THE QUALIFIED IMMUNITY LITIGATION MACHINE: EVISCERATING THE ANTI-RACIST HEART OF § 1983, WEAPONIZING INTERLOCUTORY APPEAL, AND THE ROUTINE OF POLICE VIOLENCE AGAINST BLACK LIVES

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ABSTRACT

This Article makes the case that twin plagues endemic to American law—the routine of police violence and its unequal impact on Black lives and other people of color—are rooted in the invention and application of qualified immunity by the courts and the legal profession. For the past four decades, the Supreme Court has eroded civil rights enforcement, echoing the late 1800s when the Supreme Court nullified the achievements of our Second Founding following the Civil War. Congress passed 42 U.S.C. § 1983 to protect Black lives and civil rights from unlawful state-sanctioned violence amidst widespread racial terror. The Supreme Court's invention and expansion of qualified immunity in *Harlow v. Fitzgerald* and beyond has obstructed § 1983's intended achievement. A grotesque judicial policy judgment underlies the doctrine: that it is in the interest of "society as a whole" to immunize unlawful police violence. Qualified immunity inscribes unlawful violence into the DNA of law enforcement.

The Author offers several contributions to our understanding of qualified immunity and to the public dialogue regarding abolition. First, because qualified immunity undermines § 1983's anti-racist goal to protect Black lives and civil rights and given the pernicious unequal impact of police violence on persons of color, we should call it what it is: qualified immunity is a racist policy that lawyers and judges have perpetrated in communities across the nation. It must be abolished. Second, this Article identifies absurdity at the heart of qualified immunity doctrine, which protects officers from all but clearly established violations of law. The justification for qualified immunity is directly at odds with how it operates, further supporting abolition. Third, through analysis of Tenth Circuit qualified immunity appeals 2017–2020, this Article demonstrates the

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weaponization of interlocutory appeal to delay and frustrate justice: 95% of all qualified immunity appeals by defendants during this timeframe were interlocutory. Out of sixty total defense appeals, only three occurred after final judgment. This shows jury trials shepherd cases to settlement and accountability, a goal frustrated by qualified immunity interlocutory appeals. Though often described as a "shield," a better metaphor for qualified immunity might be to understand it as a litigation machine. This litigation machine incentivizes wasteful interlocutory appeals by officers of the denial of qualified immunity which delay cases for years, impose costs on plaintiffs, and deter the filing of civil rights cases.

This Article calls for the reinvigoration of American courts as forums for rights enforcement by American juries. Qualified immunity must be abolished and § 1983 permitted to function as an anti-racist statute for the protection of Black lives and civil rights, and the rights of all persons. Following Colorado's lead, states should create their own state constitutional causes of action similar to § 1983, but which eliminate qualified immunity, expanding access to justice. More rights enforcement and officer accountability, not less, is what society values and demands. Yet no matter what we accomplish legislatively, ultimately judges will decide whether to permit our courts to enforce civil rights through jury trials, or whether to invent new ways to obstruct access to justice. For this reason, we must choose judges who believe in rights enforcement and who understand the demand that Black lives matter.

> "I have witnessed and endured the brutality of the police many more times than once—but, of course, I cannot prove it. I cannot prove it because the Police Department investigates itself, quite as though it were answerable only to itself. But it cannot be allowed to be answerable only to itself. It must be made to answer to the community which pays it, and which it is legally sworn to protect, and if American Negroes are not a part of the American community, then all of the American professions are a fraud."
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> - James Baldwin[1]

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INTRODUCTION

It is time we abolish qualified immunity.

This Article makes the case that these twin plagues endemic to American law—the routine of police violence and its unequal impact on Black lives and other people of color—are rooted in the invention and operation of qualified immunity by the courts and the legal profession. When we sue police officers for violating our federal constitutional rights under 42 U.S.C. § 1983, officers and their lawyers often invoke qualified immunity to shirk accountability for their unlawful conduct, such as the use of excessive force.[2] Although all persons may file § 1983 claims,

2. Teressa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 VILL. L. REV. 839, 856 (2017). Lawsuits alleging excessive force against police officers are authorized under the Fourth Amendment. Graham v. Connor, 490 U.S. 386, 388 (1989). While § 1983 authorizes a panoply of constitutional claims against state and local government violators, the focus of this Article is the relationship between qualified immunity and police violence, and I therefore focus on § 1983 claims for excessive force against law enforcement throughout.

Congress passed the law, along with a number of Enforcement Acts, specifically to protect Black lives and civil rights in the wake of widespread racial terror following the Civil War—lynchings and mass violence achieved with the participation or complicity of law enforcement and other local officials.[3] We might therefore understand § 1983 as the original anti-racist law. Its passage transformed American federalism, empowering Black Americans with a way to enforce the rights written on paper but systematically denied in practice.

Section 1983 lives on today as the ostensible mechanism of accountability for unconstitutional police violence. In theory, holding officers and their local governments liable will punish and deter misconduct by individual officers; incentivize better hiring, training, supervision, and discipline by departments; and vindicate demands for justice in response to wrongdoing. Like liability in any context, § 1983 seeks to impact institutional behavior by hitting the institution where it matters most: the pocketbook.[4]

But the Supreme Court has repeatedly clipped § 1983's wings, obstructing the law from living up to its full potential. One way the Court has stifled § 1983 is through the invention of qualified immunity, creating its current formulation in the 1982 case of *Harlow v. Fitzgerald*.[5] Ignoring § 1983's text and history, *Harlow* made a policy judgment that immunizing unconstitutional conduct by public officials is in the interest of "society as a whole."[6] As we will see herein, this policy judgment perversely elevates unlawful police violence as a social interest. By inventing and expanding qualified immunity to excuse unconstitutional police violence,[7] the Supreme Court has made it extremely difficult to hold officers accountable in individual cases and all but impossible to develop a consistent body of constitutional law and settlements that could impact policing in America in a significant way. Worse, by sanctioning unlawful police violence with the protection of law, qualified immunity incentivizes further acts of unlawful police violence.[8] And by

3. *See* Jamison v. McClendon, 476 F. Supp. 3d 386, 397–400 (S.D. Miss. 2020) (discussing the drafting history of § 1983); discussion *infra* Section I.B; *see also* Xi Wang, *The Making of Federal Enforcement Laws, 1870-1872*, 70 CHI.-KENT L. REV. 1013, 1056 (1995) (discussing Enforcement Acts responding to "the necessity to protect the civil and political rights of black Americans").

4. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 960 (2014) ("[O]fficers almost never contribute anything to settlements and judgments in police misconduct suits.").

5. 457 U.S. 800 (1982).

6. *Id.* at 818.

7. *Jamison*, 476 F. Supp. 3d at 404 (discussing the invention of qualified immunity and its subsequent evolvement in case law).

8. *See* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) ("[The grant of immunity] sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1523 (2016) ("[Qualified immunity] diminishes the incentive for police officers to exercise care with respect to when and how they employ violent force.").

creating a powerful procedural weapon for officers and their lawyers to fight liability, qualified immunity incentivizes obstructive litigation instead of accountability, acknowledgment, and reconciliation.[9] Where Congress created § 1983 to shield Black people—and all persons—from rights violations, qualified immunity strips that protective shield away and hands it to the officers committing the violations.

Commentators and jurists on all sides of the political and jurisprudential spectrum have criticized and condemned qualified immunity: from certain Justices,[10] to lower courts,[11] to law professors,[12] to investigative journalists,[13] to political and legal organizations,[14] to activists.[15] Yet rather than overrule or dial back qualified immunity in the face of this widespread criticism, the Supreme Court has done the opposite, ex-

9. *See infra* Part III (discussing how qualified immunity prolongs litigation through appeals).

10. *See, e.g.*, *Kisela*, 138 S. Ct. at 1162 ("[The Court's] one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment."); Ziglar v. Abbasi, 137 S. Ct. 1843, 1870–72 (2017) (Thomas, J., concurring) (criticizing qualified immunity's basis in policy judgments rather than historical common law).

11. *See* Jamison v. McClendon, 476 F. Supp 3d. 386, 391–92 (S.D. Miss. 2020) (criticizing qualified immunity as a "manufactured doctrine" invented by judges "to protect law enforcement officers from having to face any consequences for wrongdoing"); Estate of Jones v. City of Martinsburg, 961 F.3d 661, 673 (4th Cir. 2020) (criticizing a lower court application of qualified immunity and stating: "This has to stop"); McGarry v. Bd. of Cnty. Comm'rs, 294 F. Supp. 3d 1170, 1188 n.13 (D.N.M. 2018) (criticizing the expansion of qualified immunity) ("The judiciary should be true to § 1983 as Congress wrote it.").

12. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 49–51 (2018) (arguing qualified immunity is unlawful and contrary to the text of § 1983); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 76 (2017) [hereinafter *How Qualified Immunity Fails*] (discussing empirical arguments against qualified immunity); Karen Blum, Erwin Chemerinsky, & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 657 (2013) (charting the Supreme Court's expansion of qualified immunity to benefit defendants); Carbado, *supra* note 8, at 1519–22 (arguing qualified immunity contributes to police violence); Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2001, 2015 (2018) (arguing the Supreme Court should abolish qualified immunity given the unworkability of the doctrine); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 914 (2015) [hereinafter *The Maze*] (describing the "befuddled jurisprudence" of qualified immunity and restrictions on § 1983 and discussing various reform proposals).

13. Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta, & Guillermo Gomez, *For Cops who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/ (discussing an empirical analysis concluding the Supreme Court's "continual refinement" of qualified immunity has "made it harder to hold police accountable when accused of using excessive force").

14. For instance, a diverse coalition of progressive and conservative organizations including the ACLU, NAACP Legal Defense & Educational Fund, Inc., R Street Institute, and multiple other organizations has submitted an amicus brief in support of a petition for certiorari asking the Supreme Court to reconsider qualified immunity doctrine. Brief of Amici Curiae at 2–6, I.B. v. Woodard, 139 S. Ct. 2616 (2019) (denying certiorari) (No. 18-1173), 2019 U.S. S. Ct. Briefs LEXIS 1397 at *5.

15. *See* Anthony Cross, *Q&A with Dr. Apryl Alexander: Black Lives Matter 5280*, SALT MAG. (June 19, 2020), https://saltmag.online/2020/06/19/apryl-alexander-black-lives-matter-5280/ [hereinafter *Alexander Q&A*] (interviewing a Denver-based activist and scholar calling for "eliminating qualified immunity").

panding the doctrine and devoting an outsize portion of its docket to overturning denials of qualified immunity by lower courts.[16]

This Article aims to make several contributions to our understanding of qualified immunity and to the public dialogue regarding abolition. First, because qualified immunity undermines § 1983's anti-racist goal to protect Black lives and civil rights, and given the pernicious unequal impact of police violence on persons of color, we should call it what it is: qualified immunity is a racist policy.[17] Section 1983 values Black lives through rights enforcement and inclusion in the American community;[18] qualified immunity devalues Black lives and instead venerates the time of the public servants harming them, excluding Black people from membership in the meaning of America.[19] It is a racist policy lawyers and judges have perpetrated in communities across the nation, and it must be abolished.

Second, this Article identifies absurdity at the heart of qualified immunity doctrine, which protects all but clearly established violations of law. By its terms, qualified immunity disposes only of meritorious claims involving actual violations of the constitution, but that are unlucky enough to lack a factual precedent to be deemed clearly established (or unlucky enough to be decided by a judge unwilling to interpret precedent more broadly). Yet, the Court justified qualified immunity in *Harlow* based on the unfounded assumption that it would help dispose of insubstantial or frivolous cases.[20] As Professor Joanna C. Schwartz has documented, this is empirically false: insubstantial civil rights cases are disposed of through regular Rule 12(b)(6) dismissals, or sua sponte by courts, or through other procedural vehicles.[21] This Article takes the argument one step further, observing the doctrine cannot apply to insubstantial cases: qualified immunity by definition only applies when there is a meritorious claim involving a violation of the constitution, but which a court excuses as not clearly established enough.[22] Therefore, the justification for qualified immunity is directly at odds with how it operates. Qualified immunity allows defendants to dispose of meritorious claims by plaintiffs, sanctioning unlawful police violence with the force of law. Lawyers are supposed to loathe absurd results—there are even interpre-

16. Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1887–89 (2018) (explaining that, in over thirty qualified immunity cases since *Harlow*, plaintiffs prevailed in just two cases).

17. IBRAM X. KENDI, HOW TO BE AN ANTI-RACIST 18 (2019) ("A racist policy is any measure that produces or sustains racial inequity between racial groups . . . . By policy, I mean written and unwritten laws, rules, procedures, processes, regulations, and guidelines that govern people.").

18. Katherine MacFarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 3 UTAH L. REV. 639, 643 (2018).

19. Marcus R. Nemeth, *How Was That Reasonable: The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. REV. 989, 1022 (2019).

20. Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982).

21. *How Qualified Immunity Fails*, *supra* note 12, at 2, 48, 60.

22. *See infra* Part II.

tive canons against them.[23] Yet in qualified immunity, the courts have perpetuated a doctrine that is absurd at its core.

Third, this Article makes an empirical contribution to the argument for abolishing qualified immunity, analyzing Tenth Circuit qualified immunity appeals 2017–2020, 161 cases.[24] This data set supports the conclusion that qualified immunity benefits officers at the expense of those they have harmed. The Tenth Circuit during this time period affirmed the grant of qualified immunity by the district court 97% of the time, rarely reversing in a plaintiff's favor.[25] And, the Tenth Circuit dodged the constitutional question of the qualified immunity analysis 48% of the time, supporting those who have argued the doctrine frustrates the development of constitutional law.[26]

But the most striking conclusion compelled by this data regards the interlocutory appeal by defendants of the denial of qualified immunity, which can delay cases from reaching a jury trial for years. Fifty-seven out of 60 appeals by officers or other defendants, or about 95% of defense appeals, were interlocutory.[27] Out of 60 total defense appeals, only 3 were not interlocutory and occurred after a final judgment.[28] This huge disproportionality confirms that jury trial (and the prospect of facing a jury) shepherds cases to settlement, with only 3 defense appeals in this three-year span occurring after judgment. As the Tenth Circuit itself has noticed in recent cases, this data shows interlocutory qualified immunity appeals are abusively deployed by officers and their lawyers to delay cases from reaching trial and to impose litigation costs on plaintiffs.[29] The genius of § 1983 is it empowers those harmed by officials to make the case to a jury—not a judge—that their constitutional rights have been violated. Through interlocutory appeal, qualified immunity does the opposite: it empowers the officers who have violated the constitution to seek judicially granted immunity at the trial and appellate level, multiple times, blocking the path to a jury trial through years of pretrial litigation.

Qualified immunity is often described as a legal "shield" protecting officers from accountability, and there is some truth to the metaphor—a shield stolen from Black Americans whom § 1983 intended to protect

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23. *See, e.g.*, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." (first citing United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542–43 (1940); and then citing Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940)).

24. *See* discussion *infra* Section IV.C.

25. MAXTED LAW, https://www.maxtedlaw.com/tenth-circuit-qualified-immunity-data (last visited May 3, 2021).

26. *Id.*

27. *Id.*

28. *Id.*

29. *See* discussion *infra* Section IV.C.

and handed over to the officers responsible for unlawful violence.[30] Courts do employ qualified immunity to dismiss a huge quantity of § 1983 lawsuits.[31] But this Article suggests a better metaphor might be to understand qualified immunity as a perpetual litigation machine which derails cases from reaching trial on the merits and ties them up in litigation for years.[32] Sometimes this machine results in a grant of immunity for the officer. But at a minimum, through interlocutory appeal, this tireless machine delays discovery, delays presentation to the jury, and imposes costs on the plaintiff—strategic benefits to officers and their attorneys.[33] This litigation machine is deployed in every state, city, and community in America, gumming up civil rights claims and deterring plaintiffs' lawyers from taking on cases.[34] After *Harlow*, the Court has tinkered with the qualified immunity litigation machine for the past four decades, almost always to the benefit of police officers and to the detriment of those harmed by police.[35]

The need to abolish qualified immunity and reinvigorate civil rights enforcement could not be more urgent. The national movement against police violence in 2020 following the police killings of George Floyd, Breonna Taylor, Elijah McClain, and too many others, has led the way toward a vision of law which values lives. Black activists and their allies rose up to demand an end to police violence and the laws that allow it.[36] #EndQualifiedImmunity became a trending hashtag and a protest poster's demand.[37] To activists and those affected by police violence, quali-

30. Pearson v. Callahan, 555 U.S. 223, 231 (2009) (describing qualified immunity as a "shield").

31. *How Qualified Immunity Fails*, *supra* note 12, at 2, 7 n.6; Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor J., dissenting) (observing that the court frequently grants certiorari to overturn denials of qualified immunity); Blum, *supra* note 16, at 1887 (describing that, in over thirty qualified immunity cases since *Harlow*, plaintiffs prevailed in just two cases).

32. *See, e.g.*, Behrens v. Pelletier, 516 U.S. 299 (1996). *Behrens* is a §1983 case that was in pretrial litigation for seven years, in which the Court upheld multiple interlocutory appeals regarding qualified immunity. *See* discussion *infra* Section III.A.2.

33. *See infra* Part III (discussing interlocutory appeals as a delay tactic).

34. *See infra* Part III (discussing the myriad ways in which interlocutory appeals and other procedural devices are used to exhaust and frustrate litigation in the federal courts).

