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There is Nothing "Qualified" About the Doctrine of Qualified Immunity

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> I see blue lights, I get scared and start runnin'
> [T]hey 'posed to protect us
> Throw us in handcuffs and arrest us
> While they go home at night . . .
> Knowing we need help, they neglect us
> Wondering who gon' make them respect us[2]

I. Introduction

108. For a citizen whose constitutional or statutory rights are violated by a government official acting in their official capacity, Congress enacted 42 U.S.C. § 1983 to give that citizen an avenue to redress their grievances.[3] For the government official being sued for such misconduct, the United States Supreme Court created qualified immunity — an affirmative defense that exempts government officials from civil liability if they do not violate "clearly established law."

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2 Lil Baby, *The Bigger Picture* (Quality Control Music 2020).

3 42 U.S.C. § 1983.

109. The doctrine of qualified immunity has become somewhat of a misnomer since its inception in 1967. At birth, a government official *qualified* for *immunity* from civil liability only for good faith errors they committed in their official capacity.[4] Roughly twenty years later, however, the Court departed from this subjective inquiry and formed a two-part analysis that looks to the objective reasonableness of an official's conduct to determine whether the official qualifies for immunity.[5] To measure "objective reasonableness," this two-part analysis asks (1) whether a violation of a plaintiff's constitutional or statutory rights has occurred, and (2) whether a government official violated "clearly established statutory or constitutional rights."[6] Through this transformation, instead of immunizing *qualified* government officials from civil liability for reasonable lapses in judgment, the Doctrine has been utilized to immunize many *unqualified* officials through its commitment to this procedurally arbitrary two-part analysis. As a result, the Doctrine has departed significantly from its founding name, protecting some of the most egregious acts of official misconduct and robbing citizens of § 1983's remedial protections.

110. This paper presents the case against qualified immunity, and is structured as follows. Part II discusses how qualified immunity hollows constitutional rights through a) the clearly established law standard and b) the Supreme Court's 2009 ruling in *Pearson v. Callahan* that severely increased the Doctrine's reliance on the clearly established law standard. Part III disproves qualified immunity's purported common law origins as explicated by the Supreme Court in the Doctrine's two foundational cases — *Pierson v. Ray* and *Harlow v. Fitzgerald*. Part IV examines how qualified immunity fails to meet the policy objectives the Supreme Court offered, and continues to offer, to support the Doctrine's existence. Part V showcases a federal district court judge's evaluation of qualified immunity, which pointedly summarizes the need to get rid of the Doctrine. And, lastly, Part VI proposes a new standard for adjudicating § 1983 claims that would better achieve a just balance of the interests in public accountability and the need to protect government officials when they have acted reasonably.

II. Qualified Immunity's Procedural Arbitrariness Renders Constitutional Rights Meaningless

111. "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries

4 See generally *Pierson v. Ray,* 386 U.S. 547 (1967) (holding that "the defense of good faith" is available to public officials sued under § 1983).

5 See generally *Harlow v. Fitzgerald*, 457 U.S. 800, 815–16 (1982).

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

of a book of mathematics."[7] Yet, through the Supreme Court's construction of what resembles a mathematic formula, the two-part qualified immunity analysis contains no mechanism for such pragmatism, allowing for its arbitrary procedure to determine the fate of a plaintiff's ability to vindicate cherished constitutional rights. Since 1982, when the Court established the current form of qualified immunity, courts applying the Doctrine have effectively, as Justice Sotomayor put it, "render[ed] the protections" of the Constitution "hollow."[8]

112. The hollowing of our constitutional rights flows from two main sources. First, the Supreme Court has significantly narrowed the definition of what constitutes "clearly established law" over the past thirty-eight years, making it markedly more difficult for plaintiffs to show that a government official is not entitled to immunity from civil liability. Second, in the 2009 decision of *Pearson v. Callahan*, the Court strengthened the power of the Doctrine's procedural arbitrariness by holding that lower courts are not required to answer both the constitutional question and the clearly established law question of the two-part analysis, and may dispose of a case solely on the latter question — forcing increased dependence on the clearly established law standard while simultaneously stunting the growth of caselaw that can be used to *clearly establish* the law.[9]

The "Clearly Established" Law Standard

113. The second question in the two-part qualified immunity analysis asks whether, at the time they acted, a government official's conduct violated clearly established constitutional rights.[10] Thus, the question of whether a government official wields their power in an unconstitutional manner does not depend upon the objective reasonableness of such conduct in light of constitutional constraints, but rather it depends on whether the rights that were allegedly violated are "clearly established" — which, as will be more thoroughly discussed below, is a specious term of art.

114. A constitutional right is "clearly established" for purposes of qualified immunity when "'[t]he contours of [a] right are sufficiently clear' that 'every reasonable official would [have understood] that what he is doing violates that right.'"[11] The problem[12] lies in the evidence that the Court accepts as proof that a constitutional

7 OLIVER WENDELL HOLMES JR., THE COMMON LAW 1 (1909).

8 *Mullenix v. Luna*, 136 S.Ct. 305, 316 (2015) (Sotomayor, J., dissenting).

