Campbell Law Review

Volume 44
Issue 1 *Winter 2022*

Article 5

2021

With Great Power Comes Great Accountability: A New Method for Applying Qualified Immunity and Rebuilding Public Trust

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INTRODUCTION

In its original form, qualified immunity was intended to protect public officials from civil suits involving acts that violate the constitutional rights of a citizen committed while executing discretionary functions in good faith adherence to the authority of their office.[1] The augmentation of its application in *Pearson v. Callahan* created an inefficient system that categorically denies legitimate claims simply because a court has not previously ruled on that set of facts.[2] While this topic is at the forefront of public debate, it is necessary to consider how to reform the doctrine without entirely dismissing a highly interested party. This pursuit of justice should not abruptly depart from the common law tradition of good faith defenses. There are alternative standards and methods of resolution that adhere to the morals and expectations of the people. Due to recent publicity given to the relationship between qualified immunity and police officers, this Comment primarily focuses on that dynamic rather than public officials as a whole.

This Comment urges the implementation of an administrative council that represents interested parties—loosely modeled on the recent amendment to the Virginia Constitution that created a redistricting commission designed to combat gerrymandering.[3] Part I of this Comment focuses primarily on the historical application of qualified immunity and why its current status is unjust. To begin Part I, this Comment provides an analysis of police encounters with citizens and further breaks those statistics down based upon race to illustrate why public confidence has deteriorated. Then, this Comment focuses on the background of qualified immunity, explains the reasoning for its subsequent treatment, advocates for reform of the doctrine, and concludes with a discussion of what should replace the current standard.

Part II of this Comment proposes the creation of a quasi-judicial counsel. It is broken down into sections discussing its composition and structure, its function as a pretrial authority, and discusses the implementation of a new standard to replace the "clearly established" prong of qualified immunity. After balancing a new standard against reversion to the *Saucier v. Katz*

1. Pierson v. Ray, 386 U.S. 547, 557 (1967) ("[I]f the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional.").

2. WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10492, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS 3–4 (2020).

3. VA. CONST. art. II, § 6-A; Micah Altman & Michael P. McDonald, *A Half-Century of Virginia Redistricting Battles: Shifting from Rural Malapportionment to Voting Rights to Public Participation*, 47 U. RICH. L. REV. 771, 794–95 (2013) (illustrating a historical analysis of redistricting in Virginia that illustrates the relationship between partisan representation and patterns of gerrymandering districts).

analysis, this Comment advocates for the use of the "commonly understood" standard, which is intended to abrogate the closed-loop application of qualified immunity.

This Comment then concludes by advocating for legislative reformation of judicial procedure and the implementation of a new standard that allows all aggrieved parties the opportunity to pursue legitimate violations of their rights. Finally, in an effort to develop public confidence in the application of qualified immunity, this Comment recommends instituting a council comprised of interested parties to decide whether the defense should apply.

I. BACKGROUND AND DISCUSSION

A. Restoring Public Confidence in Section 1983 and Rebuilding Public Trust in Policing Methods

Between 2002 and 2011 an average of 43.9 million Americans had face-to-face contact with the police each year.[4] Across the entire sample, 715,500 experienced some threat or use of force.[5] Within that category, 535,300 believed the force applied by police officers was excessive.[6] Examining those figures from a race-perspective, the rate at which African Americans encounter police threats or actual uses of force is more than double that of whites.[7] African Americans were also found to be at a higher risk of experiencing excessive force at the hands of an officer, with such claims arising nearly three times more often.[8] Such disparities in policing have led to increasing cries for reform of both policing methods and the process by which police are held accountable.[9] However, calls to "defund

4. SHELLEY HYLAND, ET AL., BUREAU OF JUST. STAT., NCJ 249216, POLICE USE OF NON-FATAL FORCE, 2002–11 1 (Lynne McConnell & Jill Thomas eds., 2015), https://bjs.ojp.gov/content/pub/pdf/punf0211.pdf [https://perma.cc/4DTY-9V7R].

5. *Id.*

6. *Id.*

7. *Id.* (explaining that out of the 4.6 million African Americans who have face-to-face encounters with the police, 159,100 (3.5%) experience some threat or use of force; in comparison, of the 32.9 million white Americans who have face-to-face encounters with police, 445,500 (1.6%) experience a threat or use of force).

8. *Id.* (detailing that of the 159,100 African Americans who experience a use of force, 128,400 (2.8% of African Americans who come into contact with police) claim that the use of force was excessive, while of the 445,100 whites who experience a use of force, 329,500 (1.0% of whites who come into contact with police) claim the use of force was excessive).

9. Hilary Jochmans, *What's Happening in Washington with Police Reform*, 92 N.Y. ST. BAR A'SSN J. 33, 34 (2020) (contemplating the police reforms supported by President

the police" have met bipartisan resistance at national, state, and local levels as politicians try to strike a balance between maintaining the stability of current police departments and pushing forward meaningful reform.[10]

Although the "defund the police" movement warrants attention, this council is aimed at satiating public disdain for the unjust application of qualified immunity that attaches to officers who have committed egregious civil rights violations. In politics and the judiciary alike, the erosion of public trust can be effectively mitigated by affording aggrieved parties representation in the decision-making process.[11] Implementing a process that adequately represents both sides of the issues should coincide with an increased confidence in an aggrieved citizen's ability to successfully sue for redress. Further, application of the "commonly understood" standard will remove the "one-bite" safety-valve[12] for officers who act in a manner that a reasonably trained officer should know, without prior guidance, clearly violates a citizen's civil rights. The "commonly understood" standard provides that police may be held liable for actions that the reasonably trained officer, in the same or similar circumstances, would not have taken because it is generally known among officers—regardless of prior notice—that such a course of action would cause undue harm to another.

