Policy Analysis

CATO INSTITUTE

September 14, 2020 | Number 901

Qualified Immunity

A Legal, Practical, and Moral Failure

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EXECUTIVE SUMMARY

Accountability is an absolute necessity for meaningful criminal justice reform, and any attempt to provide greater accountability must confront the doctrine of qualified immunity. This judicial doctrine, invented by the Supreme Court in the 1960s, protects state and local officials from liability, even when they act unlawfully, so long as their actions do not violate "clearly established law." In practice, this legal standard is a huge hurdle for civil rights plaintiffs because it generally requires them to identify not just a clear legal *rule* but a prior case with functionally identical *facts*.

Qualified immunity is one of the most obviously unjustified legal doctrines in our nation's history. Although it is nominally an interpretation of our primary federal civil rights statute, that statute says nothing about any immunities, qualified or otherwise. And the common-law background against which it was passed also contained nothing like the across-the-board immunity for public officials that characterizes the doctrine today. Qualified immunity has also been disastrous as a matter of policy. Victims of egregious misconduct are often left without any legal remedy simply because there does not happen to be a prior case on the books involving the exact same sort of misconduct. By undermining public accountability at a structural level, the doctrine also hurts the law enforcement community by denying police the degree of public trust and confidence they need to do their jobs safely and effectively.

The most straightforward and sensible solution to this problem is complete abolition of qualified immunity. This could be appropriately accomplished either through the Supreme Court reversing its own precedent or through congressional legislation clarifying that our civil rights laws do not include any such defense to liability. Notably, even if qualified immunity is abrogated, municipalities would still have the option to indemnify state agents under appropriate circumstances. But there are also alternatives to total abolition that would eliminate qualified immunity in the typical case while still preserving a modified kind of immunity in a few safe harbors.

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INTRODUCTION

> *"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."*[1]
>
> —Chief Justice John Marshall, *Marbury v. Madison*

The substance of constitutional rights is meaningless if state actors can violate those rights with impunity. Such rights would become, in James Madison's words, "parchment barriers"—symbolic commitments to individual liberty that do nothing in practice to deter or prevent unlawful misconduct by government agents.[2] Accountability must therefore be a top priority for anyone interested in criminal justice reform more generally. Unfortunately, the environment in which most members of law enforcement operate today can best be described as one of near-zero accountability. Although this culture of near-zero accountability has many causes, by far the most significant is the doctrine of qualified immunity.

Qualified immunity is a judicial doctrine created by the Supreme Court in the late 1960s that shields state actors from liability for their misconduct, even when they break the law. One of our primary federal civil rights statutes—currently codified at 42 U.S.C. § 1983, and thus generally called "Section 1983"—says that any state actor who violates someone's federally protected rights "shall be liable" to the party injured. But under the doctrine of qualified immunity, the Court has held that such defendants cannot be sued unless they violated "clearly established law." While this is an amorphous, malleable standard, it generally requires civil rights plaintiffs to show not just a clear legal *rule* but a prior case with functionally identical *facts*.

In other words, it is entirely possible—and quite common—for courts to hold that government agents did violate someone's rights, but that the victim has no legal remedy simply because that precise sort of misconduct had not occurred in past cases. Not only does the doctrine routinely deny justice to victims of egregious misconduct, but it also undermines accountability for law enforcement at a structural level. Section 1983 was intended to be the primary means of holding state actors accountable for violating constitutional rights, yet qualified immunity all but guts both the deterrent and remedial effects of this statute. Thus, the doctrine undermines constitutional rights across the board by enfeebling the means of their vindication.

In short, qualified immunity has failed utterly as a matter of law, doctrine, and public policy. As a legal matter, it has no basis in either the text of Section 1983 or the common-law background against which the statute was enacted. The modern doctrine—especially the "clearly established law" standard—is incapable of consistent, predictable application, and continues to confuse and divide lower courts tasked with applying it. And most importantly, the doctrine regularly permits egregious unconstitutional misconduct to go unaddressed, exacerbating an ongoing crisis of accountability in law enforcement more generally. That obviously hurts the victims of police misconduct, but it also hurts the law enforcement community itself: when the judiciary routinely permits police officers to get away with unconscionable constitutional violations, members of the public can hardly be expected to have much trust or respect for officers in their community. And that diminished trust and respect makes the job of policing far more difficult and dangerous, including for those officers who do strive to act in a lawful, professional manner.

The one silver lining in this discussion is that for all the many complex problems this doctrine creates, the solution is quite simple—abolish qualified immunity. This result could be appropriately accomplished either by the Supreme Court reversing its own precedent, or by Congress passing legislation clarifying that Section 1983 means what it

says—that when state actors violate someone's federally protected rights, they "shall be liable to the party injured." However, there are some alternatives to complete abolition that would eliminate qualified immunity for most cases, while still preserving a modified version of the defense under a few more-limited, reasonable circumstances.

Regardless of whether qualified immunity is mostly or wholly abolished, it is important to clarify that eliminating the doctrine would not remove the potential for indemnifying defendants under certain circumstances. Indeed, even today, when police officers actually are held liable in civil rights cases, they are nearly always fully indemnified by their municipal employers. Thus, the immediate effect of eliminating qualified immunity would not be to subject individual officers to potentially ruinous judgments, but simply to ensure that victims of official misconduct get the remedy they deserve. Whether and how to indemnify defendants is itself a complicated policy question, but the first step toward answering it, and toward restoring accountability in law enforcement more generally, must be to restore the baseline assumption that those whose rights are violated will have a remedy.

QUALIFIED IMMUNITY LACKS ANY VALID LEGAL FOUNDATION

Passage of Section 1983

The doctrine of qualified immunity is nominally an interpretation of our principal federal civil rights statute, now codified at 42 U.S.C. § 1983. Section 1983 was first passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, which itself was part of a series of three Enforcement Acts designed to help combat lawlessness and civil rights violations in the post-war South.[3] Notably, the original version of Section 1983 was passed a mere three years after the adoption of the Fourteenth Amendment and was intended in large part to give teeth to the promise of liberty and equality enshrined in the amendment's provisions.[4]

As currently codified, the statute states:

> *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.[5] [emphasis added]

This statute thus creates a cause of action against state actors who violate someone's constitutional rights. On its face, Section 1983 does not provide for *any* immunities, qualified or otherwise. It simply states that a person acting under state authority who causes the violation of a protected right "shall be liable to the party injured." Thus, if qualified immunity is to have any valid legal basis, it cannot possibly come from the statute itself.

Of course, no law exists in a vacuum, and statutes generally will not be interpreted to extinguish by implication longstanding legal defenses available at common law.[6] For example, a statute making it a crime to "willfully discharge a firearm at another person" would not be construed to preclude a defendant from arguing self-defense because self-defense is a properly well-established background principle of our legal system.

In the context of qualified immunity, the Supreme Court has appropriately framed the issue as whether or not "[c]ertain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them."[7] The relevant question then is whether the common law of 1871 included general immunities for state agents that were so well established as to justify the doctrine of qualified immunity today.

"On its face, Section 1983, part of the Civil Rights Act of 1871, does not provide for *any* immunities, qualified or otherwise."

> "The background legal assumption during the Founding Era was that government agents were, in general, strictly liable for constitutional violations that gave rise to common-law torts."

Common-Law Background of Liability for Government Agents

In the Founding Era, constitutional claims would typically arise as part of suits to enforce general common-law rights. For example, an individual might sue a federal officer for trespass; the defendant would claim legal authorization to commit the alleged trespass in his role as a federal officer; and the plaintiff would, in turn, claim that the trespass was unconstitutional, thus defeating the officer's defense.[8] And as many scholars over the years have demonstrated, these Founding Era lawsuits did not generally permit a good-faith defense to constitutional violations.[9] Rather, the background legal assumption at this time was that government agents were, in general, strictly liable for constitutional violations that gave rise to common-law torts.[10]

The clearest example of this principle comes from the 1804 Supreme Court case *Little v. Barreme*.[11] That case involved a claim against an American naval captain, George Little, who captured a Danish ship off the French coast in 1799, during the Quasi-War with France. Federal law authorized seizure only if a ship was going *to* a French port (which this ship was not), but President Adams had issued broader instructions to also seize ships coming *from* French ports. The question was whether Captain Little's reliance on these instructions was a defense against liability for the unlawful seizure.

The opinion by Chief Justice John Marshall illustrates how the *Little* Court seriously considered, but ultimately rejected, the very rationales that would later come to support the doctrine of qualified immunity. Marshall explained that "the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages."[12] He noted that the captain had acted in good-faith reliance on the president's order, and that the ship had been "seized with pure intention."[13] Nevertheless, the Court held that "the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."[14] In other words, the officer's only defense was legality, not good faith.

This "strict rule of personal official liability, even though its harshness to officials was quite clear," persisted through the 19th century.[15] Its severity was mitigated somewhat by the prevalence of successful petitions to Congress for indemnification.[16] But on the judicial side, courts continued to hold public officials liable for unconstitutional conduct without regard to any across-the-board, good-faith defense. For example, in 1891 the Massachusetts Supreme Court held members of a town health board liable for mistakenly killing an animal they thought was diseased, even when ordered to do so by government commissioners.[17] Early 20th-century scholarship also explains how "[p]rior to 1880 there seems to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts."[18]

To be sure, even in the 19th century, "good faith" was relevant in some lawsuits against government agents, but only to the extent that it was an *element* of particular common-law claims.[19] For example, the tort of false arrest permits lawsuits against police officers making unlawful arrests, but it allows the defense of good faith and probable cause. As one contemporary treatise explained, "it is the established rule, that if [an officer] have reasonable grounds for his belief [that a citizen violated the law], and act thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted."[20] Note that "good faith" in this context is not a separate, free-standing protection from liability for unlawful conduct. Rather, at common law, an officer who acted with good faith and probable cause simply did not commit the tort of false arrest in the first place.

