TREATING THE SOCIAL CANCER: APPLYING ABOLITION CONSTITUTIONALISM TO QUALIFIED IMMUNITY

Caroline Kelly[1]*

TABLE OF CONTENTS

INTRODUCTION

Angel Sanchez, a formerly incarcerated criminal justice activist, asserts "the prison system is like a social cancer: we should fight to eradicate it but never stop treating those affected by it."[2] In other words, Sanchez argues that the ultimate objective is prison abolition, but in the meantime, activists should work to mitigate the harm perpetuated by the system. Until prison and police abolition are fully implemented, incarcerated individuals and people of color will continue to experience severe and unjust violence perpetrated by state agents. Therefore, it is essential that those who choose to vindicate their constitutional rights

---

[1]* Caroline Kelly is a Juris Doctor candidate at the Georgetown University Law Center, with expected graduation in 2025. She is a Featured Online Contributor and Senior Online Editor for Volume 62 of the *American Criminal Law Review*. She would like to thank Professor Cashin, Bonnee Nie, Halle Nahoum, and Alyson Brusie for their thoughtful feedback, and her friends and family for their constant support.

[2] Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1652 (2019).

through the civil legal system can do so. Passed in 1871 as part of the Ku Klux Klan Act, Congress drafted 42 U.S.C § 1983 to allow individuals to sue state actors that violated their constitutional rights. One barrier to this civil lawsuit is the doctrine of "qualified immunity."[3] When a defendant government official asserts qualified immunity as a defense, courts are required to halt analysis on the merits of the case and apply the qualified immunity test: whether there was a constitutional violation and whether the law was clearly established at the time of the violation.[4] Courts are not required to rule on a potential constitutional violation before dismissing a case if the law was not clearly established. Also, if the legal standard was not clearly established, a police officer is immune from liability for his or her acts, even if the court finds there was a constitutional violation.[5] Courts have interpreted the "clearly established" prong to require the plaintiffs to provide precedent, from the Supreme Court or the same circuit, with substantially similar facts where the conduct was also found to be unconstitutional.[6] Therefore, if the plaintiff's lawyer cannot produce a nearly identical case, the § 1983 claim will be dismissed.[7]

Many scholars and activists have called to abolish qualified immunity.[8] My paper contributes to this literature by connecting the constitutional and policy arguments to abolitionist constitutionalism philosophy. Part I provides an overview of "abolition constitutionalism" and the connection between historical abolitionist movements and the modern movements to abolish qualified immunity. Part II will discuss the modalities the Supreme Court can utilize to abolish qualified immunity, namely the history and purpose of the Ku Klux Klan Act, the flawed foundational precedents, the precedential impact of *Tanvir*, the text of § 1983, the inaccurate policy justifications behind its inception, and the structural commitment to Congress to decide if policy justifications require immunity. Part III encourages lower courts to act as "movement judges" and first, produce a favorable outcome denying

---

[3] Joanna Schwartz, *Qualified Immunity Is Burning a Hole in the Constitution*, POLITICO (Feb. 19, 2023), https://www.politico.com/news/magazine/2023/02/19/qualified-immunity-is-burning-a-hole-in-the-constitution-00083569.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); Brandon Hasbrouck, *Abolish Racist Policing With the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1126 (2020); ACLU, *Ending Qualified Immunity Once and For All is the Next Step in Holding Police Accountable*, (Mar. 23, 2021), https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable.

qualified immunity by applying *Taylor* and *McCoy* broadly to mean that a previous case with similar facts is not required to satisfy the "clearly established" prong and second, denounce structures that uphold white supremacy, like prisons and policing.

I. BACKGROUND

A. Abolition Constitutionalism

Abolition constitutionalism provides an important lens from which to consider the elimination of the qualified immunity doctrine. Dorothy Roberts condenses abolitionist theory to three central pillars:

> First, today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained. Second, the expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime. Third, we can imagine and build a more humane and democratic society that no longer relies on caging people to meet human needs and solve social problems.[9]

These principles require scholars to consider the systemic nature of the problems within the modern carceral system. Modern prison abolitionists recognize that the prison system is an extension of chattel slavery, and consequently, that there are significant parallels between historical and modern abolitionist movements.[10] Although there were some serious concessions to racial moderates in their drafting of the Reconstruction Amendments–the Thirteenth, Fourteenth, and Fifteenth Amendments–represent the culmination of the work of radical abolitionists.[11] Overtime, judges that were openly hostile to rendering Black people equal to white citizens restricted the expansive power of the Reconstruction Amendments.[12] However, modern abolitionists can capitalize on the values codified in this "second founding" of America.[13]

---

[9] Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 11 (2019).
[10] *Id.* at 48.
[11] *Id.* at 49, 65.
[12] *See generally* Civil Rights Cases, 109 U.S. 3 (1883); Slaughterhouse Cases, 83 U.S. 36 (1873); *See* Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631, 637 (2022) ("While past precedents have twisted these Amendments into poor shadows of their intended functions, judges can look to the original meanings of key phrases to enforce powerful protections of individual rights.").
[13] Roberts, *supra* note 8, at 54 ("Abolitionists fought for the amended Constitution to embody their radical constitutional vision and to install a "second founding" of the nation built on equal citizenship and freedom of labor.").

