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Disciplining the Judicial Imagination:
The Rhetoric of Fourth Amendment Qualified Immunity Jurisprudence

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ABSTRACT

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Systems of accountability for police who violate the U.S. Constitution are broken. Among other mechanisms of accountability, the judicial system should provide a path for victims to obtain a remedy when their constitutional rights are violated. Yet unless the law is *clearly established beyond debate*, the doctrine of qualified immunity blocks civil suits against police officers and other state actors who violate someone's constitutional rights. This is the first study to examine this doctrine's rhetorical obligations, difficulties, and constraints. Fourth Amendment cases present unique opportunities to analyze the Supreme Court's constraints on definition and analogy and how judges navigate those constraints. Judges must identify the boundary between acceptable and excessive force, a fact-specific inquiry that requires the construction and comparison of events to justify conclusions about whether the law was clearly established.

This dissertation argues that determinations about clearly established law rest upon layers of subjective definition and framing, and creative analogical arguments. These rhetorical acts are incompatible with the Supreme Court's requirement that decisions against law enforcement be beyond debate. I first argue that the doctrinal rules and instructional dimensions of the Court's decisions force courts to select frames and definitions designed to protect the officer and presume reasonableness while skirting constitutional questions about the rights and remedies for those injured. I then turn to analogical argument, exposing the doctrine's core contradiction. By requiring denials of immunity to be justified analogically and beyond debate, the Court virtually guarantees that immunity will be granted. Finally, I evaluate the rhetorical tools available to judges

in the wake of this collapse and the Court's erasure of protections and remedies against uses of excessive force by police.

The Court's rules and discourse attempt to discipline and instruct the judicial imagination to produce decisions that are beyond debate. But definition and analogy are inherently imaginative, creative practices composed of subjective framing and choices. By examining the justificatory language of representative qualified immunity opinions, this study develops a theory of the doctrine's application which ultimately guides recommendations for reform. This rhetorical study of the layers of value-laden decisions involved in definition and analogical justification clears a path for accepting the subjective nature of law.

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CONTENTS

INTRODUCTION

On a summer day in Georgia in 2014, ten-year-old "Sam" played in his yard with five other children, watched over by an adult.[1] Suddenly, police entered Sam's yard in search of a suspect. The police, outnumbering children, ordered everyone to lie down on the ground at gunpoint while they searched for a suspect. Two of the children were under the age of three and wandered the street crying during these events. Responding to the commotion, the family dog, Bruce, came around the side of the house into the area of the yard where officers guarded the prostrate children. In response, Officer Vickers shot at Bruce without hitting him, causing Bruce to retreat underneath the house. No other efforts were made to restrain the dog, and the subsequent complaint alleged that Bruce did not appear threatening. Despite being armed with a taser and pepper spray in addition to his firearm, Vickers shot at Bruce again when, a few moments later, he reappeared from beneath the house. But this time Vickers's shot hit Sam, who was lying only eighteen inches away from the officer. At the time Vickers discharged this second shot, the criminal suspect being pursued was already in custody. Before the complaint was filed, an orthopedic surgeon evaluated Sam for removal of multiple bullet fragments in his leg.

In 2019 the U.S. Court of Appeals for the Eleventh Circuit dismissed Sam's Fourth Amendment civil suit against the officer for unreasonable use of force—before trial and even before any fact discovery.[2] What explains such an early dismissal, without remedy for Sam or legal accountability for Vickers?[3] The legal doctrine of qualified immunity, a defense that government

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[1] Corbitt v. Wooten, No. 5:16-CV-51, 2017 WL 6028640, at *1 (S.D. Ga. Dec. 5, 2017); Corbitt v. Vickers, 929 F.3d 1304, 1308 (11th Cir. 2019). The ten-year-old is identified in the opinion as SDC; I have chosen to call him Sam for readability. The rest of this paragraph is a recounting of the events described in the sources cited here.

[2] *Corbitt*, 929 F.3d at 1307, 1323.

[3] Qualified immunity is not available as a defense against criminal prosecution, but the standards for criminal liability are much higher than those establishing civil liability.

agents can claim when they are accused of violating someone's constitutional or statutory rights, ultimately protected Vickers from litigation and deprived Sam of any remedy for his injury. Qualified immunity requires that state actors can only be held liable for violations of constitutional rights if the law was clearly established.

How is it that the law was not sufficiently established to give notice to Vickers that it would be unreasonable to shoot a nonthreatening dog while a child (and possibly multiple children) lay close enough to be hit by bullets? How can a federal judge state with a straight face that "there was no clearly established law making it apparent to any reasonable officer in Vickers's shoes that his actions in firing at the dog and accidentally shooting [Sam] would violate the Fourth Amendment" prohibition against excessive use of force?[4] What the court meant in this statement was that there was no case law or precedent that "in factual terms, . . . staked out a bright line" declaring the officer's actions a violation of Sam's Fourth Amendment rights.[5] For a non-lawyer, common sense may be sufficient to deem Vickers's behavior unreasonable, irresponsible, and undeserving of protection. But because of the requirement for "clearly established law"—a requirement established by the legal doctrine of qualified immunity—the decision-making process that judges must apply is carefully prescribed.

In Fourth Amendment excessive force claims like Sam's, the law evaluates the reasonableness of the act, a standard "'[in]capable of precise definition or mechanical application'" that instead "requires careful attention to the facts and circumstances of each particular case."[6] There are without question other suits alleging violations of other constitutional rights by state

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[4] *Corbitt*, 929 F.3d at 1307, 1323.
[5] *Id.* at 1312. The Supreme Court declined to review the Eleventh Circuit's decision. Corbitt v. Vickers, 141 S. Ct. 110 (2020) (mem.).
[6] Graham v. Connor, 490 U.S. 386, 396 (1989) (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

agents who are not police officers in which qualified immunity acts as a defense.[7] The fact-dependent analysis into whether or not a particular action was reasonable creates challenges for determining "clearly established" Fourth Amendment law and how it applies to novel situations. The U.S. Supreme Court's qualified immunity jurisprudence on the Fourth Amendment requires that courts carefully define the situation and the law, framing events and responsibility in a particular way. It then also requires that denials of immunity be justified beyond debate with a case factually similar to the current dispute.

The consequences of qualified immunity are an undermining of accountability for police officers who behave unlawfully and a public perception that the law does not apply to them. In recent history, qualified immunity occupied the public spotlight in 2020 after the murder of George Floyd in Minneapolis. Although empirical studies show that accountability is not entirely absent,[8] these events raised public awareness to how the Court's jurisprudence often protects officers from accountability for behavior that many would consider obviously unlawful.[9] Following Floyd's

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[7] *See, e.g.*, Turning Point USA v. Rhodes, 973 F.3d 868 (8th Cir. 2020) (granting qualified immunity to school officials in a suit alleging First Amendment violations), *cert denied sub nom*, Hoggard v. Rhodes, 141 S. Ct. 2421 (2021). The Eighth Amendment is closer to Fourth Amendment analysis than other violations, similarly involving questions of reasonableness. But the Supreme Court has recently found obvious violations in Eighth Amendment suits, unlike in the Fourth Amendment context. *See infra* Chapter 1, Section V.

[8] Professor Joanna Schwartz has found that qualified immunity is invoked and granted at the district court level far less than one might expect given its reputation as the primary guard against frivolous civil suits targeting individual state actors. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9–10 (2017).

[9] Fred O. Smith, *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2095–96 (2018) (noting that immunities such as qualified immunity often undermine accountability); *see also* John F. Preis, *Qualified Immunity and Fault*, 93 NOTRE DAME L. REV. 1969, 1970–71 (2018) (arguing that the doctrine "immunizes persons who are at fault and holds liable persons who are not"); Joanna Schwartz, *How the Supreme Court Protects Police Officers*, ATLANTIC (Jan. 31, 2023), https://www.theatlantic.com/ideas/archive/2023/01/police-misconduct-consequences-qualified-immunity/672899/.

death, legislative attempts to reform policing included most notably the George Floyd Justice in Policing Act,[10] introduced in Congress in June 2020 and again in February 2021.[11]

The murder of Tyre Nichols in Memphis in January 2023 prompted a resurgence of public attention and debate over policing and qualified immunity,[12] not because the doctrine protects the officers responsible from criminal liability (it does not), but because many believe it has created a police culture of impunity. According to some legal scholars and advocates, the doctrine doesn't just protect police from accountability; Professor Joanna Schwartz suggests that it actually encourages unreasonable behavior by police[13] or at least feeds public perception that protections encourage unreasonable behavior.[14] Ultimately, lives like Sam's are doubly impacted, first by the officer's action and then by the dismissal of their civil suit against that officer before their case is even presented in court.

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[10] George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021), available at https://www.congress.gov/bill/117th-congress/house-bill/1280/text.

[11] Barbara Sprunt, *Read: Democrats Release Legislation to Overhaul Policing*, NPR (June 8, 2020, 12:37 PM), https://www.npr.org/2020/06/08/872180672/read-democrats-release-legislation-to-overhaul-policing. The U.S. House of Representatives passed the bill twice, but the Senate never took it up for a vote; reportedly, it was the bill's elimination of qualified immunity that killed the bill for Senate Republicans. Joan E. Greve, *What Is the George Floyd Justice in Policing Act and Is It Likely to Pass?*, GUARDIAN (Feb. 6, 2023, 6:00 AM), https://www.theguardian.com/us-news/2023/feb/06/george-floyd-justice-in-policing-act-explainer-tyre-nichols.

[12] *See* Remy Tumin, *A Major Police Reform Bill Is Back in the Spotlight*, N.Y. TIMES (Feb. 1, 2023), https://www.nytimes.com/2023/02/01/us/george-floyd-act-tyre-nichols.html.

[13] *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018) (arguing that qualified immunity "may send the message that officers can disregard the law without consequence); *see also* Joanna Schwartz, *Op-Ed: How Can We Get Justice for Tyre Nichols and Other Victims of Police Brutality?*, L.A. TIMES (Jan. 27, 2023, 4:14 PM) (describing how qualified immunity protects those who engage in unlawful behavior), https://www.latimes.com/opinion/story/2023-01-27/tyre-nichols-killing-police-brutality-qualified-immunity-reform.

[14] *See, e.g.*, Jordan Rubin, *How the Supreme Court Emboldened Officers Like Those Charged with Killing Tyre Nichols*, MSNBC (Jan. 30, 2023, 10:58 AM), https://www.msnbc.com/deadline-white-house/deadline-legal-blog/tyre-nichols-qualified-immunity-supreme-court-rcna68142.

Despite extensive criticism, judges, advocates, and academics have been unable to persuade the Court or Congress to eliminate or substantially reform the doctrine. In this study I add a key cornerstone to the foundation upon which criticism of the doctrine and calls for its elimination are constructed. Possibilities for future reform efforts crucially rest on understanding how judges apply the doctrine, not just critiquing its consequences. By examining the justificatory language of a few representative qualified immunity opinions, this study develops a theory of the doctrine's application which ultimately guides recommendations for reform. Qualified immunity is not the only barrier to police accountability.[15] But it is a major political sticking point in legislative attempts to reform policing and strengthen accountability. Proposed congressional reforms in 2020 and 2021 floundered, in part, because the George Floyd Justice in Policing Act eliminated qualified immunity for law enforcement officers, and that same provision may still make comprehensive reform untenable.[16]

This dissertation argues that qualified immunity's problems are, in part, rhetorical. By *rhetoric* I do not mean "empty words." Instead, I draw upon a disciplinary definition to emphasize that "acts of language are actions in the world," as literary and rhetorical critic James Boyd White

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[15] Schwartz argues that "[e]liminating qualified immunity would help us move toward a system where people whose constitutional rights have been violated are better able to seek justice through the courts. But we won't be able to assure that those people are compensated for their losses—or that those suits can deter future misconduct—unless and until we address the web of other shields that make it difficult for plaintiffs to succeed in these cases." JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 229 (2023). That "web of other shields" includes the difficulty of finding a qualified attorney and rules limiting recovery of attorney's fees, heightened pleading standards, biases held by judges and juries, and the failure of municipalities to learn from lawsuits, among others. *Id. See also* Schwartz, *Op-Ed*, *supra* note 13.

[16] Stephen Neukam, *Graham Floats Potential Compromise on Qualified Immunity*, HILL (Jan. 30, 2023, 11:34 AM), https://thehill.com/homenews/senate/3835986-graham-floats-potential-compromise-on-qualified-immunity/.

puts it.[17] Because judges use language in judicial opinions to construct what happened and to justify the decisions reached, I approach those opinions as rhetorical—as linguistic actions that exert persuasive force upon the legal context to which they belong. In this study, *rhetoric* also names the systematic study of that persuasive force possessed by language. Consequently, a rhetorical perspective on qualified immunity examines the rhetoric of judicial opinions and offers tools to analyze these linguistic constructions and justifications.[18]

By approaching language "not as transparent or neutral but as a real force of its own," a rhetorical perspective on qualified immunity offers new insights into the complexities of the doctrine's application.[19] After all, according to White, law "is above all the creation of a world of meaning."[20] Fourth Amendment qualified immunity decisions involve persuasive linguistic choices, including definitions, framing, and analogy. While the doctrine has been critiqued from many angles, this is the first study to examine its rhetorical obligations, difficulties, and constraints. To date, the rhetorical challenge of how to construct events and justify outcomes in language has been neglected despite qualified immunity being "one of the most . . . conceptually challenging tasks federal appellate court judges routinely face."[21] Rhetorical scholarship supports and sharpens legal critiques and arguments for the doctrine's abolition or modification, particularly in the context-specific and fact-dependent world of Fourth Amendment violations.

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[17] JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM, at ix (1990).

[18] *See* DAVID ZAREFSKY, RHETORICAL PERSPECTIVES ON ARGUMENTATION, at xvi (2014) ("From the perspective of rhetoric, then, argumentation can be said to be the practice of justifying claims under conditions of uncertainty.").

[19] WHITE, *supra* note 17, at xi.

[20] *Id.*

[21] Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 229–30 (2006) (quoting Eleventh Circuit Judge Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000)).

In this dissertation, I provide an analytical study of the doctrine, demonstrating layers of value-laden decisions necessary to define the law and the event, and to compare the event to previous cases to determine whether the law was clearly established. The chapters in this project conduct a descriptive analysis of constructive linguistic justification in order to lend additional insights into how the doctrine can be reformed. Through that analysis, this study also explores the subjective nature of law itself.

As a study of the rhetoric of qualified immunity decisions, this dissertation draws upon illustrative Fourth Amendment cases to explore how events are defined and compared for purposes of decision-making. Rhetorical studies and the closely related field of argumentation teach careful attention to text and context, "stress[ing] the necessity of locating persuasive meaning in the act of addressing a situation."[22] Argumentation "is about the justification for statements" or claims.[23] Rhetoric, on the other hand, focuses on "the relationship between arguments and audiences, and hence deals with how people are induced to believe a statement."[24] Rather than focusing on author intent and treating language as a signal for that intent, rhetoric centers language for its capacity to justify outcomes and persuade audiences to give their assent. Judicial opinions are intentional texts,[25] but rhetorical studies can inform our understanding of how words define, compare, persuade, and justify—a more expansive inquiry than focusing on the intent of the author.

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[22] Robert Hariman, *Introduction* to POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW 1, 8 (Robert Hariman ed., 1990).
[23] ZAREFSKY, *supra* note 18, at xv.
[24] *Id.* at xvi.
[25] The late Patricia Wald, former Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, once explained that writing an appellate opinion "puts the writer on the line, reminds her with each tap of the key that she will be held responsible for the logic and persuasiveness of the reasoning and its implications for the larger body of circuit or national law. Most judges feel that responsibility keenly; they literally agonize over their published opinions, which sometimes take weeks or even months to bring to term." Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1375 (1995).

Language has effects beyond authorial intention, and judicial language is no exception. Taking language seriously apart from authorial intent is a foundational assumption of this project for two reasons specific to the language of law and judicial opinions. First, to make sense of how judges use definition and analogical justification, the words used in published opinions that respond to and anticipate other written judicial opinions on the same case are the most reliable artifacts available. And even more importantly, these opinions coming from courts of appeals and the Supreme Court themselves create precedent that future courts are obligated to follow.

A rhetorical perspective provides tools for examining potential reforms, in addition to offering a critique of the doctrine. It suggests a more capacious definition of dissent as limited nonconformity in which the authoritative voice of the judiciary as an institution can, through historical and experiential excess, construct a new frame for decision-making.

As such, this dissertation is an analytical study of the doctrine with a persuasive aim. Every judge and scholar applying or commenting on the doctrine brings a particular perspective and set of experiences to that work. Similarly, I do not approach this project as a neutral observer of qualified immunity but instead approach the doctrine with a particular perspective. Like many scholars and advocates, I believe the doctrine must undergo significant reform. Like every jurist deciding these cases and every scholar analyzing qualified immunity, I come to the doctrine with background knowledge and experiences that shape my perspective on and perception of the events in dispute and what constitutes a just outcome. And by examining how different judges define and construct the same events for use in analogical arguments, this study exposes the subjective nature of their choices and the interests those choices serve.

By acknowledging my own subjectivity in this study, I embrace a more fundamental aim of this project that goes beyond the study of one legal doctrine. This study clears a path for

accepting the subjective nature of law and justification upon which legal decisions are made. Fourth Amendment qualified immunity decisions rest upon creative acts of linguistic construction and justification through definition and analogy. The Supreme Court's precedential rules and opinions instruct and constrain how lower courts define the event, whose perspective they must value, how they sift relevant from irrelevant details, and how they define the law. Rhetorical theory teaches that definitions are selective, value-based propositions that serve certain interests; examining the choices made when defining the event, the act, the agent and agency, and the law exposes the values and interests qualified immunity serves. Ignoring the subjective nature of these choices only entrenches interests and values further.

WHAT IS QUALIFIED IMMUNITY?

The story of qualified immunity begins with a federal statute called Section 1983.[26] Originally enacted by Congress in 1871 as Section 1 of the Civil Rights Act (CRA),[27] Congress

[26] 42 U.S.C. § 1983. The text of Section 1983 reads as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." *Id.*

[27] Section 1983 was originally passed as Section 1 of the Civil Rights Act of 1871 (also known as the Ku Klux Act), Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for Legislative Will*, 86 NW. U. L. REV. 497, 497 n.2 (1992); *see also* Richard Briffault, Note, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1155 (1977). Professor Kirt Wilson's rhetorical study of the 1875 Civil Rights Act also provides historical context with an examination of the political and popular discourse during Reconstruction. KIRT H. WILSON, THE RECONSTRUCTION DESEGREGATION DEBATE: THE POLITICS OF EQUALITY AND THE RHETORIC OF PLACE, 1870–1875 (2002).

later revised and recodified that particular provision of the CRA, among others.[28] Then the statute "lay dormant" until the Supreme Court expanded its interpretation in 1961.[29] Section 1983 makes it possible for those who may have experienced a violation of their constitutional rights by an agent of a state government, such as a police officer or the provost of a public university, to sue that agent in their individual capacity and recover monetary damages. For example, if a police officer is searching a house for a suspected felon and in the process of that search accidentally shoots a child, the child and their guardian can sue the officer, alleging a violation of the child's Fourth Amendment right against unreasonable use of force.[30] Section 1983 is the statutory provision that creates that right,[31] specifically authorizing suits against state employees and agents. Federal employees can similarly be sued under *Bivens*, a doctrine named after *Bivens v. Six Unknown Named Agents*, a 1971 Supreme Court case holding that federal officials can be sued for violating constitutional rights.[32] Although the precedential rules governing *Bivens* and Section 1983 suits

[28] The revisions to what came to be known as Section 1983 were not substantive, and the changing labels came about due to general revisions of the U.S. Code. Gene R. Nichol Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 971 n.80 (1987).

[29] Briffault, *supra* note 27, at 1135. *Monroe v. Pape* recognized that Section 1983 created a right to sue state officials in federal court for monetary damages when they violate constitutional rights. 365 U.S. 167 (1961). For a more detailed historical account of the Reconstruction Amendments, the Civil Rights Act of 1871, and how the Supreme Court's interpretation of the Act and the Constitution eviscerated the 1871 CRA, see Briffault, *supra* note 27, at 1141–67. For discussion of Section 1983's renewed bite in the twentieth century, see *id.* at 1167–75.

[30] The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[31] Because the mere existence of a constitutional right does not necessarily mean there is a remedy through the courts when that right is violated, Congress must have passed a statute to specify a remedy or the courts must have found such a remedy in the common law.

[32] 403 U.S. 388 (1971). But note that *Bivens* is a judge-made right to sue rather than a right conferred through statute as is Section 1983. This distinction is significant for arguments that qualified immunity thwarts legislative intent: they only apply in the context of Section 1983.

vary slightly, qualified immunity doctrine functions identically under both.[33] Consequently, although some qualified immunity rules established in *Bivens* cases will be referenced in this study because they are crucial to understanding how the defense functions, the analysis centers on Section 1983 Fourth Amendment applications. I focus exclusively on Section 1983 cases because *Bivens* suits are more frequently dismissed for other reasons, including whether the law provides alternative remedies and whether the suit involves sensitive issues of national security,[34] resulting in fewer cases even reaching a decision on immunity for the defendant.

In response to the exposure to suit experienced by government officials under the expanded force of Section 1983, the Supreme Court created a qualified immunity, or immunity that only extends to particular circumstances, in *Pierson v. Ray* in 1967.[35] *Pierson* originally articulated the immunity as a good faith defense: if the officer could demonstrate that they acted on a good faith belief about what the law was, they would be protected from liability. Then, in 1982, the Court refined the test for qualified immunity in *Harlow v. Fitzgerald* by removing subjective intent and asking instead whether any clearly established law would have given a reasonable government agent notice that their action would violate a constitutional right.[36] Like all judge-made doctrines, qualified immunity is articulated and refined only in Supreme Court cases rather than in any statute passed by Congress.[37]

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[33] *See* Butz v. Economou, 438 U.S. 478, 504 (1978).
[34] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1858–63 (2017).
[35] 386 U.S. 547, 557 (1967).
[36] 457 U.S. 800, 818 (1982) (holding immunity applies when "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").
[37] Qualified immunity cannot be found in any statute or law passed by elected officials. *See* Fred O. Smith, *Restoring* Hope, 69 AM. U. L. REV. 49, 50 (2019). Instead, it is judge-made law. Yet because courts are required to comply with rulings from the Supreme Court, doctrines emerging from the Court rather than from statute carry similar precedential force. And just as qualified immunity originally emerged not as a statute, but as a judge-made defense in lawsuits permitted by statute, changes to qualified immunity happen in watershed Supreme Court cases.

Procedurally, when a plaintiff brings a suit under Section 1983 for a violation of a constitutional right, the state actor-defendant can raise the defense of qualified immunity, at which point the judge is required to consider the defense and issue a ruling. The defense can be raised at pleading, when the suit is first filed and before any discovery or trial has occurred. The defense can also be raised at summary judgment, usually after discovery, but prior to a trial. And the defense can be raised at trial. Additionally, a defendant can raise the defense more than once. If the court rules in favor of the defendant, the lawsuit against that defendant in their individual capacity[38] is dismissed, subject to appeal. If the court rules against the defendant and allows the lawsuit to continue, the defendant can immediately appeal that decision to a higher court, called interlocutory review, because the doctrine of qualified immunity is intended to protect the state actor from the cost and time of litigation in addition to protecting them from a finding of liability.[39]

Beyond the procedural rules outlined above, the Supreme Court has instituted substantive requirements for lower courts when determining whether a particular defendant should be granted the protection of qualified immunity. Since *Saucier v. Katz* in 2001,[40] plaintiffs must take two key steps in order to overcome a defense of qualified immunity.[41] The first part asks whether a

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[38] Plaintiffs can sue municipalities (called *Monell* claims); they can also sue individuals for non-monetary damages, such as an injunction (an order to stop certain behavior). Qualified immunity is not a defense to these other kinds of suits. Pulliam v. Allen, 466 U.S. 522 (1984) (holding that immunity does not apply to suits for declaratory or injunctive relief); Owen v. City of Independence, 445 U.S. 622 (1980) (denying a municipality immunity).

[39] Mitchell v. Forsyth, 472 U.S. 511, 524–530 (1985) ("[W]e hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' . . . notwithstanding the absence of a final judgment.").

[40] 533 U.S. 194 (2001).

[41] Unlike other defenses, the burden in qualified immunity in most circuits is on the plaintiff to show that the defendant does not deserve the protection of the defense, rather than the burden falling on the defendant to demonstrate that the defense affirmatively applies to them. *See* Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving Section 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 136–38 (2007).

constitutional violation occurred; the second whether the right violated was clearly established in law such that a reasonable actor would know their action was unconstitutional.[42] In other words, part one asks what the law is, while part two asks what a reasonable officer would think the law is. In 2009, the Supreme Court decision in *Pearson v. Callahan* established a rule that courts may begin with either part of the test,[43] which means that if the court decides that a reasonable state actor would not have known their behavior was unconstitutional, there is no need to determine whether a constitutional violation even occurred. The case is dismissed.[44]

It may be unsurprising that this inquiry is a pure question of law, one for a court to answer, usually before going to trial and sometimes before full discovery is completed. But this is not as straightforward as finding a clear statement of law in an authoritative case and applying it to the dispute at hand. The Court has repeatedly rejected general statements of law as "clearly established law."[45] The right or the violation must have been clearly outlined in previous case law[46] under

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[42] *See Saucier*, 533 U.S. at 200 ("[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals.").

[43] 555 U.S. 223, 241–42 (2009).

[44] "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier*, 533 U.S. at 202.

[45] Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam). At least in theory, officers are liable for "obvious violations," even when there is no factually similar precedent putting the officer on notice. Hope v. Pelzer, 536 U.S. 730 (2002) (holding that "officials can still be on notice that their conduct violates established law even in novel factual circumstances"). Yet the Supreme Court has repeatedly overturned lower court denials of qualified immunity, especially in Fourth Amendment cases, in which the violation may have been considered obvious but no similar precedent was uncovered by the plaintiff. This has led scholars to speculate that *Hope v. Pelzer*'s "obvious violation," at least in Fourth Amendment suits, is dead. *See* Smith *Restoring* Hope, *supra* note 37, at 62 (discussing cases subsequent to *Hope v. Pelzer* decided by the Supreme Court which seem to reject *Hope*'s "obvious violation" path to liability, unequivocally requiring "prior cases with a high level of contextual specificity" similar to the case at hand, especially in excessive force cases).

[46] Decisions from just a handful of courts can be considered here, including U.S. Supreme Court cases and decisions from the appellate court in the relevant circuit. The United States is divided into twelve geographic circuits, and decisions by trial courts within that geographic area can be

similar circumstances, with sufficiently similar conduct by the official, so that whether that conduct violated a constitutional right is "beyond debate."[47] Under this regime, as one circuit has explained it, "officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases," and an "official's awareness of the existence of an abstract right . . . does not equate to knowledge that his conduct infringes the right."[48] While not all facts need to be identical in order to put the official on notice, the Court has increasingly demanded that "material" facts be sufficiently similar to leave no doubt as to the right and its violation.[49] The Court has held that "[s]uch specificity is especially important in the Fourth Amendment context, where . . . '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'"[50]

The consequence of this rule, especially in Fourth Amendment cases, is that the material facts of previous cases themselves become legal precedent. Factually contextualized law as established in previous cases must be compared to events in dispute before the court. Comparing facts to determine whether two cases are similar may seem like a relatively simple task, yet vigorous disagreement in dissenting opinions and reversals of lower courts suggests otherwise.

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appealed to the corresponding circuit. For example, a decision by a federal district court in Chicago (the Northern District of Illinois) would be appealed to the Seventh Circuit, while a decision by a federal district court in Philadelphia (the Eastern District of Pennsylvania) would be appealed to the Third Circuit. Some circuits have ruled that cases decided by other circuits can be considered when deciding qualified immunity cases, while other circuits only allow decisions from their own geographic circuit and the Supreme Court to be used. *See, e.g.*, Corbitt v. Vickers, 929 F.3d 1304, 1312 (11th Cir. 2019) ("In determining whether a right is clearly established . . . this Court looks to judicial decisions of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the relevant state." (internal quotations omitted)).

[47] *Mullenix*, 136 S. Ct. at 308.

[48] Coffin v. Brandau, 642 F.3d 999, 1015 (11th Cir. 2011).

[49] *See Mullenix*, 136 S. Ct. at 309–12.

[50] *Id.* at 308 (quoting Saucier v. Katz, 533 U.S. 194, 205 (2001)).

LEGAL SCHOLARSHIP ON QUALIFIED IMMUNITY

There is an ongoing and robust debate in legal scholarship critiquing and defending qualified immunity, particularly in the context of Fourth Amendment violations. The doctrine is criticized for a variety of reasons, including its prevention of police accountability[51] and development of constitutional rights,[52] its grounding in faulty assumptions,[53] and its inability to accomplish even its stated aims.[54] Some argue that the doctrine is based in a long tradition of

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[51] *See supra* note 9.

[52] *See, e.g.*, Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633, 644–49 (2013) (discussing frequency of judicial avoidance of whether a constitutional violation occurred at all after the Supreme Court's 2009 decision in *Pearson v. Callahan*). There is empirical research to support this argument. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 37–38, 41 (2015) (finding an inconsistent development of constitutional law where contentious constitutional questions, or yet-to-be-defined areas of rights, are more often avoided by courts and where certain circuits are more likely to make constitutional law); *see also* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 608 (2021) (acknowledging that "the Supreme Court has made the search for clearly established law even more formidable by allowing lower courts to grant qualified immunity without ruling on the merits of plaintiffs' claims"). Schwartz cites a Fifth Circuit concurring opinion by Judge Don Willett critiquing the doctrine for requiring plaintiffs to "produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because those questions are yet unanswered." Zadeh v. Robinson, 902 F.3d 483, 499 (5th Cir. 2018) (Willett, J., concurring dubitante) (ruling withdrawn on other grounds).

[53] Preis notes that the requirement for clearly established law presumes that police officers carefully read binding appellate court decision. But "[a]ppellate opinions are, not surprisingly, rarely read by government officers." Preis, *supra* note 9, at 1970–71. Schwartz tested this very assumption, finding that officers are not trained on the facts of court decisions but instead are taught the general principles in watershed cases. Schwartz, *Qualified Immunity's Boldest Lie*, *supra* note 52, at 610–11.

[54] *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 8, at 9–10. In another study, Schwartz shows that the doctrine neither causes insubstantial cases to be screened out prior to filing nor causes a significant number of cases to be dismissed at either pleading or summary judgment. Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1106–07 (2020). Some might wonder what the big deal about qualified immunity is, then. Yet as Schwartz points out, regardless of the statistics on the outcomes of the qualified immunity defense, the doctrine "may send the message that officers can disregard the law without consequence." Schwartz, *The Case Against Qualified Immunity*, *supra* note 13, at 1800. Additionally the doctrine may discourage civil rights cases across the board, regardless of their merit. Schwartz, *Qualified Immunity's Selection Effects*, *supra*, at 1106–07.

immunity at common law,[55] but many scholars have disputed that history.[56] Still others argue that it is necessary for the practical functioning of state and local agencies,[57] though again, those claims have been disputed.[58]

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[55] Scott Keller, former Solicitor General of Texas, argues that qualified immunity is rooted in common law from the earliest days of the Republic, when, he asserts, a freestanding defense of good faith existed for government officials executing discretionary duties. Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1344 (2021); *see also* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1864–68 (2018) (finding some grounding for qualified immunity in history and common law, including the good faith defense).

[56] Professor James Pfander notes in response to Scott Keller that the authority upon which Keller relies reflects administrative discretion rather than immunity afforded "where an official's lawful discretion ended and legal boundaries were transgressed." James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. U. L. REV. ONLINE 148, 150 (2021). Professor William Baude has argued that the doctrine is not an updated version of the common law's subjective defense of good faith, nor is it similar to the criminal rule of fair notice and lenity. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55, 74 (2018). Furthermore, Professor Fred Smith highlights the apparent contradiction in a doctrine "utterly untethered from the text or history of Section 1983" that yet remains vibrant in today's Court culture of formalism, textualism, and distaste for judge-made rules. Smith, *Formalism, Ferguson, and the Future of Qualified Immunity*, *supra* note 9, at 2095–96; *see also* Smith *Restoring* Hope, *supra* note 37, at 49 ("During an era in which text and original meaning increasingly dominate legal doctrine, qualified immunity has the misfortune of bearing little relationship to either text or history.").

[57] Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 234 (2020).

[58] *See, e.g.*, Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305, 310 (2020) (responding to Nielson & Walker, *supra* note 57, and arguing that qualified immunity must be examined within an entire civil rights ecosystem; and demonstrating, in that ecosystem, that state and local indemnification practices will not jeopardize local budgets or governance if qualified immunity is reformed by the courts); *see also* Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 316 (2020) (arguing that "abolishing qualified immunity would clarify the law, make litigation more efficient, increase the number of suits filed, and shift the focus of civil rights litigation to what should be the critical question at issue in these cases—whether government officials exceed their constitutional authority," but would not result in overburdening the courts or local budgets with huge damages awards). *But see* John C. Jeffries Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 248 (2013) (arguing that abolishing qualified immunity would actually "inhibit[] constitutional innovation" because courts would be hesitant to expand constitutional rights if such expansion also came with a hefty price tag for officer-defendants who had no notice of the upcoming constitutional expansion). State and local governments usually indemnify government employees, meaning that they agree to take on the cost of litigation, including damages that must be paid, if the employee is sued in their personal capacity for something done in the course of their duties as a government agent.

This robust body of criticism is largely external to the doctrine's case-specific application, instead centered on theories of law and policy reasons for and against the doctrine. Other scholars, meanwhile, have examined and criticized the rules governing the doctrine's technical application and internal analysis and justification, as this study does. These critiques can be broken into two categories: criticism of the Supreme Court's requirements for *specificity and similarity* and the nature of *fact interpretation* when applying the doctrine. This study extends these critiques by examining how judges navigate the rhetorical challenges of fact interpretation and comparison, including the level of specificity.

Specificity and Similarity

Legal scholars have criticized the Court for creating confusion over the level of specificity with which the facts and law must be described and compared, and the degree of factual similarity necessary to declare that a previous case did clearly establish a particular violation. Majority and dissenting opinions themselves vigorously debate this question in some qualified immunity decisions.[59] How precisely the court defines the law can have a dramatic effect on the outcome of the case, yet expectations about the level of specificity seem to vary widely across circuits.[60] While the Fifth Circuit, which includes Texas and two other states, expects more specificity,[61] the Tenth Circuit, which includes Colorado and five other states, used to apply a "sliding scale" approach to

[59] *See, e.g.*, Hughes v. Kisela, 862 F.3d 775, 785 (9th Cir. 2016) (Berzon, J., concurring) ("The dissent's principal complaint is that the panel characterized the relevant constitutional right at too high a level of generality. That is incorrect."); *id.* at 791 (Ikuta, J., dissenting) ("Rather than ask the correct question . . . the panel opinion defines the 'clearly established right' here at the highest level of generality: the right to be free of excessive force.").
[60] Amelia A. Friedman, Note, *Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hole in Clearly Established Law*, 90 TEX. L. REV. 1283, 1284 (2012).
[61] *Id.*

qualified immunity, requiring less specificity in previous cases for more egregious or obvious[62] constitutional violations. The Supreme Court has since rejected such a sliding scale, and the Tenth Circuit has now abandoned that approach.[63] Beyond this rejection, the "altitude," as Professor John Jeffries terms it, at which rights must be defined and subsequently compared to controlling precedent has not been clarified by the Court.[64] Thus, the lack of guidance from the Court leaves lower courts to fumble around and guess at what the Court might decide in any given case.[65] With

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[62] Of course, what exactly constitutes an egregious or obvious violation is subjective, particularly in the Fourth Amendment context. And what seems obvious in hindsight may not have seemed obvious in the moment. For that reason, the Court has hesitated to label Fourth Amendment violations as obvious, especially those that involve heat-of-the-moment decisions by police officers. *See, e.g.*, Saucier v. Katz, 533 U.S. 194, 205 (2001) ("Because police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation, the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective. We set out a test that cautioned against the 20/20 hindsight in favor of deference to the judgment of reasonable officers on the scene." (internal citations omitted)). Yet courts regularly evaluate reasonableness in many other areas of law, including standard of care when determining negligence, compensation, doubt, mistakes, and risk, among others, some of which involve split-second decisions and involve significant financial liability and even criminal prison sentences.

[63] Mark D. Standridge, *Requiem for the Sliding Scale: The Quiet Ascent—and Slow Death—of the Tenth Circuit's Peculiar Approach to Qualified Immunity*, 20 WYO. L. REV. 43, 44–45 (2020). Although Supreme Court jurisprudence suggests that there are some constitutional violations that are so obvious that no precedent is necessary to find an officer liable, it appears as though this is not a rule the Court is willing to consider in more recent cases. *Id.*; *see also supra* note 45.

[64] Scholars have also noted uncertainty about which cases count for purposes of clearly established law. *See, e.g.*, John C. Jeffries Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851 (2010); Friedman, *supra* note 60, at 1284.

[65] Jeffries, *What's Wrong with Qualified Immunity?*, *supra* note 64 (critiquing the lack of clarity about the necessary level of specificity for assessing clearly established law); *see also* Daniel K. Siegel, Note, *Clearly Established Enough: The Fourth Circuit's New Approach to Qualified Immunity in* Bellotte v. Edwards, 90 N.C. L. REV. 1241, 1241–42 (2012) (noting that the Court is inconsistent in requiring factually specific and similar precedent to satisfy clearly established law, sometimes allowing broader statements of law to satisfy the requirement); Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1948–51 (2018) [hereinafter Chen, *Intractability*] (describing uncertainty and disagreement over how factually analogous prior court decisions must be to clearly establish the law); Blum et al., *supra* note 52, at 644–49 (discussing difficulties in applying the "clearly established law" standard, including lack of consistency in which court decisions count and uncertainty over the level of specificity with which the rule must be defined).

the Court's regular demand for factually similar precedent in order to find the law clearly established,[66] the doctrine has become more and more protective, according to Jeffries, "push[ing] qualified immunity far beyond the reach of any functional justification for that protection."[67] This criticism highlights one challenge judges face when asked to decide qualified immunity: how detailed a description of the event is necessary, and how similar must those details be to previously decided cases?

Fact Interpretation

In addition to the rhetorical challenge of the level of specificity necessary for comparison, courts must grapple with an incomplete factual record and the appropriate frame or perspective from which to view the factual details of the dispute. Professor Alan Chen argues that the Supreme Court has created precedential rules that simultaneously prevent fact development and often require decisions inevitably based on factual determinations.[68] This is especially true of Fourth Amendment claims, which include a reasonableness standard.[69] Determining whether particular behavior is reasonable largely depends on the context immediately at hand or the facts on the ground, and yet encouraging early resolution of cases also forces courts to answer factual questions without the full development of the factual record through discovery.

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[66] *See* Standridge, *supra* note 63, at 65 (suggesting that *Hope v. Pelzer*'s exception to the requirement for fact-specificity in clearly established law, or "obvious violations," no longer carries force); *see also supra* note 45.

[67] Jeffries, *The Liability Rule for Constitutional Torts*, *supra* note 58, at 253.

[68] *See* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 7 (1997) [hereinafter Chen, *Burdens*]; *see also* Chen, *Intractability*, *supra* note 65, at 1938.

[69] *See* Chen, *Burdens*, *supra* note 68, at 7. (arguing that reasonableness requires that an officer's "conduct must be evaluated with reference to some set of facts" by the court, and that "[e]ntitlement to qualified immunity, therefore, must be viewed as a mixed question of law and fact"); *see also* Scott v. Harris, 550 U.S. 380, 384 (2007) (evaluating one aspect of reasonableness by "tak[ing] into account not only the number of lives at risk, but also their relative culpability," rather than establishing a bright-line rule about use of deadly force).

Faced with an incomplete factual record, courts must also anticipate the Court's version of the available facts. As Professors Joseph Blocher and Brandon Garrett point out, the Supreme Court sometimes rewrites the facts of the case before it, compounding confusion and uncertainty. They argue that "[e]specially in recent years, the Supreme Court has asserted an active role in reviewing not only the legal conclusions by lower courts, but their *factual* determinations—seemingly without deference typically due to a trial-level factfinder."[70] This is an especially common occurrence in qualified immunity decisions. In Section 1983 cases, the Court has used qualified immunity to "regulate[] fact development[,] . . . . sharply limit[ing] access to discovery and remedies for civil rights plaintiffs," and yet simultaneously, the factual record is reconsidered and reinterpreted upon appeal for particular constitutional claims.[71] So-called constitutional fact review "describes a set of practices in which appellate courts engage in *de novo* review of the facts underlying the application of a constitutional standard."[72] This "plenary review . . . permits disregard of (lower court) factfinding."[73] Construction and interpretation of the factual record on appeal, normally the purview of trial courts, inserts additional uncertainty.

RHETORICAL INTERVENTION

The commentary on specificity, similarity, and fact interpretation describes qualified immunity's application as one of murky uncertainty and confusion. This dissertation contributes to legal discourse on qualified immunity by asking what judicial decisions and discourse on qualified immunity—in the form of dissenting, concurring, and lower court opinions—might

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[70] Joseph Blocher & Brandon L. Garrett, *Fact Stripping*, DUKE L.J. (forthcoming).
[71] *Id.* at 20, 25.
[72] *Id.* at 20. Constitutional fact review is not a phenomenon limited to Section 1983 cases or qualified immunity defenses. The Court has also applied the standard in reviewing agency decisions and rulemaking, among other circumstances. *See id.* at 3–4, 6–7.
[73] *Id.* at 20.

reveal about this apparent uncertainty. What constraints has the Supreme Court put into place about how to define the law and events and how to analogize between disputes and previous cases? How do judges justify qualified immunity outcomes by interpreting facts, framing those facts, and comparing factual accounts in dispute to those of previously decided cases? Can the definition of the law as laid out in previous, factually specific contexts, the definition of an event, and analogical justification be effectively constrained? When the Court puts constraints on definition and analogy, whose interests are served? What does a rhetorical perspective reveal about the creative and constructive acts of definition and analogy in the law? And, ultimately, what does that analysis suggest about how the doctrine ought to be reformed?

CASES

Importantly, rhetoric is concerned with the use of arguments and persuasion in specific contexts.[74] This dissertation examines select Fourth Amendment qualified immunity opinions to better understand how judges construct facts, compare events, and justify outcomes. This approach to studying qualified immunity addresses a gap in scholarship by focusing on the application of the doctrine rather than its articulation alone.[75] Yet as Professor David Zarefsky notes, "rhetorical situations are not unique; they often can be imagined as types of categories, with similar situations sharing similar features."[76] By studying a few choice examples, I expose patterns and structures in the Court's discourse related to qualified immunity, the framing and construction of facts, and analogical argument. Thus, the study of cases presented here is not intended to be a comprehensive

[74] ZAREFSKY, *supra* note 18, at xvi.
[75] *See* Flatford v. City of Monroe, 17 F.3d 162, 166 (6th Cir. 1994) (noting that "the difficulty for all judges with qualified immunity has not been articulation of the rule, but rather the application of it").
[76] ZAREFSKY, *supra* note 18, at xvi. Rhetorical scholars of genre are especially attentive to patterns and repeated structures of language. *See, e.g.*, KARLYN KOHRS CAMPBELL & KATHLEEN HALL JAMIESON, PRESIDENTS CREATING THE PRESIDENCY: DEEDS DONE IN WORDS (2008).

investigation of how all judges justify outcomes in qualified immunity decisions. Rather, I demonstrate how representative decisions can illuminate the particular challenges of applying qualified immunity rules and shed light on how the Court instructs judges to navigate those challenges.

Qualified immunity serves as a valid defense in a range of suits for constitutional violations, including the First Amendment protections of freedom of expression and freedom of religion, and the Eighth Amendment protection against cruel and unusual punishment. Yet the Fourth Amendment stands out as being particularly difficult because of the context-dependent nature of reasonableness. Force is not prohibited, but unreasonable force is. Identifying the boundary between these two is a highly fact-specific inquiry, requiring the construction of facts and events to justify conclusions about whether the law was clearly established. For these reasons, I focus exclusively on qualified immunity decisions related to Fourth Amendment claims where the decision hinged upon whether the law was clearly established. Additionally, due to changes in how qualified immunity should be applied handed down by the Supreme Court, I limit the scope of my study to decisions since 2010.[77] Each focal case was appealed all the way up to the Supreme Court, though not necessarily heard by the Court. This process of selection produced multiple opinions, including concurring and dissenting opinions, in which judges grapple with questions of how to define clearly established law, how to characterize the facts, and how to justify outcomes analogically. Further, the chosen cases have the advantage of addressing each other explicitly, with concurring opinions responding particularly to arguments in the dissent, or with a majority reversal by the Supreme Court that specifically responds to reasoning from the circuit court opinion. Chapters 1 and 2 examine opinions in *Mullenix v. Luna*, *Kisela v. Hughes*, and *Gravelet-Blondin*

[77] *See supra* notes 40–44 and accompanying text.

v. Shelton. The case examined in Chapter 3, *Jamison v. McClendon*, is the exception to this practice because of its unique blend of applying the law alongside a vigorous dissent.

Mullenix v. Luna

On March 23, 2010, Israel Leija was in his car at a drive-in restaurant when a Tulia, Texas, police officer approached him with a warrant for his arrest.[78] Instead of submitting to arrest, Leija sped off and led police on an eighteen-minute chase heading north on Interstate 27. Texas Department of Public Safety Trooper Chadrin Mullenix was one of many officers who responded to dispatcher calls for assistance. He parked on the Cemetery Road overpass, about twenty miles south of Amarillo, planning to shoot the engine block of Leija's vehicle to disable it. When the vehicle approached the overpass, Mullenix fired six shots at the car, killing Leija. The vehicle then hit a spike strip deployed below the bridge and rolled multiple times in the median.

A suit alleging that Mullenix violated Leija's Fourth Amendment rights was filed in federal district court, in the Northern District of Texas, on behalf of his minor child and his estate. The district court denied Mullenix's motion for summary judgment, which raised a qualified immunity defense.[79] Mullenix then appealed to the Fifth Circuit, which affirmed the district court; one dissenting opinion by Judge Dineen King was also filed.[80] The court then withdrew its first majority opinion, entering a new opinion also denying immunity but providing a more thorough discussion of clearly established law.[81] The officer petitioned for an en banc rehearing; the Fifth Circuit issued a cursory, administrative, two-paragraph denial, accompanied by a more lengthy

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[78] The facts recounted in this paragraph are drawn from the district court, Fifth Circuit, and Supreme Court decisions. Mullenix v. Luna, 136 S. Ct. 305, 306 (2015) (per curiam); Luna v. Mullenix, 773 F.3d 712 (5th Cir. 2014); Luna v. Mullenix, No. 2:12–CV–152–J, 2013 WL 4017124, at *4 (N.D. Tex. Aug. 7, 2013).
[79] *Luna*, 2013 WL 4017124, at *4.
[80] Luna v. Mullenix, 765 F.3d 531 (5th Cir. 2014).
[81] *Luna*, 773 F.3d 712.

dissent by Judge E. Grady Jolly.[82] The Supreme Court granted certiorari and reversed the Fifth Circuit in a per curiam decision, instructing the lower court to dismiss the suit against the officer on qualified immunity grounds.[83] A per curiam decision is not signed by an individual justice but is instead issued in the name of the court, often used when the decision is uncontroversial. Justice Antonin Scalia also wrote a concurring opinion, and Justice Sonia Sotomayor filed a dissenting opinion.

Kisela v. Hughes

On May 21, 2010, Corporal Andrew Kisela, on duty with the University of Arizona Police Department, heard a dispatch report of a person hacking at a tree with a knife.[84] He and other officers responded, heading to the intersection of Euclid and Seventh Streets near downtown Tucson. Upon arriving at the scene, officers saw Amy Hughes, holding a large kitchen knife, exit a house and walk toward another woman, Sharon Chadwick. When Hughes stopped about six feet from Chadwick, officers drew their guns and yelled for her to drop the knife. When Hughes did not accede to the commands, Officer Kisela shot her four times.

Surviving the incident, Hughes sued Kisela in federal court in the District of Arizona, alleging a violation of her Fourth Amendment rights. The district court determined that Kisela's use of force was objectively reasonable, granting the officer's motion for summary judgment.[85] Hughes then appealed to the Ninth Circuit, which reversed the trial court, finding that the use of force was not objectively reasonable and that the violation was clearly established in law, denying

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[82] Luna v. Mullenix, 777 F.3d 221 (5th Cir. 2014).
[83] *Mullenix*, 136 S. Ct. 305.
[84] The facts recounted in this paragraph are drawn from the district court, Ninth Circuit, and Supreme Court decisions. Kisela v. Hughes, 138 S. Ct. 1148 (2018) (per curiam); Hughes v. Kisela, 862 F.3d 775 (9th Cir. 2016), amended June 27, 2017 (denial of petition for rehearing en banc); Hughes v. Kisela, CV 11-366 TUC FRZ, 2013 WL 12188383 (D. Ariz. Nov. 28, 2016).
[85] *Hughes*, 2013 WL 12188383, at *7.

Kisela immunity.[86] The opinion contains a majority opinion, written by Judge William K. Sessions, U.S. District Judge for the District of Vermont and sitting by designation; a concurring opinion by Judge Marsha Berzon; and a dissenting opinion by Judge Sandra Segal Ikuta. After the Ninth Circuit denied Kisela's petition for rehearing en banc, he filed a petition for a writ of certiorari with the Supreme Court, which was granted. In a per curiam decision, the majority reversed the Ninth Circuit, directing the lower court to grant qualified immunity and dismiss the suit.[87] Justice Sotomayor authored a dissenting opinion, joined by Justice Ruth Bader Ginsburg.

Gravelet-Blondin v. Shelton

On May 4, 2008, Sergeant Jeff Shelton and other officers from the Snohomish, Washington, Police Department just outside of Seattle responded to a call for a wellness check reporting a suicidal man likely in possession of a firearm.[88] When officers arrived on the scene, they witnessed Jack Hawes sitting in a running vehicle with a hose attached to the exhaust and feeding into one of the vehicle's windows. The officers immediately attempted to restrain Hawes, wrestling him to the ground after ordering him out of the vehicle. At that time, neighbors Donald and Kristi Gravelet-Blondin came out of their home to find out what was happening. Officers ordered Donald Blondin[89] to get back, but when he did not retreat, Shelton tased him in dart mode, then handcuffed him.

Blondin sued Shelton in federal court in the Western District of Washington for violating his Fourth Amendment rights. In 2010, the district court denied Shelton summary judgment on the

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[86] *Hughes*, 862 F.3d 775.
[87] *Kisela*, 138 S. Ct. 1148.
[88] The facts recounted in this paragraph are drawn from the district court and Ninth Circuit decisions. Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1093 (9th Cir. 2013); Gravelet-Blondin v. Shelton, No. C09–1487RSL, 2012 WL 395428 (W.D. Wash. Feb. 6, 2012).
[89] Despite the case name, the Ninth Circuit refers to the plaintiff as Blondin, a practice I follow.

basis of qualified immunity, but after additional discovery, the court granted his renewed motion, finding that the law was not sufficiently clear in 2008 when events occurred.[90] Blondin appealed to the Ninth Circuit, which reversed the district court and ordered that the case proceed to trial in an opinion written by Judge Michael Daly Hawkins, accompanied by a dissenting opinion from Judge Jacqueline Nguyen.[91] Shelton's petition for writ of certiorari to the Supreme Court was denied.[92] Ultimately a jury found in Shelton's favor.[93]

Jamison v. McClendon

Clarence Jamison was pulled over by Officer Nick McClendon on July 29, 2013, in Pelahatchie, Mississippi, because, McClendon asserted, the temporary tags on Jamison's car were not visible.[94] McClendon repeatedly asked for Jamison's consent to search the vehicle, first by hand and then with a canine. Jamison denied these requests until it became clear that he would not be free to go until he gave his consent. Two hours later, after finding nothing, McClendon finally told Jamison he was free to go.

After this incident, Jamison sued McClendon in the Southern District of Mississippi for violating his Fourth Amendment rights.[95] Ruling on McClendon's motion for summary judgment, Judge Carlton Reeves issued a thirty-nine-page order granting McClendon qualified immunity on the Fourth Amendment claims. In that opinion, he recounts the history of Section 1983 and the doctrine of qualified immunity and contextualizes the experience of Jamison, a Black man, within America's history and present of racism and policing. Nevertheless, the opinion acknowledges that

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[90] *Gravelet-Blondin*, 2012 WL 395428.
[91] *Gravelet-Blondin*, 728 F.3d at 1093.
[92] Shelton v. Gravelet-Blondin, 571 U.S. 1199 (2014) (mem.).
[93] Gravelet-Blondin v. Shelton, 665 F. App'x 603, 605 (9th Cir. 2016).
[94] The facts recounted in this paragraph are drawn from *Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. Aug. 4, 2020).
[95] *Id.*

the law is clear: without a factually analogous case, McClendon is immune from suit.[96] After this order was issued, a settlement agreement between the parties ended litigation altogether, barring any appeals.[97]

OUTLINE OF CHAPTERS

This dissertation proceeds in three parts. In Chapters 1–3, I examine what I argue are three persuasive acts implicated in analyzing clearly established law in qualified immunity decisions: definition, analogy, and dissent. Instead of analyzing each court case sequentially, I compare specific analytical and rhetorical moves side-by-side in order to isolate layers of subjective, value-based decisions about how to define and compare events. The first two acts, definition and analogy, are mandatory in every analysis; the third act represents the possibility of rhetorical resistance to the Court's attempts to discipline the imaginative work necessary in definition and analogy.

