How Qualified Is Qualified Immunity: Adding A Third Prong To The Qualified Immunity Analysis

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ABSTRACT

This Article addresses the controversial "third prong" that some courts add to the qualified immunity analysis in 42 U.S.C. § 1983 cases. Under the doctrine of qualified immunity, public officials are immune from liability for civil rights violations so long as they do not violate clearly established law. Courts have generally analyzed this qualified immunity defense via a two-prong test—asking whether the official (1) violated the plaintiff's constitutional right, and (2) if so, asking whether that right was "clearly established" at the time of the violation. However, certain circuits add a third prong to the test, asking whether the official's actions were objectively reasonable in light of the clearly established law. Applying this prong creates an additional barrier to plaintiffs in suits against government officials in their individual capacities. Courts are not in agreement about the propriety of the third prong, and in at least one circuit various panels of the court are not even in agreement about its use. This Article addresses how the prong can change the outcome in qualified immunity cases and argues that its use is permitted and, in many cases, serves to better achieve the goals of the qualified immunity doctrine.

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INTRODUCTION

Under the doctrine of qualified immunity, public officials sued in their individual capacities are immune from liability for § 1983 civil rights violations so long as they do not violate clearly established law.[1] For decades, the United States Supreme Court and lower courts have generally analyzed this qualified immunity defense through a two-prong test—asking whether the official: (1) violated the plaintiff's constitutional right; and (2) if so, whether that right was "clearly established" at the time of the violation.[2] Some circuits, however, have added a third prong to the test in certain cases, generally framed as whether the official's actions were *objectively reasonable in light of* the clearly established law.[3] Courts are not in agreement about the propriety of this third prong—in at least one circuit, various panels of the court are not even in agreement.[4]

The purpose of this Article is to explore the existence and application of the third prong of qualified immunity in the various circuits and the Supreme Court, and to argue that the third prong is a permissible addition

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

2. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001).

3. *See, e.g.*, Sample v. Bailey, 409 F.3d 689, 696 n.3 (6th Cir. 2005).

4. *Compare* Dunigan v. Noble, 390 F.3d 486, 491 n.6 (6th Cir. 2004) ("Despite *Saucier*'s direction, some panels of this Court have continued to rely on a three step analysis of qualified immunity claims . . . . Other panels acknowledge *Saucier* as binding. We take the latter approach." (internal citations omitted)), *with* Sample v. Bailey, 409 F.3d 689, 696 n.3 (6th Cir. 2005) ("One panel of this court has recently suggested that our three-step approach for evaluating qualified immunity claims . . . is inconsistent with the Supreme Court's two-step inquiry outlined in *Saucier* . . . . We disagree . . . ." (internal citations omitted)).

to the analysis that courts have the discretion to use as they see fit. Part I provides a background of the qualified immunity defense. Part II focuses on the controversial third prong and illustrates how it can affect the outcome of a case. Part III explores circuit opinions' treatment of the prong. Part IV analyzes the Supreme Court's treatment (or lack thereof) of the issue, as well as Supreme Court cases that are at least arguably consistent with its use. Finally, Part V of this Article opines that courts are free to utilize the third prong because it does not conflict with the Supreme Court's treatment of qualified immunity cases and may better serve the goals that qualified immunity aims to achieve.

I. QUALIFIED IMMUNITY AND ITS GENERALLY ACCEPTED FIRST TWO PRONGS

Qualified immunity protects government officials from suits brought under 42 U.S.C. § 1983 (and federal officials from *Bivens*[5] actions) in their individual capacities. This immunity "gives government officials breathing room to make reasonable but mistaken judgments . . . . [and] protects 'all but the plainly incompetent or those who knowingly violate the law.'"[6] The Supreme Court established the modern formulation of qualified immunity in *Harlow v. Fitzgerald*, where it held that the doctrine protects government officials "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."[7] The qualified immunity doctrine is judicially created[8] and, as the Court has described it, is "the best attainable accommodation of [the] competing values" of deterring the abuse of power

5. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971). Section 1983 provides a remedy for persons injured by officials acting under the color of state law. Although the statute does not provide a specific remedy for plaintiffs whose constitutional rights were violated by agents of the federal government, the *Bivens* Court recognized an implied cause of action, which is now commonly referred to as a "*Bivens* action" and more or less tracks § 1983 case law.

6. Ashcroft v. Al-Kidd, 563 U.S. 731, 743 (2011) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

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

8. In recent months, qualified immunity has received national attention in light of the 2020 Black Lives Matter movement. Some federal judges have asserted that it should be revisited. *See* Jamison v. McClendon, No. 3:16-CV-595-CWR-LRA, 2020 U.S. Dist. LEXIS 139327, at *3 (S.D. Miss. Aug. 4, 2020). However, whatever one's thoughts are on the propriety of the doctrine, the Supreme Court has denied numerous requests to revisit it. So, unless it is changed by statute, it appears that it is here to stay for now. Whether the qualified immunity doctrine should be modified or done away with is beyond the scope of this Article.

by government officials and preventing suits against government officials, which would have a chilling effect on officials' ability to actually serve the public.[9] The Court elaborated on the *Harlow* standard of qualified immunity in *Anderson v. Creighton*, saying,

> Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time it was taken.[10]

Since *Anderson*, as judicial doctrines often do, the test became more crystalized, and finally, separated into numbered elements. The Court most clearly recognized this numerical formulation in *Saucier v. Katz*.[11] Under *Saucier*, courts apply the test as two prongs: "[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 [is] whether the right was clearly established . . . ."[12]

As to the first prong, a plaintiff must plead (or provide evidence in support at the summary judgment stage) that the defendant was personally involved in the conduct that forms the basis of his complaint.[13] The plaintiff must also show that the defendant's conduct constituted a violation of the plaintiff's constitutional or other federal right.[14] For example, if a plaintiff alleges that a police officer violated his First Amendment rights by arresting him for videotaping the officer during a traffic stop, the plaintiff must plead (or submit record evidence at the summary judgment stage to show) that such conduct amounts to a violation of the First Amendment and that it was in fact the defendant officer who committed the act.