Abolitionist lawyers[14] and movement judges[15] can utilize the Constitution to pursue the ultimate objective: a prison-less society. For example, since 1964, prisoners have brought successful civil rights suits against prison officials in federal court under statutes such as § 1983.[16] Impact litigation can encourage the courts to follow "a strict adherence to the Constitution's abolitionist directives."[17]

Many activists regard prison abolition as a long-term commitment but understand that progress can still be made in the interim.[18] Furthermore, it is possible to mitigate the symptoms of individuals currently experiencing the harm perpetuated by the criminal legal system in the meantime. "Non-reformist reforms" describes reform measures taken to diminish the strength of the police and prisons and expose the underlying problems.[19] When determining if an action is reformist or a measure that stifles the power of policing, abolitionist organization Critical Resistance raises questions such as "does this reduce funding to policing?"[20] "does this challenge the notion that police increase safety?"[21] and "does this reduce the scale of policing?"[22] Examples of "non-reformist reforms" include suspending the use of paid administrative leave for cops under investigation, withholding pension for cops involved in excessive force, and reducing the size of the police force.[23]

B. The Problem with Qualified Immunity

The modern policing and carceral systems are comparable to a social cancer because they are inextricably linked with constitutional violations. Even the Supreme Court has concurred that some prison

---

[14] Jamelia Morgan, *Lawyering for Abolitionist Movements*, 53 CONN. L. REV. 605, 613 (2021) ("Abolitionist lawyering provides an alternative framework—abolition—for reimagining social and legal responses to subordination, harm, violence, and predation. Abolitionist lawyering, like community lawyering, is grounded in social movements.").

[15] Hasbrouck, *supra* note 11, at 633 ("[A] movement judge [is] a jurist who understands that our Constitution contains the democracy-affirming tools we need to dismantle systems of oppression and to achieve true equality for all people.").

[16] *See* Cooper v. Pate, 378 U.S. 546 (1964).

[17] Roberts, *supra* note 8, at 113.

[18] Hasbrouck, *supra* note 11, at 664 ("Prison abolitionists' willingness to fight for a series of small victories rather than attempting to achieve the abolition of the carceral state overnight lends itself to the litigation strategy successfully deployed in the civil rights movement leading up to *Brown v. Board of Education*.").

[19] Roberts, *supra* note 8, at 114.

[20] *Reformist Reforms vs. Abolitionist Steps in Policing*, https://criticalresistance.org/resources/reformist-reforms-vs-abolitionist-steps-in-policing/.

[21] *Id.*

[22] *Id.*

[23] *Id.*

conditions amount to a deprivation of basic human needs and are therefore a violation of the Eighth Amendment.[24] Furthermore, police violence against Black and brown communities is ceaseless.[25] Therefore, there must be a viable path for obtaining not just accountability but also financial compensation. Abolishing qualified immunity will not eradicate all barriers to achieving financial compensation, but it will produce a symbolic statement that the Court is unwilling to afford police and prison officials systemic protections at the expense of individual rights.

Revered qualified immunity scholar Professor Joanna Schwartz has produced significant scholarship highlighting the flaws of qualified immunity doctrine. She asserts the major pitfall of qualified immunity lies in the fact that it eviscerates the fundamental guarantees of the Constitution. Specifically, the doctrine makes it "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."[26] The impact of this is twofold: it sends a message to officers that they can make decisions with impunity and it deters people from bringing suits.[27] Ultimately, this creates a reality in which an officer's decision-making process is more important than the protections of the Constitution. Furthermore, it suggests the violence and constitutional violations they commit in the course of their duties are unavoidable. Police become exempt from accountability because fewer people bring suits, and therefore, officers operate as if they are untouchable.

There are numerous cases in which police committed heinous acts of violence yet escaped liability on the basis of qualified immunity.[28] One blatant example of such an injustice occurred in 2018 when the Supreme Court reversed the Ninth Circuit's denial of qualified immunity to officers who shot a woman minutes after responding to a 911 call.[29]

---

[24] *See* Brown v. Plata, 563 U.S. 493 (2011).

[25] Curtis Bunn, *Report: Black people are still killed by police at a higher rate than other groups*, NBC NEWS, (Mar. 3, 2022, 12:08 PM), https://www.nbcnews.com/news/nbcblk/report-black-people-are-still-killed-police-higher-rate-groups-rcna17169 ("Black people, who account for 13 percent of the U.S. population, accounted for 27 percent of those fatally shot and killed by police in 2021, according to Mapping Police Violence, a nonprofit group that tracks police shootings.").

[26] Schwartz, *supra* note 7, at 1815.

[27] *Id.*

[28] *See* Jessop v. City of Fresno, 936 F.3d 937 (9th Cir. 2019); Corbitt v. Vickers, 929 F.3d 1304 (11th Cir. 2019); West v. City of Caldwell, 931 F.3d 978 (9th Cir. 2019); Brennan v. Dawson, 752 F. App'x 276 (6th Cir. 2018); Kelsay v. Ernst, 933 F.3d 975 (8th Cir. 2019); Baxter v. Bracey, 751 F. App'x 869 (6th Cir. 2018); Cooper v. Flaig, 779 F. App'x 269 (5th Cir. 2019); Mullenix v. Luna, 577 U.S. 7 (2015); Kisela v. Hughes, 584 U.S. 100 (2018).

[29] *Kisela*, 584 U.S. 100 at 101.

Police officers received a call from concerned neighbors about a woman who was hitting a tree with a knife.[30] When officers arrived at the scene, they saw the plaintiff walk out of her front door with a kitchen knife.[31] The plaintiff approached her roommate and began talking to her from approximately six feet away.[32] Separated by a gate, the officers ordered the plaintiff to drop her knife, but she did not hear them or acknowledge their presence.[33] Without waiting for a response or giving additional warning, the defendant officer shot the plaintiff four times.[34] Even though the plaintiff never raised the knife or verbally threatened anyone, the defendant officer's first impulse was to shoot her.[35] The Supreme Court majority first refused to decide if the defendant officer's action amounted to a constitutional violation.[36] The majority then chastised[37] the Ninth Circuit for finding the law was clearly established because there is no precedent that applies to all cases of excessive force.[38] Finally, the majority examined what they perceived to be the most analogous precedent, a case where the Ninth Circuit found deadly force did not violate the Fourth Amendment.[39]