Chapter 1 analyzes arguments in *Mullenix* and *Kisela*, tracing the layers of definition judges must construct to determine if a violation was clearly established. The history of the doctrine demonstrates priorities and values that elevate the protection of police officers. The chapter also argues that the doctrinal rules and instructional dimensions of the Court's decisions require that courts select frames and definitions designed to protect the officer and presume reasonableness while skirting constitutional questions about the rights and remedies for those injured. By characterizing disputes between the Supreme Court and lower courts as differences of specificity, the real problem, from the perspective of the Supreme Court—that lower courts sometimes frame or define the situation without sufficient sympathy for the officer—is hidden behind a performance of legal objectivity.

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[96] *Id.* at 392, 418.

[97] Stipulation of Dismissal at 1, Jamison v. McClendon, No. 3:16-cv-595-CWR-LRA (S.D. Miss. Aug. 4, 2020), ECF No. 73.

After judges assess the characteristics of the event central to the case, the event must be compared with previous cases, similarly defined. Chapter 2 examines analogical justification required by the Supreme Court in qualified immunity decisions and exposes the doctrine's core contradiction: By requiring that denials of immunity be argued analogically and justified beyond debate, the Court virtually guarantees that immunity will be granted. Together, *Mullenix, Kisela,* and *Gravelet-Blondin* demonstrate that the constructive nature of analogical justification, a reciprocal process in which the source and target are simultaneously defined and compared, cannot be constrained beyond debate. Under the weight of this contradiction, the doctrine collapses into absolute immunity.

Chapter 3 considers the rhetorical tools available to judges in the wake of this collapse and the Court's erasure of protections and remedies when police use excessive force. It examines the district court opinion *Jamison v. McClendon,* which combines a grant of qualified immunity, compelled by Supreme Court precedential rules, with a forceful dissent. The opinion makes the case against qualified immunity by examining its history and the history and present status of race and policing in the United States. It lays responsibility directly at the doorstep of the judiciary and the Supreme Court but limits its nonconformity by speaking within the generic norms of judicial opinions as an institutional authority. The opinion exposes the law's fiction of objectivity and inevitability by including voices and experiences normally excluded.

Finally, the conclusion reconsiders the stakes of this study by tracing three thematic threads that emerge through my analysis of the cases: imagination, framing, and spheres of discourse. I also pull back from the close textual analysis found in earlier chapters to take a broader look at qualified immunity by outlining recommendations for doctrinal reform suggested by the project's particulars. The three analytical chapters of this dissertation consider how the Court constrains

definition and analogical argument in Fourth Amendment qualified immunity cases by disciplining judicial imagination. The Court executes those constraints through explicit technical rules, instructions on framing and perspective, and more subtle turns of phrase, characterizations, and linguistic comparisons. Consequently, the analysis in this project is granular and specific as I explore how the boundary between acceptable and excessive force is (de)constructed. But the cases themselves are the product of often catastrophic events with profound human impact. The ability to reform qualified immunity depends upon our capacity to hold both the doctrine's technical problems and its human cost simultaneously. By better understanding how the doctrine is applied, legal scholars, judges, and lawmakers will be more equipped to ensure that in the future, individuals like Sam are not denied relief when a police officer violates their constitutional rights.

CHAPTER 1: DEFINITION

I. INTRODUCTION

Qualified immunity protects government officials from civil liability and "the burdens of litigation,"[1] even when their actions may have violated someone's constitutional rights. The "qualified" part of qualified immunity is attached to a narrow exception: if the law clearly establishes the violation, there is no immunity. Whether the law is clearly established such that "it would be clear to a reasonable officer [or "any reasonable official"[2]] that his conduct was unlawful in the situation he confronted"[3] has become one of two crucial questions courts must ask.[4] The answer can determine whether a suit ends immediately—even as early as filing of pleadings and before discovery—and whether the injured person has any path to remedy for their injury. But what does it mean for courts to define clearly established law,[5] especially in Fourth Amendment cases involving allegations of excessive force where the law "is not capable of precise definition or mechanical application"?[6]

I argue that Fourth Amendment qualified immunity decisions consist of layers of choices about defining and framing that judges must make to categorize an event as excessive force within clearly established law. Because the Fourth Amendment's protections against excessive force cannot be precisely defined in such a way that courts can mechanically apply a bright-line test in

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[1] Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam).
[2] Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (internal quotations omitted). *See infra* notes 100–104 and accompanying text.
[3] Saucier v. Katz, 533 U.S. 194, 202 (2001).
[4] Courts also ask whether, on the facts alleged, a constitutional violation occurred. These two questions can be asked in either order. *See* Pearson v. Callahan, 555 U.S. 223, 241–42 (2009).
[5] *Cf. al-Kidd*, 563 U.S. at 742 ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality.").
[6] Graham v. Connor, 490 U.S. 386, 396 (1989) (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

each new factual scenario, the law must be defined anew for the particular circumstances at hand in each case. By demonstrating the subjective nature of definitions and framing in qualified immunity decisions, this chapter argues that the Supreme Court's stated rules and performance of rhetorical pedagogy teach federal judges to prioritize the protection and redemption of police officers. The Court's pedagogy frames circumstances to presume reasonableness and casts the officer as reacting to a specific and overwhelming threat created by someone else. The Court also accomplishes the goal of prioritizing officer protection through a legal performance of objectivity; rarely are framing or definitional choices named explicitly as choices or offered up for discussion in the dialectic of judicial opinions.

The Supreme Court's mantra in excessive force qualified immunity cases has been that "[w]e have repeatedly told courts . . . *not to define clearly established law at a high level of generality*."[7] For example, a court may not simply state that deadly force can only be used in the face of a sufficient threat and deny qualified immunity on that basis.[8] The "definition" of clearly established law, in that instance, is too vague and general to be applied in a particular factual situation, according to the Court.[9] But in fact, these opinions can be analyzed as arguments by

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[7] *al-Kidd*, 563 U.S. at 742 (emphasis added); *see also* Mullenix v. Luna, 136 S. Ct. 305, 311 (2015) (per curiam) ("More fundamentally, the dissent repeats the Fifth Circuit's error. It defines the qualified immunity inquiry at a high level of generality—whether any governmental interest justified choosing one tactic over another—and then fails to consider that question in the specific context of the case." (internal quotations omitted)); City of Tahlequah v. Bond, 142 S. Ct. 9, 11 (2021) (per curiam) ("We have repeatedly told courts not to define clearly established law at too high a level of generality. It is not enough that a rule be suggested by then-existing precedent; the rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted." (internal citations and quotations omitted)).

[8] *See Mullenix*, 136 S. Ct. at 309 ("The general principle that deadly force requires a sufficient threat hardly settles this matter.").

[9] *See* Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (per curiam) ("Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer 'cannot be said to have violated a

definition in which the definition is rarely explicitly stated or negotiated, but naming and labeling suggest certain denotative and connotative meanings and serve particular interests.

This chapter explores two ways that definition is crucial to qualified immunity opinions. The first is in the series of decisions judges must make, conscious or not, about which elements to include and how to describe them when defining the event and law. Drawing on the work of literary and rhetorical theorist Kenneth Burke and Professors David Zarefsky and Edward Schiappa, I argue that to define clearly established law is to define an event through description and framing of the scene, act, agent, agency, and purpose. Courts define the event in dispute; they must also define any previous cases in which the law may have been clearly established. To frame an event is to select a particular perspective from which to present an event or scene; framing also selects and emphasizes certain details while deemphasizing and erasing others. Consequently, definition and its accompanying acts of description and framing represent layers of subjective choices about perspective, inclusion, and emphasis: *whether* to describe some aspect of the event and *how* to describe it. To name the relevant elements of an event is a powerful act of persuasion.

The second way definition is crucial to qualified immunity opinions is in the final act of categorization or classification, which rests upon layers of subjective naming described above. After defining the event and previously established law, judges must categorize the current dispute as either a violation of which every officer would have been aware, or not. In that act of categorization, the decision defines the boundary lines of clearly established law. This meaning of definition draws upon another meaning of the word, an "action of making definite" or "of being

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clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'" (quoting Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014))).

definite [or distinct] in visual form or outline."[10] I argue that, by classifying particular events as clear uses of excessive force or not, the act of classification functions to add definition, clarity, and detail to the boundary separating excessive from acceptable force. In the absence of Supreme Court decisions recognizing excessive force violations clearly established in law, however, the boundary maintains its undefined, "hazy" character.

By examining qualified immunity decisions as definitional acts, we are able to explore how the rules are built upon values that restrict and direct the inquiry. It is not an objective inquiry into "what happened," despite the rhetorical power of framing the inquiry in these terms. Instead, the Court constructs the account from the officer's perspective and with the presumption of reasonableness. By examining qualified immunity as presenting a problem of definition and framing, this chapter joins a robust body of legal scholarship. Qualified immunity has been critiqued from many angles, but this study is the first inquiry into how the mechanics of the doctrine mandate subjective definitions that reinforce pro–law enforcement values and deemphasize the protection of constitutional rights by shifting the frame. By exposing framing or definition of situation as a subjective enterprise, one that *must* prioritize or adopt a certain perspective, interest, and set of values, I offer another angle of critique and path to reform. The appearance of objectivity and mandated framing obfuscate the deprioritization of constitutional protections, avoiding even the discussion of balancing official interests against the social and ethical interests of robust protections for constitutional rights through the availability of remedies.

This chapter invites the legal and rhetorical communities to examine how judicial rhetoric's power to define, frame, and classify represents layers of subjective decisions that reinforce

[10] *Definition*, OXFORD ENGLISH DICTIONARY, https://www-oed-com.turing.library.northwestern.edu/view/Entry/48886.

hierarchies, interests, and values.[11] By examining the rules, policy goals, assumptions, and rhetorical obligations that make up the Supreme Court's qualified immunity jurisprudence, this chapter exposes the Court's deep-seated desire to justify police action, displacing blame onto other parties.

This chapter and dissertation more broadly understand Supreme Court decisions as rhetorical pedagogy. In addition to the parties in the case at hand, opinions from the Supreme Court are intended to instruct lower courts on the law. Its decisions are binding; all future decisions must be coherent with the holding and statement of law. But beyond that, lower courts frequently quote the Court directly when issuing similar decisions. Pick up any circuit court opinion, and you will find a statement of the law in which the court quotes its own binding precedential rule and that of the Supreme Court if it has issued a relevant ruling.

Rarely does the Supreme Court reverse lower courts for an *improper application* of properly stated law.[12] Qualified immunity decisions are an exception to that rule. Instead of reversing a lower court decision or remanding a case for a new decision because the deciding court applied an incorrect or obsolete legal standard, the Court more often reverses lower courts for applying the correct law incorrectly, or for defining the situation differently than the Court would have defined it.[13] Consequently, I treat the Court's language in opinions not just as relevant to the

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[11] *See* David Zarefsky, *Presidential Rhetoric and the Power of Definition*, 34 PRESIDENTIAL STUD. Q. 607, 610 (2004) [hereinafter Zarefsky, *Presidential Rhetoric*] (noting that rhetorical studies "is far more likely to suggest possibilities and to issue invitations than it is to determine outcomes").

[12] *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *see also* City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1779 (2015) (Scalia, J., dissenting in part) (reminding the majority of Supreme Court Rule 10); Scott v. Harris, 550 U.S. 380, 389–90 (2007) (Stevens, J., dissenting) (rebuking the majority for an "unprecedented departure from [the Court's] well-settled standard of review of factual determinations made by a district court").

[13] This is one reason why the Court reverses lower courts on qualified immunity decisions and is the focus of this chapter. Another reason the Court hears and reverses qualified immunity decisions

live dispute it is settling, but also as rhetorical pedagogy, instructing federal courts how to interpret future disputed events and those treated in previous cases, how and whether to apply general statements of law to those events, and how to define clearly established law.[14]

Examining the Court's qualified immunity decisions as pedagogy implies a receptive and even responsive audience. When an audience speaks back, argumentation theory examines the conversation as dialectic. On the other hand, an argument directed at an audience that does not respond is treated as rhetoric. Judicial opinions do not fit cleanly into this framing of either rhetoric or dialectic. Rhetoric, traditionally imagined as one-sided, monologic discourse, anticipates objections and points of disagreement. Judicial opinions contain aspects of this mode of argumentation by addressing the parties in the case who have already had their say in briefs and oral arguments but cannot respond to the final opinion (other than to file an appeal with another court). An opinion might also be written for a wider audience, especially in high-profile cases, such as the media, the general public, or lawmakers. And a little less immediately, opinions may be directed at and taken up by future courts, whether or not they are required to follow the precedent set in that opinion.[15]

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is when the lower court relies upon a previously decided case that the Court does not think is the most relevant or the most closely analogous from the perspective of any reasonable officer in those circumstances. Chapter 2 examines these justifications.

[14] There are some similarities between reading Supreme Court qualified immunity decisions as rhetorical pedagogy and anthropologist Charles Goodwin's "professional vision." Goodwin analyzes the trials of four L.A. police officers for the 1991 beating of Rodney King, demonstrating how the jury was taught to view the grainy video recording of the beating through the eyes of a police officer, scrutinizing every individual movement for signs of noncompliance and aggression. Charles Goodwin, *Professional Vision*, 96 AM. ANTHROPOLOGIST 606 (1994). But instead of teaching judges to see events as a trained police officer would see them, the Court instructs lower courts to rhetorically construct the events from the perspective of a hypothetical officer-cum-lawyer *who chose to use force* but who is also trained in the facts of all case law governing the jurisdiction. I am grateful to Professor Schiappa for calling my attention to this article.

[15] In his analysis of *Korematsu*, the Supreme Court case ruling that Japanese internment during World War II did not violate the Constitution, Professor Clarke Roundtree concludes that

At the same time, judicial opinions also reflect aspects of the dialectical mode of argumentation, a more immediate back-and-forth conversation between interlocutors. Circuit courts and the Supreme Court make decisions as panels. At the circuit court, panels usually consist of three judges unless a rehearing en banc is also granted, in which all active judges on the circuit participate. Cases before the Supreme Court are heard by all nine justices unless any recuse themselves. Negotiation over the draft of the majority opinion is a conversation between judges or justices who have agreed to join the opinion, but the draft itself is also a conversation with any concurring or dissenting opinions that might be written.[16] There is, additionally, at least the perception of dialectic between a lower and higher court when a case is appealed, although not every case is. The lower court issues a decision which is appealed to a higher court, and the reviewing court responds to that opinion—both the reasoning and the outcome—either reversing, affirming, or some combination of both. The case then goes back to the lower court to implement the reviewing court's instructions.

But there are crucial differences between the dialectic taking place between majorities and dissents, or between lower and higher courts. The ideal dialectical model involves interlocutors on equal footing who must come to a decision by convincing the other side or by achieving some mutually agreeable compromise. It's true that an opinion might be written with the hopes that other

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precedents and holdings "can lie around like a loaded gun, waiting to be used, reused, and applied," even beyond the express and implied limits of the holding, or "limited and reshaped" according to the needs of the current judicial decision-maker. Clarke Roundtree, *Instantiating 'the Law' and Its Dissents in* Korematsu v. United States*: A Dramatistic Analysis of Judicial Discourse*, 87 Q.J. SPEECH 1, 21 (2001). I am grateful to Professor Susan Provenzano for bringing my attention to this article.

[16] These drafts are not written sequentially, with the majority first finalized, then the dissent, then any concurrence. Instead, drafts of each are circulated prior to publishing the opinion so that each author has time to respond to the others. Roundtree also describes how dissenting opinions can highlight, directly or indirectly, strains in the logic and narrative constructed by a majority opinion, and that majority opinions must then acknowledge and respond to the dissent. *Id.* at 20.

judges or justices on the panel will end up joining it. But the majority does not need to "convince" the dissent to join; by being in the majority, the outcome is set even if one judge (in a case before a three-judge circuit court panel) or four judges (in a case before the Supreme Court) dissent. Additionally, the dialectic between lower courts and reviewing courts is not grounded in an equal relationship. The reviewing court has authority over the lower court and does not need to persuade that court of anything. It simply orders the lower court what to do, and the lower court is bound to accede. While there *are* features of dialectic in some opinions, the dialectic does not constrain and direct the arguments as much as might appear at first glance.

Furthermore, courts are also speaking back to and in conversation with other courts, interpreting and reinterpreting their holdings and descriptions of events. This may be a response to earlier courts that cannot respond to clarify their intent or dispute an interpretation. A conversation chain develops over time as courts respond to earlier courts (or a series of earlier courts) while directing themselves to contemporary or later audiences who will then take up the thread of conversation. A similar conversation thread might be woven by a court responding to another court outside of its jurisdiction and with no authority in either direction (either another circuit court or district court). Rather than a face-to-face debate (the prototypical example of dialectic in argumentation theory), this "unending conversation"[17] with meaning "susceptible to

[17] Kenneth Burke describes an "unending conversation" already begun before a particular interlocutor arrives and continuing, "vigorously in progress," after their departure. KENNETH BURKE, THE PHILOSOPHY OF LITERARY FORM 110–11 (1941) [hereinafter BURKE, PHILOSOPHY] ("[I]magine that you enter a parlor. You come late. When you arrive, others have long preceded you, and they are engaged in a heated discussion, a discussion too heated for them to pause and tell you exactly what it is about. In fact, the discussion had already begun long before any of them got there, so that no one present is qualified to retrace for you all the steps that had gone before. . . . [T]he discussion is interminable. The hour grows late, you must depart. And you do depart, with the discussion still vigorously in progress.").

momentary characterization"[18] looks more like a complicated game of telephone or a "chain novel,"[19] a dialectic with multiple interlocutors and varied audiences over time.

Dwelling for a moment on whether judicial writing is primarily rhetoric or dialectic suggests that, although it has the appearance of dialectic through and through, the procedural structure of litigation and the power structure of federal courts eliminate many of the moves normally available in dialectic (such as the ability to respond beyond responding to other judges on the same panel). At the same time, judicial opinions may appear rhetorical because they represent the court's final decision after parties have had a chance to say their piece through written briefs and oral arguments. Yet there are opportunities for appeal, and even if the particular dispute ends, courts speak to each other about the law they apply over time. The final chapter of this dissertation engages more directly with the question of audience in judicial opinions, but here we must still keep in mind that the audience is not quite as clear or definite as it might first appear. As both rhetoric *and* dialectic, appellate judicial opinions engage with and instruct lower courts on how to define the event and construct and apply the law.

This chapter proceeds by first exploring the problem of definition in law more thoroughly, asking what federal courts understand definition in law to mean. It then grounds the chapter's analysis in rhetorical and argumentation theory on definition, framing, and classification, as well as legal scholarship on the interpretation and characterization of facts in qualified immunity cases. Following that background, this chapter then examines the history and rules of the doctrine of

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[18] Angela G. Ray, *The Transcript of a Continuing Conversation: David Zarefsky and Public Address*, 45 ARGUMENTATION & ADVOC. 64, 64 (2008) (describing this "unending conversation" that "persists across time" for which "meanings are unstable and unknowable but are susceptible to momentary characterization").

[19] Professor Ronald Dworkin argues that law develops over time, with judges acting as subsequent authors of a "chain novel," each penning one part of a whole that fits together through gradual extensions and elaborations of law over time. RONALD DWORKIN, LAW'S EMPIRE 228–32 (1986).

qualified immunity, how its policy goals express certain values, and how the rules inscribe those values into the doctrine.

I then turn to the legal and rhetorical work of definition that judges engage in when justifying decisions in excessive force qualified immunity cases. Beginning with an examination of the work of definition—of the law, of rights, and of the question or inquiry—I argue that clearly defined law is specifically contextualized law. In other words, clearly defined law is a statement that under particular circumstances, a specific act is or is not a violation. Then I consider decisions that courts must make about specificity and relevance when contextualizing law and violations, concluding that it is through comparison with previous cases that relevant details are selected at the appropriate level of specificity. Yet reversals over insufficient specificity often cover over another reason for reversal: the lower court framed the event in a way that was insufficiently sympathetic to the officer. Instructions against defining the law too generally are sometimes legal performances of objectivity.

Finally, the chapter considers obvious cases and how the definition of law in those cases might differ from previous analysis in the chapter. I evaluate how courts have attempted to justify the finding of an obvious violation. The Supreme Court's reversals may suggest that every case is implicitly presumed to belong to the undefined territory between excessive and acceptable force, protecting the officer from liability, until clearly defined law establishes otherwise. This final section considers the interests served by the hazy territory's lack of definition.

II. BACKGROUND

Before closely examining the language of judicial opinions to understand how definition, framing, and classification interact in qualified immunity cases, I examine discussions about definition by three different groups: the courts themselves, rhetoric and argumentation scholars,

and legal scholars. Judges making qualified immunity determinations seem to have a paradoxical understanding of what is required for the definition of law. By drawing on the work of rhetorical theorists, I argue that the paradox comes from a failure to understand the subjective nature of definition, filling a gap in the legal scholarship. Judges make value-laden choices about defining events and actions, framing those events, and classifying the events within a category that is itself the product of a selective, subjective process of definition.

A. How Courts Understand Definition

The demand for definition permeates qualified immunity decisions and encompasses more than just definition of clearly established law.[20] Courts are also called upon to define the qualified immunity inquiry[21] and define the contours of the constitutional or statutory right.[22] When interpreting Supreme Court doctrine, some judges also seek to define the official's conduct[23] and the violation.[24] Whether categorizing, describing with appropriate specificity, or labeling a "complex nonverbal situation[],"[25] courts have to make decisions about how to define the circumstances.

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[20] Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011).

[21] Mullenix v. Luna, 136 S. Ct. 305, 311 (2015) (per curiam) ("More fundamentally, the dissent repeats the Fifth Circuit's error. It defines the qualified immunity inquiry at a high level of generality—whether any governmental interest justified choosing one tactic over another—and then fails to consider that question in 'the specific context of the case.'" (quoting Brosseau v. Haugen, 543 U.S. 194, 198 (2004))).

[22] Saucier v. Katz, 544 U.S. 194, 202 (2001) ("[A]s we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." (quoting Wilson v. Layne, 546 U.S. 603, 615 (1999))).

[23] Hughes v. Kisela, 862 F.3d 775, 794 (9th Cir. 2016) (Ikuta, J., dissenting) ("[T]he panel [wrongly] defines the alleged violation at issue as shooting a plaintiff who 'present[ed] no objectively reasonable threat to the safety of the officer or other individuals.'").

[24] *Id.* at 794 ("By defining the conduct at issue at such a high level of generality, the panel adopts the exact erroneous approach reversed in *Mullenix*, among other cases; it focuses only on the general elements of an excessive force violation.").

[25] KENNETH BURKE, LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD 361 (1966) [hereinafter BURKE, LANGUAGE].

At the same time, some language used by the Supreme Court (and lower courts as well) suggests confusion about definition. The Court's per curiam opinion in *Kisela v. Hughes* states that "[a]n officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'"[26] Notice the past-tense verb phrase "were sufficiently definite." In this statement of the rule, the clearly established right and its defined contours are presumed to have been clear at the time of the action in dispute and therefore not for the current court itself to define. Are this clearly established right and its contours to be discovered rather than defined? Must a past case clearly define the law for the current court to discover? And yet the repeated rebukes "not to *define* clearly established law at too high a level of generality"[27] contradict the possibility of discovery in past case law. The active form of *define* suggests that the court deciding the current dispute must itself construct the definition.

In a dissenting opinion to the Fifth Circuit's denial for rehearing en banc in *Luna v. Mullenix*, Judge E. Grady Jolly's words illustrate the rhetorical dilemma here. He explains that when asking whether the officer violated clearly established law, "[t]he initial task here is to *define the clearly established law* that governs the specific facts of the case."[28] But "[i]f such *law cannot reasonably be defined*, the inquiry ends."[29] On the other hand, "[i]f *there is clearly established law*," the inquiry continues.[30] Note the difference in verbs. First, clearly established law governing the case is something a judge must define, not something already defined and to be discovered. Yet at the same time, clearly established law already exists—it just "is." But if this is true—if

[26] 138 S. Ct. 1148, 1153 (2018) (quoting Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014)).
[27] City of Tahlequah v. Bond, 142 S. Ct. 9, 11 (2021) (emphasis added).
[28] 777 F.3d 221, 223 (5th Cir. 2014) (Jolly, J., dissenting) (emphasis added).
[29] *Id.* (emphasis added).
[30] *Id.* (emphasis added).

clearly established law can be said to exist without the work of definition by a later decision-maker applying the law to a new scenario—then why is any act of defining necessary at all?

B. How Rhetorical and Argumentation Scholars Understand Definition

This chapter applies theoretical foundations from rhetoric and argumentation studies laid out below. In so doing, I interrogate definition and framing in qualified immunity decisions as an argumentative proposition rather than the discovery of an objective fact. Because proffered definitions and frames often take on the *appearance* of objectivity, they obfuscate underlying values and perspectives. This chapter argues that the Supreme Court's rhetorical pedagogy teaches lower courts to explore whether it is possible to define the situation in the officer's favor. If it is, that is the definition or frame that must be adopted for qualified immunity purposes. The "world" of the alleged violation is structured, within reason, so that the officer can win. And by seeing judicial opinions as both rhetoric and dialectic, we can examine the function served when judges accuse other decision-makers of applying an improper definition, whether leveled against a majority opinion by the dissent or against a lower court by a reviewing court.

Professor Edward Schiappa argues that definitions should be approached "as constituting rhetorically induced social knowledge."[31] This is a departure from the view that definitions are objective descriptions of the essential characteristics or nature of things, one famously reflected in Plato's dialogues, including *Euthyphro* (What is piety?), *Theaetetus* (What is knowledge?), and *Phaedrus* (What is the soul?). Although philosophers have almost universally rejected the binary between "facts" and "values" or between objective observations and subjective perceptions, debates about definitions still often revert to ontological disputes over what something "really" is.

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[31] EDWARD SCHIAPPA, DEFINING REALITY: DEFINITIONS AND THE POLITICS OF MEANING 3 (2003) [hereinafter SCHIAPPA, DEFINING REALITY].

Argumentation theorists Chaïm Perelman and Lucie Olbrechts-Tyteca note that dissociation, claiming to capture the true essence of a concept as opposed to what it appears to be, is a key rhetorical move in disputes over definitions.[32]

These ontological disputes, according to Schiappa, are a distraction from what's at stake in arguments over definitions.[33] Instead, he contends, definitions are socially constructed, offering a shared way of observing and interacting with the world, of describing relationships and frames of experience. The definition of terms and human experiences, from death to rape,[34] or from excessive force to what constitutes a threat, are not brute facts but are learned beliefs that communities contest through persuasion (rhetorical inducement) and come to believe and agree upon. Discourse produces consensus such that the definition becomes a socially accepted fact rather than a contested argument.

In fact, "almost all discourse is definitive discourse," Schiappa writes, although it may do the work of definition in different ways, "whether in an explicit discourse about definition, discourse that argues from a particular definition, or discourse that stipulates a view of reality via an argument by definition."[35] Arguments *about* definition explicitly dispute what a word means or should mean, how it is or should be used.[36] Arguments *from* definition construct an argument about

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[32] CHAÏM PERELMAN & LUCIE OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 444 (1969). For an analysis of dissociative techniques employed by Stokely Carmichael to create a new understanding of racism and to counter earlier dissociative techniques of racism, see Justin D. Hatch, *Dissociating Power and Racism: Stokely Carmichael at Berkeley*, 22 ADVANCES HIST. RHETORIC 303 (2019).

[33] SCHIAPPA, DEFINING REALITY, *supra* note 31, at 10.

[34] Schiappa has two chapters on each of these socio-legal definitions (Chapters 3 & 4). *See id.*

[35] *Id.* at xi.

[36] Zarefsky defines argument about definitions as a dispute "overtly and explicitly about whether a concept or situation should be defined in a certain way." David Zarefsky, *Strategic Maneuvering Through Persuasive Definitions: Implications for Dialectic and Rhetoric*, 20 ARGUMENTATION 399, 404 (2006).

a conclusion based on an explicitly stipulated definition.[37] Arguments *by* definition, or what Professor David Zarefsky calls "persuasive definitions," occur when proposed definitions are "smuggled in" by using a label or term in a novel way.[38] The use, however, is not explained or justified. For example, naming estate taxes a "death tax" or calling the U.S. naval blockade of Cuba in 1962 a "quarantine" are arguments by definition because they invite audiences to attach emotions and connotative meanings associated with "death" or "quarantine" to the phenomenon.[39]

Of course, the definition of things is not always in contention. But a "definitional rupture"[40] occurs when an accepted definition is contested (argument *about* definition), a new definition is put forward for the sake of a conclusion (argument *from* definition), or a concept is used in a novel way (argument *by* definition), and social knowledge must be reshaped to accommodate the new use.[41] Schiappa argues that these definitional ruptures are disputes over values and beliefs rather than attempts to find the "real" objective meaning. Language users sort aspects and characteristics of concepts into essential and nonessential categories based on values and beliefs about the world and relationships within the world; we are guided by our own subjective perspectives, not objective facts.[42] Consequently, definitional disputes should, according to Schiappa, focus on the social, ethical, and legal implications of each possible definition; interlocutors should ask whose interests are being served by each proposal.[43] Definition, ultimately, "is always a matter of choice."[44]

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[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] SCHIAPPA, DEFINING REALITY, *supra* note 31, at 7.
[41] Not every argument from or by definition will result in a definitional rupture. Sometimes new definitions go unchallenged and are unproblematically incorporated into social knowledge. Additionally, the gap in social knowledge is not always addressed by the reshaping of categories and definitions. Some arguments about, from, and by definition are unpersuasive and rejected.
[42] SCHIAPPA, DEFINING REALITY, *supra* note 31, at 65.
[43] *Id.* at 67.
[44] *Id.* at 49 (quoting PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 448).

Zarefsky applies theories of definition in argumentation to U.S. presidential rhetoric, arguing that "[i]t defines political reality" by naming or defining situations in a way that shapes and gives meaning to the environment or historical moment.[45] Stated more cynically, this is a form of political manipulation through language, exercising "the art of structuring the world so that you can win."[46] Yet if all discourse is definitive discourse, and definitions are not divided into those that are objective and those that are subjective, then all discourse names or defines situations in a particular (subjective) way. Framing, or defining a situation, is simply "the process of selecting one definition or perspective rather than another."[47] Consequently, a choice of frame or definition prioritizes certain interests and elevates certain data as relevant while dismissing other data as irrelevant. If the framing of a situation is taken for granted or treated as the "true" way of seeing things, these crucial consequences will also go unnoticed, and the ultimate conclusion will seem objective and predetermined as a product of the original framing or definition.

Schiappa expands on his theory of definition to discuss "framing and naming"[48] by drawing on the work of literary and rhetorical theorist Kenneth Burke. Burke posits that "speech [is] the 'entitling' of complex nonverbal situations."[49] In other words, *entitling* labels events with language in order to talk about what happened. Read together, Burke and Schiappa argue three key features of entitling that inform my analysis here. First, entitling an event or phenomenon gives it status and "locat[es] it in our shared belief system."[50] It also "creates the impression that the thing has

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[45] Zarefsky, *Presidential Rhetoric*, *supra* note 11, at 611.
[46] *Id.* at 612 (quoting WILLIAM RIKER, THE ART OF POLITICAL MANIPULATION, at ix (1986)).
[47] David Zarefsky, *Definitions*, *in* ARGUMENT IN A TIME OF CHANGE: DEFINITIONS, FRAMEWORKS, AND CRITIQUES 1, 5 (James F. Klumpp ed., 1998) [hereinafter Zarefsky, *Definitions*].
[48] SCHIAPPA, DEFINING REALITY, *supra* note 31, at 154.
[49] BURKE, LANGUAGE, *supra* note 25, at 361.
[50] SCHIAPPA, DEFINING REALITY, *supra* note 31, at 114, 115.

been 'out there' all along, waiting to be discovered and described."[51] Second, entitling is selective and abstractive, mustering one element, perspective, and particular scope with which to view an event.[52] Details are lost in the process of generalization and abstraction, and particular perspectives and characteristics are prioritized above others.[53] And third, which element or elements come to stand in for the whole reflect personal and social values about what is essential and what is nonessential, and the abstraction then serves to reinscribe those values and hierarchies. *What* we choose to name and *how* we choose to name it are informed by the values and interests of our society and those with the power to exercise such entitling. In turn, entitling may reinforce or reshape social ideas and sensibilities if the abbreviation is adopted and comes to stand for the phenomenon.

But definition is not just about particular labels. Situations are defined through summary or description even as they are entitled—and sometimes before. Zarefsky's discussion of framing is useful here because he acknowledges that "[w]hat is really being defined is not a term but a situation or a frame of reference."[54] For example, the debates over the definition of "sexual harassment" are not just disputes over which behaviors might be categorized as such. Schiappa, influenced by Zarefsky, similarly examines how concepts like rape or death and their definitions reflect deeply held social values and beliefs about relationships and norms.[55] Everyone approaching the debate over sexual harassment has a particular frame of reference with which they understand gendered relationships and the nature of power.[56] Framing invokes both the perspective

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[51] *Id.* at 115.
[52] *Id.* at 114.
[53] Abbreviation is a process "whereby some one element of a context can come to be felt as summing up a whole." BURKE, LANGUAGE, *supra* note 25, at 371.
[54] Zarefsky, *Definitions*, *supra* note 47, at 5.
[55] SCHIAPPA, DEFINING REALITY, *supra* note 31, at 51–61.
[56] *See* Zarefsky, *Definitions*, *supra* note 47, at 2.

adopted when giving meaning to sense data as well as the selection of relevant data placed inside the frame, and irrelevant data placed outside.

Burke draws on a geometric concept to illustrate the scope and selection of framing: the scene (or definition of the situation) will vary depending on the "circumference" within which "we choose to locate it."[57] More particularly, Burke offers his pentad in order to analyze the way that situations are defined and the implications of the choices inherent to the definition of situation.[58] This analytical device asks how the act, the scene, the agent, agency, and purpose are described, emphasized, deemphasized, and developed.[59] It examines the frame or definitions of what took place (act), what context the act took place in (scene), who performed the act (agent), what instruments or tools were used to perform the act (agency), and why it was done (purpose).[60]

By examining how the author (for our purposes, the judge or justice writing the opinion) answers these questions in defining the situation, we can see that definition is a *choice* of one frame over other viable frames. Once definition is seen as a choice, the values upon which that choice is made become more visible. By shifting debates to how we *should define* something rather than what something *is*, we can more directly address the values that inform particular definitions. And we can examine more fully the social, political, and legal consequences of selecting a particular frame or definition over another.

The purpose or end point of certain frames or definitions, in qualified immunity cases, is to be able to classify or categorize events as violations clearly established in law (or not).

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[57] BURKE, LANGUAGE, *supra* note 25, at 360.
[58] *See* KENNETH BURKE, A GRAMMAR OF MOTIVES, at xv (Cal. ed., Univ. Cal. Press 1969) (1945) [hereinafter BURKE, GRAMMAR].
[59] *Id.* at xix–xxii. For a general introduction to Kenneth Burke and the pentad, see Joseph R. Gusfield, *Introduction* to KENNETH BURKE, ON SYMBOLS AND SOCIETY 1 (1989).
[60] BURKE, GRAMMAR, *supra* note 58, at xv.

Argumentation theorists Douglas Walton and Fabrizio Macagno develop a theory of classification that demonstrates the fundamental role definition plays in the process of categorization.[61] More specifically, definition, which can be either implied or explicit, provides the inferential link necessary to locate an object within a class or category.[62]

Simply put, the possibility and persuasiveness of classification turns on how the object and category are defined. For Walton and Macagno, the persuasive act is that of naming reality, or classifying events and objects, and the argumentative validity of that persuasive act can be evaluated by considering the definitions upon which the name or class rests.[63] They are able to make this argument because, unlike Zarefsky and Schiappa, they insist that definitions should capture the object's "most important and central property."[64] This property "needs to be specified . . . if [the definition] is to be successful for the purpose it was put forward."[65]

Reading Walton and Macagno alongside Burke, Zarefsky, and Schiappa enables an examination of the relationship between definition, naming, and classification where each act of definition is a subjective choice. In fact, reading these theorists together demonstrates how layered acts of definition build upon one another in subtle ways such that final classification seems obvious and inevitable despite subjective and selective choices along the way.

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[61] Douglas Walton & Fabrizio Macagno, *Reasoning from Classifications and Definitions*, 23 ARGUMENTATION 81, 82 (2009).
[62] *Id.* at 95; *see also* Fabrizio Macagno, *Definitions in Law*, 2010 BULLETIN SUISSE DE LINGUISTIQUE APPLIQUÉE 199, 211 ("Definitions are instruments establishing the conditions of a classification, or the characteristics which need to be proven true (or plausibly true) of an entity with a view to classifying it in a particular way."); *cf.* Edward Schiappa, *Defining Sex*, 85 LAW & CONTEMP. PROBS. 9, 9 (2022) [hereinafter Schiappa, *Defining Sex*] (describing some of the challenges of defining "sex" in such a way that it becomes a useful means of categorizing humans).
[63] Walton & Macagno, *supra* note 61, at 87, 105.
[64] *Id.* at 105.
[65] *Id.*

C. Legal Scholarship on Qualified Immunity

Legal scholars have identified three closely related problems with the doctrine of qualified immunity: the tension between fact and law, confusion over the requisite level of specificity, and the dual layer of reasonableness protection afforded by the doctrine. Professor Alan Chen identifies qualified immunity's "central paradox" as the discord between defining the doctrine as a pure question of law and the inherently factual evaluations necessary for reasonableness tests.[66] Declaring qualified immunity to be a question of law shifts the question from one for juries to answer to the purview of judges. This allows judges to rule on the defense at the earliest stages possible, including before discovery, before the factual record is developed, and without a chance for a fact-finder (the jury) to make determinations of credibility where different accounts of the event in question exist. This conflict, Chen argues, leads the Court to "ignore or deliberately bypass the complexity of factual disputes" in the pursuit of an early dismissal of the case for defendants.[67] While Chen sees the Court as ignoring factual complexity, Professor Michael Wells argues that the Court seems to treat any uncertainty in law or fact as grounds for granting immunity.[68]

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[66] Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230–31 (2006) [hereinafter Chen, *Facts*]; *see also* Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937 (2018).

[67] Chen, *Facts*, *supra* note 66, at 231, 242. And by treating qualified immunity as a question of law, one for the judge to resolve, the Court engages in de novo review of the facts, often reinterpreting the facts developed by the district court. *See* Joseph Blocher & Brandon L. Garrett, *Fact Stripping*, DUKE L.J. (forthcoming).

[68] Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi*: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 383–84 (2018). Although Wells's analysis is based on *Ziglar v. Abbasi*, a case brought against federal rather than state officials under *Bivens*, the Court has held that qualified immunity doctrine functions identically under both Section 1983 and *Bivens*. *See* Butz v. Economou, 438 U.S. 478, 504 (1978) ("Accordingly, without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.").

Uncertainty about the necessary level of specificity when defining the law and the facts, as well as just *how* similar a previous case must be to give notice, has attracted even more criticism from legal scholars. Professor John Jeffries criticizes the lack of clarity over the proper level of "altitude," or "the level of generality" necessary when defining and comparing the facts and the law.[69] Similarly, Professors Karen Blum, Erwin Chemerinsky, and Martin Schwartz have observed that the specificity with which the inquiry is framed can determine the outcome of the immunity question.[70] And Professor Joanna Schwartz has called into question the logic of requiring factual specificity by demonstrating that police officers are taught the general principles in landmark cases, not the factual specifics of case law in their jurisdiction.[71]

Additionally, Jeffries points out the double layer of protection in Fourth Amendment cases, which can lead to the confounding result that unreasonable behavior is nevertheless found reasonable.[72] The first layer of reasonableness is built into the question of whether a constitutional

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[69] John C. Jeffries Jr., *What's Wrong with Qualified Immunity?* 62 FLA. L. REV. 851, 854–57 (2010); *see also* Daniel K. Siegel, Note, *Clearly Established Enough: The Fourth Circuit's New Approach to Qualified Immunity in* Bellotte v. Edwards, 90 N.C. L. REV. 1241, 1241–42 (2012) (noting that the Court is inconsistent in requiring factually specific and similar precedent to satisfy clearly established law, sometimes allowing broader statements of law to satisfy the requirement, and the unequal application of this uncertain standard across circuits); Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633, 652–56 (2013) (discussing, among other problems with the doctrine, uncertainty over the level of specificity with which the law must be defined).

[70] Blum et al., *supra* note 69, at 653; *see also* Amelia A. Friedman, Note, *Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hole in Clearly Established Law*, 90 TEX. L. REV. 1283, 1284 (2012) (arguing that defining clearly established law with greater specificity makes litigation more challenging for plaintiffs).

[71] Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 610–11 (2021).

[72] John C. Jeffries Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 266–67 (2013) [hereinafter Jeffries, *Liability Rule*]; *see also* Caroline H. Reinwald, Note, *A One-Two Punch: How Qualified Immunity's Double Dose of Reasonableness Dooms Excessive Force Claims in the Fourth Circuit*, 98 N.C. L. REV. 665 (2020) (outlining particular challenges facing plaintiffs in Fourth Amendment excessive force cases to meet requirements for clearly established law because of double reasonableness test and importance of particular facts).

violation occurred at all; for example, in cases involving use of force, the court must ask whether the use of force was reasonable under the circumstances. But if the defendant has raised qualified immunity as a defense, the court must then additionally ask whether the use of force, even if unreasonable, could be thought reasonable in light of relevant case law. Justice John Paul Stevens has been credited with referring to this double layer of protection as "two bites at the apple."[73]

By examining some of these problems, including factual disputes and specificity, through a novel lens of rhetorical theory, I build upon legal scholarship by closely examining the texts of qualified immunity opinions to evaluate how law and fact are defined and specified. My analysis challenges the claim that the Court sidesteps the complexity of factual disputes. Perhaps more importantly, by introducing rhetorical theory on framing, I demonstrate that specificity is only one choice that must be made among many when framing an event. At times, when the Court criticizes the level of specificity employed by a lower court, they are in fact criticizing that court's failure to take up the officer's perspective and give the police more benefit of the doubt when characterizing the facts.[74] The power to define an event and the value-based subjective choices that go into that definition create a double layer of framing protection for police that goes hand in hand with the double layer of reasonableness protection.

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[73] Anderson v. Creighton, 483 U.S. 635, 664 n.20 (1986) (Stevens, J., dissenting) (quoting Llaguno v. Mingey, 763 F.2d 1560, 1569 (7th Cir. 1985) (Posner, J.)).

[74] Professor Thomas Crocker similarly argues that the Supreme Court requires that Fourth Amendment reasonableness questions be viewed from the perspective of the police officer. Thomas P. Crocker, *The Fourth Amendment and the Problem of Social Cost*, 117 NW. U. L. REV. 473, 513 (2022). Crocker relies on *Scott v. Harris*, 550 U.S. 372 (2007), and the Court's use of video footage in that case to argue that "reasonableness is determined not from an objective perspective of events, but from the police perspective along. Crocker, *supra*, at 515. Yet a more thorough analysis of Fourth Amendment qualified immunity decisions calls into question whether "an objective perspective of events" is even possible.

III. DEFINING QUALIFIED IMMUNITY

This section aims to uncover the values and priorities permeating the inception, historical development, purpose, and rules of qualified immunity—particularly those purposes and rules surrounding the definition of clearly established law. It treats the Court's development of the doctrine and articulation of rules as one aspect of its rhetorical pedagogy. It argues that how a situation *ought* to be defined, a value proposition that is mandated through the rules and restrictions guiding courts' inquiry into clearly established law, is a rhetorically induced legal knowledge and practice. As a value proposition with selective aims, how judges define clearly established law is a subjective and specific view of the world, not an objective statement. The rules and their underlying values foreclose certain conversations and considerations, limiting the interests a court may take into account and the perspective from which they will view the event. The rules do so by imposing a particular frame on deciding judges, constraining how they inspect the situation: which details are relevant, which perspective or angle to adopt, and which details to minimize. Because the rules are the starting point for the inquiry into clearly established law, they eliminate the possibility of certain frames or definitions; it's as if those alternative frames or definitions do not even exist. Ultimately, the interests served by the mandated frame are not subject to critical examination and do not compete against any other interests. Before the inquiry even begins, the rules perpetuate a legal performance of objectivity but simultaneously reinforce a social reality that the law protects certain interests and not others.

A. History

The history and development of the doctrine expose the values and interests it is meant to serve. The Supreme Court first established a qualified immunity defense for civil action under

Section 1983[75] in the 1967 case *Pierson v. Ray*. That civil suit was the result of an overturned conviction for a violation of Section 2087.5 of the Mississippi Code, which made it a misdemeanor to "congregate[] with others in a public place under circumstances such that a breach of the peace may be occasioned thereby, and refuse[] to move on when ordered to do so by a police officer."[76] In 1961 in Jackson, Mississippi, a group of clergymen, some Black and some white, "attempted to use segregated facilities at an interstate bus terminal" and were arrested by Jackson police.[77] Originally, all fifteen clergy were convicted for violating Section 2087.5 and given the maximum sentence, a $200 fine and four months in jail. One clergyman appealed and was granted a new trial at which the court issued a directed verdict for the defendant. Subsequently, charges against all other clergymen were dropped.[78] Then, the clergymen brought a civil suit against the police officers under Section 1983 on the theory that the officers had committed common law torts of false arrest and imprisonment.[79]

That the Supreme Court found a good faith immunity (which would later be reshaped into qualified immunity beginning with *Harlow v. Fitzgerald*'s elimination of subjective intent[80])

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[75] Recall that Section 1983 is the statutory vehicle authorizing civil suits against government officials for allegedly violating constitutional rights. The Constitution itself does not specify what ought to happen when rights are violated or what remedies ought to be available.

[76] Pierson v. Ray, 386 U.S. 547, 549 (1967).

[77] *Id.*

[78] *Id.* at 550.

[79] *Id.* The clergymen-petitioners also brought suit against the judge who found them guilty of the misdemeanor, but the Supreme Court upheld absolute immunity for the judiciary, finding that Section 1983 did not undermine or revisit that "solidly established" doctrine. *Id.* at 553–54.

[80] 457 U.S. 800, 818 (1982). *Pierson v. Ray* never mentions qualified immunity, instead referring to it as good faith immunity, although it does reject an "unqualified" immunity for police officers. 386 U.S. at 550. Although the phrase "qualified immunity" was subsequently used in some cases discussing immunities to Section 1983 and *Bivens* lawsuits, the defense still contained an inquiry into subjective intent, captured in the alternative name, good faith immunity. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief that affords a basis for qualified immunity."). *Harlow v. Fitzgerald*, however, does away with subjective intent,

protecting the police officers from liability is notable. It was, after all, a watershed decision, finding for the first time that a qualified immunity could protect against suits brought under Section 1983. But just as notable is the justification for the outcome. In 1965, four years after the events leading to the suit but two years before the case arrived at the Supreme Court, the Court had declared unconstitutional the Mississippi Code under which the clergymen had been arrested, Section 2087.5.[81] The Fifth Circuit held that because *Monroe v. Pape* declared that Section 1983 provided a pathway for suit against state and local government officials who violated statutory and constitutional rights, the officers could not assert a good faith defense.[82] This conclusion seems to require officers to have the power to predict whether statutes will be found unconstitutional in the future. Upon appeal, the Court rejected this requirement and affirmed a good faith defense under Section 1983 because the officers were enforcing a statute that was *only later* found unconstitutional.[83] *Monroe v. Pape* and Section 1983 would not be so stringently applied that individual officials would be liable in court for money damages for behavior prior to a change in the law or interpretation of the law.

This concern makes sense given the historical moment. *Monroe v. Pape*[84] in 1961 and *Bivens v. Six Unknown Named Agents*[85] in 1971 dramatically expanded opportunities for suit in federal court against state and federal officials in their individual capacity for monetary damages when they violated constitutional rights. At that same time, the Court was taking dramatic steps

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stripping good faith from the inquiry and establishing the modern test for qualified immunity, which would be revised into a more stringent form over the next few decades.

[81] *Pierson*, 386 U.S. at 550 (citing Thomas v. Mississippi, 380 U.S. 524 (1965)).

[82] *Id.* at 550–51.

[83] *Id.* at 557 ("[A] police officer is not charged with predicting the future course of constitutional law.").

[84] 365 U.S. 167 (1961).

[85] 403 U.S. 388 (1971) (holding that federal officials can be sued in their individual capacity for violating constitutional rights).

toward expanding rights, for example under the Fifth Amendment. Consider the decision in *Miranda v. Arizona*.[86] Should a plaintiff be able to sue an arresting or interrogating officer for failing to advise the plaintiff of their legal rights, recovering money damages for that now-acknowledged constitutional violation, even though at the time, the Court had not yet announced that failure to read a suspect their rights would violate their Fifth Amendment rights? The concern from the Court was twofold: first, that the Court would hesitate to expand rights that perhaps should be expanded out of a sense that the individual defendant should not be held liable for a failure to foresee that expansion; and second, that the Court would not hesitate, thereby expanding rights (perhaps the right thing to do) and penalizing the individual defendant at great financial cost in the process (perhaps not the right thing to do, in the eyes of the Court).

Qualified immunity was originally intended to protect against these two dangers. The Court's decision in *Pierson v. Ray* began that protection, and in 1982 *Harlow v. Fitzgerald* refined that protection. If a government actor violates the constitutional rights of an individual, the qualified immunity defense protects them from individual liability for monetary damages unless they had notice of that right through some previous clear establishment in law.[87] But we are now a far cry from finding that police officers are not liable for enforcing a law that only later is declared unconstitutional. Rather than protecting against lack of foresight for the expansion of constitutional rights, qualified immunity now protects when previous cases fail to place the question of a violation "beyond debate,"[88] such that "all but the plainly incompetent and those who knowingly violate the law" are protected.[89]

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[86] 384 U.S. 436 (1966).
[87] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
[88] Plumhoff v. Rickard, 572 U.S. 765, 778–79 (2014).
[89] Malley v. Briggs, 475 U.S. 335, 341 (1986).

The expansion of substantive protections for officers who violate constitutional rights has been remarked on by other scholars.[90] Thus, the rest of this section will focus on how the rules of qualified immunity prioritize certain interests and are the product of particular values.

B. Interests

One way of describing qualified immunity's goal is to balance protections for constitutional rights and access to remedies when those rights are violated against the need to shield officials from the burdens and potential harassment of litigation and liability. If courts, and particularly the Supreme Court, were more explicit about this balancing, then there might at least be opportunity to discuss the values that inform and shift decisions.

But that is not the way courts have articulated the balancing act they must perform when deciding qualified immunity defenses. Instead, the balancing act is characterized as accountability for officials against protecting them from frivolous suits and unfair liability. For example, in 2009 the Supreme Court articulated the competing interests this way: qualified immunity balances "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."[91] Gone is the person whose constitutional rights may have been violated and who endured physical harm from force. Gone even is the possible violation of constitutional rights. Instead, an irresponsible exercise of power stands in for the person, the harm, and the violation.

This is not a balancing test like those used to evaluate whether a constitutional violation has actually occurred. For example, when determining if the force used was excessive, courts must explicitly balance the amount of force used against the need for force, conducting an inquiry into

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[90] *See, e.g.*, Blum et al., *supra* note 69, at 657 ("The standard for determining when the law is clearly established has been ratcheted up.").
[91] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

the particular facts that weigh on both sides of the equation (especially the latter). Instead, in qualified immunity, the rules implicitly balance the often-unspoken interests outlined above. Not every qualified immunity case repeats this rule about the interests that qualified immunity is intended to balance. But what is repeated in nearly every case is that qualified immunity is intended to protect "all but the plainly incompetent or those who knowingly violate the law."[92] Because of the underlying interests at stake in qualified immunity, there is little room for discussion about the interests in enforcing constitutional rights and in providing a remedy for those whose rights are violated. While there is occasionally a discussion about the implications of accountability for officers who have to make tough calls,[93] rarely does the Supreme Court discuss the implications of denying remedy to those whose constitutional rights may have been violated—or even the implications on society of having a constitution outlining affirmative rights but for which there is no remedy when violated.[94]

C. Inquiry

The interests driving qualified immunity have produced a narrow inquiry that focuses on the official's needs, knowledge, and protection. In addition, the rules governing the inquiry also serve certain interests and frame the situation according to particular values. Four rules in

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[92] Malley v. Briggs, 475 U.S. 335, 341 (1986) (first using this language). This phrase has been used repeatedly in qualified immunity cases. *See, e.g.*, City of Tahlequah v. Bond, 142 S. Ct. 9, 10 (2021), Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam), *Mullenix*, 136 S. Ct. at 308, Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011), Saucier v. Katz, 533 U.S. 194, 202 (2001).

[93] *See, e.g.*, *Pearson*, 555 U.S. 245 (noting that in the event of a circuit split, it would be unfair to hold police officers liable for money damages when judges could not agree).

[94] Justice Sonia Sotomayor's dissents are an exception. But they are just that—dissents—and hold no precedential weight. Established law seems to care little for these implications. *See, e.g.*, *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting) ("[This decision] sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.").

particular accomplish this: whose perspective or knowledge must be given the most weight, who carries the burden of proof, how the question is framed, and the level of certainty required.

