Denver Law Review

Volume 96
Issue 1 *2018*

Article 6

March 2024

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Zach Lass

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LOWE V. RAEMISCH: LOWERING THE BAR OF THE QUALIFIED IMMUNITY DEFENSE

ABSTRACT

Suing government officials for any alleged misconduct is challenging and rife with obstacles. Section 1983 of Title 42 of the U.S. Code provides a right of civil action for citizens whose constitutional rights have been violated by government officials. However, finding a cause of action is only one small part of the puzzle. Up next, plaintiffs face a myriad of hurdles and obstacles that they must overcome. Most notable among these obstacles is the qualified immunity doctrine. The qualified immunity doctrine shields government officials from liability unless a plaintiff can establish that (1) the defendant's conduct violated a constitutional or statutory right and (2) the right was clearly established at the time of the defendant's conduct. Despite its original, important purpose of balancing plaintiffs' rights against the need to shielding government officials from frivolous lawsuits, qualified immunity has morphed into an almost complete defense, shielding government officials from liability for all but the most outrageous conduct. The qualified immunity defense is raised in almost every lawsuit, and both the deferential nature of the doctrine and the procedural advantages the doctrine affords governmental defendants makes the defense an incredibly high bar for most plaintiffs to overcome. This Comment explores how the qualified immunity doctrine has developed into what it is today, using an arguably uncontroversial Tenth Circuit case to illustrate why a change in the qualified immunity doctrine is necessary. Part I provides a brief summary of section 1983 actions and then outlines the development of the qualified immunity doctrine. Part II discusses *Lowe v. Raemisch*, a Tenth Circuit case where the court found that government officials who precluded an inmate from engaging in outdoor exercise for over two years were entitled to qualified immunity. Part III will then first explain how Lowe provides a perfect example of how the qualified immunity defense has grown too powerful, effectively barring the majority of constitutional claims against government officials. This Part will next outline three proposed changes to the qualified immunity doctrine that will help ensure that meritorious constitutional claims survive. This Part will conclude by applying these proposed changes to the facts of Lowe to illustrate why these changes are necessary.

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INTRODUCTION

Section 1983 of Title 42 of the U.S. Code provides a right of civil action for citizens whose constitutional rights have been violated by government officials acting under color of state law.[1] Over the last half century, section 1983 has served as one of the primary means by which people vindicate their civil rights.[2] While section 1983 does not mention any defenses in its text, courts have routinely allowed government officials to invoke the qualified immunity doctrine as a defense.[3] The qualified immunity defense creates numerous obstacles for plaintiffs seeking to re-

1. 42 U.S.C. § 1983 (2018).

2. Cathy Havener Greer, *Governmental Employee Immunity in Actions Brought Pursuant to 42 U.S.C. § 1983*, COLO. LAW., Oct. 2009, at 29, 29.

3. Stephen W. Miller, *Rethinking Prisoner Litigation: Shifting from Qualified Immunity to a Good Faith Defense in § 1983 Prisoner Lawsuits*, 84 NOTRE DAME L. REV. 929, 935, 937 (2009).

cover damages against government officials for civil rights violations.[4] To overcome a qualified immunity defense under current jurisprudence a plaintiff must establish that (1) the defendant's conduct violated a constitutional or statutory right and (2) the right was clearly established at the time of the defendant's conduct.[5] Courts have discretion to analyze these two prongs in whichever order they see fit.[6]

Since its inception, government officials have raised the qualified immunity defense in "virtually every constitutional claim" brought against them.[7] Despite its original purpose of balancing plaintiff's rights against shielding government officials from frivolous lawsuits, qualified immunity has resulted in the overprotection of officials and has morphed into an "almost absolute defense to all but the most outrageous conduct."[8] Plaintiffs now stand little chance in section 1983 actions because qualified immunity has "moved closer to a system of absolute immunity" finding liability "for only the most extreme and most shocking" violations of rights.[9] Simply put, the bar to overcome a qualified immunity defense has been set too high.[10]

Recently, in *Lowe v. Raemisch*,[11] a former inmate learned just how high that bar is.[12] In *Lowe*, an inmate at a state penitentiary was deprived of outdoor exercise for over two years.[13] Upon his release from prison, the inmate brought a section 1983 action against prison officials alleging that this deprivation of outdoor exercise amounted to cruel and unusual punishment violating his Eighth Amendment rights.[14] The United States District Court for the District of Colorado held that this deprivation of outdoor exercise for such an extended period of time likely violated Lowe's constitutional rights and rejected the prison officials' qualified immunity defenses.[15] However, on appeal the Tenth Circuit dodged the constitutional question and held that the officials were entitled to quali-

4. Amelia A. Friedman, *Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hole in Clearly Established Law*, 90 TEX. L. REV. 1283, 1283 (2012).

5. *See* Greer, *supra* note 2, at 31.

6. Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 118 (2009) (explaining that giving courts discretion to analyze either prong first has resulted in most courts skipping the first prong of whether a constitutional right was violated and proceeding directly to the second prong of determining whether the right was clearly established).

7. *Id.* at 117.

8. *See id.* at 118.

9. *Id.* at 124.

10. *See id.* at 118.

11. 864 F.3d 1205 (10th Cir. 2017), *petition for cert. filed*, No. 17-289 (U.S. Mar. 9, 2018).

12. *Id.* at 1212.

13. *Id.* at 1206–07.

14. *Id.* at 1207.

15. Lowe v. Raemisch, No. 15-cv-01830-RBJ, 2016 WL 4091175, at *3–4 (D. Colo. July 18, 2016), *rev'd*, Lowe v. Raemisch, 864 F.3d 1205 (10th Cir. 2017), *petition for cert. filed*, No. 17-289 (U.S. Mar. 9, 2018).

fied immunity because the right was not clearly established at the time of the alleged violation.[16]

This Case Comment will explain how *Lowe* illustrates the problems with the qualified immunity doctrine and will argue that the doctrine provides government officials with too great of a defense against alleged constitutional violations. Part I of this Comment will provide a brief summary of section 1983 actions and will then outline the historical development of the qualified immunity doctrine. Part II provides the facts of *Lowe* and summarizes the opinion. Part III will then argue that *Lowe* provides a perfect example of how the qualified immunity defense has grown too powerful, effectively barring the majority of constitutional claims against government officials. This Comment will then propose three necessary changes to the qualified immunity doctrine to help ensure that valid constitutional claims are recognized. This Comment will conclude by analyzing *Lowe* under these changes, illustrating why these changes are necessary.

I. BACKGROUND

A. Brief History of Section 1983

Section 1983 was enacted as part of the Ku Klux Klan Act in 1871.[17] The purpose behind section 1983 was to "deter[] [government] officials from using their positions to deprive individuals of their rights."[18] Section 1983 provides a "federal cause of action for *any* person who has been deprived of her federally protected rights by a defendant acting under color of state law."[19] To successfully bring a section 1983 claim, a plaintiff must demonstrate that some deprivation of a constitutional right has occurred and that the deprivation occurred under color of law.[20] Section 1983 is one of the primary means "by which people vindicate their civil rights."[21]

Despite the fact that section 1983 has been in existence for over 100 years, it "did not spawn significant litigation until the last quarter of the 20th century."[22] *Monroe v. Pape*[23] was the first case to explicitly recognize that section 1983 provided citizens with a cause of action against

16. *Lowe*, 864 F.3d at 1207.