35. Blum et al., *supra* note 12, at 633 (discussing the Court's expansion of qualified immunity to benefit defendants).

36. *See* Charlotte Alter, *Black Lives Matter Activists want to End Police Violence. But they Disagree on how to do it*, TIME (Jun. 5, 2020, 3:54 PM), https://time.com/5848318/black-lives-matter-activists-tactics/; Peniel E. Joseph, *From the Black Panthers to Black Lives Matter, the Ongoing Fight to End Police Violence Against Black Americans*, WASH. POST (May 29, 2020, 5:26 AM), https://www.washingtonpost.com/nation/2020/05/29/black-panthers-black-lives-matter-ongoing-fight-end-police-violence-against-black-americans/.

37. #EndQualifiedImmunity, TWITTER, https://twitter.com/hashtag/endqualifiedimmunity; *see generally Alexander Q&A*, *supra* note 15 (Denver-based activist and scholar calling for "eliminating qualified immunity"); Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (Jun. 23, 2020), https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html; Mukund Rathi, *Abolish Qualified Immunity*, JACOBIN (Jul. 9, 2020), https://jacobinmag.com/2020/07/qualified-immunity-police-violence-shase-howse-supreme-court (including photo of protesters) ("Who will hold police accountable? End qualified immunity."); *We Must End 'Qualified Immunity' for Police. It Might Save the Next George Floyd*, GUARDIAN (Apr. 20, 2021, 9:04 AM),

fied immunity represents a perversion of justice, signifying that the law values officer impunity more than their lives.[38] In their view, this gets justice exactly backward—and they are right. Moved by these calls for justice, a bipartisan bill in Colorado created a state cause of action similar to § 1983 but which specifically eliminated qualified immunity.[39] Now, people harmed by police in Colorado can sue for excessive force in state court under the state constitution (as well as for other violations of their constitutional rights), and culpable officers will have no immunity for these state claims.[40] Other states have begun to follow suit.[41] Legislation to abolish qualified immunity federally has already been proposed.[42]

Liability shapes conduct by deterring violations and incentivizing better behavior.[43] Congress's policy judgment in passing § 1983 reflects this truism: jury trials with the threat of damages awards, including punitive damages, will inform the conduct of police officers, their departments, and the local governments who pay their salaries and indemnify them.[44] This is not to suggest abolishing qualified immunity will suddenly solve the problem of police violence. But until we abolish qualified immunity and allow § 1983 to function as intended, we will not know how effective liability might be to reduce police violence and make our communities safer.[45] In any event, the legislature is the place to present

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https://www.theguardian.com/commentisfree/2021/apr/20/george-floyd-derek-chauvin-killer-mike-police.

38. *See Alexander Q&A*, *supra* note 15; Fuchs, *supra* note 37.

39. S.B. 20-217, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020); COLO. REV. STAT. § 13-21-131 (2020) (creating civil action for deprivation of state rights) ("Qualified immunity is not a defense to liability."); *see* Cary Aspinwall & Simone Weichselbaum, *Colorado Tries new way to Punish Rogue Cops*, MARSHALL PROJECT (Dec. 18, 2020 4:00 PM), https://www.themarshallproject.org/2020/12/18/colorado-tries-new-way-to-punish-rogue-cops (discussing the bill's passage led by Representative Leslie Herod and civil rights advocates).

40. Colo. S.B. 20-217; COLO. REV. STAT. § 13-21-131; *see* Aspinwall & Weichselbaum, *supra* note 39.

41. Similar to the Colorado bill, the New Mexico Civil Rights Act of 2021, HB-4, created a state cause of action eliminating qualified immunity.

42. Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020).

43. Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 363 (2020) [hereinafter *After Qualified Immunity*] (arguing that eliminating qualified immunity to enable liability will be an important "step toward greater accountability and deterrence.").

44. Schwartz, *supra* note 4, at 960 ("[O]fficers almost never contribute anything to settlements and judgments in police misconduct suits."); Robert S. Peck & Erwin Chemerinsky, *The Right to Trial by Jury as a Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections*, 96 OR. L. REV. 489, 500 (2018) ("[T]he threat of punitive damages provided considerable deterrent effect to dissuade corporations from cutting corners on safety as part of a cost-benefit analysis."); Scott Calvert & Dan Frosch, *Police Rethink Policies as Cities Pay Millions to Settle Misconduct Claims*, WALL ST. J. (Oct. 22, 2020, 11:26 AM), https://www.wsj.com/articles/police-rethink-policies-as-cities-pay-millions-to-settle-misconduct-claims-11603368002 (describing Los Angeles County's system of risk management and corrective action plan in response to every payout greater than $100,000).

45. *After Qualified Immunity*, *supra* note 43, at 363 ("[Eliminating qualified immunity] will clarify the law, reduce the cost and complexity of civil rights litigation, increase the number of attorneys willing to consider taking civil rights cases, and put an end to decisions protecting officers who have clearly exceeded their constitutional authority. Eliminating qualified immunity should, therefore, be understood as a preliminary—but important—step toward greater accountability and deterrence.").

policy arguments for or against § 1983 liability—and Congress has repeatedly spoken in favor.[46] Congress should speak again by abolishing qualified immunity. When the Supreme Court overrode the will of the people in *Harlow*, it committed the trifecta of judicial sins: overturning precedent, ignoring statutory text and purpose, and imposing unelected Justices' policy judgments.[47] We must restore § 1983 and allow American juries to decide when their police officers should be held accountable for excessive force.

This Article proceeds in five Parts. Framing the ensuing argument, Part I discusses the role of qualified immunity in what statistics confirm is a routine of police violence and impunity in America which unequally harms Black lives and other people of color. Part II shows that 42 U.S.C. § 1983 is a transformational law specifically designed to protect Black lives and civil rights; in contrast, qualified immunity devalues Black lives, endangers them to police violence, and undermines their civil rights. Part II concludes that qualified immunity is a racist policy: it endorses unlawful police violence that unequally harms Black Americans in the so-called name of society as a whole. Part III adds a few more criticisms of qualified immunity doctrine to the loud chorus of voices pointing out the incoherence of the rule, showing that qualified immunity only disposes of meritorious civil rights claims, while sanctioning unlawful police violence with the blessing of the courts. Part IV shows how the machine of qualified immunity operates to quell rights enforcement. This litigation machine incentivizes abuse of pretrial interlocutory appeals, imposes costs on plaintiffs and their lawyers, delays and frustrates justice, and deters the filing of civil rights cases. Part IV includes a data analysis of all qualified immunity appeals in the Tenth Circuit 2017–2020, showing the utilization of interlocutory appeal by law enforcement officers. This confirms that eliminating qualified immunity (and interlocutory appeal) would result in speedier resolution of cases through settlements and trial. Part V makes suggestions for what activists, lawyers, and judges can do to restore our courts as forums for rights enforcement and the achievement of racial justice.

This Article ultimately makes a broader demand about the law. Regardless of what happens legislatively, the legal profession—judges,

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46. After the Supreme Court ruled that attorney fees could only be awarded if authorized by statute in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), Congress passed 42 U.S.C. § 1988 (2000) to authorize attorney fees for successful § 1983 claims in order to incentivize rights enforcement. SENATE SUBCOMMITTEE ON THE JUDICIARY, CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT, S. REP. NO. 94-1011, at 3 (1976) *as reprinted in* 1976 U.S.C.C.A.N 5908, 5910–11 ("In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws.").

47. *See* Harlow v. Fitzgerald, 457 U.S. 800, 806–18 (1982) (explaining that government officials performing discretionary functions have immunity); United States v. Davis, 139 S. Ct. 2319, 2335 (2019) ("But what's the point of all this talk of 'bad' consequences if not to suggest that judges should be tempted into reading the law to satisfy their policy goals?").

lawyers, academics—must take responsibility for its role perpetuating racial inequality and police unaccountability through qualified immunity and other doctrines.[48] Although we must demand legislation to abolish qualified immunity given the Supreme Court is unlikely to overrule it, even if that occurs, judges will still be called upon to hear civil rights cases. Rights enforcement will always need a forum, particularly for Black people and others historically excluded from the halls of power. Courts will always have the power either to embrace their role as enforcers against rights violations, or to innovate new ways to restrict access to the courts, as they have done before.[49] After all, Congress and the states already acted legislatively by passing § 1983 and other statutes intended to protect Black lives, civil rights, and suffrage in the wake of the Civil War.[50] It was the Supreme Court that overrode those democratic achievements, leading to another century of rampant racial violence and the trampling of Black Americans' civil rights.[51] And it was the Supreme Court of the 1980s to the present that has harkened back to that bygone era by inventing qualified immunity and other doctrines designed to suffocate rights enforcement in the courts.[52] We must choose judges who embrace their role as rights enforcers rather than rights deniers. We must choose judges who believe that Black lives matter.

I. THE ROUTINE OF POLICE VIOLENCE

To understand the role of qualified immunity in policing, we must take as a point of departure empirical facts about the routine of police violence and its racial impact in America.

First, we suffer from an epidemic of police violence, police unaccountability, and the militarization of police forces that is astonishing in scale.[53] Police kill about 1,000 people every year in this country, whereas other large and diverse nations typically have police killings in the single digits.[54] Yearly, about one million people experience the threat or use of

48. As discussed *infra* Part II, when the Court invented qualified immunity doctrine in *Harlow* as in the interests of society as a whole the Court relied on a law review article, and lawyers for police officers must take responsibility for the development of qualified immunity and abusive interlocutory appeals.

49. *See* Wang, *supra* note 3, at 1017 n.18 (giving examples of the Court limiting a right).

50. *Id.* at 1031–33; Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55, 61 (2006).

51. *The Supreme Court's Failure to Protect Blacks' Rights*, NPR (Feb. 24, 2011, 11:13 AM), https://www.npr.org/2011/02/24/133960082/the-supreme-courts-failure-to-protect-civil-rights.

52. Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, DISSENT MAG. (Fall 2017, 4:40 PM), https://www.dissentmagazine.org/article/supreme-court-assault-civil-rights-section-1983.

53. EZEKIEL EDWARDS, EMILY GREYTAK, UDI OFER, CARL TAKEI, & PAIGE FERNANDEZ, AM. C.L. UNION, THE OTHER EPIDEMIC: FATAL POLICE SHOOTINGS IN THE TIME OF COVID-19, at 2 (2020), https://www.aclu.org/sites/default/files/field_document/aclu_the_other_epidemic_fatal_police_shootings_2020.pdf.

54. *The Problem*, CAMPAIGN ZERO, https://www.joincampaignzero.org/problem (last visited Mar. 15, 2021) (providing figure on police killings by country); *see also Police Violence Map*,

nonfatal force by police.[55] Increasingly, a violent "police warrior" mentality pervades law enforcement training and culture, while departments scoop up millions of dollars in surplus military equipment to be deployed against Americans in our communities.[56] Militarized violence is even unleashed against those protesting against it, as the world witnessed in 2020.[57]

Second, like racial disparities plaguing the criminal legal system broadly, the brunt of this violence routinely falls unequally upon Black people,[58] Native American people,[59] Latinx people, and other persons of color.[60] Although only 13% of the population, Black people are about 26% of those killed by police and about 37% of those killed while un-

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MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/ (last visited Mar. 15, 2021) (database and charts of police killings in 2020).

55. Among the 53.5 million people that experience police contact, about 1 million experience threat or use of force. ELIZABETH DAVIS, ANTHONY WHYDE & LYNN LANGTON, U.S. DEP'T OF JUST., NCJ251145, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, at 16–17 (2018), https://www.bjs.gov/content/pub/pdf/cpp15.pdf ("The majority of those who experienced the threat of force (84%) perceived the action to be excessive, as did most of those who were pushed, grabbed, hit, or kicked (78%), or had a gun pointed at them (65%).").

56. Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225, 225 (2015) ("Within law enforcement, few things are more venerated than the concept of the Warrior . . . . Modern policing has so thoroughly assimilated the warrior mythos that, at some law enforcement agencies, it has become a point of professional pride to refer to the 'police warrior.'"); Alain Stephens, *The 'Warrior Cop' is a Toxic Mentality. And a Lucrative Industry*, TRACE (Jun. 19, 2020), https://www.thetrace.org/2020/06/warrior-cop-mentality-police-industry/ ("While the warrior narrative has existed in law enforcement circles for decades, it has intensified in recent years, driven by the flood of funding and surplus military equipment made available to police departments following the terror attacks on September 11, 2001. There is now a cottage industry of police consulting firms, which charge departments thousands of dollars to teach tactics more suited for war than for civil society.").

57. *See, e.g.*, Abay v. City of Denver, 445 F. Supp. 3d 1286, 1291, 1294 (D. Colo. 2020) (granting temporary restraining order against "disgusting" excessive force including weapons and chemical agents against peaceful protesters).

58. *Police Violence Map*, *supra* note 54 (showing Black people are three times more likely to be killed by police compared to white people).

59. Mike Males, *Who are Police Killing?*, CTR. ON JUV. AND CRIM. JUST. (Aug. 26, 2014), http://www.cjcj.org/news/8113 ("The racial group most likely to be killed by law enforcement is Native Americans, followed by African Americans, Latinos, Whites, and Asian Americans."); Elise Hansen, *The Forgotten Minority in Police Shootings*, CNN (Nov. 13, 2017 2:51 PM), https://www.cnn.com/2017/11/10/us/native-lives-matter/index.html ("Native Americans are killed in police encounters at a higher rate than any other racial or ethnic group, according to data from the Centers for Disease Control and Prevention. Yet rarely do these deaths gain the national spotlight.").

60. Frank Edwards, Hedwig Lee, & Michael Esposito, *Risk of Being Killed by Police use of Force in the United States by age, Race-Ethnicity, and sex*, 116 PROC. NAT'L ACAD. SCIS. USA 16793, 16793 (2019) ("Risk is highest for black men, who . . . face about a 1 in 1,000 chance of being killed by police over the life course . . . . [P]eople of color face a higher likelihood of being killed by police than do white men and women."); Cody T. Ross, Bruce Winterhalder, & Richard McElreath, *Racial Disparities in Police use of Deadly Force Against Unarmed Individuals Persist After Appropriately Benchmarking Shooting Data on Violent Crime Rates*, SOC. PYSCH. & PERSONALITY SCI., June 2020, at 1 ("[A]nti-Black disparities in police use-of-force against unarmed individuals persist at both the nonlethal . . . and lethal . . . level of force."); Jonathan Mummolo, *Militarization Fails to Enhance Police Safety or Reduce Crime but may Harm Police Reputation*, 115 PROC. NAT'L ACAD. SCIS. USA 9181, 9181 (2018) ("[M]ilitarized police units are more often deployed in communities with high concentrations of African Americans, a relationship that holds at multiple levels of geography and even after controlling for social indicators including crime rates.").

armed.[61] Put another way, unarmed Black people are about three times more likely to be killed by police than white people.[62] Black people are also far more likely to experience the threat or use of force by an officer that they would categorize as excessive when compared to white people.[63] Further, people of color experience fear of police violence at far greater rates, suffering unequal psychological trauma due to living under a regime of unequal police violence.[64] As focus sharpens on the racial impact of policing, reports emerge documenting overt racism in law enforcement agencies and the infiltration of departments by unabashed white supremacists.[65] This unequal violence has no justification: The rate of police killings is not correlated with crime rates.[66] From fatal violence to the countless "daily cuts" of indignity, police violence causes diffuse and unquantifiable individual and collective racial trauma in America.[67]

In light of the empirical and historical evidence documenting the routine of police violence in America, this Article then asks the question: how does qualified immunity fit into this regime? Consider the meaning of the grant of immunity as a judicial act: when judges immunize law enforcement officers from liability for acts of unconstitutional violence, they become complicit in that violence and its racial impact. They make themselves active participants on a "field of pain and death," an arena of law and violence disproportionately enclosed upon Black lives and other persons of color.[68] The grant of immunity legitimizes a prior act of unconstitutional police violence with the protection of law and broadcasts seeds of future acts of police violence in a self-perpetuating cycle of vio-

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61. German Lopez, *There are Huge Racial Disparities in how US Police use Force*, VOX (Nov. 14, 2018, 4:12 PM), https://www.vox.com/identities/2016/8/13/17938186/police-shootings-killings-racism-racial-disparities; *see also* Joe Fox, Adrian Blanco, Jennifer Jenkins, Julie Tate, & Wesley Lowery, *What We've Learned About Police Shootings 5 Years After Ferguson*, WASH. POST (Aug. 9, 2019), https://www.washingtonpost.com/nation/2019/08/09/what-weve-learned-about-police-shootings-years-after-ferguson/?arc404=true&itid=lk_inline_manual_19.

62. *Police Violence Map*, *supra* note 54.

63. DAVIS ET AL., *supra* note 55 (noting that 60% of Black people report a threat or use of force as excessive, compared to 43% of whites).

64. Amanda Graham, Murat Haner, Melissa M. Sloan, Francis T. Cullen, Teresa C. Kulig, & Cheryl Lero Jonson, *Race and Worrying About Police Brutality: The Hidden Injuries of Minority Status in America*, 15 VICTIMS & OFFENDERS 549, 549 (2020) (finding Black people five times more likely, and Latinx people four times more likely, to fear police violence compared to white people).

65. Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 27, 2020), https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law.

66. *Police Violence Map*, *supra* note 54 (showing no connection between crime rates and rates of police killings).

67. Christian Cooper, *Why I have Chosen not to Aid the Investigation of Amy Cooper*, WASH. POST (Jul. 14, 2020), https://www.washingtonpost.com/opinions/christian-cooper-why-i-am-declining-to-be-involved-in-amy-coopers-prosecution/2020/07/14/1ba3a920-c5d4-11ea-b037-f9711f89ee46_story.html (describing the "deep-seated racial bias" from police killings to "small daily cuts" of racism).

68. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

lence and impunity.[69] Immunizing police from accountability in court by American juries in turn delegitimizes federal courts by making them refuges for state-sanctioned violence, rather than forums of enforcement against it.

