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FROM THE KKK TO GEORGE FLOYD: THREE JUDGES EXPLORE QUALIFIED IMMUNITY

*Hon. Cathy Bissoon, Hon. Benita Y. Pearson & Hon. David A. Sanders**

INTRODUCTION

This article's purpose is to place the often-used defense of qualified immunity in a historical context and highlight the primary opposition to its continued utilization, focusing on its role in litigation of excessive force claims. This article declines itself to render any specific judgment on the qualified immunity defense, as the authors here, all members of federal district courts, do not view that as the proper role of the judiciary, particularly the lower courts. The authors endeavor to explain the history, practical implications, and judicial and scholarly criticism of the doctrine in an accessible manner.

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I. HISTORY AND BACKGROUND

Following the Civil War and with Reconstruction under way, it became clear to Congress that the Southern states could not be trusted with caring for their citizens in a fair and equal manner.¹ In early 1866, Senator Lyman Trumbull of Illinois introduced the bill that would become the first Civil Rights Act.² This original bill was drafted essentially to make clear that “all persons born in the United States . . . are hereby declared citizens of the United States.”³ The act seemed to follow logically from the conclusion of the Civil War and the enactment of the Thirteenth Amendment the year before.⁴ Nevertheless, President Andrew Johnson vetoed the bill twice.⁵ Johnson’s reasoning was both racist and political; he believed the act favored Blacks over Whites, and that the act would set off a move toward centralization of the federal government.⁶ Nevertheless, on April 5, 1866, the Senate overrode Johnson’s veto and on April 9, the House of Representatives did the same.⁷

During this period, Congress was focused on how best to handle the recently defeated Southern states. While President Abraham Lincoln’s 10 percent plan was seen as a moderate one, upsetting many radical Republicans in Congress at the time,

1. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426–27 (1968) (collecting authorities).

2. *Id.* at 431.

3. *Id.* at 422.

4. *Id.* at 437–39.

5. *Id.* at 435.

6. *Mahone v. Waddle*, 564 F.2d 1018, 1028–29 (3d Cir. 1977); Rogers M. Smith, *Legitimizing Reconstruction: The Limits of Legalism*, 108 YALE L.J. 2039, 2071 (1999); see also Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1342 n.51 (1986).

7. *Jones*, 392 U.S. at 435.

Johnson's plan became far more accommodating to the South.⁸ Indeed, Johnson was "willing to accept the South back into the Union so long as the Southern states recognized merely that the formal institution of slavery was a thing of the past. He was willing to leave the treatment of the freedmen in the hands of the southern whites."⁹ Doing so, however, led several states, including South Carolina and Mississippi, to draft "Black Codes."¹⁰ These state statutes were drafted to make certain freedmen did not enjoy the same rights and privileges held by Whites.¹¹ Illustrative examples of sections provided in Black Codes included

8. Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422, 427–28 (2000). Specifically, "[o]n the question of readmitting the seceded states to the Union, Lincoln clashed with Congress over his 'Ten Percent Plan' and the Radical Republicans' Wade-Davis bill." Hon. Henry S. Cohn, *Book Review*, THE FEDERAL LAWYER, Sept. 2014, at 87 (reviewing JOHN C. RODRIGUE, LINCOLN AND RECONSTRUCTION (2013)). "The dispute centered on the percentage of male citizens in a state that had seceded that would have to sign a loyalty oath before the state could rejoin the Union." *Id.* "Lincoln's plan required only 10 percent, whereas the Wade-Davis bill would have required a majority of voters to take an oath and included other requirements that no Confederate state (except perhaps Tennessee) could have met." *Id.* "Lincoln pocket-vetoed the Wade-Davis bill." *Id.*

9. Sanford V. Levinson, *New Perspectives on the Reconstruction Court*, 26 Stan. L. Rev. 461, 467 (January 1974) (reviewing Charles Fairman, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States Volume VI: Reconstruction and Reunion: 1864–1888, Part I* (1971) and citing L. Cox & J. Cox, *Politics, Principle, and Prejudice, 1865–66: Dilemma of Reconstruction America* 151–71 (1963)). Professor Levinson also points out that the southern states had almost two years to show they would treat the freedmen in good faith and "failed overwhelmingly to do so." *Id.*

10. Katesha Long, *Debunking the Broken Windows Theory in Policing: An Incident and Badge of Slavery*, 4 HOW. HUM. & C.R. L. REV. 77, 89 (2020).

11. Hon. Bernice B. Donald and Pablo J. Davis, "To This Tribunal the Freedman has Turned": The Freedmen's Bureau's Judicial Powers and the Origins of the Fourteenth Amendment, 79 LA. L. REV. 1, 21 (Fall 2018).

North Carolina's provision requiring Blacks to have a White person as a witness when they contracted, or Mississippi's apprenticeship provision allowing "former owners" to have young Blacks as apprentices, and if the apprentices should "escape," the "former owners" were allowed to recapture them and bring them before a justice of the peace.¹²

With passage of the Civil Rights Act of 1866, Congress took active steps toward eliminating Black Codes and began the long road to protecting the civil rights of all Americans. The Act extended a federal guarantee of the basic rights to own and convey property and to use the civil courts to vindicate property rights.¹³ To be sure, acceptance came slowly. During this time, virtually all the states bristled at overarching federal oversight. Even many Republicans, while accepting "the enhancement of national power resulting from the Civil War . . . did not believe the legitimate rights of the states had been destroyed, or the traditional principles of federalism eradicated."¹⁴ Not surprisingly, however, the Southern states put up the strongest resistance, and at times, that resistance was violent. Not long after the surrender of the Confederate Army at the Appomattox Courthouse and in reaction to Reconstruction plans being put into place by Congress, Southerners founded the Ku Klux Klan in Pulaski,

12. Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865–1910*, 70 *CHI.-KENT L. REV.* 439, 455 (1994).

13. James R. Stoner, Jr., *From Magna Carta to the Montgomery March: Common Law and Civil Rights*, 6 *FAULKNER L. REV.* 49, 54–55 (Fall 2014).

14. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, 242 (2014). Indeed, as Professor Foner notes, "[i]nstead of envisioning continuous federal intervention in local affairs, [the Civil Rights Bill] honored the traditional presumption that the primary responsibility for law enforcement lay with the states, while creating a latent federal presence, to be triggered by discriminatory state laws." *Id.* at 245.

Tennessee, in 1865. The Klan was just one example of Southern Whites pushing back against many aspects of Reconstruction, chief among them rights being given to freedmen living throughout the South. Shortly after the Civil War, Congress began receiving reports of widespread violence against freed slaves, and these attacks continued despite passage of the Civil Rights Act.¹⁵ As time passed, it became evident that Congress needed something with teeth to enforce the provisions of the Civil Rights Act and the newly enacted Fourteenth Amendment. Members of the Klan and others were making it extremely difficult for freedmen to vote or afraid to even attempt it. As a result, in 1870 and 1871, Congress passed what came to be known as the "Enforcement Acts." In all, there were three Enforcement Acts, but the third Act provided what would later become Section 1983 of the Civil Rights Act. Specifically, that Act provided:

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district of circuit courts of the United States with and subject to the same rights of appeal, review upon error,

15. John Montoya, *Defying Congressional Intent: Justices Miller and Bradley Alter the Course of Reconstruction*, 10 COLUM. J. RACE AND L. 82, 83 (2020).

and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and other remedial laws of the United States which are in their nature applicable in such cases.

This third Act, known as the Ku Klux Klan or KKK Act, succeeded to an extent, undermining the organized violence of the Klan. However, the Supreme Court in *United States v. Reese*¹⁶ and *United States v. Cruikshank*¹⁷ greatly weakened the Act, holding that voting rights were better handled by the states without federal intervention. Following those decisions, the Civil Rights Act, and more specifically Section 1983, was practically ignored. It was not until almost a century later in *Monroe v. Pape*¹⁸ that litigation against government officials and agencies began to increase.¹⁹

In *Monroe v. Pape*, thirteen Chicago police officers broke into Pape's home in the early morning without a warrant. The officers got him out of bed and made him stand naked in his living room while they searched every room, emptying drawers and ripping mattress covers. They then took Pape to the station and held him for ten hours without letting him contact anyone while they interrogated him about a murder. Pape was finally released with no criminal charges filed, and he pursued an action under Section 1983, suing the officers and the city for their

16. 92 U.S. 214 (1875).

