THE AUDACITY OF IGNORING *HOPE*: HOW THE EXISTING QUALIFIED IMMUNITY ANALYSIS LEADS TO UNREMEDIED RIGHTS

ABSTRACT

This Comment uses *Kerns v. Bader* as a lens to examine how the qualified immunity analysis can lead to constitutional rights without a remedy. That gap between the right and its remedy affects the articulation of important constitutional rights, and ultimately the right itself. In the absence of guidance about what it means for a right to be clearly established, courts face difficulty in even declaring official conduct as unconstitutional. Over time, as more instances of official conduct go without being declared unconstitutional, the contours of our rights become constricted. That absence of guidance also means the caprice of a judge can decide whether a right was clearly established, requiring an arbitrary degree of factual specificity in making that judgment, and ultimately leaves the protections afforded by important rights unpredictable. In addition, discretionary sequencing in the qualified immunity analysis—deciding cases on the qualified immunity prong while leaving the constitutional merits unaddressed—means the law never becomes clearly established, the law never gets articulated, never develops, and rights articulation stalls. As the articulation of our rights slows, those rights are increasingly left without a remedy for their violation.

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INTRODUCTION

Imagine you are a military veteran.[1] You are honorably discharged and return home from Afghanistan[2] to try to resume a normal life. You live in an ordinary neighborhood, in fact right on the eighteenth hole of a golf course.[3] You are at home one night with your parents and your girlfriend, and while they are all inside sleeping, you have gone outside to work in your garage and driveway.[4] You are listening to music as you work on rearranging and organizing the storage area in the garage and side of the house.[5] A police helicopter is hovering overhead somewhere in the neighborhood, although you have no idea why it is there.[6] Then, suddenly, you hear a loud popping noise.[7] You look up and see the helicopter start to wobble, and hear it make a whining pitch as it nosedives, crashing in a backyard on the golf course less than a mile away from where you are standing.[8]

You are a former military helicopter mechanic,[9] and so you immediately drop what you are doing. You leave the garage door open, the music on, and the items you were organizing still scattered about the garage and driveway and rush to the scene of the crash.[10] When you get there, you help by instructing the on-scene police officers about how to open the helicopter doors to pull the occupants from the wreckage.[11] Once the injured passengers have been removed from the crashed helicopter, you turn your attention to the other officers and begin to relay to them the events you just witnessed.[12] Attempting to aid the police officers in their investigation, you tell them you heard a shot and that you think it came from near your home.[13]

By the time you return home from all this, you learn that during the course of investigating your tip about the shot you heard, three police officers entered your home without a warrant while you were still at the crash site.[14] The officers searched your home only briefly, but they woke up your girlfriend and confronted her in the living room while brandish-

1. The facts retold throughout this "Introduction" come from the facts of *Kerns v. Bader*, 663 F.3d 1173, 1178 (10th Cir. 2011).
2. Carolyn Carlson, *Copter Suspect Had Sniper Skills*, ALBUQUERQUE J. (Albuquerque, N.M.) (Aug. 17, 2005), http://www.abqjournal.com/news/metro/381480metro08-17-05.htm.
3. Kerns v. Bd. of Comm'rs (*Kerns II*), 888 F. Supp. 2d 1176, 1181 (D.N.M. 2012).
4. Kerns v. Bd. of Comm'rs (*Kerns I*), 707 F. Supp. 2d 1190, 1200, 1203 (D.N.M. 2010), *rev'd in part, vacated in part sub nom.* Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011).
5. *Id.* at 1200.
6. *See id.*
7. *Id.* at 1201.
8. *See id.*
9. *Kerns*, 663 F.3d at 1178.
10. *See Kerns I*, 707 F. Supp. 2d at 1200.
11. *See id.*
12. *Id.*
13. *Id.*
14. *See Kerns*, 663 F.3d at 1177.

ing their guns.[15] They did not enter your parents' bedroom because your girlfriend told the police they were sleeping.[16]

Later, you are arrested and spend nearly nine months in jail, only to be released when the prosecutor determines that the Government did not actually have enough information to charge you with anything.[17] It then becomes clear to you that you were immediately a suspect in the police's eyes. The police officers, instead of thanking you for rushing to the scene and for trying to help them with the investigation, suspected you were involved. They wanted to arrest you. They wanted to put you in jail.

You want to be vindicated. The police targeted you for a crime you did not commit and entered your home without a warrant that night. You want to be vindicated for having been put in jail for nine months for doing nothing except trying to help. In short, you want to be compensated for the violation of your constitutional rights.

But your quest for a remedy quickly encounters an obstacle. The police officers claim that no Fourth Amendment violation occurred because exigent circumstances justified their entry into your home.[18] You go to court where a federal district judge agrees with you. But on appeal in the Tenth Circuit, a panel of federal judges finds that the officers' explanation of a perceived emergency does, in fact, justify their entry, and you now have no recourse at all.[19]

Moreover, you come to find out that even if the appellate court had found a Fourth Amendment violation, you still would likely have no remedy because it requires you to overcome the affirmative defense of qualified immunity. To do so, you must show that the law was "clearly established,"[20] which requires your attorney to engage in a "scavenger hunt"[21] to find a case that is factually similar to yours.[22] But, both unfortunately and unsurprisingly for you, there has never been any litigation on the factual scenario of a police helicopter being gunned down in a residential neighborhood leading to a warrantless search of a witness's home. And the really twisted part? If this exact same thing happens again, you—or whoever the next party to suffer the same harm turns out to be—still will not have an avenue for recovery.[23]

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15. *Kerns I*, 707 F. Supp. 2d at 1203–04.
16. *Id.* at 1204.
17. *See Kerns*, 663 F.3d at 1180.
18. *See id.* at 1181.
19. *See id.* at 1182 (reversing only on the clearly established prong of the qualified immunity analysis, indicating no disagreement with the lower court's determination that a constitutional violation occurred).
20. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 232 (2009); Wilson v. Layne, 526 U.S. 603, 609 (1999); *infra* text accompanying notes 40–55.
21. Pierce v. Gilchrist, 359 F.3d 1279, 1298 (10th Cir. 2004).
22. *See Kerns*, 663 F.3d at 1192–93 (Holloway, J., dissenting).
23. Although this depiction might seem to cut in favor of the plaintiff's version of the facts, that perspective is the appropriate standard to use when making the determination about whether to

This series of events actually happened to Jason Kerns. After the helicopter crash, Kerns brought a § 1983 claim against the three police officers who entered his home without a search warrant, claiming that they violated his Fourth Amendment right to be free from unreasonable searches.[24] All three of the defendant officers moved for summary judgment on the basis of qualified immunity, claiming that an exigent circumstance justified their entry.[25] The trial court found a constitutional violation and denied summary judgment on qualified immunity.[26] The officers appealed.[27] On interlocutory appeal, the Tenth Circuit declined to affirm the constitutional ruling and remanded the case for rehearing on the qualified immunity question.

This Comment advances two primary arguments regarding the Tenth Circuit's decision in *Kerns v. Bader*.[28] First, it agrees with the dissenting judge that the Tenth Circuit inappropriately decided an interlocutory appeal of a lower court's denial of qualified immunity. Specifically, the court erred by deciding questions of fact that affected whether exigent circumstances justified the warrantless entry of a private residence.[29] Second, the Comment argues that the court created an insurmountable hurdle for the plaintiff to overcome the qualified immunity defense.[30] That is, it indicated that the plaintiff would have to find a case so factually similar that it would be virtually impossible for the plaintiff to do so.[31]

The Comment then turns to the consequences of the court's decision. The Tenth Circuit vacated the denial of qualified immunity, yet failed to address the merits of Kerns's Fourth Amendment claim. The decision therefore not only left Kerns without a remedy but also failed to clarify the law so that future plaintiffs who suffered similar constitutional harms could recover.

Part I of this Comment briefly describes the evolution of qualified immunity doctrine. Specifically, it examines the notice requirement, the

award summary judgment on qualified immunity. *See, e.g.*, Bisbee v. Bey, 39 F.3d 1096, 1100 (10th Cir. 1994).

24. *Kerns*, 663 F.3d at 1180. Kerns also brought § 1983 claims under the Fourth and Fourteenth Amendments relating to the police scrutiny and privacy invasion of his medical records. Police, without a warrant, obtained those records. Despite many cases cited by the dissenting judge, the majority held that the privacy right was not clearly established. Kerns also brought § 1983 claims of false arrest, false imprisonment, and malicious prosecution against several other officers and a ballistic forensics expert. Although these claims illustrate the complicated jurisprudence surrounding qualified immunity and the clearly established requirement, they are largely unnecessary to the analysis of this Comment. Therefore, the Comment will focus only on the Fourth Amendment issue raised regarding the warrantless entry of Kerns's home.

25. *Id.* at 1180–81.

26. *See id.* at 1180.

27. *Id.*

28. 663 F.3d 1173 (10th Cir. 2011).

29. *Id.* at 1191 (Holloway, J., dissenting).

30. *Id.* at 1192−93.

31. *See id*.

issue of whether the constitutional merits should be considered before the qualified immunity defense, and the clearly established standard used to establish and overcome a qualified immunity defense. Part II addresses the Fourth Amendment issue: whether exigent circumstances and probable cause justified the search of Kerns's home. Additionally, this Part discusses how ignoring principles from prior cases leaves those individuals whose constitutional rights have been violated with no remedy and explains that this constricts the development of the right itself. Part III discusses the qualified immunity appeal in *Kerns* and the Tenth Circuit's decision to remand the lower court's denial of summary judgment for the officers. It first addresses the threshold concern of the appropriateness of doing so on interlocutory appeal while avoiding decision on the constitutional merits of the case. Second, Part III addresses the broader relationship between rights and remedies; it uses *Kerns* as an example of how the remedy afforded for violations of our constitutional rights shapes the contours of those rights at stake and how the absence of a remedy leads to the erosion of Fourth Amendment rights in general, particularly in situations where courts can rely on the qualified immunity analysis to avoid decision on the constitutional issue. Part IV proposes a solution to the gap that exists between rights and remedies that is perpetuated by courts addressing the clearly established prong of a qualified immunity analysis without also addressing the constitutional merits. The "*Kerns* solution" ensures that the law is articulated and remedies are afforded to future victims for the violations of their rights.

I. BACKGROUND

Section 1983 of Title 42 of the U.S. Code allows individuals to sue for money damages when a government official acting "under color of law" violates their constitutional rights.[32] Although it is not itself a substantive right, § 1983 provides an avenue for individuals to recover for constitutional harms inflicted "under color of law" and is a mechanism for getting into court to enforce the substantive guarantees of the Constitution by suing the offending official for money damages.[33]

Qualified immunity is an affirmative defense available to government actors facing monetary liability in § 1983 claims.[34] Qualified immunity protects government actors who violated an individual's constitu-

32. 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .").

33. *See id.*; *see also* Monroe v. Pape, 365 U.S. 167, 171–76, 181–82, 184, 187 (1961) (discussing the history of § 1983 and the meaning of "under color of law").

34. *E.g.*, Crawford-El v. Britton, 523 U.S. 574, 587 (1998); Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

tional rights but who did so in a "reasonable" manner, meaning that the official could not have been expected to know that her conduct was unconstitutional.[35] To overcome a qualified immunity defense, a plaintiff needs to prove two elements: (1) that a constitutional violation actually occurred, and (2) that the right was clearly established at the time of the harm such that a reasonable officer would know that what she was doing violated that right.[36]

Three principal rationales underlie the qualified immunity defense. First, we do not want to over-deter police officers from taking action for fear of lawsuits.[37] Second, courts want to afford leeway to government actors who are required to use discretion and make decisions in tense or rapidly evolving situations.[38] Third, qualified immunity allows courts to articulate constitutional law without subjecting officers to retroactive liability.[39]

A. Evolution of Qualified Immunity: Notice

Courts used to consider an officer's subjective intent in determining the availability of the qualified immunity defense.[40] In *Harlow v. Fitzgerald*,[41] the Supreme Court eliminated the subjective intent prong of the qualified immunity inquiry, primarily to make cases easier to decide on a motion to dismiss or a motion for summary judgment and thus dispense with lengthy, fact-intensive trials for unmeritorious claims.[42]

As part of overcoming a qualified immunity defense, a plaintiff must succeed on the clearly established prong of the analysis by showing that the official was on notice that his conduct violated a constitutional right. The Supreme Court held in *Anderson v. Creighton*[43] that the right the official is alleged to have violated must have been clearly established in a particular and relevant way so that a reasonable official would un-

35. *See, e.g.*, *Harlow*, 457 U.S. at 818; Wood v. Strickland, 420 U.S. 308, 322 (1975). The qualified immunity doctrine does expand to slightly more than just protecting officers who reasonably violate constitutional rights from liability, but for the purposes of this Comment, the important concept is that the doctrine protects officers who "reasonably" violate constitutional rights.

36. *E.g.*, Pearson v. Callahan, 55 U.S. 223, 232 (2009); Wilson v. Layne, 526 U.S. 603, 609 (1999).

37. *E.g.*, *Harlow*, 457 U.S. at 819 ("[T]he public interest may be better served by action taken 'with independence and without fear of consequences.'" (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967))); Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

38. *Scheuer*, 416 U.S. at 240.

39. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001), *abrogated on other grounds by* Pearson v. Callahan, 555 U.S. 223 (2009). Furthermore, qualified immunity avoids requiring officers to spending time in court and conserves resources that might otherwise be spent on lawsuits were it not for qualified immunity. *See* Mitchell v. Forsythe, 472 U.S. 511, 526 (1985).

40. *Pierson*, 386 U.S. at 556–57 (holding that the good faith and probable cause standard for the defense to false arrest and imprisonment was applicable to § 1983 claims).

41. 457 U.S. 800 (1982).

42. *Id.* at 815–16; *see also Mitchell*, 472 U.S. at 526 (stating that the immunity is from suit, not just from monetary liability).

