed Pearson as a rigid rule and not an invitation for it to exercise its own discretion. This preference for constitutional avoidance **allows the First Amendment to stagnate** and become essentially backward-looking. Saucier’s merits-first adjudication is preferable in First Amendment cases precisely because courts must extrapolate enduring First Amendment principles to the new medium of citizen recording. First Amendment claims concerning the chilling of protected speech are a sui generis form of § 1983 litigation where the lower federal courts ought to have less discretion to entirely avoid reaching the merits. Pearson’s conclusion, affirmed in Camreta, that a merits-first approach can develop constitutional precedent is manifestly applicable to cases where the direct impact of unclear precedent is the chilling of protected speech. **A chilling effect is such a strong constitutional concern** under the First Amendment that it ought to rebut the presumption of Pearson discretion in favor of Saucier’s mandatory sequencing.

### Studies

#### Mandatory sequencing increases rights-affirming litigation without increasing rights restrictions; studies prove

Sobolski and Steinberg 10

Greg Sobolski (J.D., 2009, Stanford Law School; B.A., B.S., 2004, Stanford University) and Matt Steinberg (J.D., 2009, Stanford Law School; B.A., 2003, Stanford University). “An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of Pearson v. Callahan.” 62 Stanford Law Review, 523 (2010). <http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2010/03/Sobolski-Steinberg.pdf> [Premier]

Pearson is an important decision for the empirical study of qualified immunity because it signals unambiguously that lower courts may apply their discretion in resolving qualified immunity actions. The post-Pearson era that will now unfold is thus an opportunity to observe and analyze the discretionary behavior of lower courts and its impact on the development of constitutional rights. This Note has presented evidence to reorient the field’s empirical discussion of qualified immunity, providing a more specific and accurate framework through which to structure doctrinal and quantitative studies. CONCLUSION Using a random sampling strategy over a continuous time period, this Note has presented evidence from appellate courts that: (1) **Saucier’s mandatory sequencing regime made courts less likely to avoid addressing the constitutional issue**; (2) there was no statistically significant increase in the frequency of rights-restricting outcomes after Saucier; (3) **there was a statistically significant increased frequency in rights-affirming outcomes after Saucier**; but (4) plaintiffs found by the court to have successfully alleged a constitutional violation in the pre-Saucier period were eleven percent more likely to ultimately recover damages than their counterparts post-Saucier—also a statistically significant observation. We also presented evidence that the traditional view of the Saucier decision as the proxy for the shift among lower courts to mandatory sequencing may not correspond to the empirical reality of how appellate courts behaved before Saucier. In Pearson v. Callahan, however, the Supreme Court has unambiguously indicated that lower courts are to use discretion whether to sequence qualified immunity cases. Therefore, the post-Pearson period will be an ideal time to expand the empirical study of qualified immunity and gauge more precisely the impact of discretionary sequencing on articulation and refinement of constitutional rights through § 1983 litigation.

### AT: Not a Limit on QI

#### Saucier precedent limits qualified immunity; without it, QI is applied sooner and more often

Hynes 9

Tricia L. Hynes (Meyers Nave law firm). “High Court Makes It Easier to Assert Qualified Immunity for Public Officials.” Meyers Nave. 28 January 2009. http://www.meyersnave.com/high-court-makes-it-easier-to-assert-qualified-immunity-for-public-officials [Premier]

The Supreme Court’s unanimous decision in Pearson addresses this criticism, holding that trial and district courts can skip the first question in the Saucier two-step and proceed directly to examination of whether the qualified immunity is clearly established. **The result is more discretion** for district and trial courts to decide whether an official should be entitled to qualified immunity. Rather than becoming mired in constitutional debate, courts may now focus on whether the official’s conduct was reasonable or violative of clearly established law. In short, by negating the Saucier two-step, which presented constitutional issues that **made prevailing on qualified immunity problematic** in some cases, Pearson may enable public officials to assert qualified immunity **sooner in** the life cycle of **litigation and more often.**

#### QI debates should focus on specific rights; considerations change based on context

Derrick 13

Geoffrey J. Derrick (Fellow, Center for Appellate Litigation, New York, NY. J.D., magna cum laude, 2012, Boston University School of Law; B.S., 2007, Northwestern University). “Qualified Immunity and the First Amendment Right to Record Police.” 22 B.U. Pub. Int. L.J. 243 (2013). https://ssrn.com/abstract=2202388 [Premier]

Qualified immunity doctrine is a trans-substantive barrier to suits against government officials insofar as it applies equally to all underlying federal rights.33 But the chilling consideration arises only in qualified immunity cases concerning First Amendment rights, **suggesting an analysis tailored to the First Amendment.** A **rights-specific analysis** does not mean that an officer’s immunity is more or less strong depending on the right involved.34 Rather, mandating Saucier’s merits-first procedure in First Amendment cases would harness Pearson’s unguided discretion and better notify citizens about the extent of their recording rights.

## Ableism Aff

#### Limit QI against actions for damages brought under the ADA, Rehabilitation Act, and IDEA,

**Gildin 99**

Gildin, Gary S. (Professor of Law, The Dickinson School of Law of the Pennsylvania State University.) "Dis-Qualified Immunity for Discrimination against the Disabled." University of Illinois Law Review 1999.3 (1999): 897-948. [Premier]

In his article Professor Gildin challenges the applicability of¶ the qualified immunity defense in actions brought under the federal¶ disability statutes. Specifically, he contends that the qualified immunity¶ defense should not be available in actions for damages¶ brought under the Rehabilitation Act, the Americans with Disabilities¶ Act, and the Individuals with Disabilities Education Act.¶ Although these acts are very powerful tools to protect the rights of¶ disabled individuals, lower courts have slowly eviscerated a key enforcement¶ mechanism-the remedy of money damages-by transferring¶ the qualified immunity defense permitted in § 1983 actions¶ to actions brought under these acts. In support of his thesis, Professor¶ Gildin analyzes the text and legislative histories of these acts¶ and argues that neither of these supports the existence of the qualified¶ immunity defense. He also finds that there is no historical¶ linkage between § 1983 and the disability statutes that justifies borrowing¶ qualified immunity from § 1983. Finally, Professor Gildin¶ argues that judges should not legislate this defense as Congress at¶ the time it enacted the disability statutes did not intend for this defense¶ to be available.

#### QI is totally unjustified in this context – prevents discrimination suits

**Gildin 99**

Gildin, Gary S. (Professor of Law, The Dickinson School of Law of the Pennsylvania State University.) "Dis-Qualified Immunity for Discrimination against the Disabled." University of Illinois Law Review 1999.3 (1999): 897-948. [Premier]

The legislative instruction that the Acts be broadly construed to¶ afford relief to victims of disability discrimination obviously repudiates¶ a qualified immunity defense that does not appear on the face of¶ the statutes. Rather than promote relief, the qualified immunity defense¶ deprives the victim of a damage remedy against the government¶ official who intentionally engaged in the proscribed discrimination on¶ the basis of disability. In fact, in two circumstances the immunity defense¶ would have the effect of entirely barring recovery of the damages¶ caused by intentional discrimination. First, because damages may not be obtained from the federal government¶ under the Rehabilitation Act or the ADA,165 a disabled person¶ would be left without compensation for harms suffered as a¶ consequence of intentional discrimination caused by a federal official¶ who successfully asserts the qualified immunity defense. Second, immunity¶ may have the effect of precluding recovery of damages for discriminatory¶ acts of state and local officials. Although state and local¶ governmental entities are not sheltered by any immunity, the courts¶ may require that plaintiff prove that the discrimination was inflicted¶ pursuant to a governmental custom or policy before the entity will be¶ held liable.166 If the discriminatory acts of a public official do not represent¶ governmental custom or policy, the entity may not be liable. If¶ at the same time the state or local official is exonerated under the¶ qualified immunity defense, the risk of loss from violations of the disability¶ discrimination statutes will be borne by the least appropriate¶ party, the victim of discrimination. Congress has repeatedly made¶ plain its intent that the Acts should be construed, without exception,¶ to afford relief when public officials discriminate against the disabled.¶ Because qualified immunity impedes, and in some cases defeats, recovery of the damages caused by violation of the Acts, the defense¶ must not be made available to those who discriminate.

## Kantian Aff



### Intentionality

#### The court intentionally decided that the protections of officers matter more than rights of the people, Reinhardt 15

Stephen R. Reinhardt, (Circuit Judge, United States Court of Appeals for the Ninth Circuit.) The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219 (2015). Available at: http://repository.law.umich.edu/mlr/vol113/iss7/3 [Premier]

As in the habeas context, the doctrinal evolution of qualified immunity¶ was not inevitable; it was the product of a conscious choice to exempt constitutional¶ violations from civil liability because of a concern over other¶ lesser values. Here, the Court was purportedly concerned that officers not¶ face litigation and, ultimately, harsh financial consequences for mistakes¶ made in the line of duty. As a practical matter, this justification is based on a¶ false premise—that officers would pay for the liability they incur in civil¶ rights suits. As explained above, indemnification agreements generally shield¶ officers from any monetary harm. To the extent, however, that qualified immunity¶ serves a justifiable purpose of protecting officers from undergoing¶ litigation for innocent, reasonable mistakes, even in the absence of any risk¶ of financial liability, that purpose does not justify the Court’s extreme construction¶ of the qualified immunity doctrine—a construction that has once¶ again exalted a lesser concern over the protection of constitutional rights.

### Ripstein Torts

#### Immunity hinders essential tort litigation

Chen 06

Chen, Alan K. (Professor @ University of Denver Sturm College of Law)"The Facts about Qualified Immunity." Emory Law Journal 55.2 (2006): 229-278. [Premier]

The law provides a damages action to people whose constitutional rights¶ have been violated by federal, state, and local public officials acting under the¶ color of their governmental authority. 18 These "constitutional torts" serve¶ critical compensatory and deterrent functions in the scheme of constitutional¶ enforcement. 19 While acknowledging these values, the Supreme Court¶ nonetheless has established substantial barriers to such suits against public¶ officials. Through its decisions, it has developed a bifurcated system under¶ which public officials who carry out certain functions are entitled to absolute¶ immunity from constitutional tort actions, while all other officials are protected¶ by only "qualified" immunity. Officials performing prosecutorial, judicial, ¶ or legislative functions when they commit the act for which they are sued¶ may successfully claim absolute immunity. The Court's functional approach¶ means that officials who ordinarily perform these types of functions are not¶ entitled to claim absolute immunity when they perform official acts that are not¶ within the scope of these protected functions. 23 For example, a prosecutor may¶ claim absolute immunity for prosecutorial but not investigative acts. 24 She¶ may still, however, assert qualified immunity.

#### There’s no recourse in the face of powerful QI

**Reinhardt 15**

Stephen R. Reinhardt, (Circuit Judge, United States Court of Appeals for the Ninth Circuit.) The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219 (2015). Available at: http://repository.law.umich.edu/mlr/vol113/iss7/3 [Premier]

Unfortunately, the Court’s actions no longer match its rhetoric. In fact,¶ they now directly contradict it. Once again, the Court’s concern for protecting¶ government officials in general and state and local law enforcement officers¶ in particular has prevailed over the constitutional rights of individuals.¶ In recent years, the Court has used the qualified immunity doctrine, which¶ shields officials from civil liability as long as their actions do not violate¶ “clearly established statutory or constitutional rights of which a reasonable¶ person would have known,”128 to severely restrict the ability of individuals to¶ recover for constitutional violations that they suffer at the hands of law enforcement. The problem is that, due to sovereign immunity protections for¶ the federal government and state governments, and the need to prove an¶ unlawful policy or custom to hold a municipality liable under § 1983,129¶ claims against law enforcement officers are often the only remedy for individuals¶ who suffer violations of their constitutional rights. However, in the¶ name of protecting these officers from being held formally accountable for¶ “minor” errors made in the line of duty, the Court has through qualified¶ immunity created such powerful shields for law enforcement that people¶ whose rights are violated, even in egregious ways, often lack any means of¶ enforcing those rights. As law enforcement officers benefit from qualified immunity, so do municipalities, indirectly, because indemnification agreements¶ would otherwise force them to pay the damages for which the officers¶ have been held responsible; in fact, when officers receive the benefit of qualified¶ immunity, it is in reality the municipality that is relieved of its duty to¶ compensate the victim of a constitutional violation.

#### Tort law captures the unique responsibility to other persons while maintaining freedom to pursue one’s own conception of the good

Ripstein 04

Arthur, pf of law @ UToronto, PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER NO. 04-02 THE DIVISION OF RESPONSIBILITY AND THE LAW OF TORT ARTHUR [Premier]

All of these **effects that one person might have on another are** consistent with each of us having a special responsibility for how our own life goes, because they are simply the **inevitable side effects of separate persons making separate decisions in the presence of others**. But there are other ways in which we have effects on others that are different. If I use what is yours without your consent, then I subordinate your pursuit of your purposes to my pursuit of mine. **If I injure you, or damage your goods, I prevent you from using your powers to set and pursue your own conception of the good.** So while the former class of side effects must simply be accepted80 as inevitable, **th[is]** latter set **is inconsistent with each of us having a special responsibility for our own life.** However, to say that they are inconsistent is not to say that they will never happen, and here too, **the division of responsibility sheds considerable light on the doctrinal structure of tort law. If I wrongfully injure you, I am liable to you in damages, just because the payment of damages aims to “make you whole,” that is, to restore to you, as much as it is possible to do so, means equivalent to those of yours that I have injured.** To put you back in the same place is **to put you back in the same place with respect to your ability to set and pursue your own conception of the good**.

## Plan – Juries



### Solvency

#### Leaving qualified immunity to the jury is the best middle ground between plaintiff’s and defendant’s rights

Ignall 94

David J. Ignall (Associate, Wiley, Rein & Fielding, Washington, D.C. J.D., The College of William and Mary, 1991; B.A., Cornell University, 1987). “Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact.” California Western Law Review: Vol. 30: No. 2, Article 2. (1994). http://scholarlycommons.law.cwsl.edu/cwlr/vol30/iss2/2 [Premier]

The first three of these possibilities have problems. To allow the judge to make the factual determination would make the judge and the jury both triers-of-fact, which would give the defendant **two bites at the apple.** 2 ' To allow the jury to determine both the issue of qualified immunity and liability risks confusing the jury. The jury would potentially have to apply different legal standards if the law that would apply at time of trial was not clearly established at the time of the incident. To allow the matter to go to the jury without regard to qualified immunity would allow defendants to be held liable for conduct that did not violate clearly established constitutional rights. This would inhibit the ability of these government officials to perform their official duties.127 **The best alternative is to leave** the issue of **qualified immunity to the jury**, which would protect the potential immunity of the defendant and the plaintiff's right to vindication. **Although there is the danger of confusing the issues, the court can reduce this** possibility by submitting specific interrogatories to the jury to determine whether the jury found the facts as would be necessary to defeat the defense of qualified immunity.'2 The better alternative, however, would be to bifurcate the trial to allow the jury to determine the facts concerning qualified immunity. If the jury finds for any defendant concerning qualified immunity, the case is over with respect to that defendant because that defendant would be entitled to qualified immunity. If the jury finds against any defendant on the issue of qualified immunity-i.e., that the defendant's actions clearly violated the plaintiffs constitutional rights, the court would then enter judgment in favor of the plaintiff against that defendant. The court could then conclude the trial on the merits with respect to any remaining defendants who did not, or could not, 29 raise the qualified immunity defense.