17. 92 U.S. 542 (1875).

18. 365 U.S. 167 (1978).

19. Michael K. Cantwell, *Constitutional Torts and the Due Process Clause*, 4 TEMP. POL. & CIV. RTS. L. REV. 317, 317-18 (Spring 1995).

actions. After examining the history surrounding the KKK Act, Justice William O. Douglas wrote for the Supreme Court that the “under color of law” language in the statute was intended to allow civil rights suits in cases where officials acted in a manner unauthorized by state law. This familiar holding has been seen as the case that “revitalize[ed] the Civil Rights Act of 1871.”²⁰ Prior to *Monroe*, there had been very few cases filed under Section One of the Civil Rights Act—the precursor to Section 1983. The United States Code Annotated notes only nineteen decisions under the Section in its first sixty-five years.²¹ As of 2011, the courts saw an average of 40,000 to 50,000 per year.²² With that growth in claims filed came, of course, defenses to those claims. One of the first defenses to arise was that of qualified immunity, which first appeared before the Supreme Court in 1967.

In *Pierson v. Ray*, a group of fifteen Black and White clergymen attempted to use facilities in a Jackson, Mississippi bus terminal marked “White Waiting Room Only.”²³ Jackson police arrested the clergymen and charged them with violating a state statute, which made it unlawful for anyone to congregate “with others in a public place under circumstances such that a breach of the peace may be occasioned thereby”²⁴ After being vindicated in the misdemeanor proceedings, the clergymen

20. James E. Robertson, *Fatal Custody: A Reassessment of Section 1983 Liability for Custodial Suicide*, 24 U. TOL. L. REV. 807, 810 (Summer 1993).

21. *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1486 n.4 (1969).

22. MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES, S1.01[B], at 1–5 (4th ed. supp. 2011-1). The 2020 supplement to Schwartz’s book, *id.* (4th ed. supp. 2020-2), asserts that the same range persists, citing data compiled in 2014.

23. 386 U.S. 547, 552 (1967).

24. *Id.* at 549.

brought a civil rights action against the police officers under Section 1983 and under common law that the officers were liable for false arrest and imprisonment. Following trial in the Southern District of Mississippi, a jury found for the plaintiffs, and the Court of Appeals for the Fifth Circuit affirmed as to the Section 1983 action, holding the Mississippi statute had been held unconstitutional in *Thomas v. Mississippi*.²⁵ While *Thomas* had been decided subsequent to the arrests at issue, the court felt compelled to affirm by the Supreme Court's ruling in *Monroe v. Pape*. As to the common law claims, however, the Fifth Circuit reversed, holding that Mississippi law did not require police officers to predict at their peril whether a Mississippi statute would subsequently be held unconstitutional.

On appeal, the Supreme Court addressed the Section 1983 claims and the Fifth Circuit's interpretation of *Monroe v. Pape* and explained that it in "no way intimated that the defense of good faith and probable cause was foreclosed by statute."²⁶ The Court went on to hold "that the defense of good faith and probable cause, which the court of appeals found available to the officers in the common law action for false arrest and imprisonment, is also available to them in the action under section 1983."²⁷ The Court continued, "that a police officer is not charged with predicting the future course of constitutional law."²⁸

Following *Pierson*, the Supreme Court set out to provide a clear, workable explanation of this qualified immunity it had

25. 380 U.S. 524 (1965).

26. *Pierson*, 386 U.S. at 556.

27. *Id.* at 557.

28. *Id.*

created. While the first attempts proved largely unhelpful,²⁹ the Court in *Wood v. Strickland* laid out a relatively clear explanation that included both objective and subjective factors.³⁰ Specifically, the Court held that qualified immunity would not be available to a party who knew or reasonably should have known that the action he took would violate someone's constitutional rights, or if he took action with the malicious intention to cause a deprivation of constitutional rights or other injury. It soon became apparent, however, that the test prescribed in *Wood* was incapable of addressing the concerns inherent in the new doctrine, namely to avoid "insubstantial lawsuits."³¹ Indeed, dismissal of "insubstantial lawsuits was at the heart of the Court's next decision affecting qualified immunity.³²

In *Harlow v. Fitzgerald*, the plaintiff argued that White House aides to former President Richard M. Nixon participated in a conspiracy to violate his constitutional and statutory rights.³³ The issue before the Court was the scope of immunity afforded to senior aides and advisors to the President of the United States. After a lengthy explanation as to why absolute immunity would not apply, the Court found that qualified immunity was

29. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232 (1974); see also, Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 288 n.160 (1995) ("The Court set forth vague parameters without explaining how courts should apply them.").

30. See *Wood v. Strickland*, 420 U.S. 308, 322 (1975).

31. *Butz v. Economou*, 438 U.S. 478, 507–08 (1978) (relying on an assumption that the *Wood* standard would permit insubstantial lawsuits to be quickly terminated).

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

33. *Id.* at 802. It should be noted that *Harlow* was an implied constitutional cause of action—not a Section 1983 action; however, the Court extended its holding to 1983 actions because "it would be 'untenable to draw a distinction for purposes of immunity law.'" See *Baxter v. Bracey*, 140 S.Ct. 1862, 1863 (2020) (Thomas, J., dissenting) (quoting *Harlow*, 457 U.S. at 818 n.30).

the “best attainable accommodation”³⁴ The petitioners argued that should absolute immunity not be available, then a change needed to be made in the standard being applied for qualified immunity at the time. The Court described their argument as “persuasive” and explained that “dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the “good faith” standard established by our decisions.”³⁵ The Court then looked closely at the test articulated in *Wood* and found it was the subjective component applied that was causing the problem—that is, allowing insubstantial claims to proceed to trial. Specifically, following *Wood*, it became apparent that lower courts were finding an official’s subjective good faith to be a question of fact, thus defeating dispositive motions.³⁶ Consequently, the Court did away with the subjective component of the analysis and held that qualified immunity would be available to officials performing discretionary functions when their “conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”³⁷

With that background, this article will look more closely at the law developed following *Harlow*, specifically with respect to cases brought alleging excessive force by police officers. While the cases continue to look to *Harlow* and its “clearly established rights” framework, the Supreme Court has addressed these cases, adding a bit more nuance and at times what appears to be a more demanding standard. At first blush, it appears to be a fairly straightforward exercise. A plaintiff filing a lawsuit under

34. *Id.* at 814.

35. *Id.* at 814–15.

36. *Id.* at 816.

37. *Id.* at 818.

Section 1983 for excessive force must show that the officer (1) violated his Fourth Amendment rights and (2) that the right was “clearly established.”

II. THE LAW OF SECTION 1983

To demonstrate that a Fourth Amendment violation has occurred, courts balance “the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.”³⁸ The Court continued that while a test for reasonableness under the Fourth Amendment was not capable of precise definition, “its proper application requires careful attention to the facts and circumstances of each particular case”³⁹

To determine whether that right is clearly established, it must be such that a reasonable official would understand that what he is doing violates that right[.]”⁴⁰ Furthermore, “existing precedent must have placed the statutory or constitutional question” confronted by the official “beyond debate.”⁴¹ Exactly what is meant by “beyond debate,” however, is less than clear.⁴²

38. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

39. *Id.* The Court added factors that could be relevant to consider, including “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *See also Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985) (explaining courts consider totality of circumstances when deciding whether intrusion was reasonable).

40. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

41. *See Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

42. Joanna C. Schwartz, *Qualified Immunity’s Boldest Lie*, 88 U. CHI. L. REV. 605, 613–14 (2021). Professor Schwartz points out that while the Supreme Court has held twice that a prior court opinion with similar facts is unnecessary to establish excessive force, all its other decisions have repeatedly required that plaintiffs identify court decisions to overcome a qualified immunity motion.

A. *Fundamentals of Excessive Force Claims Under 42 U.S.C. § 1983*

The Fourth Amendment⁴³ protects individuals “against unreasonable searches and seizures[.]”⁴⁴ The hopefully-now-familiar text of Section 1983 provides that:

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,

43. Excessive force typically arises in Fourth, Eighth, and Fourteenth Amendment claims. This article focuses on the Fourth Amendment standards but uses examples of Fourteenth and Eighth Amendment claims when discussing Qualified Immunity. Such claims are subject to distinct substantive standards:

We reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard. As we have said many times, § 1983 “is not itself a source of substantive rights,” but merely provides “a method for vindicating federal rights elsewhere conferred.” *Baker v. McCollan*, 443 U.S. 137, 144, n.3 (1979). In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. See *id.*, at 140 (“The first inquiry in any § 1983 suit” is “to isolate the precise constitutional violation with which [the defendant] is charged”). In most instances, that will be either the Fourth Amendment’s prohibition against unreasonable seizures of the person, or the Eighth Amendment’s ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct.

