University of Dayton Law Review

Volume 47 | Number 1 Article 6

1-1-2022

# Qualified Immunity: Sculpting a Statute-esque Solution to a Judicially Created Policy Comments

Daniel Rafferty
*University of Dayton*

# Qualified Immunity: Sculpting a Statute-esque Solution to a Judicially Created Policy Comments

## Cover Page Footnote

I would like to thank my faculty advisors, Professors Thaddeus Hoffmeister and Jeanette Cox, both of whom helped strengthen and streamline my writing and analysis throughout the drafting process. I would also like to thank the attorneys at the Institute for Justice ("IJ") for their help researching this Comment and serving as a springboard for all my analysis. Specifically, I want to thank Anya Bidwell, IJ's Elfie Gallun Fellow in Freedom and the Constitution and a leader of IJ's Project on Immunity and Accountability, for providing me with initial research guidance, as well as Anthony Sanders, IJ's Director of their Center for Judicial Engagement, for helping me locate a three-second quote amongst hours of podcast content. Lastly, I give my deepest gratitude to Dustin Ireland, my friend and mentor, whose support and guidance helped successfully transition me from the demands of the military to the rigors of law school.

# COMMENT:

# QUALIFIED IMMUNITY: SCULPTING A STATUTE-ESQUE SOLUTION TO A JUDICIALLY CREATED POLICY

*Daniel Rafferty*[*]



[*] J.D. Candidate, 2022, University of Dayton School of Law. I would like to thank my faculty advisors, Professors Thaddeus Hoffmeister, and Jeanette Cox, both of whom helped strengthen and streamline my writing and analysis throughout the drafting process. I would also like to thank the attorneys at the Institute for Justice ("IJ") for their help researching this Comment and serving as a springboard for all my analysis. Specifically, I want to thank Anya Bidwell, IJ's Elfie Gallun Fellow in Freedom and the Constitution and a leader of IJ's Project on Immunity and Accountability, for providing me with initial research guidance, as well as Anthony Sanders, IJ's Director of their Center for Judicial Engagement, for helping me locate a three-second quote amongst hours of podcast content. Lastly, I give my deepest gratitude to Dustin Ireland, my friend, and mentor, whose support and guidance helped successfully transition me from the demands of the military to the rigors of law school.

"[A] body of men holding themselves accountable to nobody, ought not to be trusted by anybody."[1]

## I. INTRODUCTION

Imagine walking along the sidewalk when men in street clothes accost you, ask for identification, push you against their car, and try to take your wallet.[2] Scared and convinced you're getting mugged, you struggle and try to run away, only to find yourself tackled to the ground and pummeled mercilessly.[3] You cry out for help, and some good Samaritans call the police while recording what is unfolding in front of their eyes.[4] But when the police arrive, you're shocked to learn that the men assaulting you are themselves law enforcement; things only get worse as you're handcuffed to the hospital bed, charged with assaulting a police officer and resisting arrest, and held in a jail cell until your parents can bail you out—all because you were misidentified as someone with an arrest warrant.[5] You fight the charges, get acquitted, and initiate a years-long process of trying to hold these officers accountable, only to face procedural and policy hurdles that create all but impenetrable shields that keep these officers immune.[6] Now, the fate of your case and countless future immunity cases rests in the hands of the Supreme Court.[7] Such has been the ordeal of Jacob King.[8]

While government immunity is not a novel concept, qualified immunity is a more recent addition to the legal canon.[9] Originally created as a "good faith" exception in the 1967 case *Pierson v. Ray*, the policy really gained force fifteen years later.[10] Stemming from the landmark case *Harlow v. Fitzgerald*, the Court held that under 42 U.S.C. § 1983, "government officials . . . are shielded from liability for civil damages insofar as their conduct does not violate *clearly established* statutory or

---

[1] THOMAS PAINE, RIGHTS OF MAN 116 (Claire Grogan eds., 2011) (1737).

[2] Radley Balko, *Opinion: State-federal task forces are out of control*, WASH. POST (Feb. 14, 2020), https://www.washingtonpost.com/opinions/2020/02/14/state-federal-task-forces-are-out-control/.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.;* Brownback v. King, 140 S. Ct. 2563 (2020) (granting cert.); *see also* Baxter v. Bracey, 140 S. Ct. 1862 (2020), (denying cert.). Justice Thomas's dissent discussed the Court's refusal to hear new cases on qualified immunity. *Id.* at 1069 (Thomas, J., dissenting).

[8] *See generally* Balko, *supra* note 2. At the time of the assault, Jacob King was a 21-year-old college student on his summer break. *Id.* The assault happened as he was walking along a public sidewalk between summer jobs. *See id.* The legal costs involved with proving his innocence in state court bankrupted his parents. *Id.* At the time of writing, his civil suit against the assaulting officers has yet to make it to trial as the officers continue to fight to get the case dismissed. Jordan S. Rubin, *'Fight Continues' Post-SCOTUS for Man Beaten by Officers (3)*, BLOOMBERG LAW, https://news.bloomberglaw.com/us-law-week/man-beaten-by-officers-loses-high-court-case-over-civil-suit (Feb. 25, 2021, 5:27 PM).

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

[10] Billy Binion, *The Cops Who Sicced a Dog on a Surrendered Suspect Got Qualified Immunity. SCOTUS Won't Hear the Case.,* REASON (June 15, 2020, 1:55 PM), https://reason.com/2020/06/15/police-qualified-immunity-supreme-court-clarence-thomas-baxter/.

constitutional rights . . . ."[11] But what constitutes a "clearly established" right? In the years following *Harlow*, the Court's standing policy has led lower courts to answer this question by turning qualified immunity into a perverse game of "Go Fish."[12] In essence, plaintiffs are forced to find another case already on the books with nearly identical facts and circumstances in order to prove their rights were "clearly established."[13] For example, precedent in one jurisdiction showed that police violated someone's clearly established rights when they sicced a police dog on a suspect who was surrendering while lying on the ground.[14] In contrast, that same jurisdiction found there was no violation of a clearly established right when police sicced a dog on a suspect who was surrendering while seated with his hands raised.[15] This constricting method for defining rights has made it increasingly difficult for injured citizens to seek redress when the government infringes on those rights.

And yet, in light of a rash of high-profile and deadly interactions between the police and individual citizens, nationwide attention has been steadily increasing on the policy of qualified immunity.[16] Numerous calls for legislative action have accompanied the widespread public outcry over these apparent acts of police misconduct.[17] In response, some legislators have narrowly tailored their proposals to address the specific type of police conduct or policy that led to the situations now under scrutiny.[18] But others, riding the widespread anti-law enforcement sentiments that accompanied the Black Lives Matter protests in the summer of 2020, have set their sights on broader, more sweeping changes to foundational policing policies.[19]

---

[11] 457 U.S. 800, 818 (1982) (emphasis added).

[12] *See Project on Immunity and Accountability*, INSTITUTE FOR JUSTICE, https://ij.org/issues/project-on-immunity-and-accountability/ (last visited Jan. 17, 2022).

[13] *Id.*

[14] Campbell v. City of Springboro, Ohio, 700 F.3d 779, 782 (6th Cir. 2012).

[15] Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (denying cert.) (Thomas, J., dissenting); Baxter v. Bracey, 751 F. App'x 869, 870 (6th Cir. 2018).

[16] *See* Jay Schweikert, *Police immunity highlighted by George Floyd protestors must end, and officers must pay*, NBC NEWS, nbcnews.com/think/opinion/police-immunity-highlighted-george-floyd-protesters-must-end-officers-must-ncna1225281/ (June 15, 2020, 2:27 PM); Gene Demby, *An Immune System*, NPR (July 8, 2020, 12:06 AM), npr.org/2020/06/12/876212065/an-immune-system; *Atlanta police shooting: Rayshard Brooks death declared homicide*, BBC (June 15, 2020), https://www.bbc.com/news/world-us-canada-53047282.

[17] Ivan Pereira, *George Floyd's killing sparks calls for police reform, and some unions are acknowledging the call*, ABC NEWS (June 14, 2020, 9:13 AM), https://abcnews.go.com/US/george-floyds-killing-sparks-calls-police-reform-unions/story?id=71172743.

[18] *See* Press Release, Sen. Rand Paul, United States Senator for Kentucky, Sen. Rand Paul Introduces the 'Justice for Breonna Taylor' Act (June 11, 2020), https://www.paul.senate.gov/news/sen-rand-paul-introduces-justice-breonna-taylor-act; *see also* Kimberly Kindy et al., *Half of the nation's largest police departments have banned or limited neck restrains since June*, WASH. POST, https://www.washingtonpost.com/graphics/2020/national/police-use-of-force-chokehold-carotid-ban/ (Sept. 6, 2020, 10:47 PM).

[19] Press Release, Chair Jerrold Nadler, House Committee on the Judiciary, Chair Bass, Senators Booker and Harris, and Chair Nadler Introduce the Justice in Policing Act of 2020 (June 8, 2020), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3005; *see also* Sumitra Nair, *Black Lives Matter timeline*, WEEK (Dec. 26, 2020, 12:08 PM), https://www.theweek.in/news/world/

This Comment will analyze the potential effectiveness of three separate pieces of proposed federal legislation that aim to address qualified immunity. To set a historical foundation, Part II will examine the long history of the statute on which qualified immunity is based, beginning with its origins as the Ku Klux Klan Act and tracing its evolution via Supreme Court precedents up to its modern incarnation. Part III will then examine the three proposed pieces of federal legislation aimed at closing the "good faith" loophole under 42 U.S.C. § 1983 and extrapolate their potential effects on the modern civil rights issues presented by qualified immunity. Finally, Part IV will discuss the potential ramifications of a change to § 1983 and propose additional reforms that could supplement the effectiveness of any legislative changes to qualified immunity.