#### Current QI law empowers the judges to make the decisions that lacks transparency and debate over the fact-finding process, Chen 06

Chen, Alan K. (Professor @ University of Denver Sturm College of Law)"The Facts about Qualified Immunity." Emory Law Journal 55.2 (2006): 229-278. [Premier]

I contend that the Court assigns decision-making power to judges because¶ it is extremely uncomfortable with the idea that qualified immunity is just¶ that-qualified. The Court's recent efforts to refine this procedural structure¶ reflect its wish to move qualified immunity toward something resembling¶ absolute immunity. Accordingly, it is transferring the adjudication of civil rights claims toward judges and away from juries. At least two problems arise from this undertaking. First, if the Court[‘s] is¶ unqualifying immunity, it is doing so subversively. That is, its efforts to¶ empower lower court judges to dispose of civil rights claims are occurring¶ without a sufficient articulation of the policy considerations necessary for such¶ a move. The lack of transparency in the Court's manipulation of the doctrine¶ obscures any meaningful discourse that might arise were its attempts to¶ transform qualified immunity, and thereby undermine civil rights enforcement,¶ overt. Second, by allocating the resolution of qualified immunity claims to¶ judges, the Court ignores the critical role that facts play in articulating legal¶ principles in constitutional adjudication. Even in other contexts where the¶ Court has allocated decision-making authority regarding factual matters to¶ judges, it has at least permitted fact finders to make conclusions as a basis for¶ the judges' decisions. 17 Unless the Court confronts these foundational¶ problems, the doctrine is doomed to another generation of failed promises and¶ counterproductive exacerbation of the time and energy spent on civil rights¶ litigation.

#### Use of judges in QI suits makes QI more like absolute immunity

**Chen 06**, Alan K. (Professor @ University of Denver Sturm College of Law)"The Facts about Qualified Immunity." Emory Law Journal 55.2 (2006): 229-278. [Premier]

Indeed, even in a case decided in the Supreme Court's most recent term,¶ Justice Stevens argued that some qualified immunity determinations simply must be resolved by juries. 25 2 In Brosseau v. Haugen, the Court summarily¶ reversed a Ninth Circuit decision that an officer's use of deadly force was a¶ violation of clearly established Fourth Amendment limitations on law¶ enforcement.2 53 In the incident leading to the lawsuit, the defendant officer¶ shot a suspect in the back as the suspect tried to drive away from the scene of¶ an altercation. 254 According to Justice Stevens, who has been more willing to¶ acknowledge the factual subtleties of qualified immunity determinations than¶ other Justices, the "bizarre scenario" in the case could have led reasonable¶ jurors to disagree about whether a reasonable officer would have understood¶ her conduct to violate clearly established constitutional law. 5 As he pointed¶ out, it was not uncertainty about the law that gave rise to the officer's qualified¶ immunity claim.256 Rather, qualified immunity turned on a "quintessentially¶ 'fact-specific' question" and therefore should go to a jury. 257 As I have argued¶ here, such questions actually are not at all uncommon in qualified immunity adjudication.¶ But as the Court's experience with, or perception of, qualified immunity¶ has changed, the Court has become increasingly uncomfortable with the¶ qualified nature of official immunity. Facts are an impediment to early¶ disposition of qualified immunity claims, not an essential element of an¶ informed decision about the reasonableness of an official's behavior. As¶ illustrated throughout this Article, the Court's decisions repeatedly reflect this¶ discomfort.¶ The Court's efforts to transform qualified immunity into a purely legal,¶ nonfactual inquiry can be seen as an effort to unqualify immunity. This subtle¶ but important change makes qualified immunity increasingly like absolute¶ immunity, with the corresponding procedural advantage of permitting early¶ termination of most cases. But even as it has undertaken this critical¶ transformation, the Court can't quite bring itself to convert qualified immunity¶ to absolute immunity for all public officials. Absolute immunity is immunity¶ from suit; qualified immunity cannot ever really constitute immunity from suit¶ without being unqualified.2 58

#### QI limits jury control

Hassel 09

Diana Hassel, Professor, Roger Williams University School of Law. B.A., 1979, Mount Holyoke College; J.D., 1985, Rutgers University School of Law at Newark. “Excessive Reasonableness.” 43 Ind. L. Rev. 117 [Premier]

The **reluctance to collapse** the **excessive force and qualified immunity** issues also **stems from a desire to keep the immunity question out of the hands of the jury.** 113 Although the substantive issue of whether the Fourth Amendment was violated may be appropriate for a jury, in the Court's view, the question of whether a defendant is entitled to qualified immunity is not. 114 By insisting that the Fourth Amendment analysis be kept separate from the qualified immunity analysis, **the Saucier rule ensures that the role of the jury in the resolution of qualified immunity be kept to a minimum. The Rehnquist Court's qualified immunity doctrine may also reflect a more general distrust of juries and hostility to the trial process itself**. 115 Andrew Siegel has concluded that **the Court's approach to qualified immunity is part of a larger attempt to limit litigation,** 116 **that is to remove the resolution of civil disputes from trial courts by limiting the suits that can be brought, 117 limiting the damages that can be awarded, 118 and by requiring claims to be resolved through arbitration or other private dispute resolution mechanisms. 119 Qualified immunity doctrine illustrates this hostility** to litigation **by broadly eliminating liability for constitutional wrongs.** At bottom, Siegel believes that **the Court in recent years has exhibited "doubt in the efficacy of a lawsuit as a mechanism for resolving the problem at hand, coupled perhaps with a disproportionate animosity towards those who believe otherwise."** 120

### Confusion => Lenience

#### Qualified immunity for excessive force cases creates legal redundancy which causes jury confusion and excess lenience

Urbonya 89

Urbonya, Kathryn (Associate Professor of Law, Georgia State University), "Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force" (1989). Faculty Publications. Paper 472. <http://scholarship.law.wm.edu/facpubs/472> [Premier]

The article proposes that even though qualified immunity is appropriately available as a defense for other fourth amendment claims, it is an unnecessary defense to a fourth amendment claim challenging the use of excessive force because **the standard for liability is identical** to the standard for qualified immunity; both question whether a reasonable officer would have believed that the use of force was necessary. 37 Because the standards overlap, qualified immunity is an unnecessary defense. Some courts, however, have erroneously distinguished the standard for liability from the standard for immunity; they have stated that a court should determine the factual issues underlying the defense of qualified immunity and that a fact finder should determine the factual issues underlying the claim of excessive force, even though the factual issues are the same.38 Harlow, however, does not support that distinction; the standards in fact do overlap. 39 The fact finder thus should resolve material factual disputes. In doing so, it simultaneously determines whether officials have qualified immunity and whether they violated the fourth amendment by using excessive force during an arrest. By recognizing that the standards for qualified immunity and liability are the same, **courts will not confuse the fact finder by trying to explain in a jury instruction how unreasonable conduct nevertheless can be reasonable** for the purpose of qualified immunity. By eliminating such confusion, a fair trial can occur-state officials will not get **two chances** to prove that their conduct was reasonable. When material facts are not in dispute, then the court may determined the issues by considering motions for judgment on the pleadings40 or for summary judgment.41

### Gay Rights

#### Judges fail to protect gay rights in applying QI

**Wagner 14** Robin B. Wagner, (J.D. Candidate 2014, DePaul University College of Law.) Are Gay Rights Clearly Established?: The Problems with the Qualified Immunity Doctrine, 63 DePaul L. Rev. 869 (2014) Available at: http://via.library.depaul.edu/law-review/vol63/iss3/7 [Premier]

Therefore, when three cases on facts that easily sufficed for allegations¶ of equal protection violations came before three courts in three¶ different circuits in the same year and resulted in three different outcomes,¶ it is clear that there is a problem with the qualified immunity¶ doctrine. Under the Roberts Court, the qualified immunity doctrine¶ has become more generous to defendants with an increasing requirement¶ for circuit unanimity and an emerging approach to rational-basis¶ review that protects decision makers’ discretion. The problems arising¶ in qualified immunity doctrine are particularly apparent when evaluating¶ constitutional rights related to sexual orientation, because the key Supreme Court cases did not rely wholly on the established methodologies¶ for equal protection and due process analysis.¶ In the hands of judges who unconscientiously apply precedent or¶ wish to avoid hot-button social policy topics, the qualified immunity¶ doctrine can prevent plaintiffs from vindicating their rights and further¶ weaken the “private attorney general” approach to rights claims.¶ During the civil rights era, the courts played a leading role in recognizing¶ and expanding civil rights for people of color. In this era of gay¶ civil rights, the courts should not be the slower and less reliable vehicle¶ for recognizing implicit rights. If courts were to more regularly¶ apply the prong-one analysis of qualified immunity and faithfully adhere¶ to the actual holdings of Supreme Court precedent, the law related¶ to civil rights violations under § 1983 could provide both parties¶ with the predictability they need and deserve from the law.

### Fact-Finding

#### QI decisions are made on factual bases that should be left for juries to decide

**Chen 06**, Alan K. (Professor @ University of Denver Sturm College of Law)"The Facts about Qualified Immunity." Emory Law Journal 55.2 (2006): 229-278. [Premier]

In contrast, in civil rights cases against public officials, trial courts¶ routinely rule on defendants' qualified immunity-based summary judgment¶ motions without first holding evidentiary hearings, and often without allowing¶ complete discovery. At best, the court may be looking at a paper record that¶ might include affidavits, deposition transcripts, and documentary evidence. If¶ factual disputes arise at the summary judgment stage, it is harder to make the¶ case for the trial judge asserting decision-making power to resolve such facts¶ rather than leaving them for a jury. Moreover, unlike the situation in Ornelas,¶ there is not even a hearing at which the judge could make credibility¶ determinations. As discussed earlier, factual complexities that inevitably arise¶ in constitutional tort cases are not particularly well suited for pretrial judicial¶ decision making. 243

### Fairness

#### Juries avoid unfairness arising from factual ambiguity

Ignall 94

David J. Ignall (Associate, Wiley, Rein & Fielding, Washington, D.C. J.D., The College of William and Mary, 1991; B.A., Cornell University, 1987). “Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact.” California Western Law Review: Vol. 30: No. 2, Article 2. (1994). http://scholarlycommons.law.cwsl.edu/cwlr/vol30/iss2/2 [Premier]

If the court denies summary judgment to the defendant because the plaintiff has produced sufficient evidence to create an issue of fact on qualified immunity, the defendant has effectively lost much of the protection of qualified immunity. Nonetheless, the standard for summary judgment precludes the court from preventing the case from going to trial because the court may not resolve genuine issues of material fact on a motion for summary judgment." **The defendant should** nonetheless **be allowed at trial to raise** the defense of **qualified immunity.** Some courts apparently disagree with this proposition. 4 If the defendant cannot raise the defense of qualified immunity at trial, he risks having judgment entered against him on the merits **even if the evidence at trial fails to show** that the defendant violated **a clearly established right** of which a reasonable person would have known, but merely creates a question for the jury concerning liability. To avoid this potential unfairness, the court must determine whether the evidence adduced at trial, when viewed in the light most favorable to the plaintiff, would entitle the plaintiff to judgment as a matter of law as the law existed at the time of the alleged violation; if not, the judge should enter judgment based on qualified immunity. The problem arises if the evidence of whether defendant's conduct was egregious enough to violate a clearly established constitutional right **remains disputed at the end of the trial.** 1 There are a number of possibilities in this situation: the judge could resolve the factual disputes that concern qualified immunity, the jury could resolve-with special interrogatories-the factual issues about both qualified immunity and the merits, the jury could resolve the merits without any consideration of qualified immunity, or the jury could be instructed only on qualified immunity.

### Legal Confusion

#### Leaving immunity to judges creates legal confusion and obscures relevant factual issues

Chen 6

Alan K. Chen (The William M. Beaney Memorial Research Chair and professor of law at the University of Denver Sturm College of Law; experienced civil rights litigator and former ACLU staff attorney). “The Burdens of Qualified Immunity: Summary judgment and The Role of Facts in Constitutional Tort Law.” Emory Law Journal, Vol. 55, p. 229, 2006 U Denver Legal Studies Research Paper No. 07-05. <http://amulrev.org/pdfs/47/47-1/chen.pdf> [Premier]

This explains in large measure the difficulty the courts have had in defining the appropriate standard for resolving qualified immunity claims on summary judgment, in sorting out the extent to which discovery should be permitted on qualified immunity claims, and in deciding what role, if any, juries may play in the evaluation of qualified immunity. As a formal matter, none of these procedural problems should arise if qualified immunity operated as an effective device to protect officials not only from liability, but also from the burdens of trial and pretrial litigation. Complications in these areas occur, however, once it is recognized that qualified **immunity** claims **cannot be evaluated without reference to some set of facts.** For example, the courts' confusion about the scope of available discovery on the immunity claim itself reflects the hybrid nature of qualified immunity. Once the Supreme Court acknowledged in Anderson that discovery would be necessary to adjudicate some qualified immunity claims, it laid the groundwork for **substantial confusion among the lower courts.**4 5 0 Discovery, after all, is the most significant pretrial litigation burden that the qualified immunity defense was designed to avoid. Even when courts acknowledge that evaluation of facts is necessary to decide the qualified immunity issue, however, they generally attempt to isolate the factual issues in a manner that suggests that qualified immunity can effectively protect officials from substantial pretrial litigation. It has been suggested, for example, that the goals of qualified immunity can be achieved even when discovery is permitted if trial courts carefully limit discovery only to issues necessary to the adjudication of the immunity question.45 ' 2 **It is unclear how discovery could be meaningfully limited**, however, because the substantive constitutional law inquiry and the qualified immunity inquiry are intertwined. The facts relevant to the immunity issue will be precisely the same facts necessary for the evaluation of liability. For example, to determine whether a police officer made a reasonable mistake as to whether exigent circumstances justified a warrantless search, the parties and the court would have to explore the same basic facts concerning the officer's knowledge of exigent circumstances to adjudicate both the plaintiffs claim and the officer's qualified immunity defense. Further support that qualified immunity has become a hybrid immunity comes from the judiciary's treatment of the role of juries in assessing qualified immunity. Notwithstanding its function as gatekeeper, qualified immunity can be asserted at many different stages of the litigation process, including at, or even after, trial.4 3 When cases reach a jury, **courts have had trouble defining what role juries should play** in forming the court's legal judgment about whether the defendant violated clearly established constitutional rights.454 Some courts have addressed the issue by giving the jury "special interrogatories," which require it to make specific factual findings.45 These findings are then used by the court as a basis for making the "legal" determination of whether the defendant violated clearly established law. 4 56 The very fact that courts must occasionally address the role of juries in qualified immunity analysis underscores the hybrid nature of the defense. Since qualified immunity is supposed to be a question of law, the jury's role should be irrelevant. At least one court has recognized, however, that courts can only determine whether a clearly established right has been compromised if they know what happened; they must know the historical facts of the incident.47 Yet, at the same time, the Supreme Court in Hunter v. Bryant admonished the Ninth Circuit for an analysis that "routinely places the question of immunity in the hands of the jury."459 This curious phrasing is itself evidence of qualified immunity's paradoxical qualities. The Court's language reflects some ambivalence, suggesting that there may exist some non-routine cases in which qualified immunity, a matter of law, would be placed in the jury's hands.4a

### AT QI is Objective

#### Even “objective” standards for immunity hinge on factual issues that be decided by jury

Urbonya 89

Urbonya, Kathryn (Associate Professor of Law, Georgia State University), "Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force" (1989). Faculty Publications. Paper 472. <http://scholarship.law.wm.edu/facpubs/472> [Premier]