The negative ramifications of this case were twofold. First, the Supreme Court yet again expressed a strong message in support of police. The Court applied such deference to police authority and decision-making, which colored how they viewed the facts of this case. To somehow justify this blatant example of police brutality, the majority characterized the plaintiff as an erratic, violent woman. In contrast, the dissent describes the situation as a conversation between two roommates that did not require violent state intervention or deadly force. According to the plaintiff's roommate, she never felt unsafe throughout this encounter.[40] This comparison reveals the distorted perception and inherent biases of both the police and the Court. In dissent, Justice Sotomayor expressed her concern about how qualified immunity can act

---

[30] *Id*. at 110.
[31] *Id.*
[32] *Id.*
[33] *Id*.
[34] *Id.* at 111.
[35] *Id.* at 110–11.
[36] *Id.* at 103.
[37] *Id.* at 104 ("This Court has 'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'").
[38] *Id.* at 106 ("Use of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedents 'squarely governs' the specific facts at issue.").
[39] *Id.* ("There, as here, the police believed (perhaps mistakenly), that the man posed an immediate threat to others."); *See* Blanford v. Sacramento County, 406 F.3d 1110 (9th Cir. 2005).
[40] *Kisela*, 584 U.S. 100 at 102.

as an unbreakable shield for police.[41] She warned that qualified immunity "also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[42] This philosophy produces tragic and avoidable consequences, as demonstrated by the shooting in Kisela. Second, the Supreme Court signaled to lower courts a preference for finding qualified immunity, especially in the Fourth Amendment context. The Ninth Circuit reviewed all the precedent and examined all the facts, yet the Supreme Court granted certiorari and critiqued the lower court for incorrectly applying the qualified immunity analysis. After a decision like this, it is conceivable that lower courts would act more conservatively and grant qualified immunity more often in the future.

C. Abolishing Qualified Immunity is a Non-Reformist Reform

Abolishing qualified immunity aligns with the philosophy behind non-reformist reforms. Although dismantling qualified immunity is not the ultimate solution for a police and prison-less society, it is an invaluable step towards making the civil system more accessible for people impacted by the violence of the carceral system and furthering a cultural shift, that society is no longer willing to protect police at the expense of individuals.

Abolition will interfere with police funding by forcing the city to feel the financial burden of constantly paying for settlements or judgments in civil rights lawsuits.[43] If cases are no longer dismissed on qualified immunity grounds, more cases will advance to discovery stages. This will require the city to provide legal representation for the defendant government officials in addition to paying for any resulting liability because cities almost always indemnify their officers.[44] Furthermore, potential plaintiffs and lawyers who did not pursue legitimate legal claims because qualified immunity defenses deterred them may feel more inclined to initiate litigation.[45]

---

[41] *Id.* at 121.

[42] *Id.*

[43] *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 913 (2014) (noting that between 2006 and 2011 taxpayers in forty-four large jurisdictions paid out $735 billion to victims of police misconduct, even with qualified immunity in place).

[44] Schwartz, *supra* note 7, at 1806 ("When indemnification is discretionary, cities and counties virtually always decide to indemnify officers.").

[45] *Id.* at 1818. Schwartz contends:

> Qualified immunity doctrine may discourage people from bringing cases when their constitutional rights are violated. The Supreme Court's decisions send the message to plaintiffs' attorneys that even Section 1983 cases with egregious facts run the risk of dismissal on

Dismantling qualified immunity helps further the discourse that police are not integral to community safety. Optimistically, constant financial pressure and public scrutiny produced by such lawsuits may prompt cities to research alternatives to policing that are not only less costly to them but produce fewer constitutional violations.[46] When the public and lawmakers alike engage in more discourse about civil lawsuits, it will hopefully be apparent that police and prison officials commit constitutional violations with immense frequency, suggesting that they are not the optimal systems for promoting community safety.

II. THE SUPREME COURT MUST ABOLISH QUALIFIED IMMUNITY

Justices across the ideological spectrum have expressed their support for abolishing qualified immunity.[47] From Justice Sotomayor admonishing policing in America[48] to Justice Thomas lambasting the doctrine's divergence from the text and original meaning of the Constitution,[49] Supreme Court justices and legal scholars have laid the foundation for constitutional arguments against qualified immunity.

A. History and Purpose of the Ku Klux Klan Act

Professor Roberts states that "we should consider the abolitionist history of the Reconstruction Amendments as a usable past to help move toward a radical future."[50] One of the espoused constitutional imperatives motivating Reconstruction era legislation includes "equal protection from private or state violence."[51] During Reconstruction, the 42nd Congress passed the Civil Rights Act of 1871 in order to combat Ku

---

> qualified immunity grounds, and encourage defense counsel to raise qualified immunity at every turn and immediately appeal district court decisions denying their motions.

Id.

[46] *Id.* at 1822 ("Lawsuits that receive press coverage may capture the attention of police chiefs and other policy makers, and may inspire departments to institute changes to prevent future similar cases. Information revealed during discovery and trial-particularly if it is disclosed to the public-can create political pressure on departments to take action.").

[47] *See* Baxter v. Bracey, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting); *see* Ziglar v. Abbasi, 582 U.S. 120, 160 (2017) (Thomas, J., concurring); *see* Mullenix v. Luna, 577 U.S. 7, 24 (2015) (Sotomayor, J., dissenting).

[48] *Luna*, 577 U.S. 7 at 24 (Sotomayor, J., dissenting) (arguing that qualified immunity condones a "shoot first, think later" mentality in policing that erodes the protections of the Fourth Amendment).

[49] *Baxter*, 140 S. Ct. at 1864 (2020) (Thomas, J., dissenting) ("There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe.").

[50] Roberts, *supra* note 8, at 11.

[51] *Id.* at 71.

