ARTICLE

PLAINLY INCOMPETENT: HOW QUALIFIED IMMUNITY BECAME AN EXCULPATORY DOCTRINE OF POLICE EXCESSIVE FORCE

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Recent instances of law enforcement killing community members and ensuing social movements have increased public attention on the issue of police use of force and the lack of officer accountability. Qualified immunity has been central to this discussion because the doctrine is often used to shield officers from civil lawsuits when plaintiffs bring constitutional tort claims under 42 U.S.C. § 1983.

The traditional understanding of qualified immunity as applied to excessive force cases is that it tracks the history of the doctrine itself. It is widely accepted that the doctrine began to thwart excessive force claims against police right after it emerged for the first time in 1967 with Pierson v. Ray—a false arrest case that created a subjective good faith defense for some § 1983 claims. Most assume this influence continued as qualified immunity took on its modern form in 1982 with Harlow v. Fitzgerald—an executive privileges case that created an objective qualified immunity test relative to clearly established law. With this standard narrative, it is largely thought that these early cases on qualified immunity in the contexts of false arrests and executive branch privileges naturally, immediately, and seamlessly became a significant constraint on plaintiffs' § 1983 excessive force claims against police officers.

This is not what happened. Drawing upon an original empirical dataset of over five hundred § 1983 excessive force cases over more than five decades, this Article is the first to tell the story of how qualified immunity became an exculpatory doctrine of police excessive force. The data shows a pattern where, over time, qualified immunity

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morphed from a limited theory of executive privilege into a specific theory disproportionately used to prevent civil lawsuits against police officers who use excessive force. We found that during its origins, qualified immunity was raised in a variety of cases involving public officials, including disputes concerning employment discrimination, free speech rights, and improper seizures of property. But as the power of qualified immunity grew, so too did the proportion of qualified immunity cases involving police officers facing § 1983 suits for using excessive force.

This data matches our doctrinal assessment. From 1967, when the Court first created qualified immunity for § 1983 claims, until 2001, when the Supreme Court issued its first decision in a qualified immunity case involving police excessive force in Saucier v. Katz, many lower federal courts and legal scholars thought qualified immunity did not apply in situations where police faced civil suits for using unlawful amounts of force. Indeed, before 2001, the question of whether qualified immunity ought to apply to police officers' use of excessive force was deeply contested.

The empirical and doctrinal assessments provided in this Article suggest that there is a "middle history" of qualified immunity that needs further exploration, i.e., a series of federal court decisions that made qualified immunity a dominant § 1983 defense for law enforcement. The middle history that brought qualified immunity into excessive force doctrine has thus far been overlooked, which impoverishes our understanding of how qualified immunity adversely impacts constitutional tort litigation regarding police use of excessive force. This Article provides the first identification and critical examination of this middle history to highlight the particular doctrinal choices that federal courts made during these years to understand how qualified immunity became enmeshed with § 1983 excessive force litigation. These results demonstrate that while qualified immunity is now a central fixture in almost all excessive force cases, it is only quite recently that this relationship took its current shape as a largely insurmountable barrier to police accountability. The doctrinal and empirical examinations provided by this Article help us understand the political nature of qualified immunity and provide needed context for assessing various police reform efforts.

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INTRODUCTION

Unarmed petty theft and burglary can be survival strategies for poor and unhoused persons.[1] Living on the streets of Nashville, Tennessee, Alexander Baxter rummaged through unlocked houses so that he could steal items that could be easily resold, such as video games and laptop computers.[2] When the police pursued him in response to a reported burglary, Baxter fled to the basement of a nearby dwelling.[3] Officers Harris and Bracey followed him with their trained dog, who found Baxter downstairs.[4] The two officers entered the

1 Survival crime is described as "offending out of necessity in order to survive the situation of being homeless." Rachel Pain & Peter Francis, *Living With Crime: Spaces of Risk for Homeless Young People*, 2 CHILDREN'S GEOGRAPHIES 95, 105 (2004); *see also* Chase Karacostas, *Life Beyond 'Survival Crimes'*, AUSTIN AM.-STATESMAN (July 22, 2019, 6:31 PM), https://www.statesman.com/story/news/local/2019/07/22/survival-crimes-can-trap-some-in-lgbtq-community-in-spiral-of-desperation/4634164007 [https://perma.cc/8J3J-HGMU].

2 Petition for Writ of Certiorari at 4, Baxter v. Bracey, *cert. denied*, 140 S. Ct. 1862 (2020) (No. 18-1287) [hereinafter Petition for Cert.].

3 *Id.* at 4-5.

4 *Id.* at 5.

basement where Baxter was hiding, commanding him to show his hands.[5] Baxter testified in the district court that he did not verbally respond, but that he "was sitting on his butt with his hands up in the air."[6] The police could have easily arrested Baxter. But they chose a different tactic: releasing the police dog, who bit Baxter's armpit.[7] Baxter required emergency medical attention and was rushed to a local hospital.[8]

Baxter filed a federal civil rights complaint under 42 U.S.C § 1983 that sought monetary damages.[9] He claimed that Officer Harris' decision to release the police dog after he surrendered with his hands up and Officer Bracey's failure to intervene violated his Fourth Amendment right to be free from excessive use of force.[10] Officers Bracey and Harris responded as most police officers do when faced with a § 1983 claim: they said the doctrine of qualified immunity shielded them from such civil lawsuits.[11]

Qualified immunity is a common law doctrine that states that government officials can only face § 1983 civil lawsuits and the possibility of paying damages if the plaintiff demonstrates (1) that a constitutional right was violated and (2) that the unlawfulness of the conduct in question was clearly established at the

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5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.* A Marshall Project investigation reveals the extent and severity of the use of police dogs as weapons. Abbie Vansickle, Challen Stephens, Ryan Martin, Dana Brozost-Kelleher & Andrew Fan, *When Police Violence Is a Dog Bite*, THE MARSHALL PROJECT (Oct. 2, 2020), https://www.themarshallproject.org/2020/10/02/when-police-violence-is-a-dog-bite [https://perma.cc/5QPP-F7ZW]. The investigation reported that "[d]og bites cause more hospital visits than any other use of force by police," with roughly 3,600 people per year treated in emergency rooms for police dog attacks. *Id.* (citing Randall T. Loder & Cory Meixner, *The Demographics of Dog Bites Due to K-9 (Legal Intervention) in the United States*, 65 J. FORENSIC & LEGAL MED. 9, 10 (2019); *see also* R. PAUL MCCAULEY, WILLIAM F. BARKER, JAMES BOATMAN, VINEET GOEL, THOMAS H. SHORT & FENG ZHOU, THE POLICE CANINE BITE: FORCE, INJURY, AND LIABILITY (2008), https://www.iup.edu/criminology/files/research/reports_law_enforcements/k9-crc-report-11-08-final-for-pds_1_.pdf [https://perma.cc/6V82-CAVH]. A disproportionate number of victims of police dog attacks are Black, and two separate investigations have shown that police use dogs "almost exclusively" to attack non-White people. *See* Vansickle et al., *supra* (citing investigations into the Los Angeles County Sherriff's Department and the Ferguson, Missouri Police Department). Many people attacked by dogs are unarmed and suspected of non-violent crimes, such as minor traffic offenses. MCCAULEY ET AL., *supra* at 3-4. Vansicle et al. note that qualified immunity is major barrier to holding police accountable and providing compensation for victims attacked by police dogs. Vansickle et al., *supra*. Police brutality involving police dogs was also recently highlighted by former President Trump's decision in the last days of his presidency to pardon a former Maryland police officer who was convicted of ordering her police dog to attack an unarmed homeless man. Kristine Phillips, *Trump Pardons Former Officer Convicted in Police Brutality, Dog Bite Case*, USA TODAY (Dec. 31, 2020, 10:20 AM), https://www.usatoday.com/story/news/politics/2020/12/23/stephanie-mohr-officer-police-brutality-case-gets-trump-pardon/3904405001 [https://perma.cc/TF7X-6D32].

9 Baxter v. Bracey, 751 F. App'x 869, 870 (6th Cir. 2018), *cert. denied*, 140 S. Ct. 1862 (2020).

10 Petition for Cert., *supra* note 2, at 5.

11 *Baxter*, 751 F. App'x at 870.

time.[12] The United States Supreme Court has held that clearly established means that "at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful."[13] Put differently, "existing law must have placed the constitutionality of the officer's conduct beyond debate."[14] The Supreme Court famously described qualified immunity in 1986 as "provid[ing] ample protection to *all but the plainly incompetent* or those who knowingly violate the law."[15]

Officer Bracey moved to dismiss the failure-to-intervene charges.[16] The district court denied qualified immunity—a decision later affirmed by the court of appeals.[17] Citing the Sixth Circuit's decision in *Campbell v. City of Springboro*, the appeals court noted:

> The right to be free from the excessive use of force in the context of police canine units was clearly established by 2012, when in Campbell we held that officers who used an inadequately trained canine, without warning, to apprehend two suspects who were not fleeing, acted contrary to clearly established law.[18]

Following discovery, both officers sought summary judgement by asserting qualified immunity.[19] Although previously denied, a different Sixth Circuit panel concluded that qualified immunity did indeed apply.[20] How could this be? Didn't *Campbell* provide clearly established Sixth Circuit law on the matter? Not in the eyes of this panel.

In *Campbell*, the police released their dog on an individual who was *lying down*.[21] In this case, the officer released the police dog upon Baxter while he

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12 District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018). The Supreme Court has noted that "'clearly established law' should not be defined 'at a high level of generality'" but instead "must be 'particularized' to the facts of the case." White v. Pauly, 137 S. Ct. 548, 552 (2017). A case does not have to be "directly on point for a right to be clearly established," but "existing precedent must have placed the statutory or constitutional question beyond debate." Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam). In the context of Fourth Amendment excessive force cases, the Court has said that "an officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'" *Id.* at 1153 (quoting Plumhoff v. Rickard, 572 U.S. 765, 778-79 (2014)). It is important to note that qualified immunity is "an immunity from suit rather than a mere defense to liability . . . ." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis omitted).

13 *Wesby*, 138 S. Ct. at 589 (internal quotation marks omitted).

14 *Id.* (internal quotation marks omitted).

15 Malley v. Briggs, 475 U.S. 335, 341 (1986) (emphasis added).

16 Baxter v. Harris, No. 15-6412, 2016 WL 11517046, at *1 (6th Cir. Aug. 30, 2016).

17 *Id.* at *1.

18 *Id.* at *2.

19 Petition for Cert., *supra* note 2, at 7.

20 *Id.*

21 Campbell v. City of Springboro, 700 F.3d 779, 785 (6th Cir. 2012).

was *sitting up with his hands in the air*.[22] The Sixth Circuit panel concluded that "Baxter does not point us to any case law suggesting that raising his hands, on its own, is enough to put Harris on notice that a canine apprehension was unlawful in these circumstances."[23] This rather petty detail—whether non-fleeing plaintiffs were lying down or sitting with hands up—motivated much of the Sixth Circuit's decision to find the officers immune from facing a civil lawsuit.[24] In their eyes, *Campbell* only clearly established that using a police dog in those particular circumstances—poorly trained dog, plaintiffs lying down, no verbal warning—was unlawful and not in other situations such as Baxter's.

Qualified immunity, as a legal doctrine, has relied upon thin distinctions that allow officers to evade accountability for excessive abuses, including killing people.[25] The idea that an officer post-*Campbell* would not know that it was unlawful to release a police dog on a person visibly surrendering with their hands up defies common sense and leaves police to brutalize people without remedy or compensation.

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22 Petition for Cert., *supra* note 2, at 5.

23 Baxter v. Bracey, 751 F. App'x 869, 872 (6th Cir. 2018), *cert. denied*, 140 S. Ct. 1862 (2020). The court also states that "even with Baxter's hands raised, Harris faced a suspect hiding in an unfamiliar location after fleeing from the police who posed an unknown safety risk—all factors the Campbell court identified as significant to determining whether the seizure was lawful." *Id*. However, this level of specificity—whether plaintiff is lying down or on his rear end, arms raised or not, etc.—runs contrary to the clearly established rule found in *Campbell* that focuses on broader commonalities. The *Campbell* court stated that "[t]he question before this Court is whether or not Plaintiffs' Fourth Amendment protections against excessive force, as it relates to police dogs, was clearly established at the time the incidents occurred." *Campbell*, 700 F.3d at 788. In concluding that the officers violated a clearly established right, the court focused on the fact that the officer "allowed a 'bite and hold' dog, whose training was questionable, to attack two suspects who were not actively fleeing and who, because of proximity, showed no ability to evade police custody." *Id.* at 789. Given this background, the *Baxter* court's decision to hinge the qualified immunity decision on the absence of caselaw on whether surrendering with hands up in light of the presence of caselaw on the unlawfulness on using a police dog on a detained non-fleeing person is deeply problematic. The commonalities between the two cases significantly outweigh any thin differences, which suggests that it had been clearly established that the officers' actions in *Baxter* were unlawful.

24 "A prior decision in the 6th Circuit had held that officers violated the Fourth Amendment when they released a police dog on a suspect who had surrendered by lying down. But the appeals court ruled that this precedent did not 'clearly establish' that it was unconstitutional to release a police dog on a surrendering suspect with his arms raised." Joanna Schwartz, *Suing Police for Abuse is Nearly Impossible. The Supreme Court Can Fix That.*, WASH. POST (June 3, 2020), https://www.washingtonpost.com/outlook/2020/06/03/police-abuse-misconduct-supreme-court-immunity [https://perma.cc/WMG5-F4B].

25 *See, e.g.*, Mullenix v. Luna, 577 U.S. 7, 9-10, 19 (2015) (per curiam) (granting qualified immunity to police who shot and killed a fleeing driver); Reich v. City of Elizabethtown, 945 F.3d 968, 973-74, 981-82 (6th Cir. 2019) (granting qualified immunity to police who shot and a killed mentally ill individual during welfare check); Mason-Funk v. City of Neenah, 895 F.3d 504, 505 (7th Cir. 2018) (granting qualified immunity to police who shot and killed a hostage attempting to escape hostage situation); Isayeva v. Sacramento Sheriff's Dep't, 872 F.3d 938, 942-44, 953 (9th Cir. 2017) (granting qualified immunity to police who shot and killed an individual in a case involving "mental illness, drug abuse, and domestic conflict"); Villegas v. City of Anaheim, 823 F.3d 1252, 1255-57 (9th Cir. 2016) (granting qualified immunity to police who shot and killed a suspected armed drug dealer).

Attention to the relationship between qualified immunity and police impunity has grown in the wake of recent social movements against police violence that gained momentum and public visibility following the unjustified police killings of Tamir Rice, Breonna Taylor, George Floyd, and many others. Protesters, commentators, and scholars have identified qualified immunity as a barrier to accountability that allows police to use force unlawfully without consequences and limits the ability of victims to use civil rights statutes, such as 42 U.S.C. § 1983, to seek damages.[26] State and federal legislators have responded with proposals to reform or entirely eliminate qualified immunity.[27] And at the end of the Supreme Court's 2020 term, the Court had nine qualified immunity cases in conference—including *Baxter v. Bracey*—leading many to think that it would take the opportunity to review, rethink, or possibly overturn qualified immunity.[28] Ultimately the Court decided not to grant certiorari to any of these cases.[29]

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26 *See, e.g.*, Hailey Fuchs, *Qualified Immunity Protection Emerges as Flash Point Amid Protests*, N.Y. TIMES, https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html (Oct. 18, 2021) [https://perma.cc/X9G6-JVM6] ("[Because of qualified immunity,][i]n the vast majority of cases of police brutality, officers are never criminally prosecuted); Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta & Guillermo Gomez, *Shielded*, REUTERS (May 8, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus [https://perma.cc/X77L-VZY6] (detailing a case in which the prosecution of police for killing hospital patient Johnny Leija faced large obstacles due to qualified immunity); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1519-24 (2016) (arguing that qualified immunity contributes to police violence). Justice Sotomayor has also expressed concern that qualified immunity contributes to police violence. *See Mullenix*, 577 U.S. at 26 (2015) (Sotomayor, J., dissenting) (per curiam) ("By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow."); Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (per curiam) (arguing that the Supreme Court's decision to reverse a circuit court denial of qualified immunity to an officer who shot a woman who was holding a knife "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished").

27 *See, e.g.*, S.B. 20-217, 72d Gen. Assemb., Reg. Sess. (Colo. 2020), https://leg.colorado.gov/sites/default/files/2020a_217_signed.pdf [https://perma.cc/46P7-UH37] (eliminating qualified immunity for police officers facing liability under Colorado state law); Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020); Ending Qualified Immunity Act, S. 4142 116th Cong. (2020).

28 *See, e.g.*, Jay Schweikert, *Supreme Court Will Soon Decide Whether to Reconsider Qualified Immunity*, CATO INST. (April 28, 2020, 4:26 PM), https://www.cato.org/blog/supreme-court-will-soon-decide-whether-reconsider-qualified-immunity [https://perma.cc/B957-6HG8] ("[T]he Justices are looking closely at the fundamental question of whether qualified immunity itself needs to be reconsidered"); John Elwood, *Relist Watch: Looking for the Living Among the Dead*, SCOTUSBLOG (May 27, 2020, 11:29 AM), https://www.scotusblog.com/2020/05/relist-watch-looking-for-the-living-among-the-dead [https://perma.cc/4T4B-CX4X] (discussing nine qualified immunity cases that the Court relisted for conference).

29 Brennan v. Dawson, 752 F. App'x 276 (6th Cir. 2018), *cert. denied*, 141 S. Ct. 108 (2020); Brennan v. Dawson, 752 F. App'x 276 (6th Cir. 2018), *cert. denied sub nom.* Dawson v. Brennan, 141 S. Ct. 108 (2020); Baxter v. Bracey, 751 F. App'x 869, 870 (6th Cir. 2018), *cert. denied*, 140 S. Ct. 1862 (2020); Anderson v. City of Minneapolis, 934 F.3d 876 (8th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020); Zadeh v. Robinson, 928 F.3d 457 (5th Cir. 2019), *cert. denied*, 141 S. Ct 110 (2020); Corbitt v.

It is largely assumed that the development of qualified immunity for excessive force cases tracks the history of qualified immunity doctrine itself. In the traditional story, the Supreme Court first created qualified immunity in the 1967 case *Pierson v. Ray*, then modified the doctrine in the 1982 case *Harlow v. Fitzgerald*, giving us its modern version. It is widely thought that qualified immunity began to significantly limit civil lawsuits against police in use of force cases since the doctrine's inception.[30]

But this is not the case. Although qualified immunity has, in contemporary times, played a pivotal role in nearly every excessive force lawsuit, it was not until 2001 in the case *Saucier v. Katz* that the Supreme Court explicitly stated that qualified immunity could apply to excessive force claims.[31]

Before 2001, the question of whether qualified immunity should apply to police officers who use excessive force was deeply contested. From 1967, when the Supreme Court first created qualified immunity for § 1983 claims, until 2001, when the Supreme Court issued its first decision in a qualified immunity case involving excessive force, many lower federal courts and legal scholars thought qualified immunity *did not apply* in situations where law enforcement was accused of using unlawful amounts of force.[32]

Vickers, 929 F.3d 1304 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020); Cole v. Carson, 935 F.3d 444 (5th Cir. 2019), *cert. denied sub nom.* Hunter v. Cole, 141 S. Ct. 111 (2020); West v. City of Caldwell, 931 F.3d 978 (9th Cir. 2019), *cert. denied sub nom.* West v. Winfield, 141 S. Ct. 111 (2020); Mason v. Faul, 929 F.3d 762 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 116 (2020).

30 *See* Joanna Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1802, 1814-15 (2018) [hereinafter Schwartz, *The Case Against Qualified Immunity*] (describing the history of qualified immunity as first announced in 1967 under a good faith standard, then modified to an objective test in *Harlow*, and then modified again in *Pearson*); Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 889, 892-93 (2014) [hereinafter Schwartz, *Police Indemnification*] (describing *Harlow* as the case that extended qualified immunity to police); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 81 (2018) [hereinafter Baude, *Is Qualified Immunity Unlawful?*] (starting a discussion of history with *Pierson* and then discussing the court "tinkering" with the doctrine through *Harlow*, *Saucier*, and *Pearson*); Michael T. Kirkpatrick & Joshua Matz, *Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from* Saucier *to* Camreta *(and Beyond)*, 80 FORDHAM L. REV. 643, 644 (2011) [hereinafter Kirkpatrick & Matz, *Avoiding Permanent Limbo*] (discussing history of qualified immunity "from *Harlow* to *Pearson*, pivoting around the Court's creation of a mandatory scheme in *Saucier* and subsequent retreat in *Pearson*"); Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 480 (2001) (describing qualified immunity as "trans-substantive" in the sense that it "applies equally to suits to enforce the First Amendment, the Fourth Amendment, the Equal Protection Clause, and every other justiciable provision of the Constitution"). We discuss this point in further detail in *infra* Part III.

31 533 U.S. 194, 200-02, 204-07 (2001), *overruled in part by* Pearson v. Callahan, 555 U.S. 223 (2008). As discussed in this article, *Pearson* merely overruled *Saucier's* sequencing requirement for the qualified immunity inquiry and not the fact that qualified immunity applies in excessive force cases. *Pearson*, 555 U.S. at 236.

32 *See* Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMPLE L. REV. 61, 67 (1989) ("[E]ven though qualified immunity is appropriately available as a defense for other [F]ourth [A]mendment

This "middle history" of qualified immunity—the years after *Harlow* in 1982 through the *Saucier* decision in 2001—that brought qualified immunity into excessive force doctrine is often overlooked. It is critical to examine the *particular doctrinal choices* the Court made related to police and qualified immunity during these years in order to understand how it became entrenched in § 1983 excessive force litigation today. This Article highlights this middle history to reveal how qualified immunity made its way into § 1983 excessive force litigation, quietly taking life out of constitutional tort actions against police officers that abuse their authority.

This Article draws upon an original empirical dataset to tell the story of how qualified immunity became an exculpatory doctrine of excessive force. The data shows a pattern where, over time, qualified immunity morphed from a narrow theory of executive privilege into a specific theory to limit civil lawsuits against police officers who use excessive force. Our study sampled and analyzed 569 district court cases to determine how the development of qualified immunity at the Supreme Court impacted excessive force litigation.

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claims, it is an unnecessary defense to a [F]ourth [A]mendment claim challenging the use of excessive force because the standard for liability is identical to the standard for qualified immunity; both question whether a reasonable officer would have believed that the use of force was necessary. Because the standards overlap, qualified immunity is an unnecessary defense."); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 59 (1989) ("A strong argument can be made that the use of more force than is necessary preempts an immunity defense. Given the situation a police officer faced, the question is whether the force used was justified and necessary; was it reasonable under the circumstances? This is not an area of the law that involves a 'thicket' of legal opinions. While each case may present different facts, this well-established legal standard remains the same. . . . A finding of unreasonable use of force establishes the constitutional claim *and* defeats immunity."); LaLonde v. County of Riverside, 204 F.3d 947, 959 (9th Cir. 2000) (reaffirming that the proper test for qualified immunity in excessive force cases is the same as the test on the merits); Rowland v. Perry, 41 F.3d 167, 173 (4th Cir. 1994) ("The immunity test and the test on the merits both rely on an objective appraisal of the reasonableness of the force employed."); Jackson v. Hoylman, 933 F.2d 401, 402-03 (6th Cir. 1991) (affirming the district court's determination that "qualified immunity turns on the same objective reasonableness standard that the claim of excessive force turns on . . . ."); McNair v. Coffey, 234 F.3d 352, 355 (7th Cir. 2000) ("[O]nce a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful." (quoting Frazell v. Flanagan, 102 F.3d 877, 886-87 (7th Cir. 1996))); Frazell v. Flanagan, 102 F.3d 877, 886 (7th Cir. 1996) ("[A] number of circuits have indicated that a jury's finding on the Fourth Amendment question effectively resolves the immunity issue as well, because both questions turn on whether the officer's conduct was objectively reasonable under the circumstances."); Guffey v. Wyatt, 18 F.3d 869, 873 (10th Cir. 1994) ("If a plaintiff alleges a police officer has used excessive force in violation of the Fourth Amendment, the qualified immunity inquiry becomes indistinguishable from the merits of the underlying action."); Street v. Parham, 929 F.2d 537, 540 (10th Cir. 1991) ("When the jury . . . decided that the force used by the officer was unreasonable under all the circumstances . . . [n]o officer could reasonably believe that the use of unreasonable force did not violate clearly established law."); Scott v. District of Columbia, 101 F.3d 748, 759 (D.C. Cir. 1996) ("[T]he issues of whether an officer used excessive force and whether an officer is entitled to qualified immunity are both determined according to a single standard.").

