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**Ohio Northern University
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Goldman Lecture Series

Qualified Immunity: A Legal Fiction That Has Outlived Utility

S. RAFE FOREMAN*

First, permit me to thank the Ohio Northern University Claude W. Pettit College of Law, Charles H. Rose III, Dean of the Claude W. Pettit College of Law, and the Goldman Lecture Series. I am deeply honored to have been asked to present the Goldman Lecture. Second, let me point out that this document is not intended as a scholarly law review article or even a treatise

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on the law of qualified immunity. Instead, it is a conglomeration of information from various private and public sources and a working set of papers with actual cases, many of my own, and facts to help illustrate and perhaps clarify the effect that qualified immunity has had in these limited samplings.¹

I. MY INTRODUCTION TO CIVIL RIGHTS

I have certainly received my share of calls seeking representation for civil rights violations in my 34-year career. Still, I declined most because I had believed that these cases were too complex, too expensive, and too uncertain. Therefore, the extent of my civil rights involvement was to refer most cases to a “civil rights lawyer” and to never hear about them again.

Thus, my foray into the world of civil rights began quite unwarily. The year was 2004, and my law partner Susan Hutchison and I received a call from a Spanish-only speaking family member about their *abuelo*’s death, a taser, the beating of a spouse, and something about a pregnant woman. We found it difficult, even with the aid of an interpreter, to gather the whole story. What we completely understood, however, was the date of occurrence, and thus the statute of limitations applicable to the claim would run out in five days. Susan and I decided to “road trip” from Texas to Kansas. It was our first civil rights case together. We had some idea how to handle a § 1983 case, but I was not fully educated on the concept of qualified immunity. All we knew was that the Mendez family was having an outdoor family cookout at their home located in a trailer park in Garden City, Kansas when the trouble started.

While meeting with the clients, we learned that later, after the cookout, and quite after dark, a police officer appeared on the scene looking for the son of the grandparents who lived at the residence. The son had allegedly evaded the police, who now suspected he was at this location as his pregnant wife had attended the cookout. The son was found inside the home, hiding in the bathroom, but not understanding a word of English, he

1. *Arnone v. County of Dallas County*, 29 F.4th 262 (5th Cir. 2022); *Dyer v. City of Mesquite*, Civil Action No. 3:15-CV-2638-B, 2016 WL 2346740 (N.D. Tex. May 3, 2016); *Dyer v. Houston*, 964 F.3d 374 (5th Cir. 2020); *Garcia v. City of Lubbock*, 487 F. Supp. 3d 555 (N.D. Tex. 2020); *Hobart v. City of Stafford*, 784 F. Supp. 2d 732 (S.D. Tex. 2011); *Hobart v. Estrada*, 582 F. App’x 348 (5th Cir. 2014); *Tex. Dep’t of Crim. Justice v. Pike*, No. 10-19-00098-CV, 2020 WL 6326469 (Tex. App. Oct. 28, 2020); *Pratt v. Harris Cty.*, 822 F.3d 174 (5th Cir. 2016); *Brannan v. City of Mesquite*, Civil Action No. 3:19-CV-1263-X, 2020 WL 7344125 (N.D. Tex. Dec. 14, 2020); *Schrader v. Ruggles*, No. 20-11257, 2021 WL 2843848 (5th Cir. Jul. 7, 2021); *Timpa v. Dillard*, 20 F.4th 1020 (5th Cir. 2021); *Allah v. Milling*, 876 F.3d 48 (2d Cir. 2017); *Baxter v. Bracey*, 751 F. App’x 869 (6th Cir. 2018); *Taylor v. Riojas*, 141 S. Ct. 52, 208 (2020) (per curiam); *Latits v. Phillips*, 878 F.3d 541 (6th Cir. 2017); *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019); *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019).

decided to run rather than be apprehended for unknown reasons. He then ran through the crowd of family members outside and approached the backyard fence, which was shrouded in complete darkness. As he attempted to scale the wall before him, he was tasered at the midpoint of his back and delivered repeated jolts of electricity at 50,000 volts each. He fell off the fence and lay motionless on the ground. The crowd, particularly the man's father, the *abuelo*, yelled in Spanish into the darkness in the direction of the officer and his screaming son, "please don't shoot my son, please don't kill my son." Two additional officers stood among the crowd and heard the *abuelo* screaming something very loudly in Spanish toward the back of the house. One of the two officers drew his service revolver and fired a 9mm shot into the darkness in the direction of the *abuelo*. The pregnant woman was the *abuelo's* daughter-in-law, and she had her hands on the arm of her father-in-law, urging him to come back into the light and safety. The officer's bullet narrowly missed the nine-month pregnant daughter-in-law but severed the spine of the *abuelo*, causing him to be instantly paralyzed from just below the shoulder blades and downward. He fell to the ground immediately, no longer able to stand or walk, where he bled out because the bullet pierced the main artery in his back and the fragments caused damage to his heart. The officer who shot the weapon admitted that on a scale of zero to ten, with zero being total darkness, he shot into total darkness.

The case involved *Monell* claims and additional claims that will not be discussed here, but this was our first adventure into the mine-laden field of qualified immunity. It was here that I initially waded into the muck and mire of the bogs that have birthed the legal fiction of qualified immunity. To add to our frustration over these made-up and invented defenses, it was not long before we also met the evil twin of qualified immunity, the completely made-up condition known as excited delirium.² Excited delirium, until recently, was an unknown condition or affliction of mankind.³ Still, it is not listed in the credible medical journals or the DSM but instead is the go-to legal defense for excessive force cases under § 1983, second only to qualified immunity.⁴

"Law enforcement officers nationwide are routinely taught that "excited delirium" is a condition characterized by the abrupt onset of aggression and

2. Joshua Budhu et al., *How "Excited Delirium" is Misused to Justify Police Brutality*, BROOKINGS: HOW WE RISE (Aug. 10, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/08/10/how-excited-delirium-is-misused-to-justify-police-brutality>.

3. *Id.*

4. *Id.*; Brianna da Silva Bhatia et al., "Excited Delirium" and Deaths in Police Custody: The Deadly Impact of a Baseless Diagnosis, PHYSICIANS FOR HUM. RTS. (Mar. 2, 2022), <https://pfr.org/our-work/resources/excited-delirium/>.

distress, typically in the setting of illicit substance use, often culminating in sudden death.”⁵ The alleged diagnosis results from the misapplication of medical terminology, and instead of being a legitimate medical condition has instead morphed into a defense to the brutalization of citizens in police custody.⁶ Never has anyone attending an exuberant event such as a concert, a World Cup match, or a Super Bowl been afflicted with excited delirium. This is because evidently, excited delirium is a condition that only exists when a police officer uses excessive force, inappropriate restraints, or restraint methods on a citizen.⁷ It seems strange that this is the only physical or mental condition known to mankind that occurs only in the presence of an officer using excessive force.⁸

Accountability is an absolute necessity for meaningful criminal justice reform, and any attempt to provide greater accountability must confront the doctrine of qualified immunity. This judicial doctrine, invented by the Supreme Court in the 1960s, protects state and local officials from liability, even when they act unlawfully, so long as their actions do not violate “clearly established law.” In practice, this legal standard is a huge hurdle for civil rights plaintiffs because it generally requires them to identify not just a clear legal *rule* but a prior case with functionally identical *facts*.⁹

What is really going on here? I will confess that it is not litigation against states or state actors because the Eleventh Amendment of the United States Constitution prohibits suing states and state actors even for civil rights violations nor the even and consistent application of qualified immunity across the federal circuits or state courts.¹⁰ The real-life experience of this lawyer filing civil rights cases and battling in those trenches is that there is no consistent application of qualified immunity, thus, creating chaos and uncertainty in the courts. I proffer that this excuse from liability and accountability has lost its utility, and I could not say it better than Schweikert has:

In short, qualified immunity has failed utterly as a matter of law, doctrine, and public policy. As a legal matter, it has no basis in

5. Budhu et al., *supra* note 2.

6. *Id.*

7. Budhu et al., *supra* note 2; da Silva Bhatia et al., *supra* note 4.

8. Budhu et al., *supra* note 2.

9. Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. POL’Y ANALYSIS (Sept. 14, 2020), <https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure>.

10. U.S. CONST. amend. XI.

either the text of Section 1983 or the common-law background against which the statute was enacted. The modern doctrine—especially the “clearly established law” standard—is incapable of consistent, predictable application, and continues to confuse and divide lower courts tasked with applying it. And most importantly, the doctrine regularly permits egregious unconstitutional misconduct to go unaddressed, exacerbating an ongoing crisis of accountability in law enforcement more generally. That obviously hurts the victims of police misconduct, but it also hurts the law enforcement community itself: when the judiciary routinely permits police officers to get away with unconscionable constitutional violations, members of the public can hardly be expected to have much trust or respect for officers in their community. And that diminished trust and respect makes the job of policing far more difficult and dangerous, including for those officers who do strive to act in a lawful, professional manner.¹¹

Arguably lacking any utility or legitimate purpose, let us now turn to the definition of qualified immunity and its reach.

II. 42 U.S.C. § 1983 AND QUALIFIED IMMUNITY

A. *The Definition of 42 U.S.C. § 1983*

When a police officer violates an arrestee’s constitutional rights, the officer may be found liable under 42 U.S.C. § 1983.¹² 42 U.S.C. § 1983 states that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this

11. Schweikert, *supra* note 9.

12. Bougess v. Mattingly, 482 F.3d 886, 887 (6th Cir. 2007); Sova v. City of Mt. Pleasant, 142 F.3d 898, 904 (6th Cir. 1998).

section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.¹³

Under 42 U.S.C. § 1983, an officer may be held liable for false arrest¹⁴, false imprisonment¹⁵, malicious prosecution¹⁶, malicious abuse of process¹⁷, conspiracy to violate due process rights, or excessive force.¹⁸ Additionally, an officer may be held liable as a bystander when the officer observes and fails to prevent another officer from violating a constitutional right.¹⁹ Moreover, depending on the circumstances, an officer may be liable for damages to others as a result of the constitutional violation.²⁰ Typically, the constitutional provisions being violated are the *Fourth and Fourteenth Amendments* as well as the due process clause.²¹ In order to prevail on a § 1983 claim, the plaintiff must show (in addition to a clear violation of a constitutional right) “that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.”²²

Probable cause acts as a complete defense to a § 1983 claim for false arrest and malicious prosecution.²³ Probable cause is only based on the facts available to the officer at the time of the arrest.²⁴ Additionally, the fruit of the poisonous tree doctrine appears to be unavailable to the plaintiff.²⁵ At least in the Eastern District of Pennsylvania, one case held that if an officer engages in an unlawful search and seizure, but discovers contraband, then the officer has probable cause to arrest for the contraband

13. 42 U.S.C. § 1983 (2022).

14. *Larson v. Neimi*, 9 F.3d 1397, 1398 (9th Cir. 1993).

15. *Groman v. Twp. of Manalapan*, 47 F.3d 628, 636 (3d Cir. 1995).

16. *Thacker v. City of Columbus*, 328 F.3d 244, 259 (6th Cir. 2003).

17. *Ismail v. Freeman*, 676 F. A’ppx. 690, 691 (9th Cir. 2017).

18. *Jaegly v. Couch*, 439 F.3d 149, 151-52 (2d Cir. 2006); *Pena v. City of Rio Grande*, 879 F.3d 613, 619-20 (5th Cir. 2018).

19. *Pena*, 879 F.3d at 621 (quoting *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995)).

20. *Vaughan v. Cox*, 343 F.3d 1323, 1327, 1333 (11th Cir. 2003).

21. U.S. CONST. amend. IV; U.S. CONST. amend. XIV, § 1; *Amons v. Dist. of Columbia*, 231 F. Supp. 2d 109, 111-12 (D.D.C. 2002).

22. *Heck v. Humphrey*, 512 U.S. 447, 486-87 (1994).

23. *Harewood v. Braithwaite*, 64 F. Supp. 3d 384, 397 (E.D.N.Y. 2014). *See* *Thompson v. Clark*, 142 S. Ct. 1332 (2022) (This recent decision by the Supreme Court of the United States has caused considerable concern among police officers and prosecutors. These law enforcement professionals who arrest and charge criminal defendants daily on the basis of probable cause may worry that they are now more vulnerable to malicious prosecution claims when charges are dismissed rather than pursued to trial.).

24. *Harewood*, 64 F. Supp. 3d at 397.

25. *Price v. City of Philadelphia*, 239 F. Supp. 3d 876, 889 (E.D. Pa. 2017).

found.²⁶ Lastly, if the arrestee, in any way, pleads guilty, then the retroactive effect of probable cause is established.²⁷

B. The History of 42 U.S.C. § 1983

In the Enforcement Acts of 1871, also known as the “Ku Klux Klan Acts,” Congress specifically held that groups of people could be liable in court for violating the constitutional rights of other Americans, including public officials. “This was an effort to help protect black Americans who were the frequent targets of horrific violence, including lynching, and that in some cases public officials condoned. . . . People refer to lawsuits against the police alleging civil rights violations as §1983 claims. This is because the civil rights movement of the 1960s reinvigorated 42 U.S.C. § 1983 of the Ku Klux Klan Acts.²⁸

The goal of 42 U.S.C. § 1983 was to provide a remedy for people whose constitutional rights were violated by an official’s abuse of power while acting under the color of state law.²⁹ This statute was intended to act as a safety net for victims unable to obtain redress in a state court.³⁰ Congress believed this statute would deter these types of violations and create a balance between individual rights and the protection of state and local governments.³¹ The Supreme Court of the United States has held that the Fourth Amendment prohibits police from using excessive force when apprehending a suspect or making an arrest, subjecting officers who use excessive force to civil liability as in the 1958 case, *Monroe v. Pape*, in which the Supreme Court held that a police officer acted “under color of law” in using unreasonable force and, as such, could be liable for violating the suspect’s Fourth Amendment rights.³² The Supreme Court has held that a *Fourth Amendment* violation on its own – regardless of § 1983 – can lead to civil liability in the 1971 case *Bivens v. Six Unknown Fed. Narcotics*

26. *Id.* at 899-900.

