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How Qualified Immunity and Frozen Precedent Leaves Plaintiffs in the Cold

Sarah Rowe

HOW QUALIFIED IMMUNITY AND FROZEN PRECEDENT LEAVES PLAINTIFFS IN THE COLD

TABLE OF CONTENTS

INTRODUCTION

On October 19, 2005, police encountered Donald George Lewis near an intersection in West Palm Beach, Florida.[1] He was disoriented and seemed to be under the influence of narcotics when police instructed him to sit down.[2] Though Lewis initially complied, he stood up and ran into traffic seconds later.[3] In an ensuing struggle with the police, three officers subdued Lewis and, after two more officers arrived, all five officers "hogtied"[4] Lewis, while two kneeled on his back.[5] During the encounter, Lewis lost consciousness and was unable to be resuscitated.[6] When Lewis's mother sued the City of West Palm Beach for the use of excessive force against her son, the officers raised the defense of qualified immunity.[7] Because there was no clearly established precedent,[8] the court decided that qualified immunity would shield the officers from liability.[9] Thus, because the court did not find

1. Lewis v. City of W. Palm Beach, 561 F.3d 1288, 1290 (11th Cir. 2009).

2. *Id.*

3. *Id.* Although Lewis ran into traffic, he was not combative with police until they attempted to physically restrain him. *Id.* Even then, most of the officers involved testified that Lewis was merely resisting arrest and was not combative. *Id.* at 1292.

4. Hogtying "involves putting a person on his stomach and tying his cuffed hands to his bound feet behind his back with an adjustable nylon belt, a device known as a 'hobble.'" Joseph Neff & Emily Siegel, *"He Died Like an Animal": Some Police Departments Hogtie People Despite Knowing the Risks*, THE MARSHALL PROJECT (May 24, 2021, 4:00 PM), https://www.themarshallproject.org/2021/05/24/he-died-like-an-animal-some-police-departments-hogtie-people-despite-knowing-the-risks.

5. *Lewis*, 561 F.3d at 1290.

6. *Id.*

7. *Id.* at 1291.

8. The current standard for qualified immunity requires a court to (1) determine that the officer's conduct amounted to a constitutional violation, and (2) analyze whether the violated right was "clearly established" at the time of the violation. Saucier v. Katz, 533 U.S. 194, 201 (2001). This provides "notice" to officers before they may be subject to liability. *Id.* Following the Supreme Court's ruling in *Pearson v. Callahan*, courts were given the discretion to analyze these prongs in any order and, if a court establishes that there was no clearly established precedent, it has no obligation to determine whether the conduct was a constitutional violation. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

9. *Lewis*, 561 F.3d at 1291–92.

that the right was "clearly established," it declined to address whether the officers violated Lewis's fundamental Fourth Amendment rights.[10]

Eight years after Lewis's fatal encounter, a similar tragedy unfolded.[11] Police encountered Khari Illidge as he walked naked down a street.[12] Illidge was unresponsive to police; they assumed he was "mentally ill and possibly under the influence."[13] An officer tased Illidge, and the young man continued to walk away to a nearby home.[14] The officer tased Illidge again and attempted to subdue him.[15] After officers tased Illidge at least fourteen times, six officers hogtied Illidge.[16] A 385-pound officer helped to restrain Illidge by kneeling on his back.[17] After the restraints were in place, Illidge became unresponsive and was later pronounced dead.[18] When Illidge's mother sued the officers for the use of excessive force causing her son's death, the Eleventh Circuit pointed to the precedent set in *Lewis* and found that "the officers' actions did not violate clearly established law;" as a result,

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10. *Id.* U.S. CONST. amend. IV ("The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated."). Pursuant to Supreme Court jurisprudence, excessive force claims are reviewed in connection with the right to be free from unreasonable seizures. Mitchell W. Karsch, *Excessive Force and the Fourth Amendment: When Does Seizure End?*, 58 FORDHAM L. REV. 823, 823 (1990).

11. Callwood v. Jones, 727 F. App'x 552, 555–56 (11th Cir. 2018); *see also* Andrew Chung et al., *Shielded*, REUTERS INVESTIGATES (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/.

12. *Callwood*, 727 F. App'x at 555.

13. *Id.* at 555–56. In both *Lewis* and *Callwood*, it was clear to the officers that the men were either mentally ill or under the influence of drugs; they were not individuals acting in their right state of mind. *Callwood*, 727 F. App'x at 555; *Lewis*, 561 F.3d at 1290. An officer in *Callwood* testified that he believed Illidge was suffering from "excited delirium." *Callwood*, 727 F.App'x at 555. Excited delirium is a state of medical emergency and has been linked to many in-custody deaths. Lorry Schoenly, *Excited delirium: Medical emergency—not willful resistance*, EMS1 (Jul. 10, 2015), https://www.ems1.com/ems-products/patient-handling/articles/excited-delirium-medical-emergency-not-willful-resistance-3B8xLHBK7myikoFx/.

14. *Callwood*, 727 F. App'x at 555.

15. *Id.*

16. *Id.* at 555–56.

17. *Id.* at 555.

18. *Id.* While the court discussed the excessive amount of weight placed on Illidge, further emphasizing the egregiousness of the officers' conduct, it chose nonetheless to grant qualified immunity protection. *Id.* at 556.

they were entitled to qualified immunity.[19] Even though the *exact same court* had heard an incredibly similar case earlier[20], the Eleventh Circuit still found that there was no "clearly established law," given that this court elected *not* to establish this precedent in *Lewis v. City of West Palm Beach*.[21] The current state of qualified immunity perpetuates such injustices and repeatedly shields officers from the consequences of unlawful conduct because courts choose not to establish that the conduct was unlawful.[22]

The doctrine of qualified immunity shields government actors, including police officers, from liability for unlawful conduct.[23] Some experts argue that qualified immunity is unlawful;[24] others maintain that it is ultimately ineffective.[25] Qualified immunity requires "existing precedent [to] have placed the statutory or constitutional question beyond debate."[26]

Qualified immunity faces many critiques, including that the doctrine has been shown to result in seemingly inequitable outcomes.[27]

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19. *Id.* at 561.

20. *See* Lewis v. City of W. Palm Beach, 561 F.3d 1288, 1290–92 (11th Cir. 2009); *Callwood*, 727 F. App'x at 555–56.

21. *Callwood*, 727 F. App'x at 555–56 ("Given . . . our holding in *Lewis*, the officers' actions did not violate clearly established law, and as a result, they are entitled to qualified immunity.").

22. *See Qualified Immunity FAQ*, LEGAL DEF. FUND, https://www.naacpldf.org/qualified-immunity/#:~:text=Qualified%20immunity%20is%20also%20problematic,them%20their%20day%20in%20court (last visited Sept. 5, 2023).

23. Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. POL'Y ANALYSIS NO. 901 (Sept. 14, 2020), https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure.

24. *Id.* at 28 ("The basic argument [in support of qualified immunity] is that, while qualified immunity itself may be unlawful, it is defensible as a kind of compensating correction for . . . a 1961 case holding that state actors can be liable under [42 U.S.C.] Section 1983, even when their actions were *not* authorized by state law.") (emphasis in original).

25. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798–820 (2018) (arguing that qualified immunity has no basis in the common law, does not achieve its intended goals, and renders the Constitution hollow).

26. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

27. *See* Chung et al., *supra* note 11 ("Spanning the political spectrum, this broad coalition says the doctrine has become a nearly failsafe tool to let police brutality go

A full account of these criticisms is beyond the scope of this Comment. Rather, this Comment focuses on a particular mechanism created in *Pearson v. Callahan*, where a court has the ability to answer *only* whether an officer's actions violate "clearly established precedent" *without* analyzing whether the conduct was unlawful, thereby preventing the establishment of any relevant precedent.[28] *Pearson* thus created a problematic mechanism that can freeze precedent and create future problems for subsequent plaintiffs facing similar situations—the potential violation of their Fourth Amendment rights by police.[29] This practice, coupled with other judicial mechanisms that also prevent precedent creation, impedes victims' access to relief for violations of their constitutional rights.[30] Under this judicial regime, not only do current plaintiffs have difficulty vindicating their rights, but future plaintiffs also face the same obstacles, since overcoming a qualified immunity defense requires existing precedent, except in extremely rare circumstances.[31]

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unpunished and deny victims their constitutional rights."); Schwartz, *supra* note 25, at 1814 ("[T]he Court's qualified immunity decisions have nevertheless made it increasingly difficult for plaintiffs to show that defendants have violated clearly established law, and increasingly easy for courts to avoid defining the contours of constitutional rights."); ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR 84–91 (1st ed. 2017) ("All of these [qualified immunity] cases were unanimous. All found qualified immunity because of the absence of a case on point. Together they show a Court that is very protective of government officials who are sued, and that has made it very difficult for victims of constitutional violations to recover damages.").

28. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

29. *See id.* at 238–39.

30. *See* CHEMERINSKY, *supra* note 27, at 93–136 (providing a comprehensive analysis of several other judicial mechanisms, such as standing and the political question doctrine, that prevent plaintiffs from making it to court and litigating their rights).

31. Joanna Schwartz, *Qualified Immunity Is Burning a Hole in the Constitution*, POLITICO (Feb. 19, 2023, 7:00 AM), https://www.politico.com/news/magazine/2023/02/19/qualified-immunity-is-burning-a-hole-in-the-constitution-00083569 ("The Court has repeatedly instructed that except in extraordinary circumstances the law can only be 'clearly established' by a prior court decision. And the Court has emphasized that the prior court decision cannot simply set out a constitutional principle in general terms . . . . Instead, the prior court decision must include facts that are so similar to the facts in the present case that *every* reasonable officer would know that what he was doing was wrong.").

In addition to discussing *Pearson's* impact on subsequent plaintiffs, this Comment addresses a selection of other judicial mechanisms that freeze the development of precedent and analyzes how each mechanism prevents future plaintiffs from litigating violations of their constitutional rights. Part I discusses the development of qualified immunity and outlines qualified immunity's current state. Given that the application of qualified immunity heavily depends on precedent, Part II highlights three judicial mechanisms that freeze the development of precedent and exacerbate the doctrine's problems. Though several mechanisms adversely impact precedent-setting and hinder resolutions for future plaintiffs vindicating constitutional rights, this Comment focuses on the standing doctrine, limitations on federal habeas corpus petitions, and the post-*Pearson* approach to qualified immunity. In an attempt to protect plaintiffs' fundamental rights, Part III of this Comment proposes that the ideal approach to the qualified immunity doctrine is to eliminate the "clearly established precedent" requirement and replace it with either a good-faith standard or a "reasonably prudent police officer" standard.

I. QUALIFIED IMMUNITY'S PAST AND PRESENT

The Supreme Court introduced qualified immunity in 1967, in *Pierson v. Ray*.[32] In *Pierson*, municipal police officers arrested the plaintiffs for violating a breach-of-peace statute when the plaintiffs "attempted to use segregated facilities at an interstate bus terminal . . . ."[33] All of the plaintiffs were initially convicted; however, on appeal, one petitioner was granted a motion for a directed verdict, and the cases against the others were dropped.[34] The plaintiffs brought suit against the arresting officers and the judge, alleging that the officers were "liable at common law for false arrest and imprisonment."[35] Though the jury initially found for the officers,[36] plaintiffs appealed, and the Fifth Circuit held that the officers could not "assert the defense of good

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

33. *Id.* at 549.

34. *Id.*

35. *Id.* at 550.

36. *See* Pierson v. Ray, 352 F.2d 213, 216 (1965); Pierson v. Ray, 386 U.S. 547, 551 (1967).

faith and probable cause to an action . . . for unconstitutional arrest."[37] The Supreme Court disagreed, noting that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[38] Under a "defense of good faith and probable cause," qualified immunity offered the officers a potential shield from liability.[39]

In the decades since *Pierson* was decided, qualified immunity has undergone multiple developments, ultimately creating the doctrine that stands at the forefront of this Comment. This next Part will discuss the ways in which qualified immunity has developed and will briefly address issues created by courts' current application of the doctrine.

A. *Qualified Immunity's Development*

In *Scheuer v. Rhodes*, the Supreme Court revisited qualified immunity, this time detailing differences between when an official is entitled to *absolute* immunity as opposed to *qualified* immunity.[40] The Court emphasized that immunity, regardless of its classification, is intended to recognize that public officials may err when making the vital decisions required to perform their duties, and that it is ultimately better for them to risk possible error than to refrain from making any decisions at all.[41]

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37. *Pierson*, 386 U.S. at 551–52.

38. *Id.* at 555.

39. *Id.* at 557.

40. Scheuer v. Rhodes, 416 U.S. 232, 241–43 (1974). *See also Governmental Immunity*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/governmental_immunity#:~:text=Absolute%20immunity%20is%20usually%20involved,in%20case%20law%20or%20statutes (last updated July 2020) ("Absolute immunity is usually involved in circumstances that if challenged, it would drastically affect the government's procedures and operations. Qualified immunity protects a government actor or agent from liability only when certain conditions are in place, which are usually specified in case law or statutes.").

41. *Scheuer*, 416 U.S. at 241–42. The Court's reasoning displays the policy behind qualified immunity: to ensure that government officials can effectively perform their tasks. *Id.* Though the policy rationale is sound, the actual application of the doctrine is problematic. For an elaboration on why the application of this doctrine is problematic, *see* discussion *infra* Part II.

Scheuer reiterates that the guideline when evaluating police decisions and actions regarding arrest is "good faith and probable cause."[42] Yet, the Court clarifies that there is a more complex inquiry for "higher officers of the executive branch," given their different required duties.[43] Specifically, qualified immunity is available for higher-ranking officers in the executive branch if there is "the existence of reasonable grounds for the belief formed at the time . . . coupled with good-faith belief."[44] This created a subjective and objective component to evaluate whether an elevated officer of the executive branch could be shielded by qualified immunity.[45]

In 1982, the Court abandoned the good-faith requirement for qualified immunity protection.[46] In *Harlow v. Fitzgerald*, the Court reevaluated prior qualified immunity requirements due to the resources necessary to litigate a "subjective good faith" requirement.[47] Since subjective good faith is generally a question of fact to be decided by a jury, this requirement prevented qualified immunity cases from being resolved through motions for summary judgment.[48] The Court also found that requiring lengthier litigation to determine the presence of subjective good faith distracted officers and government officials from performing their regular duties.[49]

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42. *Scheuer*, 416 U.S. at 245 (citing *Pierson*, 386 U.S. at 557).

43. *Id*. at 246.

44. *Id.* at 247–48.

45. *See id.*

46. Harlow v. Fitzgerald, 457 U.S. 800, 815–17 (1982) ("[S]ubstantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial . . . . Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues."). One scholar has noted that while relying on clearly established precedent may promote judicial economy, it impedes the development of constitutional law. *See* Tyler Finn, Note, *Qualified Immunity Formalism: "Clearly Established Law" and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 466 (2019).

47. *Harlow*, 457 U.S. at 815–16.

48. *Id.* Motions for summary judgment do not allow courts to decide issues of fact, but do allow them to examine the pleadings and proof to determine whether trial is necessary. *How to File a Motion for Summary Judgment*, BLOOMBERG L. (Feb. 22, 2023), https://pro.bloomberglaw.com/brief/how-to-file-a-motion-for-summary-judgment/.

49. *Harlow*, 457 U.S. at 818.

The Court replaced the good faith requirement with a purely objective standard of "reasonableness of an official's conduct."[50] This standard, the Court decided, could be met when a judge analyzes the existing applicable law and determines "whether that law was clearly established at the time an action occurred."[51] According to the Court, the law had to be clearly established; if it was not, an official could not "fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."[52] This ultimately resulted in a requirement of prior cases outlining conduct as unlawful;[53] this is the current requirement today.[54] Overall, *Harlow* created a two-prong requirement for qualified immunity: (1) the conduct must be shown to be unlawful, and (2) there must have been clearly established law.[55]

Since *Harlow*, the Court has addressed the uncertainty in the second prong by clarifying and providing guidance on what constitutes "clearly established law." For example, in *Ashcroft v. al-Kidd*, the Court stated that "existing precedent must have placed the statutory or constitutional question beyond debate."[56] Despite the Court claiming that it "do[es] not require a case directly on point,"[57] lower courts have regularly been admonished to not "define clearly established law at a high level of generality."[58] This has ultimately resulted in courts frequently distinguishing cases in some manner, rather than finding that the law was clearly established.[59]

Another major change in qualified immunity doctrine jurisprudence came from *Saucier v. Katz* and, subsequently, *Pearson v. Callahan*.[60] In *Saucier*, the Court outlined a two-step inquiry for

50. *Id.*

51. *Id.*

52. *Id.*

53. *See* Mullenix v. Luna, 577 U.S. 7, 13 (2015).

