INSTITUTE FOR AMERICAN POLICING REFORM

Police are essential. So is reform.

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A White Paper on Qualified Immunity for Police Officers in the United States of America

Reform of Qualified Immunity for Police Officers: A Pathway to Legislative Reform

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INSTITUTE FOR AMERICAN POLICING REFORM

September 1, 2021

On behalf of the Institute for American Policing Reform (IAPR), it is my privilege to present our White Paper on *Reform of Qualified Immunity for Police Officers*.

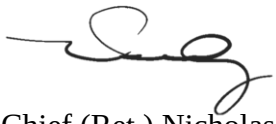
I am Nicholas Sensley, and I am the Founder and CEO of IAPR which was launched in June of 2020 in response to an overwhelming public outcry for reform of American policing. We are a nonprofit and nonpartisan Institute. Guided by our foundational value position that "Police are essential. So is police reform.", we have researched and proposed changes to the existing doctrine of qualified immunity for police officers. While police qualified immunity is not the cornerstone of comprehensive reform, it is significant to help resolve issues with police accountability and to assist in restoring community trust in policing.

Qualified immunity is a broken legal doctrine needing federal legislative action; however, police qualified immunity does not need to be eliminated. It must be reformed. Over the past 4 months of diligent and focused research, analysis, and scrutiny from diversely experienced policing officials, criminal and civil law attorneys, academicians, and community leaders, we have identified a fair and pragmatic standard for reforming qualified immunity.

Although this paper discusses reform at the federal level, reform of qualified immunity for police officers should also occur at the state level and indeed, already has in several states. State level reform can include additional levers such as damage caps, indemnification policies, insurance requirements, or fee-shifting.

It is the hope of the Institute for American Policing Reform that this comprehensive paper will assist in achieving fair and reasonable legislation on police qualified immunity. Our proposed standard will correct the most egregious abuses of qualified immunity and many of the less egregious but nevertheless undesirable cases. Importantly, it does so without eliminating qualified immunity entirely, recognizing there may be cases where police officers deserve the protections of qualified immunity.

Respectfully submitted,



Chief (Ret.) Nicholas A. Sensley
Founder & CEO

Executive Summary

The Institute for American Policing Reform (IAPR) is a nonpartisan organization providing guidance on policing laws and policies, police accountability and partnerships in community, leadership development, and police standards and training development. IAPR's value statement is that "Police are essential. So is reform." One of IAPR's focal points for reform is how qualified immunity applies to police officers.

Qualified immunity is a broken legal doctrine in need of a legislative solution.

IAPR believes reforming qualified immunity will promote police accountability, which in turn will improve relations between police and the communities they serve. Sensibly done, reform can achieve these benefits while continuing to assure that officers who perform their jobs earnestly and faithfully will have sufficient discretion to act without hesitation when their duty requires. Thus, a revised qualified immunity standard will protect officers in the rare instances where their actions are subsequently found to have inadvertently violated constitutional rights but preserve plaintiffs' ability to vindicate their constitutional rights when violated and eliminate those cases where officers who committed egregious constitutional violations nevertheless escape liability. **The four changes proposed below offer a meaningful yet fair path for reform.**

1. *Officers Must Show Their Actions Complied with Precedent.*

   The officer should be responsible for identifying a case or other legal precedent that led the officer to believe that, at the time of the incident, their actions were constitutional. To avoid the overly granular analysis that plagues the current qualified immunity doctrine, this precedent must support the officer's action by clear and convincing evidence.

2. *Courts Must Decide Constitutional Rights.*

   Courts must decide whether the officer's alleged acts actually violated the Constitution. This guidance to officers and the public will clarify and advance constitutional rights.

3. *Prohibit Interlocutory Appeals.*

   Reform should prohibit immediate "interlocutory" appeals of denials of qualified immunity in the middle of a case—an atypical and, in the context of qualified immunity, unilateral privilege that often bogs down the time to a trial on the merits.

4. *Place Backstop Liability with the Officer's Employer.*

   The victim of the rights violation should have recourse against the officer's employer if the officer receives qualified immunity, so that the victim does not bear the costs of the violation.

These reforms are necessary because qualified immunity has morphed into a roadblock to accountability that frustrates judges, legislators, attorneys, and most importantly, victims of constitutional rights violations. This shortfall is especially apparent in many civil actions against police officers for excessive force and other violations of the Fourth and Eighth Amendments where qualified immunity prevents accountability for egregious wrongs simply because a plaintiff cannot show the wrongful act violated a "clearly established" right. Some examples of cases where officers received qualified immunity include cases where officers stole money seized pursuant to a warrant; where an officer trying to shoot a non-threatening pet dog instead shot a child in the leg; where officers used a police dog on someone who had surrendered by putting their hands in the air; where officers raided the wrong house despite going to the right house initially; and the list goes on. The Supreme Court has shown little interest in taking cases that would lead to substantive reform of qualified immunity, thus leaving change in Congress's hands.

This paper discusses qualified immunity, its history, the issues with the doctrine, and how the four reforms proposed above can solve the worst instances of qualified immunity and most of its other undeserved applications. IAPR's experience and expertise is on police reform. Accordingly, although qualified immunity broadly reaches across government officials of all sorts, **this paper focuses on qualified immunity as it applies to police officers and proposes reforms specific to that end**.

Two background considerations should be kept in mind when reading this paper. First, qualified immunity is separate from, and often a gatekeeping issue decided prior to, a trial on the merits. Thus, even if an officer or municipality is denied qualified immunity, they will still have a chance to contest the allegations against them and otherwise defend their actions before a jury, which tends to favor police. Second, although this paper discusses reform at the federal level, reform can also happen at the state level (and indeed, already has in several states). IAPR is researching qualified immunity and reforms at the state level, which may include additional levers such as damage caps, indemnification policies, insurance requirements, or fee-shifting.

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Reform of Qualified Immunity for Police Officers

Part I: The Problem

I.The Doctrine

Qualified immunity is a defense to personal liability that may be asserted by government officials against claims related to their official work.[2] It exists under federal law as a defense to civil suits such as section 1983 actions and *Bivens* suits,[3] and, in most states, in some form under state law.[4] Qualified immunity protects an official from liability "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time."[5] Although courts are encouraged to answer both prongs when analyzing a qualified immunity defense, they may dismiss a claim based on the second prong alone (clearly established law) without answering the first (whether there was a constitutional violation).[6]

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[2] *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[3] Section 1983 actions are suits brought pursuant to 42 U.S.C. § 1983 for a state official's violation of federal or constitutional rights "under color" of law. Specifically, section 1983 provides

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Bivens actions are suits brought against federal officials for violations of constitutional rights under an implied cause of action first established by the Supreme Court in the case of *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The qualified immunity standard is the same for a defense to a *Bivens* claim as to a claim under section 1983. *See Harlow*, 457 U.S. at 809.

[4] In many states, the analog to qualified immunity is a statutory immunity applicable to claims under that state's Tort Claims Act. Recently, some states (Arkansas and Iowa) passed legislation codifying qualified immunity, while other states (Colorado, Connecticut, New Mexico, and Massachusetts) have passed laws removing or restricting qualified immunity.

[5] *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quotation marks omitted).

[6] *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

The first qualified immunity prong—the existence of a constitutional violation—follows traditional analysis of the constitutional right in question. For example, when a plaintiff alleges excessive force in violation of the Fourth Amendment, courts will apply the traditional reasonableness test under *Graham v. Connor*.[7]

The second prong of qualified immunity—whether the constitutional right is "clearly established"—however, is unique to qualified immunity. And it is this prong that has let officials who violate the Constitution escape liability for lack of nearly identical precedent and let courts leave potential constitutional violations undecided. As articulated by the Supreme Court, "'[c]learly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful. In other words, existing law must have placed the constitutionality of the officer's conduct beyond debate."[8] Or said another way, the contours of the right "must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[9] "This demanding standard protects all but the plainly incompetent or those who knowingly violate the law."[10]

Qualified immunity is also a defense against suit itself, not just from damages.[11] This means that defendants are encouraged to raise—and courts to decide—qualified immunity as early as possible in cases.[12] Thus, qualified immunity could be raised at the motion to dismiss stage, although it is more commonly decided at summary judgment.[13] Significantly, as a defense to a suit itself, denials of qualified immunity may be appealed immediately as an interlocutory appeal, a privilege rarely granted to denials of summary judgment on other grounds.[14]

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[7] 490 U.S. 386 (1989). The *Graham* factors include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Id.* at 396. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Id.*

[8] *Wesby*, 138 S. Ct. at 589 (quotation marks and citations omitted).

[9] *Id.* at 590 (quotation marks omitted).

[10] *Id.* at 589 (quotation marks omitted).

[11] *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

[12] *See Pearson*, 555 U.S. at 232.

[13] *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 10 (2017).

[14] *See Mitchell*, 472 U.S. at 530.

II. The History

Qualified immunity reform starts with understanding how and why the Supreme Court introduced qualified immunity—a judge-made doctrine—in the first place, and how the doctrine has evolved at the Supreme Court's hand over time.

A. Creation of the Qualified Immunity Standard

The Supreme Court introduced qualified immunity in the 1967 case of *Pierson v. Ray*.[15] In that case, police officers arrested a group of white and black clergymen who tried to use segregated facilities at an interstate bus terminal in Jackson, Mississippi and charged the clergymen with violating a Mississippi statute, later ruled unconstitutional, that forbid congregating in public under circumstances that may cause a breach of peace and refusing to move when ordered to do so by police.[16] The municipal police justice convicted the clergymen of violating the statute, which the county court overturned.[17] The clergymen subsequently brought an action for damages under section 1983 against the municipal police justice and the officers for false arrest and imprisonment.[18] The justice asserted a defense of absolute immunity and the officers asserted a defense of good faith and probable cause.[19]

On appeal to the Supreme Court, the Court held that section 1983 was enacted against the backdrop of common law immunity in existence at the time of enactment, and so it incorporated an absolute immunity for judges.[20] Although officers did not enjoy absolute immunity under common law, the Supreme Court, drawing on defenses to false arrest claims, found an officer should be "excus[ed] . . . from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional."[21] The Court reasoned that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not

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[15] 386 U.S. 547 (1967).

[16] *Id.* at 549.

[17] *Id.* at 549-50.

[18] *Id.* at 550.

[19] *See id.*

[20] *Id.* at 553-54. Absolute immunity has also been extended to prosecutors and legislators for actions within the scope of their prosecutorial and legislative roles, respectively. *See Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutorial immunity); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislative immunity). Justice Douglas, the lone dissent in *Pierson*, argued that the language of section 1983—which applies to "any person" (subsequently altered to "every person")—showed Congress's intent to override common law immunities. *Pearson*, 386 U.S. at 563 & n.2 (Douglas, J., dissenting).

[21] *Pearson*, 386 U.S. at 555.

arrest when he has probable cause, and being mulcted in damages if he does."[22] The Court then remanded the case to trial for a jury to determine whether the officers reasonably believed in good faith that the arrests were constitutional and necessary to prevent violence.[23]

Several years later, in 1982, in *Harlow v. Fitzgerald*, the Supreme Court turned the subjective "good faith" qualified immunity standard established by *Pierson* into an objective standard that shields government officials performing discretionary functions "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."[24] *Harlow* involved an alleged conspiracy by senior presidential aides to deprive the plaintiff of his constitutional rights by firing him in retaliation for testimony before Congress.[25] In reaffirming the need for qualified immunity, the Court stated that "public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability."[26] Qualified immunity, the Court said, "reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority . . . insubstantial suits need not proceed to trial."[27] And, although *Harlow* was a suit against federal officials, the Court restated that "it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials

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[22] *Id.*

[23] *Id.* at 557.

