MITCHELL | HAMLINE School of Law

Mitchell Hamline Law Journal of Public Policy and Practice

Volume 39 | Issue 1 Article 7

2018

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MITCHELL HAMLINE
LAW JOURNAL OF
PUBLIC POLICY AND PRACTICE

VOLUME 39 SPRING 2018

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*Anthony Stauber**

INTRODUCTION

Qualified immunity, as it was developed in the early 1970s, was designed to prevent police officers from being held civilly liable for constitutional rights violations that were not "clearly established."[1] The rationale behind this formulation was based in pragmatism as much as justice; an officer should not be held accountable for violating a right that she did not know existed, but it also benefits

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1. *See Qualified Immunity*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/ wex/qualified_immunity (last visited Mar. 23, 2018).

the courts and police force by limiting the number and quality of claims an individual can make against officers. The words "clearly established" however, have become something of a Pandora's Box, producing decisions in federal courts that defy a clear pattern.[2] Specifically, the question of when a right becomes "clearly established" has dogged the Supreme Court. The impact of recent qualified immunity decisions creates a framework in which courts are permitted to rule on cases without determining if there is an established right. As a result, instead of creating a growing body of literature on what is and is not an established right, the development of constitutional jurisprudence stagnates. Further, the public-facing impacts of qualified immunity doctrine have seemingly ignored victims while providing dubious benefits to the communities and the judicial system. This paper examines the modern trends in the qualified immunity doctrine which permit and encourage constitutional stagnation, and the harms created by qualified immunity and exacerbated by its modern interpretations. Its goal is to lay the foundation for a discussion of more radical solutions to the qualified immunity problem specifically, to ask if it is time to eliminate the doctrine altogether.

THE EVOLUTION OF QUALIFIED IMMUNITY DOCTRINE

A. Saucier, Katz, and Mandatory Sequencing

The most prominent decision in the early history of qualified immunity was *Harlow v. Fitzgerald*, which reiterated the dual purposes of common-law immunity standards: "to shield them from undue interference with their duties and from potentially disabling threats of liability."[3] However *Harlow*, relying on several other Supreme Court decisions, etched into the annals of qualified immunity jurisprudence that officers should be shielded from civil liability, insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[4] As we will see, the definition of "clearly

2. *See* Colin Rolfs, *Qualified Immunity After Pearson v. Callahan*, 59 UCLA L. REV. 468 (2011).

3. *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

4. *See id.*; *see also Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

established" will become one of paramount importance, and a challenge with which the courts continue to struggle.

In 2001, the Supreme Court ruled on *Saucier v. Katz* and further developed the standard for qualified immunity.[5] The court identified two distinct hurdles that a plaintiff must clear: First, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a Constitutional right?"[6] And second, "[i]f a violation could be made out on a favorable view of the parties' submissions [was the right] clearly established?"[7] The term "clearly established" was further defined in *Saucier* to mean that it must have been "clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[8]

Embedded in this decision was a comment on judicial sequencing. Under *Saucier*, to determine if a Plaintiff could defeat summary judgment, the court used a two-tier procedure: first, did the officer violate a constitutional right, and second, was that right clearly established?[9] If the answer to either of these questions is no, the Plaintiff has not met their burden of proof and qualified immunity will prevent her from receiving relief.[10] However, *Saucier* required the court to make a constitutional determination, even if it was clear that the law was not clearly established.[11] Writing for the majority, Justice Kennedy asserted that the first step ruling on the question of immunity was a threshold question: "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a Constitutional right?"[12] In practical terms, this meant that for every civil action against a police officer, there would at least be a ruling on if the conduct in question violated a constitutional right. In theory, rights that were not clearly established in one case, would become clearly established for subsequent cases.

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5. *See Saucier v. Katz*, 533 U.S. 194 (2001).
6. *See id.* at 201.
7. *See id.*
8. *See id.*
9. *Id.* at 201.
10. *Id.*
11. Rolfs, *supra* note 2, at 473.
12. *See supra* note 2, at 473.

In the following decade, there was substantial push-back on what has been termed "mandatory sequencing."[13] In several dissenting opinions, Justices Breyer, Scalia, Ginsburg, and Stevens expressed their view that mandatory sequencing would be overly-burdensome on the courts and did not improve the quality of qualified immunity analysis in the lower courts.[14] In *Brosseau v. Haugen*, Justices Scalia and Ginsburg joined Justice Breyer in a concurring opinion in which he wrote:

> I . . . express my concern about . . . the way in which lower courts are required to evaluate claims of qualified immunity under the Court's decision in Saucier v. Katz. I am concerned that the current rule rigidly requires courts unnecessarily to decide difficult constitutional questions when there is an easier basis for the decision (e.g., qualified immunity) that will satisfactorily resolve the case before the court. Indeed when courts' dockets are crowded, a rigid "order of battle" makes little administrative sense . . . [15]

In a more prosaic opinion Breyer, concurring in part and dissenting in part, stated in *Morse v. Frederick*, "I would end the failed *Saucier* experiment now."[16]

Mandatory sequencing's opponents made no secret of their concern about logistics and administration. The criticism most commonly made was that mandatory sequencing would make litigation unnecessarily lengthy, and thus interfere with the regular activities of police officers.[17] As one of the underlying goals of qualified immunity in common law as well as landmark cases such as *Harlow*, that criticism is valid if we make a few assumptions.[18] First, that mandatory sequencing would substantially increase the time police officers spend litigating claims against them.[19] We could go further and suggest that it is an assumption that increasing police officers' time in the court room would substantially interfere with the administration of justice overall. Second, that the value of Constitutional articulation in the lower courts and the development

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13. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 15–23 (2015).

14. *See, e.g.*, *Bunting v. Mellen*, 541 U.S. 1019 (2004).

15. 543 U.S. 194, 201 (2004).

16. 551 U.S. 393, 432 (2007).

17. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

18. *See generally Harlow*, 457 U.S. 800; *see also Mitchell*, 472 U.S. 511.

19. *See* Neilson & Walker, *supra* note 13, at 26; *see also* Rolfs, *supra* note 2, at 477–78.

of a body of jurisprudence relating to what is "clearly established" is insignificant compared with logistical and administrative concerns. The first is a question of fact and the second of judgment, and both will be addressed later in this paper.