Graham, 490 U.S. at 393–94 (footnote omitted).

44. U.S. CONST. amend. IV.

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[.]

As relevant to this article, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*⁴⁵ provides a parallel remedy against federal officers for violations of the federal Constitution.⁴⁶

“[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.”⁴⁷ The degree of physical coercion that law enforcement officers may use is not unlimited, however, and “*all* claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard”⁴⁸

The Supreme Court recently has reinforced that for a constitutional “seizure” to occur, an application of force must be effective—if a suspect evades the officer’s application of force in its entirety, the encounter is more properly classified as an attempted seizure, not necessarily subject to a Fourth

45. 403 U.S. 388 (1971).

46. The Eighth and Fourteenth Amendment rights of federal prisoners and pretrial detainees, respectfully, are complicated by the fact that *Bivens* remedies (specifically money damages) do not extend to suits against private prisons. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001). The nuances of that topic are beyond the scope of this article.

47. *Graham*, 490 U.S. at 396.

48. *Id.* at 395.

Amendment analysis. However, “brief seizures are seizures all the same[,]” and an individual may have a Fourth Amendment claim against officers even if that individual ultimately overcame the officer’s application of force and was not arrested during the initial encounter. Specifically, “[i]n addition to the requirement of intent to restrain, a seizure by force—absent submission—lasts only as long as the application of force.”⁴⁹

In defining the parameters of reasonableness, the Supreme Court has explained:

Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application . . . its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.⁵⁰

The *Graham* Court continued:

The reasonableness of a particular use of force must be judged from the perspective of a

49. *Torres v. Madrid*, 141 S. Ct. 989, 999 (2021).

50. *Graham*, 490 U.S. at 396 (cleaned up); *see also* *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985) (“[T]he question [is] whether the totality of the circumstances justify[es] a particular sort of . . . seizure.”).

reasonable officer on the scene, rather than with the 20/20 vision of hindsight With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

As in other Fourth Amendment contexts, however, the reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.⁵¹

B. Pre-Force Conduct by Law Enforcement

Broadly speaking, while “[t]he reasonableness of an officer’s use of force must be judged by considering ‘the totality of the circumstances,’”⁵² “several circuits have held that ‘[w]here a

51. *Graham*, 490 U.S. at 396–97 (citations and quotation marks omitted).

52. *Garner*, 471 U.S. at 8–9.

police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive."⁵³

Excessive force claims can be complicated when a case involves concerning or even provocative and unconstitutional behavior by officers before the alleged excessive force at issue was applied. Courts have struggled and are divided on how to incorporate such pre-force behavior into their Fourth Amendment analysis.

While the Supreme Court in 2017 rejected a framework previously applied by the Ninth Circuit, it has not resolved the question of which alternate competing framework should be applied.⁵⁴ Three approaches are to evaluate the force (1) at the split second it was applied; (2) during a discrete period or "segment" of the encounter which may be longer than a split second, but less than the entire interaction and buildup thereto; and (3) under a totality of the circumstances analysis.

The Fourth, Fifth, and Eleventh Circuits evaluate an officer's use of force only at the instant it was applied, regardless of the preceding circumstances.⁵⁵ Some circuits, specifically the Sixth and Seventh, apply a segmenting approach, in which the reasonability of the officer's conduct is assessed "at each stage" or segment.⁵⁶ When applying this approach, the Sixth Circuit consider events in "close temporal proximity" and related to the identified violation. "[T]he court should first identify the 'seizure' at issue here and then examine 'whether the force used to

53. *Orn v. City of Tacoma*, 949 F.3d 1167, 1176 n.1 (9th Cir. 2020) (quoting *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008) and citing *Thomas v. Durasanti*, 607 F.3d 655, 667 (10th Cir. 2010); *Lytle v. Bexar County*, 560 F.3d 404, 413 (5th Cir. 2009); *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993)).

54. *Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1548 (2017).

55. *Anderson v. Russell*, 247 F.3d 125 (4th Cir. 2001).

56. *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996).

effect that seizure was reasonable in the totality of the circumstances, not whether it was reasonable for the police to create the circumstances.”⁵⁷ ‘Segmenting does not mean breaking down an incident into the smallest portion available,⁵⁸ but recognizing that there may be natural braking points between multiple actions.

The Seventh Circuit applies a similar approach in some cases, when such a division of the total interaction is reasonably justified by the circumstances. “[W]e carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage.”⁵⁹ “In some cases each discrete use of force must be separately justified. We think a sequential analysis is appropriate here[.]”⁶⁰

The First and Ninth Circuits look to the totality of the circumstances surrounding each claim before them.⁶¹ That is not to say that these circuits evaluate the entire interaction as a single

57. *Scozzari v. City of Clare*, 653 F. App’x 412, 419 (6th Cir. 2016) (quoting *Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 406 and quoting *Dickerson*, 101 F.3d at 1161).

58. For example, the Sixth Circuit has recently cautioned against using individual frames from footage of a rapidly evolving incident: The officer’s “perspective did not include leisurely stop-action viewing of the real-time situation that they encountered.” *Cunningham v. Shelby Cty., Tennessee*, No. 20-5375, 2021 WL 1526512, at *4 (6th Cir. Apr. 19, 2021). The value of footage is fact-specific. The Sixth Circuit has rejected factual findings made by a District Court upon reviewing video footage and concluding that an officer twice pepper-sprayed a prisoner who, according to the Sixth Circuit, “was not a threat.” *Anderson v. Sutton*, 717 F. App’x 548, 552 (6th Cir. 2017).

59. *Deering v. Reich*, 183 F.3d 645, 652 (7th Cir. 1999).

60. *Dockery v. Blackburn*, 911 F.3d 458, 467 (7th Cir. 2018) (citation omitted).

61. *Stamps v. Town of Framingham* (1st Cir. 2016); *S.R. Nehad v. Browder*, 929 F.3d 1125, 1132 (9th Cir. 2019); *Bryan v. MacPherson*, 630 F.3d 805, 823 (9th Cir. 2010).

claim. Each claim is analyzed individually, but these circuits do not limit or cabin consideration of pre-force conduct.

The Tenth Circuit also applies a totality of the circumstances approach. Its test has long expressly considered reckless or deliberate provocation by officers as a part of the totality of the circumstances to be analyzed: “The reasonableness of [officers’] actions depends both on whether the officers were in danger at the precise moment that they used force and on whether [their] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.”⁶²

C. Supreme Court Guidance on Pre-Force Conduct

The Ninth Circuit formerly utilized a “provocation rule,” which held that “an officer’s otherwise reasonable (and lawful) defensive use of force is unreasonable as a matter of law, if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation.”⁶³ The Supreme Court rejected this framework: “We hold that the Fourth Amendment provides no basis for such a rule. A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure.”⁶⁴

The earlier Fourth Amendment violation in *Mendez* was a warrantless entry. Once they reached the Supreme Court, the *Mendez* plaintiffs did not attempt to defend the Ninth Circuit’s

62. *Bond v. City of Tahlequah, Oklahoma*, 981 F.3d 808, 816 (10th Cir. 2020) (quoting *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995) (footnote omitted)) (alterations by Bond Court).

63. This test is arguably distinct from that applied within the Tenth Circuit, which it has expressly maintained post-*Mendez*. *Pauly v. White*, 874 F.3d 1197, 1219 n.7 (10th Cir. 2017); *Cox v. Wilson*, 971 F.3d 1159, 1171 (10th Cir. 2020).