27. *Chillemi v. Town of Southampton*, 943 F. Supp. 2d 365, 377 (E.D.N.Y. 2013).

28. *Qualified Immunity: Both Sides of the Debate*, FINDLAW (Sept. 21, 2021), <https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity—both-sides-of-debate.html#:~:text=Qualified%20Immunity%3A%20Both%20Sides%20of%20the%20Debate&text=Qualified%20immunity%20provides%20protection%20from,to%20hold%20bad%20actors%20accountable> [hereinafter *Both Sides of the Debate*].

29. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992).

30. *McNeese v. Bd. of Ed. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 671 (1963).

31. *McKnight v. Rees*, 88 F.3d 417, 419 (6th Cir. 1996).

32. *Monroe v. Pape*, 365 U.S. 167-72, 187, 259 (1961); Schweikert, *supra* note 9.

Agents.³³ It is noteworthy to mention that nowhere in the text of the civil rights statute is immunity of any kind permitted.³⁴

C. *The Definition of Qualified Immunity*

Qualified immunity provides protection from civil lawsuits for law enforcement officers and other public officials. It attempts to balance the need to allow public officials to do their jobs with the need to hold bad actors accountable. Proponents of qualified immunity argue that without a liability shield, public officials and law enforcement officers would be constantly sued and second-guessed in courts. Critics say the doctrine has led to law enforcement officers being able to violate the rights of citizens, particularly disenfranchised citizens, without repercussion.³⁵

An officer may raise the qualified immunity defense in response to any type of § 1983 claim.³⁶ To preclude this defense, the plaintiff must show that the officer violated a clearly established constitutional right.³⁷ In some instances, such as the use of deadly force, the burden will shift to the officer to show that his conduct was reasonable.³⁸ “How qualified immunity works” is to require the courts to “employ a two-part test to determine whether qualified immunity applies. If the answer to both questions is yes, then the public official does not get immunity.

- Did the officer violate a Constitutional right?
- Did the officer know that their actions violated a ‘clearly established right’?”³⁹

“The next issue is to determine when a right is ‘clearly established.’”⁴⁰ “Under the current doctrine, a right is clearly established when the Supreme Court or the relevant federal appeals court has already treated the conduct as unconstitutional, or where a public official’s conduct is ‘obviously unlawful.’”⁴¹ But, “[i]n 2009, the U.S. Supreme Court told lower courts [they] could skip the first part of the test at its discretion,” and many now do.⁴²

33. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392-96 (1971) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

34. 42 U.S.C. § 1983 (2022).

35. *Both Sides of the Debate*, *supra* note 28.

36. *Id.*

37. *Lanigan v. Village of E. Hazel Crest*, 110 F.3d 467, 471 (7th Cir. 1997).

38. *Figg v. Schroeder*, 312 F.3d 625, 641 (4th Cir. 2002).

39. *Both Sides of the Debate*, *supra* note 28.

40. *Id.*

41. *Id.*

42. *Id.*

The result is that judges now look to past court cases to see whether there is a similar set of facts on record that would put the officer on notice that their actions violated the “clearly established” statutory or constitutional rights of another. The result is that the facts of a situation alleging police misconduct are highly relevant to when qualified immunity applies.”⁴³

While performing discretionary duties, if an officer does not violate a clearly established constitutional or statutory right that a reasonable person would have known, then the officer is entitled to qualified immunity.⁴⁴ Courts typically interpret “clearly established law” very specifically.⁴⁵ The plaintiff must show that the law is so clearly established that any reasonable officer would have known they were violating a constitutional right.⁴⁶ Courts even go further as to say that if reasonable officers could disagree over the legality of the officer’s actions, then qualified immunity applies.⁴⁷ It should also be noted that if reasonable officers could disagree as to whether probable cause was established, then the officer is still entitled to qualified immunity.⁴⁸ Qualified immunity also may be applicable when an officer acts in good faith and in reliance on other officers.⁴⁹ Finally, an officer is also entitled to qualified immunity when the officer is reasonably “mistaken” in regard to the legality of his actions.⁵⁰

D. The History of Qualified Immunity

Notably, “the statute on its face does not provide for *any* immunities.”⁵¹ The operative language just says that any person acting under state authority which causes the violation of any federal right “. . . shall be liable to the party injured.”⁵² Qualified immunity, a judicially created doctrine, if applicable, is an absolute bar to 42 U.S.C. § 1983 liability.⁵³ However, the Supreme Court held that the “tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that

43. *Id.*

44. *Brosseau v. Haugen*, 543 U.S. 194, 205 (2004).

45. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742-47 (2011) (Kennedy, J., concurring).

46. *Id.*

47. *Jaquez v. City of New York*, 706 F. A’ppx. 709, 714 (2d Cir. 2017).

48. *Id.* at 741; *Both Sides of the Debate*, *supra* note 28.

49. *Humphrey v. Mabry*, 482 F.3d 840, 847 (6th Cir. 2007).

50. *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

51. *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

52. 42 U.S.C. § 1983 (2022).

53. *Wyatt v. Cole*, 504 U.S. 158, at 163-64 (1992); *Imbler v. Pachtman*, 424 U.S. 409, 420-21 (1976).

‘Congress would have specifically so provided had it wished to abolish the doctrine.’”⁵⁴

The Supreme Court, the above holding notwithstanding, first recognized a need for liability protection in *Pierson v. Ray* in 1967.⁵⁵ In this case, the Court excused the officer from liability despite making an unconstitutional arrest, and held that an officer should not be liable when he acted in good faith under a statute that was believed to be constitutional, also stating that it would be unreasonable to punish an officer for not accurately “predicting the future course of constitutional law.”⁵⁶

The Warren Court had two reasons for giving qualified immunity in [*Pierson v. Ray*]. First, it wrote that courts had been granting qualified immunity for many years prior to §1983, and that Congress did not specifically ban qualified immunity in that section. The Warren Court then expanded that qualified immunity to acts undertaken by public officials in “good faith.” Legal scholars have since questioned this reading of the law. Secondly, and perhaps more important to the Warren Court, the Supreme Court feared that police would not seek to arrest suspects or do their jobs diligently if they feared being held liable. “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 wrote.⁵⁷

Fifteen years later, in *Harlow v. Fitzgerald*[,] the Supreme Court greatly expanded the doctrine to become closer to what it is today. In that case, an 8-1 decision, the Supreme Court said that public officials have immunity unless the official knew or should have known that their actions violated the plaintiff’s constitutional rights. It replaced the previous “good faith” test with something more “objective.” This test is now the analysis courts use when determining if qualified immunity protects an officer from a lawsuit.⁵⁸

[In *Scheuer v. Rhodes*,] personal representatives of the estates of students who were killed on the campus of a state-controlled

54. *Owen v. Independence*, 445 U.S. 622, 637 (1980) (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)).

55. *Pierson*, 386 U.S. at 555.

56. *Id.* at 557.

57. *Both Sides of the Debate*, *supra* note 28.

58. *Id.*

university, brought [. . .} damages actions under 42 U.S.C. § 1983 against the Governor, the Adjutant General of the Ohio National Guard, various other Guard officers and enlisted members, and the university president, charging that those officials, acting under color of state law, “intentionally, recklessly, willfully and wantonly” caused an unnecessary Guard deployment on the campus and ordered the Guard members to perform allegedly illegal acts resulting in the students’ deaths.⁵⁹

In this Kent State University case, the district court dismissed on Eleventh Amendment immunity and jurisdictional grounds.⁶⁰ The Court of Appeals upheld the dismissal based on the common-law doctrine of executive immunity.⁶¹ However, the United States Supreme Court reversed and recognized that the common law immunity afforded to police officers is not absolute and that such “qualified immunity is available to officers of the executive branch of government . . . dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.”⁶² The Court gave a policy explanation by stating that officials must be given protection, and adopted a functional test to determine the scope of immunity through the “scope of discretion and responsibilities of the office”.⁶³ The author of this paper asks whether the functionality test, though an important part of the court’s rhetoric, has rarely been used to prevent qualified immunity?

Thus, if qualified immunity has no constitutional or statutory basis, where did this idea of immunity originate? I thought the Revolutionary War was fought because the king was not accountable for his wrongs and this country was to be created to rectify that situation.

1. A Comparison of the History of Immunity in the United Kingdom and the United States

Immunity in the United Kingdom

Historically, the general rule in the United Kingdom has been that the Crown has never been liable to be prosecuted or proceeded

59. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

60. *Id.* at 234.

61. *Id.* at 232.

62. *Id.* at 232, 245, 247.

63. *Id.* at 246-47; *see also* *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967).

against in either criminal or civil cases.⁶⁴ The only means by which civil proceedings could be brought were:

- by way of a petition of right, which was dependent on the grant of the royal fiat (i.e., permission);
- by suits against the Attorney General for a declaration; or
- by actions against ministers or government departments where an Act of Parliament has specifically provided that immunity be waived.

The position was drastically altered by the Crown Proceedings Act 1947 which made the Crown (when acting as the government) liable as of right in proceedings where it was previously only liable by virtue of a grant of a fiat. With limited exceptions, this had the effect of allowing proceedings for tort and contract to be brought against the Crown.⁶⁵ Proceedings to bring writs of mandamus and prohibition were always available against ministers, because their actions derived from the royal prerogative. Criminal proceedings are still prohibited from being brought against Her Majesty's Government unless expressly permitted by the Crown Proceedings Act.⁶⁶ As the Crown Proceedings Act only affected the law in respect of acts carried on by or on behalf of the British government, the monarch remains personally immune from criminal and civil actions.⁶⁷ However, civil proceedings can, in theory, still be brought using the two original mechanisms outlined above—by petition of right or by suit against the Attorney General for a declaration.⁶⁸

[Additionally,] [t]he monarch is immune from arrest in all cases; members of the royal household are immune from arrest in civil proceedings.⁶⁹ No arrest can be made “in the monarch’s presence” or within the “verges” of a royal palace. When a royal palace is used as a residence (regardless of whether the monarch is actually living there at the time), judicial processes cannot be executed within that palace.⁷⁰ The monarch’s goods cannot be taken under a

64. *Sovereign Immunity*, WIKIPEDIA, https://en.wikipedia.org/wiki/Sovereign_immunity (last updated Aug. 24, 2022) [hereinafter *Sovereign Immunity*]; Crown Proceedings and Crown Practice, § 101, 12(1) HALS. STAT.

65. *Sovereign Immunity*, *supra* note 64; Constitutional Law and Human Rights, § 382, 8 (1) HALS. STAT.

66. *Sovereign Immunity*, *supra* note 64 (citing Maurice Sunkin, *Crown Immunity from Criminal Liability in English Law*, PUBLIC LAW 716 (Winter 2003)).

67. *Sovereign Immunity*, *supra* note 64; Crown and Royal Family, § 53, 12(1) HALS. STAT.

68. *Sovereign Immunity*, *supra* note 64; Crown and Royal Family, § 56, 12(1) HALS. STAT.

69. *Sovereign Immunity*, *supra* note 64; Crown and Royal Family, § 52, 12(1) HALS. STAT.

70. *Sovereign Immunity*, *supra* note 64; Crown and Royal Family, § 53, 12(1) HALS. STAT.

writ of execution, nor can distress be levied on land in their possession. Chattels owned by the Crown, but present on another's land, cannot be taken in execution or for distress. The Crown is not subject to foreclosure.^{45]}

[However,] [i]n United States law, state, federal and tribal governments generally enjoy immunity from lawsuits.⁷¹ Local governments typically enjoy immunity from some forms of suits, particularly in tort. In the US, sovereign immunity falls into two categories:⁷²

- Absolute immunity:⁷³ pursuant to which a government actor may not be sued for the allegedly wrongful act, even if that person acted maliciously or in bad faith; and
- Qualified immunity: pursuant to which a government actor is shielded from liability only if specific conditions are met, as specified in statute or case law. . . .

Judicial immunity is a specific form of absolute immunity.⁷⁴

Federal Sovereign Immunity

The federal government has sovereign immunity and may not be sued anywhere in the United States unless it has waived its immunity or consented to suit.⁷⁵ The United States has waived sovereign immunity to a limited extent, mainly through the *Federal Tort Claims Act*, which waives the immunity if a tortious act of a federal employee causes damage, and the *Tucker Act*, which waives the immunity over claims arising out of contracts to which the federal government is a party.⁷⁶ The United States as a sovereign is immune from suit unless it unequivocally consents to being sued.⁷⁷

71. *Sovereign Immunity*, *supra* note 64; CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/sovereign_immunity.

72. *Sovereign Immunity*, *supra* note 64; Aaron Larson, *Governmental Immunity and Auto Accidents*, EXPERTLAW (May 7, 2018), <https://www.expertlaw.com/library/car-accidents/governmental-immunity.html>.

73. *Sovereign Immunity*, *supra* note 64. Absolute immunity applies to acts that, if subject to challenge, would significantly affect the operation of government. *See, e.g.*, Michael Shenkman, *Talking About Speech or Debate: Revisiting Legislative Immunity*, 32 YALE L. & POL'Y REV. 351 (2013); J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879 (1980).

74. *Sovereign immunity*, *supra* note 64; *Qualified Immunity*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/qualified_immunity.

75. *Sovereign Immunity*, *supra* note 64; William Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93 (1953).

76. *Sovereign Immunity*, *supra* note 64; Evan Zoldan, *The King Is Dead, Long Live the King!: Sovereign Immunity and the Curious Case of Nonappropriated Fund Instrumentalities*, 38 CONN L. REV. 465, 482 (2006).