54. *See* EJI, *Qualified Immunity*, EQUAL JUST. INITIATIVE, https://eji.org/issues/qualified-immunity/ (last visited Oct. 21, 2023).

55. *Harlow*, 457 U.S. at 818.

56. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

57. *al-Kidd*, 563 U.S. at 741.

58. *Id.* at 742.

59. Chung et al., *supra* note 11 (discussing various aspects of qualified immunity and analyzing multiple cases in which qualified immunity was denied because there was no clearly established precedent).

60. Saucier v. Katz, 533 U.S. 194 (2001); Pearson v. Callahan, 555 U.S. 223 (2009).

adjudicating qualified immunity cases.[61] First, a court must consider whether the facts of the case resulted in the violation of a constitutional right.[62] Then, if it determines there was a constitutional violation, it must analyze whether "the right was clearly established."[63] This resulted in the "proper sequence" in which courts had to answer the two questions laid out in *Harlow*:[64] (1) whether the conduct was unlawful and (2) whether the unlawful conduct clearly established precedent. This order ensured that rights could become "clearly established."[65] Due to qualified immunity's reliance on clearly established precedent, this limited the scope of qualified immunity and ensured future plaintiffs could seek monetary compensation.[66]

The Court overturned this ruling eight years later in *Pearson*, holding that "the *Saucier* procedure should not be regarded as an inflexible requirement . . . ."[67] In doing so, the Supreme Court enabled the lower courts to exercise discretion when deciding the order in which to answer the questions set forth in *Saucier*.[68] The Court made sure to mention that the sequence from *Saucier* "is often appropriate," but nevertheless vested discretion in the lower courts.[69] Despite noting that, in many cases, only answering the second prong would not substantially conserve judicial resources, the Court ultimately held that the burden imposed by the *Saucier* order outweighed the benefits that it could provide.[70] This reversal has increasingly led lower courts to opt out of ruling on whether the conduct was unlawful, and only establish that there was no clear precedent.[71]

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61. *Saucier*, 533 U.S. at 200.

62. *Id.*

63. *Id.*

64. *Id.*; Harlow v. Fitzgerald, 457 U.S. 800 (1982).

65. *Saucier*, 533 U.S. at 200.

66. *See* John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 Sup. Ct. Rev. 115, 120–21.

67. Pearson v. Callahan, 555 U.S. 223, 227 (2009).

68. *Id.* at 236.

69. *Id.*

70. *Id.* at 236–37 (noting that the *Saucier* order promotes the development of constitutional precedent but "sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case.").

71. Chung et al., *supra* note 11.

B. *Where Qualified Immunity Stands Today*

As stated previously, overcoming a qualified immunity defense today has two main requirements: (1) the facts must show that the officer's conduct was unlawful; and (2) a prior court case must have established that the conduct was unlawful.[72] The first requirement calls upon courts to analyze the specific conduct at issue and to determine whether the conduct itself was unlawful.[73] The second requirement focuses on existing precedent to determine whether it "clearly established" the law.[74] The Supreme Court provided that these issues can be addressed in any order, and courts concluding negatively on the second prong need not discuss the first.[75]

Qualified immunity holdings from the Supreme Court differ based on which judges sit the Court at the time of a particular case.[76] The

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72. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); EJI, *supra* note 54. Once the court makes a decision that establishes certain conduct as unlawful, that decision provides notice to all officers that such conduct is now unlawful. *Id.* The flawed logic here is that if there is case law that deems particular conduct unlawful, then and *only then*, will any reasonable police officer know that the conduct is unlawful. Even if the conduct should have been found to be unlawful, it will not be established as such when there is no clearly established law relating to that conduct, thus allowing the next officer to engage in that same unlawful conduct. Thus, even though there are repeated instances of police using excessive force to restrain civilians, such as when police kill civilians by hogtieing them and kneeling on their backs, such conduct can never be unlawful under this framework because no court will hold the conduct as unlawful until another court does so. *See supra* Introduction.

73. EJI, *supra* note 54.

74. Chung et al., *supra* note 11.

75. *Pearson*, 555 U.S. at 236. In short, if there is no clearly established precedent, the court does not have to determine whether the conduct was unlawful. *See id.*

76. *See* Pearson Cunningham, Esq., *Whose Precedents Count for Qualified Immunity*, HALL BOOTH SMITH, P.C. (Dec. 28, 2021), https://hallboothsmith.com/whose-precedents-count-for-qualified-immunity/ (reviewing recent Supreme Court decisions and trends involving qualified immunity). Between 1982 to 2017, the Supreme Court has decided only two cases where it held that there was no qualified immunity: *Hope v. Pelzer*, in 2002, and *Groh v. Ramirez*, in 2004. William Baude, *Is Qualified Immunity Unlawful*, 106 CALIF. L. REV. 45, 88–90 (2018); *see Hope v. Pelzer*, 536 U.S. 730 (2002); *Groh v. Ramirez*, 540 U.S. 551 (2004). From 2002 to 2004, the following justices sat on the Supreme Court: Chief Justice Rehnquist, Justice Stevens, Justice O'Connor, Justice Scalia, Justice Kennedy, Justice Souter, Justice Ginsburg, Justice Breyer, and Justice Thomas. U.S.

current Court trends towards granting qualified immunity to government officials.[77] For example, on October 18, 2021, the Supreme Court reversed two cases that originally denied qualified immunity protections to officials, ultimately allowing qualified immunity to shield the government officials.[78] Even more recently, on June 30, 2022, the Supreme Court denied certiorari for two cases that previously granted qualified immunity.[79] Based on these recent decisions, the Supreme Court has evidenced an inclination towards expanding the shield of qualified immunity, rather than narrowing it.

II. JUDICIAL MECHANISMS FREEZE PRECEDENT AND EXACERBATE QUALIFIED IMMUNITY PROBLEMS

Since clearly established law is a vital component of the qualified immunity analysis, the freezing of precedent leads to substantial problems with the application of qualified immunity.[80] If precedent is not created, officers and other government officials will continue to be protected by qualified immunity; even where similar cases have been previously adjudicated, courts have still granted qualified immunity based solely on a finding that there was not already clearly established

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Cong., *Table of Supreme Court Justices*, CONST. ANNOTATED, https://constitution.congress.gov/resources/supreme-court-justices/ (last visited Dec. 28, 2023).

77. *See* Thomas H. Barnard, et al., *A Victory for Qualified Immunity. A Trend to Continue?*, BAKER DONELSON (Nov. 9, 2021), https://www.bakerdonelson.com/a-victory-for-qualified-immunity-a-trend-to-continue (noting that the Supreme Court reversed denials of qualified immunity in two recent cases and "is not retreating from its support of the [qualified immunity] doctrine.").

78. *See generally* City of Tahlequah v. Bond, 142 S. Ct. 9, 10–12 (2021) (holding that officers were protected by qualified immunity after shooting and killing a man holding a hammer behind his head in a threatening stance, because there was no clearly established precedent); Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 6–7 (2021) (holding that an officer was entitled to qualified immunity after kneeling on a suspect with a knife in his pocket because the facts of the case were distinguishable from earlier cases).

79. *See generally* Cope v. Cogdill, 142 S. Ct. 2573 (2022); Ramirez v. Guadarrama, 142 S. Ct. 2571 (2022). In both cases, the officials were covered by qualified immunity and the Court accordingly refused to review the case, thus allowing the officials to remain covered by qualified immunity. *See generally, Ramirez*, 142 S. Ct. 2571; *Cope*, 142 S. Ct. 2573.

80. Chung et al., *supra* note 11 (arguing that the Supreme Court continues to reinforce a narrow definition of "clearly established.").

precedent.[81] The two-prong analysis of qualified immunity is not the only mechanism that can freeze the development of precedent, but it is a doctrine that is significantly impacted by the creation or the absence of precedent.[82] Since clearly established precedent is a requirement to overcome a qualified immunity defense, it is vital that relevant precedent be established to enable subsequent plaintiffs to litigate violations of their rights.[83]

There are many judicial mechanisms that prevent plaintiffs from litigating violations of their rights.[84] Due to the nature of precedent, when plaintiffs cannot litigate violations of their rights, precedent[85] from those violations *cannot* be established. This Part focuses on three mechanisms that can prevent plaintiffs from vindicating their rights: (1) the standing doctrine; (2) limitations on federal habeas corpus petitions; and (3) post-*Pearson* qualified immunity procedure,[86] including how these mechanisms freeze precedent, and how frozen precedent perpetuates the problems created by the current qualified immunity doctrine.