Any changes to 42 U.S.C. § 1983 would ultimately benefit citizens looking to hold government officials accountable when their rights are violated. However, the Supreme Court's longstanding practice of shielding government officials from civil suits would likely continue to restrict citizens' chances at successfully suing government officials. Ultimately, any changes made via legislation without an accompanying shift in judicial policy would only incentivize those officials to develop more creative and esoteric methods for insulating themselves from accountability.

## II. BACKGROUND

### A. *Origin of § 1983*

Early on during the Civil War Reconstruction era, the federal government faced many problems in ensuring that newly freed Black Americans received full access to the rights and privileges due to them under the 14th Amendment.[20] In 1866, the racial animus that raged across the former Confederate States gave rise to the Ku Klux Klan ("KKK"), and the fledgling organization rapidly spread throughout the South, carrying with it a "huge wave of murder and arson . . . ."[21] It became increasingly difficult to prosecute and convict offenders due to widespread racism and the KKK's centralized planning; Klan members and sympathizers would either infect jury pools or conspire with government officials to block any cases from

2020/12/26/black-lives-matter-timeline.html (providing more information about Black Lives Matter and the 2020 timeline of events). For context, Black Lives Matter is a group that evolved out of a Twitter hashtag in 2013 and came into national prominence in 2014 after the death of Michael Brown at the hands of law enforcement; *Black Lives Matter: From Hashtag to Movement*, ANTI-DEFAMATION LEAGUE, https://www.adl.org/education/educator-resources/lesson-plans/black-lives-matter-from-hashtag-to-movement (June 2, 2020) (providing historical information about Black Lives Matter).

[20] Baxter v. Bracey, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting) (citing Briscoe v. LaHue, 460 U. S. 325, 337 (1983)).

[21] RON CHERNOW, GRANT 588, 621 (2017).

coming before the court at all.[22] This "insecurity of life and property" led the U.S. House of Representatives to create a committee for further investigation.[23] President Grant, trying to convey the dire state of affairs and the need for some kind of federal action, wrote to the committee directly, stating:

> A condition of affairs now exists in some of the States of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. 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.[24]

Within a week of the President's message, a bill was reported to the House that significantly matched the statutes that would eventually be ratified as the Ku Klux Klan Act of 1871.[25]

As with many federal policies during Reconstruction, the Bill faced stiff opposition.[26] However, once ratified, the Act provided two provisions for redressing violations of individuals' rights while also empowering the federal government to take necessary actions to enforce the Act.[27] One provision, codified in Section 2 of the Act, provided for civil and criminal sanctions for anyone who conspired to: "(1) challenge federal authority, (2) deprive persons 'of the equal protection of the laws, or of equal privileges or immunities under the laws,' or (3) prevent states from protecting persons against deprivations of their rights."[28] This Section of the Act created private enforcement regimes that were designed for use against private actors in lieu of effective state remedies.[29] But it was Section 1 of the Act that provided the first instance of what is now 42 U.S.C. § 1983, clearing the way

---

[22] Paul J. Gardner, *Private Enforcement of Constitutional Guarantees in the Ku Klux Act of 1871*, *in* 2 CONST. STUD. 81, 87–88 (2016); Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870─1890*, 53 J. SOUTHERN HIST. 421, 431–32 (1987).

[23] Alfred Alvins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U. L.J. 331, 332 (1967) (citing Cong. Globe, 42nd Cong., 1st Sess. 116–17 (1871)).

[24] *Id.* at 332 n.10 (citing Cong. Globe, 42nd Cong., 1st Sess. 236 (1871)).

[25] *Id.* at 332–33.

[26] *See generally* Alvins, *supra* note 23 (summarizing the legislative history of the Act and its basis under the 14th Amendment).

[27] Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 485 (1982).

[28] *Id.* (quoting the Civil Rights Act of 1871 § 2).

[29] *See* Gardner, *supra* note 22, at 87.

for individuals to seek redress when their constitutional rights were violated under the color of state law.[30] And for the first two years, the Act was fairly successful, seeing a total of 3,384 indictments against the KKK that ultimately led to 1,143 convictions.[31]

But this success was short-lived.[32] Opponents of national civil rights quickly seized on the opportunity to litigate whether a strict construction of the 14th Amendment authorized the sweeping enforcement legislation Congress had been passing.[33] The first and most critical blow came from the *Slaughterhouse Cases* in 1873, decided barely two years after the passage of the Ku Klux Klan Act.[34] In its decision, the Court narrowly interpreted the Privileges and Immunities Clause of the 14th Amendment in a way that effectively undercut the application of any of Congress's civil rights programs.[35] Within a decade, Section 2 of the Ku Klux Klan Act would be voided by *United States v. Harris*, leaving only the Section 1 provision, § 1983's statutory predecessor, which would not see significant litigation until the 1950s and 60s.[36]

Modern jurisprudence under the updated statute, now codified as 42 U.S.C. § 1983, began to increase with the Civil Rights Movement.[37] *Monroe v. Pape*, a milestone case for both civil rights and qualified immunity, saw the statute plucked out of relative obscurity and reevaluated in light of other cases interpreting the meaning of "color of state law" from similar statutes.[38] The plaintiff-appellants, a Black family with six children, found themselves at the mercy of thirteen Chicago police officers who broke into their home while they were asleep and forced them to stand naked in the living room as their house was ransacked.[39] The officers then detained the father without a warrant for 10 hours while interrogating him without granting him access to counsel or officially filing charges against him.[40]

In a lengthy opinion, the Court found that the cause of action provided under § 1983 was not invalid simply because both state and common law provided avenues of recovery for the officers' actions; neither was § 1983's

---

[30] Alvins, *supra* note 23, at 332.
[31] CHERNOW, *supra* note 21, at 708.
[32] Jamison v. McClendon, 476 F. Supp. 3d 386, 400–01 (S.D. Miss. 2020).
[33] Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1337 (1952).
[34] *Id.*
[35] *Id.* For further discussion on the invalidity of the *Slaughterhouse* cases, see George Thomas, *Who's Afraid of Original Meaning?*, POL'Y REV. (Dec. 1, 2010), https://www.hoover.org/research/whos-afraid-original-meaning; Randy E. Barnett, *The Three Narratives of the Slaughter-House Cases*, 41 J. SUP. CT. HIST. 295 (2016).
[36] 106 U.S. 629, 644 (1882); Gardner, *supra* note 22, at 88.
[37] *See e.g.,* Monroe v. Pape, 365 U.S. 167 (1961).
[38] *Id.* at 183 (citing United States v. Classic, 313 U.S. 299 (1941); Screws v. United States, 325 U.S. 91 (1945)).
[39] *Id.* at 169–70.
[40] *Id.*

coverage limited to actions taken purely under codified state law.[41] Borrowing language from *United States v. Classic*, the Court reaffirmed the standard that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[42] While observing a procedural difficulty in distinguishing between "authorized and unauthorized deprivations of constitutional rights" when interpreting color of state law, Justice Harlan's concurrence ultimately accepted that *stare decisis* dictated the Court's holding.[43] In contrast, Justice Frankfurter's dissent opined that the majority's interpretation of § 1983 was too expansive and merely duplicative of the 14th Amendment's original reach.[44] The Court ultimately found that the plaintiff-appellants had properly stated a claim, and while the statute didn't create liability in the City of Chicago, the individual officers could be civilly liable.[45]

Despite this momentous precedent, a foundation was already being laid for future judicial restrictions on § 1983's applicability.[46] As the Court explicitly detailed in later cases, § 1983 had "no mention of defenses or immunities, [so the Court] read it in harmony with the general principles of tort immunities and defenses" because it assumed that "'Congress would have specifically so provided had it wished to abolish' them."[47] Even prior to *Monroe*, the Supreme Court had been delimiting where government officials were unreachable for violations of individual rights.[48] The first hints of the modern scheme of qualified immunity came about in *Pierson v. Ray*, where the Court found that even if police were operating under an unconstitutional statute, they were immunized from suit if they were acting under a good faith belief that the statute in question was valid.[49] And while the Court initially attempted to develop a subjective standard for determining whether or not someone's right was clearly established, this was all undone by *Harlow v. Fitzgerald*.[50]

---

[41] *Id.* at 183–84.
[42] *Id.* at 184 (quoting *Classic*, 313 U.S. at 326).
[43] *Id.* at 202.
[44] *Id.* at 211–12.
[45] *Id.* at 192 (reversing the lower court's dismissal of the case).
[46] *See* Jamison v. McClendon, 476 F. Supp. 3d 386, 402 (S.D. Miss. 2020).
[47] Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring) (citations omitted)*; see also* discussion *infra* note 95 and accompanying text.
[48] *See* Tenney v. Brandhove, 341 U.S. 367 (1951) (finding elected officials immune from civil liability for potentially violating individual rights in the course of typical duties such as committee hearing testimonies).
[49] 386 U.S. 547, 557 (1967).
[50] Wood v. Strickland, 420 U.S. 308, 322 (1975) (establishing a subjective standard when an official "knew or reasonably should have known that the action [was taken] within his sphere of official responsibility would violate the [plaintiff's] constitutional rights . . . ."); *see generally* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