The ubiquity of police violence suggests it is institutional and arises from systems of law and policy—not the bad choices of a few "bad apples." Take the case of George Floyd, which tragically exemplifies what the data make plain. The indifference with which police officer Derek Chauvin murdered George Floyd laid bare the American routine of state violence against Black lives. We watched Chauvin position his knee on George Floyd's neck and hold it there for over nine minutes, choking the life from the begging man's body.[70] We watched Chauvin and his fellow officers remain unmoved by the rising desperation and fear in the cries of onlookers. We felt our stomachs turn staring straight into Chauvin's eyes when he had the presence of mind to look around—and into a bystander's camera lens—while he killed a helpless man.

The expression on Chauvin's face unsettles; it is not one of anger or emotion, more indifference and entitlement. We see the look of a police officer who believed to a certainty that the law authorized him to kill. After all, Chauvin and his fellow officers ended George Floyd's life in broad daylight on a busy city street as onlookers recorded.[71] Surely, these officers never imagined they would be charged with murder (or other crimes if George Floyd had not died), nor that their conduct would spark worldwide protest. To the officers, there was nothing unusual about their treatment of George Floyd that day—this was routine, a day like any other. They had nothing to hide nor did they try to obscure the awful truth: in their minds, Chauvin and his fellow officers were just doing their job to enforce the law.[72]

Chauvin's murder of George Floyd also unsettles—and enrages—because it illustrates the racial inequity and violence that remains the tragic heart of American criminal law.[73] Chauvin, a white law enforce-

69. The judicial order granting immunity for unlawful police violence serve as "a mandate for the deeds of others," in this case further acts of unlawful violence by police officers. *Id.* at 1611; Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018).

70. *See* Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis, & Robin Stein, *How George Floyd was Killed in Police Custody*, N.Y. TIMES (Nov. 5, 2020), https://nyti.ms/2XMtUMa.

71. *See id.* Four officers, Chauvin, J. Alexander Kueng, Thomas Lane, and Tou Thao, were criminally charged for George Floyd's death. *Id.*

72. *See* Holly Bailey, *In new Filing, Derek Chauvin's Lawyer Previews his Defense but also Seeks Dismissal of Charges*, WASH. POST (Aug. 29, 2020, 10:46 PM), https://www.washingtonpost.com/politics/in-new-filing-derek-chauvins-lawyer-previews-his-defense/2020/08/29/22f1038a-ea28-11ea-970a-64c73a1c2392_story.html. Despite seventeen prior complaints against him, Chauvin had faced no discipline other than two letters of reprimand in his career as an officer prior to killing George Floyd. Shaila Dewan & Serge F. Kovaleski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. TIMES (June 8, 2020), https://nyti.ms/2TUcBaI.

73. *See* Lynne Peeples, *Brutality and Racial Bias: What the Data Say*, 583 NATURE 22, 22–23 (2020) (discussing racial bias statistics in policing). Racial bias and inequality pervade every facet of

ment officer, snuffed the life from George Floyd, a Black man accused of a trivial, nonviolent crime, like it was nothing—even when that Black man begged for his life, even when bystanders attempted to intervene, even when George Floyd pleaded for his mother.[74] The horrific public spectacle of this racial murder vividly resonates with America's history of horrific public spectacles, from racial terror lynchings where white mobs gathered in their Sunday best to witness the torture of a Black person, to public executions of enslaved persons.[75] We are horrified by the killing of George Floyd, and we are horrified we have failed to create a legal system capable of finally eradicating racist violence by law enforcement officers.

Individual officers should be held accountable for their conduct, but as a national phenomenon it is our law that causes the American routine of police violence. Rather than a system of firm deterrence and strict accountability, our legal system is an enabler and creator of impunity for unconstitutional police violence.[76] We might understand the routine of police violence as the tip of what one commentator describes as the

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the criminal legal system, from policing, to prosecutorial discretion, to use of the death penalty. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 180–81 (Rev. ed. 2012); Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 822–23 (2013) (discussing racial disparities "at every step of the criminal process, from arrest through sentencing" and focusing on racial bias among prosecutors); David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1414–15 (2004) (extending a previous study finding gross racial inequities in the administration of the death penalty).

74. *See* Rochelle Olson, *Body Camera Transcripts: George Floyd Repeatedly Begged Police not to Kill Him*, STARTRIBUNE (July 9, 2020, 10:12 AM), https://www.startribune.com/george-floyd-repeatedly-begged-police-for-his-life-in-transcripts-of-minneapolis-police-body-cameras/571683252/. The suspected crime that led to George Floyd's death was the alleged use of a $20 counterfeit bill to buy cigarettes. Hill et al., *supra* note 70.

75. *See* EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 4 (3d ed. 2017) [hereinafter LYNCHING IN AMERICA] ("[P]ublic spectacle lynchings were attended by the entire white community and conducted as celebratory acts of racial control and domination."); *Public Spectacle Lynchings*, EQUAL JUST. INITIATIVE (Feb. 14, 2018), https://eji.org/news/history-racial-injustice-public-spectacle-lynchings/ ("In Newnan, Georgia, in 1899, at least 2000 whites watched as a white mob mutilated and burned alive a Black man named Sam Hose, and then sold pieces of his organs and bones. In 1916, a white mob in Waco, Texas, tortured and lynched a mentally disabled 17-year-old Black boy named Jesse Washington in front of city hall, stripping, stabbing, beating, and mutilating him before burning him alive in front of 15,000 white spectators. Charred pieces of his body were dragged through town, and his fingers and fingernails were taken as keepsakes."); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 48–49 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975) (noting that public execution serves a "juridico-political function" as "a ceremonial by which momentarily injured sovereignty is reconstituted . . . [through] the physical strength of the sovereign beating down upon the body of his adversary and mastering it"); DAINA RAMEY BERRY, THE PRICE FOR THEIR POUND OF FLESH: THE VALUE OF THE ENSLAVED, FROM WOMB TO GRAVE, IN THE BUILDING OF A NATION 3 (2017) (describing the compensation paid to the owners of executed slaves and the use of the bodies as cadavers by medical students).

76. Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) ("[The grant of immunity] sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."); Carbado, *supra* note 8, at 1523 ("[Qualified immunity] diminishes the incentive for police officers to exercise care with respect to when and how they employ violent force").

"punishment bureaucracy," the network of "prosecutors and armed agents" who make discretionary decisions about who to arrest and prosecute, what charges to bring, and what sentence to seek.[77] Police violence is the first point of contact at which this criminal system harms people in the name of "law enforcement," "law and order," or in the interest of "society as a whole." While other forces are at play—including indemnification of officers; problematic training, hiring, and disciplinary procedures; weakened Fourth Amendment protections; and the power of police unions[78]—qualified immunity serves a special role in this routine of police violence. The beating heart of police violence is officers' belief they are "enforcing the law" when carrying it out, and that is precisely what qualified immunity stands for: it tells officers such violence is legally sanctioned and in society's greater interest. Derek Chauvin murdered George Floyd, but it was our law that put the look of indifference and entitlement on his face when he did it.

The Supreme Court's invention of qualified immunity as we know it in *Harlow* drives this point home.[79] The Court there first held that violations of the constitution would be excused from accountability if they did not violate "clearly established" precedent,[80] a confusing, unworkable standard as discussed herein. Symbolically and literally, qualified immunity tells officers they are above the law, sanctioning officers' unlawful violence as a social interest if a judge determines the constitutional violation was not clearly established. Further, the Court created qualified immunity based on a value judgment that immunizing unlawful government conduct, like police violence, is in the interest of "society as a whole."[81] We benefit from a certain amount of unlawful police violence, according to *Harlow*, in order to ensure police officers can do their jobs of enforcing the law without worrying about being sued.[82]

This policy judgment is grotesque. It elevates the time and careers of police officers over the lives and safety of those afflicted by police

77. Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform"*, 128 YALE L.J. FORUM 848, 852 (2019).

78. *See* Schwartz, *supra* note 4, at 955 (discussing arguments that favor assigning liability to municipalities because they could improve training, hiring, and disciplinary procedures); Carbado, *supra* note 8, at 1508 (discussing the weakening of the Fourth Amendment); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1245 (2017) ("[P]olice violence, including lethal violence against unarmed suspects, is the predictable consequence of Fourth Amendment doctrine."); Hayden Carlos, *Disqualifying Immunity: How Qualified Immunity Exacerbates Police Misconduct and Why Congress Must Destroy It*, 46 S. U. L. REV. 283, 305 (2019) (explaining that, even in the absence of qualified immunity, police unions shield officers from liability).

79. *See* Jamison v. McClendon, 476 F. Supp. 3d 386, 404 (S.D. Miss. 2020) (discussing the invention of qualified immunity and its impact on police brutality).

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

81. *Id.* at 814. Although *Harlow* itself did not involve police, its holding was quickly applied to law enforcement and has been ever since. *See, e.g.*, City & Cnty. of S.F. v. Sheehan, 575 U.S. 600, 600 n.3 (2015) (quoting *Harlow*'s justification for qualified immunity as in the interest of "society as a whole").

82. *See Harlow*, 457 U.S. at 813–14 (discussing the competing values between creating a damages remedy for injured plaintiffs and protecting public officials from frivolous lawsuits).

violence. By justifying police violence against Black Americans and others most impacted as being in the interest of society as a whole, it further excludes them from membership in society and denigrates their interests.[83] The murder of George Floyd is not a case of "bad apples." His killing, and the killings of too many others, is the predictable consequence of a law enforcement system that devalues the lives of those harmed by police violence, and instead values such violence as a social interest.[84] Qualified immunity inscribes unlawful violence into the DNA of law enforcement.

When granting qualified immunity, the judge tells officers and their departments caught violating the rights of persons, "carry on." In equal measure, qualified immunity tells those harmed by police and seeking justice in the courts, "your life and safety do not matter enough to be protected, and you are not included as a member society as a whole." Embodying James Baldwin's lament, qualified immunity makes police departments "answerable only to [themselves]" rather than to the community or the courts.[85] And, it tells Black Americans and those targeted by police violence that they are "not a part of the American community."[86] In the four decades since *Harlow*, over tens of thousands of cases and tens of millions of acts of police violence, the cyclical routine of violence and impunity has become embedded into our law.[87] Over those same four decades, communities affected by unequal police violence reached a breaking point—Chauvin's knee on George Floyd's neck.

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83. *Compare id.* at 814 (arguing that qualified immunity benefits society as a whole), *with* Carbado, *supra* note 8, at 1520 (discussing how qualified immunity's "reasonableness" standard opens the door to implicit and explicit biases).

84. Carbado, *supra* note 8, at 1524 (finding police violence is not the result of rogue officers and instead rooted in structural causes); *see also* Ristroph, *supra* note 78, at 1245 (arguing that police violence incidents are not isolated acts of wrongdoing but the consequence of a legal doctrine insulating it).

85. Baldwin, *supra* note 1.

86. *Id.* The Author has strived to use dignifying language respectful of important conversations regarding conventions when discussing Black, Indigenous, people of color, and other identities and communities. Due to the historic purpose of § 1983 to protect Black lives, the Author will often refer to Black lives and communities, without always mentioning other persons of color. This is in no way to forget that police violence disproportionately affects these communities as well. *See* V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453, 1461–62 (2019). It is also in no way to forget that police violence affects all Americans regardless of race. I have no doubt that in years to come, we will have even further improved how we talk about race and identity. Until then, any omissions or errors are the fault of the Author.

87. *See* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (noting the "troubling asymmetry" in the Supreme Court's taking cases to overrule denials of qualified immunity to the benefit of officers, while it "rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases") (quoting Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1282–83 (2017) (Sotomayor, J., dissenting from denial of certiorari)); *see also* Baude, *supra* note 12, at 82 ("[N]early all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials.").

II. QUALIFIED IMMUNITY IS RACIST

At the core of qualified immunity is a judicial value judgment that unlawful police violence is in the interest of society as a whole, at the expense of Black lives and others most harmed by police.[88] As shown below, this policy judgment is not only immoral, it contravenes the text and purpose of § 1983 to protect Black lives and civil rights.[89] It also lacks empirical evidence.[90] The Supreme Court has engaged in repeated assaults on § 1983 rights enforcement in federal courts, first following Reconstruction and then again with *Harlow* in the 1980s and continuing to the present. As evidenced by the perpetual epidemic of police violence in America, state and local governments are unable or unwilling to solve the problem of police violence.[91] This failure enlivens Congress's original policy decision when passing § 1983: federal courts must act as forums to enforce the Constitution against state and local violators.[92] The national movement against police violence tells us the Supreme Court has it exactly backward: more rights enforcement, not less, is what society as a whole values and demands.

Scholars and historians more adept at the job than the Author have documented the extraordinary origin of § 1983 and the other Enforcement Acts in the wake of the Civil War.[93] It is important to briefly summarize this history here for two reasons. First, we can best appreciate the wrongheadedness of immunizing police violence by recalling the history of racial terror and state-sanctioned violence against Black Americans which led to § 1983's passage.[94] Second, lawyers, judges, and activists must continually discuss this history publicly and in § 1983 litigation to lay the groundwork for abolishing qualified immunity and strengthening rights enforcement in our courts generally.[95]

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

89. Smith, *supra* note 50, at 61 ("[T]he Civil Rights Act of 1871 [was] . . . a comprehensive legislative scheme to eradicate racial and political violence that terrorized blacks and Republicans.").

90. *How Qualified Immunity Fails*, *supra* note 12, at 18–19; Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 102 (1997) ("[T]here is no empirical foundation for the advocates of the present qualified immunity doctrine or its critics.").

91. EDWARDS ET AL., *supra* note 53, at 2, 5, 10.

92. *See* Chen, *supra* note 90, at 3; *Jailhouse Lawyer's Handbook: A Short History of Section 1983 Lawsuits and the Struggle for Prisoner's Rights*, CTR. FOR CONST. RTS., http://jailhouselaw.org/section-1983-lawsuits/ (last visited Jan. 30, 2021).

93. *See generally* Wang, *supra* note 3, at 1013 (discussing origins of the Enforcement Acts); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 425–30 (1989) (exploring historical backdrop to the Enforcement Acts).

94. *See* FONER, *supra* note 93, at 425–28.

95. *See* Jamison v. McClendon, 476 F. Supp. 3d 386, 397–401 (S.D. Miss. 2020) (extended discussion of § 1983's anti-racist origin); *see also* McGarry v. Comm'rs, 294 F. Supp. 3d 1170, 1186 (D.N.M. 2018) ("While the Court must faithfully follow the Tenth Circuit's decisions and opinions, the Court is troubled by this statement and the recent trend of the Supreme Court's hesitancy in § 1983 actions to address constitutional violations. A Reconstruction Congress, after the Civil War, passed § 1983 to provide a civil remedy for constitutional violations.").

A. Our Second Founding and White Supremacist Backlash

With the fall of the Confederacy in the Civil War, America attempted our "Second Founding" by fundamentally altering the Constitution through the Reconstruction Amendments: the Thirteenth Amendment (ratified in 1865), the Fourteenth Amendment (ratified in 1868), and the Fifteenth Amendment (ratified in 1870).[96] The Amendments abolished slavery; enshrined the protections of life, liberty, equal protection, and due process; and protected the right to vote for Black men.[97] Critically, each Amendment included an enforcement provision, authorizing Congress to enforce the hard-won rights by "appropriate legislation."[98]

For a moment, even radical abolitionists like Frederick Douglass believed that with the enshrinement of voting rights through the Fifteenth Amendment's ratification in 1870, the battle for racial equality had finally and decisively been won.[99] With the election of Black representatives and initial measures to create equality, we had "a glimpse of a different America."[100] But white supremacists in the South mobilized to undermine and defy the new Amendments through terrorism and violence.[101] Black people were terrorized, assaulted, raped, and lynched through organized violence by white people, while penal codes and state laws were redesigned to enforce a new kind of slavery against freed Black people.[102] The widespread activity of the Ku Klux Klan (the Klan) epitomized this racial terror, but it pervaded every facet of Southern life.[103] Racial terror was incited and defended at all levels of the legal system: in violence by law enforcement, the refusal by white jurors to convict whites of violence against Black people, racist voter registration rules,

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96. ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION xix-xxiii (2019).

97. *Id.*

98. *13th Amendment: Abolition of Slavery*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendment/amendment-xiii (last visited Jan. 30, 2021); *14th Amendment: Citizenship Rights, Equal Protection, Apportionment, Civil War Debt*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendment/amendment-xiv (last visited Jan. 30, 2021); *15th Amendment: Right to Vote Not Denied by Race*, NAT'L CONST. CTR, https://constitutioncenter.org/interactive-constitution/amendment/amendment-xv (last visited Jan. 30, 2021).

99. *See* Wang, *supra* note 3, at 1015 ("To many antislavery veterans, the Fifteenth Amendment ushered the American nation into a new historical epoch. Frederick Douglass declared at a meeting in Albany in April 1870 that 'color is no longer to be a calamity; . . . race is to be no longer a crime; and . . . liberty is to be the right of all.'").

100. *Jamison*, 476 F. Supp. 3d at 398.

101. *Id.*

102. *Id.* at 398–99; Wang, *supra* note 3, at 1018 ("Klansmen used force and terror to attack black voters who voted or would vote for Republican tickets."); DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II, at 52 (2012) (discussing use of forced labor, convict leasing, and criminal laws to reinforce racial subjugation following the end of slavery).

103. Wang, *supra* note 3, at 1018.

criminal codes targeting newly freed Black men, and innumerable other machinations of the legal system.[104]

Still resonating in justifications for police violence heard today, white Southerners defended racial terror "[u]nder the pretext of restoring social order."[105] White supremacists used racial terror for a range of purposes, including politically to intimidate Black people from voting and by targeting Black political leaders.[106] The Klan became a kind of "military force" for persecuting Black Americans and suppressing their vote.[107] While the defeat of the Confederacy and the passage of the Reconstruction Amendments had initially appeared to light a path to liberation for Black Americans, racial terror backlash had snuffed that light out.

