Ohio Northern University Law Review

Volume 48 | Issue 2 Article 3

2022

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Ohio Northern University
Law Review

Student Comments

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I. INTRODUCTION

Qualified immunity is a nebulous affirmative defense for public officials, especially as applied to law enforcement.[1] In this comment, I argue that the qualified immunity doctrine for law enforcement officers must be renovated but not destroyed.[2] Police officers put on bulletproof vests prepared to face potential bodily harm. However, the elimination of qualified immunity personally exposes law enforcement officers to civil liability with the possibility of future negative ramifications.[3] George Floyd's death on May 25, 2020 spotlighted the problem of police brutality and sparked protests. In the aftermath of Mr. Floyd's death and the conviction of his killer, Mr. Chauvin, on charges of second-degree murder, third-degree murder, and manslaughter, every level of American government has considered restricting or eliminating the qualified immunity doctrine for police officers.[4]

Many states have recently passed legislation to limit or eliminate qualified immunity in state courts.[5] On June 17, 2020, Jared Polis,

* I wanted to thank Professor Joanne Brant for her guidance, Katy Harris for her helpful comments, my family for their love and support, and my husband for his constant encouragement.

1. *See* Nathaniel Sobel, *What Is Qualified Immunity, and What Does It Have to Do With Police Reform?*, LAWFARE (Jun. 6, 2020, 12:16 PM), https://www.lawfareblog.com/what-qualified-immunity-and-what-does-it-have-do-police-reform.

2. *See infra* Part IV. B.

3. *See infra* Part III.

4. *See infra* Part III.

5. Billy Binion, *New Mexico Abolishes Qualified Immunity*, Reason (Apr. 7, 2021, 9:14 AM), https://reason.com/2021/04/07/new-mexico-abolishes-qualified-immunity-police-government-officials/.

Colorado's governor signed the Enhance Law Enforcement Integrity Act, which allows plaintiffs to overcome qualified immunity and creates a new civil action for deprivation of rights under the Colorado Constitution Bill of Rights.[6] About a month later, Connecticut passed a police accountability bill to restrict protections for law enforcement officers and remove the monetary cap on damages that a plaintiff could recover.[7] On March 25, 2021, New York City became the first city in the United States to eliminate qualified immunity for certain civil rights violations.[8] Then, on April 7, 2021, New Mexico eliminated qualified immunity for all government workers including law enforcement officers in state court.[9]

Part II of this comment describes the historical development of qualified immunity in the United States Supreme Court.[10] Part III examines the contemporary landscape of qualified immunity for law enforcement.[11] Part IV explores and examines why qualified immunity needs to be renovated.[12] Lastly, Part V projects the road ahead for the doctrine of qualified immunity.[13]

II. THE DEVELOPMENT OF QUALIFIED IMMUNITY

A. Historical Origins

Qualified immunity began as a judicially created remedy to balance the competing values of protecting government officials acting within their discretion to execute duties and permitting individuals to recover monetary damages for alleged harm by government officials.[14] The origin of qualified immunity lies in American common law from the nineteenth century.[15] In an

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6. Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES (June 21, 2020,7:36 PM), https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/?sh=506c8ed2378a.

7. Holly Matkin, *Connecticut Passes 'Police Accountability Bill' To Eliminate Qualified Immunity*, THE POLICE TRIBUNE (July 31, 2020), https://policetribune.com/connecticut-passes-police-accountability-bill-to-eliminate-qualified-immunity/.

8. Press Release, New York City Council, Council Votes to End Qualified Immunity and Seven Other Measures to Reform NYPD (March 25, 2021).

9. Nick Sibilla, *New Mexico Bans Qualified Immunity for All Government Workers, Including Police*, FORBES (Apr. 7, 2021, 4:00 PM), https://www.forbes.com/sites/nicksibilla/2021/04/07/new-mexico-prohibits-qualified-immunity-for-all-government-workers-including-police/?sh=26e60f8379ad.

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Part IV.

13. *See infra* Part V.

14. John D. Kirby, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 CORNELL L. REV. 462, 470 (2000).

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

1845 decision, *Kendall v. Stokes*,[16] the United States Supreme Court held that the defendant, the United States Postmaster General, was not liable because he was acting in his official capacity.[17] Amos Kendall became the Postmaster and his predecessor owed Stokes money as shown in the books, but Kendall refused to pay Stokes.[18] The Court stated that "[a] public officer, acting from a sense of duty, in a matter where he is required to exercise discretion, is not liable to an action for an error of judgment."[19]

In 1871, Congress passed the Civil Rights Act of 1871, commonly known as 42 U.S.C. § 1983, to allow individuals to bring a civil action in federal court if their constitutional rights were violated.[20] Although the Act did not mention qualified immunity, the Court applied common law concepts of good faith and probable cause to 42 U.S.C. §1983 as an introduction to qualified immunity in *Pierson v. Ray*.[21] In *Pierson*, law enforcement officers were sued for arresting ministers entering a bus station.[22] The ministers claimed they were arrested for entering a whites-only bathroom while the police officers claimed they were preventing a riot from occurring.[23] The law enforcement officers raised the defense of good faith and probable cause.[24] The Court agreed that the good faith and probable cause defense was viable in the context of tort liability and Section 1983 litigation.[25] The Court reasoned that although public officials were not granted absolute immunity, they could raise the good faith defense which was rooted in the common law.[26]

