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NOTES

THE BATTLE OVER QUALIFIED IMMUNITY

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I. INTRODUCTION

What happens when a police officer violates the U.S. Constitution or federal rights by using excessive force? In 1871, Congress passed the Ku Klux Klan Act, also known as the Civil Rights Act. Section 1 of the Civil Rights Act provides a civil cause of action against state officials who violate an individual's constitutional or federal rights.[1] This section is codified in Title 42, § 1983 of the United States Code.[2] Scholars consider § 1983 to be one of the most important civil rights statutes in American law because it opened individuals acting "under the color of state law" to be civilly liable for acts which violate a person's rights.[3] Section 1983 provides in relevant part:

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1. Zherka v. Amicone, 634 F.3d 642, 645 (2d Cir. 2011) (internal citations omitted).
2. 17 Stat. 13.
3. MARTIN A. SCHWARTZ, SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION 3 (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 3d ed. 2006).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ….[4]

The United States Supreme Court held "[t]he purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."[5] To prevail on a § 1983 claim, the plaintiff must establish two elements: "First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law."[6]

State police officers, as persons acting under the color of state law, can be held liable to individuals for any unconstitutional acts under § 1983. Officers may insulate themselves from suit by raising various defenses, including qualified immunity. Qualified immunity is a judge-made doctrine that provides "[p]ublic officials … immun[ity] from suit under 42 U.S.C. § 1983 unless they have 'violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.'"[7] The Court understands this to be an *exacting standard* but finds that it provides public officials with "breathing room to make reasonable but mistaken judgments."[8] In this sense, qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law."[9] Critics of qualified immunity believe that the recent applications of this defense prevent even severe violations of individual civil rights from being redressed and fail to hold officials responsible for their actions. The United States Supreme Court recently denied Writs of Certiorari in two cases involving excessive force claims in which the central dispute involved the qualified immunity

4. 42 U.S.C. § 1983 (2012).

5. Wyatt v. Cole, 504 U.S. 158, 161 (1992) (citing Cary v. Piphus, 435 U.S. 247, 254-57 (1978)).

6. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

7. City and County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015) (citing Plumhoff v. Rickard, 572 U.S. 765, 778 (2014)).

8. *Id.* (citing Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).

9. *Ashcroft*, 563 U.S. at 743 (citing Malley v. Briggs, 475 U.S. 335, 341 (1986)).

defense[10]: *Baxter v. Bracey*[11] and *Corbitt v. Vickers*.[12] While the Court seems hesitant to reconsider the doctrine, one scholar notes that there are "cracks in qualified immunity's armor."[13]

These cracks have become more apparent after the death of George Floyd and other victims of excessive police force, setting off an uproar over police brutality claims.[14] These claims have shown that "qualified immunity has emerged as a flash point in the protests spurred by Mr. Floyd's killing and galvanized calls for police reform."[15] On June 15, 2020, the United States Supreme Court denied Writs of Certiorari in two cases challenging the qualified immunity doctrine. Nevertheless, despite the lack of judicial resolution, several legislative bodies have taken it upon themselves to address qualified immunity. United States House of Representatives Ayanna Pressley (D-MA) and Justin Amash (L-MI) introduced the Ending Qualified Immunity Act, which seeks to abolish the qualified immunity defense.[16] Also, the Colorado Legislature passed, and the Governor signed into law, an act which both provides Coloradans with a civil cause of action against officers violating individual rights under the Colorado Constitution and removed the qualified immunity defense.[17] The spotlight on police practices across the United States has brought the qualified immunity doctrine into the forefront of discussions regarding changes to policing across the United States.

This Note examines the qualified immunity doctrine throughout

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10. Baxter v. Bracey, 751 Fed. Appx. 869 (6th Cir. 2018), *cert. denied*, 140 S. Ct. 1862, 1862 (2020) & Corbitt v. Vickers, 929 F.3d 1304 (11th Cir. 2019), *cert. denied*, 207 L.Ed. 2d 1051, 1051 (2020).

11. Baxter v. Bracey, 751 Fed. Appx. 869 (6th Cir. 2018).

12. Corbitt v. Vickers, 929 F.3d 1304 (11th Cir. 2019).

13. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798 (2019).

14. Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES, June 23, 2020, https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html.

15. *Id.*

16. *Amash, Pressley Introduce Bipartisan Legislation to End Qualified Immunity*, (June 4, 2020), https://amash.house.gov/media/press-releases/amash-pressley-introduce-bipartisan-legislation-end-qualified-immunity & *Ending Qualified Immunity Act*, https://pressley.house.gov/sites/pressley.house.gov/files/Ending%20Qualified%20Immunity%20Act%20One%20Pager.pdf.

17. Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES, June 21, 2020, https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/#61803817378a.

history and its current form. This Note also presents the views of this doctrine's critics and supporters, describes proposed changes, and discusses recent challenges to the doctrine. Part II of this Note reviews the history of the doctrine, its current status, and the split of authorities in the Circuit Courts of Appeal in applying the clearly established prong. Part III provides justifications for the doctrine to remain in its current form. Part IV responds to those justifications and considers the recent challenges made to the Supreme Court. Part V discusses two recent Supreme Court decisions regarding qualified immunity in response to state police excessive force claims. Part VI considers proposed alternatives to the current doctrine set forth in an amicus brief to the Court. Finally, Part VII describes the legislative efforts to challenge qualified immunity in the United States House of Representatives and Colorado's Legislature. This Note aims to provide an analysis of the issues with the current form of qualified immunity in claims of excessive police force and to urge the Supreme Court of the United States to consider alternatives to the present qualified immunity doctrine.

II. QUALIFIED IMMUNITY DOCTRINE

Qualified immunity began as a good faith standard and evolved to require a showing of a constitutional violation that was clearly established at the time. The Supreme Court's shift from good faith and lack of clarity in its clearly established prong requirement has led to a split in the federal Circuit Courts of Appeal decisions that remain unresolved.

a. Good Faith Standard for Immunity

Qualified immunity does not appear in the text of § 1983; instead, it is a judge-made doctrine. In 1967, the Court in *Pierson v. Ray*[18] considered whether "[police officers] could … assert the defense of good faith and probable cause to an action under § 1983 for unconstitutional arrest."[19] The Court noted that "common law has never granted police officers an absolute and unqualified immunity" for their actions.[20] However, the Court found that § 1983 "'should be read against the background of tort liability that makes a man responsible for the natural consequence of his

