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"Zooming In": Government Surveillance and the Role of Courts in Shaping Qualified Immunity Doctrine

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COMMENT

"ZOOMING IN": GOVERNMENT SURVEILLANCE AND THE ROLE OF COURTS IN SHAPING QUALIFIED IMMUNITY DOCTRINE

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The killing of George Floyd at the hands of Minneapolis police officers shocked the Nation into intense, renewed awareness regarding police use of force.[1] In the wake of increased activism surrounding police conduct, national attention has turned once again to the qualified immunity doctrine.[2] The doctrine of qualified immunity creates a default presumption of immunity for executive officials performing discretionary functions, and further protects those actors from financial liability,[3] operating as a barrier to plaintiffs attempting to challenge police conduct.[4]

Qualified immunity exists as one option amidst a range of other judicially created immunities for public officials such as absolute immunity for judicial officials. The qualified immunity doctrine purportedly exists to shield the government from the burdens of unwarranted, excessive lawsuits

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1. *George Floyd: What Happened in the Final Moments of His Life*; BBC NEWS (July 16, 2020), https://www.bbc.com/news/world-us-canada-52861726; Hannah Klein, *Protests Over George Floyd's Death Spread Around the World*, SLATE (June 5, 2020, 5:03 PM), https://slate.com/news-and-politics/2020/06/george-floyd-worldwide-protests.html.

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

3. Pierson v. Ray, 386 U.S. 547, 555–57 (1967) (establishing qualified immunity for executive officials and stating the purpose of the doctrine).

4. *See* Marcus R. Nemeth, Note, *How Was That Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. REV. 989, 994 (2019) ("The intersection of qualified immunity and excessive force doctrine has rendered § 1983 plaintiffs highly vulnerable and unlikely to succeed on the merits.").

against its executive officials.[5] However, growing scholarly consensus demonstrates that the qualified immunity doctrine insulates police officers from egregious forms of misconduct,[6] promotes "constitutional stagnation,"[7] and fails to achieve the proposed reasons for its continued existence, such as saving the government time and money.[8] Yet, even as a surprisingly diverse consensus of voices denounce qualified immunity, the Supreme Court continues to enforce the doctrine with gusto, and all signals point to the fact that the Court's position is unlikely to change.[9] This reality is juxtaposed with greater public pressure to end the doctrine as applied to police officers in excessive force cases, and growing dissent within the judiciary itself.[10]

With this context in mind, this Comment has two purposes: the first is theoretical, and the second is practical.

First, I seek to reframe the current discussion of qualified immunity by conceptualizing the doctrine as a mode of government surveillance that disproportionately impacts individuals of color.[11] The qualified immunity analysis, based both on its historical roots and present application, can be considered a mode of government surveillance, which subjects plaintiffs' behavior to an unwarranted level of scrutiny, while analytically overlooking

5. *See infra* Section I.

6. *See* Nemeth, *supra* note 4, at 994 (arguing that the Supreme Court "has rendered victims of excessive police force helpless" against police misconduct through current qualified immunity doctrine).

7. Paul W. Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 402 (2009) (explaining that the Supreme Court's abandonment of a constitutional-merits first analysis in qualified immunity doctrine stagnates the development of constitutional law).

8. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9 (2017) (demonstrating empirically that most cases involving qualified immunity do not save the government from financial burdens).

9. As recently as June 2020, the Supreme Court denied certiorari to cases which challenged qualified immunity. *See* Nick Sibilla, *Supreme Court Refuses to Hear Challenges to Qualified Immunity, Only Thomas Dissents*, FORBES (June 15, 2020, 1:30 PM), https://www.forbes.com/sites/nicksibilla/2020/06/15/supreme-court-refuses-to-hear-challenges-to-qualified-immunity-only-clarence-thomas-dissents/?sh=401355477fad; *see also* Jay Schweikert, *The Supreme Court's Dereliction of Duty on Qualified Immunity*, CATO INST. (June 15, 2020, 11:27 AM), https://www.cato.org/blog/supreme-courts-dereliction-duty-qualified-immunity (positing that the Court may not hear cases on qualified immunity hoping to "duck" the issue and pressure Congress into action during a highly politically charged moment).

10. *See* Zadeh v. Robinson, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante) ("I write separately to register my disquiet over the kudzu-like creep of the modern immunity regime."); *see also* James A. Wynn Jr., *As a Judge, I Have to Follow the Supreme Court. It Should Fix This Mistake*, WASH. POST (June 12, 2020, 8:00 AM), https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake/ (arguing that as a federal appellate judge, he believes the Supreme Court must reform the doctrine of qualified immunity).

11. *See infra* Section II.A.

defendant public officials' conduct.[12] In excessive force claims brought under the Fourth Amendment, which this Comment will focus on, the qualified immunity doctrine serves as a near-impenetrable veil that obfuscates the behavior of defendants. Though Section 1983 theoretically provides an individual cause of action for the deprivation of constitutional liberties,[13] under which the actions of *government officials* should be scrutinized, the qualified immunity analysis inverts the court's gaze to hyper-focus on the conduct of the very individuals whose rights were allegedly violated.[14] Thus, a mode of state oppression lurks even in the legal claim which supposedly creates a cause of action for the vindication of rights against law enforcement officers. In other words, even when the "bad behavior" of a law enforcement officer is supposedly on trial, the court's eyes fall heavily on, and even punish, the conduct of the (often) black and brown claimants.

The second goal of this Comment is practical. The framing of government surveillance elucidates suggestions for various institutional actors including courts, legislators, and the general public.[15]

This Comment is divided into two parts, Background and Analysis. The Background will recount the historical roots of both the Section 1983 cause of action and the qualified immunity doctrine, and their connection with racial conflict in the United States.[16] Then, I will unpack challenges plaintiffs face confronting the qualified immunity doctrine as a defense to liability, especially in cases of excessive force, focusing in detail on the interpretive steps courts take in defining constitutional violations, reconstructing facts, and determining clearly established law based on current Supreme Court precedent.[17] Part I will conclude by recounting the current status of qualified immunity doctrine on the Supreme Court and in the federal judiciary.[18]

Moving to the second Part, the Analysis will define government surveillance and trace its connection with race in the United States through policing and the legal system.[19] Section A will explain how courts may generally play a role in furthering state oppression and posits that courts may reverse this trend in Section 1983 claims. Section B will unpack the ramifications of the government surveillance framing, arguing that the mode

12. *See infra* Section II.B.
13. 42 U.S.C. § 1983.
14. *See infra* Section II.B..
15. See *infra* Section II.C..
16. *See infra* Section I.A.
17. *See infra* Section I.B.
18. *See infra* Section I.B..
19. *See infra* Section II.A.

of analysis courts employ in excessive force cases brought under Section 1983 hyper-scrutinizes the conduct of plaintiffs and simultaneously "overlooks" the conduct of defendants.[20] Thus, courts further the oppression[21] which black and brown individuals are subject to in other spheres through over-surveillance. The qualified immunity analysis obfuscates the behavior of defendants in four key ways: (1) by preventing courts from scrutinizing a defendant's actual knowledge, (2) by prohibiting an inquiry into subjective intent, (3) by priming courts to overlook the conduct of defendants, and (4) by minimizing the role of the objective fact finder.[22] Finally, Section C of the Analysis will offer brief suggestions for various institutional actors based on the framing of government surveillance.[23]

I. BACKGROUND

A. The Foundations of Modern Qualified Immunity Doctrine

Citizens may sue state government officials who violate their federal constitutional rights for money damages under Section 1983.[24] The first iteration of Section 1983 originated in the Civil Rights Act of 1871.[25] After the Civil War, federal legislators sought to secure the rights of formerly enslaved persons against various deprivations of liberties threatened by southern states by passing Reconstruction legislation and the Fourteenth and Fifteenth Amendments.[26]

Though the Fourteenth Amendment[27] guaranteed that no state could deny life, liberty, or property to a citizen without due process of law, two problems remained after its passage. First, widespread violence against and disenfranchisement of formerly enslaved persons continued to pervade many

20. *See* discussion *infra* Section II.B.

21. Although I posit that courts play a role in state oppression, this Comment does not imply that judges consciously seek to oppress the individuals in their courts. My point is that the mode of analysis courts employ may unwittingly further state oppression.

22. *See* discussion *infra* Section II.B.ii.

23. *See infra* Section II.C. A range of perspectives exist as to whether the doctrine of qualified immunity, and immunities for state actors in general, should be reformed or abolished entirely. This Comment does not take a position on any side of the debate, but rather makes suggestions to address qualified immunity doctrine as it currently exists and pertains to this analysis.

24. 42 U.S.C. § 1983.

25. Act of Feb. 28, 1871, 16 Stat. 433, 433–40 (1871).

26. For the political and congressional history of these Acts, see generally Xi Wang, *The Making of Federal Enforcement Laws, 1870-1872:* 70 CHI-KENT L. REV. 1013 (1995); Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187 (2005).

27. U.S. CONST. amend. XIV.

states, and states either lacked requisite legislation guaranteeing a remedy, or lacked the power or will to enforce such remedies when rights were deprived.[28] Second, it was unclear whether the President had the power to enforce the Fourteenth Amendment independently.[29] Thus, when passing the Civil Rights Act of 1871, now codified as Section 1983, Congress sought to create a mechanism through which the Fourteenth Amendment could be enforced.[30]

For almost a century, Section 1983 lay dormant as a cause of action.[31] But in 1961, the Supreme Court held, in *Monroe v. Pape*,[32] that action "under color of law"[33] includes a variety of state action, and does not simply pertain to state officials enforcing state laws.[34] In other words, "*Monroe* definitively determined that Section 1983's scope was as broad as the scope of the Fourteenth Amendment."[35] Following *Monroe*, federal courts experienced a flood of Section 1983 lawsuits for the first time. Importantly, the judicial quickening of the Section 1983 cause of action came about amidst newly emerging national concerns about racial deprivations of liberty.[36] In *Monroe*, police officers executed a warrantless entry into a black family's home, made the parents and children strip naked while the officers searched their apartment, and then arrested one of the family members on baseless charges.[37] Understood in its "political and social setting[]," the *Monroe* decision was reached by a newly race-conscious, post-*Brown* Supreme Court in the midst of the Civil Rights era.[38]

The text of the Civil Rights Act of 1871 did not mention immunity for government officials.[39] Yet, in *Pierson v. Ray*,[40] the Supreme Court suddenly extended a version of the common law immunity of judicial officials to

28. Grant's Address, Cong. Globe, 42d Cong., 1st Sess., p. 244 (1871).

29. Monroe v. Pape, 365 U.S. 167, 172–74 (1961).

30. *Id.*

31. James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 412 (2003).

32. 365 U.S. 167 (1961).

33. *Id.* at 186–87.

34. *Id.* at 185.

35. Sheldon Nahmod, *Section 1983 is Born: The Interlocking Supreme Court Stories of Tenney and Monroe*, 17 LEWIS & CLARK L. REV. 1019, 1059 (2013).

36. *Id.* at 1020–22.

37. 365 U.S. at 169.

38. Nahmod, *supra* note 35, at 1023.

39. *See* Caroline H. Reinwald, *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, 667 (2020) (tracing the history of common law immunities).

40. 386 U.S. 547 (1967).

executive actors such as police officers in Section 1983 claims.[41] The Court reached its conclusion by reading Section 1983 against the background of other common law immunities—for example, the total immunity available to judges and legislators—as well as the common law defenses available to police officers in tort actions—for example, the defenses of good faith and probable cause when making an arrest.[42]

Like the Court's extension of the Section 1983 cause of action in *Monroe*, the origin of modern qualified immunity for executive officials in *Pierson* also must be read against the historical backdrop of the Civil Rights era. In *Pierson*, the Court was asked to consider whether police officer respondents who arrested peaceful black ministers attempting to enter a "White Only" waiting room in Mississippi as an act of civil disobedience could be held liable by those individuals.[43] The Court sided with the white officers and held that they were free from liability if they had acted in good faith with probable cause under a statute believed to be valid when making the arrest.[44]

Despite its jurisprudential leap in *Pierson*, the Court did not explain the extent of immunity executive officials were entitled to. Over the next decade, the Court clarified that immunity for executive officials was conditional ("qualified") rather than absolute, and defined as "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief . . . for acts performed in the course of official conduct."[45] Still, the Court continued to deny immunity to officials based on either an objective showing when those officials reasonably should have known that their action would violate a constitutional right, or a subjective showing that the officials acted with "malicious intention" to deprive someone of a Constitutional right.[46]

41. *Id.* at 555–57.

42. *Id.* at 556–57. *See also* 5 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, HARPER, JAMES & GRAY ON TORTS § 29.10 (3d ed. 2020) (Discussing the "broad[] privilege" developed in actions against judicial officials at common law, the history of common law immunities awarded to public officials, and various policy justifications for judicial immunity such as safeguards built into the judicial process to prevent unconstitutional conduct; "That privilege has been extended by the weight of American case law to other officials whose functions are neither judicial nor . . . related to judicial . . . activities. These have included both legislative officials and a host of other officers whose responsibilities are essentially administrative"; The main justification for the extension of this immunity is based on "questions of the proper relationship between coordinate branches of government.").

43. 386 U.S. 547 at 553.

44. *Id.* at 555.

45. Scheur v. Rhodes, 416 U.S. 232, 247–48 (1974).

46. Wood v. Strickland, 420 U.S. 308, 322 (1975).

Then, in 1982, the Supreme Court rewrote the qualified immunity playbook in *Harlow v. Fitzgerald*.[47] First, the *Harlow* court clarified that courts should no longer consider an official's subjective intent in Section 1983 claims because the fact-intensive question of subjective intent would needlessly subject the government to the burdens of discovery, as well as the time and costs of trial.[48] In eliminating the subjective branch of the analysis, the Court specifically declared its desire to limit the amount of cases against government officials that are decided on the merits.[49] Second, the Court clarified the new standard: Executive officials performing discretionary functions are immune from suit when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[50]

After *Harlow*, the doctrine of qualified immunity has become a formidable defense to individuals whose constitutional rights have allegedly been violated by executive officials like police officers. The following sections explain why the qualified immunity analysis so often excuses defendant-executive officials from liability in a Section 1983 claim.