B. The Formation of Qualified Immunity

In the Civil Rights Act of 1871, Congress adopted what is now 42 U.S.C. § 1983, which provides citizens with a cause of action for civil rights

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Biden); Paige Fernandez, *Defunding the Police Will Actually Make Us Safer*, ACLU (June 11, 2020), https://www.aclu.org/news/criminal-law-reform/defunding-the-police-will-actually-make-us-safer/ [https://perma.cc/92WQ-GVR6].

10. Tal Axelrod, *Warner blames Democratic losses on 'defund the police*', THE HILL (Nov. 14, 2020, 11:55 AM), https://thehill.com/homenews/senate/525983-warner-blames-democratic-losses-on-defund-the-police [https://perma.cc/SW6X-4B7K]; Sarah Holder et. al., *'We Have Not Defunded Anything': Big Cities Boost Police Budgets*, BLOOMBERG CITYLAB (Sept. 22, 2020), https://www.bloomberg.com/graphics/2020-city-budget-police-defunding/ [https://perma.cc/6S4P-66R6] (providing a graph showing the rate at which police funding has changed in large cities over the past fiscal year—many cities having increased the budget between zero and five percent).

11. Claudine Gay, *Spirals of Trust? The Effect of Descriptive Representation on the Relationship Between Citizens and Their Government*, 46 AM. J. POL. SCI. 717, 721 (2002) (discussing empirical data that suggests descriptive representation in the legislature increases minority trust in the proper execution of governmental objectives).

12. The one-bite rule applies to civil suits for dog bites. It provides for a negligence standard if the dog has never bitten someone before, but strict liability if the owner had prior notice that the dog was dangerous. VA. CODE ANN. §§ 3.2-6540, 3.2-6540.1 (2021); *Smith v. Simmons*, 89 Va. Cir. 213 (2014); *see generally Butler v. Frieden*, 208 Va. 352, 355 (1967).

violations effectuated by someone acting under the color of state law.[13] During the mid-twentieth century, the Supreme Court of the United States began affording public officials qualified immunity from civil liability when performing discretionary functions so long as their conduct did not violate the "clearly established" rights the reasonable official would have known.[14] Due to the Court's expansion of the doctrine's breadth in subsequent cases, qualified immunity has become incredibly difficult for bona fide plaintiffs to overcome, leading to few cases surviving motions for summary judgment.[15]

1. Modern History of the Public Official's Good Faith Defense

Although *Harlow v. Fitzgerald* serves as the seminal case for the qualified immunity doctrine, its genesis is found in *Pierson v. Ray*. In *Pierson*, the Supreme Court addressed whether defendant-police officers were permitted to assert a good faith defense when sued under § 1983.[16] Interpreting § 1983 to have preserved common law immunities, the Court held, "the defense of good faith and probable cause . . . [is] available to them in [an] action under § 1983."[17]

Giving the doctrine its name, *Harlow v. Fitzgerald* provided the modern process of analyzing qualified immunity. In deciding the doctrine's scope, the Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[18] An official is performing a discretionary task if, in executing their official duties, they are exercising personal judgment.[19]

Assuming the plaintiff claims a constitutional violation—as in most § 1983 actions involving police—courts must determine whether the official

13. 42 U.S.C. § 1983 (2020).

14. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (citing Procunier v. Navarette, 434 U.S. 555, 565 (1978); Wood v. Strickland, 420 U.S. 308, 322 (1975)).

15. John C. Williams, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1305–07 (2012).

16. Pierson v. Ray, 386 U.S. 547, 551–52 (1967).

17. *Id.* at 557.

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

19. *Cf.* United States v. Varig Airlines, 467 U.S. 797, 811 (1984) (discussing the discretionary function exception under the Federal Tort Claims Act) ("[Discretion] includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.").

(1) committed a constitutional violation (2) that was clearly established.[20] There are two ways to locate clearly established law: (1) by finding sufficiently analogous facts from a prior case where the conduct violated a constitutional right and (2) if the reasonable public official would have known it was a civil rights violation.[21]

Under *Saucier v. Katz*, courts were *required* to decide whether a constitutional violation had occurred before reaching the issue of clearly established law.[22] Eight years later in *Pearson v. Callahan*, the Court overruled the *Saucier* mandate and allowed courts to apply qualified immunity for a lack of clearly established law without first deciding whether the facts presented a constitutional violation.[23]

2. Analytical Approach to Qualified Immunity

Since a principal purpose of qualified immunity is to avoid the costs of litigation by resolving the issue early on, the Supreme Court has instructed trial courts to resolve the issue on summary judgment early in the case.[24] As with all summary judgment issues, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact . . . ."[25] Hence, courts should grant summary judgment

if [the movant] adduces sufficient facts such that no reasonable jury, looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiffs, could conclude that it was objectively unreasonable for the [movant] to believe that he was acting in a fashion that did not clearly violate an established federally protected right.[26]

After *Saucier*, the Court provided that a qualified immunity claim may still be dismissed if the court cannot find clearly established precedent, even if a genuine dispute of material fact still exists.[27]

20. Pearson v. Callahan, 555 U.S. 223, 232 (2009) (citing Saucier v. Katz 533 U.S. 194, 201 (2001)).

21. Anderson v. Creighton, 483 U.S. 635, 640–641 (1987).

22. *Saucier*, 533 U.S. at 200.

23. *Pearson*, 555 U.S. at 227.

24. *See Saucier*, 533 U.S. at 200–01 (2001) (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991)), *abrogated by* Pearson v. Callahan, 555 U.S. 223 (2009).

25. FED. R. CIV. P. 56(a).

26. Esposito v. Quatinez, 2 F. Supp. 3d 406, 416 (E.D.N.Y. 2014) (alteration in original) (quoting Hartline v. Gallo, 546 F.3d 95, 102 (2d Cir. 2008)).