18. Pierson v. Ray, 386 U.S. 547, 555 (1967).
19. *Id.* at 551-52.
20. *Id.* at 555.

actions' … [including] the defense of good faith and probable cause."[21] Qualified immunity requires the jury to find "that the officers reasonably believed in good faith that the arrest was constitutional," but it does not require "a police officer … [to] predict[] the future course of constitutional law.[22] The Court did not decide whether the officers' actions were in good faith; instead, the Court remanded the case noting, "if the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional."[23]

In 1974, the Court again addressed the good faith standard for immunity in *Scheuer v. Rhodes*.[24] The plaintiffs were the personal representatives of the estates of three students who were killed by Ohio National Guard members while responding to political protests at Kent State University.[25] The plaintiffs claimed the public officials "'intentionally, recklessly, willfully and wantonly' caused an unnecessary deployment of the Ohio National Guard … [and] ordered the Guard members to perform allegedly illegal actions which resulted in the death of the plaintiffs' decedents."[26] The Court defined the good faith immunity doctrine as "the existence of reasonable grounds for the belief formed at the time and in light of all ~~the~~ circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."[27] The Court held that the suit's dismissal based on the immunity defense was improper and remanded for further proceedings.[28] The application of the good faith standard for immunity appears to be uniform with the *Pierson* Court's decision.

b. Development of Current Qualified Immunity Doctrine

In 1982, the United States Supreme Court shifted from the good faith standard for immunity to the current qualified immunity doctrine in

21. *Id.* at 556-57 (citing Monroe v. Pape, 365 U.S. 167, 187 (1961)).
22. *Id.* at 557.
23. *Id.*
24. Scheuer v. Rhodes, 416 U.S. 232 (1974).
25. *Id.* at 234.
26. *Id.* at 235.
27. *Id.* at 247-48.
28. *Id.* at 249-50.

Harlow v. Fitzgerald.[29] In *Harlow*, the Court considered "the scope of the immunity available to the senior aides and advisers of the President of the United States."[30] A. Ernest Fitzgerald alleged that Bryce Harlow and Alexander Butterfield, as senior aides to President Richard M. Nixon, participated in a conspiracy to violate his constitutional and statutory rights.[31] Harlow and Butterfield first argued they were entitled to absolute immunity as senior members of the White House staff.[32] The Court rejected their argument.[33] This rejection did not mean victory for Fitzgerald because the Court found that even if Harlow and Butterfield were not entitled to absolute immunity, they were entitled to qualified immunity.[34] Harlow and Butterfield made arguments for reconsidering the good faith standard for immunity to expedite the dismissal of frivolous suits against public officials.[35] The Court agreed with Harlow and Butterfield.[36] In support of the change to qualified immunity, the Court noted qualified immunity would "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."[37]

The Court articulated the standard as follows: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established* statutory or constitutional rights of which a *reasonable person* would have known."[38] The Court did not define *clearly established*, but in a footnote stated, the law should be "evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."[39] In dicta, the Court noted

> [i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law

29. Harlow v. Fitzgerald, 457 U.S. 800 (1982).
30. *Id.* at 802.
31. *Id.*
32. *Id.* at 808.
33. *Id.* at 810.
34. *Id.* at 813.
35. *Id.* at 814-15.
36. *Id.* at 813.
37. *Id.* at 814-15, 818.
38. *Id.* (emphasis added).
39. *Harlow*, 457 U.S. at 818 n.32 (1982) (citing Procunier v. Navarette, 434 U.S. 555, 565 (1978)).

> forbade conduct not previously identified as unlawful …. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.[40]

The Court vacated the judgment and remanded the case for further consideration based on its new standard for qualified immunity.[41]

In 2001, the Court in *Saucier v. Katz*[42] provided a specific order for the two-part qualified immunity test under *Harlow*.[43] The *Saucier* Court held, "the first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered."[44] The Court reasoned that this order was proper because "[i]n the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established."[45] Justice Kennedy, for the majority, appears to be concerned with the lack of clearly established precedent, which could prevent a plaintiff's recovery from a constitutional violation under § 1983. However, the strict order of the two-prong test did not last long.

Eight years later, in 2009, the Court decided *Pearson v. Callahan,*[46] which held that the lower courts did not have to rigidly apply the two-part test.[47] Instead, the Court held, "[the lower courts] should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[48] Thus, lower courts can skip over the arguably more difficult constitutional violation prong and consider whether the action violated a clearly established law at the time of the violation. One consequence of this decision is that lower courts no longer create precedent for different factual situations regarding unconstitutional actions, which will lead a court to find the act was clearly

40. *Id.* at 818-19.
41. *Id.* at 819-20.
42. Saucier v. Katz, 533 U.S. 194, 200 (2001).
43. *Id.*
44. *Id.*
45. *Id.* at 201.
46. Pearson v. Callahan, 555 U.S. 223, 236 (2009).
47. *Id.*
48. *Id.*

established as unconstitutional. The counterargument is in judicial efficiency: skipping the constitutional questions allows lower courts to more efficiently resolve suits against public officials as a desired outcome in the *Harlow v. Fitzgerald* decision.

c. Circuit Split on "Clearly Established" Violations of the Law

The lower courts have struggled to apply the clearly established prong of the *Harlow* test, causing a variety of interpretations and splits of decisions amongst the federal courts. The Supreme Court has attempted to provide some guidance, but the circuit split remains. First, the Court warned lower courts "not to define clearly established law at a high level of generality."[49] Second, an officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable officer in the defendant's shoes would have understood that he was violating it.[50] Third, the Court notes a clearly established right does not "require a case directly on point … but existing precedent must have placed the statutory or constitutional question beyond debate."[51] Thus, "the focus is on whether the officer had fair notice that her conduct was unlawful [and] reasonableness is judged against the backdrop of the law at the time of the conduct."[52]

Three approaches to the clearly established prong have emerged among the Circuit Courts of Appeal. The first and strictest approach requires plaintiffs to show the cases relied upon to demonstrate that the act was clearly established are extremely factually similar. Second is a sliding scale approach, meaning the more egregious the act, the less factually similar precedent must be to show the act was clearly established. Third, and the most common, focuses on the action and whether it was *sufficiently clear* to put officers on notice of a violation of the person's rights. This approach allows supporting precedent as long as it is sufficiently similar to the case presented to the court.

The Fifth Circuit Court of Appeals takes the strictest approach to the clearly established requirement. This circuit finds "[c]ases that are 'too factually distinct to speak clearly to the specific circumstances here' are

49. Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) (citing Brosseau v. Haugen, 543 U.S. 194, 199 (2004)).

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

51. *Ashcroft*, 563 U.S. at 741.