B. *The Crossroads:* Harlow v. Fitzgerald

Nothing quite freezes or destroys litigation like a brush with sovereign immunity, especially if it's absolute immunity.[51] During the transition between the Johnson and Nixon administrations, A. Ernest Fitzgerald suddenly found himself propelled into the national spotlight when he testified before Congress that a military acquisition program would see budget overruns of approximately two billion dollars.[52] Roughly a year later, Fitzgerald found himself discharged from government service, purportedly as a result of organizational restructuring and a reduction in force in the Department of the Air Force.[53] Suspecting that the discharge was retaliation for the unflattering testimony he had provided, Congress launched an investigation.[54] President Nixon promised to look into it, and while he initially attempted to find Fitzgerald another job at a different executive agency, resistance within his administration prevented anything from coming to fruition.[55] Eventually, the Civil Service Commission concluded that Fitzgerald's dismissal was the result of reasons specific to him and not agency restructuring; however, it ultimately concluded that it was not a retaliatory action.[56]

Unconvinced by the Commission's findings, Fitzgerald spent years litigating his case in federal court.[57] After repeated amendments and extensive discovery, the suit was eventually narrowed down to just President Nixon and two White House aides.[58] When the district court ruled that neither the President nor his aides had absolute immunity, all three appealed, with the aides raising the issue in a separate case from President Nixon.[59] The D.C. Circuit Court of Appeals dismissed both appeals.[60] Because the Supreme Court had not yet ruled on the scope of immunity available to either the President or his senior aides and advisors, both cases were granted certiorari.[61] The President's case, *Nixon v. Fitzgerald*, became a significant constitutional law precedent that helped solidify the boundaries of absolute immunity as an executive privilege.[62]

In contrast, while *Harlow* did not recognize absolute immunity for White House aides, it did alter the face of the qualified immunity doctrine.[63]

---

[51] *See generally* Nixon v. Fitzgerald, 457 U.S. 731 (1982).
[52] *Id.* at 734.
[53] *Id.* at 733–34.
[54] *Id.* at 734.
[55] *Id.* at 735–36.
[56] *Id.* at 738–39.
[57] *Id.* at 739–40.
[58] *Id.* at 740.
[59] Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).
[60] *Id.*; Nixon v. Fitzgerald, 457 U.S. 731, 741 (1982).
[61] *Harlow*, 457 U.S. at 806; *Nixon*, 457 U.S. at 741.
[62] *See Nixon*, 457 U.S. at 757.
[63] *See generally* Stephen J. Shapiro, Public Officials' Qualified Immunity in Section 1983 Actions Under Harlow v. Fitzgerald and its Progeny: A Critical Analysis, 22 U. MICH. J.L. REFORM 249 (1989).

Unlike a comparable precedent that recognized legislative aides have a form of absolute immunity derived from the Congressperson for whom they worked, the Court ruled that White House aides could not be afforded a similar immunity.[64] However, in choosing to grant Nixon's aides qualified immunity, the Court found that their previous attempts to refine the rule for determining whether an official acted in "good faith" were no longer sufficient.[65]

As mentioned previously, the Court utilized a standard that involved both an "objective" and a "subjective" component.[66] Under that analysis, the defense of qualified immunity would not apply if a government official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . ."[67] However, in *Harlow* the Court observed that the continued use of a subjective aspect to the "good faith" test was incompatible with other precedent requiring "that insubstantial claims should not proceed to trial."[68] Because subjective motivations are questions of fact, the Court observed that cases could drag on through discovery and initial proceedings in a way that was "disruptive of effective government."[69] To address this incompatibility, the Court held that officials performing discretionary functions would not be liable for civil damages unless their conduct violated "*clearly established* statutory or constitutional rights of which a reasonable person would have known."[70] Thus began the change in § 1983's legal analysis that would eventually go on to redefine how qualified immunity would be applied, functionally blocking countless meritorious suits from ever making it to trial.

### C. *Qualified Immunity in the Wake of* Harlow v. Fitzgerald

If *Monroe v. Pape* tipped the scales in favor of the rights of citizens, then *Harlow* exceedingly rebalanced them in favor of the government. Now faced with a new rule for denying qualified immunity, lower courts were left to wrestle with what exactly constituted a right that was "clearly established." It was not long before the issue found its way back to the Supreme Court for further guidance, and *Davis v. Scherer* presented the first opportunity to expound on the new doctrine.[71] Initially decided before *Harlow*, the appellee in *Davis* had secured a judgment against his superiors

---

[64] *Harlow*, 457 U.S. at 810–11.
[65] *Id.* at 815.
[66] *See* Wood v. Strickland, 420 U.S. 308, 321 (1975).
[67] *Id.* at 322 (emphasis added).
[68] Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982) (citing Butz v. Economou, 438 U.S. 478 (1978)).
[69] *Id.* at 816─817.
[70] *Id.* at 818 (emphasis added).
[71] *See generally* Davis v. Scherer, 468 U.S. 183 (1984).

in the Florida Highway Patrol for violating state statutes regarding pre- and post-termination hearings.[72] However, the Supreme Court reversed the lower court's decision, stating that "merely because [an officer's] conduct violate[d] some statutory or administrative provision" does not mean they forfeit their qualified immunity for violating other statutes or constitutional provisions.[73] Quixotically, the Court contextualizes this justification because officials protected by qualified immunity "are subject to a plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that [they] can only comply with or enforce them selectively.'"[74] In his dissent, Justice Brennan articulated why he felt the appellee's rights were "plainly violated" and that the majority's new ruling would "seriously dilute[] *Harlow's* careful effort to preserve the availability of damages actions against governmental officials . . . ."[75] And in just a few short years, Justice Brennan's fears would come true.

In the years following *Harlow*, the Court's consistent and carte blanche recognition of qualified immunity has further restricted plaintiffs' abilities to seek redress for the wrongs they have suffered.[76] Yet, even as the Court continued to apply qualified immunity in an ever-increasing number of situations and enshrine whatever extra immunities they could, the Court was simultaneously quick to identify and eliminate historical jurisprudence that frustrated the application of qualified immunity.[77] For example, the Court thought it sensible to assume that common law tort immunities were not moot because of § 1983 since the Reconstruction Congress did not expressly disclaim them when they wrote the initial statute; however, the Court paradoxically found that English common law punishments for officials who illegally searched a third party's property no longer had a place in modern caselaw.[78] As more time has passed since *Harlow*, fewer qualified immunity cases have been granted certiorari, and "nearly all of the Supreme Court's qualified immunity cases come out the same way–by finding immunity for the officials."[79]

For much of recent history, a consistent through-line on most of the Court's decisions is its attempt to reduce the excessive administrative and

---

[72] *Id.* at 187–89.

[73] *Id.* at 194–95.

[74] *Id.* at 196 (quoting Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs, 66 (1983)).

[75] *Id.* at 198 (Brennan, J., concurring in part and dissenting in part).

[76] *See, e.g.*, Malley v. Briggs, 475 U.S. 335 (1986) (finding qualified immunity for an unreasonable arrest could only be defeated if a reasonably well-trained officer in the same or similar situations would have known their application for a warrant was unreasonable); Anderson v. Creighton, 483 U.S. 635, 640 (1987); Wilson v. Layne, 526 U.S. 603, 614–15 (1999) (requiring specificity for a right to have been clearly established).

[77] *See Anderson,* 483 U.S. at 640.

[78] *Compare* Tenny v. Brandhove, 341 U.S. 367, 376 (1951)*, and* Pierson v. Ray, 386 U.S. 547, 554–55 (1967)*, with Anderson*, 483 U.S. at 644–45.

[79] William Baude, *Is Qualified Immunity Unlawful?,* 106 CAL. L. REV. 45, 82 (2018).

litigation burdens that it believes civil suits place on the government and its officials, particularly in cases concerning qualified immunity.[80] Yet, this judicial policy also created precedents outside the realm of qualified immunity that have significantly impacted how plaintiffs can sue when their rights are violated. Among other notable cases, the recent change in standards for initial pleadings that stem from *Twombly* and *Iqbal* have also presented significant hurdles.[81] Under *Twombly*, complainants must state a claim that is plausible on its face.[82] Additionally, under *Iqbal*, the complaint must include sufficient facts to survive a motion to dismiss.[83] Combine these high burdens with a qualified immunity policy that is similarly intended to eliminate suits as early as possible to avoid unnecessary burdens on the government, particularly the discovery process, and it becomes increasingly difficult to have a case heard on the merits. For § 1983 litigants, this means unless they have enough evidence to either prove a government official's malice without discovery or to show that their violated right was "clearly established" by precedent that mirrors their situation almost identically, they might never be able to get their suit past motions for dismissal or summary judgment.

Separately, in cases involving federal officials, claimants might also try to seek recovery against individual officials through a *Bivens* claim under the Federal Tort Claims Act ("FTCA").[84] However, the lower federal courts have consistently applied the FTCA's judgment bar, which was originally designed to prevent double recovery under both an individual and a vicarious liability approach, in order to dismiss *Bivens* claims.[85] This approach is not merited by either the statute or precedent because neither the Supreme Court nor Congress has imposed *respondeat superior* liability on the government for officials' tortious acts.[86] Indeed, at the time of writing, the FTCA's judgment bar was a crucial part of Jacob King's qualified immunity case before the Supreme Court.[87] If the Court returns a favorable decision for the government officials, it will further strangle citizen suits by preventing claimants from simultaneously suing under both FTCA and § 1983.[88] In short, the confluence of these procedural and policy hurdles, along with the chance of overlapping immunities, has turned nearly every qualified

[80] *See* Butz v. Economou, 438 U.S. 478, 497 (1978).

[81] *See generally* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[82] *Twombly*, 550 U.S. at 570.

[83] *Iqbal*, 556 U.S. at 666.

[84] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[85] James E. Pfander & Neil Aggarwal, *Bivens, The Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. ST. THOMAS L.J. 417, 418–19 (2011).