The Anderson majority explained that **discovery may sometimes be necessary.** 344 It noted that, if the plaintiff alleges actions that a reasonable officer would not have believed to be lawful and if the defendant alleges actions that a reasonable officer would have believed to be lawful, discovery is then appropriate prior to resolving the issue of immunity. 345 The Court explained that discovery under these circumstances should be "tailored" to the question of immunity.346 In recognizing the need for discovery, the Anderson Court did not explain what a court should do when discovery fails to resolve what actions were taken by the officer. 347 The Court did not specify the nature of the qualified immunity defense-whether a judge or jury should determine whether the alleged actions were ones that a reasonable officer could have believed to be lawful. Even though the standard for qualified immunity overlaps with the standard for liability under the fourth amendment, some courts have distinguished the standards by determining that the judge resolves the issue of qualified immunity. 348 Other courts have determined that the jury should resolve the issue. 349 Although a jury generally resolves factual disputes, the Court's emphasis in Harlow, Mitchell, and Davis that the Harlow standard is "wholly objective" has clouded the recognition that the standard could also be fact-specific. The Harlow decision merely eliminated from the qualified immunity standard a single factual issue-whether the officers knew that they had acted unlawfully. **It did not transform factual issues into legal questions.**350 Justice Scalia, the author of the majority opinion in Anderson, properly questioned in a decision rendered prior to his joining the Court whether "the expansive language of [the Harlow, Mitchell, and Davis decisions] is to be taken seriously."351 He emphasized that although the Court described its standard as "objective," the Harlow standard did not alter the procedures for moving for summary judgment. 352 He declared that after Harlow an official moving for summary judgment on the ground of qualified immunity still had the burden of demonstrating "that the objective inquiry raise[d] 'no genuine issue as to any material fact.' " 353 Justice Scalia inferred from Harlow and its progeny that the issue of qualified immunity could sometimes be resolved prior to discovery and that sometimes it could not. 354 The Court's decisions in Harlow, Mitchell, and Davis emphasized that the qualified immunity issue could be resolved prior to discovery. As Justice Stevens soundly noted in his Anderson dissent, the Harlow Court simply "assumed that many immunity issues could be determined as a matter of law before the parties had exchanged depositions, answers to interrogatories, and admissions. "355 The issue of immunity could be resolved under these circumstances when the law was not clearly established and when a court examined only the plaintiff's or only the defendant's allegations, as discussed above. 356 Such issues could be decided as a matter of law and qualified immunity could be immunity from suit, not a mere defense to liability. Nevertheless, when factual issues are intertwined with resolution of the immunity question, then discovery may be necessary and qualified immunity may only be a defense to liability, not an immunity from suit. 357 **Under these circumstances, qualified immunity is a defense to be decided at trial** because of the Anderson Court's expansive definition of what constitutes "clearly established law." By defining it to encompass the clarity of the "contours" of the asserted right, the Court allowed resolution of the qualified immunity issue to be fact specific. The Anderson Court could have promoted its asserted "wholly objective" standard by only questioning whether the law was clearly established that the officer needed probable cause and exigent circumstances to justify a warrantless search of a third-party home. The Court instead expanded the scope of qualified immunity and allowed factual inquiries by also questioning whether the particular actions taken by the officer were within the contours of the fourth amendment. The fact-specific nature of the qualified immunity issue is also apparent in excessive force claims based on the fourth amendment. In contrast to the fourth amendment claims discussed by the Court in its analysis of the Harlow standard for qualified immunity, this fourth amendment claim raises the same issue as that presented by the Harlow standard: would a reasonable officer have believed that the force was necessary? **When a jury determines the facts underlying an excessive force claim, it also resolves the issue of** qualified **immunity**. The standards for liability and immunity overlap. Qualified immunity is thus an unnecessary defense when material factual disputes are present.

### AT Not a Limit on QI

#### Forcing QI claims to go to trial is a substantial loss of immunity

Ignall 94

David J. Ignall (Associate, Wiley, Rein & Fielding, Washington, D.C. J.D., The College of William and Mary, 1991; B.A., Cornell University, 1987). “Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact.” California Western Law Review: Vol. 30: No. 2, Article 2. (1994). http://scholarlycommons.law.cwsl.edu/cwlr/vol30/iss2/2 [Premier]

Although issues of **qualified immunity "ordinarily should be decided** by the court **long before trial**,"' the summary judgment standard is designed to weed out only cases in which there are no genuine issues of fact for the jury. The Supreme Court having never ruled directly on the issue, the determination of qualified immunity, in certain circuits, can be an issue of fact for the jury.2 Ideally, the issue of qualified immunity should not survive to trial. Indeed, if the case goes to the jury, **much of the immunity is lost** because the defendant has had to go through the expense and inconvenience of litigation.'

## Plan – New Law (Hassel)



### Plan – Limit QI to Newly Developed Law

#### Qualified immunity should be limited to violations of newly developed law

Hassel 09

Diana Hassel, Professor, Roger Williams University School of Law. B.A., 1979, Mount Holyoke College; J.D., 1985, Rutgers University School of Law at Newark. “Excessive Reasonableness.” 43 Ind. L. Rev. 117 [Premier]

Meanwhile, far removed from the debate over doctrinal niceties, **the operational problem of how to address** the use of **unjustified force by police officers persists**. **The current legal regime has largely failed** in its attempt **to control excessive police violence**. 8 At least in part **that failure flows from the difficulty faced by claimants** under § 1983 **to overcome the insulation from liability that defendants derive from** both the Fourth Amendment requirements and **the qualified immunity standard. Until the nearly insurmountable barrier to recovery created by excessive reasonableness is somehow relieved, civil actions** based on the Fourth Amendment **will not effectively deter police violence**. **Addressing the problem of police violence**, providing balance to doctrine overly protective of defendants, and simplifying the procedural morass that qualified immunity has created in excessive force cases **requires a radical modification of the doctrine**. In excessive force cases, the doctrine should be modified to protect a defendant only when there has been a genuine change in the legal standard governing his actions-not merely an application of established doctrine to a somewhat new set of facts. **Currently, qualified immunity prevents liability if the defendant's actions do not violate clearly established law "of which a reasonable person would have known."** 9 **Instead, the standard should be that the defendant will be liable unless his actions violate a newly developed legal standard**. In the excessive force context, the protection provided by the reasonableness standard of Fourth Amendment, in conjunction with **this more** [\*120] **limited defense** based on a newly developed law, **will provide ample protection for the reasonably mistaken officer and will make compensation for the victim possible**.

#### Limiting QI in excessive force contexts to cases of newly developed law improves officer behavior and training and provides a clear legal standard

Hassel 09

Diana Hassel, Professor, Roger Williams University School of Law. B.A., 1979, Mount Holyoke College; J.D., 1985, Rutgers University School of Law at Newark. “Excessive Reasonableness.” 43 Ind. L. Rev. 117 [Premier]

The current regime poses at least three questions in resolving qualified immunity in an excessive force case: 1) whether the facts establish an unreasonable use of force; 2) whether the unreasonableness of that use of force was clearly established at the time of the defendant's actions; and 3) whether an objectively reasonable official would have known that his actions violated the clearly established right. The incoherency of this regime becomes most acute when a court attempts to answer the third inquiry-whether the reasonable official would have known that his actions violate a clearly established right. 163Link to the text of the note Given that it has already determined that the amount of force used was unreasonable, the court must now somehow apply another level of reasonableness to the facts. To alleviate that problem, **the qualified immunity standard**, **at least in the excessive force context**, **should become a purely legal question-does the determination that the defendant's actions violate the Fourth Amendment represent a new development in the law?** Rather than three questions, **the court will resolve** only two: **1) whether the facts establish an unreasonable use of force; and 2) whether a new legal standard has been applied by the court**. For example, in the Jennings v. Pare factual scenario discussed earlier, 164Link to the text of the note the [\*141] **court would determine whether the police officer's twisting of the plaintiff's ankle violated the Fourth Amendment. To do that the court would determine whether the officer's actions were reasonable given the circumstances apparent to the officer at the time** he acted. Consideration would be given to the factors outlined in Graham, such as the severity of the crime the plaintiff was thought to be committing, the threat the plaintiff posed to the officer or to others, and whether the plaintiff was resisting arrest. If the court determined that a Fourth Amendment violation had occurred, **the only task left for qualified immunity would be to ascertain if the Fourth Amendment standard applied represented a departure from settled law. If not, then the defendant would not be entitled to qualified immunity**. This reformulation would provide critical protection for the defendant from being held responsible for predicting novel developments in the law. This concern, after all, was one of the primary motivating forces behind the adoption of qualified immunity. 165Link to the text of the note **The new standard would also make the qualified immunity question purely a legal one, thus eliminating confusion between the roles of the judge and the jury. It is the second reasonableness inquiry that creates questions of fact in a qualified immunity analysis-a court could address purely as a legal matter whether it is adopting new law while omitting the confusing and unnecessary second inquiry into reasonableness.** Of course, determining whether new law has been developed is not a simple task. As Chaim Saiman has pointed out, law created by courts is not framed as the articulation of new black letter rules, but rather by the application of precedent to a particular set of facts. 166Link to the text of the note Notwithstanding these difficulties, however, certain kinds of decisions could be relatively clearly identified as creating new legal standards. For example, Graham itself, which announced for the first time that the Fourth Amendment would be the framework in which seizures made with excessive force are analyzed, represented a break with the past and an articulation of new standards. 167Link to the text of the note Similarly, an analysis which explicitly repudiates or overrules prior cases would also be a new development in the law. A decision which applied a well established general standard to a new set of facts would likely not be developing new law. **Only in those game changing moments when a police officer's behavior is being evaluated by a genuinely new standard would qualified immunity come into play to protect a police officer caught in between old and new constitutional standards**. Because articulations of genuinely new law are rare, **the result of such a reformulated qualified immunity standard would be that qualified immunity would rarely be granted in excessive force cases**. One result might be that **government officials would more often be found liable for unconstitutional acts. This might well have a beneficial impact on the behavior of police officers and** [\*142] **the training they receive.** More likely, however, is that cases will be resolved on the basis of the Fourth Amendment rather than because of the qualified immunity defense. It is quite possible that defendants would not lose appreciably more § 1983 cases, only that the basis for a defendant's success would be the requirements of the Fourth Amendment rather than qualified immunity. **Requiring that the Fourth Amendment, rather than qualified immunity, do the work** of determining which police behaviors should be sanctioned and which should be excused, **will lead to more clarity for the guidance of police officers and also more open understanding by the public of the range of permissible police behavior. The elimination of the obfuscation provided by qualified immunity may make it more possible to have a constructive discussion concerning the appropriate use of police force and the remedies for abuses of that force. Reforming the legal regime to provide a more meaningful deterrent to police violence can start by making the rules applicable to such claims more simple and coherent**.

### Confusion Protects Defendants

#### QI in cases of the 4th amendment gives officers two standards of reasonability to be acquitted leading to overprotection and skewed results.

**Hassel 09**, Diana. (Associate Professor, Roger Williams University School of Law) "EXCESSIVE REASONABLENESS." Indiana Law Review 43.117 (2009): 118-42. Web. 24 Oct. 2016. <https://mckinneylaw.iu.edu/ilr/pdf/vol43p117.pdf>. [Premier]

Operating on two different fronts, the Court, by the late 1980s, had created¶ two almost identical objective reasonableness tests: One governed excessive¶ force under the Fourth Amendment and the other governed qualified immunity. ¶ Difficulty arose, however, when these two standards were called into play at the same time in considering the liability of a defendant in a civil rights action.¶ When these two standards are both operating, a court must first determine¶ whether a defendant’s actions are objectively reasonable. Then, assuming that¶ the actions were not objectively reasonable, the court must determine whether it¶ was nonetheless objectively reasonable for the defendant to have believed his¶ actions were objectively reasonable. The application of this nonsensical series¶ of questions leads to skewed results. Most problematically the two doctrines lead to two levels of protection for a defendant. Additionally, courts must jump¶ through convoluted analytical hoops that result in unclear and needlessly¶ complicated decisions.¶ The problem of having two reasonableness standards could come into play¶ in any Fourth Amendment claim, but the difficulty is most acute in an action¶ concerning excessive force. Although other Fourth Amendment questions, such¶ as the legality of searches or the legality of arrests, are also ultimately based on¶ reasonableness, the standards governing such actions are much more concrete¶ and specific than those governing excessive force. The excessive force 49¶ standard, as articulated by Graham is just a generalized reasonableness¶ test—thus, the closest parallel to the qualified immunity doctrine.

#### QI benefits defendants by allowing two reasonableness defenses

Hassel 09

Diana Hassel, Professor, Roger Williams University School of Law. B.A., 1979, Mount Holyoke College; J.D., 1985, Rutgers University School of Law at Newark. “Excessive Reasonableness.” 43 Ind. L. Rev. 117 [Premier]

Academic **commentators** also **questioned** the workability or **the necessity of the simultaneous application of the qualified immunity and the excessive force standards.** 60 Kathryn Urbonya argued that **the qualified immunity standard defense is unnecessary in excessive force claims because the substantive standards already includes the protection inherent in a reasonableness standard.** 61 Urbonya and others maintained that **once the Fourth Amendment issue is resolved, the qualified immunity issue has also been resolved, and to treat the** [\*127] **two separately would unfairly benefit the defendant**.

#### S’quo law applies a Fourth Amendment reasonableness test and then a QI reasonableness test – two ways to protect defendants

Hassel 09

Diana Hassel, Professor, Roger Williams University School of Law. B.A., 1979, Mount Holyoke College; J.D., 1985, Rutgers University School of Law at Newark. “Excessive Reasonableness.” 43 Ind. L. Rev. 117 [Premier]

Although the discussion in Pearson focused on the problems with unnecessarily **addressing** a **[the Fourth Amendment] constitutional issue [and]** when a court can resolve a case by deciding that the defendant is entitled to **qualified immunity**, the problem is more fundamentally that the two standards **are the same** in the Fourth Amendment context. If the Court now allows the lower courts to bypass a [\*140] separate analysis of the excessive force issue, it seems inevitable that the two standards will collapse; bringing us back to the situation that existed pre- Saucier. 162Link to the text of the note **Some courts will**, in effect, conflate the excessive force and qualified immunity standards. Others will **attempt to separate them**, thus **providing additional protection to defendants by applying reasonableness twice**. Rather than address the heart of the conflicts inherent in qualified immunity, **the Court in Pearson** merely **provided a mechanism to paper over those problems**.

### Jury Power

#### QI limits the power of jurors to determine factual questions – aff solves

Hassel 09

Diana Hassel, Professor, Roger Williams University School of Law. B.A., 1979, Mount Holyoke College; J.D., 1985, Rutgers University School of Law at Newark. “Excessive Reasonableness.” 43 Ind. L. Rev. 117 [Premier]

The two standards also created difficulties in allocating resolution of factual and of legal issues between the judge and the jury. **Determining whether a particular set of actions is reasonable under the Fourth Amendment will often present factual questions** that normally are **submitted to a jury. In contrast, qualified immunity is characterized as a legal question to be resolved by the judge.** 63 **Because the two questions-Fourth Amendment and qualified immunity-require resolution of the same reasonableness issues, courts struggle**d to determine how **to divide the task between the judge and the jury**. 64 Some even argued that **once a jury finds that a defendant's acts were determined to be an unreasonable use of force under the Fourth Amendment, it was a usurpation of the jury's role for the judge to**, in effect, **undo that determination by concluding that the actions were reasonable under the qualified immunity standard**. 65

### Squelches 4th Amendment

#### QI in 4th Amendment cases allows courts to avoid the constitutional issue

**Hassel 09,** Hassel, Diana. (Associate Professor, Roger Williams University School of Law) "EXCESSIVE REASONABLENESS." Indiana Law Review 43.117 (2009): 118-42. Web. 24 Oct. 2016. <https://mckinneylaw.iu.edu/ilr/pdf/vol43p117.pdf>. [Premier]

The cases in which a violation of the Fourth Amendment has been found and¶ qualified immunity is granted to the defendants are even more analytically¶ disingenuous. The courts either conduct only a brief analysis of whether a¶ Fourth Amendment violation has occurred, and assuming it has, turn to the¶ qualified immunity question, or grant qualified immunity because the case law 131¶ establishing the Fourth Amendment violation was unclear at the time the¶ government official acted, never reaching the second reasonableness issue. 132¶ The difficulty presented by the three part test mandated by Saucieris avoided by¶ breezing past the Fourth Amendment analysis or by truncating the qualified¶ immunity analysis to the question of what law is clearly established. By focusing¶ merely on the first or second prong of the Saucier test, these courts avoid the¶ difficulty of grappling with all three inquiries.