64. *Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1544 (2017).

provocation rule but attempted to defend the judgment below on a totality of the circumstances theory.⁶⁵ The Supreme Court declined to engage in such an analysis in the first instance.⁶⁶ The Court's ruling was thus a narrow one: "All we hold today is that *once* a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation."⁶⁷

The Court expressly left open the argument that if an earlier constitutional violation *proximately caused* a plaintiff's damages, even if the application of force was reasonable under *Graham*, that a plaintiff may still recover for those damages in his or her claim for the initial violation, subject to standard defenses, including qualified immunity.⁶⁸ "[I]f the plaintiffs in this case cannot recover on their excessive force claim, that will not foreclose recovery for injuries proximately caused *by the warrantless entry*. The harm proximately caused by these two torts may overlap, but the two claims should not be confused."⁶⁹ How Courts handle such a proximate causation analysis would have significant impacts on a plaintiff's ability to recover for personal injuries but might create challenges under the frameworks used by some circuits. For example, the recognition of overlapping damages may not be entirely consistent with an approach predicated on segmenting constitutional claims.

D. Qualified Immunity

Not every Section 1983 case is decided on the merits. In addition to typical procedural safeguards, qualified immunity

65. *Mendez*, 137 S. Ct. at 1547 n.*.

66. *Id.*

67. *Id.*

68. *Id.* at 1548.

69. *Id.*

protects law enforcement from liability, and from litigation itself.⁷⁰ It is a strong protection, and officers are entitled to interlocutory appellate review if they are denied qualified immunity.⁷¹ As described above, the doctrine is judicially created, and based, in large part, on purely practical concerns and competing policy considerations. Indeed, the Supreme Court describes it as “as the best attainable accommodation of competing values[.]”⁷² “Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.”⁷³

In the Fourth Amendment context, an officer is entitled to qualified immunity when “clearly established” precedent does not show that the search, seizure, or use of force violated the

70. *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001).

In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is “an entitlement not to stand trial or face the other burdens of litigation.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The privilege is “an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.” *Ibid.* As a result, “we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.” *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam).

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

72. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

73. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

Fourth Amendment.⁷⁴ A court objectively evaluates the “reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.”⁷⁵

“Clearly established” means that, at the time of the officer’s conduct, the law was “‘sufficiently clear’ that every ‘reasonable official would understand that what he is doing’” is unlawful. [*al-Kidd*, 563 U.S. at 741] (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In other words, existing law must have placed the constitutionality of the officer’s conduct “beyond debate.” [*al-Kidd*, 563 U.S. at 741]. This demanding standard protects “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be “settled law,” *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam), which means it is dictated by “controlling authority” or “a robust ‘consensus of cases of persuasive authority,’” [*al-Kidd*, 563 U.S. at 741–742] (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. See [*Reichle v. Howards*, 566 U.S.

74. See *Pearson v. Callahan*, 555 U.S. 223, 243–44 (2009); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

75. *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (internal quotation marks omitted).

658, 666 (2012)]. Otherwise, the rule is not one that “every reasonable official” would know. *Id.*, at 664 (internal quotation marks omitted).⁷⁶

An aim of the doctrine is to “ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.”⁷⁷ In conducting a qualified immunity analysis, courts operate under the assumption that officers are informed of relevant controlling precedent, as defined by the circuit in which they operate.⁷⁸ The inquiry into whether a right was clearly established is an objective one—an officer’s actual ignorance of controlling precedent is irrelevant to the Court’s analysis.⁷⁹

Between 2001 and 2009, federal courts were required to determine whether a constitutional violation had occurred, regardless of whether qualified immunity was granted in an

76. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589–90 (2018).

77. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (cleaned up).

78. Scholars have questioned whether this assumption was reasonable at its inception, or, more importantly, whether the Court’s enshrinement of this assumption has resulted in officers receiving training on relevant circuit precedent. Schwartz, *supra* note 42, at 629–30. A recent study, surveying the policies and practices of police departments throughout California, concluded that officers receive little, if any, training related to specific case law other than the general contours of *Graham* and *Garner*. *Id.*

79. Even under this objective analysis, at least one court of appeal granted qualified immunity where a right became clearly established two days before a subsequent constitutional violation occurred: “[I]t is beyond belief that within two days the government could determine . . . what new policy was required to conform to the ruling, much less communicate that new policy to the [relevant] officers.” *Bryan v. United States*, 913 F.3d 356, 363 (3d Cir. 2019) (“Within one or two days, neither [officer] could reasonably be expected to have learned of this development in our Fourth Amendment jurisprudence.”).

individual case.⁸⁰ Specifically, courts were directed to follow a two-step inquiry in a specific order:

First, a court must decide whether the facts that a plaintiff has alleged (*see* Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (*see* Rules 50, 56) make out a violation of a constitutional right. [*Saucier*, 533 U.S. at 201]. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was “clearly established” at the time of defendant’s alleged misconduct. *Ibid.*⁸¹

While this encouraged the clear establishment of substantive law, the requirement that courts always address whether or not a constitutional violation occurred was not without drawbacks. As the Supreme Court explained when it overturned *Saucier*, in *Pearson*, *Saucier*’s “rigid order of battle” compelled courts to devote substantial resources to “difficult questions that have no effect on the outcome of the case.”⁸² Alternately, when the merits question had little to nothing to do with the outcome of a case, the parties, or courts, could be inclined to address the issue in a cursory manner, meaning that judges had scant argument before them, or that future jurists were reviewing opinions with scant analysis in determining whether a principle had been clearly established.

Furthermore, “[r]igid adherence to the *Saucier* rule may make it hard for affected parties to obtain appellate review of constitutional decisions that may have a serious prospective effect on their operations.”⁸³ Where law enforcement is granted qualified immunity and is thus the prevailing party in a lower

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

81. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

82. *Id.* at 236–37.

83. *Id.* at 240.

court, parties may lack an ability to appeal an adverse decision on the merits of the constitutional claim, further undermining the value of such decisions in the development of the law more broadly.⁸⁴

The Supreme Court recognized that full adherence to the Saucier two-step approach is “often, but not always, advantageous, [and] the judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case.”⁸⁵ Since *Pearson*, lower courts have retained the discretion to not answer the merits of whether an act violates the constitution where it is granting qualified immunity. Courts have recognized that the *Pearson* approach presents its own challenges, particularly that it leaves important, and properly presented, aspects of constitutional law undeveloped, which has a dispositive impact on future cases. As one Judge has described this change: “No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.”⁸⁶

Furthermore, “[o]n occasion, [some Courts of Appeal have] add[ed] a third prong to the *Saucier* test, examining ‘whether the plaintiff offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.’”⁸⁷

84. *Id.*

85. *Id.* at 242.

86. *Zadeh v. Robinson*, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J, concurring in part, dissenting in part).

87. *Srisavath v. City of Brentwood*, 243 F. App’x 909, 912 (6th Cir. 2007) (quoting *Estate of Carter v. City of Detroit*, 408 F.3d 305, 311 n.2 (6th Cir.2005)); see also generally E. Lee Whitwell, *How Qualified Is Qualified Immunity: Adding A Third Prong to the Qualified Immunity Analysis*, 43 CAMPBELL L. REV. 403 (2021).

The Fourth Circuit has expressly adopted use of a third prong, and the First and Fifth Circuits engage in the same analysis, but on occasion treat the second and third prongs as independent subsets of a two-pronged analysis.⁸⁸

The Seventh Circuit has squarely rejected the use of a third prong.⁸⁹ The Second and Eighth Circuits, which employed a third prong for a time, have stepped back to two inquires in more recent cases.⁹⁰

In criticizing the three-pronged approach, then-Judge Sotomayor explained:

Our approach does not simply divide into two steps what the Supreme Court treats singly, asking first, whether the right is clearly established *as a general proposition*, and second, whether the application of the general right *to the facts of this case* is something a reasonable officer could be

88. *Gould v. Davis*, 165 F.3d 265, 273 (4th Cir. 1998); *Whalen v. Massachusetts Trial Court*, 397 F.3d 19, 27 n.9 (1st Cir. 2005) (“We note that, on occasion, we have combined the second and third prongs of the qualified immunity analysis into a single step.” (citations omitted)); *Hare v. City of Corinth, Miss.*, 135 F.3d 320, 326 (5th Cir. 1998) (“The second prong of the qualified immunity test is better understood as two separate inquiries[.]”).

89. *Estate of Escobedo v. Bender*, 600 F.3d 770, 779 n. 3 (7th Cir. 2010) (explaining why objective reasonableness of officers’ tactics in using force relates to first prong of qualified immunity analysis, not second).