We found that during its origins, qualified immunity was raised in a variety of cases involving public officials, including cases about employment discrimination, free speech rights, and improper seizures of property. But as the power of qualified immunity grew, so too did the proportion of qualified immunity cases involving police officers facing § 1983 suits for excessive force. This Article's legal and empirical examination of qualified immunity's evolution reveals its *political nature* and provides context for understanding contemporary calls to eliminate the doctrine.

Qualified immunity defenses arise in response to constitutional tort claims against police use of excessive force made through 42 U.S.C. § 1983. Part I anchors the conversation concerning qualifying immunity in the history of constitutional tort litigation stemming from § 1983, a federal civil rights statute enacted after the Civil War to allow formerly enslaved people to bring civil causes of action against government officials who violated their constitutional rights. Enacted in 1871 yet dormant for several decades, it is against this backdrop that qualified immunity first emerged in 1967. This Part examines the historical ebbs and flows of § 1983 litigation as context for understanding the emergence and power of qualified immunity as a shield to excessive force claims. Part II discusses the traditional story about the invention of qualified immunity by the US Supreme Court through three foundational cases. It began in 1967 when *Pierson v. Ray* offered limited immunity to § 1983 claims, was transformed into a broader rule based on a two-part objective reasonableness test in 1982 in *Harlow v. Fitzgerald*, and finally took on its most current and familiar form in 2009 when *Pearson v. Callahan* overturned *Saucier v. Katz*, thereby eliminating any rules about the sequence with which courts had to carry out the two-part qualified immunity test. From this account, it was assumed that immediately after qualified immunity randomly emerged in 1967 with *Pierson* and took on its modern form in 1982 with *Harlow* that the doctrine had an adverse impact on how federal courts read excessive force claims. Part III summarizes the existing literature on qualified immunity to situate this Article's doctrinal and empirical contributions. Part IV discusses the research questions and methods guiding our empirical study of the development of qualified immunity as a defense for excessive force claims in district court cases. Part V reports our empirical findings. Our data shows that for most of the history of modern qualified immunity, it was relatively rare to have a qualified immunity case that involved police use of force. Indeed, it was only after contested litigation in the early 2000s over whether qualified immunity should apply to excessive force claims at all that the doctrine became so closely connected to police use of force. Part VI discusses how our empirical findings point to a critical "middle history" of qualified immunity, from 1982 to 2001, when the Court

had to decide whether it would apply qualified immunity to the Fourth Amendment framework for excessive force claims that it developed in *Graham v. Connor*. The Article concludes with an evaluation of current efforts to eliminate qualified immunity for police officers and argues that although these reforms have limits, they should be pursued as part of a broader strategy toward ending police violence.

I. SECTION 1983 AS CONTEXT FOR UNDERSTANDING QUALIFIED IMMUNITY

How did a doctrine that lacks any basis in statutory or constitutional text become deeply entrenched in § 1983 litigation? This Part describes how qualified immunity initially became a part of constitutional torts by explaining its origins in relation to § 1983. We begin with the birth of § 1983 when Congress passed the Civil Rights Act of 1871 following the Civil War. We then discuss the reemergence of § 1983 in the 1960s after a long period of dormancy, starting with the Supreme Court case *Monroe v. Pape*.

A. *Reconstruction and the Civil Rights Act of 1871*

Section 1983 was passed in the context of Reconstruction after the Civil War.[33] During this time, the Reconstruction Amendments—which consist of the Thirteenth, Fourteenth, and Fifteenth Amendments—were ratified and added to the U.S. Constitution.[34] These amendments altered the relationship between states and the federal government by making the federal Constitution the legal source for rights that state or local government could not violate.[35] The Thirteenth Amendment formally abolished slavery; the Fourteenth Amendment provided "equal protection of the laws" and substantive rights that allowed freed Black people to live as equal citizens; and the Fifteenth Amendment gave Black Americans the right to vote.[36] Together, these new amendments were meant to bring an end to white supremacy and intergenerational subordination of Black Americans.[37]

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33 *See generally* Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 983 (2002) (noting that the Thirteenth, Fourteenth, and Fifteenth Amendments were produced during the Reconstruction Era).

34 *See id.*; U.S. CONST. amends. XIII, XIV, XV.

35 *See* ERIC FONER, THE STORY OF AMERICAN FREEDOM 107 (1998) ("The Reconstruction amendments transformed the Constitution from a document primarily concerned with federal-state relations and the rights of property to a vehicle through which members of vulnerable minorities could stake a claim to substantive freedom and seek protection against misconduct by all levels of government.").

36 U.S. CONST. amends. XIII, XIV, XV.

37 *See* EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM 408 (2014) ("[The Fourteenth Amendment] wrote into the Constitution a nationwide standard of birthright citizenship that would eventually enable future

But even after the Reconstruction Amendments went into effect, new forms of racialized oppression and institutional racism emerged. Racialized violence ran rampant through the late 1860s and 1870s.[38] Slave patrols morphed into different entities such as local militias and the Ku Klux Klan, and even gave rise to early police departments in some regions.[39] During this time, white supremacy was enforced through violence that was often carried out or at least enabled by complicit state actors, including law enforcement.[40] White state officials often protected and worked alongside white mobs that terrorized Black communities.[41]

This is the context in which the Civil Rights Act of 1871 arose.[42] Also known as the Ku Klux Klan Act, it allows individual plaintiffs to sue

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generations—descendants of slaves and immigrants alike—to undermine racial and cultural supremacy."); FONER, *supra* note 35, at 105 (1998) ("[The Fourteenth Amendment's broad language] opened the door for future Congresses and the federal courts to breathe meaning into the guarantee of legal equality, a process that has occupied the courts for much of the twentieth century.").

38 *See* Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, *in* POLICING THE BLACK MAN 8 (Angela J. Davis, ed., 2017) ("In place of slavery, belief in a racial hierarchy took virulent expression in newly defined social norms, including lynching and other forms of racial terrorism; segregation and Jim Crow; and unprecedented mass incarceration."); W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 674 (1935) ("A lawlessness which, in 1865–1868, was still spasmodic and episodic, now became organized, and its real underlying industrial causes obscured by political excuses and race hatred. Using a technique of mass and midnight murder, the South began widely organized aggression upon the Negroes.").

39 *See* Katheryn Russell-Brown, *Making Implicit Bias Explicit*, *in* POLICING THE BLACK MAN, *supra* note 38, at 140 ("Following the Civil War, slave patrols remained in force, only in a different form. At the beginning of Reconstruction, various groups joined what had been the slave patrols and were now the patrols designed to police the movements of newly freed slaves. The state militia, the federal military, and the Ku Klux Klan became the new, more violent slave patrols."); SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 202 (2003) ("After the Civil War, the violent methods of slave patrols would also be adopted and renewed by groups dedicated to white supremacy at all costs, even by illegal means. . . . White Southerners visited retribution upon freedmen who had little means of protecting themselves from the next incarnation of slave patrols: the Ku Klux Klan.").

40 *See id.*; sources cited *supra* note 38.

41 *See* Stevenson, *supra* note 38, at 11 ("[S]tates looked to the criminal justice system to construct policies and strategies to maintain white supremacy and racial subordination. Law enforcement officers were tasked with menacing and controlling black people in ways that would shape policing and the criminal justice system in America for the next century.").

42 42 U.S.C. § 1983; *see also* Monroe v. Pape, 365 U.S. 167, 172-73 (1961) ("The Ku Klux Act grew out of a message sent to Congress by President Grant on March 23, 1871, reading: 'A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. . . . Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.'"); Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 70 (2003) ("The primary congressional response to continued lawlessness in the postwar South was the Ku Klux Klan Act of 1871, which afforded civil and criminal remedies against both governmental and private action that deprived individuals of civil rights."); Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 5 (1985) ("Following the

government officials who deprived them of constitutional rights.[43] It was later codified as a federal statute at 42 U.S.C. § 1983, giving the Act the shorthand name used to refer to it today: § 1983. Congress passed this Act as an attempt to create financial disincentives that would discourage local and state officials from using their authority to terrorize Black communities.[44] The statute emerged out of and acted alongside the Reconstruction Amendments to reconfigure the relationship between states and the federal government by creating a legal mechanism that Black Americans could use to hold state actors accountable for racialized violence and vindicate constitutional rights.[45] The mechanism implemented in § 1983 to facilitate greater accountability was a new private cause of action that allowed individual plaintiffs to sue *state and local* government officials who unlawfully deprived them of federal rights.[46] The law potentially creates accountability by exposing these people and officers to civil liability—money damages—when they violate the constitution by, for example, using excessive force. The current text of the statute at § 1983 reads, in relevant part:

> 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 . . . .[47]

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adoption of the Fourteenth Amendment in 1868, . . . came the 1871 Civil Rights Act, aimed specifically at the activities of the Ku Klux Klan. Section 1 of that Act, now § 1983, added civil remedies. It provided a civil remedy for deprivations, under color of state law, of any of the rights, privileges, and immunities secured by the Constitution.").

43 42 U.S.C. § 1983.

44 PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 197 (1st ed. 1999) ("Congress utilized the powers granted by the Reconstruction amendments with three Enforcement Acts, passed in 1870 and 1871. The first, known as the Ku Klux Klan Act, was aimed at the hooded marauders who terrorized blacks across the South.").

45 *See id*. ("Congress intended with this law to give federal judges the power to punish local and state officials in the South—many of whom belonged to or collaborated with the Klan—who prevented blacks from voting or exercising other civil rights."); *Monroe*, 365 U.S. at 171 ("Section 1979 came onto the books as § 1 of the Ku Klux Act of April 20, 1871. It was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment." (citation omitted)); 16B AM. JUR. 2D *Constitutional Law* § 822 (rev. Aug. 2021) ("Congress's enforcement power under the 14th Amendment is broad and includes the authority both to remedy and to deter violation of rights guaranteed by the 14th Amendment by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the amendment's text.").

46 42 U.S.C. § 1983.

47 42 U.S.C. § 1983 (emphasis added).

The text does not, nor has it ever, included a defense of qualified immunity for government officials, including police officers. From the law's beginning in 1871 through the 1960s, public officials were not entitled to qualified immunity for § 1983 claims based on violations of federal constitutional rights.[48] Shortly after passing § 1983, the Supreme Court even rejected the idea that Congress intended to immunize state officials facing liability under the statute.[49]

B. *Reemergence of § 1983*

Section 1983 largely laid dormant Reconstruction, falling out of use for decades. But in 1961, *Monroe v. Pape* reopened the door to using § 1983 to hold government officials financially liable for violating constitutional rights.[50] The plaintiffs in *Monroe*—a family of six Black children and their parents—sued the City of Chicago and several Chicago police officers after the police broke into their home without a warrant and ransacked the house while the family was forced to stand naked in the living room.[51] The officers also took the father to the police station, where the officers detained him for ten hours and subjected him to interrogation before allowing him to appear before a magistrate or call an attorney.[52] The plaintiffs sued the police officers and the

48 *But see* Scott Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1344 (2021) ("[H]istorical sources refute the prevailing view among modern commentators that nineteenth-century cases did not recognize 'a freestanding common-law defense' for government officers' discretionary duties."). Keller's article surveys four treatises in use in 1871 to determine what state common law immunities existed for public officials at the time Congress enacted § 1983. *Id.* at 1343. Keller argues that state law generally granted public officials immunity from liability for actions performed as discretionary duties, so long as the official was not acting in bad faith or with an improper purpose. *Id.* at 1344-45. Keller acknowledges that qualified immunity for federal § 1983 claims only began after the Court's decision in *Pierson v. Ray*, 386 U.S. 547 (1968), but his claim is that the immunities that existed at common law for state torts in the years leading up to the creation of § 1983 provide a valid foundation for the creation of qualified immunity. *Id.* at 1389. William Baude, however, challenges Keller's claim that that state common law in 1871 contained immunities akin to qualified immunity. *See* William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 STAN. L. REV. ONLINE (forthcoming 2021). Baude argues that Keller only shows that a "quasi-judicial" good-faith defense existed at common law; this doctrine was distinct and distant from the modern doctrine of qualified immunity for § 1983 claims. *Id.* (manuscript at 2). We discuss this debate in further detail in *infra* Part III.

49 Schwartz, *The Case Against Qualified Immunity*, *supra* note 30, at 1801-02 ("[T]he Supreme Court expressly rejected a good faith defense to liability under Section 1983 after it became law."); Baude, *Is Qualified Immunity Unlawful?*, *supra* note 30, at 57 (discussing the Supreme Court's rejection of the application of a good faith defense under § 1983 claims in Myers v. Anderson, 238 U.S. 368 (1915)).

50 365 U.S. 167, 191-92 (1961).

51 *Id.* at 169.

52 *Id.*

City of Chicago under § 1983 for violating their Fourth Amendment right to be free from unreasonable searches and seizures.[53]

The United States Supreme Court held that the plaintiffs were entitled to bring a § 1983 claim for damages against the police officers for violating their constitutional rights.[54] A key part of the ruling held that government officials could be liable for actions even if they were taken without official state approval or authorization, and even if they were contrary to established law, custom, and practice.[55] This gave § 1983 a potentially broad scope.

Immediately after *Monroe*, the Court took up several cases regarding § 1983's scope. The decisions in these cases interpreted the meaning of "state action" and "color of state law,"[56] allowed property and liberty interests to be adjudicated under the statute,[57] and determined that plaintiffs need not exhaust state remedies before seeking relief.[58] The initial years after *Monroe* thus established that the statute expanded access to federal court remedies for constitutional violations. At the same time the Court was defining the scope of § 1983, it was also expanding substantive constitutional protections.[59]

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53 *Id.* at 169-70.

54 *Id.* at 191-92. The Court in *Monroe* did dismiss the complaint against the city of Chicago, finding that Congress did not intend the word "person" in § 1983 to apply to municipalities. *Id.* This part of *Monroe* was later overruled in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). In *Monell*, the Court analyzed the legislative history of § 1983 and held that municipalities were proper defendants in § 1983 cases, but only where "the action that is alleged to be unconstitutional implements or executes" a municipal law, policy, or custom. *Id.* at 690. This standard makes bringing a municipal liability claim difficult or impossible in many types of cases. *See* Rudovsky, *supra* note 32, at 32; Eric Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 266 (1979) (criticizing attempts to limit municipal liability).

55 *Monroe*, 365 U.S. at 183-85.

56 *See* Rudovsky, *supra* note 32, at 24; Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) ("The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful[.]"); Reitman v. Mulkey, 387 U.S. 369, 380-81 (1967) (finding that a California statute constituted State action by "involv[ing] the State in private discriminations."); Burton v. Wilmington Parking Auth., 365 U.S. 715, 723-25 (1961) (finding state action where a restaurant "operated as an integral part of a public building devoted to a public parking service" discriminated against Black individuals).

57 *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) ("The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account.").

58 *See* Patsy v. Bd. of Regents, 457 U.S. 496, 501 (1982) (holding that exhaustion of administrative remedies is not a prerequisite for § 1983 actions); McNeese v. Bd. of Educ., 373 U.S. 668, 676 (1963) ("When federal rights are subject to . . . tenuous protection, prior resort to a state proceeding is not necessary.").

59 *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104 (1976) (Eighth Amendment); Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (due process); Chimel v. California, 395 U.S. 752, 763 (1969) (Fourth Amendment); Katz v. United States, 389 U.S. 347, 353 (1967) (Fourth Amendment); United States v. Wade, 388 U.S. 218, 227 (1967) (Sixth Amendment); N.Y. Times v. Sullivan, 376 U.S. 254, 264 (1964) (First Amendment, due process); Brown v. Bd. of Educ. 347 U.S. 483, 495 (1954) (equal protection); *see also* Rudovsky, *supra* note 32, at 35-36 (examining the doctrine of qualified immunity

With these parallel expansions after *Monroe*, § 1983 became an important vehicle for enforcing constitutional rights in the United States.

At this point, claims that police used excessive force were litigated through a variety of legal rules, although substantive due process became a primary mechanism.[60] By giving new life to § 1983, *Monroe* led to an upswing in excessive force cases against the police.[61] But only six years after confirming that the Reconstruction-era Congress intended to provide a federal cause of action to enforce liability for violations of constitutional rights committed under color of state law, the Court placed significant constraints on § 1983 by creating limited immunities for § 1983 claims. The Supreme Court would later transform these limited immunities into the modern doctrine of qualified immunity.

II. EMERGENCE OF QUALIFIED IMMUNITY

Soon after the Supreme Court opened the door for § 1983 to be invoked in response to police brutality, it limited police officers' exposure to civil liability for misconduct by creating a new rule: qualified immunity. This Part outlines the traditional story of how the Court developed the modern doctrine of qualified immunity through three foundational cases.

In *Pierson v. Ray*, the Court first applied a limited immunity based on a common law, good faith defense to false imprisonment.[62] Then, in *Harlow v. Fitzgerald*, the Court rewrote the rules governing qualified immunity to create the two-step objective qualified immunity test.[63] Finally, in *Pearson v. Callahan*, the court overturned a prior decision on qualified immunity—*Saucier v. Katz*—thereby allowing courts to address questions about "clearly

and its impact on litigation of civil rights claims); Blackmun, *supra* note 42, at 19-20 (describing the expanding significance of § 1983 in civil liberties litigation).

60 *Graham v. Connor*, 490 U.S. 386 (1989), established the Fourth Amendment as the proper basis for excessive force claims. As Obasogie and Newman have shown, litigants prior to the *Graham* decision pursued claims through different legal avenues, including the Fourth Amendment, standalone § 1983 claims, substantive due process, and the Equal Protection Clause. *See* Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of* Graham v. Connor, 112 NW. U. L. REV. 1465, 1485 (2018) (analyzing claims asserted in excessive force cases before *Graham*).

61 *See* Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 781-93 (1979) (discussing increase in number of police misconduct lawsuits from 1971 to 1979 and compiling case sample of § 1983 misconduct cases that shows majority of cases involved excessive force).

62 386 U.S. 547, 555 (1967). For a discussion regarding the debate about whether the common law immunities from 1871 provide a valid foundation for the Court's creation of qualified immunity for § 1983 claims, see *supra* note 48 and *infra* Part III.

63 457 U.S. 800, 818-19 (1982).

established law" before determining the merits of the underlying constitutional claim.[64]

A. Pierson v. Ray

Pierson v. Ray focused on the question of whether common law immunities afforded to state officials in tort law should apply to state officials sued under § 1983 for constitutional violations.[65] The plaintiffs in the case were a group of white and Black clergymen and anti-segregation protesters.[66] Police arrested them for breaching the peace when they attempted to use segregated facilities at a bus terminal in Jackson, Mississippi.[67] After the Mississippi segregation law was ruled unconstitutional, the protesters sued the officers that arrested them, alleging that the officers were liable at common law for false arrest and imprisonment and could be subject to a § 1983 lawsuit for violating the protesters' constitutional rights.[68]

To defend themselves from the case, the officers argued that they were entitled to a limited immunity from both the false imprisonment state tort claim and the federal § 1983 claim.[69] Their argument was made in the shadow of a prior case from 1951, where the Court had said that the common law of 1871 should govern interpretations of possible immunities to § 1983 claims as applied to state legislators.[70] The officers argued that the Mississippi common law of 1871 provided police officers immunity from false imprisonment claims if they act in "good faith" and with probable cause.[71]

At the Fifth Circuit, the Court of Appeals held that the officers could not assert a "good faith and probable cause" defense to the § 1983 claim.[72] The court noted that the common law tort defense only applied to state torts, not

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64 Saucier v. Katz, 533 U.S. 194, 197 (2001), *overruled in part by* Pearson v. Callahan, 555 U.S. 223, 236 (2009).

65 386 U.S. 547, 556-57. We focus on *Pierson*'s discussion of executive branch official immunity because it establishes the concept of qualified immunity to § 1983 for the first time. *Id.* at 555-57. This case also involved a question about judicial immunity, and on that issue, the Court concluded that judges are immune from § 1983 lawsuits that arise from judges performing their official duties. *Id.* at 554-55. The ruling on judicial immunity relied on a prior case, which found that § 1983 made state legislators immune from liability "as long as the deprivation of civil rights which they caused a person occurred while the legislators 'were acting in a field where legislators traditionally have power to act.'" *Id.* at 559 (quoting Tenney v. Brandhove, 341 U.S. 367, 379 (1951)).

66 *Pierson*, 386 U.S. at 549.

67 *Id.*

68 *Id.* at 550.

69 *Id.* at 555.

70 Brief for Respondents, Pierson v. Ray, 386 U.S. 547 (1967) (No. 79), 1966 WL 115420, at *32-36 (1966); Tenney v. Brandhove, 341 U.S. 367, 379 (1951).

71 *Pierson*, 386 U.S. at 551-52.

72 *Id.*

federal § 1983 claims.[73] The Supreme Court reversed the Fifth Circuit decision and held that the "good faith and probable cause" defense that applied in state tort law also applied in the context of § 1983 claims based on false arrest.[74]

The Court's reason for creating this new immunity to § 1983 suits rested on a statutory interpretation argument based entirely on the silence of Congress with respect to immunities to § 1983 claims. The text of § 1983 clearly states that "[e]very person" who under color of state law violates someone's constitutional rights[75] can be held liable. Despite this clear guidance from the statute, the Court said the "prevailing view" at common law is that police officers facing liability for the tort of false arrest could invoke a "good faith and probable cause" defense.[76] The Court assumed that because some states had this common law defense, Congress intended for the same defense to apply in the context of federal § 1983 claims.[77] The Court's reasoning was confined, however, to one narrow exception for special treatment: situations where an officer arrests an individual "acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied." [78]

The Court's decision to bring the "good faith and probable cause" defense from common law false arrest doctrine into federal constitutional tort litigation initiated what would soon become a robust doctrine of qualified immunity insulating police officers from liability for their constitutional violations.[79]

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73 *Id.* at 551.

74 *Id.* at 557.

75 An amendment added in 1996 prohibits the grant of injunctive relief against any judicial officer acting in her or his official capacity "unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983.

76 *Pierson*, 386 U.S. at 555 (stating that what would become known as qualified immunity is limited to this common law defense which immunizes police officers, provided they act in good faith and with probable cause).

77 *Id.* at 557.

78 *Id.* at 555. Chief Justice Warren noted that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Id.*

79 *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 195-97 (2004) (per curiam) (overturning lower court decision to deny qualified immunity to a police officer who shot plaintiff in the back); Plumhoff v. Rickard, 572 U.S. 765, 768-70 (2014) (granting qualified immunity to police officers who shot and killed the driver and passenger in a "dangerous" fleeing car); Mullenix v. Luna, 577 U.S. 7, 9-11 (2015) (per curiam) (granting qualified immunity to an officer who shot and killed a fleeing driver even after the officer was ordered to "stand by" to see if spike strips would stop the car first); City and County of San Francisco v. Sheehan, 575 U.S. 600, 603-06, 617 (2015) (granting qualified immunity to officers who shot a mentally ill woman in her group home when she would not drop a knife); White v. Pauly, 137 S. Ct. 548, 549-53 (2017) (per curiam) (granting immunity to an officer who shot an armed home occupant during a standoff); Kisela v. Hughes, 138 S. Ct. 1148, 1150-05 (2018) (per curiam) (granting immunity to an officer who shot a mentally ill woman with a kitchen knife); City of Escondido v. Emmons, 139 S. Ct. 500, 501-04 (2019) (per curiam) (reversing lower court decision to grant immunity to an officer

But it would have been hard for anyone to predict, based on the decision in *Pierson*, that qualified immunity would grow into what it has become today. For one thing, the Court's reasoning here—that officers should not face civil lawsuits when they enforce a statute that is legally valid at the time of the incident—applied only in the limited context of an officer being sued for false arrest when the statutory basis for the arrest is later deemed invalid. This reasoning, as initially conceived, would not apply to other circumstances of police misconduct, such as the use of excessive force.