As to the second prong, the court must determine whether the right violated was "clearly established" at the time the violation occurred.[15] In

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9. *Harlow*, 457 U.S. at 813–14. Before *Harlow*, the Court recognized a form of immunity that involved a subjective good faith component, which is no longer part of the analysis. *See* Pierson v. Ray, 386 U.S. 547, 557 (1967).

10. Anderson v. Creighton, 483 U.S. 635, 639 (1987) (citing *Harlow*, 457 U.S. at 818–19).

11. Saucier v. Katz, 533 U.S. 194, 201 (2001).

12. *Id.* at 200. As will be discussed in more detail below, the Court would later overrule this framework in part, ruling that courts have discretion to approach these two elements in either order. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

13. Greene v. Barber, 310 F.3d 889, 899 (6th Cir. 2002).

14. *Saucier*, 533 U.S. at 200.

15. *Id.*

other words, the court asks whether the state of the law was sufficient to give the officer notice that his actions were unconstitutional. To do this, courts "look first to decisions of the Supreme Court, then to [their] own precedents, and then to decisions of other courts of appeal, and . . . ask whether these precedents placed the constitutional question beyond debate."[16]

A plaintiff cannot satisfy this burden under the second prong "by alleging [a] violation of extremely abstract rights."[17] Instead, case precedent must make the "contours of the right . . . sufficiently clear that a reasonable official would understand that what he is doing violates that right."[18] So, using the videotape example above, the plaintiff must show that a reasonable officer would have known—based on the state of the law at the time—that the First Amendment protected the plaintiff's right to film a traffic stop.

Looking at *Saucier* and the Supreme Court's other recent summaries of qualified immunity, it would seem that a plaintiff need only satisfy those two prongs to survive a defendant's motion to dismiss or motion for summary judgment.[19] In other words, so long as the plaintiff can show that the defendant officer violated his constitutional or federal statutory right, and that the existence of that right was clearly established,[20] the plaintiff's claim can proceed to trial. But the analysis does not always end there. Instead, some circuits, and even panels within circuits, append a third prong to the analysis.

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16. Hearring v. Sliwowski, 712 F.3d 275, 280 (6th Cir. 2013) (citation omitted).

17. Anderson v. Creighton, 483 U.S. 635, 639 (1987); *see* City & Cnty. of San Francisco v. Sheehan, 575 U.S. 600, 611 (2015) ("Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures.").

18. *Anderson*, 483 U.S. at 640; *see* White v. Pauly, 137 S. Ct. 548, 552 (2017).

19. *See Saucier*, 533 U.S. at 201; *see also* Pearson v. Callahan, 555 U.S. 223 (2009) (affirming *Saucier*'s general two-step protocol but overruling its mandatory sequence of analysis).

20. A number of other complicating factors, not addressed in this Article, arise under the clearly established law prong, such as what law an officer is tasked with knowing. *See, e.g.*, David R. Cleveland, *Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations*, 65 U. MIAMI L. REV. 45 (2010) (discussing federal circuits' varying treatments of unpublished opinions in the qualified immunity analysis); Garcia v. Does, 779 F.3d 84, 95 n.12 (2d Cir. 2015) (discussing weight of out-of-circuit opinions). The Supreme Court itself has recognized that the issue of what sources of law can clearly establish a right remains unsettled. D.C. v. Wesby, 138 S. Ct. 577, 591 n.8 (2018) ("We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity.").

II. THE THIRD PRONG

Some federal circuits add a third prong to the qualified immunity analysis.[21] The prong varies slightly in its language from circuit to circuit. The gist of it, however, was fairly summarized by the Sixth Circuit in *Srisavath v. City of Brentwood*, which observed that "[o]n occasion, this Court adds a third prong to the *Saucier* test, examining 'whether the plaintiff offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.'"[22] In other words, *if* the official violated the plaintiff's constitutional right, *and if* the court finds that the right was clearly established at the time, then the court may still ask a third question—was the officer's violation *objectively unreasonable in light of* the state of the law at the time? This obviously adds to the plaintiff's burden, and whether it is permissible is up for debate.[23]

A. How The Third Prong Functions

The third prong serves to bridge the gap between the clearly-established-right prong and the defendant's actions in a particular case. It allows the court to ask, as a matter of law, whether the defendant acted objectively unreasonable in light of the clearly established law.[24] The

21. *See, e.g.*, Buchanan v. Maine, 469 F.3d 158, 169 (1st Cir. 2006) ("The third prong of the qualified immunity analysis recognizes that law enforcement officials will in some cases reasonably but mistakenly conclude that their conduct is lawful; in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable." (internal quotation marks, alterations, and citation omitted)); Easley v. City of Riverside, 890 F.3d 851, 856 (9th Cir. 2018), *rev'd on reh'g en banc on other grounds*, No. 16-5594, 2019 U.S. App. LEXIS 9821 (9th Cir. filed April 3, 2019); *accord* Cunningham v. Shelby Cnty., No. 2:18-CV-02185-TLP-DKV, 2020 U.S. Dist. LEXIS 57154, at *57 (W.D. Tenn. Apr. 1, 2020) ("The third and final question that the Court must answer is whether Plaintiff has put forth enough evidence to indicate that what Defendants allegedly did was objectively unreasonable in light of the clearly established constitutional rights." (internal quotation marks, alterations, and citation omitted)).

