

Qualified Immunity and Constitutional-Norm Generation in the Post-*Saucier* Era: “Clearly Establishing” the Law Through Civilian Oversight of Police*

Introduction

Civil rights litigation under 42 U.S.C. § 1983 constitutes one of the many tools of police regulation. Along with so-called police professionalism,¹ internal and external oversight, application of the exclusionary rule to evidence seized unconstitutionally for use in criminal proceedings, “pattern or practice” litigation under 42 U.S.C. § 14141, and criminal prosecutions of officers accused of unlawful behavior, § 1983 litigation serves to deter and redress police misconduct.² However, the unique advantage of § 1983 suits in police regulation—the potential to recover money damages from the offending officer—is also the source of its greatest procedural hurdle: Overcoming the officer’s qualified immunity from suit.³ Indeed, the doctrine of qualified immunity is the product of a concerted effort by the Supreme Court to strike a balance between recompense of constitutional violations and protection of government agents whose official duties expose them to civil liability.⁴

Consistent with this aim, the Supreme Court’s qualified immunity jurisprudence is animated principally by two broad considerations: Notice

* I would like to thank Jennifer Laurin for her guidance and her insightful comments throughout the writing process. My thanks also to the staff of the Civilian Complaint Review Board, whose tireless work inspired this Note and with whom I shared the distinct honor of serving the City of New York from 2007 to 2011. In addition, I owe a debt of tremendous gratitude to the staff and editors of the *Texas Law Review*—in particular, Dina McKenney, Elizabeth Johnson, Brent Rubin, Kelsie Krueger, and Spencer Patton—for their diligent efforts to prepare this Note for publication. Finally, a heartfelt thank you to my partner, Polina Novozhenets, and my friends and family for their unwavering love and support.

1. See Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 11–14 (2003) (chronicling the emergence of the “police professionalism” movement and identifying as its hallmark the use of internal management techniques to regulate police conduct).

2. See generally Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2009) (advocating for “proactive” reform of police departments through targeted use of § 14141 litigation); Stephen Clarke, Note, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How it Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 4–9 (2009) (surveying the different mechanisms of police oversight and describing the resulting “oversight gap” that civilian oversight bodies are designed to fill).

3. See James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1611–18 (2011) (discussing the origin and evolution of qualified immunity doctrine).

4. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

and fairness. As Justice Powell wrote in *Davis v. Scherer*,⁵ qualified immunity “recognizes that officials can act without fear of harassing litigation only if they *reasonably can anticipate* when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated.”⁶ The doctrine accommodates “reasonable mistakes . . . as to the legal constraints on particular police conduct” and “ensure[s] that before they are subjected to suit, officers are *on notice* their conduct is unlawful.”⁷ As the doctrine has developed, the Court has clarified that “the object of the ‘clearly established’ immunity standard is not different from that of ‘fair warning’ as it relates to law ‘made specific’ for the purpose of validly applying [18 U.S.C.] § 242.”⁸ In fact, officers named in suits under § 1983 “have the same right to fair notice” as defendants charged with federal civil rights violations under § 242.⁹ Implicit in these formulations, then, is a third consideration, linked closely to both notice and fairness: Culpability. In an oft-quoted opinion, issued only four years after the Court first extended qualified immunity to officials sued under § 1983,¹⁰ Justice White asserted that “[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”¹¹

In its classic formulation, qualified immunity provides that “government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹² Correspondingly, the Supreme Court has prescribed a two-pronged analysis that asks whether the claimant’s allegations, if true, evince a violation of her constitutional rights and whether the constitutional rights in question were “clearly established” at the time of the acts giving rise to the suit.¹³

While the Supreme Court initially mandated no specific order for this analysis, it long expressed a preference for a “merits-first approach”¹⁴ and it

5. 468 U.S. 183 (1984).

6. *Id.* at 195 (emphasis added).

7. *Saucier v. Katz*, 533 U.S. 194, 205, 206 (2001) (emphasis added).

8. *United States v. Lanier*, 520 U.S. 259, 270 (1997).

9. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

10. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

11. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

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

13. *E.g.*, *Conn v. Gabbert*, 526 U.S. 286, 290 (1999).

14. A merits-first approach calls for the resolution of the constitutional-violation question before the clearly-established-right question. *See, e.g.*, *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (“[T]he better approach to resolving cases [of] qualified immunity . . . is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all[.] . . . then [to] ask whether the right allegedly implicated was clearly established at the time of the events in question.”); *cf. Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (“A necessary concomitant to

transformed this preference into a constitutional imperative in *Saucier v. Katz*.¹⁵ This “order of battle,”¹⁶ the Court reasoned, would ensure that constitutional law—and with it, § 1983 liability for violations of once-novel constitutional rights—would continue to evolve.¹⁷ While the Court departed from the compulsory *Saucier* regime eight years later in *Pearson v. Callahan*,¹⁸ Justice Alito, writing for the unanimous *Pearson* court, reaffirmed the value of merits-first analysis.¹⁹ Among the reasons Justice Alito cited for the continued vitality of merits adjudication was the fact that “the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.”²⁰ In this way, the Court signaled that constitutional articulation remains an important goal of qualified immunity doctrine and constitutional tort law.

As some scholars have suggested, the obligatory *Saucier* analytical sequence played a critical role in the development of constitutional norms.²¹

the determination of whether the constitutional right asserted by a plaintiff is ‘clearly established’ at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.”).

15. 533 U.S. 194, 201 (2001).

16. *Pearson v. Callahan*, 555 U.S. 223, 234 (2009); see also, e.g., John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115 (adopting the Court’s phrase); Michael L. Wells, *The “Order-of-Battle” in Constitutional Litigation*, 60 SMU L. REV. 1539 (2007) (same).

17. *Saucier*, 553 U.S. at 201; see also *Lewis*, 523 U.S. at 841 n.5 (“What is more significant is that if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals.”).

18. 555 U.S. 223, 227 (2009).

19. See *id.* at 236 (“[W]hile the sequence set forth [*in Saucier*] is often appropriate, it should no longer be regarded as mandatory.”).

20. *Id.*

21. See, e.g., Paul W. Hughes, *Not a Failed Experiment: Wilson–Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 404 (2009) (reporting the results of an empirical study of judicial decisions before and after *Wilson* and *Saucier* and finding that constitutional-rights articulation increased substantially under mandatory sequencing); Jeffries, *supra* note 16, at 120 (drawing attention to “the degradation of constitutional rights that may result when *Saucier* is not followed and constitutional tort claims are resolved solely on grounds of qualified immunity”); Michael T. Kirkpatrick & Joshua Matz, *Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from Saucier to Camreta (and Beyond)*, 80 FORDHAM L. REV. 643, 644–45 (2011) (mounting a defense of *Saucier* and *Pearson* constitutional-rights articulation and advancing an argument for why the alternative vehicles of constitutional-norm generation are inadequate in comparison); Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of Pearson v. Callahan*, 62 STAN. L. REV. 523, 539 (2010) (contending that “mandatory sequencing has in fact resulted in a statistically significant increase in pro-plaintiff constitutional rights”). But see Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 670 (2009) (finding, pursuant to an empirical analysis of court decisions both before and after *Siegert* and *Saucier*, that “[s]equencing leads to the articulation of more constitutional

In fact, there is reason to believe that the alternative avenues of rights articulation routinely cited by opponents of *Saucier*—suppression, municipal liability, and the other tools of police regulation listed above²²—will not fill the void created by *Pearson*.²³ The principal reason for this disparity, as Justice Alito suggested in *Pearson*, is the fact that certain constitutional claims are unlikely to see litigation outside of the qualified immunity context—for example, Fourth Amendment searches and seizures not resulting in criminal prosecution²⁴ and incidents involving excessive force.²⁵ Logically, as the number of cases expressly recognizing constitutional rights decreases, the number of § 1983 suits that can be dismissed on clearly established grounds increases. This dilemma is especially pronounced in the Fourth Amendment context, as the Court has specified that the clearly established inquiry at issue is highly fact-bound.²⁶

Although the Supreme Court has never expressly delineated the sources of law that can render a constitutional right clearly established, its decisions have relied on a wide range of sources beyond decisional law. In particular, the Court has carved out space for internal agency policies and the findings of nonjudicial bodies to support a finding of clearly established law.²⁷ Following the Court’s lead, lower federal courts have cited to a variety of forms of nondecisional law that fall within the ambit of internal policies and nonjudicial bodies.²⁸ A significant source of such law, yet one that has largely escaped the attention of commentators,²⁹ is the work of police

law, but not the expansion of constitutional rights,” as courts required to reach the merits increasingly found no constitutional violations).

22. *E.g.*, *Camreta v. Greene*, 131 S. Ct. 2020, 2044 (2011) (Kennedy, J., dissenting).

23. *See infra* section I(B)(3).

24. Kirkpatrick & Matz, *supra* note 21, at 674–75.

25. *See, e.g.*, *City of L.A. v. Lyons*, 461 U.S. 95, 111–13 (1983) (denying standing to a plaintiff who sought an injunction against the City barring the use of chokeholds by police, on the ground that the plaintiff failed to show “irreparable injury,” namely, “any real or immediate threat that the plaintiff will be wronged again”).

26. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (“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.”); *id.* at 641 (“It follows from what we have said that the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials.”).

27. *See infra* subpart II(B).

28. *See infra* subpart II(B).

29. Commentators surveying the sources of clearly established law have overwhelmingly focused on decisional law. *See, e.g.*, Karen M. Blum, *The Qualified Immunity Defense: What’s “Clearly Established” and What’s Not*, 24 *TOURO L. REV.* 501, 514–22 (2008) (discussing the standards for demonstrating clearly established law without reference to nondecisional law); Pamela S. Karlan, Essay, *The Paradoxical Structure of Constitutional Litigation*, 75 *FORDHAM L. REV.* 1913, 1922–26 (2007) (same); Jeffrey D. May, *Determining the Reach of Qualified Immunity in Excessive Force Litigation: When Is the Law “Clearly Established?”*, 35 *AM. J. TRIAL ADVOC.* 585, 598–99 (2012) (same); Michael S. Catlett, Note, *Clearly Not Established:*

oversight bodies—in particular, civilian external investigatory bodies like the New York Civilian Complaint Review Board (CCRB).³⁰

In the course of investigating discrete incidents of alleged police misconduct, civilian external investigatory bodies engage in fact-finding and identification and application of governing legal standards in much the same way as a court assesses a motion to suppress evidence or a § 1983 claim alleging a deprivation of constitutional rights.³¹ More importantly, these bodies constantly encounter novel factual scenarios, particularly ones implicating the Fourth Amendment,³² such that their findings epitomize the sort of fact-specific guidance endorsed by the Court.³³ Further, to the extent that they are empowered to make policy recommendations to the police departments they oversee, civilian external investigatory bodies also resemble compliance agencies like the U.S. Department of Justice (DOJ), whose advisory reports have helped to provide the sort of “notice” required to overcome an official’s qualified immunity.³⁴ Consequently, the Court’s qualified immunity jurisprudence appears to permit the findings of such bodies to contribute to the clearly-established-law analysis. At present, however, the work of civilian external investigatory bodies—work that produces a wealth of valuable information and often confronts

Decisional Law and the Qualified Immunity Doctrine, 47 ARIZ. L. REV. 1031, 1041–50 (2005) (same). *But see* Amanda K. Eaton, Note, *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, 705–06 (2004) (considering the role that regulations from administrative agencies could occupy in a proposed “reasonableness approach” to ascertaining clearly established law); Amelia A. Friedman, Note, *Qualified Immunity in the Fifth Circuit: Identifying the “Obvious” Hole in Clearly Established Law*, 90 TEXAS L. REV. 1283, 1290 (2012) (observing that “[c]ircuit courts also divide on the issue of when, if ever, courts may consider policies and regulations as sources of clearly established law”).

30. Scholars have identified several different models of civilian oversight bodies: Civilian in-house, civilian external supervisory, civilian external investigatory, and civilian auditor. Clarke, *supra* note 2, at 11 & n.54. This Note takes as its focus the civilian external investigatory model, with the CCRB as an exemplar, for the reasons outlined *infra* in subparts II(A) and II(C).

31. *See infra* subpart II(C).

32. *See, e.g.*, N.Y.C. CIVILIAN COMPLAINT REVIEW BD., 2013 REPORT: 20 YEARS OF INDEPENDENT INVESTIGATIONS 6–7 (2014) [hereinafter 2013 CCRB ANNUAL REPORT], available at http://www.nyc.gov/html/ccrb/downloads/pdf/CCRB%20Annual_2013.pdf (indicating that 58% of all complaints received by the CCRB and categorized as falling within the agency’s jurisdiction in 2012 contained at least one abuse-of-authority allegation and specifying that “allegations of stop, question, frisk and/or search make up the largest portion of all allegations” in the “abuse of authority” category); N.Y.C. CIVILIAN COMPLAINT REVIEW BD., 2012 ANNUAL REPORT 5–6 (2013) [hereinafter 2012 CCRB ANNUAL REPORT], available at http://www.nyc.gov/html/ccrb/downloads/pdf/ccrb_annual_2012.pdf (placing the 2011 year-end proportion of abuse-of-authority allegations at 60% of all qualifying complaints and confirming the predominance of stop, question, frisk and/or search allegations in the abuse-of-authority category); N.Y.C. CIVILIAN COMPLAINT REVIEW BD., 2011 ANNUAL REPORT 6 (2012) [hereinafter 2011 CCRB ANNUAL REPORT], available at <http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbann2011.pdf> (calculating the 2011 year-end proportion of abuse-of-authority allegations at 61% of all qualifying complaints).

33. *See supra* note 26 and accompanying text.

34. *See infra* subpart II(B).

constitutional questions that might otherwise escape formal adjudication—is largely divorced from that of the courts.³⁵ This state of affairs represents a costly missed opportunity, especially in the wake of *Pearson*.