A. *How Standing Doctrine Leaves Questions Unanswered*

The standing doctrine prevents a plaintiff from litigating a case unless they are the "proper party to bring a matter to the court for

81. *Id. See Rivas-Villegas*, 142 S. Ct. at 7; Kisela v. Hughes, 138 S.Ct. 1148, 1153–55 (2018).

82. *See* CHEMERINSKY, *supra* note 27 at 93–136 (listing multiple mechanisms, such as the standing doctrine and political question doctrine, that prevent plaintiffs from making it to a courthouse).

83. Chung et al., *supra* note 11. It merits emphasizing that if courts do not create relevant precedent, plaintiffs might *never* be able to vindicate their constitutional rights in the face of a defendant raising the defense of qualified immunity.

84. *See* CHEMERINSKY, *supra* note 27 at 93–136. For an elaboration on these mechanisms, *see* discussion *infra* Section II.A.

85. Precedent refers to a court decision or series of decisions that act as authority for deciding subsequent cases involving similar or identical legal issues or facts. *Precedent,* LEGAL INFO. INST., https://www.law.cornell.edu/wex/precedent#:~:text=Precedent%20is%20generally%20established%20by,originally%20part%20of%20the%20statute (last updated May 2020).

86. CHEMERINSKY, *supra* note 27 at 93–136.

adjudication."[87] This ultimately allows courts to dismiss cases without addressing the substantive questions raised by the case.[88] For example, in *Warth v. Seldin*, the petitioners brought an action against their town, claiming that the town's zoning ordinance "excluded persons of low and moderate income from living in the town."[89] Rather than addressing whether the zoning ordinance was unconstitutional or violated the United States Code, the Supreme Court ruled that the petitioners did not have standing because they could not show that they suffered a "distinct and palpable injury."[90] The case was dismissed; it was never established whether the use of that particular zoning ordinance was constitutional.[91]

Despite the standing doctrine's perpetuation of inequity in constitutional rights litigation, it confers benefits, as well. It serves to promote the proper separation of powers and helps ensure that the ideal plaintiff is litigating a particular claim.[92] Without the standing doctrine, there would be significant social welfare costs and interferences with individual rights.[93] However, the standing doctrine is often interpreted too broadly and can result in cases where *no* plaintiff would have standing to pursue a violation of their rights.

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87. *Id.* at 96. The standing doctrine originates from Article III of the Constitution, which limits federal courts' jurisdiction to hear "cases or controversies." U.S. Cong, *Overview of Standing,* CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-1/ALDE_00012992/ (last visited Oct. 8, 2023). For examples of the Supreme Court applying the standing doctrine, *see, e.g.,* Cnty. of Riverside v. McLaughlin, 500 U.S. 44 (1991); Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992); Massachusetts v. Env't Prot. Agency, 549 U.S. 497 (2007).

88. *See* Warth v. Seldin, 422 U.S. 490, 517–18 (1975) (holding that judicial intervention and resolution of the dispute is inappropriate when the parties do not have standing).

89. *Id.* at 493.

90. *Id.* at 501.

91. *Id.* at 517–18; Terrance Sandalow, *Comment on Warth v. Seldin*, LAND USE L. & ZONING DIG. 27, 7–8 (1975).

92. Eugene Kontorovich, *What Standing is Good For*, 93 VA. L.R. 1663, 1672–74 (2007).

93. *Id.* at 1667. As Kontorovich explains, the standing doctrine ensures "an efficient solution" for an individual person's rights; essentially, if the standing doctrine did not exist, any member of a large class could engage in strategic litigation, rather than the individual whose rights are actually impacted. *Id.*

The following case is a particularly egregious example. In *City of Los Angeles v. Lyons*, a man was denied the ability to seek injunctive relief after being injured by police.[94] Adolph Lyons was pulled over by police for a traffic violation.[95] Although Lyons's complaint alleged that he offered no resistance, officers grabbed Lyons and applied a "chokehold," which rendered him unconscious and damaged his larynx.[96] Lyons sued to permanently enjoin the City of Los Angeles from utilizing chokeholds.[97] The Supreme Court did not address whether the use of these chokeholds constituted an excessive use of force even though there were at least sixteen chokehold deaths caused by police in Los Angeles between 1975 and 1983.[98] Instead, the Court dismissed the case for a lack of standing, holding that because Lyons could not show that "he was likely to suffer future injury from the use of the chokeholds by police officers[,]" he did not have standing to pursue his claim.[99] Justice Thurgood Marshall's dissent eloquently addresses the serious problem with the application of the standing doctrine in this instance: "Since no one can show that he will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy."[100] This standing ruling effectively permitted the practice of chokeholds in the city of Los Angeles because it deliberately failed to address the legality of chokeholds.

The standing doctrine allows courts to sidestep difficult questions by asserting that a plaintiff does not have standing to bring the claim in the first place.[101] If a court concludes that a plaintiff lacks standing, the court cannot address the underlying issues of the case. This further prevents courts from addressing constitutional violations, which prevents the creation of clearly established precedent. As discussed earlier, qualified immunity relies substantially on precedent, and the

94. City of L.A. v. Lyons, 461 U.S. 95, 97–100 (1983).
95. *Id.* at 97.
96. *Id.* at 97–98.
97. *Id.* at 98.
98. See *id.* at 101, 115–16 (Marshall, J., dissenting).
99. *Lyons*, 461 U.S. at 105.
100. *Id.* at 113.
101. *See generally* Richard J. Pierce Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999).

Supreme Court requires cases to be factually similar—almost identical, really—to the instant case in order to constitute clearly established precedent.[102] Thus, when the standing doctrine prevents an alleged claim of a constitutional violation by a state actor to reach the merits, it fails to create the required "clearly established" precedent. As a result, state actors who commit constitutional violations are left unchecked, creating a perpetual bar for future plaintiffs.

B. *Limitations on Federal Habeas Corpus Petitions Limit Precedent Creation*

Federal habeas corpus petitions are intended to protect citizens from unlawful and unconstitutional imprisonment.[103] The principle behind federal habeas corpus petitions applies when a detainee has already exhausted their remedies in state court and thus petitions for the federal court system to review their case.[104] Habeas corpus petitions are a right codified in the United States Constitution, specifically, the Suspension Clause, which provides that habeas corpus review may only be suspended in cases of "rebellion" or "invasion".[105] Despite the profound nature of this right and its memorialization in our Constitution, there are many limitations on the use of federal habeas corpus petitions.[106] These limitations work alongside the standing doctrine and post-*Pearson* qualified immunity to freeze the establishment of precedent.

Since habeas corpus petitions involve constitutional violations, they are particularly pertinent to qualified immunity jurisprudence.[107]

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102. Schweikert, *supra* note 23.

103. CHEMERINSKY, *supra* note 27 at 139. Habeas corpus is Latin for "that you have the body." Cornell L. Sch., *Habeas Corpus,* LEGAL INFO. INST., https://www.law.cornell.edu/wex/habeas_corpus (last updated Mar. 2022). Habeas corpus originated in 1215, through the Magna Carta, which provided: "No man shall be arrested or imprisoned . . . except by the lawful judgment of his peers and by the law of the land." *Id.*

104. *See* 28 U.S.C.S. § 2254(b)(1).

105. U.S. CONST. art. I, § 9, cl. 2. This provision is also known as the Suspension Clause. Cornell L. Sch., *supra* note 103.