22. Srisavath v. City of Brentwood, No. 06-6067, 2007 U.S. App. LEXIS 15053, at *912 (6th Cir. filed June 20, 2007) (quoting Estate of Carter v. City of Detroit, 408 F.3d 305, 310 n.2 (6th Cir. 2005)).

23. *Compare, e.g.*, Walczyk v. Rio, 496 F.3d 139, 166 (2d Cir. 2007) (Sotomayor, J., concurring) (stating that the third prong, "[b]y splitting the 'relevant, dispositive inquiry' in two, . . . erect[s] an additional hurdle" for qualified immunity claims, a hurdle "that has no basis in Supreme Court precedent") (citing *Saucier*, 533 U.S. at 202), *with* Sample v. Bailey, 409 F.3d 689, 696 n.3 (6th Cir. 2005) (concluding that the three-prong approach "correctly encompasses the Supreme Court's approach to qualified immunity claims and serves to ensure government officials the proper protection from civil suit under the law").

24. *See, e.g.*, Wilson v. City of Bos., 421 F.3d 45, 53 n.10, 58 (1st Cir. 2005).

Fourth Circuit's opinion in *Gould v. Davis* explains the function of the prong, and how it is different than "reasonableness" in the more common tort sense:

> This [third] prong is the source of some confusion for the parties, who argue in their briefs about whether "reasonableness" is a question of law, to be decided by the court, or a question of fact that must be decided by a jury. The parties misconstrue this part of the analysis, however, by arguing over whether the officers' behavior in this case was "reasonable." The question in qualified immunity is not whether the officers acted "reasonably" in the sense in which that term is used in tort law. The question is whether a reasonable person would have known about controlling law, once that law is deemed to have been clearly established under the second prong. The concept of objective reasonableness, as used in qualified immunity, is not a freestanding evaluation of the "reasonableness" of an officer's actions. [25]

Objective reasonableness in the qualified immunity framework is a separate hurdle of a purely legal nature that the court should address, at least as far as the Fourth Circuit surmises.[26]

What actual effect, if any, the third prong has on cases is also up for debate.[27] Some courts (and even panels within courts) suggest that it is little more than a reformulation of the two-prong test and that, "[r]egardless of how the test is articulated, a defendant will only be held liable if his or her actions were objectively unreasonable in view of clearly established law."[28] The First Circuit, on the other hand, describes the third prong as "often the most difficult one for the plaintiff to prevail upon."[29] At a minimum, the prong obviously raises the number of hurdles the plaintiff must jump from two to three. And, as explained below, the third prong has proven outcome-determinative in some cases.

A good example of a case where the third prong made all the difference comes from the Second Circuit's two-to-one ruling in *Taravella v. Town of*

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25. Gould v. Davis, 165 F.3d 265, 272–73 (4th Cir. 1998) (internal citations omitted). *See generally* Batt v. Buccilli, No. 17-1210, 2018 U.S. App. LEXIS 3635, at *27 (2d Cir. Feb. 16, 2018) ("The question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in the defendant's position should have known about the constitutionality of his conduct." (alterations and citation omitted)).

26. *Gould*, 165 F.3d at 273.

27. *See Srisavath*, 2007 U.S. App. LEXIS 15053, at *912 (discussing the application of the third prong by some courts and its effect).

28. Robertson v. Lucas, 753 F.3d 606, 615 n.4 (6th Cir. 2014).

29. *Wilson*, 421 F.3d at 57–58.

Wolcott.[30] *Taravella* involved an employment due process claim by a former town employee against the town's mayor.[31] The employee, former senior center director Denise Taravella, was fired by the town's new Mayor, Thomas Dunn.[32] Taravella sued the Mayor, asserting that she was entitled to, and deprived of, a pre-termination meeting and protection from termination without cause.[33] The terms of her employment were memorialized in a Letter of Benefits Agreement that both sides of the opinion agreed was ambiguous.[34] The defendant, Mayor Dunn, asserted that he was entitled to qualified immunity; the majority of the Second Circuit agreed—based exclusively on the third prong.[35]

As to the first prong, the court found that the right Taravella asserted, a due process property interest in her government job protecting her from termination without cause, existed.[36] The court also found that the second prong was satisfied, stating that "because this principle [that government employees have a right to a termination hearing] has been clearly established since *Loudermill*, the second prong of the qualified immunity analysis would appear to be satisfied."[37] And yet, the court found that the Mayor was nonetheless immune based on the third prong.[38] The ambiguous nature of the Letter of Benefits Agreement formed the basis of the court's ruling, which Taravella argued provided her the protection against termination without cause.[39]