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

10 See *Mullinex v. Luna*, 136 S.Ct. 305, 316 (2015).

11 *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2009) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

12 See generally Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 69–72 (2016).

right is in fact clearly established: there has to be a) existing precedent that is controlling within the plaintiff's jurisdiction, and/or b) "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."[13] In a decision issued by the Supreme Court on its emergency docket earlier this term, the Court signaled that even this evidence may not be enough to clearly establish constitutional rights. In *Rivas-Villegas v. Cortesluna*, the Court reversed the lower court's ruling that denied a government official qualified immunity because "[e]ven assuming that controlling Circuit precedent clearly establishes law for purposes of §1983, [the precedent] did not give fair notice to [the defendant]."[14] This is significant because the Court appears to be implicitly challenging the fact that controlling precedent in a plaintiff's jurisdiction *can* clearly establish law — a legal conclusion the Court settled years ago.[15] Although rulings made by the Supreme Court on its emergency docket do not necessarily hold precedential value, signals like this are nonetheless cause for pause and may indicate the Court's desire to invite challengers to litigate existing precedent.

115. The existing precedent must (1) be "particularized" to the specific facts of the case and (2) have placed that constitutional question "beyond debate."[16] Further, when opining on qualified immunity cases, the Court requires that lower courts state clearly established law at a factually specific level because — according to the Court — if not, qualified immunity will turn into "a rule of virtually unqualified liability" because a plaintiff could prevail "simply by alleging violation of extremely abstract rights."[17] Thus, "[t]he operation of this standard . . . depends substantially upon the level of generality at which the relevant legal rule is to be identified."[18] By requiring plaintiffs to point to previous cases that match their factual scenario, while duly disallowing courts to state settled law in any way that is not particularized to the facts of the case before it, the doctrine of qualified immunity has become a catch 22.[19]

116. Perfectly conceptualizing the unworkable nature of and detrimental consequences inherent in the "clearly established law" standard is a recent opinion out of the United States District Court for the District of New Mexico dealing with a police-officer defendant:

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13 *Wilson v. Layne,* 526 U.S. 603, 617 (1999) (emphasis added).

14 *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021).

15 See *Wilson v. Layne,* 526 U.S. 603, 617 (1999).

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

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

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

19 See *Plumhoff v. Rickard*, 572 U.S. 765, 779–80 (2014) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2009)).

> The Supreme Court has signaled to the lower courts that a factually identical or a highly similar factual case is required for the law to be clearly established. Factually identical or highly similar factual cases are not, however, the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way. . . . Thus, when the Supreme Court grounds its clearly established jurisprudence in the language of what a reasonable officer or a "reasonable official" would know yet still requires a highly factually analogous case, it has either lost sight of reasonable officer's experience or it is using that language to mask an intent to create "an absolute shield for law enforcement officers."[20]

117. Because the continued vitality of qualified immunity relies heavily upon the level of generality in which a prior legal rule is stated, legal precedent is articulated with extreme particularity by design; as a result, the qualified immunity analysis is outright dispositive where there is a lack of nearly identical harm in previous cases. As such, the Court's expansion of qualified immunity's reach has been exacted through the definition of clearly established law.[21] It has evolved into a test that primarily focuses on precedent, is designed to find a reason for immunity, and scarcely gives due attention to the Constitution.

The Pearson *Rule and Constitutional Stagnation*

118. The second main reason for qualified immunity's catch 22 is the 2009 Supreme Court decision in *Pearson v. Callahan*, which overruled the mandatory sequencing requirement for the two-part qualified immunity analysis.[22] Mandatory sequencing required courts to answer the two-part analysis in sequential order, with the constitutional question first and the clearly established law question second. By virtue of mandatory sequencing, courts were required to determine whether a plaintiff had alleged a constitutional violation before opining on whether such constitutional rights are clearly established. To better understand the detrimental effects of abandoning this practice, it is necessary to examine the Court's decision just eight years before *Pearson* that established mandatory sequencing — *Saucier v. Katz*.[23] In order to answer "open legal questions"[24] and define what rights are clearly established,

20 *Gotovac v. Trejo*, 495 F. Supp. 3d 1186, 1225 n.15 (D.N.M. 2020), *aff'd*, 20-2143, 2021 WL 4891621 (10th Cir. Oct. 20, 2021) (citations omitted).

21 *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2009) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)); *Plumhoff v. Rickard*, 572 U.S. 765, 779–80(2014).

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

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

24 *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2009).

the Court in *Saucier* fashioned a sequential test that began with analysis of the constitutional question and then examined the clearly established law, explaining that "[i]n the course of determining whether a constitutional right was violated . . . a court might find it necessary to set forth principles *which will become the basis for a holding that a right is clearly established*."[25] Mandatory sequencing, according to the Court, would serve to "advance [the] understanding of the law and to allow officers to avoid the burden of trial . . . ."[26]

119. Despite recognizing the importance of answering the constitutional question in the two-part analysis, the Court in *Pearson*, just eight years after *Saucier* was decided, made it permissible for lower courts to grant qualified immunity without opining on the alleged constitutional violation(s).[27] The *Pearson* Court justified abandoning the *Saucier* procedure by reasoning that mandatory sequencing "departs from the general rule of constitutional avoidance and runs counter to the older, wiser judicial counsel not to pass on questions of constitutionality unless such adjudication is unavoidable."[28] Importantly, however, the Court noted that mandatory sequencing "is often . . . advantageous," and although not required moving forward, it is "often beneficial."[29] And just two years after *Pearson*, the Court made clear that its decision to abandon mandatory sequencing was not a directive for lower courts to only address the clearly established law question, but rather it was a decision to leave "th[e] matter to the discretion of lower courts."[30] This discretionary power handed to the lower courts was simply to determine whether opining on the constitutional question is "worthwhile,"[31] and if it is not, only then should a court skip to the second prong.[32] Since 2009, however, appellate courts have increasingly exercised this discretion not to save the constitutional question for "worthwhile" cases, but rather to bypass the constitutional question entirely and tip the scales further in favor of State officials.[33] Following *Pearson*, for example, courts have routinely disposed of constitutional claims up against qualified immu-

25 *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (emphasis added).