Klux Klan violence against Black Americans.[52] As a tool to enforce the values underpinning the Fourteenth Amendment and the Civil Rights Act of 1866, the legislature provided citizens with a federal civil cause of action in Section One to hold state officers accountable when they committed constitutional violations.[53] Section One of this Act is the most relevant for this paper as it is now codified as § 1983. The remainder of the Act also pertains to federal intervention in the event of state indifference to constitutional violations and violence.[54] Section Two includes civil and criminal sanctions,[55] while Section Three and Four provide for the usage of federal force.[56]

One member of the 42nd Congress, Representative Aaron Perry from Ohio, stated "of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished."[57] The Reconstruction Amendments were met with racial violence and resistance motivated by white supremacy. In 1866, white men in Tennessee gathered to form the Ku Klux Klan,[58] which became rampant and escalated across the South. This was a concerted effort to destroy the property of newly freed enslaved people, deter Black people from voting, and install a white supremacy hierarchy to replace the institution of slavery.[59] Hundreds of people were murdered, and the Klan burned down numerous Black institutions including churches and schools.[60] After reviewing records of the Freedmen's Bureau, the Equal Justice Initiative concluded there were at least 2,000 Black victims killed

---

[52] Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484 (1981-82).
[53] *Id.* at 484.
[54] 42 U.S.C. § 1983; *See* Eisenberg, *supra* note 53, at 485. Eisenberg writes:

> It provided for civil and criminal sanctions against public and private conspiracies 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. Sections 3 and 4 authorized the use of federal force to redress a state's inability or unwillingness to deal with Klan or other violence. Among other things, sections 3 and 4 also deemed state complicity with anti-federal combinations to be 'rebellion against the government of the United States,' with a resulting suspension of the writ of habeas corpus.

Id.
[55] Jamison v. McClendon, 476 F. Supp. 3d 386, 399 (S.D. Miss. 2020).
[56] *Id.* at 400.
[57] Eisenberg, *supra* note 53, at 482, 484–86 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 78 (1871)).
[58] *Jamison*, 476 F. Supp. 3d at 398.
[59] *Id.*
[60] *Id.*

from 1865 to 1876.[61] However, this number is likely incomplete given "the indifference and even complicity of local legal systems left few authorities to whom attacks could be reported."[62] State actors such as police, judges, and jurors were complicit in Ku Klux Klan violence either through active participation or refusal to intervene leading to legal abuses.[63]

Therefore, in passing the Act, Congress was primarily motivated to address the horrific violence and legal abuses that went unchecked against Black people in America. As evidenced by Representative Perry's comments, Congress intended to work for justice allowing individuals to sue state officials for constitutional violations. Given that Congress created the Act as an accountability measure, it is most likely intentional that framers did not codify any immunities within the text itself.

B. Text of § 1983

The text of the Act itself supports the abolition of qualified immunity. 42 U.S.C § 1983 states that "every person who, under color of any statute . . . subjects . . . any citizen of the United States . . . 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."[64] The doctrine does not include qualified immunity nor any other type of immunity afforded to government officials. The language simply codifies a cause of action in the event of constitutional violations. Justice Thomas has asserted the fact that "the text of § 1983 'ma[kes] no mention of defenses or immunities,'"[65] and consequently, this supports his "strong doubts about our § 1983 qualified immunity doctrine."[66] Congress deliberately did not include any exceptions in § 1983 civil rights lawsuits, and therefore, qualified immunity is nothing more than the product of Supreme Court "legislation."

C. Precedent: Faulty Frameworks and Tanvir

Qualified immunity in § 1983 litigation first emerged in 1967 based on faulty analysis of common law doctrine. *Pierson*, the inaugural case

---

[61] Equal Justice Initiative, *Documenting Reconstruction Violence: Known and Unknown Horrors*, https://eji.org/report/reconstruction-in-america/documenting-reconstruction-violence/#chapter-3-intro/.
[62] *Id.*
[63] *Jamison*, 476 F. Supp. 3d at 400.
[64] 42 U.S.C § 1983.
[65] Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting).
[66] *Id.* at 1865.

for qualified immunity, held that good faith immunity safeguarded officers from liability based on the mistaken assumption that this defense was available in common law.[67] However, in 1871, when Congress passed the Ku Klux Klan Act, state actors did not have good faith defenses available to them.[68] Therefore, the Court in *Pierson* engaged in judicial lawmaking.

The Court has made many modifications to the qualified immunity doctrine since its inception. In 1982, the Court introduced the "objective reasonableness" standard, finding the good faith analysis to be too disruptive, as it would require numerous depositions and extensive discovery to illuminate the subjective intentions of officials.[69] Another significant modification to the doctrine occurred in 2001[70] when the Court outlined the official two-part inquiry for the reviewing court: (1) whether there was a constitutional violation and (2) whether the right was clearly established at the time.[71] Lastly, the Court expanded the doctrine even further in 2009 by permitting the reviewing court to grant qualified immunity without first determining if there was a constitutional violation.[72] In other words, a court does not need to answer both prongs of the qualified immunity analysis, thereby stalling "clearly established" jurisprudence by limiting the instances of constitutional violations in case law at a plaintiff's disposal. This is particularly problematic for fact specific inquiries, including when police utilize excessive force.

While the shift in precedent demonstrates that the Court no longer relies on good faith immunity, the current doctrine is a legal fiction. To satisfy the "clearly established" prong of qualified immunity analysis, plaintiffs traditionally have been required to provide binding precedent with nearly identical facts.[73] This process has no basis in the common law, and it assumes that officers not only know all circuit precedent, but that they act accordingly to avoid constitutional violations.