27. *Saucier*, 533 U.S. at 195 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

3. Reasoning Behind Qualified Immunity

The qualified immunity doctrine finds its roots in the good faith defense granted to those who have a legal duty to act.[28] In *Harlow v. Fitzgerald*, the Supreme Court articulated four social costs that, when balanced against the competing interests of potential plaintiffs, supported the judicial creation of qualified immunity: (1) the expense of litigation to the public at-large, (2) the diversion of government energy, (3) immobilization of officials due to fear of civil liability, and (4) the deterring effect of litigation on those who would have otherwise participated in public service.[29] These reasons serve as the primary justification for the continued application of the qualified immunity doctrine, buttressed by the strength of precedent behind it.[30]

i. Good Faith Exception to Civil Liability

The reasoning behind the birth of qualified immunity in relation to § 1983 is found in the good-faith exception for tort liability.[31] While common law never granted absolute immunity to police officers, the rationale behind insulating them from suit is that officers should not be liable for the actions that they take in good-faith reliance on their authority.[32] Stemming from the good-faith defense afforded to officers in claims of false imprisonment, the Court in *Pierson v. Ray* extended the defense to § 1983 actions.[33] The historic application of the good-faith exception in this area of civil litigation, alongside the consistent application of the doctrine, provides significant support for qualified immunity in the judiciary due to respect for *stare decisis*. Therefore, the best route for change would be for the legislature to amend the procedure for assessing qualified immunity disputes.

ii. Mitigation of Social Costs

28. *See generally Harlow*, 457 U.S. 800; Pierson v. Ray, 386 U.S. 547 (1967).

29. *Harlow*, 457 U.S. at 814 (1982) (citing Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

30. *See id.*; *see generally Saucier*, 533 U.S. at 203.

31. *Pierson*, 386 U.S. at 555–57.

32. *Id.* at 555.

33. *Id.* at 557.

The costs of qualified immunity litigation can be divided into two categories: direct costs and indirect costs.[34] Direct costs of litigation include attorneys' fees, discovery, and the state's indemnification of the wrongdoer.[35] States often indemnify a judgment against a public servant, so long as his conduct was not blatantly illegal.[36] The other three *Harlow* reasons may be labeled as indirect costs that generally impede the efficient execution of governance.[37]

The Supreme Court of the United States articulated that the monetary costs of § 1983 litigation is a primary factor for the existence of qualified immunity.[38] The direct cost of litigation would fall upon the taxpayer, thus insulation from civil suit was necessary to prevent frivolous claims from diverting funding that could be used more efficiently elsewhere.[39] The direct cost associated with § 1983 actions is mostly attributed to the expenses incurred during pretrial discovery.[40] These costs are exacerbated because the plaintiff must closely tie the facts of his case to those of a prior case; attempts to uncover these facts often necessitate discovery of specific information and testimony.[41]

Another realistic concern of the judiciary is the diversion of governmental energy. Litigation will cause the defendant, his associates, and superior officers to spend time working on issues related to the suit instead of executing their duties owed to the public. Qualified immunity is designed to further this purpose by deterring frivolous suits that tend to throw a wrench into the execution of governmental responsibilities by diverting employee attention.[42] Therefore, when formulating the doctrine, one of the foremost considerations of the Court was balancing the department's workload against the legitimacy of claims based on constitutional violations of clearly established law.[43]

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34. David L. Noll, *Qualified Immunity in Limbo: Rights, Procedure, and the Social Costs of Damages Litigation Against Public Officials*, 83 N.Y.U. L. REV. 911, 917 n.36 (2008) (citing Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 399–400 (1973)).

35. *Id.* at 917–18.

36. *Id.* (citing Lant B. Davis et al., *Suing the Police in Federal Court*, 88 YALE L.J. 781, 810–11 (1979)).

37. *See id.* at 919–22.

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

39. *See Id.*

40. *See* Noll, *supra* note 34, at 918.

41. *See Harlow*, 457 U.S. at 821 (Brennan, J., concurring) ("[I]t seems inescapable to me that some measure of discovery may sometimes be required to determine exactly what a public-official defendant did 'know' at the time of his actions.").

42. *Harlow*, 457 U.S. at 814.

43. *Id.* at 813–14.

Third, the Court is concerned that increasing the viability of § 1983 claims will cause public officials to become so immobilized by fear of civil litigation that their work will suffer, further decreasing the efficiency of government employees.[44] Perhaps this concern is most evident in the relationship between qualified immunity and police departments, as fear of litigation may affect the split-second decision-making processes of police officers.[45] In *Graham v. Connor*, the Court acknowledged that many officers must make quick decisions without time for reflection on the likely consequences of their actions.[46] Thus, an important characteristic of the qualified immunity analysis is that courts must objectively review the action of the officer from the perspective of a reasonable officer under the same or similar circumstances.[47] This standard ensures that retrospective review of life-or-death decisions does not broaden the analysis into what the perfect officer would have done, but rather provides a narrow avenue for judging *this* officer's actions.

The last consideration of *Harlow* is the likelihood that broad liability for violations will deter well-qualified citizens from taking public office or joining the police force.[48] Here, the Court has taken a long-term view of the effect civil litigation has on the likelihood of a citizen's participation in public service.[49] In considering the purpose of qualified immunity, the Court noted that a proper function of the doctrine is to encourage people to make a career out of public service without the fear of opening themselves to a litany of lawsuits. The purpose of requiring clearly established precedent is to ensure that officials were on notice before the violation of civil rights occurred.[50] For that purpose, qualified immunity is intended to provide prospective officials with well-delineated constraints on their power that illustrate the outer bounds of their authority.[51]

4. The Need for Clearly Established Law

The overarching issue with qualified immunity causes of action is that another court must have previously deemed the same act to have been a constitutional violation of that prior litigant's civil rights, which often ignores the second avenue for denial of qualified immunity on the basis that

44. *Id.* at 814.
45. *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989).
46. *Id.*
47. *Id.*
48. *Harlow*, 457 U.S. at 814.
49. *Id.* (citing Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).
50. *Id.* at 815–19.
51. *See id.* at 819.