## Plan – Private Prisons

#### //NB: The August decision by the DOJ to stop using private prisons decreased the number of private prisons nationwide but has not eliminated their use

#### Limit QI for officers who work in private prisons,

**Schaffer 96 summarizes**

Schaffer, Robert G. (JD from Duke University School of Law) “The Public Interest in Private Party Immunity: Extending Qualified Immunity from 42 U. S. C. § 1983 to Private Prisons.” Duke Law Journal, vol. 45, no. 5, 1996, pp. 1049–1087. <http://www.jstor.org/stable/1372978>. [Premier]

A decade ago, proponents of privatizing governmental services¶ hailed the private operation of correctional facilities as a way to¶ improve prison conditions and reduce costs.' Skeptics doubted¶ these claims and warned of the danger in delegating the care of¶ inmates to corporations "more interested in doing well than in¶ doing good."2 Although the problems of prison overcrowding and¶ escalating costs still frustrate state policy makers,3 contracting with¶ private parties for the operation of prisons and jails remains a¶ serious alternative for legislatures unwilling to spend state funds¶ on additional public facilities. Roughly one-third of the states have¶ passed legislation enabling state and local agencies to contract with¶ private firms for full-scale correctional services,4 and sever others are considering similar legislation.5 The number of private facilities in actual operation continues to increase.6¶ Despite this increase, opponents of private incarceration argue¶ that the introduction of the profit motive will lead private prison¶ officials to reduce the level of care afforded to inmates and cut¶ corners with respect to the protection of inmates' constitutional¶ rights.' To counteract this financial disincentive, opponents argue¶ that private prisons should not be given the same qualified immunity from section 1983 suits enjoyed by officials of public prisons.8¶ Civil rights damage suits under 42 U.S.C. ? 19839 are the most¶ common avenue of redress available to an inmate who claims a¶ government official'o has violated a right guaranteed stitution or the laws of the United States. Qualified immunity,¶ however, bars section 1983 suits against certain local, state, and¶ federal officials when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable¶ person would have known."" Those opposed to extending qualified immunity to private prison officials argue that such immunity,¶ when combined with the financial self-interest of private prisons,¶ will water down section 1983's important protections and allow¶ private prisons to maximize profits by violating the rights of in-¶ mates.12 Denying qualified immunity, even when a prison official¶ could not reasonably have known that his conduct was unconstitutional, will force private prison officials to think carefully before¶ taking action that may result in a constitutional violation.

#### The aff is topical, COs are a type of police officer, Gangi 15

Gangi, Anthony. (Gangi has worked in the correctional setting for 13 years) "Yes, Corrections Officers Are Law Enforcement Officers." CorrectionsOne. N.p., 1 Sept. 2015. Web. 26 Oct. 2016. <http://www.correctionsone.com/public-perception/articles/9317276-Yes-corrections-officers-are-law-enforcement-officers/>. [Premier]

Correctional officers need to remain firm, fair and consistent in their dealings with the inmate population. They need to show no fear in a world that is dominated by predators and aggressors. They are the law within these walls and anything less than direct obedience from the inmate population is seen as a threat to their existence.¶ Their interactions with the offender consist of multiple elements that define the role of a law enforcement professional, minus the recognition. These professionals stop assaults, prevent suicides and homicides, suppress gang activity, seize contraband, conduct investigations, make arrests, and, most importantly, prevent escapes. All of these elements can be furthered used to assist other law enforcement agencies in maintaining a safe and secure society. It's by this definition they have secured their place in the law enforcement family.¶

# Neg



## Legal Implications



### Equilibration Turn

#### Limiting immunity backfires; courts will constrict constitutional rights to equilibrate

Fallon 11

Richard H. Fallon (Ralph S. Tyler, Jr. Professor of Law, Harvard Law School), “Asking the Right Questions About Officer Immunity”, 80 Fordham L. Rev. 479 (2011). https://dash.harvard.edu/bitstream/handle/1/11222828/Fordham.pdf?sequence=1 [Premier]

My first goal in this Essay will be to refute the assumption that official immunity doctrine necessarily requires a balance of evils. Although it is undoubtedly true (indeed, almost tautologically so) that official immunity reduces the value of rights, analysis goes wrong at the outset if it assumes that the substantive content of constitutional guarantees and the availability of causes of action to enforce them are fixed, and only then asks whether official immunity should exist as a regrettably necessary expedient. As Professor John Jeffries has observed, official immunity is not a variable among constants but, instead, is one potential variable among others.5

According to him, in the absence of official immunity doctrines, **courts might prove more hesitant to expand** the scope of **constitutional rights.**6 Although Jeffries seems indubitably right about this point, the insight that official immunity is a variable among variables has further-reaching implications than even he has recognized. In the absence of official immunity, even some currently well-established constitutional rights and authorizations to sue to enforce them **would likely shrink**, and sometimes appropriately so.7 This reflection both leads to and helps corroborate a broader insight about the relationship among constitutional rights, causes of action to enforce such rights, justiciability doctrines, official immunity, and various rules of pleading and proof that I call the doctrinal Equilibration Thesis.8 According to the Equilibration Thesis, **substantive rights, causes of action** to enforce rights, **rules of pleading and proof, and immunity doctrines all are flexible** and potentially adjustable components of a package of rights and enforcement mechanisms that should be viewed, and assessed for desirability, as a whole.9 If the Equilibration Thesis is correct, it falsifies the assumption that official immunity is at best a distasteful necessity. Instead, **the Equilibration Thesis casts** official **immunity as a** potential **mechanism for achieving the best overall bundle of rights** and correspondingly calibrated remedies within our constitutional system.

### Solves Frivolous Litigation

#### QI lets courts avoid pointless and redundant litigation

Ignall 94

David J. Ignall (Associate, Wiley, Rein & Fielding, Washington, D.C. J.D., The College of William and Mary, 1991; B.A., Cornell University, 1987). “Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact.” California Western Law Review: Vol. 30: No. 2, Article 2. (1994). http://scholarlycommons.law.cwsl.edu/cwlr/vol30/iss2/2 [Premier]

On a motion for summary judgment concerning qualified immunity, the court should consider evidence with respect to qualified immunity differently than with respect to the merits. Even if the plaintiff produces sufficient evidence to create a jury question on the merits, **the defendant should be entitled to qualified immunity** if the plaintiff cannot produce evidence to support a judgment as a matter of law against the defendant-i.e., sufficient to show that the defendant violated a clearly established right of which a reasonable person would have known. If the ruling on the issue of qualified immunity mimics the ruling on the merits, the defense of qualified immunity is superfluous because **it would be available only when the plaintiff would be unable to prove liability.** The only protection left to the defendant is the ability to file an interlocutory appeal to argue that the plaintiff would be unable to prove liability on the merits. Because qualified immunity should be denied only when the plaintiff can prove as a matter of law that the defendant violated a constitutional right, the merits should never become an issue with respect to that defendant. If the defendant loses qualified immunity, he would necessarily be liable on the merits. **By making** qualified **immunity the only issue, the court can focus the litigation** so that qualified immunity can serve its purpose of protecting officials from the injustice of subjecting them to liability in the absence of bad faith and the diversion of official energy associated with defending a lawsuit. **Thus, qualified immunity would truly be a shield** to all but the truly incompetent and those who knowingly violate the law.

### Spillover

#### QI prevents procedural remedies from spilling over into other areas of law

Coenen 14

Michael Coenen, pf @ LSU Law, “SPILLOVER ACROSS REMEDIES” 98 MINN. L. REV. (2014),digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1120&context=faculty\_scholarship [Premier]

Other remedial exceptions do similar work. Professor John Jeffries has argued, for instance, that **qualified immunity doctrine**—which serves as a major exception to § 1983 damages liability—**helps to “reduce the cost of innovation**, **thereby** **advancing the growth and development of constitutional law.”**128 Professor Jeffries’s argument highlights the cross-temporal dynamics of constitutional adjudication: He aims to demonstrate how the qualifie**d immunity defense promotes the adaption of constitutional rights to changing circumstances.** His essential insight, however, also suggests how immunity rules can and do alleviate spillover across remedies: **Qualified immunity doctrine targets not the law of rights but rather the law of remedies, and it thereby helps to shield other remedial environments from adverse spillover effects**. A similar point holds with respect to the nonretroactivity rule of Teague v. Lane and other “exceptions” to habeas corpus relief; if every expansion of every constitutional guarantee warranted fullscale retroactive remediation, courts would seldom expand such guarantees to begin with.129 But **by denying collateral relief through the use of remedial exceptions—rather than the narrowing of substantive protections—courts can prevent remedy-specific considerations from shaping the cross-remedial content of substantive law**.

Remedial exceptions do not formally vary the content of substantive rules across different remedial settings. The same substantive definition of what constitutes probable cause applies, for instance, regardless of whether a trial court judge considers a suppression motion or a magistrate judge considers an application for a search warrant; it’s just that additional hurdles must be cleared in order for the suppression remedy to issue, whereas the denial of a warrant application would follow automatically from a magistrate’s identification of fatal Fourth Amendment defects. At another level, though, **remedial exceptions generate disaggregated substantive law, because they produce a world in which Fourth Amendment claims capable of generating relief vary according to the type of relief being sought. The Fourth Amendment as applied in the exclusionary setting permits police to enter homes without announcing their presence, whereas the Fourth Amendment as applied in the § 1983 setting does not. Likewise, the Fourth Amendment as applied in the exclusionary setting permits the unreasonable acquisition of evidence that will be inevitably discovered, whereas the Fourth Amendment as applied in the warrant-issuing setting does not.** Similar points can be made about the disaggregating effect of other remedial exceptions. The harmless error rule, for instance, renders evidentiary restrictions less exacting when they underlie requests for appellate relief than when they underlie requests for trial-level relief. Qualified immunity doctrine renders the First Amendment less protective when asserted in damages actions against individual public officials than when asserted as a defense to criminal prosecution. And the rules of nonretroactivity and AEDPA deference yield a far narrower set of operative substantive rights with bite in the habeas context, as compared to the operative substantive rights with bite on direct appeal.

In short, **remedial exceptions mitigate spillover by severing the connection between a decision to withhold application of a remedy and the generation of substantive precedents with cross-remedial force.** That is not to say that the invocation of such exceptions leaves the substantive right unaffected; much to the contrary, as we have seen, remedial exceptions carry significant implications for the real-world efficacy of the substantive right itself. But **remedial exceptions** carry these implications in a remedyspecific way, **leav**ing **unaltered** (both formally and functionally) **the substantive law as it applies in connection with other remedial rules.** And that is the key to understanding how remedial exceptions alleviate spillover across remedies: **The dynamics of a given remedial setting exert influences on the outcome of individual substantive cases; but remedial exceptions confine these influences to the particular remedial setting that produces them**.

### Alternatives Fail

#### Alternatives to QI wouldn’t solve. The state would create new legal checks to avoid being a lightning rod for lawsuits

King 16

Andrew King (Assistant Prosecuting Attorney). “Keep Qualified Immunity… For Now.” Mimesis Law. 1 July 2016. http://mimesislaw.com/fault-lines/keep-qualified-immunity-for-now/11010 [Premier]

Finally, that brings us back to qualified immunity. **If you get rid of qualified immunity,** then **you’ll simply have to create another screening mechanism.** Governments are usually well-insured, often well-funded, typically risk adverse, and can perpetually refill the treasury through taxes—so long as taxpayers stay put, anyhow. **This makes them tempting defendants**, as impecunious defendants usually are not sued. On top of that, a defendant who prevails in a civil rights action usually gets attorney’s fees awarded. Mostly, but for qualified immunity, **it’s a bonanza for plaintiff’s lawyers.**

### AT Stops Establishment of Rights

#### QI doesn’t prevent establishment of new rights; there’s multiple checks

Ignall 94

David J. Ignall (Associate, Wiley, Rein & Fielding, Washington, D.C. J.D., The College of William and Mary, 1991; B.A., Cornell University, 1987). “Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact.” California Western Law Review: Vol. 30: No. 2, Article 2. (1994). http://scholarlycommons.law.cwsl.edu/cwlr/vol30/iss2/2 [Premier]

A second criticism is that if the court grants qualified immunity pretrial, it would avoid ruling on the merits. Thus, courts might not create many new clearly established rights. 32 This would not necessarily be true in the two situations discussed above. With respect to Fourth Amendment rights, criminal **defendants routinely challenge searches and seizures** on motions to suppress evidence **without respect to** qualified **immunity.** With respect to the prison suicide cases, the argument holds more water because the only way in which the law could become clearly established would be through civil suits in which the individual defendants could raise qualified immunity. Nonetheless, in cases in which the facts are sufficiently egregious, the defendant is not entitled to qualified immunity even if there are no cases addressing that exact set of facts.'33 Although municipalities cannot be held liable through respondeat superior," 4 they are not entitled to qualified immunity. 3' Thus, law concerning the operation of prisons continues to be established. Furthermore, the defense of qualified **immunity bars only monetary relief, not declaratory or injunctive** relief.'3

### AT Inconsistent

#### Recent court rulings have created a clear legal framework for immunity; alternatives to the status quo would be worse

Kirkpatrick and Matz 11

Michael T. Kirkpatrick (Attorney, Public Citizen Litigation Group; Adjunct Professor, Georgetown University Law Center) and Joshua Matz, Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from Saucier to Camreta (and Beyond), 80 Fordham L. Rev. 643 (2011). http://ir.lawnet.fordham.edu/flr/vol80/iss2/9 [Premier]

In a series of cases stretching across Harlow, Saucier, Pearson, and Camreta, the Court has fashioned a procedural framework that empowers courts to regulate public officials by deciding the merits of constitutional claims even as they extend qualified immunity to official conduct that does not violate a clearly established right. **Many of the most serious criticisms of this regime that remained after Pearson have been resolved by Camreta.** Nevertheless, potent forces have begun to align against allowing any merits determinations in cases where the defendant has qualified immunity. Thus, the survival of Pearson discretion—which is of vital importance to the development of constitutional law that protects individual rights and defines the limits of official power—may be in jeopardy unless the Court reaffirms its commitment to robust mechanisms of constitutional elaboration and refines the rules governing judicial discretion. Such refinements may help reassure critics and secure the **fundamentally workable status quo** against those who would abandon constitutional elaboration to a **dangerously inadequate set of alternative procedures.** As the Court stares into permanent limbo, and is urged by some of its members that all will be fine if it steps into that abyss, we hope that it chooses wisely.

### CP – Fast Track

#### Funding attorney’s fees and fast-tracking appeals can solve the chilling effect on litigation without changing liability

Reinert 11

Alexander A. Reinert (Associate Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University), Does Qualified Immunity Matter? 8 U. St. Thomas L.J. 477 (2011). http://ir.stthomas.edu/cgi/viewcontent.cgi?article=1261&context=ustlj [Premier]

The effect of qualified immunity, therefore, may not be to reduce the success of civil rights claims but to limit the extent to which civil rights litigation tests the boundaries of the law. If the result is a suboptimal level of constitutional Bivens litigation, then it might be worth considering some modifications short of the governmental liability model that many critics of qualified immunity have suggested.106 For instance, if attorneys’ fees were available for plaintiffs who showed that their rights were violated, even though the rights were not clearly established**, it might incentivize attorneys to represent litigants in the “gray” area** of constitutional litigation. This model is not foreign to civil rights litigation—in mixed-motive employment discrimination cases, plaintiffs are not entitled to compensatory damages but may be awarded other relief, including attorneys’ fees.107 Similarly, circuit courts of appeals could create fast-track appeals for cases involving appeals from the denial of qualified immunity at the motion to dismiss stage, so as to **minimize the delay for discovery.** The United States Court of Appeals for the Second Circuit recently created a fast track for appeals of a large category of motions to dismiss.108 Notably, however, appeals from denials of motions to dismiss on qualified immunity grounds are not included in the new procedure.