According to attorneys at the Institute for Justice and leaders of its Project on Immunity and Accountability, the Court's unanimous decision in 2020, *Tanzin v. Tanvir*, provides important constitutional precedent for the qualified immunity doctrine in § 1983 cases. It represents a shift in the Court's qualified immunity jurisprudence, which has long supported

---

[67] Pierson v. Ray, 386 U.S. 547, 557 (1967).
[68] *See* Schwartz, *supra* note 7, at 1801; *See* William Baude, *Is Qualified Immunity Unlawful*, 106 CAL. L. REV. 45, 56 (2018) ("The Court concluded, 'the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.' In other words, good-faith reliance did not create a defense to liability-what mattered was legality." (citation omitted)).
[69] *See* Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982).
[70] *See* Saucier v. Katz, 533 U.S. 194, 201 (2001).
[71] *Id.*
[72] *See* Pearson v. Callahan, 555 U.S. 223, 236–37 (2009).
[73] Schwartz, *supra* note 7, at 1802.

the doctrine. In *Tanvir*, plaintiffs, who are practicing Muslims, sued Federal Bureau of Investigation (FBI) agents, arguing that they were placed on a "No Fly List" in retaliation for refusing to be government informants.[74] Although the case pertains to the damages appropriate under the Religious Freedom Restoration Act (RFRA), the Court questions the role of the judiciary in determining immunity for government officials, and Justice Thomas directly compares RFRA to § 1983.[75] The government argued that the Court should implement a qualified immunity doctrine within RFRA to protect government officials from wanton litigation, citing to *Harlow* for support.[76] In an opinion similar to his critiques of qualified immunity,[77] Justice Thomas rejected this argument on behalf of the Court.[78] Practitioners believe *Tanzin* "should cause another reformulation of qualified immunity, if not its wholesale abandonment."[79] The Court conducted a comprehensive analysis regarding the lack of court-created immunities, and consequently, this legal theory lends direct support for abolishing qualified immunity in § 1983 cases.

Thus, there is limited precedential support for qualified immunity. First, the Court manufactured the doctrine in § 1983 even though good faith immunities did not apply to the Ku Klux Klan Act. Second, the evolution of qualified immunity jurisprudence is grounded in a legal fiction that has no constitutional or precedential basis. Lastly, modern precedent suggests the Court is reconsidering the foundations of its 1967 decision.

D. Policy and Structural Considerations

Given absence of support for qualified immunity in the Act's text, in the historical foundations of the Civil Rights Act of 1871, in common law, and in precedent, the only potential justifications to retain the doctrine of qualified immunity are policy or structural considerations.

Given immunity is a policy decision, Congress should be responsible for its implementation, not the Court. The 42nd Congress intentionally decided to omit immunity in § 1983, and therefore, as the legislating

---

[74] Tanzin v. Tanvir, 592 U.S. 43, 46 (2020).
[75] *Id.* at 47 ("Because RFRA uses the same terminology as § 1983 in the very same field of civil rights law, 'it is reasonable to believe that the terminology bears a consistent meaning.'").
[76] Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity: How* Tanzin v. Tanvir*,* Taylor v. Riojas*, and* McCoy v. Alamu *Signal the Supreme Court's Discomfort with the Doctrine of Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 105 (2022).
[77] *See* Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting); *see* Ziglar v. Abbisi 582 U.S. 120, 157 (2017) (Thomas, J., concurring).
[78] *Tanvir*, 592 U.S. at 44.
[79] Jaicomo & Bidwell, *supra* note 77, at 140.

body, Congress is responsible for any amendments. Congress, not nine unelected justices, must conclude whether the policy justifications warrant a qualified immunity exception from liability, based on the will of the people. When the Court analyzed if qualified immunity applies in RFRA cases, Justice Thomas asserted that "to the extent the Government asks us to create a new policy-based presumption against damages against individual officials, we are not at liberty to do so. Congress is best suited to create such a policy. Our task is simply to interpret the law as an ordinary person would."[80] That same logic applies to § 1983 liability. The Court should never have codified qualified immunity in 1967 but instead should have respected Congress's role to incorporate immunities into statutes based on policy considerations.

In the initial construction of the qualified immunity doctrine, the Court considered it to be a good faith protection for officers. [81] In *Pierson*, plaintiffs, Black and white clergymen, were travelling to promote "racial equality and integration."[82] They utilized segregated facilities and were then arrested by Mississippi for "breach of the peace," a state code that was later found to be unconstitutional.[83] The officers argued that they arrested the ministers, who attempted to use a "white-only" waiting room, in order to prevent any escalating violence.[84] However, the ministers and officers provided contradicting testimony. The officers attributed the threat of imminent escalation to a growing crowd, but the ministers asserted that there were minimal bystanders.[85] The ministers commenced a § 1983 suit for violating their constitutional right to be free from false arrest and imprisonment.[86] The Court remanded the case to the trial court, asserting that if a jury believed the officer's testimony about the growing crowd, then the officers had acted in good faith, which was a valid immunity.[87] The officers in this instance were upholding values of white supremacy by enforcing segregation, and yet still the Court afforded a "good faith" caveat to protect officers instead of exposing them to liability. Even if there was a developing crowd in this situation, the officers could have instead arrested the instigators of violence, not the peaceful ministers. Yet, the Court refused to consider this reality. Instead, the Court allowed the policy concerns for protecting officers' decision-making processes to outweigh the concerns for punishing constitutional violations motivated by white supremacy.

---

[80] Jaicomo & Bidwell, *supra* note 77, at 138.
[81] Pierson v. Ray, 386 U.S. 547, 557 (1967).
[82] *Id.* at 552.
[83] *Id*. at 550.
[84] *Id.* at 557.
[85] *Id.* at 557.
[86] *Id.* at 550.
[87] *Id.* at 558.

Throughout the doctrine's many alterations,[88] the Court has continuously elevated policy concerns for police decision-making over the rights of individuals, demonstrating a reluctance to upset the status quo with regards to unbounded police discretion.[89] In *Harlow*, the Court described qualified immunity as a balance of "competing values" with significant social costs.[90] The Court was apprehensive about "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."[91] Even if it was legitimate for the Supreme Court to rely on these policy justifications, Professor Joanna Schwartz has demonstrated the unsubstantiated nature of these claims. The Court in *Harlow* outlined three primary concerns that provided the groundwork for their decision, namely, the financial implications of lawsuits, the concern about insubstantial cases, and the fear officers feel about enforcing the law when the possibility of a lawsuit is looming over their heads.[92]