a reasonable officer would have known it was a civil rights violation.[52] Although the Supreme Court of the United States has stated that the "clearly established law" does not need to be directly on point with the current plaintiff's facts, the practical application of qualified immunity has confined "clearly established" law to that of prior precedents.[53] Further, the Court ruled in *Pearson* that a trial court may first look for clearly established precedents, and, if one does not exist, then it may dispose of the case without deciding whether the alleged actions of the public official amounted to a violation of constitutional and statutory rights.[54] A trial judge's discretion to abstain from ruling on the existence of a violation has significantly increased the rate at which summary judgment is granted for defendants.[55] This has effectively foreclosed the opportunity to add to that body of clearly established law, since claims must mirror the facts of the prior case so closely as to be virtually identical to survive summary judgment.[56] Otherwise, plaintiffs will likely have their claims dismissed due to the lack of established law.

C. A Balancing Act Out of Balance

For centuries, free societies have strived to afford their citizens an avenue to redress governmental misconduct.[57] *Pearson*'s closed-loop application of qualified immunity has often precluded such redress.[58] The relationship between many American citizens and police officers has been heavily strained in the recent years as high-profile instances of police brutality have come to the forefront of American politics and, consequently,

52. *Id.*; *see also* Mattos v. Agarano, 661 F.3d 433, 436–42 (9th Cir. 2011) (interpreting the reasonable officer standard to mean "whether [the right's] contours were 'sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right'" (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011))).

53. Tyler Finn, *Qualified Immunity Formalism: "Clearly Established Law" and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 447 (2019).

54. Pearson v. Callahan, 555 U.S. 223 (2009).

55. *See* NOVAK, *supra* note 2, at 1–2.

56. Williams, *supra* note 15, at 1316; *see generally* Hope v. Pelzer, 536 U.S. 730 (2002) (rejecting a claim where plaintiff was a prisoner and latched to a hitching post for hours without water or bathroom breaks). *But see* Taylor v. Riojas, 141 S. Ct. 52 (U.S. 2020) (reversing a grant of qualified immunity for correctional officers that had confined an inmate to a frigid cell covered in feces because no reasonable correctional officer could have concluded that these extreme circumstances were constitutional).

57. U.S. CONST. amend. I; 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 143 (1978).

58. Wylie Stecklow, *Qualified Immunity: Is the End Near?*, 93 N.Y. ST. BAR ASS'N J. 22, 23–24 (2021).

legal reform.[59] The most pressing question revolves around how individual citizens can hold public officials—namely police officers—accountable when they blatantly abuse their power. This tenuous relationship has degraded public confidence in officers' ability to execute their duties with due discretion, requiring a new balancing of *Harlow*'s social costs against the need for citizens to hold the government accountable for the damage its officials cause.

There are some expenses a government will incur that are necessary for it to function in a proper manner. One of those expenses is incurred due to the need to provide citizens with the ability to sue the government for damages caused by the incompetent exercise of authority, as it is a paramount power of the free citizen.[60] The social expense of rejecting these suits outweighs the pecuniary loss incurred by compelling courts to delineate the boundaries of police authority. The composition of the quasi-judicial council proposed below has been crafted to adequately represent competing interests to bolster public confidence in the procedural application of qualified immunity.

1. Relief for Trial Courts

Under the proposal set out below, preliminary proceedings are removed from the consideration of the court, providing relief for the back-logged dockets of trial courts.[61] The judiciary's role will not be triggered until the council has decided if the affirmative defense applies. Then, the trial court reviews the findings of the council; if the trial court judge agrees that the defense does not apply, then the case may be set for trial.

2. Diversion of Government Energy

The indirect cost attributed to the diversion of government employees' energy from participation in the discovery process is likely to be marginally affected from implementation of this council. Using the council to carry a case through summary judgment may or may not alter the frequency at

59. NOVAK, *supra* note 2, at 1; Eric Schnurer, *Congress is Going to Have to Repeal Qualified Immunity*, THE ATLANTIC (June 17, 2020, 10:35 AM), https://www.theatlantic.com/ideas/archive/2020/06/congress-going-have-repeal-qualified-immunity/613123/ [https://perma.cc/J55H-E38R]; *see also* Jay Scheikert, *Republican Senator Introduces Legislation to Reform Qualified Immunity*, CATO INST. (June 23, 2020, 1:01 PM), https://www.cato.org/blog/republican-senator-introduces-legislation-reform-qualified-immunity [https://perma.cc/QV7R-G55S].

60. BLACKSTONE, *supra* note 57, at 143.

61. Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RSRV. L. REV. 813, 837–38 (2000) (finding an aggregate of 4,196 tort cases showed that the average claim took 30.2 months to reach a jury verdict).

which a qualified immunity defense is granted or denied. A change in the number of successful defenses, however, is not the purpose of creating this administrative body. The intent behind this proposal is to provide adequate representation of competing perspectives within the decision-making process who will utilize a revised reasonableness standard. Thus, it is difficult to speculate on the council's effect on the costs of discovery because it remains to be seen whether the application of this council would increase the number of cases that proceed beyond summary judgment and into advanced stages of discovery.[62]

3. Mitigating Immobilization by Providing Representation

The concern that a reduction in liability protection will immobilize the performance of an official's duties is highly apparent in the context of police officers acting in the line of duty. In a sample of about two-thirds of police departments, the FBI reported 56,034 officers who were assaulted while carrying out their duties, equating to almost twelve percent of the sample group.[63] Out of the ten factors that increase the risk for workplace assault, police officers fit into eight of the categories, and two of those provide policework as an example.[64] Officers are routinely expected, and often encouraged, to insert themselves into dangerous situations for the purpose of removing a threat to individuals or the public. In a manner similar to the community-caretaking function expressed in Fourth Amendment criminal jurisprudence,[65] any reform of qualified immunity must account for the responsibilities of officers and also for the intentionally increased exposure to volatile situations.

