California Western Law Review

Volume 58 | Issue 1 Article 7

2021

Oversimplifying a Fact-Intensive Procedure: Do Appellate Courts Possess the Authority to Raise Qualified Immunity Sua Sponte During the Pleading Stage?

Mary R. Powell

OVERSIMPLIFYING A FACT-INTENSIVE PROCEDURE: DO APPELLATE COURTS POSSESS THE AUTHORITY TO RAISE QUALIFIED IMMUNITY SUA SPONTE DURING THE PLEADING STAGE?

TABLE OF CONTENTS

INTRODUCTION

Some decisions can be simplified into a quick judgment call—ball or strike—while others—guilty or not guilty—cannot. When making difficult and complex decisions, our brains may become overtaxed and stressed.[1] So, to alleviate this stress, the brain then resorts to tactics to simplify the decisions before us.[2] Thus, decisions do not actually become easier to make. Instead, our brains configure the situation and our reasoning to make it appear so. Despite this increased efficiency and alleviated stress, the decisions made in response to these oversimplified issues tend to create larger, systemic problems over time. In 2020, society voiced its distaste for unabated and systemic

1. *See* On Amir, *Tough Choices: How Making Decisions Tires Your Brain*, SCIENTIFIC AMERICAN (July 22, 2008), https://www.scientificamerican.com/article/tough-choices-how-making/ ("In a series of experiments and field studies, University of Minnesota psychologist Kathleen Vohs and colleagues repeatedly demonstrate that the mere act of making a selection may deplete executive resources. For example, in one study the researchers found that participants who made more choices in a mall were less likely to persist and do well in solving simple algebra problems. In another task in the same study, students who had to mark preferences about the courses they would take to satisfy their degree requirements were much more likely to procrastinate on preparing for an important test. Instead of studying, these 'tired' minds engaged in distracting leisure activities.").

2. Ron Carucci, *Stress Leads to Bad Decisions. Here's How to Avoid Them*, HARVARD BUSINESS REVIEW (August 29, 2017), https://hbr.org/2017/08/stress-leads-to-bad-decisions-heres-how-to-avoid-them ("As research on decision making shows, our brains are wired to be more reactionary under stress. This can mean that stressed-out leaders . . . resort to binary choice-making, limiting the options available to them. In tough moments, we reach for premature conclusions rather than opening ourselves to more and better options. Faced with less familiar conditions for which our tried-and-true approaches will not work, we reflexively counter our natural anxiety by narrowing and simplifying our options. Unfortunately, the attempt to impose certainty on the uncertain tends to oversimplify things to a black-and-white, all-or-nothing extreme.").

problems by protesting George Floyd's death,[3] racial injustice,[4] police misconduct,[5] and diminished personal freedoms related to COVID-19 restrictions.[6] Through these actions, society declared it would no longer acquiesce to the government oversimplifying its struggles.

The 2020 protests also raised awareness of systemic problems with governmental procedures, such as qualified immunity for police officers.[7] Following the numerous police misconduct protests, The Cato

---

3. Following George Floyd's death, protesters voiced their distaste for systemic racial discrimination underlying police brutality. *See* Justin Worland, America's Long Overdue Awakening to Systemic Racism, TIME (June 11, 2020, 6:41 AM), https://time.com/5851855/systemic-racism-america/; Human Rights Watch, *US: Address Structural Racism Underlying Protests*, HUMAN RIGHTS WATCH (June 2, 2020 4:00 PM), https://www.hrw.org/news/2020/06/02/us-address-structural-racism-underlying-protests.

4. George Floyd's death also catalyzed civil rights protests regarding structural racism and racial inequality; it thrusted the Black Lives Matter movement into the spotlight. Individuals have compared these recent protests and the Black Lives Matter movement to the 1960's civil rights movement. *See* Jill Kimball, *Race and Politics Scholar Weighs in on Black Lives Matter Movement's Resurgence*, NEWS FROM BROWN (July 27, 2020), https://www.brown.edu/news/2020-07-27/hooker.

5. Human Rights Watch, *UN Rights Body Should Create International Inquiry Into Systemic Racism and Police Violence in the US*, HUMAN RIGHTS WATCH (June 18, 2020 9:27 AM), https://www.hrw.org/news/2020/06/18/un-rights-body-should-create-international-inquiry-systemic-racism-and-police ("Estimates suggest that police in the US kill one thousand people, disproportionately Black, every year. Police in the US also use disproportionate force on Black people at vastly higher rates than on white people, including tasers, dog bites, batons, punches, and kicks. This excessive and disparate use of force is just one example of the unjustifiable systemic racism and abusive practices by law enforcement in the US.").

6. *See* Lisa Shumaker, *As Covid-19 Cases Surge in Florida, Anti-Mask Activists Hold Protests, Disney World Reopens*, REUTERS (July 12, 2020, 7:48 AM), https://www.reuters.com/article/health-coronavirus-usa/as-covid-19-cases-surge-in-florida-anti-mask-activists-hold-protests-disney-world-reopens-idUSL2N2EJ046 (highlighting the anti-mask protest outside Walt Disney World upon their opening, which required visitors to wear masks in accordance with county officials' mandates). *See generally* Human Rights Watch, *Human Rights Dimensions of COVID-19 Response*, HUMAN RIGHTS WATCH (March 19, 2020, 12:01 AM), https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response (providing an "overview of human rights concerns posed by the coronavirus outbreak, drawing on examples of government responses to date, and recommend[ing] ways governments and other actors can respect human rights in their response").

7. American Bar Association, *Qualified Immunity*, AMERICAN BAR ASSOCIATION (December 17, 2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-

Institute, newspapers, and congressional members have heavily criticized the protection qualified immunity provides public officials.[8] When asserted, qualified immunity completely protects a public official, sued in their individual capacity, from civil monetary-based claims, and, thus, strips away plaintiffs' rights to seek monetary remedies for injustices caused by government officials.[9] Although state and local officials should be entitled to protection by qualified immunity, qualified immunity should also be heavily criticized and revised given how it restricts plaintiffs' rights to recover monetary damages for civil wrongs.

The qualified immunity affirmative defense is complex, and thus, has many facets to examine; however, this Comment focuses on raising qualified immunity during the pleading stage. Government officials must assert qualified immunity to receive protection or else they forfeit their right to use it. Recently, however, some appellate courts have raised qualified immunity sua sponte[10] during the pleading stage without the defendant ever mentioning the defense. Although these appellate courts provide reasoning for raising the affirmative defense on their own, the decision to do so fosters impartiality concerns and risks losing the public's trust in the judiciary.[11]

---

and-society/volume-21/issue-1/qualified-immunity/ ("The death of George Floyd at the hands of Minneapolis police in May 2020, and the national turmoil that his death provoked, transformed qualified immunity into an issue of national importance *See*mingly overnight.").