77. *Sovereign Immunity*, *supra* note 64; *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

The United States Supreme Court in *Price v. United States* observed: “It is an axiom of our jurisprudence. The government is not liable to suit unless it consents thereto, and its liability in the suit cannot be extended beyond the plain language of the statute authorizing it.”⁷⁸

E. The Metamorphosis of Qualified Immunity

1. Good Faith Exception (from accountability)

The next significant case regarding the development of qualified immunity was *Wood v. Strickland*, in which the Supreme Court implemented both subjective and objective elements of qualified immunity, and reasoned that the defendant had to act with good faith; however, the defendant’s ignorance would not protect him or her from well-established law.⁷⁹ Currently, this is not the case; subjective intent is not considered by the Court.⁸⁰ Whether a defendant acts in good faith or with intentional malice does not affect his or her entitlement to qualified immunity.⁸¹

The modern test for qualified immunity remains established in *Harlow v. Fitzgerald* (1982).⁸² Prior to *Harlow v. Fitzgerald*, the U.S. Supreme Court granted immunity to government officials only if: (1) the official believed in good faith that their conduct was lawful, and (2) the conduct was objectively reasonable.⁸³ The *Harlow* Court announced the rule that defendants are immune from liability under *Section 1983* unless they violate “clearly established statutory or constitutional rights of which a reasonable person would have known.”⁸⁴ The Supreme Court, following *Harlow*, has attempted to articulate the correct analysis. The lower courts remain deeply divided and inconsistent on the nebulous question of how to determine when rights are “clearly established.” For example, the Fifth, Sixth, and Eleventh Circuits—like the Second Circuit—have effectively held that overcoming qualified immunity requires a prior case.⁸⁵

2. The Exact Same Event Standard

Applying qualified immunity,

78. *Sovereign Immunity*, *supra* note 64; *Price v. United States*, 174 U.S. 373, 375-76 (1899).

79. *Wood v. Strickland*, 420 U.S. 308 (1975).

80. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

81. *Id.*

82. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

83. *Wood*, 420 U.S. at 318 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 247-248 (1974)).

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

85. Schweikert, *supra* note 9, at 10; *Both Sides of the Debate*, *supra* note 28. See *Harlow*, 457 U.S. at 818; *Latits v. Phillips*, 878 F.3d 541, 552 (6th Cir. 2017), *Young v. Borders*, 850 F.3d 1274 (11th Cir. 2017).

[t]he Supreme Court has told lower courts to waive qualified immunity in cases that are very similar. It is not enough to show that a previous case denied an officer qualified immunity for broadly similar circumstances or actions. Instead, the facts must be “sufficiently clear” that a reasonable officer would understand that they are violating a constitutional or statutory right.⁸⁶

“Unfortunately, the sort of misapplication of qualified immunity employed by the district court—construing ‘clearly established law’ to effectively require a case with identical facts—is no isolated error, but rather part of an all-too-common practice in lower courts.”⁸⁷

[Considering] one example of thousands, the Eleventh Circuit Court of Appeals has distinguished between an officer firing at a dog surrounded by children, hitting and injuring a child, and an officer firing at a truck, instead hitting a passenger. In both cases the officer fired at a target for questionable reasons, resulting in injury to the accidentally hit victim. However, the Eleventh Circuit said the two were dissimilar enough that the officer who shot the child was given qualified immunity, whereas a previous court found that the officer who fired at the truck did not get qualified immunity.⁸⁸

3. Plainly Incompetent Factor

Qualified immunity is not the same as absolute immunity. In other words, there are circumstances in which a public official can be held accountable for constitutional violations in civil court. However, in the Supreme Court’s own words, qualified immunity is an officer-friendly doctrine that protects “all but the plainly incompetent or those who knowingly violate the law.”⁸⁹

“The doctrine of qualified immunity amounts to a kind of generalized good-faith defense for all public officials, as it protects ‘all but the plainly incompetent or those who knowingly violate the law.’”⁹⁰

86. *Both Sides of the Debate*, *supra* note 28.

87. Brief of Cato Institute as Amicus Curiae Supporting Plaintiffs-Appellants at 3, *Timpa v. Dillard et al.*, 20 F.4th 1020 (5th Cir. 2021) (No. 20-10876) [hereinafter *Cato Timpa Brief*]; *see also Timpa*, 20 F.4th at 1029.

88. *Both Sides of the Debate*, *supra* note 28.

89. *Id.*

90. *Cato Timpa Brief*, *supra* note 87, at 6 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

4. Common Law Defenses

Statutes generally “will not be interpreted to extinguish by implication longstanding legal defenses.”⁹¹ The relevant question is whether the common law of 1871 included general immunities for state agents that “were so well established” as to justify the doctrine of qualified immunity today.⁹² “The clearest example of this principle” comes from the 1804 Supreme Court case, *Little v. Barreme*.⁹³ That case “involved a claim against an American naval captain[, George Little,] who captured a Danish ship off the coast of France” under war-like conditions where “President Adams had issued . . . instructions to . . . seize ships coming from” France.⁹⁴ Little wanted to use his reliance on the president’s instructions as a defense to the proposition of his unlawful seizure of the vessel.⁹⁵ Chief Justice John Marshall authored the opinion, which ultimately rejected the very rationale that today supports the doctrine of qualified immunity.⁹⁶ Marshall admits that in the beginning, he favored the doctrine based in part on the good faith reliance on the president’s order and that the ship was “seized with pure intention.”⁹⁷ The court held, however, that the “defense was [one of] legality, not [of] good faith.”⁹⁸

III. THE TRUTH OF QUALIFIED IMMUNITY

The truth of qualified immunity has been to thwart the efforts of plaintiffs seeking civil damages for constitutional violations against their client at the hands of officials purporting to act under color of law.⁹⁹ Many Section 1983 cases originate as a criminal case or a police and citizen encounter.¹⁰⁰ Since its creation, the doctrine of qualified immunity has changed from the historical framework on which it is supposed to be grounded.¹⁰¹ “Most importantly, the Supreme Court originally rejected the application of a good-faith defense to Section 1983 itself. In *Myers v. Anderson*, the Supreme Court considered a suit against election officers that

91. *Id.*; see *Forrester v. White*, 484 U.S. 219, 225–26 (1988).

92. Cato *Timpa* Brief, *supra* note 87, at 6.

93. *Id.* at 7; see *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804); see also James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1863 (2010) (“No case better illustrates the standards to which federal government officers were held than *Little v. Barreme*.”).

94. Cato *Timpa* Brief, *supra* note 87, at 7.

95. *Id.*

96. *Id.*

97. *Id.* at 7–8.

98. *Id.* at 8.

99. See *infra* Part IV.

100. *Id.*

101. See generally Cato *Timpa* Brief, *supra* note 87, at 6.

had refused to register black voters under a ‘grandfather clause’ statute, in violation of the Fifteenth Amendment.”¹⁰² “This forceful rejection of any general good-faith defense ‘is exactly the logic of the founding-era cases, alive and well in the federal courts after Section 1983’s enactment.’”¹⁰³

The text of Section 1983 does not mention immunity.¹⁰⁴ The common law of 1871 did not include any freestanding defense for all public officials.¹⁰⁵

In the context of qualified immunity, the Supreme Court correctly frames the issue as whether or not “[c]ertain immunities were so well established in 1871, when § 1983 was enacted, that ‘we presume that Congress would have specifically so provided had it wished to abolish’ them”. But the historical record shows that the common law of 1871 did not, in fact, provide for such immunities.¹⁰⁶

If its creation does not come from the statutory or constitutional basis, where did qualified immunity come from? The courts.¹⁰⁷ The courts changed the basic premise throughout the nineteenth century that public officials were liable for unconstitutional misconduct.¹⁰⁸ Today, we frequently arrive at the conclusion that the ever-changing doctrine of qualified immunity is not tied to any lawful justification and needs correction.¹⁰⁹ To understand the actual impact of qualified immunity, it is useful to examine some current effects of this doctrine.

The modern doctrine of qualified immunity is completely untethered from any statutory or historical baseline.¹¹⁰ “[T]he fact that qualified immunity itself is so deeply at odds with the text and history of Section

102. *Id.* at 8; *Myers v. Anderson*, 238 U.S. 368, 380 (1915).

103. Cato *Timpa* Brief, *supra* note 87, at 9 (quoting William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 58 (2018)).

104. *Id.* at 2. See 42 U.S.C. § 1983 (2022).

105. Cato *Timpa* Brief, *supra* note 87, at 2.

106. *Id.* at 6; *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967)) (citation omitted).

107. *Both Sides of the Debate*, *supra* note 28.

108. Cato *Timpa* Brief, *supra* note 87, at 2.

109. *Id.*; see, e.g., *Allah v. Milling*, 876 F.3d 48, 51 (2nd Cir. 2017), cert. dismissed 139 S. Ct. 49 (2018); see also, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) (“In an appropriate case, we should reconsider our qualified immunity jurisprudence.”); see generally Lynn Adelman, *The Supreme Court’s Quiet Assault on Civil Rights*, DISSENT (Fall 2017), <https://www.dissentmagazine.org/article/supreme-court-assault-civil-rights-section-1983>; see generally Baude, *supra* note 103, at 51; see generally Jon O. Newman, *Here’s a Better Way to Punish the Police: Sue Them for Money*, WASH. POST (June 23, 2016), https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-d6005beac8b3_story.html.

110. Cato *Timpa* Brief, *supra* note 87, at 5.

1983 should make appellate courts especially wary about countenancing extensions of the doctrine beyond the contours of existing precedent”¹¹¹ The literal text of Section 1983 makes no mention of any immunities, qualified or otherwise. In addition, “the relevant history establishes a baseline of strict liability for constitutional violations—at most providing a good-faith defense against claims analogous to common-law torts.”¹¹² Yet in 1915, the Supreme Court confirmed that Section 1983 provides for no general good-faith defenses before reversing itself without explanation more than half a century later.¹¹³ “Yet qualified immunity functions today as an across-the-board defense, based on a ‘clearly established law’ standard that was unheard of before the late twentieth century.”¹¹⁴

A. *The Current Consequences of Immunity*

1. *Police Shooting Statistics*

The Washington Post has tracked shootings since 2015, reporting more than 5,000 incidents since their tracking began.¹¹⁵ The database can also classify people in various categories, including race, age, weapon, etc.¹¹⁶ For 2019, it reported a total of 999 people “shot and killed by police.”¹¹⁷ Qualified immunity would apply to each one of these shootings were they to be filed as a civil rights claim.

2. *The Issue of Time Delay*

Time delay poses a serious problem for litigants and the courts.¹¹⁸ The current application of qualified immunity results in a one-sided litigation advantage to the government defendants because of the availability of an interlocutory appeal.¹¹⁹ Courts often sustain defendants’ F.R.C.P. 12(b)(6) Motions to Dismiss prior to any discovery in the case.¹²⁰ Courts also sustain

111. *Id.* at 3.

112. *Id.* at 13.

113. *Id.* at 8; see generally *Pierson v. Ray*, 386 U.S. 547 (1967); *Myers v. Anderson*, 238 U.S. 368 (1915); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Wyatt v. Cole*, 504 U.S. 158 (1992).

114. Cato *Timpa* Brief, *supra* note 87, at 13.

115. Julie Tate et al., *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (last updated June 13, 2022); see also John Sullivan et al., *In Fatal Shootings by Police, 1 in 5 Officers’ Names Go Undisclosed*, WASH. POST (Apr. 1, 2016), https://www.washingtonpost.com/investigations/in-fatal-shootings-by-police-1-in-5-officers-names-go-undisclosed/2016/03/31/4bb08bc8-ea10-11e5-b0fd-073d5930a7b7_story.html.

116. Tate et al., *supra* note 115.

117. *Id.*

118. Joanna C. Schwartz, Symposium, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1825 (2018).

119. *Id.* at 1803.

120. *Id.* at 1835 n.207.

defendants' motions for summary judgment with alarming regularity.¹²¹ Thus, these cases can go on to the interlocutory appeal level before ever having a trial.¹²² To further complicate the matter, the Supreme Court has held that qualified immunity is not just a legal defense against liability but that it is also intended to grant immunity from lawsuits altogether.¹²³ Thus, a plaintiff can find his claim completely dismissed before ever having a trial.¹²⁴ Because of years and years of delay, high costs and expenses are incurred in the process. The plaintiff often must literally win twice, at the interlocutory appeal level and then at the trial court or jury trial level.¹²⁵ These time delays and financial outlays often exhaust the ability to press forward for clients and their counsel alike.

IV. CASE STUDIES FROM HUTCHISON & FOREMAN, PLLC

This part builds upon various sources from our actual cases and should therefore be considered a series of illustrative examples to explain and clarify the effect of qualified immunity in these cases.

A. *Arnone*¹²⁶

Let me tell you a story you will not believe . . . happen[ed] in 2021. . . . Dallas County is so powerful that it appoints its own County policymakers to create and ratify local policies which circumvent and ignore state law, the federal Constitution and individual civil rights of its citizens. The District Attorney . . . , duly appointed policymaker for Dallas County (hereinafter "County"), authorizes a policy which allows the DA to manufacture probable cause out of inadmissible evidence, . . . to have Dallas County citizens arrested in violation of their fundamental constitutional rights. This is not the first time a facially unconstitutional policy was employed, and Dallas County has allowed its District Attorney policymaker to violate the constitutional rights of the citizens of this county. We are here because they have done it again, and again. In *Crane v. State of Tex.*, 759 F.2d 412, 429-30 (5th Cir. 1985) this Court upheld the plaintiff[']s action challenging Dallas County's policy and practice

121. *Id.* at 1811.

122. *Id.* at 1803.