For our current purposes, these assumptions bring into sharp relief the values that the Supreme Court was bringing to the discussion of qualified immunity. At least under *Saucier* the Court decided that, whatever logistical burden it may impose, mandatory sequencing was necessary to advance the law.[20] Looking more broadly, it would not be reaching to believe that the proponents of mandatory sequencing were concerned about the very thing—stagnation and an overbroad interpretation of qualified immunity—that would come to pass in *Pearson*.[21]

B. Pearson and Graham; Not Much Hope

In 2009, the Supreme Court heard *Pearson v. Callahan*, and overruled *Saucier*, discarding this mandatory procedure.[22] In its place, it gave courts the discretion to avoid the constitutional question if they could find that the right was not clearly established.[23] Writing for the majority, Justice Alito stated:

> [W]e conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.[24]

For civil actions against police officers under *Pearson*, if a judge determines that the right in question is not clearly established, that judge need not determine if there had been a constitutional violation.[25] The action would produce no precedent. The majority, however, seemed confident that giving discretion to the lower courts to determine which prong of the qualified immunity analysis they

20. *See generally Saucier*, 533 U.S. 194.
21. *See Pearson v. Callahan*, 555 U.S. 223 (2009); *see also* Rolfs, *supra* note 2, at 478–80.
22. 555 U.S. 223.
23. *See id.*
24. *Id.* at 236.
25. *Id.*; Rolfs, *supra* note 2 at 479.

would address first, if at all, they would continue to do so when the circumstances called for it.[26] In one particularly prescient statement, Justice Alito stated: "In addition, the *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."[27]

Thus, the *Pearson* majority found that mandatory sequencing was valuable as a tool to develop a body of decisions dealing with a wide range of unique factual circumstances.[28] They believed, however, that left to their own devices, lower courts would rule on both prongs of the qualified immunity when the case called for it.[29] This, as we will see, proved to be naïve.

With *Pearson* as the controlling case, the doctrine of qualified immunity has been murky. To begin, because *Pearson* gave lower courts the freedom to skip the constitutional question of if the right in question was "clearly established," they did.[30] Often. Thus, the body of jurisprudence from which plaintiffs could draw under Saucier dried up under *Pearson*.[31] Neilson explains:

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26. *Pearson*, 555 U.S. at 236 ("On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

27. *Id.*

28. *Id.* ("In addition, the *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.").

29. *Id.*

30. Neilson & Walker, *supra* note 13 at 29 (citing Rolfs, *supra* note 2 at 497-98, concluding that "there is a significantly high probability that *Pearson* has had an actual effect on the rate at which circuit courts avoid constitutional determinations"); *see also* Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623, 625 (2011) (examining every published court of appeals case that cited *Pearson* from 2009 to 2010 and finding that the court avoided constitutional questions in 19.5% of cases).

31. *See* John M.M. Greabe, *Mirabile Dictum!: The Case for Unnecessary Constitutional Ruling in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 410 (1999).

> Rights only become clearly established as a result of a court holding that, on a particular set of facts, there was a constitutional violation. If a court makes no constitutional determination after denying a plaintiff a remedy because the law was not dearly established by a previous decision with analogous facts, a remedy will be denied in a later case with a similar violation, because the right is still not clearly established. In this way, constitutional violations can indefinitely go without being remedied, and officials can continuously engage in unconstitutional conduct.[32]

Beyond the freedom to skip constitutional questions afforded to judges under *Pearson*, research suggests that judges often reverse-engineer the answers to constitutional questions based on their knowing that the defendant will be granted qualified immunity.[33] Researchers from the College of William and Mary found that judges are reluctant to acknowledge a constitutional violation where they subsequently intend to grant qualified immunity.[34] They wrote:

> In an effort to avoid [cognitive] dissonance, therefore, judges may-entirely unintentionally-allow their beliefs about whether a government officer is entitled to qualified immunity to influence their analysis of whether a constitutional violation occurred at all.[35]

In essence, this is a direct rebuke of Justice Alito's hopes that lower courts would make a good-faith effort to address both prongs of the qualified immunity analysis when the circumstances called for it. Constitutional stagnation is not merely boon for abstract legal discussions. The ability of courts to skip the Constitutional question has made it quantifiably more difficult for plaintiffs to succeed in civil actions against police officers.[36]

Apart from Constitutional stagnation, *Pearson*-style qualified immunity analysis is again murky when it comes to novel factual circumstances. In *Graham v. Connor*, the Supreme Court again addressed nuanced questions of qualified immunity applicability.[37] In this particular case, they arrived at a conclusion that suggested

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32. Rolfs, *supra* note 2 at 479.

33. Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 66 (2009). Faculty Publications. *available at* http://scholarship.law.wm.edu/facpubs/66.

34. *Id.*

35. *Id.*

36. *See* Nielson & Walker, *supra* note 13 at 29.

37. *See* 490 U.S. 386 (1989).

that previous cases a plaintiff is using to claim that the officer acted unreasonable needs to be appropriately specific to the factual circumstances in their case.[38] They wrote:

> The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized "excessive force" standard.[39]

Inconveniently, the court left wide open what an "appropriate level of specificity" was to be.[40] In subsequent cases, courts found even egregious violators of Constitutional rights to be immune from liability because the case law the plaintiffs cited as on point were not similar *enough* to give the defendant officer notice that their actions were wrong.[41] Other times, it seemed that the court was not asking for similarity, but identical circumstances.[42]

The Supreme Court addressed this problem in *Hope v. Pelzer*, a case that attempted to rein in the scope of qualified immunity application.[43] *Hope* found that "officials can still be on notice that their conduct violates established law even in novel factual

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38. *See id.*

39. *Id.* at 394.

40. *See Anderson v. Creighton*, 483 U.S. 635, 640; *see also Wilson v. Layne*, 526 U.S. 603, 615 (1999); Neilson & Walker, *supra* note 13 at 397.

41. *See Suissa v. Fulton Cty., Ga.*, 74 F.3d 266 (11th Cir. 1996) (abrogated by *Hope v. Pelzer*, 536 U.S. 730 (2002)) (Suisa, a government employee, alleged that he and the other defendant were discriminated against because they were Jewish. Fulton County Marshal Captain asked Suisa to write a report detailing his grievances, whereupon the captain allegedly threatened Suisa to influence the contents of Suisa's report. The appellate court concluded that, despite several decisions that were on point and that defendants should have known of, the decisions do not "dictate, that is truly compel . . . the conclusion that an unsuccessful attempt to prevent protected speech violates the First Amendment.").

42. *See, e.g., Ashcroft v. al-Kidd*, 563 U.S. 731, (2011) ("a government official's conduct violates clearly established law when at the time of the challenged conduct the contours of the right are sufficiently clear that every reasonable office would have understood that what he is doing violates that right . . . we do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." (internal citations omitted)); *See generally* Karen Blum, Erwin Chemerinsky, & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633, 651-656 (2012-2013).

43. *See* 536 U.S. 730 (2002).

circumstances."[44] The standard they established was that the state of the law needed to give officers "fair warning" that the officer's conduct was illegal.[45] As Rolfs points out, "[t]his holding greatly relaxed the standard that was purportedly announced in *Saucier*, making it 'much easier for civil rights plaintiffs' to overcome qualified immunity."[46] In retrospect, *Hope* seems out of place during a time when decision after decision affirmed a broad application of qualified immunity that unequivocally favored the interests of government actors over alleged victims. However, in subsequent cases involving unnecessary force, courts seemed to ignore *Hope* as an outlier because the conduct of the government actor so obviously violated established law that case law with similar circumstances was not necessary.[47]

With the standards for similar factual circumstances so unclear, it is poignant to look at one of the key justifications in *Pearson* for allowing judges to skip the constitutional question.[48] The words speak for themselves:

> Although the first prong of the Saucier procedure is intended to further the development of constitutional precedent, opinions following that procedure often fail to make a meaningful contribution to such development. For one thing, there are cases in which the constitutional question is so factbound that the decision provides little guidance for future cases.[49]

In other words, *Pearson* tells us that many mandatory sequencing decision hold little value because they are overly "factbound" and are unlikely to contribute to further jurisprudence. Therefore, they argue, it would be a better use of judicial resources

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44. *Id.* at 741.