17. Mark R. Brown, *The Fall and Rise of Qualified Immunity: From* Hope *to* Harris, 9 NEV. L.J. 185, 186 (2008).

18. *See* Miller, *supra* note 3, at 933.

19. *Id.*

20. *See id.* at 934 (explaining the general test under section 1983).

21. Allison Cohn, *Can $1 Buy Constitutionality?: The Effect of Nominal and Punitive Damages on the Prison Litigation Reform Act's Physical Injury Requirement*, 8 U. PA. J. CONST. L. 299, 302 (2006).

22. *See* Greer, *supra* note 2.

23. 365 U.S. 167 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978).

government officials to vindicate constitutional rights violations.[24] In *Monroe*, thirteen police officers burst into a home without a search warrant and forced the occupants to stand naked in the living room while the officers ransacked the entire house.[25] The occupants of the home brought a section 1983 action against the officers alleging that the home invasion violated their constitutional rights.[26] The officers argued that section 1983 did not provide a cause of action, arguing that "under color of law" meant actually approved or authorized by state law, and not simply that their actions violated state law or the Constitution.[27] The Supreme Court, however, disagreed, holding that section 1983 provides a civil cause of action for any person whose constitutional rights have been violated by government officials acting under color of law.[28] The Court rejected the officers' "under color of law" argument, explaining that section 1983 provides a civil cause of action regardless of whether the unconstitutional conduct was authorized or unauthorized.[29] To hold otherwise would allow wrongdoers to avoid liability merely because they were clothed with governmental authority.[30] Following *Monroe*, section 1983 litigation became much more common and now serves as the basis for many civil actions against government officials.[31]

B. The Rise of Qualified Immunity

Plaintiffs' ability to bring successful section 1983 actions took a significant blow with the development of the qualified immunity defense.[32] Since its development, the qualified immunity defense has grown in both power and usage, and has protected government officials from liability for almost forty years.[33] Section 1983 does not contain any reference to defenses or immunities.[34] However, based on the idea that "Congress must have known . . . [that] government officials enjoyed various immunities" the doctrine of qualified immunity "emerged by way of

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24. *Id.* at 180.
25. *Id.* at 169.
26. *Id.* at 170.
27. *Id.* at 170, 172.
28. *Id.* at 185. *Monroe* also discusses—at great length—the legislative history of section 1983, providing excellent insight into the drafters' intent. *See id.* at 175–83, 185–87.
29. *Id.* at 184. Previous liability had generally been limited to officials acting within the scope of their authority. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 17 (1883) ("[C]ivil rights, such as are guarantied [sic] by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority . . . ."). *Monroe* stood for the opposite proposition: that an official could be liable for unauthorized, unsupported conduct. 365 U.S. at 184.
30. *Monroe*, 365 U.S. at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)) (explaining that section 1983 targets the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.").
31. Richard B. Golden & Joseph L. Hubbard, Jr., *Section 1983 Qualified Immunity Defense: Hope's Legacy, Neither Clear nor Established*, 29 AM. J. TRIAL ADVOC. 563, 565–66 (2006).
32. *Id.* at 566 (explaining that "[t]he most significant limitation of Section 1983 liability came with the development of the qualified immunity defense").
33. *Id.* at 563.
34. Brown, *supra* note 17.

judicial implication."[35] Seven years after *Monroe*, the Supreme Court laid the groundwork for the qualified immunity defense in *Pierson v. Ray*.[36] In *Pierson*, where a number of black and white clergymen were falsely arrested under the guise of disturbing the peace, the Court held that police officers were entitled to a "good faith" defense because the statute that the officers had relied on when making the arrest had not been deemed unconstitutional at the time of their conduct.[37] Shortly after *Pierson*, the Supreme Court built upon this idea of a good faith defense in *Scheuer v. Rhodes*[38] where the Court added a reasonableness element to the doctrine.[39] In *Scheuer*, the National Guard killed several students while attempting to disperse a Vietnam War protest.[40] The Court explained that the officers were entitled to immunity if they both (1) had a good faith belief that their conduct did not violate constitutional rights and (2) had "reasonable grounds for the belief . . . in light of all the circumstances."[41] This addition of the reasonableness element has "guided the development of the qualified immunity defense" ever since.[42]

Following *Pierson* and *Scheuer*, courts applied both an objective and subjective approach when analyzing the reasonableness element of qualified immunity.[43] Essentially, courts were objectively evaluating the reasonableness of the conduct, "examining whether the official knew or should have known that such conduct violated a federally protected right," and were also subjectively evaluating whether the official intended to violate the plaintiff's right.[44] For example, in *Wood v. Strickland*,[45] a group of students who were expelled for "spiking" their teachers' punch with liquor brought a section 1983 action against school officials alleging that their expulsion violated their due process rights.[46] The Court determined that public officials should be protected from liability if the

35. *Id.*

36. 386 U.S. 547 (1967).

37. *Id.* at 557. The Mississippi Code the officers relied on made it a crime to congregate with others in a public place "under circumstances such that a breach of the peace may be occasioned thereby." *Id.* at 549. This law was held unconstitutional, largely because it was used to arrest minorities and others whom the police had no actual probable cause to arrest. *Id.* at 550; *see also* Thomas v. Mississippi, 380 U.S. 524, 524 (1965) (holding the Mississippi Code unconstitutional).

38. 416 U.S. 232 (1974), *abrogated by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

39. *Id.* at 247–48.

40. *Id.* at 235.

41. *Id.* at 247–48 ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.").

42. Golden & Hubbard, *supra* note 31, at 568.

43. *See* Friedman, *supra* note 4, at 1285.

44. *See* Golden & Hubbard, *supra* note 31, at 568.

45. 420 U.S. 308 (1975).

46. *Id.* at 309–11. In *Wood*, the due process challenge arose because the students and their parents were not given adequate notice of the board meeting where the expulsion decision was made. *See* Strickland v. Inlow, 485 F.2d 186, 188, 190 (8th Cir. 1973), *vacated and remanded sub nom.* Wood v. Strickland, 420 U.S. 308 (1975). The board did hold another meeting that the students did attend, but the primary board members who had made the decision were not in attendance, and the board upheld the vote to expel. *Wood*, 420 U.S. at 312–13.

officials were "acting sincerely and with a belief that [they were] doing right," but "ignorance or disregard of settled, indisputable law" would not be tolerated.[47] The Court found that the officials were entitled to qualified immunity because they had acted reasonably, had not ignored any settled law, and had not intended to violate the students' rights.[48] However, the subjective and objective approach proved difficult to follow and many courts struggled with the approach.[49] Additionally, the Court was concerned that there were too many lawsuits going to trial because it is was too easy for plaintiffs to plead in bad faith, precluding granting of qualified immunity before trial and allowing frivolous lawsuits to proceed.[50]

Largely in response to these concerns, the Supreme Court abandoned the subjective element completely and established a strictly objective standard in *Harlow v. Fitzgerald*.[51] In *Harlow*, the Court concluded that the subjective element was "incompatible with [the] admonition . . . that insubstantial claims should not proceed to trial."[52] The Court held that government officials were entitled to qualified immunity if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[53] The *Harlow* decision was seen as both an effort to eliminate confusion in the lower courts and as a response to an increasingly large volume of section 1983 litigation.[54] There was a strong concern that there were too many section 1983 claims going to trial, significantly burdening public officials.[55] The objective standard articulated in *Harlow* requires plaintiffs to prove that (1) there was a violation of a constitutional right, and (2) the right was clearly established at the time of the violation.[56] Application of this objective standard largely depends on the level of specificity at which the legal rule is defined.[57] If courts define the right too broadly, public officials would be liable for more violations and the qualified im-

47. *Wood*, 420 U.S. at 321.

