QUALIFIED IMMUNITY: IN DEFENSE OF "CLEARLY ESTABLISHED"

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I. INTRODUCTION

Qualified immunity has been termed "the most important doctrine in the law of constitutional torts."[1] The doctrine of qualified immunity provides a limited shield from liability for civil damages to government officials performing discretionary functions so long as their conduct does not violate "clearly established" law.[2] The Supreme Court of the United States has stated, "[a]s a matter of public policy, qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[3] Scholarship on qualified immunity does not break down along traditional partisan lines. Critics include conservatives such as Will Baude[4] and liberals such as Joanna Schwartz,[5] and while defenses of the doctrine are rare, they also transcend partisan lines.[6]

This Note avoids the ongoing debate of the general propriety of qualified immunity, and instead focuses on the standard of clearly established law that forms the core of the doctrine in its practical application. This Note focuses on the importance of the clearly established standard to the retention and morale of law enforcement personnel, and the benefits that has for the larger community. While avoiding the debate on qualified immunity's creation in the courts, this Note stresses why future modifications of qualified immunity should retain the clearly established standard. Arguments for completely

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[1] Aaron L. Neilson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1853 (2018) (quoting John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010)).

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

[3] Malley v. Briggs, 475 U.S. 335, 335 (1986).

[4] See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88 (2018) for a discussion on why the doctrine of qualified immunity lacks legal justification, and is therefore unlawful.

[5] See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 2 (2017) for a study finding qualified immunity "rarely serve[s] its intended role" and a proposal for it to be modified to better reflect its "role in constitutional litigation."

[6] *See generally* Nielson & Walker, *supra* note 1.

abolishing qualified immunity—and therefore the standard of clearly established law—have paid far too little attention to its importance.

Part II begins with a history of qualified immunity, and more specifically, the development of the clearly established standard. This Note argues so long as qualified immunity is not statutorily overturned, the application of clearly established law is alive and well and aligns with the Court's treatment of law enforcement. Part III, argues from a policy perspective, the standard improves law enforcement retention, which has a net positive on the communities in which officers serve. This Note concludes with examples of why the standard is not an absolute bar on police accountability.

In recent years, qualified immunity has been in the crosshairs of politicians, political pundits, and the national media.[7] While the future of the doctrine is uncertain, assuming some form of qualified immunity remains, law enforcement officers should continue to be judged only by what law is clearly established at the time of their actions, not with the benefit of hindsight.

II. DEVELOPING THE MODERN TEST FOR QUALIFIED IMMUNITY AND THE STANDARD OF "CLEARLY ESTABLISHED" LAW

A. Harlow v. Fitzgerald

The modern-day test for qualified immunity was established by the Supreme Court in 1982 in *Harlow v. Fitzgerald*.[8] Ernest Fitzgerald, a former management analyst in the Department of the Air Force, testified before a congressional subcommittee in 1968 about cost overruns and unexpected technical difficulties over the development of a particular airplane.[9] In 1970, Mr. Fitzgerald was dismissed from his position because of alleged departmental reorganization and reduction in force.[10] Mr. Fitzgerald suspected the real motivation behind his termination was unlawful

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[7] *See, e.g.*, Ed Yonhka et al., *Ending Qualified Immunity Once and For All Is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021), https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable/ [https://perma.cc/W3EJ-N23L]; *see also* Clark Neily, *Qualified Immunity Is Still the Key to Real Police Reform*, CATO INST. (May 14, 2021, 12:04 PM), https://www.cato.org/blog/qualifed-immunity-still-key-real-police-reform [https://perma.cc/MD25-DERS].

[8] 457 U.S. 800, 818–19 (1982).

[9] Nixon v. Fitzgerald, 457 U.S. 731, 733–34 (1982).

[10] *Id.* at 733.

retaliation for his testimony before Congress.[11] He sued, naming various officials as defendants.[12] After extensive discovery, only three defendants remained: President Richard Nixon and presidential aides Bryce Harlow and Alexander Butterfield.[13]

Mr. Fitzgerald's claims against President Nixon proceeded in *Nixon v. Fitzgerald*,[14] where the Court held the President of the United States is entitled to absolute immunity from damages liability based on official acts.[15] Mr. Fitzgerald's claims against Harlow and Butterfield proceeded in the separate action of *Harlow v. Fitzgerald*.[16]

In *Harlow*, the Court opened by stating, "[O]ur decisions consistently have held that government officials are entitled to some form of immunity from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability."[17] But unlike President Nixon, the privilege of absolute immunity was unavailable to Mr. Harlow and Mr. Butterfield.[18] Instead, the Court held, "[f]or executive officials in general . . . qualified immunity represents the norm."[19]

Before *Harlow*, a defendant asserting qualified immunity had to satisfy both an objective and a subjective test.[20] The objective test determined whether an official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]."[21] The subjective test determined whether an official "took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury."[22] In *Harlow*, the Court abandoned the subjective portion of the test, noting the determination of the subjective good faith of government officials led to increased costs in litigation.[23] Along with costs, the Court was concerned with the possibility

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[11] *Id.* at 736.

[12] *Id.* at 739.

[13] *Id.* at 740.

[14] 457 U.S. 731.

[15] *Id.* at 749.

[16] 457 U.S. 800, 802 (1982).

[17] *Id.* at 806.

[18] *Id.* at 809.

[19] *Id.* at 807.

[20] *Id.* at 815.

[21] *Id.* (alteration in original) (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).

[22] *Id.* (quoting *Wood*, 420 U.S. at 322).

[23] *Id.* at 816.

of a subjective test as a "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service."[24]

With those concerns in mind, the Court established the modern-day test for qualified immunity.[25] The new test focused solely on an objective component: "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[26]

B. The "Clearly Established" Standard After Harlow

1. The Meaning of "Clearly Established"

In *Harlow*, the Court held the objective reasonableness of an official's conduct should be measured by reference to clearly established law.[27] The Court held, "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."[28] But "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.'"[29] After *Harlow*, courts were left to decide what was and what was not clearly established.

In *Anderson v. Creighton*,[30] the Court addressed whether an action for damages against an FBI agent accused of searching a home in violation of the Fourth Amendment could proceed if a reasonable officer would have believed his actions complied with the Fourth Amendment.[31] Citing *Harlow*, the Court held the test for whether an official may be held personally liable hinges on the "objective legal reasonableness" of the action, assessed under the legal rules that were clearly established at the time of the offense.[32] Further, if the test for clearly established was interpreted too broadly, it would "bear no relationship to the 'objective legal

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[24] *Id.*

[25] *Id.* at 818.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 818–19.

[29] *Id.* at 819 (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).

[30] 483 U.S. 635 (1987).

[31] *Id*. at 636–37.

[32] *Id.* at 639 (citing *Harlow*, 457 U.S. at 819).

reasonableness' that is the touchtone of *Harlow*."[33] To advise against a broad application, the Court stated, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[34]

The Court did not go as far as to say, "an official action is protected by qualified immunity" only if the "very action in question has previously been held unlawful."[35] Instead, the Court held, "in the light of pre-existing law the unlawfulness must be apparent."[36] The Court decided the case in the officer's favor, reaffirming principles of qualified immunity that require that an official be permitted to argue that in light of clearly established law, a reasonable official could have believed his behavior was lawful at the time of the action.[37]

In *Brosseau v. Haugen*,[38] the Court addressed whether an officer violated clearly established law when she shot a suspect in the back while he was fleeing in a motor vehicle.[39] In deciding whether the law was clearly established, the Court of Appeals for the Ninth Circuit first turned to *Graham v. Connor*[40] and *Tennessee v. Garner*.[41] The Court held while *Graham* and *Garner* set the standard for determining whether uses of force are reasonable, the facts of *Brosseau* were not the obvious type where *Graham* and *Garner* alone offered a basis for decision.[42] Instead, a court should ask whether the officer's actions were clearly established in a more

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[33] *Id.*

[34] *Id.* at 640.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 641.