Accordingly, this Note argues that the work of civilian external investigatory oversight bodies can serve as at least a partial antidote to the constitutional stasis threatened by the end of mandatory *Saucier* sequencing. In particular, this Note advocates for the investigative findings and policy recommendations of agencies like the CCRB to be given at least the same weight as internal police regulations and advisory reports by external compliance agencies, and possibly as much weight as regional appellate court opinions, in the qualified immunity analysis. Not only is this proposal consistent with the purposes of § 1983 litigation and qualified immunity doctrine, but the work it envisions is already taking place at oversight boards around the nation. The sole structural changes necessary to optimally implement this proposal relate to the formalization and publication of the agencies' findings and recommendations.

Parts I and II provide the theoretical framework for this proposal: Part I explains the purpose and the structure of constitutional civil rights litigation and highlights the post-*Saucier* dilemma of constitutional stagnation. Part II describes the process of constitutional-norm generation occurring in civilian external investigatory bodies, taking the CCRB as an exemplar, and explores the jurisprudential foundations for treating the findings of oversight bodies as a source of clearly established constitutional law. Part III sketches the proposal described above, arguing in favor of utilizing civilian external investigatory oversight findings to promote the development of constitutional rights and overcome the high bar set by the Supreme Court to proving clearly established law in a § 1983 claim. This Part additionally anticipates and responds to a number of critiques and concludes by cautioning that while this proposal represents an important step toward strengthening police regulation and constitutional articulation, it is only one part of a larger regulatory framework.

I. Constitutional Civil Rights Litigation and the Risk of Constitutional Stasis

In order to contextualize the proposal advocated by this Note, it is necessary to first understand the policies underlying § 1983 litigation and qualified immunity, the mechanics of constitutional tort adjudication, and the threat to constitutional clarity posed by the disavowal of mandatory *Saucier* sequencing.

35. See *infra* section II(C)(4).

A. *The Framework of § 1983 Litigation*

1. *The Structure and Underlying Purposes of § 1983 Litigation.*— Congress originally passed 42 U.S.C. § 1983 as § 1 of the Ku Klux Act of April 20, 1871, with the express purpose of enforcing the Fourteenth Amendment.³⁶ The statute creates a private cause of action against any person “who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”³⁷

Since first recognizing a private cause of action against state police in the 1961 case *Monroe v. Pape*,³⁸ the Court has elaborated on the functions of § 1983 litigation, and it is now settled that § 1983 serves three primary purposes: Redress of unconstitutional conduct by state actors, deterrence of such conduct, and vindication of constitutional rights.³⁹ Critically, § 1983 actions also reach conduct that other mechanisms of police regulation do not—namely, Fourth Amendment events that fail to discover incriminating evidence,⁴⁰ claims of excessive force that do not rise to the level of crimes,⁴¹ and, most alarmingly, “searches and arrests not aimed at successful prosecution, but rather at the assertion of police authority or . . . police harassment.”⁴²

To state a claim for relief under § 1983, a plaintiff must allege that the defendant violated her constitutional rights while acting “under color” of state law.⁴³ Section 1983 liability extends to individual state officials as well as municipal governments and their departments, though the requirements for assessing liability on individuals and municipalities

36. *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

37. 42 U.S.C. § 1983 (2006).

38. 365 U.S. 167, 169, 187 (1961).

39. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (“When government officials abuse their offices, ‘action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.’” (alteration in original) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)); Karlan, *supra* note 29, at 1918 (“Damages litigation offers an opportunity not only to compensate individuals who have been injured by unconstitutional conduct, but to refine constitutional law as well.”); Pfander, *supra* note 3, at 1611–12 (“In both [*Bivens* and § 1983 cases], the right of action confronts government officers with personal liability for violating the constitutional rights of the plaintiff[.] . . . thus promis[ing] to deter official wrongdoing and to compensate victims of unconstitutional conduct.” (footnote omitted)).

40. *See supra* note 24 and accompanying text.

41. *See supra* note 25 and accompanying text.

42. Jeffries, *supra* note 16, at 136.

43. 42 U.S.C. § 1983 (2006); *see also* Karlan, *supra* note 29, at 1919 (“[T]he only reason the individual defendant *can* be sued is because he’s acting under color of state law . . .”).

differ.⁴⁴ While a plaintiff may seek money damages or equitable relief under § 1983,⁴⁵ if she elects to pursue damages, she must overcome the official-defendant's affirmative defense of qualified immunity.⁴⁶

2. *The Structure and Underlying Purposes of Qualified Immunity.*—Qualified immunity is a common law doctrine designed to protect government employees from the burdens of suits arising from actions taken in their official capacity.⁴⁷ Consistent with its purpose of ensuring that “‘insubstantial claims’ against government officials be resolved prior to discovery and on summary judgment if possible,”⁴⁸ the doctrine confers immunity from suit, rather than serving as a mere defense to liability.⁴⁹ However, in contrast with the absolute immunity granted to legislators, judges, and certain members of the Executive Branch,⁵⁰ the doctrine's protection is limited, reflecting the Supreme Court's sensitivity to the tension between securing redress of constitutional violations and formulating optimal incentives for government agents.⁵¹ Accordingly, in order to defeat a state officer's claim of qualified immunity and impose individual liability under § 1983, a court must find *both* that (1) the plaintiff's allegations, if true, evince the violation of a constitutional right *and* (2) the constitutional right in question was clearly established at the time of the official's act.⁵²

44. Karlan, *supra* note 29, at 1919. Notably, municipalities cannot be held liable on a theory of respondeat superior; rather, the plaintiff must establish that the municipality caused her harm through the implementation of an unconstitutional policy or custom. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). This can be an onerous showing. *See, e.g.*, Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1758–63 (1989) (drawing particular attention to the high burden of establishing “final policymaking authority” and causation).

45. 42 U.S.C. § 1983; *see also* *Mitchum v. Foster*, 407 U.S. 225, 242–43 (1972) (asserting that “Congress plainly authorized the federal courts to issue injunctions in § 1983 actions” and holding that § 1983 “is an Act of Congress that falls within the ‘expressly authorized’ exception of [the federal anti-injunction statute, 28 U.S.C. § 2283]”).

46. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 818 (1982).

47. *Id.* at 814.

48. *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987) (quoting *Harlow*, 457 U.S. at 818–19).

49. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

50. *Harlow*, 457 U.S. at 807.

51. *Id.* at 807, 814; *see also* *Pearson*, 555 U.S. at 231 (“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”); *Anderson*, 483 U.S. at 638 (“[P]ermitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.”).

52. *E.g.*, *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

Much to the chagrin of courts and commentators, the Court has never formulated a definitive set of criteria for determining when a constitutional right is clearly established.⁵³ In fact, in *Harlow v. Fitzgerald*,⁵⁴ the foundation of modern qualified immunity jurisprudence, the Court conspicuously declined to define clearly established law.⁵⁵ In the thirty years since *Harlow*, the Court has provided some guidance to the lower courts, but it has largely taken the form of general principles of adjudication. For instance, the Court held in *Anderson v. Creighton*⁵⁶ that the right alleged to have been violated by a government actor “must have been clearly established in a . . . particularized . . . sense,” such that “in the light of pre-existing law the unlawfulness must be apparent”; “[t]he contours of the right,” the Court explained, “must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”⁵⁷ The Court elaborated on the *Anderson* formulation in *United States v. Lanier*⁵⁸ and *Hope v. Pelzer*,⁵⁹ declaring that “fundamentally” or “materially” similar cases are not necessary to render the law clearly established.⁶⁰ Similarly, in *Wilson v. Layne*,⁶¹ the Court suggested several sources that might clearly establish the law—Supreme Court decisions, controlling authority in the jurisdiction of the court hearing the case, and “a consensus of cases of persuasive authority”⁶²—but did so only in the service of pointing out the deficiencies in the plaintiffs’ case.⁶³ As a result, the circuit courts of appeals have devised a number of different approaches to the use of persuasive decisional law in the clearly established inquiry.⁶⁴

Notwithstanding the obliqueness of the Court’s counsel on this topic, its guiding principle is “fair notice”—adequate warning to state actors that their conduct will expose them to individual liability for violating constitutional rights.⁶⁵ As a practical matter, however, mere “notice” does not reflect the

53. See generally Blum, *supra* note 29 (describing the Court’s inconsistent case law on the subject); Catlett, *supra* note 29 (same).

54. 457 U.S. 800 (1982).

55. *Id.* at 818 n.32 (“[W]e need not define here the circumstances under which ‘the state of the law’ should be ‘evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.’” (quoting *Proconier v. Navarette*, 434 U.S. 555, 565 (1978))).

56. 483 U.S. 635 (1987).

57. *Id.* at 640 (internal quotation marks omitted). As explained above, the *Anderson* Court was specifically addressing Fourth Amendment rights, signaling that the elaboration of such rights is a highly fact-bound endeavor. See *supra* note 26 and accompanying text.

58. 520 U.S. 259 (1997).

59. 536 U.S. 730 (2002).

60. *Id.* at 741; *Lanier*, 520 U.S. at 269–70.

61. 526 U.S. 603 (1999).

62. *Id.* at 616–17.

63. *Id.* at 617.

64. Blum, *supra* note 29, at 515–22; Catlett, *supra* note 29.

65. See, e.g., *Hope*, 536 U.S. at 739 (“Officers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal

stringency of the Court's approach: Considerations of fairness and culpability have long inflected the Court's qualified immunity holdings, as evidenced by the parallels the Court has drawn between § 1983 and its criminal counterpart, § 242, as well as the emphasis it has placed on the shelter afforded by the doctrine to "all but the plainly incompetent or those who knowingly violate the law."⁶⁶ Indeed, when Justice Scalia selectively quoted *Anderson* in *Ashcroft v. al-Kidd*,⁶⁷ transforming "a reasonable official" into "every reasonable official,"⁶⁸ no Justice questioned this formulation.⁶⁹

Early iterations of the *Harlow* test permitted the assessment of the two prongs in any order.⁷⁰ Despite the Court's intimated preference for merits

offense defined in 18 U.S.C. § 242."); *Lanier*, 520 U.S. at 270–71 (analogizing § 1983 civil liability to § 242 criminal liability and referring repeatedly to the notion of "fair warning"); *Anderson v. Creighton*, 483 U.S. 635, 638–40 (1987) (describing the foundations of qualified immunity doctrine, with a particular emphasis on officials' "reasonable" expectations and understandings of the law); Erwin Chemerinsky & Karen M. Blum, *Fourth Amendment Stops, Arrests and Searches in the Context of Qualified Immunity*, 25 *TOURO L. REV.* 781, 789–90 (2009) (interpreting the Court's use of the phrases "fair notice" and "fair warning" in *Hope* as suggesting that "[f]air warning is all you need").

66. See *supra* notes 8–11 and accompanying text.

67. 131 S. Ct. 2074 (2011).

68. Compare *id.* at 2083 ("A Government 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 understood that what he is doing violates that right.'" (alterations in original) (emphasis added) (quoting *Anderson*, 483 U.S. at 640)), with *Anderson*, 483 U.S. at 640 ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." (emphasis added)).

69. Justice Scalia's opinion for the Court was joined by Justices Roberts, Kennedy, Thomas, and Alito. *Al-Kidd*, 131 S. Ct. at 2078. Justices Kennedy, Ginsburg, and Sotomayor each wrote concurring opinions, none of which mentioned Justice Scalia's misreading of *Anderson*. See *id.* at 2085–90. Justice Kagan recused herself from the case. *Id.* at 2078. Of course, commentators were quick to detect the heightened burden Justice Scalia's rhetoric portended. See, e.g., Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633, 654 (2013) ("More significantly, in *Ashcroft v. al-Kidd*, the Supreme Court recently raised the bar for plaintiffs to overcome the clearly-established-law hurdle. The majority opinion, written by Justice Scalia, added the 'every reasonable' phrase to the clearly established law test, surreptitiously changing the game when nobody was looking." (footnotes omitted)). Pondering the Justices' apparent passivity, Professor Chemerinsky surmised that "[p]erhaps . . . Justice Scalia did not call attention to the shift and the other Justices simply did not notice the change in the law." *Id.* at 656. Nevertheless, as Professor Blum observed, even as the lower courts "have taken note of the Supreme Court's conflicting messages and the current Court's raising of the qualified immunity bar," *id.* at 655, individual judges have recognized that *al-Kidd* did not overrule the *Hope* line of cases, *id.* 656 & n.168 (citing *Morgan v. Swanson*, 659 F.3d 359, 393 (5th Cir. 2011) (Dennis, J., specially concurring in part)).

70. See, e.g., *Davis v. Scherer*, 468 U.S. 183, 197 (1984) ("A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue."); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred."); Hughes, *supra* note 21, at 408 ("Most courts [during the pre-*Saucier* era] felt free to choose either to address the substantive constitutional

adjudication,⁷¹ lower courts quickly learned that the two prongs were not equally easy to satisfy.⁷² Logically, an affirmative finding on the clearly established prong could compel a like conclusion with regard to the constitutional violation prong, while the inverse would not necessarily follow. Correspondingly, a court confronted with conflicting lines of precedent on the existence of a particular constitutional right could either engage in the thorny task of articulating a constitutional norm or summarily grant qualified immunity on the ground that the split of authority itself evidenced that the law was not clearly established.⁷³ Whether motivated by considerations of expediency or scrupulous adherence to the doctrine of constitutional avoidance, courts routinely avoided the merits of § 1983 claims.⁷⁴

Cognizant of the risk that repeated invocations of qualified immunity might “stunt the development of the law and allow government officials to violate constitutional rights with impunity,”⁷⁵ the Court fixed the terms of qualified immunity analysis in *Saucier v. Katz*,⁷⁶ launching the opening salvo in the war over the “order of battle” in constitutional tort law.

B. *The “Order of Battle” in Qualified Immunity Analysis*

1. *Diagnosing the Problem: Saucier v. Katz.*—Confronted with the erroneous denial of qualified immunity on a federal-excessive-force claim,

question at the outset, or to proceed first to the ‘clearly established’ prong of the qualified immunity analysis.”).