[24] 457 U.S. 800, 818 (1982). An intervening case between *Harlow* and *Pierson*, *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975) had introduced an objective element to go along with the subjective element for the good faith immunity test. *See also Harlow*, 457 U.S. at 815 n.25. In *Wood*, a case brought against school board members, the Supreme Court reasoned that "[a] compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." 420 U.S. at 322.

[25] 457 U.S. at 802.

[26] *Id.* at 806.

[27] *Id.* at 807-08 (quotation marks and citations omitted). Other costs of suit the Court believed qualified immunity avoids are "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, 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." *Id.* at 814 (quotation marks and brackets omitted).

under 42 U.S.C. § 1983 and suits brought directly under the Constitution against federal officials."[28]

In support of its decision to switch qualified immunity to a fully objective standard that looks at clearly established law, the Supreme Court reasoned that administering a subjective standard required substantial evidence production and often resolution by a jury, an outcome at odds with the Court's desire to use qualified immunity to weed out insubstantial claims from proceeding to trial and avoid disruption of government.[29] The Court thought this objective standard would still cause an official to hesitate where the "official could be expected to know that certain conduct would violate statutory or constitutional rights," but that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences."[30] In addition, an official would have a defense in extraordinary circumstances if he could prove "that he neither knew nor should have known of the relevant legal standard."[31]

B. Clearly Established Law

Subsequent Supreme Court decisions elaborated on what makes a right "clearly established," almost uniformly pushing courts to look at precedent in increasingly granular fashion. Starting with *Anderson v. Creighton*, the Supreme Court reviewed a *Bivens* claim for a Fourth Amendment violation from a warrantless search of a family's home based on an erroneous belief that a suspect in a bank robbery might be found there.[32] The Court found that to be "clearly established," a right must be more particularized than "the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances"—the level of generality used by the appellate court—lest qualified immunity be turned into a rule of pleading.[33] Rather, the Court held, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that

[28] *Id.* at 809 (quotation marks and brackets omitted).

[29] *See id.* at 815-17.

[30] *Id.* at 819 (quotation marks omitted).

[31] *Id.*

[32] 483 U.S. 635, 637 (1987). For background, the search involved several uniformed and plain-clothes white officers showing up at night, brandishing guns at the house of a black family with three young daughters. *Id.* at 664 n.21 (Breyer, J. dissenting). One of the officers also punched the father in the face when he moved to open the door to the garage at an officer's request and hit one of the daughters who screamed for help. *Id.* The officers chased the daughters and shook one of them after the mother told the daughters to run to a neighbor's house for safety. *Id.*

[33] *Id.* at 639-40.

right."[34] Thus, the Court remanded the case for review in light of the more particularized standard.[35]

Similarly, in 2015, in *Mullenix v. Luna*, the Supreme Court reversed a Fifth Circuit decision denying qualified immunity to an officer who shot a fleeing fugitive approaching spike strips manned by another officer.[36] The Fifth Circuit had analyzed the clearly established law as a "rule that a police officer may not use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."[37] But according to the Supreme Court, the proper inquiry was whether it was "beyond debate" that an officer could not confront "a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at [the spike strips]"—a fact pattern which did not implicate a clearly established right.[38] The Court emphasized that

> We have repeatedly told courts not to define clearly established law at a high level of generality. The dispositive question is whether the violative nature of *particular* conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts."[39]

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[34] *Id.* at 640.

[35] *See id.* at 646.

[36] 577 U.S. 7, 8-9 (2015) (*per curiam*). The officer asserted that he shot to disable the fugitive's car, despite being told to stand by and never having been trained in such a tactic. *Id.* at 9.

[37] *Id.* at 12 (quotation marks omitted). The dissent pointed to clearly established law as the requirement "that the government must have *some* interest in using deadly force over other kinds of force," which the facts of the case did not satisfy because the shooting provided no marginal gain over using the spike strips already in place. *Id.* at 22-23 (Sotomayor, J., dissenting). The dissent further criticized the holding as "sanctioning a 'shoot first, think later' approach to policing." *Id.* at 26 (Sotomayor, J., dissenting).

[38] *Id.* at 13-14. The Court noted it had "never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity," *id.* at 15, and distinguished circuit court cases that had found constitutional violations or denied qualified immunity in the context of suspects fleeing in a car as different because they involved a car moving away from an officer, cars moving at low speeds, or suspects who had not verbally threatened officers, *id.* at 16, 18.

[39] *Id.* at 12 (citations and quotation marks omitted) (emphasis in original).

In another recent example, *Kisela v. Hughes*, the Supreme Court reversed the Ninth Circuit's denial of qualified immunity to an officer responding, along with two other officers, to a report of a woman acting erratically—whom the officer shot while she appeared calm, holding a kitchen knife pointed down, standing six feet away from another woman but on the other side of a fence from the officer, after she did not respond to two quick commands to drop the knife.[40] The second woman had told the officers to "take it easy."[41] The Ninth Circuit analyzed the clearly established right as one "to walk down her driveway holding a knife without being shot,"[42] and the dissent in the Supreme Court thought the clearly established law was that "a police officer may only deploy deadly force against an individual if the officer has probable cause to believe that the person poses a threat of serious physical harm, either to the officer or to others."[43] But the Court, without deciding whether there was a constitutional violation, concluded there was no clearly established law prohibiting an officer from shooting at a woman who had been behaving erratically enough for a witness to call the police, who was separated from the officer by a fence, who had moved within a few feet of a bystander, and who had failed to acknowledge two quick commands to drop the knife.[44] The Court distinguished the facts of *Kisela* from precedent cases where courts denied qualified immunity to an officer who shot a previously-armed man acting erratically with no bystanders nearby and a case where a sniper safely positioned away from an armed suspect shot the suspect as he was retreating to a cabin, instead analogizing to a case that granted qualified immunity to an officer who shot a man carrying a sword, acting erratically, and attempting to enter another house.[45]

And as one more example, in *City of Escondido v. Emmons*, the Supreme Court remanded a case where the Ninth Circuit had denied qualified immunity to an officer responding to a domestic disturbance call who took down a man who stepped outside the home, closed the door against the officer's direction, and tried to brush past the officer.[46] The Ninth Circuit looked at the case as one where the right to be free of excessive force was clearly established, applying the *Graham* factors.[47] But the Court criticized the Ninth Circuit because it "defined the clearly established right at a high level of generality by saying only that the 'right to be free of excessive

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[40] 138 S. Ct. 1148, 1151 (2018) (*per curiam*); *see also id.* at 1155-56 (Sotomayor, J., dissenting).

[41] *Id.* at 1151. The two women, the officers later discovered, were roommates and the shooting victim had a history of mental illness. *Id.*

[42] *Hughes v. Kisela*, 862 F.3d 775, 785 (9th Cir. 2016).

[43] *Kisela*, 138 S. Ct. at 1158 (Sotomayor, J., dissenting) (citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)) (brackets and quotation marks omitted).

[44] *Kisela*, 138 S. Ct. at 1153.

[45] *Id.* at 1153-54; *see also id.* at 1161 (Sotomayor, J., dissenting).

[46] 139 S. Ct. 500, 502 (2019) (*per curiam*).

[47] *Emmons v. City of Escondido*, 716 F. App'x 724, 726 (9th Cir. 2018).

force' was clearly established. . . . Under our precedents, the Court of Appeals' formulation of the clearly established right was far too general."[48] Although the Ninth Circuit had also cited a case in that circuit finding a "right to be free from the application of non-trivial force for engaging in mere passive resistance," the Court apparently did not believe *Emmons* involved passive resistance.[49]

These cases and others not discussed here set lower courts on an increasingly narrow path to identify clearly established law in granular detail, searching for cases with almost identical facts as the case before the court.[50] But the Supreme Court late last year signaled the granular search for precedent may have gone too far in *Taylor v. Riojas*.[51] There, the Fifth Circuit had granted qualified immunity to prison officials who left an inmate naked in cells covered in feces for six days, because "the law wasn't clearly established that prisoners couldn't be housed in cells teeming with human waste for only six days."[52] The Supreme Court reversed because "[c]onfronted with the particularly egregious facts of this case, any reasonable officer should have realized that [Plaintiff]'s conditions of confinement offended the Constitution."[53]

C. Order of Operations

The Supreme Court has also waffled back and forth on whether courts must decide if there is a constitutional violation before they determine whether that right is "clearly established."[54] The

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[48] *City of Escondido*, 139 S. Ct. at 503.

[49] *Id.* (quotation marks omitted); *see also Emmons v. City of Escondido*, 921 F.3d 1172, 1175 (9th Cir. 2019) ("The Court therefore must have concluded implicitly that [Plaintiff's] actions involved more than passive resistance. Otherwise, the Court would not have vacated our decision.").

[50] *See Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting) ("As I have previously noted, this Court routinely displays an unflinching willingness to summarily reverse courts for wrongly denying officers the protection of qualified immunity but rarely intervenes where courts wrongly afford officers the benefit of qualified immunity in these same cases.") (quotation marks and brackets omitted).

[51] 141 S. Ct. 52 (2020) (*per curiam*).

[52] *Id.* at 53 (quotation marks and brackets omitted).

[53] *Id.* at 54; *see also McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (vacating and remanding for further consideration in light of *Taylor v. Riojas* a Fifth Circuit decision that had granted qualified immunity to a correctional officer who had pepper sprayed a prisoner for no reason at all).

[54] *Compare Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) (holding the requisites of a qualified immunity defense must be considered in proper sequence, first deciding whether the facts alleged show a violation of a constitutional right), *with Pearson v. Callahan*, 555 U.S. 223, 236 (2009)

present standard, articulated in *Pearson v. Callahan*, grants courts discretion to decide which prong of qualified immunity—whether there was a constitutional violation or whether the right was clearly established—the court will answer first.[55] The Supreme Court reasoned this approach conserves judicial and litigant resources, avoids potential bad or fact-bound decision-making, limits challenges on appeal where a defendant wins on the "clearly established" prong but loses on the "constitutional violation" prong, and adheres to the principles of constitutional avoidance.[56] However, leapfrogging the first prong (constitutional violation) also permits the underlying action to evade review of whether it violates a constitutional right, a conundrum one judge has described as

> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. 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.[57]

Another judge has also criticized as unworkable the *Pearson* standard and subsequent decisions placing a presumption on foregoing review of constitutional violations in certain circumstances in favor of deciding cases on "clearly established law," because review of the facts under the first prong informs determination of the law in the second.[58]

D. Interlocutory Appeals

Unlike most decisions denying summary judgment, which cannot be appealed until a final decision in the case, denials of qualified immunity may be appealed on an interlocutory, or

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(holding that judges have discretion to decide which of the two prongs of qualified immunity analysis should be addressed first).

[55] *See Pearson*, 555 U.S. at 236.

[56] *See id.* at 236-41. The rule of constitutional avoidance counsels judges to not pass on questions of constitutionality unless such adjudication is unavoidable. *See id.* at 241.

[57] *Cole v. Carson*, 935 F.3d 444, 471 (5th Cir. 2019) (Willett, J., dissenting).

[58] *See Manzanares v. Roosevelt Cnty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1289-91 & n.9 (D.N.M. 2018) (Browning, J.) ("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* worked better.").

immediate, basis.[59] The Court permits interlocutory appeals of denials of qualified immunity because "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial."[60] This means officers as defendants can potentially seek review of a decision denying their motion to dismiss or motion for summary judgment—motions typically raised early in a case's lifecycle—from up to three courts (district court, circuit court, and Supreme Court) before the case goes to trial or before extended discovery. An interlocutory appeal arguably avoids many of the expenses of trial and discovery for a case that may ultimately be dismissed anyway, but conversely, appeals can take years, drawing out the litigation process, increasing attorneys' fees, and potentially delaying justice to a plaintiff on a claim that is ultimately successful.