[38] 543 U.S. 194 (2004) (per curiam).

[39] *Id.* at 194.

[40] 490 U.S. 386 (1989) (holding excessive force claims that occurred during an arrest are to be analyzed under the Fourth Amendment reasonableness standard, rather than a substantive due process standard).

[41] 471 U.S. 1 (1985) (holding police use of deadly force against non-dangerous fleeing felons, and those who do not pose an imminent threat of physical harm to the officer or others is prohibited); Haugen v. Brosseau, 339 F.3d 857, 862 (9th Cir. 2003) (first citing *Graham*, 490 U.S. at 394–95; and then citing *Garner*, 471 U.S. at 11–12), *rev'd*, 543 U.S. 194 (2004).

[42] *Brosseau*, 543 U.S. at 199 (first citing *Graham*, 490 U.S. at 394–95; and then citing *Garner*, 471 U.S. at 11–12).

"'particularized' sense."[43] After turning to the more particularized facts in *Brosseau*, the Court found Officer Brosseau's actions were on the "hazy border between excessive and acceptable force," and thus the law was not clearly established.[44]

In *Mullenix v. Luna*,[45] the Court of Appeals denied the officer's claim of qualified immunity, holding the "immediacy of the risk posed by [the suspect was] a disputed fact that a reasonable jury could find either in the plaintiffs' favor or in the officer's favor."[46] The Supreme Court granted certiorari and addressed whether the state trooper used excessive force when he shot the fleeing motorist during a high-speed pursuit.[47] With facts similar to *Brosseau*, the Court admonished the Court of Appeals' holding and reminded lower courts "not to define clearly established law at a high level of generality."[48] Instead, like *Brosseau*, the Court held an application of "*Garner*'s 'general' test for excessive force was 'mistaken,'" and the correct inquiry involved analysis of the facts at hand.[49] Requiring "specificity" to find clearly established law is "especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.'"[50] The Court overturned the Court of Appeals and held the law was not clearly established.[51]

In *White v. Pauly*,[52] the Supreme Court addressed whether an officer violated clearly established law when he arrived late to a call, witnessed shots being fired by one of several individuals in a house surrounded by other officers, and proceeded to shoot and kill an armed suspect.[53] The Court reiterated its now well-settled principle: "While this Court's caselaw 'do[es] not require a case directly on point' for a right to be clearly established, 'existing precedent must have placed the statutory or constitutional question

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[43] *Id.* (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).

[44] *Id.* at 201 (quoting *Saucier*, 533 U.S. at 206).

[45] 577 U.S. 7 (2015) (per curiam).

[46] Mullenix v. Luna, 765 F.3d 531, 538 (5th Cir. 2014), *withdrawn and superseded by*, 773 F.3d 712 (5th Cir.), *rev'd*, 577 U.S. 7 (2015).

[47] *Mullenix*, 577 U.S. at 11.

[48] *Id.* at 12 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).

[49] *Id.* at 12–13 (quoting *Brosseau*, 543 U.S. at 199).

[50] *Id.* at 12 (alteration in original) (quoting *Saucier*, 533 U.S. at 205).

[51] *Id.* at 18–19.

[52] 137 S. Ct. 548, 549 (2017) (per curiam).

[53] *Id*. at 549.

beyond debate.'"[54] The Court refused to establish a rule that would require future courts to find a case "directly on point," and left open the possibility that "'general statements of the law are not inherently incapable of giving fair and clear warning' to officers."[55] But in *Pauly*, the Court held general statements of law such as *Garner* and *Graham* were not sufficient to meet the clearly established standard.[56]

In *Kisela v. Hughes*,[57] the Court again applied its well-settled precedent for clearly established law.[58] The Court expressed frustration with the Ninth Circuit's inability to understand its precedent, stating, "[t]his Court has 'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'"[59] The Court held the Ninth Circuit contravened well-settled principles, and the law was not clearly established.[60]

In sum, the Court's cases since *Harlow* have instructed lower courts to avoid defining clearly established law too generally, and to find precedent to be clearly established only once it has placed a constitutional question beyond debate. Because clearly established law cannot be defined too generally, another question often arises—how can precedent ever become clearly established?

2. Constitutional Avoidance and the Problem of Stagnation

To overcome qualified immunity, the allegedly violated constitutional right must have been "a clearly established constitutional right of which a reasonable official in the defendant's position should have known."[61] Under this formulation, courts may first decide whether the law was clearly established before ever addressing whether a constitutional right was violated.[62] The obvious concern is whether this rule would ever allow for future constitutional violations to become clearly established.[63] Despite this

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[54] *Id.* at 551 (alteration in original) (quoting *Mullenix*, 577 U.S. at 12).

[55] *Id.* at 551–52 (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)).

[56] *Id.*

[57] 138 S. Ct. 1148 (2018) (per curiam).

[58] *Id*. at 1152.

[59] *Id.* (quoting City & Cnty. of S.F. v. Sheehan, 575 U.S. 600, 613 (2015)).

[60] *Id.* at 1153–55.

[61] Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 141.

[62] *Id.* at 140–42.

[63] *See id.* at 142–43.

concern, the Court's decisions do not establish a bar on the future of creating clearly established law.[64]

In *Saucier v. Katz*,[65] the Supreme Court addressed whether a military police officer who arrested a demonstrator was entitled to qualified immunity.[66] The Court of Appeals held the proper analysis involved a two-part qualified immunity inquiry: first, was the conduct clearly established, and second, could the officer have believed, considering the clearly established law, that his conduct was lawful.[67] The Supreme Court rejected the Court of Appeals' proposed test.[68] Instead, it established a mandatory two-step procedure for lower courts to follow, thus helping solve the issue of constitutional stagnation by forcing courts to decide the constitutional issue before determining whether the defense of qualified immunity would apply.[69] The Court's approach has been criticized as one that "flew in the face of the well-established doctrine of constitutional avoidance, under which courts avoid deciding constitutional issues unless absolutely necessary."[70]

Given that a court could typically dispense of a case by simply determining the law was not clearly established, and that constitutional avoidance is a well rooted doctrine, "it was surprising that the Supreme Court would endorse, let alone mandate, what appeared to be a blatant violation of this bedrock principle."[71] Unsurprisingly, just eight years later, in *Pearson v. Callahan*,[72] the Court addressed the *Saucier* two-step procedure and considered whether it should be overruled.[73]

The *Pearson* court noted before *Saucier*, the Court's decisions suggested "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all."[74] At any rate, rather than

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[64] *Id.* at 175.

[65] 533 U.S. 194, 197 (2001), *receded from by* Pearson v. Callahan, 555 U.S. 223 (2009).

[66] *Id*. at 197.

[67] Saucier v. Katz, 194 F.3d 962, 967 (9th Cir. 1999), *rev'd*, 533 U.S. 194.

[68] *Saucier*, 533 U.S. at 209.

[69] *Id.* at 200.

[70] Beermann, *supra* note 61, at 141.