90. *Bailey v. Pataki*, 708 F.3d 391, 404 n. 8 (2d Cir. 2013) (“There is some tension in our Circuit’s cases as to whether the qualified immunity standard is of two or three parts, and whether the “reasonable officer” inquiry is part of step two—the “clearly established” prong—or whether it is a separate, third step in the analysis”); *Feist v. Simonson*, 222 F.3d 455, 464 (8th Cir. 2000), overruled on other grounds by *Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001) (analyzing qualified immunity using three prongs); *Henderson v. Munn*, 439 F.3d 497, 501 (8th Cir. 2006) (“To determine whether an official is entitled to qualified immunity, we ask two questions[.]”).

expected to anticipate. Instead, we permit courts to decide that official conduct was “reasonable” even after finding that it violated clearly established law in the particularized sense. By introducing reasonableness as a separate step, we give defendants a second bite at the immunity apple, thereby thwarting a careful balance that the Supreme Court has struck “between the interests in vindication of citizens’ constitutional rights and in public officials’ effective performance of their duties.”⁹¹

Certain panels of the Sixth Circuit continue to employ a third prong, although other panels have criticized the practice.⁹² The Seventh Circuit has expressly rejected a three-pronged analysis.⁹³ The Ninth Circuit has created similar ambiguity.⁹⁴

The Supreme Court has not expressly addressed the use of a three-prong framework, although the potential circuit split has been raised by parties before it. Indeed, the issue was robustly briefed⁹⁵ by the parties in *Tolan v. Cotton*,⁹⁶ in which the Court

91. *Walczyk v. Rio*, 496 F.3d 139, 168–69 (2d Cir. 2007) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987), in turn quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

92. *Dunigan v. Noble*, 390 F.3d 486, 491 n.6 (6th Cir. 2004) (collecting disagreeing panels within the Sixth Circuit); *Robertson v. Lucas*, 753 F.3d 606, 615 (6th Cir. 2014) (acknowledging an ongoing in-circuit dispute over the precise contours of the analysis).

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

94. *CarePartners, LLC v. Lashway*, 545 F.3d 867, 876 n. 6 (9th Cir. 2008) (“We have previously expressed the qualified immunity test as both a two-step test and a three-step test”).

95. The parties’ briefing is freely accessible at <https://www.scotusblog.com/case-files/cases/tolan-v-cotton/>.

96. 572 U.S. 650 (2014).

ultimately issued a per curiam opinion. While the opinion repeated that “[i]n resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry[,]” the Court did not acknowledge lower-court disagreement regarding the use of a third prong, or splitting the second inquiry into two sub-inquiries.⁹⁷

E. But Which Courts Can Clearly Establish a Right?

“The Supreme Court has not expressly resolved the question of what authorities ‘count’ and how conflicting authorities should be evaluated when there is no binding Supreme Court precedent to ‘clearly establish’ the law.”⁹⁸ In *Elder v. Hollowal*, the Court reflected a permissive view, and instructed that a court should use its “full knowledge of its own [and other relevant] precedents.”⁹⁹

“[D]istrict court decisions—unlike those from the courts of appeals—do not *necessarily* settle constitutional standards or prevent repeated claims of qualified immunity[,]” and therefore “[m]any Courts of Appeals [] decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity.”¹⁰⁰ Circuits take different approaches on whether out-of-circuit, unpublished or district court decisions can establish a right with sufficient clarity.¹⁰¹

97. *Id.* at 655.

98. Michael Avery, David Rudovsky, Karen M. Blum, & Jennifer Laurin, *Police Misconduct: Law and Litigation* § 3:9 (Thompson Reuters, 3rd ed. 2020) (footnotes omitted).

99. 510 U.S. 501, 516 (1994).

100. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (emphasis added).

101. David R. Cleveland, *Clear As Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity*

Concerns are compounded when a court decides a Section 1983 case on qualified immunity grounds, rather than merits, in circuits that take a narrow view of what prior opinions can clearly establish a right. A recent example brings those concerns, about the law remaining underdeveloped and not providing relief to potentially deserving plaintiffs, into sharp relief. In *Norris v. Hicks*,¹⁰² the Eleventh Circuit considered the execution of a search warrant on the wrong home. The officers arrived at the specific, and only, address they had a warrant to search, but, after throwing flash grenades into the building, determined that it was uninhabitable and abandoned. Because they understood the object of their search to be an inhabited residence, they assumed that the building they were at was not the location to be searched. Without engaging in any discussion of the issues, or seeking a warrant for an alternate location, they moved through the backyard of the first building, “and then forcibly entered a nearby yellow house whose lights were on[.]” A resident was apprehended in the house, and he brought suit against the officers.

The Court of Appeals for the Eleventh Circuit had previously affirmed a denial of qualified immunity where officers had a warrant to search a specific address, but entered another residence on the same block (173 Powerline Drive, rather than 133), despite the units being properly labeled with their respective numbers.¹⁰³ The Eleventh Circuit in *Norris* refused to

Determinations, 65 U. MIAMI L. REV. 45 (2010) (collecting and describing authorities from each circuit).

102. *Norris v. Hicks*, No. 20-11460, 2021 WL 1783114, at *1 (11th Cir. May 5, 2021).

103. *Treat v. Lowe*, 668 F. App'x 870 (11th Cir. 2016) (per curiam). The factual underpinnings of *Treat* are more robustly discussed in the District Court's decision: *Treat v. Lowe*, No. 1:14CV174, 2016 WL 1246406 (S.D. Ga. Mar. 24, 2016).

consider the impact of *Treat*, because the decision was unpublished, and unpublished decisions in the Eleventh Circuit cannot clearly establish constitutional law.¹⁰⁴ Because *Norris* is also unpublished, neither *Norris* nor *Treat* provide any meaningful benefit to future litigants or courts within the Eleventh Circuit. This result is somewhat ironic, given the Eleventh Circuit's policy on the publication of opinions is designed to *minimize* impairments to "the development of the cohesive body of law."¹⁰⁵

F. *Contours of a Clearly Established Right*

Most courts continue to analyze qualified immunity using the two steps expressly discussed in *Saucier*: (1) were a plaintiff's rights violated, and (2) was the violated right clearly established at the time of the violation. If a court finds for the officer on the first, question, the officer is entitled to judgment on the merits. If the officer prevails on the second question, he is entitled to judgment on the basis of qualified immunity.

A common criticism of the second prong relates to the level of granularity courts use to define whether a right was clearly established at the relevant time. The challenge facing courts is hardly surprising. Broadly speaking, a denial of qualified immunity asks individuals at the top levels of a profession premised on the ability to craft and advance arguments to concede that an issue—one argued by thoughtful counsel who might have encouraged their clients to settle if that client was without valid argument—is beyond debate. That can be a tall order.

104. *Norris*, 2021 WL 1783114, at *6 n.9.

105. FED. R. APP. P. 36, Eleventh Circuit Internal Operating Procedure 5, available at https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/Rules_Bookmark_DEC20.pdf.

Some courts have responded to the clear-establishment principle through the use of what at least one scholar has called “Ultra-Particularity.” “‘Ultra-particularity’ is a clever tool used to invoke qualified immunity and shield officers and jailers from liability. The term is a combination of the words *ultra*, which is defined as ‘beyond what is ordinary, proper, or moderate; excessively; extremely,’ and particularity, which means ‘the quality or state of being particular as distinguished from the universal.’”¹⁰⁶ Some judges apply what Wallach would call ultra-particularity to only deny qualified immunity where nearly identical conduct was already found, in a binding manner, to violate the constitution.

While the Supreme Court has not granted certiorari and accepted full briefing and argument in many cases concerning the contours of “clear” establishment, a significant number of per curiam decisions in unargued cases have been devoted to the issue.¹⁰⁷ In each of these cases, the Supreme Court reversed a lower court which had denied an officer qualified immunity.

These per curiam qualified immunity opinions are somewhat atypical of cases decided by the Supreme Court. The Supreme Court’s rules state: “A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of

106. Ian Wallach, The Use of ‘Ultra-particularity’ to Invoke Qualified Immunity: A Substantial Threat to Civil Rights Claims and a Potentially Fatal Blow to Eighth Amendment Claims, *THE CHAMPION*, Mar. 2021, at 42–47.