B. Challenges Presented by the Qualified Immunity Analysis[51]

Based on the Supreme Court's standard in *Harlow*, courts now apply a two-part test to determine whether qualified immunity applies: (1) whether a constitutional violation occurred, and (2) whether the right was clearly established at the time of the violation.[52]

i. The First Prong of the Qualified Immunity Analysis: Constitutional Violation

The first prong of the qualified immunity analysis has followed a strange developmental path under Supreme Court precedent: Today, courts have license to functionally ignore the question of whether a constitutional violation occurred in favor of relying on the test's second prong (i.e., whether the right was clearly established *at the time of the violation*). Yet, ignoring this first question has produced constitutional stagnation, and contributed to

47. 457 U.S. 800 (1982).

48. *Id.* at 815–16.

49. *Id.* at 815–16, 818.

50. *Id.* at 818.

51. Importantly, this brief treatment of the complex issues presented by the qualified immunity doctrine is not exhaustive. Many issues are beyond the scope of this Comment. For a more thorough treatment of the issue, see generally John C. Jeffries Jr., *What's Wrong With Qualified Immunity?*, 62 FLA. L. REV. 851 (2010).

52. *See, e.g.*, City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019) (per curiam) (outlining the two-step analysis).

slow and conflicting precedents when courts face novel issues.[53] I will only briefly address the first prong of the test, because most of this analysis centers on the second prong—determining clearly established law.

Following *Harlow*, courts exercised their own discretion to determine when the constitutional violation question must be addressed in a Section 1983 analysis.[54] Despite promptings from the Supreme Court suggesting a constitutional merits-first analysis,[55] courts failed to address the question first, if at all.[56] Then, after two decades of uncertainty, in *Saucier v. Katz*[57] the Supreme Court mandated that the constitutional question must be considered first, before reaching the issue of clearly established law.[58]

By addressing the constitutional question first, a court is more likely to determine the existence or non-existence of a constitutional right, thus engaging in constitutional development.[59] Under constitutional merits-first sequencing, a court may find that a constitutional right existed in a given case, *even if the officer did not violate that right under the circumstances or under the second prong of the analysis.*[60] This finding leaves the door open for plaintiffs to establish a violation existed under similar facts in the future.[61] Without mandatory sequencing, the danger is that the constitutional questions

53. Hughes, *supra* note 7, at 417.

54. Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 672–673 (2009) (recounting the history of discretionary sequencing under the doctrine).

55. *See* Siegert v. Gilley, 500 U.S. 226, 232 (1991) ("A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits.").

56. *See* Leong, *supra* note 54, at 670 (finding, in one empirical study, that "courts avoided the constitutional question in over a quarter of the cases in which the government officer raised a qualified immunity defense").

57. 533 U.S. 194 (2001).

58. *Id.* at 200–01 ("In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. . . . 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.").

59. Hughes, *supra* note 5353, at 404.

60. *See Saucier*, 533 U.S. at 201 (The Court recognized this principle in *Saucier* by noting that addressing the constitutional violation question first allows courts to "set forth principles" important for constitutional analyses in similar cases in the future, creating a case-by-case development of constitutional law).

61. Sarah Lochert, Note, *Qualified Immunity, Constitutional Stagnation, and the Global War on Terror*, 105 NW. U. L. REV. 829, 838–39 (2011).

at stake will remain unaddressed, leaving future plaintiffs without clear insight, and stagnating the development of the law.[62]

Yet, in *Pearson v. Callahan*, [63] the Supreme Court abruptly changed course and overruled *Saucier*, allowing courts discretion to address or omit the constitutional violation question.[64] The Court reasoned in *Pearson* that merits-first sequencing imposes an unnecessary burden on lower courts, despite the availability of alternative bases upon which the courts could easily dispose of a case.[65] The *Pearson* decision has been widely criticized for creating confusion among the very courts that discretionary sequencing supposedly helped.[66] Additionally, the abolishment of mandatory sequencing means that courts may be more likely to delay in resolving cases when the court faces a novel constitutional question, such as the use of evolving technologies by law enforcement officers.[67] Even the Supreme Court avoids addressing the constitutional violation question. In one of the Court's most recent qualified immunity decisions, *Kisela v. Hughes*,[68] the Court skipped the constitutional violation question entirely and proceeded directly to an analysis of whether the law was clearly established.[69]

In summary, because plaintiffs must access a large body of case law specific to their claim to succeed in qualified immunity cases, judicial avoidance of the constitutional question may significantly limit plaintiffs' ability to successfully bring a case on qualified immunity grounds.[70]

62. Hughes, *supra* note 53, at 401.

63. 555 U.S. 223 (2009).

64. *Id.* at 227 ("We now hold that the *Saucier* procedure should not be regarded as an inflexible requirement . . . .").

65. *See id.* at 235 (recounting criticisms on this basis from various members of the Court).

66. *See* Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 318 (2020) ("The Court's decision in *Pearson* has been widely criticized for creating confusion about the scope of constitutional rights.").

67. *See* Zadeh v. Robinson, 902 F.3d 483, 499 (5th Cir. 2018) (Willett, J., concurring dubitante) ("If courts leapfrog the underlying constitutional merits in cases raising novel issues like digital privacy, then constitutional clarity—matter-of-fact guidance about what the Constitution requires—remains exasperatingly elusive."); Schwartz, *supra* note 66, at 318 ("This concern is particularly acute for constitutional claims regarding novel practices and technologies, like Tasers and drones, for which there are few pre-*Pearson* decisions, and it can take many cases over many years for circuits to issue clarifying rulings.").

68. 138 S. Ct. 1148 (2018) (per curiam).

69. *Id.* at 1152 ("Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes.").

70. *See, e.g.*, Schwartz, *supra* note 66, at 319 ("In a world without qualified immunity, it would be more difficult for district and appellate courts to avoid ruling on the merits of plaintiffs' constitutional claims.").

ii. The Second Prong of the Qualified Immunity Analysis: Clearly Established Law

Even when a court finds that an official violated a plaintiff's constitutional right, the claim may (and often does) fail when the court considers whether the right was clearly established at the time of the violation.[71] Despite the importance of the "clearly established" branch of the qualified immunity analysis, the standard is mired in confusion. First, it is unclear at what level of generality courts must analyze constitutional violations, creating a highly fact-specific approach, which virtually guarantees defeat for plaintiffs. Second, it remains unclear whether a court may consider persuasive authority as well as binding authority in the clearly established law analysis, creating a circuit split that only the Supreme Court can resolve.

a. Generality of Clearly Established Law

Following its decision in *Harlow,* in *Anderson v. Creighton*,[72] the Supreme Court clarified that in order to succeed on a Section 1983 claim, plaintiffs cannot simply allege a violation of "extremely abstract rights."[73] Instead, the violated right must be "particularized" and "sufficiently clear that a reasonable official would understand that what he is doing violates that right."[74] Yet, the Court has not clearly signaled what level of factual similarity between a case and prior precedent is necessary to constitute clearly established law.

On one hand, since *Anderson*, the Court has consistently limited the clearly established law analysis to apply to narrowly defined, factually-bound rights. In *Ashcroft v. al-Kidd*, [75] the Supreme Court rejected the notion that courts can find clearly established law "at a high level of generality,"[76] specifically noting that the U.S. Court of Appeals for the Ninth Circuit erred in finding clearly established law by looking to the general history and purposes of the Fourth Amendment.[77] On the other hand, the Supreme Court has denied that a particularized right entails exact factual similarity to precedent.[78]

71. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (iterating the "clearly established" standard for the first time).

72. 483 U.S. 635 (1987).

73. *Id.* at 639.

74. *Id.* at 640.

75. 563 U.S. 731 (2011).

76. *Id.* at 742.

77. *Id.*

78. *Id.* at 741.

Yet, the instruction that "existing precedent must have placed the statutory or constitutional question beyond debate"[79] is interpreted by courts, in practice, to entail just such a fact-bound analysis.[80] As a result, the inability to find factually similar cases cripples plaintiffs' claims, especially when the violation is novel.[81] Thus, the "clearly established" inquiry creates a system in which an official may violate a constitutional right, but as long as he is the first to violate the right, he will probably not be found liable.

Directed to perform a fact-bound analysis without relying wholly on the facts, federal courts have developed vastly disparate approaches to the clearly established law analysis. Some circuits demand legal precision and virtual factual identicality,[82] adopting a formalist approach.[83] Others, seeking to find breathing room for plaintiffs, define rights generally, and risk that their decisions will be summarily reversed by the Supreme Court. The Ninth Circuit has been a specific victim of the Supreme Court's summary reversals on the issue of clearly established law.[84] Recently, the Supreme Court reversed the Ninth Circuit's decision denying qualified immunity to a police officer on this precise issue, accusing the Ninth Circuit of relying on an overly broad "right to be free of excessive force" instead of defining the right by asking "whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances."[85]

The Supreme Court has been surprisingly active in addressing the issue of clearly established law, to plaintiffs' detriment. From 2001 to 2016, the Court issued eighteen decisions addressing whether a right was clearly established in qualified immunity cases, finding in sixteen cases that the defendants did not violate clearly established law.[86] Many of these decisions came as summary reversals.[87] The Court's actions have led scholars and

79. *Id.*

80. Jefferies, *supra* note 51, at 854–55.

81. *See id.* (Further specifying that "the fact-specific . . . approach does not mesh with . . . constitutional law or with the antecedent methodology of the common law," because courts, including the Supreme Court, commonly draw general principles from precedent in applying the law to novel facts).

82. *See* Mark R. Brown, *The Fall and Rise of Qualified Immunity: From Hope to Harris*, 9 NEV. L.J. 185, 197 (2008) (analyzing the overly fact-bound approach taken by the Eleventh Circuit for over a decade).

83. *See* Tyler Finn, Note, *Qualified Immunity Formalism: 'Clearly Established Law' and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 446–48 (2019) (identifying a circuit split among federal appellate courts on the First Amendment right to record police activity; some circuits take a formalist approach, relying only on nearly factually identical cases within the circuit).

84. *See, e.g.*, City of Escondido v. Emmons, 139 S. Ct. 500, 502 (2019) (per curiam).

85. *Id.* at 503.

86. Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 63 (2016).

87. *Id.*

dissenters on the Court alike to conclude that the Court's majority *does* demand near factual identicality in order to warrant the title of clearly established law.[88] The Court's frequent summary reversals, therefore, operate as a way to keep federal circuit courts in line and ensure that they continue to "stick to the facts."[89]

b. Sources of Authority for Clearly Established Law

Another challenge faced by lower courts in determining clearly established law is whether courts must rely only on binding authority (from the Supreme Court and their own circuit), or whether persuasive authority may also constitute clearly established law. Significantly, the Supreme Court declined to address this question in *Harlow*'s[90] original holding, and over nearly four decades, the Court has continued to waver cryptically on the issue. On one hand, the Court has intimated that a consensus of persuasive authority may demonstrate clearly established law,[91] and, in *Hope v. Peltzer*,[92] even looked to persuasive authority in its analysis of an Eighth Amendment violation.[93] Yet, the Court subsequently restricted the standard for what may constitute a consensus of persuasive authority,[94] and has even gone so far as to question whether a circuit's own case law may be "a dispositive source of clearly established law."[95]

88. Kisela v. Hughes, 138 S. Ct. 1148, 1161 (2018) (per curiam) (Sotomayor, J., dissenting) ("The majority's decision, no matter how much it says otherwise, ultimately rests on a faulty premise: that those cases are not identical to this one. But that is not the law, for our cases have never required a factually identical case to satisfy the 'clearly established' standard.").

89. *See* Salazar-Limon v. Houston, 137 S. Ct. 1277, 1282 (2017) (Sotomayor, J., dissenting from the denial of certiorari) (noting "a disturbing trend regarding the use of this Court's resources" regarding the frequency of the Court's summary reversals in qualified-immunity cases); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 48 (2018) (noting and critiquing the trend that the Supreme Court has been surprisingly willing to grant qualified immunity a place on its docket through summary reversals).

90. 457 U.S. 800 (1982)

91. *See* Wilson v. Layne, 526 U.S. 603, 617 (1999) ("Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident that clearly established the rule on which they seek to rely, *nor have they identified a consensus of cases of persuasive authority* such that a reasonable officer could not have believed that his actions were lawful.") (emphasis added).

92. 536 U.S. 730 (2002).

93. *See id*. at 744–45 (Referencing cases from other circuits, but ultimately concluding that the case law presented no relevant persuasive authority. However, the Court later referenced a Department of Justice report to support its conclusion, which is technically a source of persuasive authority).

94. *See, e.g.*, Ashcroft v. al-Kidd, 563 U.S. 731, 741–42 (2011) (clarifying that any consensus of persuasive authority must be "robust" and so clear that the relevant precedent "must have placed the statutory or constitutional question beyond debate," creating a noticeably higher threshold for clearly established law).

95. Reichle v. Howards, 566 U.S. 658, 665–66 (2012).

Despite the Supreme Court's reticence, the source of clearly established law can be critical in a qualified immunity analysis. If a plaintiff is allowed to rely on persuasive authority to build their case, the universe of potentially factually similar precedent expands significantly. Given the importance of factual similarity, the difference between relying on one circuit's case law versus the broader universe of case law can be the differentiating factor between victory and certain defeat for plaintiffs.[96] The Supreme Court has suggested that the critical question for courts is whether including case law from other circuits constitutes sufficient notice for government officials.[97] However, relying on an overly restrictive body of law may dangerously sever the qualified immunity analysis from the reasonableness standard which supposedly must govern the action of government officials, as well as other sources which influence government behavior, such as internal policy.[98]

Federal circuits are split on this issue. Some circuits, such as the Eleventh Circuit, rely only on binding precedent as established by the highest state courts in the jurisdiction as well as the Supreme Court.[99] Other circuits, such as the First, Fifth, Seventh, Eighth, and Tenth Circuits, are willing to look beyond the decisions of their jurisdictions, and the Sixth Circuit is willing to do so "grudgingly."[100] The Ninth Circuit considers the widest body of case law, even going so far as to consider the unpublished opinions of other circuit courts.[101]

The Supreme Court has done little to resolve the circuit split in its most recent qualified immunity decisions, but its dicta suggest a more conservative approach. In *City & County of San Francisco v. Sheehan*, [102] the Court essentially dodged the question, concluding 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."[103] And in *City of Escondido v. Emmons*,[104] the Court muddied the waters in an area of

96. *See* Finn, *supra* note 83, at 460 *""*("Limiting the sources of law . . . makes for a restrictive and formalist assessment.").

