An Unqualified Defense of Qualified Immunity

ELLIOTT AVERETT*

> "*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.*"
>
> —Chief Justice Earl Warren[1]

ABSTRACT

This Note argues that, rather than being eliminated, qualified immunity should be strengthened in the face of a nationwide increase in violent crime and collapsing police staffing. This paper first examines efforts to repeal qualified immunity in Congress as well as recently enacted statutes designed to circumvent it in New Mexico, Colorado, and New York City. It then responds to two common critiques of qualified immunity. Qualified immunity is much weaker than is commonly believed, as fewer than four percent of civil rights lawsuits are dismissed on qualified immunity grounds, and textualist critiques about qualified immunity are inherently selective. The paper then explains why eliminating qualified immunity is unjust: it leaves police officers liable even in cases where a damages award does nothing to deter misconduct and imposes legal costs on defendants which frequently exceed any damages. Finally, this paper addresses the policy rationale for qualified immunity by examining previously unpublished law enforcement employment data from Colorado, where qualified immunity was circumvented in June 2020. This evidence suggests that ending qualified immunity will contribute to rising crime as officers pull back from proactive policing or leave the profession. The paper concludes by endorsing a version of the good faith test for qualified immunity which could prevent it from becoming a total nullity.

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1. Pierson v. Ray, 386 U.S. 547, 555 (1967).

I. INTRODUCTION

On the evening of August 26, 2012, police officers in Fayetteville, North Carolina tried to detain Herman Harris because they suspected he had been involved in a carjacking.[2] Harris ran when he saw the police, and officers chased

2. *See* Harris v. Pittman, No. 5:13-CT-3087-BO, 2016 WL 7655798, at *1, *7 (E.D.N.C. Feb. 22, 2016).

after him.[3] Officer Zachary Pittman saw Harris running into an apartment complex and told him to stop, but Harris refused.[4] Pittman chased Harris and warned him he would be tased if he did not stop running, but Harris continued to flee.[5] Pittman caught up to Harris and grabbed ahold of him, and the two men then tumbled down a steep embankment into dark woods.[6] As they fell, Harris started punching Pittman, precipitating a life-or-death struggle as the two men fought in the dark.[7]

Officer Pittman attempted to tase Harris but both men were caught in taser wire and, when the taser was fired, it affected the officer as well.[8] Harris fought for control of the taser, then grabbed Officer Pittman's service firearm.[9] The gun discharged in the holster, striking Harris in the finger.[10] Harris gained control of the firearm, pointed the muzzle at Officer Pittman's head, and pulled the trigger.[11] Miraculously, the weapon misfired.[12] Officer Pittman regained control of his gun and saw Harris standing over him as he was lying on the ground.[13] Physically exhausted and fearing for his life, Officer Pittman shot Harris three times.[14] Harris survived the shooting, and later entered a plea of no contest to a charge of assaulting a police officer with a firearm.[15]

Harris sued Officer Pittman.[16] Harris's complaint initially claimed Pittman shot him four times in anger after he'd already been incapacitated.[17] On appeal, Harris argued only that Officer Pittman's final shots were excessive and claimed they were fired after Harris was knocked to the ground by Pittman's first shot.[18] The facts of officer-involved shootings are often disputed, but the evidence overwhelmingly supported Office Pittman's account. Harris admitted trying to kill Pittman with his own gun and conceded Pittman was legally justified in shooting

3. Harris v. Pittman, 927 F.3d 266, 269 (4th Cir. 2019).
4. *Id.*
5. *Id.*
6. *Id.*; *see also* Memorandum in Support Regarding Second Motion for Summary Judgment Filed by Zachery Pittman Affidavit of Orellano at 2, Harris v. Pittman, No. 5:13-ct-03807-BO (E.D.N.C. June 25, 2015), ECF No. 56.
7. *Harris*, 2016 WL 7655798, at *2.
8. *Id.* at *4.
9. *Id.* at *2.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at *3.
14. *Id.*
15. *See* Memorandum in Support Regarding Second Motion for Summary Judgment Filed by Zachery Pittman Exhibit Transcript of January 16, 2015 Hearing at 3, Harris v. Pittman, No. 5:13-ct-03807-BO (E.D.N.C. June 25, 2015), ECF No. 56.
16. *See* Complaint Against Zachery Pittman filed by Herman Harris at 2, Harris v. Pittman, No. 5:13-ct-03807-BO, (E.D.N.C. April 18, 2013), ECF No. 1.
17. *See* Harris v. Pittman, No. 5:13-CT-3087-BO, 2016 WL 7655798, at *1, *6–8 (E.D.N.C. Feb. 22, 2016).
18. Harris v. Pittman, 927 F.3d 266, 272 (4th Cir. 2019).

him at least once.[19] Harris's DNA was found on the trigger and grip of Pittman's firearm.[20] Witnesses who heard the incident said the final shots were fired in quick succession, corroborating Officer Pittman's version of events.[21] Crime scene photos show taser probes and wire scattered through dense brush and an injured Officer Pittman standing in a disheveled, dirty uniform.[22]

One might expect Harris's lawsuit to be a sure loser. Officer Pittman was entitled to raise qualified immunity as a defense, and we are told qualified immunity is powerful protection for police officers. We are told qualified immunity "operates like absolute immunity"[23] and tells police they can "shoot first and think later."[24] We are told qualified immunity makes it "nearly impossible for individuals to sue public officials"[25] and that denial of qualified immunity is a "rare outcome."[26] Surely, such a powerful defense would not permit a felon to sue the policeman who, by his own admission, he unsuccessfully tried to murder. Yet Officer Pittman was denied qualified immunity—twice[27]—and was "pulled from one fight and thrust into another, this time in a courtroom."[28] As with the fight for his life, Officer Pittman ultimately won,[29] but only after eight years of litigation, a jury trial, and seeing his reputation dragged through the mud.[30]

The reality of qualified immunity is that Officer Pittman's experience is becoming the rule, not the exception. Police officers are rarely protected by qualified immunity, partly because lower courts have failed to grant it when the Supreme Court says they should, and partly because of one-sided fee-shifting rules that apply in civil rights lawsuits. Worse, Congress and state legislatures are now taking up bills that would eliminate qualified immunity or circumvent it via

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19. *Id*. at 269–270.

20. *Id*. at 276.

21. *Id*. at 284.

22. *Harris*, 2016 WL 7655798, at *10.; s*ee also* Memorandum in Support Regarding Second Motion for Summary Judgment Filed by Zachery Pittman Exhibit D at 69-90, Harris v. Pittman, No. 5:13-ct-03807-BO (E.D.N.C. June 25, 2015), ECF No. 56.

23. Jamison v. McClendon, 476 F. Supp. 3d 386, 391 (S. D. Miss. 2020).

24. Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

25. Ed Yohnka et al., *Ending Qualified Immunity Once and For All is the Next Step in Holding Police Accountable,* ACLU (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/ [https://perma.cc/9CL2-FQJH] (last visited Dec. 16, 2021).

26. Aloe Blacc, *Want to build trust? Quit trampling our right to hold government officials accountable*, USA TODAY, (Jan. 12, 2022), https://www.usatoday.com/story/opinion/2022/01/12/police-qualified-immunity-aloe-blacc/9025084002/ [https://perma.cc/HL4J-DB9Z].

27. Harris v. Pittman, 927 F.3d 266, 268 (4th Cir. 2019).

28. *Id*. at 287 (Wilkinson, J., dissenting).

29. A jury ultimately rejected all of Harris' claims at trial. *See* Jury Verdict at 2, *Harris v. Pittman*, No. 5:13-ct-03807-BO (E.D.N.C. July 19, 2021), ECF No. 182.

30. As the litigation dragged on, Harris' allegations were repeated in the media on several occasions. *See, e.g*., *Man sues Fayetteville police officer who shot him*, WRAL.COM (Nov. 20, 2013), https://www.wral.com/man-sues-fayetteville-officer-who-shot-him/13133423/ [https://perma.cc/9TRF-NE24]; Peter Hayes, *Excessive Force Claims Proceed in North Carolina Over Shooting*, BLOOMBERG LAW (June 18, 2019), https://news.bloomberglaw.com/white-collar-and-criminal-law/excessive-force-claims-proceed-in-north-carolina-over-shooting [https://perma.cc/NJH8-FGMS].

state law. This comes even as violent crime is spiking and police recruitment collapses. Ending qualified immunity will only exacerbate these problems; if anything, legislatures and the Court should act to strengthen and preserve it.

The goal of this Note is to collect and advance the best arguments in favor of qualified immunity. Part II explains qualified immunity in context, including the broader universe of constitutional tort litigation in which it developed. Part III examines ongoing efforts to repeal or circumvent qualified immunity via legislation. Part IV responds to two common objections to qualified immunity: the objection that it is a judicial invention and the objection that it renders constitutional protections hollow. Part V explains how the elimination of qualified immunity leaves police officers liable even for good faith conduct while unjustly enriching plaintiff's attorneys. Part VI argues that ending qualified immunity will harm public safety just when the nation can least afford it, driving officers out of the profession and crippling proactive police work even as departments face a staffing crisis and murder rates return to levels last seen in the 1990s. This includes evidence from Colorado, where qualified immunity was effectively eliminated in 2020 by legislation. Finally, Part VII suggests that a "good faith" test for qualified immunity could more effectively protect officers from insubstantial litigation.

II. QUALIFIED IMMUNITY IN CONTEXT

Qualified immunity is sometimes discussed in isolation, giving the impression it was suddenly imposed on an otherwise-unchanged legal world. But qualified immunity did not appear out of nowhere. Rather, it evolved alongside expanding constitutional protections and a major growth in civil rights litigation. Whether one believes these developments are positive or negative, qualified immunity must be understood both in the historical context in which it arose and the broader regime of constitutional tort litigation that developed alongside it.

After the Civil War, Congress sought to enforce the Fourteenth Amendment in the face of "lawless conditions" and racist terrorism in the former Confederacy.[31] In 1871, Congress passed the Ku Klux Klan Act, which is today codified as 42 U.S.C. § 1983.[32] Section 1983 permits suits for money damages in federal court against any "person" who, "under color of any law, statute, ordinance, regulation, custom, or usage" of a state or territory, deprives another person of a constitutional right.[33] For decades, plaintiffs rarely invoked Section 1983, which generated "only 21 cases in the first 50 years of its existence."[34]

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31. Monroe v. Pape, 365 U.S. 167, 174 (1961).

32. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2018)).

33. *Id.*

34. Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

Then, over a two-decade period in the mid-20th century, the Supreme Court dramatically expanded police liability for constitutional torts. First, the Court held in *Monroe v. Pape* that Section 1983 creates a cause of action against officials when they act *contrary* to state law.[35] Then in 1971, the Court created the *Bivens* remedy, allowing for Section 1983-like claims against federal law enforcement officers even though no statute creates such a cause of action.[36] In deciding *Monroe*, the Court had concluded Section 1983 did not apply to corporate entities. But in 1978 the Court reversed its decision and held in *Monell v. Department of Social Services* that Section 1983 liability extends both to natural persons and municipal corporations such as cities and counties.[37] Between 1961 and 1984, the number of civil rights lawsuits filed in federal court by non-prisoners increased over 7,000 percent.[38]

Monroe, *Bivens*, and *Monell* were not the only reasons for the rise in constitutional tort litigation. As it was expanding liability for civil rights violations, the Court was also expanding the number of civil rights. In 1967, the Court held in *Katz v. United States* that the Fourth Amendment's protection extends to any place where a person has a "reasonable expectation of privacy."[39] In 1968, the Court held in *Terry v. Ohio* that police could not detain a person without first having reasonable suspicion that a crime had been or would be committed.[40] In the 1980s, the Court in *Tennessee v. Garner* restricted the use of deadly force to apprehend fleeing felons[41] and later held uses of force by police must be objectively reasonable to comply with the Fourth Amendment.[42] Simply put, constitutional tort litigation grew in tandem with an expansion in the number of constitutional rights.