In *Butz v. Economou,*[27] federal officials in the executive branch were charged with violating citizens' constitutional rights.[28] Before this case, the United States Supreme Court only applied the qualified immunity doctrine to state, not federal, officials.[29] The Court declared that federal officials cannot have absolute immunity when an unconstitutional act is committed in their official capacity because individuals would be left without any manner of redress for their injuries.[30] Therefore, the Court held that both state and

16. Kendall v. Stokes, 44 U.S. 87, 97 (1845).
17. *Id.* at 98-99.
18. *Id.* at 94-95.
19. *Id.* at 87.
20. 42 U.S.C. § 1983 (2021).
21. Pierson v. Ray, 386 U.S. 547, 557 (1967).
22. *Id.* at 548-49.
23. *Id.* at 549, 557.
24. *Id.* at 551-52.
25. *Pierson*, 386 U.S. at 557.
26. *Id.* at 555-57.
27. Butz v. Economou, 438 U.S. 478, 480 (1978).
28. *Id.* at 480.
29. Keller, *supra* note 15, at 1396 n. 386.
30. "[In] varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office

federal officials can be liable in their personal capacity even though they possess qualified immunity if there was a constitutional violation, and "the constitutional right [they were] alleged to have violated was 'clearly established' at the time of the violation."[31] The rationale for this application of qualified immunity to federal officials was to preserve the principles guaranteed by the United States Constitution.[32]

B. Modifications to the Clearly Established Law Standard

A review of judicial modifications to the qualified immunity doctrine demonstrates how the Supreme Court has made "freewheeling policy choice[s]"[33] that have spun out of control and need to be reined in.[34] In 1986, the qualified immunity doctrine took a turn in favor of government officials. In *Harlow v. Fitzgerald*,[35] the Court expanded upon *Butz v. Economou* by changing the qualified immunity doctrine to a purely objective standard of analysis.[36] In *Harlow*, the Court determined that executive aides were not entitled to absolute immunity but were shielded by qualified immunity if their conduct did not violate a statutory or constitutional right.[37] The Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages. . . ."[38] Government officials should not be threatened with civil litigation under the shield of qualified immunity unless they knew or should have known they violated a clearly established legal right.[39]

Harlow eliminated the old test, which evaluated both objective and subjective prongs of analysis, to wit: (1) whether the defendant violated established law from an objective perspective, and (2) subjectively, whether the defendant took measures in good faith.[40] In *Harlow,* the Court articulated a new standard under which an official is entitled to qualified immunity unless they knew or should have known they violated a clearly established

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and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Butz*, 438 U.S. at 497-98 (quoting Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974)).

31. *Id*. at 498.
32. *Id*. at 505.
33. Malley v. Briggs, 475 U.S. 335, 342 (1986).
34. *See*, *e.g.*, Rivas-Villegas v. Cortesluna, 142 S. Ct. 4 (2021); City of Tahlequah v. Bond, 142 S. Ct. 9 (2021).
35. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
36. *Id.*at 817-19.
37. *Id.* at 818.
38. *Id.* at 818.
39. *Id.* at 818-19.
40. 5 MODERN FED. JURY INSTR. Civ. P 87.03, at 87 (2021).

legal right.[41] By shifting the goalposts of qualified immunity to an objective standard, the Court in *Harlow* essentially removed the case from a jury because the subjective good faith of the defendant was not a question of fact under consideration.[42] This replacement of the qualified immunity test prompted early settlement of cases in favor of defendants, thus making it more difficult for plaintiffs to bring defendants into court.[43]

The newly formulated *Harlow* standard was applied in *Malley v. Briggs*,[44] which examined whether a reasonable trained police officer in the defendant's position would have requested a warrant without probable cause.[45] The Court explained that qualified immunity shields "all but the plainly incompetent or those who knowingly violate the law."[46] Moreover, in *Anderson v. Creighton*,[47] individuals sued an FBI agent for entering their home without a warrant. The Court held that the FBI agent was not civilly liable under the doctrine of qualified immunity for violating the Fourth Amendment when a reasonable officer would have thought the search was in accordance with the Fourth Amendment.[48] The Court reasoned that "qualified immunity [was] not lost when an officer violate[d] the Fourth Amendment unless a reasonable officer would know that the specific conduct was impermissible."[49]

In 2002, the doctrine of qualified immunity tilted slightly in favor of plaintiffs.[50] *Hope v. Pelzer*[51] stated that well-settled law such as "materially similar facts" and "general statements of law" are enough to notify officials of their wrongdoing.[52] In *Hope*, a prisoner was handcuffed to a hitching post on two occasions.[53] The prisoner alleged that the three guards violated the Eighth Amendment, and he could recover damages from the officers under §1983.[54] The plaintiffs presented two decisions of the Eleventh Circuit and Department of Justice guidelines.[55] The Court held that the plaintiffs met the

41. Harlow, 457 U.S. at 818-19.
42. 5 MODERN FED. JURY INSTR. Civ. P 87.03, at 87 (2021).
43. *Id.* at 87 (2021) (citing Hunter v. Bryant, 502 U.S. 224 (1991); Conner v. Heiman, 672 F.3d 1126 (9th Cir. 2012)).
44. *Malley*, 475 U.S. at 341.
45. *See generally id.* at 339.
46. *Id.* at 341.
47. Anderson v. Creighton, 483 U.S. 635, 637 (1987).
48. *Id.* at 646.
49. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 589 (7th ed. 2016) (explaining Anderson v. Creighton, 483 U.S. 635 (1987)) [hereinafter CHEMERINSKY, FED. JURIS.].
50. Aaron Belzer, *The Audacity of Ignoring Hope: How the Existing Qualified Immunity Analysis Leads to Unremedied Rights*, 90 DENV. L. REV. 647, 653 (2013).
51. Hope v. Pelzer, 536 U.S. 730 (2002).
52. *Id.* at 733, 741.
53. *Id.* at 733.
54. *Id*. at 735.
55. *Id*. at 735, 737.