97. *Id* at 460 n.92.

98. In overly formalist jurisdictions, the question essentially becomes: "Is there a specific controlling case that would put an officer on notice that his behavior is unreasonable?" The question should be: "Does a critical mass of law and policy exist that would put an officer on notice that his behavior is unreasonable?" *See generally* Jeffries, *supra* note 51.

99. *Id.* at 858–59.

100. *Id.*

101. *Id.*

102. 135 S. Ct. 1765 (2015).

103. *Id.* at 1778 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).

104. 139 S. Ct. 500 (2019).

general consensus by implying that the circuit's *own* appellate case law may not constitute binding precedent.[105]

iii. Challenges Presented by the Qualified Immunity Doctrine in Fourth Amendment Excessive Force Claims

With the general challenges presented by the qualified immunity doctrine established, this discussion now turns to the unique challenges presented by the doctrine in the context of excessive force claims.

Excessive force claims brought under the Fourth Amendment, which protects individuals from unreasonable searches and seizures by government officials, are governed by a unique application of the qualified immunity analysis. The Supreme Court developed the test for what constitutes excessive force in *Graham v. Connor*.[106] In *Graham*, the Court held, first, that based on the text of the Fourth Amendment, courts should not consider an officer's subjective intent in favor of an "'objective reasonableness' standard," and second, that this reasonableness standard should be largely governed by the individual facts of the case based on the "totality of circumstances."[107] Specifically, in weighing the actions of the officers, courts must consider "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[108]

The *Graham* analysis creates barriers for plaintiffs because the standard is based on a highly factually specific analysis muddled by conflicting Supreme Court precedent. The Court has acknowledged that the *Graham* analysis yields vastly different results on what exactly constitutes reasonable force.[109] Facing cases involving similar issues, the Court has come to divergent decisions; for example, in *Tennessee v. Garner*,[110] the Court found an officer liable for using deadly force for shooting at a fleeing suspect, yet in *Scott v. Harris*,[111] declined to find an officer liable for shooting at a fleeing suspect.[112] It seems to follow that one or two facts can change the outcome

105. *See id.* at 503 ("Assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity . . . .").

106. 490 U.S. 386 (1989).

107. *Id.* at 392, 396 (quoting Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)).

108. *Id.* at 396.

109. Scott v. Harris, 550 U.S. 372, 383 (2007) ("Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.'").

110. 471 U.S. at 3.

111. 550 U.S. at 376.

112. Nemeth, *supra* note 4, at 1015 n.126 (identifying this trend; further identifying that the Supreme Court's precedents on the use of force appropriate to stop fleeing suspects are conflicting).

for cases which seem, on their faces, remarkably similar. Thus, in *Graham*, the Court created a "reasonableness test that is inherently fact bound."[113]

Many concluded that it would be superfluous for a court to perform both the excessive force and qualified immunity analyses in the same case, given the near-identicality of the fact-bound reasonableness standards.[114] However, the Supreme Court has held otherwise. Specifically, in *Saucier v. Katz*,[115] the Supreme Court rejected eliminating the qualified immunity analysis in excessive force cases based on the near-identicality of the two standards.[116] The Court reasoned that though the *Graham* analysis determines whether an officer made a reasonable mistake in applying force, the qualified immunity inquiry determines whether the officer made a reasonable mistake "as to the legal constraints on particular police conduct."[117] In other words, the qualified immunity analysis is primarily concerned with whether an officer had notice that a mistake would be unreasonable, as supplied by clearly established law. Thus, an officer can make an unreasonable mistake under *Graham*, yet still warrant qualified immunity if he did not have notice that the mistake would be *unlawful.*

In summary, the qualified immunity standard, as applied to excessive force cases, produces a strange double reasonableness regime. Even within the Court, dissenting Justices have suggested that the qualified immunity standard applies to Fourth Amendment search and seizure cases, essentially duplicating the same reasonableness analysis, usually in favor of the defendant-government officials.[118]

iv. The Current State of the Law for Qualified Immunity

Growing scholarly consensus demonstrates that the qualified immunity doctrine insulates police officers from even the most egregious forms of misconduct,[119] promotes constitutional stagnation,[120] and fails to achieve the proposed reasons for its continued existence, such as saving the government

113. Reinwald, *supra* note 39, at 670.

114. Nemeth, *supra* note 4, at 1015.

115. 533 U.S. 194 (2001).

116. *Id.* at 197.

117. *Id.* at 205.

118. *See id.* at 215–17 (Ginsburg, J., dissenting) ("As the foregoing discussion indicates, however . . . [t]he constitutional issue whether an officer's use of force was reasonable in given circumstances routinely can be answered simply by following *Graham*'s directions. . . . Once it has been determined that an officer violated the Fourth Amendment . . . there is simply no work for a qualified immunity inquiry to do."); *see also* Anderson v. Creighton, 483 U.S. 635, 648 (1987) (Stevens, J., dissenting) (objecting to the "double standard of reasonableness" created by the qualified immunity analysis in Fourth Amendment search and seizure cases).

119. *See supra* note 6.

120. *See supra* note 7.

time and money.[121] However, even as a surprisingly diverse consensus of voices have denounced qualified immunity,[122] the Supreme Court has addressed qualified immunity only sparingly in the last decade, mostly through pro-defendant summary reversals.[123] In June 2020, the Court denied certiorari to nine cases involving qualified immunity.[124]

Therefore, though calls to end the doctrine of qualified immunity are not new, the Supreme Court continues to enforce the doctrine.[125] This reality is juxtaposed with greater public pressure to end the doctrine, and growing dissent within the lower federal judiciary.[126] Most notably, two members of the Court, Justices Sotomayor and Thomas, have explicitly vocalized willingness to re-examine and potentially overturn the doctrine for at least three years.[127] Dissenting from the Supreme Court's most recent refusal to grant certiorari to a batch of qualified immunity cases in 2020, in *Baxter v. Bracey*,[128] Justice Thomas further criticized qualified immunity and indicated continued willingness to overturn the doctrine based on his position that the judge-made doctrine strays from the statute's text.[129]

v. Summary

In the midst of the Civil Rights era, in *Monroe v. Pape* the Supreme Court breathed life into a piece of Reconstruction legislation, now codified as Section 1983, which served to give teeth to the Fourteenth Amendment.[130] Six years later, faced with an onslaught of Section 1983 litigation in federal

121. *See supra* note 8.

122. For example, the two Supreme Court Justices who have signaled a willingness to revisit the doctrine, Justice Sotomayor and Justice Thomas, often fall on divergent sides of the political spectrum. Similarly, lower federal court criticism has stemmed from both liberal judges, and notably, even from more conservative, Trump-appointed judges. *See supra* note 10.

123. *See, e.g.*, City of Escondido v. Emmons, 139 S. Ct. 500, 504 (2019) (per curiam); Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam); Mullenix v. Luna, 136 S. Ct. 305, 312 (2015) (per curiam); Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015) (per curiam); City & Cnty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1778 (2015).

124. Sibilla, *supra* note 9.

125. Schweikert, *supra* note 9.

126. *See, e.g.*, Zadeh v. Robinson, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante) ("I write separately to register my disquiet over the kudzu-like creep of the modern immunity regime.").

127. *See* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (criticizing the doctrine for becoming "an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment"); Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence.").

128. 140 S. Ct. 1862 (2020).

129. *Id.* at 1862 (Thomas, J., dissenting from denial of certiorari).

130. *See supra* Section I.A.

courts, the Court suddenly extended a version of common law judicial and legislative immunity to law enforcement officers in *Pierson v. Ray*.[131] Now, the qualified immunity doctrine serves as a formidable hurdle for plaintiffs. Courts must follow a two-step analysis for qualified immunity. In the first branch of the analysis, courts inquire whether a constitutional violation occurred.[132] Courts are permitted to skip this question entirely, stunting the availability of Constitutional precedent for future plaintiffs.[133] Courts must also determine whether the individual's right was clearly established at the time of the alleged violation.[134] Many courts require that plaintiffs demonstrate a clearly established right through near factual identicality to prior case law, drawing only on mandatory sources of authority.[135]

In addition to the general challenges presented by the qualified immunity doctrine, plaintiffs face additional challenges in excessive force claims brought under the Fourth Amendment.[136] A defendant-executive official will not be liable even if he uses unreasonable force, so long as the court finds he did not have constitutional notice through prior case law.[137] Thus, the "double reasonableness" regime creates *double barriers* for plaintiffs. Even faced with formidable scholarly, judicial, and public opposition, the doctrine of qualified immunity continues to shield law enforcement officers in Section 1983 actions.

II. ANALYSIS

In this Part, I argue that the courts' application of the qualified immunity analysis, based both on its historical roots and present application, should be considered a method of government surveillance. The framing of government surveillance reveals that the qualified immunity analysis, as applied in cases of excessive force, is dangerously void of analytical balance, lacking an objective gaze. Specifically, the combination of the qualified immunity and excessive force analyses results in an unwarranted level of scrutiny aimed at plaintiffs, while analytically obfuscating and veiling defendant-public officials' conduct.

Part I recounted how the historical origin of the Section 1983 claim is inextricably linked to racial conflict and the deprivation of civil rights. In the modern era, scholars have demonstrated that government surveillance, most

131. 386 U.S. 547, 555–57 (1967).
132. *See supra* Section I.B.
133. *See supra* Section I.B.i.
134. *See supra* Section I.B.ii.
135. *See supra* Section I.B.ii.b.
136. *See supra* Section I.B.iii.
137. *See supra* Section I.B.iii.

notably made physically manifest through "Broken Windows" policing,[138] disparately impacts impoverished communities, as well as brown and Black individuals.[139] However, the eye of the state, as well as its modes of oppression, does not stop at overly invasive, physical methods of policing. Scholars such as Michelle Alexander have famously demonstrated how increased surveillance of minority groups has led to a new legal caste system in the United States through the mass incarceration of Black men.[140]

In some ways, this analysis builds on the fundamental premises of this scholarship. However, I am interested in addressing how the state's oppression of low-income individuals and communities of color lurks *even in the legal claim that supposedly creates a cause of action for the vindication of rights against law enforcement officers*. I seek to demonstrate that even when the "bad behavior" of a law enforcement officer is supposedly on trial, the court's eyes instead fall heavily on, and even punish, the conduct of the (often) Black and brown claimants.

Section II.A draws the contours of this theoretical framework, first by defining government surveillance and explaining how government surveillance plays a role in policing and punishment in the United States. Section II.B outlines how the framing of government surveillance illuminates specific issues courts confront in applying the qualified immunity analysis in excessive force cases, mainly through factual reconstruction that hyper-focuses on the plaintiffs' conduct and obfuscates the behavior of defendants. Section II.B also draws on case studies of recent Supreme Court and federal appellate court decisions to demonstrate the theoretical framework. Finally, Section II.C draws on observations from these case studies to create suggestions for various institutional actors, including courts seeking to apply the qualified immunity analysis in a way that regains analytical balance, as well as legislators hoping to reform the doctrine, and the public.[141]

138. Broken Windows policing is the name commonly given to proactive policing policies implemented in the 1980s and 1990s in major cities across the United States, inspired by Kelling and Wilson's famous article on order maintenance of the same name. *See* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/.

139. *See infra* Section II.A.ii.

140. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

141. Obviously, many interests seek the total abolishment of qualified immunity as a legal defense. However, this Comment will consider how state legislators could potentially reform qualified immunity if the alternative of reform is chosen. For a discussion on the benefits of reforming, rather than abolishing, the doctrine of qualified immunity, see generally John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207 (2013).

A. Government Surveillance, Race, and the Legal System

i. Defining Surveillance

The concept of surveillance has long been linked to the government's assessment and control of criminality.[142] Quite literally, surveillance is "the careful watching of a person or place, especially . . . because of a crime that has happened or is expected."[143] In his seminal work, *Discipline and Punish: The Birth of the Prison*, Michel Foucault argues that from the eighteenth to the twentieth century, the state's primary means of punishment changed from public spectacle to surveillance.[144] According to Foucault, through omnipresent, constant surveillance, the state maintains control by quickly perceiving and correcting the actions of "delinquent" citizens.[145] As an example, Foucault drew on the model of the "Panopticon" prison created by eighteenth century philosopher Jeremy Bentham.[146] In the Panopticon, an all-seeing prison guard sat at the center of a large, spherical prison structure in which he could peer into every prisoner's room.[147] The state, by analogy, constantly watches its citizens and exercises control through piercing, oppressive, and omnipresent scrutiny.[148]

Modern commenters on surveillance often focus on the legal ramifications of new surveillance technologies, such as drones, and their intersection with the right to privacy,[149] as well as the First Amendment right to free speech[150] and the Fourth Amendment right to be free of unreasonable searches and seizures.[151] However, it is worth noting that the implications of surveillance go well beyond an examination of the latest surveillance technologies, which often dominates the discussion. The focus on advancing

142. *See, e.g.*, MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977).

143. *Surveillance*, THE CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/surveillance (Nov. 28, 2020).

144. FOUCALT, *supra* note 142, at 195–208.

145. *Id*.

146. Michel Foucalt, *"Panopticism"* from *Discipline & Punish: The Birth of the Prison*., 2 RACE/ETHNICITY: MULTIDISCIPLINARY GLOB. CONTEXTS 1, 5 (2008).

