"NO MAN IS ABOVE THE LAW AND NO MAN IS BELOW IT": HOW QUALIFIED IMMUNITY REFORM COULD CREATE ACCOUNTABILITY AND CURB WIDESPREAD POLICE MISCONDUCT

*Lindsey de Stefan**

I. INTRODUCTION

In recent months, it has been difficult to ignore the overwhelming presence of police violence in the media.[1] Hardly a month has gone by without headlines asserting use of excessive force, brutality, or other misconduct in some corner of the United States.[2] It seems that no region of the nation has been unaffected by the violence, with civilian deaths at the hands of law enforcement cropping up from San Francisco[3] to New York City[4] to South Carolina,[5] and almost everywhere in between. And with public confidence in law enforcement at a

* J.D. Candidate, 2017, Seton Hall University School of Law; B.A., Ramapo College of New Jersey. Special thanks to Professor Alice Ristroph and Katheryn Pereyra-Caldwell for their support and guidance throughout the writing process.

[1] Commentary and criticism about American police has spanned various forms of media and traversed many genres. *See, e.g.*, *The Daily Show with Jon Stewart* (Comedy Central television broadcast Dec. 3, 2014) (discussing the grand jury's decision not to indict the officer who killed Eric Gardner, explaining: "I think what is so utterly depressing is that none of the ambiguities that existed in the Ferguson case exist in the Staten Island Case, and yet the outcome is exactly the same: No crime, no trial. All harm, no foul.").

[2] *See, e.g.*, *Unarmed Black Mo. Teen Shot After Altercation, Police Say*, CBS NEWS (Aug. 10, 2014, 1:30 PM), http://www.cbsnews.com/news/michael-brown-shooting-unarmed-black-missouri-teen-shot-after-altercation-police-say/; Josh Sanburn, *Behind the Video of Eric Garner's Deadly Confrontation with New York Police*, TIME (July 23, 2014), http://time.com/3016326/eric-garner-video-police-chokehold-death/.

[3] *See* Timothy Williams, *San Francisco Police Officers to Be Dismissed over Racist Texts*, N.Y. TIMES (Apr. 3, 2015), http://www.nytimes.com/2015/04/04/us/san-francisco-police-officers-to-be-dismissed-over-racist-texts.html?_r=0.

[4] *See* Christopher Mathias, *Video Shows NYPD Officers Beating Brooklyn Man After He Appears to Surrender*, HUFFINGTON POST (July 23, 2015, 1:11 PM), http://www.huffingtonpost.com/entry/nypd-beating-thomas-jennings_55b0ff8fe4b07af29d57a1c0.

[5] *See* Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?_r=0.

twenty-two year low—with only fifty-two percent of United States citizens asserting that they have considerable confidence in law enforcement[6]—the nation has clearly taken notice.[7]

Naturally, these violent incidents raise important questions for many Americans, regardless of locale or the type of community in which they reside. Why is this happening? And how can we stop it? Unsurprisingly, extensive media commentary has invited a myriad of proposed answers to these inquiries and has even generated some potential solutions. Some point to a lack of education and opine that officers need more comprehensive training to teach them how to "defuse the sorts of deadly, racially charged confrontations" that have recently been highlighted in numerous communities throughout the country.[8] Others suggest that allowing citizens to record police would create officer accountability, serve as a disciplinary basis for abusive behavior, encourage the use of justified policing tactics, and generally deter misconduct.[9] Others still suggest that police culture is to blame since rookies shape their attitudes about the use of force based on the words and actions of fellow officers,[10] and because the warrior mentality of policing fosters an "us" versus "them" relationship between law enforcement and citizens.[11] In fact, a few experts have even suggested that there has not been a wave of police violence, but that mainstream media is merely covering brutality more frequently

---

[6] *See* Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015), http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx (explaining that 25% of Americans have a "great deal of confidence" in police, 30% have "some confidence," 27% have "quite a lot" of confidence, and an all-time high of 18% have either "very little or no confidence in police").

[7] The international community has also reacted to U.S. police brutality. *See, e.g.*, Adam Taylor, *How the Rest of the World Reacted to the Ferguson Verdict*, WASH. POST (Nov. 25, 2014), https://www.washingtonpost.com/news/worldviews/wp/2014/11/25/how-the-rest-of-the-world-reacted-to-the-ferguson-verdict/ ("'So the U.S. government, when talking about their own country, forgets about democracy, human rights, protection of "peaceful protesters" and people's right to protest,' Russian news outlet Pravda.ru proclaimed . . . .").

[8] Phillip Swarts, *Police Need Better Training and Community Relations, Presidential Task Force is Told*, WASH. TIMES (Jan. 13, 2015), http://www.washingtontimes.com/news/2015/jan/13/police-brutality-solutions-are-training-community-/?page=all.

[9] *See* Carol M. Bast, *Tipping the Scales in Favor of Civilian Taping of Encounters with Police Officers*, 5 U. DENV. CRIM. L. REV. 61, 97 (2015).

[10] *See* David Lester, *Officer Attitudes Toward Police Use of Force*, *in* AND JUSTICE FOR ALL: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 177, 182–83 (William A. Geller & Hans Toch eds., 1995).

[11] Sue Rahr & Stephen K. Rice, *From Warriors to Guardians: Recommitting American Police Culture to Democratic Ideals*, NAT'L INST. OF JUST., https://www.ncjrs.gov/pdffiles1/nij/248654.pdf (last visited Jan. 2, 2017).

and comprehensively.[12]

Irrespective of whether there has been an increase in the incidence of brutality or whether the nation is merely recognizing what has been an ongoing reality for many United States citizens, the existence of a problem is now inescapably obvious. The solution, however, is decidedly less clear. Perhaps none of the aforementioned proposals are the right answer. Alternatively, and more likely, maybe they are *all* the answer—at least partially and in combination with a number of other considerations. It is improbable that a single factor can be deemed the sole cause of widespread police misconduct. Of course, an elaborate problem with multiple dimensions will require an equally multifaceted solution. In fact, any adequate resolution will likely require the cooperation of many individuals and entities across various disciplines and industries.[13] But no matter how winding, every path to change must begin with a single step. And the most logical place to begin is by reforming the stringent protection from civil liability enjoyed by law enforcement officers alleged to have violated individual constitutional rights.

This Comment will explore how judicial amendment of the qualified immunity doctrine—specifically as it is applied to law enforcement officers—could serve as a catalyst to begin to rein in police misconduct. Part II will describe the general history of the most significant statutory provision in this context, § 1983, and the expansion of constitutional torts that occurred in the mid-twentieth century. Part III focuses on the judicial development of qualified immunity in the Supreme Court and explains the status of the doctrine today. Part IV discusses some of the most significant practical problems with the modern qualified immunity jurisprudence and its application. Part V goes on to analyze the recent spotlight on police use of force. Finally, Part VI proposes that judicial amendment of qualified immunity application will serve as an effective first step in decreasing the overall incidence of police misconduct in the United States.

---

[12] *See* Eliott C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015, 7:26 AM), http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/ (discussing the lack of accurate statistics regarding police killing civilians in the line of duty or police use of excessive force).

[13] For example, implementing more comprehensive training would take the combined efforts of experts in police brutality to design such training, as well as the cooperation of police forces nationwide. Statutes protecting those who audiotape police would require congressional or state legislative action—or both. And a change in police culture would necessitate the active participation of police unions and local law enforcement nationwide.