burden of showing a clearly established law was violated.[56] The Court used precedent concerning 18 U.S.C. § 242,[57] *United States v. Lanier*,[58] to justify its holding in *Hope*.[59] Although the facts of the case were unique, the Court reasoned public officials should have known their conduct violated clearly established law.[60]

In 2001, *Saucier v. Katz*[61] modified the qualified immunity doctrine by requiring a specific order of the prongs to defeat qualified immunity.[62] The first question concerned whether a constitutional right was violated, followed by a determination of whether that right was clearly established.[63] Seven years later, the United States Supreme Court again reconsidered the order of the prongs.[64] In *Pearson v. Callahan*,[65] there was no longer a required order as the Court held that trial courts could decide which prong to address first.

In *Ashcroft v. al-Kidd,*[66] the Court varied the wording of the *Harlow* standard once again.[67] After September 11th, Attorney General John Ashcroft told federal officials to keep terrorist suspects in custody.[68] Ashcroft alleged this conduct was authorized under the material-witness statute, 18 U.S.C. § 3144.[69] The material-witness statute was designed to keep an individual who had crucial evidence or would later become unattainable in custody.[70] Abdullah al-Kidd was arrested under the material-witness statute as a pretext because the government did not have sufficient proof that he committed a crime, and he was not a material witness.[71] Mr. al-Kidd filed a lawsuit against Attorney General John Ashcroft in his personal capacity for violating the Fourth Amendment because Mr. Ashcroft knew or should have known that the government did not need Mr. al-Kidd as a material witness and there was not sufficient proof that Mr. al-Kidd engaged in any misconduct.[72] The Court

56. *Hope,* 536 U.S. at 744.
57. 18 U.S.C. § 242 (2021).
58. United States v. Lanier, 520 U.S. 259 (1997).
59. *Hope*, 536 U.S. at 739-40.
60. *Id.* at 744.
61. Saucier v. Katz, 533 U.S. 194 (2001).
62. *See generally id.* at 201-05.
63. *Id.* at 201.
64. *See generally* Pearson v. Callahan, 555 U.S. 223, 236 (2009). The required sequence of the prongs, whether the defendant violated a constitutional right, and whether the right was clearly established at the time, was initially mandated in *Saucier v. Katz.*
65. *Id.* at 241-42.
66. Ashcroft v. al-Kidd, 563 U.S. 731 (2011).
67. CHEMERINSKY, FED. JURIS., *supra* note 49, at 584.
68. *Ashcroft*, 563 U.S. at 734.
69. *Id.* at 734.
70. *Id.* at 733.
71. *Id.* at 734.
72. *Id.*

held that Mr. Ashcroft was entitled to qualified immunity because his authorization did not violate a clearly established law.[73]

> In *Ashcroft*, the Court changed "a reasonable official" to "every reasonable official." The wording "a reasonable official" suggests a single standard of reasonableness, one that uses an objectively reasonable official as a guide. The wording "every reasonable official" suggests that there is a range of reasonableness and what is reasonable will vary from one official to another. This change interjects a greater degree of subjectivity to the qualified immunity analysis.[74]

In *Mullenix v. Luna,*[75] a police officer shot a fleeing suspect during a hot pursuit.[76] The officer had a warrant for the suspect's arrest.[77] Other officers placed spike strips to stop the suspect's getaway car.[78] However, the pursuing officer planned to shoot at the getaway car as an alternative method to stop him.[79] The pursuing officer called the supervisor to ask for permission to shoot, but before the supervisor answered with orders to "stand by," the officer shot the suspect.[80] The Court held that the officer was entitled to qualified immunity because the violated established constitutional right had to be beyond debate.[81] Furthermore, the Court used the articulated standard in *Ashcroft* by stating that "[a] clearly established right is one that is 'sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right.'"[82] The Court did not mention the plaintiff's interest in redressing his constitutional injuries like in the prior case, *Harlow v. Fitzgerald.*[83]

The Court transformed qualified immunity into an almost impenetrable defense for police officers by stating the violation of clearly established law

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73. *Ashcroft*, 563 U.S. at 731, 744.

74. John P. Gross, *Qualified Immunity and the Use of Force: Making the Reckless into the Reasonable*, 8 ALA. C.R. & C.L. L. REV. 67, 81 (2017) (citing *Ashcroft*, 563 U.S. at 741).

75. Mullenix v. Luna, 577 U.S. 7 (2015).

76. *Id.* at 9.

77. *Id.* at 8.

78. *Id*.

79. *Id.* at 9.

80. *Mullenix*, 577 U.S. at 9.

81. *Id.* at 19.

82. Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. 62, 67 (2016) (quoting *Mullenix*, 577 U.S. at 11-12).

