A One-Two Punch: How Qualified Immunity's Double Dose of Reasonableness Dooms Excessive Force Claims in the Fourth Circuit*

Qualified immunity shields government officials from lawsuits alleging they violated a person's constitutional rights. Under the doctrine, if an official can show his actions did not violate clearly established law, then he is protected from liability. But though its purpose purports to protect officials who make tough choices in close calls, its function proceeds more harshly. Despite decades of criticism, qualified immunity has only become a sturdier defense under the Supreme Court's direction. The Court has steadily heightened a plaintiff's burden to demonstrate clearly established law, as well as hinted at narrowing the playing field of where clearly established law may originate. This Recent Development highlights a 2018 excessive force case out of the Fourth Circuit that illustrates these very problems; a young girl's personal autonomy was violated, but the officer's actions were nonetheless protected by qualified immunity. Despite the result, this case illustrates where a path forward could be taken that would counter qualified immunity's one-two punch in excessive force claims.

INTRODUCTION

When life or death is on the line, we expect law enforcement's actions to be guided by their training and not by fear of a budding lawsuit. Potential liability might distract government officials from performing their duties and, accordingly, the law protects reasonable mistakes through qualified immunity. But what happens when the specificity required to overcome a qualified immunity defense is inherently unobtainable for plaintiffs?

That is the hurdle faced by many Fourth Amendment claimants under today's qualified immunity standards, as demonstrated in *E.W. ex rel. T.W. v. Dolgos*,[1] a 2018 Fourth Circuit decision. No life or death was on the line there; instead, a school resource officer, accompanied by two adults, handcuffed a compliant ten-year-old girl because of a fight that happened three days prior.[2] The girl's mother subsequently sued the officer for use of excessive force.[3] Although the Fourth Circuit found the officer had indeed violated E.W.'s constitutional rights, it held those rights were not *clearly established* by law; therefore, the officer was protected by qualified immunity and the plaintiff was left without recourse.[4]

1. 884 F.3d 172 (4th Cir. 2018).
2. *Id.* at 176.
3. *Id.* E.W.'s mother brought the suit on behalf of E.W. *Id.* at 177.
4. *Id.* at 186–87.

Few bright-line rules exist in Fourth Amendment excessive force cases, which makes proving the violations of rights difficult.[5] Rather, these cases are analyzed through a fact-bound reasonableness test that inevitably varies case by case.[6] For E.W., a successful challenge of the officer's qualified immunity defense depended on her ability to find other cases that specifically defined "the contours of her right" to show that a reasonable officer would have known they were violating it.[7] But over time, the Supreme Court has demanded more and more specificity in "clearly established law." Because each excessive force case involves its own particular set of facts, a plaintiff is often unable to find a case specific enough to her own factual circumstances to prove there was clearly established law showing an officer's actions would be unconstitutional.

Consequently, qualified immunity remains lethal to the claims of many plaintiffs in fact-driven suits like E.W.'s, and the Supreme Court's recent jurisprudence has only exacerbated the inherent issue. First, the Court has failed to resolve a circuit split as to what constitutes clearly established law, instead muddying the waters by bringing into question case law many believed settled.[8] Second, the Court continues to narrow the window of specificity for a constitutional right established in a previous case.[9]

This Recent Development will analyze how the Fourth Circuit's holding of a constitutional violation in *E.W.*, while laudable, might fail to impact future plaintiffs faced with immunity defenses in today's qualified immunity doctrine. The Fourth Circuit sits in the middle of a split among circuits as to what creates "clearly established law,"[10] and this Recent Development argues it is time for the Supreme Court to address that split and to rein itself in on the specificity requirements it has steadily been heightening.

Part I of this analysis will discuss the development of qualified immunity and excessive force claims, along with recent criticism facing the qualified immunity doctrine. Part II will present the facts and holding of *E.W.* Part III will show how *E.W.* is emblematic of a larger problem with qualified immunity and evaluate the consequences of the decision on future excessive force claims. Lastly, Part IV will recommend that the Fourth Circuit more consistently consider the case law of other circuits and that the Supreme Court resolve the current circuit split on clearly established law and revert back to its earlier balance of qualified immunity's purpose.

5. *See* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 859–60 (2010).

6. *E.W.*, 884 F.3d at 179 ("The ultimate 'question [is] whether the totality of the circumstances justified a particular sort of . . . seizure.'" (quoting Jones v. Buchanan, 325 F.3d 520, 527–28 (4th Cir. 2003))).

7. *Id.* at 185.

8. *See infra* notes 65–71 and accompanying text.

9. *See infra* notes 46–64 and accompanying text.

10. *See infra* Part IV.

I. WHEN QUALIFIED IMMUNITY MEETS A FOURTH AMENDMENT CLAIM

A. *Origins of Qualified Immunity*

United States Code § 1983 creates a mechanism by which government officials can be held personally liable for money damages for violating the constitutional rights of citizens.[11] Congress enacted § 1983 during Reconstruction in the 1871 Ku Klux Klan Act.[12] Although the statute, as written then and now, makes no mention of any immunity, the Supreme Court recognized qualified immunity as a defense based on the "solidly established" common law doctrine that shielded judges from liability for "acts committed within their judicial jurisdiction."[13] Though the Court failed to clarify how this immunity for judges extended to other officials, it concluded that qualified immunity protected officials who conducted themselves in good faith with a reasonable belief in the legality of their actions.[14]

This quasi-subjective standard for qualified immunity did not last long. The modern incarnation of qualified immunity stems from *Harlow v. Fitzgerald*,[15] which threw out the subjective component.[16] To decide whether the official's actions were protected, the Supreme Court created an objective reasonableness test that disregards an official's actual intent.[17] In order to bring a successful § 1983 claim against a government official, a plaintiff has to prove two things: (1) that there was a constitutional violation; and (2) on the qualified immunity prong, that the official's conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known."[18]

11. Section 1983 provides:

> 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 . . . .

42 U.S.C § 1983 (2018). While § 1983 creates a remedy against state and local officials, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* allows for similar causes of action based on constitutional violations committed by federal officials. 403 U.S. 388, 389 (1971).

12. Klu Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983 (2018)). The provision was initially enacted to provide a civil remedy for abuse committed by the Ku Klux Klan in Southern states. *See* Briscoe v. LaHue, 460 U.S. 325, 337–38 (1983).

13. *See* Pierson v. Ray, 386 U.S. 547, 553–54 (1967).

14. *See id.* at 557.

15. 457 U.S. 800 (1982).

16. *Id.* at 817–18. Proof of an official's subjective motive, the Court explained, would have entailed intensive discovery. *Id.* at 817. Additionally, some courts understood subjective motive to be a factual question that could only be resolved by a jury, thereby defeating one part of qualified immunity's purpose by needlessly subjecting some officials to the time and costs of trial. *See id.* at 816–18.

17. *Id.* at 818.

18. *Id.*

Clearly established law is now the name of the game for plaintiffs, yet the Court has failed to elucidate further—in *Harlow* and in cases since—what "clearly established" actually means.[19] In its stead, lower courts have typically relied on the existence of precedent to determine if the disputed issue has been addressed, either from the U.S. Supreme Court, their own circuit, or, in some jurisdictions, from a consensus of other circuits.[20]

The new test for qualified immunity seeks to balance the rights of citizens with the need to protect officials in their discretionary duties,[21] or, in other words, to give "government officials breathing room to make reasonable but mistaken judgments about open legal questions."[22] Even though the doctrine purports to balance those concerns, over time the Supreme Court has chastised courts who do not apply the doctrine strictly,[23] frequently reversing denials of qualified immunity,[24] particularly in the context of policing.[25] Largely these reversals have stemmed from lower courts defining a clearly established right at too "high [a] level of generality."[26] But the result of the Supreme Court's pressure weighs heavily on excessive force claims. In turn, when qualified immunity is applied to cases brought under the Fourth Amendment, the scales are tipped significantly in favor of defendants.