45. *Id.*

46. *See* Philip Sheng, *An "Objectively Reasonable" Criticism of the Doctrine of Qualified Immunity in Excessive Force Cases Brought Under 42 U.S.C § 1983*, 26 BYU J. PUB. L. 99, 107 (2012).

47. *See Hope*, 536 U.S. at 730.; *See also* Sheng, *supra* note 46 at 107 ("[i]nterestingly however, in the only excessive force case to be heard since *Hope* where clearly established was at issue, the Court seemed to completely ignore *Hope*.").

48. *See* 555 U.S. at 237.

49. *Pearson*, 555 U.S. at 237 (citing *Scott v. Harris*, 550 U.S. 372, 388 (counseling against the Saucier two-step protocol where the question is "so fact dependent that the result will be confusion rather than clarity")).

if lower courts skipped this analysis if the constitutional ruling will be too fact-specific.[50] That same court then held in *Graham* that any plaintiff claiming that government officers should not be afforded qualified immunity must present evidence of appropriate specificity showing that the officer should have known they were acting unreasonably.[51] The very "factbound" determinations that would have been mandatory under *Saucier* and could satisfy the specificity requirement under *Graham* are discouraged and unavailable under *Pearson*. Whether the *Graham* court anticipated the very broad reading of "appropriate specificity" is uncertain. But what is certain is that, in its current iteration, qualified immunity is closer to absolute immunity, and a plaintiff's burden is almost insurmountable.

THE JUDICIAL FUNCTIONS OF RIGHTS AND REMEDIES

Setting aside, for now, the impact that this legal catch-22 has on victims of police violence and other misconduct, qualified immunity presents another profound challenge: the discovery and implementation of rights and remedies.[52] Constitutional scholar Owen Fisk described the separate duties of courts of "discovering the meaning of constitutional values such as equality, liberty, or property . . . [and] fashioning the most effective strategy for actualizing those values."[53] Qualified immunity in its current iteration does not encourage courts to make decisions and analyze questions with the goal of discovering constitutional values.[54]

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50. *See generally*, *id.* at 236-37 ("The [mandatory sequencing] procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right. District courts and courts of appeals with heavy caseloads are often understandably unenthusiastic about what may seem to be an essentially academic exercise.").

51. 490 U.S. at 397.

52. *See generally*, Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 51 (1979).

53. *Id.*

54. See, e.g., John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120 ("For rights that depend on vindication through damage actions, the repeated invocation of qualified immunity will reduce the meaning of the Constitution to the lowest plausible conception of its content. Functionally, the Constitution will be defined not by

Notably, the ability for courts to sidestep constitutional questions retards the "discovery" of true rights. In similar fashion, the courts' treatment of victims has established a "rights-backwards" approach that has curtailed the scope of Constitutional rights.

A. Discovering Rights

The judiciary has a unique role with regard to individual rights. In one sense, they are purely instrumental of the legislature. The courts do not get to "discover" rights in that they do not get to write legislation that either expands or curtails the expression of some abstract concept of a right. On the other hand, however, courts act as illuminators of "true rights" – that is, the pursuit of a perfect application of the abstract to the concrete. Whenever the legislature writes laws or statutes, the courts are in a position to test the application of those laws or statutes to an infinite number of factual scenarios. If we envision each of those applications as a data points on a graph, the composite will display the arc of our true rights. Modern qualified immunity starves our legal system of constitutional jurisprudence and severely hampers our discovery of rights.

Many understand the Constitution is not a static document without nuance. Branches of legal study and political philosophy have been dedicated to the explication of the Constitution in ever-evolving contexts. That is not to make a statement on interpretivism or framers' intent—even Justices Scalia and Ginsburg would agree that the text of the Constitution must be interpreted in order for it to have any value to specific circumstances.

Assume *ad absurdum* that some combination of the Supreme Court and lower courts had addressed literally every factual circumstance and articulated the Constitutional outcome satisfactorily. We would have a perfect outline of those things which were permitted and those which were not; we would have actualized the concept of "true rights". Christopher Eisgruber writes that "[f]rom the vantage of the Constitution, accordingly, 'rights' are mandatory constraints upon government" which "attach to states

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what judges, in their wisdom, think it does or should mean, but by the most grudging conception that an executive officer could reasonably entertain.").

of affairs which are required by the Constitution."[55] In this sense, every time that the Constitution is applied to a novel circumstance, we get one step closer to a perfect understanding of our own true rights—or the "state of affairs required by the Constitution"—and how to conduct ourselves so as to not infringe upon the rights of others.[56]

Insofar as we assume that the Constitution is the ideal framework for balancing rights and promoting net benefits, developing this understanding of the Constitution applied to any number of circumstances is essential to bringing us closer to a perfect, Constitutional republic. That is, there is a correlative relationship between the sheer number of constitutional questions that a court answers and the discovery of our constitutional values.

That is not to say that all jurisprudence makes a meaningful contribution to our understanding of the Constitution and the rights implicated therein. Rolfs characterized the argument that Constitutional articulation—answering the Constitutional question in all qualified immunity cases—may lead to bad precedent. "Mandatory sequencing may force courts to decide constitutional questions with insufficient information…[a] court opinion written [with insufficient information] may not be helpful to other courts."[57] All things considered, proponents of this argument will say, it would be wiser for courts to skip the constitutional question. Essentially, the argument goes, bad facts make bad law, and the nature of claims involving qualified immunity inherently contain bad facts.[58]

Assuming that mandatory sequencing in fact leads to more "bad" law, there are two main flaws with this argument. The first one I have already addressed: the requirement under *Pearson* and *Graham* for factually similar circumstances with "appropriate specificity" would suggest that any case law, no matter how insufficiently developed, might be helpful for future litigation.

The second shortcoming in this argument is that it fails to see the bigger picture. Critiques on logistical shortcomings such as the possibility for bad law seem to implicate an underlying invalidity in

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55. Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty after* City of Boerne v. Flores, 1997 SUP. CT. REV. 79, 88 (1997).

56. *Id.*

57. Rolfs, *supra* note 2 at 483.

58. *See* Rolfs, *supra* note 2 at 482.

constitutional litigation as a whole.[59] In other words, some opponents of mandatory sequencing see utilitarian concerns as independent and sufficient justification to discard the whole concept.[60] Fiss' response seems to state the obvious; that logistical issues can be addressed with logistical solutions.[61] He writes:

> Like an art, [judicial communication] always seems in peril. But the principal threats to this capacity . . . have nothing to do with structural reform; . . . these threats to the integrity of the judicial process can be fought in ways that leave the structural suit untouched as a distinctive mode of constitutional litigation.[62]

Although the production of bad law, judicial overwork, and burdening the court system are valid concerns, none persuasively outweigh the value that comes from discovering rights.[63]

B. Discovering Remedies

Fundamentally, courts have been grappling with an unavoidable conflict between the abstract, essentialist, capital-letter Constitutional Rights, and the utilitarian, pragmatic constitutional rights.[64] In one sense, the latter is a function of the former. The judiciary (and if we are going to further suspend our cynicism, the legislature) exists to realize our "true" Constitutional Rights by embodying them in official decisions, laws, statutes, and, most importantly, remedies. This view is a "rights-forward" approach wherein the rights create the remedies. "The remedy," writes Fiss, "expresses the judge's desire to give a meaning to a constitutional value that is more tangible, more full-blooded than a mere

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59. *Pearson* 555 U.S. at 237 ("Many constitutional determinations fail to make meaningful contribution to [constitutional] development.").