### CP – Insurance

#### Don’t increase liability for officers; instead give victims a remedy in the form of comprehensive insurance for officer misconduct

**Kirby 90,** Kirby, John D. (Kirby graduated cum laude from Cornell Law School and is currently an attorney in San Diego.) "Qualified Immunity for Civil Rights Violations: Refining the Standard." Cornell Law Review 75.2 (1989-1990): 461-495. [Premier]

The requirement' 90 that state and federal governments provide¶ insurance or indemnification for certain categories of officials would¶ add a significant extra cost to the system. However, if the rationale¶ for protecting public officials from civil rights damages is that it is¶ the necessary price of effective government, 19' it would be more¶ equitable to spread this cost throughout society by requiring state¶ and federal governments to insure or indemnify their officials.¶ Someone must pay the "price" of efficient government. Currently,¶ that price is borne by the individual plaintiff, who is often left without¶ a remedy in the face of a qualified immunity defense. Widespread¶ and comprehensive insurance or indemnification programs¶ would shift this burden to society as a whole. Lower-level government¶ officials would be protected against personal liability (perhaps¶ with an exception for "malicious intent"); victims would retain a¶ remedy for violations; and the cost of providing insurance would be¶ borne more equitably by taxes collected from the society at large. 192

### CP – Nominal Damages

#### The USFG ought to encourage plaintiffs to file for nominal damages instead of punitive damage when filing tort claims against public officials. Pfander 11

Pfander, James E., "RESOLVING THE QUALIFIED IMMUNITY DILEMMA: CONSTITUTIONAL TORT CLAIMS FOR¶ NOMINAL DAMAGES" (2011). Faculty Working Papers. Paper 13.¶ http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/13 [Premier]

To address the stagnation and vindication threats posed by qualified¶ immunity, this brief essay suggests the revival of an old model of litigation: the¶ suit for nominal damages. The suit for nominal damages arose at common law to¶ enable litigants to secure the judicial resolution of a claim of right even in¶ circumstances where the plaintiff did not seek, or could not establish a claim to,¶ compensatory damages.25 An award of nominal damages signified the invasion of¶ a legal right in circumstances in which the plaintiff either failed to prove actual¶ damages or chose to waive compensatory damages and pursue the nominal claim¶ alone. In any case, the court had the power to adjudicate the legal question and¶ award judgment. If the plaintiff was successful, the decision was entitled to¶ preclusive effect and the defendant was obliged to pay the costs of the litigation.26¶ With its emphasis on securing the resolution of a question of law, one can readily¶ see why the suit for nominal damages has often been described as an early¶ precursor to the declaratory judgment action.

#### It’s preferable, side-steps the need of qualified immunity, solves community relations, establishes more clear constitutional violations t set precedent for the future and acknowledges officer wrongdoing, Pfander 11

Pfander, James E., "RESOLVING THE QUALIFIED IMMUNITY DILEMMA: CONSTITUTIONAL TORT CLAIMS FOR¶ NOMINAL DAMAGES" (2011). Faculty Working Papers. Paper 13.¶ http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/13 [Premier]

Building on these early foundations, this essay proposes that Bivens and¶ section 1983 litigants should be entitled to obtain a determination of their¶ constitutional claims by initiating a suit for nominal damages against the¶ responsible officer.28 Although it would promise little by way of compensation,¶ such a nominal damages claim could be an attractive option for plaintiffs who¶ wish to secure judicial vindication. By expressly declaring in the complaint that¶ they do not intend to seek and will not accept any compensatory or punitive¶ damages, or an award of costs and attorney’s fees (and thereby confining¶ themselves to nominal damages alone), plaintiffs would waive the money¶ damages aspect of constitutional tort litigation that threatens official defendants¶ with personal liability.29 By removing the threat of personal liability, and with it¶ much of the justification for qualified immunity, the suit for nominal damages¶ would allow the plaintiff to secure a constitutional decision even where the law¶ was not clearly established.30¶ Such an immunity-free nominal damages claim could contribute much to¶ the clarity and flexibility of constitutional tort litigation. In a variety of cases¶ involving unprecedented government wrongdoing, as with cases brought to¶ challenge detention or torture at Guantanamo Bay, the suit for nominal damages¶ would enable the federal courts to clarify the law without threatening the lowlevel¶ (or high-level) officers who carried out the challenged policy.31 A finding¶ that the government violated the individual’s constitutional rights would provide a¶ measure of vindication, even if it did not provide make-whole relief. Moreover,¶ the judicial inquiry in such cases could focus on the content of constitutional law¶ rather than on the often-complex question whether the norms in question can be¶ regarded as clearly established.

## Policing Implications



### QI K/T Police

#### Qualified immunity protects police from the burden of lawsuits

Schott 12

Richard G. Schott, J.D. “Qualified Immunity; How It Protects Law Enforcement Officers.” FBI Law Enforcement Bulletin. 2012. <https://leb.fbi.gov/2012/september/qualified-immunity-how-it-protects-law-enforcement-officers> [Premier]

Law enforcement is a difficult profession. It presents many challenges and risks, as well as great rewards, to those who undertake it. One of the risks associated with law enforcement is the possibility of **being sued civilly** for an action taken in the course and scope of one’s employment. In an effort to mitigate the costs and burden of defending oneself from a lawsuit, government actors are entitled to assert immunity as a barrier to being sued. For law enforcement officers, the level of immunity available is qualified immunity. As the name implies, this type of immunity is protective, but is not an absolute guarantee against successfully being sued. It is comforting, though, to know that the purpose of qualified immunity is to protect all but “the plainly incompetent or those who knowingly violate the law.”61 As this article has demonstrated, the test to determine whether qualified immunity should be afforded officers has changed over the years, but **the objective nature of the doctrine** itself **has remained unchanged for nearly 30 years.** This objective determination often shields competent law enforcement officers from defending a suit itself, much less from being found liable at the conclusion of a suit.

#### Lack of immunity would open police up to a flood of litigation that hamgstrings law enforcement.

King 16

Andrew King (Assistant Prosecuting Attorney). “Keep Qualified Immunity… For Now.” Mimesis Law. 1 July 2016. http://mimesislaw.com/fault-lines/keep-qualified-immunity-for-now/11010 [Premier]

Plus, qualified immunity, along with other mechanisms, prevents and **screens out a lot of frivolous litigation.** And that cost of frivolous litigation otherwise would be socialized by taxpayers. Plus, in highly variable and discretionary jobs like policing, there is nearly daily opportunity for negligence to occur. So, **under such a lower standard of culpability, departments might be essentially uninsurable or unable to** effectively **patrol.** Contrary to how it may appear to some, a madman didn’t appear one day and set-up the doctrine of qualified immunity. It’s there for reasons that plenty of courts deemed to be important reasons. Judge Newman’s suggestion to tear the fence down because he fails to see the value was made without due consideration. Qualified immunity and its related doctrines might not be the best solution of all best possible worlds, but it is a solution. Let’s figure out a better one before tearing down the old one.

### Litigation Hurts Effectiveness

#### Police are facing massive litigation costs

Elinson and Frosch 15

Zusha Elinson (U.S. news reporter) and Dan Frosch (general assignment reporter for The Wall Street Journal's Southwest Bureau). “Cost of Police-Misconduct Cases Soars in Big U.S. Cities.” Wall Street Journal. 15 July 2015. <http://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834> [Premier]

**The cost of** resolving **police-misconduct cases has surged** for big U.S. cities in recent years, even before the current wave of scrutiny faced by law-enforcement over tactics. The 10 cities with the largest police departments paid out $248.7 million last year in settlements and court judgments in police-misconduct cases, up 48% from $168.3 million in 2010, according to data gathered by The Wall Street Journal through public-records requests. Those cities collectively paid out $1.02 billion over those five years in such cases, which include alleged beatings, shootings and wrongful imprisonment. When claims related to car collisions, property damage and other police incidents are included, the total rose to more than $1.4 billion. On Monday, New York City agreed to a $5.9 million settlement with the estate of Eric Garner, whose death after being put in a police chokehold last summer sparked widespread protests. City officials and others say the large payouts stem not just from new cases, but from efforts to resolve decades-old police scandals. In 2013 and 2014, for example, Chicago paid more than $60 million in cases where people were wrongfully imprisoned decades ago because of alleged police misconduct. For some cities, the data show that **cases have gotten more expensive** to resolve. Philadelphia police have faced criticism for numerous shootings in recent years. Last year, the city settled 10 shooting cases for an average of $536,500 each. In 2010, it settled eight for an average of $156,937. A city lawyer attributes the rise to a few large settlements, not a pattern of questionable shootings. “**The numbers are staggering, and they have huge consequences for taxpayers**,” says Kami Chavis Simmons, a former assistant U.S. attorney who now directs the criminal-justice program at Wake Forest University School of Law. “Municipalities should take a hard look at the culture of police organizations and any structural reforms that might help alleviate the possibility of some of these huge civil suits.” William Johnson, executive director of the National Association of Police Organizations, which represents about 240,000 officers, says lawsuits and settlements aren’t necessarily an indication of problematic policing. “You could have Mother Teresa running a police department and you’re still going to have lawyers out there saying she’s not to be trusted and we’re going to sue,” he says.

#### The aff would increase suits, that would force cops to spend more of their time in the court room instead of solving problems outside of it, Rosen 05

Michael M. Rosen, (Rosen is an and graduated from Harvard Law School in 2003) A Qualified Defense: In Support of the Doctrine of Qualified Immunity in Excessive Force Cases, With Some Suggestions for its Improvement, 35 Golden Gate U. L. Rev. (2005). http://digitalcommons.law.ggu.edu/ggulrev/vol35/iss2/2 [Premier]

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.

### Effectiveness K/T Policing

#### Decline of active and engaged policing is driving a record spike in crime, caused by police fear of backlash

Hofstetter 16

George Hofstetter (President of the Association for Los Angeles Deputy Sheriffs). “Proactive policing and the violent crime rate.” 2016. http://campaign.r20.constantcontact.com/render?m=1119707513166&ca=4a80a442-8caf-45c4-97ca-745c0f1b6f88 [Premier]

This past week, FBI Director James Comey waded back into the debate over policing in America, stating he believed **less aggressive policing was driving an alarming spike in murders** in many cities. Director Comey received strong backlash from President Obama for similar remarks in 2015, when he linked the rise in violent crime to the "chill wind that has blown through American law enforcement over the last year." At that time, President Obama accused Comey of "cherry-picking data" and ignoring "the facts" on crime in pursuit of a "political agenda." However, statistics and interviews with police officers suggest Comey is exactly right. **Proactive policing, which has proven to reduce crime and been a staple of modern** American **police work, is screeching to a halt across the country**. The reason is because police officers are becoming increasingly risk averse. There is a direct correlation between the second guessing and protest of police officers and the disinclination of police to engage in proactive police work and avoid the risks inherent in actively engaging suspected criminals. Take, for example, the City of Minneapolis, which has been rocked for months by protests following the 2015 shooting of Jamar Clark, who attempted to take an officer's gun from him. Despite some bystanders' claims that Clark was handcuffed when shot, a four-month investigation found the shooting was justified, with evidence proving Clark was not handcuffed and did try to grab the officer's gun. Minneapolis police were under intense public criticism in the months following the shooting and proactive police work plummeted. In the precinct where the Clark incident happened, police stops and contacts dropped 51% and arrests declined 45%. City-wide police contacts dropped 32%, and arrests decreased by the same amount. **Officers told the** local **paper they were in "self-preservation mode,"** (aka career survival) responding to emergency calls, but not engaging in proactive policing. Said one veteran officer: "Confrontation equals getting indicted, put on the front page or [Chief] Harteau will bury you." The term "bury you" refers to the discipline meted out to officers sacrificed on the altar of public opinion to ease some executives and politicians lives. The same story is being repeated in other cities, where officers retreat from proactive policing and violence soars. In Chicago, where officers have been under the microscope since the Laquan McDonald shooting, investigative stops in 2016 plunged a staggering 80% over the same period the year before. "The officers are just having second thoughts about being aggressive," said a local professor of criminology. At the same time, violent crime has soared to a level not seen in years. On the heels of a nation-leading 468 homicides in 2015, 141 people were murdered in Chicago in the first three months of 2016, a 72% increase from the same period the year before. **The violence continues unabated.** Over the recent Mother's Day weekend, eight people were fatally shot and 43 others were shot and wounded. A similar situation has played out in Baltimore, where arrests plunged immediately after six officers were indicted in the death of Freddie Gray. Officers said they were afraid to do their jobs given the charges filed against their peers in Gray's death. In five of eight months following Gray's death and subsequent rioting, homicides topped 30 to 40 a month - levels not seen in years.

### Police Solve Crime

#### Policing is key to solve crime; harsh punishments have no impact without strong enforcement

OJP 16

Office of Justice Programs (Agency of the Department of Justice). “Five Things About Deterrence.” National Institute of Justice. 6 June 2016. http://nij.gov/five-things/pages/deterrence.aspx [Premier]

Does punishment prevent crime? If so, how, and to what extent? Deterrence — the crime prevention effects of the threat of punishment — is a theory of choice in which individuals balance the benefits and costs of crime. In his 2013 essay, “Deterrence in the Twenty-First Century,” Daniel S. Nagin succinctly summarized the current state of theory and empirical knowledge about deterrence.[1] The information in this publication is drawn from Nagin’s essay with additional context provided by NIJ and is presented here to help those who make policies and laws that are based on science.[2] NIJ’s “Five Things About Deterrence” summarizes a large body of research related to deterrence of crime into five points. 1. **The certainty of being caught is a vastly more powerful deterrent than the punishment.** Research shows clearly that the chance of being caught is a vastly more effective deterrent than even draconian punishment. 2. Sending an individual convicted of a crime to prison isn’t a very effective way to deter crime. Prisons are good for punishing criminals and keeping them off the street, but prison sentences (particularly long sentences) are unlikely to deter future crime. Prisons actually may have the opposite effect: Inmates learn more effective crime strategies from each other, and time spent in prison may desensitize many to the threat of future imprisonment. See Understanding the Relationship Between Sentencing and Deterrence for additional discussion on prison as an ineffective deterrent. 3. **Police deter crime by increasing the perception that criminals will be caught and punished.** The police deter crime when they do things that strengthen a criminal’s perception of the certainty of being caught. Strategies that use the police as “sentinels,” such as hot spots policing, are particularly effective. A criminal’s behavior is **more likely** to be influenced by seeing a police officer with handcuffs and a radio than by a new law increasing penalties. 4. Increasing the severity of punishment does little to deter crime. Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions for specific crimes. More severe punishments do not “chasten” individuals convicted of crimes, and prisons may exacerbate recidivism.

### Litigation Doesn’t Solve Misconduct

#### Suing individual officers can’t solve the organizational roots of police violence

Rushin 15

Rushin, Stephen (Visiting Assistant Professor, University of Illinois College of Law), Structural Reform Litigation in American Police Departments (2015). 99 Minnesota Law Review 1343 (2015); U of Alabama Legal Studies Research Paper No. 2414673. [https://ssrn.com/abstract=2414673](https://ssrn.com/abstract%3D2414673) [Premier]

Federal policymakers did not come to view local police misconduct as a pervasive, national epidemic until the Wickersham Commission Report revealed the scope of the problem in 1931.33 Since then, the most prominent federal regulations of law enforcement have come via decisions handed down by the United States Supreme Court, which use the weapon of evidentiary exclusion to discourage certain police practices. Federal law also permits private litigants to bring civil suits against state actors that violate their constitutional rights. And federal law makes it a criminal offense for local law enforcement to violate a person’s constitutional rights. These traditional regulations operate as “cost-raising mechanisms.”34 That is to say, these traditional approaches attempt to dissuade police wrongdoing by raising the potential costs of such behavior. **They cannot force police departments to adopt proactive reforms** aimed at curbing misconduct. While these cost-raising mechanisms almost certainly have had some statistically significant effect on police wrongdoing, they are ill equipped to combat **the organizational roots** of police wrongdoing. The Rodney King beating brought national attention to the inadequacies of this traditional regulatory approach. In the years that followed, Congress responded by quietly passing 42 U.S.C. § 14141 to fill this regulatory void.

#### Increasing litigation doesn’t impact police behavior; officers are indemnified

Rushin 15

Rushin, Stephen (Visiting Assistant Professor, University of Illinois College of Law), Structural Reform Litigation in American Police Departments (2015). 99 Minnesota Law Review 1343 (2015); U of Alabama Legal Studies Research Paper No. 2414673. https://ssrn.com/abstract=2414673 [Premier]

Second, private litigants can bring suit under 42 U.S.C. § 1983 against state agents, like police officers, who violate their constitutional rights.42 The Court has also carved out a narrow avenue for private litigants to hold an entire police department or municipality liable for the actions of an individual officer.43 In theory, civil litigation ought to incentivize police departments to make proactive reforms in order to avoid costly judgments. The empirical evidence on the effectiveness of private civil litigation, though, is mixed. Professor Charles Epp has shown that when the Court opened up police departments to civil liability in the late 1970s, some insurance companies opted to no longer provide liability protections for police departments, citing the unacceptably high risk.44 This led to some departments making proactive reforms.45 Conversely, Professor Samuel Walker argues that civil litigation is an ineffective way to incentivize police reform. This is in part **because of the organization of local government**—“one agency of government, the police department, commits abuses of rights, another agency, the city attorney’s office, defends the conduct in court, and a third agency, the city treasurer, pays whatever financial settlement results from the litigation.”46 In addition, a **recent study** by Professor Joanna Schwartz claims that **virtually all police departments indemnify individual** police **officers**.47 And in the end, civil litigation cannot force a police department to adopt costly reforms. Since it is a cost-raising mechanism, it can only raise the cost of some types of misconduct, with the hope that a rational police department will respond with proactive policy changes.