B. *Fourth Amendment Claims Undergo a Similar Reasonableness Approach*

The Fourth Amendment protects individuals from unreasonable searches and seizures by government officials.[27] Though the Fourth Amendment is often

19. *See The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 272, 277 (2009).

20. *See* John C. Williams, Note, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1312–13 (2012) (describing the analyses of each circuit and finding that (1) the majority of circuits looked to outside case law if no Supreme Court case or its own precedent was on point, (2) some circuits were more restrictive but still looked at other case law, and (3) the Eleventh Circuit unequivocally focused on binding precedent).

21. *Harlow*, 457 U.S. at 807. The Court also identified the social costs that government officials face because of civil lawsuits including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* at 814.

22. Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).

23. *See id.* at 742 ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality."); *see also* Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam).

24. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798 n.2 (2018) [hereinafter Schwartz, *Case Against*] (noting that between 1982 and 2018, the Supreme Court had decided thirty-two qualified immunity cases and found violations of clearly established law in only two of them).

25. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV., 45, 88–90 app. (2018).

26. *See, e.g.*, *Mullenix*, 136 S. Ct. at 308 (explaining that courts must examine an officer's conduct within the "specific context of the case, not as a broad general proposition").

27. U.S. CONST. amend. IV ("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.").

asserted in criminal cases to suppress evidence unlawfully obtained,[28] it also serves as the basis for many civil claims brought against law enforcement under 42 U.S.C. § 1983.[29] In fact, the existence of § 1983 as a vehicle for vindicating Fourth Amendment violations can often come at the expense of criminal defendants.[30] When the Supreme Court limits the exclusionary rule, it often argues that the reason for the rule—deterrence—is already well served by civil remedies like a § 1983 claim.[31]

Plaintiffs may assert excessive force claims under the Fourth Amendment through a § 1983 lawsuit.[32] Just as *Harlow* eliminated the subjective element in qualified immunity, *Graham v. Connor*[33] changed the standard for analyzing excessive force claims.[34] In *Graham*, a black man went to a convenience store to buy orange juice because of an insulin reaction. Over the course of the next several hours, police initiated a traffic stop, handcuffed him, violently threw him into a police car, and dumped him onto his front yard—all based on a series of grave misunderstandings.[35] The man suffered a broken foot and several other injuries.[36] Shortly thereafter, he sued the officers under § 1983 for excessive force during the stop.[37]

Prior to *Graham*, lower courts had analyzed excessive force claims under *Johnson v. Glick*,[38] which called for the consideration of an officer's subjective motives and whether he was acting with malicious or sadistic intent.[39] But the Supreme Court flipped the script in a unanimous decision,[40] reasoning that excessive force claims should be examined under the Fourth Amendment's objective reasonableness standard without regard to an officer's "underlying

28. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (establishing that the exclusionary rule applies to both the federal government and states).

29. *See, e.g.*, E.W. *ex rel.* T.W. v. Dolgos, 884 F.3d 172, 177 (4th Cir. 2018).

30. *See* Hudson v. Michigan, 547 U.S. 586, 597 (2006).

31. *See id.* at 596–97 (holding that violation of the knock-and-announce rule does not require suppression of the evidence obtained in the ensuing search). But this deterrence theory presumes that § 1983 claims can indeed deter police officers from unlawful conduct. *Id.* As this Recent Development discusses, qualified immunity may often defeat that purpose by protecting an officer on a civil claim as well. *See infra* Part II.

32. *See* Graham v. Connor, 490 U.S. 386, 395 (1989) (clarifying that § 1983 claims for excessive force should be analyzed under the Fourth Amendment and not the Due Process Clause).

33. 490 U.S. 386, 395 (1989).

34. *Id.* at 397.

35. *Id.* at 388–89. A police officer witnessed Graham leave the store without buying anything, which he thought was suspicious—although Graham later explained the line had been too long. *Id.* The officer initiated an investigatory stop of Graham and his friend, which quickly escalated as more officers arrived, and eventually ended after the officers learned from the convenience store that Graham had done nothing wrong. *Id.* at 389.

36. *Id.* at 390.

37. *Id.*

38. 481 F.2d 1028 (2d Cir. 1973).

39. *Id.* at 1033; *see Graham*, 490 U.S. at 393.

40. *See Graham*, 490 U.S. at 388.

intent or motivation."[41] And, importantly, the reasonableness of an officer's actions could only be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[42]

Noting that the reasonableness test under the Fourth Amendment was not capable of "precise definition or mechanical application,"[43] the *Graham* Court emphasized the necessity of a careful balancing test that considers the individual facts and circumstances of each case.[44] Specifically, courts need to consider three factors: "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."[45] Ultimately, the case was remanded back to the trial court, and Graham lost.[46]

C. *A Growing Burden To Find Clearly Established Law*

Although *Graham* did not address qualified immunity, it helped usher in a new era for plaintiffs facing a qualified immunity defense—an era that, so far, has presented real challenges for plaintiffs. Fourth Amendment claims under *Graham* are evaluated through a reasonableness test that is inherently fact bound;[47] one new fact in the equation could completely rewire a case's ultimate outcome.[48] But for purposes of defeating qualified immunity, plaintiffs have to identify cases sufficiently similar to their own that address the right at issue and establish clear law. When a Fourth Amendment case deals with its own particularized set of facts, that case may be unhelpful toward creating a clear right for a slightly different fact pattern.

If the Supreme Court has taught us anything about identifying clearly established law, it is that specificity is paramount.[49] In *Mullenix v. Luna*,[50] the Fifth Circuit found that shooting a fleeing motorist in a high-speed pursuit

41. *Id.* at 396–97.

42. *Id.* at 396 (citing Terry v. Ohio, 392 U.S. 1, 20–22 (1968)).

43. *Id.* (internal quotation marks omitted) (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)). The Fourth Amendment has "both the virtue of brevity and the vice of ambiguity." JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 42 (1966).

44. *Graham*, 490 U.S. at 396.

45. *Id.*

46. *Id.* at 399; Greg Lacour & Emma Way, *Why Police 'Get Away with It'*, CHARLOTTE MAG. (June 23, 2017), https://www.charlottemagazine.com/why-police-get-away-with-it/ [https://perma.cc/2ANE-3DEH].

47. *See Graham*, 490 U.S. at 396.

48. *See infra* notes 172–75 and accompanying text.

49. *See* Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (per curiam) (stating that the Court could not determine clearly established law because three cases, though similar, all showed that "the result depends very much on the facts of each case" and the defendant's actions fell into a "hazy border between excessive and acceptable force" (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001))).