107. *See, e.g.*, *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500 (2019) (per curiam); *Kisela v. Hughes*, 138 S.Ct. 1148 (2018) (per curiam); *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam); *Mullenix v. Luna*, 577 U.S. 7 (2015) (per curiam); *Taylor v. Barkes*, 575 U.S. 822 (2015) (per curiam); *Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam); *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam).

law.”¹⁰⁸ Cases involving questions of qualified immunity make up a fair number of these rare grants—about one a term for nearly a decade. Reaction, or what some scholars and practitioners might term overreaction, to cases like these may be a driving factor in the development of cases utilizing ultra-particularity. In these reversals, the Supreme Court has emphasized that it “has repeatedly told courts not to define clearly established law at a *high* level of generality.”¹⁰⁹

Before November 2020, each of these unargued per curiam decisions reversed a decision denying qualified immunity. Before November 2020, the Supreme Court had only reached a Plaintiff’s result *twice* where a case raised qualified immunity. This term, the Court has more than doubled that number.

One pre-November 2020 case centered on a claim of excessive force.¹¹⁰ In *Hope v. Pelzer*,¹¹¹ the Court was faced with a gruesome Eighth Amendment claim, in which a prisoner had been chained to a hitching post, shirtless, for seven hours in the hot Alabama sun while guards taunted him about his thirst and obvious agony.¹¹² The Court described this as an “obvious” violation of the Eighth Amendment.¹¹³ It explained that, even if he had at some point been disruptive or posed a safety concern—which was not at all clear—by the time Hope was restrained, any such fear had abated, making the act “punitive treatment amount[ing] to gratuitous infliction of “wanton and

108. SCOTUS Rule 10. The Supreme Court’s Rules are available at <https://www.supremecourt.gov/ctrules/2019RulesoftheCourt.pdf>.

109. *Emmons*, 139 S. Ct. at 503 (citation and quotation marks omitted, emphasis added).

110. The second, *Groh v. Ramirez*, 540 U.S. 551 (2004), involved the nonviolent execution of a facially deficient warrant.

111. 536 U.S. 730 (2002).

112. *Id.* at 734–35.

113. *Id.* at 738.

unnecessary” pain that our precedent clearly prohibits.”¹¹⁴ The Court denied the guards qualified immunity, even though the facts presented were “novel.”¹¹⁵

In November 2020, the Court deviated from its per curiam pattern—it reversed a *grant* of qualified immunity and remanded the unargued case for further proceedings.¹¹⁶ *Taylor* was a conditions-of-confinement case with “particularly egregious facts[, which] any reasonable officer should have realized . . . offended the Constitution.”¹¹⁷ The plaintiff Taylor was housed in a “pair of shockingly unsanitary cells” for six full days and was unable to eat or drink for four days due to contamination concerns.¹¹⁸

Then, less than six months later in *McCoy v. Alamu*, the Court reversed another grant of qualified immunity, without opinion, in light of *Taylor v. Riojas*.¹¹⁹ *McCoy* involved a guard using pepper spray on an incarcerated plaintiff, without cause or provocation. The Fifth Circuit concluded that it was not clearly

114. *Id.*

115. *Id.* at 741. In urging reform, an Assistant City Attorney in Mesa, Arizona, has argued that lower courts should more regularly follow the lead of *Hope*, and deny qualified immunity more regularly when confronted with obvious, if novel, constitutional violations. Alexander J. Lindvall, *Qualified Immunity and Obvious Constitutional Violations*, 28 GEO. MASON L. REV. 1047 (2021).

116. *Taylor v. Riojas*, 141 S. Ct. 52 (2020).

117. *Id.* at 54.

118. *Id.*

119. *McCoy v. Alamu*, No. 18-40856, 2021 WL 1279403, at *1 (5th Cir. Apr. 6, 2021). Filings on the Supreme Court’s docket in *McCoy* indicate that this decision was made *sua sponte*. The Supreme Court’s opinion in *Taylor v. Riojas* had not been cited by the parties following its issuance, although Plaintiff cited to an earlier, unrelated *Taylor* order from the Fifth Circuit. The parties’ briefing is freely accessible at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-31.html>.

established that a *single* assault with pepper spray, even if it had no legitimate purpose and was entirely unprovoked, violated McCoy's rights, and thus that the assailant was entitled to qualified immunity, because it was not "beyond debate" that a single application of pepper spray was not a "*de minimus* use of physical force[.]"¹²⁰

Finally, on June 28, 2021, the Court summarily reversed a grant of qualified immunity in *Lombardo v. City of St. Louis, Missouri*.¹²¹ The plaintiff had been picked up by officers earlier that day for trespassing and failing to appear in court for a traffic ticket and was placed in a holding cell.¹²² He apparently made some effort to hang himself, and at least six officers responded to his cell and restrained him following some physical struggle.¹²³ After the plaintiff was prone, handcuffed, and shackled with leg irons, "officers held [plaintiff]'s limbs down at the shoulders, biceps, and legs. At least one other placed pressure on [plaintiff]'s back and torso. [Plaintiff] tried to raise his chest, saying, 'It hurts. Stop.'"¹²⁴ "After 15 minutes of struggling in this position, [plaintiff]'s breathing became abnormal and he stopped moving."¹²⁵ Officers and medical personnel were unable to resuscitate him.¹²⁶

Only time will tell whether these cases represent a shift in the qualified immunity jurisprudence. They may be seen as a message to lower courts to shift away from ultra-particularity,

120. *McCoy v. Alamu*, 950 F.3d 226, 233 (5th Cir. 2020), *vacated*, 141 S. Ct. 1364 (2021).

121. No. 20-391, 2021 WL 2637856, at *1 (U.S. June 28, 2021).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* (emphasis added).

126. *Id.*

or perhaps they reflect some dichotomy in which the Court is more willing to reject qualified immunity defenses in the context of alleged misconduct behind prison walls. Many of the Supreme Court's grants of qualified immunity—all but one of the per curiam decisions cited in Footnote 107, *supra*—were Fourth Amendment claims involving interactions between officers and individuals who came into contact in homes or on the street. *Hope*, *Taylor*, and *McCoy* all involved Eighth Amendment claims by convicted and incarcerated plaintiffs, and *Lombardo* involved a pretrial detainee who was already inside of a holding cell at the time the force was applied.¹²⁷ If, and how, these recent cases will shift qualified immunity jurisprudence going forward is beyond the scope of this article.

127. The Court declined to specify whether his claim was properly viewed under the Fourth or Fourteenth Amendments. *Lombardo*, 2021 WL 2637856, at *1, n.2.

III. THE CRITICISM

Given this background, both scholars and jurists alike have challenged the continued efficacy of the jurisprudence in our current societal context. Those opponents argue that the qualified immunity defense undermines government accountability by shielding government officials from liability even in situations that appear to be, on their face and to the public, egregious examples of government overreach and abuse, particularly in the area of alleged police misconduct. “Commentators have argued that the Court’s decisions have provided unclear and shifting guidance about how factually similar a case must be to clearly establish the law and which courts’ decisions can clearly establish the law.¹²⁸ Commentators have also argued that the ‘clearly established’ standard protects officers who have outrageously abused their power simply because no prior decision has declared that conduct unlawful.”¹²⁹

The late Justice Ruth Bader Ginsburg acknowledged the potential for abuse created by the Court’s current jurisprudence on qualified immunity in the context of a false arrest case arising

128. See, e.g., Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633, 653–56 (2013) (describing shifting standards for clearly established law); Alan K. Chen, *The Intractability of Qualified Immunity*, 93 *NOTRE DAME L. REV.* 1937, 1948–51 (2018) (describing confusion about how factually analogous prior court decisions must be to clearly establish the law); John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 *FLA. L. REV.* 851, 854–59 (2010) (describing confusion about which sources can clearly establish the law and how factually analogous prior cases must be to clearly establish the law).