48. *Id.* at 322, 326.

49. *See* Golden & Hubbard, *supra* note 31, at 568 (explaining that both the Supreme Court and lower courts struggled to decide whether the reasonableness factor should be judged subjectively, objectively, or a combination of both).

50. *See* Friedman, *supra* note 4, at 1286–87 (explaining reasons for the Court's shift to a purely objective qualified immunity inquiry).

51. 457 U.S. 800, 818 (1982). Many commentators also feel that the shift to the purely objective approach was driven by a significant rise in the volume of civil rights litigation and the fear that too many frivolous cases were going to trial. *See* Friedman, *supra* note 4, at 1286 (explaining reasons for the Court's shift to a purely objective qualified immunity inquiry).

52. *Harlow*, 457 U.S. at 815–16. A subjective determination of an officer's conduct is "a question of fact for the jury," but "qualified immunity is a question of law that should be decided . . . prior to the case proceeding to trial." Golden & Hubbard, *supra* note 31, at 570–71. A subjective component is therefore incompatible with deciding qualified immunity before trial. *Id.*

53. *Harlow*, 457 U.S. at 818.

54. Friedman, *supra* note 4, at 1286.

55. *Id.*

56. *Harlow*, 457 U.S. at 818.

57. Friedman, *supra* note 4, at 1286.

munity defense would fail.[58] Conversely, if the right was defined too narrowly, officials would generally be deemed to lack notice and would prevail with the qualified immunity defense.[59] Following *Harlow*, many circuits struggled to implement this objective standard because they were unsure of how broadly or narrowly to define the constitutional right at issue.[60]

Five years later, the Supreme Court attempted to clarify this confusion and articulated the level of specificity that courts should use to define the right at issue in *Anderson v. Creighton*.[61] In *Anderson*, a family brought a *Bivens* action against federal officials after the officers barged into their home without a warrant, punched the husband in the face, and harassed the wife and children.[62] The *Anderson* Court announced the "objective legal reasonableness test" and stated that whether an official would be protected by qualified immunity "turns on the 'objective legal reasonableness' of the action [as indicated by] the legal rules that were 'clearly established' at the time [the action] was taken."[63] Like the test articulated in *Harlow*, this test involved two prongs.[64] First, the court must define the relevant legal rule and determine whether the defendant's conduct violated the constitutional or statutory right.[65] Second, the court must determine whether the right was "clearly established" at the time the action was taken.[66] The Court explained that to meet the second prong, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[67] By defining the right narrowly and specifically, the *Anderson* Court established that qualified immunity would protect a much broader range of official conduct.[68] The specificity requirement makes it much less likely that courts will find that the right was clearly established, protecting government officials in vastly more circumstances.[69] The two-

58. *Id.*; *see also* Golden & Hubbard, *supra* note 31, at 573 ("[T]he broader the legal rule is defined, the less likely it is that the official will be entitled to qualified immunity.").

59. Friedman, *supra* note 4, at 1286 (explaining that "[a] specifically defined right, such as freedom from random drug searches in shopping malls, would afford a larger number of defendants with qualified immunity because [such a] precise definition . . . appl[ies] to a much narrower range of conduct").

60. *Id.*

61. 483 U.S. 635 (1987).

62. *Id.* at 664 n.21. While *Anderson* involves a *Bivens* claim, not a section 1983 claim, *Bivens* claims against state officials are parallel to section 1983 claims against state officials and all of the same tests and defenses are used. Golden & Hubbard, *supra* note 31, at 569–70.

63. *Anderson*, 483 U.S. at 639 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)).

64. *Id.* at 639–40.

65. *Id.* at 639.

66. *Id.* at 640.

67. *Id.*

68. Friedman, *supra* note 4, at 1286–87.

69. *Id.*

pronged test laid out in *Anderson* remains the basic test for determining whether an official is entitled to qualified immunity.[70]

Two critical questions remained unanswered after *Anderson*. First, do courts have to answer the first prong of the qualified immunity analysis as a threshold matter before moving to the second prong? And second, what constitutes clearly established law?

1. Do Courts Have to Answer the First Prong of the Qualified Immunity Test as a Threshold Matter Before Moving on to the Second Prong?

The next significant development of the qualified immunity doctrine came in *Saucier v. Katz*,[71] where a protester brought an excessive force lawsuit against federal officers after he was arrested and thrown into a police van for unfurling a protest banner.[72] On its way to finding that the officers were entitled to qualified immunity, the Supreme Court clarified the sequence for applying the two-step qualified immunity test.[73] The Court stated that the threshold question courts must consider is "taken in the light most favorable to the party asserting the injury, do the facts alleged show the [official's] conduct violated a constitutional right?"[74] The Court made it explicitly clear that this question "must be the initial inquiry."[75] Only if a court determined that a constitutional right was implicated would that court then be required to consider the second step of the analysis to determine whether the right was clearly established at the time of the official's conduct.[76] The *Saucier* decision was largely intended to prevent courts from skipping the constitutional questions and thus ensure that constitutional law grew from case to case.[77] The Court was concerned that the practice of routinely skipping the constitutional questions would not provide a clear standard for determining whether something was constitutional.[78]

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70. *See* Golden & Hubbard, *supra* note 31, at 575 (explaining that while *Anderson* provides the basic test for qualified immunity, many courts now cite to Saucier v. Katz, 533 U.S. 194 (2001)).

71. 533 U.S. 194 (2001), *overruled by* Pearson v. Callahan, 555 U.S. 223 (2009).

72. *Id.* at 198.

73. *Id.* at 201.

74. *Id.*

75. *Id.*

76. *Id.* ("If no constitutional right [was] violated . . . there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out . . . the next, sequential step is to ask whether the right was clearly established.").

77. Greg Sobolski & Matt Steinberg, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 532 (2010).

78. *Saucier*, 533 U.S. at 201 ("This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law [were] clearly established . . . ."); *see also* Sobolski & Steinberg, *supra* note 77 (explaining that "Saucier sequencing was intended to ensure the 'law's elaboration from case to case'" (quoting *Saucier*, 533 U.S. at 201)).

Following *Saucier*, however, many courts and commentators criticized this mandatory approach.[79] Critics argued that this mandatory approach stood directly opposite to the Court's own constitutional avoidance principles, effected judicial efficiency, wasted judicial resources, and created bad law.[80] Largely in response to this criticism, the Supreme Court took up the question again in *Pearson v. Callahan*.[81] In *Pearson*, the Court—sua sponte—instructed the parties to brief whether *Saucier* should be overruled.[82] Almost predictably, the *Pearson* Court overruled *Saucier*'s mandatory approach, holding that "the *Saucier* protocol should not be regarded as mandatory in all cases."[83] The Court noted, however, that the mandatory approach was "often beneficial" and stated that this "decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases."[84] After *Pearson*, lower courts are free to use their discretion and may skip the constitutional question, proceeding directly to determining whether the law was clearly established.[85] Despite the Court's statement that the mandatory approach was "often beneficial," most courts, including the Supreme Court, now bypass the constitutional question, "leaving the constitutional issue for another day."[86]

2. What Constitutes "Clearly Established" Law?

Courts have also struggled with determining what constitutes "clearly established" law.[87] Under *Anderson*, when determining whether the law was clearly established at the time of an official's conduct, courts must specifically define the right at issue and only look at cases with materially similar facts.[88] Historically, the Supreme Court has offered little guidance outside of *Anderson* and the level of specificity required by *Anderson* has resulted in a much more protective qualified immunity doctrine—one that strongly favors the interests of government officials.[89]

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79. *See* Sobolski & Steinberg, *supra* note 77, at 533.