Moreover, even if we rely on the weak justification for using common law principles from 1871 to interpret § 1983, there is no reason to think that Congress intended for § 1983 to provide an immunity to police officers, especially in the context of excessive force. Critically, as the historical context we detailed above makes clear, a key purpose of § 1983 was to hold state actors accountable for their participation in racialized violence. When the Reconstruction-Era Congress passed what has become § 1983, it wanted to empower people to sue state and local officials for participating in racialized brutality that violated constitutional rights in light of these officials failing to do their jobs properly.[80] Affording police immunity for using excessive force undermines this very purpose.

Pierson may have aligned with common law principles for false arrest, but, shortly afterwards, the Court started to substitute its own policy judgments for the commands of both § 1983 and the Constitution.[81] Between qualified

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who forcibly took a man to the ground as he attempted to walk past them); City of Tahlequah v. Bond, 142 S. Ct. 9, 10-11 (2021) (per curiam) (reversing lower court decision to deny qualified immunity to police who shot man with a hammer); *see also Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting) (noting the "disturbing trend" where the Court "routinely displays an unflinching willingness to summarily reverse courts for wrongly denying officers the protection of qualified immunity but rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases." (internal quotation marks omitted)).

80 *See* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1334 (1952) ("On April 20, 1871, Congress passed another statute 'to enforce the provisions of the Fourteenth Amendment to the Constitution.' Known as the Ku Klux Klan Act, this statute was the indignant reaction of Congress to the conditions in the southern states wherein the Klan and other lawless elements were rendering life and property insecure. . . . [T]he person whose civil rights were injured was given a civil cause of action against the officer who should have but did not protect him, a provision which was specifically directed against lynching and other forms of mob violence." (footnotes omitted)).

81 *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L. J. 2, 8 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*] ("Although the concept of qualified immunity was drawn from defenses existing in the common law at the time 42 U.S.C. § 1983 was enacted, the Court has made clear that the contours of qualified immunity's protections are shaped not by the common law but instead by policy considerations."); *see also* Rudovsky, *supra* note 32, at 38. The Court shifted toward public policy considerations in the case that immediately followed *Pierson*: *Wood v. Strickland*, 420 U.S. 308 (1975). In *Wood*, the Court cited "strong public-policy reasons" as grounds for extending a "qualified good-faith" immunity to local school board officials. *Id.* at 318. Specifically, the Court

immunity's first appearances in 1967 and 1982, the Court extended this defense to public officials in other contexts, including school board officials, prison officials, mental health hospital administrators, and executive branch cabinet officials.[82]

These cases demonstrate a shift in the Court's reasoning. When first introduced, qualified immunity was justified primarily on grounds of statutory interpretation, with fidelity to analogous common law defenses in tort law. However, in later cases from this period, the Court began channeling arguments about economic and judicial efficiency to rationalize qualified immunity.[83]

B. Harlow v. Fitzgerald *and Rewriting Qualified Immunity*

The court created qualified immunity in *Pierson*, but the doctrine acquired its modern form fifteen years later in *Harlow v. Fitzgerald*.[84] While *Harlow*

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worried that "[d]enying any measure of immunity in these circumstances 'would contribute not to principled and fearless decision-making but to intimidation.'" *Id.* at 319. It further said that:

> The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students. The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure.

Id. at 319-20. The Court's decision in *Harlow* solidified its use of policy considerations to justify qualified immunity. In the case, the petitioners argued that the Court should rewrite the rules of qualified immunity based on a public policy argument that "permit[s] the defeat of insubstantial claims" against public officials "without resort to trial." Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982). The Court accepted the invitation to depart from whatever common law basis for qualified immunity might exist in favor of public policy; it adopted a new qualified immunity rule based on concerns about claims that "frequently run against" innocent public officials "at a cost not only to the defendant officials, but to society as a whole." *Id.* at 814. The Court also cited

> social costs [that] include 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. In light of these considerations, the Court adopted the modern two-part qualified immunity test based on clearly established law as "the best attainable accommodation of competing values." *Id.* Justice Thomas has also described the modern evolution of qualified immunity doctrine as involving "precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make." Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring).

82 *See Wood*, 420 U.S. at 318 (extending a good faith qualified immunity to local school board officials); Procunier v. Navarette, 434 U.S. 555, 556-67, 560, 563 (1978) (prison officials); O'Connor v. Donaldson, 422 U.S. 563, 564, 577 (1975) (mental health hospital administrators); Butz v. Economou, 438 U.S. 478, 514-15 (1978) (federal executive level cabinet officials).

83 *See infra* Section II.B.

84 *Harlow*, 457 U.S. 800, 813-815 (1982).

provides the foundation for today's conception of qualified immunity for police, the case had little to do with law enforcement. Rather, it concerned two top-level executive aides to President Nixon.[85] Fitzgerald testified in Congress about financial fraud in the Nixon administration and was fired shortly thereafter.[86] He brought a *Bivens* claim[87] against the two presidential aides that fired him—Bryce Harlow and Alexander Butterfield—on the grounds that they unlawfully retaliated against him.[88] Harlow and Butterfield argued that, as government officials, they were immune from the constitutional claims Fitzgerald brought against them.[89]

Up until this point, the Court recognized two types of immunity: *absolute immunity* for legislators and judges performing their official functions and *qualified immunity* for other public officials.[90] The defendants wanted the Court to grant the Presidential aides absolute immunity, but the Court ultimately held that executive branch officials were only entitled to qualified immunity.[91] But the Court also went on to throw out the old qualified immunity rules and issue entirely new ones. As we discussed above, at this point, qualified immunity was available in the form of a "good faith" affirmative defense under a subjective standard that imposed liability if an officer "took the action[s] *with the malicious intention* to cause a deprivation of constitutional rights or other injury."[92]

The Court decided to adjust this rule because it did not facilitate dismissal of "insubstantial" claims before trial.[93] The decisions giving support to qualified immunity in the years between *Pierson* and *Harlow* relied on new arguments about the need to grant state officials discretion in decisionmaking and the need for judicial and economic efficiency.[94] The *Harlow* Court

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85 *Id.* at 802.

86 Nixon v. Fitzgerald, 457 U.S. 731, 733-34 (1982).

87 Section 1983 provides a cause of action for constitutional violations committed by state actors. There is no similar statute that applies to unconstitutional conduct of federal officials, but in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court held that plaintiffs can bring a lawsuit against federal officials directly under the Fourth Amendment in federal court. *Bivens*, 403 U.S. at 388. Since then, the Court has extended *Bivens* to violations of other constitutional protections, creating a private cause of action against federal officers for violations of constitutional rights. *See, e.g.*, Carlson v. Green, 446 U.S. 14, 16, 24-25 (1980) (Eighth Amendment); Davis v. Passman, 442 U.S. 228, 248-49 (1979) (Fifth Amendment's Due Process Clause).

88 *Harlow*, 457 U.S. at 802-05.

89 *Id*. at 808.

90 Absolute immunity for legislators and judges was supported because their "special functions or constitutional status requires complete protection from suit . . . ." *Id.* at 807.

91 *Id.* at 809.

92 *Id.* at 815.

93 *Id.* at 813-15.

94 *See* Butz v. Economou, 438 U.S. 478, 526-27 (1978) (Rehnquist, J., concurring in part and dissenting in part) (commenting that the limited qualified immunity provided would lead to increases in litigation against government officials based on decisions made while in office); Scheuer

expanded those arguments, weighing plaintiff's rights against the interests of judicial expediency:

> In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include 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.[95]

The Court concluded that the subjective standard "proved incompatible" with the idea "that insubstantial claims should not proceed to trial" because subjective intent is a factual determination that, if disputed, could not be decided on motions for summary judgment.[96] The Court then decided to change qualified immunity to an entirely "objective" standard,[97] which granted immunity to "government officials performing discretionary functions . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[98]

This revision represents the Court's first major transformation of qualified immunity. Rather than using the common law from 1871 to justify and model qualified immunity as done in *Pierson*, the *Harlow* Court made a *policy judgement* rooted in a demand for efficiency and desire to protect the state from litigation expenses. By stoking fears about costs and the limits of public resources, the Court was able to rein in the power of § 1983 to hold state actors accountable for their constitutional violations.

C. Pearson v. Callahan

To understand the significance of *Pearson v. Callahan*,[99] it is helpful to start with the case that *Pearson* overruled: *Saucier v. Katz*.[100]

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v. Rhodes, 416 U.S. 232, 246-47 (1974) (noting that greater immunity may need to be provided to officials depending on the range of their responsibilities to empower official action).

95 *Harlow*, 457 U.S. at 814 (internal quotation marks and citations omitted).

96 *Id.* at 815-16.

97 *Id.* at 818 ("Reliance on the objective reasonableness of an official's conduct . . . should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." (footnote omitted)).

98 *Id.* at 818.

99 555 U.S. 223 (2009).

100 533 U.S. 194 (2001), *overruled in part by* Pearson v. Callahan, 555 U.S. 223 (2009).

In 2001, the Court decided *Saucier v. Katz*, a qualified immunity case about a federal officer that allegedly used excessive force on a protester.[101] *Saucier* settled a circuit split on whether the Fourth Amendment reasonableness inquiry precluded questions about qualified immunity in § 1983 excessive force claims, where plaintiffs allege that police violated their Fourth Amendment rights.[102] Before *Saucier*, the Supreme Court had applied qualified immunity to Fourth Amendment search and seizure claims, meaning that officers could be shielded from civil lawsuits when they performed illegal searches or arrests.[103] But the Supreme Court had not yet decided if the analysis regarding qualified immunity was separate from or intertwined with assessments of the constitutional violation in situations where someone alleges excessive force by the police. As we discuss in more detail in Part VI, the key issue in the case was whether the test for qualified immunity—which looks to the reasonableness of an officer's conduct measured by reference to "clearly established law"[104]—was identical to the Fourth Amendment excessive force test established in *Graham v. Connor*—which looks to whether an officer's use of force was reasonable under the circumstances[105]—such that a finding of unreasonable force under the Fourth Amendment necessarily precludes the officer from being entitled to qualified immunity.[106] The *Saucier* Court held that "reasonableness" must be analyzed differently in the two contexts, such that an officer could have acted unreasonably and used excessive force but have acted reasonably with respect to following clearly established law and still be entitled to qualified immunity.[107]

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101 *Id.* at 197-98.

102 *Id.* at 197. Some courts believed that that qualified immunity did not apply because (1) the law clearly established that excessive force is unlawful, and (2) the immunity analysis collapsed into the excessive force inquiry as both inquiries looked to the reasonableness of the police officer's actions; other courts, however, believed that officers could be entitled to qualified immunity in cases where the officer had a reasonable but mistaken belief that the force used was reasonable. *See infra* subsection V.A.1 (discussing the pre-*Saucier* circuit split on the issue of whether qualified immunity applied in excessive force cases).

103 *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 646 (1987) (extending qualified immunity to an FBI agent who conducted a search in violation of the Fourth Amendment); Malley v. Briggs, 475 U.S. 335 344-45 (1986) (holding that qualified immunity applies in cases of unconstitutional arrest pursuant to an objective reasonableness standard).

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

105 Graham v. Connor, 490 U.S. 386, 396 (1989) ("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.").

106 Saucier v. Katz, 533 U.S. 194, 203-05 (2001), *overruled in part by* Pearson v. Callahan, 555 U.S. 223 (2008).

107 *Id.* at 204 ("The inquiries for qualified immunity and excessive force remain distinct, even after *Graham*.").

In reaching this conclusion, the court clarified that the qualified immunity test involves two distinct steps.[108] In the first step, the court conducts a factual inquiry into whether a constitutional violation occurred.[109] If a constitutional violation is established in step one, then the court moves to the second step, where the court determines the objective reasonableness of the officer's actions by conducting a legal inquiry into whether the constitutional right the defendant violated was "clearly established" at the time the violation occurred.[110] The sequencing of these two steps was a critical issue in *Saucier*.

The Supreme Court in *Saucier* held that the qualified immunity test must always begin with the question of whether a constitutional violation occurred, and only then, after an affirmative finding at that step, could the court move on to the second question of whether the violated right was clearly established.[111] Put differently, the qualified immunity test had to be performed in that particular order. The Court justified this sequencing rule on the basis of judicial efficiency, as there was no reason to look to the question of clearly established law if there was no underlying constitutional violation for which an officer needed to invoke qualified immunity.[112] But the Court also justified the sequencing on the grounds that it promoted the "elaboration from case to case" of constitutional principles and prevented constitutional stagnation.[113] As the *Saucier* Court wrote, "the law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."[114]

With this backdrop in mind, we now move back to *Pearson v. Callahan*, which involved a challenge to the *Saucier* rule mandating the sequence of the qualified immunity test steps.[115] *Pearson* ultimately ended the mandatory sequencing rule, giving courts the option to decide the question of clearly established law before determining whether an underlying constitutional violation occurred.[116] The majority wrote:

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108 *Id.* at 201 ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. . . . If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." (citation omitted)).

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.* at 202.

113 *Id.* at 201.

114 *Id.*

115 555 U.S. 223 (2008).

116 *Id.* at 236.

> [W]hile the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.[117]

The court decided to overrule *Saucier* on the grounds that the sequencing rule provided "little if any conservation of judicial resources."[118] In fact, the Court said that judicial resources are often wasted by starting with the question of whether a constitutional right had been violated.[119] If there was no clearly established law on the issue, the Court reasoned, then there was no reason for the Court to spend time deliberating over whether or not the defendant violated a constitutional right.[120]

Pearson therefore introduced a second transformation to qualified immunity by allowing courts to pursue the question of clearly established law before asking the question of whether a constitutional violation occurred. This transformation ultimately pushed aside what usually was the key question in a § 1983 case—whether a constitutional violation actually happened—and put questions of whether a right is "clearly established" at the forefront of qualified immunity analyses. The decision to overrule *Saucier* also helped to overshadow the more substantive impact of the case regarding excessive force.

We will revisit *Saucier* in Part VII to show that even though the Court overruled the part of the decision about mandatory sequencing, the key holding about excessive force is still with us today.[121]

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Legal scholars have written extensively on the impact of *Pierson*, *Harlow*, and *Pearson* on § 1983 cases, configuring these three cases as the modern framework for qualified immunity.[122] Scholarly literature following this traditional view of the history of qualified immunity is often critical of the doctrine's emergence in *Pierson* and transformations under *Harlow* and *Pearson*, but it does not fully explore the particular ways that qualified immunity came to apply to cases regarding police use of force. In the next Part, we provide an overview of scholarly perspectives on qualified immunity

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117 *Id.*
118 *Id.*
119 *Id.* at 236-37.
120 *Id.* at 237.
121 *See infra* Part VII.
122 *See* sources cited *supra* note 30.

and explain how this Article provides a novel account of how qualified immunity emerged in excessive force doctrine.

III. SCHOLARLY PERSPECTIVES ON QUALIFIED IMMUNITY

Part II examined the doctrinal evolutions and policy choices made by federal courts that led qualified immunity to emerge as a viable defense to constitutional tort claims. How have legal scholars discussed these transformations? Two topics tend to occupy the literature on qualified immunity: a debate about the validity of qualified immunity doctrine itself and a debate about the sequencing of the qualified immunity test. What's missing from this field is an understanding of how qualified immunity specifically became attached to police excessive force doctrine. Existing literature acknowledges the critical role that qualified immunity plays in excessive force cases today, but it has yet to provide an account of the doctrinal history of how excessive force became so closely entangled with qualified immunity. This literature also lacks an empirical assessment of the growing relationship between qualified immunity and excessive force. This gap implies that excessive force has been a natural part of qualified immunity doctrine from the beginning. Our Article reveals, however, that this narrative obscures the political nature of qualified immunity as the Supreme Court explicitly applied it for the first time in 2001 as a shield for police officers who used excessive force. The discussion in this Part highlights how our argument about the nature and impact of the decision to create qualified immunity for excessive force builds on and extends the important work done so far in this field.

A. *Debates on the Merits of Qualified Immunity*

The landscape of recent qualified immunity legal scholarship is primarily occupied by criticisms and defenses of the doctrine. Critics have attacked both its legal foundations and its empirical justifications. The doctrine's supporters offer conditional defenses that keep the rule generally intact but in a modified form.

Joanna Schwartz and William Baude have both published important critiques of the doctrine in recent years.[123] Schwartz has primarily contributed

123 *See generally* Baude, *supra* note 48; Joanna Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309 (2020) [hereinafter Schwartz, *After Qualified Imminuity*] (arguing that abolishing qualified immunity would pose multiple benefits, including clarifying the law, reducing litigation costs, and focusing § 1983 analysis to whether officials have overstepped their authority); Schwartz, *The Case Against Qualified Immunity*, *supra* note 30, (arguing for an overhaul of qualified immunity doctrine); Baude, *Is Qualified Immunity Unlawful?*, *supra* note 30, (asserting that most rationales evoked to justify modern qualified immunity doctrine are largely unconvincing); Schwartz, *How Qualified Immunity Fails*, *supra* note 30 (questioning assumptions underlying the Supreme Court's qualified immunity

extensive empirical research examining whether the policy justifications the Court uses to ground qualified immunity have merit, while Baude has generally focused more on the doctrinal question of whether qualified immunity has a sound legal basis.

In *How Qualified Immunity Fails*, Schwartz shows that qualified immunity generally does not achieve its purported policy aims. She reviewed 1,183 § 1983 cases in federal district court and counted how often defendants brought qualified immunity motions in courts, the frequency with which district courts granted the motions, and whether the motions led to the dismissal of cases before discovery and trial.[124] Schwartz found that of the cases where qualified immunity could be asserted against defendants only 3.9% were actually dismissed on this basis.[125] Of the cases specifically involving law enforcement defendants, only 0.6% were dismissed on a motion to dismiss and 2.6% on a motion for summary judgment.[126] Given these findings, Schwartz concluded that qualified immunity failed to serve its intended purpose of shielding public officials from the burden of discovery and trial.[127]

Schwartz followed this empirical study on qualified immunity with a 2018 article arguing for the elimination of qualified immunity given that it has no basis in common law, it is ineffective in achieving its policy goals, and it hinders development of substantive constitutional protections.[128] In 2019, Schwartz published another piece on qualified immunity that offers five predictions about what would happen if the Court followed the call to reform qualified immunity.[129] Schwartz contends that if her predictions are right, eliminating qualified immunity would not substantially change constitutional protections or their coverage, but would "clarify the law, make litigation more efficient, increase the number of suits filed, and shift the focus of [§ 1983]

jurisprudence). Kit Kinports' *The Supreme Court's Quiet Expansion of Qualified Immunity* also offers a critical examination of the legal evolution of qualified immunity doctrine, combing through the Court's decisions in *Ashcroft v. al-Kidd,* 563 U.S. 731 (2011), *City and County of San Francisco v. Sheehan,* 575 U.S. 600 (2015), and *Heien v. North Carolina*, 574 U.S. 54 (2014), to show how the Court "engaged in a pattern of covertly broadening the defense, describing it in increasingly generous terms and inexplicably adding qualifiers to precedent that then take on a life of their own." 100 MINN. L. REV. HEADNOTES 62, 64-65 (2016). However, in doing this, Kinports does not fully explicate how qualified immunity came to apply to police excessive use of force cases—an argument and examination that we provide in this Article. Kinports does, however, explore how the Court changed its characterization of the standard governing the qualified immunity defense and whether lower court opinions can create clearly established law changed through these cases. *Id.* at 67-72.

124 Schwartz, *How Qualified Immunity Fails*, *supra* note 81, at 9.

125 *Id.* at 10.

126 *Id.*

127 *Id.* at 9-10, 71.

128 Schwartz, *The Case Against Qualified Immunity*, *supra* note 30, at 1799-1800.

129 Schwartz, *After Qualified Immunity*, *supra* note 123, at 316.

litigation to what should be the critical question at issue in these cases—whether government officials have exceeded their constitutional authority."[130]

William Baude's first major piece criticizing qualified immunity, *Is Qualified Immunity Unlawful*,[131] argues that the three justifications the Supreme Court has offered for imposing qualified immunity fail. Those justifications are, first, that the doctrine of qualified immunity emerges out of a common law "good-faith" defense available in 1871 when Congress created § 1983.[132] Baude argues such a defense did not exist at common law at that time.[133] The second justification is that it makes up for an earlier error in expanding the scope of § 1983.[134] Baude says that there was no error made.[135] The third justification is that it offers "fair warning" to state actors, not unlike the rule of lenity.[136] Baude argues that there's no legal justification for having this protection for government officials.[137]

These criticisms of qualified immunity engendered responses from several scholars defending the legal basis of qualified immunity doctrine. Aaron L. Nielson and Christopher J. Walker speak directly to Schwartz and Baude's criticisms in *A Qualified Defense of Qualified Immunity*.[138] They argue that Baude's conclusions about qualified immunity fail because *stare decisis* applies with "special force" in the realm of qualified immunity, as "the judiciary has great[] discretion to create defenses" to causes of action against public officials.[139] They also reject the argument that qualified immunity is in tension with the history of § 1983 and propose that the history is "murky" and "calls out for additional historical examination and analysis."[140] As to Schwartz's empirical arguments, Nielson and Walker point out some methodological limitations to her study, and argue that to the extent that her empirical work supports policy arguments against qualified immunity in the § 1983 context, they "should be directed to Congress, not the Court."[141]

Scott A. Keller's 2021 article *Qualified and Absolute Immunity at Common Law* also responds to Schwartz and Baude's arguments and defends the doctrine on the basis that it is, or at least could be, consistent with the

130 *Id.* at 316.

131 Baude, *Is Qualified Immunity Unlawful?*, *supra* note 30, at 58-59.

132 *Id.* at 58.

133 *Id.* at 58.

134 *Id.* at 62-63.

135 *Id.* at 64-65.

136 *Id.* at 69-72.

137 *See id.* at 77 ("If the only legal basis for qualified immunity doctrine is as an extension of the lenity and fair warning principles, then the doctrine needs to be radically overhauled.").

138 Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018) [hereinafter Nielson & Walker, *A Qualified Defense*].

139 *Id.* at 1855.

140 *Id.* at 1864-68.

141 *Id.* at 1877-80.

common law when Congress enacted § 1983.[142] Keller concludes that the common law in 1871 recognized a form of qualified immunity that protected all government officers in their performance of discretionary duties.[143] The immunity, however, differed from qualified immunity in its modern form.[144] First, courts started from an assumption that the immunity applied and the plaintiff carried the burden of showing it should be set aside.[145] Second, to get past qualified immunity, plaintiffs had to show that the defendant acted with bad faith or improper motive—akin to a subjective test like that under *Pierson*—rather than the modern objective test in *Harlow*.[146]

Keller also argues that the common law rules regarding immunities from 1871 offer a useful guide for thinking about how to reform modern qualified immunity.[147] The subjective bad faith test would make it easier for courts to dismiss insubstantial claims while still providing plaintiffs with a remedy when public officials "grossly breach their public duties."[148]

Though Keller carefully combs through treatises on official immunities from around 1871 and cites to a few sources from this period that generally discuss the police or sheriffs, it is worth noting that he does not give any attention to the historical treatment of excessive force specifically.[149] Keller's article synthesizes some trends from state tort cases on immunities in 1871.[150] Yet, he does not address prior research that specifically looked at whether state tort law granted law enforcement immunity in cases involving excessive force.[151]

Ilan Wurman's *Qualified Immunity and Statutory Interpretation* analyzed state tort law beginning in 1871 to better understand the common law rules governing police use of force.[152] He shows that the common law rules on excessive force at that time do not resemble any of the qualified immunity rules for § 1983 excessive force claims.[153] Wurman found that nearly all cases

142 Keller, *supra* note 48, at 1344-47.

143 *Id.* at 1368.

144 *Id.* at 1378.

145 *Id.* at 1375-77.

146 *Id.* at 1358-59, 1388-89, 1398.

147 *Id.* at 1347.

148 *Id.*

149 *Id.* at 1364-66, 1372-75.