71. See *supra* note 14 and accompanying text.

72. See, e.g., Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 141–42 (contending that “courts can usually determine whether any right alleged is clearly established without defining the contours of the right itself or even determining whether the alleged right exists”); Pierre N. Leval, Madison Lecture, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1278 n.86 (2006) (“It is often immediately apparent that the claimed right was not clearly established at the time of the defendant’s conduct, while it may be very difficult to determine whether the claimed right should be found to exist.”).

73. See Pfander, *supra* note 3, at 1602 (“In cases of legal uncertainty, courts will often prefer to avoid the constitutional issue and dispose of the case on the ground that the right in question was not established with the requisite clarity.”).

74. See, e.g., Beermann, *supra* note 72, at 149 (explaining that “when a damages suit was the only realistic way to raise a constitutional issue[,] . . . the court would not reach the merits of the constitutional claim if the right alleged was not clearly established at the time of the challenged conduct”); Hughes, *supra* note 21, at 418–29 (finding, incident to an empirical study of all circuit court opinions addressing qualified immunity in 1988, 1995, and 2005, that *Saucier* sequencing dramatically increased the rate of both positive and negative constitutional articulation); Sobolski & Steinberg, *supra* note 21, at 556 (reporting that, empirically, “*Saucier*’s mandatory sequencing regime makes courts less likely to avoid addressing the constitutional issue”); cf. Wells, *supra* note 16, at 1547–54 (discussing the policy of constitutional avoidance in the qualified immunity context).

75. Beermann, *supra* note 72, at 149.

76. 533 U.S. 194, 201 (2001).

the Supreme Court in *Saucier* set forth a rigid order of analysis for the dual prongs of qualified immunity.⁷⁷ Rejecting the Ninth Circuit's analytical framework, which called for a preliminary decision on the clearly established prong, the Court declared that "the requisites of a qualified immunity defense must be considered in proper sequence": "[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals."⁷⁸

The Court cited several considerations in support of this new bright-line rule. First, insofar as qualified immunity constitutes "an *immunity from suit* rather than a mere defense to liability," proper application of the privilege demands a conclusive resolution of the matter "early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive."⁷⁹ Second, the assessment of whether a constitutional right was violated "is the process for the law's elaboration from case to case"; indeed, "[t]he law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."⁸⁰ Third, and relatedly, "the procedure permits courts in appropriate cases to elaborate the constitutional right with greater degrees of specificity."⁸¹ With only one concurring opinion joined by two Justices and one opinion concurring in part and dissenting in part—an opinion exactly twenty-two words long⁸²—the Court spoke with a clear voice in fixing the analytical structure of qualified immunity jurisprudence.

2. *Critiques of the Mandatory Saucier Regime.*—Despite the Court's near-unanimity in adopting the *Saucier* rule, dissenting views quickly emerged. In April 2004, less than three years after *Saucier*, a total of five Justices joined opinions respecting the denial of certiorari in *Bunting v. Mellen*⁸³ that overtly questioned the wisdom of mandatory sequencing.⁸⁴

77. See *id.* at 199–201.

78. *Id.* at 199–200.

79. *Id.* at 200–01 (internal quotation marks omitted).

80. *Id.* at 201.

81. *Id.* at 207.

82. The opinion, written by Justice Souter, reads in its entirety, "I join Parts I and II of the Court's opinion, but would remand the case for application of the qualified immunity standard." *Id.* at 217 (Souter, J., concurring in part and dissenting in part). It merits note that Part II established the fixed sequencing regime. *Id.* at 200–01 (majority opinion).

83. 541 U.S. 1019 (2004) (order denying certiorari).

84. See *id.* at 1019 (Stevens, J., respecting denial of certiorari) (characterizing, in an opinion joined by Justices Ginsburg and Breyer, *Saucier* sequencing as "an unwise judge-made rule"); *id.* at 1023–24 (Scalia, J., dissenting from denial of certiorari) (contending, in an opinion joined by Chief Justice Rehnquist, that the *Saucier* rule "should not apply where a favorable judgment on

Eight months later, Justice Breyer penned a concurring opinion in *Brosseau v. Haugen*,⁸⁵ joined by Justices Scalia and Ginsburg, in which he urged the Court to reconsider *Saucier*.⁸⁶ Justice Breyer continued to advocate for the reversal of *Saucier* in 2007, when the Court heard both *Scott v. Harris*⁸⁷ and *Morse v. Frederick*,⁸⁸ punctuating his opinion in the latter case with the declaration, “I would end the failed *Saucier* experiment now.”⁸⁹

Justice Breyer’s criticisms were largely representative of those expressed by lower courts and commentators. First, *Saucier*’s rigid order of analysis conflicts with the settled principle of constitutional avoidance, which dictates that Courts avoid the adjudication of constitutional issues when narrower grounds for decision are available.⁹⁰ Second, decisions rendered under the *Saucier* structure afford precedential weight to assertions that by definition qualify as dicta: A finding of a constitutional violation under *Saucier* step one, for instance, necessarily becomes dictum when the court grants qualified immunity on the ground that the law was not clearly established under *Saucier* step two.⁹¹ Third, critics highlighted two potential deficiencies in the actual decisions produced under *Saucier* sequencing: Not only was there a risk of strategic preparation by parties who rationally anticipated victory on clearly established grounds, resulting in suboptimal briefing on the constitutional merits,⁹² but courts obligated to reach the merits often produced highly fact-bound constitutional decisions that were of limited precedential value.⁹³ Finally, lower courts had devised a number of ways to avoid *Saucier*’s strictures, effectively treating the decision as advisory.⁹⁴ Against this background, the Court in 2008⁹⁵ agreed

qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination” and observing that “[t]his problem has attracted the attention of lower courts”).

85. 543 U.S. 194 (2004) (per curiam).

86. *Id.* at 201–02 (Breyer, J., concurring).

87. 550 U.S. 372, 387 (2007) (Breyer, J., concurring).

88. 551 U.S. 393, 425, 430 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part).

89. *Id.* at 432.

90. *Pearson v. Callahan*, 555 U.S. 223, 241 (2009); *Scott*, 550 U.S. at 388 (Breyer, J., concurring); Beermann, *supra* note 72; Leval, *supra* note 72, at 1277 & nn. 83–84.

91. *Pearson*, 555 U.S. at 240; Beermann, *supra* note 72, at 142, 154–56; Leval, *supra* note 72, at 1275–76. In light of this characterization, commentators attacked *Saucier* decisions as “advisory opinions” barred by Article III. *E.g.*, Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 895–905, 907 n.321, 920 (2005).

92. *Pearson*, 555 U.S. at 239; Jeffries, *supra* note 16, at 129–31; Kirkpatrick & Matz, *supra* note 21, at 652–53.

93. *Pearson*, 555 U.S. at 237; Beermann, *supra* note 72, at 166–67.

94. *See Pearson*, 555 U.S. at 234–35; Beermann, *supra* note 72, at 161–62; Leval, *supra* note 72, at 1276 n.81.

95. *Pearson v. Callahan*, 128 S. Ct. 1702, 1702 (2008) (mem.) (granting certiorari).

to hear an appeal by Cordell Pearson, a Utah police officer and the named defendant in a § 1983 suit, from an adverse qualified immunity judgment.⁹⁶

3. *Return to Judicial Discretion: Pearson v. Callahan.*—Signaling its receptivity to the mounting criticism of *Saucier*, the Court expressly directed the parties in *Pearson* to address in briefing whether the mandatory sequencing regime should be retained.⁹⁷ *Pearson* and his cohort evidently made a compelling case—the Court unanimously reversed *Saucier*.⁹⁸ Writing for the Court, Justice Alito described the *Saucier* procedure as “beneficial” and “often appropriate,” but concluded that “it should no longer be regarded as mandatory.”⁹⁹ To this end, Justice Alito summarized the criticisms of *Saucier* voiced by lower courts and current Justices,¹⁰⁰ and he marshaled a list of the Court’s own critiques, broadly mirroring those detailed above.¹⁰¹

Despite reaffirming the value of *Saucier* sequencing, however, Justice Alito never articulated criteria for when lower courts *should* reach the merits in qualified immunity decisions. Rather, he enumerated a series of circumstances under which courts should *not* announce constitutional holdings: Highly fact-bound cases, cases where the constitutional issue will soon be decided by a higher court, cases involving “uncertain interpretation[s] of state law,” cases where qualified immunity is invoked at the pleading stage, cases plagued by “woefully inadequate” briefing of constitutional issues, and cases giving rise to unreviewable constitutional decisions “that may have a serious prospective effect on [the] operations [of government actors].”¹⁰² Commentators have attempted to deduce a set of principles of merits adjudication from *Pearson*,¹⁰³ but this is the best available guidance to lower courts. Perhaps recognizing the jurisprudential consequences of granting lower courts unfettered discretion to structure their qualified immunity analyses, Justice Alito emphasized the availability of alternative vehicles of constitutional articulation—namely, suppression motions in criminal cases, § 1983 suits against municipalities, and § 1983 suits for injunctive relief.¹⁰⁴ Unfortunately, there is ample evidence that these vehicles are alone inadequate to the task: Suppression motions, for

96. *Pearson*, 555 U.S. at 227.

97. *Pearson*, 128 S. Ct. at 1702–03.

98. *See Pearson*, 555 U.S. at 227.

99. *Id.* at 236.

100. *Id.* at 234–35.

101. *See id.* at 236–42.

102. *Id.* at 237–40.

103. *See, e.g.,* Beermann, *supra* note 72, at 171, 175–78 (criticizing *Pearson* for failing to set forth affirmative standards for when courts should reach the constitutional merits and proposing guidelines that reflect several of Justice Alito’s observations in *Pearson*).

104. *Pearson*, 555 U.S. at 242–43.

instance, require the introduction at trial of illegally seized evidence, and § 1983 suits that avoid qualified immunity nevertheless face onerous obstacles to establishing standing and entitlement to relief.¹⁰⁵ In this light, *Pearson*’s regime of complete judicial discretion threatens to stall constitutional articulation.

4. *Opportunity and Peril: Camreta v. Greene*.—In 2010, the Court granted certiorari in yet another case challenging a qualified immunity judgment.¹⁰⁶ What distinguished named petitioner Bob Camreta from his forebear Cordell Pearson, however, was the fact that Camreta had actually *prevailed* below—because the Ninth Circuit had affirmed summary judgment in his favor on clearly established grounds, Camreta sought to appeal the adverse constitutional ruling that served only as a precedent for future § 1983 claims.¹⁰⁷ Camreta’s posture epitomized a critique often leveled at *Saucier* sequencing: A defendant’s “win” on qualified immunity could somehow be coupled with a “loss” on constitutional compliance that was effectively insulated from appellate review.¹⁰⁸ Acknowledging the peculiar dilemma faced by such defendants, but unwilling to abandon the practice of merits adjudication, the Court recognized prevailing-party review of qualified immunity judgments.¹⁰⁹ Although the Court’s holding was narrow in scope—it addressed only the Supreme Court’s *power* to review prevailing party appeals, not its *choice* to grant a particular certiorari petition¹¹⁰—it nonetheless represented an emphatic response to critics of qualified immunity merits adjudication. By reaffirming the importance of strategic sequencing,¹¹¹ the Court signaled its continuing support for constitutional articulation—as Justice Kagan wrote for the majority, “This Court, needless to say, also plays a role in clarifying rights.”¹¹²

The opportunity embodied in Justice Kagan’s opinion, however, was counterbalanced by peril: Justices Scalia and Kennedy wrote separate opinions, the latter joined by Justice Thomas, urging the Court to end the

105. Jeffries, *supra* note 16, at 131–34; Kirkpatrick & Matz, *supra* note 21, at 673–76; *supra* note 25.

106. *Camreta v. Greene*, 131 S. Ct. 456, 456 (2010) (mem.) (granting certiorari).

107. *Camreta v. Greene*, 131 S. Ct. 2020, 2027 (2011).

108. *E.g.*, *Bunting v. Mellen*, 541 U.S. 1019, 1024–25 (2004) (Scalia, J., dissenting from denial of certiorari).

109. *Camreta*, 131 S. Ct. at 2030–33.

110. *Id.* at 2033.

111. *See id.* at 2031 (“[W]e have long recognized that . . . our regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo.”); *id.* at 2032 (“[I]t remains true that following the two-step sequence—defining constitutional rights and only then conferring immunity—is sometimes beneficial to clarify the legal standards governing public officials.”).

112. *Id.* at 2032.

practice of “unnecessary” merits adjudication.¹¹³ Taking a cue from Justice Alito’s opinion in *Pearson*, Justice Kennedy cited the vehicles of constitutional articulation that are unencumbered by qualified immunity.¹¹⁴ And like Justice Alito before him, Justice Kennedy also glossed over the weaknesses inherent in these alternatives.¹¹⁵

Following *Pearson* and *Camreta*, the future of qualified immunity sequencing—and with it, an important conduit of constitutional-rights development—is uncertain. Freed of the imperative to reach the merits in constitutional tort claims, courts may increasingly grant qualified immunity to government agents without contributing to the substantive law that guides official conduct. As a result, a growing need exists for sources of clearly established law. Counterintuitively, it is nondecisional law that may hold the key to resolving this dilemma.

II. Civilian Oversight Agencies and Constitutional-Norm Generation

A. *The Role of Civilian Oversight*

Civilian oversight represents a critical component of the patchwork of police regulation in the United States.¹¹⁶ Given the limited effect of constitutional criminal procedure,¹¹⁷ the problems inherent in internal police oversight mechanisms,¹¹⁸ and the de jure and de facto barriers to the successful assessment of criminal¹¹⁹ or civil sanctions on individual police

113. *Id.* at 2036 (Scalia, J., concurring); *id.* at 2037, 2043–45 (Kennedy, J., dissenting).

114. *See id.* at 2043–44 (Kennedy, J., dissenting).