First, the facts and events must be viewed from the officer's perspective.[95] There are policy reasons for this rule. The Court is hesitant to hold officers liable for actions based on a misunderstanding of the situation. We might be able to wrap our heads around why liability should only attach in cases where the officer acted unreasonably when viewing the circumstances from their frame of reference. But again, there is no objective reason to prioritize officer protections over redress for constitutional violations occurred. It is equally reasonable to argue that if someone's constitutional rights were violated, there should be remedy or compensation. Which is a greater injustice: for a police officer to be found liable for a violation that occurred because they had less than complete information about the circumstances, or for a constitutional violation to go without remedy? The answer to that question will depend on the values and priorities held by the one answering the question. The Court's answer has been to say that officer protections should win out at the expense of those who suffered a violation.[96] Consequently, that priority has been built into the procedures of qualified immunity doctrine.

Second, the burden is on the plaintiff to demonstrate that the officer *should have known* that the course of action they chose would violate the Fourth Amendment's prohibition against the use of excessive force.[97] This is contrary to how most affirmative defenses work in both civil and

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[95] *Id.* at 1157 (per curiam) ("We analyze [the objective reasonableness] question from the perspective of a reasonable officer on the scene." (internal quotations omitted)).

[96] Concerns about financial cost to officers are unfounded. As Schwartz has noted, because police departments and municipalities indemnify officers for actions in the course of their duties, they are rarely personally financially liable. Even when found to have violated constitutional rights, most officers will not accrue financial liability. Schwartz, *supra* note 71, at 674.

[97] *See, e.g.*, Rich v. Palko, 920 F.3d 288, 294 (5th Cir. 2019) ("It is the plaintiff's burden to find a case in his favor that does not define the law at a high level of generality."); Corbitt v. Vickers,

criminal law—the *defendant* has the burden of demonstrating that they deserve the protections of the defense.[98] It turns the idea of an affirmative defense on its head to require the plaintiff to demonstrate that the defendant does *not* deserve the protections of the defense. By comparing qualified immunity to how other affirmative defenses function, it's even more clear that the rules create a presumption of immunity for officials whose behavior may have violated constitutional rights.

Third, the inquiry is framed to prioritize certain interests. Consider the questions asked by the doctrine and the presumptions inherent in those questions. By asking whether the violation was clearly established in law,[99] the doctrine begins with a presumption of immunity for the officer until it can be shown that the law clearly established that the official's behavior was a violation and therefore not immune from litigation and liability. This is not the only way the inquiry could

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929 F.3d 1304, 1311 (11th Cir. 2019) ("Once an officer has raised the defense of qualified immunity, the burden of persuasion on that issue is on the plaintiff.").

[98] For example, self-defense is an affirmative defense. In criminal assault and battery cases, the defendant must supply evidence to prove self-defense by a preponderance of the evidence. LUCAS D. MARTIN, 6 AM. JUR. ASSAULT & BATTERY § 62 (2d ed. 2022). For civil suits such as battery or trespass, the defendant similarly bears the burden of proof for affirmative defenses such as consent. *See* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 94–95 (1997).

[99] The other question that is asked as part of the qualified immunity inquiry is whether, on the facts alleged, a violation occurred. Courts may ask these two questions in any order after *Pearson v. Callahan*, and if the answer to the one asked first is "no," they need not address the other question. Scholars have commented on the fact that courts often choose to address the clearly established law question first, avoiding whether a constitutional violation occurred at all. *See* Blum et al., *supra* note 69, at 644–49 (discussing courts' avoidance of the merit of the constitutional claim itself and instead focusing on whether the law was clearly established following the Supreme Court's decision in *Pearson v. Callahan*). While this is easier for courts, it results in a stunting of constitutional law development. Even the Supreme Court itself regularly chooses not to address whether a violation occurred. *See, e.g.*, *Kisela*, 138 S. Ct. at 1152 ("Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity."); Mullenix v. Luna, 136 S. Ct. 305, 309 (2015) (per curiam) ("We address only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place, and now reverse.").

have been framed. Given the historical development and policy reasons for qualified immunity, the Court could have chosen to ask first whether a constitutional violation occurred, and then to ask whether finding a violation in this instance represents an expansion of rights or deviation from the law as it was at the time the events occurred. This question's framing shifts the focus from whether the law was clearly established, a proposition that allows liability in a narrow set of circumstances but otherwise presumes immunity, to whether the finding of a violation in this case is a departure from the law, a proposition that begins with the presumption that this decision is coherent with law unless otherwise demonstrated. With this framing, the burden would likely be on the defendant officer to show that there was a departure or expansion; placement of the burden of proving an affirmative defense would then be consistent with other areas of law. Conversely, the current presumption implicitly prioritizes the protection of officials over protection of constitutional rights. Plaintiffs must work uphill to demonstrate that the officer should have known their actions would violate constitutional or statutory rights.

Lastly, the Court's insistence on the level of certainty with which the law was clearly established in order to deny qualified immunity unquestionably benefits the officer and prioritizes those protections over the protections of constitutional rights. This is most obvious in the Court's directive that qualified immunity is intended to protect "all but the plainly incompetent and those who knowingly violate the law."[100] But more recently, the Court has begun to ask whether existing case law placed the question "beyond debate."[101] The entire legal profession is built upon the idea that few issues are beyond debate. Not only that, but questions about how to describe, frame, and

[100] Malley v. Briggs, 475 U.S. 335, 341 (1986); *see also supra* note 92 (citing cases).
[101] Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."). Although *al-Kidd* cites *Anderson v. Creighton* and *Malley v. Briggs* for this proposition, 2011 is the first time the Court used that specific language and explicitly required that level of certainty.

classify events and whether every person would draw the same conclusion are rarely beyond debate. Violations that seem beyond debate to the Fifth or Ninth Circuit are apparently very much debatable according to a majority of the Supreme Court. Requiring certainty "beyond debate" not only muddies the waters as to how obvious the violation must be but also muddies the waters in favor of the officer. Is there any doubt? Even an iota? Then immunity must be granted.

Adding to the certainty that resolution "beyond debate" requires, the Court has engaged in a subtle shift from stating that "[t]he contours of the right must be sufficiently clear that *a* reasonable officer would have understood that what he is doing" is a violation.[102] In the 2011 decision *Ashcroft v. al-Kidd*, the Court selectively quoted its own decision from 1987 in *Anderson v. Creighton*, declaring that the law is clearly established if "'[t]he contours of [a] right [are] sufficiently clear' that *every* 'reasonable official would [have understood] that what he is doing violates that right.'"[103] Note that the Court in *al-Kidd* updated verb tenses and articles using brackets, as is the custom, but simply neglected to quote "that a," replacing it with "that every." To some, this may seem to be a brazen expansion of protections, particularly as it goes unremarked and unjustified. To others, this may simply be the logical culmination of the policy interests underlying the doctrine in the first place.

But the expansion has stuck, with a later Supreme Court case citing *al-Kidd* and simply paraphrasing the language: "[A] defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that *any* reasonable official in the defendant's shoes would have understood that he was violating it."[104] When Fourth Amendment

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[102] Anderson v. Creighton, 483 U.S. 635, 640 (1987) (emphasis added).
[103] 563 U.S. at 741 (emphasis added, all other alterations in original) (quoting *Anderson*, 483 U.S. at 640).
[104] Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014) (emphasis added).

protections are assessed based on reasonableness, the expectation that violations should only be remedied if the plaintiff is able to demonstrate that it is "beyond debate" that any and every reasonable official would know the behavior constituted a violation places a nearly insurmountable burden on the plaintiff. These foundational rules inscribe certain values and priorities—values that affect the definition of the law and situation.

When the questions asked presume immunity and place the burden on the plaintiff to prove otherwise, and when the circumstances must be viewed from the perspective of the officer, it becomes easy to forget that there may have been a constitutional violation at all—that a civilian experienced harm at the hands of a government actor. This is doubly easy to forget when the language of the Court explicitly articulates the purpose of the doctrine as protecting nearly every officer. It is one thing to ask whether a reasonable person in the officer's shoes would know that the action they were about to take would violate statutory or constitutional law. It is another thing altogether to ask whether *every* reasonable officer would know that the action is a violation. Add on top of that the Court's mantra that the doctrine "protects all but the plainly incompetent or those who knowingly violate the law,"[105] and it is apparent that rather than an objective inquiry asking whether the law is clearly defined, the Court has created a doctrine built on a foundation of values and priorities that give preference to government officials over the constitutional rights of civilians.

IV. DEFINING AND FRAMING LAW

Clearly, foundational rules and underlying values prioritize the interests of police officers. But in practice, how do courts apply those rules and "define clearly established law"?[106] The Court's rhetorical pedagogy in *Mullenix v. Luna* and *Kisela v. Hughes* demonstrates that law must

[105] Malley v. Briggs, 475 U.S. 335, 341 (1986); *see also supra* note 92 (citing cases).
[106] *al-Kidd*, 563 U.S. at 742.

be evaluated in the context of the particular event in order to be clearly defined. I also argue that the specificity and relevance of contextual facts depend on comparison and contrast with previously decided cases. Yet the Court's instructions about more specificity are often distractions from the real disagreement the Court has when qualified immunity is denied. Instead of more specificity, *Mullenix* and *Kisela* show that the Court's rhetorical pedagogy instructs lower courts to frame the event in a way that redeems the officer, transforming their action into mere reaction to the threat posed by the victim of police force.

A. What Is a Definition of Law?

If the law is already clearly established, does defining that law simply mean to restate or summarize what has already been clearly defined? Or is it a more active and conscious endeavor, not simply repeating what has come before? Does defining the law mean that judges must examine previous cases (established law) and pick out what was "essential" in that law such that it was clearly established? Or, in contrast, is it less about what is essential or core to the law and more about the "outlines or limits" of the law?

In *Mullenix*, the majority per curiam opinion offers two examples of a flawed definition of right or law in previous cases that the Court reversed. The first example the *Mullenix* decision points to for definition is from *Brosseau v. Haugen*, a 2004 Supreme Court decision based on a situation in which police shot a suspect in the back when he attempted to flee in his Jeep. There, the Court reversed the Ninth Circuit's denial of qualified immunity for relying on *Garner* for clearly established law. The *Mullenix* Court explains that in *Brosseau*, it was insufficient to define the rule as the general principle established in that landmark Fourth Amendment case: that "deadly force is only permissible where the officer has probable cause to believe that the suspect poses a

threat of serious physical harm, either to the officer or to others."[107] Instead, as the Court explains in *Brosseau*, the Ninth Circuit should have asked "whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the 'situation [she] confronted: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.'"[108] The "correct" inquiry, according to the Court, is specifically contextualized with respect to the threat posed by the fleeing individual.

The second example of an incorrect definition of the law offered by the *Mullenix* Court is drawn from *Anderson v. Creighton*, a 1987 Fourth Amendment suit for an unreasonable search. The *Mullenix* Court explains that in *Anderson*, the Supreme Court reversed the lower court decision because "the lower court had denied qualified immunity based on the clearly established 'right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances.'"[109] The *Anderson* Court critiques the lower court "for failing to address the actual question at issue: whether 'the circumstances with which Anderson was confronted . . . constitute[d] probable cause and exigent circumstances.'"[110]

Both of these examples eliminate the possibility that when defining clearly established law, courts can simply repeat the statement of law from previous cases. The Supreme Court criticizes lower court decisions not only for their generality but also for not defining a narrowly contextualized rule particular to the circumstances confronting the officer. For purposes of qualified immunity, definition of the law is not simply a restatement or summary of the Constitution, a statute, or even the rule articulated in a previous case.

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[107] 136 S. Ct. at 309 (quoting Brosseau v. Haugen, 543 U.S. 194, 199 (2004)).
[108] *Id.* (quoting *Brosseau*, 543 U.S. at 199).
[109] *Id.* (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
[110] *Id.* (quoting *Anderson*, 483 U.S. at 640–41).

More importantly, these examples demonstrate that law cannot be defined in a vacuum but instead must be contextualized. At no point does the Court offer a decontextualized and general definition of the law governing what constitutes "probable cause and exigent circumstances." The particular circumstances must be articulated in order for a court then to define the law such that it has relevance to the outcome of the case. In other words, the definition of situation and definition of law are interrelated. The definition of law depends on its application to a situation.

Yet this definition leaves open the possibility that the law exists to be discovered, so long as the version of already defined law that the judge ultimately selects fits the circumstantial particulars of the case at hand. This may be a tempting conclusion to draw because of the curious slippage in the Court's substitution of "inquiry" and "question" for "rule"[111] and "right,"[112] respectively. Perhaps clearly established law can be discovered, as long as the proper question is being asked and framed appropriately. Alternatively, the law may be defined based on past case law and the exact details of the case at hand, supplying a new specific rule of law that combines previous decisions and the new elements before the court to be decided. I will return to these two possibilities below, as well as the question of specificity.

A third observation from the pedagogical exemplars selected by the *Mullenix* Court has to do with whether definition in qualified immunity decisions should focus on what is essential to the concept[113] (in this case, the definition of clearly established law) or on the outlines and limits of the concept.[114] Look again at the explanation for why the lower court in *Anderson* misapprehended

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[111] *Id.* (quoting *Brosseau*, 543 U.S. at 199).
[112] *Id.* (quoting *Anderson*, 483 U.S. at 640).
[113] *See Definition*, OXFORD ENGLISH DICTIONARY, https://www-oed-com.turing.library.northwestern.edu/view/Entry/48886; SCHIAPPA, DEFINING REALITY, *supra* note 31, at 176.
[114] *See Definition*, OXFORD ENGLISH DICTIONARY, https://www-oed-com.turing.library.northwestern.edu/view/Entry/48886.

its task: it "fail[ed] to address the actual question at issue: whether 'the circumstances with which Anderson was confronted . . . constitute[d] probable cause and exigent circumstances.'"[115] Put another way, the Court demands that lower courts ask whether clearly established law has placed *this particular event* within the defined boundaries of "excessive force" or "unreasonable (warrantless) searches." Because events or situations do not "speak for themselves," courts are tasked with asking whether the event clearly belongs to an already-established category. Classification, according to Walton and Macagno, supplies the inferential link between object and class;[116] the ability to classify an event as excessive force rests on multiple layers of definition, including tracing boundaries of the category through definition of events in already decided cases.

Though not quoted by the Court in *Mullenix*, *Anderson* also explains that for the law to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[117] Here we see a subtle slippage from the definition of law to the definition of a constitutional right. Yet the Court in *Anderson* goes on to say that this requirement does not mean "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in light of pre-existing law the unlawfulness must be apparent."[118] The Court here casually shifts from the contours of the right to the boundaries between lawful and unlawful action taken by the official. In other words, clear contours of the right also outline the contours of lawful and unlawful action. To define the law, in these cases, is to trace the outlines and limits of the law, or the outlines

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[115] *Mullenix*, 136 S. Ct. at 309 (quoting *Anderson*, 483 U.S. at 640–41).
[116] Walton & Macagno, *supra* note 61, at 82.
[117] *Anderson*, 483 U.S. at 640. Later Supreme Court decisions repeat this language, substituting "a reasonable official" with any or every reasonable official. *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (per curiam); Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).
[118] *Anderson*, 483 U.S. at 640 (internal citations omitted).

and border territory of two categories: lawful and unlawful action, or excessive force and reasonable force (or at least force not already declared excessive).

This insight builds upon and departs from rhetorical scholarship and theorization by Burke and Schiappa on definition. Schiappa seems to draw a line between definition and entitling by explaining that disputed entitlement is a situation where the definition of a particular category (like obscenity or art or excessive force) is not in dispute. Yet Walton and Macagno show that whether an instance belongs in a class depends upon the definition of that class and whether the instance fits that definition.[119] Even if the definition of the category appears settled, the classification of the instance remains a question of definition (e.g., of the class's boundaries, of the instance's characteristics). The dispute is whether a particular instance *belongs* in that category because it possesses the requisite characteristics to satisfy the category's agreed-upon definition.[120]

Here, the category (excessive force) is already defined in previous cases; a qualified immunity decision determines whether the event in dispute belongs within that defined category. But if we broaden our understanding of definition to also mean making the outline or boundary of an object or concept more precise and clear, then asking whether particular details can constitute an entitled event is itself an act of definition. Whether or not we accept the Supreme Court's declaration that the Fourth Amendment "is not capable of precise definition or mechanical application,"[121] every case has the potential to be a borderline case under the Court's rules, and the exact contours and placement of that border are questions of definition. Apart from a stated rule, specific cases clarify where the category ends and another begins.

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[119] Walton & Macagno, *supra* note 61, at 96.
[120] *See* SCHIAPPA, DEFINING REALITY, *supra* note 31, at 113; Walton & Macagno, *supra* note 61, at 96.
[121] Graham v. Connor, 490 U.S. 386, 396 (1989) (internal quotations omitted).

But then it should be asked: do qualified immunity decisions add definition to the outlines of excessive force, or do those decisions simply duplicate the boundary clearly established by previously decided cases? In other words, do additional cases give the law more definition even when a court finds the law already clearly established?

On the one hand, if the law is already clearly established such that *this particular case* is clear to every reasonable officer, then the justification and conclusion in that decision would not necessarily provide additional definition of the outlines and limits of the law. The contours were already adequately defined. On the other hand, no two cases are *ever* identical. As Chapter 2 will show, this reality, and the accompanying challenges of how every reasonable officer might view the situation, means that the law on excessive force is rarely clearly established. But it also means that when qualified immunity is denied because a court rules that the law was clearly established, the particularities of the event for this new decision do provide added definition and precision to the outlines and contours of the law.

Entitling may be a "selective and abstractive" method of labeling "complex nonverbal situations,"[122] but defining the contours and boundaries of those categories reverses the abstractive

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[122] SCHIAPPA, DEFINING REALITY, *supra* note 31, at 114. Readers might raise two objections to applying Schiappa's theory of entitlement to the definition of law and categorization of events, both of which hinge on Schiappa's insistence that entitlement is the act of labeling nonverbal situations.

The first objection may argue that the definition or entitlement is based on a linguistic account of the facts developed at the district court and therefore does not and is not intended to put a label on complex nonverbal situations. Yet this understanding of the process does not go back far enough. Yes, a Supreme Court opinion declaring that Event X was excessive force clearly established in law is an act of entitlement based on the language mustered by each party during litigation. But beneath the layers of language and advocacy, there is a complex nonverbal event that happened and which, at each stage of litigation, advocates and decision-makers argue for and decide upon how to entitle those events.

Second, critics might argue that discussion of defining the law requires a natural law perspective, or that analyzing the distinction between a discovery of the law defined or a construction of the definition of law requires contrasting theories of law, namely, natural law

process. Certainly the rules that the Supreme Court has put in place for qualified immunity require that courts resist abstract statements of rules. Instead, defining clearly established law means asking whether the law has clearly placed these specific circumstances within the category of excessive force. But once a new event is classified as a violation of clearly established law, its details make up part of the boundary line between excessive and acceptable force, partially reversing the abstractive process of categorization.

B. Proper Definitions

Definition is not simply a restatement of the law, but it remains unclear whether definition is a passive act of identification and explanation—a discovery of the contours of the law in past cases, explained and applied to new circumstantial details—or an act of construction. Furthermore, clearly established law is contextualized—but what is the proper context? In other words, what is the proper frame or definition of the situation, according to the Court's instructions and rhetorical pedagogy? The Court's comparison of "correct" and "incorrect" definitions in *Mullenix*[123] suggest particular expectations for framing and specificity.

In *Mullenix v. Luna*, the Supreme Court quotes the Fifth Circuit's definition of "the clearly established rule" as prohibiting officers from "us[ing] deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."[124] It proceeds to explain that

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versus positive law. I do not believe my analysis hinges on such a theoretical distinction or requires a deep dive into the theory of law. In either case, the rules and practices of the Court in qualified immunity cases (and consequently, the lockstep application by lower courts) require an examination of past decisions to determine what a reasonable officer would believe the law to be. And, as this chapter shows, for qualified immunity purposes, the law cannot be defined in a meaningful way for particular situations without an examination and definition of the particulars. The law, in qualified immunity cases, is a constructed definition, articulated anew in every case and with each new set of facts, but faithfully consistent with past cases.

[123] Correct and incorrect from the perspective of the Court's majority, anyway.

[124] 136 S. Ct. 305, 308–09 (2015) (quoting Luna v. Mullenix, 773 F.3d 712, 725 (2014)).

"almost that exact formulation of the qualified immunity question" has already been rejected by the Court.[125] Why was it rejected? Because it is, according to the Court, founded on "[t]he general principle that deadly force requires a sufficient threat," which "hardly settles the matter."[126] This is because the relevant inquiry must ask whether a past case makes clear that Chadrin Mullenix's actions "in these circumstances" were unreasonable.[127]

What are the relevant circumstances? "In this case, Mullenix confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road" in the Texas panhandle.[128] Added precision in the facts seems to elaborate the threat and danger, where "fleeing felon" becomes "reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight," and where "sufficient threat of harm" is discarded altogether and replaced with threats to shoot police officers, another of whom is in close proximity. In other words, if we treat the Court's restatement as a pedagogical endeavor, then the nature and degree of the threat the officer faces must be defined in a more precise way in order to compare those circumstances with the nature and degree of the threat in the already decided case. Details relevant to the known or reasonably suspected threat faced by the officer are emphasized; details that might mitigate that threat do not appear (as well as other details relevant to the suspect-victim's perception of events).

It also appears as though the *type* of threat posed is a relevant detail on which the Court calls for specificity: the threat to shoot officers. The Court's articulation also suggests that flight—

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[125] *Id.* at 309.
[126] *Id.*
[127] *Id.*
[128] *Id.*

and the type of flight—is significant. The *Mullenix* Court describes the flight as "high-speed vehicular flight." Flight might relate to the nature of the threat, either enhancing or minimizing the threat. But the definition of the circumstances, specifying the type of flight and nature of threat, could also reflect the Court's concern that an officer be able to determine quickly what actions are reasonable. By framing situations according to method of flight (vehicular) or the type of weapon possessed (firearm), the framing seems to function as a tool for analogizing—more specifically, a tool to evaluate how an officer in these circumstances would analogize without "obligat[ion] to be creative or imaginative in drawing analogies from previously decided cases."[129]

In fact, comparison with a previously decided case is crucial for sifting (ir)relevant details in *Mullenix*. First, the Court explains that an earlier decision, *Brosseau*, declared the proper definition of a situation as an officer deciding "'whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.'"[130] And in *Mullenix*, the officer had to decide whether to shoot the engine block of a vehicle driven by "a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road." I would suggest that the Court's repetitive parallel structure here ("a disturbed felon," "a reportedly intoxicated fugitive," "set on avoiding capture through . . . vehicular flight") is not an empty flourish. Instead, the case the Court determines to be the most relevant or analogous seems to guide the level of specificity and selection of details crucial to the definition of the question and the situation in dispute.

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[129] Coffin v. Brandau, 642 F.3d 999, 1015 (11th Cir. 2011).
[130] *Mullenix*, 136 S. Ct. at 309 (quoting Brosseau v. Haugen, 543 U.S. 194, 199 (2004)).

The Court's discussion in *Kisela v. Hughes* supports this conclusion. After rebuking the Ninth Circuit for defining clearly established law at a high level of generality, the Court again reminds the lower court that remote constitutional guidelines and statements prohibiting the use of excessive force are too general for the qualified immunity inquiry. "An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'"[131] However, instead of then stating what the proper inquiry ought to have been in this case, the Court moves into an examination of the most relevant and analogous court decisions that would have defined the law for an officer in Andrew Kisela's shoes.

Further, it's notable that the Supreme Court in *Mullenix* critiques the Fifth Circuit's definition of a clearly established rule, substituting the Fifth Circuit's *rule* with its own "relevant *inquiry*."[132] In fact, the Court's explanation of its own past qualified immunity decisions executes a similar substitution. Explaining *Brosseau*, the Court replaced the circuit court's "clearly established rule" with "[t]he correct *inquiry*."[133] And the Court's illustration from *Anderson,* although not an excessive force case, similarly substitutes "the clearly established 'right'" articulated by the circuit court with "the actual *question* at issue" explained by the Supreme Court.[134] These variations imply that the Court is signaling that there can be no abstract, decontextualized statement of the law (or rule or right) that settles the qualified immunity question. But *even contextualized,* the Court does not declare a rule or right but instead *asks a question*. It's as if the law cannot be defined without first asking a question—defining the particular context and

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[131] Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (per curiam) (quoting Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014)).
[132] *Mullenix*, 136 S. Ct. at 309 (emphasis added).
[133] *Id.* (emphasis added) (citing *Brosseau*, 543 U.S. at 199).
[134] *Id.* (emphasis added) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

situation to which that law will be compared. It is through that comparison and contrast, ultimately, that the law is defined.

In other words, definition of law is not simply the discovery of law in past decisions, even if that law is particularized to circumstances. It is an iterative process in which the inquiry is constructed, drawing on the particular circumstances in the case at hand. Those circumstances are then compared to and contrasted with the circumstances (and, ultimately, the outcomes) in previously decided cases. Through this comparison, the law is constructed and its outlines are defined. It cannot simply be discovered.

C. Subjective Framing

Clearly defined law must be contextualized, constructed through comparison between relevant case law and the events in dispute, giving priority to the way the officer would have perceived the scene, act, and other agents. The rules of qualified immunity interact with and influence choices made by courts to frame events. The language in *Mullenix* and *Kisela* shows how the rules and framing serve particular interests and protect social hierarchies. Contrasting language used by the Supreme Court majorities, dissents, and reversed lower courts illuminates the subjective nature of those choices and reveals the interests that the Court, ultimately, is set on protecting.[135]

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[135] Of course, neither reversed circuit court opinions nor dissents establish law, and dissents are often written differently from majority opinions for that reason. Dissents can be less constrained and less concerned with legal technicalities and more concerned with values and the broader impact of the majority's opinion. *See* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1412–13 (1995) ("[A dissent] is most apt to turn away from the technicalities of the majority holding and play to higher levels of aspirations and values . . . . A dissent is liberating."). Yet I do not offer examples from the dissent as the "correct" framing but to show how situations can be framed and defined differently in order for dissenters to highlight the choices made by the majority in defining the situation, choices which might otherwise remain invisible without the contrast.

In fact, through the language of the inquiry and description of the relevant circumstances the officer faced, judges frame or define the situation through the selection (and minimization) of details and characterization of those details. As Schiappa puts it, these "acts . . . always serve preferred interests, even if those interests are not noticed or are uncontroversial."[136] Burke's pentad, a useful analytical device that exposes choices made when defining situations, clarifies some of the selective choices made in these opinions. Rather than exposing "false" frames, the pentad suggests the multiplicity and variety of potential frames; Burke's goal in particular is to expose each frame as a partial view, a choice, one way of seeing things among many. I analyze the language of these opinions to explore how judges—and ultimately, how the Supreme Court—frames actions, choices, details, and agency in order to exonerate some and blame others. Other legal scholars and commentators have noted the way that courts reframe events to justify certain outcomes and shift the roles of active aggressor and passive victim.[137] By applying Burke's

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[136] SCHIAPPA, DEFINING REALITY, *supra* note 31, at 154.

[137] One particular context in which courts have been accused of rewriting the facts is in religious practice and public life, most recently captured in the Supreme Court's 2022 decision in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022). In finding for Kennedy, the Court stated in the very first sentence that the public school employee and football coach "lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks." *Id.* at 2415. This statement contains multiple factual errors, as Professor Andrew Koppelman points out. Andrew Koppelman, *Elena Kagan and the Supreme Not-A-Court*, HILL (Sept. 25, 2022, 8:00 AM), https://thehill.com/opinion/judiciary/3659769-elena-kagan-and-the-supreme-not-a-court/. Koppelman argues that the Court made "an extraordinary series of misrepresentations," "distorting the record and minimizing the harm to students in order to vindicate the religious claim." Andrew Koppelman, *The Emerging First Amendment Right to Mistreat Students*, 73 CASE W. RES. L. REV. (forthcoming 2023) (manuscript at 12 n.64, 13), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4259163. Factual revisions serve to "reframe government neutrality toward religion as unconstitutional discrimination against people of faith." Dahlia Lithwick & Mark Joseph Stern, *How the Right Is Bringing Christian Prayer Back Into Public Schools*, SLATE (April 14, 2022, 3:01 PM), https://slate.com/news-and-politics/2022/04/how-republicans-recast-christian-indoctrination-as-religious-freedom.html. For a rhetorical analysis of how the dissent in and discourse around *Obergefell v. Hodges* reframed religious people as victims of LGBTQ+ advocates' aggression, see Calvin R. Coker, *From Exemptions to Censorship: Religious Liberty and Victimhood in* Obergefell v. Hodges, 15 COMM. & CRITICAL/CULTURAL STUD. 35 (2018).

rhetorical theory on narrative to judicial opinions, I explore the linguistic moves that make such a reframing possible, shifting responsibility from party to party.

Simply viewing the scene, act, and other agents from the perspective of the officer gives that officer-defendant an advantage. But the language in *Mullenix* suggests that framing from the officer's perspective is not enough to meet the requirements set by the Court. Both per curiam and dissenting opinions in the Court's decision in *Mullenix* define the situation from the perspective of the officer, but the definitions nevertheless seem to describe wildly different events. The per curiam opinion explains that Mullenix "confronted" a fugitive who had made multiple threats against police officers.[138] In contrast, the dissent characterizes the event as follows: "Mullenix fired six rounds in the dark at a car traveling 85 miles per hour. He did so without any training in that tactic, against the wait order of his superior officer, and less than a second before the car hit spike strips deployed to stop it."[139]

Notice that both of these definitions of the situation describe what Mullenix knew. Neither of them name the victim—the officer seems to be the acting agent and central character in both descriptions. Yet the per curiam opinion's description presents an officer confronting a threat. How the officer confronts that threat is obscure and, by implication, unimportant; Burke uses the term *agency* to describe how an act is done;[140] in this framing of events, Mullenix's agency is a vague background detail. What is important, however, is the particularity and degree of the threat posed by the unnamed "fugitive." On the other hand, the dissent's description presents an officer taking action with a lethal weapon: action that is risky, dangerous, and contrary to the orders of his superior officers.

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[138] *Mullenix*, 136 S. Ct. at 309.
[139] *Id.* at 313 (Sotomayor, J., dissenting).
[140] BURKE, GRAMMAR, *supra* note 58, at xv.

The two opinions frame events that are almost unrecognizably different simply by shifting the primary act and the agent responsible for that act. According to the per curiam opinion, the act in question is the unnamed fugitive's dangerous driving and threats against police officers, an act for which Israel Leija (the unnamed threat) is responsible. Mullenix, on the other hand, while he is the only named participant, seems simply to find himself in these dangerous circumstances, hardly acting at all. Burke distinguishes between *action*, a deliberate and intentional act, and *motion*, a reflexive, unavoidable act for which the actor is hardly responsible.[141] By centering Leija's action and reducing Mullenix's agency to simply "confront[ing]" this action and agent without any description of the nature of that agency or how he confronted the threat, Mullenix is cast in a passive, reflexive light. Framing Mullenix's act as motion and Leija's as action places responsibility on Leija. On the other hand, the dissent centers Mullenix as agent and his choices as action. By elaborating on Mullenix's behavior with richly detailed specificity, the dissent contrasts and highlights the per curiam opinion's reduction of his action to a single word.

Furthermore, the framing of the inquiry also determines whether the plaintiff or the defendant will be cast as engaging in action for which they are responsible or motion for which they cannot be blamed. Justice Sotomayor's dissent highlights this distinction when she laments that the per curiam opinion focuses on "*whether* the car should be stopped rather than the dispositive question of *how* the car should be stopped."[142] She asks whether there is a "governmental interest" in the action—specifically, in the method chosen for how to stop the vehicle. Sotomayor's inquiry into the action taken by Mullenix suggests intentionality in and responsibility for that choice. She also subtly shifts the burden away from the plaintiff and onto

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[141] *Id.* at 14.
[142] *Mullenix*, 136 S. Ct. at 315 (Sotomayor, J., dissenting).

the defendant, demanding that the officer articulate the government interest in such use of force. By minimizing agency or *how* the action was done, the per curiam opinion implicitly reduces the significance of the act and the centrality of the agent. It casts Mullenix's action as motion.

This per curiam opinion asks lower courts to actively define the situation (not just view it passively) from the perspective most favorable to the officer, emphasizing those details that create a presumption of reasonableness by casting the officer's behavior as a compelled response to the situation (motion) rather than a deliberate action. It's as if the framing sets out to define the situation presuming reasonableness. Only if factually similar case law demonstrates otherwise can that presumption be overcome.

Three years after *Mullenix,* the Supreme Court's per curiam and dissenting opinions reflect a similar pattern in *Kisela,* distinguishing between officer motion (in the per curiam opinion) and officer action (in the dissent). The per curiam opinion frames the situation this way:

> Kisela and two other officers had arrived on the scene after hearing a police radio report that a woman was engaging in erratic behavior with a knife. They had been there but a few minutes, perhaps just a minute. When Kisela fired, [Amy] Hughes was holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so.[143]

In this frame, Hughes is the responsible actor, taking threatening steps and refusing to drop the knife when ordered. Kisela was simply responding to the threat she posed, responding to action with motion. But the dissent contends otherwise:

> [A]t the time of the shooting: Hughes stood stationary about six feet away from [Sharon] Chadwick, appeared 'composed and content,' and held a kitchen knife down at her side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else.[144]

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[143] Kisela v. Hughes, 138 S. Ct. 1148, 1150 (2018) (per curiam).
[144] *Id.* at 1155 (Sotomayor, J., dissenting).

This time, rather than explicitly depicting Kisela as the agent taking action, the dissent instead argues that Hughes cannot be assigned that role. She was engaged in passive behavior; by implication, Kisela chose action for which he is responsible.

Taken together, these two per curiam opinions suggest that the Court is so committed to the redemption of police officers that it constructs the scene, act, agent, and agency, if at all possible, by placing blame elsewhere.[145] And implicitly, it instructs lower courts to do the same. It accomplishes this construction by characterizing the victim as an intentional, threatening agent engaged in action to which the officer must respond. The response is often described in vague, general terms so that it appears as motion—a reflexive and unconscious response to the threat posed by the victim of that response.

These differences in framing the event are much more acute than a disagreement over defining clearly established law at too high a level of generality. Yet the Supreme Court explains its reversals with just that justification: that the circuit court defined the law too generally. Perhaps definitional specificity has become a useful shorthand for all disagreements over definition. Whether or not the Court is engaged in a conscious misdirection or generalization, it nevertheless executes a crucial substitution: "you weren't specific enough" stands in for "you're looking at this situation from the wrong perspective." The effect of that substitution is to conceal the fact that a certain frame has been selected from among many options.

Asking for greater specificity has the appearance of an objective demand (though of course choosing *which* specific details to emphasize requires subjective value judgments). But framing of

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[145] *See* BURKE, PHILOSOPHY, *supra* note 17, at 191–220 (analyzing Hitler's promise of redemption through scapegoating the Jewish population). For another rhetorical analysis examining how Burke's pentad makes visible the framing choices that redeem some and villainize others, see Mari Boor Tonn, Valerie A. Endress & John N. Diamond, *Hunting and Heritage on Trial: A Dramatistic Debate over Tragedy, Tradition, and Territory*, 89 Q.J. SPEECH 165 (1993).

the inquiry involves more than just the level of specificity. It implicates which perspective the judge chooses and whether that decision-maker focuses on defining the right or the violation with specificity. The judge also frames the inquiry by either placing emphasis on whether the officer had sufficient justification to adopt the chosen course of action or whether the course of action was itself a clear violation. The subtle shifts in frame serve particular interests and reflect certain values. When questions of framing are avoided altogether by instead focusing on the level of specificity, there is no discussion of these subjective choices.

Criticism over insufficient specificity, however, may serve a different purpose at the circuit court level when expressed by a dissenting judge about the majority's denial of qualified immunity. Judge Sandra Segal Ikuta writes that the Ninth Circuit opinion "directly contravenes the Supreme Court's repeated directive not to frame clearly established law in excessive force cases at too high a level of generality."[146] Examining this decision from the perspective of dialectic helps to explain its possible function. Drafts of panel opinions (majority, dissents, and concurrences) are circulated for all members of the panel prior to publication. In the drafting stage, opinions can change the minds of other panel members—or at least prompt them to address arguments that had been ignored in the original draft. As such, this rebuke from Judge Ikuta could have reminded someone in the majority that the Supreme Court has a history of reversing circuit court decisions for this exact reason. Do they really want to risk being reversed in the same manner yet again?[147]

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[146] Hughes v. Kisela, 862 F.3d 775, 791 (9th Cir. 2016) (Ikuta, J., dissenting) (citing White v. Pauly, 137 S. Ct. 548, 552 (2017) (per curiam)).

[147] Judge Ikuta does not include that the Supreme Court has reversed the Ninth Circuit in particular time and again, nor does she cite a Ninth Circuit reversal when quoting the oft-repeated rebuke. Perhaps, as a sitting judge on that circuit, she wished to frame it as a problem faced by all circuits.

In the end, Judge Ikuta did not persuade her colleagues to change their votes, although the concurrence responds directly to her critique.[148] The dissent is also a signal to the litigants as to the basis for appeal—and a call to the higher court (here, the Supreme Court) to review the case. The Supreme Court does repeat the language used by Judge Ikuta, adding "and the Ninth Circuit in particular" and citing three additional reversals.

Clearly defined law is contextualized law. But because all contextual framing is subjective and the product of a particular perspective and set of values, that framing serves certain interests. By viewing a situation from the officer's point of view (in spite of any mistakes of law or fact that point of view might make[149]), asking whether *every* reasonable officer would know the conduct was a violation, and focusing on the act that violates rather than the nature of the constitutional violation and the individual injured by that violation, the doctrine prioritizes the protection of the officer. The effects are compounded because the cases to which courts look for answers to the inquiry *also* prioritize the officer's perspective and needs. Consequently, the inquiry and its definition of the circumstances in dispute, on the one hand, and the source material for the answer to that inquiry, on the other, look for every possible way that any reasonable officer could have chosen this course of action. There is little room to remember that the course of action injured someone and may have violated not just a general sense of dignity but the rights that are so fundamental as to be enumerated in the Bill of Rights.[150]

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[148] *Hughes*, 862 F.3d at 786 (Berzon, J., concurring) (constructing a point-by-point response to the arguments made in the dissenting opinion).

[149] Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" (internal quotations omitted)).

[150] And courts do not have to address whether a constitutional right was violated at all. Even the Supreme Court, the final arbiter in what the Constitution says and means, regularly avoids answering the question. *See supra* note 99 (citing Supreme Court cases).

V. DEFINING OBVIOUS CASES

The Court repeatedly emphasizes that factually analogous cases are necessary to "help move a case beyond the otherwise 'hazy border between excessive and acceptable force' and thereby provide an officer notice that a specific use of force is unlawful."[151] But exactly how thick is that hazy border, and how does a judge know if a particular use of excessive force falls into that liminal territory, therefore requiring a factually analogous case to move it beyond that border?

There are two ways to answer that question. One is that violations outside of the hazy border will simply be obvious. In *Hope v. Pelzer*, the Supreme Court declared that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[152] There is evidently such a thing as a violation so obvious that a factually analogous and squarely governing precedent is not necessary to give the officer notice that their actions would violate constitutional or statutory rights.[153] There is no way to know which violations fit into this category, though the fact that the Supreme Court has only once, in 2002, come close to recognizing an obvious Fourth Amendment excessive force violation seems to indicate that it may not accept a justification of obviousness from a lower court.[154]

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[151] Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (per curiam) (quoting Mullenix v. Luna, 136 S. Ct. 305, 312 (2015) (per curiam)).

[152] Hope v. Pelzer, 536 U.S. 730, 741 (2002).

[153] *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), is one example of this kind of conclusion. The Ninth Circuit brushed aside arguments that because no factually analogous case was presented by the plaintiff, qualified immunity must be granted because the law was not clearly established. *Id.* at 1203. In response, the court said this: "Here, the generally applicable law was clearly established in *Graham* and *Garner* . . . . Law enforcement officers may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed. . . . When Horiuchi shot Harris, without any warning, as he was retreating toward an area of safety, he acted in a patently unreasonable manner that violated clearly established law." *Id.* at 1204.

[154] *See* Vaughan v. Cox, 536 U.S. 953 (2002) (mem.). In that memorandum opinion, the Court vacated the Eleventh Circuit's grant of qualified immunity, instructing it to revisit the issue in light of *Hope v. Pelzer*, which the Court had decided the day before. *Vaughan* does not explicitly hold

Another way to determine whether an undecided case falls outside of the hazy border is to compare it to other cases where the violation has been "obvious" and established without a closely analogous case declaring it so. Somewhat counterintuitively, courts may analogize to previous decisions in order to justify the lack of closely analogous case law. And it stands to reason if a previous case found a clear violation without an analogous case that, first, clear violations exist and, second, similar violations might be equally clear.

Another look at *Kisela v. Hughes* can test whether this explanation might account for some disagreement among judges and opinions. A reader well versed in the rules governing qualified immunity and requirements for clearly established law might be surprised at the Ninth Circuit's reliance on *Harris v. Roderick*—and Justice Sotomayor's affirmation of that reliance in her dissenting opinion. *Harris v. Roderick* arose out of the famous Ruby Ridge standoff in Idaho in 1992; the lawsuit centered around an FBI sniper's shooting of Kevin Harris as he was fleeing to safety after the sniper shot another resident in the back.[155] What could a woman standing in her front yard in Tucson holding a kitchen knife have in common with a white separatist barricaded against federal agents in a rural compound?

Reliance on *Harris* "does not pass the straight-face test," according to Judge Ikuta's dissenting opinion at the Ninth Circuit,[156] an assertion repeated by the Supreme Court's per curiam reversal of the Ninth Circuit.[157] The Court, after detailing the events in *Harris*, continues: "Suffice

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that the use of force constituted an obvious violation, though the Court's instructions imply that it might be. *Id.* Nevertheless, circuits have occasionally found obvious violations and gone unreviewed and unreversed or vacated by the Supreme Court.

[155] *Harris*, 126 F.3d at 1193.

[156] Hughes v. Kisela, 862 F.3d 775, 797 (9th Cir. 2016) (Ikuta, J., dissenting).

[157] Kisela v. Hughes, 138 S. Ct. 1148, 1154 (2018) (per curiam).

it to say, a reasonable police officer could miss the connection between the situation confronting the sniper at Ruby Ridge and the situation confronting Kisela in Hughes' front yard."[158]

This may well be true: an officer responding to a call for a welfare check might not immediately think of an FBI raid and standoff as the scenario from which to draw lessons for their behavior. But the Ninth Circuit's majority opinion and Justice Sotomayor's Supreme Court dissent seem to be drawing on *Harris* in a slightly different way. Without a discussion of the facts, the majority Ninth Circuit opinion cites *Harris* for the rule that "[l]aw enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed."[159] Then, in concluding their discussion on qualified immunity, the judges return to *Harris*: "As indicated by *Deorle* and *Harris*, as well as the Supreme Court's reference to the 'obvious case,' that right [to "walk down her driveway holding a knife without being shot"] was clearly established."[160] Justice Sotomayor's dissent continues to insist that *Harris* is relevant in determining whether Kisela violated clearly established Ninth Circuit law: "Both *Curnow* and *Harris* establish that, where, as here, an individual with a weapon poses no objective and immediate threat to officers or third parties, law enforcement cannot resort to excessive force."[161]

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[158] *Kisela*, 138 S. Ct. at 1154.
[159] *Hughes*, 862 F.3d at 780.
[160] *Id.* at 785 (quoting Brosseau v. Haugen, 543 U.S. 194, 199 (2004)). *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), another Ninth Circuit case relied upon by the circuit court when denying Kisela's qualified immunity defense, involved a man who had complied with police orders to discard his weapons yet continued walking toward police. *Id.* at 1277–78. Police then shot him with beanbag rounds in the face without warning. The Ninth Circuit denied the officer's qualified immunity defense.
[161] *Kisela*, 138 S. Ct. at 1160 (Sotomayor, J., dissenting). *Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991), denied qualified immunity to an officer who shot a man fleeing from police while holding a gun. *Id.* at 323. Whether he pointed that gun at police or was holding it by the muzzle was disputed. *Id.* Perhaps Justice Sotomayor erred in this sentence's circular reasoning; the very definition of "excessive force" implies that officers may not use it. At the very least, this language choice may suggest a particular perspective when examining police use of force, one that presumes force (or lethal force) as excessive unless established otherwise.

At best, Justice Sotomayor's argument can be described as a cursory reference, nothing close to the level of detail, comparison, and scrutiny examined above. And the Court's per curiam opinion in *Kisela v. Hughes* (as well as the Judge Ikuta's Ninth Circuit dissent) calls this out.

Both opinions that would deny immunity suggest that this, like similar cases, is an obvious violation. The Ninth Circuit aligns its use of *Harris* with the Court's recognition of "obvious cases,"[162] and Justice Sotomayor uses language that echoes the belief that Kisela's action is an obvious violation.[163] Despite the objections of those who would (and did, ultimately) grant immunity to Kisela,[164] the alternative argument is that this case does not fall at all within the hazy border between acceptable and excessive force because past cases clearly defined the law and violation. It is no coincidence, I would argue, that the three cases mentioned by those arguing for a denial of qualified immunity—*Curnow v. Ridgecrest Police*,[165] *Deorle v. Rutherford*,[166] and *Harris v. Roderick*[167]—were all decided as obvious, without the need for factually analogous cases to give notice to the officers who committed the alleged violations. If the definition of the rule in each of these final decisions was good enough to deny immunity without an analogous case, then

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[162] *Hughes*, 862 F.3d at 785 (quoting Brosseau v. Haugen, 543 U.S. 194, 199 (2004)).

[163] For example, Justice Sotomayor's analysis uses language such as "the Fourth Amendment clearly forbids" and "[t]his Court's precedents make clear" when discussing whether Kisela's actions violated the Constitution. *Kisela*, 138 S. Ct. at 1158, 1160 (Sotomayor, J., dissenting).

[164] *Id.* at 1153 (per curiam) ("This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.").

[165] 952 F.2d at 325 (finding that under the plaintiff's version of the facts, "the police officers could not reasonably have believed the use of deadly force was lawful" and citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), as the general rule justifying such a conclusion).

[166] 272 F.3d 1272, 1286 (9th Cir. 2001) (finding an obvious violation because "[n]o reasonable officer could have believed that Rutherford's action in shooting Deorle with the 'less lethal' lead-filled beanbag round was appropriate or lawful"). The court continued, "It does not matter that no case of this court directly addresses the use of [beanbag rounds]." *Id.*

[167] 126 F.3d 1189, 1203 (9th Cir. 1997) (relying exclusively on general precedential rules, including "*Graham*'s totality of the circumstances test").

surely that clear definition could apply here as well, or so the Ninth Circuit's and Justice Sotomayor's opinions suggest.

Ultimately, the Ninth Circuit was reversed and Justice Sotomayor was outvoted when the Supreme Court rejected the argument that *Kisela* was an obvious case just like *Curnow*, *Deorle*, and *Harris*. This conclusion, along with Court case law and language, might lead some to believe that no Fourth Amendment excessive use of force case is an obvious violation without a factually analogous case to move it "beyond the otherwise 'hazy border between excessive and acceptable force.'"[168] We can imagine hypothetical situations that, if they arose, should present obvious violations to a reasonable person.[169] Yet only once has the Court acknowledged the possibility of an obvious violation in the use of force, in *Vaughan v. Cox*.[170] That decision was issued in 2002, the day after the Court issued its ruling in *Hope v. Pelzer*, and in the decades since, Supreme Court qualified immunity jurisprudence suggests that it will no longer entertain the possibility of obvious violations.[171]

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[168] *Kisela*, 138 S. Ct. at 1153 (quoting Mullenix v. Luna, 136 S. Ct. 305, 312 (2015) (per curiam)). The fact that Ninth Circuit cases finding obvious violations exist, such as *Curnow*, *Deorle*, and *Harris*, raises a qualification to this possibility. Not every use-of-force civil suit in which qualified immunity is raised as a defense is successfully appealed to the Supreme Court. Consequently, some circuits have found obvious excessive force violations. Nevertheless, the Supreme Court itself has only once affirmatively endorsed such a finding by instructing a lower court to revisit a claim in light of *Hope v. Pelzer*. *See supra* note 154.

[169] Judge Berzon in her concurrence with the Ninth Circuit's denial of rehearing en banc constructed just such a hypothetical, in which an officer "happens upon someone standing outside a house using a kitchen knife to chop onions at a summer barbecue, while chatting amicably with another woman standing close by." After two quick warnings to drop the knife, the officer shoots the noncompliant person, in Judge Berzon's hypothetical. Despite the absence of "a precedential case with these precise facts . . . our precedents as well as common sense would place beyond debate the question of whether that officer acted lawfully." Hughes v. Kisela, 862 F.3d 775, 786–87 (9th Cir. 2016) (Berzon, J., concurring).

[170] 536 U.S. 953 (2002) (mem.).

[171] Mark D. Standridge, *Requiem for the Sliding Scale: The Quiet Ascent—and Slow Death—of the Tenth Circuit's Peculiar Approach to Qualified Immunity*, 20 WYO. L. REV. 43, 44–45, 65 (2020)

The Supreme Court has found obvious violations in other contexts, including suits alleging Eighth Amendment violations.[172] Yet the Supreme Court seems to have little interest in defining obvious violations of excessive force under the Fourth Amendment.[173] Until that obvious case arises, the Supreme Court in its rhetorical pedagogy seems to have put lower courts on notice: for allegations of Fourth Amendment excessive force, qualified immunity can only be denied where there is a closely analogous case clearly establishing that the conduct was unlawful, and no case that might call that into question.[174] Every excessive force case begins in the hazy territory and can only be moved beyond that border if the contours are sufficiently definite when comparing the case being litigated with governing precedent.[175]

(suggesting that *Hope v. Pelzer*'s exception to the requirement for fact-specificity in clearly established law, or "obvious violations," no longer carries force).

[172] *See, e.g.*, Taylor v. Riojas, 141 S. Ct. 52 (2020) (per curiam) (vacating and remanding the Fifth Circuit because every reasonable correctional officer should have known that Taylor's conditions of confinement violated the Eighth Amendment). The Court's decision in *McCoy v. Alamu*, 141 S. Ct. 1364 (2021), reversed and remanded the case to the Fifth Circuit, instructing the circuit court to reconsider in light of the decision in *Taylor v. Riojas*. In both these cases, the plaintiff alleged a violation against the Eighth Amendment's prohibition against cruel and unusual punishment.

[173] This doesn't mean they haven't had recent opportunities. In *Ramirez v. Guadarrama*, the Fifth Circuit granted dismissal on qualified immunity grounds to law enforcement officers who responded to a call from Selina Marie Ramirez saying that her husband, Gabriel Eduardo Olivas, was threatening to commit suicide and burn down the house. 142 S. Ct. 2571 (2022) (Sotomayor, J., dissenting from denial of writ of certiorari). After officers arrived on the scene, Olivas doused himself in gasoline. Despite another officer's warning that tasing Olivas would set him on fire, the two defendant officers nonetheless tased Olivas. As a result, Olivas died and the house burned to the ground. In granting the officers qualified immunity, the Fifth Circuit reasoned that "petitioners had not shown that Olivas had any 'clearly established' 'constitutional right not to be tased' and 'caus[ed] . . . to burst into flames." *Id.* at 2572. The Supreme Court refused to grant Ramirez's petition to rehear the case.

[174] *See infra* Chapter 2, Subsection III.C.

[175] Some readers might wonder, reflecting on this analysis, whether there is any hazy territory at all, or whether instead every instance of force is automatically presumed reasonable and lawful unless a previous case sufficiently similar has deemed otherwise. Yet by constructing this hazy territory between excessive and acceptable force, the Court is able simultaneously to declare an act to have violated the Fourth Amendment *and* to protect the police officer from liability. In other words, an action that falls within the hazy border *could* be a violation—or not. But either way, the

Thus far, I've adopted the Court's language about borderline cases, using the term they chose to entitle the territory: *hazy.*[176] But it's worth interrogating the Court's choice to define Fourth Amendment cases as "hazy." This label suggests an objective fog and uncertainty[177] and distracts from what makes these cases difficult; it's not the *inability* to determine what happened or which cases are relevant, but that the event and law are polysemic, open to more than one interpretation depending on framing. Again, the Court uses language that obscures the subjective choices involved in defining and classifying situations.

Is an undefined border between acceptable and excessive force inevitable? Has the development of law over the last several decades served to clarify and define the boundaries with more precision, or has the hazy territory remained the same (or even expanded)? Is its maintenance the product of the inadequacy of language to define all situations, or the product of the Court's unwillingness to give the law definition? By looking backward, we can understand the values, norms, and perspectives that inform the declaration of an obvious case (or the denial that something is an obvious case). But we should also consider the norms these acts of classification set going forward. If every use of force is a borderline case, and if the situation must be defined from the perspective of a reasonable officer with the emphasis on whatever details might have justified a use of force (but not *that* particular use of force), is the Court "sanction[ing] a 'shoot first, think later' approach to policing"?[178] Whose interests are served by refusing to define the boundary between excessive and acceptable force?

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officer is not liable. In essence, the hazy border allows the Court to maintain the appearance of protecting constitutional rights while prioritizing the protection of the police.

[176] I am indebted to Professor Schiappa for inquiring into the implications of using "hazy."