150 *Id.* at 1373-75.

151 *See* Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 SEATTLE U. L. REV. 939, 964-72 (2014) (unearthing a rich common law history of excessive force cases and finding "no immunities beyond those the jury was willing to grant").

152 *See id.* at 939. ("[This Article] describe[s] the evolution of qualified immunity doctrine and demonstrates how common law immunities were . . . incorporated into § 1983 by the Congress of 1871 . . . .").

153 *See id.* at 972 ("The common law had a very different approach to excessive force cases. The test was objective rather than subjective, like modern doctrine, but it was emphatically the province of the jury to decide the reasonableness of the action. There were no immunities beyond those the jury was willing to grant, and the officer was to be personally liable or indemnified by the state.").

and authorities from the time agreed that the test for immunity in an excessive force suit was whether the force was "of necessity to accomplish a given lawful purpose," a question that had to be determined by a jury, and that "[s]ubjective intent and good faith [were] featured in some cases, but this was rare."[154] Thus, officer liability was determined by the objective question: "Did the officer use as much force as was necessary to accomplish his purpose, and no more?," recognizing that "[t]here were no immunities beyond those the jury was willing to grant."[155]

Baude's response to Keller's defense of qualified immunity similarly shows how Keller's argument obscures the differences between historical immunities that existed in 1871 and modern qualified immunity.[156] Baude demonstrates that historical immunities "protected quasi-judicial acts like election administration and tax assessment, not ordinary law enforcement decisions."[157] And officials who were covered under this quasi-judicial immunity were not entitled to the immunity when they exceeded their authority, including, Baude argues, when they violated the Constitution.[158] Further, when the immunity did apply it was not, as it is today, an immunity from suit. Rather, it was an available defense that required defendants to show that they acted in good faith.[159] Keller's article recognizes some of these distinctions between historical immunities and today's qualified immunity, but Baude's discussion of the extent of the differences clarifies that the Court has not simply reshaped a previously existing historical doctrine. Instead, it has imagined and created modern qualified immunity from scratch.

B. Pearson*,* Saucier*, and the Sequencing Debate*

A second subset of qualified immunity literature focuses on the debate about the sequence of the two parts of the qualified immunity test. Most legal commentary on these decisions has focused on the impact that the sequencing

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154 *Id.* at 971-72 (citing Murdock v. Ripley, 35 Me. 472, 474 (1853); State v. Mahon, 3 Del. (3 Harr.) 568, 569 (1842); Bellows v. Shannon, 2 Hill 86, 90 (N.Y. Sup. Ct. 1841); State v. Stalcup, 24 N.C. (2 Ired.) 50, 52 (1841)).

155 Wurman, *supra* note 151, at 971-72.

156 *See* Baude, *supra* note 48, (manuscript at 2) (explaining that the good faith defense Keller described applied to "quasi-judicial" acts and that quasi-judicial immunity is "very different from modern qualified immunity, which generally applies across the board to all of the official acts for which a government actor might be sued.").

157 *Id.* (manuscript at 1).

158 *See id.* (manuscript at 7-8) ("The Constitution was understood to set a limit to lawful official action and officials who exceeded constitutional limits were thought to enjoy no residual discretion within which to act lawfully or, in Keller's terms, no immunity from suit." (quoting James E. Pfander, *Zones of Discretion at Common Law* (Northwestern Univ. Pritzker Sch. Of L. Pub. L. & Legal Theory Series, Working Paper No. 20-27, 2020))).

159 *Id.* (manuscript at 9-10).

rule might have on the development of constitutional law.[160] Nancy Leong's *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis* offers an empirical assessment of whether the sequencing rule has led courts to more frequently decide or elaborate on the contours of constitutional rights.[161] Leong finds that mandatory sequencing did not give rise to an increase in decisions for plaintiffs, meaning that the cases did not expand or describe new constitutional rights.[162]

Similarly, Aaron Nielson and Christopher J. Walker published an empirical study of the effects of the *Pearson* decision that was motivated by, among other things, the concern that the rule change in *Pearson* would lead to "constitutional stagnation."[163] Their study examines over 800 federal appellate court decisions and finds that in approximately one quarter of cases, courts decided the law was not clearly established without addressing the underlying constitutional claim.[164] They also find that after *Pearson*, it was less likely that a court would find that a constitutional violation did occur, but that the law was not clearly established.[165] They argue that consequently, while constitutional law would still continue to develop post-*Pearson*, there is "some support" for concerns that constitutional law regarding police use of force will stall.[166]

Other articles also engaged this question concerning law's underdevelopment. Colin Rolfs's *Qualified Immunity After* Pearson v. Callahan compares district court and circuit court decisions on qualified immunity post-*Pearson*. He finds that only circuit courts have trended toward dismissing cases without deciding the underlying constitutional issue.[167] However, Ted Sampsell

160 *See generally* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015) (noting the impacts of *Pearson*'s procedural rules, particularly the sequence of its two-part test, on the development of substantive constitutional law); Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667 (2009) (arguing that "mandatory sequencing does not correspond to any increase in the rate at which courts find for plaintiffs" in qualified immunity cases); Colin Rolfs, Comment, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468, 474 (2011) ("[W]hether courts use their Pearson discretion has . . . to do with whether a court is interested in producing constitutional law.").

161 Leong, *supra* note 160.

162 *Id.* at 670.

163 *See* Nielson & Walker, *supra* note 160, at 6 (noting that courts continue to "find constitutional violations yet grant qualified immunity less frequently now . . . than they did before *Pearson*," creating "obvious" substantive consequences).

164 *Id.* at 33-34.

165 *Id.* at 35-36. They describe these as the "pure *Saucier*" cases because they are cases that would be more likely to occur when the court had to first determine if a constitutional violation occurred before moving on to clearly established law. *Id.* at 38.

166 *Id.* at 38.

167 Rolfs, *supra* note 160, at 474 ("Circuit courts have begun to use the discretion granted by *Pearson* to avoid constitutional determinations far more than they did under the *Saucier* sequencing

Jones and Jenna Yaunch come to a somewhat different conclusion in their study of *Pearson* in the two years following the decision. After examining every circuit court decision that cited *Pearson* in 2009 and 2010, they find that these courts mostly "continue to follow the sequenced Saucier framework" and issued rulings on the underlying constitutional issue.[168] Michael Kirkpatrick and Joshua Matz's work generally defends the evolution of the qualified immunity doctrine from *Saucier* to *Pearson* and offers "only minor reforms" to what they describe as an "otherwise well-functioning procedural framework."[169]

This review of the literature on *Saucier* and *Pearson* highlights the extensive empirical research legal scholars have conducted on the issue of whether allowing courts to skip over the underlying constitutional question in a qualified immunity case hinders the development of constitutional principles. But, as we discuss next, legal scholars' fixation on sequencing and the characterization of *Pearson* as overturning *Saucier* obscures the fact that another aspect of *Saucier* is alive and well: the decision to unequivocally allow qualified immunity to exist as a separate judicial inquiry apart from questions about constitutional violations in § 1983 excessive forces cases, "which creates additional barriers to police accountability. Indeed, legal scholarship on qualified immunity has largely failed to fully acknowledge the impact of the Court's decision in *Saucier* to transform the nature of police use of force cases by resolving what was then a contested circuit split and making qualified immunity an available defense that is separate from inquiries into whether the use of force violates the Fourth Amendment. This Article is the first to revisit the full history of how excessive force became entangled with qualified immunity and to provide an empirical assessment of how the doctrine was transformed by that history.

C. *Overlooking How Qualified Immunity Became Attached to Excessive Force*

The aforementioned literature has made important contributions that track the traditional story of qualified immunity's history that emphasizes the significance of *Pierson*, *Harlow*, and *Pearson*.[170] But does this traditional

rule. District courts, on the other hand, are avoiding constitutional determinations at a level similar to the *Saucier* period.").

168 Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623, 625 (2011).

169 "Our view is born of the conviction that recent [qualified immunity] cases have achieved a desirable balance amongst competing considerations of fairness, efficiency, and the need to refine constitutional law. It is also born of fear that some of the Court's more conservative members may soon imperil this compromise. Refinement, not redesign, is the best path forward for the Court's qualified immunity jurisprudence." Kirkpatrick & Matz, *Avoiding Permanent Limbo*, *supra* note 30, at 643.

170 *See, e.g.*, Keller, *supra* note 48, at 1340 (introducing the common law foundations of qualified immunity with a discussion of racialized police violence and qualified immunity); Baude, *Is Qualified*

narrative account for the *specific* history concerning the relationship between qualified immunity and excessive force?

Many qualified immunity articles talk about the doctrine as a shield for police officers facing civil liability for allegedly using unlawful amounts of force. Indeed, these articles commonly begin with an introduction that examines the connection between qualified immunity and police use of force and discuss the high stakes associated with the doctrine in light of its link to police accountability.[171] But while legal scholars have emphasized the role qualified immunity plays in excessive force cases today, nearly all of them fail to acknowledge the contested history of qualified immunity in excessive force cases or the fact that it was only in *Saucier v. Katz* that the Supreme Court resolved a circuit split and definitively held that qualified immunity could apply in excessive force cases.[172] A few specific examples from the literature demonstrate this point.

Joanna Schwartz's scholarship has contributed enormously to our understanding of how qualified immunity fails to achieve on its purported policy objectives in use of force litigation[173] and how state and local governments indemnify individual police officers found liable in civil rights lawsuits.[174] Her work relies on an analysis of the history of qualified immunity that follows the traditional narrative concerning the shifts from a subjective to an objective standard in *Pierson* to *Harlow* and the shifts regarding the sequencing rules in *Saucier* and *Pearson*.[175] While revealing critical information about the existing relationship between excessive force and qualified immunity, Schwartz's scholarship spends less time engaging with the history that brought this relationship to fruition. In *Police Indemnification*—which focuses on the extent to which civil liability has the

Immunity Unlawful?, *supra* note 30, at 48 (citing increasing awareness of police excessive force as an example that "illustrate[s] the costs of unaccountability"); Nielson & Walker, *supra* note 160, at 3 (introducing qualified immunity with story of excessive force case where police tased the plaintiff in her home).

171 *See, e.g.*, Keller, *supra* note 48, at 1340 (introducing the common law foundations of qualified immunity with a discussion of racialized police violence and qualified immunity); Baude, *Is Qualified Immunity Unlawful?*, *supra* note 30, at 48 (citing increasing awareness of police excessive force as an example that "illustrate[s] the costs of unaccountability"); Nielson & Walker, *supra* note 160, at 3 (introducing qualified immunity with story of excessive force case where police tased the plaintiff in her home).

172 *See infra* Section V.A. for a discussion of this history; Saucier v. Katz, 533 U.S. 194, 197 (2001), *overruled in part by* Pearson v. Callahan, 555 U.S. 223 (2008).

173 *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 81, at 11 ("[Q]ualified immunity is not achieving its policy objectives . . . .").

174 *See* Joanna Schwartz, *Police Indemnification*, *supra* note 30, at 887 (studying the extent to which law enforcement officials are indemnified in police misconduct).

175 *See, e.g.*, *id.* at 892-95 (assessing the development of qualified immunity doctrine); Schwartz, *The Case Against Qualified Immunity*, *supra* note 30, at 1802, 1814-15 (expounding on doctrinal developments).

potential to influence the behavior of individual officers—Schwartz importantly emphasizes the need for further studies of qualified immunity's development in relation to police. But she also describes *Harlow* as the case that "extended qualified immunity"[176] to law enforcement even though *Harlow* involved immunity for executive-branch officials in President Nixon's administration—a context that differs from situations that characteristically involve state and local police officers using force.[177] It was only later that the Supreme Court explicitly imported the modern qualified immunity test created in *Harlow* into the context of policing,[178] and even later that it imported the test to excessive force specifically.[179]

Schwartz also argues that one of the "*foundational assumptions* underlying the Court's qualified immunity doctrine" is that "the threat of personal liability would have a debilitating effect on law enforcement officers' decisionmaking."[180] The fact that the Court did not unequivocally apply qualified immunity to excessive force cases until *Saucier* complicates the picture of qualified immunity as being, from the start, a doctrine grounded in policy decisions about police decision-making. While Schwartz discusses *Saucier* in several of her articles, her focus is on the case's decision on sequencing,[181] rather than the cases' extension of qualified immunity to excessive force.

William Baude's *Is Qualified Immunity Unlawful?* also begins with a discussion of increasing awareness of police excessive force, talks about how qualified immunity in this context "illustrate[s] the costs of unaccountability," and highlights calls from advocates to reform qualified immunity in light of police violence.[182] But Baude's history of qualified immunity, like Schwartz's, tells the traditional story of how the Court "tinkered" with the doctrine without addressing how the Court brought excessive force under the doctrine's

176 Schwartz, *Police Indemnification*, *supra* note 30, at 889 ("[*Harlow* is] a decision that extended qualified immunity to police officers based in part on the assumption that they were personally responsible for settlements and judgments against them . . . .").

177 Harlow v. Fitzgerald, 457 U.S. 800, 802-06, 809 (1982) ("It is no disparagement of the offices held by petitioners to hold that Presidential aides, like Members of the Cabinet, generally are entitled only to a qualified immunity.").

178 *See* Malley v. Briggs, 475 U.S. 335, 339 (1986) (applying the *Harlow* test to police defendants).

179 *See* Saucier v. Katz, 533 U.S. 194, 202 (2001) (applying principles of *Harlow* to an excessive force case), *overruled in part by* Pearson v. Callahan, 555 U.S. 223 (2008).

180 Schwartz, *Police Indemnification*, *supra* note 30, at 894 (emphasis added).

181 *See id.* at 893 n.37 ("The Court, in *Saucier v. Katz*, required judges to decide whether an officer's conduct was unconstitutional before deciding whether the unconstitutionality of his conduct was clearly established."); Schwartz, *How Qualified Immunity Fails*, *supra* note 81, at 16-17 (elaborating on the *Saucier* Court's holding with respect to the order of inquiries).

182 Baude, *Is Qualified Immunity Unlawful?*, *supra* note 30, at 48.

purview.[183] While Baude mentions *Saucier* once in the text of the article, he describes it only as a case that "created a special sequencing requirement."[184]

Similarly, Scott Keller's article on common law immunities from 1871 begins with a discussion of the relationship between contemporary instances of racialized police violence and qualified immunity.[185] But it does not give any attention to the historical treatment of excessive force specifically, nor does it mention that modern qualified immunity has only recently become a significant aspect of § 1983 excessive force litigation.

Nielson and Walker also start their article *The New Qualified Immunity* by discussing excessive force.[186] However, they only explore the legacy of *Saucier* in terms of its sequencing rule and do not mention that it was the first Supreme Court decision about excessive force and qualified immunity.[187] In a different article, Nielson and Walker focus on examining the connection between qualified immunity at common law and today's protections for police facing civil liability.[188] Yet, their history overlooks the decades where there was no certainty across federal courts about whether qualified immunity had any place in excessive force doctrine.[189]

Richard H. Fallon, Jr.'s article, *Asking the Right Questions About Officer Immunity* similarly obscures the history of qualified immunity and excessive force by describing qualified immunity as "trans-substantive" in the sense that "it applies equally to suits to enforce the First Amendment, the Fourth Amendment, the Equal Protection Clause, and every other justiciable provision of the Constitution."[190]

There are, however, some exceptions to the general trend of treating qualified immunity as a permanent fixture in excessive force law. Two of these exceptions are relatively older articles that were published in the wake of *Harlow*, well before the Supreme Court heard its first case on excessive force and qualified immunity. First, Kathryn R. Urbonya's *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force* focused specifically on the application of *Harlow* to

183 *Id.* at 81.

184 *Id.*

185 *See* Keller, *supra* note 48, at 1340 (discussing the heightened debate about qualified immunity following high-profile incidents of police use of force against racial minorities in 2020).

186 Nielson & Walker, *supra* note 160, at 3 (describing a 2011 case about police use of excessive force).

187 *Id.* at 17 ("And then came the watershed in 2001: *Saucier v. Katz*. There, the Court held that constitutional questions must be decided first." (footnote omitted)).

188 They write, for example, "from the earliest days of the republic, American law has sometimes shied away from holding government officials liable for reasonable mistakes. Indeed, the Fourth Amendment itself is not violated when an officer makes such a reasonable mistake." Nielson & Walker, *A Qualified Defense*, *supra* note 138, at 1864.

189 *Id.* at 1864-68.

190 Fallon, Jr., *supra* note 30, at 480.

excessive force cases.[191] The article was published after the Court's landmark decision in *Tennessee v. Garner* but before the Court's decision in *Graham v. Connor*, during a time of uncertainty about how qualified immunity worked in the excessive force context.[192] Urbonya's article focuses on how the Court modified the "reasonableness" standard in the qualified immunity test after *Harlow* to make it more fact specific and how this shift made qualified immunity an "unnecessary defense to a [F]ourth [A]mendment claim challenging the use of excessive force because the standard for liability is identical to the standard for qualified immunity; both question whether a reasonable officer would have believed that the use of force was necessary."[193]

Second, David Rudovsky's *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights* discusses the early history of § 1983 and modern qualified immunity, focusing particularly on the impact of *Harlow* and a subsequent 1987 case *Anderson v. Creighton*.[194] While the article deals with a variety of civil rights claims, such as those arising under the First Amendment and antidiscrimination law, it offers early insights into the application of the clearly established law standard in excessive force cases. Rudovsky points out that while excessive force cases "may present different facts . . . [the] well-established legal standard remains the same"[195]—was the force reasonable under the circumstances? And because of this, it seems that "[a] finding of unreasonable use of force establishes the constitutional claim *and* defeats immunity."[196] Rudovsky correctly predicts

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191 *See* Urbonya, *supra* note 32, at 90-91 ("Application of the *Harlow* standard to excessive force claims under the [F]ourth and [F]ourteenth [A]mendments indicates that qualified. Immunity is not available as a defense.").

192 Tennessee v. Garner, 471 U.S. 1 (1985); Graham v. Connor, 490 U.S. 386 (1989).

193 Urbonya, *supra* note 32, at 66-67.

194 483 U.S. 635 (1987); Rudovsky, *supra* note 32, at 47 ("*Anderson v. Creighton* swept away these decisions and created an additional basis for the qualified immunity defense . . . ."). Rudovsky says *Harlow* focused on the applicable legal norms, thereby limiting qualified immunity to situations where officers were acting with specific constitutional guidance. *Id.* at 49. However, he notes that *Anderson* added a "conduct" component to the qualified immunity analysis that looks to "whether the *conduct* had been previously clearly proscribed in a setting where the constitutional standard itself is defined by notions of reasonableness." *Id.* (emphasis added). Rudovsky criticizes this formulation of qualified immunity on several levels, arguing that it (a) potentially redefines substantive constitutional law, and (b) "unnecessarily subordinates constitutional protections to interests of governmental efficiency." *Id.* at 52, 77. He also uses the example of excessive force to argue against the idea that a broad immunity standard is necessary to protect against "overdeterrence." *See id.* at 77 ("According to this theory, if officials are accountable in damages when the proper course of conduct is not clearly predictable, the officials will steer too far from the line, resulting in a loss of governmental effectiveness."). He says that the substantive constitutional rule for excessive force already balances the government interests in being able to carry out duties with a significant margin of error because officers do not face liability if they reasonably believed that force was necessary under the circumstances. *Id.* at 77-78.

195 *Id.* at 59.

196 *Id.* at 59.

that the Court's decision in *Anderson* would undermine this argument, as the Court found in the context of a Fourth Amendment search case that "reasonableness" for the Fourth Amendment and for qualified immunity are "analytically different concepts."[197]

The only article that deals directly with the legacy of the Court's decision to bring qualified immunity into excessive force law is Diana Hassel's *Excessive Reasonableness*, which expands on early arguments about the problems with applying qualified immunity to excessive force cases.[198] Hassel argues that Fourth Amendment doctrine combined with qualified immunity created an "an almost impenetrable barrier to liability" for excessive force by creating "two layers" of protection for police.[199] The first layer, qualified immunity, protects police if their actions are deemed to be objectively reasonable, and the second, Fourth Amendment law, protects police if the force used is similarly thought to be objectively reasonable.[200] Hassel calls this double-layer of protection "excessive reasonableness."[201]

* * *

As these examples show, the traditional narrative fails to address the years of uncertainty about qualified immunity in excessive force cases and masks the central role of *Saucier* in solidifying and legitimating the doctrine in § 1983 suits regarding police use of excessive force. The inattention to this history suggests that qualified immunity's role in excessive force litigation is part of a natural, benign doctrinal evolution rather than an abrupt choice deliberately made as part of federal courts' deference to police that ultimately shields them from civil lawsuits in all but the most extreme cases of police violence. Moreover, treating *Saucier* as a case about sequencing rather than a case about excessive force has also obscured the broader questions of why and how qualified immunity became prominent in this context.

Does the traditional story of qualified immunity map on to the empirical evidence about the rise of qualified immunity in the context of excessive force cases? We sampled over 500 district court qualified immunity cases to develop a better sense of how the doctrine became such an integral aspect of excessive force litigation. Unlike other studies that have looked at the impact of qualified immunity cases with a variety of underlying claims,[202] our study

197 *Id.*

198 Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 118 (2009).

199 *Id.* at 117.

200 *Id.* at 117-20.

201 *Id.* at 120.

202 *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 81, at 9 (describing an empirical study that examines the role of qualified immunity in district court cases involving a variety of

looks exclusively at qualified immunity in *police excessive force* cases. Because it focuses on the relationship between qualified immunity, law enforcement, and use of force, this study can help expand the literature by speaking specifically to the relationship between qualified immunity and police violence while demonstrating how the law *actively produces* unaccountability in policing. The next Section provides greater detail on the research question and methods used in our empirical study.

IV. RESEARCH QUESTION AND METHODS

A. *Research Question*

The understanding among scholars and jurists has largely been that the doctrine of qualified immunity has shaped § 1983 excessive force claims ever since the Court created it in 1967, with subsequent doctrinal clarifications occurring over time.[203] Our research sought to test this theory by looking more closely at the development of qualified immunity as a defense for police excessive force cases. Today, police commonly use qualified immunity to evade constitutional tort claims, but little is known about the prevalence of qualified immunity in excessive force claims over the past few decades. Has qualified immunity been evenly asserted in police excessive force cases for as long as it has been available as a defense?

B. *Methods*

To better understand the impact of the Supreme Court's qualified immunity decisions on district courts, we conducted an empirical study using Westlaw to collect a sample of federal district court cases where the defendant asserted qualified immunity. Our sample included cases from January 1, 1968—the year after *Pierson v. Ray* was decided—to December 31, 2019. To collect only cases involving qualified immunity, we performed an advanced search for all district court cases where the term "qualified immunity" appeared at least five times in the court order. We then read each case to determine if it involved an analysis by the court of whether a defendant was entitled to qualified immunity, and only included cases where the court made a substantive determination on this issue.

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claims filed against state and local law enforcement defendants); Leong, *supra* note 160, at 684-85 (discussing the author's empirical analysis of qualified immunity cases in federal district courts and federal appellate courts); Nielson & Walker, *supra* note 160, at 27-30 (collecting prior empirical studies of qualified immunity under *Saucier* and conducting analysis of qualified immunity cases shortly after *Pearson*).

203 *See* sources cited *supra* notes 30–32 (surveying scholarly treatment of excessive force claims).

We divided the cases into three time periods. The first period spanned 1968-1982, the time after *Pierson* but before *Harlow*, when the original subjective good-faith qualified immunity standard applied. The second period spanned 1982-2001, the years after *Harlow* that established the modern objective qualified immunity standard, but before *Saucier*, which established that qualified immunity applied to excessive force claims. The third period spanned 2001-2019, the post-*Saucier* years after the Supreme Court definitively stated that qualified immunity applied to excessive force cases.

The first period only had sixty-nine total qualified immunity cases, so we included all sixty-nine in our sample set. For the second and third time periods, we used a random number generator to randomly select 250 qualified immunity cases from our search results.[204] In total, our sample included 569 cases.[205] For all sampled cases, we recorded the underlying claim asserted by the plaintiff. Then, out of the total number of cases in each of the three time periods, we counted how many cases had excessive force by law enforcement as an underlying claim.