Most notably, in the context of Section 1983 itself, in 1915 the Supreme Court held that the statute did not incorporate any freestanding good-faith defense. In *Myers v. Anderson*, the Court held that Maryland election officers

were liable for enforcing a state statute that violated the Fifteenth Amendment's ban on racial discrimination in voting.[21] The defendants in *Myers* argued that, even if the statute was unconstitutional, they could not be held personally liable because the plaintiffs "fail[ed] to allege that the action of the defendants in refusing to register the plaintiffs was corrupt or malicious," that "[m]alice is an essential allegation in a suit of this kind against registration officers at common law," and that Section 1983 "does not dispense with the necessity of alleging and proving malice."[22]

The Supreme Court rejected these arguments. The Court explicitly noted that "[t]he non-liability in any event of the election officers for their official conduct is seriously pressed in argument," but then stated that "we do not undertake to review the considerations pressed on these subjects because we think they are fully disposed of . . . by the very terms of [Section 1983], when considered in the light of the inherently operative force of the Fifteenth Amendment."[23] In other words, given the plain language of Section 1983, the only relevant question was whether the defendants had acted unconstitutionally—whether or not they acted in good faith or with malice was irrelevant. Although the Supreme Court did not elaborate on this point in *Myers*, the lower-court decision that it affirmed was much more explicit:

> [A]ny state law commanding such deprivation or abridgment [of a constitutional right] is nugatory and not to be obeyed by any one; and any one who does enforce it does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and no allegation of malice need be alleged or proved.[24]

The *Myers* Court's rejection of any general good-faith defense "is exactly the logic of the founding-era cases, alive and well in the federal courts after Section 1983's enactment."[25]

Creation and Evolution of Qualified Immunity

The doctrine of qualified immunity has changed substantially over the years, but it was first articulated in the 1967 Supreme Court case *Pierson v. Ray*.[26] That case involved a Section 1983 suit against police officers who had arrested several people under an anti-loitering statute that violated the First Amendment. The Supreme Court held that, because the common-law tort of false arrest allowed the defense of good faith and probable cause, defendants should have that same defense in an analogous suit under Section 1983.[27] Critically, the Court extended this defense to include not just a good-faith belief in probable cause for the arrest, but a good-faith belief in the legality of the statute under which the arrest was made.

Note that *Pierson* presents exactly the same kind of issue as *Myers v. Anderson*—both involved state officials who violated individuals' rights by enforcing unconstitutional statutes, who then claimed they should not be held personally liable because they were acting in good faith. But whereas the Court rejected this argument in *Myers*, it accepted it in *Pierson*. Tellingly, the *Pierson* Court failed to cite *Myers* or otherwise acknowledge that it was reversing its own precedent.

Nevertheless, despite ignoring prior case law and the common-law background of strict liability for constitutional violations, the *Pierson* Court at least grounded its decision on the premise that the analogous tort at issue—false arrest—allowed a good-faith defense at common law. One might then have expected the qualified immunity doctrine to adhere generally to the following model: determine whether the analogous tort permitted a good-faith defense at common law, and if so, assess whether the defendants had a good-faith belief in the legality of their conduct.

But as the Supreme Court continued to refine qualified immunity over the next couple of decades, it soon discarded even this loose tether to history. In 1974 the Court abandoned the analogy to common-law torts that permitted a good-faith defense (such as false arrest),

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"Under *Harlow v. Fitzgerald*'s 'clearly established law' standard, whether a defendant was acting in good faith is irrelevant; what matters is the state of the prior case law at the time of the defendant's alleged misconduct."

and instead held that a good-faith defense was available for all executive officers (not just police officers) for any "acts performed in the course of official conduct."[28]

Most importantly, in the 1982 case *Harlow v. Fitzgerald*, the Supreme Court fundamentally changed the nature of the good-faith defense that qualified immunity was purportedly based on.[29] Up until this point, qualified immunity had turned, in part, on a "'subjective' test of good faith," which meant a defendant had to "be acting sincerely and with a belief that he is doing right."[30] In other words, to claim qualified immunity, defendants had to have an actual good-faith belief that they were acting lawfully. But in *Harlow*, the Court eliminated this requirement and instead held that defendants would be entitled to qualified immunity whenever "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[31] Under *Harlow*'s "clearly established law" standard, which continues to govern qualified immunity today, whether or not a defendant was actually acting in good faith is entirely irrelevant; all that matters is the state of the prior case law at the time of the defendant's alleged misconduct.[32]

The modern doctrine of qualified immunity is therefore completely untethered from any statutory or historical baseline. The text of Section 1983 makes no mention of any immunities, qualified or otherwise, and the relevant history establishes a baseline of strict liability for constitutional violations—at most providing a good-faith defense against claims analogous to certain common-law torts. And in 1915 the Supreme Court confirmed that Section 1983 provides for no general good-faith defenses before reversing itself without explanation more than half a century later. Yet qualified immunity functions today as an across-the-board defense, based on a "clearly established law" standard that was unheard of before the late 20th century.

Although in recent years the Supreme Court has made token attempts to justify the doctrine of qualified immunity on historical grounds, many current and previous members of the Court have candidly acknowledged the uncomfortable truth that the modern doctrine has, at the very least, diverged markedly from any plausible historical baseline:[33]

- In the 2018 case *Kisela v. Hughes*, Justice Sonia Sotomayor dissented, noting that qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment."[34]
- In the 2017 case *Ziglar v. Abbasi*, Justice Clarence Thomas wrote in a concurring opinion that "[i]n further elaborating the doctrine of qualified immunity . . . we have diverged from the historical inquiry mandated by the statute."[35]
- In the 1998 case *Crawford-El v. Britton*, Justice Antonin Scalia dissented, saying "our treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume."[36]
- And in the 1992 case *Wyatt v. Cole*, Justice Anthony Kennedy wrote a concurring opinion, acknowledging that "[i]n the context of qualified immunity . . . we have diverged to a substantial degree from the historical standards."[37]

In short, qualified immunity has become nothing more than a "freewheeling policy choice" that is at odds with Congress's judgment in enacting Section 1983.[38]

THE DOCTRINAL PROBLEMS WITH QUALIFIED IMMUNITY

The Stringency of "Clearly Established Law"

The defining feature of modern qualified immunity doctrine is the "clearly established law" standard—that is, even if state actors have violated someone's constitutional rights, they

cannot be held liable unless those rights were "clearly established" at the time of the violation. But that naturally raises the question of what it means for rights to be "clearly established."

The crucial takeaway from decades of Supreme Court jurisprudence is that "clearly established law" cannot be defined at a high level of generality; instead, the law must be "particularized" to the facts of the case.[39] In practice, it is quite difficult for plaintiffs to make this showing because lower courts typically require a prior case in the relevant jurisdiction with functionally similar facts before they will hold that the law is clearly established. Although the Supreme Court has always insisted that an exact case on point is not strictly necessary, it has also stated that "existing precedent must have placed the statutory or constitutional question beyond debate."[40]

Instead of trying to tease out this standard in the abstract, it may be more helpful to consider a few concrete examples of the sorts of minor factual distinctions on which courts will rely to conclude that the law was not "clearly established" on some particular point. (Note that the key facts in the following cases will be presented in the light most favorable to the civil rights plaintiffs because that is how courts are supposed to construe disputed facts when ruling on qualified immunity as a matter of law.)

BAXTER V. BRACEY.[41] In early 2014, two Nashville police officers, Brad Bracey and Spencer Harris, were pursuing a homeless man named Alexander Baxter in response to reports that Baxter had been trying to burglarize unlocked houses. The officers, along with a police dog, followed Baxter into a residential basement and found Baxter sitting on the ground with his hands in the air. Even though Baxter had clearly surrendered at this point, however, Harris—after waiting about 5 to 10 seconds—released the dog to attack Baxter. The police dog bit Baxter in his armpit (which was exposed, as his hands were raised in surrender), and Baxter required emergency medical treatment at a hospital.

Baxter brought a Section 1983 suit against these officers, claiming that the deployment of the police dog against him after he had surrendered violated his Fourth Amendment rights. A prior Sixth Circuit case had already held that an officer clearly violated the Fourth Amendment when he used a police dog without warning against an unarmed residential burglary suspect who was lying on the ground with his hands at his sides.[42] But the court here held that this prior case was insufficient because "Baxter does not point us to any case law suggesting that *raising his hands, on its own*, is enough to put Harris on notice that a canine apprehension was unlawful in these circumstances."[43] In other words, prior case law holding it unlawful to deploy police dogs against nonthreatening suspects who surrendered by laying on the ground did not make it clear that it was unlawful to deploy police dogs against nonthreatening suspects who surrendered by sitting on the ground with their hands up.

LATITS V. PHILIPS.[44] In June 2010, Laszlo Latits was stopped by Detroit-area police for turning his car the wrong way on a divided boulevard. A police officer testified that he saw bags in the car that he suspected contained drugs, and the dashboard camera shows the officer shining his flashlight into the car and raising his gun to Latits's head. Latits then drove away, and the police pursued. Another officer, Lowell Phillips, repeatedly rammed Latits's car—in violation of department policy and a direct order not to use this maneuver—and eventually drove Latits off the road. Phillips then jumped out of his car, ran toward Latits's, and shot him three times in the chest, killing him. Latits's widow sued Phillips under Section 1983, and the Sixth Circuit held that Phillips had violated Latits's Fourth Amendment rights because no reasonable officer would have concluded that Latits "present[ed] an imminent or ongoing danger. . . . Officer Phillips's use of deadly force was objectively unreasonable."[45]

Nevertheless, in spite of this objectively unreasonable shooting, a majority of the Sixth Circuit panel found that the officer was entitled to qualified immunity. The court itself acknowledged that several prior cases had

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clearly established that "shooting a driver while positioned to the side of his fleeing car violates the Fourth Amendment, absent some indication suggesting that the driver poses more than a fleeting threat."[46] Even though that statement would seem to govern this case exactly, the majority held that these prior cases were "distinguishable" because they "involved officers confronting a car in a parking lot and shooting the non-violent driver as he attempted to *initiate* flight," whereas here "Phillips shot Latits after Latits led three police officers on a car chase for several minutes."[47] The lone dissenting judge in this case dryly observed that "the degree of factual similarity that the majority's approach requires is probably impossible for any plaintiff to meet."[48]

Avoiding the Merits Entirely

Because of qualified immunity, courts will often hold that even though a person's rights were violated, that person has no legal remedy because the law was not clearly established. But perhaps even more surprisingly, courts are permitted to grant qualified immunity without ever deciding whether a constitutional violation occurred in the first place.