83. *Harlow,* 457 U.S. 800, 819 (1982); Mark D. Standridge, *Requiem for the Sliding Scale: The Quiet Ascent-and Slow Death-of the Tenth Circuit's Peculiar Approach to Qualified Immunity*, 20 WYO. L. REV. 43, 52 (2020).

must place the law "beyond debate."[84] The Supreme Court previously held that absolute immunity is not given to all public officials.[85] Rather, police officers are generally given an inferior form of immunity.[86] *Mullenix*'s standard clearly shows the scale tipping strongly in favor of maintaining a police officer's immunity without acknowledging a plaintiff's need for a monetary remedy.[87]

In the 2018 decision *Kisela v. Hughes*,[88] officers responded to a 911 call and came to the scene where Hughes was using a kitchen knife in a dangerous manner against Chadwick.[89] The officers told Hughes to drop the knife at least twice, but Hughes proceeded to walk toward Chadwick.[90] Since Hughes disobeyed the police officers' commands, Officer Kisela shot four times through a fence and critically wounded Hughes.[91] Hughes brought a Section 1983 action against Officer Kisela, claiming excessive force in violation of the Fourth Amendment.[92] The Court held that Officer Kisela's use of force did not violate clearly established law and that he was entitled to qualified immunity.[93]

The Court reasoned that excessive force under the Fourth Amendment is fact-sensitive, and the officer is given qualified immunity unless there is precedent which in a plain or unequivocal manner applies to the facts at issue.[94] These cases allow the Court to differentiate the blurred lines "between excessive and acceptable force."[95] Evaluating Officer Kisela's conduct from the objective standard of whether "any competent officer would have known" that the shooting in this case violated clearly established law, the Court stated that Officer Kisela shooting Hughes to protect Chadwick, when Hughes disobeyed the officers' commands, did not clearly violate the Fourth Amendment.[96] *Kisela* demonstrates how the "clearly established" law standard has morphed into a fact-specific inquiry to overcome qualified immunity that all but eliminates the prospect of recovering monetary

84. Marshall Heins II, *Absolutely Qualified: Supreme Court Transforms the Doctrine of Qualified Immunity into Absolute Immunity for Police Officers*, 8 HLRE L. REV. 1, 10 (2017) (quoting Kinports, *supra* note 82, at 66).
85. *Id.* at 10-11.
86. *Id.* at 11.
87. *Id.* at 11.
88. Kisela v. Hughes, 138 S.Ct. 1148 (2018).
89. *Id.* at 1151.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Kisela*, 138 S. Ct. at 1152.
94. *Id.* at 1153.
95. *Id.* (quoting *Mullenix*, 577 U.S. at 18.).
96. *Id.*

damages from an officer-defendant.[97] In reality, the fortified qualified immunity doctrine has become tantamount to absolute immunity.[98]

III. CONTEMPORARY CONTEXT OF LAW ENFORCEMENT QUALIFIED IMMUNITY

On June 22, 2020, United States Supreme Court declined to reconsider the qualified immunity doctrine that has been around for over fifty years and opted to give Congress the opportunity to clarify the doctrine.[99] However, the Supreme Court recently held for the first time in sixteen years that the qualified immunity doctrine did not shield an officer.[100] In *Taylor v. Riojas,*[101] the Court revived *Hope* by demonstrating that there does not have to be a cookie-cutter precedent to meet the clearly established law requirement.[102] In this case, petitioner Trent Taylor was imprisoned in the Texas Department of Criminal Justice and sued the correctional officers for violating his Eighth Amendment rights.[103] The prison was extremely unsanitary, and Taylor had to sleep naked in feces.[104] The Court ruled that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time."[105] The Court emphasized that the defendants did not show any extreme circumstances to justify Taylor staying in an unsanitary environment for six days and the correctional officers were not entitled to qualified immunity.[106]

Unlike previous qualified immunity cases, which favored public officials, *Taylor* provided plaintiffs a lesser burden to break down the qualified immunity shield, so they could sue the correctional officers for monetary damages regardless of whether there was precedent clearly establishing the

97. *See id.* at 1161 (Ginsburg, J, dissenting).

98. Justice Ginsburg stated, "Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment." *Kisela*, 138 S. Ct. at 1162 (Ginsburg J., dissenting).

99. Devin Dwyer, *Supreme Court Won't Revisit Qualified Immunity for Police, Leaving It to Congress*, ABC NEWS (June 22, 2020, 12:24 PM), https://abcnews.go.com/Politics/supreme-court-wont-revisit-qualified-immunity-police-leaving/ story?id=71374240.

100. Erwin Chemerinsky, *SCOTUS Hands Down a Rare Civil Rights Victory on Qualified Immunity*, ABA J. (Feb. 1, 2021, 9:11 AM), https://www.abajournal.com/columns/article/chemerinsky-scotus-hands-down-a-rare-civil-rights-victory-on-qualified-immunity[hereinafter, Chemerinsky, *SCOTUS*].

101. Taylor v. Riojas, 141 S. Ct. 52 (2020).

102. CHEMERINSKY, FED. JURIS., *supra* note 49, at 589.

103. *Taylor*, 141 S. Ct. at 53.