Finally, we conducted an analysis of United States Supreme Court cases. We performed a Westlaw search of all Supreme Court cases since April 12, 1967, to collect all cases that involved qualified immunity as an issue presented to the court. We then recorded the underlying claim asserted by the plaintiff in each of those cases to determine both the proportion of qualified immunity cases involving excessive force and the total number of qualified immunity cases.

V. FINDINGS

Our study of federal district court cases found that during the first period of qualified immunity's history, defendants asserted qualified immunity in a variety of cases involving public officials, such as disputes concerning employment discrimination, free speech rights, and seized property. For this first period, it was incredibly rare for qualified immunity to come up in an excessive force case. Fewer than three percent (2.9%, or 2/69) of all qualified immunity cases involved police use of force.

But as the power of qualified immunity grew, so too do did the proportion of qualified immunity cases involving excessive force. In 1982, the Court in *Harlow v. Fitzgerald* expanded qualified immunity by creating the modern

204 The second time period produced 3,226 total search results and the third time period produced "10,000+" total search results. The maximum number of cases that Westlaw can return in a search is 10,000.

205 We set the parameters of the searches such that they included only cases before and after the exact decision date of the relevant cases. The post-*Harlow* sample set pulled cases from June 25, 1982 to June 17, 2001. This search produced a total of 3,226 total search results. The post-*Saucier* sample set pulled cases from June 19, 2001 to December 31, 2019 and produced "10,000+" total search results. The maximum number of cases that Westlaw can return in a search is 10,000.

"objective" qualified immunity test that courts use today.[206] However, there was no clarity about whether the test applied to excessive force cases because the Court had not yet definitively stated whether qualified immunity applied in this context. During this second period, from *Harlow* in 1982 to just before *Saucier* in 2001, there was a steady increase in qualified immunity cases involving excessive force. From 1981 to 2001, just under 15 percent (14.4% or 36/250) of all sampled qualified immunity cases involved excessive force.

In 2001 with *Saucier v. Katz*, the Court explicitly made qualified immunity a part of excessive force doctrine.[207] In the years after *Saucier*, the proportion of qualified immunity cases involving excessive force jumped. During this third period of qualified immunity's history—from 2001 to 2019, after the *Saucier* Court affirmed that qualified immunity could shield officers from liability for excessive force—nearly one-third of all sampled qualified immunity cases (31.2%, or 78/250) involved police excessive force. This means that the portion of qualified immunity cases involving excessive force more than doubled after the Court's 2001 decision in *Saucier*. Excessive force was also the most common underlying claim in our sample of cases post-*Saucier*. The next most common claims in qualified immunity cases were employment law claims (10%, or 25/250), Fourth Amendment unconstitutional search claims (24/250, or 9.6%), and First Amendment claims (7.2%, or 18/250).[208] The percentage of qualified immunity cases involving excessive force as well as the raw numbers of total qualified immunity cases involving excessive force are outlined in Table 1 and Figures 1-2. The full breakdown of post-*Saucier* cases by case type is also reported in the pie chart at Figure 3 below.

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206 *See supra* Section II.B.

207 *See infra* subsection VI.A.3.

208 Employment claims include claims for employment discrimination, unlawful retaliation, and other wrongful termination claims. Fourth Amendment unlawful search claims include all Fourth Amendment claims involving allegations of searches without a proper warrant or sufficient cause. The breakdown of other represented claims are as follows: false arrest, wrongful arrest, and false imprisonment claims (12/250); claims involving parental rights (e.g., due process claims brought by parents arising from removal of a child from parental custody, abuses to children in state custody, and termination of parental rights) (12/250); claims brought by imprisoned persons regarding prison conditions (11/250); claims against health care providers for failure to provide medical treatment or providing injurious medical treatment (9/250); claims involving education and school conditions (7/250); various equal protection clause claims (excluding employment discrimination claims) (6/250); and claims regarding privacy rights (6/250). "Various claims" (42/250) includes the remainder of cases in the sample: procedural due process claims (5/250); termination of state contracts, licenses, and permits (4/250); malicious prosecution (4/250); due process property deprivation (4/250); wrongful death (3/250); Eighth Amendment claims (excluding those involving prison conditions) (3/250); and disability rights (3/250).

Table 1: Number of District Court Qualified Immunity Cases Involving Excessive Force Claims

Time Period	Total Number of Qualified Immunity Cases in Database	Number Sampled	Number Involving Excessive Force	Percent (%)
Pierson–Harlow **(1968–1982)**	69	69	2	2.89%
Harlow–Saucier **(1982–2001)**	3,226	250	36	14.4%
Saucier– **present (2001–2019)**	10,000+	250	78	31.2%

Figure 1: Percent of District Court Qualified Immunity Cases Involving Excessive Force Claims

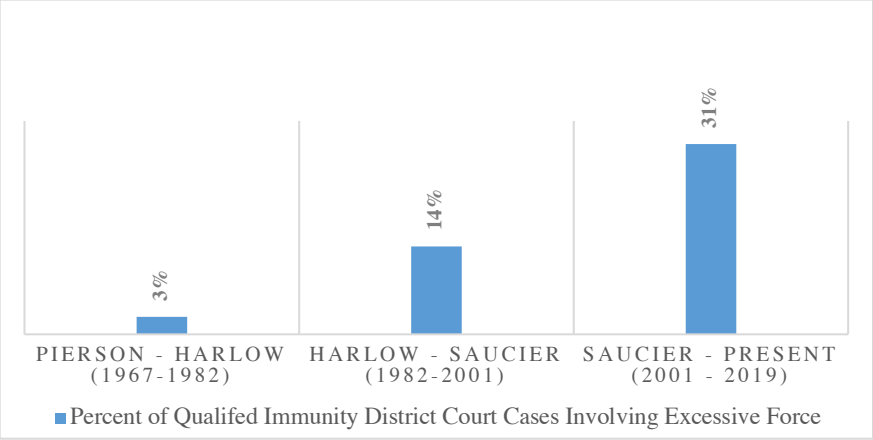


Figure 2: Number of District Court Qualified Immunity Cases Involving Excessive Force claims from Sample

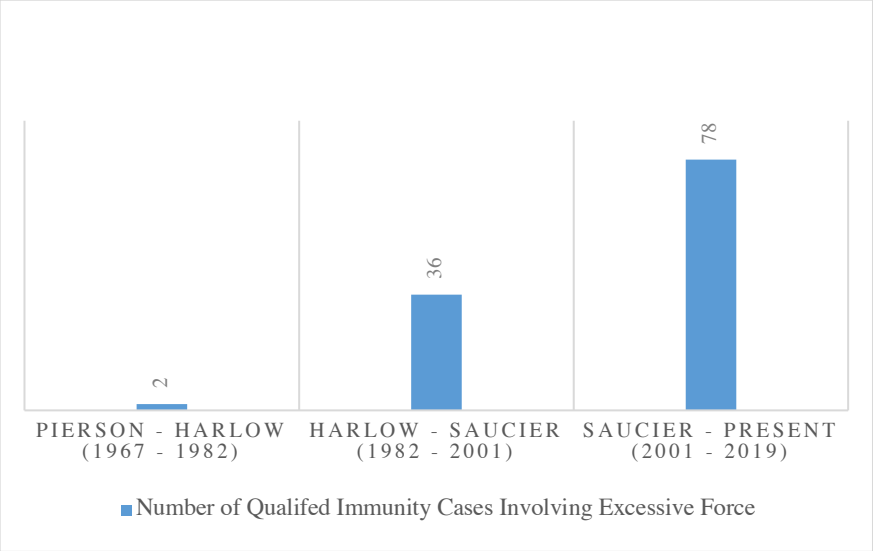
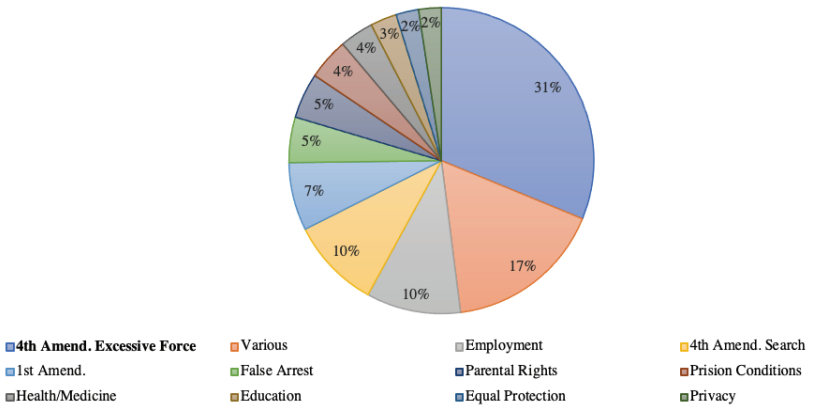


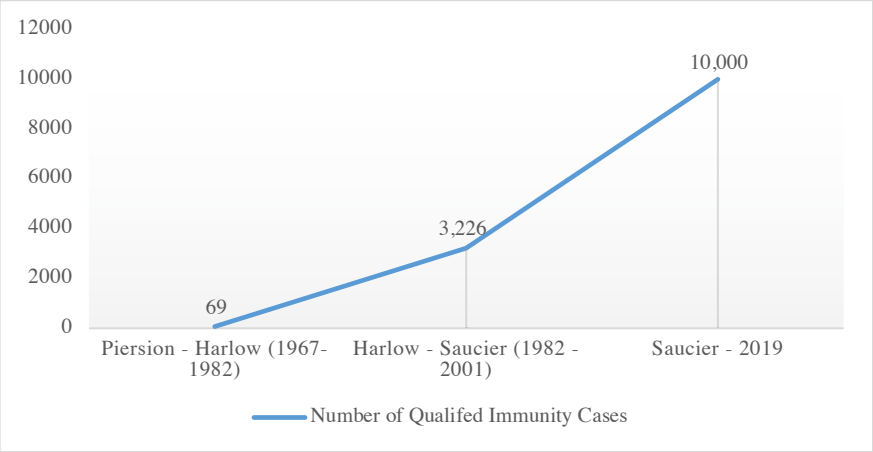
Figure 3: Post-Saucier: Qualified Immunity Cases by Case Type



In addition to an increase in the portion of qualified immunity cases involving excessive force, our data shows a substantial increase in the total number of qualified immunity cases after the Court modernized the doctrine in *Harlow* and after the Court decided that qualified immunity could apply to excessive force in *Saucier*. For the fifteen years when the *Pierson* "good faith" approach applied, there were only sixty-nine qualified immunity cases

in our database. There was an enormous jump in the number of qualified immunity cases for the second period, with 3,226 cases in the database for the nineteen years after *Harlow* and before *Saucier*. And in the third period, the number of qualified immunity cases in the database substantially increased again, with over 10,000[209] cases in the database in the eighteen years after *Saucier* was decided in 2001.

Figure 4: Number of Qualified Immunity Cases



In the years after *Saucier*, cases involving both qualified immunity and excessive force also became more prevalent at the Supreme Court. Before *Saucier*, when qualified immunity came to the Court, it was in cases with a variety of underlying facts and claims. But after *Saucier*, excessive force became more closely entangled with qualified immunity and the question of "clearly established law." As our analysis illustrates, there was a significant increase in the number of cases where the Supreme Court applied the qualified immunity standard after 2001, and in over a third of these cases (11/30), qualified immunity came to the Court through an excessive force case.[210]

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209 The maximum number of cases that Westlaw can return in a search is 10,000. For this search, Westlaw returned "10,000+" cases.

210 This data includes cases where the Court specifically applied the qualified immunity standard to determine whether an official was properly granted or denied qualified immunity. Omitted from this count are cases about procedural issues related to qualified immunity, see, e.g., *Behrens v. Pelletier*, 516 U.S. 299, 305-09 (1996) where the Court analyzed whether qualified immunity decisions are appealable final decisions, cases about judicial and prosecutorial immunity, see, e.g., *Mireles v. Waco*, 502 U.S. 9 (1991) where the Court discussed judicial immunity and *Kalina v. Fletcher*, 522 U.S. 118 (1997) where the Court analyzed prosecutorial immunity, cases about what type of immunity applies to specific types of defendants, see, e.g., *Cleavings v. Saxner*, 474 U.S. 193, 194 (1985) for a discussion regarding absolute versus qualified immunity for prison disciplinary committees,

Table 2: Supreme Court Cases Applying the Qualified Immunity Standard

Time Period	Supreme Court Qualified Immunity Cases	Supreme Court Qualified Immunity Cases Involving Excessive Force	Percent (%)
Harlow–Saucier **(1982–2001)**	10	1	10%
Post-Saucier–Present **(1982–2021)**	30	11	36.7%

The standard assumption is that qualified immunity has been available for and used by police accused of using excessive force since its introduction to § 1983 litigation. But our empirical examination of qualified immunity cases shows a much more nuanced pattern where, over time, qualified immunity largely *morphed into a specific theory of police use of force*. In other words, qualified immunity shifted from its origins as an idea to protect a wide range of public officials facing liability for various types of actions to a doctrine used disproportionately to protect police from civil lawsuits and the possibility of paying damages when excessive force is alleged.

These results demonstrate that while qualified immunity is a central issue in most excessive force cases today, it was not until the Court's 2001 decision in *Saucier v. Katz* that this relationship between qualified immunity and excessive force took shape. This framing helps us understand the political nature of qualified immunity and provides context for understanding various police reform efforts. This data suggests that there is a "middle history" of qualified immunity—a series of cases that led excessive force claims to increasingly be met with a qualified immunity defense—that needs to be further explored.

VI. DISCUSSION

Our empirical analyses reveal that qualified immunity's strong connection to police use of force emerged relatively recently. And it has not been as

Wyatt v. Cole, 504 U.S. 158, 169-70 (1992) where the Court held that there was no immunity available to private defendants, and cases where qualified immunity is part of the procedural history of a case but was not addressed by the Supreme Court, see, e.g., *Whitley v. Albers*, 475 U.S. 312, 327-28 (1986) for an example where the Court declined to review a qualified immunity ruling.

central to law enforcement defense strategies in excessive force cases for the length of time that qualified immunity has been available. Indeed, qualified immunity shifted from its origins as an idea to protect executive and judicial officials to a theory that has, in large part, been used as a defense by police officers. In this Part, we explain the process by which qualified immunity became naturalized in excessive force law, i.e., how it came to be thought of as a fundamental part of constitutional tort litigation. We will first tell the story of the "middle history" of cases that produced this outcome, and then focus on court cases that demonstrate the impact of qualified immunity's hollowing effect on Fourth Amendment law.

A. *Uncovering the "Middle History" of Qualified Immunity*

Greater attention needs to be paid to the specific doctrinal choices the Supreme Court made in its qualified immunity jurisprudence in the years after *Harlow* that led it to become closely connected to police use of force. A middle history of qualified immunity at the Supreme Court, spanning from 1982 to 2001, is responsible for this development. To better understand this middle history, we first provide a synthesis of the key jurisprudential shifts during these years, and then in the subsections that follow, provide a detailed discussion of each case.

Three years after *Harlow*, the Supreme Court decided *Tennessee v. Garner*, the seminal excessive force case that reiterated the propositions that (a) the use of deadly force constitutes a Fourth Amendment seizure and (b) that the use of deadly force on a fleeing unarmed person violates their constitutional rights.[211]

In the two years after *Garner*, the Supreme Court decided two cases that were critical to the development of qualified immunity for police officers. These cases—*Malley v. Briggs* and *Anderson v. Creighton*—involved police asserting qualified immunity in the context of invalid arrest warrants and illegal searches, not excessive force.[212] But because the conduct of the police in these cases was, as in excessive force cases post-*Graham*, analyzed under a

211 Tennessee v. Garner, 471 U.S. 1, 11 (1985) ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.").

212 Malley v. Briggs, 475 U.S. 335, 337 (1986) ("This case presents the question of the degree of immunity accorded a defendant police officer . . . when it is alleged that the officer caused the plaintiffs to be unconstitutionally arrested by presenting a judge with a complaint and a supporting affidavit which failed to establish probable cause."); Anderson v. Creighton, 483 U.S. 635, 636-37 (1987) ("The question presented is whether a federal law enforcement officer who participates in a search that violates the Fourth Amendment may be held personally liable for money damages . . . .").

Fourth Amendment standard defined by notions of reasonableness,[213] these cases would later provide the basis for the Court's decision to extend qualified immunity to excessive force.[214]

Malley involved the first application of the new modern qualified immunity standard from *Harlow* to the police.[215] And then the Court in *Anderson*, reviewing a *Bivens* claim, held that the reasonableness standards for Fourth Amendment searches and qualified immunity are in fact different standards. The first standard (the Fourth Amendment prohibition on unreasonable searches) asks whether the defendant's actions violated the constitutional standards governing searches, while the second standard (the *Harlow* objective reasonableness standard) asks whether it was *clearly established* that the defendant's actions violated the constitutional standards.[216] Put differently, an officer could have a reasonable (under the qualified immunity test) but mistaken (under the constitutional standards governing searches) belief that he conducted a legal search. The distinction the Court created here between the reasonableness of the search itself and the reasonableness of the officer's belief about the legality of the search made it possible for qualified immunity to apply in the Fourth Amendment context. In extending modern qualified immunity to police in these cases, the Court had to introduce new *policy judgements* about how to balance the need for police discretion with police accountability under § 1983. These cases demonstrate an expansion of the Court's decision to use qualified immunity to supplant § 1983 and the Constitution with its own judgements about the need to protect police from the burdens of litigation.

In 1989, the Court decided *Graham v. Connor*, which firmly rooted excessive force cases in the Fourth Amendment and confirmed that the

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213 *See Anderson*, 483 U.S. at 643 ("[Plaintiffs] argue that it is inappropriate to give officials alleged to have violated the Fourth Amendment—and thus necessarily to have *unreasonably* searched or seized—the protection of a qualified immunity intended only to protect reasonable official action. It is not possible, that is, to say that one 'reasonably' acted unreasonably."). The Court discussed the relationship between the Fourth Amendment's prohibition on unreasonable searches and the qualified immunity objective reasonableness standard. *Id.* at 643-44.

214 *See* Saucier v. Katz, 533 U.S. 194, 203 (2001) (rejecting argument that qualified immunity should not apply to excessive force cases on the following grounds: "In *Anderson*, a warrantless search case, we rejected the argument that there is no distinction between the reasonableness standard for warrantless searches and the qualified immunity inquiry. We acknowledged there was some 'surface appeal' to the argument that, because the Fourth Amendment's guarantee was a right to be free from 'unreasonable' searches and seizures, it would be inconsistent to conclude that an officer who acted unreasonably under the constitutional standard nevertheless was entitled to immunity because he 'reasonably' acted unreasonably."), *overruled in part by* Pearson v. Callahan, 555 U.S. 223 (2008).

215 *See Malley*, 457 U.S. at 339. A prior case had, however, applied the *Harlow* standard to the U.S. Attorney General. *See* Mitchell v. Forsyth, 472 U.S. 511, 524 (1985)*; see also* Baude, *Is Qualified Immunity Unlawful?*, *supra* note 30, at 88-90 (charting all post-*Harlow* qualified immunity cases by defendant and constitutional claim).

216 *Anderson*, 483 U.S. at 638-41.

objective reasonableness test guided these cases.[217] *Graham* did not involve the police asserting qualified immunity. But with the Court's decision in *Anderson* establishing qualified immunity for police search and seizure cases, some lower courts after *Graham* around this time began allowing qualified immunity for excessive force claims.[218] A majority of circuits, however, did not allow police in excessive force cases to assert qualified immunity.[219] The decision to exclude qualified immunity from excessive force made sense to most circuit courts because the question of excessive force—under *Graham*—and the question of qualified immunity—under *Harlow*—both turned on whether the officer acted reasonably under the circumstances. As one circuit court put it at the time: "the substantive inquiry that decides whether the force exerted by police was so excessive that it violated the Fourth Amendment is the same inquiry that decides whether the qualified immunity defense is available to the government actor."[220] For almost twelve years after *Graham*, a split continued in circuit courts about whether § 1983 excessive force claims could be trumped by qualified immunity, with most courts concluding that it could not.[221]

In 2001, the Supreme Court decided to weigh in on the question of excessive force and qualified immunity for the first time in *Saucier v. Katz*. This case put the question of whether police officers could evade liability when they use unconstitutional force squarely before the court. Faced with that decision, a majority of the Court made a particular doctrinal choice to expand qualified immunity to excessive force, building primarily on the policy arguments about the virtues of qualified immunity it had developed in earlier cases.[222] Critically, however, three justices—Justices Ginsburg, Breyer,

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217 Graham v. Connor, 490 U.S. 386, 395 (1989) ("Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach.").

218 Slattery v. Rizzo, 939 F.2d 213, 215 (4th Cir. 1991) ("There is no principled reason not to allow a defense of qualified immunity in an excessive use of force claim . . . ."); Brown v. Glossip, 878 F.2d 871, 873 (5th Cir. 1989) ("We can discern no principled distinction between the availability of qualified immunity as a defense to unreasonable searches . . . under the [F]ourth [A]mendment and as a defense to an excessive force claim also grounded in the [F]ourth [A]mendment."); Gold v. City of Miami, 121 F.3d 1442, 1446 (11th Cir. 1997) (per curiam) ("Use of force must be judged on a case-by-case basis. Because of this lack of a bright-line standard, qualified immunity applies unless application of the [excessive force] standard would inevitably lead a reasonable officer in the defendant's position to conclude that the force was unlawful." (internal quotation marks and citation omitted)).

219 *See* cases cited *supra* note 32.

220 Quezada v. County of Bernalillo, 944 F.2d 710, 718 (10th Cir. 1991).

221 *See* cases cited *supra* notes 32 & 218.

222 *See* Saucier v. Katz, 533 U.S. 194, 205-06 (2001) ("[P]olice officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation . . . . The concern of the immunity inquiry

and Stevens—all disagreed with the majority's decision to allow qualified immunity in § 1983 excessive force cases, writing that "an officer whose conduct is objectively unreasonable under *Graham* should find no shelter under a sequential qualified immunity test."[223]

With this general trajectory of the middle history of qualified immunity in mind, this Section offers a more detailed account of the key decisions that opened the door for qualified immunity to become a part of excessive force doctrine.

1. Qualified Immunity Applied to Fourth Amendment Searches: *Malley v. Briggs* and *Anderson v. Creighton*

In the initial years after *Harlow*,1982 to 1986, lower courts often precluded qualified immunity in cases that involved well-established Fourth Amendment rights.[224] Under *Harlow*, successfully overcoming a qualified-immunity defense only required plaintiffs to show that a clearly established legal principle governed the case.[225] The lack of clear factual precedent—which the court would later require for qualified immunity—was irrelevant to the inquiry at this moment. In 1986, the Supreme Court heard its first cases regarding the *Harlow* qualified immunity standard in relation to Fourth Amendment claims regarding invalid searches and false arrests.[226] These claims were somewhat analogous to qualified immunity's origins in *Pierson* as they involved police relying on seemingly valid but later invalidated information as the basis for a search or arrest.[227]

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is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. 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. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. . . . Qualified immunity operates . . . to protect officers from the sometimes hazy border between excessive and acceptable force . . . ." (internal quotation marks and citations omitted)), *overruled in part by* Pearson v. Callahan, 555 U.S. 223 (2008).

223 *Id.* at 214 (Ginsburg, J. concurring). The justices noted that "the determination of police misconduct in excessive force cases and the availability of qualified immunity both hinge on the same question: Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer, identically situated, have believed the force employed was lawful?" *Id.* at 210.

224 *See, e.g.*, Llaguno v. Mingey, 763 F.2d 1560, 1569 (7th Cir. 1985) (holding that the arresting officers' subjective beliefs of the reasonableness of their actions are no basis for immunity in light of established legal principles); Creamer v. Porter, 754 F.2d 1311, 1317 (5th Cir. 1985) ("The defense of qualified immunity is no longer to be evaluated with reference to any subjective consideration of an officer's good faith in carrying out certain discretionary functions."); Hobson v. Wilson, 737 F.2d 1, 27 (D.C. Cir. 1984) ("We consider irrelevant to this inquiry defendants' assertions that the evidence does not support those allegations . . . .").

225 Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982).