115. *See supra* note 105 and accompanying text.

116. *See* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 802, 804–05 (2012) (categorizing civilian oversight as part of the “law of the police” and noting that civilian oversight often interacts with the internal administrative processes that provide “the most commonly used remedy for misconduct”); Clarke, *supra* note 2, at 2 (“Civilian oversight has become commonplace because it satisfies a need in most American jurisdictions.”).

117. *See, e.g.*, Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1016–23 (2001) (discussing the extent to which police have been able to circumvent the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), and positing that *Miranda* has not only “helped the police shield themselves from evidentiary challenges” but has also “reduce[d] the pressure on police to reform their practices on their own initiative”); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 368–406 (criticizing the ineffectiveness of the exclusionary sanction in shaping police conduct).

118. *See, e.g.*, Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 537 (2004) (citing “real or perceived conflicts of interest” and the consequent loss of “citizen perceptions of legitimacy,” *inter alia*, as among the “most significant limitation[s] of internal review”); Clarke, *supra* note 2, at 9–10 (describing the shortcomings of internal police oversight, including perceptions of “bias[], ineffective[ness], and illegitima[cy],” as well as “[t]he hostility and skepticism that police officers commonly display toward civilians who attempt to file complaints”).

119. *See, e.g.*, John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 803–04 (attributing the rarity of criminal prosecutions to the police “code of silence” and the conflict of interest between prosecutors and officers); *id.* at 806–11 (highlighting the limits of federal

officers¹²⁰ or municipalities,¹²¹ external oversight bodies reach police conduct that might otherwise escape reproach. Further, given the rate at which municipalities settle lawsuits arising from police misconduct¹²²—in fiscal year 2012, the City of New York settled approximately \$152 million in suits against the New York City Police Department (NYPD), arising from 9,570 claims¹²³—civilian oversight agencies play a vital role in developing the law of the police by addressing legal claims silenced by settlement in the civil arena. Moreover, civilian oversight has become commonplace in the United States since its emergence in the early twentieth century¹²⁴: There are now over one hundred civilian oversight bodies in the nation, covering cities in thirty-six different states—from Akron, Ohio, to Yonkers, New York.¹²⁵

Prominent police scholar Samuel Walker defines civilian oversight as “an agency or procedure that involves participation by persons who are not sworn officers (citizens) in the review of citizen complaints against the police and/or other allegations of misconduct by police officers.”¹²⁶ This broad definition encompasses several types of civilian oversight bodies: civilian in-house, civilian external supervisory, civilian external investigatory, and civilian auditor.¹²⁷ Civilian in-house oversight bodies, like Chicago’s Office of Professional Standards or Seattle’s Office of Professional Accountability, place civilians in the internal affairs unit of the police department, in either an

prosecution of police officers under 18 U.S.C. § 242); Clarke, *supra* note 2, at 4–6 (contending that prosecutions of criminal police misconduct “only occur in rare, highly-publicized cases” due to political pressures and the mutually dependent relationship between police and prosecutors).

120. See *supra* subpart I(A).

121. See, e.g., Schuck, *supra* note 44, at 1758–63, 1772–81 (explaining the contours of municipal liability under § 1983 and criticizing the *Monell* “policy or custom” doctrine as excessively protective of municipalities).

122. See, e.g., Henry Goldman, *NYPD Abuse Increases Settlements Costing City \$735 Million*, BLOOMBERG (Sept. 4, 2012, 1:08 PM), <http://www.bloomberg.com/news/2012-09-04/nyc-police-abuse-joins-pothole-settlements-costing-735-million.html> (discussing the City of New York’s settlement calculus and quoting the Law Department’s torts division chief as stating, “In the vast number of cases, our police officers did the right thing, but from a risk-management point of view we want to settle meritorious claims, reviewing the venue, the sympathy factor, [and] the injury”); cf. Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 874 n.184 (2012) (quoting statements by city officials in New York, Chicago, and San Francisco suggesting that settlements in police misconduct cases are often strategic business decisions divorced from the merits of the underlying claims).

123. JOHN C. LIU, CITY OF NEW YORK: OFFICE OF THE COMPTROLLER, CLAIMS REPORT—FISCAL YEAR 2012, at 43, 44 chart 18 (2013), available at http://comptroller.nyc.gov/wp-content/uploads/documents/2013_Claims-Report.pdf.

124. Samuel Walker, *The History of the Citizen Oversight*, in CITIZEN OVERSIGHT OF LAW ENFORCEMENT 1, 2–6 (Justina Cintrón Perino ed., 2006).

125. See *U.S. Oversight Agency Websites*, NAT’L ASS’N FOR CIVILIAN OVERSIGHT L. ENFORCEMENT (2013), <http://nacole.org/resources/u-s-oversight-agency-websites/> (listing civilian oversight bodies by jurisdiction).

126. Walker, *supra* note 124, at 2.

127. See *supra* note 30.

investigatory or supervisory role.¹²⁸ Civilian external supervisory bodies, like the Los Angeles County Office of Independent Review, examine the investigations conducted by internal police investigative units.¹²⁹ Civilian external investigatory bodies, like the CCRB or the Washington, D.C., Office of Police Complaints (OPC), conduct independent investigations of police misconduct—and may, in some cases, possess the power to conduct policy review.¹³⁰ Civilian auditor bodies, like the Special Counsel for the County of Los Angeles, which monitors the Los Angeles Sheriff’s Department, are generally provided “full access to police department records” and granted “wide-ranging authority to report on all aspects of departmental policy and to advocate for systemic reform.”¹³¹

While each of these oversight models makes a unique contribution to the regulation of police and the promulgation of constitutional norms, this Note centers on civilian external investigatory bodies for several reasons. First, investigatory agencies “embody a *criminal trial model* of citizen oversight.”¹³² Investigations are directed at determining guilt or innocence in a discrete case and are governed by “elaborate rules of procedure designed to protect the rights of accused officers.”¹³³ Further, investigations are highly fact intensive, requiring the collection of testimonial, physical, and documentary evidence akin to what might be seen in a criminal or civil trial.¹³⁴ In this regard, the investigative findings of oversight bodies resemble the sources of law that may support a ruling on qualified immunity. Second, unlike civilian in-house oversight bodies, civilian external investigatory bodies are entirely independent from the departments they regulate.¹³⁵ This separation confers a presumption of neutrality—and quasi-judicial legitimacy—on their investigative findings.¹³⁶ Lastly, by virtue of the novel factual scenarios they routinely encounter in the course of their investigations, civilian external investigatory bodies are constantly engaged in constitutional-norm generation. Considering that Fourth Amendment violations predominate a

128. Clarke, *supra* note 2, at 13–14.

129. *Id.* at 14–15.

130. *Id.* at 16–17, 21; see also Samuel Walker, *Alternative Models of Citizen Oversight*, in CITIZEN OVERSIGHT OF LAW ENFORCEMENT, *supra* note 124, at 11, 13 (identifying the CCRB and the OPC as “citizen review boards with full authority to receive and investigate complaints”).

131. Clarke, *supra* note 2, at 17–18.

132. Walker, *supra* note 130.

133. *Id.*

134. See, e.g., N.Y.C. CIVILIAN COMPLAINT REVIEW BD., JANUARY–JUNE 2012 REPORT 4 (2013) [hereinafter 2012 CCRB SEMI-ANNUAL REPORT], available at http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbsemi2012_Jan_Jun.pdf (describing the CCRB’s investigative process and characterizing it as “an in-depth fact-finding inquiry”).

135. Clarke, *supra* note 2, at 16.

136. See Walker, *supra* note 130, at 12–13; Clarke, *supra* note 2, at 16.

typical oversight agency’s work,¹³⁷ the fact-intensive investigations conducted by civilian external investigatory bodies seem particularly responsive to the Supreme Court’s demand for fact-specific guidance to clearly establish Fourth Amendment law.

This would be purely academic, of course, had the Court dictated that decisional law alone could clearly establish the law for qualified immunity purposes. In fact, the Court has endorsed the use of various forms of nondecisional law to demonstrate the sort of fair notice and culpability required to justify imposing individual § 1983 liability on a government agent.¹³⁸

B. The Jurisprudential Foundations for Treating the Findings of Oversight Bodies as a Source of Clearly Established Law

As explained above, the Supreme Court has never set forth a categorical rule demarcating the sources of law that may clearly establish the relevant law to a reasonable official for the purposes of qualified immunity. To the contrary, the Court itself has cited to a variety of authorities other than decisional law in its qualified immunity holdings.

The Court first indicated its willingness to consider nondecisional law in the modern qualified immunity inquiry in *Wilson v. Layne*. In *Wilson*, the Court affirmed the grant of qualified immunity to federal and state law enforcement officers who invited representatives of the media to accompany them in the execution of an arrest warrant at a private residence.¹³⁹ While the Court held that the officers’ actions violated the Fourth Amendment, it concluded that qualified immunity was nonetheless appropriate due to the “undeveloped” state of the law and the officers’ reasonable reliance on departmental policies permitting—or at least not prohibiting—“ride-alongs” during warrant executions.¹⁴⁰ Although the Court made clear that its holding rested on the combined force of these considerations, it characterized the officers’ reliance on their respective departmental guidelines as “important to [its] conclusion.”¹⁴¹

137. See, e.g., *Recommended Training for Board and Commission Members*, NAT’L ASS’N FOR CIVILIAN OVERSIGHT L. ENFORCEMENT (2013), <http://nacole.org/resources/recommended-training-for-board-and-commission-members/> (listing “[c]ase law concerning stops [and] detentions, search, seizure and arrest, [and] rights of arrested persons” as part of a recommended training curriculum for civilian oversight agency employees); *supra* sources cited note 32.

138. See *infra* subpart II(B).

139. *Wilson v. Layne*, 526 U.S. 603, 605–08 (1999).

140. *Id.* at 605–06, 617. The federal department’s policy “explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests,” whereas the state department’s policy “did not expressly prohibit media entry into private homes.” *Id.* at 617.

141. *Id.* at 617.

The Court built on *Wilson's* foundation in *Hope v. Pelzer*, citing to an even broader array of nonlegal authority in denying qualified immunity to three Alabama prison guards accused of violating a prisoner's Eighth Amendment rights through the unjustified use of a "hitching post."¹⁴² The guards had handcuffed the prisoner to a hitching post for a number of hours on two separate occasions, each apparently motivated by punitive—rather than compliance- or order-oriented—aims.¹⁴³ The Eleventh Circuit granted the guards qualified immunity, finding no cases with "materially similar" facts that would render the law clearly established.¹⁴⁴ To this end, the Eleventh Circuit deemed inapposite two circuit precedents at least arguably on point—one finding an Eighth Amendment violation in the practice of handcuffing inmates to cells or fences for prolonged periods of time, and the other setting forth the premise that "physical abuse directed at [a] prisoner *after* he terminate[s] his resistance to authority would constitute an actionable [E]ighth [A]mendment violation."¹⁴⁵ Rejecting the Eleventh Circuit's "rigid gloss" on the *Harlow* test, the Court reaffirmed its holding in *Lanier* that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."¹⁴⁶ "[T]he salient question that the Court of Appeals ought to have asked," the Court continued, "is whether the state of the law in 1995 gave respondents *fair warning* that their alleged treatment of [the prisoner] was unconstitutional."¹⁴⁷

In answering this question in the affirmative, the Court referenced the two circuit precedents discussed above, an Alabama Department of Corrections (ADOC) regulation circumscribing the use of the hitching post, and a report by the DOJ advising the ADOC of "the constitutional infirmity in its use of the hitching post."¹⁴⁸ The regulation, which the Court characterized as "[r]elevant to the question whether [one of the circuit precedents] provided fair warning to respondents that their conduct violated the Constitution," set forth guidelines for the use of the hitching post—guidelines that were routinely disregarded.¹⁴⁹ The Court ascribed significance to this norm of noncompliance: "A course of conduct that tends to prove that the requirement was merely a sham, or that respondents could

142. 536 U.S. 730, 735, 741–42, 746 (2002).

143. *Id.* at 733–35, 736 & n.5.

144. *Id.* at 735–36. Notably, the Eleventh Circuit also demanded that "the federal law by which the government official's conduct should be evaluated must be preexisting, obvious, and mandatory." *Id.* at 736 (quoting *Hope v. Pelzer*, 240 F.3d 975, 981 (11th Cir. 2001)) (internal quotation marks omitted).

145. *Id.* at 741–43 (quoting *Ort v. White*, 813 F.2d 318, 324 (11th Cir. 1987)) (first alterations in original) (internal quotation marks omitted).

146. *Id.* at 739, 741.

147. *Id.* at 741 (emphasis added).

148. *Id.* at 741–43.

149. *Id.* at 743–44.

ignore it with impunity, provides equally strong support for the conclusion that they were fully aware of the wrongful character of their conduct.”¹⁵⁰ As for the DOJ report, the Department had conducted a study of the state’s use of the hitching post one year before the incident giving rise to the suit and had concluded, *inter alia*, that “the systematic use of the restraining bar [for ostensibly punitive purposes] constituted improper corporal punishment.”¹⁵¹ When the DOJ “advised the ADOC to cease use of the hitching post in order to meet constitutional standards,” the state defended its practices.¹⁵² Even without evidence that the results of the DOJ’s investigation were communicated to the individual defendants, the Court determined, the “exchange” between the DOJ and the ADOC “lends support to the view that reasonable officials in the ADOC should have realized that the use of the hitching post under the circumstances alleged by [the prisoner] violated the Eighth Amendment.”¹⁵³

More recently, in *Groh v. Ramirez*,¹⁵⁴ the Court denied qualified immunity to an agent of the Bureau of Alcohol, Tobacco, and Firearms (ATF) who executed a search warrant that, while duly issued by a neutral magistrate, was entirely devoid of any description of the items to be seized.¹⁵⁵ Noting that the warrant was facially invalid under the express terms of the Fourth Amendment, the Court had no difficulty in finding the relevant law clearly established.¹⁵⁶ It bolstered its finding of notice, however, by reference to two ATF directives—one instructing agents not to execute warrants containing fatal deficiencies and another admonishing agents that they would be held individually liable for “exceed[ing] their authority while executing a search warrant.”¹⁵⁷ Although the Court took care to dispel any inference that “an official is deprived of qualified immunity whenever he violates an internal guideline”¹⁵⁸—echoing its holding in *Davis v. Scherer*¹⁵⁹—it made clear that such guidelines may be relevant to the issue of notice.¹⁶⁰

Following *Wilson*, *Hope*, and *Groh*, the lower federal courts have recognized the utility of nonjudicial statements of law in establishing notice to government agents asserting qualified immunity. Although the circuits

150. *Id.* at 744.