104. *Id.*

105. *Id.*

106. *Id.* at 54.

violation.[107] Erwin Chemerinsky, an expert in constitutional law, federal practice, civil rights, civil liberties, and appellate litigation, stated that *Taylor* proves the Court may be more likely to permit the plaintiff to pierce the shield of qualified immunity.[108] Justice Thomas was the only dissenting judge in *Taylor* but provided no further explanation.[109]

In June 2020, as a response to police brutality in the George Floyd case, the House of Representatives created the "George Floyd Justice in Policing Act of 2021" as a way to hold law enforcement accountable.[110] Reforming qualified immunity was located in Section 102 of the Act.[111] George Floyd Justice in Policing Act has been passed in the U.S. House of Representatives and is pending approval by the Senate.[112] This bill would prohibit chokeholds and limit qualified immunity for law enforcement.[113] Commenters have stated that the bill might pass if there is a compromise between the political parties on qualified immunity.[114] Included as part of the Act:

> It shall not be a defense or immunity in any action brought under this section against a local law enforcement officer (as such term is defined in section 2 of the George Floyd Justice in Policing Act of 2021), or in any action under any source of law against a Federal investigative or law enforcement officer (as such term is defined in section 2680(h) of title 28, United States Code), that–
>
> > (1) the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when the conduct was committed; or
> >
> > (2) the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of their deprivation by the defendant, or that at such time, the state of the law was otherwise such that the defendant could

107. *See generally id.* at 53-54.
108. Chemerinsky, *SCOTUS*, *supra* note 100.
109. *Taylor*, 141 S. Ct. at 54.
110. H.R. 1280, 117th Cong. (2021).
111. *Id.*
112. Susan Ferrechio, *Police Reform Deal Hinges on 'Qualified Immunity',* WASH. EXAMINER (Apr. 22, 2021 1:00 PM), https://www.washingtonexaminer.com/news/congress/police-reform-deal-hing es-on-qualified-immunity; *see also* H.R. 1280, 117th Cong. (2021).
113. TCR Staff & Michael Gelb, *Democrats Push George Floyd Justice Bill Into the Senate*, THE CRIME REP. (Mar. 4, 2021), https://thecrimereport.org/2021/03/04/democrats-push-george-floyd-justice-bill-into-the-senate/.
114. Ferrechio, *supra* note 112.

> not reasonably have been expected to know whether his or her conduct was lawful.[115]

Although this language is driven by the passion of the current climate to scale back the previous justifications for violations of the Fourth Amendment and excessive force cases, the Act does little to protect law enforcement officers required to make rapid judgment calls without risk of personal financial liability.[116] Additionally, independent investigation of law enforcement by the Attorney General of each state through million-dollar grants and House appropriations as well as a national task force to oversight law enforcement practices are included in George Floyd Justice in Policing Act of 2021.[117]

The Supreme Court has emphasized that the immunity doctrine must balance two competing interests: First, allowing damages as a remedy for enforcing the law and correcting a wrong.[118] Secondly, allowing officials to discharge their duties without unduly harassing litigation and risk of personal liability.[119] The George Floyd Justice in Policing Act is one-sided for the plaintiffs' remedy.

A. The Current Police Crisis and Consequences of Elimination

Although police officers must be accountable for their actions, there are several negative consequences that result from eliminating qualified immunity. These negative consequences include, but are not limited to, a shortage of police officers, delayed action, and increased crime.[120] Moreover, elimination will not totally resolve the core issue of police brutality.

1. Shortage of Officers

Even before Mr. Chauvin's conviction, law enforcement agencies were having difficulties attracting and retaining qualified officers.[121] Law enforcement agencies are justifiably concerned that overzealous changes to qualified immunity may deter quality applicants, destabilize turnover, and trigger acute personnel shortages in specialty units that execute high-risk

115. H.R. 1280, 117th Cong. (2021).

116. Whitney K. Novak, *Policing the Police: Qualified Immunity and Considerations for Congress*, CONG. RES. SERV. (June 25, 2020), https://crsreports.congress.gov/product/pdf/LSB/LSB1049 2.

117. H.R. 1280, 117th Cong. (2021).

118. Ziglar v. Abbasi, 137 S.Ct. 1843, 1866 (2017).

119. *Id*.

120. *Frandsen*, *infra* Part III, Section A I-II.

121. Luke Barr, *US Police Agencies Having Trouble Hiring, Keeping Officers, According to a New Survey*, ABC NEWS (Sept. 17, 2019, 4:01 AM), https://abcnews.go.com/Politics/us-police-agencies-trouble-hiring-keeping-officers-survey/story?id=65643752.

policing operations.[122] Although accountability and oversight of police officers are necessary, police officers with the appropriate temperament will still be deterred from applying to a job that might lead to losing all their personal belongings.

Due to negative public perception and susceptibility to civil liability, there have been police officer shortages nationwide.[123] For example, the Philadelphia Police Department reported that from January 1 to April 23, 2021, seventy-nine police officers were accepted in the Deferred Retirement Option Program, which means they will retire sometime within four years.[124] Moreover, the number of applicants for the department has decreased to almost less than half from 5,000 to 2,670 in two years.[125] In a like manner, Washington has been having a problem attracting individuals to become police officers with the public's negative image of law enforcement.[126] The Spokane County Sheriff's Office paid for billboards that state: "HIRING 40 LATERAL OFFICERS," "$15K HIRING BONUS" as a way to address the shortage of recruits.[127] These billboards are posted in Portland, Seattle, and Denver.[128] The Sheriff's Office has 227 authorized deputies and is attempting to resolve the staff shortage by using $140,000 to fill the 40 vacancies.[129] Spokane County Sheriff Ozzie Knezovich stated, "The entire nation is having a hard time filling their ranks because recruitment is way off. I feel fortunate because I have seen agencies that are at 50% strength, and I don't know how you do anything at that level."[130]

In North Carolina, the Durham County Fraternal Order of Police stated that five to eight police officers leave the police force every month, and the defund the police movement has greatly impacted the desire for individuals

122. Joan Vennochi, *Who Wants to Be a Police Officer?,* BOS. GLOBE (April 21, 2021, 3:01 PM), https://www.bostonglobe.com/2021/04/21/opinion/who-wants-be-police-officer/?p1=BGSearch_Advanced_Results; *see also* Barr, *supra* note 105.