> We conclude that Dunn's conduct was objectively reasonable as a matter of law . . . . [T]he Agreement is ambiguous as a matter of law. Dunn read the Agreement, sought legal advice, and reasonably concluded that Taravella could be terminated without a hearing. Because a reasonable mayor could understand the Agreement to provide that Taravella could be fired without a hearing, it cannot be said that Dunn acted unreasonably in doing so."[40]

30. Taravella v. Town of Wolcott, 599 F.3d 129 (2d Cir. 2010).
31. *Id.* at 131–32.
32. *Id.*
33. *Id.*
34. *Id.* at 135.
35. *Id.* at 134–35.
36. *Id.* at 134.
37. *Id.*
38. *Id.* at 134–35.
39. *Id.* at 135.
40. *Id.*

Under this fact-intensive application of the third prong, the Second Circuit found that qualified immunity applied.[41]

Judge Straub dissented in *Taravella*, arguing (among other things) that the third prong was a result of confusing Second Circuit precedent that had been abrogated by the Supreme Court's ruling in *Saucier*.[42] Judge Straub would ultimately win the day because, as discussed below, the Second Circuit would go on to move away from the third prong entirely in 2016.[43] Nonetheless, the majority ruling in *Taravella* shows that the third prong has teeth and can be outcome-determinative.

Another case where the third prong was the determining factor is *Liebe v. Norton*, where the plaintiff alleged that individual Defendant Prison Guard, Lyle Norton, failed to prevent the suicide of an inmate on suicide watch.[44] The Eighth Circuit found that the claim met the first and second prongs, but that the third prong entitled Norton to qualified immunity.[45] The way the court applied the prong, however, was less clear-cut. The court began its analysis:

> It is the third prong of the qualified immunity test which is the crux of this appeal. This prong, regarding whether a reasonable official would have known that his conduct violated a constitutional right, involves both an objective and subjective component. The objective component examines whether a serious deprivation occurred. The subjective component examines Norton's state of mind, and requires that he acted with "deliberate indifference." The district court held that this prong was not met because Norton's actions did not amount to deliberate indifference. We agree.[46]

This analysis is confusing because it seems to draw on questions that are more applicable to the first prong—whether the defendant violated plaintiff's constitutional rights. And in fact, the court's conclusion that "Norton may have been negligent in not checking on Liebe more often, or in failing to notice the exposed electrical conduit in the temporary holding cell, . . . [but not] indifferent,"[47] is almost identical to opinions in other inmate-suicide cases where the same determination led to a finding that the

41. *Id.*

42. *Id.* at 136–41. Judge Straub also relied heavily on former Second Circuit Judge Sotomayor's concurrence in *Walczyk*, discussed in more detail below. *See infra* notes 85–87 and accompanying text.

43. Ricciuti v. Gyzenis, 834 F.3d 162, 170 (2d Cir. 2016).

44. Liebe v. Norton, 157 F.3d 574, 576 (8th Cir. 1998).

45. *Id.* at 577.

46. *Id.* (internal citations omitted).

47. *Id.* at 578.

first prong—a constitutional violation—was not satisfied.[48] *Liebe* thus shows that the third prong can overlap with the other two prongs, sometimes to the point that it seems to simply be a reformulation of one or the other of them. But, as the circuit court framed it, it was nonetheless the third prong that carried the day for the defendant.[49]

B. Miscellaneous Issues: Objective Reasonableness Under the Fourth Amendment and the Saucier Order-of-Battle

Before exploring other courts' takes on the third prong, a discussion of the question would not be complete without addressing two issues that may further convolute the role of the third prong: its overlap with the Fourth Amendment and the *Saucier* order-of-battle rule.

Fourth Amendment cases present a complication to the use of the third prong as an "objective reasonableness" standard because "objective reasonableness" is also the standard for whether an officer's use of force amounts to a constitutional violation.[50] In other words, to overcome the first prong of qualified immunity in an excessive force case, the plaintiff must plead or prove that the officer's use of force was not objectively reasonable. Assuming the plaintiff proves as much, and then goes on to satisfy the second prong (showing that the officer's objectively unreasonable use of force was clearly established as unlawful), then the third prong would appear to be redundant in light of the first. It would require the court to ask whether the officer, who acted objectively unreasonably *and* violated clearly established law, also acted objectively unreasonably *in light of* clearly established law. The *Saucier* Court partially addressed this issue, ruling that objective reasonableness under the Fourth Amendment did not consume the qualified immunity analysis. In doing so, *Saucier*'s reasoning suggests that the third prong has a place in the analysis. The Court reasoned that an excessive force analysis involves

> a list of factors relevant to the merits of the constitutional excessive force claim, requiring careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. If an officer reasonably, but mistakenly, believed that a suspect was likely

48. *See, e.g.*, Goodman v. Kimbrough, 718 F.3d 1325, 1332 (11th Cir. 2013).

49. *Liebe*, 157 F.3d at 577; *see also* Wilson v. City of Bos., 421 F.3d 45, 58 (1st Cir. 2005).

50. *See generally* Graham v. Connor, 490 U.S. 386 (1989).