State and local officials in the South not only failed to stop racial violence, these officials were often participants, conspirators, and protectors of white supremacist racial terror.[108] Indeed, "the authorities assigned to deal with the [Klan] terror were often more sympathetic to the perpetrators than their victims."[109] Black Americans found no refuge in local law enforcement—these were the people who allowed them to be lynched, who perpetrated violence against them, and who enforced racist violations of their civil rights.[110] Black Americans found no refuge in state courts—these were the places white people went to receive impunity from all white male juries and white male judges sympathetic to, if not members of, the Klan.[111] Federal agencies proved unable to stem the racial terror violence, and state and local responses failed if they were attempted at all.[112] Lacking an enforcement mechanism, the Amendments of our Second Founding became little more than dead letters.

B. Section 1983 and the Transformation of Our Federalism

Black leaders and suffragists took action, petitioning federal elected officials and demanding that Congress enforce the Reconstruction

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104. BLACKMON, *supra* note 102, at 119–30; Mitchum v. Foster, 407 U.S. 225, 240 (1972) ("[S]tate courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.").

105. Wang, *supra* note 3, at 1018.

106. *Id.*; Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 676 (2002) ("This terror assumed disparate shapes—from the storied nightriding of disguised bands on horseback, to cryptic threats, horrific assaults, and, not infrequently, murder.").

107. Wang, *supra* note 3, at 1018.

108. Cardyn, *supra* note 106, at 784–85.

109. *Id.* at 784.

110. *See* Jamison v. McClendon, 476 F. Supp. 3d. 386, 399 (S.D. Miss. 2020) ("Many of the perpetrators of racial terror were members of law enforcement.").

111. Cardyn, *supra* note 106, at 784 ("Grand and petit juries were routinely infiltrated by klansmen and sympathizers . . . .").

112. *See id.* at 795 (discussing the alienation of Klan activities from federal and state authorities).

Amendments to protect Black Americans' lives and civil rights.[113] Never before had federal rights been enforced against state and local violators. In extensive debates and legislative action to address racial terror against Black Americans in the 1860s–1870s, Congress passed a series of five laws known as the Enforcement Acts.[114] Congress designed the Enforcement Acts to criminally punish racial violence and the suppression of civil rights, and to create a civil cause of action against state violators in federal court.[115] Demonstrating the purpose to achieve racial justice, § 1983 was originally known as the Ku Klux Klan Act of 1871.[116] As the Court has recognized on occasion, § 1983 and the other Enforcement Acts were the "product of a vast transformation" in American federalism, the specific purpose of which "was to interpose the federal courts between the States and the people, as guardians of the people's federal rights."[117]

Several points should be made about § 1983 and the Enforcement Acts in support of the argument that qualified immunity is a racist policy which devalues Black lives. First and most importantly, these laws were specifically designed and implemented to protect Black lives, Black civil rights, and Black suffrage.[118] We know this from the legislative history, from Black activists demanding Congressional action, and from well-documented racial terror documented during this time period.[119] Section 1983 stands for the proposition that Black lives matter, and that our Courts must enforce this truth.

Second, the Supreme Court's undoing of § 1983 through the invention of qualified immunity is particularly appalling due to the care with

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113. Wang, *supra* note 3, at 1019 (petition of Black legislators in Georgia) ("If elections take place this fall . . . [v]iolence and bloodshed will mark the course of such elections, and a fair expression of the will of the people cannot be had.").

114. *Id.* at 1013–19 (discussing the political debates leading to the passage of the Enforcement Acts) ("[E]very mail brings to us the details of some revolting tragedy and that [n]othing but the most stringent of all laws and regulations will check this era of bloodshed and dethrone this dynasty of the knife and bullet.").

115. *The Enforcement Acts of 1870 and 1871*, U.S. SENATE, https://www.senate.gov/artandhistory/ history/common/generic/EnforcementActs.html (last visited Jan. 31, 2021); *see also* Wang, *supra* note 3, at 1013.

116. Jamison v. McClendon, 476 F. Supp. 3d. 386, 399–400 (S.D. Miss. 2020).

117. Mitchum v. Foster, 407 U.S. 225, 242 (1972). "The predecessor of [§] 1983 was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment." *Id.* at 238.

118. *See The Enforcement Acts of 1870 and 1871*, *supra* note 115.

119. *See* Wang, *supra* note 3, at 1056 (discussing the Enforcement Acts' emergence from political concerns and compromises) ("[T]he necessity to protect the civil and political rights of [B]lack Americans vs. the breach of the tenets of traditional constitutionalism . . . .").

which Congress crafted its broad remedies.[120] We should pause to consider the language as it currently reads[121]:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[122]

The language of this remarkable law is both broad and specific—striving to ensure no loophole gets exploited. Congress stated the various means by which state actors might try to violate Americans' federal rights, whether by "statute, ordinance, regulation, custom, or usage."[123] Congress knew those planning rights violations behind the scenes could be as culpable as those carrying them out and therefore authorized liability against anyone who "subjects, *or causes to be subjected*," a citizen or person to a deprivation.[124] Moreover, § 1983 is all-encompassing in the rights which may be remedied through a federal lawsuit: "any rights, privileges, or immunities secured by the Constitution and laws."[125] The text is careful in enabling broad remedies and says nothing about immunity, stating that violators "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[126]

Third, the text undermines the Supreme Court's conclusion that § 1983 can accommodate qualified immunity as an exception.[127] By inventing qualified immunity, the Court effectively wrote into § 1983 an immunity exception not stated in the text. In fact, Congress deliberately inserted one, and only one, exception to liability: no injunctive relief

120. *Id.* at 1050 ("The new section spelled out more than twenty kinds of specific practices for which conspiracy was to be illegal, including using force or intimidation to interfere with voting rights in federal elections.").

121. The original law was rephrased slightly a few years later, yet again reiterating Congress's concern that the law fulfill its purpose. *See* Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983); Civil Rights Act of 1875, ch. 114 § 1, 18 Stat. 335 (1875) (codified as amended at 42 U.S.C. § 1983).

122. 42 U.S.C. § 1983.

123. *Id.*

124. *Id.* (emphasis added).

125. *Id.*

126. *Id.*

127. Baude, *supra* note 12, at 50.

against judicial officers save in certain circumstances.[128] Congress fully considered the rule, as well as the exceptions, and created no carve out for police immunity.[129] Indeed, creating a qualified immunity exception like the Court later invented would have been unimaginable to the Congress responding to widespread racial terror: eliminating immunity and enforcing the Constitution to stop violence against Black Americans was precisely the purpose of the law.

Section 1983 and the Second Founding should have transformed the American legal system, opening federal courts as forums to enforce federal rights against widespread racial terror against Black Americans.[130] Where the original Constitution rejected Black personhood and enshrined enslavement, the Second Founding did the opposite: it protected suffrage, civil rights, and personhood for Black Americans, guaranteed by the ability to enforce these rights through jury trials in federal courts.[131] But rather than reckon with our history of racial violence, rather than do the hard work of enforcing civil rights as was its duty under the Constitution, the Supreme Court closed the doors to the courthouse.

C. The Supreme Court's First Assault on Federal Civil Rights Enforcement

Undermining our Second Founding and the Enforcement Acts, the Supreme Court dismantled what the American people and Congress created, shutting the courthouse doors for those seeking protection from state violence.[132] For § 1983, the doors would not open again until 1961, when *Monroe v. Pape*[133] breathed new life into the law.[134] Over the century between the law's passage in 1871 and *Monroe*, the Supreme Court nullified the power of § 1983 and the other Enforcement Acts, stripping power from democracy and from Black Americans seeking enforcement of their civil rights.[135]

As contemporaneously documented by Ida B. Wells,[136] and by the Equal Justice Initiative and scholars today,[137] this dark period in Ameri-

128. 42 U.S.C. § 1983.

129. *Id.*

130. There are indications the Enforcement Acts were initially successful in beating back white supremacist racial violence before being undermined by federal courts and a Southern movement for "Redemption" through the return of white supremacy. *See* Jamison v. McClendon, 476 F. Supp. 3d 386, 397–402 (S.D. Miss. 2020).

131. FONER, *supra* note 96, at 17.

132. *See infra* notes 174–87 and accompanying text.

133. 365 U.S. 167 (1961).

134. Alan W. Clarke, *The Ku Klux Klan Act and the Civil Rights Revolution: How Civil Rights Litigation Came to Regulate Police and Correctional Officer Misconduct*, 7 SCHOLAR 151, 158, 163–64, 167 (2005).

135. *Id.* at 152–53, 155–58, 163–64, 167.

136. In groundbreaking investigative journalism, Ida B. Wells courageously documented lynchings in the South at great personal danger, including white mobs who threatened to lynch her and who demolished her printing press and torched her publishing office. See IDA B. WELLS-BARNETT, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES (1892); IDA B. WELLS-BARNETT,

can history saw the full spectrum of racism and violence against Black Americans: from mass racial terror to more nuanced forms of discrimination, from massacres and lynchings to prohibitions on interracial sex and policies designed to suppress Black votes.[138] Black Americans and their allies turned to federal courts for protection as the Enforcement Acts and Amendments authorized. But in a series of decisions, the Supreme Court systematically shut every avenue to federal protection, shattering the promise of our Second Founding.[139]

Take several now-notorious examples. In *United States v. Cruikshank*,[140] the Supreme Court in 1875 struck down federal prosecutions regarding the horrific Colfax Massacre, in which hundreds of Black people were murdered by the Klan and co-conspirators in an effort to suppress the Black vote.[141] In *United States v. Reese*,[142] also in 1875, the Court struck down sections of an 1870 Enforcement Act punishing deprivations of the right to vote.[143] In the 1883 *Civil Rights Cases*,[144] when striking down antidiscrimination laws the Court disdained the idea that Black Americans would seek protection from discrimination, suggesting they should be content as "mere citizen[s]."[145] The same year, in *Pace v. Alabama*[146] the Court upheld state laws criminalizing interracial adultery and sexual intercourse.[147] Spotlighting the Court's indifference toward Black lives, in *United States v. Harris*,[148] referred to as the "Ku Klux

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THE RED RECORD: TABULATED STATISTICS AND ALLEGED CAUSES OF LYNCHING IN THE UNITED STATES (1895); IDA B. WELLS-BARNETT, MOB RULE IN NEW ORLEANS: ROBERT CHARLES AND HIS FIGHT TO DEATH, THE STORY OF HIS LIFE, BURNING HUMAN BEINGS ALIVE, OTHER LYNCHING STATISTICS (1900), for examples of Wells's experiences.

137. *Public Spectacle Lynchings*, *supra* note 75.

138. *Id.*

139. *See, e.g.*, United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Reese, 92 U.S. 214 (1875); Civil Rights Cases, 109 U.S. 3 (1883); Pace v. Alabama, 106 U.S. 583 (1883); United States v. Harris, 106 U.S. 629 (1883); Carter v. Greenhow, 114 U.S. 317 (1885).

140. 92 U.S. 542 (1875).

141. *Id.* at 548–49, 551–59. After a first trial resulted in an acquittal and hung jury on the remaining defendants, the trial court had dismissed the case by holding the Enforcement Act unconstitutional, a ruling the Supreme Court affirmed. *Id.* at 559.

142. 92 U.S. 214 (1875).

143. *Id.* at 215, 217–22. In *Reese*, a Black man named William Garner was denied the right to vote because he had not paid a $1.50 tax. *Id.* at 215. After indictment of the officials responsible under the Enforcement Act of 1870, the Supreme Court ultimately declared it unconstitutional, opening the door to voter suppression against Black Americans through poll taxes, literacy tests, and other mechanisms.

144. 109 U.S. 3 (1883).

145. *Id.* at 25–26. Demonstrating disregard for the impact of slavery and racism—echoed in voices still heard today—the Court suggested even in 1883, amidst widespread racial terror in the country, that rights enforcement was no longer necessary for Black Americans:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.

Id. at 25.

146. 106 U.S. 583 (1883).

147. *Id.* at 584–85.

148. 106 U.S. 629 (1883).

Klan" case, the Court struck down as unconstitutional the Force Act of 1870, an Enforcement Act being used to punish the beating and lynching of Black people held in state custody.[149] Finally, in a case that appears to have written off § 1983 liability with almost no analysis, in *Carter v. Greenhow*[150] the Court held that the Enforcement Acts merely provided a "review on writ of error to the judgments of the state courts," indicating civil rights claimants must seek redress in state courts and cannot sue in federal court.[151]

These and many other decisions from the period show a Supreme Court undoing the Second Founding's goal to protect Black lives, civil rights, and suffrage, by striking down the laws passed by Congress, by undoing the protections of the Reconstruction Amendments, and by refusing to allow federal enforcement of the Constitution against state violators. The damage caused by this judicial fiat against the protection of Black lives, and the abdication of judicial responsibility to enforce the law, cannot be overstated. Black suffrage would be systematically suppressed for decades, while thousands of racial-terror lynchings occurred between the Civil War and World War II, "violent and public acts of torture that traumatized [B]lack people throughout the country and were largely tolerated by state and federal officials."[152] After the Supreme Court struck down the Enforcement Acts in *Cruikshank*, federal prosecutions of racial violence ceased, and the Justice Department dropped 179 prosecutions in Mississippi alone.[153] Racial terror continued to infect not just the South but the nation for the next century: in the Author's home state of Colorado, a Black juvenile named Preston "John" Porter, Jr., was lynched and burned alive in 1900 with the complicity of the Denver Sheriff's Office, a public event that drew spectators from around the state.[154] Meanwhile, the Klan and white supremacist groups persisted and enjoyed periods of resurgence and even political power.[155]

What would have happened if the federal judiciary had embraced the duty Congress and the American people had bestowed upon it to open the federal courthouse doors and enforce civil rights? How many Black lives would have been saved, how much racial terror punished and deterred? How many Black voters would have felt empowered to participate in their democracy, had the Court honored its duty to uphold the Constitution and enforce federal law? How many fewer prisons would dot the American landscape had Black lives been valued rather than painted as criminal?

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149. *Id.* at 635–37, 639–44.
150. 114 U.S. 317 (1885).
151. *Id.* at 322–23.
152. LYNCHING IN AMERICA, *supra* note 75, at 3.
153. *Id.*
154. STEPHEN J. LEONARD, LYNCHING IN COLORADO 1859-1919, at 123–25 (2002).
155. Jared A. Goldstein, *The Klan's Constitution*, 9 ALA. C.R. & C.L. L. REV. 285, 290, 343–46 (2018) (charting the history of the Klan, racial terror violence, and political activities).

D. Harlow v. Fitzgerald*: The Supreme Court's Second Assault on Civil Rights*

When the Warren Court revived § 1983 in *Monroe* during a period of civil rights expansion in the 1960s, it offered another brief "glimpse of a different America" before the 1980s ideological shift that would undo this progress.[156] As discussed at greater length below, in *Pierson v. Ray*[157] the Court initially restricted what would become qualified immunity as a mere "good faith" defense for officers—a factual matter to be presented to the jury.[158] But in 1982 in *Harlow*, the Court overruled *Pierson* and veered away from the text and purpose of § 1983, paving the way for the next four decades of unchecked police violence.[159] In this Section, this Article notes how the Court has expanded and tinkered with the clearly established standard to the benefit of lawyers as part of a broader assault on civil rights enforcement.

Recall the standard from *Harlow*: when invoked by an officer, the doctrine requires the plaintiff harmed by police to establish (1) a violation of a constitutional right, (2) under clearly established law.[160] The first problem is that the Court has defined prong two as requiring plaintiffs to show a published case factually on point by the Supreme Court, or from the Circuit Court of Appeals governing the jurisdiction.[161] Settlements of civil rights claims, jury verdicts, unpublished cases, public policies, state laws—none of that makes clearly established law. This stifles rights enforcement. Second, the courts have placed this burden onto the plaintiffs, rather than on the defendants as an affirmative defense.[162] Third, the Court continually puffs up the standard: while it claims "[w]e do not require a case directly on point," it simultaneously condemns a "high level of generality" in defining clearly established law, effectively requiring identical precedent at a factual level of generality.[163] In almost every qualified immunity case the Court has reviewed it has ruled in favor of the officer, sending a clear message to lower courts to grant qualified immunity in more cases.[164]

Fourth, the standard is muddy and confusing and easily manipulable.[165] As every law student learns, every case can be factually distin-

156. Jamison v. McClendon, 476 F. Supp. 3d 386, 397–98 (S. D. Miss. 2020).
157. 386 U.S. 547 (1967).
158. *Id.* at 555–58.
159. Harlow v. Fitzgerald, 457 U.S. 800, 813–15, 817–19 (1982).
160. *Id.* at 818.
161. Michael Silverstein, *Rebalancing* Harlow*: A New Approach to Qualified Immunity in the Fourth Amendment*, 68 CASE W. RSRV. L. REV. 495, 503–06 (2017).
162. *Id.* at 498–99, 503.
163. Ashcroft v. al-Kidd, 563 U.S. 731, 741–42 (2011).
164. Blum, *supra* note 16, at 1887–89 (as of 2018, finding for plaintiffs in just two cases in over thirty qualified immunity cases since *Harlow*).
165. *See The Maze*, *supra* note 12, at 962–64; John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) ("[D]etermining whether an officer violated 'clearly established' law has proved to be a mare's nest of complexity and confusion.").

guished if you are creative enough. So no matter how close the facts match or how glaring the misconduct, if the judge so desires "a court can almost always manufacture a factual distinction" and conclude the matter is not clearly established.[166] Recent grants of qualified immunity include a case where an officer unleashed an attack dog on a man surrendered with his hands up,[167] the shooting of a fifteen-year-old boy on his way to school,[168] the shooting of a ten-year-old boy lying on the ground,[169] the shooting of a fourteen-year-old boy with his hands up who had dropped a BB gun,[170] and the killing of a man by "hog-tying" him while a 385-pound officer knelt on his back.[171]

Fifth, the court has flip-flopped on whether the constitutional question should be decided first. In *Pearson v. Callahan*[172] the Court overruled itself to hold that lower courts may skip prong one, the constitutional question, if they choose to find the alleged violation fails to meet the clearly established law prong.[173] This frustrates the development of constitutional law because judges can dispose of lawsuits by finding no violation of clearly established law without concluding whether a constitutional violation even occurred.[174]

Sixth, the Court has fiddled with the language it uses to describe qualified immunity, adding rhetorical tools devised to litigate qualified immunity and dispose of more lawsuits. Consider a couple examples of how the Court has invented new language to strengthen police immunity: In *Malley v. Briggs*,[175] the Court stated qualified immunity should protect "all but the plainly incompetent."[176] This is not a workable standard. It

166. McGarry v. Bd. of Cnty. Comm'rs, 294 F. Supp. 3d 1170, 1201 n.16 (D.N.M. 2018).

167. Baxter v. Bracey, 751 F. App'x 869, 870 (6th Cir. 2018), *cert. denied*, 140 S. Ct. 1862 (2020).

168. Nicholson v. City of Los Angeles, 935 F.3d 685, 689 (9th Cir. 2019). "Because no analogous case existed at the time of the shooting, we hold that the district court erred in denying Gutierrez qualified immunity for this claim." *Id.* at 695.