147. *Id.*

148. *Id.*

149. *See* W. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890) (arguing for the existence of a Constitutional "right to privacy."); *see also* Roe v. Wade, 410 U.S. 113, 129 (1972) (citing Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972)) (arguing that a Constitutional right to "personal . . . privacy" emanates from the "penumbras" of rights guaranteed through the Bill of Rights). In this context, the "right to privacy" has typically been construed as a right to decisional or bodily autonomy.

150. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

151. 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 . . . .").

technologies often obfuscates means of surveillance that are less flashy or more structurally embedded in everyday society, emerging "through legislation, codification, or cultural habit . . . developed or calcified into systems that fit neatly within our accepted societal institutions . . . virtually indistinguishable from the backgrounds of our everyday lives."[152] Shifting the conversation away from surveillance as it relates to informational privacy, this Comment builds upon a body of scholarship that has instead analyzed how Black and brown communities are disproportionately, and very physically, subject to the oppressive gaze of the state through policing and the legal system, and the implications raised therein under the Fourth Amendment.

ii. Government Surveillance Through Policing and the Legal System

In the United States, race, criminalization, and surveillance have been connected since the time of slavery. Some scholars have argued that modern policing in the United States owes its origins, at least in part, to the regulation of the slave economy.[153] Southern society used methods of control to extend the arm and eye of the state over enslaved persons and plantation space, such as slave patrols, which inspected the countryside for signs of escapees, slave passes, which served as the precursors to modern photo identification, and fugitive slave posters and laws.[154] These methods created a system in which the overseeing class could "exercise surveillance" over the plantation at all times.[155]

The state continues to exercise surveillance over minority bodies through modern methods of policing, specifically through broken windows policing[156] and intelligence-led policing. In the 1980s, law enforcement in large cities across the United States began to implement policing tactics that explicitly focused on aggressive enforcement of minor nuisance crimes, also called "quality of life" crimes.[157] Influenced in part by Kelling and Wilson's famous article, *Broken Windows*, police employed methods such as stop and

152. Jeffrey L. Vagle, *The History, Means, and Effects of Structural Surveillance* 10 (U. Penn. L. Sch., Pub. L. Rsch. Paper No. 16-3, 2016) (defining this kind of surveillance by the helpful term, "structural surveillance").

153. *See generally, e.g.*, CHRISTIAN PARENTI, THE SOFT CAGE: SURVEILLANCE IN AMERICA, FROM SLAVERY TO THE WAR ON TERROR (2004); SALLY HADDEN, SLAVE PATROLS (2003).

154. *See* HADDEN, *supra* note 153, at 41–71.

155. *See* PARENTI, *supra* note 153, at 13–33.

156. *See supra* note 138 and accompanying text.

157. *Id.*

frisk,[158] or "Terry stops,"[159] and concentrated misdemeanor arrests as a way to deter crime through order maintenance.[160]

Broken windows policing necessitates increased scrutiny by law enforcement officials of individuals in "poorly maintained" locations. The state, surveilling the neighborhood, notes unkempt lawns or littered sidewalks and catalogues these signs of "disorder" as license to swarm the community with increased police presence. However, the implementation of broken windows policing is inequitable, resulting in disproportionate police presence in places with elevated rates of poverty, as well as minority neighborhoods.[161] The resulting highly concentrated police presence in many communities creates a state of near-constant police surveillance.

This state of surveillance is not theoretical but rather all too tangible for those subjected to practices such as stop-and-frisk.[162] For example, in New York City, citizens subjected to stop and frisk experienced bruising, torn clothing, and even unwanted sexual touching after being searched by police.[163] Living under a state of constant surveillance can be palpably felt. To lower their chances of being stopped by police, some citizens in overly policed urban neighborhoods changed their hairstyles and clothing, as well as their route to work, and adopted the practice of carrying their drivers' licenses at all times, even when out walking their dogs.[164] Another reported feeling "nervous . . . paranoid, 'cause you never know what's going to

158. By stop and frisk, I refer to the policing practice of temporarily detaining people on the street, questioning them, and also physically searching or "frisking" them through a compulsory, hands-on search. For example, from 2004 to 2012, the New York Police Department stopped and frisked more than four million New Yorkers. *See* CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT 3 (2012) https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf (defining stop and frisk).

159. "Terry stops" refer to the police practice of stopping citizens based on the standard of reasonable suspicion, rather than the higher standard of probable cause, approved by the Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968). I refer to stop and frisk and Terry stops separately because of the distinct legal ramifications of many urban law enforcement stop and frisk policies, as opposed to "Terry stops" generally.

160. Jeffrey Fagan, Anthony A. Braga, Rod K. Brunson & April Pattavina, *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 FORDHAM URB. L. J. 539, 542 (2016).

161. *See id.* at 544; *see also* Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 463–64 (2000) ("We find little evidence to support claims that policing targeted places and signs of physical disorder, and show instead that stops of citizens were more often concentrated in minority neighborhoods characterized by poverty and social disadvantage.").

162. In *Terry*, the Court acknowledged that a frisk is "a severe . . . intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." 392 U.S. at 24–25.

163. *See* CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 158, at 5.

164. *Id.* at 7.

happen."[165] Still another captured the unique humiliation of being subject to suspicious public gaze: "When they stop you in the street, and then everybody's looking . . . it does degrade you."[166]

Though courts have struck down some explicitly race-based stop and frisk policies,[167] these decisions do not encompass many similar or identical policing methods that do not explicitly rely on racial "discriminatory intent," yet are still implemented in a racially disproportionate manner based on police discretion.[168]

In some cities, police have expanded the *Terry* regime by explicitly adopting passive or surveillance-based policing models, which "more closely approximat[e] a panopticonistic vision of policing."[169] For example, the Boston Police Department mandates that officers must conduct non-contact surveillances of "known criminal offenders" as well as "known crime locations" during regular field observation.[170] The result is that police log, in detail, the regular, everyday activities of citizens in the same informational database that houses information gathered from investigative stops.[171] These "passive surveillance" activities have traditionally been used to track the activities of high-level criminal suspects denoted as national security concerns.[172] Buoyed by digital-age developments, law enforcement officers increasingly rely on this kind of information-led, data-management driven policing.[173] The result is a regime that vocally embraces government surveillance as a way to predict and control the behavior of its citizens, especially in communities of color.[174]

165. *Id.* at 6.

166. *Id*.

167. *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540, 561–62 (S.D.N.Y. 2013) (finding New York City liable for stops and frisks which violated the Fourth and Fourteenth Amendments because the stops were not based on "reasonable suspicion.").

168. *See* Washington v. Davis, 426 U.S. 229, 239–240 (1976) (stating that for an equal protection claim under the Fourteenth Amendment, plaintiffs must show a facially neutral law with disproportionate racial impacts was conceived with discriminatory intent). In *Floyd*, the Court concluded that racially disproportionate impact of wide-spread, official policy may be a permittable "starting point" to determine discriminatory intent. 959 F. Supp. 2d at 571.

169. Fagan et. al, *supra* note 160, at 551.

170. *Id.* at 547.

171. *Id.* at 547–551.

172. *Id.* at 551.

173. *See generally* Larry Catá Backer, *Global Panopticism: States, Corporations, and the Governance Effects of Monitoring Regimes*, 15 IND. J. GLOBAL LEGAL STUD. 101, 112–13 (2008) (tracing developments in globalization and the surveillance state).

174. Fagan, et. al, *supra* note 160, at 550–51; *see also* BARTON GELLMAN & SAM ADLER-BELL, CENTURY FOUND., THE DISPARATE IMPACT OF SURVEILLANCE (2017), https://tcf.org/content/report/disparate-impact-surveillance/?session=1&session=1 (tracing the disparate impacts of surveillance through policing and the welfare system on communities of color in the United States).

State policies that disproportionately surveil communities of color extend beyond the streets and into courtrooms and prisons. Scholars such as Michelle Alexander have shown how our very laws and institutions create a "racialized system of social control" through the mass incarceration of black bodies.[175] For example, laws and policies passed in service of the "War on Drugs" in the last decades of the twentieth century created disparate levels of criminal classifications and mandatory sentence lengths[176] for drugs more widely available and used in Black communities, as opposed to drugs used more often in white communities.[177] As a result, Black men[178] are often convicted at higher rates, for more serious crimes such as felonies, and remain incarcerated for far longer.[179]

One can draw a line from the "racialized system of control" created by the intersection of law and policing in the United States to Foucault's vision of the Panopticon, a method of punishment where the state exerts control over its "delinquent" subjects through total surveillance.[180] Just as the guard in Foucault's vision sits at the center of the prison, able to turn at any time to peer into the cell of any prisoner, here the state sits in the streets, the courtroom, and the jail cell, always able to surveil and scrutinize the behavior of black and brown communities, with drastic, and demonstrably inequitable, consequences.

iii. Judicial Discretion and Section 1983 Claims

Courts play a central role in enforcing a racialized system of control, especially in the criminal sphere, through their role in sentencing. However, less attention has been paid to the ways that courts use their discretion to function as mechanisms of racial and social control beyond the obvious

175. ALEXANDER, *supra* note 140, at 178.

176. *Id.*

177. UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 113–133 (Nov. 2004). *See also* DEBORAH J. VAGINS & JESSELYN MCCURDY, AM. CIVIL LIBERTIES UNION, CRACKS IN THE SYSTEM, TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW i–3 (2006) (explaining the racial and sentencing disparities between crack versus powder cocaine; "For example, distribution of just 5 grams of crack [cocaine] carries a minimum 5-year federal prison sentence, while for powder cocaine, distribution of 500 grams – 100 times the amount of crack cocaine – carries the same sentence.").

178. Though Alexander's work focused mostly on the experiences of Black men, other scholars have shown similar disparate treatment and impacts for women of color. *See generally* Stephanie Hong, *Say Her Name: The Black Woman and Incarceration*, 19 GEO. J. GENDER & L. 619 (2018).

179. ALEXANDER, *supra* note 140, at 141–47 (explaining that, at the time, the average federal drug sentence for African Americans was forty-nine percent longer than the average federal drug sentence for Caucasians).

180. FOUCALT, *supra* note 142, at 195–208.

contexts. By obvious contexts, I mean areas of law that obviously implicate race, such as criminal law, or constitutional claims brought to challenge a government program that relies on race, pursuant to the Fourteenth Amendment's Equal Protection Clause.[181] However, constitutional tort claims[182] against state officials, brought under Section 1983,[183] are also connected with race in powerful and nuanced ways. As recounted in Part I, legislators passed Section 1983 originally as a means of redress for former enslaved persons and people of color whose constitutional rights were violated in southern states following the abolition of slavery.[184] Currently, though no widespread study has been conducted analyzing the demographics of those who bring claims against law enforcement officers for excessive force under Section 1983,[185] it is reasonable to posit that a greater percentage of plaintiffs represent racial minorities. This is mostly a statistical proffer. On the whole, people of color simply are more likely to have more frequent contacts with the police.[186] Given that minority individuals are more likely to be on the receiving end of police misconduct, the importance of Section 1983 actions for individuals of color should not be understated.

In constitutional tort claims, judges hold the "keys to the kingdom" for plaintiffs through wide judicial discretion. This judicial latitude is partly to be expected because of the very nature of constitutional tort law. Awarding damages to redress constitutional violations is a relatively new practice, originating with the development of Section 1983. Constitutional tort claims are therefore considered a kind of quasi-constitutional law, or "sub-constitutional law."[187] The novel nature of weighing damages claims for constitutional violations therefore "requir[es] . . . judicial creativity. . . reflecting, implicitly or explicitly, the weighing of costs and benefits."[188]

Thus, it is worth noting that the kind of judicial discretion enjoyed by judges in constitutional tort claims may be wider than areas of law traditionally linked with race, such as criminal law. For example, even

181. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

182. By constitutional tort, I mean an action by which individuals can directly bring claims against government officials for government-inflicted injury when their constitutional rights are violated. Constitutional tort claims are generally brought against state officials under 42 U.S.C. § 1983 and may be made against federal officials pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics. 403 U.S. 388, 392 (1971).

183. Civil Action for Deprivation of Rights, 42 U.S.C. § 1983.

184. *See supra* Section I.A.

185. This is true at least to the author's knowledge at the time of writing.

186. *See supra* Section II.A.ii

187. Jeffries, *supra* note 141, at 243.

188. *Id.*

judges who would like to impose softer, creative, or alternative solutions to minor drug offenders may be constrained by mandatory sentencing laws.[189] On the other hand, in a Section 1983 claim, the court plays a large role in determining remedy. For example, the factfinders in Section 1983 claims may award nominative damages or punitive damages, but as in traditional tort claims, the judge may overturn a jury verdict if the judge believes jury damages are excessive.[190] In addition, a judge can grant measures beyond damages such as injunctive relief.[191]

Judges enjoy the most powerful discretion in Section 1983 claims through a vice-like grip over procedure. Critically, judges decide whether a claim should be decided summarily in favor of the defendant-government official, as is often the case, or proceed to trial. By making this decision, judges close the door to plaintiffs or keep the door open for a potential remedy, and judges face heavy pressure from the Supreme Court to decide in favor of the defendant-government officials.[192] Scholars have posited that by demanding the dismissal of "insubstantial suits" in *Harlow v. Fitzgerald*,[193] the Supreme Court attempted to create a procedural mandate for judges, couched with the language of substantive law.[194] However, as explained in Part I, this "reasonableness" analysis is infamously open-ended, lacking a clear liability rule[195] and subject to competing directives.

Armed with a curious level of procedural control over the outcome of Section 1983 litigation, judges fill in the cryptic dead-ends of the qualified immunity analysis with their own judgement. Scholars have therefore suggested that the availability of remedies in a Section 1983 claim is almost solely determined by how a judge interprets qualified immunity and the identity of the defendant on trial.[196]

If qualified immunity is read broadly to protect a wide range of constitutional error . . . the gap [between the rights guaranteed by the

189. *See* Tracie A. Todd. *Mass Incarceration: The Obstruction of Judges.* 82 LAW & CONTEMP. PROBS. 191, 199–201 (2019) (reflecting that mandatory sentencing laws leave very little room for judicial discretion).