Congress also acted to make civil rights work more attractive for lawyers. While the "American Rule" traditionally requires that each party pay its own litigation costs, Congress changed this rule in civil rights lawsuits by passing the Civil Rights Attorney's Fees Award Act of 1976, codified at 42 U.S.C. § 1988.[43] Under Section 1988, a prevailing plaintiff will recover reasonable attorney's fees absent "special circumstances,"[44] while a prevailing defendant recovers nothing unless the plaintiff's suit is frivolous.[45] Courts begin fee award calculations using

35. *Monroe*, 365 U.S. at 187.
36. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 391 (1971).
37. 436 U.S. 658, 690 (1978).
38. Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 662 (1987). Eisenberg and Schwab argued much of this increase may not stem from constitutional tort claims, but other data they present also shows that the number of "other civil rights" cases (a category which includes non-prisoner constitutional tort claims) roughly doubled between 1975 and 1984. *Id.* at 664–66.
39. Katz v. United States, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).
40. Terry v. Ohio, 392 U.S. 1, 28 (1968).
41. Tennessee v. Garner, 471 U.S. 1, 11 (1985).
42. Graham v. Connor, 490 U.S. 386, 388 (1989).
43. Pub. L. No. 94-559, § 1, 90 Stat. 2641 (1976).
44. Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (citations and quotation marks omitted).
45. Hughes v. Rowe, 449 U.S. 5, 14 (1980) (per curiam).

the lodestar method, which entails multiplying the number of hours "reasonably expended on the litigation" by a "reasonable hourly rate."[46] Courts must consider the extent of a plaintiff's success when calculating fee awards, but fees need not be proportionate to damages.[47]

As constitutional rights expanded and civil rights litigation exploded, qualified immunity and other immunities grew in turn. First, the Supreme Court held in 1951 that Congress did not intend for Section 1983 to invalidate the immunity afforded to state legislators at common law.[48] In 1967, the Court decided *Pierson v. Ray*, in which it considered a suit from civil rights activists who had been arrested and convicted under a statute later found to be unconstitutional.[49] The Court held the judge who tried and convicted the plaintiffs was absolutely immune from suit and ruled the police officers who arrested them could assert a limited defense of "good faith and probable cause."[50] Although the court did not use the term, *Pierson* is now identified as the first modern case in which the court recognized a qualified immunity for police officers.[51]

The Court subsequently refined and further strengthened qualified immunity doctrine. In 1982, the Court in *Harlow v. Fitzgerald* did away with *Pierson's* "good faith" requirement, and instead held officials were immune as long as they did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[52] In 1986, the Court emphasized that qualified immunity should protect "all but the plainly incompetent or those who knowingly violate the law."[53] While the Court has not required that plaintiffs identify a factually identical precedent in order to defeat qualified immunity,[54] it has repeatedly reminded lower courts not to define "clearly established right[s]" at a high level of generality.[55] The Court has shown no interest in revisiting qualified immunity in recent terms.[56]

III. ALTERNATIVES TO QUALIFIED IMMUNITY

Qualified immunity's critics have not convinced the Supreme Court to eliminate it, but they have succeeded in convincing Congress and state legislatures to take up the issue. And while some scholars have suggested a more limited version

46. *Hensley*, 461 U.S. at 433.
47. City of Riverside v. Rivera, 477 U.S. 561, 574 (1986).
48. Tenney v. Brandhove, 341 U.S. 367, 376 (1951).
49. Pierson v. Ray, 386 U.S. 547, 549–50 (1967).
50. *Id.* at 554–57.
51. *E.g.*, Joanna Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018).
52. Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982).
53. Malley v. Briggs, 475 U.S. 335, 341 (1986).
54. *See* White v. Pauly, 137 S. Ct. 548, 551 (2017).
55. Anderson v. Creighton, 483 U.S. 635, 639–40 (1987); *see also, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018).
56. *See* City of Tahlequah v. Bond, 142 S. Ct. 9, 10–12 (2021) (per curiam) (reversing denial of qualified immunity); Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021) (per curiam) (reversing denial of qualified immunity).

of qualified immunity ought to be retained, legislators seem to have no interest in such a compromise. In June 2020, the House of Representatives passed a bill which would have ended qualified immunity. Colorado, New Mexico, and New York City have circumvented qualified immunity by creating Section 1983-like torts in state or local law while adding provisions that bar qualified immunity as a defense. These pieces of legislation provide us with a concrete idea of how qualified immunity would likely be repealed in practice—and the potential consequences of its elimination.

A. H.R. 7120: The George Floyd Justice In Policing Act of 2020

H.R. 7120, the George Floyd Justice in Policing Act, passed the House of Representatives by a vote of 236–181 on June 25, 2020.[57] Among other reforms, the Act's Section 102 abolishes qualified immunity by amending 42 U.S.C. § 1983. Although Section 102 is titled "Qualified Immunity Reform," its effect is the total elimination of qualified immunity as a defense for police officers and federal agents.[58] In addition to eliminating the "clearly established" version of qualified immunity created by the Court in *Harlow*, H.R. 7120 also prevents the Court from recognizing a more limited *Pierson*-style "good faith" defense in the future.[59] H.R. 7120 leaves in place qualified immunity for non-police officials, other immunities, and the fee-shifting provisions of Section 1988.[60]

H.R. 7120 did not proceed to a vote in the Senate, which does not seem presently inclined to alter the law of qualified immunity.[61] But it did receive unanimous support from Democrats in the House,[62] so eventual enactment does not seem out of the question.

B. Colorado S.B. 20-217: The Enhance Law Enforcement Integrity Act

Colorado was the first state to limit qualified immunity in the wake of George Floyd's murder.[63] Signed into law on June 19, 2020, S.B. 20-217 creates a new cause of action[64] against police officers who deprive individuals of rights secured by the Bill of Rights or Colorado's Constitution.[65] Defendant officers cannot raise

57. *See* 166 CONG. REC. H2505 (daily ed. June 25, 2020).

58. H.R. 7120, 116th Cong. § 102 (2020) (as passed by House, June 25, 2020).

59. *Id.*

60. *Id.*

61. Marianne Levine & Nicholas Wu, *Lawmakers Scrap Qualified Immunity Deal in Police Reform Talks*, POLITICO (Aug. 17, 2021, 5:38 PM), https://www.politico.com/news/2021/08/17/lawmakers-immunity-police-reform-talks-505671 [https://perma.cc/3X2W-ZF8L].

62. 166 CONG. REC. H2505 (daily ed. June 25, 2020); *see* H.R. 7120, 116th Cong. § 102 (2020) (as passed by House, June 25, 2020).

63. 2020 Colo. Sess. Laws 445.

64. S.B. 20-217 also included a number of other major changes to policing in Colorado. It revised the state's use of force standards, authorized the state Attorney General to file "pattern or practice" suits against municipalities, required the use of body worn cameras, and created new criminal offenses for certain kinds of police misconduct. *See* COLO. REV. STAT. §§ 24-31-903(2)(a), 24-31-902(II)(A), 24-31-113, 18-8-802(d) (2021).

65. *Id.* § 13-21-131(1).

qualified immunity as a defense. The Act does not cap damages and entitles plaintiffs' attorneys to reasonable costs and fees if they prevail. Defendants are entitled to costs and fees only if the plaintiff's claim is "frivolous."[66] If an officer fails to activate their body camera while on duty, S.B. 20-217 creates a "permissive inference" in any subsequent civil suit that the officer engaged in misconduct absent a showing that the camera malfunctioned.[67]

Relative to Section 1983, S.B. 20-217 harshly penalizes defendant officers who lose a civil rights lawsuit at trial. If an officer is found civilly liable for excessive force or failing to intervene to stop excessive force, the state's Peace Officer Standards and Training Board must permanently revoke the officer's certification.[68] Officers may be indemnified by employers, but the employer may also decline indemnification if it determines the officer was not acting with a good faith belief that an action was lawful or if the officer is convicted of a crime. In such cases, officers are personally liable for up to 5% of the judgment or $25,000, whichever is less. If a judgment against an officer is uncollectable, the employer must pay it,[69] but employers are barred from categorically promising to indemnify officers in advance.[70]

C. New Mexico H.B. 4: The New Mexico Civil Rights Act

New Mexico's repeal of qualified immunity is more limited than that proposed in Congress or enacted in Colorado.[71] Effective July 1, 2021, the New Mexico Civil Rights Act created a Section 1983-like cause of action which may be brought by any person deprived of his rights by a "public body" or person acting on behalf of that body.[72] It does not allow qualified and sovereign immunity to be raised as defenses, but preserves legislative, judicial, and other common law immunities.[73] H.B. 4 permits suits only for violations of the state constitution's bill of rights, a difference which may be significant in ways that are hard to predict. For example, unlike the Supreme Court, New Mexico state courts have concluded that the state constitution prohibits pretextual traffic stops.[74]

Unlike other legislation discussed here, H.B. 4 repeals qualified immunity as a defense for all government officials, not just police officers.[75] An individual government employee's acts or omissions can give rise to liability under H.B. 4, but plaintiffs' claims must be brought against the agency employing the individual, and the agency must indemnify the employee if they were acting "under color of

66. *Id.* § 13-21-131(3).
67. *Id.* § 24-31-902(1)(a)(III).
68. *Id.* § 24-31-904(1)(a)(II).
69. *Id.* § 13-21-131(4)(a).
70. *Id.* § 13-21-131(4)(b)(I)(B).
71. N.M. STAT. ANN. § 41-4A (2021); *see* H.B. 4, 2021 Leg., 1st Sess. (N.M. 2021).
72. *Id.* § 41-4A-3(B).
73. *Id.* § 41-4A-10.
74. *Compare* State v. Ochoa, 206 P.3d 143, 155–56 (N.M. Ct. App. 2008) *with* Whren v. United States, 517 U.S. 806, 812 (1996).
75. N.M. STAT. ANN. § 41-4A-4.

or within the course and scope of the authority of the public body."[76] H.B. 4 also limits liability for defendants in ways that federal law and other state qualified immunity legislation does not. The award of fees to a prevailing plaintiff is discretionary,[77] damages are capped at two million dollars, and legal fees count toward the cap.[78]

D. New York City Local Law No. 48

On April 25, 2021, the New York City Council enacted Local Law No. 48 without Mayor DeBlasio's signature. The law creates in the city's code a statutory right to be free from unreasonable search, seizure and excessive force, and takes much of its language from the Fourth Amendment.[79] It also provides that this right should be construed consistently with the Fourth Amendment and similar search-and-seizure provisions in the state constitution.[80] It creates a Section 1983-style cause of action against NYPD officers who violate this statutory right.[81] Defendants may not raise qualified immunity or any "substantially equivalent immunity" as a defense.[82]

Local Law No. 48 provides for a minimum statutory damages award of $1,000 for any prevailing plaintiff, and requires the court to award the plaintiff all reasonable attorney's fees and costs.[83] The law does not alter the city's indemnification scheme, but renders the city directly liable for violations committed by NYPD officers.[84] Local Law No. 48 also requires the New York City Law Department to publish the identities of all officers named as defendants in civil actions and requires the Law Department to state whether the defendant officer was accused of excessive force, assault and battery, malicious prosecution, false arrest or imprisonment, or the deprivation of analogous rights guaranteed by the statute.[85]

IV. CRITIQUES OF QUALIFIED IMMUNITY ARE UNPERSUASIVE

The campaign against qualified immunity has its roots in critiques originating from both the judiciary and legal academia. Textualist and originalist attacks on qualified immunity tend to assert qualified immunity is not rooted in the text of Section 1983 or the common law of 1871. Other scholars and jurists attack qualified immunity on policy grounds, claiming that it unfairly denies constitutional protections to victims of police misconduct. Neither critique is persuasive. Textualist and originalist critiques of qualified immunity are inherently selective.

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76. *Id.* §§ 41-4A-3, 41-4A-8.
77. *Id.* § 41-4A-5.
78. *Id.* § 41-4A-6(A).
79. N.Y.C. Admin. Code § 8-802 (2021).
80. *Id.* § 8-807.
81. *Id.* § 8-803.
82. *Id.* § 8-804.
83. *Id.* § 8-805.
84. *Id.* § 8-803(b).
85. *Id.* § 7-114.

And while it is popular to say qualified immunity makes it difficult or impossible to sue police, the quantitative evidence shows otherwise.

A. Textualist Critiques of Qualified Immunity Are Necessarily Selective

Textualist and originalist[86] critics of qualified immunity have complained the doctrine is a judicial innovation which is not rooted in the text of Section 1983 or the common law of 1871. The merits of these claims are debatable, as Scott Keller has argued that the evidence supports the existence of a qualified immunity defense for executive officials in the 19th century.[87] But beneath these arguments is a deeper conceptual problem. The conceit of textualism is that it fixes the meaning of a statute or constitutional provision at the time of its enactment.[88] Yet the sheer number of non-textualist innovations in constitutional tort litigation since 1871 means that any textualist who seeks to eliminate qualified immunity while ignoring non-textualist interpretations of Section 1983 and the constitution is effectively pushing for a statute that, as Justice Scalia once recognized, "bears scant resemblance to what Congress enacted."[89] On the other hand, an even-handed application of textualism would reshape constitutional tort litigation in ways that qualified immunity's critics would prefer to avoid.

The first kind of textualist attack on qualified immunity, recently advanced by Professor Alexander Reinert, looks only at the text of Section 1983.[90] Reinert argues that in reading a qualified immunity defense into Section 1983, the Court relied on the derogation canon of statutory interpretation. That canon holds that statutes in derogation of the common law are generally construed narrowly,[91] but Reinert argues that because common-law defenses were not incorporated into statutes, creating new causes of action prior to 1871, Congress never expected that common-law defenses would apply to Section 1983.[92] Additionally, Professor Reinert argues that the original text of Section 1983 invalidated then-existing common-law immunities.[93] Thus, because there is no immunity defense mentioned in in the text of the statute, qualified immunity does not exist.

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86. Generally, statutory interpretation involves textualism and constitutional interpretation involves originalism, but "the justifications for, and methodologies of, textualism and originalism overlap significantly." J. Joel Alicea, Dobbs *and the Fate of the Conservative Legal Movement*, CITY J. (Dec. 5, 2021), https://www.city-journal.org/dobbs-and-the-fate-of-the-conservative-legal-movement [https://perma.cc/7MPL-BWU7].

87. Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1344 (2021).

88. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78 (2012).

89. Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (referring to the holding of *Monroe v. Pape*, 365 U.S. 167, 183 (1961)).

90. Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 101, 108–09 (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4179628 [https://perma.cc/T88V-P2DU].

91. *Id.* at 140–41.

92. *Id.* at 165.

93. *Id.* at 166–68.

The problem with the text-only argument, as Professor Reinert recognizes, is that its implications necessarily extend far beyond qualified immunity. Under existing precedent, judges, legislators, and prosecutors are absolutely immune from suit under Section 1983. Lower courts have extended a quasi-judicial absolute immunity to other officials, including administrative law judges, social workers, mediators, parole board members, and occupational licensing boards.[94] If Professor Reinert is correct and Section 1983 recognizes no common law defenses whatsoever, nearly all of these immunities must also fall away.[95] Justice Scalia called the Derogation Canon a "stabilizing" canon,[96] and it is easy to see why: refusing to apply it in this context is profoundly destabilizing.

Professor Reinert attempts to avoid the implications of his approach by saying absolute immunity "may be" justified on other grounds. He also suggests Congress may have effectively reenacted judicial immunity by amending Section 1983 in 1996.[97] But why would this be? If, as Reinert argues, the original text of Section 1983 explicitly eliminated judicial immunity as a common law defense,[98] it seems doubtful a later Congress could restore it only by implication.[99] And to the degree Congressional acquiescence[100] has effectively ratified the Supreme Court's restoration of judicial immunity, why should the same ratification not also extend to all common law immunities? Indeed, Congress has amended Section 1983 twice since *Pierson* was decided without ever acting to abrogate any of the immunities it recognized.[101] Similarly, the Civil Rights Attorney's Fees Award Act of 1976 was enacted by Congress against the backdrop of qualified immunity that had already been recognized in *Pierson*.[102]

The "text-only" approach to constitutional tort litigation creates a second problem for qualified immunity's critics: to the extent one believes constitutional tort liability should rise or fall by the text of statutes, no constitutional tort liability for federal law enforcement can be justified. The text of Section 1983 makes it clear that federal officials are not covered, which is why constitutional tort liability for federal agents rests entirely on the Court's creation of an implied right of action in *Bivens v. Six Unknown Named Agents*.[103] The Court has increasingly

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94. *See generally* Margaret Z. Johns, *A Black Robe Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil Rights Cases*, 59 SMU L. REV. 265 (2006).

95. I agree with Professor Reinert that legislative immunity is an exception, as it is likely justified on other grounds. *See* Reinert, *supra* note 90, at 168.

96. *See* SCALIA & GARNER, *supra* note 88, at 318–319.

97. *See* Reinert, *supra* note 90, at 183 n.276.

98. *Id*. at 171–72.

99. *See* SCALIA & GARNER, *supra* note 88, at 327–33.

100. *See* Bob Jones Univ. v. United States, 561 U.S. 574, 600 (1983) (holding Congress acquiesced in the IRS's construction of the tax code by amending the statute in question without amending the disputed provision).

101. *See* Act of Dec. 29, 1979, Pub. L. No. 97-170, 93 Stat. 1284 (1979) (amending § 1983 to allow suits against officials of the District of Columbia); Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (codified as amended at 42 U.S.C. §§ 1983, 1988).

102. *See supra* note 43.

103. 403 U.S. 388, 389 (1971).

recognized *Bivens* was a mistake, but so far has declined to overrule it.[104] Unless, and until, *Bivens* is overruled, ending qualified immunity would effectively expand liability for federal officers in the total absence of any statute creating a cause of action against them.

The second, more widespread textualist critique of qualified immunity assumes Section 1983 must be understood in light the common law of 1871, but argues the Court had the common law wrong. Most prominently, Professor William Baude has argued that there was no good faith defense at common law in the early years of the Republic or when Section 1983 was enacted.[105] This critique has received substantial attention from courts: Justice Thomas complained qualified immunity is "no longer grounded in the common-law backdrop against which Congress enacted" the Civil Rights Act.[106] Circuit judges have also argued that qualified immunity is effectively a "judge-made immunity regime."[107]

As with the text-only approach to Section 1983, textualists who believe the Court misread the common law backdrop to the Civil Rights Act must explain if and how other immunities are justified. Professor Baude suggests that other immunities "might have their own firmer historical and legal bases."[108] This position has some merit, but there is reason to think that the absolute immunity recognized in 1871 was not as broad as that which exists today.[109] Justice Douglas' dissent in *Pierson* also collected substantial historical evidence showing that Congress had no intention of leaving judicial immunity intact.[110] A textualist who asserts that qualified immunity is incompatible with the common law of 1871 must grapple with the possibility that this logic extends to at least some of the immunities afforded to members of the bar, and the substantial consequences such a result entails.[111]

Then there is *Monroe v. Pape*.[112] Twenty years ago, Justice Scalia argued the Court had erred in *Monroe* by allowing Section 1983 suits for constitutional torts committed in violation of, rather than "*under color of*," state law.[113] Professors Aaron Nielson and Christopher Walker have marshalled significant evidence

104. *See, e.g.*, Egbert v. Boule, 142 S. Ct. 1793, 1802–03 (2022).

105. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55–58 (2018).

106. Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring).

107. Zadeh v. Robinson, 928 F.3d 457, 474 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

108. Baude, *supra* note 105, at 80.

109. *See* Jay Feinman & Roy Cohen, *Suing Judges: History and Theory*, 31 S.C. L. REV. 202, 231–37 (1980) (arguing judicial liability for malicious and extrajudicial acts was broader in 1871 than is commonly believed); Keller, *supra* note 87, at 1385–88 (concluding that legislative aides and prosecutors were not entitled to absolute immunity at common law).

110. Pierson v. Ray, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting). Of course, many textualists would deny that legislative history is a useful aid in statutory construction. *See* SCALIA & GARNER, *supra* note 88, at 369–90.

111. *See* Feinman & Cohen, *supra* note 109.

112. Monroe v. Pape, 365 U.S. 167 (1961).

113. Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (citing Crawford-El v. Britton, 93 F.3d 813, 829 (D.C. Cir. 1996) (Silberman, J., concurring)).

supporting Justice Scalia's conclusion that *Monroe* was wrongly decided.[114] An analysis of the text of Section 1983 conducted by a linguistics expert found that virtually no laypeople read it in the way the Court does.[115] In at least one case from 1880, the Court held that for a federal officer to act "under [the] color of" federal authority, he must act in compliance with federal law.[116] Walker and Nielson also note the sharp break in actual practice created by *Monroe*, which helped transform Section 1983 from a virtually ignored statute into one which generates tens of thousands of lawsuits every year.[117]

Baude responds that even if *Monroe* is wrongly decided, qualified immunity creates a mismatch between the immunity that ought to exist and the immunity that actually exists because, under the theory of Section 1983 Justice Frankfurter advanced in his *Monroe* dissent, a cause of action would typically exist only where state law immunizes or authorizes official misconduct.[118] Baude points out that this theory does not require federal immunity of any kind—instead, Section 1983 becomes a kind of a gap filler, allowing lawsuits when state law denies plaintiffs a remedy.[119] But Justice Frankfurter's theory would not limit liability only by denying plaintiffs a double recovery when Section 1983 is "redundant with state tort law."[120] Common law tort actions filed in state court also would not trigger the fee shifting provisions of 42 U.S.C. § 1988, substantially reducing defendants' overall legal exposure.[121]

Beyond *Monroe*, an approach to constitutional tort litigation rooted in the common law of 1871 must also account for the fact that constitutional law today bears near-zero resemblance to that which existed when Section 1983 was enacted. Most Section 1983 liability for police flows from the Fourth Amendment, but contemporary Fourth Amendment jurisprudence is decidedly non-originalist in nature.[122] Congress in 1871 probably would have been surprised to know it had authorized suits against state officials who use deadly force to apprehend a fleeing felon, something indisputably allowed by the Fourth Amendment until *Garner* was decided in 1985.[123] It also may have been surprised to know the Fourth

114. Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1869–71 (2018).

115. *Id*. at 1869.

116. *Id*. at 1870 (citing Tennessee v. Davis, 100 U.S. 257 (1880)).

117. Nielson & Walker, *supra* note 114, at 1871.

118. Baude, *supra* note 105, at 66–67.

119. *Id*. at 68.

120. *Id*.

121. *See infra* Part V(B).

122. Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia*, 70 HASTINGS L.J. 75, 98 (2019) (finding that 13.73% of the Supreme Court's Fourth Amendment opinions were originalist in nature during Justice Scalia's tenure).

123. Tennessee v. Garner, 471 U.S. 1, 13–14 (1985) (rejecting the common law rule for use of deadly force by police because of "sweeping change in the legal and technological context").

Amendment protects non-tangible things in which a person has a reasonable expectation of privacy[124] and restricts the longstanding authority of constables to arrest suspicious persons who are out after dark.[125] Yet one rarely sees much clamor for a return to a Fourth Amendment jurisprudence based strictly on 18th century common law.[126]

The point here is not to say that "two wrongs make a right."[127] The point is that, as Judge Ho observed: "Originalism for plaintiffs, but not for police officers, is not principled judging."[128] If the Court has authority to recognize new constitutional rights and tort remedies for violating them—as it did in *Monroe*, *Bivens*, *Terry*, *Garner*, *Katz*, and other cases—it follows that it has the inherent authority to limit the scope of those remedies.[129] It is certainly possible to conjure up a textualism that ends qualified immunity even as it conveniently preserves absolute immunity, legitimizes every existing Fourth Amendment precedent, and upholds *Monroe* and *Bivens*. Yet any claim that such a just-so textualism is more than an "ideological device" is hard to credit.[130]

Justice Scalia famously described himself as "an originalist and a textualist, not a nut."[131] Unless applied selectively, a textualist approach to constitutional tort litigation leads to results only a nut could love. It suggests that judges and other quasi-judicial officials might be subject to suits for money damages. It calls for reexamining constitutional protections, like *Terry*, *Garner*, and *Katz,* that have been relied upon by a generation of Americans. It expands liability for law enforcement far beyond anything the Congress that enacted Section 1983 ever imagined. And it will worsen America's severe violent crime problem.[132] If a textualist approach to jurisprudence requires the end of qualified immunity, perhaps

124. Katz v. United States, 398 U.S. 347, 365–66 (1967) (Black, J., dissenting) (discussing the common law of eavesdropping); *but see* Orin S. Kerr, *Katz as Originalism*, 71 DUKE L.J. 1047–1104 (2022).

125. Minnesota v. Dickerson, 508 U.S. 366, 380–82 (Scalia, J., concurring) (discussing the common law authority of constables to detain "night walkers" without any cause).

126. One exception is Ilan Wurman's *Qualified Immunity and Statutory Interpretation*, 37 SEATTLE U. L. REV. 939 (2014), which calls for a return to the common law rules governing both qualified immunity and the use of force by police. Yet Wurman discusses the common law of arrest at length without making any reference to *Garner* or the common-law fleeing felon rule. *Id*. at 961–72. Some originalists try to address the problem by identifying the original meaning of the Fourth Amendment at a "high level of generality." Rosenthal, *supra* note 122, at 130–32.

127. *Contra* Baude, *supra* note 105, at 62.

128. Cole v. Carson, 935 F.3d 444, 479 (5th Cir. 2019) (Ho & Oldham, JJ., dissenting).

129. *Cf.* Egbert v. Boule, 142 S. Ct. 1793, 1803–04 (2022) (limiting the expansion of the *Bivens* remedy).

130. *Contra* SCALIA & GARNER, *supra* note 88, at 16.

131. *Morning Edition: Justice Scalia, the Great Dissenter, Opens Up*, NPR (Apr. 28, 2008), https://www.npr.org/2008/04/28/89986017/justice-scalia-the-great-dissenter-opens-up [https://perma.cc/6884-GGRT].

132. *See infra* Part VI.

that is more reason to explore approaches to jurisprudence rooted in substantive notions of the common good.[133]

B. Qualified Immunity Does Not Render Constitutional Protections Hollow

Professor Joanna Schwartz echoes Justice Sotomayor's assertion that qualified immunity for police "sanction[s] a 'shoot first, think later' approach to policing" and "renders the protections of the Fourth Amendment hollow."[134] Popular media perpetuates a similar narrative, with one NPR commentator suggesting that qualified immunity makes police "basically impervious to any lawsuits."[135] Some advocacy groups call qualified immunity a "nearly failsafe tool to let police brutality go unpunished and deny victims their constitutional rights."[136] Yet the evidence Schwarz herself collected about the real-world impact of qualified immunity suggests that it fails to affect the vast majority of Section 1983 suits against police officers. If anything, qualified immunity is too weak, not too powerful.