43. 483 U.S. 635 (1987).

derstand that he is violating a constitutional right.[44] In *Brosseau v. Haugen*,[45] the Supreme Court emphasized that whether a right was clearly established depended on the facts of the case and held that the right must be particularized in order to meet the requirement.[46]

However, in *Hope v. Pelzer*,[47] the Supreme Court, in reversing a lower court's grant of qualified immunity, said that the standard of finding "materially similar"[48] facts was a "rigid gloss on the qualified immunity standard" and was not necessary to ensure that officers are put on notice that their conduct is unconstitutional.[49] The Court further stated that "general statements of the law are not inherently incapable of giving fair and clear warning"[50] and that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful."[51] Aside from that, the Supreme Court has given little clarification on what is suitable to qualify as clearly established for the purposes of a qualified immunity analysis.

B. Evolution of Qualified Immunity: Sequencing

In *Wilson v. Layne*,[52] the Supreme Court recognized a two-part inquiry for qualified immunity analyses and suggested a proper sequence for that inquiry.[53] A court must first determine whether there was a violation of a constitutional right.[54] If so, a court must then determine if the right was clearly established at the time of the alleged violation.[55]

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44. *Id.* at 640 ("[T]he 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.").

45. 543 U.S. 194 (2004).

46. *Id.* at 198–99, 201.

47. 536 U.S. 730 (2002).

48. *Id.* at 739 (quoting Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001)) (internal quotation marks omitted).

49. *Id.*

50. *Id.* at 741 (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)).

51. *Id.* (quoting *Lanier*, 520 U.S. at 270–71) (internal quotation mark omitted); *see also* Pierce v. Gilchrist, 359 F.3d 1279, 1298 (10th Cir. 2004) ("*Hope* thus shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional. As this Court held even prior to *Hope*, qualified immunity will not be granted if government defendants fail to make 'reasonable applications of the prevailing law to their own circumstances.'" (quoting Currier v. Doran, 242 F.3d 905, 923 (10th Cir. 2001))).

52. 526 U.S. 603 (1999).

53. *Id.* at 609 ("A court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged a deprivation of an actual constitutional right at all . . . ." (quoting Conn v. Gabbert, 526 U.S. 286, 290 (1999) (internal quotation mark omitted)).

54. *See id.* ("Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public.").

55. *Id.*

In *Saucier v. Katz*,[56] the Court made the *Wilson* sequencing approach mandatory, holding that courts had to approach the qualified immunity analysis in the proper order, addressing the constitutional issue before going on to address the clearly established, or qualified immunity, prong.[57] When addressing the first prong, whether an officer's conduct violated a constitutional right, courts were instructed to consider the facts in the light most favorable to the party alleging the injury.[58] In addressing the second prong, whether the right was clearly established, the Court thought it critical to articulating the law that this be analyzed in light of the specifics of the case, not in a broad or general context.[59] This inquiry also was meant to "advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable."[60]

The rationales for following this sequence are as follows: "First, it clarifies the law so that police officers may avoid future violations if their conduct is held unconstitutional."[61] Additionally, courts are more willing to articulate new constitutional law principles without subjecting officers to liability for seemingly reasonable actions taken in uncertain legal situations or under tense or uncertain circumstances.[62] Following this sequence also "ensures that, in the future, a similarly-wronged plaintiff would be able to recover if she had, in fact, suffered a violation of her constitutional rights."[63] If courts were to decide the clearly established prong first, without litigating the merits of the constitutional issue, then the same § 1983 claims could be brought repeatedly and never actually become clearly established for the purposes of qualified immunity. Answering the clearly established question first would allow officers to take multiple bites at the "constitutionally forbidden fruit," and leave future plaintiffs with no remedy for similar recurring constitutional violations.[64] The Supreme Court acknowledged the importance of articulating constitutional principles in *Wilson*, stating that "[d]eciding the constitutional question before addressing the qualified immunity question also pro-

56. 533 U.S. 194 (2001).
57. *Id.* at 201.
58. *Id.*
59. *Id.*
60. *Id.*
61. Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 668 (2009).
62. *See* Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974).
63. Leong, *supra* note 61.
64. *See, e.g.*, Garcia *ex rel.* Garcia v. Miera, 817 F.2d 650, 656–57 n.8 (10th Cir. 1987); John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 430 (1999) ("When a court bypasses the merits of the pleaded constitutional claim in the circumstances just described, it not only effectively awards the defendant officers one 'liability-free' violation of the Constitution (as it must under the doctrine of qualified immunity), but it also, by declining to 'clearly establish' the undermined right, paves the way for 'multiple bites of a constitutionally forbidden fruit.'" (quoting *Garcia*, 817 F.2d at 656–57 n.8)).

motes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public."[65]

Conversely, the critics of sequencing have pointed out that sequencing fails to "adhere to a basic constitutional obligation by avoiding unnecessary decision of constitutional questions."[66] In some cases, a sequenced-based decision can insulate that decision from appellate review, even if the constitutional ruling is incorrect.[67] If a defendant is found to have violated the Constitution but prevails on qualified immunity, then "[a]s a prevailing party, the defendant cannot appeal the constitutional ruling, even if it believes the ruling is incorrect and the consequences of that ruling are unfavorable for both that defendant and others who are similarly situated."[68]

Commentators have also expressed practical concerns with mandatory sequencing. Specifically, courts will be forced to decide complicated constitutional issues unnecessarily, wasting judicial resources when it is clear that a defendant will prevail on qualified immunity.[69] Similarly, there are concerns that deciding constitutional issues on underdeveloped factual records and under busy conditions will lead courts to the wrong answer, thus articulating bad (constitutional) law.[70] Finally, the immunity afforded to defendants is often characterized as freedom from suit, not just freedom from liability.[71] Mandatory sequencing has the potential to result in officers being forced to endure lengthy litigation on the constitutional issue, only later to be found entitled to qualified immunity.[72]

Ultimately, mandatory sequencing was short-lived. In *Pearson v. Callahan*,[73] the Supreme Court acknowledged the criticisms of mandatory sequencing despite having made it compulsory only eight years earlier.[74] In doing so, the Court overruled the mandatory nature of the *Saucier*

65. Wilson v. Layne, 526 U.S. 603, 609 (1999).

66. Morse v. Frederick, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part); *see also* Leong, *supra* note 61, at 676–77 (pointing out that the avoidance principle is rooted in separation of powers and largely related to concerns of altering statutory laws from the bench, a concern inapplicable in the qualified immunity context). Further, I would argue that although constitutional questions should often be avoided in other areas of law, it simply does not make sense to adhere to the avoidance principle when the issue at hand is actually a constitutional issue. This is tantamount, in my opinion, to ignoring the basis of the entire litigation and the underlying interest of articulating the law.

67. *Morse*, 551 U.S. at 431; Brosseau v. Haugen 543 U.S. 194, 202 (2004) (Breyer, J., concurring) ("[Sequencing] can sometimes lead to a constitutional decision that is effectively insulted from review . . . ."); *see also* Bunting v. Mellen, 541 U.S. 1019, 1020–21 (2004).

68. Leong, *supra* note 61, at 678; *see also Bunting*, 541 U.S. at 1020–21.

69. *E.g.*, *Brosseau*, 543 U.S at 201–02 (citing *Bunting*, 541 U.S. at 1025) ("[W]hen courts' dockets are crowded, [sequencing] makes little administrative sense . . . .").

70. *E.g.*, Scott v. Harris, 550 U.S. 372, 387 (2007) (Breyer, J., concurring); Cnty. of Sacramento v. Lewis, 523 U.S. 833, 858–59 (1998) (Breyer, J., concurring); *see also* Leong, *supra* note 61, at 681 n.73.

71. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

72. *Id.*

73. 555 U.S. 223 (2009).

74. *Id.* at 234–35.

sequence and announced that although the two-part inquiry survived and may still often be appropriate, it was thenceforth permissive.[75] In directing lower courts when the sequence was appropriate, the Supreme Court gave remarkably ineffectual guidance by instructing judges to simply "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[76]

II. FOURTH AMENDMENT ISSUES AND THE AUDACITY OF IGNORING *HOPE*

In *Kerns*, the Tenth Circuit remanded the trial court's denial of summary judgment on qualified immunity for the three officers who entered Kerns's home with no warrant.[77] The Tenth Circuit's determination on the qualified immunity issue essentially expressed its view that the officers had an objectively reasonable belief that an exigent circumstance existed, although it held that the lower court did not address the issue with sufficient depth.[78] Because the Tenth Circuit remanded the case on the clearly established prong, it did not address the Fourth Amendment question. But the law was clear that a Fourth Amendment violation occurred. As the dissent pointed out, "Some cases . . . require a more particularized inquiry. This is not one of them. . . . The Officers had neither a warrant nor probable cause. If the circumstances they encountered did not support a reasonable belief [in an exigency, the entry] violated clearly established Fourth Amendment law."[79] The *Kerns* court should not have remanded the case. It should have affirmed the lower court's ruling or rejected the interlocutory appeal altogether because both were rooted in factual evaluations.

The absence of Supreme Court guidance about the clearly established standard makes it difficult for judges to declare an action unconstitutional. That difficulty is because of the uncertainty about how specifically precedent applies in determining what amounts to a constitutional violation. This uncertainty about what serves as binding precedent for constitutional violations enables courts to ignore the constitutional question altogether, which affects the articulation of constitutional rights. By remanding *Kerns* to the lower court, the Tenth Circuit not only denied Kerns a remedy for the violation of his right but also left the law unclear, ensuring that the next similarly situated plaintiff would also be left without a remedy.

Kerns raises two principal issues regarding the violation of one's Fourth Amendment right to be free from unreasonable searches, which I

75. *Id.* at 236.
76. *Id.*
77. Kerns v. Bader, 663 F.3d 1173, 1182 (10th Cir. 2011).
78. *See id.* at 1181–83.
79. *Id.* at 1192 (Holloway, J., dissenting).

will discuss in turn in subparts A and B. First, the officers had no objectively reasonable basis to believe that an exigent circumstance existed to justify their warrantless entry of Kerns's home. Furthermore, the determination of any such belief being objectively reasonable was fact dependent and therefore a question for a jury. Second, even if the police officers could prove an objectively reasonable belief in an exigency, their warrantless entry and search of Kerns's home was unreasonable. Even in exigent circumstances, police still need probable cause to search a home without a warrant, and the officers in *Kerns* were unable to establish probable cause. Finally, in subpart C, I will examine the effect that the context of litigation has on articulating rights, specifically how litigation in either a criminal or a civil context can affect the available remedy for violations of rights and how the relationship between the litigation context and the available remedies can affect the underlying right itself. I will examine these issues with an eye toward the underlying rationales of qualified immunity, the specificity required by the court in making the clearly established determination, and the relationship between constitutional rights and the remedies afforded for their violation.

A. Objectively Reasonable Belief in an Exigency

The Fourth Amendment protects individuals from unreasonable searches and seizures.[80] Warrantless searches are presumptively unreasonable and thus presumptively unconstitutional.[81] To justify as constitutional the warrantless entry into a home, officers need to prove that one of the established exceptions, such as consent or exigent circumstances, applies.[82]

In *United States v. Najar*,[83] the Tenth Circuit, following the Supreme Court's announcement in *Brigham City v. Stuart*,[84] put forth the two-part test for determining whether an exigent circumstance exists to justify the warrantless entry of a home.[85] First, "officers [must] have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others."[86] Second, the manner and scope of the search must be reasonable.[87] In the context of the *Kerns* decision, only the first prong is controversial.

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80. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

81. *E.g.*, Kyllo v. United States, 533 U.S. 27, 31 (2001); Payton v. New York, 445 U.S. 573, 586 (1980).

82. *E.g.*, *Payton*, 445 U.S. at 578–81, 583; Katz v. United States, 389 U.S. 347, 356–57 (1967); United States v. Najar, 451 F.3d 710, 712–13, 715, 717, 721 (10th Cir. 2006).

83. 451 F.3d 710 (10th Cir. 2006).

84. 547 U.S. 398, 405–07 (2006).

85. *Najar*, 451 F.3d at 718.

86. *Id.*

87. *Id.*

Applying that test to *Kerns*, the issue was whether the officers who entered Kerns's home without a warrant had an objectively reasonable basis to believe there was an immediate need to protect the lives or safety of themselves or others. If the officers had a reasonable belief, then the warrantless entry was justified and no constitutional violation occurred. If the officers did not have a reasonable belief, then the entry was not justified and Kerns's Fourth Amendment right was violated. The determination of that objectively reasonable belief rests squarely on the assessment of the facts of the case. Any exigency that the police perceived was not objectively reasonable because (1) the officers had the opportunity to ask Kerns about the condition of his home (thus, there was no *immediate* threat), and (2) the circumstances justifying the exigency were factually in dispute (and therefore, by definition, not objective).