190. Sheldon Nahmod, *Damages and Injunctive Relief Under Section 1983*, 16 URB. LAWYER 201, 203 (1984).

191. *See generally* United States v. City of Yonkers, 96 F.3d 600 (2d Cir. 1996) (standing for the proposition that judges have wide discretion to impose remedies in constitutional tort cases).

192. *See supra* Section I.B.

193. 457 U.S. 800, 818 (1982).

194. Jeffries, *supra* note 141, at 251 ("As thus interpreted, *Harlow* announced a change in substantive law, but it aimed at a change in procedure. It sought to accelerate the dismissal of insubstantial suits and thus to protect government officers not only from liability but also from the burdens of discovery and trial.").

195. *Id.* at 208–09.

196. *Id.* at 246.

Constitution and the availability of a remedy to enforce them] is large. If qualified immunity were construed more narrowly . . . the gap would be reduced.[197]

The conclusion that the outcome of Section 1983 litigation in excessive force claims is heavily influenced by judicial discretion is clear through the divergent results in federal courts nominally applying the same analysis. As noted in Section I, the geographic disparities between the results of Section 1983 cases are glaring. In a recent study analyzing 435 federal district court rulings in excessive force cases in California and Texas over the span of almost five years, Texas federal district courts granted immunity to police in 59% of cases as compared to 34% of California cases.[198] Courts in Texas, nominally applying the same analysis as federal district courts in California, were almost twice as likely to grant officers qualified immunity. At the appellate level—in a review of 529 cases since 2005—the same study found that the Fifth Circuit granted qualified immunity to officers in 64% of cases, in contrast with the Ninth Circuit, which granted qualified immunity in 42% of cases.[199]

iv. Summary

So far, Section II.A has defined government surveillance and traced its connection with state control and punishment generally, as well as its relationship with race in the United States. In the United States, a system of social control exists in which low-income and Black and brown bodies are almost constantly subject to the oppressive gaze of the state through policing and the law. Courts play a role in perpetuating this system of control—for example, through sentencing determinations in criminal law. However, the Section 1983 cause of action provides an arena in which courts have broad power to provide or deprive low-income persons and racial minorities of remedies for the deprivation of constitutional rights. Critically, based on the nature of constitutional tort law, courts enjoy wide discretion in Section 1983 claims and in how the court chooses to interpret the defense of qualified immunity, leading to vastly divergent outcomes in different federal appellate circuits.

197. *Id.*

198. Andrew Chung, Lawrence Hurley, Jackie Botts, Andrew Januta & Guillermo Gomez, *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/.

199. *Id.*

B. Unpacking the Ramifications of Qualified Immunity as a Mode of Government Surveillance

This Section applies the framing of government surveillance to analyze how courts use their analytical discretion to conduct the qualified immunity analysis. I suggest that one of the reasons that the current state of the law heavily favors defendants[200] is because the mode of analysis courts employ in excessive force cases brought under Section 1983 hyper-scrutinizes the actions of plaintiffs. Bringing the argument full circle, just as Foucault argued that the state exercises control through piercing, oppressive, and omnipresent scrutiny, a court may further this state control in excessive force cases by subjecting the plaintiffs to increased scrutiny. In contrast, courts may functionally "overlook" the conduct of defendants, saving government officials from an objective gaze. In this way, courts (unwittingly) further the oppression which Black and brown individuals, as well as low-income individuals, are subject to in other spheres through over-surveillance.

This conclusion is unintuitive for several reasons. Most obviously, the purpose of Section 1983 is to partially waive the government's immunity from suit. In Section 1983 claims, the conduct of the government is on trial through the actions of state officials. One would intuit that in a cause of action which empowers citizens against the state, the *state official's* actions should be closely scrutinized. However, the opposite is true. The qualified immunity analysis serves as a way for the courts to invert who and what is scrutinized in an excessive force claim brought under Section 1983. Section II.B.i explains how the analysis of excessive force through *Graham v. Connor* inverts the court's gaze to hyper-focus on plaintiffs by reconstructing facts through the eyes of defendant law enforcement officers. Section II.B.ii explains how simultaneously, the qualified immunity analysis obfuscates any meaningful close scrutiny of defendants in four key ways.

i. The Interaction of the Graham *Analysis and the Qualified Immunity Analysis Inverts the Court's Gaze to Hyper-focus on Plaintiffs and Overlook the Conduct of Defendants.*

First, courts hyper-scrutinize plaintiffs in a Section 1983 excessive force claim when the court analyzes whether the officer acted with excessive force under *Graham v. Connor*.[201] The factors in *Graham*, which determine the reasonableness of an officer's actions, explicitly focus on the plaintiff's behavior, rather than the action of the defendant-public official. By examining whether the plaintiff committed a crime, posed a threat to others,

200. *See supra* Section I.B; *see also* Schwartz, *supra* note 8, at 6.

201. 490 U.S. 386 (1989).

or actively evaded arrest, courts scrutinize the *plaintiff* for signs that a *defendant's* use of force was "justified."

Though courts nominally must consider the "totality of circumstances"[202] and balance the interests of the government against individual rights,[203] in excessive force cases courts are instructed to step into the shoes of the defendant in reconstructing the facts. The Supreme Court has specified that the facts "must be judged from the perspective of a reasonable officer on the scene," instead of with the "20/20 vision of hindsight."[204] Even when courts attempt to scrutinize the amount of force a defendant uses, their scrutiny must be tempered by "allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."[205] One could imagine an analysis that subjects the defendant-law-enforcement officer's actions to real scrutiny, based on factors such as whether the defendant used the least amount of force available, or attempted de-escalation before engaging in force. But under the current excessive force regime, courts are encouraged to focus the weight of their judgment on the *plaintiff's* actions.[206] As a result, the seemingly objective excessive force standard is so focused on the defendant's perspective that it becomes subjective, entirely focused on "the individual actor's knowledge" of the plaintiff at the moment force was deployed.[207]

Graham's standard may be defended because officers almost always must act without perfect knowledge in high-stakes situations.[208] Therefore, taking the perspective of the officer may be the only fair way to assess whether their use of force was reasonable. And perhaps, if courts were not ordered to perform both the excessive force reasonableness analysis *and* the qualified immunity analysis, this would be a fair defense. However, the "double layer of reasonableness"[209] created by the interaction of the two analyses creates an almost impenetrable layer of subjectivity. The current qualified immunity analysis ratchets up the level of subjectivity in excessive force cases further by obfuscating the real motives and behavior of defendants.

202. Tennessee v. Garner, 471 U.S. 1, 8–9 (1985).

203. *Id.* at 8.

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

205. *Kisela v Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam).

206. *See* Jeffries, *supra* note 51, at 861.

207. *See id.* ("Indeed, the Supreme Court's definition of 'objective unreasonableness' might plausibly be called 'subjective unreasonableness,' as it turns so heavily on the individual actor's knowledge and situation.").

208. 490 U.S. at 397.

209. *See supra* Section I.B.iii.

The following cases demonstrate how courts hyper-scrutinize plaintiffs, yet simultaneously shield defendants from scrutiny through the qualified immunity analysis.

a. Mullenix v. Luna*: Whose Behavior is Closely Scrutinized?*

A comparison of the majority and dissenting opinions in a recent Supreme Court case, *Mullenix v. Luna*,[210] illustrates how courts hyper-focus on the plaintiffs' conduct in excessive force claims. In *Mullenix*, the Court hyper-focused on the plaintiff's, rather than the defendant's, conduct in order to find that a police officer did not violate clearly established law when shooting at and killing a suspect engaged in a car chase, granting the officer qualified immunity.[211] In its analysis, the Court overwhelmingly focused on the conduct and characteristics of the decedent, characterizing him 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."[212]

On the other hand, Justice Sotomayor ultimately reached her dissenting conclusion that Mullenix had violated clearly established law by closely scrutinizing the defendant Mullenix's actions. Justice Sotomayor began her dissenting opinion with the weight of the analytical lens focused fully on the defendant, Mullenix: "[Defendant] fired six rounds in the dark at a car traveling 85 miles per hour . . . without any training . . . against the . . . order of his superior officer . . . ."[213] She noted that regardless of the danger the plaintiff posed, Mullenix still chose to deploy a potentially lethal tactic,[214] ignored the orders of superior officers to "stand by,"[215] and "spent minutes in shooting position discussing his next step with a fellow officer" before making the decision to shoot the decedent.[216] Justice Sotomayor even pointed to a statement made by Mullenix after the shooting, potentially suggesting he acted with bad faith.[217] Perhaps most relevant to this analysis, Justice Sotomayor explicitly accused the majority of "recharacteriz[ing]" the facts to

210. 136 S. Ct. 305 (2015) (per curiam).

211. *Id.* at 308.

212. *Id.* at 309.

213. *Id.* at 313 (Sotomayor, J., dissenting).

214. *Id.* at 314–15.

215. *Id.* at 314, 316.

216. *Id.* at 316.

217. *Id.* at 316 (observing that after killing the decedent, the defendant said to his commanding officer, "How's that for proactive?", referencing a conversation they had earlier that day).

paint the defendant making a "split-second, heat-of-the-moment choice" as opposed to a calculated decision to shoot.[218]

In *Mullenix*, the majority reached its conclusion granting qualified immunity to the defendant-officer by focusing its critical lens squarely on an analysis of the decedent's behavior. The Court painted Mullenix as an officer acting in the heat of the moment to take down a grave threat to public safety. In contrast, by focusing on the defendant's actions, Justice Sotomayor painted a starkly different picture of a shooter who had ample time to take an alternate course of action, but still chose to act with lethal force. Justice Sotomayor's dissent in *Mullenix* illustrates how the court's hyper-focus on the plaintiff obscured facts about the defendant relevant to the qualified immunity analysis.

b. Nelson v. City of Battle Creek *and* Estate of Jones v. City of Martinsburg*: Zooming In or Out?*

A comparison of two recent federal appellate court cases from the Sixth Circuit and the Fourth Circuit also demonstrate how the excessive force analysis and the qualified immunity analysis interact to hyper-surveil the behavior of plaintiffs and obfuscate the behavior of defendants. In *Nelson v. City of Battle Creek*,[219] the Sixth Circuit reversed the district court's decision to deny qualified immunity to an officer who shot and injured a teenage boy ("N.K.") playing with a B.B. gun.[220] The key factual dispute in *Nelson* was whether the officer decided to shoot N.K. before or after N.K. attempted to toss the B.B. gun to the ground in compliance with the officer's orders.[221] Notably, the district court rejected granting summary judgment to the officer because the legal question of qualified immunity "turn[ed] on disputed facts and *depend[ed] on which view of the facts the jury might accept.*"[222] However, denying that this dispute warranted deferring to a factfinder's judgment, the Sixth Circuit granted qualified immunity to the officer.

The Sixth Circuit's view of the facts isolated the defendant from scrutiny. In reconstructing the critical moment when the gun was fired, the court posited there was no real dispute because the testimonies "do not create a dispute of fact as to when [the officer] decided to shoot," when "[the officer] saw N.K. grab and raise the gun."[223] Critically, the court noted that the plaintiff "fail[ed] to dispute this fact because N.K. and other witnesses *cannot*

218. *Id.*
219. 802 F. App'x 983 (6th Cir. 2020).
220. *Id.* at 984.
221. *Id.* at 986–97.
222. *Id.* at 987 (emphasis added).
223. *Id.* at 988.

speak to [the officer's] decision-making or his perception of harm in the two-second span the events unfolded."[224] Instead of focusing on *when the gun was actually fired*, which could be objectively determined from the video footage of the incident, the court held that the critical moment was *when the officer decided to shoot*, a subjective decision entirely internal to the officer.[225] Obviously, the exact moment an officer *decided* to shoot cannot be gleaned by any amount of objective evidence. Here, by shifting the critical factual inquiry from a moment objectively ascertainable through video footage or witness accounts, to a moment which objective evidence cannot address, the court insulated the officer from scrutiny.[226]

The Fourth Circuit's decision in *Estate of Jones v. City of Martinsburg*[227] proves a telling counter-example to *Nelson.* In *Jones*, the court reversed summary judgment awarded by the district court to the defendants to hold that five law enforcement officers who shot a homeless man twenty-two times to death after he was stopped for jaywalking did not merit qualified immunity.[228] Though noteworthy for the court's dicta, which, in its concluding remarks about the case, explicitly referenced George Floyd and stated that to award qualified immunity in this case "would signal absolute immunity for fear-based use of deadly force, which we cannot accept,"[229] *Jones* is also notable for the path the court took to arrive at its conclusion.

At first glance, the Fourth Circuit's reversal of qualified immunity seems surprising based on facts unfavorable to the decedent, Jones. At the time of the encounter with law enforcement, Jones was armed with a small knife, which he later used to stab an officer.[230] Further, Jones resisted verbal commands to drop the knife.[231] Based on these facts, the lower court concluded that Jones presented an "ongoing threat" to the officers, justifying their use of force, because he possessed a weapon at the time of his death.[232] Yet, the Fourth Circuit concluded that a reasonable jury could find that Jones

224. *Id.* (emphasis added).

225. *Id.*

226. In a dissenting opinion, Judge Moore criticized both the majority's "metaphysical line drawing" between the defendant's decision to shoot and *actually* shooting, as well as the majority's analysis of the plaintiff's conduct. *Id.* at 991 (Moore, J., dissenting). Specifically, Judge Moore criticized the majority's decision to focus heavily on an analysis of the plaintiff's conduct within a two-second time span. In language relevant to this analysis, Judge Moore accused the majority of "adjusting the 'clearly established law' lens *to a microscopic level*." *Id.* at 991–92 (emphasis added).

227. 961 F.3d 661 (4th Cir. 2020).

228. *Id.* at 664.

229. *Id.* at 673.

230. *Id.* at 665.

231. *Id.*

232. *Id.* at 666.

was "secured" and "incapacitated" in the moments before his death,[233] and therefore the officers' use of force was unreasonable.[234]

In arriving at its conclusion, the Fourth Circuit went to great lengths to distinguish the possession of a weapon from Jones's ability to use or wield the weapon. In the court's eyes, Jones was "secured" because, after being "tased four times, hit in the brachial plexus, kicked, and placed in a choke hold,"[235] Jones fell to the ground, his left arm falling "limply to his body," so that he would have been physically unable to wield the knife.[236] Beyond Jones's physical incapacitation, the Court noted the position of his body on the ground, the number of officers surrounding Jones, and the "inaccessible"[237] location of the knife" as further support for the fact that Jones was secured.