[86] *Id.*

[87] King v. United States et al., 917 F.3d 409, 418 (6th Cir. 2019), *cert. granted sub nom.* Brownback v. King, 140 S. Ct. 2563 (2020) (No. 19-546).

[88] *Id.* For a discussion on the case's outcome, see *infra* notes 224–26 and accompanying text.

immunity case into a lengthy and frustrating ordeal where litigants often have little to no hope of recovery.[89]

## III. ANALYSIS

### A. *42 U.S.C. § 1983 Textual History from Enactment to Present*

From the get-go, the statute that came to be known as 42 U.S.C. § 1983 was intended to address significant ills plaguing the country.[90] Because the 42nd Congress wanted a law with teeth to improve their ability to enforce the 14th Amendment, the Bill faced lengthy and impassioned debate.[91] By the time the original statute was enacted, even though it was crafted with general language, its somewhat repetitive construction represented a thorough attempt to cover all angles of interpretation:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .[92]

The repetitive and redundant construction is likely due to Congress's concern that, even though the southern states no longer had discriminatory laws on the books, their officers and officials would consciously avoid enforcing them to protect the newly freed slaves.[93] Yet, beyond attempting to blanket cover any codified "law, statute, ordinance, [or] regulation . . . of the State," the Reconstruction Congress also included the terms "custom" and "usage."[94] At the time the Act was ratified, these words were likely intended to incorporate the common law and any similarly unenumerated policies.[95]

---

[89] *See* Baude, *supra* note 79.

[90] *See supra*, notes 19–30 and accompanying text.

[91] *See* Monroe v. Pape, 365 U.S. 167, 168–82 (1961) (giving extensive review of the legislative history); *see generally* Cong. Globe, 42d Cong., 1st Sess. (1871) (showing extensive legislative debate).

[92] Act of Apr. 20,1817, ch. 22, 17 Stat. 13 §1 (1871).

[93] *See Monroe*, 365 U.S. at 176.

[94] Act of Apr. 20,1817, ch. 22, 17 Stat. 13 §1 (1871).

[95] According to 1828 edition of Webster's Dictionary, custom was defined "[i]n *law*, [as a] long established practice, or usage, which constitutes the unwritten *law*, and long consent to which gives it authority." *Custom*, WEBSTER'S DICTIONARY 1828, http://webstersdictionary1828.com/Dictionary/Custom (last visited Jan. 17, 2022) (emphasis in original). Similarly, usage was defined as "long continued use; custom; practice." *Usage,* WEBSTER'S DICTIONARY 1828, http://webstersdictionary1828.com/Dictionary/usage (last visited Jan. 17, 2020). This would seem to contradict Justice Douglas's opinion in *Tenney v. Brandhove* that Congress did not disclaim any

However, despite the use of blanket terms, these redundancies and vagaries likely made it more susceptible to judicial interpretation and eventually led to much of the Act being either struck down in the *Slaughterhouse Cases* or otherwise eviscerated by the Court's restrictive Reconstruction interpretations of the 14th Amendment.[96] While the portion of the statute that would become § 1983 would continue to survive on the books, apart from modest revisions, it would see little attention until its renaissance in *Monroe*.[97]

By the time § 1983 came before the Court in *Monroe*, it was a noticeably different statute than its original incarnation.[98] Some of the changes were minor linguistic or grammatical tweaks that either reflected modern English or accounted for other additions made across the entire code.[99] Other updates were likely meant to account for the changes America had undergone since Reconstruction.[100] The most obvious of these changes was the complete removal of the clause expressly disclaiming the effects of state laws on an offender's liability under the statute.[101] This change was likely done in recognition of the intense revision that the parabellum Civil Rights Acts endured at the hands of the courts.[102]

While § 1983 would undergo two additional rounds of revision in 1979 and 1996, these would be predominantly pro forma updates.[103] The 1979 update would only add the necessary language to make the statute applicable to the District of Columbia, and the 1996 update would codify the statute's applicability to judges under specific conditions.[104] Though the statute's caselaw has continued to evolve, its current language has remained static since the 1996 update.[105] This meant that even after *Monroe* resuscitated the cause of action that § 1983 was originally created for, the

---

immunities in tort. 341 U.S. 367, 376 (1951); s*ee also* discussion on common law immunities, *supra* note 78 and accompanying text. The original statute's text explicitly states that the offender would still be liable, "[notwithstanding] any such . . . custom, or usage of the State to the contrary . . . ." Act of Apr. 20,1817, ch. 22, 17 Stat. 13 §1 (1871). Based on the aforementioned commonplace meanings, this means the statute would cover torts under the common law.

[96] Developments in the Law: Section 1983 and Federalism, 90 HARVARD L. REV. 1133, 1156–57 (1977).

[97] *See* Myers v. Anderson, 238 U.S. 368, 378 (1915) (quoting the then-current statutory text).

[98] 42 U.S.C. § 1983 (1952) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.")

[99] *Id.* These include changing "any person" to "every person," and adding a comma after usage (i.e., "usage,"). Compare *Id.*, with 42 U.S.C. § 1983 (1866).

[100] 42 U.S.C. § 1983 (1952). For example, "State or Territory" was likely added to better reflect the totality of the United States' jurisdiction. *Id.* Or that victims were no longer just "any person within the jurisdiction of the United States" but instead "any citizen of the United States or other person within the jurisdiction thereof." *Id.*

[101] *Id.*

[102] See generally Developments in the Law: Section 1983 and Federalism, supra note 96.

[103] *See generally* 42 U.S.C. § 1983 (1979); 42 U.S.C. § 1983 (1996).

[104] *Id.*

[105] 42 U.S.C § 1983 (1996).

statute has maintained nearly the same level of vagueness as the original Ku Klux Klan Act while lacking anything that resembles the removed state law disclaimer, thus inviting even greater freedom for interpretation.[106]

### B. *42 U.S.C. § 1983 Forecasted Evolution and Proposed Statutory Changes*

Following the rash of high-profile and deadly police encounters in the first half of 2020, public outcry raised the issue of qualified immunity to a national talking point.[107] As a result of heightened discourse, members of both houses of Congress proposed various pieces of legislation aimed at addressing government or, more specifically, police misconduct.[108] Not all of these pieces of proposed legislation addressed qualified immunity either directly or indirectly.[109] However, at least two bills in the House and one bill in the Senate addressed it head-on.[110] The earliest and simplest of these was H.R. 7085, the "Ending Qualified Immunity Act," which was proposed by Representative Justin Amash, a Libertarian from Michigan, along with seventeen co-sponsors.[111] A few days later, Representative Karen Bass (D) from California joined with Representative Jerrold Nadler (D) from New York to propose the "Justice in Policing Act of 2020," also known as the "George Floyd Justice in Policing Act."[112] While the Act as a whole was aimed at more comprehensive policing reforms, one of its first recommendations was an amendment to § 1983.[113]

---

[106] *See* discussion *supra* notes 102–04 and accompanying text.

[107] *See e.g.*, Balko, *supra* note 2; *see also* Schweikert, *supra* note 16; Eric Schnurer, *Congress is Going to Have to Repeal Qualified Immunity*, ATLANTIC, https://www.theatlantic.com/ideas/archive/2020/06/congress-going-have-repeal-qualified-immunity/613123/ (June 17, 2020, 10:35 AM).

[108] *See* Bill Binion, *The Majority of Americans Oppose Qualified Immunity. Where is Congress?*, REASON (July 22, 2020, 4:25 PM), https://reason.com/2020/07/22/the-majority-of-americans-oppose-qualified-immunity-where-is-congress/; *see also* Barbara Sprunt, *READ: Democrats Release Legislation To Overhaul Policing,* NPR (June 8, 2020, 12:37 PM), https://www.npr.org/2020/06/08/872180672/read-democrats-release-legislation-to-overhaul-policing.

[109] *See, e.g.,* Justice for Breonna Taylor Act, S. 3955, 116th Cong. (2020).

[110] *See* Ending Qualified Immunity Act, H.R. 7085, 116th Cong. § 4 (2020); George Floyd Justice in Policing Act, H.R. 7120, 116th Cong. § 102 (2020); Reforming Qualified Immunity Act, S. 4036, 116th Cong. § 1, 4 (2020).

[111] H.R. 7085 § 1. Of the 17 co-sponsors, 16 were Democrats and one was Republican. Billy Binion, *With 1 Republican Cosponsor, Rep. Justin Amash Gains Tripartisan Support To End Qualified Immunity,* REASON (June 11, 2020, 5:10 PM), https://reason.com/2020/06/11/justin-amash-tom-mcclintock-republican-cosponsor-tripartisan-support-to-end-qualified-immunity/.

[112] H.R. 7120 (as passed by House of Representatives, June 25, 2020); S. 3912, 116th Cong. (2020); *H.R.7120–George Floyd Justice in Policing Act of 2020*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/7120/cosponsors (last visited Jan. 20, 2022). *See also* Press Release, Chair Jerrold Nadler, House Committee on the Judiciary, Chair Bass, Senators Booker and Harris, and Chair Nadler Introduce the Justice in Policing Act of 2020 (June 8, 2020), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3005.

[113] H.R. 7120 § 102; S. 3912 § 102; H.R. 7120 § 102 (as passed by House of Representatives, June 25, 2020).