123. Angel San Juan, *SETX Law Enforcement Face Officer Shortage; BPD Recruiting with Creative Campaign*, KDFM (Apr. 14, 2021), https://kfdm.com/newsletter/setx-law-enforcement-face-off icer-shortage-bpd-recruiting-with-creative-campaign.

124. Mensah M. Dean et al., *Police in Philly and Beyond are Struggling with a Shortage of Police Recruits and a Surge in Retirements*, THE PHILA. INQUIRER (Apr. 23, 2021), https://www. msn.com/en-us/News/crime/police-in-philly-and-beyond-are-struggling-with-a-shortage-of-police-recruits-and-a-surge-in-retirements/ar-BB1fZgML.

125. *Id.*

126. Colin Tiernan, *Applicants Scarce for Open Law Enforcement Positions*, THE SPOKESMAN-REV. (Apr. 24, 2021), https://www.spokesman.com/stories/2021/apr/24/officers-down-applicants-scarce-for-open-law-enfor/.

127. *Id.*

128. Cory Howard, *Sheriff's Office Puts Up Recruitment Billboards in Portland, Seattle and Denver*, KHQ Q6 NEWS, (Apr. 7, 2021), https://www.khq.com/sheriffs-office-puts-up-recruitment-billboards-in-portland-seattle-and-denver/article_d4fda194-97ef-11eb-86cd-43d8ec845ecf.html.

129. Tiernan, *supra* note 126.

130. *Id.*

to join the police force.[131] Police departments in Colorado have experienced the same shortage problems.[132] A recent County Sheriffs of Colorado and the Colorado Association of Chiefs of Police survey demonstrated that 65% of police officers who left the department expressed concerns about Colorado's Enhance Law Enforcement Integrity Act, which eliminated qualified immunity as a defense in a civil action.[133]

2. Delayed Action and Increased Crime

If the understaffing of law enforcement discussed above continues, police departments will not be able to respond quickly to calls for service.[134] Police departments will have to "prioritize violent crime[s]" and decline to engage in proactive policing or investing low-level crimes.[135] After Mr. Chauvin's conviction, Minneapolis police officers have delayed or refused to take 911 calls to avoid being subject to public criticism.[136]

New York City enacted a law that eliminated qualified immunity on March 25, 2021.[137] Unsurprisingly, the New York Police Department reported an increase in violent crime during late March to mid-April 2021.[138] In New York, from March 8 to April 4, 2021, shootings increased by 95%, homicides increased by 60%, and rapes increased by 54% in contrast to March 2020.[139] Similarly, other city police departments have delayed responding to calls because of the risk associated with being sued.[140] From June 2020 through the end of February 2021:

131. Crystal Price, *Durham County FOP Calling for City Support for Police Officers as Average of 5 Leave DPD Per Month*, CBS 17, (May 10, 2021), https://www.cbs17.com/news/local-news/durham-county-news/durham-county-fop-calling-for-city-support-for-police-officers-as-average-of-5-leave-dpd-per-month/.

132. Olivia Prentzel & Julia Cardi, *Colorado Police Ranks Down Amid COVID-19, Calls for Reform*, THE GAZETTE, (Mar. 28, 2021), https://gazette.com/news/colorado-police-ranks-down-amid-covid-19-calls-for-reform/article_378fde38-8b31-11eb-95f2-9f978389f0cb.html.

133. *Id.*

134. *See* Tiernan, *supra* note 126.

135. *Id*.

136. Fola Akinnibi & Sarah Holder, *Where Floyd Died, Crime Surge Shows a Deep Rift With Police*, BLOOMBERG LAW (Apr. 23, 2021, 5:20 PM), https://news.bloomberglaw.com/us-law-week/wher e-floyd-died-crime-surge-shows-a-deep-rift-with-police-1.

137. Press Release, *supra* note 8.

138. *NYPD: Violent Crime Surges In New York City Over Past Month*, CBS NEW YORK (Apr. 10, 2021, 11:13 PM), https://newyork.cbslocal.com/2021/04/10/nyc-violent-crime-numbers-april-2021/; *See also* Larry Celona & Amanda Woods, *NYC Saw a Startling Crime Surge Last Week: NYPD Stats*, THE NEW YORK POST (Mar. 29, 2021, 3:55 PM), https://nypost.com/2021/03/29/nyc-saw-a-startling-crime-surge-last-week-nypd-stats/ .

139. *Id.*

140. Jason Johnson, *Why Violent Crime Surged After Police Across America Retreated*, USA TODAY (Apr. 9, 2021, 6:00 AM), https://www.usatoday.com/story/opinion/policing/2021/04/09/violent-crime-surged-across-america-after-police-retreated-column/7137565002/.