Professor Schwartz addressed all three of these contentions. First, Professor Schwartz conducted a study on eighty-one state and local law enforcement agencies and concluded that individual officers rarely contribute to settlements or judgments.[93] Usually, the city indemnifies individual officers, or plaintiffs sue municipalities rather than the individuals.[94] Law enforcement officers also rarely have to pay litigation fees because legal counsel is secured by agencies such as the municipality or police unions.[95] Second, Professor Schwartz notes that qualified immunity is an extraneous protection because there are so many other mechanisms to weed out insubstantial cases. Qualified immunity is not the only barrier to achieving civil justice that makes civil rights suits an extremely onerous process for plaintiffs.[96] There is no

[88] *See generally* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Saucier v. Katz, 533 U.S. 194, 201 (2001); Pearson v. Callahan, 555 U.S. 223, 236–37 (2009).
[89] *See* Pierson, 386 U.S. at 555 ("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.").
[90] *Harlow*, 457 U.S. at 816 ("[T]here is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'").
[91] *Id.*
[92] Schwartz, *supra* note 7, at 1804 ("Qualified immunity has long been justified as a shield from financial
liability.").
[93] *Id.* at 1805 ("Among the forty-four largest agencies in my study, 9225 cases were resolved with payments to plaintiffs, and plaintiffs were paid more than $735 million in these cases. But individual officers contributed to settlements in just 0.41% of these cases, and paid approximately 0.02% of the total awards to plaintiffs.").
[94] *Id.* at 1806.
[95] *Id.* at 1805.
[96] *See* Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613

constitutional right to a lawyer in civil rights cases, and therefore, plaintiffs may struggle to locate a lawyer willing to represent them.[97] Furthermore, lawyers may decline cases because of low attorney's fees,[98] or because the plaintiff is not "sympathetic" enough to a jury.[99] Also, after securing representation, a plaintiff must draft a complaint that survives the high pleading standard.[100] Lastly, Professor Schwartz highlights studies that demonstrate officers rarely consider the possibility of litigation in the course of their job, and so their decision-making process is unaffected by the prospect of civil litigation.[101]

III. THE LOWER COURTS MUST RELY ON SUPREME COURT PRECEDENT UNTIL ABOLITION

As discussed above, there are numerous arguments grounded in history, text, precedent, structure, and policy that support the Supreme Court abolishing qualified immunity. In the meantime, lower courts can rely on recent Supreme Court precedents *Taylor v. Riojas* and *McCoy v. Alamu*, which suggest plaintiffs do not need to present case law with identical facts to overcome a qualified immunity defense. Some scholars suggest that these cases demonstrate the Court's discontent with qualified immunity and indicate their willingness recalibrate the doctrine.[102]

Supreme Court caselaw *Hope*, *Taylor,* and *McCoy* together hold that in novel factual circumstances, qualified immunity cannot be a defense when the constitutional violations are obvious.[103] In *Hope v. Pelzer*, an incarcerated individual brought a § 1983 claim after guards tied him to a hitching post for hours without any bathroom breaks and minimal opportunities to drink water.[104] Guards forced him to sit shirtless in the Alabama heat while they taunted him.[105] The Court did not require the

---

(2019); Joanna C. Schwartz, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 225–26 (2023).

[97] Schwartz, *supra* note 97, at 20 (explaining how civil rights lawyers are primarily based in cities depriving rural communities of access to lawyers).

[98] *Id.* at 27 (discussing how attorneys are paid based on a contingency fee system so when damages are low, attorneys will not be fully compensated for their labor).

[99] *Id.* at 20.

[100] *Id.* at 42 ("Plausibility pleading standard does not weed out weak cases, it weeds out cases where the plaintiffs do not have access to the evidence they need to prove their claims before discovery.").

[101] Schwartz, *supra* note 7, at 1811 (citing to Victor E. Kappeler, *Critical Issues in Police Civil Liability* (4th ed. 2006)).

[102] Colin Miller, *The End of Comparative Qualified Immunity*, 99 TEX. L. REV. ONLINE 217, 223 (2020-2021).

[103] Jaicomo & Bidwell, *supra* note 77, at 129.

[104] Pelzer, 536 U.S. 730 at 735.

[105] *Id.* at 734–35.

plaintiff to produce a case with similar facts, but rather concluded that "obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment."[106] Going forward, courts could deny qualified immunity even in novel factual circumstances based on this "obviousness standard:" when the circumstance is so blatantly or obviously cruel, a reasonable officer should know that their actions violated the Constitution, and so no factually similar precedent is required.

Although *Hope* represented a shift in the Court's qualified immunity precedent, the impact of this case was minimal. Prior to *Taylor* in 2020, the Supreme Court had only reversed findings of qualified immunity twice because the law was clearly established.[107] In *Taylor*, an incarcerated plaintiff brought a § 1983 claim for an Eighth Amendment violation after correctional officers placed him in two different unsanitary cells for six days.[108] In the first cell, human feces covered the floor, ceiling, window, and walls.[109] The next cell was freezing, and the only way Taylor could eliminate waste was in an already clogged drain.[110] After holding his bladder for twenty-four hours, he was forced to urinate, which caused the cell to overflow with sewage.[111] The Fifth Circuit concluded that although the correctional officers violated the Eighth Amendment, the law was not clearly established.[112] The Supreme Court reversed, asserting that "confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution."[113]

McCoy, although the shortest, is arguably the most notable of the three opinions. In *McCoy*, the Supreme Court reversed a grant of qualified immunity and ordered the lower court to reconsider the facts in light of *Taylor*.[114] In this case, an incarcerated plaintiff sued a correctional officer under § 1983 for violating his Eighth Amendment rights.[115] The correctional officer sprayed the plaintiff in the face with pepper spray, without provocation.[116] A neighboring inmate threw water on the correctional officer twice, and the correctional officer redirected his rage at the plaintiff when the neighboring inmate blocked the front of