80. *Id.* at 536–37.

81. 555 U.S. 223, 227 (2009). In *Pearson*, a man sued police officers for conducting a warrantless search of his home. *Id.* The district court held that the officers were entitled to qualified immunity, but the Tenth Circuit reversed, holding that that the right had been clearly established at the time of the officers' conduct. *Id.* at 229–30. The Supreme Court granted certiorari. *Id.* at 231.

82. *See* Sobolski & Steinberg, *supra* note 77, at 534.

83. *Pearson*, 555 U.S. at 236.

84. *Id.* at 236, 242.

85. Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TUORO L. REV. 633, 644 (2013).

86. *Id.* at 647.

87. Friedman, *supra* note 4, at 1289–91.

88. *Id.* at 1288.

89. *Id.* at 1278 (explaining that the "overly specific definition of rights" has led courts to "requir[e] plaintiffs to prove [that] a constitutional right was clearly established with an impossibly high degree of specificity").

However, fifteen years after *Anderson*, the Supreme Court seemingly retreated from the specificity requirement in *Hope v. Pelzer*.[90]

In *Hope*, an inmate brought a section 1983 action after being chained to a hitching post without water or bathroom breaks for approximately seven hours.[91] The Supreme Court retreated from the strict and particularized inquiry that it articulated in *Anderson*, and held that an official was not entitled to qualified immunity if the law provided "fair warning that [the official's] conduct violated the Constitution."[92] The Court emphasized that "general statements of the law are not inherently incapable of giving fair and clear warning, and . . . may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'"[93] *Hope* strongly suggested that officials could be on notice that their conduct violated clearly established rights even in new and different circumstances.[94] *Hope* refocused the clearly established law inquiry from the narrow, right-specific inquiry, and suggested that courts could define the right at issue more generally.[95] According to *Hope*, plaintiffs could overcome the qualified immunity defense if the officials' conduct obviously violated that right even in the absence of applicable precedent.[96] *Hope*'s "fair warning" formula allowed for a more generalized inquiry into the right at issue, and is a more "plaintiff-friendly" inquiry, but it has largely been ignored by courts around the country.[97]

Even the Supreme Court has largely ignored *Hope*'s "fair warning" formula.[98] In *Brosseau v. Haugen*,[99] just two years after *Hope*, the Court determined that an officer who shot a fleeing suspect in the back was entitled to qualified immunity because there were no cases that "squarely govern[ed]" the situation.[100] The *Brosseau* Court seemingly rejected *Hope*'s "fair warning" idea, reinforcing that material similarity and factual specificity were necessary for the right to be clearly established.[101] Seven years later, in *Ashcroft v. Al-Kidd*,[102] the Court raised the bar even higher, holding that an "official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have

90. 536 U.S. 730 (2002).
91. *Id.* at 734–35.
92. *Id.* at 741.
93. *Id.* (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
94. *Id.* ("[O]fficials can still be on notice that their conduct violated established law even in novel factual circumstances." (citing United States v. Lanier, 520 U.S. 259, 271 (1997))).
95. *See* Friedman, *supra* note 4, at 1287–88.
96. *Id.*
97. Blum, Chemerinsky & Schwartz, *supra* note 85, at 654–55.
98. *Id.* at 654.
99. 543 U.S. 194 (2004).
100. *Id.* at 201.
101. Golden & Hubbard, *supra* note 31, at 595–96.
102. 563 U.S. 731 (2011).

understood that what he is doing violates that right.'"[103] The Court went further still, stating that "existing precedent must have placed the statutory or constitutional question beyond debate."[104] Defendants asserting qualified immunity now use the *Al-Kidd* formula, and *Hope*—while not overruled—has been ignored and distinguished by other courts.[105]

C. The Procedural Advantages of Qualified Immunity

Not only does qualified immunity create an often times insurmountable bar for plaintiffs to overcome substantively but it also provides governmental officials with significant procedural advantages.[106] First, qualified immunity determinations must generally be made before discovery, meaning that plaintiffs faced with a qualified immunity defense must overcome a significant hurdle before obtaining all of the relevant facts and documents.[107] Second, because "[q]ualified immunity presents a legal question demanding prompt judicial attention," it generally should be decided long before trial.[108] Qualified immunity, in a sense, creates a "super-summary judgment" like stage: even when officials are not entitled to summary judgment on the merits, a court may grant summary judgment on qualified immunity grounds.[109]

These procedural advantages are amplified by the collateral order doctrine.[110] The Supreme Court has explained that the collateral order doctrine—which permits immediate appeals in federal court—applies to qualified immunity decisions.[111] A defendant can immediately appeal a qualified immunity decision, providing officials with multiple levels of review well before the merits of the case have ever been heard.[112] The collateral order doctrine allows officials multiple shots at immunity—a relatively easy bar to satisfy—and drags out litigation over the course of multiple appeals before a case is ever heard on its merits.[113]

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103. *Id.* at 741 (alterations in original) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

104. *Id.* (holding that despite the broad history and purposes of the Fourth Amendment, nothing would have provided the defendant "fair[] warning" in this case (quoting Al-Kidd v. Ashcroft, 580 F.3d 949, 972–73 (9th Cir. 2009))).

105. Blum, Chemerinsky & Schwartz, *supra* note 85, 654–56 (explaining the serious and limiting implications that the holding in *Al-Kidd* will have on the qualified immunity doctrine).

106. *See* Brown, *supra* note 17, at 194.

107. Golden & Hubbard, *supra* note 31, at 611–12 (explaining that "[t]he most difficult practical battle in litigating qualified immunity is the battle over whether a factual issue precludes summary judgment that would otherwise grant qualified immunity to one or more defendants").

108. Brown, *supra* note 17, at 194.

109. *See id.* at 195.

110. *See id.*

111. *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 528–30 (1985) (holding that denial of qualified immunity is an appealable collateral order justifying immediate review).

112. *See* Brown, *supra* note 17, at 196.

113. *See id.* at 195–96.