106. CHEMERINSKY, *supra* note 27 at 142, 144.

107. *See* CHEMERINSKY, *supra* note 27 at 139 (noting that habeas corpus petitions involve a person alleging that they have been "convicted or sentenced in violation of the Constitution and laws of the United States."); Schweikert, *supra* note

When limitations on habeas corpus petitions prevent these constitutional violations from being litigated, they prevent constitutional violations from being clearly established by case law. In turn, this impedes the creation of precedent and expands the qualified immunity shield for government officials. This Comment addresses two limitations that can thwart the creation of clearly established precedent for qualified immunity purposes: (1) the ban on review of Fourth Amendment claims; and (2) the retroactivity principle.[108]

Because habeas corpus petitions presume that petitioners have exhausted their state court remedies, the Supreme Court has determined that Fourth Amendment claims, typically for the illegal seizure or discovery of evidence, cannot be reviewed by a federal court on habeas corpus, assuming that such an issue was already raised and decided in state court.[109] The problem with the ban on review of Fourth Amendment claims is that it assumes that the state and federal courts are equally suited to address Fourth Amendment claims.[110] Professor Erwin Chemerinsky disagrees with this theory, stating that "federal courts are uniquely situated to decide constitutional claims, and this justifies relitigation of constitutional issues on habeas corpus."[111] Despite Professor Chemerinsky's position, the Supreme Court has upheld the ban on Fourth Amendment claims, preventing the review of search-and-seizure violations in habeas corpus petitions.[112]

The ban on review of Fourth Amendment claims prevents the establishment of precedent. When federal courts are unable to review potential violations of Fourth Amendment claims in habeas corpus petitions, they are unable to establish whether these claims were, in fact, violations.[113] In turn, this prevents precedent from being established, which ensures that government officials remain shielded

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23 (arguing that qualified immunity allows "police officers to get away with unconscionable constitutional violations.").

108. A thorough discussion of federal habeas corpus petition limitations is beyond the scope of this Comment.

109. Stone v. Powell, 428 U.S. 465, 494–95 (1976).

110. CHEMERINSKY, *supra* note 27 at 145.

111. *Id.* CHEMERINSKY, *supra* note 27 at 145.

112. *Stone*, 428 U.S. at 494–95.

113. This is particularly troubling, given Professor Chemerinsky's view that federal courts are *better* suited to adjudicate constitutional violations. *See* CHEMERINSKY, *supra* note 27 at p. 145.

by qualified immunity when engaging in the same violations that are alleged in petitions for habeas corpus review.

The lack of retroactive application is another limitation on federal habeas corpus petitions.[114] In *Teague v. Lane*, Teague, a Black man, was convicted by an all-white jury after the prosecutor used all ten peremptory challenges to exclude Black jurors.[115] On appeal, Teague argued that he had been denied "the right to be tried by a jury that was representative of the community."[116] After the state courts denied all appeals, Teague filed a petition for a writ of habeas corpus.[117] Before rehearing Teague's case, the Supreme Court decided *Batson v. Kentucky*, which established that the use of peremptory challenges in a discriminatory violates a petitioner's right to equal protection.[118] However, in *Teague*, the Supreme Court held that the rule from *Baston* did not apply retroactively; therefore, Teague did not suffer an equal protection violation when his opposing council struck only Black jurors.[119]

After *Teague*, federal courts may not use newly established constitutional violations during habeas corpus review.[120] This process also prevents the establishment of new fact-oriented precedent, which is a critical component of qualified immunity. Though a court will at least have the constitutional violation established for qualified immunity purposes, qualified immunity jurisprudence relies substantially on having cases with similar facts to create the necessary precedent. By prohibiting cases from applying new rules retroactively, fewer cases are being litigated,[121] and thus fewer cases have the potential to create the required "similar case" precedent required by the Supreme Court.

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114. CHEMERINSKY, *supra* note 27 at 153.

115. Teague v. Lane, 489 U.S. 288, 292–93 (1989).

116. *Id.* at 293. Specifically, this right to be tried by an "impartial jury drawn from a fair cross section of the community" comes from the Sixth Amendment. *Id.* at 296; *see also* U.S. CONST. amend. VI.

117. *Teague*, 489 U.S. at 292–93. .

118. *Id.* at 294–95; Batson v. Kentucky, 476 U.S. 79, 89 (1986).

119. *Teague*, 489 U.S. at 295–96.

120. *See id.* at 310, 316 ("We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants . . . .") (emphasis in original).

121. *See* Timothy Finley, *Habeas Corpus—Retroactivity of Post-Conviction Rulings: Finality at the Expense of Justice*, 84 J. CRIM. L. & CRIMINOLOGY 975,

C. *Problems with Post*-Pearson *Qualified Immunity*

In *Pearson*, the Supreme Court ultimately favored judicial economy over protecting constitutional rights.[122] Allowing courts to skip the "unlawful conduct" question has made it exceedingly difficult for plaintiffs to obtain remedies for violations of their rights.[123] Experts have noted that appellate courts have "increasingly ignored the question of excessive force", thus avoiding setting clearly established precedent for subsequent cases, even for the "most egregious acts of police violence."[124] The post-*Pearson* qualified immunity analysis "creates a 'Catch-22' for civil rights plaintiffs."[125] While the "clearly established" component of qualified immunity technically *can* be established based on the unlawful conduct being obvious enough that it is clear, despite not having existing precedent, these cases are rare; actual precedent is usually necessary to meet this prong of the analysis.[126]

982–85 (1994) (listing cases that were denied review based on the retroactivity principle, such as *Penry v. Lynaugh*, *Butler v. McKellar*, and *Graham v. Collins*).

122. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) (holding that courts could decline to address whether the conduct was unlawful if they concluded that there was no clearly established precedent); Nathaniel Sobel, *What is Qualified Immunity, and What Does it Have to Do With Police Reform?*, LAWFARE (June 6, 2020, 12:16 PM), https://www.lawfareblog.com/what-qualified-immunity-and-what-does-it-have-do-police-reform ("[C]ourts often take . . . the 'simpler' route of resolving a case based on the 'clearly established' inquiry.").

123. *See* Chung et al., *supra* note 11.

124. *Id.*

125. Sobel, *supra* note 122. For readers unfamiliar with the term, a "catch-22" is "a problematic situation for which the solution is denied by a circumstance inherent in the problem or by a rule." *Catch-22*, MIRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/catch-22 (last visited Oct. 8, 2023).

126. District of Columbia v. Wesby, 583 U.S. 48, 64 (2018) (citing Brosseau v. Haugen, 543 U.S. 194, 199 (2004)). Situations where unlawful conduct is so obvious that it is clear are the "extraordinary circumstances" in which factually similar precedent is not required to overcome a qualified immunity defense. *See* Alexander J. Lindvall, *Qualified Immunity and Obvious Constitutional Violations*, 28 GEO. MASON L. REV. 1047, 1049 (2021); *see also* Hope v. Pelzer, 536 U.S. 730, 733–35, 745–46 (2002) (holding that prison guards were not entitled to qualified immunity, despite a lack of factually similar precedent, after handcuffing a prisoner to a hitching post for seven hours, with minimal water and no bathroom breaks). *But see* Ziglar v. Abbasi, 582 U.S. 120, 127–28, 153 (2017) (discussing the treatment of eighty-four individuals whose presence in the United States was unlawful, who were detained in tiny cells, strip searched, and subjected to physical and verbal abuse; nonetheless, the officials

A study by Joanna Schwartz, a law professor at UCLA School of Law, and an expert on qualified immunity, concluded that the clearly established precedent prong of the qualified immunity analysis does not serve its intended purpose.[127] In her study, Professor Schwartz reviewed police methodology, policies, and various forms of training and identified that police officers are rarely informed regarding relevant precedent.[128] This shows the clearly established concept has no actual bearing on the decisions made by police in the field,[129] which has been the basis for the objective component of qualified immunity analysis since *Harlow*.[130] This suggests that creating precedent is a necessary but insufficient condition to prevent future harms. While establishing precedent may allow new plaintiffs a remedy—litigating their claims—it will have little impact on *preventing* constitutional violations; this is just one of many issues resulting from the current form of the qualified immunity doctrine.[131]

Overcoming a qualified immunity defense requires clearly established precedent.[132] *Pearson* does not require courts to address the question necessary to establish precedent: that the conduct was unlawful.[133] When combined, these two factors detrimentally impact plaintiffs because government officials may repetitively engage in the same unlawful acts. If courts merely rule that no clearly established precedent existed, and not that particular conduct was unlawful, government defendants will remain shielded by qualified immunity.

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were still covered by qualified immunity because reasonable officials in their positions would not have known of the illegality of their conduct).

127. Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 609–11 (2021) (arguing that, despite reliance on "clearly established law" in qualified immunity litigation, police are not actually informed or regularly updated regarding relevant case law).

128. *Id.*

129. *Id.*

130. *See* Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982).

131. Ultimately, if police officers are not regularly updated on case law, they will remain unaware that certain conduct has been deemed unlawful, even when precedent is established. This, in turn, reduces the efficacy and purpose of the qualified immunity prongs, which are both overbroad and illogical.