Thus, instead of focusing on a simple list of potentially damning facts, all centered on the *decedent's* conduct (i.e., Jones had a knife, Jones fled from an officer, Jones resisted arrest, and Jones stabbed an officer), the Court fleshed out a moving picture of the encounter, attempting to contextualize the facts within the dynamics *between* Jones and the officers. Towards the end of the analysis, the court "zoomed out" even more broadly to capture the overarching context of Jones's encounter with police:

> Having zoomed in on the precise moments before Jones's death, we pull back for context. The defendants portray Jones as a fleeing, armed suspect, who was not cooperating with law enforcement and had even reportedly "hit" an officer, displacing that officer's hat . . . Jones was not an armed felon on the run, nor a fleeing suspect luring officers into a high-speed car chase. Jones was walking in the road next to the sidewalk . . . . He was without housing and had a knife on his person . . . . What we see is a scared man who is confused about what he did wrong, and an officer that does nothing to alleviate that man's fears. *That* is the broader context in which five officers took Jones's life.[238]

In *Jones*, the court understood that "zoom[ing] in" on the precise moments of the encounter actually crippled its analysis by forcing the court to focus on minutiae: Did Jones's arm fall to the ground before or after the first shot was fired? Was his body fully on top of his other arm, making the knife inaccessible? At what angle was Jones's holding the knife? By focusing on the span of several seconds, the lower court's analysis was

233. *Id.* at 664.
234. *Id.* at 668.
235. *Id.* at 669.
236. *Id.*
237. *Id.* at 669.
238. *Id.* at 670–71.

infected with a kind of myopia. Instead, the Fourth Circuit chose to claw its way out of an analytical hole and "zoom out" to claim the power of context. Context revealed the more important facts. Jones was simply jaywalking on the street. He was schizophrenic and did not understand what he was being asked. He was experiencing homelessness. For this, he was shot twenty-two times by five police officers.

"Zooming out" also allowed the court to subtly scrutinize the defendant's behavior. By making observations like "[Officer Lehman] quickly escalated the encounter," and pointing out that the "officer [did] nothing to alleviate [the] man's fears,"[239] the court emphasized facts that highlighted *the officers'* role in the encounter.

Although the Sixth Circuit in *Nelson* "zoomed in" on the plaintiff's behavior, interpreting the clearly established right at stake at a "microscopic" level, the Fourth Circuit in *Jones* zoomed out, pulling back for context in order to reclaim an objective lens.

c. Jones v. Treubig and Franklin v. Franklin City: At What Level Should the Defendant's Conduct Be Scrutinized?

Finally, a comparison of the Second Circuit's recent decision in *Jones v. Treubig*[240] ("Treubig") and the Eighth Circuit's recent decision in *Franklin v. Franklin County*[241] perhaps most starkly illustrates how the qualified immunity analysis insulates defendants from judicial scrutiny.

In *Franklin*, after a man died in police custody following a confrontation with officers, the Eighth Circuit reversed a denial of summary judgment to two of the officers involved in the encounter.[242] Police arrested Franklin for "walking along a road" and "swinging a stick like a sword."[243] At containment, officers attempted to move Franklin to an isolation cell for arguing with other prisoners.[244] During a violent encounter, the officers kicked Franklin, pinned him to the ground under the weight of several officers, tased him at least two times, and put him in handcuffs.[245] Upon arriving in the cell, the officers attempted to remove the handcuffs, but because Franklin was still "resisting," the officers kept him pinned to the ground, applying their bodyweight, and tased him up to five more times.[246]

239. *Id.* at 671.
240. 963 F.3d 214 (2d Cir. 2020).
241. 956 F.3d 1060 (8th Cir. 2020).
242. *Id.* at 1060–61.
243. *Id.* at 1061.
244. *Id.*
245. *Id.*
246. *Id.* at 1061.

Franklin died as a result of "methamphetamine intoxication, exertion, struggle, restraint, and multiple electro muscular disruption device applications."[247]

In *Franklin*, the court hyper-focused on the decedent's conduct to conclude that he was acting "violently" and therefore the officers' use of force was constitutional.[248] The majority characterized Franklin as violent during the encounter, even though the officers tased Franklin up to eight times when he was already handcuffed and on the ground, because "the threat of Franklin's violent aggression did not subside until after the final shot of the taser," and "Franklin acted violently and uncooperatively *immediately before each shock of the taser*."[249] By breaking down the encounter to a series of truncated events, the court decided Franklin was "violent" because he showed minimal signs of resistance in the mere seconds between each taser deployment. The court hyper-focused not only Franklin's conduct, but the *hypothetical threat* someone in Franklin's position would pose. Instead of inquiring whether Franklin *actually posed* a threat to officers while pinned to the ground in handcuffs, warranting the use of a taser eight times, the court merely concluded, "[a] person in handcuffs can still present a danger to officers."[250]

At the same time, the court shifted any critical gaze away from the officers, minimizing the officers' decision to use force by suggesting taser deployment on drive-stun mode "only causes discomfort and does not incapacitate the subject."[251] The court avoided scrutinizing the defendant officers' choice to *continue to use force* simply by citing to the Supreme Court's dicta in *Plumhoff v. Rickard*,[252] where the Court concluded that when officers are justified in firing at a suspect "to end a severe threat to public safety" the officers do not need to stop until the "threat has ended."[253] Yet, the proposition that Franklin, a man handcuffed in an isolation cell, presented "a severe threat to public safety" at an analogous level to a man involved in a high-speed car chase is questionable at best. The court employed a dubious analogy to avoid scrutinizing whether the officers were reasonable in *continuing to use force* by deploying a taser eight times.

In contrast—in an analysis that contradicts *Franklin* at almost every turn—the Second Circuit held that an officer was not entitled to qualified

247. *Id.*
248. *Id.* at 1062–63.
249. *Id.* at 1062 (emphasis added).
250. *Id.* at 1062–63.
251. *Id.* at 1063 (quoting Brossart v. Janke, 859 F.3d 616, 626 (8th Cir. 2017)).
252. 572 U.S. 765 (2014).
253. *Id.* at 777.

immunity for multiple deployments of a taser in *Jones v. Treubig*,[254] because the court closely scrutinized the defendant's conduct in-between taser deployments.[255] The plaintiff, Jones, who was attempting to return his uncle's prescription medication, was stopped by police and resisted arrest.[256] The defendant-officer tased Jones—while Jones was laying, pinned, on the ground—two times.

In *Treubig*, the court scrutinized the officer's decision to deploy the taser a second time *separately* from the first taser deployment. Instead of simply accepting that Jones's original resistance meant continual resistance, the court analyzed whether, based on jury interrogatories at the district court, evidence supported that Jones was resisting arrest at the time of the second tasing.[257] The court emphasized that Jones did not concede that he could physically move after the first tasing, leading to a genuine dispute of material fact.[258] The court then closely scrutinized the officer's behavior, emphasizing the critical fact that after deploying the first taser, the officer had time to reassess the situation before deploying a second time, in order to refute that the officer could not adequately assess whether Jones was still resisting in a rapidly evolving situation.[259] Thus, by turning the critical lens sharply on the defendant's knowledge immediately before the second tasing, the Second Circuit reached the result that a second use of force could be unreasonable under the totality of the circumstances.

d. Summary

In summary, these cases demonstrate how the *Graham* excessive force analysis encourages courts to hyper-focus on the plaintiffs, leading to factual reconstruction which "zooms in" on plaintiffs' behavior, focusing on minutiae and losing the power of context and objectivity. Simultaneously, the current qualified immunity analysis ratchets up the level of subjectivity in excessive force cases by obfuscating the behavior of defendants.

ii. The Qualified Immunity Analysis Further Obfuscates the Defendant Officer from Scrutiny in Excessive Force Cases in Four Key Ways.

The qualified immunity analysis further obfuscates the behavior of defendants in excessive force cases in four key ways. First, the clearly

254. 963 F.3d 214 (2d Cir. 2020).
255. *Id.* at 230.
256. *Id.* at 220.
257. *Id.* at 230.
258. *Id.* at 230–31.
259. *Id.* at 229.

established law standard prevents courts from scrutinizing a defendant's actual knowledge of their actions' constitutionality. Second, the abandonment of the subjective prong of the analysis casts a veil over a defendant's state of mind. Third, courts are primed to overlook the behavior of defendants through the stated purposes of the qualified immunity analysis to decide fewer cases on the merits. Fourth, the current state of qualified immunity law encourages courts to minimize the role of an objective factfinder.

a. The Clearly Established Law Standard Prevents the Court from Scrutinizing an Officer's Actual Knowledge

First, in the "clearly established law" analysis, courts use past legal decisions about use of force as a proxy for whether the officer had notice of whether a certain use of force would be constitutional.[260] However, as others have noted, whether case law actually supplies government officials notice of the law is in itself a questionable proposition; it has even been called a "legal fiction."[261] When previous legal decisions are rigidly accepted as the sole indicator of constitutional notice, an officer's actual knowledge of whether their use of force was reasonable or constitutional becomes obsolete. In other words, it is possible that an officer may possess actual knowledge or suspicion that a certain use of force is probably unconstitutional, but if the accepted legal proxy does not exist, what the officer did or did not know does not matter. The court is disallowed from scrutinizing or probing the officer's actual knowledge.

Simultaneously, the Supreme Court's lack of clear direction on acceptable sources of clearly established law exacerbates the problem. Sources of persuasive authority may allow plaintiffs to show that even if a prior legal decision is not "on point," police officers had constructive notice that their acts may be unconstitutional through accepted and widely followed department rules or official manuals of conduct. However, only a few circuits allow an analysis of persuasive authority to establish notice of unconstitutionality.[262] It is also true that the police department may strictly prohibit a certain use or method of force, but this prohibition would still not serve as adequate evidence that the officer should have been on notice about their conduct. In summary, the more rigidly the clearly established law analysis is applied, the more the defendant-public official is insulated from

260. *See supra* Section I.B.ii.

261. *See* Finn, *supra* note 83, at 464 ("The presumption that public officials are aware of ongoing developments in constitutional law is well recognized as a legal fiction.").

262. *See supra* Section I.B.ii.b.

real scrutiny. The defendant-law-enforcement officer's actual knowledge of potential unconstitutionality is essentially off-limits for courts to scrutinize.

b. The Abandonment of the Subjective Prong of the Analysis Casts a Veil Over the Officer's State of Mind.

Similarly, the current law prohibits any real scrutiny of defendant-law enforcement officers through the abandonment of the subjective prong of the qualified immunity analysis. Before *Harlow v. Fitzgerald*,[263] courts could scrutinize whether a defendant-executive official acted with "malicious intention" to deprive an individual of a Constitutional right.[264] The showing of malicious intent sufficed to prove the officer was not entitled to qualified immunity. By forbidding courts to inquire whether an officer actually intended to act unconstitutionally, the Court shielded the officer from scrutiny. Now, a police officer may actually intend to act unconstitutionally, but their conduct will be excused so long as no prior case provided "notice" that the behavior was definitively unconstitutional. In so doing, the Court further shields the defendant from real scrutiny.

For example, in *Estate of Jones*,[265] the Fourth Circuit introduced facts gathered through video recording, which subtly impugned the officers' state of mind at the time of the encounter. The Court specified that, "[o]ne officer can be heard loudly calling Jones a 'mother***ker.' . . . At least one officer can be seen kicking Jones violently as he lay on the ground,"[266] and later, that after killing Jones, the officers concluded they had "to gather some f**king story."[267] These details could feasibly provide evidence that the officers knew their conduct was unconstitutional. Similarly, in *Mullenix*,[268] Justice Sotomayor pointed to a statement made by the officer after he shot and killed the decedent suggesting he had acted in bad faith.[269] Yet, under the current regime, these facts are analytically useless. Courts are disallowed from probing the officers' state of mind. The defendants' real motives and intentions are hidden behind an analytical veil.

263. 457 U.S. 800 (1982).

264. Wood v. Strickland, 420 U.S. 308, 322 (1975).

265. Estate of Jones v. City of Martinsburg, 961 F.3d 661 (4th Cir. 2020).

266. *Id.* at 665.

267. *Id.* at 666.

268. Mullenix v. Luna, 136 S. Ct. 305 (2015) (per curiam).

269. *Id.* at 316 (Sotomayor, J., dissenting) (After killing the decedent, the defendant said to his commanding officer, "How's that for proactive?," referencing a conversation they had earlier that day).

c. Courts are Primed to Overlook an Officer's Behavior Through the Instruction to Decide Fewer Cases on the Merits.

Further, at a meta-level, the purpose of the qualified immunity analysis gives courts incentive to overlook the behavior of defendants in their analyses. The Supreme Court has repeatedly stated that the purpose of qualified immunity is to reduce the number of cases that proceed to trial against the government.[270] Thus, the Court's "goal in formulating qualified immunity is chiefly to affect the administration of summary judgment in constitutional tort actions."[271] As a result, courts approach the qualified immunity analysis in excessive force cases with a predisposition towards awarding summary judgment to defendant-officers.

Notably, the stated goal of qualified immunity creates a procedural paradox for courts analyzing the facts of a case. Appellate courts may review summary judgment awarded to police officers on issues of excessive force when a matter of law is at stake, subject to de novo review. Based on the relevant standard under the Federal Rules of Civil Procedure, courts must review the facts in the light most favorable to the non-moving party to determine whether summary judgment was warranted when there is a genuine dispute of material fact.[272] But the Supreme Court's essentially procedural mandate, clothed with the veil of substance, affects how lower courts must view disputed facts. Directed by the overarching goal of saving the government from the burdens of a real trial, judges are already primed to view the facts in favor of defendants.

The Court's mandate to decide fewer cases on the merits is critically important to the framing of government surveillance. A court's standard of review can be understood as the color applied to the courts' critical lens. When the standard of review is favorable to the non-moving party, the court will view the facts "colored" by that party's perspective.