Courts do not have appellate jurisdiction to review a denial of qualified immunity if the denial is based on a dispute over a genuine issue of fact for trial, rather than an interpretation of law such as whether a right was clearly established.[61]

III. The Issues

Qualified immunity has engendered much criticism, and the George Floyd Justice in Policing Act of 2021 recently passed by the House of Representatives would eliminate qualified immunity as a defense to section 1983 actions.[62] On the other hand, qualified immunity has staunch

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[59] *See Mitchell v. Forsyth*, 472 U.S. 511 (1985). Generally, interlocutory appeals are reserved for statutory exceptions such as orders granting or denying injunctions, important legal questions certified for review, or the small class of collateral orders that conclusively determine an important issue independent of the merits and are effectively unreviewable on appeal from a final judgment. *See Johnson v. Jones*, 515 U.S. 304, 309-11 (1995); *see also* 11 U.S.C. §§ 1291, 1292.

[60] *Mitchell*, 472 U.S. at 526 (emphasis in original).

[61] *See Johnson*, 515 U.S. at 317-18, 320 (holding interlocutory appeals may not generally be taken on orders determining whether the record sets forth a genuine issue of fact for trial). For example, in *Johnson*, the Court denied an interlocutory appeal to officers who challenged a denial of qualified immunity on the basis that they had not beaten or observed anyone beating the plaintiff—a disputed factual question rather than a question of law. *Id.* at 308.

[62] *See* H.R. 1280, 117th Cong. Title I, Subtitle A, § 102 (2021) (as passed by the House March 3, 2021) ("Section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) is amended by adding at the end the following: It shall not be a defense or immunity in any action brought under this section against a local law enforcement officer (as such term is defined in section 2 of the George Floyd Justice in Policing Act of 2021), or in any action under any source of law against a Federal investigative or law enforcement officer (as such term is defined in section 2680(h) of title 28, United States Code), that—(1) the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when the conduct was committed; or (2) the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of their deprivation by the

advocates who want to preserve the doctrine.[63] Some groups have also proposed a more limited reform of qualified immunity that stops short of eliminating it.[64]

IAPR believes that qualified immunity in its current form frustrates justice and police accountability by immunizing conduct that goes beyond—and often well beyond—any reasonable gray area in constitutional law or room for mistake in the split-second decisions facing officers. This is not to say qualified immunity prevents all accountability. Indeed, according to a recent Reuters survey of appellate case law, qualified immunity was granted just over half of the time it was raised and decided on appeal between 2017 and 2019.[65] Additionally, according to research by Professor Joanna Schwartz looking at a sampling of district court decisions in section 1983 cases against officers, across cases where qualified immunity could have been raised, even if it was not, fewer than 4% of cases were dismissed because of qualified immunity.[66] But too

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defendant, or that at such time, the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.").

[63] *See, e.g.*, *Remarks as Delivered by Attorney General William P. Barr at the Major Cities Chiefs Association Conference*, United States Department of Justice (Oct. 16, 2020) https://www.justice.gov/opa/speech/remarks-delivered-attorney-general-william-p-barr-major-cities-chiefs-association ("The absolute worst thing would be to adopt a proposal to eliminate qualified immunity, which protects police officers from personal liability when they make good-faith errors in enforcing the law. If a police officer knowingly violates someone's clearly established constitutional rights, then personal liability may be appropriate. But qualified immunity provides breathing space for officers to do their jobs without fear that an inadvertent or unpredictable error will subject them to financial ruin. Without qualified immunity officers would be deterred from going into risky situations that are necessary to save lives."). Several legislators in the House of Representatives also recently introduced a bill to protect qualified immunity at the state level. *See* Local Law Enforcement Protection Act of 2021, H.R. 4500, 117th Cong. (2021).

[64] For example, the Major Cities Chiefs Association recently released a statement supporting limited reform of qualified immunity (but not eliminating it) "to improve transparency and ensure those individuals who engage in gross misconduct are held accountable for their actions." *See Qualified Immunity Reform Policy Statement*, Major Cities Chiefs Assoc. (May 6, 2021) https://majorcitieschiefs.com/wp-content/uploads/2021/05/MCCA-Qualified-Immunity-Reform-Policy-Statement.pdf.

[65] *See* Andrew Chung et al., *Shielded: Supreme Defense*, Reuters, (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/. This investigation also found that grants of qualified immunity are increasing over time, particularly cases that grant qualified immunity on just the second prong (clearly established law). See *id.* at 56.

[66] *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 12, at 10; *see also* Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 328-29 & n.92 (2020). In many

often, and too inconsistently, qualified immunity permits officers to evade accountability for actions that make the public question whether police can ever be held accountable.

Where qualified immunity fails to reach the right balance, the issue primarily derives from the overly granular view of clearly established law the Supreme Court has pushed the lower courts to adopt. Other elements of qualified immunity also warrant criticism, though. Permitting courts to decide qualified immunity on clearly established law without deciding if there is a constitutional violation in the first place permits questionable conduct to repeatedly evade accountability. And permitting interlocutory review of denials of qualified immunity grants a one-sided litigation advantage to defendants.[67]

A. Clearly Established Law is Too Granular and Too Inconsistent

Despite the Supreme Court's refrain that "there does not have to be a case directly on point" to prove clearly established law,[68] in practice, qualified immunity review often gets hung up on the search for nearly identical precedent, with the result that plaintiffs cannot hold officers liable for constitutional violations unless they can identify a case with a largely overlapping fact pattern. On the other hand, courts that use an intermediate level of granularity can reach less objectionable results—whether they grant or deny qualified immunity. The following sample cases illustrate this spectrum.

In *Baxter v. Bracey*, the Sixth Circuit granted qualified immunity to officers who released a police dog to apprehend a burglary suspect in a basement who had surrendered by raising his hands after the officers located the suspect.[69] This was because no case law "suggest[ed] that

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cases alleging police misconduct or other section 1983 violations, the cases are dismissed on the pleadings, for failure to prosecute, or sua sponte by courts. *See id.* at 47.

[67] There is also an argument that qualified immunity is wrong as a matter of law, because it is no longer grounded in the common-law backdrop against which Congress passed section 1983—a position Justice Thomas has expressed willingness to consider. *See Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from denial of certiorari); *see also Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (Thomas, J., statement respecting denial of certiorari) (suggesting different degrees of qualified immunity analysis may be appropriate depending on the type of claim and the officer's responsibilities). This paper does not take a position on the common-law legal justification for qualified immunity, but government officials should be aware that if courts adopted such an argument, it would dramatically curtail or eliminate qualified immunity in the absence of legislation.

[68] *See District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quotation marks omitted). *But see Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) ("Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue.") (quotation marks omitted).

[69] 751 F. App'x 869, 870 (6th Cir. 2018), *cert denied* 140 S. Ct. 1862 (2020).

raising [Plaintiff's] hands, on its own, is enough to put [the officer] on notice that a canine apprehension was unlawful in these circumstances. That's because even with [Plaintiff]'s hands raised, [the officer] faced a suspect hiding in an unfamiliar location after fleeing from the police who posed an unknown safety risk."[70] The precedent cases against which the Sixth Circuit distinguished the facts in *Baxter* were one where the court denied qualified immunity to an officer who used a police dog, without warning, to search for and apprehend a suspect who had surrendered by lying down outside[71] and an older case where the court ruled it was not unreasonable to use a police dog to search for and apprehend a suspected felon hiding in a darkened building in the middle of the night, after warning the suspect that a dog would be released.[72]

A more appropriate level of granularity in this case would have been whether police can release a police dog to apprehend a suspect who has surrendered, without distinguishing whether the suspect surrendered by putting his hands up or by lying down or was inside or outside.[73]

In *Tucker v. City of Shreveport*, the Fifth Circuit granted qualified immunity to officers arresting the plaintiff following a traffic stop for driving with a broken brake light.[74] The plaintiff had kept driving for a few minutes after the officer activated his flashing lights until pulling over in a residential driveway in what one officer termed a high-crime area.[75] An officer ordered the plaintiff out of the car and, although agitated and verbally combative, the plaintiff had complied with orders to put his arms behind his back when one of the officers came over, grabbed the plaintiff and, feeling the plaintiff's arm "tensing up," pulled the plaintiff to the ground.[76] On the

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[70] *Id.* at 872.

[71] *See Campbell v. City of Springboro*, 700 F.3d 779, 784-85, 787 (6th Cir. 2012). *Campbell* also denied the officer qualified immunity for a second incident where the officer used the same police dog against a suspect hiding in a backyard playhouse. *Id.* at 786. The police dog in *Campbell* was not current on its training, but it was unclear whether the harm inflicted was due to a lack of training. *See id.* at 784 & n.1, 792. Nevertheless, the *Baxter* court also referenced the lack of training in *Campbell* as another point of distinction against the facts of *Baxter*. *See* 751 F. App'x at 872.

[72] *See Robinette v. Barnes*, 854 F.2d 909, 913-14 (6th Cir. 1988).

[73] The officers would, of course, still be able to argue at trial that the suspect had not, in fact, surrendered, that whether the suspect had surrendered was unclear, or that any other factual dispute rendered their seizure reasonable, and thus constitutional, under the Fourth Amendment.

[74] 998 F.3d 165, 170 (5th Cir. 2021); *see also id.* at 185-86 (Higginson, J., dissenting).

[75] *Id.* at 178.

[76] *See id.* at 179. Video footage of the incident is available at https://www.ca5.uscourts.gov/opinions/pub/19/19-32047_OfcChandler-full.mp4 ("Chandler Video"); https://www.ca5.uscourts.gov/opinions/pub/19/19-30247_OfcMcIntire-full.mp4;

ground, the plaintiff's legs kicked in the air as the officer and two others punched and kicked him while handcuffing him.[77]

The Fifth Circuit, analyzing the takedown separately from the actions on the ground, went through a litany of cases but could not find one that would "squarely govern" the facts of the dispute at hand.[78] The precedent cases included denials of qualified immunity where: officers tackled a suspect who had pulled his arm away from the officers and stepped away from them; a plaintiff who, after being told she was not under arrest, walked away from an officer who then slammed her face against a car window; officers punched, kicked, choked, tased, and forced onto his stomach an obese arrestee whose active resistance was disputed; an officer immediately used his taser and nightstick during a traffic stop without first attempting physical skill, negotiations, or commands; and an officer who smashed a car window, pulled the plaintiff out of a car, and threw her against the vehicle.[79] The key facts distinguishing *Tucker* from these precedent cases, the Fifth Circuit held, were that the plaintiff had kept driving for a couple minutes after the officer turned on his siren and flashing lights, the plaintiff stopped in a residential driveway in a purported high-crime area, the plaintiff was a couple inches taller than the officer, the plaintiff never kept his hands still, and one of the officers felt tension in the plaintiff's arm.[80] With respect to the officers' kicking and punching the plaintiff while he was on the ground, the Fifth Circuit granted qualified immunity because the plaintiff—whose legs had kicked in the air and who moved his arms following the takedown—was not subdued and the plaintiff did not allege the use of force continued after he was handcuffed.[81]

Thus, *Tucker* is a case where qualified immunity let officers escape liability for escalating a traffic stop into a physical altercation by "violently slamming an arrestee who is not actively resisting arrest" into the ground.[82] That is a more appropriate level of analysis than whether the plaintiff was a few inches taller than the officer, or kept driving for a few minutes before pulling over, or pulled over in a residential driveway instead of a parking lot. But that was also the level of generality the district court had used in denying qualified immunity, which the circuit court overturned.[83]

("McIntire Video"); and https://www.ca5.uscourts.gov/opinions/pub/19/19-30247_OfcKolb-full.mp4 ("Kolb Video"). *Id.* at 170 n.1.