> to fight back, for instance, the officer would be justified in using more force than in fact was needed.[51]

The Court went on to explain that "[t]he qualified immunity inquiry, on the other hand, *has a further dimension*. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the *legal* constraints on particular police conduct."[52] Because an officer may misconstrue how a legal doctrine applies to the facts he faces, if his "mistake as to what the law requires is reasonable," he is immune.[53] While the question of appending a numbered third prong was not before the *Saucier* Court, the ruling nonetheless suggests that an official's objective reasonableness as to the state of the law is distinct from the questions posed in the first two prongs, and is indeed a "further dimension" of qualified immunity.[54]

The other issue that may complicate the matter is the old order-of-battle rule. When the Court solidified the qualified immunity analysis in *Saucier*, it also held—in a ruling so unpopular that it would later be completely reversed—that courts were required to conduct the two-pronged analysis *in order*.[55] So, a district court faced with the First Amendment police-videotape example above could not grant a motion to dismiss the claim against the officer simply by finding that, regardless of whether the right was violated, it was not clearly established. Instead, the court had to begin its analysis with the first prong. The Court reversed this part of *Saucier* nine years later in *Pearson v. Callahan*, ruling that the sequential order of battle may be a helpful way to analyze qualified immunity, but that it is not a requirement.[56] The ruling did not address a numeric third prong, but the Court's retreat from the rigid order-of-battle sequence does not run contrary to those circuits which have found that objective legal reasonableness can have a place in the analysis, perhaps even as a formal third prong.

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51. Saucier v. Katz, 533 U.S. 194, 205 (2001) (emphasis added) (internal citations, quotation marks, and bracket omitted).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 200 ("[T]he requisites of a qualified immunity defense must be considered in proper sequence.").

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

III. CIRCUIT COURT TREATMENT OF THE THIRD PRONG

Circuit courts are not in agreement as to whether, and when, to use the third prong. As the Second Circuit put it, this "additional 'reasonableness' hurdle a plaintiff must satisfy to prevail in a suit against a public officer alleging a constitutional tort has not been without controversy."[57]

Some circuits, like the Fourth Circuit, explicitly add the third prong.[58] Others use the third prong but describe it as a mere subset of the *second* prong.[59] For instance, as the Fifth Circuit reasoned,

> [T]he second prong of the qualified immunity test is better understood as two separate inquiries: whether the allegedly violated constitutional rights were clearly established at the time of the incident; and, if so, whether the conduct of the defendants was objectively unreasonable in the light of that then clearly established law.[60]

Other courts, such as the Second and Eighth Circuits, employed the third prong for a time and then moved away from it. The Eighth Circuit employed the third prong until around 2001.[61] But for reasons that are not

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57. Ricciuti v. Gyzenis, 834 F.3d 162, 170 (2d Cir. 2016) (citations omitted).

58. *See, e.g.*, Gould v. Davis, 165 F.3d 265, 272 (4th Cir. 1998) ("In the final prong of the qualified immunity analysis, we must determine whether a reasonable person in the officers' position would have known that his actions violated the right alleged by the plaintiff.").

59. *See, e.g.*, Whalen v. Massachusetts Trial Court, 397 F.3d 19, 27 n.9 (1st Cir. 2005) ("We note that, on occasion, we have combined the second and third prongs of the qualified immunity analysis into a single step." (citations omitted)).

60. Estate of Sorrells v. City of Dallas, No. 01-10610, 2002 WL 1899592, at *2 (5th Cir. July 10, 2002) (quoting Hare v. City of Corinth, 135 F.3d 320, 326 (5th Cir. 1998)); *see also* Tremblay v. McClellan, 350 F.3d 195, 200 (1st Cir. 2003) ("Even were a reasonable suspicion constitutional standard clearly established in 1999 for these circumstances, the question would be whether an objectively reasonable officer in Officer McClellan's position could have understood that his actions did not violate the Fourth Amendment. This question could be considered to merge the second and third prongs of the immunity analysis."); Easley v. City of Riverside, 890 F.3d 851, 856 (9th Cir. 2018), *rev'd on reh'g en banc on other grounds*, No. 16-55941, 2019 U.S. App. LEXIS 9821 (9th Cir. filed April 3, 2019) ("The second prong requires us to analyze two discrete sub-elements: 'whether the law governing the conduct at issue was clearly established' and 'whether the facts as alleged could support a reasonable belief that the conduct in question conformed to the established law.'" (quoting Green v. City & Cnty. of San Francisco, 751 F.3d 1039, 1052 (9th Cir. 2014))).

61. *See* Feist v. Simonson, 222 F.3d 455, 462 (8th Cir. 2000), *overruled on other grounds by* Helseth v. Burch, 258 F.3d 867, 871 (8th Cir. 2001).

abundantly clear, the Eight Circuit no longer uses the prong.[62] Instead, somewhere along the line, the court merged the second and third prongs and finally dispensed with the third prong altogether.[63] The Second Circuit used it for a time,[64] but then moved away from it in *Ricciuti v. Gyzenis*, and seemed to acknowledge that the prong's foothold was questionable, stating that it "need not resolve whether the 'reasonableness' of a defendant-officer's belief that his conduct did not violate the law is an independent basis for granting qualified immunity . . . ."[65] These circuits do not currently utilize the prong but have not spoken in a definitive voice as to whether it may have a place in some future case.