50. 136 S. Ct. 305 (2015) (per curiam).

violated a clearly established right,[51] but the Supreme Court reversed and rebuked the Fifth Circuit for describing the right too broadly.[52] Although the Fifth Circuit described the officer's actions as "deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others,"[53] the correct inquiry was whether the officer's conduct was prohibited "in the 'situation [she] confronted.'"[54] With proper specificity, the analysis should have included pivotal facts: "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."[55] With those new facts, the case law became too muddied to establish a clear rule for the officer to have followed.[56] And if the case law is too murky, a plaintiff like Mullenix cannot use it to analogize to his own case and show the law was clearly established.

The Supreme Court's push for such specificity in *Mullenix* is not surprising given the defendant-friendly evolution of the Court's qualified immunity jurisprudence. The lone exception is *Hope v. Pelzer*,[57] when the Court went to great lengths to explain that clearly established law did not mean a plaintiff had to find "fundamentally similar" or even "materially similar" cases.[58] Instead, "the salient question . . . [was] whether the state of the law . . . gave [the officers] *fair warning* that their alleged treatment of [the plaintiff] was unconstitutional."[59] But, over time, the Supreme Court has gradually expanded the breadth of the qualified immunity defense through sharpened language and additional qualifiers.[60]

Much of this traces back to *Ashcroft v. al-Kidd*,[61] when the Supreme Court strengthened the doctrine through a subtle change in its language. First, the Court explained that qualified immunity protects officials unless the law was "'sufficiently clear' [such] that *every* 'reasonable official would [have understood] that what he is doing violates that right.'"[62] Previous opinions had

51. *Id.* at 308.

52. *See id.* ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality." (internal quotation marks omitted (omission in original) (quoting Ashcroft v. al-Kidd 563 U.S. 731, 742 (2011))).

53. *Id.* at 308–09 (quoting Luna v. Mullenix, 773 F.3d 712, 725 (5th Cir. 2014)).

54. *Id.* at 309 (quoting *Brosseau*, 543 U.S. at 199).

55. *Id.* at 309.

56. *See id.*

57. 536 U.S. 730 (2002).

58. *Id.* at 741.

59. *Id.* (emphasis added).

60. *See* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 65–67 (2016) (noting the defense's steady growth since *Harlow*).

61. 563 U.S. 731 (2011).

62. *Id.* at 741 (emphasis added) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

only required a reasonable official, not every single one.[63] Second, the Court also required that "existing precedent must have placed the statutory or constitutional question *beyond debate*."[64] Once again, "beyond debate" was a new addition that seemed to further strengthen the doctrine. Indeed, the phrase has appeared in the majority of the Court's qualified immunity cases ever since.[65]

The Supreme Court has also been frustratingly opaque in defining "clearly established" law. It once posited that courts could look beyond precedent and toward "a consensus of cases of persuasive authority."[66] In *Hope*, for instance, the Court even examined an Alabama Department of Corrections regulation and a United States Department of Justice report alongside circuit precedent as clearly establishing a violation.[67]

Recently, however, the Court seems to be backtracking, leaving it unclear as to whether persuasive authority is convincing enough—or even whether binding circuit authority suffices. In *City of San Francisco v. Sheehan*,[68] the Court offered that, "to the extent that a 'robust consensus of cases of persuasive authority' *could* itself clearly establish the federal right respondent alleges, no such consensus exists here."[69] And in *City of Escondido v. Emmons*,[70] its most recent qualified immunity case, the Court further questioned its precedent by "[a]ssuming without deciding that a court of appeals decision *may* constitute clearly established law for purposes of qualified immunity."[71] Given the Court's selective caseload,[72] a limitation to purely Supreme Court precedent would be devastating to plaintiffs. They would have a much smaller share of Fourth Amendment cases to rely upon, thereby rendering it more difficult to find a case similar to their own. For now, though, it remains an open question.

Although the vast majority of the Court's recent qualified immunity decisions have favored the defendant,[73] some justices have sounded the alarm

63. *See* Kinports, *supra* note 60, at 65.

64. *al-Kidd*, 563 U.S. at 741 (emphasis added).

65. Kinports, *supra* note 60, at 66. Kinports also noted how *al-Kidd* picked up on dicta from a previous Supreme Court case, *Malley v. Briggs*, 475 U.S. 335 (1986), to support its statement that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Kinports, *supra* note 60, at 66 (quoting *Malley*, 475 U.S. at 341). But that language, as used originally, intended to show how absolute immunity was not needed to protect law enforcement officers executing a warrant without probable cause; there was no indication the Court meant to strengthen the underlying qualified immunity doctrine. *Id.*

66. Wilson v. Layne, 526 U.S. 603, 617 (1999).

67. Hope v. Pelzer, 536 U.S. 730, 741–42 (2002).

68. 135 S. Ct. 1765 (2015).

69. *Id.* at 1778 (emphasis added) (quoting *al-Kidd*, 563 U.S. at 742).

70. 139 S. Ct. 500 (2019) (per curiam).

71. *Id.* at 503 (emphasis added).

72. Each term, the Supreme Court hears only eighty cases out of approximately 7000–8000 petitions for review. *The Supreme Court at Work,* SUP. CT. U.S., www.supremecourt.gov/about/courtatwork.aspx [https://perma.cc/W5MF-4FGT].

73. *See* Schwartz, *Case Against*, *supra* note 24, at 1798 n.2.

against this tightening jurisprudence. In *Kisela v. Hughes*,[74] for example, a police officer shot a woman four times who was allegedly "acting erratically" with a kitchen knife.[75] Justice Sotomayor dissented from the Court's "disturbing trend" in qualified immunity cases of insulating an officer from liability through summary reversal of a lower court's opinion.[76] Joined by Justice Ginsberg, she argued that the Court's "one-sided approach . . . transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment."[77] Notably, in her analysis of clearly established law, she cited Supreme Court precedent, Ninth Circuit precedent, and out-of-circuit precedent.[78]

D. *Flaws of Qualified Immunity*

Unsurprisingly, given its frequent effect of immunizing officials despite bad behavior, qualified immunity has been the source of significant criticism.[79] In particular, critics have noted the problematic sequencing structure,[80] the duplication of the reasonableness test,[81] and the failure of the doctrine to achieve its intended purposes.[82]

First, to defeat qualified immunity, plaintiffs likely need a robust background of law that is specific to their case. But that might elude them due to the Court's aversion to addressing constitutional questions when another ground exists to decide a case.[83] For a brief period, the Supreme Court overrode the principle of constitutional avoidance by forcing lower courts to address the constitutional question prior to qualified immunity.[84] First, a court would have to ask if there was a constitutional violation.[85] Once that question was answered, only then could a court decide if the law was clearly established as to that

74. 138 S. Ct. 1148 (2018).

75. *Id.* at 1151.

76. *Id.* at 1162 (Sotomayor, J., dissenting).

77. *Id.*

78. *Id.* at 1158, 1160–61 (detailing several similar cases, including a Ninth Circuit case denying qualified immunity after law enforcement shot a man who had been acting erratically with a machete).

79. Some critics even question its constitutionality altogether. *See, e.g.*, Baude, *supra* note 25.

80. *See* Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1790 (2016).

81. *See* Jeffries, *supra* note 5, at 861.

82. *See* Schwartz, *Case Against*, *supra* note 24, at 1833.

83. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) ("Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function . . . ." (quoting Blair v. United States, 250 U.S. 273, 279 (1919))).

84. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001) ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry.").