Lastly, Senator Michael Braun (R) from Indiana proposed the "Reforming Qualified Immunity Act."[114] This Comment will evaluate them each in turn.

i. "Ending Qualified Immunity Act"

As previously discussed, the doctrine of qualified immunity achieved a significant amount of national attention in the wake of George Floyd's death.[115] Riding the wave of public discourse, Representative Amash seized on the opportunity to propose an amendment to § 1983.[116] First, the Bill presents an abridged history of the statute from its inception in 1871 to the current state of jurisprudence based on Harlow v. Fitzgerald.[117] This history drew particular attention to the fact that prior versions of § 1983 had never included defenses or immunities for government officials, specifically the defenses of "good faith" or rights not having been "clearly established."[118] The Bill's findings also recognized that for almost a century after these "law[s began] . . . government actors were not afforded qualified immunity for violating rights."[119] Finally, the findings note that the existence of qualified immunity "severely limit[s]" civil rights plaintiffs' ability to use § 1983 the way it was intended and has ultimately frustrated Congress's purpose behind the statute.[120] To remedy this "erroneous interpretation . . . and reiterate the standard found on the face of the statute," the Bill proposed adding the following language to the end of the statute:

> It shall not be a defense or immunity to any action brought under this section that the defendant was acting in *good faith*, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when it was committed. Nor shall it be a defense or immunity that the *rights . . . were not clearly established* at the time of their deprivation by the defendant, or that the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.[121]

Beyond this clause, no other additions or edits to the statute were proposed.[122]

---

[114] S. 4036; *S. 4036–Reforming Qualified Immunity Act*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/senate-bill/4036 (last visited Jan. 21, 2022).

[115] *See* Schweikert, *supra* note 16.

[116] Press Release, Rep. Ayana Pressley, Congresswoman, 7th Dist. of Mass., *Reps. Pressley, Amash Introduce Bipartisan Legislation to End Qualified Immunity* (June 4, 2020), https://pressley.house.gov/media/press-releases/reps-pressley-amash-introduce-bipartisan-legislation-end-qualified-immunity.

[117] H.R. 7085, 116th Cong. § 2–3 (2020).

[118] *Id.* § 2.

[119] *Id.*

[120] *Id.*

[121] *Id.* § 3–4 (emphasis added).

[122] *Id.* § 1–4.

The crux of this revision is the language removing *Harlow*'s requirement that the claimed right must be "clearly established" at the time it was violated in order for § 1983 to provide a cause of action.[123] Under *Harlow*, the combination of "clearly established" and "which a reasonable person would have known" created the exceedingly restrictive requirement of finding a favorable outcome from a prior case with essentially identical facts before recognizing that a plaintiff had a right.[124] However, if cases were dismissed because they did not sufficiently show that an allegedly violated right was "clearly established," then the alleged rights at issue would never be recognized.[125] This constraint has perpetuated a system with a never-ending cycle of unrecognized violations because there was no avenue for initially proving that a plaintiff ever had a right that could have been violated in the first place.[126] However, by eliminating the "clearly established" requirement, the "Ending Qualified Immunity Act" would make it easier for civil rights plaintiffs to proceed with litigation because it would be left to a finder of fact to determine "...whether or not a government official's actions had violated a right.[127] Similarly, the removal of the "reasonably would have known" standard would help prevent future attempts to define what rights are reasonable for the average government official to know, including situations where they violate statutes or regulations granting a right to the plaintiffs.[128]

The first portion of the amendment, which is aimed at removing the good faith exception first introduced in *Pierson v. Ray*, is of no less importance.[129] Indeed, the subjective good faith standard was supplanted by *Harlow*'s objective "clearly established" requirement as a way to defeat "insubstantial claims" at the earliest possible stages of litigation.[130] However, if the objective test were done away with, courts might default to the test that immediately preceded *Harlow*, thus inviting courts to reinstate the good faith exception.[131] By preemptively barring the use of good faith to escape liability,

---

[123] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights of which a reasonable person would have known*." *Id.* (emphasis added) (citations omitted).

[124] *Id.*; *see supra* notes 70–79 and accompanying text.

[125] Anderson v. Creighton, 483 U.S. 635, 645–46 (1987); *see also* Joseph D. McCann, *The Interrelationship of Immunity and the Prima Facie Case in Section 1983 and Bivens Actions*, 21 GONZ. L. REV. 117, 139–40 (1985–86) (noting the "Catch-22" that arises when cases get dismissed before ruling on whether a right was violated, thus inviting the same situation in the future).

[126] McCann, *supra* note 124.

[127] *See* H.R. 7085, 116th Cong. § 1, 4 (2020).

[128] *Id.* § 4. This would address caselaw policy arguments such as "it [is not] always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages." Davis v. Scherer, 468 U.S. 183, 196 (1984).

[129] 386 U.S. 547, 557 (1967). "We hold that the defense of good faith and probable cause . . . is also available . . . in [an] action under § 1983." *Id.*

[130] Behrens v. Pelletier, 516 U.S. 299, 306 (1996) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)); *see also supra* notes 66–70 and accompanying text.

[131] H.R. 7085 § 2–3.

the Bill would functionally restore § 1983 to a condition free of judicially interpreted immunities that better maps to the original 1871 statute.[132]

ii. "Justice in Policing Act"

Unlike the narrowly focused aims of Representative Amash's "Ending Qualified Immunity Act," the "Justice in Policing Act" was designed to address a broad range of issues and policies related to law enforcement.[133] At the time it was first proposed, the Bill succeeded a series of high-profile acts of violence against Black Americans in the first half of 2020, several of which involved the police.[134] These acts led to a resurgence of protests spearheaded by the Black Lives Matter movement.[135] Accompanying the protests were calls for government action, ranging from police reform to outright defunding the police altogether.[136] It was against this backdrop that Representatives Bass and Nadler proposed their Bill, which focused on wider police reform and accountability.[137] Its many proposals run the gamut from requiring national accreditation of state law enforcement agencies and creating a national police misconduct registry to mandating racial bias training and widespread implementation of mandatory police cameras.[138]

Title I of the "Justice in Policing Act," dubbed "Police Accountability," focuses mostly on establishing community oversight mechanisms and dedicates only a few lines to amend § 1983.[139] As proposed, the Bill would append the statute with the following text:

> It shall not be a defense or immunity to any action brought under this section *against a local law enforcement officer (as defined in section 2 of the Justice in Policing Act of 2020), or in any action under any source of law against a Federal investigative or law enforcement officer (as such term is defined in section 2680(h) of title 28, United States Code)* that—

---

[132] *See supra* note 92 and accompanying text.

[133] *See* H.R. 7120, 116th Cong. § 1 (2020) (as passed by House of Representatives, June 25, 2020).

[134] *See* Richard Fausset, *Two Weapons, a Chase, a Killing and No Charges*, N.Y. TIMES, https://www.nytimes.com/2020/04/26/us/ahmed-arbery-shooting-georgia.html (Sep. 3, 2021) (detailing the shooting of Ahmaud Arbury); Marquise Francis, *'Sleeping while black': Family seeks justice for Breonna Taylor, killed in her bedroom by police*, YAHOO! NEWS (May 13, 2020), https://news.yahoo.com/asleep-while-black-family-seeks-justice-for-breonna-taylor-killed-in-her-bedroom-by-police-210858395.html (discussing the no-knock raid that killed Breonna Taylor); Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES, https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html (Sep. 7, 2021) (outlining the initial investigation into the death of George Floyd).

[135] Nair, *supra* note 19.

[136] *Id.*; *see also #DefundThePolice*, BLACK LIVES MATTER (May 30, 2020), https://blacklivesmatter.com/defundthepolice/.

[137] H.R. 7120 § 1; *see also* S. 3912, 116th Cong. § 1 (2020).

[138] *See* H.R. 7120 § 1.

[139] H.R. 7120 § 1, 102.

> (1) the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when the conduct was committed; or
>
> (2) the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of their deprivation by the defendant, or that *at such time*, the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.[140]

For the most part, these proposed changes are nearly identical to those in the previously discussed "Ending Qualified Immunity Act."[141] Aside from some organizational and formatting differences, the main difference between the Bills is the explicit restriction of this amendment to law enforcement or correctional officers.[142] Unlike Representative Amash's Bill, which would functionally abolish qualified immunity regardless of the type of government official who violated a plaintiff's rights, the "Justice in Policing Act" would only remove qualified immunity in cases where a plaintiff's rights were violated by someone traditionally understood to be working in law enforcement.[143] Other types of government officials, such as school administrators and municipal employees, would still retain the use of a qualified immunity defense.[144] While the committee report on the Bill recognizes this disparity, it does not attempt to harmonize the differences.[145] Instead, because qualified immunity is "a judge-made doctrine . . . not rooted in legislative text," the report proposes that the committee either review the non-law enforcement applications of qualified immunity some point in the future or leave them to the Supreme Court to revise or destroy it's applicability to other government officials. [146]

Another notable difference between the Bills was the inclusion of the phrase "at such time" when determining if a defendant could reasonably have known the lawfulness of their conduct.[147] Based on the immediately preceding text, "at the time of their deprivation by the defendant," one interpretation would support an argument that "at such time" relates to

---

[140] *Id.* § 102 (emphasis added).
[141] *See* H.R. 7085, 116th Cong. (2020) and following discussion.
[142] *Compare* H.R. 7085*, with* H.R. 7120 § 102.
[143] *Compare* H.R. 7120, *with* H.R. 7085; *see also* Nick Sibilla, *House of Representatives Votes to End "Qualified Immunity" for Police*, INSTITUTE FOR JUSTICE (June 25, 2020), https://ij.org/press-release/house-of-representatives-votes-to-end-qualified-immunity-for-police/.
[144] Sibilla, *supra* note 142; Justin Driver, *Schooling Qualified Immunity*, EDUCATION NEXT, https://www.educationnext.org/schooling-qualified-immunity-should-educators-be-shielded-from-civil-liability/ (March 21, 2021).
[145] H.R. REP. NO. 116-434, at 52 (2020).
[146] *Id.*
[147] H.R.7085, 116th Cong. § 4 (2020).