Professor Schwartz conducted an extensive study of how qualified immunity has affected Section 1983 litigation in practice, examining 1,183 cases filed in five district courts over a two-year period.[137] In the vast majority of these cases, qualified immunity had no impact: just 3.2% of cases (72 cases) were dismissed before trial on qualified immunity grounds.[138] Plaintiffs received a settlement, a Rule 68 judgment, or a favorable verdict at trial in 57.7% of cases.[139] Of the cases that failed, 15% were dismissed *sua sponte* or as a sanction, 17% were dismissed for other reasons, and 6% of cases ended in a defense verdict at trial.[140] Even if the denominator includes only those cases in Schwartz's dataset where a defendant raised qualified immunity as a defense, the result is similar: qualified immunity ended just 10.3% of plaintiffs' cases.[141] In only *one* of 1,183 cases Schwartz reviewed did a court conclude the plaintiff's rights were violated but grant qualified immunity because the right in question was not clearly established.[142]

Interlocutory appeals change very little. Professor Schwartz's research found that when qualified immunity is denied in district court, defendants file an

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133. *See* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 91–116 (2022) (criticizing originalism and textualism as illusory).

134. Mullenix v. Luna, 557 U.S. 7, 26 (2015) (Sotomayor, J., dissenting); Schwartz, *supra* note 51, at 1814.

135. *An Immune System*, NPR (July 8, 2020), https://www.npr.org/2020/06/12/876212065/an-immune-system [https://perma.cc/2J52-NXKP].

136. Andrew Chung et. al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/ [https://perma.cc/YSU5-UJA4].

137. Joanna Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 45–46 (2017).

138. *Id.*

139. *Id.* at 47.

140. *Id.* at 46.

141. *Id.* at 45.

142. Joanna Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 342 (2019).

interlocutory appeal only about one-fifth of the time.[143] Relative to the overwhelming frequency with which qualified immunity is denied in district courts, courts of appeal favor defendants: Professor Reinert's research shows that when defendants appeal a denial of qualified immunity, circuit courts reverse that denial about 46% of the time.[144] Including appeals brought by plaintiffs, circuit courts grant qualified immunity in about 60% of cases.[145] But as a statement of qualified immunity's impact on litigation, these numbers mislead. When so few denials of qualified immunity are ever appealed and the odds of success on appeal are close to even, the reality for defendants is that the district court's word on qualified immunity is typically the last word.[146]

In her article, Professor Schwartz freely admits that the widely held belief that qualified immunity is akin to absolute immunity—a claim that can be found even in judicial opinions[147]—is wrong.[148] Based on her study, cases where judges identify constitutional misconduct and still grant qualified immunity appear to be extreme outliers. Instead, plaintiffs receive settlements or a judgment in the majority of Section 1983 cases they file.[149] Schwartz nonetheless contends that qualified immunity is problematic because it creates the *perception* of police impunity, even absent actual impunity.[150] But that perception is hardly qualified immunity's fault. It exists because critics of qualified immunity have helped create it.[151]

At first glance, it is hard to reconcile Professor Schwartz's research with the Supreme Court's jurisprudence, which suggests qualified immunity should be a powerful defense. But qualified immunity doctrine still has at least two major gaps. First, although the Court has held that it does not want lower courts to define "clearly established law" at a high level of generality, it held in *Hope v. Pelzer* that immunity may be denied in novel circumstances when it was "obvious" to officers that a constitutional right was being violated.[152] Second, officers can be denied immunity even when they are conducting searches or seizures pursuant to a warrant. In *Malley v. Briggs*, the Court held an officer could be denied qualified immunity in a false arrest suit even though he had first submitted an arrest warrant

143. Schwartz, *supra* note 137, at 75.

144. *See* Alexander A. Reinert, *Qualified Immunity on Appeal: An Empirical Assessment*, JACOB BURNS INST. FOR ADVANCED LEGAL STUD., at 29–30 (2021).

145. *Id.* at 26.

146. Professor Schwartz's finding that qualified immunity ended only 10.3% of plaintiffs' cases accounts for the impact of interlocutory appeal. *See* Schwartz, *supra* note 137, at 44–45.

147. Jamison v. McClendon, 476 F. Supp. 3d 386, 391 (S.D. Miss. 2020) ("The doctrine is called 'qualified immunity.' In real life it operates like absolute immunity.").

148. Schwartz, *supra* note 142, at 336.

149. *Id.* at 328.

150. *See* Schwartz, *supra* note 51, at 1818.

151. *See* Joanna Schwartz, *Suing police for abuse is nearly impossible. The Supreme Court can fix that.*, WASHINGTON POST (June 3, 2020), https://www.washingtonpost.com/outlook/2020/06/03/police-abuse-misconduct-supreme-court-immunity [perma.cc/UVE2-MHWD]; Yohnka, *supra* note 25.

152. Hope v. Pelzer, 536 U.S. 730, 741 (2002); *see* Taylor v. Riojas, 141 S. Ct. 52, 53 (2020) (per curiam).

affidavit and received judicial approval for the warrant.[153] Officers must have an "objectively reasonable" belief that the facts in a warrant affidavit establish probable cause.[154]

These gaps allow for some remarkable lower court opinions. The Fifth Circuit recently decided a case in which police officers sought and received—with the approval of a prosecutor—arrest warrants for a local journalist based on her violation of a Texas statute making it a crime to solicit nonpublic information from government officials.[155] At the time police sought the warrants, no court had ever ruled the statute was invalid. The warrants were approved by a judge and the plaintiff did not allege the affidavits included false information.[156] Nonetheless, citing *Hope* and *Malley*, the panel majority held the Texas statute unconstitutional, disclaimed any need to identify a factually analogous precedent, and reversed the District Court's grant of qualified immunity.[157] Apparently, in the panel majority's view, every "reasonably well-trained officer" is required to second-guess the unanimous legal conclusions of the state legislature, a prosecutor, and a judge.[158]

Then there is the problem of the summary judgment standard. Summary judgment is appropriate when, after drawing all inferences in favor of the non-moving party, there is no "*genuine* issue of *material* fact."[159] The Supreme Court has already said courts need not deny qualified immunity to a defendant on a summary judgment motion when the plaintiff's claims are "utterly discredited by the record."[160] Yet as Officer Pittman's case shows, courts can easily avoid qualified immunity by taking a broad view of which facts are "material" and "genuinely" disputed. There, Harris's claims were supported only by his complaint, while Officer Pittman's account was supported by forensic DNA evidence, witness testimony, and Harris's admission that he had tried to shoot Officer Pittman.[161] Yet the majority opinion treated the case as if it were a "one-on-one swearing contest."[162]

It seems likely that lower courts' routine denials of qualified immunity arise out of a general hostility toward qualified immunity jurisprudence.[163] At times,

153. Malley v. Briggs, 475 U.S. 335, 345–46 (1986).

154. *Id*. at 345.

155. Villareal v. City of Laredo, 17 F.4th 532, 537–38 (5th Cir. 2021), *reh'g en banc granted*, 42 F.4th 265 (5th Cir. 2022).

156. *See id*. at 541–543.

157. *Id*. at 539–40, 543.

158. *Id*. at 543.

159. Scott v. Harris, 550 U.S. 372, 380 (2007) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

160. *Scott*, 550 U.S. at 380.

161. Harris v. Pittman, 927 F.3d 266, 284–85 (2019) (Wilkinson, J., dissenting).

162. *Id*. at 284.

163. *See, e.g*., Horvath v. City of Leander, 946 F.3d 787, 795, 800–03 (5th Cir. 2020) (Ho., J., concurring in the judgment in part and dissenting in part) (explaining that he would "welcome a principled re-evaluation of our precedents" related to qualified immunity); Cole v. Carson, 905 F.3d 334, 336 (5th Cir. 2018), *aff'd*, 935 F.3d 444 (5th Cir. 2019) ("Qualified immunity is a judicially created

judges seem to flirt with openly defying the Supreme Court's instructions. In the Eastern District of New York, one opinion on a motion for summary judgment consisted of seven pages criticizing qualified immunity doctrine followed by a denial. The court reasoned that "[c]ase precedent and policy rationale fail to justify an expansive regime of immunity that would prevent [a] plaintiff from proving a serious constitutional violation."[164] In 2018, after the Supreme Court had summarily reversed its initial denial of qualified immunity, the Fifth Circuit doubled down and denied immunity again, prompting dissenters to say the court was at "war with the Supreme Court's qualified-immunity jurisprudence."[165] The Ninth Circuit's repeated failure to properly apply qualified immunity precedent has drawn comment from the Court itself.[166]

It is theoretically possible that qualified immunity, if implemented as envisioned by the Court, might amount to a powerful shield for police officers. As things stand today, this is clearly not the case. Schwartz's data and the drumbeat of judicial complaints about qualified immunity suggest lower courts are exploiting doctrinal gaps and the limits of appellate review to deny qualified immunity almost as a matter of routine. The Court is left fighting to keep qualified immunity on life support by issuing repeated summary reversals.[167] So long as qualified

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doctrine calculated to protect an officer from trial before a jury of his or her peers."); Zadeh v. Robinson, 928 F.3d 457, 480–81 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) (observing that "a growing, cross-ideological chorus of jurists and scholars" are calling for reconsideration of qualified immunity); Sampson v. Cnty. of Los Angeles, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part) (calling qualified immunity "ill-conceived"); McKinney v. City of Middletown, 49 F.4th 730, 756 (2d Cir. 2022) (Calabresi, J., dissenting) ("I would be remiss in not adding briefly why we should not be here at all, why the doctrine of qualified immunity—misbegotten and misguided—should go."); Manzanares v. Roosevelt Cnty. Adult Det. Ctr., 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018) ("The Court disagrees with the Supreme Court's approach. The most conservative, principled decision is to minimize the expansion of the judicially created clearly established prong, so that it does not eclipse the congressionally enacted § 1983 remedy."); Briscoe v. City of Seattle, 483 F. Supp. 3d 999, 1008 (W.D. Wash. 2020) ("Although qualified immunity jurisprudence is due for a major overhaul, the Court is currently bound by the following standards . . ."); Jamison v. McClendon, 476 F. Supp. 3d 386, 390–92 (S.D. Miss. 2020) (inveighing against qualified immunity and police misconduct); Ventura v. Rutledge, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019) ("[T]his judge joins with those who have endorsed a complete re-examination of the doctrine which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases."); Estate of Smart v. City of Wichita, No. 14-2111-JPO, 2018 WL 3744063, at *18 n.174 (D. Kan. Aug. 7, 2018) ("[T]he court is troubled by the continued march toward fully insulating police officers from trial—and thereby denying any relief to victims of excessive force—in contradiction to the plain language of the Fourth Amendment."); Thompson v. Clark, No. 14-CV-7349, 2018 WL 3128975, at *6–7 (E.D.N.Y. June 26, 2018) ("The legal precedent and policy justifications of qualified immunity, it has been charged, fail to validate its expansive scope. The law, it is suggested, must return to a state where some effective remedy is available for serious infringement of constitutional rights."). Professor Schwartz compiled many of these cases, and I have added some as well. *See* Schwartz, *supra* note 142, at 311 n.6.

164. *Thompson*, 2018 WL 3128975, at *13.

165. *Cole*, 935 F.3d at 473, 476 (Ho & Oldham, JJ., dissenting).

166. *Cf.* Ashcroft v. Al-Kidd, 563 U.S. 731, 742 (2011) ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.").

167. *See* Schwartz, *supra* note 142, at 310 ("Since 2005 . . . the Court has granted certiorari to consider twenty qualified immunity denials, and ruled in the government's favor every time.").

immunity remains mostly a paper tiger, it can hardly render constitutional protections hollow.

V. ELIMINATING QUALIFIED IMMUNITY IS UNJUST

If justice "gives to every man his due," then ending qualified immunity is unjust.[168] Critics claim an end to qualified immunity will reduce police misconduct and that an officer who obeys the law has nothing to fear from such a repeal. But in reality, without qualified immunity, police officers would be liable for damages even in novel factual situations and face retroactive liability when constitutional law changes. The biggest winners would not be innocent victims of police misconduct but—thanks to fee-shifting rules which make trials an unacceptable risk for defendants—plaintiffs' attorneys and undeserving litigants like Herman Harris.

A. The Fair Notice Problem

Critics of qualified immunity often suggest that all a police officer needs to do to avoid liability is obey the commands of constitutional law. Setting aside the fact that constitutional law is remarkably voluminous and police officers are typically not lawyers, the total abolition of qualified immunity proposed by legislators would not simply make police officers liable when they break existing law.[169] Rather, it would make police officers liable even in truly novel factual situations and would impose retroactive liability when an appellate court invalidates a statute or puts a new gloss on precedent. A world without qualified immunity is therefore one of profound uncertainty, where police can never be assured of avoiding liability no matter how scrupulously they comply with existing law.

The Supreme Court recognizes that its Fourth Amendment jurisprudence provides relatively little specific guidance for police officers.[170] The Court allows officers to detain a person based on a "reasonable" suspicion[171] and requires that uses of force be "objectively reasonable."[172] Probable cause exists when a "reasonable officer" could infer from the evidence the suspect committed a crime.[173] Predictably, the word "reasonable" is not a terribly helpful guidepost: the Court's Fourth Amendment case law has been called "an embarrassment," "a mess," "a mass of contradictions," "cobbled-together," "bizarre," and "inconsistent."[174] Even when courts agree on what "reasonableness" means, intelligent jurists still

168. J. INST. 1.1 (J.B. Moyle trans., 5th ed. 1913).

169. For a more in-depth discussion of the fair notice rationale for qualified immunity, see Nathan S. Chapman, *Fair Notice, The Rule of Law, and Reforming Qualified Immunity*, FLA. L. REV. (forthcoming 2022).