[77] *Id.* at 181.

[78] *Id.* at 176-78.

[79] *See id.*

[80] *See id.* at 178-79.

[81] *See id.* at 182-84.

[82] *See id.* at 175 (quotation marks and modifications omitted).

[83] *See id.* at 175-76.

For further reference, the **Appendix** contains additional recent examples of cases granting qualified immunity for lack of clearly established law, which highlight issues with how courts analyze this prong of the qualified immunity test.

On the other hand, where courts have identified the right level of granularity, they have reached more appropriate outcomes—whether granting or denying qualified immunity.

In *Masters v. City of Independence*, the Eighth Circuit affirmed a judgment denying qualified immunity to an officer who discharged a taser against the plaintiff for at least 20 seconds—continuing well after the plaintiff had stopped resisting arrest and started complying with the officer's commands—until the plaintiff fell unconscious, because it was clearly established that "prolonging the use of a Taser against a suspect who was complying with a police officer's commands constituted an excessive use of force."[84] The officer had attempted to distinguish the facts of *Masters* from precedent because the precedent case involved a second taser application while the officer in *Masters* used just one, prolonged taser strike, but the Eighth Circuit rightly avoided going into that level of granularity.[85]

Similarly effective, in *Hedgpeth v. Rahim*, the D.C. Circuit granted qualified immunity to an officer who took down the plaintiff by pushing his knee into the back of the plaintiff's leg after the plaintiff did not comply with multiple orders to put his hands behind his back.[86] As the plaintiff fell, his head hit a window pane nearby.[87] The court found that there may be a genuine dispute about whether the use of force was reasonable for the suspected offense (public intoxication and pushing someone into the street), but it was not clearly established that it was "unlawful to use a takedown maneuver against a suspect who was shouting repeatedly and belligerently at the officers, who refused their orders to put his hands behind his back, and who had been described by a person with him as 'hard to handle.'"[88] Qualified immunity appears acceptable in this case,

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[84] 998 F.3d 827, 833, 837 (8th Cir. 2021). For an article on the incident with embedded video footage, see Nick Berardini & Matt Stroud, *A Shot to the Heart*, The Intercept, (June 7, 2016), https://theintercept.com/2016/06/07/tased-in-the-chest-for-23-seconds-dead-for-8-minutes-now-facing-a-lifetime-of-recovery/.

[85] *Masters*, 998 F.3d at 837. Of course, even at the level of generality used by the court, the officers may still have avoided liability had someone else not already been subject to prolonged tasing. But the court could conceivably also have viewed this case as one where an officer continued to use force against a subject no longer resisting arrest—a higher level of generality but still more particularized than the generic right to be free from excessive force.

[86] 893 F.3d 802, 805 (D.C. Cir. 2018).

[87] *Id.*

[88] *Id.* at 809. Whether wrongfully decided or not, precedent cases had also granted qualified immunity for similar situations where greater force was used. *Id.* at 809-10 (citing cases where officers received qualified immunity where multiple officers slammed a belligerent, public intoxication suspect into the ground; an officer punched an individual rushing down stairs toward

because the court does not appear to be splitting hairs and distorting common sense to dismiss a case in favor of police officers.

B. Potential Constitutional Violations Remain Undetermined

Because the Supreme Court permits courts to decide qualified immunity based on a right not being clearly established, without deciding whether an action does, in fact, violate the Constitution, certain acts can effectively be repeated without repercussion until a court rules on the underlying merits of such an act. In some cases, a court decision to skip over the merits can even create confusion over the scope of constitutional rights that previously a plaintiff may have argued were clearly established.

In *Frasier v. Evans*, for example, officers surrounded the plaintiff, who had been recording a police arrest of a third party, and demanded the plaintiff turn over the tablet used to record the incident.[89] An officer then searched the tablet without consent.[90] The plaintiff claimed the search and detention were in retaliation for filming the police in public, in violation of the First Amendment.[91]

The court granted the officers qualified immunity because judicial precedent in the Tenth Circuit did not clearly establish a First Amendment right to record police in public, even though the officers *actually knew* from prior training that such a right existed and four other circuits had held such a right existed.[92] Additionally, the court only assumed a First Amendment right to record police in public existed, without clarifying whether such a right, in fact, does exist[93]—thus a

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the officer; an officer ripped apart a protestor's earbuds and shoved the protester into a stone column; and an officer threw a driver trying to produce his license back into the car and slammed the door on the driver's leg).

[89] 992 F.3d 1003, 1008 (10th Cir. 2021) *petition for cert. pending*, No. 21-57 (filed July 8, 2021).

[90] *Id.*

[91] *Id.*

[92] *Id.* at 1015, 1022. The court also found out-of-court authority was split on whether a right to record police in public was clearly established at the time of the alleged incident. *Id.* at 1022-23. Highlighting the importance of reaching constitutional decisions on the merits, the right to record police in public is one that generally took multiple successive cases to establish in many circuits. *See* Schwartz, *After Qualified Immunity*, *supra* note 65, at 325 ("For example, every circuit that has considered the question has concluded that there exists a First Amendment right to record the police. But, in some circuits, it took many cases litigated over many years to establish that principle because courts repeatedly granted qualified immunity without reaching the constitutional question. In a world without qualified immunity, courts could not have avoided this difficult constitutional question and might have announced the right exists sooner.").

[93] *See Frasier*, 992 F.3d at 1023.

plaintiff in a future case in the Tenth Circuit is left with a more uncertain area of law than before the decision, when a plaintiff could rely on out-of-circuit cases that granted such a right.

C. Interlocutory Appeals Create a Litigation Imbalance

Officers who are denied qualified immunity may appeal the denial immediately.[94] Rationalized as necessary to preserve qualified immunity as an immunity from the costs and burdens of suit, in practice, permitting interlocutory appeals does not necessarily realize such a benefit. For one, officers most often raise qualified immunity as a defense at summary judgment—after at least some discovery.[95] Additionally, litigating interlocutory appeals is still time-consuming and expensive, and according to one study from Professor Schwartz, led to reversals only 12.2% of the time.[96] In fact, independent of strategic considerations, officers may also be better served by reserving their appeal on qualified immunity until after a trial, because trials may proceed more quickly than an interlocutory appeal.[97] Justice Stevens also thought permitting a Fourth Amendment case to go to trial would not cause a great disruption in a police officer's job compared to the senior government officials for whom objective qualified immunity had initially been recognized in *Harlow*, because testifying in court is part of an officer's job.[98]

On the other hand, permitting interlocutory appeals can front-load costs to plaintiffs, who will have to bear the expense of litigating the appeal without knowing whether they will succeed on the merits before a jury. According to Professor Schwartz's study, 39% of interlocutory appeals were never decided, apparently because the motions were settled while the appeal was pending.[99] Inspiring settlements through interlocutory appeals may appear beneficial, but such settlements may be unduly coercive to plaintiffs because of the impending expense of going through the appeals process.

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[94] *See supra* Part I, § II.C.

[95] *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 12, at 9-10 (finding qualified immunity was raised at the motion to dismiss stage in just under 14% of cases in which it could have been raised and that those motions were granted just under 14% of the time).

[96] *See id.* at 39.

[97] *See Wheatt v. City of E. Cleveland*, No. 1:17-CV-377, 2017 WL 6031816, at *1 n.7 (N.D. Ohio Dec. 6, 2017) (Gwin, J.) ("Qualified immunity does not shield government officials from litigation headaches. And interlocutory appeals exacerbate governmental expenses. Here, this case will likely be tried in less than four days. Defendants may win. And even if defendants lose at trial, an appellate court can examine the same immunity issues, only on a more complete record. An interlocutory appeal worsens government expenses, it does not lessen them.").

[98] *See Anderson v. Creighton*, 483 U.S. 635, 661-62 (1987) (Stevens, J., dissenting).

[99] *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 12, at 40, 75.

D. Stated Benefits of Qualified Immunity Fail to Materialize

As the Supreme Court has articulated it, qualified immunity is designed to prevent insubstantial suits from proceeding to trial, thus sparing defendants the expense of litigation and discovery.[100] Indeed, the Court's concern with plaintiffs circumventing qualified immunity through clever pleading formed part of the basis for making qualified immunity an entirely objective, rather than subjective, exercise.[101] However, in practice, qualified immunity rarely serves these objectives.

First, although courts are encouraged to decide qualified immunity early in the process, most qualified immunity decisions come at summary judgment or later—after at least partial discovery.[102] Second, qualified immunity forms the basis for case dismissals in less than 4% of cases where it could have been raised, while many cases are simply dismissed on the pleadings.[103] Third, as Justice Kennedy recognized in *Wyatt v. Cole*, the heightened pleading standard and revisions to summary judgment law imposed after *Harlow* render qualified immunity less necessary to prevent insubstantial suits from proceeding to trial, because such cases may be dismissed even without a qualified immunity argument.[104] Subsequent case law and the "plausibility" pleading standard has further confirmed insubstantial suits may be dismissed without resort to qualified immunity.[105] And finally, any cost savings from getting a case dismissed on qualified immunity may be offset by the time and expense of litigating the qualified immunity issue.[106]

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[100] *See supra* Part I, § II.A.

[101] *See id.*

[102] *See supra* note 94 and accompanying text.

[103] *See supra* note 65 and accompanying text.

[104] 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) ("*Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof on the question; and in *Harlow* we relied on that fact in adopting an objective standard for qualified immunity. 457 U.S., at 815-819. However, subsequent clarifications to summary-judgment law have alleviated that problem, by allowing summary judgment to be entered against a nonmoving party 'who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' *Celotex Corp. v. Catrett*, 477 U. S. 317, 322 (1986).") (cleaned up).

[105] *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Although *Iqbal* decided a question framed by qualified immunity, it did so based on the factual allegations in the pleadings without needing to delve into a legal analysis of "clearly established" law. *See id.* at 676-77, 685.

[106] *See Schwartz, After Qualified Immunity*, *supra* note 65, at 342-43.

Consider a recent case decided in the Middle District of Florida, *Edwards v. City of Fort Myers*.[107] In this case, a pro se plaintiff alleged that during a traffic stop, when he was outside his car, he asked the officers for permission to return to his car and get his cell phone.[108] The plaintiff received permission, yet when he turned to go back to his car, the officers tased the plaintiff multiple times, and then kicked and beat him.[109] Apparently the arrest report, which the plaintiff alleged was falsified, contained statements that the plaintiff was at fault, disobedient, and combative.[110] These allegations are serious constitutional violations whose resolution depends on factual determination of what happened, and the court accordingly denied qualified immunity at the motion to dismiss stage.[111] However, whatever the merits of this case, it is difficult to imagine an insubstantial case with any record of police use of force that would not be able to clear the same hurdle such that a court would be justified in granting a motion to dismiss without further evidentiary review.

Thus, while qualified immunity relatively infrequently weeds out insubstantial cases, it has renewed impact as a form of liability shield for police officers above and beyond that already provided by the Fourth Amendment—exactly what Justice Stevens worried about in his dissent in *Anderson v. Creighton*.[112]

End of Part I

[107] No. 2:19-cv-711-SPC-NPM, 2021 WL 1627475 (M.D. Fla. Apr. 27, 2021).

[108] *Id.* at *1.

[109] *Id.*

[110] *Id.* at *3. The court did not consider the arrest report at the motion to dismiss stage because it was not part of the pleadings. *See id.*

[111] *Id.* at *5.