226 *See* Malley v. Briggs, 475 U.S. 335, 338-40 (1986); Anderson v. Creighton, 483 U.S. 635, 636-38 (1987).

227 Pierson v. Ray, 386 U.S. 547, 550-551 (1967).

Importantly, at this point, the Supreme Court had not decided any cases about qualified immunity in the context of police excessive force. And there was no consensus on the issue in lower federal courts. Some courts believed that qualified immunity did not apply because the law clearly established that use of excessive force violated the Fourth Amendment, and because the immunity analysis collapsed into the excessive force inquiry since both inquiries looked to the reasonableness of the police officer's actions.[228] Other courts, however, believed that officers could be entitled to qualified immunity in cases where the officer "reasonably, but mistakenly" believed that a reasonable amount of force was used under the circumstances.[229] Other

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228 *See, e.g.*, Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988) ("We hold therefore under these circumstances that [Appellant] cannot claim immunity on the basis of his claimed ignorance about constitutional rights of fleeing felons . . . ."); Fernandez v. Leonard, 784 F.2d 1209, 1217 (1st Cir. 1986) ("The question before us is whether this constitutional violation was clearly established . . . . We think that it was."); Vizbaras v. Prieber, 761 F.2d 1013, 1018-19 (4th Cir. 1985) (Winter J., concurring and dissenting) ("[W]e have consistently read *Harlow* as eliminating the subjective element from the defense, and we have focused instead on whether the challenged conduct violated clearly established rights."); Clark v. Beville, 730 F.2d 739, 740 (11th Cir. 1984) ("The issues presented to the jury in this case were whether a reasonable officer under similar circumstances would have had probable cause to believe that [Appellant] committed the offense of disorderly conduct and whether the degree of force used in relationship to the need presented was reasonable under the circumstances." (citations omitted)); Stanulonis v. Marzec, 649 F. Supp. 1536, 1545 (D. Conn. 1986) ("Here, [the officer's] movement of his vehicle . . . could be found to constitute unreasonable force in the attempt to apprehend plaintiff. That conduct, if proven as claimed, could constitute a violation of plaintiff's Fourth Amendment rights."); Skevofilax v. Quigley, 586 F. Supp. 532, 545 (D.N.J. 1984) ("If plaintiffs prove that defendants arrested and imprisoned them without any basis in law, then those defendants shown to have taken part in the wrongful conduct will clearly be without immunity for their actions."); *cf.* Patzner v. Burkett, 779 F.2d 1363, 1370 (8th Cir. 1985) (describing that qualified immunity was raised as to warrantless arrest claim, but not as to an excessive force claim).

229 *See, e.g.*, Whitt v. Smith, 832 F.2d 451, 452-54 (7th Cir. 1987) ("[I]t is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present . . . we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable."); White v. Pierce County, 797 F.2d 812, 816 (9th Cir. 1986) ("The deputies could have reasonably believed the force used to subdue [plaintiff] was necessary for their immediate safety."); Acoff v. Abston , 762 F.2d 1543, 1548-50 (11th Cir. 1985) ("A reasonable person at the time of the shooting incident might have read the relevant appellate decisions . . . and still have concluded that a policy allowing the use of deadly force to arrest a person for a serious felony was constitutional." (citations omitted)); Varela v. Jones, 746 F.2d 1413, 1418 (10th Cir. 1984) ("[P]olice officers are not civilly liable if they act upon a reasonable belief that the amount of force they used is reasonable under the circumstances."); Bauer v. Norris, 713 F.2d 408, 411 (8th Cir. 1983) ("[T]he court generally instructed the jury on appellant's defense of qualified immunity for official actions taken in good faith."); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d at 1339, 1347 (2d Cir. 1972) ("At common law the police officer always had available to him the defense of good faith and probable cause, and this has been consistently read as meaning good faith and 'reasonable belief' in the validity of the arrest or search."); *cf.* Bibbo v. Mulhern, 621 F. Supp. 1018, 1027 (D. Mass. 1985) ("[T]his is not a case where summary judgment would be appropriate on the grounds of good faith immunity.").

courts, were less certain, finding that qualified immunity might be a defense in some contexts.[230]

Meanwhile, at the Supreme Court, the first case to apply the modern *Harlow* qualified immunity standard to police was *Malley v. Briggs*, which involved an officer seeking an arrest warrant based on information gained from a wiretap.[231] The officer received a signed warrant from a judge, but a court later determined that the application for the warrant failed to establish probable cause, thereby invalidating the warrant.[232] The arrested defendants sued the police under § 1983 for violating their rights under the Fourth and Fourteenth Amendments in applying for the warrant.[233] The police argued that they were entitled to absolute, rather than qualified, immunity because they were acting like an informant or prosecutor in the investigation.[234]

The court disagreed and held that the *Harlow* standard applied.[235] It did so in part because it had previously held in *United States v. Leon* that an objective reasonableness standard applied in the context of a suppression hearing on whether the exclusionary rule barred evidence obtained by a signed but later invalidated warrant.[236] *Leon* had relied on *Harlow*, setting the ground for *Harlow* to apply in the Fourth Amendment search context for § 1983 claims.[237] Although the *Malley* Court ultimately decided to apply the standards from *Leon* about the exclusionary rule to the context of § 1983 constitutional tort liability, the Court did recognize the heightened dangers of immunity in the context of § 1983 claims against police. The Court wrote:

> [A] damages remedy for an arrest following an objectively unreasonable request for a warrant imposes a cost directly on the officer responsible for the unreasonable request, without the side effect of hampering a criminal prosecution. Also, in the case of the § 1983 action, the likelihood is obviously

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230 *See, e.g.*, Heath v. Henning, 854 F.2d 6, 9 (2d Cir. 1988) ("[W]hile an instruction on state law is a necessary part of a charge on the affirmative defense of qualified good faith immunity, it is unnecessary when considering section 1983 liability."); Martin v. Gentile, 849 F.2d 863, 869 n.7 (4th Cir. 1988) ("Once it is established that a [F]ourth [A]mendment violation has in fact occurred, the officer's *objective* 'good faith' may . . . become relevant . . . to the availability of the qualified immunity defense . . . ." (citations omitted)); Fiacco v. City of Rensselaer, 783 F.2d 319, 326 (2d Cir. 1986) (1987) ("[W]e see no basis on which to disturb the jury's liability verdict against the Officers on the § 1983 claim."); *Vizbaras*, 761 F.2d at 1016 ("[W]e hold that the district court did not err in instructing the jury on the good faith immunity defense."); Coon v. Ledbetter, 780 F.2d 1158, 1164 n.2 (5th Cir. 1986) (leaving open the question whether qualified immunity is a defense to constitutional claims based on negligence).

231 475 U.S. 335, 338-40 (1986).

232 *Id.* at 337-39.

233 *Id.* at 338-39.

234 *Id.* at 341-42.

235 *Id.* at 344-45.

236 468 U.S. 897, 919 n.20 (1984).

237 *Id.* at 922.

> greater than at the suppression hearing that the remedy is benefiting the victim of police misconduct one would think most deserving of a remedy—the person who in fact has done no wrong, and has been arrested for no reason, or a bad reason.[238]

But at the same time, dicta from the Court's decision in *Malley* demonstrates how the Court began to envision a much more powerful version of qualified immunity for police than it had ever before. The Court wrote, "As the qualified immunity defense has evolved, it provides ample protection to all but the *plainly incompetent* or those who knowingly violate the law."[239] This line would later be cited in numerous Supreme Court decisions granting qualified immunity to police officers for excessive force.[240]

One year after *Malley*, the Court took up a second Fourth Amendment search case that set the foundation for the Court's later decisions regarding qualified immunity as a defense to excessive force claims. In *Anderson v. Creighton*, the FBI conducted a warrantless search, and the question of whether the FBI agents violated the Constitution turned on whether their search was reasonable.[241] The plaintiffs in the case argued that it was nonsensical to allow the FBI agents to assert qualified immunity because the agents had failed to show probable cause and exigent circumstances, which meant that the search was by definition unreasonable under the Fourth Amendment.[242] The plaintiffs argued that "it is inappropriate to give officials alleged to have violated the Fourth Amendment—and thus necessarily to have *unreasonably* searched or seized—the protection of a qualified immunity intended only to protect *reasonable* official action."[243] Put differently, "It is not possible . . . to say that one 'reasonably' acted unreasonably."[244]

The Court, however, disagreed. Even though the Fourth Amendment specifically uses the term "unreasonable" to set restrictions on searches and seizures, the Court held that an officer's conduct could violate the Fourth Amendment rules governing searches yet still be objectively reasonably for qualified immunity purposes.[245] According to the Court, the reasonableness standards for the Fourth Amendment and qualified immunity are subject to

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238 *Malley*, 475 U.S. at 344.

239 *Id.* at 341 (emphasis added).

240 *See, e.g.*, White v. Pauly, 137 S. Ct. 548, 551 ("In other words, immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'"); Mullenix v. Luna, 577 S. Ct. 7, 12 (2015) (per curiam) ("Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'").

241 483 U.S. 635, 636-37 (1987).

242 *Id.* at 640-41, 643.

243 *Id.* at 643.

244 *Id.*

245 *Id.* at 643-44.

separate analyses.[246] The court also said that the argument that it was not possible to say an officer "reasonably acted unreasonably" was "foreclosed by the fact that this Court has previously extended qualified immunity to officials who were alleged to have violated the Fourth Amendment," citing the decision in *Malley*.[247]

The case also offered greater impunity for police. Specifically, it included policy judgements in the qualified immunity analysis about the dangers and hard decisions in police work and the need to protect police. As Justice Scalia wrote in the majority opinion:

> [R]egardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable, so that the [the plaintiff's] objection, if it has any substance, applies to the application of Harlow generally. We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.[248]

In the Court's view, because police often made determinations about probable cause with considerable uncertainty as to whether the search comported with the Fourth Amendment, they should be held liable only if their conduct was clearly forbidden.[249]

The *Anderson* opinion also predicted a future interpretation problem with the "reasonableness" standard in qualified immunity that would become central to the Court's later refinement of the doctrine: that the test of "objective legal reasonableness" depends "upon the level of generality at which the relevant 'legal rule' is to be identified."[250] The Court directed lower courts to analyze questions of clearly established law by looking to specific rules rather than general rights, setting the stage for qualified immunity to become a high bar for plaintiffs to overcome. The Court noted that "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

246 *See id*.
247 *Id.* at 643 (citing Malley v. Briggs, 475 U.S. 335, 340 (1986)).
248 *Id.* at 644 (emphasis added) (citation omitted).
249 *See id.* at 644-46.
250 *Id.* at 639.

right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[251]

The Court's ultimate formulation of the qualified immunity rule for police officers in Fourth Amendment search cases was that an officer has qualified immunity from civil lawsuits if the actions that the officer took "could reasonably have been thought consistent" with the allegedly violated rights.[252] And here, because a reasonable officer could have believed that the defendant officer's actions were legal, he was entitled to qualified immunity.[253] *Anderson* thus made qualified immunity more defendant-friendly by adding a new basis for qualified immunity: an officer is immune from Fourth Amendment liability for a warrantless search if a reasonable officer could have believed that the conduct was lawful.[254] This holding set the groundwork for thinking about the "reasonableness" standards for the Fourth Amendment and for qualified immunity as separate and distinct frameworks. This would later become the key issue in determining whether or not qualified immunity could apply to excessive force claims. By solidifying modern qualified immunity's role as a doctrine that protects police from Fourth Amendment claims, *Anderson* represents a key transformation of the doctrine and the beginning of the substantive redefinition of Fourth Amendment principles to allow police to use force with greater impunity.

2. Qualified Immunity Meets *Graham*: 1989–2001

The Supreme Court's 1989 decision in *Graham v. Connor* established the modern constitutional landscape for police excessive force claims.[255] Prior to this decision, plaintiffs brought suit against police officers for using excessive force through different constitutional and statutory claims, such as substantive due process and § 1983 as a standalone cause of action.[256] In *Graham*, the Court held that all claims concerning police use of force should be analyzed under the Fourth Amendment's "objective reasonableness" standard.[257] *Graham* refined the "objective reasonableness" test, holding that the reasonableness of an officer's use of force should be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[258] While

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251 *Id.* at 640 (emphasis added).

252 *Id.* at 638.

253 On remand, the trial court held that "[a]n officer knowing what Anderson did could reasonably have concluded that there was probable cause." Creighton v. Anderson, 724 F. Supp. 654, 661 (D. Minn. 1989), *aff'd*, 922 F.2d 443 (8th Cir. 1990).

254 *See Anderson*, 483 U.S. at 635.

255 *See generally* 490 U.S. 386, (1989).

256 *See generally* Obasogie & Newman, *The Futile Fourth Amendment*, *supra* note 60.

257 Graham v. Connor, 490 U.S. 386, 388 (1989).

258 *Id.* at 396.

some initially thought that this decision might bring clarity and simplicity to understanding which standards applied in these type of cases, the *Graham* decision ultimately made things more ambiguous by eschewing any bright-line rules that might actually restrict police use of force in favor of a hazy notion of "reasonableness" that remains undefined and has shown to be quite deferential to police perspectives.[259] The Court justified this approach by appealing to the need to give officers wide latitude to make decisions about force.[260] The test eliminated other frameworks for assessing whether an instance of police use of force violated the Constitution. In doing so, it solidified the Fourth Amendment "objective reasonableness" standard as the only tool for doctrinal assessment of these situations.[261] *Graham* allowed the court to avoid creating any specific rules that might guide officers in using force, and effectively got the Court out of the business of making any real decisions on what constitutes unconstitutional use of force for years to come.[262]

Graham was decided after *Anderson*—the case holding that qualified immunity covers Fourth Amendment search and seizure claims and that reasonableness for qualified immunity was different from reasonableness for Fourth Amendment purposes.[263] Yet, *Graham* expressly left open questions about whether qualified immunity might apply to § 1983 cases where police are alleged to have used force in a manner that violates the Fourth Amendment.[264] Just as lower courts before *Graham* disagreed about whether qualified immunity was a defense available to police for excessive force claims, courts in the decade after *Graham* also disagreed about whether officers who use unreasonable force may assert qualified immunity as a defense to § 1983 litigation.

Following the *Graham* decision, five circuit courts—including the Sixth, Seventh, Ninth, Tenth, and D.C. Circuits—held that the excessive force and qualified immunity standards merged or were essentially the same in

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259 *See generally* Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281 (2019) [hereinafter Obasogie & Newman, *The Endogenous Fourth Amendment*].

260 *Graham*, 490 U.S. at 397 ("[P]olice officers are often forced to make split-second judgements—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.").

261 *See* Obasogie & Newman, *The Futile Fourth Amendment*, *supra* note 60, at 1477-78. In the *Graham* decision, the Court made a particular doctrinal choice in analyzing constitutional questions regarding police violence under the Fourth Amendment—which has an individualizing effect—instead of the Fourteenth Amendment's Equal Protection Clause with its potential to allow group-based and structural analysis—a move that did not reflect a preexisting trend or consensus in the federal courts. The Court's doctrinal choice in *Graham* has contributed to the perpetuation of police excessive use of force in many communities of color. *See generally id.*

262 *See id.* at 1477-78.

263 *See* Anderson v. Creighton, 483 U.S. 635, 643-44 (1987).

264 *Graham*, 490 U.S. at 399 n.12.

application in all but extraordinary cases.[265] In a Tenth Circuit case on the issue, the court explained its reasoning as follows:

> While qualified immunity is a powerful defense in other contexts, in excessive force cases the substantive inquiry that decides whether the force exerted by police was so excessive that it violated the Fourth Amendment is the same inquiry that decides whether the qualified immunity defense is available to the government actor.[266]

A Sixth Circuit judge's concurrence two years after *Graham* similarly explained why qualified immunity would not typically apply in excessive force cases:

> This is not to say that qualified immunity will never be available under any circumstances in excessive force cases; and in fact, the Supreme Court has intimated that such a defense may in some instances be available. For the most part, however, because an officer is equipped with all the knowledge he needs regarding the use of excessive force, the only determination left to be made is whether the conduct was excessive under the circumstances.[267]

Three circuits—the Fourth, Fifth, and Eleventh—concluded in the aftermath of *Graham* that the test for qualified immunity differs from the substantive test of reasonableness under the Fourth Amendment.[268] These courts applied the rule from *Anderson* for unreasonable searches to excessive force cases.

The First and Second Circuits landed in the middle.[269] The First Circuit thought that qualified immunity and excessive force standard are similar inquiries, writing in one case: "In theory, substantive liability and qualified immunity are two separate questions . . . . In police misconduct cases, however, the Supreme Court has used the same 'objectively reasonable' standard in describing both the constitutional test of liability and the Court's own standard for qualified immunity."[270] But at the same time, the First Circuit thought that if a reasonable officer could have believed that the defendant officer's force was justified and lawful, they were entitled to qualified immunity under *Anderson*, regardless of whether there was a Fourth

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265 *See* cases cited *supra* note 32.

266 Quezada v. County of Bernalillo, 944 F.2d 710, 718 (10th Cir. 1991).

267 Yates v. City of Cleveland, 941 F.2d 444, 450 (6th Cir. 1991) (Suhrheinrich, J., concurring) (footnote omitted).

268 *See* cases cited *supra* note 218.

269 *See, e.g.*, Finnegan v. Fountain, 915 F.2d 817, 823-24 (2d Cir. 1990); Roy v. Lewiston, 42 F.3d 691, 695 (1st Cir. 1994); Napier v. Town of Windham, 187 F.3d 177, 183 (1st Cir. 1999).

270 *Roy*, 42 F.3d at 695 (citing Graham v. Connor, 490 U.S. 386, 397 (1989) and Anderson v. Creighton, 483 U.S. 635, 639 (1987)).

Amendment violation.[271] The Second Circuit seemed to view qualified immunity and excessive force as separate inquiries, but the rule it formulated effectively merged the analysis.[272] It said that even if an officer exerts "constitutionally excessive force," qualified immunity is appropriate unless it "should have been apparent" that the "particular degree of force under the particular circumstances was excessive.[273]

The division among the courts of appeals on whether the qualified immunity inquiry is superfluous in Fourth Amendment excessive force cases would lead the Supreme Court to take up the issue in 2001 in *Saucier v. Katz*.

3. The Supreme Court of the United States Decides Qualified Immunity Applies to Excessive Force: *Saucier v. Katz*

After years of expanding qualified immunity in other areas, the Supreme Court in *Saucier v. Katz* established the doctrinal framework we are familiar with today: allowing police officers alleged to have used excessive force to invoke qualified immunity as a defense to § 1983 claims.[274] The question presented before the Court in *Saucier* was whether the test for qualified immunity is identical to the Fourth Amendment reasonableness standard used to determine whether police use of force is lawful such that a finding of unreasonable force necessarily precludes the officer from being entitled to qualified immunity. The *Saucier* majority decided that the course chosen by most appellate courts up to that point—using *Graham* as the guide for excessive force and leaving qualified immunity out of the analysis—was misguided.[275] The Court created a second-layer objective reasonableness test for qualified immunity, that would apply on top of the objective reasonableness test used in *Graham*.[276] Justices Ginsburg, Breyer, and Stevens all disagreed with this approach, finding qualified immunity duplicative of

271 *Napier*, 187 F.3d at 183 (citing *Anderson* to support the proposition that "police officers are entitled to qualified immunity if reasonably well-trained officers confronted with similar circumstances could reasonably believe their actions were lawful under clearly established law").

272 *See Finnegan*, 915 F.2d at 823-24.

273 *Id.*

274 Saucier v. Katz, 533 U.S. 194, 197 (2001) ("[T]he ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest."), *overruled in part by* Pearson v. Callahan, 555 U.S. 223 (2008).

275 *Id.* at 203-07; *see also* cases cited *supra* notes 228–230 (discussing the circuit split among lower courts).

276 *Saucier*, 533 U.S. at 204-05 ("The inquiries for qualified immunity and excessive force remain distinct, even after *Graham*. . . . The qualified immunity inquiry, on the other hand, has a further dimension.").

Graham's objective reasonableness test and therefore inappropriate for excessive force claims.[277]

The underlying facts of *Saucier* involved an animal rights protester named Elliot Katz who staged a demonstration at the celebration of a military base in San Francisco where then-Vice-President Al Gore was speaking.[278] Katz attempted to display a banner, and several military police officers, including the defendant officer Donald Saucier, grabbed Katz from behind and rushed him out of the area.[279] Officer Saucier took Katz to a military van and threw him inside with a "gratuitously violent shove."[280] The police then drove Katz to a military police station and released him.[281]

Katz filed a *Bivens* claim against the military police officers for violating his constitutional rights.[282] Katz alleged that the officers had used excessive force during his arrest.[283] The district court granted the defendant military officers' motions for summary judgment on the grounds of qualified immunity for all officers except the excessive force claim against Saucier.[284] The court argued that there was a factual dispute about whether Saucier had used excessive force to remove Katz from the crowd and put him in the van.[285] The lower court held that "the law governing excessive force claims was clearly established at the time of the arrest, and that in the Fourth Amendment context, the qualified immunity inquiry is the same as the inquiry made on the merits."[286]

The Ninth Circuit Court of Appeals agreed with the district court that summary judgement based on qualified immunity would be an inappropriate response to the excessive force claim against Saucier.[287] It first concluded that the law on excessive force was clearly established under *Graham v. Connor*'s objective reasonableness test.[288] It then found that the qualified immunity inquiry was essentially the same as the constitutional inquiry, and as such, became redundant

277 *Id.* at 214 (Ginsburg, J., concurring) ("[A]n officer who uses force that is objectively reasonable in light of the facts and circumstances confronting [him] simultaneously meets the standard for qualified immunity, and the standard the Court set in *Graham* for a decision on the merits in his favor. Conversely, an officer whose conduct is objectively unreasonable under *Graham* should find no shelter under a sequential qualified immunity test." (internal quotation marks and citations omitted)).

278 *Id.* at 197-98 (majority opinion).

279 *Id.* at 198.

280 *Id.* at 198, 208.

281 *Id.* at 198.

282 *Id.* at 198-99; *see also* cases cited *supra* note 87 and accompanying text.

283 *Saucier*, 533 U.S. at 197.

284 *Id.* at 199.

285 *Id.*

286 *Id.* (internal quotation marks omitted).

287 *Id.* at 199-200.

288 *Id.* at 199.

when excessive force is alleged, because "both concern the objective reasonableness of the officer's conduct in light of the circumstances."[289]

At the Supreme Court, Katz argued that the Ninth Circuit had correctly concluded that the two reasonableness inquiries merge.[290] Katz argued that *Graham*'s standard on the merits provides the same protection for a law enforcement officer as the protection under the doctrine of qualified immunity because "the same facts are viewed from the same perspective (the objectively reasonable officer) and assessed with an equivalent measure of what level of force is legally excessive ('reasonable' and 'reasonably known to be reasonable')."[291]

He also argued that qualified immunity did not make sense in the context of excessive force. The Court had already struck a balance between providing police officers with the ability to use discretion in executing their duties, while preserving the right to a jury trial when there is a genuine issue of material fact whether excessive force was used.[292] *Graham* instructs the lower courts that the threshold showing that an officer has not acted in an objectively reasonable manner is a high one.[293] Officers need not show that other options were available; they need only show that their actions were reasonable from their perspective at the time.[294] Katz argued that following *Graham*, lower courts applying the *Graham* standard to various factual circumstances had found that the excessive force test provides officers with wide latitude to determine the amount of force that is reasonably necessary.[295] Therefore, according to Katz, it did not make sense to apply qualified immunity in excessive force cases because doing so would upend the decision the Court made in *Graham*—a decision that already afforded broad constitutional latitude to officers using force.[296]

The Supreme Court rejected the Ninth Circuit's conclusion that qualified immunity should not apply to excessive force claims under *Graham*.[297] Instead,

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289 *Id.* at 200.

290 *Id.* at 203-04.

291 Brief for Respondents, Saucier v. Katz, 553 U.S. 194 (2001) (No. 99-1977), 2001 WL 173527, at *24 [hereinafter Brief for Respondent Katz].

292 *Id.* at *5-6; *17-19 ("*Graham* achieves this mixture of providing police officers the confidence they need in order to do their difficult job, while preserving the right to a jury trial when there is a genuine issue of material fact.").