This aspect of qualified immunity is another instance where the Supreme Court's doctrine has changed dramatically over time. For instance, in the 2001 case *Saucier v. Katz*, the Court created a mandatory sequencing standard in which lower courts were required to first determine whether the defendant violated someone's constitutional rights, and then, if necessary, determine whether those rights were clearly established.[49] But just eight years later, in *Pearson v. Callahan*, the Court reversed *Saucier* and instead held that lower courts have the discretion to grant qualified immunity on the ground that the law was not clearly established without actually deciding the threshold question of whether the law was violated in the first place.[50]

The practical result of this discretion is that qualified immunity not only denies justice to victims whose rights have been violated, but it also stagnates the development of the law going forward. After all, if courts refuse to resolve legal claims because the law was not clearly established, then the law will never become clearly established.[51] Indeed, if courts grant qualified immunity without at least deciding the merits question, then the same defendant could continue committing exactly the same misconduct indefinitely—and never be held accountable.

One of the best examples of this stagnation concern is the sluggishness with which the federal courts have come to recognize the First Amendment right to record police officers in public. Although the Supreme Court has yet to weigh in on this subject, every circuit court to address this issue on the merits has found that there is, in fact, such a right under the First Amendment. But in the Third and Fourth Circuits, this right has long gone unprotected precisely because these courts granted qualified immunity to officers who arrested people for exercising this right without ruling on the merits question.[52] And the Third Circuit even granted qualified immunity to officers in a second right-to-record case on the grounds that, naturally, the right-to-record had yet to be clearly established in that circuit so "it was not unreasonable for the officers to regard their conduct as lawful."[53]

Although courts have the option to decide the merits question first, they frequently duck the relatively difficult constitutional question in favor of the usually simpler question of whether the law was clearly established. The best source for understanding this point empirically is a 2015 paper written by professors Aaron Nielson and Christopher Walker, in which they examined 844 federal appellate cases for the years 2009 through 2012 that involved qualified immunity.[54] Out of all those cases where the court had a choice about the order in which to decide these questions (i.e., the cases where qualified immunity was granted), courts decided the merits question first 63 percent of the time (665 claims). However, out of these 665 claims, the courts nearly always (92 percent of the time) decided that there was not, in fact, any constitutional

violation. In other words, they reach the merits in those cases where qualified immunity itself is irrelevant because there was no violation of someone's rights to begin with.

Courts "developed the law"—in the sense of holding that there was a constitutional violation, but it was not clearly established at the time of the violation—in only 8 percent of the cases in which qualified immunity was granted. The 37 percent of cases (400 claims) where courts decided not to reach the merits (and thus, granted immunity solely because the law was not clearly established) probably represent those cases in which the merits question was more difficult, and where the law is therefore more in need of development.

Appeals before Final Judgment

An additional wrinkle of the qualified immunity doctrine is that it gives a one-sided litigation advantage to government defendants in the form of "interlocutory appeals."

As a general rule of civil procedure, parties cannot appeal adverse court decisions until there is a final judgment on the merits.[55] Usually that means a decision for one side or another at trial, or else a pretrial resolution of the entire case by the district court judge. Qualified immunity is most frequently raised by defendants at the summary judgment stage—that is, after the evidence has been taken but before the case goes to trial.[56] And the denial of summary judgment to a defendant is generally not considered to be a final judgment: when a judge denies summary judgment it simply means that there are genuine factual disputes in the case that need to be resolved by a jury.

But according to the Supreme Court, qualified immunity is not just a defense against liability, but rather is intended to be an immunity from suit altogether; where applicable, it is supposed to protect defendants from going to trial in the first place.[57] Therefore, denials of qualified immunity are a rare instance of decisions subject to what is called the "collateral order doctrine"—if a district court denies the defendant's motion to dismiss for qualified immunity, the defendant may immediately appeal that decision (an "interlocutory appeal") before the case goes to trial.

Thus, to even get before a jury, civil rights plaintiffs essentially must win twice in a row—once before the district court and again before the court of appeals. The cost of pretrial appellate litigation can easily exhaust the limited resources of civil rights plaintiffs and induces plaintiffs to settle before their case can go to trial, often on far less favorable terms than they would have in the absence of these litigation costs.

But the collateral order doctrine fails even to achieve the professed benefits for government defendants that motivated the Supreme Court to establish this rule in the first place, and it often results in increased litigation costs for all involved. As one federal judge recently explained, "[a]dditional expense and burden result because an interlocutory appeal adds another round of substantive briefing for both parties, potentially oral argument before an appellate panel, and usually more than twelve months of delay while waiting for an appellate decision. All of this happens in place of a trial that (1) could have finished in less than a week, and (2) will often be conducted anyway after the interlocutory appeal."[58]

Doctrine Is Amorphous, Unpredictable, and Counterproductive

Modern qualified immunity doctrine—especially the clearly established law standard—has proven impossible to apply with predictability or consistency. Indeed, there is perhaps no other Supreme Court doctrine that has engendered as much confusion and division among lower court judges as the Court's amorphous instructions on when a given right is clearly established, as both judges and commentators have recognized.[59]

The fundamental, intractable problem is that there is simply no objective way to define the level of generality at which "clearly established law" should be defined. Since the Court first announced this standard in 1982 it has issued dozens of substantive qualified immunity decisions that attempt to hammer

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out a workable understanding of "clearly established law," but with little practical success. On the one hand, the Court has repeatedly instructed lower courts "not to define clearly established law at a high level of generality,"[60] and stated that "clearly established law must be 'particularized' to the facts of the case."[61] But on the other hand, it has said that its case law "does not require a case directly on point for a right to be clearly established,"[62] and that "general statements of the law are not inherently incapable of giving fair and clear warning."[63]

How to navigate between these abstract instructions? The Court's specific guidance has been no more concrete—it has stated simply that "[t]he dispositive question is 'whether the violative nature of particular conduct is clearly established.'"[64] The problem, of course, is that this instruction is circular—how to identify clearly established law depends on whether the illegality of the conduct was clearly established. It is therefore no surprise that lower courts remain persistently confused and divided on how to answer the nebulous question of how similar the facts of a prior case must be for the law to be clearly established.[65]

The harsh and unpredictable nature of qualified immunity also deters meritorious lawsuits from being filed in the first place. In some cases, even when potential clients have a strong argument on the merits, experienced civil rights attorneys may nevertheless recognize that the limited case law in their jurisdiction will preclude them from being able to identify "clearly established law." Or, the cost and uncertainty inherent in the doctrine might mean that prosecuting a Section 1983 case is simply not worth the time and effort even if an attorney could, in principle, prevail on the merits.

This question is difficult to measure rigorously, of course, because there is no comprehensive database of civil rights cases that were never brought. But the anecdotal experience of civil rights attorneys nevertheless suggests that qualified immunity functions as a substantial filter. For example, in 2011 Alexander Reinert identified more than 40 attorneys or law firms who had experience with multiple civil rights cases from 2006 through 2011 and interviewed them about screening factors. He reported that "[n]early every respondent, regardless of the breadth of her experience, confirmed that concerns about the qualified immunity defense play a substantial role at the screening stage," and that for some it was "the primary factor when evaluating a case for representation."[66]

THE MORAL FAILURES OF QUALIFIED IMMUNITY

Regularly Denies Justice to Victims of Egregious Misconduct

Even setting aside its legal and doctrinal shortcomings, the most obvious and serious consequence of qualified immunity is that the doctrine routinely leaves individuals whose rights are violated without any legal remedy. And given how the "clearly established law" test works in practice, whether victims of official misconduct will get redress from their injury turns not on whether state actors broke the law, nor even on how serious their misconduct was, but simply on the happenstance of whether the case law in their jurisdiction happens to include prior cases with fact patterns that match their own.

To illustrate the absurdity of this principle, consider that if a Texarkana resident's rights have been violated by local law enforcement, whether or not that resident could successfully sue for relief under Section 1983 might well turn on whether the misconduct occurred in Texas (the Fifth Circuit) or Arkansas (the Eighth Circuit).

Perhaps most disturbingly, in light of the Supreme Court's insistence that "clearly established law" be "particularized" to the facts of a case, the doctrine can actually have the perverse effect of making it harder to overcome qualified immunity the more egregious the misconduct is—precisely because extreme, egregious misconduct is less likely to have arisen in prior cases than more run-of-the-mill misconduct. To demonstrate this point, consider the following recent cases, all of which

resulted in grants of qualified immunity simply because the precise misconduct at issue had not previously been held unlawful. (Again, the facts in these cases are presented in the light most favorable to the plaintiffs.)

JESSOP V. CITY OF FRESNO. Police officers executing a search warrant in relation to alleged illegal gambling machines produced an inventory sheet stating that they had seized $50,000 from the suspects. But the officers had actually seized $151,380 in cash and another $125,000 in rare coins and simply pocketed the difference between what they seized and what they reported—effectively using a search warrant to steal more than $225,000.