8. *See* Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INSTITUTE (September 14, 2020), *https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure* ("This is a mess of the Supreme Court's own making. The justices invented the doctrine of qualified immunity, and they have a responsibility to abolish it."); H.R. 7085, 116th Cong. (2020).

9. *See* Pierson v. Ray, 386 U.S. 547 (1967).

10. When a court acts sua sponte, it is acting "[w]ithout prompting or suggestion on its own motion." *Sua Sponte*, BLACK'S LAW DICTIONARY (11th ed. 2019) (explaining sua sponte in Latin means "of one's own accord; voluntarily").

11. MODEL CODE OF JUD. CONDUCT Pmbl. (AM. BAR ASS'N 2010) ("An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret, and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law."; *Id.* at Cannon 1 r. 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the

Additionally, by deciding qualified immunity early in the litigation process, significant factual issues arise. At the pleading stage, courts presume a plaintiff's factual assertions are true. However, pleading standards only require plaintiffs to set forth enough facts to prove a claim can be made. These standards do not require plaintiffs to plead descriptive details. Yet, qualified immunity requires courts to make a fact-intensive decision based on these thin facts.

To circumnavigate this factual issue, courts could prohibit adjudicating qualified immunity until the parties conduct limited discovery. However, this solution opposes qualified immunity's purpose. Qualified immunity not only gives state and local officials immunity in certain circumstances, but it aims to limit the time government officials spend in litigation. Thus, the Supreme Court urges courts to decide qualified immunity as soon as possible in the litigation process.

This Comment analyzes whether appellate courts can adequately raise qualified immunity sua sponte during the pleading stage given potential factual inefficiencies and concerns of bias and impartiality. A circuit split exists regarding whether appellate courts will address qualified immunity for the first time on appeal. One circuit court prohibited defendants from raising qualified immunity for the first time on appeal, while another circuit court provided various reasons why qualified immunity could be raised sua sponte. Part I presents relevant background on qualified immunity and appellate courts' sua sponte authority. Part II introduces the two court circuit split and highlights each courts' reasoning. Part III discusses why appellate courts should only be allowed to address qualified immunity sua sponte if no additional fact-finding is required to adequately analyze qualified immunity.[12] Finally, Part IV suggests appellate courts should analyze

---

independence,* integrity,* and impartiality* of the judiciary, and shall avoid impropriety and the appearance of impropriety."); *See* COMM'N TO PROMOTE PUB. CONFIDENCE IN JUD. ELECTIONS, FINAL REP.TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006) ("Without public confidence, the judicial branch could not function.") (quoting *In re* Raab, 100 N.Y.2d 305, 315–16 (2003)).

12. This Comment will not focus on due process issues regarding appellate courts raising new issues sua sponte. The cases discussed in this Comment involve situations where the court provided parties with notice and an opportunity to be heard. However, in the event the appellate court did not provide the parties with notice and an opportunity to be heard, it will be indicated in the text or footnotes. Several articles already discuss the due process complications that arise when an appellate court raises

whether a complaint presents a sufficient factual basis for ruling on qualified immunity during the pleading stage before raising it sua sponte.

I. BACKGROUND INFORMATION

A. Acting Sua Sponte

"*It is the general rule, of course, that a federal appellate court does not consider an issue not passed on below.*"[13]

Derived from English common law, this general rule establishes how appellate courts should respond when new issues arise on appeal. However, the Supreme Court's decision in *Singleton v. Wulff* blurs the guidelines on when the general rule should be applied.[14] The Court added new case law further outlining appellate courts' sua sponte auhority.[15] The Court stated,

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, . . . or where "injustice might otherwise result."[16]

---

an issue for the first time on appeal, especially when the court does not allow the parties to brief or argue the issue. *See, e.g.*, Michael J. Donaldson, *Justice in Full Is Time Well Spent: Why the Supreme Court Should Ban Sua Sponte Dismissals*, 36 QUINNIPIAC L. REV. 25 (2017); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO L. REV. 1253 (2002); Ronald J. Offenkrantz & Aaron S. Lichter, *Sua Sponte Actions in the Appellate Courts: The "Gorilla Rule" Revisited*, 17 J. APP. PRAC. & PROCESS 113 (2016).

13. Singleton v. Wulff, 428 U.S. 106, 120 (1976).

14. *Singleton*, 428 U.S. at 121.

15. *Id.*

16. *Id.* (citations omitted). In a footnote inserted at the end of the above quote, the Supreme Court indicated the provided justifications were not exclusive. *Id.* at 121 n.8.

This rule conflicts with or creates a broad exception to the general rule that appellate courts may not consider new issues on appeal.[17] Scholars commonly refer to *Singleton*'s rule as the "Gorilla Rule," after comparing it to a well-known riddle.[18] The riddle asks, "'Where does an eight-hundred pound gorilla sleep?' The response is: 'Anywhere it wants.' . . . The judicial application of this rule would be: 'When will an appellate court consider a new issue?' The response is: 'Any time it wants.'"[19]

The Gorilla Rule generally clarifies how the Supreme Court and appellate courts have raised and continue to raise new issues sua sponte.[20] In extremely influential cases, like *Erie Railroad Company v. Tompkins*[21] and *Mapp v. Ohio*,[22] the Supreme Court ruled on issues the parties did not brief or address during oral arguments.[23] There, the losing parties never addressed or spoke on the issues that determined their cases' outcomes.[24]

Following *Singleton*, the Supreme Court continued to affirm appellate courts' decisions to raise new issues sua sponte. For example, in *United States National Bank of Oregon v. Independence Insurance Agents of America, Inc.*,[25] the District of Columbia ("D.C.") Circuit

---

17. *See* Offenkrantz & Lichter, *supra* note 11, at 119.

18. Robert J. Martineau, Considering New Issues on Appeal: The General Rule and the Gorilla Rule, 40 VAND. L. REV. 1023 (1987).

19. *Id.*

20. *See* Offenkrantz & Lichter, *supra* note 11, at 119.

21. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 (1938) (Butler, J., dissenting) (indicating the court did "not decide either of the questions presented but, chang[ed] the rule of decision in force since the foundation of the Government, [and] remand[ed] the case to be adjudged according to a standard never before deemed permissible").

22. Mapp v. Ohio, 367 U.S. 643, 674–75 (1961) (Harlan J., dissenting) (addressing the distinction between the issue the parties briefed and argued compared to the issues the majority presented and indicating the "five members of this Court have simply 'reached out' to overrule Wolf").