the time a plaintiff's rights were violated.[148] This interpretation would allow for a more flexible case-by-case analysis of the "state of the law" to determine whether an official could not reasonably have known that their conduct was unlawful.

iii. "Reforming Qualified Immunity Act"

While not intended to go as far as either of the previous bills, Senator Mike Braun's proposal, the "Reforming Qualified Immunity Act," is fairly consistent with Representative Amash's.[149] First, Braun's findings are almost identical, varying only slightly in the way it presents the history of § 1983 and qualified immunity.[150] However, because Braun's Bill is intended to reform, rather than eliminate, qualified immunity, he goes to greater lengths to specify how and when it should be applied.[151] The first part of his amendment echoes the same language as both previous bills:

> [I]t shall not be a defense to any action brought under this section that, at the time of the deprivation—
>
> (A) the defendant was acting in good faith;
>
> (B) the defendant believed, reasonably or otherwise, that his or her conduct was lawful;
>
> (C) the rights, privileges, or immunities secured by the Constitution and laws were not clearly established; or
>
> (D) the state of the law was such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.[152]

Aside from structural markers, formatting, and the occasional adjustment for syntax, this portion is identical to the other bills.[153]

Here, however, the Bill splits from its companions in two ways. First, the "Reforming Qualified Immunity Act" lays out two situations where an official would not be individually liable for depriving anyone's rights.[154] In the first situation, if the alleged unlawful conduct was expressly authorized by statute or regulation in that jurisdiction, the official's reasonable belief that they were acting constitutionally would grant them immunity so long as no binding and meritorious court cases found those rules to be

---

[148] H.R. 7120, 116th Cong. § 102(2) (2020).
[149] *Compare* S. 4036, 116th Cong. (2020), *with* H.R. 7085.
[150] *Compare* S. 4036, 116th Cong. (2020), *with* H.R. 7085.
[151] *See generally* S. 4036, 116th Cong. (2020).
[152] *Id.*
[153] *Compare* S. 4036, *with* H.R. 7085, 116th Cong. (2020), *and* H.R. 7120, 116th Cong. (2020) (as passed by House of Representatives, June 25, 2020).
[154] S. 4036 § 4.

unconstitutional.[155] In the second situation, provided everything else was the same, the inclusion of a binding decision from a court in the jurisdiction that explicitly held the alleged unlawful act to be constitutional would also immunize the official from liability.[156] On its face, this Bill appears to be shifting the burden of proof from the current doctrine: instead of forcing the plaintiff to try and prove that a particular right was "clearly established" by plumbing the depths of caselaw for a near match, this Bill would instead require the government to prove that its actions were supported by statute, the Constitution, and good faith.

The second way the Bill distinguishes itself from its companions is by including a subsection focusing directly on local governments.[157] Specifically, the Bill looks at holding the municipality or local government liable for any deprivation of rights that resulted from their agent or employee's actions.[158] The Bill even goes one step further and prevents the municipality from claiming any immunity under the good faith or clearly established rules that were disclaimed in the previous sections about individual officials' liability.[159] This inclusion appears to be an attempt to incentivize local governments to provide better accountability for their officers and employees.[160] However, there are some issues with the Bill's choice of definitions, chief among them its use of the word "defendant," which is used throughout to describe an individual being sued under § 1983.[161] However, in the closing section of the Bill, it states that "the term 'defendant' does not include . . . an individual employed by a municipality or other unit of local government acting in his or her official capacity."[162] This definition would seem to render much of the earlier portions toothless because unless government officials acting in their official capacities can be a defendant under the statute, then the good faith and clearly established exceptions are left functionally intact.[163]

However, this appears to be Senator Braun's attempt to address another aspect of qualified immunity known as *Monell* liability.[164] In brief, the Supreme Court recognized that local municipalities could be sued as a legal person under § 1983 when a person's rights have been violated; however, they cannot be sued under vicarious liability for the torts or actions

---

[155] *Id.* §2.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] Press Release, Sen. Mike Braun, U.S. Senator of Indiana, Senator Mike Braun introduces Reforming Qualified Immunity Act (June 23, 2020), https://braun.senate.gov/node/755.
[161] S. 4036, 116th Cong. (2020).
[162] *Id.* § 2.
[163] If that is the case, the only application for much of the revised statute would be the unlikely situation where an officer wearing his uniform—thus acting under color of state law—is depriving citizens of their rights while off-duty.
[164] *See generally* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

of its employees.[165] Typically, under *Monell*, the only types of employees whose actions can open the municipality to § 1983 liability are those in policymaking positions or whose actions are reasonably understood to carry the weight of municipal policy.[166] Looking at the "Reforming Qualified Immunity Act," the inclusion of text regarding municipalities appears to be an attempt to walk back that policy by holding them liable for violations "by an agent or employee of the municipality . . . acting within the scope of his or her employment."[167] In this light, the Bill's seemingly confusing definition of the term "defendant" actually reflects an intentional effort to isolate the different impacts of the Bill's broader reforms to qualified immunity.[168] In doing so, the Bill appears to allow a series of defenses for individuals sued in their individual capacity that are not similarly available to municipalities or local governments sued as legal persons.[169]

## IV. POLICY RECOMMENDATIONS

### A. *Enactment of Either of the Three Bills*

While none of these Bills provide a silver bullet for vindicating individual rights in the courthouse, and while each one has its tradeoffs, any of them would improve the litigation environment for civil rights suits. Arguably, the cleanest and simplest bill is the "Ending Qualified Immunity Act," and this simplicity—combined with its tri-partisan support—could be a potential asset in getting the Bill through Congress.[170] But, while the Bill's straightforward and simple language would address the most significant issues with qualified immunity, it might also leave enough room for other relevant pockets of Supreme Court jurisprudence on the issue to linger or dampen its effects.[171] In contrast, the "George Floyd Justice in Policing Act" is a much larger omnibus reform legislation that clocked in at 136 pages when it was reported to the Senate.[172] The Bill also paid greater attention to other police reform efforts, such as community outreach, a National Police Misconduct Registry, and research and training on racial profiling and implicit biases.[173] However, what little focus it places on qualified immunity would be enough to address the policy at a level comparable to the "Ending Qualified Immunity Act," albeit only in situations

---

[165] *Id.* at 691, 700–01.
[166] *Id.* at 690.
[167] S. 4036, 116th Cong. § 4 (2020).
[168] *See supra* notes 161–63 and accompanying text.
[169] S. 4036 § 4.
[170] *See* Binion, *supra* note 111.While the majority of the bill's cosponsors are Democrats, the presence of a single Libertarian and Republican co-signers show the across-the-aisle support of the reform movement. *Id.*
[171] *See, e.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 685 (1978); *supra* notes 164–69 and accompanying text.
[172] H.R. 7120, 116th Cong. (2020).
[173] *See generally id.*

concerning traditional law enforcement.[174] Last but not least, the "Reforming Qualified Immunity Act" is far less unilateral than its companion bills, but its more tailored construction would likely provide a more surgical solution, pruning away the most damaging parts of qualified immunity while retaining some degree of protection for government officials.[175]

These attempts at reforms are not without their detractors. The National Association of Police Officers submitted a letter to the House of Representatives prior to the passage of the "George Floyd Justice in Policing Act" that expressed "significant concerns" about the "practical elimination of qualified immunity . . . ."[176] The Association also asserted that "the change to qualified immunity [means] an officer can go to prison for an unintentional act that unknowingly broke an unknown law."[177] In contrast, while the Fraternal Order of Police's statement on the Act was far tamer and hesitantly optimistic about what it could accomplish, the statement's cautious phrasing indicates that the organization believes more work needs to be done.[178]

Outside the political realm, the increased spotlight on qualified immunity over the past decade has led to a spate of academic literature on the policy.[179] Works supporting qualified immunity affirm the longstanding arguments about the value and necessity of qualified immunity as an effective shield to allow for the smooth operation of government.[180] In contrast, those opposing have attempted to dissect and refute those arguments from multiple angles.[181] Joanna Schwartz, a prolific writer on qualified immunity and related academic fields, has conducted extensive research into the claims that qualified immunity is necessary to protect on-the-ground police work.[182]

---

[174] *See supra* notes 138–46 and accompanying text.

[175] *See* discussion *supra* Part III.A.2.iii.

[176] Letter from William J. Johnson, Executive Director and General Counsel, Nat'l Ass'n of Police Org., to U.S. House of Representatives (June 24, 2020) (on file at http://www.napo.org/files/5815/9370/8966/NAPO_Opposition_Letter_Justice_in_Policing_Act_MOC_1.pdf).

[177] *Id.* This argument is at best a hyperbolic conflation of tangential statutes, and at worst a downright lie. The Act's changes to § 1983 that remove qualified immunity only impact an officer's civil liability to a person whose rights were violated and imposes no criminal penalties. *See* 42 U.S.C. § 1983 (creating civil cause of action); *see also* H.R. 7120, 116th Cong. § 102 (2020) (not adding any criminal liability). While the letter correctly observes that a different section of the Act would slightly modify the mens rea of 18 U.S.C. § 242 from "willfully" to "knowingly or recklessly", this is legally unrelated to the proposed changes to qualified immunity. Johnson, *supra* note 179.

[178] *See* Press Release, National Fraternal Order of Police, National FOP President Statement on the Justice in Policing Act (June 9, 2020), https://fop.net/CmsDocument/Doc/pr_2020-0609.pdf.

[179] *See, e.g.,* Baude, *supra* note 79; Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018).