On the Court, dissenters such as Justice Sotomayor have critiqued the Court for failing apply the correct critical lens in excessive force cases.[273] For example, in her *Mullenix*[274] dissent, Justice Sotomayor noted that her

270. *See supra* Section I.A.

271. *See* Jeffries, *supra* note 51, at 866.

272. FED. R. CIV. P. 56(c).

273. Other current and former dissenters on the issue of qualified immunity, especially as applied in cases of excessive force, include Justice Clarence Thomas, Justice Ruth Bader Ginsburg, and Justice John Paul Stevens. *See supra* notes 118, 127.

274. Mullenix v. Luna, 136 S. Ct. 305 (2015) (per curiam).

denial of qualified immunity followed directly from the correct application of the relevant standard of review.[275]

Justice Sotomayor criticized the majority's factual reconstruction even more pointedly in a similar dissent in *Kisela v. Hughes*,[276] where the Court reversed the Ninth Circuit's denial of qualified immunity to a police officer who shot a woman behaving erratically with lethal force.[277] The Court arrived at its conclusion by focusing on the plaintiff's behavior through the eyes of the defendant officer: "He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 . . . ."[278] However, Justice Sotomayor chastised the majority for failing to construe the facts in the light most favorable to the decedent:

> This case arrives at our doorstep on summary judgment, so we must "view the evidence . . . in the light most favorable to" Hughes, the nonmovant, "with respect to the central facts of this case." *The majority purports to honor this well-settled principle, but its efforts fall short.* Although the majority sets forth most of the relevant events that transpired, it conspicuously omits several critical facts and draws premature inferences that bear on the qualified-immunity inquiry. *Those errors are fatal to its analysis, because properly construing all of the facts in the light most favorable to Hughes*, and drawing all inferences in her favor, a jury could find that the following events occurred on the day of Hughes' encounter with the Tucson police.[279]

Here, Justice Sotomayor essentially accused her fellow Justices of failing to view the facts of the case objectively. By hyper-focusing on the behavior of the plaintiff and failing to apply a standard of review that construed facts in favor of the plaintiff, the Justices overlooked "critical facts" that bore on the clearly established law analysis. For example, "the police officers themselves never witnessed any erratic conduct,"[280] "the other two officers on the scene declined to fire at Hughes,"[281] suggesting that lesser means of force were necessary, and "the officers did not observe any illegal activity while at the scene."[282]

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275. *Id.* at 313 (Sotomayor, J., dissenting) ("Resolving all factual disputes in favor of plaintiffs, as the Court must on a motion for summary judgment," she noted, "Mullenix knew the following facts . . . .")

276. 138 S. Ct. 1148 (2018) (per curiam).

277. *Id.* at 1150, 1152.

278. *Id.* at 1153.

279. *Id.* at 1155 (Sotomayor, J., dissenting) (emphasis added) (citation omitted).

280. *Id.* at 1157.

281. *Id.*

282. *Id.*

d. The Current State of Qualified Immunity Law Encourages Courts to Minimize the Role of an Objective Factfinder Such as the Jury.

Finally, the current qualified immunity analysis encourages courts to minimize the role of an objective factfinder. Because courts are instructed to reduce the number of cases decided on the merits, courts are more likely to minimize factual disputes that could conceivably go before a jury. For example, in *Nelson*, [283] the Sixth Circuit denied that any factual dispute existed as to whether the plaintiff had already thrown down his weapon when the officer fired by re-characterizing the critical inquiry as the moment when the officer decided to shoot.[284] The court then substituted its own judgment for that of a potential jury's to conclude that the moment that the officer decided to shoot was before the plaintiff had dropped his weapon.[285]

In contrast, the Fourth Circuit in *Estate of Jones*[286] emphasized and elevated the role of the reasonable factfinder.[287] In fact, the emphasis on the reasonable factfinder was key to the court's clearly established law analysis in *Estate of Jones*. The court framed the constitutional question at stake in the case as whether at the time of the shooting "it was clearly established that officers may not shoot a secured or incapacitated person."[288] However, given that Jones was armed with a knife and had attempted to stab an officer, this framing was not necessarily intuitive. The court arrived at its framing by drawing on the perspective of a phantom jury in reconstructing facts. The court concluded that Jones was "secured" before he was shot because a reasonable jury could find that he could not move when pinned to the ground by five officers, and "incapacitated" because "a jury could reasonably infer that Jones was struggling to breathe."[289]

Throughout its analysis, the court continually presented two potential versions of events and demurred that a reasonable fact-finder would be able to find either for the Estate or for the defendants, justifying the case proceeding to trial.[290] For example, in addressing the "problematic" fact that Jones possessed a weapon, the court concluded that that "these admitted facts do not preclude a jury from finding that [Jones] was secured."[291] Similarly,

283. Nelson v. City of Battle Creek, 802 F. App'x 983 (6th Cir. 2020).
284. *See supra* notes 223–226 and accompanying text.
285. *Nelson*, 802 F. App'x at 988.
286. Estate of Jones v. City of Martinsburg, 961 F.3d 661 (4th Cir. 2020).
287. *See supra* notes 233–238 and accompanying text.
288. *Estate of Jones*, 961 F.3d at 668.
289. *Id.* at 668–69.
290. *See supra* notes 233–239 and accompanying text.
291. *Estate of Jones*, 961 F.3d at 669.

the court admitted that "to be sure, the incident moved quickly," but still, "[a] jury could reasonably find that Jones was secured before the officers backed away, and that [they] could have disarmed Jones and handcuffed him . . . ."[292]

The court's focus on the reasonable factfinder in in *Estate of Jones* was critical. Instead of *solely* reconstructing the facts through the perspective of a reasonable officer on the scene, the court introduced the perspective of a phantom third-party. Through this phantom party's eyes, a quickly moving encounter between a citizen and an officer became subject to alternative explanations, highlighting the real factual disputes that should proceed to trial, instead of emphasizing what the *officer* thought, felt, and believed about the situation. The Fourth Circuit did not discount the officer's perspective, but rather presented the officer's perspective as one of two competing explanations of the encounter. The court then considered whether both explanations were sufficiently viable to proceed to trial. In this way, the court staunchly pushed against the inertia of subjectivity in the clearly established law analysis.

Similarly, in *Treubig*,[293] the Second Circuit focused on the perspective of the reasonable factfinder.[294] At trial, after the jury awarded Jones nominal and punitive damages against Treubig, the district court granted judgment as a matter of law to the defendant.[295] On appeal, the Second Circuit concluded that the court had incorrectly taken a question of fact from the jury:

> Not only was there evidence in the record to support that Jones was no longer resisting arrest at the time of second tasing, but the jury made that specific factual finding in a special interrogatory. Because that jury finding was rationally supported by the above-referenced evidence in the record (if credited), it must be accepted for purposes of the qualified immunity analysis utilizing, to the extent any other factual issues remain, the underlying evidence in the light most favorable to Jones. . . . And, importantly, disputed material issues *regarding the reasonableness of an officer's perception of the facts (whether mistaken or not) is the province of the jury*, while the reasonableness of an officer's view of the law is decided by the district court."[296]

Thus, the court defended the jury's role as the ultimate arbiter of facts, even disputed facts pertaining to an officer's perception of the encounter. This emphasis is critical to the framing of surveillance because the Second Circuit resisted insulating the officer's view of the facts from scrutiny.

292. *Id.*

293. Jones v. Treubig, 963 F.3d 214 (2d Cir. 2020).

294. *See supra* notes 257–259 and accompanying text.

295. *Jones*, 963 F.3d at 221.

296. *Id.* at 230–31 (emphasis added) (citation omitted).

Instead of allowing the state official's view of the threat determine the outcome of the case, the Second Circuit instead insisted that even his perception should be subject to scrutiny by a reasonable fact-finder.

e. Summary

In excessive force cases, the qualified immunity analysis leads courts to closely inspect the behavior of plaintiffs while veiling the defendants from scrutiny. The *Graham* excessive force analysis leads to factual reconstruction that "zooms in" on plaintiffs' behavior, focusing on minutiae and losing the power of context and objectivity. Simultaneously, the qualified immunity analysis ratchets up the level of subjectivity in excessive force cases by obfuscating the behavior of defendants. The qualified immunity analysis obfuscates defendants from scrutiny in four ways. First, the clearly established law standard prevents courts from scrutinizing a defendant's actual knowledge of his actions' constitutionality. Second, the abandonment of the subjective prong of the analysis casts a veil over a defendant's state of mind. Third, courts are primed to overlook the behavior of defendants through the stated purpose of the qualified immunity analysis to decide fewer cases on the merits. Fourth, the current state of qualified immunity law encourages courts to minimize the role of an objective factfinder. As a result of the interplay between the qualified immunity and excessive force analyses, cases which would typically proceed to trial based on a dispute about the existence of material fact are decided summarily based on the reconstruction of the factual record.

C. Reclaiming Objectivity Under the Qualified Immunity Analysis in Excessive Force Claims

This Section inquires as to how the connection between government surveillance and qualified immunity may elucidate practical solutions for lower federal courts and state courts in excessive force claims brought under Section 1983 or state analogues, informed by the case studies in Section II.B. The framing of government surveillance illuminates a severe lack of objectivity as the fatal flaw in the current state of the law. Thus, this Section suggests ways that federal and state courts may regain analytical balance by reclaiming objectivity within the framework accepted by the Supreme Court. This Section also includes suggestions for other institutional actors, such as legislators and the general public. Seven brief observations emerge.

First, courts should emphasize and elevate the role of the jury. Second, courts should hesitate to interpret the Supreme Court's substantive changes to qualified immunity doctrine as procedural mandates. Third, courts can leverage judicial discretion to scrutinize the conduct of defendants in

reconstructing facts. Fourth, members of the public should continue to record police-citizen encounters. Fifth, legislative reformers should consider restoring the subjective prong of the qualified immunity analysis. Sixth, courts should use persuasive authority in defining clearly established law. And finally, courts should consider their unique institutional competencies and power over individuals deprived of constitutional rights when shaping qualified immunity doctrine.

i. Courts Should Emphasize and Elevate the Role of the Jury.

Courts applying the qualified immunity analysis may reach vastly different results when the perspective of a reasonable factfinder is introduced, emphasized, and elevated in excessive force cases. As explained in Section II.B, the "double layer of reasonableness" created by the qualified immunity analysis pushes courts to careen into subjectivity when reconstructing facts in excessive force cases. One way to reclaim objectivity, as Justice Sotomayor's dissent in *Kisela*[297] and cases such as *Estate of Jones*[298] and *Treubig*[299] suggest, is to incorporate the perspective of a phantom, objective third-party. In these cases, the construct of the reasonable factfinder functions to highlight the existence of genuine factual disputes.

Similarly, the reasonable factfinder construct creates a way that courts can scrutinize a *defendant's* perception of the facts. Importantly, this suggestion does not impugn the directives of the Supreme Court. As the Second Circuit in *Treubig* emphasized, an officer's perception of the *law* is for courts to decide, yet the officer's perception of *facts* is not beyond the scrutiny of the jury. Courts may obey the directive to analyze the excessive force claim from the perspective of a reasonable officer at the scene, while simultaneously allowing that perspective to be scrutinized by a reasonable, objective factfinder.

ii. Courts Should Hesitate to Interpret the Court's Stated Goals in the Qualified Immunity Analysis as Justifying a Procedural Change to Standards of Review.

The Supreme Court has, time and again, emphasized that the goal of qualified immunity is to insulate the government from the burdens of discovery and litigation by deciding fewer cases on the merits.[300] Yet, the Court cannot change the standard of review applicable in a case without formally revising the Federal Rules of Civil Procedure. As Justice

297. Kisela v. Hughes, 138 S. Ct. 1148 (2018) (per curiam).

298. Estate of Jones v. City of Martinsburg, 961 F.3d 661 (4th Cir. 2020).

299. Jones v. Treubig, 963 F.3d 214 (2d Cir. 2020).

300. *See supra* Section II.B.

Sotomayor pointed out in *Kisela*, when cases arrive on appeal from summary judgment, as they often do in qualified immunity cases, courts still must view the facts in the light most favorable to the non-moving party.[301] Thus, when the defendant appeals a denial of qualified immunity, the suggestion that courts should be predisposed to settle cases through summary judgment seems to be in direct tension with the rule that the court must view all evidence in favor of (in this case) the plaintiff.

But when these two directives conflict, a court should resist the impetus to allow the Supreme Court's motivations for the qualified immunity analysis to change the way it applies the relevant standard of review. As Section II.B demonstrates, the standard of review has the potential to powerfully impact the outcome of the case on appeal by framing the way that the court reconstructs fact. For example, in *Treubig*, the district court belatedly granted judgment as a matter of law on the issue of qualified immunity to the defendant after a jury had awarded damages to the plaintiff.[302] Arguably, the standard of review the Second Circuit applied on appeal, that the court must "consider the evidence in the light most favorable to the party against whom the motion was made,"[303] and "give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence,"[304] changed the outcome in favor of the plaintiffs. The Second Circuit applied a critical lens favorable to the plaintiff in order to scrutinize the actions of the defendant before the deployment of a second taser strike.

This analysis has demonstrated that the court's method of factual reconstruction—namely, who and what the court chooses to scrutinize—matters. Thus, courts should hesitate to construe the Supreme Court's predisposition towards summary judgment as license to change the standard of review, which influences *who* the court chooses to scrutinize.

iii. Courts Can Leverage Judicial Discretion to Scrutinize the Conduct of Defendants in Reconstructing Facts.

In some ways, the qualified immunity analysis is interpretively restrictive (in other words, appellate courts risk reversal by the Supreme Court if the analysis is applied incorrectly).[305] Yet, this Comment has demonstrated that courts also enjoy wide discretion in applying the qualified

301. *See supra* notes 271–275 and accompanying text.

302. 963 F.3d 214 at 216.

303. *Id.* at 224 (quoting Black v. Finantra Capital, Inc., 418 F.3d 203, 209 (2d Cir. 2005) (quotation marks omitted)).