The Ninth Circuit granted immunity to the officers. The court noted that while "the theft" of "personal property by police officers sworn to uphold the law" may be "morally wrong," the officers could not be sued for the theft because the Ninth Circuit had never issued a decision specifically involving the question of "whether the theft of property covered by the terms of a search warrant, and seized pursuant to that warrant, violates the Fourth Amendment."[67]

CORBITT V. VICKERS. Police officers pursued a criminal suspect, Christopher Barnett, into the backyard of Amy Corbitt (who had no relation to Barnett), at which time one adult and six minor children were in the yard. The officers demanded they all get on the ground; everyone immediately complied and the police took Barnett into custody. But then the Corbitt family's dog Bruce walked into the scene. Without provocation or any immediate threat, Michael Vickers, a deputy sheriff, fired his weapon at Bruce. His first shot missed, and Bruce retreated under the home. About 10 seconds later, Bruce reappeared and Vickers fired again—missing once more, but this time striking Corbitt's 10-year-old child, who was still lying on the ground, only 18 inches away from the officer. The child suffered severe pain and mental trauma and is receiving ongoing care from an orthopedic surgeon.

The Eleventh Circuit granted qualified immunity to Vickers on the grounds that no prior case law involved the "unique facts of this case." Although the panel majority dutifully recited Supreme Court precedent purporting to say that overcoming qualified immunity does not require that "the very action in question has previously been held unlawful," the court went on to say that "[n]o case capable of clearly establishing the law for this case holds that a temporarily seized person—as was [the child] in this case—suffers a violation of his Fourth Amendment rights when an officer shoots at a dog—or any other object—and accidentally hits the person." One judge did dissent, and would have denied qualified immunity on the seemingly obvious grounds that "no competent officer would fire his weapon in the direction of a nonthreatening pet while that pet was surrounded by children," but that position did not prevail.[68]

KELSAY V. ERNST. Melanie Kelsay was swimming at a public pool with a friend, engaged in what she called "horseplay," but some onlookers thought her friend might be assaulting her and called the police. The police arrested her friend and put him a patrol vehicle, even though she repeatedly told them he hadn't assaulted her; they then decided to arrest her, the alleged victim of this non-crime, because she was "getting in the way of the patrol vehicle door." While talking with Deputy Matt Ernst, Kelsay saw that her daughter had gotten into an argument with a bystander, and tried to go check on her. Ernst grabbed her arm and told her to "get back here," but released her. Kelsay then said she needed to go check on her daughter and again began walking toward her. At that point, without giving any further instructions, Ernst ran up behind her, grabbed her, and slammed her to the ground in a "blind body slam" maneuver, knocking her unconscious and breaking her collarbone.

A divided panel of the Eighth Circuit granted qualified immunity to Ernst. The Eighth Circuit then agreed to rehear the case en banc and affirmed the panel's grant of immunity in an 8–4 decision. The majority noted that there were no prior cases involving the "particular circumstances" of this case; that is, no prior cases specifically held that "a deputy was forbidden

> "In *Corbitt v. Vickers*, the Eleventh Circuit granted qualified immunity to Deputy Sheriff Michael Vickers on the grounds that no prior case law involved the 'unique facts' of the *Vickers* case."

> "Qualified immunity also hurts police officers themselves—most notably by depriving officers of the public trust and confidence that is necessary for them to do their jobs safely and effectively."

to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to 'get back here' and continued to walk away from the officer." The principal dissent by Chief Judge Lavenski Smith noted that that the Supreme Court has never required "a case directly at point," and that here, an ample body of case law would have "put a reasonable officer on notice that the use of force against a nonthreatening misdemeanant who was not fleeing, resisting arrest, or ignoring other commands violates that individual's right to be free from excessive force." But again, this position did not prevail.[69]

ALLAH V. MILLING. In October 2010 a man named Almighty Supreme Born Allah was being held in prison awaiting trial for drug charges. Prison guards kept Allah in solitary confinement for more than a year and forced him to wear leg irons and underwear while showering. This torturous treatment was due entirely to one incident of supposed misconduct by Allah—he once asked a guard if he could speak to a lieutenant about why he wasn't being allowed to visit the commissary.

Following a two-day bench trial, the district court found that the defendants had violated Allah's due process rights, and even denied them qualified immunity, issuing a $62,650 judgment. But the Second Circuit reversed this decision. The appellate court agreed that the prison guards violated Allah's rights, specifically holding that this treatment was unlawful punishment because Allah's treatment "cannot be said to be reasonably related to institutional security, and Defendants have identified no other legitimate governmental purpose justifying the placement." Nevertheless, the court said the guards were entitled to immunity because there was no prior case concerning the particular disciplinary practice employed by the prison.[70]

Exacerbates Crisis of Accountability in Law Enforcement

Especially in the context of law enforcement officers, qualified immunity most visibly and obviously redounds to the detriment of the victims of police misconduct. But qualified immunity also hurts police officers themselves—most notably by depriving officers of the public trust and confidence that is necessary for them to do their jobs safely and effectively.

Although only a small proportion of officers are involved in fatal encounters in any given year, that fraction still generates a huge number of fatalities in absolute terms.[71] For example, between 2015 and 2017, police officers fatally shot nearly a thousand Americans each year,[72] with tens of thousands more wounded.[73] And the widespread prevalence of cellphones, combined with the ability to share videos on YouTube and other social media, means that footage of police shootings are being documented and shared like never before.[74] It is therefore unsurprising that, as word and video of police misconduct has spread, faith in law enforcement has plummeted. Indeed, in 2015, Gallup reported that public trust in police officers had reached a 22-year low.[75]

Of course, one might object that it is unfair to hold all police officers in disrepute simply because of certain highly publicized (but relatively rare) fatal encounters. But what exacerbates this crisis of confidence is the widespread—and accurate—perception that members of law enforcement will almost never be held accountable, even when they commit seemingly flagrant misconduct. Indeed, police officers themselves share this assessment—in a 2017 survey of more than 8,000 officers, 72 percent disagreed with the statement that "officers who consistently do a poor job are held accountable."[76]

This lack of meaningful accountability is a problem not just for the general public, but for the law enforcement community as well. Policing is dangerous, difficult work. Without the trust of their communities, officers cannot safely and effectively carry out their responsibilities. Unsurprisingly then, public perception of accountability is absolutely essential to police effectiveness.[77] When people sense that police can break the law with impunity, it undermines their respect for the rule of law in general and increases the chance that they will

refuse legal directives.[78] And in the wake of so many high-profile police shootings, police officers overwhelmingly report both that their jobs are more dangerous and more difficult.[79]

The antidote to this crisis, of course, is robust, predictable accountability—indeed, it is exactly the sort of accountability that Section 1983 is supposed to provide, but which qualified immunity severely undercuts. If police officers could credibly say "yes, there are bad actors in the system, but most of us do our jobs professionally, and anyone who steps out of line *will* be held to account," that would go a long way toward restoring trust and confidence in law enforcement.

But in a system in which the judges routinely excuse egregious police misconduct on the grounds that there did not happen to be any prior cases with the same basic facts, then no one in law enforcement can credibly make the above statement. In other words, qualified immunity prevents responsible law enforcement officers from overcoming negative perceptions about policing, and instead protects only the minority of police who routinely break the law, thereby eroding relationships between police and their communities.

Widespread Judicial Criticism

Even though qualified immunity is a judicial invention, its legal, practical, and moral infirmities have not gone unnoticed by members of the judiciary. In addition to all the current and former U.S. Supreme Court justices who have taken issue with the doctrine, a large and diverse array of lower-court judges have begun to criticize it as well, with many explicitly calling for the Supreme Court to reconsider qualified immunity entirely. To give just a few notable examples:

- Judge Don Willett, a Trump appointee to the Fifth Circuit, explained how "[t]o some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly," and he sharply noted that "this entrenched, judge-created doctrine excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations."[80]
- Judge James Browning, a George W. Bush appointee to the District of New Mexico, has issued several opinions that include a blistering criticism of the Supreme Court's "clearly established law" standard, and cites the Cato Institute's amicus briefs for the argument that "qualified immunity has increasingly diverged from the statutory and historical framework on which it is supposed to be based."[81]
- Judge Lynn Adelman, a Clinton appointee to the Eastern District of Wisconsin, wrote an article for *Dissent* magazine titled "The Supreme Court's Quiet Assault on Civil Rights," in which he argued that "[o]f all the restrictions that the Court has imposed on [Section 1983] . . . the one that has rapidly become the most harmful to the enforcement of constitutional rights is the doctrine of qualified immunity."[82] Adelman also participated in a Cato Institute forum on qualified immunity in March 2018, in which he elaborated on the legal, doctrinal, and practical problems with qualified immunity.[83]

These are but a few examples, and the number of federal judges who are speaking out against qualified immunity is rapidly growing.[84] To underscore the incredible ideological breadth of the opposition to qualified immunity, it is worth noting that the judicial critics of the doctrine now include nominees of every single president since Carter.

ALTERNATIVES TO QUALIFIED IMMUNITY

Complete Abolition

The starting point for any discussion about how to address qualified immunity

"Even though qualified immunity is a judicial invention, its legal, practical, and moral infirmities have not gone unnoticed by members of the judiciary."

"Outright abolition of qualified immunity would give concrete form to the axiomatic legal principle that for every right, there is a remedy."

should be total elimination of the doctrine. Under the plain terms of Section 1983, and in accordance with the common-law background against which that statute was passed, any state actor who violates someone's constitutional rights is supposed to be "liable to the party injured"—period. Outright abolition of qualified immunity would give concrete form to the axiomatic legal principle that for every right, there is a remedy. It would also maximally encourage public accountability—especially among members of law enforcement—by ensuring that all government agents take seriously their independent obligations to understand and abide by constitutional limitations. In other words, "the courts didn't tell me not to do it!" would not be a sufficient excuse for public officials who break the law.