52. Brosseau v. Haugen, 543 U.S. 194, 198 (2004).

not enough to deny qualified immunity."[53] In *Cleveland v. Bell,*[54] the Fifth Circuit distinguished Mr. Cleveland's claim of a constitutional violation in the state's refusal of his request for medical attention while in prison from an earlier Fifth Circuit case, *Fielder v. Bosshard*.[55] The personal representative of Mr. Cleveland's estate claimed violations under the Fourteenth Amendment for deliberate indifference to his medical needs while in prison.[56] In *Fielder*, the personal representative of Mr. Fielder's estate claimed he was subjected to cruel and unusual punishment while incarcerated because of the officer's failure to help him through his delirium.[57] To distinguish the two cases, the Fifth Circuit noted that Cleveland's dizziness symptoms were not the same as Fielder's hallucinations, erratic behavior, and shaking.[58] They also noted that Mr. Cleveland received medical attention two days before his death, while Fielder only sought medical care ten hours after his symptoms began.[59] The Fifth Circuit eventually held "*Fielder*'s very different facts could not put Nurse Bell on 'fair notice' that she was acting unconstitutionally."[60] Thus, they upheld the officer's qualified immunity from suit.[61] The thin line between the type of symptoms a prisoner is seeking aid for and the timeframe when medical attention was last provided, presents obstacles to all plaintiffs in the Fifth Circuit in obtaining relief under § 1983. The Fifth Circuit is an outlier in its approach to the clearly established prong.

Another approach to the clearly established prong is found in the Tenth Circuit Court of Appeals, which has "adopted a sliding scale [approach] to determine when law is clearly established."[62] In applying this sliding scale approach, the Tenth Circuit finds "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation."[63] The Seventh Circuit Court of Appeals also adopts a sliding

53. Cleveland v. Bell, 938 F.3d 672, 677 (5th Cir. 2019) (quoting Mullenix v. Luna, 577 U.S. 7, 18 (2015)).
54. *Id.*
55. Fielder v. Bosshard, 590 F.2d 105 (5th Cir. 1979).
56. *Cleveland*, 938 F.3d at 675.
57. *Fielder*, 590 F.2d at 107.
58. *Cleveland*, 938 F.3d at 677 (quoting *Fielder*, 590 F.2d at 108).
59. *Id.*
60. *Id.*
61. *Id.*
62. A.M. *ex rel.* F.M. v. Holmes, 830 F.3d 1123, 1135 (10th Cir. 2016) (quoting Pierce v. Gilchrist, 359 F.3d 1279, 1298 (10th Cir. 2004).
63. *Id.* at 1135-36 (quoting *Pierce*, 359 F.3d at 1298).

scale approach. The Seventh Circuit provides that to show an act is clearly established to violate a protected right, plaintiffs must "show either a reasonably analogous case that has both articulated the right at issue and applied it to a factual circumstance similar to the one at hand or that the violation was so obvious that a reasonable person necessarily would have recognized it as a violation of the law."[64] It makes clear that "[t]his requirement does not mean [that a plaintiff] ha[s] to find a case 'on all fours' with the facts."[65]

The Second Circuit Court of Appeals finds an official's conduct to be clearly established when "its 'contours … are sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'"[66] It notes that "'officials can still be on notice that their conduct violates [clearly] established law even in novel factual circumstances' … and here can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances.'"[67] If there is a lack of precedent to demonstrate that the act is clearly established, the court may "also consider whether 'the right was clearly established based on general constitutional principles or a consensus of persuasive authority.'"[68] It too notes that "absence of controlling authority holding identical conduct unlawful does not guarantee qualified immunity."[69] The Fourth Circuit further explains that "'officials can still be on notice that their conduct violates established law even in novel factual circumstances … [and] need not have 'fundamentally similar' or even 'materially similar' facts."[70] Finally, the Ninth Circuit Court of Appeals also finds that they "need not identify a prior identical action to conclude that the right is clearly established."[71] The Ninth Circuit found that the high standards of the qualified immunity doctrine "is intended to give officers breathing

64. Leiser v. Kloth, 933 F.3d 696, 701-02 (7th Cir. 2019) (quoting Howell v. Smith, 853 F.3d 892, 897 (7th Cir. 2017)) (citations omitted).

65. *Id.*

66. Simon v. City of New York, 893 F.3d 83, 92 (2d Cir. 2018) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

67. *Id.*

68. Thompson v. Virginia, 878 F.3d 89, 98 (quoting Booker v. S.C. Dep't of Corrections, 855 F.3d 533, 543 (4th Cir. 2017)).

69. *Thompson*, 878 F.3d at 98 (quoting Owens ex rel. Owens v. Lott, 372 F.3d 267, 279 (4th Cir. 2004)).

70. *Thompson*, 878 F.3d at 98 (quoting Hope v. Pelzer, 536 U.S. 730, 739 (2002)).

71. Ioane v. Hodges, 939 F.3d 945, 956 (9th Cir. 2019) (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

room 'to make reasonable but mistaken judgments about open legal questions …' '[i]t protects all but the plainly incompetent or those who knowingly violate the law.'"[72]

The Third Circuit provides an example of how this sufficiently clear approach is analyzed. The Third Circuit "'do[es] not require a case directly on point' … [r]ather, '[t]o be clearly established,' a right need only have 'a sufficiently clear foundation in then-existing precedent.'"[73] It "do[es] not require a case 'directly mirror[ing] the facts' at hand, so long as 'there are sufficiently analogous cases that should have placed a reasonable official … on notice that his actions were unlawful.'"[74] The court's application of these principals is seen in *Kane v. Barger*.[75] In this case, Brandy Kane sued Officer Shawn Barger for violations of "her Fourteenth Amendment right to bodily integrity during his investigation into whether she was the victim of a sexual assault."[76] Officer Barger took Kane to a back room at the police station to photograph her body using his cellphone.[77] The court found a clearly established law that Officer Barger violated in *Doe v. Luzerne County*.[78] In *Doe*, a male police officer videotaped female officers partially unclothed and captured images of "intimate bodily areas of vulnerable females."[79] The *Kane* court held "[w]hile *Doe* did not involve the specific right to bodily integrity… [it is] [w]ithout doubt, Barger's 'specific conduct' is 'sufficiently factually similar' to our decision in *Doe* to have placed him on notice that his conduct was unconstitutional."[80]

III. JUSTIFICATIONS FOR QUALIFIED IMMUNITY

The Court has recognized that the qualified immunity doctrine is not without its limitations. Advocates for the doctrine rely mainly on the policy concerns mentioned in *Harlow v. Fitzgerald*, *stare decisis*, and the history of the doctrine itself.