Recall that in *Kerns* there was a police helicopter downed by a gunshot.[88] Kerns was the only person to claim that the sound he heard came from near his home.[89] But he said that he heard a "loud pop sound,"[90] not *shots*. He explained that the sound just as likely could have been a car backfiring.[91] None of Kerns's nearby neighbors confirmed hearing a noise.[92] In fact, most of his neighbors were unaware that the helicopter crash had occurred at all.[93]

The officers argued that their warrantless entry was justified under an exigency exception.[94] They claimed that the condition of Kerns's driveway and home provided an "objectively reasonable basis to believe there [was] an immediate need to protect the lives or safety of themselves or others . . . ."[95] Specifically, the police asserted exigent circumstances existed because a door was left open, music was left on inside the home (which may or may not have stopped playing at some point), a window was broken (which was actually merely damaged), boxes were left scattered about the driveway in an untidy manner, and no one answered the door.[96]

But before entering, the police at Kerns's home were in contact with the officer at the crash site who was with Kerns.[97] In fact, the police were in contact with Kerns via the officer at the scene the entire time—even asking follow-up questions about where specifically Kerns thought he

88. Kerns v. Bader, 663 F.3d 1173, 1177 (10th Cir. 2011).
89. *Kerns I*, 707 F. Supp. 2d 1190, 1203 (D.N.M. 2010), *rev'd in part, vacated in part sub nom.* Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011).
90. *Id.* at 1200.
91. *Id.* at 1201.
92. *Kerns*, 663 F.3d at 1178.
93. *Kerns II*, 888 F. Supp. 2d. 1176, 1204 (D.N.M. 2012).
94. *Kerns*, 663 F.3d at 1181.
95. United States v. Najar, 451 F.3d 710, 718 (10th Cir. 2006).
96. *Kerns*, 663 F.3d at 1177; *Kerns I*, 707 F. Supp. 2d at 1202–03.
97. *Kerns II*, 888 F. Supp. 2d. at 1200.

heard the shot come from, where he was standing, etc.[98] The police at Kerns's home could have easily and quickly radioed to the crash site to ask Kerns if anyone was home, or if the door being open alarmed Kerns, or if Kerns had left music on.[99] Or they could have simply asked Kerns for consent to enter his home. The officers' purported belief in an *immediate* need to protect themselves or others by entering Kerns's home seems unreasonable given these facts.

Fourth Amendment doctrine is very clear: warrantless searches are presumptively unreasonable.[100] To overcome that presumption, police officers must have probable cause and justify the search pursuant to one of the categorical exceptions, such as an exigency.[101] As the dissenting judge in *Kerns* pointed out, "If the circumstances [the officers] encountered did not support a reasonable belief that danger to someone was imminent, then" they violated Kerns's Fourth Amendment right.[102]

Fourth Amendment doctrine regarding exigent circumstances states that in the absence of a warrant, the police need probable cause and an objectively reasonable basis to believe there is an immediate need to protect the safety of themselves or others.[103] With respect to *Kerns*, the determination of whether an exigency existed depends on whether objectively reasonable officers outside of Kerns's home would have believed there was an immediate need to enter the home to protect the safety of themselves or others.[104] Only if that belief were found reasonable, would the warrantless entry be constitutionally justified. At best, that exigency is a question of fact most suitable for a jury given the disputed facts regarding the officers' alleged justification for the warrantless search. At worst, the exigency simply did not exist.

But there are even more specific statements of law regarding when a warrantless entry is constitutionally justified under an exigency exception. In *United States v. Martinez*,[105] the Tenth Circuit held that officers violated Mr. Martinez's Fourth Amendment rights when they entered his home with no warrant and could not establish a reasonable belief in an

98. *Kerns*, 707 F. Supp. 2d at 1203.

99. *Kerns II*, 888 F. Supp. 2d. at 1187 ("Johnston did not speak directly with J. Kerns, but spoke through other law enforcement officers, and, using this technique, Johnston clarified J. Kerns' perceptions concerning the directionality of the noise J. Kerns heard.").

100. *E.g.*, Kyllo v. United States, 533 U.S. 27, 31 (2001); Payton v. New York, 445 U.S. 573, 586 (1980).

101. *E.g.*, *Payton*, 445 U.S. at 578–81, 583; Katz v. United States, 389 U.S. 347, 356–57 (1967); United States v. Najar, 451 F.3d 710, 712–13, 715, 717, 721 (10th Cir. 2006).

102. Kerns v. Bader, 663 F.3d 1173, 1192 (10th Cir. 2011) (Holloway, J., dissenting).

103. *E.g.*, Brigham City v. Stuart, 547 U.S. 398, 402 (2006); *Payton*, 445 U.S. at 588–89; *Najar*, 451 F.3d at 718.

104. *Kerns*, 663 F.3d at 1193 ("[T]he majority's statement of the issue it would have the district court address suffers from other flaws. The majority's reference to the Officers' 'belief' that exigent circumstances existed should not deter the district court on remand from correctly focusing on whether a reasonable officer would have believed that exigent circumstances existed (an issue which, as I have said, must in this case be resolved by the jury).").

105. 643 F.3d 1292 (10th Cir. 2011).

exigent circumstance.[106] In *Martinez*, the officers, responding to a 911 call,

> knocked on the front door[,] . . . received no response[,] . . . inspected the perimeter of the house[,] . . . saw no signs of forced entry[,] . . . nor heard anyone inside. The officers then . . . found a closed but unlocked sliding glass door into the house. Through the glass, they could see some electronics boxes near the door and . . . the house looked disheveled. . . .
>
> The officers entered through the unlocked door . . . .[107]

Martinez is a case from the same circuit, *involved officers from the same county as those in Kerns*, and was decided only five months before *Kerns*. But *Martinez* reached a different conclusion about the constitutional violation. As it relates to articulating rights, the contrast between the two cases shows that what facts amount to a constitutional violation is anything but concrete and fails to make the law predictable or clear for anyone.[108] That opacity also makes courts' determination about the constitutional violation more difficult.[109] Without a national standard to follow, courts vary both in what they deem a constitutional violation and what is adequately clearly established law sufficient to give an officer "fair and clear warning" that his conduct was unconstitutional.[110]

Warrantless searches violate clearly established Fourth Amendment law "unless the police can show that it falls within one . . . carefully defined set of exceptions based on the presence of 'exigent circumstances.'"[111] Given that "[t]he government bears the burden of proving the exigency exception"[112] and that "[t]hat burden is especially heavy when the exception must justify the warrantless entry of a home,"[113] it seems unreasonable that the Government could to prevail at the summary judgment stage, particularly in light of the factual dispute raised by Mr.

106. *Id.* at 1293–94.

107. *Id.* at 1294–95.

108. And recall *Wilson v. Layne*, 526 U.S. 603 (1999), where the Court stated, "Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." *Id.* at 609; *see also infra* text accompanying notes 172–95 (noting how the context of articulation may help to explain the different results).

109. If the law were clearly established, the *Kerns* court could have relied on prior decisions to find a constitutional violation. Because the law is unclear, the determination of whether a constitutional violation occurred is made more difficult.

110. Hope v. Pelzer, 536 U.S. 730, 741 (2002).

111. Coolidge v. New Hampshire, 403 U.S. 443, 474–75 (1971); *see also* Welsh v. Wisconsin, 466 U.S. 740, 749 (1984) ("[E]xceptions to the warrant requirement are 'few in number and have been carefully delineated.'" (quoting United States v. U.S. District Court, 407 U.S. 297, 318 (1972))); Payton v. New York, 445 U.S. 573, 582–86 (1980).

112. United States v. Najar, 451 F.3d 710, 717 (10th Cir. 2006); *see also Welsh*, 466 U.S. at 750 ("[T]he burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless . . . entries.").

113. *Najar*, 451 F.3d at 717.

Kerns.[114] The presumption of unreasonableness regarding warrantless searches also explains, as the *Kerns* dissent points out, why the lower court did not devote a great deal of its analysis to the question of whether the Fourth Amendment law regarding warrantless entries into a private residence was clearly established; it was obvious.[115]

Although the Government bears the burden of demonstrating exigent circumstances,[116] in the interest of not over-deterring police from making split-second judgments in favor of public safety, courts afford deference to police in reviewing those split-second judgments. But even affording police that deference and conceding the point that this was a tense and rapidly developing situation, the entry into Kerns's home was outside that cushion of discretion. Further, the question of whether the situation supported a reasonable belief of an imminent threat so as to justify the warrantless entry is one that was rooted in evaluations of fact. And, as the district court held, that question was one for a jury.[117]

Affirming the constitutional violation in *Kerns* would not have had the effect of over-deterring police from acting in the interest of public safety. Even had the qualified immunity ruling been affirmed, the Government would likely have indemnified[118] the officers in *Kerns*, so the penalties would have been levied against the County of Bernalillo, not against the officers themselves.[119] Given that this is the same county sheriff's department as in *Martinez*,[120] and that those police officers under remarkably similar circumstances entered private homes without warrants, it is not unreasonable to think that additional deterrent measures against the county would be warranted. The Tenth Circuit's *Martinez* decision and the district court's opinion in *Kerns*, both finding a constitutional violation, also suggest that deterring that behavior is desirable.[121]

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114. *See* Johnson v. Jones, 515 U.S. 304, 313 (1995) ("[T]he appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." (quoting Mitchell v. Forsyth, 472 U.S. 511, 528 n.9 (1985) (internal quotation mark omitted)); *id.* ("[A] qualified immunity ruling . . . is . . . a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case.'" (second and third alterations in original) (quoting *Mitchell*, 472 U.S. at 530 n.10) (internal quotation marks omitted)).

115. Kerns v. Bader, 663 F.3d 1173, 1191–92 (10th Cir. 2011) (Holloway, J., dissenting).

116. *Najar*, 451 F.3d at 717; *see also Welsh*, 466 U.S at 750.

117. The assessment of whether officers had a *reasonable belief* is different from cases like, for example, *Brigham City v. Stuart*, 547 U.S. 398 (2006), where the exigency is one that the officers actually observed. *Id.* at 400–01. There, officers could hear yelling from inside the home, observed an individual punch someone, and saw the victim bleeding. *Id.* That situation reflects an objective exigency determination because of a danger to someone inside the home that was actually observed by officers. *Id.* at 401–03.

118. *See* N.M. STAT. ANN. § 41-4-4 (2012).

119. *See* Leong, *supra* note 61, at 668 n.1.

120. United States v. Martinez, 643 F.3d 1292, 1294 (10th Cir. 2011).

121. *Id.* at 1299–1300 ("The sanctity of the home is too important to be violated by the mere possibility that someone inside is in need of aid—such a 'possibility' is ever-present. It is for this reason that exceptions to the Fourth Amendment's warrant requirement are 'subject only to a few

The *Kerns* court should have affirmed the constitutional ruling. Although *Martinez* was decided five months before *Kerns*, the search in *Kerns* actually happened prior to that in *Martinez*, so the officers in *Kerns* could not have been aware at that time.[122] But as it relates to the constitutional merits of *Kerns*, the Tenth Circuit decided the cases within the same year. And in light of *Martinez*, the court missed the opportunity to articulate constitutional law in *Kerns*. Given the remarkably similar facts in *Kerns* and *Martinez*, it should have been easy for the *Kerns* court to at least affirm the constitutional violation, even if it were to remand the qualified immunity holding, as it did.

In *Kerns*, the site of the helicopter crash can be more appropriately characterized as the locus of a tense and rapidly developing situation than can Kerns's home. At the crash site, several witnesses reported hearing a shot that had come from the immediate area.[123] In contrast, there were no substantiated reports of a shot (or noise) from near Kerns's home[124] other than from Kerns himself, who claimed to have heard a noise that "could have been engine backfire or a rifle report."[125] The circumstances outside Kerns's home were relatively benign when compared to the facts of other Tenth Circuit cases where a reasonable belief in an exigency was found to exist.[126] The circumstances in *Kerns* do not seem to add up to a basis for a reasonable belief in an imminent threat inside Kerns's home that would constitutionally justify the warrantless entry.

The officers could have reasoned that because Kerns was the one to report the noise, he could be the shooter and thus there could have been people injured in his home. The problem with this justification is that it starts to look as if the police were *suspicious* of Kerns and entered his home with an *investigatory* purpose and only relied on the exigency exception in hindsight as a pretext for entering without a warrant.[127]

Furthermore, the police in *Kerns* had ample opportunity to establish a more ironclad exception to the warrant requirement: consent. Not even attempting to get Kerns's consent when he was conversing with an officer at the crash site less than half a mile from his home seems unrea-

specifically established and well-delineated exceptions.'" (quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978))).

122. Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011); *Martinez*, 643 F.3d at 1294.

123. *Kerns I*, 707 F. Supp. 2d 1190, 1203 (D.N.M. 2010), *rev'd in part, vacated in part sub nom.* Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011).

124. *Kerns*, 663 F.3d at 1178.

125. *Kerns I*, 707 F. Supp. 2d at 1201.

126. *See infra* note 144 (collecting the Tenth Circuit's exigency cases).

127. Warrantless entry is not justified by an investigatory purpose. If the only justification the police had was a suspicion of Kerns, then the investigatory entry of his home is a plain violation of the Fourth Amendment and one that is clearly established. *See, e.g.*, U.S. CONST. amend. IV; Mincey v. Arizona, 437 U.S. 385, 393 (1978).

sonable.[128] Moreover, that continuous contact with Kerns undermines the argument that the officers believed an imminent threat existed inside the home. If the officers were operating under that belief, why not alert or ask Kerns about it?[129]

For their part, the officers asserted that it is a "well settled"[130] principle that "officers can reasonably search for victims upon reports of gunfire."[131] Citing *Michigan v. Fisher*,[132] the officers pointed out that they do not need "ironclad proof" of a life-threatening injury to invoke the emergency aid exception.[133] However, even affording police wide deference, the situation in *Kerns* and the warrantless entry seem to be outside the margin of error within which reasonable constitutional violations fall, even in light of *Fisher*.

Not only was there no "ironclad proof" of an imminent, life-threatening danger in Kerns's home, which police concededly do not always need, there was hardly any objective reason to suspect people inside the home were in grave danger or were a threat to the police. And, even if there had been a reason to suspect a grave danger, why not radio the officer at the crash site and ask Kerns about the conditions at the home, or for consent to enter? Although police should be given plenty of leeway, the reasoning the police officers relied on in *Kerns* to justify their warrantless entry does not add up to an objectively reasonable fear for safety so much as it does to an investigation of someone the police thought was suspicious, which is a clear constitutional violation.[134]

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128. The failure to get Kerns's consent when he was conversing with an officer at the crash site could itself be considered a Fourth Amendment violation because the Fourth Amendment protects against "unreasonable searches." U.S. CONST. amend. IV.