[71] Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 3 (Bos. Univ. Sch. of L., Working Paper, No. 09-51, 2009), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1730&context=faculty_scholarship [https://perma.cc/3K4X-9J38].

[72] 555 U.S. 223 (2009).

[73] *Id.* at 223.

[74] *Id.* at 232 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998)).

providing an option, "*Saucier* made that suggestion a mandate."[75] *Pearson* held it is unnecessary to address the constitutional issue before determining whether the law was clearly established in every case—thus, the *Pearson* Court held the *Saucier* two-step would no longer be mandatory.[76]

The Court suggested a two-step procedure might still be preferred, though it recognized that in some cases there "would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the 'clearly established' prong."[77] The Court held "[i]t often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be."[78] The Court recognized the two-step procedure may promote "the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."[79]

At times, the *Saucier* rule came at a price[80]: "There are cases in which it is plain that a constitutional right is not clearly established" and "[d]istrict courts and courts of appeals with heavy caseloads are often understandably unenthusiastic about what may seem to be an essentially academic exercise."[81] These possible academic exercises could result in "substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case."[82]

The Court noted several additional problems with strict adherence to the *Saucier* two-step rule, including limited success in furthering the development of constitutional precedent,[83] uncertain interpretation of state law,[84] difficulty in determining the factual basis for the plaintiff's claims,[85] a potential for bad decision making,[86] and making it harder for "affected parties to obtain appellate review of constitutional decisions that may have

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[75] *Id.*

[76] *Id.* at 236.

[77] *Id.*

[78] *Id.* (quoting Lyons v. Xenia, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring)).

[79] *Id.*

[80] *Id.*

[81] *Id.* at 237.

[82] *Id.* at 236–37.

[83] *Id.* at 237.

[84] *Id.* at 238.

[85] *Id.* at 238–39.

[86] *Id.* at 239.

a serious prospective effect on their operations."[87] Lastly, "[a]dherence to *Saucier*'s two-step protocol departs from the general rule of constitutional avoidance and runs counter to the 'older, wiser judicial counsel "not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."'"[88] Ultimately, the Court determined the *Saucier* procedure "should not be regarded as an inflexible requirement."[89] The Court's opinion reflects its "respect for the lower federal courts" and "the judges of the district courts and the courts of appeals [who] are in the best position to determine the order of decision[ ]making that will best facilitate the fair and efficient disposition of each case."[90]

With the *Saucier* two-step now optional, how does law ever become clearly established? The Court in *Pearson* addressed this concern by pointing out "the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity."[91] In fact, as stated by the Court:

> Most of the constitutional issues that are presented in § 1983 damages actions . . . also arise in cases in which that defense is not available, such as criminal cases and § 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages.[92]

Post-*Pearson*, arguments that the Court encouraged stagnation in developing clearly established law abound.[93] But a brief look at examples of clearly established law reveals the Court's claim that clearly established law is often developed outside of cases involving a qualified immunity defense has merit. For example, the standard for evaluating whether police have used excessive force was developed in *Graham v. Connor*.[94] In *Graham*, the Court created a three-prong test to balance the objective reasonableness of a police use of force: "[T]he severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers

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[87] *Id.* at 240.

[88] *Id.* at 241 (quoting Scott v. Harris, 550 U.S. 372, 388 (2007) (Breyer, J., concurring)).

[89] *Id.* at 227.

[90] *Id.* at 242.

[91] *Id.*

[92] *Id.*

[93] *See, e.g.*, Anthony Stauber, Note, *When Is a Right Not a Right?: Qualified Immunity After* Pearson, 39 MITCHELL HAMLINE L.J. PUB. POL'Y AND PRAC. 125, 142 (2018).

[94] 490 U.S. 386, 393–95 (1989).

or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[95] But the case did not involve qualified immunity.[96]

Instead, the Court addressed when force was excessive, and specifically noted the defense of qualified immunity had not been raised.[97] While *Graham* has often been cited as too general to develop clearly established law, it is still the foremost case applied in an excessive force analysis and, "[i]n an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law."[98]

Another example was presented in *Barton v. Martin*.[99] In *Barton*, officers were found to have violated the Fourth Amendment when they entered a home without a warrant for a suspect who had allegedly shot a cat.[100] As for warrantless entry, the Sixth Circuit held "[e]xisting precedent has placed the constitutional question at issue 'beyond debate.'"[101] That precedent was "clearly established" in *Payton v. New York*[102] and *Welsh v. Wisconsin*.[103] Neither *Payton* nor *Welsh* were cases that included a qualified immunity defense or analysis.[104]

Graham, *Payton*, and *Welsh* are far from an exhaustive list of cases that could serve or have served as clearly established law despite never including a qualified immunity defense.[105] Still, they are examples of why the *Pearson*

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[95] *Id.* at 396.

[96] *Id.* at 399 n.12.

[97] *Id.*

[98] Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 8 (2021) (per curiam) (quoting Brosseau v. Haugen, 543 U.S. 194, 199 (2004)).

[99] 949 F.3d 938 (6th Cir. 2020).

[100] *Id.*

[101] *Id.* at 950 (citing Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

[102] 445 U.S. 573, 585–89 (1980) (holding the Fourth Amendment prohibits law enforcement from entering a home without a warrant to make an arrest absent consent or exigent circumstances).

[103] 466 U.S. 740, 748–49 (1984) (holding a warrantless arrest of petitioner in his home was unconstitutional because the officers lacked exigent circumstances to enter).

[104] *Payton* was analyzed under the lens of the Fourth Amendment as it related to a New York statute allowing police officers to enter a private home without a warrant to make a felony arrest. *Payton*, 445 U.S. at 576–83. *Welsh* also questioned the validity of an arrest made without a warrant when the officers entered petitioner's home to enact the arrest, notwithstanding probable cause. *Welsh*, 466 U.S. at 741–42.

[105] *See, e.g.*, Arizona v. Gant, 556 U.S. 332, 335–38 (2009) (arising out of a motion to suppress and establishing a standard for searches incident to arrest of an automobile); Riley

(*continued*)

rule does not mean an end to all clearly established law,[106] and this is without mentioning the post-*Pearson* cases that include a qualified immunity defense that may nevertheless someday serve as clearly established law.[107]

In October 2021, the Court issued two per curiam opinions addressing qualified immunity and excessive force.[108] Those two cases, *City of Tahlequah v. Bond* and *Rivas-Villegas v. Cortesluna*, overturned lower court decisions denying qualified immunity and garnered the support of all nine Justices.[109]

In *Bond*, officers responded to a 911 call reporting the caller's ex-husband, Dominic Rollice, was intoxicated and would not leave her residence.[110] The caller requested the police to come assist, "otherwise, 'it's going to get ugly real quick.'"[111] Officers arrived on scene and were led to the side entrance of the garage where Rollice awaited inside.[112] Officers explained they were just trying to help, but Rollice appeared "nervous" and refused a request for consent to conduct a pat-down for weapons.[113] Body camera captured the rest of the interaction as Rollice retreated into the garage.[114] Officers asked him to stop, but he continued toward the back wall

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v. California, 573 U.S. 373, 378–81 (2014) (arising out of a motion to suppress and establishing cell phones may not be searched incident to arrest).

[106] *See* Lange v. California, 141 S. Ct. 2011, 2016–17 (2021). The Court refused to create a categorical exception to the warrant requirement for police to enter a home in hot pursuit of a misdemeanant defendant. *Id.* at 2024–25. This is a case that did not arise out of a post-*Pearson* qualified immunity analysis and will almost certainly be cited as "clearly established" law soon. *See id.* at 2024 ("The flight of a suspected misdemeanant does not always justify warrantless entry into a home . . . [o]n many occasions, the officer will have a good reason to enter.").