123. William Baude, Reply, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. 115, 124 (2022).

124. *Id.*

125. *Id.*

126. *Arnone v. Cnty. of Dallas Cnty.*, 29 F.4th 262 (5th Cir. 2022).

of issuing misdemeanor capias warrants without a finding of probable cause. *Crane* held “the record plainly shows that the Dallas County District Attorney was alone responsible for the County system and could change it at will.” “His authority to establish County procedures for issuing misdemeanor capias derived from the County office to which he was elected by County voters. That he had such authority is patent and admitted by the District Attorney himself stating that he [‘]has established policies and procedures of an administrative nature only as to the filing and processing of criminal information in Dallas County.[‘]”

During a contested divorce, Arnone was charged with allegations of aggravated sexual assault of his son on November 14, 2002, that allegedly occurred nearly five years earlier on July 1, 1997. ROA.325-329. The Dallas County District Attorney’s office hand altered the information and changed the charge on the day of court. The DA then presented Arnone with a plea deal, and he entered an open plea of nolo contendere to a single non-sexual charge of injury to a child. ROA.323. The plea agreement is signed by an assistant District Attorney under the name of “Bill Hill Criminal District Attorney Dallas County.” ROA.304-305. The trial court placed Arnone on ten-years deferred adjudication community supervision, but withheld adjudication and made no finding of guilt. Thus, there was no conviction. “A defendant on deferred adjudication has not been found guilty.” *Donovan v. State*, 68 S.W.3d 633, 636 (Tex.Crim.App. 2002).

What is critical for this Court to realize, and is also appropriate for judicial notice under FRE 201, is that Arnone would have never legally come back to court after his deferred plea and therefore would never be found guilty of any crime unless and until a valid violation of deferred probation is alleged, then that violation must be presented to a neutral magistrate or judge in order to find probable cause to arrest and only then should a warrant for the arrest and reincarceration of Arnone be issued. But this is not what occurred here. The DA moved to proceed with an adjudication of guilt on the original charge, manufactured probable cause (polygraph) to obtain an arrest warrant, incarcerated Arnone on this unconstitutional arrest warrant for weeks and the trial court later adjudicated Arnone guilty and sentenced him to prison based solely on the same inadmissible evidence. There is no way this is Constitutional.

Arnone was erroneously placed on the sex offender caseload and required to submit to polygraph tests. Arnone disputes that this was ever mentioned, or a part of the plea as explained in a pleading filed by his trial counsel S. Becker, now a State District Judge. ROA.972-976. Nonetheless, Arnone was later removed from the sex offender caseload due solely to his polygraph test results by the Dallas County Probation Office. Upon learning of this action from the Probation office, the Dallas County DA, in accordance with County policy, then moved to adjudicate guilt, and requested that Arnone be “cited to appear” aka warrant issued, and Arnone was arrested by the Dallas County Sheriff’s Office. ROA.1353. The record reveals that Arnone was credited for time served from March 20, 2003 where he remained in custody until sentenced to prison upon an adjudication on May 23, 2003. ROA.843. This tells us then, the approximate date Bill Hill requested the arrest warrant be issued, March 13, 2003, and when it was served and Arnone arrested, March 23, 2003. ROA.969,843. In April 2003, the trial court adjudicated Arnone’s guilt and sentenced him to prison for fifteen years. Arnone filed a direct appeal because of his adjudication and finding of guilt after his probation was revoked and the DA prosecuted the appeal under the name of Bill Hill. ROA.308, 331-333. Arnone filed for federal habeas relief on the basis of actual innocence. ROA.311-316. Arnone served thirteen years, seven months, and 22 days in prison and, during that time, filed direct appeals and writs of habeas corpus. A jailhouse inmate freed Arnone on a writ of habeas corpus based on the same facts and issues presented herein.

In October 2015, the Texas Court of Criminal Appeals (CCRA) granted an application for a writ of habeas corpus, concluding the adjudication of Arnone’s guilt, based on his dismissal from sex offender treatment as a result of failed polygraph tests, was improper, i.e.[.] against state and federal law and/or unconstitutional. The CCRA set aside Arnone’s conviction of guilt, and Arnone was released from custody. ROA.318-321. The mandate from the CCRA was mailed on November 2, 2015, however Arnone was not aware or released until after November 13, 2015. ROA.1074-1077. A factual timeline was presented by Plaintiff and will not be restated here but which accurately sets forth the relevant timelines. ROA.1041. Arnone asserts direct liability against Dallas County for its unconstitutional conduct as set forth in

detail in Plaintiff's Fifth Amended Complaint and seeks reversal of the order dismissing his claims.¹²⁷

The Fifth Circuit Court of Appeals affirmed the dismissal.¹²⁸

*B. Dyer*¹²⁹

This case arises out of the death of Graham Dyer, who was in custody at the Mesquite police and jail and then transported from jail to the hospital with fatal head injuries in August 2013.¹³⁰ The district court dismissed on the grounds of qualified immunity.¹³¹

Plaintiffs Kathy and Robert Dyer ("the Dyers") appeal the dismissal on qualified immunity grounds of their deliberate-indifference claims against paramedics and police officers employed by the City of Mesquite, Texas. The Dyers' claims arise out of the death of their 18-year-old son, Graham, from self-inflicted head trauma while in police custody. . . . Graham died after violently bashing his head over 40 times against the interior of a patrol car while being transported to jail.¹³²

The United States Fifth Circuit Court of Appeals affirmed in part reversed in part and remanded back to the trial court where the case is awaiting trial.¹³³

*C. Garcia*¹³⁴

This 1983 case against the Lubbock Police Department and Lubbock County Sheriff's office "arises out of the wrongful arrest, incarceration[,] and refusal to provide medical care for Plaintiff Raul Garcia."¹³⁵

On May 18, 2018, Raul Garcia was a fifty-eight year old man married . . . with children.

Mr. Garcia was diagnosed as a diabetic in 2017[,] . . . [while] he was diagnosed with cancer and began undergoing chemotherapy.

127. Brief for Appellant at 2-6, *Arnone*, 29 F.4th 262 (No. 21-10597).

128. *Arnone*, 29 F.4th at 264.

129. *Dyer v. City of Mesquite*, 2016 WL 2346740 (N.D. Tex. May 3, 2016); *Dyer v. Houston*, 964 F.3d 374 (5th Cir. 2020)

130. *Dyer*, 964 F.3d at 377, 379.

131. *Id.* at 377.

132. *Id.*

133. *Id.*

134. *Garcia v. City of Lubbock, Tex.*, 487 F. Supp.3d 355 (N.D. Tex. 2020).

135. Plaintiff's Original Complaint at ¶ 21, *Garcia*, 487 F. Supp.3d 355 (No. 5:20-cv-00053-H).

As part of that therapy, Mr. Garcia had a port inserted into his chest for ongoing chemotherapy. A chemotherapy “port” is an implantable reservoir with a thin, silicone tube that attaches to a vein. It is centrally placed under the skin near a large vein in the upper chest and provides a medication delivery system and remains in place . . . [if] necessary for the treatment regimen. It is clearly visible to an observer. . . .

Mr. Garcia followed his doctor’s recommendations and ordered two bracelets: one to inform responders of his port (for chemotherapy) and one to inform responders of his diabetes. The very purpose of these bracelets was to provide notice to responders of Mr. Garcia’s conditions if he was unable to do so. One bracelet was stamped with “Port” to inform/warn responders that he had a port inserted into his chest. The other bracelet included a medical alert symbol and a specific alert for “Diabetes.” . . .

Garcia entered the United Supermarket to get food for himself and his wife—to take back to her at the hospital where she was undergoing cancer treatment.

While in the supermarket, Mr. Garcia began experiencing the beginning of a hyperglycemic episode. He began experiencing dizziness, confusion[,] and difficulty communicating. . . .

Lubbock police officers Mark Ellison and Joshua Conklin . . . [approached Garcia, who] was outside . . . leaning on a railing. He was wearing . . . his medical bracelets on both wrists. . . .

Mr. Garcia was totally compliant and did nothing to resist the officers. . . .

Despite the fact that Mr. Garcia’s medical bracelets were clearly visible (and as proven by events, there was no odor of alcohol or any other indicia of ingestion of alcohol other than confusion), the officers did not ask a single medical question or make inquiry as to Mr. Garcia’s medical condition. . . .

Mr. Garcia made no indication that he intended to drive or do anything to endanger either himself or anyone else. He was simply sick and confused.

Defendants Ellison and Conklin then determined to arrest Mr. Garcia for public intoxication. . . .

At approximately 1:36 p.m. (about six minutes after arriving), the officers placed Mr. Garcia in the back of Officer Ellison’s patrol car.

During transport to the jail, the video shows that Mr. Garcia went in and out of consciousness, slumping over in the back of the

vehicle. During that time, Officer Ellison (driving) continually beat on the partition with his hand, and yelled “wake up!” and “sit up!” over and over again. Despite Mr. Garcia’s obvious continuing distress and inability to communicate coherently, Officer Ellison made no attempt to obtain a medical assessment or medical treatment. . . .

Inexplicably, while Mr. Garcia was not booked in at the jail and he was not medically screened, his medical bracelets were removed and he was placed in jail overalls. . . .

[Garcia was found unresponsive in a cell.] Mr. Garcia was noted to be comatose upon arrival at University Medical Center and immediately intubated. He was diagnosed with diabetic ketoacidosis—a life threatening complication of diabetes and treated with medication that ultimately saved his life, but not before he suffered complications and some permanent effects of the emergent condition and failure to receive timely medical treatment. . . .

As a result of wrongful arrest and failure to obtain proper medical care, Mr. Garcia suffered significant injury and impairment.¹³⁶

The district court dismissed based on F.R.C.P. 12(b)(6) motions on the grounds of lacking deliberate indifference and qualified immunity.¹³⁷ The case is pending an appeal to the Fifth Circuit Court of Appeals.

*D. Hobart*¹³⁸

This lawsuit arises from the death of Aaron Hobart . . . , son of Plaintiffs Steve and Pam Hobart. . . . Aaron suffered from a schizoaffective disorder, which resulted in delusions. Aaron’s mental health was deteriorating in the days, weeks, and months leading up to February 18, 2009. . . . [The] officer believed that Aaron was “experiencing a mental health crisis” [Aaron began speaking] in an alternate voice—which Mr. Hobart described as “hoarse, whispered,” and “raspy”—and claimed that “he knew all the secrets of the universe,” while other people were “all just ignorant”. After being transferred temporarily to a mental health

136. Plaintiff’s Original Complaint, *supra* note 135, at ¶¶ 21-23, 25, 29-31, 34, 36-40, 47, 51-52, 54, 58, 79.

137. *Garcia*, 487 F. Supp.3d at 576-78.

138. *Hobart v. City of Stafford*, 784 F. Supp.2d 732 (S.D. Tex. 2011); *Hobart v. Estrada*, 582 F. App’x. 348 (5th Cir. 2014).

facility, Aaron was prescribed medication for his schizoaffective disorder and released on September 13, 2007. . . .

On February 18, 2009, Aaron refused to leave his room to go to his doctor's appointment. . . . Aaron [was] speaking "belligerently and abusively" in the same raspy alternate voice. Mrs. Hobart also called Dr. Moreland, who told her not to press Aaron to attend the appointment that day so that Aaron could calm down. Dr. Moreland also sent a follow-up email to Mrs. Hobart giving her instructions on how to administer Aaron's medication, and providing information from the Houston Crisis Intervention Team ("CIT") website regarding how to request emergency help. The information stated that the CIT program "educates patrol officers about mental illness and tactics and techniques to help verbally de-escalate situations involving individuals in serious mental health crises," that one should call for a CIT officer "[w]hen the situation involves a person in a serious mental health crisis," and that, if the situation is an emergency, one should call 911 and request a CIT officer. It also noted that "If the person is mentally ill and poses a substantial risk of imminent harm to self or others, Texas Peace officers have the authority to take the individual to a facility for an emergency mental health evaluation, even if the person is involuntary. The officer may use whatever force he needs to get the individual to the facility for evaluation." . . .

Based on the instructions in Dr. Moreland's email, Mrs. Hobart called 911 and requested a "CIT officer" The operator informed her that an officer would come to the Hobarts' home. . . . Officers Garcia and Claunch from the SPD were the primary officers dispatched on the call, but Officer Estrada was the first to arrive at the Hobarts' home. . . .

The video shows Officer Estrada enter[ing] the Hobarts' home by himself at approximately 15:07:59 on the video's clock. . . . Immediately after he enters the home, one can hear Officer Estrada conversing with Mrs. Hobart. At approximately 15:08:15, one can hear noises, and Officer Estrada shouts, "Stop!" and "Get back!" several times. At approximately 15:08:20, one can hear gunshots. Officer Estrada then begins shouting, . . . "Shots fired!" and "Oh my god!" and Mrs. Hobart begins screaming loudly. . . .

Officer Estrada fired six or seven bullets in the Hobarts' home, and four struck Aaron: one in the back of the right upper neck, one in the right lower back, one in the back of the right hip, and one in the right middle back At the time of his death on February 18,

2009, Aaron was nineteen years old, stood five-foot-nine-inches tall, and weighed 166 pounds. He was barefoot and dressed in shorts and a t-shirt. There is no suggestion that he had any type of weapon at that time. Officer Estrada stands six-foot-one-inch tall and weighs 190 pounds.¹³⁹

This is an appeal of the district court's denial of a motion for summary judgment on the basis of qualified immunity in an excessive force case arising from the shooting death of a mentally ill teenager after the parents sought the assistance of a Crisis Intervention Team officer in transporting the teenager to the hospital.¹⁴⁰

The United States Fifth Circuit Court of Appeals reversed the denial of the district court to grant the dismissal and instead dismissed the issue of deliberate indifference in qualified immunity.¹⁴¹

*E. Pike*¹⁴²

In an effort to avoid the revolving door of qualified immunity dismissals in federal court, Pike's case was filed under the *Texas Tort Claims Act*, where the state has waived immunity for the use of personal property.¹⁴³

Pike is an inmate of the Texas Department of Criminal Justice housed in the OB Ellis Unit Trustee Camp. While incarcerated there, he worked on the unit's 20,000 acre farm, under the supervision of TDCJ employees, including both his direct supervisor and the supervisor over maintenance. The tractors that the inmates were required to use were always in general disrepair. Most of the gauges didn't work. Many of the hydraulics didn't work and most did not have operating lights. . . . In mid May 2018, inmate Danny Ware was assigned to a particular tractor. While he was climbing onto the tractor, a defective battery box flew open, he fell to the ground and hurt his leg. A TDCJ safety officer inspected the tractor and determined that the cause of the injury was a defect in the tractor. . . .

