ARTICLE

INTERPRETING IMMUNITY

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To those familiar with the F.3d, qualified immunity needs no introduction. The federal docket is filled with § 1983 civil rights litigation, and qualified immunity is a government official's first line of defense. Despite its ubiquity, the doctrine is in a perpetual state of crisis. Since the Supreme Court's seminal decision in *Harlow v. Fitzgerald* in 1982, the Court has addressed the definition, administration, or application of qualified immunity in at least twenty-four cases. Despite the almost annual ritual of doctrinal clarification, the

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2 See infra text accompanying notes 24-26 for a discussion of this case.

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1 See, e.g., Brosseau v. Haugen, 125 S. Ct. 596 (2004) (holding that an officer is shielded from suit under the doctrine of qualified immunity when he makes a decision that, even if constitutionally deficient, is a reasonable misunderstanding of the law governing the situation), discussed infra at Part IV.B; Groh v. Ramirez, 540 U.S. 551 (2004) (finding that an officer who violates a citizen's Fourth Amendment rights is deprived of qualified immunity); Chavez v. Martinez, 538 U.S. 760, 760-61 (2003) (discussing how courts first determine whether officers are entitled to a qualified immunity defense, by looking at whether the alleged violated plaintiff's constitutional rights); Hope v. Pelzer, 536 U.S. 730, 745-46 (2002) (finding that the defense of qualified immunity was precluded at the summary judgment stage of a case involving cruel and unusual punishment), discussed infra at Part IV.A; Nevada v. Hicks, 533 U.S. 353, 356 (2001) (discussing how, under certain circumstances, state officials would have to exhaust their qualified immunity claims in tribal court); Saucier v. Katz, 533 U.S. 194, 194-95 (2001) (noting that the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is separate from the merits of the excessive force itself); Hanlon v. Berger, 526 U.S. 808, 810 (1999) (holding that federal agents who brought a camera crew onto the respondent's ranch were entitled to qualified immunity because the Fourth Amendment rights of the respondent were not "clearly established"); Wilson v. Layne, 526 U.S. 603, 609 (1999) (stating that the qualified immunity analysis under a § 1983 cause of action and under a *Bivens* cause of action are equivalent), discussed infra at Part I.B; Conn v. Gabbert, 526 U.S. 286, 290 (1999) (rejecting a "common sense" approach to the immunity question); County of Sacramento v. Lewis, 523 U.S. 833, 842 (1998) (discussing how the court should first look to whether the plaintiff has alleged a deprivation of a constitutional right, and only then should the court ask whether the allegedly implicated right was clearly established at the time of the event at issue); Crawford-El v. Britton, 523 U.S. 574, 588 (1998) ("[A] defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense."); Richardson v. McKnight, 521 U.S. 399, 399-400 (1997) (concluding that since prison guards employed by a private prison management firm do not receive direction from the government,
federal reporters are crammed with dissents and en banc decisions taking issue over the proper scope and role of qualified immunity. This confusion is not accidental. It reflects a fundamental tension between the immunity doctrine and the conception of law and legal reasoning that lies at the foundation of the common law’s adjudicative techniques.

The current state of the law can be summarized briefly. When a government official raises the qualified immunity defense, the court is directed to ask two questions. The first is whether the plaintiff has alleged a violation of constitutional rights. Assuming this question is answered in the affirmative, the court addresses whether the unconstitutionality of the official conduct was clearly established as of the time of the violation. The plaintiff can survive summary judgment only if both questions are answered positively.

Each prong, however, reflects a different approach to the reading and analysis of legal texts. In the first stage, courts read the relevant case law, extract the holding, and apply it to the next set of facts. Analogous cases provide support, while contrary authority is effec-

3 See Saucier, 533 U.S. at 201 (requiring a court to determine, as a threshold question to the qualified immunity analysis, whether the facts show that the officer’s conduct violated a constitutional right).

4 See id. (addressing, as sequential steps in the qualified immunity inquiry, whether a constitutional right would have been violated if the plaintiff’s allegations were established, and whether that right was clearly established at the time).
tively distinguished. The hallmark of this analysis is the supremacy of the court’s reasoning over its wording and even above its bottom-line holding. As every first-year law student realizes, by virtue of its reasoning, a precedent case can be used to support an almost opposite conclusion. This method of analysis allows holdings to be re-analyzed at the very moment of application. Each decision is a link in the evolving chain of the law, rather than the final exposition of legal doctrine.

The purpose of qualified immunity is to dismiss insubstantial cases at the outset of the litigation. Towards this end, the Court has developed a system that short-circuits the law’s analytical process and focuses instead on “clearly established” statements of blackletter, almost codified, law. The second prong of the immunity analysis asks whether the illegality was clearly established and looks for a precedent that states black and white that the conduct is prohibited. This method is reminiscent of reading detailed codes rather than common law cases. Unlike cases, codes are, ideally, designed to clearly define a series of legal rights and obligations. A codified regime presents a comprehensive solution to the various doctrinal and interpretative problems plaguing any area of the law. Reducing law to a code, seeks to end, rather than encourage, the evolution of legal doctrine.5

The problem arises when these two systems of legal interpretation attempt to operate together. Substantive constitutional tort doctrines are cast decidedly in the common law mode.6 But this method does

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5 There are, of course, complex questions of interpretation that require detailed analysis of a code’s language, history, scope, application, and the like. However, these questions arise because of the shortcomings of the code, whether avoidable or unavoidable. Ideally, a code would not raise difficult questions of interpretation. This contrasts sharply with common law cases that do not even attempt to generate and catalogue a collection of rules to be applied by future decision makers.

6 There is, of course, a vigorous and lively debate as to whether the common law model is appropriate for constitutional interpretation. Justice Scalia, in particular, has been a vocal critic of the idea that the common law should serve as a model for constitutional interpretation. See Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law, 3-14 (1997); see also Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). Justice Scalia argues:

Bivens is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be “implied” by the mere existence of a statutory or constitutional prohibition. As the Court points out . . . we have abandoned that power . . . . There is even greater reason to abandon it in the constitutional field, since an “implication” imagined in the Constitution can presumably not even be repudiated by Congress.

Id. Whatever the status of Scalia’s view as a normative matter, as a descriptive matter, the evolution of constitutional tort doctrine proceeds largely on common law terms. See generally David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877 (1996) (contrasting the common law method to other means of constitutional interpretation); see also Henry P. Monaghan, Forward: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975) (exploring the role and authority of extra-textual constitutional law created by the Court’s opinions).
not naturally generate the types of holdings likely to be considered “clearly established.” The source of the unending doctrinal instability is that the Court asks lower courts to merge two incompatible methods of legal analysis. Finally, because the Supreme Court has yet to address the conceptual gulf or interpretive differences in reading common law and statutory texts, its numerous attempts to harmonize immunity doctrine have failed.

Mothers never cease to tell us that “you never appreciate something until it is taken away.” The same holds true for legal analysis. This article explains the administrative and analytical difficulties presented by qualified immunity resulting from the doctrine’s rejection of the traditional approach to reading, writing, and analyzing cases. The immunity inquiry reflects an emaciated version of common law thinking, and, in essence, asks the law to proceed without its interpretive and operational assumptions. These methodologies, however, cut to the core of the common law’s coherence as an adjudicative system. Just as a car cannot run without an engine, the common law stalls and sputters when divested of its adjudicative mechanisms. In addition to doctrinal observations, qualified immunity law affords the opportunity to examine the confluence between the common law’s literary, prudential, and interpretative assumptions. The two-tiered immunity inquiry conveniently places the results of each system side-by-side, making for an effective comparative review.

This article begins by discussing how the Supreme Court arrived at the code-inspired method of legal analysis featured in the immunity decisions. Part II examines the interaction between the immunity standard and the traditional mode of common law interpretation. Part III reflects on the unique difficulty presented by the “clearly established” doctrine decided under totality-of-the-

More importantly, the types of cases discussed in this article largely avoid the issues debated by Scalia and his interlocutors. Almost by definition, cases that raise difficult questions as to whether the law was “clearly established” are not those in which the Court engages in free-ranging constitutional interpretation—as even the most ardent critic of the doctrine would be sympathetic to official immunity in those cases. Rather, I am concerned with instances where the “clearly established” question is close, which means that the constitutional right, broadly defined, has already been established (clearly or otherwise). Even under Scalia’s view, localized applications of constitutional principles to specific facts rarely turn on constitutional hermeneutics. The cases discussed below were decided almost exclusively by reference to the Court’s own precedents and articulated policies. Neither constitutional text, nor Eighteenth century common law plays a significant role in the disposition of qualified immunity in these cases. See, e.g., Wilson v. Layne, 526 U.S. 603 (1999) (using case-by-case analysis, rather than constitutional text or Eighteenth century common law to grant qualified immunity); Anderson v. Creighton, 483 U.S. 635, 644 (1987) (refusing to limit the contours of official immunity to the often arcane rules of the common law). For our purposes then, “common law” refers to the “law’s elaboration from case to case,” and to the uncontroversial view that specific details of constitutional tort doctrine are developed sequentially and incrementally by the Supreme Court and lower federal courts. Saucier, 533 U.S. at 201.
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circumstances general standards. Part IV then applies the lessons of the previous sections to explain the tension between the Supreme Court's two most recent qualified immunity decisions. Finally, Part V closes by commenting on two meta-lessons brought to the forefront by the side-by-side comparison of these two modes of legal interpretation. I argue that, despite the wholesale theoretical rejection of the classical mythology of the common law, in practice, these myths continue to shape the form and structure of contemporary legal analysis.

I. CASES AND CODES

A. Analytic Structure of the Early Immunity Cases

Qualified immunity began as a privilege to the emerging class of federal constitutional torts.7 The Court's first qualified immunity case, Pierson v. Ray,8 involved a § 1983 claim against an officer who had initiated an arrest pursuant to a statute that would later be declared unconstitutional by the Supreme Court.9 In a short paragraph, the Court held that the common law rule that a police officer is not liable for a false arrest simply because the suspect's innocence is later proven "require[s] excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional..."10 The Court went on to note that "police offi-

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7 As federal civil rights law was developing, the Supreme Court determined that in enacting § 1983, Congress did not mean to abrogate traditional common law immunities. Thus, the court affirmed absolute judicial immunity in Pierson v. Ray, 386 U.S. 547 (1967), prosecutorial immunity in Imbler v. Pachtman, 424 U.S. 409 (1976), and legislative immunity in Tenny v. Brandhove, 341 U.S. 367 (1951), from federal and constitutional torts. More complete overviews of the evolution of immunity doctrine can be found in: Alan K. Chen, The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests, 81 IOWA L. REV. 261, 267 (1995) [hereinafter Chen, The Ultimate Standard] (suggesting that "framing the immunity doctrine as a standard distorts the advantages of both constitutional rules and constitutional standards"); Alan K. Chen, The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law, 47 AM. U. L. REV. 1, 6 (1997) [hereinafter Chen, Burdens of Qualified Immunity] (arguing that "courts and commentators alike have failed to appreciate that factual issues are an inherent part of the qualified immunity inquiry ... ."); Diana Hassel, Living a Lie: The Cost of Qualified Immunity, 64 MO. L. REV. 123 (1999) (noting the conflicting ways in which courts have administered the qualified immunity defense). A comprehensive historical overview of immunity doctrine can be found in Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 CASE W. RES. L. REV. 396 (1986-87) (exploring "two historical models for evaluating government officials' claims for immunity from civil liability, and the relation of those models to the qualified immunity currently applicable to most executive officers").

8 386 U.S. 547 (1967).

9 See Thomas v. Mississippi, 380 U.S. 524, 524 (1965) (finding the Mississippi statute, under which the arrest was issued, unconstitutional); Pierson, 386 U.S. at 550 (noting the unconstitutionality of the statute at issue in Thomas).

10 Pierson, 386 U.S. at 555.
cer[s are] not charged with predicting the future course of constitutional law." Qualified immunity was thus born.

Pierson's analytic structure presented little difficulty or novelty. The case merely extended the good-faith defense to include reliance on a facially valid statute. The next few cases similarly hewed to a traditional line. It was not until Wood v. Strickland that the Court offered the distinction between law and "clearly established" law. Wood, however, gave little guidance as to what exactly distinguished these two categories—a question the Court did not face until Procunier v. Navarette. Navarette involved liability of prison officials for interfering with the mail privileges of inmate Navarette. In the time between when Navarette's rights were allegedly infringed and the case's consideration in the Supreme Court, the Court had decided Procunier v. Martinez, which granted some constitutional privileges to prisoners' outgoing mail. Because Martinez was decided after the conduct at issue in Navarette, the Court held that even if it were to find the conduct unconstitutional it could not have been clearly established at the time of the alleged offense. Immunity was granted "as a matter of law" because the officials "could not reasonably have been expected to be aware of a right that has not yet been declared."

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11 Id. at 557.
12 In these early cases, the qualified immunity doctrine seemed rather unremarkable. Notably, Justice Douglas's Pierson dissent passes over the qualified immunity issue and criticizes the majority's grant of absolute immunity for judicial officers. Id. at 558–67 (Douglas, J., dissenting).
15 Id. at 321–22 (explaining that a "clearly established" law is such that an officer's "action cannot reasonably be characterized as being in good faith"). In light of the subsequent history, it is interesting to note that the pro-immunity dissenters were suspicious of the "objective" part of the immunity test, but favored the "subjective" component. Of course in Harlow, the Court dropped the "subjective" factor and the doctrine now rests exclusively on the "objective" half.
16 The Wood dissenters predicted this problem. See Wood, 420 U.S. at 329 (Powell, J., dissenting) ("The Court states the standard of required knowledge in two cryptic phrases . . .").
18 Id. at 556–57 ("Navarette, an inmate . . . charg[ed] six prison officials with various types of conduct allegedly violative of his constitutional rights . . .").
20 See Navarette, 434 U.S. at 563 (describing how Martinez offered these protections).
21 Id. at 565 ("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law . . .").
22 Id. In a dissent signaling things to come, Justice Stevens raised several red flags regarding the Court's understanding of clearly established law. He warned of the dangers of a contextual immunity analysis, accusing the majority of "chang[ing] the nature of the defense and over-
**Butz v. Economou**, reframed the policy goals of qualified immunity by focusing on immunity from suit rather than from liability. This idea became the centerpiece of the Court’s analysis in Harlow v. Fitzgerald. In that seminal opinion, the Court openly noted that a central goal of qualified immunity is to reduce the social costs of constitutional tort litigation: the increased expense to the government, the diversion of official attention from official duties, and the deterrence of able citizens from pursuing public office. In light of these goals, the Court held that determinations of immunity should involve only one question, whether the official actions were “objectively reasonable,” with reasonableness to be determined “as a matter of law” by the court on summary judgment.

**B. Codification of the Common Law?**

When the Court issued Harlow it had only limited experience distinguishing between “law” and “clearly established law.” Navarette and Pierson were the only cases that turned on a version of this distinction. In each of these cases, however, the distinction was fairly obvious. In Pierson, the official relied on a statute that the Supreme Court thereafter declared unconstitutional. Similarly, in Navarette, the Court issued an interceding opinion recognizing a new category of prisoners’ rights. The Court’s pre-Harlow experience allowed it to overlook what would become a much more difficult question: What happens when the law changes—not at the level of headline-grabbing Supreme Court cases overruling past precedents or recognizing newly minted constitutional rights—but in the evolving common law way,
by which the law changes slowly and incrementally. This question continues to plague the Court.  