129. *Kerns II*, 888 F. Supp. 2d. 1176, 1200 (D.N.M. 2012) ("The Court lent weight to the Kerns' argument that, 'if there was concern for the safety of people possibly inside the Kerns' home, Bader, Thompson, and Carter could have learned if there were people in the Kerns' home directly from J. Kerns, with whom Johnston was in radio contact,' and noted that the officers' actions once inside the home undercut their explanation for preceding without a warrant or consent." (quoting Kerns v. Bd. of Comm'rs, 2009 WL 3672877, at *9 (D.N.M. Oct. 5, 2009))).

130. *Id.* at 1197 (quoting City Defendants' Reply to Plaintiffs' Response to Their Motion for Summary Judgment Requesting Dismissal of Counts I, X, and Xiii of Plaintiffs' First Amended Complaint at 10, *Kerns I*, 707 F. Supp. 2d 1190 (D.N.M. 2010) (No. CIV 07-771 JB/ACT), 2009 WL 4993511, at *10).

131. *Id.*

132. 558 U.S. 45 (2009) (per curiam).

133. *Kerns II*, 888 F. Supp. 2d at 1206. In *Fisher*, the facts more strongly indicated a real emergency inside the house. There, police responding to a disturbance call were directed to a specific house "where a man was going crazy," according to witnesses. *Fisher*, 558 U.S. at 45. The scene outside the house was chaotic: several smashed windows—both the house and cars outside—a damaged fence on the property, and blood on the outside of the house. *Id.* at 45–46. Furthermore, the officers, who could see Fisher inside the house "screaming and throwing things," observed that he was cut and bleeding, and when they asked if he needed medical attention, he began cursing at them and eventually pointed a gun at one of the officers. *Id.* at 46–47. The *Kerns* case is a far cry from *Brigham City*, though. In *Brigham City*, as with *Fisher*, the officers were able to make a determination that an emergency existed because of a danger to someone inside the home that was actually observed. *Brigham City*, 547 U.S. at 406.

134. Although somewhat far-fetched, I concede that it is possible the police officers may have believed Kerns could have just gone on a rampage, killed his family, shot down the helicopter, and

In any event, although over-deterring police is a genuine concern, and courts should not haphazardly second-guess police decisions made in dangerous situations,[135] the police here had ample opportunity to assess an ostensibly nonthreatening situation and to ask Kerns about the unlocked door, the damaged window, and the music, before entering his home. Unlike most other Tenth Circuit cases where an exigency was determined to exist,[136] in *Kerns* there was no imminent threat apparent from outside Kerns's home,[137] no reports had singled out his home as a threat or as suspicious,[138] no movement was detected inside the home,[139] nothing was known about the residents,[140] and there were no obvious signs of a crime or injury having taken place there.[141] The objective facts regarding the condition outside Kerns's home and the conduct of the officers before entering make it seem likely that the officers' justification of being worried about the safety of those inside the home was a pretext. It seems just as likely that the officers were suspicious of Kerns and only after entering his home and getting caught with their hands in the cookie jar by Kerns's girlfriend, did they try to justify their warrantless entry made with investigatory motives by claiming exigent circumstances.

Throughout litigation, Kerns's arguments focused mostly on distinguishing his case from those cases where an exigency was found to have existed. Kerns focused less on finding cases with somewhat similar facts where the holding was that no exigency existed. However, it is question-

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then feigned as a good Samaritan to hide his crimes (helping police at the crash site and disclosing that he only heard the gunshot). But although that may have created a reason for the officers to be *suspicious* of Kerns, it still in itself does not demonstrate an *objectively reasonable belief* that there was an imminent threat to themselves or others. Particularly in the absence of any verifying evidence, it amounts to a mere police suspicion.

135. *E.g.*, Ryburn v. Huff, 132 S. Ct. 987, 991–92 (2012) ("[J]udges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation.").

136. *See infra* note 144 (collecting the Tenth Circuit's exigency cases).

137. *See* United States v. Riccio, 726 F.2d 638, 643 (10th Cir. 1984) (holding that warrantless entry was justified under exigency exception where the defendant, suspected of bank robbery, fired gunshots through a window at police).

138. *See* United States v. Gambino-Zavala, 539 F.3d 1221, 1224 (10th Cir. 2008) (holding an exigency justified a warrantless entry where police responded to multiple 911 calls reporting gunshots in an apartment identified by a tenant as the source of shots, witnesses stated that the occupants were known to have guns, and the gun owners' cars were parked outside the apartment).

139. *See* United States v. Najar, 451 F.3d 710, 720 (10th Cir. 2006) (holding that warrantless entry was justified under exigency exception where a 911 call was silent, call-back attempts went unanswered, police responding had the 911 operator call and police could hear the phone ringing inside thus confirming the call came from that residence, and police could see and hear someone inside the home who, when he eventually answered the door, denied having called 911).

140. *See* United States v. King, 222 F.3d 1280, 1281–82 (10th Cir. 2000) (holding that an exigency justified arrest inside a home pursuant to a search warrant where police knew that two target-residents were drug dealers, gang members, and known to carry firearms).

141. *See* Michigan v. Fisher, 548 U.S. 30, 45 (2009) (per curiam) (holding that an exigency justified warrantless entry where police, responding to a disturbance, were told by witnesses that a man "was going crazy," there were broken windows on the home and broken glass on the ground, blood on the exterior of the home, and the officers could see the resident inside throwing things and yelling).

able that it would have mattered.[142] Most of the controlling Tenth Circuit cases dealing with whether an exigency exists[143] require more than was present in *Kerns* to find that one did.[144] In contrast to these cases, in which the exigency usually arose in part because the police were alerted to a threat in an identified residence and were uncertain as to the whereabouts of the suspect or resident of the home, Kerns was nearby with a police officer, was aiding the police in the crash investigation, and could have been contacted.[145] Even if the officers were suspicious of Kerns and

142. *See* United States v. Martinez, 643 F.3d 1292, 1293–95 (10th Cir. 2011) (finding no exigency when officers, responding to a 911 call, could not locate or contact the resident, received no answer upon knocking on the door, the house looked disheveled, boxes were scattered around, and a door was unlocked).

143. *See* Wilson v. Layne, 526 U.S. 603, 614–15, 617–18 (1999) (holding in part that to clearly establish a law requires controlling precedent in that circuit or by the Supreme Court, or a consensus of persuasive authorities). Because it, too, is rather vaguely defined, I will ignore the consensus arm of this test throughout this Comment.

144. *See Gambino-Zavala*, 539 F.3d at 1224 (holding an exigency justified a warrantless entry where police responded to multiple 911 calls reporting gunshots in an apartment identified by a tenant as the source of shots, witnesses stated that the occupants were known to have guns, and the gun owners' cars were parked outside the apartment); *Najar*, 451 F.3d at 717–18, 720 (collecting sources and holding that warrantless entry was justified under exigency exception where a 911 call was silent, call-back attempts went unanswered, police responding had the 911 operator call and police could hear the phone ringing inside thus confirming the call came from that residence, and police could see and hear someone inside the home who, when he eventually answered the door, denied having called 911); United States v. Thomas, 372 F.3d 1173, 1177 (10th Cir. 2004) (holding an exigency justified the warrantless entry into an apartment after ordering everyone out, including defendant who had brandished a weapon, to search for anyone who may have been harmed or injured); United States v. Rhiger, 315 F.3d 1283, 1288–90 (holding that a warrantless entry was justified under exigency exception where officers observed defendant buying materials to manufacture methamphetamines and, after smelling methamphetamine being cooked, had reasonable belief that the officer and public safety were threatened by a potential methamphetamine lab explosion); United States v. Gay, 240 F.3d 1222, 1228–29 (10th Cir. 2001) (holding an exigency justified no-knock entry where police knew location of defendant's residence, defendant was thought to carry a gun, and thus posed a threat to officers' physical safety); United States v. King, 222 F.3d 1280, 1285 (10th Cir. 2000) (holding an exigency justified arrest in home pursuant to search warrant where police knew that two target-residents were drug dealers, gang members, and known to carry firearms); United States v. Wicks, 995 F.2d 964, 970–71 (10th Cir. 1993) (holding that the warrantless entry of motel room was justified under exigency exception where investigation of suspect established probable cause and combination of factors, including safety and destruction of evidence); United States v. Butler, 980 F.2d 619, 622 (10th Cir. 1992) (holding a warrantless entry was justified by "presence of a legitimate and significant threat to the health and safety of the arrestee" who was with officers); United States v. Smith, 797 F.2d 836, 841 (10th Cir. 1986) (holding that the totality of circumstances demonstrated an exigency relating to officer safety that justified a warrantless search where agents investigating a suspected smuggling operation saw marijuana in plain view through the window of a parked airplane); United States v. Riccio, 726 F.2d 638, 643 (10th Cir. 1984) (holding that warrantless entry was justified under exigency exception where the defendant, suspected of bank robbery, fired gunshots through a window at police). *But see Martinez*, 643 F.3d 1292, 1293–95 (finding no exigency when officers, responding to a 911 call, could not locate or contact the resident, received no answer upon knocking on the door, the house looked disheveled, boxes were scattered around, and a door was unlocked); United States v. Davis, 290 F.3d 1239, 1243 (10th Cir. 2002) (holding no exigency existed where officers had no reasonable belief that safety of officers or of defendant's wife was at risk, defendant was communicating with officers, and defendant had no known reputation for violence); United States v. Bute, 43 F.3d 531, 538 (10th Cir. 1994) (holding that no exigent circumstances existed where a door of a commercial building was open and officers claimed entry for protection of property to justify warrantless entry).

145. *Kerns I*, 707 F. Supp. 2d 1190, 1203 (D.N.M. 2010), *rev'd in part, vacated in part sub nom.* Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011).

reasoned he was the shooter, he was with police already and did not pose an immediate threat that would justify the officers' warrantless entry.

The established principle that warrantless searches require probable cause and a clear, objective basis for belief that an exigency exists should have led the *Kerns* court to affirm the Fourth Amendment violation. Exigency law is clear,[146] so the important question in determining the constitutional violation was whether the officers' belief was objectively reasonable. And that question of whether the belief in an exigency was objectively reasonable was based in facts and therefore more appropriate for a jury.[147] It certainly does not meet the standard for summary judgment, particularly given that the movant could not show that there was no dispute as to material facts.[148] These facts were material to the determination of whether an objectively reasonable belief in an exigency existed, and therefore to whether a constitutional violation occurred. Although many qualified immunity cases are appropriately decided at summary judgment, *Kerns* is not one of them. In *Kerns*, the determination of the constitutional violation itself turned on whether a reasonable belief in an exigency justified the warrantless entry.

In *Anderson*, the Supreme Court held that whether exigent circumstances support warrantless searches requires an examination of the "information possessed by the searching officials."[149] Notwithstanding the factually disputed information known to the police who entered Kerns's home, the police were armed with the knowledge that Kerns could be contacted via radio. This also arguably should have led the *Kerns* court to affirm the constitutional ruling. Especially in light of *Martinez*,[150] where contact with the homeowner was a point of discussion surrounding a reasonable belief in an exigency, failure to contact Kerns, when it was known by the officers that they could have done so without any delay, amounts to a violation of Kerns's Fourth Amendment right. Because the right in this context will not have been established, the result of failing to affirm the constitutional ruling leaves Kerns, and the next similarly situated plaintiff, without a remedy for the violation of his Fourth Amendment right.

B. Probable Cause

In addition to demonstrating an objectively reasonable belief in an exigency, defendants must prove they had probable cause. Thus, even if

146. *See* Brigham City v. Stuart, 547 U.S. 398, 404–06 (2006); United States v. Najar, 451 F.3d 710, 718–20 (10th Cir. 2006).

147. *See generally* Johnson v. Jones, 515 U.S. 304, 313 (1995); Farmer v. Colo. & S. Ry. Co., 723 F.2d 766, 768 (10th Cir. 1983) ("An appellate court should not overturn a trial court's finding of fact unless it is definitely and firmly convinced that a mistake has been made.").

148. *See infra* text accompanying notes 215–29.

149. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

150. *See* United States v. Martinez, 643 F.3d 1292, 1293–94 (10th Cir. 2011); United States v. Davis, 290 F.3d 1239, 1243 (10th Cir. 2002).

the police officers are able to demonstrate an objectively reasonable belief in an exigency, "officers need either a warrant or probable cause plus exigent circumstances in order to make lawful entry into a home."[151] And even as mushy as the standard is, the officers in *Kerns* could not establish probable cause on the facts.

Although it is understandable that the officers would be amped during a tense and chaotic situation following the shooting of a police helicopter and eager to find and arrest the shooter, situations like that should not justify diminishing the constitutional protections afforded by the Fourth Amendment. If anything, that is precisely the situation when it is most important to uphold and reinforce those protections to deter understandably excited and potentially rancorous police officers from overreaching their bounds and violating the constitutional rights of private citizens.

Officers Bader, Thompson, and Carter were at the Kerns residence with Officer Johnston.[152] Officer Johnston was the only one of the four who did not enter the home.[153] These officers, while unable to articulate specific facts to establish probable cause leading to their warrantless entry, alluded to "feel[ing]" the need to get in the house to make sure no one was hurt.[154] Affording officers leeway is an important rationale of qualified immunity. But that latitude must be balanced somehow against the type of intrusion that follows in order to preserve the individual constitutional protections of the Fourth Amendment, particularly when the subject of the search is a place as sacred as a home.[155] The requirement of probable cause provides that balance and equilibrates the interests of the police in protecting public safety with the interests of individuals to be free from unreasonable searches.

Even as opaque as the probable cause standard is, it is hard to find enough to establish probable cause on the facts of *Kerns*.[156] Here, "[t]he officers did not report seeing any movement inside the Kerns' home" and "[o]ther than the broken window, [Officer] Bader did not find any evi-

151. Kirk v. Louisiana, 536 U.S. 635, 638 (2002); *see also Brigham City*, 547 U.S. at 402; Payton v. New York, 445 U.S. 573, 588–89 (1980); *Najar*, 451 F.3d at 718.

152. *Kerns I*, 707 F. Supp. 2d 1190, 1203 (D.N.M. 2010), *rev'd in part, vacated in part sub nom.* Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011).