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

27 See generally *Pearson v. Callahan*, 555 U.S. 223 (2009).

28 *Pearson v. Callahan*, 555 U.S. 223, 241 (2009).

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

30 *Camreta v. Greene*, 563 U.S. 692, 707 (2011); see also *Evans v. Skolnik*, 997 F.3d 1060, 1072–73 (9th Cir. 2021) (Berzon, JJ., concurring).

31 E.g., *Berg v. Kelly*, 897 F.3d 99, 106 (2d Cir. 2018) (quoting *Plumhoff v. Rickar*d, 572 U.S. 765, 774 (2014).

32 See *Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

33 Karen M. Blum, *Section 1983 Litigation: Post-Pearson and Post-Iqbal*, 26 TOURO L. REV. 433 (2010); Albert W. Alschuler, *Herring v. United States: A Minnow or A Shark?*, 7 OHIO ST. J. CRIM. L. 463 N.57 (2009); see also *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, JJ., concurring).

nity on the clearly established question: just in the last decade, cases dealing with excessive force by police officers have gone from weighing 56.4 percent in favor of civil rights plaintiffs to 43 percent as a direct result of courts frequently bypassing the constitutional question via their *Pearson* power.[34] The "inexorable result" of this practice, as explained by Judge Willett of the United States Court of Appeals for the Fifth Circuit, "is 'constitutional stagnation' — [that is,] fewer courts establishing law at all, much less *clearly* doing so."[35] Thus, the catch 22 that is qualified immunity proceeds as follows:

> Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because those questions are yet unanswered. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads defendants win, tails plaintiffs lose.[36]

120. Put differently, without courts answering the constitutional question and defining the contours of a constitutional right, the law is necessarily deprived of any explanation that might lend itself to forming the basis of clearly established law for purposes of qualified immunity.

121. In addition to constitutional stagnation, the reality of applying qualified immunity in line with *Pearson* is unworkable in practice for the district courts that bear the brunt of adjudicating § 1983 cases, as explained by the United States District Court for the District of New Mexico in a recent case:

> The appellate courts have little appreciation for how hard it is to do a clearly established prong review first without looking — closely and thoroughly — at whether there is a constitutional right and whether there is a violation. It is difficult to review the facts, rights, and alleged violations in the comparative cases without looking at the facts, rights, and alleged violations on the merits in the case before the Court. *Pearson v. Callahan* sounds like a good idea in theory, but it does not work well in practice. The clearly established prong is a comparison between the case before the Court and previous cases, and *Pearson v. Callahan* suggests that the Court can compare before the Court fully understands what it is comparing. In practice, *Saucier v. Katz* works better.[37]

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34 Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020).

35 *Zadeh v. Robinson*, 902 F.3d 483, 498–99 (5th Cir. 2018) (Willett, JJ., concurring) (quoting Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 12 (2015)).

36 *Zadeh v. Robinson*, 902 F.3d 483, 499 (5th Cir. 2018) (Willett, JJ., concurring).

37 *Gotovac v. Trejo*, 495 F. Supp. 3d 1186, 1222 n.14. (D.N.M. 2020), *aff'd*, 20-2143, 2021 WL

122. All of this begs the question: How can a right reach the highly coveted status of being clearly established when the courts are increasingly bypassing the only opportunity to establish it? A procedure of adjudication that leaves questions of constitutional right, or lack thereof, pending is one that puts citizens at a glaring disadvantage to a powerful government. A test of immunity so dependent upon the state of the law as prescribed by the courts must be equipped with a workable function to actually produce that law — and qualified immunity is not.

III. Qualified Immunity Has No Common Law Origins

123. After finding that "[t]he legislative record g[ave] no clear indication that Congress meant to abolish wholesale common-law immunities" when section 1983 was enacted, the Court held that all executive officers have some sort of qualified immunity.[38] The Court grounded the Doctrine in common law defenses that were in effect in 1871 — when section 1983 became law.[39] However, upon closer examination, the evidence reveals no historical support for the Court's proposition because the common law did not actually reflect such immunities. A review of the general consensus among the courts preceding the enactment of the Civil Rights Act of 1871 divulges the polarity among the modern approach to official immunity and the common law approach to official misconduct.

What the Common Law Really Looked Like: 1786–1871

124. In the years following the American Revolution, the rise of the modern police force resulted in an increase of excessive force cases — which commenced the discussion of State official liability. The overwhelming majority of these cases resolved questions of excessive force by asking whether an officer used more force than necessary to accomplish his lawful objective. If he did, he was held liable for the citizens injuries. The following cases ranging from 1786 to 1871 are illuminating of the fact that there was no discussion of immunities, and that the true state of common law leading up to the passage of the Civil Rights Act of 1871 is not what the Court has insisted on.