[107] *See generally* Caniglia v. Strom, 141 S. Ct. 1596 (2021).

[108] *See* City of Tahlequah v. Bond, 142 S. Ct. 9, 11 (2021) (per curiam); Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021) (per curiam).

[109] *Bond*, 142 S. Ct. at 12 (holding the officers did not violate any clearly established law and were therefore entitled to qualified immunity as a defense, reversing the Tenth Circuit's holding); *Cortesluna*, 142 S. Ct. at 8–9 (reversing the Ninth Circuit's finding that the officer was on notice that his conduct amounted to excessive force and that Officer Rivas-Villegas was entitled to qualified immunity).

[110] *Bond*, 142 S. Ct. at 10.

[111] *Id.* (quoting Bond v. City of Tahlequah, 981 F.3d 808, 812 (10th Cir. 2020)).

[112] *Id.*

[113] *Id.*

[114] *Id.*

where the tools were located.[115] Rollice grabbed a hammer, turned around to face officers, stepped out from behind an obstructed view, and appeared to bring the hammer back to throw or charge the officers.[116] Rollice was ordered to drop the hammer, but he did not, and he was shot and killed by the officers.[117]

The Court of Appeals reversed the district court's grant of qualified immunity to the officers[118] and concluded several cases clearly established the officers' conduct was unlawful.[119] The Supreme Court disagreed.[120] The Court cited to settled principles of qualified immunity and its repeated insistence "not to define clearly established law at too high a level of generality."[121] With those principles in mind, the Court held the Court of Appeals "contravened those settled principles here. Not one of the decisions relied upon by the Court of Appeals . . . comes close to establishing that the officers' conduct was unlawful."[122]

The Court of Appeals relied heavily on *Allen v. Muskogee*.[123] In *Allen*, officers responded to a possible suicidal suspect who was parked in a car.[124] The officers arrived on scene and approached the vehicle while screaming at the suspect to drop his gun before attempting to physically secure the gun from the suspect's hands.[125] Unlike the officers in *Allen*, the officers in *City of Tahlequah* merely followed Rollice at six to ten feet and did not yell until he picked up the hammer.[126] Thus, the Court could not "conclude that *Allen* 'clearly established' that the [officers'] conduct was reckless or that their

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[115] *Id.*

[116] *Id.* at 10–11.

[117] *Id.* at 11.

[118] Bond v. City of Tahlequah, 981 F.3d 808, 812 (10th Cir. 2020), *rev'd* 142 S. Ct. 9 (2021).

[119] *Id.* at 825–26.

[120] *Bond*, 142 S. Ct. at 11–12.

[121] *Id.* at 11 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).

[122] *Id.* at 12.

[123] 119 F.3d 837 (10th Cir. 1997); Bond v. City of Tahlequah, 981 F.3d at 816–26.

[124] *Allen*, 119 F.3d at 839.

[125] *Id.* at 841 (noting whether the officer was "screaming" while approaching Allen's car was an issue of material fact, as some testimony indicates he was, while other testimony indicates he cautiously approached the vehicle). *See also Bond*, 142 S. Ct. at 12 ("The officers in *Allen* responded to a potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to physically wrest a gun from his hands.").

[126] *Compare Allen*, 119 F.3d at 839–41, *with Bond*, 142 S. Ct. at 12.

ultimate use of force was unlawful."[127] In conclusion, the Court held neither the Court of Appeals nor the respondent "identified a single precedent finding a Fourth Amendment violation under similar circumstances," and therefore, the officers were entitled to qualified immunity.[128]

In *Cortesluna*, officers were dispatched to a 911 call that reported a woman and her two children were barricaded in a room for fear that respondent Ramon Cortesluna, the woman's boyfriend, would hurt them.[129] Officers arrived on scene and ordered Cortesluna outside and onto the ground.[130] Officers then observed a knife in Cortesluna's left pocket.[131] While officers removed the knife, Officer Rivas-Villegas "briefly placed his knee on the left side of Cortesluna's back."[132] Cortesluna sued.[133]

The Court of Appeals, relying on *LaLonde v. County of Riverside*,[134] held the officer was "not entitled to qualified immunity because existing precedent put him on notice that his conduct constituted excessive force."[135] In *LaLonde*, officers responded to a noise complaint at the plaintiff's apartment.[136] While investigating the noise complaint, officers believed LaLonde was attempting to obstruct their investigation and they decided to arrest him.[137] LaLonde resisted.[138] After LaLonde's resistance ceased, officers began to handcuff LaLonde and "Officer Horton forcefully put his knee into LaLonde's back, causing him significant pain."[139] The Court of Appeals held the officers were not entitled to qualified immunity.[140]

The Court of Appeals analogized *LaLonde* to *Cortesluna*, stating, "[b]oth *LaLonde* and this case involve suspects who were lying face-down on the ground and were not resisting either physically or verbally, on whose back the defendant officer leaned with a knee, causing allegedly significant

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[127] *Allen*, 119 F.3d at 841.

[128] *Id.*

[129] 142 S. Ct. 4, 6 (2021) (per curiam).

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] 204 F.3d 947 (9th Cir. 2000).

[135] Cortesluna v. Leon, 979 F.3d 645, 653–54 (9th Cir. 2020), *rev'd*, 142 S. Ct. 4 (2021) (citing *LaLonde*, 204 F.3d 947).

[136] *LaLonde*, 204 F.3d at 951.

[137] *Id.* at 951–52.

[138] *Id.* at 952.

[139] *Id.*

[140] *Id.* at 962.

injury."[141] Although the Court of Appeals relied on *LaLonde*, it acknowledged "the officers here responded to a more volatile situation."[142] Judge Collins dissented from the panel and stated, "the facts of *LaLonde* are materially distinguishable from this case and are therefore insufficient to have made clear to every 'reasonable officer' that the force Rivas-Villegas used here was excessive."[143] The Supreme Court agreed with the dissent and reversed.[144]

The Supreme Court first cited the same settled principles of law as it had in *Bond*.[145] The Court reiterated "[s]pecificity is especially important in the Fourth Amendment context, where . . . 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."[146] The Court then briefly highlighted the standard for finding a violation of excessive force:

> Whether an officer has used excessive force depends on "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[147]

Graham's "standards are cast 'at a high level of generality.'"[148] Even still, "[i]n an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law."[149] But *Cortesluna*, the Court held, was "not an obvious case."[150]

Because the Court held *Graham* is too general for the facts of *Cortesluna*, where the alleged excessive force violation was not egregious, the Court turned to cases cited by the Court of Appeals and the plaintiff that would have put Rivas-Villegas on notice that his specific conduct was unlawful.[151] Yet, the Court did not find any, because "[n]either Cortesluna nor the Court of Appeals identified any Supreme Court case that addresses

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[141] Cortesluna v. Leon, 979 F.3d 645, 654 (9th Cir. 2020), *rev'd*, 142 S. Ct. 4 (2021).

[142] *Id.*

[143] *Id.* at 664 (Collins, J., dissenting) (citing District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018)).

[144] Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021) (per curiam).

[145] *Id.* at 7–8.

[146] *Id.* at 8 (quoting Mullenix v. Luna, 577 U.S. 7, 12 (2015)).

[147] *Id.* (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)).

[148] *Id.* (quoting Brosseau v. Haugen, 543 U.S. 194, 199 (2004)).