153. *Id.*

154. *See infra* note 163.

155. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 31 (2001) ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)); *Payton*, 445 U.S. at 573 ("The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.").

156. Establishing probable cause as it relates the warrantless entry seems difficult here. However, the probable cause that the police asserted for Kerns's arrest warrant (a separate issue in *Kerns*) seems reasonable based on the unchallenged information included in the warrant affidavit. *See* Kerns v. Bader, 663 F.3d 1173, 1187–90 (10th Cir. 2011).

dence revealing where a shooter may have been standing."[157] These observations should have indicated that no shooter was ever present there because "Bader is a trained human tracker" and thus should have been able to make a determination about recent foot traffic in or out of the home.[158]

The small hole broken through the window was one of the primary justifications for the officer's assertion that an exigency existed.[159] But the window was actually only broken through a single pane of a double-paned window, and "a golf ball striking the Kerns' window would not have been out of the ordinary, because the Kerns' backyard borders the eighteenth hole of the Paradise Hills golf course."[160] It is also plainly unreasonable to conclude that the second pane of glass could have stopped a bullet (was it *magic* glass?). And if it was a bullet that made the hole in the outer pane, but was thwarted by the second pane, where was the bullet?

In addition to there being no evidence of any person responsible for the shooting, "many officers at the Kerns' home were searching for 'shell casings, guns, [and] people,' but no such evidence was ever found there."[161] Johnston, one of the officers present at Kerns's home stated that he "did not think that the shooter would be found at the scene, because of the time lag between the helicopter crash and his arrival at the Kerns' home."[162]

In fact, both Officers Bader and Johnston later conceded that they could not come up with an articulable reason that led them to believe someone in the home was injured or in danger.[163] Thus, these officers

157. *Kerns II*, 888 F. Supp. 2d 1176, 1187 (D.N.M. Aug. 2012).

158. *Id.*

159. *Id.* at 1187–88.

160. *Id.* at 1187.

161. *Id.* (alteration in original) (quoting Sergeant Robert Johnston's deposition).

162. *Id.* at 1189–90. That "time lag" also points to the exigency having ended. *See* Flippo v. West Virginia, 528 U.S. 11, 13–14 (1999) (concluding that when the exigency ends, so does any justification for warrantless entry); Mincey v. Arizona, 437 U.S. 385, 394–95 (1978) (rejecting a "murder scene exception" to the warrant requirement and holding that when the exigency ends, so does the justification for warrantless entry).

163. *Kerns II*, 888 F. Supp. 2d at 1190 n.20 ("Kerns point[ed] to Johnston's statement, in response to a question whether he could articulate what led him to believe that someone may have been hurt inside the house, that, '[a]t this point in time, no, sir.' Later in his deposition, however, Johnston state[d]: 'When we got to the Kerns residents [sic] and the door was open, the lights were on, the music was playing loud, it was late at night, early in the morning, nobody was answering the door, for whatever reason, and the fact that a shooting had taken place of a helicopter, unknown if anybody else had been shot in the interim prior to, after, whatever that yes, *I felt at that time we needed to get in that house to make sure there was nobody injured inside that house*.'" (alteration in original) (emphasis added) (quoting Sergeant Robert Johnston's deposition)); *id.* ("In response to a question whether [Officer Bader] could articulate any objective facts that made him think someone had taken refuge inside of the house, Bader said 'no.' Earlier in his deposition, however, Bader had stated: 'So now we are thinking well, the door is unlocked, we haven't found the offender, now nobody is coming to the door. There may be somebody hurt or maybe somebody being held hostage. We really don't know what's going on yet and that's not good. I mean, this is as far as we know, and we don't have the information to tell us otherwise, *this is basically the scene of a crime. This is*

could not even meet an articulable suspicion standard, a standard below that of probable cause.[164] It appears that no probable cause existed given that the officers at Kerns's home did not have enough evidence to suggest that a crime had occurred there or that an immediate danger existed inside the home. Furthermore, two of the officers admitted to not having enough evidence to meet an even lower standard of suspicion. The officers who entered the home were presumably either acting on a hunch or were motivated by an investigatory purpose, neither of which is constitutional.

It looks more like the police aspired to investigate Kerns, entered his home to do so, and worked backwards to justify their warrantless entry pretextually only after Kerns's girlfriend caught them inside. For his part, Kerns asserted (seemingly correctly) that the officers entered his home because they considered the home a crime scene connected to the helicopter shooting and were beginning to investigate it.[165] This assertion is consistent with the testimony given by Officer Bader that "this is basically the scene of a crime. This is where somebody shot down a helicopter."[166] However, the Fourth Amendment law is clear that "the seriousness of the offense under investigation [does not] itself create[] exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search."[167]

In the absence of probable cause and an objective exigency, the warrantless entry of a private home is unreasonable and therefore unconstitutional.[168] No objective exigency and no probable cause add up to a violation of Kerns's Fourth Amendment right to be free from unreasonable searches.

C. Context's Effect on Articulating Rights

The Tenth Circuit seemed to disregard the statements made by Officers Bader and Johnston—two of the officers at Kerns's home—that they could not articulate a reason as to why they believed someone in the home was injured or in immediate need of help. The court also did not seem to afford deference[169] to the lower court's ruling or to consider many of the facts in the "light most favorable to the" plaintiff, as it was

where somebody shot down a helicopter. That's a big deal, and to have these people now not able to come to the door to contact us is extremely troubling.'" (emphasis added) (quoting Officer Drew Bader's deposition)).

164. *See generally* Terry v. Ohio, 392 U.S. 1, 20–22 (1968).
165. *Kerns II*, 888 F. Supp. 2d at 1196.
166. *Id.* at 1190 n.20 (quoting Sergeant Robert Johnston's deposition).
167. *Mincey*, 437 U.S. at 394.
168. *E.g.*, Kirk v. Louisiana, 536 U.S. 635, 638 (2002).
169. United States v. Najar, 451 F.3d 710, 717 (10th Cir. 2006).

required to do.[170] Why did the *Kerns* court think these statements were not important?

One explanation is that the court did not believe that these particular statements were important to their determination given the entirety of the statements made by the officers during their depositions. Or perhaps the court's decision here is representative of the general trend in Fourth Amendment unreasonable search and seizure jurisprudence to move away from the strict warrant requirement and towards a balancing of police interests against individual privacy interests.[171] But if this were the reasoning, and if the court had assessed the justification of the warrantless entry under the general reasonableness standard, the court likely would have found the officers' justification unreasonable.

Another possible reason that the court disregarded the officers' own admissions is that the context in which claims are brought and litigated affects how judges think about Fourth Amendment protections.[172] Most Fourth Amendment claims are brought in criminal proceedings and are made in an attempt to exclude evidence obtained as the result of an allegedly unreasonable search.[173] Professor Leong has suggested that the exclusionary remedy is one that judges see as a "massive remedy" and a "get-out-of-jail-free card," and that they are therefore reluctant to grant defendants—who have already been all but proven to have been in possession of contraband by the very nature of their appearance in an exclusionary hearing—the benefit of excluding the evidence.[174] That aversion to granting the exclusionary remedy in most Fourth Amendment claims leads judges to "distort doctrine, claiming the Fourth Amendment was not really violated,"[175] and thereby constrict the protections of the Fourth Amendment. That judicial focus on Fourth Amendment claims in the criminal context, then, leads judges to become accustomed to the practice of deciding cases in a rights-constrictive manner, rather than a rights-expansive approach.[176]

170. Scott v. Harris, 550 U.S. 372, 377 (2007) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001), *abrogated on other grounds by* Pearson v. Callahan, 555 U.S. 223 (2009)).

171. The trend in Fourth Amendment jurisprudence of moving from a strict warrant requirement toward a general reasonableness balancing approach is beyond the scope of this Comment, but see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 894 nn.155–58 (1999) (collecting sources).

172. Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 418–21 (2012) (discussing how the context in which litigation is brought affects the articulation of rights). "Context" is used here to "refer to a given set of remedial, factual, and procedural circumstances," for example, criminal or civil proceedings. *Id.* at 407.

173. *Id.* at 430.

174. *Id.* at 430–31 (quoting Hudson v. Michigan, 547 U.S. 586 (2006) (internal quotation marks omitted) (discussing the effect of single-context litigation through the lens of the available remedies).

175. *Id.* at 431 (quoting Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994)) (internal quotation mark omitted).

176. *Id.* at 431–32.

As it relates to *Kerns*, the Tenth Circuit possibly reasoned that because no evidence was obtained as the result of the unreasonable search and the standard remedy for unreasonable searches is to exclude the evidence obtained, Kerns really suffered no tangible injury. It would follow that as a result of the standard exclusionary remedy not being applicable in this case, Kerns's constitutional injury likewise was not cognizable as a Fourth Amendment claim. If a judge routinely rules on Fourth Amendment claims against unsavory criminal defendants who have been caught with contraband and seek to exclude unreasonably obtained evidence, then what could compel a judge used to that routine to grant monetary damages to a plaintiff who ostensibly suffered no harm at all?

Interestingly, in *Martinez*, the Tenth Circuit only five months before *Kerns* decided an exigency case of warrantless entry with similar officer justifications to those made in *Kerns*. The court held that "[b]ecause the officers lacked a reasonable basis for believing an individual inside Mr. Martinez's home was in need of immediate aid or assistance, we agree with the district court's determination that the warrantless search of Mr. Martinez's home was a violation of the Fourth Amendment."[177]

Martinez was an appeal by the Government from a district court's grant of a motion to suppress.[178] There, the officers who entered the home with no warrant claimed a belief in an exigency when after knocking on the door with no response, they "inspected the perimeter of the house"[179] and approached an "unlocked sliding glass door [through which] they could see some electronics boxes near the door and they noticed that the house looked disheveled."[180] They then entered the home and "spent approximately five minutes inside."[181]

The facts in *Kerns* are extraordinarily similar. Recall in *Kerns* that the officers entered the home with no warrant, claiming a belief in an exigent circumstance when, after knocking on the door with no response, they inspected the perimeter of the house.[182] Upon inspection, the officers noticed the generally disheveled condition outside the home: boxes in the driveway and garage, a broken (damaged) window, no lights on, and

177. United States v. Martinez, 643 F.3d 1292, 1300 (10th Cir. 2011).

178. *Id.* at 1293.

179. *Id.* at 1294.

180. *Id.* at 1295.

181. *Id.*; *see also id.* at 1296 ("The government contends the officers' warrantless search was justified by exigent circumstances because the officers had an objectively reasonable belief that someone inside the house needed immediate aid or was in danger. It emphasizes four facts to support its position: (1) the static-only 911 call from the residence; (2) the 'disheveled' appearance of the house; (3) the unlocked door on the backside second floor of the house; and (4) the electronics boxes just inside the unlocked door.").

182. *Kerns I*, 707 F. Supp. 2d 1190, 1202–03 (D.N.M. 2010), *rev'd in part, vacated in part sub nom.* Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011).

music playing.[183] The officers in *Kerns* also entered the home through an unlocked door and spent only about five minutes inside the home.[184]

The most notable factual difference between *Kerns* and *Martinez* with respect to the belief in an exigency is that in *Martinez*, the "Bernalillo County Emergency Communication Center received a 911 call from Mr. Martinez's residence. The 911 dispatcher who received the call heard only static on the line."[185] In *Kerns*, the plaintiff was actually with the police and in contact with the other officers who were at his home.[186] The other notable difference between *Kerns* and *Martinez* is that *Martinez* was litigated in the criminal context, regarding a suppression motion; *Kerns* was litigated in a civil context, in a § 1983 action.

A 911 call being placed from the home and the police thereafter not being able to reach the owner of the home would sensibly seem to weigh in favor of the court finding an objectively reasonable belief in an exigency. But the Tenth Circuit, in *Martinez*, ultimately agreed with the district court holding that the officers were unable to show a basis for an objectively reasonable belief in an exigent circumstance.[187] Even noting that "'reasonable belief' is a lower standard than probable cause[,] . . . the district court was explaining that the evidence was *neutral* and did not support an objectively reasonable belief there was any emergency in the house."[188] The *Martinez* court also noted the deference to be afforded in reviewing the district court's ruling on factual circumstances surrounding an exigency[189] and that "[t]he burden of proof was on the government to establish that exigent circumstances justified a warrantless search, and this 'burden is especially heavy when the exception must justify the warrantless entry of a home.'"[190] The *Martinez* court concluded:

> The sanctity of the home is too important to be violated by the mere possibility that someone inside is in need of aid—such a "possibility" is ever-present. It is for this reason that exceptions to the Fourth Amendment's warrant requirement are "subject only to a few specifically established and well-delineated exceptions."[191]

What explains the different decisions in *Kerns* and *Martinez*? The simple explanation is that the judges found the evidence more compel-

183. *Id.*; *see also Kerns*, 663 F.3d at 1777 ("[The officers] soon noticed that something seemed amiss when they reached Mr. Kerns's house: a door was ajar, music was playing, no lights were on.")

184. *Kerns I*, 707 F. Supp. 2d at 1203–04.

185. United States v. Martinez, 643 F.3d 1292, 1294 (10th Cir. 2011). Remarkably, this case took place in the same county as did *Kerns*.

186. *Kerns I*, 707 F. Supp. 2d at 1203.

187. *Martinez*, 643 F.3d at 1293–94.

188. *Id.* at 1299.

189. *Id.* at 1296.

190. *Id.* at 1299 (quoting United States v. Najar, 451 F.3d 710, 717 (10th Cir. 2006)).

191. *Id.* at 1299–1300 (quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978)).

ling in one direction than I did. But another explanation is that the two cases reveal that the context in which the constitutional right is litigated affects what remedy is available, and the available remedies, in turn, affect how courts ultimately define the scope of the right.