[177] *See Hazy*, OXFORD ENGLISH DICTIONARY (defining hazy as "covered or obscured by a haze" and "lacking intellectual clarity; vague, ill-defined, uncertain"), https://www-oed-com.turing.library.northwestern.edu/view/Entry/84891.

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

VI. CONCLUSION

This chapter contributes to the robust body of legal scholarship analyzing and critiquing qualified immunity by interrogating definition—what it means to define the law, and how the rules of qualified immunity guide and constrain the definition of the inquiry and situation. It shows that clearly defined law is contextualized, and that definition of the law and its contours occurs through the construction of comparisons between past cases and the current dispute. These definitions are not passively discovered, nor are they objective descriptions of what is "real." The officer-centered values of the doctrine, especially as articulated in Fourth Amendment cases, require judges to frame the inquiry and description of events in the way most favorable to the officer, presuming reasonableness by minimizing unfavorable details and emphasizing the nature of the threat. The definition of the situation is intent upon a construction that explains *how* a reasonable officer could have taken that action, not *whether* a reasonable officer would have done so. In excessive force qualified immunity cases, judicial rhetoric is the art of examining whether the world can be structured so that the officer can win.

Discussing correct or incorrect levels of specificity obfuscates the key issue in two ways: it hides that qualified immunity reversals are really about the chosen frame for the situation, and it hides subjective choices behind a screen of objectivity. Judicial rhetoric in qualified immunity cases performs objectivity even as it is constructed on a foundation that prioritizes protections for officials. The interests at stake are not debated. The Court has deprioritized the protection of constitutional rights by simply ignoring them.

That the Supreme Court has neglected to give definition to the line separating acceptable from excessive force, insisting that the law in this area "is not capable of precise definition,"

compounds the problem.[179] Instead, the Court has sought to define the category of excessive force by way of example (previously decided cases) rather than a definition that enumerates the fundamental characteristics of the category.[180] This is problematic because, as Macagno argues, definitions "by example cannot warrant a classification when a new entity . . . is considered."[181] If Macagno is to be believed, then defining excessive force through previous cases will rarely provide a sufficient basis for finding that the law was clearly established such that this new event should also be classified as excessive force. The absence of what Schiappa calls a "regulatory definition," or one that is intended to regulate behavior, has dire consequences.[182] The police will not conform with a definition that is insufficient to classify new events. And courts may not be able to hold them accountable when a qualified immunity defense is raised.[183]

Subjective fact-framing and construction is not unique to qualified immunity inquiries into clearly established law. Courts must explain "what happened," selecting a frame and characterization of the facts in a range of legal disputes, including in Fourth Amendment suits, when determining whether a constitutional violation occurred at all. The fact-dependent inquiry into whether use of force was objectively unreasonable similarly requires construction of the

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[179] Graham v. Connor, 490 U.S. 386, 396 (1989) (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).
[180] *See* Macagno, *supra* note 62, at 200.
[181] *Id.* at 205.
[182] Schiappa, *Defining Sex*, *supra* note 62, at 12.
[183] Although there is a dearth of accountability in excessive force cases successfully appealed to the Supreme Court in which a qualified immunity defense was raised, Schwartz's empirical scholarship demonstrates that this is not universally true of all suits alleging excessive force under Section 1983. Despite the power of a qualified immunity defense, officers do not always raise that defense at trial. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9–10 (2017) (noting that qualified immunity is invoked and granted far less than one might expect given the doctrine's stated aims). Furthermore, just because plaintiffs in excessive force cases have never won at the Supreme Court does not mean they never win in district courts. Accountability may not be entirely lacking in federal courts across the country, but the Supreme Court's jurisprudence and rhetorical pedagogy certainly structure a doctrine counterproductive to that accountability.

disputed event and comparable case law. Consequently, qualified immunity creates a second insulating layer for law enforcement when the court is inclined to structure the event so that the officer's behavior is seen as reasonable, as the Court seems to require. Subjective and selective framing, like reasonableness, creates a dual layer of protection and also permits the confounding result that an action may have been an unreasonable violation of the law, but nevertheless reasonable when viewed from a particular angle.[184]

The Fourth Amendment "entitled" a right "to be secure in [one's] person, . . . against unreasonable . . . seizures."[185] But it wasn't until the 1989 decision in *Graham v. Connor* that the U.S. Supreme Court "entitled" a particular category of Fourth Amendment violations "excessive force."[186] This phrase, as Burke would say, has become a "receptacle[] of personal attitudes and social ratings," but it was also the product of social attitudes.[187] The Court, in *Graham v. Connor*, did not suddenly introduce to the public the possibility that force by police officers might go too far. But by giving it a label *and* a clear legal status as a category of Fourth Amendment violations, it attained a status in law and in social consciousness.

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[184] *See* Jeffries, *Liability Rule*, *supra* note 72, at 265–70.
[185] U.S. CONST. amend. IV.
[186] *See* Graham v. Connor, 490 U.S. 386, 388 (1989) ("This case requires us to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person."). The phrase "excessive force" had been used previously but was largely confined to cases in which people were ejected from modes of transportation by private operators for not having a proper ticket, *see* New Jersey Steamboat Co. v. Brockett, 121 U.S. 637 (1887), or for uses of corporal punishment against students, *see* Ingraham v. Wright, 430 U.S. 651 (1977). Lower courts appear to have used the phrase as well, relating it to criminal or civil suits for assault and battery. *See, e.g.*, King v. Blankenship, 636 F.2d 70, 73 (4th Cir. 1980) ("[N]ot every instance of the use of excessive force gives rise to a cause of action under § 1983 merely because it gives rise to a cause of action under state tort law or is prosecutable under criminal assault and battery law.").
[187] BURKE, LANGUAGE, *supra* note 25, at 361.

Yet excessive force cannot and does not speak for itself.[188] It is the courts—specifically judges and juries—who examine phenomena and label them as belonging to the category of excessive force or not. "[T]he mere act of naming an object or situation," Burke writes, "decrees that it is to be singled out as such-and-such rather than as something-other."[189] Yet in constructing qualified immunity as a nearly total shield against excessive force suits, the Supreme Court has found a way around the rhetorical force of the category. Qualified immunity is a doctrinal trap door constructed by the Supreme Court that silently and gradually undermines legal protections against police brutality while avoiding the debate over constitutional rights altogether. The right may be "entitled" in the Burkean sense, but the Court's jurisprudence calls into question when, if ever, someone is entitled to remedies when the right is violated. This chapter demonstrates that in disputes over classification, legal doctrines can be used as an end run around accepted definitions and categories.

In this way, excessive force remains a theoretical constitutional prohibition, alive in legal and public consciousness. Yet through qualified immunity, the Supreme Court seems to aim toward cabining excessive force to classroom discussions and public ideals, inaccessible in practice.[190] Where no violation is obvious, few violations are beyond debate.

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[188] SCHIAPPA, DEFINING REALITY, *supra* note 31, at 127 (quoting Justice Warren E. Berger's statement that pornography "can and does speak for itself," Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973)). Schiappa goes on to say, "Contrary to Chief Justice Berger's claim, phenomena do *not* 'speak for themselves.' It is people who make sense of their experience of the world. Through descriptions, people 'entitle' tiny slices of reality from various points of view." *Id.* at 128.

[189] *Id.* at 117 (quoting BURKE, PHILOSOPHY, *supra* note 17, at 4).

[190] For a more thorough discussion of how the Court's rules surrounding remedies have effectively neutered the power of rights, particularly in areas of public law, see Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477 (2018).

CHAPTER 2: ANALOGY

I. INTRODUCTION

In the summer of 2017, law enforcement officers in Arlington, Texas, responded to a call from Selina Marie Ramirez and her children saying that their husband and father, Gabriel Eduardo Olivas, was threatening to commit suicide and burn down the house.[1] After officers arrived on the scene, Olivas doused himself in gasoline. Despite one officer's warning to colleagues that tasing Olivas would set him on fire, two other officers nonetheless tased Olivas, causing him to burst into flames. As a result, Olivas died and the house burned to the ground. Ramirez brought suit on her own behalf and on behalf of Olivas's minor children and estate. The Fifth Circuit reversed the trial court's denial of the two officer defendants' motion to dismiss based on the defense of qualified immunity.[2] In a per curiam opinion, the circuit court reasoned that the plaintiff relied exclusively upon "case law purportedly establishing that deadly force may not be employed against individuals threatening only themselves" and that, consequently, those cases were "not apropos."[3] In other words, the officers were protected from accountability because Ramirez "had not shown that Olivas had any 'clearly established' 'constitutional right not to be tased' and 'caus[ed] . . . to burst into flames.'"[4] In 2022 the Supreme Court refused to grant Ramirez's petition to review the Fifth Circuit's decision, also known as denying certiorari.[5]

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[1] Ramirez v. Guadarrama, 142 S. Ct. 2571 (2022) (Sotomayor, J., dissenting from denial of writ of certiorari); Ramirez v. Guadarrama, 3 F.4th 129, 131–32 (5th Cir. 2021) (per curiam).
[2] *Ramirez*, 3 F.4th at 131–32.
[3] *Id.* at 136.
[4] *Ramirez*, 142 S. Ct. at 2572 (Sotomayor, J., dissenting from denial of writ of certiorari) (quoting *Ramirez*, 3 F.4th at 132, 134).
[5] *Id.* at 2571 (mem.).

Earlier in the same term, the Court issued two back-to-back summary reversals without dissent in cases where law enforcement officers had been denied the defense of qualified immunity.[6] In those reversals, the Court reminded the circuits why it continually reversed their qualified immunity decisions: "Precedent involving similar facts can help move a case beyond the otherwise hazy borders between excessive and acceptable force and thereby provide an officer notice that a specific use of force is unlawful."[7] The Court also stated, in a tone suggestive of exasperation, "We have repeatedly told courts not to define clearly established law at too high a level of generality."[8] The Court could just as easily state that it has also repeatedly instructed lower courts that previous cases finding a violation must squarely govern the specific facts of the context faced by officers.[9] Chapter 1 took up the definition of law, and this chapter turns to the Court's instructions about analogy and factual similarity. Do the Court's repeated instructions and strict constraints on analogy work, producing more consistent outcomes and clear law? How do judges use analogy within these constraints? And if it is so *obvious* that "the officers plainly did not violate

[6] City of Tahlequah v. Bond, 142 S. Ct. 9 (2021) (per curiam) (holding that officers who fatally shot a man who refused to drop a hammer and made threatening physical gestures did not violate any clearly established law); Rivas-Villegas v. Cortesluna, 142 S. Ct. 4 (2021) (per curiam) (holding that force used to subdue and disarm a man allegedly threatening his girlfriend and her two children did not violate any clearly established law).

[7] *Rivas-Villegas*, 142 S. Ct. at 9 (quoting Kisela v. Hughes 138 S. Ct. 1148, 1153 (2018) (per curiam)).

[8] *City of Tahlequah*, 142 S. Ct. at 11 (citing Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)). The Court could have also cited, among others, *Kisela*, 138 S. Ct. at 1152 ("This Court has 'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." (quoting City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1775–76 (2015))).

[9] *See, e.g.*, *City of Tahlequah*, 142 S. Ct. at 11 ("But the facts in [precedent relied upon by the Tenth Circuit] are dramatically different from the facts here."); *Kisela*, 138 S. Ct. at 1153 ("[P]olice officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue.'" (quoting Mullenix v. Luna, 136 S. Ct. 305, 309 (2015) (per curiam))).

any clearly established law,"[10] how is it that lower courts continue to rule inappropriately by granting qualified immunity, according to the Supreme Court?

The core tension in qualified immunity doctrine is the Supreme Court's demand for analogical justification alongside strict rules of constraint. The Court requires factually analogous source cases to justify the denial of qualified immunity. To constrain those analogies, it has established limiting precedential rules. But analogical justification cannot be constrained to the degree the rules require. It is a creative process of construction in which source and target are simultaneously defined and shaped for comparison. Attempts to constrain analogical arguments have pressed the doctrine closer to collapse into absolute immunity.[11] After all, without total identity between the facts of the analogical source case and the case at hand to be decided, who's to say that *every* reasonable person would analogize the two? Yet no two cases are ever *completely* alike. Constraints that limit analogical argument to those that are beyond debate will inevitably find all analogy unjustified.

Three qualified immunity decisions justify these claims: *Mullenix v. Luna*, *Kisela v. Hughes*, and *Gravelet-Blondin v. Shelton*. A close analysis of these cases demonstrates that the construction of analogies goes hand in hand with the construction of facts, both of which are iterative, reciprocal processes. From the construction of the building blocks of comparison—facts—judges move back and forth between the case serving as the analogical source and the

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[10] *City of Tahlequah*, 142 S. Ct. at 11.

[11] I am not the first to suggest that the Supreme Court "is unqualifying immunity." Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 233 (2006). Professor Alan Chen attributes the slide into absolute immunity to the procedural dilemmas created by declaring qualified immunity a question of law despite the deeply factual nature of the reasonableness inquiry in some cases (such as alleged Fourth Amendment violations). *Id.* at 232–33. But this chapter is the first to consider how the requirement for analogical justification and how analogical argument work in qualified immunity decisions, concluding that the internal conflict between analogy and constraint draws the doctrine closer to absolute or "unqualified" immunity.

present dispute to construct and reconstruct the facts and comparisons. This reciprocal process often occurs within a dialogical negotiation with other judges' written opinions. My analysis of analogical justification in these three cases demonstrates that analogical argument cannot be productively constrained as narrowly as the Court desires because of the creative, iterative nature of analogical construction.

Analogy is ubiquitous in law, but Fourth Amendment qualified immunity decisions present unique opportunities to study argument by analogy. To determine whether the law was clearly established, judges must justify the conclusion analogically; no other form of argument can be used. The written argument cannot mix or dilute analogy with policy arguments or arguments about legislative intent. The only justification available is factual analogy between a previous case and the case to be decided. These decisions present the opportunity to examine both how analogical justification works—and whether and to what extent it can be constrained.

To be clear about the arguments made, the definition and scope of terms I use must first be established. Analogical justification refers to the language used to validate or reject comparisons between events or cases. My analysis examines the construction of analogy in written judicial opinions, and my argument is limited to linguistic justifications rather than conscious or unconscious reasoning. As a scholar of the language of argument and persuasion, I focus this study on the ways that language explains, persuades, and justifies. To make clear the distinction between psychological reasoning and justification in language meant for an audience, I use the terms analogical justification, analogical argument, and variations of the two (e.g., argument by analogy) interchangeably to describe and analyze arguments made in language. In contrast, I use analogical reasoning to refer to mental or psychological processes. I will not use precedent and analogy (or precedential justification and analogical justification) interchangeably, though many scholars do.

To distinguish between rules of precedent that constrain analogical justification and the case serving as the source of analogy, I restrict the term precedent to those cases that establish rules of constraint. Cases that are utilized as the source in analogical justification I refer to as the source, analogical source, or source analog.

A. Analogy

With the distinctions I am making between reasoning and argument in mind, it's important to sort theories on analogy into two groups: those that explain analogy as a human cognitive endeavor and those interested in how analogy is explained and justified through language. Some skeptics of analogy's place in legal decision-making, such as Judge Richard Posner, can be set aside for present purposes because their critique of analogy is that it is "a surface phenomenon," descriptive of how judges talk but not how they think, and how judges think is actually in terms of policy, while analogies simply obscure the policy implications a judge balances in coming to a decision.[12] Judge Posner asserts that analogical justification is "merely rhetoric, perhaps even self-serving judicial rhetoric."[13] Regardless of the merits of this critique, it does not negate the value of studying the execution of analogical argument for its persuasive appeal, particularly if and when case-to-case comparison on a granular factual level is required by the Supreme Court.[14]

Key theorists attempting to give logical structure to the cognitive work of analogy include Professor Scott Brewer, Professors Frederick Schauer and Barbara Spellman, and Professor Lloyd Weinreb. Brewer explains that analogical reasoning is a three-step process involving first an abductive inference of a rule from examples, then testing of the rule in a reflective process against

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[12] Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761, 765 (2006).
[13] *Id.* at 762.
[14] *See infra* Section II.

a range of scenarios, and finally an application of the rule to the undecided case at hand.[15] While Brewer is concerned with argumentative contexts and the rational persuasive power of arguments, his concern is that the process is susceptible to logical explanation, not that this is the process undertaken *in language* in order to justify the outcome to an audience.[16] The reasoning he describes is, in fact, largely internal.[17] Schauer and Spellman build on Brewer's logical structure by explaining that the first step, the selection of examples, is a process of unconscious sorting informed by experience and training.[18] The principles or rules imposed by that training and experiences operate on a subconscious level, leading the reasoner to believe they are simply comparing particulars between cases without the intercession of rules.[19] Weinreb offers a critique of Brewer's structure, arguing that it is not really analogical reasoning at all but is simply inductive reasoning followed by deductive rule application. Once the rule is derived from the analogy, the facts of the analogy's source are no longer relevant to the outcome of the present dispute.[20] In contrast, Weinreb argues that analogy, down to a careful comparison of the facts, is crucial because the general nature of language always leaves "a gap between a rule and its application that no further statement of the rule or specification of the facts will close completely."[21] Do the facts of

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[15] Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 962–63 (1996).
[16] *Id.* at 926–29.
[17] *See id.* at 979.
[18] Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 250 (2017).
[19] *Id.* at 250.
[20] LLOYD WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT 102 (2d ed. 2016) ("Once the initial AWR [analogy-warranting rule] has been formulated, the analogy drops from sight and need never be mentioned again or, indeed, even be known; for aught that appears, the AWR might just as easily have been found in a dream or, as sometimes is said, have 'popped' into the judge's head. Both elements of the analogy, the source and the target, may reappear in the second, confirmatory stage, but only as examples, among others, by which to test the AWR.").
[21] *Id.* at 58.

the undecided dispute align more closely with the facts of cases resolved by the rule, or cases that fall outside the scope of the rule? The comparison of facts, and the sorting of relevant from irrelevant facts (and the hierarchy of importance in between) will be informed by experience and training.[22] Yet even for Weinreb, this ability to sort is one of awareness and perception and need not appear at all in the analogy's justification in language, even if the language of law is the source of analogy's necessity.[23]

Professors Larry Alexander and Emily Sherwin argue that "[a]nalogical decision making based on factual similarity between cases is either intuitive or deductive" and that "authoritative rules" are the law's best hope for constrained decision-making subject to reason.[24] And although they are at pains to define reasoning as "conscious, language-based deliberation," a "process that is at least susceptible to explanation and justification,"[25] they are largely focused on the internal processes a decision-maker might engage in when evaluating a case, past cases, possible rules, and the outcome. Their claims treat rule-based reasoning that *could* be explained (but isn't necessarily), contrasted with analogical reasoning which cannot be explained apart from deduction or moral reasoning. And they argue that only the former represents a process of deliberative constraint. The latter is unconstrained, unexplained, or both. Yet they acknowledge what they believe is an insignificant gap in their theory: the precise boundaries of a rule may be unclear; "[a]mbiguity at the margins of usage, however, is not fatal to rule-governed legal reasoning if the meaning of the rule is clear in a significant number of cases."[26] Professor Cass Sunstein, like Weinreb, argues that this is precisely where analogical processes are crucial to law, and perhaps more prevalent than

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[22] *Id.* at 60, 121.
[23] *See id.* at 118–27.
[24] LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 13, 87 (2008).
[25] *Id.* at 10 & n.3.
[26] *Id.* at 20.

Alexander and Sherwin would admit, especially when the decision in the previous case was not accompanied by a fully developed rule. Analogical reasoning is employed, he argues, when invoking a previous judgment in a disputed situation because it bears some similarity to the dispute without squarely governing on all fronts.[27] Sunstein does seem to treat analogical argument as a valuable process for external deliberation and negotiation, used to develop and describe principles tested against the source and target at the granular factual level.[28] And yet Sunstein's conception of analogy does little to explain how analogical justifications are or can be constrained.[29] Similarly, Professor Edward Levi explains analogy as a way for law to develop when new situations arise, not a tool for producing consistency. He describes a three-step process: "similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case."[30] Analogy enables the law to expand and contract as society and the moment require.[31]

Importantly, a few European argumentation scholars have examined analogical justification in judicial decision-making in the European context. Professors Luis Duarte

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[27] Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 748 (1993).
[28] *Id.* at 779 ("Their meaning lies in their use. They are not simply unanalyzed fact patterns; they are used to help people think through contested cases and to generate low-level principles. . . . The principles and patterns we develop and describe are in turn brought to bear later on, and tested through confrontation with, other cases.").
[29] He does argue that one of analogical reasoning's advantages is that it "operates with precedents that have the status of fixed points," thus contributing to "a degree of stability and predictability." *Id.* at 782–83. But at the same time, "analogical reasoning may be especially desirable in a context in which we seek moral evolution over time," a statement that suggests analogy's advantage is in its flexibility, useful as a tool for developing rather than constraining law. *Id.* at 782.
[30] EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–2 (Univ. of Chi. Press 2013) (1949). Note that, for Levi, the facts remain relevant throughout the process rather than falling by the wayside once a rule is articulated. "[T]he scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced." *Id.* at 2.
[31] *Id.* at 104.

d'Almeida and Claudio Michelon argue that current theories of analogy fail to account for law's normative qualities.[32] They propose that analogical argument in law should be understood as the extension of the rule derived from a previous case to another case not explicitly contained within the previous decision's articulation of the rule's application.[33] Analogy, in other words, extends the rule beyond its original parameters. Professor Harm Kloosterhuis theorizes analogical arguments in European judicial decisions as dialectical exercises, anticipating and responding to potential objections and working alongside other persuasive strategies to bolster justification.[34]

This chapter fills a gap in scholarship on analogy to ask how analogical argument—rather than analogical reasoning—is constructed, and whether that process can admit to constraint. Analogical justification, as I am defining it, is not a question of discovery or a flash of insight[35] but a question of rhetorical invention. The selection of source analogs, prioritization of certain details as material, emphasis and deemphasis of context, choice of words, and selection of point of view actively construct claims of similarity.[36] Professor James Boyd White describes the craft of judges as the art of "translation."[37] It does not involve the discovery of a fixed law or rule applied

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[32] Luis Duarte d'Almeida & Claudio Michelon, *The Structure of Arguments by Analogy in Law*, 31 ARGUMENTATION 359, 362 (2017).
[33] *Id.* at 388.
[34] Harm Kloosterhuis, *Reconstructing Complex Analogy Argumentation in Judicial Decisions: A Pragma-Dialectical Perspective*, 19 ARGUMENTATION 471 (2005).
[35] Other scholars discussing analogical reasoning have noted that an initial flash of insight begins the process of comparison. *See* Brewer, *supra* note 15, at 962; Schauer & Spellman, *supra* note 18, at 260. But this study is concerned with how analogy is justified through the language of judicial opinions.
[36] I am not making a claim here about authorial intent. But I am arguing that the process of construction, some of it intended by the author and some of it not, is not simply an objective elaboration of similarities discovered (and that would similarly be discovered by any observer regardless of their position and identity). These choices, while they may not have all been explicit and intentional choices by the author, are nevertheless evident in the language used and construct an argument for the reader who encounters it.
[37] JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 246 (1990).

to the dispute at hand but instead is an act of "integration," or "putting two things together in such a way as to make a third, a new thing with a meaning of its own."[38] I borrow the theory behind White's term "translation" but choose a different label: construction. This emphasizes the agency and choice of the judge-author-rhetor when writing an opinion justifying outcomes in a case, even if every single word was not consciously chosen for its full persuasive effect.[39] Although judicial opinions are unusually intentional texts, my study is concerned with what the language chosen—consciously or not—does, rather than discovering the "true" intent of the judicial author. The written opinion negotiates the space between past law, the present question and controversy, and the audiences it addresses. Analogies and disanalogies simultaneously construct and compare (either positively or negatively) the analogical source decision and the present question. In discussing Fourth Amendment adjudication, White argues that there can be no perfect replication or facsimile translation in which previous cases explaining and applying Fourth Amendment law are simply copied and pasted into the resolution of new disputes.[40] Instead "the art by which one text is made in response to another . . . [is] in the acknowledgment that each text is a new act, resting in part upon the ground of its own creation, yet faithful to the old one too."[41] By acknowledging the judge as a thinking, strategic author or rhetor responsible for construction as a means to justification, and by examining varying constructions of analogies often leading to different outcomes, we can get closer to an understanding of how analogical argument in law works.

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[38] *Id.* at 263.
[39] I want to emphasize that I am not really departing from White's theory, but rather simply choosing another label—one that is, I believe, a better metaphor for the practice of justification in judicial opinions, and one that does not unintentionally invoke theory around translation.
[40] WHITE, *supra* note 37, at 218.
[41] *Id.*

I also draw on the rhetorical scholarship of Professor David Zarefsky, who explains argumentation as "the practice of justifying claims under conditions of uncertainty."[42] Rather than concern over the logical proof of the justification, argumentation "involves persuading a person to accept a claim by offering what that person will regard as good reasons for believing it. If accepting the reasons increases the likelihood that one will accept the claim, then that person has found the claim to be justified."[43] This approach applied to judicial decisions understands those opinions as rhetorical arguments articulated for audiences and in compliance with a particular set of rules accepted by the discourse community.[44] In sum, to examine judicial decisions as rhetorical argumentation is to study the construction of justification crafted within a particular rule-governed context and for a particular audience (or audiences) whose expectations dictate certain moves when the outcome is uncertain.

B. Analogy and Precedent

In order to understand the arguments made by courts to justify qualified immunity outcomes, a few words about the relationship between precedent and analogy are necessary. Professor Dan Hunter equates the two; in law, he says, precedents are "[p]rior analogs . . . used to predict, explain, or justify the outcome of the currently undecided case."[45] Similarly, Brewer treats analogical reasoning and precedential reasoning as two types of exemplary reasoning. In "developing a philosophical explanation of analogical reasoning,"[46] he argues that abduction is a

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[42] DAVID ZAREFSKY, THE PRACTICE OF ARGUMENTATION: EFFECTIVE REASONING IN COMMUNICATION 3 (2019).
[43] *Id.*
[44] "Arguments are addressed to people. . . . One function of the audience is to establish the boundaries of acceptable argumentative practice." DAVID ZAREFSKY, RHETORICAL PERSPECTIVES ON ARGUMENTATION 39 (2014).
[45] Dan Hunter, *Reason Is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197, 1206 (2001) (focusing on the distinction between analogy, induction, and metaphor).
[46] Brewer, *supra* note 15, at 926.

crucial step in "the structure of exemplary argument[s]."[47] That structure, according to Brewer, applies to all types of exemplary reasoning, including precedential reasoning.[48] Levi seems to treat precedent and analogy in the same way as well, but only because he makes the following argument about judicial decisions not constrained by some binding statutory rule:

> [The judge] is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important.[49]

In essence, Levi suggests that all precedent is a question of analogical argument because all precedent can be distinguished from the current case if the reasoner wishes to do so. Sunstein approaches precedent similarly; in formulating a theory of analogy in law, he uses "precedent" to describe both any previous case law that might be compared to the current undecided case and cases that established rules for comparison.[50] Because "precedents cannot be said to be uncontroversially binding or 'on all fours,'" the reasoner's task is to sift through the details of each case (both the source and the target) and determine which differences and similarities are relevant.[51] He posits that analogy "thus works when an incompletely theorized judgment about case *X* is invoked to come to terms with case *Y*, which bears much (but not all) in common with case *X*, and in which there is as yet no judgment at all";[52] an earlier statement explains that what

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[47] *Id.* at 934.
[48] *Id.* at 934–35 (listing "The Common Law Method of Reasoning from 'Precedential' Analogies" as the first type of analogical or exemplary reasoning, and expounding on Levi's paradigmatic example of precedential reasoning by analogy in *MacPherson v. Buick Motor Co.* in which the court considered whether a defective wooden wheel is "inherently dangerous" under precedential rules by evaluating a range of factual scenarios that were determined to be inherently dangerous or not).
[49] LEVI, *supra* note 30, at 2–3.
[50] Sunstein, *supra* note 27, at 745 & n.19 (explaining that relevant differences hinge upon "relevant precedents, which foreclose certain possible grounds for distinction").
[51] *Id.* at 745 & n.19.
[52] *Id.* at 748.

is both common *and relevant* depends upon "relevant precedents, which foreclose certain possible grounds for distinction."[53] Here, Sunstein makes a distinction between precedents that create relevant and binding rules for future courts to follow when comparing cases—rules not tied to factual details—and precedents that guide decision-making because of their (relevant) factual similarities to the dispute at hand.[54]

Frederick Schauer, on the other hand, distinguishes more forcefully between the two, but the line he draws is that precedent is constraining and forces the reasoner to an outcome they would not have otherwise chosen, while analogy is freeing and aids in arriving at the outcome a reasoner believes is correct.[55] This distinction hinges on the function of analogy and precedent in psychological processes rather than linguistically articulated arguments. When it comes to arguing for an outcome, Schauer collapses the distinction, asserting that both precedent and analogy require a "rule of relevance" to argumentatively justify a conclusion that precedent or analogy controls.[56] Yet analogy and precedent still occupy different parts of a continuum for Schauer, though identifying where analogy ends and precedent begins poses a challenge. Elsewhere, Schauer gestures toward that implied continuum by explaining that analogy covers situations where past cases "are not controlling precedents in the strict sense—that is, in the sense of being so close to

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[53] *Id.* at 745.

[54] My argument that Sunstein is making this implicit distinction is bolstered by his analysis of analogical arguments in the hate speech and cross burning case, *R.A.V. v. City of St. Paul*. *Id.* at 759–67. Specifically, Sunstein concludes that "a reference to analogies helps us figure out what we think, but it does not dictate particular outcomes." *Id.* at 766. Nevertheless, Sunstein's conception of legal analogy is more constrained by precedent than analogy outside of the law: "the method of analogy may indeed be less determinate outside of law. In law, we have a wide range of 'fixed points' for inquiry . . . . whereas in morality they are either revisable or entirely open-ended." *Id.* at 771.

[55] Frederick Schauer, *Why Precedent in the Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy*, 3 PERSP. PSYCHOL. SCI. 454, 456–57 (2008).

[56] *See* Frederick Schauer, *Analogy in the Supreme Court:* Lozman v. City of Riviera Beach, Florida, 2013 SUP. CT. REV. 405; Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

the current case on the facts and questions presented that anyone who acknowledges the constraints of precedent must be bound by such virtually identical precedents."[57]

Alexander and Sherwin distinguish between analogical and precedential reasoning, but do so differently than Schauer:

> Analogical methods, however, are likely to be more effective [at enlarging the perspective of judges when crafting a rule] because they require the judge to engage with the facts of prior cases, make comparisons, and formulate rules that explain the importance or unimportance of common facts. Analogical techniques are broader in scope [than precedential reasoning]. *All cases are potentially 'governed' by analogy, whereas precedent rules cover only those cases that fall within their stated terms.*[58]

This extended quotation illuminates the implicit distinction between precedent and analogy, which will be useful in understanding the layers of precedent and analogy required of courts when justifying qualified immunity decisions. Precedential reasoning for Alexander and Sherwin rests upon their normative argument for rule-based reasoning. Precedent governs when the rule articulated by the court with rule-making authority states terms that clearly capture the dispute at hand. Analogical reasoning, however, involves engagement with the facts of prior cases. Implicitly, engagement with the facts is unnecessary for precedential reasoning, at least beyond the facts included in the rule that establish the rule's scope and terms.

Although Alexander and Sherwin are largely concerned with internal, psychological processes of reasoning, their distinction between analogy and precedent is a helpful model to explain the two-part analysis into which the Supreme Court's qualified immunity rules have forced

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[57] Frederick Schauer, *Forward* to LEVI, *supra* note 30, at v, xii–xiii.
[58] ALEXANDER & SHERWIN, *supra* note 24, at 120 (emphasis added).

courts.[59] Here, I am not referring to the two-step inquiry established by *Saucier v. Katz*.[60] Instead, I argue that past judicial decisions exert two layers of pressure on qualified immunity decisions yet to be made, the first of which is rule-based constraint and the second of which is anticipatory analogical justification.

The primary rule of precedent that courts must apply and comply with is that qualified immunity must be granted unless the violation was clearly established in law.[61] This rule is accompanied by a constellation of rules to constrain and direct courts in looking for clearly established law. This chapter will examine three groups of constraining precedential rules. First, some rules restrict which court decisions can clearly establish the law in particular circuits.[62] Other rules restrict which facts can be considered[63] and how specific the details must be[64] when asking whether the law was clearly established so that this particular action under these particular circumstances constitutes a violation. Compliance with these rules requires no comparison of facts between the case establishing the precedential rule and the dispute at hand. The "stated terms"[65] of the rule are sufficient to determine whether or not the rule applies.

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[59] Their normative claims that rule-based reasoning is the only alternative to run-of-the-mill moral and empirical reasoning, of which analogical reasoning is a type, and that analogies "do not themselves rationally decide cases," are beyond the scope of this chapter. *Id.* at 66.

[60] 533 U.S. 194, 200 (2001) ("[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals.").

[61] *Id.* at 202.

[62] *See infra* Subsection III.A.

[63] *See infra* Subsection III.B.

[64] *See infra* Subsection III.C.

[65] ALEXANDER & SHERWIN, *supra* note 24, at 120.

Determining whether or not a rule applies is not the same as applying the rule itself.[66] In order to apply the Supreme Court's rules about which facts are relevant and how specific the comparison must be, courts must examine whether the law is "beyond debate" such that "any reasonable officer" would know that their conduct violated a statutory or constitutional right.[67] In the application of this rule, courts step from rule-based justification in which the terms of the rule capture its application into analogical justification where the facts of the source analog and dispute at hand are carefully compared. This second layer, once the previous rules have been observed, no longer asks whether the case *is* precedent. Instead, it asks whether the case *could be perceived* as precedent by a layperson—*any* layperson or *every* layperson. Recall Schauer's distinction between analogy and precedent which turned on the point at which the comparison of "facts and questions presented" and the point at which "anyone who acknowledges the constraints of precedent must be bound by such virtually identical precedents."[68] To distinguish between these two layers, I refer exclusively to precedential rules as precedent; to discuss whether a previous case could be perceived as precedent, I refer to the previous case as the analogical source or source analog. The question this chapter addresses is what this process of comparison looks like in language and at what point the comparison is so close as to be "virtually identical" and undeniable by any.

Distinguishing between cases that supply precedential rules and cases that serve as source analogs clarifies the distinction between the rules established by the Supreme Court and applied by lower courts and the factual analogies they construct. It also avoids the separate debate over

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[66] Consider one Sixth Circuit judge's statement that "the difficulty for all judges with qualified immunity has not been articulation of the rule, but rather the application of it." Flatford v. City of Monroe, 17 F.3d 162, 166 (6th Cir. 1994).
[67] Plumhoff v. Rickard, 572 U.S. 765, 778–79 (2014).
[68] Schauer, *supra* note 57, at v, xii–xiii.

whether precedential holdings can be avoided by making factual distinctions.[69] By pulling apart precedential rules and analogical justification, I shine a spotlight on qualified immunity's core failure: despite the constraining authority of precedential rules, the creative process of analogical construction defies constraint.

To demonstrate these claims, the chapter proceeds in three subsequent sections. Section II lays the groundwork for exploring precedential constraint and analogical construction by justifying the assertion that analogical argument is the core requirement of the Supreme Court's qualified immunity doctrine. Then, Section III explores constraints the Court has attempted to place on analogical construction in qualified immunity cases by establishing precedential rules. Finally, Section IV explores the constructive nature of analogical arguments to demonstrate the impossibility of strict constraint.

II. ANALOGICAL REQUIREMENT

Taking a closer look at the arguments in *Mullenix v. Luna* and *Kisela v. Hughes* illustrates and supports the functional distinction I argue the Court is making between precedential rules and analogical justification.

Mullenix, the earlier of the two decisions, insists that clearly established law is found in past cases. The opinion quotes another Supreme Court decision published in 2011: "We do not require a *case* directly on point, but existing *precedent* must have placed the statutory or constitutional question beyond debate."[70] Note that while the question itself, the right at issue, is

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[69] Related to this debate is the murky distinction between holding and dicta. *See* Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 219 n.2 (2010) (collecting arguments about the distinction between holding and dicta).

[70] Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam) (emphasis added) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)). Here, the Court is using precedent to refer to what I call the source analog.

grounded in constitutional or statutory law, in order for that law to be "clearly established," it must have been articulated and applied in an actual case.[71] General statements in the Constitution or in a statute are not sufficient to satisfy whether the law is clearly established.

The Court goes on to explain what it means for the question to have been placed "beyond debate":

> "We have repeatedly told courts . . . not to define clearly established law at a high level of generality." The dispositive question is "whether the violative nature of *particular* conduct is clearly established." This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition."[72]

This implies, without directly stating, that the previous case or analogical source should have articulated that a particular action or course of conduct violated the statutory or constitutional right. The conduct of the officer in the case under consideration should be substantially similar to the conduct of the officer in the case that established the law. But this quotation also makes clear that beyond similarity of conduct, the specific circumstances for that conduct are relevant to examining whether the conduct has been clearly established as a violation.

Justice Sonia Sotomayor's dissenting opinion in *Kisela v. Hughes* illustrates the crucial nature of analogous facts when determining whether the law is clearly established. Note that this is the dissent: every other justice disagreed with her except Justice Ruth Bader Ginsburg, who joined Justice Sotomayor's opinion. Justice Sotomayor cites two Ninth Circuit cases to support the assertion that Ninth Circuit law had "establish[ed] that, where, as here, an individual with a weapon

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[71] Judge E. Grady Jolly's dissent in the Fifth Circuit's denial for petition for rehearing en banc in *Mullenix* further underlines this insistence, although as a dissent, it has no precedential weight: "The only means for an officer to have [reasonable understanding of what the legal standards are that govern his conduct] is by notice of the law through the decisions of the courts." Luna v. Mullenix, 777 F.3d 221, 222 (5th Cir. 2014) (Jolly, J., dissenting).

[72] *Mullenix*, 136 S. Ct. at 308 (first quoting *al-Kidd*, 563 U.S. at 742; then quoting *id.*; and then quoting Brosseau v. Haugen, 543 U.S. 194, 198 (2004)).

poses no objective and immediate threat to officers or third parties," force is not permitted.[73] The per curiam opinion had already pointed out that one of those cases, *Harris v. Roderick,* was not factually analogous. Justice Sotomayor acknowledges but qualifies the distinction in two ways: In a footnote, she argues that the context in *Harris* was significantly more dangerous than the one faced by Officer Andrew Kisela, and consequently, he would have been on notice that if deadly force in a more dangerous situation violated the Fourth Amendment, deadly force in this situation would also be a violation. And second, she contends that because "the Ninth Circuit had [already] held that the officer unreasonably used force against a man who, although armed, made 'no threatening movement' or 'aggressive move of any kind,'" the rule itself was clearly established or obvious enough. Kisela ought to have known that deadly force in the particular situation he confronted would be a similar violation.[74] But the per curiam opinion focuses on which Ninth Circuit or Supreme Court case is most *factually analogous* to the actions of and circumstances encountered by Kisela. Because the case they determine to be most factually analogous found no Fourth Amendment violation, they conclude that a reasonable officer in Kisela's position could draw the same conclusion.[75] Judgment for the officer on the basis of qualified immunity should be granted. The Supreme Court has soundly rejected the application of an abstract or general rule unless the facts of the case or cases establishing that rule are also substantially similar to the facts of the dispute being litigated.

Analogy and the Supreme Court's articulation of the proper way to analyze clearly established law with respect to the particular context suggest that law is not always a fixed, abstract, definite rule to be applied to each legal dispute. It is a process of definition, of an inquiry

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[73] Kisela v. Hughes, 138 S. Ct. 1148, 1160 (2018) (Sotomayor, J., dissenting).
[74] *Id.* (quoting Harris v. Roderick, 126 F.3d 1189, 1203 (1997)).
[75] *Id.* at 1153 (per curiam).

undertaken, of a comparison of details and a weighing of the importance of those details. Its application is not an objective act of identification and categorization. Fourth Amendment excessive force cases exist in the "[a]mbiguity at the margins of usage,"[76] and according to the Court, precedential rules can constrain the inquiry but cannot establish the final outcome. In the end, the law can only be clearly established through factually analogous decisions.

III. CONSTRAINTS

This section explores the first layer of precedent in qualified immunity: precedential rules. These rules, established in Supreme Court cases, are binding upon all courts applying federal law. They govern all Fourth Amendment qualified immunity claims,[77] even if the case in dispute is factually distinguishable from the facts of the case in which the precedential rule was announced. In this section, I will focus on the constraints that guide and shape the substantive course of the argument rather than procedural rules and constraints.[78] These constraints fall into three categories:

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[76] *See* ALEXANDER & SHERWIN, *supra* note 24, at 20 (arguing that rule-governed legal reasoning is the predominant form of reasoning, sufficient for most disputes although there may be "[a]mbiguity at the margins of usage").

[77] Some of these rules apply across all qualified immunity claims, but not all. There are nuances in rules about which facts are relevant and how specific the similarities must be that are unique to Fourth Amendment claims.

[78] One example of a procedural constraint is the defendant's right to the defense even at the motion to dismiss stage, prior to discovery, and the right to interlocutory appeal. Under this procedural rule, the court must evaluate whether the law clearly established a statutory or constitutional violation of the nature alleged in the pleadings. If qualified immunity is granted, the judge will dismiss the case in favor of the defendant. If qualified immunity is not granted, the defendant can appeal immediately to the circuit court. Even if the defendant loses the defense at the pleading stage, the defendant can reraise the defense at every phase of litigation, including at summary judgment, at trial, and after a verdict has been issued. While I do not contend that these procedural rules have no impact on the construction of analogical argument, the Court has insisted that even before a fully developed factual record exists, qualified immunity is a legal question that, first, must be answered by the trier of law (the judge) and, second, can be answered by construing all facts in favor of the nonmoving party (the plaintiff or alleged victim). In other words, this procedural requirement, while it forces courts to engage in analogical justification and requires them to construe all facts in favor of the nonmoving party, may not significantly impact the substance or process of analogy.

which cases can be considered *sources for analogy*, which facts are *relevant* to the analogy, and how *specifically* the facts must be defined.

A. Sources for Analogy

Importantly, the Supreme Court has limited analogs to specific cases.[79] Decisions from just a handful of courts can be considered here, including U.S. Supreme Court cases and decisions from the appellate court in the relevant circuit, as well as "a consensus of cases of persuasive authority."[80] In other words, Tenth Circuit decisions do not govern Seventh Circuit decisions, but if a few other circuits have established the law clearly in the same way and no circuit has established contrary law, the Seventh Circuit can rely on that consensus. For most circuits, controlling authority (as opposed to persuasive authority) includes "judicial decisions of the United States Supreme Court, the United States Court of Appeals for the [relevant circuit], and the highest court of the relevant state."[81] Additionally, that decision must have been issued prior to the time

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[79] *See* Plumhoff v. Rickard, 572 U.S. 765, 778–79 (2014) ("[A] defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. In other words, existing precedent must have placed the statutory or constitutional question confronted by the official beyond debate." (internal quotations omitted)).

[80] Ashcroft v. al-Kidd, 563 U.S. 731, 746 (2011) (Kennedy, J., concurring) ("[Q]ualified immunity is lost when plaintiffs point either to cases of controlling authority in their jurisdiction at the time of the incident or to a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." (internal quotations omitted)). Curiously, the Court has begun to repeat a statement that may call into question whether "controlling authority in their jurisdiction" *can* establish the law clearly. In a 2015 qualified immunity decision, the Court stated that "even if 'a controlling circuit precedent could constitute clearly established federal law in these circumstances,' it does not do so here." City of San Francisco v. Sheehan, 575 U.S. 600, 614 (2015) (quoting Carroll v. Carman, 574 U.S. 13, 17 (2014)). This statement has been repeated by the Court in later qualified immunity decisions, including in *Kisela*, 138 S. Ct. at 1153. The language certainly leaves room for a future decision from the Court that only Supreme Court decisions can clearly establish law.

[81] Corbitt v. Vickers, 929 F.3d 1304, 1312 (11th Cir. 2019).

of the officer's actions in order to give notice that those actions would violate clearly established law.[82]

While there is scholarly debate about whether officers are actually guided by binding opinions in their jurisdiction,[83] this rule generally forces courts to examine only those cases that would be binding, ignoring unpublished opinions, opinions issued after the events, or decisions from other jurisdictions not supported or affirmed by other jurisdictions. Deviations from this constraint do not go unnoticed or unreversed. In *Hughes v. Kisela*, the Ninth Circuit majority opinion cites *Glenn v. Washington County* as "[t]he most analogous Ninth Circuit case."[84] The problem? *Glenn* was decided in 2011, and the incident at issue in *Hughes v. Kisela* occurred in 2010.[85] The dissent points out this glaring problem,[86] and the majority, rather than revising the opinion more substantially, issued a new opinion simply adding a footnote explaining that it "read *Glenn* as at least suggestive of the state of the clearly established law at the time it was decided" and that it "rel[ied] on *Glenn* as illustrative, not as indicative of the clearly established law in 2010."[87] The Supreme Court granted certiorari in the case, rebuking the Ninth Circuit for this error, and adding that "[t]he panel failed to explain the difference between 'illustrative' and 'indicative' precedent [in its amended footnote], and none is apparent."[88] Even Justice Sotomayor's dissent

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[82] Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam) ("Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct."); *al-Kidd*, 563 U.S. at 746 (Kennedy, J., concurring) ("[Q]ualified immunity is lost when plaintiffs point either to cases of controlling authority in their jurisdiction *at the time of the incident* . . . such that a reasonable officer could not have believed that his actions were lawful." (internal quotations omitted) (emphasis added)).
[83] Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 610–11 (2021).
[84] 862 F.3d 775, 783 (9th Cir. 2016) (citing Glenn v. Washington County, 673 F.3d 864 (9th Cir. 2011)).
[85] *Id.* at 778.
[86] *Id.* at 795 n.2 (Ikuta, J., dissenting).
[87] *Id.* at 783–84 n.2 (majority opinion).
[88] Kisela v. Hughes, 138 S. Ct. 1148, 1154 (2018) (per curiam).

makes no mention of *Glenn* and makes no attempt to defend the Ninth Circuit's use of the case. It would seem, then, that this precedential rule functions to constrain analogical justification, and the Court is quick to step in when the rule is unduly ignored.

However, the record in *Gravelet-Blondin v. Shelton* suggests that the lines of this constraint may be blurrier than the previous example suggests. In this case, the Ninth Circuit grapples with whether "[t]he right to be free from the application of non-trivial force for engaging in mere passive resistance was clearly established prior to 2008."[89] The panel concludes that a variety of Ninth Circuit cases, while not dealing with tasers, clearly established that nontrivial force such as beanbag projectiles and pepper spray constituted excessive force where resistance was minimal or passive.[90] It also argues that because several other circuits had, by the date of the incident at issue, declared the use of a taser capable of constituting excessive force, then a consensus exists sufficient to provide notice.[91] The dissent disagrees. Judge Jacqueline Nguyen argues that the Supreme Court's command to undertake a context-specific inquiry requires a more direct case on point—that "non-trivial force" is too general a consideration and that case law must have unequivocally addressed the use of a taser.[92] The law regarding the use of tasers was not clear in 2008, according to the dissent.

The Supreme Court denied certiorari without an explanation.[93] Denial of certiorari does not mean that the Court agrees with the justifications or the outcome. Yet it does suggest that the Ninth Circuit, in this case, does not deviate far enough from the constraints of the Court to merit even a summary reversal. Unlike in *Kisela*, the Ninth Circuit does not rely on a case decided after

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[89] Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1093 (9th Cir. 2013).
[90] *Id.*
[91] *Id.*
[92] *Id.* at 1104 (Nguyen, J., dissenting) ("All 'non-trivial force' is not created alike.").
[93] Shelton v. Gravelet-Blondin, 571 U.S. 1199 (2014) (mem.).

the incident; instead, it relies on earlier cases that establish the law more generally with respect to a variety of uses of nontrivial force. One might think that an objective constraint such as the date an opinion was issued should not raise complicated problems or present gray areas. A temporal sequence is clear—the date of the events in dispute is either before or after cited case law. But even this seemingly objective inquiry can overlap with other gray areas, such as the specificity with which analogical sources establish the law.

B. Relevant Facts: Officer Knowledge and *Graham* Factors

Although disputed facts must be interpreted in favor of the plaintiff or alleged victim (the nonmoving party), the events and context must be viewed from the officer's perspective: what did they know at the time of the incident? This constraint is similar to the reasonableness analysis for determining whether a Fourth Amendment violation occurred at all.[94] For example, the Supreme Court in *Mullenix v. Luna* focuses on the facts "known" to Officer Chadrin Mullenix at the time—that the victim, Israel Leija, was "reportedly intoxicated" and that "he twice told the dispatcher he had a gun and was prepared to use it" against officers unless the chase ceased.[95] It does not matter for the analysis whether he was actually intoxicated, nor does it matter that no gun was found after the chase was over and Leija was deceased.[96] This constraint limits the range of details judges can consider when comparing the dispute at hand with the source analog. It also means that certain factual disputes must be resolved in favor of the officer if, in the moment, the officer perceived events a certain way—even if that perception was mistaken.[97]

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[94] Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam) ("The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (quoting Graham v. Connor, 490 U.S. 386, 396 (1989))).
[95] 136 S. Ct. 305, 309, 312 (2015).
[96] Luna v. Mullenix, 773 F.3d 712, 716 (5th Cir. 2014).
[97] Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a

In addition to narrowing relevant facts to those known by the officer at the time of the incident, another implied constraint on material facts derives from the factors relevant to evaluating whether the amount of force used was reasonable. Factors are areas of inquiry that the law (either statutory or precedent) instructs courts to consider when making a particular decision; a list of factors can guide courts through considering all relevant data.[98] That factors used to evaluate reasonableness might constrain which facts are relevant follows logic—if "the law" instructs judges to evaluate particular factors, then whether the law was "clearly established" in a particular circumstance would likely hinge on those same factors. The Supreme Court's 1989 decision in *Graham v. Connor*, which interprets and clarifies *Tennessee v. Garner*, serves as the touchstone for Fourth Amendment excessive force analysis, instructing courts to evaluate the reasonableness of an officer's actions based on factors including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[99]

The Supreme Court's selection of facts when describing the situation facing Mullenix suggests that the factors listed above should constrain courts when selecting relevant details to

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mistake based on mixed questions of law and fact.'" (quoting Groh v. Ramirez, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting))).

[98] *Cf.* Withrow v. Williams, 507 U.S. 680, 693–94 (1993) (explaining that the voluntariness of a confession depends on a totality of circumstances and listing relevant factors, including "the crucial element of police coercion" as well as "the length of interrogation, its location, [and] its continuity," "the defendant's maturity, education, physical condition, and mental health," and whether the defendant was informed of their *Miranda* rights).

[99] 490 U.S. at 396 (citing Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)). Courts have widely determined the second factor, the threat posed to officers and others, to be the most important. *See, e.g.*, Hughes v. Kisela, 862 F.3d 775, 779 (9th Cir. 2016) ("The 'most important factor under *Graham* is whether the suspect posed an immediate threat to the safety of officers or third parties.'" (quoting George v. Morris, 736 F.3d 829, 838 (9th Cir. 2013)) (internal quotations omitted)); *see also* Emmett v. Armstrong, 973 F.3d 1127, 1136 (10th Cir. 2020) (stating that whether the suspect posed an immediate threat is "undoubtedly the most important" factor).

compare. It describes the particular circumstances "Mullenix confronted [as] a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road."[100] When concluding its analysis, the Court elaborates a little more about the dispositive facts resolving this case:

> The fact is that when Mullenix fired, he reasonably understood Leija to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and who was racing towards [an officer's] position.[101]

Consequently, when analogizing to previous cases in order to determine whether the law was clearly established in the context Mullenix faced, the Court seems to ask whether any court has previously found that officers facing similar threats or levels of threat violated the Fourth Amendment's prohibition against excessive force. The first two cases it considers are comparable because of the nature of the danger: high-speed car chases. They are the only other Fourth Amendment excessive force claims dealing with high-speed car chases ever taken up by the Supreme Court. The justification further emphasizes the need for comparable threats, explaining that no violation was found in either of the previous cases because the officer was faced with "a fugitive whose reckless driving 'posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase.'"[102] In comparing these two sets of circumstances, the Court concludes that facts relevant to these circumstances—how much of a threat officers and bystanders faced—are sufficiently similar that a reasonable officer would believe Mullenix's actions were reasonable.

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[100] *Mullenix*, 136 S. Ct. at 309.
[101] *Id.* at 312.
[102] *Id.* at 310 (quoting Scott v. Harris, 550 U.S. 372, 384 (2007)).