For the purpose of retaining an officer's security in the execution of their duties, the council will include a representative who appreciates the

62. Joanna C. Shwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 54 (2017) (finding discovery for qualified immunity is nuanced and highly fact-intensive, often causing discovery to be long and expensive).

63. Criminal Services Investigation Services Division, *Officers Assaulted*, F.B.I. (2019), https://ucr.fbi.gov/leoka/2019/topic-pages/officers-assaulted [https://perma.cc/4CXK-YS42].

64. NAT'L INST. FOR OCCUPATIONAL SAFETY AND HEALTH, CTRS. FOR DISEASE CONTROL AND PREVENTION, VIOLENCE IN THE WORKPLACE, PUB. NO. 96-100 (1996), https://www.cdc.gov/niosh/docs/96-100/risk.html, [https://perma.cc/2AER-CBPV] (noting risk factors that may be implicated by policework: contact with the public, delivery of passengers, having a mobile workplace "such as a police cruiser," working with volatile persons in the "criminal justice setting," working alone or in small groups, working at odd hours of the day, working in high-crime areas, and working in community-based settings).

65. *See generally* Brigham City v. Stuart, 547 U.S. 398, 403–04 (2006) ("One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury.").

stress an officer may have been experiencing when the civil rights violation occurred. Though recent public attention has set its sights on the repeal of qualified immunity, any attempt to alter or abolish this defense must consider the effect of potential legal liability on the inclinations of the average officer when coming to another's assistance. The law should not render every minor violation of an officer actionable if he pursued a course of action that a trained officer in those circumstances would have believed to be reasonable. For the purpose of this Comment, a minor violation is one that does not cause significant physical injury to the potential plaintiff or unduly restrict his freedom of movement.

4. Maintaining Public Interest in Public Service

The intent to increase public interest in joining police departments presents two antonymic issues: (1) broadening officer liability to allow suit for any violation they commit will deter future service because of the risk of suit, yet (2) granting police *carte blanche* authority will erode public respect for police and decrease the social desirability of enlisting. In the middle of either ditch is a road, a smooth balance between the two undesirable positions. Avoiding the first requires citizens to appreciate the inherently dangerous nature of policework and grant officers a degree of discretion in how they carry out their duties.

To avoid the second ditch, the authority of the police must be amenable to redress for civil rights violations. Seldom does the common law *impose* a duty on an individual to come to the aid of another.[66] As first responders, the primary function of police is to render assistance to those in need. Such situations call for split-second decisions and do not allow for thoughtful reflection on how to proceed, which necessitates the availability of a tailored defense.

Overall, the ability of citizens to seek recourse for civil rights violations outweighs the social costs contemplated by the Court. At the least, these violations may be addressed and mitigated by a more equitable standard. The following proposal intends to strike a balance between giving § 1983 teeth and maintaining officer confidence in their ability to execute their duties without being exposed to excessive liability.

D. A New Standard for Applying Qualified Immunity

The primary issue of qualified immunity is the inability of genuinely aggrieved plaintiffs to tie their case closely enough to clearly established

66. *See* RESTATEMENT (SECOND) OF TORTS § 323 (AM. L. INST. 1965) (stating the prerequisites for the imposition of duty on one who negligently renders aid).

precedent necessary to survive summary judgment. Therefore, a new standard must ameliorate concerns regarding the lack of clearly established law that allows for disposal of a case without finding whether an officer violated the plaintiff's constitutional rights.

Until abrogation in *Harlow*, plaintiffs could recover for civil rights violations if the officer had the subjective intent to violate the plaintiff's rights.[67] Since the subjective intent standard brought too many insubstantial cases to trial, the Court removed that approach and placed qualified immunity on its current trajectory.[68] After this decision, qualified immunity still had a functional and relatively fair standard as courts began prescribing what was considered a civil rights violation and what was not, creating a body of clearly established law in the process.[69]

That process was all but abandoned after the decision in *Pearson* to allow trial courts to dispose of suit without deciding whether the actions of the officer amounted to a constitutional violation.[70] This system either indicates to officers that those rights within the closed loop are the only restrictions on their power or it leaves the prudent officer without an understanding of what courses of action they may pursue without potentially violating another's constitutional rights.[71]

1. Reversion to Saucier's Procedural Requirements

There are two alternate paths for revising the current standard of qualified immunity: (1) reverting back to the procedure of decision-making asserted in *Saucier* or (2) adjusting the necessary elements of qualified immunity. These two options will be compared against one another later in Section VIII(B) of this Comment. Under the *Saucier* standard, there was a slow, developing body of law that defined the outer boundaries of officials' power, which gave courts the ability to notify officials about the constraints placed on their office.[72] Since the analytic procedure created in *Pearson* has paralyzed many citizens' ability to seek meaningful redress, the law must compel courts to create a well-developed body of law that states when an officer has violated someone's rights.

67. Harlow v. Fitzgerald, 457 U.S. 800, 815–16 (1982).

68. *Id.*

69. Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 707–08 (2009).

70. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

71. *See Harlow*, 457 U.S. at 819 (noting that a major purpose of qualified immunity is to create a body of law that provides public officials with and understanding of the outer boundaries of their power).