293 *Id.* at *8 ("*Graham* still provides a high threshold of protection for officers through jury instructions."); *see also Saucier* 533 U.S. at 205.

294 Brief for Respondent Katz, *supra* note 291, at *5-6 ("It is not enough to show that using 20/20 hindsight the officer could have made a better choice."); *see also Saucier*, 533 U.S. at 204-05 (explaining that claims should be evaluated under the "objective reasonableness standard" and that the level of reasonableness of the officer's belief should be judged as of the moment in question).

295 *Saucier*, 533 U.S. at 204.

296 Brief for Respondent Katz, *supra* note 291, at *9-11.

297 *Saucier*, 533 U.S. at 204-05, 207.

the majority opinion added a second objective reasonableness inquiry to *Graham* to determine if officers could have qualified immunity—even if they were found to have used excessive force in violation of the Constitution.[298] The decision split, with Justice Kennedy writing the majority opinion joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Thomas, and Souter, and with Justice Ginsburg, joined by Justices Breyer and Stevens, writing a concurrence that argued qualified immunity should not apply.[299]

The majority opinion had two main parts. As noted in our discussion of qualified immunity's emergence,[300] the first issue in the case was the proper sequence of the two-step qualified immunity test. The Court created a new rule that required lower courts to first engage the part of the qualified immunity test that asks whether a constitutional right was violated on the facts alleged *before* moving to the part of the test that asks whether the law was clearly established.[301] The Court held that if no constitutional right was violated, courts need not inquire further into qualified immunity or questions about clearly established law.[302] The Court thought that by putting the constitutional question first through this new rule, qualified immunity better serves its intended purpose: disposing of weak claims early on in litigation.[303] The Ninth Circuit decided the clearly established law question before the constitutional violation question, which under this new rule was an error.[304]

The second issue in the decision, which has been largely overlooked in the qualified immunity literature,[305] was whether qualified immunity could apply to excessive force cases at all.[306] Before commenting on that question specifically, the Court first addressed whether the Ninth Circuit correctly conducted the clearly established law analysis.[307] The Ninth Circuit had concluded that the law on excessive force met the "clearly established" standard.[308] The Court of Appeals argued that *Graham v. Connor* clearly established that federal courts determine whether force is excessive in violation of the Fourth Amendment by asking whether the officer's actions were objectively reasonable under the circumstances, given the officer's

298 *Id.* at 201.

299 Justice Souter wrote an opinion concurring in part and dissenting in part. *Saucier*, 553 U.S. at 196.

300 *See supra* Part II.

301 *Saucier*, 533 U.S. at 201.

302 *Id.*

303 *Id.* at 200-02.

304 *Id.* at 200. Several years later, the Supreme Court would overturn this sequencing rule in *Pearson v. Callahan*, letting courts decide which part of the test to do first. 555 U.S. 223, 236 (2009).

305 *See supra* note 32 (listing court cases and legal scholarship arguing that qualified immunity should not apply in police excessive force cases).

306 *Saucier*, 533 U.S. at 203-04.

307 *Id.* at 202.

308 *Id.* at 200.

knowledge at the time.[309] The Supreme Court, however, concluded that its own *Graham* rule for excessive force was too general to provide any clearly established law on excessive force.[310] The Ninth Circuit's conclusion that the law was clearly established was an error because "the question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals."[311] Writing for the majority, Justice Kennedy explained:

> In this litigation, for instance, there is no doubt that Graham v. Connor clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in Anderson "that 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." The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.[312]

The decision in *Anderson*—a case about Fourth Amendment searches—proved critical to the Court's analysis regarding the Fourth Amendment and police use of force.[313] Because the Court in *Anderson* decided to create an analytical distinction between the reasonableness standards for warrantless searches and for qualified immunity, the *Saucier* Court was able to similarly distinguish between reasonableness for excessive force and for qualified immunity.[314]

But as Katz pointed out, *Anderson* came before *Graham*, and it did not make sense to extend its analysis for probable cause to excessive force.[315] Since *Graham* came after *Anderson*, it presumably addressed the concerns stated in *Anderson*. Katz argued in the respondents' brief:

> Both cases at their core seek to balance the concern that "actions for damages may offer the only realistic avenue for vindication of constitutional guarantees," with the concern that "permitting damages suits against government officials can entail substantial social costs, including the risk that

309 *Id.* at 199, 204.

310 *Id.* at 202-03.

311 *Id.* at 200.

312 *Id.* at 201-02 (citations omitted).

313 *Id.* at 203-04.

314 *Id.* at 204 ("The inquiries for qualified immunity and excessive force remain distinct, even after *Graham*.").

315 Brief of Respondent Katz, *supra* note 291, at *7.

> fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."[316]

Graham's objective reasonableness standard for excessive force gave officers latitude for making mistakes about what amount of force was necessary.[317] Because the test for excessive force already provided officers with a protection sufficiently similar to qualified immunity, it would be a mistake to add a separate immunity inquiry—and an additional hurdle for plaintiffs—in excessive force cases.[318] Katz also argued that *Anderson* was distinguishable because Fourth Amendment search cases dealt with evolving precise legal standards for probable cause; thus, officers operated with legal uncertainty when conducting searches.[319] In contrast, *Graham's single standard* directing officers to use objectively reasonable force under the circumstances governs Fourth Amendment excessive force cases.[320]

The Court rejected these arguments about the relationship between *Anderson* and *Graham*.[321] It concluded that objective reasonableness under *Graham* centered on whether the use of force was objectively reasonable given the facts and the circumstances of the case.[322] With respect to officers' mistaken beliefs, this might mean that an officer could "reasonably but mistakenly" think something about a situation such that a particular use of force was thought to be necessary.[323] Qualified immunity, however, involved a different type of mistake. Rather than a mistake about the facts before an officer, qualified immunity, according to the Court, was about when an officer makes a reasonable mistake about whether the force used was legal.[324]

While Katz had argued that the ambiguous nature of the *Graham* objective-reasonableness test made qualified immunity unnecessary by

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316 *Id.* at *7 (quoting Anderson v. Creighton, 483 U.S. 635, 638 (1987)).

317 *Id.* at *7-8 (explaining that *Graham* gives officers "a high threshold of protection" prior to, at, and after the summary judgment stage).

318 *Id.*

319 *Id.* at *27 ("[T]he *Graham* standard is well settled compared with probable cause, which is often in a state of flux. . . . This is because the determination of probable cause involves the legal standards for the underlying crime, which is often evolving. . . . Such legal uncertainty explains and underscores the need for the qualified immunity doctrine in the area of probable cause. No such developing legal doctrine exists in the area of the amount of force necessary to make an arrest.").

320 *Id.* at *24-26.

321 Saucier v. Katz, 553 U.S. 194, 206 (2001) ("*Graham* and *Anderson* refute the excessive force/probable cause distinction on which much of respondent's position seems to depend."), *overruled in part by* Pearson v. Callahan, 555 U.S. 223 (2008).

322 *Id.* at 205-06 (explaining that *Graham* directs courts to consider facts and circumstances such as the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting or attempting to evade arrest).

323 *Id.* at 205.

324 *Id.* at 205-06.

granting officers wide latitude in making split-second decisions,[325] the Court found the ambiguity of the test provided a reason for allowing a separate qualified immunity test. The Court explained:

> 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. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.
>
> Graham does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances. This reality serves to refute respondent's claimed distinction between excessive force and other Fourth Amendment contexts; in both spheres the law must be elaborated from case to case. Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes "hazy border between excessive and acceptable force," . . . and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.[326]

Qualified immunity and excessive force, therefore, were distinct inquiries—even after *Graham*. In addition to the deference officers receive via the ambiguous *Graham* standard regarding the constitutionality of the underlying excessive force claim, the Supreme Court's view in *Saucier* is that officers may also be entitled to qualified immunity in the event that they use excessive force in violation of an individual's rights if they somehow reasonably believe that their actions were lawful.

In applying these new standards to the facts of the case in *Saucier*, the majority decided to start by assuming that a constitutional violation could have occurred, in order to move immediately to the issue of clearly established law.[327] It noted that the "general prohibition against excessive force was the source for clearly established law that was contravened in the circumstances this officer faced."[328] The Court identified the "gratuitously violent shove" as the main source of the excessive force complaint, and concluded that neither the Ninth Circuit nor Katz had cited any cases demonstrating a clearly established rule prohibiting an officer from acting as Officer Saucier had,

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325 *See supra* note 317 and accompanying text.

326 *Saucier*, 553 U.S. at 205-06 (quoting Priester v. Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000)).

327 *Id.* at 207.

328 *Id.* at 207-08.

emphasizing the urgency of protecting the Vice President at the event and that the arrest did not injure Katz.[329]

Justice Ginsburg wrote a concurring opinion, joined by Justices Stevens and Breyer, which disagreed with the decision to apply qualified immunity to excessive force cases.[330] The opinion was a concurrence because it agreed with the outcome of the majority decision—granting summary judgment to the officer—but on the grounds that the officer's use of force was reasonable under *Graham*, not on the grounds that the officer should have a qualified immunity defense available to him.[331]

Justices Ginsburg, Stevens, and Breyer first argued that qualified immunity should not apply to excessive force because both used the same objective reasonable test. They said that the majority opinion "tacks on to a *Graham* inquiry a second, overlapping objective reasonableness inquiry" because "the determination of police misconduct in excessive force cases and the availability of qualified immunity both hinge on the same question: Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer, identically situated, have believed the force employed was lawful?" [332] The concurring opinion explained further:

> [A]n officer who uses force that is objectively reasonable "in light of the facts and circumstances confronting [him]," simultaneously meets the standard for qualified immunity, and the standard the Court set in Graham for a decision on the merits in his favor. Conversely, an officer whose conduct is objectively unreasonable under Graham should find no shelter under a sequential qualified immunity test.[333]

This means that, under the concurring opinion, it would be impossible for an officer to violate the constitutional standards for excessive force under *Graham*, yet still meet the standards for qualified immunity. As the Justices wrote: "Once it has been determined that an officer violated the Fourth Amendment by using 'objectively unreasonable' force as that term is explained in *Graham v. Connor*, there is simply no work for a qualified immunity inquiry to do."[334]

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329 *Id.* at 208-09.
330 *Id.* at 216-17 (Ginsburg, J., concurring).
331 *Id.* at 209-10.
332 *Id.* at 210.
333 *Id.* at 214 (citations omitted) (quoting Graham v. Connor, 490 U.S. 386, 397 (1989)).
334 *Id.* at 216-17.

The culmination of qualified immunity's middle history in *Saucier v. Katz* demonstrates that there was no natural or inevitable expansion of qualified immunity into § 1983 excessive force doctrine. Rather, the conversation among federal courts on whether qualified immunity should be available as a defense in § 1983 litigation was remarkably uneven and contested. Prior to 2001, there was no Supreme Court doctrine establishing that police officers sued for excessive force could invoke qualified immunity. Most circuits and many legal scholars thought that it did not make sense to apply qualified immunity to excessive force claims because both standards turn on whether an officer reasonably believed that the use of force was necessary.[335] *Saucier* changed that. It established new defendant-friendly ground rules that would govern all excessive force cases moving forward. And as our empirical findings in Part III demonstrate, as the Court *made the specific, disputed choice* to connect qualified immunity to cases that involve police use of force, lower courts began to see for the first time an influx of excessive force cases where defendants asserted qualified immunity. In the next Section, we look at the concrete implications and effects of this decision to bring qualified immunity into excessive force.

B. *Middle History Implications*

This Section examines the consequences of the Court's choice to bring qualified immunity into the realm of excessive force law. We first discuss how this choice hollowed out the Fourth Amendment constitutional limits on excessive force by allowing the question of "clearly established law" to preempt the question of whether an instance of police use of force was reasonable. We then talk about two more specific aspects of this shift that work to undermine § 1983 excessive force claims. First qualified immunity operates as a self-reinforcing doctrine while also allowing abstract legal questions to overshadow victims' experiences with police violence. Second, after discussing how qualified immunity transformed federal courts' approach to § 1983 claims, we show the impact of this transformation on excessive force cases at the Supreme Court. In the years after *Saucier*, the Court took up eleven excessive force cases that implicated qualified immunity, all but two of which were decided in favor of the police. [336]

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335 *See* sources cited *supra* note 32.

336 *See* cases cited *supra* note 79. The only cases where the Supreme Court did not rule in favor of the police were *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (per curiam) and *Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam). The Supreme Court decided both cases on procedural grounds relating to the way the district court interpreted the respective facts of the cases, not on substantive issues of qualified immunity. *Hernandez*, 137 S. Ct. at 2005-08 (vacating and remanding the appellate court's finding of qualified immunity due to its incorrect reliance on facts unknown to a border

1. Legal Questions of "Clearly Established Law" Replace Constitutional Law

Qualified immunity has allowed questions about "clearly established law" to preempt constitutional questions about the reasonableness of particular instances of police use of force.[337] Cases where the police have allegedly used excessive force traditionally focus on the constitutional question of whether the officer's use of force was reasonable under the circumstances. For example, in *Graham v. Connor*—the case that is considered the foundation of modern excessive force litigation—there was never any conversation about qualified immunity or clearly established law at any stage in the litigation. The courts at all stages in the case focused solely on the constitutional question of whether the officer used excessive force in violation of the Fourth Amendment.[338] But under the modern qualified immunity rules today, an officer's ability to face civil suit for excessive force often does not depend on that constitutional question. Instead, the ability to pursue civil liability turns *solely* on the question of whether there is preexisting clearly established law matching the particular facts of the case. The question of whether the officer violated the Constitution by using unreasonable force is frequently not addressed by the courts.

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patrol agent at the time he shot the plaintiff); *Tolan*, 572 U.S. at 657 ("[T]he Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan . . . .").

[337] *See e.g.*, City of Tahlequah v. Bond, 142 S. Ct. 9, 11 (2021) (per curiam) ("We need not, and do not, decide whether the officers violated the Fourth Amendment in the first place . . . . On this record, the officers plainly did not violate any clearly established law."); Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) ("Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred . . . Kisela was at least entitled to qualified immunity."); Copson v. Hephner, No. 19-0127, 2021 WL 1202072, at *11 (S.D. W. Va. Mar. 30, 2021) ("In this case, the court need not, and does not, decide whether [the officers] violated the Fourth Amendment when [they] used deadly force . . . because, even assuming a Fourth Amendment violation occurred, the officers were entitled to qualified immunity." (internal quotation marks and citations omitted); Chavez v. Las Vegas Metro. Police Dep't, No. 11-1445, 2014 WL 374444, at *6 (D. Nev. Feb. 3, 2014) ("[T]he Court declines to reach the issue of whether [the officers] violated [the plaintiff's] Fourth Amendment rights. . . . [The officers] are entitled to the defense of qualified immunity because the law is not clearly established."), *aff'd*, 648 F. App'x 657 (9th Cir. 2016); *see also* Wilson v. Prince George's County, 893 F.3d 213, 221 n.11 (4th Cir. 2018) ("Supreme Court precedent offers little guidance regarding our determination whether the right at issue is clearly established because in many instances, the Court has declined to decide whether an officer's actions constituted a violation of the Fourth Amendment and instead has considered whether the right recognized by a court of appeals was clearly established").

[338] *See* 490 U.S. 386 (1989); Graham v. City of Charlotte, 827 F.2d 945, 949 (4th Cir. 1987); Graham v. City of Charlotte, 644 F. Supp. 246, 249 (W.D.N.C. Sept. 19, 1986). The Suprme Court noted that "[s]ince no claim of qualified immunity has been raised in this case, . . . we express no view on its proper application in excessive force cases that arise under the Fourth Amendment." *Graham*, 490 U.S. at 399 n.12.

As we discussed in Part I, qualified immunity has a preemption function because of a specific doctrinal choice the Court made in *Pearson v. Callahan*.[339] The test for modern qualified immunity consists of two questions: whether the defendant infringed the plaintiff's constitutional right and whether the constitutional infringement violated clearly established law.[340] In *Pearson*, the court held that lower courts could address the "clearly established law" question first.[341] If the court finds that the constitutional law that applies to the facts of the case is not clearly established, the court can choose not to address whether the defendant's actions violated the Constitution.[342] This means for excessive force cases, the question of "clearly established law" *can come before* the question of whether force is excessive. And critically, if a court does determine that there is no clearly established law, it can stop the analysis there.[343] If there is no clearly established law, the defendant is automatically entitled to qualified immunity.[344] The issue of whether an officer used excessive force in violation of the Fourth Amendment is effectively moot. This has several consequences, all of which entrench qualified immunity's disempowering effect on the constitutional limits on excessive force.

Qualified immunity becomes a self-reinforcing doctrine where "clearly established law" preempts examination of underlying constitutional issues. When a court determines there is no clearly established rule about a given use of force, its analysis stops. And by not addressing the constitutionality of the facts at hand, there will continue to be a lack of clearly established law on the issue, creating a cycle of unaccountability.

Another way to think about this is in terms of the underdevelopment of Fourth Amendment law. Qualified immunity gives courts the opportunity to avoid deciding critical questions about what types of force are constitutional. Without qualified immunity, courts faced with questions about novel excessive force issues—such as use of the "prone position"—would always have to decide whether or in what circumstances such force is permissible. But qualified immunity allows courts to perpetually kick the can down the proverbial road by simply saying there is no clearly established law on the issue.[345] A court's decision to not address the constitutional question should not be understood as merely reflecting the absence of a clearly established policy. In fact, when a court chooses to grant qualified immunity to an officer without giving any attention to the constitutional question of whether force

339 *See supra* Section II.C.

340 *Id.*

341 *See id.*

342 *Id.*

343 *Id.*

344 *See id.*

345 *See* cases cited *supra* note 337.

is excessive, it signals that the court is comfortable with maintaining a particular legal environment: one without clear limits on police use of force and where police are above the Fourth Amendment.

A close analysis of recent district court excessive force cases helps to make more concrete these abstract arguments about what qualified immunity does to the Fourth Amendment.

In a 2021 district court case in West Virginia, the court granted qualified immunity to two police officers who shot and killed a man experiencing a mental health crisis.[346] The police had been called when the man, Kyle Andrew Copson, had been spotted near a gas station "with a knife, . . . agitated, walking back and forth."[347] Two police officers arrived and found Copson "waving the knife and talking to himself."[348] Copson then walked into the parking lot of a neighboring fast-food restaurant, where he "continued to wave the knife and yell," despite the officers' orders to drop the weapon.[349] Copson eventually "came toward" one of the officers with the knife, at which point both officers fired shots at and killed Copson.[350] There was evidence that Copson "was suffering from the effects of his mental illnesses" on the day of the shooting, although the police officers said they were unaware of this at the time.[351] He had a history of "paranoid schizophrenia, bipolar disorder, anxiety, depression, and opioid addiction."[352]

Copson's family brought a Fourth Amendment excessive force claim against the police officers.[353] Yet, rather than analyzing whether Copson's constitutional rights had been violated, the district court skipped over this issue and started its analysis with the second prong of the qualified immunity analysis: whether the law in this area was clearly established.[354]

Copson's family argued that a line of cases in the Fourth Circuit clearly established that "mere possession" of a weapon does not justify deadly force.[355] The court said that those cases did not present clearly established law on point because Copson was "waving that weapon in a public setting while behaving erratically and refusing officers' repeated commands to drop the knife."[356] The family pointed specifically to one case from the Fourth Circuit denying qualified immunity to an officer who responded to a call about a

346 Copson v. Hephner, No: 1:19-00217, 2021 WL 1202072, at *1-2 (S.D. W.Va. Mar. 30, 2021).
347 *Id.* at *1.
348 *Id.*
349 *Id.*
350 *Id.*
351 *Id.* at *2.
352 *Id.*
353 *Id.* at *5.
354 *Id.* at *5, *9.
355 *Id.* at *9.
356 *Id.*

suicidal man and shot him in his home as the man proceeded down his stairs with a knife toward the officer while the officer directed him to drop the knife.[357] The district court distinguished this case too, on the ground that Copson was in public, rather than at home waving the knife, and that the officers did not know about Copson's mental health history.[358]

There was no analysis of whether, in fact, Copson's constitutional rights had been violated when he was shot and killed by the officers.[359] The court decided that it "need not . . . decide whether [the officers] violated the Fourth Amendment when [they] used deadly force against [Copson]."[360] This conclusion was largely supported by *Kisela v. Hughes*, a 2018 Supreme Court case where the Court similarly granted qualified immunity to police officers without answering the constitutional question concerning the reasonableness of shooting a person with a knife.[361] By focusing exclusively on the question of clearly established law, the district court in Copson and the Supreme Court in Kisela were able to pass over questions about police use of deadly force against people who possess knives. Turning excessive force cases into debates primarily about qualified immunity allows courts to analyze only a given situations' technical similarity to other case law, and to the reasonableness of the officer's use of deadly force.

A 2013 Florida district court case provides another example of how qualified immunity permits courts to avoid drawing clear lines about when it is permissible for police to shoot people. In *Belizaire v. City of Miami*, police responded to a 911 call about a domestic dispute and confronted Gibson Belizaire in response to the call.[362] The officers alleged that Belizaire was "suspected of having fired a gun" in their direction.[363] Belizaire ran away from the officers and hid in a vacant lot.[364] He remained there for over an hour and a half while officers, joined by canine units and a SWAT team, surrounded the area.[365] Officers neither warned Belizaire, nor asked him to drop any

357 *Id.* at *10 (citing Connor v. Thompson, 647 F. App'x 231 (4th Cir. 2016)).

358 *Id.*

359 *Id.* at *11.

360 *Id.*

361 *Id.* In *Kisela*, the police responded to a report of a woman "acting erratically" and "hacking at a tree with a large kitchen knife." Kisela v. Hughes, 138 S. Ct. 1148, 1151, 1153 (2018). The officers arrived and saw Hughes "emerge from [a] house carrying a large knife at her side" and walk towards another woman and stop "no more than six feet from her." *Id.* at 1151. Officers directed Hughes to drop the knife, "but she did not acknowledge the officers' presence or drop the knife." *Id.* One officer fired four shots. *Id.* The Supreme Court concluded that it "need not . . . decide whether [the officer] violated the Fourth Amendment when he used deadly force against Hughes" because the officer was "at least entitled to qualified immunity." *Id.* at 1152.

362 944 F. Supp. 2d 1204, 1207 (S.D. Fla. 2013).

363 *Id.*

364 *Id.*

365 *Id.*

weapons, nor extended the opportunity to surrender.[366] Rather, they fired 130 rounds at Belizaire and killed him.[367]

Belizaire's family filed a § 1983 suit filed in response, and the court granted qualified immunity for all of the officers.[368] The family argued that *Tennessee v. Garner* clearly established that it is unconstitutional to use deadly force unless the suspect poses a significant threat of death or serious bodily injury to the officer or others.[369] The court said that *Garner* did not count as clearly established law because *Garner* dealt with an "unarmed, fleeing suspect" whereas here, the complaint "concedes that Belizaire was not fleeing at the time of his death."[370] The family also pointed to two Eleventh Circuit cases finding officers used excessive force when they shot unarmed individuals who were not fleeing and "did not pose a threat."[371] In this case, the court said Belizaire "may not have posed an immediate threat, [but] he did in fact pose a threat" because he was believed to have been armed.[372] The court said this case was more like *Penley v. Eslinger*, a separate Eleventh Circuit case where the police shot a fifteen-year-old boy who had brought a toy gun to school.[373] In *Penley*, the boy was in the school bathroom with the toy gun when police decided to have a sniper shoot him.[374] That case was similar to the facts here, the court said, because in both cases the officers believed that the person had a gun.[375] The court recognized the cases were, however, very different because there were "no allegations here that Mr. Belizaire presented an immediate threat to anyone once he reached the vacant lot" and "no allegations that he ever displayed his weapon or attempted to fire back at the police perimeter."[376] Nonetheless, the court said that there was a "nebulous state of the law" which countered the assertion that the officers violated a clearly established right, and that this case fell into the "hazy border between excessive and acceptable force."[377]

These cases demonstrate how the decision to apply qualified immunity to § 1983 excessive force claims has led lower courts to only ask questions about clearly established law when they analyze cases about the use of force. Qualified immunity allows courts to avoid addressing constitutional

366 *Id.*
367 *Id.*
368 *Id.* at 1207-08, 1211.
369 *Id.* at 1210.
370 *Id.* at 1211-12.
371 *Id.* at 1211.
372 *Id.* at 1212.
373 *Id.* (citing Penley v. Eslinger, 605 F.3d 843, 845 (11th Cir. 2010)).
374 *Id.*; *Penley*, 605 F.3d at 846.
375 *Belizaire*, 944 F. Supp. at 1212.
376 *Id.*
377 *Id.*

questions about the limits that the Fourth Amendment places on officers' use of deadly force in specific situations such as when a person is fleeing or has a knife. Analysis of the underlying facts of the case and the reasonableness of the officer's use of force in cases such as these are left by the wayside.