[112] *Anderson v. Creighton*, 483 U.S. 635, 648, 664, 668 (1987) (Stevens, J., dissenting) (criticizing the Court's grant of qualified immunity in the context of an unlawful search as establishing a double standard of reasonableness under the Fourth Amendment, i.e. "the constitutional standard already embodied in the Fourth Amendment and an even more generous standard that protects any officer who reasonably could have believed that his conduct was constitutionally reasonable. . . . The Court counts the law enforcement interest twice and the individual's privacy interest only once . . . which unjustifiably and unnecessarily upsets the delicate balance between respect for individual privacy and protection of the public servants who enforce our laws").

Part II: The Solution

As described in Part I of this paper, **although qualified immunity is not an absolute shield to civil liability for a police officer's misconduct, it too often protects bad policing**. This, in turn, frustrates efforts to ensure police are held accountable when they cross the line and contributes to an impression—however erroneous—that police are beyond the law. At the same time, officers facing a lawsuit for a tough, split-second decision made in earnest pursuit of their duties understandably appreciate the cushion provided by qualified immunity, regardless of whether that is the intent of qualified immunity.[113]

IAPR believes that reforming qualified immunity reform is necessary to restore the balance between policing and protecting individual, constitutional rights. Properly done, reform will eliminate the obvious abuses of qualified immunity and encourage courts to provide guidance on policing behavior. Such reform contains four elements. At a high level, qualified immunity reform must:

1. **End the narrow, crabbed "clearly established law" analysis** that has devolved into an unproductive and unpredictable search for nearly identical factual precedent—a practice that has let officers escape liability on egregious fact patterns and consequently undermines public trust that police will be held accountable for their misconduct.

2. **Inspire courts to advance the protection of constitutional rights** by requiring courts to decide the constitutional question at issue in a qualified immunity case.

3. **Eliminate interlocutory appeals** of denials of qualified immunity, which lead to litigation imbalances in qualified immunity cases.

4. **Place backstop liability against the municipality or officer's employer** for a constitutional rights violation, rather than with the victim of the rights violation.

Importantly, **this reform does not require eliminating qualified immunity wholescale**.

The path to reform likely runs through Congress, due to the Supreme Court's apparent reluctance to correct the issues currently plaguing qualified immunity. To that end, this section describes the necessary elements of a reformed qualified immunity standard and proposes statutory language to accomplish that reform. The IAPR proposed standard contains elements that both

[113] Based on IAPR's policing experience, qualified immunity is not top-of-mind when officers make the split-second decisions inherent in their jobs. Nevertheless, as qualified immunity has become a more prominent issue in high-profile police reform discussions, officers' awareness of the doctrine, and resistance to reform, may have also increased. Sensible reform targets the times qualified immunity has prevented accountability for egregious abuses of police power. While this proposed reform will encourage better training and respect for individual rights, it does not seek to restrain officers from acting as necessary in the field beyond deterring any officer from feeling emboldened by qualified immunity to push constitutional boundaries.

advocates for eliminating qualified immunity and advocates for preserving qualified immunity in its current form should support, although the IAPR proposed standard falls between these two polar opposites. For parties that want to eliminate qualified immunity, this proposed reform will ensure the excesses of qualified immunity are reined in and victims of constitutional rights violations are not left without recourse. And for parties that want to preserve qualified immunity, this reform codifies a form of qualified immunity in the narrow set of cases where officers had no reason to believe they crossed the line.

While qualified immunity applies to diverse groups of government officials, **this reform is specific to police officers**, because IAPR's experience, expertise, and focus is on qualified immunity as it applies to police officers.

I. Elements of Reform

Four adjustments to the current qualified immunity standard accomplish this reform. First, replace the search for "clearly established law" to prove a constitutional violation with a requirement that officers show "binding legal precedent" supports their action by "clear and convincing evidence." Second, require courts to decide the constitutional law underlying the claim. Third, eliminate interlocutory appeals. And fourth, if officers receive qualified immunity but there is nevertheless a constitutional violation, place liability on the officer's employer.

As an initial matter, qualified immunity reform should tailor the doctrine's application to individual officers rather than immediately default to municipal liability, because effectively promoting police accountability requires holding individual officers responsible for their wrongs. Municipalities and individual states will, of course, still be free to indemnify their officers as they see fit—which currently happens for nearly all suits against police officers.[114]

E. Officers Must Show Their Actions Complied with Binding Legal Precedent

The search for "clearly established law" can devolve into an exercise in futility when there is a constitutional violation but courts either draw hair-splitting distinctions against precedent cases or the conduct is simply so egregious it is without legal precedent. In either scenario, "clearly established law" operates as a "get out of jail free" card for police misconduct based on what amounts to a technicality, rather than an objective test for whether the officers acted in good faith compliance with the Constitution.

IAPR suggests fixing this problem with three adjustments. First, place the burden on officers to show their conduct comports with the law at the time they acted—which should also

[114] *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. R. 885, 890 (2014) (finding police officers contributed to settlements and judgments in just .41% of cases in her sample of 9,225 civil rights damages actions resolved in plaintiffs' favor, which amounted to only .02% of funds paid). Indemnification may also be adjusted as part of state-level police reform. *See, e.g.*, Colo. Rev. Stat. § 13-21-131(4)(a) (2021) (prohibiting indemnification for amounts up to the lesser of 5% of the damages or $25,000, unless the officer acted in good faith and with a reasonable belief that the action was lawful).

comport with their training. This easily ensures victims of egregious, but unprecedented, police misconduct will have their day in court, while retaining a defense for officers who had no reason to believe their action fell outside permissible legal standards. For example, in *Jessop v. City of Fresno*, the Ninth Circuit granted qualified immunity to officers who stole $225,000 of cash and coins seized pursuant to a valid warrant, because it was not clear that a Fourth Amendment "seizure" applied to the continued holding of property already taken pursuant to a valid warrant.[115] But the reason it was unclear was that no similarly brazen act had previously come before the Ninth Circuit.[116] By flipping the burden to officers to show legal precedent supported their actions, this case would likely come out differently (or at least get to a ruling on the merits), because the officers would be unable to point to a case on point giving them permission to steal money seized pursuant to a warrant. So too for *Corbitt v. Vickers*—a case where an officer shooting at a non-threatening dog unintentionally hit an innocent child—where the court granted qualified immunity because it was not clearly established whether the shooting of an innocent bystander had to be intentional to violate the Fourth Amendment.[117]

Second, officers should have to show that the precedent case they believe supports their action does so by clear and convincing evidence. While flipping the burden to officers in the first step will prevent the egregious grants of qualified immunity, that presumption may not be enough for cases where qualified immunity becomes a hair-splitting exercise. But requiring a "clear and convincing" showing that the officers comported with existing law will challenge courts to ensure they are not dismissing cases based on meaningless distinctions. For instance, in *Baxter v. Bracey*—the case where officers released a police dog on a visible suspect who had surrendered by raising his hands in a basement—the court compared the facts of the case to one where officers were found to have violated the Constitution by releasing a police dog against someone lying down outside and to another where officers did not violate the Constitution by releasing a police dog to track down a hidden suspect in a dark, unfamiliar building.[118] The court found that the plaintiff's raising his hands, on its own, was not enough to put the officer on notice that using a police dog was unconstitutional, but with a clear and convincing standard, the officer would instead have needed to show under a more exacting analysis why releasing a police dog against a visible suspect who was not fleeing fell under the umbrella of the second precedent case above and not the first.

Third, the revised standard should replace "clearly established law" with comparison against "binding legal precedent." "Binding legal precedent" is a well-understood legal term and more accurately describes the comparative exercise appropriate to qualified immunity. Plus, using a new definitional term replaces the baggage of "clearly established law" that has led to the abuses of qualified immunity discussed above, while retaining the functional benefit of protecting officers

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[115] 936 F.3d 937, 940-42 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2793 (2020).

[116] *Id.* at 941.

[117] 929 F.3d 1304, 1316-17 (11th Cir. 2019); *see also* Appendix.

[118] 751 F. App'x 869, 872 (6th Cir. 2018), *cert denied*, 140 S. Ct. 1862 (2020); *see also supra* notes 68-72 and accompanying text.

who act according to an objective standard of knowledge.[119] Switching to "binding legal precedent" also removes confusion over what courts exactly can "clearly establish" the law, an uncertainty the Supreme Court has noted but never resolved.[120] On the other hand, binding legal precedent means exactly what it does in all other circumstances within a circuit, which although it varies somewhat circuit to circuit, typically means decisions by the Supreme Court, appellate courts in that circuit, or a state court of last resort.

This standard is fair and workable. Courts should be able to easily apply a "clear and convincing" standard because courts are already familiar with such a standard in other contexts. And officers' training should educate them on legally permissible acts, so officers who stay within their training should retain the benefit of qualified immunity. Furthermore, because the standard is still based on precedent existing at the time of the incident, officers are protected from a subsequent Supreme Court or appellate court ruling creating a new constitutional right or overturning precedent.

Of course, even with this revised standard, courts may still find paths to be deferential to officers in a qualified immunity analysis. For instance, the court may use general principles to find the officer's actions complied with precedent—like in *Mullenix v. Luna*, where the Supreme Court noted that it had never found a Fourth Amendment violation from the use of deadly force in a high speed chase[121]—but the clear flipping of burdens and baseline presumptions and the requirement that officers meet the new standard with a showing of "clear and convincing evidence" counsel against such an overly-permissive approach.

F. Courts Must Decide Constitutional Rights

Courts must decide whether the facts alleged comprise a constitutional violation, reverting to the original *Saucier v. Katz* standard. The current *Pearson* standard, which permits courts to skip over the constitutional question, has allowed courts to evade answering constitutional questions and may be responsible for the recent upward trend in grants of qualified immunity.[122] Forcing a decision on the constitutional merits of a claim, however, forces courts to confront the issues of the underlying allegation and **provide guidance to officers and the public on constitutionally acceptable behavior**. Forcing courts to confront the constitutional issues, while preserving a form of qualified immunity, may also lead more courts to deny qualified immunity in

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[119] Of course, like any new definitional term, court decisions could reach unforeseen outcomes despite the term's apparent simplicity and common understanding.

[120] *See City and Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 614 (2015) ("[E]ven if a controlling circuit precedent could constitute clearly established law . . .") (quotation marks omitted). It is also uncertain under the current qualified immunity standard whether court decisions outside a circuit can clearly establish the law within a circuit (or render the law unclearly established in that circuit).

[121] *See* 577 U.S. 7, 15 (2015).

[122] *See Chung*, *supra* note 64.

the questionable or egregious cases.[123] Even in cases where there is an obvious moral wrong by officers but no Fourth Amendment precedent, such as *Jessop v. City of Fresno*, deciding the constitutional question in favor of dismissing the case would at least provide closure on the merits.[124]

The Supreme Court, in switching to the *Pearson* standard, argued that the *Saucier* standard was unworkable because of principles of constitutional avoidance and lack of detailed briefing on the constitutional questions,[125] but these concerns are overblown. For one, courts face struggles just the same in deciding qualified immunity questions without a thorough canvas of constitutional law to draw upon.[126] For another, switching to a clear and convincing evidentiary standard, as discussed above, will naturally lead to more comprehensive briefing on the constitutional questions. Finally, if, as described above, the revised qualified immunity standard places the burden on officers to show binding legal precedent, officers will desire clarity on the limits of constitutionally acceptable officer actions. After all, at the end of the day, the existence of a constitutional violation is core to a section 1983 claim.