---

[106] *Id.* at 745.
[107] Jaicomo & Bidwell, *supra* note 77, at n. 18.
[108] Taylor v. Riojas, 592 U.S. 7, 7 (2020).
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id*. at 8.
[113] *Id.* at 9.
[114] McCoy v. Alamu, 141 S.Ct. 1364 (2021).
[115] McCoy v. Alamu, 950 F.3d 226, 228 (5th Cir. 2020).
[116] *Id.* at 229.

his cell with sheets.[117] *McCoy* is significant because first, while the facts are clearly barbaric and inhumane, arguably, the degree of egregiousness is less than that in *Hope* or *Taylor*.[118] The actions of the correctional officer highlight the indifference to humanity embedded within the criminal legal system, but "the defining feature of the case was that the Fifth Circuit chose to make weapon-by-weapon comparisons while considering whether precedent was clearly established."[119]

According to Professor Colin Miller, there are two potential interpretations of the summary disposition in *McCoy*. First, it is possible but very unlikely that the Court remanded this case for the Fifth Circuit to examine if these facts were extreme like in *Taylor*.[120] As previously stated, the degree of egregiousness is noticeably less than in *Taylor* because of the duration of the misconduct and the type of injury.[121] The second, and more plausible interpretation, is that the Supreme Court signaled that this contextual case comparison analysis is now obsolete.[122] The implication of this is broad: "If this interpretation is correct, unless there is a case directly on point in either direction, every qualified immunity case should stand or fall on its own merits, based on whether any reasonable officer should have realized that his behavior contravened the Constitution."[123] Defendants can now defeat qualified immunity without a case that holds nearly identical conduct was previously found to be unconstitutional.

Taylor was decided eighteen years after *Hope*. Prior to *Taylor*, the Supreme Court repeatedly overturned denials of qualified immunity, making the "obviousness" standard articulated in *Hope* seem negligible.[124] *Taylor* could have easily been dismissed like *Hope* was in 2002. However, significantly, the Court decided *McCoy* just three months after *Taylor*, signaling the Court was serious about requiring courts to consider: whether, based on the egregious nature of the allegations, a reasonable officer would know that their conduct violated the Constitution, regardless of the existence of factually similar precedent. Next, I will discuss the future of qualified immunity precedent after *McCoy*, particularly how the courts have applied *Taylor* and how they should apply *Taylor*.

A. How the Lower Courts Have Applied Taylor

---

[117] *Id.*
[118] Jaicomo & Bidwell, *supra* note 77, at 134.
[119] *Id.*
[120] Miller, *supra* note 105, at 223.
[121] Jaicomo & Bidwell, *supra* note 77, at 134.
[122] Miller, *supra* note 103, at 224.
[123] *Id.*
[124] Schwartz, *supra* note 7, at 1815.

The following case, *Jones v. Solomon*, is an example of how the lower circuits have applied *Taylor* and *McCoy* in their qualified immunity analysis. Notably, the court here decided to grant qualified immunity.

In 2024, an incarcerated plaintiff brought a § 1983 claim after being housed in a cell with no running water, where he was forced to defecate, supervised and without toilet paper.[125] He was provided a meal without utensils and without anything to clean his hands after defecating.[126] He also was forced to wear soiled boxers and unable to shower for twenty-four hours even though he had feces on him.[127] After one bowel movement, the correctional officers forced him to search through his own feces for contraband.[128] The Fourth Circuit described this case as "a sequence of events that are gross, degrading, and deeply concerning. And we have serious doubts about their constitutionality."[129] However, this recognition was not enough to overcome the clearly established prong of the qualified immunity analysis.

The Fourth Circuit acknowledged that it was clearly established at the time that inmates are guaranteed basic hygiene and sanitation, but that the Supreme Court discourages lower courts from approaching "clearly established" precedent at a high level of generality.[130] In other words, the Fourth Circuit still required precedent with substantially similar facts to overcome a qualified immunity defense. The court examined several other conditions of confinement cases, but based on the specific facts of the case, which the court ultimately trivialized and minimized to be depriving the plaintiff "of the means to clean his hands, arms, and clothing for about a day,"[131] the court concluded a reasonable correctional officer would not have known that this amounted to an Eighth Amendment violation. Notably, the court also asserted that the facts of a case do not need to reach the egregious scale of *Taylor* to violate clearly established law.[132] Ultimately, the Fourth Circuit held that the correctional officers were entitled to qualified immunity even after forcing the plaintiff to be housed in unsanitary conditions.[133]

B. How the Lower Courts Should Apply Taylor

When Professor Brandon Hasbrouck was interviewing to become a

---

[125] Jones v. Solomon, 90 F.4th 1988, 202, 208 (4th Cir. 2024).
[126] *Id.* at 208.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* at 210.
[131] *Id.* at 211.
[132] *Id.* at 212.
[133] *Id.* at 202.

federal judge for the Fourth Circuit,[134] he was vocal about wanting to be a movement judge. He defined a movement judge as someone who applies the principles of abolition constitutionalism and recognizes the human impact of every legal decision, especially on people of color.[135] He "wanted to bring an abolition constitutionalist legal philosophy to the bench, focusing on the Constitution's potential to dismantle modern systems of oppression—particularly those deriving from slavery."[136] Judges play such a monumental role in society, from the district court judge who decides to grant qualified immunity, which terminates a plaintiff's ability to recover fees for medical expenses, to the Supreme Court justices who overturn decades of precedent. Judges must consider who is bearing the burden of their decision-making, especially when it comes to constitutional rights and notions of justice. Critical race theorists encourage people in power, in this case judges, to "look to the bottom" by listening to the experiences of people of color and marginalized groups when applying the law.[137] Abolitionists who want to utilize the law as an outlet for social change can become judges and implement this philosophy.

Professor Hasbrouck cites examples of movement judges, one of whom is Judge Reeves from the United States District Court of Mississippi. Judge Reeves "was in the first class of students to attend integrated public schools" in Mississippi and has been vocal about the racism he experienced while attending law school at the University of Virginia.[138] Since joining the bench, he has utilized his opinions to discuss police brutality and systemic racism.