125. In 1786, the case of *Gilbert v. Rider* addresses the general school of thought surrounding excessive force cases and how courts dealt with them. After the jury found for the plaintiff, the reporter wrote the following:

4891621 (10th Cir. Oct. 20, 2021).

38 *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

39 *Filarsky v. Delia*, 566 U.S. 377, 384 (2012); *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967)); *Tower v. Glover*, 467 U.S. 914, 921 (1984).

> The defendant supposed he had no right to take him out of the county of Hartford; therefore refused to travel the post-road. Gilbert peremptorily refused to go any other way; his obstinacy obliged the officer to bind him, and compel him to go by force; — *he used no greater force than was necessary*.[40]

126. This evinces officers' beliefs that this was the proper way of defending themselves from liability.

127. In 1854, the case of *Hager v. Danforth* reversed a lower court ruling due to the trial courts improper jury instruction leaving out the "more than necessary force" test. In this case, a sheriff arrived at Mr. Hager's home to serve a subpoena. The sheriff entered the kitchen door, which was open, and upon entry, encountered Mr. Hager's wife. The sheriff attempted to make his way upstairs to serve Mr. Hager when his wife refused and ordered him to leave. At this juncture, the sheriff "choked her and threw her back against the catch of a door, and slightly bruised her." At trial, the jury found for the plaintiff after hearing a jury instruction that the sheriff did not have a legal justification to use force to serve Mr. Hager on the basis of the subpoena. The state supreme court reversed, proclaiming that the jury instruction ought to have said that "the defendant was justified, notwithstanding such resistance, in using all the force necessary to enable him to serve the subpoena, and that *he was only liable for any excess of violence used by him more than was necessary* to overcome the resistance with which he met."[41]

128. In 1854, the case of *State v. Lafferty* shows that the permissible nature of an officer's actions were examined through the lens of necessity. The court framed the case to turn on "whether, after the arrest, [the officer] used unnecessary force and violence in attempting to carry [the arrestee] to a place of custody." In addressing this issue, the court's holding limited officers in their peace-keeping authority, stating that they have "no right to use force where no force is necessary, or reasonably anticipated to be necessary . . . ." The court noted that an officer is only entitled to protection where he "keeps within the line of his duty . . . ." Further, and to the contrary of the Supreme Court's modern-day assessment of public official conduct, the question of whether a public official was liable to a plaintiff in their individual capacity was afforded to the jury — not the judge.[42]

129. Lastly, in 1870 — one year before the Civil Rights Act of 1871 passed — *Golden v. South Carolina*, the South Carolina supreme court upheld a jury instruction utilizing the "more than necessary" test. Rejecting the police officer's proffer of two

40 *Gilbert v. Rider*, 1 Kirby 180 (Conn. Super. Ct. 1786).

41 *Hager v. Danforth*, 20 Barb. 16, 17–18 (N.Y. Sup. Ct. 1854) (emphasis added).

42 *State v. Lafferty*, 5 Del. 491 (Gen. Sess. 1854).

jury instructions that 1) an officer should not be found guilty if he was engaged in the discharge of his duties, and 2) an officer should not be found guilty if he acted in good faith, the court focused on the potential for abuse and the need for limiting officers based on necessity. The court heeded at the outset that "[i]t can scarcely be a question that if the defendant, as an officer of police authorized to make arrests, *found it necessary* to forcibly place his hand upon [the plaintiff], to secure him as a prisoner, this cannot be deemed an assault." The court unambiguously purported that "when force is authorized, *it must not exceed what is necessary*, else the excess will be criminal." In examining the necessities of the case before it, the court stated:

> The force applied must have a due regard to the purpose it is to accomplish. It is allowed, when it may be necessary to overcome, by its interposition, the violence which is opposed to prevent the due exercise of the authority with which the officer is charged. If it proceeds beyond the limit of the necessity which originally permitted its use, it is no justification.[43]

130. All of this is to say that the jurisprudential landscape leading up to 1871 raises a legitimate challenge to the Court's reliance on the common law at the time that the Civil Rights Act of 1871 was passed. In fact, the "more than necessary" test persevered among the court in years following 1871.[44] What is clear from this review is that the common law from this time is not what the Supreme Court has purported it to be; the question of permissible state official misconduct was one for the jury, and it was accepted — nay expected — that the official would face consequences for their use of force in excess of what was necessary.

IV. Qualified Immunity Does Not Serve its Purported Policy Goals

131. "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does," wrote the *Pierson* Court as it crafted the foundation of qualified immunity.[45] Birthing the Doctrine's first policy goal, the Court created qualified immunity based in part on an unfounded assumption that government officials personally satisfy judgments and settlements. However, the

43 *Golden v. South Carolina*, 1 S.C. 292 (1870).

44 E.g., *State v. Dennis*, 43 A. 261, 262 (Del. Gen. Sess. 1895); *Beaverts v. State*, 4 Tex. App. 175, 177 (Tex. App. 1878); *Mesmer v. Cmmw.*, 67 Va. 976, 984–85 (1875); *Mudrock v. Killips*, 28 N.W. 66, 68 (Wis. 1886).