23. Adam A. Milani & Michael R. Smith, Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts, 69 TENN. L. REV. 245, 253–54 (2002). The lack of notice and opportunity to be heard raises significant due process issues this Comment will not address; however, scholars have previously addressed that issue. *See supra* note 11.

24. Milani & Smith, *supra* note 22, at 254.

25. U.S. Nat'l Bank v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 441 (1993).

Court raised a new issue regarding the statute's validity, even though the parties conceded the statute's validity in their briefs.[26] The D.C. Circuit asked the parties to address the new issue at oral argument and to subsequently provide supplemental briefing.[27] Despite neither party directly addressing the new issue in their supplemental briefs, the D.C. Circuit held that the statute was repealed and thus, invalid.[28]

On certiorari, the Supreme Court upheld the D.C. Circuit's decision and affirmed that the court did not abuse its discretion in raising the issue on its own.[29] The Supreme Court held that the appellate court properly considered the statute's validity, because the parties disputed whether the statute was relied on as authority for the administrative agency's ruling.[30] Then, the Supreme Court cited *Arcadia v. Ohio Power Company*[31] for the principle that "a court may consider an issue 'antecedent to . . . and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief."[32]

The Supreme Court's decision to assert a new legal basis in *United States National Bank of Oregon*, demonstrates the broader issues surrounding appellate courts' sua sponte authority. Appellate courts, including the Supreme Court, have not "articulate[d] any principled basis for determining when and under what circumstances a new issue will be considered" on appeal.[33] *Singleton*'s standard favors "unbridled discretion" instead of a principled approach and allows for appellate courts to raise new issues sua sponte by asserting various legal reasons.[34] The unbridled discretion provided to appellate courts when deciding issues sua sponte presents itself in a compiled list of fifteen different legal bases appellate courts have used to reason why they possess authority to consider new issues sua sponte:[35] (1) jurisdiction

---

26. The parties never challenged the statute's validity in the district court, in their opening briefs, at oral argument, or in their supplemental briefs, despite the court's invitation to address the issue. *Id.*

27. *Id.*

28. *Id.* at 444–45.

29. *Id.* at 447.

30. U.S. Nat'l Bank, 508 U.S. at 446–47.

31. *Id.* at 447 (citing Arcadia v. Ohio Power Co., 498 U.S. 73, 77 (1990)).

32. *Id.* (quoting Arcadia, 498 U.S. at 77).

33. Martineau, *supra* note 17, at 1024.

34. *See* Miller, *supra* note 11, at 1279, 1287–88.

35. Miller, *supra* note 11, at 1279–86.

(e.g., standing, capacity, and ripeness),[36] (2) limiting federal court power (e.g., comity, abstention, or sovereign immunity),[37] (3) questions of law,[38] (4) frivolous cases,[39] (5) important cases involving matters of public concern,[40] (6) to avoid plain error,[41] (7) "[w]hen the issue has already been mentioned,"[42] (8) "[w]hen there is little additional work involved,"[43] (9) "[t]o affirm the judgment below,"[44] (10) "[b]ecause the case is before trial,"[45] (11) "[t]o protect pro se litigants,"[46] (12) to determine facts,[47] (13) "[i]n the interest of justice,"[48] (14) "[b]ecause the issue is related to another issue before the court,"[49] and (15) "[f]or no reason at all."[50]

Parties remain uncertain whether an appellate court will raise a new issue sua sponte because appellate courts lack consistency. When a new

---

36. *Id.* at 1280 (collecting cases).

37. *Id.* at 1280–81 (collecting cases).

38. *Id.* at 1281–82 (collecting cases).

39. *Id.* at 1282.

40. *Id.*

41. Miller, *supra* note 11, at 1283 (collecting cases) ("[T]he Supreme Court reserves for itself the right to review plain error. Supreme Court Rule 24(1)(a) provides that at its option, 'the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.'").

42. *Id.* at 1284 (collecting cases) (stating how the court will raise issues already addressed in the briefing, argument, or raised by amici).

43. *Id.*

44. The Supreme Court is inclined to address issues not presented for review by the petitioner if the respondent asserts those issues "as an alternative ground for affirmance." *Id.* at n.151.

45. *Id.* (collecting cases).

46. Miller, *supra* note 11, at 1285.

47. *Id.*

48. *Id.* (stating how this principle is "meaningless, because any time the new issue would affect the result, it could be a miscarriage of justice for the party that lost below not to be permitted to raise the issue").

49. *Id.* at 1286 (explaining an issue is related to another when it is "'intimately bound up' with the Court's discussion and was 'easily subsumed within the question on which [it] granted certiorari'").

50. *Id.* (referencing a Supreme Court case where the Court reasoned it could raise the issue sua sponte because the Court is "'not always guided by concessions of the parties, and the very considerations of symmetry urged by the Government suggest that [the Court] first turn [its] attention' to this issue").

issue is raised it usually requires the appellate court to devote additional time beyond the original appealed decision to handle the new issue.[51] Furthermore, when an appellate court provides a new legal basis for asserting an issue sua sponte, given the case's individual facts, the courts ignore the judicial system's precedential value.[52] These among other issues provide reasons why the Supreme Court and appellate courts should be cautious about creating new principles for sua sponte authority.

B. Qualified Immunity

Under 42 United States Code Section 1983 ("Section 1983"), an individual can redress any statutory or constitutional violations caused by a state or local official acting under the color of law.[53] In defense, the state or local official may assert qualified immunity to shield themselves from monetary damages.[54] If the defendant successfully asserts qualified immunity, then the defendant is immune from suit entirely, not merely liability.[55]

The qualified immunity doctrine[56] arose from the Supreme Court's desire to protect government officials who make decisions in legally

---

51. Martineau, *supra* note 17, at 1032.

52. *Id.* at 1033.

53. The statute states, "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 . . . ." 42 U.S.C. § 1983 (2020). Qualified immunity only applies to damages claims that arise from actions made by the official in his official capacity. Harlow v. Fitzgerald, 457 U.S. 800, 819 n.34 (1982). Suppose a federal official violates an individual's constitutional rights. In that case the individual may bring a *Bivens* action, which is similar to qualified immunity and was created in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1938, n.6 (2018) [hereinafter *Intractability*].

54. *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009).

55. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

56. Qualified immunity is a judicially-created affirmative defense, and its origins are reasonably traced back to *Pierson v. Ray*, 386 U.S. 547, 554–57 (1967). *Intractability supra* note 52, at 1937 n.4.

uncertain situations.[57] The Court reasoned that government officials should not constantly fear the threat of litigation every time they make a decision.[58] Without some protection, government officials may make decisions based on intimidation and fear rather than grounded principles and logic.[59] The Supreme Court found it in the public's best interest to provide government officials with the qualified immunity defense, because it allows government officials to reasonably and independently exercise their duties without fearing consequences.[60]

To provide government officials this protection and also to protect the "public['s] interest in [deterring] unlawful conduct,"[61] the Supreme Court developed a two-step analysis for qualified immunity.[62] The first step requires courts to determine whether the official violated the plaintiff's constitutional or statutory right.[63] The second step requires courts to determine whether that right was clearly established at the time of the defendant's conduct, so the defendant was aware of the violation.[64]

Before 2009, the Supreme Court required lower courts to engage in this two-step procedure when ruling on qualified immunity.[65] It was mandatory for the lower courts to decide the first question before the second.[66] In doing so, if the court found the defendant's conduct did not violate a constitutional or statutory right under step one, then the court could skip the second step and find qualified immunity applied.[67] However, if a violation existed, then the Supreme Court required the

---

57. *See Pierson*, 386 U.S. at 554.

58. *Id.*

59. *See id.*

60. *Id.*

61. Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982). This interest refers to the civil remedy 42 U.S.C § 1983 provided to plaintiffs whose constitutional or statutory rights were violated by a state or local official. *Id.*

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

63. *Id.*

64. *Id.*

65. *Id.* Prior to 2009, the courts followed the Saucier test, but after 2009, the courts relied on *Pearson v. Callahan*, 555 U.S. 233, 236 (2009), to guide their analysis. Pearson v. Callahan, 555 U.S. 223, 234 (2009). Pearson is discussed in the following paragraph.

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

67. *Id.*

court to analyze the case under the second step as well.[68] If the court found the right was not clearly established at the time of the defendant's conduct under step two, then the court granted qualified immunity.[69] Therefore, under this framework, a court could find the defendant's conduct violated a constitutional or statutory right yet dismiss the claims under qualified immunity because the law was not clearly established at the time of the alleged incident.[70]

However, in 2009, the Supreme Court receded from the mandatory and "rigid" two-step approach[71] and made it optional.[72] Judges may now use their discretion to determine two things before ruling on qualified immunity: (1) which of the two steps they will analyze first, and (2) whether they will engage in step one's analysis at all.[73] Therefore, under *Pearson's* new standard, courts may grant qualified immunity by only assessing the second step—whether a right was clearly established at the time of the defendant's conduct.[74]

Before 2001, in *Gomez v. Toledo*,[75] the Supreme Court clarified that qualified immunity is an affirmative defense that the defendant has the burden to plead.[76] The Supreme Court further indicated there is "no

---

68. *Id.*

69. *See id.*

70. *See id.* at 201–02.

71. *Pearson*, 555 U.S. at 234.

72. In Pearson, the Supreme Court receded from Saucier's approach. It did not overrule Saucier. *Id.* at 235–36 ("urging the Court to reconsider Saucier's 'rigid' 'order of battle,' which 'requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (e.g., qualified immunity) that will satisfactorily resolve the case before the court'") (quoting Brosseau v. Haugen, 543 U.S. 194, 201–02 (2004) (Breyer, J., joined by Scalia and Ginsburg JJ., concurring)).

73. *Id.* at 236–43. Pearson allows courts to decide qualified immunity cases in four different ways: (1) when there is a clearly established right but no constitutional or statutory violation, (2) when there is both a clearly established right and constitutional or statutory violation, (3) when there is no clearly established right but there is a constitutional violation, and (4) when there is a clearly established right and the constitutional question should be skipped because it is not ripe for review. *See* Ted Sampsell-Jones & Jenna Yauch, Measuring Pearson in the Circuits, 80 FORDHAM L. REV. 623, 624 (2011).

74. *See Pearson*, 555 U.S. at 239–42.

75. Gomez v. Toledo, 46 U.S. 635 (1980).

76. *Id.* at 640.

basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith."[77] Despite *Gomez*'s reliance on an old qualified immunity rendition that included subjective bad faith as an element, the Supreme Court continues to uphold *Gomez* to clarify that qualified immunity does not create further pleading requirements for the plaintiff.[78]

C. Qualified Immunity at the Pleading Stage

During the pleading stage, a party may assert qualified immunity in a motion to dismiss, motion for judgment on the pleadings, or an answer. Typically, defendants assert qualified immunity in their answer and then raise it in a summary judgment motion.[79] Defendants may also raise qualified immunity at the motion to dismiss stage, but defendants are significantly less likely to do so because the legal standard is more stringent than that of a summary judgment motion.[80]

When ruling on a motion to dismiss based on qualified immunity, a court must consider two standards.[81] First, the complaint must contain facts supporting the defense.[82] Second, and similar to all motions to dismiss, the court may only grant the motion when it is beyond doubt that the plaintiff cannot provide any facts to support the claim.[83] This

77. *Id.*

78. *See* Crawford-El v. Britton, 523 U.S. 574, 595 (1998).

79. UCLA law professor Joanna C. Schwartz conducted an empirical study on five federal district courts and their rulings on qualified immunity, and she found qualified immunity "rarely served its intended role as a shield from discovery and trial." Joanna C. Schwartz, How Qualified Immunity Fails, 127 YALE L.J. 2 (2017). Throughout the 368 cases where litigants raised qualified immunity at least once, defendants asserted the defense in a motion to dismiss or judgment on the pleadings in only ninety-five cases (25.8%). *Id.* at 29. Whereas defendants asserted the defense in a motion for summary judgment in 229 cases (62.2%). *Id.*

80. McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004); Alvarado v. Litscher, 267 F.3d 648, 651–52 (7th Cir. 2001) (citations omitted) ("[W]e note that a complaint is generally not dismissed under Rule 12(b)(6) on qualified immunity grounds . . . Because an immunity defense usually depends on the facts of the case, dismissal at the pleading stage is inappropriate . . . .").

81. *See McKenna*, 386 F.3d at 436.

82. *Id. See* infra Section IV.iv for further discussion about this standard.

83. *McKenna*, 386 F.3d at 436.

requires the court to accept all the plaintiff's alleged facts as true[84] and draw all reasonable inferences in the plaintiff's favor, "not only those that support [the] claim but also those that defeat the immunity defense."[85] Given this standard, no factual disputes will exist. The court then looks to the plaintiff's alleged facts to determine whether the facts are similar enough to prove the law was clearly established at the time of the incident and whether a constitutional violation occurred.