72. Leong, *supra* note 69, at 708.

A reversion to the procedure prescribed in *Saucier* would likely be an amenable standard for applying qualified immunity because it compels courts to continue building a body of "clearly established" law. Under *Saucier*, the Supreme Court mandated that trial courts must first provide a holding on whether the alleged facts contained a violation of a plaintiff's constitutional right.[73] Only then could the court move on and consider whether it had been clearly established.[74]

After finding a violation of a constitutional right, the court is then permitted to analyze whether the right in question was clearly established. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition . . . ."[75] Lower courts have interpreted this direction narrowly, requiring plaintiffs to closely tie their cases to precedent.[76]

The Court has stated that clearly established law includes those violations that would have been apparent to the reasonable person.[77] Its practical application, however, has illustrated that courts only charge the reasonable officer with knowledge of prior judicial rulings.[78] By refusing to consider if the reasonable officer would have known a violation had occurred in the abstract, plaintiffs are effectively foreclosed from obtaining a judgment on the sole basis that sufficiently similar conduct had not been previously deemed unconstitutional.[79]

2. Adoption of the "Commonly Understood" Standard

Alternatively, the "clearly established" prong of qualified immunity should be replaced with a "commonly understood" standard for officer conduct. That is, police may be held liable for actions that the reasonably trained officer, in the same or similar circumstances, would not have taken because it is generally known among officers—regardless of prior notice—that such a course of action would cause undue harm to another. This applies the reasonably prudent officer standard to violations of civil rights for

73. Saucier v. Katz, 533 U.S. 194, 201 (2001), *abrogated* by Pearson v. Callahan, 555 U.S. 223 (2009).

74. *Id.*

75. *Saucier*, 533 U.S. at 201; *see also, e.g.,* Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011).

76. Finn, *supra* note 53, at 447.

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

78. Finn, *supra* note 53, at 448, 476 (advocating for courts to begin looking beyond precedential cases to find if a right was clearly established in First Amendment jurisprudence).

79. West v. City of Caldwell, 931 F.3d 978, 984 (9th Cir. 2019) (stating the prior precedential finding must be obvious to the officer in question).

the purpose of evaluating the conduct from the perspective of the trained police officer. Utilizing the commonly understood standard does not dispose of the need for the council to decide whether a constitutional violation took place.

i. Practical Application of the "Commonly Understood" Standard

In practice, the council must first find a constitutional violation occurred, followed by an analysis of whether the officer had notice of the right's existence. "Commonly understood" is intended to replace and relax the notice requirement of the "clearly established" standard. It allows the council to look beyond precedential cases to decide whether the reasonable officer knew of its existence even if the precise set of facts has not yet been brought to court.

"Commonly understood" is differentiated from the current application of "clearly established" based on how it interprets what conduct is reasonable. It encourages courts to consider persuasive sources beyond precedent and to interpret precedential cases more broadly. Essentially, plaintiffs should not be required to find a perfectly analogous case for blatant violations[80] of their constitutional rights, while more nuanced scenarios[81] may still require that precedential authority provided notice to the officer that such an act violated the rights of an individual. Under this standard, a showing of prior notice to the officer would be conclusive evidence that the act was commonly understood to be a violation.

ii. Sequential Approach to Qualified Immunity Analysis

Regardless of whether the legislature chooses to adopt the *Saucier* two-step method or to implement the commonly understood standard in lieu of clearly established law, qualified immunity procedure must require courts to rule on whether a constitutional right was violated. If the law

80. "Blatant violations" are actions an officer takes that serve no legitimate, lawful purpose except to cause unnecessary injury to the individual. *Baxter v. Bracey* is an example of a blatant violation. *See* Baxter v. Bracey, 751 F. App'x 869, 872 (6th Cir. 2018).

81. "Nuanced scenarios" are those where an officer attempts to execute her duties in good faith yet, due to a deviation in adherence to her authority, causes undue injury to the individual. Where a case is concerned with applying qualified immunity in such scenarios, the court should grant considerable weight to whether the officer was given prior notice of unconstitutionality by the court. *Saucier v. Katz* is an example of a "nuanced scenario." *See* Saucier v. Katz, 533 U.S. 194, 198 (2001), *abrogated by* Pearson v. Callahan, 555 U.S. 223 (2009).

requires plaintiffs to produce clearly established law, then it must work to create such precedent. Otherwise, plaintiffs will continue to find themselves outside the closed-loop and consequently, without remedy.

II. RECOMMENDATION

A. Virginia Constitutional Amendment

A recent amendment to the Virginia Constitution created a commission of various interested parties in an effort to combat the gerrymandering of voting districts throughout the state.[82] The commission was created in response to public complaints about the nearly unilateral power of a majority to redraw district lines that intentionally left large minorities underrepresented.[83] The current commission is to be composed of a diverse group of representatives for a total of sixteen commissioners. Those seats are apportioned as follows:

- Two appointed by the most-represented political party in the Senate;
- Two from the party with the second most seats in the Senate;
- Two appointed by the most-represented political party in the House of Delegates;
- Two from the party with the second most seats in the House of Delegates; and
- Eight citizens appointed according to criteria established by the General Assembly.[84]

As a regulatory procedure designed to vet potential citizen commissioners, the amendment also creates a committee of five retired circuit court judges, one of whom is to be the committee chair.[85] The composition of the Redistricting Commission Selection Committee is determined by the Chief Justice, who submits a list of judges to the four aforementioned party leaders for confirmation, then, each leader selects a judge from that list.[86] Those

82. VA. CONST. art. II, § 6-A.

83. *See* Rachel Weiner, *Virginians approve turning redistricting over to bipartisan commission*, WASH. POST, (Nov. 4, 2020, 9:59AM), https://www.washingtonpost.com/local/virginia-politics/virginia-redistricting-amendment-results/2020/11/02/5d1ef242-19f8-11eb-befb-8864259bd2d8_story.html [https://perma.cc/D3A8-NGSB].