132. *Harlow*, 457 U.S. at 818.

133. Pearson v. Callahan, 555 U.S 223, 232–36 (2009) (giving courts discretion to decide if the right at issue was "clearly established" before entertaining the merits of the constitutional claim).

Too many victims find themselves unable to obtain relief for violations of their rights due to a lack of "clearly established" precedent.[134] *Kisela v. Hughes* is a particularly well-known qualified immunity case where the Supreme Court determined that there was no violation of clearly established precedent.[135] In *Kisela*, the plaintiff stood stationary, "about six feet away from [her roommate], appear[ing] 'composed and content' . . . and held a kitchen knife down at her side with the blade facing away from [her roommate]."[136] Upon seeing this, Officer Kisela decided Hughes posed a danger to the roommate, and thus, shot Hughes four times.[137]

The Supreme Court ultimately reasoned that Officer Kisela was shielded by qualified immunity because the cases relied on by the lower court were either distinguishable or decided *after* the shooting took place.[138] Justice Sotomayor wrote a potent dissent, criticizing the majority's analysis of the clearly established precedent prong.[139] She emphasized that past precedent was sufficient to establish that the use of deadly force in this particular situation was unreasonable and listed multiple cases with similar facts.[140] Justice Sotomayor concluded her dissent by stating that the *Kisela* decision "tells officers that they can shoot first and think later, and. . . tells the public that palpably unreasonable conduct will go unpunished."[141]

A Reuters study found several instances where plaintiffs lost their cases for failing to meet the specificity required for a court to determine that there was clearly established precedent, such as the *Callwood v.*

134. EJI, *supra* note 54.

135. Kisela v. Hughes, 138 S. Ct. 1148, 1154–55 (2018).

136. *Id.* at 1155.

137. *Id.*

138. *Id.* at 1154.

139. *Id.* at 1159–61 (Sotomayor, J., dissenting).

140. *See, e.g.,* Bryan v. MacPherson, 630 F.3d 805, 831 (9th Cir. 2010) (concluding that an officer's force was excessive when he tased a man without warning him and without considering less forceful alternatives); Graham v. Connor, 490 U.S. 386, 397 (1989) (stating that the reasonableness of an officer's conduct is an objective standard that is not dependent on the officer's underlying intent); Tennessee v. Garner, 471 U.S. 1, 11–12 (1985) (finding that where feasible, an officer should provide warning prior to using deadly force and may only reasonably use deadly force when the "officer has probable cause to believe that the suspect poses a threat of serious physical harm . . . ."); *Kisela*, 138 S. Ct. at 1157 (Sotomayor, J., dissenting).

141. *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

Jones case discussed previously.[142] There, Khari Illidge was killed by the use of excessive force[143] and the court ruled there was no clearly established precedent.[144] Notably, the Court in the *Callwood* decision specifically alluded to their prior decision in the *Lewis v. City of West Palm Beach* case when determining that there was *still* no clearly established precedent, even though they were the exact same court that failed to establish precedent by taking advantage of post-*Pearson* discretion.[145] Answering only the "clearly established precedent" prong of the qualified immunity analysis resulted in the officers in the subsequent case *also* being protected by qualified immunity.[146] Consequently, no precedent was established, and Illidge's rights were unprotected and unenforceable.[147] Illidge's mother received no compensation for the police's clearly excessive use of force.[148]

More recently, the Supreme Court created another potential problem for finding clearly established precedent in cases regarding qualified immunity.[149] In 2018, the Supreme Court decided *District of Columbia v. Wesby*, concluding that the "then-existing precedent" was insufficient because the precedent needed to "be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply."[150] Tucked in a footnote of the opinion, the Supreme Court noted "[w]e have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity."[151] While this footnote simply addresses that a question has not yet been answered, it provides the Supreme Court (as

142. Chung et al., *supra* note 11; Callwood v. Jones, 727 F. App'x 552, 561 (11th Cir. 2018).

143. As the court did not address whether the officers' conduct constituted excessive force, this conclusion is that of this Author.

144. *Callwood*, 727 F. App'x at 561.

145. *See* Chung et al., *supra* note 11; Lewis v. City of W. Palm Beach, 561 F.3d 1288, 1291–92 (11th Cir. 2009); *Callwood*, 727 F. App'x at 561.

146. Chung et al., *supra* note 11; *Lewis*, 561 F.3d at 1291–92; *Callwood*, 727 F. App'x at 561.

147. Chung et al., *supra* note 11.

148. *See id.*; *Callwood*, 727 F. App'x at 561 (holding that because there was no clearly established precedent, the officers were entitled to qualified immunity).

149. *See* District of Columbia v. Wesby, 138 S. Ct. 577, 591 n.8 (2018).

150. *Id.* at 590.

151. *Id.* at 591 n.8.

well as lower courts) with even more discretion regarding qualified immunity decisions. Specifically, this footnote suggests that the *only* applicable precedent for qualified immunity cases is Supreme Court precedent,[152] which makes up only a miniscule percentage of its annual decisions.[153] Given that courts rule disproportionately in favor of police officers,[154] this logic leads to even more inequities in the application of qualified immunity because it limits which courts' decisions can be considered in providing clearly established precedent.

These inequitable outcomes are a major problem stemming from the post-*Pearson* qualified immunity analysis. By eliminating the requirement that courts address whether specific police conduct was unlawful, precedent is simply *not* created. Failing to create precedent allows police and other officials to continuously violate people's constitutional rights in a perpetual cycle, with police prevailingly shielded by qualified immunity.

The Supreme Court acknowledged the benefits of the analysis required by *Saucier*, but opted to reverse the rule due to the "burden" that the *Saucier* analysis placed on the courts and the litigating parties.[155] This procedure for adjudicating qualified immunity cases provides a loophole through which courts can choose to avoid answering potentially difficult

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152. As this Comment has extensively discussed, the Supreme Court is seriously limited in its creation of qualified immunity precedent because of several judicial mechanisms, including the standing doctrine, habeas corpus jurisprudence, and the application of *Pearson. See* discussion *supra* Part II. The Author of this Comment would like to highlight the circular denial of justice to plaintiffs here: if Supreme Court decisions are the *only* decisions qualified for consideration in a qualified immunity case, and the Supreme Court continuously fails to create precedent for qualified immunity cases, then there is almost *no precedent* for plaintiffs to use in vindicating their constitutional rights.

153. Quality Judges Initiative, *FAQs: Judges in the United States*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (June 12, 2014), https://iaals.du.edu/sites/default/files/documents/publications/judge_faq.pdf ("More than 100 million cases are filed each year in state trial courts, while roughly 400,000 cases are filed in federal trial courts."); *About the Supreme Court*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about#:~:text=The%20Supreme%20Court%20agrees%20to,asked%20to%20review%20each%20year (last visited Nov. 4, 2023) (explaining that the Supreme Court only hears about 100 to 150 cases each year).

154. *See* Chung et al., *supra* note 11.

155. Pearson v. Callahan, 555 U.S. 223, 236–37 (2009).

questions. Unfortunately, these are the questions that most need answering. If it is *actually in doubt* whether a particular act is lawful, then the courts *need* to answer the question. Failing to resolve these difficult issues allows future plaintiffs' rights to be violated and simultaneously deprives police officers and other government officials of guidance regarding whether their actions are lawful.

III. PROTECTING PLAINTIFFS

Professor Chemerinsky contends that "[plaintiffs] must always have standing to raise a constitutional issue," and that federal courts should be available to litigate these rights.[156] However, some of these mechanisms provide valuable functions, as well. The standing doctrine serves to protect the appropriate separation of powers and ensures that the plaintiff litigating the claim is the ideal plaintiff.[157] Limitations on federal habeas corpus petitions reduce the burdens on the federal court system and prevent federal courts from adjudicating meritless claims.[158] Though this Author agrees with Professor Chemerinsky that courts should prioritize protecting constitutional rights,[159] it is unlikely that the Supreme Court would take the same view. In fact, in many of the cases discussed previously, the Supreme Court took the exact opposite view, allowing the rights of individuals to be trampled in order to protect other interests.[160] Accordingly, it is unlikely that the Supreme Court would

156. CHEMERINSKY, *supra* note 27, at 96, 133.

157. GianCarlo Canaparo, *Why Standing Matters,* THE FEDERALIST SOC'Y (June 25, 2021), https://fedsoc.org/commentary/fedsoc-blog/why-standing-matters. Specifically, the ideal plaintiff will have suffered injury in fact, caused by the defendant's unlawful conduct, and a court's decision can adequately redress this specific harm. *Standing Requirement: Overview*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/standing-requirement-overview (last visited Dec. 28, 2023).