However, pleading standards only require a plaintiff to "state a claim to relief that is plausible on its face."[86] A plausible claim requires a plaintiff to provide sufficient details about the specific instances to demonstrate the plaintiff may be entitled to relief.[87] Therefore, a plaintiff is not required to describe every detail or fact pertinent to the allegations.[88]

II. CIRCUIT COURTS ARE SPLIT ON WHETHER APPELLATE COURTS MAY ADDRESS QUALIFIED IMMUNITY FOR THE FIRST TIME ON APPEAL

Similar to *United States National Bank of Oregon*,[89] appellate courts relied on the *Singleton* standard to assert qualified immunity sua sponte. The Eighth and Second Circuit Courts of Appeals provided legal grounds for raising qualified immunity on their own.[90] Alternatively, the Fourth Circuit Court of Appeals denied hearing qualified immunity as a new issue on appeal and relied on the general rule to justify its decision.[91] Thus, a circuit split exists as to whether an

---

84. The court may only consider the facts alleged in "the complaint itself, documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice." Reed v. Palmer, 906 F.3d 540, 548 (7th Cir. 2018) (quotations and citations omitted).

85. *McKenna*, 386 F.3d at 436.

86. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

87. *See Reed*, 906 F.3d at 548.

88. *Id.*

89. U.S. Nat'l Bank v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439 (1993).

90. *See* Dean v. Blumenthal, 577 F.3d 60, 66, 67 n.6 (2d Cir. 2009); Hamner v. Burls, 937 F.3d 1171, 1176 (8th Cir. 2019); Story v. Foote, 782 F.3d 968, 969–70 (8th Cir. 2015).

91. *See, e.g.,* Suarez Corp. Indus. v. McGraw, 125 F.3d 222, 226 (4th Cir. 1997).

appellate court may address qualified immunity for the first time on appeal during the pleading stage.[92]

The two circuit courts that raised qualified immunity sua sponte reasoned that qualified immunity could be addressed for the first time on appeal for multiple reasons: the appellate court has the authority to (1) affirm on any grounds found within the record,[93] (2) raise and address pure questions of law,[94] (3) address the defenses established on the face of the complaint,[95] and (4) avoid novel constitutional law questions.[96]

On two separate instances, the Eighth Circuit asserted qualified immunity sua sponte during the pleading stage.[97] In *Story v. Foote*, the district court screened and dismissed the prisoner's Section 1983 civil rights claim against four correctional officers for failure to state a claim under 28 United States Code Section 1915(a) before service of process.[98] The plaintiff, Story, appealed and the Eighth Circuit requested a response from the defendants.[99] On appeal, the Eighth Circuit raised qualified immunity sua sponte.[100] It asserted it had the authority to do so because it can (1) "affirm on any ground supported by the record" and (2) "[i]t is unnecessary and inefficient to address whether Story adequately pleaded a constitutional violation . . . if the

---

92. This Comment does not focus on appellate courts deciding whether a trial court property raised qualified immunity sua sponte. However, there are instances where appellate courts have addressed this situation. *E.g.,* Sonoda v. Cabrera, 255 F.3d 1035, 1037 (9th Cir. 2001); Chavez v. Robinson, 817 F.3d 1162, 1165 (9th Cir. 2016); Easley v. City of Riverside, 765 F. App'x 282, 284 (9th Cir. 2019); Moore v. Morgan, 922 F.2d 1553, 1555 (11th Cir. 1991).

93. *Dean*, 577 F.3d at 66; *Hamner*, 937 F.3d at 1176; *Story*, 782 F.3d at 970.

94. *Dean*, 577 F.3d at 66; *Hamner*, 937 F.3d at 1176; *Story*, 782 F.3d at 970.

95. *Hamner*, 937 F.3d at 1176; *Story*, 782 F.3d at 970.

96. Hamner v. Burls, 937 F.3d 1171, 1176 (8th Cir. 2019); Story v. Foote, 782 F.3d 968, 970 (8th Cir. 2015). This Comment will not address the constitutional implications.

97. *Hamner*, 937 F.3d at 1176; *Story*, 782 F.3d at 970.

98. *Story*, 782 F.3d at 969.

99. *Id.*

100. *Id.* at 970; *see id.* at 975 (Bye, J., concurring in part and dissenting in part) ("[T]he district court did not discuss qualified immunity and the correctional officers [defendants] do not raise qualified immunity on appeal.").

defense of qualified immunity is established on the face of the complaint."[101]

Four years later, the Eighth Circuit relied on *Story*'s principles to again raise qualified immunity sua sponte in *Hamner v. Burls*.[102] In *Hamner*, a prisoner, Hamner, civilly sued prison officials under Section 1983 and pleaded a retaliation claim, two Eighth Amendment claims, and sought "damages, a declaratory judgment, and injunctive relief."[103] The district court granted the defendants' motion to dismiss all claims, and Hamner appealed.[104] By the time the Eighth Circuit addressed the appeal, Hamner's injunctive and declaratory judgment relief claims were moot and only damages remained.[105] Recognizing this, the Eighth Circuit viewed raising qualified immunity sua sponte as an "obvious question" given the changed circumstances.[106]

The court reasoned it had the authority to raise qualified immunity for various reasons.[107] First, since the Supreme Court cautioned against turning "'small cases into large ones[,]'"[108] it should not resolve a novel constitutional question when it could instead address a straightforward qualified immunity question.[109] Second, it relied on *Story*'s reasoning for the principle that it may affirm on any grounds found within the record and it is appropriate to resolve qualified immunity on appeal when established on the face of the complaint.[110] Third, since the case's posture materially changed (i.e., now only damages claims remained), "qualified immunity could be dispositive" to the remaining claims.[111] Fourth, qualified immunity presents "a purely legal issue that is

---

101. *Id.* at 970 (Colloton, J., majority) (citations omitted).

102. Hamner v. Burls, 937 F.3d 1171, 1176 (8th Cir. 2019) (requesting the parties file supplemental briefs addressing qualified immunity with the Eighth Circuit before arguing before the court).

103. *Id.* at 1175.

104. *Id.*

105. *Id.*

106. *Id.* (reasoning qualified immunity does not apply to injunctive or declaratory relief and can be used where state or local officials are sued in their official capacities).

107. Hamner v. Burls, 937 F.3d 1171, 1175–176 (8th Cir. 2019).

108. *Id.* (quoting Camreta v. Greene, 563 U.S. 692, 707 (2011)).

109. *Id.*

110. *Id.* at 1176.