129. Schwartz, *supra* note 42 at 608 (footnotes in original). See Jeffries, *supra* note 128, at 854–58, 863–66; John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 *VA. L. REV.* 207, 256–58 (2013); see also Michael L. Wells, *Qualified Immunity After Ziglar v. Abbasi: The Case for a Categorical Approach*, 68 *AM. U. L. REV.* 379, 436–38 (2019).

under the Fourth Amendment. In *District of Columbia v. Wesby*, Justice Ginsburg, while concurring in the judgment based on precedent, observed:

The Court's jurisprudence, I am concerned, sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection. A number of commentators have criticized the path we charted in *Whren v. United States*, 517 U. S. 806 (1996), and follow-on opinions, holding that "an arresting officer's state of mind . . . is irrelevant to the existence of probable cause," *Devenpeck v. Alford*, 543 U. S. 146, 153 (2004). See, e.g., 1 W. LaFare, Search and Seizure §1.4(f), p. 186 (5th ed. 2012) ("The apparent assumption of the Court in *Whren*, that no significant problem of police arbitrariness can exist as to actions taken with probable cause, blinks at reality."). I would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry.¹³⁰

That same year in *Kisela v. Hughes*,¹³¹ one of the per curiam decisions referenced above, Justice Sonia Sotomayor, in an impassioned dissent, challenged the majority's view that a police officer was entitled to qualified immunity for shooting a woman who was alleged to have been engaging in "erratic behavior" with a knife. Justice Sotomayor observed that the majority opinion:

130. 138 S. Ct. 577, 594 (2018) (Ginsburg, J, concurring).

131. 138 S. Ct. 1148 (2018).

is symptomatic of “a disturbing trend regarding the use of this Court’s resources” in qualified-immunity cases. [*Salazar-Limon v. Houston*, 137 S.Ct. 1277, 1282 (2017) (Sotomayor, J., dissenting from denial of certiorari)]. As I have previously noted, this Court routinely displays an unflinching willingness “to summarily reverse courts for wrongly denying officers the protection of qualified immunity” but “rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.” *Id.*, at [1282–83]; see also Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 82 (2018) (“[N]early all of the Supreme Court’s qualified immunity cases come out the same way—by finding immunity for the officials”); 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*, 113 MICH. L. REV. 1219, 1244–1250 (2015). Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.

The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right

or just under the law about this, I respectfully dissent.¹³²

Consistent with Justice Sotomayor's observations, Professor Erwin Chemerinksi, Dean of the University of California Berkeley School of Law, recently explained that "[i]n case after case, the Supreme Court found officers were protected by qualified immunity under [the Court's Section 1983 standing jurisprudence]. From 1982 to 2020, the court dealt with qualified immunity in 30 cases. The plaintiffs prevailed in only two: [*Hope v. Pelzer*, 536 U.S. 730 (2002) and *Groh v. Ramirez*, 540 U.S. 551 (2004)]."¹³³

Professor Kit Kinports, in her article *The Supreme Court's Quiet Expansion of Qualified Immunity*, likewise noted that, as of the time of her 2016 article, of the eighteen Section 1983 cases before the Supreme Court in the fifteen preceding years, the Court found that qualified immunity applied in sixteen of them.¹³⁴ She blames this result, in part, on the Court engaging "in a pattern of covertly broadening the defense, describing it in increasingly generous terms and inexplicably adding qualifiers to precedent that then take on a life of their own."¹³⁵ Indeed, Kinports suggests that the Court has all but lost sight of one of the of the countervailing interests first acknowledged by it in *Harlow*: "vindicating constitutional rights and compensating victims of constitutional injury."¹³⁶

132. *Id.* at 1162 (Sotomayor, J., dissenting).

133. Erwin Chemerinksi, *SCOTUS hands down a rare civil rights victory on qualified immunity*, ABA JOURNAL (February 1, 2021), available at <https://www.abajournal.com/columns/article/chemerinsky-scotus-hands-down-a-rare-civil-rights-victory-on-qualified-immunity>.

134. Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. 62, 63 (2016).

135. *Id.* at 64.

136. *Id.* at 68.

In yet another of the Court's per curiam decisions, *Mullenix v. Luna*,¹³⁷ for example, a case involving alleged excessive force by a state trooper who shot and killed a motorist who was allegedly fleeing from arrest, Kinports observes that the Court's recitation of the governing qualified immunity standard is as follows:

The doctrine of qualified immunity shields officials from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." "Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law."¹³⁸

Kinports notes the absence in this updated standard of any acknowledgment of the rights of the victim to redress for the alleged harms inflicted—a departure, she claims, from the jurisprudence in *Harlow* and its progeny.¹³⁹

In his article *Is Qualified Immunity Unlawful?*, Professor William Baude, an outspoken critic of the defense, argues that in addition to the broadening of the defense, the qualified immunity defense has been bolstered in a more fundamental way:

137. 577 U.S. 7 (2015).

138. Kinports, *supra* note 134, at 67–68.

139. *Id.* at 68.

Over the past several decades, the Court has been slowly changing the doctrinal formula for qualified immunity. Most recently, it has begun to strengthen qualified immunity's protection in another way: by giving qualified immunity cases pride of place on the Court's docket. It exercises jurisdiction in cases that would not otherwise satisfy the certiorari criteria and reaches out to summarily reverse lower courts at an unusual pace. Essentially, the Court's agenda is to especially ensure that lower courts do not improperly deny any immunity.¹⁴⁰

Scholars like Baude argue that the qualified immunity defense, which he claims was intended to serve three Court-proffered purposes—creating a good-faith exception to alleged constitutional wrongs suffered at the hand of the state; correcting for the erroneous overinclusion of actions recognized under Section 1983; and providing a warning against future violations of like kind—does not truly serve those purposes and, even if it did, there are better alternatives to the doctrine.¹⁴¹

Baude explains that the contemporary expansion of qualified immunity suggests that the statute itself—Section 1983—demands this “good faith” exception to the deprivation of rights by a state actor.¹⁴² Baude rejects this both facially, insofar as the statute itself does not provide for it, and historically, as having

140. William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 48 (2018).

141. See, e.g., *id.*; Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309 (2020); Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

142. Baude, *supra* note 140, at 55–58.

been previously rejected in the Court's jurisprudence.¹⁴³ Moreover, Baude explains that this expansion is not lost on the High Court. He cites to both Justice Anthony Kennedy's and Justice Clarence Thomas's specific acknowledgements that the current jurisprudence of qualified immunity has strayed far from its historical roots and far from analogous common law immunities.¹⁴⁴

As the Court's qualified immunity expansion is grounded in neither the statutory framework of Section 1983 nor in its historical roots, Baude explores an alternative theory that the broadening of the qualified immunity defense was a course correction for the Court's expansive view of recovery and actionability under the statute. Baude cites to Justice Antonin Scalia's dissent in *Crawford-El v. Britton*,¹⁴⁵ in which Justice Scalia explains, in part:

Monroe [v. Pape] changed a statute that had generated only 21 cases in the first 50 years of its existence into one that pours into the federal courts tens of thousands of suits each year, and engages this Court in a losing struggle to prevent the Constitution from degenerating into a general tort law. (The present suit, involving the constitutional violation of misdirecting a package, is a good enough example.) Applying normal common-law rules to the statute that Monroe created would carry us further and further from what any sane Congress could have enacted.

We find ourselves engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented—rather than applying the common

143. *Id.* at 51–60.

144. *Id.* at 61.

145. 523 U.S. 574 (1998).

law embodied in the statute that Congress wrote.¹⁴⁶

This explanation, however, is found inadequate by Professor Baude, as it is premised on the notion that *Monroe* was wrongly decided because it was based upon an erroneous interpretation of what it means to commit an act “under color of law.”¹⁴⁷ Baude goes on to explain that historically, the interpretation offered by the majority in *Monroe* was historically grounded and, therefore, accurate.¹⁴⁸

Additionally, Baude explained that if Justice Scalia’s compensation theory—in essence that two wrongs make a right, and *Monroe* was one of those wrongs—were correct, the resulting immunity doctrine should be the opposite of the immunity doctrine that currently exists.¹⁴⁹ Baude writes:

Section 1983 fills in a remedial gap: it provides a federal forum for conduct legalized or immunized by the state. Yet qualified immunity entirely ignores both state liability and state immunity. . . . That would mean denying immunity in cases where states grant it, while granting immunity only in cases where states deny it. Yet modern qualified immunity doctrine looks nothing like this.¹⁵⁰

Finally, Baude tested the theory that the purpose of the expansive qualified immunity doctrine is to give “fair warning” to

146. Baude, *supra* note 140 at 62–63, quoting *Britton*, 523 U.S. at 611–12 (Scalia, J., dissenting).

147. *Id.* at 63–64.

148. *Id.* at 64–65.

149. *Id.* at 66.