84. VA. CONST. art. II, § 6-A(b)(1)–(b)(2).

85. VA. CONST. art. II, § 6-A(b)(2)(A).

86. *Id.*

four judges select a fifth judge from the list to serve as the chairman of the Committee.[87]

Next, each party will select their congressional representatives from each branch of the legislature for a total of eight congressmen.[88] Each party from both branches submits a list of sixteen citizens—who meet the statutory requirements—proposed for membership on the commission for a total of sixty-four candidates.[89] The committee of judges then selects—by majority vote—two citizens from each party's list of sixteen to serve on the Redistricting Commission.[90] Finally, the commission internally selects its chairman from the list of confirmed citizens.[91]

B. Formation of the Qualified Immunity Council

1. Composition

The proposed commission will consist of five representatives appointed by various groups interested in the outcomes of § 1983 litigation and the availability of the defense for officers. In an effort to remedy the recent erosion of public confidence in qualified immunity's application, one member of the council should be selected by the state's Plaintiff's Bar or an organization similarly situated to properly represent the interests of citizens seeking to file suit. Next, police officers' interests should be represented by an appointee from the state's police union.[92] For the purpose of providing citizens with another basis for restoring confidence in the legal process, there should be two councilors selected by the majority party in the state's legislative branch whose representation is allocated based on population (i.e., the equivalent of the House of Representatives). In order to balance the scales between the competing interests, the second-most represented political party in that branch should also provide a single appointee of their own.

Similar to the Redistricting Commission Selection Committee, the law should also provide for a regulatory board that assesses the merit of each appointee. While this commission should be comprised of experienced legal minds, it does not necessarily need to be restricted to retired judges.

87. *Id.*

88. VA. CONST. art. II, § 6-A(b)(1).

89. VA. CONST. art. II, § 6-A(b)(2)(B).

90. *Id.*

91. VA. CONST. art. II, § 6-A(c).

92. RON DELORD & RON YORK, LAW ENFORCEMENT, POLICE UNIONS, AND THE FUTURE 179 (2017) (estimating that out of the roughly 800,000 officers in the United States, between seventy-five and eighty percent are represented by police unions).

Perhaps, the supreme court of the state or judiciary committee of either branch of the legislature would suffice so as to dispense with the need for creating an entire committee that only serves a single function every few years.

2. Requirements for Appointment

Finally, the people proposed for membership should be required to meet a minimum criterion before they may be considered by the regulatory body. Although this would fall under the prerogative of the state's legislature, there are a few necessary requirements for admission to a quasi-judicial body. At a minimum, a councilman should have some legal background and demonstrate an ability to properly decide legal issues. Although membership in the respective state bar would be a proper indication of skill, it may be demonstrated as well by prior experience working in or with the courts. In addition, it is essential to remove those who are wholly motivated by potential for political gain, so contemporaneous employment in either political party should preclude someone from membership. Aside from these primary considerations, additional credentials should be a decision of the state legislature.

C. Function of the Council and Application of the Second Prong

The primary function of the council is to determine whether an officer or public official has met the prerequisite standard necessary to apply qualified immunity. While imposition of the council does not ameliorate the burdens of discovery, the council's existence is aimed at rebuilding public confidence in the fair application of the defense.

This is not to say that trial courts consistently act in an unjust manner by granting summary judgment to officers, as they are acting within the directives of the United States Supreme Court. The purpose of removing the trial courts from this pretrial issue is to provide the public with an affirmative showing of meaningful reform. As the council represents various perspectives on the issue, its decisions will reflect a measured balance of those competing interests.

1. Adherence with Procedural Due Process

The implementation of a quasi-judicial council to decide whether qualified immunity applies does not deprive officers of due process because it meets the necessary requirements of procedural due process. First, bringing cases to the council follows traditional pretrial procedures of notice, so the officer will have time to prepare her defense. Second, officers will have an opportunity to be heard by the council and the trial court should they appeal

the council's decision.[93] Finally, the decision will be made by a neutral decisionmaker. Although each individual on the council may have differing interests in the outcome of qualified immunity litigation, the diversity in its composition gives it the necessary qualities to be considered a neutral decisionmaker.

Due process is not a technical conception bound by specific rules and requirements in every case. Rather, it is a flexible prescription of the necessary procedural protections that a specific case demands.[94] The Court in *Matthews v. Eldridge* enumerated four primary interests to be considered when determining if due process has been satisfied: (1) the private interest affected by official action, (2) the risk of erroneous deprivation through implemented procedures, (3) "the probable value, if any, of additional or substituted procedural safeguards[,]" and (4) the government's "fiscal and administrative burden[]" of implementing new safeguards.[95]

Although the primary purpose of implementing this council is to provide stakeholders with reassurance that others' causes of action will not be erroneously kicked out of court, it maintains adherence to the fundamental tenants of procedural due process stated in *Eldridge*. First, it seeks to balance the interests of both parties by providing them with a diverse forum that can rule on the issue of whether qualified immunity applies. Second, the council does not present any increased risk of erroneous deprivation as it is only a new quasi-judicial body deciding a single issue in the case. In operation, the council may decrease the likelihood of an erroneous deprivation, as it provides another layer of scrutiny for both parties to plead their case. Third, the council adds procedural value in two ways: (1) it seeks to satisfy the public desire for reform in the realm of qualified immunity, thereby increasing public confidence, and (2) it provides a diverse forum for both parties to have their arguments heard and subjects the ruling to later review of the trial court as well, decreasing the likelihood of faulty application of qualified immunity. Finally, the implementation of this council will likely increase the administrative burden of the government as the council will need to be staffed and attended to by government officials. In terms of litigation costs for individual cases, however, there is no foreseeable difference from costs incurred under the current method of application.

93. The trial court's standard of review on the council's decision should be decided by the state legislature.

94. Matthews v. Eldridge, 424 U.S. 319, 334 (1976).

95. *Id.* at 335.