The Seventh Circuit is the court most decidedly against the use of the third prong. In *Jones v. Wilhelm*, the court addressed the issue head on: "Wilhelm urges us to append a third prong to the two-part *Saucier* test, contending that 'even if the Court finds that there was clearly established law which was violated, the immunity question should be decided based on whether police officers acted reasonably under the circumstances they faced.'"[66] *Saucier* (which the Seventh Circuit referenced) states that "[t]he relevant, dispositive inquiry is whether it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted."[67] Perhaps somewhat confusingly, the Seventh Circuit deduced from this *Saucier* language that it "goes without saying" that the officer's objective reasonableness has no part in the discussion.[68] Thus, the court held that "qualified immunity remains a two-part test which first examines whether the defendant's alleged actions constitute a violation of constitutional rights, and then determines whether the implicated right was clearly established at the time."[69]

The Sixth Circuit's take, on the other hand, is perhaps the murkiest, as different panels of the Sixth Circuit expressly disagree *with each other* about the issue. For instance, one panel of the Sixth Circuit in *Dunigan v. Noble*[70] made the observation in a footnote that "[d]espite *Saucier*'s

62. *See* Tlamka v. Serrell, 244 F.3d 628, 632 (8th Cir. 2001); Wilson v. Lawrence Cnty., 260 F.3d 946, 951 (8th Cir. 2001); Henderson v. Munn, 439 F.3d 497, 501–02 (8th Cir. 2006); Howard v. Kansas City Police Dep't, 570 F.3d 984, 988 (8th Cir. 2009).

63. *See generally* Saucier v. Katz, 533 U.S. 194 (2001).

64. *See, e.g.*, Gonzalez v. City of Schenectady, 728 F.3d 149, 154–55 (2d Cir. 2013); Edwards v. Arnone, No. 14-329, 2015 U.S. App. LEXIS 9107, at *2 (2d Cir. June 2, 2015).

65. Ricciuti v. Gyzenis, 834 F.3d 162, 170 (2d Cir. 2016).

66. Jones v. Wilhelm, 425 F.3d 455, 460 (7th Cir. 2005).

67. *Saucier*, 533 U.S. at 197.

68. *Jones*, 425 F.3d at 461.

69. *Id.*

70. Dunigan v. Noble, 390 F.3d 486, 491 n.6 (6th Cir. 2004).

direction, some panels of this Court have continued to rely on a three step analysis of qualified immunity claims grounded in our pre-*Saucier* en banc decision in *Williams v. Mehra* . . . . Other panels acknowledge *Saucier* as binding . . . . We take the latter approach."[71]

The following year, another panel responded to the *Dunigan* footnote with its own footnote, stating, "One panel of this court has recently suggested that our three-step approach for evaluating qualified immunity claims . . . is inconsistent with the Supreme Court's two-step inquiry outlined in *Saucier* . . . . We disagree."[72] Ten years later, a panel of the Sixth Circuit in *Robertson v. Lucas* continued to use the prong, observing that "[w]e have, from time to time, elaborated a third step in the qualified immunity analysis: 'whether the plaintiff has offered sufficient evidence "to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.'" . . . This requirement is implicit in the two-step approach."[73] Obviously, these approaches are at odds. But, the Sixth Circuit has also recognized that "one panel cannot overrule a pre-existing decision of another panel."[74] So, unless the Supreme Court or an en banc panel squarely addresses the issue, the panels appear to be at a respectful impasse.

IV. THE SUPREME COURT'S TREATMENT (OR LACK THEREOF) OF THE THIRD PRONG

The Supreme Court has never explicitly suggested that it intends to move from the two-prong structure.[75] However, the language it used in *Anderson*—a fundamental qualified immunity case—suggests that "objective reasonableness" has a place somewhere in the analysis.[76] And, as will be explained in more detail below, the Court was once specifically asked to consider the issue of the third prong and did not address it.

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71. *Id.* (internal citations omitted).

72. Sample v. Bailey, 409 F.3d 689, 696 n.3 (6th Cir. 2005) (citing *Dunigan*, 390 F.3d at 491 n.6).

73. Robertson v. Lucas, 753 F.3d 606, 615 n.4 (6th Cir. 2014) (internal citations omitted); *see also* Cunningham v. Shelby Cnty., No. 2:18-CV-02185-TLP-DKV, 2020 U.S. Dist. LEXIS 57154, at *24 (W.D. Tenn. Apr. 1, 2020) (continuing to use all three prongs).

74. Spengler v. Worthington Cylinders, 615 F.3d 481, 491 n.4 (6th Cir. 2010).

75. Some of the courts that use the third prong have acknowledged as much. *See, e.g.*, Estate of Carter v. City of Detroit, 408 F.3d 305, 311 n.2 (6th Cir. 2005) ("In cases subsequent to *Saucier* the Supreme Court has not formally broken up the two steps prescribed by *Saucier* into three steps, . . . but the three-step approach may in some cases increase the clarity of the proper analysis." (citing Brosseau v. Haugen, 543 U.S. 194 (2004); Groh v. Ramirez, 540 U.S. 551, 563 (2004))).

76. Anderson v. Creighton, 483 U.S. 635, 639–40 (1987).

In *Anderson*, the Court hinted at the idea of objective legal reasonableness when discussing another often-debated issue of qualified immunity—how generally or specifically a right must be defined to be "clearly established."[77] In answering this question (for perhaps the first time, but far from the last[78]), the Court gave an explanation that would just as readily apply in arguing in support of the third prong:

> The operation of this standard . . . depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. [79]

But, the Court explained, "if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the '*objective legal reasonableness*' that is the touchstone of *Harlow*."[80] And such an approach "would destroy 'the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties,' by making it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'"[81] Thus, under the clearly-established-law analysis, the "contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right."[82] This explanation by the Court of the second prong suggests that there must be some level of fact application of the purported right at issue in order to determine whether it is clearly established as to those facts. It almost necessarily follows that the question of whether a reasonable officer would know that what "he is doing" is unconstitutional requires an analysis of objective reasonableness.