170. *See* Mullenix v. Luna, 577 U.S. 7, 18 (2015) (citing Brosseau v. Haugen, 543 U.S. 194, 198 (2004)) (noting the "hazy border between excessive and acceptable force.").

171. Terry v. Ohio, 392 U.S. 1, 30 (1968).

172. Graham v. Connor, 490 U.S. 386, 397 (1989).

173. District of Columbia v. Wesby, 138 S. Ct. 577, 587 (2018).

174. *See* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 479–80 (2011) (collecting scholarly critiques).

differ. The Court recently joined most lower courts in concluding it is reasonable for an officer to pull over a vehicle when the registered owner's license is suspended,[175] but Justice Sotomayor and the Supreme Court of Kansas disagreed.[176] By insisting that courts identify an analogous factual precedent before imposing liability, qualified immunity ensures the boundary of reasonableness is explicitly delineated before an officer may be punished for straying beyond it.

Jurists and scholars debate the level of generality at which a constitutional right ought to be considered clearly established for the purpose of qualified immunity, but legislators seem uninterested in the discussion. The repeals of qualified immunity that have been proposed and enacted so far do not change when a constitutional right ought to be considered clearly established for purposes of qualified immunity. They simply end qualified immunity completely, imposing retroactive liability on police officers even when a court changes constitutional law.[177] Unless he can see the future, a police officer working in a jurisdiction without qualified immunity can do nothing to be assured of avoiding liability. Even if he conforms his conduct to existing law, he could be liable for money damages if an appellate court were to overrule existing precedent or invalidates the statute on which he relied.

The Supreme Court's recent decision in *Caniglia v. Strom* provides a helpful illustration of how a total repeal of qualified immunity penalizes officers acting in good faith.[178] In 2015, a group of Cranston, Rhode Island police officers led by Sergeant Brandon Barth sent the plaintiff to a hospital after his wife reported he had shown her a firearm and asked her to shoot him with it.[179] The plaintiff's firearms remained in his home after he departed the scene in an ambulance, and Sergeant Barth believed they should be seized.[180] He called his superior, Captain Russell Henry, who authorized the officers to seize the firearms.[181] The plaintiff later sued Henry, Barth, and the other officers, alleging they violated his Fourth Amendment rights when they entered his home and seized his firearms without a warrant.[182]

The District Court granted summary judgment, concluding the search and seizure were reasonable under the community caretaking exception to the warrant requirement.[183] The First Circuit affirmed on appeal.[184] The panel noted the scope of the community caretaking exception was unsettled,[185] but joined several other

175. Kansas v. Glover, 140 S. Ct. 1183, 1186 (2020); *see* Petition for Writ of Certiorari at 6–9, Kansas v. Glover, 140 S. Ct. 1183 (No. 18-556), at *6–9 (collecting state and federal cases).

176. *See Glover*, 140 S. Ct. 1183, 1187, 1194 (2020) (Sotomayor, J., dissenting).

177. *See supra* Part III.

178. Caniglia v. Strom, 141 S. Ct. 1596, 1598 (2021).

179. Caniglia v. Strom, 953 F.3d 112, 119 (1st Cir. 2020).

180. *Id.* at 120.

181. *Id.*

182. *Id.*

183. Caniglia v. Strom, 396 F. Supp. 3d 227, 233–35 (D.R.I. 2019).

184. *Caniglia*, 953 F.3d at 118.

185. *See id.* at 124.

circuits in extending it to certain warrantless searches of homes.[186] The Supreme Court granted certiorari and unanimously reversed, holding for the first time that the exception could not justify a search or seizure in a private home.[187] On remand, the District Court granted the officers qualified immunity, observing that "the very fact [the] Supreme Court disagreed with this Court and the First Circuit on the issue of community care taking function[s]" showed the law was not clearly established.[188] Under the circumstances, the District Court concluded, "it is not possible that a reasonable Cranston Police Officer could have understood the potentially problematic nature of their conduct."[189]

Without qualified immunity, Captain Henry, Sergeant Barth, and the other Cranston officers would have been liable for money damages. It would not have mattered that Sergeant Barth was acting in good faith, as demonstrated by his decision to seek guidance from a superior in the face of uncertainty. It would not have mattered that the First Circuit, Fifth Circuit, Sixth Circuit, Eighth Circuit, and Ninth Circuit had all concluded, as Captain Henry apparently did, that the community caretaking exception extended to homes.[190] It would not have mattered that four federal judges, including a retired Supreme Court justice,[191] believed the officers acted reasonably. Without qualified immunity, the officers would be liable—not for committing misconduct, but because they could not anticipate how Fourth Amendment doctrine would change six years in the future.

Professor Baude argues fair notice principles cannot justify qualified immunity because the doctrine is broader than the criminal rule of lenity, upon which the Court has said it is based.[192] Of course, when fewer than one in ten civil rights lawsuits filed against police are dismissed on qualified immunity grounds, the doctrine's alleged breadth is questionable.[193] But to the extent qualified immunity really is broader than the rule of lenity, that distinction is justified. To avoid liability, all most criminal defendants needed to do was nothing: absent a legal duty, a person who does not act generally cannot be liable either criminally or in tort for an omission.[194] A narrower rule of lenity makes it risky to act in the face of legal "gray areas," but most people can avoid the gray area simply by not acting.

By contrast, qualified immunity reflects the law's expectation that police will act even in the face of uncertainty. In practice, police officers are rarely subject to

186. *Id*. at 133.
187. *Caniglia*, 141 S. Ct. at 1598.
188. Caniglia, 569 F. Supp. 3d at 91.
189. *Id*.
190. *See Caniglia*, 953 F.3d at 124 (discussing circuit split).
191. The First Circuit panel included retired Justice Souter, sitting by designation.
192. Baude, *supra* note 105, at 74, 77.
193. *See supra* Part IV(B).
194. SANFORD H. KADISH, STEPHEN J. SHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES 235 (10th ed. 2017); RESTATEMENT (SECOND) OF TORTS § 314 (1965).

formal quotas,[195] and have broad discretion in deciding when to enforce the law.[196] But police cannot always avoid legal liability by deciding not to act. Twenty-two states have statutes that mandate the arrest of domestic violence offenders.[197] The common law imposed an affirmative duty to act on police.[198] In rare cases, officers even face criminal prosecution for failure to act—two American police officers have recently faced criminal charges for using *too little* physical force.[199] Qualified immunity is broader than the rule of lenity because the public expects police will act even "in circumstances that are tense, uncertain, and rapidly evolving."[200] The only way a police officer can avoid legal gray areas is leave the profession altogether—something officers are already doing more and more often.[201]

I will say it plainly: holding officers liable retroactively for changes in constitutional law is unjust. So too is holding officers liable for making reasonable, good-faith mistakes in novel or uncertain legal and factual circumstances. Cases like *Caniglia* are not rare—the rapid pace of technological change regularly leads to novel Fourth Amendment situations,[202] and the Supreme Court and lower courts routinely revisit older Fourth Amendment precedents or disagree about their proper meaning.[203] Without qualified immunity, even the best police officer will inevitably find himself subject to suit and liable for damages.

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195. As of 2016, only three percent of police officers were subject to formal arrest or citation quotas. RICH MORIN ET AL., PEW RSCH. CTR., BEHIND THE BADGE 46 (Rich Morin eds., 2017). *See infra* Part V(B).

196. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 760–61 (2005).

197. Alayna Bridgett, *Mandatory-Arrest Laws and Domestic Violence: How Mandatory-Arrest Laws Hurt Survivors of Domestic Violence Rather Than Help Them*, 30 HEALTH MATRIX 437, 449 (2020). Another six states have so-called "preferred" arrest laws, which encourage police to make arrests but do not require them. *Id.* at 448.

198. Kai Ambos, *Omissions*, *in* 1 CORE CONCEPTS IN CRIMINAL LAW AND CRIMINAL JUSTICE 28–30 (Kai Ambos et al. eds., 2020).

199. *Baltimore Police Officer Found Guilty of Reckless Endangerment*, STATE'S ATT'Y FOR BALTIMORE CITY (Aug. 16, 2022), https://www.stattorney.org/media-center/press-releases/2628-baltimore-police-officer-found-guilty-of-reckless-endangerment [https://perma.cc/9VY2-AHCM]; *see also* State v. Peterson, No. 19-7166CF10A (Fla. Cir. Ct. Aug. 19, 2021) (denying defendant's motion to dismiss).

200. Graham v. Connor, 490 U.S. 386, 397 (1989).

201. *See infra* Part VI(C).

202. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2211 (2018) (cell phone metadata); Riley v. California, 573 U.S. 373, 378 (2014) (searches of cell phones incident to arrest); United States v. Jones, 565 U.S. 400, 402 (2012) (GPS tracking); Kyllo v. United States, 533 U.S. 27, 29 (2001) (thermal imaging devices).

203. *Compare* County of Los Angeles v. Mendez, 137 S. Ct. 1539, 1547 (2017) (overruling Ninth Circuit precedent allowing a court to look backward in time to see if another Fourth Amendment violation precipitated an otherwise-lawful use of force) *with* Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir. 1997) (holding excessive force analysis includes officers' actions prior to use of force) *and* Claybrook v. Birchwell, 274 F.3d 1091, 1104 (6th Cir. 2001) (holding that excessive force analysis must be segmented).

B. The Fee-Shifting Problem

When denying qualified immunity at summary judgment, courts sometimes suggest it will take a trial to sort out disputed factual issues.[204] The implication is that at trial, an officer who acted reasonably will be exonerated. While this was true for Officer Pittman, the reality is that jury trials in Section 1983 cases are rare because the one-sided fee shifting rules of 42 U.S.C. § 1988 make trial an enormous and unacceptable risk for defendants. Actuarial reality creates pressure to settle even non-meritorious Section 1983 cases when a court denies qualified immunity. Eliminating it entirely will only exacerbate this problem.

The calculation of fees for a prevailing plaintiff in Section 1983 cases involves several considerations,[205] but the bottom line for defendants is that fee awards may far exceed damages. In *City of Riverside v. Rivera*, the Supreme Court considered a fee award for plaintiffs who had sued thirty individual police officers, the city's police chief, and the city, demanding both injunctive relief and damages.[206] The plaintiffs dropped their request for injunctive relief, the district court granted summary judgment in favor of 17 officers, and the jury exonerated another eight officers at trial.[207] Only the city and five officers were found liable, and the jury awarded plaintiffs just $33,350 in damages.[208] The district court nonetheless awarded the plaintiffs attorney's fees for every hour counsel spent on the case—$245,456.25, in total.[209] The Supreme Court affirmed the fee award 5 to 4, with a plurality holding that plaintiffs' fee awards under Section 1988 need not be proportional to damages recovered.[210]

In dissent, Justice Rehnquist noted the plurality had turned Section 1988 into "a relief act for lawyers."[211] Fee awards for plaintiff's attorneys in Section 1983 cases now regularly exceed the damages or settlement recovered—sometimes by orders of magnitude.[212] And while the Supreme Court has held that an award of

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204. *See, e.g.*, Harris v. Pittman, 927 F.3d 266, 271 (4th Cir. 2019) ("The only issue on appeal is whether, at this early stage of the litigation and before a jury has had a chance to assess witness credibility and other evidentiary issues, it can be said that Pittman is entitled to qualified immunity as a matter of law."); Cole v. Carson, 935 F.3d 444, 447 (5th Cir. 2019) ("We conclude that it will be for a jury, and not judges, to resolve the competing factual narratives as detailed in the district court opinion . . . .").

205. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

206. City of Riverside v. Rivera, 477 U.S. 561, 564–65 (1986).

207. *Id.*

208. *Id.* at 564–65.

209. *Id.*

210. *Id.* at 581 (Powell, J., concurring in the judgment).

211. *Id.* at 588 (Rehnquist, J., dissenting).

212. *See, e.g.*, Lilly v. City of New York, 934 F.3d 222, 226 (2d Cir. 2019) ($28,128 in fees for a $10,001 settlement); Bravo v. City of Santa Maria, 810 F.3d 659, 666 (9th Cir. 2016) ($1.023 million in fees for a $5,002 verdict); Winston v. O'Brien, 773, F.3d 809, 811 (7th Cir. 2014) ($187,467 in fees for a $7,501 verdict); Richardson v. City of Chicago, 740 F.3d 1099, 1103–04 (7th Cir. 2014) ($123,000 in fees for a $3,001 verdict); McAfee v. Boczar, 738 F.3d 81, 9495 (4th Cir. 2013) ($100,000 in fees for a verdict of under $3,000); Barbour v. City of White Plains, 700 F.3d 631, 632 (2d Cir. 2012) (per curiam) ($286,065 in fees for a $30,000 settlement); Marryshow v. Flynn, 986 F.2d 689, 691 (4th Cir. 1993) ($20,808 in fees for a $14,500 verdict); Curtis v. City of Des Moines, 995 F.2d 125, 128 (8th Cir. 1993)

fees is "usually" inappropriate when a plaintiff recovers only nominal damages,[213] courts in some circuits continue to award them.[214] Even if defendants are able to avoid paying a plaintiff's attorney's fees, the one-sided nature of Section 1988 means they will virtually always pay for their own defense.[215] The realistic outcomes for a defendant who takes a Section 1983 case to trial usually range from Pyrrhic victory to utter catastrophe.