[180] *See* Nielson & Walker, *supra* note 182; *see also* John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 244 (2013) (explaining that qualified immunity is intended to prevent "timidity and caution in the exercise of government powers that generally operate to the public good.").

[181] *See generally* Baude, *supra* note 79.

[182] See Joanna C. Schwartz, Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking, 57 UCLA L. REV. 1023 (2010); Joanna C. Schwartz, What Police Learn from Lawsuits, 33 CARDOZO L. REV. 841 (2012); Joanna C. Schwartz, Police Indemnification,

Her findings appear to counteract claims that qualified immunity shields individual officers from costly civil damages, allows for a more efficient judiciary, and otherwise provides the government with benefits that cannot be achieved through other means.[183] While her findings have not gone uncontested, they do provide substantial support for any federal policy changes that would amend or remove qualified immunity altogether.[184]

In this author's opinion, Senator Braun's "Reforming Qualified Immunity Act" would be the best-fitting solution to the issue of qualified immunity. It is designed to preserve the public policy goals of apportioning liability for individual officers and agents while also removing much of the caselaw architecture that frustrated valid § 1983 claims from moving forward. In an ideal political world, its existence as a standalone bill would reduce the chances of getting neutered in an omnibus legislation. Additionally, its deliberate attempts to address civil rights issues while recognizing the importance of efficient operations in both the judiciary and law enforcement provides a suitable middle ground that could draw in genuine support from both sides of the aisle and increase its chances of passage. And while it would not completely eliminate the chance of government officials escaping accountability, those chances would be greatly reduced.

All that said, the realities of modern American politics show a decreased likelihood that any of the bills will end up ratified. At the time of writing, neither the "Ending Qualified Immunity Act" nor the "Reforming Qualified Immunity Act" have seen any movement following their initial introduction into their respective houses of Congress.[185] With now-former Representative Amash out of office, the "Ending Qualified Immunity Act" has no champion left to push for legislative action, and Senator Braun has not spoken publicly about his Bill since the week he proposed it.[186]

The "George Floyd Justice in Policing Act" has seen much greater success, passing the House on June 25, 2020.[187] However, the vote ran almost

---

89 N.Y.U. L. REV. 885 (2014); Joanna C. Schwartz, Introspection Through Litigation, 90 NOTRE DAME L. REV. 1055 (2015).

[183] Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1803–04 (2018).

[184] *See* Nielson & Walker, *supra* note 182.

[185] *H.R.7085—Ending Qualified Immunity Act*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/7085/ (last visited Jan. 22, 2022); *S.4036—Reforming Qualified Immunity Act*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/senate-bill/4036/ (last visited Jan. 22, 2022).

[186] *See* Todd Spangler, *Justin Amash not planning to run for reelection to US House*, DETROIT FREE PRESS, https://www.freep.com/story/news/politics/elections/2020/07/17/justin-amash-not-running-reelection-congress/5457428002/ (July 17, 2020, 4:49 PM) (showing Rep. Amash's planned departure from office); s*ee also Press Releases*, MIKE BRAUN, U.S. SENATOR FOR INDIANA, https://www.braun.senate.gov/press-releases (last visited Jan. 22, 2022) (showing no statements regarding his bill since the day it was introduced).

[187] *US House passes 'George Floyd' police reform bill*, BBC (June 26, 2020), https://www.bbc.com/news/world-us-canada-53188189.

entirely along party lines, with only three Republicans voting in favor.[188] Additionally, its Senate counterpart never made it out of committee, and the House-ratified version has not seen any activity in the Senate since it was read on the floor in July of 2020.[189] The Democrats did manage to flip enough Senate seats in the 2020 election to split the chamber 50-50, and Democratic Vice President Kamala Harris would be able to cast the tie-breaking vote in any even tally.[190] Even though this might allow a final version of the Act to make it to the Oval Office for ratification, it will likely never make it through a Republican filibuster.[191]

### B. *State Policy to Address Shortfalls*

From its inception, § 1983 was intended to provide a way for individuals to seek equitable redress through the federal courts when their local courts and governments were either unable or patently unwilling to provide it to them. Yet, the societal conditions that required federal intervention as an exclusive remedy no longer exist, and state legislatures and courts are now fairer and more accessible to the average citizen. While amending or abolishing § 1983 is one way to address the need for change, it might be faster and simpler to work within each individual state to devise solutions to government abuse or official misconduct.[192] In fact, there are some situations where addressing qualified immunity at the state level is a necessity.

For example, while qualified immunity can be challenging under normal circumstances, adding a joint task force into the mix raises the complications significantly. Though they first came into existence at the start of the Drug War under President Nixon, joint task forces have continued to grow in number and scope.[193] An inexhaustive count between the Drug Enforcement Administration ("DEA"), Federal Bureau of Investigation ("FBI"), and the U.S. Marshalls alone shows upwards of 490 different

---

[188] *Id.*

[189] *S. 3912—Justice in Policing Act of 2020*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/senate-bill/3912 (last visited Jan. 22, 2022); *H.R. 7120—George Floyd Justice in Policing Act of 2020*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/7120/all-actions (last visited Jan. 22, 2022).

[190] James Arkin & Andrew Desiderio, *How Warnock and Ossoff painted Georgia blue and flipped the Senate*, POLITICO (Jan. 7, 2021, 9:34 PM), https://www.politico.com/news/2021/01/07/warnock-ossoff-flipped-senate-georgia-456310.

[191] *See generally* Tom McCarthy, *Explainer: what is the filibuster and why do some Democrats want to get rid of it?*, GUARDIAN (Jan. 30, 2021, 3:00 PM), https://www.theguardian.com/us-news/2021/jan/30/what-is-filibuster-meaning-republicans-blocking-biden-agenda.

[192] *See* Jacob Sullum, *New Mexico Could Be the Third State To Authorize Lawsuits Against Abusive Cops Without Qualified Immunity*, REASON (Feb. 19, 2021, 12:55 PM), https://reason.com/2021/02/19/new-mexico-could-be-the-third-state-to-authorize-lawsuits-against-abusive-cops-without-qualified-immunity/*; see also Protecting Everyone's Constitutional Rights Act*, INSTITUTE FOR JUSTICE, https://ij.org/activism/legislation/model-legislation/model-protecting-everyones-constitutional-rights-act/ (last visited Jan. 22, 2022).

[193] Balko, *supra* note 2.

task forces.[194] The proliferation of these task forces allows for state and federal law enforcement to dodge accountability and liability, claiming immunity under whatever color of law will best suit them in the situation.[195] It was a joint task force that assaulted Jacob King, and those involved have so far escaped liability via this jurisdictional "shell game."[196] While there is not much the states can do to address the immunity of federal agents, they can update local policies on state law enforcement participation in joint task forces in order to make it more difficult for state officers to escape liability.

Another step state legislatures can take to address issues presented by qualified immunity is to simply reform their own immunity laws. At present, three states have already begun to tackle the problem.[197] The first was Colorado, whose "Enhance Law Enforcement Integrity Act" was passed in June 2020.[198] Among other police reforms, this Act strips officers of qualified immunity in civil suits where they either violated someone's rights or failed to intervene when they observed another officer doing so.[199] Shortly thereafter, Connecticut passed its own reforms.[200] But, while Connecticut's changes make it easier for injured parties to sue officers who violate their rights, they do not expand the officer's personal liability and still leave a good faith exception for retaining immunity.[201] The third state, New Mexico, saw their bill face some back and forth between the houses in the legislature.[202] However, the bill had the backing of New Mexico's Governor, and it was eventually signed into law in 2021.[203] For any other states that are interested in pursuing similar reforms, public interest groups

---

[194] *Id.*

[195] *Id.; see also* Aaron Malin, *Secret, Dangerous, and Unaccountable: Exploring Patterns of Misconduct in Missouri's Drug Task Forces* 13, SHOW-ME CANNABIS, http://show-mecannabis.com/wp-content/uploads/2015/02/Draft-FINAL-Comprehensive-Report-Drug-Task-Forces.pdf (Feb. 2015) (discussing how task forces ignore state law by dividing responsibility to escape oversight).

[196] *See* Balko, *supra* note 2 and accompanying text.

[197] *See* Sullum, *supra* note 195; *see also* Scott Shackford, *Colorado Police Reforms Mandate Body Cameras, Strip Bad Officers of Lawsuit Immunity*, REASON (June 19, 2020, 2:45 PM), https://reason.com/2020/06/19/colorado-police-reforms-mandate-body-cameras-strip-bad-officers-of-lawsuit-immunity/; Ilya Somin, *Connecticut Passes Law Curbing Qualified Immunity—but with Loopholes*, REASON (Aug. 2, 2020, 5:47 PM), https://reason.com/volokh/2020/08/02/connecticut-passes-law-curbing-back-qualified-immunity-but-with-loopholes/.

[198] Shackford, *supra* note 200; *see also SB20-217 Enhance Law Enforcement Integrity*, COLORADO GENERAL ASSEMBLY, https://leg.colorado.gov/bills/sb20-217 (last visited Jan. 22, 2022) (showing the Bill's passage in June 2020).

[199] Shackford, *supra* note 200.

[200] Nick Sibilla, *New Connecticut Law Limits Police Immunity In Civil Rights Lawsuits, But Loopholes Remain*, FORBES (July 31, 2020, 9:09 PM), https://www.forbes.com/sites/nicksibilla/2020/07/31/new-connecticut-law-limits-police-immunity-in-civil-rights-lawsuits-but-loopholes-remain/?sh=14276ef6ce8d.