There may be rare cases where deciding the constitutional question as related to the officer's qualified immunity argument proves genuinely unworkable or significantly more burdensome than simply deciding the officer's actions comported with the state of the law at that time, but even in such a case, the constitutional question will still need to be decided if there is backstop liability against the municipality for all constitutional violations as proposed below.

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[123] Court decisions on qualified immunity tend to align with decisions on whether there was a constitutional violation. *See Schwartz*, *supra* note 65, at 321-22 ("Far more often, courts rule on the constitutional right and whether it was clearly established and reach the same conclusion on both, or grant qualified immunity without deciding the constitutional question.") (citing Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 37 (2015)). On the other hand, some scholars have argued that qualified immunity is necessary for courts to uphold innovational constitutional rights. *See id.* at 319. ("The prevailing scholarly view is that courts would narrow constitutional protections absent qualified immunity.") (citing Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 Fordham L. Rev. 479, 480 (2011) and John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 248 (2013)). Professor Schwartz disagrees that qualified immunity is necessary for constitutional innovation, because cases seeking large-scale change can be brought as motions for injunctive relief and officers are almost always indemnified against personal damages anyway. *See id.* at 320-21.

[124] *Cf.* 936 F.3d at 943 (Smith, J., specially concurring) (arguing that stealing money seized pursuant to a valid warrant does not violate the Fourth Amendment because a "seizure" occurs only in the initial taking of property).

[125] *See supra* Part I, § II.C.

[126] *See supra* note 57 and accompanying text.

G. Prohibit Interlocutory Appeals

Interlocutory appeals—available only to defendants from denials of qualified immunity—upset the balance in litigation between ensuring plaintiffs have a path to a remedy for a constitutional violation and sparing officers from the frivolous costs of a lawsuit. As noted In Part I, §§ II.D. and III.C, many interlocutory appeals come from denials of summary judgment motions, which themselves come after some discovery and the costs thereof have already occurred. Interlocutory appeals can stretch out litigation timelines, front-load costs to less-well-funded plaintiffs facing uncertain jury verdicts, and may not even result in meaningful cost savings given the efforts that go into an appeal. In fact, in many cases, a trial will proceed more expeditiously than a full appeal of qualified immunity.[127] Especially as qualified immunity has become more of a liability shield rather than a case management tool, the ability for officers, and only officers, to take interlocutory appeals has thus become a unilateral litigation tactic rather than an integral component of a litigation immunity as originally intended. Accordingly, the right to take interlocutory appeals from denials of qualified immunity no longer belongs within a qualified immunity defense.

H. Place Backstop Liability with the Officer's Employer

As a final backstop, if an officer receives qualified immunity, their employer should still be liable for any constitutional violations. **This is a simple matter of equity.** If there has been a constitutional violation but the officer is entitled to qualified immunity, why should the person whose rights were violated be the one who must bear the costs of the violation? That would frustrate efforts to ensure police accountability and impair community faith in the police forces protecting those communities. Additionally, placing backstop liability on the municipality or police department places responsibility on the entities developing police training to ensure their lessons remain current and emphasize the individual liberties core to our nation's system of rights.

II. Proposed Model Standard

Below is sample legislation reflecting a qualified immunity standard that meets the above criteria. This is marked against unofficial draft legislation published by Politico in June 2021 reflecting the ongoing Senate compromise discussions, which the Senate may have moved past at the time of this paper.[128] The language is inspired, in part, by a bill proposed in Florida by State

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[127] *See supra* notes 96, 105 and accompanying text.

[128] *See* Nicholas Wu & Marianne Levine, *Police reform talks stalling as law enforcement groups bristle*, Politico (June 10, 2021), https://www.politico.com/news/2021/06/10/police-reform-talks-stalling-as-law-enforcement-groups-bristle-493220. The draft legislation itself is available at https://www.politico.com/f/?id=00000179-f803-dc85-a77d-f93728640000. Note that the language relevant to qualified immunity from this draft legislation also extends section 1983 causes of action to include claims against federal officers, a reform which is outside the scope of this paper.

Senator Shevrin Jones and State Representative Michele Rayner.[129] Senator Braun (R-IN) also previously introduced a bill to reform qualified immunity that similarly flipped the burden to an officer to show legal justification for their action.[130] Blue underline reflects additions to the language and ~~red strikethrough~~ reflects deletions.

> Section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) is amended—
>
> (1) by striking "Every" and inserting the following:
>
> "(a) In this section, the term 'public employer' means a Federal law enforcement agency, a State, a public agency, as defined in section 901 of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10251), or any unit of local government, that, at the time of a deprivation of any rights, privileges, or immunities described in section (b), employs, or contracts with an individual to perform the duties of, a Federal or local law enforcement officer or any other officer empowered by law to execute searches, to seize evidence, or to make arrests.
>
> "(b) Every";
>
> (2) in subsection (b), as so designated, by inserting "the United States or" before "any State"; and
>
> (3) by adding at the end the following:
>
> "(c) If, while acting under color of law, any officer who is empowered by law to execute searches, to seize evidence, or to make arrests 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, ~~the public employer of~~ that officer shall be liable to the party injured for the conduct of the officer in an action at law, suit in equity, or other proper proceeding for redress, ~~regardless of whether a policy or custom of the public employer caused the violation, and~~ regardless of whether the officer has any defense or immunity from suit or liability, except as provided in paragraph (d) of this section.
>
> "(d) An officer who is empowered by law to execute searches, to seize evidence, or to make arrests is immune from liability under this section if he or she can establish, by clear and convincing evidence, that at the time his or her actions were taken, his or her actions (1) as established by binding legal precedent, did not constitute a deprivation of constitutional or statutory rights, or (2) were taken under the apparent authority of a statute which is invalid if the officer would not have been liable had

[129] *See* Fla. SB. 670 (2021) & Fla. HB 261 (2021).

[130] *See* Reforming Qualified Immunity Act, S.B. 4036, 116th Cong. § 4(b)(2) (2020).

the statute been valid. If an officer asserts a defense of immunity under this paragraph (d), the trial court must first determine whether a deprivation of rights, privileges, or immunities under paragraph (c) of this section has occurred.

"(e) If an officer who is empowered by law to execute searches, to seize evidence, or to make arrests has subjected or caused any citizen of the United States or other person within the jurisdiction thereof to be deprived of any rights, privileges, or immunities secured by the Constitution and laws pursuant to paragraph (c) of this section but is entitled to immunity under paragraph (d) of this section, the public employer of that officer shall be liable to the party injured for the conduct of the officer in an action at law, suit in equity, or other proper proceeding for redress, regardless of whether a policy or custom of the public employer caused the violation, and regardless of whether the officer has any defense or immunity from suit or liability. This paragraph shall constitute an abrogation of sovereign immunity with respect to public employers that are States or public agencies of States and a waiver of sovereign immunity with respect to Federal law enforcement agencies for any claim brought under this section. Nothing in this paragraph shall be construed to limit or preclude any legal, equitable, or other remedy that is available, under this section or under any other source of law, against an individual officer.

"(f) There shall be no interlocutory appeal of a trial court's denial of the application of the defense of immunity under this section.".

III. Conclusion

The four reforms outlined above offer a fair and workable solution to the problems that have made qualified immunity such a frustrating standard and a focal point for issues of police accountability. The IAPR proposed standard will correct the most egregious abuses of qualified immunity and many of the less egregious but nevertheless undesirable cases. Importantly, it does so without eliminating qualified immunity entirely, recognizing there may be rare cases where officers deserve the protections of qualified immunity. In all cases, the victim of a constitutional rights violation will have a path to vindicate their rights, whether against the officer or the officer's employer. These changes will improve police accountability and restore public faith that officers are not above the law, without demonizing officers making tough decisions while serving their communities. In other words, it embodies IAPR's value statement that "Police are essential. So is reform."

APPENDIX[131]

Sample Cases Granting Qualified Immunity for Lack of Clearly Established Law

J.W. v. Paley, No. 19-20429, 2021 WL 2587555 (5th Cir. June 23, 2021)

A school resource officer used a taser against a special education student (Plaintiff) who had been in a fight, was agitated, and was trying to leave the school building. The officer continued to tase Plaintiff even after Plaintiff was lying face down on the ground and not struggling. The Fifth Circuit granted qualified immunity to the officer because of a Fifth Circuit split in case law on whether a Fourth Amendment use-of-force claim could be brought against a school official, the "antithesis of clearly established law." Although a prior case had permitted a suit to go to trial where a school resource officer had slammed a student into a wall, a different, unpublished case had rejected the notion of Fourth Amendment claims based on school discipline, because doing so would circumvent Fifth Circuit case law disallowing substantive due process claims against school officials for disciplinary actions.

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

Officers sent to execute a no-knock warrant against a violent drug dealer wound up raiding the wrong house—Plaintiff's house, which was the house next door to the house on the warrant—after initially going to the correct house and turning away. The raid involved two groups, the Flint Circuit Drug Task Force ("Task Force") and the Henry County Sheriff's Office Special Response Team ("SRT"). The Task Force had been investigating the drug dealer but had been chased away from his property when conducting surveillance. One of the Task Force agents had described the property as habitable but run down, not abandoned, with off-white siding. The warrant accurately described the property to be raided in detail. The Task Force requested assistance from the SRT for the raid, but the SRT relied on the Task Force to describe the location. In preparing for the raid, no one reviewed the warrant beyond making sure it was signed, authorized no-knock entry, and matched the address from a presentation on the property; and no pre-raid site visit was conducted because of the target's violent nature.

The SRT officers set out to execute the warrant as the sun was setting. When the officers arrived at the target address to execute the warrant, however, they moved on from the target house, because they did not think it looked like an occupied, habitable building. The officers instead continued to Plaintiff's house, which had yellow siding and was 40 yards away, separated by a few trees from the target house. The officers raided Plaintiff's house with flash grenades and forcible entry. Plaintiff sued the commanding officer and others for violation of the Fourth Amendment.

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[131] The facts presented in these case summaries are allegations either supported by evidence at the time of the decision or presumed to be true for the purposes of the decision.

*Brian Morganelli served as a Weil, Gotshal, & Manges LLP 2021 Research Fellow at the Institute for American Policing Reform.

The court granted the officer qualified immunity, finding the officer did not violate clearly established law. The court looked at whether the officers made a reasonable effort to avoid mistake, and found his conduct was not clearly inconsistent with that standard. Important to the court's reasoning, and distinguishing against precedent cases, was that the officer had not previously visited the address subject to the warrant because the suspect's history of violence made pre-surveillance risky.

A precedent case had denied qualified immunity to an officer who led agents on a raid of the wrong house, when that officer "did nothing" to ensure the raid was conducted at the right address. Specifically, the officer in the precedent case led agents to the wrong address on a daytime raid in a neighborhood with clearly marked house numbers and distinguishable residences, despite having previously visited the correct location and having the correct address in the warrant, which the officer did not reference.

The court also disregarded an unpublished decision that found a constitutional violation from a mistaken execution of a warrant at the wrong address, because an unpublished decision could not clearly establish the law.