Five years after Harlow, Anderson v. Creighton squarely presented this issue. Agent Anderson was searching for a bank robber when he barged into the Creighton home without a warrant. The search failed to uncover the bank robber, and a Bivens action ensued. Anderson maintained that he was entitled to summary judgment if he could establish as a matter of law that a reasonable officer would have thought the search lawful. The Court of Appeals rejected this approach, finding that the unconstitutionality of warrantless searches, which lacked probable cause and exigent circumstances, was already "clearly established."

Justice Scalia's Anderson opinion sets forth the problem as follows: the operation of the qualified immunity standard "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." At the broadest level of generality, the constitutional phrase "Due Process" would clearly establish any and all due process violations. However, Scalia opined that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson has had a far-reaching effect on qualified immunity holdings. It seems that the plaintiff must now cite specific cases showing that the particular conduct (or something very close to it) has previously been declared unlawful. This question is decided by the court, "as a matter of law," at the outset of the lawsuit.

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32 The Court probably did not appreciate the gravity of this problem. Qualified immunity's formative period was during, or right after, an era of wide-ranging expansion of constitutional and civil rights. If every term brought about new constitutional rights and duties, the distinction between "law" and "clearly established law" could be easily found within the U.S. Reporters. If an interceding case declared a new obligation, that obligation was obviously not "clearly established" prior to the Court's announcement. Navarette and Pierson provided the Court with a neat, but oversimplified distinction between "law" and "clearly established law." See Linda Meyer, "Nothing We Say Matters: Teague and New Rules," 61 U. CHI. L. REV. 423, 424 (1994) (making similar observations regarding Teague analyses).

33 457 U.S. 800 (1982).
35 Id. at 637. A Bivens action seeks damages for constitutional violations committed by federal agents where no specific statute expressly authorizes a grant of relief. See Bivens v. 6 Unknown Federal Agents, 403 U.S. 388 (1971).
36 Id. at 637–38.
37 Id. at 639.
38 Id. at 640.
39 This feature of immunity doctrine is discussed more fully in Chen, Burdens of Qualified Immunity, supra note 7, at 37–43.
The impact of this analytical framework is demonstrated by the Court’s decision in *Wilson v. Layne*, where officers invited members of the media to “ride along” with police as they executed an arrest warrant. As police barged into the Wilson home and executed the search, media cameramen took several rounds of photographs. The media crew, however, did not play any part in the warrant’s execution. Because the media acted for private purposes and did not further any law enforcement objectives, the Supreme Court had an easy time holding that inviting the media on the search violated Wilson’s constitutional rights. The real issue was whether these rights were “clearly established” at the time of the violative conduct. In granting qualified immunity, the Court reached for its mantra developed in earlier cases that police officers were not required to “predict the future course of constitutional law.” Despite finding the conduct unconstitutional, the officers were granted qualified immunity. Since there was no case specifically prohibiting police from inviting the media into a search, the law was “undeveloped,” and not “clearly established.”

Justice Stevens’s dissent strikes to the heart of the difficulty. Stevens conceptualized the case as a refusal to grant an “unprecedented request for an exception to a well-established principle,” not a newly developed legal obligation. Since precedents dating back to *Semayne’s Case* in 1604 established the legal principle that “the house of every one is to him as his castle and fortress” there was little novelty in Wilson’s holding and no reason to grant immunity. The dissent suggests that media “ride-alongs” were no more permitted in 1604 than in 1997. In other words, the common law contains rules that are a part of the “law” even if a court has never proclaimed them as such. While new instances may arise, at the level of doctrine, the law does not change. This view of the law concords with the traditional theory that courts apply preexisting legal rules to emerging fact patterns.

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41 Id. at 607.
42 Id. at 608.
43 Id. at 609–14.
44 Id. at 617 (quoting Procunier v. Navarette, 434 U.S. 555, 562 (1978)).
45 Id. at 619 (Stevens, J., dissenting).
47 See *Wilson*, 526 U.S. at 622-23 (suggesting that the doctrine set forth *Semayne’s Case* has remained good law continuously since it was decided).
C. The Troubled Merger

According to the Anderson and Wilson majorities, the distinction between "law" and "clearly established law" can be thought of as the difference between interpreting cases and interpreting codes. "Law" is determined by engaging the traditional interpretive techniques of the case method. "Clearly established law," however, assumes that cases should be read like legislated codes. In the common law mode, new or evolving decisions are teased out from existing law, and the law's rhetorical posture conceptualizes emerging decisions as embedded or implied within existing ones. Under this traditional approach, the law is understood to contain a stratum of implied principles that lurk under, over, and behind decided case law. This method of legal interpretation was displayed in Wilson: in determining whether police conduct violated the Constitution, the Court referred to its holdings in Horton v. California, Arizona v. Hicks, and

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48 In their 1991 article, "New Law, Non-Retroactivity and Constitutional Remedies," 104 HARV. L. REV. 1731 (1991), Professors Richard H. Fallon and Daniel J. Meltzer point out that the Supreme Court's jurisprudence regarding the doctrine of non-retroactivity in habeas corpus, qualified immunity, and tax refund cases sounded a definitive note of legal positivism. Positivism, which they trace back to Austin, holds that the law's legitimacy stems from the law being the command of the ruling sovereign. Id. at 1758. Austinian positivism eschews the legal and especially moral/legal reasoning, arguing that all law is predicated on the authority of the lawmaker. Since legal authority stems from the source of its declaration, rather than any intrinsic properties, positivists generally de-emphasize the analytical progression and logical connection from one case to the next.

Fallon and Meltzer contrast this model to the Blackstonian tradition, which understands law to be discovered rather than declared. Id. Law is viewed as part of a seamless web of legal doctrine, where legal reasoning plays a large role in creating and justifying the law. Id. at 1759. It is, therefore, important for each court to justify a new decision in light of the existing legal materials and doctrines. Because all law is essentially old and "discovered" by the court, retroactivity poses little conceptual difficulty. Each case is decided by a court reaching into the storehouse of legal doctrines and finding the correct pre-existing rule. Thus, litigants are always on notice. See id. at 1758-64 (discussing the question of whether law is made or found).

Fallon and Meltzer also describe how each of these views has a modern proponent. H.L.A. Hart is the heir to Austin's positivism, while Ronald Dworkin inherited most of the Blackstonian view. Id. at 1759-60.

Building on the work of Fallon and Meltzer, Professor Linda Meyer discusses the implications of positivism and retroactivity as it is reflected in the Supreme Court's habeas corpus jurisprudence. See Meyer, supra note 32. Meyer seeks to explain that the trouble with the habeas doctrine is that the common law's holding/dicta distinction is at odds with the positivist new/old distinction mandated by Teague. See id. at 426. While I agree with many of the observations made by Professors Fallon, Meltzer, and Meyer, in this Article, I have adopted an alternate set of terms designed to stress other aspects of common law traditions of legal analysis and interpretation.


50 496 U.S. 128, 140 (1990) (discussing the necessary correlation between the warrant and the scope of the search).

51 480 U.S. 321, 325 (1987) (holding that taking action beyond the warrant's objectives produced a "new invasion").
Maryland v. Garrison, and discovered that the Fourth Amendment required police actions to relate to the objective of the authorized intrusion. Proceeding from these premises, the Court found media ride-alongs unconstitutional.

In moving to the "clearly established" inquiry, however, Anderson and Wilson switched gears. Here, the conception of "law" is limited to a catalogue of codified provisions. The ideal clearly established principle, like the ideal code provision, applies unambiguously to the presented set of facts. Just as the ideal code articulates all the exceptions to the rule at the outset, "clearly established" law requires any exceptions to be articulated at the outset and rejects the interpretive method that modifies the rules at the moment of application. Pursuing this stance, the Court held that immunity would be granted unless the plaintiff could produce a black and white case demonstrating that the particular conduct had been previously held unconstitutional. Like the ideal code, the "clearly established" inquiry eschews any norm or interpretive gesture from outside the limited canon of formally recognized law. Common sense, moral outrage, or police department regulations are irrelevant from the perspective of "clearly established law."

In Saucier v. Katz, the Court spelled out two additions to qualified immunity doctrine. First, the Court made explicit what it had been suggesting for some time: that the question of "clearly established law" was procedurally and analytically distinct from the question of whether the conduct itself was illegal. Saucier further directed courts to address these questions in a particular order. Courts are first to

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52 480 U.S. 79, 87 (1987) (recognizing "the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants").

53 Wilson v. Layne, 526 U.S. 603, 611 (1999) ("[T]he purposes justifying a police search strictly limit the permissible extent of the search ....").

54 This issue is profitably discussed in Fredrick Schauer and Virginia J. Wise, Nonlegal Information and the Delegalization of Law, 29 J. LEGAL STUD. 495 (2000).


57 Saucier was not the Supreme Court's final word on the topic. In the past few terms, the Court has revisited qualified immunity in Hope v. Pelzer, 536 U.S. 730 (2002), and in Brosseau v. Haugen, 125 S. Ct. 596 (2004). These cases are discussed, infra in Part IV.

58 See Saucier, 533 U.S. at 201 (explaining that the Court must first ask the threshold question of whether the behavior violated a constitutional right, before separately determining if the rule was "clearly established"). The development of this doctrine is laid out in 1B MARTIN SCHWARTZ & JOHN KIRKIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 9.36 (3d ed. 1997). Prior to Saucier, some courts combined these two inquiries asking only if the law was clearly established. See, e.g., Wilson v. Meeks, 52 F.3d 1547, 1557 (10th Cir. 1995) (granting police officer defendants qualified immunity, but muddling the distinction between the constitutional violation and clearly established prongs).
determine whether a constitutional violation has been alleged. Assuming the affirmative, the court turns to the "clearly established" inquiry.

Saucier's second innovation concerns a particular subset of immunity cases that greatly confused lower courts. The problem was introduced by Graham v. Connor, which maintains that an officer violates the Fourth Amendment when excessive force is used to affect an arrest. Under Graham, applications of force are judged under an objectively reasonable standard. Saucier confronts how this "objectively reasonable" test, which is part of the substantive constitutional doctrine interacts with the "objectively reasonable" test that lies at the center of the qualified immunity doctrine. The lower Court of Appeals in Saucier decided that because the immunity inquiry asks the same question as the substantive constitutional standard—whether the conduct is objectively reasonable—the additional immunity inquiry is unnecessary, and the jury should decide the entire issue.

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59 See Saucier, 533 U.S. at 201. It is worth noting that in Saucier, the Supreme Court did not follow its own advice:

Because we granted certiorari only to determine whether qualified immunity was appropriate, however, and because of the limits imposed upon us by the questions on which we granted review, we will assume a constitutional violation could have occurred under the facts alleged based simply on the general rule prohibiting excessive force, then proceed to the question whether this general prohibition against excessive force was the source for clearly established law that was contravened in the circumstances this officer faced.

There was no contravention under this standard.

Id. at 207-08. More recently, the Court, once again, ignored its own instructions in Brame.

"We exercise our summary reversal procedure here simply to correct a clear misapprehension of the qualified immunity standard," 125 S. Ct. at 598 n.3, and "[w]e express no view as to the correctness of the Court of Appeals' decision on the constitutional question itself. We believe that, however that question is decided, the Court of Appeals was wrong on the issue of qualified immunity," id. at 598. As indicated below, the Court ignores its own directives in order to avoid the conceptual difficulties in distinguishing between the two phases of qualified immunity law. As these cases demonstrate, this issue is particularly sensitive in general standard contexts. See infra notes 154-65 and accompanying text (discussing how and when the general standard regime appears).


62 Id. at 388.

63 Saucier, 533 U.S. at 200. Interestingly, just four days before the Supreme Court published Saucier, the Tenth Circuit issued Medina v. Cram, 252 F.3d 1124 (10th Cir. 2001), in which the debate between Judges Tacha and Seymour prefigured the majority and dissent in Saucier.
Saucier rejected this approach. The Supreme Court stressed that the immunity analysis should be kept analytically and temporally distinct from the underlying substantive rule. The excessive force question is to be answered contextually, taking into account a variety of facts, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Immunity, by contrast, is addressed solely via reference to positive law. So long as no case ever specifically stated that this conduct was unconstitutional, immunity is granted upon motion for summary judgment.

D. Qualified Immunity Comes Full Circle

Saucier v. Katz brings immunity law full circle. The case contrasts the doctrine's common law origins with the code-based structure imposed more recently by the Court. The analysis seems duplicative because it directly contrasts two versions of immunity. The substantive standards set forth in Graham v. Connor stem directly from the officer's privilege at common law to make a warrantless arrest based upon probable cause without fear of retributive suit. This older vision of immunity is currently reflected in the context-sensitive Graham factors, which provide the officer with a zone of protection for miscalculations taken in good faith and in furtherance of legitimate government purposes.

However, after a generation of doctrinal restructuring, qualified immunity could not recognize itself. Many courts were confused as to how to reconcile the new code-based standard analyzed "as a matter of law" with its context-sensitive forbear.

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64 Saucier, 533 U.S. at 205 (quoting Graham, 490 U.S. at 396).
65 Id. at 206.
66 The Court's most recent qualified immunity holding, Hope v. Pelzer, 536 U.S. 730 (2002), is discussed infra in Part IV.A.
67 Not surprisingly, this issue confused many lower courts. Conflicting cases are collected in Schwartz & Kirkin, supra note 60, at § 9.96.
68 The progression of this doctrine can be seen by contrasting earlier with later cases. Compare Stacey v. Emery, 97 U.S. 643, 645 (1878) ("If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."), with Henry v. United States, 361 U.S. 98, 102 (1959) ("If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent."), and Scott v. United States, 436 U.S. 128 (1978) (holding that objective reasonableness of officers' conduct must be analyzed before analyzing the officers' subjective intent), and Graham v. Connor, 490 U.S. 386, 396 (1989) ("[H]owever, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.").
69 Graham, 490 U.S. at 396-99.
Saucier’s answer is telling, and provides an encapsulated history of the doctrine’s evolution. For qualified immunity purposes, “objective” no longer means what a prudent person would consider reasonable under the circumstances,\(^\text{70}\) rather, it refers to the match between the government official’s conduct and cases enunciating clearly established principles. According to Saucier, the difference between these two versions of the “objectively reasonable” test is the difference between “law” and “clearly established law.”\(^\text{71}\) The context-sensitive standards expressed in Graham are “law,” while “clearly established law” is decided at the outset of the case, before the factual account is fully developed. As long as the plaintiff fails to find a case which, like a code provision, specifically attests to the illegality of the conduct, immunity is likely to be granted.

The next two sections explore the effects of reading cases like codes, and are divided into two categories.\(^\text{72}\) The first set examines rule refinement cases that focus on the law’s elaboration from case to case. The second set looks at cases decided under totality-of-the-circumstances tests, or general standard cases. While the distinction between rule refinement and general standard cases is obviously somewhat imprecise, these divisions illuminate two types of concerns arising from the tension between immunity doctrine and prevailing methods of legal interpretation. The rule refinement discussion stresses how legal interpretation is influenced by internal interpretive considerations, while the general standard cases focus on the role of extra-legal considerations.