2. Application of a Revised Standard for the Second Prong

Upon legislative creation of the council, there should also be a reformed or revised standard for its application. First, a reversion to the *Saucier* application of qualified immunity will be explored followed by a comparison to the aforementioned "commonly understood" standard.

i. The Saucier Two-Step Method

The primary benefit of reverting back to *Saucier* is the re-opening of consideration for new civil rights violations as the courts will be compelled to develop a body of law surrounding civil rights violations caused by the police.[96] Noting that "the requisites of a qualified immunity defense must be considered in proper sequence[,]" the Court ruled that an essential aspect of the defense was determining whether a civil rights violation had occurred.[97] The reasoning for this is two-fold: first, the Court posited that an early disposition on this fact would reduce the costs of litigation where there was not a violation found;[98] second, the Court stated that the finding of clearly established law would be influenced by the finding of a constitutional violation.[99] Further, the Court was cognizant of the need to develop clearly established violations as precedent for future cases as "[t]he law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."[100]

Rejecting this logic, *Pearson* stood for the proposition that amelioration of the social costs contemplated in *Harlow* is worth the high barrier to suit imposed on future plaintiffs.[101] However, the current application of qualified immunity is a legal, practical, and moral failure as it deprives plaintiffs of the ability to pursue legitimate claims against public officials and police of the opportunity to understand their capabilities more fully.[102] Consequently, it has eroded public confidence in the legitimacy of legal

96. *See* Saucier v. Katz, 533 U.S. 194, 200 (2001), *abrogated by* Pearson v. Callahan, 555 U.S. 223 (2009).

97. *Id.*

98. *Id.*

99. *Id.* at 201.

100. *Id.*

101. *See* Pearson, 555 U.S. at 236–37.

102. *See generally* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

processes intended to provide an avenue of meaningful redress for damages caused by their government.[103]

One drawback to the *Saucier* method of application is how slowly "clearly established law" is created. Under *Pearson*, the violation found must still have been previously established by precedent for the case to go to trial so the first time a right is violated, the officer will most likely still receive immunity because he was not on notice of these limitations on his authority.[104] Such a standard has led to some absurd comparisons of facts where minute, irrelevant differences in fact have led to dismissal of legitimate claims.[105] Therefore, a new standard for application of qualified immunity should dispense with the "one-bite rule" allowed for public officials and afford citizens who are the first to meet egregious violations a path for recovering the damages incurred.

ii. The "Commonly Understood" Standard

Similar to the "reasonable officer" standard put forward in *Graham v. Connor*, the "commonly understood" standard views violations from the perspective of the reasonable officer on the scene.[106] However, it also allows courts to deny immunity if the officer knew or should have known that his actions would violate the plaintiff's civil rights and, consequently, cause undue harm. While remaining an objective consideration, this standard would not foreclose recovery solely based on the fact that such harm has not previously been brought before a court. Further, by maintaining the perspective of the well-trained officer, this standard preserves immunity for those borderline constitutional violations and only allows egregious violations to find footing without prior precedent.[107] Essentially, the goal of

103. *See* Kyle Hawkins et al., *Qualified Immunity: A Shield Too Big?* 104 JUDICATURE 66, 68 (2021) (examining and challenging qualified immunity through historical, doctrinal, sociological, and political perspectives).

104. *Saucier*, 533 U.S. at 202 ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987))).

105. *See, e.g.*, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 378–79 (2009) (holding that a strip search of a female student, though it was a constitutional violation, had not been clearly established, which allowed for immunity to attach); *see also* Baxter v. Bracey, 751 F. App'x 869, 873 (6th Cir. 2018) (distinguishing the facts of the current case from precedent because the plaintiff hid and his hands were not in the same location; therefore, the violation was not clearly established).

106. Graham v. Connor, 490 U.S. 386, 396 (1989).

107. Finn, *supra* note 53, at 447 (arguing that, although in theory, the current application of qualified immunity is intended to take the perspective of the objectively reasonable

substituting the "commonly understood" standard for the "clearly established" precedent requirement is to allow cases involving unequivocally clear violations to reach trial without rendering close-call violations fully amenable to suit without prior notice that it was a civil rights violation.

Both standards have the benefit of compelling courts to establish a body of precedent that illustrates what constitutes a constitutional violation. The main difference between the two standards is that "commonly understood" grants some plaintiffs the opportunity to successfully reach trial even though current precedent has not clearly established the act to be a constitutional violation. Due to this crucial difference between the two options, the enactment of this council should replace the "clearly established" prong of qualified immunity with the "commonly understood" standard.

CONCLUSION

Overall, the current application of qualified immunity created by the Court in *Pearson v. Callahan* has instituted an unjust defense that precludes citizens from holding their government and its officials accountable for the damages that it inflicts on its own citizens. The justification for the doctrine relies on a terse assertion of social costs that the country must be insulated from for public officials to function properly. However, these costs pale in comparison to the necessity of the American populous to find meaningful avenues of redress for injuries incurred at the hands of those sworn to serve and protect it.

Therefore, it is necessary to legislatively amend the judicially created defense of qualified immunity and replace it with an effective standard that does not preclude suit on the mere basis that no one else has ever tried to sue for a factually analogous injury. Requiring clearly established precedent fails to meet the fundamental moral, legal, and practical functions of civil litigation. It places an often-insurmountable hurdle in the path of legitimate plaintiffs seeking to be made whole.

Over a decade of applying *Pearson* has caused the American public to lose confidence in their ability to hold officials accountable and has called the legitimacy of the process into question.[108] To remedy this situation,

officer, its practical application has restricted the knowledge of the reasonable officer to clearly established precedent).

108. *See* PEW RESEARCH CENTER, MAJORITY OF PUBLIC FAVORS GIVING CIVILIANS THE POWER TO SUE POLICE OFFICERS FOR MISCONDUCT (2020), https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/ [https://perma.cc/EW9U-J698] ("Two-thirds of Americans (66%) say that civilians need to have the power to sue police officers to hold them

states should implement the council proposed above to afford the aggrieved public an affirmative commitment towards changing the political and judicial landscape. Further, granting interested parties representation in the process ensures that neither perspective will be excluded from consideration, which strikes a balance between the competing interests.

*Miller Moreau**

accountable for misconduct and excessive use of force, even if that makes the officers' jobs more difficult.").

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