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72. *Ioane*, 939 F.3d at 956 (citing Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011)).
73. Kane v. Barger, 902 F.3d 185, 194 (3d Cir. 2018).
74. *Id.* at 195 (citing *L.R.* v. Sch. Dist. of Phila., 836 F.3d 235, 249 (3rd Cir. 2016)).
75. *Id.* at 195-96.
76. *Id.* at 191.
77. *Id.* at 189.
78. Doe v. Luzerne County, 660 F.3d 169 (3d Cir. 2011).
79. *Kane*, 902 F.3d at 196.
80. *Id.*

a. Policy Concerns Expressed in Harlow

The Court in *Harlow v. Fitzgerald* considered whether aides to high executive officials were entitled to absolute or only limited qualified immunity.[81] The Court held they were only entitled to qualified immunity and expressed concern about insubstantial suits against public officials proceeding to trial.[82] The *Harlow* Court saw that insubstantial suits against government officials had severe societal costs, including "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."[83] Also, the Court noted "there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[84] Thus, the concerns in *Harlow* revolve around deterring necessary action of public officials and the distraction frivolous litigation may cause from performing their duties.

The good faith standard for immunity required the Court to consider the officer's subjective intent—whether the officer knew or had malicious intent—which consistently presented a question of fact that would prevent summary judgment under Rule 56 of Federal Rules of Civil Procedure.[85] The Court noted that subjective inquiries would allow potentially frivolous litigation to continue, while further impacting the official from being able to perform his or her duties.[86] Also, this would subject the official to discovery requests seeking the subjective intent of the official, thus prolonging the expense and time of litigation.[87] Therefore, the Court did not include a subjective prong in its articulation of the qualified immunity doctrine.[88] The *Harlow* Court was extremely concerned with distracting public officials with suits and limiting their actions while executing their duties, which may be necessary. The distraction of litigation on public officials continues to be expressed as a ground to keep the doctrine undisturbed.

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81. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).
82. *Id.*
83. *Id.* at 814.
84. *Harlow*, 457 U.S. at 814 (citing Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert denied*, 339 U.S. 949 (1950)).
85. *Harlow*, 457 U.S. at 815-16.
86. *Id.*
87. *Id.* at 816-17.
88. *Id.* at 818.

b. Stare Decisis

Another defense of qualified immunity rests on overcoming *stare decisis* of the Court's past decisions, especially when the prior decision involves statutory interpretation.[89] The Court in *Kimble v. Marvel Entertainment, LLC*[90] noted:

> Indeed, we apply statutory *stare decisis* even when a decision has announced a "judicially created doctrine" designed to implement a federal statute. All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects.[91]

Applying this principle to the judicially created qualified immunity doctrine, the Court, considering *stare decisis* principles, is hard-pressed to make further changes to the doctrine. To overcome this great deference to past decisions, special justification beyond mere wrongness must exist.[92]

In his recent article, *Is Qualified Immunity Unlawful?,* Professor William Baude argues against the application of *stare decisis* due to the Court's irregular application in qualified immunity jurisprudence.[93] In response, Professors Aaron L. Nielson and Christopher J. Walker note that Baude is correct that the Court has varied in its application, but they believe he puts too much weight on this consideration.[94] In their view, "[while] procedural rules for qualified immunity have shifted … we are not persuaded that this undermines stare decisis."[95] To make their point, they consider the Court's procedural shift in *Pearson v. Callahan*, eliminating a mandatory order to the qualified immunity test.[96] They note, "the Court [has] stressed that procedural rules can be changed more readily

89. Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1856 (2018).

90. Kimble v. Marvel Entertainment, LLC, 576 U.S. 446, 456 (2015) (internal citations omitted).

91. *Id.*

92. Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014) (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)).

93. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018).

94. Nielson & Walker, *supra* note 88 at 1853.

95. *Id.* at 1860.

96. *Id.* at 1859.

than substantive rules," as seen in *Harlow*'s change to the qualified immunity doctrine.[97] Furthermore, this procedural shift does not show a special justification to overrule the precedent on this doctrine. Thus, failure to produce any special justification would caution the Court to keep the doctrine as is.

Baude also argues that the Court's statutory interpretation can include consideration of constitutional concerns.[98] Thus, when qualified immunity is not considered to be interpreting a statute and is rather seen as interpreting the Constitution, it lessens the impact of *stare decisis* and would allow the Court to stray from precedent. Professors Nielson and Walker find this to be a weak argument because "even if the Court does think there is a constitutional undertone to qualified immunity, Baude does not demonstrate that such an undertone would be erroneous, at least in all applications."[99] In sum, they note "[t]he Court has concluded that Congress incorporated qualified immunity in Section 1983 … [a]nd based on that conclusion, the Court has done its best to see that Congress's will is respected."[100] *Stare decisis* is strong medicine and remains a foundation for supporters of the current doctrine to remain unchanged.

c. History

Professors Nielson and Walker address five historical considerations that support the qualified immunity doctrine. First, they note that the mere fact that § 1983 does not mention qualified immunity is not dispositive.[101] Other defenses the Court recognizes are not included in their statutory schemes and remain available despite their absence from the text of the statute itself.[102] Second, they note that from the beginning of the United States, "American law has sometimes shied away from holding government officials liable for reasonable mistakes."[103] They point to the Court's precedent in finding no violation of the Fourth Amendment where the officer makes a reasonable mistake.[104] Third, they note, "nineteenth

97. *Id.* at 1860.
98. *Id.*
99. *Id.* at 1861.
100. *Id.* at 1862.
101. *Id.* at 1864.
102. *Id.*
103. *Id.*
104. *See* Hein v. North Carolina, 574 U.S. 54 (2014).

century authority supports a good-faith defense."[105] Citing to Cooley's *Treatise on Torts*, which states in part "if he have reasonable grounds for his belief, and act thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted."[106] Fourth, the Supreme Court has "criticized efforts to punish at least certain types of officers for reasonable mistakes."[107] The Court's 1849 decision in *Wilkes v. Dinsman*[108] demonstrates one such criticism. The Court in *Wilkes* found an officer who has "[been] intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved … that he exercised the power … in a manner not confided to him."[109] The Court also notes, "it is not enough to show he committed an error in judgment, but it must have been a malicious and wilful error."[110] Thus, reasonable mistakes of officers need not be punished if only an error in judgment.[111] Fifth, the Court has "recognized something akin to *Harlow*'s objective standard" in 1896.[112] While this was post-enactment of § 1983, the Court cited cases from before 1871 to support its holding.[113]

The history of official immunity tends to support the good faith standard over the objective standard provided in *Harlow v. Fitzgerald.* Notwithstanding the more persuasive argument, Professors Nielson and Walker contend that there is "something at least akin to an objective standard [which] had some purchase in the nineteenth century. And …, perhaps not much would change if the standard were subjective."[114] While the historical argument alone is not the most robust defense, combined with the other considerations, it remains adequate to stall the Court from uprooting its past decisions.