304. FED. R. CIV. P. 50(a).

305. *See* discussion of the Supreme Court and summary reversals of Ninth Circuit decisions, *supra* Section I.B.iii.

immunity analysis. Courts reach vastly disparate outcomes applying the same law to similar facts. In the Second Circuit, a court may choose to scrutinize a second taser deployment as analytically separate from the first deployment and conclude that a reasonable jury may find the second deployment unreasonable.[306] In the Sixth Circuit, a court may decline to scrutinize seven subsequent taser deployments, concluding that reasonableness is solely determined by the hypothetical existence of an ongoing threat.[307]

Whether such wide judicial discretion is analytically desirable is debatable. The Section 1983 action theoretically provides a cause of recourse for individuals whose rights have been violated by government actors. The fact that an individual may not have a remedy for this violation, solely as an accident of geography, seems to be an aberration of this principle. In addition, as discussed in Part I, the Supreme Court has issued seemingly competing and conflicting directives in this area of law. Yet, scholars have suggested that wide judicial discretion may simply be par for the course with constitutional tort law.[308] In other words, even if the Supreme Court spoke more directly on conflicting issues, Section 1983 actions would still require judges to use creativity and ingenuity in balancing the interests of the government versus the interest of individuals.[309]

Notably, courts enjoy the most latitude in reconstructing facts. The Supreme Court cannot simply overturn a case because it disagrees with a court's finding of facts but must also take issue with the court's legal application of the qualified immunity doctrine. Thus, the Supreme Court has often seemed to apply summary reversals to the most egregious aberrations from their desired application of qualified immunity based on the clearly established law standard. For example, in reversing the Ninth Circuit's decision in *City of Escondido v. Emmons*,[310] the Supreme Court chastised the Ninth Circuit for not even attempting to define the constitutional right with a level of specificity, instead concluding that "the 'right to be free of excessive force' was clearly established" by the Fourth Amendment.[311]

Cases such as *Estate of Jones v. Martinsburg*[312] demonstrate how a court can make a good-faith attempt to define the constitutional violation at a high level of specificity, while taking advantage of its wide discretion in

306. *See supra* notes 257–258 and accompanying text.
307. *See supra* notes 248–252 and accompanying text.
308. *See* Jeffries, *supra* note 141, at 243.
309. *Id.*
310. 139 S. Ct. 500 (2019).
311. *Id.* at 503 (quoting Emmons v. City of Escondido, 716 Fed. App'x 724, 726 (9th Cir. 2018)).
312. 961 F.3d 661 (4th Cir. 2020).

reconstructing facts. In *Estate of Jones*, by applying the correct standard of review, the Fourth Circuit engaged in a thorough analysis of the facts to frame a specific constitutional violation.[313] Critically, instead of hinging its conclusion on a list of facts solely damning to the plaintiff, the court contextualized unfavorable facts in the wider encounter between police and the decedent. *Estate of Jones* demonstrates that courts do not have to hyper-focus on the conduct of plaintiffs while obfuscating the conduct of defendants in the qualified immunity analysis. By acknowledging facts unfavorable to the decedent, yet simultaneously applying a critical lens to the *defendants*' conduct, the court used its discretion to conduct an analysis which meets Section 1983's foundational command to balance government interests and individual rights.

iv. Members of the Public Should Continue to Record Encounters Between Citizens and Law Enforcement Officers as an Aid to Courts in Reconstructing Facts Objectively.

One tool courts can employ in reconstructing facts objectively is the use of recording technologies. Nominally worn as a safeguard against police abuse of power, ongoing debate remains about the efficacy of police-worn body cameras.[314] In addition, the fact that cameras are outward-facing raises its own issues within the framing of government surveillance. One could argue that in a police-citizen encounter, the fact that the citizen's behavior is the main subject of recording, not the officer's, only adds fuel to the fire of subjectivity. If introduced as evidence, the court sees the encounter from the law enforcement officer's view, conceivably duplicating *Graham v. Connor's*[315] command to view the facts through the eyes of the reasonable officer at the scene.

Yet, recording technologies can still play a role in reclaiming objectivity. For example, in *Estate of Jones*,[316] the Fourth Circuit frequently drew on video recordings of the police-citizen encounter to intersperse its analysis with details that painted a more complete picture of the circumstances surrounding the decedent's death. The court used recordings to conclude that the decedent was incapacitated at the time of his death based

313. *Id.* at 669. (Specifically, whether police could use deadly force against a man who was secured and incapacitated).

314. Candice Norwood, *Body Cameras Are Seen as Key to Police Reform. But Do They Increase Accountability?*, PBS NEWS HOUR (June 25, 2020, 4:41 PM), https://www.pbs.org/newshour/politics/body-cameras-are-seen-as-key-to-police-reform-but-do-they-increase-accountability.

315. 490 U.S. 386 (1989).

316. 961 F.3d 661.

on the sounds of gurgling and choking caught on tape.[317] In addition, the *Estate of Jones* court scrutinized the behavior of the defendant-police officers by pointing out that one officer could be seen kicking the decedent after he was already restrained.[318] The court also chose to include details gleaned from the recording technology that impugned the officers' state of mind.[319] In *Estate of Jones*, the court used technology to subtly turn the weight of the analytical lens back to the defendants, regaining balance in an analysis which typically hyper-focuses on plaintiffs' conduct.

Of course, the use of recording technologies will be most beneficial, and most powerful, when third-party witnesses and bystanders capture encounters between citizens and law enforcement officers objectively, and in full. Through the framing of government surveillance, nothing could more powerfully challenge the state's critical focus on its citizens. Simply consider the power and impact that one such recording has had on the public conscience and imagination—a witness' recording of the murder of George Floyd at the hands of Minneapolis police officers.[320] Courts have wide latitude to reconstruct facts, but what if the court is forced to watch both sides of the facts play out before its eyes? How can the court, faced with an objective recording of the encounter, faithfully apply the lens of the defendant-police officer in reconstructing facts—especially if the defendant's behavior is egregious and gruesome to watch? Arguably, these kinds of recordings have the potential to seriously challenge the current state of qualified immunity law by providing an undeniably objective version of events.

v. Legislative Reformers Should Consider Restoring the Subjective Prong of the Qualified Immunity Analysis.

The discussion of recording technologies exposes a related solution to the issues posed by the qualified immunity analysis. As the law currently stands, even if a recording technology captured clear evidence of malice, it would not matter. In *Estate of Jones*,[321] as well as Justice Sotomayor's

317. *Id.* at 669 ("Jones had been tased four times, hit in the brachial plexus, kicked, and placed in a choke hold, at which point gurgling can be heard in the video."); *id.* at 665 ("A loud choking or gurgling sound, which seems to be coming from Jones, is audible on Staub's audio recorder at this time.").

318. *Id.* at 665.

319. *Id.* at 666 (noting that after fatally shooting Jones, one officer exclaimed, we "have to gather some f**king story").

320. Helier Cheung, *George Floyd Death: Why US Protests Are So Powerful This Time*. BBC (June 8, 2020), https://www.bbc.com/news/world-us-canada-52969905 (Explaining that George Floyd's death incited global outrage because the "gruesome" incident "was clearly recorded on video," making the officer's malfeasance "obvious.").

321. 961 F.3d 661.

dissenting opinion in *Mullenix*,[322] the judges identified facts about the defendants' conduct which feasibly impugned their state of mind at the time the officials used force.[323] Yet, based on *Harlow*, the malicious intent to deprive an individual of a constitutional right is irrelevant to the qualified immunity analysis.[324] Many others have pointed out that restoring the subjective prong of the qualified immunity analysis would create more equitable results.[325] This analysis has demonstrated that the rejection of subjective intent is especially egregious because it further casts a veil over defendant law enforcement officers, obfuscating state officials from real scrutiny.

Thus, if legislators seek to reform, rather than abolish, the doctrine of qualified immunity, specifying that plaintiffs can introduce evidence relating to bad faith is a good place to start. Practically, a state legislature could craft a claim which functions as a state analogue to Section 1983 and specify within the text: *Qualified immunity will not be available as a defense to these claims if the public official can be shown to have been acting with malicious intent or otherwise in bad faith to deprive an individual of a constitutional right.*

vi. Courts Should Use Persuasive Authority to Define Clearly Established Law.

Courts should use sources of persuasive, as well as mandatory, authority in the clearly established law analysis. As discussed in Section II.B, legal decisions are probably not a realistic proxy for the defendant's actual knowledge or notice of unconstitutional force. However, within the law as it currently stands, courts should at least attempt to broaden the universe of potential case law available to plaintiffs in establishing constitutional notice. For example, in *Treubig*,[326] the Second Circuit drew on the decisions of sister circuits to establish that an officer should be on notice that deploying a taser a second time may be unconstitutional when the force is no longer necessary due to the totality of the circumstances.[327] Specifically, the court held that

322. Mullenix v. Luna, 136 S. Ct. 305, 313 (2015) (Sotomayor, J., dissenting).

323. *Id.* at 316 (observing that after killing the decedent, the defendant said to his commanding officer, "How's that for proactive?", referencing a conversation they had earlier that day).

324. .*See supra* Section I.A.

325. .*ee, e.g.*, Schwartz, *supra* note 8, at 73. ("Restoring the subjective prong to qualified immunity analysis could also mitigate at least one serious concern with the doctrine. . . . If the subjective prong were restored to the qualified immunity analysis, government officials would not be entitled to qualified immunity if they knew or should have known that their conduct was unlawful.").

326. Jones v. Treubig, 963 F.3d 214 (2d Cir. 2020).

327. *Id.* at 236–37.

the clearly established law was clear not only from the Second Circuit's own decisions, but also "reinforced by a compelling consensus of cases in our sister circuits."[328] The court relied on cases from the Fourth, Sixth, and Ninth Circuits in determining that the law was clearly established.[329]

In *Treubig*, the Second Circuit correctly looked to these decisions to support its analysis. By using persuasive sources of authority, the court painted a more realistic picture of the defendant official's knowledge at the time of the encounter based on broadly accepted uses of force. Courts should draw on persuasive authority especially when it takes the form of department manuals, codes or trainings. These sources may provide direct evidence of an officer's actual knowledge at the time of use of force, and should not escape close scrutiny.

vii. Courts Should Consider Their Institutional Competencies, As Well As Their Power Over Individuals Deprived of Constitutional Rights, While Crafting Qualified Immunity Doctrine.

Judicial actors at each level have unique institutional competencies which impact how courts approach excessive force claims and the doctrine of qualified immunity. For example, most Section 1983 claims are heard by federal courts, giving federal district and appellate courts an outsized opportunity to shape the qualified immunity defense.[330] Federal appellate courts, especially, are subject only to the limitation of reversal by the Supreme Court. However, federal district courts should also consider the powerful role they play in qualified immunity analysis by creating and shaping the factual record. This Comment has demonstrated how the outcome of excessive force cases often turns on one or two critical facts. Appellate courts are tasked with reviewing summary judgment granted based on qualified immunity de novo, which means that appellate courts do not have to take the district courts' versions of events as a given. However, district courts are still the first arena in which the factual record is created and shaped, and judges are the powerful overseers of this process.

At the state level, state courts may enjoy the most judicial discretion and latitude in shaping qualified immunity doctrine. Section 1983 claims can also be brought in state courts, and state courts often hear these claims along with state common law claims such as battery or assault, and claims brought

328. *Id.*

329. *Id.*

330. For a more thorough discussion of the concurrent jurisdiction of federal and state courts in Section 1983 claims, see, e.g., Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK L. REV. 1057 (1989).

under state constitutional analogues to Section 1983. State courts have wide latitude to apply state common law and to interpret state constitutional law. Even though most states have some version of qualified immunity, critically, states *do not* have to apply the same mode of federal analysis to state qualified immunity doctrines. Thus, state courts are in a unique position to create and craft remedies for individuals in Section 1983 claims by using their own discretion beyond the doctrinal limitations of qualified immunity's federal counterpart.

Finally, others have established the role of courts in perpetuating race-based inequalities through over-policing and over-surveilling racial minorities. Yet, this Comment has sought to demonstrate the unique role courts may play in *denying remedies* to these individuals. In a common law system, change occurs through the multiplication or whittling away of precedent based on individual acts of judicial discretion. When courts apply a qualified immunity analysis that fails to subject defendants to real scrutiny, future, individual plaintiffs are those who will pay. These individuals are often members of racial minority groups. Yet, precedents gather momentum over time to transcend the level of the individual and impact our public consciousness. Courts must acknowledge how deliberately failing to scrutinize the conduct of law enforcement officers and "zooming in" on plaintiffs' conduct may directly impact and inflame racial and class-based tensions. The framing of government surveillance is ultimately useful for suggesting that the critical lens through which the court weighs the actions of individuals and state officials, and more specifically, *who* the court chooses to scrutinize, matters.

III. CONCLUSION

This Comment has introduced the concept of government surveillance to re-frame the discussion surrounding the defense of qualified immunity in cases brought under Section 1983 pursuant to the Fourth Amendment. The qualified immunity analysis, based on its historical roots and present application, can be considered a mode of government surveillance. Specifically, as judges exercise their judicial discretion through doctrinal interpretation, the qualified immunity analysis simultaneously "zooms in" on plaintiffs' behavior while obfuscating law enforcement officers' conduct. Though Section 1983 theoretically provides an individual cause of action for the deprivation of constitutional liberties, the qualified immunity doctrine creates a near-impenetrable veil under which state action is not seriously scrutinized. Thus, state oppression lurks even in the legal claim which supposedly creates a cause of action for the vindication of individual rights. This analysis directly supports and extends the theory that Black, brown, and

impoverished communities are overwhelmingly subject to government surveillance through policing and the legal system. Even when the "bad behavior" of a law enforcement officer is supposedly on trial, the court hyper-surveils and punishes the conduct of the citizen bringing the claim through the qualified immunity defense.

Finally, the framing of government surveillance elucidates practical suggestions for various institutional actors including courts, legislators, and the general public. Most importantly, courts must consider their institutional competencies and power in shaping qualified immunity doctrine. Who and what is scrutinized through the act of judicial interpretation matters.