II. CASE-BY-CASE ADJUDICATION

A. Source Material: Recent Immunity Decisions

Under Saucier, courts faced with a claim of qualified immunity are to answer two questions. Was the conduct unconstitutional? And was it clearly established?\(^\text{73}\) While Saucier clarified the analytic scheme, the conceptual difference between these two questions remains uncertain. When will a rule be sufficiently anticipated by prior holdings to be considered “law” but not so anticipated as to be deemed “clearly

\(^{70}\) See, e.g., Henry, 361 U.S. at 102 (discussing whether the facts and circumstances are such as to warrant a prudent man’s belief that an offense had been committed); Stacey, 97 U.S. at 645 (referring to what a man of prudence and caution would believe under the facts and circumstances).

\(^{71}\) See Saucier v. Katz, 533 U.S. 194, 200 (2001) (stating that the Court will first determine whether a constitutional right would have been “violated on the facts alleged,” and, if so, will then determine whether that right was clearly established).

\(^{72}\) See supra note 48 (discussing reading cases as legislative codes).

\(^{73}\) Saucier, 533 U.S. at 200.
established law”? Unless the precedent case includes exactly the same facts (in which case it is highly unlikely that the case would be litigated), some degree of case-to-case reasoning is undoubtedly required. The tension is intensified because Saucier/Brosseau mandate that courts first ask whether the conduct was illegal, and only then decide whether it was really illegal.71 Placing these two inquiries side-by-side puts courts in the awkward position of conducting the same analysis twice, yet reaching opposite results.75 This problem becomes clearer through several examples.

In Savard v. Rhode Island,76 the First Circuit, sitting en banc, attempted to define the line between the two prongs of immunity analysis.77 The question in Savard was whether the rule announced in the court’s previous decision of Roberts v. Rhode Island78 was clearly established when decided.79 Roberts involved a § 1983 suit that contested the constitutionality of a policy mandating a strip-search of every detainee admitted to the Rhode Island prison facility.80 Plaintiff Roberts claimed that, as applied to non-violent, non-drug related detainees arrested for misdemeanors, this prison policy violated the Fourth Amendment.81

In Roberts, the court found the facts to lie between two established lines of precedents.82 On the one hand was the Supreme Court’s opinion in Bell v. Wolfish,83 which upheld strip searches of pretrial detainees who came into contact with people from outside the prison even in the absence of any individualized suspicion.84 Bell stated that in the prison context, constitutional infringements “must be evaluated in the light of the central objective of prison administration, safeguarding institutional security,” and that this evaluation should

74 In both cases, the Supreme Court ignored its own mandate to the lower courts. See supra note 59 (discussing how the Court ignored its own directives in Saucier and Brosseau).

75 See Petta v. Rivera, 143 F.3d 895, 914 (5th Cir. 1998) (“We have observed before that the qualified immunity analysis partakes of a somewhat ‘schizophrenic’ nature.”). As explained supra in note 32, it is unlikely that the court anticipated this outcome.

76 338 F.3d 23 (1st Cir. 2003).

77 See id. at 32 (“We are mindful that there is a distinction for qualified immunity purposes between an unconstitutional but objectively reasonable act and a blatantly unconstitutional act.”) (citations omitted).

78 299 F.3d 107, 113 (1st Cir. 2001) (quoting Logan v. Shenly, 660 F.2d 1007, 1013 (4th Cir. 1981)) (“An indiscriminate strip search policy routinely applied ... can not be justified simply on the basis of administrative ease in attending to security considerations.”).

79 Savard, 338 F.3d at 23.

80 Roberts, 299 F.3d at 107.

81 Id. at 108.

82 See id. at 111 (“The institutional security concerns in play here fall somewhere between those exhibited in Swain, which were insufficient to support a search, and those in Arruda and Bell, which made broad-based searches without individual suspicion reasonable.”).


84 Id. at 540.
defer to the "professional expertise of correctional officials."

The search in *Bell* was justified because the search policy conformed with the goals and policies of penal institutions. *Arruda v. Fair* was decided in the same spirit. There, the court upheld strip-searches performed on dangerous inmates who had entered particularly sensitive areas of a maximum-security prison.

The First Circuit's decision in *Swain v. Spinney* offered a different interpretation of the *Bell* standard. *Swain* involved a detainee who was strip-searched upon intake to the prison facility. In *Swain*, the First Circuit held that, as applied to prisoners confined in local jails for minor offenses, *Bell* required officials to first develop individualized reasonable suspicion that the inmate possessed contraband before conducting strip-searches.

While *Roberts* recognized that its facts were somewhere between the two lines of precedent, the court found the strip-search policy unconstitutional. *Bell* and *Arruda* were distinguished because those searches were limited to occasions when the threat of contraband was at its highest—after the prisoners had been in contact with individuals who came from the outside—a condition absent from *Roberts*. The court also noted that, unlike in *Bell* and *Arruda*, the prison population in *Roberts* included persons picked up off the street for simple misdemeanors. Since these persons were hardly expecting to wind up in jail, they were unlikely to be carrying contraband with intent to smuggle it into the prison complex.

*Savard* presented class action claims of detainees who were subjected to the strip-searches declared unconstitutional by *Roberts*. A First Circuit panel had denied prison officials qualified immunity, but upon rehearing en banc, the *Savard* court split four-to-four and reinstated the district court's grant of immunity.

The plurality in *Savard* retraced *Roberts*’s steps from *Swain* to *Arruda* finding that "both [cases] offer[ed] valuable insights, but that

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85 Id. at 547-48.
86 Id. at 560.
87 710 F.2d 886, 887 (1st Cir. 1983) ("[T]here is nothing in the record here that indicates that strip searches were conducted in a more intrusive or demeaning fashion than those in Wolfish.").
88 Id. at 888.
89 117 F.3d 1, 8 (1st Cir. 1997).
90 See id. at 6 (concluding that under *Bell*, "[a] strip and visual body cavity search thus requires independent analysis under the Fourth Amendment").
91 See *Roberts*, 239 F.3d at 111 ("[U]nlike in *Bell* or *Arruda*, Rhode Island does not limit its searches to prisoners who have had contact with outside visitors.").
92 Id. at 112.
93 Id. at 111.
94 *Savard* v. Rhode Island, 320 F.3d 34, 42 (1st Cir. 2003).
95 *Savard* v. Rhode Island, 338 F.3d 23, 33-34 (1st Cir. 2003) (en banc).
neither is a very exact match." The plurality agreed with Roberts that the facts were somewhere in between the relevant precedents, but concluded that Roberts was not "clearly established" when decided. The court was troubled, however, as to why, when examined as a matter of "law," Roberts was found to lay on the Swain side of the line (finding the conduct illegal), but when examined under "clearly established law," Roberts belonged to the Arruda side (finding the government's actions legitimate). The court answered that for purposes of qualified immunity, ambiguity will always be resolved in favor of the defendant government official. Since the entire en banc court recognized that the "strip search policy fell into the gray area between Swain and Arruda," immunity would be granted so long as the facts were distinguishable "in a fair way" from Swain.

The dissent traversed substantially the same grounds yet reached the opposite conclusion. The dissenters did not understand why qualified immunity should resurrect a claim (arguing that the strip-search policy is constitutional) firmly rejected in Roberts.

No fewer than four published court opinions agreed that Roberts lies somewhere between the Swain and Arruda. Further, every judge who reviewed the case agreed that the Rhode Island prison's strip-search policy was closer to Swain than to Arruda and, therefore, unconstitutional. Under the "law" standard, the analysis was relative; the judges examined which precedent provided a better match and ruled accordingly.

The unanimity broke when it came to the "clearly established" question. Here, the fact that Rhode Island's policy was found to be in the gray area meant that immunity would be resolved in favor of the
government. The dissent by contrast disagreed, failing to see why a case that was easily distinguishable for “law” purposes created confusion under the “clearly established” perspective.

The conflict regarding “clearly established law” is further reflected by two contrasting Tenth Circuit opinions. Currier v. Doran\(^\text{107}\) presented a variation on the facts of the Supreme Court’s holding in DeShaney v. Winnebago County Dep’t of Social Services\(^\text{108}\). In Currier, the state removed a young Anthony Juarez from his mother’s custody, and awarded custody to Vargas, the boy’s father. According to the allegations, on more than six occasions, Defendant Doran, a state family services employee, failed to properly investigate bruises and injuries appearing on Anthony’s body and ignored telltale signs of physical abuse. Roughly one year after being placed in Vargas’s custody, Vargas poured boiling water over the child, who died shortly thereafter. A suit against the state for Fourteenth Amendment violations ensued.\(^\text{109}\)

The Supreme Court’s DeShaney holding loomed large in Currier. DeShaney famously considered the Fourteenth Amendment claims of the young Joshua who was subjected to severe child abuse by his father. Although officials had several opportunities to observe the abuse firsthand, they took no action to remove Joshua from his father’s custody.\(^\text{110}\) The Court rejected Joshua’s due process claim, finding that a state had no affirmative duty to secure the life, liberty, or property of its citizens when the deprivation was not caused by the state. The Court justified its holding, reasoning that the peril Joshua faced was not a state-created danger.\(^\text{111}\)

Drawing on the negative inference of this language, Currier found that the state could be liable for third-party torts if the state assisted in creating the danger that caused the harm.\(^\text{112}\) Currier distinguished DeShaney on the grounds that Joshua (DeShaney plaintiff) was re-

\(^{107}\) 242 F.3d 905 (10th Cir. 2001) (holding that defendant, Medina, a state social worker, was entitled to qualified immunity since there was no clearly established law regarding her behavior).

\(^{108}\) 489 U.S. 189 (1989) (holding that the state had no duty under the Constitution to protect a child from his father following the receipt of reports of possible abuse).

\(^{109}\) Currier, 242 F.3d at 909–10.

\(^{110}\) DeShaney, 489 U.S. at 193-94.

\(^{111}\) Id. at 201 (“[T]he state] played no part [in its] creation, nor did it do anything to render him any more vulnerable to them. . . . [T]he state] placed him in no worse position than that in which he would have been had it not acted at all.”).

\(^{112}\) Currier, 242 F.3d at 917–18 (“[S]tate officials can be liable for the acts of third parties where those officials ‘created the danger’ that caused the harm.”) (quoting Seamons v. Snow, 84 F.3d 1226, 1236 (10th Cir. 1996)). On the broader issue of governmental liability for third-party torts, see McClendon v. City of Columbia, 305 F.3d 314, 324 (5th Cir. 2002) (en banc) (upholding, via a divided Fifth Circuit, the viability of “state-created danger” theory of liability and cases cited therein.)
turned to the same parent, making the child no worse off than if the state had not acted. Anthony (Currier plaintiff), on the other hand, was placed into the custody of a different parent. Because Anthony was placed in a worse position than he would have been in had the state not intervened at all, the state was subject to liability.

Having established a constitutional violation, Currier turned to the "clearly established" prong. The court retraced its steps, again finding a state-created danger exception built into DeShaney. Even though Currier reached the opposite conclusion from DeShaney, DeShaney clearly established the constitutional violation at issue in Currier. Currier holds that even under the "clearly established law" prong, government defendants are charged not only with knowing DeShaney’s positive holding, but with drawing out the legal implications "embedded" within the precedent court’s reasoning.

Currier’s image of immunity lies in sharp contrast with Herring v. Keenan, another Tenth Circuit decision decided less than a year earlier. In Herring, the court found that probation officer Keenan violated probationer Herring’s rights when she disclosed his HIV-positive status to his employer. In the ensuing suit, the court found a constitutional right of privacy to personal medical information. Specifically, the court relied on A.L.A. v. West Valley City, a case decided after the events giving rise to Herring’s action. A.L.A. held that police officers may not disclose the results of an arrestee’s HIV test, concluding that, "there is no dispute that confidential medical information is entitled to constitutional privacy protection."

After finding the constitutional violation, the court turned to qualified immunity. Since A.L.A. was decided after the events in Herring, the case was deemed out-of-bounds for qualified immunity purposes. Looking primarily to the Supreme Court’s holding in Griffin v. Wisconsin, the court granted Keenan qualified immunity. Griffin distinguished between the Fourth Amendment rights of regular citi-
zens and rights granted to probationers. Since supervision of probationers was a "special need" of the state, the Court "permit[ted] a degree of impingement upon privacy that would not be constitutional if applied to the public at large." Herring, in turn, reasoned that since Griffin held that a probationer's rights were limited, and because neither the Supreme Court nor the Tenth Circuit provided further guidance on the matter, a reasonable probation officer would be excused from knowing that the disclosure of a probationer's HIV status violated the Constitution. 12

Judge Seymour dissented, finding that "the majority extrapolates from the [Supreme] Court's naked holding without ever acknowledging the underlying analysis and reasoning, and fails entirely to apply that analysis and reasoning to the facts of this case." Judge Seymour charged the majority with ignoring the fact that Griffin's justification rested on the special needs of the probation system which legitimates the reduced privacy rights of probationers. Griffin struck a balance between probationers' privacy interests and government "interests in reducing recidivism and ensuring that the community is not harmed by the probationer's being at large." This balancing would turn out quite differently in Herring since Keenan's disclosure served no legitimate government interest.

B. Legal Interpretation at Common Law 129

The interpretive method employed in federal tort cases (and common law judging, more generally) exhibits three related tendencies. First, "legal rules" are nothing more than the abstracted form in

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121 Id. at 875.
122 See Herring, 218 F.3d at 1176.
123 Id. at 1182.
124 Id. at 1181.
which a downstream court expresses the holdings of a precedent court. These rules do not have a canonical form and are formulated by the deciding, rather than the precedent court. Second, the rules themselves are subject to modification at the moment of application. A court applying a common law rule can propose a distinction or refinement of the rule (understood to be consistent with the rule) to explain why the rule should be applied in a modified version in light of the facts at bar. Third, the primary significance of a common law precedent lies in the reasoning and analysis used by the precedent setting court in reaching its conclusion. Frequently, courts find themselves bound more by the precedent court's reasoning than by its bottom-line holding. The lawyer's skill lies in the ability to read a body of decided cases, ferret out the underlying reasoning, extract the operative rule, and then apply the holdings/rules to emerging factual circumstances.