45 *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

available evidence directly undermines this assumption. Beginning with the historical context, in the early days of our republic, it was common practice for courts to determine liability of public officials and for Congress to identify immunities held by such public officials and provide indemnity accordingly.[46] The solution to public official misconduct was to hold public officials accountable in the spirit of deterrence, but then to indemnify them for the costs of litigation and damages.[47] Moreover, it presently remains uncommon for government officials to pay out of their own "lot" when they have violated a citizen's constitutional right(s) under color of law.[48] But this policy objective is just one of the many reasons the Court has come to offer in maintaining qualified immunity.

132. Fifteen years following *Pierson*, the Supreme Court in *Harlow v. Fitzgerald* expanded the policy goals giving life to the Doctrine, listing "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office" as costs that society will incur if not for qualified immunity.[49] Since 1982, though, the Doctrine's two main policy objectives have become 1) the need to protect public officials from the financial burden of judgments and settlements,[50] and 2) the need to shield government officials from the burdens of discovery and other pre-trial processes.[51] The problem is, however, that the Doctrine's presumed ability to meet these goals is unsupported; despite the Court's assertion that it "believe[s] it sufficiently serves this goal,"[52] the available data speaks to the contrary. Indeed, the available data shows that not one of the two aforementioned justifications are achieved via qualified immunity.

Qualified Immunity Does Not Shield Government Officials from the Burdens of Discovery and Other Pre-Trial Processes

133. Regarding the first of the Doctrine's two main policy objectives, if the Supreme Court in *Pearson* pegged the resolution of insubstantial claims at the "earliest pos-

46 See James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U.L. Rev. 1862, 1922, 1925 (2010).

47 See James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U.L. Rev. 1862, 1880 (2010).

48 See James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U.L. Rev. 1862, 1893–1904 (2010).

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

50 See *Forrester v. White*, 484 U.S. 219, 233 (1988).

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

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

sible stage"[53] of litigation to be the "driving force"[54] behind qualified immunity, it is doing a terrible job at achieving this goal. A study conducted in 2017 ("The Study") that looked at 1,183 section 1983 lawsuits in five federal districts over a two-year period revealed that cases where qualified immunity was available to a defendant almost *never* resulted in dismissal at the "earliest possible stage" of litigation. Among these cases, 979 of them made available the defense of qualified immunity, and only 368 defendants raised it — that is, in just 37.6 percent of such cases.[55] But it is when one looks into the courts' adjudication of the affirmative defense in those 368 cases that it becomes clear that the Doctrine does not meet one of its primary objectives.

134. First — and what is certainly antithetical to avoiding pre-trial burdens — the evidence showed that most governmental official defendants asserted this defense at the summary judgment stage — thus, the main burden of litigation, namely discovery, had already begun.[56] Second, The Study shows that the Doctrine's intended goal of disposing of cases at the "earliest possible stage" of litigation is rarely met because rulings on qualified immunity are seldom dispositive — that is, the cases were rarely dismissed as a result of the ruling. Specifically, most courts seemed unwilling to grant qualified immunity prior to discovery because a) plaintiffs met their burden at the motion to dismiss stage or once discovery began, or b) factual disputes precluded summary judgment.[57] A ruling from one of the studied cases out of the United States District Court for the Middle District of Tennessee explained the problem with disposing of qualified immunity cases as the "earliest stage of litigation" — namely the motion to dismiss stage — as follows: "[T]he determination of qualified immunity is usually dependent on the facts of the case, and, at the pleadings stage of the litigation, there is scant factual record available to the court."[58] And the Middle District of Tennessee is not alone; in fact, this sentiment appears common among circuit courts across the country.[59]

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53 *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

54 *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Anderson v. Creighton*, 483 U.S. 635 n.2 (1987)); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009); *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

55 Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 28–29 (2017).

56 Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 29, 31–32 (2017).

57 Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 54–55 (2017).

58 *Turner v. Weikal*, Case No. 03:12-cv-00915 *3 (M.D. Tenn. Jun. 27, 2013) (internal quotation marks and citations omitted).

59 See, e.g., *Wesley v. Campbell*, 779 F.3d 421, 433 (6th Cir. 2015); *Owens v. Baltimore City State's Attorneys Off.*, 767 F.3d 379, 396 (4th Cir. 2014); *Newland v. Reehorst*, 328 Fed. Appx. 788 n.3 (3d Cir. 2009); *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 192–92 (2d Cir. 2006); *St. George v. Pinellas County*, 285 F.3d 1334, 1337, 1338 (11th Cir. 2002); *Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001); *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976).

135. Moreover, based on these 1,183 cases,[60] seven (0.6 percent) were dismissed at the motion to dismiss stage, and twenty-seven (2.6 percent) were disposed of at the summary judgment stage.[61] Thus, if it is ordinary practice for judges to only seriously consider qualified immunity upon development of the facts, yet once the facts are developed, most judges are unwilling to dispose of a case,[62] how effective is qualified immunity in fulfilling one of its main objectives? Further, if the Supreme Court purports qualified immunity to protect "all but the plainly incompetent or those who knowingly violate the law,"[63] unless the overwhelming majority of officials are plainly incompetent, qualified immunity seems to fail tremendously at shielding government officials from the burdens of pretrial and discovery processes.