Either the Supreme Court or Congress could easily eliminate qualified immunity. On the judicial side, civil rights plaintiffs are increasingly filing petitions for certiorari with the Supreme Court, explicitly asking for the Court to reconsider the doctrine—although so far the Court has turned down all of these petitions.[85] But all the Court would need to do is grant one of these petitions and hold that Section 1983 does not provide for qualified immunity, or any other general, across-the-board good-faith defense.

From a legislative perspective, the most natural and straightforward way for Congress to eliminate the defense of qualified immunity would be to amend Section 1983 by adding an additional subsection that states as follows:

> It shall not be a defense to any action brought under this section that the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when it was committed. Nor shall it be a defense that the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of their deprivation by the defendant, or that at this time, the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.

This potential language specifically identifies and negates both versions of qualified immunity that the Supreme Court has articulated: the subjective good-faith understanding of the defense that prevailed from 1967 until 1982, and the objective, "clearly established law" understanding that the Court officially adopted in *Harlow* in 1982. If enacted, such an amendment would effectively eliminate the defense of qualified immunity as we know it and restore the general principle that Section 1983 means what it says—that when state actors violate constitutional or federal rights, they are liable to the party injured.

The suggested language above is written in terms of a negation of a defense ("it shall not be a defense that . . .") as opposed to an affirmative statement of liability (e.g., "any person who causes the violation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable under this Section, regardless of whether such rights, privileges, or immunities were clearly established"). The advantage of this approach is that it cleanly addresses the doctrine of qualified immunity, without either endorsing or eliminating other doctrines that the Supreme Court has developed with respect to Section 1983, and civil rights litigation generally.

For example, the Supreme Court has held that legislators and judges are absolutely immune from liability under Section 1983 because such immunities were well established at common law in 1871.[86] These doctrines—unlike qualified immunity—actually *do* have support in the common-law history, and in practice they do not seem to create the same hurdles to meritorious civil rights litigation that qualified immunity does. The proposed language above would not implicate these doctrines

because these specific defenses do not arise from the subjective beliefs of the defendants or the state of the law—they are simply absolute defenses for the official acts of public agents in specific roles.

The Supreme Court has also held that prosecutors are absolutely immune from suits relating to the "judicial phase of the criminal process,"[87] although not from suits relating to the "investigative phase of a criminal case" (e.g., advising the police).[88] But absolute prosecutorial immunity—much like qualified immunity generally—is textually and historically unsupported, and is essentially the product of the Supreme Court reading into Section 1983 a policy judgment at odds with the plain terms of the statute.[89]

Prosecutorial immunity is a significant problem in its own right, as it corrodes prosecutorial accountability and leaves victims without redress even for the most obvious and egregious constitutional violations—for example, willfully withholding exculpatory evidence from innocent defendants that leads to a wrongful conviction.[90] Ideally, Congress would amend Section 1983 to eliminate absolute prosecutorial immunity along with qualified immunity. But a full treatment of that subject is beyond the scope of this paper. The proposed amendment above neither eliminates nor modifies prosecutorial immunity (because such immunity arises from the prosecutor's role in judicial proceedings, not subjective beliefs or the state of the law), nor does it endorse the current state of the doctrine—it simply leaves that fight for another day.

Additionally, the proposed amendment would not affect qualified immunity for federal officers in damages actions brought under the doctrine articulated in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*.[91] The Supreme Court has applied qualified immunity equally in both Section 1983 suits and *Bivens* actions, notwithstanding that the former cause of action was created by Congress and the latter was (arguably) invented by the Supreme Court. But the proposed amendment here is specific to "any action brought under this section" and thus would not affect the defenses available in *Bivens* actions, which are not brought under Section 1983.[92]

Whether federal defendants should receive qualified immunity is, of course, an important question in its own right—but it is made more complicated by the fact that Congress has never expressly endorsed the cause of action to which federal qualified immunity is a defense in the first place. As with prosecutorial immunity, the question of whether there ought to be a cause of action against federal officers analogous to Section 1983—and what defenses should exist for such suits—is beyond the scope of this paper. The proposed amendment would simply leave those questions for another day.

Finally, the proposed amendment would not affect municipal liability, often called "*Monell* liability," from the Supreme Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). At common law, the traditional rule for employer liability was *respondeat superior* ("let the master answer"), meaning that employers are liable for the acts of their employees committed in the course of their employment. But in *Monell*, the Court held that this doctrine does not apply to municipal employers under Section 1983—in other words, just because a municipal employee commits a constitutional violation does not mean that the municipality itself is liable. Instead, a plaintiff must also show that the violation was committed pursuant to an official "policy or custom" of the municipal body.

It is debatable whether the *Monell* Court was correct in interpreting Section 1983 as eliminating *respondeat superior*.[93] And making municipal employers liable for the illegal conduct of their employees may itself be a promising strategy for increasing accountability.[94] But again, the proposed amendment would leave this issue to the side for now, neither endorsing nor rejecting the *Monell* doctrine.

"Making municipal employers liable for the illegal conduct of their employees may itself be a promising strategy for increasing accountability."

> "There are alternatives to outright abolition of qualified immunity that would eliminate immunity in many cases yet preserve a modified version of the defense for relatively more sympathetic defendants."

Abolition, Except for Limited Safe Harbors

While complete elimination of qualified immunity is probably the optimal solution, there are alternatives to outright abolition that eliminate immunity in the mine-run of cases but nevertheless preserve a modified version of the defense for relatively more sympathetic defendants—most notably, where a defendant's conduct is specifically authorized by a statute that has yet to be found unconstitutional, or where the defendant was acting in accord with judicial precedent applicable at the time of the conduct.

For example, in *Pierson v. Ray*—the Supreme Court case that marked the genesis of qualified immunity—the defendants were police officers who arrested several people in 1961, pursuant to a Mississippi anti-loitering statute. Four years later, the Supreme Court held that this same anti-loitering statute violated the First Amendment.[95] Even though the historical rule for constitutional violations was strict liability, one can understand the seeming unfairness in finding the defendants liable when their only conduct alleged to be illegal was executing a statute they reasonably believed to be lawful at the time.

Similarly, it is easier to be sympathetic to defendants who act in accord with judicial precedent that is subsequently reversed or overturned after the alleged violation occurred. For example, in *Arizona v. Gant*, the Supreme Court held that the power of police to conduct a search incident to an arrest does not permit them to search a suspect's car after the suspect is already removed from the car and restrained.[96] This decision arguably reversed a prior case, *New York v. Belton*, which most lower courts had interpreted as authorizing searches in such instances. Again, there is a seeming unfairness in holding police liable for conducting such searches pre-*Gant*, given that most courts had found such searches to be constitutional in this time period.[97]

Of course, executive officers—no less than legislators or judges—have an independent obligation to enforce and respect constitutional limitations, and it could be argued that strict liability for constitutional violations is the rule that best encourages law enforcement to take this obligation seriously. But as a compromise measure, it would be possible to amend Section 1983 to permit immunity in these limited instances, while still eliminating qualified immunity in its broader form.

Specifically, Congress might clarify that defendants are not liable when either their conduct was specifically authorized by a state or federal statute, and no court in their jurisdiction had found the statute unlawful, or when a court in their jurisdiction had specifically found the conduct at issue to be lawful when it was committed (even if that decision was subsequently reversed). This approach would preserve immunity in those relatively rare—but more sympathetic—cases in which defendants are specifically acting in *accordance* with clearly established law, but it would still have a major effect on run-of-the-mill civil rights claims, which are typically very fact- and context-specific and would not fall within one of these safe-harbor provisions.

Possible Indemnification

Whether qualified immunity is substantially cut back or wholly abolished, it is important to keep in mind that just because a defendant is liable under Section 1983 does not necessarily mean the defendant will end up personally paying the entire amount of any judgment. After all, state and local actors could still be indemnified, meaning that their government employers would end up paying some or all of the judgment owed to successful civil rights plaintiffs. Historically, indemnification, rather than immunity, is the principled way in which Congress adjudicated between the competing concerns of ensuring that victims of official misconduct had a complete remedy for their injury and mitigating the harshness of strict liability in cases where federal officials made "reasonable" mistakes.[98]

Today, especially in the context of law enforcement, defendants are virtually always indemnified. In a recent study, Joanna Schwartz demonstrated that governments paid approximately 99.98 percent of the dollars that civil rights plaintiffs recovered in lawsuits against police officers.[99] This result is partially explained by the incredible political influence of police unions, which nearly always succeed in securing indemnification and representation for their members. Therefore, the primary immediate effect of eliminating qualified immunity would not be to subject individual defendants to massive personal liability but rather to ensure that victims of unconstitutional misconduct obtain a remedy.

To be sure, automatic indemnification is itself far from an ideal solution. If indemnification is all but guaranteed, then liability may not actually do much to further accountability because state officials will know that, even if they are successfully sued, they will not personally be on the hook for any substantial portion of the judgment. Moreover, automatic and total indemnification by municipal employers simply shifts the burden of paying for judgments from individual defendants to the taxpayers at large, which is not an improvement.

The optimal way to structure possible indemnification is itself a complicated policy judgment, the full consideration of which is beyond the scope of this paper. But one promising idea would be a requirement that law enforcement officers—like basically all other professionals whose jobs entail a risk to the public—carry liability insurance.[100] That approach would have the benefits of ensuring that there would be funds to compensate victims, protecting individual defendants from ruinous judgments, and pricing out those particular officers who regularly commit constitutional violations by making them uninsurable. Alternatively, municipal employers might agree to indemnification provisions, but only under circumstances akin to the safe-harbor conditions described above—that is, where defendants are relying in good faith on specific statutes or judicial precedents that were reasonably believed to be lawful at the time of any constitutional violation.

RESPONSES TO COMMON OBJECTIONS

"Isn't it unfair to hold public officials liable when the law isn't sufficiently clear?"