111. *Id.*

amendable to consideration for the first time on appeal."[112] Fifth, the defendants claimed they would assert qualified immunity if the court remanded the case; therefore, to avoid the case's inevitable return to the court (i.e., procedural roundabout), the court chose to raise the issue on its own.[113]

Moreover, the Second Circuit also found it could raise qualified immunity sua sponte but differed in its reasoning. In *Dean v. Blumenthal*,[114] a state Attorney General candidate brought a Section 1983 civil rights claim alleging violations of the candidate's First Amendment right to receive campaign contributions and Fourteenth Amendment right to due process of law.[115] When the case reached the Second Circuit, all that remained were damages claims since the other requested relief had become moot.[116]

The Second Circuit chose to raise qualified immunity sua sponte, because it did not agree with the district court's reasoning and only damages claims remained.[117] According to the Second Circuit, the district court incorrectly conflated the injury-in-fact requirement when assessing the candidate's claim for Article III standing.[118] The court stated it could raise qualified immunity sua sponte because the court may affirm a lower court's decision on any grounds found in the record and may raise purely legal questions when there is "no need for additional fact-finding."[119] The Second Circuit found no additional fact-finding was necessary because "it is clear that a constitutional right to receive campaign contributes was not clearly established."[120] The court acknowledged that neither the Second Circuit nor the Supreme Court recognized (at the time of the alleged conduct) that candidates possessed a "First Amendment right to receive campaign contributions."[121]

---

112. *Id.*
113. *Id.*
114. Dean v. Blumenthal, 577 F.3d 60 (2d Cir. 2009).
115. *Id.* at 63.
116. *Id.* at 65–66.
117. *Id.* at 62, 66, 67 n.6.
118. *Id.* at 66 n.4.
119. *Dean*, 577 F.3d at 66, 67 n.6.
120. *Id.* at 68.
121. *Id.* at 69.

Alternatively, the Fourth Circuit Court of Appeals refused to consider qualified immunity for the first time on appeal. In *Suarez Corporation Industries v. McGraw*,[122] the plaintiffs filed nine causes of action against the Attorney General and Senior Assistant Attorney General of West Virginia.[123] The plaintiffs brought four of the nine counts under Section 1983 and the remaining five counts under state laws.[124] The defendants filed two motions to dismiss partially on the grounds of absolute immunity and did not allege qualified or sovereign immunity.[125] After the district court denied the motions, the defendants appealed the order, asserting they were entitled to absolute, qualified, and sovereign immunity.[126]

The Fourth Circuit refused to address qualified immunity because the defendant asserted it for the first time on appeal.[127] In doing so, the court upheld the well-settled rule; no party may raise a defense for the first time on appeal.[128] Additionally, the court highlighted it had refused to consider qualified immunity sua sponte in prior Section 1983 cases where the defendant did not preserve the defense below.[129]

III. PROBLEMS WITH RAISING QUALIFIED IMMUNITY SUA SPONTE DURING THE PLEADING STAGE

In the following sub-sections, this Comment will address the various problems with raising qualified immunity sua sponte: adversarial system, efficiency justifications, tension with the facts, and whether qualified immunity can be found on the face of the complaint.

---

122. Suarez Corp. Indus. v. McGraw, 125 F.3d 222 (4th Cir. 1997).

123. *Id.* at 224–25.

124. *Id.* at 225.

125. *See id.* at 224, 226. The first motion to dismiss responded to the original complaint, while the second motion to dismiss responded to the amended complaint. *Id.* at 224.

126. *Id.* at 226.

127. *Id.*

128. *Suarez Corp.*, 125 F.3d at 226.

129. *Id.* (citing Buffington v. Baltimore County, 913 F.2d 113, 120–22 (4th Cir. 1990)). The Fourth Circuit indicated other circuit courts also agree with this reasoning and cited cases from the Eleventh and Sixth Circuits. However, these cases do not involve appeals stemming from the pleading stage. *Id.* at 226 (citing Caban–Wheeler v. Elsea, 71 F.3d 837, 842 (11th Cir. 1996); Berryman v. Regiler, 47 F.3d 1167, 1995 WL 31575, at *4 (6th Cir. 1995)).

A. Adversarial System

When appellate courts raise qualified immunity sua sponte, they contravene the systematic foundations of our adversarial system. Parties must bring forth complaints and make strategic decisions about what motions to file and defenses to assert, not inquisitorial judges.[130] Yet, when an appellate court raises an affirmative defense on behalf of a party—let alone the government—the court, albeit not maliciously, blurs "the line between advocate and decisionmaker."[131] In turn, an appellate court's sua sponte decision appears to shift the power from the parties to the court when it assumes control over the issues presented and argued.[132] The judiciary may also seem biased and impartial due to the fact that qualified immunity, or any affirmative defense, heavily favors defendants.[133] This appearance of bias deteriorates the public's confidence that the judiciary remains independent, impartial, and competent when it raises dispositive defenses on behalf of the government.[134]

B. Sizing up the Appellate Courts' Efficiency Justifications for Raising Qualified Immunity Sua Sponte

From the circuit split, the two appellate courts implicitly utilize *Singleton*'s standard to assert why qualified immunity may be raised sua sponte for multiple reasons. However, not all grounds stated by the courts adequately justify raising qualified immunity sua sponte.

As a policy consideration, judicial efficiency cannot be the motivating factor for raising qualified immunity sua sponte. Qualified immunity serves to protect government officials, not the courts' efficiency. In *Hamner*, one of the many reasons why the appellate court raised qualified immunity is to prevent a "procedural roundabout."[135] Nevertheless, other appellate courts have rejected the efficiency argu-

---

130. *See* Brief of Professors of Civil Procedure and Federal Courts as Amici Curiae in Support of Petitioner at 4–5, Hamner v. Burls, 141 S.Ct. 611 (2020) (mem.), *cert. denied*, (No. 19–1291).

131. *Id.* at 6.

132. *See id.* at 6–7.

133. *Id.* at 6.

134. *See supra*, note 10.

135. Hamner v. Burls, 937 F.3d 1171, 1176 (8th Cir. 2019).

ment when ruling on qualified immunity before trial.[136] Those circuit courts did not address qualified immunity sua sponte because the defendants had an opportunity to raise qualified immunity on remand.[137] Therefore, the defendants suffered no prejudice by the courts' decisions.[138]

However, the distinction between the courts' reliance on efficiency highlights an important procedural distinction. The two circuit courts raised qualified immunity because they could dispose of the case entirely. Otherwise, the other circuit courts have recognized that the cases before them would return to the lower court regardless of if they dismissed the Section 1985 claim because the case involved other claims that would not be dismissed. This distinction outlines the circumstances where appellate courts inefficiently raise qualified immunity: when doing so would not dispose of the case entirely.

In *Hamner*, the Eighth Circuit incorrectly relies on judicial efficiency to raise qualified immunity sua sponte. The court considered that if it remanded the case, the defendant would assert qualified immunity, and then the case would be appealed once again.[139] Therefore, to avoid this procedural roundabout, the appellate court concluded it could address the issue, because qualified immunity is a pure question of law and the parties had notice and an opportunity to be heard on the issue.[140] Yet, the Eighth Circuit presented no intention to remand the case and the Defendant presented no intention to raise qualified immunity.[141] Instead, it presented a hypothetical indicating "if this court were to reject the district court's decision on any claim," then the defendants would assert qualified immunity below, and the case would once again be appealed to the appellate court to decide the qualified immunity issue.[142]

---

136. The cases addressed here contain a different procedural posture (i.e., summary judgment), but the efficiency argument remains consistent between the summary judgment and pleadings stage.