IV. THE ARGUMENT AGAINST QUALIFIED IMMUNITY

Scholars who oppose the current qualified immunity doctrine focus

105. Nielson & Walker, *supra* note 88, at 1866.
106. 1 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 326 (John Lewis ed., 3d. ed. 1906) (quoting Ball v. Rawles, 28 P. 937 (Cal. 1892)).
107. Nielson & Walker, *supra* note 89, at 1866.
108. Wilkes v. Dinsman, 48 U.S. 89, 130-31 (1849).
109. *Id.*
110. *Id* at 131.
111. *Id.*
112. Nielson & Walker, *supra* note 88, at 1867.
113. *Id.* at 1868.
114. *Id.*

their criticisms on the *Harlow* Court's justifications by advancing normative and other policy arguments. Recently their arguments have caught the attention of some Supreme Court Justices, including Justice Sonia Sotomayor. Notably, critics of the doctrine often do not rely on *stare decisis* or historical impact of the doctrine in their challenges to the Supreme Court since those arguments lean in favor of conservative judicial activism. Instead, critics will advance normative or policy arguments when seeking a reconsideration of the doctrine and its application.

a. Response to the Policy Arguments in Harlow

Legal scholar and law professor Joanna C. Schwartz has written several articles criticizing the qualified immunity doctrine. In Professor Schwartz's article *The Case Against Qualified Immunity*, she urges the Supreme Court to reconsider its qualified immunity doctrine.[115] One criticism of the doctrine is that it utterly fails to promote its intended policy goals.[116] The policy goals the Court and supporters of the current doctrine include "shield law enforcement officers from the financial burdens of being sued … shield government officials from burdens of discovery and trial … [and concerns of] the threat of being sued … in job application decisions or officers' decisions on the street."[117] Professor Schwartz vehemently argues that the doctrine serves none of the policy goals.[118]

First, Professor Schwartz notes that "[a] combination of state laws, local policies, and litigation dynamics ensures that officers are virtually never required to pay anything toward settlements and judgments entered against them."[119] To support this contention, she "gathered information from eighty-one state and local law enforcement agencies … regarding the total number of damages actions naming an individual officer that resulted in a payment to a plaintiff over a six-year period."[120] Professor Schwartz "found that officers employed by these eighty-one jurisdictions virtually never contributed to settlements and judgments during the six-year study

115. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1799-1800 (2018).
116. *Id.* at 1803.
117. *Id.* at 1804.
118. *Id.*
119. *Id* at 1805.
120. *Id.* at 1805 (citing Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 902-12 (2014)).

period."[121] Further, she notes that the municipality, municipal insurer, or the union provides the accused officers with counsel.[122] With the availability of these protections, Professor Schwartz finds it "does not—and need not—serve this policy goal."[123] Thus, the question becomes, if police officers are mostly insulated from the costs of litigation and of judgments entered against them through institutional protections, why is it necessary for the clearly established prong to be excessively difficult to overcome?

Second, Professor Schwartz finds that if the purpose of qualified immunity is to dispose of inadequate claims before discovery, then "the doctrine is utterly miserable at achieving its goal."[124] In support of her conclusion, she notes that "just seven of these 1183 cases [included in her study] (0.6%) were dismissed on qualified immunity grounds before discovery."[125] Professor Schwartz notes that

> courts should reject qualified immunity arguments in motions to dismiss so long as the plaintiff has alleged a plausible claim for relief, and should reject qualified immunity arguments in summary judgment motions so long as the plaintiff has created a factual dispute about whether the officer violated her clearly established rights.[126]

Thus, "all available evidence indicates that qualified immunity does little to shield government officials from discovery and trial in filed cases, and that the doctrine is both ill-suited and unnecessary to play its intended role."[127] Again, this would tend to suggest that the *Harlow* Court's policy goal of expediting litigation, so officers may return to their duties promptly and avoid litigation, is not effective in actual practice since most cases are not resolved pre-summary judgment.

Finally, Professor Schwartz addresses the Supreme Court's justification that a weaker qualified immunity doctrine may deter public officials from fully carrying out their duties due to risks of a suit or from

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121. *Id.*
122. *Id.*
123. *Id.* at 1808.
124. *Id.* at 1809.
125. *Id.* at 1809 (citing Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 15 (2017)).
126. *Id.* at 1809-10.
127. *Id.* at 1811.

accepting public office or these types of positions in the future.[128] She discredits the former by noting that multiple studies have shown police officers "infrequently think about the threat of being sued when performing their jobs."[129] As to the latter argument, she notes that the "difficulty recruiting officers has been attributed to high-profile shootings, negative publicity about the police, strained relationships with communities of color," and various other factors.[130] The final argument presented against the effectiveness of this policy is that the risk of financial liability and the burden of litigation is not one that an officer indeed faces based on the "indemnification practices and litigation dynamics already shield[ing] government officials from financial sanctions."[131] She concludes that "the threat of being sued appears to play little role in the decisions of job applicants and officers on the street."[132]

Professor Schwartz's normative approach and her empirical studies support the findings that the policy goals of the doctrine, as articulated in *Harlow,* are no longer relevant to present-day civil rights litigation. Officers who violate the U.S. Constitution or other rights of a person are being provided with a defense to suit, which is seldom unsuccessful. But more importantly, Professor Schwartz's findings show that a weakening of the qualified immunity defense would not give rise to the parade of horribles and frivolous suits against public officials.

b. Recent Qualified Immunity Cases Involving Excessive Force Claims

On June 15, 2020, the Supreme Court denied issuing a Writ of Certiorari in two cases involving excessive police force and seeking reconsideration of the qualified immunity doctrine.[133] These cases provide insight into typical claims of a police officer's use of excessive force and the qualified immunity doctrine preventing the officer from being held responsible for a violation of an individual's right to be free from excessive force. The denial of these cases may also suggest that in order to change the doctrine, there may need to be a case with even more egregious facts to have the Court grant a Writ of Certiorari and thoroughly reconsider qualified immunity.

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128. *Id.*
129. *Id.*
130. *Id.* at 1813.
131. *Id.*
132. *Id.* at 1814.
133. Baxter v. Bracey, 751 Fed. Appx. 869 (6th Cir. 2018), *cert. denied.,* 140 S. Ct. 1862, 1862 (2020) & Corbitt v. Vickers, 929 F.3d 1304 (11th Cir. 2019), *cert. denied.*, 207 L. Ed. 2d 1051, 1051 (2020).