Even if qualified immunity could be defended on this basis, it is worth noting what an incredible double standard this represents between government agents and everyone else. Ordinary citizens are subject to the well-known legal maxim that "ignorance of the law is no excuse."[101] If anything, one would expect law enforcement—public officials specifically charged with knowing and enforcing the law—to be held to a higher standard of care than ordinary citizens. But in fact, they are held to a far lower standard. Ignorance of the law is no excuse—unless you wear a badge.

Still, putting aside the double standard, this concern is at least reasonable in the abstract. And if qualified immunity were limited to instances where public officials were genuinely acting in good faith, or were relying on judicial precedent specifically authorizing their conduct (even if courts later revised that precedent), then it would not be as serious a problem—although it would still be inconsistent with the relevant legal history and the plain terms of Section 1983.

But qualified immunity is not at all limited to such sympathetic circumstances. As discussed already, the case law reveals that it frequently is used to shield defendants who commit egregious misconduct—especially unnecessary and unlawful police shootings. Defendants in these cases are not excused from liability because they were reasonably acting in good faith, but just because there did not happen to be a particular prior case in the relevant jurisdiction with functionally

"Today, especially in the context of law enforcement, defendants are virtually always indemnified."

“By definition, qualified immunity is unnecessary to screen out ‘frivolous’ lawsuits because the doctrine only matters when the underlying claim is itself meritorious.”

similar facts. Whatever the abstract merits of this objection, it simply does not reflect the reality of most qualified immunity litigation.

Finally, even if this were a reasonable policy argument, it is not appropriate for the courts to impose such a policy by judicial fiat. The intent of Congress—as clearly expressed in the plain terms of Section 1983—was to hold state actors liable when they violate people’s constitutional rights. If there are good arguments for modifying or limiting that liability, it is for the people’s legislative representatives to weigh and consider them, not the courts.

“Won’t the risk of liability deter police from doing their jobs?”

Police officers often have to make split-second decisions under dangerous, uncertain, and evolving conditions. Therefore, the argument goes, it is unreasonable to subject them to personal liability anytime they happen to make the wrong call, and imposing such liability may well deter them from doing their jobs at all.

To a certain extent, this concern is reasonable. But that is exactly why our legal standards for determining whether a constitutional violation occurred in the first place are highly deferential to on-the-spot police decisionmaking. The Supreme Court has made clear that the Fourth Amendment’s “unreasonableness” standard must “allow[] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving” and cannot be judged with “the 20/20 vision of hindsight.”[102] Even if police arrest the wrong person or use force that turns out to be unnecessary, so long as they were acting reasonably at the time, they did not violate the law at all. Qualified immunity only comes into play when an officer has acted objectively unreasonably under all the circumstances. In that situation, qualified immunity amounts to an unnecessary and inappropriate double counting of this deference.

More generally, however, the whole point behind Section 1983 is that we *want* public officials to expect to face legal consequences when they violate constitutional rights. This statute is intended not just to provide redress to individual victims, but to ensure accountability at a structural level. To the extent that police or other state officials have reason to think that they are on the verge of acting unconstitutionally, the threat of civil liability may well cause them to think twice before engaging in potentially unlawful conduct. That is a feature, not a bug, of our civil rights laws.

“Don’t we need qualified immunity to deter frivolous lawsuits?”

Whether or not frivolous civil rights litigation is a problem at all, it is a red herring in any discussion of qualified immunity. Qualified immunity only does work in the instance where someone’s constitutional rights have, in fact, been violated, but a court determines that those rights were not “clearly established” at the time of their violation. Therefore, by definition, qualified immunity is unnecessary to screen out “frivolous” lawsuits because the doctrine only matters when the underlying claim is itself meritorious. Indeed, dismissals on the ground of qualified immunity generally occur *after* discovery, which means the doctrine has failed at its goal of mitigating the time and cost of litigation for defendants.

The tools we use to address and deter frivolous litigation are entirely separate. Heightened pleading standards require plaintiffs to make specific, factual, nonconclusory allegations showing that they are entitled to relief.[103] Rule 11 of the Federal Rules of Civil Procedure requires attorneys to attest that they have a good-faith basis for the factual and legal arguments in all submitted pleadings, and it provides for sanctions if they fail to meet this standard.

Depending on the particular subject matter and context, more-stringent requirements may apply. For example, Rule 9(b) of the Federal Rules of Civil Procedure imposes extra pleading requirements for alleging fraud, the “anti-SLAPP” laws (legislation intended to reduce strategic lawsuits against public

participation) enacted by many states allow for early dismissal of frivolous defamation lawsuits, and the Prison Litigation Reform Act of 1996 limited the ability of prisoners to bring successive, nonmeritorious lawsuits.[104] So even assuming there is a problem with frivolous civil rights litigation generally, addressing it will require rules like these. But this issue is entirely unrelated to qualified immunity.

"Isn't qualified immunity entitled to respect as judicial precedent?"

Stare decisis—Latin for "to stand by things decided"—is the general principle that judicial decisions should be guided by precedent and that courts should not lightly overrule past decisions even if there is reason to doubt their correctness. And the few defenders of qualified immunity rely heavily on this idea for their contention that the Supreme Court should not reconsider the doctrine; indeed, it is the first and central legal argument raised in Nielsen and Walker's "qualified" defense of qualified immunity.[105] But while stare decisis is an important idea, the Supreme Court has always made clear that it is not an "inexorable command" and that it can give way to countervailing considerations. And there are especially strong reasons for the Court to reconsider its qualified immunity jurisprudence.

First, stare decisis "does not matter for its own sake" but rather is important "because it 'promotes the evenhanded, predictable, and consistent development of legal principles.'" The rule therefore "allows [the Court] to revisit an earlier decision where experience with its application reveals that it is unworkable."[106] Qualified immunity is a textbook example of such an unworkable doctrine. As discussed previously, the "clearly established law" standard has proven hopelessly amorphous, malleable, and incapable of consistent application. The doctrine has therefore failed to provide the stability, predictability, and respect for judicial authority that comprise the traditional justifications for stare decisis in the first place.

Second, the Supreme Court has already rejected the idea that qualified immunity should be immune from reconsideration. In 1967, the *Pierson* Court created a good-faith defense to suits under Section 1983 after having rejected the existence of any such defenses half a century earlier in *Myers*. Then in 1982, the *Harlow* Court created the "clearly established law" standard, which replaced the requirement that a defendant have an actual good-faith belief in the legality of their conduct. And in 2001, the *Saucier* Court created a mandatory sequencing standard, requiring courts to first consider the merits and then consider qualified immunity, but then overruled *Saucier* just eight years later in *Pearson v. Callahan*, which made that sequencing optional.

Indeed, the *Pearson* Court explicitly considered and rejected the argument that stare decisis should prevent the Court from reconsidering its qualified immunity jurisprudence. The Court noted that the *Saucier* standard was a "judge-made rule" that "implicates an important matter involving internal Judicial Branch operations"; that "experience has pointed up the precedent's shortcomings"; and that in such an instance "[a]ny change should come from this Court, not Congress."[107] Of course, the same could be said of qualified immunity in general. It would be a strange principle of stare decisis that permitted modifications only as a one-way ratchet in favor of greater immunity (and against the grain of text and history to boot).

Third, as discussed above, qualified immunity is no mere technical error; it is a pernicious, destructive doctrine that regularly abets egregious constitutional violations and is actively undermining confidence in law enforcement nationwide.

"If you abolish qualified immunity, wouldn't you need to reverse *Monroe v. Pape* as well?"

In response to the otherwise insurmountable assertion that modern qualified immunity lacks any plausible historical basis, some judges and commentators have employed a clever sideways defense of the doctrine. The basic argument is that, while qualified immunity

"It would be a strange principle of stare decisis that permitted modifications to qualified immunity only as a one-way ratchet in favor of greater immunity."

"Despite its veneer of reasonableness, the two-wrongs-make-a-right theory is deeply flawed, both on its own terms and as a matter of principle."

itself may be unlawful, it is defensible as a kind of compensating correction for an entirely separate error that the Supreme Court made in *Monroe v. Pape*—a 1961 case holding that state actors can be liable under Section 1983, even when their actions were *not* authorized by state law.[108] For those who think *Monroe* was wrongly decided, that case erroneously expanded the reach of Section 1983; therefore, the argument goes, the fact that qualified immunity erroneously restricts the scope of Section 1983 may be tolerable under a kind of two-wrongs-make-a-right theory. Or, if the Supreme Court *does* decide to reconsider the legal and historical bases for qualified immunity, then it is bound, on pain of inconsistency, to reconsider *Monroe* as well.

This objection may sound like an abstruse academic rejoinder, but it is fast becoming one of the most popular defenses of qualified immunity from those who are otherwise inclined to take text and history seriously. Scalia first stated this argument in 1998, in his dissenting opinion in *Crawford-El v. Britton*,[109] but Nielsen and Walker also invoke it as part of their "qualified" defense of qualified immunity.[110] More recently, Judges James Ho and Andrew Oldham—self-proclaimed originalists on the Fifth Circuit—relied heavily on the alleged shortcomings of *Monroe* to rebut the suggestion of their fellow judge, Willett, that qualified immunity should be reconsidered.[111] Specifically, Ho and Oldham stated that, while they "welcome[d] the discussion" of qualified immunity's historical shortcomings, they believed a "principled originalist would not cherry pick which rules to revisit based on popular whim," and noted that "[i]f we're not going to do it right, then perhaps we shouldn't do it at all"—where "it" means to actually interpret statutes as they are written.

Despite its veneer of reasonableness, however, this two-wrongs-make-a-right theory is deeply flawed, both on its own terms and as a matter of principle.