The plurality in *Rivera* noted that defendants in civil rights cases can limit exposure to an award of attorney's fees by making a pretrial settlement offer,[216] and that is what defendants are now encouraged to do.[217] Local governments routinely settle Section 1983 cases filed against the officers they employ for purely financial reasons.[218] Sometimes the decision to settle is made for defendants by an insurance carrier.[219] It would be preferable if cases in which qualified immunity is denied went to trial more often, as empirical evidence suggests officers usually prevail when they do.[220] But the one-sidedness of Section 1988 means that, for

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($49,000 in fees for a $11,000 judgment); McCown v. City of Fontana, 711 F. Supp. 2d 1067, 1069 (C.D. Cal. 2010) ($148,250 in fees for a $20,000 settlement), *aff'd* 464 F. App'x. 577, 579 (9th Cir. 2011).

213. Farrar v. Hobby, 506 U.S. 103, 115 (1992).

214. *See* Guy v. City of San Diego, 608 F.3d 582, 589 (9th Cir. 2010) (holding denial of attorney's fees to a plaintiff who received only nominal damages was an abuse of discretion); Murray v. City of Onaway, 323 F.3d 616, 617 (8th Cir. 2003) (affirming award of $7,428 in fees for plaintiff who recovered nominal damages); Lee v. McCue, 2007 WL 2230100, at *8 (S.D.N.Y. July 25, 2007) (awarding $35,000 in fees after nominal damages verdict); Rutherford v. McKissack, 2011 WL 3421516, at *7 (W.D. Wash. Aug. 4, 2011) (awarding $90,000 in costs and fees after a nominal damages verdict), *aff'd* 505 Fed. App'x 677 (9th Cir. 2013); Mike Carter, *$1 Verdict in Police Case Costs Seattle a Lot More*, SEATTLE TIMES, April 12, 2013, at A1.

215. *See* Hughes v. Rowe, 449 U.S. 5, 14 (1980) (per curiam).

216. City of Riverside v. Rivera, 477 U.S. 561, 580–81 (1986).

217. *See* Bernard Farber, *Attorneys' Fees in Federal Civil Rights Lawsuits Part Two*, 2011 (5) AELE MONTHLY L.J. 101, 104 (2011) (advising defendants to make a "reasonable settlement offer" when liability is "arguable").

218. *See, e.g.*, Andrew Binion, *County Settles Racial Profiling Suit Against Kitsap County Sheriff's Sergeant*, KITSAP SUN, Sept. 1, 2021 (calling decision to settle a "financial decision to avoid the risks of going to trial"); Christopher Coble, *Man Tased by Colorado Police Receives $110K Settlement*, FINDLAW.COM (July 28, 2017, 1:57 PM), https://www.findlaw.com/legalblogs/personal-injury/man-tased-by-colorado-police-receives-110k-settlement/ [https://perma.cc/8UM6-MFU8] (saying case was settled because the cost of litigation "would have far exceeded the value of the settlement"); Tess Sheets, *Orlando to Pay $95K to Settle Excessive Force Suit Over 2015 Arrest of Noel Carter*, ORLANDO SENTINEL, June 18, 2020 (calling decision to settle "a financial decision" which was "not based on the facts of the case").

219. *E.g.,* Rachael S. Brickman, *245K Paid To Settle Police Brutality Suits*, NJ.COM (Jan. 14, 2009, 4:29 PM), https://www.nj.com/hunterdon/2009/01/245_paid_to_settle_police_brut.html [https://perma.cc/PQF8-NLG8] (settlements were a "strictly a financial decision made by the insurance company"); Adam Reiss, *Settlement Offered in Phoenix Airport Strangling Case*, CNN (Oct. 19, 2009) https://www.cnn.com/2009/CRIME/10/19/arizona.gotbaum/index.html [https://perma.cc/6CLX-MVDW] (settlement was a "financial decision by the insurance carrier"); *Stow Officials Address Police Brutality Suit Settlement*, AKRON BEACON JOURNAL, Feb. 17, 2013 ("[I]nsurance carrier . . . negotiated the settlement.").

220. *See* Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2082 (2018) (defendants prevailed at trial in nearly 70% of civil rights cases); Schwartz, *supra* note 137, at 46 (defendants prevailed at trial in 87% of civil rights cases); Andrew Chung et al., *Shot By Cops, Thwarted by Judges and Geography*, REUTERS (Aug. 25, 2020, 10:00 AM), https://www.reuters.com/investigates/special-report/usa-police-immunity-variations [https://perma.cc/QT9M-9CYY] (reporting that in cases

defendants, a settlement offer is often the only fiscally responsible choice when qualified immunity is denied. Unsurprisingly, Professor Schwartz's research shows settlements are the most common outcome in Section 1983 cases, while only 6.5% of cases are resolved via trial.[221] When qualified immunity is denied, nuisance settlements become the cost of doing business for police departments.

Legislative efforts to circumvent qualified immunity at the state and local level seem designed to exacerbate this problem. Every state or local "repeal" of qualified immunity identified in this Note includes a Section 1988-like fee-shifting provision, while only New Mexico's H.B. 4 caps damages and attorney's fees.[222] Several create even more pressure for defendants to settle: Colorado's S.B. 20-217 limits indemnification, creates adverse evidentiary inferences against defendants, and decertifies officers if they lose an excessive force suit at trial (but not if they settle).[223] New York City's Local Law 48 creates a minimum damages award of $1,000, incentivizing plaintiffs to bring lawsuits even where they would otherwise recover only nominal damages.[224]

If qualified immunity's critics believe civil rights cases should be resolved at trial rather than on summary judgment, they should also be willing to accept a jury's conclusions about the value of a plaintiff's case. Courts should not use Section 1988 to penalize defendants when they disagree with a jury's damages award.[225] Cases in which a plaintiff seeks no injunctive relief and can prove no damages should be resolved through a police department's disciplinary processes rather than through tort litigation. But because existing law embodies none of these principles, ending qualified immunity will not meaningfully increase the rate at which Section 1983 cases are resolved at trial or deter actual police misconduct. It will simply generate windfalls for plaintiff's attorneys and punish officers who try to police constitutionally.

VI. ELIMINATING QUALIFIED IMMUNITY HARMS PUBLIC SAFETY

For better or worse, the Supreme Court has justified qualified immunity partly on public policy grounds.[226] The Court knows that ending qualified immunity would deter public officials from carrying out their duties and able citizens from accepting public office.[227] In the policing context, these concerns have proven especially valid. Violent crime has now risen to levels not seen in decades,

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where qualified immunity was denied by district courts in California and Texas, 64% settled and a jury decided for police "in nearly all of the remaining cases").

221. Schwartz, *supra* note 137, at 46.

222. *See supra* Part III.

223. *Id.*

224. *Id.*

225. *See* City of Riverside v. Rivera, 477 U.S. 561, 591 (Rehnquist, J., dissenting) ("I reluctantly conclude that the court may have attempted to make up to respondents in attorney's fees what it felt the jury had wrongfully withheld from them in damages.").

226. Harlow v. Fitzgerald, 47 U.S. 800, 813–14 (1982).

227. *Id.* at 814 (noting the social costs of insubstantial litigation).

and empirical evidence shows proactive policing strategies coupled with an increase in police staffing can help reduce it. Yet ending qualified immunity threatens to hobble proactive policing just when at-risk communities need it most, while making police recruiting and retention even more difficult than they already are.

A. Proactive Policing and Adequate Police Staffing Reduce Violent Crime

Violent crime can no longer be ignored. The murder rate rose 30% in 2020 alone—the largest increase in 100 years.[228] The homicide rate is now at its 1995 level.[229] Violent crime has historically had a disproportionate impact on communities of color, and 85% of the increase in murder in 2020 occurred in Black or Hispanic neighborhoods.[230] Rising homicide rates cannot be dismissed solely as a statistical aberration or a product of the pandemic—since reaching a modern low in 2014, the murder rate has risen 47% over the last seven years.[231] Aggravated assault has risen 22% in the same period.[232] When a dozen major cities are setting all-time homicide records[233] and citizens are suggesting the National Guard be deployed to fight street crime,[234] the government should use all available tools to stem the bloodshed.

Proactive policing, which first emerged in the 1980s, is a proven tool.[235] Rather than waiting for citizens to report a crime, proactive policing relies on police initiative and asks officers to proactively prevent crime.[236] Proactive policing includes controversial stop-question-frisk programs, but departments have also experimented with other proactive policing strategies, including focused deterrence aimed at repeat offenders and hot spots policing aimed at locations where crime is concentrated.[237] The evidence supporting different proactive policing strategies varies, but the National Academy of Sciences' Consensus Study Report concluded that "a number of proactive policing practices are successful in reducing crime and disorder, at least in the short term, and [. . .] most of these strategies do

228. Jacqueline Howard, *US records highest increase in nation's homicide rate in modern history, CDC says*, CNN (Oct. 6, 2021), https://www.cnn.com/2021/10/06/health/us-homicide-rate-increase-nchs-study/index.html [https://perma.cc/4UYF-ZP2C].

229. *Id.*

230. Rav Arora, *See No Murder*, CITY J. (Dec. 1, 2021), https://www.city-journal.org/violent-crimes-disparate-racial-impact [https://perma.cc/Z5QH-UTS2].

231. FBI CRIME DATA EXPLORER, https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/crime-trend [https://perma.cc/MC5C-LRPG] (last visited Dec. 17, 2021).

232. *Id.*

233. Bill Hutchinson, *'It's just crazy': 12 Major Cities Hit All-Time Homicide Records*, ABC NEWS (Dec. 8, 2021, 6:08 AM), https://abcnews.go.com/US/12-major-us-cities-top-annual-homicide-records/story?id=81466453 [https://perma.cc/X6WU-X34E].

234. Arora, *supra* note 230.

235. NAT'L ACAD. OF SCI., CONSENSUS STUDY REPORT HIGHLIGHTS: PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 1 (2018).

236. *Id.*

237. *Id.* at 2.

not harm communities' attitudes toward police."[238] More recently, a panel of criminal justice experts overwhelmingly agreed that both "police-led targeted enforcement directed at places and persons at high risk for gun crime" and "police-led focused deterrence programs" help reduce gun violence.[239]

Criminologists also overwhelmingly agree that having more police officers on the street reduces violent crime.[240] At least two different studies have found that on average, hiring ten additional police officers prevents one homicide.[241] There is also evidence that hiring more officers substantially reduces the prevalence of other serious crimes, including robbery, assault, burglary, and auto theft.[242] Importantly, research shows an increase in police staffing is not associated with an increase in arrests for serious offenses or incarceration, which suggests the decline in crime is driven by the deterrent effect of having officers on the street rather than incapacitation via imprisonment.[243] Some social scientists have suggested that an increase in police staffing could, therefore, reduce both violent crime and the incarceration rate.[244]

By contrast, understaffed police departments may see an increase both in crime and police misconduct. Police departments address staffing shortages by asking —and sometimes requiring—officers to work overtime.[245] Many departments do not limit the number of hours officers are allowed to work, and those that do rarely restrict officers to less than 16 hours of work per day.[246] Research shows 17 to 19 hours without sleep can significantly impair cognitive performance and

238. *Id.* at 1.

239. *Reducing Gun Violence*, CRIM. JUST. EXPERT PANEL, https://cjexpertpanel.org/surveys/reducing-gun-violence/ [https://perma.cc/4UDX-PGGG] (last visited Dec. 17, 2021).

240. Matthew Yglesias, *The End of Policing Left Me Convinced We Still Need Policing*, VOX (June 18, 2020 3:50 PM), https://www.vox.com/2020/6/18/21293784/alex-vitale-end-of-policing-review [https://perma.cc/Y5UH-KXQY] (quoting criminologist Patrick Sharkey as saying, "[o]ne of the most robust, most uncomfortable findings in criminology is that putting more officers on the street leads to less violent crime").

241. Aaron Chalfin et al., *Police Force Size and Civilian Race* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 28202, 2020) ("We find that each additional police officer hired abates between 0.06 and 0.1 homicides. . . ."); Steven Mello, *More COPS, less crime*, 172 J. PUB. ECON. 174, 185 (2019) ("I find that an additional officer prevents 0.11 murders, 0.53 rapes, and 1.98 robberies.").

242. PAUL HEATON, RAND CORP., HIDDEN IN PLAIN SIGHT: WHAT COST-OF-CRIME RESEARCH CAN TELL US ABOUT INVESTING IN POLICE 11 (2010).

243. FRANKLIN ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL 164–66 (2012) (explaining incarceration fell even as the NYPD added officers and adopted proactive tactics).