First, in *Baxter v. Bracey*,[134] Alexander Baxter sued two police officers, Spencer Harris and Brad Bracey, for violation of his constitutional right – to be free from excessive force during an arrest – due to their release of a police dog after Baxter had allegedly surrendered.[135] After chasing Baxter and cornering him in a basement, the officers released a police dog into the basement and bit Baxter in the armpit.[136] The officers claimed qualified immunity as a defense to the suit, which the district court denied.[137] The officers filed an interlocutory appeal to review the district court's ruling, and the Sixth Circuit Court reversed finding "Harris's use of the canine to apprehend Baxter did not violate clearly established law."[138] The Sixth Circuit noted, "[e]ven if Baxter raised his hands, the other circumstances—undisputed in the record below—weigh against a finding that 'every reasonable official would understand that what [Harris did] is unlawful.'"[139] Baxter petitioned the Supreme Court for review of the Sixth Circuit Court's judgment and to consider whether "the judge-made doctrine of qualified immunity, which cannot be justified by . . . the text of 42 U.S.C. § 1983 or the relevant common law background, and which has been shown not to serve its intended policy goals, be narrowed or abolished?"[140]

Justice Thomas dissented from denial of certiorari in *Baxter*. Justice Thomas expressed doubts in the qualified immunity precedent as it stands because it "appears to stray from the statutory text."[141] Justice Thomas believes the Court "ought to return to the approach of asking whether immunity 'was "historically accorded the relevant official"' in an analogous situation 'at common law.'"[142] He concluded that he "continue[s] to have strong doubts about our § 1983 qualified immunity doctrine … [and] would grant the petition for certiorari."[143] Justice Thomas seemed eager to accept this case and review the doctrine under a more textualist approach of § 1983 and available defenses.

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134. Baxter v. Bracey, 751 Fed. Appx. 869, 870 (6th Cir. 2018).
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 871.
139. *Id.* at 872 (citing District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018)).
140. Petition for a Writ of Certiorari at i, Baxter v. Bracey, 751 Fed. Appx. 869 (6th Cir. 2018), *cert. denied.,* 140 S. Ct. 1862, 1862 (2020) (No. 18-1287).
141. Baxter v. Bracey, 751 Fed. Appx. 869 (6th Cir. 2018), *cert. denied.,* 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting from denial of certiorari).
142. *Id.* at 1864.
143. *Id.* at 1865.

Second, in *Corbitt v. Vickers*,[144] a police chase and apprehension of a suspect in Coffee County, Georgia, ended with Officer Michael Vickers shooting a minor child.[145] In seeking to apprehend a suspect, Officer Vickers stopped the suspect on Amy Corbitt's property, where six minors and one adult were in the yard.[146] Officer Vickers ordered everyone to the ground, including the children, while he restrained the suspect.[147] While attempting to restrain the suspect,who was not visibly resisting arrest,Officer Vickers shot twice at the family dog.[148] The first shot missed the dog, but when the dog reappeared, Officer Vickers shot a second time, again missing the dog, but hitting Corbitt's son in the back of the knee.[149] Corbitt sued Officer Vickers on behalf of her injured son under § 1983 for Officer Vicker's excessive force during the arrest.[150] Officer Vickers moved to dismiss the suit based on qualified immunity because "case law ha[s] not staked out a 'bright line' indicating that the act of firing at the dog and unintentionally shooting SDC was unlawful."[151] The district court denied Officer Vickers's motion and held he was not entitled to qualified immunity.[152] The Eleventh Circuit reversed holding "Corbitt failed to present us with any materially similar case from the United States Supreme Court, this Court, or the Supreme Court of Georgia that would have given Vickers fair warning that his particular conduct violated the Fourth Amendment."[153] Corbitt filed a petition for a Writ of Certiorari asking the Court two questions: "(1) Whether qualified immunity is an affirmative defense (placing the burden on the defendant to raise and prove it) or whether it is a pleading requirement (placing the burden on a plaintiff to plead its absence)[] [and] (2) [w]hether the Court should recalibrate or reverse the doctrine of qualified immunity."[154]

144. Corbitt v. Vickers, 929 F.3d 1304, 1307 (11th Cir. 2019).
145. *Id.* at 1307-08.
146. *Id.* at 1308.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 1308-09.
151. *Id.*
152. *Id.* at 1309.
153. *Id.* at 1315.
154. Petition for a Writ of Certiorari at i, Corbitt v. Vickers, No. 19-679 (U.S. Nov. 22, 2019).

V. SUPREME COURT'S RECENT CONSIDERATION OF QUALIFIED IMMUNITY IN EXCESSIVE FORCE CLAIMS

In 2018, the Supreme Court in *Kisela v. Hughes*[155] addressed the qualified immunity of a police officer who shot the plaintiff four times after failing to drop her weapon, a large kitchen knife.[156] Officer Kisela and two other officers responded to a 911 call about a woman hacking a tree with a large kitchen knife.[157] Upon the officers' arrival at the scene, Amy Hughes came out of her house with a large knife and stopped about six feet from her roommate, Sharon Chadwick.[158] The officers drew their weapons and ordered Hughes to drop the knife.[159] After Hughes failed to drop the knife following two commands from the officers, Officer Kisela "dropped to the ground and shot Hughes four times through the fence."[160] After the shooting, the police officers spoke with Chadwick about Hughes's behavior, and she told them of Hughes's history of mental illness.[161] The officers did not know of Hughes's mental illness before the shooting.[162] Hughes brought suit under § 1983, alleging Officer Kisela used excessive force in violation of her Fourth Amendment rights.[163] The district court granted summary judgment in Officer Kisela's favor.[164]

The Ninth Circuit reversed the district court and found that Officer Kisela violated Hughes's Fourth Amendment right and that this violation was clearly established based on Ninth Circuit precedent.[165] But the Supreme Court disagreed and reversed the Ninth Circuit.[166] The Court found that Officer Kisela's action did not violate any clearly established law because "[t]his is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment."[167] Kisela "had mere seconds to assess the potential danger to Chadwick … [and] was confronted with a

155. Kisela v. Hughes, 138 S. Ct. 1148, 1150-51 (2018).
156. *Id.*
157. *Id.* at 1151.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 1154-55.
167. *Id.* at 1153.

woman . . . whose behavior was erratic enough to cause a concerned bystander to call 911."[168] The Court further found that the precedent relied on by the Ninth Circuit cut in Officer Kisela's favor.[169] Justice Sotomayor, joined by Justice Ginsburg, disagreed with the majority's holding over whether Officer Kisela's actions violated a clearly established law.[170] Justice Sotomayor initially considered the first prong of the qualified immunity doctrine: whether there was a violation of Hughes's constitutional rights.[171] She concluded that the "facts would permit a jury to conclude that Kisela acted outside the bounds of the Fourth Amendment by shooting Hughes four times."[172] By considering the constitutionality of Officer Kisela's act first, she supported a return to the *Saucier* rigid requirement that a court decides the constitutionality of the official's act before considering whether the law was clearly established. However, Justice Sotomayor did not say this directly. She noted that "[r]ather than defend the reasonableness of Kisela's conduct, the majority sidesteps the inquiry altogether and focuses instead on the 'clearly established' prong of the qualified-immunity analysis," which remains permissible under *Pearson v. Callahan*.[173]