Here, the Court narrows the relevant details to (1) what Mullenix knew about and (2) how much of a danger Leija posed. This more subtle redirection of the lower court's justification is partly because the lower court did not rely exclusively or even substantially on any facts that were either unknown to Mullenix or fell outside of the factors deemed relevant. Rarely do courts rely exclusively on discrete facts. Nevertheless, I would argue that the Court does provide guidance on which facts matter and which facts the lower courts should have ignored altogether. For example, although the Fifth Circuit mentions that Leija's arrest warrant was due to failure to complete all community service hours and a new domestic violence complaint while he was on probation,[103] the Supreme Court ignores these details; they were unknown at the time to Mullenix, who simply knew there was a warrant for Leija's arrest and that he had fled when an officer attempted to arrest him. Similarly, the Court does not mention that after shooting Leija, the first thing Mullenix said was "How's that for proactive?"[104] According to the Fifth Circuit, "Mullenix had been in a counseling session earlier that same day, during which [his supervisor] intimated that Mullenix was not being proactive enough as a Trooper."[105] But the per curiam opinion ignores this detail even though both the Fifth Circuit and Justice Sotomayor's dissent see fit to include it. The officer's state of mind does not factor into the analysis.[106] Instead, when analogizing between the circumstances faced by Mullenix and those defined in the source analog, the Court examines the level of danger posed by the fugitive, drawing comparisons to another case in which the officer

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[103] Luna v. Mullenix, 773 F.3d 712, 715–16 (5th Cir. 2014).
[104] *Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting).
[105] *Luna*, 773 F.3d at 717.
[106] This may not be entirely true. Testimony that officers were concerned for the safety of others and believed the victim to be an imminent threat has been relevant to the Court's analysis. *See, e.g.*, *Mullenix*, 136 S. Ct. at 310 ("Mullenix explained, however, that he feared Leija might attempt to shoot at or run over the officers manning the spike strips. Mullenix also feared that even if Leija hit the spike strips, he might still be able to continue driving in the direction of other officers. The dissent ignores these interests.").

"shot a fleeing suspect out of fear that he endangered 'other officers on foot who [she] *believed* were in the immediate area,' 'the occupied vehicles in [his] path,' and 'any other citizens who *might* be in the area.'"[107] It goes on to cite *Plumhoff v. Rickard*, which held that "an officer acted reasonably when he fatally shot a fugitive who was 'intent on resuming' a chasee that 'pose[d] a deadly threat to others on the road.'"[108] In both of these cases, the Court determines that force was not excessive; past cases had not clearly established that Mullenix's actions violated Leija's Fourth Amendment rights. Qualified immunity must be granted, the Court concludes.[109] It is not relevant to the Court's analysis of clearly established law that Mullenix had never been trained to disable a car by shooting out the engine block, had never seen it done, and had never practiced it, and that his supervisor instructed him to wait to see if the spike strips worked.[110] There seems to be some constraint guiding courts to rely only upon those facts that relate to the *Graham* factors, ignoring others.

Justice Sotomayor's dissent actually does align with this constraint; she mentions Mullenix's "glib comment" about proactivity only because it is "revealing of the culture this Court's decision supports when it calls it reasonable—or even reasonably reasonable—to use deadly force for no discernible gain and over a supervisor's express order to 'stand by.'"[111] Courts do indeed mention details in the statement of facts or in other parts of the opinion that are not dispositive of the outcome. I am not suggesting that opinions in their entirety must ignore details

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[107] *Id.* at 309–10 (quoting Brosseau v. Haugen, 543 U.S. 194, 197 (2004)) (emphasis and alterations in *Mullenix* opinion).
[108] *Id.* at 310 (quoting Plumhoff v. Rickard, 134 S. Ct. 1012, 2022 (2014)).
[109] Readers may wonder if this means that the law had actually established that his actions did not violate the Fourth Amendment at all. But the Supreme Court declined to answer this question. *Id.* at 308 ("We address only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place.").
[110] *Id.* at 313 (Sotomayor, J., dissenting).
[111] *Id.* at 316.

not relevant to the *Graham* factors, or those of which the officer was unaware.[112] The Court does sometimes note when it shares details that cannot influence the analysis because they are irrelevant or because "officers knew none of this" at the time.[113]

I do not want to overstate this constraint. That the *Graham* factors are not exhaustive adds a layer of complication, and courts are instructed to consider the totality of the circumstances.[114] This suggests that even if a detail does not fit into the *Graham* factors, if a judge determines that it is an important piece of the totality of the circumstances (and consistent with what the officer knew at the time), then it may be considered as part of the opinion's analogical argument.

C. Specificity & Similarity

Another important constraint is the requirement that the source analog "squarely govern."[115] A reapplied general rule is not enough.[116] The facts of the case must be closely analogous. If the circumstances are materially different, or the potential threat posed by the victim is of a different nature or degree,[117] then the Court has been known to declare the case insufficiently similar to serve as notice.[118] When determining whether a case squarely governs, should judges

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[112] For example, the majority in *Kisela v. Hughes* includes in the statement of facts that "[a]fter the shooting, the officers discovered that Chadwick and Hughes were roommates, that Hughes had a history of mental illness, and that Hughes had been upset with Chadwick over a $20 debt. . . . Chadwick 'came home to find' Hughes 'somewhat distressed,' and Hughes was in the house holding Bunny [Chadwick's dog] 'in one hand and a kitchen knife in the other.' Hughes asked Chadwick if she 'wanted [her] to use the knife on the dog.' The officers knew none of this, though." 138 S. Ct. 1148, 1151 (2018) (per curiam).

[113] *Id.*

[114] *See* Graham v. Connor, 490 U.S. 386, 396 (1989).

[115] *Kisela*, 138 S. Ct. at 1153 ("[P]olice officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." (quoting *Mullenix*, 136 S. Ct. at 309)).

[116] *Id.* ("[T]he general rules set forth in '*Garner* and *Graham* do not by themselves create clearly established law.'" (quoting White v. Pauly, 137 S. Ct. 548, 552 (2017) (per curiam))).

[117] *See infra* Subsection IV.B.

[118] A reader would be forgiven for asking, at this point, *how* different must the circumstances or threat be in order to be considered "material," or to justify a pronouncement of insufficient similarity? The Court's answer to that question, as a general rule, is that if any reasonable officer

compare facts relevant to each factor, or should the factors themselves be compared? Take for instance whether the suspect poses an immediate threat. For a source analog to squarely govern, does the nature of the threat need to be the same or similar, with the same or similar number of bystanders and officers in danger?[119] Or does the threat level and immediacy need to be similar without the specific nature of the threat being the same?[120] To illustrate this uncertainty, just a year after *Mullenix*, Judge Marsha Berzon, writing a concurrence to the Ninth Circuit's denial for en banc rehearing in *Hughes v. Kisela*, describes the Supreme Court's analysis in *Mullenix* and explains why it is consistent with denying qualified immunity in the circumstances facing Kisela. "In the absence of a precedential case with precisely the same facts as the case before us, we must compare the specific *factors* before the responding officers."[121] Judge Berzon justifies this rule by arguing that the "Court did not limit its qualified immunity analysis in *Mullenix* to the question of whether *some* facts distinguished *Mullenix* from the Court's most analogous precedents involving excessive-force claims" but instead "compared the factors relevant to the excessive-force inquiry in each case."[122] Ultimately, the Supreme Court reversed the opinion with which Judge Berzon concurs, rebuking the Ninth Circuit for "read[ing] [case law] too broadly in deciding whether a new set of facts is governed by clearly established law."[123] Contrary to Judge Berzon's opinion,

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would distinguish the threat or circumstances, then the two are insufficiently similar to constitute notice. It is, admittedly, not a conclusive answer. See *infra* Section IV for more discussion.

[119] For example, a fugitive might be driving a car recklessly through a densely populated area popular with weekend pedestrians on a Saturday night.

[120] For example, a fugitive might be driving a car or might be on foot with a loaded gun and a high-capacity magazine.

[121] *Hughes*, 862 F.3d at 787 (Berzon, J., concurring) (emphasis in original).

[122] *Id.* at 787 n.1 (emphasis in original). Confusingly, two sentences later Judge Berzon restates her argument emphasizing a comparison of *facts*, not *factors*: "[T]he Court considered the specific facts of the case, compared those facts to the relevant facts in available precedential cases (with a heavy focus on the threat presented), and weighed whether those precedents" provided notice. *Id.*

[123] *Kisela*, 138 S. Ct. at 1154.

judges are constrained to analogizing facts, not factors, even if factors do help identify the most material facts for comparison.[124]

Furthermore, the Supreme Court's instructions about squarely governing source analogs have subtly raised the bar for clearly established law. The Court has moved from "whether it was clearly established law that 'a' reasonable officer should know" to one that "*every* reasonable official would have understood."[125] In the same decision, the Court adds that "existing precedent must have placed the statutory or constitutional question *beyond debate*."[126] This "new qualified immunity standard" makes it even more difficult for victims to obtain a remedy when their constitutional rights have been violated.[127] And while the Court has long declared that this doctrine protects "all but the plainly incompetent or those who knowingly violate the law,"[128] the shift from "a" to "every," and the addition of "beyond debate" constrain analogical justification even more

[124] *See supra* notes 98–99 and accompanying text (discussing the definition of factors and some examples). But see *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013), which concluded that the law on nontrivial force was clearly established even without taser-specific case law, a conclusion the Supreme Court chose not to review. 571 U.S. 1199 (2014) (mem.).

[125] Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1247 (2015) (first quoting Karen Blum et al., *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633, 657 (2013); and then quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (emphasis added by Reinhardt)). Please note that Judge Reinhardt was later credibly accused of sexually harassing his law clerks.

[126] *Id.* (quoting *al-Kidd*, 563 U.S. at 741) (emphasis added by Reinhardt).

[127] *Id.* at 1247–48.

[128] Malley v. Briggs, 475 U.S. 335, 341 (1986).

by requiring greater factual similarity for the law to have been clearly established[129] and by virtually eliminating opportunities to argue that the violation was obvious.[130]

This constraint on analogical justification applies to both the specificity with which the facts are described and the level of similarity necessary between source analog and the dispute at hand. Although the Court has been accused of requiring virtual identity between cases in order for the law to be clearly established,[131] the Court insists that indeed "[w]e do not require a case directly on point."[132] Nevertheless, "existing precedent must have placed the statutory or constitutional question beyond debate."[133] What exactly the Court imagines as the space between "directly on point" and not "beyond debate" is unclear. The Eleventh Circuit attempts to give color and clarity to this constraint by explaining that "officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases."[134]

The Ninth Circuit's use of *Harris v. Roderick* in its decision in *Kisela* is a more obvious deviation from this constraint, and one that the Supreme Court quickly addresses. *Harris v. Roderick* involved an FBI sniper who shot Kevin Harris in the back at Ruby Ridge in 1992.[135] Judge Sandra Segal Ikuta's Ninth Circuit dissent in *Kisela* argues that *Harris* could not reasonably be relied upon because of the dramatically different factual circumstances,[136] an argument with

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[129] Judge Carlton Reeves explains that "judges now spend an inordinate amount of time trying to discern whether the law was clearly established 'beyond debate' at the time the officer broke it. But it is a fool's errand to ask people who love to debate whether something is debatable." Jamison v. McClendon, 476 F. Supp. 3d 386, 405–06 (S.D. Miss. 2020).
[130] This is significant because an obvious violation does not require closely analogous case law that squarely governs. *See supra* Chapter 1, Section V.
[131] Kisela v. Hughes, 138 S. Ct. 1148, 1161 (2018) (Sotomayor, J., dissenting) ("The majority's decision . . . ultimately rests on a faulty premise: that those cases are not identical to this one.").
[132] Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).
[133] *Id.*
[134] Coffin v. Brandau, 642 F.3d 999, 1015 (11th Cir. 2011).
[135] 126 F.3d 1189, 1193 (9th Cir. 1997); *see also* discussion in Chapter 1, Section V.
[136] Hughes v. Kisela, 862 F.3d 775, 797 (9th Cir. 2016) (Ikuta, J., dissenting).

which the Supreme Court's per curiam opinion agrees.[137] The justification for relying on *Harris*, without any factual comparison, boils down to the general rule that excessive force cannot be used against someone who poses no immediate threat, even if they are armed.[138] This analysis cares little about the comparison of facts, and the Court is clear that it falls short of the requirement for a squarely governing case that places the issue beyond debate.

A much closer question, again in *Kisela*, is whether the Ninth Circuit's decision in *Deorle v. Rutherford* places the unconstitutionality of Kisela's actions beyond debate. The victim in *Deorle* was carrying what appeared to be a can of lighter fluid, complied with orders to discard other weapons (including an unloaded crossbow), and was shot with beanbag rounds without warning even though there were no bystanders in the vicinity.[139] The per curiam opinion compares these facts to the situation faced by Kisela, where Amy Hughes held a large kitchen knife and stood within six to eight feet of another woman. With this level of specificity in defining the facts, the Supreme Court finds too much dissimilarity to put every reasonable officer on notice and place the question beyond debate.[140] These distinctions may disappear at higher levels of generality, such as if one were to conclude that both victims were unarmed. Yet the Court rejects that general statement of the facts and also determines that not every reasonable officer would draw the conclusion that Hughes was unarmed given all the circumstances.

Drawing clear lines between "debatable" and "beyond debate" is difficult. But one possible permutation of this constraint seems to be whether there is another case, similarly debatable, that

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[137] Kisela v. Hughes, 138 S. Ct. 1148, 1154 (2018) (per curiam) ("Suffice it to say, a reasonable police officer could miss the connection between the situation confronting the sniper at Ruby Ridge and the situation confronting Kisela in Hughes' front yard.").
[138] *Id.* at 1160 (Sotomayor, J., dissenting).
[139] *Id.* at 1154 (per curiam); Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001).
[140] *Kisela*, 138 S. Ct. at 1154.

comes out the other way. In other words, if another analogical source case is available that absolves the officer of responsibility, either finding no violation or failing to answer that question at all, then the standard of "every reasonable officer" is harder to meet. This seemed to play out in *Kisela* as the judges and justices discuss another debatably similar case, *Blanford v. Sacramento County*, in which the Ninth Circuit found no excessive force violation. In that case, the victim was wandering the streets carrying a two-foot Civil War–era sword and did not respond to police orders to drop it.[141] (Is a twelve-inch kitchen knife more like lighter fluid or more like a two-foot Civil War sword?) The contrary analogies between these two cases expose an obvious but nonetheless crucial constraint on analogical argument in qualified immunity cases. Courts are not required to settle on the *most* analogous case and apply it accordingly. Instead, to deny qualified immunity, courts must identify an analogous case establishing a violation that every reasonable officer (excepting only the incompetent or those who willfully violate the law) would recognize as analogous. If the court cannot do that, either because no such case exists or because there is another case that could be thought analogous that comes out in favor of the officer, then qualified immunity must be granted. The constraint is unidirectional in favor of the officer defendant. The consequence of this constraint is that we actually do not need to determine whether a twelve-inch kitchen knife is more like lighter fluid than a two-foot Civil War sword. It is enough that a reasonable person, in the totality of the circumstances, might equate the kitchen knife to the sword for a court to be required to grant qualified immunity. This is a powerful constraint and one that may explain the Supreme Court's track record in excessive force qualified immunity cases. At least since *Harlow v. Fitzgerald* and the modern form of qualified immunity in 1982,[142] the Supreme Court has almost

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[141] *Id.* at 1153; Blanford v. Sacramento County, 406 F.3d 1110 (9th Cir. 2005).

[142] 457 U.S. 800 (1982). Scholars point to *Pierson v. Ray*, 386 U.S. 547, 557 (1967), as the inception of qualified immunity. But prior to 1982, the test for qualified immunity included

exclusively granted certiorari on Fourth Amendment excessive force cases where the circuit court *denied* qualified immunity in order to reverse or remand the question.[143] And for two of the cases the Supreme Court chose to hear in which the circuit court granted qualified immunity, it remanded with instructions to the lower court on other grounds without any discussion of whether qualified immunity was improperly granted.[144] In only one case in which the circuit court granted immunity did the Supreme Court vacate with instructions to reconsider, a decision issued in 2002 in light of *Hope v. Pelzer*.[145]

Perhaps these constraints do function to limit the "disciplined imagination"[146] of analogical justification. It's difficult to say whether lower courts are issuing more rulings in qualified immunity cases more consistent with the Court's position and fewer that are at odds with its instructions. But from the Supreme Court's perspective, some courts are still getting it wrong when

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subjective intent as a measure of good faith, which is no longer part of the doctrine. I chose to examine Fourth Amendment cases after *Harlow* because only then did the Court begin to ask whether there was any clearly established law that would give a reasonable government agent notice that their action violated a constitutional right, as is the focus of this study. In any event, whether measuring from *Harlow* or *Pierson*, the statistics are identical or nearly so.

[143] By my count, these cases include *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021) (per curiam); *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021) (per curiam); *Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam); *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam); *Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017) (Alito, J.); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam); *City of San Francisco v. Sheehan*, 575 U.S. 600 (2015) (Alito, J.); *Plumhoff v. Rickard*, 572 U.S. 765 (2012) (Alito, J.); *Scott v. Harris*, 550 U.S. 372 (2007) (Scalia, J.); *Muehler v. Mena*, 544 U.S. 93 (2005) (Rehnquist, CJ.); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam); and *Saucier v. Katz*, 533 U.S. 194 (2001) (Kennedy, J.).

[144] Lombardo v. St. Louis, 141 S. Ct. 2239, 2242 (2021) (reversing the Eighth Circuit for inadequate consideration of whether force used was excessive, but "express[ing] no view as to whether the officers used unconstitutionally excessive force or, if they did, whether Gilbert's right to be free of such force in these circumstances was clearly established at the time of his death"); Tolan v. Cotton, 572 U.S. 650, 660 (2014) (reversing the Fifth Circuit for failing to credit the nonmoving party's version of facts at summary judgment, but declining to "express a view as to whether Cotton's actions violated clearly established law").

[145] Vaughan v. Cox, 536 U.S. 953 (2002) (mem.) (citing Hope v. Pelzer, 536 U.S. 730 (2002)).

[146] Brewer, *supra* note 15, at 954.

it comes to excessive force claims, as can be inferred by two summary reversals in the 2021–2022 term in which the Court overturned circuit court decisions denying officers immunity.[147]

IV. CONSTRUCTION

Do the Court's rules successfully constrain analogical justification in qualified immunity decisions? And what can we learn about how analogy is constructed when comparing analogies by different judges with the same set of facts and source analogs? I use three cases, *Mullenix*, *Kisela*, and *Gravelet-Blondin*, to examine how the opinions construct analogy within the constraints laid down by the Court by integrating the case serving as analogical source and the present conflict. These opinions reveal two layers of construction: the construction of facts and the construction of analogy. I then discuss how the context of dialectic enriches and complicates the construction of both. By illuminating the creative and constructive process of justifying outcomes to audiences, I expose the core tension within qualified immunity between strict attempts to constrain and the constructive process of analogical justification. The conclusion of the dissertation offers suggestions for how this analysis might be used to revise the doctrine.

The construction of facts and analogy work simultaneously within the reciprocal, iterative process of justifying a judicial decision. They do not exist in a vacuum, and judges do not apply them one at a time. But for the sake of analysis, I will first introduce construction of facts and then construction of analogy. The third section explores the context of dialectical construction to offer concluding thoughts on how the elements function as part of a complex and evolving ecosystem of an opinion, and how they collectively resist constraint.

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[147] *See* Rivas-Villegas v. Cortesluna, 142 S. Ct. 4 (2021) (per curiam); City of Tahlequah v. Bond, 142 S. Ct. 9, 11 (2021) (per curiam).

A. Construction of Facts

Facts do not exist in a pure and objective state, waiting to be discovered and massaged according to the needs and goals of the rhetor.[148] The language used to present and explain facts in judicial justifications for analogies is inherently evaluative. Definition of the facts is both a persuasive technique and an inescapable requirement for linguistic descriptions of events. Consider, for example, the various descriptions of the object Hughes held that created the perception in Kisela's mind that she was a threat to Chadwick.[149] The Supreme Court per curiam opinion describes her as "holding a large kitchen knife" in its statement of facts;[150] then, when comparing this situation to Ninth Circuit case law, the per curiam opinion says she was "armed with a large knife" and refers to the knife as a "weapon."[151] Judge Ikuta's dissent at the Ninth Circuit simply labels it a "large knife" in the statement of facts[152] and argues that Hughes should be described as "knife-wielding" and "armed" with a "weapon" in the circumstances facing Kisela.[153] On the other hand, Justice Sotomayor's dissent describes Hughes as "[holding] a kitchen knife down at her side with the blade facing away from Chadwick" and describes the knife as "an everyday household item which can be used as a weapon but ordinarily is a tool for safe, benign

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[148] EDWARD SCHIAPPA, DEFINING REALITY: DEFINITIONS AND THE POLITICS OF MEANING 5 (2003) (disputing the commonly held belief that "facts involve objective reality and values reflect subjective human preferences").

[149] Other examples include construing Hughes's behavior as "erratic" or stating that she "ignored" orders to drop the knife compared with not "comply[ing]" with those orders. Similarly, descriptions of how far Hughes was from Chadwick vary, from five to eight feet away, to "stationary about six feet away," to "within striking distance." Justice Sotomayor discusses some of this conclusory (and pro-police) language in her dissent. *See* Kisela v. Hughes, 138 S. Ct. 1148, 1159–60 (2018) (Sotomayor, J., dissenting).

[150] *Id.* at 1150 (per curiam).

[151] *Id.* at 1154.

[152] Hughes v. Kisela, 862 F.3d 775, 792 (9th Cir. 2016) (Ikuta, J., dissenting).

[153] *Id.* at 794, 795, 796.

purposes."[154] And the Ninth Circuit majority opinion describes it as a "large kitchen knife," and one "which has a perfectly benign primary use."[155] Finally, the district court describes it as a twelve-inch kitchen knife.[156]

Each of these choices of language or labels imposes upon the situation a different frame or perspective from which the events are to be viewed. Certain words define the situation in a particular way, and all frames or definitions are selective, limiting, and value-laden. Chapter 1 offers a thorough discussion of framing and definition,[157] but of particular importance here is Zarefsky's argument that definition is not just about a word or concept but is about how one views an entire situation, or the frame of reference for interpreting events.[158] That frame, according to literary and rhetorical theorist Kenneth Burke, is selective, emphasizing certain features or details and deemphasizing others (or ignoring them altogether), an often unconscious process of selection that reflects personal or social values.[159]

Notably, the mandate to view the scene from the officer's perspective inclines the writer to construct facts from that point of view; when approaching the scene as a police officer rather than, for example, a neighbor walking a dog, the "fact" of a kitchen knife is more likely to be construed as a weapon than as the alternative interpretation that Hughes, engaged in food preparation, was suddenly called into the yard and neglected to put down the knife.

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[154] *Kisela*, 138 S. Ct. at 1155, 1159 (Sotomayor, J., dissenting) (quoting *Hughes*, 862 F.3d at 788 (Berzon, J., concurring)).
[155] *Hughes*, 862 F.3d at 778, 785 (majority opinion).
[156] Hughes v. Kisela, CV 11-366 TUC FRZ, 2013 WL 12188383, at *2 (D. Ariz. Nov. 28, 2016).
[157] *See supra* Chapter 1, Subsection II.B.
[158] David Zarefsky, *Definitions*, *in* ARGUMENT IN A TIME OF CHANGE: DEFINITIONS, FRAMEWORKS, AND CRITIQUES 1, 5 (James F. Klumpp ed., 1998).
[159] KENNETH BURKE, LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD 371 (1966); *see also* SCHIAPPA, *supra* note 148, at 114.

Active construction is even more present when the "fact" is a judgment-laden label for the purpose of drawing legal conclusions. Just as the opinions labeling Hughes's kitchen knife as a "weapon" frame that situation in a particular way, the Ninth Circuit majority opinion in *Gravelet-Blondin* frames the scene by describing the victim's behavior on the scene as "passive resistance."[160] On the very first page of the opinion when introducing the issue, it labels the Blondin as "a passive bystander"[161] engaged in "passive resistance" when confronting officers restraining his neighbor after they were called to the scene on a wellness check.[162] Without explicitly justifying its label, the court provides some additional factual details as support: "Blondin did not resist arrest or attempt to escape,"[163] and he "was perfectly passive, engaged in no resistance, and did nothing that could be deemed 'particularly bellicose,'" although he "did not retreat during this brief period" as he was ordered to do.[164] And once the "fact" of Blondin's passive resistance is constructed, the majority continues to build on that fact by discussing whether use of force against someone demonstrating a "total lack of resistance" has been clearly established as a violation.[165] Yet the dissenting opinion asserts that "the majority's factual characterization is somewhat misleading."[166] Judge Nguyen insists that, because Blondin exited his home and "demand[ed] to know what the officers were 'doing to Jack,'" he should not be labeled a passive bystander.[167] According to the dissent, noncompliance cannot be characterized as passive

[160] Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1093 (9th Cir. 2013).
[161] *Id.* at 1089.
[162] *Id.* at 1089 n.1.
[163] *Id.* at 1091.
[164] *Id.* at 1092.
[165] *Id.* at 1096.
[166] *Id.* at 1103 (Nguyen, J., dissenting).
[167] *Id.*

resistance because the *potential* for future active resistance remains and an officer in the moment cannot know which way the scene is going to unfold.[168]

If we understand judicial opinions as persuasive constructions, then Professor Edward Schiappa's scholarship on definition can inform our analysis of these choices of words and labels. Schiappa argues that "definitions are institutional, not brute, facts."[169] They do not exist in a vacuum but are constructed in a particular context for particular purposes. Beyond that, "almost all discourse is definitive discourse,"[170] and qualified immunity decisions are no different, as the examples above demonstrate. If Hughes's knife is a weapon, and if that definition wins out, then Kisela gets the protection of qualified immunity. On the other hand, if Blondin's behavior is defined as passive resistance, then Shelton does not get to claim qualified immunity. It may seem strange to use the words "persuade" or "justify" for these definitions because, as I described above, judges engage in very little explicit persuasion when applying these labels. But that's not because persuasion isn't at work.[171] Explicit justification for outcomes often happens at a higher level than justifying the individual words or labels used. The Ninth Circuit's opinion does not construct a methodical argument for why Blondin's behavior should be described as "passive resistance," though it does provide some explanation. Largely, the opinion relies upon the implicit assumption that the fact of his passivity cannot be challenged and moves on to justifying accountability for an officer in the situation as defined.

An argument about definition need not explicitly center the definitional dispute. If a rhetor can persuade an audience to accept a definition upon which the balance of the argument rests, then

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[168] *Id.* at 1104.
[169] SCHIAPPA, *supra* note 148, at xii.
[170] *Id.* at xi.
[171] *Id.* at 3 ("Describing definitions as 'rhetorically induced' calls attention to the persuasive processes that definitions inevitably involve.").

the work of persuasion has been done, and the Ninth Circuit can more easily move on to whether use of force against someone demonstrating a "total lack of resistance" has been clearly established as a violation.[172] But the dissent is not convinced. It does not accept the majority's definition of Blondin's behavior as "mere passive resistance." Schiappa calls this a "definitional rupture," which "requires that we address the issue of how words are defined."[173] Two common "theor[ies] of definition" are essence (what something *is*) and usage (how something is *used*).[174] We might be tempted to see the Ninth Circuit's argument as one of essence, that passive resistance and Blondin's behavior as such is simply a brute fact that, properly understood, can be described no other way if one is truly looking at the components of his behavior. And Judge Nguyen's response could be understood to respond in kind when she describes the "majority's factual characterization" as "misleading" because it "obscures the undisputed fact that Blondin repeatedly failed to comply with officer's orders to retreat."[175] But when we look at the fuller context of the qualified immunity argument in which the majority draws upon the label, there is an implied argument that because similar behavior has been labeled as minor or passive resistance by the Ninth Circuit, Blondin's behavior should also have that label.[176] This is not an argument about the essence of passive resistance, but an argument about *use* or how the court has used the term in the past. Yet the dissent does not engage with the majority in the same way. It does not draw upon

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[172] *Gravelet-Blondin*, 728 F.3d at 1096.
[173] SCHIAPPA, *supra* note 148, at 7, 9.
[174] *Id.* at 9.
[175] *Gravelet-Blondin*, 728 F.3d at 1103–04 (Nguyen, J., dissenting).
[176] *Id.* at 1094 (majority opinion) (comparing Blondin who "committed no act of resistance" to plaintiffs who were found to be engaged in minor or passive resistance by not complying with orders or even taking steps to actively defy an order not to exit a vehicle).

Ninth Circuit (or any other) case law, instead arguing that the majority has failed to properly weigh Blondin's noncompliant behavior from the perspective of an officer on the scene.[177]

Understanding that the purpose of qualified immunity is to ensure that the law has provided state actors with sufficient and clear notice that certain behaviors would violate constitutional rights, a theory of usage grounded in analogous case law would seem to offer stronger justification than one grounded in essence (one might even say common sense). But Schiappa argues that disputes over essence (or what he calls "real definitions") are "unproductive," and that arguments over usage ought to be understood and approached as "value propositions."[178] Is it possible to evaluate the Ninth Circuit majority's use of "passive resistance" not as a definitional argument about the term's fact of usage, but as a definitional argument about how it *should* be used, or whether it should be used to describe the circumstances here? I'm not suggesting that this might be a purely value-based argument in the sense that it relies on moral or ethical arguments to justify denying qualified immunity. Rather, I wonder what it might lend to our understanding about judicial justification in qualified immunity cases, resting on analogy, to approach such definitions as questions of values rather than (or in addition to) questions of fact. In other words, if a court with controlling authority has previously labeled certain behavior as passive resistance, then the behavior in question here, more passive than those already described, *should* also be considered passive resistance, not as a brute fact but as a value proposition.[179]

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[177] *Id.* at 1104 (Nguyen, J., dissenting).
[178] SCHIAPPA, *supra* note 148, at 10.
[179] *See Gravelet-Blondin*, 728 F.3d at 1094 ("In *Bryan*, after being pulled over for a seatbelt infraction and ordered to stay in the car, Bryan exited his car, acted belligerent, and ignored repeated orders to get back in the car. We interpreted even this behavior as 'passive' or 'minor' resistance, rather than 'truly active resistance.'" (quoting Bryan v. MacPherson, 630 F.3d 805, 822, 830 (9th Cir. 2010))).

Meanwhile, even though the dissent seems to be making an argument about the essence of Blondin's behavior and "passive resistance," its disagreement over the appropriate label can also be analyzed as a value proposition. Judge Nguyen disputes describing Blondin as a "'passive bystander' [because] he came out of his house in slippers, *demanding* to know what the officers were 'doing to Jack.'"[180] Here, she refers back to her earlier discussion of the facts and her suggestion that the majority mischaracterized the situation. Earlier in the dissent she focused on "how Blondin suddenly approached the scene" and used "accusatory phrasing" of "What are *you doing* to Jack?" instead of something like "Is everything alright, officers?"[181] The most charitable reading of the dissent is that because Blondin exited his house to find out what was happening, and because the phrasing of his question seemed to take a side in the situation, he cannot be considered a passive bystander who is simply observing. Further, because Blondin did not back away from the scene when ordered to do so, he did not demonstrate, as the majority described, a "total lack of resistance."[182] Judge Nguyen's determination to see the scene from the officer's point of view is both compliant with constraints put in place by the Supreme Court *and* the judge's personal value judgment about how much "accusatory phrasing" and disobedience a reasonable officer is required to endure from someone who presents no visible threat and is not suspected of committing a crime. The majority acknowledges that Blondin may have been belligerent but refers back to its own case law that found that belligerence and refusals to follow police orders do not justify the use of nontrivial force.[183] On the other hand, Judge Nguyen's argument is grounded in values rather than case law (or facts of usage, as Schiappa has called it). Her argument ignores

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[180] *Id.* at 1103 (Nguyen, J., dissenting) (quoting the majority opinion and the record developed by the district court).
[181] *Id.* (emphasis in original).
[182] *Id.* at 1103–04.
[183] *Id.* at 1094 (majority opinion) (citing *Bryan*, 630 F.3d at 822, 830).

how the Ninth Circuit has used the term "passive resistance" in the past but is instead grounded in a firm belief of how the Ninth Circuit *should* use the term.

Does this comparison suggest that Judge Nguyen's argument is informed by values while the majority's argument is informed by precedential rules and facts? Do the constraints put into place by the Supreme Court—namely, the requirement that a source analog put *every* reasonable officer on notice that an action in a particular context would violate a statutory or constitutional right—remove values from the argument over definition?

One way to answer that question is to say that the rules of qualified immunity already build in value judgments. By requiring that case law already place the question beyond debate, courts are not free to define terms and categories differently or more expansively than the previous case already did. This restricts future value judgments (at least where qualified immunity is at issue) and implicitly prioritizes consistency and stability in the law over its development and progression. And by requiring that the events in dispute be viewed from the perspective of a reasonable officer on the scene, there is no room for value judgments about whose point of view matters most.[184] Taken together, these two constraints inscribe into the rules an underlying preference for valuing law enforcement and their on-the-job judgment calls over the constitutional rights of civilians. This is especially true given that *even if* the court determines that a constitutional violation took place, protection for officers still matters more than protection for constitutional rights of civilians if that violation was not clearly established.

The Ninth Circuit is making a value-based proposition by selecting a more general description for behavior in defining Blondin's conduct as "passive resistance." Rather than

[184] This is slightly complicated by the rule that courts must, at the motion to dismiss stage, assume the facts pled are true and, at summary judgment, resolve all factual disputes in favor of the nonmoving party.

deciding that a source analog must have found a violation where someone exited their home to interrupt police action and find out what was happening, and then refused to return to their home, the Ninth Circuit asks whether nontrivial force used on those engaged in passive resistance has been clearly established as a constitutional violation.[185] By framing the behavior more generally, the Ninth Circuit has more case law to review and more opportunities to find the violation clearly established.[186] And although the dissent does not provide an alternative wording for the question, it does dispute this framing as "contraven[ing] the Supreme Court's instruction that the qualified immunity inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'"[187] Although it seems that Judge Nguyen takes more issue with the label of "non-trivial force" than "passive bystander" as a general proposition,[188] it could certainly be argued that the descriptions "passive bystander" and "passive resistance" are too vague to expect every reasonable officer to evaluate whether behavior constitutes resistance and whether it is passive, in light of all available source analogs or case law.

Additionally, these value-based judgments about language and definition are made by and through constructing a coherent reading and interpretation of previous texts or cases and the text of the dispute at hand, including the record previously developed at the district court, with attention to the rules of civil procedure and qualified immunity. "Passive bystander" and "passive

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[185] *Gravelet-Blondin*, 728 F.3d at 1089 ("We must decide whether it was clearly established as of 2008 that the use of a taser in dart mode *against a passive bystander* amounts to unconstitutionally excessive force within the meaning of the Fourth Amendment." (emphasis added)).

[186] Of course, more case law does not always necessarily mean higher chances of success for the victim or plaintiff in these cases. *See supra* notes 141–144 and accompanying text. But in this case, framing the behavior at a higher level of generality certainly played out in the victim's rather than the police officer's favor.

[187] *Gravelet-Blondin*, 728 F.3d at 1103 (Nguyen, J., dissenting) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).

[188] *Id.* (citing the same cases relied upon by the majority but framing the question in terms of specific force (namely, pepperball projectiles and pepper spray) rather than "non-trivial force").

resistance" are adopted by the Ninth Circuit in *Gravelet-Blondin* in part because previous Ninth Circuit decisions constructed those terms and the substantive content of their legal definition in the contexts of those particular cases.

By examining the definition of facts as value-based arguments rather than objective disagreements over essence, we may begin to understand why this constrained and narrow doctrine remains one that is so hotly contested and frequently appealed. If the very terms used to describe events are value judgments and constructed as responses to source analogs, the potential for different outcomes is enormous. The point of my analysis is not discovering which interpretation or approach is the *correct* one. This is especially important to clarify because, while the Supreme Court denied certiorari in this case, that doesn't necessarily mean it endorsed the outcome or the justifications laid out by the majority.[189] I am not presenting the Ninth Circuit's justification here as an exemplary model of analogical justification; instead, it serves as a contrast to the dissent and

[189] On the other hand, some might point to the conclusion of *Gravelet-Blondin v. Shelton*'s litigation as evidence that the dissent had it right. This is also unsupported. The district court originally granted Officer Shelton's motion for summary judgment based on a qualified immunity defense. *See id.* at 1090 (majority opinion). But because the Ninth Circuit denied Officer Shelton's qualified immunity defense, reversing the district court, and the Supreme Court refused to grant certiorari and rehear the case, the suit ended up going to trial in the Western District of Washington. Ultimately, after considering all of the evidence at trial, including witness testimony and video recordings, the jury concluded that in fact Officer Shelton did not violate Blondin's constitutional rights by tasing him. *See* Gravelet-Blondin v. Shelton, 665 F. App'x 603, 605 (9th Cir. 2016). How is it possible that the Ninth Circuit can conclude that, on the record, a clearly established constitutional right was violated of which every reasonable officer would have had notice (the standard for denying qualified immunity), but a jury can conclude that in fact no constitutional violation occurred? Largely, this is due to the fact that at summary judgment, the trier of law (the judge) must resolve all factual disputes in favor of the nonmoving party (in this case, the plaintiff). *See id.* But a jury is asked to make its own determinations about credibility and which evidence to believe. Additionally, while qualified immunity is intended to protect state agents from both liability and "even the burdens of litigation," Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam), a jury verdict in favor of the defendants here is not necessarily a sign that qualified immunity should have protected the officer long before the factual record was fully developed and the trier of fact had an opportunity to weigh the credibility of evidence and testimony.

demonstrates why, despite the constraints put in place by the Court, such profound disputes remain over when to deny qualified immunity.

Because the construction and interpretation of definitional labels and terms for past contested events is a rhetorical, persuasive act, both the labeling and the interpretation of those labels are creative and subjective acts. Another detail that plays a part in the analogical justification of judges writing opinions in *Hughes v. Kisela* is the amount of time it took for the events to unfold. Temporal duration can be labeled with a number—often seen as objective and easily compared. Yet the time it took for Kisela to fire his weapon once he arrived at Hughes's home is variously described as 30–45 seconds,[190] less than a minute,[191] and "mere seconds."[192] Some of these descriptions may appear more precise and hence more objective than others, with "mere seconds" standing out as having the clearest aim toward persuasion. And yet the use of those labels, even those that appear more objective, reveals persuasive influence. Judge Berzon uses the first description, 30–45 seconds, to contrast how quickly "Hughes was gunned down" from the time Kisela arrived on the scene compared to the time in the most analogous case according to those opinions wishing to grant qualified immunity, *Blanford v. Sacramento County*. She argues that the two cases are clearly distinguishable because Kisela opened fire 30–45 seconds after arriving on the scene compared to "repeated police commands over the course of roughly two minutes" in *Blanford*.[193] Earlier, Judge Berzon also articulates the situation faced by Kisela in other language, painting a stark contrast to the events in *Blanford*: "[W]hen [Hughes] does not immediately comply

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[190] Hughes v. Kisela, 862 F.3d 775, 791 (9th Cir. 2016) (Berzon, J., concurring).
[191] Kisela v. Hughes, 138 S. Ct. 1148, 1151 (2018) (per curiam) (retelling the factual events leading to this appeal).
[192] *Id.* at 1153 (explaining that this is "far from an obvious case" because "Kisela had mere seconds to assess the potential danger to Chadwick").
[193] *Hughes*, 862 F.3d at 791 (Berzon, J., concurring).

[with orders to drop the knife], the policeman opens fire within a few seconds and shoots the individual four times."[194] The temporal labels themselves in their connotative power are tools of persuasion. How they are employed, as in Judge Berzon's opinion, adds another persuasive layer, particularly when comparing to or distinguishing from other sets of facts.[195]

The definition of facts embodies judgments about the significance of those facts, as in "passive bystander." But as in the example from *Kisela* showing how time was described by various judges, the label or definition is both significant for its comparative power and for its suggestive power with respect to the abstract factors *Graham* instituted and courts continue to emphasize in excessive force cases. For example, Judge Ikuta distinguishes Kisela's situation from the most analogous case according to those wanting to deny qualified immunity: "In stark contrast to *Deorle*, Officer Kisela was present at the scene for only a matter of seconds, while the officer in *Deorle* had been on the scene for forty minutes and had observed the victim 'for about five to ten minutes from the cover of some trees.'"[196] A pure comparison of time shows a wide gap between "a matter of seconds" (really, somewhere between 30 and 45 seconds) and the first unit of comparison, 40 minutes; the comparison with the second unit, 5–10 minutes, is less stark but still distinguishable. How close is close enough? Judge Ikuta seems to draw a line somewhere between 2 minutes and 5 minutes, since she insists the distinction in *Blanford* is irrelevant[197] while

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[194] *Id.* at 787.

[195] And we cannot forget that judges are relying on past judicial opinions for the comparable "set of facts." These past opinions are also subject to this same reality—that words are chosen and situations are described through constructive processes intent on justification.

[196] *Hughes*, 862 F.3d at 795 (Ikuta, J., dissenting) (quoting Deorle v. Rutherford, 272 F.3d 1272, 1277, 1281–82 (9th Cir. 2001)).

[197] *Id.* at 798 ("[T]he concurrence points to distinctions between the facts of this case and those in *Blanford*, such as . . . the length of the encounter . . . . Such distinctions might be more compelling if a federal judge could descend as a *deus ex machina* to whisper in the ears of officers on the scene about the application of precedent before a shot is even fired.").

the distinction in *Deorle* is material. It's notable that when comparing Kisela's situation with a case Judge Ikuta wishes to distinguish, Kisela had only "a matter of seconds." But when wishing to compare and gloss over distinctions, Kisela had 45 seconds, which appears much closer to two minutes than "a matter of seconds." Even setting aside those argumentative choices, drawing a line between 2 and 5 minutes is arbitrary, especially when the other circumstances are different.

We might also wonder why, as Judge Ikuta's comparison and distinction implies, more time on the scene renders a shooting more clearly governed by law (and consequently less reasonable), while less time suggests that the action taken by the officer was less clearly governed by law. Judge Ikuta offers some justification for this; in addition to brushing aside distinctions between *Blanford* and the case at hand as only those apparent to judges, she argues that "in the world in which we actually live, officers must make split-second decisions regarding the use of force."[198] This implies that officers who respond more quickly to situations with force, even deadly force, should be granted more leeway and discretion than those with more time to ponder the relevant source analogs. Judge Ikuta also employs the briefness of time in which Kisela acted to explain why deadly force rather than a less-lethal form of force was justified, or at least not a clear violation. She argues that because of a chain-link fence and locked gate separating Kisela from Hughes, and because Hughes stood so close to Chadwick ("within striking distance"), Kisela had "insufficient time to transition from his firearm to his taser."[199] Notice how Judge Ikuta selects and depicts details to construct a particular scenario. But Justice Sotomayor's dissent calls this narrative into question. Perhaps a fast-acting police officer should not always be granted discretion and presumed reasonable. "The only reason," Justice Sotomayor argues, "this case unfolded in

[198] *Id.*
[199] *Id.* at 792.

such an abrupt timeframe is because Kisela, unlike his fellow officer, showed no interest in trying to talk further to Hughes or use a 'lesser means' of force." Contrary to Judge Ikuta's argument, Justice Sotomayor sees the abrupt escalation and resolution of the situation as a sign of Kisela's unreasonable behavior, and she contrasts it with the behavior of the other officers on the scene, both of whom declined to shoot.[200] But would *every* reasonable officer in these circumstances, without a squarely governing source analog, know that shooting under these circumstances would violate the Fourth Amendment rights of the victim? The Supreme Court says no.

By understanding that even the words and definitions chosen by judges in opinions require value-laden judgments and constructive synthesis of details, we can appreciate the creative process that analogical justification requires. Language choices frame situations, and those frames subjectively emphasize and deemphasize certain details, highlighting some and obscuring others. When even the smallest units of comparison are subject to values and judgment calls, it is easier to see the opinion in its totality as a rhetorical construction.

B. Construction of Analogy

This close review of argument and justification in the three cases suggests that the articulation of circumstances, selection and emphasis of material facts, and description of analogous cases are all active choices of construction, not passive discovery of similarity. But perhaps the categories of relevant facts established by the *Graham* factors[201] provide a more objective, passive standard by which to compare the present dispute and potential source analogs.

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[200] Kisela v. Hughes, 138 S. Ct. 1148, 1157 (2018) (Sotomayor, J., dissenting) ("[O]ne of [the other officers] explained that he was inclined to use 'some of the lesser means' than shooting, including verbal commands, because he believed there was time.").

[201] Recall that the *Graham* factors include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham v. Connor, 490 U.S. 386, 396 (1989) (citing Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)).

It's not as simple as that, for at least two reasons. First, the *Graham* factors are not exhaustive.[202] Judges should and do consider "the facts and circumstances of each particular case" and "the totality of the circumstances.[203] And second, even if the factors were exhaustive, the Supreme Court has warned courts that general rule statements from *Graham* and other cases cannot satisfy qualified immunity's requirement for clearly established law.[204]

Judge Berzon's concurrence in the Ninth Circuit's decision in *Kisela* provides an example for how judges draw on both the particulars in the dispute at hand and the particulars in past cases to articulate the clearly established rules that should guide officer behavior in those specific circumstances.[205] Responding to the dissent's criticism that the majority relied on too general a statement of the law—the "right to be free of excessive force"—arguing that "[t]he inverse of a high level of generality is not, as the dissent suggests, a previous case with facts identical [to] those in the instant case."[206] And because an identical case is neither necessary nor possible (or at least highly improbable), "we must compare the specific *factors* before the responding officers with those in other cases to determine whether those cases would have put a reasonable officer on notice

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[202] *See id.* ("[The reasonableness test's] proper application requires careful attention to the *facts and circumstances of each particular case, including* . . . whether the suspect poses an immediate threat"; "the question is 'whether the *totality of the circumstances* justifie[s] a particular . . . seizure.'" (quoting *Garner*, 471 U.S. at 8–9) (emphasis added)).

[203] *Id.*

[204] *See* Mullenix v. Luna, 136 S. Ct. 305, 309 (2015) (per curiam) (reversing the Ninth Circuit and explaining that the Court had already rejected reliance on *Tennessee v. Garner*, the foundational case interpreted by *Graham v. Connor*, for the rule that "deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others" because reliance on that "general" test was "mistaken" (first quoting Haugen v. Brosseau, 339 F.3d 857, 873 (9th Cir. 2003); and then quoting Brosseau v. Haugen, 543 U.S. 194, 199 (2004) (per curiam))).

[205] Similar to my use of *Gravelet-Blondin v. Shelton*, I do not present Judge Berzon's opinions as a model of correctness; in the end, she lost the argument. Nevertheless, her opinion demonstrates a process of justification that closely compares the source analog and the dispute at hand filtered through factors derived from the particulars of both as well as *Graham*'s general guidance.

[206] Hughes v. Kisela, 862 F.3d 775, 786 (9th Cir. 2016) (Berzon, J., concurring).

that his actions were unlawful."[207] But instead of immediately evaluating the factors facing Kisela, Judge Berzon first conducts a review of Ninth Circuit case law. She appears to be presuming that the factors facing Kisela will be evident to readers and immediately recognizable in the cases she examines. Nevertheless, the starting point in Judge Berzon's justificatory synthesis of present case and source analogs begins with "the specific factors before" Kisela.

Judge Berzon goes on to review the actions taken by officers in their particular circumstances in Ninth Circuit cases—both those finding constitutional violations and those deemed to have not violated the Fourth Amendment. Her description of the cases focuses on the threat posed by the victim.[208] More specifically, the cases she reviews include:

- a victim who was armed with a gun but who did not point that gun at officers and who had his back to the police when he was shot;[209]
- another victim who was armed but did not make any threatening or aggressive movements in the moment (despite being suspected of killing a federal agent);[210]
- "an arrestee [who] never attacked or even threatened to attack a police officer";[211]
- an unarmed victim who had and discarded weapons, made verbal threats, but who had committed no serious offense, was not a flight risk, and was given no warning that force would be used;[212] and
- an armed and mentally disturbed individual refusing to comply with police orders and attempting to enter a residential building, and who was warned that force would be used.[213]

These descriptions focus on the details that are at issue in *Kisela*: whether Hughes was "armed," whether she was close enough to Chadwick to be considered an imminent threat despite not making any aggressive movements in the moment and never having made verbal threats, and whether she

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[207] *Id.* at 787.
[208] *Id.* at 787–88.
[209] *Id.* at 787 (citing Curnow v. Ridgecrest Police, 952 F.2d 321, 325 (9th Cir. 1991)).
[210] *Id.* (citing Harris v. Roderick, 126 F.3d 1189, 1203 (9th Cir. 1997)).
[211] *Id.* (citing Smith v. City of Hemet, 394 F.3d 689, 703–04 (9th Cir. 2005) (en banc)).
[212] *Id.* at 787–88 (citing Deorle v. Rutherford, 272 F.3d 1272, 1277, 1285 (9th Cir. 2001)).
[213] *Id.* (citing Blanford v. Sacramento City, 406 F.3d 1110, 1113, 1116–19 (9th Cir. 2005)).

was given a sufficient warning that lethal force would be used. The descriptions of potential source analogs resonate with similarity to the description of the facts earlier in the opinion and in the majority's opinion.

Judge Berzon concludes after her exposition of case law:

> Taken together, our precedents as of May 21, 2010 [the day Kisela shot Hughes] suggest several factors critical to the constitutional analysis. These include the severity of the underlying crime, if any; whether the individual against whom force is used was armed, and if so, whether her movements suggested an immediate threat; whether a warning has been issued, if practicable, and particularly whether she has been warned of the imminent use of a significant degree of force; whether she complies with such warnings, ignores them, or actively flaunts them; whether she is mentally or emotionally disturbed; and whether she makes any threatening statements. None of these factors is dispositive, but each is relevant.[214]

These factors are not rules discovered by Judge Berzon to be applied to *Kisela* in an abstract way but are the product of a reciprocal back-and-forth movement between the specifics in the disputed case, the general guidelines laid out by *Graham* and *Garner*, and previously decided cases in the Ninth Circuit.

But in her application of these "suggest[ed] factors," Judge Berzon also does not engage a one-way, point-to-point application of the factors. After listing the factors, she begins by "turn[ing] . . . to the facts of this case," facts now selected and described in the shadow of the critical factors Judge Berzon has just listed. Judge Berzon organizes the particular details of *Kisela* in order of the factors, beginning with the lack of underlying crime (officers were responding to a "check welfare" call, not a report of a crime).[215] She then discusses the kitchen knife Hughes held when police arrived, followed by her behavior: reportedly "composed and content" when police arrived, she engaged in conversation and was possibly "unfocused" but "not appear[ing] angry."[216]

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[214] *Id.* at 788.
[215] *Id.*
[216] *Id.*

Judge Berzon continues with additional details related to whether Hughes's behavior "suggested an immediate threat," including that "police did not observe Hughes making any verbal threats toward Chadwick or the police."[217] This detail is notable because it is the observation of an absence of something—and notably an absence of something that was present in one Ninth Circuit case which nevertheless found that the use of force was excessive and held officers accountable.[218] It is also the source analog upon which Judge Berzon will primarily rely later on in her analysis;[219] even when appearing simply to discuss only the facts in the case at hand, she constructs a persuasive argument by drawing upon other tools and resources. Finally, Judge Berzon concludes her review of the facts by explaining that while the police ordered Hughes to drop the knife, it is unclear from the evidence whether she heard them, and she was never warned that they would shoot if she did not obey orders.[220]

Then Judge Berzon moves more explicitly to measuring these facts and previous decisions together: "On these facts . . . no officer could have reasonably believed *in light of our precedents* that Hughes's conduct justified the use of lethal force."[221] She points to the narrow holding in *Deorle*,[222] followed by an explicit comparison between the facts in *Deorle* and those in *Kisela*.[223]

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[217] *Id.*
[218] *Id.* at 789.
[219] *See Id.*
[220] *Id.* at 788.
[221] *Id.* at 789 (emphasis added).
[222] *Id.* ("As we held in *Deorle*, '[e]very police officer should know' that it is objectively unreasonable to shoot an unarmed, mentally disturbed person who has been given no warning about the imminent use of serious force, poses no risk of flight, and presents no objective imminent threat to the safety of others—even where that person had committed a minor criminal offense and threatened to assault a police officer, neither of which Hughes had done." (quoting Deorle v. Rutherford, 272 F.3d 1272, 1285 (9th Cir. 2001))).
[223] *Id.* ("It is true that Hughes, unlike Deorle, held a kitchen knife. But it was down at her side, and she did not verbally threaten to 'kick [a police officer's] ass' as Deorle did, nor did police have any basis for thinking she had committed a crime." (quoting *Deorle*, 272 F.3d at 1277)).

Judge Berzon saves one element to address last: Hughes's "erratic behavior" and the possibility of mental instability. She introduces this section by explicitly gesturing to Judge Ikuta's emphasis and its crucial role in "the dissent's formulation of what it considers to be the relevant alleged constitutional right in this case."[224] Judge Ikuta's dissent does indeed criticize the majority opinion for not "consider[ing] the alleged violation as: shooting a reportedly erratic, knife-wielding woman who comes within striking distance of a third party, ignores multiple orders to drop her weapon, and cannot otherwise be timely subdued due to a physical barrier separating her from the officer."[225] Where does this label originate?

In fact, the district court only uses a form of the term "erratic" twice, both times in the statement of facts. The first is to explain how the situation arose: someone reported to the police that they had seen a woman "with [a] knife and reportedly screaming and *acting erratically*."[226] Then officers (including Kisela) observed a woman "who matched the description of the woman who was reported to be *acting erratically*, come out of the front door of the residence carrying a knife in her hand and walking in the direction of the yard where Chadwick was."[227] Neither of these uses are in quotation marks, suggesting that it is a label adopted by the district court rather than a term used by people reporting Hughes's behavior to police or recorded in any incident reports. Yet all three Ninth Circuit opinions pick up on the phrasing and use some version of "erratic" over twenty times. Notably, the Ninth Circuit opinions in *Blanford v. Sacramento County* and *Deorle v. Rutherford*, the cases primarily analogized by the dissent and the concurrence,

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[224] *Id.*
[225] *Id.* at 794 (Ikuta, J., dissenting).
[226] Hughes v. Kisela, CV 11-366 TUC FRZ, 2013 WL 12188383, at *1 (D. Ariz. Nov. 28, 2016) (emphasis added).
[227] *Id.* at *1 (emphasis added).

respectively, also use a version of "erratic" to describe the behavior of the victim.[228] Implicitly, both opinions arguing for and against the protection of qualified immunity seek to define Hughes's behavior in a way that aligns it (and therefore the reasonableness of a lethal response) to their chosen source analog.