60. *See id.* at 239.

61. *See* Fiss at 45.

62. *Id.* (Fiss' response is not specific to bad jurisprudence (he is addressing the problem of judges being overworked), but nonetheless characterizes the counterargument).

63. Fourth, Fifth, and Eighth Amendment jurisprudence cannot be developed in the abstract— the system needs to be "fed" in order to advance and demonstrate the arc of our true rights.

64. Ronald Dworkin, *Taking Rights Seriously*, 82 (1977) (Explaining crudely, "this is the distinction between arguments of principle on the one hand and arguments of policy on the other").

declaration of what a right is."[65] Daryl Levinson adds an important point of analysis to this discussion.[66] He writes,

> Rights are the "true meaning of . . . constitutional values, such as equality liberty, due process, or property . . ." Remedies are designed to "actualize the constitutional value and incorporate considerations that are not principled corollaries of the constitutional value but rather are "subsidiary," "strategic," and "instrumental." Thus, remedies are "subordinate" to rights. They are not only subordinate, but also metaphysically segregated, for "rights operate in the world of abstraction, remedies in the world of practical reality."[67]

Under a rights-forward approach, then, remedies exist subordinate to the rights that call for them. Their value is determined by the extent to which they actualize our abstract conceptions of rights; how well they move from the "realm of abstraction" to the "world of practical reality."[68] This is a symbiotic relationship with the rights-discovering function. As jurisprudence develops a wide body of unique factual applications of the Constitution, we get a better understanding of the "true rights" which govern (or permit) our actions in the republic. Remedies make our understanding of "true rights" actionable and tangible. In a word, they make those rights exist.

The distinction between rights-forward and rights-backward approaches—one that is critical in our discussion of rights and remedies in the context of qualified immunity—is not necessarily the existence of a remedy. Although a right without any remedy is almost certainly rights-backward (and, as Levinson would state, no right at all) it is not the remedy's non-existence that gives us this insight.[69] It is the question of whether we are tailoring our conception of the right to reflect the available or desirable remedy.

The formulation of rights in modern qualified immunity jurisprudence is markedly rights-backward. Levinson tracks an important and analogous evolution in cases involving constitutional claims for unacceptable prison conditions.[70] Citing *Hutto v.*

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65. Fiss, *supra* note 52 at 46.

66. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 870 (1999).

67. *Id.* (quoting Fiss, *supra* note 52 at 51–52).

68. *Id.* at 871.

69. *See id.* at 888.

70. *Id.* at 878–882.

Finney[71] and *Rhodes v. Chapman*[72], Levinson explains how courts can slip into rights-backward thinking.[73] In *Hutto* and *Rhodes*, the courts originally found that the prison conditions violated the Eighth Amendment. [74] That is, applied to these unique factual circumstances, the courts discovered another contour in the "true rights" of prisoners. In order to effectuate that true right, they need to create some sort of remedy. In each of these cases, the prisons eventually discarded specific objectionable practices "even though any one or several of these conditions in isolation might not be sufficient to trigger a constitutional violation."[75] Because courts often look to other courts to provide guidance on particularly endemic problems, those remedial measures became criteria for subsequent prison-conditions lawsuits. In other words, rather than courts looking to the Eighth Amendment to fashion remedies effectuating the "true rights" contained therein, they began using the remedies offered in prior litigation to determine what rights the victim actually had.

The rights-backward nature of prison reform litigation is not theoretical.

> Besides becoming part of the definition of the right, prison reform remedies have also influenced the scope of the Eighth Amendment less directly. Expansive district court structural reform of prisons where conditions [do not meet those criteria developed in *Hutto* and *Rhodes*] has provoked the Supreme Court to curtail the scope of the right.[76]

A straight line can be drawn from Levinson's analysis of prison-condition litigation to qualified immunity. For one, the requirement that any constitutional right violation be "clearly established" suggests that a plaintiff only has a right (such as against unreasonable search and seizure, excessive force, etc.) insofar as that right has been established by external forces. There is no inherency. Prior litigation does not interpret the right for the purpose

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71. 437 U.S. 678 (1978).
72. 452 U.S. 337 (1981).
73. Levinson, *supra* note 66 at 878–882.
74. *See Hutto*, 437 U.S. 678 (1978); *see also Rhodes*, 452 U.S. 337 (1981).
75. Levinson, *supra* note 66 at 879.
76. *Id.* at 881.

of determining the appropriate remedy; it is part of the definition itself.

Second, the definition of the constitutional right has been contoured around the available remedy. Take, for example, the majority holding in *Davis v. Scherer* [77], denying the plaintiff's claim against the defendant for violation of federal constitutional rights;

> It would become more difficult, not only for officials to anticipate the possible legal consequences of their conduct, but also for trial courts to decide even frivolous suits without protracted litigation. Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials as police officers or prison wardens, . . . routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules, "often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively."(citation omitted).[78]

The scope of the plaintiff's rights is predicated on the ability of the court to create and implement a remedy.[79] Fiss describes this as the "tailoring principle," which, in his words, "also obscures the criteria of choice in suggesting that the violation will be the exclusive source of the remedy: it suggests that the shape of the remedy is exclusively a function of the definition of the violation."[80] Insofar as *Pearson* requires that for any violation to be actionable, it must be of a clearly established constitutional right of which a reasonable person would know, the remedy is a function of the violation.

As it relates to Levinson's concern that rights-backward formulations will lead courts to curtail the scope of the right[81], qualified immunity doctrine echoes the pattern in prison-condition litigation. First, the right in question—here, the right against unreasonable force, unreasonable search and seizure, etc.—is tailored to the remedy. What is available as a remedy to these violations is a lawsuit for compensatory damages if and only if the *Pearson* criteria are met. In that sense, those rights have *Pearson* baked in—you do not have an absolute right against unreasonable

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77. 468 U.S. 183, 206 (1984).
78. *Id.* at 196.
79. *See generally* Levinson, *supra* note 66 at 870.
80. Fiss, *supra* note 52 at 48.
81. *See* Levinson, *supra* note 66.

police, but you have a right against unreasonable police force where the officer should have known that he was violating a right. Because of public policy considerations like those articulated in Davis, we as a society choose not to provide a remedy for unreasonable police force where the officer was acting reasonably. Thus, our conception of the constitutional right to be free from unreasonable force is tailored to fit around the Davis concerns. "A subtle inversion of right and remedy thus occurs[,]" writes Levinson, "[r]emedies are used by courts to define a constitutional standard that would otherwise be impossible to articulate, and those remedies become the normative criteria by which constitutional violations are judged."[82]

Second, the rights-backward state of qualified immunity leads to courts curtailing the scope of individual rights. If we imagine the formulation of rights and remedies as a road, the first trip is from remedy to rights, as discussed above. Once we have arrived at the right by way of the remedy, that is, we have a definition of the right that is subordinate to the remedy, courts use that right to create and apply a remedy. As Fiss explains,

> [T]he tailoring principle fundamentally misleads. It does in fact tend to support an artificial conception of "violation" – one that looks back and that sees discrete incidents as the object of the remedy – but it also errs in an even more basic way. It suggests that the relationship between remedy and violation is deductive or formal, and thereby gives us an impoverished notion of remedy.[83]

It is this "impoverished notion of remedy" that provides the annals of qualified immunity litigation with some of its most egregious miscarriages of justice.[84]

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82. *Id.* at 880.