244. Phillip J. Cook & Jens Ludwig, *More Prisoners Versus More Crime is the Wrong Question*, BROOKINGS INST. (Dec. 19, 2011), https://www.brookings.edu/research/more-prisoners-versus-more-crime-is-the-wrong-question/ [https://perma.cc/FJA6-WL7Z].

245. Mike Maciag, *The Alarming Consequences of Police Working Overtime*, GOVERNING (Sept. 26, 2017), https://www.governing.com/archive/gov-police-officers-overworked-cops.html [https://perma.cc/VNV8-ACP7].

246. Seth W. Stoughton, *Moonlighting: The Private Employment of Off-Duty Officers*, 2017 U. ILL. L. REV. 1848, 1876–77 (2017).

slows reaction times.[247] One study found that sleep deprivation exacerbates implicit bias amongst officers,[248] while two others have found officers who work longer shifts are more likely to use force and be the subject of citizen complaints.[249] Chronically understaffed police departments will use overtime shifts to meet public safety needs, increasing the risk of misconduct as tired officers work long hours.

There are those who believe that policing has no impact on crime.[250] Others concede that policing reduces violent crime but argue cities can better address it via other means.[251] A full response to these claims is beyond the scope of this Note, but I will say that there is, at best, an absence of evidence for them.[252] For those who believe—as I do—that good policing makes a difference, the impact of ending qualified immunity on public safety cannot be ignored.

B. Ending Qualified Immunity Hurts Proactive Policing

Existing constitutional tort law disincentivizes proactive policing. In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court held that an official's "failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause" and generally cannot form a basis for a lawsuit under Section 1983.[253] One court recently held *DeShaney* barred a suit even against officials who ordered police to completely vacate a multi-block area of Seattle for weeks, leading to the plaintiff's murder at the hands of a third party.[254] *DeShaney* creates mismatched incentives: an officer who decides not to act escapes liability no matter how unreasonable inaction might be,

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247. A.M. Williamson & Anne-Marie Feyer, *Moderate Sleep Deprivation Produces Impairments in Cognitive and Motor Performance Equivalent to Legally Prescribed Levels of Alcohol Intoxication*, 57 OCCUPATIONAL & ENV'T MED. 649, 649 (2000).

248. Lois James, *The Stability of Implicit Racial Bias in Police Officers*, 21 POLICE Q. 30, 43 (2018).

249. Leonard Bell et al., *Effects of 13-Hour 20-Minute Work Shifts on Law Enforcement Officers' Sleep, Cognitive Abilities, Health, Quality of Life, and Work Performance: The Phoenix Study*, 18 POLICE Q. 293, 312 (2015) (finding a significant increase in citizen complaints when officers work 13-hour shifts); Justin Anderson et. al., *King County Sheriff's Office Overtime: Better Strategy Could Reduce Hidden Costs and Safety Risks*, KING CNTY. (WASH.) AUDITOR'S OFFICE 3 (June 27, 2017), https://kingcounty.gov/~/media/depts/auditor/new-web-docs/2017/kcao-overtime-2017/kcao-overtime-2017.ashx?la=en [https://perma.cc/C8KN-J593] (finding working four hours of overtime in a week increases the odds an officer will receive a citizen complaint or use force in the following week).

250. Yglesias, *supra* note 240.

251. *See* Roge Karma, *How Cities can Tackle Violent Crime Without Relying on Police*, VOX (Aug. 7, 2020, 8:10 AM), https://www.vox.com/21351442/patrick-sharkey-uneasy-peace-abolish-defund-the-police-violence-cities [https://perma.cc/2AYQ-CY5F].

252. Many have suggested, for example, that so-called "violence interrupters" might replace police, but there is little evidence showing these programs actually reduce violent crime. *See* German Lopez, *The Evidence for Violence Interrupters Doesn't Support the Hype*, VOX (Sept. 3, 2021, 8:00 AM), https://www.vox.com/22622363/police-violence-interrupters-cure-violence-research-study [https://perma.cc/UXX8-X6U2]. Others have suggested social workers might respond to some 911 calls instead of officers. But the only city to have fully implemented such a program estimates it diverts just 5% to 8% of 911 calls, and virtually none of the diverted calls involve reports of criminal activity. EUGENE POLICE DEP'T CRIME ANALYSIS UNIT, CAHOOTS PROGRAM ANALYSIS 8 (2020).

253. DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 197 (1989).

254. Sinclair v. City of Seattle, No. C21-0571-JCC, 2021 WL 5049838, at *1 (W.D. Wash. Nov. 1, 2021).

while an officer who makes an arrest may be liable on a later determination that he acted unreasonably. Similar incentives exist in state tort law, where the "public duty doctrine" often bars citizens from suing an officer who negligently fails to protect them from crime.[255]

Without qualified immunity, the disincentive effect of Section 1983 suits would be supercharged. Every piece of legislation discussed in this Note eliminates qualified immunity as a defense for officers who act in good faith while relying on existing law.[256] Facing retroactive liability every time caselaw changes, no police officer could search anything or seize anyone without worrying that an appellate court would one day pull the legal rug out from under him.[257] Consider the incentives facing an officer deciding whether to make a discretionary *Terry* stop in a world without qualified immunity: he cannot be sued if he unreasonably fails to make the stop, but if he does, he could be found liable *despite* having reasonable suspicion if *Terry* were ever revisited or narrowed. Such sweeping changes in Fourth Amendment law are rare but do occur, and the uncertainty alone creates a powerful disincentive.[258]

Professor Schwartz argues officers will not be deterred from proactive policing in the absence of qualified immunity because they are indemnified.[259] But Schwartz herself opposes complete indemnification schemes,[260] and legislators have adopted a similar view. Colorado's S.B. 20-217 leaves open the possibility that an individual officer could be personally liable for up to $25,000.[261] Colorado's Fraternal Order of Police reacted by adding coverage to the union's legal defense plan and increasing its monthly premium.[262] After New York City passed Local Law No. 48, the NYPD Police Benevolent Association's legal counsel warned officers the city had "increasingly declined indemnification and has required police officers to make personal financial contributions in civil settlements even for good-faith mistakes of law or fact."[263] Discretionary indemnification is, in the absence of qualified immunity, perceived as an unreliable source of protection.

Even if a complete indemnification scheme did assuage individual officers' concerns—as it may under New Mexico's statute[264]—this only shifts the cost and

255. *E.g.*, Woods v. District of Columbia, 63 A.3d 551, 553 (D.C. 2013).

256. *See supra* Part III.

257. *See supra* Part V(A).

258. In 2009 the Court effectively eliminated the search-incident-to-arrest exception to the warrant requirement for vehicles, a sweeping change which invalidated 28 years of police training and practice. *See* Arizona v. Gant, 556 U.S. 332, 359 (2009) (Alito, J., dissenting).

259. Schwartz, *supra* note 142, at 353.

260. *See* Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 953–54 (2014).

261. COLO. REV. STAT. § 13-21-131(4) (2021).

262. *See SB 217 Duty Related Civil Liability Coverage for FOP LDF Members*, COLO. FRATERNAL ORD. OF POLICE, https://www.coloradofop.org/news/sb-217-duty-related-civil-liability-coverage-for-fop-ldf-members/?id=5d00fa81-4019-4da0-9ec9-b0d8d9239380 [https://perma.cc/Q4KP-65AC] (last visited Dec. 17, 2021).

263. Patrick J. Lynch, *Legal Guidance on City Council Int. No. 2220-A and the Elimination of Qualified Immunity*, NYCPBA (Apr. 16, 2021), https://www.nycpba.org/miscellaneous/legal-guidance/ [https://perma.cc/8LJM-GZTV].

264. *See supra* Part III(C).

burden of litigation onto officers' municipal employers, who will in turn discourage proactive policing to minimize their liability. Modern proactive policing is often programmatic, meaning that strategies like focused deterrence and hot spot policing are implemented systematically by police departments rather than by individual officers.[265] Departments also incentivize proactive policing at the individual level by offering promotions, positive performance reviews, special assignments, or public recognition to proactive officers.[266] Without qualified immunity, legal uncertainty and the cost of litigation would deter departments from adopting proactive policing programs or incentivizing officers to engage in proactive work.

Schwartz contends the cost of litigation has little impact on local policy, citing evidence that legal costs account for one to two percent of municipal budgets.[267] But this is more than it seems: a study of municipal expenditures found that the 150 largest cities spend, on average, just eight percent of their budgets on policing, five percent on housing, and three percent on parks.[268] Moreover, records from risk management associations suggest the threat of litigation does, in fact, shape policy. The Idaho Counties Risk Management Program's website links to LexiPol, a clearinghouse for police department policies designed to mitigate legal risk.[269] In 2019, the Illinois Counties Risk Management Trust revoked a jail's law enforcement liability coverage after determining the facility overused strip searches and failed to document the use of force.[270] Perhaps most tellingly, at a recent meeting of the Washington Cities Insurance Authority, the organization's director warned that proposed legislation circumventing qualified immunity in that state could "make police liability an uninsurable risk" if enacted.[271]

A complete indemnification scheme also risks saddling cities with costs they cannot bear. While large cities are often self-insured, small and mid-sized jurisdictions rely on liability insurance. With multimillion dollar civil rights verdicts on the rise nationwide, even police departments which have faced few civil rights

265. NAT'L ACAD. OF SCI., *supra* note 235, at 1.

266. *See* Robert VerBruggen, *De-Policing and What to Do About It*, CITY J. (Oct. 26, 2021), https://www.manhattan-institute.org/verbruggen-depolicing-alternatives [perma.cc/DMR9-HNV7].

267. Schwartz, *supra* note 142, at 354–56.

268. Emily Badger & Quoctrung Bui, *Cities Grew Safer. Police Budgets Kept Growing*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/interactive/2020/06/12/upshot/cities-grew-safer-police-budgets-kept-growing.html [perma.cc/7U4S-8S3H].

269. *Law Enforcement*, IDAHO CNTYS. RISK MGMT. PROGRAM, https://web.archive.org/web/20210617061647/https://www.icrmp.org/risk-management/law-enforcement/ [https://perma.cc/6BPJ-D36T] (last visited Dec. 17, 2021).

270. *Jail Conditions, Management to Result in Insurance Loss*, WCIA.COM (Nov 6, 2019, 2:31 PM), https://www.wcia.com/news/local-news/jail-conditions-management-to-result-in-insurance-loss/ [perma.cc/UCE9-4VX7].

271. Ann Bennett, *Director's Report at Executive Committee Meeting*, WASH. CITIES INS. AUTH. (Aug. 27, 2021), https://www.wciapool.org/AgendaCenter/ViewFile/ArchivedAgenda/_08272021-33 [perma.cc/Q8HE-2J5F].

claims "are experiencing rate increases of 30 to 100 percent."[272] In New Mexico, which eliminated qualified immunity but adopted complete indemnification and a damages cap, the situation is even worse: municipalities are facing premium increases of 63%.[273] The insurer providing coverage for counties refuses to cover claims in which qualified immunity is not available as a defense.[274] As one New Mexico police chief explained: "[Insurers'] goal is to have no injuries or accidents, but that isn't realistic, and that isn't policing . . . . We send officers to do dangerous things that other people don't want to do. Their profits are hurt by the risky things we do."[275]

C. Ending Qualified Immunity Will Exacerbate the Police Staffing Crisis

Police leaders have long been sounding the alarm about a crisis in police staffing. In 2019, the Police Executive Research Forum (PERF) identified a "triple threat" to police staffing: a growing number of officers eligible for retirement, fewer people applying to become officers, and an increasing number of officers leaving their department or the profession before retirement age.[276] PERF surveyed departments across the country about trends in recruiting and retention. As compared to five years prior, 41% of police departments reported personnel shortages had grown more severe, and 47% reported that officers' average length of service had declined.[277] Meanwhile, 63% said they had seen a decline in the number of applications for sworn officer positions.[278] Measured in terms of full-time sworn police officers per 1,000 U.S. residents, police staffing levels fell 10.3% from 1997 to 2016.[279]

The rioting surrounding George Floyd's murder and the COVID-19 pandemic have only exacerbated this problem. In 2022, PERF surveyed police departments across the United States and asked them how recruiting and retention had changed between 2019 and 2021. Responding agencies reported hiring had fallen by almost 4%, resignations had grown by over 42%, and retirements increased by 23.6%.[280] Large agencies with over 500 officers were hardest hit. Overall staffing levels at these agencies declined by 3.48%, compared with declines of roughly

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272. Kimberly Kindy, *Insurers force change on police departments long resistant to it*, WASHINGTON POST (Sept. 14, 2022), https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-insurance-settlements-reform [perma.cc/NU6J-AG8X].

273. Robert Nott, *Civil Rights Act leading to higher insurance premiums, officials say*, SANTA FE NEW MEXICAN (July 30, 2022), https://www.santafenewmexican.com/news/local_news/civil-rights-act-leading-to-higher-insurance-premiums-officials-say/article_e153ed2c-06a2-11ed-9cd6-33215f539447.html [perma.cc/7BDD-9NWM].

274. *Id*.

275. Kindy, *supra* note 272.

276. POLICE EXEC. RSCH. F., THE WORKFORCE CRISIS, AND WHAT POLICE AGENCIES ARE DOING ABOUT IT 8 (2019).

277. *Id*. at 19–20.