Qualified Immunity Does Not Shield Government Officials from the Financial Burdens of § 1983 Lawsuits

136. Regarding the second of the Doctrine's two main policy objectives, the Supreme Court's insistence on protecting governmental officials' "lot" fails to recognize the reality of indemnity and how § 1983 claims resolve in practice. In fact, a study that focused on police indemnification practices in cases of official misconduct discovered evidence quite to the contrary of the Court's assertions.[64] The study ("The Indemnification Study") observed eighty-one state and local law enforcement agencies across the Nation from 2006 to 2011 and found that all jurisdictions had a wide variety of indemnification statutes, policies, and procedures when confronting cases of police misconduct.[65] The Indemnification Study importantly found that "law enforcement officers employed by [all] eighty-one jurisdictions . . . almost never contributed to settlements and judgments in police misconduct lawsuits" — a conclusion that necessarily conflicts with one of qualified immunity's primary purposes.[66]

137. Beginning with the forty-four largest jurisdictions in The Indemnification Study, there were 9,225 civil rights cases that resulted in payments to plaintiffs, which was estimated to reach $735,270,772 in settlements and judgments. Police officers involved in these cases contributed to satisfying such settlements and judgements in

60 Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 45 (2017).

61 Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 46 (2017).

62 See *Justiniano v. Walker*, 986 F.3d 11, 27 (1st Cir. 2021).

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

64 Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

65 Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 905 (2014).

66 Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 905, 912 (2014).

.41 percent of those cases and were financially responsible for approximately .02 percent of the total dollars paid. In the thirty-seven smaller jurisdictions, not one of the 8,141 officers employed by departments therein contributed to a settlement or judgment in *any type* of civil claim.[67] Further, in all eighty-one jurisdictions, "no officer paid a nickel to satisfy punitive damages awards in section 1983 cases."[68] And not even could the financial burden of retaining defense counsel save this policy goal because The Indemnification Study found that police officers are nearly always provided an attorney free of charge.[69]

V. "The Doctrine is Called 'Qualified Immunity.' In Real Life it Operates Like Absolute Immunity."

138. These are words uttered by a federal district court judge amidst public outrage across the Nation following the police killing of George Floyd;[70] his sentiment is in good company.[71] In August 2020, Judge Carlton Reeves of the United States District Court for the Southern District of Mississippi reluctantly granted a police officer's motion for summary judgment on qualified immunity grounds and took the opinion as an opportunity to lay out the unjust nature of the judge-made doctrine.[72] Judge Reeves began his opinion with a powerful message, aiming to magnify how the Doctrine's arbitrary procedure has unfair effects on civil rights plaintiffs:

> Clarence Jamison wasn't jaywalking.
>
> He wasn't outside playing with a toy gun.
>
> He didn't look like a "suspicious person."
>
> He wasn't suspected of "selling loose, untaxed cigarettes."
>
> He wasn't suspected of passing a counterfeit $20 bill.
>
> He didn't look like anyone suspected of a crime.
>
> He wasn't mentally ill and in need of help.

67 Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 913, 915 (2014).

68 Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 918 (2014).

69 Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 915–16 (2014).

70 See *Jamison v. McClendon*, 476 F. Supp. 3d 386, 391 (S.D. Miss. 2020).

71 See e.g., *Estate of Taylor v. Salt Lake City*, 16 F.4th 744, 789–90 (10th Cir. 2021); *Salway v. Norris*, 2:20-CV-115-MLC, 2021 WL 2953668, at *2–4 (D. Wyo. July 14, 2021); *Monterroso v. Purdy*, No. 20-CV-255-CAB-BGS, 2020 WL 5576719 n.1 (S.D. Cal. Sept. 17, 2020); *United States v. Weaver*, 975 F.3d 94, 109 (2d Cir. 2020); *Briscoe v. City of Seattle*, 483 F. Supp. 3d 999 (W.D. Wash. Sept. 1, 2020).

72 See generally *Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020).

> He wasn't assisting an autistic patient who had wandered away from a group home.
>
> He wasn't walking home from an after-school job.
>
> He wasn't walking back from a restaurant.
>
> He wasn't hanging out on a college campus.
>
> He wasn't standing outside of his apartment.
>
> He wasn't inside his apartment eating ice cream.
>
> He wasn't sleeping in his bed.
>
> He wasn't sleeping in his car.
>
> He didn't make an "improper lane change."
>
> He didn't have a broken tail light.
>
> He wasn't driving over the speed limit.
>
> He wasn't driving under the speed limit.
>
> No, Clarence Jamison was a Black man driving a Mercedes convertible.[73]

139. After each declaration, Judge Reeves added a footnote clarifying which victim of police misconduct he was referring to.[74] He did this to exhibit how the very heartbeat of qualified immunity — the clearly established law standard — places arbitrary lines on factual scenarios, which in turn precludes plaintiffs like Jamison from vindicating their constitutional rights.

140. Begrudgingly applying qualified immunity to Jamison's case, Judge Reeves nevertheless dedicated a significant portion of his analysis to explain how what began as a mechanism to balance two competing interests — the need to hold officers accountable against the need to protect officers in the discretionary functions of their job — has morphed into a shield from liability no matter how egregious an officer's conduct:[75] "A review of our qualified immunity precedent makes clear that the Court has dispensed with any pretense of balancing competing values."[76] His analysis begged the central question that "[i]f Section 1983 was created to make the courts 'guardians of the people's federal rights,' what kind of guardians have the courts become?"[77] According to Judge Reeves, the clearly established standard

73 *Jamison v. McClendon*, 476 F. Supp. 3d 386, 390 (S.D. Miss. 2020).