169. Corbitt v. Vickers, 929 F.3d 1304, 1308 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020).

170. Nelson v. City of Battle Creek, 802 F. App'x 983, 984, 988 (6th Cir. 2020).

171. Callwood v. Jones, 727 F. App'x 552, 555–56 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 100 (2018).

172. 555 U.S. 223 (2009).

173. *Id.* at 243–45. In *Saucier v. Katz*, 533 U.S. 194, 201 (2001), the Court ruled that judges must address the first prong, whether a constitutional violation occurred, in order to facilitate the development of constitutional law, which the Court overruled in *Pearson*. Since *Pearson*, courts increasingly have granted qualified immunity and increasingly skipped part one of the test, not deciding the constitutional question, which frustrates the development of what can be considered clearly established law for the next aggrieved plaintiff. Chung et al., *supra* note 13.

174. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 1–2, 5 (2015) (describing "constitutional stagnation" caused by *Pearson*'s approach); Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 691 (2009) (finding that qualified immunity was denied in 14%–32% of district court decisions); Greg Sobolski & Matt Steinberg, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 545 (2010) (finding that qualified immunity was denied in approximately 32% of appellate decisions).

175. 475 U.S. 335 (1986).

176. *Id.* at 335.

does not help us know whether an officer violated clearly established law because mildly incompetent or even highly competent officers might violate the law. And the Court did not purport to be overruling the prior standard. Rather, the Court gratuitously created language which police officers and their lawyers could marshal to help them litigate qualified immunity. Now, an officer's lawyer can claim the client is not "plainly incompetent" and should receive qualified immunity, having nothing to do with the legal standard.

In *Ashcroft v. al-Kidd*,[177] the Court once again tweaked the language, giving officers two more rhetorical tools to leverage in qualified immunity litigation.[178] Whereas previously the Court had described the objective standard according to what "a reasonable official" would know, in *al-Kidd* it added the word "every," so that "*every* reasonable official" would have to know the constitutional law violated.[179] The Court secondly stated that in assessing whether a prior case constitutes clearly established law, the "existing precedent must have placed the statutory or constitutional question beyond debate."[180] Once again, not a doctrinal change, just gratuitous language, inventing new rhetorical tools to strengthen qualified immunity. Now, lawyers for officers, by simply debating whether a right was clearly established, can argue it is not "beyond debate."

In the four decades since *Harlow*, nearly every time the Court has heard a qualified immunity case, it has ruled in favor of officers and often taken the opportunity to add some new formulation of language, inventing another tool in the police officer's toolbox to litigate the issue and avoid liability.[181] This is no accident. During that same time period, the Court has eroded civil rights enforcement and jury trials generally.[182]

E. Unlawful Violence Against Black Lives in the Interest of "Society as a Whole"

The legal profession bears responsibility for the creation and development of qualified immunity and its role in the routinization of police

177. 563 U.S. 731 (2011).

178. *Id.* at 741.

179. *Id.* The Court then further tweaked this language by stating a plaintiff must show "every 'reasonable official would understand that what he is doing' is unlawful." District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (quoting *Ashcroft*, 563 U.S. at 741).

180. *Ashcroft*, 563 U.S. at 741.

181. *See, e.g.*, *Wesby*, 138 S. Ct. at 589; Behrens v. Pelletier, 516 U.S. 299 (1996); McClesky v. Kemp, 481 U.S. 279, 313 (1987); Mitchell v. Forsyth, 472 U.S. 511 (1985).

182. Peck & Chemerinsky, *supra* note 44, at 490 (describing the "decades long attacks" on jury trials and access to courts); Harold S. Lewis, Jr., *Teaching Civil Rights with an Eye on Practice: The Problem of Maintaining Morale*, 54 ST. LOUIS U. L.J. 769, 769 (2010) (lamenting the "sedulous erosion of civil rights doctrine"); Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1057–58 (1989) (urging the expansion of state court remedies because of lack of federal relief) ("[T]he Supreme Court has been cutting back on the substance of federal constitutional rights and the availability of federal court relief . . . .").

violence. Today's grants of qualified immunity for unlawful police violence originate in the Supreme Court's policy judgment in *Harlow* that it is in the interest of society as a whole.[183] In overriding the will of Congress in passing § 1983, the Court cited a law review article from 1980, an article which itself lacked any empirical evidence and was based on the author's policy judgments and speculation about how officials will respond to being held accountable.[184] It is chilling to learn that a law review article—not a public debate by elected representatives, not peer-reviewed empirical research—formed the bedrock of the legal regime propping up unlawful police violence for the next four decades.

Consider further *Harlow*'s reasoning based on policy judgments lacking any empirical evidence: according to the Court's value judgment, the "general costs of subjecting officials to the risks of trial" would be a "distraction" for government officials and a "deterrence of able people from public service."[185] The Court cited nothing for these pronouncements, nor did it give any metric by which it would weigh the various interests. Balanced against plaintiffs' interest in presenting their case to a jury, the Court chose to more heavily weigh the so-called interests of police officers and their departments not to be held accountable to the law.[186] According to the Justices' value system, it was more important to protect officers from litigation for unlawful conduct than to protect people harmed by unlawful police violence.

This policy judgment not only lacked evidence; it usurped the power of Congress in creating § 1983. In other words, the Court did not have the right to make this policy judgment in the first place. Worse, it made a value judgment that is untrue and immoral, valuing the time and careers of officers more than the lives of those harmed.[187] By explicitly claiming that allowing such unlawful police violence is in the interest of society as a whole, the Court delineated who it considered to be a member of society. As James Baldwin feared, the Court effectively stated that Black Americans and others aggrieved by unlawful police violence "are not a part of the American community"—they were not part of the society as a whole the Court envisioned.[188]

The Supreme Court should be afflicted by this, as should any law professor writing about civil rights enforcement, any lawyer invoking

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

184. *Id.* at 814 n.22. (citing Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 324–27). The author of this article, a law professor, makes theoretical arguments—without evidence—that § 1983 liability will result in "considerable cost to society." Schuck, *supra*, at 305. It is this kind of reckless theorizing and policymaking by the legal profession which this Article intends to push back against.

185. *Harlow*, 457 U.S. at 816.

186. *Id.* at 818.

187. *How Qualified Immunity Fails*, *supra* note 12, at 19 (explaining that there is no empirical basis for the doctrine).

188. *See* Baldwin, *supra* note 1.

qualified immunity on behalf of an officer, and any judge called upon to decide the question. In a nation struggling to reckon with its history of racial injustice, qualified immunity functions as a racist policy gutting the anti-racist core of § 1983. How do we expect officers and their departments to respond to the impunity given them by law? It tells officers "society" values and expects their unlawful violence unequally impacting Black Americans, Native Americans, Latinx Americans, and others. Nationwide, law enforcement has responded consistent with *Harlow*'s value judgment—a persistent routine of violence.

III. THE ABSURDITY OF QUALIFIED IMMUNITY AND ITS CYNICAL ORIGIN

Having established that qualified immunity is a racist policy devaluing Black lives contrary to the text and purpose of § 1983, this Part discusses the absurdity and cynicism at the heart of the doctrine. The Court has attempted to justify qualified immunity by suggesting it will facilitate "the dismissal of insubstantial lawsuits without trial."[189] As thoroughly researched by Professor Joanna C. Schwartz, this "fervently held position" not only lacks any empirical support, it is contrary to available evidence.[190] Insubstantial lawsuits are dismissed far more often without litigating qualified immunity, either sua sponte by the Court without a response being filed by defendants, or through motions to dismiss for failure to state a claim.[191] In terms of the volume of § 1983 litigation, Professor Schwartz's research shows that qualified immunity plays almost no role in dismissing frivolous lawsuits pre-discovery.[192]

These empirical findings make sense given the way § 1983 works in practice. Weak cases are screened out in several ways. Lawyers representing § 1983 plaintiffs almost always represent their clients on a contingency fee basis, meaning the lawyer only gets paid if the case successfully settles or results in a plaintiff's verdict.[193] The law firm usually fronts all costs associated with the litigation as well, such as costly expert fees and deposition expenses.[194] Plaintiff's lawyers have no incentive to accept frivolous cases—they will waste time and lose money.[195] Moreo-

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

190. *How Qualified Immunity Fails*, *supra* note 12, at 76 ("In recent years, the Supreme Court has dedicated an outsized portion of its docket to qualified immunity motions in cases against law enforcement because, it has explained, the doctrine is so 'important to "society as a whole."' But the Court relies on no evidence to back up this fervently held position. Instead, my research shows that qualified immunity doctrine infrequently plays its intended role in the litigation of constitutional claims against law enforcement.").

191. *See id.*

192. *Id.*

193. *See, e.g.*, Thomas A. Eaton & Michael L. Wells, *Attorney's Fees, Nominal Damages, and Section 1983 Litigation*, 24 WM. & MARY BILL RTS. J. 829, 850 (2016) (discussing the role of contingency fees in case selection, plaintiffs' lawyers are unlikely to accept cases "unless the potential liability is substantial").

194. *After Qualified Immunity*, *supra* note 43, at 316 (noting that without qualified immunity such considerations "would continue to discourage attorneys from filing insubstantial cases").

195. Eaton & Wells, *supra* note 193, at 850.

ver, without qualified immunity American juries would still be called upon to decide whether officers used excessive force using reason and common sense, further deterring the filing of insubstantial suits.[196]

This Part adds several points to Professor Schwartz's empirical findings: First, it should not surprise that empirical evidence shows qualified immunity does not dispose of insubstantial lawsuits because the standard, by logical necessity, only applies to meritorious claims.[197] This is absurd: the doctrine's function undermines its claimed justification. Second, a brief return to the origin of qualified immunity highlights the cynicism of the doctrine's formulation in *Harlow*. The first qualified immunity cases created the doctrine as a limited defense to be decided by a jury, which would not delay trial or impose costs on the plaintiff.[198] In *Harlow*, the Court overturned that precedent to craft an unworkable standard making judges the gatekeepers of whether § 1983 claims reach trial, a standard designed to deter civil rights lawsuits, impose massive costs on meritorious cases, and delay cases from reaching trial.[199]

A. Qualified Immunity by Logical Necessity Only Applies to Meritorious Claims.

The qualified immunity standard is directly at odds with the justification for its existence. It is nonsensical to think that qualified immunity would be needed to dispose of frivolous lawsuits—the test logically may only dispose of substantiated violations of the Constitution which happen to lack a perfect precedential analogue. Remember, qualified immunity only applies where a claimant cannot show (1) a violation of a constitutional right, (2) which is clearly established by matching the facts of existing precedent.[200] But if no violation of a constitutional right is found at all under prong one, then qualified immunity is not needed to dispose of the claim, because the claim would be dismissed for failure to state a claim under Rule 12(b)(6).[201] Even if qualified immunity did not exist, insubstantial claims would be dismissed for failing to establish a constitutional violation.[202] Indeed, that is what Professor Schwartz's empirical study shows: weak § 1983 claims are disposed of regardless, making the qualified immunity analysis unnecessary.[203]

If we dissect the standard further, we see that instead of disposing of insubstantial claims, it achieves the exact opposite: the disposal of meri-

196. For two decades following *Monroe*, juries capably decided § 1983 cases until *Harlow* in 1982.
197. *See* discussion *infra* Section II.A.
198. *See* Pierson v. Ray, 386 U.S. 547, 557–58 (1967).
199. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
200. *Id.*
201. *How Qualified Immunity Fails*, *supra* note 12, at 44–46.
202. *Id.* at 56.
203. *Id.* at 46.

torious cases involving actual violations of a constitutional right.[204] Qualified immunity only applies to the exclusion of a regular 12(b)(6) dismissal where the second prong of the test is unmet, where no case factually matches such that the judge does not find the right clearly established.[205] To get to that prong of the test, one of two things has happened: First, the Court may apply qualified immunity by choosing to skip the constitutional question, conducting a short-circuit analysis, and find no clearly established law even if the underlying conduct violated the constitution.[206] This tells us nothing about whether there is an underlying constitutional violation—indeed, there may be a substantial violation involving serious harm. One negative impact of skipping the constitutional question is to frustrate the development of constitutional law, but it has nothing to do with whether the claim at issue is substantiated.[207]

Second, the Court may apply qualified immunity by first finding a constitutional violation—a serious matter—but then concluding there is not a close enough case on point to consider the conduct a violation of clearly established law.[208] In such situations, a constitutional violation has been found, so the case can hardly be considered insubstantial: The violation of a person's constitutional rights is, by definition, a substantial and serious harm.[209] The issue on prong two is not whether the violation is meritorious and well-supported by evidence—the issue is whether a particular judge decides there is a precedent close enough on point. This legal analysis has no bearing on the merit of the underlying claim or the seriousness of the injury, and more to do with whether the plaintiff is lucky enough to find a published Supreme Court or Circuit Court opinion with identical facts, and lucky enough to have their case assigned to a judge who favors allowing cases to be presented to the jury at trial.[210]

So, we are left to conclude that the standard is designed to dispose of meritorious claims involving actual violations of the Constitution. Those meritorious claims—asserted by people whose constitutional rights have been violated—will be unjustly denied because they are unlucky enough to have no factual match in published precedent. Let us return to the inquiry motivating this Article: how should we expect this

204. *Id.* at 62.

205. Saucier v. Katz, 533 U.S. 194, 201 (2001).

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

207. Even the Supreme Court often avoids the constitutional question, "thus leaving unsettled constitutional issues raised in the context of qualified immunity." Blum et al., *supra* note 12, at 644 (further discussing "*Pearson*'s negative effect on the development and clarification of constitutional rights" in lower courts which often demonstrates "willingness to ignore the merits question").

208. *See Harlow*, 457 U.S. at 818.

209. For instance, the harm inherent in a constitutional violation is illustrated in the context of injunctive relief: "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)).

210. *See* Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2070 (2018) ("[O]nly a handful of opinions reviewed a case at which a jury trial transpired—every other case reviewed a decision on a motion for summary judgment or to dismiss.").

to impact police behavior? The message sent is clear: if their lawyers do a decent job distinguishing precedent for courts already generally hostile to civil rights enforcement, culpable officers and their departments will face no accountability and have no incentive to improve their policies and practices to reduce unlawful violence.[211] Over the decades since *Harlow*, over tens of thousands of cases, the routine of unlawful police violence persists.

B. The Cynical Origin of Qualified Immunity as Deliberately Unworkable

The origin of the current formulation of qualified immunity in *Harlow* supports the conclusion that it was devised to deter meritorious § 1983 claims. In making the case that qualified immunity is a racist policy, let us assure ourselves that in 1982 the Justices knew very well the problem of police violence against Black Americans and the underenforcement of civil rights. Unchecked police violence had long been lamented and condemned by countless Black activities and leaders, from James Baldwin to Malcom X to Martin Luther King, Jr.[212] The Kerner Report, which thoroughly documented the impact of police violence on Black communities, provided hard data to back up the well-justified claims of Black Americans that their communities were being targeted.[213] When the Court revived § 1983 litigation in *Monroe* in 1961, it came face-to-face with shocking police violence against Black people.[214] The Court there affirmed the verdict for a Black family of six who sued Chicago police officers for the violent, degrading, and unlawful raid of the family's residence.[215]

We can therefore have no doubt the Justices knew police violence against Black communities continued to persist and that § 1983 afforded a remedy designed to deter such rights violations. But by 1982 in *Harlow*, a different set of Justices with different views about federal rights enforcement occupied the bench. By tracing the development of qualified immunity as we now know it—particularly the opinions of Justice Powell, *Harlow*'s author—we learn the doctrine was never intended, nor expected, to be workable or fair.

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211. Carbado, *supra* note 8, at 1529 ("[Qualified immunity] diminishes the incentive for police officers to exercise care with respect to when and how they deploy violent force.").

212. *See* Baldwin, *supra* note 1; Martin Luther King, Jr., Address at the March on Washington for Jobs and Freedom: I Have a Dream (Aug. 28, 1963) ("We can never be satisfied as long as the Negro is the victim of the unspeakable horrors of police brutality."); Malcolm X, Democracy is Hypocrisy (1960) (transcript available in Educational Video Group Great Speeches Video Series) ("Every case of police brutality against the negro follows the same pattern. They attack you, bust you all upside your mouth, and then take you to court and charge you with assault.").