These features are integrally connected. Because the law is not posited by a governing body but is developed by judges over time, rules often start out as generalized holdings and become more specified and localized over time. The rule's origin as a case holding—along with the lack of a binding and canonical text—means that the precedential case—with all its contextual idiosyncrasies—can be revisited by a downstream court. Secondly, because the rule can be "pierced" by examining its factual predicates, common law rules are subject to subtle modification, expansion, or contraction at the moment of application. Third, because the law arises from decided cases, the legal regime is not developed through a rational/hierarchical delineation of all the legal rules that are needed to effectively govern any given area of the law. Quite to the contrary, published opinions only come about once a client decides to seek legal counsel, the lawyer deems the case worthy, the parties find it unwise to settle, and the losing party undertakes the expense of appeal. While the merits of this system can be and have often been debated, this adjudicative method is unlikely to produce a comprehensive cata-

126 Schauer, Precedent, supra note 125.

127 A good demonstration of this common law feature was displayed in an argument between Judges Posner and Easterbrook in United States v. Booker, 375 F.3d 508 (7th Cir. 2004). Booker presented the question of whether the Supreme Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (2004), which found the State of Washington's sentencing guidelines unconstitutional, applied to the federal guidelines scheme. Judge Posner's majority opinion found the federal guidelines unconstitutional because the reasoning in Blakely "casts a long shadow" on the federal guidelines. Id. at 510. Judge Easterbrook dissented, arguing that it is not the job of the court of appeals to apply Supreme Court holdings to alternate circumstances, especially when the Supreme Court itself withheld judgment on the issue. Id. at 516 (Easterbrook, J., dissenting). While Posner favored reasoning over its stated holding, Easterbrook held that since the Court specifically limited its holding to the Washington state sentencing regime, the court of appeals had no business invalidating the guidelines.
logue of legal rights and duties along the lines of a bureaucratically enacted code. Rather, the system nearly guarantees that legal doctrine will be haphazard and incomplete, while relying substantially on the court’s ability to infer future holdings from within existing case law.\footnote{See generally George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1 (1984) (providing an empirical analysis of which cases are litigated and appealed).}

In a more general sense, the viability of this mode of adjudication depends on being able to hold together the idea that the law is both a coherent and predictable set of rules, as well as an organism that can react and adapt to new situations—typically by offering new interpretations of existing texts. In easy cases (where the precedent points the way of the desired social outcome), the precedent/rule is cleanly applied to the new set of facts.\footnote{This description is taken from EISENBERG, supra note 125, at 50. While Schauer, in Is the Common Law Law?, supra note 125, contends that doctrine and precedent exerts more pull on common law decisions than Eisenberg allows, their difference is one of degree not kind.} However, when the result dictated by precedent is in tension with the desired social outcome, the law employs a variety of methods to modify the rule’s application and reach the desired result. These techniques include introducing reasoning from an alternate case or line of cases, pointing to some inconsistency within the line of precedent, and restricting the precedent’s reach (or shadow) of a case by limiting its holding to specific facts. The deciding court reaches back into the morass of legal materials that established the rule and reformulates the rule in light of emerging facts.\footnote{For a typical illustration of this technique, see Rector v. City and County of Denver, 348 F.3d 935, 944 (10th Cir. 2003), which disposed of a central issue in the case by discovery of a principle lurking between two Supreme Court cases decided in the 1970s.} By casting legal development in archeological terms of “rediscovering” the tradition, the law is able to maintain the appearance of being both consistent and adaptive.

This method, ably displayed by Herring, Savard, and Currier, dovetails with the conception of the law where the law is bound together by an underlying conceptual substructure of legal doctrine, or what we might term “Law.”\footnote{See supra Part II.A. (describing in detail the analyses in Herring, Savard, and Currier).} Reported cases are evidence of the Law—gateways to understanding the underlying doctrine. It is this latent layer that legitimizes the common law’s regenerative powers, because it holds that “new” distinctions are not new, but are discovered from within the latticework of existing legal rules. The lawyer’s skill lies in the ability to understand the contours of the Law from within the body of reported case law. Under this system, there is no need for a set of preordained legal rules because new rules can be crafted out of
the body of latent principles at the moment of application. The Law, thus, develops case-by-case, addressing new issues as they arise.

While all this sounds hopelessly out of date as a matter of theory, it has surprising resonance in practice. Lawyers use case law as evidence of trends or approaches used by other tribunals faced with similar facts. When counsel proposes a theory to distinguish between various lines of precedent, he or she is arguing that under a correct reading of the Law the case should be decided in favor of his client. This new theory or proposed distinction, which may at first blush conflict with the decided law, is legitimate because it is drawn out from the Law's latent substructure. Even today, lawyers make frequent reference to the legal principles lurking beneath decided case law, and argue that cases fit a coherent conceptual structure. While this is not the place to speculate on why the common law practice remains intact despite the rejection of its predicate theory, it is worth noting that cases are still largely decided through an inductive analytical process of, and abstraction from, decided case law.

Even this rather thin description of the common law's operation demonstrates the inherent tension between common law adjudication and the code-inspired model favored by "clearly established" doctrine. Codes are introduced to put an end to the meandering, case-by-case progression of the common law. While in practice codes raise difficult questions of construction and interpretation, in their ideal form, they reflect a decision to replace judicial analytics with legislative fiat. Common law precedent, by contrast, is typically only the starting point of legal analysis. In addition to the precedent's strict "holding," the style, structure, tone, and reasoning of prior cases play an important role in determining its interpretation by downstream courts. Since these less-than-fully articulated signals exert a pull on the bottom-line outcome, the case's holding cannot simply be reduced to a code-like rule.

Because cases are designed to be the starting point of applying the law to a new set of facts, unlike codified schemes, they do not (even attempt to) contain a comprehensive and conclusive presentation of the relevant doctrine. It is therefore difficult to predict future decisions without reading the case law and analyzing it in the common law method. This is the central problem of clearly established analysis. The body of law comprising constitutional tort doctrine is written in the traditional mode and must be interpreted in that same mode. The "clearly established" doctrine, however, asks courts to read these cases like codes, focusing on a bumper-sticker-like "rule" rather than the cases' broader context and analytic method. When these traditions are ignored, the seams that hold the law together begin to unravel. Thus, despite more than a generation of experience with qualified immunity, the Supreme Court and lower courts remain in-
herently uncertain about how to distinguish between clearly established and regular precedents.

The conceptual tension has resulted in courts adopting two competing approaches. Some courts collapse the distinction between the two *Saucier* inquiries, treating the clearly established doctrine as a reprise of the traditional legal inquiry. Other courts treat the lack of positive statements as evidence that the law is not clearly established, and grant defendants immunity unless the plaintiff has the fortitude to find a case with remarkably similar facts. Neither of these responses is satisfactory.

C. Text and Context

The theoretical comments in Part II.B. are borne out by recent case law. Take for example, *Currier's* treatment of *DeShaney*. Judging *ex ante*, *Currier* is exactly the case *DeShaney* was intended to cover. *DeShaney* taught that state social workers are not liable for the conduct of abusive parents, if the child would have been in the abusive parent's custody had the state not intervened. While *DeShaney* seemed squarely on point, *Currier* held, however, that as applied to its facts, *DeShaney* supported liability—a classic demonstration of a rule being modified at the moment of application.

*Currier* was able to distinguish *DeShaney* because it looked behind the blackletter rule and analyzed the holding in light of its predicate facts. This approach exhibits several of the common law's interpretive features. First, because the rule is really a case-holding, it can be "pierced," meaning the downstream court can look to the facts be-

132 See *Saucier v. Katz*, 533 U.S. 194 (2001) (asking: first, whether a constitutional violation been alleged and second, whether the law was "clearly established").

135 See supra notes 107-14 and accompanying text (discussing *Currier's* analysis of a state's possible liability for third party torts).

136 See supra notes 107-14 and accompanying text (discussing *Currier's* application of *DeShaney* to find that the latter clearly established the constitutional violation at-issue).

137 See *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001) ("[In *DeShaney*] the court was careful to note . . . that the state had played no part in creating the danger . . . ").
hind the rule and tailor its application accordingly. Second, *DeShaney* was modified at the moment of application, as the state-created danger exception was, at best, left undecided by the original holding.\(^{138}\)

Lastly, *Currier* reflected the triumph of the case’s reasoning over its holding. Whereas *DeShaney* denied governmental liability, *Currier* relied on it to support liability for the defendant government officials.

First-year students quickly learn that it is usually unclear how many of a case’s facts are necessary to its holding. The law professor’s battery of questions demonstrates the difficulty of placing prudential limitations on a complex holding such as *DeShaney*. While *Currier’s* analysis represents a possible interpretation of *DeShaney’s* operative principles, it is far from unassailable. Restated in qualified immunity terms, *Currier* is a good candidate for the “law,” but a stretch for “clearly established law.” But while this approach demonstrates sensitivity to the texture of the common law method, it fails to provide any analytical coherence to the distinction between “law” and “clearly established law.”

*Herring* reflects the opposite viewpoint.\(^{139}\) There, the court found that the clearly established inquiry demanded suspension of the common law process. Rather than deriving the law from relevant precedents, *Herring* maintained that the law must resemble a code where each fact must be unambiguously accounted for in the given rule. While common law reasoning may create law, these open-ended interpretive techniques cannot “clearly” establish law. For this reason, *Herring* analyzed *Griffin* as a one-dimensional, seemingly codified, statement of law which broadly determined that probationers have reduced privacy rights and deprived *Griffin* of any meaningful context through which to examine its factual or prudential underpinnings. Using only the blunt tools of clearly established analysis, the Court could not differentiate between the “special needs” of the probation system that justify a warrantless search, and the disclosure of a probationer’s medical status that is unrelated to legitimate state

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\(^{138}\) See, e.g., McI lendon v. City of Columbia, 305 F.3d 314 (5th Cir. 2002) (en banc) (per curiam) (upholding, via a divided Fifth Circuit, the viability of the “state-created danger” theory of liability).

\(^{139}\) See supra text accompanying notes 115-24 (giving a detailed account of the court’s *Herring* analysis). The structural similarity between *Herring* and *Currier* is quite striking. In both cases, the Tenth Circuit was faced with relevant Supreme Court precedent denying relief. Both Supreme Court precedents, however, hinted at prudential limits on their respective doctrines of non-liability; *DeShaney* suggested that certain scenarios may support government liability, and *Griffin* indicated that the limitations on probationers’ rights were circumscribed by substantive constraints. See supra text accompanying notes 120-24 (describing the *Herring* court’s reliance on the *Griffin* holding). The central difference was the relative weight the Tenth Circuit placed on the Court’s reasoning as opposed to its holding.
interests. In *Herring*, clearly established law evokes an image of an unambiguous code. If a rule needs to be "pierced" to examine its original context, or if the court must consider the limitations and exceptions attending to the rule, the rule cannot be clearly established.

Judge Seymour's dissent accurately points to the structural limitations of the majority's approach. The dissent argues that *Griffin* is a common law holding whose downstream application must be guided by the facts of the case and the reasoning employed by the court. Since *Griffin* was decided in the context of a search of a probationer's home for contraband in violation of the terms of probation, it cannot be blindly applied to the substantially different facts in *Herring*. To the contrary, *Griffin*’s exception for the "special needs" of the probation system would seem to support liability in *Herring* where the government had no legitimate "special needs" claim. Like *Currier*, Seymour's dissent ties the application of the *Griffin* rule to the facts of that case. When viewed and interpreted in the appropriate context, *Griffin* supports (rather than forecloses) finding that plaintiff *Herring*'s privacy rights were clearly established.\(^\text{142}\)

The debate in *Herring* touches on the same issue that divided the Supreme Court in *Wilson*.\(^\text{143}\) Both the *Herring* and *Wilson* majorities conceptualized the announced rule as creating a novel doctrinal refinement of the law—one that officers were not charged with predicting. Conversely, Justice Stevens and Judge Seymour viewed the defendants as looking for an unwarranted exception to the longstanding rule. Stevens and Seymour view the rules from the common law perspective and deny qualified immunity because the correct outcome involved an ordinary application of relevant precedents. The *Wilson* and *Herring* majorities, however, took a more limited view of existing case law. By limiting each precedent to its most restricted blackletter holding, these majorities highlighted the analytic gap stretching from one case to another. As a result, each case seems far removed from its precedent and leaves the jurist with the overall impression that the law is not clearly established.

\(^{140}\) See *Herring*, 218 F.3d at 1176–77 (finding that the "special needs" at play in *Griffin* were distinguishable from the facts of the case at hand).

\(^{141}\) See id. at 1181 (Seymour, J., dissenting) (arguing that the requirement of "an exacting factual similarity between prior cases at bar" is inappropriate).

\(^{142}\) See id. at 1181–82 (Seymour, J., dissenting) (arguing that *Griffin* supports a finding that "a probationer has a constitutional right to privacy").

\(^{143}\) See supra text accompanying notes 40–46 (offering a detailed account of the facts and reasoning in *Wilson*); see also supra Part I.B. (discussing in detail the problem of articulating the difference between law and clearly established law).
The First Circuit's experience with Savard/Roberts\(^{144}\) suggests a similar set of analytical difficulties. When viewed from the ordinary perspective of "law," the First Circuit, en banc, agreed that Roberts was decidedly on the Swain-side of the Arruda/Swain line. However, when it came to the clearly established analysis, the court dead-ended in a four-four split. The plurality's view of clearly established analysis requires courts to severely limit the scope of permitted analogies and legal inferences. Under this artificial form of legal analysis, the entire space between Arruda and Swain merges into an undifferentiated "gray area" with little room for refined analytic distinctions.\(^{145}\) Cases within this area are not clearly established.

This analysis asks the court to don analytical blinders that make easy distinctions appear uncertain, and simple analogies seem far-fetched. Blinders firmly in place, the court surveys the legal landscape, only to find it confusing and inconclusive, or not clearly established. Under this methodology, a colorable immunity claim will almost always be available. But if potential, albeit rejected, arguments can throw the system into disarray, there seems to be no limit to the number of inferences, rejected theories, and plausible, if losing, arguments, that will bar a court from declaring the law clearly established.\(^{146}\)

At a higher level of generality, the legal landscape is only navigable by means of distinctions that give order to the near-endless constellations of divergent doctrines and facts.\(^{147}\) The more sophisticated the legal system, the greater the number and subtlety of its distinctions. While there will always be disagreement at the margins, a functioning system succeeds in sorting the majority of legal questions into the correct analytical box with reasonable consistency.\(^{148}\) Herein lays the danger of the Savard-majority model. The realm of constitutional tort law must be comprehensive enough to account for a wide variety

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\(^{144}\) See supra text accompanying notes 76-106 (discussing the Savard issue of whether Roberts was "clearly established").

\(^{145}\) Id.

\(^{146}\) It is important to distinguish the tension caused by the mismatch of the common law and clearly established methods from the general critiques of law and legal determinacy. The "clearly established" doctrine only plays an active role in cases where the "legal" question, finding a constitutional violation, has been answered decidedly for the plaintiff. Thus, from the perspective of the general indeterminacy critiques, the legal decision is uncontroversial, or what Schauer would term an "easy case." See Frederick Schauer, Easy Cases, 58 S. CAL. L. REV. 399, 406 (1985) [hereinafter Schauer, Easy Cases]. Rather, in these qualified immunity cases, the difficulties stem from abandoning the traditional modes of interpretation.

\(^{147}\) See Pierre Schlag, Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction, 40 STAN. L. REV. 929, 935 (1988) ("If the splits can arrange and rearrange themselves without reason and in no apparent order, . . . [i]t becomes exceedingly difficult to give a rational account of the legal enterprise. And it becomes very difficult to give an account of the legal enterprise in which reason plays a leading role.").

\(^{148}\) See Schauer, Easy Cases, supra note 146 and accompanying text.
of factual and doctrinal nuances and order is maintained only by sub-

tle distinctions. Savard’s idea of clearly established law dumbs down 

the legal analysis until only the most basic and obvious distinctions 

are recognized. From this “blind” perspective, the law will invariably 

look jumbled and disorganized—anything but clearly established.

The problem with the “clearly established code” model is that it 

takes a legal text produced by a particular tradition, written and in-

terpreted within that tradition, and subjects it to a foreign set of in-

terpretive assumptions. Because the common law assumes that its 

holdings will be analyzed and applied through reference to its tradi-

tional techniques of legal reasoning, legal rules are presented within 

their factual context, and doctrinal ambiguities remain 

unresolved. Further, since the primary use of a common law precedent is as an 

analytic guide for future decisions, the constitutional tort regime sys-

tematically fails to produce results that satisfy “clearly established” 

standards.