83. Fiss, *supra* note 52 at 47.

84. *See, e.g., Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014) (holding that there was no clearly established right against police officers using lethal force to end a high-speed car chase); *Safford Unified School District No. 1 v. Redding*, 557 U.S. 364, 379 (2009) (affirming the grant of qualified immunity for a middle school assistant principal and school nurse who conducted a strip search on a 13-year-old student, writing, "the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law."); *see also* Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N. Y. TIMES (2014), https://www.nytimes.com/2014/08/

OUTSIDE OF THE COURTROOM: QUALIFIED IMMUNITIES VICTIMS AND FICTIONS

A. Judicial Notice

Beyond the abstract, one important function of constitutional and doctrinal development is the notice-giving function that has for government officers. Again, assuming that the Constitution creates a framework for the most effective, fair, and just system of governance, we conclude that giving guidance to government officers on how to more closely adhere to the Constitution will get us closer to a "perfect" society of law and order. The more officers know what they can and cannot do, and the more specific each of those imperatives is, the closer society comes to an ideal realization of its rights. In this sense, *Pearson* fails us because it allows repeated violations of citizens' rights without a judicial determination that would deter such conduct in future cases. Jack Beermann, Professor of Law at Boston University School of Law, writes,

> In some circumstances, repeated immunity findings can cause the law to stagnate. With regard to constitutional claims that are likely to be litigated only in the constitutional tort context, officials might repeatedly engage in the same conduct and successfully defend damages suits with qualified immunity, leaving the scope of constitutional rights undetermined.[85]

In principle, the function of the "clearly established" prong of qualified immunity analysis is to give a notice to police officers and provide guidance for future conduct.[86] A large issue arises,

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27/opinion/how-the-supreme-court-protects-bad-cops.html?_r=0 ("for ex-ample, the officer who shot Michael Brown can be held liable only if every reasonable officer would have known that the shooting constituted the use of excessive force and was not self-defense."); *see also* Alan K. Cheng, *Qualified Immunity Limiting Access to Justice and Impeding Development of the Law,* 41 ABA HUM. RTS. MAG. (2015), https://www.americanbar.org/publications/human_rights_magazine_home/2015--vol--41-/vol--41--no--1---lurking-in-the-shadows--the-supreme-court-s-qui/qualified-immunity-limiting-access-to-justice-and-impeding-devel.html.

85. Jack Beermann, *Qualified Immunity and Constitutional Avoidance*.2009 Sup. Ct. Rev. 139, 141 (2009).

86. *See* Neilson & Walker, *supra* note 13 at 24.

therefore, when courts stop ruling on the Constitutional question in these cases; police do not receive judicial guidance. Nielson writes, "if courts do not exercise their discretion to decide questions in [constitutionally uncertain cases], there would be a 'significant possibility that conscientious law enforcement officers will be deprived of needed judicial guidance . . . .'"[87] There are an infinite number of factual circumstances that involve a Constitutional question. Creating a wealth of rulings and opinions is an effective way to keep doctrine and police procedure as "fresh" as possible.[88]

The Ninth Circuit Court of Appeals Judge Stephen Reinhardt voiced his particular concern with the issue of judicial notice and advancing technology.[89] He writes,

> At a time in which it is vital for constitutional law to keep pace with changes in technology, social norms, and political practices, this trend toward granting immunity while failing to articulate constitutional rights will surely have far-reaching, negative repercussions.[90]

One area where we can see just how aberrant this notion is—that technology will continue to advance without the law developing to guide its use by law enforcement—is in Fourth Amendment jurisprudence. Early landmark Fourth Amendment cases demonstrated the Supreme Court's interest—one might even say *obsession*—with examining the scope and permissibility of new technologies.[91] As technology and law enforcement capabilities develop and expand, so does the quantity of judicial opinions relating to those capabilities. But as long as courts have the option

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87. *Id.*

88. Rolfs, *supra* note 2 at 479–80.

89. *See* Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219 (2015).

90. *Id.* at 1250.

91. *See, e.g.*, *Katz v. United States*, 389 U.S. 347 (1967) (assessing the constitutionality of recording defendant in a telephone booth with an electronic recording device); *Smith v. Maryland*, 442 U.S. 735 (1979) (instillation and use of a "pen register" on defendant's phone was not a search and no warrant was required); *Kyllo v. United States*, 553 U.S. 27 (2001) (both the "use of sense-enhancing technology to gather information about the interior of a home," and "use or thermal imaging to measure heat emanating from a home" are "searches" under the Fourth Amendment).

to sidestep the constitutional question, it is unlikely that judicial guidance on questions involving technology will be satisfactorily and prudently answered.

B. Accountability

Inversely, it is essential to be able to hold police officers accountable for their actions. Researchers have found that effective procedures for redressing harms caused by individual officers and agencies are essential for reducing crime.[92] Insofar as modern qualified immunity interpretation sets a near unobtainable standard for plaintiffs to hold police officers accountable, it fails to achieve its purpose.

David Bayley identifies two ways in which violating the rule of law reduces enforcement effectiveness.[93] First, "violating the rule-of-law lessens the willingness of the public to assist the police in carrying out their assigned role."[94] This analysis comes from the idea that a great deal of police information comes from the public and is offered voluntarily. Empirically, if police cannot obtain information from the public, their chance of solving a crime decreases substantially.[95] Second, when police officers violate the rule of law, they alienate the community they are supposed to serve.[96] Bayley suggests that this creates a cycle in which "abuse by the police intensifies public suspicion and hostility toward the police" which then "prompts police to exert their authority . . . perhaps more forcibly" and restart the cycle." [97]

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92. *See* Samuel Walker, *Police Accountability: Current Issues and Research Needs*,NAT'L INST. OF JUST.(2006), https://www.ncjrs.gov /pdffiles1/nij/grants/ 218583.pdf.

93. David H. Bayley, *Law Enforcement and the Rule of Law: Is There a Tradeoff?*, 2 J. CRIMINOLOGY & PUB. POL'Y 133 (2002) (although Bayley's research looked into instances in which police officers unexcusedly violated the law, there is no reason to believe that those same effects would not be present in cases where officers violated the law but were technically excused.)

94. *Id.* at 141.

95. *Id.* at 142 (citing Peter W. Greenwood, Jan M. Chaiken, and Joan Petersilia, *The Criminal Investigation Process*, NAT'L INST. L. ENFORCEMENT & CRIM. JUST. (1977)).

96. *Id.*

97. *Id.* at 143.