139. *Hobart*, 784 F. Supp.2d at 739-41, 743 (citations omitted).

140. *Hobart*, 582 F. App'x. at 349-50.

141. *Id.* at 359.

142. *Tex. Dep't of Crim. Justice v. Pike*, No. 10-19-00098-CV, 2020 WL 6326469 (Tex. App. Oct. 28, 2020).

143. Plaintiff James Pike's First Amended Original Petition, and Request for Disclosure at 3, *Pike*, 2020 WL 6326469 (No. 10-19-00098-CV); *Pike*, 2020 WL 6326469, at *2.

On or about June 27, 2018, Mr. Pike was assigned by his TDCJ supervisor to the same tractor that Ware had been injured on. Pike was directed to use the tractor for the planting, harvesting, and maintenance of row crops, his tasks assigned by the TDCJ during his incarceration at the direction of TDCJ supervisors.

As Mr. Pike climbed onto the tractor, the battery box again flipped up and threw Pike off of the tractor. He hit his face on the tractor engine as he fell, sustaining an orbital fracture and ocular muscle entrapment.

After a few seconds on the ground, Mr. Pike was able to collect himself and fully understand the immense pain emanating from his face. When Mr. Pike touched his face, he noticed a substantial volume of blood coming from the injured area, as well as the rapid swelling that was occurring in his left eye.

Pike was treated for the injuries he sustained that day by Marty Shields, M.D., at Ellis Unit before being later transported to UTMB Galveston on or about July 1, 2018. In Galveston, Texas, Pike was diagnosed, to the best of his memory, with orbital floor fracture and ocular muscle entrapment, which has caused Mr. Pike permanent double vision and embarrassing eyeball displacement.

TDCJ had prior knowledge of the dangerous condition of the subject tractor's unsecured and/or faulty top step that caused Mr. Pike's injuries[.] The faulty step was a condition of tangible property that waive[d] immunity under the Act.

To this day, Mr. Pike continues to suffer from severe pain, embarrassment, and permanent damage to the left orbital region of his face.¹⁴⁴

The Texas Attorney General appealed alleging that “the trial court erred in denying TDCJ’s plea to the jurisdiction” when TDCJ never “used” the tractor as required to waive sovereign immunity under Sections 101.021(1)(A) and (2) of the Texas Civil Practice & Remedies Code.¹⁴⁵ The 10th Court of Appeals in Waco reversed and sent the case back to the trial court on that basis.¹⁴⁶ The case is still pending and awaiting trial.¹⁴⁷

144. Plaintiff James Pike’s First Amended Original Petition, and Request for Disclosure, *supra* note 143, at 8, 10-17.

145. *Pike*, 2020 WL 6326469, at *2-4.

146. *Id.* at *1.

147. *Id.*

*F. Pratt*⁴⁸

Wayne Pratt (“Pratt”) was involved in a minor traffic accident. In response to a disturbance call, HCSD Deputy Vincent Lopez, upon arrival at the scene, observed a vehicle with front-end damage resting in a ditch and Pratt “running in circles . . . imitating a boxer.” HCSD Deputies Brian Goldstein and Michael Medina arrived shortly. All three officers attempted to interact with Pratt. Pratt did not respond, but began to walk away. All three officers requested that he stop walking away. Pratt still did not respond, and remained in an uncooperative state.

After several warnings, Pratt began approaching Lopez and came within 5-7 feet of Lopez. Lopez then unholstered his taser and commanded Pratt to stop. At this point, Goldstein and Medina unholstered their tasers as well and Pratt began to run away. Lopez deployed his taser, but was ineffective in stopping Pratt. Lopez cycled his taser two more times in the next forty seconds, which also failed to stop Pratt. Around this time, deputies Tommy Wilks, Tarzis Lobos, Francisco Salazar, B. J. Auzene, R. DeAlejandro, and R. M. Goerlitz arrived at the scene.

Because Lopez’s efforts to subdue Pratt were ineffective, Medina deployed his taser. Pratt fell to the ground. Goldstein attempted to handcuff Pratt but, because of Pratt’s continued resistance, he was able to secure only one of Pratt’s arms in a handcuff. Medina cycled his taser two more times in the next thirty seconds. Pratt continued to struggle. When Lobos began aiding Goldstein in handcuffing Pratt, however, he stopped resisting and said “okay, okay, I’ll quit. . . . I’ll stop fighting.” Goldstein then secured both of Pratt’s arms in handcuffs. Pratt was patted down for weapons. None were found.

After Pratt was in handcuffs, Salazar aided Goldstein in lifting Pratt and walking him toward the patrol car. After a few steps, however, Pratt again began to resist and broke free from Goldstein’s grip. Salazar returned Pratt to the ground. While on the ground, Pratt began kicking at Goldstein and Salazar. Pratt kicked Goldstein in the groin twice during the exchange. Witnessing this exchange, Wilks retrieved a hobble restraint (i.e., handcuffs that attach to an arrestee’s ankles) from his patrol car.

As Pratt continued to struggle, Salazar, Lobos, and Medina attempted to aid Goldstein in controlling him. During this struggle

148. *Pratt v. Harris Cnty., Tex.*, 822 F.3d 174 (5th Cir. 2016).

Medina tasered Pratt once again, this time in “drive stun mode” (in which the taser leads make direct contact with the arrestee’s body), and Goldstein was able to gain control of Pratt’s legs. Goldstein then rolled Pratt onto his stomach, crossed Pratt’s legs, and bent them towards his buttocks. Salazar also placed his knee on Pratt’s back in order to maintain compliance. When Wilks returned with the hobble restraint, Goldstein aided him in attaching it to Pratt’s legs. Pratt ceased resisting and said “Ok I quit. I’m done.” Goldstein and Salazar also ceased physically restraining him. At this point, Pratt’s handcuffs were connected to the hobble restraint behind his back. Pratt was “hog-tied.”

EMS arrived at the scene. EMS paramedics requested that the hobble restraint and handcuffs be removed so CPR could be administered. Pratt did not have a pulse and had ceased breathing. Upon treatment, Pratt regained a pulse, but did not resume independent breathing until after arriving at the hospital. Pratt died the following morning.¹⁴⁹

Pratt died, among other factors, from positional asphyxiation as a result of the hog-tying his ankles to his wrists and prone restraint.¹⁵⁰

At the time of Pratt’s arrest, the HCSD had a policy that prohibited officers from using hog-tie restraints, prompting the HCSD to conduct an “In Custody Death Review” of Pratt’s death. The results were presented to a grand jury, and Goldstein, Medina, and Lopez were no-billed by the grand jury. A second internal investigation was conducted, reviewing specifically the use of the “hog-tying” restraint by Goldstein and Wilks. The Administrative Disciplinary committee found Goldstein and Wilks’s alleged misconduct “not sustained.”¹⁵¹

. . . Erony Pratt . . . brought this § 1983 cause of action alleging various violations of Pratt’s Fourth Amendment rights against individual officers and Harris County. The HCSD officers moved for summary judgment, asserting defenses of qualified immunity. Harris County also moved for summary judgment contending that Pratt failed to sufficiently plead *Monell* liability as a matter of law. On summary judgment, the district court granted qualified

149. *Id.* at 178-79 (citations omitted).

150. *Id.* at 179.

151. *Id.*

immunity to the HCSD officers, denied Pratt's *Monell* claims against Harris County, and dismissed the complaint.

On appeal, Pratt challenge[d] the district court's grant of qualified immunity, contending unconstitutional conduct by HCSD officers.¹⁵²

"The district court granted qualified immunity to HCSD officers in their individual capacity and denied Pratt's claims under *Monell*. Pratt appealed."¹⁵³ The Court of Appeals affirmed.¹⁵⁴

G. Sanders¹⁵⁵

This case arises out of the death of Natalie Sanders who died in custody at the Mesquite jail on May 26, 2017. On May 26, 2017, Natalie Sanders was a thirty-seven year old woman—daughter of Patricia Brannan and mother of Alyssa Sanders. Natalie was a carefree and happy child until she hit her teen years. Her military family moved every three years and that took its toll during Natalie's high school years. She eventually turned to drugs and would swing between trouble and working diligently to be drug free and get her life together.

On May 26, 2017, Ms. Sanders was waiting in a broken-down truck for her boyfriend to return. A resident of the area, suspicious of the truck, called the Mesquite police. The officers responding to the call were Jeremie Wood and Defendant Layton Winters, who arrived at the scene at approximately 8:45 a.m. . . .

After Ms. Sanders was in handcuffs, Officer Winters asked her a series of questions about whether she had any drugs on her person. He asked her if she had anything in her pockets such as meth or heroin. When Ms. Sanders paused, Officer Winters stated that was a "yes." . . . Ms. Sanders stated that she had a "pipe." When Officer Winters asked her where she had the pipe, Ms. Sanders reached around with her still cuffed right arm into her bra and pulled out a meth pipe and handed it to Officer Winters.

Officer Winters again asked Ms. Sanders whether she had any drugs on her. He asked about heroin and Ms. Sanders replied that she didn't do heroin. Winters responded with "what *do* you do?"

152. *Id.* at 179-80; citing *Pratt v. Harris Cnty., Tex.*, No. H-12-1770, 2015 U.S. Dist. LEXIS 4757, 2015 WL 224945 (S.D. Tex. Jan. 15, 2015).

153. *Pratt*, 822 F.3d at 177. See also *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

154. *Id.*

155. *Brannan v. City of Mesquite, Tex.*, No. 3:19-CV-1263-X, 2020 WL 7344125, slip op. (N.D. Tex. Dec. 14, 2020).

Ms. Sanders responded “meth.” Winters verified “meth?” Ms. Sanders affirmed. Despite her on the spot confession that she “did” meth and her possession of a meth pipe, neither officer conducted a search of Ms. Sanders’ person. Instead, Officer Winters placed Ms. Sanders in the back of his patrol car.

Shortly after being placed in the back of the patrol car, Ms. Sanders (unbelted) reached into her jacket pocket, pulled something out and placed it in the waistband of her pants. She then leaned back against the seat and the officers (who had been searching her belongings) seatbelted her in. Minutes before they arrived at the Mesquite police station, Ms. Sanders asked Officer Winters if she could have a drink of water when they arrived, and he told her yes. She then leaned very far forward, removed the object from her waistband and placed it in her mouth.

Minutes later, Officer Winters with Ms. Sanders arrived at the Mesquite police department sally port. After exiting the car, they began to walk to the jail entrance. Ms. Sanders stopped at a trash can along the way and began to spit into the trash can and make dry heaving movements. Officer Winters believed that Ms. Sanders had swallowed, or was attempting to swallow, drugs. He ordered her to spit them out, but she continued her swallowing attempts. Believing that she had swallowed narcotics, Winters repeatedly yelled, “spit out the dope!” Officer Winters apparently notified dispatch and reported that Ms. Sanders had swallowed a narcotic. Even the arrest report states that “[o]nce at the doors, Winters observed Sanders attempting to swallow an unknown item believed to be narcotics.” [emphasis omitted].

Officer Winters radioed to Officer Martin that he believed that Ms. Sanders had swallowed a baggie of narcotics and he needed assistance in the sally port. Officer Martin notified Officer Green that it was believed that Ms. Sanders had swallowed a baggie of narcotics and directed Officer Green to assist Officer Winters in the sally port.

Officer Green went to the sally port to assist Defendant Winters. Officer Green commanded Ms. Sanders to open her mouth and tried to physically pry her mouth open repeatedly saying “open your mouth! [“] Green was aware that a detainee’s refusal to open their mouth upon command was a red flag for ingestion of something illegal.

Investigator Moehring, who investigated the in-custody death of Ms. Sanders, reviewed the sally port video and noted that after

visibly swallowing something, Ms. Sanders “immediately begins to act as if she were under the influence of a substance.”

Officer Winters advised the jail supervisor, Defendant Lt. Kelly, that Ms. Sanders had likely swallowed drugs in the sally port.

The Mesquite Police Department Intake Screening Form for Ms. Sanders was filled out by Lt. Kelly at 9:45 a.m. The form asks “do you have any of the following conditions?” with a number of conditions that can be check marked. For Ms. Sanders, Lt. Kelly check marked “drug addiction” and next to that, hand-wrote “meth.”

Up to the point where she swallowed what we now know was a bag of meth, Ms. Sanders had been ambulatory, cooperative and articulate. . . .

After Ms. Sanders swallowed the baggie of meth in the sally port, her demeanor began to change. She was placed into a holding cell where she was interviewed by Defendant Kelly using a pre-printed form that asked questions about a detainee’s medical history. Ms. Sanders laid on her side in the cell but responded to most of the questions and told Kelly that she was addicted to “meth.” . . .

Sanders was then taken to the medical cell to be assessed by paramedics who had been contacted by the jail. She was thoroughly searched and then placed on a concrete bench, where she immediately slumped onto her side. . . .

The Mesquite Fire Department was contacted to dispatch paramedics to assess Ms. Sanders. . . . When the paramedics entered her cell, Ms. Sanders was curled into a ball on the bench, her arms covering her face. Mr. Palaciano asked her if she had swallowed anything. Ms. Sanders was unresponsive. . . . She had no verbal response and instead, slumped back over on the bench and curled into a fetal position.¹⁵⁶ . . .

[The paramedics] told the officers that they were not going to do anything for Ms. Sanders.¹⁵⁷ . . .

Despite knowing the level of Ms. Sanders’ distress, Martin did nothing to assist her and she died in her cell. . . .

156. Plaintiffs’ Fourth Amended Complaint at 15-17, 20-31, 33-34, 36, *Brannan*, 2020 WL 7344125, slip op. (No. 3:19-CV-1263-X).

157. *Id.* at 37.