85. *Id.*

violation.[86] The Supreme Court reasoned summarily that this battle order was needed to allow for "the law's elaboration from case to case."[87] The more cases decided on constitutional grounds, the clearer the law would become for officials to follow.[88]

However, this approach received significant criticism.[89] For one, it invoked separation of powers issues.[90] Critics argued that courts would have to wade into the executive branch's constitutional powers even though they could dismiss the case on another ground.[91] Additionally, as Justice Breyer emphasized in a concurrence in *Brosseau v. Haugen*,[92] forcing preliminary decisions of constitutional law would create unnecessary expenses for the judiciary and might result in bad law that was unreviewable by a higher court.[93] Predictably, the Court reversed this sequencing structure less than a decade later.[94]

Now courts retain discretion as to when to decide constitutional issues.[95] This return to normalcy, however, creates the possibility that some constitutional violations will always find protection in qualified immunity

86. *Id.*

87. *Id.*

88. *See* Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 674–75 (2009) (explaining how the "law-elaboration function" was the justification for side-stepping constitutional avoidance).

89. *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1277 (2006) ("This rule involves so many and such serious problems that I am not sure where to begin.").

90. *See* Leong, *supra* note 88, at 676–77.

91. Morse v. Frederick, 551 U.S. 393, 428 (2007) (Breyer, J., concurring) ("[W]e should also adhere to a basic constitutional obligation by avoiding unnecessary decision of constitutional questions."); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 842–43 (2001) (tracing the history of the Court's constitutional avoidance canon as a means of preserving separation of powers). But constitutional avoidance makes less sense in the qualified immunity context. The court rules not on the constitutionality of a statute, which might engender concern that it is encroaching on legislative powers. Rather, the court rules only on the constitutionality of an individual government official's actions (i.e., the executive branch). *See* Leong, *supra* note 88, at 677.

92. 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring).

93. *Id.* In *Bunting v. Mellen*, 541 U.S. 1019 (2004), Justice Scalia explained the dictum flaw: "Two Circuits have noticed that if the constitutional determination remains locked inside a § 1983 suit in which the defendant received a favorable judgment on qualified immunity grounds, then 'government defendants, as the prevailing parties, will have no opportunity to appeal for review of the newly declared constitutional right in the higher courts.'" *Id.* at 1024 (Scalia, J., dissenting from denial of certiorari) (quoting Horne v. Coughlin, 191 F.3d 244, 247 (2d Cir. 1999)).

94. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

95. The concurrence in *E.W.*, of course, wished the majority *had* avoided the constitutional issue because the opinion "significantly extends [its] precedent in a novel and uncertain manner." E.W. *ex rel.* T.W. v. Dolgos, 884 F.3d 172, 189 (4th Cir. 2018) (Shedd, J., concurring). Judge Shedd agreed with the majority's qualified immunity determination but disagreed that a constitutional right was violated. *Id.*

because a court refuses to address them.[96] As one commentator explained, the doctrine "creates a silent echo chamber, in which civil rights questions go repeatedly unanswered."[97]

Another inherent flaw of qualified immunity is that it duplicates work already done in the court's constitutional analysis. Many critics have admonished the one-two punch of the double reasonableness test that Fourth Amendment plaintiffs face,[98] including several Supreme Court Justices.[99] First, a plaintiff has to prove an officer's actions were objectively unreasonable under the Fourth Amendment.[100] Then, even after the officer's actions have been proven as objectively unreasonable, a plaintiff still must show that the officer would have *known* his actions were objectively unreasonable based on the law at the time of the incident.[101]

Because the objective reasonableness standard in excessive force cases encompasses the same concerns that qualified immunity addresses (i.e., was the officer reasonable in his actions?), qualified immunity would seem to merge into the merits of the excessive force analysis.[102] At one time, a majority of circuits even believed the two analyses should merge in an excessive force claim.[103] Otherwise, having both doubly insulates an officer from liability.[104] The officer might act objectively unreasonably—even *subjectively* unreasonably with bad faith or malice—but if his actions are distinct enough not to have been addressed by a court before, then he stands immune.

96. *See* Colin Rolfs, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468, 468 (2011) (concluding that post-*Pearson*, circuit courts more often ruled on the immunity prong first without addressing the constitutional right prong, but district courts continue to address the constitutional right prong first). *But see* Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623, 640–41 (2011) (finding that *Pearson* generally did not change courts' behavior in which prong to address first).

97. Cover, *supra* note 80, at 1790.

98. *See* Jeffries, *supra* note 5, at 861 ("If, taking all the limitations on the officer's time, information, and perceptions into account, the officer's use of force was 'objectively unreasonable,' arguably there would be no need for an independent inquiry into whether a reasonable officer could have believed such conduct to be lawful.").

99. *See* Saucier v. Katz, 533 U.S. 194, 216–17 (2001) (Ginsberg, J., dissenting) (arguing that once objective reasonableness is met, "there is simply no work for a qualified immunity inquiry to do"); *see also* Anderson v. Creighton, 483 U.S. 635, 664 (1987) (Stevens, J., dissenting) (criticizing the majority's allowance of a double reasonableness test that counted "the law enforcement interest twice and the individual's privacy interest only once").

100. *See Saucier*, 533 U.S. at 204–05.

101. *See id.* at 205.

102. Jeffries, *supra* note 5, at 861.

103. *See* Frazell v. Flanigan, 102 F.3d 877, 886–87 (7th Cir. 1996) ("[O]nce a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful.").

104. *See Anderson*, 483 U.S. at 659 (Stevens, J., dissenting).

Nevertheless, in *Saucier v. Katz*,[105] the Supreme Court rejected criticism that the two reasonableness standards are superfluous and explained that the first reasonableness test protects officers from mistakes of fact whereas the second test protects officers from mistakes of law.[106] Thus, any approach seeking to rebalance the scales of qualified immunity must eye more modest goals in order to find judicial approval at the highest level.[107]

Lastly, real-life results simply may not support the core justifications behind qualified immunity. The doctrine is meant to protect officials from the burdens of extensive discovery and trial. It equips judges with a tool to eliminate weak cases before those burdens grow.[108] But a recent study suggests the vast majority of qualified immunity cases still make it to trial anyway.[109] Furthermore, almost all police officers involved in civil rights claims never pay the costs of their defense.[110] With no real financial liability at stake, police officers do not need qualified immunity's protection from a lawsuit. So despite steadily strengthening the doctrine, the Supreme Court has made little impact on the doctrine's ultimate policy goals.

Not all commentators agree with this characterization,[111] and one could argue that the doctrine's failure to meet its policy goals only underscores why the Supreme Court must further strengthen it. But there are numerous reasons to reject that conclusion. For one, evidence suggests that qualified immunity unfortunately deters people from filing even meritorious claims because of the expenses of fighting under the doctrine.[112] Second, because of other procedural constraints, like a defendant's high burden at the 12(b)(6) and summary judgment stages, qualified immunity may simply be the wrong vehicle to dismiss insubstantial claims.[113] And finally, further strengthening immunity would only aggravate the "silent echo chamber" already at hand: each new, slight variation of a constitutional violation would continue to be dismissed because there is no "clearly established law" on point.

105. 533 U.S. 194 (2001).

106. *See id.* at 195.

107. *But see* Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring) (questioning qualified immunity's evolution from its common law origins and suggesting that the Court "reconsider our qualified immunity jurisprudence" in an appropriate case).

108. *See* Harlow v. Fitzgerald, 457 U.S. 817–18 (1982).

109. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 8 (2017) [hereinafter Schwartz, *How Qualified*].

110. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

111. Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1876 (2018) (raising doubt as to whether Schwartz's empirical analysis of qualified immunity actually warrants a full reconsideration of the doctrine).

112. *See* Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 492 (2011).

113. *See* Schwartz, *How Qualified*, *supra* note 109, at 54.

All of this, of course, begs the question: If qualified immunity is not reaching its goals—and it seems the improper vehicle *to* reach those goals[114]—then why continue to allow it to shield officials from objectively unreasonable behavior? As it stands today, qualified immunity is "as if the one-bite rule for bad dogs started over with every change in weather conditions."[115]

II. BACKGROUND OF *E.W.*

E.W. was ten years old when she got into a kicking and shoving match with another female student on a school bus.[116] As a result, she was suspended from the bus for three days, but there were no further incidents between the girls.[117] Three days after the scuffle, a school resource officer[118] and two school officials called E.W. into an office and questioned her about the incident.[119] E.W. responded calmly and was compliant but did not seem remorseful to the officer.[120] Because of this, the officer handcuffed the four-feet, four-inches tall, ninety-five-pound girl for two minutes, allegedly out of fear for the physical safety of the larger adults in the room,[121] even though E.W. had no prior behavioral issues.[122]

The Fourth Circuit found that the handcuffing alone, even without physical injury to E.W., violated her constitutional rights[123]: "[The officer] took a situation where there was no need for any physical force and used unreasonable force disproportionate to the circumstances presented."[124] When

114. *See* Schwartz, *Case Against*, *supra* note 24, at 1799, 1833–35 (concluding that if qualified immunity is not overruled, the Supreme Court should at least incorporate the subjective test again or consider the policy goals in individual cases and that lower courts should more heavily rely on *Hope*).

115. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256 (2013).

116. E.W. *ex rel.* T.W. v. Dolgos, 884 F.3d 172, 176 (4th Cir. 2018).

117. *Id.* at 177, 181.

118. The officer, Rosemary Dolgos, was a deputy sheriff in Wicomico County in Maryland. *Id.* "A school resource officer, by federal definition, is a career law enforcement officer with sworn authority who is deployed by an employing police department or agency in a community-oriented policing assignment to work in collaboration with one or more schools." *Frequently Asked Questions*, NAT'L ASS'N SCH. RESOURCE OFFICERS, https://nasro.org/frequently-asked-questions/ [https://perma.cc/JR2L-DCP3]. Accordingly, like other governmental officials, state or local, their official actions may be protected by qualified immunity. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

119. *E.W.*, 884 F.3d at 177.

120. *Id.*

121. *Id.* The source of the officer's concern was allegedly both "the incident [the officer] observed in the surveillance video and E.W.'s apathy." *Id.*

122. *Id.* at 181. The court discusses E.W.'s lack of disciplinary history in its analysis, but this factor may run afoul of the objective reasonableness test, which inquires what the officer knew at the time of the seizure and not with 20/20 hindsight. *See* Graham v. Connor, 490 U.S. 386, 397 (1989). Here, the officer had no knowledge of E.W.'s disciplinary background. *E.W.*, 884 F.3d at 177. Therefore, it should not be considered in the excessive force claim.

123. *E.W.*, 884 F.3d at 185. The court rejected a rule that handcuffing was per se reasonable. *Id.* at 180 (citing Tennessee v. Garner, 471 U.S. 1, 7–8 (1985) (holding that probable cause to arrest does not automatically justify the manner in which search or seizure is conducted)).

124. *Id.* at 185.

viewed through *Graham*'s objective reasonableness lens,[125] the officer's actions were not justified because the majority of the *Graham* factors weighed in favor of E.W.[126] The first—"the severity of the crime at issue"[127]—weighed against E.W. because an assault, even a minor one like this, constituted a violent offense.[128] The second—"whether the suspect poses an immediate threat to the safety of the officers or others"[129]—strongly favored E.W., who was a foot shorter and sixty pounds lighter than the officer, and also was surrounded by three adults.[130] Moreover, significant time had elapsed between the fight and the questioning with no escalation.[131] And the final factor—"whether [s]he is actively resisting arrest or attempting to evade arrest by flight"[132]—also favored E.W., because there was no evidence she was attempting to flee or resist.[133]

The court also weaved additional factors into the traditional *Graham* fabric, including E.W.'s age and the school setting.[134] Those factors, the court explained, were relevant in shifting the analysis from what would be appropriate in a street-policing scenario to what would be appropriate at a school, where uses of force could undermine a student's willingness to attend and effectively learn.[135] Notably, the court supported its use of these elements by noting their inclusion in the analyses of other circuit courts, while also citing reported and unreported district court opinions.[136]

Interestingly, while the Fourth Circuit summarily stated that *Graham* applied, it remains an open question whether *Graham* applies to excessive force cases in school settings, or if another case about school searches, *New Jersey v. T.L.O.*,[137] controls.[138] *T.L.O.* held that Fourth Amendment protections in schools hinge on additional considerations unique to a school, such as the need for school personnel to maintain order and discipline in the classroom.[139] Hence,

125. *Graham*, 490 U.S. at 397.

126. *E.W.*, 884 F.3d at 179–80 (quoting *Graham*, 490 U.S. at 396).

127. *Id.* at 179.

128. *Id.* at 180. But the court noted this factor was "tempered" because the assault was only a misdemeanor. *Id.*

129. *Id.* at 179 (quoting *Graham*, 490 U.S. at 396).

130. *Id.* at 181.

131. *Id.*

132. *Id.* at 179 (quoting *Graham*, 490 U.S. at 396).

133. *Id.* at 181–82.

134. *Id.* at 179, 182–83.

135. *See id.* at 183–84; *see also* Alexis Karteron, *Arrested Development: Rethinking Fourth Amendment Standards for Seizures and Uses of Force in Schools*, 18 NEV. L.J. 863, 880 (2018) (recommending that higher consideration of the school context be included in the excessive force analysis because of the heightened trauma students experience during the use of force and arrests in schools).

136. *E.W.*, 884 F.3d at 182–83.

137. 469 U.S. 325 (1985).

138. *See* Karteron, *supra* note 135, at 868–69.

139. *T.L.O.*, 469 U.S. at 339. In some cases, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *Id.* at 340. But the Court noted in a subsequent school search case that "the nature of [a child's constitutional rights] is what is

a court might conclude that those considerations should underpin an excessive force claim in a school as well. Some circuits have extended *T.L.O.* in varying degrees to excessive force claims in school,[140] while others have not.[141] Those that have not and, instead, continue to apply *Graham*, do not always include the school setting or age of a student as relevant factors in their analyses.[142]

Regardless, once E.W. established that her constitutional rights had been violated, E.W. still had to show the officer's actions violated clearly established law.[143] While *Graham* requires officers to measure force against the aforementioned factors, *Graham* is "cast at a high level of generality"—too high to provide notice to a reasonable officer that he is behaving unconstitutionally.[144] In other words, E.W. needed to find a factually analogous case because *Graham* only gave the general framework of how a law enforcement officer should measure his actions.[145] The court opined that Fourth Amendment cases, in particular, require a "high level of specificity because 'it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.'"[146]

In its search for controlling authority, the Fourth Circuit held that the specific facts in *E.W.* did not have to be previously decided.[147] Yet, inevitably, the court hunted for just that—matching facts—and found nothing.[148] Unlike its Fourth Amendment analysis, the court limited its search for authority only to cases within its own circuit or from the Supreme Court.[149] Without a similar case, the court found the officer had no notice of the right at issue and was therefore protected from suit under qualified immunity.[150] But the court emphasized that its excessive force holding applied to future cases "involving

appropriate for *children* in school." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995) (emphasis added). Accordingly, the age and sex of a student is an important factor in a Fourth Amendment search claim in school. *See, e.g.*, *T.L.O.*, 469 U.S. at 342 ("Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.").