C. Chilling

One of the most touted justifications behind qualified immunity is the fear of chilling police action.[98] This was one of the main concerns that the majority expressed in *Harlow*; "the fear of civil rights lawsuits may cause officials to be 'overdeterred.'"[99] The Supreme Court has previously expressed their belief that subjecting a government official to civil liability can "dampen the ardor of all but the most resolute . . . [public officials], in the unflinching discharge of their duties."[100]

Current events, including the apparent and dramatic increase cases of deadly force being employed on unarmed, black men, have brought this discussion to a head. In non-academic circles, the theory of the "Ferguson Effect" has become ubiquitous (in the months following cases such as the shooting of Michael Brown in Ferguson, Missouri, many cities, especially those with marked racial tensions, see an increase in crime.) [101] According to proponents of the Ferguson Effect theory, this spike in crime is due to police being deterred from vigorously performing their duties, resulting in less-effective law enforcement.[102] Policymakers and government officials, all the way up to the Attorney General, have remarked on the Ferguson Effect, and the continued need for a robust doctrine of qualified immunity.[103]

The project of this paper is not to discuss the multifaceted issues raised by the Ferguson Effect. The intersections of race relations, socioeconomic disparity, police militarization, and historic discrimination are numerous; and undoubtedly all play a role in the phenomena in cities such as Ferguson and Baltimore. However, it is prudent to look to those cities as case studies that bring the question of chilling into sharp relief. Looked at in this light, proponents of qualified immunity and believers in the Ferguson Effect make two very important and flawed assumptions. First, they

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98. *See, e.g., Harlow*, 457 U.S. at 806–07.
99. *Id.*
100. *New York Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964).
101. Shaila Dewan, *Deconstructing the 'Ferguson Effect'*, N. Y. TIMES (2017), https://www.nytimes.com/interactive/2017/us/politics/ferguson-effect.html?_r=0.
102. *Id.*
103. *Id.*

assume that fear of liability does in fact deter police actions, and second, that officials' deterrence is necessarily and problematically overbroad.[104] As we will see, both of these assumptions are unfounded.

First, there has been a wealth of research on the issue of whether fear of liability actually chills police conduct. Joanna Schwartz' extensive and influential studies have strongly suggested that the overdeterrence theory—the Ferguson Effect—is unfounded. One component of official liability that is often overlooked is that government officers, especially police officers are almost always completely indemnified from civil judgments against them.[105] The lynchpin in the Ferguson Effect is the idea that officers so greatly fear civil liability that they will refrain from acting in the course of duty. It is, of course, possible that officers fear more than just the financial component of a judgment against them. The spectacle of a trial, the potential for termination, and the damage to one's reputation could all potentially contribute to the alleged overdeterrence.[106] However, in serious cases of officer misconduct, immunity from a civil trial does not immunize the officer from the court of public opinion. If we analyze the outcomes of officers involved in some of the most high-profile cases of misconduct, we find that even when there is no pre-existing heightened scrutiny of officers—no reason for the officers to fear financial liability—officers often suffer from public backlash.[107] This suggests that the non-financial factors cannot justify overdeterrence because officers are *always* subject to repercussions from negative public opinion.

Further, research has suggested that allegations of misconduct have little impact on internal matters such as opportunities for promotions or performance reviews.[108] Again, officers cannot

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104. *See, e.g., id.*

105. Lindsey De Stefan, *No Man Is Above the Law and No Man Is Below It:" How Qualified Immunity Reform Could Create Accountability and Curb Widespread Police Misconduct*, STETON HALL L. SCH. STUDENT SCHOLARSHIP 2, 18 (2017) (citing 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)).

106. *See, e.g.*, Chao Xiong, *City of St. Anthony, Officer Jeronimo Yanez Part Ways,* The Star Tribune (2017), http://www.startribune.com/city-of-st-anthony-officer-jeronimo-yanez-part-ways/433691813/.

107. *See generally* Dewan, *supra* note 101.

108. De Stefan *supra* note 105 at 18.

suggest that fear of internal repercussions affect their actions in the field because, frankly, they do not suffer internal repercussions.[109] Summarizing many of the conclusions reached in Schwartz' papers, Lindsey De Stefan adds, "in many instances, even the police department that employs the officer suffers no direct financial consequences."[110] Often, the costs of litigation and judgments are factored into a city or department's budget as a cost-of-doing-business expense.[111] Essentially, when neither the individual officer nor the supervising department suffers any significant consequence from an officer's misconduct, we cannot consider internal repercussions a realistic source of the overdeterrence alleged by the Ferguson Effect.

What we are left with is the financial liability; proponents of the Ferguson Effect must rest their argument on the idea that officers fear the prospect of having to *personally* satisfy a judgment against them, and therefore are deterred from acting. On this narrow formulation, Schwartz' research is again instructive; "While officers consistently report that the threat of liability deters misconduct, the threat of liability does not actually change most officers' behavior on the job." [112]

Second, we need to consider a question that proponents of the Ferguson Effect theory often take for granted: what behavior is (allegedly) being deterred and is that deterrence necessarily overbroad? Again, research suggests that any deterrence that does exist primarily impacts low-quality police behaviors.[113] Data on street stops by Chicago police officers, for example, show a dramatic decrease in frequency following the release of video footage of the controversial shooting of Laquan McDonald.[114] If the

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109. *See id.*

110. *Id.*

111. *Id.*

112. Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1077-78 (2010).

113. "Low-quality" is this author's term meant to differentiate those police behaviors that are sanctimoniously guarded by qualified-immunity advocates and those which a reasonable observer would agree are not valuable to effective law enforcement.

114. John A. Shjarback *et. al*., *De-Policing in the Wake of Ferguson: Radicalized Changes in the Quantity and Quality of Policing Among Missouri Police Departments*, 50 J. CRIM. JUST. 42, 44, (2017)(quoting Rob Arthur &

decrease in street stops in fact led to an increase in crime, we could reliably vindicate the Ferguson Effect. However, when the rate of police stops in Chicago decreased, there was *no* significant increase in crime.[115] In fact, researchers suggest that although the overall number of stops decreased, the quality of these stops improved.[116] This seems to answer our question; in the Chicago case study, the deterred behavior was *frivolous street stops and searches*. [117] If the deterrent effect of liability only touches behaviors such as these, shown to be empirically inefficient and qualitatively discriminatory, we ought not be concerned with *over*deterrence. [118]

D. Image

1. Domestic

For most members of a community, the legal intricacies of qualified immunity will not matter. The important thing to most citizens is the optics; police officers who violated an individual's rights are getting off without so much as a reprimand.[119] Indeed, the judicial system itself is complicit in this violation. As it relates to image, a lesson that policymakers seem to forget is that *perception is reality*. Professor Wayne Logan theorizes that "public perceptions of procedural justice can influence citizen willingness to comply with the law and assist police." [120] Further, Logan asserts that instances in which flagrant violations of individual liberty, such as warrantless and unreasonable searches, are excused, the effect is to "lessen confidence in the perceived fairness and legitimacy of police."[121]

Jeff Asher, *Gun Violence Spiked–And Arrests Declined–In Chicago Right After The Laquan McDonald Video Release*, FiveThirtyEight (2016), https://fivethirtyeight.com/features/gun-violence-spiked-and-arrests-declined-in-chicago-right-after-the-laquan-mcdonald-video-release/).