158. *See* Nicholas Beekhuizan, *Post-AEDPA Compromise: Increased Habeas Corpus Relief for Capital Cases and Tighter Restrictions for Noncapital Cases*, 10 IND. J.L. & SOC. EQUAL. 321, 330–31 (2022) (noting that the Antiterrorism and Effective Death Penalty Act of 1996, which reformed habeas litigation, was intended to reduce the sheer number of habeas corpus petitions, increase the percentage of meritorious petitions, and ensure capital cases came to faster, final resolutions).

159. CHEMERINSKY, *supra* note 27, at 206 ("[T]he appropriate, and indeed the most important, role of the federal courts is to enforce the Constitution.").

160. *See, e.g.,* Kisela v. Hughes, 138 S. Ct. 1148 (2018); Teague v. Lane, 489 U.S. 288 (1989); City of L.A. v. Lyons, 461 U.S. 95 (1983); Ashcroft v. al-Kidd, 563

choose to limit the use of the standing doctrine or dispose of the limitations on federal habeas corpus petitions, despite the impact that these mechanisms have on the development of precedent—specifically, preventing its creation.

Since these mechanisms limit the development of precedent, and because qualified immunity relies so heavily on the establishment of precedent, this Comment proposes an ideal solution: eliminating the clearly established precedent requirement altogether. A government official should not be protected after violating the rights of an individual simply because a previous case did not inform them of the illegality of their actions.[161] As Professor Schwartz indicated in her study, government officials are generally not apprised of newly created precedent anyway.[162] If these officials do not rely on case law to provide them with notice of what conduct violates the Constitution, it makes little sense for courts to rely on precedent case law to determine the liability of these same officials.

Though reversing *Pearson* would reduce the inequities to plaintiffs denied recourse from a lack of qualified immunity precedent, it would not resolve all present concerns. Any case regarding constitutional violations can serve as notice to government officials that their conduct may violate a constitutional right, even if qualified immunity is not at issue. Therefore, although reversing *Pearson* would be a step in the right direction, it would not limit the adverse impact of other mechanisms, such as the standing doctrine and limitations on federal habeas corpus petitions, on qualified immunity analyses.

The Supreme Court has based many of its decisions regarding qualified immunity on judicial economy.[163] In *Harlow*, the Supreme

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U.S. 731 (2011); Ziglar v. Abbasi, 582 U.S. 120 (2017). These cases served to prioritize values such as judicial economy (as in *Teague* or *Lyons*) and protecting public officials from liability for their actions (as in *Kisela*, *al-Kidd*, or *Ziglar*).

161. For example, the officers in *Callwood* used a taser on Illidge fourteen times, despite Illidge appearing disoriented and/or under the influence. Callwood v. Jones, 727 F. App'x 552, 555–56 (11th Cir. 2018). Six officers then hogtied Illidge and he ultimately died as a result of the interactions with the police. *Id.* Nevertheless, the officers were granted qualified immunity. *Id.* at 561.

162. Schwartz, *supra* note 128, at 609–11.

163. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–16 (1982) (abandoning the good faith requirement for qualified immunity due to the judicial resources required for assessing good faith); Pearson v. Callahan, 555 U.S. 223, 236–37 (2009) (holding that, although the *Saucier* test is useful, requiring both prongs to be answered

Court decided to abandon the good-faith approach to qualified immunity because too many resources were necessary to determine whether a government official acted in good faith.[164] Ultimately, the Supreme Court should acknowledge that protecting the constitutional rights of citizens is more important than conserving judicial resources.

There are two avenues the Supreme Court can take to revise the qualified immunity analysis and eliminate the clearly established precedent requirement. One option involves reverting to a pre-*Harlow* analysis, where the Court would take the time and resources necessary to determine the subjective characteristics of the government official's conduct. This would require the Court to analyze the actual knowledge of the government official, as well as why they acted in the manner incidental to the case. If they find that the official subjectively acted in good faith *and* did not know their conduct was unlawful, then that official may claim a qualified immunity defense.[165]

Alternatively, the Supreme Court could implement a "reasonably prudent person" standard in the analysis.[166] In this case, the Supreme Court would need to create a more robust definition of a reasonably prudent person.[167] Rather than relying on clearly established precedent, the Court would consider how a reasonably prudent government official would act

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"sometimes results in a substantial expenditure of scarce judicial resources . . . ."). Ultimately, many of the developments in qualified immunity jurisprudence have been rationalized, despite their negative impact, because they conserve judicial resources.

164. *Harlow*, 457 U.S. at 815–16.

165. Prior to the Supreme Court's decision in *Harlow*, this two-step subjective good faith analysis was the test for qualified immunity. *See generally* Pierson v. Ray, 386 U.S. 547 (1967).

166. Generally speaking, the "reasonably prudent person" standard is used in common law to define the degree of care that an individual would exercise, most often in the context of negligence claims. David Berg, *Negligence and the "Reasonable Person" in a Personal Injury Case*, LAWYERS.COM (Mar. 1, 2022), https://www.lawyers.com/legal-info/personal-injury/personal-injury-basics/who-is-the-reasonable-person-in-a-personal-injury-case.html. The reasonably prudent person is a "hypothetical person who is reasonably prudent or careful based on the totality of circumstances in any conceivable situation. *Id.* He or she exercises that degree of care, diligence, and forethought that should objectively be exercised under the particular circumstances." *Id.*

167. In order to utilize the "reasonably prudent person" standard, the Supreme Court would need to explicitly define what a reasonably prudent government official would do in the situations being analyzed for the applicability of the qualified immunity defense.

when faced with the facts presented in a particular case. Though this approach would promote judicial economy, it may subject a government official to liability even if they subjectively did not know that their conduct was unlawful; however, either approach will reduce the likelihood that a victim of a government official's unlawful[168] conduct finds themselves without recourse for violations of their constitutional rights.

There is no perfect solution to the problems posed by qualified immunity, aside, perhaps, from abandoning it altogether. While the doctrine itself is supported by an important policy rationale—that government officials need to be able to do their jobs effectively and without fear of reprisal[169]—the current application of the doctrine is seriously flawed and creates significant, and often tragic, inequity. Given the history of qualified immunity, it is highly unlikely that the Supreme Court will choose to abandon the doctrine any time soon. In the meantime, the partisan impact of qualified immunity can be substantially reduced by modifications to its structure. By eliminating courts' reliance on clearly established precedent and replacing this requirement with either: (1) a subjective good faith requirement; or (2) a reasonably prudent person standard, the Supreme Court can ensure that victims of a government official's unlawful conduct can obtain justice for their injuries. Alternatively, overturning *Pearson* would aid in allowing subsequent plaintiffs to litigate their constitutional rights, although it would not protect these plaintiffs from the negative impact caused by other judicial mechanisms that freeze the development of precedent.

CONCLUSION

Police arrived at Fred Bletz's residence at 11:40 p.m. to arrest his son, Zachary, on an outstanding bench warrant.[170] Fred held a shotgun

168. The Author would like to note that while courts consistently do not reach the question of whether officers' conduct is lawful or not, the use of the term "unlawful" here refers to conduct that violates constitutional rights. Therefore, the conduct would be considered unlawful, as a Constitutional violation.

169. *See Qualified Immunity*, IACP, https://ilacp.memberclicks.net/assets/2022Facts/IACP%202021%20Qualified%20Immunity%20Policy%20Fact%20Sheet%5B44921%5D.pdf (last visited Dec. 28, 2023) ("The doctrine of qualified immunity is grounded in the recognition that certain government officials, including police officers, must make discretionary decisions as part of their job functions and sometimes do not have clear guidance as to what actions may be unconstitutional.").