140. *See* C.B. v. City of Sonora, 769 F.3d 1005, 1024–25 (9th Cir. 2014) (en banc) (citing and applying the *T.L.O.* test but not relying on it exclusively); Gray *ex rel.* Alexander v. Bostic, 458 F.3d 1295, 1304–05 (11th Cir. 2006) (directly applying *T.L.O.*).

141. *E.W.*, 884 F.3d at 179; *see* A.M. v. Holmes, 830 F.3d 1123, 1151 (10th Cir. 2016).

142. *See A.M.*, 830 F.3d at 1151–52 (describing *Graham* factors without mention of the age, sex, or school setting of the student, though it ultimately determined the case solely on the qualified immunity prong).

143. *E.W.*, 884 F.3d at 185.

144. *Id.* at 186 (quoting Plumhoff v. Rickard, 572 U.S. 765, 779 (2014)).

145. *See id.*

146. *Id.* (quoting Saucier v. Katz, 533 U.S. 194, 205 (2001)).

147. *Id.* at 185 ("It is not required, however, that a court previously found the specific conduct at issue to have violated an individual's right[] [so long as t]he unlawfulness of the officer's conduct [is] 'manifestly apparent' . . . ." (quoting Owens *ex rel.* Owens v. Lott, 372 F.3d 267, 279 (4th Cir. 2004))).

148. *See id.* at 186–87.

149. *See id.* at 186.

150. *Id.* at 186–87.

similar circumstances."[151] Ironically, "similar circumstances" may be the death knell of future litigants hoping to rely on *E.W.*

III. CONSEQUENCES OF *E.W.* FOR SIMILAR LITIGANTS

Aware of the drought of relevant authority and seeking to establish a constitutional right for future litigants, the *E.W.* court wisely addressed the case's constitutional issue head-on.[152] Despite that willingness, questions remain about the breadth of the decision and how it might unfold in future qualified immunity cases. The court's declaration that the "excessive force holding is clearly established for any future qualified immunity cases involving similar circumstances" leaves a lot of ground to be covered.[153] As the concurrence pointed out, the exact parameters of the majority's holding are left unclear.[154] Does the majority intend only to establish the violation of "handcuff[ing] an arrested juvenile at school simply to punish or teach him a lesson" or is it "opening the door to permit all custodial arrestees to pursue . . . excessive force claims based on the mere fact that they were handcuffed"?[155]

To be sure, it may be difficult to create a broad right based on a particular set of facts. In *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*,[156] the Fourth Circuit considered a case where police officers tasered a mentally disabled man who was acting bizarrely and had wrapped himself around a traffic pole.[157] The court found the tasering unconstitutional and explained that, "a police officer may *only* use serious injurious force, like a taser, when an objectively reasonable officer would conclude that the circumstances present a risk of immediate danger that could be mitigated by the use of force."[158] This is broad language, but because of the unique situation,[159] *Armstrong* likely will not set clear law for the use of tasers, or similar weapons, in cases with less colorful facts.

After all, the Fourth Circuit has previously hitched itself tightly to the requirement for specificity in case law.[160] In *Fields v. Prater*,[161] the plaintiff sued for denial of employment for a social services position based on her political

151. *Id.* at 187.

152. *See id.* at 178–79.

153. *Id.* at 187.

154. *Id.* at 198 (Shedd, J., concurring).

155. *Id.*

156. 810 F.3d 892 (4th Cir. 2016).

157. *Id.* at 896–97.

158. *Id.* at 905.

159. The man was subject to an involuntary civil commitment order. *Id.* at 896. When police arrived at the scene, he was walking across an active roadway. *Id.* Once off the road, he continued to act oddly by eating grass and dandelions and putting cigarettes out on his tongue. *Id.*

160. *See* Jeffries, *supra* note 5, at 857–58.

161. 566 F.3d 381 (4th Cir. 2009).

affiliation.[162] In the plaintiff's corner was (1) a state social services handbook that prohibited consideration of political affiliation for employment decisions[163] and (2) a previous Fourth Circuit opinion holding that electoral boards could not consider political affiliation in county registrar appointments.[164] Yet, instead of relying on these factors, the Fourth Circuit found that no clearly established authority existed and granted qualified immunity,[165] despite the obvious intuition that the defendant's actions were both patently unreasonable and violative of internal policy.

Confusion will follow *E.W.* as to whether the right addressed is a broad one—entailing a person's right not to be handcuffed—or if further delineation is required. If intended to extend to all handcuffing, the Supreme Court will certainly reject the decision as creating clearly established law, unless the underlying facts are virtually identical. As Judge Shedd's concurrence in *E.W.* emphasized, at least six federal circuit courts have rejected the notion that handcuffing alone, without any injuries, qualifies as excessive force.[166] Indeed, the Fourth Circuit itself proclaimed in *Brown v. Gilmore*[167] that "a standard procedure such as handcuffing would rarely constitute excessive force where the officers were justified . . . in effecting the underlying arrest."[168] Thus, despite Judge Shedd's concern that *E.W.* opens the door "to permit all custodial arrestees to pursue . . . excessive force claims based on the mere fact that they were handcuffed,"[169] that concern is misplaced once the single thread of *E.W.* is considered within the entire tapestry of handcuffing cases. Clearly, the core facts matter.

What may be more difficult to discern is whether the court has established a more particularized right against handcuffing juveniles at school or against handcuffing purely for disciplinary reasons. The latter distinction might be unimportant because the court's reasonableness analysis does not delve into the officer's subjective reasons for seizing an individual.[170] Exactly why the specific officer holds a person is irrelevant, as long as a reasonable officer would have done the same.[171] The former right—against handcuffing certain juveniles at school—again seems too broadly defined to meet the Supreme Court's specificity requirements. But as the right is defined more narrowly, the more

162. *Id.* at 383. Although *Fields* is a First Amendment case, the same issue of clearly established law applies to it as well. *Id.*

163. *Id.* at 388.

164. *Id.* at 389–90.

165. *Id.* at 389; *see also* Jeffries, *supra* note 5, at 857–58.

166. E.W. *ex rel.* T.W. v. Dolgos, 884 F.3d 172, 193–94 (4th Cir. 2018) (Shedd, J., concurring).

167. 278 F.3d 362 (4th Cir. 2002).

168. *Id.* at 369.

169. *E.W.*, 884 F.3d at 198 (Shedd, J., concurring).

170. *See id.* at 179 (majority opinion).

171. *See id.*

difficult it becomes to create useful precedent for qualified immunity purposes.[172] For example, it would be unhelpful to future plaintiffs that the clearly established right against handcuffing specifically applies to compliant, ninety-pound, ten-year-old girls surrounded by three adults following a fight with another child on a bus several days prior.