Next, Justice Sotomayor vehemently disagreed with the majority's finding that Officer Kisela's actions were not clearly established as violative of Hughes's Fourth Amendment right to be free from the excessive use of police force. First, she noted that the Court strains to distinguish the Ninth Circuit's case of *Deorle v. Rutherford*[174] from the facts presented in *Kisela.* The facts of *Deorle* consisted of an individual who was "'verbally abusive,' shouted 'kill me' at the officers, screamed that he would 'kick [the] ass' of one of the officers, and 'brandish[ed] a hatchet [and crossbow] at a police officer,'… [and] discarded [the weapons] when instructed to do so by the police and then steadily walked toward . . . the officers… [when] th[e] officer, without giving a warning, shot the man in the face with beanbag rounds."[175] The Ninth Circuit held

168. *Id.*
169. *Id.* at 1154.
170. *Id.*
171. *Id.* at 1156.
172. *Id.* at 1157-58.
173. *Id.* at 1158.
174. Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001).
175. *Kisela*, 138 S. Ct. at 1158-59 (Sotomayor, J., dissenting) (citing *Deorle*, 272 F.3d at 1276-78) (internal citations omitted).

> [e]very police officer should know that it is objectively unreasonable to shoot . . . an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals.[176]

This conclusion of the Ninth Circuit Court of Appeals was sufficient for Justice Sotomayor to deem the actions of those officers—shooting an individual experiencing a mental disability—as violative of the individual's constitutional rights under clearly established law.

She further argued the Court misapplied the summary judgment standard by failing to view facts in favor of the non-moving party, Hughes. The majority erred by determining "[w]hether Hughes could 'strik[e]' Chadwick from that particular distance, even though the kitchen knife was held down at her side, is an inference that should be drawn by the jury, not this Court."[177] The majority erred again when considering her failure to comply with an officer's instructions to drop the knife.[178] Another error occurred when the Court failed to consider the time difference between the two cases—forty-minute confrontation in *Deorle* and less than a minute in *Kisela*.[179] In addition to her view that *Deorle* is factually similar enough to *Kisela*, as well as other holdings of the Ninth and other Circuits with similar facts, Officer Kisela's actions were clearly established violations of the Fourth Amendment. The Court noted a single case that could indicate that Hughes posed an immediate danger. Still, Justice Sotomayor found significant factual differences and found that it went against the overwhelming majority of cases.[180]

She ended her dissent with a warning that the Court's opinion "sends an alarming signal to law enforcement officers and the public. It tells officers … shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[181]

176. *Id.* at 1159 (citing *Deorle*, 272 F.3d at 1285).
177. *Id.*
178. *Id.* at 1159-60.
179. *Id.* at 1160.
180. *Id.* at 1160-61.
181. *Id.* at 1162.

VI. SUGGESTED ALTERNATIVES TO THE CURRENT QUALIFIED IMMUNITY DOCTRINE

In *Baxter*, legal scholars in an amici curiae brief proposed three alternatives to the qualified immunity doctrine: (1) clear up the clearly established prong and requirements when cases are not factually identical to one another; (2) allow only the common-law defenses existing in 1871 and let Congress debate further defenses to suit; or (3) require lower courts to determine the constitutional validity of the act to create a precedent for courts to determine if an act was clearly established as a violation of a federal right.[182]

The first suggestion is for the Court to "clearly delineate the 'clearly established' requirement."[183] They ask that the requirement be delineated as "a reasonable officer would understand that what he is doing violates a right when the relevant decisions all point in that direction, even if no ruling is directly on point."[184] This suggestion appears to follow the Third Circuit's approach, which finds a violation of a clearly established right so long as "there are sufficiently analogous cases that should have placed a reasonable official … on notice that his actions were unlawful."[185] The concern with this approach is that the circuit courts would likely still splinter on what constitutes a *sufficiently analogous case*. The Fifth Circuit's clearly established precedent would likely be seen as too prohibitive, as demonstrated in *Cleveland v. Bell*.[186] Under this alternative, it is also unclear whether the Tenth Circuit's sliding scale approach would survive. Under the clearly established prong of the test, the egregiousness of the police officer's conduct requires less similarity to other cases to show a reasonable officer understood what he was doing violated a right. This approach seems to comport with the inquiry's overall focus: whether the officer had fair notice that the action was unlawful. But it would not require a sufficiently definite contour of the violated right, because the reasonable officer inquiry could vary between circuits or states.

The second suggestion is to "conform the immunity defense more closely to the common-law principles prevailing in 1871 … [or] limit the

182. Brief of Legal Scholars as Amici Curiae in Support of Petitioner at 20-22, Baxter v. Bracey, 140 S. Ct. 1862 (2019) (No. 18-1287).
183. *Id.* at 20.
184. *Id.*
185. Kane v. Barger, 902 F.3d 185, 195 (3d Cir. 2018) (internal citations omitted).
186. 938 F.3d 672, 677 (5th Cir. 2019).

immunity defense to the particular claims for which it was available at common law."[187] This would be an approach that Justice Thomas would likely endorse based on his dissent from the denial of Writ in *Baxter*. Based on this suggestion, the Court would eliminate the doctrine in its present form, rely on the common law when the Civil Rights Act was passed in 1871, or place the doctrine into Congress's hands. The scholars note the expansion of the doctrine from the common-law principles is something Congress has done previously in response to the Court's holding in *Westfall v. Erwin*[188] with the enactment of the Federal Employees Liability Reform and Tort Compensation Act of 1988.[189] The concern with this suggestion is that Congress may not act promptly to provide protections to public officials. However, in 2020, a proposed bill was presented to the U.S. House of Representatives entitled: Ending Qualified Immunity Act. The Act would eliminate the qualified immunity, which may be too extreme. The Ending Qualified Immunity Act will be discussed further in the section below. Lastly, there is also the concern that the elimination of the doctrine would open the floodgates of litigation while Congress decided to act or not. The common-law immunity defenses are minimal. Their limitations were partially a reason for the creation of the qualified immunity doctrine.