213. *See* NAT'L ADVISORY COMM'N ON CIV. DISORDERS, KERNER COMMISSION REPORT (1968).

214. Monroe v. Pape, 365 U.S. 167, 172–75 (1961).

215. *Id.* at 192.

1. *Pierson v. Ray*: A Limited Defense for a Jury to Decide

Although commentators sometimes attribute the invention of qualified immunity to *Pierson*,[216] the doctrine described in that case bears almost no resemblance to what we have now. *Pierson* permitted a very limited "good faith" defense by officers that a jury would decide at trial.[217] In 1967, Chief Justice Warren unwittingly established what would, after several shapeshifts, be transformed into the judicial grant of qualified immunity established in *Harlow*.[218] Black and white religious clergy had traveled to Mississippi to promote integration in 1961, and they were arrested and charged under Jim Crow criminal code.[219] They sued the officer who arrested them under § 1983, alleging that those very criminal codes violated the Constitution.[220] The officers won in a jury trial, arguing they "reasonably believed in good faith that the arrest was constitutional," as the Court put it, because they were following state laws.[221] The Court reversed for a new trial due to erroneous evidentiary rulings, but it affirmed the trial court's allowance of this limited good faith privilege to be decided by juries.[222]

Pierson's idea of a good faith privilege therefore drastically differs from qualified immunity as we know it. Chief Justice Warren discussed this "limited privilege" as a factual question for a jury to decide—not a legal question requiring dismissal before discovery, as the doctrine would eventually be contorted to allow.[223] And in *Pierson*, the privilege is subjective: juries should decide whether an officer violated the Constitution by assessing the officer's intent (good faith) and information known to the officer (probable cause).[224] Had the law stayed consistent with *Pierson*, we would not have the judicial grant of immunity at all—rather, the relative good faith of an officer's conduct would be a matter for a jury to decide.

2. *Wood v. Strickland*: An Even More Limited Defense, Still for the Jury to Decide

After inventing the limited privilege for a jury to decide, the Court further limited this privilege and expanded the reach of § 1983 liability.

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216. *See* Pierson v. Ray, 386 U.S. 547, 555 (1967).
217. *Id.* at 557.
218. *See id.* at 548.
219. *Id.* at 549.
220. *Id.* at 548–50.
221. *Id.* at 557. Though *Pierson* devised a privilege far more limited than today's qualified immunity, even then the opinion is likely incorrect because § 1983 permits no immunity or privilege whatsoever except for injunctive relief against judges. Baude, *supra* note 12, at 55. *Pierson* is therefore also wrong in finding the judge absolutely immune from § 1983 liability utilizing the same textual analysis, as Justice Douglas argued in dissent. *Pierson*, 386 U.S. at 559 ("The congressional purpose seems to me to be clear.").
222. *Pierson*, 386 U.S. at 558.
223. *Id.* at 557.
224. *Id.*

In *Wood v. Strickland*,[225] the Court broadened liability under § 1983 by concluding that a violation could be proved by "ignorance or disregard of settled, indisputable law" by a state actor.[226] After *Wood*, liability under § 1983 could be established against an officer under either (1) the subjective lack of good faith standard of *Pierson*, i.e., by showing an officer subjectively, knowingly violated a right, or (2) under this new objective standard that they violated clearly established law.[227] This expansion makes sense: ignorance of the law is never an excuse, so officers should not be able to escape liability by claiming they did not know they violated "settled, indisputable law."[228] *Wood* kept in place *Pierson*'s holding that these matters be decided by a jury.[229]

Justice Powell, who would later author *Harlow*, dissented in *Wood*, and the relationship between these two opinions reveals the cynical origin of qualified immunity as it exists today.[230] Justice Powell went from lampooning the notion of a "settled" law standard to centering it as the cornerstone of qualified immunity as we know it. In *Wood* Justice Powell argued it would be absurd to expect state officials—in that case, public school officials—to know what is "settled" or "clearly established constitutional law": "The Court's decision appears to rest on an unwarranted assumption as to what lay school officials know or can know about the law and constitutional rights."[231] Justice Powell went further, calling out the Court for its "two cryptic phrases" used to describe the objective test: "settled, indisputable law" and "unquestioned constitutional rights."[232] Powell noted the silliness of expecting "the average school board member," the defendant in that case, to know what is clearly established law, and he gave an example of the Court's recent reversal in doctrine.[233] The opinion's tone conveys that Justice Powell relished pointing out how law changes and is never quite as clearly established as we think, and that local officials would seldom know the nuance of constitutional law. Yet the next time he addressed the doctrine in *Harlow* Justice Powell would sing a very different tune.[234]

3. *Harlow v. Fitzgerald*: Qualified Immunity and the Death of § 1983 Jury Trials

Just a few years after *Wood*, the Court abrogated the decision and eliminated § 1983 liability on showings of subjective bad faith or mal-

225. 420 U.S. 308 (1975).
226. *Id.* at 321.
227. *Id.* at 322.
228. *Id.* at 321.
229. *Id.* at 329 (Powell, J., concurring in part and dissenting in part) ("These officials will now act at the peril of some judge or jury . . . .").
230. *See id.* at 327–29.
231. *Id.* at 329.
232. *Id.*
233. *Id.*
234. *See* Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

ice.[235] In an opinion by Justice Powell, *Harlow* overruled the subjective good faith standard of *Pierson* and made the objective clearly established law test the centerpiece of qualified immunity.[236] From *Harlow* forward, proving a violation of clearly established law would be the requirement for liability to be shown, rather than an alternative basis of liability as conceived in *Wood* and *Pierson*.[237] Moreover, in *Harlow* the Court decided that judges should decide this new "immunity," turning upside down the holding in *Pierson* that this "privilege" would be a matter for a jury to decide.[238] As explained above, the Court reached this policy judgment without any empirical evidence, based on what it believed was in the interest of society as a whole.

Harlow is an example of law by judicial edict: the overturning of precedent, the disregard of the history, purpose, and text of § 1983, and a failure to support its policy judgments with any evidence. By making the qualified immunity test purely objective and a question for the courts—rather than the jury—the Court usurped the power of citizens, as litigants and jurors, to hold state actors liable for unconstitutional conduct.[239] The Court centered the clearly established law test of *Wood*—which Justice Powell had previously highlighted as unworkable—as the sole way liability could be shown, rather than an alternative basis of liability.[240] The Court created a legal standard that would incentivize motions to dismiss and motions for summary judgment—inviting officers to claim they had not violated clearly established law and debate the lawfulness of violence that average citizens would think undebatable.

The tragedy of *Harlow* is that the Court was aware, or should have been aware, of the ruling's implications. We can see this from Justice Powell's dissent in *Wood*.[241] Justice Powell knew questions of constitutional law are never settled and are always debatable; police officers or other public officials would not know what is clearly established constitutional law,[242] or keep up on published opinions with the diligence of law professors. Despite *Monroe* as precedent, despite the unfinished work of the civil rights movement in recent memory, the Court effectively concluded the work of racial justice was not in society's interests to pursue.[243]

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235. *Id.* at 817–18.
236. *Id.* at 818.
237. *Id.* at 818–19.
238. *Id.* at 818 (stating that a judge may determine qualified immunity at summary judgment).
239. *Id.*
240. *See id.*; *see also* Wood v. Strickland, 420 U.S. 308, 328–29 (1975) (Powell, J., dissenting).
241. *See Wood*, 420 U.S. at 328–30 (Powell, J., dissenting).
242. *Id.* at 329.
243. *See* McCleskey v. Kemp, 481 U.S. 279, 313 (1987); Samuel R. Gross, *David Baldus and the Legacy of* McCleskey v. Kemp, 97 IOWA L. REV. 1905, 1921 (2012) (stating that Justice Powell later told his biographer he regretted the decision and admitted "my understanding of statistical analysis . . . ranges from limited to zero") (internal cite omitted; noting *McCleskey* was a "terrible"

This troubling origin of qualified immunity further supports abolishing the doctrine. Nothing required the Court to invent the judicial grant of qualified immunity in *Harlow*. To the contrary, the Court performed feats of rhetorical jiggery to overrule precedent, disregard history and text, and invent policy conclusions without evidence. Worse, Congress had recently overruled the Supreme Court and expanded § 1983 liability to incentivize lawyers to accept civil rights cases by passing the Civil Rights Attorney's Fees Awards Act of 1976.[244] The Court in *Harlow* invented a qualified immunity standard that would achieve the exact opposite result, disincentivizing civil rights lawsuits and making them more costly for plaintiffs and their lawyers. And, the Court knew or should have known—at least Justice Powell did given his dissent in *Wood*—that the *Harlow* test would plow fertile ground for voluminous pretrial litigation by officers and their attorneys, inviting lawyers to argue whether a constitutional violation counts as clearly established or not. To lawyers trained to distinguish cases and advocate positions, nothing is ever clearly established, nor certainly ever "beyond debate."[245] We are, naturally, still debating.

IV. INTERLOCUTORY APPEAL: THE PROCEDURAL MACHINE OF QUALIFIED IMMUNITY

Invoking qualified immunity triggers procedural machinery which slows justice to a stop. An irony—and inherent contradiction—to the Supreme Court's qualified immunity doctrine is that it generates litigation, echoing Charles Dickens's warning of law's tendency to "make business for itself."[246] Where the Supreme Court attempts to justify the doctrine as a way to reduce litigation costs and more quickly resolve cases, in reality, qualified immunity incentivizes tedious appellate litigation and delays cases far longer than regular proceedings.[247] If qualified immunity is the engine of this gummed machine, interlocutory appeal is the axle around which cases slowly revolve, possibly multiple times, before the facts can finally be presented to a jury. Officers and their law-

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decision). Without divining Justice Powell's subjective intent, it is worth noting he authored this infamous decision holding the Baldus studies' statistical proof of racially-biased impact against Black Americans in capital punishment as inadequate to establish an equal protection violation and requiring proof of "discriminatory purpose." *McCleskey*, 481 U.S. at 313; *see also* Linda Greenhouse, *Black Robes Don't Make the Justice, but the Rest of the Closet Just Might*, N.Y. TIMES (Dec. 4, 2002), https://www.nytimes.com/2002/12/04/us/black-robes-don-t-make-the-justice-but-the-rest-of-the-closet-just-might.html (arguing that the synergy of *McCleskey* and *Harlow* to subvert racial justice is unmistakable: in both opinions Justice Powell enabled racist systems of violence against Black Americans to persist outside of law's reach. Justice Powell's life and jurisprudence may be complicated: he joined majorities preserving a modicum of affirmative action but was "a patrician son of the Old South").

244. 42 U.S.C. § 1988(b) (1976); *see supra* Part I; *see also* Eaton & Wells, *supra* note 193, at 839 (discussing the importance of § 1988 attorney fees to incentive meritorious § 1983 litigation and deter civil rights violations).

245. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

246. CHARLES DICKENS, BLEAK HOUSE 385–86 (1853).

247. *See, e.g.*, Behrens v. Pelletier, 516 U.S. 299 (1996).

yers deploy this machine in a war of attrition to drive meritorious civil rights cases into the ground and deter future litigation—indeed, it is often in meritorious cases where the machine is deployed most fervently.[248] Officers and their attorneys do this by filing abusive interlocutory appeals under *Mitchell v. Forsyth*,[249] which supposedly allows immediately appeal of the "purely legal question" of clearly established law, but which in reality invites appeals disputing the facts.[250] At a minimum, the *Mitchell* standard, like qualified immunity doctrine generally, has proven unworkable: as Professor Karen Blum describes, there is "confusion and inconsistency" over what constitutes a valid interlocutory appeal.[251]

This Part first describes the judicial invention of interlocutory appeal in this setting. As for qualified immunity itself, the Court in *Mitchell* relied on the same flawed policy judgment that devalues those harmed by police in the interest of society as a whole.[252] Also, like qualified immunity itself, officers exploit the plasticity of the *Mitchell* standard to file frivolous appeals that impose costs and deter civil rights cases.[253] Second, this Part illustrates how the Courts fail to deter or punish abusive interlocutory appeals, despite frequently dismissing them for lack of jurisdiction.[254] Third, this Part builds on prior empirical scholarship by analyzing all qualified immunity appeals in the Tenth Circuit 2017–2020. The data show 88% of all qualified immunity appeals involve law enforcement defendants, and 95% of qualified immunity appeals by defendants are interlocutory.[255] This evidence supports the conclusion that police and their attorneys use interlocutory appeals to drain resources, impose costs, and delay cases. It further supports the idea that abolishing interlocutory appeal of qualified immunity denials would facilitate swift resolution of cases through settlements and trials. As predicted by Justice Brennan when he dissented in *Mitchell*, interlocutory appeals of qualified

248. Blum, *supra* note 16, at 1907.

249. 472 U.S. 511 (1985).

250. *See, e.g.*, Castillo v. Day, 790 F.3d 1013, 1018 (10th Cir. 2015) (dismissing appeal for lack of jurisdiction where defendant assumed "her version of the facts" and rejecting defendant's "attempt[] to characterize" a factual dispute as legal); Henderson v. Glanz, 813 F.3d 938, 949–50 (10th Cir. 2015) (dismissing two appeals) ("[Defendants'] argument does not accept as true [Plaintiff's] version of the facts or view the facts in the light most favorable to [Plaintiff].").

251. Blum, *supra* note 16, at 1915–16.

252. *Mitchell*, 472 U.S. at 524.

253. I disagree with critics of interlocutory appeals of qualified immunity denials who fail to appreciate its overlap with qualified immunity doctrine generally. *See, e.g.*, Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 NOTRE DAME L. REV. ONLINE 169, 175 (2019) ("[C]ritiques [of qualified immunity] do not map directly on the propriety of allowing interlocutory appeals in qualified immunity cases.") (suggesting unspecified tinkering with the doctrine rather than total abolition). To the contrary, the justification for interlocutory appeals is rooted in the same flawed justification for qualified immunity in *Harlow* and results in some of the most pernicious consequences of qualified immunity doctrine, as further shown in Part III's data analysis. *See infra* Part III.

254. *See, e.g.*, Behrens v. Pelletier, 516 U.S. 299 (1996).

255. *See* data analysis discussion *infra* Section III.C.

immunity denials have proven "a potent weapon of harassment and abuse."[256]

A. Three Bites at the Appellate Apple

The Court permits at least three appeals for officers denied qualified immunity—two via pretrial interlocutory appeals, which take years to resolve, and one post-verdict.[257] Without qualified immunity appeals, a typical civil case can easily get through discovery and resolution at trial in less than two years.[258] With qualified immunity appeals, it could take five years, seven years, or even longer to reach trial.[259]

1. Another Policy Judgment and Manipulable Standard

Let us recall the basics of civil procedure. Every law student learns the axiomatic rule that only final judgments can be appealed, usually after a verdict or dismissal of the case, save a few exceptions.[260] The important reason only final judgments can be appealed is obvious: if every decision by a trial court—every motion denied or objection overruled—could be appealed immediately, the case would go up to the appellate court and back, up and back, in endless circles of litigation, and no case would ever make it through discovery, let alone to trial.[261] So, in the usual course of a case, the parties make their objections to rulings, develop the factual and legal record, try the case to a jury, and appeal in the event of an unfavorable ruling.[262] One case = one appeal.

Courts have devised exceptions to the final judgment rule, one of which is the collateral order doctrine, which has been described as "probably the most maligned rule of federal appellate jurisdiction" due to

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256. *Mitchell*, 472 U.S. at 544 (Brennan, J., concurring in part and dissenting in part).

257. *See Behrens*, 516 U.S. at 310–11.

258. *See, e.g.*, Michael E. Hegarty, Magistrate Judge, U.S. District Court for the District of Colorado, CLE Presentation at the Alfred A. Arraj Federal Courthouse, The District Court, By the Numbers (Aug. 29, 2019) (written materials available at https://www.facultyfederaladvocates.org/event-3363995) (detailing statistical data compiled by Magistrate Judge Hegarty of the District of Colorado. In 2018, 56.2% of the trials that year were tried within two years of filing).

259. *See, e.g.*, *Behrens*, 516 U.S. at 321 (noting this case was seven years into litigation when it reached the Supreme Court for the second time).

260. 28 U.S.C. § 1291 (referred to as the "final judgment" rule of federal civil procedure); *see also Mitchell*, 472 U.S. at 544 (Brennan, J., concurring in part and dissenting in part) ("The rule respects the responsibilities of the trial court by enabling it to perform its function without a court of appeals peering over its shoulder every step of the way. It preserves scarce judicial resources that would otherwise be spent in costly and time-consuming appeals. Trial court errors become moot if the aggrieved party nonetheless obtains a final judgment in his favor, and appellate courts need not waste time familiarizing themselves anew with a case each time a partial appeal is taken.").

261. Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1816–18 (2018) (discussing the historical root of a final judgment as "one that ended trial court proceedings," a view adopted by Congress in 28 U.S.C. § 1291).