137. Narducci v. Moore, 572 F.3d 313, 325 (7th Cir. 2009); Bines v. Kulaylat, 215 F.3d 381, 385 (3d Cir. 2000).

138. *See* Kelly v. Foti, 77 F.3d 819, 822 (5th Cir. 1996); *Bines*, 215 F.3d at 385.

139. *Hamner*, 937 F.3d at 1176.

140. *Id.*

141. *See id.*

142. *Id.*

Conversely, in *Dean,* the Second Circuit, does not rely on the efficiency argument to justify raising qualified immunity sua sponte. Instead, the Second Circuit raised qualified immunity because it disagreed with the district court's reasoning.[143] The court explained why the district court's decision was incorrect and raised qualified immunity to affirm the decision, because it could affirm on any grounds found within the record.[144]

Overall, appellate courts should sparingly rely on the judicial efficiency justification when raising qualified immunity sua sponte because it justifies raising *any* affirmative defense sua sponte.[145] Defendants plead affirmative defenses to dispose of claims or entire cases; thus, affirmative defenses improve judicial efficiency when adequately asserted and granted. Allowing this policy to guide a court's decision to raise qualified immunity sua sponte will continuously favor raising qualified immunity or any affirmative defense sua sponte.

C. Qualified Immunity's Fact-Intensive Nature vs. Qualified Immunity as a Pure Question of Law

Appellate courts claim that raising qualified immunity sua sponte is proper because it is a pure question of law; however, qualified immunity is not an entirely legal question.[146] If courts address qualified immunity as a purely legal question during the pleading stage, this creates two concerns. First, a lack of adequate facts presents issues for the courts in deciding qualified immunity's first prong, a constitutional question. Second, the complaint's facts may not be adequate or robust enough to decide qualified immunity's second prong.

Additionally, on appeal from a motion to dismiss, a disparity exists between the facts necessary to establish qualified immunity and the facts necessary to satisfy general pleading standards. The analysis for a qualified immunity defense depends heavily on a case's particular facts. When ruling on a motion to dismiss, the court takes the facts asserted in the complaint as true and draws all reasonable inferences in

143. Dean v. Blumenthal, 577 F.3d 60, 66–67 (2d Cir. 2009).

144. *Id.*

145. *See* Brief of Professors, *supra* note 129, at 7.

146. *See* Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 241 (2006) [hereinafter *Facts*].

favor of the plaintiff.[147] However, pleading standards only require a plaintiff to set forth facts sufficient enough to allege a claim.[148] The Federal Rules of Civil Procedure do not require plaintiffs to assert robust facts so that a court may make a constitutional comparison to another previously decided case. Therefore, this tension is why courts have called a motion to dismiss a "'mismatch for [qualified] immunity and almost always a bad ground for [sic] dismissal.'"[149]

Another tension exists between qualified immunity's factual inquiry and the Supreme Court's push to resolve qualified immunity as soon as possible.[150] When a court assesses a case's sufficiency early in the litigation process (e.g., during the pleading stage), the court can only use the limited facts provided in the plaintiff's complaint.[151] If the factual record is sufficient to meet the pleading standards but insufficient to assess qualified immunity, then the court should not analyze qualified immunity. Instead, the parties should engage in limited discovery before the court considers qualified immunity, but doing so, undermines qualified immunity's purpose to preserve public officials from cumbersome discovery.

Professor Alan Chen ("Professor Chen") asserts the Supreme Court understood this tension and thwarted the need for discovery by giving the court all the decision-making power:[152]

> The Court is determined to accelerate the adjudication of immunity claims to avoid trial, and perhaps even discovery, by assigning to judges the function of deciding when an official's conduct violates clearly established constitutional law about which a reasonable official should know. That is, the Court's characterization of qualified immunity as a question of law is driven not by analytical factors ordinarily applied to the law/fact distinction, but by its purely functional

147. Hamner v. Burls, 937 F.3d 1171, 1174 (8th Cir. 2019).

148. *See* FED. R. CIV. P. 8(a).

149. Alvardo v. Litscher, 267 F.3d 648, 652 (7th Cir. 2001) (Easterbrook, J. concurring) (quoting Jacobs v. City of Chicago, 215 F.3d 758, 775 (7th Cir. 2000)).

150. *See Facts*, *supra* note 145, at 264.

151. *See id.* at 230.

152. *Id.* at 264.

> decision to allocate all decision making concerning qualified immunity to judges.[153]

Applying Professor Chen's argument to the pleading stage implies that the courts either mitigate or de-escalate the tension between expediency and the factual analysis. How the court defines the scope of the clearly established law will determine the relevant facts and ultimately dictate whether the parties must engage in additional fact-finding.

D. Can Qualified Immunity be Found on the Face of the Complaint?

Lastly, the two appellate courts indicate they may raise qualified immunity sua sponte because a court has the authority to raise grounds found within the record. If the court finds qualified immunity on the complaint's face, then the court finds qualified immunity is found within the record. However, what does it mean to find qualified immunity on the complaint's face?

In *Story* and *Hamner*, the Eighth Circuit summarily asserts that it can raise qualified immunity because this defense is established on the complaint's face.[154] But, the court fails to explain how it found qualified immunity "on the face of the complaint."[155] Instead, the court continues forward by analyzing qualified immunities second step—requiring the right violated be clearly establish at the time of the defendant's conduct. Specifically in *Story*, Judge Bye's dissent disagreed with the appellate court's decision to raise qualified immunity sua sponte, because he found the complaint's face did not establish qualified immunity.[156] He recommend the court could more appropriately assess qualified immunity after discovery and further briefing.[157]

Alternatively, in *Dean*, the Second Circuit implicitly concluded that beyond the complaint no additional fact-finding was necessary to raise and rule on qualified immunity.[158] This is where the Second and Eighth Circuits diverge. The Second Circuit reasoned no additional facts were

---

153. *Id.*

154. Story v. Foote, 782 F.3d 968, 970 (8th Cir. 2015); Hamner v. Burls, 937 F.3d 1171, 1176 (8th Cir. 2019).

155. *See Story*, 782 F.3d at 969–70.

156. *Id.* at 975–76 (Bye, J., concurring in part and dissenting in part).

157. *Id.* at 976.