151. *Id.* at 744–45.

152. *Id.* at 745.

153. *Id.*

154. 540 U.S. 551 (2004).

155. *Id.* at 554–55, 564–66.

156. *Id.* at 563–64.

157. *Id.* at 564 (internal quotation marks omitted).

158. *Id.* at 564 n.7.

159. 468 U.S. 183, 194 & n.12 (1984) (holding that the violation of a statute or administrative regulation cannot alone defeat an official’s qualified immunity, unless that statute or regulation supplies the basis for the cause of action).

160. *Groh*, 540 U.S. at 564 & n.7.

have approached the issue with varying degrees of enthusiasm and specificity, at least partial reliance on internal policies and guidelines is now commonplace. The Eighth Circuit, for instance, has announced that “[p]rison regulations governing the conduct of correctional officers are . . . relevant in determining whether an inmate’s right was clearly established.”¹⁶¹ Not only has the Ninth Circuit expressly adopted the Eighth Circuit’s view of regulations in the prison context,¹⁶² but it has expanded this analysis to policing, stating that police department training materials “are relevant not only to whether the force employed in [a particular] case was objectively unreasonable but also to whether reasonable officers would have been on *notice* that the force employed was objectively unreasonable.”¹⁶³ Other circuits evincing willingness to consider internal regulations in the qualified immunity inquiry include the First,¹⁶⁴ Second,¹⁶⁵ Fifth,¹⁶⁶ Sixth,¹⁶⁷ and Tenth¹⁶⁸ Circuits. Individual

161. *Treats v. Morgan*, 308 F.3d 868, 875 (8th Cir. 2002) (citing *Hope v. Pelzer*, 536 U.S. 730 (2002)).

162. *Furnace v. Sullivan*, 705 F.3d 1021, 1027 (9th Cir. 2013).

163. *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1062 (9th Cir. 2003) (internal citations omitted).

164. *See, e.g., Raiche v. Pietroski*, 623 F.3d 30, 39 (1st Cir. 2010) (“A reasonable officer with training on the Use of Force Continuum would not have needed prior case law on point to recognize that it is unconstitutional to tackle a person who has already stopped in response to the officer’s command to stop and who presents no indications of dangerousness.”).

165. *See, e.g., Okin v. Vill. of Cornwall-on-Hudson Police Dep’t*, 577 F.3d 415, 433–34 (2d Cir. 2009) (noting that although “it is clear that ‘[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision,’” the court “may examine statutory or administrative provisions in conjunction with prevailing circuit or Supreme Court law to determine whether an individual had fair warning that his or her behavior would violate the victim’s constitutional rights.” (alteration in original) (citations omitted)); *see also Williams v. City of N.Y.*, No. 05 Civ. 10230, 2007 WL 2214390, at *12 n.185, *13 (S.D.N.Y. July 26, 2007) (referencing the NYPD Patrol Guide procedure governing strip searches in denying summary judgment on qualified immunity grounds to officers who allegedly conducted a strip search of the plaintiff without reasonable suspicion).

166. *See, e.g., Gutierrez v. City of San Antonio*, 139 F.3d 441, 446–47, 449–50 (5th Cir. 1998) (holding the law banning “hog-tying” to be clearly established and finding a material dispute of fact regarding the reasonableness of the officer-defendants’ resort to hog-tying a suspect, based in part on two widely distributed publications describing the dangers of the practice and an internal memo “reminding” officers that the practice was forbidden). Although *Gutierrez* predates *Hope*, its partial reliance on nondecisional law is consistent with the Supreme Court’s approach.

167. *See, e.g., Barker v. Goodrich*, 649 F.3d 428, 431, 435–37 (6th Cir. 2011) (noting that “[a] defendant’s deviation from normal practice and prison policies can . . . provide notice that his actions are improper” and relying on case law, coupled with “the notice given by normal prison practice and the obvious cruelty inherent in the conduct,” to deny qualified immunity to correction officers who left a prisoner handcuffed in an observation cell for over twelve hours); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004) (“In addition to prior precedent, the Officers’ training demonstrates that they were aware of [the decedent’s] clearly established right to be free from this type of excessive force.”); *Toms v. Taft*, 338 F.3d 519, 521, 527 & n.5 (6th Cir. 2003) (citing *Hope* in support of the use of state Department of Corrections policies to determine whether the defendant warden “knowingly violated [a prisoner’s] rights” by refusing to provide him affirmative assistance in securing a marriage license while incarcerated).

district courts have followed suit, even where their circuits have not explicitly adopted *Hope*-like rules.¹⁶⁹

As this weight of authority indicates, the federal courts have reserved space for nonjudicial statements of the law to contribute to the qualified immunity analysis. Such sources of law are increasingly important in the post-*Saucier* era, as courts are now accorded largely unfettered discretion to reach the merits of constitutional tort claims.¹⁷⁰ It is in this context that the work of civilian external investigatory oversight bodies constitutes an essential—albeit untapped—resource for constitutional articulation. Without the promise of regular decisional law to promulgate constitutional norms and place officers on notice of constitutional infirmities in policing practices, grants of qualified immunity may become increasingly common and constitutional rights may stagnate. By engaging in fact-finding, legal research, objective evaluation of compliance with internal regulations, and, sometimes, policy review, civilian external investigatory oversight bodies mirror the work of courts and compliance agencies and serve a function similar to the internal policies and regulations cited by the federal courts. By harnessing the existing work of these bodies, then, it may be possible to counteract the stasis threatened by *Pearson* discretion, while remaining consistent with the notice, fairness, and culpability objectives of qualified immunity doctrine. It is to this work—and the distinctive features of the CCRB, in particular—that this Note now turns.

168. See, e.g., *Weigel v. Broad*, 544 F.3d 1143, 1149–50, 1154–55 (10th Cir. 2008) (citing to officers’ training materials, in addition to case law from the circuit, to conclude that positional asphyxia caused by officers’ application of pressure to a prone, restrained suspect’s torso violated his clearly established constitutional rights).

169. See, e.g., *Estate of Gaither ex rel. Gaither v. Dist. of Columbia*, 833 F. Supp. 2d 110, 123 n.7 (D.D.C. 2011) (citing *Hope* to observe that “regulations and policies may, in appropriate circumstances, provide a reasonable officer with warning that his conduct might be unconstitutional” but distinguishing *Hope* as evincing a “far less attenuated” connection between the relevant regulations and the alleged constitutional violation than in the instant case); *Womack v. Smith*, No. 1:06-CV-2348, 2011 WL 819558, at *14–15 (M.D. Pa. Mar. 2, 2011) (relying on *Hope* as well as prison regulations to deny qualified immunity to prison officials who kept a prisoner in ambulatory restraints for approximately one month); *Hershell Gill Consulting Eng’rs., Inc. v. Miami-Dade Cnty.*, 333 F. Supp. 2d 1305, 1310, 1337–38 (S.D. Fla. 2004) (drawing on internal studies, warnings from fellow government employees, and the apparent failure to comply with internal guidelines to deny qualified immunity to government officials who employed Minority and Women Business Enterprise programs to award race- and gender-conscious contracts without the requisite evidence of discrimination); *Niziol v. Dist. Sch. Bd.*, 240 F. Supp. 2d 1194, 1213 (M.D. Fla. 2002) (“Case authority, rules and regulations and controlling legal directives may all be proffered to make [the qualified immunity] showing.” (citing *Hope v. Pelzer*, 536 U.S. 730 (2002))).

170. See *supra* section I(B)(3).

C. *The CCRB as an Exemplar of Civilian External Investigatory Oversight*

1. *Overview of the CCRB.*—The CCRB is the largest civilian oversight agency in the nation,¹⁷¹ with a staff of approximately 100 investigators.¹⁷² It is one of three agencies charged with overseeing the NYPD, though it is the sole external oversight body—the other two agencies, the Internal Affairs Bureau (IAB) and the Office of the Chief of Department (OCD), are arms of the NYPD.¹⁷³ The NYPD is by far the largest municipal police force in the nation—with approximately 34,500 officers,¹⁷⁴ it is nearly three times the size of the second-largest department, the 13,350-strong Chicago Police Department¹⁷⁵—and it currently commands a budget of \$4.6 billion.¹⁷⁶ By virtue of size alone, the NYPD and CCRB merit consideration in any discussion of police reform.

The CCRB's enabling legislation, codified at Section 440 of the New York City Charter, empowers the agency to “receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department.”¹⁷⁷ The Charter circumscribes the agency's jurisdiction to complaints “that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability.”¹⁷⁸ Using the first letter of each broad category of misconduct, the agency has developed an acronym for its jurisdiction: FADO (force, abuse of authority, discourtesy, and offensive

171. *History*, N.Y.C. CIVILIAN COMPLAINT REV. BOARD (2014), <http://www.nyc.gov/html/ccrb/html/about/history.shtml>.

172. *See* 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134, at 11. The agency is currently authorized to employ 116 investigators, 2013 CCRB ANNUAL REPORT, *supra* note 32, at 2, down from an authorized headcount of roughly 150 investigators in 2007, *see* N.Y.C. CIVILIAN COMPLAINT REVIEW BD., JANUARY–DECEMBER 2006 REPORT 15–16 (2007) [hereinafter 2006 CCRB ANNUAL REPORT], *available at* <http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbann2006.pdf>.

173. U.S. COMM'N ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY 51 (2000). The jurisdiction of the three agencies differs as well: The CCRB focuses on violations of departmental guidelines and constitutional standards, IAB investigates allegations of corruption and potentially criminal misconduct, and OCD addresses procedural missteps and personnel matters. *Id.* at 51–53.

174. *Frequently Asked Questions: Police Administration*, NYPD, http://www.nyc.gov/html/nypd/html/faq/faq_police.shtml.

175. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 4 (2011), *available at* <http://www.bjs.gov/content/pub/pdf/cslla08.pdf>.

176. THE COUNCIL OF THE CITY OF N.Y., FIN. DIV., HEARING ON THE FISCAL YEAR 2014 EXECUTIVE BUDGET FOR THE POLICE DEPARTMENT 1–2 (2013), *available at* <http://www.council.nyc.gov/downloads/pdf/budget/2014/execbudget/2police.pdf>.

177. N.Y. CITY CHARTER § 440(c) (2010).

178. *Id.*

language).¹⁷⁹ These groupings are sufficiently expansive to embrace a wide array of misconduct, ranging from acts likely to see adjudication in parallel criminal or civil proceedings (e.g., fatal police-involved shootings or warrantless searches yielding incriminating evidence) to those resulting in only symbolic or *de minimis* harms (e.g., shoves, profane language, or street encounters of limited duration and intrusiveness).¹⁸⁰ Unsurprisingly, given the size of the NYPD and the scope of the CCRB’s jurisdiction, the CCRB consistently receives and investigates a considerable number of complaints: Each year from 2008 to 2013, the CCRB received between 5,400 and 7,600 complaints within its jurisdiction, of which between 1,200 and 2,700 were subjected to full investigations.¹⁸¹ The agency also has authority to refer to the NYPD “other misconduct” uncovered in the course of its investigations,¹⁸² including officers’ failure to prepare required reports, officers’ falsification of statements or records, and officers’ commission of “miscellaneous” misdeeds.¹⁸³

2. *The Investigations Division: Fact-Finding, Legal Research, and the Trial Court Paradigm.*—Of the five units within the CCRB,¹⁸⁴ the unit most relevant to this Note is the Investigations Division. The Investigations Division is comprised of several teams of twelve to twenty civilian investigators.¹⁸⁵ Each investigator is tasked with managing her own docket of complaints, and for each complaint—which typically comprises a discrete incident involving one or more FADO allegations—the investigator must conduct a factual investigation encompassing sworn interviews with the involved parties, collection of pertinent records, and composition of a closing report detailing the investigator’s findings of fact and law.¹⁸⁶ In

179. 2012 CCRB ANNUAL REPORT, *supra* note 32, at 5.

180. *See, e.g.*, 2011 CCRB ANNUAL REPORT, *supra* note 32, at 20–21 (profiling several CCRB cases).

181. *See* 2013 CCRB ANNUAL REPORT, *supra* note 32, at 3, 12; 2012 CCRB ANNUAL REPORT, *supra* note 32, at 2, 11; 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134, at 6, 10.

182. N.Y.C., N.Y., RULES OF THE CITY OF N.Y. tit. 38-a, § 1-44 (2013).

183. 2013 CCRB ANNUAL REPORT, *supra* note 32, at 14–15.

184. *See* 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134, at 2. The other four units are the Policy and Strategic Initiatives Division, the Administrative Prosecution Unit, the Administration Division, and the Mediation Unit. *Id.* at 2–3.

185. *See* 2013 CCRB ANNUAL REPORT, *supra* note 32, at 26 (listing the current managers of the agency’s six investigative teams); N.Y.C. CIVILIAN COMPLAINT REVIEW BD., 2010 ANNUAL REPORT 25 (2011) [hereinafter 2010 CCRB ANNUAL REPORT], *available at* <http://www.nyc.gov/html/crb/downloads/pdf/ccrbann2010.pdf> (indicating that there were five investigative teams as of December 31, 2010); *supra* note 172 (placing the agency’s authorized headcount at 100–150 investigators).