#### Litigation has no direct impact or deterrence value

Emery and Maazel 2K

Richard Emery (Emery, Cuti Brickerhoff & Abady PC) and Ilann Margalit Maazel (Emery, Cuti Brickerhoff & Abady PC). “Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification And a Proposed Solution.” Fordham Urban Law Journal, Volume 28, Issue 2 2000 Article 5. http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1811&context=ulj [Premier]

Civil litigation sometimes-infrequently-achieves the goal of public vindication by jury trial. It is only sometimes effective because most suits settle and never see the inside of the courtroom. 6 But, plainly, **civil litigation is mostly ineffective in punishing police** officers. No prayer for relief in the civil complaint includes imprisonment, probation, community service, termination, suspension, or discipline of any kind. At worst, civil litigation "punishes" police officers only in the sense that they are forced, under oath, under cross-examination, and in public, to account for their actions. They are forced to confront the victims they falsely arrested, assaulted, or unlawfully strip-searched. Often officers endure grueling depositions by hostile questioners. And if a jury finds for a plaintiff after trial, the officer must face the public humiliation-such as it may be-of knowing that a jury heard his testimony, rejected it, and found that he violated the Constitution. And if an officer refuses to admit his own wrongdoing, if he lies under oath, he must for all time live with the knowledge that he not only committed the wrong that led to the lawsuit, but that he committed the moral and legal crime of perjury-surely an uncomfortable feeling, at best. However, this punishment is still mild indeed, and of no solace to the victims of police misconductespecially those who seek to translate their horrible experience into reform of a broken system, and who must helplessly face an officer who lies with impunity to a judge and jury. As ineffective as civil litigation is in punishing police officers who violate the law, it is even less effective in deterring officers from future unlawful conduct. This is true for one basic reason: **police** officers **almost never pay anything out of their own pockets** to settle civil lawsuits. Nor do they pay for judgments rendered after jury verdicts for plaintiffs. Police officers are **so far removed** from the process of settling cases and paying money damages that they often have no idea how much their cases settle for, or even whether they settle at all. We have deposed many officers who had been sued one, two, three times before, yet had no idea how any of those cases were resolved. Who does pay for police misconduct? The taxpayers do. In the **overwhelming majority** of civil rights cases of police misconduct in New York State, the taxpayer pays every dollar of the settlement or judgment.' Between 1994 and 1996, for example, New York taxpayers paid approximately seventy million dollars for judgments and settlements arising out of police misconduct, almost two million dollars per month.8

### Moral Balancing

#### QI is an instance of sacrificing some rights for the safety of society, Hassel 99

Hassel, Diana. (Associate Professor, Roger Williams University School of Law) "Living a Lie: The Cost of Qualified Immunity." Missouri Law Review 64.1 (1999): 123-156. [Premier]

Soon after it began expanding the scope of section 1983, the¶ Supreme Court recognized that law enforcement and other officials¶ needed a margin of error for actions they took in the course of their¶ official duties.6 4 The Court reasoned that, although any protection¶ from a damage claim would leave some individuals without a remedy,¶ some protection was necessary to allow officials to perform¶ their work adequately.65 Without this protection, officials would¶ work in constant fear that their good faith actions might accidentally¶ violate an individual's constitutional rights, thereby exposing them¶ to liability. 66 Acting on this reasoning, the Court, in Pierson v. Ray, 67¶ held that law enforcement officials accused of constitutional violations¶ under section 1983 were entitled to a good faith defense¶ against claims for damages.68¶ Thus, the Court viewed the qualified immunity doctrine from¶ its inception as a pragmatic compromise, necessary to accommodate¶ the conflicting goals of protecting individual rights and facilitating¶ the "effective operation of government." 69 In creating the doctrine¶ of qualified immunity, the Court consciously decided to sacrifice¶ some measure of constitutional protection to facilitate the effective¶ operation of government.

### AT Police Indemnified

#### Civil suits majorly hamper policing, even without direct financial damages

Scheidegger 16

Kent Scheidegger (Legal Director, Criminal Justice Legal Foundation). “Civil Remedies for Police Transgressions.” Crime and Consequences. 24 June 2016. http://www.crimeandconsequences.com/crimblog/2016/06/civil-remedies-for-police-tran.html [Premier]

Third, a claim of violation of civil rights should be harder to prove than a claim of mere negligence. It's a more serious charge. **Even if a police officer does not pay the judgment out of** his **pocket, it will be a stain on his record and reputation.** Some officers are dirty and deserve to be stained, but many, many others are doing their best at a difficult job and being second-guessed over decisions that must be made on the spot, **sometimes in situations where the law is unclear** at the time of the act.

### CP – Laundry List

#### The United States should allow private enforcement of the police misconduct provision of VCCLEA, ban racial profiling on the state and local levels, close loopholes in ERPA application and provide best practice incentive grants to state and local law enforcement departments

**Lawson and Henderson 07** Karen McGill Lawson, President and CEO, LCCREF and Wade Henderson, Counselor, LCCREF; A report from the Leadership Conference on Civil Rights Education Fund, September 2007. “Prosecute Police Misconduct and Hate Crimes” <http://www.civilrights.org/publications/reports/long-road/police.html> [Premier]

**In 1994, Congress passed** 42 U.S.C. 14141, **the police misconduct provision of the Violent Crime Control and Law Enforcement Act** of 1994. **The provision authorizes the Attorney General to file lawsuits to reform police departments engaging in a pattern or practice of violating citizens' federal rights.** The Division also enforces the Omnibus Crime Control and Safe Streets Act of 1968 and Title VI of the Civil Rights Act of 1964, which together prohibit discrimination on the basis of race, color, sex, or national origin by police departments receiving federal funds. Starting in the late 1990s, the Special Litigation Section began to conduct investigations and implement consent decrees and settlement agreements where evidence demonstrated a violation of the police misconduct statutes. The investigations addressed such systemic problems as excessive force, false arrest, retaliation against persons alleging misconduct, and discriminatory harassment, stops, searches, and arrests. **The decrees require the police departments to implement widespread reforms, including training, supervising, and disciplining officers, as well as implementing systems to receive, investigate, and respond to civilian complaints of misconduct**. The decrees have had a widespread impact and are being used as models by other police departments. The Section has also used its authority under the Civil Rights of Institutionalized Persons Act (CRIPA) to reform restraint practices in adult prisons and jails and to obtain systemic relief in juvenile correctional facilities. **In recent years, however, the Section has retreated in its enforcement of these important statutes.** This rollback has resulted in less accountability on the part of police agencies and a retreat in efforts to ensure that law enforcement and integrity go hand in hand. **Given the lack of enforcement of these statutes by the Department of Justice, it is more important than ever to amend 42 U.S.C. 14141 to allow for a private right of action to enforce the statute.** In addition, **the Department needs to support an expansion of its authority, as outlined in the End Racial Profiling Act** (ERPA). ERPA builds on the guidance issued by the Department of Justice in June 2003, **which bans federal law enforcement officials from engaging in racial profiling.** It would **apply this prohibition to state and local law enforcement, close the loopholes to its application, include a mechanism to enforce the new policy, require data collection to monitor government progress toward eliminating profiling, and provide best practice incentive grants to state and local law enforcement agencies to enable them to use federal funds to bring their departments into compliance with the bill.** The Justice Department guidance was a good first step, but ERPA is necessary to "end racial profiling in America," as President Bush pledged to do. Moreover, while the Civil Rights Division has committed to vigorously enforcing the federal hate crimes statute, the statute itself is flawed. To strengthen its effectiveness, unnecessary obstacles to federal prosecution must be removed and authority must be provided for federal involvement in a wider category of bias motivated crimes. For instance, we have seen a rise in recent years in the number of hate crimes perpetrated due to discrimination based on sexual orientation. To enhance the federal response to this growing crisis, the Civil Rights Division must have the authority to prosecute all violent crimes based on race, color, religion, national origin, gender, sexual orientation, and disability. Expanding the authority needed to prosecute such cases is critical to protecting members of these groups from this most egregious form of discrimination.

### CP – No Racial Bias

#### Limit liability only in cases where there’s no racial bias

Capers ‘11 (I. Bennett Capers is the Stanley A. August Professor of Law at Brooklyn Law School B.A., Princeton University J.D., Columbia University School of Law. Prior to joining Brooklyn Law School, he taught at Hofstra University School of Law, where he served as Associate Dean of Faculty Development in 2010-11, and where he received the 2006-07 Teacher of the Year Award and the 2009 Lawrence A. Stessin Prize for Outstanding Scholarly Publication, “Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle”, Harvard Civil Rights-Civil Liberties Law Review, Winter 2011) [Premier]

Given that the Court's abandonment of its commitment to equal citizenship is traceable, at least in the Fourth Amendment context, to Terry v. Ohio, one place to begin imagining a new criminal procedure jurisprudence is in first re-conceptualizing, and then policing, reasonable suspicion. Recall that **in Terry, the Court authorized the limited detention of individuals so long as an officer has reasonable suspicion that criminal activity is afoot, and frisks so long as an officer also has reasonable suspicion that the individuals are armed.** Recall also that **one by-product of Terry has been racial profiling. Rather than interpreting the Fourth Amendment in a way that would further the goal of equal citizenship, the Terry Court endorsed the ductile concept of reasonable suspicion, which ultimately undermined that goal.** However, this result was not inevitable. Nor is this result irreversible. One goal of the new criminal procedure revolution should be to re-conceptualize, rather than abandon, reasonable suspicion. Here, **my proposal is** perhaps radical in its simplicity: **reinterpret the Fourth Amendment to permit stop-and-frisks where articulable suspicion is present, but only so long as such suspicion is free of racial bias or prejudice**. n237 In fact, Terry itself provides support for such an interpretation. In Terry, the Court deliberately omitted any reference to Terry's race or the [\*39] race of his companions; n238 by doing so, the Court was arguably sanctioning only race-neutral articulations of reasonable suspicion. In short, what I am suggesting is that the Court make explicit what was arguably implicit in Terry: that articulable reasonable suspicion must be race neutral. For too long the Fourth Amendment has been an area where the Court has spoken softly about racial discrimination, or not at all. n239 It is time for the Court to speak loudly and clearly. Under my proposal, a similar principle would limit the concept of "consensual encounters," advanced in United States v. Mendenhall. n240 In Mendenhall and its progeny, the Court categorized certain "stops" as non-stops and thus outside of the purview of the Fourth Amendment where there has been no show of force and where a reasonable person--even if never advised of his right to leave, which is usually the case--would still feel free to leave. However, **the fact is that minorities are disproportionately singled out** for "consensual encounters," **and** minorities are **least likely to "feel free to leave."** n241 In renewing its commitment to equal citizenship, **the Court can reduce the racial disparity** in consensual encounters **by reinterpreting the Fourth Amendment to require that the selection of individuals for encounters be free of racial bias or prejudice.** n242 Lastly, this limiting principle would also apply to determinations of probable cause. While a racial description of a suspect could continue to be a factor in determining whether probable cause exists, in the absence of a suspect description, **using race to gauge whether probable cause exists** to make an arrest **would be impermissible.** In the recent Seattle School District cases, Chief Justice Roberts wrote: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." n243 In an interview in The New Republic, Justice Scalia claimed, "In the eyes of the government, we are just one race here. It is American." n244 For his part, Justice Clarence Thomas espouses the idea of whites and blacks, and presumably other racial groups, being "blended into a common nationality." n245 One goal of the new criminal procedure revolution committed to equal citizenship would be to say this not just in affirmative [\*40] action cases, or in magazine interviews, but also in cases involving the Fourth Amendment. Some may counter that this proposed re-conceptualization is ineffectual, pure window dressing. The reasonable suspicion standard, this argument would likely state, is so malleable that requiring race neutrality is likely to be inconsequential. Moreover, officers know that referencing race may expose them to claims of racism, and accordingly omit race in their articulations of the bases for their encounters, stops, and arrests. Perhaps more importantly, an officer's decision to single out an individual for a limited detention or consensual encounter is more likely to be based on implicit racial biases unknown to the officer rather than deliberate racism. n246 Accordingly, merely re-conceptualizing reasonable suspicion and consensual encounters is unlikely to result in real change. To a certain extent, these concerns are valid, but only to an extent. **First**, the above argument fails to recognize **the signaling function** that **such a change would have**. The Court functions as a schoolmaster of sorts. n247 Just articulating that reasonable suspicion and consensual encounters must be race neutral **can foster an atmosphere that encourages race-neutral policing.** In short, such changes have a function beyond signaling a change in requirements. **Such changes also do the work of shifting norms and values**. n248 **Second**, by **repeatedly foregrounding race and the notion of equality in its Fourth Amendment jurisprudence, the Court can make an immediate difference in police-citizen encounters that goes beyond norm shifting.** The simple fact, and one that I readily concede, is that **racialized policing is rarely the product of deliberate discrimination**. n249 **Rather, it is usually the product of implicit biases about race that we all have. But such biases are not ineradicable**. **One way to neutralize racial biases is explicitly to make race salient.** "**Even when stereotypes and prejudices are automatically activated, whether or not they will bias behavior depends on how aware people are of the possibility of bias, how motivated they are to correct potential bias, and how much control they have over the specific behavior."** n250 **By promulgating reasonable suspicion, probable cause, and consensual encounter standards that explicitly call attention to race neutrality and equal [\*41] citizenship, the Court can sensitize officers to their implicit biases, and provide officers with the tools for overriding such biases. Indeed, emphasizing race neutrality and equal citizenship could even lead to more efficient policing**. Recall the racial profiling statistics discussed earlier. n251 Despite the fact that blacks and Hispanics bear the brunt of police stops and encounters, the likelihood that searched blacks and Hispanics will be found with contraband is statistically identical to the likelihood that searched whites will be found with contraband. n252 This suggests that officers could be more efficient by focusing on non-racial factors. In an earlier article, I argued that calling officers' attention to race in a way that requires officers to then neutralize race is an effective way to minimize inappropriate biases: For example, officers learning about the reasonable suspicion requirement should be encouraged to switch the racial identity of the suspect in various fact patterns, i.e., would they reach the same conclusion about reasonable suspicion, or about electing to conduct an encounter, if the subject were white instead of black, or Hispanic instead of white? Officers reaching the same decision would know that they are not being influenced by racial bias. Officers making a different decision, however, can then determine for themselves whether their different decision can be justified. I.e., whether their consideration of race is appropriate or inappropriate. n253 Now, a different example seems appropriate. **An officer applying a standard that calls attention to race and equal citizenship might have thought twice about whether she had probable cause to arrest Henry Louis Gates, Jr. for "disorderly conduct**." n254 Similarly, had officers applied an explicitly racially-neutral standard in assessing reasonable suspicion, it is likely that the law-abiding minority professors who I mentioned earlier--Cornel West, William Julius Wilson, Paul Butler, and Devon Carbado--would not have had to endure the citizenship-diminishing harm of being stopped based on little more than racial incongruity. **It is even possible that the 402,543 African Americans stopped in New York City between January and September of 2007** n255 and found not to be engaged in activity warranting arrest **might have escaped having their citizenship diminished.** [\*42] Third, **making race neutrality and equal citizenship a component part of any Fourth Amendment analysis is likely to have the additional benefit of re-invigorating and fortifying the judiciary's** (and the screening prosecutor's) **policing function.** In prior work, I have argued that inappropriate biases can be detected, and overridden, by engaging in switching exercises, in which decisionmakers switch the race of individuals under consideration. n256 **One way to police reasonable suspicion and consensual encounters would be to subject such decisions to similar scrutiny**. For example, a court (or screening prosecutor) reviewing the facts in Terry v. Ohio could easily conclude that reasonable suspicion would have existed even if Terry and his companion were white, all other factors being the same. Conversely, a court reviewing the Mendenhall or Whren or Caballes cases might conclude that the decision to engage Mendenhall, or to tail and stop Whren and Caballes, would not have been made were they white. Since the Fourth Amendment also requires that all searches and seizures be reasonable, **this requirement of race neutrality would also apply to the duration and terms of any stop or search. For example, even where, under this new standard, an initial stop is race-free and lawful, the stop can metastasize into an unlawful stop if the duration or terms are not race neutral.** This would capture disparate treatment beyond the stop or encounter. **A case in point is Anderson v. Creighton,** n257 **the leading case on** the scope of police officers' **qualified immunity**. Officers entered the Creighton home apparently believing that exigent circumstances justified a warrantless search for Mrs. Creighton's brother, though they declined to inform the Creightons of this. n258 Instead, the officers proceeded to yell at the Creightons, punch Mr. Creighton in the face, and hit their ten-year old daughter, causing an arm injury that required medical treatment. n259 Ultimately, **the Court rejected their civil rights claim on the ground that reasonable officers could believe that exigent circumstances justified** the **warrantless entry**. n260 **Had the Court focused** instead **on** the reasonableness of **the post-entry conduct of the police, my proposal would strengthen the Court's ability to find a violation.** The police officers were all white; the Creightons were black. n261 **The Court would thus ask whether the post-entry treatment of the Creightons** [\*43] **was reasonable under the Fourth Amendment, and whether the police would have engaged in such treatment had the Creightons been white.** n262 Fourth, my proposal has the advantage of simplicity. It does not jettison Terry stops, or the ability of officers to engage in consensual encounters. Nor does it require an overhaul of any other Fourth Amendment law. Rather, it merely asks the Court to make explicit what was arguably implicit in Terry, and certainly implicit in the decisions of the first criminal procedure revolution: that equal citizenship matters. My proposal--this part at least--requires only that the Court act as a schoolmaster and speak. As such, this part of the proposal largely maintains the status quo, but with the goals of eliminating racialized policing and achieving equal citizenship. To be sure, these proposals may not entirely eliminate unequal treatment. But they will constitute an important first step in the goal of democratic policing, the sine qua non of equal citizenship.