278. *Id*. at 20.

279. *Id*. at 19.

280. *PERF Survey Shows Steady Staffing Decrease Over the Past Two Years*, POLICE EXEC. RSCH. F., https://www.policeforum.org/workforcemarch2022 [perma.cc/GB4K-FGE8] (last visited Oct. 22, 2022).

1% to 2.5% in midsize and small agencies.[281] Resignations and retirements in large agencies climbed by 43% and 24%, respectively.[282] Hiring in large agencies fell by 5% even as hiring in small police departments increased.[283]

Professor Schwartz correctly notes that the police staffing crisis cannot be blamed on the absence of qualified immunity, which is by and large still the law.[284] But it seems possible that the weakness of qualified immunity is contributing to the problem and that ending it will make an already-difficult problem harder to solve. Schwartz admits that ending qualified immunity will likely lead to more lawsuits against officers.[285] With no qualified immunity and a limited indemnification regime, the same financial risks and uncertainty that disincentivize proactive policing also make policing less attractive as a career.[286]

Schwartz concedes that police officers also dislike being sued for non-financial reasons.[287] Being named in a lawsuit has negative implications for background checks and credit reports.[288] There is the burden of discovery, including time spent in depositions. There are also reputational costs—as with Officer Pittman, the media covers many high-profile lawsuits against police, and plaintiffs' attorneys sometimes deliberately use the media to their advantage.[289] State and local statutes circumventing qualified immunity seem designed to make these non-monetary consequences worse. New York City is now required to publish online the full name of every officer who is sued along with the allegations against him, while Colorado permanently revokes an officer's certification if he is found liable for excessive force in a civil trial.[290]

D. Eighteen Months Without Qualified Immunity: Evidence From Colorado

Colorado's state-level circumvention of qualified immunity has been in effect longer than any other, as the relevant provisions of S.B. 20-217 took effect on June 19, 2020. It is not possible to separate the effect of S.B. 20-217's repeal of qualified immunity from other changes in law and policing that occurred in the same time frame, but there are troubling indications that S.B. 20-217 is already having an adverse effect on police recruitment and retention. It also appears that police in Colorado reduced discretionary enforcement activity in 2020 even as crime in Colorado rose more quickly than it did across the rest of the country.

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281. *Id.*
282. *Id.*
283. *Id.*
284. Schwartz, *supra* note 142, at 353.
285. *Id.* at 362.
286. *See* Part VI(B), *supra*.
287. Schwartz, *supra* note 142, at 353–54.
288. *Id.* at 354 n.236.
289. *Cf.* Steve Miletich, *Two Attorneys Ordered to Pay More than $24,000 over Perjury Allegation against Seattle Police Officer Who Shot Charleena Lyles*, SEATTLE TIMES (Aug. 7, 2018, 11:15 AM), https://www.seattletimes.com/seattle-news/law-justice/two-attorneys-ordered-to-pay-more-than-24000-over-perjury-allegation-against-seattle-police-officer-who-shot-charleena-lyles/ [perma.cc/R8DN-5EAH].
290. *See supra* Part III(C)–(D).

Violent crime rose across the United States between 2019 and 2020, but violent crime in Colorado increased 6.5%—a greater increase than that seen nationally.[291] Reported property crime in Colorado jumped 8% in the same period, even as property crime sharply declined across the rest of the country with retail outlets closed by the COVID-19 pandemic.[292] In Denver, criminologists observed that police officers had reduced activity in the latter half of 2020 even as violent crime surged in parts of the city and homicides rose by 50%.[293] Statewide, the overall number of arrests fell by 36% as compared with just a 29% decline nationally.[294]

Police hiring and retention also appears to have been adversely affected. Data from Colorado's Peace Officer Standards and Training (POST) Board shows that beginning in 2020, the ratio of law enforcement hiring to departures in Colorado declined to below replacement level for the first time since 2018.[295] Figure 1

FIGURE 1: Monthly Colorado Law Enforcement Hiring and Departures, 2019–2021.

291. Alayna Alvarez, *Colorado's Violent Crime Rate Hits 25-year High*, AXIOS DENVER (Sept. 28, 2021), https://www.axios.com/local/denver/2021/09/28/colorados-violent-crime-25-year-high [perma.cc/R9TU-R43M].

292. *Id.*

293. David Pyrooz, Justin Nix & Scott Wolfe, *Opinion: Understanding Denver's Devastating Rise in Homicides in 2020, the Largest in at Least 5 Years*, DENVER POST (Feb. 24, 2021, 9:27 AM), https://www.denverpost.com/2021/02/24/denver-crime-rate-homicide-shooting-property-crime-police/ [https://perma.cc/P9XV-E298].

294. FBI CRIME DATA EXPLORER, *supra* note 231. To view the pertinent data, click "Arrest" and select "Colorado" from the drop-down menu.

295. The ratio of law enforcement hiring to departures in Colorado was 137% in 2018, 115% in 2019, 88% in 2020, and 73% in 2021. *See* Letter from Lawrence Pacheco, Dir. of Commc'ns, Colo. Att'y Gen's. Off. Communications, Colorado Attorney General's Office, to Elliott Averett (Jan. 10, 2022) (on file with author).

shows law enforcement departures have exceeded new hires in Colorado nearly every month since S.B. 20-217 took effect in June 2020.[296]

Figure 2 shows that while law enforcement hiring in Colorado has been declining since at least 2018, the rise in departures seems to have begun in 2020 and accelerated in 2021. From 2020 to 2021, Colorado saw a net loss of 921 law enforcement employees—meaning the state lost approximately 5% of its total law enforcement workforce in just two years.[297] This exceeds the 3.5% nation-

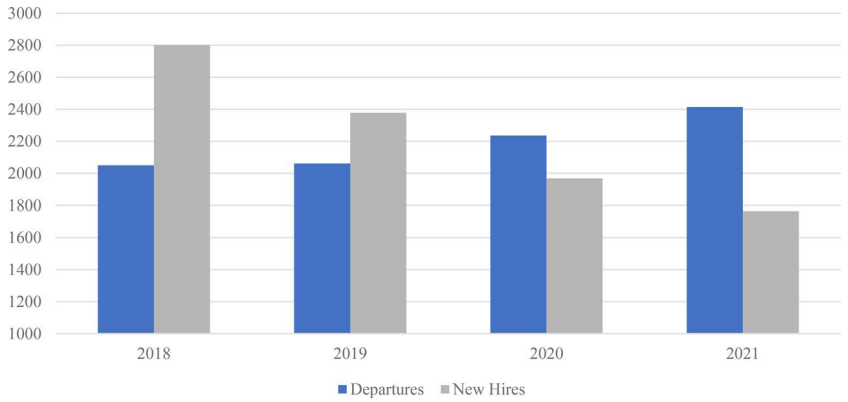

FIGURE 2: Annual Colorado Law Enforcement Hiring and Departures, 2018–2021.

wide decline in police officer staffing levels that PERF's survey measured over the same period.[298]

POST employment data is not conclusive: it includes both sworn officers and civilian employees, and many other aspects of policing in Colorado and elsewhere changed in June 2020. But officers themselves also say the absence of qualified immunity in Colorado is driving them from the profession. One officer left for a law enforcement job in Alaska because he feared a mistake could cost him his savings.[299] A survey conducted by Colorado police leaders in December 2020 found 73% of agencies were reporting a shortage of sworn personnel.[300] Among officers who left policing in 2020, S.B. 20-217 was the leading reason

296. *Id.*

297. There were roughly 19,000 sworn and non-sworn law enforcement employees in Colorado in 2020. *See* FBI CRIME DATA EXPLORER, https://crime-data-explorer.fr.cloud.gov/pages/le/pe [perma.cc/5CS6-WAT8] (last visited Jan. 17, 2022).

298. POLICE EXEC. RSCH. F., *supra* note 280.

299. Leigh Paterson & Scott Franz, *Following a Tough Year, Some Colorado Departments Lose Officers and Struggle to Hire*, KUNC (Sept. 1, 2021, 2:00 PM), https://www.kunc.org/news/2021-09-01/following-a-tough-year-some-colorado-departments-lose-officers-and-struggle-to-hire [perma.cc/N428-MPZA].

300. COLO. ASS'N OF CHIEFS OF POLICE & CNTY. SHERIFFS OF COLO., 2020 COLORADO LAW ENFORCEMENT: CHALLENGES AND OPPORTUNITIES (2021), https://www.publicsafetycolorado.com/2020-law-enforcement-survey [perma.cc/R5F5-FAL9].

given, with fully 65% of departing officers citing it as a factor.[301] Police executives also reported the elimination of qualified immunity was a factor driving officer departures.[302] Colorado's experience should, at the very least, give pause to those eager to undermine qualified immunity elsewhere.

VII. CONCLUSION

Like the officers it protects, the Supreme Court's qualified immunity doctrine isn't perfect. Its common-law origins are murky. There are times when its application leads to unjust results. But the empirical evidence collected so far suggests that those cases are extreme outliers, that lower courts only rarely grant qualified immunity, and that one-sided fee-shifting rules are pressuring defendants to settle even non-meritorious Section 1983 suits. Can qualified immunity doctrine be reenforced to empower police to combat surging violent crime? Professor Schwartz suggests qualified immunity can't be made much stronger,[303] but there is one option: a version of the subjective test that the Court abandoned in *Harlow*.

Scott Keller argues that in 1871, most courts presumed an executive official exercising his discretion was acting in good faith.[304] Thus, in suing government officials for discretionary actions, plaintiffs at common law faced the "heightened burden" of showing "malice through clear evidence."[305] In *Harlow*, the petitioners asked the Court to adopt a similar standard and require that a plaintiff make a "clear and convincing showing of malice or bad faith" in order to defeat qualified immunity[306] This rule would have operated at the summary judgment stage, much like the "actual malice" rule courts that apply in defamation suits brought by public figures.[307] Instead, the Court eliminated the subjective element of qualified immunity entirely in favor of *Harlow's* objective "clearly established law" test.[308]

In addition to being more consistent with the common law of 1871 than the rule set out in *Harlow*, requiring a plaintiff show clear and convincing evidence of bad faith to defeat qualified immunity has much to recommend it from a policy perspective. Such a rule would solve the fair notice problem, given that a defendant could hardly be accused of having acted in bad faith when the law changed after he acted. It would also virtually guarantee that officers acting pursuant to a judicial order are afforded qualified immunity absent clear evidence of bad faith on the part of the officer who sought the order. The Court worried a subjective test would be too easily defeated by artful pleading but, given that fewer than

301. *Id*.
302. *Id*.
303. Schwartz, *supra* note 137, at 71–72.
304. Keller, *supra* note 87, at 1375.
305. *Id*. at 1376.
306. *Id*. at 1396 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814–15 (1982)).
307. *Id*. at 1398 n.403.
308. *Id*. at 1397–98.

four percent of civil rights cases are dismissed on qualified immunity grounds, it seems artful pleading has already carried the day.

A return to the subjective test abandoned in *Harlow* would also be fairer to plaintiffs. For example, because qualified immunity incorporates no subjective element, officers who engage in criminal misconduct occasionally receive qualified immunity.[309] A good-faith standard would put an end to these cases: when the state has already proven beyond a reasonable doubt that an officer engaged in criminal conduct, it should be trivial to show that the officer was acting in bad faith. Nor would requiring "clear and convincing evidence" of bad faith to survive summary judgment create an insurmountable barrier for plaintiffs—in the era of body cameras and cell phone videos, evidence about an officer's subjective intentions at the time he took an action is easier to come by than it ever has been.[310] Plaintiffs with a valid claim would be compensated; plaintiffs like Herman Harris would not be.

I am not unsympathetic to plaintiffs who have a valid claim for relief denied because of qualified immunity, nor to judges hesitant to dismiss a suit in the face of disputed facts. But the Supreme Court correctly identified the trade-offs at play almost 40 years ago when it said that without qualified immunity, litigation costs would explode, able citizens would decline public office, and the fear of lawsuits would cause officials to shy away from fulfilling their duties.[311] Given the apparent weakness of qualified immunity in practice, the ongoing collapse of police recruitment and retention, and the alarming nationwide rise in violent crime, it seems the Court's fears are coming to pass. Section 1983 claims "run against the innocent as well as the guilty," and the Court recognizes qualified immunity is important not just for police, but for "society as a whole."[312] When qualified immunity is wrongly denied by courts or eliminated by legislatures, it is not defendant officers who ultimately suffer most, but rather the residents of vulnerable communities increasingly beset by violent crime.

309. *See, e.g.*, Richmond v. Badia, 47 F.4th 1172, 1186 (11th Cir. 2022) (reversing district court's grant of qualified immunity to police officer who was convicted of criminal battery for excessive force); Jessop v. City of Fresno, 936 F.3d 937, 939 (9th Cir. 2019).

310. As of 2016, almost half of all police departments had acquired body-worn cameras, including over 80% of large urban police departments. U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BODY-WORN CAMERAS IN LAW ENFORCEMENT AGENCIES, 2016, at 2 (2018).

311. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

312. *Id.*