The striking similarities suggest that perhaps the available remedy affected the respective courts' definition of the contours of the right at issue.[192] In *Martinez*, even considering the 911 call and the officers' inability to locate the homeowner, the court found that no reasonable belief in an exigency existed to justify entry into the home.[193] Therefore, in *Martinez*, the evidence obtained as a result of the warrantless search was suppressed.[194] In *Kerns*, however, the remedy of exclusion was not applicable because no evidence was obtained as a result of the similarly brief, similarly warrantless search.[195] Thus, akin to how an aversion to the exclusionary remedy leads judges to reason that no Fourth Amendment right was actually violated, the concept here is that if the standard remedy cannot be applied, then the right itself must not have been violated in any meaningful way.

III. RIGHTS, QUALIFIED IMMUNITY AND THE REMEDIAL EQUILIBRATION THEORY

> Absence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as what the courts will do.
>
> —Llewellyn, *The Bramble Bush*[196]

> [I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.
>
> *—Marbury v. Madison*[197]

Daryl Levinson's "remedial equilibration"[198] model is an appropriate way to think about what it means to have a right, and how the actual,

192. *See, e.g.*, Levinson, *supra* note 171, at 885 ("The defining feature is the threat of undesirable remedial consequences motivating courts to construct the right in such a way as to avoid those consequences. At the extreme, where no viable remedy is at hand, courts may define the right as nonexistent."); *see also* Leong, *supra* note 172, at 409 ("[T]he availability and scope of particular remedies affects the substantive development of constitutional rights.").

193. *Martinez*, 643 F.3d at 1295–96.

194. *Id.* at 1300.

195. *Kerns II*, 888 F. Supp. 2d 1176, 1187 (D.N.M. 2012).

196. K. N. LLEWELLYN, THE BRAMBLE BUSH 88 (Oxford Univ. Press ed., 2008) (1930).

197. 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1783)) (internal quotation marks omitted).

198. Levinson, *supra* note 171, at 858. Contrast the remedial equilibration theory with the "rights essentialism" model, which assumes a "pure constitutional value" that is distinct from, and is even "corrupted by being forced into[,] a remedial apparatus" as part of an operational function of the real world, *id.*, and is a really abstract *Allegory of the Cave*-type of way to think about rights.

tangible remedy for the violation of that right is what defines the contours of the right itself. Professor Levinson posits that rights and remedies are ultimately inseparable from one another, that they are "inextricably intertwined. Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence."[199] As it relates to Jason Kerns, "the absence of any remedy at all, render[s his Fourth Amendment] right essentially worthless"[200] and any protection afforded by it, means nothing.[201]

By allowing for a no-remedy situation, such as in *Kerns*, the court is allowing the Fourth Amendment to be diluted. Although the Supreme Court has elucidated several categorical exceptions to the warrant requirement,[202] Fourth Amendment doctrine is clear that police cannot enter one's home without a warrant.[203] If a warrantless search does not fall within one of those categorical exceptions, it violates the Fourth Amendment.[204] The importance of a right is directly related to the afforded remedy. That relationship means that in cases like *Kerns*, the Fourth Amendment gradually becomes less of a guaranteed protection for individuals and simply one more trivial hassle that police officers sometimes have to deal with after the fact.

In this Part, I will address three issues related to the Tenth Circuit's decision in *Kerns* to reverse the lower court's denial of qualified immunity. First, this Part addresses the threshold procedural concern of an appellate court deciding the fact-based exigency matter of whether an objectively reasonable basis for belief in an imminent threat existed to justify the officers' warrantless entry. Second, it addresses what the clearly established requirement means in the absence of any guidance from the Supreme Court and how that lack of guidance affects the relationship between constitutional rights and the remedies afforded for their violations. Third, this Part addresses the issue of sequencing in a quali-

199. *Id.*

200. *Id.* at 888.

201. Although the actual entry into Kerns's home is a fairly benign harm, the principle applies nonetheless. For a far more egregious illustration of a right without corresponding remedy, see Connick v. Thompson, 131 S. Ct. 1350 (2011). There, a man spent eighteen years in prison after *Brady* violations—withholding exculpatory evidence—by a prosecutor who was held to be entitled to absolute immunity for the intentional withholding of exculpatory evidence at Connick's trial. *Id.* at 1355–56. For his nearly two decades in prison, enduring who knows what sorts of atrocities, and missing out on a significant period of his free adult life, literally being deprived of his liberty—and in many senses of the word, his life—Connick received a remedy of absolutely nothing because of absolute prosecutorial immunity and the difficulty in proving municipal liability. *Id.* at 1356–58.

202. *E.g.*, Arizona v. Hicks, 480 U.S. 321, 323 (1987) (plain view exception); Welsh v. Wisconsin, 466 U.S. 740, 742 (1984) (community caretaking exception); Mincey v. Arizona, 437 U.S. 385, 394 (1978) (exigent circumstances exception); Warden v. Hayden, 387 U.S. 294, 295–96 (1967) (fleeing suspect exception).

203. *E.g.*, Kyllo v. United States, 533 U.S. 27, 37 (2001) (holding it was "clear that any physical invasion of the structure of the home, 'by even a fraction of an inch,' was too much" (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).

204. *See, e.g.*, *Welsh*, 466 U.S. at 749; Payton v. New York, 445 U.S. 573, 585–88 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971).

fied immunity analysis and how a court's decision on the clearly established prong without a decision on the constitutional merits affects both the articulation of constitutional principles and the effect thereof on the relationship between rights and remedies.

A. Cross-eyed and Procedureless

Facts are never what they seem to be, but appellate courts' standard when reviewing questions of fact is limited to clear error.[205] Although "[t]he existence of exigent circumstances is a mixed question of law and fact,"[206] facts come with points of view. As a threshold matter then, did the Tenth Circuit, in *Kerns*, even have proper jurisdiction to consider the district court's holding on the issue of a reasonable belief in an exigency? The lower court denied summary judgment because the issue was so factually dependent that it was a jury question.[207] However, the Tenth Circuit "do[es] not have jurisdiction to review the district court's factual findings, including its finding that a genuine dispute of fact existed."[208] Moreover, "government officials cannot appeal pretrial denial of qualified immunity to the extent the district court's order decides nothing more than whether the evidence could support a finding that particular conduct occurred."[209] In *Kerns*, the district court denied summary judgment on the qualified immunity issue, holding that "a jury could find that there was no imminent threat that would justify the Officers' entry into the Plaintiffs' home."[210] As the dissenting judge in *Kerns* noted:

> The question is not a difficult one in my view, and so I disagree with the majority's decision to remand the matter to the district court to rule again on this strictly legal question. The Officers had neither a warrant nor probable cause. If the circumstances they encountered did not support a reasonable belief that danger to someone was imminent, then the armed, nighttime entry into the home violated clearly established Fourth Amendment law.[211]

The question of law to decide in *Kerns* was whether the law was clear regarding exigent circumstances; it was.[212] The critical inquiry was whether those facts supported a reasonable belief in exigent circumstanc-

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205. *See generally* Johnson v. Jones, 515 U.S. 304, 313 (1995); Manning v. United States, 146 F.3d 808, 812 (10th Cir. 1998) ("[An appellate] court must accept the district court's factual findings unless they are clearly erroneous."); Farmer v. Colo. & S. Ry. Co., 723 F.2d 766, 768 (10th Cir. 1983) ("An appellate court should not overturn a trial court's finding of fact unless it is definitely and firmly convinced that a mistake has been made.").

206. United States v. Anderson, 981 F.2d 1560, 1567 (10th Cir. 1992).

207. *Manning*, 146 F.3d at 812.

208. Armijo *ex rel.* Chavez v. Wagon Mound Pub. Sch., 159 F.3d 1253, 1259 (10th Cir. 1998).

209. Foote v. Spiegel, 118 F.3d 1416, 1422 (10th Cir. 1997); *see also* Behrens v. Pelletier, 516 U.S. 299, 312–13 (1996); *Johnson*, 515 U.S. at 313 (1995).

210. Kerns v. Bader, 663 F.3d 1173, 1191 (10th Cir. 2011) (Holloway, J., dissenting).

211. *Id.* at 1192.

212. *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 402 (2006); United States v. Najar, 451 F.3d 710, 717–18 (10th Cir. 2006).

es. That determination of whether there was an objectively reasonable belief in exigent circumstances, however, was a question of characterizing facts and that should have been put forth for a jury to decide.

Notably, in an opinion authored by the same judge who wrote *Kerns*, the Tenth Circuit recently held that it is the

> district court's exclusive job to determine which *facts* a jury could reasonably find [and we are not to consider] . . . questions about what facts a jury might reasonably find . . . in appeals from the denial of qualified immunity at summary judgment. . . . So, for example, if a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated we usually must take them as true—and do so even if our own *de novo* review of the record might suggest otherwise as a matter of law.[213]

In other words, whether a reasonable officer would have perceived that an imminent threat of danger existed that would justify the warrantless entry and search of Kerns's home was a question of fact better suited for a jury, particularly because that was the district court's determination. In *Martinez*, working by hindsight and deferring to the district court's ruling, the Tenth Circuit noted that its review "entails a determination whether the district court's factual findings are clearly erroneous, viewing the evidence in the light most favorable to the district court's findings."[214]

Similarly, in *Johnson v. Jones*,[215] the Supreme Court distinguished reviewable summary judgment determinations from unreviewable ones, holding that interlocutory appeals are not appropriate where the disputed factual issue may affect the qualified immunity determination.[216] But, under *Shroff v. Spellman*,[217] a recent Tenth Circuit case, interlocutory appeals may still be appropriate if the factual dispute is immaterial and would not affect the qualified immunity determination.

In *Kerns*, the facts the officers asserted regarding the existence of an exigent circumstance were in dispute. That determination of a reasonable belief in an exigency rested in large part upon

213. Lewis v. Tripp, 604 F.3d 1221, 1225 (10th Cir. 2010).

214. United States v. Martinez, 643 F.3d 1292, 1296 (10th Cir. 2011) (quoting *Najar*, 451 F.3d at 717) (internal quotation marks omitted).

215. 515 U.S. 304 (1995).

216. *Id.* at 313 ("We now consider the appealability of a portion of a district court's summary judgment order that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' i.e., which facts a party may, or may not, be able to prove at trial. This kind of order, we conclude, is not appealable. That is, the District Court's determination that the summary judgment record in this case raised a genuine issue of fact concerning petitioners' involvement in the alleged beating of respondent was not a 'final decision' within the meaning of the relevant statute."); *see also* Mitchell v. Forsythe, 472 U.S. 511, 528 (1985).

217. 604 F.3d 1179, 1186, 1188 (10th Cir. 2010).

> something seem[ing] amiss when they reached Mr. Kerns's house: a door was ajar, music was playing, no lights were on. Things took an even darker turn when the officers noticed a broken window. A silver-dollar-sized hole punctured a window of the house, with shattering concentrically outward. This, the police thought, might be the result of a gunshot—perhaps by the same sniper who had just fired on the police.[218]

However, Kerns disputed several of those facts, including that the door was open[219] and that Kerns described the noise he heard as a gunshot.[220] While still waiting outside Kerns's home, the officers could not agree even among themselves about whether the music was shut off at some point.[221] Furthermore, the "silver-dollar-sized hole" puncturing the window actually only punctured a single pane of glass and may have been more appropriately characterized as a "golf-ball-sized hole" given that the *damaged* window was facing a golf course.[222] As the dissent pointed out, "[T]he majority seems to have strayed at times from viewing the facts in the light most favorable to Plaintiffs as we are constrained to do in the posture of this appeal."[223] Finally, despite the second pane having stopped whatever it was that punctured the first pane of glass, no bullet was found.[224]

Thus, *Shroff* precludes review because these factual issues were disputed and sufficiently material, meaning that the interlocutory appeal was inappropriately undertaken.[225] Even had the facts not been "disputed" in the typical sense, the factual dispute was really, Do these *facts* support "an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others"?[226] Put another way, this was not a question of law; it was a question of fact. And, "it is . . . questions [of law]—and not questions about what facts a jury might reasonably find—that we may consider in appeals from the denial of qualified immunity at summary judgment."[227] Specifically, *Kerns* centered not on whether the law was clear but on how the facts could be

218. Kerns v. Bader, 663 F.3d 1173, 1177 (10th Cir. 2011).

219. *Kerns I*, 707 F. Supp. 2d 1190, 1200, 1203 (D.N.M. 2010) ("Johnston's report alleges that the garage door was open when Johnston and his SWAT team got to the Plaintiffs' residence. J. Kerns, however, asserts that the garage door was closed when he left his home to go to the crash [s]ite." (citations omitted)), *rev'd in part, vacated in part sub nom.* Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011).

220. *Id.* at 1283 n.6 ("While the police consistently assert that J. Kerns told them that he heard a gun shot, J. Kerns is equally insistent that he referred to the sound as a popping noise and stated only that it could have been a rifle report when the officers pressed him for more detail.").

221. *Id.* at 1203 ("According to Johnston, . . . the music coming from the residence played the entire time. . . . Bader observed that the music that had been coming from the Plaintiffs' residence turned off, which raised concerns . . . ." (citations omitted)).

222. *Id.* at 1202.

223. *Kerns*, 663 F.3d at 1191 (Holloway, J., dissenting).

224. *Kerns II*, 888 F. Supp. 2d 1176, 1187 (D.N.M. 2012).

225. Shroff v. Spellman, 604 F.3d 1179, 1186–87 (10th Cir. 2010).

226. United States v. Najar, 451 F.3d 710, 718 (10th Cir. 2006).

227. Lewis v. Tripp, 604 F.3d 1221, 1225 (10th Cir. 2010).

characterized to support an objective belief in an emergency or not. To make that determination, characterizations of facts absolutely had to take place.