2. Qualified Immunity and Police Excessive Force at the Supreme Court Post-*Saucier* (2001–2021)

After *Saucier*, the Court reviewed eleven more excessive force cases that implicate qualified immunity. In all but two cases, the Court decided the qualified immunity issue in favor of the police.[378] Critically, many of the Court's decisions in this period were per curiam opinions that were decided without full briefing on the issues or oral argument.[379]

This subsection briefly summarizes and discusses the impact of these decisions. In recent years, the Court has used qualified immunity to further degrade the Fourth Amendment by consistently overturning lower court decisions that denied qualified immunity to police officers.[380] We show how the Court has continually raised the bar for what counts as clearly established law, now requiring plaintiffs to point to prior excessive force cases that are nearly identical to their own to move forward with their claims. Our discussion also highlights how the Court decided to extend the decision to apply qualified immunity to police officers in *Saucier*, where the force involved was a "violent shove," to increasingly brutal instances of police use of force.

Three years after *Saucier*, the Supreme Court for the first time granted qualified immunity to a police officer who decided to shoot and kill. In *Brosseau v. Haugen*, police officer-defendant Brosseau shot Haugen in the back as he was driving away from the scene of a fight he had been involved in.[381] The Ninth Circuit concluded that Brosseau used excessive force and declined to grant him qualified immunity on the grounds that shooting Haugen in the

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378 *See* cases cited *supra* notes 79 & 336.

379 *See generally* Brosseau v. Haugen, 543 U.S. 194 (2004) (per curiam); Tolan v. Cotton, 572 U.S. 650 (2014) (per curiam); Mullenix v. Luna, 577 U.S. 7 (2015) (per curiam); White v. Pauly, 137 S. Ct. 548 (2017) (per curiam); Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (per curiam); Kisela v. Hughes, 138 S. Ct. 1148 (2018) (per curiam); City of Escondido v. Emmons, 139 S. Ct. 500 (2019) (per curiam); Rivas-Villegas v. Cortesuluna, 142 S. Ct. 4 (2021) (per curiam); City of Tahlequah v. Bond, 142 S. Ct. 9 (2021) (per curiam).

380 *See* sources cited *supra* note 79; *see also* Baude, *Is Qualified Immunity Unlawful?*, *supra* note 30, at 82-83 (discussing how the Court nearly always reverses lower court decisions denying qualified immunity and decides in favor of defendants).

381 543 U.S. 194, 195-97 (2004) (per curiam).

back violated a clearly established right.[382] The Supreme Court in a per curiam opinion reversed the decision to deny qualified immunity to the officer.[383]

The Court framed the doctrine in slightly broader terms than ever before, stating that qualified immunity shields officers who "reasonably misapprehend" the law and emphasizing that qualified immunity turns on the question of "fair notice."[384] The excessive force standards set out in *Graham* and *Garner* were not, according to the Court, enough to provide officers with fair warning about the law, as they "cast . . . a high level of generality."[385] Instead, there had to be a case where an officer faced the *exact situation* Officer Brosseau confronted: "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight."[386] Despite the fact that *Haugen* cited to a case where a court found that an officer was not justified in using deadly force to stop a fleeing suspect, the Court said that this was a "hazy" area of law, and because the cases did not "clearly establish" a Fourth Amendment violation, Officer Brosseau was entitled to qualified immunity.[387]

After *Brossaeu*, the Court went a decade without hearing another § 1983 excessive force case that raised the issue of qualified immunity. Then, the Court took up *Plumhoff v. Rickard*.[388] In this case, the police shot and killed a driver and a passenger who had been pulled over for having a car headlight that did not work.[389] The Supreme Court held that the officers were entitled to qualified immunity because on the exact date of the incident in 1999, there was not yet a consensus on whether officers could shoot people in a fleeing vehicle, even though subsequent case law might indicate that such use of force is unlawful.[390]

In the third case involving a fleeing driver—*Mullenix v. Luna*—the driver led officers on a high-speed chase after they tried to arrest him at a drive-in restaurant.[391] Several officers eventually set up spike strips, but one officer, defendant Officer Mullenix, decided to shoot at the car instead, despite an order from his superior to "stand by" and "see if the spikes work first."[392] The Fifth Circuit denied qualified immunity to Mullenix, but yet again, the

382 *Id.* at 195.
383 *Id.* at 198.
384 *Id.*
385 *Id.* at 199.
386 *Id.* at 200.
387 *Id.* at 201 (citing Estate of Starks v. Enyart, 5 F.3d 230, 234 (7th Cir. 1993)).
388 572 U.S. 765 (2014).
389 *Id.* 768-70.
390 *Id.* at 779-81.
391 577 U.S. 7, 8 (2015) (per curiam).
392 *Id.* at 7, 8-10.

Supreme Court overturned the appellate court.[393] As before, the Court described the requisite law that needed to be clearly established in remarkably specific terms.[394] Because there was no prior case law stating that police could not shoot when specifically "confronted [with] 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 [down the road]," there was no clearly established standard for police to follow.[395]

Justice Sotomayor wrote a dissent in *Mullenix* criticizing both the Court's analysis of the facts and law, and aptly predicting the broader trajectory of the Court's qualified immunity jurisprudence.[396] She correctly noted that there had to be some governmental interest in order for excessive force to be justified, and here, there was no plausible governmental interest in allowing Mullenix to disregard orders and shoot rather than waiting for the spike strips to work.[397] Justice Sotomayor also cited Officer Mullenix's disturbing comments immediately after the incident to demonstrate how the Court's broadening of qualified immunity had perpetuated police violence.[398] She wrote:

> When Mullenix confronted his superior officer after the shooting, his first words were, "How's that for proactive?" . . . . [T]he comment seems to me revealing of the culture this Court's decision supports when it calls it reasonable—or even reasonably reasonable—to use deadly force for no discernible gain and over a supervisor's express order to "stand by." By sanctioning a "shoot first, think later" approach to policing, the Court renders the protections of the Fourth Amendment hollow.[399]

Justice Sotomayor would continue to raise these critical arguments as the Court intervened in other cases to grant qualified immunity to police officers.[400]

In addition to the cases involving police officers shooting drivers, the Court, in 2015, granted qualified immunity to police officers who shot a woman with a mental disability after the officers forced their way into her room in a group home.[401] In *City and County of San Francisco v. Sheehan*, the

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393 *Id.* at 19.

394 *Id.* at 11-13.

395 *Id.* at 13-15.

396 *Id.* at 20-26 (Sotomayor, J., dissenting).

397 *Id.* at 21-23.

398 *Id.* at 26.

399 *Id.* at 25-26.

400 *See* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (Sotomayor, J., dissenting) (per curiam) ("Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.").

401 *See* City and County of San Francisco v. Sheehan, 575 U.S. 600, 603-04, 617 (2015).

officers had been summoned to the group home by a worker who requested help transporting Sheehan to a different facility after she had threatened the worker.[402] The woman had a knife and threatened to kill the officers as they forced their way into her room, and the officers shot her several times.[403] The Court granted qualified immunity to the officers on the grounds that they had "no fair and clear warning of what the Constitution requires" with respect to the amount of force they could use under the circumstances.[404]

The cases from 2014 to 2015 marked the beginning of a trend where the Court decided to review and overturn appellate court decisions denying qualified immunity to police who used deadly force.[405] From 2017 to 2021, the Court issued six more opinions—this time all in the form of *per curium* decisions—that overturned appellate court decisions that had previously denied qualified immunity to police officers.[406]

First, in *White v. Pauly*, an officer arrived late to the scene of an ongoing police action and shot and killed an armed occupant of the house without giving any warning.[407] The Court said that the case involved a "unique set of facts and circumstances" because the officer arrived late, and therefore no clearly established law proscribed the level of force he was allowed to use under the circumstances.[408]

Second, in *Kisela v. Hughes*, an officer shot a woman wielding a kitchen knife after responding to calls for a welfare check.[409] The appellate court had decided the officer was not entitled to qualified immunity because the law in the circuit clearly established that it was unreasonable to use deadly force on someone who had not committed a serious crime, was not evading arrest, and was merely behaving strangely.[410] The Supreme Court reversed on the basis that this was "far from an obvious case in which any competent officer would have known that shooting . . . would violate the Fourth Amendment."[411] Justice Sotomayor dissented from the decision, correctly noting that while the victim in *Kisela* behaved erratically and had a kitchen knife, she did not

402 *Id.* at 603-04.

403 *Id.* at 604-06.

404 *Id.* at 617 (internal quotation marks omitted).

405 *See* Plumhoff v. Rickard, 572 U.S. 765, 768-70 (2014); Mullenix v. Luna, 577 U.S. 7, 9-11 (2015) (per curiam); City and County of San Francisco v. Sheehan, 575 U.S. 600, 603-06, 617 (2015).

406 *See* Hernandez v. Mesa, 137 S. Ct. 2003, 2005-08 (2017) (per curiam); White v. Pauly, 137 S. Ct. 548, 549-53 (2017) (per curiam); Kisela v. Hughes, 138 S. Ct. 1148, 1150-05 (2018) (per curiam); City of Escondido v. Emmons, 139 S. Ct. 500, 501-04 (2019) (per curiam); Rivas-Villegas v. Cortesuluna, 142 S. Ct. 4 (2021) (per curiam); City of Tahlequah v. Bond, 142 S. Ct. 9 (2021) (per curiam).

407 137 S. Ct. 548, 549 (2017) (per curiam).

408 *Id.* at 552.

409 138 S. Ct. 1148, 1150 (2018) (per curiam).

410 Hughes v. Kisela, 862 F.3d 775, 785 (2016).

411 *Kisela*, 138 S. Ct. at 1153.

pose any immediate threat because she was not near anyone else, had not committed a crime, and was not attempting to flee or evade arrest.[412]

Third, in *City of Escondido v. Emmons*, police officers responding to a domestic disturbance took a man to the ground after he ignored the officers' orders.[413] The Supreme Court reversed the appellate court decision on the grounds that the court did not define clearly established law with adequate specificity.[414]

Fourth, in *Rivas-Villegas v. Cortesluna*, an officer leaned on a man with his knee after another officer had shot the man with a bean-bag gun.[415] The appellate court denied the officer qualified immunity, but the Supreme Court reversed that decision on the grounds that the case the appellate court relied on diverged from the facts of this situation.[416]

Fifth, in *City of Tahlequah v. Bond*, police officers responding to a domestic disturbance shot and killed a man standing in a garage with a hammer as the man "raised the hammer" as if he was about to throw it.[417] The Tenth Circuit held that the cases in the circuit established the officers could be held liable under the Fourth Amendment, but the Supreme Court reversed on the grounds that there was not a lower court case with facts that matched closely enough to create clearly established law.[418]

Dissenting in *Kisela*, Justice Sotomayor, joined by Justice Ginsberg, presented a powerful critique of the Court's "disturbing trend" of overturning lower court decisions and granting immunity to the officers.[419] The dissent called out the Court's string of decisions that eviscerated Fourth Amendment protections by "effectively treating qualified immunity as an absolute shield."[420] Justice Sotomayor highlighted how the Court had used its power to craft policies reinventing the power balance between police and citizens, writing:

> [T]his Court routinely displays an unflinching willingness "to summarily reverse courts for wrongly denying officers the protection of qualified immunity" but "rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases." Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.

412 *Id.* at 1156-57 (Sotomayor, J., dissenting).
413 139 S. Ct. 500, 501-02 (2019) (per curiam).
414 *Id.* at 503.
415 Rivas-Villegas v. Cortesuluna, 142 S. Ct. 4, 6-7 (2021) (per curiam).
416 *Id.* at 7-8.
417 City of Tahlequah v. Bond, 142 S. Ct. 9, at 10-11 (2021) (per curiam).
418 *Id.* at 11.
419 138 S. Ct. at 1162 (Sotomayor, J., dissenting).
420 *Id.* at 1155.

> The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.[421]

As this overview of post-*Saucier* excessive force cases has shown, the Court has ruled in favor of the police on the issue of qualified immunity in nearly every case.[422] The only exceptions were partial-wins for the plaintiffs in *Tolan v. Cotton* and *Hernandez v. Mesa*.[423] In *Tolan*, the Court concluded that the Fifth Circuit failed to properly draw factual inferences in the light most favorable to the plaintiff in its summary judgement decision on qualified immunity.[424] The ruling, however, was only a partial win for the plaintiff because it only touched on the summary judgement standard and declined to address whether the officer's actions violated a clearly established right.[425] Simimlarly in *Hernandez*, the Court concluded that the Fifth Circuit erred in granting qualified immunity to a federal border patrol agent who had shot and killed a fifteen-year-old Mexican child who was playing with his friends on property that was on the U.S. side of the U.S.-Mexico border.[426] The ruling here was only a partial victory for the plaintiff, however, because it was based on the appellate court's failure to consider a critical fact in the case—that the border patrol agent did not know the child's nationality when he decided to shoot him—rather than any principles about clearly established Fourth Amendment standards, such as those that would prevent officers from shooting unarmed children.[427] As such, the Court merely remanded the case and instructed the Fifth Circuit to redo the qualified immunity analysis instead of affirmatively holding that an officer who shoots a child under such circumstances has violated clearly established law and must face liability.[428]

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421 *Id.* at 1162 (citations omitted).

422 *See supra* notes 79 & 336.

423 Tolan v. Cotton, 572 U.S. 650, 657-60 (2014) (per curiam); Hernandez v. Mesa, 137 S. Ct. 2003, 2007-08 (2017) (per curiam).

424 *Tolan*, 572 U.S. at 657.

425 *Id.* at 660.

426 *Hernandez*, 137 S. Ct. at 2005.

427 *See id.* at 2007-08.

428 *Id.* Back at the Fifth Circuit on remand, the appellate court ultimately decided not to reach the issue of qualified immunity because it decided that *Bivens*—which was the vehicle for the excessive force claim here as the defendant was a federal border patrol rather than state officer—does not provide a remedy for a foreign citizen shot by a U.S. officer in a cross-border shooting. Hernandez v. Mesa, 140 S. Ct. 735, 741 (2020). The Supreme Court took the case up in 2020 and affirmed the Fifth Circuit's decision. *Id.*

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In the years after *Saucier*, the Court's relationship to qualified immunity and excessive force changed substantially. Before *Saucier*, the two doctrines were mostly unrelated. Questions of excessive force were largely decided under constitutional principles, as foundational cases on excessive force like *Garner* and *Graham* made clear. And qualified immunity, when it came to the Court, involved cases with a variety of underlying facts and claims. But after *Saucier*, excessive force was forever entwined with qualified immunity and the question of "clearly established law." This has underdeveloped federal courts' assessments of which particular uses of force violate the Constitution, giving more leeway to police to use force and reducing the likelihood of accountability when force becomes excessive.

Our empirical findings[429] demonstrate that after *Saucier*, qualified immunity almost exclusively came to the Supreme Court through excessive force cases. And as our discussion of the recent excessive force cases at the Supreme Court shows, in the aftermath of *Saucier*, the Court took on what was effectively a policy campaign of telling lower courts that they should use qualified immunity to shield police from civil lawsuits when they use excessive force. The Court's decision to rule in favor of police—nearly all of whom used deadly force—in nine out of the eleven post-*Saucier* decisions corroborates Justice Sotomayor's warning that the Court's qualified immunity doctrine teaches police to "shoot first and think later" and tells the public that "palpably unreasonable conduct will go unpunished."[430]

CONCLUSION: RECLAIMING § 1983

Now that we have set forth both the history and the consequences of the decision to formally introduce qualified immunity in excessive force law, we can better understand the urgency of recent demands to abolish the doctrine. As we explained at the beginning of this Article, § 1983 was created during Reconstruction following the Civil War as a response to widespread abuse of power and racialized violence by public officers.[431] Today, qualified immunity takes that power out of § 1983. The Court can reclaim the original intent of § 1983 by overturning the holding in *Saucier v. Katz* that definitively brought qualified immunity to Fourth Amendment excessive force cases. Before *Saucier*, many circuits said that the qualified immunity inquiry in excessive force cases was inappropriate and duplicative to the extent that it matched

429 *See supra* Part V.

430 Kisela v. Hughes, 138 S. Ct. 1155, 1162.

431 *See supra* Section I.A.

the reasonableness prong of the Fourth Amendment analysis regarding whether the use of force was lawful. The Court needs to return to the pre-*Saucier* era where the determination of whether a police officer violated the Fourth Amendment rested largely on an examination of whether their actions aligned with constitutional principles. There may be reason to be hopeful that the Court might rethink qualified immunity, as Justices Sotomayor and Thomas have both recently voiced concerns about the doctrine in written opinions.[432] In the Supreme Court's 2020-2021 term, nine qualified immunity cases were considered for review, including several that asked the court explicitly to reconsider the doctrine.[433] The Court ultimately declined to hear any of these cases.[434]

On the legislative side, there have been both federal and state bills aimed at ending qualified immunity. Colorado's governor signed a bill in June 2020 that, among other reforms, eliminated qualified immunity for police officers facing liability under Colorado state law.[435] The law, however, did not change the rules governing qualified immunity for officers sued under the federal § 1983 statute.[436] Also in June 2020, U.S. House Representatives Justin Amash and Ayanna Pressley introduced the "Ending Qualified Immunity Act," which would eliminate qualified immunity in any federal civil lawsuit that alleges a deprivation of rights.[437] United States Senator Edward Markey introduced an identical "Ending Qualified Immunity Act" bill in the Senate in July, which was co-sponsored by Elizabeth Warren and Bernie Sanders.[438]

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432 In June 2020, Justice Thomas wrote that "qualified immunity doctrine appears to stray from the statutory text . . . ." in a dissent from a decision to deny certiorari. Baxter v. Bracey, 140 S. Ct. 1862, 1862 (June 15, 2020). Concurring in *Ziglar v. Abbasi*, Justice Thomas wrote that "[i]n further elaborating the doctrine of qualified immunity . . . we have diverged from the historical inquiry mandated by the statute." 137 S. Ct. 1843, 1871 (2017). Justice Sotomayor wrote in *Kisela v. Hughes* that qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment." 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J. dissenting).

433 *See* cases cited *supra* note 29; John Elwood, *Relist Watch: Looking for the Living Among the Dead*, SCOTUSBLOG (May 27, 2020, 11:29 AM), https://www.scotusblog.com/2020/05/relist-watch-looking-for-the-living-among-the-dead [https://perma.cc/RNC8-NQGN] (listing the nine cases that "in one way or another all challenge current qualified immunity").

434 *See* cases cited *supra* note 29.

435 *See*, S.B. 20-217, 72nd Gen. Assemb., Reg. Sess. (Colo. 2020), https://leg.colorado.gov/sites/default/files/2020a_217_signed.pdf [https://perma.cc/46P7-UH37]; *see also* Keith Coffman, *Colorado Reform Law Ends Immunity for Police in Civil Misconduct Cases*, REUTERS (June 2020, 12:20 AM), https://www.reuters.com/article/us-minneapolis-police-colorado/colorado-reform-law-ends-immunity-for-police-in-civil-misconduct-cases-idUSKBN23R05Xf [https://perma.cc/EN32-HDWR].

436 Jay Schweikert, *Colorado Passes Historic, Bipartisan Policing Reforms to Eliminate Qualified Immunity*, CATO INST. (June 22, 2020, 11:31 AM), https://www.cato.org/blog/colorado-passes-historic-bipartisan-policing-reforms-eliminate-qualified-immunity [https://perma.cc/4NKK-6ARV].

437 Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020). As of December 3, 2020, the bill was most recently referred to the house judiciary committee in June 2020.

438 Ending Qualified Immunity Act, S. 4142 116th Cong. (2020). As of December 3, 2020, the bill was most recently referred to the senate committee on the judiciary in July 2020.

As one might expect, law enforcement groups lobbied against the legislative efforts to end the immunity and received some support from legislators.[439] U.S. House Representative Jim Banks, for example, introduced a bill to codify qualified immunity, which would elevate the doctrine from a judicially created rule to a federal law, thereby protecting it from court action.[440]

While eliminating qualified immunity would be a step in the right direction toward combating excessive force by police, it is also important to recognize the limits of qualified immunity reforms. First, qualified immunity only deals with civil liability and money damages. It would not address how the criminal justice system has consistently failed to pursue criminal prosecution of police officers when they commit unlawful acts of violence with criminal impulse. In addition, even without qualified immunity, the constitutional standard governing Fourth Amendment excessive force law would still be a barrier to police liability. As we discussed earlier when analyzing the "double reasonableness" problem, excessive force doctrine operates under the ambiguous objective reasonableness test established in *Graham v. Connor*.[441] This reasonableness standard hinders the development of specific on-the-ground guidelines for police use of force by preventing courts from creating concrete rules that might protect citizens. The resulting ambiguity allows police departments to signal compliance with constitutional standards by adopting vague policies that only require police to act "reasonably."[442]

It is also worth questioning whether reforms regarding civil liability would actually spur substantial changes to policing practices. For one thing, police departments, municipalities, and their insurers—*not individual officers*—nearly always pay for any damages won by plaintiffs.[443] This mitigates the financial risks of civil liability that ought to deter police from using excessive force.[444]

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439 *See* Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill*, WASH. POST (Oct. 7, 2021, 6:00 AM), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html [https://perma.cc/E5D8-WQUB].

440 Qualified Immunity Act of 2020, H.R. 7951, 116th Cong. (2020).

441 *See* 490 U.S. 386, 396 (1989); John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. ON C.L. & C.R. 155, 161 (2016) (explaining that Supreme Court case law has resulted in "a highly deferential standard by which to determine whether use of force is justified; the decision to use deadly force is left almost entirely up to the individual officer").

442 *See* Obasogie & Newman, *The Endogenous Fourth Amendment*, *supra* note 259, at 1288 ("Instead of an independent judiciary determining the meaning of the Fourth Amendment and impressing it upon local police departments, local departments create meaning and symbolic adherence to ambiguous constitutional norms by developing use-of-force policies that reflect their own institutional and administrative preferences. In turn, federal courts defer to these policies as a reasonable iteration of police force.").

443 *See generally* Schwartz, *Police Indemnification*, supra note 30.

444 *Id*.

Indeed, some commentators have suggested that requiring police departments to carry liability insurance would reduce police violence because "high-risk" officers could be charged higher premiums or insurance companies could simply refuse to cover officers with records of abuse.[445] But expanding this insurance market would mean that police departments would have the added benefit of insurance company resources when fighting excessive force lawsuits. And moreover, the insurance company solution is only possible if we assume and accept that the future inevitably involves a continuation or expansion of law enforcement's current role in society.

Structural accounts of police violence recognize that police violence is routine, rather than aberrational, and lies at the core of police behavior. Critiques of reform-based approaches offer good reason to be skeptical of the potential for any single policy change to combat excessive force by police. But the fact that the existing constitutional rules on excessive force have such little power to begin with makes the need to eliminate the additional barrier of qualified immunity more, not less, urgent. It is critical to recognize the invention of qualified immunity and the contested decision to carry it into excessive force law as political decisions that further deteriorated what was an already rotting Fourth Amendment.

445 Clark Neily, *Make Cops Carry Liability Insurance: The Private Sector Knows How to Spread Risks, and Costs*, CATO INST. (March 29, 2018), https://www.cato.org/commentary/make-cops-carry-liability-insurance-private-sector-knows-how-spread-risks-costs [https://perma.cc/3YJR-U5GJ].

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