74 *Jamison v. McClendon*, 476 F. Supp. 3d 386, nn. 1–19 (S.D. Miss. 2020).

75 *Jamison v. McClendon*, 476 F. Supp. 3d 386, 402 (S.D. Miss. 2020).

76 *Jamison v. McClendon*, 476 F. Supp. 3d 386, 403 (S.D. Miss. 2020).

77 *Jamison v. McClendon*, 476 F. Supp. 3d 386, 404 (S.D. Miss. 2020) (quoting *Haywood v. Drown*, 556 U.S. 729, 735 (2009)).

itself is "a fool's errand" because it is asking "people who love to debate whether something is debatable."[78] Judge Reeves's opinion has been commended by his colleagues for its informative criticism on the evolution of qualified immunity.[79]

141. All of this — the Doctrine's procedural arbitrariness, lack of alleged common law origins, and failure to meet its purported policy goals — is to say that qualified immunity must be revisited, re-evaluated, and replaced. As Judge Guido Calabresi of the United States Circuit Court of Appeals for the Second Circuit made clear, "[t]he noxious effects of our current approach are all too obvious, and are manifested . . . broadly, in the current protests."[80] And after all, "revisiting precedent is particularly appropriate where . . . experience has pointed up the precedent's shortcomings."[81]

VI. A New Standard for Balancing Public Accountability and the Protection of Government Officials

142. To return governmental immunity to a *qualified* form of immunity, I propose the following standard: courts adjudicating claims of alleged government official misconduct should only ask whether the current state of the law *and/or* common standards of human decency would have likely given that official a fair warning that their conduct is to be unconstitutional. This means that courts would no longer engage in a specified two-part analysis like the current qualified immunity procedure, but rather could find that the facts of a case involve a constitutional violation in light of precedent and/or common standards of human decency. Importantly, this standard will depart from two significant parts of the current qualified immunity analysis. First, a "fair warning" threshold will not require courts to find prior cases with nearly identical facts to the case before it, which is the problematic basis of the rigid and unworkable clearly established law standard. Second, the "fair warning" standard will allow courts to consider the subjective intent of a government official to speak to an official's bad faith in the discharge of their duties.

78 *Jamison v. McClendon*, 476 F. Supp. 3d 386, 406 (S.D. Miss. 2020).

79 See *Richardson v. City of New York*, 2020 WL 5754989 n.12 (S.D.N.Y. Aug. 24, 2020); *Peterson v. Martinez*, No.3:19-CV-01447-WHO, 2020 WL 4673953 n.5 (N.D. Cal. Aug. 12, 2020).

80 *United States v. Weaver*, 975 F.3d 94, 110 (2d Cir. 2020) (Calabresi, JJ., concurring).

81 *Pearson v. Callahan*, 555 U.S. 223, 233 (2009).

Defining What Constitutes a "Fair Warning"

143. The first significant departure from the current form of qualified immunity is how the "fair warning" standard will direct courts to focus on precedent: instead of judging an official's conduct *based solely* upon the clearly established law at the time — and then defining that clearly established law at a nearly unattainable level — the "fair warning" standard will a) require courts to focus on the reasonableness of a belief that the state of the law and/or the common standards of human decency would or would not have put an official on notice that their conduct is unconstitutional, and b) allow for more general conclusions to be drawn from settled law.

144. To recap, under the current qualified immunity regime, a right is "clearly established" — and a plaintiff can overcome the affirmative defense — when "'every reasonable official would [have understood] that what he is doing violates that right.'"[82] Under this new standard, however, a "fair warning" that an official's conduct is unconstitutional means that a reasonable official likely would have been on notice that their conduct was likely violating an individual's right(s).

145. The "fair warning" standard would give courts the discretion to analyze the facts of a case in light of settled law, common standards of human decency, or both. An inquiry into settled law would necessarily entail just that — a court surveying controlling precedent as they would in any other case. But *how* a court will focus on controlling precedent is where current qualified immunity and the "fair warning" standard differ: the "fair warning" standard will not require courts to find prior cases with the same factually specific scenarios before it can subject a government official to potential liability. As it stands under current qualified immunity, courts must find existing precedent that 1) is "particularized" to the specific facts of the case before it and 2) has placed that constitutional question "beyond debate."[83] Under this new standard, however, courts will be permitted to engage in more generalized interpretations of the factual scenarios from prior cases to allow for the fate of individuals' constitutional rights to depend on ordinary adjudicatory principles, as opposed to the arbitrary procedure that is qualified immunity. Thus, in this determination, a court's survey of the law will not be a death sentence.