158. *See* Dean v. Blumenthal, 577 F.3d 60, 67 n.6 (2d Cir. 2009).

needed because "it is clear that a constitutional right to receive campaign contributions was not clearly established."[159] The court then proceeded to demonstrate why this right was not clearly established by analyzing relevant case law.[160]

Conversely, in *Story* and *Hamner*, it was unclear whether the complaint established a clear constitutional right. The Eighth Circuit shifts through murky Fourth and Eighth Amendment case law comparing robust factual records to bare bone factual assertions found in the pleadings before it.[161] This distinction highlights that the courts' ability to declare whether the complaint established a qualified immunity defense depends upon what claims are asserted and the complaint's factual depth.[162]

IV. BEFORE APPELLATE COURTS RAISE QUALIFIED IMMUNITY SUA SPONTE, THEY SHOULD ANALYZE WHETHER SUFFICIENT FACTS EXIST TO RULE ON QUALIFIED IMMUNITY DURING THE PLEADING STAGE

When faced with procedurally similar situations (such as *Story, Hamner, and Dean*), appellate courts should first assess whether the facts contained in the complaint are sufficient for the court to rule on before raising qualified immunity sua sponte. Implementing this additional step will protect plaintiffs, ensure judicial efficiency does not eclipse justice, and guarantee that qualified immunity does not transform into an absolute immunity.

Qualified immunity presents a significant barrier for plaintiffs bringing Section 1983 claims, but it should not be unsurmountable. Re-

159. *Id.* at 68.

160. *Id.* at 68–70.

161. Story v. Foote, 782 F.3d 968, 971–72 (8th Cir. 2015) (highlighting Story's pleading deficiencies by stating, "Story does not allege that the male officers knew that female offices would observe" and, "Story does not allege that a more private, yet equally secure and cost-effective means of conducting the body-cavity inspection was readily available to the officers."); Hamner v. Burls, 937 F.3d 1171, 1177–78 (8th Cir. 2019) (recognizing Hamner's assertion that the gaps in his treatment continued to occur but dismissing it).

162. If the defendant believes the complaint fails to state a claim, then the defendant must assert those grounds in addition to qualified immunity. Otherwise, the court must accept the plaintiff's factual assertion as true. *See Facts*, *supra* note 145, at 273 (quoting Imbler v. Pachtman, 424 U.S. 409 n.13 (1976)).

quiring appellate courts to determine whether the complaint presents an adequate factual basis before the court raises and rules on qualified immunity protects plaintiffs' rights to redress their harms. Courts must be prevented from oversimplifying qualified immunity's fact-intensive nature and summarily dismissing plaintiffs' cases.

Additionally, requiring appellate courts to engage in this additional step will ensure judicial efficiency does not eclipse the courts' proper and just functioning. Affirmative defenses heavily favor the defendant, and defendants have the burden to raise the defense or risk forfeiting the right to it. Thus, when appellate courts raise an affirmative defense sua sponte, the judiciary may appear biased. But, by specifically assessing the case's factual adequacy, this Comment's proposed suggestion attenuates the courts' bias from its intention to rule efficiently. Moreover, it will often stop the courts from making an oversimplified "yes" or "no" decision regarding qualified immunity and instead recognize its fact-intensive nature. Engaging in a more robust review of the factual record will allow a case to be justly adjudicated and strengthen the public's confidence in the judiciary.

If courts do not continue to uphold qualified immunity's distinct nature of eligibility, then the courts will enlarge qualified immunity's protection and it will begin to resemble absolute immunity.[163] Qualified immunity and absolute immunity are two distinct defenses. A court can only grant qualified immunity when the defendant qualifies for it, whereas with absolute immunity, the court may grant it regardless of the defendant's conduct or circumstances.[164] More specifically, a defendant qualifies for immunity when the plaintiff cannot prove that at the time of the incident the defendant violated the plaintiff's constitutional or statutory rights.

While the legislature and courts can grant absolute immunity to public officials, no statutes or judicial rulings indicate intentions to do so. Moreover, granting absolute immunity to state and local officials would severely limit a plaintiff's ability to redress their harms through Section 1983 claims, which will effectively gut the statute's functions to compensate victims and deter perpetrators.[165] Therefore, to maintain qualified immunity's qualified nature, courts must continue to

163. *Id.* at 274.
164. *See id.* at 273.
165. *See id.* at 275.

guarantee their qualified immunity decisions do not compromise the defense's qualified nature.

Accordingly, if appellate courts continue to raise qualified immunity sua sponte, it should only be under the factual circumstances akin to *Dean*. *Dean* states that the law requires courts to acknowledge that no additional fact-finding is necessary to conduct qualified immunity fact-specific analysis under the first step. This statement of the law differs from *Story* and *Hamner*, where the court summarily asserted that the complaint established qualified immunity on its face and did not assess whether additional fact finding was necessary.[166] Moreover, analyzing qualified immunity's second step heavily relies on the facts. If additional fact finding is necessary to create a sufficient factual record, then the appellate court should not address qualified immunity sua sponte during the pleading stage.

If an appellate court cannot address qualified immunity because of a factual deficiency, this does not make certain that defendants will endure unnecessary litigation. Instead, if the appellate court remands the case, the district court may employ a few actions. First, the district court could grant a defendant's motion for a more definite statement.[167] This will require plaintiffs to present additional facts underlying their claim. Second, if the circumstances require the parties to engage in discovery, then the courts may "limit the timing, sequence, frequency, and extent of that discovery."[168]

CONCLUSION

Appellate courts should refrain from oversimplifying their decisions to raise qualified immunity sua sponte to a yes or no question. Instead, appellate courts should only raise qualified immunity sua sponte under narrow circumstances: when doing so (1) disposes of the case entirely, and (2) allows the court to address qualified immunity as a pure question of law (i.e., no additional facts are needed to make a decision). Confining the courts to these circumstances aligns with the general rule and corrals *Singleton*'s unbridled discretion to a more principled approach. Additionally, it prevents plaintiffs' claims and chances for recovery from being summarily dismissed. By side-

166. *See* discussion *supra* Section IV.iv.

167. Thomas v. Indep. Twp., 463 F.3d 285, 301 (3d Cir. 2006).

168. *Id.*

stepping this additional measure, appellate courts will harm plaintiffs, the integrity of the appellate system, and enlarge qualified immunity's protection.

Mary R. Powell[*]

---

* J.D. Candidate, California Western School of Law, 2022; Editor in Chief, *California Western Law Review*; B.A. Economics, University of San Diego, *magna cum laude*, 2019. I have many thanks to give. First, thank you to my faculty advisor, Professor Allison Cato, for her feedback and guidance. I am also grateful for and thank the *California Western Law Review* team for their diligent editing. Last, I owe many thanks to the Powell and Dickerson families who supported me through the entire writing, editing, and publication process.