Even though that level of specificity dilutes the usefulness of the right for later litigants, those specifics are at the heart of the right in question. The *E.W.* decision turned on several factors, each playing a significant role. The court in *E.W.* hints that had the fight occurred the same day or involved violence against an authority figure rather than a student, the handcuffing may have been reasonable.[173] Broadly defining the constitutional right in *E.W.* may unshackle that right from its underlying rationale—at least under the Supreme Court's current qualified immunity jurisprudence. As the Supreme Court has shown time and time again, it will not accept broad proclamations of constitutional rights—rather, the individual facts rule.[174]

The *E.W.* court repeatedly emphasized that a specific set of facts need not have been decided previously,[175] but in the context of excessive force claims, that does not offer a generous amount of help when most determinations of constitutional rights hinge on a particular fact. As such, future litigants hoping to rely on *E.W.* should be careful not to characterize too broadly in defining the constitutional right established in *E.W.* They should also be wary of defining the right in *E.W.* too narrowly, such that it loses any relevance to their own claim entirely. For now, the law that seems most clearly established by *E.W.* is a narrow one—that an officer may not handcuff a compliant, young student who poses no safety threat to those around her for a disciplinary incident that occurred several days prior.[176] Change a single factor in that equation, though, and the law becomes hazier.

IV. ADJUSTING THE SCALES OF QUALIFIED IMMUNITY

Without adjustments in the Fourth Circuit's analysis, qualified immunity appears doomed to render Fourth Amendment protections hollow.[177] Lacking a prior case with functionally identical circumstances in the relevant jurisdiction,

172. Jeffries, *supra* note 5, at 859.

173. *See E.W.*, 884 F.3d at 183 n.5.

174. *See supra* notes 49–60 and accompanying text.

175. *E.W.*, 884 F.3d at 185.

176. Indeed, that is essentially how the Eighth Circuit recognized the right contemplated in *E.W.* before finding that it did not create a clearly established right for a noncompliant second grader who was screaming and attempting to run away before being handcuffed in *K.W.P. v. Kansas City Public Schools*, 931 F.3d 813, 816–18, 823 (8th Cir. 2019).

177. *See* Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting) (arguing the Court had adopted a "shoot first, think later" approach to policing).

a plaintiff can suffer an endless trove of abuses under the Fourth Amendment with zero legal recourse.

But what measures could the Fourth Circuit reasonably take to fix the issue? And at what point does the Supreme Court need to step in and address the matter?[178] *E.W.* illustrates two functional challenges faced by Fourth Amendment plaintiffs when trying to reach the clearly established law standard: (1) where a court may venture to find clearly established law and (2) the level of factual analogy required to create clearly established law addressing the conduct in question. The former issue could and should be addressed by the Fourth Circuit, but it also represents a split among jurisdictions, which should ultimately be taken up by the Supreme Court. The latter issue, however, might *only* be fixable by the Supreme Court.

The clearest path for established law issues has already been carved by other circuits beyond the Fourth. Here, E.W. may have defeated the officer's qualified immunity defense had the Fourth Circuit modified its search for clearly established law. While the Fourth Circuit appeared to only look inwardly for precedent,[179] six other circuits typically expand their search to include consensuses outside of their borders.[180] If the Fourth Circuit had looked outwardly, the court would have found two relevant decisions from the Ninth and Eleventh Circuits, which both found unconstitutional uses of force when officers handcuffed compliant children who posed no safety threat at school.[181] These decisions were acknowledged by the *E.W.* court in its Fourth Amendment analysis,[182] but not when the court moved onto qualified immunity.

178. This Recent Development proposes a judicial remedy rather than a statutory remedy as the appropriate vehicle for change. Though qualified immunity seems to be largely a statutory precedent, the Supreme Court has frequently tinkered with it. *See* Baude, *supra* note 25, at 80–82 (examining the "unorthodox" nature of qualified immunity as a statutory precedent and noting the Court's changes to the sequencing order and the elimination of the subjective requirement). These changes "suggest that the Court takes more ownership of it than more orthodox statutory doctrines" and would be able to "cut back on some of the excesses of qualified immunity." *Id.* at 81–82.

179. *See E.W.*, 884 F.3d at 186.

180. *See* Jeffries, *supra* note 5, at 859 (identifying the First, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits as courts that analyze other circuit authority).

181. *See* C.B. v. City of Sonora, 769 F.3d 1005, 1030 (9th Cir. 2014) (en banc) (finding excessive force when a compliant but nonresponsive eleven-year-old who posed no safety threat was handcuffed on a playground, even while he was surrounded by four or five adults); *see also* Gray *ex rel.* Alexander v. Bostic, 458 F.3d 1295, 1300–01, 1306 (11th Cir. 2006) (holding that handcuffing a nine-year-old for five minutes after she physically threatened a teacher was "excessively intrusive"). Another relevant case might have been *Neague v. Cynkar*, 258 F.3d 504 (6th Cir. 2001), which involved a seventh grader who was handcuffed at school after becoming argumentative and combative with the school principal. *Id.* at 505–06. The Sixth Circuit ultimately found that this was not a constitutional violation based on a per se handcuffing rule. *Id.* at 508 ("This court's opinion in *Kain v. Nesbitt*, 156 F.3d 669 (6th Cir. 1998), supports our view that the handcuffing of a person in the course of an otherwise lawful arrest fails, as a matter of law, to state a claim for excessive force.").

182. *See E.W.*, 884 F.3d at 182.

Confusingly enough, the Fourth Circuit previously *has* indicated it may consider authority from other circuits as persuasive in its case law review.[183] Indeed, several months after *E.W.* was decided, a different panel analyzed other circuits' case law, although it too granted qualified immunity.[184] So what gives here? Perhaps the court deemed the Ninth and Eleventh Circuit cases together as simply not enough to create "clearly established law."[185] But failing to mention them at all in its qualified immunity analysis suggests they were never even potentially relevant to the court's decision. Considering the baseline obviousness of the right violated, though—the child's right not to be handcuffed when she poses no threat—one might expect the magic number of cases to create "clearly established law" would be fairly low.

In the future, the Fourth Circuit should not cabin its search of law based on arbitrary geographical barriers. And most importantly, the Supreme Court should definitively resolve the split in the remaining jurisdictions and declare conclusively that clearly established law can originate from jurisdictions around the country, thereby avoiding the serious dilemma where actions violate federal law in one state but not in another.

Critics might argue that expanding the parameters of clearly established law would overly burden law enforcement officers to keep track of minute legal updates from around the country and unfairly punish them in borderline cases.[186] But it seems unlikely that law enforcement officers parse through their own circuit's case law and recognize the subtle developments that might affect them. For broad developments, this might be a fair expectation, but Fourth Amendment challenges, as discussed above, are not often written in black letter law.[187] Considering lawyers attend law school for three years to understand the complexities and reasoning of cases, it is fanciful to believe that officers have

183. Owens *ex rel.* Owens v. Lott, 372 F.3d 267, 280 (4th Cir. 2004).

184. Wilson v. Prince George's Cty., 893 F.3d 213, 223 (4th Cir. 2018) ("A survey of other circuits' case law also illustrates the lack of clear consensus regarding violations of this nature.").

185. Feminist Majority Found. v. Hurley, 911 F.3d 674, 705–06 (4th Cir. 2018) (granting qualified immunity even though three other circuits had clearly established law on the right at issue). *Feminist Majority* arguably dealt with a more complex right than at issue here—"the general right of a student to be free from a school administrator's deliberate indifference to student-on-student sexual harassment"—but it raises the additional issue of not only where courts can look for established law but also how many cases must be on point. *Id.*

186. *See* Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992) (citing Anderson v. Creighton, 483 U.S. 635, 639–40 (1987)) (explaining that under qualified immunity "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines").