Particular facts were the foundation for the officers alleged exigency assessment. These facts served as the basis for the *Kerns* dissent, the lower court's determination that it was a jury question, and the Tenth Circuit's reversal of the lower court's denial of summary judgment in the officers' favor on the qualified immunity appeal.[228] The disputed factual issues clearly affected the qualified immunity determination, if not entirely dispositive themselves Therefore, the *Kerns* case should not have even survived to reach a decision on interlocutory appeal under the *Johnson* standard for unreviewable summary judgment determinations.[229]

B. Unclearly "Clearly Established"

Hope teaches that "general statements of the law are not inherently incapable of giving fair and clear warning" to police officers that their conduct is unconstitutional.[230] It follows that general statements regarding when an exigency exists should have been sufficient to give the officers in *Kerns* fair warning about the constitutionality of their conduct. Because "the Supreme Court has never given a fully cogent definition of what it means for a right to be 'clearly established[,]' [t]he result is an expansion of subjective judicial discretion and a decrease in the overall uniformity of qualified immunity rulings."[231]

The *Kerns* majority accepted the interlocutory appeal but left undecided the clearly established question because it felt it was "without the benefit of a full analysis from the district court" and because "briefing on appeal [was] less than entirely satisfactory."[232] However, "the majority is incorrect to say that the district judge did not address the second prong of the qualified immunity analysis"[233] sufficiently because "both aspects of the qualified immunity test were placed in play by the parties before the district court."[234] The majority even acknowledged that both parties did indeed address the clearly established question in their briefs.[235] Address-

228. *Kerns*, 663 F.3d at 1191 (Holloway, J., dissenting) ("[The officers'] argument rests on rejection of the district court's holding that the jury must decide questions of fact pertaining to whether a reasonable officer would have perceived an immediate need to protect himself or others under the circumstances. And as noted, that holding is not reviewable in this interlocutory appeal.").

229. *Id.* ("[Pursuant to *Johnson*, w]e do not have jurisdiction to review that holding in this interlocutory appeal.").

230. Hope v. Pelzer, 536 U.S. 730, 741 (2002).

231. John C. Williams, Note, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1298–99 (2012).

232. *Kerns*, 663 F.3d at 1182 (majority opinion).

233. *Id.* at 1192 (Holloway, J., dissenting).

234. *Id.* at 1181 (majority opinion).

235. *Id.* at 1181 ("And even if they did somehow violate the Fourth Amendment, the officers added, they did not violate *clearly established* Fourth Amendment law. In his opposition to summary judgment, Mr. Kerns understood both prongs of the qualified immunity analysis to be in play and

ing the district court's perceived brevity, the dissent pointed out "that the district court's concise treatment of the issue is completely unsurprising . . . . Some cases do indeed require a more particularized inquiry. This is not one of them. . . . '[G]eneral statements of the law are not inherently incapable of giving fair and clear warning.'"[236]

By avoiding ruling on the constitutional merits while remanding the denial of summary judgment, the *Kerns* decision begins to construct a substantive change in Fourth Amendment protections from "the right . . . to be [free from] unreasonable searches"[237] to "'[t]he right to be free of unreasonable searches and seizures only if such conduct is clearly established at the time of the violation.' This amounts to . . . instead of using objective reasonableness as a guide, officers need only worry about what has been clearly established"[238] in a manner particular enough to satisfy the specific court hearing the case. Thus, the *Kerns* decision not only leaves a right without remedy but also potentially provides an incentive for unconstitutional police conduct. Ironically, it does so by (clearly) establishing that so long as police officers can identify a unique fact, they can achieve any objective without fear of liability by pointing to that unique fact to characterize the situation as one that is not yet clearly established. In effect, all police now need to do to become immune from liability for unconstitutional conduct is say: Despite evidence to the contrary, it was unclear to us at the time, based on this or that excruciatingly unique factual nuance, that the Fourth Amendment prohibits that.

The Supreme Court's failure to give any meaningful guidance about what can serve as particular enough to clearly establish a right in order to make the qualified immunity determination has led to an unpredictable[239] burden of proof for plaintiffs attempting to overcome a qualified immunity defense. It has also led to an unpredictable availability of remedies for violations of Fourth Amendment rights.[240] This unpredictability results, at least in some cases, in the articulation of Fourth Amendment doctrine that is rights-constrictive.[241] The lack of guidance about the clearly established requirement leaves the availability of a remedy up to the caprice of a judge who may or may not require a high degree of factual similarity.[242] And, as discussed in the next subpart, judges tend to be

proceeded to explain . . . why our precedent clearly established that their conduct violated those rights." (citation omitted)).

236. *Id.* at 1192 (Holloway, J., dissenting) (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)).

237. U.S. CONST. amend. IV.

238. David B. Owens, Comment, *Fourth Amendment Remedial Equilibration: A Comment on* Herring v. United States *and* Pearson v. Callahan, 62 STAN. L. REV. 563, 580 (2010).

239. *See The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 272, 278 (2009).

240. *See* Williams, *supra* note 231 ("[T]he Supreme Court has never given a fully cogent definition of what it means for a right to be 'clearly established.' The result is an expansion of subjective judicial discretion and a decrease in the overall uniformity of qualified immunity rulings.").

241. *See* Leong, *supra* note 172, at 432–33.

242. One of the other issues raised by Kerns—which is particularly illustrative of this point but largely unnecessary to the analysis of this Comment—was the privacy protection of his medical

reluctant to recognize a violation of a right where they are reticent to afford a remedy. This reluctance also leads to an articulation of constitutional law that is constrictive of constitutional protections.[243]

The decision in *Kerns* not only is contrary to the spirit of the Fourth Amendment (particularly given that it was Kerns's *home* that was searched) but also leaves room for all police officers who conduct unreasonable searches of a home to rely on any unique fact to provide them with an escape hatch from liability for their unconstitutional conduct. The *Kerns* decision is not an adherence to *Hope*. Warrantless searches are unreasonable[244] and violate the Fourth Amendment unless they meet the objective exigency exception.[245] Without such a justification, police officers violate the Fourth Amendment and should be held liable for doing so. If no remedy is afforded for their violation, what is the point of declaring the existence of rights at all? After all, what good is a right—a constitutional guarantee, no less—if there is no recovery when a government actor violates it?

With no Supreme Court guidance about what it means for a right to be clearly established, courts are left to determine whether the law was clear on the unique facts of the case in front of them. This idiosyncratic determination starts to make the qualified immunity analysis look almost subjective, leaving courts to determine if the right in question was clearly established in the opinion of that particular judge. This seems rather analogous to the fact-intensive good faith inquiry abandoned in *Harlow*. Furthermore, the articulation of constitutional law and principles becomes erratic and idiosyncratic to the specific situation presented to that court. Without a baseline meaning for "clearly established," the determination of such leaves future decisions unpredictable and inconsistent.[246]

The *Kerns* court followed up its decision in *Martinez* by muddying the law and leaving Jason Kerns without a remedy for the violation of his Fourth Amendment right. That lack of remedy is something courts should allow to happen only one time, in the interest of articulating the law.[247] But the goal of law articulation was not accomplished here. The

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records, which the police officers also obtained without a warrant. Addressing both the merits and the qualified immunity issue, the court held that the law entitling medical records to privacy protection was not clearly established enough. The dissent cited nearly a dozen cases dating back to 1977 to illustrate that the privacy interest in medical records is constitutionally protected and has been clearly ruled as such in both the Tenth Circuit and the Supreme Court. Kerns v. Bader, 663 F.3d 1173, 1198–1200 (10th Cir. 2011) (Holloway, J., dissenting).

243. *See infra* text accompanying notes 262–67.

244. U.S. CONST. amend. IV.

245. *See* cases cited *supra* note 103.

246. And, "promot[ing] clarity in the legal standards for official conduct [is a benefit to] both the officers and the general public." Wilson v. Layne, 526 U.S. 603, 609 (1999).

247. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); *see also supra* text accompanying note 62 (noting one rationale of qualified immunity is that it allows courts to articulate constitutional law without subjecting officers to retroactive liability).

Kerns decision not only trivializes Kerns's Fourth Amendment right but also adds to the watering down of Fourth Amendment rights in general.

To overcome a qualified immunity defense, should courts require plaintiffs to engage in a "scavenger hunt for cases with precisely the same facts"?[248] For example, to show that the right was clearly established, should the *Kerns* plaintiff be responsible for finding cases where a police helicopter was shot down, only one person in the immediate area claimed to have heard a shot or a car backfiring but no neighbors confirmed hearing the noise, the door of a house was left open, there was music on inside the house, and a window of a home on the eighteenth hole of a golf course had a single pane of a double-paned window broken? Or should courts respect the lesson from *Hope* that "general statements of the law"[249] (e.g., that "police, absent a warrant, need probable cause and an objectively reasonable belief in an exigency to enter a home") are enough to put police officers on notice that their conduct is unconstitutional?[250] The *Kerns* court ignored the principle from *Hope* that a general statement should suffice, and inappropriately appropriated from the jury the ability to determine whether an objectively reasonable belief in an exigency existed. It also demonstrated how divergent "clearly established" standards can be—even within the same court and the same year.

By remanding the district court's denial of summary judgment on qualified immunity, the *Kerns* court ignored the principle from *Hope* about general statements of law and required Kerns to engage in the sort of factual "scavenger hunt" that *Pierce* warned about.[251] By ignoring *Hope*, and because Kerns understandably could not find a case with the exact same facts and in the same context—despite *Martinez* being exceedingly close—the court remanded the denial of qualified immunity. That decision left not only Jason Kerns but also any similarly situated plaintiff in the future with no remedy for the violation of his Fourth Amendment right.

By taking the route it did and, in effect, holding on interlocutory appeal that the law was not clearly established, the court ignored the lesson from *Hope* that a right need only to be defined clearly enough to give the officers "fair and clear" warning that their conduct violates the Fourth Amendment. Both the Supreme Court and the Tenth Circuit have articulated as unconstitutional the warrantless entry of a private home absent probable cause and an objectively reasonable exigency. At a min-

248. Pierce v. Gilchrist, 359 F.3d 1279, 1298 (10th Cir. 2004).

249. Hope v. Pelzer, 536 U.S. 730, 741 (2002) (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)).

250. This leans towards being a fact-specific determination and one that is better suited for a jury than for a judge on summary judgment, except that the justifications offered by the police were arguably plainly unreasonable.

251. *Pierce*, 359 F.3d at 1298.

imum, the *Kerns* court missed an opportunity to articulate the law and advance constitutional principles.

The law has already established the categorical exigencies that allow for warrantless searches to be upheld as constitutional. The law is also clear that officers need an objectively reasonable belief in an imminent threat to qualify for the exigency exception to the warrant requirement.[252] By examining the minutia of the facts of this case (a job usually reserved for a jury) instead of simply asking itself whether this falls within one of the clear exigency categories, the court has carved out an exception to the exception and leaves the issue of warrantless searches less clear than it was before *Kerns*. Thus, the next time a warrantless search happens, the offending officers can simply rely on this decision to declare that the law was not clearly established enough.

C. Sequencing Issues

In addition to highlighting how the clearly established determination can lead to rights without remedies, the *Kerns* decision also demonstrates that same ill effect as a result of permissive *Saucier* sequencing.[253] Even though the constitutional issue was acknowledged, it was not decided at the circuit court level. This means the law is actually *less* clear, and one more constitutional violation of this exact kind will have to occur before it can even *potentially* become clearly established. Not holding police liable for reasonable mistakes is an underlying rationale of qualified immunity. In the interest of that policy rationale, courts should allow for only a single violation to take place and then articulate the law accordingly without subjecting officers to liability.[254]

But the situation here is different. By not addressing the constitutional issue and remanding the case to a lower court for final decision, the *Kerns* court has ensured that this exact same constitutional violation can occur without consequence *at a minimum* one more time. And the reality is that the one-more-violation estimate is the best-case scenario. Because even if the very same constitutional violation does occur, it only becomes clearly established for the purposes of qualified immunity if it reaches the Tenth Circuit for decision.[255] And even then, it only becomes clearly established if the decision somehow survives under both *Martinez*

252. *See* United States v. Najar, 451 F.3d 710, 718 (10th Cir. 2006); *see also* cases cited *supra* note 103.

253. Pearson v. Callahan, 555 U.S. 223, 234–35 (2009).

254. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); *see also* Garcia *ex rel.* Garcia v. Miera, 817 F.2d 650, 658 n.8 (10th Cir. 1987) ("'[O]fficials might believe they 'have one bite of the apple.[]' But if courts cannot prospectively articulate constitutional standards, there looms the even more unpalatable possibility of multiple bites of a constitutionally forbidden fruit." (quoting Comment, Harlow v. Fitzgerald*: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 926 (1984))).

255. Wilson v. Layne, 526 U.S. 603, 614–15, 617–18 (1999) (holding in part that to clearly establish a law requires controlling precedent in that circuit or by the Supreme Court, or a consensus of persuasive authorities).

and *Kerns*, the prospect of which seems impossible. Furthermore, the judge hearing the case would then have to *choose* to address the constitutional merits, instead of only whether the law was clearly established. The result is that officers are likely to get many bites at the "constitutionally forbidden fruit" before the law becomes clear enough to forbid it.

That unremedied right is supposed to be allowed to happen only to the immediate plaintiff, in the interest of not chilling police behavior.[256] But by not addressing the constitutional issue, the court left the right to be free from unreasonable searches in the absence of an exigency unestablished.[257] And by not establishing the officers' conduct as a constitutional violation, the *Kerns* court left the harm to the immediately plaintiff unremedied and left the right without a corresponding remedy for future plaintiffs.

To be fair, the Supreme Court has given little guidance about when to follow the permissive *Saucier* sequence and when it is appropriate for a lower court to bypass the constitutional question and proceed directly to the clearly established prong. Because the *Kerns* court did not declare the officers' conduct a constitutional violation, or definitively not a constitutional violation, the law is yet (or, still) not clearly established, which means that that harm can continue repeating without a remedy.