Ms. Sanders . . . was found non-responsive with no pulse or breath. The paramedics were once again called, but it was too late. Ms. Sanders died from an overdose of methamphetamine. . . .

The Mesquite Police Department has a history and pattern of deliberate indifference to medical needs that has resulted in serious injury and death to its citizens. Its unconstitutional policies, customs and practices include, but are not limited to not to take detainees to the hospital even if they are in a medical crisis; not to respond to medical necessity; not to properly monitor detainees/inmates; not to have a process for decision-making as related to medical care for detainees between paramedics and officers; to ignore detainee medical crises; and to dismiss substance abuse induced medical problems as not meriting medical care.¹⁵⁸

The District Court dismissed the case against the City, paramedics, and all officers involved, save Winters and Kelly, on qualified immunity on 12(b)(6) motion.¹⁵⁹ The remaining case is pending trial.¹⁶⁰

*H. Schrader*¹⁶¹

Schrader was driving his huge and heavy welding truck to his girlfriend's house.¹⁶² En route, he saw police lights behind him, and not realizing that he was the one the officers were trying to pull over, he looked for a safe place to get out of the way so that they could pass. The officer alleged that Schrader had been racing (in a welding truck) and was evading arrest.¹⁶³ He arrested Schrader on felony charges.¹⁶⁴ Schrader was restrained in handcuffs despite the fact that he had not been racing in a welding truck nor evading rest and had committed no crime and was complying with instructions.¹⁶⁵ The officer then proceeded to do a "leg sweep" on Schrader.¹⁶⁶ But because he was illegally handcuffed, Schrader was unable to break his fall, which resulted in a severely broken leg.¹⁶⁷ All this was caught on dashcam recordings. Schrader sustained several broken

158. *Id.* at 47-48, 50.

159. *Brannan*, 2020 WL 7344125 at *1, *9.

160. *Id.* at *1.

161. *Schrader v. Ruggles*, No. 20-11257, 2021 WL 2843848 (5th Cir. Jul. 7, 2021).

162. Brief for Appellant at 6, *Schrader*, 2021 WL 2843848 (No. 20-11257).

163. *Id.*; *Schrader*, 2021 WL 2843848, at *1.

164. Brief for Appellant, *supra* note 162, at 19.

165. *Id.* at 6; *Schrader*, 2021 WL 2843848, at *1.

166. *Schrader*, 2021 WL 2843848, at *1.

167. Brief for Appellant, *supra* note 162, at 6; *Schrader*, 2021 WL 2843848, at *1.

bones, including a spiral fracture of the left tibia and the widely displaced fracture in the left fibula.¹⁶⁸

The district court granted the defense’s motion for summary judgment from which an appeal was taken to the Fifth Circuit Court of Appeals on the grounds that “[t]he District Court erred in granting summary judgment for Ms. Ruggles on the inattention to medical needs claims when there remained qualified immunity issues of fact related to deliberate indifference and knowledge of substantial harm.”¹⁶⁹

The United States Court of Appeals for the Fifth Circuit affirmed, stating that “Schrader fail[ed] to establish a sufficiently serious deprivation.”¹⁷⁰

*I. Timpa*¹⁷¹

National headlines read, “MAN IN MENTAL CRISIS ALREADY IN HANDCUFFS”¹⁷²

On August 10, 2016, Anthony “Tony” Timpa was at New Fine Arts located . . . [in] Dallas, TX. . . . While at that location, he contacted 9-1-1 telling the dispatcher that he feared for his safety. He further told the dispatcher that he suffered from anxiety, schizophrenia, had been off of his medication, and was unarmed. The call gets disrupted for some reason, and the dispatcher calls him back. Throughout both calls, Timpa states he is anxious, and afraid. At times, his statements are incoherent, and it is more than apparent that he is disoriented. While outside of the store, Tony suddenly and inexplicably to onlookers runs into the parking lot, as depicted on a surveillance camera. Upon leaving the store, Tony was pursued by Sammie Washington, who was working in the course and scope of his employment for Terron Security Services, Inc., a [s]ecurity [c]ompany employed by, or contracted by, New Fine Arts.

Timpa crosses near the 1700 block of Mockingbird Lane multiple times in a disoriented panic. Concerned for his own safety, he flags down a security guard. Tony’s behavior remains erratic, as other 9-1-1 callers indicate. . . . [T]he two security guards handcuff him on the ground. Officers from the Dallas Police Department

168. Brief for Appellant, *supra* note 162, at 22.

169. *Schrader*, 2021 WL 2843848, at *1; Brief for Appellant, *supra* note 162, at 1.

170. *Schrader*, 2021 WL 2843848, at *3.

171. *Timpa v. Dillard*, 20 F.4th 1020 (5th Cir. 2021).

172. Plaintiffs’ Third Amended Complaint at 14, *Timpa*, 20 F.4th 1020 (No. 20-10876).

begin arriving on the scene. First on the scene is Sgt. Kevin Mansell who arrives near 10:30:36 PM. Some seven minutes later at 10:37:46 PM, Officers Justin Dillard, and Danny Vasquez arrive. Next come Officers Domingo Rivera and Raymond Dominguez, three minutes later at 10:40:13 and 10:40:41, respectively.¹⁷³

THE DEFENDANTS SMOTHER TONY FOR 14 MINUTES

Officers Dillard and Vasquez approach Timpa, who is handcuffed, and laying on the ground. Their body cameras record Timpa telling the officers that, “You’re going to kill me.” (Vasquez 0:50-0:60). Dillard tells them that he is not going to do so, but then he and other officers proceed to roll Timpa onto his chest face down in the grass. Once face down, Vasquez puts his knee on Timpa’s left shoulder, and pins it to the ground for approximately 160 seconds. (Dillard 0:50-3:30). Dillard puts his knee into the back of Anthony Timpa, and pins him with his bodyweight. Dillard likewise puts [his] hands on Timpa’s shoulders, and presses them into the ground. As Vasquez and his own bodycam depicts, Dillard maintains this position for approximately 14 minutes and 7 seconds. (Vasquez 1:30-15:37). Periodically, Dillard applied additional force into Timpa’s back. (Vasquez 2:03, 4:28, 8:40). While Dillard and Vasquez pin down Timpa’s torso, Defendant Johnson puts his bodyweight on Timpa’s thighs, and pulls and holds Timpa’s feet and ankles forward at an angle. (Vasquez 1:31-3:47). . . . The body cameras vividly depict the horror that unfolds during these minutes. Anthony Timpa repeatedly tells the officers that they are going to “kill me,” and “don’t hurt me.” (e.g., Vasquez 2:30-2:35). Likewise, he makes repeated cries for help. (Vasquez 3:10, 3:40-3:45).¹⁷⁴

“HIS NOSE IS BURIED.”

In multiple places, the audio, and video makes plain that the Defendants recklessly, and knowingly were killing Tony Timpa. Dillard does more than crush Tony’s lungs with his body weight. He drives his neck, head, and face into the grass and dirt.¹⁷⁵

OFFICERS RIDICULE A DYING MAN RATHER THAN RENDER AID

Tony continues to gasp, gag, and groan. (Vasquez 9:15-9:35). Meanwhile, the officers surrounding him laugh, and jeer. . . . After approximately 11 and half minutes with Dillard’s knee square in his

173. *Id.* at 15-22.

174. *Id.* at 25-29, 32-33.

175. *Id.* at 37-38.

back, Timpa goes completely unresponsive. (Vasquez 11:50). He is no longer gasping, or mumbling. He is completely silent. It is not until more than a minute later, [that] Dillard inquires if Tony is conscious. He does not dislodge his knee, or move off of the unresponsive Timpa. Even after realizing that Tony is unresponsive, Dillard continues to keep his bodyweight on top of Tony for an additional two and a half minutes. (Vasquez 13:02-15:37).¹⁷⁶

OFFICERS FINALLY RECOGNIZE THEY HAVE KILLED TONY

The officers then discuss with EMS workers what to do with Tony. It is decided then that they will place him on a gurney, and arrange transportation. . . . “I hope I didn’t kill him,” Dillard begins. (Dillard 15:55). Some of the officers begin to laugh. (Dillard 16:00-16:05). . . . The officers load Tony into the ambulance. Shortly thereafter, one of the EMS workers tells, Sgt. Kevin Mansell, “He’s dead.” (Dillard 17:00).¹⁷⁷

Because Mr. Timpa died in police custody, the Dallas Police Department was required to complete a Custodial Death Report, and submit it to the Texas Attorney General. . . . The Dallas Police Department’s Custodial Death Report (“CDR”) states that Mr. Timpa appeared intoxicated . . . [but] never threatened the officers involved. The CDR states that Mr. Timpa never resisted being handcuffed or arrested by the officers involved[,] . . . never attempted to escape or flee from the officers involved[,] . . . never attempted to hit or fight with the officers involved[,] . . . [and] never used a weapon to threaten or assault the officers involved.¹⁷⁸

MEDICAL EXAMINER CONCLUDES TONY’S DEATH WAS A HOMICIDE

Dallas County Medical Examiner Dr. Emily Ogden shows that Mr. Timpa’s death was the result of excessive physical restraint. Dr. Ogden concluded the manner of Tony’s death was a “Homicide.” . . . Dr. Emily Ogden likewise told Vicki Timpa that an officer restrained by placing a knee on Mr. Timpa’s back for some thirteen minutes while Mr. Timpa lay face-down restrained in handcuffs.¹⁷⁹

176. *Id.* at 44, 46-47 (citations omitted).

177. Plaintiffs’ Third Amended Complaint, *supra* note 172, at 49, 51-52, 54.

178. *Id.* at 59, 61-66 (citations omitted).

179. *Id.* at 68-69, 71.

The district court granted the motion for summary judgment and dismissed it based on qualified immunity.¹⁸⁰ The United States Fifth Circuit Court of Appeals affirmed in part and reversed in part and remanded to the trial court for trial.¹⁸¹ The *Timpa* case has gained national recognition, and it has been featured on many news outlets.¹⁸²

V. OTHER CASES

A. *Allah*¹⁸³

Petitioner, Almighty Supreme Born Allah, was deprived of his constitutional rights when Respondents kept him in solitary confinement for over a year as a pretrial detainee. It was clearly established at the time of this deprivation that pretrial detainees may not be subjected to punitive treatment, and that the dungeon-like conditions in which Allah was kept were punitive because they served no legitimate purpose in his case.¹⁸⁴

“Allah was an inmate with the Connecticut Department of Correction (“DOC”).”¹⁸⁵ Allah was assigned to “Administrative Segregation” due to receiving a high-risk score.¹⁸⁶

Such segregation entails restrictive housing, close management, and “physical separation from the general prison population.” . . . The sole justification for his placement was that he had been in Administrative Segregation when he was discharged earlier that year, and it was DOC policy to continue segregating such detainees on their return. . . . Therefore, his restrictions were purely punitive, and violated his due process rights. But in a split decision, the court held that the Defendants were entitled to qualified immunity. The

180. *Timpa*, 20 F.4th at 1025.

181. *Id.*

182. Bernie Pazanowski, *Dallas Cop Must Face Suit Over Man Killed From Kneeling Tactic*, BLOOMBERG LAW (Dec. 16, 2021, 3:47 PM), <https://news.bloomberglaw.com/us-law-week/dallas-cop-must-face-suit-over-man-killed-from-kneeling-tactic>; Joanna C. Schwartz, *He Died After a Cop Kneeled on His Neck for 14 Minutes. Now, His Family Can Finally Sue*, USA TODAY, <https://www.usatoday.com/story/opinion/2021/12/29/police-force-officers-killed-him-when-he-asked-help/9024452002/> (last visited Jul. 7, 2022); Jacob Vaughn, *Federal Appeals Court: Dallas Police in Tony Timpa Case Not Shielded by Qualified Immunity*, DALLAS OBSERVER (Dec. 17, 2021, 4:00 AM), <https://www.dallasobserver.com/news/federal-appeals-court-dallas-police-in-tony-timpa-case-not-shielded-by-qualified-immunity-13032294>.

183. *Allah v. Milling*, 876 F.3d 48 (2d Cir. 2017).

184. Brief of the Cato Institute as Amicus Curiae Supporting Petitioner at *2-3, *Allah*, 876 F.3d 48 (No. 16-1443-pr) (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)).

185. *Id.* at *4.

186. *Id.* at *4-5.

majority acknowledged that “the extremity of the conditions imposed upon Allah come perilously close to the Supreme Court’s description of ‘loading a detainee with chains and shackles and throwing him in a dungeon.’” Nevertheless, the majority determined that Allah’s rights were not clearly established, because “Defendants were following an established DOC practice,” and “[n]o prior decision of the Supreme Court or of this Court . . . has assessed the constitutionality of that particular practice.”¹⁸⁷

*B. Baxter v. Bracey.*¹⁸⁸

In early 2014, two Nashville police officers, Brad Bracey and Spencer Harris, were pursuing a homeless man named Alexander Baxter in response to reports that Baxter had been trying to burglarize unlocked houses. The officers, along with a police dog, followed Baxter into a residential basement and found Baxter sitting on the ground with his hands in the air. Even though Baxter had clearly surrendered at this point, however, Harris—after waiting about 5 to 10 seconds—released the dog to attack Baxter. The police dog bit Baxter in his armpit (which was exposed, as his hands were raised in surrender), and Baxter required emergency medical treatment at a hospital.¹⁸⁹

Without criminal prosecution, people who are injured or killed by police, or the families of those victims, often resort to civil litigation to seek justice.¹⁹⁰ Yet there have been numerous cases in which a plaintiff was seriously injured or killed as a result of police misconduct but could not recover damages because of qualified immunity.¹⁹¹ For plaintiffs to prevail, they must show that the specific nature of the civil rights violation was “clearly established” in a prior court ruling.¹⁹² For example, in 2020, the Supreme Court of the United States threw out *Baxter v. Bracey*, in which a man sought damages after an officer ordered a police dog to attack him, even though he had surrendered and was seated with his arms in the air.¹⁹³ The plaintiff in *Baxter* was unable to point to a prior case with similar facts.¹⁹⁴

187. *Id.* at *4-6 (citing *Allah*, 876 F.3d at 51-52, 58-60; quoting *Wolfish*, 441 U.S. at 539 n.20).