187. *See* Corey Fleming Hirokawa, Comment, *Making the "Law of the Land" the Law on the Street: How Police Academies Teach Evolving Fourth Amendment Law*, 49 EMORY L.J. 295, 328–29 (2000) (examining how Fourth Amendment law is taught in several Atlanta-area police academies and noting that police officers were "much better able to work with specific, clearly-delineated policies than with vague exhortations to consider all the circumstances").

adequate training to comprehend the perforations of every Fourth Amendment decision ordered by a court, regardless of where it originates.[188]

Additionally, the failure of the *E.W.* court to venture outside of its own precedent to evaluate qualified immunity is inconsistent with its use of outside authority to analyze a Fourth Amendment violation generally.[189] When the *E.W.* court added the age and school-setting elements to the traditional *Graham* factors to determine excessive force, the court specifically cited the prevailing practices of other courts around the country.[190] If the positions of other circuits helped define reasonableness under the Fourth Amendment, why should their logic not extend to an almost identical reasonableness analysis under qualified immunity? The concern again seems to harken back to giving officers reasonable notice of the law that governs their actions. But that justification begins to lose its sheen when one remembers that officers are already on their second bite of the reasonableness apple. Even if qualified immunity is denied, the plaintiff still has to prove the officer acted unreasonably in the moment, a high burden on its own.

Ultimately, if the Fourth Amendment is to have any teeth at all in a § 1983 claim, then the Supreme Court should resolve the current circuit split and clarify that clearly established law can originate outside of binding authority. But that alone will not solve the "kudzu-like creep of the modern immunity regime."[191]

Today's qualified immunity jurisprudence unfairly demands precision-point specificity. While the Supreme Court once described a fair warning standard in *Hope*,[192] it has long since left that notion in the dust, instead requiring that "every . . . official" be aware of a right "beyond debate."[193] To

188. *See* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 346–48 (1991) (studying the effects of the exclusionary rule on law enforcement officers and finding that over a third of law enforcement officers are mistaken about search and seizure law); L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 682 (1998) (showing that police officers who took a test on search and seizure law were only right on slightly more than fifty percent of the questions).

189. *See* E.W. *ex rel.* T.W. v. Dolgos, 884 F.3d 172, 186 (4th Cir. 2018).

190. *Id.* at 182–83. The court referenced the Fifth, Ninth, and Eleventh Circuits, as well as several U.S. District Courts, including the Eastern District of Kentucky, the Middle District of Tennessee, the District of Maryland, and the Northern District of Ohio. *Id.*

191. Zadeh v. Robinson, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring), *withdrawn on reh'g*, 928 F.3d 457 (2019). Judge Willett originally concurred with the majority opinion finding a constitutional violation but no clearly established law when the Texas Medical Board executed a warrantless subpoena on a doctor's office. *Id.* at 487, 498. On rehearing, Judge Willett, in dissent, found there was clearly established law but again criticized the "legal *deus ex machina*" of qualified immunity. Zadeh v. Robinson, 928 F.3d 457, 478–79 (2019) (Willett, J., concurring in part, dissenting in part).

192. *See* Hope v. Pelzer, 536 U.S. 730, 739–40 (2002).

193. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

regain the balance it once sought in *Harlow*, the Court must again adjust the scales.

If not, even a case like *E.W.* that purports to create a clear constitutional right to prevent invasions into the bodily autonomy of harmless children might fail to meet even that mark. How many other ways could the facts unfold in cases after *E.W.* that might reach toward the same right, even if abstract, but be too distinct factually to find clear authority under the Supreme Court's current requirements? Next time, a child could be placed in a police car instead of handcuffed; she might be frisked by an officer at school several days after the underlying incident; or she might be arguing in a room with just one official before the seizure; or, outside the school context entirely, as an innocent bystander in a rowdy situation.

Each action seemingly invokes the same issue in *E.W.*, but at a level of abstraction—namely no immediate danger posed by a child but an intrusion on that child's bodily autonomy by the officer nonetheless. But the exact type of intrusion, the lead-up, or the location is different. Each situation then, if presented before a court today, might lead to a finding of a constitutional violation but not create clearly established law for the others on the list because the violative nature of the *particular* conduct does not establish clear enough rules for the others.

Such a result would seem absurd and would allow officers to act unreasonably in known murky areas without punishment. A return to more abstraction and the "fair warning" standard that *Hope* envisioned is necessary. Fair warning rather than heightened specificity would ensure that an officer, once notified that the law forbids a general set of actions, would not escape liability purely because the exact specifics of that officer's actions and the surrounding circumstances were unaddressed.

Take E.W.'s case as a way to understand how the fair warning standard might operate. First, with the Fourth Circuit's borders open to outside case law, the school resource officer would have been on notice of two decisions relatively on point in the Ninth and Eleventh Circuits.[194] Both cases found constitutional violations when officers handcuffed compliant schoolchildren.[195] But when examined more specifically under the Supreme Court's current approach, the other circuits' cases somewhat differ from *E.W.* In the Ninth and Eleventh circuit cases, neither child had engaged in any physical violence prior to the handcuffing; one had argued with a principal[196] and the other had simply been unresponsive because of medication issues.[197]

194. *See* C.B. v. City of Sonora, 769 F.3d 1005, 1030 (9th Cir. 2014) (en banc); Gray *ex rel.* Alexander v. Bostic, 458 F.3d 1295, 1300–01, 1306 (11th Cir. 2006).

195. *See C.B.*, 769 F.3d at 1030; *Gray*, 458 F.3d at 1306.

196. *Gray*, 458 F.3d at 1300–01.

197. *C.B.*, 769 F.3d at 1010–11.

Yet under *Hope*'s fair warning standard, those small factual deviations would not render the cases irrelevant to E.W.'s claim. A case need not be "materially similar" or "fundamentally similar" under *Hope*.[198] Instead, an officer need only have fair warning that his actions would be unconstitutional. And here, rather than be shielded by the differences in those two cases, the officer would be fairly warned of the similarities—that small children who do not pose a physical threat to anyone's safety should not be handcuffed. Thus, qualified immunity's second round of reasonableness would not have protected the officer's decision to handcuff E.W.

CONCLUSION

Handcuffing a ten-year-old girl who currently presents no threat is a seemingly bizarre choice for a police officer to make. So bizarre, in fact, that E.W. had very little law to rely on when the officer later raised qualified immunity as a defense to her lawsuit. Qualified immunity was never meant to protect the idiosyncratic choices of law enforcement when they violate a person's constitutional rights. Yet with the Supreme Court's vigorous enforcement of specificity in establishing clear law combined with the Fourth Circuit's inconsistency as to what is sufficiently precedential, plaintiffs are drafted into a hazy, unwinnable battle.

Larger grievances concerning qualified immunity may be outside the Fourth Circuit's purview, but the court should more consistently decide from where clearly established law may originate. And the Supreme Court, for its part, should finally resolve the split about the sources of clearly established law and reverse some of its more exacting specificity requirements. No longer should jurisdictional lines define where constitutional rights are "clearly established" or not; no longer should "a change in the weather conditions" change the reasonableness of a police officer's actions. With a rebalancing of the scales, the Fourth Amendment can get back in the ring.

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198. Hope v. Pelzer, 536 U.S. 730, 741 (2002).

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