> Chicago's police made 31,000 fewer arrests — a 53% decline as murders rose 65%. In Louisville, where massive unrest included the shooting of two police officers during a protest, homicides jumped 87% as the police made 35% fewer vehicle stops since June while arrests plummeted 42% during summer months compared with 2019.[141]

Proactive policing is necessary to decrease crime.[142] The police officers' delay in responding to preventative incidents has also increased crime in Los Angeles, Houston, New Orleans, Minneapolis, St. Louis, Milwaukee, and other cities.[143] Due to the risk of being subject to lawsuits and public criticism, numerous police officers are retiring, and the individuals who are continuing their jobs as police officers are discouraged from completely fulfilling their duties out of fear.[144] As evidenced by the increasing crime percentages due to police officers failing to respond to emergency calls and taking preventive measures, the elimination of qualified immunity seems to hurt the public more than using another method to keep police officers accountable.[145]

3. Police Officers' View of the Job in the Current Climate

In 2017, Pew Research revealed that more than "eight-in-ten police" stated that the current attitude toward the police has made their job more difficult and that seven-in-ten citizens believe that a position in law enforcement has become increasingly hazardous.[146] In 2021, police officers retired and left the police force due to the distrust of police officers, lack of resources provided to the police departments, and lack of the number of police officers employed, which contributed to being overworked and burnout.[147] With the combination of being underfunded, the distrust of the police, and the threat of lawsuits, police officers have lost their desire to be an officer and strongly discouraged other people to become officers.[148]

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141. *Id.*
142. *Id.*.
143. *Id*.
144. *Id*.
145. *NYPD: Violent Crime Surges*, *supra* note 138; Johnson, *supra* note 140.
146. Rich Morin et al., *Behind the Badge: Police Views, Public Views*, PEW RESEARCH CENTER (Jan. 11, 2017), https://www.pewresearch.org/social-trends/2017/01/11/police-views-public-views/ .
147. Maxine Bernstein, *'Overworked, Overwhelmed and Burned Out': Why Portland Cops Say They're Leaving in Droves*, THE OREGONIAN (Apr. 5, 2021, 11:01 AM), https://www.oregonlive.com/crime/2021/04/overworked-overwhelmed-and-burned-out-why-portland-cops-say-theyre-leaving-in-droves.html.
148. Johnson, *supra* note 140; Bernstein, *supra* note 147.

IV. RENOVATION OF THE DOCTRINE

Due to increasingly negative perceptions of police officers and low officer morale, the consequences of eliminating the qualified immunity doctrine may further contribute to fewer police officers, delayed responses to emergency calls, and difficulty recruiting more officers.[149] The solution to resolve police brutality does not lie in eliminating qualified immunity. Nonetheless, the Court's lack of clarity for how a plaintiff overcomes qualified immunity should be addressed, and the Court should renovate the doctrine.

A. Preservation of Sovereign Immunity

Police officers, as government actors, receive their qualified immunity from their employer: the sovereign.[150] Cities and counties may be liable for the torts of their actors when they are acting in the scope of their duties as enumerated in a policy, procedure, training method, or analogous official protocol.[151] Besides these statutory remedies where state governments have consented to liability, the sovereign and its agents share in the protections afforded by immunity.[152] Sovereign immunity also functions to prevent lawsuit threats to public funds.[153] "[A] state has the important role of tending to its own treasury in ways that comport with the public will and public good. And when that treasury is depleted, the state's survival is imperiled."[154]

The same logic of government sovereign immunity applies to police officers in the context of qualified immunity.[155] Police officers are paid by citizens' tax dollars and must act especially quickly to serve the public.[156] Hence, qualified immunity functions to shield police officers while serving the most essential public needs in contexts where there is insufficient time to deliberatively evaluate all the consequences of an action that is equivocal in the law.[157] If federal, state, and local governments eliminate qualified

149. Akinnibi & Holder, *supra* note 136.

150. Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 441-42 (2016) ("The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity.").

151. *Id.* at 458 ("Private suits against nonconsenting States may threaten their financial integrity, and . . . strain States' ability to govern in accordance with their citizens' will, for judgment creditors compete with other important needs and worthwhile ends for access to the public [finances]") (quoting Alden v. Maine, 527 U.S. 706, 709 (1999)).

152. *Id.* at 465.

153. *Id.* at 458.

154. *Id.*

155. *See generally, Taylor*, 141 S. Ct. at 53.

156. Tiernan *supra* note 126.

157. *Taylor*, 141 S. Ct. at 53.

immunity for police officers, there will likely be a domino effect resulting in the elimination of qualified immunity for other public officials.

B. Proposed Solution

Instead of eliminating the hazy qualified immunity doctrine, where the lines have been so blurred that plaintiffs have difficulty rebutting the defense and recovering a monetary remedy, the Court should renovate the qualified immunity doctrine by using the following standard:

> A public official has the presumption that he is not personally subject to monetary damages. The presumption may be rebutted if the plaintiff proves that the defendant erroneously acted outside of the known training practices of his position and the defendant's action against the plaintiff violated the plaintiff's statutory or constitutional right.[158]

The current standard of "clearly established law" is a moving target and insufficiently defined.[159] The Court's application of the doctrine has changed throughout the development of qualified immunity.[160] As is discussed in Part II on the development of qualified immunity, the Court has added to qualified immunity over the years to fortify the doctrine.[161] Therefore, the doctrine must be clarified, reconsidered, and renovated to provide the defendant room to make quick decisions in the course of his job and provide the plaintiff with the opportunity to recover a monetary remedy when the defendant harms the plaintiff's constitutional or statutory right.