262. Or, if the court grants a Rule 12(b)(6) motion to dismiss or grants a Rule 56 motion for summary judgment, the plaintiff can appeal that dismissal because it is a final judgment that terminates the case.

its opacity, internal inconsistency, and fungibility as a doctrine.[263] The doctrine allows pretrial appeal of orders that conclusively decide an important issue separate from the merits if it is effectively unreviewable after final judgment.[264] A classic example is the need to immediately appeal denials of excessive pretrial bail: waiting until a conviction (or acquittal) would make review impossible because the point of the appeal is to challenge pretrial detention.[265]

Following *Harlow*'s expansion of immunity, the Supreme Court in *Mitchell* ruled that the legal questions at issue in qualified immunity cases—whether there was (1) a constitutional violation, (2) under clearly established law—could be immediately appealed under the collateral order doctrine.[266] In *Mitchell*, a lawsuit was brought against former Attorney General John Mitchell for the warrantless wiretap of the plaintiff's phone calls, and Mitchell appealed the denial of his motion for summary judgment.[267] The Court held that denials of qualified immunity may be immediately appealed because they involve a "right not to *stand trial*" at all, or even face discovery.[268] As others have noted, applying the collateral order doctrine here is a stretch at best: qualified immunity and the facts necessarily intertwine, so the legal issue is not separate from the merits and fails the test—nor is it unreviewable after a final judgment.[269]

Mitchell superficially limited interlocutory appeal of the denial of qualified immunity to the "purely legal" question of whether the facts support a violation of clearly established law.[270] As later held in *Johnson v. Jones*,[271] "*fact*-related dispute[s]" are not immediately appealable.[272] The legal ruling may be appealed, but the underlying facts favorable to the plaintiff may not. In theory, limiting the standard to the legal issue requires officers and their lawyers to assume the facts alleged by the plaintiff at the pleadings stage and to view the evidence in the light most favorable to the plaintiff at the summary judgment stage.[273]

But in practice the standard is easily manipulated: the legal and factual questions in qualified immunity analyses necessarily intertwine, and officers and their lawyers routinely abuse the standard by framing factual

263. Lammon, *supra* note 261, at 1842, 1842 n.180.
264. *Id.* at 1838–39 (discussing the origin of the collateral order doctrine).
265. *Id.* (citing Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541 (1949)).
266. Mitchell v. Forsyth, 472 U.S. 511, 528–30 (1985).
267. *Id.* at 513, 516. Notably, the case was not a § 1983 action because it involved federal officials and was brought as a *Bivens* action, yet its holding applies to § 1983 cases.
268. *Id.* at 526–27.
269. Solimine, *supra* note 253, at 177.
270. *Mitchell*, 472 U.S. at 530.
271. 515 U.S. 304 (1995).
272. *Id.* at 307.
273. *Id.*

questions as legal disputes.[274] By exploiting this fungible standard, defendants file interlocutory appeals that ultimately involve disputes of fact cloaked as legal disputes.[275] Just as the question of whether a matter is "beyond debate" invites lawyers to debate it, the question of whether an appeal is "purely legal" invites lawyers to find ways to argue that it is. The result, as shown below, is a high volume of abusive, costly, and time-consuming appeals that frustrate the purpose of § 1983: to see cases to trial.[276]

Ultimately, the Court made the same policy judgment in *Mitchell* as it did in *Harlow*, relying on the same amount of empirical evidence: none.[277] The Court once again claimed that the purpose of immunity is not only to avoid damages, but to avoid "the general costs" of litigation, like "distraction of officials from their governmental duties," and "deterrence of able people from public service."[278] As vaguely as it did in *Harlow*, the Court stated that "[i]nquiries of this kind can be peculiarly disruptive of effective government."[279]

There are several problems with *Mitchell*'s logic. First, like in *Harlow*, the Court once again failed to provide any evidence in support of this policy judgment: no data suggesting litigation costs were hampering public officials, no research suggesting police officers were quitting out of fear of being held accountable for their conduct.[280] It was not evidence that led to *Mitchell*'s value judgment—as in *Harlow*, the value judgment of a particular majority of Justices decided the outcome. The Court could have easily concluded that qualified immunity denials are not collateral orders, as Justice Brennan argued at the time and others have argued since.[281] In fact, evidence continues to confirm that *Mitchell*'s policy judgment is false: interlocutory appeals are unnecessary to dispose of frivolous § 1983 actions which are dismissed through simpler mechanisms.[282] As this Article's data analysis indicates, interlocutory appeal instead harms meritorious § 1983 claims and imposes unfair litigation costs on plaintiffs.

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274. The Supreme Court itself has acknowledged this problem: "True, the categories of 'fact-based' and 'abstract' legal questions used to guide the Court's decision in *Johnson* are not well defined." Ashcroft v. Iqbal, 556 U.S. 662, 674 (2009).

275. *See, e.g.*, Valdez v. Motyka, 804 F. App'x 991, 995 (10th Cir. 2020) ("Though the Appellants argue legal errors pervade the district court's view of the facts concerning seizure and objective reasonableness, in the end they are challenging the district court's view of the facts."). According to qualified immunity scholar Professor Karen M. Blum, "many of these appeals are dismissed for lack of jurisdiction because defendants are arguing the appeal based on their own version of the facts[.]" Blum, *supra* note 16, at 1908 (citing appeals dismissed for lack of appellate jurisdiction).

276. Blum, *supra* note 16, at 1907 (noting that "there is a great deal of confusion" about when interlocutory appeal is proper or not).

277. Mitchell v. Forsyth, 472 U.S. 511, 530, 536 (1985).

278. *Id.* at 526 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982)).

279. *Id.* (quoting *Harlow*, 457 U.S. at 817).

280. *Harlow*, 457 U.S. at 814, 816–17, 818.

281. *Mitchell*, 472 U.S. at 543 (Brennan, J., concurring in part and dissenting in part).

282. *How Qualified Immunity Fails*, *supra* note 12, at 75.

Second, both *Harlow* and *Mitchell* were lawsuits against Executive Branch officials—including the Attorney General himself.[283] Although it is beyond the scope of this Article to explore, the policy justifications for limiting litigation against Executive officials do not apply to lawsuits against ordinary police officers for their violence against citizens. It can hardly be contended that a lawsuit against an officer would be "peculiarly disruptive of effective government" in the same fashion as a lawsuit against the Attorney General.[284] But just after *Mitchell*, the Court made no such distinction and swiftly authorized interlocutory appeals for officers and others claiming qualified immunity.[285] The Court made *Harlow* and *Mitchell* Trojan horses for the expansion of qualified immunity for all officials, including regular police officers.

2. Multiple Interlocutory Appeals

Doubling down on *Mitchell*'s expansion, in *Behrens v. Pelletier*,[286] the Court further expanded the scope of interlocutory appeal by holding that denials of qualified immunity could be appealed multiple times pretrial—in that case resulting in seven years of pretrial and appellate litigation.[287] Once again, the Court relied on the policy judgment originating in *Harlow* and reiterated in *Mitchell* that qualified immunity permits officers to avoid not only trial but "pretrial matters," including discovery, that are "peculiarly disruptive" to government.[288] Indeed, *Behrens* was made nearly inevitable by the groundwork of *Mitchell*, which itself involved two pretrial appeals.[289]

Harlow, *Mitchell*, and *Behrens*, and the thousands of cases to follow, incentivize officers to engage in pogo stick litigation—up and back, up and back, to the courts of appeal and even the Supreme Court—before the case reaches discovery, and again before reaching a jury. As pointed out by the dissenting Justices in *Behrens*, the Court knew its dramatic

283. *See Harlow*, 457 U.S. at 802; *Mitchell*, 472 U.S. at 513.

284. *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 817).

285. Failing to explore the distinctions between Executive Branch officials and law enforcement officers, the Court in *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987), held *Mitchell*'s allowance of interlocutory appeal applies to a *Bivens* lawsuit alleging an unlawful search by a federal agent. The first case in which the Court appears to have discussed *Mitchell* regarding a § 1983 excessive force claim against a police officer is, paradoxically, *Johnson v. Jones*, 515 U.S. 304, 317–18 (1995), which declined to permit interlocutory appeals regarding disputed facts underlying a qualified immunity determination. But in so holding, the Court unwittingly affirmed that *Mitchell*'s flawed policy judgments also applied to police officers, such that interlocutory appeals of the so-called pure question of law could be appealed. *See id.* (acknowledging that the policy judgments of "protecting public officials from lawsuits . . . militates in favor of immediate appeals" as in *Mitchell*). In other words, in *Jones* the Court should have instead ruled that the policy justifications for permitting interlocutory appeal for the Attorney General in *Mitchell* do not apply to lawsuits against lower-level defendants like police officers, forbidding interlocutory appeals entirely for such § 1983 claims.

286. 516 U.S. 299 (1996).

287. *Id.* at 302, 321.

288. *Id.* at 308.

289. *Id.* at 306 n.2.

expansion of the collateral order doctrine would result in "very great delays, and oppressive expenses," and would "ossify civil rights litigation" rather than allow for the development and presentation of the facts to juries on the merits.[290]

To put this in stark terms, *Mitchell* and *Behrens* give civil rights defendants (at least) three bites at the proverbial appellate apple:[291]

> **(1) First Appeal:** After a complaint is filed, an officer's lawyers may move to dismiss under Rule 12(b)(6) and assert qualified immunity, which will take months or even a year to decide.[292] If the trial court denies qualified immunity, the officer can immediately appeal.[293] Litigating the appeal may also take a year or more.[294] In a meritorious case, a plaintiff may be over two years into litigation, with hundreds of hours of attorney time expended, before having even reached discovery.[295]
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> **(2) Second Appeal:** If that first appeal fails and the case proceeds to discovery, the plaintiff may finally seek evidence from the defendant, conduct depositions, and develop the facts.[296] An officer's lawyers may then move for summary judgment, and for a second time may appeal if qualified immunity is denied.[297] Once again, this process may take one or two years to resolve. By this point, the case may easily be five or seven or more years into the litigation, and still without a trial date.[298]
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> **(3) Third Appeal:** Finally, after years of pretrial litigation and appeals, if the case proceeds to a trial, the officer may again

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290. *Id.* at 321 (Breyer, J., dissenting) (citations omitted).

291. The case of *Valdez v. Motyka* illustrates this problem. There, the defense filed an interlocutory appeal after the Rule 12(b)(6) dismissal motion was denied, then again at summary judgment. Valdez v. Motyka, 804 F. App'x 991, 992–94 (10th Cir. 2020). The second appeal was certified as frivolous by the trial court, Valdez v. Motyka, 416 F. Supp. 3d 1250, 1259 (D. Colo. 2019), but the interlocutory appeal still had to be litigated. After the dismissal of the interlocutory appeal, now six years into the litigation, the case is yet to reach trial. *See* Valdez v. Motyka, No. 15-cv-0109-WJM-STV, 2020 U.S. Dist. LEXIS 122359, at *48 (D. Colo. July 13, 2020) (most recent opinion on this case granting in part and denying in part Denver's Motion for Summary Judgment). In the interest of transparency, the Author litigated *Valdez v. Motyka*.

292. *See* Mitchell v. Forsyth, 472 U.S. 511, 515 (1985); *Behrens*, 516 U.S. at 303.

293. *See Mitchell*, 472 U.S. at 516; *Behrens*, 516 U.S. at 303.

294. Blum, *supra* note 16, at 1890 n.23 ("Concerning the expense and delay caused by interlocutory appeals, defense attorneys explained that the costs of trying a case are a lot greater than the costs of taking an appeal. Delay, of course, works to the defendant's advantage, and a typical interlocutory appeal will delay proceedings by roughly one year.").

295. City of Riverside v. Rivera, 477 U.S. 561, 564–65 (1986) (awarding over $245,000 in attorney fees after trial).

296. *Behrens*, 516 U.S. at 311.

297. *Id.* at 321 (Breyer, J., dissenting).

298. *See, e.g.*, Valdez v. Motyka, 804 F. App'x 991, 992–93 (10th Cir. 2020) (totaling six years of litigation); *Behrens*, 516 U.S. at 321 (Breyer, J., dissenting) (totaling seven years of litigation).

> appeal an adverse judgment or denial of a posttrial motion, for a total of three bites at the appellate apple.[299]

Behrens itself was seven years into the litigation, four years of which had been tied up in interlocutory appeals, when the Court still found no issue with granting multiple pretrial appeals.[300] As noted by Justice Breyer in dissent, even from the defendant's perspective, "[H]e might well have won more quickly and easily either in the trial court or on appeal from an initially adverse judgment on the merits."[301] Although a nice illustration of the hypocrisy of the immunity doctrine—which wastes time and money rather than saving it—what Justice Breyer failed to appreciate is that presenting the facts to the jury was the last thing the officer or his lawyers appeared willing to risk. Culpable officers will take their chances with an appointed trial judge, and then roll the dice again with appointed appellate judges, as many times as possible, rather than face the music at trial before a jury.

Interlocutory appeal serves the culpable police officer's interest in avoiding a jury trial, and in avoiding justice, at any cost. Interlocutory appeals force those seeking enforcement of civil rights to undergo a war of attrition that is costly, time-consuming, and justice-denying.

B. Abuse of Interlocutory Appeals and Certification of Appeals as Frivolous

It is no secret, as commentators and courts have noted, that officers and other § 1983 defendants abuse interlocutory appeal of qualified immunity denials to delay cases and to avoid facing trial.[302] Although this damages the legitimacy of the courts and results in Dickensian, wasteful litigation, courts typically fail to do anything about it.[303] One way litigants can resist is to file a motion to certify an interlocutory appeal as frivolous in the district court.[304] Pursuant to the doctrine of dual jurisdiction, district courts can retain jurisdiction, despite the filing of an interlocutory appeal, upon a certification of the appeal as frivolous.[305] Be-

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299. *See Behrens*, 516 U.S. at 304–05.

300. *Id.* at 321 (Breyer, J., dissenting).

301. *Id.*

302. *See, e.g.*, Torres v. Puerto Rico, 485 F.3d 5, 7 (1st Cir. 2007) ("The [trial] court certified the defendants' appeal as 'a frivolous one which is interposed solely for the purpose of delay' and sanctioned the defendants for their dilatory tactics."); Blum, *supra* note 16, at 1891 ("The Court's policy-driven qualified immunity approach has . . . imposed substantial burdens and costs on the litigation of civil rights claims by encouraging multiple and often frivolous or meritless interlocutory appeals.").

303. Arielle Herzberg, *"The Right of Trial by Jury Shall Be Preserved": Limiting the Appealability of Summary Judgment Orders Denying Qualified Immunity*, 18 U. PA. J. CONST. L. 305, 324 (2015) ("Expanding appealability of summary judgment denials of qualified immunity orders may, therefore, threaten the legitimacy of the judicial system.").

304. *Behrens*, 516 U.S. at 310–11.

305. *Id.* (stating that the district court may "retain jurisdiction" pending disposition of frivolous appeal).

cause interlocutory appeals may be "subject to abuse," the law allows a district court's retention of jurisdiction after a party files an interlocutory appeal if "the district court (1) after a hearing and, (2) for substantial reasons given, (3) [finds] the claim to be frivolous."[306]

When an appeal is certified as frivolous, it may proceed to trial as scheduled, even as both sides continue to litigate it in the appellate court.[307] Hence the strange concept of "dual-jurisdiction," which requires litigating the pretrial appeal and the trial matter simultaneously.[308] Often, courts have certified interlocutory appeals as frivolous when officers file appeals based on disputed facts rather than the pure question of clearly established law—violating the principle announced in *Johnson* that only "pure" legal questions may be appealed pretrial.[309] While proceeding to trial provides some benefit for plaintiffs, it is far from ideal because the trial might occur before the interlocutory appeal is decided.[310] So, even if the plaintiff prevails at trial, the Court of Appeals might overturn the verdict if it grants qualified immunity on the interlocutory appeal. And, the attorney's time and attention must be split between trial preparation and appellate briefing in the same case.

Far more deterrence is needed to stop the abuse of interlocutory appeals by officers and their lawyers. Because simply filing the interlocutory appeal wins at least a battle for the defense by forcing a delay and imposing costs on the other side, it is no deterrence for the Court to dismiss the appeal for lack of jurisdiction. By that time, a couple more years may have passed. The plaintiff may fatigue and feel coerced into accepting a meager settlement. Costs and fees increase, and the plaintiff's attorney may be less able to effectively get through discovery and trial.

A series of cases in the Tenth Circuit illustrate the problem of abusive pretrial appeals which Courts have pointed out but inadequately deterred. In *Ralston v. Cannon*,[311] the Tenth Circuit admonished the defense for seeking interlocutory appeal of the denial of qualified immunity at summary judgment where disputed facts meant the Court plainly lacked appellate jurisdiction:

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306. Stewart v. Donges, 915 F.2d 572, 576 (10th Cir. 1990) (citation omitted); *see also Behrens*, 516 U.S. at 310–11; Braley v. Campbell, 832 F.2d 1504, 1510 (10th Cir. 1987) ("An appeal is frivolous when the result is obvious, or the appellant's arguments of error are wholly without merit.").

307. Apostol v. Gallion, 870 F.2d 1335, 1339 (7th Cir. 1989).

308. *Id.* at 1339–40.

309. Valdez v. Motyka, 416 F. Supp. 3d 1250, 1259 (D. Colo. 2019) (certifying appeal as frivolous where officer disputed facts instead of the question of law); Martinez v. Mares, No. 1:14-CV-00041 WJ-KBM, 2014 WL 12650970, at *2 (D. N.M. Sept. 22, 2014); *see also* Rose v. Utah State Bar, No. 2:10-CV-1001-WPJ, 2011 WL 1706487, at *2 (D. Utah May 4, 2011), *aff'd*, 471 F. App'x 818 (10th Cir. 2012) (certifying appeal as frivolous and retaining jurisdiction over trial proceedings).

310. *See* Blum, *supra* note 16, at 1916–17.

311. 884 F.3d 1060 (10th Cir. 2018).