Judge Ikuta uses the term to emphasize the threatening situation into which officers were inserting themselves. Her dissenting opinion attaches the reports of erratic behavior with the fact that Hughes was holding a knife, transforming her into a "knife-wielding woman . . . within striking distance."[229] In doing so, it elides what the officers heard secondhand in reports and what the officers saw themselves, conveniently erasing the calm behavior they observed. In fact, although—or perhaps *because*—the majority uses the report of Hughes's erratic behavior to compare her to the victim in *Deorle*,[230] the dissent uses Hughes's reportedly erratic behavior to distinguish Kisela's circumstances from those in *Deorle*, subtly questioning the use of that label in the majority's source analog. "Shooting an armed, unresponsive, and reportedly erratic woman as she approaches a third party is materially different from shooting an unarmed, *largely compliant* man as he approaches an officer with a clear line of retreat."[231] Here, erratic behavior simply disappears from *Deorle*'s set of facts, evaporating between Deorle's being unarmed (compared to Hughes's

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[228] Blanford v. Sacramento County, 406 F.3d 1110, 1112 (9th Cir. 2005) (describing Blanford as "wearing a ski mask and carrying a sword [while] walking through a suburban residential neighborhood outside Sacramento and *behaving erratically*" (emphasis added)); *Deorle*, 272 F.3d at 1275–76 (describing Deorle as "upset at being diagnosed with Hepatitis C, and having consumed a half-pint of vodka and some Interferon, his prescription medication, began *behaving erratically*" (emphasis added)).

[229] *Hughes*, 862 F.3d at 794 (Ikuta, J., dissenting).

[230] *Id.* at 784 (majority opinion) ("*Deorle* also offers similar facts, though the plaintiff in *Deorle* was acting far more strangely than Ms. Hughes. In *Deorle*, an officer responded to a call about an individual who was drunk and behaving erratically. . . . As in this case, police in *Deorle* were at the scene to investigate peculiar behavior." (internal citations omitted)).

[231] *Id.* at 795 (Ikuta, J., dissenting).

being "armed") and largely compliant (compared to Hughes's unresponsiveness). Perhaps compliance is meant to contrast both unresponsiveness and erratic behavior, or perhaps not. Either way, it drops out of the dissent's comparison.

How does Judge Berzon respond to the dissent's definition? Rather than disputing that Hughes's behavior was reported to have been erratic, she connects it to the possibility of mental illness, disconnecting it from its threatening nature. This is in stark contrast to Judge Ikuta's attempt to dispute the parallel descriptions of "erratic behavior" between Deorle and Hughes. Rather than negating the use of the term in one situation, Judge Berzon associates erratic behavior and the possibility of "mental instability."[232] In fact, she attempts to convince her readers to take that connection for granted by writing as if responding to the point (even though it was a point that the dissent, the focus of her previous paragraph, did not make): "It is certainly true that Hughes's earlier, reportedly 'erratic,' behavior toward a tree could be construed as an indicator of mental instability."[233] By treating this connection is a foregone conclusion, she does not have to defend it and can instead use the connection to modify the legal implications of Hughes's reportedly erratic behavior in hacking at a tree. While the dissent casts the behavior as aggravating the threatening circumstance, Judge Berzon treats it as mitigating: "[T]here is no basis in our case law for treating mental illness as an *aggravating* factor in evaluating the reasonableness of force employed. To the contrary, we have held that the apparent mental illness of a suspect *weighs, if anything, in the opposite direction*."[234] By understanding reports of erratic behavior as evidence of mental instability rather than threat escalation, Judge Berzon is able both to tie this dispute more closely

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[232] *Id.* at 789 (Berzon, J., concurring).
[233] *Id.*
[234] *Id.* (emphasis added). The majority makes a similar argument—that mental illness should "diminish the governmental interest in using deadly force." *Id.* at 781 (majority opinion).

to source analogs finding a constitutional violation (and clearly establishing the law) *and* to suggest that the dissent would violate binding case law prohibiting "two tracks of excessive force analysis, one for the mentally ill and one for serious criminals."[235]

I have engaged in this extended analysis, drawing on both definition and reciprocal construction between texts in order to illustrate the interplay between persuasive language and framing choices made by judges as they justify outcomes. The construction of analogy is conducted on this field of interplay, and that reality conflicts with and undermines attempts to restrain and constrain analogies, despite the Supreme Court's attempts.

C. Dialectical Construction

The Ninth Circuit's decision in *Kisela* and each of its three parts should be understood as a conversation. The argument, response, and reply are a dialectic that respond to anticipated and actual counterarguments and do not simply state self-contained justifications. The content of the justificatory language is in part a product of that dialectic.

Judge Berzon's concurring opinion comes second in the Federal Reporter, following the majority opinion, but only because that's the conventional order in which majority, concurring, and dissenting opinions are published. Her opinion is a response to arguments made by the dissent, specifically countering the arguments put forward there. Judge Berzon's construction of the factors at play in *Kisela*, the labels used, and the most analogous case is a *responsive* construction.

Not every case—and not every excessive force qualified immunity decision—produces opinions constructed as a back-and-forth dialectic or conversation. Even those that include hints of a conversation do not engage in the same way. The judicial conversation in *Gravelet-Blondin*, before abrupt termination when the Supreme Court denied certiorari, is limited. Rather than a

[235] *Id.* at 790 (quoting Bryan v. MacPherson, 630 F.3d 805, 829 (9th Cir. 2010)).

separate concurrence addressing the dissent's arguments, the majority opinion simply inserts footnotes responding to those arguments, specifically referencing the dissent in four of the eleven footnotes in that opinion.[236] Nevertheless, there may be subtle responses to the dissent in the main text of the opinion (or at least statements anticipating dissent); when discussing the inherent danger of a suicide call, the majority contends that "[i]t strains logic to attribute any of the dangers involved in responding to suicide calls to" Blondin, the victim of tasing in this case.[237] In the footnote attached to that statement, the majority specifically refers to the dissent: "We agree with the dissent that officers responding to suicide calls face a risk that the suspect may attempt to 'go out in a blaze of glory,' . . . . [but w]e fail to grasp the attribution of any part of that threat to Blondin."[238] When addressing whether the law was clearly established, the dialectic is notably cursory. Judge Nguyen's dissent accuses the majority of "contraven[ing] the Supreme Court's instruction that the qualified immunity inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'"[239] The dissent goes on to suggest that the panel majority conducted its analysis of clearly established law "without reference to the specific factual context" and, as I discussed earlier, mischaracterizes the facts it did discuss.[240] The majority inserts a brief footnote, suggestive of its frustration with the blanket criticism that it fails to reference specific facts, followed by the somewhat contradictory accusation that it mischaracterizes the facts. In a footnote, it states that "[t]he dissent's concern that we frame our inquiry in terms of 'non-

[236] Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1089 n.1, 1092 n.5, 1094 nn.7 & 8 (9th Cir. 2013).
[237] *Id.* at 1092.
[238] *Id.* at 1092 n.5.
[239] *Id.* at 1103 (Nguyen, J., dissenting).
[240] *Id.*

trivial force' broadly, treating all 'non-trivial force' alike, ignores this taser-specific portion of our constitutional inquiry altogether."[241]

My earlier analysis of judicial construction of the meaning and legal significance of "passive bystander" and "erratic behavior" illustrate the dialectical nature of construction, responding to, rejecting, and incorporating other uses and arguments. More particularly, reports of Hughes's erratic behavior lead the majority to conclude, drawing on case law, that officers should have been aware of the possibility of mental illness, an awareness that ought to have been a mitigating factor, cautioning against an abrupt use-of-force response. The dissent, however, aligns reports of erratic behavior with the fact that she was carrying a knife when police arrived on the scene, emphasizing the threat posed by Hughes so that analogy with case law involving threats from armed suspects seems more apposite. The concurrence responds to this rhetorical move by realigning erratic behavior with mental illness, as the majority hints at, so that more direct analogies could be made between Hughes and victims similarly behaving strangely due to mental illness and against whom force was deemed excessive. The arguments are constructed through response and reply, and the analogical justification in particular is part of that process of construction and dialectic.

Other judges writing opinions in specific decisions are not just a spectatorial audience; they are interlocutors. Understanding these opinions and analogical justification as conversations completes the picture of analogical arguments in excessive force qualified immunity cases. Construction of facts and of analogy in the context of a dialectical conversation enriches our understanding of the rhetorical choices made by judges. In the end, this constructive project cannot sustain constraints placed on it by the Supreme Court.

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[241] *Id.* at 1094 n.8 (majority opinion).

V. CONCLUSION

My friend Iain loves to play a game called Spot It. The game is made up of a deck of circular cards, each with eight simple images arranged in various sizes and orientations on the card. The images are different colors—a green cactus, a red ladybug, a blue ice cube, and so on. The game is played by putting two cards face up at the same time and identifying the one image that is on both cards (there is always only one); the object of the game is to be the first one to shout which image is common, winning the round.

Iain is six, and this game is not easy for him. Often he cannot find the identical item until I've pointed it out. But there are times when he recognizes it right away. I am thirty-six—and sometimes the game is not easy for me either. I might see the winning object immediately with a flash of recognition; other times I have to take each object one by one to check for its twin. But once the object is identified, whether Iain sees it first or I do, no explanation is needed. I don't need Iain to justify the conclusion he's drawn that the upside-down green cactus is the same as the right-side-up green cactus, even though one is twice as big as the other. They are the same, apart from orientation and size. Instead of demanding an explanation for the claim that the two cacti are identical, I wonder instead why I couldn't see the identity all along.

The constraints on qualified immunity decisions in Fourth Amendment excessive force cases put in place by the Supreme Court suggest that the Court wants the identification of constitutional violations to be like a game of Spot It for officers. No need to analogize creatively—just recognize another green cactus, even if it is slightly smaller and rotated ninety degrees clockwise. But the construction and justification of analogies is creative, inventive, effortful work. Even the constraints get blurry: What counts as "beyond debate"? Must the predated source analog have found a constitutional violation with exactly the same use of force? Beyond that, the "facts"

that serve as building blocks to analogies are themselves constructed through value propositions and definitions. Most importantly, the definition of circumstances and actions are constructed negotiations between source analog and the record developed in the dispute at hand. Meaning is not objectively found in the previous case and in the dispute at hand and then compared. Meaning and the comparisons between cases are a reciprocal process. And all of this definitional and analogical construction, in many cases, is part of a dialectical back-and-forth between judges and courts. Importantly, the events constructed and the judges constructing those events are embedded in a wider geographic, historical, and political context, one that precedential rules exclude but that nonetheless exerts a powerful influence.

One interesting feature of analogical justification in qualified immunity decisions is that judges must speculate about how others might reason analogically. They are pressed to imagine the psychological processes, articulations, and disarticulations every or any reasonable person might make between source cases and the situation with which they are faced. With written language, judges attempt to replicate the psychological process of analogical reasoning, conscious or unconscious, that the officer may have engaged in. Although this unique feature of qualified immunity decisions is beyond the scope of this chapter, it further demonstrates the difficulty of constraint. How is it possible to place guardrails around the doctrine when it requires constructive analogical justification *and* speculation about how any reasonable officer would reason analogically? Further analysis of how judges imagine reasonable police officers think analogically could be a fruitful extension of this research.

Unless the standard is perfect identity, constructing analogies is an active, iterative, dialectical task, what White would call the integrative "art of recognition and response."[242] And

[242] WHITE, *supra* note 37, at 230.

while the Supreme Court has attempted constraint in qualified immunity decisions by restricting which cases can give notice, how similar the facts of those cases must be, whose perspective matters when viewing the scene, and how debatable the analogy is, those constraints fall short. The disciplined imaginative work of analogical argument cannot be disciplined beyond debate. And the Court continues to issue summary reversals of lower court decisions. Because analogical justification is a creative act, the only way to constrain perfectly is to push the requirement for analogy closer and closer to identity. Either the constraints must be loosened, or analogical justification will veer ever closer to a requirement of identity, an impossible hurdle for plaintiffs to clear. Qualified immunity has and will continue to slide gradually into absolute immunity.

Because of the constraints articulated by the Court for excessive force qualified immunity defenses, the law is rarely found to be clearly established. Consequently, even when the "right" outcome seems obvious to a court, if there is *any* room for debate about the definition of a legal term, the best analogy, or how a reasonable officer might have viewed the circumstances, qualified immunity should be granted. The result is that actions that might seem unreasonable to the vast majority of people remain protected.

Does this mean the doctrine of qualified immunity is a failure? That depends on which outcome you would prioritize: the protection of officials to exercise discretion in their roles as government actors, or the protection of the constitutional rights of civilians. The human cost—and the possible perception of injustice—should not be ignored. A constrained approach to analogy in qualified immunity decisions means that public faith in accountability for unlawful behavior may be undermined. And it means that Selina Marie Ramirez and her children have no remedy for the emotional, psychological, and financial damage done when police caused their husband and father, Gabriel Eduardo Olivas, to die and their house to burn to the ground.

CHAPTER 3: DISSENT

I. INTRODUCTION

Chapter 1 explored the selective and subjective nature of definition, exposing how the rules and structure of qualified immunity reinforce power hierarchies and protect police officers from accountability. Chapter 2 analyzed the contradiction inherent to qualified immunity between analogical justification and constraints requiring undebatable outcomes if ruling against the officer. Analysis grounded in rhetorical theories of definition and analogy reveal how this doctrine stacks the deck against plaintiffs from the beginning and how qualified immunity slides into absolute immunity for officers who violate the Fourth Amendment's prohibition against excessive force. Because the doctrine single-mindedly aims to protect officers, judges must often make decisions that comply with the law and doctrine but fail to remedy the violation of a constitutional right and hold accountable those who violate rights.

Chapter 3 turns to rhetorical resistance and dissent in the face of these constraints and internal contradictions. If the required outcome unjustly protects unconstitutional behavior by state actors, how is a judge to respond? The most obvious answer may be compliance. It is, after all, the responsibility of trial court judges to apply the law, not to create or change it. Alternatively, a judge might issue a decision that they believe is most just, even if it is not in line with the law as announced by the Court. Their job is not at risk; the worst that could happen to the district court judge is that they receive a sharply worded reversal from the circuit court.[1]

[1] The risk–benefit calculation might be different for plaintiffs; risking a circuit court reversal might be more worthwhile for those simply focused on winning their individual case. But the focus of this chapter is how the judicial decision-maker navigates the rhetorical challenges presented when law and justice seem to come into conflict as is the case in some qualified immunity decisions.

Judge Carlton Reeves, a federal district court judge in the Southern District of Mississippi, faced this dilemma in the summer of 2020. Seven years earlier,[2] on July 29, 2013, litigant Clarence Jamison was passing through Pelahatchie, Mississippi, on his way home to South Carolina from vacationing in Phoenix, Arizona.[3] He was driving a recently purchased 2001 Mercedes-Benz convertible with valid temporary tags when he was stopped by Officer Nick McClendon. McClendon testified that he stopped Jamison because the tags were folded over when Jamison drove past his patrol car.

Jamison complied with McClendon's request for his license, proof of insurance, and proof of ownership, and McClendon's first background check on Jamison came back clear. But before a second background check on Jamison and the car could come back, McClendon returned to the passenger side of Jamison's car, seeking consent to search the vehicle. Jamison refused. Despite that refusal, and lacking justification to search the vehicle, McClendon continued to detain him, repeatedly asking to search the car. To justify the search, he lied to Jamison, claiming that he had received a report that the car contained ten kilograms of cocaine. Finally, Jamison relented to McClendon's request to search the vehicle. McClendon found nothing. He then asked if he could "deploy [his] canine," a request Jamison initially denied but finally granted after McClendon would not let him leave.[4] The canine similarly found nothing. By the time Jamison was allowed to leave, he had been detained for almost two hours on the side of the road.

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[2] It is not unusual in litigation for seven years to elapse between the event and a summary judgment order.

[3] Jamison v. McClendon, 476 F. Supp. 3d 386, 392 (S.D. Miss. 2020). The description of the facts leading to Clarence Jamison's lawsuit and Judge Reeves's opinion are taken from the statement of facts. *Id.* at 392–95.

[4] *Id.* at 394 (alteration in original).

This encounter and the suit that followed are not just about the Fourth Amendment or qualified immunity. They are also about race and the history of white supremacy in America. Clarence Jamison was a Black man pulled over by a white police officer in Mississippi, a state with an awful history of (sometimes state-facilitated) brutality against Black people. He was detained just a few miles from the site of a "modern day lynching" that occurred two years prior.[5] And this stop took place in a national context: across the country, police had already killed more than 600 people in 2013 before Jamison's encounter with McClendon.[6]

After the stop, Jamison filed suit against McClendon, alleging that he violated the Fourth Amendment by conducting a nonconsensual search and unlawfully prolonging the stop.[7] McClendon denied both claims and also asserted that he was entitled to the defense of qualified immunity even if both claims might be true.

Judge Reeves's August 2020 opinion evaluates Jamison's Fourth Amendment claim in light of McClendon's qualified immunity defense. Because no previous case meeting the Supreme Court's precedential rules had clearly established the unlawfulness of McClendon's behavior under similar factual circumstances, the opinion concludes that he is protected by qualified immunity. The opinion, however, does not stop there. The qualified immunity analysis and decision span about three pages in the Federal Reporter. The balance of the thirty-nine-page decision (setting aside a few pages for the statement of facts and legal standard) comprises both forceful dissent to that outcome and advocacy for legal change. Professor Austin Sarat notes,

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[5] *Id.* at 413–14.

[6] *See* Mapping Police Violence, https://mappingpoliceviolence.org/. The opinion cites this data. *Jamison*, 476 F. Supp. at 414. What it does not mention is that Black people are almost three times more likely to be killed by police than white people. Mapping Police Violence, *supra*.

[7] *Jamison*, 476 F. Supp. 3d at 395–96. Jamison's complaint also alleged a Fourth Amendment violation for an unlawful stop and a Fourteenth Amendment violation for a racially motivated stop, both of which were previously dismissed by the court. *Id.*

> Even as [Judge] Reeves fulfilled his responsibility to apply the law and follow precedent, he did something innovative and important with the genre of the judicial opinion. He turned it to the urgent task of memorialization [of victims of police violence] and to the work of calling law to the task of redemption.[8]

Sarat goes on to compare Judge Reeves's opinion to the "great dissents written by Supreme Court justices," appealing to "'the intelligence of a future day,' when new decisions may correct the injustices that Judge Reeves's opinion so powerfully documents."[9]

This chapter examines how the opinion constructs a dissent within and against the constraints of qualified immunity. In doing so, I contribute to the scholarship on judicial dissent in legal and rhetorical fields. I will illustrate how the language of the decision is a creative blend of traditional, monologic law and disruptive, skeptical dissent, overflowing with historical and legal excess. Dissent itself is an act of excess because it is not a pronouncement of law, nor does it immediately influence the law. I also use *legal excess* to signify the voices, perspectives, legal and national histories and contexts, citations, and other rhetorical devices that stretch or even violate the generic norms of judicial opinion writing in qualified immunity cases. The opinion's dissent, through disruptive acts of excess, highlights what qualified immunity law excludes. Although the opinion is not technically a dissent, I define dissent in a more capacious way to capture judicial writing that challenges the traditional voice of the law. I also trace the threads of resistance woven throughout the opinion. Ultimately, this dissertation's conclusion focuses on how these threads of resistance might suggest multiple paths to reform.

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[8] Austin Sarat, *Memorializing Miscarriages of Justice*, VERDICT (Aug. 11, 2020), https://verdict.justia.com/2020/08/11/memorializing-miscarriages-of-justice.

[9] *Id.* (quoting CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (Columbia Univ. Press 1928)).

While analyzing the language of the opinion, I concentrate on the text and structure of the opinion itself rather than Judge Reeves's intent or state of mind reflected in the language.[10] There will be a few points where I make observations about the author's background, but my analysis of the text is just that—an exploration of what the text suggests, reveals, and accomplishes, without necessarily ascribing any of those acts to the specific intent of the author himself. Perhaps some readers will think this does a disservice to the intentionality of the author. I acknowledge this possibility, but I also believe this approach is faithful to a strategic choice in the opinion: Despite opportunities to reference his own identity and experiences, the author instead speaks with the institutional voice of the court and legal system.[11] By focusing on the language of the opinion itself, I choose to center the core question that this chapter attempts to answer: How does language simultaneously resist and affirm law, and how does the law itself offer solutions to the problem of qualified immunity?

The contrast between the opinion's skepticism and excess on the one hand and its narrow upholding of the law on the other shatters the illusion of objectivity within the law. It unmasks the monologic performance in qualified immunity decisions as a weapon of power. All communication requires some abstraction; as Chapter 1 demonstrates, language, labels, and categories all

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[10] Like previous chapters, I am not making a claim here about authorial intent. My focus is on what the language of the opinion does and can demonstrate about dissent, audience, and the norms of genre or spheres of argument. Nevertheless, behind the language of the opinion, there *is* a judicial author with intent and hopes for what the opinion does. In this case, the author, Judge Reeves, has expressed that when it comes to his work as a judge, and particularly the opinions he writes, he feels "an obligation to the people accustomed to seeing court as a 'hostile place, foreign soil,' and, with him, expected a very different face of justice. 'I want to be speaking to the general public.' . . . Recounting history, he says, is one way to help Mississippians understand the truth." Reynolds Holding, *The Judge Who Told the Truth About the Mississippi Abortion Ban*, ATLANTIC (Nov. 30, 2021), https://www.theatlantic.com/ideas/archive/2021/11/supreme-court-mississippi-abortion-ban/620833/.

[11] *See infra* Section IV.

generalize.[12] Yet qualified immunity doctrine has utilized abstraction masquerading as blind justice. Courts have deployed that abstraction to reinforce hierarchies of oppression and exclusion, and in an especially powerful manner because the abstract, decontextualized, and detached voice of the law appears objective. Although the opinion appeals to multiple audiences, its limited nonconformity and continuity with generic norms of the law, particularly its choice to speak for the institution of the court, demonstrates dissent's capacity to shift the boundaries and rules of technical spheres of discourse. This rhetorical choice is particularly effective when applying the law of qualified immunity because the rigid doctrine excludes so much context, law, and history in order to protect police officers. This opinion strips those protective walls away, exposing the entire landscape of Section 1983, qualified immunity, and the ongoing battle for equal protection for all.

The opinion's path—to grant qualified immunity while issuing a call for sweeping change in the law—is the ultimate act of limited nonconformity, a double gesture of affirmation and disruption, an act of dissent as defined by Professor Robert Ivie.[13] By reframing and expanding the scope of its inquiry, the opinion educates a public audience to advocate for change while respecting the continuity and institution of the judiciary.[14] It denaturalizes the rhetoric and logic of the qualified immunity decision through skepticism, lived experience, and a reframing of the

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[12] Abstraction and generalization may be inevitable, but they are not an inevitable tool against civil rights enforcement. Consider the close factual comparisons required in qualified immunity cases. If courts were able to apply general rules against excessive force to determine whether the law were clearly established, fewer police officers using violence inappropriately would be shielded from accountability.

[13] Robert L. Ivie, *Enabling Democratic Dissent*, 101 Q.J. SPEECH 46, 50–51 (2015) ("[Dissent] is a minority voice raised in a rhetorical act of limited nonconformity. . . . The double gesture of democratic dissent, as an act of connected criticism, consists of one move to disrupt and another to affirm.").

[14] *See supra* note 10.

question and situation. It chooses excess and makes the law strange by entertaining what the law has attempted to exclude. By embracing both law and law's excess, the opinion exposes the limiting narrowness of judicial opinions and qualified immunity doctrine, both of which silence and erase particular identities, perspectives, and experiences.

Theory: Audience and Dissent

Judge Reeves's opinion is not a traditional dissent. Yet the opinion exhibits generic features of judicial dissents in a forceful disagreement with law it must nevertheless uphold. Legal and rhetorical scholars have developed theories of voice, purpose, and audience in dissenting opinions; this chapter builds upon that scholarship by exploring the potential for rhetorical resistance alongside legal compliance. Most scholarship on judicial dissents, both in law and rhetoric, has focused on U.S. Supreme Court dissenting opinions. But dissents as we know them today did not always exist. In the early days of the Republic, the Court adopted the English tradition of issuing *seriatim* opinions; each justice would write an individual opinion, and the Court would issue a brief summary of what the justices agreed upon.[15] Then, with the appointment of Chief Justice John Marshall in 1801, the Court began to issue a single majority opinion with only rare dissents.[16] Dissent remained a rarity for the balance of the nineteenth century and the first part of the

[15] Christine M. Venter, *Dissenting from the Bench: The Rhetorical and Performative Oral Jurisprudence of Ruth Bader Ginsburg and Antonin Scalia*, 56 WAKE FOREST L. REV. 321, 327 (2021).

[16] M. Todd Henderson, *From* Seriatim *to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 311, 312; *see also* Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 2–3 (2010). *But see* Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 783 & n.9 (2000) (identifying the first Supreme Court dissent in 1792).

twentieth, though unanimity in majority opinions was not always complete.[17] Then the New Deal era brought a "proliferation of dissents," a Supreme Court "norm [that] continues to this day."[18]

Some believe that dissenting opinions reveal "dysfunction" within the Court, weakening its credibility and authority by suggesting a lack of clarity or finality in the law it announces.[19] Others take a more nuanced view of dissent—that it is "a healthy, and even necessary, practice that improves the way in which law is made."[20] Professor Todd Henderson gives two reasons for this: first, dissents sometimes become the law over time; and second, dissents "reveal the deliberative nature of the Court, which in turn enhances its institutional authority and legitimacy."[21] The late Justice Ruth Bader Ginsburg echoes this sentiment, embracing "dissent when important matters are at stake" and emphasizing "the independence of the individual judge to speak in his or her own voice, and the transparency of the judicial process."[22]

What do judges hope to accomplish when penning a dissenting opinion? Why spend the time and effort to articulate a dissenting view of the law and its application that will neither influence future courts through precedential power or stare decisis, nor change the immediate

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[17] Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1284, 1310 (2001). Justice Harlan's dissent in *Plessy v. Ferguson* is one of the most famous dissents from this era. 163 U.S. 537 (1896) (Harlan, J., dissenting); *see also* Krishnakumar, *supra* note 16, at 800.

[18] Henderson, *supra* note 16, at 333, 334; *see also* Post, *supra* note 17, at 1274 ("This revolution [during the New Deal Era] in the practice of dissent in part reflects a shift in the Court's jurisprudential understanding of the nature of law, from a grid of fixed and certain principles designed for the settlement of disputes, to the site of ongoing processes of adjustment and statesmanship designed to achieve social purposes."). For an overview of the development of the Supreme Court opinion and dissent, see generally Henderson, *supra* note 16.

[19] Henderson, *supra* note 16, at 283 (including in this position the former Chief Justice Marshall and current Chief Justice John Roberts).

[20] *Id.* at 284.

[21] *Id.* at 284–85.

[22] Ginsburg, *supra* note 16, at 3, 7.

outcome for the parties in the case?[23] Justice Ginsburg categorizes purposes by evaluating potential audiences for dissenting opinions, sorted into three groups[24]: First, a dissent may be written for its potential impact on the majority opinion, with the rest of the panel as the audience. Justice Ginsburg calls this the dissent's "in-house impact."[25] A well-written dissent can lead the writer of the majority opinion to revise and refine their announcement of the law.[26] And more rarely (but far more rewarding), "a dissent will be so persuasive that it attracts the votes necessary to become the opinion of the Court," flipping the outcome.[27] The second and third categories are aimed at external audiences. A dissent may be written for future litigants and jurists, and the dissenter may be writing for a future Court which will reverse the decision made today.[28] In the words of New Deal–era Chief Justice Charles Evans Hughes, in a passage from which Sarat and Justice Ginsburg would later draw, "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[29]

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[23] Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1412 (1995) ("A dissent makes no new law; it highlights one's difference from a majority of colleagues, and it means extra, self-assigned work."). Stare decisis is the legal doctrine that courts are bound by their own previous decisions and may not issue contradictory rulings. For more discussion, see Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1258–59 (2006).

[24] These categories are not mutually exclusive. A dissenting opinion may aim to accomplish one purpose, or it may speak to multiple audiences with multiple purposes at once.

[25] Ginsburg, *supra* note 16, at 3.

[26] *Id.*

[27] *Id.* at 4. Justice Ginsburg estimates that this might happen four or fewer times per term during her tenure on the Court. *Id.*

[28] *Id.* at 4–5 (using the dissenting opinions in *Dred Scott* and the *Civil Rights Cases* as examples of dissents that would later be vindicated with the overturning of precedent).

[29] HUGHES, *supra* note 9, at 68.

Dissents may also appeal to the legislative branch to change the law.[30] If not a court of last resort, the dissent may explicitly or implicitly appeal to the reviewing court to reverse the decision[31] and provide litigants with language and arguments for appeal to the next reviewing court—or to future litigants in similar cases.[32] And finally, Justice Ginsburg observes that dissents may be penned for a more public audience in order to spur social and legislative change.[33] The late Judge Patricia Wald, former Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, summed up these three purposes and audiences this way: "A dissent speaks to the rest of the court, to courts in other places, to higher courts, to Congress, to future generations; it brings no hope of present reward or vindication."[34]

This chapter offers an analysis of dissent and audience informed by rhetoric and argumentation, working from the assumption that judicial opinions can be read productively as *arguments*. Taking judicial opinions as arguments acknowledges uncertainty or the possibility that the "claims [made therein] *could be otherwise*."[35] There is space, either implied or expressed, for

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[30] *See* Shari Seidman Diamond, *Judicial Rulemaking for Jury Trial Fairness*, *in* JURIES, VOIR DIRE, BATSON, AND BEYOND: ACHIEVING FAIRNESS IN CIVIL JURY TRIALS 59, 61 (2001) (describing dissenting and concurring opinions by California Supreme Court Justice Goodwin Liu and Court of Appeals Judge Jim Humes, and explaining that statutory changes reflect recommendations proposed in those two opinions), available at https://ncji.org/wp-content/uploads/2022/06/Pound-Report-2021_FINAL_web.pdf.

[31] Andrew F. Daughety & Jennifer F. Reinganum, *Speaking Up: A Model of Judicial Dissent and Discretionary Review*, 14 SUP. CT. ECON. REV. 1, 3–4 (2006).

[32] *See* Vanessa Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism To Transform Coalitions in the U.S. Supreme Court*, 59 DUKE L.J. 183, 186 (2009) (demonstrating that dissenting opinions may be intended to arm future litigants in similar cases with framing and language more likely to produce a winning outcome).

[33] Ginsburg, *supra* note 16, at 6; *see also* Post, *supra* note 17, at 1347 (noting that because the specific outcome of the case "has no . . . dispositive force on the general legal public, [that public] is therefore much more likely to be affected by a strong dissent").

[34] Wald, *supra* note 23, at 1412.

[35] DAVID ZAREFSKY, THE PRACTICE OF ARGUMENTATION: EFFECTIVE REASONING IN COMMUNICATION 13 (2019) [hereinafter ZAREFSKY, PRACTICE].

being wrong.[36] A judicial opinion is not an argument in the colloquial sense of two or more individuals or groups engaged in a back-and-forth disagreement. Although it is possible to see the dialectic in some opinions, especially when there are multiple opinions on the same question from multiple judges,[37] one presumption underlying this chapter is that even individual judicial opinions, without any other written judicial responses, reversals, or affirmations, can be read as arguments where there is uncertainty in the outcome.

That something is an argument implies that it is directed at someone—an individual or a group.[38] The audience, according to Professor David Zarefsky, might be "evoked by the arguer and inferred from the text," or it might be stated explicitly.[39] Argumentation theorists Chaïm Perelman and Lucie Olbrechts-Tyteca define audience "as the ensemble of those whom the speaker wishes to influence by [their] argumentation."[40] That argument may be aimed at an identifiable individual or group, or it may be a text with wider ambitions. Perelman and Olbrechts-Tyteca describe a "universal audience" as the universe of all reasonable people imagined by the arguer.[41] Alternatively, the audience may be "composite" in which an argument is aimed at "heterogeneous groups of people who differ in their backgrounds and positions."[42] Here, the arguer is "in dialogue

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[36] This dissertation is itself an argument, meaning that the claims I am making, including the one in question here (that there is value in considering judicial opinions as arguments) could also be wrong, or, at the very least, that there could be some value in reading them otherwise.

[37] *See supra* Chapter 2, Subsection IV.C.

[38] ZAREFSKY, PRACTICE, *supra* note 35, at 9 (explaining that one of the preconditions for argumentation is that "the agreement of the other party (whether a single individual or a group) is sought").

[39] DAVID ZAREFSKY, RHETORICAL PERSPECTIVES ON ARGUMENTATION 39 (2014) [hereinafter ZAREFSKY, RHETORICAL PERSPECTIVES].

[40] CHAÏM PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 19 (1969) (emphasis omitted).

[41] *Id.* at 31–35. Perelman and Olbrechts-Tyteca also conceive of the universal audience as "all normal, adult persons." *Id.* at 30. *See also* ZAREFSKY, PRACTICE, *supra* note 35, at 12.

[42] ZAREFSKY, RHETORICAL PERSPECTIVES, *supra* note 39, at 257; *see also* PERELMAN & OLBRECHTS-TYTECA, *supra* note 40, at 31.

simultaneously with multiple different interlocutors."[43] Inevitably, the audience (or audiences) is a construction of the arguer (or "speaker"), yet one that is "as close as possible to reality."[44]

By noting the values, beliefs, and expectations the argument seems to take for granted or emphasize,[45] we can infer whom the arguer's intended audience might be. Professor Edwin Black notes that discourse implies and constructs a listener through its substance and style.[46] For Black, this "second persona" is an ideological construct, an imagined audience to whom the speaker appeals using appropriate metaphors, imagery, and connotation. Discourse also constructs its listener through the generic norms it observes and breaks, its call to action, and the types of appeals upon which it draws. In turn, identifying audience helps define more precisely what the arguer hopes to accomplish. The analysis can also work in the other direction; attending to the audience for whom an argument is crafted can make more visible the "boundaries of an acceptable argumentative practice."[47]

The rhetorical features of judicial dissent are nearly always presented as a contrast to the rhetorical features of judicial (presumably majority) opinions—or the language of the law writ large. Professor Robert Ferguson characterizes the "distinct literary genre" of appellate judicial opinions as being defined by "the monologic voice, the interrogative mode, the declarative tone, and the rhetoric of inevitability."[48] The monologic voice is unifying in its control, speaking with a

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[43] ZAREFSKY, RHETORICAL PERSPECTIVES, *supra* note 39, at 257.
[44] PERELMAN & OLBRECHTS-TYTECA, *supra* note 40, at 20.
[45] ZAREFSKY, PRACTICE, *supra* note 35, at 13 ("[R]easoning with the audience in mind means that one takes the audience's beliefs and values as the starting point of the argument, and then should reason from those beliefs to the claim the arguer wants to support.").
[46] Edwin Black, *The Second Persona*, 56 Q.J. SPEECH, 109, 111–12 (1970). Black calls the listener the "second persona" constructed by a text, the first persona being the speaker or authorial voice it constructs.
[47] ZAREFSKY, RHETORICAL PERSPECTIVES, *supra* note 39, at 39.
[48] Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 202, 204 (1990).

voice that collapses the distance between author, institution, and text, only raising alternative views in order to answer and discipline those views.[49] The interrogative mode encompasses a recognition that "[t]he real creativity in a judicial decision lies in the question that judges decide to accept as the basis of their deliberations."[50] By aiming at a unified and clear answer to that carefully chosen question, controlling judicial opinions adopt a declarative tone that "resists mystery, complexity, revelation, and even exploration," instead drawing on "hyperbole, certitude, assertion, simplification, and abstraction."[51] Together, the monologic voice, the interrogative mode, and the declarative tone produce what Ferguson calls "a rhetoric of inevitability" in which the conclusion seems obvious, compelled, and unquestionable.[52] Professor Gerald Wetlaufer echoes Ferguson's articulation of judicial rhetoric's commitment "to objectivity, to clarity and logic, to binary judgment, and to the closure of controversies," and to the use of "impersonal voice."[53] These features prompt Wetlaufer to argue that the rhetoric of law is characterized by "the systematic *denial* that it is rhetoric."[54] Legal opinions are at pains, in other words, to deny that they are constructed, persuasive arguments, preferring instead to appear as the inevitable and singular outcome when law is applied to fact.

Professor Catherine Langford builds upon Ferguson's generic framework for judicial opinions by outlining what she sees as the generic traits of dissent: "an individualistic tone, a

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[49] *Id.* at 205–06.
[50] *Id.* at 208.
[51] *Id.* at 210, 213.
[52] *Id.* at 213. Ferguson also characterizes a majority opinion as a "compelled performance. The one thing a judge never admits in the moment of a decision is freedom of choice." Instead, the opinion "appear[s] as if forced to its inevitable conclusion by the logic of the situation and the duties of office, which together eliminate all thought of an unfettered hand." *Id.* at 206–07.
[53] Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1552 (1990).
[54] *Id.* at 1555.

skeptical voice, a democratic standard, and an advocacy medium."[55] She argues that, in contrast to the monologic voice of the majority opinion, dissent allows a judge to employ a personal voice using personal pronouns.[56] Skepticism questions, challenges, and exposes flaws in the majority opinion's reasoning and conclusion; while the majority's rhetoric might attempt to frame law as objective, the dissent "alludes to the subjectivity of the law."[57] Third, dissent democratizes the least democratic branch of government by exposing debate among jurists and providing space for divergence of opinion that might otherwise go unremarked because of the majority's rhetoric.[58] And lastly, dissents are oriented toward advocacy by providing reasoning and language upon which future judges and litigants can rely.[59]

Speaking from over fifteen years of experience, Judge Wald describes a distinct voice and rhetoric of dissent, an "outlet" from the limited, controlled, and impersonal rhetoric employed when speaking for the court.[60] Implicitly acknowledging that different situations call for different rhetorical stances in dissents, Judge Wald notes that dissents are "most apt to turn away from the technicalities of the majority holding and play to higher levels of aspirations and values," while also drawing attention to "the majority's insistence on a relentless imposition of precedent regardless of the consequences."[61] Dissents may use a "strategy of personalization" to highlight and contrast "the cold, impersonal, authoritarian judges of the majority, who impliedly do not take

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[55] Catherine L. Langford, *Toward a Genre of Judicial Dissent:* Lochner *and* Casey *as Exemplars*, 9 COMM. L. REV. 1, 2 (2009).
[56] *Id.* at 2–3.
[57] *Id.* at 2, 5.
[58] *Id.* at 7–8.
[59] *Id.* at 2, 10.
[60] Wald, *supra* note 23, at 1380. "Judges write in a different voice when they concur or dissent. They speak on their own rather than for the court." *Id.* at 1412.
[61] *Id.* at 1412.

the human condition into account when they mercilessly impose the law."[62] In a "troubled, outraged, sorrowful, puzzled" tone, the writer may embrace "[e]xuberant (or excess) prose" and "[a] sense of urgency and of impending doom."[63]

Rhetorical scholars have explored dissent, both in the judicial context and otherwise, as a necessary and healthy component of democracy. Distinguishing between dissent and protest, Ivie admits that while both "signal[] a schism—the estrangement of a house divided against itself," nevertheless "[s]omething is gained by considering dissent's distinctive rhetorical contribution to democratic practice other than as simply radical protest."[64] Although he is not talking specifically about dissenting opinions written by judges, Ivie's analysis of the productive "limited nonconformity" of dissent[65] can inform a study of judicial dissent. Rhetorical invention that softens "[t]he dissonance of disruption" with "a reassuring embrace of that which is recognizable, understandable, and sanctioned by social convention" imbues dissent with power.[66] Ivie's concepts of limited nonconformity, revision, and double gesture align with and build upon Professor Kristine Bartanen's analysis of a dissent by Justice Sandra Day O'Connor in the 1980s. Bartanen insightfully observes that dissent is grounded in continuity[67] and "argues for change in a way that respects—even constitutes—that system."[68] Continuity and respect for the system are themes that Ivie and other rhetorical scholars elaborate upon.

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[62] *Id.* at 1413.
[63] *Id.* at 1412–13.
[64] Ivie, *supra* note 13, at 47, 49.
[65] *Id.* at 50.
[66] *Id.* at 51, 56.
[67] Kristine M. Bartanen, *The Rhetoric of Dissent in Justice O'Connor's* Akron *Opinion,* 52 S.J. SPEECH COMM. 240, 247 (1987) (suggesting that some of the tools available to dissenters that establish continuity are a reliance on precedent, aim toward future remedy, and advocacy for change within an enduring system).
[68] *Id.* at 261. The necessity of continuity even in disagreement is an idea that does not originate with Bartanen. David Zarefsky notes that "it is almost a truism in argumentation studies that

Professors Katie Gibson and Erin Rand both adopt Ivie's observations about dissent within democracy and apply them to judicial dissent: specifically, the feminist and forceful dissents that Justice Ginsburg penned while a Supreme Court Associate Justice. Gibson particularly focuses on the revisionary and disruptive practice of introducing and "legitimat[ing] voices, experiences, and rights of groups traditionally excluded by the rhetoric of the law."[69] In contrast to the "neutrality, abstraction, and universality" of majority opinions that, in Wetlaufer's words, "'operate[] through the systematic denial that it is rhetoric,'" Justice Ginsburg's practice of making the law and its impact personal, individual, and human is her power.[70] Rand concurs with Gibson's assessment that Justice Ginsburg's dissents call out law's neglect and silencing of particular voices and lived experiences.[71] Drawing on Ivie's theory of dissent as limited nonconformity and Langford's theory of dissent as challenging the unity of the monologic voice, Rand highlights dissent's rhetorical denaturalization of the majority opinion's certainty, unifying voice, and inevitability.[72] In addition to denaturalizing the rhetorical moves of the majority, dissents operate "in excess of the law because they reintroduce the politics that law attempts to exclude."[73] And yet, writing a dissenting opinion is not the only way to counter the monologic voice of the law, as Gibson's analysis of Justice Ginsburg's majority opinion in *United States v. Virginia* demonstrates.[74] Gibson argues

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productive disagreement must be grounded in agreement." ZAREFSKY, RHETORICAL PERSPECTIVES, *supra* note 39, at 179.

[69] Katie L. Gibson, *In Defense of Women's Rights: A Rhetorical Analysis of Judicial Dissent*, 35 WOMEN'S STUD. COMM. 123, 124 (2012).

[70] *Id.* at 125 (quoting Wetlaufer, *supra* note 53, at 1555).

[71] Erin J. Rand, *Fear the Frill: Ruth Bader Ginsburg and the Uncertain Futurity of Feminist Judicial Dissent*, 101 Q.J. SPEECH 72, 76 (2015).

[72] *Id.*

[73] *Id.* at 73.

[74] 518 U.S. 515 (1996). The case is also commonly known as *VMI* because the issue in question was whether the Virginia Military Institute could continue as an exclusively male public institution of education. *Id.*

that Justice Ginsburg has challenged law's traditional voice across all genres, including both majority and dissenting opinions.[75]

Though Rand and Gibson mainly comment on feminist jurisprudence, they also touch on its intersection with critical race theory.[76] Specifically, Gibson draws upon Professor Mari Matsuda's call for "'outsider jurisprudence,' one that seeks justice by bringing 'attention to the experiences and perspectives of subordinated persons, communities, and peoples.'"[77] Critical race theory, according to Professors Mari Matsuda, Charles Lawrence, Richard Delgado, and Kimberlé Crenshaw, embraces the subjective perspective and "the particulars of a social reality" defined by individual and collective experiences.[78] Where traditional law prefers abstraction and objectivity, critical race theory prioritizes contextualizing and historicizing events. It treats claims of objectivity and neutrality with skepticism, an affective orientation reflected in the scholarship of Professor Patricia Williams as well.[79] Matsuda also argues for "multiple consciousness" grounded in lived experience and "a deliberate choice to see the world from the standpoint of the oppressed."[80] On the other hand, "[a]bstraction and detachment," the hallmarks of the voice of the law, "are ways out of the discomfort of direct confrontation with the ugliness of oppression."[81]

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[75] KATIE L. GIBSON, RUTH BADER GINSBURG'S LEGACY OF DISSENT: FEMINIST RHETORIC AND THE LAW 18 (2018).
[76] *See, e.g.*, *id.* at 12.
[77] *Id.* (quoting Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989)).
[78] MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÉ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 3 (1993); *see also* PATRICIA J. WILLIAMS, ALCHEMY OF RACE AND RIGHTS 3 (1991) ("[S]ubject position is everything in my analysis of the law.").
[79] MATSUDA ET AL., WORDS THAT WOUND, *supra* note 78, at 3, 6; *see generally* WILLIAMS, *supra* note 78.
[80] Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297, 299 (1992).
[81] *Id.*

In *Jamison v. McClendon*, we find a unique union of monologic and skeptical voices, the declarative tone and democratic deliberation, inevitability juxtaposed against law's malleability. Judge Reeves meets the rhetorical challenge of complying with the Supreme Court's constraining qualified immunity rules despite deep disagreement by penning a precise, impersonal, and blunt opinion on that particular issue while bookending the opinion with a forceful dissent and argument for change. Studying this opinion as dissent exposes the inventive melding of disagreement and concurrence, a "double gesture" of disruption and affirmation.[82] Compelled dismissal of the case contrasts with the powerful contextualizing history lesson of protections of civil rights and the rise of a doctrine undermining those protections. This contrast renders the clinical treatment of qualified immunity unnatural, strange, and almost unrecognizably inhumane. The judge's decision could have denied qualified immunity despite basing the ruling on shaky legal ground. McClendon would then have needed to appeal to the Fifth Circuit, which probably would have reversed the decision but could have conceivably upheld it. The case might have even made it to the Supreme Court, presenting an opportunity for the Court itself to speak differently about qualified immunity. But why would Jamison succeed where so many others had failed? Instead, the opinion bows to the Court's clear instructions by granting qualified immunity, but it simultaneously issues a powerful argument for reforming the doctrine itself.

To demonstrate these claims, the chapter first provides a more detailed outline of the opinion in *Jamison v. McClendon*. Next it explores the opinion's excess, contrasting the law's performance of abstraction and objectivity. The chapter then turns to the limited nature of the opinion's nonconformity and its continuity with norms of the law. Finally, before concluding, I

[82] Ivie, *supra* note 13, at 50, 51.

consider the audiences that the opinion implies and what that analysis reveals about the opinion's purpose and place in the technical sphere of legal argument.

II. THE OPINION

The opinion in *Jamison v. McClendon* begins with a simple title: "Order Granting Qualified Immunity."[83] But it opens by memorializing twenty victims of police violence and the mostly everyday behavior, like jaywalking or napping in your own car, that led to the confrontations.[84] It then briefly recounts Jamison's encounter with McClendon before explaining that the Supreme Court has "invented a legal doctrine" called qualified immunity, which protects McClendon from suit.[85] Even though "[i]mmunity is not exoneration," immunity must be granted.[86] After this introduction, the opinion presents the factual and procedural background as is typical of the first part of a district court opinion. The details and factual disputes of the encounter are elaborated, as well as the legal claims made and defenses raised.[87] It explains which claims have been resolved already and how, and identifies the particular question before the court. The next part briefly states the legal standard for summary judgment.[88]

Before applying that legal standard and answering the question immediately before the court (Is McClendon entitled to qualified immunity?), the opinion develops the relevant historical

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[83] Jamison v. McClendon, 476 F. Supp. 3d 386, 390 (S.D. Miss. 2020).
[84] *Id.* at 390 & n.1, 391 & n.15.
[85] *Id.* at 391–92.
[86] *Id.* at 392.
[87] *Id.* at 392–96.
[88] *Id.* at 396. Summary judgment is a procedural step before trial and typically following discovery in which one party asks the court to rule in their favor as a matter of law. In other words, that party asks the court to find that the undisputed facts are such that no reasonable jury could decide for the other party. The defense of qualified immunity is one such legal question that judges may be asked to rule upon, thereby dismissing the case prior to trial. Brosseau v. Haugen, 543 U.S. 194, 198 (2004) ("If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.").

legal context in Part III. This part begins with the foundations for Jamison's suit, grounded in the Reconstruction Amendments and the Enforcement Act of 1871, also known as the Civil Rights Act or Ku Klux Klan Act.[89] It recounts how the Supreme Court weakened protections promised by the constitutional amendments and legislative reforms.[90] Then it describes the resuscitation of Section 1983, the updated and revised Section 1 of the Ku Klux Klan Act of 1871, and the statutory authority for suing state actors for constitutional violations.[91]

But then a new doctrine once again undermined civil rights in the advent of qualified immunity, a doctrine created by the Supreme Court and gradually shaped into "absolute immunity," as the opinion explains it.[92] This part concludes with a few recent examples of the behaviors that qualified immunity has protected, including a detailed account of Trent Taylor's confinement in a freezing, feces-covered cell for six days.[93] Nevertheless, in concluding the history of the rise and fall of Section 1983 and the expansion of qualified immunity, Judge Reeves's opinion again returns to the fact that "qualified immunity is the law of the land and the undersigned is bound to follow its terms absent a change in practice by the Supreme Court."[94]

Part IV considers both parts of the qualified immunity inquiry, beginning with whether there was a constitutional violation.[95] Did McClendon's initial physical intrusion into the car and his subsequent search of the vehicle violate Jamison's Fourth Amendment rights? The opinion

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[89] *Jamison*, 476 F. Supp. 3d at 396–400.
[90] *Id.* at 400–01.
[91] *Id.* at 401–02.
[92] *Id.* at 402–09.
[93] *Id.* at 406–08 (quoting Taylor v. Stevens, 946 F.3d 211 (5th Cir. 2019)). The Supreme Court would later reverse the Fifth Circuit's decision, finding that at least in this particular suit alleging a violation of the Eighth Amendment, an obvious violation did occur despite the lack of factually analogous precedent. *See* Taylor v. Riojas, 141 S. Ct. 52 (2020) (per curiam). The Court issued this decision less than three months after the opinion in *Jamison* was issued.
[94] *Jamison*, 476 F. Supp. 3d at 409.
[95] *Id.* at 409–18.

concludes that, since Jamison is the nonmoving party, it must take his version of the facts as true as required at summary judgment; consequently, the initial intrusion into the car was an unreasonable search in violation of the Fourth Amendment.[96] More strikingly, it concludes that although Jamison did give his consent to McClendon to search the car, that consent was not voluntarily given, making the search itself a constitutional violation as well.[97] McClendon's behavior coerced Jamison's consent, and "[c]onsent is valid only if it is voluntary."[98] Beyond that, the stop must be viewed contextually—a Black man pulled over by a white police officer in a country where racial and police violence is an everyday risk may not "fe[el] free to say no to an armed Officer McClendon."[99] But after holding that McClendon's initial intrusion and subsequent search of the vehicle violated the Fourth Amendment, it also concludes that he is entitled to qualified immunity because the law was not clearly established.[100]

Instead of ending here, the opinion continues with a sixth part advocating for the end of qualified immunity and offering "a tangible example of how easily legal doctrine can change" in a case involving another civil rights statute birthed out of the Reconstruction Era, Section 1981.[101] The case is offered as an example of "reading" the statute "against a background" of robust constitutional protections, including the Seventh Amendment right to a jury trial, rather than a robust immunity doctrine and protection for those who violate constitutional rights.[102] Only then does the opinion conclude with a restatement that McClendon's motion is granted and a final call

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[96] *Id.* at 411.
[97] *Id.* at 415–16.
[98] *Id.* at 411 (quoting United States v. Gomez-Moreno, 479 F.3d 350, 357 (5th Cir. 2007)).
[99] *Id.* at 415–16.
[100] *Id.* at 416–18.
[101] *Id.* at 420.
[102] *Id.* at 422–23.

to "waste no time in righting this wrong,"[103] suggesting that both the law as a whole and this particular outcome are unjust and should be righted by the Court.

III. EXCESS

Dissent, in its performance and in its substance, is excess. It is a legal act of excess in that it has no immediate impact. The law is what it is with or without the dissent. Additionally, its substance is an excess of law; it "reintroduce[s] the politics that law attempts to exclude,"[104] it makes visible the ways that law is subject to politics, and it contextualizes the human experience captured in the legal dispute. The opinion's dissent exposes how supposedly impartial, clinical legal decisions *are* political, and how the social, historical, and legal context brought Jamison and McClendon to Judge Reeves's federal courtroom and decided their fates.

As demonstrated in Chapter 2, the Supreme Court has constrained the application of qualified immunity by limiting the scope of relevant factual and legal context. The acceptable circumference for defining the situation is narrow, circumscribed, and oriented toward the officer's perspective of events. By exploring the history of the Reconstruction Amendments, Section 1983, and qualified immunity; by reviewing recent applications of qualified immunity; and by examining the social context of race in which Jamison was pulled over, the opinion in *Jamison v. McClendon* challenges whether that application of the law is impartial and just. It expands the circumference and shifts the frame, thereby exposing the subjective underpinnings of law constructed to reinforce a particular hierarchy.