II. THE COURT'S EXPANSION OF REMEDIES FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS

To appreciate the qualified immunity doctrine and its modern implications, one must first journey briefly down the historical path that preceded its inception. That path begins with § 1983 of Title 42 of the United States Code, which provides:

> 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.[14]

Although the statute now finds its home in the United States Code, it was originally enacted as part of the Civil Rights Act of 1871 and was colloquially referred to as the "Ku Klux Klan Act" at that time.[15] In the post-Civil War Reconstruction years, the so-called Radical Republicans in Congress were becoming increasingly worried that murders, whippings, and other (mostly) Klan-perpetrated brutalities in some southern states were preventing newly freed slaves from voting.[16] These fears were affirmed when the 1870 elections brought a wave of violence.[17] After most affected state governments failed both to punish the perpetrators of those atrocities and to protect the victims, Congress intervened by passing the Civil Rights Act of 1871, which included what we now know as § 1983.[18] In the subsequent ninety years, § 1983 was largely inconsequential;[19] but in 1961, when

---

[14] 42 U.S.C. § 1983 (2012).

[15] Ian D. Forsythe, *A Guide to Civil Rights Liability under 42 U.S.C. § 1983: An Overview of Supreme Court and Eleventh Circuit Precedent*, THE CONST. SOC'Y, http://www.constitution.org/brief/forsythe_42-1983.htm (last visited Jan. 2, 2017).

[16] David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 UTAH L. REV. 1, 7 (1999).

[17] *Id.*

[18] Monroe v. Pape, 365 U.S. 167, 174–76 (1961), *overruled in part by* 436 U.S. 658 (1978).

[19] *See* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 8–12 (1985) (explaining "as the 20th century dawned, the Nation's commitment to civil rights lay in remnants" as a result of the Supreme Court's narrow interpretations of the Civil Rights Acts, gains

the United States Supreme Court handed down its decision in *Monroe v. Pape*, the statute began a rapid ascent to a position of significance in constitutional and civil rights jurisprudence.[20]

In *Monroe*, the Court held that § 1983 provided a remedy to individuals "deprived of constitutional rights, privileges, and immunities" as a result of a government official's abuse of his position.[21] In reaching this conclusion, the Court relied on its earlier statutory construction of the phrase "under color of" as including acts of an official that are in violation of state law.[22] The Court also reviewed the legislative history of the original Civil Rights Act in considerable detail and determined that one of Congress's primary purposes was to provide a federal remedy for infringements of constitutional rights in circumstances in which a state remedy was theoretically, but not practically, available.[23] In so concluding, the Court vastly expanded the understanding of—and, thus, the potential application of—§ 1983 as a tool in civil rights litigation.[24] Indeed, after *Monroe*, the number of cases brought under the statute skyrocketed,[25] and § 1983 has since

made by Democrats in Congress, and the move toward reconciliation); Eric H. Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 499–500 n.2 (1985) (explaining that § 1983 "languished in obscurity" until 1961, with only twenty-one cases brought under § 1983 in federal courts between 1871 and 1920—only nine of which made it to the Supreme Court).

[20] *See* Forsythe, *supra* note 15.

[21] 365 U.S. at 172.

[22] *See* Williams v. United States, 341 U.S. 97, 99 (1951); Screws v. United States, 325 U.S. 91, 111 (1944) ("It is clear that under 'color' of law means under 'pretense' of law."); United States v. Classic, 313 U.S. 299, 326 (1941) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.").

[23] *Monroe*, 365 U.S. at 174–75 (describing the "lawless conditions" of the South and the failure of those states to provide any "effective redress").

[24] *See* Blackmun, *supra* note 19, at 19 (explaining that in the twenty-two years before *Monroe*, the number of § 1983 claims to reach the Court "can almost be counted on one hand"); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 28 (1989) (opining that "the Court freed the [Civil Rights] Act from a narrow and unjustified construction"); Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53, 53 (1986) (asserting that "the Supreme Court revived a long-neglected, ninety-year-old statute . . . making it the vehicle for a broad cause of action to remedy constitutional violations"); Zagrans, *supra* note 19, at 500–01 (averring that the Court "breathed new life into the moribund [Civil Rights Act]").

[25] *See* Ruggero J. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORDER 557, 563 (1973) (describing the 1100% increase in cases brought under § 1983 in the decade after *Monroe*); *History of the Federal Judiciary*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/jurisdiction_federal_question.html (last visited Oct. 26, 2016) ("Civil rights cases, particularly suits filed under Section 1983,

become the so-called "statute of choice" under which to bring constitutional tort lawsuits against government officials.[26] But *Monroe* was not the Court's last word on available redress for constitutional violations—rather, it was just the beginning of a long and tumultuous relationship.

A decade later, the Court created a new cause of action that is, in effect, the federal analog of a § 1983 claim—the *Bivens* action.[27] In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Court concluded that there is a private right of action for violations of federal rights perpetrated by federal (rather than state) officials.[28] While *Bivens* did not directly implicate § 1983 or litigation thereunder,[29] *Bivens* did further expand the availability of private remedies for constitutional torts. Then, seventeen years after *Monroe*, the Court expanded the ambit of § 1983 even further.[30] After undertaking a second (and equally exhaustive) review of the legislative history of the Civil Rights Act of 1871 in *Monell v. Department of Social Services*, the Court overruled a portion of its *Monroe* holding by concluding that municipal bodies could be subject to liability under § 1983.[31] However, the Court provided a substantial shield to municipal bodies by holding that a municipality could incur civil liability only when it was *itself* the cause of the constitutional violation alleged, rather than imposing liability vicariously based solely on its employment of the tortfeasor.[32] Put differently, the *Monell* Court concluded that a municipal body might be subject to liability when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[33] But the Court left the door for

became one of the largest sources of federal court business in the late twentieth century.").

[26] Rudovsky, *supra* note 24, at 25.

[27] *See* John C. Jeffries, Jr., *What's Wrong With Qualified Immunity?*, 62 FLA. L. REV. 851, 851 (2010).

[28] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 390, 392 (1971).

[29] By its very language, § 1983 does not apply to constitutional rights violations by federal officials. *See* 42 U.S.C. § 1983 (emphasis added) (specifying its application to "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any *State* or Territory or the District of Columbia . . . .").

[30] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 (1978).

[31] *See id.* at 690.

[32] *See id.* at 694 (emphasis added) ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

[33] *Id.* at 690.

any further municipal exemptions from liability wide open: "[W]e express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under § 1983 'be drained of meaning.'"[34]

Noticeably, none of these early cases directly grappled with the qualified immunity doctrine,[35] and one might naturally wonder how they amount to significant steps on the path to its conception. Indeed, the aggregate effect of these decisions appears to be a pivotal expansion in the development of constitutional rights by allowing individuals greater opportunity to seek redress when government officials violate their constitutional or statutory rights. However, in the wake of these cases, the Court began to face the practical considerations of increased liability for government officials: its disallowance of vicarious municipal liability meant that, in most cases, the only potential defendant—and thus the only party who might shoulder the burden of damages to the plaintiff—would be the official who had inflicted the constitutional injury.[36]

III. THE DEVELOPMENT OF QUALIFIED IMMUNITY

The qualified immunity doctrine has diverged substantially from the general course toward expanding constitutional rights that *Monroe* and its progeny began to pave in the 1960s and 1970s. It has instead veered off down a long and winding byway that continues until this day. In fact, it would sometimes seem that the two paths now travel in opposite directions altogether. Notably, the statutory text of § 1983 does not explicitly or impliedly provide for any immunities;[37] but as the Court gradually increased liability for public officials who had violated constitutional rights, it correspondingly started to extend the immunities that had traditionally been available at common law.[38] Interestingly, the Court conceded that the statute's text is broader than the common law of torts was in 1871 because it "purports to create a

[34] *Id.* at 701 (quoting Scheuer v. Rhodes, 416 U.S. 232, 248 (1974)).