[201] *Id.*

[202] Susan Dunlap, *Civil rights bill passes Senate but must return to House (Updated)*, NM POLITICAL REPORT (March 17, 2021), https://nmpoliticalreport.com/2021/03/17/civil-rights-bill-passes-senate-but-must-return-to-house/; Lindsey Wasson, *New Mexico Ends Qualified Immunity for Abusive Police (Updated),* EQUAL JUST. INITIATIVE, https://eji.org/news/new-mexico-ends-qualified-immunity-for-abusive-police/ (April 9, 2021) (showing the bill's passage).

[203] *See* Sullum, *supra* note 195; Press Release, Michelle Jujan Grisham, Governor, NM, *Gov. Lujan Grisham ratifies Civil Rights Act* (Apr. 7, 2021), https://www.governor.state.nm.us/2021/04/07/gov-lujan-grisham-ratifies-civil-rights-act/.

like the Institute for Justice have created draft legislation that state legislatures can use as a launching point for their own policymaking.[204]

Some cities and municipalities have also begun to address qualified immunity in their own policy decisions, particularly in the context of high-profile police shootings.[205] One such example accelerated civil rights settlements, has begun to see increased use in recent years by utilizing the "threat of [§ 1983] litigation rather than litigation itself to compensate police-involved shooting victims' family members."[206] Another example of this policy in action is the $12 million settlement that Breonna Taylor's family received after police executed a no-knock warrant that led to her death.[207] While this policy has its tradeoffs, such as allowing officials to avoid ever facing an admission of guilt or determination of liability or otherwise preventing full discovery into potentially unconstitutional practices, it does reduce the time spent in litigation and provide families with some measure of closure.[208] Regardless, like all the aforementioned attempts at addressing qualified immunity, accelerated settlements are a welcome and necessary step along the path to an eventual shift away from the current policy.

### C. *Amend the FTCA to Improve Citizen Suit Access Against Federal Officers*

As stated above, situations like joint task forces can complicate traditional qualified immunity analysis through the involvement of federal officers.[209] While § 1983 only provides a remedy when rights are violated "under color of state law," suits arising from violations by federal officials must be litigated under the FTCA through a *Bivens* action.[210] However, the list of violations that give rise to a *Bivens* claim is exceedingly narrow, and the Supreme Court, absent clear congressional intent, has avoided expanding it.[211] But, since *Bivens* has "no statutory hook" because it is a "judicially created cause of action to enforce the Constitution," it would require concise amendments to the FTCA to both codify and expand the federal cause of action under *Bivens*.[212] This would likely prove difficult because Congress's historical attempts to do just that have borne little fruit.[213]

---

[204] *See* INSTITUTE FOR JUSTICE, *supra* note 195.

[205] *See* Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 2018 UTAH L. REV. 639, 642–643 (2018).

[206] *Id.*

[207] Rukmini Callimachi, *Breonna Taylor's Family to Receive $12 Million Settlement From City of Louisville*, N.Y. TIMES, https://www.nytimes.com/2020/09/15/us/breonna-taylor-settlement-louisville.html (Oct. 2, 2020).

[208] Macfarlane, *supra* note 208, at 641.

[209] *See* discussion *supra* notes 196–99 and accompanying text.

[210] *See generally* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[211] Hernandez v. Mesa, 137 S. Ct. 2003, 2006 (2017) (citation omitted).

[212] Nielson & Walker, *supra* note 182, at 1863.

[213] *See* Pfander & Aggarwal, *supra* note 85, at 418–19.

D. *Need for SCOTUS Re-Evaluation*

Ultimately—and putting aside any Justices' squeamishness at perceptions of judicial activism—if qualified immunity and *Bivens* claims can be made by judicial action, they can also be unmade by it. While Justices Thomas and Sotomayor are the most recent voices to speak of the Court's need to reevaluate the doctrine of qualified immunity, Justice Breyer has also previously shown sympathy for arguments against qualified immunity.[214] However, there does not appear to be a critical mass among the remaining Justices to support forecasting a change in policy or docket selection. As recently as the 2020 session, the Court refused to hear at least eight separate cases that would allow them to reconsider qualified immunity.[215] Additionally, with the significant changeover to the bench in the last five years, it is difficult to determine how the newer Justices would rule on new cases. Justice Gorsuch's previous tenure on the Tenth Circuit saw him ruling in support of qualified immunity.[216] Conversely, while Justice Coney Barrett is known as a strong textualist and has previously written on textualists favoring statutory stare decisis, she wrote the opinion for a Seventh Circuit qualified immunity case where she upheld the lower court's decision to deny immunity to an officer who lied on a warrant affidavit.[217] Ultimately, while Supreme Court action would arguably be the most direct and effective method for reforming qualified immunity, longstanding avoidance policy and stare decisis make it unlikely that it will happen any time soon.

---

[214] Ziglar v. Abbasi, 137 S. Ct. 1843, 1869 (2017) (Thomas, J., concurring); Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020), *cert. denied* (Thomas, J., dissenting); Mullenix v. Luna, 577 U.S. 7, 20 (2015) (Sotomayor, J., dissenting); Kisela v. Hughes, 138 S. Ct. 1148, 1155 (2018) (per curiam) (Sotomayor, J., dissenting)*; see* Richardson v. McKnight, 521 U.S. 399, 411 (1997) (opinion of Breyer, J.) (opining qualified immunity should not apply when tortfeasors' employers' private insurance would shield them from liability).

[215] John Kramer, *Supreme Court Refuses to Hear Cases Challenging Qualified Immunity*, INSTITUTE FOR JUSTICE (June 15, 2020), https://ij.org/press-release/supreme-court-refuses-to-hear-cases-challenging-qualified-immunity/; *see also* Richard Wolf, *Legal immunity for police misconduct, under attack from left and right, may get Supreme Court review*, USA TODAY, https://www.usatoday.com/story/news/politics/2020/05/29/police-misconduct-supreme-court-reconsider-qualified-immunity/5275816002/ (June 9, 2020, 2:37 PM) (discussing the "baby steps [approach] to big changes in court precedent" that Chief Justice Roberts has taken).

[216] Cortez v. McCauley, 478 F.3d 1108, 1141 (10th Cir. 2007) (en banc) (Gorsuch, J., concurring in part and dissenting in part) ("The qualified immunity doctrine . . . is intended to protect diligent law enforcement officers, in appropriate cases, from the whipsaw of tort lawsuits seeking money damages. . . . Before a law enforcement officer may be held financially liable, the Supreme Court requires a plaintiff to establish not only that his or her rights were violated but also that those rights were [clearly established].").

[217] Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 326 (2005); Rainsberger v. Benner, 913 F.3d 640 (7th Cir. 2018). It is important to note that this case should not be used as proof that Justice Barrett would be interested in reviewing and potentially overturning qualified immunity. Rainsberger deals with a clear-cut case of a government official violating someone's "clearly established" rights—namely ones established in the Bill of Rights—and not rights comparable to those typically at issue in contested § 1983 cases.

## V. CONCLUSION

While reasonable minds may differ on whether qualified immunity serves a necessary and valuable role in federal jurisprudence, that should not inoculate it from attempts at reform or improvement. *Ubi ius, ibi remedium*—where there is a right, there is a remedy—or at least there should be.[218] It should not be a novel or radical statement that "people [have a right] to be secure in their persons" as well a right to not be "deprived of life, liberty, or property, without due process of law . . . ."[219] But, when the system of law has been bent in such a way that due process itself restricts an individual's ability to redress violations of those rights more than it restricts the actions of the government and its agents, those statements begin to feel like empty platitudes.

Despite the wide variety of statutory and constitutional interpretation canons courts apply when writing decisions, none appear to be as devastatingly effective as the unspoken "implicit rule that the government always wins . . . ."[220] As long as the Supreme Court continues to either deny certiorari to § 1983 and *Bivens* cases or decide them in favor of the government, it sends the message that government agents are not meant to be held accountable when their actions infringe on individual rights. Even if Congress ends up redrawing the boundaries of any of the various immunity doctrines, the Court's current posture and approach means that no amount of legislating will prevent government attorneys from arguing in favor of even more creative workarounds. At the time of writing, the Supreme Court had just published its decision on *Brownback v. King*.[221] In a unanimous decision, the Court held that the district court's summary judgment on Jacob King's FTCA claims was "on the merits," thus triggering the Act's judgment bar and preventing him from suing again under the same claims.[222] However, the Court remanded the case for the Sixth Circuit to determine if this means the procedural operation of the FTCA's judgment bar precludes him from bringing his *Bivens* claim.[223]

By the time of publication, it will have been over seven years since Jacob King was assaulted.[224] For him, it must feel increasingly impossible to reconcile his experiences with "the deep-rooted feeling that the police must

---

[218] *Ubi jus ibi remedium,* OXFORD REFERENCE, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803110448446 (last visited Jan. 25, 2022).

[219] U.S. CONST. amend. IV, V.

[220] Short Circuit Podcast, *Episode 154: Class Action Coupons and a Building for Buddhists*, INSTITUTE FOR JUSTICE, at 35:40 (Nov. 23, 2020), https://ij.org/sc_podcast/episode-154-class-action-coupons-and-a-building-for-buddhists/.

[221] *See generally* 141 S. Ct. 740 (2021).

[222] *Id.* at 750.

[223] *Id.* at 747 n.4.

[224] *Brownback v. King*, INSTITUTE FOR JUSTICE, https://ij.org/case/brownback-v-king/ (last visited Jan. 25, 2022).

obey the law while enforcing the law. . . ."[225] But, with the Court remanding the case for further review, Jacob's fight is not over. That means there is still a chance, however slim, for that "deep-rooted feeling" to be vindicated.

[225] Spano v. New York, 360 U.S. 315, 320 (1959).