188. *Baxter v. Bracey*, 751 F. App’x 869 (6th Cir. 2018).

189. Schweikert, *supra* note 9, at 7.

190. *Id.* at 1.

191. *Id.* at 7, 11-12; see, e.g., *Pratt v. Harris Cnty., Tex.*, 822 F.3d 174, 184 (5th Cir. 2016).

192. Schweikert, *supra* note 9, at 6-7.

193. *Baxter v. Bracey*, 140 S. Ct. 1862 (2020); Schweikert, *supra* note 9, at 7.

194. Schweikert, *supra* note 9, at 7.

*C. Taylor*¹⁹⁵

A state inmate brought § 1983 action alleging that prison officials housed him in unconstitutional conditions and were deliberately indifferent to his health and safety, in violation of his Eighth Amendment rights, and sought damages, as well as declaratory and injunctive relief.¹⁹⁶ The petitioner in this case, Trent Taylor, was an inmate in the custody of the Texas Department of Criminal Justice in Lubbock, Texas.¹⁹⁷ Taylor alleged that, for six full days in September 2013, correctional officers confined him in a pair of shockingly unsanitary cells.¹⁹⁸ The first cell was covered, nearly floor to ceiling, in “massive amounts of feces”: all over the floor, the ceiling, the window, the walls, and even “packed inside the water faucet.”¹⁹⁹ Fearing that his food and water would be contaminated, Taylor did not eat or drink for nearly four days.²⁰⁰ Correctional officers then moved Taylor to a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes.²⁰¹ Taylor held his bladder for over 24 hours, but he eventually (and involuntarily) relieved himself, causing the drain to overflow and raw sewage to spill across the floor.²⁰² Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage.²⁰³

The Court of Appeals for the Fifth Circuit properly held that such conditions of confinement violate the Eighth Amendment’s prohibition on cruel and unusual punishment.²⁰⁴ However, based on its assessment that “[t]he law wasn’t clearly established” that “prisoners couldn’t be housed in cells teeming with human waste. . . for only six days,” the court concluded that the prison officials responsible for Taylor’s confinement did not have “‘fair warning’ that their specific acts were unconstitutional.”²⁰⁵

The Supreme Court of the United States held that the Court of Appeals for the Fifth Circuit erred in granting the officers qualified immunity on this

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

196. *Taylor v. Stevens*, 946 F.3d 211, 216 (5th Cir. 2019).

197. *Id.* at 216.

198. *Id.* at 216, 218 n.6.

199. *Id.* at 218.

200. *See id.* at 218 (one officer, upon placing Taylor in the first feces-covered cell, remarked to another that Taylor was “going to have a long weekend”); *see also id.* at 219 n.9 (another officer, upon placing Taylor in the second cell, told Taylor he hoped Taylor would “f***ing freeze”).

201. *Taylor*, 946 F.3d at 218.

202. *Id.* at 219.

203. *Id.* at 218, 221-22.

204. *Id.* at 220.

205. *Id.* at 222 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

basis.²⁰⁶ The Supreme Court has previously explained that “[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.”²⁰⁷ But 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.²⁰⁸ The Fifth Circuit identified no evidence that the conditions of Taylor’s confinement were compelled by necessity or exigency.²⁰⁹ Nor does the summary judgment record reveal any reason to suspect that the conditions of Taylor’s confinement could not have been mitigated, either in degree or duration.²¹⁰ And although an officer-by-officer analysis will be necessary on remand, the record suggests that at least some officers involved in Taylor’s ordeal were deliberately indifferent to the conditions of his cells.²¹¹ Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor’s conditions of confinement offended the Constitution.²¹² The Supreme Court granted “Taylor’s petition for a writ of certiorari, vacate[d] the judgment of the Court of Appeals for the Fifth Circuit, and remand[ed] the case for further proceedings consistent with . . . [its] opinion.”²¹³

The Harvard Law Review analysis²¹⁴ of the *Taylor* case reveals that,

[f]ollowing the high-profile police killings of spring 2020, more eyes have turned to holding officers accountable and the ways in which legal doctrines like qualified immunity prevent that from

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

207. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (citing *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

208. See *Hope*, 536 U.S. at 741 (explaining that “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.”) (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)); see also *id.* at 745 (holding that “[t]he obvious cruelty inherent” in putting inmates in certain wantonly “degrading and dangerous” situations provides officers “with some notice that their alleged conduct violate[s]” the Eighth Amendment).

209. See generally *Taylor*, 946 F.3d 211.

210. See generally *id.*

211. *Id.* at 218-20.

212. See *Taylor v. Riojas*, 141 S. Ct. 52, 54 n.2 (2020) (“In holding otherwise, the Fifth Circuit noted ‘ambiguity in the caselaw’ regarding whether ‘a time period so short [as six days] violated the Constitution.’ But the case that troubled the Fifth Circuit is too dissimilar, in terms of both conditions and duration of confinement, to create any doubt about the obviousness of Taylor’s right.”) (quoting *Taylor*, 946 F.3d at 222); see *Davis v. Scott*, 157 F.3d 1003, 1004 (5th Cir. 1998) (the court found “no Eighth Amendment violation where inmate was detained for three days in dirty cell and provided cleaning supplies”).

213. *Taylor*, 141 S. Ct. at 54.

214. *Qualified Immunity – Obviousness Standard – Taylor v. Riojas*, 135 HARV. L. REV. 421-22 (2021) (citations omitted).

happening. Qualified immunity has come under fire from academics, judges, practitioners, legislators, and the public alike for unjustly precluding remedies for violations of people's constitutional rights. Last term, in *Taylor v. Riojas*, the Supreme Court held that correctional officers were not entitled to qualified immunity because the conditions of confinement alleged by the petitioner were so horrific that any reasonable officer should have known they were unconstitutional. In doing so, the Court—for the first time – overturned a grant of qualified immunity based on the obviousness of the constitutional violation.²¹⁵

*D. Latits v. Phillips*²¹⁶

In June 2010, Laszlo Latits was stopped by Detroit-area police for turning his car the wrong way on a divided boulevard. A police officer testified that he saw bags in the car that he suspected contained drugs, and the dashboard camera shows the officer shining his flashlight into the car and raising his gun to Latits's head. Latits then drove away, and the police pursued. Another officer, Lowell Phillips, repeatedly rammed Latits' car—in violation of department policy and a direct order not to use this maneuver—and eventually drove Latits off the road. Phillips then jumped out of his car, ran toward Latits's, and shot him three times in the chest, killing him. Latits's widow sued Phillips under Section 1983, and the Sixth Circuit held that Phillips had violated Latits's Fourth Amendment rights because no reasonable officer would have concluded that Latits “present[ed] an imminent or ongoing danger . . . [therefore,] Officer Phillips's use of deadly force was objectively unreasonable.”²¹⁷

*E. Jessop v. City of Fresno*²¹⁸

[In *Jessop*,] [p]olice officers executing a search warrant in relation to alleged illegal gambling machines produced an inventory sheet stating that they had seized \$50,000 from the suspects. But the officers had actually seized \$151,380 in cash and another \$125,000 in rare coins and simply pocketed the difference between

215. *Id.* (citations omitted).

216. *Latits v. Phillips*, 878 F.3d 541 (6th Cir. 2017).

217. Schweikert, *supra* note 9, at 7.

218. *Jessop v. City of Fresno*, 918 F.3d 1031 (9th Cir. 2019).

what they seized and what they reported—effectively using a search warrant to steal more than \$225,000.

The Ninth Circuit granted immunity to the officers. The court noted that while “the theft” of “personal property by police officers sworn to uphold the law” may be “morally wrong,” the officers could not be sued for the theft because the Ninth Circuit had never issued a decision specifically involving the question of “whether the theft of property covered by the terms of a search warrant, and seized pursuant to that warrant, violates the Fourth Amendment.”²¹⁹

*F. Corbitt v. Vickers*²²⁰

[In *Corbitt v. Vickers*,] [p]olice officers pursued a criminal suspect, Christopher Barnett, into the backyard of Amy Corbitt (who had no relation to Barnett), at which time one adult and six minor children were in the yard. The officers demanded they all get on the ground; everyone immediately complied, and the police took Barnett into custody. But then the Corbitt family’s dog Bruce walked into the scene. Without provocation or any immediate threat, Michael Vickers, a deputy sheriff, fired his weapon at Bruce. His first shot missed, and Bruce retreated under the home. About 10 seconds later, Bruce reappeared, and Vickers fired again—missing once more, but this time striking Corbitt’s 10-year-old child, who was still lying on the ground, only 18 inches away from the officer. The child suffered severe pain and mental trauma and is receiving ongoing care from an orthopedic surgeon.

The Eleventh Circuit granted qualified immunity to Vickers on the grounds that no prior case law involved the “unique facts of this case.” Although the panel majority dutifully recited United States Supreme Court precedent purporting to say that overcoming qualified immunity does not require that “the very action in question has previously been held unlawful,” the court went on to say that “[n]o case capable of clearly establishing the law for this case holds that a temporarily seized person—as was [the child] in this case—suffers a violation of his Fourth Amendment rights when an officer shoots at a dog—or any other object—and accidentally hits the person.” One judge did dissent, and would have denied qualified immunity on the seemingly obvious grounds that “no

219. Schweikert, *supra* note 9, at 11.

220. *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019).

competent officer would fire his weapon in the direction of a nonthreatening pet while that pet was surrounded by children,” but that position did not prevail.²²¹

*G. Kelsay v. Ernst*²²²

Melanie Kelsay was swimming at a public pool with a friend, engaged in what she called “horseplay,” but some onlookers thought her friend might be assaulting her and called the police. The police arrested her friend and put him in a patrol vehicle, even though she repeatedly told them he hadn’t assaulted her; they then decided to arrest her, the alleged victim of this non-crime, because she was “getting in the way of the patrol vehicle door.” While talking with Deputy Matt Ernst, Kelsay saw that her daughter had gotten into an argument with a bystander and tried to go check on her. Ernst grabbed her arm and told her to “get back here,” but released her. Kelsay then said she needed to go check on her daughter and again began walking toward her. At that point, without giving any further instructions, Ernst ran up behind her, grabbed her, and slammed her to the ground in a “blind body slam” maneuver, knocking her unconscious and breaking her collarbone.

A divided panel of the Eighth Circuit granted qualified immunity to Ernst. The Eighth Circuit then agreed to rehear the case en banc and affirmed the panel’s grant of immunity in an 8–4 decision. The majority noted that there were no prior cases involving the “particular circumstances” of this case; that is, no prior cases specifically held that “a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy’s instruction to ‘get back here’ and continued to walk away from the officer.” The principal dissent by Chief Judge Lavenski Smith noted that that the Supreme Court has never required “a case directly at point,” and that here, an ample body of case law would have “put a reasonable officer on notice that the use of force against a non-threatening misdemeanor who was not fleeing, resisting arrest, or ignoring other commands violates that individual’s right

221. Schweikert, *supra* note 9, at 11. See also *Corbitt*, 929 F.3d at 1323 (Wilson, J., dissenting). On June 15, 2020, the Supreme Court decided not to review this case. *Corbitt v. Vickers*, 141 S. Ct. 110 (2020) (petition for writ of certiorari denied).

222. *Kelsay v. Ernst*, 933 F.3d 975, 978 (8th Cir. 2019).

to be free from excessive force.” But again, this position did not prevail.²²³

VI. THE PRACTICAL EFFECT (WHAT IS CLEARLY ESTABLISHED LAW?)²²⁴

The Courts Of Appeals are divided in their application of the “clearly established law” standard. As the amicus curiae brief submitted to the Supreme Court in the Taylor case states, “the amorphous nature of the ‘clearly established law’ test has precluded the doctrine from effecting the stability and predictability that normally justify respect for precedent.”²²⁵ Moreover, the courts have already treated qualified immunity as a judge-made, common law doctrine and thus appropriate for revision.²²⁶ Continued adherence to the doctrine would not serve valid reliance interests but would only prolong the inability of citizens to vindicate their constitutional rights.²²⁷ In short, its utility has expired. Jay Schweikert calls qualified immunity “one of the most obviously unjustified legal doctrines in our nation’s history.”²²⁸ He justifies those claims because the doctrine is not supported by constitutional, statutory, or common law.²²⁹ The point of my paper is to establish that, at least from my experience, victims of egregious misconduct have no legal remedy unless there happens to be a decided case that directly involves the exact same sort of misconduct the victims suffered. It doesn’t take a rocket scientist to understand the absurdity of such a requirement. For example: let’s say that no other officer has ever stood over an unarmed teenager who is inside his own home and fired five shots into the teen’s back, thus killing him dead in front of his mother, then this doctrine would excuse his conduct? This “free pass” instead of accountability undermines the very purpose of the Civil Rights Act.²³⁰ How does such a doctrine allow the public to have the degree of public trust and credibility in law enforcement that is required to keep civilization from turning into anarchy?

According to Schweikert, “[t]he crucial takeaway from decades of Supreme Court jurisprudence is that ‘clearly established law’ cannot be

223. Schweikert, *supra* note 9, at 11-12.

224. Let me acknowledge that we have won many cases. These cases, however, do not add to our examination of the overall impact of qualified immunity.

225. Brief of Cross-ideological Groups Dedicated to Ensuring Official Accountability, Resorting to the Public’s Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner at 6, *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (No. 19-1261).

226. *See Pearson v. Callahan*, 555 U.S. 223, 233-34 (2009).

227. Schweikert, *supra* note 9, at 2.

228. *Id.*

229. *Id.* at 1-2.

230. *Id.* at 2-3.

defined at a high level of generality; instead, the law must be ‘particularized’ to the facts of the case.”²³¹ I agree with Schweikert that the most straightforward and sensible solution is to completely abolish the qualified immunity doctrine.²³² Whatever happened to the adage “no one is above the law”? As it happens, I am loathing, and sad to say is that many are above the law.