150. *Id.* at 68.

a potential wrongdoing state actors that a yet-to-be committed act is contrary to the Constitution—the concept familiar in the criminal law, known as “lenity.”¹⁵¹ Baude rejects this explanation, citing the differential treatment a criminal defendant receives in response to a lenity defense when compared to that raised by a state actor in response to a Section 1983 claim: “The Justices regularly empathize with officials subject to suit, asking if the official can really be expected to anticipate constitutional rulings that even federal appellate judges did not. But one rarely sees a similar empathy for regular criminal defendants, and indeed the Court’s decisions do not bear it out.”¹⁵² Baude posits that even if the concept of lenity were the driving force behind the Court’s qualified immunity defense jurisprudence, lenity “seems to justify a much more modest immunity doctrine than the one we have, one that at most, tracks the modest defenses available to real criminal defendants.”¹⁵³

In the end, Professor Baude answers his titular question in the affirmative, concluding that qualified immunity is unlawful.¹⁵⁴ For Baude, the doctrine is neither founded in the statutory language of Section 1983, nor authorized under any appropriate theory of statutory interpretation.

Echoes of Professor Baude’s conclusions are whispered in the halls of the Supreme Court. In addition to the above-referenced critiques from Justices Ginsburg and Sotomayor, Justice Thomas has offered one of the most recent embraces of Baude’s findings in a dissent from the denial of certiorari in *Baxter v. Bracey*:¹⁵⁵

151. *Id.* at 69.

152. *Id.* at 77.

153. *Id.*

154. *Id.* at 80.

155. 140 S. Ct. 1862, 1865 (2020).

There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe. Leading treatises from the second half of the 19th century and case law until the 1980s contain no support for this “clearly established law” test. Indeed, the Court adopted the test not because of “general principles of tort immunities and defenses,” . . . but because of a “balancing of competing values” about litigation costs and efficiency. . . .

Regardless of what the outcome would be, we at least ought to return to the approach of asking whether immunity “was ‘historically accorded the relevant official’ in an analogous situation ‘at common law.’”¹⁵⁶

Still, others like Professors Hillel Levin and Michael Wells of the University of Georgia School of Law in their article, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, disagree with Baude’s ultimate answer and suggest that his statutory interpretation argument is flawed insofar as it relies on faulty methodology.¹⁵⁷ Nevertheless, even both Levin and Wells appear to agree that the defense has been subject to abuse and should be subject to “adjustment,”¹⁵⁸ writing “[t]here is much to criticize about the Court’s § 1983 jurisprudence, including the expansive qualified immunity doctrine it has

156. *Id.* at 1864 (citations omitted) (Thomas, J., dissenting).

157. Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 CAL. L. REV. ONLINE 40, 41–43 (2018).

158. *Id.* at 41.

developed. We share many of Professor Baude's apparent policy preferences, but we think his methodology is wrong."¹⁵⁹

Even in the face of this more academic disagreement concerning the origin of the qualified immunity defense and whether its development is grounded in sound statutory interpretation, the strains of the defense itself are best viewed through the lens of those on the front line of its application—the lower federal courts. While only few of these cases ever receive significant press coverage, and even fewer get to the Supreme Court, thousands of Section 1983 cases are filed each year in our nation's trial courts.¹⁶⁰ It is district and circuit court judges who must grapple first with what the law forbids and what will go uncompensated.

In recent years, frustration has crept into the jurisprudence of some lower federal court judges forced to apply the qualified immunity doctrine in the face of what might appear to be unjustified police conduct. In *Jamison v. McClendon*,¹⁶¹ District Judge Carlton Reeves of the Southern District of Mississippi was forced to grapple with qualified immunity in a case involving a Black welder in South Carolina who was stopped and searched for approximately two hours by police seemingly because he was driving a Mercedes.

Judge Reeves began his opinion with a gut-wrenching recitation of cases involving Black men and women who had been stopped, searched and, largely, killed, by police officers.¹⁶² Finding that despite what he believed to be outrageous and unjustified conduct by the police officer who stopped Mr. Jamison, the

159. *Id.* at 70.

160. *See* page 539, *supra*, (estimating the number of cases at between 40,000 and 50,000).

161. 476 F. Supp. 3d 386 (S.D. Miss. 2020).

162. *Id.* at 390–91.

officer was entitled to qualified immunity, Judge Reeves explained:

The Constitution says everyone is entitled to equal protection of the law—even at the hands of law enforcement. Over the decades, however, judges have invented a legal doctrine to protect law enforcement officers from having to face any consequences for wrongdoing. The doctrine is called “qualified immunity.” In real life it operates like absolute immunity.

Tragically, thousands have died at the hands of law enforcement over the years, and the death toll continues to rise. Countless more have suffered from other forms of abuse and misconduct by police. Qualified immunity has served as a shield for these officers, protecting them from accountability.

This Court is required to apply the law as stated by the Supreme Court. Under that law, the officer who transformed a short traffic stop into an almost two-hour, life-altering ordeal is entitled to qualified immunity. The officer’s motion seeking as much is therefore granted.

But let us not be fooled by legal jargon. Immunity is not exoneration. And the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine.¹⁶³

163. *Id.* at 391–92.

Similarly, in *Ventura v. Rutledge*,¹⁶⁴ District Judge Dale Drozd, offered his own perspectives on qualified immunity in a case involving the fatal shooting of an individual by police, who was alleged not to have posed an immediate threat to himself or others:

In legal circles and beyond, one of the most debated civil rights litigation issues of our time is the appropriate scope and application of the qualified immunity doctrine, particularly in cases of deaths resulting from police shootings. . . . While there is so much more that could, and perhaps should, be said about the current state of this judicially created doctrine, the undersigned will stop here for today. In short, this judge joins with those who have endorsed a complete reexamination of the doctrine which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases. However, the Supreme Court's decision in *Kisela* is, of course, binding on this court.¹⁶⁵

At least one federal judge has done what would normally be unthinkable—sounded the alarm in the media. On the heels of a string of tragic killings by police officers in 2020, Circuit Judge James Wynn Jr. of the U.S. Court of Appeals for the 4th Circuit took to the Washington Post to air his grievances with qualified immunity, writing in an opinion piece:

The judge-made law of qualified immunity subverts the Civil Rights Act of 1871, which Congress intended to provide remedies for constitutional violations perpetrated by state officers.

164. 398 F. Supp. 3d 682 (E.D. Cal. 2019).

165. *Id.* at 687 n.6 (citations omitted).

Eliminating the defense of qualified immunity would improve our administration of justice and promote the public's confidence and trust in the integrity of the judicial system.¹⁶⁶

Notwithstanding these expressions of frustration—including frustrations expressed by the justices themselves—Supreme Court jurisprudence on qualified immunity for alleged police misconduct remains obdurate.

* * *

Against this backdrop, on May 25, 2020, an African American man entered a grocery store in Minneapolis, Minnesota. The man was alleged to have used a counterfeit \$20 bill to pay for a purchase. Police were called. The man was arrested for this crime, and during that arrest was murdered by a police officer who restrained the man by kneeling on the man's neck while the man pleaded for his life. What followed was an unprecedented level of protest activity focused on police brutality. The cries for justice for the man—George Floyd—and others who had died at the hands of police, could be heard throughout the country—in cities and towns, big and small.

Faced with the growing chorus of outrage concerning alleged police misconduct, attention soon turned to the Congress to act. On February 24, 2021, the George Floyd Justice in Policing Act, H.R. 1280, was introduced in the United States House of Representatives. The law's purpose is to address police misconduct, including excessive force, and racial bias in policing. Relevant here, the bill seeks to limit qualified immunity as a

166. Hon. James Wynn Jr., *Opinion: As a judge, I have to follow the Supreme Court. It should fix this mistake.*, WASHINGTON POST, June 12, 2020, available at <https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-fol-low-supreme-court-it-should-fix-this-mistake/>.

defense to liability in private civil actions against a law enforcement officer.

On March 3, 2021, H.R. 1280, passed the House by a narrow margin and was sent to the United States Senate. Indicative or reflective of the same jurisprudential paralysis detailed above—changes stymied by the acknowledgment of the realities and dangers of police work in the face of a stream of police killings of predominantly Black men—the primary points of contention surrounding the bill concern the availability of the qualified immunity defense. As of this writing, despite a good deal of negotiation, the Senate has yet to bring the George Floyd Justice in Policing Act to vote.