II. *LOWE V. RAEMISCH*

A. Facts

Donnie Lowe served just over two years in the Colorado State Penitentiary for a parole violation.[114] Upon his release, Lowe brought a section 1983 lawsuit against two prison officials alleging that they deprived him of outdoor exercise for two years and one month while he was in prison.[115] Lowe alleged that this deprivation of outdoor exercise amounted to cruel and unusual punishment, violating his Eighth Amendment rights.[116]

B. Procedural History

The prison officials filed a motion to dismiss, asserting that they were entitled to qualified immunity, but the District of Colorado denied the motion.[117] In doing so, the federal district court concluded that "a reasonable official . . . almost certainly did know . . . that, at the time of Mr. Lowe's confinement, depriving him of outdoor exercise for an extended period of time was likely a violation of his constitutional rights."[118] The court emphasized that Tenth Circuit cases, as well as other cases, clearly established that the officials' conduct violated Lowe's Eighth Amendment rights.[119] The court highlighted that even the prison officials acknowledged a possible constitutional violation when the officials asserted that Lowe "should have known in February 2013 that his constitutional rights had been violated" in their statute of limitations argument.[120] The prison officials appealed.[121]

C. Opinion of the Court

Judge Bacharach authored the opinion of the court.[122] The Tenth Circuit reversed the district court's ruling, holding that the prison officials were entitled to qualified immunity because "competent officials could reasonably disagree about the constitutionality of disallowing outdoor exercise for two years and one month."[123]

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114. William Vogeler, *No Clearly Established Right for Prisoners to Exercise Outside*, FINDLAW: U.S. TENTH CIR. (July 27, 2017, 6:00 AM), https://blogs.findlaw.com/tenth_circuit/2017/07/no-clearly-established-right-for-prisoners-to-exercise-outside.html; *see* Lowe v. Raemisch, No. 15-cv-01830-RBJ, 2016 WL 4091175, at *1 (D. Colo. July 18, 2016), *rev'd*, 864 F.3d 1205 (10th Cir. 2017), *petition for cert. filed*, No. 17-289 (U.S. Mar. 9, 2018).

115. Lowe v. Raemisch, 864 F.3d 1205, 1206–07 (10th Cir. 2017), *petition for cert. filed*, No. 17-289 (U.S. Mar. 9, 2018).

116. *Id.* at 1207.

117. *Lowe*, 2016 WL 4091175, at *1, *4.

118. *Id.* at *3.

119. *Id.*

120. *Id.*

121. *Lowe*, 864 F.3d at 1207.

122. *Id.* at 1206.

123. *Id.* at 1212.

Judge Bacharach began by assuming, "[f]or the sake of argument," that there was a constitutional violation.[124] He stated that even with that assumption, the officials would be entitled to "qualified immunity unless the denial of outdoor exercise for two years and one month had violated a clearly established constitutional right."[125] Next, Judge Bacharach laid out the contours of the qualified immunity doctrine.[126] He explained that "[t]he law is clearly established when a Supreme Court or Tenth Circuit precedent is on point or the alleged right is clearly established from case law in other circuits."[127] He emphasized that "precedent is considered on point if it involves '*materially similar conduct*' or applies 'with *obvious clarity*' to the conduct at issue."[128] He then highlighted that "qualified immunity generally protects all public officials except those who are 'plainly incompetent or those who knowingly violate the law.'"[129]

Judge Bacharach next explored the case law surrounding denial of exercise and the Eighth Amendment.[130] Based on this review he articulated four main conclusions:

1. The denial of outdoor exercise could violate the Eighth Amendment "under certain circumstances."

2. The denial of outdoor exercise does not create a per se violation of the Eighth Amendment.

3. Restricting outdoor exercise to one hour per week does not violate the Eighth Amendment.

4. The denial of outdoor exercise for three years could arguably involve deliberate indifference to an inmate's health under the Eighth Amendment.[131]

Based on these conclusions, he explained that denying outdoor exercise could, under certain circumstances, be unconstitutional, but the Tenth Circuit has not defined those circumstances.[132]

Judge Bacharach then examined several factors from prior cases.[133] He stated that "the duration of a prisoner's inability to exercise outdoors"

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124. *Id.* at 1207.
125. *Id.*
126. *Id.* at 1207–08.
127. *Id.* at 1208.
128. *Id.* (internal quotation marks omitted) (quoting Estate of Reat v. Rodriguez, 824 F.3d 960, 965 (10th Cir. 2016)).
129. *Id.* (internal quotation marks omitted) (quoting White v. Pauly, 137 S. Ct. 548, 551 (2017)).
130. *Id.*
131. *Id.* at 1208–09 (footnotes omitted) (quoting Bailey v. Shillinger, 828 F.2d 651, 653 (10th Cir. 1987) (per curiam)).
132. *Id.* at 1209.
133. *Id.* at 1209–10.

will be an important factor.[134] For example, he found that limiting outdoor exercise to one hour per week and denying it for roughly eleven months had both been deemed constitutional, but explained that courts had not answered whether a two year denial would be permissible.[135] Judge Bacharach then distinguished several cases that suggested denying outdoor exercise for that two-year period would be unconstitutional.[136] He distinguished one of these cases by asserting that the context of that court's inquiry had been very different, and distinguished the other by stating "[t]here we addressed the denial of any *out-of-cell* exercise rather than *outside* exercise."[137] Based on this reasoning, he concluded that the court "lack[ed] any on-point precedent regarding the constitutionality of disallowing outdoor exercise for a period approximating two years and one month."[138]

Next, Judge Bacharach entertained Lowe's argument that "even if no precedent is on point, our case law provided the two prison officials with 'fair warning' that their conduct was unconstitutional."[139]

Based on the lack of precedent, Judge Bacharach concluded that the right was not clearly established and held that the prison officials were entitled to qualified immunity because the deprivation of outdoor exercise in this case did not "obviously cross[] a constitutional line."[140]

III. ANALYSIS

Lowe highlights the current problems with the qualified immunity doctrine. First, because *Pearson* gives courts discretion to determine which prong to analyze first, the Tenth Circuit dodged the question of whether denying outdoor exercise for over two years was unconstitutional and the law surrounding the issue remains unclear.[141] Second, despite giving some treatment to the "fair warning" formula based on a more generalized inquiry into the right at issue as the *Hope* Court did, the Tenth Circuit applied a very narrow test, asking whether "our precedents" made the legality of the conduct "undebatable."[142] This limited treatment demonstrates how narrow and particularized the current inquiry into determining whether the right was clearly established really is. And as the doctrine stands today, it cuts off legitimate constitutional

134. *Id.* at 1209.

135. *Id.* ("We have not squarely addressed a denial of that duration.").

136. *Id.* at 1209–10 (distinguishing Fogle v. Pierson, 435 F.3d 1252 (10th Cir. 2006) (holding that denying outdoor exercise could arguably violate the Eighth Amendment) and Housley v. Dodson, 41 F.3d 597 (10th Cir. 1994) (holding that denial of out-of-cell exercise could violate the Eighth Amendment)).

137. *Id.*

138. *Id.* at 1210.

139. *Id.* (internal quotation marks omitted) (quoting Plaintiff-Appellee's Answer Brief at 12, *Lowe*, 864 F.3d 1205 (No. 16-1300)).

140. *Id.*

141. *See supra* Section II.C.

142. *See supra* Section II.C.

claims before plaintiffs bringing those challenges ever make it through the front door. Third, the collateral order doctrine allowed the officials in *Lowe* to immediately appeal the district court's qualified immunity determination, providing the officials with multiple levels of review before the case was ever heard on its merits.[143] This meant that even though the district court found that the officials were not entitled to qualified immunity, the officials never had to defend Lowe's claim on its merits because they could immediately appeal the district court's determination. Without any significant changes, the promise of using section 1983 as a tool to remedy constitutional violations will be lost.[144]

The following Section identifies three suggestions that will restore balance to the qualified immunity doctrine. First, and perhaps most importantly, the Court should return to the *Saucier* requirement that courts answer the constitutional question first before answering whether the right was clearly established. Second, the Court should clarify the "fair warning" idea and the concept of the "obvious case" that it originally articulated in *Hope*. This could be accomplished by establishing a circuit-wide standard for determining when a right is "clearly established." Third, courts should no longer apply the collateral order doctrine to qualified immunity determinations. This Comment will conclude by hypothetically applying this reformulated qualified immunity test to *Lowe*, illustrating the advantages of this approach.