186. 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134; *cf.* N.Y. CITY CHARTER § 440(c) (2010) (“The board shall have the power to receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department No finding or recommendation shall be based solely upon an *unsworn* complaint or statement” (emphasis added)).

2011, the most recent year for which interview data is available, investigators obtained sworn statements from approximately 6,000 officers and 5,000 civilians.¹⁸⁷ Each team has three supervisors who review complaints at several critical stages of investigation—most notably at the time a complaint is received and categorized as FADO or non-FADO and at the point immediately preceding submission to the agency’s Board for final approval.¹⁸⁸ At these decisive points, supervisory staff may bring the agency’s authority to bear on police conduct that at least arguably falls within the FADO framework. For example, by treating a police encounter as a potential abuse of authority, the agency labels the incident a Fourth Amendment event; and by subjecting the incident to a full investigation and submitting a finding to the board for approval, the agency behaves much like a prosecutor electing to file criminal charges or a trial court recognizing a cause of action and allowing a lawsuit to proceed.

Moreover, the actual conduct of CCRB investigations resembles judicial proceedings in a number of ways. First, the agency epitomizes the criminal trial model of oversight described above.¹⁸⁹ Investigations focus on the adjudication of individual acts of alleged misconduct, requiring in-depth fact-finding and adherence to a number of procedural protections for officers.¹⁹⁰ The agency is empowered to compel production of documents and witnesses,¹⁹¹ and the Police Department is subject to a statutory duty to cooperate with CCRB investigations.¹⁹² At the same time, interviews with police officers are closely regulated, requiring, *inter alia*, the pre-testimonial recitation of an officer’s rights to notice, presence of counsel, and the privilege against compelled self-incrimination.¹⁹³ Second, case closing reports are designed to approximate judicial opinions. The reports have individual sections dedicated to summaries of testimony and evidence, identification of subject officers, findings of fact (i.e., reconciling discrepant evidence), application of governing legal standards, and

187. Daniel D. Chu, Chair, Civilian Complaint Review Bd., Testimony Before the Public Safety Committee of the New York City Council 1–2 (Mar. 15, 2012), *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/budget_testimony20120315.pdf.

188. N.Y.C. CIVILIAN COMPLAINT REVIEW BD., JANUARY-DECEMBER 2002 STATUS REPORT 4–5 (2003) [hereinafter 2002 CCRB ANNUAL REPORT], *available at* <http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbann2002.pdf>.

189. *See supra* notes 132–34 and accompanying text.

190. *See, e.g.*, N.Y.C., N.Y., RULES OF THE CITY OF N.Y. tit. 38-a, § 1-24 (2013) (setting forth rules for the conduct of officer interviews); *supra* note 134.

191. *See* N.Y.C., N.Y., RULES OF THE CITY OF N.Y. tit. 38-a, § 1-23 (conferring subpoena power on the board); N.Y. CITY CHARTER § 440(c)(3) (2010) (authorizing the board to “compel the attendance of witnesses and require the production of such records and other materials as are necessary for the investigation of complaints”).

192. N.Y. CITY CHARTER § 440(d)(1) (2010).

193. N.Y.C., N.Y., RULES OF THE CITY OF N.Y. tit. 38-a, § 1-24.

recommended dispositions for each allegation.¹⁹⁴ Significantly, these legal standards are derived from NYPD Patrol Guide procedures, administrative trial opinions, and New York state and federal case law.¹⁹⁵ Third, and related, is the evidentiary standard to which investigative findings are subject—preponderance of the evidence,¹⁹⁶ the same standard as that applied in civil lawsuits. Notably, there is both anecdotal and circumstantial evidence that the agency in practice applies a stricter evidentiary standard—one closer to clear and convincing evidence.¹⁹⁷ Lastly, as is explained in greater depth below, investigative findings are subject to review and approval by a neutral arbiter: The board.

3. The Board: Complaint Adjudication, Policy Review, and the Appellate Court and Compliance Agency Paradigms.—The board occupies a unique space in the CCRB, with functions analogous to both an appellate court and a compliance agency. Although the board technically oversees the entire agency, its primary responsibility is to review closed cases and make the ultimate determination, based on the record and report compiled by the investigator, of whether misconduct occurred—and if so, what disciplinary measures are warranted.¹⁹⁸ The board consists of thirteen members who “reflect the diversity of the city’s population”: five members are designated by the mayor, five are designated by the city council (one for each of the five boroughs of New York City), and three are designated by the police commissioner.¹⁹⁹ The board meets in panels of three, comprising one representative of each designee group, to review closed cases and vote on the final disposition of each allegation.²⁰⁰ The board recognizes three findings “on the merits” (substantiated, exonerated, and unfounded) and three “other” findings (unsubstantiated, officer(s) unidentified, and

194. See 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134 (describing, in broad strokes, the contents of case closing reports).

195. See *id.* (indicating that closing reports present “relevant case law and police department regulations”); 2002 CCRB ANNUAL REPORT, *supra* note 188, at 34–35 (describing the administrative case law, utilized by CCRB investigators, governing an officer’s obligation to provide her name and/or shield number upon request); *cf.* Armacost, *supra* note 118, at 534 (“The legal standards that courts in civil and criminal cases employ . . . almost entirely define police norms about the use of force. This is evidenced by police departments’ written policies governing uses of force, which virtually track word-for-word the judicial rules that govern legal liability.”).

196. N.Y.C., N.Y., RULES OF THE CITY OF N.Y. tit. 38-a, § 1-33(b).

197. ROBERT A. PERRY, N.Y. CIVIL LIBERTIES UNION, MISSION FAILURE: CIVILIAN REVIEW OF POLICING IN NEW YORK CITY 1994–2006, at 32, 38 (2007).

198. See 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134, at 2–3 (clarifying the structure of the CCRB and the activities of the board). As the authority to impose discipline on police officers is vested exclusively in the police commissioner, the board may only make recommendations as to discipline. *Id.* at 3–4.

199. *Id.* at 3.

200. *Id.* at 4.

miscellaneous).²⁰¹ A finding on the merits “reflect[s] the board’s determination on whether or not an officer’s actions are misconduct,” while other findings “reflect the board’s decision that there is not enough evidence to determine whether or not what the officer did was wrong.”²⁰² A panel can close a case by majority vote,²⁰³ refer the case to the full board for discussion, or return the case to the Investigations Division for further investigation.²⁰⁴ In addition, the board retains discretion to change the disposition of an allegation from the investigative staff’s original recommendation.²⁰⁵ Accordingly, the board’s operations resemble those of an appellate court in several noteworthy respects: The board enjoys the power to affirm or reverse investigative findings, subject a case to en banc review, and remand a matter for further factual discovery.

If the board substantiates an allegation, indicating that it has found “sufficient credible evidence to believe that the subject officer committed the act charged and thereby engaged in misconduct,” it forwards the case to the police department with a disciplinary recommendation; all other findings, whether or not on the merits, subject the allegations in question to administrative closure by the agency.²⁰⁶ Significantly, the board has instructed the Investigations Division to conduct an analysis modeled on the *Harlow* qualified immunity test when seeking to substantiate an allegation: Officers may not be sanctioned for misconduct “when they act in good faith and their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²⁰⁷ Responding to the critical comments of Police Commissioner Ray Kelly on the draft of the CCRB’s 2007 Annual Report, then-Chair Franklin Stone wrote:

Although you state that “good faith by the officer” is “rarely credited in his or her favor,” the CCRB does consider an officer’s good faith in evaluating whether misconduct occurred. Good faith is relevant, . . . except when an officer “obviously violates clearly established law.”

. . . .

201. *Id.*

202. *Id.*

203. *Id.*

204. N.Y.C., N.Y., RULES OF THE CITY OF N.Y. tit. 38-a, § 1-32 (2013).

205. *Cf.* 2011 CCRB ANNUAL REPORT, *supra* note 32, at 11 (describing the manner in which the board “makes findings on the specific misconduct allegations[,] . . . assess[ing] individually the evidence and witness statements pertaining to each allegation”).

206. 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134.

207. N.Y.C. CIVILIAN COMPLAINT REVIEW BD., JANUARY–DECEMBER 2007 REPORT 24 (2008) [hereinafter 2007 CCRB ANNUAL REPORT] (quoting *DiPalma v. Phelan*, 578 N.Y.S.2d 948, 950 (App. Div. 1992) (Doerr, J., dissenting in part) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)), *aff’d*, 609 N.E.2d 131 (N.Y. 1992)), available at http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbann2007_A.pdf.

We agree that there are contours to search and seizure law that would stump judges, let alone police officers. However, the CCRB does take the “totality of the circumstances” into account and does not substantiate claims which “do not violate clearly established statutory or constitutional rights of which a reasonable person would have known[.]” . . . We substantiate only those cases in which a preponderance of the evidence shows that a police officer engaged in conduct that he or she knew or should have known was improper.²⁰⁸

In practice, the CCRB treats some broad legal standards as sufficiently clearly established as to charge officers with at least constructive knowledge of their mandates, effectively foreclosing a good-faith defense. For instance, because “[m]ost street stop encounters in New York City are governed by the well-articulated findings of the case of *People v. [De Bour]*,²⁰⁹ . . . officers are charged with knowing and understanding [*De Bour*].”²¹⁰ Given that officers are “instructed in the key points of [*De Bour*],” issued a printed copy of “the important principles of that case on their memobook flypage,” and provided with “regularly issue[d] legal memos [from the NYPD Legal Bureau] on updates to [*De Bour*] and its progeny,” the board views violations of *De Bour* as misconduct “regardless of [an officer’s] intentions.”²¹¹

Once a substantiated case arrives at the police department, the police commissioner has exclusive authority to assess discipline.²¹² The commissioner can mandate “Instructions” (retraining of the subject officer), “Command Discipline” (a punishment imposed by the subject’s commanding officer, up to a loss of ten vacation days), or “Charges and Specifications” (the filing of formal charges in anticipation of an administrative trial at the Department).²¹³ As is discussed in more detail below, the department conducted its own trials, with extremely limited CCRB involvement, until 2007.²¹⁴ Even after an administrative trial, the commissioner reserves the right to make new findings of fact and law—or simply to decline to impose punishment²¹⁵—subject only to the requirement

208. Letter from Franklin H. Stone, Chair, N.Y.C. Civilian Complaint Review Bd., to Raymond W. Kelly, Police Comm’r, N.Y.C. Police Dep’t (June 16, 2008), *available at* <http://home2.nyc.gov/html/ccrb/pdf/StoneLettertoKelly.pdf>.

209. 352 N.E.2d 562 (N.Y. 1976). *De Bour* created a four-tiered framework for analyzing police encounters. *Id.* at 571–72.

210. 2007 CCRB ANNUAL REPORT, *supra* note 207.

211. *Id.*

212. 2011 CCRB ANNUAL REPORT, *supra* note 32, at 17.

213. *APU and Police Discipline*, N.Y.C. CIVILIAN COMPLAINT REV. BOARD (2014), <http://www.nyc.gov/html/ccrb/html/police/police.shtml>.

214. *See infra* notes 229–33 and accompanying text.

215. N.Y.C. CIVILIAN COMPLAINT REVIEW BD., JANUARY–DECEMBER 2001 STATUS REPORT 11 (2002) [hereinafter 2001 CCRB ANNUAL REPORT], *available at* <http://www>

that he commit his findings to writing.²¹⁶ In all cases, substantiated allegations remain on an officer's record, though officers have the right to appeal adverse disciplinary decisions in state court.²¹⁷ While administrative trial opinions are not publicly accessible, in 2012 the New York Civil Liberties Union successfully brought suit in New York County Supreme Court to compel release of a limited number of opinions.²¹⁸

The existence of this parallel adjudicative system may complicate the appellate court analogy, but it strengthens the CCRB's resemblance to a compliance agency: Just as the U.S. Department of Justice's report in *Hope* placed the Alabama Department of Corrections on notice of the unconstitutionality of its practices through a nonbinding recommendation independent of the ADOC's internal disciplinary system,²¹⁹ the CCRB's findings can provide the NYPD with notice of constitutional violations in policing, regardless of the Department's ultimate disciplinary decision.

In a further parallel to a compliance agency, the board also has the power to make nonbinding policy recommendations to the police commissioner.²²⁰ Utilizing the data compiled in CCRB investigations, the board has reported on, *inter alia*, deficient training of officers assigned to patrol public housing developments, officers' failure to conform to appropriate legal standards in authorizing and conducting strip searches, and officers' refusal to provide their names and shield numbers to civilians upon request.²²¹ In many of these cases, the NYPD has adopted the CCRB's recommendations, either through Patrol Guide revisions or retraining of officers.²²²

.nyc.gov/html/ccrb/downloads/pdf/ccrbann2001.pdf; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 173, at 62.

216. 2001 CCRB ANNUAL REPORT, *supra* note 215.

217. *Id.*; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 173, at 62; *see also id.* at 62 n.94 ("If the subject officer disagrees with the commissioner's disciplinary decision, he may institute an Article 78 proceeding (a review of administrative proceedings) in New York State Supreme Court to have that decision ruled invalid.").

218. Decision and Order at 30–32, *In re* N.Y. Civil Liberties Union v. N.Y.C. Police Dep't, No. 102436/12 (N.Y. Sup. Ct. Oct. 9, 2012). The NYCLU requested the release of *all* disciplinary trial opinions, seeking "not the personnel file or any personal identification information of any officer, but rather the reasoning process of the Administrative Law judges who handle complaints against police officers." *Id.* at 31. Although the court recognized the public interest in this information, citing Justice Brandeis's statement that "[s]unlight is said to be the best of disinfectants," it found the request "exceedingly broad" and correspondingly ordered the Department "to disclose five decisions, edited to protect the officer or officers . . . involved." *Id.*

219. *See supra* notes 148–53 and accompanying text.

220. *Policy Recommendations*, N.Y.C. CIVILIAN COMPLAINT REV. BOARD (2014), <http://www.nyc.gov/html/ccrb/html/news/policy.shtml>.