First, the core premise behind this theory—that *Monroe v. Pape* was wrongly decided as a matter of law—is itself highly suspect, as there is a very good originalist argument that *Monroe* was correct. To restate Scalia's (and by extension, Ho and Oldham's) criticism of *Monroe*: the text of Section 1983 creates liability for those who act "under color of any statute, ordinance, regulation, custom, or usage of any State." Thus, in Scalia's view, state officials can only be liable under Section 1983 if they were, in fact, acting in accordance with state law. Therefore, by holding that state officials could be liable even when their actions were *not* authorized by state law, the *Monroe* Court massively expanded liability under Section 1983, in contravention of the statutory language.

But the problem with this argument is that it glosses over the meaning of the phrase "under color of." After all, the statute could have been written to cover violations committed "*in accordance with* any statute, ordinance, regulation, custom, or usage, of any State." If that were what the statute said, Scalia's criticism of *Monroe* would be well taken. But, as a historical, originalist matter, that is simply not what the phrase "under color of" means. To the contrary, this phrase is a longstanding term-of-art that was well understood to encompass false claims to authority.

As detailed by Steven Winter in an article on exactly this subject, the use of this phrase goes back more than 500 years to an English bail-bond statute that voided obligations taken by sheriffs "by colour of their offices" if they failed to comply with statutory requirements.[112] In other words, it encompassed illegal acts by government agents who abused or exceeded their statutory authority—which is exactly the sort of unlawful conduct recognized by *Monroe*. Therefore, as opposed to Scalia's suggestion in *Crawford-El*, a faithfully originalist understanding of Section 1983 would seem to support the result in *Monroe*.[113] And if that is the case, then obviously the whole two-wrongs-make-a-right theory collapses.

Second, even assuming that *Monroe v. Pape* were wrongly decided, it hardly follows that the Supreme Court must reconsider that case if it decides to reconsider qualified immunity. *Monroe*, whether correct or not, meets all the

traditional criteria for respect as precedent: at the very least, the question is a close call on the merits, with persuasive arguments on either side; it has produced a clear, unambiguous rule, which lower courts routinely apply without any confusion or disagreement; and it has been thoroughly accepted by both the judiciary and the general public as legitimate and appropriate.

In sharp contrast, modern qualified immunity is at the opposite end of the spectrum on all of these criteria. The current version of the doctrine is utterly divorced from the text and history on which it is supposed to be based. The "clearly established law" standard has proven hopelessly amorphous, malleable, and incapable of consistent, predictable application in lower courts. And as evidenced by the diverse and growing chorus of judges, academics, and public-policy voices calling for the Supreme Court to revise or abolish the doctrine, it has hardly been accepted as legitimate. Thus, even if both *Monroe* and qualified immunity merit originalist criticism, there is a far stronger case for reexamining the latter than the former.

Third, setting aside the specific questions of whether *Monroe* was correct and how it compares to qualified immunity, we should reject the two-wrongs-make-a-right approach to judicial decisionmaking at a fundamental level. Of course the Supreme Court sometimes reaches the wrong answer, and sometimes those wrong answers will distort other areas of law. But in light of the inevitable disagreement over which cases are actually correct, the idea that "you got this case wrong so I'm allowed to get this other case wrong" is a license for endless, unresolvable turmoil. Suppose that qualified immunity itself has gone "too far" in correcting for the supposed mistake in *Monroe*—are judges then licensed to distort the meaning of other statutes to fix this problem? What compensating errors will be necessary to address the distortion to those statutes? That way lies madness, not the rule of law.

Textualism and originalism, at their best, aim to provide principled, predictable, value-neutral means of deciding cases. Some questions will still be hard even under this approach, and how originalists should deal with nonoriginalist precedent is a famously thorny problem. But the best that judges can do is try to get the right answer in each case that comes before them—and the two-wrongs-make-a-right theory renders this principled approach impossible. Indeed, notwithstanding his opinion in *Cole v. Carson*, Ho, in particular, appears to have reversed course on this objection. More recently, in *City of Leander v. Horvath*, he plainly acknowledged that "there is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases," and stated that the two-wrongs-make-a-right theory leads to "a false choice—not to mention a troubling one," noting that "[w]e can get *both* prongs of the doctrine right."[114] Just so.

CONCLUSION

Qualified immunity is a legally baseless judicial invention. It has proven unworkable as a matter of judicial doctrine, it routinely denies justice to the victims of egregious misconduct, and it undermines public accountability across the board, especially for members of law enforcement. Whether through judicial reconsideration or legislative action, the time has come to abolish qualified immunity.

"The best that judges can do is try to get the right answer in each case that comes before them—and the two-wrongs-make-a-right theory renders this principled approach impossible."

NOTES

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

2. *The Federalist*, no. 48 (James Madison).

3. This paper refers to all historical versions of the statute anachronistically as "Section 1983," as the operative text has been, in relevant part, essentially identical through every iteration.

4. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871).

5. 42 U.S.C. § 1983.

6. *Forrester v. White*, 484 U.S. 219, 225–26 (1988).

7. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967)).

8. Akhil Reed Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96, no. 7 (1987): 1506. Of course, prior to the passage of the Fourteenth Amendment, such "constitutional torts" were almost exclusively limited to federal officials, as the substantive protections of the Bill of Rights were not yet applicable against the states. *Barron v. Baltimore*, 32 U.S. 243, 250–51 (1833).

9. James E. Pfander, *Constitutional Torts and the War on Terror* (New York: Oxford University Press, 2017), pp. 3–14, 16–17; David E. Engdahl, "Immunity and Accountability for Positive Governmental Wrongs," *University of Colorado Law Review* 44 (1972): 14–21; and Ann Woolhandler, "Patterns of Official Immunity and Accountability," *Case Western Reserve Law Review* 37, no. 3 (1986): 414–22.

10. For a more complete analysis of this particular subject in the context of qualified immunity, see William Baude, "Is Qualified Immunity Unlawful?," *California Law Review* 106 (2018): 51–61.

11. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

12. *Little v. Barreme*, 6 U.S. (2 Cranch) at 179.

13. *Little v. Barreme*, 6 U.S. (2 Cranch) at 179.

14. *Little v. Barreme*, 6 U.S. (2 Cranch) at 179.

15. Engdahl, "Immunity and Accountability for Positive Governmental Wrongs," p. 19.

16. James E. Pfander and Jonathan L. Hunt, "Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic," *New York University Law Review* 85 (2010): 1867 (noting that, in the early republic and antebellum period, public officials succeeded in securing private legislation providing indemnification from Congress in about 60 percent of cases).

17. See *Miller v. Horton*, 26 N.E. 100, 100–01 (Mass. 1891) (Holmes, J.).

18. Max P. Rapacz, "Protection of Officers Who Act Under Unconstitutional Statutes," *Minnesota Law Review* 11 (1927): 585. See also Engdahl, "Immunity and Accountability for Positive Governmental Wrongs," p. 18 (a public official "was required to judge at his peril whether his contemplated act was actually authorized . . . [and] judge at his peril whether . . . the state's authorization-in-fact . . . was constitutional").

19. Baude, "Is Qualified Immunity Unlawful?," pp. 58–60.

20. Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrong Which Arise Independently of Contract*, ed. John Lewis, 3rd ed. (Chicago: Callaghan and Company, 1906), p. 326 (quoting *Ball v. Rawles*, 28 P. 937 (Cal. 1892)).

21. 238 U.S. 368 (1915).

22. 238 U.S. at 371.

23. 238 U.S. at 378–79.

24. *Anderson v. Myers*, 182 F. 223, 230 (C.C.D. Md. 1910).

25. Baude, "Is Qualified Immunity Unlawful?," p. 58 (citation omitted).

26. 386 U.S. 547 (1967).

27. 386 U.S. at 556–57.

28. *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974).

29. 457 U.S. 800 (1982).

30. *Wood v. Strickland*, 420 U.S. 308, 321 (1975).

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

32. Although *Harlow* specifically involved a suit against federal officers, under the doctrine articulated in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the Court nevertheless indicated that the same standard of immunity would apply to state officers under Section 1983. See *Harlow*, 457 U.S. at 818 n.30.

33. See *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (defending qualified immunity on the ground that "[a]t common law, government actors were afforded certain protections from liability").

34. *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

35. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment).

36. *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

37. *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring).

38. *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

39. *White v. Pauly*, 137 S. Ct. 548, 552 (2017).

40. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

41. 751 F. App'x 869 (6th Cir. 2018).

42. *Campbell v. City of Springsboro*, 700 F.3d 779, 789 (6th Cir. 2012).

43. *Baxter*, 751 F. App'x at 872 (emphasis added).

44. 878 F.3d 541 (6th Cir. 2017).

45. 878 F.3d at 552.

46. 878 F.3d at 552–53 (quoting *Hermiz v. City of Southfield*, 484 F. App'x 13, 17 (6th Cir. 2012)).

47. 878 F.3d at 553.

48. 878 F.3d at 558 (Clay, J., concurring in part and dissenting in part).

49. 533 U.S. 194 (2001).

50. 555 U.S. 223 (2009).

51. See *Sims v. City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018) (per curiam) ("This is the fourth time in three years that an appeal has presented the question whether someone who is not a final decisionmaker can be liable for First Amendment retaliation. . . . Continuing to resolve the question at the clearly established step means the law will never get established.").

52. *Kelly v. Borough of Carlisle*, 622 F.3d 248, 263 (3d Cir. 2010); and *Szymecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009).

53. *Karns v. Shanahan*, 879 F.3d 504, 524 (3d Cir. 2018).

54. Aaron L. Nielsen and Christopher J. Walker, "The New Qualified Immunity," *Southern California Law Review* 89 (2015): 34–35.

55. 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.").

56. Joanna C. Schwartz, "How Qualified Immunity Fails," *Yale Law Journal* 127, no. 1 (2017): 48–49.

57. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2018–19 (2014); and *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

58. *Wheatt v. City of E. Cleveland*, No. 1:17-CV-377, 2017 U.S. Dist. LEXIS 200758, *8-9 (N.D. Ohio Dec. 6, 2017).