### CP – Objective Force Test

#### CP Text: The United States should impose an objective test for police use of excessive force

#### Solves

Salky et al 15

Steven Salky, Jacob Schuman, Keisha Stanford, all attorneys and members of the National Association of Criminal Defense Lawyers, “LAWFUL USE OF DEADLY FORCE BY THE POLICE” 39-MAY *Champion* 20, May 2015 [Premier]

The first half of the proposed rule--that the use of deadly force be “objectively necessary”--likely is more controversial. It is, in effect, the inverse of the “good faith” rule applied in some states. While Washington, for instance, allows police officers to use deadly force as long as they honestly believe it to be justified, and while Connecticut and North Carolina authorize deadly force so long as the police reasonably believe it essential to catch the suspect, police use of deadly force should be excused only when it is actually necessary to make an arrest. In other words, police officers' subjective perspectives should not govern whether they are charged with committing a crime. **Only homicides committed by the police that are objectively justified should be considered lawful. This proposed standard would empower grand juries** (and petit juries) **to determine if the officer committed a crime, regardless of an officer's subjective belief that the use of deadly force was necessary.** It is worth noting that such a proposed limit on police officers' ability to use deadly force to arrest would have no impact on their right to invoke “self-defense.” The police, in other words, would still be able to argue that they “reasonably believed” that deadly force was necessary to protect themselves (or others in the immediate area) from death or serious bodily injury. Policing is dangerous work and the law should give deference to law enforcement agents making splitsecond decisions to perceived threats from those seeking to do them serious bodily harm. Second, \*25 this formulation would have no impact on the actual charges brought against an officer, nor the punishment the officer would face if convicted. An officer who reasonably believed deadly force was necessary to make an arrest would no longer have an “arrest” defense, but could still face a lighter charge and receive a lighter sentence based on his or her subjective perspective. **An “objective necessity” test** in cases of deadly-force arrests **is appropriate** for several fundamental reasons. **First**, when a police officer uses deadly force to apprehend a suspect, **the burden should fall on the officer to demonstrate that such force was required. The current** state of the **law** in states like Missouri **fails to encourage the police who are wielding the firearms to think twice before shooting to kill. Second, the “reasonable belief” approach** that prevails in most states **allows officers who use unnecessary force to avoid responsibility by focusing on their subjective perspectives of the victim-- consider Officer Wilson's descriptions of Brown as a “demon” and “Hulk Hogan.”** **This makes it too easy to avoid indictment, especially in cases with racial undertones.** **Finally, a law enforcement officer's ability to use deadly force** to make an arrest **should not only be viewed as a** matter of practical police work, but also as a **reflection of the fundamental relationship between those authorized to protect us and the suspect legally presumed to be not guilty. Whether the state is authorized to deprive a civilian of his right to life should not come down to the mental state of one particular police officer.** Instead, the government should be allowed to kill only when such killings are actually necessary, **an issue that grand juries** (and petit juries), **as direct representatives of the populace, are best positioned to determine**.

### CP – Transparency

#### The United States ought to implement the policy recommendations given in the final report for the Task Force on 21st Century Policing, solves best,

**De Stefan 2017** De Stefan, Lindsey, (J.D. Candidate, 2017, Seton Hall University School of Law) “No Man Is Above the Law and No Man Is Below It:” How Qualified Immunity Reform Could Create Accountability and Curb Widespread Police Misconduct" (2017). Law School Student Scholarship. Paper 850. [Premier]

In response to the officer-perpetrated violence and the national reaction thereto, President¶ Obama created the Task Force on 21st Century Policing in December 2014, to determine best¶ practices for strengthening relationships between law enforcement and the public while also aiming to reduce crime.¶ 114¶ In its Final Report, the Task Force set forth myriad recommendations¶ and action steps by which to implement such recommendations, all of which aim at a paramount¶ umbrella objective: fostering trust and legitimacy between the police and the communities they¶ serve.¶ 115¶ The Final Report is comprehensive in that it covers six general topics and recommends¶ collaboration not only among the various levels of government,116 but between individual law¶ enforcement agencies and local schools,117 higher-learning institutions,¶ 118 other local¶ jurisdictions,119 and individual and corporate members of the community.120 But the scope of the¶ Task Force’s assignment was limited to police-community interactions, and it advocates for¶ holistic evaluation of the criminal justice system in order to determine a plan for comprehensive¶ criminal justice reform.121¶ Establishing police accountability is a palpable recurring theme of the Final Report. For¶ example, the Task Force encourages law enforcement agencies to foster transparency and ensure¶ accountability by making departmental policies freely available to citizens, regularly posting data¶ about stops, summonses, arrests, crime, and the like on the department website, and promptly and¶ candidly communicating with the community about serious incidents—including alleged officer¶ misconduct.¶ 122¶ Additionally, the Task Force emphasizes the need for policy reform to control the¶ use of police force and urges departments to mandate external, independent criminal investigations for cases of officer-involved shootings, in-custody deaths, and fatal use of force in order to¶ demonstrate transparency and rebuild trust.123

## First Amendment Neg



### Right to Privacy

#### The right to record violates privacy of citizens interacting with police

Posner 12

Richard Posner (judge on the United States Court of Appeals for the Seventh Circuit in Chicago and a Senior Lecturer at the University of Chicago Law School; most cited legal scholar of the 20th century). ACLU of Illinois v. Alvarez. Dissenting Opinion. United States Court of Appeals for the Seventh Circuit. No. 11-1286. 8 May 2012. <http://www.aclu-il.org/wp-content/uploads/2012/05/Alvarez_ruling.pdf> [Premier]

A person who is talking with a police officer on duty may be a suspect whom the officer wants to question; he may be a bystander whom the police are shooing away from the scene of a crime or an accident; he may be an injured person seeking help; he may be a crime victim seeking police intervention; he may be asking for directions; he may be arguing with a police officer over a parking ticket; he may be reporting a traffic accident. In many of these encounters the person conversing with the police officer may be very **averse to the conversation’s being broadcast** on the evening news or blogged throughout the world. In some instances **such publicity would violate the tort right of privacy, a conventional exception to freedom of speech** as I have noted. Restatement (Second) of Torts §§ 652A, 652D (1977) (“unreasonable publicity given to [another person’s] private life”); Wolfe v. Schaefer, 619 F.3d 782, 784 (7th Cir. 2010); Reuber v. Food Chemical News, Inc., 925 F.2d 703, 718- 19 (4th Cir. 1991) (en banc) (“publiciz[ing] private facts in a highly offensive manner about an issue not of public concern”); Miller v. Motorola, Inc., 560 N.E.2d 900 Case: 11-1286 Document: 45 Filed: 05/08/2012 Pages: 66 (Ill. App. 1990). This body of law is endangered by today’s ruling.

#### Citizens need privacy in interacting with police; it improves public safety

Posner 12

Richard Posner (judge on the United States Court of Appeals for the Seventh Circuit in Chicago and a Senior Lecturer at the University of Chicago Law School; most cited legal scholar of the 20th century). ACLU of Illinois v. Alvarez. Dissenting Opinion. United States Court of Appeals for the Seventh Circuit. No. 11-1286. 8 May 2012. <http://www.aclu-il.org/wp-content/uploads/2012/05/Alvarez_ruling.pdf> [Premier]

Police may have no right to privacy in carrying out official duties in public. But **the civilians they interact with do.** The majority opinion “acknowledge[s] the difference in accuracy and immediacy that an audio recording provides as compared to notes or even silent videos or transcripts” but says that “in terms of the privacy interests at stake, the difference is not sufficient to justify criminalizing this particular method of preserving and publishing the public communications of these public officials” (emphasis in original). The assertion lacks a supporting argument, and by describing the recording as a “method of preserving and publishing the public communications of these public officials” neglects the fact that the recording will publish and preserve what the civilians with whom the police are conversing say, not just what the police say. The further statement that these “are not conversations that carry privacy expectations even though uttered in public places” implies that anything said outdoors is ipso facto public. Yet people often say things in public that they don’t expect others around them to be listening to, let alone recording for later broadcasting, and we are given no reason to think that this is never the case when someone complains to a police officer, or otherwise speaks with one, “in public” in the sense of being in a place in which there are other people about. Suppose a police detective meets an informant in a park and they sit down on a park bench to talk. A crime reporter sidles up, sits down next to them, takes out his iPhone, and turns on the recorder. The detective and the informant move to the next park bench to continue their conversation in private. The reporter follows them. Is this what the Constitution privileges? It is small consolation to be told by the majority that “the ACLU plans to record openly, thus giving the police and others notice that they are being recorded” (emphasis in original). All the ACLU means is that it won’t try to hide its recorder from the conversants whom it wants to record, though since the typical recorder nowadays is a cell phone **it will be hidden in plain view**. A person who doesn’t want his conservation to be recorded will have to keep a sharp eye out for anyone nearby holding a cell phone, which in many urban settings is almost everyone. The ubiquity of recording devices will **increase security concerns by distracting the police.**

#### The right to privacy in police interaction is most important for the most vulnerable people

Posner 12

Richard Posner (judge on the United States Court of Appeals for the Seventh Circuit in Chicago and a Senior Lecturer at the University of Chicago Law School; most cited legal scholar of the 20th century). ACLU of Illinois v. Alvarez. Dissenting Opinion. United States Court of Appeals for the Seventh Circuit. No. 11-1286. 8 May 2012. <http://www.aclu-il.org/wp-content/uploads/2012/05/Alvarez_ruling.pdf> [Premier]

I disagree with the majority that “anyone who wishes to speak to police officers in confidence can do so,” and “police discussions about matters of national and local security do not take place in public where bystanders are within earshot.” Forget national security; the people who **most need police assistance** and who most want their conversations kept private are often the people **least able to delay their conversation until they reach a private place.** If a person has been shot or raped or mugged or badly injured in a car accident or has witnessed any of these things happening to someone else, and seeks out a police officer for aid, what sense would it make to tell him he’s welcome to trot off to the nearest police station for a cozy private conversation, but that otherwise the First Amendment gives passersby the right to memorialize and publish (on Facebook, on Twitter, on YouTube, on a blog) his agonized plea for help? And as in our informant example, **many of the persons whom police want to talk to do not want to be seen visiting police stations.**

### Privacy K/T Safety

#### Police privacy is key to effective law enforcement

Posner 12

Richard Posner (judge on the United States Court of Appeals for the Seventh Circuit in Chicago and a Senior Lecturer at the University of Chicago Law School; most cited legal scholar of the 20th century). ACLU of Illinois v. Alvarez. Dissenting Opinion. United States Court of Appeals for the Seventh Circuit. No. 11-1286. 8 May 2012. <http://www.aclu-il.org/wp-content/uploads/2012/05/Alvarez_ruling.pdf> [Premier]

Privacy is a social value. And so, of course, is public safety. The constitutional right that the majority creates is likely to impair the ability of police both to extract information relevant to police duties and to communicate effectively with persons whom they speak with in the line of duty. **An officer may freeze if he sees a journalist recording a conversation** between the officer and a crime suspect, crime victim, or dissatisfied member of the public. He may be concerned when any stranger moves into earshot, or when he sees a recording device (**even a cell phone**, for modern cell phones are digital audio recorders) in the stranger’s hand. To distract police during tense encounters with citizens endangers public safety and **undermines** effective **law enforcement**. The majority opinion disclaims any intention of “immuniz[ing] behavior that obstructs or interferes with effective law enforcement.” I am not reassured. A fine line separates “mere” recording of a police-citizen encounter (whether friendly or hostile) from obstructing police operations by distracting the officers and upsetting the citizens they are speaking with. Today’s ruling may cause state and federal judicial dockets in Illinois to swell because it will **unwittingly encourage** police **officers to shoo away bystanders**, on the authority of cases like Colten v. Kentucky, 407 U.S. 104, 109-10 (1972); cf. City of Houston v. Hill, 482 U.S. 451, 462 n. 11 (1987); King v. Ambs, 519 F.3d 607, 613-15 (6th Cir. 2008), when the Case: 11-1286 Document: 45 Filed: 05/08/2012 Pages: 66 officer wants to have a private conversation in a public place.

### Doesn’t Solve Misconduct

#### Recording doesn’t solve police misconduct; it empirically doesn’t lead to prosecution

Williams 14

Lauren C. Williams (Tech Reporter at Think Progress). “Why Body Cameras Alone Won’t Solve Our Police Abuse Problem.” Think Progress. 19 August 2014. [https://thinkprogress.org/why-body-cameras-alone-wont-solve-our-police-abuse-problem-26d098a6602e](https://thinkprogress.org/why-body-cameras-alone-wont-solve-our-police-abuse-problem-26d098a6602e#.47c2hqje3) [Premier]

Police and **witnesses’ video recordings haven’t consistently led to convictions in the past,** and even if the evidence is damning, police accused of violating citizens’ rights are **rarely prosecuted**. In 2013, a Chicago police officer wasn’t even charged for fatally shooting an unarmed man, despite video footage showing the officer standing over the victim’s body. Earlier this year, a jury acquitted two former police officers caught on tape beating a schizophrenic homeless man to death in 2012. **Even videos** of police abuse **that have gone viral** have **sparked little legal action.** No charges have been brought against the officers involved in Garner’s death even after the medical examiner ruled it a homicide. The officer who shot and killed Grant was found guilty of involuntary manslaughter instead of murder.