[35] Save, of course, for *Monell*'s express declination to decide questions of immunity.

[36] *See* Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 455–56 (1978).

[37] *See supra* text accompanying note 14.

[38] *See* Kalina v. Fletcher, 522 U.S. 118, 123 (1997) ("We have . . . recognized that Congress intended [§ 1983] to be construed in light of common law principles that were well settled at the time of its enactment."); Pierson v. Ray, 386 U.S. 547, 557 (1967) (expanding the common law good faith and probable cause defense that was available for false arrest and imprisonment to actions brought under § 1983).

damages remedy against every state official for the violation of any person's federal constitutional or statutory rights."[39] In order to deal with the lack of legal and historical context to fit the field of constitutional torts, the Court has come to rely on loosely related common law causes of action and their corresponding immunities[40] in an attempt to tailor them to the structure of modern government.[41] In so doing, the Court has gradually but consistently expanded the scope of immunities available, both in terms of which officials are entitled to such immunity[42] and in regard to the types of situations in which immunity is available.[43] The Court has arguably enlarged the immunities available to the officials perpetrating constitutional violations more than it expanded the remedies for those whose rights were violated in the first instance.[44]

Interestingly, the Court began sketching the contours of official immunity under § 1983 a decade before it broadened the applicability

[39] *Kalina*, 522 U.S. at 123.

[40] *See* Wyatt v. Cole, 504 U.S. 158, 164 (1992) (explaining that "[i]n determining whether there was an immunity at common law that Congress intended to incorporate into the Civil Rights Act, we look to the most closely analogous torts"); Rudovsky, *supra* note 24, at 36 (explaining that a threshold question of the qualified immunity analysis is "whether and to what degree qualified immunity would have been a defense in common law analogues to constitutional tort claims").

[41] *See* Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 145 (2009) (noting the Court-created doctrine used to adapt the scope of immunities at common law to contemporary government structure).

[42] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 807–13 (1982) (qualified immunity for high-level Presidential aides); Wood v. Strickland, 420 U.S. 308, 319 (1975) (qualified immunity for school officials); Scheuer v. Rhodes, 416 U.S. 232, 237–38 (1974) (qualified immunity for Governor of Ohio).

[43] *See generally* City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774–78 (2015) (reversing Court of Appeals and granting qualified immunity to officers who forcibly entered a mentally disabled woman's room and shot her multiple times); Carroll v. Carman, 135 S. Ct. 348, 349–50 (2014) (per curiam) (reversing Court of Appeals and granting qualified immunity to officer who went into a private backyard and onto the deck without a warrant); Plumhoff v. Rickard, 134 S. Ct. 2012, 2020–24 (2014) (reversing District Court and Court of Appeals and granting qualified immunity to officers who fired fifteen shots to end a high-speed car chase and killed the driver and passenger); Scott v. Harris, 550 U.S. 372, 374–86 (2007) (reversing District Court and Court of Appeals and granting qualified immunity to officer who ended a car chase by running the driver off the road and rendering him a quadriplegic).

[44] *See, e.g.*, Beermann, *supra* note 41, at 148–49 (explaining that eliminating the subjective prong of the qualified immunity analysis "dramatically expanded the immunity defense and made it more likely that defendants would prevail before trial"); Evan J. Mandery, *Qualified Immunity or Absolute Impunity? The Moral Hazards of Extending Qualified Immunity to Lower-Level Public Officials*, 17 HARV. J.L. & PUB. POL'Y 479, 513 (1994) (averring that the combination of qualified immunity and the protection for individual judgment built into many constitutional standards "offer[s] virtually absolute immunity to public officials").

of that statute in *Monroe*, concluding "that § 1983 [was] to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them."[45] Accordingly, in *Tenney v. Brandhove* the Court noted a legacy of legislative freedom dating back to sixteenth century England and held that legislators were entitled to absolute immunity from civil liability when acting within their legislative capacity.[46] The Court later reinforced a similarly longstanding tradition of absolute judicial immunity[47] and the well-settled common law rule of absolute immunity for prosecutors.[48]

Even before its admittedly limited imposition of municipal liability in *Monell*, the Court had already begun to rein in the breadth of the newly expanded § 1983 remedy.[49] In *Pierson v. Ray*, the Court faced the issue of what immunity, if any, was available to police officers who arrested a group of clergymen for violating a Mississippi law when, several years after the arrest, the law was held unconstitutional as applied to circumstances similar to those at issue.[50] In holding that officers were immune from civil liability if they acted in good faith and with probable cause, the Court placed a particular emphasis on fairness, reasoning that a police officer should not have to "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."[51] In recognizing that public officials not otherwise entitled to absolute immunity[52] also require some margin for error,[53] *Pierson*'s "good faith and probable cause" guideline[54] was the birth of an immunity doctrine that would continue to plague the Supreme

[45] Imbler v. Pachtman, 424 U.S. 409, 417–18 (1976) (summarizing the holding of Tenney v. Brandhove, 341 U.S. 367, 367 (1951)).

[46] *See Tenney*, 341 U.S. at 376–79 (expressing disbelief at the notion "that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language [of § 1983]").

[47] *See* Pierson v. Ray, 386 U.S. 547, 553–55 (1967) (comparing legislative and judicial immunity at common law, explaining that "[t]he immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine").

[48] *See Imbler*, 424 U.S. at 421–27.

[49] *See Pierson*, 386 U.S. at 555–57.

[50] *Id.* at 549–50.

[51] *See id.* at 555–57.

[52] *See id.* at 555 (noting that "[t]he common law has never granted police officers an absolute and unqualified immunity").

[53] *See* Scheuer v. Rhodes, 416 U.S 232, 242 (1974) ("Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err.").

[54] *Id.* at 245.

Court,[55] to baffle lower federal courts,[56] and to consume considerable judicial resources[57] in the ensuing decades.

Seven years later, the Court undertook its first qualified immunity analysis since *Pierson*.[58] In *Scheuer v. Rhodes*, the Court clarified the application of the doctrine, explaining that there were two criteria that must be met for an official to be eligible for immunity: (1) he must have had a reasonable basis for the belief in light of all circumstances existing at the time; and (2) he must have believed in good faith that the action was lawful.[59] Put another way, the Court engaged in a two-pronged analysis that assessed the official's allegedly unconstitutional act under both objective and subjective standards.[60] The Court further expounded this two-part test shortly thereafter, explaining that entitlement to immunity requires that an official act with a sincere belief that he is doing right, and he must not have violated a well-settled constitutional right—even if the violation resulted from ignorance or indifference.[61]

These early cases justified qualified immunity on two primary bases, both of which were rooted in the rationales of traditional common law: fairness and overdeterrence.[62] The Court explained that

---

[55] *See generally* Pearson v. Callahan, 555 U.S. 223, 223 (2009); Saucier v. Katz, 533 U.S. 194, 194 (2001); Harlow v. Fitzgerald, 457 U.S. 800, 800 (1982).