59. For discussions by judges, see *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante) ("[T]he 'clearly established' standard [is] neither clear nor established among our Nation's lower courts."); and *Golodner v. Berliner*, 770 F.3d 196, 205 (2d Cir. 2014) ("Few issues related to qualified immunity have caused more ink to be spilled than whether a particular right has been clearly established."). For discussions by commentators, see Alan K. Chen, "The Intractability of Qualified Immunity," *Notre Dame Law Review* 93, no. 5 (2018): 1951 (qualified immunity "has been a nightmare for litigators and judges who confront its implementation on a routine basis"); Erwin Chemerinsky, *Federal Jurisdiction*, 7th ed. (New York: Wolters Kluwer, 2016), p. 595 ("[T]here is

great confusion in the lower courts as to whether and when cases on point are needed to overcome qualified immunity."); and Schwartz, "How Qualified Immunity Fails," p. 75 ("[T]he restrictive manner in which [the court] defines 'clearly established law' . . . creates confusion in the lower courts.").

60. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).

61. *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

62. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *White*, 137 S. Ct. at 551).

63. *White*, 137 S. Ct. at 552 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

64. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *al-Kidd*, 563 U.S. at 742).

65. From the last few years alone: compare, for example, *Demaree v. Pederson*, 887 F.3d 870, 884 (9th Cir. 2018) (denying immunity because of "a very specific line of cases . . . which identified and applied law clearly establishing that children may not be removed from their homes without a court order or warrant absent cogent, fact-focused reasonable cause to believe the children would be imminently subject to physical injury or physical sexual abuse"); with 887 F.3d at 891 (Zouhary, J., concurring and dissenting in part) (arguing that no case addressed "circumstances like these, where the type of abuse alleged is sexual exploitation, and it would take a social worker at least several days to obtain a removal order"); *Sims v. Labowitz*, 885 F.3d 254, 264 (4th Cir. 2017) (denying immunity because "well-established Fourth Amendment limitations . . . would have placed any reasonable officer on notice that [ordering a teenage boy to masturbate in front of other officers] was unlawful"); with 885 F.3d at 269 (King, J., dissenting) ("[N]o reasonable police officer or lawyer would have considered this search warrant . . . to violate a clearly established constitutional right."); *Young v. Borders*, 850 F.3d 1274, 1281 (11th Cir. 2017) (Hull, J., concurring in the denial of rehearing en banc) ("The dissents define clearly established federal law at too high a level of generality. . . ."); with 850 F.3d at 1292 (Martin, J., dissenting in the denial of rehearing en banc) ("In circumstances closely resembling this case, this Court held that an officer's use of deadly force was excessive even though the victim had a gun."). See also *Harte v. Bd. of Comm'rs*, 864 F.3d 1154, 1158, 1168, 1198 (10th Cir. 2017) (splintering the panel into three conflicting opinions on whether the various acts of misconduct violated clearly established law).

66. Alexander A. Reinert, "Does Qualified Immunity Matter?," *University of St. Thomas Law Journal* 8, no. 3 (2011): 492.

67. 936 F.3d 937 (9th Cir. 2019). On May 18, 2020, the Supreme Court decided not to review this case.

68. 929 F.3d 1304 (11th Cir. 2019). On June 15, 2020, the Supreme Court decided not to review this case.

69. 933 F.3d 975 (8th Cir. 2019) (en banc). On May 18, 2020, the Supreme Court decided not to review this case.

70. 876 F.3d 48 (2d Cir. 2017).

71. Gene Demby, "Some Key Facts We've Learned about Police Shootings over the Past Year," NPR, April 13, 2015.

72. Julie Tate et al., "Fatal Force," *Washington Post* database (last updated June 19, 2020).

73. Nathan DiCamillo, "About 51,000 People Injured Annually by Police, Study Shows," *Newsweek*, April 19, 2017.

74. Wesley Lowery, "On Policing, the National Mood Turns toward Reform," *Washington Post*, December 13, 2015.

75. Jeffery M. Jones, "In U.S., Confidence in Police Lowest in 22 Years," Gallup, June 19, 2015.

76. Rich Morin, Kim Parker, Renee Stepler, and Andrew Mercer, *Behind the Badge* (Washington: Pew Research Center, 2017), p. 40.

77. See Jack McDevitt, Russell Wolff, and Amy Farrell, *Promoting Cooperative Strategies to Reduce Racial Profiling* (Washington: Institute on Race and Justice, Northeastern University, 2008), pp. 20–21.

78. Fred O. Smith, Jr., "Abstention in a Time of Ferguson," *Harvard Law Review* 131, no. 6 (2018): 2356.

79. Morin et al., "Behind the Badge," pp. 65, 80.

80. *Zadeh v. Robinson*, 928 F.3d 457, 479, 480-81 (5th Cir. 2019).

81. *Manzanares v. Roosevelt County Adult Detention Ctr.*, 331 F.

Supp.3d 1260, 1294 n.10 (D.N.M. 2018).

82. Lynn Adelman, "The Supreme Court's Quiet Assault on Civil Rights," *Dissent*, Fall 2017.

83. See Jay Schweikert, "Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability," Cato Institute Policy Forum, March 1, 2018.

84. See also *Horvath v. City of Leander*, 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) ("[T]here is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases."); *Ventura v. Rutledge*, No. 1:17-cv-00237-DAD-SKO, 2019 U.S. Dist. LEXIS 119236, *26 n.6 (E.D. Cal. Jul. 17, 2019) ("[T]his judge joins with those who have endorsed a complete reexamination of [qualified immunity] which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases."); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 U.S. Dist. LEXIS 132455, *46 n.174 (D. Kan. Aug. 7, 2018) ("[T]he court is troubled by the continued march toward fully insulating police officers from trial—and thereby denying any relief to victims of excessive force—in contradiction to the plain language of the Fourth Amendment."); *Thompson v. Clark*, No. 14-CV-7349, 2018 U.S. Dist. LEXIS 105225, *26 (E.D.N.Y. June 11, 2018) ("The legal precedent for qualified immunity, or its lack, is the subject of intense scrutiny."); Jon O. Newman, "Here's a Better Way to Punish the Police: Sue Them for Money," *Washington Post*, June 23, 2016 (article by senior judge on the Second Circuit); and Stephen Reinhardt, "The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences," *Michigan Law Review* 113, no. 7 (2015): 1219 (article by former judge of the Ninth Circuit).

85. See Jay Schweikert, "The Supreme Court's Dereliction of Duty on Qualified Immunity," Unlawful Shield, June 15, 2020.

86. See *Tenney v. Brandhove*, 341 U.S. 367, 372–76 (1951) (legislators); and *Pierson v. Ray*, 386 U.S. 547, 553–55 (1967) (judges).

87. *Imbler v. Pachtman*, 424 U. S. 409, 430 (1976).

88. *Burns v. Reed*, 500 U.S. 478, 493 (1991).

89. See *Kalina v. Fletcher*, 522 U.S. 118, 131–34 (1997) (Scalia, J., joined by Thomas, J., concurring) (arguing that the Court in *Imbler* misunderstood 1871 common-law rules).

90. See *United States v. Olsen*, 737 F.3d 625, 631–32 (2013) (Kozinski, C. J., dissenting from order denying petition for rehearing en banc) (collecting federal and state cases in which courts have vacated convictions and ordered new trials due to the suppression of exculpatory material).

91. 403 U.S. 388 (1971).

92. See *Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982).

93. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 834–42 (1985) (Stevens, J., dissenting) (explaining how Section 1983 is best read as incorporating the well-established common law doctrine of *respondeat superior*).

94. See Adelman, "The Supreme Court's Quiet Assault on Civil Rights" ("Many of the problems [with qualified immunity] would go away if the law were changed so that the *respondeat superior* doctrine applied to constitutional torts.").

95. *Thomas v. Mississippi*, 380 U.S. 524 (1965).

96. 556 U.S. 332 (2009).

97. 453 U.S. 454 (1981).

98. Pfander and Hunt, "Public Wrongs and Private Bills," p. 1867.

99. Joanna C. Schwartz, "Police Indemnification," *New York University Law Review* 89, no. 3 (June 2014): 885.

100. See Clark Neily, "Make Cops Carry Liability Insurance: The Private Sector Knows How to Spread Risks, and Costs," *New York Daily News*, March 29, 2018.

101. *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015).

102. *Graham v. Connor*, 490 U.S. 386, 397 (1989).

103. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

104. 28 U.S.C. § 1915(g).

105. Aaron L. Nielsen and Christopher J. Walker, "A Qualified Defense of Qualified Immunity," *Notre Dame Law Review* 93

(2018): 1856.

106. *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

107. *Pearson v. Callahan*, 555 U.S. 223, 233–34 (2009).

108. 365 U.S. 167 (1961).

109. 523 U.S. 574, 611 (1991) (Scalia, J., dissenting).

110. Nielsen and Walker, "A Qualified Defense of Qualified Immunity," pp. 1868–72.

111. See *Cole v. Carson*, 935 F.3d 444, 477–79 (5th Cir. 2019) (en banc) (Ho & Oldham, J., dissenting).

112. Steven L. Winter, "The Meaning of 'Under Color of' Law," *Michigan Law Review* 91, no. 3 (1992): 342–46.

113. Nielsen and Walker, to their credit, explicitly discuss this rejoinder and thus acknowledge that "there is historical support for *Monroe*'s reading of 'under color of,'" although they discuss reasons why "this defense may not be bulletproof." Nielsen and Walker, "A Qualified Defense of Qualified Immunity," pp. 1868–69.

114. *Horvath v. City of Leander*, 946 F.3d 787, 801, 803 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part).

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CITATION

Schweikert, Jay R. "Qualified Immunity: A Legal, Practical, and Moral Failure," Policy Analysis no. 901, Cato Institute, Washington, DC, September 14, 2020. https://doi.org/10.36009/PA.901.

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