This section discusses revision of framing in three categories: First, I discuss the reintroduction of race into a legal inquiry that rarely considers race explicitly. Then, I examine the

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[103] *Id.* at 424.
[104] Rand, *supra* note 71, at 73.

opinion's excessive review of the development of law, from Reconstruction to the resuscitation of Section 1983 to the expansion of qualified immunity. Finally, I consider the opinion's closing, which presents an argument for how and why the doctrine should be reconsidered.

A. Race: History and Present

The opinion's explicit evaluation of the racial dynamics of policing seems to conflict with the Supreme Court's colorblind ideal of what the law should be.[105] This subsection explores how the opinion's introduction shifts the narrow frame laid down by the Supreme Court by subtly reintroducing race into the law. It also considers how this rhetorical excess invites emotional response, another legal excess. Then, I consider the opinion's evaluation of the legal concept of consent and explicit discussion of race. I argue that this discussion is a choice that highlights the exclusion of race from law and the harm that exclusion does.

i. The Introduction: Frame Shifting and (Emotional) Excess

The written order begins with a list of things Jamison was *not* doing. Why? This list memorializes twenty victims of police violence.[106] It is, according to Sarat, "a powerful indictment of racism in policing delivered in a series of simple declarative sentences."[107] The list begins with a wide range of situations: "jaywalking," "playing with a toy gun," or "mentally ill and in need of

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[105] Or at least the conservative (majority) wing of the Supreme Court. *See, e.g.*, Parents Involved v. Seattle School District No. 1, 551 U.S. 701 (2007).

[106] The last victim, Ace Perry, was subjected to a traffic stop, interrogation, and written warning by a white police officer for driving 65 miles per hour on a road with a speed limit of 70 miles per hour. *See* Jodi Leese Glusco, *Run-in with Sampson Deputy Leaves Driver Feeling Unsafe*, WRAL (Feb. 14, 2020), https://www.wral.com/run-in-with-sampson-deputy-leaves-driver-feeling-unsafe/18953226/. Every other named victim was killed by law enforcement officers, with one exception: Charles Kinsey was shot in the leg. *See Therapist Charles Kinsey Calls Decision to Overturn Shooting Conviction of North Miami Officer Jonathan Aledda 'Saddening,'* CBS MIAMI (Feb. 17, 2022), https://www.cbsnews.com/miami/news/therapist-charles-kinsey-jonathan-aledda-shooting-conviction-overturned/.

[107] Sarat, *supra* note 8.

help."[108] Gradually it narrows to behavior involving vehicles: sleeping in a car, driving with a broken tail light, driving over the speed limit, and driving under the speed limit.[109] Each declarative sentence is paired with a footnote: "That was Michael Brown," "That was 12-year-old Tamir Rice," "That was Jason Harrison."[110] The weight of situations, some similar to Jamison's circumstances and some not so similar, becomes heavier with each sentence. There is no sense of safety in the negatives—no security in the fact that Jamison wasn't jaywalking or playing with a toy gun or sleeping in his car like other victims of police violence. Instead, the seemingly unending collection of situations that no reasonable person could believe ought to end in death builds toward the question: what situation *is* safe for someone like Jamison? When the list finally concludes with a shift to the affirmative—"No, Clarence Jamison was a Black man driving a Mercedes convertible"[111]—the reader cannot breathe a sigh of relief. If driving under the speed limit led to a traffic stop that left Ace Perry feeling unsafe,[112] and if sleeping in a car led to Rayshard Brooks's death,[113] then what danger awaits Jamison?

In the main text of the opinion, the focus is on Jamison and scenarios that create danger when police are involved. In the notes, the victims are named and remembered. And perhaps because the list begins with Michael Brown, Tamir Rice, Elijah McClain, Eric Garner, George Floyd, Philando Castile, and Tony McDade, names that had become household names in the five years leading up to this opinion, there is no explanatory development in the footnotes beyond the simple sentence, "That was [victim's name]": "That was Michael Brown."[114] But the list does not

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[108] *Jamison*, 476 F. Supp. at 390.
[109] *Id.* at 391.
[110] *Id.* at 390 nn.1, 2, & 7.
[111] *Id.* at 391.
[112] *Id.* at 391 & n.19.
[113] *Id.* at 391 & n.15.
[114] *Id.* at 390 n.1.

include only those names of victims to police violence who had grabbed national headlines in the *Washington Post* or *Newsweek*. Judge Reeves pulls some names from local news stories, like Hannah Fizer.[115]

Nineteen of the twenty people memorialized were Black, and seventeen of the twenty were Black men. Studying the names reminds us that while police violence jeopardizes everyone regardless of gender or race, it nevertheless disproportionately targets Black victims. Some of the victims were young. And most of them are dead as a result of their encounter with police, but all are forever affected.[116] Interestingly, while sixteen of the incidents took place between 2014 and 2020, one happened in 1999,[117] and the three events that occurred between 1967 and 1970 all happened in Mississippi.[118] This list is, of course, not a comprehensive account of all dangerous police encounters in the last half century. But it does suggest that this national problem has deep, local roots in Mississippi.

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[115] Nor does the list only include Black victims; Hannah Fizer was white. *See* Adam Rothman & Barbara J. Fields, *The Death of Hannah Fizer*, DISSENT (July 24, 2020), https://www.dissentmagazine.org/online_articles/the-death-of-hannah-fizer.

[116] Eighteen of the twenty victims lost their lives at the hands of law enforcement. Only Charles Kinsey and Ace Perry survived.

[117] *See Jamison*, 476 F. Supp. 3d at 391 & n.12. Amadou Diallo was killed in 1999.

[118] *See id.* at 391–92 & nn.9, 10, & 11 (naming James Earl Green, Ben Brown, and Phillip Gibbs). Ben Brown was killed on the Jackson State University campus in 1967 when he was shot twice in the back while walking near a standoff between students and police. *See* Jerry Mitchell, *History: Ben Brown, 2 Students Killed at JSU*, CLARION LEDGER (May 9, 2017), https://www.clarionledger.com/story/news/local/journeytojustice/2017/05/09/this-week-in-civil-rights-history-may-9-through-15/101479210/. James Earl Green and Phillip Gibbs were killed in 1970 on that same campus during another student protest. Gibbs-Green Shooting: May 15, 1970, Jackson State University, https://www.jsums.edu/universitycommunications/gibbs-green-shooting-may-15-1970/. Located in Jackson, Mississippi, Jackson State is a public historically Black university. Judge Reeves completed his bachelor's degree at Jackson State in 1986, the first of his family to go to college. He probably would have learned of the deaths of Green, Brown, and Gibbs while an undergraduate. Today, the site of the shooting in 1970 is named for Gibbs and Green. *Id.*

This list contextualizes McClendon's detention of Jamison on the side of a Mississippi road within the history and present of police violence against civilians, often unarmed, and disproportionately Black. The list is excess; for example, what happened in 2019 to Elijah McClain in Aurora, Colorado, when police placed him in a chokehold twice and paramedics injected him with ketamine[119] has no legal bearing on Jamison's civil suit or McClendon's assertion of qualified immunity as a defense. But it introduces into the law what is already present in the social and political consciousness. In its excess, the list dispels any illusion that this traffic stop happened in a vacuum—or that law happens in a vacuum either. It expands the scope of the frame[120] that would otherwise be narrow and constricted in compliance with the Supreme Court's current interpretation of qualified immunity.

The citations attached to this list also represent an excess of law, an expansion of relevance for judicial decision-making. The opinion's list does not rest on explication by court cases, as is common practice in judicial opinions, or even on law review articles, which is less common but still an accepted practice. Instead, the opinion cites news articles from the *New York Times*, *NPR*, and other media outlets rather than the U.S. Supreme Court, the Fifth Circuit, or the Southern District of Mississippi. There has been no legal finding stating what most Americans know to be true: that police violence is a problem and that it is disproportionately meted out against Black civilians. But that legal findings do not exist is a consequence of legal technicalities, immunities, settlement agreements, and cases dismissed—not reality understood in the world. The law has functioned well to protect police officers from the consequences of their actions, and that fact

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[119] *See* Lucy Tompkins, *Here's What You Need to Know About Elijah McClain's Death*, N.Y. TIMES (Jan. 18, 2022), https://www.nytimes.com/article/who-was-elijah-mcclain.html.

[120] Kenneth Burke calls this the circumference. KENNETH BURKE, LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD 360 (1966).

creates two tracks of knowledge, one in the law and one in public consciousness. By citing news sources, this opinion reintroduces the voices, experiences, and data that law excludes. It also draws attention to that very exclusion (and consequent failure): look at all these instances of horrific violence for which the law has no response or remedy.

This citation practice in the opinion's introduction may also hint at a key intended audience, one that is more likely to have access to *NPR*'s website than to Westlaw or LexisNexis.[121] Voters and politicians may not be able to retrieve Breonna Taylor's family and estate's settlement agreement with the city of Louisville, Kentucky, but they can access archived news stories from the *BBC*. More importantly, these news sources contain language that the average adult can understand, without the legal jargon or technicalities that legal documents contain.[122] The opinion's introductory list educates the audience on the context of policing in the United States. The sources cited continue that education and expand the universe of sources relevant to the law.

The remainder of the introduction further represents legal excess and frame shifting. Qualified immunity decisions consider the scene from the perspective of the officer. Yet the introduction tells a story from a different point of view: Clarence Jamison's. It refers to McClendon only as "an armed police officer" or "the officer."[123] And at the conclusion of the encounter, the introduction observes that "[t]hankfully, Jamison left the stop with his life. Too many others have not."[124] Here again, we see excess: Jamison's point of view contextualized within the problem of police violence. The assertion that too many others have not survived is supported by a *New York*

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[121] See *infra* Section V for a more extended discussion of audience.
[122] Actually, there are ways to obtain legal documents like victim settlements or court orders without costly subscriptions to services like Westlaw. But they are hard to find and written in legalese indecipherable to even educated adults.
[123] *Jamison*, 476 F. Supp. 3d at 391.
[124] *Id.*

Times article; the citation's parenthetical note explains that this article "discuss[es] the deaths of Eric Garner, George Floyd, and 68 other people killed while in law enforcement custody whose last words included the statement, 'I can't breathe.'"[125] This citation adds another dimension, an additional awareness of the outcome Jamison could have experienced and almost certainly feared in his encounter with McClendon.

But this brief concluding paragraph to the introductory narrative also demonstrates emotional excess. By modifying the factual statement that "Jamison left the stop with his life" with "thankfully," the opinion inserts emotion into a normally emotionless recounting of the facts or events. It does so explicitly, directly stating the relief that accompanies the outcome. Contextualizing Jamison's encounter with the list of other victims of police violence, and with the statement that "too many others have not," also creates an excess of feelings in the introduction—first, perhaps, of dread in a reading of the list. After all, the opinion has not yet mentioned the conclusion of Jamison's encounter with McClendon. And then comes relief or thankfulness at the realization that despite the emotional harm such an experience might do, or the physical damage done to the vehicle, Jamison did escape with his life, unlike so many others.

The introduction does not end there. Even as the opinion acknowledges that "[u]nder the law, the officer who transformed a short traffic stop into an almost two-hour, life-altering ordeal is entitled to qualified immunity," it resists the inevitability of that law. It sandwiches the legal pronouncement with factual and emotional framing in excess of the law's requirements. Before the legal conclusion, it states that "[t]ragically, thousands have died at the hands of law enforcement . . . . [and c]ountless more have suffered from other forms of abuse and misconduct

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[125] *Id.* at 391 n.20 (quoting Mike Baker et al., *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.,'* N.Y. TIMES (June 29, 2020)).

by police."[126] Following the legal conclusion that the case must be dismissed on qualified immunity grounds, the final sentence of the introduction reads, "As the Fourth Circuit concluded, 'This has to stop.'"[127] That emotion exists at all in the opinion is excess; that the emotion is anger, directed at the law applied, makes it impossible to ignore the excess of feeling.

The emotional excess throughout the introduction is not without linguistic restraint, but even that restraint underscores, rather than limits, emotional impact. Even as word choice, contextualization, and citations create emotional power, the opinion's syntax is direct, even clipped. While describing the results of McClendon's search, the opinion states, "Nothing was found. Jamison isn't a drug courier. He's a welder."[128] These sentences, in their short, declaratory nature, land with anger at what Jamison had to endure. This authoritative, unequivocal anger is even more apparent in the final words of the introduction: "This has to stop." Taken together, the restrained syntax, contextual excess, and narrative frame-shifting both educate and inspire an emotional response in the reader in what Sarat calls "the present's pained voice."[129]

ii. Consent: Excess as Rhetorical Strategy

Before considering whether McClendon is entitled to the defense of qualified immunity, the opinion first addresses whether there was a constitutional violation at all. Jamison's complaint alleged two constitutional violations relevant to this decision: a violation of the Fourth Amendment's prohibition against unreasonable search in McClendon's initial intrusion into the vehicle, and a similar Fourth Amendment violation for conducting the search. The second allegation turns on the question of whether Jamison's consent to search was valid. Consent is

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[126] *Id.* at 392.
[127] *Id.* at 392 (quoting Estate of Jones v. City of Martinsburg, 961 F.3d 661, 673 (4th Cir. 2020)).
[128] *Id.* at 391.
[129] Sarat, *supra* note 8.

normally sufficient to overcome any allegation of an unreasonable search. But if the consent was given involuntarily, the search may be a violation of the Fourth Amendment. The Fifth Circuit considers six factors to determine whether consent was voluntary, and the opinion quotes these factors directly: "(1) the voluntariness of the suspect's custodial status; (2) the presence of coercive police procedures; (3) the nature and extent of the suspect's cooperation; (4) the suspect's awareness of his right to refuse consent; (5) the suspect's education and intelligence; and (6) the suspect's belief that no incriminating evidence will be found."[130] The opinion indicates that the last three factors support a conclusion that Jamison gave consent voluntarily.[131] But because the other three factors create doubt about whether consent was voluntary, the opinion finds "a genuine factual dispute about whether Jamison voluntarily consented to the search,"[132] and a genuine factual dispute at summary judgment means the court must find for the nonmoving party (Jamison, in this case). With respect to the first factor, Jamison was not at liberty to leave; nor was he cooperative with the officer's requests, withholding his consent multiple times.[133] And a jury could credit "evidence of omissions, outright lies, and promises by the officer" that amount to coercive procedures.[134] There may have been coercion—and consequently, consent may not have been voluntary.

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[130] *Jamison*, 476 F. Supp. 3d at 412 (quoting United States v. Escamilla, 852 F.3d 474, 483 (5th Cir. 2017)).
[131] *Id.* at 412 ("Jamison was aware of his right to refuse consent; he refused to give consent after being asked four times by Officer McClendon. Jamison graduated from high school and there is nothing in the record showing that he 'lack[ed] the requisite education or intelligence to give valid consent to the search.' Finally, Jamison believed—rightly so—that no incriminating evidence would be found." (quoting United States v. Cooper, 43 F.3d 140, 148 (5th Cir. 1995))).
[132] *Id.* at 413.
[133] *Id.* at 412–13.
[134] *Id.* at 413.

Rather than ending the inquiry into a constitutional violation there and moving on to the question of immunity, the opinion instead takes a two-and-a-half-page detour. It invokes a hypothetical reader, one who "would be forgiven for pausing here and wondering whether we forgot to mention something."[135] That "something" is "the elephant in the room—how race may have played a role in whether Officer McClendon's actions were coercive."[136]

The opinion turns to race after conducting the formal, legal analysis, examining the factors that the Fifth Circuit set out. This organizational choice in the opinion suggests that there is no room in the law to consider race and its impact on power dynamics and coercion in situations like the one in which Jamison found himself. Yet considering race may not be quite so far outside of legal analysis of coercion and consent as this separation in the opinion suggests. The opinion itself, when asking how race might have played a role in the perception of coercion, cites a Supreme Court case which acknowledges "that the race, gender, age, and education of a young Black woman who 'may have felt unusually threatened by the officers, who were white males' were all relevant factors in determining whether the woman voluntarily consented to a seizure."[137] This suggests at least *some* room to consider race when analyzing the validity of consent, though it could be argued that this precedent does not necessarily support a finding of invalid consent based on race alone without any of the accompanying factors listed by the Court (like gender and education) and without any specific evidence from the event itself to suggest that race made a difference. Whatever the strength or weakness of such an approach, the opinion chooses the alternative: to treat considerations of race as excess to the legal analysis as articulated by the Fifth Circuit in accordance with the Supreme Court's instructions.

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[135] *Id.*
[136] *Id.*
[137] *Id.* at 413 n.208 (quoting United States v. Mendenhall, 446 U.S. 544, 558 (1980)).

Why? Perhaps the opinion is treating race as "[an]other factor relevant to the inquiry" rather than evidence that might go to the question of coercion.[138] Yet while discussing the role that race may have played in the stop, the focus is on whether or not Jamison felt free to refuse consent: "Who can say that he felt free to say no to an armed Officer McClendon?"[139] Or perhaps the opinion wishes to demonstrate that, whether or not the reader is willing to consider race's impact on whether Jamison's consent was coerced, there is sufficient evidence to find that it was coerced apart from race.[140] There is another possibility. Isolating the question of whether race contributed to the coerciveness of McClendon's tactics provides a platform for in-depth consideration of how race might have played a role. It creates an opportunity to educate the legal system and other judges as well as the public at large.[141] And like the dissents of Justice Ginsburg, this act of rhetorical excess "shifts the language of the law to legitimate voices, experiences and rights of groups traditionally excluded by the rhetoric of the law."[142]

The opinion's historical and racial instruction on consent begins with "a different kind of traffic stop result[ing] in the brutal lynching of James Chaney, Michael Schwerner, and Andrew

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[138] *Id.* at 412.
[139] *Id.* at 415.
[140] A judge might do this if they were concerned about being overturned upon appeal. However, since the outcome of this decision is in McClendon's favor, such a possibility is unlikely in this case. Instead, the opinion may be constructed with an eye toward future decisions in the Southern District of Mississippi. While a decision such as this would not be binding authority, it could be drawn upon for persuasive authority within the District.
[141] It may also send a secondary message of the need for reform. The opinion argues forcefully for the end of qualified immunity. In addition to rethinking qualified immunity, this approach to consent may demonstrate that the legal system ought to consider how race has been erased in the law and how that erasure renders law inadequate to serve justice.
[142] Gibson, *supra* note 69, at 124. In support of the subtle assertion that race is often ignored, the opinion cites Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1151 n.81 (2012), which lists "cases in which the Supreme Court failed to recognize the potential impact of race and racism." *Jamison*, 476 F. Supp. 3d at 413 n.207.

Goodman" in Philadelphia, Mississippi, just an hour north of Pelahatchie, where Jamison was detained.[143] The opinion does not mention that its own release coincides with the fifty-six-year anniversary of the discovery of those three murdered civil rights workers' bodies.[144] It memorializes them in their humanity by naming them prominently. The opinion goes on to name James Craig Anderson, the victim of another lynching that occurred just west of Pelahatchie.[145] But this lynching occurred in 2011, just two years before Jamison's experience. "For Black people, this isn't mere history. It's the present."[146]

It may have been a rhetorical choice to set apart as excess the analysis of racial context and history as a factor in understanding whether Jamison felt coerced. But the opinion makes clear that this context is not optional if one is truly to understand Jamison's mindset during the stop. The opinion asserts that "Jamison's traffic stop cannot be separated from this context" after discussing the Black Lives Matter movement "that would shine a light on killings by police and police brutality writ large—a problem Black people have endured since 'states replaced slave patrols with police officers who enforced Black codes.'"[147] The opinion here is not directly countering the prescribed legal analysis for qualified immunity set out by the Supreme Court, but its insistence on providing context in order to rightly understand the traffic stop exposes both the narrowness of qualified immunity analysis and, more importantly, whom that narrow framing or limited

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[143] *Jamison*, 476 F. Supp. 3d at 413.
[144] Carrie Johnson, *Judge, Shielding Cop Via 'Qualified Immunity,' Asks Whether It Belongs in 'Dustbin,'* NPR (August 6, 2020), https://www.npr.org/2020/08/06/899489809/judge-shielding-cop-via-qualified-immunity-asks-whether-it-belongs-in-dustbin#:~:text=Press-,Judge%2C%20Shielding%20Cop%20Via%20'Qualified%20Immunity%2C'%20Asks%20Whether,doctrine%20itself%20to%20be%20reevaluated.
[145] *Jamison*, 476 F. Supp. 3d at 413–14.
[146] *Id.* at 414.
[147] *Id.* (quoting Hannah L.F. Cooper, *War on Drugs Policing and Police Brutality*, 50 SUBSTANCE USE & MISUSE 1188, 1189 (2015)).

circumference benefits. By expanding the circumference, the opinion asserts that Jamison's mindset and experience of the encounter *as a Black man* matters and should have a place in legal discourse.

To drive home the point that encounters with the police are quantifiably different for Black men,[148] the opinion turns to a source offering widespread credibility. After a general statement that achievement or prestige does not offer Black people any protection from police scrutiny, including "Black doctors, judges, and legislators alike," the opinion draws upon the experiences of Senator Tim Scott.[149] The Republican U.S. senator from South Carolina has been pulled over time and again, even while in office, and often simply because he was driving a new car.[150] Scott has also shared similar experiences of his brother, a command sergeant major in the U.S. Army, and of a former staffer.[151] These narratives usher the voices of Black Americans into legal decision-making and humanize those experiences of police encounters. Admittedly, a U.S. senator already has a substantial platform, but the experiences he shares from that platform have largely been excluded from legal analysis. The personalized, individualized, humanized experiences of Tim Scott and

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[148] The opinion itself repeatedly refers to Black people rather than Black men. Yet the evidence it draws on almost exclusively deals with the experiences of Black men. *See Jamison*, 476 F. Supp. 3d at 414–15 nn.215–219; *see also* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 7–13 (2017) (discussing the perception that Black men in particular are a threat and consequently subjected to "police tactics such as stop and frisk, which are designed to humiliate African American males—to bring them into submission").

[149] *Jamison*, 476 F. Supp. 3d at 414–15 & n.217.

[150] *Id.* at 414–15 & nn.217–219.

[151] *Id.* at 415 n.219. Most people understand the prestige and respect conferred upon a U.S. senator in that office. A command sergeant major is similarly prestigious in the armed forces; it is the highest rank (sergeant major) achievable by an enlisted service member combined with the highest assignment attainable (command). Achievement should not inoculate people from unlawful policing practices. But if excellence and respect in politics and military service cannot protect from police harassment, it demonstrates, *a fortiori*, how pervasive harassment in policing truly is. I should not, however, be mistaken for arguing that this problem is only a problem because it affects high-ranking people.

others are accompanied with aggregated and less-personal data, including the statistic that police kill Black Americans at twice the rate of white Americans.[152] Notably, the opinion never refers to any experiences of its author, Judge Reeves, a Black man who grew up in Mississippi and was only the second Black person appointed to the federal bench in that state. The use of individual experience, it would seem, has its limits; here, the opinion maintains an institutional authorial persona rather than adopting an individual voice, even as it draws upon the personal experiences of others.

Returning to the personal experience that matters most for this particular decision, the opinion concludes: "It was in this context that Officer McClendon repeatedly lied to Jamison. It was in this moment that Officer McClendon intruded into Jamison's car. It was upon this history that Jamison said he was tired."[153] Consent was involuntary, rendering the search unlawful.

As the opinion departs from the discussion of the Fifth Circuit's factors analyzing consent and turns to historical and pedagogical exploration of race's influence, it again moves from traditional legal citations like court cases and law review articles to publicly available reports. The first citation in this history is to a Department of Justice report, followed by a series of footnotes primarily citing articles from the *New York Times*, the *Washington Post*, and other news sources.[154] Only at the conclusion of this account, in which the opinion returns to Jamison's encounter, consent, and the Fourth Amendment, does the opinion return to traditional legal citations.[155]

This section of the opinion, which considers whether Jamison's consent was coerced, demonstrates that excess is a rhetorical choice that can underscore what the law excludes. The

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[152] *Id.* at 415 & n.221.
[153] *Id.* at 415.
[154] *See id.* at 413–15 nn.209–223.
[155] *Id.* at 415–16 nn.224–225. *See infra* Section IV (discussing limits to the opinion's citational nonconformity).

opinion includes Black experiences of policing in the United States but sets them apart as something the law *might* acknowledge, but only grudgingly. By turning to that compelling evidence only after conducting the standard legal analysis, the opinion elevates the substance of those experiences by giving specific Black perspectives and lived experiences their own space. This choice also highlights the fact that they are often a reluctant legal afterthought, if any thought at all. By refusing to shoehorn experiences into the law's prescribed contours of coercion, the opinion is free to draw on voices and sources that would not normally be included in legal analysis, such as voices of a senator or an Army major reported in mainstream media. And by *signaling* that separation with a constructed reader who wonders whether race might be overlooked in the inquiry,[156] it actively draws attention to the law's gaze averted from race. It refuses to ask that Jamison's race and experiences as a Black man within this history and in this moment be accepted as part of the legal analysis. Instead, it acknowledges that they are typically *not* accepted or even considered. That subtle indictment of the legal system coincides with a more direct indictment of the judiciary and legal system at large in its accounting of the history of constitutional amendments passed following the Civil War, the enforcement statutes, and the development of qualified immunity.

B. The Law: A History Lesson

In addition to contextualizing Jamison's experience as a Black man confronted by police, the opinion contextualizes the relevant laws and doctrines in Part III, immediately following the legal standard in Part II. To frame the ultimate question about McClendon's entitlement to

[156] *Id.* at 413 ("A reader would be forgiven for pausing here and wondering whether we forgot to mention something. When in this analysis will the Court look at the elephant in the room—how race may have played a role in whether Officer McClendon's actions were coercive?" (internal citations omitted)).

qualified immunity, the opinion does not use the history of the Fourth Amendment, as some might expect. Instead, the history begins with Section 1983, the statutory enforcement mechanism to hold accountable those who violate constitutional rights,[157] and the Reconstruction Amendments passed in order to ensure the end of slavery and promote the political equality of the races.[158] Both Section 1983 and the Amendments, as well as other accompanying legislation, were intended to "forc[e] states to fulfill their constitutional responsibilities."[159] States would be accountable to the federal legislative and judicial branches for upholding the constitutional rights of all citizens equally, regardless of race. The history continues with the weakening of those statutory and constitutional protections orchestrated by the federal judiciary, followed by Section 1983's resuscitation. Finally, after the Supreme Court introduced qualified immunity, it gradually metastasized the doctrine into near-absolute immunity.[160] Judge Reeves's opinion develops each part of this history: (1) the statutory and constitutional foundations and subsequent weakening, (2) the resuscitation of Section 1983, and (3) the development of qualified immunity. The opinion's history lesson is excess to the legal analysis and counters the typical rhetoric of inevitability with a demonstration of the judiciary's agency in that history and responsibility for the immunity it "manufactured."[161] The outcome is not inevitable, and the Supreme Court has the tools it needs to once again align law and justice.

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[157] *See supra* Chapter 1, notes 26–31 and accompanying text.
[158] *Jamison*, 476 F. Supp. 3d at 397–98.
[159] *Id.* at 398 (quoting THE OXFORD GUIDE TO THE SUPREME COURT OF THE UNITED STATES 442 (Kermit L. Hall et al. eds., 2d ed. 2005)).
[160] *Id.* at 391 ("The doctrine is called 'qualified immunity.' In real life it operates like absolute immunity."); *see also id.* at 405 ("Each step the Court has taken toward absolute immunity heralded a retreat from its earlier pronouncements.").
[161] *Id.* at 391–92 (asserting that "[o]ver the decades, however, judges have invented a legal doctrine to protect law enforcement officers from having to face any consequences for wrongdoing," and that "the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine").

i. History of Amendments and Statutes

In Section III.A, the history the opinion tells of the Reconstruction Amendments and additional legislation intended to guarantee constitutional rights and protections for all is one of federal intervention alongside of "white supremacist backlash, terror, and violence," a battle between "two visions of America."[162] And in that battle, legislation and its application and enforcement by the judicial and executive branches made a difference. "For the first time in history, the United States saw a Black man serve in the United States Senate . . . , the establishment of public school systems across the South, and increased efforts to pass local anti-discrimination laws."[163] This was a "glimpse of a different America" made possible by legislative changes to federal laws and systems.[164] But the opinion emphasizes that this was just a glimpse of a potential, not a realization. One brief paragraph describes the progress made possible by the Reconstruction Amendments. Nearly two pages are devoted to the white supremacist backlash. White militias murdered, the Ku Klux Klan's membership and influence grew, and "terrorism in Mississippi was unparalleled."[165]

Here, the opinion hints at one villain this narrative will highlight.[166] Mississippi made hunting and fishing by Black people a criminal offense.[167] The Klan was formed in 1866 in a "law office" in Tennessee.[168] "[B]lack schools and churches were burned with impunity."[169] "[N]o one

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[162] *Id.* at 398 & n.58.
[163] *Id.* at 398.
[164] *Id.*
[165] *Id.*
[166] I use the word "highlight" deliberately. There is no one responsible party for the violence and terror this country rained down on the heads of Black people during this period.
[167] *Jamison*, 476 F. Supp. 3d at 398.
[168] *Id.*
[169] *Id.* (quoting Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 2018 UTAH L. REV. 639, 660).

served a day" for the murders of sixty-three Black Mississippians that occurred in the first three months of 1870.[170] In other words, the legal system itself played a central part in the performance of white supremacy following emancipation.

Then the opinion's finger-pointing becomes more direct. It identifies the enforcers of the legal system, police officers, as "perpetrators of racial terror" and responsible for preventing the enforcement of laws that would have protected Black victims.[171]

The U.S. legislature attempted to hold states accountable for combating the violence and for its own complicity for condoning and participating in that violence with the Ku Klux Klan Act of 1871, also known as the Enforcement Act or Civil Rights Act of 1871.[172] After an overview of the Act, the opinion focuses on Section 1, the precursor to 42 U.S.C. § 1983, which "uniquely targeted state officials who 'deprived persons of their constitutional rights.'"[173] It opened "the doors to the courthouse" to anyone who had suffered a violation of rights by a police officer or other government official.[174]

The opinion characterizes the passage of the Act as "recognition that—to borrow the words of today's abolitionists—'the whole damn system [was] guilty as hell.'"[175] The opinion explicitly indicts the system for eroding civil rights. At the same time, it demonstrates that the statute upon

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[170] *Id.* (quoting RON CHERNOW, GRANT 588 (2017)).
[171] *Id.* at 399.
[172] *Id.*
[173] *Id.* at 400 (quoting Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 485 (1982)).
[174] *Id.* The statute applies to any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." 42 U.S.C. § 1983.
[175] *Id.* (quoting @ignitekindred, TWITTER (Apr. 26, 2016, 6:39 PM)) (alteration in opinion). That tweet is no longer available, but this is the chant used by demonstrators in Milwaukee after a grand jury declined to charge officers with the death of Breonna Taylor. *See* Jake Johnson, *'The Whole Damn System Is Guilty as Hell': Protests Erupt Nationwide After No Officers Charged for Killing Breonna Taylor*, COMMON DREAMS (Sept. 24, 2020), https://www.commondreams.org/news/2020/09/24/whole-damn-system-guilty-hell-protests-erupt-nationwide-after-no-officers-charged.

which Jamison's suit stands was born out of state-sanctioned and -perpetrated violence and intimidation of Black people in Mississippi and across the South. By quoting modern protesters similarly calling attention to the systematic denial of civil rights to Black people, the opinion collapses the distance between 1871 and 2020. The whole damn system *was* guilty as hell. The whole damn system *still is* guilty as hell. Why? Because although the Act was successful for a time,[176] the federal government again abandoned Reconstruction and emancipation. The opinion turns its criticism to the judicial system specifically: "Federal courts joined the retreat and decided to place their hand on the scale for white supremacy."[177]

The opinion then provides a lengthy quotation from Professor Katherine Macfarlane about the late nineteenth-century Supreme Court decisions, including the *Slaughter-House Cases*, that "narrowed [the] construction of both the Fourteenth Amendment and the civil rights statutes enacted pursuant to it."[178] In the opinion's footnotes, a supporting voice emerges, supporting the assertion that federal courts aligned themselves with white supremacy: "That is not surprising since many of these judges were members of the Klan, supporters of the Confederacy, or both."[179] State and local officials may have participated in white supremacist violence and intimidation, but the judicial system did not have clean hands. The courts' "involvement in that downfall [of the promise of the Fourteenth Amendment and Reconstruction] and its consequences could not have been greater."[180]

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[176] *Jamison*, 476 F. Supp. 3d at 400 ("Led by federal prosecutors at the Department of Justice, 'federal grand juries, many interracial, brought 3,384 indictments against the KKK, resulting in 1,143 convictions.'" (quoting CHERNOW, *supra* note 170, at 708)).
[177] *Id.*
[178] *Id.* at 401 (quoting Macfarlane, *supra* note 169, at 661–62).
[179] *Id.* at 400 n.91.
[180] *Id.* at 401 (quoting DERRICK A. BELL JR., RACE, RACISM, AND AMERICAN LAW 48 (6th ed. 2008)).

The opinion makes two crucial points in framing this history lesson: Section 1983 was, in its inception, specifically intended to force state and local officials to respect the constitutional and statutory rights of Black people in the face of white supremacist violence and intimidation. Race is not excessive to the legal question at hand. Instead, it *is* the question, or at least should be, if the history of the statute is to be observed. And second, courts have not been neutral decision-makers in this history, dispassionately applying the law. The Supreme Court has taken specific steps to curtail the force and effectiveness of this legislation passed to ensure the equal protection of all Americans, Black Americans especially. The law as it stood in 1871 or 1873 or 2020 is not inevitable, and neither is its application. It has been constructed and narrowed, and even manufactured. And Judge Reeves's opinion, in its historical review, indicts the courts for, at least in the nineteenth century, constructing the law in favor of white supremacy.

ii. Resuscitation

Despite abandonment by the federal government and judiciary, civil rights activists continued to labor for full equality and rights of citizenship. The end of Section III.A of the opinion highlights *Brown v. Board of Education* as one victory for those advocates, along with other twentieth-century civil rights laws.[181] The opinion goes on to identify this activism and *Brown* as the "backdrop" for the Supreme Court's attempt to breathe new life into Section 1983 with its 1961 decision in *Monroe v. Pape*.[182] With that decision, Section 1983 became the powerful statutory authorization opening the doors of federal courts to people seeking vindication of constitutional rights violated by state and local officials.[183]

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[181] *Id.*
[182] *Id.*
[183] *Id.* at 402.

The opinion describes the events leading to that landmark case, quoting from the Supreme Court majority's opinion, as "a case where '13 Chicago police officers broke into [a Black family's] home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers.'"[184] Judge Reeves's opinion adds the detail of the family's race, a necessary alteration to the description of events. Sometimes in judicial opinions, quotations drawn from other sources need to be supplemented because the crucial language is in the wrong verb tense or includes a pronoun for which the antecedent must be provided. Not so here. Not once in the Supreme Court's decision did the majority mention that the Chicago family subjected to this indignity was Black. Although the opinion in *Jamison* did not overlook *Monroe v. Pape*'s omission, inserting "[a Black family]" where the original opinion simply used "petitioners,"[185] it did not draw attention to its omission otherwise. Nevertheless, while the Court may wish to ignore it, the point is clear that race is unequivocally bound up in the history and application of Section 1983 and the vindication of Fourth Amendment violations.

It is here that the opinion recites the language of Section 1983 and reminds the reader of why this matters right now. Jamison has claimed that McClendon "violated his Fourth Amendment right to be free from unreasonable searches and seizures," a claim that can be brought in federal court because of Section 1983.[186] The opinion has leapt the distance from 1961 to 2020 while

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[184] *Id.* at 401–02 (quoting Monroe v. Pape, 365 U.S. 167, 169 (1961)) (alteration in opinion).
[185] *Monroe*, 365 U.S. at 169.
[186] *Jamison*, 476 F. Supp. 3d at 402. The quoted excerpt of Section 1983 in the opinion reads, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

tracing a thread from Reconstruction to the rise of the Ku Klux Klan to the Enforcement Act of 1871 to the *Slaughter-House Cases* to *Monroe v. Pape*. But the history lesson is not quite over.

iii. Qualified Immunity

If Section III.A, which the opinion titles "Section 1983: A New Hope,"[187] shows the strength of Jamison's claim, then Section III.B dashes that hope and pins the blame squarely on the Supreme Court. Even the section's title, "Qualified Immunity: The Empire Strikes Back," foreshadows that reversal.[188] The first sentence gets right to the point, with active verbs pointing fingers at a responsible subject: "Just as the 19th century Supreme Court neutered the Reconstruction-era civil rights laws, the 20th century Court limited the scope and effectiveness of Section 1983 after *Monroe v. Pape*."[189] History repeats, with devastating consequences.

The opinion's blame is apparent for the nineteenth-century Court; "neutered" casts unequivocal judgment. But the twentieth-century Court only "limited the scope and effectiveness" of the statute. To be sure, limiting was still something the Court actively engaged in, but to "limit[] the scope and effectiveness" is more technical language, with less of a critical undertone in the word choice. Nevertheless, by beginning with the phrase "just as," the sentence equates the two actions and guides the reader's focus to the same institutional villain. The verb choice may also indicate a different direct object for the action (both grammatically and performatively), even if the impact on civil rights laws and Section 1983 is similar. Civil rights laws were directly undermined by the Supreme Court in the 1870s; the *Slaughter-House Cases* explicitly limited the strength and scope of the Thirteenth and Fourteenth Amendments.[190] But Section 1983 has not

[187] *Jamison*, 476 F. Supp. 3d at 396.
[188] *Id.* at 402.
[189] *Id.*
[190] 83 U.S. 36 (1973).

been directly chipped away; instead, qualified immunity[191] and other limits on the statute's power are external procedural and substantive doctrines that plaintiffs must clear before the promise of Section 1983 can be realized in each individual case. The damage done to Section 1983 by the twentieth-century Court is more subtle and indirect.

The story takes us back to race and Mississippi once again. Qualified immunity was "born" in the Supreme Court's 1967 decision in *Pierson v. Ray*.[192] The opinion recounts the events leading to the lawsuit: a group of Black and white clergymen attempted to use segregated facilities at a bus terminal in Jackson, Mississippi.[193] When the statute which they were arrested for violating was declared unconstitutional, they sued under Section 1983. In response, the officers asserted a good faith defense. The Supreme Court, with its decision, decided to read a good faith defense into the statute and immunized the officers from civil suit.

The opinion takes aim explicitly at this manufactured doctrine through skepticism and countering of the univocal expression of the law emanating from the contemporary Court. It explains the roots of qualified immunity as narrated by the Court in *Ziglar v. Abbasi*, a 2017 case, quoting heavily from a concurrence written by Justice Clarence Thomas.[194] In it, Thomas insists that the Supreme Court "'read [qualified immunity] in harmony with general principles of tort immunities and defenses'" and that "'[c]ertain immunities were so well established in 1871 . . . that we presume that Congress would have specifically so provided had it wished to abolish them.'"[195] Note that in Thomas's telling quoted by the opinion, the Supreme Court had simply

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[191] The opinion refers to qualified immunity as "perhaps the most important limitation" on Section 1983. *Jamison*, 476 F. Supp. 3d at 402.
[192] *Id.* at 402–03.
[193] *Id.* at 403 (citing Pierson v. Ray, 386 U.S. 547, 549 (1967)).
[194] *Id.* at 402 (citing Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring)).
[195] *Id.* (citing Ziglar, 137 S. Ct. at 1870 (Thomas, J., concurring)) (internal citations omitted).

performed a passive "read[ing]" of the doctrine and law rather than the active construction or "manufacture" that the *Jamison* opinion describes. In the *Jamison* opinion, on the other hand, the Supreme Court is an active agent, "invent[ing]" and "manufactur[ing] doctrine," and "neuter[ing] . . . civil rights laws,"[196] responsible for the law as it is. In the (admittedly brief) excerpt from Thomas's concurrence, the Supreme Court's articulation of the law is a foregone conclusion, and the Court is simply complying with the force of legislation and history. In a note, the *Jamison* opinion challenges that history more explicitly, stating that "[s]everal scholars have shown that history does not support the Court's claims about qualified immunity's common law foundations."[197]

The opinion's skepticism is reflected in its narration of the development of the doctrine from 1967 in *Pierson v. Ray* to its modern policy goals and technical requirements. From protecting officers from liability if they were acting in good faith, "[s]ubsequent decisions 'expanded the policy goals animating qualified immunity,'" transforming it to balance the importance of constitutional rights against protection for officials, in the 1982 Supreme Court case *Harlow v. Fitzgerald*.[198] But that expansion was not enough for the Court, according to the *Jamison* opinion: "A review of our qualified immunity precedent makes clear that the Court has dispensed with any pretense of balancing competing values."[199] The opinion then goes on to list seven

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[196] *Id.* at 391, 392, 402.
[197] *Id.* at 402 n.109 (citing Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018)); *see also* William Baude, *Is Qualified Immunity Unlawful*, 106 CALIF. L. REV. 45, 55, 74 (2018) (arguing that, though there may be policy justifications for qualified immunity, there is no legal justification—specifically, qualified immunity is not an updated version of common law's subjective defense of good faith and is in no way similar to the criminal rule of fair notice or lenity); James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. U. L. REV. ONLINE 148, 150 (2021).
[198] *Jamison*, 476 F. Supp. 3d at 403 (quoting Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 14 (2017)); Harlow v. Fitzgerald, 457 U.S. 800, 800 (1982).
[199] *Jamison*, 476 F. Supp. 3d at 403.

egregious situations in which "courts have shielded a police officer."[200] It is clear, at this point, whose interests prevailed and which institution made it happen, and the skeptical persona foreshadowed in the introduction has moved from the footnotes to the main text of the opinion.

The skeptic's pointed accusation of the judicial system broadly, and the Supreme Court in particular, gains force with the rhetorical question, "If Section 1983 was created to make the courts 'guardians of the people's federal rights,' what kind of guardians have the courts become?"[201] Two concise sentences of condensed history suggest the answer: "Once, qualified immunity protected officers who acted in good faith. The doctrine now protects all officers, no matter how egregious their conduct, if the law they broke was not 'clearly established.'"[202] With this summary, the reader is left to answer for themselves what kind of guardians the courts have become.[203]

The opinion goes on to lay out the case against the Supreme Court and its manipulation of the doctrine to confer absolute immunity upon officers at the expense of constitutional rights. It names the addition of the requirement that the law be "clearly established" in 1982.[204] Shortly after, the Supreme Court "'evolved' the qualified immunity defense to spread its blessings 'to all but the plainly incompetent or those who knowingly violate the law.'"[205] In 2011, the Court "ratcheted up the standard . . . when it added the words '*beyond debate*'" and transformed the inquiry from what *a* reasonable officer would understand to what *every* reasonable officer would

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[200] *Id.*
[201] *Id.* at 404 (quoting Haywood v. Drown, 556 U.S. 729, 735 (2009)).
[202] *Id.*
[203] The opinion distinguishes between its blame for the Supreme Court and the role that lower courts play. District courts and appellate courts alike are bound to apply the law as articulated by the Supreme Court, and "it is unnecessary to ascribe malice to the appellate judges deciding these terrible cases. No one wants to be reversed by the Supreme Court." *Id.* at 408.
[204] *Id.* at 404 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
[205] *Id.* (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)). Note that "evolved" was the *Jamison* opinion's own word, not a quotation from *Malley*.

understand as a violation of the law.[206] Placing "evolved" in quotation marks, the opinion suggests some irony in the term; in fact, this change in the law was not natural progress but a deliberate choice by the Court to restrict civil rights protections. The opinion uses active verbs to describe what the Supreme Court has done: "evolved" and "ratcheted up" are active and powerful indictments.

The opinion also names three procedural gifts to officer defendants. Officers are entitled to summary judgment—even if genuine issues of fact remain—if the law is not clearly established beyond debate.[207] The Court has instructed lower courts to dismiss cases as quickly as possible so that defendants are not burdened by tedious litigation; dismissal may be prior to any discovery.[208] And denials of qualified immunity, contrary to typical federal court rules limiting appeals to after a final judgment is made, can be immediately appealed; "[q]ualified immunity's premier advantage thus lies in the fact that it affords government officials review by (at least) four federal judges before trial."[209] This detailed history, a rhetorical excess beyond the necessary legal analysis, educates the audience and indicts the Supreme Court by countering its rhetoric of inevitability with a narrative of agency in which the Court shaped qualified immunity.

iv. Exemplars

The opinion's narrative of qualified immunity's development includes exemplar cases in which the doctrine has shielded officials. Just as the opinion contextualizes Jamison's experience of the traffic stop on July 29, 2013, the opinion similarly contextualizes the law that would deny him remedy. Both contexts are excess, beyond what the law cares to know when a decision-maker

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[206] *Id.* (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).
[207] *Id.* at 405.
[208] *Id.* at 404.
[209] *Id.* (citing Elder v. Holloway, 510 U.S. 510, 516 (1994)).

issues a ruling. But it is only by looking at the universe of qualified immunity cases that one can see the large-scale effects of the doctrine—and the potential connection between the doctrine and the state of policing in America that contributed to Jamison's perception of the stop.

The opinion first uses a list of cases in which officers and prison guards were granted qualified immunity to demonstrate that courts are no longer balancing competing values and are instead simply protecting officers.[210] The seven examples are concise, prioritizing quantity over depth, arranged into a single sentence. The sentence begins, "Our courts have shielded"; the rest of the sentence is comprised of seven direct object clauses separated by semicolons. It's worth quoting the sentence in its entirety:

> Our courts have shielded a police officer who shot a child while the officer was attempting to shoot the family dog; prison guards who forced a prisoner to sleep in cells "covered in feces" for days; police officers who stole over $225,000 worth of property; a deputy who body-slammed a woman after she simply "ignored [the deputy's] command and walked away"; an officer who seriously burned a woman after detonating a "flash-bang" device in the bedroom where she was sleeping; an officer who deployed a dog against a suspect who "claim[ed] that he surrendered by raising his hands in the air"; and an officer who shot an unarmed woman eight times after she threw a knife and glass at a police dog that was attacking her brother.[211]

The reader is propelled through the nineteen lines that the sentence occupies in the published Federal Supplement without a single period. Five different circuits are represented in the list: the Fifth,[212] Sixth,[213] Eighth,[214] Ninth,[215] and Eleventh (the Eleventh is represented three times).[216]

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[210] *Id.* at 405–06 ("Federal judges now spend an inordinate amount of time trying to discern whether the law was clearly established 'beyond debate' at the time an officer broke it. But it is a fool's errand to ask people who love to debate whether something is debatable.").
[211] *Id.* at 403–04 (internal citations omitted).
[212] Taylor v. Stevens, 946 F.3d 211, 220 (5th Cir. 2019).
[213] Baxter v. Bracey, 751 F. App'x 869, 872 (6th Cir. 2018), *cert. denied*, 140 S. Ct. 1862 (2020).
[214] Kelsay v. Ernst, 933 F.3d 975, 980 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 2760 (2020).
[215] Jessop v. City of Fresno, 936 F.3d 937, 942 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2793 (2020).
[216] Corbitt v. Vickers, 929 F.3d 1304, 1323 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020); Dukes v. Deaton, 852 F.3d 1035, 1039 (11th Cir. 2017); Willingham v. Loughnan, 261 F.3d 1178, 1181 (11th Cir. 2001), *cert. granted, judgment vacated*, 537 U.S. 801 (2002).

The Supreme Court denied certiorari in four of the circuit court decisions; only one case, out of the Eleventh Circuit, was vacated and remanded by the Supreme Court.

After giving this wide-angle context, the opinion then takes two particular cases, neither included in the list described above, and through them explores the extent to which courts struggle to determine whether the law was clearly established beyond debate.[217] The first case, *McCoy v. Alamu*, illustrates the point that when any factual distinction is potential for debate, nothing can ever be said to be clearly established.[218] In that case, the Fifth Circuit granted a corrections officer immunity because he only pepper sprayed an inmate once, unprovoked, instead of using the full can as had been done in a previous case.[219]

The second case presented by the *Jamison* opinion, *Taylor v. Stevens*, makes a similar hair-splitting factual distinction. Precedent had found that confining a prisoner in unsanitary conditions for months violated the Eighth Amendment. But here, Taylor was only confined to feces-covered cells for six days. Therefore, the Fifth Circuit concluded that the law was not clearly established and granted immunity.[220] The *Jamison* opinion quotes extensively from the circuit court's review of the facts; one block quotation occupies nearly a full page.[221]

The detailed facts of *Taylor* do not influence the outcome of Jamison's claim. Yet as the opinion points out, the details are simultaneously horrifying and the very basis for granting

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[217] *Jamison*, 476 F. Supp. 3d at 403–04.
[218] *See id.* at 404 (citing McCoy v. Alamu, 950 F.3d 226, 231, 233 (5th Cir. 2020)).
[219] Note that in the 2020 term, the Supreme Court reversed both McCoy v. Alamu and Taylor v. Stevens. *See* Taylor v. Riojas, 141 S. Ct. 52 (2020) (per curiam); McCoy v. Alamu, 141 S. Ct. 1364 (2021) (per curiam). Although some believe these reversals indicate a softening on the part of the Supreme Court with respect to the stringency of the qualified immunity standard, both of these cases were Eighth Amendment violations rather than Fourth Amendment violations. *See supra* Chapter 1, Section IV.
[220] *Jamison*, 476 F. Supp. 3d at 406–08 (citing Taylor v. Stevens, 946 F.3d 211, 218–19, 222 (5th Cir. 2019)).
[221] *Id.* at 406–07.

immunity. The more detailed the description of the facts, the more a reader might be convinced that surely this is a violation of a human being's fundamental rights. But the more detailed the description of the facts, the more likely it is for an officer to be granted immunity based on granular distinctions.

This collection of examples, contextualizing the doctrine and this decision that must be made for McClendon, suggests the truth behind Justice Sonia Sotomayor's pronouncement that the Court's qualified immunity jurisprudence in *Kisela v. Hughes* "sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[222] Qualified immunity did not *cause* the problem of police brutality and its disproportionate harm to Black people. But it has sent a message of absolute immunity to both the police and the public, and Jamison brought this awareness to the side of a Mississippi highway.

C. The Flexibility of Law

The titles of Section III.A and III.B, "A New Hope" and "Qualified Immunity: The Empire Strikes Back" imply a third piece to complete the trilogy. Part VI is entitled "The Return of Section 1983." Previous pages of the opinion have framed the situation and the law expansively—and this excess exposes a few truths about the law. First, the development and application of law is not inevitable, with courts (especially the Supreme Court) simply bending to the force of history and legislation. Against that inevitability, this opinion offers a counternarrative of the Supreme Court's deliberate choice to prioritize the protection of officials above all else, even dispensing with balancing of interests. And finally, it exposes the arbitrary and narrow framing of Fourth Amendment and qualified immunity inquiries by contextualizing Jamison's experience in

[222] 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

Mississippi as a Black man within a continuing history of racism and the disproportionate police brutality and harassment of Black people. The law may not accommodate the consideration of race, but race is present nonetheless. Pretending that it doesn't exist or has no impact does not make it so.

The penultimate part of the opinion answers the question, "In light of this history and the Supreme Court's responsibility, what is to be done?" The introduction of the opinion drew a distinction between law and justice. It asserted that although legally McClendon is entitled to qualified immunity, "[i]mmunity is not exoneration."[223] The opinion equates the legal protection provided by the Supreme Court's "manufactured doctrine" with "legal jargon."[224] The fact that the law can provide no remedy for the harm done to Jamison "has to stop."[225] The law points to the exit; justice points in the opposite direction. Part VI offers a way to close the gap between the two. Arguing that the Court should send qualified immunity "to the dustbin of history" just as it did with the doctrine of "separate but equal" in *Brown v. Board*, the opinion reminds the Court that stare decisis is not an unassailable principle.[226] The Court has overruled other Supreme Court precedent,[227] and several of its members have expressed beliefs that qualified immunity may be unjustifiable and ripe for overruling.[228]

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[223] *Jamison*, 476 F. Supp. 3d at 392.
[224] *Id.*
[225] *Id.* (quoting Estate of Jones v. City of Martinsburg, 961 F.3d 661, 673 (4th Cir. 2020)).
[226] *Id.* at 419.
[227] *Id.* at 420 (naming *Janus v. AFSCME* overruling *Abood v. Detroit Board of Education*; *Knick v. Township of Scott* overruling *Williamson County v. Hamilton Bank*; and *Ramos v. Louisiana* overruling *Apodaca v. Oregon*).
[228] *Id.* at 419. The opinion quotes Justices Kennedy, Scalia, Thomas, and Sotomayor. Yet only two of these justices remain on the Court, even as of 2020, and Justice Thomas seems to advocate for revision of the doctrine to be more faithful to the tort immunities available in 1871 rather than abolishing the doctrine altogether. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part).