115. *Id.*

116. *Id.* at 17–22.

117. Dewan, *supra* note 101.

118. *See generally* Shjarback *et. al*., *supra* note 114 at 11-17.

119. *See* Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L. J. 69, 93 (2012).

120. *Id.*

121. *Id.*

Negative perception of the police and courts is especially poignant in minority communities, where the perception that police officers can act with virtual impunity "can only lessen confidence in the perceived fairness and legitimacy of police, already strained by reports of police fabrications and racial bias."[122] Judge Stephen Reinhardt has remarked that "the Court's recent treatment of . . . qualified immunity evinces a lack of sensitivity to the unequal treatment of minorities in our criminal justice system."[123]

2. International

Beyond our borders too, the world takes notice when the United States denies justice to victims of institutional abuse and violence. The United Nations Human Rights Council issued a scathing condemnation of United States' police violence practices, recommending:

> [The United States should] [E]nsure that all instances of police brutality and excessive use of force by law enforcement officers were investigated promptly, effectively and impartially by an independent mechanism, with no institutional or hierarchical connection between the investigators and the alleged perpetrators; and provide effective remedies and rehabilitation to the victims.[124]

Other recommendations from other committees within the United Nations Human Rights Council included that the United States "should ensure that reports of brutality and ill-treatment of . . . vulnerable groups by its law-enforcement are . . . thoroughly investigated and that perpetrators are . . . appropriately punished."[125] One report concerning the torture of criminal suspects by Chicago police officers was especially concerned with lack of remedy

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122. *Id.*

123. Reinhardt, *supra* note 49 at 1251.

124. U.N. Human Rights Council, Compilation Prepared by the Office of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/WG6/22/USA/2, at 9 (2015) (*available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/039/92/PDF/G1503992.pdf).

125. U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture, U.N. Doc. CAT/C/USA/CO/2, at 9 (July 25, 2006) (*available at* http://undocs.org/CAT/C/USA/CO/2).

provided to the victims.[126] It noted that, although many of the victims have been exonerated of the crimes for which they were detained, "the vast majority . . . have not received any compensation for the extensive injuries suffered . . . ."[127]

Perhaps the body most on point in their recommendations is Amnesty International. In a comment to an UNHRC declaration on the Right to Life, Amnesty International commented:

> the right to life should include, as appropriate, all recognized forms of reparation, including: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, illustrating specific measures that may be appropriate, taking into account the specific harm caused in each case, for each form.[128]

It is uncertain whether Amnesty International made this comment with United States' policies in mind, but its suggestion certainly connotes that the United States has an impoverished vision of the Right to Life. It is itself telling that criticism from a human rights body, so often leveled at dictatorial regimes and third-world autocrats, could apply equally to those countries as to the United States.

At the United Nations Human Rights Council in 2015, attending countries offered recommendations to the United States ranging from the broad; "[We recommend the United States] [s]trengthen the existing mechanisms to prevent the excessive use of force and discriminatory practices in police work,"[129] to the jarringly specific; "[We recommend the United States] [c]ollaborate closely with marginalized communities to fix the problems in the justice system

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126. *Id.*

127. U.N. Comm. *Against Torture, Concluding observations on the combined third to fifth periodic reports of the United States of America*, U.N. Doc. CAT/C/C/USA/CO/3-5, at 13-14 (Dec. 19, 2014) (*available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/247/23/PDF/G1424723.pdf?OpenElement).

128. The UN Human Rights Committee's Proposed General Comment On the Right to Life: Amnesty International's Preliminary Observations, Amnesty International, at 13 (June 12, 2005), https://www.amnesty.org/download/Documents/IOR4016442015ENGLISH.pdf.

129. Human Rights Council, Rep. of the Working Group on the Universal Periodic Review: United States of America, U.N. Doc. A/HRC/30/12, at 22 (July 2o, 2015) (*available at* http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_12_ENG.docx).

that continues to discriminate against them despite recent waves of protest over racial profiling and police killings of unarmed black men."[130]

Although it is questionable what weight countries actually give to recommendations from international human rights bodies, one thing that is certain is that the United States takes part in those assessments and itself issues recommendations to other countries. For example, in the same UNHRC summit in which Namibia and Peru made recommendations about the United States' justice system, the United States suggested:

> [Namibia] [a]mend the labour law to address the inconsistency with regard to the minimum age to work and the school age for compulsory education, as well as more vigorously enforce the labour laws related to child labour (United States of America);[131]

and

> [Peru] [e]nsure timely prosecution of human rights cases before the National Criminal Court and that all alleged violations of human rights, including labour rights, are investigated and prosecuted by the civilian justice system (United States of America);[132]

The hypocrisy is blatant. But beyond the principle that countries in glass houses shouldn't throw stones, the ability for the United States to carry out its foreign policy goals, especially humanitarian goals that involve influencing foreign legislation through diplomacy, is hampered when it does not practice what it preaches.[133] Consider, for example, how the phenomenon of police

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130. *Id.* at 21.

131. U.N. Human Rights Council, Rep. of the Working Group on the Universal Periodic Review: Namibia, at 21 (Mar. 21, 2011) (*available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/122/97/PDF/G1112297.pdf?OpenElement).

132. U.N. Human Rights Council, Rep. of the Working Group on the Universal Periodic Review: Peru, U.N. Doc. A/HRC/22/15, at 19 (Dec. 17, 2012) (*available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/AHRC2215_English.pdf).

133. *See, e.g.*, Anna A. Koptyaeva, *The international image of the state as an instrument of soft power*, 23 ARCTIC AND NORTH 15, 15 (2016) ("Constructing and advancing the international image of the country has become an importan[t] issue. In an era of globalization, many states are engaged in purposeful creation of their positive image, its development and promotion both at home and abroad

brutality going unpunished and remedied is perceived in countries suffering from endemic police corruption. Whether or not there is some nuanced legal justification for the police officers escaping liability, the rest of the world sees a system wherein rights are not always rights, and victims of government abuse will rarely see justice.

E. Judicial Resources

One final justification for the policy of qualified immunity has to do with the scarcity of judicial resources.[134] The majority in *Harlow* wrote:

> Finally, the Court has more recently emphasized a third rationale—constitutional litigation imposes high social costs, including the government's litigation expenses and the diversion of officials' attention toward defending lawsuits rather than performing their duties. These costs can be substantial, the Court says, because it assumes that a significant percentage of constitutional tort claims are frivolous.[135]

This is the rationale behind the idea that qualified immunity can be granted as a matter of procedure as a 12(b)(6) motion.[136] In theory, this insulates officers not only from liability, but from the lawsuit altogether.

The argument put forward in *Harlow* rests on three vital assumptions: (1) defending against Constitutional torts would take up a large amount of judicial time and resources, (2) the net benefit to entertaining Constitutional tort claims is relatively low, and (3) qualified immunity solves the problem by dismissing lawsuits against defendant officers before any real burden has been put on them.[137] Even without quibbling about the first, the other

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through 'soft power' mechanisms. State[] authorities realize that it is an important tool to protect national interests . . . attracting foreign investment[,] and increas[ing] influence in the world.")