[149] *Id.* (citing *Brosseau*, 543 U.S. at 199 (2004)).

[150] *Id.*

[151] *Id.*

facts like the ones at issue here."[152] The Court did not go as far to state a Supreme Court case is necessary to find clearly established law.[153]

That said, the Court noted even if the "Circuit precedent can clearly establish law for purposes of §1983, *LaLonde* is materially distinguishable and thus does not govern the facts of this case."[154] Finally, because "neither *LaLonde* nor any decision of this Court is sufficiently similar," the Court reversed the Ninth Circuit's determination that Rivas-Villegas was not entitled to qualified immunity.[155] After *Bond* and *Cortesluna*, "[i]f there is any clearly established Supreme Court precedent, it is that the Court believes lower courts continue to misconstrue Supreme Court direction on granting qualified immunity in cases where it is uncertain that 'every reasonable official would have understood that what he is doing violates that right.'"[156]

III. IN DEFENSE OF "CLEARLY ESTABLISHED"

A. Consistency: The Court's Treatment of the Police

In *Graham v. Connor*,[157] the Court stated, "[t]he '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."[158] The Court considered "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."[159] Since *Graham*, most lower courts have applied these principles and have avoided judging police officers who were forced to make split-second decisions without the benefit of hindsight.[160]

The *Graham* Court reasoned reasonableness is "not capable of precise definition or mechanical application," but "requires careful attention to the

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[152] *Id.*

[153] *See id.* at 8–9.

[154] *Id.* at 8.

[155] *Id.* at 9.

[156] Ken Wallentine, *With 2 Rulings, SCOTUS Rebukes Lower Courts and Doubles Down on Qualified Immunity Guidance*, LEXIPOL (Oct. 18, 2021), https://www.lexipol.com/resources/blog/with-2-rulings-scotus-rebukes-lower-courts-and-doubles-down-on-qualified-immunity-guidance/ [https://perma.cc/887K-FS66] (quoting Mullenix v. Luna, 577 U.S. 7, 11 (2015)).

[157] 490 U.S. 396 (1989).

[158] *Id.* at 396 (citing Terry v. Ohio, 392 U.S. 1, 20–22 (1968)).

[159] *Id.* at 397.

[160] *See* Darrell L. Ross, *An Assessment of* Graham v. Connor*, Ten Years Later*, 25 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 294, 307 (2002).

facts and circumstances of each particular case."[161] The Court set forth factors to help determine objective reasonableness for police uses of force.[162] These factors included: "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."[163]

The *Graham* decision established a fair standard in which courts can judge officers—fallible humans capable of making mistakes—who, by the nature of their job, are forced to make difficult decisions within seconds.[164] When those same difficult decisions result in a possible violation of one's constitutional rights, the Court's qualified immunity precedent applies, providing "government officials breathing room to make reasonable but mistaken judgments about open legal questions."[165]

That "breathing room" is most notably highlighted in the requirement of clearly established law. In *Mullenix v. Luna*,[166] the Court held a right is clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[167] The Court requires specificity to the facts at hand to find that a reasonable official would have understood what they were doing violates someone's constitutional rights.[168] Similar to an analysis under *Graham*, to find clearly established law, there must be specific facts showing a reasonable officer would have known at the time of a split-second decision that their actions violated someone's constitutional rights.[169] This is an inquiry that "must be undertaken in light of specific context of the case, not as a broad general proposition."[170]

From a policy perspective, the Court's reasoning for clearly established is similar to the Court's reasoning for applying a set of factors to determine

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[161] *Graham*, 490 U.S. at 396 (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

[162] *Id.*

[163] *Id.* (citing Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)).

[164] *See* Michael Ranalli, *Police Use of Force: The Need for the Objective Reasonableness Standard*, LEXIPOL (Mar. 24, 2017), https://www.lexipol.com/resources/blog/police-use-of-force-need-objective-reasonableness-standard/ [https://perma.cc/G86T-9VUX].

[165] Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).

[166] 577 U.S. 7 (2015).

[167] *Id.* at 11 (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012)).

[168] *Id.* at 12.

[169] *See* Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam).

[170] *Id.* (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).

objective reasonableness in *Graham*.[171] Police officers should not be judged from the benefit of hindsight, but by what was known at the time of the incident.[172] The standard is both fair and consistent—split-second decisions made by police officers deserve protection— both in finding whether an officer used excessive force or whether an officer made a reasonable mistake because no prior case provided enough specificity to put a reasonable officer on notice that their actions were unconstitutional. Without specificity and without laws that put every *reasonable* officer on notice, it would go against the Court's prior treatment of police officers to expect an officer to have known his actions were unconstitutional based on precedent that could have only reasonably been determined in "the peace of a judge's chambers."[173]

B. Necessity: Why "Clearly Established" Must Remain

In the summer of 2020, the idea of defunding the police, "a fringe proposal consigned to university campuses and left-wing activist groups as recently as a few weeks [earlier]," became mainstream.[174] The movement became popular shortly after the murder of George Floyd by former Minneapolis Police Officer Derek Chauvin.[175] Despite calls for action, it remains unclear what "defunding" the police means.[176]

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[171] *Compare Mullenix*, 577 U.S. at 12 (explaining it can be difficult for an officer to determine what legal doctrine would apply to the situation they are confronting), *with* Graham v. Connor, 490 U.S. 386, 396 (1989) (explaining reasonableness should be assessed from the perspective of a reasonable officer, and not in hindsight).

[172] *See Graham*, 490 U.S. at 396.

[173] Johnson v. Glick, 481 F.2d 1028, 1033 (4th Cir. 1973).

[174] Nate Hochman, *The Origins of 'Defund the Police*,*'* THE DISPATCH (June 22, 2020), https://thedispatch.com/p/the-origins-of-defund-the-police?utm_source=url [https://perma.cc/8M39-PESG].

[175] *See* Eric Levenson & Aaron Cooper, *Derek Chauvin Found Guilty of All Three Charges for Killing George Floyd*, CNN (Apr. 21, 2021, 12:13 PM), https://www.cnn.com/2021/04/20/us/derek-chauvin-trial-george-floyd-deliberations/index.html [https://perma.cc/2EFP-K5HR].

[176] Hochman, *supra* note 174. It remains unclear where the movement originated, or what it is attempting to accomplish. *Id.* Some argue it is "merely an attempt to 'reimagine' the role of police in American society." *Id. See also* Christy E. Lopez, *Defund the Police? Here's What that Really Means*, WASH. POST (June 7, 2020, 6:37 PM), https://www.washingtonpost.com/opinions/2020/06/07/defund-police-heres-what-that-really-means [perma.cc/LNC7-JQWU]. Others argue it "should be interpreted literally." *Id. See also* Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12,

(*continued*)

Yet Minneapolis tried to put the popular slogan into action.[177] More than one year after George Floyd's death, the city put "defunding" the police to a vote.[178] The vote was "whether to change the city charter and implement a department of public safety instead, which activists [said] would take on a public-health approach to policing—opting for social workers and violence interrupters over the police-only model that the city has now."[179] The proposal was defeated by a large margin and even caused some to question the idea at all.[180] Minneapolis's attempt to "defund the police" ignored what was happening in their own city—the police were quitting,[181] and violent crime was surging.[182]

This problem was not specific to Minneapolis.[183] Police officers across the county were quitting.[184] According to a study conducted by the Law Enforcement Legal Defense Fund, there was a 24% increase in voluntary resignations from ten of the nation's largest police departments.[185] The

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2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html [perma.cc/AGW8-UL37].