> In closing, this court notes that the jurisdictional limitation at issue in this appeal has been in place since the Supreme Court's decision in *Johnson* . . . more than twenty years ago. *Johnson* made clear that allowing appeals from district court determinations of evidentiary sufficiency simply does not advance the goals of the qualified-immunity doctrine in a sufficiently weighty way to overcome the delay and expenditure of judicial resources that would accompany such appeals.[312]

In a rarity, the Court went on to reprimand the defense attorneys: "It certainly follows, then, that appeals like the instant one that flaunt the jurisdictional limitations set out in *Johnson* serve only to delay the administration of justice. That being the case, this court expects practitioners will be cognizant of, and faithful to, the jurisdictional limitation set out in *Johnson*."[313]

That same year, the Tenth Circuit also issued a warning in *Perry v. Durburow*[314] that "[a] defendant who brings an interlocutory appeal like this one and then 'challenge[s] . . . the district court's determinations of evidentiary sufficiency' . . . does so at his or her own peril."[315] But it is unclear what "peril" the Tenth Circuit envisions would be suffered by defendants who file meritless interlocutory appeals. In that case, the court excused defendant's misconduct because the defendant "unequivocally—if belatedly—clarified at oral argument that he accepts all of the district court's factual findings as true for purposes of this interlocutory appeal."[316] The 2020 interlocutory appeal dismissal in *Valdez v. Motyka*[317] made plain the ineffectiveness of this judicial scolding of the attorneys.[318] The same city attorney's office handling the *Ralston* case once again filed a frivolous interlocutory appeal disputing the facts rather than a pure question of law, which the Tenth Circuit once again dismissed.[319]

Judicial admonishment and vague warnings of "peril" have not deterred abusive interlocutory appeals. Certification of appeals as frivolous provides some recourse to litigants by allowing cases to proceed toward trial, but this is an imperfect solution. Appellate courts have the power to summarily dismiss meritless interlocutory appeals to avoid duplicitous and unnecessary litigation and to sanction attorneys who file abusive appeals, and they should deploy it more forcefully.[320]

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312. *Id.* at 1067 (citing Johnson v. Jones, 515 U.S. 304, 315–17 (1995)).
313. *Id.* at 1068.
314. 892 F.3d 1116 (10th Cir. 2018).
315. *Id.* at 1120 (quoting *Ralston*, 884 F.3d at 1062).
316. *Id.*
317. 804 F. App'x 991 (10th Cir. 2020).
318. *Id.* at 995.
319. *Id.* at 991 (noting counsel from Denver City Attorney's office); *Ralston*, 884 F.3d at 1060 (noting counsel from Denver City Attorney's office).
320. *See* Herzberg, *supra* note 303, at 322.

C. Data Analysis of Tenth Circuit Interlocutory Appeals of the Denial of Qualified Immunity

A data analysis of all Tenth Circuit cases involving qualified immunity appeals 2017–2020, 161 cases, confirms the importance of qualified immunity for law enforcement and the weaponization of interlocutory appeals to delay and frustrate justice.[321] This data must be understood in conjunction with Professor Schwartz's findings that qualified immunity does not dispose of insubstantial cases.[322] From that starting point, we know that qualified immunity appeals work only to dispose of and undermine meritorious cases.

The data from this time period confirm the importance of qualified immunity for police impunity. Out of 161 qualified immunity appeals during this time period, 141, or 88%, involved law enforcement officer defendants.[323] Fifty-three of these appeals involved a claim of excessive force, or 38% of the cases involving law enforcement officers.[324] Moreover, every single defense appeal of the denial of qualified immunity in an excessive force case, 22 cases, was interlocutory.[325] This disproportionate invocation of qualified immunity by law enforcement, compared to other public officials, suggests law enforcement officers are by far the most likely § 1983 defendants to invoke qualified immunity and to appeal when it is denied, often to defend uses of excessive force.

The data also confirm the importance of interlocutory appeal for denials of qualified immunity. Fifty-seven out of 60 appeals by officers or other defendants, or about 95% of defense appeals, were interlocutory.[326] Out of 60 total defense appeals, only 3 were not interlocutory and occurred after a final judgment.[327] This is a staggering disproportionality. It means that the prospect of trial either incentivizes pretrial settlement, or results in verdicts which cause settlement or go unchallenged—likely some combination of the three. And, out of 60 defense appeals, officers or other defendants only won outright reversals in 28 cases, or 47% of the time.[328] Put another way, 53% of the time, the interlocutory appeal failed to dispose of the case or keep it out of discovery, the sole justification given by the Supreme Court for pretrial qualified immunity appeals.[329] This data therefore supports the conclusion that defendants exploit interlocutory appeal to impose costs on meritorious civil rights cases.

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321. *See* MAXTED LAW, *supra* note 25.
322. *How Qualified Immunity Fails*, *supra* note 12, at 48.
323. *See* MAXTED LAW, *supra* note 25.
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*

Defense Appeals	Defense Interlocutory	Defense After Verdict
60	57 (95%)	3 (5%)
	Success Rate	Success Rate
	29 out of 57 (51%)	1 out of 3 (33%)

TABLE 1.[330]

The data also confirm that officers tend to successfully defend qualified immunity wins—disposing of meritorious § 1983 cases, as we have established herein—when appealed by plaintiffs. Out of 161 total appeals involving qualified immunity, 101 were plaintiff appeals of the grant of qualified immunity.[331] Plaintiffs appealing won reversals outright in only 3 of their appeals, a mere 3% of the time.[332] Plaintiffs won a split decision, affirming and reversing in part, in 24 of their appeals, or 24% of the time.[333]

Plaintiff Appeals	Full Reversal	Partial or Full Reversal
101	3 (3%)	24 (24%)

TABLE 2.[334]

The Tenth Circuit also skips the constitutional question regarding qualified immunity at a high rate. Seventy-eight out of 161 appeals, or 48%, declined to answer the constitutional question.[335] For interlocutory appeals by defendants, 29 out of 57, or 51%, declined to answer the constitutional question.[336] This finding lends empirical support for the view that qualified immunity stymies the development of constitutional law following the Court's ruling in *Pearson* that answering the constitutional question is discretionary.

Total Appeals Avoiding Constitutional Question	Interlocutory Appeals Avoiding Constitutional Question
78/161 (48%)	29/57 (51%)

TABLE 3.[337]

These inequitable outcomes confirm the relative ease with which officers exploit the qualified immunity doctrine. Consider the incentives: When officers win on qualified immunity at the district court, the Tenth Circuit overwhelmingly affirms at least partially in their favor, about 97% of the time, and rarely completely reverses in favor of a plaintiff, a mere 3% of the time.[338] When a district court denies qualified immunity

330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.*

at the motion to dismiss stage or at summary judgment, officers file interlocutory appeals, winning 42% of the time.[339] This shows a stark disparity in outcomes of qualified immunity appeals in favor of officers. But it also shows the incentive for officers to interlocutory appeal qualified immunity denials no matter the outcome: despite losing 58% of the time, officers and their lawyers obviously calculate that the cost is worth the effort.[340] This shows the incentive for officers to appeal—they may suffer some litigation costs, but that is often a cost worth bearing when they have everything to gain and nothing to lose.

For purposes of understanding qualified immunity as a litigation machine, the most compelling comparison is the high percentage of interlocutory appeals filed by the defense, comprising 95% of all defense appeals.[341] A miniscule 3 defense appeals out of 60 occurred after a trial verdict over this three-year period.[342] This means that almost all cases that reach trial result in a settlement (or verdicts unchallenged by the defense). This strongly supports the experience of litigators, supported by common sense, that the imminence of presenting the facts to a jury at trial pushes cases toward a resolution on the merits.

The converse of this is also true. Interlocutory appeals regarding qualified immunity push the case into procedural limbo, creating years of appellate litigation that obstruct the parties from presenting the facts to a jury. With the possibility of a verdict far afield, police officers, their departments, and local authorities have no incentive to settle the case, nor to address the potentially serious misconduct and use of excessive force in their departments that led to the lawsuit. The qualified immunity litigation machine stops accountability and incentivizes avoidance, contributing to the routinization of police violence and impunity that is the norm in America. The harder courts make it to present the facts to a jury, the harder it is to enforce the Constitution and stop police violence.

V. LAW THAT VALUES LIVES

The basic insight of this Article—that qualified immunity is a racist policy which devalues Black lives—crystallized when, in the midst of researching this Article, 2020's movement against police violence burst across America in the aftermath of George Floyd's death. Therein lies the lesson. If we are to end the routine of police violence in America, the voices of those affected by police violence, like the voices that led to § 1983's passage, must be uplifted by our courts and legislators and integrated into our law. Ignoring their demands will further delegitimize the courts amid deepening outrage by Americans over the unaccountability

339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.*

of police violence and the lack of a forum for enforcement. But if we listen, we can make law that values Black lives and the lives of all people affected by policing.

Below I suggest modest steps to revive courts as forums for rights enforcement. Federal and state legislation is needed, but no matter what laws are passed, judges will have the power to decide who finds refuge in the courts. Put simply, judges can either choose to allow cases to be fairly presented to juries like § 1983 envisioned, or they can contrive obstructions to jury trials, as with the innovations of qualified immunity and interlocutory appeal.

> **(1) Abolish qualified immunity legislatively.** The best and most effective solution to the problems raised in this Article would be to federally abolish qualified immunity entirely, or at a minimum, for law enforcement officers and other low-level actors in government. This would streamline excessive force cases to quicker, cheaper, more efficient resolution.[343] Abolishing qualified immunity means better accountability and deterrence.[344] Because federal legislation may not come soon, states should follow Colorado's lead and create state constitutional causes of action without qualified immunity, expanding access to courts and providing an alternative forum.
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> **(2) Call out qualified immunity for what it is.** Pending abolition, courts must actively call qualified immunity into question. Qualified immunity is a racist policy which contravenes the purpose of § 1983 to protect Black lives and civil rights. In every qualified immunity opinion, courts must openly criticize the doctrine and urge the Supreme Court to overrule it or the legislature to abolish it. Some judges have begun to do this, and such criticism should appear in every judicial decision discussing qualified immunity.[345]
>
> **(3) Abolish interlocutory appeals.** While abolishing qualified immunity would be the best solution and would make this Article moot, if that fails, we should alternatively end the Dickensian cycle of wasteful, abusive interlocutory appeals. This could be accomplished by overruling *Mitchell* and its progeny, but that seems as unlikely as the overruling of *Harlow*. Legis-

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343. *After Qualified Immunity*, *supra* note 43, at 316 ("If these predictions are correct, abolishing qualified immunity would clarify the law, make litigation more efficient, increase the number of suits filed, and shift the focus of civil rights litigation to what should be the critical question at issue in these cases—whether government officials exceeded their constitutional authority.").

344. *Id.* at 317.

345. *See, e.g.*, Jamison v. McClendon, 476 F. Supp. 3d 386, 403–04 (S.D. Miss. 2020); McGary v. Bd. Of Cnty. Comm'rs, 294 F. Supp. 3d 1170, 1186 (D. N.M. 2018).

lative abolition of qualified immunity interlocutory appeals would likely be necessary.

(4) Dismiss and sanction interlocutory appeals immediately. Failing abolition, courts must powerfully deter abusive interlocutory appeals. Judges should *sua sponte*, or after expedited jurisdictional motions (which should occur within fourteen days of filing an appeal), dismiss abusive interlocutory appeals, and should sua sponte issue monetary sanctions against abusers.[346] This will reduce the incentive for officers to file abusive appeals, deter such abusive appeals, and provide some recourse to plaintiffs and their lawyers.

(5) Certify appeals as frivolous. Litigants should move to certify appeals as frivolous, and courts should grant this relief more liberally. Further, when denying qualified immunity, trial courts should *sua sponte* rule that any appeal will be certified as frivolous and will be sanctioned.[347] This too will deter abusive interlocutory appeals and reduce the delays in getting cases to trial.[348]

(6) Always determine the constitutional question first. Although the Supreme Court in *Pearson* held that it is not required to decide the constitutional question before reaching qualified immunity,[349] nothing prevents trial and appellate courts from reaching the constitutional question first in every case. Doing so will develop constitutional law by ensuring that novel questions are decided, allowing a future litigant to utilize the decision and informing officers that the violation is now clearly established law.

(7) Find "obvious" violations contrary to clearly established law. Judges should deny qualified immunity, even where there is no case on point, by finding the constitutional violation "obvious" or "beyond debate" such that no "reasonable officer" would have doubted it, and fulsomely explaining that in detail.[350] In many cases where courts grant immunity, they could just as easily conclude that the violation was "obvi-

346. If the court finds that an appeal is frivolous, it may award damages and single or double costs. FED. R. APP. P. 38. These costs may be awarded against counsel personally if the court finds the fault is with the lawyer. The test under Rule 38, and 28 U.S.C. § 1927, is whether counsel exhibited objectively unreasonable conduct in pursuing the appeal. Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987) (en banc).

347. Blum, *supra* note 16, at 1909.

348. *Id.* ("Yet, plaintiffs rarely ask the district court to certify such appeals as frivolous and district court judges appear reluctant to grant such certifications.").

349. Pearson v. Callahan, 555 U.S. 223, 241 (2009).

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

ous" and therefore contrary to clearly established law. Let a jury hear the facts and decide whether it is obvious.

(8) Generously rely on persuasive authority from other circuits. Clearly established law can also be authority from other circuits, and courts should utilize this generously, particularly regarding novel technologies and uses of force. For instance, even if only one other circuit court has found a particular situation unconstitutional, courts may rely on that alone as "consensus" authority if there is no contrary authority.[351]

(9) Express that Black lives matter. Litigants and courts must use language that recognizes the value of Black lives and the lives of all persons and communities harmed by police violence.[352] Plaintiffs and their attorneys must unabashedly educate courts on the significance of race in policing and criminal law generally. Courts must do their own work, highlighting the history of racial injustice and rejecting the immoral value judgment at the heart of qualified immunity that it is in the interest of society as a whole. Courts should continually remind themselves, and their readers, that racial injustice must be uprooted in every corner of the law.[353]

(10) Expand civil rights enforcement as § 1983 envisioned. Beyond qualified immunity, courts should actively undertake to honor the letter and spirit of § 1983 to offer expansive protection against civil rights violations. Circuits should revisit precedents that restrict § 1983 enforcement in view of the true purpose and text of the law, and courts should expand civil rights protections rather than restrict them.[354]

(11) Choose judges who value civil rights. We must select judges who value civil rights enforcement, who understand the demand that Black lives matter, and who believe in the role of the courts in making that demand a reality.

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351. *See, e.g.*, Ullery v. Bradley, 949 F.3d 1282, 1291 (10th Cir. 2020) (relying on the "clearly established weight of persuasive authority in our sister circuits").

352. Estate of Jones v. City of Martinsburg, 961 F.3d 661, 673 (4th Cir. 2020), *as amended* (June 10, 2020) ("Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of [B]lack lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a [B]lack man at the hands of police, this time George Floyd in Minneapolis. This has to stop.").

353. U.S. District Court Judge Carlton W. Reeves set an example, which courts should emulate, when he conducted an extended discussion of § 1983's history. Jamison v. McClendon, 476 F. Supp. 3d 386, 397 (S.D. Miss. 2020) ("If the Civil War was the only war in our nation's history dedicated to the proposition that Black lives matter, Reconstruction was dedicated to the proposition that Black futures matter, too.").

354. *See The Maze*, *supra* note 12, at 962–64 (discussing ways to expand civil rights enforcement, including allowing respondeat superior liability for civil rights claims).

CONCLUSION

The legal profession bears substantial culpability for the routine of police violence in America and its racial impact. For the past four decades, the Supreme Court has engaged in an assault on civil rights enforcement echoing the late 1800s when the Supreme Court nullified the achievements of our Second Founding following the Civil War.[355] Congress passed § 1983 to protect Black lives and civil rights from unlawful state-sanctioned violence amidst widespread racial terror.[356] The Supreme Court invented qualified immunity specifically to obstruct § 1983's intended achievement, devaluing Black lives and endorsing unlawful police violence in the supposed interest of "society as whole." In an America plagued by police violence that unequally affects Black people and other persons of color,[357] qualified immunity is a racist policy and must be abolished. When culpable officers and their lawyers trigger the machinery of qualified immunity, years of costly litigation and appeals commence—making it all but impossible to present the facts to a jury and make the case for justice. Writ large across tens of thousands of cases—in a nation with one million acts of police violence and one thousand police killings per year[358]—qualified immunity forms the cornerstone of law's edifice of violence and impunity. Every grant of immunity makes judges complicit in unlawful police violence, fueling future violence by broadcasting a message of impunity to officers and their departments.

Federal legislation must abolish qualified immunity and expand civil rights enforcement against police violence in America, and states should follow Colorado's example and create their own constitutional causes of action without qualified immunity to widen access to justice. Of course, qualified immunity is only one part of the problem, so work must continue nationally and on the state and local level to change policing in America. But no matter what laws we pass or new policies we implement, no matter how many citizen-oversight boards we create, the courts will always play a role in settling disputes over rights violations.

Our judges will choose either to continue the judicial assault on civil rights of the past four decades, or instead to revive federal courts as spaces for the airing of truths and the achievement of justice. Our judges will choose whether to rationalize and excuse police violence, or to embrace enforcement against it through jury trials. Our judges will choose whether to elevate police violence as a social interest, or whether to uplift and protect Black lives and the lives of everyone affected by policing.

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355. *See* LYNCHING IN AMERICA, *supra* note 75, at 7.

356. *See Jamison*, 476 F. Supp. 3d at 399.

357. *Police Violence Map*, *supra* note 54 (chart showing Black people three times more likely to be killed by police compared to white people).

358. Peeples, *supra* note 73, at 22.

I hope they hear the chants echoing down American streets.[359] I hope they reflect on the true purpose of the law. I hope they rise to the challenge that this moment, and our history, demands. Our day of reckoning is today. We are not asking the courts to solve America's problems. All we are asking for is the chance to make the case to the jury.

359. Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 350 (2001) (discussing the role of protest movements in shaping constitutional meaning).