In *Jamison v. McClendon*, Judge Reeves wrote a scathing opinion about qualified immunity. The plaintiff in this case, a Black man, was driving from Arizona to South Carolina when a white officer pulled him over because of a folded temporary tag.[139] The officer asked the plaintiff five times if he could search his car unnecessarily extending the time of this encounter.[140] After declining this request and questioning the officer's intentions multiple times, the plaintiff finally consented to stop the harassment.[141] After he failed to find anything, the officer asked if his

---

[134] Hasbrouck, *supra* note 11, at 632.
[135] *Id.* at 670.
[136] *Id.* at 633.
[137] *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325 (1987).
[138] Kenya Downs, *The Man Behind The Speech: Judge Carlton Reeves Takes On Mississippi's Past*, NPR, (March 2, 2015) https://www.npr.org/sections/codeswitch/2015/03/02/387477815/the-man-behind-the-speech-judge-carlton-reeves-takes-on-mississippis-past
[139] Jamison v. McClendon, 476 F. Supp. 3d 386, 392 (S.D. Miss. 2020).
[140] *Id.* at 393.
[141] *Id.* at 394.

canine could search the car.[142] The traffic stop lasted nearly two hours.[143] The plaintiff brought a § 1983 suit against the officer for violating his Fourth and Fourteenth Amendment rights.

Judge Reeves held the officer's physical intrusion and subsequent vehicular search amounted to an unreasonable search, a Fourth Amendment violation.[144] However, the officer did not violate clearly established law because the plaintiff could only provide general assertions of law, not specific case comparisons where the officer's conduct (five requests for consent to search the car, lying, a promise of leniency, and putting his arm inside Jamison's vehicle while waiting for the results of a background check)[145] had been found unconstitutional.[146] Despite ultimately granting qualified immunity to the defendant officer, Judge Reeves utilized the opinion to discuss police violence and express his support for the Supreme Court to overturn qualified immunity. He began his opinion with nineteen instances of police murdering Black people in America.[147] He then discussed the history of Ku Klux Klan violence against Black people[148] and the supposed role of the court in protecting federal rights.[149]

Judge Reeves published his opinion in August of 2020, and three months later, in November of 2020, the Supreme Court published its opinion in *Taylor*. If *Taylor* and *McCoy* had been available as precedent, Judge Reeves may have been more inclined to deny qualified immunity to the officer. Thus, movement judges such as Judge Reeves must consider the opportunity *Taylor* and *McCoy* have provided for them in the lower courts to depart from such strict qualified immunity jurisprudence.

Going forward, lower court movement judges should take a two-step approach to qualified immunity decisions.

First, movement judges can invoke *McCoy* to produce a favorable outcome, taking into consideration the impact of their decision on the plaintiff. No longer does a plaintiff need to supply precedent where the same conduct was found unconstitutional. Rather, judges can just determine whether a reasonable officer would have understood their conduct to be unconstitutional. For example, in *Jones*, the right to basic sanitary living conditions was "clearly established" at the time the Fourth Circuit published the opinion, and yet the conditions the court described

---

[142] *Id.*
[143] *Id.* at 395.
[144] *Id.* at 416.
[145] *Id.*
[146] *Id.* at 418.
[147] *Id.* at 390–91.
[148] *Id.* at 398.
[149] *Id.* at 404 ("If Section 1983 was created to make the courts 'guardians of the people's federal rights,' what kind of guardians have the courts become?").

as "gross, degrading, and deeply concerning" somehow did not amount to an unconstitutional violation. A movement judge should have denied qualified immunity in this instance by focusing on the blatant lack of dignity afforded to this incarcerated individual. People do not shed their constitutional rights nor lose their personhood when they enter prison. Forcing any individual to exist with feces on their hands and body is blatantly unnecessary to safety and shockingly unconscionable. Any officer should have understood these dehumanizing conditions to be unconstitutional.

Second, a movement judge must condemn structures that uphold white supremacy and promote abolition. In *Jones*, a movement judge could have discussed both prison abolition and qualified immunity abolition. The judge should have drawn attention to the horrific conditions present in the U.S. carceral system, where people are deprived of basic human decency. In addition, a judge should encourage others to imagine a future where people are not in degrading, unsanitary, and dehumanizing confinement. Not only would a movement judge have denied qualified immunity, but they would have also indicated their support for abolishing qualified immunity, as Judge Reeves did. In his district court opinion in *Jamiso*n, Judge Reeves cited the work of revered legal scholars to compare the violence against Black Americans during Reconstruction with the violence Black Americans experience at the hands of police today.

Ultimately, the potential of qualified immunity after *Taylor* and *McCoy* is relatively unclaimed. Lower court judges must adopt movement judge frameworks to condemn the doctrine of qualified immunity, highlight the history of racialized violence, contextualize that history within modern police violence against Black people, and deny every officer qualified immunity by reading the *Taylor* and *McCoy* expansively.

CONCLUSION

In the current criminal legal system, constitutional violations are unrelenting, suggesting they are an inherent part of the system design. The most important abolitionist project is reimagining a process of community justice and public safety to replace the current criminal system, but many abolitionists understand that this is a long-term process. There are people experiencing the symptoms (constitutional violations) of the "social cancer" right now. Consequently, in the meantime, it is important to advocate for tangible non-reformist reforms that expose the racist underpinnings and deficiencies of the current structure without allocating more resources to bolster prisons and police. Abolishing qualified immunity directly aligns with this vision of

non-reformist reforms. When police and correctional officers violate individuals' constitutional rights, the civil system is one option for individuals to seek accountability and monetary justice. Qualified immunity is a baseless, unjust burden on this process. When individuals win § 1983 civil rights suits, they are diverting money the city has allocated towards police budgets and placing it in the hands of directly impacted individuals. Abolition constitutionalism is a theoretical framework that can be utilized to overturn qualified immunity. In the meantime, movement judges in lower courts can express their solidarity with abolitionist movements by denying qualified immunity and condemning modern policing and prison conditions.