[177] Kiara Alfonseca, *Activists Push to Disband Minneapolis Police in Upcoming Vote*, ABC NEWS (Aug. 13, 2021, 6:00 AM), https://abcnews.go.com/US/activists-push-disband-minneapolis-police-upcoming-vote/story?id=79422183 [https://perma.cc/H6LC-BMNS].

[178] *Id.*

[179] *Id.*

[180] *See* Chris Cillizza, *Even Democrats Are now Admitting 'Defund the Police' Was a Massive Mistake*, CNN (Nov. 5, 2021, 3:34 PM), https://www.cnn.com/2021/11/05/politics/defund-the-police-democrats/index.html [https://perma.cc/664Q-UYM2].

[181] Joshua Q. Nelson, *Minneapolis Police Leaving Force in Droves: Former Officer Says Cops Feel 'Helpless,'* FOX NEWS (May 25, 2021, 11:36 AM), https://www.foxnews.com/us/minneapolis-police-leaving-former-officer-cops-feel-helpless [https://perma.cc/C4NU-S38L].

[182] Holly Bailey, *Minneapolis Violence Surges as Police Officers Leave Department in Droves*, WASH. POST (Nov. 13, 2020, 12:25 PM), https://www.washingtonpost.com/national/minneapolis-police-shortage-violence-floyd/2020/11/12/642f741a-1a1d-11eb-befb-8864259bd2d8_story.html [https://perma.cc/Z5M6-S3TT].

[183] Peter Aitken, *America's Largest Police Departments See Significant Increase in Departures in 2021: Report*, FOX NEWS (Oct. 7, 2021, 1:40 PM), https://www.foxnews.com/us/americas-largest-police-departments-significant-increase-departures [https://perma.cc/M7FD-6YCU].

[184] *Id.*

[185] *Id.* (including Cleveland, Pittsburgh, Austin, Las Vegas, Chicago, San Jose, Los Angeles County, Washington D.C., San Francisco, and Miami-Dade).

theme seemed to be consistent from city to city—police officers did not feel supported, so they quit.[186] Minneapolis saw the same result as the rest of the country—while officers were quitting, violence was surging.[187]

At the same time police officers were quitting in record numbers and violent crime was surging, there were renewed calls to revisit qualified immunity.[188] In response, the International Association of Chiefs of Police (IACP) issued a brief statement on qualified immunity.[189] The IACP addressed the need for current qualified immunity doctrine for law enforcement, stating, "[t]he loss of this protection would have a profoundly chilling effect on police officers and limit their ability and willingness to respond to critical incidents without hesitation."[190]

Unlawful Shield, a project of the libertarian CATO Institute, issued a response to the IACP.[191] Accusing the IACP of calling police officers either cowardly or vicious, Unlawful Shield disagreed with the idea that officers would hesitate to do their jobs if they were not held to "a lower standard of

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[186] *See id.*

[187] *See* Jason Johnson, *Why Violent Crime Surged After Police Across America Retreated*, USA TODAY (Apr. 9, 2021, 6:00 AM), https://www.usatoday.com/story/opinion/policing/2021/04/09/violent-crime-surged-across-america-after-police-retreated-column/7137565002/ [https://perma.cc/UN5W-S4A3]. *See also* Gillian Flaccus et al., *'Overwhelmed': Cops Combat Violent Crime as Ranks Dwindle*, AP NEWS (Aug. 8, 2022), https://apnews.com/article/gun-violence-covid-health-police-2b1f9d8dce1fe3acbb1c5e3910d39e09 [https://perma.cc/LB8R-5MT8].

[188] Ed Yohnka et al., *Ending Qualified Immunity Once and For All Is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021), https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable/ [https://perma.cc/A45D-LKTD]. *See also* Gregory Svirnovskiy, *9 Ideas to Solve the Broken Institution of Policing*, VOX (Apr. 25, 2021, 9:30 AM), https://www.vox.com/22396400/defunding-abolishing-police-among-ideas-derek-chauvin-verdict [https://perma.cc/X9G3-AH7X].

[189] Press Release, Int'l Ass'n of Chiefs of Police, IACP Statement on Qualified Immunity, https://www.theiacp.org/sites/default/files/IACP%20Statement%20on%20Qualified%20Immunity.pdf [https://perma.cc/935Z-QE9P] [hereinafter IACP Statement on Qualified Immunity].

[190] *Id.*

[191] Jay Schweikert, *Rebutting the IACP's Spurious Defense of Qualified Immunity*, UNLAWFUL SHIELD (June 11, 2020), https://www.unlawfulshield.com/2020/06/rebutting-the-iacps-spurious-defense-of-qualified-immunity/ [https://perma.cc/A5BA-A22U].

accountability then [sic] ordinary citizens" and were "actually held accountable for violating people's constitutional rights."[192]

But the IACP did not argue police officers would *not* respond to critical incidents, instead, they argued officers might do so with increased hesitation because of their decreased immunity from civil suit.[193] The IACP was simply identifying a trend in modern law enforcement—with less public support, officers are quitting.[194] Repealing qualified immunity would not be the sole reason officers feel less supported, but it would exacerbate the overall feeling and result in further demoralization among law enforcement personnel and thus further reductions in existing forces—and recruitment.[195]

Unlawful Shield's argument that police officers should not be held to a lower standard of accountability than "ordinary citizens and all other professions"[196] is a gross oversimplification of the issue. Qualified immunity does not hold police officers to a lower standard; it holds them to a different standard more appropriate for their role in society and the situations with which they regularly confront, that ordinary citizens do not (indeed, when confronted with such situations, the typical response of citizens is to "call the cops").[197] This different standard is by design, as originally mentioned in *Harlow*, safeguarding the public interest "may be better served by action taken 'with independence and without fear of consequences.'"[198] It is common that a police officer navigates the intricacies of the Fourth Amendment daily, which is not necessarily something done by ordinary citizens in other professions.[199]

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[192] *Id.*

[193] IACP Statement on Qualified Immunity, *supra* note 189.

[194] Charles Fain Lehman, *Why Cops Are Quitting*, CITY J. (July 13, 2021), https://www.city-journal.org/why-cops-are-quitting [https://perma.cc/TQA9-KGKD].

[195] *See* Ryan Young et al., *'We Need Them Desperately': US Police Departments Struggle with Critical Staffing Shortages*, CNN (July 20, 2022, 12:59 AM), https://www.cnn.com/2022/07/19/us/police-staffing-shortages-recruitment/index.html [https://perma.cc/S42Z-DM5T].

[196] Schweikert, *supra* note 191.

[197] *See* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982); Sherri Gordon, *Things to Consider Before You Call the Police on Someone*, VERYWELL MIND (Oct. 4, 2020), https://www.verywellmind.com/things-to-consider-before-you-call-the-police-on-someone-5076019 [perma.cc/6EYM-TEUT].

[198] *Harlow*, 457 U.S. at 819 (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).

[199] *See generally* Timothy Roufa, *A Day in the Life of a Cop*, LIVEABOUT (Aug. 2, 2019), https://www.liveabout.com/a-day-in-the-life-of-a-police-officer-974861 [perma.cc/GN4U-RT77].