A. A Return to Mandatory Sequencing: Answering the Constitutional Question First

Courts should return to the mandatory requirement of deciding the constitutional question first before analyzing whether the right was clearly established. Simply put, this approach is a more effective way to protect constitutional rights. In *Saucier*, the Supreme Court held that courts should perform a mandatory two-step analysis: first determining whether a constitutional violation had occurred, and second, determining whether the law was clearly established so that a reasonable official would have understood that her conduct violated the clearly established right.[145] This mandatory approach was designed to prevent courts from sidestepping constitutional questions to ensure that constitutional law grew from case to case.[146] The Supreme Court was concerned that the routine practice of avoiding the constitutional question would provide "no clear standard" for determining whether conduct was unconstitutional.[147] Based on criticism that a mandatory approach was leading to a flood of frivolous litiga-

143. *See supra* Section II.C.

144. *See generally* Hassel, *supra* note 6, at 142 (explaining that changes must be made for section 1983 actions to remain meaningful).

145. Saucier v. Katz, 533 U.S. 194, 200 (2001), *overruled by* Pearson v. Callahan, 555 U.S. 223 (2009).

146. *See* Sobolski & Steinberg, *supra* note 77.

147. *Id.* (quoting County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998)).

tion, was inapposite with the Court's own constitutional avoidance principles, and was wasting judicial resources, the Court reverted to a discretionary approach in *Pearson*, allowing courts to once again bypass the constitutional question.[148] Despite the Court's statement that the mandatory *Saucier* approach was "often beneficial," most courts now bypass the constitutional question and go straight to determining whether the law was clearly established.[149]

A return to mandatory sequencing is necessary because the purpose behind the mandatory *Saucier* approach—ensuring that a clear standard emerges in constitutional law—is being ignored. In a comprehensive, circuit-wide study analyzing the impacts of the mandatory sequencing approach versus the *Pearson* Court's discretionary sequencing approach, researchers found that mandatory sequencing "resulted in a proliferation of rights-affirming holdings."[150] In other words, there were more pro-plaintiff constitutional rulings when courts were required to first analyze whether a plaintiff's constitutional rights were violated.[151] This does not mean, and should not be read to mean, that more plaintiffs were eventually victorious in their constitutional claims.[152] Rather, it means that by preventing courts from circumventing the constitutional question, courts were forced to create "clearly established" precedent for future plaintiffs to rely on.[153] The original plaintiffs bringing a challenge very well may lose, but because courts were forced to answer the constitutional question, future plaintiffs could then rely on that precedent.[154] Furthermore, future defendants could no longer assert that the law was not clearly established.[155]

The current tendency of courts to bypass the constitutional questions leaves constitutional law unsettled and fails to clarify constitutional questions.[156] If courts address the constitutional question, the law will become clearer and future similar conduct will not be shielded by qualified immunity.[157] The rights-affirming nature of mandatory sequencing benefits plaintiffs and lowers the qualified immunity bar. This approach would effectively allow more plaintiffs to overcome qualified immunity,

148. *Id.* at 536.
149. *See* Blum, Chemerinsky & Schwartz, *supra* note 85.
150. *See* Sobolski & Steinberg, *supra* note 77, at 538–39.
151. *Id.* at 548.
152. *See* Blum, Chemerinsky & Schwartz, *supra* note 85, at 651; *see also infra* text accompanying notes 153–54.
153. *See* Blum, Chemerinsky & Schwartz, *supra* note 85, at 651 (explaining that even if the original plaintiff loses because the right was not clearly established at that time, the mandatory two-step approach establishes precedent that will allow future plaintiffs bringing similar claims to be successful).
154. *Id.*
155. *Id.* at 644.
156. *Id.* at 644, 647.
157. *Id.* at 650.

and is a more just way to balance the individual rights of plaintiffs against the needs of government officials.

B. Articulating a Circuit-Wide Standard for "Clearly Established" by Clarifying Hope*'s "Fair Warning" Formula for the "Obvious Case"*

Courts should return to *Hope*'s "fair warning" formula for the basic "concept of an obvious case" in qualified immunity analysis.[158] As the doctrine currently stands, *Hope* has largely been ignored and the dispositive inquiry remains whether "[t]he contours of the right [established by factually similar precedent] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[159] Courts are required to specifically define the right at issue, looking only at cases with materially similar facts.[160] If there is no on-point precedent, even if the conduct likely crosses a constitutional line, courts have a tendency to grant qualified immunity.[161] The "fair warning" formula and the concept of the "obvious case," as articulated in *Hope*, remain largely undefined.[162]

The *Hope* Court articulated that officials are not entitled to qualified immunity—even in novel factual circumstances—when officials have "fair warning" that their conduct violated a constitutional right.[163] *Hope* dictates that more general statements of law can provide "fair warning" to an official and that a general constitutional rule can provide "obvious clarity to the specific conduct in question."[164] *Hope* refocused the clearly established inquiry from the specific, narrow inquiry into on-point precedent to a more general inquiry that allowed plaintiffs to overcome qualified immunity in obvious cases under completely new circumstances.[165] By removing the specificity requirement, a "fair warning" standard allows courts to look outside of factually similar cases and apply the law more generally. But most courts have interpreted *Hope* too narrowly, applying it only to those cases in which the conduct is so obvious and egregious that no court could disagree that the right was clearly established.[166] *Hope* should not be read so narrowly as to still require factual similarity as the touchstone of the qualified immunity analysis.[167]

By allowing a more general approach, courts can apply the law in a more just manner, finding egregious conduct unconstitutional even in the

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158. *See* Friedman, *supra* note 4, at 1284.
159. Anderson v. Creighton, 483 U.S. 635, 640 (1987).
160. Friedman, *supra* note 4, at 1287.
161. Brown, *supra* note 17, at 191.
162. Golden & Hubbard, *supra* note 31, at 593.
163. *See* Hope v. Pelzer, 536 U.S. 730, 746 (2002); *see also* Friedman, *supra* note 4, at 1287–88.
164. *Hope*, 536 U.S. at 741; *see also* Friedman, *supra* note 4, at 1287–88.
165. Friedman, *supra* note 4, at 1288.
166. *See* Greer, *supra* note 2, at 34.
167. Brown, *supra* note 17, at 204.

face of novel factual circumstances. The best example of where officials would have "fair warning" because of an "obvious case" can be found in due process law.[168] The Due Process Clause clearly establishes the right to due process and any action violating due process, regardless of how novel or unclear that action may be, violates the clearly established right to due process.[169] Incorporating this idea that certain rights are so clearly established, regardless of novel circumstances or unclear actions, would ensure a more just balance of plaintiffs' rights against government protection.[170] Furthermore, such an approach would eliminate successful qualified immunity defenses in truly egregious and obvious cases while maintaining the defense for more ambiguous cases.[171] To achieve this result, courts should revert to the approach articulated in *Hope* and clarify the fair warning formula as applied to the obvious case.