### QI Doesn’t Deny Constitutional Rights

#### QI usually denied when denying due process or 1st Amendment, Hassel 99

Hassel, Diana. (Associate Professor, Roger Williams University School of Law) "Living a Lie: The Cost of Qualified Immunity." Missouri Law Review 64.1 (1999): 123-156. [Premier]

Certain generalizations can be made about the type of government actions¶ that will likely result in a denial of qualified immunity. Claims involving the¶ denial of due process or the violation of First Amendment rights are likely to be¶ well represented in the group of claims that survive a motion for summary¶ judgment based on qualified immunity." 7 Another type of case that appears¶ frequently in the group in which qualified immunity is denied is an attack on the¶ established policies or procedures of a governmental institution such as a prison¶ or police department." 8 In those cases, the constitutionality of large institutional¶ policies are challenged through the device of a suit against individual employees¶ who implement the policy.0 9

### Constitutionality

#### Expansive reading of Free Speech law is unconstitutional

Posner 12

Richard Posner (judge on the United States Court of Appeals for the Seventh Circuit in Chicago and a Senior Lecturer at the University of Chicago Law School; most cited legal scholar of the 20th century). ACLU of Illinois v. Alvarez. Dissenting Opinion. United States Court of Appeals for the Seventh Circuit. No. 11-1286. 8 May 2012. <http://www.aclu-il.org/wp-content/uploads/2012/05/Alvarez_ruling.pdf> [Premier]

Judges asked to affirm novel “interpretations” of the First Amendment should be mindful that the constitutional right of free speech, as construed nowadays, is **nowhere** to be found **in the Constitution.** The relevant provision of the First Amendment merely forbids Congress to abridge free speech, which as understood in the eighteenth century meant freedom only from censorship (that is, suppressing speech, rather than just punishing the speaker after the fact). A speaker could be prosecuted for seditious libel, for blasphemy, and for much other reprobated speech besides, but in a prosecution he would at least have the protection of trial by jury, which he would not have if hauled before a censorship board; and his speech or writing would not have been suppressed, which is what censorship boards do. Protection against censorship was the only protection that the amendment was understood to create. Patterson v. Colorado, 205 U.S. 454, 461-62 (1907) (Holmes, J.); Blue Canary Corp. v. City of Milwaukee, 251 F.3d 1121, 1123 (7th Cir. 2001); Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 23-24 (1998); cf. 4 William Blackstone, Commentaries on the Laws of England 150-53 (1769). The limitation of the amendment to Congress, and thus to federal restrictions on free speech (the First Amendment does not apply to state action), and to censorship is the original understanding. **Judges have strayed so far from it that further departures should be undertaken with caution.** Even today, with the right to free speech expanding in all directions, it remains a partial, a qualified, right. To make it complete would render unconstitutional defamation law, copyright law, trade secret law, and trademark law; tort liability for wiretapping, other electronic eavesdropping, and publicly depicting a person in a “false light”; laws criminalizing the publication of military secrets and the dissemination of child pornography; conspiracy law (thus including much of antitrust law); prohibitions of criminal solicitation, threats and fighting words, securities fraud, and false advertising of quack medical remedies; the regulation of marches, parades, and other demonstrations whatever their objective; limitations on free speech in prisons; laws limiting the televising of judicial proceedings; what little is left of permitted regulation of campaign expenditures; public school disciplining of inflammatory or disruptive student speech; the attorneyclient, spousal, and physician-patient privileges in cases in which an attorney or spouse or physician would like to speak but is forbidden by the privilege to do so; laws making medical records confidential; and prohibitions against the public disclosure of jurors’ names in cases in which jurors might be harassed. **All these** legal **restrictions of free speech are permitted** (some because they may actually increase the amount of speech, a point I’ll come back to). The question in this case is whether a state, to protect both privacy and public safety, should be allowed in addition to forbid the recording of conversations between police officers and members of the public in a public place unless both parties to the conversation consent to being recorded for posterity.

## Juries Only Neg



### Not Competent

#### Juries lack the knowledge or training to adjudicate technical details of immunity

Balcerzak 85

Stephanie E. Balcerzak (Court of Appeals, Seventh Circuit, 1986 term; BA, Georgetown; JD, Yale). “Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation.” The Yale Law Journal, Vol. 95, No. 1 (Nov., 1985), pp. 126-147. <http://www.jstor.org/stable/796123> [Premier]

The practice of allocating to the jury legal questions concerning an official's qualified immunity defense can **seriously impair the interest of a plaintiff** in a civil rights action. As difficult as it is for a judge to ascertain whether a constitutional right is "clearly established,"" **it is practically impossible for a jury to make such a determination.** If a jury were forced to grapple with the question of law posed by the Harlow immunity inquiry, a trial within a trial would be required, "with the jury hearing 'evidence' of the state of law, trends in the law, and clarity of the law."67 However, because evaluating the relative strength of competing legal positions is both a difficult and technical task, **even a properly instructed jury would be** decidedly **ill-equipped** to determine, for instance, whether the use of tear gas on an inmate confined to his prison cell constitutes a form of corporal punishment that clearly violates the Eighth Amendment.68 In light of the technical complexity inherent in the Harlow immunity inquiry, there is a great risk that a jury instructed to resolve the immunity issue will misunderstand the distinction between the plaintiff's substantive claim and the official's immunity defense and will consequently resort to traditional tort notions of reasonableness to evaluate the legal validity of the official's defense.69 Did the official act reasonably under the circumstances? Did the official have a reasonable belief in the lawfulness of his actions? Answering these questions may lead a jury to grant an official qualified immunity **even if he violated a clearly established** constitutional **right** as long as he acted with a good-faith belief that the purpose or intent underlying his conduct was not constitutionally proscribed.70

#### Past court cases prove juries can’t handle immunity claims

Blum 14

Blum, Karen M. (Professor and Associate Dean at Suffolk University Law School; J.D., Suffolk University Law School; L.L.M., Harvard) "The Qualified Immunity Defense: What's “Clearly Established” and What's Not," Touro Law Review: Vol. 24: No. 3, Article 4. 2014. <http://digitalcommons.tourolaw.edu/lawreview/vol24/iss3/4> [Premier]

After a convoluted procedural history, the case finally went to the jury with ten special interrogatories addressing the factual disputes surrounding Officer Klein's approach to the suspect's car and his subsequent confrontation with Curley. In addition, the jury was given a separate liability verdict sheet with four questions, three regarding the objective reasonableness of Klein's actions and one directed at causation. Upon reaching the Third Circuit, two out of the three judges on the panel decided that even though it looked as if the trial judge intended to give the qualified immunity issue to the jury, the jury's answers to the liability questions reflected no constitutional violation on the merits.' 1 6 Judge Roth, in dissent, was of the opinion that the trial court did put the issue of qualified immunity to the jury and that constituted error. He interpreted the answers to the liability questions as having established that there was a constitutional violation. "7 **Curley exemplifies the confusion that ensues when juries are given questions of qualified immunity.** While there is case law going both ways on this, the ultimate issue of qualified immunity should not be given to the jury. **It creates nothing but chaos.** In Curley, the Third Circuit, like the Second Circuit in Stephenson, adopted the view that "the court, not a jury, should decide whether there is immunity in any given case."' " 18 Where qualified immunity is still in play when a case goes to trial, the jury should be given special interrogatories to resolve the key factual disputes, but the ultimate legal question of qualified immunity should be left to the judge.

#### Judges are the best decision-makers

**Chen 06**, Alan K. (Professor @ University of Denver Sturm College of Law)"The Facts about Qualified Immunity." Emory Law Journal 55.2 (2006): 229-278. [Premier]

If this policy-driven allocation is what is going on, the Court has some¶ license to make judgments about where to allocate the determination of¶ qualified immunity questions. The Court might believe, for example, that¶ judges are better suited than juries to understand the broad policies underlying¶ qualified immunity. Moreover, it could be argued that the experience of the¶ common person (i.e., jurors) is not necessarily relevant to understanding the¶ situations that routinely confront public officials. The Court may also believe¶ that a matrix of decisions by judges about whether the law is clearly¶ established (and what conduct violates that law) is more likely to lead to a¶ coherent jurisprudential foundation for public officials to rely upon in shaping¶ their behavior. This foundation, in turn, could lead to greater uniformity and¶ predictability under the law. Of course, there are counterarguments as well,¶ but the point here is only to suggest that the Court could make a plausible case¶ for allocation of decision making on qualified immunity to judges.

### Delay

#### Jury involvement functions as a mini-trial; that undermines immunity and delays the whole process

Rosen 5

Michael M. Rosen (Attorney in San Diego at Fish & Richardson PC, an intellectual property law firm; JD, Harvard Law). “A Qualified Defense: In Support of the Doctrine of Qualified Immunity in Excessive Force Cases, With Some Suggestions for its Improvement.” 35 Golden Gate U. L. Rev. (2005). http://digitalcommons.law.ggu.edu/ggulrev/vol35/iss2/2 [Premier]

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 interrogatories 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.

### CP – Mini-Discovery

#### Mini-discovery resolves factual issues and doesn’t delay or overburden the court

Rosen 5

Michael M. Rosen (Attorney in San Diego at Fish & Richardson PC, an intellectual property law firm; JD, Harvard Law). “A Qualified Defense: In Support of the Doctrine of Qualified Immunity in Excessive Force Cases, With Some Suggestions for its Improvement.” 35 Golden Gate U. L. Rev. (2005). <http://digitalcommons.law.ggu.edu/ggulrev/vol35/iss2/2> [Premier]

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 plaintiffs **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, openended 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!31 Thus, the possibility of mini-discovery receives significant support, albeit in a footnote, from the Supreme Court. 132 Further- 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 rule s. ",33 In addition, a district court may enter, upon the motion of any party, any protective order "which justice requires.",34 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.'35 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 infringedl37 or invalidl38 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. 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. 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.

#### Mini-discovery would be strictly limited to avoid excess delays

Rosen 5

Michael M. Rosen (Attorney in San Diego at Fish & Richardson PC, an intellectual property law firm; JD, Harvard Law). “A Qualified Defense: In Support of the Doctrine of Qualified Immunity in Excessive Force Cases, With Some Suggestions for its Improvement.” 35 Golden Gate U. L. Rev. (2005). <http://digitalcommons.law.ggu.edu/ggulrev/vol35/iss2/2> [Premier]

To be sure, the mini-discovery alternative in this context is not without its problems. First and foremost, both Bluml44 and Chenl45 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 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 regulations"9 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.163 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 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."

## Private Prisons Neg



### Status Quo Solves

#### Squo solves, private prisons are extraordinarily scrutinized, Schaffer 96

Schaffer, Robert G. (JD from Duke University School of Law) “The Public Interest in Private Party Immunity: Extending Qualified Immunity from 42 U. S. C. § 1983 to Private Prisons.” Duke Law Journal, vol. 45, no. 5, 1996, pp. 1049–1087. http://www.jstor.org/stable/1372978. [Premier]

Finally, monitoring by state officials and public scrutiny are¶ routine when a private contractor operates a correctional facility.247 Most states who contract for the private operation of prisons and jails require a state-employed contract monitor to check¶ private contractors' quality of care and to verify compliance with¶ contractual standards.248 In some cases, the monitor is a full-time¶ employee who works at the private facility.249 In addition, external observers (such as the media and human rights organizations)¶ provide informal monitoring of private prisons.'2o The level of¶ scrutiny received by a private contractor ordinarily exceeds that received by state-operated prisons.~1 Although monitoring and¶ public scrutiny cannot ensure that private prison officials always¶ will act properly, they do provide a greater incentive to protect¶ prisoners' rights. The court in Manis failed to take into account¶ the policing effect of these alternative.

### Solvency

#### The aff increases frivolous law suits which slow efficiency, Lemkemeier 98

David Lemkemeier, (J.D. from Washington University.) Withholding Qualified Immunity from Private Prison Guards: A Costly Mistake, 54 Wash. U. J. Urb. & Contemp. L. 345 (1998) Available at: http://openscholarship.wustl.edu/law\_urbanlaw/vol54/iss1/16 [Premier]

The Court's decision in Richardson to deny qualified immunity to¶ private prison guards will: (1) burden the courts with a massive¶ increase in frivolous prisoner lawsuits; (2) encourage "unwarranted¶ timidity" from private prison guards, thereby compromising their job¶ effectiveness and the security of prisons; and (3) artificially raise the¶ costs to states of contracting prison services out to private prison¶ management firms.¶ A massive increase in prisoner litigation will further burden courts¶ that are already inundated with prisoner lawsuits, many of which lack¶ merit.69 The Richardson decision's facilitation of prisoner litigation¶ contradicts the policy concerns enumerated in Wyatt and incorporated¶ into Richardson against litigation concerns. 70 It also contradicts the intent of recent efforts by Congress to curb frivolous lawsuits.7 1 The¶ Courts will be burdened on account of Richardson because an¶ official's successful invocation of qualified immunity terminates a¶ law suit before discovery. 72 Without qualified immunity for prison¶ guards, private prison firms and the courts will be forced to engage in¶ expensive and time-consuming discovery. 3 This is likely to impose¶ on courts an unnecessary and costly burden.

#### The aff increases costs for the state, Lemkemeier 98

David Lemkemeier, (J.D. from Washington University.) Withholding Qualified Immunity from Private Prison Guards: A Costly Mistake, 54 Wash. U. J. Urb. & Contemp. L. 345 (1998) Available at: http://openscholarship.wustl.edu/law\_urbanlaw/vol54/iss1/16 [Premier]

A final result of Richardson will be to drive up a state's costs of¶ prison privatization in the long run. Studies indicate that the costs to house prisoners in private prisons are high and the current savings¶ made by states through privatization are low. 75 However, studies also¶ show that private prison management firms have recently made¶ substantial profits. 76 It is clear that the cost increases in the wake of¶ Richardson from defending prisoners' lawsuits and paying for¶ insurance will artificially raise costs for prisons." It is unclear,¶ however, whether this cost will be passed on to the states.78 States¶ enjoy only a slim margin of savings in their existing contracts with¶ prison firms and, therefore, may be unable and unwilling to contract¶ for a higher price. Prison firms, on the other hand, appear to maintain¶ a large profit margin and, therefore, may still find it profitable to run¶ prison even if that means absorbing these additional costs.

#### The aff ruins the ability for officers to do their job, Lemkemeier 98

David Lemkemeier, (J.D. from Washington University.) Withholding Qualified Immunity from Private Prison Guards: A Costly Mistake, 54 Wash. U. J. Urb. & Contemp. L. 345 (1998) Available at: http://openscholarship.wustl.edu/law\_urbanlaw/vol54/iss1/16 [Premier]

Another result of Richardson may be to impair the performance of¶ private prison guards and lessen the quality of private prison security.¶ According to the policy objectives articulated in Wyatt, incorporated¶ into Richardson, and balanced in Procunier, prison guards should¶ benefit from qualified immunity in order to enable "fearless"¶ maintenance of discipline undeterred by the threat of litigation. The¶ appropriateness of qualified immunity for prison guards was¶ determined by the Court in Procunier, a result of balancing the¶ guards' and public's interest in fearless maintenance of discipline¶ against the prisoners' interest in civil rights. Because this policy¶ balance is indistinguishable in the public and private prison settings,¶ the Court's inexplicable denial of qualified immunity for private¶ prison guards in Richardson disrupts the balance reached in¶ Procunier and may lead to timid conduct from private guards and¶ violence in private prisons.7

## Topicality



### Limit

#### Limit doesn’t mean to decrease but just to stop from increasing, MacMillian n.d.

"Limit American English Definition and Synonyms | Macmillan Dictionary." Limit American English Definition and Synonyms | Macmillan Dictionary. N.p., n.d. Web. 26 Oct. 2016. <http://www.macmillandictionary.com/us/dictionary/american/limit\_2>. [Premier]

1 to prevent a number, amount, or effect from increasing past a particular point

### QI

#### QI applies where officials violated what was not a clearly established right and a hypothetical official wouldn’t have known,

**L.I.I. 09**

LII. "Qualified Immunity." LII / Legal Information Institute. N.p., 2009. Web. 26 Oct. 2016. <https://www.law.cornell.edu/wex/qualified\_immunity>. [Premier]

“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” Pearson v. Callahan (07-751). Specifically, it protects government officials from lawsuits alleging that they violated plaintiffs’ rights, only allowing suits where officials violated a “clearly established” statutory or constitutional right. When determining whether or not a right was “clearly established,” courts consider whether a hypothetical reasonable official would have known that the defendant’s conduct violated the plaintiff’s rights. Courts conducting this analysis apply the law that was in force at the time of the alleged violation, not the law in effect when the court considers the case.