And "what courts do, as opposed to what they say, is the effective regulator for the scope of a given right."[258] A right is defined by its remedy; or at least one can tell how important the court thinks a particular right is by the remedy afforded when it has been violated. And "even if a court says a lot about the value of a right, the manner in which it vindicates that right is really what determines its value."[259] Put simply: without a tangible remedy for its violation, no right can genuinely be said to exist.[260]

The result in *Kerns* is especially troubling because it has ensured the absence of a corresponding remedy for future plaintiffs. Furthermore, the court even conceded that a right had been violated but found that the right (or exigency, really) was not clearly established enough.[261] Although, admittedly, the court did not make explicit the assertion that the right had been violated, it appears clear that the court believed it had

256. *See Harlow*, 457 U.S. at 815; *Garcia*, 817 F.2d at 656–57 n.8.

257. And if the court, as it seems to do be doing here, requires such a high level of factual specificity, the court should therefore be taking every opportunity to articulate the law under every factual circumstance imaginable. This consistent articulation would balance the specificity requirement seemingly imposed in *Kerns* and help give the law definitive contours, while allowing police and citizens to predict the law and conform their behavior accordingly.

258. *See* Owens, *supra* note 238, at 564.

259. *Id.* at 564–65.

260. *See* Levinson, *supra* note 171, at 894.

261. *See* Kerns v. Bader, 663 F.3d 1173, 1181 (10th Cir. 2011) ("[T]hat no constitutional violation took place . . . isn't so clear in this case.").

been violated. The *Kerns* court admitted it was not manifest that no constitutional violation took place. It did not disturb or remand the lower court's ruling on the constitutional prong; it only remanded on the clearly established prong of the analysis.

Along with the decision in *Martinez*, it seems likely that the *Kerns* court would agree that Kerns's right had been violated. Knowing it would rely on the clearly established prong to remand the case, there are several possible explanations for the court's failure to address the constitutional issue. One possible explanation is the cognitive dissonance theory.[262] "[J]udges are deeply uncomfortable with the notion of acknowledging a violation yet denying relief. Cognitive psychology research supports this notion: judges are reluctant to acknowledge a constitutional violation where they subsequently intend to grant qualified immunity because such a result induces a state of psychological discomfort known as cognitive dissonance."[263] Perhaps the court simply did not feel comfortable explicitly declaring that a right had been violated and then remanding the case back to a lower court for the ultimate determination because, as it knew, the law cannot be articulated at a level high enough to become clearly established for the purposes of qualified immunity.[264]

Similarly, not sequencing affects rights articulation as well. By deciding first that a law is not clearly established, judges addressing the constitutional question are less likely to find a violation of the right.[265] This reticence creates rights-constrictive law articulation because knowing that a plaintiff cannot recover for the harm makes it difficult for a judge to say that a right has been violated in the first place. Therefore, the articulation of the right at issue gets less protective based on the unavailability of the remedy.[266] This illustrates how the articulation of important constitutional rights is shaped by the availability of the remedy, or at least by the willingness of courts to grant that remedy. It also illustrates how sequencing—or not following the *Saucier* sequence—affects the articulation of constitutional rights in general.

Whatever the reason for not addressing the underlying constitutional claim, the decision in *Kerns* amounts to an implicit acquiescence by the court to affording no remedy for the right at issue. The Tenth Circuit had to have been aware that Kerns's Fourth Amendment right would be left unarticulated and without a remedy for its violation. By not discuss-

262. *See* Leong, *supra* note 61, at 670–71, 702–06, 708 (discussing the cognitive dissonance theory as an explanation for judges articulating rights by way of remedies).

263. *Id.* at 670.

264. Wilson v. Layne, 526 U.S. 603, 614–15, 617–18 (1999); *see also* Cortez v. McCauley, 478 F.3d 1108, 1114–15 (10th Cir. 2007) ("[F]or a right to be clearly established, 'there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'" (quoting Medina v. City of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992)).

265. *See* Owens, *supra* note 238, at 582.

266. *See id.*

ing the right and not explicitly declaring that a violation occurred or did not occur, the *Kerns* court left the right to be free from unreasonable searches—of one's home no less—below the threshold for the clearly established standard. The *Kerns* decision has arguably made the right even *less* clearly established because the decision could be claimed at this point to be in controversy with *Martinez*. At a minimum, the effect of not sequencing in *Kerns* will result in the same remedy-less constitutional violation in at least one more instance.

Although the concept of qualified immunity accepts this result once in order to further articulation of the law, the idea is to make the law more clear so that an unremedied constitutional violation does not happen repeatedly.[267] The *Kerns* court is, in effect, kicking the can down the road, waiting for the next *Kerns* case to make a decision about the right at stake instead of taking the opportunity to articulate constitutional law now. And, unfortunately, while that can is being kicked down the road, those future plaintiffs suffering similar constitutional harms will be left without any avenue for recovery.

That avoidance exemplifies a court willfully allowing for a violation of the exact same constitutional right to go unremedied in the future. By leaving the law unarticulated, the *Kerns* court has, with its eyes wide open, guaranteed that, at the bare minimum, one more violation of the exact same kind can occur and the plaintiff in that case too will be left with no remedy, especially because the law will not be clearly established for the purposes of qualified immunity even if the constitutional issue is decided in Kerns's favor upon remand in the district court (ahem, again). Leaving the law unarticulated means that another case with a similar constitutional violation not only has to occur but also has to reach the Tenth Circuit before the right can be articulated meaningfully.[268] And in a repeat of Kerns's case that actually makes it up to the Tenth Circuit, it would not yet have been decided by a court with sufficient authority. So, the importance that the *Kerns* court places on this right is in question and Fourth Amendment law articulation stalls, leaving unpredictable protections. This prospect is especially disheartening because *Kerns* was a prime opportunity for a federal court to articulate Fourth Amendment law in the civil context, as opposed to the typical criminal context, and to provide some balance to the articulation of Fourth Amendment law at large.

Courts should not leave constitutional rights without a remedy for violations thereof. Constitutional rights are arguably of greater importance than rights deriving from other sources, as demonstrated by their having been enshrined in the country's founding document as guar-

267. *See, e.g.*, *Wilson*, 526 U.S. at 609; Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).
268. *Wilson*, 526 U.S. at 614–15, 617–18).

antees.[269] When a violation is identified, particularly by a federal court, that court should be obligated to take it seriously and to take action to ensure that the immediate case is the only time it is heard but not remedied. By addressing the qualified immunity analysis in an order opposite the *Saucier* sequence, courts are able to recognize constitutional violations but decide the case on the clearly established prong without addressing the constitutional harm at all. This leaves the law unarticulated and unclear for the purposes of qualified immunity moving forward. Thus the right at issue does not become clearly established for subsequent cases and subsequent victims will similarly be left with no remedy for the violations of their constitutional rights. This stalling in constitutional rights articulation leaves individuals suffering constitutional harms at the hands of government actors without a corresponding remedy. The absence of remedy, in turn, defines the right, which means this cycle is self-perpetuating and leads to less protections stemming from constitutional rights.

IV. AND JUSTICE FOR ALL

When courts are faced with a "*Kerns* situation"—where a right exists and has been violated but it is clear that the harmed individual will be left without a remedy or where the law could be blackened regarding that right—there are several possible solutions. To make that determination, in line with the underlying qualified immunity rationales, the question courts should consider is the following: When the person in this case is left with no remedy, is it possible that the next person could also be left with no remedy?

To address this issue, I propose the admittedly novel *Kerns* solution. In this solution, appellate courts would be required to decide the constitutional issue. Consequently, the law would be articulated to ensure that another similar harm does not take place without an available remedy for the (subsequently) harmed individual. The *Kerns* solution is similar to the mandated *Saucier* sequence, except that it would not be mandatory in all cases, only in those cases in the *Kerns* situation. The *Kerns* solution would be a balancing test outlined by factors to be weighed. One particularly strong showing on a given factor could make up for a relatively weak showing on another. The factors outlining the proposed *Kerns* solution and an obligatory decision on the constitutional question are as follows:

1. *Will the immediate plaintiff be left without a remedy for a constitutional harm?* Under this factor, the rationales underlying qualified immunity would allow for the harm to take place once without a remedy. But if the immediate plaintiff

269. *E.g.*, U.S. CONST. amend. IV.

is left without a remedy, then it is likely that the next one will draw the shortest straw as well.[270]

2. *Is this a harm that has the potential to be repeated?* Stated another way: if the constitutional question is left unaddressed here, would that potentially result in another individual being left with no remedy for a constitutional violation in the future? For example, if the issue were so factually anomalous that it is exceptionally unlikely the harm could repeat, this factor would not be met. But, if in the eye of the beholder there is seemingly any chance at all that the harm could repeat, then the appellate courts should be required under this proposed *Kerns* solution test to address the constitutional question for the purposes of clearly establishing the law.

3. *Is this case sufficiently developed for this court to articulate a meaningful legal principle?* Put another way, would there be a risk of making the law less clear, either as a result of failing to address the constitutional issue, as in *Kerns*, or because the factual record is insufficient to articulate a decent legal principle? This factor is designed to ensure that the facts surrounding the constitutional merits are reasonably developed so that the law that does get articulated is useful and consequential. In those cases where there is need for additional factual development, the "procedural trigger" solution, described below, should be incorporated into this step.

Another possible solution, either as a stand-alone solution or in combination with the third factor of the *Kerns* solution, is the procedural trigger solution. Under this solution, if a case needed to be remanded (a) for development of the factual record in order to articulate the legal principle correctly or (b) as in *Kerns*, on the qualified immunity prong and was ultimately decided in a lower court on the constitutional merits where the level of authority would not sufficiently establish constitutional law, it would automatically trigger a demarcated procedural kick, sending the case back up to a circuit court to affirm the ruling at the level sufficient to clearly establish the law for future cases. This solution will ensure a well-developed factual record on the constitutional issue because the case would necessarily have gone through the trial phase on that issue and the parties would be aware of the need to brief it. It would

270. Note that the law could be articulated here in either direction. The test would be truncated at this point if it were determined that the immediate plaintiff suffered no constitutionally cognizable harm. At least then, however, if the law were articulated such that a constitutional violation were not recognized, there would be no underlying constitutional harm in the next case, and the *Kerns* solution would have served its purpose of articulating the law.

also allow a federal court—one arguably more experienced in constitutional issues—to oversee the issue and the ensuing articulation of rights. This solution would also ensure that in all cases where a constitutional right was at issue—whether a right was found to exist or not—that right would thereafter be clearly established for the purposes of a remedy being available in the future.

In the interest of articulating useful constitutional principles, and for cases in which the record is truly insufficient to do so, the procedural trigger solution should be embraced within the third step of the *Kerns* solution for more in-depth factual development at the trial level. In the procedural trigger solution, those cases bearing on important constitutional issues but not developed enough to make good law would be remanded for rehearing on the constitutional merits. Such cases then would automatically be kicked back up to the circuit level for a recognition of the right, thereby establishing the law clearly at the necessary circuit level.

One anticipated counterargument to the *Kerns* solution is that the record on appeal may not be factually developed enough. In those cases, the concern is that courts would be prone to getting the constitutional question wrong, articulating bad law. But this factual development concern is already extant to a lesser degree in all appellate cases. If the solution proposed here were to be adopted, the procedural trigger solution accounts for it, necessitates rehearing at trial, and accounts for clearly establishing rights at the circuit level. Diluting constitutional rights and their corresponding remedies for the sake of not re-briefing issues or remanding as part of this solution seems like a precarious ransom when constitutional rights are at stake.

Another possible solution is reinstating the mandatory *Saucier* sequencing, but making one of two narrow exceptions to the Federal Rules of Civil Procedure. The first possibility is to allow for an immediate appeal (before addressing the clearly established prong) on the constitutional issue for those parties who lose on that prong. This exception would allow for the non-prevailing party to appeal the constitutional issue while maintaining the incentive for parties to litigate it before even reaching the clearly established prong.[271] Conversely, an exception could be made to allow for an interlocutory appeal after both prongs of the qualified immunity analysis have been decided for those parties who prevail only on the qualified immunity question.

Finally, another solution that has been previously suggested is to "provid[e] more specific guidance to lower courts regarding when se-

271. Thanks to Nick Poppe for suggesting this variation during one of many excellent discussions.

quencing is and is not appropriate."[272] The *Kerns* solution provides just that guidance and ensures that plaintiffs suffering constitutional harms are not left without a remedy.

CONCLUSION

"Absence of a remedy is absence of a right."[273] Maintaining the integrity of constitutional rights relies on the real world vindication of those rights when a violation has occurred. When constitutional rights are at stake, courts should be careful to ensure that those rights are strengthened instead of diluted. Rights are strengthened when remedies are afforded that provide a tangible, corresponding resolution for their violation.

When courts are given ineffectual guidelines about what it means for a right to be clearly established, or about when to decide the constitutional issues in a qualified immunity case, the integrity of our constitutional rights is put in jeopardy because the result is the opportunity for unremedied, albeit recognized, violations. By ignoring the lesson from *Hope* that general statements of law are not inherently incapable of establishing a law, it gets more difficult to articulate constitutional rights because those available remedies begin to dissolve in the absence of rights articulation, specifically in the context of qualified immunity, and often therefore under the Fourth Amendment at large. The result of leaving rights unarticulated is a diminished availability of remedies for the violations of those rights. Fewer and increasingly unreachable remedies result in incomplete and increasingly unarticulated rights. And so the cycle goes. *Kerns* is an example of this difficulty of rights articulation and the disappointing effect on the underlying right.

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272. Leong, *supra* note 61, at 671.

273. LLEWELLYN, *supra* note 196.

* J.D. Candidate, 2014. I thank Professor Nancy Leong, to whom I owe a tremendous debt of gratitude for her invaluable comments, time, and insight in developing this Comment. I also thank the *Denver University Law Review* Board, in particular Edward Shaoul and Bill Reed for their dedication and immensely helpful input in making this Comment publishable. Most importantly, I thank my amazing wife, Sarah, for always being so understanding, supportive, and encouraging. I have no idea how or why you put up with me, but you are the sunshine of my life and make possible all of my endeavors.