Stewart v. City of Euclid, 970 F.3d 667 (6th Cir. 2020), *cert. denied*, 970 F.3d 667 (2021)

Officers responded to a call about a suspicious car parked on a street, inside which Decedent was sleeping. The first officer to respond saw items he believed to be a wine bottle cap, a digital scale, and a marijuana blunt inside the car. When the second officer arrived, the first officer described the scene, and the second officer parked his car in front of Decedent's car to block escape. Neither officer turned on their cars' flashing lights. The officers approached Decedent's car and knocked on the window; neither announced themselves as police. In response, Decedent started the car, and one of the officers grabbed Decedent's arms and yelled "stop" to keep the vehicle from moving. That officer attempted to pull Decedent from the car while the other officer opened the passenger's side door to try to push Decedent from the car. At this point, Decedent put the car in gear and drove off (staying within the speed limit), bumping into the patrol car that had been parked to block his escape. The driver's-side officer disengaged from the moving car, but the other officer climbed fully inside. Decedent asked the officer why he was in his car, and the officer yelled a response. Inside the car, the officer tried to gain control of the gearshift while striking Decedent in the head, and also deployed a taser with little effect. At one point, the car came to an abrupt stop as if it stalled; the officer did not try to exit, and Decedent turned the car on and continued driving after pushing away the officer. Decedent continued driving at twenty to thirty miles an hour as the officer attempted to get control of the car. The car twice hit the curb. Eventually, the officer got the car into neutral, but Decedent continued to rev the engine, at which point the officer pulled out his pistol and shot Decedent twice. Decedent then attempted to punch the officer for the first time, and the officer shot Decedent three additional times. Decedent's mother brought suit under section 1983 for violation of decedent's Fourth Amendment rights.

The court granted qualified immunity to the officer for his use of force inside the vehicle. The court found the officer's decision to enter the vehicle was irrelevant to the use of force question. The court did not rule on whether a constitutional violation existed, because it found no clearly established law on whether an officer could use deadly force while inside a suspect's car.

The court distinguished cases where an officer used deadly force while standing outside a fleeing vehicle, which turned on whether the officer was afraid of being struck by the vehicle, and found cases from outside the circuit with similar facts could not establish precedent in the Sixth Circuit. However, the court permitted state law claims against the officer to proceed, because state law immunity turned on recklessness, not clearly established law.

The dissent would have denied qualified immunity because the dissent believed it was clearly established that an officer could not use deadly force on an unarmed, fleeing suspect who posed no imminent threat of physical injury to the officer or bystanders.

Goffin v. Ashcraft, 977 F.3d 687 (8th Cir. 2020), *petition for cert. pending*, No 20-1362 (filed March 30, 2021)

Officers responded to a report that Plaintiff was stealing guns, ammunition, and painkillers. Officers received other reports that Plaintiff was armed and dangerous. Officers stopped Plaintiff in a car outside a garage and escorted him to a patrol car, where one officer patted down Plaintiff and did not remove anything. As officers were putting Plaintiff in handcuffs, Plaintiff broke free and ran toward a group of bystanders. One of the officers, who had observed the pat down, saw Plaintiff raise his right shoulder, as if to reach for a gun, and the officer shot Plaintiff once in the back.

The court granted qualified immunity because it was not clearly established that an officer could not shoot an individual suspected of being armed and dangerous after the officer observed nothing being removed during a pat down. The court distinguished this case against a case that denied qualified immunity to an officer who shot a suspect after the officer saw the suspect throw down his gun and surrender (which case was also decided after the incident at issue).

The dissent would have denied qualified immunity because it was clearly established that the use of deadly force against a fleeing suspect who does not pose a significant threat of death or serious injury to officers or others is not permitted.

Shelton v. Stevens, 964 F.3d 747 (8th Cir. 2020)

Officers were executing an arrest warrant against Plaintiff. Following a high-speed chase, which ended when Plaintiff crashed and fled on foot, the officers came across Plaintiff walking with his hands in the air on the street. Plaintiff refused to comply with commands to get on the ground. Two officers tackled Plaintiff to the ground, but Plaintiff continued to resist and potentially reached for a concealed weapon. Three more officers entered the scrum, and one used a chokehold that caused Plaintiff to lose consciousness at the same time another officer hit Plaintiff on the head with his radio. No more than two seconds later, an officer stomped on Plaintiff's ankle, which caused a broken ankle that required surgery. Plaintiff sued for excessive force, and the district court dismissed complaints against all officers except for the ankle stomp.

The officer who stomped on plaintiff's ankle appealed, and the Eighth Circuit granted qualified immunity. Although the court found the ankle stop was unreasonable under the Fourth Amendment, it did not clearly violate plaintiff's rights any more than the chokehold or hit to the

head, for which actions those officers had received qualified immunity. The Eighth Circuit distinguished this case against ones that had denied qualified immunity for use of gratuitous force against a compliant or fully subdued suspect and compared it to one case that permitted the use of a taser on a prone suspect who refused to surrender.

Cox v. Wilson, 971 F.3d 1159 (10th Cir. 2020), *cert. denied*, No. 20-1002, 2021 WL 1725182 (May 3, 2021)

Officers, in their cars, were following Plaintiff, who was driving erratically in snowy, dangerous conditions on a congested roadway. Other officers had set up spike strips down the road and informed the officers in vehicular pursuit of that fact. One of the officers in pursuit pulled up next to plaintiff and told Plaintiff to stop, but Plaintiff did not comply. The officer saw Plaintiff move his hand down to his right hip as if to reach for a weapon, but out of the officer's view. At some point, the car in front of Plaintiff's car stopped, and the officers in pursuit pulled up on either side of Plaintiff, boxing his car in. One of the officers got out of his car to attempt to take the keys out of the ignition in Plaintiff's car, but instead "almost immediately" shot Plaintiff. The officer said he thought Plaintiff had attempted to move his car to get away, which could have placed the officer in harm's way, although other witnesses provided conflicting testimony on whether Plaintiff's car moved.

The jury ultimately found the shooting was not unreasonable. The jury instructions, however, did not include a sentence requested by Plaintiff that would have instructed the jury to consider the officer's actions preceding the shooting. Plaintiff appealed the denial of this instruction, and the Tenth Circuit affirmed, finding that the inclusion of such a sentence would have been error because the officer was entitled to qualified immunity for getting out of the car. The court reasoned getting out of the car did not violate any clearly established law. The court compared this case to another case where the Tenth Circuit granted qualified immunity to officers who recklessly approached a home without announcing themselves, leading to a confrontation with the residents where one of the officers shot a resident, because it was not clearly established that such recklessness could lead to liability.

Two judges dissented from a denial of rehearing. Their dissent argued that the Tenth Circuit had analyzed the comparative case used to grant qualified immunity at too high a level of generality by comparing to a precedent case where officers approached a home on foot instead of a car chase—two factually distinct types of misconduct, even if both were similarly improper.

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

An officer pulled over Plaintiff, purportedly because the temporary tag on Plaintiff's car was folded over to where the officer could not see it. Plaintiff promptly pulled over and provided his license and registration. The officer requested a background check and criminal history search. The background check came back clear, and, while the criminal history search was being run, the officer went to Plaintiff to obtain consent to search the car. The officer asked five times for permission, saying he received a call that there were ten kilos of cocaine inside. On the fifth ask, Plaintiff gave permission. The officer then went through the car in detail but found nothing. The traffic stop lasted nearly two hours with the search.

The court castigated qualified immunity as a doctrine but believed that its hands were tied by the case law (although the authority relied upon by the court included *Taylor v. Riojas* before it was overturned by the Supreme Court). Accordingly, the court granted qualified immunity to the officer because, even though the search was the product of undue coercion in violation of the Plaintiff's constitutional rights, it was not clearly established that the officer's sequential requests for permission to conduct a search and use of lies and other intimidation to get permission violated the Constitution. Prior decisions from outside circuit courts and the district court holding such actions violated the Constitution could not serve as clearly established law within the Fifth Circuit. Additionally, precedent cases were not on point because they involved searches after the background checks had already come back clear; or were defined at too high a level of generality, such as a right to be free from unreasonable intrusion into the interior of a car.

Cugini v. City of New York, 941 F.3d 604 (2d Cir. 2019)

Plaintiff had voluntarily surrendered at a police precinct in connection with a misdemeanor complaint of stalking and harassment filed by Plaintiff's estranged sister. In advance of Plaintiff being moved from the holding cell to central booking, an officer came to Plaintiff's holding cell and told her to put her hands behind her back. Plaintiff readily complied, but the officer twisted Plaintiff's arm and handcuffed her very tight. Plaintiff said "ouch," and the officer said "don't make me hurt you" and tightened Plaintiff's cuffs further, whereupon Plaintiff again said "ow" or uttered a cry. Plaintiff was kept in cuffs for forty minutes while being transferred. When the officer went to remove Plaintiff's cuffs, he instead made them tighter until another officer removed them. Plaintiff was left with nerve damage from having the cuffs on too tightly.

The court granted qualified immunity to the officer, because although the officer violated Plaintiff's constitutional rights, and it was clearly established that excessive use of force in handcuffing was prohibited, it was not clearly established that an officer had to respond to a complaint by a person who "exhibited only non-verbal aural and physical manifestations of her discomfort."

Winzer v. Kaufman Cnty., 916 F.3d 464 (5th Cir. 2019), *reh'g denied*, 940 F.3d 900 (5th Cir. 2019), *cert. denied* 141 S. Ct. 85 (2020)

Officers were responding to calls of a man shooting a gun in the streets. When officers arrived, a man in a brown shirt fired a shot at them and fled into the trees. After a few minutes, officers spotted Decedent down the road, in a blue jacket and riding a bicycle, over a hundred yards away from the officers. Decedent apparently wanted to show a toy gun to the officers. Decedent had both hands on the handlebars of his bike, but the officers thought Decedent raised a hand and pointed a gun at them. They shouted to drop the gun and, within a second, opened fire. Decedent was struck four times and fled to his yard, where his father attempted to attend to him. The officers followed Decedent to his yard and tased him twice when he resisted being handcuffed. Ten seconds later, Decedent went limp and was later pronounced dead at the scene.

The court found that a jury could find the officers violated Decedent's constitutional rights, but, without analysis, granted qualified immunity on the second prong (clearly established law)

because "[u]nder this exacting standard, we cannot conclude that decedent's right to be free from excessive force was clearly established here." The finding that a jury could find Decedent's constitutional rights were violated, however, permitted the suit to continue against the county.

Kelsay v. Ernst, 933 F.3d 975 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 2760 (2020)

Plaintiff was roughhousing with a friend at a public pool, which led a fellow pool patron to call and report a suspected assault to the police. Officers arrived and arrested Plaintiff's friend. The friend became enraged when taken to the patrol car, and Plaintiff walked over the car to protest the arrest of her friend. An officer on scene told two subsequently arriving officers that Plaintiff had tried to prevent the arrest of her friend by pulling officers off and getting in the way of the patrol vehicle door. At the same time, Plaintiff's daughter got in an argument with the pool patron who called the police. As Plaintiff walked over to her daughter, one of the subsequently arriving officers grabbed Plaintiff's arm and told her to "get back here." Plaintiff told the officer why she was walking away and kept walking after the officer released her arm, but after she took a few steps, the officer grabbed Plaintiff in a bear hug and threw her to the ground, breaking Plaintiff's collarbone and knocking her out. The officer arrested Plaintiff, who was ultimately convicted of two misdemeanor offenses for attempted obstruction of government operations and disturbing the peace. Plaintiff sued the officer for use of excessive force.

The Eighth Circuit granted qualified immunity to the officer, because it was not clearly established at the time of the incident that a takedown maneuver to arrest a suspect who ignored instructions and walked away was forbidden. The court found the officer could have reasonably believed plaintiff was non-compliant, and so the court found this case different from ones that prohibited the use of force against compliant, non-fleeing individuals. The court also favorably compared this case to a case finding an officer did not violate the Fourth Amendment when he took down a suspect who had walked away after being ordered to put his hands behind is back.