[56] *See, e.g.*, Curley v. Klem, 499 F.3d 199, 208–09 (3d Cir. 2007) (noting the Circuit split regarding whether judges or juries should decide if qualified immunity applies); Harbert Int'l v. James, 157 F.3d 1271, 1285–86 (11th Cir. 1998) (disagreeing with the Sixth and Ninth Circuits' interpretations of Davis v. Scherer, 468 U.S. 183 (1984)); DiMeglio v. Haines, 45 F.3d 790, 795–97 (4th Cir. 1995) (surveying the interpretations of eight different Courts of Appeal to Siegert v. Gilley, 500 U.S. 226 (1991) and asserting disagreement with all of those constructions of the Court's holding).

[57] *See* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 2 (1997) (noting that federal courts have used increasingly more resources for adjudicating immunity claims in recent years); Charles T. Putnam & Charles T. Ferris, *Defending a Maligned Defense: The Policy Bases of the Qualified Immunity Defense in Actions Under 42 U.S.C. § 1983*, 12 BRIDGEPORT L. REV. 665, 670 (1992) (describing the scarcity of judicial resources but the ever-increasing number of § 1983 cases filed in "overburdened federal courts"). *See also Table C-3: U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending March 31, 2015*, U.S. CTS., http://www.uscourts.gov/statistics/table/c-3/federal-judicial-caseload-statistics/2015/03/31 (last visited Jan. 2, 2017) (follow "Download Data Table" hyperlink) (Excluding prisoner petitions, 36,841 of the 281,608 civil cases (approximately thirteen percent) filed in District Courts from April 1, 2014, to March 31, 2015, were described as "Civil Rights" cases).

[58] *See Scheuer*, 416 U.S. at 232.

[59] *See id.* at 247–48.

[60] *See* Chen, *supra* note 57, at 19.

[61] *See* Wood v. Strickland, 420 U.S. 308, 321–22 (1975).

[62] *See Scheuer*, explaining that official immunity at common law was based on:

public officials, from police officers to governors, "who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices."[63] The Court further expounded that the immunity doctrine recognizes that officials will sometimes make mistakes and, accordingly, gives them room to err in the performance of their duties based on the assumption "it is better to risk some error and possible injury from such error than [for an official] not to decide or act at all."[64] The Court's justification demonstrates its concern that officials would fail to make important decisions or take necessary actions for fear of incurring civil liability, and that the public good would ultimately suffer.[65] In essence, qualified immunity avoids "placing police officers between the proverbial rock and a hard place" when tension arises between the officer's law enforcement responsibilities and his constitutional obligations.[66]

But a mere seven years after deciding *Wood v. Strickland*, the Court significantly altered its qualified immunity jurisprudence when it wholly abandoned the two-part objective-subjective test in favor of a purely objective analysis: officials would be entitled to immunity so long as they did not violate clearly established constitutional or statutory rights of which a reasonable person would have known.[67] The Court's adjusted analysis seems to mirror a shift in its predominant policy concerns.[68] The Court became less concerned with unfairness and over-deterring officials, and more concerned with the substantial social burdens at stake in unrestricted litigation of claims against government officials, such as financing the official's defense, diverting

> [T]wo mutually dependent rationales: (1) the injustice . . . of subjecting to liability an officer who is required, by . . . his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

See Scheuer, 416 U.S. at 240. *See also* Chen, *supra* note 57, at 15 (noting that qualified immunity jurisprudence in the Supreme Court "began with a focus on fairness and overdeterrence rationales").

[63] *Scheuer,* 416. U.S. at 241–42.

[64] *Id.* at 242.

[65] *See Wood*, 420 U.S. at 319–20 ("The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long term interest . . . .").

[66] Chen, *supra* note 57, at 16.

[67] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[68] *See* Chen, *supra* note 57, at 17–18 ("While fairness and overdeterrence still play a formal role in the Court's immunity jurisprudence, their function as the driving force behind qualified immunity was severely diminished after *Harlow*.").

official efforts from important public matters, and dissuading capable individuals from seeking public office.[69] The Court reasoned that inquiring into the official's subjective state was incompatible[70] with the effective balancing of important social costs and the individual's right to sue an official for violations of his constitutional liberties, requiring the elimination of the subjective "good faith" prong of the qualified immunity test.[71]

Though it has been tweaked somewhat along the way, *Harlow v. Fitzgerald* represents the modern test for qualified immunity. The current standard for qualified immunity involves two different questions, both of which must be answered affirmatively in order for a plaintiff's suit to proceed against an official: (1) Did the defendant violate the plaintiff's constitutional right?; and (2) Was a constitutional right clearly established at the time of the violation?[72] In its most recent formulation, these questions do not need to be answered sequentially,[73] and the Court has left the order of inquiry to the discretion of the district courts.[74]

IV. THE PROBLEMS WITH QUALIFIED IMMUNITY

The legal academic community has criticized the qualified immunity doctrine on a number of grounds since at least the 1980s.[75] Despite these criticisms, in recent years—and particularly since the beginning of the Roberts era[76]—the Court has made it ever more difficult to impose liability on law enforcement officers alleged to have acted unconstitutionally.[77] This extension of the doctrine has occurred

[69] *Harlow*, 457 U.S. at 814.

[70] *See id.* at 815–18 (explaining why a subjective intent can so rarely be decided on summary judgment and discussing the disruptive effects to government that broad-ranging discovery to uncover subjective states of mind can have).

[71] *See id.* at 814–15 ("[T]he dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the 'good faith' standard established by our decisions.").

[72] Pearson v. Callahan, 555 U.S. 223, 232 (2009).

[73] The Court does, however, state that it is "often beneficial" to answer the two questions in the above specified order. *Id.* at 236.

[74] *See id.* at 236–43.

[75] *See, e.g.*, Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 233 (2006) (condemning the "lack of transparency" in the Court's manipulation of the qualified immunity doctrine and its disregard of the critical role that facts play in the qualified immunity analysis); Rudovsky, *supra* note 24, at 27 (criticizing the limitations on constitutional torts that the Court's qualified immunity doctrine has imposed and the potential danger that qualified immunity will redefine substantive constitutional law).

[76] *See supra* note 43.

[77] *See* Erwin Chemerinsky, *Closing the Courthouse Doors*, 41 HUM. RTS. 5, 5 (2014).

gradually. The decisions that have perpetrated the expansion might even appear unrelated; but they have nevertheless resulted in one overarching thematic problem: a lack of accountability.

A. *The Surprising Lack of Clarity of the "Clearly Established" Right*

One problem with qualified immunity results from the so-called two-pronged inquiry. In 2001, concerned that disposal of cases based solely on the "clearly established" prong would "stunt the development" of constitutional law, the Court mandated that lower courts first decide whether there was a constitutional violation before determining whether the right was clearly established.[78] The *Saucier v. Katz* decision was unpopular,[79] to say the least, and in 2009, the Court unanimously overruled the decision and once again left the procedural sequence to the discretion of lower courts.[80] But because courts are no longer required to address the two-part inquiry in any particular order, the practical effect has been precisely what the Court feared in its *Saucier* decision: frequent disposal of cases based on the perceived lack of a "clearly established" right without ever addressing the merits of the constitutional claim.[81]

A recent survey of circuit court cases decided since the 2009 *Pearson v. Callahan* decision demonstrates the frequency with which lower courts dispose of cases based on a lack of a clearly established law.[82] The study, which analyzed 844 published and unpublished courts of appeal opinions decided between 2009 and 2012, encompassing 1,460 total claims, found that courts granted qualified immunity in 1,055 of the claims, or approximately 72% of the time.[83] In 534 (or nearly 51%) of the claims wherein a court granted immunity, the court concluded that the right asserted was not clearly established.[84] So in more than half of the claims in which courts granted immunity, the basis for the holding was the absence of clearly established law.