Finally, the scholars suggest "the Court could address some of the procedural rules relating to qualified immunity."[190] Here, the Court would have to reverse its ruling in *Pearson v. Callahan* – allowing lower courts to decide either the constitutional question or the clearly established prong first – and require courts to first determine whether there was a constitutional violation.[191] This change would create more precedents on constitutional issues for the court to consider the clearly established prong of the test.[192] But this suggestion by scholars does not seem to address the issue that the doctrine currently faces. While having more case law on whether a particular action violates the constitution would create more precedent within the circuits, it still would not clarify the *clearly established* standard. If this option is combined with the first, this would

187. Brief of Legal Scholars as Amici Curiae in Support of Petitioner, *supra* note 179, at 21.
188. Westfall v. Erwin, 484 U.S. 292, 300 (1988).
189. Pub. L. No. 100-694, 102 Stat. 4563.
190. Brief of Legal Scholars as Amici Curiae in Support of Petitioner, *supra* note 179, at 22.
191. *Id.* at 15-16.
192. *Id.*

seem closer to resolving the circuit split. First, determine whether there was a constitutional violation and then apply this particular review to determine if the act was clearly established at the time of the incident. More case law will make determining the constitutionality of an act easier for the courts as well as establish what a reasonable officer would do in a particular situation.

VII. ENDING QUALIFIED IMMUNITY ACT & STATE LEGISLATURE ACTIONS

On June 4, 2020, Representatives Ayanna Pressley (D-MA) and Justin Amash (L-MI) introduced the Ending Qualified Immunity Act to the United States House of Representatives.[193] This bill seeks to abolish the qualified immunity defense to § 1983 suits by adding additional language to the statute. The bill includes the following language:

> It shall not be a defense or immunity to any action brought under this section that the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful . . . when it was committed. Nor shall it be a defense or immunity that the rights, privileges, or immunities secured by the Constitution or laws were not clearly established at the time of their deprivation by the defendant, or that the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.[194]

If enacted, this additional language would eliminate all forms of qualified immunity defense for public officials in § 1983 suits.

Under the "Sense of Congress" section of the proposed bill, it notes "Congress … must correct the erroneous interpretation of section 1983 which provides for qualified immunity, and reiterate the standard found on the face of the statute, which does not limit liability on the basis of the defendant's good faith beliefs or on the basis that the right was not 'clearly

193. *Amash, Pressley Introduce Bipartisan Legislation to End Qualified Immunity*, (June 4, 2020), https://amash.house.gov/media/press-releases/amash-pressley-introduce-bipartisan-legislation-end-qualified-immunity & *Ending Qualified Immunity Act*, https://pressley.house.gov/sites/pressley.house.gov/files/Ending%20Qualified%20Immunity%20Act%20One%20Pager.pdf (last visited Nov. 1, 2020).

194. Ending Qualified Immunity Act, H.R. 7085, 116th Cong. § 4 (2020).

established' at the time of the violation."[195] As of November 1, 2020, the bill has been referred to the House Committee on the Judiciary for further consideration.[196]

The recent calls for police reform across the United States have brought qualified immunity into the public's attention. While the qualified immunity doctrine may produce results that seem unfair or unjust, the entire elimination of the doctrine is not necessary to promote the interests of the victims. Subjecting individuals serving in an official public capacity to increased liability for their day-to-day actions may have severe consequences. By taking a more moderate approach and taking time to clarify the qualified immunity clearly established prong, the Court will be able to protect individual rights and hold public officials responsible.

The United States Congress is not the only legislative body acting against the qualified immunity doctrine. The Colorado Legislature created a new civil cause of action against peace officers for violations of the Colorado Constitution's Bill of Rights or where they fail to intervene when rights are being violated.[197] The new cause of action is found in Colorado Revised Statutes 13-21-131 and provides similar protections as in § 1983:

> (1) A peace officer …, employed by a local government who, under color of law, subjects or causes to be subjected, including failing to intervene, any other person to the deprivation of any individual rights that create binding obligations on government actors secured by the bill of rights, article II of the state constitution, is liable to the injured party for legal or equitable relief or any other appropriate relief.[198]

The law clearly states, "[q]ualified immunity is not a defense to liability pursuant to this section."[199] While this act will affect a majority of police officers in Colorado, it does not include violations by actors not in law enforcement or who work for state law enforcement, both of which would be governed by § 1983.[200]

The removal of qualified immunity may seem to be concerning to

195. *Id.* § 3.
196. H.R. 7085, 116th Cong. (2020) (as provided to the H. Comm. on the Judiciary, June 4, 2020), https://www.congress.gov/bill/116th-congress/house-bill/7085/actions.
197. Sibilla, *supra* note 17.
198. COLO. REV. STAT. ANN. § 13-21-131(1) (West 2020).
199. COLO. REV. STAT. ANN. § 13-21-131(2)(b) (West 2020).
200. Sibilla, *supra* note 17.

individual police officers, the Colorado Legislature included an indemnity provision within the act. The act requires peace officer employers to indemnify them for "any judgment or settlement entered against the peace officer for claims arising pursuant to this section."[201] This indemnification is limited or excluded where "the officer did not act upon a good faith and reasonable belief the action was lawful, then the peace officer is personally liable and shall not be indemnified by the peace officer's employer for five percent of the judgment or settlement or twenty-five thousand dollars, whichever is less."[202] Thus, even where an officer acts in bad faith and without a reasonable belief in the lawfulness of his or her action, he or she would only be liable for $25,000. "Colorado's new law ensures that victims are made whole and that good cops aren't deterred from doing their job."[203] Perhaps if the Ending Qualified Immunity Act does not pass in Congress, they may consider proposing new language, which would also include an indemnity provision to lessen the concerns regarding the payment of judgments by individual officials.

VII. CONCLUSION

The core of the challenges to qualified immunity rests on the clearly established prong. The inconsistent application throughout the federal courts to claims made under § 1983 presents extremely challenging obstacles to an individual whose rights have been violated by a public official. While the Court may not have granted any Writs of Certiorari in its most recent term, the challenges to qualified immunity are unlikely to stop soon. The Court should provide clear guidance to lower courts on what it means to be clearly established and reinstate the order in which the two prongs are decided: (1) was there a constitutional violation and then (2) was it clearly established at the time of the incident. This will promote the increase of precedent within the circuits as well as provide a more unambiguous requirement.

Even if the Court does not act, legislatures across the country have debated qualified immunity within their jurisdictions. The arguments made to the Court regarding the normative concerns may not convince the Supreme Court Justices to overturn *Harlow* but may give weight to some legislative debates. The challenges to the doctrine will continue, and

201. COLO. REV. STAT. ANN. § 13-21-131(4) (West 2020).
202. *Id.*
203. Sibilla, *supra* note 17.

whether those challenges will be resolved judicially or legislatively remains to be seen.