The dissent thought the "body of relevant case law" clearly established that the use of force against a non-threatening misdemeanant who was not fleeing, resisting arrest, or ignoring other commands violated that person's right to be free from excessive force, comparing this case to ones where courts found it unreasonable to: tase an individual who committed an open-bottle violation inside a car and who refused to put down her cell phone; takedown a bar owner not suspected of committing a crime who told officers to leave the bar; takedown an individual who raised her hands over her head in frustration fifteen feet away from someone with whom she had been fighting; and attempt to handcuff an individual who had a condition known to the officer that prevented the individual from putting his hands behind his back, and to tase that individual when he attempted to rise to his feet after falling to the ground with the officer during the attempted handcuffing.

Nicholson v. City of Los Angeles, 935 F.3d 685 (9th Cir. 2019)

A group of teenagers were freestyle rapping in an alley; one of them had a toy gun with a bright orange tip. Two plainclothes officers driving by saw the gun, stopped, and ran down the alley toward the teenagers. Within a few seconds of entering the alley, one of the officers shot at the teenager holding the toy gun, hitting one of the other teenagers in the group. The teenagers say

the officers never identified themselves nor said to drop the gun before firing. Responding officers handcuffed all the teenagers at the direction of the shooting officer—including the teenager who was shot, who was kept in handcuffs for over five hours. The teenager who was shot and another who was detained brought suit for a violation of due process under the Fourteenth Amendment. (Plaintiffs brought their claim under the Fourteenth Amendment because they were not the target of the shooting, so their Fourth Amendment rights were not violated).

The court denied qualified immunity for the prolonged detention in handcuffs. However, the court granted qualified immunity to the officer for the shooting itself. The court found the shooting violated the Plaintiffs' due process rights, but there was no case on point sufficient to demonstrate a violation of clearly established law. The Plaintiffs argued that individuals have a liberty interest in their bodily security, but the court thought that defined the right at too high a level of generality. And cases cited by the Plaintiffs showing constitutional violations from shootings under the Fourth Amendment could not clearly establish Fourteenth Amendment rights.

Corbitt v. Vickers, 929 F.3d 1304 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020)

Officers pursuing a criminal suspect entered Plaintiff's yard, where several children and one adult were playing. The officers ordered everyone onto the ground and handcuffed the adult and placed a gun at his back. While the children were lying on the ground, the family dog wandered over. An officer shot at the dog, but missed, and the dog retreated. A few seconds later, the dog returned. The same officer shot at the dog again but missed the dog and hit one of the children lying on the ground in the knee. At the time, the child was lying only eighteen inches away from the officer.

The Eleventh Circuit granted qualified immunity to the officer, because "the law is not clearly established that there is a Fourth Amendment violation when an already-seized bystander, as in the instant case, is accidentally harmed as an unintended consequence of an officer's intentional shot at something else entirely," and the court believed shooting at the dog was within the officer's discretion to control the situation, even if the officer could have been more careful in hindsight. As part of its decision, the court noted that Plaintiff "failed to present us with any materially similar case from the Supreme Court, [the Eleventh Circuit], or the Supreme Court of Georgia that would have given [the officer] fair warning that his particular conduct violated the Fourth Amendment." The court found the principle that officers may not use excessive force in carrying out an arrest was too broad to give notice in a qualified immunity case.

The dissent believed shooting at a non-threatening pet surrounded by children was unreasonable, and an obvious, facial violation of the Constitution for which qualified immunity could be denied even without materially similar precedent.

Sauers v. Borough of Nesquehoning, 905 F.3d 711 (3d Cir. 2018)

An officer engaged in a high speed, reckless car chase of a suspect who committed a summary traffic offense. During the chase, the officer lost control of his car and hit Plaintiff's car, which was driving in the opposite direction, killing Plaintiff's wife. The officer pleaded guilty to vehicular homicide.

The court granted qualified immunity to the officer on Plaintiff's section 1983 claim for violation of due process under the Fourteenth Amendment, because at the time the officer decided to engage in the high-speed pursuit, it was not clearly established that officers could face constitutional liability for actions taken in conscious disregard of a great risk of harm during a police pursuit. The court found that although one circuit court had applied a deliberate indifference test, it was unclear whether the deliberate indifference test would apply to the officer's actions or the intent-to-harm test would apply, as it did in other circuits.

The dissent argued it was clear that an officer undertaking a non-emergency, high-speed pursuit, who had time to deliberate before giving chase, would have known that the test is whether the action "shocks the conscience" by using a deliberate indifference threshold.

E.W. by and through T.W. v. Dolgos, 884 F.3d 172 (4th Cir. 2018)

A school resource officer took Plaintiff, a ten-year-old student, out of class to discuss a fight between Plaintiff and another student three days earlier. The officer thought Plaintiff was not taking the talk seriously, so the officer put Plaintiff in handcuffs and reseated her. The officer said she was concerned about her physical safety because of Plaintiff's apathy. Plaintiff began to cry and the officer released Plaintiff after two minutes. Plaintiff brought suit under section 1983 for excessive force in violation of the Fourth Amendment.

The court found the officer's actions were not objectively reasonable under *Graham v. Connor*. However, the court granted the officer qualified immunity because it was not clearly established that handcuffing a compliant, ten-year-old surrounded by multiple adults in a closed room for hitting another child three days earlier violated the Fourth Amendment. The court distinguished this case against one that found it obviously unreasonable for an officer to point his gun at an individual's face and handcuff the individual outside his hotel room without reasonable suspicion that a crime had been committed, apparently because in that case, the plaintiff was non-threatening and had engaged in no criminal activity. In contrast, the court in *E.W.* looked to another case that found the use of handcuffs would rarely be considered excessive force when the officer has probable cause for the underlying arrest.

The court also found the officer was entitled to immunity under Maryland's Tort Claims Act, because the officer had not acted with malice or gross negligence (the applicable standard for immunity under Maryland state law).

Wilson v. Prince George's Cnty., 893 F.3d 213 (4th Cir. 2018)

An officer was called to a residence following a burglary and assault. Plaintiff, the suspect in the burglary and assault, began walking toward the officer. Plaintiff was holding a pocketknife and stabbing himself with it in the chest and had slit his throat. The officer yelled at Plaintiff to drop his knife but Plaintiff did not comply. When plaintiff was about twenty feet away from the officer, Plaintiff stumbled forward four steps toward the officer, and the officer shot Plaintiff five times.

The court found the officer's conduct was not objectively reasonable; however, the court granted qualified immunity because it was not clearly established that the officer violated Plaintiff's constitutional rights. At the time, case law had prohibited shooting someone for the mere possession of a deadly weapon and shooting without warning an unarmed, mentally ill individual stomping toward an officer, but had granted qualified immunity to an officer who shot a mentally ill individual who had cut himself with a knife, verbally threatened officers, and slashed at an officer with the knife. The court found these cases did not clearly establish a constitutional violation for shooting an armed, mentally ill individual, who had been engaged in criminal activity, and who refused the officer's command to drop a pocketknife, even though the individual had not threatened anyone and was stumbling toward the officer while inflicting harm on himself.

Collie v. Barron, 747 F. App'x 950 (5th Cir. 2018)

Officers responding to a report of an armed robbery by two shirtless, black males came across Plaintiff, also a shirtless, black male but who was uninvolved in the robbery. Officers shouted potentially conflicting commands to Plaintiff, who continued to walk away from the officers with his hands in his pockets. When Plaintiff took his hands out of his pocket and pointed toward one of the officers, the other officer thought he saw a glint of a gun and shot Plaintiff.

The Fifth Circuit held that the officer who shot Plaintiff did not act unreasonably, because he reasonably perceived a threat of serious bodily harm or death. But even if that belief was unreasonable, the court found Plaintiff had not identified any similar case to show officers acted unreasonably in approaching an individual in the vicinity of a robbery in a dimly lit area who matched the rough description of a suspect in the robbery. (Plaintiff did not match a more complete description of the robbery suspects because he was older and shorter, although evidence available at summary judgment did not show whether the officers had received that description). The Fifth Circuit also affirmed the district court's denial of Plaintiff's request to take more discovery, which Plaintiff contended would have shown that the officers knew or should have known that Plaintiff did not match the more complete description of the robbery suspects, because qualified immunity is an immunity from suit and the costs of discovery.

Moore-Jones v. Quick, 909 F.3d 983 (8th Cir. 2018)

An officer, using his flashing lights and sirens, went to pull over Plaintiff for an expired registration. Plaintiff initially slowed to fourteen miles per hour and pulled onto the right shoulder of the road in an area that was narrow, unlit, and dark, before pulling back onto the road and continuing at thirty-five miles per hours (on a road where the speed limit was fifty-five miles per hour). After Plaintiff passed an exit, the officer began a PIT maneuver, striking Plaintiff's car and causing it to spin into a ditch. Plaintiff sued for excessive force in violation of the Fourth Amendment.

The court granted qualified immunity to the officer. The court found the right to be free from a PIT maneuver was not sufficiently definite, comparing this case to ones that permitted the use of force when a suspect refused commands to stop. The court distinguished the facts of this case from a district court case in the circuit that found a PIT maneuver constituted excessive force where the officer was driving an unmarked car with a malfunctioning emergency light. In contrast,

the court found support for the officer's actions in case law from outside the circuit that permitted PIT maneuvers in high-speed or reckless chases.[132]

Manzanares v. Roosevelt Cnty. Adult Detention Ctr., 331 F. Supp. 3d 1260 (D.N.M. 2018)

Plaintiff is a groundskeeper who was lent an inmate to aid in his work preparing county fairgrounds. Plaintiff believed he would only be provided with non-violent offenders, but the inmate lent to Plaintiff had a history of violence and wound up attacking Plaintiff with a pickaxe. The inmate had been transferred to the detention center that lent the inmate out. Transfers were allowed only for non-violent offenders according to policy, but the transferring detention center misrepresented the inmate's history. However, the facility that received the inmate also did not conduct a background check, although it should have. Plaintiff brought suit against the wardens and county commissioner, among others, for failure to supervise and train and for violation of due process.

The court found no due process violation, and even if there was a violation, the law was not clearly established because there was no precedent on point. Although critical of the "clearly established law" prong in qualified immunity analysis, the court found none of the precedent cases raised by the Plaintiff constituted "clearly established law" for the specific facts at hand. Plaintiff unsuccessfully raised three cases to argue that government officials can be liable for a due process violation for failure to supervise and classify individuals: a case where government officials placing children in a foster home failed to screen children for whether they would be a threat to others, which led to a sexual assault; a case where a student committed suicide after a school, aware of the child's threats to commit suicide, suspended him and left him alone with a firearm; and a case where parents placed their child in a daycare recommended by state officials and the daycare owner murdered the child. The court, on the other hand, found the facts of this case were closer to a case where courts granted qualified immunity to officials who knew of an escape plan but did nothing to stop it, which led to the inmates attempting to escape and murdering a prison guard.

[132] This case appears to closely resemble a recent event, also in Arkansas, where an officer executed a PIT maneuver against a pregnant woman who turned on her hazard lights and continued driving at a safe speed to find a place to pull over after the officer turned on his lights and siren to pull the woman over for speeding. *See* David K. Li, *Arkansas woman suing police after brief chase ends with her car flipped on its top*, NBC News (June 9, 2021) https://www.nbcnews.com/news/us-news/arkansas-woman-suing-police-after-brief-chase-ends-her-car-n1270217. Because the court in *Moore-Jones* did not rule on the constitutionality of the PIT maneuver, the law may potentially remain not clearly established, permitting the officer in this recent case to again receive qualified immunity on the plaintiff's section 1983 claims. *Cf. Cheeks v. Belmar*, No. 4:18-cv-2091-SEP, 2020 WL 5569982, at *15-17 (E.D. Mo. Sept. 17, 2020) (citing *Moore-Jones* in granting qualified immunity to officers who used a PIT maneuver against a suspect in a high-speed chase).