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77. *Id.* at 640.

78. This question is, perhaps, the most frequently litigated qualified immunity issue that comes before the Court. *See e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) ("This Court has 'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'" (*citing* City & Cnty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1775–76 (2015))).

79. *Anderson*, 483 U.S. at 639.

80. *Id.* (emphasis added).

81. *Id.* (quoting Davis v. Scherer, 468 U.S. 183, 195 (1984) (alteration in original)).

82. *Id.* at 640 (emphasis added).

Along the same lines, Justice Kennedy's dissent in *Groh v. Ramirez*[83] suggests that whether an officer acted objectively reasonably in light of the state of the law is a part of the qualified immunity framework.

> The central question is whether someone in the officer's position could reasonably but mistakenly conclude that his conduct complied with the Fourth Amendment. An officer might reach such a mistaken conclusion for several reasons. He may be unaware of existing law and how it should be applied. Alternatively, he may misunderstand important facts about the search and assess the legality of his conduct based on that misunderstanding . . . . Finally, an officer may misunderstand elements of both the facts and the law . . . . Our qualified immunity doctrine applies regardless of whether the officer's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.[84]

In short, rulings and dissents from the Supreme Court show that objective legal reasonableness has a place in the analysis, albeit not explicitly in a numbered prong—at least not yet.

Justice Sotomayor is the only member of the Court who has explicitly addressed the issue of whether a third numbered prong is part of the platform. She was decidedly against it. While still a Circuit Judge for the Second Circuit, Justice Sotomayor addressed the issue in a concurrence in *Walczyk v. Rio*:

> Contrary to what our case law might suggest, the Supreme Court does not follow this "clearly established" inquiry with a second, *ad hoc* inquiry into the reasonableness of the officer's conduct. Once we determine whether the right at issue was clearly established for the particular context that the officer faced, the qualified immunity inquiry is complete.[85]

Justice Sotomayor also noted the obvious benefit to defendants of adding the prong: "By splitting the 'relevant, dispositive inquiry' in two, we erect an additional hurdle to civil rights claims against public officials that has no basis in Supreme Court precedent."[86] She went on to say:

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83. Groh v. Ramirez, 540 U.S. 551 (2004).

84. *Id.* at 566–67 (Kennedy, J., dissenting) (internal citations omitted).

85. Walczyk v. Rio, 496 F.3d 139, 166–67 (2d Cir. 2007) (Sotomayor, J., concurring).

86. *Id.* at 166. As the First Circuit put it, the third prong is "often the most difficult one for the plaintiff to prevail upon . . . ." Wilson v. City of Boston., 421 F.3d 45, 57–58 (1st Cir. 2005).

> I recognize that the distinction I am drawing is a fine one, but I believe it has real consequences. Our approach does not simply divide into two steps what the Supreme Court treats singly, asking first, whether the right is clearly established *as a general proposition*, and second, whether the application of the general right *to the facts of this case* is something a reasonable officer could be expected to anticipate. Instead, we permit courts to decide that official conduct was "reasonable" even after finding that it violated clearly established law in the particularized sense. By introducing reasonableness as a separate step, we give defendants a second bite at the immunity apple, thereby thwarting a careful balance that the Supreme Court has struck "between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties."[87]

If the Supreme Court were ever to address the issue of the third prong directly, the *Walczyk* concurrence certainly suggests that Justice Sotomayor would be against it.

Since *Walczyk*, the Supreme Court has had an opportunity to squarely answer the question, but instead side-stepped a deep dive into the issue in *Tolan v. Cotton*.[88] The *per curiam* ruling in *Tolan* appears fairly unassuming with respect to the third prong; in fact, the opinion does not even mention it. But what is not apparent from the opinion is that the parties explicitly and extensively briefed the issue of the third prong, and even explained the disagreements between the circuits on the issue.[89] Despite lengthy and detailed arguments from the parties, the Court did not take up the issue of the third prong's propriety. Instead, the focus of the Court's ruling dealt with a separate issue involving the summary judgment standard. In framing the question, the Court only generically noted, "In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry."[90] The main thrust of the ruling did not otherwise address the third-prong debate. Thus, *Tolan* suggests that the Court might not have adopted the third prong, but neither did it reject it or show any interest in fleshing out the issue, nor in retreating from *Anderson*'s recognition of objective legal reasonableness.

87. *Walczyk*, 496 F.3d at 168–69 (*quoting Anderson*, 483 U.S. at 639).

88. Tolan v. Cotton, 572 U.S. 650 (2014).

89. *See* Reply Brief for Appellants, Tolan v. Cotton, No. 12-20296, 2012 WL 12332298 (5th Cir. 2012).

90. *Tolan*, 572 U.S. at 655.

Since *Tolan*, some circuit courts have continued to use the third prong.[91] This may be because, without digging deeply into the briefing in *Tolan*, it is not apparent that the *Tolan* Court was presented with the opportunity to address the question. Or, it may be because, as asserted elsewhere in this Article, the Court's precedent seems to leave room for an objective legal reasonableness analysis in qualified immunity cases.