Unlawful Shield is far from the only commentator ignoring what eliminating qualified immunity would do to the hiring of police officers and retention rates across the country.[200] For example, in the *Washington Post*, Nancy La Vigne and Marc Levin labeled police officers quitting as "Myth No. 4" for ending qualified immunity.[201] In support of this "myth," the authors cited a 1995 study that found that for 95% of municipal officers, the threat of litigation was not one of the top ten thoughts they had while on the job.[202] What this survey did not factor in, and the authors did not identify, is that qualified immunity existed when it was conducted.[203] Qualified immunity is essential for officers *because* it allows the threat of litigation to not be on the forefront of their mind while making critical decisions in a stressful environment. To argue qualified immunity is unnecessary because most officers are not concerned about litigation when doing their jobs is like arguing the Fourth Amendment can be safely repealed because most citizens do not have their homes searched without a warrant. That is its purpose—it is a feature, not a bug.

With only 4% of lawsuits against law enforcement dismissed based on qualified immunity,[204] it is likely that the effect of ending such protection would be far more ruinous to the communities who would lose officers

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[200] *See* Nancy La Vigne & Marc Levin, *Five Myths About Qualified Immunity*, WASH. POST (May 27, 2021, 2:33 PM), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-qualified-immunity/2021/05/27/db829e38-bcbc-11eb-9c90-731aff7d9a0d_story.html [https://perma.cc/FH7S-2CNG].

[201] *Id.*

[202] *Id.*; Arthur H. Garrison, *Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers*, 18 POLICE STUDIES 19, 26 (1995).

[203] Qualified immunity was recognized as a defense to Section 1983 claims by the Supreme Court in 1967. *Qualified Immunity*, NAT'L CONF. OF ST. LEGISLATORS (Jan. 12, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/qualified-immunity.aspx [perma.cc/F2PG-MKBF]. Garrison's survey and the *Washington Post* article were published in 1995, and 2021, respectively. Garrison, *supra* note 202; La Vigne & Levin, *supra* note 200.

[204] Jason Johnson, *Ending Qualified Immunity Could Cost Lives, Livelihoods*, USA TODAY (Aug. 6, 2021, 8:00 AM), https://www.usatoday.com/story/opinion/todaysdebate/2021/08/06/ending-qualified-immunity-could-cost-lives-livelihoods/5461051001/ [https://perma.cc/QS56-G6JQ].

patrolling their neighborhoods than maintaining qualified immunity would ever be.[205]

If qualified immunity were to be eliminated, the cost of being an officer might be too high. Just as Minneapolis realized after rushing to "defund the police," this Note predicts that if qualified immunity were to be repealed, the need for effective law enforcement would lead legislatures to enact some sort of immunity. But it remains unknown, and unpredictable, as to what that statutory protection might look like.

Such statutory protection could be even more protective of police than the existing qualified immunity doctrine established by the Court and criticized by commentators, such as Unlawful Shield.[206] But if not, statutory protection that eliminates the clearly established doctrine would inevitably result in confusion and varying standards that are likely to increase uncertainty in both the law, and in the law enforcement community.[207] This uncertainty could have a dual effect of police demoralization, with its attendant consequences,[208] while increasing bad police behavior that is not currently protected under the doctrine of qualified immunity, as standards become more variable and unsettled. And even if such bad behavior were open to lawsuits, the damages remedy is imperfect, and the expense of litigation could result in a deadweight loss on society.[209]

No matter how qualified immunity exists, whether judicially created or statutorily enacted, it must retain something similar to the current clearly established standard if it will continue to safeguard against officer

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[205] *See* IACP Statement on Qualified Immunity, *supra* note 189; Olivia Mitchell, *Cleveland Police Face Officer Shortage Amid Increase in Violent Crime*, CLEVELAND.COM (May 27, 2022, 3:13 PM), https://www.cleveland.com/news/2022/05/cleveland-police-department-combats-officer-shortage-amongst-spike-in-crime.html [https://perma.cc/U7MH-5ZPN].

[206] *See* Schweikert, *supra* note 191.

[207] *See* Joseph Fawbush, *Qualified Immunity: Both Sides of the Debate*, FINDLAW (Sept. 28, 2022), https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html (explaining one of the benefits of qualified immunity is its basis in narrow interpretations of established precedent, which allows officers to make split-second decisions without the burden of considering whether they are violating the law).

[208] *See* IACP Statement on Qualified Immunity, *supra* note 189.

[209] Fawbush, *supra* note 207 ("Removing qualified immunity could open up public officials and police to unwarranted lawsuits, in which judges and juries could second-guess split-second decisions and lead to significant costs for cities, police officers, and other public officials.").

demoralization, preserve officer retention, increase officer recruitment, and thus contribute to effective policing and safer communities.

C. "Clearly Established" Is Not an Impossible Standard.

Critiques of qualified immunity, and more specifically the clearly established doctrine, often claim it presents an impenetrable barrier against policing bad behavior by law enforcement personnel.[210] But in fact, the clearly established standard is not impossible to meet. This is illustrated by both the few suits in which qualified immunity results in dismissal, and by specific cases.[211]

For example, in *Wright v. City of Euclid*,[212] the Sixth Circuit reversed the district court's grant of qualified immunity to officers who were found to have violated clearly established law by using excessive force against Mr. Wright.[213] Mr. Wright pulled his SUV into a driveway, rolled his window down, and began talking to his friend who was standing outside.[214] Mr. Wright's friend never approached the SUV, and the conversation lasted for about a minute.[215] "Unbeknownst to Wright and his friend, plain-clothed officers Kyle Flagg and Vashon Williams, in an unmarked vehicle, were surveilling the friend's home based on reports of illegal drug activity in the area and at that residence in particular."[216] Wright pulled out of the driveway and the officers followed him.[217] Mr. Wright, still unaware of the officers following him, pulled into a driveway to answer a text message.[218] The officers, still in an unmarked vehicle, stopped and approached with their guns drawn.[219] Mr. Wright was unsure who was approaching and thought that he was about to be robbed.[220] Mr. Wright noticed a badge on one of the men as they yelled at him to shut the car off and to open his door.[221] Officer

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[210] *See, e.g.*, Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 UNIV. CHI. L. REV. 605, 607 (2021) ("Qualified immunity shields government officials from damages liability—even when they have violated the law-so long as the right was not 'clearly established.'").

[211] *See, e.g.*, Wright v. City of Euclid, 962 F.3d 852, 870–72 (6th Cir. 2020).

[212] 962 F.3d 852.

[213] *Id.* at 870–72.

[214] *Id.* at 860–61.

[215] *Id.* at 861.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.*

Flagg opened the driver's side door and instructed Mr. Wright to shut the vehicle off.[222] Mr. Wright complied and raised his hands.[223]

Despite having his hands in the air, Officer Flagg grabbed Mr. Wright's left wrist, twisted it behind his back, and then tried to secure his right arm to handcuff him while he was still in the vehicle.[224] Officer Flagg failed, and Mr. Wright continuously told the officer that he was hurting him.[225] Officer Flagg seemingly ignored Mr. Wright's statements and continued to demand to see Mr. Wright's right hand.[226] Officer Flagg then tried to pull Mr. Wright from the vehicle.[227]

Mr. Wright had recently undergone a surgery that "required staples in his stomach and a colostomy bag attached to his abdomen."[228] Although officers could not see the bag and staples, Mr. Wright's ability to move to and from his vehicle was made increasingly harder.[229] In an attempt to assist himself with exiting the vehicle, Mr. Wright placed his right hand on the center console.[230] In response, Officer Williams moved around Officer Flagg and pepper sprayed Mr. Wright from point-blank range.[231] While Officer Williams pepper sprayed Mr. Wright, Officer Flagg "deployed his taser into" Mr. Wright's abdomen.[232] Mr. Wright was finally removed from the vehicle, handcuffed, and it was revealed that the staples around his colostomy bag were bleeding.[233] Mr. Wright was arrested and after being released from the hospital, he was charged for obstructing official business, resisting arrest, criminal trespass, and failure to use a turn signal.[234] The charges were dropped around seven months later.[235]

The court first addressed whether there was a constitutional violation for excessive force.[236] Applying the *Graham* factors to both Officer Flagg and

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[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] *Id.* at 861–62.