146. An inquiry in the common standards of human decency is one that would allow courts to simply do justice. Courts will be able to make objectively reasonable, common-sense inferences from the general standards of life that, presumably, every individual is aware of. This inquiry will account for a government official's conduct

82 *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

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

that is inherently, and obviously, "antithetical to human dignity,"[84] which necessarily means that there need not be prior caselaw on point for a court to deny a defendant immunity. This standard is one of custom, not law, and there should be no fear that such a standard is unworkable or improper because the Supreme Court is no stranger to using the customs of our country and its people to guide legal rules for government officials. For example, in Fourth Amendment jurisprudence, the Court created the "knock and talk" exception to the warrant requirement, which allows officers to approach a home for the purpose of making contact with an occupant without a warrant.[85] Considering an officer must enter the more intimate parts of one's home to execute this attempt, the Court said that the officers, like any other citizen, hold an implied license "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[86] In establishing this rule, the Court reasoned that "'[a] license may be implied from the habits of the country,'" and that "complying with the terms of that traditional invitation *does not require fine-grained legal knowledge* . . . ."[87] Thus, the requirement that an official not violate common standards of human decency is one that will account for those violations that do not require fine-grained legal knowledge, but that nevertheless occurred. This part of the analysis will serve as a catch-all for those novel cases that exhibit blatant breaches of human decency — something that the doctrine of qualified immunity fails miserably at.

147. Further, and on a procedural note, courts will decide if a government official should receive immunity by determining the plausibleness of an official's belief that they did not have a fair warning that their conduct was unconstitutional considering the law and/or common standards of human decency known to us all. A government official's claim of immunity would *not* be plausible, for example, where a court could reasonably infer from the law and/or common standards of human decency that a reasonable official likely had a fair warning that their conduct was unconstitutional. The Supreme Court has defined "plausible" as it relates to whether a plaintiff's claim is sufficient to overcome a defendant's motion to dismiss as one where the "factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Considering that immunities from liability are affirmative defenses, it is safe to assume a government official will assert such a defense at the motion to dismiss stage, and therefore, it seems appropriate to borrow the "plausibility" rule for this new standard. Where it would be plausible that an official likely had a fair warning of the unconstitutionality of

84 See *Hope v. Pelzer*, 536 U.S. 730, 745 (2002).

85 See generally *Florida v. Jardines*, 569 U.S. 1 (2013)

86 *Florida v. Jardines*, 569 U.S. 1, 8 (2013).

87 *Florida v. Jardines*, 569 U.S. 1, 8 (2013) (emphasis added) (quoting *McKee v. Gratz*, 260 U.S. 127, 136 (1922)).

their conduct given the settled law and common standards of human decency, it is proper for that official to anticipate the consequences of their misconduct.[88]

Subjective Intent of the Officer.

148. The next significant departure from the current form of qualified immunity is returning to courts considering the subjective intent of a government official to determine the constitutionality of their actions. The Supreme Court initially rid qualified immunity of subjective inquiries in *Harlow* in 1982 and has been unwavering in its commitment against probes into the subjective intent of government officials ever since. However, the *Harlow* Court held that subjective-intent evidence was inadmissible because inquiries into the subjective intent of a government official prevented qualified immunity from doing its principal job of disposing of "insubstantial claims" before trial[89] — a policy goal that this paper has debunked. The Court explained that "[j]udicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues," which "can be peculiarly disruptive of effective government."[90] But now — exactly forty years after *Harlow* was decided — we are faced with evidence that qualified immunity does not achieve its policy goals and, further, that the defense weighs unjustly in favor of protecting government officials. Because "[r]evisiting precedent is particularly appropriate where . . . a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings,"[91] it appears especially appropriate to reconsider the Court's decision to ignore the subjective intent of a government official.

149. A claim of immunity from liability should fail through a showing of bad faith on the part of a government official. A person using their office to violate a citizen's Constitutional right(s) due to personal judgment or incompetence cannot be said to be reasonable — and it is, and should be, that simple.

VII. Conclusion

150. There is nothing "qualified" about the doctrine of qualified immunity. It is rare that a judge-made doctrine becomes commonly spoken of among laypeople,

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

89 *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).

90 *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982).

91 *Pearson v. Callahan*, 555 U.S. 223, 233 (2009).

yet qualified immunity has taken center stage in the fight against police brutality.[92] The American people want public accountability; they have grown tired of and angry with the law's lack of give for common standards of human decency. Qualified immunity stands as a barrier to the lawfulness of public official conduct, public accountability, and, ultimately, overall trust in the United States government's ability to care for its citizens. The Doctrine's jurisprudence has only proven to the very court that formed it that qualified immunity no longer has a place in a fair and civilized society.

151. It is imperative that the doctrine of qualified immunity face judgment and be left in the past as no more than a steppingstone to a more equitable standard for adjudicating constitutional violations. Our constitutional rights are the fabric of this Nation; the freedom we relinquish is premised on an understanding that our government will do right by us. When an American citizen pursues redress of their grievances, a court of law should make every effort to do just that. "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen."[93] Public officials are citizens too, and while there are some concerns weighing in favor of certain immunities, none of those concerns outweigh the demands of our Constitution in protecting citizens from our powerful government.

92 See generally April Rodriguez, *Lower Courts Agree — It's Time to End Qualified Immunity*, AM. C.L UNION (Sep. 10, 2020); Amir H. Ali & Emily Clark, *Qualified Immunity*: *Explained*, THE APPEAL (June 20, 2019); Nathaniel Sobel, *What Is Qualified Immunity, and What Does It Have to Do With Police Reform?*, LAW FARE (Jun. 6, 2020).

93 *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandies, J., dissenting).