It is important to realize that these proclivities run deep within 

our interpretive traditions. At their core, common law courts are de-

ciders of cases, not expositors of doctrine. Extensions of the opera-

tive rules are left to future cases and the law is content to leave issues 

undecided until the question is directly put to the court. Moreover a 

court’s experiment to venture out and decide more than it was asked 

is viewed with skepticism and derided as obiter dicta. Rather than 

attempts to be the final word on the matter, the common law opin-

ion understands that it is but a link in the evolving chain of common 

law revelation. While this system may work well for context-sensitive

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149 See Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 HARV. L. REV. 4 (1996) (exploring the uses of minimalism by the Supreme Court and the circumstances under which such use is warranted); see also Michael C. Dorf, Dicta and Article III, 142 U. PA. L. REV. 1997 (1994) (focusing on the implications of Article III for resolving how federal courts should distinguish between dicta and holdings of past cases).

150 Cass Sunstein calls this judicial minimalism. See Sunstein, supra note 149, at 6–7 (describing “leaving as much as possible undecided . . . as ‘decisional minimalism’”).


152 This is not to suggest that the common law contains no blackletter principles, as it surely does. Every area of the law, constitutional torts included, has known legal principles. See, e.g., Saucier v. Katz, 533 U.S. 194, 201 (2001) (explaining that qualified immunity has two compo-

nents which should be considered in a particular order); Anderson v. Creighton, 483 U.S. 635, 

638 (1987) (stating that all government agents are entitled to raise a defense of qualified immu-

nity); Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1055 n.3 (9th Cir. 

2003) (stating that a municipality may not raise a claim of qualified immunity). It is important 

to recognize, however, that what makes a rule “blackletter law” is that it is consistently applied 

across a wide variety of factual scenarios. The nature of tort liability (including constitutional 

torts), on the other hand, is that the legal determinations are highly fact-specific, and that, 

other than at the margins, few blackletter rules exist. Therefore, the rules in this area are open-

textured and are applied only through contextual legal analysis.
development of legal doctrine, it has difficulty producing "clearly established law."

III. MULTI-VARIABLE LEGAL CALCULUS

The previous section looked at the "clearly established" doctrine within the context of the standard tale of common law development and adjudication. This is the "rule-refinement" model. However, there is another model of development in which the rules are not continually refined called "general standard" cases. While scholars have not generally distinguished between these two forms of legal analysis, these cases present important differences when assessing the interaction between common law legal reasoning and the clearly established mandate.\textsuperscript{153}

A. What Is the General Standard and When Does It Appear?\textsuperscript{154}

The most familiar general standard is the reasonableness standard in tort law. Here, the "legal" question is little more than an evaluative inquiry into the facts of the case. The question is whether, consider-

\textsuperscript{153} While these categories are not airtight, it is worth noting how these two modes of legal reasoning are affected by the qualified immunity doctrine.

\textsuperscript{154} The classic demonstration of the tension between rule-refinement and general standard regimes is the contrast between Justice Holmes's opinion in \textit{Baltimore & Ohio Railroad Co. v. Goodman}, 275 U.S. 66 (1927), which favored rules for recurring negligence situations, and Justice Cardozo's opinion in \textit{Pokora v. Wabash Railway Co.}, 292 U.S. 98, 104 (1934), which argued that since rules "declared at times by courts" are "taken over from the facts of life," the proper standard of care must be determined in light of the facts of each case. In the context of probable cause standards, the Supreme Court has stated in \textit{Ornelas v. United States}, 517 U.S. 690 (1996): Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. As such, the standards are not readily, or even usefully, reduced to a neat set of legal rules. We have described reasonable suspicion simply as a particularized and objective basis for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. We have cautioned that these two legal principles are not finely-tuned standards, comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.\textellipsis This Court has a long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application; each case is to be decided on its own facts and circumstances. \textit{Id.} at 695-96 (internal brackets, citations and quotation marks omitted).

An early attempt to explain how normative questions embedded in the general standard cases should be analyzed in qualified immunity cases can be found at Henk J. Brands, Note, \textit{Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury}, 90 \textit{COLUM. L. REV.} 1045 (1990).
ing all the circumstances, the defendant's conduct was reasonable.\textsuperscript{155} Detailed factual review, however, comes at the expense of predictability. Totality of the circumstances tests are thus best suited to cases in which the legal outcome depends on a wide variety of facts—where the law cannot be usefully reduced into a more definite "legal rule." Put differently, the facts and law converge, and the decision-maker must evaluate the facts in light of the remote legal standard. Even Justice Scalia, the Court's most ardent supporter of clear rules, finds that these cases must be decided under general standards since "we have passed the point where 'law' properly speaking has any further application."\textsuperscript{156} In Justice Scalia's view, the lack of meaningful "legal" issues in these cases is the very reason why the Supreme Court should deny certiorari in most general standard situations.\textsuperscript{157}

Because identifying the correct legal rule is rarely difficult, general standard cases focus on the application of a legal standard to particular facts.\textsuperscript{158} Since the standard must be calibrated to the specific facts of the case, the court must bridge the gap between the lofty legal ideal—e.g., due process—and a specific act of governmental deprivation. While this process adds little in the way of "law," it has grave implications for the way the general standard is administered.

The open-ended nature of the inquiry means that fact appraisal and value judgment play greater roles in the court's decision than technical doctrinal analysis.\textsuperscript{159} General standards specifically invite social and communal values to assist the court in translating the abstracted standard to the specific facts of the case. Commercial norms

\textsuperscript{155} See Kenneth S. Abraham, \textit{The Trouble with Negligence}, 54 VAND. L. REV. 1187, 1188 (2001) (describing the continuation of this trend, in the centrality of the negligence standard, in current tort law); James Henderson, Jr., \textit{Expanding the Negligence Concept: Retreat from the Rule of Law}, 51 IND. L.J. 487, 525 (1976) (noting a trend whereby almost all tort cases are decided under a totality of the circumstances/negligence standard); see also EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 77, 244-90 (2003) (analyzing the "unexpected persistence of negligence").

\textsuperscript{156} Antonin Scalia, \textit{The Rule of Law as a Law of Rules}, 56 U. CHI. L. REV. 1175, 1182 (1989); see also Ornelas v. United States, 517 U.S. 690, 703 (1996) (Scalia, J., dissenting) ("The facts of this case illustrate the futility of attempting to craft useful precedent from the fact-intensive review demanded by determinations of possible cause and reasonable suspicion.").

\textsuperscript{157} Scalia, supra note 156, at 1187 (arguing that, where possible, the court should avoid making decisions that do not reflect a general rule).

\textsuperscript{158} For an example, consider Justice Kennedy's description in \textit{Saucier v. Katz}, 533 U.S. 194, 205 (2001):

It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances.

\textit{Id.}

\textsuperscript{159} See generally Stephen Weiner, \textit{The Civil Jury Trial and the Law-Fact Distinction}, 54 CAL. L. REV. 1867 (1966) (noting that this process is conceptualized differently in tort, contract, and malicious prosecution cases).
become relevant to contract cases, professional or social standards assist in determining the appropriate duty of care in tort, and police officers' experience are relevant to determinations of probable cause. The communal voice, the voice from "outside" the law performs the translating function abdicated by the general standard.

The viability of this analytical structure depends on the ability to mediate the gap between general concepts (due process, excessive force, and unreasonable search) and the specific interactions between law enforcement and individual citizens. Since the general legal standard is a fact-based value judgment, the standard must be interpreted through positive law, communal or industry standards, and

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160 Id. at 1895-96 ("Indeed, courts have made many of the same observations with respect to the concept of reasonableness in this context as they have in the negligence sphere.").

161 Id. at 1876-77 (discussing the application of the reasonableness standard in various fields); see also Abraham, supra note 156, at 1201 ("[T]he finder of fact is encouraged or required to apply an independent norm that has developed through either experience (custom and professional standards) or legal authority (statutes). ").

162 See generally cases collected in Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, in 2 West's Criminal Practice Series § 3.2(c) (4th ed. 2004) (noting that the experience of the police officer is relevant to the determination of probable cause).

163 Interestingly, in the analogous habeas corpus context, the Supreme Court has noted the tension between general standards and the requirement for clearly established precedents. See Wright v. West, 505 U.S. 277 (1992) (discussing whether a lower court had properly applied a standard to determine whether the evidence was insufficient to sustain a conviction). In his Wright concurrence, Justice Kennedy wrote:

Whether the prisoner seeks the application of an old rule in a novel setting depends in large part on the nature of the rule. If the rule in question is one which of necessity requires case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. . . . By its very terms the [sufficiency of the evidence standard in Jackson v. Virginia] provides a general standard which calls for some examination of the facts... So of course there will be variations from case to case. Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

Id. at 308-09 (Kennedy J. concurring) (internal citations omitted).

More recently, commentators have argued that in Williams v. Taylor, 529 U.S. 362 (2000), the entire court adopted the Kennedy view and held that that mixed questions of law and fact do not create a "new rule" for habeas purposes. See Randy Hertz & James Liebman, 2 Federal Habeas Corpus Practice and Procedure 1101-04 (2001). In the immunity context, however, the Court has given no indication that it appreciates the scope of this problem, and, in fact, it was Justice Kennedy who authored Saucier. See supra text accompanying notes 64-65 (discussing the Saucier determination that an immunity analysis should be kept separate from the underlying substantive rule). The Court's most recent exposition of the immunity standard continues this trend, as only Justice Stevens seems to have grappled with this problem in his Brosseau dissent. See Brosseau v. Haugen, 125 S. Ct. 596, 603 (2004) (Stevens, J., dissenting) (arguing that a general legal rule that applies fact-specific case-by-case analysis is still clearly established for qualified immunity purposes). Perhaps further inquiry would reveal why the Court takes such divergent views in the immunity and habeas context.
intuitional/moral reasoning. In short, the domain of the law is nearly unlimited.\textsuperscript{164}

But, it is precisely this type of free-formed inquiry that the "clearly established" test seeks to eliminate. "[T]hat we are morally outraged, or the fact that our collective conscience is shocked by the alleged conduct does not mean necessarily that the officials should have realized that it violated a constitutional right ...."\textsuperscript{165} But without the mediation techniques, what connects the legal ideal to real facts?

\textbf{B. Exemplary Cases}

\textit{Anderson v. Creighton}\textsuperscript{166} held that the general Fourth Amendment standards are not particular enough to generate clearly established law, and that plaintiffs must support their claims with examples from cases with more specific facts. \textit{Saucier v. Katz} held the same with respect to excessive force claims.\textsuperscript{167} More recently, in \textit{Robles v. Prince George's County},\textsuperscript{168} the Fourth Circuit provided a further demonstration of the incompatibility of the general standards and clearly established analysis.

The facts in \textit{Robles} are quite astonishing. Responding to a late-night disorderly conduct call, two Prince George's County ("PGC") police officers arrested Robles for an outstanding traffic warrant pending in neighboring Montgomery County.\textsuperscript{169} The PGC officers wanted to hand Robles over to officers in Montgomery County. Because formal custody transfers require cumbersome procedures, the officers sought to make use of a more expedient "transfer" on county lines. Unable to arrange such an exchange, the officers drove Robles to a deserted parking lot in the neighboring county and tied him to a metal pole. Before driving off, they left a note at Robles's feet stating that there were outstanding warrants for his arrest in Montgomery County. Thereafter, and without identifying themselves as either police officers or perpetrators, the arresting officers placed a call to the

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\textsuperscript{164} Scholars have understood the totality-of-the-circumstances analysis as reflecting the view that law is an "unlimited domain." Schauer, \textit{The Limited Domain of the Law}, supra note 55, at 1910.

\textsuperscript{165} Foster v. City of Lake Jackson, 28 F.3d 425, 430 (5th Cir. 1994) (internal quotation marks and citations omitted); see also Doe v. Louisiana, 2 F.3d 1412, 1421 (5th Cir. 1993) (King, J., concurring) (noting in the course of granting qualified immunity that while "the actions [alleged in the complaint] are egregious, [it] does not mean that he has asserted the violation of a federally protected right. . . .").

\textsuperscript{166} 483 U.S. 635 (1987).

\textsuperscript{167} 533 U.S. 194, 201-06 (2001).

\textsuperscript{168} 302 F.3d 262 (4th Cir. 2002).

\textsuperscript{169} Id. at 267.
Montgomery County police reporting that a man was tied to a pole in an empty parking lot.\(^{170}\)

The Fourth Circuit was not amused by the officers’ “Keystone Kop” routine.\(^{171}\) The court had no trouble finding that the police behavior here was “not reasonably related”—indeed it was entirely unrelated—“to any legitimate law enforcement purpose,” and that the officials’ actions unambiguously violated Robles’s due process rights.\(^{172}\) With respect to qualified immunity, the court found that the PGC officers did not violate any “clearly established law,” since according to Anderson “a greater degree of specificity is required to overcome a defense of qualified immunity.”\(^{173}\)

Even more recently, in Brosseau v. Haugen,\(^{174}\) the Supreme Court reaffirmed this analytic approach. The plaintiff filed an excessive force claim against Officer Brosseau for shooting him as he attempted to flee the scene by car.\(^{175}\) The Ninth Circuit denied the officer’s qualified immunity motion, finding that the general standards set forth in Graham v. Connor\(^{176}\) and Tennessee v. Garner\(^{177}\) sufficiently established the law in this case.\(^{178}\) The Supreme Court reversed, holding that in light of all the particular circumstances facing Officer Brosseau at the scene, no cases clearly established the unconstitutionality of her actions.\(^{179}\)

Cases share a common analytic feature. Qualified immunity was granted because on the one hand, the operative general standard was too vague to clearly establish rights in a particular case, while individual cases decided under the standard were deemed too fact specific to clearly establish the law in a different set of circumstances. In Saucier, the officer’s use of excessive force was immunized simply because he “did not know the full extent of the threat respondent posed or how many other persons there might be who, in concert with respondent, posed a [security] threat . . . .”\(^{180}\) The mere assertion of incomplete information prevented the law from being clearly established (the Court seemed wholly disinterested in setting forth the minimal duty incumbent upon the officer to ascertain the answers).

\(^{170}\) Id.
\(^{171}\) Id. at 271.
\(^{172}\) Id. at 269.
\(^{173}\) Id. at 270 (citing Anderson v. Creighton, 483 U.S. 635, 639 (1987)).
\(^{174}\) 125 S. Ct. 596 (2004). See detailed discussion of this case infra Part IV.B.
\(^{175}\) Id. at 597.
\(^{176}\) 490 U.S. 386 (1989).
\(^{177}\) 471 U.S. 1 (1985).
\(^{178}\) Brosseau, 125 S. Ct. at 598.
\(^{179}\) See id. at 600 (comparing various precedents to determine that, since “the result depends very much on the facts of each case,” the law regarding the Fourth Amendment in this context is not “clearly established”).
The Robles defendants similarly escaped liability, not because there was some reasonable basis or legitimate (if misguided) governmental purpose in their actions, but because they were lucky enough to find that there were no cases on the books in which the right kind of pole was used for the right amount of time.\textsuperscript{181}

Such results are almost guaranteed since, under the clearly established inquiry courts are restricted from relying on the very devices that make the general standard intelligible in light of the facts facing the court.\textsuperscript{182} By excluding communal and social norms, state laws, and departmental regulations, courts invariably find that the general standard cannot be translated toward the particular deprivation at is-

\textsuperscript{181} See Robles v. Prince George’s County, 302 F.3d 262, 269 n.2 (4th Cir. 2002) (dismissing the applicability of Hope v. Pelzer, 536 U.S. 730 (2002) in a short footnote). Of course, from the defendant’s perspective, the amount of time Robles was restrained was totally fortuitous.