[234] *Id.* at 862.

[235] *Id.*

[236] *Id.* at 865–70.

Officer Williams' actions, the court found Mr. Wright's constitutional right to be free from excessive force had been violated.[237] The court then determined whether those rights were clearly established.[238] Relying on Sixth Circuit precedent, the court held Officer "Flagg's drawing of his firearm and use of his taser violated Wright's constitutional rights that were clearly established as of the date of the encounter."[239] The court reached this conclusion by "examining 'whether the contours of' the plaintiff's constitutional rights 'were sufficiently defined to give a reasonable officer fair warning that the conduct at issue was unconstitutional.'"[240] The court recognized qualified immunity is not granted simply because the precedent failed to address the same fact pattern in question, but "it is to say that in light of pre-existing law the unlawfulness must be apparent."[241]

Again, relying on Sixth Circuit precedent, and for similar reasons as discussed with Officer Flagg's uses of force, the court held "that the right to be free from being pepper sprayed when a suspect is not actively resisting arrest was also clearly established at the time of the encounter in question."[242] Officer Flagg's drawing of his firearm and use of his taser, and Officer Williams's use of pepper spray from point blank range were egregious amounts of force considering the circumstances.[243] Prior precedent made the unlawfulness of such uses of force apparent, or clearly established.[244] This case presents a clear example of clearly established not being an impossible standard to meet.[245]

In a 2017 law review article, Joanna C. Schwartz highlighted the "findings of the largest and most comprehensive study to date of the role qualified immunity plays in constitutional litigation."[246] Schwartz found "[a]cross the five districts in [her] study, just thirty-eight (3.9%) of the 979

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[237] *Id.* at 865–71. The court also addressed several other issues, such as failure to intervene, false arrest, extended detention, malicious prosecution, state-law claims, and municipal liability. *Id.* at 872–82. However, for purposes of this Note and policy arguments in support of clearly established, this Note's analysis is limited to just the excessive force claims.

[238] *Id.* at 869–72.

[239] *Id.* at 869.

[240] *Id.* (quoting Brown v. Chapman, 814 F.3d 447, 461 (6th Cir. 2016)).

[241] *Id.* (quoting Hope v. Pelzer, 536 U.S. 730, 739 (2002)).

[242] *Id.* at 871.

[243] *Id.* at 870–72.

[244] *Id.* at 870–71.

[245] *See id.*

[246] Schwartz, *supra* note 5, at 2.

cases in which qualified immunity could be raised were dismissed on qualified immunity grounds."[247] As admitted by Schwartz, "[m]y findings do show that Section 1983 claims against the police are infrequently dismissed on qualified immunity grounds."[248]

With only 3.9% of cases being dismissed on qualified immunity grounds, it is hard to argue it is an impossible standard for prospective plaintiffs to overcome.[249] Schwartz's study offers important empirical data on the effectiveness of qualified immunity in achieving several of its policy objectives and should "encourage more extensive empirical examination of the doctrine's effects."[250] But the limited success of the qualified immunity defense does not support a complete overhaul of qualified immunity by the Court.[251]

From a policy perspective, qualified immunity, and more precisely, a requirement for constitutional violations to have been clearly established at the time of an accused violation, accomplishes a key goal of the *Harlow* Court: minimizing "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.'"[252] With only 3.9% of cases being dismissed on qualified immunity grounds, Schwartz's data does not support any argument that the doctrine is overprotective of officers, such as Flagg and Williams,[253] from abusing the constitutional rights of prospective plaintiffs.[254]

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[247] *Id.*

[248] *Id.* at 11.

[249] *Id.* at 10. In fact, this is not what Schwartz argues; instead, she maintains that while her findings might show a low number of cases dismissed because of qualified immunity, it is still an "incoherent, illogical, and overly protective doctrine" for government officials who act unconstitutionally or in bad faith. *Id.* at 11.

[250] Nielson & Walker, *supra* note 1, at 1876.

[251] *Id.*

[252] *Id.* at 1875 (alteration in original) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)).

[253] Wright v. City of Euclid, 962 F.3d 852, 870–72 (6th Cir. 2020).

[254] Schwartz, *supra* note 5, at 2.

IV. CONCLUSION

With the recent decisions of *City of Tahlequah v. Bond*[255] and *Rivas-Villegas v. Cortesluna*,[256] the Court has further strengthened its precedent regarding clearly established law. At least for now, the Court appears unwilling to reconsider any fundamental aspect of qualified immunity, and equally unlikely to water down its current precedent on clearly established law.[257]

This Note is not intended to address the general propriety of qualified immunity. Instead, it is intended to argue the standard of clearly established law—which is at the center of the practical application of qualified immunity—should remain in its current form, no matter the future of the doctrine itself. Requiring the law to be clearly established before using it as a standard to judge law enforcement protects officers who are forced to make split-second decisions with less information than what will be available by the time their decision is reviewed in court.[258] It resembles how the Court has treated other decisions officers make, such as the decision to use force.[259] It is critical for the future of law enforcement and the communities they serve that the standard of "clearly established" remain in place. And as unfortunate it as it may be, studies will likely continue to highlight the issues of police retention and recruitment, and their correlation to higher crime rates, with results likely to mirror the data that already exists.[260] All of this being said, it is still fortunate for prospective plaintiffs who have suffered a grave violation of their constitutional rights that clearly established is not an impossible standard to overcome.[261] And should the day come that Congress

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[255] 142 S. Ct. 9, 10–12 (2021) (holding officers who shot and killed a suspect armed with a hammer did not violate clearly established law).

[256] 142 S. Ct. 4 (2021) (holding an officer who placed his knee on a suspect's back for no more than eight seconds did not violate clearly established law).

[257] Jay Schweikert, *Supreme Court Reaffirms Unwillingness to Reconsider Qualified Immunity*, CATO (Oct. 22, 2021, 2:44 PM), https://www.cato.org/blog/supreme-court-reaffirms-unwillingness-reconsider-qualified-immunity [https://perma.cc/EN35-E5PC].

[258] *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989).

[259] *See id.* at 396.

[260] *See* Justin Nix et al., *Arresting the Recruitment Process*, CITY J., Autumn 2021, https://www.city-journal.org/police-departments-recruitment-crisis [https://perma.cc/D67E-T4XM].

[261] *See* Palma v. Johns, 27 F.4th 419, 442 (6th Cir. 2022) ("Applying this test, Johns violated clearly established Fourth Amendment law by tasing and shooting Palma."). Although Judge Readler in dissent stated, "[e]ven when viewed with a generous eye, the

(*continued*)

addresses qualified immunity, such a decision should be made with thoughtful consideration of what the standard of clearly established does for law enforcement as a whole, including the communities in which they serve.

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majority opinion's rule has little precedent to justify it, let alone precedent that is clearly established," *id.* at 444 (Readler, J., dissenting), the panel nonetheless overturned the district court and held qualified immunity did not attach, providing yet another example of the standard being defeated, *id.* at 443–44 (majority opinion).