To offer a roadmap of how and why to eliminate qualified immunity, the opinion looks to a 2014 Fifth Circuit case, *Dulin v. Board of Commissioners of Greenwood Leflore Hospital*. That case was based on Section 1981, a companion statute to Section 1983, which "prohibits racial discrimination in making and enforcing contracts."[229] George Dulin, a white man, argued that he had been removed without cause from his position as an attorney representing the local hospital board in Greenwood, Mississippi, and was replaced by a Black woman.[230] However, like Section 1983, Section 1981 contains hurdles that plaintiffs must clear, not existing in the statute, including a temporal proximity requirement for evidence of racial motivation.[231] Initially, Dulin's complaint was dismissed because it could not satisfy this requirement. But after one Fifth Circuit judge penned a lengthy dissent, the rest of the panel withdrew its decision and "issued in its place a two-paragraph, per curiam order directing the district court to hold a full trial on Dulin's claims."[232] Ultimately, a "powerful defense of the Seventh Amendment" right to a jury trial convinced the panel to prioritize that right over the judge-created doctrines.[233]

The solution to Section 1983 and qualified immunity that the opinion in *Jamison v. McClendon* presents is a reframing. Rather than reading the statute "against a background of robust immunity," the statute should be read against "the background of a robust Seventh Amendment" right to a jury trial.[234] It reduces judge-created doctrines to "legalistic argle-bargle"[235] that "took a

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[229] *Id.* at 420 (quoting White Glove Staffing, Inc. v. Methodist Hosps. of Dallas, 947 F.3d 301, 308 (5th Cir. 2020)).
[230] *Id.* at 421 (citing Dulin v. Bd. of Comm'rs of Greenwood Leflore Hosp., 586 F. App'x 643, 645–46 (5th Cir. 2014)).
[231] *Id.* at 421.
[232] *Id.* at (first citing *Dulin*, 657 F.3d at 258–83 (Barksdale, J., dissenting); and then citing *id*. at 251 (per curiam)).
[233] *Id.* at 422.
[234] *Id.* at 423.
[235] *Id.* at 422 (quoting United States v. Windsor, 570 U.S. 744, 799 (2013) (Scalia, J., dissenting)).

Reconstruction-era statute designed to protect people *from the government* . . . and turned the statute on its head to protect the government *from the people*."[236] The legal and statutory groundwork exists in case law and statutory history to support such a shifting frame; total reconstruction of the law is not necessary.

This entire opinion has reframed the event and inquiry, demonstrating the possibility for law to align with justice and the people rather than with denial of access to the courts and protection for the government. And note the rhetorical strategies employed in this pointed accusation. The opinion quotes Justice Antonin Scalia, a judge not known to be a vocal advocate for civil rights, protections against police, or access to the courts. Moreover, the entity from which the people are protected is not another person acting as an agent for the government, an official, or an officer; instead, it is the government itself. This subtle substitution functions more persuasively; most people are on board with protecting people from government overreach, even if they believe law enforcement officers deserve particular protections. But it is also a reflection of how a more expansive circumference for framing can shift the debate. This is no longer an individual case of a private citizen suing a single law enforcement officer for a particular act that may or may not have been "reasonably reasonable."[237] Instead, by examining the history of the statute, the development of qualified immunity, and the range of cases in which courts have applied the doctrine, the institutional protection comes into focus, and the hierarchy of protections becomes clearer. The doctrine protects government interests over the interests and constitutional rights of the people.

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[236] *Id.*

[237] *See* Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).

Notably, this is not a case-by-case solution. The problem with the decision in *Dulin*, the *Jamison* opinion argues, is that "[i]nstead of seeking en banc review to eliminate the judge-created rules that prohibited Mr. Dulin's case from moving forward, the panel simply decided his case would be an exception to the rules."[238] This action did not "go[] far enough to correct the wrong."[239] Importantly, the opinion points out, the Fifth Circuit was capable of making an exception and having "the imagination to see how their constricting view of § 1981 harmed someone who shared the background of most federal judges."[240] It quietly figured out a way to entertain the legal claims of a white male attorney. The opinion does not draw significant attention to this fact. It appears in a three-sentence paragraph, the penultimate paragraph before a brief conclusion. Yet the message is clear: we make exceptions for particular identities. That is not justice. "That same imagination must be used to resuscitate § 1983 and remove the impenetrable shield of protection handed to wrongdoers."[241]

The opinion's policy argument implicitly explains the reasons behind why, in its analysis, it made no attempt to find a loophole for Jamison, to argue that there was sufficient weight of precedent and case law from other circuits to put McClendon on notice, or to maneuver into a different outcome. The Fifth Circuit's decision in *Dulin* demonstrates that at times, the law makes exceptions and plaintiffs can benefit from those exceptions. Indeed, it places Jamison's claims squarely in the territory of *not* clearly established law. It unequivocally distinguishes all cases that might serve as precedent within the rules of the Fifth Circuit and makes no attempt to argue that the clearly established rule as of 1986 that "an officer may be held liable for an unreasonable

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[238] 476 F. Supp. 3d at 423.
[239] *Id.*
[240] *Id.*
[241] *Id.*

'intrusion into the interior of [a] car'" is clear or specific enough to give McClendon notice.[242] It applies the Supreme Court's rules exactly and precisely rather than attempting to walk the line between the rules and Jamison's interests. In doing so, it attempts to persuade the Court (and advocates arguing before the Court) to have the "imagination" necessary "to resuscitate § 1983 and remove the impenetrable shield of protection handed to wrongdoers."[243] This imagination, as the opinion demonstrates, involves reframing of the history of the law and its current application to take a more expansive view, reexamine the interests served by the doctrine's evolution, and return constitutional rights to their rightful priority.

IV. LIMITED NONCONFORMITY

The imagination this opinion offers as the solution to the problem of qualified immunity occupies a place within the law. It is a legal excess with respect to how this particular doctrine has been applied by district courts, as instructed by the Supreme Court. But it is not an intellectual practice entirely foreign to the practice or decision-making of law. In this way, the opinion maintains continuity[244] with the law, practicing a limited nonconformity[245] in its exercise of excess and dissent. The opinion's dissenting voice demonstrates institutional norms and continuity in order to prioritize institutional accountability for qualified immunity and argue for reform from the inside. The opinion simultaneously educates and appeals to a nonlegal audience and conforms with judicial norms in its analysis and proposal of a solution.

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[242] *Id.* at 417–18 (quoting United States v. Pierre, 958 F.2d 1304, 1309 (5th Cir. 1992)).
[243] *Id.* at 423.
[244] *See* Bartanen, *supra* note 67, at 247.
[245] *See* Ivie, *supra* note 13, at 50.

Although the opinion does use nonlegal and nonacademic citations when contextualizing police violence[246] and Jamison's experience of the stop as a Black man,[247] the application of law conforms to expectations that statements be supported by authoritative judicial opinions. When evaluating the history and development of law, the opinion relies on academic (usually law review) articles, just as the Supreme Court does in some of its own opinions.[248] The opinion's citational nonconformity is particularly notable when shifting between practices, as it does in concluding whether Jamison's consent was voluntary and how race may be relevant to that inquiry. Even as the opinion expands the voices and stories to be heard in legal decision-making—by citing popular news sources and accounts of police harassment by U.S. Senator Tim Scott and others—it returns to the law itself to assert relevance and legal conclusions.[249] The opinion asks the rhetorical question, "[W]ho can say that Jamison felt free that night on the side of Interstate 20?" Then, supported by the weight of the context it has provided, it turns to direct legal support in the form of a concurring opinion in a Fourth Circuit case:[250]

> Black people "are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of

[246] *Jamison*, 476 F. Supp. 3d at 390–91 & nn.1–20.
[247] *Id.* at 414–15 & nn.210–222.
[248] See Adam Feldman, *Empirical SCOTUS: With a Little Help from Academic Scholarship*, SCOTUSBLOG (Oct. 31, 2018, 5:22 PM), https://www.scotusblog.com/2018/10/empirical-scotus-with-a-little-help-from-academic-scholarship/.
[249] *See Jamison*, 476 F. Supp. 3d at 415–16.
[250] The Fourth Circuit does not have binding authority over district courts within the Fifth Circuit. Yet courts regularly look to other circuits for guidance (persuasive rather than binding authority) where their own circuit is ambiguous or silent. Similarly, concurring opinions are not statements of law and hold no authority, but they are sometimes quoted for their persuasiveness, even by the Supreme Court. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 235 (2009). Justice Samuel Alito even cites a dissenting opinion by Justice Anthony Kennedy as persuasive authority in *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting Groh v. Ramirez, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)).

> their church, bird-watching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles."[251]

Then, to settle the legal question, the opinion explains that in this context, McClendon's repeated lies, relentless requests and refusals to let Jamison leave, and intrusion into his vehicle created "a situation where [Jamison] felt he had 'no alternative to compliance' and merely mouthed 'pro forma words of consent.'"[252] The final legal conclusion relies upon precedent and a direct quotation for support.

The opinion even looks directly to the Supreme Court's own jurisprudence as a model for "looking at the 'origins' of the relevant law."[253] Examining the origins of relevant law may be excess for district courts when asking whether a defendant should be protected by qualified immunity, but it is part of the practice of the Supreme Court in other areas of law. And even the way forward that the opinion offers, while a departure from regular practice in judicial opinions, remains within the world of judicial discretion and power to propose a solution.[254] It is Fifth Circuit case law that provides "a tangible example of how easily legal doctrine can change."[255]

The opinion limits its nonconformity further by speaking almost exclusively for the court rather than the individual writer.[256] This is a key distinction between this dissent, a pronouncement of the law and a legal decision surrounded by a dissent to that decision, and a traditional dissent in which a single judge writes separately from the majority opinion. While Judge Wald described personalization as a key strategy of dissent, "separat[ing] the dissenter from the cold, impersonal,

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[251] *Jamison*, 476 F. Supp. 3d at 415 (quoting United States v. Curry, 965 F.3d 313, 332–33 (4th Cir. 2020) (Gregory, C.J., concurring)).
[252] *Id.* at 415–16 (quoting United States v. Ruigomez, 702 F.2d 61, 65 (5th Cir. 1983)).
[253] *Id.* at 396 (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020)).
[254] *Id.* at 420–23.
[255] *Id.* at 420.
[256] Contrast this with Wald, *supra* note 23, at 1412 ("Judges write in a different voice when they concur or dissent. They speak on their own rather than for the court.").

authoritarian judges of the majority,"[257] the strategy of *this* dissent is to speak stubbornly and emphatically for the institution of the court it represents and to identify relentlessly with the judiciary as a whole. It exposes "the particular rhetoric embraced by the law . . . [despite] the systematic *denial* that it is rhetoric"[258] without the "individualistic tone" Langford has identified as a feature of dissents.[259] The only time the opinion uses singular first-person pronouns is in Part VI when it proposes a path forward.[260] The rest of the opinion speaks in the first-person plural, using "us" and "we" to refer to the court making the decision and to the judiciary at large. The writer does not differentiate between himself and the system or institution. "This Court agrees" with the Fourth Circuit that "'[a]lthough we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives,'" yet "[t]his Court is also required to apply the law as stated by the Supreme Court."[261] And although it is the Supreme Court that must act to make change, the conclusion calls a collective system to account: "Let *us* waste no time in righting this wrong."[262] Although it would certainly be possible for the writer to distance himself from the institution responsible for the law as it is, instead the opinion chooses collective action, unity within the judiciary, and continuity toward change for which the law itself makes room.

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[257] *Id.* at 1413.
[258] Wetlaufer, *supra* note 53, at 1555.
[259] Langford, *supra* note 55, at 2.
[260] *Jamison*, 476 F. Supp. 3d at 420 ("I do not envy the Supreme Court's duty in these situations. Nor do I have any perfect solutions to offer. . . . I share [*Dulin*'s] original version here to give a tangible example of how easily legal doctrine can change."). The opinion reiterates this point in the first sentence of the conclusion. *Id.* at 423; *see also id.* ("There is another, more difficult reason I have told this story, though.").
[261] *Id.* at 391–92 (quoting Estate of Jones v. City of Martinsburg, 961 F.3d 661, 673 (4th Cir. 2020)).
[262] *Id.* at 424 (emphasis added); *see also id.* at 423 ("Then we added one judge-made barrier after another.").

The authorial persona conforms with the author's institutional role and possesses authority to speak for and with the authority of the institution. The opinion solidifies this institutional voice in part by choosing not to invoke the author's own embodied experience as a Black man who has lived his life in Mississippi, a student in the first integrated public-school class in Mississippi, and a judge appointed by President Barack Obama to replace one "who referred to Black people in his courtroom as 'baboons' and 'chimpanzees.'"[263]

The closest the opinion gets to mentioning the writer specifically (apart from the use of "I" in Part VI) is after sharing the history and critiques of qualified immunity, stating that nevertheless, "the undersigned is bound to follow its terms absent a change in practice by the Supreme Court."[264] By identifying the authorial persona as the person authorized to speak and sign for the institution of the court, the opinion asserts distance between the individual writing the opinion and the institution for which the document speaks. Despite the identity and background of the author, these attributes are never invoked or discussed in the opinion, which is at pains to speak in the voice of the court.

The opinion argues for eliminating qualified immunity so that courts can hold accountable those who violate constitutional rights.[265] By exercising limited nonconformity within the judicial system, it also argues for holding *that system* accountable to the Constitution and the ideals upon which it was founded.[266]

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[263] Holding, *supra* note 10. Judge Reeves grew up in Yazoo City, Mississippi, and race permeated the experiences of his youth. After being falsely accused of flipping off a female classmate, he was beaten cruelly by a white school administrator, a memory that "still brings tears to his eyes" and for which he has not been able to forgive the administrator. *Id.*

[264] *Jamison*, 476 F. Supp. 3d at 409.

[265] *Id.* at 423.

[266] *See id.* at 421–22 ("We err again when we invent legal requirements that are untethered to the complexity of the real world.").

V. AUDIENCE

Qualified immunity is deeply flawed. The judicial branch as an institution is responsible for those flaws. However compelling this argument made by the *Jamison* opinion may be, it cannot affect change unless aimed at an audience with the power to make the opinion's aspirations for justice and accountability a reality. So for whom is the opinion intended? To answer that question, other considerations emerge: What (and whose) expectations does the opinion meet? Which norms and conventions does it uphold, and to which does it apply pressure or ignore entirely?[267] From what values and beliefs does the opinion reason?[268] Taken together, these questions illuminate the audience constructed[269] by the text.

This part will examine three groups that the opinion implies as its audience: the legal community, lawmakers, and the public. It concludes by reflecting on what the construction of audience can tell us about the opinion's engagement in spheres of argumentation, whether technical or public.

A. The Legal Community

The form of the opinion (and the expectations and norms of the form) overwhelmingly suggest that Judge Reeves intends the opinion for legal insiders: judges and advocates. The forceful argument for eliminating qualified immunity is located within a published district court opinion. Judge Reeves's chambers made the somewhat unusual choice to publish this district court opinion; as a published opinion, other courts can cite it as persuasive authority. The opinion's exposition of

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[267] ZAREFSKY, RHETORICAL PERSPECTIVES, *supra* note 39, at 39 ("One function of the audience is to establish the boundaries of acceptable argumentative practice.").
[268] ZAREFSKY, PRACTICE, supra note 35, at 13; *see also* Black, *supra* note 46, at 112 ("The best evidence in the discourse [for its implied auditor] will be the substantive claims that are made, but the most likely evidence available will be in the form of stylistic tokens.").
[269] PERELMAN & OLBRECHTS-TYTECA, *supra* note 40, at 19.

the history of Section 1983 and qualified immunity, as well as its proposal for reform, are reminiscent of law review articles; yet while law review articles are read and occasionally cited by courts, locating doctrinal history and arguments for reform within a judicial opinion itself makes uptake by practitioners (judges and attorneys) more likely.

That is particularly true for any reviewing court for this particular decision, should it be appealed. In many ways, the textual persona of this opinion is an authority, not a protestor. It speaks in the voice of the institution rather than as an individual distancing themselves from the institution. It presents qualified immunity as an institutional problem which "we" must address. And it upholds the norms and expectations of that institution, appealing to others who see themselves as part of the institution, believing in its goals.[270] The Court created the problem. Courts can find the solution. The arguments are largely those supported by law. Some contextual information deviates from that category of support,[271] but even moments of excess are grounded in jurisprudence.

Of course, the Supreme Court is the most direct and obvious target within this larger category. The solution proposed—a repeal of qualified immunity altogether—is implicitly something only the Supreme Court can do, since the Court created qualified immunity. And the opinion reviews the possibility of the current Court eliminating the doctrine despite the weight of stare decisis.[272] It also cites the Court's own practice to justify its review of the history of the statute, a citation that will justify itself to other courts, certainly, but particularly constructs the High Court itself as a member of the audience with which it is making rhetorical eye contact.

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[270] *See supra* Section IV.
[271] *See supra* Section III.
[272] Jamison v. McClendon, 476 F. Supp. 3d 386, 419–20 (S.D. Miss. 2020).

B. Lawmakers

On the one hand, the opinion's emphasis on qualified immunity's being a judge-created doctrine implies a judicial audience that ought to clean up the mess it created. On the other hand, it could also be a signal to the legislature to step in and ensure full enforcement of its statutes. The historical development of Section 1983 and qualified immunity demonstrates a judge-made doctrine thwarting the legislative intent to provide a remedy for constitutional violations and a means to obtain that remedy. Although the solution to the problem proposed by the opinion in the penultimate part is one for the Supreme Court to execute (overturning its own jurisprudence on qualified immunity), there is an implied legislative solution as well: explicit language written into Section 1983 stating the immunities available.

C. The Public

Judge Reeves could have issued a narrow legal opinion in this case and written an op-ed that any national news outlet in the country would have published to express his disagreement with the decision and how the doctrine should be changed. But he did not do that. So even though these choices point to legal insiders as the main audience for the opinion, the opinion nonetheless indicates that it also invokes a public audience, even if not as its primary audience.

The opinion offers an education in civil rights law and American history, and it does so in a way that avoids legal jargon. It explains, quoting from a law review article, that summary judgment normally cannot be granted when "the plaintiff has stated a proper claim and genuine issues of fact exist," and it describes "[q]ualified immunity's premier advantage" as access to "review by (at least) four federal judges before trial," language that most members of the public understand even if they don't know what summary judgment or interlocutory appeals are.[273]

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[273] *Id.* at 405.

The opinion then exposes the procedural inaccessibility of remedies for constitutional rights that most Americans take for granted, through narrative and a careful explanation of the law. The introduction creates a context accessible to all, through citations and public information that go beyond admissible forms of evidence. This context is, primarily, social rather than legal, locating the law within a social and cultural milieu recognizable to anyone who pays even passing attention to current events. And even when other cases are cited, the opinion is at pains to explain those cases rather than leaving it to the reader either to know the case law well enough themselves or to look up the supporting citations. Landmark cases like *Pierson v. Ray* are explained in detail, both for the facts of the case and the legal implications. And other recent qualified immunity decisions are narrated at length. The opinion unapologetically mixes Eighth Amendment claims with Fourth Amendment claims, a distinction that would seem important to some legal insiders but that would be lost on a general public. It leaves the reader with an overwhelming sense that even though constitutional rights carry weight in the public imagination, those rights are fragile in the face of technical legal doctrine.

Despite these features, it remains true that the opinion is written as a text largely for insiders, according to the expectations of the genre of judicial opinion. The opinion suggests that judges and advocates are the primary audience through its use of footnotes (even if many of those footnotes cite publicly available and comprehensible sources), its focus on the Supreme Court's responsibility to change the doctrine it created, and the range of institutional norms it honors. With that primary audience, and with the "limited nonconformity" of the opinion's dissent in mind, perhaps there's another way to look at the opinion's deviation from some norms other than the possibility that it attempts to reach a different audience.

D. Spheres of Argument

Professor G. Thomas Goodnight posited that arguments can be categorized as taking place in one of three spheres: the public, the personal, or the technical sphere.[274] The public sphere deals with "interests of the entire community"[275] and encompasses arguments "accessible to everyone," while the personal sphere includes those arguments that are only relevant to those directly engaged in the discussion.[276] The technical sphere, including legal discourse,[277] has narrower rules and norms around "evidence, presentation, and judgment," limiting participation to insiders who know the rules, practices, and terminology.[278] Discourse might migrate from sphere to sphere, a migration that Goodnight argues can diminish public discourse. One way it might diminish public discourse is by simply removing discussion from the public sphere, relegating the issue to experts and denying public participation.[279] Conversely, public discourse may be diminished by the pretense of public debate about a technical issue. In other words, public *consumption* of debate may be mistaken for actual public *deliberation*.[280] Alternatively, arguments that violate the norms of a more limited sphere (like the technical sphere) may be intended to shift the norms and rules of argument within that specialized sphere rather than move the debate to another sphere.[281]

Goodnight locates legal argument squarely within the specialized technical sphere. So one way to view the *Jamison* opinion is as an attempt to shift the argument from the technical to the

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[274] G. Thomas Goodnight, *The Personal, Technical, and Public Spheres of Argument: A Speculative Inquiry into the Art of Public Deliberation*, 18 J. AM. FORENSIC ASS'N 214, 215 (1982).
[275] *Id.* at 220.
[276] ZAREFSKY, PRACTICE, *supra* note 35, at 234, 246.
[277] *Id.* at 242–43.
[278] Goodnight, *supra* note 274, at 220.
[279] *Id.* at 215, 221.
[280] *Id.* at 215, 226.
[281] *Id.* at 217.

public sphere by including in the opinion elements that would not normally be there, including historical, social, and legal context. We could also imagine that the opinion is simply attempting to *return* to the public sphere a debate over accountability and constitutional rights that the courts appropriated and screened behind technocratic procedure and terminology.[282]

But given the constrained nonconformity of the opinion, it makes more sense to evaluate the opinion as attempting to shift the grounds for technical legal discourse—or at least to shift the grounds for qualified immunity discourse to better align with other doctrines sensitive to history and context. The opinion is a demonstration of how such an attempt can be made by drawing on rhetorical tools normally relegated to dissenting opinions, not intending to alter the outcome of a case but shifting a particular legal question's framing to reshape the law.

VI. CONCLUSION

Judge Reeves may be correct in saying that recounting history is one way to help Mississippians understand the truth.[283] It is also a means to induce the legal community—and the Supreme Court in particular—to face the truth of what qualified immunity has done and become. By recounting history, the *Jamison* opinion exposes how the Court has circumvented legislative intent through the creation and shaping of the doctrine of qualified immunity, just as the Court circumvented the Reconstruction Amendments and accompanying civil rights legislation in the late 1800s and early 1900s.

Judge Reeves's opinion subversively uses traditional norms of the legal genre in order to force a reexamination of those traditions. The opinion juxtaposes the Court's narrow application of law, excluding race, with legal history and the lived experience of race in America. This

[282] *See supra* Chapter 1, Section VI.
[283] *See* Johnson, *supra* note 144.

juxtaposition exposes law's purported neutrality, stability, and objectivity as a façade papering over the reality that law does, in fact, change, and that its supposed neutrality actually reinforces hierarchy and oppression. Law executes this façade by stripping out history, context, lived experience, and the impact of race on that lived experience. This opinion reintroduces those things by taking up generic features of dissent and a commitment to "multiple consciousness."[284]

But by expressing dissent and excess through the voice of the institution and in the form of a judicial opinion, the *Jamison* opinion also demonstrates a commitment to law, its capacity to change and transform, and its ability to stand for justice and make room for lived experience. In the words of Matsuda, the opinion declares from within the courtroom that "this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood."[285] The law can be otherwise, if the Court has the capacity to see beyond its own limited perspective.

Zarefsky once stated that presidential rhetoric defines political reality.[286] The *Jamison* opinion demonstrates that judicial rhetoric defines who and what is visible to the law, who and what has a voice in the development and application of the law. The traditional voice of the law may blind itself to the variety of lived experiences, but it need not always be so. This opinion shows another way.

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[284] Matsuda, *When the First Quail Calls*, *supra* note 80, at 299.
[285] *Id.* at 298.
[286] David Zarefsky, *Presidential Rhetoric and the Power of Definition*, 34 PRESIDENTIAL STUD. Q. 607, 611 (2004).

CONCLUSION

The Supreme Court describes the legal distinction between excessive and acceptable force as a "hazy border." Factually analogous cases establishing the law can move a particular case that might appear ambiguously located with respect to that border more clearly into one territory or the other—either beyond the hazy border into excessive force or the other direction into acceptable force.[1] Extending the metaphor for law as material and tangible, the Court has also described the exact entitlements[2] of rights and prohibitions of legal rules as "contours," evoking a boundary line between what's protected and what's not, what's prohibited and what's not.[3] And Professor John Jeffries describes the requisite level of specificity (and often-criticized generality) in defining clearly established law as the "altitude" at which the analysis is conducted.[4] I conclude this study by examining the metaphor suggested here: that of law as a material marker of geographic territory and boundary lines, evaluating what it gestures to and obscures about law and legal decision-makers. Then I will draw on that metaphor to trace three themes developed across the chapters of this dissertation to highlight my study's relevance for both the study of law and the study of rhetoric.

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[1] *See* Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (per curiam) ("[Previous cases] involving similar facts can help move a case beyond the otherwise 'hazy border between excessive and acceptable force.'" (quoting Mullenix v. Luna, 136 S. Ct. 305, 312 (2015) (per curiam)).

[2] I mean this in both the Burkean and the popular sense.

[3] *See* City of Tahlequah v. Bond, 142 S. Ct. 9, 11 (2021) (per curiam) ("[T]he rule's *contours* must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted." (internal citations and quotations omitted) (emphasis added)); Plumhoff v. Rickard, 572 U.S. 765, 778–79 (2014) ("[A] defendant cannot be said to have violated a clearly established right unless the right's *contours* were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." (internal quotations omitted) (emphasis added)).

[4] John C. Jeffries Jr., *What's Wrong with Qualified Immunity?* 62 FLA. L. REV. 851, 854–55 (2010).

Geographic boundaries and markings are, of course, subjective. They are lines drawn and redrawn over time, as territory and topography change. These unstable, human-made lines contrast with the topography upon which borders are imposed. But even that topography is unstable, unpredictable, and shifting over time and in moments of flux in the earth's crust. Similarly, the lines drawn by laws are imposed on and responsive to changes in culture and society. The instability of geographic boundaries comes into focus when examined over time, as borders shift, appear, and disappear.

Describing law or landforms as unstable suggests a value preference for permanence and fixed lines. It presumes that change is negative. But if we describe this quality as *flexibility* rather than *instability,* the potential for positive connotations materializes, reflecting an openness to the possibility that, over time, choices can improve as well as degrade. As this study demonstrates, law is not a line drawn once with clear dimensions and a fixed position, only to be discovered, acknowledged, and affirmed over time. Regardless of whether change is framed as progress or regress, change is an inevitable feature of the law despite its appearance of stability or even permanence.

With each opinion, judges construct and reconstruct law's boundaries. Although the Supreme Court's language instructing lower courts to describe law from a particular altitude or perspective or with a particular degree of specificity implies objective discovery of law's boundaries, this study has shown that judicial opinions actively construct the line between excessive and acceptable force, between lawful and unlawful action. By mutually constructing previous events described in case law and the event in question, judges retrace, refine, and revise law's boundaries.

One of the considerations in constructing clearly established law's boundary line is where a reasonable person would believe that line to be. Complicating the construction of boundary lines even further, the perception of where a line has been drawn in the past is a deeply contextualized vision, contingent upon the location of the viewer, the angle at which events are viewed, and the surrounding objects and actors that might obstruct or enhance particular perceptions.

Over time, qualified immunity has been redrawn. It originally appeared in 1967 in *Pierson v. Ray* as a good faith defense, reimagined over time into its current form, requiring certainty beyond debate for every officer. Under the pen of judges, law is flexible, unstable, and ever changing. Despite rhetorical performances of inevitability and objectivity in judicial opinions, the unstable boundary lines of law come in and out of focus and shift from side to side depending on the values, preferences, and priorities of the decision-makers. Drawing on the extended metaphor of shifting geographic boundaries, I explore the significance of three themes across this project: imagination, framing, and spheres of discourse.

Imagination

Imagination is defined in part as "[t]he power or capacity to form internal images or ideas of objects and situations not actually present to the senses, including remembered objects and situations."[5] Because past events must be described and compared, imagination permeates the application of qualified immunity doctrine, and judicial opinions are obligated to make imagination, or the act of conjuring past situations, material through words on the page. The Supreme Court employs rhetorical pedagogy and precedential rules to instruct lower courts to create images consistent with the perspective and knowledge of the police officer. It further

[5] *Imagination,* OXFORD ENGLISH DICTIONARY, https://www-oed-com.turing.library.northwestern.edu/view/Entry/91643.

requires courts to construct events establishing law through comparing and contrasting past case law with the dispute at hand, calibrating the level of specificity and sifting relevant from irrelevant facts in that comparison. And ultimately, despite rebuking lower courts for not imagining the scene specifically enough, the Court instead teaches lower courts to presume police reasonableness when imagining the event, casting officers as passive, reactionary agents and displacing act and agency onto other participants.

Ironically, some courts have interpreted the Supreme Court's instructions to mean that "officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases."[6] And yet by requiring a nearly identical case to serve as analogical justification for denying qualified immunity rather than general statements of law, the Court's precedential rules do seem to presume that in the heat of the moment, officers are imaginatively comparing and contrasting the factual details of previously decided cases in order to determine which course of action to take in a tense situation, evaluating whether planned action violates constitutional rights.[7] Qualified immunity's requirement for specific factual analogical justification collapses under the weight of the expectation that the justification be beyond debate. Requiring lower courts to speculate about the imaginative analogies officers might draw in their heads in the moment impossibly conflicts with demands for certainty and unanimity among all reasonable officers.

By stretching legal imagination beyond the boundaries the Court has set for qualified immunity doctrine to include historical context and perspectives beyond that of the officer, the *Jamison* opinion reminds its readers that those boundaries were not always there. The Court has gradually shifted the doctrinal lines to benefit officers. But other voices, lived experiences, and

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[6] Coffin v. Brandau, 642 F.3d 999, 1015 (11th Cir. 2011).
[7] Research suggests they do not. *See* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 610–11 (2021).

perspectives transform the imagined landscape when they are entertained. Judge Carlton Reeves's opinion in *Jamison v. McClendon* contextualizes Clarence Jamison's Mississippi roadside detention and McClendon's immunity within a history of race, policing, and Section 1983. The opinion exposes the imaginative selectivity of the doctrine and calls upon the Court to expand its vision to include the experiences of Black Americans and to take stock of the entire territory of immunity it created.

Framing

Jamison criticizes the Court for transforming legislation "designed to protect people *from the government*" into a doctrine that "protect[s] the government *from the people*."[8] This study suggests how the Court's modern qualified immunity jurisprudence executes that reversal. Chapter 1 demonstrates how the inquiry is framed in such a way that police protection is balanced against police accountability, redrawing the circumference of the inquiry to exclude the party alleging a constitutional injury, and defining the event as a threat created by the victim and to which the police officer reflexively responded. By framing the relevant competing interests as police protection versus police accountability and defining police action as a necessary response to threat, the imagined topography upon which boundary lines are then drawn is transformed and reshaped.

The doctrine has dissociated police from law, transforming police into legal and judicial subjects rather than agents of the law or government. In part, the Court's precedential rules have accomplished this reversal by framing the inquiry from the officer's perspective and prioritizing police interests, by placing the burden of proof on the plaintiff, and by requiring certainty beyond debate in order to rule against the officer.[9] Additionally, the Court solidifies the connection

[8] Jamison v. McClendon, 476 F. Supp. 3d 386, 422 (S.D. Miss. 2020).
[9] *See* Chapter 1, Subsection III.C.

between police and those in need of judicial protection by defining the officer's choices as a compelled response to a dangerous threat. Mullenix, according to the Court, was forced to confront a dangerous fugitive. Ignoring *how* Mullenix *chose* to confront the threat glosses over the agency Mullenix possessed in that situation and exemplifies how the Court, through linguistic choices, redeems and justifies officer behavior. Once adopted, this framing rationalizes a reversal in which courts must protect the officer from governmental punishment in the form of a Section 1983 suit. The Court has attempted to disarticulate or dissociate police and government, Section 1983 and the people in need of protection, and rearticulate government with Section 1983 and the police with the people needing protection from the government.

These frames cut to the core of constitutional and jurisprudential questions. Who counts as a person such that their interests are relevant to legal decisions? Which injuries are cognizable and redressable by the law and courts? Where does government end and the people ("We the People," even) begin? Who is entitled to make these decisions and draw these lines of injury and redress?

Spheres of Discourse

For a brief historical moment in 2020 and 2021, qualified immunity entered the public sphere of discourse. The George Floyd Justice in Policing Act was introduced into the House of Representatives, energizing a public debate over immunities and potential consequences should the legislative branch eliminate qualified immunity.[10] Popular news outlets explained the doctrine and speculated on the possibility of its abolition.[11] But after the bill passed the House, it floundered

[10] George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021), available at https://www.congress.gov/bill/117th-congress/house-bill/1280/text.

[11] *See e.g.*, Patrick Jaicomo & Anya Bidwell, *Police Act Like Laws Don't Apply to Them Because of 'Qualified Immunity.' They're Right.* USA TODAY (May 30, 2020, 4:00 AM), https://www.usatoday.com/story/opinion/2020/05/30/police-george-floyd-qualified-immunity-supreme-court-column/5283349002/; Li Zhou & Ella Nilson, *The House Just Passed a Sweeping Police Reform Bill*, VOX (June 25, 2020, 8:50 PM), https://www.vox.com/2020/6/25/21303005/police-reform-

in the Senate, and public discussion receded, though it revived in early 2023 in the wake of Tyre Nichols's murder.[12] In the meantime, the doctrine has remained an impediment to enforcement of constitutional rights—especially, as this study shows, the constitutional prohibition against excessive force and unreasonable searches and seizures under the Fourth Amendment.

Rhetorical situations such as those summoned and constructed by the *Jamison* opinion or the George Floyd Justice in Policing Act may briefly shift discourse from a technical sphere into the public sphere. Yet beyond the halls of Congress, the prompted discourse seems to be of a type that Professor G. Thomas Goodnight warned against: public consumption should not be mistaken or substituted for public deliberation.[13] The doctrine will not be submitted to a public vote. At this point, it is unlikely that it will even be voted on by representatives of the people. We might ask why advocates have been unable to shift qualified immunity from the technical legal sphere of discourse to the public sphere of discourse by educating the public and inspiring public furor capable of pressuring Congress into taking action. Perhaps it is the procedural rules and mechanisms that make the doctrine difficult to understand without an understanding of legal civil procedure. A more cynical suggestion might be that the public simply does not have the attention span to understand and care about technical legal questions. Whatever the reason, qualified

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bill-house-democrats-senate-republicans; Jason Breslow, *Where Efforts to Overhaul Policing Stand in Congress After Chauvin Verdict*, NPR (April 21, 2021, 4:40 PM), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/21/989500468/where-efforts-to-overhaul-policing-stand-in-congress-after-chauvin-verdict. For details about local efforts to address policing, see Madeline Halpert, *2 Years After George Floyd's Murder, Congress Still Hasn't Passed Major Federal Police Reforms—Here's What States and Cities Have Done Instead*, FORBES (May 25, 2022, 2:21 PM), https://www.forbes.com/sites/madelinehalpert/2022/05/25/2-years-after-george-floyds-murder-congress-still-hasnt-passed-major-federal-police-reforms-heres-what-states-and-cities-have-done-instead/?sh=793f13131869.

[12] *See* Remy Tumin, *A Major Police Reform Bill Is Back in the Spotlight*, N.Y. TIMES (Feb. 1, 2023), https://www.nytimes.com/2023/02/01/us/george-floyd-act-tyre-nichols.html.

[13] G. Thomas Goodnight, *The Personal, Technical, and Public Spheres of Argument: A Speculative Inquiry Into the Art of Public Deliberation*, 18 J. AM. FORENSIC ASS'N 214, 226 (1982).

immunity remains mostly within technical legal discourse despite pockets of public discussion and advocacy, and moments of broader public interest.

Yet the terms of that discourse, its rules and boundaries, are not fixed. The Supreme Court's rhetorical pedagogy has instructed lower courts to structure and define events in favor of the officer and with a presumption of reasonableness. And its precedential rules have gradually required greater and greater certainty, demanding analogical arguments that are beyond debate to every reasonable officer in the heat of the moment. But the authoritative voice of the law presents alternatives to a narrow, ahistorical, colorblind framing that centers the officer's perspective, as Judge Reeves's decision in *Jamison v. McClendon* demonstrates.

This study introduces the legal discourse over qualified immunity to rhetoric and argumentation studies in the belief that analyzing the language of judicial opinions can reveal the ways that it contains, shapes, and reflects power even though the discourse remains almost exclusively within a technical sphere. More particularly, Chapter 1 builds upon rhetorical theory on definition and categorization by demonstrating that although definitions and framing are selective, subjective, and constructive reinforcements of values and hierarchies, legal performances of objectivity distract from their selective nature, removing opportunities to explicitly debate definitions and framing. It demonstrates the power exercised in the *refusal* to define.

Chapter 1 explores the Court's rhetorical pedagogy in qualified immunity cases, showing how it goes beyond precedential rules by teaching lower courts how to *see* police use of force and how to *construct* the event in a frame that redeems the officer and places blame on the victim. Chapter 2 contributes to rhetorical theory on analogy, demonstrating the constructive nature of analogical justification and the consequences of constraint. No analogy is beyond debate, and by

requiring analogical justifications denying immunity to be beyond debate, the Court gives decisional power to grant immunity to every potential analogy and no decisional power to deny immunity to any. Analogical justification cannot be constrained to eliminate debate. Chapter 3 expands rhetorical theory on dissent to demonstrate the power of Professor Richard Ivie's "limited nonconformity" in judicial opinions. The controlled voice of authority speaks for the institution, but it violates generic norms through historical, doctrinal, and evidentiary excess, expanding the circumference of what's relevant to highlight the subjective malleability of the law and qualified immunity in particular.

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The subjective, value-based judgments involved in legal decision-making about what happened and what the law has to say about who is responsible are unavoidable. Events cannot be defined objectively; relevant details and the appropriate circumference depend on the perspective, purpose, and priorities of the decision-maker. Exposing the subjective nature of description and comparison reveals values and hierarchies once hidden by legal performances of objectivity. Imagination, or the ability to consider events from perspectives different from one's own, cannot be stripped out of the law but should be made explicit. And once we understand that values contribute to the drawing of legal boundaries, which are not fixed or inevitable, we are better equipped to ask why the lines are drawn where they are, whose interests they serve, and whether they should be redrawn.

RECOMMENDATIONS FOR REFORM

This study joins the outcry from scholars, judges, and legislators who have remarked on qualified immunity's flaws. Qualified immunity doctrine in the Fourth Amendment context is unworkable. As this dissertation shows, the Court's rules and rhetorical pedagogy require police-

friendly framing and definition of the situation, combined with constrained analogical justification that is beyond debate. Both of these features nudge qualified immunity closer and closer to absolute immunity. This study is the first to closely examine the definitions and analogical arguments made in qualified immunity decisions, demonstrating how language structures events and outcomes in favor of officers. It provides new evidence to bolster the claim that qualified immunity must be either abolished or reformed.

Applying rhetorical and argumentation theory does not just yield an account of what's not working. These chapters also recommend a few paths to reform. Short of total abolition, I suggest five changes to the doctrine. In this section I characterize options for abolition and reform and evaluate the strengths and weaknesses of each.

Total Abolition of Qualified Immunity

Perhaps the most straightforward fix would be to eliminate qualified immunity altogether, either by judicial or legislative action. The Court could overturn its own precedential rules in *Pierson v. Ray*, *Saucier v. Katz*, and *Pearson v. Callahan*, or Congress could reform Section 1983 to clearly rule out qualified immunity as a legitimate defense. This dissertation demonstrates that qualified immunity, as articulated by the Supreme Court, protects unreasonable, unconstitutional behavior in five ways. First, the doctrine is built upon rules that prioritize the interests of police over accountability. Second, the doctrine erases or villainizes the victims of police misbehavior while framing the police as passive, reactionary actors without agency. Third, because excessive force violations are defined by example, and examples cannot logically justify classification of new events, the doctrine causes every case to stand as precedent only unto itself, with no future power of notice. Fourth, the doctrine's reliance on analogical justification to provide notice cannot be constrained beyond debate, as the Supreme Court has required. And finally, the doctrine

transforms police into victims in need of government protections, turning Section 1983 and the Constitution on their heads.

Let me be clear. Ending qualified immunity and embracing the absolute immunity it is sliding into is not an option. The Court has rejected absolute immunity for law enforcement officers, reasoning that no such immunity ever existed at common law.[14] Furthermore, absolute immunity against suit would, without other reforms, hollow out Fourth Amendment rights, eliminating nearly all protection against police overreach in use of force or searches and seizures. Most importantly, it would directly contravene legislative intent in Section 1983 to codify a right to redress when a state actor violates someone's constitutional rights.

Instead, I argue that qualified immunity should be abolished in favor of no immunity for police who violate constitutional rights. Eliminating immunity would redirect the inquiry in these suits. Instead of anxiously splitting hairs over whether certain cases are sufficient to notify *every* officer that this *particular* act under these *specific* circumstances violates a constitutional right, courts would be able to prioritize asking whether a right was violated and by whom. By declaring that the violation of a constitutional right merits some form of remedy, the constitutional protections of the Fourth Amendment would again be given weight and meaning in the Supreme Court. Section 1983's promises for accountability and remedy would be read once again against "a robust Seventh Amendment" and the right to a jury trial.[15] Instead of "protect[ing] the government *from the people*," courts could once again "protect people *from the government*" as Section 1983 was designed to do.[16]

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[14] Pierson v. Ray, 386 U.S. 547, 555 (1967).
[15] Jamison v. McClendon, 476 F. Supp. 3d 386, 423 (S.D. Miss. 2020).
[16] *Id.* at 422.

Concerns about the consequences of eliminating qualified immunity for law enforcement officers are less compelling than one might think. When sued individually for violating someone's Fourth Amendment rights, individual officers rarely foot the bill for court fees or even, if the plaintiff wins, damages awarded by a court. Instead, police departments and municipalities usually indemnify their employees against these suits, paying legal fees and damage awards on behalf of the employee.[17]

Eliminating immunity altogether would have a range of implications, many of which are beyond the scope of this dissertation.[18] By focusing only on constitutional rights enshrined in the Fourth Amendment, I have shown the unique challenges of applying qualified immunity in those claims, where reasonableness requirements make every decision context-specific, difficult for crafting and applying bright-line rules. But the doctrine applies to other constitutional violations as well; eliminating it altogether would affect constitutional rights that may not present the same problems under the defense that Fourth Amendment suits do. For example, freedom of expression protected under the First Amendment has more bright-line rules easily applied without context-specific analysis or considerations of reasonableness. Qualified immunity could be made specifically unavailable as a defense for state and federal law enforcement officers without affecting the availability of immunity for other state actors, as the George Floyd Justice in Policing Act attempted to do.[19] Alternatively, qualified immunity could be abolished as a defense

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[17] Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305, 310 (2020). For a more thorough discussion of the implications of abolishing qualified immunity, see Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 316 (2020).

[18] *See generally*, Schwartz, *After Qualified Immunity*, *supra* note 17.

[19] George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021), available at https://www.congress.gov/bill/117th-congress/house-bill/1280/text. The bill would abolish qualified immunity for all federal and local law enforcement officers by proposing that Section 1983 be revised to explicitly reject any defense based on good faith or that the law was not clearly established.

exclusively in the Fourth Amendment context, leaving the defense available in suits alleging other constitutional violations.

Nevertheless, the politics of abolishing qualified immunity, whether done by the Court or by Congress, may prove too much. In the legislature, the George Floyd Justice in Policing Act has stalled and is unlikely to become law.[20] And the current Supreme Court seems uninterested in revisiting the doctrine, despite signaling some discomfort with qualified immunity.[21] Rejecting the doctrine altogether may be too large a leap at this point in history. Consequently, I offer some suggestions for reforming the doctrine which the Court and legislators may find more palatable.

Entertaining Debate

Requiring denials of qualified immunity to be *beyond debate* creates problems for the doctrine's application. Through explicit precedential rules and rhetorical pedagogy, outlined in Chapter 1, the Court instructs courts to construct the act, agent, and agency of the past event from the perspective of the officer—even from the perspective of an assumed *reasonable* officer. Although the Court emphasizes the specificity with which the law and situation must be defined, the need to eliminate debate if ruling against the officer forces courts to emphasize details that the officer would use to justify aggression and minimize those that would indicate the unreasonableness of aggression. Because the situation must be framed sympathetically for the officer, that framing transforms the balancing of interests. Instead of balancing the protection of constitutional rights against protection for police, the one-sided inquiry balances two interests that

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[20] *See* Oliver Laughland, *Biden Promised to Reform the Police. Why Has So Little Progress Been Made?*, GUARDIAN (Dec. 26, 2022, 6:00 PM), https://www.theguardian.com/us-news/2022/dec/26/biden-review-police-criminal-justice-reform-promises.

[21] *See Jamison*, 476 F. Supp. at 419–20 (summarizing the Court's discomfort); *see also* Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring) (noting his "growing concern with [the Court's] qualified immunity jurisprudence).

center the police: the need to protect police when executing their duties against the need for accountability when they overstep.

Compounding the problems in defining the event, a previous case must be sufficiently similar that *any* and *every* reasonable person would be on notice. As Chapter 2 demonstrates, however, analogical justification cannot be constrained to eliminate all debate without sliding into a requirement for identity. For example, in *Kisela*, the comparisons considered by two Supreme Court opinions and three Ninth Circuit opinions demonstrate the difficulty of resolving, beyond debate, whether a large kitchen knife is a weapon or could be considered one by a reasonable police officer arriving on the scene. The consequences of demanding that decisions against police officers rest on justification that is beyond debate reverberate through how courts define and frame the situation and how they analogize cases to justify the outcome. Attempting to eliminate debate distorts the analogical comparison between cases and the event in dispute by misunderstanding the constructive and creative process of analogical justification. Here, qualified immunity slides into absolute immunity because any case that *could* be analogized becomes dispositive—as long as it is in the officer's favor.

The Court should eliminate the precedential rule requiring denials of immunity to be beyond debate, along with language about what every or any reasonable officer would know, in order to resolve the doctrine's internal tension. Instead of requiring that outcomes in the plaintiff's favor be absolutely clear to any and every reasonable person, courts should instead ask whether a reasonable person would be more likely than not to believe that a violation occurred in light of relevant case law. Consider Officer Mullenix's decision to shoot at a car travelling in excess of 80 miles per hour when spike strips were already prepared to stop the vehicle and he had never attempted or been trained in the tactic. It is nearly impossible to say that every reasonable officer

would believe such an action violates the Fourth Amendment. Debate is inevitable. Asking whether a reasonable officer would be more likely than not to believe the act violates the Fourth Amendment sustains protections for reasonable officers while still honoring the promise of the Fourth Amendment and Section 1983.

Sufficiency of General Rules

Eliminating the need to find the violation "beyond debate" in previous case law might loosen constraints on lower courts to frame the situation in the most officer-friendly way possible, discussed in Chapter 1, and to analogize any case that might seem remotely comparable to a reasonable officer, discussed in Chapter 2. The Court could take the elimination of restrictions one step further and permit general statements of law from landmark cases to serve as notice, rather than requiring a factually analogous case at all. This would bring the doctrine more in line with how police are actually trained.[22] While this would resolve the inner tension found in qualified immunity analogical justification, it would not necessarily alter the pro-police framing or change the fact that courts might still feel compelled to speculate whether a reasonable officer in this position would believe force was prohibited and then to emphasize only the details of the scene that justify force.

Immunity as a True Affirmative Defense

Treating qualified immunity as a true affirmative defense and not a question of law to be resolved by a judge might also eliminate some of the structural benefits for officers, especially if combined with other recommendations such as allowing general statements of law to serve as notice. Chapter 1 explained how the Court's precedential rules and rhetorical pedagogy instruct

[22] *See* Schwartz, *Qualified Immunity's Boldest Lie*, *supra* note 7, at 610–11. Recommendations such as permitting departmental rules, procedures, and direct orders to serve as notice might also be prudent, but are beyond the scope of this dissertation.

lower courts to frame the event from the officer's perspective and from the presumption of reasonableness. But two changes in particular could expand possible frames for evaluating the event. First, by categorizing qualified immunity as an affirmative defense, the burden of proof would return to the defendant. Instead of placing the burden on the plaintiff to demonstrate that there *was* a case clearly establishing the action as a violation, this change would require the defendant to demonstrate that a reasonable officer would believe the action to be lawful. And second, like other affirmative defenses, although the judge would determine whether the jury could be instructed on the affirmative defense, the jury ultimately would decide whether a reasonable person, given all the evidence presented at trial, would believe the act was lawful or unlawful.

Recall the inquiry from *Kisela v. Hughes* in which judges debated whether a twelve-inch kitchen knife is more like lighter fluid or more like a two-foot Civil War sword. Individual experiences would still impact how each jury member frames the situation and whose perspective they found most sympathetic. People with a variety of lived experiences may come to different conclusions about whether a large kitchen knife, carried into the yard, would reasonably be considered a weapon in that context. But they would draw upon a range of experiences to arrive at a conclusion rather than a single individual who, tasked with interpreting the law, may find more in common with a police officer tasked with enforcing that law and frame the event from that sympathetic position.[23]

[23] These proposed reforms would positively revise the doctrine in a way that addresses the problems pointed out by this study. But many other reforms to the doctrine itself and civil rights procedure are necessary in order to ensure full access to the judicial process and the Seventh Amendment's promise of a jury of peers to evaluate claims. In particular, Joanna Schwartz observes that, due to rules permitting exclusion of certain people from juries, "people inclined to see the world from the perspective of plaintiffs in civil rights cases are excluded from jury pools at several points in the process." JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 155 (2023).

Immunity When the Law Changes

A more dramatic revision of the doctrine could also reframe disputed events, resolving some of the problems previously discussed. Instead of asking whether a (or all, or every) reasonable officer would believe the action to be lawful, the doctrine could be rewritten to protect only those actions that were clearly lawful at the time of the incident, returning the doctrine to its original form in *Pierson v. Ray*. This reframing would disrupt the foundational assumptions and priorities discussed in Chapter 1 that underlie doctrinal rules presuming reasonableness and placing the burden of overcoming that presumption on the plaintiff. Courts might ask, after determining whether a constitutional violation occurred, whether that decision represents an expansion of rights or deviation from the law. Attempting to determine what counts as "new law" may bring a whole new set of hair-splitting problems as it has in habeas cases,[24] but it would at least shift the hair-splitting onto the defendant rather than being the plaintiff's burden when the values and priorities underlying the doctrine are already stacked against them.

Standard of Review by Appellate Courts

In part, the Supreme Court has boxed lower courts into framing the event in the most officer-friendly way by engaging in de novo review of qualified immunity cases, giving no deference to the lower court's decision. In the absence of clear error, appellate courts are generally not supposed to reevaluate the factual record. This contradiction occurs because the Court treats qualified immunity as a question of law, triggering de novo review. Yet as this dissertation

[24] Professor Linda Meyer demonstrates how the requirement that imprisoned people cannot attack their convictions by filing for federal habeas relief on the basis of "new rules" has devolved into a hair-splitting review of the facts, analysis, and holding of cases not dissimilar from the current state of qualified immunity. Linda Meyer, *Nothing We Say Matters*, 61 U. CHI. L. REV. 423 (1994). Meyer argues that this inquiry has led to the undermining of precedent, "stripping prior cases of all persuasive force beyond their particular factual contexts." *Id.* at 423.

demonstrates, qualified immunity decisions regularly hinge on interpretation of the facts, and the Supreme Court regularly reinterprets the facts when faced with a decision on whether to grant immunity. Questions of fact are evaluated using two possible standards: clearly erroneous and substantial evidence.[25] By recognizing the fact-bound nature of the inquiry and adjusting the appropriate standard of review to something more deferential to district courts and juries, the doctrine may reflect a more balanced view of the law and the facts, preventing the slide into absolute immunity.

* * *

Police brutality and excessive force are familiar concepts to those living in the United States, and while many cannot recall which constitutional amendment prohibits excessive force, most are aware of the protection. Despite that awareness, particularly awakened in the summer of 2020 with the murder of George Floyd and protests against police brutality, few people outside of the legal profession know what qualified immunity is. By constructing technical rules that are nearly insurmountable for plaintiffs alleging Fourth Amendment violations, the doctrine may play some part in maintaining the public perception of justice and force of constitutional rights even as it undermines those protections.

The current qualified immunity doctrine protects officers who engage in unreasonable conduct unless there is a nearly identical case that already declared that same conduct unreasonable, eliminating all debate. The Court has attempted to strip out subjective decision-making from the work of constructing the boundaries of clearly established law. But by bringing a rhetorical perspective to the study of qualified immunity, this project demonstrates that, rather

[25] For a thorough discussion on how to regulate constitutional fact review legislatively, see Joseph Blocher & Brandon L. Garrett, *Fact Stripping*, DUKE L.J. (forthcoming).

than removing subjectivity, the doctrine has packaged value-based decisions as legal performances of objectivity. The judicial imagination cannot be disciplined into pure objectivity.

This dissertation contributes to the legal scholarship on qualified immunity as the first study to explore the *internal* structure of qualified immunity's rules and language-based application on a granular level. The stakes of this dissertation for the practice of law are high. I have exposed the value preferences of the doctrine and shown how at every turn, from explicit rules to subjective framing, courts must sympathize with the police officer and marginalize the victim. The internal tension between outcomes that are beyond debate but based on analogical justification produces an immunity more absolute than qualified. By protecting unreasonable conduct through judge-made law in the face of constitutional protections, the doctrine calls into question the reasonableness of law itself.

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