---

[78] *See* Saucier v. Katz, 533 U.S. 194, 201 (2001).

[79] Pearson v. Callahan, 555 U.S. 223, 234–35 (2009) (noting that lower court judges "have not been reticent in their criticism," that application of the *Saucier* rule "has not always been enthusiastic," and that even some members of the Court were critical).

[80] *Id.* at 236.

[81] *See* James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1602–03 (2011).

[82] *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 30–32 (2015).

[83] *Id.*

[84] *See id.* at 31–32.

But perhaps somewhat ironically, the concept of a "clearly" established right is in and of itself less than clear, and a great deal of confusion exists over what rights fall within this vague classification.[85] In essence, approximately fifty percent of the time,[86] a court's decision to grant immunity to an official is based on a muddled and uncertain legal precept. To qualify as clearly established, "a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[87] There are few unambiguous bright-line rules in modern constitutional jurisprudence. Instead, most doctrines are articulated as relatively vague standards or balancing tests.[88] In addition, because there are considerable distinctions in the structure, aim, and available alternative remedies of various constitutional rights, the general-purpose nature of qualified immunity is problematic.[89] Defining a clearly established law is straightforward when the right is laid out in a stable and fairly specific doctrine, but when the rule changes, the new law only becomes clearly established when a clarifying court decision is handed down.[90] When such constitutional rights are violated, qualified immunity allows officials to avoid liability because of a failure to anticipate developments in the law.[91] And although the Court held in 2002 that there need not be a case on point in order to find clearly established law,[92] it has nevertheless continued to grant qualified immunity in the absence of similar precedent.[93] Unsurprisingly, lower courts struggle with the question of whether a right is clearly established, and the circuits have developed markedly varying approaches to the inquiry.[94]

Finally, despite multiple attempts to clarify the doctrine over the years, it seems that the Supreme Court has only further added to the confusion of lower courts. Indeed, almost without fail, Supreme Court cases since *Pearson* have apparently further expanded the qualified immunity doctrine by upholding its application in all manner of

---

[85] *See* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 329 (1995).

[86] This percentage assumes the reliability of the aforementioned survey.

[87] Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015).

[88] *See* Chen, *supra* note 57, at 50.

[89] *See* Jeffries, *supra* note 27, at 859.

[90] *See id.*

[91] *Id.*

[92] *See* Hope v. Pelzer, 536 U.S. 730, 741 (2002) (explaining that "officials can still be on notice that their conduct violates established law even in novel factual circumstances").

[93] *See* Chemerinsky, *supra* note 77, at 6.

[94] *See* Jeffries, *supra* note 27, at 852 ("[D]etermining whether an officer violated 'clearly established' law has proved to be a mare's nest of complexity and confusion.").

diverse situations—seemingly in every set of circumstances with which it has been presented.[95]

B. *An Overconfidence in Overdeterrence*

The judicial system's somewhat naïve faith in the power of civil suits as a deterrent has inadvertently produced another problem in qualified immunity jurisprudence.[96] This belief has generated concern in the Supreme Court about overdeterrence—the notion that fear of being sued "is so strong that it can 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[97] This trepidation about too much deterrence and its potentially chilling effect on government operations has played a powerful role in shaping Court decisions toward limiting civil remedies.[98] Of course, lawsuits are intended to have this deterrent effect—indeed, they are relied upon to have such effect as part of our system of accountability for government officials. Unfortunately, reality suggests that the deterrent power of lawsuits is not quite as potent as the Supreme Court envisions.[99]

The Court specifically fears that financial liability, in the form of paying compensatory damages to victims whose constitutional rights were violated by an officer, will be a vehicle of overdeterrence.[100] The widespread practice of indemnification, however, means that individual officers are almost never financially responsible for civil judgments against them, practically eliminating any fiscal motivation

---

[95] *See, e.g.*, Taylor v. Barkes, 135 S. Ct. 2042, 2045 (2015) (holding that prison officials were entitled to qualified immunity after failing to prevent an inmate's death because "[e]ven if the [prison's] suicide screening and prevention measures contained . . . shortcomings" there was no precedent at the time that would have made it clear that the system was unconstitutional"); Reichle v. Howards, 132 S. Ct. 2088, 2094 (2012) (officers entitled to qualified immunity because the Court has never held that there is a "right to be free from a retaliatory arrest that is otherwise supported by probable cause"); Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (former Attorney General entitled to qualified immunity where he detained terrorism suspects using the pretext of a federal material-witness statute because the arrest was objectively reasonable even if it was improperly motivated).

[96] *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1024–25 (2010) (explaining that the Court believes that being sued or even the threat of being sued is enough to make officials act within the laws).

[97] *Id.* at 1025 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982)).

[98] *See id.*

[99] *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 894 n.41 (2014) (explaining that the Court has never given any empirical evidence to support its belief in the deterrent power of lawsuits).

[100] *See id.* at 893.

for avoiding harmful conduct.[101] In fact, in many instances, even the police department that employs the officer suffers no direct financial consequences because police litigation costs and damages awards are often paid from a city or insurer's general budget.[102] Therefore, the police department is not financially penalized, and thus has no incentive to discipline the officer or attempt to prevent him from repeating the unconstitutional behavior in the future. And because law enforcement officials are often unaware of the allegations set forth in lawsuits filed against them or their employees, officers' conduct often goes uninvestigated and undisciplined, and allegations of unconstitutional conduct do not affect performance reviews or opportunities for promotion.[103] Finally, although many law enforcement officers claim that the threat of incurring liability deters them from misconduct, studies contrarily indicate that potential liability does not actually alter most officers' on-the-job actions.[104]

C. *The Unintended Upshot of a Universally Applicable Standard*

Although many of the weaknesses of qualified immunity can, for the most part, be considered unintended consequences, one significant flaw was the Court's deliberate decision to utilize a one-size-fits-all standard. In early qualified immunity decisions, the Court acknowledged the possibility that the doctrine might apply differently depending on the type of official involved in a particular situation.[105] But, as it so commonly does, the Court altered its approach. For nearly four decades, the Court has applied the qualified immunity doctrine as a standard applicable to all officials who do not enjoy absolute immunity.[106] Indeed, the Court has been explicit about its unwillingness "to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various

---

[101] *See id.* at 938–40.

[102] *Id.* at 957.

[103] *See* Schwartz, *supra* note 96, at 1076–77.

[104] *Id.* at 1077–78.

[105] *See* Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) ("[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time . . . ."); Pierson v. Ray, 386 U.S. 547, 554–55 (1967) (distinguishing judges, who are entitled to absolute immunity, and police officers, who enjoy good-faith immunity); Chen, *supra* note 85, at 287–89.