221. *See id.*

222. *See e.g.*, Letter from Hector Gonzales, Chair, and Florence L. Finkle, Exec. Dir., N.Y.C. Civilian Complaint Review Bd., to Raymond W. Kelly, Police Comm'r, N.Y.C. Police Dep't (May 12, 2004), *available at* <http://www.nyc.gov/html/ccrb/downloads/pdf/stripsearchletter.pdf> (describing deficiencies in the Department's strip-search policies and highlighting the

4. *The CCRB Staff: Legal Training and Orientation Toward Trial.*—

Consistent with the CCRB’s various legal and quasi-legal functions, the agency has both a staff replete with attorneys and an operational orientation toward legal practice. Although legal experience is not a prerequisite for most CCRB positions—for example, prospective investigators need only a Bachelor’s degree²²³—it is hardly surprising, in light of the strong legal bent of the agency’s work, that the agency has often drawn attorneys to prominent roles. Attorneys have dominated the board in recent years,²²⁴ and the Investigations Division has historically employed several attorneys in leadership positions. Although the current Deputy Executive Director for Investigations, who heads the division, is a career investigator,²²⁵ his assistant—who also acts as Director of Training—is a former prosecutor.²²⁶ Additionally, each of the three previous Deputy Executive Directors for

Department’s response); Press Release, N.Y.C. Civilian Complaint Review Bd., Based on CCRB Recommendation, NYPD Retrains Officers Who Patrol NYCHA Buildings (Oct. 27, 2010), available at http://www.nyc.gov/html/ccrb/downloads/pdf/Police_Retraining_10_27_2010.pdf (explaining changes to the Department’s trespass-enforcement policies in public housing developments); *Policy Recommendations*, *supra* note 220 (providing links to CCRB policy recommendations and corresponding NYPD reforms, including, *inter alia*, the department’s responses to CCRB recommendations concerning officer-self-identification and search-warrant-execution procedures).

223. *Civilian Complaint Review Bd: Job Posting Notice—Investigator*, NYC.GOV, <http://www1.nyc.gov/jobs/index.page> (enter “CCRB” in the “Search for Open NYC Jobs” search box; then follow “Investigator” hyperlink).

224. The current board, with one vacancy, is made up of seven attorneys and five non-attorneys. *The Board*, N.Y.C. CIVILIAN COMPLAINT REV. BOARD (2014), <http://www.nyc.gov/html/ccrb/html/about/board.shtml> (showing one vacancy at the time of printing). Of the non-attorneys, two are police commissioner designees, one is a mayoral designee, and two are city council designees. *Id.* In 2013, the board comprised eight attorneys and four non-attorneys, with one vacancy. See 2013 CCRB ANNUAL REPORT, *supra* note 32, at 22–25. In 2012, the board comprised seven attorneys and four non-attorneys, with two vacancies. See 2012 CCRB ANNUAL REPORT, *supra* note 32, at 20–23. In 2011, the board comprised eight attorneys and three non-attorneys, with two vacancies. See 2011 CCRB ANNUAL REPORT, *supra* note 32, at 22–25. In 2010, the board comprised nine attorneys and three non-attorneys, with one vacancy. See 2010 CCRB ANNUAL REPORT, *supra* note 185, at 21–24. In 2009, the most recent year during which the board was fully staffed, the board comprised ten attorneys and three non-attorneys. See N.Y.C. CIVILIAN COMPLAINT REVIEW Bd., JANUARY–DECEMBER 2009 STATUS REPORT 2–6 (2010) [hereinafter 2009 CCRB ANNUAL REPORT], available at <http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbann2009.pdf>.

225. See 2013 CCRB ANNUAL REPORT, *supra* note 32, at 26 (identifying Denis McCormick as current Deputy Executive Director for Investigations); N.Y.C. CIVILIAN COMPLAINT REVIEW Bd., PUBLIC MEETING OF THE CCRB: AUGUST 8, 2012, at 4–5 (2012), available at http://www.nyc.gov/html/ccrb/downloads/pdf/pubmeeting_20120808.pdf (describing McCormick’s education and his fourteen-year tenure at the CCRB).

226. See 2013 CCRB ANNUAL REPORT, *supra* note 32, at 26 (identifying Roger Smith, a former Assistant District Attorney, as current Assistant Deputy Executive Director for Investigations and Director of Training); *Personal Notes on Lawyers*, N.Y. L.J., Sept. 18, 1998, at 30 (announcing Smith’s appointment as an assistant district attorney in the New York County District Attorney’s Office). Smith is currently accompanied by two additional Assistant Deputy Executive Directors for Investigations, both of whom are also attorneys. 2013 CCRB ANNUAL REPORT, *supra* note 32, at 26.

Investigations were former prosecutors²²⁷ or held similar legal positions.²²⁸ Further, in 2007, the CCRB hired four attorneys to assist the Investigations Division by “review[ing] legal issues in cases”²²⁹ and to lead a pilot prosecution program under which CCRB attorneys would “second seat” NYPD prosecutors in administrative trials at the police department.²³⁰ The board heralded this reform as strengthening prosecutions²³¹ and orienting the agency’s investigative work toward success at trial.²³² In April 2012, the CCRB and the NYPD drafted a Memorandum of Understanding authorizing CCRB attorneys to prosecute *all* substantiated cases destined for administrative trials, thereby replacing the pilot program with a permanent Administrative Prosecution Unit.²³³ As for investigative staff, investigators receive comprehensive training, both at the CCRB and NYPD, on the Patrol Guide and legal principles and are supervised by staff with relevant legal experience.²³⁴

227. See 2011 CCRB ANNUAL REPORT, *supra* note 32, at 26 (identifying Laura Edidin as then-Deputy Executive Director for Investigations); Al Baker, *Vow to Fight Police Misconduct Faces Skepticism*, N.Y. TIMES, Jan. 12, 2012, <http://www.nytimes.com/2012/01/13/nyregion/bloombergs-pledge-to-fight-police-misconduct-faces-skepticism.html> (describing Edidin as a former Assistant United States attorney).

228. Meera Joshi, the executive in charge of the Investigations Division in 2010 and 2009, was a former Inspector General in the N.Y.C. Department of Investigation. See 2009 CCRB ANNUAL REPORT, *supra* note 224, at 7 (identifying Joshi as then-First Deputy Executive Director); 2010 CCRB ANNUAL REPORT, *supra* note 185 (same); Press Release, N.Y.C. Dep’t of Investigation, DOI Arrests Former Employee of the City Department of Correction for Padding Her Salary by More Than \$8,000 During a 13-Month Period (Sept. 25, 2007), *available at* http://www.nyc.gov/html/doi/downloads/pdf/pr67wellington_9252007.pdf (describing Joshi as an Inspector General in the N.Y.C. Department of Investigation). Abigail Margulies, a former Assistant District Attorney, served as Deputy Executive Director of Investigations in 2009. See People’s Response to Defendant’s Motion to Set Aside Verdict at 1, *People v. McNair*, No. 5967/2002 (N.Y. Sup. Ct. Oct. 23, 2003), 2003 WL 25744127 (identifying Margulies as a New York County Assistant District Attorney then assigned to the Office of the Special Narcotics Prosecutor for the City of New York); N.Y.C. CIVILIAN COMPLAINT REVIEW BD., JANUARY–DECEMBER 2008 STATUS REPORT, 7 (2009), *available at* <http://www.nyc.gov/html/ccrb/downloads/pdf/ccrbann2008.pdf> (naming Margulies as then-Deputy Executive Director for Investigations).

229. 2007 CCRB ANNUAL REPORT, *supra* note 207, at 11.

230. Press Release, N.Y.C. Civilian Complaint Review Bd., The CCRB and the NYPD Announce Pilot Prosecution Project (Sept. 10, 2008), *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/091008_pilot_prosecution_program.pdf.

231. See 2011 CCRB ANNUAL REPORT, *supra* note 32, at 19 (“[T]he CCRB’s attorneys have provided the Police Department’s judges . . . with important insights into the nature of CCRB investigations, thereby strengthening prosecutions.”).

232. See *id.* (remarking that not only do “[t]he agency’s attorneys now review investigations resulting in substantiated allegations with an eye towards what is needed to prevail at trial” but they also “spot and resolve potential obstacles to prosecution early on in an investigation and . . . anticipate what defenses will be raised at trial so that investigators can collect necessary rebuttal evidence before closing the investigation”).

233. 2012 CCRB SEMI-ANNUAL REPORT, *supra* note 134, at 15.

234. See *Frequently Asked Questions*, N.Y.C. CIVILIAN COMPLAINT REV. BOARD (2014), <http://www.nyc.gov/html/ccrb/html/faq/faq.shtml>.

5. *Conclusion.*—In sum, the CCRB has many of the characteristics of judicial bodies and compliance agencies—in structure as well as operations—and it serves an important function in generating constitutional norms in New York. Its compilation and analysis of Fourth Amendment claims is particularly valuable in light of the *Anderson* Court’s call for fact-specific guidance in this context.²³⁵ Nevertheless, the agency’s work is substantially divorced from local civil and criminal processes at present: Neither lawsuits²³⁶ nor suppressions of evidence²³⁷ trigger CCRB investigations, and CCRB case files must be requested through New York’s Freedom of Information Law for use in civil or criminal proceedings.²³⁸ In this light, the CCRB is inhibited from reaching its full potential as a source of constitutional articulation after *Pearson*. While the agency has a number of unique features, its fact-finding structure and legal orientation—coupled with the prominence of the department it oversees—make it a useful model for the proposal outlined in this Note.

III. Directing Civilian Oversight Findings to Constitutional Development

Having demonstrated that civilian external investigatory oversight bodies like the CCRB are engaged in work resembling that of both judicial bodies and compliance agencies, and having established that the current state of qualified immunity doctrine not only permits the use of nonjudicial statements of law in the qualified immunity analysis but impliedly demands it as a practical matter for continued constitutional—especially Fourth Amendment—norm generation, this Note now proceeds to outline a proposal to imbue oversight findings with the authority they deserve. Recalling that qualified immunity doctrine is rooted in considerations of notice, fairness, and culpability,²³⁹ the proposal rests on the premise that findings of external oversight bodies serve the same purpose—and bear many of the same characteristics—as the sources of law cited by the Supreme Court and the lower federal courts in qualified immunity rulings.

235. See *supra* note 26 and accompanying text.

236. Schwartz, *supra* note 122.

237. Clarke, *supra* note 2, at 23.

238. Cf. N.Y. CIV. RIGHTS LAW § 50-a(1) (McKinney 2012) (“All personnel records . . . under the control of any police agency or department of the state or any political subdivision thereof . . . shall be considered confidential and not subject to inspection or review without the express written consent of such police officer . . . except as may be mandated by lawful court order.”); N.Y. PUB. OFF. LAW § 87(2)(a) (McKinney 2012) (“Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that . . . are specifically exempted from disclosure by state or federal statute.”).

239. See *supra* notes 5–11, 65–66 and accompanying text.

A. *Contours of the Proposal*

First and foremost, the findings of oversight bodies should be entitled to at least the same weight in the qualified immunity analysis as internal police regulations and advisory reports by external compliance agencies, and possibly as much weight as regional appellate court opinions. Acknowledging that the weight accorded to oversight findings may be dependent on the existence of other legal authority, this proposal sets a baseline that reflects courts' present use of nonjudicial statements of the law—that is, as relevant to establish notice and culpability but not dispositive²⁴⁰—while reserving space for the uniquely court-like work of oversight bodies to play a more prominent role in the analysis. Indeed, this proposal places great emphasis on those features of oversight agencies that mirror the characteristics of trial and appellate courts: An adversarial process involving attorneys, subpoena power, sworn testimony, procedural safeguards for testifying officers, extensive factual discovery, multiple levels of impartial merits review, and a final arbiter with power to affirm or reverse findings or remand a case for further investigation.²⁴¹ Of course, this proposal also recognizes that police oversight bodies often interpret *local* law,²⁴² and while the state law of the police must conform to constitutional minimums, the findings of, say, the CCRB may not serve the same notice function outside of New York; for this reason, the upper bound of authority is a “regional” appellate court—a state court of appeals or a federal court of appeals applying the law of the oversight body’s jurisdiction.

To concretize this continuum of authority, it is helpful to consider several different scenarios that a court might face when considering a claim of qualified immunity: First, where binding case law supports the existence of the right asserted by the plaintiff, an oversight finding can serve as additional evidence of notice or culpability, similar to the ATF directive in *Groh*²⁴³ and the ADOC regulation and DOJ report in *Hope*.²⁴⁴ Second, where binding case law is conflicting, an oversight finding can serve as a tiebreaker—occupying a space somewhere between an internal policy statement and a persuasive judicial opinion.²⁴⁵ Third, where no binding case law exists on point and persuasive case law is either supportive or conflicting, an oversight finding can serve as a tiebreaker with a thumb on the scale in favor of recognizing the right in question—situating the finding closer to a binding judicial opinion. In these cases, marked by conflicting

240. See *supra* subpart II(B).

241. See *supra* sections II(C)(2)–(3).

242. See *supra* note 195 and accompanying text.

243. See *supra* notes 157–60 and accompanying text.

244. See *supra* notes 148–53 and accompanying text.

245. This category can be further subdivided to include instances where persuasive case law is supportive, conflicting, or opposed, but considering that oversight findings often reflect the state of binding case law, persuasive case law may be deprioritized here for the sake of simplicity.

or silent binding case law, the investigative and adjudicative processes of civilian oversight assume new significance: Far from simply announcing a general rule of conduct, like the regulations in *Groh* and *Hope*, an oversight finding reflects the result of an adversarial process focused on the resolution of a narrow factual or legal issue. Indeed, there is a reasonable basis to conclude that an officer whose conduct contravenes the specific standards enunciated in an oversight investigation is more culpable in the relevant sense (i.e., had more notice of the impropriety of her actions) than an officer who has simply violated departmental regulations, which are necessarily painted in broad strokes. Viewed in this light, the difference between a policy directive (e.g., “a stop must be supported by reasonable suspicion”) and an oversight finding (e.g., “a stop based solely on a suspect’s presence in a high-crime area and change of direction at the sight of an officer is not supported by reasonable suspicion”) is patent.