Moreover, a more recent opinion from the Supreme Court suggests that the Court is not averse to using the third prong in practice, although not by name. The year after *Tolan*, the Supreme Court in *Mullenix v. Luna* found that a police officer was entitled to qualified immunity after shooting a suspect during a high-speed chase.[92] At the outset of the analysis, the Court stated that it was only deciding the issue based on the second (clearly established law) prong.[93] Despite framing the analysis in those terms, the actual meat of the opinion focused as much on the reasonableness of the officer's actions as on the state of the law at the time he acted.[94] "Ultimately, whatever can be said of the wisdom of [Officer] Mullenix's choice, this Court's precedents do not place the conclusion that he acted unreasonably in these circumstances 'beyond debate.'"[95] Although framed as a clearly-established-law analysis, the substance of the *Mullenix* opinion appears closer to the third prong—whether the officer's actions were objectively unreasonable *in light of* clearly established law—than the second prong.

CONCLUSION

The third prong furthers the purpose of qualified immunity, which is to provide more protection to government officials than defendants in other kinds of cases. Without the third prong, the first prong adds no protection at all. For example, the basic question that a court must answer in reviewing

91. *See, e.g.*, Easley v. City of Riverside, 890 F.3d 851, 856 (9th Cir. 2018), *rev'd on reh'g en banc on other grounds*, No. 16-55941, 2019 U.S. App. LEXIS 9821 (9th Cir. filed April 3, 2019); Robertson v. Lucas, 753 F.3d 606, 615 (6th Cir. 2014).

92. Mullenix v. Luna, 136 S. Ct. 305, 313 (2015).

93. *Id.* at 308 ("We address only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place . . . .").

94. *See id.* at 311.

95. *Id.* ("Without implying that *Lytle* was either correct or incorrect, it suffices to say that *Lytle* does not clearly dictate the conclusion that Mullenix was unjustified in perceiving grave danger and responding accordingly, given that Leija was speeding towards a confrontation with officers he had threatened to kill."); *id.* at 309 ("[I]t would be unreasonable to expect a police officer to make the numerous legal conclusions necessary to apply *Garner* to a high-speed car chase . . . .") (quoting *Pasco v. Knoblauch*, 566 F.3d 572, 580 (5th Cir. 2009)) (alteration in original)).

a motion to dismiss or summary judgment motion in *any* case is whether the plaintiff makes out a claim for which relief can be granted (e.g., whether a car wreck plaintiff makes out a claim for negligence, or an employee makes out a claim for discrimination under Title VII). In § 1983 cases, the baseline inquiry is no different; if a plaintiff alleges that an officer violated his constitutional right, and the court finds this not to be the case, the plaintiff loses.[96] The *Saucier* framework demonstrates that "courts must . . . answer the constitutional question as if there were no such thing as qualified immunity," and separately ask "whether the additional protections of qualified immunity are available."[97] In other words, the first prong of qualified immunity is no real immunity at all; it simply gives the defendant the same right as any other defendant—the right to ask the court to find that as a matter of law his alleged conduct is not actionable.

However, the third prong gives the first prong added value. It recognizes, as *Saucier* did, that qualified immunity has a "further dimension" than just the standard, dispositive-motion hurdles that any plaintiff faces.[98] As the Supreme Court in *Anderson* similarly recognized, objective legal reasonableness is the "touchstone" of *Harlow* and, without it, "*Harlow* would be transformed from a guarantee of immunity into a rule of pleading."[99] The third prong raises the burden beyond simply requiring plaintiffs to establish a cause of action, which is the same burden plaintiffs face in any context. Under the third prong, the plaintiff must plead or prove that the defendant acted objectively unreasonably in light of clearly established law.

And as a pro-third-prong panel of the Sixth Circuit recognized in *Bailey*, the prong is not without a basis in Supreme Court case law. Rather, the third prong "directly flows" from the *Anderson* and *Saucier* Courts' recognition that "'[i]f the officer's mistake as to what the law requires is reasonable . . . the officer is entitled to the immunity defense.'"[100] This approach is more consistent with the Court's goal of protecting government officials from litigation when it "would be [un]clear to a reasonable [official] that his conduct was unlawful in the situation he confronted."[101]

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96. *See, e.g.*, Alberici v. Cnty. of Los Angeles, No. CV 12-10511-JFW (VBKx), 2013 U.S. Dist. LEXIS 146362, at *91 (C.D. Cal. Oct. 9, 2013) ("Because the Court concludes that there was no constitutional violation, it need not reach the second step of the *Saucier* analysis.").

97. Wilson v. City of Bos., 421 F.3d 45, 55 (1st Cir. 2005).

98. *Saucier*, 533 U.S. at 205.

99. Anderson v. Creighton, 483 U.S. 635, 639 (1987).

100. Sample v. Bailey, 409 F.3d 689, 696 n.3 (6th Cir. 2005) (citing *Saucier*, 533 U.S. at 205).

101. *Saucier*, 533 U.S. at 202.

"Qualified immunity serves to insulate public officials 'from undue interference with their duties and from potentially disabling threats of liability.'"[102] Although courts are not required to employ the third prong in all cases, they appear to be free to elect to do so, and doing so may better strike the balance qualified immunity seeks to achieve.

102. Swanson v. Town of Mountain View, 577 F.3d 1196, 1199 (10th Cir. 2009) (citing Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982)).