Throughout the approximately fifty years that the qualified immunity doctrine has existed, the Supreme Court struggled with addressing the needs of government actors and constitutional violations.[162] First, the Court recognized that officials were entitled to qualified immunity unless the violation was of a clearly established law and the Court failed to define what "clearly established" specifically meant.[163] The vagueness of the phrase itself caused misapplications and policy-driven decisions depending upon the justices sitting on the Court.[164]

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158. *See also* Smith, *supra* note 150, at 487 (noting that the effect of money damages in suits against government "may threaten representative government and local autonomy"); *See also Kisela*, 138 S. Ct. at 1156 (Sotomayor, J., dissenting) (suggesting that qualified immunity would not apply when a defendant's "unlawfulness of conduct" is evident).

159. *Compare Butz*, 438 U.S. at 498; *Ashcroft*, 563 U.S. at 744; *Kisela*, 138 S. Ct. at 1148.

160. *Butz*, 438 U.S. at 498; *Harlow*, 457 at 818; *Hope*, 536 U.S. at 741, 755.

161. *See infra* Part II.

162. *Compare Butz*, 438 U.S. at 498; *Ashcroft*, 563 U.S. at 744; *Kisela*, 138 S. Ct. at 1152.

163. *Butz*, 438 U.S. at 498.

164. *Ashcroft*, 563 U.S. at 744; *Kisela*, 138 S. Ct. at 1152.

Secondly, the Court has failed to clarify what constitutes a "violation" of a clearly established constitutional or statutory right.[165] As evidenced in the relevant precedent, the Court continued to lose focus on balancing the interests of plaintiffs obtaining a remedy against government actors and the protection of officials exercising discretion while on duty.[166] In *Harlow*, the good faith element was removed, and clearly established law was defined based on whether an official knew or should have known that he or she violated a clearly established legal right.[167] Then, the Court decided in *Hope* that precedent did not have to be exactly on point for a plaintiff to prove the defendant violated clearly established law, and, in this case, the defendant was not entitled to qualified immunity.[168] *Hope* articulated that well-settled law such as "materially similar" facts and "general statements of law" are enough to notify officials of their wrongdoing.[169]

Pearson v. Callahan reversed the sequencing the Court must take in addressing the prongs of the violation of a clearly established law, which allowed the Court to ignore evaluating if the official's conduct was constitutional and dismissed disputes on the basis that the violation had no clearly established law.[170] Then, the Court stated that "[a] clearly established right is one that is 'sufficiently clear that *every* reasonable official would have understood'", which created a range of reasonableness standard.[171] The increasingly morphing definition of clearly established law made the plaintiff's quest for damages uncatchable and fleeting.[172]

V. THE ROAD AHEAD

Overall, the road ahead for qualified immunity will be determined by the federal, state, and local governments because the United States Supreme Court has declined to revisit the qualified immunity doctrine. The question for policymakers is now to what extent qualified immunity will be reformed or eliminated. The adverse implications of a wholesale elimination are already clear in the data regarding crime, law enforcement response, and human resources data from a variety of agencies.[173]

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165. *See generally Harlow*, 457 U.S. at 818; *Hope*, 536 U.S. at 741; *Hope*, 536 U.S. at 755 (Thomas, J., dissenting).

166. *Harlow*, 457 U.S. at 817-18.

167. *Id.* 457 U.S. at 818.

168. *Hope*, 536 U.S. at 735-37.

169. *Id.* 536 U.S. at 741, 746 (quoting Hope v. Pelzer, 240 F.3d 975, 981 (2001)).

170. *Pearson*, 555 U.S. at 232.

171. Kinports, *supra* note 83, at 67 (quoting *Mullenix*, 136 S. Ct. at 305).

172. *Id.*

173. *See* NYPD: Violent Crime Surges, *supra* note 138; Johnson, *supra* note 140; Morin et al., *supra* note 146.

Although Congress will likely decide to address the issue of qualified immunity, Congress should not quickly abolish a judicial doctrine which has been around for decades. Benjamin Franklin stated, "Passion governs, and she never governs wisely."[174] In the midst of unrest with Mr. Floyd's death and the conviction of his killer, state and local governments have already restricted or eliminated qualified immunity.[175] If Congress makes the decision to eliminate all qualified immunity for law enforcement because of police brutality cases, without regard to the lives, the recruitment and retention of law enforcement officers protecting millions of citizens, then the Congressmen and women who swore to protect the citizens of their state will be failing their sworn promise.

After reviewing the increasing rates of police inaction on calls for service and preventive measures, the elimination of qualified immunity will not resolve the problem of police brutality and elimination of qualified immunity will likely harm the public.[176] The development of the qualified immunity doctrine demonstrates an issue with the articulation of the clearly established law standard.[177] The standard has varied considerably and made the plaintiff's burden of proof more difficult to defeat qualified immunity.[178] The solution would be for either the Court or Congress to adopt a clearer rule without destroying the qualified immunity doctrine.

174. Letter from Benjamin Franklin to Joseph Galloway (Feb. 5–7 1775), FOUNDERS ONLINE, https://founders.archives.gov/documents/Franklin/01-21-02-0257.

175. *See* Akinnibi & Holder, *supra* note 137; Press Release, *supra* note 9.

176. Akinnibi & Holder, *supra* note 136.

177. *Butz,* 438 U.S at 498.

178. *Id.*; *Harlow*, 457 U.S. at 818; *Hope*, 536 U.S. at 741; *Hope*, 536 U.S. at 755 (Thomas, J., dissenting).