\textsuperscript{182} Robles is by no means an isolated case, as the Federal Reporters are filled with similar examples. See, e.g., Willingham v. Loughman, 261 F.3d 1178, 1187 (11th Cir. 2003) (finding that in the context of a standard excessive force claim, “[a]lmost always, to establish the law clearly in the context of the Fourth Amendment, a materially similar case must have already decided that what the police officer was doing was unlawful”); Lassiter v. Ala. A.& M. Univ., 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc) (holding that immunity should be denied only for acts “so obviously wrong, in the light of preexisting law, that only a plainly incompetent officer . . . would have done such a thing . . .”); See also Trulock v. Freeh, 275 F.3d 391, 403-04 (4th Cir. 2001) (holding that although it was unconstitutional for agents to search password-protected computer files based on roommate’s consent to search the computer which they shared, defendants were entitled to qualified immunity since no in-circuit cases specifically prohibited this action and one out-of-circuit district court case suggested that the action was constitutional); Jenkins by Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 826 n.4 (11th Cir. 1997) (“In this circuit the law can be ‘clearly established’ for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose.”); Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 465 (5th Cir. 1994) (en banc) (Garwood, J., joined by five other judges, dissenting in part) (stating that although a high school principal’s inaction in regards to a teacher who sexually molested a student was “deplorable,” at the time it was not “clearly established . . . that mere inaction on his part violated the United States Constitution”); White v. Taylor, 959 F.2d 539, 544 (5th Cir. 1992) (granting qualified immunity because a general standard did not clearly establish the law at the correct level of generality); Marsh v. Arn, 937 F.2d 1056, 1067 (6th Cir. 1991) (“We recognize that there is no definitive guide as to when a right is ‘clearly established.’”); K.H. v. Morgan, 914 F.2d 846, 849 (7th Cir. 1990) (finding that child welfare workers who placed a child with foster parents known to be incompetent and dangerous could be subjected to a damages suit only if the “specific right asserted” was “either expressly established by, or clearly implicit by existing case law”). Additional examples are collected in Linda Ross Meyer, When Reasonable Minds Differ, 71 N.Y.U. L. Rev. 1467, 1518-19 (1996) (citing Soliday v. Miami County, 55 F.3d 1158, 1161 (6th Cir. 1995) (granting doctor immunity for cremating a body before notifying relatives); Cameron v. Seitz, 38 F.3d 264, 267 (6th Cir. 1994) (finding that qualified immunity was available to an employer who retaliated against an employee on account of her engagement to another man); Rich v. Mayfield Heights, 955 F.2d 1092, 1093 (6th Cir. 1992) (holding that officers did not violate clearly established law by failing to cut down a prisoner hanging from a jail cell door); Hilliard v. City and County of Denver, 930 F.2d 1516, 1521 (10th Cir. 1991) (finding that although the court was “appalled” by the officers’ conduct, they did not violate a woman’s constitutional rights when they left her in a high crime district after arresting her and impounding her car).
Moreover, courts have cautioned that moral outrage or even plain common sense is no substitute for the clearly established analysis, as one court recently stated, "I know it when I see it' is not a substitute for qualified immunity analysis." By excluding the very factors used to translate the general standard to a given set of facts, it is nearly impossible to show how any action could become clearly established under the general standard.

Robles's argument from judicial silence demonstrates a further incongruity. The "there-is-nothing-on-the-books-that-says-this-is-illegal" line of argument seems to envision a codified system of constitutional torts where the law is arranged rationally and hierarchically in a catalogued code. In this hypothetical system, the most obvious and egregious violations receive prominent attention (thus defeating immunity), while silence can be reasonably interpreted as official ambivalence. However, the tradition of general standard litigation rests on a very different set of premises. The presence (or absence) of an on-point decision carries little, if any, normative weight (in terms of the importance of having an on-point decision on those particular facts). In a litigant-driven system, decisions on the books have everything to do with the litigants' cost-benefit analysis and nothing

See Davis v. Scherer, 468 U.S. 183, 195 (1984) (holding that violation of state law or regulation does not deprive an official of qualified immunity); Doe v. Delie, 257 F.3d 309, 318-19 (3d Cir. 2001) (finding that a state statute cannot clearly establish a federal right for qualified immunity purposes); Herring v. Keenan, 218 F.3d 1171, 1180 (10th Cir. 2000) (holding that a departmental policy prohibiting disclosure of personal information does not clearly establish the right for immunity purposes). But see Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1062 (9th Cir. 2003) (finding that it was clearly established that compressing the chest of a restrained plaintiff constituted excessive force because local newspapers had publicly discussed cases of compression asphyxia and because the material was covered in officer training).

See Foster v. City of Lake Jackson, 28 F.3d 425, 430 (5th Cir. 1994) (holding that moral outrage is an insufficient legal basis); see also Doe v. Louisiana 2 F.3d 1412, 1421 (5th Cir. 1993) (King, J., concurring) (noting, in the course of granting qualified immunity, "[t]hat the actions [alleged in the complaint] are egregious [but this quality], however, does not mean that he has asserted the violation of federally protected right").


Judge Posner realized this tension quite some time ago. See K.H. v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990) ("It begins to seem as if to survive a motion to dismiss a suit on grounds of immunity the plaintiff must be able to point to a previous case that differs only trivially from his case. But this cannot be right. The easiest cases don't even arise."); see also Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 253 (2d Cir. 2001) ("To the extent that no case applying this right... has previously arisen in our circuit, we view this unremarkable absence as a strong indication that the right to be free of excessive force is so well-recognized and widely observed... as to have eluded the necessity of judicial pronouncement.").

In fact, the tradition goes back to the very first treatise on torts. See FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 81-83 (1859) (stating that action lies in tort even if there is no precedent or writ authorizing such action because "torts are infinitely various not limited or confined").
to do with the doctrinal importance of having a holding on a given set of facts.\footnote{See generally Priest & Klein, supra note 128 (presenting a model of litigation that explains the contrast between litigated and settled disputes); Jonathan M. Freiman, The Problem of Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitution, 34 IDAHO L. REV. 61 (1997) (discussing the litigation deterrents caused by the clearly established doctrine).} Given the lack of correlation between the community’s disapproval of particular conduct, and a judicial opinion stating as much, arguments from judicial silence are wholly out of place.\footnote{The Seventh and Ninth Circuits have addressed this issue most directly. See McGreal v. Ostrov, 368 F.3d 657, 683 (7th Cir. 2004) (“To demonstrate that the law was clearly established, the plaintiff may point to closely analogous cases demonstrating that the conduct was unlawful or demonstrate that the violation is so obvious that a reasonable actor would know that what he is doing violates the Constitution.”); Lee v. Gregory, 363 F.3d 931, 936 (9th Cir. 2004) (“Even if there is no closely analogous case law, a right can be clearly established on the basis of ‘common sense.'” (quoting Giebel v. Sylvester, 244 F.3d 1182, 1189 (9th Cir. 2001))).}

Under the Anderson/Saucier/Robles line of cases the “objective reasonableness” test turns into a scavenger hunt for exactlying similar case law, bearing little relationship to whether the conduct is actually reasonable or not.\footnote{See Pierce v. Gilchrist, 359 F.3d 1279, 1298 (10th Cir. 2004) (“Hope thus shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional.”).} It imagines something like the tax code, or a parodied form of legal positivism, where anything that cannot be cited chapter and verse as illegal is presumed to be within the bounds of the law. But a tort system, which invariably governs a near-infinite number of potential interactions between parties cannot work this way. The current doctrine fails because it ignores the interpretive traditions on which constitutional tort law rests.

\section*{C. General Standards and Specific Facts}

General standard precedents clash with qualified immunity at yet another level. Immunity is intended to be a one-time reprieve. In theory, if immunity is granted to the first set of defendants, the rule becomes clearly established and further claims are rejected.\footnote{See, e.g., Savard v. Rhode Island, 338 F.3d 23, 33 (1st Cir. 2003) (stating that downstream defendants will not be able to raise the same immunity claim because the decision of the immunity-granting court clearly established the law).} Ideally, ongoing litigation creates an expanding set of clearly established legal principles. Once the rule is clearly established, the defense should no longer be available.\footnote{See id. (implying that, if the case-at-hand matched a rule from one of the raised precedents, immunity would have been foreclosed).}

However, the relationship between rules of law and general standard case-precedents affords defendants successive rounds of immunity. Since the general legal standard must remain broad enough to
cover every factual scenario arising under its broad heading, successive rounds of litigation fail to refine or circumscribe the operative principle.  

To show just how this process works, it is useful to compare the general standard cases with rule-refinement cases. For example, Herring's holding has been rephrased as establishing a "constitutionally protected right to confidentiality [that] extends to medical information or records." Similarly, one court read Currier for the principle that the state assumes a duty of care when its agents affirmatively act to place a citizen in harm's way.

It is much more difficult however to rephrase the holdings or the ratio of a general standard case. To take one recent example, a court faced with two excessive force cases that pulled in opposite directions characterized one case as:

[F]inding excessive force where the plaintiff was already handcuffed when an officer slammed her head on the car, and another as finding [no excessive force] where an officer grabbed the plaintiff from behind by the shoulder and wrist, threw him against a van three or four feet away, kneed him in the back and pushed his head into the side of the van, searched his groin area in an uncomfortable manner and handcuffed him.

Rather than expressing the law in terms of a rule that can be "clearly established," these cases do little more than offer demonstrations of how particular facts have been judged in light of the general stan-

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193 This is not to deny that there are circumstances where successive applications of a general standard steer the law in one direction, resulting in a sub-rule under the general standard. A good example is whether, under the Fourth Amendment, a "reasonable person" would feel free to terminate the encounter with police. Courts have interpreted "reasonable person" in a more specific "legal" sense and have moved away from deciding these cases under a general standard. See, e.g., Florida v. Bostick, 501 U.S. 429, 436 (1991) (finding that a "reasonable person" sitting on a bus would think that he could ignore two police officers questioning him about drug transportation); United States v. Little, 18 F.3d 1499 (10th Cir. 1994) (finding similarly with respect to a person confined to a train roomette). But these cases seem to reflect the exception rather than the rule.

194 See supra Part II.C. (discussing the rule-refinement approach as applied to Herring and Currier).

195 See Herring v. Keenan, 218 F.3d 1171 (10th Cir. 2000) (granting immunity, even though an unconstitutional violation of privacy occurred).

196 See State v. Russo, 790 A.2d 1132, 1147-48 (Conn. 2002) (citing Herring, 218 F.3d at 1175); see also Livsey v. Salt Lake County, 275 F.3d 952, 956 (10th Cir. 2001) (describing Herring as finding a "legitimate expectation of privacy in nondisclosure of HIV status").

197 242 F.3d 905 (10th Cir. 2001) (denying immunity because it had been clearly established that government officials are liable when they contribute to the harm).

198 See Eckert v. Town of Silverthorne, 25 Fed. Appx. 679, 688 (10th Cir. 2001) (observing exceptions to the general rule in cases where government official creates the danger of harm).

199 Durruthy v. Pastor, 351 F.3d 1080, 1094 (11th Cir. 2003) (summarizing with a parenthetical the holding of Lee v. Ferraro, 284 F.3d 1191, 1198-99 (2002)).

200 Id. (summarizing Nolin v. Isbell, 207 F.3d 1253, 1257 (11th Cir. 2000)) (internal quotation marks omitted).
standard. The precedents are adjudicative examples, not elaborations of legal principle. While these cases offer useful advice as to how the standard should be administered, they are unlikely to create binding statements of "clearly established law."

This tension is demonstrated by contrasting rule refinement cases with general standard precedents such as *Saucier* and *Robles.* See supra text accompanying notes 180-81 (discussing the relationship between the facts and reasoning in *Saucier* and *Robles*). *Brosseau* demonstrates that *Saucier* did not clearly establish any point of law, but merely held that the law was not clearly established in a particular set of circumstances. " Plaintiff Robles's experience shows the same is true of *Hope.* Even though the Supreme Court issued *Hope* (which clearly established that prison guards could not handcuff prisoners to a fence for punitive reasons) just a few weeks before *Robles* was decided, Robles dismissed *Hope* in a brief footnote, finding that the case "involved a much lengthier detention under painful and dangerous conditions amounting to cruel and unusual punishment. It is therefore not dispositive of this claim." See *Brosseau v. Haugen,* 125 S. Ct. 596, 600 (2004) (discussing the vagueness of general standards and the factual particulars of the case).

As a forward-looking precedent, *Robles* is certain to suffer a similar fate. Any one of its specific facts can be used to support an argument that the law is not clearly established in just a slightly different setting. Since each fact plays a part in creating the constitutional violation, each can serve as a legitimate basis for distinction by a downstream court.

The general standard emerges because the multiplicity of potentially relevant facts means that the legal standard cannot be effectively reduced to a more refined or particularized rule of law. Cases are decided in localized, fact-specific terms to ensure that the law retains enough elasticity to cover potential factual permutations. This places Plaintiffs in a double bind. By definition, no statement of law can be specific enough to clearly establish a particular violation, yet general enough to account for the diversity of factors relevant to the analysis. But precedents decided under the general standard are unlikely to be of much use either. They cover only a narrow set of circumstances closely hewn to the basic case-facts. It is difficult to see how a downstream case will be controlled by a case whose holding must be stated in terms of its facts—the long parentheticals used to describe general standard cases. While the traditional mode of legal analysis allows

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201 See supra text accompanying notes 180-81 (discussing the relationship between the facts and reasoning in *Saucier* and *Robles*).
203 Hope v. Pelzer, 536 U.S. 730 (2002), was published on June 27, 2002; *Robles* was published on August 26, 2002.
204 Robles v. Prince George's County, 302 F.3d 262, 269 n.2 (4th Cir. 2002).
205 See *Anderson v. Creighton,* 483 U.S. 635 (1987) (holding that general Fourth Amendment standards are not particular enough to generate "clearly established law"); see also Meyer, supra note 182, at 1509 (explaining that case law is often indeterminate in its level of generality).
courts to look at several general standard cases to reconstruct a more particular legal principle, this is exactly the type of analysis that the "clearly established" rule seeks to limit. Official defendants are granted nearly limitless opportunities to argue that the presence or absence of a specific fact justifies the officer's interpretation of the general standard as reasonable. When confronting this claim, the court inevitably looks at the morass of general standard precedents and has little choice but to determine that the law is not clearly established.

The confluence of qualified immunity and the general standard leads to a paradox. On one hand, the clearly established law requires the general standard to be stated with sufficient particularity in terms of the specific case facts. Yet the analytic and interpretive structure of general standard precedents prevents courts from doing exactly that. The law seems destined to remain at the level of abstracted ideals, making it all too easy for officers to be granted immunity.

However, there are general-standard qualified immunity cases that engage in a fact-specific common law styled analysis to overcome qualified immunity. See, e.g., Carr v. Castle, 337 F.3d 1221, 1226-27 (10th Cir. 2003) (using common law styled case-to-case reasoning to decide the qualified immunity claim); Holland ex rel. Overdorff v. Harrington, 268 F.3d 1179, 1195-97 (10th Cir. 2001) (using common sense moral reasoning to deny qualified immunity in an excessive force claim). Nonetheless, this mode of analysis simply raises the question as to the analytical difference between the two prongs of immunity analysis.