[106] *See* Procunier v. Navarette, 434 U.S. 555, 561–62 (1978) (explaining that officials not entitled to absolute immunity "could rely only on the qualified immunity described" in earlier cases); Chen, *supra* note 85, at 289.

officials' duties."[107] In so doing, the Court has overextended the doctrine. It is essentially providing too much protection for lower-level officers because all officials not entitled to absolute immunity now enjoy immunity that the Court "ha[d] developed for a quite different group of high public office holders."[108] This is perhaps most problematic when a plaintiff alleges Fourth Amendment violations because the qualified immunity doctrine provides officers with two layers of liability protection: qualified immunity's reasonableness standard on top of the reasonableness already embodied in Fourth Amendment substantive law.[109]

D. *Annihilating Accountability*

Of course, the most outwardly evident and alarming problem with qualified immunity jurisprudence has been its cumulative erosion of law enforcement accountability. Perhaps Erwin Chemerinsky summarized it best when he noted that "[i]n recent years, the court has made it very difficult, and often impossible, to hold police officers and the governments that employ them accountable for civil rights violations."[110] Many of the aforementioned procedural and substantive problems with the qualified immunity doctrine have contributed to what might be considered a deleterious byproduct. But recent Court decisions have also demonstrated a willingness to extend immunity in even the most egregious circumstances.[111]

For example, in *Plumhoff v. Rickard*, the Court held that three officers did not use excessive force and were entitled to qualified immunity when they had collectively fired fifteen shots at a fleeing car, causing the deaths of the driver and passenger.[112] The incident ensued

---

[107] Anderson v. Creighton, 483 U.S. 635, 643 (1987).

[108] *Id.* at 647 (Stevens, J., dissenting).

[109] *See* Chen, *supra* note 85, at 296.

[110] Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), http://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html?_r=0.

[111] *See, e.g.*, City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774–78 (2015) (officers forcibly entered a mentally disabled woman's room and shot her several times); Carroll v. Carman, 135 S. Ct. 348, 349–50 (2014) (per curiam) (officers went into a private backyard and onto the deck without a warrant because an alleged car thief "might have fled" there); Scott v. Harris, 550 U.S. 372, 374–86 (2007) (officer ended a car chase by running the driver off the road and rendering him a quadriplegic). *See also* Susan Bendlin, *Qualified Immunity: Protecting "All But the Plainly Incompetent" (and Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023, 1023 (2012) (opining that "[p]ublic officials can be more certain than ever before that qualified immunity will shield them from suits for money damages even if their actions violate the constitutional rights of another").

[112] Plumhoff v. Rickard, 134 S. Ct. 2012, 2017–18, 2021–24 (2014).

after one of the officers stopped the vehicle for having only one working headlight and, rather than exit the vehicle as the officer instructed, the driver instead sped away, prompting the officer and several others to give chase.[113] The Supreme Court disagreed with the district court and the court of appeals, which had both concluded that the officers used excessive force in violation of the Fourth Amendment.[114] In overturning the courts below, the Supreme Court reasoned that the use of deadly force was permissible because the driver "posed a grave public safety risk" and that firing fifteen times was not unreasonable because "the officers need not stop shooting until the threat is over."[115] Somewhat similarly, in *Brosseau v. Haugen*, the Court held that an officer was entitled to immunity when she shot an unarmed man in the back through the window of his Jeep—which was not moving[116]—as a means of preventing his escape.[117] The Court acknowledged that the officer's actions probably "fell in the 'hazy border between excessive and acceptable force,'" but that previous Court decisions "by no means 'clearly establish' that Brosseau's conduct violated the Fourth Amendment."[118]

V. THE PROBLEM OF POLICE USE OF FORCE

The qualified immunity doctrine presents myriad problems in both its conception and application, such that this Comment could not hope to address them all. But those mentioned in the previous section are among those of particular relevance to the recent questions surrounding police misconduct. Indeed, the link between police violence and the vast confusion regarding "clearly established" rights, or of giving lower courts complete discretion to address the two-pronged test in whichever order they see fit, might not be obvious at first blush. But it is not difficult to see how qualified immunity's gradual deterioration of law enforcement's accountability plays a role in the current predicament between the police and those they are tasked with policing.

---

[113] *Id.* at 2017.

[114] *Id.* at 2016–17.

[115] *Id.* at 2021–22. The Court also reasoned that the presence of a passenger in the front seat should play no part in its analysis. *Id.* at 2022.

[116] Despite the fact that the vehicle was not moving, the officer nevertheless claimed that she shot Haugen in the back because she was "'fearful for the other officers on foot who [she] believed were in the immediate area, [and] for the occupied vehicles in [Haugen's] path and for any other citizens who might be in the area.'" Brosseau v. Haugen, 543 U.S. 194, 197 (2004) (per curiam).

[117] *Id.* at 195–97.

[118] *Id.* at 201 (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001)).

A. *The President's Task Force on 21st Century Policing Prescribes Trust and Legitimacy*

In response to the officer-perpetrated violence and the national reaction thereto, President Obama created the Task Force on 21st Century Policing[119] in December 2014, to determine best practices for strengthening relationships between law enforcement and the public while also aiming to reduce crime.[120] In its Final Report, the Task Force set forth myriad recommendations and action steps to implement such recommendations, all of which aim at a paramount umbrella objective: fostering trust and legitimacy between the police and the communities they serve.[121] The Final Report is comprehensive in that it covers six general topics and recommends collaboration not only among the various levels of government,[122] but between individual law enforcement agencies and local schools,[123] higher-learning institutions,[124] other local jurisdictions,[125] and individual and corporate members of the community.[126] But the scope of the Task Force's assignment was limited to police-community interactions, and it advocates for holistic evaluation of the criminal justice system in order to determine a plan for comprehensive criminal justice reform.[127]

Establishing police accountability is a palpable recurring theme of the Final Report. For example, the Task Force encourages law enforcement agencies to foster transparency and ensure accountability by making departmental policies freely available to citizens, regularly posting data about stops, summonses, arrests, crime, and the like on the department website, and promptly and candidly communicating with the community about serious incidents—including alleged officer

---

[119] *See generally* Community Oriented Policing Services Office, *President's Task Force*, U.S. DEP'T OF JUST., http://www.cops.usdoj.gov/policingtaskforce (last visited Apr. 24, 2016).

[120] *See* Press Release, Fact Sheet: Task Force on 21st Century Policing (Dec. 18, 2014), https://www.whitehouse.gov/the-press-office/2014/12/18/fact-sheet-task-force-21st-century-policing.

[121] *See* PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1–4 (2015) [hereinafter TASK FORCE].

[122] *See id.* at 7–8.

[123] *See id.* at 15, 41–43, 47–49, 50.

[124] *See id.* at 16, 55, 59, 95–96.

[125] *See id.* at 28–29, 90.

[126] *See, e.g.*, *id.* at 19–20, 26, 35, 44–46.

[127] *See* TASK FORCE, *supra* note 121, at 5–8. The Task Force noted that many citizens think of police as the "face" of the criminal justice system, and may blame the police for policies with which they disagree such as drug laws, sentencing protocol, and incarceration rules. *Id.* at 7.

misconduct.[128] Additionally, the Task Force emphasizes the need for policy reform to control the use of police force and urges departments to mandate external, independent criminal investigations for cases of officer-involved shootings, in-custody deaths, and fatal use of force in order to demonstrate transparency and rebuild trust.[129]

B. *The Police and the Policed: A Relationship in Need of Repair*

Unsurprisingly, police shootings generally tend to produce tension between the police and the policed.[130] That most of the incidents propagated through various forms of media since 2014 have involved the deaths of unarmed citizens at the hands of police[131] has only made matters worse. Regardless of whether the number of police slayings has in fact increased, or whether the media is simply giving more attention to such occurrences, the general relationships between law enforcement agencies and communities nationwide are likely even further strained than in the case of more isolated, or seemingly more isolated, events.[132] In addition, multiple declinations of grand juries to indict officers involved in high-profile slayings of unarmed citizens has further exacerbated the problem, inciting outrage, inspiring protests,[133] and raising critical questions about the extent of police accountability.[134]

---

[128] *See id.* at 13.