One way the Court can clarify the fair warning formula is by articulating a circuit-wide standard for determining when a right is clearly established. To do so, the Court should articulate clear guidance on what sources of law courts can rely on when determining whether the right was clearly established at the time of the alleged rights violation. The Supreme Court has largely failed to articulate this clear guidance.[172]

Currently, circuits are split on what sources they can rely on and have very "different approaches" for "evaluating whether a right was clearly established."[173] Most courts agree that cases in their own circuit "involving 'fundamentally similar' facts" provide strong support for a finding of a clearly established right.[174] But while the Supreme Court has suggested that nonbinding case law and regulations can also provide evidence that a right was clearly established, the Court has never provided a definitive rule and, as a result, courts are split on the issue.[175] Some circuits, most notably the Second and Eleventh Circuits, rely strictly on case law from their own circuit and that of the Supreme Court.[176] Other circuits, such as the Fourth, Fifth, and Sixth Circuits, primarily restrict the inquiry to their own circuit precedent, but occasionally look outside to other circuits.[177] The Tenth Circuit falls on this narrower end of the spectrum, looking primarily at Tenth Circuit precedent and occasionally

168. Friedman, *supra* note 4, at 1286.
169. *Id.*
170. *Id.* at 1284 (remember that the original idea behind qualified immunity was to balance two competing interests: (1) the importance of protecting the rights of citizens, and (2) the need to protect government officials from frivolous lawsuits as the officials execute their official duties); *see also* Sobolski & Steinberg, *supra* note 77, at 528.
171. Friedman, *supra* note 4, at 1284.
172. *Id.* at 1288.
173. *Id.* at 1289.
174. *Id.* (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)).
175. *Id.* at 1289–90.
176. *Id.*
177. *Id.* at 1290.

looking outside at other circuits.[178] On the other side of the spectrum, the Eighth and Ninth Circuits are willing to look at all case law, regardless of which circuit the law originates from.[179]

A few circuits "consider policies and regulations as sources of clearly established law" but these sources are rarely relied on and most courts seem reluctant to adopt this approach.[180] Finally, six circuits have explicitly recognized that a right may be so clearly established in obvious cases even when the case involves novel factual circumstances.[181] However, this recognition is markedly inconsistent and each court varies on what level of heightened generality is appropriate and what range of broader sources they can consider.[182]

A universal, circuit-wide approach would remedy this marked inconsistency and is needed to ensure that plaintiffs' rights are adequately protected, regardless of which circuit the case is decided in. This universal, circuit-wide approach would permit courts to consider, and allow plaintiffs to rely on, more general authority outside of their own circuit and Supreme Court precedent when determining whether a right was clearly established.[183] The Eighth and Ninth Circuit approach, permitting courts to consider all relevant decisional law regardless of which circuit that law originates from, is the most appealing approach. This broader base of authority should also include general rules, nonbinding case law, official guidance documents, and regulations.[184] This broader approach is necessary because constraining a plaintiff to only being able to only rely on local circuit precedent tips the scales in favor of the government officials in most cases.[185] Allowing courts to rely on a broader base of authority when determining whether a right was clearly established would greatly enhance plaintiffs' ability to overcome a qualified immunity defense and restore some balance to the qualified immunity doctrine.

C. Elimination of the "Procedural Advantage"

Courts should eliminate the current procedural advantages of the qualified immunity defense. The current system mandates that because a qualified immunity determination is a question of law, it should be de-

178. *Id.* at 1290 n.43.
179. *Id.* at 1289.
180. *Id.* at 1290.
181. *Id.* at 1293. The six circuits that have recognized the idea of the obvious case are the First, Third, Fourth, Sixth, Seventh, and Tenth Circuits. *Id.*
182. *Id.* at 1293–94 (explaining that even the circuits that have recognized that obvious cases require less factual similarity have no consistent way of determining whether the law was clearly established).
183. *Id.* at 1304 (explaining that allowing "plaintiffs to establish the law by reference to more general rules, nonbinding case law, and regulations" would help address the current problems with the qualified immunity defense).
184. *Id.*
185. *Id.* at 1291.

cided long before trial.[186] Courts have concluded that the qualified immunity decision should be left out of "the hands of the jury."[187] This idea essentially reflects the principle that government officials should generally be free from the burdens of a lawsuit.[188] This procedural advantage is amplified by the collateral order doctrine, permitting immediate appeals on qualified immunity determinations.[189] An adverse ruling against officials in the district court makes the case ripe for appeal. An adverse ruling on appeal makes the case ripe for appeal to the Supreme Court. At this point, years have likely elapsed since the initial action and the officials can simply outlast many plaintiffs before the merits of the case will ever be heard. Even more notably, the collateral order doctrine allows officials to have the qualified immunity determination examined "by (at least) four federal judges before trial."[190]

It is fine, and likely desirable, if district courts do still rule on qualified immunity before the trial. This will ensure that certain meritless lawsuits are dismissed at an early stage.[191] But, upon that determination, the collateral order doctrine should not apply. Permitting immediate appeals on all qualified immunity determinations has resulted in the overprotection of government officials and the under protection of plaintiffs.[192] A more appropriate approach would be to draw a line between qualified immunity decisions that are immediately appealable and those that are not.[193] To level the playing field, if the district court determines that the government official is not entitled to qualified immunity at the summary judgment or motion to dismiss stage, that decision should not be immediately appealable and the case should proceed to trial.[194] At the conclusion of the trial, a defendant could then appeal the qualified immunity determination in conjunction with any other issues. Not only would this procedure allow more meritorious claims to survive a qualified immunity defense but it would also preserve judicial resources. Additionally, there would be fewer appeals and the circuit courts would have fewer cases to piecemeal together before remanding back down for final determinations.

This Comment will now examine *Lowe* under these three proposed changes.

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186. *See* Brown, *supra* note 17, at 195.
187. *Id.* at 194 (quoting Hunter v. Bryant, 502 U.S. 224, 228 (1991)).
188. *Id.* at 195.
189. *Id.*
190. *Id.* at 196.
191. Kathryn R. Urbonya, *Interlocutory Appeals from Orders Denying Qualified Immunity: Determining the Proper Scope of Appellate Jurisdiction*, 55 WASH. & LEE L. REV. 3, 11 (1998).
192. *Id.*
193. *Id.* at 28 (explaining that "a more narrow interpretation of the collateral order doctrine" is appropriate for qualified immunity determinations).
194. *Id.* at 28–29.

1. The *Lowe* Court Must Answer the Constitutional Question First

In this hypothetical, the court is faced with the mandatory sequencing requirement: the court must address the merits of the constitutional question before turning to whether the law was clearly established.[195] In *Lowe*, the Tenth Circuit simply skipped this step, assuming for the sake of argument that an Eighth Amendment violation occurred.[196] However, had the Tenth Circuit not bypassed the first step, it likely would have found that Lowe had pled a plausible Eighth Amendment violation. Judge Bacharach admitted as much in his analysis when he stated that "denial of outdoor exercise could violate the Eighth Amendment 'under certain circumstances.'"[197] Furthermore, this statement lines up with the district court's finding that depriving Lowe of outdoor exercise for over two years was "likely a violation of his constitutional rights."[198] This is not to say that even if the Tenth Circuit had determined that there was a constitutional violation it would necessarily reached a different conclusion in this case. It may still have decided that the officials were entitled to qualified immunity. But the court would have at least answered whether denying outdoor exercise for over two years was unconstitutional. The major problem lies in the fact that by skipping this question, the law remains unclear. Future plaintiffs with similar allegations cannot rely on *Lowe* because it did not provide a constitutional answer. Future defendants, however, can rely on *Lowe* to support an assertion that the law is not clearly established because the court plainly says this.[199] This circular process does not protect plaintiffs' constitutional rights and stagnates the development of constitutional law. By skipping the first step, the court not only rejects one plaintiff's challenge but also makes it increasingly difficult for future plaintiffs to succeed in a similar challenge. After *Lowe*, this specific constitutional question is more unclear than it was before, making it less likely that courts will find that the law is clearly established. Had the court been required to answer the constitutional question first, future plaintiffs would know whether this conduct was constitutional and future defendants could not hide behind the clearly established requirement. All the current decision leaves parties with is a sense of uncertainty. This illustrates why returning to mandatory sequencing is necessary.