See, e.g., Brown v. Gilmore, 278 F.3d 362, 367-70 (4th Cir. 2002) (examining a wide array of factors to determine that the defendant-officers' conduct was neither an unreasonable seizure, nor constituted excessive force).

See, e.g., Savard v. Rhode Island, 338 F.3d 23 (1st Cir. 2003) (en banc) (finding that an imprecise distinction between permissible and impermissible strip searches in prison justified a grant of qualified immunity); Hudson v. Hall, 251 F.3d 1289, 1297 (11th Cir. 2000) ("Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases."). The idea is especially true when the inquiry is as heavily fact-dependent as the "voluntariness" inquiry. See Doe v. Delie, 257 F.3d 309, 318-21 (3d Cir. 2001) (explaining that the diversity of opinions regarding whether it was reasonable to disclose a prisoner's medical information justified the grant of qualified immunity); see also Schnickloth v. Bustamonte, 412 U.S. 218, 226 (1973) (surveying case law on voluntariness of consent to search, explaining that "none of [the prior decisions] turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all surrounding circumstances"). But see, e.g., DeSpain v. Uphoff, 264 F.3d 965, 979-80 (10th Cir. 2001) (holding that, despite the absence of case law discussing the use of pepper spray, "this issue can be decided based not upon the specific characteristics of pepper spray but upon the requirement that an excessive use of force 'occur maliciously and sadistically for the very purpose of causing harm'").

For a different perspective on the relationship between broad substantive standards and the qualified immunity doctrine, see Chen, The Ultimate Standard, supra note 7 (arguing for a rule-oriented scheme with a set of criteria for determining protection entitlement, rather than the qualified immunity doctrine).

See Azeez v. Fairman, 795 F.2d 1296, 1301 (7th Cir. 1986) (arguing that courts should not use the general standard to "read the defense of immunity out of federal tort law by the facile expedient of stating constitutional rights in the most general possible terms . . . . The right must be sufficiently particularized to put potential defendants on notice"). There are, of course,
IV. CONTINUING THE CONFUSION: HOPE AND BROSSEAU

When the Supreme Court decided Saucier in 2001, the line beginning with Harlow, running through Anderson and Wilson, and terminating with Saucier seemed firmly cemented. But only a year after Saucier, the Court issued Hope v. Pelzer, which presents a very different vision of qualified immunity. \(^\text{211}\)

A. Hope: The Interpretive Approach

*Hope* presented an inmate's allegations that, as punishment for a prior altercation with prison guards, he was forced to spend seven hours in the hot sun without a shirt while handcuffed to a hitching post. \(^\text{212}\) During this time, he was given water only once or twice and was not allowed any bathroom breaks. \(^\text{215}\) Plaintiff alleged that a guard taunted him about his thirst, giving water to a dog and then spilling a cooler of water onto the ground. \(^\text{214}\)

While the Court of Appeals had little difficulty finding this conduct unconstitutional, defendants obtained immunity on the basis that the law was not clearly established. \(^\text{215}\) The Supreme Court granted certiorari and reversed. \(^\text{216}\)

The most telling part of the Court's discussion focused on the precedential value of *Ort v. White* for qualified immunity purposes. \(^\text{217}\) In *Ort*, prison officials denied an inmate water in order to coerce him to perform his assigned farm duties. \(^\text{218}\) The practice was upheld based on the distinction between punishment on the one hand, and “coercive measures undertaken to obtain compliance with a reasonable prison rule” to “maintain order and discipline” on the other. \(^\text{219}\) The court found the water deprivation legitimate because its purpose was

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\(^{211}\) 536 U.S. 730, 739 (2002) (“For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . [I]n the light of pre-existing law the unlawfulness must be apparent.”).

\(^{212}\) Id. at 739-35.

\(^{213}\) Id. at 735.

\(^{214}\) Id.

\(^{215}\) Id.

\(^{216}\) Id. at 736.

\(^{217}\) Id. at 743-44. See Ort v. White, 813 F.2d 318, 326 (11th Cir. 1987) (“[T]here must be a mutual accommodation between institutional needs and objectives and the provisions of the [C]onstitution that are of general application.”).

\(^{218}\) Ort, 813 F. 2d at 321.

\(^{219}\) Id. at 325.
to coerce the inmate to comply with prison regulations.\textsuperscript{220} The key analogy was to civil contempt: the court found that the plaintiff “essentially had the keys to the water keg in his own pocket.”\textsuperscript{221}

According to the Court of Appeals decision in \textit{Hope}, Ort could not clearly establish the law as applied to the facts of \textit{Hope}.\textsuperscript{222} The Supreme Court disagreed, however, and provided a traditional, common law styled reading of the case. Despite the fact that Ort upheld the coercive practice of denying water to the prisoner, based on Ort’s reasoning, the Supreme Court found the official’s actions in \textit{Hope} were “clearly established” as unconstitutional.\textsuperscript{223} Ort implied a “premise [that] has clear applicability in this case. [Plaintiff] Hope was not restrained at the worksite until he was willing to return to work . . . . Ort therefore gave fair warning to respondents that their conduct crossed the line of what is constitutionally permissible.”\textsuperscript{224}

In \textit{Hope’s} reading of Ort, even under the “clearly established” standard, reasoning triumphs over the naked holding. Even a case with the opposite holding can provide the basis of “clearly established law.”\textsuperscript{225} This view supports the interpretive tradition that finds the law by drawing legal principles from between the lines of individual cases, and views cases as evidence of the law, rather than the law itself.\textsuperscript{226}

\textit{Hope’s} second departure from the \textit{Anderson-Saucier} line regards the relationship between general standards and clearly established law. \textit{Hope} rejected the “rigid gloss,” exemplified by \textit{Robles}, and refocused the inquiry on whether the official had “fair warning” that the conduct was unconstitutional.\textsuperscript{227}

\begin{footnotes}
\item[220] Id.
\item[221] Id. at 326.
\item[222] The Eleventh Circuit did not provide an adequate explanation. The court simply declared that “[i]n Ort, the defendant was refused water while at a work site, until he agreed to do his job of carrying the water to the work site.” Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001) (internal citations omitted).
\item[224] Id. at 743.
\item[225] This view of clearly established law was expressed in Judge Seymour’s dissent in \textit{Herring v. Keenan}, 218 F.3d 1171, 1181 (10th Cir. 2000) (Seymour, J., dissenting) (“[T]he majority extrapolates from the Supreme Court’s bare holding . . . . without addressing the underlying analysis and reasoning . . . .”). \textit{See supra} text accompanying notes 123-24.
\item[226] Justice Thomas, joined by Justices Rehnquist and Scalia dissented from \textit{Hope}. \textit{Hope}, 536 U.S. at 748 (Thomas, J., dissenting). The dissent found the lower courts ruling to be a correct reading of \textit{Anderson’s} and \textit{Saucier’s} requirement that the right be established “in a more particularized, and hence more relevant, sense.” \textit{Id.} at 753 (citing \textit{Anderson} v. \textit{Creighton}, 483 U.S. 635 (1987)). The dissent further rejected the common law reading of Ort. Echoing the \textit{Herring} majority, Justice Thomas’s dissent criticized the majority’s reading as relying on “dicta [implying] that a guard might have violated a prisoner’s Eighth Amendment rights by denying him water.” \textit{Id.} at 762.
\item[227] \textit{Hope} did not elaborate on how the fair warning standard should work in practice. \textit{Vinyard v. Wilson}, 311 F.3d 1340 (11th Cir. 2002), a case vacated and remanded by \textit{Hope}, understood that \textit{Hope} created a sliding scale between the reprehensibility of the conduct and the need for
\end{footnotes}
The fair warning standard allows the court to employ more traditional modes of interpretation. Here, departmental regulations, state law, legal analogies, and even common sense are relevant to whether the law is clearly established. *Hope* creates the possibility of moving away from the idea that law is found exclusively in the Federal Reporter, and restructures qualified immunity to make it more compatible with general standard inquiries.

In fact, *Hope* itself paved the way for expanding the domain of norms that can create clearly established law and took notice of a Department of Justice ("DOJ") communication advising Alabama prison authorities that several practices, including use of the hitching posts, were improper. Even though there was no evidence that the officers who restrained Plaintiff Hope were aware of the DOJ's position, the court held that the DOJ communication "lends support to the view that reasonable officials... should have realized" that their actions violated the Eighth Amendment.

Clearly established precedents. *Vinyard* envisioned a three-tiered structure. In some cases the words of the relevant federal statute, or of the Constitution itself, are specific enough to clearly establish the law even in the total absence of case law. *Id.* at 1350. In other cases, the court looks to decided law, which itself divides into two categories. Some cases include "broad statements of principle... not tied to particularized facts" that can clearly establish law, applicable in the future to different sets of detailed facts. *Id.* at 1351. *Vinyard* held, however, that "there is a presumption against wide principles of law" and that these broad statements must clearly establish the law "with obvious clarity." *Id.* Finally, if there is no broad precedent declaring unconstitutionality, the court looks to "precedent that is tied to the facts." *Id.* *Vinyard* held that "most judicial precedents are tied to particularized facts and fall into this [third] category." *Id.* at 1351-52. For cases in this class, qualified immunity applies if the official actions are "fairly distinguishable" from the precedents. *Id.* at 1352. On the other hand, if the conduct of the official is "materially similar, the precedent can clearly establish the applicable law." *Id.*

228 Which sources of law create clearly established law has been the source of much contention. Compare *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988) (holding that all case law, including decisions of other circuit courts of appeals, district courts, and state courts, are relevant to the clearly established inquiry), with *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988) (finding that, in general, the Sixth Circuit looks only to Supreme Court, Sixth Circuit and forum state supreme court decisions). See also Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 ARIZ. L. REV. 621, 623-24 (1993) (noting the federal court's failure to use state law decisions to clearly establish the law); Jonathan M. Stemerman, *Unclearly Establishing Qualified Immunity: What Sources of Law May Be Used To Determine Whether the Law Is "Clearly Established" in the Third Circuit*, 47 VILL. L. REV. 1221 (2002) (indicating that courts do not agree on what authorities may be used to clearly establish the law). Prior to *Hope*, it seemed well-settled that state law and departmental regulations and communiqués could not demonstrate that the law was clearly established law. *See* Davis v. Scherer, 468 U.S. 183, 194 (1984) (rejecting the argument that qualified immunity is lost due to a violation of a state statute or regulation); Doe v. Delie 257 F.3d 309, 319 (3d Cir. 2000) ("To overcome qualified immunity, Doe's clearly established right must be the federal right on which the claim for relief is based."). But see Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1062 (9th Cir. 2003) (basing a clearly established inquiry on accounts from local newspapers and materials covered in officer training courses).

Hope's reception has been mixed. Some courts, most notably the Eleventh Circuit panels on remand, insisted that Hope changes little. Other courts concede that Hope reigns in some of the most generous grants of immunity but otherwise leaves the doctrine unchanged. Notably, the First Circuit's en banc decision in Savard was decided after Hope, and the Fifth Circuit has likewise issued two

230 This is, in part, because the opinion itself plods through cases from Harlow to Saucier, tying them together with an aura of consistency. See Hope, 536 U.S. at 799-41. In truth, Justice Stevens' decision however, remains conceptually at odds with these cases and refers back to the theories reflected in his dissents in Navarette and Anderson, and to Justice Ginsburg’s dissent in Saucier.

231 See, e.g., Willingham v. Loughnan 321 F.3d 1299 (11th Cir. 2003). The first Willingham panel held that "[a]lmost always, to establish the law clearly in the context of the Fourth Amendment, a materially similar case must have already decided that what the police officer was doing was unlawful." 261 F.3d 1178, 1187 (11th Cir. 2001). On remand, and with instructions to be reconsidered in light of Hope, the Eleventh Circuit stood by its original analysis of the immunity issue stating, "[o]ur earlier conclusion remains unaffected by the Supreme Court's decision in Hope," and went so far as to suggest that "[d]ecisions of this Court before the Supreme Court's Hope decision demonstrate that the law of the Circuit harmoniously complies with the Supreme Court's reminder." 321 F.3d at 1303-04. Another Eleventh Circuit case exhibited a similar pattern. The court's first decision in Vaughan v. Cox, 264 F.3d 1027 (11th Cir. 2001), was vacated by the Supreme Court in light of Hope. On remand, the Eleventh Circuit stood by its original decision granting the officer qualified immunity. Vaughan, 316 F.3d 1210, 1214, cert. denied, 539 U.S. 904 (2003) ("For qualified immunity purposes, therefore, we ask whether officers had 'arguable probable cause'... [i]n our prior opinion, we concluded that Deputy Cox had arguable probable cause and we reaffirm that decision today.") (internal citations omitted). Thereafter, the court, sua sponte, granted a rehearing. In reversing its two prior decisions, the court, presumably based on its new understanding of Hope, denied the officers qualified immunity. Vaughan, 343 F.3d at 1383 ("Applying [the general standard] in a common-sense way, a reasonable officer would have known that firing into the cabin of a pickup truck... would transform the risk of an accident on the highway into a virtual certainty.").

The Eleventh Circuit still seems confused about the role of factually/materially similar case law. Compare Storck v. City of Coral Springs, 354 F.3d 1307, 1317 (11th Cir. 2003) (deciding this issue post-Hope, and even citing to it, while adhering in substance, if not in name, to the "materially similar" standard), and Thomas ex rel. Thomas v. Roberts, 323 F.3d 950, 954 n.6 (11th Cir. 2003) ("[P]ublic officials are not obligated to be creative or imaginative in drawing analogies nor do we require them to construe general legal formulations that have not once been applied to a specific set of facts by any binding judicial authority.") (internal quotations omitted), with Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1264-65 (11th Cir. 2004) (arguing that Hope abrogated this restrictive gloss on qualified immunity). A discussion of the effects of Hope on Eleventh Circuit law can be found in Amanda K. Eaton, Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of Hope v. Pelzer on the Qualified Immunity Doctrine, 38 GA. L. REV. 661 (2004). Finally, to see another conflicting approach to Hope see Estep v. Dallas County, 310 F.3d 353, 360 (5th Cir. 2002) ("[P]re-existing law must dictate, that is, truly compel... the conclusion for every like-situated, reasonable government agent that what the defendant is doing violates federal law in the circumstances.") (quoting Lassiter v. Ala. A. & M. Univ., 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc). Lassiter, of course, was one of the cases criticized by the Supreme Court in Hope, and Estep was published four months after Hope.

232 See, e.g., Vinyard v. Wilson, 311 F.3d 1340, 1350 (11th Cir. 2002) (reiterating Hope's position that officers have a "right to fair notice.").