[129] *See id.* at 19, 21.

[130] *See* HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 74 (1998).

[131] *See, e.g.*, Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0; Justin Fenton, *Autopsy of Freddie Gray Shows "High-Energy" Impact*, BALT. SUN (June 24, 2015, 10:25 AM), http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-freddie-gray-autopsy-20150623-story.html; Abby Ohlheiser, *Death of Tamir Rice, 12-Year-Old Shot by Cleveland Police, Ruled a Homicide*, WASH. POST (Dec. 12, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/12/12/death-of-tamir-rice-12-year-old-shot-by-cleveland-police-ruled-a-homicide/.

[132] *See* Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. 235, 236 (2015) (discussing how apparent racial targeting by police generates distrust, which boils over from time to time—for example, in 2014 in response to the deaths of Eric Garner, Michael Brown, and several other high-profile police slayings).

[133] *See* Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES (Aug. 10, 2014), http://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html; J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0.

[134] *See* Vincent Warren, *Building Trust and Legitimacy: Listening Session before the*

Unfortunately, while the FBI plans to improve its system for gathering information about the use of force by law enforcement by 2017, its data collection up to this point has been less-than-stellar.[135] And although the *Washington Post* undertook a year-long investigation in 2015 in order to accurately track the number of fatal shootings by on-duty police officers,[136] the fallibility of previous federal data makes it impossible to ascertain how that total compares to prior years.[137] Moreover, the *Post*'s report does not include other types of deaths at the hands of police, such as in-custody deaths[138] or deaths resulting from Tasers.[139] However, it is noteworthy that the *Post*'s figure of 986 lethal police shootings is more than double the FBI's average annual tally for the preceding decade.[140] So, if nothing else, this stark disparity reveals that such occurrences are substantially more prevalent than anyone was aware.

Of course, the *Post*'s figures are subject to varying interpretations, each of which has some merit. Some may consider the recent shootings to be an unfortunate but nonetheless routine consequence of enforcing the laws. On the other hand, nationwide protests[141] have

President's Task Force on 21st Century Policing, CENTERFORCONSTITUTIONALRIGHTS 3–4 (Jan. 9, 2015), http://www.ccrjustice.org/sites/default/files/assets/files/CCR Testimony_PolicingTaskforce_20150113Final.pdf (explaining that the repeated failure of grand juries to indict officers who engage in brutality, and the grant of immunity to some officers involved in Eric Garner's death "demonstrate a worrying lack of accountability or consequence for police misconduct").

[135] Kimberly Kindy et al., *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015), http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/.

[136] *See* Sandhya Somashekhar & Steven Rich, *Final Tally: Police Shot and Killed 986 People in 2015*, WASH. POST (Jan. 6, 2016, 6:38 PM), https://www.washingtonpost.com/national/final-tally-police-shot-and-killed-984-people-in-2015/2016/01/05/3ec7a404-b3c5-11e5-a76a-0b5145e8679a_story.html.

[137] In other words, it is truly impossible to determine whether there have actually been more police shootings of civilians, or whether the media has simply been giving more coverage to these incidents.

[138] Forty-seven people were killed in police custody in the United States in 2015. *The Counted: People Killed by Police in the US*, THE GUARDIAN, http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database (last visited Jan. 15, 2016).

[139] Fifty people died as a result of officers with Tasers in 2015. *Id.*

[140] *Id.*

[141] *See, e.g.*, Lauren Gambino et al., *Thousands March to Protest Against Police Brutality in Major US Cities*, THE GUARDIAN (Dec. 14, 2014, 10:58 AM), http://www.theguardian.com/us-news/2014/dec/13/marchers-protest-police-brutality-new-york-washington-boston; William Mathis, *Hundreds Rally in New York City to Protest Police Brutality*, HUFFINGTON POST (Oct. 24, 2015, 7:57 PM), http://www.huffingtonpost.com/entry/rise-up-october-rally-nyc_us_562c0fd9e4b0aac0b8fd23f3; *Protests Follow Decision Not to File Charges in Minneapolis Police Shooting*, CBS (Mar. 30, 2016, 8:02 PM),

demonstrated that many others consider civilian deaths at the hands of police officers to be an insult to constitutional rights. And surely the opinions of many Americans lie somewhere on the spectrum in between. While the statistical truth may forever remain a mystery, one thing is clear: the need for change.[142] The American public has lost trust in its law enforcement, not only because of the perceived frequency of the use of lethal force, but because of subsequent investigations into such incidents, which many view as biased.[143] The nation is calling for reform,[144] and various government agencies,[145] branches of local government,[146] and even the President[147] have responded to the outcry. But although the need for change has been

http://www.cbsnews.com/news/jamar-clark-protests-follow-decision-not-to-file-charges-in-minneapolis-police-shooting/.

[142] The urgent necessity is demonstrated by the handful of police departments nationally, including Philadelphia, Seattle, and San Francisco, which have already begun implementing specific recommendations of the Task Force. *See* Community Oriented Policing Services Office, *Task Force Recommendations Implementation Map*, U.S. DEP'T OF JUST., http://www.cops.usdoj.gov/Default.asp?Item=2827# (last visited Feb. 10, 2016).

[143] *See* Katz, *supra* note 132, at 235.

[144] *See, e.g.*, Michelle Basch, *Demonstrators Call for Change at Public Hearing on Fairfax Police Practices*, WTOP (Sept. 15, 2015, 1:39 AM), http://wtop.com/fairfax-county/2015/09/demonstrators-call-for-change-at-public-hearing-on-fairfax-police-practices/slide/1/; Phil Helsel, *Former Tennis Star James Blake Calls for Police Change After Mistaken Arrest*, NBC NEWS (Sept. 11, 2015, 9:41 PM), http://www.nbcnews.com/news/us-news/former-tennis-star-james-blake-calls-nyc-police-change-after-n426211; Meghan Keneally & Evan Simon, *Law Enforcement Analysts Call for Changes to Police Training After Recent Incidents*, ABC NEWS (May 5, 2015, 6:23 PM), http://abcnews.go.com/News/law-enforcement-analysts-call-police-training-recent-incidents/story?id=30827523.

[145] *See, e.g.*, Mark Berman et al., *Justice Department Sues the City of Ferguson to Force Policing Reform*, WASH. POST (Feb. 11, 2016, 7:52 AM), https://www.washingtonpost.com/news/post-nation/wp/2016/02/10/ferguson-demands-changes-to-agreement-reforming-police-tactics-justice-dept-criticizes-unnecessary-delay/; Kindy et al., *supra* note 135.

[146] *See, e.g.*, Ralph Ellis et al., *After Fatal Shootings by Police, Chicago Mayor Calls for Changes in Officer Training*, CNN (Dec. 27, 2015), http://www.cnn.com/2015/12/27/us/chicago-police-shooting/; Jayne Miller, *Baltimore Mayor Pushes for Changes to Fire Police Officers*, WBAL-TV (Oct. 21, 2015, 6:11 PM), http://www.wbaltv.com/news/baltimore-mayor-pushes-for-changes-to-fire-police-officers/35968256.

[147] *See* Julie Hirschfeld Davis, *Obama Calls for Changes in Policing After Task Force Report*, N.Y. TIMES (Mar. 2, 2015), http://www.nytimes.com/2015/03/03/us/politics/obama-calls-for-changes-in-policing-after-task-force-report.html?_r=0 (urging local law enforcement to consider independent criminal investigations and independent prosecutors in situations involving police use of force); Alex Johnson, *Obama: U.S. Cracking Down on 'Militarization' of Local Police*, NBC NEWS (May 18, 2015, 7:23 PM), http://www.nbcnews.com/news/us-news/u-s-cracking-down-militarization-local-police-n360381 (barring the federal government from providing local law enforcement with tanks, grenade launchers, and other heavy military equipment).

duly acknowledged, the question of how to implement comprehensive reform on a national scale remains largely unresolved.