170. Bletz v. Gribble, 641 F.3d 743, 747 (6th Cir. 2011).

toward police and repeatedly asked who they were, because he was without his glasses or his hearing aid.[171] As Fred lowered his shotgun, the attending police shot and killed him.[172] The Sixth Circuit ruled that individuals *do* have a "right to be free from deadly police force while complying with police commands to disarm" and that Fred's right was clearly established.[173] Accordingly, the court rejected the defendant officer's claim for qualified immunity.[174]

Eight years later, a teenage boy, N.K., was playing "cops and robbers" in his neighborhood with some friends.[175] As part of the game, the boy was carrying a BB gun.[176] Police, responding to a report, ordered N.K. and his friends to show their hands.[177] N.K. pulled the gun from his waistband, tossed it to the side, and was shot by police.[178] N.K. was only fourteen years old.[179] At trial, the officer conceded that N.K. had released the gun by the time he shot N.K.[180] In other words, the officer used deadly force against N.K. while he complied with the police officer's commands to disarm, which was determined in *Bletz* to be a constitutional violation. Still, the Sixth Circuit concluded that there was *not* a clearly established

171. *Id.* at 748.

172. *Id.* Notably, Fred was not shot while he was aiming the shotgun at the police: if he was aiming when police shot and killed Fred, the use of force may have been a more reasonable response. Rather, Fred was shot while *lowering* his shotgun in compliance with the police's instructions. *Id.* at 752.

173. *Id.* at 754.

174. *Id.* This is one of the few cases where a court *did* find that a right was violated and that the right was clearly established; however, there are still issues with the level of specificity at which courts adjudicate qualified immunity claims, even when cases like *Bletz* have previously been decided.

175. Nelson v. City of Battle Creek, 802 F. App'x 983, 984 (6th Cir. 2020).

176. *Id.* The reader should note that the BB gun "was all black and missing its blaze-orange barrel tip which typically characterizes these types of toy guns[,]" modifying the toy to more closely resemble a real gun to enhance their "cops and robbers" game. *Id.*

177. *Id.* In the subsequent lawsuit, the plaintiff alleged that (1) the police officer was informed that N.K. had a BB gun, not an actual gun; and (2) the police had instructed N.K. to raise his hands *and* drop the BB gun. Trace Christenson, *City, officer sued over 2013 shooting of teen*, BATTLE CREEK ENQUIRER (May 4, 2016), https://www.battlecreekenquirer.com/story/news/local/2016/05/04/city-officer-sued-over-2013-shooting-teen/83930908/.

178. *Nelson*, 802 F. App'x at 984.

179. Christenson, *supra* note 177.

180. *Nelson*, 802 F. App'x at 987.

precedent—N.K. reached for his waistband, while the plaintiff in *Bletz* did not—even though the same constitutional right was at issue.[181] Once again, qualified immunity protected these officers from liability despite the similarities and legal recourse available by applying *Bletz.*

The criticisms of qualified immunity are well-founded, and the seemingly impervious shield provided by this doctrine has left many plaintiffs without remedies—an inequity that should be impermissible. When qualified immunity intersects with judicial mechanisms that work in unity to freeze precedent, such inequities are compounded, and more plaintiffs find themselves without recourse for violations of their rights. When courts leverage the standing doctrine to sidestep adjudicating constitutional violations, they deny future plaintiffs the right to litigate potential claims. Furthermore, courts fail to deter government officials from committing constitutional violations in the first place. Without consequences, egregious conduct will continue to happen. The limitations on federal habeas corpus petitions have a similar impact and further seriously limit the possibility of precedent to be created. These limitations prevent federal courts from ruling on Fourth Amendment claims and retroactively applying new law. These limitations are yet another mechanism that stymies the development of precedent. Given the current state of the qualified immunity doctrine and its substantial reliance on clearly established precedent, these additional mechanisms leave aggrieved plaintiffs without recourse.

Understanding how other constitutional mechanisms impact the utility of qualified immunity is essential to appreciating the importance of modifying the doctrine. Qualified immunity is not only problematic because of the post-*Pearson* analysis. It is also problematic because unrelated constitutional mechanisms similarly freeze the development of precedent and prevent plaintiffs from litigating their claims. Relying on clearly established precedent is illogical and ineffective. The problem is clear: the current qualified immunity doctrine simply does not work.[182]

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181. *Id.* at 990. Both plaintiffs asserted that officers had violated their Fourth amendment rights. *Id.* at 984; *Bletz*, 641 F.3d at 749 (asserting claims for violations of the decedent's Fourth, Fifth, Eighth, and Fourteenth Amendment rights, but denying the officer qualified immunity for the Fourth Amendment claim).

182. Although proponents of qualified immunity would argue that the doctrine is working, because it is shielding government officials from liability, it could be argued that the inequities perpetuated by the use of this doctrine ultimately render it ineffective. Further, the clearly established precedent requirement does not serve a

Qualified immunity was created and shaped by the Supreme Court and can be modified by the Supreme Court.[183] To address the inequities discussed in this Comment, the Court should explore one of the following options. First, it could reverse the decision in *Pearson* and return to the test used in *Saucier*: (1) whether a constitutional right was violated; and (2) whether the right was clearly established.[184] Though this would slightly improve the impact of qualified immunity, it would not address the concerns caused by other judicial mechanisms that similarly freeze precedent. Second, the Court could replace the clearly established precedent requirement with the previous subjective good faith requirement used before the Court's decision in *Harlow*. While this would create more equitable rulings on qualified immunity protection, it would also require far greater judicial resources. Finally, the Court could replace the clearly established precedent requirement with a reasonably prudent person requirement. Of the three potential options, this is the best choice for the Court to employ, as it would facilitate the creation of precedent for plaintiffs to utilize in their suits, without abandoning qualified immunity completely.

Had qualified immunity been modified, Khari Illidge's mother may have been able to obtain a remedy for the death of her son. N.K. may have been compensated for the injuries he sustained as a fourteen-year-old, who was shot at the hands of police. Countless others may have been able to obtain remedies, or been spared from the use of excessive police force altogether. As the qualified immunity doctrine stands today, each person who is unlawfully beaten, illegally detained, or unjustifiably murdered, is without recourse. And when the courts decide not to address the underlying constitutional violation, subsequent persons who are unconstitutionally battered, detained, or murdered by government officials will continue to be denied justice. The current state of the doctrine, whose cyclical logic denies recourse to aggrieved parties, cannot stand.

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logical purpose, because police officers are not routinely updated on new precedent. *See* Schwartz, *supra* note 128.

183. Whitney K. Novak, *Policing the Police: Qualified Immunity and Considerations for Congress*, CONG. RSCH. SERV. (Feb. 21, 2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10492#:~:text=law%20enforcement%20end.%E2%80%9D-,Considerations%20for%20Congress,choose%20to%20revise%20the%20doctrine.

184. Saucier v. Katz, 533 U.S. 194, 200 (2001).

The Court must change its approach to qualified immunity jurisprudence to ensure that individual rights can be protected from the unlawful actions of government officials. A single constitutional violation is one too many; yet qualified immunity allows for a second, third, fourth, and even fifth constitutional violation, with no recourse if the courts decide not to address whether the constitutional violation has occurred in the first place.[185] Not only does qualified immunity prevent plaintiffs from obtaining remedies for their harm, but it also allows government officials to continuously violate the rights of the citizens whom they have sworn to serve *and protect*.[186] No one is above the law, unless the law is twisted to a standard where courts do not even have to decide whether the law was broken. Qualified immunity, as it stands now, does not further the pursuit of justice; it freezes justice in its tracks.

*Sarah Rowe**

185. Although the Author is unaware of any cases where a right was allowed to be violated four or five times, the *Lewis* and *Callwood* cases demonstrate instances where a violation would be allowed to occur *at least three times*, because the "excessive force" question has *still* not been answered. *See* Lewis v. City of W. Palm Beach, 561 F.3d 1288, 1291 (11th Cir. 2009); Callwood v. Jones, 727 F. App'x 552, 561 n.13 (11th Cir. 2018) ("Because we conclude that the officers did not violate clearly established law, we do not decide whether they violated Illidge's constitutional right to be free from excessive force.").

186. *At Opposite Ends of the Country, Police Agencies Make a Promise*, DISPATCH (Jan. 2023), https://cops.usdoj.gov/html/dispatch/02-2023/police_promises.html (noting multiple police agencies who have committed to the "Peace Officer Promise" which states "We, the members of the [department name], promise that while doing our best to control crime, we will do everything in our power to do no harm to the communities we *serve and protect*.") (emphasis added). *But see* Letters to the Editor, *No mention of serving all in California's police oath*, THE MERCURY NEWS (June 11, 2020), https://www.mercurynews.com/2020/06/11/letter-no-mention-of-serving-all-in-californias-police-oath/#lnm53e7bnfijhhccmcg ("[T]he California Police Officer's Oath makes no reference to [the protect and serve motto].").

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