134. *See Harlow*, 457 U.S. at 806–07.

135. *Id.* (internal citations omitted).

136. FED. R. CIV. P. 12(b)(6).

137. *See Pearson*, 555 U.S. at 223 (noting the "substantial expenditure of scare judicial resources on difficult questions that have no effect on the outcome of the case."); *see also* Rolfs, *supra* note 2 at 480–82.

assumptions in this argument are both dubious and worryingly victim-averse.

There is a factual question about whether qualified immunity actually prevents officers from being "diverted" from their official duties. In many cases, particularly excessive force lawsuits, the victim and the defendant officer will have different allegations of the facts.[138] While it is true that a 12(b)(6) motion does not require a reconciliation of the facts in the case, in qualified immunity cases where it is clear that the Constitutional right was clearly established but the *reasonableness of the officer* is at issue, it is unlikely that a court would dismiss the suit until there was at least *some* preliminary discovery.[139]

Take, for example, a case where a police officer repeatedly tased a suspect, even after that suspect was prostrate on the ground. The police officer had previously attended a mandatory training session in which city lawyers explained the decision in *Smith v. City of Troy* and advised officers how they could be compliant.[140] The victim sued the officer, who responded that he was aware of Constitutional limit on his ability to tase the victim under *Smith*, but continued to do so because he thought that the victim had a concealed gun that he was reaching for.[141] The victim vociferously denies that he had a gun. At the pre-trial proceedings, the city attorney could introduce a motion to dismiss for failure to state a claim for which relief could be granted under 12(b)(6)—alleging that, even assuming the victim's version of events, there is no legally cognizable relief that the court could grant. Philip Sheng summarized the likely outcome of this type of scenario; "[i]n a situation. . . where a government official is entitled to qualified immunity under one set of facts, but not the other, summary judgment would be precluded until the disputed facts are resolved by a jury."[142]

This is a substantial carve-out of protection from lawsuits; if the case involves a dispute over only the reasonableness requirement of *Pearson*, questions of fact will allow the plaintiff to defeat the defendant's motion to dismiss and proceed to discovery.[143] If the

138. *See* Sheng, *supra* note 46 at 101.
139. *See id.*
140. *See Smith v. City of Troy, Ohio,* 874 F.3d 938 (6th Cir. 2017).
141. *See id.*
142. Sheng, *supra* note 46 at 101.
143. *Id.*

case advances to discovery, the plaintiff will be allowed to make demands, take depositions, and use every tool provided by the Rules of Civil Procedure, and the officer herself will almost certainly be "diverted" from her duties to some extent.[144] This anathema to the purpose articulated in *Harlow*.

An even more basic question remains on the issue of judicial resources: is not achieving justice for victims of police misconduct a socially and judicially valuable undertaking? The *Harlow* Court's language makes their opinion on this question abundantly clear: "social costs [of constitutional litigation] include the expenses of litigation" and "the diversion of official energy from pressing public issues." [145] Framed another way, the Justices believe that entertaining Constitutional litigation against government officers (not even necessarily *succeeding* in claims against officers, just *hearing* the lawsuit) is less valuable than the time they spend listening.

A VICTIM-CENTRIC APPROACH TO CONSTITUTIONAL VIOLATIONS

As robust as is the body of analysis and criticism of qualified immunity, there is a dearth of creative solutions. One rare exception is James Pfander's theory of nominal damages for Constitutional tort judgments. [146] According to Pfander, allowing litigants to pursue Constitutional redress against government officers, even without the possibility for monetary damages, is sufficient to achieve justice for victims.[147] Further, nominal damages can help close the loophole of Constitutional articulation without mandatory sequencing; "a nominal damages claim could be an attractive option for plaintiffs who wish to secure a judicialjudicial test of their claim," Pfander writes, and without potentially millions of dollars on the line "and with it much of the justification for qualified immunity, the suit . . . would allow the plaintiff to secure a

144. *See generally*, FED. R. CIV. P. 26.
145. *Harlow*, 457 U.S. at 814.
146. *See* James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601 (2011).
147. *See generally*, *id.*

constitutional decision even where the law was not clearly established."[148]

Pfander's solution is an attractive one. Not only could it solve the problem of constitutional articulation, but it would also allow victims of police misconduct to achieve some notion of justice. As he points out, most victims of police misconduct are only harmed once, and often, they seek vindication more than money. [149] However, Pfander's solution, as with the many others that propose to tweak or adjust current procedures, is willing to accept the many assumptions that the Courts make. It concedes that police officers fear personal liability and that fear of personal liability chills officers' actions. Further, it grants that the chilled behavior is otherwise valuable, that lawsuits against officers divert their attention from their official duties, and that qualified immunity in fact keeps officers out of the courtroom. Finally, it concedes that the Court's time is better spent on other (undefined) matters than entertaining victims' lawsuits against officers.[150]

Rather than assuming that we need qualified immunity and then working backwards through the many issues addressed in this paper, it is time that we start by evaluating each of those assumptions and determining if we need qualified immunity. The thrust of this paper, as well as the conclusions of many prominent, diverse, and learned scholars, suggests that the assumptions on which courts and proponents routinely rest are flawed.

Which raises the fundamental question: when the justifications for the policy are unsound and the damage it causes is great, is it time to abandon the policy? Is it time to put away the tweaks and the adjustments and admit that the machine has been broken from the beginning?

Naturally, one of the first objections to scrapping qualified immunity will be administrative: the courts will be overrun, judges will be overworked, and through the megaphone we will hear that "justice delayed is justice denied." But administrative problems can have administrative solutions. There is a natural threshold to how much litigants can burden a court. As with any other lawsuit, a plaintiff needs to compose a complaint, pay the filing fees to initiate the suit, and complete the early pre-trial matters before any

148. *Id.* at 1607-08.
149. *See id* at 1628.
150. *See id* at 1607–08.

substantial matter comes before a judge. Most of these would-be plaintiffs would need to hire a lawyer. Those lawyers are bound by professional codes of conduct which prohibit filing frivolous claims. All of those steps would require a substantial amount of time and effort. All things considered, the same factors that prevent frivolous and meritless lawsuits in *any* matter would apply in the context of Constitutional tort claims against government officers. There is no reason to believe that opening up this channel of litigation would have more of an impact on the court system than any other.

CONCLUSION

If we truly believe that victims have a right to redress for Constitutional harms, we cannot let the administrative concerns shape and limit that right. If we truly believe in the rights of the individual, we should reflect that belief in the "balancing of interests" suggested in *Harlow*. [151] Chilling, clogging the courts, and diverting officers' attentions from their official duties are all weights on one side of the scale, but the denial of remedies for Constitutional violations—that is, the denial of the rights themselves—will surely weigh more. This is the fundamental concern of a victim-centric approach; how much do we value Constitutional tort claims and the results they produce? It is time that we recognized that to the Courts, that value is low, if not negligible. It is time that we structured an approach to Constitutional liability that does not have the government's finger on the scales. It is time that we made justice attainable to victims of police misconduct, and affirmed that a right is always a right.

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151. *See Harlow*, 457 U.S. 223.

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