Second, to ensure the optimal execution of this proposal, oversight bodies should formalize and publicize all of their merits findings. This aspect of the proposal is critical to satisfy the notice, fairness, and culpability concerns embedded in the Supreme Court’s qualified immunity jurisprudence.²⁴⁶ In the case of the CCRB, then, the complaint disposition letters sent to complainants and officers at the conclusion of an investigation²⁴⁷ should include at least a brief summary of the reasoning underlying the finding. Similarly, the agency statistics and reports released to the public²⁴⁸ should incorporate brief factual summaries of all substantiated cases, edited as necessary to preserve confidentiality in conformity with state law.²⁴⁹ This would not require an inordinate amount

246. Notably, in two recent class action lawsuits challenging the NYPD’s stop-and-frisk and public-housing-trespass-enforcement practices, the Southern District of New York found that CCRB reports provided notice of unconstitutionality to the Department and the City of New York. *See Floyd v. City of N.Y.*, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *46 & n.418 (S.D.N.Y. Aug. 12, 2013) (declaring that “CCRB complaints regarding stop and frisk . . . provided a further source of ongoing notice to the NYPD” and citing an officer’s trial testimony “regarding CCRB complaints about his stop activity”); *Davis v. City of N.Y.*, No. 10 Civ. 0699(SAS), 2013 WL 1288176, at *15 (S.D.N.Y. Mar. 28, 2013) (observing that “the City receive[d] notice of the unconstitutionality of its practices through individual CCRB reports and [a] CCRB study”). Although Judge Scheindlin, who decided both cases, was removed from *Floyd* by the Second Circuit because “the appearance of impartiality had been compromised by certain statements made by [the judge] during proceedings in the district court and in media interviews,” the Second Circuit expressed no view on the merits of the underlying action. *Ligon v. City of N.Y.*, 736 F.3d 118, 121–22 (2d Cir. 2013) (per curiam). In fact, in its most recent ruling, the Second Circuit granted the City’s motion to remand the case for the purpose of exploring settlement and vacated its earlier order staying proceedings in the district court. *Ligon v. City of N.Y.*, Nos. 13–3123–cv, 13–3088–cv, 13–3461–cv, 2014 WL 667358, at *1–2 (2d Cir. Feb. 21, 2014) (per curiam).

247. 2011 CCRB ANNUAL REPORT, *supra* note 32, at 11.

248. *See News, Reports & Statistics*, N.Y.C. CIVILIAN COMPLAINT REV. BOARD (2014), <http://www.nyc.gov/html/ccrb/html/news/news.shtml> (providing public access to information “about agency operations, complaint activity, case dispositions and police department discipline”).

249. *See supra* note 238.

of additional work, as substantiated cases make up a small percentage of all cases investigated by the CCRB—between seven and fifteen percent every year, historically²⁵⁰—and closing reports already include abbreviated summaries of findings.²⁵¹

B. *Critiques of the Proposal*

The proposal is susceptible to criticism from both extremes—on the one hand, arguments that it “goes too far” in granting significant weight to oversight findings, and on the other, arguments that it “does not go far enough” to meaningfully advance constitutional rights.

Those who contend that the proposal goes too far may emphasize that oversight staff are not required to have formal legal training, and while the investigative process may *resemble* an adversarial proceeding, it lacks certain critical characteristics of the latter (e.g., the right to presence of counsel for all parties, final review by a neutral arbiter capable of making independent findings of fact and law, and rules of evidence). They may also assert that the administrative, criminal, and civil systems are currently treated as separate rather than interconnected,²⁵² such that the proposal represents a material alteration of the hierarchy of legal authority. Finally, they may question whether a complaint is only substantiated *because* it represents a violation of clearly established law, and if so, whether this renders the proposal superfluous.

In contrast, those who maintain that the proposal does not go far enough may draw attention to the fact that oversight bodies have narrowly cabined jurisdiction²⁵³ and rely in many cases on self-reporting by either

250. See, e.g., 2013 CCRB ANNUAL REPORT, *supra* note 32, at 12 (calculating the 2013 year-end complaint substantiation rate at 14.4%); 2012 CCRB ANNUAL REPORT, *supra* note 32, at 11 (placing the 2012 year-end complaint substantiation rate at 15%, seven percentage points higher than the 2011 year-end rate of 8%, and remarking that the substantiation rate between 2008 and 2010 ranged from 7% to 11%).

251. It warrants note that other civilian external investigatory oversight bodies, including the Chicago Independent Police Review Authority, the District of Columbia Office of Police Complaints, and the San Francisco Office of Citizen Complaints, already release reports of sustained cases that include the sorts of details envisioned by this proposal. See, *Complaint Examiner Decisions*, D.C. OFF. POL. COMPLAINTS, <http://policecomplaints.dc.gov/page/complaint-examiner-decisions> (providing links to the decisions of the city’s legally trained complaint examiners, which take the form of written opinions that cite both case law and police regulations); *Reports & Statistics*, CITY & COUNTY S.F. OFF. CITIZEN COMPLAINTS, <http://www.sfgov3.org/index.aspx?page=515> (providing links to monthly openness reports and quarterly and annual reports issued by the Office of Citizen Complaints, which include summaries of investigative findings); *Sustained Cases 2013*, CITY CHI. INDEP. POLICE REV. AUTHORITY, http://www.iprachicago.org/sustained_cases_2013.html (providing links to monthly reports of the Independent Police Review Authority’s substantiated cases that include summaries of the underlying allegations).

252. See *supra* notes 236–38 and accompanying text.

253. See *supra* text accompanying note 178.

civilians or officers,²⁵⁴ with the result that oversight bodies are only exposed to a fraction of the police misconduct occurring in the locality. Relatedly, they may point out that the parallel treatment of the administrative, criminal, and civil systems, combined with the limited means of redress provided by oversight investigations,²⁵⁵ incentivizes rational complainants *not* to initiate and participate in oversight investigations.

C. Responses to Critiques

The primary response to those who contend that the proposal goes too far calls for recognition of the fact that both the Supreme Court and the lower federal courts have already endorsed the use, in the clearly-established-law inquiry, of nondecisional statements of law that may be far less scrutinized, particularized, and formalized than oversight findings.²⁵⁶ Internal regulations, for instance, often take the form of vague standards promulgated by administrators, and reports of compliance agencies are not necessarily subjected to the same in-depth factual investigation and multitiered review as oversight findings. Moreover, as noted above, the proposal is calculated to satisfy the Court’s paramount interest in assuring that only officers with fair notice—and, as a corollary, the requisite culpability—are subject to liability.

As to the criticism regarding the absence of legal training, it may reasonably be argued that formal legal training need not be an absolute prerequisite to effectively analyzing police misconduct. Indeed, the fact that the CCRB, like much of its cohort, requires no legal experience for new investigators supports this premise.²⁵⁷ Furthermore, it merits note that not

254. See 2012 CCRB ANNUAL REPORT, *supra* note 32, at i (noting that the board encourages “members of the community to file complaints . . . [and] all parties involved in a complaint to come forward and present evidence”).

255. The sole result of a substantiated allegation is the potential imposition of discipline on the subject officer. See *supra* note 206 and accompanying text.

256. See *supra* subpart II(B).

257. See *supra* note 223 and accompanying text; see also, e.g., *Investigator*, D.C. OFF. POLICE COMPLAINTS (Jan. 9, 2014), <http://policecomplaints.dc.gov/release/investigator-0> (advertising an open investigator position and indicating, in an attached posting, that applicants need only “a four-year degree from an accredited college or university,” relevant investigative experience, interpersonal and writing skills, and high ethical standards). The National Association for Civilian Oversight of Law Enforcement (NACOLE), a nonprofit organization dedicated to establishing and improving police oversight in the United States, recommends similar qualifications for oversight investigators. See *Qualification Standards for Oversight Agencies*, NAT’L ASS’N FOR CIVILIAN OVERSIGHT L. ENFORCEMENT (2013), <http://nacole.org/resources/qualification-standards-for-oversight-agencies/> (recommending that investigators possess “[a] Bachelor of Arts/Science, an equivalent degree, or a combination of education and relevant experience” and listing, as preferred experience, “[t]hree (3) years experience conducting civil, criminal or factual investigations that involved gathering, analyzing and evaluating evidence,

only do oversight bodies routinely employ attorneys in key positions,²⁵⁸ they also provide in-depth legal training to investigative staff²⁵⁹ and subject investigative findings to careful legal scrutiny.²⁶⁰

Although the contention that oversight investigations lack certain features of formal judicial proceedings has merit, it is not fatal to this proposal for three principal reasons: First, the characteristics that oversight agencies *do* share with judicial bodies amply secure the rights of involved parties and ensure that findings are held to appropriate evidentiary standards.²⁶¹ Second, as explained above, courts have sanctioned the use of less formalized statements of law in the clearly-established-law analysis. Third, and relatedly, under this proposal, the weight accorded to oversight findings may vary with the availability of other sources of legal authority.

With regard to the final two critiques from this group, one focusing on the parallel structure of the different judicial systems and the other questioning the utility of the proposal, they may be met by equally forceful rebuttals. First, although the administrative, civil, and criminal law systems may currently operate in isolation, this only represents a default state of affairs and does not preclude future intercourse: Records of oversight bodies, for instance, may be admissible in court,²⁶² investigative findings may be released pursuant to court order,²⁶³ and even administrative opinions

conducting interviews with friendly and adverse witnesses and documenting information in written form”).

258. *See supra* section II(C)(3); *see also, e.g.*, CITY & CNTY. OF S.F., OFFICE OF CITIZEN COMPLAINTS, 2012 ANNUAL REPORT 27–28 (2013), *available at* <http://www.sfgov3.org/modules/showdocument.aspx?documentid=4516> (summarizing the operations of the agency’s Legal Unit); GOV’T OF D.C., OFFICE OF POLICE COMPLAINTS, ANNUAL REPORT: FISCAL YEAR 2012, at 3–4 (2013), *available at* <http://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/OPC%20Annual%20Report%20FY%202012.pdf> (listing multiple attorneys on the oversight agency’s staff).

259. *See supra* section II(C)(3); *see also, e.g.*, CITY & CNTY. OF S.F., *supra* note 258, at 3–4 (summarizing the legal and tactical training received by investigative staff in 2012); ILANA B.R. ROSENZWEIG, INDEP. POLICE REVIEW AUTH., ANNUAL REPORT 2010–2012, at 14–18 (2013), *available at* http://www.iprachicago.org/IPRA_AnnualReport2010-2012.pdf (describing the investigative training provided to agency staff, including education on shooting reconstruction, interview and interrogation techniques, and Fourth Amendment law).

260. *See supra* section II(C)(2); *see also, e.g.*, CITY & CNTY. OF S.F., *supra* note 258 (indicating that the agency’s Legal Unit, comprising “one supervising trial attorney, one full-time trial attorney, one full-time attorney policy analyst, and one part-time attorney mediation coordinator,” provides legal opinions and analysis, reviews investigative findings “for merit, form, and legality,” and presents substantiated cases to the police department); GOV’T OF D.C., OFFICE OF POLICE COMPLAINTS, ANNUAL REPORT: FISCAL YEAR 2005, at 4, 6–7 (2006), *available at* http://policecomplaints.dc.gov/sites/default/files/dc/sites/police%20complaints/publication/attachments/Annual_Report_FY05_Final.pdf (stating that completed investigations are reviewed by a supervisor and the executive director of the agency, a former senior attorney in the Civil Rights Division of the U.S. Department of Justice).

261. *See supra* sections II(C)(2)–(3).

262. *E.g.*, Williams v. McCarthy, No. 05-Civ.-10230(SAS), 2007 WL 3125314, at *6 & nn. 38–40 (S.D.N.Y. Oct. 25, 2007) (discussing the role of civilian complaint records in the court).

263. *See supra* note 238 and accompanying text.

may soon see the light of day.²⁶⁴ Second, although complaints do often involve clearly established law, they also regularly implicate truly novel factual scenarios.²⁶⁵ In this light, a finding of misconduct can represent a step toward making the law clearly established when *Pearson* might allow avoidance.

With regard to the critiques from the opposite extreme—those not already addressed above—two remarks are in order: First, oversight investigations are only *one part* of a complex patchwork of police oversight, so comprehensive coverage of all extant misconduct is neither necessary for this proposal nor even possible. Second, by forging a connection between oversight and civil liability—and increasing the likelihood of recovery under § 1983—this proposal may actually *incentivize* participation in oversight investigations.

Conclusion

This Note is founded on a simple premise: The vindication of constitutional rights is a critical aspect of police regulation. By recognizing a federal cause of action against officers who violate the constitutional rights of civilians, and conferring a defeasible form of immunity on officer-defendants, the Supreme Court has indicated that individual constitutional rights deserve protection in the courts of the United States. Despite the Court’s repeated affirmation of the importance of constitutional articulation, however, the process of elaborating constitutional rights through decisional law faces a grave challenge in the form of *Pearson* discretion. This Note seeks to use one of the existing tools of police regulation—civilian external investigatory oversight—to surmount this challenge, recognizing that the necessary legal foundations are already in place and the vital work on the ground is already in progress across the nation. One word of caution: Although the proposal advocated by this Note represents one response to the modern qualified immunity dilemma, and one uniquely responsive to the Court’s Fourth Amendment demands, it addresses only one fragment of the law of the police. Police regulation, no less than constitutional articulation, requires a creative, multifaceted approach—one sensitive to the strengths and weaknesses of both existing and prospective regulatory tools.

—Ryan E. Meltzer

264. See *supra* note 218 and accompanying text. As indicated above, several oversight bodies already release administrative opinions and reports of investigative findings. See *supra* note 251.

265. See *supra* subparts II(A), II(C).