233 338 F.3d 23 (1st Cir. 2003). See supra text accompanying notes 76-106 (discussing the reasoning in Savard).
fractured en banc opinions grappling with applying the clearly established standard in both the rule refinement and general standard contexts.234

B. Brosseau: The Code Approach

Whatever the Court intended to change in Hope, its most recent exposition of the qualified immunity standard in Brosseau v. Haugen235 pulls back to the analysis staked out in Anderson and Saucier. Brosseau presented an excessive force claim against an officer who shot a suspect fleeing an alleged crime scene by car. The Court of Appeals, relying largely on Hope, found that the violation was sufficiently clear so that general excessive force standards set forth in Graham and Garner established the law and defeated a claim of qualified immunity.236

The Supreme Court reversed in a short per curiam opinion, holding that while there is no doubt that the general standards were clearly established, the law was not specifically settled in light of the particular facts facing Officer Brosseau.237 While Plaintiff argued that the law was clearly established by several more specific holdings applying excessive force standards to car chases and getaways, the Court quickly dismissed these precedents, stating:

These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau’s actions fell in the “hazy border between excessive and acceptable force.” The cases by no means “clearly establish” that Brosseau’s conduct violated the Fourth Amendment.238

Finally, in a brief footnote, without any analysis, the Court dismissed several other cases cited by plaintiff and stated that they postdated the events in question.239

Justice Stevens was the lone dissenter. Repeating themes voiced as far back as his dissent in Navarette,240 Stevens held that this case in-

234 See McClendon v. City of Columbia, 305 F.3d 314 (5th Cir. 2002) (en banc) (discussing the state’s obligation to protect its citizens from the actions of third-party tortfeasors); see also Kinney v. Weaver, 367 F.3d 337 (5th Cir. 2004) (en banc) (discussing qualified immunity in the context of a First Amendment general standard claim). Compare McClendon, 305 F.3d at 331–32 (granting qualified immunity in a majority per curiam opinion), with McClendon, 305 F.3d at 340–41 (Parker, J., dissenting) (arguing to deny qualified immunity).
236 See Haugen v. Brosseau, 339 F.3d 857, 875–75 (9th Cir. 2003) (finding Brosseau’s use of force to be a “clear violation” of Garner).
237 See Brosseau, 125 S. Ct. at 599–600 (describing the difficulty of applying any other case directly to this one because none of them are precisely on point).
238 Id. at 600 (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001)).
239 Id. at 600 n.4.
240 See Procunier v. Navarette, 434 U.S. 555, 569 (1978) (Stevens, J., dissenting) (arguing that the majority did not examine carefully the factual basis for the defense); see also Wilson v. Layne,
volved factual, rather than legal, uncertainty and that the entire issue should be tried to the jury.241

Justice Breyer filed a concurrence joined by Justices Scalia and Ginsburg.242 Breyer argued that Saucier's requirement that the constitutional question is decided before the clearly established question should be overruled. According to the concurrence, the procedural rule "requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (e.g., qualified immunity) that will satisfactorily resolve the case before the court."243 Justice Breyer favors returning to a version of immunity that places less emphasis on the distinction between "law" and its "clearly established" cousin.

Brosseau takes a sharp turn from Hope and reinforces the problems arising in general standard cases. The Court almost openly admits that, on the one hand, the general standard is too vague to clearly establish any law, while at the same time, more specific cases decided under the standard are too specific to cover divergent fact patterns. Under this approach, factually intensive cases present an almost insurmountable obstacle for § 1983 plaintiffs.244

The Court's outright dismissal of the "postdated" specific case law is similarly disturbing.245 While under the Hope-inspired "fair notice" standard there may be some logic to granting less precedential effect to cases decided after the events in question (ignoring the fact that the 'notice' proceeds under the dubious assumption that police officers spend their evening reading slip copies of the F.3d), the Court's categorical dismissal is premised on a code-based legal theory deeply at odds with traditional common law interpretation and analysis. Excluding cases decided after the events in question presents a vision of law where the law is limited to narrow readings of officially sanctioned materials. Whatever the theoretical merits of such a system, this conception is deeply incompatible with prevailing traditions regarding legal reading, writing, and analysis.

526 U.S. 603, 618 (1999) (Stevens, J., concurring in part and dissenting in part) (discussing qualified immunity and how the majority misapplied it based on the facts of this case); Anderson v. Creighton, 483 U.S. 635, 647 (1987) (Stevens, J., dissenting) (stating that the majority did not adhere to principles of the Fourth Amendment when applying qualified immunity in this case).

241 See Brosseau, 125 S. Ct. at 601 (Stevens, J., dissenting) (discussing whether or not Brosseau was entitled to qualified immunity, and concluding that "that question should be answered by a jury").

242 Id. at 600–01 (Breyer, J., concurring).

243 Id. at 601.

244 See Brosseau, 125 S. Ct. at 599 (noting that the "high level of generality" in the precedential case could not be dispositive except for "obvious" cases).

245 See id. at 600 (dissmissing Cole v. Bone, and Smith v. Freeland).
A final comment is reserved for the Breyer concurrence. While the sentiment that cases should be disposed of via the path of least resistance has its merits, the structure of the current immunity doctrine makes this position untenable. If cases could be dismissed for not being “clearly established,” there would be no way to refine and elaborate constitutional norms and values except in all but the most egregious cases. For example, in Wilson the Court held that although media ride-alongs were unconstitutional they are not “clearly established.” While the Wilson defendants were not liable in tort, future officers enabling media participation are subject to liability since Wilson had “clearly established” the principle. Under the Breyer method however, Wilson, and every media ride-along, would be dismissed upon summary judgment for failing to present a “clearly established” constitutional right.

The tug between the Court’s most recent opinions reflects the conceptual tension embedded in immunity doctrine: whether clearly established law makes any sense in light of our traditions of reading, writing, and analyzing cases. The cases extending from Harlow to Anderson to Saucier have turned immunity from a balancing test designed to find the “best attainable accommodation of competing values,” into a regimented “question of law” devoid of contextual analysis.

Because common law cases are not designed to produce outcomes that will easily satisfy the quest for “clearly established law,” courts in-

246 Id. (Breyer, J. concurring).
247 The concurrence apparently favors a return to the time when the immunity doctrine did not reflect a clear analytical distinction between “law” and “clearly established law.” See, e.g., Davis v. Scherer, 468 U.S. 183, 194 (1984) (failing to distinguish between actions whose unconstitutionality is clearly established and actions that, while unconstitutional, are not clearly established under the qualified immunity standard). Over time, the Court gradually endorsed a conception that distinguished these ideas and presented them as conceptually distinct. See Siegert v. Gilley, 500 U.S. 226 (1991) (holding that qualified immunity represents a “threshold question,” but failing to clearly distinguish between law and clearly established law); Saucier v. Katz, 533 U.S. 194, 194 (2001) (distinguishing specifically between the constitutional violation and “clearly established” prongs of the immunity inquiry).
249 Id. at 603.
250 For example, see the discussion in Jennings v. Stillwater, 383 F.3d 1199, 1208 (10th Cir. 2004), regarding whether the cause of action presented in Wilson v. Meeks, 52 F.3d 1547, 1557 (10th Cir. 1995), was dismissed on constitutional or clearly established grounds.
251 457 U.S. 800 (1982).
254 Harlow, 457 U.S. at 814.
255 See Crawford-El v. Britton, 523 U.S. 574, 589 (1997) (“The [Harlow] court’s clear and convincing evidence requirement applies to the plaintiff’s showing of improper intent (a pure issue of fact), not to the separate qualified immunity question . . . which is ‘an essentially legal question.’”).
evitably stumble. "[T]he law's elaboration from case to case" requires abstraction, synthesis, and analysis—the very tools that are unavailable under the clearly established inquiry. Thus, since Harlow, a near-endless number of panel dissents, en bancs and associated petitions, and Supreme Court opinions have fought against strict application of the bifurcated immunity analysis. This tradition is reflected in Hope, Lanier, and Currier, as well as in the dissenting voices of Savard, Herring, Anderson, Wilson, and Saucier. In each of these cases, the refusal to adhere to the tight strictures of the clearly established mandate demonstrates the discomfort with the interpretative premises lying at the core of the Anderson/Saucier model of immunity.

V. CONCLUSIONS: LEGAL INTERPRETATION IN THE COMMON LAW TRADITION

A. Stability and Change in the Common Law

Both the common law's admirers and critics have commented on the malleability of the legal tradition. To its critics, this open-endedness reflects a jurisprudence that produces a set of confused, conflicting and irrational results. Certainty is never guaranteed and even an educated guess requires the expensive services of a trained practitioner. To its admirers, the common law strikes the perfect balance between the stability required to ensure confidence in commercial, personal, and governmental affairs, and the flexibility needed to ensure that the law reflects contemporary social policy and reality.

Like any tradition, the common law maintains a dialectic between tradition and change, and between continuity and ingenuity. Historians argue over whether changes in the common law dominate over continuity, or whether the reverse is a more accurate description.
The analysis of qualified immunity suggests that one might profitably approach this problem by considering the difference between substantive doctrine on the one hand and interpretive methods on the other.

The evolution of immunity doctrine itself reflects this lesson. The substantive elements of immunity have undergone several incarnations. Ann Woolhandler has demonstrated that at different points in time, immunity depended in turn on at least five conditions: whether the action was deemed illegal, whether the actor exceeded the scope of authority, whether the official occupied a high or low government office, whether the action was ministerial or discretionary, or whether the relief sought was monetary or coercive. However, despite change in the substantive results, the law's analytic and interpretative structure remained fairly constant. The decision to grant immunity rests on a contextual analysis of the relevant precedents and policies justifying immunity.

Beginning with Butz and Harlow, the Court tinkered with the analytical method itself. The Court asked the law to reconceptualize its interpretation of itself. Cases were not to be analyzed as expressions of judicial reasoning to guide future courts but were to be reduced to blackletter legal soundbites sharply limited to their facts. These literary and interpretive traditions, however, cannot simply be eliminated. They are integral to the law's operation. Legal "rules," which are little more than abstracted holdings from previous cases, must be interpreted and modified to the facts of downstream cases. Holdings are not self-applying. Further, decisions often include several distinct but interlocking legal bases, and the job is left to the

OBLIGATIONS, 294-302 (1999), is a good example of the stability-dominant theory. Of course, the high-water mark of the stability theory can be found in FREDRICK POLLOCK, THE GENIUS OF THE COMMON LAW (Lawbook Exchange 2000) (1912).

See Woolhandler, supra note 7 (tracing the development of immunity for federal officials).

See id. at 414-22 (describing the "legality model" adopted during the Marshall Court).

See id. at 411 ("Courts using a discretionary model avoid total abandonment of the rule of law by drawing . . . distinctions between . . . areas where judgment is legitimately exercised and where it is not.").

See id. at 430 (noting that the Taney Court "granted less expansive immunity to officials below cabinet level").

See id. at 426 ("[The] failure to perform a ministerial act could subject [a government] official to damages liability.").

See id. at 409-10 ("Early in the twentieth century, however, the legality model [for immunity] came substantially to dominate the field of coercive relief, while both the legality and discretion models continued to struggle for predominance in actions for [monetary] damages.").

See generally id. (examining the doctrine of immunity for federal officials).


See supra text accompanying notes 23-26 (discussing the Butz/Harlow approach to qualified immunity, resulting in the "objectively reasonable" test).
downstream court to identify the "correct" basis for the decision. Much the same is true for distinguishing material facts from those inserted for rhetorical flourish. Overall, the binding nature of precedent is to be found more in its reasoning—as understood by the deciding court—than by its holding. 278 Similarly, cases are notorious for only deciding the fairly limited question presented to the court, and the doctrine of dicta specifically disfavors forward-looking speculations. The common law is content to leave marginal and difficult questions for another day, when those facts are squarely presented to the court.

While there is nothing logically necessary about this system, much of our legal writing, thinking, and analysis is predicated on maintaining these internal assumptions. In this way, the law's doctrinal instability is balanced by the stability of the mechanisms through which the law is created, refined, and applied. The aura of continuity is achieved, not by reaching the same result every time, but by subjecting each case to the same methods of analysis and interpretation. Each case thus appears to be part of a seamless tradition, even if the bottom-end doctrine sustains significant modifications.

Immunity doctrine does not work well because it rejects the interpretative methods that form the basis of this tradition. Far beyond steering the doctrine in a new direction, the "clearly established" mode alters the very assumptions used to understand and decide cases. This move creates a nearly irreconcilable rupture in the operation of the common law, and exposes the fault lines in the law's evolution from case to case. The Supreme Court's attempts to harmonize the doctrine have been a dismal failure. 279 The problem is not the lack of clarity, but rather a lack of parity between the tradition that generates substantive constitutional tort law and the interpretive demands of clearly established law.

B. The Surprising Endurance of Common Law Mythology

There is a second, and, perhaps, even more surprising metalesson. In classic common-law mythology, tension between dynamism and stability was held together by the idea that legal innovation was grounded in legal tradition. Reported cases are merely evidence of the law, and not the "Law" itself. Law exists as a set of interlocking

278 See Schauer, Precedent, supra note 125, at 595–602 (discussing how the deciding court establishes the doctrine set forth in the precedent case).
279 See, e.g., Kerman v. New York, 374 F.3d 93 (2d Cir. 2004) (struggling to define the role of qualified immunity once a jury has found the conduct unreasonable as a matter of Fourth Amendment principles).
legal principles—the "seamless web" of the law. Legal development or revelation occurs when a new idea is found (via legal analysis) within the existing law. Lawyers discuss legal trends, contrapose conflicting lines of precedent, and re-characterize familiar cases, all in an effort to demonstrate how the new principle is merely an explicit affirmation of pre-existing law.

Of course, in the post-realist world of American legal thought this conception is quite unfashionable. Legal realists notoriously reject the idea that the law consists of a "brooding omnipresence in the sky." Realism has died a thousand deaths, and no one wants to believe that lawyering consists mainly of archeological excavation.

Yet the theological rejection has had surprisingly little effect on praxis. Despite being shorn of these medieval myths, the everyday operation of the law demonstrates that this mythical conception is alive and well. Lawyers still reason interstitially from one case to another, discovering rather than creating the law. Similarly, forward-looking decisions are non-binding dicta; the law is to remain in its latent, implied state until needed to decide a case. Doctrinal explanation remains overwhelmingly backward-looking, and lawyers prefer to find innovative theories within the reported case law. Moreover, while forward-looking "policy" concerns have taken on increased significance, these arguments are most compelling when located in the decisional law. Lord Coke would be happy to know that in the twenty-first century (in America) the most comfortable form of legal innovation remains the "this-is-what-the-law-has-always-done" argument.

The interaction between "clearly established" and common law emphasizes just how dependent the common law is on its traditional, interpretive assumptions. The "clearly established" system offers an example of what the legal landscape would look like if the law were deprived of its analytical reasoning, and its ability to reach back into the storehouse of case law and "discover" a new legal doctrine. Rather than seeing the law's evolution from case to case, the "clearly established" perspective finds unpredictable developments and inconclusive analogies. Where the common lawyer finds a context-sensitive system that can account for subtle factual variations, the

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280 The origin of this phrase is analyzed in Ethan Katsh, *Law in a Digital World: Computer Networks and Cyberspace, 58 Vill. L. Rev. 403, 403 n.3 (1993).
281 See, e.g., Wilson v. Layne, 526 U.S. 603 (1999) (finding that the unconstitutionality of allowing media to accompany police during a search of a private home was not anticipated by prior precedents).
282 See, e.g., Savard v. Rhode Island, 338 F.3d 23, 30 (1st Cir. 2003) (en banc) ("In the end, we recognize that both *Swain* and *Arruda* offer valuable insights [to this case on strip searches] but that neither is a very exact match.").
code-based model finds an endless minefield of irreconcilable holdings.

The discussion of qualified immunity results in the surprising realization that common law practice has survived and flourished despite the rejection of its underlying theory. Legal academics may be the priests who lost their faith but kept their jobs. But judges and lawyers are the parishioners who, despite their agnosticism, continue to adhere to the central tenets of common law practice.