VI. AMENDING QUALIFIED IMMUNITY DOCTRINE AS A CATALYST FOR CURBING POLICE VIOLENCE

Altering the qualified immunity doctrine is an excellent way to begin the path to restoring trust by establishing a much-needed sense of accountability. Civil remedies are a good starting point because, as repeated failures to indict officers—even where video footage of the incident exists—have demonstrated, accountability under the criminal law is a far-off possibility, if it is possible at all. Prosecutors are generally disinclined to bring charges against law enforcement officers,[148] and grand juries are equally as hesitant to indict them.[149] Independent investigations, as suggested by the Task Force, are an excellent idea, but establishing a feasible system nationwide would take both time and the cooperation of thousands of local law enforcement divisions nationwide. On the other hand, the Supreme Court could begin to relax the stringent immunity afforded to police officers with a single opinion, and could thus be implemented relatively quickly.

Of course, this is easier said than done. The Court has increasingly enlarged the immunity afforded to police officers in its recent decisions, and any 180-degree turnaround would likely require a change in Court composition. Nevertheless, the current Court can reinvigorate the usefulness of civil remedies for constitutional violations by simply providing more guidance and clarification regarding qualified immunity. In elucidating the contours of the doctrine and demonstrating its proper application, the Court can enhance accountability and help to repair trust between law enforcement and their respective communities.

The concept of a clearly established right is, in many ways, a problem that requires solving. A substantial number of cases are disposed of on the premise that a right was not "clearly established"—yet lower courts have struggled for years with what those words actually

[148] *See* HUMAN RIGHTS WATCH, *supra* note 130, at 85. Reasons that prosecutors may opt not to pursue brutality charges against police officers include: (1) the typically close working relationship between district attorneys and officers; (2) difficulty in convincing juries that officers committed a crime (as opposed to merely making a mistake); and (3) lack of information about prosecutable cases or systems for reviewing potentially prosecutable cases. *Id.* at 86.

[149] *See id.* (explaining that even seemingly foolproof cases against on-duty officers can fail because of juries' tendencies to support the police and their reluctance to find officers guilty on criminal charges).

mean.[150] Arguably, then, at least some officers are escaping liability simply because of the Court's repeated failures to establish consistency and clarity in its qualified immunity jurisprudence. But if the Court used qualified immunity opinions to demonstrate what qualifies as a clearly established right by meticulously outlining its reasoning in answering whether a set of facts implicates such a right, the Court could alleviate some confusion. In other words, rather than taking cases simply to overturn the lower courts' denial of immunity, which arguably only further clouds the issue, it could take cases to affirm those denials or, alternatively, to reverse lower courts' grant of immunity. By so doing, the Court can give examples of what constitutes a right that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right,"[151] and can give lower courts somewhat of a guide to follow.

By elucidating the contours of the clearly established right, the Court would alleviate some of the confusion of lower courts and ensure that they are in fact applying that portion of the test properly. Proper application of this prong directly promotes accountability, as the public can rest assured that, at least in that regard, cases are not being disposed of based merely on perplexity and uncertainty. Moreover, increased confidence about the clearly established prong could foster a willingness to take on the second part of the test and, in so doing, advance the development of constitutional law and clarify further constitutional rights.

The Court could also accept that its attempts at a general standard for all classes of officials that are not otherwise entitled to absolute immunity has been problematic and hugely unsuccessful. Though the Court apparently fears "complicat[ing]" qualified immunity,[152] the doctrine is obviously quite complicated as is, and adopting more particularized classes of officials with standards of immunity that are more appropriate to each would not only assist lower courts in properly analyzing immunity, but would promote justice in constitutional tort litigation. For example, the Court could classify officials based on the approximate number of people with whom they come in contact, and that might therefore bring civil suits against them.[153] A governor could

[150] *See supra* note 94 and accompanying text.

[151] Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015).

[152] *See supra* note 107 and accompanying text.

[153] *See* Mandery, *supra* note 44, at 514 (explaining that many concerns justifying qualified immunity for higher-level officials do not apply to lower-level officials, whose decisions typically only affect people they directly come into contact with, and whose tasks can be duplicated by other low-level officials, so any time spent defending a lawsuit is not an excessive governmental burden).

theoretically face a lawsuit from any resident of the state because a governor's decisions potentially affect all citizens of the state, such that more stringent protection—much like the standard afforded to all officials now—is appropriate. But law enforcement officers, who come in contact with only the residents of one town, city, or perhaps county,[154] risk possible suits from a much smaller pool of people. The threat of litigation would therefore be much less crippling on governmental function, and immunity protection need not be so rigorous. In the case of allegations of Fourth Amendment violations, in light of the already-existing reasonableness standard, immunity may be inappropriate altogether.

In addition, the Court could do its proverbial homework and take notice of the widespread indemnification of officers that often results in a complete absence of financial or employment-related consequences for law enforcement. If the Court stopped relying on its own intuition, and instead came to grip with the facts, it would likely realize that it has been overzealous in protecting low-level officers, and be inclined to alter course somewhat.

By beginning to mend the qualified immunity doctrine in these ways, the Court will allow more civil suits for the vindication of constitutional rights to succeed. This will help reduce the public mentality—strengthened by recent events—that cops get away with everything, in every regard. Civil suits avoid subjecting law enforcement to the criminal liability that many laypersons believe is warranted. While this may be true in select circumstances, reality demonstrates that criminal charges are highly unlikely to stick against a police officer. But allowing more civil suits to go forward will serve as an important reminder to both civilians and law enforcement that the police are not above the law, and that they are held accountable for their wrongdoings. In turn, this accountability will begin to heal the relationship between law enforcement and communities; it can serve as the first step on the long path to rebuilding the trust that is so crucial.

VII. CONCLUSION

By adopting different immunity standards for high-level and low-level officials, clarifying the vagueness surrounding the definition of a "clearly established" right, and acknowledging the real-world effects of indemnification, the Court can begin to repair some of the substantial

[154] In fact, more likely than not, an officer will only ever come in contact with *some* as opposed to all residents of the town, city, or county.

flaws in its qualified immunity jurisprudence. As it does, more constitutional tort suits will be permitted to succeed—just as the Court in *Monroe v. Pape* intended all those years ago—thereby fostering law enforcement accountability. Because criminal liability for police officers is, as a practical matter, nearly impossible in many situations, and because strategies like improving police training and recruiting tactics will likely take years to effectively implement on a national scale, civil liability is the immediate answer. Civil suits are the fastest and most efficient way to ensure the imposition of at least some repercussions for uses of force that the nation (though not the legal system) have considered to be excessive, unnecessary, and, sometimes, outrageous. Civil liability can be an initial, but potentially powerful, way to demonstrate that our officers are our guardians and that they are accountable to us—a principle that it seems many members of both the police and the policed have forgotten recently.

Of course, large-scale police reform and everything it entails, including exploring ways to make criminal liability more feasible, are crucial and will serve a prominent role in effecting change in due time. But amending the application of qualified immunity to allow for increased civil liability for police violations of constitutional rights is the most immediate way to rebuild trust and begin healing the citizen-police relationship.