195. Saucier v. Katz, 533 U.S. 194, 200 (2001), *overruled by* Pearson v. Callahan, 555 U.S. 223 (2009).

196. Lowe v. Raemisch, 864 F.3d 1205, 1207 (10th Cir. 2017), *petition for cert. filed*, No. 17-289 (U.S. Mar. 9, 2018).

197. *Id.* at 1208 (quoting Bailey v. Shilinger, 828 F.2d 651, 653 (10th Cir. 1987) (per curiam)).

198. Lowe v. Raemisch, No. 15-cv-01830-RBJ, 2016 WL 4091175, at *3 (D. Colo. July 18, 2016), *rev'd*, 864 F.3d 1205 (10th Cir. 2017), *petition for cert. filed*, No. 17-289 (U.S. Mar. 9, 2018).

199. *Lowe*, 864 F.3d at 1207 ("[T]he two officials would enjoy qualified immunity unless the denial of outdoor exercise for two years and one month had violated a clearly established constitutional right. In our view, the right was not clearly established.").

2. The *Lowe* Court Applies the More Generalized "Fair Warning" Inquiry

Second, assuming that the court followed the mandatory protocol and concluded that Lowe had alleged a constitutional violation, the Tenth Circuit would next analyze whether the law was clearly established such that a reasonable official would understand that the conduct violated that right. Judge Bacharach cites the *Hope*'s "fair warning" formula, but then reverts to a much stricter standard asking whether the "legality of the conduct is undebatable."[200] The court further conflates *Hope* by explaining that the Tenth Circuit has not squarely addressed this issue. The court then concludes that because the legality of the conduct is debatable, the law is not clearly established.[201]

But *Hope*'s fair warning standard does not require the legality to be completely undebatable, rather it dictates that government officials are not entitled to qualified immunity—even in novel factual circumstances—when officials have "fair warning" that their conduct violated a constitutional right. Without even leaving the circuit, the officials in *Lowe* had fair warning that their conduct violated a constitutional right. For example, in *Anderson v. Colorado*,[202] the District of Colorado found a constitutional violation based on very similar prison conditions as those faced by Lowe.[203] Additionally, in *Fogle v. Pierson*,[204] the Tenth Circuit concluded that the denial of outdoor exercise suggested deliberate indifference, a violation of the Eighth Amendment.[205] Finally, in *Housley v. Dodson*,[206] the Tenth Circuit concluded that denial of out-of-cell exercise could constitute a violation of the Eighth Amendment.[207] Even just limiting the inquiry to within the Tenth Circuit, an official—even in this novel factual circumstance—would have had "fair warning" that their conduct violated Lowe's constitutional rights. In short, applying *Hope*'s "fair warning" idea in *Lowe* would likely have led the court to a different outcome.

Additionally, let us assume that there was a uniform, circuit-wide approach for determining whether a right was clearly established.[208] This approach would permit courts to look outside the bounds of local circuit or Supreme Court precedent. Again, this likely would have led to a different outcome. For example, in *Young v. Ericksen*,[209] the Eastern Dis-

200. *Id.* at 1210–11.
201. *Id.* at 1211.
202. 887 F. Supp. 2d 1133 (D. Colo. 2012).
203. *See id.* at 1138, 1157 (holding that it was unconstitutional to deny a prison inmate outdoor exercise for twelve years).
204. 435 F.3d 1252 (10th Cir. 2006).
205. *Id.* at 1260.
206. 41 F.3d 597 (10th Cir. 1994).
207. *Id.* at 600.
208. *See* discussion *supra* Section III.B.
209. 758 F. Supp. 2d 777 (E.D. Wis. 2010).

trict of Wisconsin denied an official's qualified immunity defense, concluding that denying an inmate outdoor exercise for almost an entire year without any penological reason for doing so was an Eighth Amendment violation.[210] Similarly, in *Antonetti v. Skolnik*,[211] the District of Nevada denied an official qualified immunity, holding that an inmate who was limited to five hours of outdoor exercise per week, despite a regulation providing that he should get at least seven, had pled a colorable constitutional argument.[212] These cases, in conjunction with others,[213] are far less egregious than the two-year blanket ban in *Lowe* and all suggest that the right was clearly established. However, the Tenth Circuit limited "the clarity of the constitutional right . . . on our precedents' similarity of conditions" and rejected any notion that unpublished cases could support that the right was clearly established.[214] In doing so, the court limited the law that Lowe could rely on and constrained what law future plaintiffs can rely on. A less constrained approach is needed to ensure that citizens' constitutional rights are adequately protected.

3. Assume the *Lowe* Court Did Not Apply the Collateral Order Doctrine

Finally, assume that the collateral order doctrine did not apply to qualified immunity decisions. In this scenario, the case would have proceeded, and Lowe would have had the opportunity to present the merits of his case. This does not mean that Lowe would have necessarily prevailed, but it does mean that Lowe would have gotten his day in court. However, because the collateral order doctrine did apply, the officials had the ability to immediately appeal. And despite the district court's finding that the officials had likely violated Lowe's constitutional rights, the officials had a second level of review before discovery was ever conducted. A more just, efficient approach would be to only allow appeals after the final judgment is entered, excluding qualified immunity from the collateral order doctrine.

CONCLUSION

The qualified immunity doctrine has developed through judicial creation over the course of the last half century. The doctrine was originally intended to balance the rights of individual plaintiffs against government officials. Unfortunately, the balance is no longer equal, and qualified immunity presents an almost insurmountable bar that plaintiffs wishing to vindicate their constitutional rights have to overcome. To

210. *Id.* at 785–86.
211. 748 F. Supp. 2d 1201 (D. Nev. 2010).
212. *Id.* at 1209.
213. *See, e.g.*, Norwood v. Woodford, 661 F. Supp. 2d 1148, 1155–56 (S.D. Cal. 2009) (stating that deprivation of outdoor exercise for five weeks could violate the Eighth Amendment).
214. Lowe v. Raemisch, 864 F.3d 1205, 1212 n.9 (2017), *petition for cert. filed*, No. 17-289 (U.S. Mar. 9, 2018).

ensure that plaintiffs have an adequate opportunity to hold government officials accountable, changes to the qualified immunity doctrine are necessary. This Comment argues that all three proposed changes should be adopted, however, adopting any of them independently would help lower the exceedingly high bar that the qualified immunity defense currently imposes on plaintiffs. Admittedly, no fix is perfect, and there will be drawbacks to any approach, but the current approach is simply not working. A more balanced test is needed to ensure that plaintiffs bringing legitimate constitutional claims against government officials stand a fighting chance and do not lose before they ever argue the merits of their claim.

Zach Lass[*]

* J.D. Candidate 2019, University of Denver Sturm College of Law. I would like to thank the members of *Denver Law Review* for their tireless work and feedback on this Article. I would also like to thank the professors at Sturm College of Law for their help and input throughout the writing process.