In recognition of the reality of this proposition, New Mexico in 2021 took the bold step of enacting a state Civil Rights Act, which eliminated the defense of qualified immunity.²³³ Colorado is taking a similar step, although their language is a bit different than the New Mexico version.²³⁴ Some states are following New Mexico, while other states are doubling down on the dogmatic support of qualified immunity.²³⁵ Make no mistake though; qualified immunity is a very hotly debated topic.²³⁶

B. Call To Action

There has long been a discussion of ending or significantly amending the qualified immunity doctrine.²³⁷ Congress has introduced legislation to end qualified immunity, and Supreme Court justices of vastly different judicial philosophies have also endorsed revisiting police officers’ liability shield.²³⁸ For now, however, it remains the doctrine of the courts that plaintiffs bringing a Section 1983 claim must first show that the public official’s unconstitutional actions were very similar to a previous case in which qualified immunity was denied.²³⁹ While the Supreme Court recently declined to grant a handful of petitions calling for qualified immunity to be

231. *Id.* at 7 (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017)).

232. Schweikert, *supra* note 9, at 2.

233. N.M. STAT. ANN. § 41-4A-4 (2022).

234. COLO. REV. STAT. § 13-21-131(2)(b) (2022).

235. Jay Schweikert, *Qualified Immunity*, A.B.A. (Dec. 17, 2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/ [hereinafter *Qualified Immunity, A.B.A.*]; Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill*, WASH. POST (Oct. 7, 2021, 6:00 AM), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html.

236. Schweikert, *Qualified Immunity, A.B.A.*, *supra* note 235.

237. Adam M. Taylor, & Ayanna Alexander, *Calls to End Qualified Immunity Boosted by Chauvin’s Conviction*, BLOOMBERG LAW (Apr. 21, 2021, 6:37 PM) <https://news.bloomberglaw.com/business-and-practice/calls-to-end-qualified-immunity-boosted-by-chauvins-conviction>.

238. Schweikert, *Qualified Immunity, A.B.A.*, *supra* note 235.

239. Osagie K. Obasogie & Anna Zaret, *Plainly Incompetent: How Qualified Immunity Became an Exculpatory Doctrine of Police Excessive Force*, 170 U. PA. L. REV. 407, 411 (2022).

reconsidered,²⁴⁰ whether it should do so in a future case remains an open and pressing question.²⁴¹

VII. THE ARGUMENTS AGAINST QUALIFIED IMMUNITY

Several arguments against qualified immunity as it currently stands include:

- Liability is necessary to hold officers accountable for excessive force . . . [and to thwart officers from] maliciously violat[ing] the Fourth Amendment and other Constitutional rights of citizens without any cost to themselves[.] . . .
- The fear of rampant lawsuits against police are overblown.
- The current doctrine as applied today in courts leads to hairsplitting and it is often impossible for plaintiffs to meet the burden.
- The doctrine is applied inconsistently and can greatly depend on the judge or judges involved in the case.²⁴²

The sensible result of the existence of the qualified immunity doctrine is that it both denies justice to victims and also ossifies any further development of the law.²⁴³ Indeed, “if courts refuse to resolve legal claims because the law was not clearly established” at the time of the case, then, logically, the law never has the opportunity to “become clearly established”.²⁴⁴ “[I]f courts grant qualified immunity without at least deciding the merits question, then the same defendant could continue committing exactly the same misconduct indefinitely—and never be held accountable.”²⁴⁵

A. Pullback?

In the past several years the Supreme Court has attempted to justify qualified immunity on traditional grounds, but many members of the Court

240. See generally *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (petition for writ of certiorari denied); *Corbett*, 141 S. Ct. 110 (petition for writ of certiorari denied); *Zadeh v. Robinson*, 141 S. Ct. 110 (petition for writ of certiorari denied).

241. See *Baxter*, 140 S. Ct. at 1865 (Thomas, J., dissenting from the denial of certiorari) (“I continue to have strong doubts about our §1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition for certiorari.”).

242. *Both Sides of the Debate*, *supra* note 28.

243. Schweikert, *supra* note 9, at 8.

244. *Id.*

245. *Id.*

have come to grips with the fact that the modern qualified immunity doctrine lacks historical grounding:²⁴⁶

- In the 2020 case *Taylor v. Riojas*, discussed above, the Court in a per curiam opinion created the obviousness doctrine as an exception to qualified immunity.²⁴⁷
- “In the 2018 case *Kisela v. Hughes*, Justice Sonia Sotomayor dissented, noting that qualified immunity has become ‘an absolute shield for law enforcement officers’ that has ‘gutt[ed] the deterrent effect of the Fourth Amendment.’”²⁴⁸
- “In the 2017 case *Ziglar v. Abbasi*, Justice Clarence Thomas wrote in a concurring opinion that ‘[i]n further elaborating the doctrine of qualified immunity . . . we have diverged from the historical inquiry mandated by the statute.’”²⁴⁹
- “In the 1998 case *Crawford-El v. Britton*, Justice Antonin Scalia dissented, saying, ‘our treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume.’”²⁵⁰
- “And in the 1992 case *Wyatt v. Cole*, Justice Anthony Kennedy wrote a concurring opinion, acknowledging that ‘[i]n the context of qualified immunity . . . we have diverged to a substantial degree from the historical standards.’”²⁵¹

“In short, qualified immunity has become nothing more than a ‘freewheeling policy choice’ that is at odds with Congress’s judgment in enacting Section 1983.”²⁵²

B. Crisis of Accountability in Law Enforcement

In the context of law enforcement officers, qualified immunity has been in the public view dating all the way back to the police beating Rodney King.²⁵³ Because the public can now view the facts that allegedly give rise to qualified immunity, decent and well-trained officers are hurt and

246. *Id.* at 6.

247. *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020).

248. Schweikert, *supra* note 9, at 6 (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting)).

249. *Id.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment)).

250. *Id.* (quoting *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting)).

251. *Id.* (quoting *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring)).

252. *Id.* at 3; *Cole*, 504 U.S. at 170 (Kennedy, J., concurring) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)); Schweikert, *supra* note 9, at 3.

253. See generally LOU CANNON, OFFICIAL NEGLIGENCE: HOW RODNEY KING AND THE RIOTS CHANGED LOS ANGELES AND THE LAPD (1997).

disadvantaged by those officers who are improperly trained and act with ill motives.²⁵⁴ Qualified immunity erodes the public trust in the police force globally, not just bad police officers, by depriving officers of the public trust and confidence that is necessary for them to do their job safely and effectively.²⁵⁵ Although only a subset of police officers are involved in fatal encounters each year, that subset is still responsible for an astronomical amount of fatalities in “absolute terms.”²⁵⁶ Schweikert points out that,

between 2015 and 2017, police officers fatally shot nearly a thousand Americans each year, with tens of thousands more wounded. And the widespread prevalence of cellphones, combined with the ability to share videos on YouTube and other social media, means that footage of police shootings are being documented and shared like never before. It is therefore unsurprising that, as word and video of police misconduct has spread, faith in law enforcement has plummeted. Indeed, in 2015, Gallup reported that public trust in police officers had reached a 22-year low.²⁵⁷

Due to many recent events, including the unjustified murder of George Floyd at the hands of police officers, the percentage of the general public that trusts police officers continues to sink.²⁵⁸

C. Widespread Judicial Criticism

“Even though qualified immunity is a judicial invention, its legal, practical, and moral infirmities have not gone unnoticed by members of the judiciary.”²⁵⁹ In addition to current and former United States Supreme Court justices who have criticized qualified immunity, a diverse spectrum of

254. Jay Schweikert et al., *How Qualified Immunity Hurts Law Enforcement*, CATO INST., <https://www.cato.org/study/how-qualified-immunity-hurts-law-enforcement> (last visited July 7, 2022).

255. *Id.*

256. Schweikert, *supra* note 9, at 12 (citing Gene Demby, *Some Key Facts We've Learned about Police Shootings over the Past Year*, NAT'L PUB. RADIO (Apr. 13, 2015)).

257. *Id.* at 12 (citing Julie Tate et al., *supra* note 115; Nathan DiCamillo, *About 51,000 People Injured Annually by Police, Study Shows*, NEWSWEEK (Apr. 19, 2017) <https://www.newsweek.com/51000-people-injured-annually-police-586524>; Wesley Lowery, *On Policing, the National Mood Turns Toward Reform*, WASH. POST (Dec. 13, 2015); Jeffery M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015) <https://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx>).

258. See generally Desmond Ang et al., *Police Violence Reduces Civilian Cooperation and Engagement with Law Enforcement*, HARV. KENNEDY SCH. (Sept. 8, 2021), <https://www.hks.harvard.edu/publications/police-violence-reduces-civilian-cooperation-and-engagement-law-enforcement>.

259. Schweikert, *supra* note 9, at 13.

lower court judges have criticized qualified immunity as well, with many asking the Supreme Court to abolish qualified immunity altogether.²⁶⁰

Jay Sweikert mentions several lower judges that have criticized qualified immunity in his article, quoted below:

Judge Don Willett, a Trump appointee to the Fifth Circuit, explained how “[t]o some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly,” and he sharply noted that “this entrenched, judge-created doctrine excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations.”²⁶¹

Judge Willett of the Fifth Circuit explained in a recent opinion that this creates a ‘Catch-22’ for civil rights plaintiffs.²⁶² Because courts often take what Willett called the “simpler” route of resolving a case based on the “clearly established” inquiry—rather than engaging in the “knotty constitutional inquiry” of whether the officials violated the Constitution—*Pearson* has resulted in fewer precedents finding constitutional violations.²⁶³ In turn, as Willett put it, “[n]o precedent = no clearly established law = no liability.”²⁶⁴ And according to a recent study conducted by Reuters: “Plaintiffs in excessive force cases against police have had a harder time getting past qualified immunity since [*Pearson*].”²⁶⁵

Judge James Browning, a George W. Bush appointee to the District of New Mexico, has issued several opinions that include a blistering criticism of the Supreme Court’s “clearly established law” standard, and cites the Cato Institute’s amicus briefs for the argument that “qualified immunity has increasingly diverged from the statutory and historical framework on which it is supposed to be based.”²⁶⁶

Judge Lynn Adelman, a Clinton appointee to the Eastern District of Wisconsin, wrote an article for *Dissent* magazine titled

260. *Id.*

261. *Id.* (citing *Zadeh v. Robinson*, 928 F.3d 457, 479, 480–81 (5th Cir. 2019)).

262. *Zadeh*, 928 F.3d at 479 (Willett, J., dissenting).

263. *Id.*

264. *Id.* at 479–80.

265. Andrew Chung et al., *Shielded*, REUTERS INVESTIGATES, <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> (last visited July 7, 2022).

266. Schweikert, *supra* note 9, at 13 (citing *Manzanares v. Roosevelt Cnty. Adult Det. Ctr.*, 331 F. Supp.3d 1260, 1294 n.10 (D.N.M. 2018)).

“The Supreme Court’s Quiet Assault on Civil Rights,” in which he argued that “[o]f all the restrictions that the Court has imposed on [Section 1983] . . . the one that has rapidly become the most harmful to the enforcement of constitutional rights is the doctrine of qualified immunity.” Adelman also participated in a Cato Institute forum on qualified immunity in March 2018, in which he elaborated on the legal, doctrinal, and practical problems with qualified immunity.²⁶⁷

As Professor Scott Michelman aptly put it, “in order for a plaintiff to overcome qualified immunity, the right violated must be so clear that its violation in the plaintiff’s case would have been obvious not just to the average ‘reasonable officer’ but to the least informed, least reasonable ‘reasonable officer.’”²⁶⁸

D. What To Do About Qualified Immunity

The starting point for any discussion about how to address qualified immunity should be the total elimination of the doctrine.²⁶⁹ Under the plain terms of *Section 1983*, and in accordance with the common-law background against which that statute was passed, any state actor who violates someone’s constitutional rights is supposed to be “liable to the party injured”—period.²⁷⁰ The George Floyd Justice in Policing Act, which was passed by the House of Representatives in March 2022, is faced with significant opposition in the Senate because a portion of the Act seeks to discard the doctrine of qualified immunity.²⁷¹ “Critics say it shields police officers from personal liability for their actions, while supporters call it essential to officers’ ability to do their job. There are strong arguments for and against qualified immunity, but its implications for police accountability are complex and poorly understood.”²⁷² As Schweikert explains:

267. *Id.* (citing Lynn Adelman, *supra* note 109); Jay Schweikert, *Qualified Immunity: The Supreme Court’s Unlawful Assault on Civil Rights and Police Accountability*, CATO INST., (Mar. 1, 2018), <https://www.cato.org/events/qualified-immunity-supreme-courts-unlawful-assault-civil-rights-police-accountability>.

268. Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2004 (2018).

269. Schweikert, *supra* note 9, at 2.

270. *Id.*

271. Nancy La Vigne & Marc Levin, *Five Myths About Qualified Immunity*, WASH. POST (May 27, 2021, 2:33 PM) https://www.washingtonpost.com/outlook/five-myths/five-myths-about-qualified-immunity/2021/05/27/db829e38-bcbc-11eb-9c90-731aff7d9a0d_story.html.

272. *Id.*

Outright abolition of qualified immunity would give concrete form to the axiomatic legal principle that for every right, there is a remedy. It would also maximally encourage public accountability—especially among members of law enforcement—by ensuring that all government agents take seriously their independent obligations to understand and abide by constitutional limitations. In other words, “the courts didn’t tell me not to do it!” would not be a sufficient excuse for public officials who break the law.²⁷³

In my opinion, making municipal employers liable for the illegal conduct of their employees may itself be a promising strategy for increasing accountability. Qualified immunity is a doctrine that has long outlived its utility.

273. Schweikert, *supra* note 9, at 14.